

**SUPREME COURT OF NIGERIA**  
FRIDAY 14TH JUNE, 2013. SC. 214/2012  
**CORAM:- W. S. N. ONNOGHEN, M. S. MUNTAKA-  
COOMASSIE, N. S. NGWUTA, O. ARIWOOLA,  
M. D. MUHAMMAD, JJSC**

NNANYELUGO CHIDI AROH ..... APPELLANT  
AND  
1. PEOPLES DEMOCRATIC PARTY  
2. INDEPENDENT NATIONAL  
ELECTORAL COMMISSION ..... RESPONDENTS  
3. PRINCESS STELLA NGWU

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APPEALS - Fresh evidence - Admission - Power of CA - By CA Rules O. 4 r. 2 - The court can grant leave to adduce further evidence on appeal - And it must act judicially and judiciously in exercise of such discretion (H1)

APPEALS - Court - Discretion - Determination - Appellate court determines whether discretion was judicial and judicious - And not whether it would have exercised the discretion differently (H2)

APPEALS - Fresh evidence - Admission - Principles - Under CA Rules O. 4 r. 2 - The evidence sought to be adduced must inter alia - Be of such that could not have been obtained with reasonable care for use at the trial (H3)

APPEALS - Fresh evidence - CA Rule O. 4 r. 2 - Applicability - The provision is only invoked in appeal - Against decision of a lower court on the merits of the case (H4)

APPEALS - Court - Discretion - Exercise of - Correctness - CA rightly exercised its discretion - Having considered that appellant can still adduce evidence at the trial proper (H5)

**FACTS**

By originating summons filed at the Federal High Court Abuja, plaintiff/appellant sought for a determination of the following ques-

tions inter alia, whether appellant is not the duly nominated candidate of 1<sup>st</sup> defendant/1<sup>st</sup> respondent for the National Assembly April election for Igbo Etit/Uzouwani Federal Constituency, having won the primary election of 1<sup>st</sup> respondent. Appellant therefore asked for among other things, a declaration that he is the duly nominated candidate of 1<sup>st</sup> respondent for the said election. Appellant was dissatisfied with the outcome of the primary election conducted by 1<sup>st</sup> respondent (Peoples Democratic Party) and the eventual submission of the name of 3<sup>rd</sup> defendant/3<sup>rd</sup> respondent to 2<sup>nd</sup> defendant/2<sup>nd</sup> respondent as candidate of 1<sup>st</sup> respondent in the said National Assembly Election of April 2011.

In response, 1<sup>st</sup> respondent filed preliminary objection seeking for an order striking out the proceedings for want of jurisdiction in that the originating summons is incompetent. In its ruling, the court held that the facts of the matter are seriously in dispute. It therefore ordered the parties to file their pleadings in the matter. Appellant not satisfied with the ruling, appealed to the Court of Appeal, Abuja. Meanwhile, during the proceedings at the appeal court, appellant filed a motion seeking for leave to adduce further evidence. The court refused the application on the ground that the matter is pending before the trial Federal High Court, where appellant can easily adduce evidence at the trial under the general cause list as ordered by the trial court. Appellant immediately lodged an appeal in Supreme Court against the refusal of his application for leave to adduce fresh evidence.

### **ISSUES FOR DETERMINATION**

*“(1) Whether the Court of Appeal was right in refusing the application of the appellant to adduce fresh evidence in the appeal considering the very vital nature of the evidence sought to be adduced and the overall justice of the suit.*

*(2) Whether the decision of the Court of Appeal that the appellant still has the opportunity to present the evidence sought to be adduced in the lower court did not amount to deciding the appellant’s appeal at the interlocutory stage without considering the appeal on the merits.”*

# **HELD** (Unanimously dismissing the appeal per ONNOGHEN JSC)

*APPEALS - Fresh evidence - Admission*

**1. It is not in dispute that the Court of Appeal has the power to grant leave to an applicant before it to adduce fresh/further/additional evidence on appeal as evidenced in Order 4 Rule 2 of the Court of Appeal Rules 2011 which provides as follows:-**

***“The Court shall have powers 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 case 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.”***

**From the above provision, it is clear that the powers of the Court of Appeal therein conferred is discretionary and it is settled law that in the exercise of its discretionary powers, a court must act judicially and judiciously. (p. 2665 C)**

*Court - Discretion - Determination*

**2. It is also settled law that where a court has exercised its discretion and an appeal arises therefrom, the question to be determined by the appellate court is whether the lower court exercised its discretion judicially and judiciously. It is not for the appellate court to decide whether it would have exercised the discretion differently and proceed to so decide/act. In the instant case, the lower court exercised its discretion by refusing the application.**

**The question to be determined therefore is whether the exercise by that court of the discretion so conferred on it by law is judicial and judicious. (p. 2665 G)**

*APPEALS - Fresh evidence - Admission - Principles*

**3. However, in exercising the powers under Order 4 Rule 2 of the Court of Appeal Rules 2011, *supra*, certain guiding principles have been laid down by this Court to act as beacon lights to aid the court. The principles have been stated in the case of Owata vs. Anyigor (1993) 2 NWLR 380 at 393 to include the following:-**

***“(i) The evidence sought to be adduced should be such that it could not have been obtained with reasonable care and diligence for use at the trial***

***(ii) If the fresh evidence is admitted it would have an important but not necessarily crucial effect on the whole case.***

***(iii) If the evidence sought to be adduced is such that is apparently credible in the sense that it is capable of being believed even if it may not be incontrovertible.***

***(iv) Additional evidence may be admitted if the evidence sought to be adduced could have influenced the judgment at the lower court in favour of the applicant, if it had been available at the trial court.***

***(v) The evidence must be material and weighty even if not conclusive, where the evidence sought to be adduced is immaterial and irrelevant, it will be rejected.”***(p. 2666 A)

*APPEALS - Fresh evidence - CA Rule O. 4 r. 2 - Applicability*

**4. From both the provisions of Order 4 Rule 2 of the Court of Appeal Rules 2011 and the principles guiding the court in the exercise of its powers under the said Order 4 Rule 2 *supra*, it is very clear that the provision is only invoked in an appeal against a decision of a lower court on the merits of the case. In other words a final decision of the trial court. In the instant case, the decision of the trial court which resulted in the appeal in which the powers of the lower court under Order 4 Rule 2 *supra* is sought to be invoked was not on the merits of the Originating Summons.** (p. 2666 F)

*Court - Discretion - Exercise of - Correctness*

**5. I agree with the lower court that having regards to the peculiar facts of this case, appellant still has opportunity to ad-**

