

SUPREME COURT OF NIGERIA
4TH FEBRUARY, 1994. SC.82/1988,
CORAM:- M. L. UWAIS, O. OLATAWURA, I. L.
KUTIGI, U. MOHAMMED, Y. O. ADIO, JJSC

J. A. ODUTOLA PLAINTIFF/APPELLANT

AND

INSPECTOR KAYODE DEFENDANT/RESPONDENT

APPEALS - Court of Appeal - discretionary power of the court to re-enter a struck out appeal under 0.3 r. 25(2) - What appellant must show - to succeed in an appeal against the exercise of that discretion

APPEALS - Motion to relist struck out appeal - not pursued timeously - where proceeding was without jurisdiction *ab initio* - whether time can start running against appellant

COURT PROCESSES - Service - personal service directed on appellant - who is a living person and not an incorporated body - whether appellant can be served through his employee

EQUITY - Appeals - relisting struck out appeal - not timeously pursued - where appellant was not served - whether equitable doctrine of helping the vigilant and not the indolent - is applicable

JURISDICTION - Appeals - motion to relist appeal that was struck out for non-appearance - where notice of hearing was not served on appellant - proceedings deemed conducted without jurisdiction *ab initio*

LEGAL PRACTITIONERS - Service of process - Default of counsel in failing to accept service on behalf of his client - not to be visited on the plaintiff

FACTS

The plaintiff/Appellant filed an action against the Defendant/Respondent before the High Court Ibadan claiming general damages for trespass on the land in dispute and seeking an injunction. The suit was dismissed by the learned trial Judge and the plaintiff appealed to the Court of Appeal. On the first day the appeal came up for hearing the Defendant's counsel was present but the plaintiff was absent. The second time the matter came up, the plaintiff was still absent and the court of appeal struck out the appeal, refusing the Defendant's application that it be dismissed.

After about two years, the plaintiff filed a motion praying the court to relist his appeal. Affidavit filed in the proceedings reveal that the hearing notice was sought to be served on the plaintiff's counsel who refused service on grounds of not having instructions to that effect. The bailiff was allegedly given a directive that the plaintiff be served through his personal address. But the bailiff served the notice of appeal on one of the plaintiff's employee whom the plaintiff claimed did not give him the notice. The Court of Appeal refused to grant the plaintiffs application to relist the appeal brought pursuant to O. 3 r. 25 (2) of the Court of Appeal Rules, 1990. The aggrieved plaintiff has now appealed to the Supreme Court to determine whether the Court of Appeal was right in law to hold that the plaintiff/Appellant was duly served.

HELD (unanimously allowing the appeal)

1. As it is very clear that the power of the Court of Appeal to grant an application under O. 3 r. 25 (2) (re-entering a struck out appeal) is discretionary, to succeed in an appeal against the exercise of that discretion, the appellant must show that it was wrongfully exercised or that the discretion was not exercised judicially. (p.9 L4)
2. Since the hearing notice of the plaintiffs appeal did not reach the plaintiff because his counsel rejected service, it will be wrong to visit the refusal to accept service which is a default of counsel (that might well be founded), on the plaintiff. (p.9 L15)
3. The directive that personal service be affected on the plaintiff was not carried out correctly by the bailiff, seeing that the plaintiff who is a living person and not an incorporated body cannot be served through his servant as employee. (p.9 L24)

4. Although it is true that the plaintiff was at fault for not taking any action to relist the appeal timeously, the overriding consideration is that the Court of Appeal's proceeding in which the appeal was struck out was conducted without jurisdiction and is ab initio null and void. It cannot therefore, be said that time began to run against the plaintiff in applying to relist the case, and the lower court's application of the equitable doctrine of helping the vigilant and not the indolent against the plaintiff is wrong. (p.10 L33)

5. The dismissal of the plaintiff's appeal by the lower court has occasioned a miscarriage of justice and the Court of Appeal was in error in refusing the application to relist the appeal in accordance with the provisions of O. 3 r. 25 (2) of the Court of Appeal Rules, especially as there was no evidence that the plaintiff knew that the appeal was fixed for hearing on the day in question. (p. 11 L11)

REPRESENTATION:

Appellant in person.

Respondent absent and unrepresented.

