**THE FEDERAL GOVERNMENT OF NIGERIA AND OTHERS**

**V.**

**ZEBRA ENERGY LIMITED**

IN THE SUPREME COURT OF NIGERIA

THE 13TH DAY OF DECEMBER, 2002

SC. 268/2001

**LEX (2002) - SC. 268/2001**

OTHER CITATIONS

2PLR/2002/94 (SC)

(2002) 18 NWLR (Pt.798)162

(2002) 12 S.C (Pt. II) 136

(2002) All N.L.R 391

**BEFORE THEIR LORDSHIPS**

SALIHU MODIBBO ALFA BELGORE, JSC

IDRIS LEGBO KUTIGI, JSC [DISSENTING]

UTHMAN MOHAMMED, JSC

AKINTOLA OLUFEMI EJIWUNMI, JSC

EMMANUEL OLAYINKA AYOOLA, JSC

**BETWEEN**

1. THE FEDERAL GOVERNMENT OF NIGERIA

2. THE PRESIDENT OF THE FEDERAL REPUBLIC OF NIGERIA

3. ALHAJI RILWANU LUKMAN (THE PRESIDENTIAL ADVISER ON  
PETROLEUM AND ENERGY)

4. DR. ABOKI ZHAWA (PERMANENT SECRETARY, MINISTRY OF PETROLEUM RESOURCES)

5. DR. W.F. DUBLIN GREEN (DIRECTOR, DEPT. OF PETROLEUM RESOURCES)

6. DR. CHRISTOPHER KOLADE (CHAIRMAN PANEL OF REVIEW OF CONTRACTS, LICENCES ANDAPPOINTMENTS)

7. ATTORNEY-GENERAL OF THE FEDERATION Appellants

AND

ZEBRA ENERGY LIMITED Respondents

**ORIGINATING COURT(S)**

1. COURT OF APPEAL

2. HIGH COURT OF ABIA STATE HOLDEN AT UMUAHIA

**REPRESENTATION**

A. A. KAYODE, SAN with MARYAM L. GABDO -for the Appellants

AND

C.O. AKPAMGBO, SAN with UCHE NWOKEDI, Esq., JOHN ERAMEH, Esq., C. CHUKS-NNADI, Esq., EMEKA UNIGWE, Esq. AUGUSTINE AKPAMGBO, Esq.) - for the Respondent

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

COMMERCIAL LAW - CONTRACT - OFFER:- Acceptance of an offer – Whether may be demonstrated by the conduct of the parties as well as by their words or by documents that have passed between them

COMMERCIAL LAW - CONTRACT - OFFER:- Offer to enter into a unilateral contract – When is deemed accepted - Commencement of performance, even though completion of performance is a condition precedent to the offeror's liability to perform his promise – Legal effect

CONSTITUTIONAL LAW - FAIR HEARING:- Were a court decides a case on the evidence of one of the parties alone while ignoring the evidence for the other side – Implication for the constitutional requirement of fair hearing - Whether right to be heard is a fundamental principle of the adversary system of administration of justice

**PRACTICE AND PROCEDURE ISSUES**

ACTION- TRIAL:- Essence of trial - Need to allow both sides to a dispute to present whatever facts they have before the courts so as to enable the court to arrive at a fair and just decision – Duty of court thereto

ACTION - ORIGINATING SUMMONS:- Proceedings where the facts are likely to be in dispute – Whether it is improper to commence such action by originating summons

JUDGMENT AND ORDER - CONSEQUENTIAL ORDERS:- Settled law that consequential order is not merely incidental to a decision but one necessarily flowing directly and naturally from, and inevitably consequent upon it – Meaning of – Duty of court thereto – Whether a proper consequential order need not be claimed but a substantive order must be claimed and sustained from the facts before the court

INTERPRETATION OF STATUTE - PUBLIC OFFICER ACT:- Applicability of the Public Officers Protection Act applies to matters arising from the contract

WORDS AND PHRASES - "PUBLIC OFFICER": Who are public officers within the meaning of the Public Officers Protection Act ?

"The words 'public officer' or 'any person' in public office as stipulated in section 2 of the Public Officers (Protection) Law, 1963 not only refer to natural persons or persons sued in their personal names but that they extend to public bodies, artificial persons, institutions or persons sued by their official names or titles." Per MOHAMMED, JSC (P. 19, paras. C-D)

**MAIN JUDGMENT**

E.O. OGWUEGBU, JSC. (DELIVERING THE LEADING RULING):

On the 15th of February, 2002, this Court delivered judgment in the above appeal. The plaintiff/appellant's appeal was dismissed by the majority judgment. On the 20th February, 2002, the appellants brought a motion on notice for the following orders:

(1)   An order setting aside the judgment of this Honourable Court contained in the lead judgment of Uthman Mohammed, JSC., delivered on the 15th of February, 2002.

