

SUPREME COURT OF NIGERIA

18TH JULY, 1995. SC. 12/1992

**CORAM:- M.L. UWAIS, I.L. KUTIGI, E.O. OGWUEGBU,
S.U. ONU, Y.O. ADIO, JJSC**

AFRICAN CONTINENTAL BANK PLC PLAINTIFF
APPELLANT

AND

1. LOSADA NIGERIA LTD
2. ALHAJA TAIBAT ADENIJI DEFENDANTS/
RESPONDENTS

JUDGMENTS - Motion for Judgment - When not served - Court lacks jurisdiction - Judgment obtained is a nullity - And will be set aside.

JUDGMENTS - Setting aside judgment - When is a court competent - To set aside its own judgment.

PRACTICE & PROCEDURE - Motion for judgment - Failure to serve the respondents - Is not a mere irregularity - Proceedings will be vitiated.

RULES OF COURT - Motion for Judgment - Service thereof - High Court of Lagos State (Civil Procedure) Rules - Order 40, is applicable and not Order 6 Rule 5.

SERVICE OF PROCESSES - Motion for Judgment - Mode of service thereof - Is by personal service - Though court may be moved for substituted service- If personal one fails.

SERVICE OF PROCESSES - Substituted service - Where Limited substituted service is ordered - It does not apply to service of every other process.

FACTS

The Appellant as plaintiff, caused a Writ of Summons to be issued against the Respondents (Defendants) before the High Court of Lagos State, Ikeja, claiming N2.5 million. The Respondents failed to enter appearance to the Writ of Summons. The appellant then obtained leave of court to serve and served the process by substituted service on the last known addresses of the Respondents. The respondents also did not enter any defence. Thereafter,

the appellant brought a Motion for Judgment. But without leave of Court and purporting to act under Order 6 Rule 5, High Court of Lagos State (Civil Procedure) Rules, pasted by way of substituted service, its motion for Judgment at the same addresses where it pasted the earlier process as granted by the court. Whereupon the Motion was heard and judgment was entered in the appellant's favour as per its Writ of Summons and Statement of Claim. The appellant on the 18/11/88 executed the said judgment on the properties of the respondents. The respondents on the 23/11/88 brought an application praying the trial court to have its judgment and the execution thereof set aside and grant them leave to file their defence to the suit. Upon which application, the trial Judge heard both parties and thereafter, set aside its earlier judgment-and the execution thereof.

Being dissatisfied, the appellant appealed to the Court of Appeal Lagos Division. That Court dismissed appellant's appeal. The appellant's further appeal is this before the Supreme Court wherein it formulated three issues as falling for determination. The apex court however viewed the lone issue raised by the respondents as proper.

ISSUE FOR DETERMINATION

Whether the learned Justices of Appeal rightly upheld the decision of the learned trial Judge in exercising his discretion to raise the issue of the propriety of the service of the Motion for Judgment on the basis of which the Appellant obtained judgment.

HELD (Unanimously dismissing the appeal per lead judgment of KUTIGI JSC)

Motion for judgment - Applicable rule

1. I endorse the view so clearly expressed above. The Court of appeal rightly in my view came to the conclusion that a Motion for Judgment comes under Order 40 which requires personal service and not under Order 6 Rule 5 as contended by Mr. Agbakoba. It does not also fall under Order 9 Rule 14 which provides for action by Money Lenders under the Money Lenders Act. So that although the Court of Appeal (per Ademola J.C.A.) rightly in my view said in his judgment that the argument of Counsel on Order 6 Rule 5 "look formidable" and that "its acceptance is dangerous and destructive of audi alteram partem rules in our adversary system", that was not the reason for rejecting the argument. It is primarily and simply because Rule 5 did not apply all. (p. 1495 C)

Service of Motion for Judgment

2. The Motion for Judgment should therefore have been served personally

on the Respondents. It was only when personal service failed that the court should have been moved as may be appropriate for a substituted service. The court has a discretion to make or refuse to make an order for substituted service. That was what the appellant herein purported to have done single handedly without the leave or order of the trial court. (p. 1495 E)

Substituted service

3. It was clear however, from the order made by the learned trial judge on the 21st March 1988 on the application for substituted service that that order was restricted to service of the writ of summons, the Statement of Claim and other processes “so far filed” only. That order cannot by any stretch of imagination be intended to be a blank cheque to extend to service of other court processes filed after that date. The Motion for Judgment which was filed on 13th June 1988 was therefore clearly outside the ambit of that order. (p. 1495 F)

Where motion for judgment is not served

4. It was essential for the motion to have been served since the court has no jurisdiction over a person who has not been served unless he of course submits to jurisdiction. The two lower courts were therefore clearly right when they come to the conclusion that the Motion for Judgment was never served on the respondents and that the judgment obtained thereon was a nullity and ought to be set aside. (p. 1495 H)

Motion for judgment - Failure to serve respondents

5. I have no hesitation in agreeing with the lower courts that failure to serve the Motion for judgment on the Respondents in this case was not a mere irregularity but a fundamental irregularity which vitiated the entire proceedings and entitled the Respondents to have the judgment of the trial court set aside. A trial judge being a judge of fact and law it is within his rights in raising any issue suo motu as the interest of justice demands. (p. 1496 G)

Court setting aside its own judgment.

