

SUPREME COURT OF NIGERIA
FRIDAY 13TH JANUARY, 2017. SC. 404/2013
CORAM:- W. S. N. ONNOGHEN AG. CJN,
M. U. PETER-ODILI, O. ARIWOOLA, K. B. AKA'AH,
K. M. O. KEKERE-EKUN, JJSC

- 1 FOLARIN ROTIMI ABIOLA WILLIAMS
 2. TOKUNBO ENIOLA WILLIAMS, SAN APPELLANTS
AND
 1. ADOLD STAMM INTERNATIONAL
(NIG) LTD
 2. CHIEF ROTIMI WILLIAMS CHAMBERS..... RESPONDENTS
-

LEGAL PRACTITIONERS - Court processes - Signing of - Validity of - Process not signed by a legal practitioner whose name appears on the roll - As provided for in LPA Act 2004 ss. 2, 24(1)(2) - Is incompetent and liable to be struck out (H1)

COURT PROCESSES - Competence of - Omission to place a tick beside name of legal practitioner who signed the process - Has not misled respondents as to who signed the process - And such omission cannot invalidate it (H2)

EVIDENCE - Appeals - Fresh evidence - Admissibility of - Conditions - For Court to grant leave to adduce fresh evidence on appeal - The evidence must inter alia be such that could not have been obtained for use at trial (H3)

DOCUMENTS - Fresh evidence - Admissibility of - As the documents were clearly not in existence at time of filing the suit - It would not have been possible for applicant to plead them at that stage (H4)

APPEALS - Document - Admissibility - Fresh documents will not be introduced at this stage - As their introduction is not crucial to determination of the appeal - And respondents will also be pre-

diced (H5)

FACTS

This motion on notice was brought before the Supreme Court pursuant to section 36(1) of the Constitution of the Federal Republic of Nigeria 1999 (as amended), sections 22 and 29 (b) of the Supreme Court Act Cap S15 LFN 2004, Order 2 rule 12(1) and (2) of the Supreme Court Rules (as amended in 1999) and under the inherent jurisdiction of the Court. The applicant is seeking for leave to produce and tender documentary evidence as fresh evidence, an order admitting in evidence the bundle of documents captioned “*additional evidence*” as further and/or fresh evidence in the appeal and an order deeming the aforesaid further and/or fresh evidence as evidence properly before the Court for the fair and just determination of the appeal.

The grounds for the application are that the documentary evidence sought to be introduced was not available to applicant during the proceedings at the lower Courts, that the documents are material and relevant and go to the root of the issue before the apex Court and that their admission would assist the apex Court in arriving at a just and fair resolution of the appeal. The application is supported by an affidavit of 6 paragraphs deposed to by one Azeez Biodun, a litigation officer in Chief Ladi Williams’ chambers. Respondents in opposition to the application relied on their counter-affidavit consisting of 7 paragraphs, deposed to by one Oluwafemi Ademola, a legal practitioner in the firm of Kola Awodein & Co. There was also filed, a written address in opposition.

ISSUE FOR DETERMINATION

Whether this Honourable Court has the discretionary power to allow Exhibits AB/15 and AB/16 to be admitted as further evidence for the determination of this appeal.

HELD

(Unanimously dismissing the application per

KEKERE-EKUN JSC)

COURT PROCESSES - Signing - Validity of

1. There is no doubt that it has been held in a plethora of decisions of this Court and it is now firmly settled that a Court process that is not signed by a legal practitioner whose name appears on the roll of legal practitioners and who is entitled to practice as a barrister and Solicitor as provided for in Sections 2 and 24 (2) (1) of the LPA Cap. 111 LFN 2004 is incompetent and liable to be struck out. (p. 181 H)

COURT PROCESSES - Competence of

2. On page 14 of the applicant's written address, at the bottom of the page, the handwritten name, LADI WILLIAMS' appears above two names, Chief Ladi Rotimi Williams, SAN and Chris I. Eneje. The grouse of the respondents appears to be that there is no mark beside either of the two names to identify which of them signed the process. In the instant case, the name LADI Williams, though handwritten, is very clear and legible. The respondents are not contending that Chief Ladi Rotimi Williams, SAN is not the same person as LADI WILLIAMS who signed the process or that the person who signed the process is not a legal practitioner whose name is on the roll of legal practitioners entitled to practice law in Nigeria. I am satisfied that there is no doubt as to who signed the process and that he is a legal practitioner whose name is on the roll. The omission to place a tick beside the name Chief Ladi Rotimi Williams, SAN has not misled the respondents nor this Court as to who signed the process and such omission cannot invalidate it. I therefore hold that the applicants' written address filed on 16/11/2015 is competent. (p. 182 D)

EVIDENCE - Fresh evidence - Admissibility of - Conditions

3. It is evident that an application brought pursuant to

Order 2 Rule 12 of the Rules of this Court is not one that is granted as a matter of course. It calls for the exercise of the Court's discretion, which must be exercised judicially and judiciously. As rightly submitted by learned counsel for both parties, there are settled principles, which guide the Court in determining whether to grant leave to adduce fresh or further evidence. They are, inter alia, as follows:

(a) The evidence sought to be adduced must be such as could not have been, with reasonable diligence, obtained for use at the trial, or are matters which have occurred after judgment in the trial Court.

(b) In respect of other evidence other than in (a) above, as for instance, in respect of an appeal from a judgment after a hearing on the merits, the Court will admit such fresh evidence only on special grounds.

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

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

This is however not the end of the matter, as the application would not be granted as a matter of course. The power to admit new, fresh or additional evidence must always be exercised sparingly and with caution. The Court must consider whether there are special circumstances to warrant the grant of the application and whether it would be in furtherance of the justice of the case.

(pp. 186 E/190 A)

H DOCUMENTS - Fresh evidence - Admissibility of

4. The first issue for the Court to consider is whether the evidence now sought to be relied upon could have, with diligence, been obtained for use at the trial Court or

whether they are matters that occurred after judgment. Exhibit AB/15, the notice of rescission of the family agreement is dated 13/7/2009 while Exhibit 48/16, the sworn affidavit of the Probate Registrar regarding the last will of the deceased was deposed to on 22/11/2011. The ruling of the trial Court that gave rise to this appeal was delivered on 26/7/2007. It is therefore evident that they could not have been obtained for use at the trial Court when the application for stay of proceedings was filed. However, judgment was delivered by the Court of Appeal on 1st March 2013. The first opportunity to seek to bring the evidence to the Courts attention would have been while proceedings were pending at the lower Court. In the instant case, the documents were clearly not in existence at the time the suit was filed at the trial Court. It would therefore not have been possible for the applicant to plead them at that stage. (pp. 188 C/190 A)