(2)     An order directing the appeal to be argued de novo before a new Panel of the Court.

The grounds on which the application is based are as follows:

1.     There was a denial of fair hearing when the Court struck out grounds 5 and 6 raised in the Notice of Appeal filed on 9th September, 1999 and argued as Issue 5 in the Appellant's Brief, which issue touched on the title to the land in dispute on the ground that no leave of Court was obtained to argue those grounds when in fact leave was applied for and granted.

2.       The learned Justice of the Supreme Court who read the lead judgment did not and could not have read the Appellant's Reply Brief dated 19th November, 2001, when he stated in his Judgment:

(a)     that there was no reaction by the Appellant to the Respondent's allegation that no leave of court was obtained when in fact this issue was addressed on page 4 paragraph 1 of the Reply Brief, and

(b)    When the learned Justice in dealing with Issue No. 2 stated at page 8 paragraph 2 as follows:

Learned Counsel for the Appellants made heavy weather of these amendments but failed to point out how the amendments affected their case before the Court or how it would entail injustice or surprise or embarrassment to them. To say that the Appellant's were overreached by the amendments simpliciter without describing how the amendments affected their case before the Court is a hollow submission.'

When in fact at pages 1, 2 ad 3 of the Reply Brief the Appellant catalogued the miscarriage of justice occasioned by the grant of the application to amend the pleadings and the documentary evidence to wit: the plans before the Court.

There is an affidavit of seventeen paragraphs in support of the application with exhibits annexed to it. The relevant paragraphs read as follows:

7.     That the appeal was argued on the 19th of November, 2001, on which day the Appellant filed its Reply to the Respondent's Brief with copies of same duly made available to the Court.

8.       That in the lead judgment of Mohammed, JSC., the learned Justice who read the lead Judgment struck out grounds 5 and 6 of the Appellant's grounds of appeal which grounds formed the subject matter of Issue 5 raised in the Appellant's Brief.

9.    That the two grounds struck out raised the issue of title to the land in dispute and the non-consideration and determination of these grounds of appeal was prejudicial to the case of the Applicant.

10.     That the reasons given in the lead judgment for striking out those grounds of appeal was that the Appellant did not in its Reply Brief dispute the contention of the Respondent's Counsel that those grounds of appeal are incompetent as no leave of Court was obtained to argue those grounds.

Xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx

12.     That in resolving Issue No. 2 against the Appellant, the Honourable Justice Mohammed, JSC., at page 8 of the lead Judgment also stated as follows:

Learned Counsel for the Appellant made heavy weather of these amendments but failed to point out how the amendments affected their case before the court or how it would entail injustice or surprise or embarrassment to them. To say that the Appellants were overreached by the amendments simpliciter without describing how the amendment affect their case before the Court is a hollow submission.'

13.     That it is of course incorrect that the prejudice created by the granting of the amendment was not stated by the Appellant as all these were set out on pages 1, 2 and 3 of the Reply to the Respondent's Brief.

14.     That I am informed by Miss. O. M. Lewis and I verily believe that the statements attributed to the Honourable Justice of the Supreme Court who read the lead Judgment could not have occurred if cognizance had been taken of the Reply to the Respondent's Brief filed by the Appellant before the Court.

15.     That the error on the part of the Honourable Justice who read the lead judgment has resulted in a miscarriage of justice, as Judgment would have been given in favour of the appellant or at worst the case would have been sent back for retrial.

The defendants/respondents thereafter filed a motion in opposition praying the Court for the following orders:

An order striking out the appellant's motion dated 15/2/2002 (sic) to set aside the judgment of this Honourable Court dated 15/2/2000 (sic) and for the trial of this suit de novo at the Umuahia High Court, Abia State;

------------------------------------------------------------------

AND TAKE NOTICE that the grounds on which this application is based are as follows:

(i)     The Appellant’s said motion violates Order 8, Rules 16 of the Supreme Court Rules and is by reason thereof incompetent.

(ii)   The motion is an appeal by the back door against decisions of this Honourable Court which are correctly embodied in its judgment.

The application is supported by an affidavit of eight paragraphs with exhibits annexed to the said affidavit. In addition, the defendant/respondent filed a counter-affidavit of nineteen paragraphs in opposition to the plaintiffs' motion to set aside the judgment. The relevant paragraphs are reproduced hereunder:

4.     That paragraph 11 of the affidavit is incorrect as Exhibit A' on which the appellants rely for this application, was in respect of the five grounds of appeal filed by the appellants on March, 13, 1996, which 5 grounds of appeal formed part of the appellant's Motion on Notice also filed on March, 13, 1996, and granted on July 9, 1996.

7.       That the Motion on Notice referred to in paragraph 4 above which is annexed hereto as Exhibit 1' was supplanted by a subsequent Motion on Notice filed on September 9, 1999 granted on March 11, 2000, and containing a second Amended Notice of Appeal.