***duce whatever evidence he intends to call/adduce at the trial proper. The fact is that the decision of the trial court that the matter be tried on pleadings has not been set aside and the court cannot at this stage close its eyes to that glaring fact. It is a statement of fact which is equally relevant to the exercise of the discretion of the lower court under the relevant Rules of Court. It is my considered view that to recognize that glaring fact i.e. that trial is yet to commence as ordered by the trial court does not amount in law to deciding the substantive appeal in an interlocutory application. It is rather the surrounding facts and circumstance which aids the court in the decision either to grant or refuse the application for leave to adduce further/fresh evidence on appeal in a matter where no evidence has been taken by the trial court in the first place. While it is settled law that courts are enjoined not to decide the merits of cases in interlocutory proceedings, I hold the view that the same is not the case in the instant case.***

(p. 2667 G)

### **REPRESENTATION**

C. N. Nwagbo Esq. with G. C. Ugwunweze; C. A. Ezugwu; M. C. Nwosu and I. L. Alege, for appellant  
 Olusola Oke with A. O. Ajana & O. Akinyibo Esq, for 1st respondent  
 T. O. Busari Esq. with Messrs. Adeola Adedipe; A. A. Usman and P. Whyte (Miss), for 2nd respondent  
 P. M. B. Onyia Esq. for 3rd respondent

### **CASES REFERRED TO**

Ehinlawo vs. Oke (2008) 16 NWLR (pt. 1113) 357  
 Asaboro vs. Aruwaji (1974) NSCC (Vol. 9) 211  
 Owata vs. Anyigor (1993) 2 NWLR (pt. 276) 380  
 Abatan vs. Awudu (2003) 10 NWLR (pt. 829) 451  
 Badaru vs. S.C.B Nig. Ltd (2003) 10 NWLR (pt. 827) 94  
 Iweka vs. SCOA Nig Ltd (2000) FWLR (pt. 15) 2524  
 Obasi vs. Onwuka (1981) 3 NWLR (pt. 61) 364  
 Hassan vs. Aliyu (2010) 17 NWLR (pt. 1223) 547  
 Akanbi vs. Alao (1989) 3 NWLR (pt. 108) 118  
 Nwanzee vs. Idris (1993) 3 NWLR (pt. 279) 1

Iweka II vs. Awotogi (1991) 4 NWLR (pt. 108) 305

Odedo vs. INEC (2008) 7 SC 29-30

Amachi vs. INEC (2008) 1 SC (pt. 1) 44

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

- B Supreme Court Act, s. 22  
 Court of Appeal Act 2004, ss. 15, 16  
 Court of Appeal Rules 2011, O. 4 r. 2

### **LEAD JUDGMENT BY ONNOGHEN JSC**

- C This is an appeal against the ruling of the Court of Appeal  
 Holden at Abuja in appeal No.CA/A/221/2011 delivered on the 26th  
 April, 2012 in which the court dismissed the application of appellant  
 for leave to adduce further evidence before the lower court. The  
 D appeal is therefore an interlocutory one as the main appeal against  
 the decision of the Federal High Court, Holden at Abuja in suit  
 No.FHC/ABJ/CV/83/2011 delivered on the 25th day of March, 2011  
 still pends before the lower court.

- E By an Originating Summons filed on the 27th day of Janu-  
 ary, 2011, the appellant, as plaintiff sought the determination of the  
 following questions by the Federal High Court, Holden at Abuja, to wit:

- F “1. *Whether having won the Primary Elections conducted  
 by the Peoples Democratic Party (PDP) on the 12th of January 2011  
 for Igbo Etiti/Uzouwani Federal Constituency, is the plaintiff not the  
 duly nominated candidate for the National Assembly Elections in April,  
 2011.*

- G 2. *Whether the Primary Election conducted by the Peoples  
 Democratic Party (PDP) on the 12th of January 2011 can be set  
 aside without any petition, complaint or irregularity in the conduct of  
 the Primary.*

- H 3. *Whether having regard to the extant Laws and Regulations,  
 Peoples Democratic Party (PDP) could conduct another primary elec-  
 tion to select a candidate for Igbo Etiti/Uzouwani’s Federal Constitu-  
 ency after the 15th day of January 2011 without recourse to the  
 plaintiff.*

4. *Whether by virtue of section 87(10) of the Amended Elec-  
 toral Act 2011, the plaintiff having won the primaries can question or*

*complain against the unlawful replacement by his party and refusal to issue him with INEC nomination forms.*

5. *Whether in view of Part VI section 50(d) of the Electoral Guidelines for the 2010 of the Peoples Democratic Party (PDP) and complaint that was not brought to the appropriate levels in writing within 24 hours of completion of the primaries Elections of the party can be entertained by the party or said to be valid and proper.* <sup>B</sup>

6. *Whether in view of Part VI section 50(e) of the Electoral Guidelines for the 2010 of the Peoples Democratic Party (PDP), the plaintiff is entitled to be given an opportunity to present his case and whether he is entitled to be communicated in writing within 48 hours the decisions of the panel.”* <sup>C</sup>

*Flowing from the determination of the above questions, the plaintiff/appellant sought the following reliefs:-*

“1. A DECLARATION that the plaintiff is the duly nominated candidate of the Peoples Democratic Party (PDP) representing Igbo Etti/Uzouwani Federal Constituency in the Primary Elections conducted on the 12th day of January 2011 for the elections scheduled for April 2011.

2. AN ORDER of injunction restraining the Peoples Democratic Party (PDP), their servants and agents, privies, howsoever from forwarding the name of any other candidate other than that of the plaintiff to the 2nd Defendant as the Peoples Democratic Party (PDP) candidate for the Legislative Elections Scheduled for the April 2011 representing Igbo Etti/Uzouwani Federal Constituency. <sup>E</sup>

3. An order compelling the 1st Defendant to issue INEC nomination forms to the plaintiff.

4. An order restraining the 2nd Defendant from publishing any other name other than of the plaintiff as the candidate for the Election into the House of Representatives for Igbo Etti/Uzouwani Federal Constituency in the Elections scheduled for April, 2011” <sup>F</sup>

The defendants/respondents in this appeal reacted to the claims of the plaintiff by filing the appropriate processes including a preliminary objection filed on 7/2/11 by learned Counsel for 1st defendant CHIEF OLUSOLA OKE seeking an order striking out the proceedings for want of jurisdiction in that the Originating Summons is incompetent. The above preliminary objection was argued together with the Originating Summons as directed by the trial court. In the <sup>H</sup>

judgment delivered on 25/3/11, the trial court held that the facts of the case are seriously in dispute particularly between the affidavits of the plaintiff and 1st defendant as they relate to the questions for determination and that the conflicting affidavits cannot be resolved without recourse to oral evidence etc. Consequently the court ordered parties to file their pleadings in the matter.

