ORIGINAL

IN THE COURT OF APPEAL
EKITI JUDICIAL DIVISION
HOLDEN AT ADO-EKITI

ON TUESDAY THE 17TH DAY OF APRIL, 2018

BEFORE THEIR LORDSHIPS:

HON. JUSTICE JOSEPH SHAGBAOR IKYEGH - JUSTICE, COURT OF APPEAL
HON. JUSTICE BOLOUKUROMO MOSES UGO - JUSTICE, COURT OF APPEAL
HON. JUSTICE MOHAMMED MUSTAPHA - JUSTICE, COURT OF APPEAL

APPEAL NO. CA/EK/8C/2017
SUIT NO. FHC/AD/CS/27/2016

BETWEEN:

THE ECONONMIC AND FINANCIAL CRIMES COMMISSION .....APPELLANT

AND

1. **MR. AYODELE FAYOSE (GOVERNOR OF EKITI STATE)** } **... RESPONDENTS**
2. **ZENITH BANK PLC**

RULING

DELIVERED BY HON. JUSTICE JOSEPH SHAGBAOR IKYEGH (JCA)

This is a motion on notice seeking for the leave of the Court to adduce fresh evidence on appeal. Prayer 1 of the motion paper states-

> **"An ORDER of this Honourable Court granting leave to the Appellant to adduce fresh evidence to wit: Motion Ex-parte and**

affidavit in support of same dated the 24th day of June, 2016 in Suit No. FHC/L/CS/871/2016 BETWEEN FEDERAL REPUBLIC OF NIGERIA AND ZENITH BANK PLC to enable this Honourable Court come to a justicable conclusion as to whether the Appellant suppressed or concealed any material facts before Hon. Justice M. B. Idris before granting the an order of attachment dated 24th June, 2016"

The grounds in support of the motion state verbatim thus:

1. **That on the 24th day of June, 2016 the appellant filed a motion ex-parte dated same date for interim order of attachment of the 1st Respondent's Accounts which are suspected to have warehoused proceeds of unlawful activities.**
2. **That after considering the said motion, the affidavit in support of same and the exhibit attached his Lords, Hon. Justice M. B. Idris granted the application.**
3. **That on the some day the 1st Respondent filed Suit No. SUIT NO: FHC/AD/CS/27/2016 the 1st Respondent, the Appellant and Zenith Bank Plc at the Federal High Court, Ado-Ekiti Judicial Division.**

4. That in its pleading before the court below, the 1st Respondent did not allege that the Appellant suppress or conceal material facts to put the Appellant on notice of the evidence to adduce before the court below to dislodge the allegation.
5. That the 1st Respondent raised the issue of suppression of facts against the Appellant for the first time in course of oral adumbration of its address after pleadings have closed.
6. That there was no opportunity for the Appellant to adduce the evidence sought to be adduced before the lower Court because the issue was not part of the 1st Respondent's pleading.
7. That the lower court, Coram Taiwo O. Taiwo delivered a judgment on the 13th day of December, 2016 and found that the Appellant suppressed facts based on the 1st Respondent oral allegation and exhibit EFCC 09.
8. That the evidence sought to be adduced are crucial to the just determination of this case.
9. That the 1st Respondent is still contending before this Honourable Court that the Appellant suppressed material facts before Hon. Justice M. B. Idris.
10. That this Honourable Court has power and judicial discretion under ORDER 4 RULES 2, OF

THE COURT OF APPEAL RULES 2016, to grant this application.

11. **This Honourable Court is statutorily empowered to guarantee fair hearing in the course of its adjudication on issues between parties before it.**
12. **The Appellant will not be prejudiced by this application"**

While the affidavit accompanying the motion deposed unedited as follows:

"1. That I am one of the prosecuting counsel in the Legal Department of the Economic and Financial Crimes Commission.

2. That I am conversant with the facts deposed herein having delivered the same in the course of my duties as an officer of the Applicant.