8.       That in paragraph 12 of the affidavit in support of the application for a 2nd Amended Notice of Appeal in the Motion on Notice granted on March, 11, 2000, the appellants had deposed as follows:-

That the Notice of Appeal, particularly grounds 2, 4, 5 and 6 has to be amended after relating the amendments made on the plans on the day judgment was to be delivered with the pleadings and evidence.'

9.       That in view of paragraph 7 above the original Amended Notice of Appeal filed by the appellants on March 6, 1996, granted on July, 9, 1996, and referred to in Exhibit A' in the appellant's affidavit was abandoned together with the five grounds of appeal contained in it and the leave to file grounds of appeal not based on law only.

10.     That the appellants failed to disclose in their affidavit the fact that their 1st Amended Notice of Appeal which was allowed in Exhibit A' of their affidavit contained only five grounds of Appeal unlike the 2nd Amended Notice of Appeal which contained 6 grounds of appeal  on which this appeal was argued.

11.     That the motion seeking leave to file the 2nd Amended Notice of Appeal and granted on March 11, 2000, did not contain any prayer for leave to file any ground of appeal which was not based on law or which was an attack on the concurrent findings of the lower courts. The said motion and the order allowing it are hereto attached as Exhibit 2'.

Xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx

13.     That paragraphs 9 and 10 of the affidavit are not correct in that grounds 5 and 6 were based on facts or on concurrent findings of facts of the two lower courts and no leave to file these two grounds were sought or obtained in the Appellant’s motion to file an amended Notice of Appeal containing a prayer for leave to argue grounds other than those of law allowed on 9/3/2000 and on which this appeal was fought.

14.     That the appellants did not exhibit in their affidavit the prayers contained in their 2nd motion allowed on 9/3/2000 on which the appeal was argued and which did not seek leave to argue grounds not based on law only.

xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx

16.     That the submissions in the Amended Brief filed on 15/2/2000 and alleging miscarriage of justice, ignored the fact that the two lower courts had already found that there was no miscarriage of justice, while on p. 8 of the lead judgment the allegation of a miscarriage of justice had been exhaustively dealt with and dismissed.

In  moving the motion, Professor Kasunmu, SAN, stated that the application is brought out under the inherent jurisdiction of the court and that the grounds upon which the application is based are set out in the schedule to the application. These grounds have been set out earlier in this ruling. He also relied on the affidavit in support of the application together with the documents annexed to the affidavit.

There is a preliminary issue raised by the learned counsel for the respondents to the effect that the leave granted to the applicants by this Court to further amend their notice of appeal and to deem it as properly filed and served contained a sixth ground of appeal which was of mixed law and fact. That the appellants did not obtain leave of this Court to appeal on that 6th ground.

Before the application to further amend the notice of appeal granted on 11-3-2000, the appellants had on 9-7-96 obtained leave of this Court to appeal on grounds other than of law and also on concurrent findings of the two lower courts.

The sixth ground of appeal was argued with ground five as Issue (5) in the appellant's brief of argument. Professor Kasumnu, SAN, replied to the objection in the appellant's Reply brief. This was the Reply brief which he contends in this application that the court did not advert to in its judgment which led to the striking out and non-consideration of the said Issue (5). Learned counsel for the respondents has raised the same objection to the said ground (6) in their opposition to this application.

In the first application brought by the appellants/applicants granted by this Court on 9-7-96, leave to appeal on grounds other than law was sought. When, therefore, the appellants brought another application to further amend their notice of appeal which was granted on 11-3-2000 and which application contained the sixth ground of appeal on mixed law and facts, they did not need any leave. They  needed only leave to amend their notice of appeal since the leave to appeal on grounds other than law granted on 9-7-96 covered not only the grounds of appeal then filed but also, the additional 6th ground. The leave granted on 9-7-96 relates to the entire appeal. See Awote & Ors. v. Owodunni & Ors. (1986) 5 NWLR (Pt. 46) 941. In the instance, the 6th ground of appeal which was argued as issue (5) in the appellants' brief in the appeal was competent.

Having cleared the way, I will continue with the consideration of the application for an order to set aside the judgment of this Court delivered on 15-2-2002.

Professor Kasunmu, SAN, contended that the appellants were denied fair hearing when the Court struck out grounds 5 and 6 raised in their Notice of Appeal and argued as Issue (5) in the Appellant's brief which issue touched on title to the land in dispute. He referred the Court to the portion of the judgement of my learned brother, Mohammed, JSC., on the issue which reads:

Learned counsel for the appellants made heavy weather of these amendments but failed to point out how the amendments affected their case before the Court or how it would entail injustice or surprise or embarrassment to them. To say that the Appellants were over reached by the amendments simpliciter without describing how the amendments affect their case before the Court is a hollow submission.

