

# IN THE SUPREME COURT OF NIGERIA

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Suit No: SC383/2001

**Petitioner:** Mohammed Mari Kida

And

**Respondent:** A.D. Ogunmola

Date Delivered: 2006-06-16

**Judge(s):** Idris Legbo Kutigi , Aloysius Iyorgyer Katsina-Alu , Dahiru Musdapher , Ignatius Chukwudi Pats-Acholonu , George

## Judgment Delivered

In the High Court of Justice of Borno State of Nigeria, in the Maiduguri Judicial Division and in suit No. M/391/94, the plaintiff claimed against the defendants as follows:- .

(a) An order for specific performance compelling the defendants jointly and severally to conclude the agreement for assignment in respect of property situate and lying at No. 4A Ahmadu close Damboa Road, GRA Maiduguri between the plaintiff and the defendants by delivering of the title deeds and the physical possession of the said property to the plaintiff.

Or in the alternative - An order for the repayment to the plaintiff the sum of N625,000.00 by the defendant being the sum collected by the defendants from the plaintiff as consideration for the assignment of the said property.

N50,000.00 General damages for the breach of contract.

(b) The cost of the suit."

The five defendants mentioned in the suit included the respondent therein Mr. A. D. Ogunmola who was the second defendant. It appears from the printed record, that the court bailiff was only able to serve personally the Writ and the accompanying Statement of Claim on the 1st defendant and the 5th defendant, both through the 1st defendant, Pastor Mohammed Audu Mshelia. In an enrolled order issued by the learned trial judge, leave was granted to the plaintiff to:-

" 1. Issue and serve the 2nd defendant [respondent herein] with the Writ of Summons and other court processes out of jurisdiction.

2. An Order to serve the 2nd , 3rd and 4th Respondents/Defendants with the Writ of Summons and other court processes by means of substituted service by pasting same at 4A Ahmadu Bello close, GRA, Maiduguri, being the last known place of abode of the 2nd 3rd and 4th respondents/defendants."

Apparently when none of the defendants filed a defence to the Statement of Claim accompanying the Writ of Summons, and apparently when 2nd; 3rd and 4th defendants were served, the plaintiff filed a motion praying for judgment to be entered in default of Statement of Defence against all the defendants. In opposition to this application, the first defendant filed a counter-affidavit on the 26/11/1996, while on the 8/10/1995 the 2nd and 5th defendants, applied by a motion on Notice and prayed for orders to extend time within which to enter conditional appearance and to deem the proposed Memorandum of appearance under protest as duly filed. In his ruling delivered on the 26/3/1996, the learned trial judge granted extension of time to enter the conditional appearance and deemed the appearance under protest as duly filed.

On the 12/6/1996, the plaintiff's motion to enter judgment in default of defence against the defendant was moved by the learned counsel for the plaintiff. Only the 1st defendant was represented by counsel who opposed the application, the other defendants including the 2nd defendant, the respondent herein, were absent from court, though they were said to have been served. In his Ruling on the aforesaid Motion delivered on the 24/12/1996, the learned trial judge granted the

plaintiffs prayer and entered judgment in default of defence against all the defendants, including the 2nd defendant. In the said judgment, the learned trial judge ordered the defendants including the 2nd, to jointly and severally refund the sum of N625,000.00 to the plaintiff, including costs. In order to execute the judgment, the plaintiff successfully obtained an Ex-parte Order granting him leave for the attachment and sale of the property situate at 4 A Damboa, Road, G.R.A Maiduguri in the satisfaction of the judgment.

On the 3rd of July, 1997, the 2nd defendant filed an application before the trial judge praying for the following orders:-

"(a) An order extending the time within which to apply to set aside the judgment of court entered in this suit of the 24/12/1996.

(b) An order setting aside the judgment of court entered in this suit on the 24/12/1996 in default of appearance and defence.

(c) An order setting aside the order of court made on the 17/2/1997 granting leave to the plaintiff to issue writ of execution against the immovable property of the judgment debtors."

