

SUPREME COURT OF NIGERIA

FRIDAY 15TH APRIL, 2016. SC. 226/2005

**CORAM:- W. S. N. ONNOGHEN, C. B. OGUNBIYI, K. B.
AKA'AH, K. M. O. KEKERE-EKUN, C. C. NWEZE, JJSC**

1. BULLET INTERNATIONAL NIGERIA LTD APPELLANTS/
2. MUSA GARBA IZAM APPLICANTS
AND
1. DR. MRS. OMONIKE OLANIYI
2. C. B. VENTURES LIMITED RESPONDENTS

SUPREME COURT - Jurisdiction - Appellate jurisdiction of the Court is inter alia - To review decisions of CA - And where an issue did not arise from CA - It may not form the basis of appeal to SC (H1)

APPEALS - Pleadings - Consistency of - Parties are bound by their pleadings - And as an appeal is not a new action - Appellant is not permitted to set up a case different from what he made out at trial (H2)

APPEALS - Fresh issue - Raising of - Conditions - SC will allow fresh issue where inter alia - The issue involves substantial point of law - And all facts in support of the issue are before it (H3)

COURTS - Issue - Failure to raise - Issue of illegality of the Minister's delegate to append signature having not been raised at trial - Will not be allowed on appeal - As doing so will overreach respondents (H4)

FACTS

Before the Supreme Court of Nigeria, appellants/applicants brought this application by way of Motion on Notice, seeking for leave of the Court to raise and argue fresh issue to wit: whether the title over the disputed property enures in favour of 1st respondent (who was the plaintiff in the trial court) in the absence of statutory consent of the Federal Capital Territory Minister appended or manifest on the face of the Deeds of Assignment and letters of Approval of Consent (exhibited/contained in the record of appeal) upon which

1st respondent relies to claim title and legal capacity to institute and maintain the suit resulting in this appeal.

The application was predicated on eleven grounds and supported by an affidavit. Respondents filed counter-affidavit in opposition on the ground that the issue is a fresh one. Hence, respondents will be prejudiced if the leave is granted to applicants.

ISSUE FOR DETERMINATION

Whether the appellants/applicants have made out a case to be granted the indulgence of the court?

HELD (Unanimously dismissing the application per NWEZE JSC)

SUPREME COURT - Jurisdiction

1. Now, it cannot be gainsaid that the rationale for the appellate jurisdiction of this court is, *inter alia*, to review the decisions of the Court of Appeal. If therefore, an issue did not arise for determination before that court, it [such an issue] may not form the basis of an appeal to this apex court.
(p. 2468 G)

Pleadings - Consistency of

2. The explanation is simple. Parties are bound by their pleadings. They would not, therefore, be allowed to set up an entirely new case on appeal. This prescription is firmly anchored on simple logic. An appeal is not a new action. On the contrary, it is a continuation of the matter, the subject matter of the appeal. Hence, the appellant would not be permitted to set up a case different from what he made out at trial court.

In other words, an appellate court must not allow an appellant, before it, to jettison the question on which the parties joined issues and fought their case before the trial court. In fact, to do otherwise would amount, in effect, to permitting the appellant to commence an entirely new case on appeal.

In the same vein, an appellate court, before which a new point is sought to be canvassed, must refuse to grant leave to do so where the fresh point sought to be raised introduces a

new line of defence, completely, different from the issues brought by the parties in the court below, or where, if the applicant had raised the new point, the respondent to the application would have been able to meet it, Adigun v. Attorney General Oyo State (supra). As a general principle, therefore, such an issue, which was not raised in the court below, will not be entertained on appeal.

This must, indeed, be so! Were it otherwise, the appellate court would be deprived of the benefit of the opinion of the lower Court. (p. 2468 H)

APPEALS - Fresh issue - Raising of - Conditions

3. That notwithstanding, there are special circumstances or conditions under which points of law not agitated at the trial court, may be allowed to be raised on appeal. As already indicated earlier, these special circumstances or conditions have been laid down in a long line of authorities.

Thus this court would exercise its discretion to allow such a fresh issue or question to be raised for the first time if:

(i) it involves a substantial point of law, substantive or procedural;

(ii) all the facts in support of such a new issue or question are before it; hence no further evidence would be adduced which will affect the new point;

(iii) the refusal of leave to argue the fresh point will occasion a miscarriage of justice;

(iv) the emergence of exceptional Circumstances;

(vi) a proper application for such issue or question to be raised. (p. 2470 C)

COURTS - Issue - Failure to raise

4. The applicants' Reply Brief filed in respect of the application herein, unwittingly, added a fillip to the formidable contention of the respondents' counsel. In the said brief, it was pointed out that the pith of the applicants' complaint in the fresh issue is that the "delegate" [the Principal Deeds Registrar, B. K. Adams] who, purportedly signed the approval of consent to assign the res on behalf of the FCT Minister did so

unlawfully and in violation of the provisions of section 22 of the Land Use Act. The view was equally canvassed that the FCT Minister cannot empower his subordinates to proceed to sign approval of consent to assign on his behalf without an enabling enactment.

B Unarguably, that was not the pivot on which their case gravitated at the lower courts. Instructively, from the entries on page 75 of the record, the approval of consent letter by the erstwhile Minister of the FCT dated July 19, 1995 was received in evidence on July 6, 1999 as exhibit C1 (g). Learned senior counsel, C. O. Akpamgbo, SAN (deceased) neither objected to its admissibility nor did he cross examine the witness on the document. Surely, if their case had been hinged on the illegality of the Minister's delegate appending his signature to the approval of consent to assign, it would have been taken up in cross examination on that day, namely, July 6, 1999, when it was tendered and admitted as shown.