3. That I have the consent and authority of the Executive Chairman of the Economic and Financial Crimes Commission to depose to this affidavit.

4. That on the 24th day of June, 2016 the Appellant filed a motion ex-parte dated same date for interim order of attachment of the 1st Respondent's Accounts which are suspected to have warehoused proceeds of unlawful activities. Attached and marked exhibit **EFCC**

01 is copy of the said ex-parte application filed by the Appellant before Hon. Justice M. B. Idris.

5. That after considering the said motion, the affidavit in support of same and the exhibit attached his Lords, Hon. M. B. Idris granted the application. Attached and marked exhibit **EFCC 02** is copy of the said order.

6. That on the some day the 1st Respondent filed Suit No. SUIT NO: FHC/AD/CS/27/2016 the 1st Respondent, the Appellant and Zenith Bank Plc at the Federal High Court, Ado-Ekiti Judicial Division.

7. That in its pleading before the court below, the 1st Respondent did not allege that the Appellant suppress or conceal material facts to put the Appellant on notice of the evidence to adduce before the court below to dislodge the allegation.

8. That the 1st Respondent raised the issue of suppression of facts against the Appellant for the first time in course of oral adumbration of its address after pleadings have closed.

9. That the 1st Respondent's originating processes and the judgment of the lower court has been compiled and transmitted before this Honourable Court.

10. That there was no opportunity for the Appellant to adduce the evidence sought to be adduced before the lower court because the issue was not part of the 1st Respondent's pleading.

11. That the Appellant was unable to adduce this evidence because it was ambushed before the lower court by the 1st Respondent who was allowed to go outside its pleadings by raising allegation suppression of fact orally.

12. That the lower court, Coram Taiwo O. Taiwo delivered a judgment on the 13th day of December, 2016 and found that the Appellant suppressed facts based on the 1st Respondent's oral allegation. Attached and marked exhibit **EFCC 03** is copy of the said judgment.

13. That the evidence sought to be adduced are crucial to the just determination of this case.

14. That the 1st Respondent is still contending before this Honourable Court that the Appellant suppressed material facts before Hon. Justice M. B. Idris.

15. That the evidence sought to be adduce will undoubtedly establish before this Honourable Court that the Appellant did not suppress the facts that some of the account attached by the

order of Hon. Justice M. B. Idris are in the name of the 1st Respondent.

16. That this Honourable Court has power and judicial discretion under ORDER 4 RULES 2, OF THE COURT OF APPEAL RULES, 2016, to grant this application.

17. This Honourable Court is statutorily empowered to guarantee fair hearing in the course of its adjudication on issues between parties before it.

18. The Appellant will not be prejudiced by this application.

19. That it will advance the course of justice if this application is granted"

The 1st Respondent opposed the motion with a counter affidavit sworn to on 23rd day of March, 2018 unedited thus-

"1. That I am the Deponent herein and one of the counsel working closely with the lead Counsel, Chief Mike Ozekhome, SAN, the Chief Counsel/Head of Chambers, of Mike Ozekhome's Chambers, of Counsel to the 1st Respondent herein.

2. That by virtue of my position aforesaid, I am conversant with the facts deposed herein, except as may be stated otherwise.

3. That I have the consent of Chief Mike Ozekhome, SAN, the lead Counsel and that of the 1st Respondent, Mr. Ayodele Fayose, the Governor of Ekiti State, to depose to this counter affidavit.

4. That at a meeting held on the review of this case, at our office, 40/42, Ajilosun Street, Ado-Ekiti, Ekiti State, on Monday, 19th March, 2018, at about 4.00p.m., I was informed by Chief Mike Ozekhome, SAN, lead counsel to the 1st Respondent herein, of the following facts and I verily believed him to be true, as follows:

(a) That as the lead counsel to the 1st Respondent and having been fully involved in the conduct of this case, he is fully seized of the facts hereinafter stated

(b) That he has read through a copy of the Appellant/Applicant's Motion to adduce fresh evidence, which said motion is dated 12th day of March, 2018, but filed 13th day of March, 2018 and other accompanying processes, to wit: affidavit in support, as well as the various exhibits attached thereto.

