

SUPREME COURT OF NIGERIA
MONDAY 1ST JULY, 2016. SC. 673/2013
CORAM:- I.T. MUHAMMAD, O. RHODES-VIVOUR,
S. N. NGWUTA, K.B. AKA'AH, A. SANUSI, JJSC

1. LATEEF ADEGBITE
2. NOFIU OLAOSEBIKAN APPELLANTS
AND
AMINU AMOSU RESPONDENT
(for himself and on behalf of Eyile family)

SUPREME COURT - Fresh evidence - Tendering of - SC grants leave to adduce such evidence where inter alia - The evidence must be such as would not have been - With due diligence obtained for use at the trial (H1)

JURISDICTION - Federal High Court - Constitution 1999 s. 251(1)(p),(q),(r)(s) - Conferred exclusive jurisdiction on FHC - In a matter in which FG or any of its agency is involved (H2)

DOCUMENTS - Tendering of - Counsel's mistake - Documents not tendered at trial Court due to inadvertence of counsel - Can be tendered on appeal as fresh evidence in the interest of justice (H3)

APPEALS - Court - Jurisdiction - Basis - Jurisdiction of appellate court inures when trial court is imbued with jurisdiction - And jurisdiction is so fundamental that it can be raised any time (H4)

FACTS

Before the Supreme Court of Nigeria, applicants/appellants brought this application praying for an order granting leave to adduce further or additional evidence which was not tendered at the two lower courts. The application is supported by seven grounds, 13 paragraph affidavit, some exhibits and written address. Learned counsel for appellants admitted orally and in his brief that when appellants engaged him as counsel (following the death of their previous counsel), he realised the need to raise on appeal, issue of jurisdiction of the trial court as a fresh issue. After the delivery of judgment by

the Court of Appeal, appellants' new counsel applied to the office of the Surveyor-General of the Federation for information regarding the status of the disputed land shown on respondent's Survey Plan No. NSMC/95/LS045/ dated 7/4/95 marked as Exhibit "A" attached to the application. Learned counsel stated that his inquiries and report from the office of the Surveyor-General, revealed to him that the disputed land fall within Federal Government acquisition.

He has therefore obtained Exhibits B and C as evidence backing up his inquiries. Learned counsel stated that it is the said report from the office of Surveyor General and the notice of acquisition of the disputed land that appellants want the honourable court to now receive as further evidence to show want of locus standi of respondent to institute the case and lack of jurisdiction of the High Court of Lagos State to have heard it. Learned counsel maintained that the aforementioned new facts were discovered after judgment had been delivered by the Court of Appeal. Learned counsel cited Order 2 Rule 12 of the Supreme Court Rules and cited the case of *Asaboro v. Aruwaji* (1974) 1 All NLR (Pt.1) 140 at 144, in which the Supreme Court stated the principles which the courts have always taken into consideration in the judicial exercise of powers to grant leave to adduce fresh evidence. He therefore urged the Court to grant appellants' application as prayed.

HELD (Unanimously granting the application per
MUHAMMAD JSC)

SUPREME COURT - Fresh evidence - Tendering of

1. Thus, Section 33 of the Act and Order 2 Rule 12 of the Rules of this court, create an avenue where this court shall permit receiving of new/additional/fresh evidence. But that does not normally occur except where the appellant (a party) first seeks and obtains leave to do so. This kind of leave should however be differentiated from where an appellant is seeking leave to file additional grounds of appeal.

The circumstances where this court may grant leave to an applicant to adduce new/fresh/additional evidence have for long been pronounced upon by this court.

I have had the advantage of encapsulating such condi-

tions/circumstances in another judgment:

“It is now trite that for an appeal court to admit additional evidence of facts on appeal, there must exist special grounds. In Asaboro v. Aruwaji (1974) 1 All NLR (Pt. 1) 140, such special grounds were stated as follows:

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

b) The evidence shall be such as if admitted, it would have an important not necessarily crucial effect on the whole case.

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

d) The additional evidence may be admitted if the evidence sought to be adduced would have influenced the judgment at the lower court (trial court) in favour of the applicant had it been available at the trial court.

e) The evidence should be weighty and material, where evidence sought to be admitted is irrelevant and immaterial, it will be rejected.” (p. 3192 E)

JURISDICTION - Federal High Court

2. It is beyond dispute as per paragraphs 6 and 7 of the affidavit in support that the matter proceeded to hearing at the trial court whereof judgment was delivered in favour of the respondent. Court below gave its judgment on 18/7/2013, affirming the trial court’s decision. The Constitution of the Federal Republic of Nigeria, 1999 (as amended) has conferred exclusive jurisdiction on the Federal High Court in a matter in which the Federal Government or any of its agencies is involved. (Section 251 (1)(p), (q), (r) and (s). Exhibits ‘B’ and ‘C’ annexed to the affidavit in support are to the effect that the land in dispute has been acquired by the Federal Government. The Federal Government is therefore, directly involved. (p. 3197 B)

DOCUMENTS - Tendering of - Counsel’s mistake

3. I agree, too, that there was ineptitude, inadvertence or mis-

take from the previous counsel for the applicants (at both the trial and appeal courts) as the said documents (exhibits 'B' and 'C'), in particular, were not sought for and tendered before the trial court or even at the court below. That of course, is what they describe as "mistake of counsel" or "sin" of counsel which should not be visited on his clients.