E After all, the forensic tool of cross examination was, deliberately, woven into our adjectival law of evidence as an adversarial mechanism for devastating the case put forward on the other side. Having failed to utilise that forensic tool at the appropriate time, the respondents would, indubitably, be prejudiced if the applicants are granted the indulgence of canvassing, for the first time in this court, the question whether the "delegate" [the Principal Deeds Registrar, B. K. Adams] could sign the approval of consent to assign the res on behalf of the FCT Minister.

G As counsel for the respondents pointed out, if that issue had been raised at the trial, they would, perhaps, have been able to join issues with the applicant on it. That is not all, I entirely, agree with him that if this court obliges this entreaty to raise that issue now, it would have endorsed the evidently, surreptitious attempt to overreach the respondents by the introduction of an entirely new case or line of defence different from the issues fought by the parties at the lower courts.

(p. 2471 C)

REPRESENTATION

A. B. Anachebe, SAN, for the applicants; with him Rita Chris-Garuba (Mrs.); F. C. Anachebe (Mrs.); Charles Jibuaku; Uchenna Uche and Aaron Ocholi.

Israel Olorundare, for the respondents; with him: Tunde Babalola; O. Adekunle (Mrs.); Omoniye Onabule; Bamikole Adeleju; Chinyere B Ofoegbu and Akin Ogbuntolu

CASES REFERRED TO

CSS Bookshops Ltd v. R. T. M. C R. S. [2006] 11 NWLR (pt. 992) 530 C

Long-John v. Blakk [2005] 17 NWLR (pt 953) 1

Ajuwon v. Adeoti [1990] 2 NWLR (pt. 132) 271

Popoola v. Adeyemo [1992] 8 NWLR (pt. 257) 1

Coker v. UBA [1997] 2 NWLR (pt. 490) 641

D

Adigun v. Attorney General Oyo State (No 2) [1987] 2 NWLR (pt. 56) 197

AIC v. NNPC [2005] 1 NWLR (pt. 937) 563

Makanjuola v. Balogun [1989] 3 NWLR (pt. 108) 192

Shonekan v. Smith (1964) 1 All NLR 168

E

Savannah Bank of Nigeria v. Ajilo [1989] 1 NSCC 135

UBN v. Ayodare & Sons Ltd [2007] 13 NWLR (pt. 1052) 567

Olalomi Ind. Ltd v. NIDB Ltd [2009] 16 NWLR (pt. 1167) 266

P. I. P. Ltd. v. Trade Bank (Nig) Ltd [2009] 13 NWLR (pt. 1159) 577 F

Adefulu v. Oyesile [1989] 5 NWLR (pt. 122) 377

Oloriode v. Oyebe [1984] 1 SCNJ 390

STATUTE REFERRED TO

Land Use Act, s. 22

G

LEAD JUDGMENT BY NWEZE JSC

By their Motion on Notice, filed on November 11, 2015, the appellants/applicants beseeched this court with entreaties for the following reliefs:

H

1. Leave to raise and argue fresh issues in this appeal, to wit:

I. Whether the title over the disputed property enures in favour of the first respondent (who was the plaintiff in the trial court) in the absence of statutory consent of the FCT Minister appended or mani-

fest on the face of the Deeds of Assignment and Letters of Approval of Consent (exhibited/contained in the record of appeal) upon which she relies to claim title and legal capacity to institute and maintain the suit resulting in this appeal?

ii. Whether the first respondent possesses requisite locus standi
B to invoke the jurisdiction of any court to hear and determine the substantive cause?

2. Leave to further amend the Amended Notice of Appeal
C filed [on] February, 2007 to incorporate the additional grounds of appeal as encapsulated in grounds F and G underlined in the proposed Further Amended Notice of Appeal exhibited herewith;

3. Leave to amend the appellant's Brief of Argument to incorporate the said additional grounds and issues arising therefrom;

4. An order deeming the Further Amended Notice of Appeal
D and Amended Brief of Argument as duly filed subject to the leave of the Honourable court herein sought.

The application was predicated on eleven grounds as shown in the processes. In the affidavit in support of the application, to which is attached exhibits A and B, one Uchenna Uche, deposed to the
E following facts:

*"1. That I am a (sic) Counsel in the Chambers of Mr. A. B. Anachebe, SAN of lead Counsel to the appellants/applicants and being conversant with the facts of this matter; do hereby on the authority
F and instructions of the appellants and my employer depose to this affidavit on their behalf.*

*2. That the cause resulting in this litigation arose from the purported purchase of the res by the first respondent from the second respondent who initially acquired same from the second appellant.
G The first respondent subsequently sued the first appellant (who was the sitting tenant) for recovery of possession, mesne profit, etc, after the first appellant did not co-operate when the first respondent introduced herself as the new Landlord.*

*3. That the statutory consent of the FCT Minister is not manifest in the Deed of Assignment and Letters of Approval of Consent
H contained in the record of appeal and relied upon in proof of title of the first respondent over the res.*

4. That while recently reviewing the case file, Mr. A. B. Anachebe, SAN, of lead Counsel realized that there was need to

raise and argue fresh issues, for which leave of court is required, albeit to enable comprehensive determination of the issues arising in this appeal.