Professor Kasunmu, SAN, further submitted that the reason given by the court for striking out the two grounds was that leave was not obtained before they were filed and if the court had read the Reply brief, it would have discovered that leave was indeed sought and obtained and the remarks made by the Court as to the incompetence of the two grounds of appeal would not have been made.

He concluded that the germane issue in the appeal which is title to the land in dispute was not considered and in his view, it was a fundamental error. We were urged to set aside the judgment and order that the appeal be heard de novo by another panel.

Learned Senior Advocate of Nigeria referred the Court to the cases of Alao v. A.C.B. Ltd. (2000) 6 S.C. (Pt. 1) 27, (2000) 9 NWLR (Part. 672) 264, 271-273; 280-281 and 296, Ex parte, Pinochet Ugarte No. 2 (1999) 1 WLRL 272 and Olorunfemi & Ors. v. Asho (1999) 1 S.C. 55, (1999) 1 NWLR (Pt. 585) 1. In Asho's case (supra), this Court failed to consider the respondent's cross-appeal. A  motion to set aside the said judgment was brought. The Court granted the application and ordered that the appeal be re-heard by a panel different from that which heard it. I will say more on this later in the Ruling. Pinochet's case had to do with bias which is not the case in the application before the Court.

Chief K.K. Ogba, learned counsel for the respondents submitted that the application to set aside the judgment is contrary to Section 235 of the Constitution of the Federal Republic of Nigeria, 1999, and the provisions of Order 8, rule 16 of the Supreme Court Rules, 1999, as amended. It was his further contention that the applicants did not seek the leave of court to appeal on the sixth ground of appeal when they applied for leave to further amend the Notice of Appeal.

I have expressed my view on this point in this Ruling and I will not make further comments on it. The said ground of appeal was competent. Chief Ogba referred the Court to the case of Alao v. A.C.B. Ltd. (supra and submitted that Alao's case provided the only conditions upon which this Court can set aside its judgment.

The learned respondent's counsel referred the Court to Section 235 of the Constitution which makes provision for the finality of any determination of the Supreme Court and Order 8, rule 16 of the Rules of this Court which provides that the court will not review any judgment once given and delivered by it except to correct any clerical mistakes or some error arising from any accidental slip or omission, or to vary the judgment or order so as to give effect to its meaning or intention. These two provisions do not arise in the application before us.

I shall state that this court possesses inherent power to set aside its judgment in appropriate cases. Such cases are as follows:

(i)    When the judgment is obtained by fraud or deceit either in the court or of one or more of the parties. Such a judgment can be impeached or set aside by means of an action which may be brought without leave. See Alaka v. Adekunle (1959) LLR 76; Flower v. Lloyd (1877) 6 Ch.D. 297; Olufumise v. Falana (1990) 3 NWLR (Pt. 136) 1.

(ii)   When the judgment is a nullity. A person affected by an order of court which can properly be described as a nullity is entitled ex debito justitiae to have it set aside. See Skenconsult (Nig.) Ltd. v. Ukey (1981) 1 SC. 6, Craig v. Kanssen (1943) KB 256, 262 and 263; Ojiako & Ors. v. Ogueze & Ors. (1962) 1 All NLR 58, Okafor & Ors. v. Anambra State & Ors. (1991) 6 NWLR (Pt. 200) 659, 680.

(iii)    When it is obvious that the Court was misled into giving judgment under a mistaken belief that the parties consented to it. See Agunbiade v. Okunoga (1961) All NLR 119 and Obimonure v. Erinosho (1966) 1 All NLR 250.

In Olorunfemi v. Asho (supra)  (Suit No. SC. 13/1999), this Court in its unreported Ruling dated 18-3-99 set aside its judgment delivered on 8-1-99 on the ground that it failed to consider the respondent's cross-appeal before allowing the appellant's appeal. It ordered that the appeal be heard de novo by another panel of Justices of this Court. See generally Alao v. A.C.B. Ltd. (supra).

The applicant's application does not fall within any of the above cases. The nearest to it is Asho's case (supra), where the respondents’ cross-appeal was not considered by the court before allowing the appellant's appeal. The applicants are contending in this application that Issue (5) in their brief which was distilled from grounds 5 and 6 of their grounds of appeal was struck out as incompetent by Mohammed, JSC., who wrote the leading judgment and that the said issue involved a consideration of title to the disputed land.

I think one should draw a distinction between failure of the court to determine a cross-appeal and failure to determine one out of several issues in an appeal determined by the Supreme Court. A cross-appeal arises where two parties to a judgment are dissatisfied with it and each accordingly appeals. The appeal of each is called a cross-appeal in relation to that of the other. Each appeal is an independent and separate complaint by the parties even though both appeals are heard together. If the appellant withdraws or discontinues his appeal, a respondent/cross-appellant may proceed with his cross-appeal just as a counter-claimant in a civil suit may prove his counter-claim where the plaintiff discontinues his own action. In other words, an issue in an appeal cannot be equated with a cross-appeal, moreso, where the non-determination of an issue in the appeal is by the Supreme Court and not by an intermediate appellate court. Even in the latter case, the substantiality of the ground of appeal or issue which was not considered must have had a decisive effect on the judgment and a miscarriage of justice must have resulted. Therefore, applications to set aside the judgment of this Court should not be taken very lightly by litigants and should not be turned into an avenue of re-arguing an appeal which was dismissed.