CASES REFERRED TO

1. Craig v. Kansen (1943) 1 All E.R. 108
2. Abisi v. Mends 2 W.A.C.A. 238
3. Kudoro v. Alaka 1 F.S.C. 82
4. Solanke v. Ajibola (1969) 1 N.W.L.R. 253
5. Odusote v. Odusote (1971) 1 All N.L.R. 221 (New Edition)
6. Awani v. Erejuwa 11 (1979) 11 S.C 307
7. Obimonure v. Erinosho (1966) 1 All N.L.R. 250 at p. 252
8. Scott-Emuakpar v. Ukavbe (1975) 12 S.C. 41 at p. 47
9. Oditia v. Okwudinma (1969) 2 All N.L.R. 228 at pp. 231 - 232
10. United Nigeria Press Ltd. & Anor v. Adebajo (1969) N.S.C.C. 395
11. Obimonuke v. Erinosho & Anor (1966) N.S.C.C. 290
12. Niger Construction Nigeria Ltd v. Okugbeni (1987) 4 N.W.L.R. (pt. 67) 787
13. Inter Contractors Nigeria Ltd v. National Provident Fund Management Board (1988) 1 N.S.C.C 759
14. Management Enterprises Ltd. v. Otusanya (1987) 2 N.W.L.R. (pt. 55) 179
15. Nigeria Ltd v. Okpon (1989) 2 N.W.L.R. (pt. 103) 337

STATUTES AND RULES REFERRED TO

- 1. Supreme Court Rules 1985 O. 6 r. 8(7)
- 2. Constitution of the Federal Republic of Nigeria s.33(1)
- 5 3. Court of Appeal Rules Cap.62 Laws of the Federal of Nigeria 1990 O.3. r.25(2); O.1 r.3(2), (6) and (8)

LEAD JUDGMENT BY UWAIS JSC

10 The appellant herein was the plaintiff in the High Court of former Oyo State holden at Ibadan, where he brought an action against the respondent as defendant, claiming general damages for trespass and injunction to restrain the defendant, his agents, servants or assigns from continuing to commit trespass on the land in dispute. The suit was dismissed by the learned trial
 15 Judge -Ademakinwa J. The plaintiff appealed from that decision to the Court of Appeal.

 In the Court of Appeal, the plaintiff filed his brief of argument but it seems from the record of appeal that the defendants did not. The facts of what transpired in the Court of Appeal may be narrated as follows: On 25th September, 1984, the appeal came up for hearing. The defendant's counsel was present but the plaintiff was absent as he was not served with the hearing notice of the appeal. Consequently, the appeal was adjourned to the 5th December, 1984. However, the case was not before the Court of Appeal on that day. It came up for hearing on the following day- 6th December, 1984. Once again the plaintiff
 25 was absent while the defendant was represented by counsel. The registrar of the Court of Appeal informed the lower court that the plaintiff was served by hand on the 27th day of November, 1984. Counsel for the defendant, therefore, applied that the appeal be dismissed but the Court of Appeal struck it out. The plaintiff took no action for about two years. However, he filed a motion on
 30 notice on 30th October, 1986 praying the Court of Appeal to relist his appeal. In the affidavit in support of the application, the plaintiff deposed that his address for service was care of his counsel, Chief A.T. Sokan of 302, Ibadan/ Abeokuta Road. That the hearing notice was neither served on Chief Sokan nor on the plaintiff but on one Mrs. Julie Adebule, who was a cashier in one of
 35 the plaintiff's establishment. That Mrs. Adebule failed to deliver the hearing notice to the plaintiff. As the motion to relist the appeal could not be served on the defendant, the plaintiff brought an ex parte motion seeking leave to serve the motion on notice on the defendant by pasting at the defendants address at 57/256A Ibadan Grammar School Road, Ibadan. The motion ex-parte was

heard by the Court of Appeal on 2nd December, 1986 and was granted as prayed. The motion to relist the appeal was adjourned for hearing on 13th January, 1987. On the adjourned date both parties were represented in the Court of Appeal. Counsel for defendant asked for adjournment to enable him file a counter-affidavit challenging the application to relist the appeal. The application for adjournment was granted and the motion on notice was fixed for hearing on 11th February, 1987. In the meanwhile the counter-affidavit sworn to by an officer of the Court of Appeal who was in-charge of court processes - Mr. Tajudeen Olaniyan, was filed. In paragraph 3, 4, 5, 6, thereof explanation was given as to why the hearing notice in question was not served on the plaintiff. One of the reasons was that when Chief Sokan refused to accept service on behalf of the plaintiff, on the ground that he had no instructions from the plaintiff to do so, Mr. Tajudeen Olaniyan was allegedly "given a directive" that the plaintiff should be served through his personal address which is 5/7, Alhaji Jimoh Odutola Road, Ogunpa, Ibadan."