It is the above decision which gave rise to appeal NO.CA/A/221/2011. However, in the course of the proceedings in the said appeal, appellant filed a motion in which he prayed the court for an order granting him leave to adduce further evidence.

The said application gave rise to the ruling of the lower court delivered on the 26th day of April, 2012 in which the court dismissed the application. In effect, the reason for the refusal to grant the application lies in the fact that the action still pends at the trial court where the evidence can be easily introduced at the trial under the general cause list as ordered by the trial court.

The instant appeal is therefore against the decision of the lower court delivered on 26th April, 2012. The issues for determination of which have been formulated by appellant, NNANYELUGO CHIDI AROH ESQ in person in the appellant brief filed on the 13th day of June, 2012, as follows:-

(1) *Whether the Court of Appeal was right in refusing the application of the appellant to adduce fresh evidence in the appeal considering the very vital nature of the evidence sought to be adduced and the overall justice of the suit.*

(2) *Whether the decision of the Court of Appeal that the appellant still has the opportunity to present the evidence sought to be adduced in the lower court did not amount to deciding the appellant's appeal at the interlocutory stage without considering the appeal on the merits."*

On his part, learned Counsel for 1st respondent, CHIEF OLUSOLA OKE in the 1st respondent's brief deemed filed on 04/12/2012 is of the view that the main issue for determination is as follows:

*"Whether given the facts of this appeal and the law, the Court of Appeal was not right in holding that the Appellant's application is lacking in merit and as such dismissed same."*

Learned Senior Counsel for the 2nd respondent, AHMED RAJI SAN in the 2nd respondent's brief deemed filed on 4/12/12 appellant's

issue No.1 supra, as the appropriate issue for the determination of the appeal. The two issues identified by learned Counsel for 3rd respondent are same as those of appellant though couched differently. In this judgment, the two issues identified by appellant will be treated together.

In arguing the appeal, appellant submitted that the lower court erred in law and indeed misapplied the law when it refused the application to adduce fresh/additional evidence particularly when 1st respondent had pleaded the document in paragraph 59(v) of their counter affidavit to the Originating Summons and relied on same in their written address in paragraph 2.3(II) at page 270 of the record but failed to exhibit the said document; that the case of 1st and 3rd respondents is dependent on the document sought to be adduced as fresh evidence; that the refusal of the application to adduce fresh evidence was not a discretion judicially and judiciously exercised as enjoined in the case of *EHINLAWO vs OKE* (2008) 16 NWLR (pt.1113) 357 at 383; that the evidence sought to be adduced is such as could not have been, with reasonable diligence, obtained for use at the trial; that the evidence is such that if admitted would have an important, not necessarily crucial effect on the whole case; and that the evidence is apparently credible in the sense that it is capable of being believed as it need not be incontrovertible, relying on *Asaboro v. Aruwaji* (1974) NSCC (Vol. 9) 211 at 214; *Ehinlanwo vs Oke* supra; *Owata vs Anyigor* (1993) 2 NWLR (Pt.276) 380; *Abatan vs Awudu* (2003) 10 NWLR (pt. 829) 451 at 454; *Badaru vs S.C.B Nig. Ltd* (2003) 10 NWLR (pt. 827) 94.

It is the further submission of appellant that the lower court by stating that trial had not commenced at the trial court and as such appellant has the opportunity to introduce the document sought to adduce as fresh evidence during the said trial, had in effect, determined the substantive appeal at the interlocutory stage, which the law frowns upon; relying on *Group Danoe vs. Voltic (Nig) Ltd* (2009) 3-4 S.C 34 at 71; *Akuma Industries Ltd vs. Ayman Ent. Ltd* (1998) 13 NWLR (pt.633) at 72.

It is also the view of appellant that the court should invoke its powers under section 22 of the Supreme Court Act to determine the entire suit as the lower court can no longer hear and determine the substantive appeal particularly as all the material facts needed to de-

termine the Originating Summons are before the court.

Finally, appellant urged the court to resolve the issues in favour of appellant and allow the appeal.

On his part, learned Counsel for 1st respondent conceded that the conditions an applicant must satisfy in an application for leave to adduce fresh evidence are as stated in the case of *Owata vs. Anyigor* supra but submits that the application before the lower court failed to satisfy the said conditions; that all the conditions must be fulfilled as decided in *Iweka vs. SCOANig Ltd* (2000) FWLR (Pt.15) 2524; that appellant's case still pends at the trial court with evidence yet to be taken in the proceedings; that appellant, in the circumstance, still has his right and opportunity to present the evidence sought to be adduced as additional evidence on appeal.

It is the further submission of Counsel that having regards to the circumstances of this case, it cannot be said that the fresh evidence sought to be adduced could not have been available at the trial when the trial is yet to commence; that the fresh evidence, if admitted, is contrary to the case of appellant at the trial which is to the effect that the primary election of 12th January, 2011 was cancelled by 1st respondent without giving appellant fair hearing, whereas the fresh evidence seeks to establish the fact that there was no cancellation of the said primary election.

Reacting to appellant's issue 2, learned Counsel submitted that the lower court restricted itself to determining the application before it and that in determining the application, the court had to discuss the applicable principles of law to relevant facts of the case.

With regards to section 22 of the Supreme Court Act, learned Counsel stated that the invitation has ignored the fact that the trial court found and held that the suit was wrongly commenced by Originating Summons, which decision is a subject of an appeal still pending before the lower court; that the order now sought from this Court is one which would not have been made by the trial court following its decision and urged the court to resolve the issues against appellant and dismiss the appeal.

In his argument, learned Counsel for 2nd respondent submitted that the lower court was right in refusing the application to adduce fresh evidence in that an additional evidence cannot be required at the Court of Appeal when trial has not commenced at the

trial court and generally agreed with the submission of Counsel for 1st respondent.

The arguments of learned Counsel for the 3rd respondent are substantially the same as those of 1st and 2nd respondents and therefore need no repetition in this judgment.

It is important to note from the onset that the appeal which is pending at the lower court did not arise from any determination of the trial court on the merits of the Originating Summons filed by appellant but arose from a ruling by that court purely on a procedural issue as to whether the suit initiated by way of an Originating Summons should be heard by affidavit evidence or on pleadings. The trial court held that it is a proper case to be heard on pleadings.