Document - Admissibility

5. It goes without saying that the proposed introduction of the fresh/additional evidence vide Exhibits AB/15 and AB/16 is not as straightforward as it might seem at first glance. What is clear from the averments in the affidavits before the Court and the exhibits attached thereto is that there are several matters pending in different Courts involving the respondents and their two brothers regarding the distribution of the estate of their late father in which the documents play a pivotal role. Two lower Courts have made pronouncements on the documents, which are the subject of pending appeals. They cannot serve their intended purpose in this appeal until there is a final pronouncement as to their validity and/or authenticity. It is obvious from Exhibit KA2, that the will sought to be relied upon has not been admitted to probate, as one of the reliefs in the suit filed by Chief Ladi Williams, SAN and Chief Kayode Williams, as claimants, at the

trial Court, that led to the appeal, was for an order vacating the caveat entered on 22/12/2009 by the present appellants (as defendants) and for an order for the grant of Letters of Administration (with will annexed) of the deceased's estate in their favour, being the only beneficiaries under the will. The deed of revocation is also in dispute. The applicant is also not a party to any of these documents. Taking all these factors into consideration, it is my view that this application is an attempt to over-reach the respondents by bringing in through the back door, documents that are presently in dispute in other proceedings. I am not satisfied that the introduction of these documents is crucial to the proper determination of this appeal or that their admission would be in furtherance of the justice of this matter. Rather I am of the view that the respondents would be prejudiced by the grant of this application. This Court being an appellate Court, they would be denied the opportunity of cross-examining on them unless this Court assumes the role of the trial Court which it would not ordinarily do.
(p. 191 F)

REPRESENTATION

- F** Chima Okereke Esq., with Frances Monago (miss), for the Appellants
Chris Eneje Esq. with him, Daniella Ikokwu (Miss) for 1st Respondent
G Mohammed Sallah, Esq. for 2nd Respondent

CASES REFERRED TO

- Bala v. Dikko (2013) 4 NWLR (pt. 1343) 52
Oketade v. Adewunmi (2010) 8 NWLR (pt. 1195) 53
H P.M.B. Ltd. v. N.D.I.C. (2011) 12 NWLR (pt. 1261) 253
Okafor v. Nweke (2007) 10 NWLR (pt. 1043) 521
F.B.N. Plc. v. Maiwada (2013) 5 NWLR (pt. 1348) 1433
S.L.B. Consortium Ltd. v. N.N.P.C. (2011) 9 NWLR (pt. 1252)

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Nwaogu v. Atuma (2013) All FWLR (pt. 675) 274 – 275

Uzodinma v. Izunaso (2011) 17 NWLR (pt. 1275) 30

Asaboro v. Aruwaju (1974) 4 SC 119

Akanbi v. Alao (1989) 3 NWLR (pt. 108) 118

Mobil Oil (Nig.) Ltd. v. F.B.I.R. (1977) 3 SC 1

Adeyefa v. Bamgboye (2014) LPELR-22884 (SC)

Esangbedo v. State (1989) 4 NWLR (pt. 113) 57

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

Ngige v. Obi (2006) 14 NWLR (pt. 999) 1

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C

STATUTES & RULES REFERRED TO

Constitution of the Federal Republic of Nigeria 1999 (as amended),
s. 36(1)

Supreme Court Act Cap S15 LFN 2004, ss. 22, 29(b)

Legal Practitioners Act Cap 207 LFN 1990, s. 24 (2)(1)

Supreme Court Rules 1999 (as amended), O. 2 r. 12(1)(2)

D

LEAD JUDGMENT BY KEKERE-EKUN JSC

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This is a motion on notice dated 7/11/2013 but filed on 8/11/2013 pursuant to Section 36 (1) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended), Sections 22 and 29 (b) of the Supreme Court Act, Cap S15, Laws of the Federation of Nigeria, 2004, Order 2 Rule 12 (1) and (2) of the Supreme Court Rules (as amended in 1999) and under the inherent jurisdiction of this Honourable Court. It is filed on behalf of the 1st respondent/applicant and seeks the following reliefs:

F

1. AN ORDER of this Honourable Court granting LEAVE to the 1st respondent/applicant to produce and tender documentary evidence as fresh evidence for the fair and just determination of this appeal

2. AN ORDER of this Honourable Court admitting in evidence the bundle of documents captioned “*ADDITIONAL EVIDENCE*” as further and/or fresh evidence in this appeal, and also to allow the said further and/or fresh evidence form part of the Record of Appeal for the hearing and determination of this appeal

H

3. AN ORDER of this Honourable Court deeming the afore-said further and/or fresh evidence as evidence properly before this Honourable Court for the fair and just determination of this appeal.

B The grounds for the application as stated on the face of the motion paper can be summarised as follows: That the documentary evidence sought to be introduced was not available to the applicant during the proceedings at the lower Courts; that the documents are material and relevant and go to the root of the issue
C before this Court and that their admission would assist this Court in arriving at a just and fair resolution of the appeal.

The application is supported by an affidavit of 6 paragraphs deposited to by one AZEEZ BIODUN, a litigation officer in Chief Ladi Williams' chambers, counsel to the 1st respondent. Attached
D to the affidavit are two exhibits marked AB/15 and AB/16 respectively. Exhibit AB/15 is a certified true copy of a document titled Notice to Rescind Family Agreement dated and signed on 13th July, 2009, while Exhibit 48/16 is a certified true copy of an affidavit
E deposited to on 22nd November 2011 by one Mr. Agboola Isaiah Olusegun, Head, Probate Division, High Court of Lagos State forwarding the purported Will of late Chief Rotimi Williams, SAN, CFR to the Probate Division of the High Court. Exhibits AB/15 and AB/16 are the documents sought to be introduced as fresh
F evidence in this appeal.

Also filed in support of the application are the following processes:

(a) 1st respondent/applicant's written address in support of
G the motion filed on 13/11/2015.

(b) Further affidavit of 25 paragraphs deposited to on 24/4/2015 by Chief Oladipupo Akanni Olumuyiwa Williams, SAN, one of the directors of the 1st respondent/applicant with exhibits attached thereto and marked A/1 to A/7a respectively.

H (c) Two additional affidavits filed on 5/10/2015 also described as "*further affidavits*" deposited to by AZEEZ ABIODUN:

(i) The first, henceforth referred to as the 2nd further affidavit, consists of 6 paragraphs. Attached thereto are Exhibits AB/1 -

AB/14, which were inadvertently omitted from the affidavit in support of the application.

(ii) The second, henceforth referred to as the 3rd further affidavit, contains 5 Paragraphs.

The appellants/respondents, in opposition to the application relied on their counter affidavit filed on 6/2/2015 consisting of 7 paragraphs, deposed to by OLUWAFEMI ADEMOLA, a legal practitioner in the firm of KOLA AWODEIN & CO., solicitors to the appellants/respondents. Attached to the Counter affidavit are exhibits marked KA1, KA2 and KA3 respectively. Also filed in opposition is a 9-paragraph further counter affidavit deposed to on 30/4/2015. Additional exhibits are annexed thereto and marked Exhibits KA4 and KA5 respectively.

The appellants/respondents also filed a written address in opposition to the 1st respondent/applicant's address in support of the application. It was deemed filed by an order of this Court at the hearing of the application on 18/10/2016.

On the said 18/10/2016, CHRIS ENEJE Esq. of counsel leading DANIELLA IKOKWU (Miss) for the 1st respondent/applicant adopted all the processes filed on behalf of the applicant and urged the Court to grant the application.

CHIMA OKEREKE ESQ. leading FRANCES MONAGO (Miss) for the appellants/respondents (henceforth referred to as respondents adopted and relied on all the processes filed in opposition and urged the Court to dismiss the application with substantial costs.

As no processes were filed on behalf of the 2nd respondent, MOHAMMED SALLAU ESQ. of counsel had nothing to urge on the Court on its behalf. Reference to the respondents in this application therefore shall be in relation to the appellants/respondents.