When the application came up for hearing on the adjourned date namely, 11th February, 1987, both parties were represented by counsel. The plaintiff's counsel Mr. N. O. O. Oke, who moved the motion, stated as follows:-

".....I am not challenging any of the paragraphs of the counter-affidavit by a bailiff of this court. I also agree that my client has done nothing since 1984. I agree that Mr. Sokan who was duly served, signed the notice of appeal. It is also true that when the counsel for applicant who signed the notice of appeal refused to accept service, it was served on an employee of the appellant. I do not know when the appellant got the record of appeal which he handed over to me and from which I prepared a draft brief. Urges the court to grant the application notwithstanding all the admissions made above."

Without counsel for the defendant responding, the Court of Appeal (Nnaemeka-Agu and Ogundare JJ.C.A, as they then were, and Gambari, J.C.A) made the following ruling, per Nnaemeka-Agu, J.C.A :-

"I do not see any need to call upon the respondent's counsel in view of the facts disclosed in the counter-affidavit which have been admitted, and the far-reaching admissions by the applicant's counsel before us. Under our rules, service on a counsel who signed a notice of appeal is good service. And it is manifest that the applicant himself who has done nothing since 1984 is not diligent in the prosecution of his appeal. Our jurisdiction in the

matter is equitable: equity helps the vigilant and not the indolent. In the circumstances, I refuse the application to relist the appeal which was struck out in 1984. N50.00 costs to the respondent."

Feeling aggrieved by the ruling, the plaintiff appealed to this court on 3 grounds of appeal. The plaintiff filed his brief of argument on the 28th June, 1988 but the defendant has failed to file respondent's brief in reply. The issue formulated in the plaintiff's brief are as follows-

"2.1. The main issue on this appeal is whether the Court of Appeal was right in law to hold that the appellant was duly served having regard to the materials before it particularly the bailiff's affidavit which showed that the appellant was not personally served as required by law and the previous order of the Court of Appeal itself.

The secondary issues are:-

(a) Whether service on an employee of the appellant was personal service on the appellant having regard to its order that the appellant be served personally.

(b) Whether the Court of Appeal could be heard to hold, as it did on the 11th day of February, 1987 that service on a counsel who signed a Notice of Appeal is good service, when the court itself had after receiving the report that counsel refused service, ordered personal service instead of service through counsel."

The plaintiff was present in the court at the hearing of the present appeal. But his counsel, the defendant's counsel and the defendant were absent. The plaintiff stated that he did not see his counsel and that he had no objection to the appeal being heard on the basis of the appellant's brief which was filed. The court therefore, invoked the provisions of Order 6 rule 8(7) of the Supreme Court Rules, 1985, which read-

"When an appeal is called, and it is discovered that a brief has been filed for only one of the parties and neither of the parties concerned nor their legal practitioner appear to present oral argument, the appeal shall be regarded as having been argued on that brief."

and deemed the appeal as having been argued on the appellant's brief. In the brief in question it is argued that the lower court was wrong in holding that the plaintiff was served with the notice for the hearing of this appeal since his counsel Chief Sokan rejected service and the court made an order that the service should be effected personally on the plaintiff and no

such service was, in fact, executed by the bailiff on him. Instead his employee was served and the employee failed to pass on the hearing notice to him. Reference is made to paragraph 6 of the plaintiff's affidavit in support of his application for the appeal to be relisted. The paragraph reads-

"6. That instead of serving the hearing notice of the appeal on me through the address I gave for service of processes namely through my lawyer, it was purportedly to one Mrs. Julie Adebule, who was a cashier at one of my establishments, and she never delivered it to me. (see the document attached herewith and marked 'Exhibit A')."

It is then contended that the counter-affidavit sworn to by the bailiff (Mr. Tajudeen Olaniyan) confirmed the deposition in the said paragraph 6 of the plaintiff's affidavit. Further reference was made in paragraphs 5, 7, 8 and 9 of the counter-affidavit to show that personal service on the plaintiff was ordered by the Court of Appeal when it came to its notice that the plaintiffs counsel refused to be served with the hearing notice of the appeal. It is consequently submitted that the Court of Appeal was wrong to have held that there was good service on the appellant through his counsel. Failure to effect personal service on the plaintiff as was ordered by the lower court, it is canvassed, rendered the proceedings of the court on the 6th day of December, 1984, whence the plaintiff's appeal was struck out, a nullity on the authority of *Criag v. Kanseen*, (1943) 1 All E.R. 108 and *Abisi v. Mends*, 2 W.A.C.A. 238.

It is also submitted that the non-service of the hearing notice on the plaintiff is a violation of the appellant's fundamental rights as enshrined in section 33 subsection (1) of the 1979 Constitution of the Federal Republic of Nigeria. Therefore, it is canvassed that the proceedings of 6th December, 1984 being a nullity, the Court of Appeal erred in law in not relisting the appeal as per the plaintiff's application.

