

SUPREME COURT OF NIGERIA

APRIL 2ND, 1993, SC. 107/1987

**CORAM:- M.L. Uwais, S. Kawu, A.B. Wali,
E.O. Ogwuegbu, S.U. Mohammed, JJSC.**

National Bank of Nigeria Ltd APPELLANT
And

1. Guthrie (Nig.) Ltd

2. Amicable Assurance Co. Ltd. RESPONDENTS

CIVIL PROCEDURE - failure to serve writ of summons - court
lacks jurisdiction - whether cured by
enterance of appearance

JUDGMENT - Motion for judgment - ground for -
success - specific admission of liability
by defendant

FACTS

The Appellant as Plaintiff commenced an action against the Defendants/Respondents in the High Court of Lagos State claiming from the 1st and 2nd Defendants jointly and severally, a declaration that the 2nd Defendant is liable as the Guarantor of the first Defendant to pay the balance of overdraft in the sum of N512,534.75 and in interest on it; judgment for N512,584.75 being the balance of the overdraft payable by the Defendants. The Plaintiff subsequently brought a motion under Order 28 rule 6 and Order 35 rule 1 of the High Court of Lagos State (Civil Procedure) Rules Cap 52 Laws of Lagos State praying the court to enter judgment in accordance with the rules.

The trial Judge rejected the application on the ground that there was no specific admission by the Defendants to warrant her entering judgment in favour of the Plaintiff.

The Plaintiff appealed to the Court of Appeal which dis-

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missed his appeal holding that there was no service of the writ of summons on the 1st Defendant at the time the application under Order 28 was made and the documents exhibited by the Plaintiff to the affidavit in support of the application did not constitute a clear and unambiguous admission of liability by the Defendants to the amount claimed by the Plaintiff.

The Plaintiff/Appellant further appealed to the Supreme Court who upheld the decisions of the two lower courts.

HELD (unanimously dismissing the appeal)

1. For the Plaintiff to succeed in showing that the learned trial Judge exercised her discretion wrongly, it must be shown that the discretion was not judicially exercised. This means that either the discretion was exercised in an arbitrary or illegal manner or with regard to unnecessary factor or bad faith or relying upon wrong principles. In the instant case, the trial Judge had exercised her discretion properly in refusing to grant the Plaintiffs application for judgment under Order 28 rule 6. (p. 16 - 17)

2. The trial Judge was right when she held that there was no specific admission by the 1st Defendant to justify granting of Appellant's application for judgment under Order 28 rule 6.(p. 22)

3. If an application is brought by a Plaintiff for an order for judgment when there is neither an admission or there is an admission which is not specific and categorical, such application cannot be granted because the circumstance which will make the trial judge exercise his discretion in favour of the Applicant is non-existent. (p. 23)
4. The failure to serve a writ of summons on a Defendant is a fundamental vice since the service is a condition precedent to the exercise of jurisdiction by the court out of whose Registry the writ of summons was issued. And where the service is not effected the court seised with the case lacks the jurisdiction to hear or determine the claim on the writ. (p. 27)
5. When the 1st Defendant entered appearance the High Court had no jurisdiction to hear the Plaintiff's claim. It therefore, should have declined to entertain the application for judgment as far as the 1st Defendant was concerned. (p. 27-28)
6. The entering of appearance which was done under protest did not amount to a waiver by the 1st Defendant to be served with the writ of summons and the Plaintiff's statement of claim. (Skenconsult v. Ukey applied). (p.28)

REPRESENTATION

Chief R. A. O. Oriade for the Appellant.

1st Respondent absent and unrepresented.

J.U. Igwe with him S. Ekwowusi for the 2nd Respondent.

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10 **CASES REFERED TO**

- 1. Efetiroroje V. Okpalefe II (1991) 5 NWLR 517
- 15 2. Nalsa & Team Associates V. N.N.P.C. (1991) 8 NWLR 652
- 3. Eweka V. Amadasum (1983) 8 SC. 87
- 4. Craig V. Kanssen (1943) K. B. 262
- 20 5. Sken Consult (Nig) Ltd. V. Ukey (1981) 1 SC. 6
- 6. Obimonure V. Erinoshe (1966) 1 ALL NLR 250
- 25 7. Adeigbe & Anor. V. Kusimo & anor. (1965) NMLR 284
- 8. Whimpey (Nig) Ltd. V. Balogun. (1986) 3 NWLR (pt 28) 324
- 30 9. Nwabueze V. Okoye (1988) 4 NWLR (pt 91) 664

RULES

- 35 1. High Court of Lagos State (Civil Procedure) Rules Cap 52
Laws of Lagos State 1973. Order 28 rule 6, Order 35 rule
1.

**LEAD JUDGMENT
BY UWAIS JSC**

An action was commenced in the High Court of Lagos State by a writ of summons taken out by the Appellant as plaintiff, against the Respondents as 1st and 2nd defendants respectively. In the Statement of Claim filed by the plaintiff paragraph 14 thereof reads thus:-

“14. Whereof the Plaintiff claims against the First and Second Defendants jointly and severally as follows:-

(1) Declaration that the Second Defendant is liable as the Guarantor of the First Defendant to pay the balance of overdraft in the sum of N512,584.75 and interest thereon.

