IN THE SUPREME COURT OF NIGERIA

Suit No: SC288/2002

Petitioner: Broad Bank of Nigeria Ltd
And
Respondent: Alhaji S. Olayiwola & Sons Ltd & Anor

Date Delivered: 2005-01-14

Judge(s): Salihu Modibbo Alfa Belgore, Sylvester Umaru Onu, Aloysius Iyorgyer Katsina-Alu, Umaru Atu Kalgo, Ignatius Chu

Judgment Delivered

The appellant had instituted an action by writ of summons against the respondents who live outside the jurisdiction of Lagos State and on the same day filed an ex-parte application praying for leave of the court to issue the writ and serve same outside the jurisdiction. The prayers sought in the motion paper were granted and later the respondents were served.

The respondents filed a notice of preliminary objection to set aside the issuance and service of the writ and the statement of claim, and also to strike out the suit. In the course of the argument one of the questions that arose for determination by the court was which rules of court applied id est, - the 1972 Rules or the 1994 Rules of Lagos State High Court. The High Court held that it was 1972 Rules that applied in the case and ruled inter alia as follows: -

(a) that the applicable rule is 1972 rules.

(b) that the grant of leave to issue a writ for service out of jurisdiction can be obtained before or after the filing of the writ provided it is obtained before service of the writ itself.

(c) that once the defendants are given 30 days to enter appearance, the number of days specified in the writ does not matter. The writ not having been endorsed for service out of the jurisdiction is incompetent.

The appellant piqued by the ruling of the court below appealed to the Court of Appeal on the questions of applicable rules of court, and also on the writ not having been endorsed. The respondent cross appealed on the aspect of the decision dealing with subsequent leave to issue and serve and the number of days limited for appearance. The Court of Appeal dismissed the appeal and allowed the cross-appeal. The appellant doggedly appealed to this court. On the strength of the grounds of appeal filed, three issues were framed by the appellant and they are as follows:-

\"(a) whether the learned justices of the Court of Appeal were right in holding that obtaining leave to issue after the filing of the writ of summons but before actual service of same on the defendants is bad in law'

(b) were the learned justices of the Court of Appeal were right in setting aside the service of the writ of summons, statement of claims and other originating processes on the defendants in Osun State of Nigeria on grounds of the non endorsement of the writ and the stated time for appearance on the processes served'

(c) were the learned justices of the Court of Appeal right in holding that the old rules (1972 rules) as against the new rules (1994 rules) applies to the proceedings taken before the lower court on the 19th day of November, 1997'\"

The respondent replicando filed 5 issues for determination. It seems to me that the issues framed by the appellants represent to my mind the real essence of the case; in other words, they constitute the questions which the court is asked to provide worthy answers.

On issue one the gamut and premise of the argument of the appellant are that the whole decisions of the High Court and the Court of Appeal rivet on elevating an unimportant topic in relation to matters of form and procedure to paramountcy and over reliance or over emphasis on matters bothering on technicality. In other words the lower courts fixed their minds on mere abstruse matters in relation to procedural law and allowed themselves to be obscured from looking at the real issues to be determined. The learned counsel for the appellant cited the case of Okenwa v. Military Governor of Imo State (1996) 6 NWLR (Pt.455) at p. 394 wherein this court spumed the over reliance on mere technicality to determine a matter, a state of affair from which the courts are now shifting their ground, and concentrating on the substance of the case. He referred to the eloquent pronouncement of the Court per Ayoola, J.S.C, in C.T. and F.C. v. NNPC (2002) 14 NWLR (Pt.786) 133 which seems to decry the attitude of the court in quest of justice getting itself mired in purely technical considerations. His argument is that the court should eschew the non essential matter and concentrate in doing justice stressing that once the defendant was served after the leave was obtained it should not matter whether the prayer for service of the writ was first obtained or not before the issue.