I think it pertinent to quote in extenso the counter-affidavit filed in opposition to the plaintiff's application for his appeal to be relisted. It reads thus-

"I, Tajudeen Olaniyan, male Christian, Civil servant of Court of Appeal, Officer in-charge of court processes within Ibadan municipality make oaths and declare as follows-

1. That paragraph 6 of the affidavit sworn to by Alhaji Jimoh Odutola on the 30th day of October, 1986 is true.

2. That paragraphs 5, 7, 11, 14, 15, 16 & 17 thereof are not true.

3. *That the hearing notice was issued to the address given in the notice of appeal as care his solicitor, Chief A.T. Sokan, 302, Abeokuta road, Apata, Ibadan.*

4. *That Chief A.T. Shokan refused the service of the hearing notice indicating that the appeal is to be heard on Tuesday, the 25th September, 5 1984 on the ground that he (Chief A.T. Sokan) had no instruction of the appellant (Alhaji Jimoh A. Odutola) to receive the hearing notice. The photocopy of the hearing notice is attached as exhibit 1.*

5. *That the refusal of the hearing notice by Chief A.T. Sokan, the 10 court was notified accordingly on the 25th September, 1984 and the court gave a directive that Alhaji Jimoh Odutola (appellant) should be served through his personal address which is 5/7. Alhaji Jimoh Odutola road, Ogunpa Ibadan as stated on the record of appeal. Photocopy of the memo sent from the court to the registry is attached as exhibit 2.*

6. *That according to the directive of the court the hearing notice for 15 5th December, 1984 was issued to Alhaji Jimoh Odutola of 5/7 Alhaji Jimoh Odutola road, Ogunpa, Ibadan. Photocopy of the hearing notice is attached as exhibit 3.*

7. *That the reason for personal service was due to the fact that 20 changes of counsel can take place at any stage of the appeal but litigants remain same.*

8. *That Alhaji Jimoh Odutola came to the registry to enquire what has happened to his appeal before the motion in question was filed, and was informed of the personal service on him and also shown the dispatch book in 25 which Mrs. Julie Adebule signed her name.*

Photocopy of the paper is attached as exhibit 4.

9. *That the hearing notice was served on Alhaji Jimoh Odutola through his employee.*

10. *That I swear to this affidavit in good faith.*

(Sgd.) T. Olaniyan

DEPONENT."

Now, the plaintiff's application was brought under Order 3 rule 25 (2) of the Court of Appeal Rules, Cap. 62 of the Laws of the Federation of Nigeria, 35 1990 which provides-

"(2) When an appeal has been struck out owing to the non-appearance of the appellant the court may, if it thinks fit, and on such terms as to costs or otherwise as it may deem just, direct the appeal to be re-entered for

It is very clear from the foregoing that the power of the Court of Appeal to grant an application under Order 3 rule 25 (2) is discretionary. Therefore, for an appeal against the exercise of the discretion, by the Court of Appeal, to succeed it must be shown by the appellant that there has been a wrongful exercise of the discretion in that the court had acted under a mistake of law, or in disregard of principle, or under a misapprehension of the facts, or has taken into account irrelevant matters, or on the ground that injustice could arise or that no weight or no sufficient weight has been given to relevant consideration, or when, as is usually said, the discretion was not exercised judicially. See *Kudoro v. Alaka* (1956) 1 F.S.C. 82; (1956-58) SCNLR 255; *Solanke v. Ajibola* (1969) 1 N.M.L.R. 253; *Odusote v. Odusote*, (1971) 1 ALL N.L.R. 221 (New Edition) and *Awani v. Erejuwa II* (1976) 11 S.C.307. 5 10

In the present case it is clear that hearing notice of the plaintiff's appeal did not reach the plaintiff because his counsel rejected service. The refusal to accept service is a default of counsel and not the plaintiff. It will, in my opinion, therefore, be wrong to visit the default on the plaintiff. The plaintiff's counsel might have had a good reason for rejecting the service. His fees or instructions might not have been perfected, or no instructions were at all given to him by the plaintiff. In such a case counsel will be justified to refuse to do anything on behalf of a client that had failed to perform his (the client) obligation to the counsel. Although after service was rejected by Chief Sokan there was a directive given to the bailiff to serve the plaintiff personally, it is not clear from the bailiff's counter-affidavit, nor was it stated therein or in the record of appeal, who was it that ordered personal service on the plaintiff. Be that as may, the directive was not albeit carried out correctly. Instead of the plaintiff being served, his employee was served. The plaintiff is a living person and not an incorporated body or association the service upon which can be effected over its servant or employee or place of business. 15 20 25 30