The 2nd defendant filed an affidavit of urgency and also the affidavit in support of the motion. The 2nd defendant deposed that he was the registered owner and the holder of the Right of Occupancy of the properties Nos. 4 and 4A Ahmadu close, Damboa Road, GRA Maiduguri covered by the Certificate of Occupancy NE/3198. He deposed further that he assigned and conveyed the properties to Faith Revival Ministries Church and left Maiduguri to settle down in Ibadan with his family since 1995. He denied knowledge of any transaction with the plaintiff and he never appointed the 1st defendant as his agent and denied receiving any sum of money from the 1st defendant. He also denied any service on him of the processes of this suit as he was in Ibadan having relocated there with his family since 1995. He further denied appointing or engaging any person to appear for him in this suit. The plaintiff filed a counter affidavit in which it was deposed that the 2nd defendant was served by substituted service pursuant to the order of court made on the 28/2/1995. It is further deposed, that the 2nd defendant entered appearance and had engaged the service of counsel who entered conditional appearance on his behalf and appeared in court on his behalf, that the motion for judgment in default of pleadings was duly served on the 2nd defendant through his counsel. It was further deposed that the 2nd defendant was still the legal owner of the properties before the execution of the judgment in this matter.

In his ruling on the matter delivered on 25/7/1997, the learned trial judge agreed with the plaintiff that the 2nd defendant was duly served with all the processes by substituted means ie by pasting the processes on the door of the last known place of abode of the 2nd defendant and that the 2nd defendant was represented by counsel who had appeared for him on a number of occasions. The learned trial judge found no justifiable reason to grant the prayer of the 2nd defendant. The application was accordingly refused.

The 2nd defendant felt unhappy and appealed against the ruling to the Court of Appeal, Jos. The issues submitted to the Court of Appeal for the determination of the appeal, included, the jurisdiction of the trial court to adjudicate in the matter where a party claimed that he had not been served with the court processes. The issue of what amounts to proper service. After dealing with some preliminary matters including the Notice of Preliminary Objection and a Respondent's Notice that the Ruling of the trial court, the subject matter of the appeal, be affirmed on other grounds, the Court of Appeal allowed the 2nd defendant's appeal and set aside the default judgment entered by the trial court on the 24/12/1996. The Ex-parte Order granting the plaintiff leave to execute the judgment on the immovable properties of the 2nd defendant was also set aside.

The plaintiff, [hereinafter referred to as the appellant] felt disgruntled with the decision of the Court of Appeal has now appealed to this court. The Notice of Appeal contains 5 grounds of appeal. Distilled from the grounds of appeal both the appellant and the respondent agree that only one issue arises for the determination of the appeal and the issue is as follows:-

"Whether in the circumstances of this case, the court below was right in considering and declaring the Writ of Summons and the service of the Writ of Summons on the respondent was null and void for non compliance with the rules of court

and sections 97, and 99 of the Sheriffs and Civil Process Act."

Now, there is no dispute and it is common ground that the respondent was no longer resident within the jurisdiction of the court when the writ was filed, that was why the appellant on the 28/2/1995 obtained the order to Issue and Serve the respondent with the Writ of Summons outside the jurisdiction of the court, [emphasis supplied].

But what is amazing and difficult to understand is that the same Order also granted the appellant leave to serve the respondent with the originating processes by substituted means within jurisdiction by pasting the same at No. 4A Ahmadu close, GRA Maichiguri being the last known place of abode of the respondent. It is also not disputed that the respondent was served not in pursuance of the order granted for the Issuance and Service of the Writ out of jurisdiction, but by the substituted means. The appellant in an affidavit sworn in support of the application to enter judgment in default of appearance [see page 8 of the record] stated in paragraph 5 of the affidavit thus:-

"5. That 1 was informed by the said Haruna T. Mshelia when 1 verily believe, that the 2nd, 3rd and 4th defendants/respondents were served by substituted means pursuant to an order of this Honourable Court."

Now, the appellant applied to issue and serve the Writ on the respondent outside the jurisdiction of the court and yet the appellant was served by substituted means, by Pasting the Originating Processes on the last known abode of the appellant within jurisdiction, when it was manifestly clear that the respondent was no longer resident there or within the jurisdiction of the court. For a defendant to be legally bound to respond to the order for him to appear in court to answer a claim of the plaintiff, he must be resident within jurisdiction see National Bank [Nig.] Ltd vs. John Akinkumi Shayoye and Anor. [1977] 5 SC 181. Substituted service can only be employed when for any reason, a defendant cannot be served personally with the processes within the jurisdiction of the court for example when the defendant cannot be traced or when it is known that the defendant is evading service. Also, where at the time of the issue of the writ, personal service could not in law be effected on a defendant, who is outside the jurisdiction of the court, substituted service should not be ordered see Fry v. Moor [1889] 23 QBD 395. If the defendant is outside the jurisdiction of the court at the time of the issue of the writ and consequently could not have been personally served in law, not being amenable to that writ, an order for substituted service cannot be made, see Wilding v Bean [1851] 2 QB 100.