In the instant application, it was contended that the failure of my learned brother, Mohammed, JSC., to consider Issue (5) in the appellant's brief which was germane to title to the land in dispute, was a fundamental error. In my opinion, the error was not such that warrants the order sought. The applicants failed to bring their case within any of the conditions under which this Court can grant the order sought.

The failure to consider Issue (5) in the leading judgment in the circumstances stated did not rob the judgment of its efficacy where the said issue was exhaustively considered and resolved against the applicants in one of the concurring opinions. It will be uncharitable on the part of the applicants to contend that Issue (5) was not considered by the Court and that the failure amounted to a denial of fair hearing. The inherent jurisdiction of the court to set aside its judgment cannot be converted to an appellate jurisdiction as though the matter before it is another appeal, intended to afford losing litigants yet another opportunity to re-state or re-argue their appeal.

It must be emphasised that this court is a court of final resort and under the Constitution, it cannot under any disguise sit on appeal over its judgment or review it except under very exceptional circumstances.

For the above reasons, I see no merit in the application and I hereby dismiss it with N1,000.00 costs to the respondents.

**A. B. WALI, JSC.:**

I have had a preview of the lead Ruling of my learned  brother, Ogwuegbu, JSC., and I agree with the reasons ably set out by my learned brother for dismissing the appellant/applicant's application to set aside the judgment of this court which was delivered on 15/2/2002. I adopt the reasons as mine.

The application brought on 20/2/2002 is hereby dismissed for want of merit with N1,000.00 costs to the Respondents.

**U. MOHAMMED, JSC.:**

I have had the advantage of reading the ruling of my learned brother, Ogwuegbu, JSC., in draft, and I agree with him that this court has no power to set aside its judgment on the grounds which the applicants have based their application.

There is no power in the Supreme Court to review or set aside its own judgment. It may however depart from a principle of law which it has previously laid down. Such a departure will not affect the efficacy of the previous judgment. In a recent full court's decision of this court, viz, Eleazor Obioha v. Innocent Ibero & Anor. (1994) 1 NWLR (Part 322) 503, this court reached the following conclusions:

By virtue of Section 215 of the 1979 Constitution, the Supreme Court cannot sit on appeal over its own judgment. The provision gives a stamp of finality to any decision of the Supreme Court. There is no constitutional provision for the review of the judgment of the Supreme Court by itself. Indeed there can be no appeal questioning the decision of the Supreme Court to itself or to anybody or person as there must be finality to litigation. Hence, the appellate jurisdiction of the Supreme Court is limited by Section 213(2) of the 1979 Constitution to hearing appeals from the Court of Appeal only and no more. In the instant case, the Supreme Court has no jurisdiction to grant the application since the purpose of the application is to challenge the correctness of the judgment of the Supreme Court delivered on the 26th of February, 1993 in SC. 91/88 and to seek rehearing of the appeal. (Cardoso v. Daniel (1986) 2 NWLR (Part. 201) 1; Adigun v. A.G. Oyo State (1987) 2 NWLR (Part 56) 197; Asiyanbi v. Adeniji (1967) 1 All NLR 861).

The facts which led to the decision above seems to be on all fours with the case in hand. The application seeking for the review of the judgment  which this court delivered on 26th February, 1993 was in fact asking for the judgment of this court to be set aside because, according to the applicants, this court made an accidental slip or omission whilst considering the point whether the appellants were entitled to judgment. In the application it was pointed out by the applicants that this court took the erroneous view that the respondent filed only two grounds of appeal in the respondent's Notice of Appeal and inadvertently failed to take notice of the two additional grounds of appeal to the Court of Appeal from the High Court. In view of this error the applicant came back to the Supreme Court and applied for the following orders:

(i)     directing a review of the judgment given in appeal SC. 91/1988 aforementioned as delivered on 26th day of February, 1993, and

(ii)     correcting some errors arising from accidental slip or omission in the judgment, to wit:- that the respondent in his appeal from the decision of the High Court to Court of Appeal filed only two grounds;

(iii)     discharging the order restoring the judgment of the High Court arising from the error arising (sic) from the accidental slip or omission;

(iv)     discharging the decisions of the Court in the judgment of 23rd February, 1993.