5. *That to expedite hearing of this appeal, which is already fixed for January 19, 2016, the appellants diligently filed appropriate Further Amended Notice of Appeal and Amended Brief of Argument along with this Motion, subject to leave of the Hon. Court. Meanwhile, the Amended Notice of Appeal filed on February 7, 2007, and the proposed Further Amended Notice of Appeal are herewith filed as exhibits "A and B," respectively.*

6. *That the appellants will rely on the entire record of appeal particularly the judgments of the Courts below, in arguing the instant application.*

7. *That the respondents will not be prejudiced if this application is granted...* "[Italics supplied]

When the application was heard on January 19, 2016, A. B. Anachebe, SAN, who appeared with Rita Chris-Garuba (Mrs.); F. C. Anachebe (Mrs.); Charles Jibuaku; Uchenna Uche and Aaron Ocholi, for the applicants, moved the court to favour the applicants with the above reliefs. He adopted the process titled "*Appellants' brief of Argument in support of the Motion for leave.*"

In the said Brief, learned senior counsel pointed out that the application simpliciter seeks the leave of the court to raise and argue fresh issues on grounds other than law as contained in the Proposed Further Amended Notice of Appeal, exhibit A. A lone issue was formulated for the determination of the merit of the application, viz:

Whether the appellants/applicants have made out a case to be granted the indulgence of the court?

ARGUMENT OF THE APPELLANT

Learned senior counsel for the applicants noted that a ground of appeal, other than a ground of law, which is filed at this court without leave of the Court of Appeal or this court is incompetent unless leave is sought and obtained, hence the instant application, *CSS Bookshops Ltd v R. T. M. C R. S.* [2006] 11 NWLR (pt 992) 530, 545; *Long-John v Blakk* [2005] 17 NWLR (pt 953) 1.

He contended that leave of court is required before raising and arguing a fresh issue, *Ajuwon v Adeoti* [1990] 2 NWLR (pt 132)

271, 274; *Popoola v Adeyemo* [1992] 8 NWLR (pt 257) 1, 9. He pointed out that the new issues sought to be raised in these proceedings are relevant and do not call for additional evidence as they are documentary which, merely, require judicial interpretation. In his view, the said new issues are, amply, covered by the proceedings of the lower courts. He submitted that the instant application was brought seeking leave to raise and argue fresh issues on grounds other than grounds of law and the further amendment of the Amended Notice of Appeal filed on February 7, 2015 and Brief of Argument, *Coker v UBA* [1997] 2 NWLR (pt 490) 641, 643.

RESPONDENT'S CONTENTION

On his part, Israel Olorundare, SAN, who appeared with Tunde Babalola: O. Adekunle (Mrs.); Omoniyi Onabule; Bamikole Adeloju; Chinyere Ofoegbu and Akin Oguntolu, for the respondents, referred to the thirty-three paragraph Counter Affidavit filed on November 10, 2015 in opposition to the Motion. He adopted the Brief filed on November 10, 2015.

In the said brief, counsel framed three Issues for the determination of the merit of this application. However, only issue two is relevant apropos the crux of the relief in the application. It was framed thus:

Whether the issue of consent to assign, the subject matter of this suit to the first respondent, is a legitimate issue the applicants can pursue for the first time in this court having regard to the state of evidence at the trial court and materials placed before this court for leave to raise and argue same?

Counsel addressed this issue on pages 8 -17, paragraphs 4.20 -4.42. In the main, the contention of the respondents was that leave to raise fresh issues will be refused in a situation where, if it had been raised at the trial, the defence would have been able to meet them, *Adigun v. Attorney General Oyo State* (No 2) [1987] 2 NWLR (pt 56) 197. A fortiori, the court would not oblige such a request where the point sought to be raised, for the first time, introduces an entirely new case or line of defence different from the issues fought by the parties at the lower courts, *Ejiofodomi v Okonkwo* [1982] 11 SC 74.

He pointed out that the appellants did not challenge, by their pleadings or during trial, the respondents' ownership of the property in dispute on the basis of the absence of consent of the Minister or on

the basis that the letter of consent and the deed of assignment was not signed by the Minister both at the trial and before the lower court.

He maintained that if they had done so, the respondents would have joined issues with them and adduced further documents to debunk that line of contention. He drew attention to pages 311 -312 of the record on the steps they went through before the Minister finally approved and gave his consent under section 22 (supra). He pointed out that the Minister approved the transaction and appended his signature. He explained that the respondents would have adduced additional evidence to show that the Minister consented to the transaction - and delegated his authority to his delegate who signed on his behalf, *Adigun v Attorney General, Oyo State (No 2) (supra)*. B C

He re-iterated the submission that parties would not be allowed to set up an entirely new case different from the issues they canvassed at the lower courts, *Ejiofodomi v Okonkwo (supra)*. He noted that the applicants did not show any special circumstance to warrant the exercise of discretion in their favour, *AIC v NNPC [2005] 1 NWLR (pt 937) 563; Makanjuola v Balogun [1989] 3 NWLR (pt 108) 192, 206; Shonekan v Smith (1964) 1 All NLR 168, 173.* D E

APPLICANTS' REPLY

As noted earlier, learned senior counsel, also, adopted the Reply brief filed on January 6, 2016. In the said Reply brief, counsel canvassed the view that the respondents misconceived the purport of the application, paragraphs 1. 0 - 5.0, pages 1 -2. F

He pointed out that the issue sought to be raised is the judicial interpretation of the provisions of section 22 of the Land Use Act. In this case, the statutory consent of the Minister is not manifest on the face of the Deeds of Assignment and/or Letters of Approval of Consent, *Savannah Bank of Nigeria v Ajilo [1989] 1 NSCC 135, 137; UBN v Ayodare and Sons Ltd [2007] 13 NWLR (pt 1052) 567, 572; Olalomi Ind. Ltd v. NIDB Ltd [2009] 16 NWLR (pt 1167) 266, 272; P. I. P, Ltd v Trade Bank (Nig) Ltd [2009] 13 NWLR (pt 1159) 577, 584.* G H

Counsel took the view that, as the consent of the FCT Minister was not obtained before the interest in the res was purportedly assigned by the second respondent to the first respondent, the first respondent had no locus standi to invoke the jurisdiction of the court

to entertain her claims, *Adefulu v Oyesile* [1989] 5 NWLR (pt 122) 377, 381; *Oloriode v Oyebe* [1984] 1 SCNJ 390.