Thus, documents not tendered at the trial court due to inadvertence of counsel, can be tendered on appeal as fresh evidence in the interest of justice. (p. 3197 F)

C Court - Jurisdiction - Basis

4. My lords, it is elementary, that an appeal is a continuation of the Original case/suit from the court of first instance. Thus, the jurisdiction of an appellate court including this court, can only inure when the trial court is imbued with jurisdiction. That is why an issue of jurisdiction is so fundamental such that it can be raised at any stage of the proceedings even for the first time in this court. (p. 3199 B)

NOTABLE POINT OF INTEREST

MUHAMMAD JSC

1. Address of counsel does not take place of evidence

My lords, address of counsel however brilliant, can never take the place of evidence. Thus, there is need for me to examine the affidavit evidence placed before this court. (p. 3194 B)

REPRESENTATION

S.O. Oyewo for the Appellants

G Chief Dr. V. A. Odunaiya for Respondent

CASES REFERRED TO

Asaboro v. Aruwaji (1974) 1 All NLR (pt. 1) 140

FGN v. Akinde (2013) 7 NWLR (pt. 1353) 349

H Makeri v. Kafinta (1990) 7 NWLR (pt. 163) 411

Fawehinmi v. President FRN (2007) 4 NWLR (pt. 654) 275

Madukolu v. Nkemdilim (1962) 1 All NLR 587

Obiora v. Duru (1994) 8 NWLR (pt. 365) 631

Amaechi v. INEC (2008) 5 NWLR (pt. 1080) 227

Obasi v. Onwuka (1987) 3 NWLR (pt. 61) 364

A-G. Federation v. Alkali (1972) 12 SC 20

Owuta v. Ayigor (1993) 2 SCNJ 1

UBA v. B.T.L. Ind. Ltd. (2005) 4 SC 40

Oyakhire v. State (2006) 15 NWLR (pt. 1001) 157

Gaji v. Pave (2003) 8 NWLR (pt. 823) 583

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Ariay Ltd. v. Airline Mgt. Support Ltd. (2003) 7 NWLR (pt. 820) 577

Shanu v. Afribank (2003) 13 NWLR (pt. 684) 392

STATUTES & RULES REFERRED TO

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States Land Act Cap. 45 LFN 1958, s. 2(2)

Supreme Court Act, s. 33

Supreme Court Rules, O. 2 r. 12

LEAD JUDGEMENT BY MUHAMMAD JSC

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An application was filed by the appellants/applicants in which they seek for the following reliefs:

An order granting leave to adduce further or additional evidence which was not tendered at the two lower courts to wit:

a) *A letter from the office of the Surveyor General of the Federation Ref: No.*

FMLHUD/LA/S5A/Vol.III dated 14/08/2003 Captioned “REQUEST FOR LAND INFORMATION (CHARTING) ON PARCEL OF LAND COVERED BY SURVEY PLAN NO. NSMC/95/LS045 DATED 7/4/95.” (attached as Exhibit “B” to this application).

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b) *Certified True Copy of the Government Notice No. 13 Volume 63 dated 4th March, 1976 (attached as Exhibit “C” to this application)*

AND FOR SUCH FURTHER or other orders as this Honourable court may deem fit to make in the circumstances.

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Moving the motion, learned counsel for the applicants, Mr. Oyewo, stated that the motion is accompanied by seven grounds; a 13 paragraph affidavit; some exhibits and a written address. After stating the historical facts giving rise to the appeal in his written brief (address), the learned counsel admitted orally and in his brief that when the applicants engaged him as counsel (after the death of their previous counsel), he realised the need to raise on appeal, issue of jurisdiction of the trial court as a fresh issue. After the delivery of

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judgment by the lower court, the applicants' new counsel applied to the office of the Surveyor General of the Federation for information regarding the status of the disputed land shown on the respondent's Survey Plan No. *NSMC/95/LS045/* dated *7/4/95* (Exhibit "A") attached to this motion. Exhibit "A" was issued by the office of the
 B Surveyor General showing that the disputed land falls within Federal Government acquisition; copy of the report Ref: NO.FMLHUD/LA/S5A/Vol...III, dated *14/08/2013* is attached to this motion as Exhibit "B".

On *19/8/2013*, learned counsel obtained certified true copy
 C of the *Government* Notice No. 344 dated 4th March, 1976 under and by *virtue* of which acquisition of the disputed land was published in the Federal Republic of Nigeria Official Gazette No.13, Volume 63 of 11th March, 1976; certified true copy of the said Official Gazette
 D which had hitherto been pleaded by the applicants but not tendered before the trial High Court and now attached to this motion as Exhibit "C".

Learned counsel for the applicants, stated that it is the said report from the office of Surveyor General and the notice of acquisition of the disputed land that the applicants want the honourable court to now receive as further evidence to show want of *LOCUS STANDI* of the respondent to institute the case and lack of jurisdiction of the High Court to have heard it. All these facts, submitted the learned counsel for the applicants, were discovered after judgment
 F had been delivered by the lower court on *18/7/2013*. The evidence sought to be adduced (Exh. B & C), he contended, were dated *14/8/2013* and *19/8/2013* respectively. Learned counsel cited Order 2 Rule 12 of the Supreme Court Rules. He relied on the case of *Asaboro V. Aruwaji* (1974) 1 All NLR (Pt.1) 140 at 144, in which this court
 G stated the principles which the courts have always taken into consideration in the judicial exercise of powers to grant leave to adduce new evidence. He stated further that the three conditions stated by this court in the above cited case, must co-exist before the court can
 H grant the applicants leave to call further evidence on appeal.

In paragraph 4.04 of his written address, the learned counsel for the applicants lamented the inability of the erstwhile counsel (his predecessor) for not requesting for and tendering in evidence of Exhibit "A". He clearly pointed out that it is clear that the evidence sought

to be adduced could have been obtained for use at the trial court with reasonable diligence. The applicants, he lamented further, have thus failed to satisfy the first condition laid down above and if the applicants' case was to be considered on the principle in *Asaboro v. Aruwaji* (supra) alone, it would have failed.