(a)     that the District Officer in Exhibit K assessed the capacities in which the parties sued and were sued from personal capacities to representatives capacities; and

(b)     that the District Officer in Exh. K has no authority to alter the capacities in which the parties sued and were sued from personal capacities to representatives capacities;

(v)     discharging the decision of the court in the judgment of 23/2/93 that there was no basis for the decision of District Officer in which Exh. K, the native court judgment upon the respondents plea of estoppel rested to the effect that the native court action was fought or prosecuted in representative capacities;

(vi)     ordering the rehearing of the appeal in this court or the rehearing of the appeal in the Court of Appeal or the retrial of the case itself.

This Court unanimously dismissed the application of Eleazor Obioha and held, per Belgore JSC., what this court is being asked to do is to review its judgment, not to correct clerical errors or errors from accidental slip or omission but to overturn the judgment already given. This court has consistently refused to be dragged into this pitfall. The purpose of this application is clear, it is an appeal cloaked in the guise of a motion. The Chief Justice in his contribution referred to S. 215 of the 1979 Constitution which provided that the decision of this court was final. Kutigi, JSC., also agreed with Belgore, JSC.,'s ruling and said that it was settled law that this court had no power to change its own judgment or sit as an appeal court over its own judgment. In the same judgment the decision of Obaseki, JSC., in the case of Adigun & Ors. v. Attorney-General of Oyo State & Ors. (1987) 2 NWLR (Part 56) 197, was referred to. In that case Obaseki, JSC., reproduced the provisions of Section 215 of the Constitution which reads:

Without prejudice to the powers of the President or of the Governor of a state with respect to the prerogative of mercy, no appeal shall lie to any other body or person from any determination of the Supreme Court.

Obaseki, JSC., went further and said:

This provision gives a stamp of finality to the determination by the Supreme Court. There is no constitutional provision for the review of the judgments of the Supreme Court by itself. Indeed, if there were, it would constitute an appeal into which the present application falls. But as the Constitution and the law now stand, there cannot be an appeal questioning the decision of the Supreme Court to itself or to anybody. This is good for the integrity of the court as there must be finality to litigation when a matter has undergone two, three or four appeals.

The decision of this court in the case of Obioha v. Ibero (supra) has established beyond any doubt that there is no constitutional provision for the review of the judgment of the Supreme Court by itself. It will not be possible for this court to set aside its judgment without reviewing its decision. The moment this court delivered its judgment, subject to slip rule principle, it becomes functus officio. For these reasons and fuller reasons in the ruling of my learned brother, Ogwuegbu, JSC., this application is dismissed. I grant N1,000.00 costs to the respondents.

**U. A. KALGO, JSC.:**

I have read in advance the ruling of my learned brother, Ogwuegbu, JSC., in this application which has just been delivered. I entirely agree with the reasoning and the conclusions reached therein which I adopt as mine. I have nothing useful to add. I therefore find no merit in the application. I dismiss it and abide by the order of costs made in the leading ruling.

**I. L. KUTIGI, JSC. (Dissenting):**

This is a Motion On Notice brought pursuant to the inherent jurisdiction of the Court by the Appellants/Applicants praying for the following orders:-

1.     An order setting aside the judgment of this Honourable Court contained in the lead judgment of Uthman Mohammed, JSC., delivered on the 15th of February, 2002.

2.       An order directing that the appeal be argued de-novo before a new Panel of the Court.

3.       And for such order or further orders as this Honourable Court may deem fit to make in the grounds for the application are as contained in the schedule attached to the motion. It reads-

THE SCHEDULE GROUNDS FOR THE APPLICATION

1.       There was a denial of fair hearing when the Court struck out grounds 5 and 6 raised in the Notice of Appeal filed on the 9th September, 1999, and argued as Issue 5 in the Appellant's Brief, which issue touched on the title to the land in dispute on the ground that no leave of court was obtained to argue those grounds when  in fact leave was applied for and granted.

2.       The learned Justice of the Supreme Court who read the lead (majority) Judgment did not and could not have read the Appellant's Reply Brief dated 19th November, 2001, when he stated in his judgment:

(a)     That there was no reaction by the Appellant to the Respondent's allegation that no leave of Court was obtained when in fact this issue was addressed on page  4 paragraph 1 of the Reply Brief, and

(b)     When the learned Justice in dealing with Issue No. 2 stated at page 8 paragraph 2 as follows:

Learned Counsel for the Appellants made heavy weather of these amendments but failed to point out how the amendments affected their case before the Court or how it would entail injustice or surprise or embarrassment to them. To say that the Appellants were over-reached by the amendment simpliciter without describing how the amendments affected their case before the Court is a hollow submission.'

When in fact at pages 1, 2 and 3 of the Reply Brief the Appellant catalogued the miscarriage of justice occasioned by the grant of the application to amend the pleadings and the documentary evidence, to wit: the plans before the Court.  
The Application was supported by a 17 - paragraphed affidavit sworn by one Olusola Odeyinka, a litigation officer in the Chambers of Prof. A.B. Kasunmu SAN, Counsel for the Appellant/Applicants. I consider the following paragraphs of the affidavit quite relevant –

4.     That Judgment was delivered by the Supreme Court in this matter on the 15th of February, 2002, wherein the appeal of the Appellant was dismissed by three to the five Judges who presided over the appeal.