The genesis of this application is a suit commenced before the High Court of Lagos State by way of writ of summons dated 2/02/2007 by the 1st respondent, ADOLD/STAMM INTERNATIONAL Ltd., as plaintiff, against FOLARIN ROTIMI ABIOLA WILLIAMS, TOKUNBO ENIOLA WILLIAMS and CHIEF ROTIMI WILLIAMS CHAMBERS, the appellants and 2nd respondent re-

spectively, as defendants, wherein the 1st respondent sought to recover from the appellants and 2nd respondent a judgment sum awarded in its favour, being client's money, had and received on its behalf but which the appellants and 2nd respondent had refused/failed and/or neglected to hand over to it despite repeated demands. The 1st respondent (hereinafter referred to as the applicant) sought the following reliefs vide paragraph 24 of its statement of claim at page 4 of the record:

“(i) A declaration that the defendants owe a fiduciary duty to the claimant which duty they have breached jointly and severally;

(ii) A declaration that the fund is held in *cestui qui trust* for the benefit of the claimant and since the defendants have failed to refund the money to the claimant for two years, they are liable for damages for breach of trust;

(iii) An order that the defendants should jointly and severally render a full and detailed account of the funds held by them in trust.

(iv) An order of this Honourable Court compelling the defendant to pay over the outstanding balance of the said judgment sum which is N21,818,198.26 (twenty-one million, eight hundred and eighteen Naira(sic), one hundred and ninety-eight Naira, twenty-six Kobo) to the claimant in accordance with the order of the Supreme Court.

(v) An Order that interest rate of 11% per annum be paid on the said outstanding balance from 3rd of February, 2005, till judgment and thereafter 7% until the judgment debt is fully liquidated.

(vi) Damages of N10 million for breach of fiduciary relationship or breach of trust.

(vii) An Order that the defendants shall pay the cost of this action.

Upon receipt of the writ of summons, the respondents filed an application before the trial Court seeking a stay of proceedings and an order referring the dispute to arbitration as stipulated in an agreement executed by all the four sons of the late Chief F.R.A. Williams, SAN i.e. the respondents and their two brothers, Chief

Oladipupo Akanni Olumuyiwa Williams, SAN (henceforth referred to as Chief Ladi Williams, SAN) and Mr. Kayode Adekunle Olusegun Williams (henceforth referred to as Mr. Kayode Williams).

The trial Court by its ruling delivered on 26/7/2007 dismissed the application on the ground that the applicant herein was not a party to the agreement nor was it a beneficiary thereof and that in the circumstances, the said agreement could not be the basis of an order for stay of proceedings pending a reference to arbitration. The respondents were dissatisfied with the ruling and appealed to the Court of Appeal, Lagos division, which Court, on 1st March 2013, dismissed the appeal and affirmed the ruling of the trial Court. The respondents are still dissatisfied and have further appealed to this Court vide the present appeal No. 404/2013.

In order to support its opposition to the appeal, the applicant seeks to rely on two documents as fresh evidence. It is contended by the applicant that the agreement containing the Arbitration Clause (Exhibit AB14) was rescinded by a “*Rescission Agreement*” dated 13th July 2009 (Exhibit AB15) signed by Chief Ladi Williams, SAN and Mr. Kayode Williams on grounds of mistaken belief in the intestacy of their late father.

It is averred as follows in paragraphs 4 (v) to (xiii) and 5 of the affidavit in support of the application;

“4 (v) That whilst the said dismissed appeal was pending at the Court below, the 1st respondent/applicant became in possession of additional evidence that are relevant and germane to the fair and just determination of this appeal Hence, this application.

(vi) That after the execution of Exhibit AB/14 the Probate Division of the High Court of Lagos State discovered the will of Late Chief F.R.A. Williams, SAN, CFR dated the 22nd day of June, 1954, which Said discovering (sic) was communicated to all the four surviving sons of Late Chief F.R.A. Williams, SAN, CFR by the Probate Division of High Court of Lagos State.

(vii) That the said Will dated 22nd day of June 1954 is now sought to be admitted as fresh evidence via this application. Attached herewith and marked as Exhibit AB/16 is the certified true copy of the affidavit of Mr. Agboola Isiah Olusegun, Head Probate

Division, Lagos State High Court dated 22nd day of November, 2011 forwarding the said Will to Probate Court.

(vii) That the existence and surfacing of the said Exhibit AB/16 would impact seriously on the said Exhibit 14.

(viii) That the aforementioned Exhibits AB/15 and AB/16 being vital and relevant documents be allowed as fresh and or further evidence in this appeal, to enable this Honourable Court arrive at a fair and just determination of the appeal.

(ix) That at the time this suit was initiated, the said Exhibits AB/15 and AB/16 were not available to the 1st respondent/applicant. Hence, this application.

(x) That by the provisions of the Act and Rules of this Honourable Court, a party who became in possession of fresh evidence not available at the commencement of the suit, can with the leave of this Honourable Court be allowed to bring in such fresh evidence that are relevant to the just determination of the application.

(xi) That the facts and documents sought to be admitted as fresh evidence are not strange to the respondents, as such the respondents are not being taken by surprise.

(xii) That the 1st respondent/applicant's right to fair hearing guaranteed under the Constitution would be breached if this application is refused, as the 1st respondent/applicant would have been denied right to fair trial and fair hearing by not allowing these vital and relevant evidence.

(5) That it is in the interest of justice that this application be granted."

The respondents, in opposition to the above averments, deposed to the following facts in paragraph 5 (a) - (k), 6 and 7 (wrongly numbered 5 & 6) of their counter affidavit filed on 6/2/2015:

"5(a) The documents exhibited by the 1st respondent/applicant as Exhibit AB/15 and Exhibit AB/16 which the 1st respondent/applicant seeks leave of this Honourable Court to produce and tender as fresh evidence in this appeal by its application are documents that have been pronounced upon and rejected by both the High Court and the Court of Appeal and/or still pending before the

High Court and the Court of Appeal.

(b) The Federal High Court, Coram Abang J. in Suit No. FHC/L/CS/773/10 Union Registrars Ltd. Vs United Investments Limited held that the Family Agreement could not be rescinded unilaterally by two of the four signatories.

(c) The Federal High Court further held that the Family Agree-^Bment (purportedly rescinded by Exhibit AB/15 which the 1st respondent/applicant seeks leave of this Honourable Court to produce and tender as fresh evidence in this appeal) was to be preferred as a document governing the relationship between the broth-^Cers as it was signed before they went to Court.

(d) The Federal High Court also held that Exhibit 48/16 (the purported Will) is in dispute between the parties and cannot be held valid until same is proved and admitted to probate. Annexed^D herewith and marked Exhibit KA1 is a copy of the decision of Honourable Justice Abang in Suit No. FHC/L/CS/773/10 Union Registrars Ltd. Vs United Investments Limited.

(e) The Court of Appeal sitting in Lagos Coram: Justices R.M. Pemu, S.C, Oseji and T. Abubakar also held that the notice^E of rescission was invalid. I refer to Appeal No. CA/L/247/2012 F.R.A. Williams vs Chief Ladi Williams & Ors wherein the Court of Appeal stayed the PROBATE action in the High Court and ordered the parties to go to Arbitration. Now shown to me attached herewith and marked Exhibit KA2 is a copy of the decision of the^F Court of Appeal.