Learned counsel for the appellant argued further, that there are other stronger reasons why the evidence sought to be adduced should be admitted by this court:

i. that the evidence shows that the disputed land has been acquired by the Federal Government. Thus, all hitherto existing rights become extinguished hence the respondent lacks the required locus *standi* to institute the suit.

ii. cited and relied on Sections 2 and 2(2) of the States Land Act, Cap.45, Laws of the Federation 1958.

iii. In an action to protect acquired land, only the Attorney-General has the requisite standing to sue and the respondent can only sue if he had been granted *fiat* by the Attorney-General to do so in his name.

iv. the competence of the respondent to initiate the action is a fundamental issue as it relates to the jurisdiction of the trial court to adjudicate on it.

Learned counsel cited in support some cases among which are: *FGN v. Akinde* (2013) 7 NWLR (Pt.1353) 349 at 370 F - H; *Makeri v. Kafinta* (1990) 7 NWLR (Pt.163) 411 at 420 - H; *Fawehinmi v. President Federal Republic of Nigeria* (2007) 4 NWLR (Pt.654) 275 at 333 - 334 - H - 8; *Madukolu v. Nkemdilim* (1962) 1 A" NLR 587 at 595.

In urging this court to grant the reliefs sought, learned counsel for the applicants made further copious submissions, which in my view, relate to the main suit, which would even be properly considered by the trial court. I do not consider such submissions relevant at this stage and Learned counsel for the respondent, in opposing the motion, filed are hereby discountenanced.

Learned counsel for the respondent, in opposing the motion, filed a counter affidavit. He stated, while making oral submissions, that the counter affidavit, sworn to by one Oyewole, a legal officer in the Law Firm of V. A. Odunaiya & Co.; solicitors to the respondents, is of 4 paragraphs. He adopted and relied on all the paragraphs. He

urged this court to refuse the motion on Notice.

My lords, Order 2 Rule 12(1-3) of the Supreme Court Rules, 1985, as amended, lays down the necessary steps to be taken by an appellant (a party) who wishes the court to receive additional or further evidence of witnesses (whether they were or were not called at the trial court) or how to order the production of any document, exhibit or other thing connected with the proceedings in accordance with the provisions of Section 33 of the Supreme Court Act. The requirement of Section 33 of the Act is limited to the exercise of the court's appellate jurisdiction, where the court thinks it necessary and expedient and in the interest of justice that the court can:

- a) Order the production of any document, exhibit, or other thing connected with the proceedings, which appears necessary for the determination of the case.
- b) Order any witness who would have been compellable witness at the trial to attend and be examined before that court, whether they were or not called at the trial or be examined as provided by rules of court.
- c) Receive the evident, if tendered, of any witness (including the appellant) who is a competent but not compellable witness.

Thus, Section 33 of the Act and Order 2 Rule 12 of the Rules of this court, create an avenue where this court shall permit receiving of new/additional/fresh evidence. But that does not normally occur except where the appellant (a party) first seeks and obtains leave to do so. This kind of leave should however be differentiated from where an appellant is seeking leave to file additional grounds of appeal. See: Obiora v. Duru (1994) 8 NWLR (Pt.365) 631 ((1994) 10 SCNJ 48).

The circumstances where this court may grant leave to an applicant to adduce new/fresh/additional evidence have for long been pronounced upon by this court.

I have had the advantage of encapsulating such conditions/circumstances in another judgment:

"It is now trite that for an appeal court to admit additional evidence of facts on appeal, there must exist special grounds. In Asaboro v. Aruwaji (1974) 1 All NLR (Pt. 1) 140, such special grounds were stated as follows:

a) *The evidence sought to be adduced must be such as would not have been, with reasonable diligence, obtained for use at the trial.*

b) *The evidence shall be such as if admitted, it would have an important not necessarily crucial effect on the whole case.*

c) *The evidence must be such as apparently credible in the sense that it is capable of being believed and it need not be incontrovertible.*

d) *The additional evidence may be admitted if the evidence sought to be adduced would have influenced the judgment at the lower court (trial court) in favour of the applicant had it been available at the trial court.*

e) *The evidence should be weighty and material, where evidence sought to be admitted is irrelevant and immaterial, it will be rejected.*” See: Amaechi v. INEC (2008) 5 NWLR (Pt.1080) 227. See also: Asaboro v. Aruwaji (supra); Ukarino Obasi & Anor v. Eke Onwuka & 5 Ors (1987) 3 NWLR (Pt.61) 364 at 370; Attorney General of the Federation v. Mallam Modu Alkali (1972) 12 SC 20; Owuta v. Ayigor (1993) 2 SCNJ 1 at pp 12 - 13; UBA v. B.T.L. Ind. Ltd. (2005)4 SC 40. The three principles, or rather, conditions, laid down in Asaboro v. Aruwaji (supra) were held by this court that they must co-exist.

The learned counsel for the applicant has in his written address acknowledged this position of the law (paragraph 4.03 thereof) and even went further to state categorically after some analysis that:

“It is therefore clear that the evidence sought to be adduced could have been obtained for use at the trial court with reasonable diligence.

The applicants have thus failed to satisfy the first condition laid down above. So if this case was to be considered on the principle in Asaboro v. Aruwaji (supra) alone it would have failed.” (paragraphs 4.04 - 4.05 of the written address)

The learned counsel for the applicants made other frank observation (paragraph 4.04) of his written address. This is what he observed:

“In the instant case, the applicants’ counsel could have called before the trial court the same evidence which the applicants now

seek leave to call. He only needed to have requested for the Charting of the respondent's Survey Plan of the land in dispute (exhibit "A" at the trial court) in the office of the Surveyor General to determine whether or not the land had been acquired as alleged in the pleadings. It is more regrettable that counsel did even tender the acquisition law (Decree NO.344 of 1976) which was copiously pleaded by him. It is therefore clear that the evidence sought to be adduced could have been obtained for use at the trial court with reasonable diligence.