6. It is indisputable that a court of law is competent to set aside its own judgment in a number of circumstances. And the present circumstance, when the judgment obtained was a nullity, is one of such circumstances. (p. 1497 C)

NOTABLE POINTS OF INTEREST

ONU JSC

1. Service of Motion for judgment - 0.6, r. 5 not to be read in isolation

Thus, in construing service of Motion for Judgment, Order 6 Rule 5 to be meaningful, ought not to be read in isolation since the Rule should be complemented by Order 6 Rule 2 which makes provisions for how a writ of summons, originating summons or any other originating process shall be served personally by delivery to the person to be served; Order 9 Rules 2,3 and 14(3) relating to default of appearance generally and endorsement of liquidated demand and leave in actions by moneylenders under the Money Lenders Act, Cap. 124; Order 24 Rules 2 and 15 respecting claims for debt or liquidated demand and setting aside judgment by default as well as Order 40 Rules 1, 5 and 6 regarding application by motion, length of notice of motion and dismissal or adjournment of motion, where necessary notice is not given, respectively. Treating Order 6 Rule 5 in isolation is capable of wreaking, injustice or doing substantial violence to the administration of justice. (p. 1503 D)

2. Danger of shutting out a respondent through Order 6, Rule 5.

While adopting the above dictum as most apposite to the instant case and as such a befitting affirmative answer to Issue 1 hereof, I need only add that to uphold the Appellant’s appeal is to open wide the sluice or give room for the perpetuation of myriads of evil in relation to obtaining judgments by default. Furthermore, the order of the trial court in relation to the Motion for judgment imbibing “all writs, notices, pleadings, orders, summonses, warrants and other documents” vide Order 6 Rule 5 of the Rules, ought not to be construed as extending to “judgments.” To so hold is to elevate the Rules which after all constitute subsidiary legislation as overriding the provisions of the Constitution of the Federal Republic of Nigeria, 1979. (p. 1504 D)

ADIO JSC

3. Supremacy of the constitution

It has never been the case in our law that the provision of an ordinary statute would render nugatory the relevant provision of the Constitution. Therefore, if any law of a state including a subsidiary legislation like the aforesaid High Court (Civil Procedure) Rules of Lagos State, is inconsistent with the provisions of the Constitution, the provisions of the Constitution prevail, and that state law is to the extent of the inconsistency void. Therefore, any provision of the Rules which purports to dispense with hearing of a defendant before judgment is given against him will be null and void. (p. 1506 H)

REPRESENTATION

O. Agbakoba, Esq. for the Appellant.
Respondent absent and not represented.

CASES REFERRED TO

- Ikeogu v. Aliri (1991)3 NWLR (Pt. 179) 258 SC.
 B Okumagba v. Egbe (1965) 1 NMLR 62
 Sken Consult Nigeria Ltd. v. Ukey (1981) 1 SC. 6;
 United Nigeria Press Ltd v. Adebajo (1969)1 ANLR 431
 Sodipo v. Lemminkainen (1986) 1 SC. 197 at 217
 C Board of Customs & Excise v. Barau (1982) 10 SC. 48
 Williams v. Williams (1987) 2 NWLR (Pt. 34) 66
 Nneji v. Chukwu (1988)3 N.W.L.R. (Pt. 81)84,
 Bello v. Attorney-General, Oyo State (1986) 5 N.W.L.R. (Pt. 45)828
 Grimshaw v. Dunbar (1953)1 Q.B. 406 at 416
 Amadi v. Anulaobi (1992) 4 N.W.L.R. (Pt. 238) 721
 D Ntukidem v. Oko (1986) 5 NWLR (Part 5) 909

STATUTES & RULES REFERRED TO

High Court of Lagos State (Civil Procedure) Rules. 1972, 0.6, r.2; 0.6, r. 4
 &5; 0.9, r. 14(3); 0.40, rr.3, 5 & 6; Constitution of the Federal Republic of
 E Nigeria, 1979, s. 33(1)