(f) These decisions have a bearing on this present application of the 1st respondent/applicant to produce and tender as fresh evidence in this appeal.

(g) The Court of Appeal in Appeal No. CA/L/247/2012 F.R.A. Williams vs Chief Ladi Williams & Ors has already held that any issues about the said Exhibit AB/16 are issues that can be resolved through Arbitration in view of the Family Agreement signed by the^H four brothers.

(h) An appeal against the decision of the Court of Appeal sending the four brothers to arbitration is already pending before this Honourable Court as Appeal No. SC.807/2014.

(i) Their late father, the Late Chief F.R.A. Williams made a DEED revoking all earlier testamentary dispositions. Now shown to me and marked Exhibit KA3 is a copy of the aforesaid DEED.

(j) The hearing of this suit before the trial Court is yet to commence.

B *(k) The 1st respondent/applicant still has the opportunity to bring the documents before the trial Court in this suit, if of any relevance.*

C *6. I believe it will not be in the interest of justice for this Honourable Court to grant the 1st respondent/applicant's application.*

7. The 1st and 2nd appellants will be prejudiced if this application is granted."

D In the applicant's further affidavit deposed to on 24/4/2015 in response to the averments reproduced above, it is averred that the rescission agreement and the holograph will of the late Chief F.R.A Williams, SAN, have not been set aside or declared invalid by any Court of competent jurisdiction; that the trial Court per E K.O. Alogba, J in his ruling of 17/11/2014 held that having regard to the discovery of the will, the Family Agreement, Exhibit AB/15, had become spent and of no further efficacy, noting that it was executed by the four brothers at a time when they were unaware of the fact that their late father died testate; that in the judgment of F the Court of Appeal in Appeal No. CA/L/151/2010, which is the subject of the substantive appeal pending before this Court, the Court held that the 1st respondent is not a party to Exhibit AB/15; that the late Chief Williams did not revoke any testamentary dis- G positions made by him and that Exhibit KA3 dated 25/5/1998 purported to be such a revocation is unregistered and a photocopy and that the signature thereon is not that of the late Chief Williams.

H In their further counter affidavit filed on 30/4/2015, it is averred on behalf of the respondents that the issue before Alogba, J. was whether or not to grant a stay of proceedings and therefore the learned trial Judge had no jurisdiction to pronounce on the validity or otherwise of Exhibit AB/15; that the issue of whether a will had been found was a non-issue at that stage of the proceed-

ings and that the arbitration agreement has yet to be challenged and/or nullified in any suit. They also maintained that the signature on Exhibit KA3 is the true signature of the late Chief Williams.

In the written address in support of the application, which was filed on 16/11/2015, a single issue was distilled for determination as follows: B

Whether this Honourable Court has the discretionary power to allow Exhibits AB/15 and AB/16 to be admitted as further evidence for the determination of this appeal.

The respondents on the other hand identified two issues thus: C

1. Whether the 1st respondent/applicant's written address filed on 16th November 2015 should not be discountenanced same having not been signed by a legal practitioner known to law.

2. Whether in the circumstances of this matter, the 1st respondent's Exhibits AB/15 and AB/16 should be admitted as fresh evidence in this appeal. D

I am of the considered view that the sole issue formulated by the applicant is adequate for the disposal of this application. The first issue formulated by the respondents is in the nature of a preliminary objection. I shall consider it first before going into the merits of the application. E

It is contended on behalf of the respondents that the written address in support of the application is incompetent for failure to disclose the identity of learned counsel who signed it by marking and/or making a tick beside his name. Reliance was placed on Section 24 (2) (1) of the Legal Practitioners Act (LPA) Cap. 207 Laws of the Federation of Nigeria, 1990, Bala vs Dikko (2013) 4 NWLR (Pt. 1343) 52: Oketade Vs Adewunmi (2010) 8 NWLR (Pt.1195) 53: P.M.B. Ltd. Vs N.D.I.C. (2011) 12 NWLR (Pt.1261) 253 @ 262 F - G (CA); Okafor vs Nweke (2007) 10 NWLR (pt. 1043) 521 @ 532 - 533 B - C. Learned counsel urged the Court to strike out the written address There is no response to this submission on behalf of the applicant. F G H

There is no doubt that it has been held in a plethora of decisions of this Court and it is now firmly settled that a Court process that is not signed by a legal practi-

tioner whose name appears on the roll of legal practitioners and who is entitled to practice as a barrister and Solicitor as provided for in Sections 2 and 24 (2) (1) of the LPA Cap. 111 LFN 2004 is incompetent and liable to be struck out. See: Oketade vs Adewunmi (supra); Okafor Vs Nweke (supra): F.B.N. Plc. Vs Maiwada (2013) 5 NWLR (Pt. 1348) 1433. In S.L.B. Consortium Ltd. Vs N.N.P.C. (2011) 9 NWLR (Pt. 1252) 317 @ 331 B-332A, this Court affirmed its earlier decision in Registered Trustees of Apostolic Church Lagos Area vs Rahman Akinde (1967) NMLR 263 and held that a process prepared and filed in Court by a legal practitioner must be signed by the legal practitioner, and it is sufficient signature if the legal practitioner simply writes his own name over and above the name of his/or firm in which he carries out his practice.

On page 14 of the applicant's written address, at the bottom of the page, the handwritten name, LADI WILLIAMS' appears above two names, Chief Ladi Rotimi Williams, SAN and Chris I. Eneje. The grouse of the respondents appears to be that there is no mark beside either of the two names to identify which of them signed the process. In the instant case, the name LADI Williams, though handwritten, is very clear and legible. The respondents are not contending that Chief Ladi Rotimi Williams, SAN is not the same person as LADI WILLIAMS who signed the process or that the person who signed the process is not a legal practitioner whose name is on the roll of legal practitioners entitled to practice law in Nigeria. I am satisfied that there is no doubt as to who signed the process and that he is a legal practitioner whose name is on the roll. The omission to place a tick beside the name Chief Ladi Rotimi Williams, SAN has not misled the respondents nor this Court as to who signed the process and such omission cannot invalidate it. I therefore hold that the applicants' written address filed on 16/11/2015 is competent.