(c) That he knows as a fact that the entire depositions contained in the affidavit support, as deposed to by one Rotimi Oyedepo Iseoluwa, are replete with inconsistencies and deliberate falsehood

meant to mislead this Honourable Court.

(d) That contrary to the averment in paragraph 3 of the said affidavit in support, he knows as a matter of fact that the Appellant/Applicant does not have an Executive Chairman to have given consent to the deponent to depose to the facts contained therein, as the present occupant of that office, is in acting capacity.

(e) That he knows as a fact that the Applicant has not satisfied the conditions for the grant of leave to adduce fresh evidence on appeal, as provided for by decided cases on this issue.

(f) That contrary to the erroneous conclusion reached by the Appellant/Applicant, to the effect that, the funds in question are proceeds of unlawful activities, he knows as a fact that, no one including the 1st Respondent, has been convicted by a court of competent jurisdiction declaring the source of the funds as illegal.

(g) That he knows as a fact that it is only a court of competent jurisdiction that can pronounce someone guilty of a crime or an offence, none of which has yet happened to Ayodele Fayose, the sitting Governor of Ekiti State, who enjoys

immunity from prosecution by the constitution.

(h) That till date, no Court of competent jurisdiction in Nigeria or elsewhere else, has ever tried, let alone finding Mr. Ayodele Fayose, the incumbent Governor of Ekiti State, Mr. Musiliu Obanikoro, the Former Minister of State for Defence, Col. M. S. Dasuki (RTD), the former National Security Adviser, and Mr. Abiodun Agbele, guilty of any fraud, conspiracy, proceeds of crime, Money laundering, or any offence howsoever, such as to conclude, as done by the Applicant before this Honourable Court and also before Justice Taiwo, of the Federal High Court, Ado Ekiti, that the funds in the 1st Respondent's accounts are proceeds or suspected proceeds of crime, or based on money laundering.

(i) That as at time the 1st Respondent filed the suit that led to the instant appeal, the facts available to the 1st Respondent was that his accounts kept with the 2nd Respondent were frozen by it, acting on the basis of a mere letter dated 20th June, 2018, written to the 2nd Respondent by the Appellant/Applicant herein.

(i) That as at the time the present suit leading to this appeal was filed, the Appellant had not obtained the order

contained in Exhibit EFCC 02 herein. The accounts of the 1st Respondent were frozen based on a mere letter not on the above Exhibit EFCC 02.

(k) That he knows as a fact that it was the Appellant/Applicant in trying to justify its action and in response to the 1st Respondent's Originating Summons filed on 24th June, 2018, that it attached Exhibit EFCC 02 herein, as Exhibit EFCC 09 to its counter affidavit in the suit before the trial court.

(l) That the 1st Respondent's reply was in response to the facts as contained in the said Exhibit EFCC 09, as there was absolutely nothing to show from the said exhibit that the monies in question belong to the 1st Respondent, notwithstanding the mere allegations in the exhibit that the money was proceed of crime.

(m) That contrary to the averments contained in the affidavit in support, the issue of suppression of material facts only arose upon the filing of the Appellant/Applicant's counter affidavit to which it had attached Exhibit EFCC 09.

(n) That contrary to the averments specially contained in paragraphs 10 and 11 of the affidavit in support, the Appellant/Applicant who had supplied the trial court with a total of nine (9) different exhibits including Exhibit EFCC 09, had ample time and opportunity to

have furnished the court below with Exhibit EFCC 01 herein, being processes filed by it, that led to its obtaining Exhibit EFCC 09, but it failed, refused and or neglected to do so, for reasons best known to it.

