**CHIEF LAYIWOLA OLUMEGBON**

**V.**

**HFP ENGINEERING NIGERIA LIMITED & ORS**

IN THE COURT OF APPEAL OF NIGERIA

THE 6TH DAY OF MARCH, 2015

CA/L/476/06(R)

**LEX (2015) - CA/L/476/06(R)**

OTHER CITATIONS

2PLR/2015/31 (CA)

(2015) LPELR-24473 (CA)

**BEFORE THEIR LORDSHIPS**

SAMUEL CHUKWUDUMEBI OSEJI, JCA

YARGATA BYENCHIT NIMPAR, JCA

JAMILU YAMMAMA TUKUR, JCA

**BETWEEN**

CHIEF LAYIWOLA OLUMEGBON - Appellant(s)

AND

1. HFP ENGINEERING NIGERIA LIMITED

2. MR. MUNIRU AKINYEMI

3. MR. LATEEF OLUMEGBON

4. LT. COLONEL BODE SOARES (RTD)

5. ALHAJI RAUFU OLUMEGBON - Respondent(s)

**ORIGINATING COURT**

LAGOS STATE HIGH COURT

**REPRESENTATION**

JOHN AGA, FUNMILOLA KUKU, TEMITOPE ISHOLA - For Appellant

AND

K. A. DAODU, E.M. OLUKO, A. L. O. KARIM, PATRICK OJIEHENOR - For Respondent

**ISSUES FROM THE CAUSE(S) OF ACTION**

CONSTITUTIONAL LAW – FAIR HEARING:- Consent Judgment – when it is deemed to have infringed upon a parties right to fair hearing – relevant considerations

**PRACTICE AND PROCEDURE ISSUES**

ACTION - APPLICATION FOR EXTENSION OF TIME:- Nature – Discretionary basis – Duty of court to act judicially and judiciously

APPEAL- NOTICE OF APPEAL:- Application to amend Notice of Appeal – how granted

ACTION - DUTY OF A LITIGANT:- Duty of a litigant to check on his counsel with respect to his case – consequence of failure thereof

APPEAL - FRESH ISSUE ON APPEAL:- Fresh point or question which was not raised, tried or considered by the trial court Where raising such a point or question will require fresh or additional evidence to be adduced – Attitude of court thereto

**MAIN JUDGMENT**

YARGATA BYENCHIT NIMPAR, J.C.A. (DELIVERING THE LEAD RULING):

This ruling is premised on a motion on Notice dated 31/1/11 filed by the Appellant on 4/2/11 seeking the following orders:

*1. AN ORDER granting leave to the Appellant/Applicant to raise a new point on appeal as contained in ground 1 of the proposed amended Notice of Appeal exhibited to this application as Exhibit TO.*

*2. AN ORDER granting leave to the Appellant/Applicant to amend his Notice of Appeal dated 29th April, 2004 by adding a new ground 1 as contained in the proposed Amended Notice of Appeal exhibited to this application as Exhibit TO and renumbering the existing grounds as grounds 5 - 7 respectively.*

*3. AN ORDER enlarging the time within which the Appellant/Applicant may file his Brief of Argument in this appeal.*

The application is founded on the following grounds:

*1. Upon the perusal of the Record of Appeal, it was discovered that there is a constitutional point touching on the infraction of the Appellant/Applicant's fundamental right to fair hearing which was not raised at the court below but which the Appellant/Applicant now seek to raise for the first time in this court by reason of which the leave of this must is required.*

*2. It is therefore imperative for the Notice of Appeal dated 29th April, 2004 to be amended by adding a new ground 1 as contained in the proposed amended Notice of Appeal and renumbering the existing grounds as grounds 2 - 7 respectively hence leave of this court is also required.*

*3. The Rules of this court prescribes the period within which the Appellant/Applicant ought to have filed his brief of Argument herein.*

*4. Whereas the time prescribed by the Rules of this court within which to file the Appellant's brief of Argument has expired, this court has the power to enlarge the time within which the Appellant may file his brief of Argument.*

The motion is supported by an affidavit of 8 paragraphs deposed to by John Olayemi, a litigation officer with Messrs Tayo Oyetibo & Co Solicitors to the Appellant and accompanying the affidavit are 3 annexures marked as Exhibits T, TO, TO - 1 which are (i) Certified True Copy of Notice of Appeal (ii) Proposed Amended Notice of Appeal (iii) A Motion on Notice dated 18th August, 2009 seeking to amend Appellant/Applicants Notice of Appeal dated 29th April, 2004.