(2) Judgment for #512,534.75 being balance of the overdraft payable by the Defendants as at the 31st day of August, 1984 and interest thereon at the 13 % (thirteen per centum) per annum with effect from the 1st day of September, 1984 until the whole debt with interest is settled.

(3) Any further judgment or other orders as this Honourable Court may consider necessary to give in favour of the Plaintiff in the interest of justice.”

Subsequently, the plaintiff brought a motion under Order 28 rule 6 and Order 35 rule 1 of the High Court of Lagos State (Civil Procedure) Rules, Cap. 52 of the Laws of Lagos State, 1973 in which he asked for the following orders:-

- “1. *An order for declaration that the Second Defendant is liable as the Guarantor of the First Defendant to pay the balance of overdraft in the sum of \$512,534.75 and interest thereon.*
- 5 2. *An order entering judgment against the First and Second Defendants jointly and severally in the sum of N512,534.75 being balance of the overdraft payable by the Defendants as at the 31st day of August 1984 and interest thereon at the rate of 13 % thirteen per centum) per annum with effect from the 1st day of September, 1984 until the whole debt with interest is settled.*
- 10 3. *Any further order or other orders as this Honourable Court may consider necessary to give to in favour of the Plaintiff/Applicant in the interest of justice.”*
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The affidavit in support of the application states in paragraphs 4 to 13 as follows:

- 20 “4. *That the First Defendant was a customer of the plaintiff at the plaintiff’s branch at No. 123, Itire Road, Lavtanson, Surulere, Lagos.*
- 25 5. *That the First Defendant made an application dated the 30th day of January, 1984 for an overdraft of N1,000,000.00 (One million naira) for working capital and also another overdraft of #500,000.00 for Letter of Credit,*
- 30 6. *That the Second Defendant executed a written guarantee dated the 1st day of March, 1984 as the guarantor of the First Defendant in the sum of #500,000.00 (Five hundred thousand naira) in order to settle any balance or part of*
- 35 *the balance of overdraft that might be granted the plaintiff*

to the First Defendant within a period of six months from the 1st day of March, 1984 to 30th day of August, 1984. (A copy of the written Guarantee is attached hereto and marked Exhibit "A").

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7. *That the Plaintiff, by a letter dated 7th March, 1984, the overdraft of N1,000,000.00 (one million naira) for Working Capital and N500,000.00 (five hundred thousand naira) for Letter of Credit to the First Defendant, as requested, and for a period of three months expiring on the 31st day of May, 1984 with interest thereon at the rate of 13 % per annum.*

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8. *That the First Defendant wrote to the Plaintiff a letter dated the 30th day of May, 1984 asking for extension of the credit facilities for another period of nine months from June, 1984 to February, 1985 or in the alternative asking the plaintiff to offset part of the N1,000,000.00 (one million naira) overdraft with the sum of #527,000.00 which the First Defendant had kept with the Plaintiff as a fixed deposit with interest. (A copy of the First Defendant's letter dated 30th May, 1984 is attached hereto and marked Exhibit "B").*

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9. *That the First Defendant's fixed deposit with interest with the plaintiff was #527,770.00 as at the 1st day of August, 1984 which said deposit of N527,770.00 was credited to the overdraft account of the First Defendant as requested by the First Defendant.*

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10. *That the balance of overdraft payable by the First and
Second Defendants to the plaintiff in respect of the
#1,000,000.00 overdraft granted to the First Defendant
was N512,534.75 as at the 31st day of August, 1984.*
- 5
11. *That the plaintiff wrote two letters dated 10^h August, 1984
and 21st August, 1984 respectively to the Second
Defendant to demand payment of the sum of N500,000.00
towards settlement of part of the overdraft of N1,000,000.00
granted to the First Defendant.*
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12. *That the plaintiff also wrote another letter dated 29th
August, 1984 to Second Defendant demanding the sum of
N510,657.75 in settlement of balance of overdraft payable
by the First Defendant with the Second Defendant as its
guarantor as at the 30^h day of August, 1984. (A copy of
the letter is attached hereto and Marked Exhibit "C").*
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13. *That none of the Defendants has a valid defence to the
plaintiff's claim."*
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A counter-affidavit and a further counter-affidavit were filed
by the 1st defendant. The following allegations were made in the
30 further counter-affidavit:-

- "1. *That we have not received the writ of Summons and the
Statement of Claim in respect of the above mentioned suit.*
- 35 2. *That there is no record in our client's file to indicate that
they were served with the writ of summons and the
Statement of Claim.*