The respondent on the other hand drew the attention of the court to the obvious strict language of the statute which has the effect of a command and stressed that non abidance of the dictates of Sheriffs and Civil Process Act, Cap. 407 of the Laws of the Federation (which demands that service out of jurisdiction be done in a special way,) would render any act done contrary to that provision null and void. Reference was made to such cases as Nwabueze v. Okoye (1988) 4 NWLR (Pt.91) 664 at 698; Fumudoh v. Aboro (1991) 9 NWLR (Pt.214) 210; Erokoro v. Government of Cross Rivers State (1991) 4 NWLR (Pt.185) 322 at 337 and University of Ife v. Fawehinmi Construction Co. Ltd. (1991)7 NWLR (Pt.201) 26; Achineku v. Ishagba (1988) 4 NWLR (Pt.89) 411 at 420. The respondents\' ground is that where the statutory provision uses the word \"shall\" a party cannot elect to abide by the provision or seek to water down the intent and tenor of the spirit of the statute.

The courts established by the Constitution are vested with power to do justice. In their avowed onerous responsibility or duty to do justice they are guided not just by the tenets and spirit of the law but also by the rules of court which are aids in the administration of justice. The rules of court are statutory instruments not elevated to the pedestal of statutes. Now Order 2 rule 4 of the 1972 Lagos High Court Rules states as follows:

\"subject to the provisions of Part vii of the Sheriffs and Civil Process Act, no writ of summons for service out of the jurisdiction, or of which notice is to be given out of the jurisdiction shall be issued without the leave of the court or a judge-in-chambers\"

The rule is subject to the contents of the statute referred to. Section 97 of the Sheriffs and Civil Process Act states as follows:

\"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: \' 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)\'.\"

Section 99 states:

\"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 to the writ of summons shall be not less than 30 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\".

A proper and careful examination of the purport of Lagos State High Court Rules of 1994 and Section 97 seems to impress one of the importance and nay the emphasis of obtaining the leave of the court before a writ that is meant to be issued outside the jurisdiction of the court is issued. If the leave to issue and serve the writ out of the jurisdiction is not first, obtained, it would appear ex facie to defeat the seeming imperativeness which is patently clear and manifest in the language of the statute. On the face of it, one might question how a party intending to cause a writ to be served out of the jurisdiction would not first seek the leave to issue and serve the writ for it is the condition sine qua non. It is important that both the statute and the rules must at all times guide a party seeking the court\'s powers to avail him of the remedies he seeks to rely upon. However, the court in this endeavor should counsel itself on the paramountcy of justice at all times. Ayoola, J.S.C had in C. T. and F. C. v. NNPC Supra said;

\"The question which gave rise to this appeal came before the High Court of Lagos State by way of preliminary objection to the originating summons issued at the instance of the respondent whereby the respondent sought to set aside an award made on 28th March, 1990 by the arbitrators/ respondents in favor of the appellant which was at all material times, a company resident in the United States of America. The substance of the preliminary objection was that the originating summons had been issued without the leave of the High Court as stipulated by Order 2 r. 4 of the High Court of Lagos State (Civil Procedure)Rules, 1972 (\"the Rules\") which was then the applicable Rules. Those Rules have now been replaced by the High Court of Lagos State (Civil Procedure) Rules, 1994. However reference in this judgment is to the 1972 Rules. Order 2 r. 4 provided that:

'Subject to the provisions of part vii of the Sheriffs and Civil Process Act, no writ of summons for service out of the jurisdiction, or of which notice is to be given out of the jurisdiction, shall be issued without the leave of the court or a judge-in-chambers'.

The rules did not make similar provisions in regard to issue of originating summons. However, notwithstanding that there is a difference between a writ of summons and an originating summons; the court below held that Order 2 r. 4 applied to originating summons as it applied to writ of summons. The main question which arises in this appeal is whether having so held it should not have declared the origination summons issued, without leave, to commence the proceedings a nullity by reason of non-compliance with Order 2 r. 4\".

He repudiated this narrow view which seeks to asphyxiate the court in its bid to do justice. There is now a body of corpus juris on the complex issue of what constitutes the validity of a writ meant to be served out of the jurisdiction first made without leave. What befuddles one in this case is that the proposed endorsement that ought to generally be made on the writ which was to be served out of the jurisdiction was not done. It may be argued and with good reason that the endorsement should have been done by a court official and therefore the responsibility should not be laid at the feet of the appellant. The argument of the respondent would appear to mean that the writ should wear iron cast garb to qualify for its validity. Ordinarily one might conceivably argue that it is the duty of the proponent of the action to ensure that the writ does wear the veil of validity by ensuring that it is so endorsed but then he is not an officer of the court. The appellant has referred this court to the case of Adegoke Motors v. Adesanya (1989) 3 NWLR (Pt.109) 250; (1988) Vol. (Pt.III) NSCC 53, where Oputa, J.S.C said;

\"There must be a difference and distinction between the validity of a writ of summons and the validity of the service of the same writ. If a writ is valid, any default in service becomes a mere irregularity which may make such a writ voidable but definitely not void\".