My lords, address of counsel however brilliant, can never take the place of evidence. Thus, there is need for me to examine the affidavit evidence placed before this court. The applicants deposed to the following facts amongst others:

"3. In suit No. ID/518/95/ as the respondent sued the applicants herein at the High Court of Lagos State claiming title to the land in dispute shown on survey plan No. NSMC/95/LS045 dated 7/4/95 which was admitted at his (respondent's) instance as exhibit 'A' by the trial High court.

4. In their pleadings before the High Court the applicants questioned the jurisdiction of the court to entertain the case on the ground that the disputed land has been acquired by the Federal Government under Decree No. 344 of 1976

5. The respondent equally joined issues on the point of jurisdiction in his pleading before the High Court.

6. The matter proceeded to hearing and on 29/6/2006 the trial High Court gave judgment in favour of the Respondent.

7. Dissatisfied, the appellant/applicants appealed to the Court of Appeal which in its judgment dated 18/7/2013 affirmed the judgment of the trial High Court.

8. Consequently on 7/8/2013 Oyesola Oyewo of counsel who took over the matter from the appellants/applicants' previous counsel applied to the office of the Surveyor General of the Federation for information regarding the status of the disputed land shown on the respondent's survey plan referred to in paragraph 3 above; copy of counsel's letter dated 7/8/2013 is attached and marked as exhibit 'A'.

9. The respondent's survey plan was charted and a report was issued by the office of the Surveyor General showing that the disputed land falls within Federal Government acquisition; copy of the

Adegbite v. Amosu (2016) 7 KLR Muhammad JSC 3195
report Ref No. FMLHUD/LA/S5A/Vol.III dated 14/08/2013 which is
now sought to be adduced as further evidence is attached as exhibit
'B'.

10. On 19/8/2013 counsel also obtained certified true copy of
the Government Notice NO.344 by virtue of which acquisition of the
disputed land was published in the Federal Republic of Nigeria Offi- B
cial Gazette No. 13 Volume 63 of 11th March. 1976; certified true
copy of the said official Gazette is attached as exhibit 'C'.

11. I verily believe that the evidence sought to be adduced
(exhibits 'B' and 'C' herein) have a crucial effect on the whole case C
because they show:

a) that the respondent lacked the required locus standi to insti-
tute this case

b) that the trial court lacked jurisdiction to have heard the case

c) that the Court of Appeal was in error to have affirmed the D
judgment of the trial High Court and

d) that the jurisdiction of this Hon. Court to entertain the ap-
peal is equally affected.

12. The appellants have raised the issue of jurisdiction as a
ground of appeal before this honourable court hence the need to E
adduce further evidence in order to establish that the land in dispute
falls within the Federal Government Acquisition." (underlining sup-
plied)

In his counter affidavit, the respondent deposed to the follow- F
ing facts:

"3. That I was informed in our chambers by Mrs. Tunde
Sobowale of counsel on Thursday 10/12/15 at about 5.00pm when
this matter was being reviewed and I verily believe as follows:

a. That same is not a jurisdictional issue.

b. Membership of the Court was qualified in accordance with G
the law.

c. The processes through which the matter was placed before
the court followed minutely the provisions of the law.

d. The issue was already dealt with at the lower court. H

e. The issue of jurisdiction which was raised at the lower court
(High Court) had been raised, taken and dealt with at the lower
court.

f. The documents now being sought to be used as additional

evidence are not of such a nature that would affect the jurisdiction of the court.

g. It was the appellants' choice then not to tender any document in support of his case at the lower court, during trial.

h. The respondent will be prejudiced if the application is granted.

B *i. The appellants had the opportunity to obtained(sic) the documents at the High Court and tender them but chose not to do so.*

j. The nature of the evidence sought to be adduced does not affect the jurisdiction of this or any other court.

C *k. That it is in the interest of justice to dismiss the appellants' application."*

From the parties' affidavit evidence as above, it is my finding as follows:

a) as per exhibits 'A' (paragraph 3) exhibit 'B' (paragraph 9) and exhibit 'C' (paragraph 10) of the affidavit in support, the status of the land in dispute shown in these exhibits shows that the land in dispute was acquired by the Federal Military Government as per Government Notice No. 344 (Public Lands Acquisition Act (Chapter 167)).

E b) The Survey Plan No. NSMC/95/S045 dated 7/4/95, issued by the office of the Surveyor General as per copy of report Ref No. FMLHUD/LA/S5A/Vol.III dated 14/08/13 (exhibit 'B', paragraph 9 of Affidavit in Support) covers the disputed land which is shown to have been captured by Government Notice No. 344 published in F the Federal Republic of Nigeria Gazette No. 13 Volume 63 of 11th March, 1976 (exhibit 'C' paragraph 10 of the affidavit in support).

c) The issue of jurisdiction, was pleaded by both parties: applicants as defendants in their amended statement of defence, paragraphs 2, 12, 14 and 17, and the respondent as plaintiff, joined issues on jurisdiction as per paragraph 1(a) of his further amended reply to statement of defence (paragraph 12 of record). However, G no evidence was led by any of the parties.

d) At the court below, the issue of jurisdiction was as well abandoned hence the judgment of the trial court was affirmed. H

I entirely agree with the learned counsel for the applicants that these are strong, cogent points which may likely affect the jurisdiction of the trial court. The evidence sought to be tendered on appeal is apparently credible in the sense that it is capable of being believed,

though need not be incontrovertible. See: *Obasi & Anor v. Onwuka & 5 Ors* (supra); *A-G Federation v. Alkali* (supra). The issue of jurisdiction is fundamental and it can be raised at any stage of the proceedings even for the first time in this court. See: *Oyakhire v. The State* (2006) 15 NWLR (Pt.1001) 157 SC; *Gaji v. Pave* (2003) 8 NWLR (Pt.823) 583 SC; *Ariay Limited v. Airline Management Support Ltd.* (2003) 7 NWLR (Pt.820) 577 SC. B