It has been held that where the service of any notice of a proceeding is required to be given, failure to notify any party to the case is a fundamental omission which entitles the party not served and against whom any order is made in his absence to have the order set aside on the ground that a condition precedent to the exercise of jurisdiction for making the order has not been fulfilled- see *Obimounure v. Erinosho*, (1966) 1 ALL N.L.R. 250 at p. 252; *Scott-Emuakpor v. Ukavbe*, (1975) 12 S.C. 41 at p. 47 and *Odita v. Okwudinma*, (1969) 1 ALL N.L.R. 228 at pp. 231- 232 where Lewis, J.S.C. made the following obser- 35

vation -

5 *"In our view the failure to serve notice on the appellant or alternatively to obtain an order dispensing with such service renders the proceedings a nullity, and not a mere irregularity as Mr. Ohen submitted, as the appellant was entitled as a person directly affected to notice of the proposed application. In Criag v. Kanseen, (1943) 1 ALL E.R. 108 Lord Greene, M.R. at page 113 said-*

10 *"Those cases appear to me to establish that an order which can properly be described as a nullity is something which the person affected by it is entitled ex debito justitiae to have set aside. So far as the procedure for having it set aside is concerned, it seems to me that the court in its inherent jurisdiction can set aside its own order, and that an appeal from the order is*
 15 *not necessaryThe question we have to deal with is whether the admitted failure to serve the summons upon which the order in this case was based was a mere irregularity, or whether it was something worse, which would give the defendant the right to have the order set aside. In my opinion, it is beyond question that failure to serve process where service of process is*
 20 *required, is a failure which goes to the root of our conceptions of the proper procedure in litigation. Apart from proper ex parte proceedings, the idea that an order can validly be made against a man who has had no notification of any intention to apply for it is one which has never been adopted in England."*

25 Another reason given by the Court of Appeal for refusing to grant the plaintiff's application is that the plaintiff had failed to be diligent since he did not take action ever since the appeal was struck out in 1984. The application to relist the appeal was filed on 24th November, 1986. That is nearly two
 30 years after the appeal was struck out. No explanation was given in the affidavit in support of the application. Furthermore counsel for the plaintiff admitted in the Court of Appeal that his "client had done nothing since 1984." True, the plaintiff was at fault for not taking any action to relist the appeal timeously. But the overriding consideration is that the proceeding in which the appeal
 35 was struck out was, on the authorities cited above, conducted by the lower court without jurisdiction and is ab initio null and void. So that in effect it is as if the proceeding did not take place at all. In that case, it cannot be said that time began to run against the plaintiff in applying to relist the case. The case was in fact never removed from the list since the proceedings that purported

to lead to that order is a nullity. The jurisdiction of the Court of Appeal on plaintiff's application is statutory, as per Order 3 rule 25 (2) of the Court of Appeal Rules, and not equitable. It is, therefore, wrong for the lower court to apply the equitable doctrine of helping the vigilant and not the indolent against the plaintiff.

It is well established principle of law that all judicial discretion must be exercised according to common sense and according to justice, and if there is any miscarriage of justice in the exercise of such discretion, it is within the competence of an appeal court to have it reviewed.

In the circumstances of this case the Court of Appeal was in error in refusing the application to relist the appeal in accordance with the provision of Order 3 rule 25 (2) of the Court of Appeal Rules, especially as there was no evidence that the plaintiff knew that the appeal was fixed for hearing on the day in question. It cannot, therefore, be denied that the dismissal of the appeal in the circumstances had occasioned a miscarriage of justice. In my opinion, it would be wrong for this court to hold that the lower court was justified in refusing to grant the plaintiff's application or that it was exercising its discretion properly and judicially in so acting.

In the result, the appeal succeeds and it is allowed. The ruling of the Court of Appeal refusing the plaintiff's application is hereby set aside. It is ordered that the appeal be re-entered for hearing by the Court of Appeal, at Ibadan. The plaintiff is entitled to the costs of this appeal assessed at N1,000.00.

OLATAWURA JSC

I had a preview of the judgment of my learned brother Uwais, J.S.C, just read. I agree with his conclusions.

The appeal before us has nothing to do with the merits of the judgment of the Court of trial, but is mainly on procedural matter: Object of service of the process of a Court.

The appellant was the plaintiff in the High Court of Oyo State, Ibadan Judicial Division. He sued the respondent for the sum of N1,200.00 being special and general damages for trespass committed by him on the appellant's land at Molete, Ibadan. He in addition asked for an injunction restraining the respondent, his agents, servants or assignees from further trespass. Pleadings were filed and exchanged. After a full trial, judgment was entered in

favour of the respondent, and the plaintiff's claims were dismissed. There was no order as to costs.