BOOK REFERRED TO

Wester's Dictionary of the English Language, Deluxe Encyclopedic Edition

LEAD JUDGMENT BY KUTIGI JSC

- F This is an appeal against the judgment of the Court of Appeal Lagos
 Division, delivered on the 17th day of April, 1991 dismissing the Appellant's
 appeal against the ruling of the Ikeja High Court of Lagos State delivered
 on January 17th, 1988 which set aside an earlier order of the court entering
 judgment for the Appellant (as Plaintiff) in that court on the ground inter
 G alia that the Motion for Judgment was not served on the Respondents (as the
 Defendants). The facts of the case which are not disputed may be stated thus-

- The Plaintiff/Appellant issued a Writ of Summons against the Defen-
 dants/Respondents on the 22nd day of February 1988 claiming against them
 jointly and severally the sum of N2.5 million being the balance of overdraft
 H facilities granted to the Respondents by the Appellant as their bankers. The
 Appellant was unable to serve the Writ of Summons and the accompanying
 Statement of Claim on the Respondents personally. It therefore brought an

application for leave to serve same by substituted means. The application was
 granted on 21st March 1988 when the court said -

*"It is hereby ordered as prayed. Service of the Writ of Summons
 and the Statement of Claim and all other processes so far filed in this suit (if
 any) by pasting same on the front door of the Defendants' last known place
 of abode/business located at No. 50, Community Road, Akoka, Lagos, shall
 be good and sufficient service of the processes aforesaid."* B

The service by pasting was effected by the Bailiff on the 30th March,
 1988. When the Respondents failed to enter appearance and file a Statement
 of Defence within the stipulated time, the Appellant brought an application
 for judgment on 13th June, 1988. The Appellant purportedly served the said
 application by pasting it at the address of the Respondents just in the same C
 manner that the Writ of Summons and the Statement of Claim were served
 above. Thereafter the learned trial judge entered judgment for the Appellant
 against the Respondents as per its Writ of Summons and Statement of Claim
 on the 5th day of September 1988.

Judgment was executed on the properties of the 2nd Respondent
 on 18th November 1988. The respondents then on the 23rd November, 1988
 brought an application to set aside the said judgment and the execution thereof D
 and for leave to file a defence in the suit.

After hearing arguments from both sides, the learned trial judge in a
 considered ruling delivered on the 17th day of January, 1989 had no difficulty
 in setting aside his own judgment which he entered in default of appearance
 and defence as well as the execution issued.

The Appellant was dissatisfied with the Ruling and appealed to the E
 Court of Appeal, Lagos Division. The following issues were set down for
 determination -

*"1. Whether the mere filing of the Motion for Judgment in the High
 Court Registry does or does not constitute a valid service of the same on the
 Defendants/Respondents under Order 6, Rule 5 of the High Court of Lagos
 State (Civil Procedure) Rules (1972) considering the fact that they had not
 given an address for service by entering an appearance at the time the said
 Motion was filed."* F

*2. Whether the further service of the Motion for Judgment on the
 Defendants/Respondents by pasting on the door No. 50, Community Road,
 Akoka (even if necessary) was irregular in the circumstances of this case,
 simply because no leave of court was obtained before such mode of service
 was adopted."* G

*3. Even if the service of the Motion for Judgment by pasting without
 leave of court authorising such, was irregular, was the irregularity capable
 of rendering the proceedings void such as to justify the trial judge raising the*

issue suo motu?”

The Court of Appeal considered all the three issues and relevant authorities and unanimously dismissed the appeal. It is against the judgment of the Court of Appeal that the Appellant has now appealed to this Court.

Parties have filed and exchanged briefs of argument. Mr. Agbakoba learned counsel for the Appellant has in his brief submitted three issues for determination as follows -

“(i) *Whether the learned Justices of the Court of Appeal were right to hold, as they did, that on a proper construction of Order 6, Rule 5 of the High Court of Lagos State (Civil Procedure) Rules, 1972 a Motion on Notice to enter final judgment in default of appearance and defence is not a “Notice” or “other document” deemed sufficiently served on a party not entering appearance to a suit by filing same at the Court’s Registry.*

“(ii) *Whether the learned Justices of the Court of Appeal were right to hold, as they did, that the learned trial Judge was right in raising the issue of propriety of service of the Motion for Judgment by the Appellant in default of appearance and defence against Respondents, Suo motu, when the Respondents had not complained of such impropriety.*

“(iii) *If the answers to questions (i) and (ii) above are in the negative, what will be the effect on the Decision of the Court of Appeal given on April 17, 1991?”*

It is perhaps necessary to observe that what the appellant termed issue (iii) above is clearly not an issue since it is not based on any ground of appeal as required by the rules of court. It is doubtless that if issues (i) and (ii) succeed at all the court is always in a position to make any appropriate consequential order. It is therefore not completely surprising that the appellant failed to argue the said issue (iii) in its brief. It is to be deemed abandoned and struck out accordingly.