3. *That no reference of the Writ of Summons and the Statement of Claim is made in the Plaintiff/Applicant's motion and affidavit.*
4. *That the first defendant was only served with a motion and affidavit in November, 1984.* 5
5. *That we received a copy of the motion and affidavit on 7/12/84 and that same day we entered appearance on behalf of the first defendant.* 10
6. *That our client has not filed his defence owing to the fact that he has not received the Plaintiff/Applicant's Statement of Claims.* 15
7. *That the defendant has a defence to the Plaintiff's Claim".*

The 2nd defendant who had filed a statement of Defence substantially denying the averments in the plaintiff's Statement of Claim also filed a counter-affidavit to the plaintiff's application. The statements in paragraphs 3 to 14 of the counter-affidavit read thus:- 20

- "3. *That a Statement of Defence by the 2nd Defendant was filed on the 6th November, 1984 and served upon the plaintiff's Solicitor on the 21st November, 1984. Copy of the said Statement of Defence is attached and marked Exh. "D".* 25
4. *That the issues raised in the statement of Defence are vital and legitimate.* 30
5. *That the 2nd Defendants letters to the plaintiff dated 1st March and 8th March, 1984 gave the preconditions for the guarantee. Copies of the said letters are attached and marked Exhs. "A" and "B".* 35

6. *That it is a fact that the guarantee entered into by the 2nd Defendant was only supplementary to the fixed deposit of the 1st Defendant and the domiciliation of the proceeds of the said contracts payable to the 1st Defendant, and this stand was maintained by the 2nd Defendant in Exhs. "A" and "B"*
7. *That it is a fact that the plaintiff has failed to apply the domicillation of the proceeds of the contracts but instead recalled the overdraft within three (3) months.*
8. *That the plaintiff in its letter dated 29th February, 1984 to the 2nd Defendant stated that the overdraft was to be available for a period of six (5) (sic) months and the facts contained in paragraph 7 of plaintiff's affidavit shows that the plaintiff did not comply with the arrangement as conveyed in its said letter dated 29th February, 1984, copy of which is attached and marked Exh. "C".*
9. *That part of the plaintiff's letter to the 2nd Defendant dated 2nd March, 1984 (copy of which is attached and marked Exh. "D") which are conditions 1-3 confirms the intentions of the 2nd Defendant in issuing the guarantee.*
10. *It is a fact that whereas the 2nd Defendant regarded the guarantee as supplementary or collateral to the fixed deposit and the domicillation of the 1st Defendant contract money, the plaintiff in its condition a of Exh. "B" maintained the contrary.*
11. *That the plaintiff in seeking summary judgment, is wrongfully relying upon the guarantee simpliciter (sic) with out reference to the pre-conditions as contained in Exhs. "A", "B", "C" and "D".*

12. *That the plaintiff has failed to obtain an assignment of the proceeds of contracts amounting to about N1.2 million which is due to the 1st Defendant, in breach of a condition of the guarantee.*
13. *That the plaintiff having applied the fixed deposit the 1st Defendant amounting to N500,000.00 ought not fall back on the guarantee for the same amount.*
14. *That the plaintiff's application for judgment is in bad faith".*

The plaintiff's application came before Fafiade, J. In her ruling, rejecting the application, the learned judge remarked as follows:-

"There is no doubt the (sic that) Rule 6 (of Order 28) will operate where a party admits either in its pleadings or, otherwise. Plaintiff's Counsel has referred to 3 exhibits attached to the application for judgment which are guarantee executed by 2nd Defendant, and letters between plaintiff and defendants prior to the filing of this action. Although the motion paper is brought under Order 28 Rule 6 which presupposes an admission by both defendants, there is no such facts deposed to in the affidavit in support of the application, rather the deponent referred and exhibited the letters above. I deem it necessary for defendants to make specific admission as envisaged in Order 28 Rule 6 before an order can be obtained under it. In the absence of such admission, I find that this application is premature, objection raised is up held. Motion is therefore struck out. There will be no order for costs." (parenthesis mine)

Dissatisfied with ruling, the plaintiff appealed to the Court of Appeal. In dismissing the appeal that court held inter alia that there was no service of the writ of summons on the 1st defendant at the time the application under Order 28 rule 6 was brought by the plaintiff and that the documents exhibited by the plaintiff to the
5 affidavit in support of the application did not constitute a clear and unambiguous admission of liability by the 1st defendant of the amount claimed by the plaintiff. Furthermore, the Court held that even if there was any admission of liability by the 2nd defendant,
10 as guarantors to the 1st defendant, such admission was not necessarily an admission of liability by the 1st defendant.