It is beyond dispute as per paragraphs 6 and 7 of the affidavit in support that the matter proceeded to hearing at the trial court whereof judgment was delivered in favour of the respondent. Court below gave its judgment on 18/7/2013, affirming the trial court's decision. The Constitution of the Federal Republic of Nigeria, 1999 (as amended) has conferred exclusive jurisdiction on the Federal High Court in a matter in which the Federal Government or any of its agencies is involved. (Section 251 (1)(p), (q), (r) and (s). Exhibits 'B' and 'C' annexed to the affidavit in support are to the effect that the land in dispute has been acquired by the Federal Government. The Federal Government is therefore, directly involved. C D

It is also in evidence (paragraph 12 of the affidavit in support) E that the appellants have raised the issue of jurisdiction as a ground of appeal before this court, hence the need to adduce further evidence in order to establish that the land in dispute falls within the Federal Government Acquisition.

I agree, too, that there was ineptitude, inadvertence or mistake from the previous counsel for the applicants (at both the trial and appeal courts) as the said documents (exhibits 'B' and 'C'), in particular, were not sought for and tendered before the trial court or even at the court below. That of course, is what they describe as "mistake of counsel" or "sin" of counsel which should not be visited on his clients. See: *Shanu v. Afribank* (2003) 13 NWLR (Pt.684) 392 at page 403 - B - C; *Chime & Anor v. Nelson Ude & 2 Ors* (1996) 7 NWLR (Pt.461) 379. F G

Thus, documents not tendered at the trial court due to inadvertence of counsel, can be tendered on appeal as fresh evidence in the interest of justice. See: *Jadesanmi v. Okotie-Eboh* (1986) 1 NWLR (Pt.16) 264. Further, in *Adeleke v. Aserifa* (supra). H The law was restated by Karibi-Whyte in his contribution in the above

case as follows:

“Hence where evidence is available and could with reasonable care and diligence be made available to the applicant at the time of the trial, as in the instant case, the court of Appeal will refuse to exercise its discretion to receive such evidence... However, if applicant B referred to the document in his pleadings or evidence but did not tender it, the appellate court can admit it. See *Latinwo v. Ajao* (1973) 2 SC 99.”

Further, on the issue of jurisdiction, the learned counsel for the applicants (paragraph 4.11) submitted that the competence of the respondent to initiate the action is a fundamental issue as it relates to the jurisdiction of the trial court to adjudicate on it, as the standing to sue, *locus standi*, is a condition precedent for the determination of a case on the merit. *Madukolu v. Nkemdilim* (1962) 1 All NLR 587 at 595. D

Learned counsel argued that in an action to protect acquired land (such as the one in dispute), it is only the Attorney-General of the Federation that has the requisite standing to sue and the respondent can only sue if he had been granted *fiat* by the Attorney-General. It is not the case in this matter. He cited *Makera v. Kafinta* (1990) 7 NWLR (Pt.163) 411 at 420 - H; *Fawehinmi v. President FRN* (2007) 4 NWLR (Pt.1054) 275 at pages 333 - 334 - H - B.

In considering the totality of this application, I think the interest of justice requires that the application be granted as per the reliefs F sought by the applicants. In any event, this court granted a similar application in *Nwanezie v. Idris* (1993) 3 NWLR (Pt.279) 1 at page 17, where it was held as follows:

“In any case where the challenge to the decision of the court is G founded on lack of jurisdiction, the court is bound to consider such evidence which goes to the root of the matter and to show that the court has acted without jurisdiction - See: *Adeigbe v. Kushimo* (1965) 1 All NLR 248.

A party to litigation cannot be shut out and the court pre- H cluded on technical grounds from receiving evidence showing that the decision of court was given without jurisdiction. The issue of jurisdiction is fundamental to the proper hearing of a cause - *Madukolu v. Nkemdilim* (1962) 2 SCNJ 341; 1962 1 All NLR 587. There is no doubt that the evidence sought to be adduced if, admitted, would

not only have a critical but a decisive effect on the whole case. In the instant case, it is necessary to receive such evidence for the just disposal of the case. To refuse to admit the additional evidence tantamount to the appeal court endorsing the decision of the trial court reached without jurisdiction."

My lords, it is elementary, that an appeal is a continuation of the Original case/suit from the court of first instance. Thus, the jurisdiction of an appellate court including this court, can only inure when the trial court is imbued with jurisdiction. That is why an issue of jurisdiction is so fundamental such that it can be raised at any stage of the proceedings even for the first time in this court. See: Deborah v. Okonkwo (1982) 11 SC 74 at 94; A-G Oyo State v. Fairlakes Hotel Ltd. (1988) 5 NWLR (Pt.92) 1 at pp. 48-49-H-A; Oredoyin v. Arowolo (1989) 4 NWLR (Pt.114) 172 at page 187 - C; International Bank Plc v. Olam (Nig.) Ltd. (2013) 6 NWLR (Pt.1351) 468 at pages 479 - F - G.

Permit me, my lords, to quote and adopt the encapsulating reasoning put forward by Oguntade, JCA, (as he then was) in the case of Gazu v. Nyam (1988) 2 NWLR (Pt. 538) 477 at 494:

".....There is still another reason why the evidence sought to be called ought to be admitted, if as contended by the applicant, the trial court which heard the case has no jurisdiction; it follows that the judgment of that court is potentially useless. Under the doctrine of RES JUDICATA, a judgment given without jurisdiction cannot create an estoppel. It is therefore, in the interest of the direct parties to this case, and the larger public that the true status of the judgment be pronounced upon as soon as possible. Otherwise, a great injury would be caused to innocent privies of the parties who would have placed reliance on the judgment in transactions involving large sums of money before realising that it is valueless."