***It is not in dispute that the Court of Appeal has the power to grant leave to an applicant before it to adduce fresh/further/additional evidence on appeal as evidenced in Order 4 Rule 2 of the Court of Appeal Rules 2011 which provides as follows:-***

***“The Court shall have powers 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 case 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.”***

***From the above provision, it is clear that the powers of the Court of Appeal therein conferred is discretionary and it is settled law that in the exercise of its discretionary powers, a court must act judicially and judiciously.***

***It is also settled law that where a court has exercised its discretion and an appeal arises therefrom, the question to be determined by the appellate court is whether the lower court exercised its discretion judicially and judiciously. It is not for the appellate court to decide whether it would have exercised the discretion differently and proceed to so decide/act. In the instant case, the lower court exercised its discretion by refusing the application.***

**The question to be determined therefore is whether the exercise by that court of the discretion so conferred on it by law is judicial and judicious.**

**However, in exercising the powers under Order 4 Rule 2 of the Court of Appeal Rules 2011, supra, certain guiding principles have been laid down by this Court to act as beacon lights to aid the court. The principles have been stated in the case of Owata vs. Anyigor (1993) 2 NWLR 380 at 393 to include the following:-**

**“(i) The evidence sought to be adduced should be such that it could not have been obtained with reasonable care and diligence for use at the trial**

**(ii) If the fresh evidence is admitted it would have an important but not necessarily crucial effect on the whole case.**

**(iii) If the evidence sought to be adduced is such that is apparently credible in the sense that it is capable of being believed even if it may not be incontrovertible.**

**(iv) Additional evidence may be admitted if the evidence sought to be adduced could have influenced the judgment at the lower court in favour of the applicant, if it had been available at the trial court.**

**(v) The evidence must be material and weighty even if not conclusive, where the evidence sought to be adduced is immaterial and irrelevant, it will be rejected.”**

**From both the provisions of Order 4 Rule 2 of the Court of Appeal Rules 2011 and the principles guiding the court in the exercise of its powers under the said Order 4 Rule 2 supra, it is very clear that the provision is only invoked in an appeal against a decision of a lower court on the merits of the case. In other words a final decision of the trial court. In the instant case, the decision of the trial court which resulted in the appeal in which the powers of the lower court under Order 4 Rule 2 supra is sought to be invoked was not on the merits of the Originating Summons.** It was an interlocutory decision in which the court held, inter alia, at pages 412 - 413 as follows:-

**“I believe strongly that the contradictions in these documents of the parties and the apparent conflicts in the affidavit evidence as a whole cannot be resolved without recourse to oral evidence. In other**

*words, the parties will need to adduce oral evidence in this case before the court can determine the questions submitted by the plaintiff pursuant to Order 3 Rule 1 of this court, 2009. I decline to determine the questions submitted by the plaintiff due to the apparent conflict in the affidavit evidence by the parties. Instead I make an order for the parties to file and exchange pleadings. The plaintiff is given 7 days to do so and serve the other parties. The Defendants are equally given 7 days to file their respective statement of defence and serve the plaintiff...”*

It is against the above decision of the trial court that appellant appealed to the Court of Appeal which appeal is still pending. The above decision of the trial court is to enable appellant and the respondents to call oral evidence in support of their contending positions to enable the court resolve the issues in controversy between the parties. Rather than adopt that procedure, appellant decided to exercise his right of appeal, which he is of course entitled to do, but realizing the need for the conflicts in the case to be resolved by calling evidence, appellant decided to apply to the Court of Appeal for leave to adduce additional evidence in the appeal, which evidence he could have easily adduced at the trial court upon the trial under the general cause list as ordered by the trial court supra. This is a misconceived application devised or contrived to overreach the decision of the trial court. Appellant, apparently, wants to have the decision of the trial court set aside upon an application to adduce fresh evidence on appeal against an interlocutory decision of the trial court, while his appeal against that decision still pends. One may ask: What would be the use of the appeal against the decision that Originating Summons is not the appropriate process to be adopted in view of the conflicting affidavits etc, if the application to adduce additional/fresh evidence is granted?

***I agree with the lower court that having regards to the peculiar facts of this case, appellant still has opportunity to adduce whatever evidence he intends to call/adduce at the trial proper. The fact is that the decision of the trial court that the matter be tried on pleadings has not been set aside and the court cannot at this stage close its eyes to that glaring fact. It is a statement of fact which is equally relevant to the exercise of the discretion of the lower court under the relevant Rules of***

***Court. It is my considered view that to recognize that glaring fact i.e. that trial is yet to commence as ordered by the trial court does not amount in law to deciding the substantive appeal in an interlocutory application. It is rather the surrounding facts and circumstance which aids the court in the decision either to grant or refuse the application for leave to adduce further/fresh evidence on appeal in a matter where no evidence has been taken by the trial court in the first place. While it is settled law that courts are enjoined not to decide the merits of cases in interlocutory proceedings, I hold the view that the same is not the case in the instant case.***

On the invitation for the court to invoke its powers under section 22 of the Supreme Court Act, it is very obvious from what I have been saying all along that the invitation is misconceived.

This is an appeal against the interlocutory decision of the lower court refusing an application by appellant to adduce fresh evidence in the appeal. The appeal against the decision of the trial court is still pending at the lower court, which court is to decide the main issue as to whether or not having regards to the facts of the case, an Originating Summons is the appropriate process to adopt in resolving the issues in controversy between the parties. That court ought to be given the opportunity to discharge its functions. If on the other hand appellant realizes that the appeal is an unnecessary waste of his time and the courts' time as well, he may withdraw same so as to move his case forward. Short cuts are very dangerous at times.

In conclusion, I find no merit whatsoever in the appeal which is accordingly dismissed with costs which I assess and fix at N200,000.00 to each set of respondents. Appeal dismissed.