(o) That he knows as a fact that the trial court had specially granted the Appellant/Applicant herein an adjournment, upon his own request, to specially respond to the issue of suppression of material fact, which he alleged was raised by the 1st Respondent's counsel at the time of adumbrating on his oral submission.

(p) That it is not for the 1st Respondent to have gone fishing for processes filed by the Appellant before Honourable Justice M. B. Idris, as the parties based their argument, and the trial court also its judgment, on the available processes (i.e. Exhibits as front loaded by the parties), before the trial court.

(q) That contrary to the depositions in paragraph 12 of the affidavit in support, the finding of the trial court that the Appellant/Applicant suppressed material facts was not based entirely on the oral submission of the learned counsel to the 1st Respondent, but due largely to the trial court's own assessment (pages 50 and 51 of the judgment, pages 622 and 623 of the record), of the available evidence, Exhibit EFCC 09, as provided by the Appellant herein.

(r) That he verily believes that since the decision of the trial court unfreezing the said accounts was not based on the issue of whether or not the Appellant herein suppressed material facts, the evidence sought to be adduced is not crucial to the just determination of this appeal.

(s) That the evidence for which leave is being sought by the Appellant, though readily available to the Appellant, was never made available to the trial court by the Appellant herein.

(t) That he verily believes that the evidence sought to be produced will not have any effect on the decision of the trial court as its decision was not predicated solely on the issue of suppression of material fact, but on other factors.

(u) That it will be in the best interest of justice to dismiss the instant motion as same is lacking in merit and will serve no useful purpose.

(v) That the 1st Respondent will be greatly prejudiced if the application is granted.

(w) That it is in the interest of justice to refuse the application for injunction pending appeal being sought by the applicant herein"

The appellant's learned counsel moved the motion and relied heavily on the affidavit in support of the motion and the four (4)

Exhibits attached thereto read with order 4 rule 2 of the Court of Appeal Rules 2016 (Rules of the Court) to urge that the affidavit evidence particularly paragraphs 4-15 thereof disclosed special circumstances to warrant the granting of the application which should be succeed and that the 1st respondent will not be prejudiced if the application is granted.

The 1st respondent relied on counter affidavit filed on 23rd day of March, 2018 to contend that the appellant did not establish special circumstances and therefore did not meet the requirements for a grant of the application which should be refused as to grant it would prejudice the 1st respondent vide ***Uzodima v. Ezuanoso (2011) 17 NWLR (Pt. 1275) 30 at 54-55, G and T investment Ltd. V. Witt Busch Ltd. (2011) 8 NWLR (Pt.1250) 500 at 527*** and Order 4 rule 2 of the Rules of the Court.

The affidavit (supra) of the appellant is copious. Likewise, the counter affidavit (supra) of the 1st respondent. In my opinion, there was no need for reply affidavit. The motion to file reply affidavit out of time filed on 13th day of April, 2018 having not been moved before the motion was heard is deemed abandoned and is hereby struck out.

All that would resolve the dispute one way or the other with regard to the present application is contained in the record. The crucial question is whether the appellant established special circumstances to entitle it to the prayer (supra) sought in the motion paper. Order 4 rule 2 of the Rules of the Court relevant to the application provides:-

> ***"The Court shall have power to receive further evidence on questions of fact, either by oral examination in Court, by affidavit, or by deposition taken before an Examiner or Commissioner as the Court may direct, but, in the case of an appeal from a judgment after trial or hearing of any cause or matter on the merits, no such further evidence (other than evidence as to matters which have occurred after the date of the trial or hearing) shall be admitted except on special grounds". (my Emphasis)***

Case law developed the principle for the consideration of this specie of application based primarily on special circumstances to the effect that conditions under which an application to adduce fresh or additional evidence on appeal are first that the evidence sought to be adduced is such that could not have been obtained

with reasonable care or diligence for use at the trial or is a matter that may have occurred after the judgment in the trial Court.