5.     That the lead (majority) Judgment was read by Uthman Mohammed, JSC., with A.B. Wali, JSC., and E. O. Ogwuegbu, JSC., concurring while I.L. Kutigi, JSC., and U.A. Kalgo, JSC., dissented.

6.     That the Appellant's Brief was filed on the 7th of June, 1999, whilst the Respondent's Brief was filed and served on the Appellant's Counsel on the evening of Thursday, the 15th of November, 2001.

7.     That the appeal was argued on the 19th of November, 2001, on which day the Appellant filed its Reply to the Respondent's Brief with copies of same duly made available to the Court.

8.    That in the lead (majority) judgment of Mohammed, JSC., the learned Justice who read the lead Judgment struck out grounds 5 and 6 of the Appellant's grounds of appeal which grounds formed the subject matter of Issue 5 raised in the Appellant's Brief.

9.    That the two grounds struck out raised the issue of title to the land in dispute and the non-consideration and determination of these grounds of appeal was prejudicial to the case of the Applicant.

10.    That the reasons given in the lead (majority) judgment for striking out those grounds of appeal was that the Appellant did not in its Reply Brief dispute the contention of the Respondent's Counsel that those grounds of appeal are incompetent as no leave of Court was obtained to argue those grounds.

11.   That I am informed by Miss O.M. Lewis and I verily believe same to be true that contrary to the fact as stated in the lead judgment, leave of this Honourable Court in respect of grounds 5 and 6 was obtained on the 9th of July, 1996 and this was so stated on page 4 of the Reply to the Respondent's Brief. Attached herewith and marked as Exhibit A is the application to appeal on grounds other than grounds of law and the order of Court granting the said application.

12.   That in resolving Issue No. 2 against the Appellant, the Honourable Justice Mohammed, JSC., at page 8 of the lead Judgment also stated as follows:

Learned Counsel for the Appellant made heavy weather of these amendments but failed to point out how the amendments affected their case for the Court or how it would entail injustice or surprise or embarrassment to them. To say that the Appellants were over-reached by the amendments simpliciter without describing how the amendments affect their case before the Court is a hollow submission.'

13.   That it is of course incorrect that the prejudice created by the granting of the amendment was not stated by the Appellants as all these were set out on pages 1, 2 and 3 of the Reply to the Respondent's Brief.

14.   That I am informed by Miss. O. M. Lewis and I verily believe that the statements attributed to the Honourable Justice of the Supreme Court who read the lead (majority) Judgment could not have occurred if cognizance had been taken of the Reply to the Respondent's Brief filed by the Appellant before the Court.

15.     That the error on the part of the Honourable Justice who read the lead (majority) judgment has resulted in a miscarriage of Justice, as Judgment would have been given in favour of the appellant or at worst the case would have been sent back for retrial.

The Appellants/Applicants also relied on the following documents which were already before the Court:-

a.       The Record of Appeal

b.       The Exhibits

c.       The Appellants' Brief filed on the 7th of June, 1999

d.       The Respondents' Brief filed on the 15th of November, 2001

e.       The Reply to the Respondents' Brief filed on the 19th November, 2001

f.       The judgments of the five Justices delivered on the 15th of February, 2002.

The application was moved by learned Counsel for the appellants/ applicants, Professor A.B. Kasunmu SAN. He relied on the grounds for the application as contained in the Schedule attached to the application above. He also relied on the affidavit and the documents already in Court referred to above. It was stressed that the singular act of erroneously striking out grounds 5 & 6 of the Grounds of Appeal as well as issue (5) which directly touched on the title to the land in dispute, the effect was as if the appeal was never heard at all. That issue (5) was the meat of appellant's case. He said the Appellants' Reply brief clearly showed the Appellants properly reacted to the question of leave raised or alluded to by the Respondents in their brief and that the Appellants never conceded the point as stated in the majority lead judgment of the Court. That issue (5) being the Appellants' main issue in the appeal was never considered. Failure to consider issue (5) was a fundamental error which has occasioned a miscarriage of justice. The following cases were cited in argument - Gbadamosi Sanusi Olorunfemi & Ors. v. Chief Rafiu Eyinle Asho (2000) 1 S.C. 15, (2000) 2 NWLR I (Pt. 643) 143, Alhaji Alao v. A.C.B. Ltd. (2000) 9 NWLR (Pt. 672) 264, Awote v. Owodunni (1986) 5 NWLR (Pt. 46) 941.

The Court was urged to grant the application as prayed.