Now, a careful reading of the remaining two issues submitted for determination above will show that in substance they are the same with the three issues earlier canvassed and lost at the Court of Appeal. The respondents would appear therefore to be right when they stated in their brief that the single issue for determination in this appeal is -

“*Whether the learned Justices of Appeal rightly upheld the decision of the learned trial Judge in exercising his discretion to raise the issue of the propriety of the service of the Motion for Judgment on the basis of which the Appellant obtained Judgment*”

even though they proceeded to address the issues as formulated by the appellant.

On issue (i) Mr. Agbakoba learned counsel for the appellant relying

on Order 6 Rules 4 & 5 of the High Court of Lagos State Civil Procedure Rules, 1972 (hereinafter simply referred to as the Rules), submitted that there are two ways by which documents not requiring personal service might be served. First, where the defendant to be served has entered an appearance, the document to be served may be delivered to any adult person at the address for service provided in the Memorandum of Appearance. Second, where the defendant has entered no appearance, then the document is sufficiently served when filed in the court’s Registry.

He said although by Order 6 Rule 2 of the Rules, all Writs of Summons, Originating Summons, and other originating processes are required to be served personally, there is nowhere in the Rules where the class of documents of which personal service is not required are clearly spelt out; but that any application brought during the pendency of an action would constitute a subordinate or mesne process as against an originating process. It was contended that Order 6 Rule 5 of the Rules makes express provision to cover service of mesne or subordinate processes on a defendant in a situation in which the defendant has entered no appearance to a Writ when it provides that “all writs, notices, pleadings, orders, summonses, warrants and other documents” in respect of which personal service is not expressly required shall be sufficiently served when filed in the court’s Registry. It was submitted that on the facts of this case and from the clear and unambiguous wording of Order 6 Rule 5, the Motion on Notice to enter Judgment against the defendants in default of appearance and defence filed on June 13, 1988 would by the simple act of filing same in the Registry, without more, be deemed to have been served on the Defendants. He said where words in a statute are clear and unambiguous, they should be given their ordinary meaning and enforced accordingly. That it is nowhere stated in the Rules that a Motion for Judgment in default of appearance and defence required to be served personally on a defendant. He referred to the case of Ekeogu v. Aliri (1991) 3 NWLR (Pt. 179) 258 S.C. and Okumagba v. Egbe (1965) 1 NMLR 62; (1965) 1 All NLR 62.

It was also contended that the Court of Appeal erred in finding that strict adherence to the clear and unambiguous provision of Order 6 Rule 5 would be destructive of the audi alteram partem rules of our adversary system of justice since it was not an issue in the High Court and could not therefore properly be raised in the Court of Appeal.

Mr. Sofola learned Senior Counsel for the respondents in his brief submitted that the Court of Appeal was right in holding that Order 6 Rule 5 of

1494 ACB PLC v. Losada Ltd. (1995) 7 KLR Kutigi JSC
the Rules was not applicable to a Motion for Judgment and that the applicable order was Order 40 of the Rules. Accordingly failure to allow the Respondents two clear days to answer to the application ordinarily violated their right to be heard. That his contention was reinforced by the finding of the trial court that the Motion for Judgment was never served at all. It was further submitted that on the clear and unambiguous words of Order 9 Rule 14(3) of the Rules, the notice of the Motion for Judgment shall be served personally and returnable not less than four days after such service in the case of default of defence and that the appellant was wrong in its contention that there was no express provision concerning whether the Motion for Judgment was to be served personally or not. He also referred to Section 33(1) of the 1979 Constitution and submitted that being one of the fundamental rights guaranteed to a citizen it over-rides any other law or subsidiary legislation and courts of law are bound to have regard to it as the Court of Appeal had rightly done in this case.

It is clear to me that issue (i) above seeks for a true and proper construction of Order 6 Rule 5 of the 1972 Rules. It reads -

“5. Where no appearance has been entered by or for a party, in compliance with the provisions of these Rules, or where a party or his legal practitioner, as the case may be, has omitted to give an address for service as required by Orders 3 and 8 all writs, notices, pleadings, orders, summonses, warrants and other documents, proceedings, and written communications in respect of which personal service is not expressly required shall be deemed to be sufficiently served when filed in the Registry unless the court or a Judge in Chambers otherwise directs.”