He further contended that the pith of the applicants' complaint in the fresh issue is that the "delegate" [the Principal Deeds Registrar, B. K. Adams] who, purportedly, signed the approval of consent to assign the res on behalf of the FCT Minister did so unlawfully and in violation of the provisions of section 22 of the Land Use Act, *NNPC v Trinity Mills Ins Brokers* [2003] 9 NWLR (pt 825) 384, 396. He maintained that the FCT Minister cannot empower his subordinates to proceed to sign approval of consent to assign on his behalf without an enabling enactment, *Ogualaji v A-G, Rivers State* [1997] 6 NWLR (pt 508) 209, 234; *CCB (Nig) Plc v A. G. Anambra State* [1992] 8 NWLR (pt 261) 528, 556; *Ude v Nwara* [1993] 2 NWLR (pt 278) 638, 661.

D RESOLUTION OF THE ISSUE

By way of preliminary remarks, it must be noted that the substantive appeal is still pending. In this ruling, therefore, attempts would be made not to broach any question that may impinge on the ultimate outcome of the substantive issues in the main appeal, *Kotoye v Saraki and Anor* [1994] 7 NWLR (pt 357) 414/428; *Globe Fishing Ind Ltd v Coker* [1990] 7 NWLR (pt 162) 265, 277; *Ireogbu and Anor v Okwordu and Anor* [1990] 6 NWLR (pt 159) 643, 660 - 661; *A-G Federation v A-G Abia State and Ors* [2001] 7 SC (pt. 1) 32; [2001] 11 NWLR (pt 725) 689; *S.G.B, Ltd v Buraimoh* [1991] 1 NWLR (pt. 168) 428; *Akilu v Fawehinmi* [1989] 2 NWLR (pt.102) 122; *Ojukwu v. Gov. of Lagos State* [1986] 3 NWLR (pt. 26) 39.

Thus, I would endeavour to circumscribe this ruling to the narrow question whether this application is grantable in the circumstances of this case. As shown above, the applicants beseeched this court for:

Leave to raise and argue fresh issues in this appeal, to wit:

Whether the title over the disputed property enures in favour of the first respondent (who was the plaintiff in the trial court) in the absence of statutory consent of the FCT Minister appended or manifested on the face of the Deeds of Assignment and Letters of Approval of Consent (exhibited/contained in the record of appeal) upon which she relies to claim title and legal capacity to institute and maintain the suit resulting in this appeal?

As it were, the other reliefs, that is, reliefs 1 (ii) (the question of

locus standi); 2 (leave to further amend the Amended Notice of Appeal); 3 (leave to amend the appellants' Brief of Argument) and 4 (an order deeming the processes as being, duly, filed and served) are contingent reliefs, that is, their success is, entirely, dependent on the fate of the principal relief, namely, leave to raise and argue the above fresh issue. B

Earlier in this Ruling, I had indicated that the Respondents, most vociferously, opposed the application. Indeed, the averments in the Counter Affidavit sworn to by Emmanuel Okon speak to the stridency of their contestation of the merit of the said application. For their bearing on the merit vel non of this application, the relevant depositions apropos their interrogation of the propriety of this application are set out here - C

5. That from the record before this Honourable Court the facts are as follows: D

6. a. The first Respondent (Dr. Mrs. Omonike Olaniyi) commenced this suit at the trial court on 27th October, 1997 (eighteen years ago) against the first Appellant (Bullet Int'l. Nig Ltd) for recovery of possession/ perpetual injunction/ mesne profit damages for use and occupation of the property subject matter herein and claimed damages...; E

b. The second Respondent (CB Ventures Ltd) and the second Appellant (Musa Garba Izam) were later joined as defendants in the course of the suit...; F

c. That the trial court entered judgment in favour of the first Respondent (Dr. Mrs. Omonike Olaniyi) on 9th October, 2002 and perpetually restrained the Appellants (Bullet Int'l. Ltd and Musa Izam) from continuing to occupy the property...; F

d. Musa Garba Izam (the second Appellant), the original owner of the property, subject matter herein admitted in writing by his letter of 27th May 1996 that he had sold the property to CB Ventures Limited (second Respondent) who (sic) he owed money to (sic) for N10, 000, 000. 00 (Ten Million Naira) since 1995 and the two lower courts also found so... H

e. Musa Garba Izam (the second Appellant) also admitted in writing by his letter dated 27th March, 1995, at page 246 of the record that 'I have retrieved the original title documents in respect of the property at Plot No 2370 Cadastral Zone A6, Maitama District, Abuja,

from the Federal Mortgage Finance Ltd. I am hereby forwarding same to CB Venture for their retention;

f. Musa Garba Izarn by exhibit P1H at pages 206 and 238 also admitted on record that he *'the Assignor has agreed (the previous requisite consent having been obtained) with the Assignee for the sale of the above-mentioned property with the structures and developments thereon for the sum of...*

k. That because of the allegations of Musa Izarn in his letter of 27th May, 1996, exhibit A herein attached regarding who signed the Deed of Assignment and the application, an investigation was carried out by the Minister of the FCT report of which is contained in Memo dated 30th May, 1996 at page 310 of the record and pages 226, 228, 311-312 of the record;

l. The findings of the investigation revealed that there was no malpractice involved nor *was the consent obtained surreptitiously as claimed* and the second Appellant (Musa Garba Izam) signed his signature on the Deed of Assignment and relevant authorisation on the assignment between him and CB Ventures Ltd. Hence, he agreed and consented to the assignment to CB Ventures Ltd and promised to convey this information to the Minister of the FCT;

m. That it was after the said investigation had been concluded that *the Minister of the FCT was advised to approve consent for the transaction under section 22 of the Land Use Act; 1978;*

n. That all the necessary bureaucratic process and protocols were followed *before consent was granted by the Minister. The consent granted by the Minister and his signature under section 22 of the Land Use Act was conspicuously manifest on the documents:*

o. That this same process was followed when the initial approval for consent by the second Appellant ... was obtained by him from the Minister of the FCT. *The approval of consent by the FCT Minister when the second Appellant applied for the consent of the Minister regarding his assignment of the property to CB Ventures is on page 204 of the record;*

p. That the alleged fresh issues sought to be raised *are not fresh issues at all as they have been raised; argued and exhaustively dealt with as lacking in merit at the trial court and affirmed by the lower court.* Please see pages 158 -172, 380 -385 of the record;