G

### **MUNTAKA-COOMASSIE JSC**

In the originating summons filed by the appellants before the Federal High court Abuja, appellants claimed the following reliefs:-

- H “a. A Declaration that the plaintiff is the duly nominated candidate of the Peoples Democratic Party representing Igbo-Etiti/Uzo-Uwani Federal constituency in the primary Elections conducted on 12th day of January, 2011 for the election schedule for April 2011.  
b. An order of injunction restraining the Peoples Democratic

*Party, their servants and agents, privies whosoever from forwarding the name of any other candidates other than that of the plaintiff to the 2nd defendant as the peoples Democratic Party (PDP) candidate for the Legislative Elections schedule for the April 2011 representing Igbo-Etiti/Uzo-Uwani Federal Constituency.*

*c. An order compelling the 1st defendant to issue INEC nomination forms to the plaintiff.* B

*An Order restraining the 2nd defendant from publishing any other name other than that (sic) of the plaintiff as the candidate for the Election into the House of Representatives for Igbo-Etiti/Uzo-Uwani Federal Constituency in the Elections schedule for April, 2011".* C

The originating summons was supported with 20 paragraphs-affidavit with the Exhibits attached as Exhibits 1-19.

The 1st respondent in response filed its counter-affidavit and also filed a motion in which it sought the following reliefs:- D

*"An Order striking out the suit for being incompetent and for want of jurisdiction to entertain same".*

In reply to the counter-affidavit of the 1st defendant, the plaintiff filed a further affidavit containing 21 paragraphs. Consequently, the 1st defendant filed counter-affidavit to the plaintiff's further affidavit containing 14 paragraphs. The trial court considered the objection of the defendants and in view of the contradictions in the affidavits filed by the parties and the different documents in support thereof, instead of striking out the case as prayed by the defendants, transferred the case to the general cause list for oral evidence to be taken. The trial court found thus:- F

*"...I believe strongly that the contradictions in these documents of the parties and the apparent conflicts in the affidavit evidence as a whole cannot be resolved without recourse to oral evidence. In other words, the parties will need to adduce oral evidence in this case before this court can determine the questions submitted to the plaintiff pursuant to order 3 Rule 8 of the Rules of this court, 2009. I therefore decline to determine the questions submitted by the plaintiff due to the apparent conflict in the affidavit adduced by the parties. Instead I make an order for the parties to file and exchange pleadings. The plaintiff is given 7 days to do so and serve the parties. The defendants are equally given 7 days to file their respective statement of defence and serve the plaintiff..."* G H

The plaintiff was dissatisfied with the decision of the trial court and appealed to the Court of Appeal, Abuja, hereinafter called the lower court. While the appeal was pending, the appellant by a motion on Notice dated 20/4/2011 prayed the lower court for the following:-

B *“1. An order granting leave to the appellant/applicant to adduce fresh evidence.*

*2. And for such further or other orders as this court may deem fit to make in the circumstance.*

C The grounds upon which the application was based are as follows:-

*“a. That as at the time of filing the suit, the subject matter of this appeal, the applicant/appellant was not aware of the existence of the document sought to be brought in.*

D *b. That the 1st defendant in the suit pleaded the said document in paragraph 5 (a) of their counter-affidavit to the originating summons on page 182 of the records.*

*c. That the 1st defendant further relied on the said document in their written address paragraph 2.3(1)*

E *d. That the entire case of the 1st defendant is dependent on the said document which is the extract of the meeting in which the 1st defendant claimed to have purportedly cancelled the nomination of the appellant.*

F *e. That the said document resolves all the issues between the parties as it determines whether or not the said primary election was ever cancelled.”*

G The respondents opposed this application and filed counter affidavit and written addresses. The lower court in its ruling dated 26/04/2012 refused the application. In its conclusion the lower court held as follows:-

H *“The situation in this case is not only far from satisfying any of the foregoing conditions, but is incredibly novel. The purpose for this kind of application is to bring in the fresh evidence sought to be admitted in order to fill in the gap or provide the missing link in the evidence adduced at the trial which was not then available or could not have been discovered with due diligence by the applicant whereas, in the instant case, trial has not commenced at the court below, the issue of leading fresh evidence on appeal is a complete non-starter.”*

The appellant was again dissatisfied with the decision of the lower court, and after obtaining the leave to appeal lodged this appeal before this court. In accordance with the rules of this court all the parties filed and exchanged their respective briefs of argument. The appellant distilled two issues for determination in this brief of argument as follows:- B

1. Whether the Court of Appeal was right in refusing the application of the appellant to adduce fresh evidence in the appeal considering the very vital nature of the evidence sought to be adduced and the overall justice of the suit. C

2. Whether the decision of the court of Appeal that the appellant still has the opportunity to present the evidence sought to be adduced in the lower court did not amount to deciding the appellant's appeal at the interlocutory stage without considering the appeal on the merit. D

The 1st respondent formulated a sole issue for determination in the following terms:-

*"Whether given the facts of this appeal and the law the court of Appeal was not right in holding that the appellant's application is lacking in merit and as such dismissed same".* E

The 2nd respondent adopted the first issue (issue No.1) formulated by the appellant as the issue for determination in the appeal; while the 3rd respondent formulated two (2) issues for determination as follows:- F

*"a. Whether the lower court was wrong in refusing the appellant's application for leave to adduce fresh evidence at the court of Appeal.*

*b. whether the lower court's remark that the appellant has the opportunity to present the said evidence in the trial amounted to deciding the main appeal in the interlocutory stage".* G

The appellant thereafter filed replies to the 1st, 2nd and 3rd respondents brief of argument. At the hearing of the appeal the learned counsel to the appellant adopted his brief of argument and urged this court to allow the appeal. H

On his issue No. 1 it was contended that the lower court misapplied the law when it refused the appellant's application to adduce fresh evidence. This is so because all the parties to the case relied on the same document, and the document was particularly pleaded by

the 1st respondent. The entire case of the 1st and 3rd respondents rest on the said document. It was therefore submitted that in order to do substantive justice, courts will exercise their discretion in favour of an application for leave to adduce fresh evidence, the case of *Asaboro v. Aruwaji* (1974) NSCC (Vol.9) 211 at 214 was cited. He referred to the conditions that must be met by an applicant for leave to adduce fresh evidence in *Asaboro v. Aruwaji* (supra) and contended that he had satisfied all the conditions. He further contended that in the present dispensation, the courts have laid more emphasis on doing substantial justice, cites *Ehinlawo v. Oke* (2008) 16 NWLR (pt.1113) 337 at 383; *Owata v. Anyigor* (1993) 2 NWLR (Pt.276) 380, *Abatan Awudu* (2003) 10 NWLR (pt. 829) 451 at 454, *Badaru v. SCB Nig. Ltd* (2003) 10 NWLR (pt.827) 94 and *Uzodinma v. Izunaso* SC.117/2011 delivered on 20/5/11.

Further, it was contended that the evidence sought to be adduced, if admitted will have a very crucial effect on the entire case, in addition, the evidence sought to be adduced is credible and. very believable because the 1st respondent never denied. The document is not just weighty but fundamentally material to the just determination of the issues between the parties.