It is from that decision that the plaintiff has now *appealed to this Court, formulating in its brief of argument five issues for*
15 *determination; namely:-*

1. *Whether the Court of Appeal was right in dismissing the plaintiffs appeal instead of entering judgment for the*
20 *plaintiff in the sum of #512,534.75 with interest since the 1st and 2nd defendants had made admissions of liability in writing.*
- 25 2. *Whether the Court of Appeal was right in upholding the denial by the 1st defendant that the writ of summons was not served on it while it entered appearance to the writ contesting the plaintiff's application for judgment.*
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3. *Whether the plaintiff's application for judgment against the 1st and 2nd defendants was premature on the ground that the admissions made by the 1st and 2nd defendants were*
35 *ambiguous and equivocal.*

4. *Whether the deed of guarantee dated 1st March, 1984 could have been amended by the two letters subsequently written by the 2nd defendant.*
 5. *Whether the deed of guarantee dated 1st March, 1984 was not a sufficient admission by the 2nd defendant of liability to pay to the plaintiff the sum of #500,000.00 with interest thereon as debt owed by the 1st defendant from 1st March, 1984 to 31st August, 1984.*
- The appeal is not being contested by the 1st defendant as it is neither represented by its officials nor by counsel. For 2nd defendant, a brief of argument was filed on its behalf by its counsel and the following five issues for determination were raised therein:-
- “(1) *Whether or not there was evidence before the Trial Court and the Court below of the service upon the first defendant/respondent of the writ of summons and the statement of claim.*
 - (2) *Whether or not there was an admission of the sum of N512,534.75, subject matter of the plaintiff/appellant’s claim by either or any of the Respondents and whether or not the second respondent could be bound by an admission, if any, made by a third party.*
 - (3) *Whether or not the Court below could properly enter judgment against the second Respondent when there was no admission by the second Respondent who has valid good and substantial defences to the Claim.*

(4) *Whether in the circumstances and having regard to the weight and totality of the evidence it was appropriate or convenient to dispose of the matter summarily in favour of the Appellant on their motion for judgment.*

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(5) *Whether or not the Court in constructing a deed of guarantee is precluded from looking at the correspondences between the parties in order to ascertain the real intention of the parties to the guarantee”.*

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I would like to consider plaintiff’s issues Nos. 1 and 3 together as they are correlated.

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20 Chief Oriade learned counsel for the plaintiff stated that the affidavit in support of the application to the High Court by the plaintiff for judgment alleged that 1st defendant was granted by the plaintiff, as its own (1st defendant) request, an overdraft in the sum of N 1,000,000.00 with interest thereon chargeable at the
25 rate of 13% per annum with effect from 7th March, 1984. In addition, the sum of N527,770.00 which was deposited with the plaintiff was credited to the overdraft account of the 1st defendant, thus reducing the overdraft account to N512,534.75 as at 31st August, 1984. He contended that all these facts were not denied by any of
30 the defendants.

Learned counsel referred to the guarantee agreement executed by the 2nd defendant on 1st March, 1984 to pay the sum of
35 N500,000.00 and any interest thereon in respect of any debt due to the plaintiff which had become payable by the 1st defendant in the period of six months that is from 1st March, 1984 to 31st August, 1984. As at the latter date the sum being claimed by the plaintiff

had become due, and action was filed by the plaintiff in October, 1984. He stated that both 1st and 2nd defendants had entered appearances to the writ of summons issued by the plaintiff. In the light of the foregoing facts, he submitted that the Court of Appeal was wrong to have held that the deed of guarantee executed by the 2nd defendant did not constitute a clear and an unambiguous admission of liability to the plaintiff. He also argued that the Court of Appeal was in error when it held the decision of the High Court that the plaintiff's application for judgment under Order 28 rule 6 was premature at the time it was brought.

Mr. Igwe, learned counsel for the 2nd defendant, in reply argued that the deed of guarantee and the letter in question did not constitute an admission under Order 28 rule 6. Although the guarantee agreement states that money would be lent to the 1st defendant, he submitted that that is not by itself an admission that the money had in fact been supplied by the plaintiff to the 1st defendant. *Proof that the 1st defendant had in fact become indebted to the plaintiff in the sum claimed would have to be established for the provisions of Order 28 rule 6 to apply.*

Now Order 28 rule 6 provides as follows:-

“6. Any party may at any stage of a cause or matter, where admissions of fact have been made, either the pleadings, or otherwise, apply to the Court or a Judge in Chambers for such judgment or order as upon such admissions he may be entitled to, without waiting for the determination of any other question between the parties; and the Court or

judge in Chambers may upon such application make such order, or give such judgment, as the Court or the Judge in Chambers may think just”

5 It is clear from these provisions that for Order 28 rule 6
to apply there must be an admission in the pleadings or otherwise by a party or parties to a case and that the trial judge has a discretion, even where the admission exists or is proved, to give judgment or grant an order as may appear just to the
10 trial judge. In the exercise of her discretion in the present case, the learned trial judge stated as quoted above that the plaintiff failed to state, in it affidavit in support of its application for judgment, that there was any admission of liability by the 1st
15 and 2nd defendants. But that all that the plaintiff did was to exhibit to the affidavit a guarantee agreement executed by the 2nd defendant and letters exchanged by the parties prior to the filing of the action. In the opinion of the learned trial judge
20 there has to be a specific admission before an order can be obtained under Order 28 rule 6. She found that the documents exhibited to the affidavit in support of the application by the plaintiff did not prove or show such admission. She
25 then concluded that in the absence of the admission, the application was premature and she struck it out.