7. That the records of appeal bear eloquent testimony *that the*

consent of the FCT Minister was duly sought and obtained both when the second Applicant assigned Plot 2370 Cadastral Zone A Maitama District Abuja to the second respondent and when the second respondent assigned same to the first respondent;

8. That on 9th December, 1998, one Bako M. Chinoko, under subpoena and testifying as PW1 (at page 71 of the record of appeal) tendered without objection File No. FCT/ABU/PL/344 in the name of M. C. Izam (the second applicant) *containing the approval of consent to assign the property to the second respondent and same was received in evidence as exhibit C1;*

10. That the letter of application for consent to assign from the second applicant herein to the second respondent dated 8th of May, 1995 was admitted in evidence (at page 72 of the record, as exhibit P1(a);

11. That the valuation report used *to assess the consent fee in respect of the property* was on 6th July, 1999 (at page 75 of the record);

12. That the approval of consent letter by the then Minister of the FCT Jeremiah Useni dated July 19, 1995 was on July 6, 1999 (at page 75 of the record) received in evidence unopposed by the applicants' counsel C. O. Akpamgbo SAN (of the Blessed Memory) as exhibit C1 (g);

17. That PW2 at page 78 of the record testified that there was subsequently an application for consent dated 3/3/97 by the second respondent to assign the property to the first respondent and same was admitted in evidence unopposed as exhibit C1 9(j);

18. That page 78 of the record shows that the approval of consent to assign from the second respondent to the first respondent dated 10/4/97 was received in evidence unopposed as exhibit C1(k);

24. That in a letter dated 27/5/96 at page 208 of the record captioned 'Approval of Consent to Assign C OF O No FCT/ATOP/PL.344 owned by M. G. Izam, the second applicant admitted the entire transaction when in the opening paragraph he stated 'I had sold the above named property to C. B. Ventures Limited...;

25. That the instant application for leave to raise and argue fresh issue on whether the consent of the FCT Minister is 'manifest on the fact of the Deeds of Assignments' is a desperate act of a drowning man as by and under our laws a seller of property can only do so

with the consent of the Minister of the Federal Capital Territory;

27. That no special circumstance was disclosed in the applicants' affidavit in support of his (sic) motion showing why the issue should be re-opened or why any aspect of it was not taken at the courts below;

B 28. That the respondents would have been able to meet the issue if raised at the courts below with more witnesses to clear any doubt that may otherwise exist;

C 29. That the *applicants by this motion seek to pursue for the first time an entirely new line of defence different from issues fought by the parties in the courts below.* [Italics supplied for emphases]

D It was on the strength of the above depositions that counsel for the respondents canvassed the strong view that leave to raise fresh issues will be refused in a situation where, if it had been raised at the trial, the defence would have been able to meet them, *Adigun v Attorney General Oyo State (No 2) [1987] 2 NWLR (pt 56) 197*. A fortiori the court would not oblige such a request where the point sought to be raised, for the first time, introduces an entirely new case or line of defence different from the issues fought by the parties at the lower courts, *Ejiofodomi v Okonkwo (supra)*.

F I find considerable merit in the above submission. The attitude of this court on raising fresh points on appeal has been expressed in many cases: cases too numerous to be cited here. Albeit, I take liberty to refer to one or two of them: *Akpene v Barclays Banks of Nigeria [1977] 1 SC 471*; *Abinabina v Enyimadu (1953) 12 WACA 171*; *Djukpan v Orovuyovbe (1967) 1 All NLR 134, 137 - 138*; *Oniah v Onyia [1989] 1 NWLR (pt.99) 514*; *Makanjuola v Balogun [1989] 3 NWLR (pt.108) 192*.

G ***Now, it cannot be gainsaid that the rationale for the appellate jurisdiction of this court is, inter alia, to review the decisions of the Court of Appeal. If therefore, an issue did not arise for determination before that court, it [such an issue] may not form the basis of an appeal to this apex court.*** London C. B. A. v White (1897) 4 A.C. 413; *Nabakas Government and Anor v A-G Uganda and Anor (1965) 3 WLR 512; (1966) AC 1*.

H ***The explanation is simple. Parties are bound by their pleadings. They would not, therefore, be allowed to set up an entirely new case on appeal. This prescription is firmly an-***

chored on simple logic. An appeal is not a new action. On the contrary, it is a continuation of the matter, the subject matter of the appeal. Hence, the appellant would not be permitted to set up a case different from what he made out at trial court.

London C. B. A. v White (supra); Mogaji and Ors v Cadbury Nig Ltd and Ors [1985] 7 SC 59.

In other words, an appellate court must not allow an appellant, before it, to jettison the question on which the parties joined issues and fought their case before the trial court. In fact, to do otherwise would amount, in effect, to permitting the appellant to commence an entirely new case on appeal.

Ejiofodomi v. Okonkwo (supra).

In the same vein, an appellate court, before which a new point is sought to be canvassed, must refuse to grant leave to do so where the fresh point sought to be raised introduces a new line of defence, completely, different from the issues brought by the parties in the court below, Ejiofodomi v. Okonkwo (supra); or where, if the applicant had raised the new point, the respondent to the application would have been able to meet it, Adigun v. Attorney General Oyo State (supra). As a general principle, therefore, such an issue, which was not raised in the court below, will not be entertained on appeal.