Upon service on the Respondents the 1st Respondent filed a counter affidavit dated 17/3/11 filed on the same date and 2nd - 5th Respondents counter affidavit is dated 24/2/11. The Appellant/Applicant filed a Reply affidavit dated 20/10/11.

Pursuant to order of court made on the 21/1/13 written addresses were filed. The Appellant's written address filed on 28/1/13 and a reply to the 2nd - 5th Respondents on points of law filed on 26/2/13.

The 1st Respondent filed a counter affidavit dated 17/3/11 and filed on the same day. His written address dated 3/2/15 was deemed filed same day.

The 2nd - 5th Respondents filed a 14 paragraph counter affidavit dated 24/2/11 filed on the same day. Their written address is dated 25/2/13 filed same day.

All these processes were adopted and relied upon at the hearing of this application.

The Appellant/Applicant formulated a sole issue for determination thus:

*Whether this Honourable Court ought not to grant the prayers contained in the motion on Notice dated 31st January, 2011 but filed on 4th February, 2011.*

The 1st Respondent also distilled a sole issue as follows:

*Whether this Honourable Court ought to grant the Applicants prayers contained in his motion on Notice dated 31st January, 2011 but filed on 4th February, 2011?*

The 2nd - 5th Respondents on their part settled a sole issue thus:

*Whether this Honourable Court ought to grant the Appellant/Applicants prayers as contained in his Notice of Motion dated 31st January, 2011 but filed on 4th February, 2011.*

The court shall adopt the issue formulated by the Appellant/Applicant which is basically the same as issues formulated by the Respondents.

**FACTS:**

Brief facts of this application are that the Appellant/Applicant along one other instituted an action against the 1st Respondent at the Lagos High Court on behalf of the entire Olumegbon chieftaincy family. They were later substituted by other members of the family. Parties later settled amicably and filed terms of settlement dated 5th December, 1995 on 8th December, 1995 which were entered as judgment at the lower court on 8th December, 1995.

The appellant did not appeal against the said judgment but filed a fresh suit seeking to set aside the said consent judgment. The matter was heard and dismissed in a judgment delivered on the 27th February, 2004. The Appellant appealed against the judgment and now this application seeking to amend the Notice of Appeal by raising a new point of appeal.

Proffering arguments in support of the application, Appellant/Applicant's counsel submitted that on their taking over the brief they observed from the record of appeal that applicant's right to fair hearing was violated in the proceedings leading to the consent judgment because his name was removed without his knowledge and whilst he was outside the country thus the challenge to the removal of his name by the proceedings leading to the judgment which is the subject of this appeal. Learned Counsel admitted the fact that the applicant had filed the earlier suit in dual capacity i.e. in a representative capacity and that was not the issue at the lower court. Thus the need to set aside the consent judgment by the subsequent suit and the necessity for this motion to raise the fresh point.

Arguing further, the applicant argued that this court has the powers to grant leave to raise a fresh point relying on A.G. OYO V FAIR LAKES HOTEL (1988) 5 NWLR (Pt. 92) 1 on the need to do justice. That in doing so the court should consider a number of factors amongst which is when the new issue involves a substantial point of law whether substantive or procedural and relied on H.R. LTD V F. INDST LTD (2007) 5 NWLR (Pt.1027) 326 at 343 and BANKOLE v PELU (1991) 8 NWLR (Pt 211) 523 at 542.

Applicant went further to argue that the issue to be raised touch on right to fair hearing citing G.T.B. v FADCO IND. LTD (2007) 2 NWLR (Pt.1033) 307 at 322. He also added that no new evidence is required as the point canvassed is evident on the records of appeal and relied on OREDOYIN V AREWOLU (1989) 4 NWLR (Pt 114) (incomplete citation); ALHAJI ADISA & ANOR V SOLEH BONAH (NIGERIA) (1975) 1 NMLR 364 and SONEKAN V SMITH (1964) NMLR 59.