30 For the plaintiff to succeed in showing that the learned trial judge exercised her discretion wrongly, it must be shown that the discretion was not judicially exercised. This means that either the discretion was exercised in an arbitrary or illegal manner or without due regard for all necessary considerations or with regard to unnecessary factor or bad faith or relying upon wrong principles - see Efetiroroje v. Okpalefe II,
35 (1991)15 N.W.L.R. 517 at pp. 537 G and Nalsa & Team Associate v. N.N.P.C. (1991) 8 N.W.L.R. 652 at p. 670 D.

The Court of Appeal in its consideration made the following observations (per Nnaemeke-Agu, J.C.A. as he then was):-

“So while it is true that a judgment would be entered under the rule at any stage of the proceedings, the question is whether such stage had been reaches in the circumstances of this case.....”

But what is the admission being relied upon in this case? The learned counsel for the appellants is relying on Exhibits PA 9 as constituting the admission. Now Exhibit. PA 8 is a guarantee by the 2nd respondents to be responsible for the advances to be made by the appellants to the 1st respondents to the tune of N500,000.00. It made no admission that any such advance had been made. Also that guarantee by its terms expired on the 30th of August, 1984, and there is nothing from the 2nd respondents to show that it was renewed. There is no evidence as to who part of the amount claimed accrued before the date. Although, there is a statement by the 1st respondent in Exhibit PA 9, letter dated 30th May, 1984, that the 2nd respondents had agreed to renew it, it does not appear to have been confirmed by the 2nd respondents.

.....

Upon a view of Exhibits PA 8 and PA 9 and for what I have said above, I am satisfied that they did not constitute a clear and unambiguous admission by the 1st respondent of liability for the amount claimed by the appellants. At best it could be said that the 1st respondents admitted owing the appellants a certain sum which could not yet be determined from the materials before the (trial) Court."

(parenthesis and emphasis mine).

It follows from the foregoing that the Court of Appeal was of the view that the trial judge had exercised her discretion properly in refusing to grant the plaintiff's application under Order 28 rule 6.

It is a common ground between the plaintiff and the defendants that a guarantee agreement executed by the 2nd defendant in favour of the plaintiff exists. The amount guaranteed by the 2nd defendant is the sum of N500,000,00. What is not obvious is whether the amount guaranteed or part thereof had been paid by the plaintiff to the 1st defendant. The plaintiff relied on the letter of the 1st defendant written to the plaintiff on 30th May, 1984 to show that the 1st defendant was indebted to it in the sum it claims in the action. The letter in question reads as Follows:

*"The Manager,
National Bank of Nigeria Limited*

*123, Itire Road,
Lawanson,
Lagos,*

Dear Sir,

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OUR FACILITIES WITH YOUR BANK

We refer to your letter on the approved facility of million, and your subsequent visit to our office with y Head Office Personnel (Mr. H. Omotosho)

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We confirm our discussion when we expressed our regret at the disappointments we have experienced from the State Governments who owe us large sums of money. The efforts we have made have not been fruitful as the majority of the State Governors have said that they had not completed the payment of the arrears of salaries, would therefore not like to commit themselves as to when they would make payments to us. We enclose herewith copies of some of their letters inviting us to meet their Governors and, copies of our letters of reminders pressing them to settle their debts. In view of this unforeseen delay by the State Governments to settle their debts to us, we hereby request that you bear with us during this very difficult period. We shall appreciate therefore if you could extend our facility for another nine months period, to expire at the end of February, 1985.

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The guarantee from Amicable Assurance Co. Ltd. will expire at the end of August, 1984, and they have agree to extend it for another six months period to 28th February, 1985. This will give us the time not only to collect the debts from the State Governments, but also to obtain our various import licences and to place orders, import the necessary raw materials and then start produc-

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tion again. Within that time also we hope to obtain import licences for our Fire Fighting and Bakery Divisions, and to be able to import the equipment which are in very great demand. From the proceeds of sales of the louvre frames to be manufactured locally, sales of fire fighting equipment including fire vehicles and some of bakery equipment we should be able to start repayment of the facility and liquidate the whole amount by February, 1985.

10 *If however, you find all the above not acceptable, we shall have no choice than to ask you to offset part of the N1 million facility with the N527,000.00 you are holding in fixed deposit for us plus the accrued interest. Once again, we regret the delay in settling the amount and assure you that we are doing all in our*
15 *power to collect money from our debtors.*

We thank you for the fruitful discussion we had with you
20 *during your visit to our office.*

Yours faithfully,
Guthire (Nigeria) Limited.
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J. O. Savage,
Ag, Managing Director.
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The following facts emerge from the letter:-

- 35 1. *That the plaintiff had approved overdraft facilities to the 1st defendant to the tune of N 1,000,000.00*
2. *That the 1st defendant was having difficulties in collecting*

money owed to it (1st defendant) from State Governments.