On issue No. II, learned counsel referred to the originating summons and the ruling of the trial court that declined to hear the case on the affidavit evidence before it and ordered pleadings; and its appeal against the order at the lower court refusing the applicant to adduce fresh evidence on the ground that the evidence could still be presented at the hearing of the case. It was therefore his contention that the order of the lower court has the effect of determining the appeal before it at the interlocutory stage as it had the effect of holding that the trial court was right to have called for oral evidence on the pleadings ordered. It is on this premise that it was contended that the lower court was wrong to have held as it did. It is wrong for the lower court to make orders or make pronouncements which affects the substantive matter at the hearing of an interlocutory application. Learned counsel cited the case of *Group Danoe V. Voltic Orhi Ltd* (2009) 3 - 4 SC 34. He therefore urged the court to invoke its power under Section 22 of the supreme court Act to determine the entire suit.

The 1st respondent's learned counsel also adopted his brief

of argument and urged this court to dismiss the appeal. On his sole issue for determination, it was submitted that it is the primary duty of the trial court to take evidence. However, an appellate court has the discretionary power to allow further evidence to be adduced by a deserving party on appeal. Subject to the fulfillment of the conditions set out in *Owata v. Anyigor* (1993) 2 NWLR (pt.380) 397, that the conditions set out must co-exist, cites *Iweka v. Scoa Nig. Ltd* (2000) FWLR (pt.15) 2524. Learned counsel pointed out that it is undisputed that:-

- a. the appellant's case before the trial court is still pending;
- b. evidence is yet to be led by any of the parties;
- c. the trial court has not had the opportunity to consider evidence of any of the parties.
- d. the appellant still has unfettered right and opportunity to present his evidence, he now seeks to adduce on appeal before the trial court; and
- e. the appellant's appeal challenging the decision of the trial court is still pending before the lower court. It was therefore contended that the evidence being sought to be adduced could still be obtained and used at the trial court.

Learned counsel therefore contended that the application is a clear case of misapplication of the law. "Fresh evidence" it was submitted mean evidence at the second hearing and not the first hearing which has not even taken place. He cites *Obasi & Anor v Onwuka* (1981) 3 NWLR (Pt.61) 364. It was further pointed out that the Appellant did not plead the document being sought to be tendered; hence it is irrelevant to the Appellant's case. Learned counsel to the 1st respondent concedes as a principle of law that the court is not allowed to delve into the substantive claim at an interlocutory stage but in this case, the lower court determined the merit or otherwise of the appellant's application in consonance with the settled principles of law. He referred to the ruling of the lower court and submitted that the finding of the lower court was well founded in law having regard to the facts of the case, as a matter of fact, either by way of originating summons or oral evidence, the appellant's case is yet to be tried and determined. It is therefore unavailable for an appellant to seek to adduce further evidence or fresh evidence in an interlocutory appeal in support of a claim still pending before a trial court

which is yet to try and determine such claim. Learned counsel therefore contended that this is not a kind of situation that would make this court to invoke its powers under section 22 of the Supreme Court Act. The trial court declined jurisdiction to hear the matter under the originating summons proceedings which decision is subject to an appeal pending before the lower court, hence this court cannot invoke section 22 of the Supreme Court Act to hijack an appeal pending before the lower court. The case of *Hassan v. Aliyu* (2010) 17 NWLR (Pt.1223) 547 at 601 was cited.

The second respondent also adopted his brief of argument and urged this court to dismiss the appeal.

Learned counsel to the 2nd respondent submits that the lower court was right in its ruling of 26/4/2012. It was pointed out that the peculiarity of this appeal stems from the fact that trial has not commenced in the suit, as a result the decision in *Asaboro v. Aruwaji* (supra) could not be applied in this case, in that judgment has been delivered by the trial court after hearing the evidence of the parties. Counsel referred to order 4 Rule 2 of the court of Appeal Rules, 2011 which is the same with order 1 Rule 20 (3) of the court of Appeal Rules 1981 which was interpreted by this court in *Akanbi v. Alao O.* (1989) 3 NWLR (Pt.108) 118 at 139 to the effect that application to adduce fresh evidence must be in respect of matter which had occurred after judgment in the trial Court or in respect of matters that occurred at the trial or before the judgment.

Learned senior counsel further submitted that to allow fresh evidence on appeal, the applicant must show special ground, which the applicant failed to show in this case.

The case of the appellant did not fall within the two exemptions. There was no trial by the trial court, neither did the fresh evidence sought to be adduced occur after the matter was instituted, particularly the appellant did not plead the document being sought to be adduced as fresh evidence.

Finally, learned senior counsel submitted that the appellants have not fulfilled the parameters for admitting additional evidence as stated in *Nwanzee v. Idris* (1993) 3 NWLR (Pt.279) page 1 at 15, *Iweka II v. Awotogi* (1991) 4 NWLR (Pt.108) 305.

Learned counsel to the 3rd respondent also adopted his brief of argument at the hearing of this appeal and urged this court dismiss

the appeal.

On issue No.1, it was submitted that the lower court was right in refusing the appellant's application for leave to adduce additional evidence on appeal. Learned counsel pointed out that hearing on the merits of the suit at the trial court is still pending and has not commenced. No evidence has been led as to warrant the seeking to adduce additional or fresh evidence at the appeal court. Even the appeal pending at the lower court is to determine the propriety or otherwise of the order of the trial that pleadings be filed. Hence, in whichever way the appeal goes at the lower court, the case would still go back to trial court either to be heard on the affidavit evidence or by oral evidence as ordered by the trial court. The appeal before the lower court has nothing to do with the substantive matter before the trial court. Hence, the appellant's application did not satisfy any of the conditions for allowing fresh evidence or additional evidence on appeal. The case of *Owata v. Anyigor* (supra) was cited.

On the issue No. 2, learned counsel submitted that there is nothing in the ruling appealed against that amounted to the lower court deciding the main appeal in an interlocutory application. The appeal pending before the lower court was against the ruling of the trial court directing that the suit be heard on pleadings and not on affidavit evidence. Hence the job before the lower court regarding the appeal is to determine whether the trial court was wrong in its exercise of the discretion under order 3 Rule 8 of the Federal High court Rules, 2009 to hear the case on pleadings, instead of under originating summons procedure.