Chief Ogba, learned Counsel for the Respondents opposed the application. He filed a Counter-Application which I find quite irrelevant to this application. He said the application was contrary to Section 235 of the 1999 Constitution and Order 8 Rule 16, Rules of the Supreme Court. He said Appellants/Applicants' issue (5) which was struck out by the lead majority judgment of this Court was not germane to the appeal. That the leave of this Court which was obtained by the Appellants was in respect of the 1st Amended Notice of Appeal only and did not affect the 2nd Amended Notice of Appeal by the Appellants. That the application is an attempt to appeal through the backdoor. The case of Alhaji Alao v. A.C.B. Ltd. (supra) was cited in support. We were urged to dismiss the application.

Because of the nature of the order which I intend to make finally in this Ruling, I ought to be brief. First of all I think reliance placed by Chief Ogba, learned Counsel for the Respondents on Section 235 of the Constitution and Order 8 Rule 16 of the Supreme Court Rules is clearly misplaced. The provisions of the Constitution and the Rules respectively deal with the finality of any determination of the Supreme Court and a review of the judgment of the Supreme Court. These are not the issues involved in this application. This application is only asking us to set aside our own judgment and to re-hear the appeal fresh because of the circumstances and or reasons set out in the supporting papers for the application.

On the question of whether or not leave to file grounds 5 & 6 was obtained before they were filed by the Appellants, the lead judgment after setting down the two grounds resolved as follows-

It is axiomatic that the Respondents' Counsel is right that ground 5 has been erroneously coined ground of law. It is at best ground of mixed law and fact. Ground 6 is definitely a ground of facts only. These two grounds could only be argued after obtaining the necessary leave of this Court or the Court below. The appellants have not reacted to this objection in their Reply brief. Since they have not done so I will regard their silence as accepting that the objection is meritorious, therefore strike out grounds 5 & 6 and the issues formulated on them.

And the issue formulated on grounds 5 & 6 which was struck-out reads:-

5.     Whether the respondents had established a claim to the land in dispute and whether in the circumstance of the case, the test for resolving conflicting traditional evidence was applicable and properly applied.

The Appellants/Applicants have convincingly demonstrated in this Court that they did not only react to the leave question but had also filed a Reply brief contrary to the holding above. In the Reply brief they gave 9th July 1996 as the date leave of this Court was obtained. The point therefore at which to resolve the question of whether or not the Appellants obtained leave is not now. It could only have been properly resolved at the hearing of the appeal where the issues were joined and which stage has long been passed as shown in the decision above. It was never decided then.

Now back to the question before the Court. The Supreme Court and indeed any Court of law, has in my view, inherent power and jurisdiction to set aside its own judgment or decision in appropriate cases. These will include –

(1)    When the judgment was obtained by fraud; or

(2)    When the judgment is a nullity such as when the Court itself was not competent; or

(3)    When the Court was misled into giving judgment under a mistaken belief that the parties had consented to it; or

(4)   Where judgment was given in the absence of jurisdiction; or

(5)   Where the procedure adopted was such as to deprive the decision or judgment of the character of a legitimate adjudication.

(see generally Alao v. A.C.B. Ltd. (supra), Madukolu & Ors. v. Nkemdilim (1962) All NLR (Part 2) 581.

In the case of Gbadamosi Sanusi Olorunfemi & Ors. v. Chief Rafiu Eyinle Asho (supra), referred to by Prof. Kasunmu, this Court set aside its own judgment earlier reported in (1999) 1 S.C. 55, (1999) 1 NWLR (Pt. 585) 1 and ordered a fresh hearing of the appeal because the Court failed or inadvertently forgot to consider the cross-appeal of the Respondent in the same appeal. That was proper, I believe. The procedure of considering a main appeal and leaving out a cross-appeal, would certainly in my view be one which would have deprived the decision or judgment of the character of a legitimate adjudication.

So in the instant case, the Appellants/Applicants' principal or main issue (5) which relates to the title to the land in dispute is certainly germane to their appeal. Issue (5) is in my view wrongly excluded and which exclusion has clearly deprived the majority lead judgment of the character of a legitimate adjudication. To borrow the words of Prof. Kasunmu, it is as if the Appellants/Applicants were never heard at all. I agree. This does not mean that issue (5) if taken at all will be resolved in favour of the Applicants as that will be pre-emptive of the result of the appeal. But the issue as it stands, if resolved in favour of the applicants will certainly have a positive effect on the lead majority judgment as it now stands. This is however not the time to say  whether the issue will succeed or fail in the appeal. It is enough now if the issue is substantial, germane and positive. I say it is. The Appellants/Applicants therefore deserve to be heard again. This is fundamental to any legitimate and lawful adjudication.

Consequently the application succeeds. It is hereby allowed by me. I accordingly order as follows-

1.   The judgment of this Honourable Court contained in the lead majority judgment of Uthman Mohammed, JSC., delivered on the 15th of February, 2000 is ex debito justitiae set aside.

2.   The appeal No. SC/26/96  is hereby directed to be argued de novo before a new Panel of the Court.

3.       There shall be no order as to costs.