In the instant case, the respondent was known to be out of jurisdiction, and it is not in dispute that the respondent had moved out of Maiduguri to Ibadan, where he had relocated with his family long before the issue of the Writ of Summons, it is trite law, that after its issue a Writ of Summons or any originating process must be properly served on the defendant. Without such service, he may not know that he has been sued. He may not know the claims against him. The object of the service is therefore to give notice to the defendant of the claims against him, so that he may be aware of, and be able to resist, if he desires to, that which is claimed against him. Where service of a process is legally required the failure to serve it in accordance with the law is a fundamental flaw and a person affected by any order but was not served with the process is entitled *ex debito justitiae* to have the order set aside as a nullity. See Obiomonure vs. Erinsho [1966] 1 ALL N.LR 250, Mbadinuju vs. Ezuka [1994] 10 SCNJ 109. Skenconult vs. Ukey [1980] 1 SC 6, Adeigbe vs. Kusimo [1965] NMLR 284. Service of the originating process has been held to be a condition precedent to the exercise of jurisdiction by the court out of whose registry the originating process was issued. See National Bank vs. Guthrie [1993] 4 SCNJ 1 at 17.

The validity of the issue of the writ and the service of the court on the respondent was raised before the trial judge and the learned trial judge in his ruling on this issue stated thus:-

"Let me at this juncture dispose of the issue of whether the applicant can rely on the ground that there was no valid writ issued before the issue of service could be visited. I am in full agreement with Mr. Mshelia that parties are bound by the case they set before the court xxxxxxxxxxxxxx the issue of the validity of the writ is alien to the application of the appellant. It is not one of the grounds set out in the motion, therefore the same cannot be canvassed. I am in full agreement with Mr. Mshelia that the ground and the submission must be disregarded."

Thus, the trial court disregarded the complaint of the respondent on the validity of the issue and service on him of the processes. The Court of Appeal rightly in my view, held that the trial judge acted erroneously to have discountenanced

the argument of the counsel for the respondent on this issue. In my view, the validity of the Originating Processes in a proceeding before a court, is fundamental, as the competence of the proceeding is a condition sine qua non to the legitimacy of any suit. Therefore, the failure to commence proceedings with a valid Writ of Summons goes to the root of the case and any order emanating from such proceedings is liable to be set aside as incompetent and a nullity. It clearly borders on the issue of jurisdiction and the competence of the court to adjudicate on the matter. Such issue can be raised at any time and it can never be alien to the proceedings as claimed by the learned trial judge.

However, of more fundamental nature, the respondent who was outside jurisdiction, claimed to be unaware of the suit as he was not served with the Originating process outside the jurisdiction of the Borno State High Court as properly ordered by the Court. He was allegedly served by substituted means. As shown above, that was no service.

As mentioned before in this judgment service of process on a party to a proceeding is crucial and fundamental. See *Auto Import Export vs. Adetayo* [2000] 18 NWLR (Pt 799) 554, *SGBN vs. Adewunmi* [2003] 10 NWLR (Pt [829] 526 *Mbadinuju vs. Ezuka* [1994] 8 NWLR (Pt 364) 535. Failure to serve process where service of process is required is a fundamental vice. It deprives the trial court of the necessary competence and jurisdiction to hear the suit. In other words the condition precedent to the exercise of jurisdiction was not fulfilled. That being so, the trial court, in the instance case had no jurisdiction to hear the appellant's application and enter judgment against the respondent in default of filing Statement of Defence. The proceedings as far as it affected the respondent on the 24/12/1996 was a nullity. See also *Scott-Emuakpor vs. Ukaube* [1975] 12 SC 41. See *UBN Plc vs, Okonkwo* [2004] 5 NWLR (Pt 867] 445.

Confining my self to the fundamental issue of service in this matter, I need not even consider the argument of counsel since where there is no service, there is no valid trial. It was manifest and common ground that the respondent was known to be out of jurisdiction. Paragraph 3 of the Statement of Claim accompanying the Writ of Summons states:

"3. The second defendant is a business man who resides at Ibadan Oyo State."

The learned trial judge on the 28/2/1995, made an ex-parte order to issue and serve the writ of summons on the respondent out of jurisdiction. But by paragraph 4 of the affidavit in support of the Motion for judgment in default of defence, it was deposed to that the respondent was "served" with the Originating Process by substituted means, that is to say by pasting the same on the door of No. 4A Ahmadu close, Damboa Road, GRA, Maiduguri within jurisdiction. So the Writ was never sealed to be served out of jurisdiction and the 2nd respondent was never served as ordered by the trial court. This is enough to dispose of the appeal. There is no need to discuss sections 97 and 99 of the Sheriffs and Civil Process Act. I accordingly dismiss the appeal and affirm the decision of the Court of Appeal. The respondent is entitled to his costs against the appellant assessed at N10, 000.00.