This must, indeed, be so! Were it otherwise, the appellate court would be deprived of the benefit of the opinion of the lower Court. Agboola v. USA Plc [2011] 11 NWLR (pt. 1259) 375, 414; Eze v. A. G. Rivers State [2001] 18 NWLR (pt. 746) 524; Ejiofodomi v. Okonkwo (supra); Dweye v. Iyomahen [1983] 2 SCNLR 135; A. G. Oyo State v. Fairlakes Hotels (supra).

Such an unwholesome development would, actually, be an aberration for, in the normal course of juridical affairs, it is desirable for the appellate court to have the benefit of the opinion of the lower court on such points, Skenconsult Nig. Ltd and Ors v. Ukey (supra) at 18. As Lord Hudson observed in United Marketing Co. v. Kara (1963) 1 WLR 523, 524:

Even if the facts were beyond dispute and no further investigation of facts were required, their Lordships would not readily allow a fresh point of law to be argued without the benefit of the judg-

ments of the judges in the court below.

The dictum of Lord Birkenhead LC in *North Staffordshire Railway Co v Edge* (1920) AC 254, 263-264, actually, speaks more pungently and appositely to the point being made here.

Listen to the venerable Lord Chancellor:

- B *"The efficiency and authority of a Court of Appeal and especially of a final Court of Appeal are increased and strengthened by the opinions of learned Judges who have considered these matters below. To acquiesce in such an attempt as the appellants have made in this case is in effect to undertake decisions which may be of the highest importance without having received any assistance at all from the Judges in the courts below..."* [Italics supplied]

C ***That notwithstanding, there are special circumstances or conditions under which points of law not agitated at the trial court, may be allowed to be raised on appeal. As already indicated earlier, these special circumstances or conditions have been laid down in a long line of authorities.*** *Fadiora and Anor v Gbadebo and Anor* [1978] 3 SC 219, 248; *Abinabina v. Enyimadu* (supra); *Ejiofodomi v. Okonkwo* (supra) at 93 - 94; *Dweye v Iyomahan* [1983] 2 SCNLR 135, 138; *Niger Progress Ltd v. N. EL Corp* [1989] 3 NWLR (pt 107) 68, 100; *Shonekan v Smith* (1964) 1 All NLR 168, 173; *Akpena v. Barclays Bank of Nig. Ltd and Anor* [1977] 1 SC 47. ***Thus this court would exercise its discretion to allow such a fresh issue or question to be raised for the first time if:***

- (i) *it involves a substantial point of law, substantive or procedural;*
- (ii) *all the facts in support of such a new issue or question are before it; hence no further evidence would be adduced which will affect the new point;*
- (iii) *the refusal of leave to argue the fresh point will occasion a miscarriage of justice;*
- (iv) *the emergence of exceptional Circumstances;*
- H (vi) ***a proper application for such issue or question to be raised.*** *Plateau Publishing Co. Ltd. and Ors v Chuks Adophy* [1986] 4 NWLR (pt. 34) 205, 223; *Atoyebi v. Gov. of Oyo State* [1994] 5 NWLR (pt. 344) 290, 305; *Uhunmwangho v. Okojie* [1989] 5 NWLR (pt. 122) 471; *Djukpan v. Orovuyevbe* (1967) 1 All NLR

134; Uor v. Loko [1998] 2 NWLR (pt. 77) 430; A-G., Oyo State v. Fairlakes Hotel Ltd [1988] 12 SC (pt. 1) 1; [1988] 5 NWLR (pt. 92) 1; Management Enterprises Ltd. v. Otusanya [1987] 2 NWLR (pt. 55) 179; Sken Consult v. Uke [1981] 1 SC 6; [1981] 1 S.C. (Re-print) 4; Wanko v. Ado-John [1999] 9 NWLR (pt. 619) 401.

How did the applicants fare in their application? I had taken the pains to reproduce the depositions in the affidavit and Counter affidavit in support and opposition, respectively, of the application herein. I need not reproduce them here. My intimate, indeed, fastidious reading of these depositions and the gamut of averments in the pleadings of the parties at the trial court lends credence to the submission of the respondents' counsel that this application is a disingenuous attempt to map an entirely new course or line of defence.

The applicants' Reply Brief filed in respect of the application herein, unwittingly, added a fillip to the formidable contention of the respondents' counsel. In the said brief, it was pointed out that the pith of the applicants' complaint in the fresh issue is that the "delegate" [the Principal Deeds Registrar, B. K. Adams] who, purportedly signed the approval of consent to assign the res on behalf of the FCT Minister did so unlawfully and in violation of the provisions of section 22 of the Land Use Act. The view was equally canvassed that the FCT Minister cannot empower his subordinates to proceed to sign approval of consent to assign on his behalf without an enabling enactment.

Unarguably, that was not the pivot on which their case gravitated at the lower courts. Instructively, from the entries on page 75 of the record, the approval of consent letter by the erstwhile Minister of the FCT dated July 19, 1995 was received in evidence on July 6, 1999 as exhibit C1 (g). Learned senior counsel, C. O. Akpamgbo, SAN (deceased) neither objected to its admissibility nor did he cross examine the witness on the document. Surely, if their case had been hinged on the illegality of the Minister's delegate appending his signature to the approval of consent to assign, it would have been taken up in cross examination on that day, namely, July 6, 1999, when it was tendered and admitted as shown.