One would easily agree with Mr. Agbakoba that literally speaking, under Rule 5 above, if a document is not required to be served personally and if the defendant has entered no appearance then the document is deemed sufficiently served when filed in the court's Registry. This would however in my view depend on the nature and type of document in question and whether or not the document does not come under any other provision of the Rules. But the factual situation here is that the Motion for Judgment was not only filed but purportedly pasted on the premises of the Respondents, and it was on the strength of the purported service that judgment was entered in favour of the Appellant. So the vital question to ask is Does a Motion for Judgment come within the ambit of “other documents” in Rule 5 in respect of which personal service is not expressly required? The Court of Appeal in the lead Judgment of Ademola J.C.A., answered the question thus

“A Motion for Judgment is an application for Judgment to be entered in favour of a party. Motions and other applications are governed by Order 40 of the High Court of Lagos State (Civil Procedure) Rules 1972, and not Order 6 generally which deals with the service of writs, summonses, warrants,

ACB PLC v. Losada Ltd. (1995) 7 KLR Kutigi JSC 1495

and other documents of similar character.

A motion must be served on the other party at least (2) clear days before it is heard (Order 40 Rule 5). It is necessary before a motion is heard that any person who is affected ought to have notice of such motion and the court could dismiss or adjourn such a motion until such notice of the motion is given to the other side (Order 40 Rule 6).

From what I have been saying so far, it is quite clear that a motion cannot be in the category of documents that are deemed served by mere filling of same in the Registry as envisaged by Order 6 Rule 5 as it has been canvassed in the argument of Mr. Agbakoba.”

I endorse the view so clearly expressed above. The Court of Appeal rightly in my view came to the conclusion that a Motion for Judgment comes under Order 40 which requires personal service and not under Order 6 Rule 5 as contended by Mr. Agbakoba. It does not also fall under Order 9 Rule 14 which provides for action by Money-Lenders under the Money Lenders Act. So that although the Court of Appeal (per Ademola J.C.A.) rightly in my view said in his judgment that the argument of Counsel on Order 6 Rule 5 “looks formidable” and that “its acceptance is dangerous and destructive of *audi alteram partem* rules in our adversary system” that was not the reason for rejecting the argument. It was primarily and simply because Rule 5 did not apply at all. Enough of that.

The Motion for Judgment should therefore have been served personally on the Respondents. It was only when personal service failed that the court should have been moved as may be appropriate for a substituted service. The court has a direction to make or refuse to make an order for substituted service. That was what the appellant herein purported to have done single handedly without the leave or order of the trial court. It was clear however, from the order made by the learned trial judge on the 21st March 1988 on the application for substituted service that that order was restricted to service of the writ of summons, the Statement of Claim and other processes “*so far filed*” only. That order cannot by any stretch of imagination be intended to be a blank cheque to extend to service of other court processes filed after that date. The Motion for Judgment which was filed on 13th June 1988 was therefore clearly outside the ambit of that order. It was essential for the motion to have been served since the court has no jurisdiction over a person who has not been served unless he of course submits to jurisdiction. The two lower courts were therefore clearly right when they came to the conclusion that the Motion for Judgment was never served on the respondents and that

the judgment obtained thereon was a nullity and ought to be set aside (see

1496 ACB PLC v. Losada Ltd. (1995) 7 KLR Kutigi JSC
Sken Consult Nigeria Ltd. V. Ukey (1981) 1 S.C. 6; United Nigeria Press Ltd.
& Anor. V. Adebajo (1969) 1 ANLR 431.

B Issue (ii) relates to the question of propriety of service of the Motion
for Judgment by the Appellant in default of appearance and defence against
the Respondents which was raised suo motu by the learned trial Judge and
upheld by the Court of Appeal. Mr. Agbakoba rightly in my view agreed that
it was the duty of a Judge in determining any cause or matter to exercise due
diligence in order to ensure that justice is done between the parties and cited
the case of Sodipo v. Lemminkainen OY & Anor. (1986) 1 S.C. 197 at 217;
(1986) 1 NWLR (Pt.15) 220 in support. However, he contended that since
C the respondent's complaint in the High Court was not that the Motion for
Judgment was served on them irregularly by pasting but that they were not
aware of the suit at all until execution was levied, the trial court could have
only validity raised the point suo motu if it was fundamental to the jurisdiction
of the court. He said the mode of service being a mere irregularity, the trial
judge exceeded his jurisdiction to have raised the issue suo motu because an
irregular proceedings could only be set aside by the affected party.

D The Respondents in their brief submitted that the trial court being a
court of law and justice and not of technicalities or injustice the learned trial
judge rightly identified the issue involved and raised it suo motu which was
to enable him come to a just decision in the case. Further when the matter
was raised suo motu the learned trial judge gave the parties the opportunity
E of addressing it and thereafter came to his decision thereon. We were referred
to Board of Customs & Excise v. Barau (1982) 10 Sc. 48. They said the
learned trial judge having exercised his discretion judicially and judiciously
on the matter which was fundamental in the case the Court of Appeal was
right not to have interfered with that exercise of discretion. Reference was
F made to University of Lagos & Anor. V. Aigoro (1985) 1 NWLR (Pt. 1) 143
and Williams v Williams (1987) 2 NWLR (Pt. 54) 66.