Judgement delivered by  
Idris Legbo Kutigi, J.S.C

I read before now the judgment just delivered by my learned brother Musdapher, JSC. I agree with him that the appeal lacks merit and ought to be dismissed. It is hereby dismissed with N10,000.00 costs against the Appellant in favour of the Respondent.

Judgement delivered by  
Aloysius Iyorgyer Katsina-Alu, J.S.C

I have had the advantage of reading in draft the judgment delivered by my learned brother Dahiru Musdapher, JSC. I agree with it.

The appeal clearly has no merit. It is now trite law that failure to serve process where service of process is required is a fundamental vice. This means that the trial court is deprived of the necessary competence and jurisdiction to hear the action.

It is not in dispute that the respondent was not resident within the jurisdiction of the trial court. Para. 3 of Statement of Claim accompanying the Writ of Summons states clearly as follows:

"3. The second defendant is a businessman who resides at Ibadan Oyo State."

The purported service with the original process was by substituted means that is by pasting it on the door of No. 4A Ahmadu Close, Damboa Road, GRA, Maiduguri within jurisdiction. The trial court had ordered that the respondent be served out of jurisdiction. This, as I have shown above was never done. This means that the condition precedent to the exercise of jurisdiction by the trial court was not fulfilled. That failure clearly deprived the trial court of the necessary competence and jurisdiction to hear the suit. In my judgment, the proceedings as it affected the respondent was a nullity.

In the circumstance, I also dismiss the appeal and affirm the decision of the Court of Appeal. I also award N10,000.00 costs in favour of the respondent.

Pronouncement

(Section 294(2) of the Constitution)

Hon. Justice I. C. Pats-Acholonu who participated with us in the appeal agreed at our conference that the appeal be dismissed.

Judgement delivered by

George Adesola Oguntade, J.S.C

The respondent was the 2nd of five defendants against whom the appellant as plaintiff brought a suit at the Maiduguri High Court of Borno State. The appellant (hereinafter referred to as the plaintiff) claimed from the defendants (including the respondent hereinafter referred to as the 2nd defendant) the following reliefs:

(a) An order for specific performance compelling the defendants jointly and severally to conclude the agreement for assignment in respect of property situate and lying at No. 4A Ahmadu Close Damboa Road, GRA Maiduguri between the plaintiff and the defendants by delivering of the title deeds and the physical possession of the said property to the plaintiff.

Or in the alternative - An order for the repayment to the plaintiff the sum of N625,000.00 by the defendant being the sum collected by the defendants from the plaintiff as consideration for the assignment of the said property.

N50,000.00 General damages for the breach of contract.

(b) The cost of the suit."

This appeal raises an issue as to the propriety of the service of the Writ of Summons on the 2nd defendant. The trial judge had, following an application brought by the plaintiff granted orders as to the issuance and service of the Writ of Summons in these words:

" 1. Issue and serve the 2nd defendant [respondent herein] with the Writ of Summons and other court processes out of jurisdiction.

2. An Order to serve the 2nd, 3rd and 4th Respondents /defendants with the Writ of Summons and other court processes by means of substituted service by pasting same at 4A Ahmadu Bello Close, G.R.A, Maiduguri, being the last known place of abode of the 2nd, 3rd and 4th respondents/defendants."

The trial judge ultimately gave judgment in favour of the plaintiff on his claim reproduced above. Following an appeal by the 2nd defendant against the judgment as to the validity of the service of the Writ of Summons on him, the Court of Appeal, Jos Division (hereinafter referred to as 'the court below') on 14-3-2001 came to the conclusion that the issuance and service of the Writ of Summons on the 2nd defendant were invalidly done. They were accordingly set aside. The judgment against the defendant was also set aside. This appeal, by the plaintiff, is against the aforesaid judgment of the court below. The solitary issue for determination as formulated by plaintiffs counsel reads:

"Whether in the circumstances of this case, the court below was right in considering and declaring the Writ of Summons and the service of the Writ of Summons on the respondent was null and void for non compliance with the rules of court and sections 97 and 99 of the Sheriffs and Civil Process Act."

My learned brother Musdapher JSC has set out the facts leading to this appeal and I need not go over them here. He has also shown why this appeal must fail. I agree with him. I only wish to emphasise some aspects of the issues considered in the lead judgment.