After all, the forensic tool of cross examination was,

deliberately, woven into our adjectival law of evidence as an adversarial mechanism for devastating the case put forward on the other side. Oforlette v State [2002] 12 NWLR (pt 681) 415, 436. ***Having failed to utilise that forensic tool at the appropriate time, the respondents would, indubitably, be prejudiced if the applicants are granted the indulgence of canvassing, for the first time in this court, the question whether the “delegate” [the Principal Deeds Registrar, B. K. Adams] could sign the approval of consent to assign the res on behalf of the FCT Minister.***

As counsel for the respondents pointed out, if that issue had been raised at the trial, they would, perhaps, have been able to join issues with the applicant on it. That is not all, I entirely, agree with him that if this court obliges this entreaty to raise that issue now, it would have endorsed the evidently, surreptitious attempt to overreach the respondents by the introduction of an entirely new case or line of defence different from the issues fought by the parties at the lower courts. Ejiofodomi v Okonkwo (supra).

As Aniagolu, JSC (of the blessed memory) posited, most eloquently, in Ejiofodomi v Okonkwo (supra):

“...I cannot see that this court should now allow the appellant to jettison before this court, the issue on which the parties fought their case all the way to the appeal court - an issue on which, he lost all the way. To do so would amount in effect, to our allowing her to commence an entirely new case before this court. There must, in the public interest, be an end to litigation (interest res (sic) publicae ut sit finis litium) and it is my view that to allow this new issue ... to be raised at this late stage, is not to further, but to hinder, that public interest...”

In all, for the above reasons, I find that this application must be, and is hereby, dismissed for being vexatious and unmeritorious. In consequence, the contingent reliefs 1 (ii); 2; 3 and 4 must fail. Application dismissed.

ONNOGHEN JSC

I have had the benefit of reading in draft the lead ruling of my

learned brother, NWEZE JSC just delivered.

I agree with his reasoning and conclusion that the application lacks merit and should be dismissed.

It is settled law that an application for leave to raise fresh Point(s)/issue(s) on appeal is not an opportunity for an appellant to present a completely different case/defence from that on which issues had been joined in the pleadings and evidence adduced at the trial. It is also not designed as an engine to perpetrate miscarriage of justice having regard to the facts and circumstances of the case. B

In the instant case parties did not join issues in their pleadings on the fresh point(s) sought to be raised neither do we have evidence on record to establish same. Even if there is such evidence, it grounds to no issue as there are no pleaded facts to support same. C

It is for the above reasons and the more detailed ones contained in the lead ruling of my learned brother that I too find no merit in the application and consequently dismiss same. D

I abide by the consequential orders made in the said lead ruling including the order as to costs.

Application dismissed.

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OGUNBIYI JSC

The application at hand seeks leave to raise fresh issues on appeal which same were not canvassed at the lower court. The appellants/applicants reiterate that the new Issues which are documentary would not, as a matter of fact require the calling of additional evidence. F

The law is well settled that the granting of an application of this nature is not a matter of course; the applicant must as a matter of fact satisfy the court before it could exercise its discretion in favour. Where a new issue is sought to make out a new case for the appellant/applicant, the court will be very cautious in making an order especially where the issue raised may be at variance with the initial case set out by the applicant. G H

In other words, the court will not advance such application which invariably is likely to either over reach the other party or otherwise seek to rectify a bad case. My learned brother Nweze, JSC had dealt exhaustively with the application at hand. I hereby endorse

his reasoning and conclusion arrived thereat and also I find no merit in the application but dismiss same.

I further abide by the consequential order made therein the lead ruling including order as to costs.

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AKA'HS JSC

I was privileged to read in draft the lead ruling of my learned brother, Nweze JSC. I agree with his reasoning and conclusion that the application should be dismissed as it lacks merit.

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The appellants/applicants are seeking leave to raise and argue a fresh issue in this appeal to wit;

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Whether the title over the disputed property enures in favour of the 1st respondent (who was the plaintiff in the trial court) in the absence of statutory consent of the Federal Capital Territory Minister appended or manifest on the face of the Deeds of Assignment and letters of Approval of Consent (exhibited/contained in the record of appeal) upon which she relies to claim title and legal capacity to institute and maintain the suit resulting in this appeal?

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Leave to raise fresh issues on appeal will be refused where the point sought to be raised for the first time introduces an entirely new case or line of defence different from the issues fought by the parties at the lower courts. See: Ejiofodomi v. Okonkwo (1982) 11 SC 74.

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The appellants never challenged by their pleadings the 1st respondent's ownership of the property in dispute on the basis that the letter of consent and the deed of assignment was not signed by the Minister. If it had been raised at the trial the defence would have had the opportunity to adduce sufficient evidence to counter the challenge. See: Adigun v. Attorney-General Oyo State (No. 2) (1987) 2 NWLR (Pt. 56) 107. Where the fresh point sought to be raised introduces a new line of defence different from the issues agitated by the parties at the trial or at the court below, this court must refuse to grant the leave being sought because the appellate court would be deprived of the opinion of the lower courts. See: Agboola v. U.B.A. Plc (2011) 11 NWLR (Pt. 1259) 375. An appeal is a continuation of the matter which is the subject of appeal and the appellate jurisdiction of this court is to review the decisions of the Court of Appeal. If therefore an issue did not arise for determination before that court, it

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may not form the basis of an appeal to this court.