Submitting on the other prayers, applicant submitted that prayer one is the main relief while the prayers 2 is consequential upon prayer one while prayer 3 is to allow appellant file his Appellant's brief as allowed by Order 6 Rule 4 and 15 of the rules of this court and he relied on the following cases: F.B.N. PLC V MAY MEDICAL CLINIC (2001) 9 NWLR (Pt.717) 28; OKPALA V IBEME (1989) 2 NWLR (Pt.102) 208; ALADAJA V ALADE (1994) 7 NWLR (Pt.358) 537 and PHARMATEK INDUSTRIAL PROJECTS LTD V BAYO OJO (1996) 1 NWLR (Pt 359) 332 at 338.

The applicant contended that the need to amend the notice of appeal is to allow the appellant ventilate his grievances and to serve the ends of justice. On enlargement of time to file appellant's brief, applicant argued that the reasons for delay are clear in the supporting affidavit and the court will not punish a litigant for the fault of his counsel in following the case of HARUNA V MODIBBO (2004) 16 NWLR (Pt 900) 487 at 536. Applicant finally urged the court to grant the application.

The 1st Respondent in arguing the sole issue contended that a ground of appeal must arise from the judgment appealed against as held in the case of BUBA-IYA V SIKELI (2006) 2 NWLR (Pt.968) 523. And that when a new issue is to be raised, the court must be satisfied that there was a decision one way or the other on that point at the trial court relying on SAUDE V ABDULLAHI (1989) 4 NWLR (Pt.116) 434. Flowing from there, 1st Respondent argued that the new issue does not emanate from the judgment nor was it before the trial court, because this appeal is only against the suit filed to set aside another judgment. That it makes this appeal an abuse and the right of appeal is not an unlimited right to argue any ground of appeal.

On relief one, 1st Respondent submitted that it is an attempt to appeal against a decision in which he was not a party, citingFAWEHINMI V NBA (NO. 1) (1989) 2 NWLR (Pt 105) 551; CHRISTOPHER EJIDE V OGENYI NWIDENYI & ORS in RE OGBUZUNE UGADU (1988) 5 NWLR (Pt.39) 189 at 203 & 210.

1st Respondent continued to argue that the Appellant/Applicant was not a party to the judgment he alleged his right was breached when his authority to act for the family had been withdrawn and revoked. Applicant's capacity was challenged since he did seek leave to appeal as an interested party in Suit No. LD/234/94 relying on CHRISTOPHER EJIDE V OGENYI NWIDENYI & ORS in RE OGBUZUNE (1988) 5 NWLR (Pt.39) 189 at 203 & 210 where the court held that a person interested cannot launch an appeal in the name of the party but must obtain leave to appeal as an interested party. Further to that is the argument that the new issue does not arise from the judgment appealed against, citing ADEDEJI V N.B.N LTD (1989) 1 NWLR (Pt.96) 219. 1st Respondent admitted there may be exceptional situations that will make the court to exercise its discretion to do so, but that it must be based on exceptional circumstances, he relied on EJIOFODOMI V. OKONKWO (1982) 11 SC 74; DWEYE V IYOMA - HAN (1983) 8 SC 76; AWOTE V OWODUNNI (1986) 5 NWLR (Pt 46) 491; ABINABINA V ENYIMADU 12 W.A.C.A. 171.

Submitting further, the 1st Respondent argued that leave cannot be granted where additional evidence will be required citing the following cases: OREDOYIN V AROWOLO (1989) 4 NWLR (Pt 114) 172; EDOKPOLO V SEM-EDO (1989) 4 NWLR (Pt.116) 494; CHRIS V ONANUJU (2008) 9 NWLR (Pt.1093) 654; FCDA V EZINKWO (2007) WRN (W1.18) 158 at 172; BANKOLE V PELU (1991) 8 NWLR (Pt.211) 523; A.G. OYO STATE V FAIR LAKES HOTEL LTD (1988) 5 NWLR (Pt.92) 1 and H.R. LTD V F. IND. LTD (2007) 5 NWLR (Pt 1027) 326 at 342-343.

The 1st Respondent argued that the allegation that appellant's right to fair hearing was breached would require further evidence because the contention is that he benefitted from the consent judgment and since the applicant denies that fact, the Respondents would have to call evidence in proof of same. Furthermore, 1st Respondent argues that a situation of fait accompli exist, the judgment has been enforced and any proceeding in respect of the said consent judgment is futile and this court will not indulge in an academic exercise, and relied on NATIONAL INSURANCE CORPORATION OF NIGERIA V POWER & IND. ENG. CO. LTD (1986) 1 NWLR (Pt 14) 19; DIKE V NZEKA (1986) 4 NWLR (Pt 34) 155.