The plaintiff then appealed to the Court of Appeal, Ibadan Judicial Division on a number of grounds. On 6th December, 1984 the appeal was struck out for non-appearance. The appellant filed a motion ex-parte under
5 order 1 rule 3(2), (6) and (8) of the Court of Appeal Rules praying the Court to serve the respondent by substituted service in order to relist the appeal which had earlier on been struck out. The appellant's counsel then was one Mr. N.O.O. Oke. On 2nd December, 1986 when the matter came before the Court of Appeal, it would appear that the prayer for substituted service was heard. The
10 record of the Court reads:

"Court:- Order as prayed. Substituted service to be effected within 14 days from today. 1st Motion for relisting adjourned to 13/1/87 for hearing.

15
Sgd. Uche Omo, P.J
2/12/86."

The matter came up on 13th January, 1987. On that day Mr. Oke
20 appeared for the appellant/applicant. Mr. Akande represented the respondent. As a result of Mr. Akande's application for adjournment, the motion was further adjourned to 11th February, 1987 and the appellant was advised to file "a further affidavit to cover the points raised by the court". The panel on that day, i.e. 13th January, 1987 consisted of Uche Omo, Kutigi, (JJ.CA. as they
25 were then) and Omolulu Thomas J.CA. The appellant took advantage of the advice offered by the Court. He swore to an affidavit and averred in paragraph 3 as follows:

*"3. That after the proceedings in Court of the application on 13th January, 1987, my solicitors advised me to serve on (i) Lawyer A.T. Soka
30 and (ii) on the bailiff, copies of the application and of the affidavit in support with a covering letter (copies of which I attach herewith marked exhibits 'AA' and 'BB') inviting them to swear to a counter-affidavit if there is any falsity in the affidavit in relation to either of them."*

It was as a result that one Tajudeen Olaniyan who was in-charge of
35 court processes swore to a counter-affidavit and averred in paragraphs 3, 4, 5, 7, 8, and 9 as follows:

"3. That the hearing notice was issued to the address given in the notice of appeal as care his solicitor, Chief A T. Soka, 302, Abeokuta Road, Apata, Ibadan.

4. That Chief A. T. Sokan refused the service of the hearing notice indicating that the appeal is to be heard on Tuesday, the 25th September, 1984 on the ground that he (Chief A.T. Sokan) had no instruction of appellant (Alhaji Jimoh A Odutola) to receive the hearing notice. The photocopy of the hearing notice is attached as exhibit 1. 5

5. That the refusal of the hearing notice by Chief A. T Sokan, the court was notified accordingly on the 25th September, 1984 and the court gave a directive that Alhaji Jimoh Odutola (appellant) should be served through his personal address which is 5/7 Alhaji Jimoh Odutola Road, Ogunpa Ibadan as stated on the record of appeal. Photocopy of the memo sent from the court to the registry is attached as exhibit 2. 10

6. That according to the directive of the court the hearing notice for 5th December, 1984 was issued to Alhaji Jimoh Odutola of 5/7 Alhaji Jimoh Odutola Road, Ogunpa, Ibadan. Photocopy of the hearing notice is attached as exhibit 3. 15

7. That the reason for personal service was due to the fact that changes of counsel can take place at any stage of the appeal but litigants remain same.

8. That Alhaji Jimoh Odutola came to the registry to enquire what has happened to his appeal before the motion in question was filed, and was informed of the personal service on him and also showed the despatch book in which Mrs. Julie Adebule signed her name. Photocopy of the paper is attached as exhibit 4. 20

9. That the hearing notice was served on Alhaji Jimoh Odutola through his employee." 25

At the time the motion came up for hearing on 11th February, 1987 the membership of panel that heard the application had changed. The application was heard by Nnaemeka-Agu, Ogundare (JJ.C.A. as they were then) and Sulu-Gambari, J.C.A. 30

It was Mr. Oke learned counsel for the applicant that moved the application to relist the appeal which was struck out. I will now set out the submissions of Mr. Oke, the learned counsel for the appellant/applicant in view of the counter-affidavit of Mr. Olaniyan (already set out) and the order of the Court. Mr. Oke moved the application and said: 35

"I am not challenging any of the paragraphs of the counter-affidavit by a bailiff of this court. I also agree that my client has done nothing since 1984. I agree that Mr. Sokan who was duly served signed the notice of

appeal. It is also true that when the counsel for the appellant who signed the notice of appeal refused to accept service, it was served on an employee of the appellant. I do not know when the applicant got the record of appeal which he handed over to me and from which I prepared a draft brief. Urges the court to grant the application notwithstanding all admissions made
5 *above."*

In a unanimous decision, the court per Nnaemeka-Agu, J.C.A said:

"I do not see any need to call upon the respondent's counsel in view of the facts disclosed in the counter-affidavit which have been admitted, and the far-reaching, admissions by the applicant's counsel before us. Under our
10 *rules, service on a counsel who signed a notice of appeal is good service. And it is manifest that the applicant himself who has done nothing since 1984 is not diligent in the prosecution of this appeal. Our jurisdiction in the matter is equitable: equity helps the vigilant and not the indolent. In the circumstances I refuse the application to relist the appeal which was struck*
15 *out in 1984. N50.00 costs to the respondent."*

The appellant filed Notice of appeal on these grounds:

"(i) The Appeal Court erred in law in holding that personal service
20 *of the hearing notice of the appeal had been effected on the plaintiff/appellant which according to the affidavit sworn to on 4th February, 1987 and filed by the Officer-in-charge of court processes, Tajudeen Olaniyan had been ordered by the court, when in fact the said hearing notice was not delivered to the plaintiff/appellant himself as required by law for personal*
25 *service to be effected.*

(ii) The Court of Appeal erred in law in holding that the plaintiff/appellant slept on his rights when upon the materials before it, the plaintiff/appellant acted promptly when he heard that the appeal had been struck
30 *out without his being served with hearing notice.*

(iii) The non-service of the hearing notice of the appeal and the order striking out the appeal in such circumstances, and the Court of Appeal's subsequent refusal to relist the said appeal is a violation to the maxim audi
35 *alteram partem and of the constitution of the Federal Republic of Nigeria in the appellant's favour".*

The only brief before us is the appellant's brief. The main issue raised in the appellant's brief is whether the appellant was served in accordance with

the order of court which ordered a personal service. The secondary issue raised by the appellant can only arise where the order of court allows an alternative mode of service.

When the appeal came up for hearing, only the appellant was present in Court. His counsel was absent. We exercised our powers under Order 6 rule 8(7) of the Supreme Court Rules 1985 and regarded, the appeal as having been argued on the appellant's brief.

I will now deal with the merit of the appeal: Since the lower court ordered a personal service on the defendant, any other service not in accordance with the order of court was not a proper service. This case has brought out clearly the statutory and honest duties required of a bailiff: to serve in accordance with order of court. Where a personal service is ordered, he must serve that person personally. Where a substituted service either by pasting at the last known abode of the person required to be served, or by a publication in a newspaper is ordered, any other service which is not in accordance with the clear and unambiguous language of the court is ineffectual.

Bailiffs are officers of the Court. Any dereliction of duty in the discharge of their duties will cause unnecessary delay in the administration of justice.

A false return of service on the part of the bailiff may lead to an attempt to deceive the court. This in itself is an abuse of that order.

However in the counter-affidavit filed by the bailiff, it was categorically stated that the appellant was not served. It is better to quote him even at the expense of repetition:

"9. That the hearing notice was served on Alhaji Jimoh Odutola through his employee."

I am sure that change in the panel of the Court of Appeal that ordered personal service on the appellant led to the error on the part of the court to have overlooked the court's earlier order of personal service. The general and accepted practice of court is that service on counsel for the party is a good service on the party, but where personal service is ordered, as in this case, any other mode of service is defective in law. The Court of Appeal was therefore clearly in error in the special circumstances of the appeal to have held that service on a counsel was a good service. The lower court was carried away about the date of the appeal pending since 1984 without advertng to the court's earlier and specific order. The reason for the order of personal service was to bring to the notice of the appellant that an application for the dismissal

of his appeal was pending. If he had been served personally and he thereafter folded his arms and refused to come to court, then the application for the dismissal of the appeal could not have been effectively resisted: *United Nigeria Press Ltd. and Anor v. Adebajo* (1969) 1 All N.L.R. 431.

5 In this appeal there is no doubt that a condition precedent to a proper service of the process of court based on the order of the court has not been fulfilled thereby rendering the entire exercise a nullity: *Ohimonure v. Erinsho & Anor.* (1966) 1 All N.L.R 250.

The appellant has raised a constitutional issue of fair hearing which 10 is enshrined in S.33 of the 1979 Constitution of the Federal Republic of Nigeria. This is the third ground of appeal in this Court.

In determining the issue involved the appellant's main and secondary issues made no reference to this issue of fair hearing. The issues arising 15 from any appeal should be reflected in the grounds of appeal: *Niger Construction Ltd. v. Okugbemi* (1987) 4 NWLR (Pt.67) 787. Where any ground of appeal is not reflected in the issues raised by the appellant, unless it is raised in the respondent's brief, the ground of appeal is deemed to have been abandoned. Under Order 6 rule 5(1) (a) of the Supreme Court Rules 1985, the brief filed by 20 an appellant shall contain "the issues arising in the appeal". The appellate jurisdiction of this Court is initiated by the appellant filing a notice of appeal which must set forth the grounds of appeal.