I am in full agreement with Oguntade (JCA) now JSC (in retirement). I adopt the reasoning.

Accordingly, I hereby grant this application as prayed. The applicants are granted leave to adduce further evidence in this court which was not tendered at the two lower courts, to wit:

a) A letter from the office of the Surveyor General of the Federation Ref No. FMLHUD/LA/S5A/Vol.III dated 14/08/2013 Captioned ***"RE: REQUEST FOR LAND INFORMATION (CHARTING)***

ON PARCEL OF LAND COVERED BY SURVEY PLAN NO. NSMC/95/LS045 DATED 7/4/95" (attached as exhibit "B" to this application).

- b) Certified True Copy of the Government Notice No. 344 published in the Federal Republic of Nigeria Official Gazette No.13 Volume 63 dated 4th March, 1976 (attached as Exhibit 'C' to this application).

Application granted as prayed.

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RHODES-VIVOUR JSC

I have had the advantage of reading in draft the Ruling of my learned brother, I. T. Muhammad, JSC. I agree with his lordship that this application should be granted. In view of the importance of the jurisdiction point in particular I would add a few paragraphs of my own.

The appellants/applicants seek leave to adduce further or additional evidence which was not tendered at the two lower courts to wit:

- (a) A letter from the office of the Surveyor-General of the Federation Ref No/ FMCHUD/LA/S5A/vol.III dated 14/8/13 captioned: "RE: REQUEST FOR LAND INFORMATION (CHARTING) ON PARCEL OF LAND COVERED BY SURVEY PLAN NO NSMC/95/LS45 dated 7/4/95" (attached as exhibit B to this application).

- (b) Certified true copy of the Government Notice No.344 published in the Federal Republic of Nigeria Official Gazette No.13 Volume 63 dated 4 March, 1976 (attached as exhibit 'C' to this application).

- Paragraphs 9, 10 and 11 of the affidavit in support justifies the granting of this application. It reads:

9. The respondent's survey plan was charted and a report was issued by the office of the Surveyor-General showing that the disputed land falls within Federal Government acquisition; copy of the report Ref. No. FMLHUD/LA/S5A/VOL.III dated 14/8/2013 which is now sought to be adduced as further evidence is attached as exhibit 'B'.

10. On 19/8/2013 Counsel also obtained certified true copy of the Government Notice No.344 by virtue of which acquisition of

the disputed land was published in the Federal Republic of Nigeria Official Gazette No 13 Volume 63 of 11 March, 1976; certified true copy of the said Official Gazette is attached as exhibit 'C'.

11. I verily believe that the evidence sought to be adduced (exhibits 'B' and 'C' herein) have a crucial effect on the whole case because they show. B

(a) that the respondent lacked the required locus standi to institute this case.

(b) that the trial court lacked jurisdiction to have heard the case. C

(c) that the Court of Appeal was in error to have affirmed the judgment of the trial High Court and

(d) that the jurisdiction of this Honourable court to entertain the appeal is equally affected.

Relevant extracts from the counter-affidavit states that: D

3 (f) The documents now being sought to be used as additional evidence are not of such a nature that would affect the jurisdiction of the court.

(i) The appellants had the opportunity to obtain the documents at the High Court and tender them but chose not to do so. E

j) The nature of the evidence sought to be adduced does not affect the jurisdiction of this or any court.

The learned trial judge entered judgment in ignorance of facts that ought to have been known by him. These facts are that the land in dispute, which both courts below found that the respondent is the owner is wrong since exhibit B, Government Notice No.13 Vol. 63 dated 4 March, 1976 shows that the land in dispute is part of a large piece of land acquired by the Federal Government of Nigeria for public purpose. F

This application by the appellant/applicant raises a very strong case of jurisdiction in that no one has competence or locus standi in a claim of ownership over land which has been acquired by the Government for public purposes. See *Makeri v Kafinta (1990) 7 NWLR (pt.163) p.411*. Once the disputed land is acquired by the Federal Government all existing rights are extinguished, consequently the ripple effect is that the respondent as claimant had no locus standi to institute the case. In answer to depositions in the counter-affidavit I must say that the documents, particularly exhibit B now sought to be used G

as additional evidence would fundamentally affect the jurisdiction of the court.

The fact that the appellant's had the opportunity to tender the documents at the trial court but chose not to do so is a very weak point. Issues of jurisdiction may be pleaded or not pleaded. Jurisdiction can be raised at any stage of the proceedings, in the trial court or in this court for the first time without leave. All that is required is that some process is filed so that the adverse party is not taken by surprise. See *Opobjyi & anor v Muniru (2011) 12 SC (Pt. 111) p..83 NNPC v Klifco. Nig. Ltd. (2011) 4 SC (Pt. 1) p.108*. The nature of the evidence sought to be adduced, particularly exhibit B affects the jurisdiction of the Courts.

WHAT ARE THE CONSEQUENCES OF NOT GRANTING THIS APPLICATION

If it turns out that the land in dispute between the parties is part of a large piece of land that has been acquired by the Federal Government of Nigeria for public purposes, then the judgment of both courts below are worthless. The respondent would no longer be able to develop or alienate the land. It becomes mandatory in the circumstances that the true status of the land is established and this can only be done by granting this application. In the event that the application is refused the respondent and innocent third parties would have dealings on the land in ignorance of exhibit B, with disastrous consequences. The application should be granted I hereby grant the application as proposed by Hon. Justice I.T. Muhammad, JSC.