From the evidence on record and especially the counter affidavit which was deposed to on behalf of the 1st respondent, the 2nd appellant who was the original owner of the property admitted in writing that he had sold the property to C. B. Ventures Ltd to whom he owed: N10,000,000.00. Before the property was assigned to C. B. Ventures, the requisite consent was obtained from the Minister of the Federal Capital Territory. B

The 1st appellant obtained good title from 2nd appellant since the necessary bureaucratic processes and protocols were followed before consent was granted by the Minister to the 2nd appellant to assign the property to the 1st appellant. Based on the above stated facts it is clear that the applicants are seeking to pursue for the first time an entirely new line of defence different from the issues which were fought by the parties below. It is for this reason and the more detailed reasons contained in the Lead Ruling of my learned brother, Nweze JSC that I came to the conclusion that the application lacks merit and I accordingly dismiss it. C D

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KEKERE-EKUN JSC

By their motion on notice filed on 11/11/2015 the appellants/applicants seek leave to raise the following fresh issues in this appeal:

1. LEAVE to raise and argue fresh issues in this appeal, to wit: F

i. Whether the title over the disputed property enures in favour of the 1st Respondent (who was plaintiff in the trial Court) in the absence of statutory consent of the FCT Minister appended or manifest on the face of the Deeds of Assignment and Letters of Approval of Consent (exhibited/contained in the record of appeal) upon which she relies to claim title and legal capacity to institute and maintain the suit resulting in this appeal. G

ii. Whether the 1st Respondent possesses requisite locus standi to invoke the jurisdiction of any court to hear and determine the substantive cause. H

2. LEAVE to further amend the Amended Notice of Appeal filed 7th February, 2007 to incorporate the additional grounds of appeal as encapsulated in grounds F & G underlined in the proposed

Further Amended Notice of Appeal exhibited herewith.

3. LEAVE to amend the Appellant's Brief of Argument to incorporate the said additional grounds and issues arising therefrom. Some of the grounds upon which the application is predicated are:

B (ii) The new issues sought to be raised in this proceedings are relevant and do not call for additional evidence as they are documentary, merely requiring judicial interpretation.

C (iii) In instituting the instant action, the 1st Respondent (as plaintiff) relied on Deeds of Assignment and Letters of Approval of Consent executed in favour of the 1st & 2nd Respondents, in her purported capacity as the Owner/Landlord of the subject res: Plot 2370, Cadastral Zone A6 Maitama, Abuja.

D (iv) The trial Court admitted in evidence the Deeds of Assignment and Letters of Approval of Consent.

(v) Section 22 of the Land Use Act clearly provides that Consent of the FCT Minister must be obtained *which is not manifest on the face of the said Deeds of Assignment and/or Letters of Approval of Consent*

E (vi) The said Letters of Approval of Consent conveyed pre-conditions or bureaucratic requirements for grant of statutory consent.

F (vii) *In the absence of mandatory Consent of the FCT Minister appended on the said Deeds of Assignment or Letters of Consent as provided under section 26 of the Land Use Act; the purported transfer of title or Landlordship of the res to the 1st or 2nd Respondent is ineffectual.*

G (viii) *Having not legally acquired title over the res in line with section 22 of the Land Use Act, the 1st Respondent lacks locus standi to institute and/or maintain the suit resulting in this appeal.* (Italics supplied for emphasis)

H The circumstances in which a party would be permitted to institute a fresh issue not taken at the lower court are as stated by this court in the case of A.I.C Ltd. Vs NNPC (2005) 1 NWLR (Pt.937) 563 @ 585 - 586 F - A cited in paragraph 4.2c of the Respondent's brief, to wit:

"... The position of the law on raising of fresh issue on appeal is quite clear. It is that no substantial point of law which has not been

taken in the court below will be allowed to be raised for the first time before the Supreme Court except under special circumstances: Makanjuola V. Balogun (1989) 3 NWLR(Pt.108) 192 at 206. For such a point of law to be entertained, it must be shown to be a substantial point of law substantive or adjectival and that no further evidence which could have been called in the court below if it was raised there could have affected the decision one way or the other: See on this, Stool of Abinabina V. Chief Koje Enyimadu (1953) 12 WACA 171; Shonekan V. Smith (1964) 1 All NLR 168 p. 173; K. Apena V. Barclays Bank of (Nig.) Ltd & Anor. (1977) 1 SC. 47; Niger Progress Ltd. V. N.E.L. Corp. (1989) 3 NWLR (Pt.107) 68 at p. 100. Furthermore, to canvass such an issue, leave of court must be sought and obtained: see Obiako V. State (2002) 10 NWLR (Pt. 776) 612 at 616.” (Underlining mine for emphasis) B

See also: Adigun Vs A.G. Oyo State (No.2) (1987) 2 NWLR (Pt.56) 197 and Ejiofodomi Vs Okonkwo (1982) SC. 74. In Ejiofodomi's case (supra), it was held that leave will be refused where the applicant seeks to introduce on appeal for the first time an entirely new case or line of defence different from the issue fought by the parties at the court below. C

My learned brother, CHIMA CENTUS NWEZE JSC in the lead ruling, has reproduced in extensor, the relevant averments in the supporting and counter affidavits. I need not repeat the exercise here. D

It is pertinent to note, as rightly submitted by learned counsel for the respondents, that the appellants had the opportunity at the trial court to thrash out the issue now sought to be raised in this court as a fresh issue. See paragraphs 16 - 22 of the respondents' counter affidavit filed on 30/11/2015 (reproduced in the lead ruling). They have not shown any special circumstance to warrant it being raised before this court under any guise. E

Furthermore, the alleged lack of locus standi of the 1st respondent to institute the suit before the trial court is a completely new line of defence, which did not feature in any of the courts below. The copious averments in the respondents' counter affidavit clearly show that if the fresh issues now sought to be raised had been raised at the trial court, the respondents would have been able to meet them. F

Having regard to the facts and circumstances of this case, it is my considered view that the exercise of the court's discretion in the G

appellants' favour would result in a miscarriage of justice and a breach of the appellants' fundamental right to fair hearing. There is no doubt that by this application, the appellants seek to move the goal posts long after the game has started. It is overreaching.

For these and the more elaborate reasons articulately advanced
B in the lead ruling, I also find the application to be devoid of merit. It is accordingly dismissed.

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