3. *That in view of the debt owed the 1st defendant by the State Governments, the 1st defendant would like the plaintiff to extend the date for the expiry of the overdraft facilities from 31st August, 1984 to the end of February, 1985.* 5
4. *That in the event of the plaintiff granting the extension to the end of February, 1985, the 2nd defendant were agree able to extend their guarantee of the sum of N500,000.00 to 28th February, 1985.* 10
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5. *That the extension if granted by the plaintiff would enable the 1st defendant collect the debts owed it by the State Governments, obtain various import licences, place orders to import necessary raw materials and then start production again and obtain import licences for its Fire Fighting and Bakery Division to import equipments which were in great demand.* 20
25
6. *That from all the facts in No. 5 above the 1st defendant would be able to repayment of the overdraft facilities and liquidate the whole amount by February, 1985.* 25
7. *That in the alternative, if the plaintiff found all the afore mentioned proposals unacceptable then it can offset part of the #1,000,000.00 overdraft facilities with the sum of N527,000.00 which the plaintiff held in fixed deposit with accrued interest for the 1st defendant.* 30
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8. *That the 1st defendant apologised to the plaintiff for the delay in settling “the amount”*

and assured the plaintiff that it was doing all in its power to collect payment from its debtors.

5 It is clear to me from no. 8 above that the 1st defendant admitted that it was by 30th May 1984 owing the plaintiff some money either amounting to N
10 1,000,000.00 or less but higher than the sum of N527,000.00 plus accrued interest which the 1st defendant had in deposit account with the plaintiff. However, this admission is vague as the exact amount the 1st defen-
15 dant owed the plaintiff cannot be ascertained with any degree of certainty from the letter of 30th May, 1984. Furthermore, the admission relates to the date 30th May, 1984 and not 31st August, 1984 when the plaintiff alleges
20 that the amount being claimed in the action became due to it. So that the letter of 30th May, 1984 is not necessarily a proof of what became due and owing in August, 1984. In the light of this, I am satisfied that the trial judge
25 was right when she held that there was no specific admission by the 1st defendant to justify an order being granted to the plaintiff under Order 28 rule 6.1 also agree with the Court of Appeal that the admission in the letter in
30 question did not constitute a clear and unambiguous admission by the 1st defendant of liability for the amount being claimed by the plaintiff, which the plaintiff alleged became due and owing on 31st August, 1984 by the de-
35 fendants jointly and severally.

As to whether the application by the plaintiff was premature the Court of Appeal (per Nnaemeka-Agu, JCA as he then was) observed as follows:-

*“My first observation on the above provision is that the application may on the impissima verba of the rule, be made 5
“at any stage of the proceedings”, provided that “admissions of facts have been made.” I do not however, think that when the learned trial judge stated that the application was pre-
mature, she meant that it could not be made in a proper case 10
until any particular stage was reached in the proceedings.*

*Neither she nor any of the counsel for the respondents said any such thing. What I understand them to have been saying is that in the context of this case, a stage had not been 15
reached for entering judgment on admission as the 1st respondent had not been served and there was not an admission, if any of such a Quality to entitle the appellant to a judgment under the rule. So, while it is true that a judgment would be
entered under the rule at any stage of the proceedings, the 20
question is whether such a stage had been reached in the circumstances of this case.”*

I entirely agree with the observation. If an application is brought by a plaintiff under Order 28 rule 6 for an order of 25
judgment, when there is neither an admission or there is an admission which is not specific and categorical, such application cannot be granted because the circumstance which will make the trial judge exercise his discre- 30
tion in favour of the applicant is non-existent. In other words in the absence of the circumstance, the application is inchoate, ill-timed and therefore pre-
mature. I think this is what the trial judge and the 35
lower court meant when they held that the application was premature.

I will next consider plaintiff's issue No. 2 which is; whether the Court of Appeal was right in holding that judgment under Order 28 rule 6 could not be entered against the 1st defendant, who not having been served with the writ of summons nevertheless entered appearance to the writ in order to contest the application for judgment under Order 28 rule 6. Learned counsel for the plaintiff argued that the Court of Appeal was wrong in holding that the proceedings in the High Court were a nullity since the 1st defendant was not served with the writ of summons when it entered appearance. He submitted that the 1st defendant was in fact served with the writ as shown by the proof of service tendered in the Court of Appeal.