I shall now proceed to the merit of the application. Relying

on the provisions of Order 2 Rule 12 (1), (2) and (3), and the case of Nwaogu vs Atuma (2013) ALL FWLR (Pt.675) 274 - 275 G - C; 274 A, learned senior counsel for the applicant referred to the principles that guide the Court in the exercise of its discretion in an application of this nature. He also relied on the case of Uzodinma vs. Izunaso (2011) 17 NWLR (pt. 1275) 30 and submitted that the main consideration of the Court should be the weight of the new evidence and its impact. It is contended that Exhibits AB/15 and AB/16 are vital and relevant documents, which would enable the Court arrive at a fair and just determination of the appeal. It was also argued that the documents were not available to the applicant while the matter was before the two lower Courts. He referred to the averments in paragraphs 3 (a) and 4 (i) - (xiii) of the affidavit in support of the application filed on 8/11/2013 (reproduced earlier in this ruling) as constituting special circumstances to warrant the grant of the application. He argued that the applicant could not, despite diligence, have obtained the evidence for use by the trial Court, as the respondents herein, did not file a statement of defence but immediately upon being served with the writ of summons, filed an application for stay of proceedings seeking a referral of the matter to arbitration pursuant to a Clause in a Family Agreement to which it was not a party. Learned senior counsel submitted that if admitted in evidence, the proposed fresh evidence would have an important effect on the appeal, as it would counter the reliance by the respondents on the Family Agreement as their basis for seeking a stay of proceedings. Relying on the cases of: Asaboro vs Aruwaju (1974) 4 SC 119, Akanbi vs Alao (1989) 3 NWLR (pt.108) 118 @ 140 A-B and Mobil Oil (Nig.) Ltd. Vs F.B.I.R. (1977) 3 SC 1 @ 15, he submitted further that the applicant need not give evidence at the trial before taking advantage of the rules to adduce new evidence. Reliance was also placed on the concurrent findings of fact by the two lower Courts evidenced by Exhibits A/7 (ruling of Alogba, J. delivered on 26/7/2007) attached to the further affidavit of the applicant filed on 24/4/2015 and the ruling of the lower Court of 1/3/2013 at pages 245 - 286 of the record to the effect that the applicant is not a party to the Family Agreement.

Learned senior counsel submitted that the evidence sought to be admitted is credible, material and weighty. He referred to the ruling of the trial Court delivered on 17/11/2014 wherein the learned trial judge held that the discovery of the will of the late Chief Williams had knocked the bottom off the arbitration agreement relating to the distribution of the estate, the implication being that with the discovery of the will it would be the document that would govern the distribution of the estate. He urged the Court to grant the application having regard to the fact that the proceedings before the High Court have been stalled more than 9 years now on account of the application for stay of proceedings and that the appellants/respondents and the 2nd respondent have meddled with and dissipated its money in their possession.

In reaction to the above submissions, learned counsel for the respondents submitted that the applicant has not fulfilled any of the conditions precedent to the grant of this application. On the conditions to be satisfied before an application to adduce fresh evidence may be granted, he relied on: *Adeyefa & Ors. Vs Bamgboye* (2014) LPELR-22884 (SC): (2013) 2 SCNJ 198. While conceding that Order 2 Rule 12 (1) and (2) of the Supreme Court Rules (as amended) provides for the introduction of fresh evidence on appeal, he submitted that the applicant is undeserving of the exercise of the Court's discretion in its favour for the following reasons:

- a. The additional evidence sought to be tendered are unnecessary, immaterial and have not placed before the Honourable Court any question or questions in controversy between the parties.
- b. The 1st Respondent/Applicant have (sic) not shown special circumstances why the new evidence sought to be admitted ought to be received.
- c. The application is sought to overreach Appellants/Respondents and is made in bad faith.

Learned counsel argued that the decision in *Akanbi vs Alao* (Supra) cited in support of the applicants case is in fact against it. He submitted that the substance of the decision in that case is that

a party that fails to plead the document at the trial Court cannot seek leave to introduce such evidence through the back door as further evidence before this Court in other words, that the relevant facts must be (or must have been) pleaded at the trial Court before an application to bring them in as fresh evidence on appeal could be made. It is contended that the documents in issue were in existence during the proceedings at the lower Court before the appeal before this Court was filed. Learned counsel submitted that attempts had been made at the Federal High Court and at the Court of Appeal to introduce the documents but they did not succeed, as both Courts held them to be inadmissible. That in the circumstances, the first condition has not been met. He submitted that the cases of Uzodinma vs Izunaso (supra) and Obasi Vs Onwuka (supra) cited and relied upon by learned senior counsel for the applicant are inapplicable in this case, as the documents sought to be introduced as fresh evidence have no weight, having been held to be inadmissible by the two lower Courts.

With regard to the submission in paragraph 4.8 of the applicant's written address that the documents were not available to the 1st respondent/applicant, learned counsel argued that the requirement for their admissibility is evidence that they could not have been obtained with reasonable diligence and not whether they were available or not. That the applicant has not shown the Court what efforts, if any, it made to obtain the evidence before now. That in any event the documents are not relevant to the fair and just determination of the appeal. It is contended on behalf of the respondents that the grant of this application would seriously overreach them, as they were neither pleaded nor referred to in the applicants pleadings at the trial Court and therefore they were denied the opportunity of scrutinizing them. Learned counsel noted that the authenticity of Exhibit AB/16 is likely to be contested by the parties to this appeal, as it had earlier been held to be inadmissible by the Court of Appeal in another matter. He submitted that allowing the applicant to use the documents would seriously jeopardize the respondents. He submitted that the documents, as shown in paragraph 4.16 of the applicant's written address, are conten-

tious and it would not be proper for them to be allowed in by this Court. He referred to Adeyefa's case (*supra*) wherein it was held that the tendering of documents in this Court is subject to valid objection. This is because they cannot now be cross examined upon them unless this Court assumes the whole role of the trial Court." *He urged the Court to dismiss the application.*

Order 2 Rule 12 (1), (2) and (3) of the Supreme Court Rules (as amended) provides as follows:

"12. (1) *A party who wishes the Court to receive the evidence of witnesses (whether they were or were not called at the trial) or 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 Act, shall apply for leave on notice of motion prior to the date set down for the hearing of the appeal.*

(2) *The application shall be supported by affidavit of the facts on which the party relies for making it and of the nature of the evidence or the document concerned.*

(3) *It shall not be necessary for the other party to answer the additional evidence intended to be called but if leave is granted, the other party shall be entitled to a reasonable opportunity to give his own evidence in reply if he so wishes."*

It is evident that an application brought pursuant to Order 2 Rule 12 of the Rules of this Court is not one that is granted as a matter of course. It calls for the exercise of the Court's discretion, which must be exercised judicially and judiciously. As rightly submitted by learned counsel for both parties, there are settled principles, which guide the Court in determining whether to grant leave to adduce fresh or further evidence. They are, inter alia, as follows:

(a) ***The evidence sought to be adduced must be such as could not have been, with reasonable diligence, obtained for use at the trial, or are matters which have occurred after judgment in the trial Court.***

(b) ***In respect of other evidence other than in (a) above, as for instance, in respect of an appeal from a***

judgment after a hearing on the merits, the Court will admit such fresh evidence only on special grounds.

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

(d) The evidence must be such as apparently credible in the sense that it is capable of being believed and it need not be incontrovertible. See: Asabaro vs Aruwaji (1974) 4 SC (Reprint) 87 @ 90 - 91: Akanbi vs Alao (1989) 3 NWLR (Pt.108) 118@ 137 - 138 H - B: Esangbedo vs The State (1989) 4 NWLR (Pt.113) 57 @ 67 A-C.

Before delving into the merits of this application, I deem it necessary at this early stage to reiterate the fact that hearing in the substantive suit is yet to commence at the trial Court The applicant herein is yet to file any pleadings. I have carefully examined the six grounds of appeal filed by the respondents contained in their Notice of Appeal dated 14/3/2014 at pages 287 - 292 of the record. Of particular relevance to this application are grounds 3, 4 and 6 reproduced below without their particulars:

“Ground 3

The learned justices of the Court of Appeal erred in law in affirming the decision of the trial Judge that Chief Ladi Williams SAN was not the alter ego and directing mind of the 1st respondent and was therefore the actual Claimant/1st respondent.