The second condition is that if fresh evidence is admitted it will have an impacting but not necessarily crucial effect on the whole case; third, that the evidence sought to be adduced must be credible, in the sense that it is capable of being believed even if it may not be incontrovertible; fourth that such evidence may have influenced the judgment of the lower court in favour of the applicant if it had been adduced thereat; and fifth that the evidence is material and weighty, even though it need not be conclusive. These conditions must be satisfied cumulatively before the application can be granted. See ***Onwubuari v. Igboasonyi (2011) ALL FWLR (Pt. 569) 1059, Gambari V. Ibrahim (2011) ALL FWLR (Pt. 595) 261, Iweka V. S. C. O. A. Nigeria Limited (2000) FWLR (Pt. 15) 2524, U. B. A. Limited V. BTL Industries Limited (2005) 10 NWLR (Pt.933) 356, A. I. C. Ltd V. N. N. P. C. (2005) ALL FWLR (Pt. 270) 1945, Musa V. Kadri (2006) ALL FWLR (Pt. 295) 758, Uzodinma V. Izuanoso (supra).***

Here the additional or fresh evidence sought to be adduced is contained in an ex-parte application filed on 14th day of December, 2016 showing it was in existence at the time the action on appeal commenced. What constitutes "reasonable

diligence" is a matter of fact, therefore the affidavit evidence must depose to facts substantiating or evidencing the exercise of reasonable diligence or care in the search for the fresh evidence. It cannot be otherwise because the phrase "diligence" means among other things conscientiousness in paying proper attention to a task or giving the degree of care require in a given situation. It is akin to painstaking, scrupulous, meticulous, farsighted or circumspect endeavour. The affidavit in support of the application did not contain facts substantiating the fact of the exercise of reasonable diligence in the search for the additional or fresh evidence.

It has to be appreciated that an application of this nature is not granted as a matter of course. It calls for judicious use of discretion by the Court entertaining the application. Thus in the case of ***U. B. A. Limited V. BLT Industries Ltd (supra) at 371*** the Supreme Court held per the lead judgment prepared by Oguntade, J.S.C., that:

> ***"The discretion to grant party the liberty to call new evidence on appeal is one sparingly exercised. This is because its indiscriminate use portends great danger for the administration of justice. .....It is***

the normal expectation therefore that parties would diligently bring before the court all the evidence needed in support of their case including all documents.

Human experience shows that we often get wiser after an event. When judgment has been given in a case, parties with the advantage of what the court said in the judgment get a new awareness of what they might have done better or not done at all. If the door were left open for everyone who has fought and lost a case at the court of trial to bring new evidence on appeal, there would be no end to litigation and all the parties would be the worse for that situation. There is no doubt that there is jurisdiction and power in the court to allow fresh evidence on appeal but it is a power which has been used only in exceptional circumstances."

See also ***Asaboro v. Aruwaju and Anr (1974) 4 S.C. 119 (Reprint), Okpanum V. S. G. E. (Nig.) Ltd. (1998) 7 NWLR (Pt. 559) 537.***

In the Privy Council case of **Turnball v. Doral (1902) AC 429** followed by the Supreme Court in **Iweka (supra),** for example,

the fresh evidence in a document which could have been obtained by discovery during trial proceedings was not allowed to be let in which resulted in the refusal of the Privy Council to order a new trial of the case.

Pages 560-561 of the record disclosed that the appellant's learned counsel at the court below expressed the intention that if time was available he would have filed better and further affidavit to "place on oath..... the issue of suppression of fact to show that there was no suppression of material facts before Justice Idris." This was on 30th day of September, 2016. The court below then adjourned the matter for continuation on 7th day of November, 2016. The case resumed hearing on 7th day of November, 2016 and thereafter till judgment was delivered on 13th day of December, 2016 without the appellant filing further and better affidavit to supply the materials constituting the fresh evidence sought to be adduced on appeal in this case.