Learned counsel for the 2nd respondent replied that the affidavit of service sworn to by the bailiff as proof of service on the 1st defendant was not before the High Court, it was not even part of the record of proceedings compiled for the appeal to the Court of Appeal. The affidavit of service was filed in the Court of Appeal as an annexure to an application brought by the plaintiff requesting the Court of Appeal to depart from its rules so that the appeal before it could be argued on documents exhibited to the application. He pointed out that the affidavit was sworn to on 5th June, 1985 after the plaintiff's application for judgment under Order 28 rule 6 was struck out by the trial judge. He then

submitted that the affidavit was not part of the record of appeal before the lower court and since no application was made to the Court of Appeal to tender it in evidence, as additional evidence,

that court was entitled on the authority of Prince W. L. Eweka v. Madam Ebose Amadasum (1983) 8 S.C.87 to disregard it. He canvassed that in the absence of proof of service of the writ of summons and plaintiffs statement of claim no valid order could have been made by the lower courts under Order 28 rule 6 because the court lacked the jurisdiction to entertain the case. 5

For a better understanding of the contention here, I think it is necessary to quote in extenso the remarks made by the Court of Appeal (per Nnaemeka-Agu, J.C.A), which is:- 10

“The case against the 1st respondents has yet another serious difficulty; there was no proof of service of the writ on the 1st respondents as at the date when the ruling appealed against was handed down. This was the third issue in the appeal. It is useful to set out paragraphs 5-8 of the counter-affidavit of Sebastain Ozoana sworn to in this court on the 22nd of November, 1985. He deposed interalia, as follows: 15 20

- “5. That I have further been informed by the said Simon Okeke Esq. that he has repeatedly complained in Court about the non-service of the writ of summons on the 1st defendant. 25
6. That I was further informed by the said Simon Okeke Esq. that on the 27th of May, 1985, when the application of the plaintiff was dismissed, the learned trial Judge, Justice Moni Fafiade, had in response to the remark of counsel to the 1st defendant observed that there was no records of service on the 1st defendant in the court file. 30
7. That on the 6th of September, 1985 when the record of appeal was settled at the Lagos High Court Registry, the affidavit of service in respect of the 1st defendant was not 35

one of the documents settled.

8. *That on the 21st of October, 1985, when the plaintiff's*
 5 *motion seeking for departure from the rules came up at the*
Court of Appeal, Lagos, the affidavit of service in respect
of the 1st defendant was not one of the documents before
the Court."

10 *The reaction of the learned counsel for the appel-*
lants to the remark of the learned counsel for the respon-
dent about none-service of writ summons was to procure
 15 *and exhibit PA3, a purported affidavit of service of the*
writ of summons on the 1st respondent. Exh. "PA2" was
ex facie, sworn to on the 5th of June, 1985- some nine
days after the ruling in question. As it was not in exist-
 20 *ence on the date of the ruling, it is mystery how it came*
to form a part of the record of this appeal. There was no
application or leave to call further evidence in the appeal.
I have therefore no alternative but to ignore the affidavit
 25 *of service, Exh. PA3, in coming to a conclusion in the*
matter. See Prince W. L. Eweka v. Madam Ebose
Amadasum (1983) 8 S.C. 87. Although, there was an
 30 *entry of appearance on their behalf as shown by Exh. PA*
4, it does appear from the above affidavit that as at that
date there was no service of the writ of summons On
them: at least there was no proof of that. If therefore, as
 35 *the affidavit of counsel set out above shows, they had not*
been served with the writ of summons, the proceedings is
a nullity. See Craig v. Kanssen (1943) K.B. 262:
Skenconsult (Nigeria) Ltd. v. Ukey (1981) 1 S.C.6:

Obimonure v. Erinoshé (1966) 1 All N.L.R. 250 at p. 252. If, as it appears from the affidavit of their counsel set out above the 1st respondents heard of the institution of the action against them and entered appearance to enable them to appear in Court to inform the Court of non-service of the writ and the Statement of Claim, that will not clothe the non-service with legality. Failure to file a defence by a party not served with the writ and the Statement of CL cannot be an admission of liability. “ 10

By the decisions of this Court in *Adeigbe & Anor. v. Kusimo & Anor.* 1965 N.M.L.R. 284; *Obimonure v. Erinoshé & Anor.*, (1966) All N.L.R. 245 at p. 247; *Skenconsult (Nig.) Ltd. v. Ukey*, (1981) 1 S.C.6 at p. 26, it is now established that, the failure to serve a writ of summons on a defendant is a fundamental vice since the service is a condition precedent to the exercise of jurisdiction by the court out of whose Registry the writ of summons was issue. What remains to be considered, however, is whether by entering appearance to a writ that was not served on it, the 1st defendant had waived its right to be served first before taking any tangible step in the action. It is already established above that the service of a writ of summons on a defendant is fundamental and where the service is not effected the court seised with the case lacks the jurisdiction to hear or determine the claim on the writ, it follows that when the 1st defendant entered appearance the High Court had no jurisdiction to hear the plaintiff's claim. It therefore should have declined to entertain the application for judgment under Order 28 rule 6 as far as the 1st defendant was concerned. How-

ever, although the 1st defendant made protest in its counter-affidavit that it was served with the writ of summons, the issue whether in view of the non-service, the High Court had jurisdiction to entertain the plaintiffs application was
5 neither raised nor considered by the High Court. When the point was raised in the Court of Appeal, it was proper for the lower court to deal with the matter and to have come to the conclusion that the proceedings in the High
10 Court on the application for judgment by the plaintiff was a nullity for that is the logical conclusion the High Court would have reached had the issue been raised before it. In my opinion, the entering of appearance by the 1st
15 defendant which was done in protest did not amount to a waiver by the 1st defendant to be served with the writ of summons and the plaintiff's statement of claim
20 *Skenconsult v. Ukey*, (1981) 1 S.C.6 at p. 25.