Learned Counsel to the 1st Respondent drew attention to paragraph 4(a) - (c) of the supporting affidavit which are facts contained in pages 70 - 71 of the Record of Appeal and same controverted at pages 86 - 100 of the record. That the testimony of Chief Femi Okunnu SAN was believed by the trial court. He urged the court to refuse the application because additional evidence would be required in line with UOR V LOKO (1988) 2 NWLR (Pt.77) 440; AKPENE V BARCLAYS BANK OF NIG LTD (1977) 1 SC 47 and ABAYE V OFILI (1988) 1 NWLR (Pt 15) 145.

On the prayer for enlargement of time to file Brief of argument, the 1st Respondent submitted that it is not granted for the asking and relied on LONG JOHN V  BLAKK (1998) 6 NWLR (Pt.555) 19 and EZECHUKWU V ONWUKA (2006) 2 NWLR (Pt.963) 191. The 1st Respondent further argued that no materials have been placed before the court upon which to exercise discretion. Furthermore, that no cogent reason was given by the applicant. 1st Respondent explained that the notice was filed in 2004 and applicant only got to realize that the Appellant's brief was not filed in 2009. That, this is clearly the fault of applicant not Counsel and such acts should not be condoned, citing UNIVERSITY OF LAGOS & ANOR V M. I. AIGORO (1984) 11 SC 152; OGWU V GODDAY RESOURCES (2009) ALL FWLR (Pt 485) 1734 - 1735; T.M. LTD V. S. ENGINEERING (2009) 6 NWLR (Pt.1136) 11- 12. And that in BANK OF BURODA & ANOR V MERCANTILE BANK (NIG) LTD (1987) 3 NWLR 233 the court did not indulge an applicant who was tardy in complying with the rules of court. That the delay herein is not explained and therefore defeats the application as it relied on DOLARIMA V YALE (2009) 6 NWLR (Pt 1137) 429 - 430; MESAGAN V GOV. ONDO STATE (2005) 12 WRN 113 - 114. Learned Counsel finally urged the court to refuse the application.

On their part, the 2nd - 5th Respondents submitted that paragraph 4(g) and (h) of the supporting affidavit is the root of this application and thus the belief by the applicant that his fundamental right to fair hearing was violated. They reiterated the point that appeals emanate from decisions of trial court, citing HON. MINISTER FOR WORKS AND HOUSING V TOMAS NIG LTD & ORS (2002) FWLR (Pt 124) 456 at 482to submit that the new issue does not arise from the judgment in LD/2570/97 but that applicant seeks to import same from suit No. LD/243/94. That if any, it arose from a different suit LD/243/94 in which the applicant is not a party and did not seek leave to appeal as an interested party. They argued that a ground of appeal not arising from the decision appealed against would be discountenanced. They relied on CHIOLU & ORS V AKANI & ORS (2001) FWLR (Pt 71) 1781 at 1788; MERCANTILE BANK OF NIG PLC & ANOR V NWOBODO (2005) 7 S.C. (Pt 11) 1 at 4 - 6 affirmed in ILOABACHIE V ILOABACHIE (2000) 5 NWLR (Pt.626) 194 at 263 that such a ground of appeal is incompetent. Learned Counsel to the 2nd - 5th Respondents reiterated the reason for raising a fresh issue on appeal which is to resolve the real question in controversy between the parties and to prevent any miscarriage of justice as held in A.G. OYO STATE V FAIR LAKES HOTELS LTD (1988) 5 NWLR (Pt 92) 1 at 23.

The point that the new issue does not emanate from the judgment appealed against was emphasized and the following cases cited in support: SARAKI V KOTOYE (1992) 9 NWLR (Pt.264) 156 at 184; EGBE V ALHAJI (1990) 1 NWLR (Pt 128) 546 at 590; IKWEDI & ORS V EBELE & ORS (2005) 7 M.J.S.C 125 at 144.