G I have no hesitation in agreeing with the lower courts that failure
to serve the Motion for Judgment on the Respondents in this case was not
a mere irregularity but a fundamental irregularity which vitiated the entire
proceedings and entitled the respondents to have the judgment of the trial court
set aside. A trial judge being a judge of fact and law it is within his rights in
raising any issue suo motu as the interest of justice demands.

I also agree with the Court of Appeal when it said on page 68 of the
judgment thus -

H *"The second issue in this appeal is as to the propriety of the learned*

judge raising the issue of service or non-service suo motu. The short answer

ACB PLC v. Losada Ltd. (1995) 7 KLR Kutigi JSC 1497
lies in the dictum of the Supreme Court in Chief Harold Sodipo v. Lemminkainen OY & Anor. (supra) quoted above to the effect that "a judge exists to determine disputes and examine with due care and microscopic senses all matters before him in his pursuit of justice".

B That quotation to my mind is a complete answer to criticism by the
appellant of the way and manner the learned trial judge had dealt with the
matter. It would be in my opinion the pursuit of great injustice, if the learned
judge discovering the irregularity in the service of the motion for judgment,
had allowed sleeping dogs to lie."

C It is indisputable that a court of law is competent to set aside its own
judgment in a number of circumstances. And the present circumstance, when
the judgment obtained was a nullity, is one of such circumstances.
The two issues having been resolved against the appellant, this appeal fails.

It is accordingly dismissed. The judgments and orders of both the
High Court and the Court of Appeal are hereby confirmed Cost of N1,000 to
the respondents.

UWAIS JSC

D I have had the privilege of reading in draft the judgment read by my
learned brother Kutigi, J.S.C. I am in complete agreement with it. I too see
no merit in the appeal. I accordingly dismiss it with N1,000.00 costs to the
respondent.

OGWUEGBU JSC

E I have had the advantage of reading in advance the draft of the judgment
just delivered by my learned brother, Kutigi, J.S.C. I agree with him that
the appeal be dismissed.

F This appeal is against the judgment of the court of Appeal, Lagos
division which dismissed the appeal of the appellant to that court. The main
issue for determination in the appeal turns on the proper construction to be
placed on Order 6, Rule 5 of the High court of Lagos State (Civil Procedure)
Rules 1972.

The Rule Provides:

G *"6(5) Where no appearance has been entered by or for a party, in compliance with the provisions of these Rules, or where a party or his legal practitioner, as the case may be, has omitted to give an address for service as required by Orders 3 and 8 all writs, notices, pleadings, orders, summonses, warrants and other documents, proceedings and written communications in respect of which personal service is not expressly required shall be deemed to be sufficiently served when filed in the registry unless the Court or a judge*

The writ of summons and the statement of claim in these proceedings were served on the defendants/respondents by pasting following a court order made on the application of the plaintiff/appellant.

The learned trial judge while granting the application for substituted service made an order granting leave to serve the writ of summons, the statement of claim and all other processes so far filed in the suit (if any) by pasting same on the front door of the defendants' last known place of abode/business located at No. 50 Community Road, Akoka. Lagos.

Having served the defendants by substituted means, the plaintiff/appellant proceeded to serve the motion on notice for judgment in default of appearance by pasting the same. Judgment was accordingly entered for the plaintiff for the sum of two million, five hundred thousand naira plus interest.

The defendants applied to the court to set aside the judgment and the writ of execution issued thereon.

The application to set aside the judgment and the execution was granted. The learned trial judge said:

"I therefore hold that the said notice for further directions upon which the judgment of 5th September, 1988 was based is a notice requiring to be served. I hold that the said notice was not properly served. Accordingly, the judgment of this court entered in default of appearance and of filing a defence to the action on the 5th day of September, 1988 and the execution issued thereon are hereby set aside."

The plaintiff/appellant who was dissatisfied with the decision of the learned trial Judge appealed to the Court of Appeal, Lagos Division, That court dismissed his appeal and affirmed the decision of the learned trial Judge.

The plaintiff has further appealed to this court. It was contended on behalf of the appellant by Mr. Olisa Agbakoba both in the appellant's brief of argument and oral submissions that by order 6, rule 2 of the Lagos State High Court (Civil Procedure) Rules, 1972 all writs of summons, originating summons and other originating processes require to be served personally, that the rules did not spell out the class of documents of which personal service is not required and that an application brought during the pendency of an action, for example, a motion to amend pleadings would constitute a subordinate process.

It was his contention that order 6, rule 5 made express provision to cover service of subordinate processes on a defendant in a situation where the defendant has entered no appearance to a writ. He further submitted that

the "notices" or "other documents" referred to in this rule refer to processes filed during the pendency of an action.