Indeed the court should wherever possible admit of no technical constraints but concern itself with the validity of the writ. It is important to restate for emphasis that section 97 of the Sheriffs and Civil Process Act prescribes and demands that a writ proposed for service outside the jurisdiction of the court shall in addition to any other endorsement be endorsed \"to be served... out of the State\". A careful examination of the prescription of the Act shows that a writ to be served out of the jurisdiction which does not have such endorsement is irregular procedurally speaking but nowadays courts are shying away from over reliance on mere technicality.

The appellant had referred this court to the learned opinion of the highly revered jurist Glanville Williams 10th Edition 1974 of Salmond on Jurisprudence at 476 which runs thus:-

\"So far as the administration of justice is concerned with the application of remedies to violated rights, we may say that the substantive law defines the remedy and the right while law of procedure defines the modes and conditions of the application of one to the other.\"

That is the correct statement of the law. I believe that where the prescription of the law is mandatory even if only on a procedural level, a court in its quest to do justice ought generally to be imbued with the dictates of reason and the nature of the particular case to seek to accommodate a party that appears to have run foul of the dictates of a procedural law. The contention in this case is that the appellant had unwittingly not done what it was supposed to do, id est, the course which the law has insisted in this type of matter has not been followed. Reference was therefore made in the case of Nwabueze v. Okoye (1988) 4 NWLR (Pt.91) p. 664 at 698, where Obaseki, J.S.C said;

\'The writ of summons in this matter was issued without leave at the time of issue. The issue of the writ without leave is therefore invalid and null and void\".

In England it is mandatory that for a writ meant for service out of jurisdiction that leave of the court be obtained. The court has discretion to grant leave or not. In vol. 1 2001 of English (Civil Procedure) Rules otherwise known as the White Book, the learned authors state as follows at p. 125:

\'The applicant must show a serious issue to be tried in respect of each cause or cause of action in respect of which he asks for permission... The court has a general discretion to decide whether or not the case is a proper one for service out of the jurisdiction. In particular it must consider the question of forum convenience namely, in which forum the case could most suitably be tried for the intent of the parties and for the end of justice.\"

What all this amounts to is that no writ of summons or originating summons meant to be served outside the jurisdiction may validly be issued without leave being first obtained by the court as the court has a discretion to grant or refuse. The term \"leave\" in judicial context imports the exercise of the court\'s discretion either positively or negatively as it would be outside the bounds of reason to take for granted that the court would willingly grant an application. The raison de tre for first securing the leave of the court is that the court owes it as a duty to determine whether the person sought to be served outside the jurisdiction can be conveniently tried elsewhere. However, in this case the respondents have known and were very much aware of the case against them and ought not seek protection under the veil of technicality. See Seaconsar Far East Ltd. v. Bank Markazi Jombouri Islam Iran (1993) 4 All ER 456 and also Spiliada Maritime Corp v. Consular Ltd. Subnom Spiliad (1987) AC 460.

In that latter case the issue that was before the House of Lords was the forum convenience and the jurisdiction. Lord Joff of Cheverly in the leading judgment said;

\"In the Abidin Daver (1984) AC 398, 411, Lord Diplock stated that, on this point, English law and Scots law may now be regarded as indistinguishable. It is proper therefore to regard the classic statement of Lord Kinnear in Sim v. Robinow (1892) 19 R. 665 as expressing the principle now applicable in both jurisdictions,\" He said, at p. 668:

'the plea can never be sustained unless the court is satisfied that there is some other tribunal, having competent jurisdiction, in which the case may be tried more suitably for the interests of all the parties and for the ends of justice. For earlier statements of the principle, in similar terms, see Longworth v. Hope (1865) 3 Macph. 1049, 1053 per Lord President McNeill, and Clements v. Macaulay (1866) 4 Macph. 583, 592, per Lord Justice-Clerk Inglis; and for a later statement, also in similar terms, see Societe du Gaz de Paris v. Societe Anonyme de Navigation \"Lex Armateurs Francais 1926 SC (H.L.) 13, 22, per Lord Summer. I feel bound to say that I doubt whether the Latin tag \'forum non conveniens\' is apt to describe this principle. For the question is not one of convenience, but of the suitability or appropriateness of the relevant jurisdiction. However the Latin tag (sometimes expressed as forum non conveniens and sometimes as forum conveniens) is so widely used to describe the principle, not only in England and Scotland, but in other Commonwealth jurisdictions and in the United States, that it is probably sensible to retain it. But it is most important not to allow it to mislead us into thinking that the question at issue is one of mere practical convenience. Such, a suggestion was emphatically rejected by Lord Kinnear in Sim v. Robinow 19 R. 665, 668 and by Lord Dunedin, Lord Shaw of Dunfermline and Lord Sumner in the Societe du Gaz case, 1926 SC (H.L) 13, 18, 19, and 22 respectively1.\"

Lord Dunedin, with reference to the expressions \"forum non competens\" and \"forum non conveniens\" said, at p. 181

'In my view, \'competent is just as bad a translation for competens as \'convenient is for \'conveniens\'. The proper translation for these Latin words, so far as this plea is concerned, is \'appropriate\'. '...The key to the solution of this problem lies, in my judgment, in the underlying fundamental principle. We have to consider where the case may be tried 'suitably for the interests of all the parties and for the ends of justice.' Let me consider the application of that principle in relation to advantages which the plaintiff may derive from invoking the English jurisdiction. Typical examples are: damages awarded on a higher scale; a more complete procedure of discovery; a power to award interest; a more generous limitation period. Now, as a general rule, I do not think that the court should be deterred from granting a stay of proceedings, or from exercising its discretion against granting leave under R.S.C. Order 11, simply because the plaintiff will be deprived of such an advantage, provided that the court is satisfied that substantial justice will be done in the available appropriate forum.\"

The respondents have not complained that they would suffer a great inconvenience if the trial was held in Lagos High Court and in any case it is as in this case for the court to exercise its discretionary power to determine the forum convenience. There is nothing to show beyond latching on the abstract issue of technicality that the respondents would be adversely affected by the irregularity committed. In this connection much as I may sympathize with the respondents, I do not share their point which does not go to the merit of the case but on mere form.

On the second issue, let me first restate the relevant and appropriate law and rule that guide this point. Order 3 rule 5 of the High Court of Lagos State Civil Procedure 1994 Rules provides as follows:

\"Subject to the provisions of the Sheriffs and Civil Process Act, a writ of summons or other originating process issued by the court for service in Nigeria outside Lagos state shall be endorsed by the registrar of the court with the following notice.. .\'This summon (as the case may be) is to be served out of Lagos State of Nigeria and in the ... State.\"

Section 97 of the Sheriffs and Civil Process Act, Vol. 407, Laws of the Federation of Nigeria on the other hand states:-

\"Every writ of summons for service under this part out of the state in 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 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).\"

The term \"shall\" in the context would appear to mean or understood to convey the message that the said writ should be endorsed or in other words have on the face of it the words that such a writ shall be served outside the jurisdiction of the court. The argument of the learned counsel for the appellant is that it is the duty of the registrar of the court to perform the functions of endorsement and therefore the appellant should not be punished for the failure or negligence of the

registrar. If the prescription of the law is that a writ should be of certain nature or in certain manner before it can be valid for service, it is the bounden duty of the registrar to perform his duty of endorsing the process. The appellant cannot be punished for the negligence or tardiness of the registrar in the performance of his duty. The underlying principle behind service out of the jurisdiction of the court rests a priori on the fact that the court from which leave is being sought may not have immediate jurisdiction on that person without that leave.

The learned counsel for the appellant relied on the opinion of Ogundare, J.S.C, in Odua Investment Company Ltd. v. Talabi (1991) 10 NWLR (Pt.523) 1 at 42 which runs thus;

\"If there is a distinction between the validity of a writ and the validity of the service of the writ and I agree there is, I am at a loss to fathom how any defect in the service of the writ can make the writ which is valid to be voidable. I would think that it is the service alone that would be voidable\"

It must be understood that in a writ meant to be served out of the jurisdiction the endorsement of those words that would enable the court to consider the granting of leave is inextricably attached to the writ since such a writ might readily invoke the endorsement which will enable the court to exercise the discretion.