Also, being a public document under section 102 of the Evidence Act 2011 (Evidence Act) secondary evidence of the fresh evidence in question comprising court processes of the Federal High Court, Lagos which were in existence at the time the action giving rise to the present appeal was filed at the court below produced in certified true copies thereof would have been

admissible under sections 104 and 105 of the Evidence Act and could have been tendered even at the bar for that purpose vide **Ogbunyiya and Ors v. Okudo and Ors (1979) NSCC 77.**

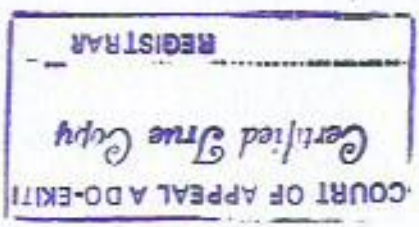
There was thus opportunity for the appellant at the court below to put in evidence the materials comprising the fresh evidence intended to be adduced on the appeal.

In the result, I find no merit in the application and hereby dismiss it without costs.

HON. JUSTICE JOSEPH SHAGBAOR IKYEGH
JUSTICE COURT OF APPEAL

APPEARANCES:

Mr. O. Rotimi for the Appellant/Applicant.
Chief M. Ozekhome, SAN (with Mr. S. N. Asadu and O. Uche, Esq.) for the 1st Respondent.
Mr. O. Ayinde for the 2nd Respondent.



APPEAL: CA/EK/8C/2017

BOLOUKUROMO MOSES UGO

I had the privilege of reading in draft the ruling just delivered by my learned brother **Joseph Shagbaor Ikyegh J.C.A.** and I agree with him. The principles an appellate court must take into consideration in the judicious exercise of its power to grant leave to adduce new evidence are as follows:

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

2. In respect of other than (1) above, as for instance in respect of matters which occurred at the trial or before judgment, or in respect of an open from a judgment after a hearing on the merits, the court will admit such fresh evidence only o/n grounds as provided for under Order 4 Rule 2 of the Court of Appeal Rules.

3. The evidence to be adduced should be such as if admitted, it would have an important, not necessarily crucial effect on the whole case.

4. 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 *Akanbi v. Alao* (1989) 3 NWLR (PT 108) 118.

Mr. Oyedepo for applicant, apparently realizing that these conditions were not fulfilled by appellant's application, suggested that it should nevertheless be granted in the interest of justice. He did not elaborate beyond that. I am afraid that is not sufficient. Interestingly, in the same *Akanbi v. Alao* (1989) 3 NWLR (PT 108) 118 @ 157-158 paras F-A, Oputa, J.S.C. dismissed a similar submission thus:

> "..... the aim of all adjudications in our courts should be the attainment or furtherance of justice. This however should not be an abstract justice, nor should it be subjective justice. **Rather it should** be fair and even handed justice, **justice according to law.**
>
> Whenever anything is said to have been done "in furtherance of justice" one gets easily taken in. That however should not be the case, until one is quite clear and quite sure of what exactly that expression comprehends and / or means. For unless and until what is meant is clear such expressions like "furtherance of justice" or interest of justice" may cover a "multitude of sins." Expressions like "furtherance of justice" or "interest of justice" may in the end be a covering for injustice.
>
> .....

"Also a decision given without due regard to all our decided cases in point; given against all known principles can hardly be said to have been given in "furtherance of justice".

It is for this little bit and the fuller reasons of my learned brother in the lead ruling, which I adopt as mine, that I also dismiss this application.

BOLOUKUROMO MOSES UGO
JUSTICE, COURT OF APPEAL

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19/10/2018

CA/EK/8C/2017

HON. JUSTICE MOHAMMED MUSTAPHA, JCA

I have had the privilege of reading a draft and copy of the ruling just delivered by my learned brother, **Joseph Shagbaor Ikyegh,** J.C.A; I agree with the reasoning and conclusion, and adopt it as mine.

HON. JUSTICE MOHAMMED MUSTAPHA
JUSTICE, COURT OF APPEAL

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