On whether the fact the applicant not presenting further evidence, the 2nd - 5th Respondents countered that argument and said the applicant did not refer to any page of the record to support his argument that there is evidence to support the fresh ground of appeal. Furthermore, that an appellant would be debarred from arguing a case totally inconsistent with or contradictory to the case he previously argued or from raising a different case on appeal; he relied on REDDISH, RE WALTEN (1877) 5 CH.D 882; WILSON V UNITED COUNTY'S BANK (1920) A.C. 120; A.G. OYO STATE V FAIR LAKES HOTELS LTD SUPRA at 23 and OKENWA V MILITARY GOVERNMENT OF IMO STATE (1996) 6 NWLR (Pt.455) 394 at 407 where the Supreme Court held that an appellant cannot jettison the case made at the trial court as that would amount, in effect, to permitting the appellant to commence an entirely a new case before the appellate court. Learned Counsel for 2nd - 5th Respondents relied on ATTORNEY GENERAL, OYO STATE V FAIR LAKES HOTEL LTD. SUPRA at 29 to highlight situations when leave to raise a fresh point can be allowed and argued that the applicant failed to meet the said situations. The cases of YUSUF SULE V BADAMOSI KABIR & ORS (2011) 2 NWLR (Pt.1232) 504 at 537; and FESCUM & CO LTD V FEDERAL AIRPORT AUTHORITY OF NIGERIA (2010) 15 NWLR (Pt 1216) 311 at 320 - 323 were relied upon as listing the conditions before leave can be granted. Learned Counsel finally urged the court not to grant the application as the fresh point does not have basis in the judgment appealed against.

Appellant in reply on points of law to the 2nd - 5th Respondents written address contended that the consent judgment in LD/243/94 was entered when appellant's name had been removed and therefore he could not have appealed thus the fresh suit he filed in LD/2570/97 seeking to set aside the consent judgment, he relied on VULCAN GASES V OKUNLOLA (1993) 2 NWLR Pt 274 139 at 154.

Appellant reiterated that the fact of removing the name of the appellant can be found in the record of appeal at page 19 and therefore it can be raised as a fresh issue to resolve the controversy as he cited A.G. OYO STATE V FAIR LAKES HOTEL LTD (1988) 5 NWLR (Pt 92) and finally urged the court to grant the application.

The application under consideration is twofold; one arm is seeking leave to raise a fresh point on appeal and consequential to that is the need to amend the Notice of Appeal. The second arm is for enlargement of time to file Appellant's Brief of Argument the time allowed to do so having lapsed. The Applicant listed four grounds upon which the application is founded and gave reasons in the supporting affidavit. Arguments canvassed were reviewed in the early part of this ruling.

An application to amend Notice of Appeal just like similar applications to amend processes can generally be made and granted anytime before judgment but with leave of court. This has been restated in several cases. When the application is to raise a fresh issue on appeal certain conditions other than leave of the court must be met. Primarily, the fresh point must arose out of the decision of the court of first instance and would not have been raised earlier in that court, see OKENWA V MILITARY GOVERNOR IMO STATE (1995) 6 NWLR (Pt.445) 394.  
"The discretion has been exercised in a variety of situations in the interest of the administration of justice. The following situations are disclosed by some of the decided cases, among many, where substantial points of law, substantive and procedural are involved. The leave has been granted to raise new points of law:

(1) When the point of law raised discloses ex facie that court has no jurisdiction.

(2) Where the point of law raised arose out of the decision of the court of first instance and could not have been raised earlier in that court....

(3) Where the point of law raised involves the interpretation of documents relevant to the determination of the case before the court....

(4) Where all the materials necessary for the determination of the point of law raised are present in the records.

(5) Where the court is satisfied that the evidence is such that establishes beyond doubt, that the facts, if truly investigated would have supported the new plea." Per IGUH J.S.C.

See also ALHAJI FATAI AYODELE ALAWIYE V MRS OGUNSANYA (2012) NSCQR VOL 52 186; ATTORNEY GENERAL OYO STATE V FAIR LAKES HOTEL LTD (1988) 5 NWLR (Pt 92) 1 at 23.

It is the requirement too that the above listed factors must co-exist to allow the court act on them. It is also part of the consideration that parties must not raise fresh issues consistent with their pleadings at the court of trial, see CHIEF AYOOLA ADEOSUN V GOVERNOR OF EKITI STATE & ORS (2012) NSCQR VOL. 49 534; KWAJAFFA V BANK OF THE NORTH (2004) 18 NSCQR 543.