Ground 4

The learned Justices of the Court of Appeal erred in law when they upheld the finding of the trial Court to the effect that “the 1st respondent was not mentioned in the exhibit and could not be liable for the terms and conditions inherent in exhibit TEW1.”

Ground 6

The learned Justices of the Court of Appeal erred in law in refusing to stay proceedings in this matter and refer the parties to arbitration as they have contracted in Exhibit TEW1.”

Essentially, in the substantive appeal before this Court, the appellants will seek to convince the Court, among other things, that Chief Ladi Williams, SAN is the alter ego of the applicant and

that the applicant is therefore bound by the Family Agreement, Exhibit AB/14 and that a stay of proceedings ought to have been granted in compliance with a clause in the said Family Agreement to refer disputes to arbitration. The applicant, on the other hand seeks to debunk the appellants' claims by relying on fresh evidence to show not only that the said Family Agreement has been rescinded but also that the foundation of that agreement has collapsed, as it was entered into in the belief that the late Chief F.R.A. Williams, SAN died intestate, whereas a will (Exhibit AB/16) had been discovered by the Probate Section of the Lagos State High Court.

The first issue for the Court to consider is whether the evidence now sought to be relied upon could have, with diligence, been obtained for use at the trial Court or whether they are matters that occurred after judgment. Exhibit AB/15, the notice of rescission of the family agreement is dated 13/7/2009 while Exhibit 48/16, the sworn affidavit of the Probate Registrar regarding the last will of the deceased was deposed to on 22/11/2011. The ruling of the trial Court that gave rise to this appeal was delivered on 26/7/2007. It is therefore evident that they could not have been obtained for use at the trial Court when the application for stay of proceedings was filed. However, judgment was delivered by the Court of Appeal on 1st March 2013. The first opportunity to seek to bring the evidence to the Courts attention would have been while proceedings were pending at the lower Court.

In paragraph 4 (v) and (vi) of the affidavit in support of the application, it was averred as follows:

- “(v) That whilst the said dismissed appeal was pending at the Court below, the 1st respondent/applicant became in possession of additional evidence that are relevant and germane to the fair and just determination of this appeal. Hence, this application.*
- (vi) That after the execution of Exhibit AB/14 the Probate Division of the High Court of Lagos State discovered the Will of Late Chief F.R.A. Williams, SAN, CFR dated the 22nd day of June, 1954, which said discovering (sic) was communicated to all the*

four surviving sons of Late Chief F R A Williams, SAN, CFR by the Probate Division of High Court of Lagos State."

There is nothing in the above paragraphs, or indeed any of the paragraphs of the affidavit, which explains why the application was not brought before the lower Court. With regard to Sub-paragraph (vi), it is not in dispute that Chief Ladi Williams, SAN, is not only one of the four sons of the deceased to whom the discovery of the purported last will and testament was said to have been communicated, but he is also a director of the applicant, a fact personally deposed to by him in the applicant's further affidavit filed on 24/4/2015.

It was argued on behalf of the respondents that since the applicant failed to plead the documents at the trial Court, it is not entitled to seek to bring them in as fresh evidence on appeal. While the guiding principles in an application to adduce additional evidence were correctly stated in *Akanbi vs Alao* (Supra), the facts are distinguishable from the facts of this case on this particular issue. This is because in that case, the suit at the High Court was heard on its merits. The plaintiffs called evidence and closed their case. The defendants filed pleadings but elected not to call any evidence and rested their case on that of the plaintiffs. Judgment was entered against them. At the Court of Appeal, they applied to adduce further evidence to rely on judgments pleaded and relied on in their statement of defence, arguing that the failure to call evidence at the trial was against their instructions to their counsel, as they were available and willing to testify. The Court of Appeal allowed the application. On appeal to the Supreme Court, this Court allowed the appeal on the ground that the decision not to call evidence was a strategy employed by their counsel, which, had it succeeded would have enhanced their case. The strategy having failed, they were held not be entitled to be granted leave to adduce further evidence to repair the damage. They were bound by their counsel's decision not to call evidence. It was held in that case that the decision whether or not to grant leave to adduce fresh evidence on appeal would depend on the peculiar facts of each case.

In the instant case, the documents were clearly not in existence at the time the suit was filed at the trial Court. It would therefore not have been possible for the applicant to plead them at that stage.

This is however not the end of the matter, as the application would not be granted as a matter of course. The power to admit new, fresh or additional evidence must always be exercised sparingly and with caution. The Court must consider whether there are special circumstances to warrant the grant of the application and whether it would be in furtherance of the justice of the case. See: Uzodinma vs Izunaso (No.2) (2011) 17 NWLR (Pt. 1275) 30 @ 55 B-C.

From a careful reading of the various affidavits filed on behalf of the applicant, it seeks to rely on the documents in question in proof of the fact that the family agreement between the four brothers, upon which the prayer for stay of proceedings at the trial Court is predicated, has been rescinded and that there is in existence the last will and testament of the late chief F.R.A. Williams, SAN, which also knocks the bottom off the said family agreement. The attention of this Court has been drawn to the fact that the documents the applicant seeks to introduce as fresh evidence are contentious and have been considered and pronounced upon by different Courts. I have earlier reproduced some paragraphs of the counter affidavit filed on 6/2/2015 on behalf of the respondents. Paragraph 5 (b), (c) and (d) are to the effect that in suit no. FHC/L/CS/773/10; Union Registrars Ltd. Vs United Investments Ltd. before the Federal High Court Coram Abang, J., His Lordship held, regarding Exhibit AB/15 (the notice of rescission of family agreement), that the family agreement executed by the four brothers could not be rescinded unilaterally by two of them; that the family agreement was to be preferred in determining the relationship between the parties thereto, having been executed before the matter was instituted in Court; that Exhibit AB/16 (the purported will) is in dispute between the parties and can therefore not be held to be valid until it has been proved and admitted to probate. I refer to

pages 21 - 22 of the ruling, which is Exhibited as Exhibit KA1. In paragraph 5 (e) of the said counter affidavit, it is averred that the Court of Appeal has also weighed in on an aspect of this matter in Appeal No CA/L/247/2012; F.R.A. Williams vs Chief Ladi Williams, SAN & Ors. In its ruling delivered on 31/3/2014 (attached as Exhibit KA2), the Court held that the notice of rescission of the family agreement is invalid. The Court also stayed the probate action pending at the High Court and ordered the parties to go to arbitration. There is a pending appeal before this Court in SC. 807/2014 against the said decision. Moreover, it is averred in paragraph 4 C (i) of the aforementioned counter affidavit that the late Chief F.R.A. Williams, SAN made a deed revoking all earlier testamentary dispositions made by him. The said deed of revocation is attached as Exhibit KA3.

In response to the said averments, it is contended on behalf D of the applicant in its further affidavit filed on 24/4/2015 that neither of the documents intended to be relied upon as fresh evidence has been set aside or declared invalid by a Court of competent jurisdiction. The applicant maintains its reliance on the ruling of E Alogba, J. to the effect that it is not a party to the family agreement and that with the discovery of the will, the family agreement is no longer of any efficacy. It is contended that the matters before the Federal High Court and the Court of Appeal have no relevance to the appeal before this Court. The authenticity of the alleged deed F of revocation is also challenged.