Still on issue 2, the appellant\'s counsel argued that by the ruling of the court the defendants were given 30 days to enter appearance after service and that the provision or intention of Section 99 of the Sheriffs and Civil Process Act Cap. 407 have been met. Although there must be conformity with the dictates of the statute, it is essential not merely desirable that \"30 days\" mentioned in the section is endorsed in the writ. But the court tends to be flexible in respect of a procedural law as the end of justice is to do real justice, rules of court may at times be juggled now and then to meet the ends of the justice as they are mere aids to the court in its quest for justice. A Reference was made by the appellants to the cases of Woodward v. Sarsons (1875) LR 10 CP 733,746, and in Liverpool Borough Bank v. Turner 29 LJ (CH) 827, that sometimes it is difficult to distinguish from mandatory enactments as to what is directory and what is obligatory. This is so and in this connection I am prepared to hold that this is an enactment that is directory. It is the wisdom of the law that a court should as much as possible have active mind to expound the horizon of law, and such activism should make the court focus on the reality of the issues before it and not allow too much technicality to affect its mind.

Lastly on the 3rd issue the point being argued here is which rules ought to have guided the High Court of Lagos State in respect of this matter - the 1972 rules of the Court or the 1994 Rules. The appellant contended in its brief that by virtue of Lagos State Legal Notice of No. 34 of 1966, the commencement date of the new Rules was to be 2nd September, 1996 long before the proceedings of 1997.

Having regard to what I have said earlier on the 2 issues the question is now a mere academic exercise. The Sheriffs and Civil Process Act formerly an ordinance was enacted as far back 1945, further confirmed by Legal Notice No. 1 1955 No. 47 of 1955 and No. 107 of 1955. It has always been there and its primary purpose with the statutory instrument made pursuant thereto is for the mode of service of process which is the duty of the Sheriff. The appellant regales very much on the elasticity which seems to characterize Order 5 rule 1 of 1994 Rules in that where there is a failure to comply, it should be treated as a mere irregularity. Learned counsel for the appellant cited the case of Steel Bell (Nig.) Ltd. v, Government of Cross Rivers State (1996) 3 NWLR (Pt. 438) 571 where Niki Tobi, J.C.A (as he then

was) said; \"non compliance with the rules of court is generally curable if not intended to over reach.' That is the correct statement of the law. However the respondents continued to harp almost ad infinitum on the nature of the writ and service made by the appellant which they submitted should vitiate the whole process. Rules of court are made to enable the court meet the ends of justice. They are not immutable and cannot be construed in the absolute terms. It is the duty of the court to use its powers to discover the true intents of the law and do justice and not to destroy them unless the words used convey a meaning that renders obscure the true intentions of the statute.

The respondents themselves are not arguing that the applicable rule of court in this case was the moribund 1972 rules. Whichever way one looks at the whole case, it is 1994 rules of court that apply as the action was instituted long after 1994 the rules have come into existence.

In my view the appeal shall be allowed and is hereby allowed. It has merit and I set aside the judgment of the lower court. Each party to bear its own costs.

Judgment delivered by Salihu Modibbo Alfa Belgore J.S.C

I read in advance the judgment of my learned brother, Pats-Acholonu, J.S.C and I agree this appeal has merit. For the same reasons he set out in the judgment I also allow this appeal with costs as assessed in the leading judgment.

Judgment delivered by Sylvester Umaru Onu J.S.C.

I am in entire agreement with the judgment of my learned brother, Pats -Acholonu, J.S.C, just delivered that there is merit in this appeal which therefore succeeds. I accordingly allow it with no order as to costs.

Judgment delivered by Aloysius Iyorgyer Katsina-Alu J.S.C.

I have had the advantage of reading in draft the judgment of my learned brother, Pats-Acholonu in this appeal. I agree with it and, for the reasons which he gives, I, too, would allow the appeal. I abide by the order for costs.

Judgment delivered by Umaru Atu Kalgo J.S.C.

I have read in advance the judgment of my learned brother, Pats-Acholonu, J.S.C just delivered and I entirely agree with his reasoning and conclusions which I adopt as mine in this appeal. I agree that there is merit in the appeal and I therefore allow it with costs as assessed in the leading judgment.