Considering the first prayer on the motion paper against the backdrop of these condition, can it be said that the application meets the settled requirements? The objection of the Respondents is primarily on the fact that the fresh issue sought to be raised does not arise from the judgment appealed against nor was it the case of the parties by their pleadings. The judgment appealed against is in Suit No LD/2570/97 meanwhile the fresh issue takes its roots from another suit LD/243/96. This was the suit in which the name of the appellant was substituted and parties entered a consent judgment which the appellant is alleged to have benefitted from. He denied same but did not claim his share of the proceeds from the consent judgment if he was denied. The suit appealed against was merely to set aside the consent judgment in which he was not a party. It was dismissed, the appellant did not fight Suit No LD/2570/97 on the fresh issue that is sought to be raised. Since the pleadings of the parties did not touch on this aspect, the judgment in LD/2570/97 could not have dwelt on. I agree with Respondents that the fresh issue does not arise from the judgment appealed against.

The next point to consider is that the fresh issue sought to be raised must relate to a substantial point of law which is substantive or procedural. The fresh issue sought to be raised is ground one of Exhibit TO which is the proposed amended Notice of Appeal and it states thus:

***"GROUND NO. 1***

*The learned trial Judge erred in law when she failed to set aside the consent judgment entered in Suit No. LD/243/91 when the proceeding leading to the judgment was a nullity on ground of breach of the Plaintiff/Appellant's right to fair hearing.*

*PARTICULARS OF ERROR*

*(i) The Appellant along with Madam Adijat Olumegbon (deceased) had for themselves and on behalf of the Olumegbon chieftaincy family commenced Suit No. LD/243/94 seeking inter alia for damages for trespass against the 1st Respondent*

*(ii) The name of the Appellant was subsequently removed as a party in the said Suit No. LD/243/94 and the suit immediately compromised by the Respondents.*

*(iii) The name of the Appellant was removed from the said Suit No. LD/243/94 by the Respondents without being afforded an opportunity of being heard prior to the said removal of his name.*

*(iv) The removal of the Appellants name from the said suit in the manner aforesaid was a violation of his fundamental right to fair hearing as guaranteed by Section 36(1) of the Constitution of the Federal Republic of Nigeria 1999.*

*(v) Once a person shows that his fundamental right to fair hearing has been violated in a proceeding, any judgment founded upon the impugned proceedings must be set aside.*

*(vi) In the premises, the consent judgment in Suit No. LD/243/94 ought to be set aside."*

It is obvious from the proposed Ground one quoted above that it raises substantial issues of law and fundamental right to fair hearing which on its own is a very fundamental issue. On this account, I find that the issue is one of importance but it does not stand alone as it must be considered along other factors.

The other factor to consider is for the applicant to show that there is no need for further evidence. This the applicant tried to say so but the Respondents challenged same in their respective briefs highlighted earlier in this ruling.

The contention of the Respondents is that the proceeds from the consent judgment was shared amongst family members and the applicant benefited. If he benefitted, can he be allowed to challenge the consent judgment? If he denies that he did not enjoy it, would the Respondents who assert that he did, not want to show proof of his enjoying the proceeds of the consent judgment? All these is not part of the judgment appealed against and therefore it would amount to the applicant setting up a new case at this level of trial. Courts frown against an appellant/applicant setting up a new case that parties had not joined issues on, see the case of OKENWA V MILITARY GOVERNOR, IMO STATE & ORS (1996) 6 NWLR (Pt 455) 394 at 407 where the court held thus:

"An appellant will also not be allowed to raise on appeal, a fresh point or question which was not raised or tried or considered by the trial court particularly where to raise such a point or question will require fresh or additional evidence to be adduced."

See also OREDOYIN V AROWOLO (1989) 4 NWLR (Pt 114) 172 at 190 & 192 on when such applications can be granted, the court went on to say:

"Where however, such a fresh point of law, substantive or procedural and it is plain that no further evidence needs to be adduced which would affect the decision on the matter, the appellate court will allow the question to be raised and the point taken to prevent a miscarriage of justice."

It is clear that another fundamental condition in allowing an appellant to raise a fresh point is where no fresh evidence is required. That is to say the record of appeal must bear all materials relevant to the determination of such point of law. That however is not the situation here and therefore the application does not meet the requirement of law and cannot be granted. The proof of denial of fair hearing is not against the judgment appealed against and it was not canvassed at the trial court. Appellant was not denied fair hearing in the proceedings under consideration in the pending Notice of Appeal. I agree with both counsel for the Respondents that the appellant is being ingenious in importing an issue arising from another judgment - LD/234/94 which is not on appeal here. Even in that case he was not a party and therefore his option was to seek leave to appeal as an interested party which he failed to do.