NGWUTA JSC

I have read in its draft form the lead ruling just delivered by my learned brother, I. T. Muhammad, JSC and I agree that under the peculiar facts and circumstances, this application ought to be granted.

I commend the candour of learned Counsel for the appellants in conceding that in strict application of the rules as interpreted in *Asaboro v. Aruwaji (1974) 1 All NLR (Pt. 1) 140 at 144* the application ought to be denied.

Rules of practice are meant to be respected and obeyed. See *Ezegbu v. F.A.T.B. Limited (1992) 1 NWLR (Pt. 220) 699*. Be that as it may the rules are handmaids of law to aid in the due administration

of justice and where the strict application of any rule will result to a technically snacking, instead of enhancing the due administration of justice, the Court should exhibit some creativity and get around such rule to do substantial justice to the parties.

In the case at hand the documents sought to be received as additional evidence constitute a challenge to the *locus* of the respondent to institute the action and *ipso facto* a challenge to the jurisdiction of this Court to hear the appeal. The failure to tender the documents in the trial Court was said to be the fault of Counsel who was conducting the case for the appellant. B

Jurisdiction, which is challenged by the documents ought to be received as additional evidence, is the building block of any case in Court. It is the limit imposed upon the power of a validly constituted Court to hear and determine an issue before it. Its components are: C

- (1) The subject matter in issue.
- (2) The persons between whom the issues are joined, and
- (3) The kind of relief sought. D

See *Ikin v. Edjerode* (2005) 92 LRCN 3288 at 3316; *Adeyemi v. Opeyemi* (1976) 9-10 SC 31. E

It is the authority of a Court to exercise judicial powers over a matter before it and a judgment delivered without jurisdiction is a nullity. The issue can be raised at any stage of the proceeding in the trial Court or in the appellate Court. See *National Bank v. Soyoye* (1977) 5 SC 181; *Ndeayo v. Ogunnaya* (1977) 1 SC 11; *Osa v. Akereja* (1989) 3 NWLR (Pt. 84) 508. F

On the facts of this matter, I am of the view that the admission of the documents challenging the *locus* of the respondent will serve also the interest of the respondent because any judgment in his favour will result in another litigation by the alleged real owner of the property (by acquisition). G

In any case, since the documents clearly raise the issue of jurisdiction, the issue sought to be raised cannot be defeated by rules of Court. This is because jurisdiction is radical in nature and since it is at the foundation of adjudication, it cannot be defeated by the provisions of rule of Court. See *Akegbejo & 3 ors v. Dr. D. O. Ataga & 3 ors* (1998) 1 NWLR (Pt. 534) 459 at 469. Because it is the foundation of any adjudication by the Court there is no special format for H

raising it. See *Akegbejo & 3 ors v. Dr. D. O. Ataga & 3 ors (supra)*. The Court will not endure that a rule meant to facilitate administration of justice shall work injustice.

For the above and the more exhaustive reasoning in the lead ruling, I also grant the application as prayed.

B Application granted.

AKA'AH S JSC

C I read in draft the ruling of my learned brother, Ibrahim Tanko Muhammad JSC granting the applicants leave to adduce fresh evidence in the appeal. I agree with his reasoning and conclusion that the application should be granted since the issue of the jurisdiction of the trial court to have handled the case is at stake.

D The appellants/applicants brought this application praying for an order granting leave to adduce further or additional evidence which was not tendered at the two lower courts to wit:

(a) "A letter from the office of the Surveyor-General of the Federation Ref No. FMLHUD/LA/S 5A/VOL.III dated 14/08/2013 E captioned *"RE: REQUEST FOR LAND INFORMATION (CHARTING) ON PARCEL OF LAND COVERED BY SURVEY PLAN NO. NSMC/95/LS045 DATED 7/4/95"* (attached as Exhibit "B" this application).

(b) *Certified true copy of the Government Notice No. 344 published in the Federal Republic of Nigeria Official Gazette No. 13 F Volume 63 dated 4th March, 1976 (attached as Exhibit "C" to this application).*

G The grounds for making the application which are the same as the reasons why the evidence sought to be adduced should be admitted are:-

1. The evidence sought to be adduced would if admitted show that the land in dispute which is depicted on the respondent's survey plan No. NSMC/95/LS045 dated 7/4/95 and admitted as Exhibit 'A' at the trial High Court has been acquired by the Federal Govern- H ment hence the trial court had no jurisdiction to have heard the case.

2. The issue of jurisdiction (namely acquisition of the disputed land by the Federal Government) was raised in the pleadings of the parties before the High Court but was not proved by the appellants.

3. The issue of jurisdiction is fundamental hence it can be raised

at any stage of the proceedings even for the first time in the Supreme Court.

4. Jurisdiction cannot be acquired or conferred by consent or inadvertence of the parties: nor can it be enlarged by estoppel or because the lower courts were oblivious or mistaken as to the defect in their jurisdiction. B

5. If the additional documents sought to be tendered are admitted, they would have an important and crucial effect in this appeal.

6. The additional documents sought to be tendered are apparently credible, material and weighty. C

7. The additional documents sought to be tendered would have influenced the judgments of the two lower courts in favour of the appellants/applicants as the case would have been struck out for want of jurisdiction. D

The application was supported with a 13 paragraph affidavit sworn to by Reis Silas, a legal practitioner to which he annexed the documents that are intended to be adduced as additional evidence marked Exhibits "B" and "C", Learned counsel also filed a brief of argument in support of the application. E

The application was stoutly opposed and one Bamidele Oyewole, a Litigation Officer in the Law Firm of V. A. Odunaiya & Co deposed to a 4 paragraph counter-affidavit. In paragraph 3(d), (e), (g) and (i) of the counter-affidavit, the deponent stated:- F

"3 That I was informed in our Chambers by Mrs. Tunde Sobowale of Counsel on Thursday 10/12/15 at about 5.00 pm when this matter was being reviewed and I verily believe as follows:-

(d) The issue was already dealt with at the lower court.