In reply to the 1st and 2nd respondents, briefs of argument it was pointed out that none of the two lower courts ever declined jurisdiction to entertain the suit, hence this court has the jurisdiction to determine the suit, the case of *Odedo v. INEC* (2008) 7 SC at 29 - 30 and *Amechi v. INEC & 2 Ors* (2008) 1 SC (pt.1) 44 were cited.

The reply to the 3rd respondent's brief of argument was mainly on the substantive issue of substitution which is still pending before the trial court. I have set out in great details the facts of this case in order to have a full grasp of the events leading to this appeal. What bothers my mind at this stage is whether an appellate court can order a fresh/additional evidence in an interlocutory appeal when the substantive case is still pending before the trial court.

In *Owata v. Anyigor* (1993) 2 NWLR (pt. 380) at 391, this court per Karibi-Whyte JSC (as he then was) laid down the conditions that must be met before an application of this nature could be granted as follows:-

- B *“1. The evidence sought to be tendered should be such that it could have been obtained with reasonable care and diligence for use at the trial.*
- 2. If the fresh evidence is admitted it would have an important but not necessarily crucial effect on the whole case.*
- C *3. If the evidence sought to be adduced is such that is apparently credible in the sense that it is capable of being believed even if it may not be incontrovertible.*
- 4. Additional evidence may be admitted if the evidence sought to be adduced could have influenced the judgment at the lower court*  
D *in favour of the appellant, if it has been available at the trial court.*
- 5. The evidence must be material and weighty even if not conclusive. Where the evidence sought to be adduced is immaterial and irrelevant it will be rejected”.*

E From above stated principles it is clear that for an application of this nature to be made there must be:-

- i. trial in which evidence would have been adduced before the trial court.
- ii. the trial court would have given its judgment, and
- F iii. the evidence sought to be adduced must have been pleaded otherwise it would be immaterial and irrelevant”.

The name “Fresh or additional” in itself shows there must have been “first hearing” upon which the fresh or additional evidence is to be based “second hearing”, i.e. the appellate court to which the application is made. Where there is no first hearing” there can be no “second hearing”. Where the trial court has not heard or taken evidence and deliver its judgment, any application to adduce additional or fresh evidence in an interlocutory proceedings in respect of a case which the substantive matter is still pending at the trial  
H court is not only a misnomer but an abuse of judicial process.

In *Akanbi v. Alao* (1989) 3 NWLR (pt.108) 118 at 139 this court, per Craig, JSC (as he then was) stated thus:-

*“It seems to me that the import of the Rule is that the court may in its discretion admit fresh evidence in respect of matter which*

*had occurred after judgment in the trial court but in other cases, as for instance, in respect of matters which occurred at the trial or before judgment, the lower court will admit such fresh evidence only on special grounds”.*

Adumbrating on the issue further Mr. Justice Karibi-Whyte, JSC (as he then was) stated at p. 151 of the same case as follows:- B

*“It is however necessary that the issue in respect of which such evidence is being tendered must have been pleaded. See Onibudo v. Akibu (1982) 7 SC 60. If there was no pleading, the pleading of the party seeking to adduce further evidence must be amended to reflect such evidence. However even where there is pleading and it will be unfair to the trial Judge or create an undesirable precedent, the application will be refused. A.G. v. Alkali (1972) 12 SC. 29. The Court of Appeal will be reluctant to admit such new or further evidence which was not tendered in the lower court or tendered but rejected or any application made to the lower court for leave to tender the document. The Federal Supreme Court has held in Inland Revenue v. Rezcallah (1962) 1 All NLR 1 that where the further evidence was available at the trial but not tendered an appellate court will not grant an application to adduce such evidence”.* C D E

In the instant appeal, the document being sought to be tendered as fresh evidence was not pleaded, the trial has not commenced at the trial court where the substantive case is pending, the document is therefore available to be tendered at the trial court if the appellant so wished. F

My lords, I have no iota of doubt that granting this type of application will create an undesirable precedent which we should all avoid. Appellant in this case left the substance and merely pursuing shadow. The lower court was therefore right when it held thus:- G

*“The purpose for this kind of application is to bring in the fresh evidence sought to be admitted in order to fill in the gap or provide the missing link in the evidence adduced at trial which was not then available or could not have been discovered with due diligence by the applicant. Whereas in the instant case trial has not commenced at the court below, the issue of leading fresh evidence on appeal is a complete non-starter”.* H

I have completely agreed with the lower court’s stance on this point. The application to adduce fresh evidence on appeal when

the substantive matter has not been heard on merit by the trial court is not only premature but also amounts to an abuse of court process.

B On my personal note, I think the appellant should be interested in making sure that the substantive matter is heard so that he can (sic) out in the document at the trial. I resolve this particular issue against the appellant and in favour of the Respondent.

C The 2nd issue raised by the appellant is a complete misapplication of the law to the facts of this case. The appeal before the lower court is to determine the propriety of the trial court ordering pleading. The application to adduce fresh evidence was raised for the first time at the lower court. There is absolutely no connection between the application and the appeal before the lower court. If the lower court determines the appeal and affirm the order of the trial court the case would be sent for trial, if it holds otherwise the discretion is D on the lower Court either to send the case back to trial court to be heard under the originating summons proceedings or to invoke its powers under section 15 of the Court of Appeal Act to hear the appeal and the substantive matter together. All the submission of the appellant to the effect that the lower court veered into the substantive case in an interlocutory proceeding are of no moment. I find no E merit in the submissions of the learned counsel to the appellant, and I also resolve this issue against the appellant.

F I was opportune to have a preview of the judgment of my learned brother Walter Samuel Nkanu Onnoghen, JSC. I entirely agree with the reasons and conclusion of his lordship in holding that the appeal is devoid of any merits. I too hold that the appeal lacks merit and I too dismiss the appeal. I abide by the consequential orders made therein.

G \_\_\_\_\_

### **NGWUTA JSC**

H In a pre-election dispute, the appellant as plaintiff, by way of Originating Summons in Suit No. FHC/ABJ/CV/83/2011 before the Abuja Division of the Federal High Court, prayed for diverse reliefs predicated on the resolution of the question he presented to the Court. The Respondents filed a notice of preliminary objection urging the trial Court to strike out the suit by way of Originating Summons as incompetent.

The Court took the preliminary objection and the Originating Summons together and in its judgment delivered on 25/3/2011, the trial Court sustained the preliminary objection and, in the exercise of its discretion, ordered parties to file pleadings in the matter.

Appellant appealed to the Court below in Appeal No.CA/A/221/2012. In the course of proceeding in the appeal, appellant brought a motion before the Court below, praying for leave to adduce further evidence. In its ruling delivered on 26/4/2012, the Court below denied the application. Aggrieved, the appellant appealed to this Court.