One other point is that the suit was filed in a representative capacity, his capacity withdrawn and he is alleged to have benefitted from the proceeds of the settlement. Appellants right of appeal is not unlimited or at large, he is restricted to grounds that arise from the proceedings or judgment appealed against. The conditions under which an application to raise a fresh point can be granted must all co - exist and that is not the case here, consequently, prayer 1 is hereby refused. It is not made out. Prayer 2 which is a follow up to prayer one also collapses.

The second arm of the application is prayer 3 on the motion paper which prays as follows:

*"3. AN ORDER enlarging the time within which the Appellant/Applicant may file his brief of Argument in this Appeal."*

Grounds Nos. 3 and 4 of Grounds upon which the application is made appreciate the fact that time allowed for the Appellant to file his Appellants Brief of Argument has lapsed and therefore he must seek leave of court to file the brief of argument out of time.

The Notice of appeal in this appeal was filed on 29th day of April, 2004, it is annexed to the motion and marked as Exhibit T. The supporting affidavit deposed to the fact that Chief B. O. Benson SAN was indisposed hence the need to engage the present counsel. Also that the failure in filing the appellant's brief came to the notice of the deponent on 11th September, 2009 when he knew that it was the ill health of Chief B. O. Benson SAN that caused the failure to file.

There is a valid Notice of Appeal before the court and this arm of the prayer is to be allowed to file a brief of argument the time for doing so having lapsed. Ordinarily, this is an application that should be granted without much ado. However, the 1st Respondent is opposed to the grant of the application basically, because of time lag. It is coming over 5 years late.

An application for extension of time even though an innocuous application is not granted for the asking because it calls for the exercise of discretion by the court. Discretion is exercised judicial and judiciously and usually upon materials placed before the court. See EZECHUKWU V ONWUKA (2006) 2 NWLR (Pt 963) 151 where the court held thus:

"An appellant seeking extension of time in order to successfully invoke the exercise of the discretion of the court must adequately/satisfactorily explain the cause of the delay to act within time and proffer cogent and substantial reasons. It is not likely that such an applicant will succeed if the delay is in ordinate unless substantially explained."

The contention of the 1st Respondent is that no genuine reason is advanced to explain the delay in not filing the Appellant's brief on time. The time gap between filing of Notice of Appeal and when it became clear that Appellant's Brief was not filed is about 5 years, between 2004 and 2009. The question the 1st Respondent asked is whether it portrays the applicant as diligent in prosecuting the appeal. Indeed a litigant who fails to check on his counsel cannot be said to be serious. See NIGERIAN AGRICULTURAL & COOPERATIVE BANK LTD V MR. LEWECHI OZOEMELAM (2004) LPELR - 5955; (2005) 7 NWLR (Pt 925) 552 where the court held as follows:

"A litigant is required to be vigilant and diligent. He has a duty to check on what happened to his case and were he defaults he pays the price."

However the fact of the ill health of B.O. Benson SAN has not been controverted and since there is a valid notice of appeal upon which the Appellant's Brief of Argument can stand, it will be in the interest of justice to grant this arm of the application. Courts are not by creation meant to punish parties for errors committed in the prosecution of matter. It is created to determine the rights of parties and rights can only be determined when opportunity is given to parties to be heard. Accordingly therefore, prayers 1 and 2 are hereby refused. Prayer 3 is granted. The appellant is given leave to file and serve his Appellant's Brief of argument within 7 days from today.

I make no order as to cost.

**SAMUEL CHUKWUDUMEBI OSEJI, J.C.A.:**

I had the privilege of reading before now the draft of the lead Ruling just delivered by my learned Brother **Y.B. NIMPAR JCA.**

I agree with the reasoning and conclusion contained therein and I have nothing extra to add.

Accordingly, I refuse prayers 1 and 2 in the motion on notice while prayer 3 is hereby granted.

I also abide by the consequential orders made in the lead Ruling.

**JAMILU YAMMAMA TUKUR, J.C.A.:**

My lord ***Yargata Byenchit Nimpar JCA,*** afforded me the opportunity of reading before today the draft ruling just delivered.

I agree with the reasoning and conclusions contained therein, and also abide by the consequential orders contained therein.