As stated earlier the issues arising from the appeal must be reflected 25 in the grounds of appeal. Before the introduction of filing of briefs, appeals were allowed on the grounds of appeal filed and successfully canvassed.

However since the introduction of the filing of briefs, appeals are allowed on the issues raised and successfully canvassed. Be that as it may, I do not see how the issue of fair hearing can be raised more so when the Court 30 below mistakenly took the service on the employee of the appellant as personal service. The gravamen of the appellant's complaint is that there was no personal service as ordered by the Court. The issue of fair hearing is therefore irrelevant and unnecessary to the just determination of this appeal: *Inter Contractors Nigeria Ltd. v. National Provident Fund Management Board* (1988) 1 35 N.S.C.C. 759; (1988) 2 N.W.L.R. (Pt. 76) 280.

On the whole I will therefore allow the appeal set aside the ruling of the Court of Appeal dated 11th February, 1987, and I order that the appeal struck out on 11th February, 1987 be restored to Cause List and to be heard expeditiously by the Court of Appeal Ibadan. The costs of this appeal are

KUTIGI, JSC

I have had a preview of the judgment just delivered by my learned 5
brother Uwais, J.S.C. I agree with his reasoning and conclusions. The appeal
is allowed. The ruling of the Court of Appeal is accordingly set aside and the
case restored to the Cause List. The appellant is awarded costs assessed at
N1,000.00

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MOHAMMED, JSC

I agree that this appeal should succeed for the reasons given in the
lead judgment just read by my learned brother, Uwais, J.S.C. It is trite that 15
service of process on parties before the hearing of the action is fundamental
and if not properly effected would result in declaring a trial null and void. In
United Nigeria Press Ltd & Anor v. Adebajo (1969) 1 All NLR. 431 this Court
had the following to say on service of process:

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*"In our opinion, the object of all types of service of processes,
whether personal or substituted, is to give notice to the other party on whom
service is to be effected so that he might be aware of and able to resist, if he
may, that which is sought against him. Therefore, since the primary consid- 25
eration in an application for substituted service is as to how the matter can
be best brought to the attention of the other party concerned, the court must
be satisfied that the mode of service proposed would probably, after all
practicable means of effecting personal service have proved abortive, give
him notice of the process concerned."*

30

To effect personal service of court process on a party, the Bailiff or
any officer of court entrusted with the task should satisfy himself that he has
found the right man. It is not enough to leave a court process with a person
who works in the same office with the defendant, as was done in this case
even if the latter undertakes to convey it to the appellant. 35

I therefore agree with my Lord that this appeal should be allowed. I
also set aside the ruling of the Court of Appeal, refusing to relist the appeal. I
abide by all the consequential orders made in the lead judgment.

ADIO JSC

I have had the advantage of a preview of the lead judgment just delivered by my learned brother, Uwais, J.S.C. and I agree that this appeal should be allowed and is hereby allowed by me.

5 The lower court, itself, ordered that a hearing notice be personally served on the appellant. When the matter subsequently came before the lower court, it was erroneously thought that service of the hearing notice had been effected on the appellant personally in accordance with the order of the Court. The court dealt with the matter in the belief that the appellant was in default in
10 not attending the court.

My learned brother, Uwais, J.S.C., had pointed out in the lead judgment, and I entirely agree with him that where a personal service of a process is ordered on a party, a bailiff or any official of the court effecting the service must serve the party personally. If, it had been shown, the hearing notice
15 which was, according to the order of the lower court, to be served on the appellant personally was, in fact, not so served on him, the order of the lower court striking out the appeal of the appellant was a nullity. The service of a process on a party, where it should be served or its service in the manner in which it should be served, is one of the fundamental conditions precedent to
20 the exercise of jurisdiction by a court. See *Management Enterprises Ltd v. Otusanya* (1987) 2 NWLR (Pt.55) 179. Therefore, if a service of a process is necessary and there is no proof that such service was effected on the appropriate party, any judgment emanating from such proceeding is a nullity, See *Obimonure v. Erinosh* (1966) 1 All NLR 250; and *I.T.T. Nigeria Ltd. v. Okpon*
25 (1989) 2 NWLR (Pt.103) 337. The result is the same where the service of a process is ordered to be effected in a particular manner and there is no proof that it was effected in the prescribed manner.

It is for the reasons given above and the detailed reasons given by my learned brother, Uwais, J.S.C. in the lead judgment, with which I entirely
30 agree, that I too allow the appeal and abide by the consequential order made by my learned brother including the order for costs.

Appeal Allowed.