Issues for determination presented by the parties and arguments thereon have been set out in the lead judgment of my Lord, Onnoghen, JSC, CON, CFR which I have read in draft and with which I entirely agree. I desire to make a few observations by way of contribution.

Order 4 Rule 2 of the Court of Appeal Rules, 2011 on further evidence provides:

*“Ord.4 r.2: The Court shall have powers to receive further evidence - 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.”*

This Court has interpreted and applied the above provision in various decisions, one of which is *Owata v. Anyigor* (1983) 2 NWLR 390 at 393 discussed in the lead judgment. The Court re-stated the principles upon which a Court can admit further evidence to include:

*“(i) The evidence sought to be adduced should be such that it could not have been obtained with reasonable care and diligence for use at the trial.*

*(ii) If the fresh evidence is admitted it would have an important but not necessarily crucial effect on the whole case.*

*(iii) If the evidence sought to be adduced is such that is apparently credible in the sense that it is capable of being believed even if it may not be incontrovertible.*

*(iv) Additional evidence may be admitted if the evidence sought to be adduced could have influenced the judgment at the lower Court in favour of the applicant, if it had been available at the*

trial Court.

*(v) The evidence must be material and weighty even if not conclusive, where the evidence sought to be adduced is immaterial and irrelevant, it will be rejected."*

B The principles apply conjunctively, each must be satisfied in a particular case. In this case, the further evidence is sought to be admitted in an appeal against an interlocutory decision of the Court. The case is yet to be tried. The underlined expressions in principles 1, 2 and 4 imply that the trial has been concluded at the time further C evidence is sought to be admitted.

The requirement that the further evidence will have effect on the whole case makes the principle inapplicable to an interlocutory proceeding which is not the whole case. It is a contradiction in terms to say that the further evidence was not available at the trial Court D when the trial is yet to open.

With due respect, the appellant misconstrued the decision of the Court below to the effect that the appellant still has the opportunity to present the evidence sought to be adduced in the lower Court. By that decision on the application to admit further evidence, the E Court below did not determine the appeal in which the application was made.

If the appeal is allowed, the Court below will order that the matter be heard by affidavit evidence or in the alternative, the Court F will determine the matter pursuant to Section 16 of the Court of Appeal Act, 2004. If the appeal is dismissed, the trial Court will proceed to try the case on pleadings. In either case, the appellant will have the opportunity to apply to adduce further evidence. This, in my humble view, is the import of the decision of the lower Court.

G Based on the above and the more comprehensive reasoning in the lead judgment, I also find no merit in the appeal, and accordingly I also dismiss same with N200,000.00 costs to each set of Respondents.

H

### ARIWOOLA JSC

This is an appeal against the ruling of the Abuja Division of the court of Appeal delivered on 26th April, 2012 wherein the court dismissed the appellant's application for leave to adduce further evi-

dence before the court below.

It is interesting to note that the trial Federal High Court is yet to decide on the main action commenced by way of Originating Summons. Indeed, the trial court having gone through all the processes filed before it including the preliminary objection of the 1st respondent to the whole proceedings the trial court had ordered pleadings to be filed to try the matter on same. B

The above decision of the trial court led to the appeal to the court below before which the appellant sought leave to adduce further evidence. The leave sought was refused and the application was dismissed for the undisputable and very clear reason that the said fresh evidence sought to be adduced by the appellant can be adduced during the trial on merit on pleadings before the trial court. C

The appellant on appeal to this court had, inter alia, sought the determination of the following issue: D

*“Whether the court of appeal was right in refusing the application of the appellant to adduce fresh evidence in the appeal considering the very vital nature of the evidence sought to be adduced and the overall justice of the suit.”*

There is no doubt, that an appellate court is competent to allow fresh or further evidence on appeal, if the admission of same is necessary to prevent an obvious miscarriage of justice. See; Attorney General of Oyo State Vs. Fairlakes Hotels Ltd (1988) 5 NWLR (Pt.92) 1 at 19, Onwugbufor Vs Okoye (1996) 1 NWLR (Pt.424) 252 at 291, Temco Engineering & Co. Ltd Vs. S.B.N. Ltd (1995) 5 NWLR (Pt.397) 607 at 617. E  
F

Generally, the court in considering or dealing with the application for leave to adduce fresh or further evidence on appeal will ensure that in allowing the application the appellant is not allowed to change his position in the appellate court by making a completely different case from the case he had presented at the court below or trial court. See Uor vs. Loko (1988) 2 NWLR (Pt.77) 430 at 438 Ejilofodomi vs Okonkwo (1982) 11 SC 74 at 96. G

However, the court has settled it that appellate court is to be guided by the following principles in the consideration of application to adduce fresh or further evidence on appeal. H

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

or is or are on matter(s) which occurred after the judgment;

(b) after hearing the case on merit, the court of appeal will only admit evidence other than under (a) above on special grounds.

(c) the evidence to be adduced must be credible in the sense that it is capable of being believed. See *Iloegbu Vs COP* (1992) 7 B NWLR (Pt.254) 459, *Akinbi Vs Alao* (1985) 3 NWLR (pt.108) 118.

In the instant case as earlier stated, the appellant's case before the trial court was yet to be heard on merit hence there was still room and ample opportunity to adduce the said evidence for which leave was being sought to adduce on appeal. Whether or not leave is to be granted to adduce fresh or further evidence on appeal is entirely at the discretion of the court which is considering the application, though such discretion must not be exercised arbitrarily but judicially and judiciously.

In the instant case in my view the appellant seems not to appreciate the position of the law on this matter. There is no way it can be said that the court below was wrong in refusing to allow the appellant to adduce further evidence when he was yet to adduce, at the trial any evidence at all, other than the affidavit evidence in support of the Originating Summons which the trial court had held to be inappropriate for trial of the case, hence the order for pleadings to be filed.

Without any further ado, for the above short comments, and the detailed and well articulated reasons contained in the lead judgment of my learned brother, Onnoghen, JSC, with which I am in total agreement, I hold that the appeal is devoid of any merit. Indeed, it is frivolous and liable to dismissal. Accordingly, it is dismissed by me.

I abide by the consequential order in the said lead judgment including the order on costs.

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### **MUHAMMAD JSC**

For the reasons articulated in the lead judgment of my learned brother Onnoghen JSC, which I adopt as mine, I hereby dismiss the unmeritorious appeal and abide by the consequential orders made in the lead judgment including the order on costs.