Now, sections 97 and 99 of the Sheriffs and Civil Process Act, Cap. 467, Laws of the Federation 1990 provide:

"97. Every Writ of Summons for service under this part out of the State or the Capital Territory in which it was issued shall, in addition to any other endorsement or notice required by the law of such State or the Capital Territory, have endorsed thereon a notice to the following effect (that is to say)

"This summons (or as the case may be) is to be served out of the.....State (or as the case may be)..... and in the..... State (or as the case may be)".

99. The period specified in a Writ of Summons for service under this part as the period within which a defendant is required to answer before the Court of the Writ of Summons shall be not less than thirty days after service of the Writ has been effected, or if a longer period is prescribed by the rules of the Court within which the Writ of Summons is issued, not less than that longer period."

Section 97 above prescribes that every Writ of Summons for service outside the State whose High Court is issuing the Writ shall carry the endorsement set out in the section. It is only when this has been done, that the Writ of Summons can validly be served outside jurisdiction: See *Nwabueze v. Okoye* [1988] 4NWLR (Part 91) 644.

Earlier above, I. set out the terms of the orders made by the trial court. It was not shown that the mandatory requirements under Section 97 of Cap. 407 above were complied with. The effect of such non-compliance is that the writ of summons could not be validly served outside Borno State. In *Fry v. Moore* [1889] 23 Q.B.D. 395 at 399, Lopes L.J. observed:

"*Field v. Bennett* 56 L.J. (Q.B) 89 and *Hilfyard v. Smyth* 36 W.R. 7 appear to me to establish clearly that there cannot be substituted service of a writ which could not at the time when it was issued be served personally. In the present case, the writ could not be personally served because no leave had been obtained to issue it as rule 4 or Order II requires when the defendant is out of jurisdiction. Therefore the order for substituted service was irregular. If we were to hold that service effected in this way was regular, we should render all the rules relating to service out of the jurisdiction absolutely useless. If a defendant was out of jurisdiction the plaintiff would only have to obtain an order for substituted service of an ordinary writ and then every other step in the action could proceed in the ordinary way."

See also the views of Bate J. in *M. Khatoun v. Bans Mehr* (Nigeria) and *Anor.* [1961] NRNLR 2 7.

In the instant case, as the issuance of the Writ of Summons, had not conformed with the mandatory provisions of section 97 of Cap.407, the Writ of Summons could not be served personally outside jurisdiction on the 2nd defendant. For this reason, an order for substituted service could not be made on the writ. This is on the supposition that the 2nd respondent was at the relevant time resident outside Borno State as the first order of the trial court implied.

On the other hand, the second order directed that the 2nd defendant be served by substituted service by pasting same at 4A Ahmadu Bello Close, G.R.A. Maiduguri being "the last known place of abode of the 2nd, 3rd and 4th respondents/defendants." It is apparent that there is inherent contradiction between the two orders made as to service. The first order implied that the 2nd defendant lived outside the jurisdiction whilst the second order stated that 2nd defendant's last known place of abode was 4A Ahmadu Bello Close, G.R.A., Maiduguri, a place within jurisdiction of Borno State High Court.

It is pertinent to bear in mind the terms of Order 5 Rule (2) of the Borno State High Court (Civil Procedure) Rules which provides:

"2. The Writ of Summons shall contain the name and place of abode of the Plaintiff and of the Defendant so far as they can be ascertained; and it shall state briefly and clearly the subject matter of the claim and the relief sought for and the dates of the Writ and place (called return-place of hearing.)"

The Writ of Summons in this case does contain the details required under Rule 2 above. To say the least, the processes by which the suit was-commenced including the writ issued and the orders made by the trial court were all muddled such that it is inevitable to conclude that the 2nd defendant was not served as required by law.

I am in agreement with the views expressed by the court below at page 96 of the record where it said:

"Learned counsel for the appellant has complained against the Order of 28/2/95, and that the orders contained therein are contradic'ing. The orders are self explanatory and a close examination of them disclose that they are indeed contradictory, in the sense that one was for service of process out of the jurisdiction, (which presupposes that the learned trial Judge was satisfied that one or more of the Defendants was resident outside the jurisdiction of the Court) and then ordered substituted service of same on the 2nd, 3rd and 4th Defendants, when it is on record that the first order was in fact directed at the 2nd Defendant/Appellant, as the statement of claim and other proceedings show. This is a real bundle of contradiction. As a matter of fact I would say that the 2nd Defendant/Appellant should not have been included in that particular order of 28/2/95, but possibly in another separate order later."

In the final conclusion, I would also dismiss this appeal as in the lead judgment of my leaned brother Musdapher JSC. I subscribe to the order made on costs in the lead judgment.