Mr. Agbakoba also submitted that from the clear and unambiguous wording of order 6, rule 5, the motion for judgment against the defendants in default of appearance, by the act of filing same in the Registry without more, should be deemed to have been served on the defendants provided two conditions are fulfilled, namely; (a) the defendants must have failed to file an appearance or omitted to provide an address as required by the rules and (b) the motion on notice to enter judgment in default of appearance and defence must constitute a "notice" or "other documents" within the meaning of that order of which personal service is not expressly required.

It was also submitted that the defendants' affidavit in support of the motion to set aside the judgment did not state that the motion for judgment was served on them irregularly and that during the proceedings on 9:1:89, the learned trial judge observed suo motu that the notice for further directions was not properly served in that it was served by pasting without leave of the court having been obtained.

Mr. Kehinde Sofola, S.A.N., submitted in his brief that the relevant issue being considered in this appeal is the inherent and statutory jurisdiction vested in the trial court to be fair and just in discharging its duties under the law, that the trial court is a court of law and not of technicality and that courts exist to do justice and not injustice. He referred us to the cases of Nneji v. Chukwu (1988) 3 N.W.L.R. (Pt. 81) 184, Bello v. Attorney-General Oyo State (1986) 5 N.W.L.R. (Pt. 45) 828 and Erisi v. Idika (1987) 4 N.W.L.R. (Pt. 66) 503.

It was his further submission that where the court raises an issue suo motu it is required to allow the parties an opportunity of addressing it on that issue before it comes to a determination thereon and that it was done in this case. He cited the case of Board of Custom & Excise v. Barau (1982) 10 S.C. 48 at 106-107.

We were urged to uphold the concurrent findings of the trial court and the Court of Appeal and in the alternative, to hold that where there is a likelihood of a breach of the principle of audi alterem partem or that of Section 33(1) of the 1979 Constitution, the single approach is to nullify the proceedings deriving therefrom.

The failure to serve the defendants/respondents with the notice of motion in default of appearance and filing of statement of defence cannot be a mere irregularity. When the appellant found that the service of the said notice by pasting was irregular as the leave for substituted service granted by the trial court on 21:3:8 did not cover the said motion, he sought refuge in Order 6, Rules of the Rules.

The said Order 6, Rule 5 of the High Court of Lagos State (Civil

Procedure) Rules, 1972 should not be read in isolation from the other Rules of that Court. Order 40 of the Rules deals with motions and other applications. Rules 3, 5 and 6 thereof show clearly that the application for judgment in default of appearance comes within the purview of Order 40 and is governed by it. Rules 3, 5 and 6 provide:

B “3. *Except where according to the practice existing at the time of the passing of the Act any order or rule might be made absolute Ex Parte in the first instance, and except where notwithstanding Rule 2 a motion or application may be made for an order to show cause only, no motion shall be made without previous notice to the parties affected thereby. But the Court if*
C *satisfied that the delay caused by proceeding in the ordinary way would or might entail irreparable or serious mischief, may make any order Ex Parte upon such terms as to costs or otherwise*

5. *Unless the Court or a Judge in Chambers gives special leave to the contrary there must be at least two clear days between the service of a notice of motion and the day named in the notice for hearing the motion.*

D 6. *If on the hearing of a motion or other application the Court shall be of opinion that any person to whom notice has not been given ought to have had such notice, the Court may either dismiss the motion or application or adjourn the hearing thereof, in order that such notice may be given* “ (Italics are for emphasis only).

E The above Rules in addition to the audi alterem partem rule which is one of the principles of natural justice are meant to ensure that no one is to be condemned, punished or deprived of property in any judicial proceeding: unless he had an opportunity of being heard. These rules are also entrenched in section 33(1) of the 1979 Constitution. Order 6, Rule 5 does not apply in
F the instant case.

The words “shall” and “must” appearing in rules 3 and 5 of Order 40 are mandatory, except where the court directs otherwise. In this case, the purported service of the notice of the motion for judgment in default of appearance had been shown earlier in this judgment to be unauthorised. It was not a mere irregularity. It was a fundamental omission. The judgment based on it is vitiated by the irregularity. See *Sken Consult Nig. Ltd. & Or. v. Ukey* (1981) 1 S.C. 6 at 26 and *Craig v. Kanssen* (1943) K.B. 256. “It is beyond question that failure to serve process where service is required 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 no notification of any intention to apply for it has never been adopted in
H this

The principle is that unless and until the court has pronounced a judgment upon the merits or by consent, it has the power to revoke the expression of its coercive power where it has only been obtained by a failure to follow any of the rules of procedure as in this case. See *Evans v. Bartlam* (1937) A.C. 473 at 480 and *Grimshaw v. Dunbar* (1953) 1 Q.B. 408 at 416.