It goes without saying that the proposed introduction of the fresh/additional evidence vide Exhibits AB/15 and AB/16 is not as straightforward as it might seem at first glance. What is clear from the averments in the affidavits before the Court and the exhibits attached thereto is that there are several matters pending in different Courts involving the respondents and their two brothers regarding the distribution of the estate of their late father in which the documents play a pivotal role. Two lower Courts have made pronouncements on the documents, which are the subject of pending appeals. They G H

cannot serve their intended purpose in this appeal until there is a final pronouncement as to their validity and/or authenticity. It is obvious from Exhibit KA2, that the will sought to be relied upon has not been admitted to probate, as one of the reliefs in the suit filed by Chief Ladi Williams, SAN and Chief Kayode Williams, as claimants, at the trial Court, that led to the appeal, was for an order vacating the caveat entered on 22/12/2009 by the present appellants (as defendants) and for an order for the grant of Letters of Administration (with will annexed) of the deceased's estate in their favour, being the only beneficiaries under the will. The deed of revocation is also in dispute. The applicant is also not a party to any of these documents. Taking all these factors into consideration, it is my view that this application is an attempt to overreach the respondents by bringing in through the back door, documents that are presently in dispute in other proceedings. I am not satisfied that the introduction of these documents is crucial to the proper determination of this appeal or that their admission would be in furtherance of the justice of this matter. Rather I am of the view that the respondents would be prejudiced by the grant of this application. This Court being an appellate Court, they would be denied the opportunity of cross-examining on them unless this Court assumes the role of the trial Court which it would not ordinarily do. See: Adeyefa vs Bamgboye (2013) 10 NWLR (Pt. 1363) 532 @ 544 - 545 F - E per Fabiyi, JSC.

On the whole, I find no merit in this application. It is hereby refused and accordingly dismissed. The parties shall bear their respective costs.

H

ONNOGHEN AG. CJN

I have had the benefit of reading in draft the lead ruling of my learned brother KEKERE-EKUN JSC just delivered.

My learned brother has dealt exhaustively with the issues raised for determination thereby leaving me with nothing more to add except to agree with his reasoning and conclusion that the application is grossly without merit and should be dismissed. I therefore order accordingly.

I abide by the consequential orders made in the said lead ruling. Application dismissed. B

PETER-ODILI JSC

I agree with the ruling just delivered by my learned brother, Kudirat Kekere-Ekun JSC and in support of the reasoning I shall make some comments. C

The 1st respondent by notion on notice filed on 8/11/13 prays for the following reliefs: D

1. An Order of this honourable Court granting leave to the respondent/applicant to produce and tender documentary evidence as fresh evidence for the fair and just determination of this appeal.

2. An Order of this honourable Court admitting in evidence the bundle of documents captioned *'ADDITIONAL EVIDENCE'* as further and/or fresh evidence in this appeal and also to allow the said further and/or fresh evidence form part of the record of appeal for the hearing and determination of this appeal. E

3. An Order of this honourable Court deeming the aforesaid further and/or fresh evidence as evidence properly before this honourable Court for the fair and just determination of this appeal. F

The motion is supported by a 6 paragraph affidavit deposed to by Azeez Biodun, Litigation Officer in the law firm of Chief Ladi Rotimi Williams. Also a written address was filed by learned counsel for the 1st respondent/applicant on the 16/11/15. G

Learned counsel for the appellants/respondents adopted their written address filed 19/1/16 and, deemed filed on 18/10/16.

Copious processes as Further Affidavit and Counter Affidavit and Further counter Affidavit were filed on either side. H

BACKGROUND FACTS

The appellants/respondents without filing a defence to this

suit at the trial Court filed an application seeking to refer this action to an arbitration pursuant to an arbitral Clause contained in Rescission/Family Agreement. It is now being contended that the said family agreement has been rescinded hence the application to reply on the purported rescission in this Court as fresh and further evidence through this application.

The learned trial Judge on the 26/7/2007 dismissed the said application for lacking in merit and on appeal, the Court of Appeal, Lagos Division dismissed the appeal on the 1st day of March, 2013 and of note is that whilst the appeal at the Court of Appeal was pending, the 1st respondent/applicant said it became in possession of the WILL of late Chief F. R. A. Williams SAN, CFR dated the 22nd day of June, 1954 which is now sought to be admitted as fresh evidence in this application as Exhibit AB/16.

The applicant crafted a single issue, viz:
Whether this Honourable Court has the discretionary power to allow Exhibits AB/15 and AB/16 to be admitted as further evidence for the determination of this appeal.

The appellants/applicants' learned counsel adopted their written address filed on the 19/1/2016 in which he formulated two issues for determination which are as follows:

1. Whether the 1st respondent/applicants written address filed on 16th November. 2015 should not be discountenanced same having not been signed by a legal practitioner known to law.

2. Whether in the circumstances of this matter the 1st respondent's Exhibits AB/15 and AB should be admitted as Fresh Evidence in this appeal.

The sole issue of the applicant is adequate in the determination of this application and I shall use it.

Whether this Honourable Court has the discretionary power to allow Exhibits AB/15 and AB/16 to be admitted as further evidence for the determination of this appeal.

Canvassing the position of applicant, learned counsel stated that the Supreme Court has the discretion to allow the admission of further evidence for the determination of the appeal. He cited Order 2 Rule 12(1), (2) and 3 of the Supreme Court Rules (as

amended in 1999) *Nwaogu v Atuma* (2013) ALL FWLR (Pt. 675) 260 at 274 - 275; *Uzodinma v Izunaso* (2011) 17 NWLR (Pt. 1275)30

That the applicant need not give evidence at the trial before taking advantage of the rules to adduce new or further evidence. That the discretion of the Court to grant leave to adduce new evidence or fresh evidence is properly exercised if it is for the furtherance of justice. He cited *Asaboro v Aruwaju* (1974) 4 SC 119; *Akanbi v Alao* (1989) 3 NWLR (Pt. 108) 118 of 140; *Mobil Oil (Ng) v F. B. I. R.* (1977) 3 SC 1 at 15; *Obasi v Onwuka* (1987) 3 NWLR (Pt. 61) 364. B C

Learned counsel for the applicant referred to paragraphs of the affidavit which are paragraphs 3(a), 4(i), 4(ii), 4(iii), 4(iv), 4(v), 4(vi), 4(vii), 4(viii), 4(x), 4(xi) and 4(xii), 4(xiii) and 5 as giving special circumstance upon which the new evidence as sought to be admitted. D

It was submitted that the evidence sought to be adduced being the Rescission Agreement dated 13th day of July, 2009 (Exhibit AB/15) and the said Will of Late Chief F.R.A. Williams SAN being Exhibit AB/16 if admitted would have an important effect on the appeal where the appellant/respondents are parading the Family Agreement as their basis for seeking stay of proceedings in the case but a separate entity having regard to its certificate of incorporation being Exhibit A/B attached to the 1st respondent/applicant's Further Affidavit filed on the 24th April 2015. That the evidence sought to be admitted are apparently credible in the sense that they are capable of being believed and are material, weighty and have an important effect on the whole case. He referred to the Appeal Court dicta in his matter. E F G

Learned counsel stated on for the applicant that a party must be consistent in his litigation and that appellant's counsel shifted on appeal from the position he canvassed at the trial Court which can be seen in the appellants/respondents Further Counter-Affidavit of 30th April, 2015. He cited *Anike v SPDC Ltd* (2011) 7 NWLR (Pt. 1246) 227 at 242; *Ngige v Obi* (2006) 14 NWLR (Pt. 999) 1. H

Responding, learned counsel for the appellants/respondents

contending that it is trite that a party to an appeal who intends to adduce fresh evidence on appeal must first satisfy some laid down criteria before such evidence is considered for admission and the 1st respondent/applicant has not fulfilled any of the conditions necessary for the grant of the leave sought. He cited Adeyefa & Ors v Bamgboye (2014) LPELR- 22884.