In view of the foregoing conclusions which I have arrived at, it is not necessary for me to consider the points raised by the plaintiff in issues nos. 4 and 5. Moreover, it seems to me
25 that the determination of the issues will involve a decision on important points to be considered in the substantive action and that will prejudice the case of one or more of the parties before the High Court.

The issues formulated by the 2nd defendant have all been
30 covered in dealing with those contained in the plaintiff's brief of argument. No useful purpose will therefore be served in considering them on their own.

On the whole, this appeal has no merit and it therefore fails. The decision of the Court of Appeal is affirmed and the appeal is hereby dismissed with N1,000.00 cost to the 2nd defendant.

KAWU JSC

5

I have had the advantage of reading, before now, the lead judgment of my learned brother, Uwais, J.S.C. which has just been delivered. I agree entirely with his conclusion that there is no merit in the appeal. I am satisfied that on the materials before the learned trial judge no specific admission of liability was made by the defendants which would justify an order under Order 28 r. 6 and Order 35 r. 1 of the High Court of Lagos State (Civil Procedure Rules, 1973). I am satisfied that the learned trial judge correctly exercised her discretion in refusing to grant the plaintiff's application and the Court of Appeal was also right in upholding her ruling. The appeal lacks merit and it is accordingly dismissed with N1,000.00 costs to the 2nd defendant.

20

WALI JSC

I have been privileged to read in advance, a copy of the lead judgment of my learned brother Uwais, J.S.C. I entirely agree with his reasoning and conclusion for dismissing the appeal.

25

For those same reasons which I hereby adopt as mine, I also dismiss this appeal as lacking in merit. The decision of the Court of Appeal affirming the Ruling of the trial court is hereby confirmed. The 2nd defendant is awarded N1000.00 cost against the appellant.

30

OGWUEGBU JSC

I have had the privilege of a preview in draft of the lead judgment just delivered by my learned brother Uwais, J.S.C. and I am in complete agreement with his reasoning and conclusions.

35

The appeal calls for consideration of Order 28, rule 6, Order

36, rule 6 of the High Court Civil Procedure Rules Cap. 52 Vol. 3, Laws of Lagos State and the question of non-service of the writ of summons on the 1st defendant/respondent among other issues.

These have been fully covered in the lead judgment but I
5 wish to emphasis the importance of service of process on a defendant.

Where this is required, failure to serve the process is a fundamental defect. The non-service of the writ of summons on the 1st defendant/respondent affected the jurisdiction of the court. Even
10 though the learned trial judge did not deal with this issue in her judgment, the Court of Appeal was right to have considered it. The proceedings against the 1st respondent should not have proceeded at all.

Notification of an opposing party of the institution of any
15 proceeding other than an application brought ex-parte is a condition precedent to the exercise of the jurisdiction by the court. Failure to do so is a defect in competence which is fatal. See Obimonure v. Erinsho & Or. (1966) All N.L.R. 245, Craig v. Kanssen (1943)
20 K.B. 256, (Nig) Ltd. & Or. v. Balogon (1986) 3 N.W.L.R. (pt. 28) 324 and Nwabueze v. Okoye (1988) 4 N.W.L.R. (pt. 91) 664.

The origin of the purported affidavit of service on the 1st respondent is questionable. It was deposed to on 5:6:85, days after
25 trial court had ruled against the appellant's application of judgment under Orders 28, rules 6 and Order 35, rules 1 and 6 of the High Court of Lagos State (Civil Procedure) Rules, 1972. To put it mildly, I would say that the affidavit of service was smuggled into the records of appeal of this court.

30 The claim against the respondent was joint and several, one wonders whether the appellant can proceed against the 2nd respondent when there was no proof of service of the writ of summons on the principal debtor. This issue is however not raised in this appeal and I shall not express any opinion on it.

35 I agree that the appeal lacks merit and it is also dismissed by me. The decision of the Court of Appeal is affirmed. I abide by the order as to costs contained in the lead judgment.

PRONOUNCEMENT***By Uwais, JSC.***

In accordance with the provisions of section 258 subsection (2) of the Constitution of the Federal Republic of Nigeria and the decisions of this Court in Attorney-General of Imo State v. Attorney-General of Rivers State, (1983) s S.C. 10 and Egbe Iyare v. Chief Andrew Jimoh Sule. (1983) s S. C. 54; I wish to announce with heavy heart that my learned brother, the late Hon. Justice Shehu Usman Mohammed, JSC. who sat with us to hear this appeal and pertook thereafter in the conference on the case that was held by all the members of the panel is dead. The late Justice who died in a motor accident on Tuesday 9th February, 1993 had agreed during the Conference that this appeal should be dismissed with N1,000.00 costs to the 2nd Respondent.

May his gentle soul rest in perfect peace, Amen.