(e) The issue of jurisdiction which was raised at the lower court (High Court) had been raised, taken and dealt with at the lower court. G

(g) It was the appellants' choice then not to tender any document in support of his case at the lower court during trial.

(i) The appellants had the opportunity to obtain the documents at the High Court and tender them but chose not to do so". H

I feel somewhat disconcerted when learned counsel for the applicants sought to show that the application was necessitated by facts which were discovered after judgment was delivered by the lower

court on 18/7/2013. In paragraphs 12 and 14 of their 3rd Amended Statement of Defence which was amended on 1st April, 2002 and filed pursuant to Order of Court dated 11th April, 2002 the Defendants (now appellants/applicants) pleaded as follows:-

B “12. That the site over which Defendants operate as technicians is within the area over which the Federal Government compulsorily acquired in 1976 under and by virtue of Government Notice No. 344 of 1976. The Ministry of Works and Housing permit dated 27/9/84 will be founded upon at the trial of this action and letter dated 18/9/1984.

C 14. That since 1976 the land in dispute has been vested in the Federal Government by act of compulsory acquisition at such Plaintiffs claim is totally misconceived”.

D The applicant relies heavily on the letter written from the Federal Ministry of Lands, Housing and Urban Development with ref. No. FMLHUD/LA/55A/VOL. III dated 14/8/2013 and addressed to Oyesola Oyewo 10, Seriki Aro Avenue, off Obafemi Awolowo Way, Ikeja, Lagos. It reads:-

E “RE: REQUEST FOR LAND INFORMATION (CHARTING) ON PARCEL OF LAND COVERED BY SURVEY PLAN NO. NSMC/95/LS045 DATED 7/4/95

I am directed to acknowledge your charting request dated 7th August, 2013 and to convey to you that the charting have (sic) been carried out.

F Please note that the parcel of land (verged blue) shown on the reference survey plan falls within Federal Government Acquisition Abesan Scheme ‘B’.

The above is for your information

G Signed: Oluwajuyitan A. I. (Mrs.)

AD/HOU (CADASTRAL Survey) Lagos”.

It is the document which was referred to as Exhibit B In paragraph 9 of the affidavit. In paragraph 4.01 of the brief in support of the application, learned counsel posited that:-

H “*This application arises from facts discovered after judgement had been delivered by the lower court. The judgement of the lower court was delivered on 18/7/2013 (page 307 of the record) whereas the evidence sought to be adduced are dated 14/8/2013 (exhibit B) and (exhibit C) respectively. The court, therefore ought not receive*

further evidence under Order 2 Rule 12 of the Supreme Court Rules except there are special grounds justifying their reception”.

In *Asaboro v. Aruwaji* (1974) 1 All NLR (Pt. 1) 140 this Court per Coker JSC at page 144 stated the principles which an appellate court should take into consideration in the judicious exercise of powers to grant leave to adduce fresh evidence thus:-

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

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

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

The handling of the case at the trial court by Chief Kunle Oyewo leaves much to be desired. If the issue at stake rested on the letter dated 14/8/2013, I would have had no hesitation whatsoever to refuse the application as I did with a similar application in SC. 226/2005. - *Bulet International Ltd v. Dr. (Mrs.) Omonike Olaniyi* (unreported Ruling of this Court) delivered on 15/4/2016. In that case although the issue of locus standi was raised as to whether the respondent possessed the requisite locus standi to invoke the jurisdiction of any court to hear and determine the substantive cause, the request to amend the Notice of Appeal in order to accommodate the issue was refused because the applicant was questioning the absence of statutory consent of the FCT Minister which was not made manifest on the Deeds of Assignment even though the file for the plot contained the minute that the Minister had given his approval of consent.

It was argued 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. In our ruling, it was held that this court will 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 see: *Ejiofodomi v. Okonkwo* (1982) 11 SC. 74; *Adigun v. Attorney-General, Oyo State* (No. 2) (1987) 2 NWLR (Pt. 56) 197.

The fresh evidence sought to be adduced in this case which has been annexed to the affidavit in support of the application shows that the land in dispute was compulsorily acquired by the Federal

Government since 1976.

The respondent could maintain an action on the said land if he can show that he successfully challenged the acquisition which was later revoked - see: *Gbadamosi v. Akinloye (2013) 6-7 SC (Pt. 1) 153; (2013) 15 NWLR (Pt. 1378) 455* or he received a fiat from the Attorney-General of the Federation to give him the standing to sue - see: *Makeri v. Kafinta (1990) 7 NWLR (Pt. 163) 411*. The application ought to be granted since it is dealing with jurisdiction which cannot be conferred even by the consent of the parties.

C

SANUSI JSC

I had the privilege of reading in advance the Ruling just delivered by my learned brother Ibrahim Tanko Muhammad JSC. I am at one with his reasoning and conclusion that this application has merit and deserves to be granted. I accordingly hereby grant leave to the appellant/applicants to adduce further evidence before this court which they were unable to tender before the two lower courts. Namely:-

a) Letter from the office of the Surveyor General of the Federation with Ref No FMLHUD/LA/55A/Vo/III dated 14/8/2013 titled "RE REQUEST FOR LAND INFORMATION (CHARING) ON PARCES OF LAND COVERED BY SURVEY PLAN NO NSMCL, 95/L5045 DATED 7/4/195 (attached as Exhibit B to this motion.

b) Certified true copy of the Government Notice No344 published in the Federal Republic of Nigeria Official Gazette No 13 Volume 63 dated 4th of March 1976 (attached to the motion papers. The application is hereby granted as prayed.

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