That the documents were in existence long before this appeal was brought and even during proceedings at the lower Court and the respondents/applicants had made attempts to use the documents in other suits but the attempts were rightly refused by both the Federal High Court and the Court of Appeal as the two Courts declared the said documents inadmissible. That the documents are contentious and so cannot be brought into this process He cited Adeyefa's case (supra)

The point on which this application is hinged in a nutshell is that the evidence Exhibit A15 and Exhibit AB16 are sought to be admitted because they are credible in the sense that they are capable of being believed. Also that they are material and weighty and would have an important effect on the whole case,

The appellant/respondent disagrees with that stance of the applicant stating that the evidence sought to be brought in as fresh evidence will in no way help this Court to do justice in this appeal hence should be discountenanced.

There is no disputing the effect of the Provisions of Order 2 Rule 12(1), (2) of the Supreme Court Rules, (as amended) to allow fresh evidence on an appeal before it.

The said provisions of the relevant Rule of Court are thus:

"(1) A party who wishes the Court to receive the evidence of witnesses (whether they were or were not called at the trial) or to order the production of any document, exhibit or other thing connected with proceedings in accordance with the provisions of Section 33 of the Act, shall apply for leave on notice of motion prior to the date set down for the hearing of the appeal.

(2) The application shall be supported by affidavit of the facts on which the party relies for making it and of the nature of the evidence or the document concerned.

(3) It shall not be necessary for the other party to answer the additional evidence intended to be called but if leave is granted the other party shall be entitled to a reasonable opportunity to give his own evidence in reply if he so wishes."

What Order 2 Rule 12 (1), (2) and (3) of the Rules of Supreme Court translate to have been explained in the case of Adeyefa & Ors v Bamgboye (2014) LPELR- 22884 (SC) on the issue of admission of fresh evidence held thus

"It is basic that admission of further evidence in this Court is not granted as a matter of course. This Court in the case of Esangbedo v The State (1989) 4 NWLR (Pt. 113) 57 at page 67, per Nnemeka-Agu. JSC stated the guiding settled principles as follows:

1. It must be shown that the evidence could not have been obtained and, with reasonable diligence, used at the Court of trial.

2. The Court must be satisfied that the evidence is such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive.

3. The evidence must be apparently credible, though it need not be uncontrovertible." See also Uzodinma v Izunaso (2011) 17 NWLR (Pt. 1275) 30.

Taking the affidavit evidence from both sides in view, clearly the conditions on which fresh evidence can be brought in at this level of the adjudication are far from available.

Firstly the documents were not pleaded and in another related suit, the Court of Appeal declared the same documents inadmissible and so letting the documents in this matter would clearly create some confusion or complication, a situation such as was decried by this Court in Adeyefas case (supra) per Fabiyi JSC as follows:

This significantly cast aspersion on the posture of the appellants/applicants. I do not want to say it that they embarked upon falsehood: all in a bid to get in those unpleaded documents through the back door as it were. I was not taken in by the ploy or gimmick embarked upon by the appellants/applicants. No Court of record should tolerate such a rather mundane practice.

That there is the danger that granting this application would seriously and gravely overreach the appellants as the documents sought to be tendered would produce, the safe harbour would be to refuse this application in the interest of balancing the scale of justice as it should be without jeopardizing the interest of one side to the advantage of the other.

From the foregoing and as fuller presented in the lead ruling, I too refuse this application and I dismiss it as lacking in m

C

ARIWOOLA JSC

I have had the preview of the draft of the lead Ruling just delivered by my learned brother, Kekere-Ekun, JSC. I am in agreement with the reasoning that led to the conclusion that the application lacks merit and should be dismissed. It is hereby refused and accordingly dismissed by me.

I abide by the consequential orders the said lead ruling including the order on costs.

E

AKA'AH S JSC

The application filed on behalf of the 1st respondent applicant is seeking the leave of this Court to admit the bundle of documents captioned *ADDITIONAL EVIDENCE* as further and/or fresh evidence and also to allow the said further and/or fresh evidence to form part of the Record of Appeal for the just and fair determination of the appeal.

The facts leading to this application are well set out in the Lead Ruling of my Lord, Kekere-Ekun JSC. The motions has been stoutly opposed and this has led the parties to file several affidavits in support of and against the motions. These affidavits have been copiously reproduced in the lead ruling. It is therefore unnecessary for me to reproduce same. Suffice it to state that I fully agree with the resolution of the issue in the application as has been properly dissected by my Lord, Kekere-Ekun JSC and the issue is:-
Whether this Honourable Court has the discretionary power to

allow Exhibits AB/15 and AB/16 to be admitted as further evidence for the determination of this appeal.

Order 2 Rule and 12(1) (2) and (3) of the Supreme Court Rules (as amended) under which this application is predicated provides:-

“Ord.2 Rule 12(1) A party who wishes the Court to receive evidence of witnesses (whether they were or were not called at the trial or 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 Act, shall apply for leave on notice of motion prior to the date set down for the hearing of the appeal.

2. The application shall be supported by affidavit of the facts on which the party relies for making it and of the nature of the evidence or the document concerned.

3. It shall not be necessary for the other party to answer the additional evidence intended to be called but if leave is granted the other party shall be entitled to a reasonable opportunity to give his own evidence in reply if he so wishes.

The principles guiding appellate Courts when considering whether to grant leave to adduce fresh evidence on appeal are

1. An appellate Court can only receive fresh evidence, new evidence or additional evidence on appeal except in circumstances where the matter arose ex improviso which no human ingenuity could foresee and it is in the interest of justice that evidence of that fact be led.

2. The Court will permit fresh evidence in furtherance of justice in civil cases under the following circumstances:

(i) Where the evidence sought to be adduced is such as could not have been obtained with reasonable care and diligence for use at the trial.

(ii) Where the fresh evidence is such that if admitted would have an important, but not necessarily crucial, effect on the whole case.

(iii) Where the evidence sought to be tendered on appeal is such as is apparently credible in the sense that it is capable of being believed. It need not necessarily be in controvertible. See:

Asaboro v. Aruwaji (1974) 4 SC 119, Obasi v. Onwuka (1987) 3 NWLR (pt. 61) 364 and Akanbi v. Alao (1989) 3 NWLR (Pt. 108) 118.

I am one with my Lord that this application is unnecessary since the controversy surrounding the documents tendered as fresh evidence has not yet been resolved and the substantive action is yet to take off the ground as pleadings are yet to be filed and exchanged between the parties. It is a matter of grave concern and heart rendering to watch uterine brothers go at each others throats with such venom on mundane things. I entirely agree that the application is unmeritorious and it is accordingly refused. It is hereby dismissed.

Parties should bear their respective costs.

D

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