The Court of Appeal in my view, came to the right decision when it held that non-service of the motion for judgment affected the jurisdiction of the trial judge and that he was right when he raised the issue suo motu. The learned trial judge gave learned counsel for both parties opportunity to address him on the issue he raised and they did so exhaustively before he came to a decision thereon. See *Board of Customs & Excise v. Barau* (1982) 10 S.C. 48 at 106-107.

In conclusion, there is no merit in the appeal. I, too, dismiss it with costs as assessed in the lead judgment of my learned brother, Kutigi, J.S.C.

ONU JSC

Having had the advantage to read in draft the judgment of my learned brother, Kutigi, J.S.C., just delivered, I agree with his reasoning and conclusions that the appeal lacks merit and ought to fail.

In expatiation thereto, I wish to add a few words of mine as follows:-

The three broad issues submitted as arising for the determination of this Court (the background facts from which the appeal herein took root having been so well stated in the judgment of my learned brother to need any recapitulation) are:

(i) Whether the learned Justices of the Court of Appeal were right to hold, as they did, that on a proper construction of Order 6, Rule 5 of the High Court of Lagos State (Civil Procedure Rules), 1972, a Motion on Notice to enter final Judgment in default of appearance and defence is not a “Notice” or “other documents?” deemed sufficiently served on a party not entering appearance to a suit by filing same at the Court’s Registry.

(ii) Whether the learned Justices of the Court of Appeal were right to hold as they did, that the learned trial judge was right in raising the issue of propriety of service of the Motion for judgment by the Appellant in default of appearance and defence against respondents suo motu, when the Respondents had not complained of such impropriety.

(ii) If the answers to questions (i) and (ii) above are in the negative, what will be the effect of the Decision of the Court of Appeal given on April 17th, 1991?

In arguing the three issues, the crux of learned counsel for the

Appellant's contention, inter alia, is firstly that it is possible to hold that the Respondents were properly served the Motion for judgment. Secondly, he contended that reliance on Order 6, rule 5 of the Lagos State High Court (Civil) Procedure) Rules (hereinafter referred to as the Rules) has been substantiated. He further argued that even though the court below had taken the view that Order 6 rule 5 of the Rules was unavailing to them, it was his own contention that the order is available to them, maintaining that there is a penalty to be paid by those who do not obey court orders. He placed reliance on Appendix A in Form 1 which, he submitted, deals implicitly with the matter. He thereafter contended that even though on the face of it, it looks as if the Respondents' fundamental right to fair hearing is being breached, that is not so as the price the Respondents have to pay is that contained on Form 1. He concluded his submission by saying that personal service is not required as set out in Order 6.

The kernel of the Respondents' several submissions contained in their brief (they were neither present at the hearing of the appeal nor represented by counsel) is, inter alia, that should the contention of the Appellant on the point be allowed to stand, substantial violence would be done to the administration of justice. I see the force in this contention of the Respondents. But to begin with, I will first of all consider the first issue by setting out the purport of Order 6, rule 5 which I perceive is a mode of constructive service as opposed to actual or personal service. It provides that -

5. Where no appearance has been entered by or for a party, in compliance with the provisions of these Rules, or where a party or his legal practitioner, as the case may be, has omitted to give an address for service as required by Orders 3 and 8 all writs, notices, pleadings, Order, summonses, warrants, and other documents proceedings and written communications in respect of which personal service is not expressly required shall be deemed to be sufficiently served when filed in the Registry unless the Court or a "*judge in Chambers otherwise directs.*"

[Italics above is mine].

The above rule as can be seen, provides for a situation where a defendant enters no appearance to the writ etc. but for which express provisions are made to cover such mesne or subordinate processes wherein personal service is not expressly required, provided that there shall be sufficient service of process if filed in the Court's Registry during the pendency of an action. In the case in hand, I am of the firm view that when learned counsel for the Appellant strenuously submitted that there was no express provision concerning whether the Motion for judgment was to be served personally or

not, he was palpably wrong. Thus, where a judge dismissed a suit for default

of appearance (and this, in my view, applies where judgment is given against a party behind his back without his being served with the processes of court as in the instant case of Motion for judgment) he (the judge) ought to review the order when he has the opportunity to do so in an appropriate application by the party affected (as indeed happened in the case in hand) to have the matter finally settled on the merits. See *Amadi v. Anulaobi* (1992) 4 N.W.L.R. (Pt. 238) 721. The learned trial Judge in the case in hand upon being moved by the Respondents, considered the contending arguments of both parties dispassionately before arriving at the decision to grant the Respondents' application. Order 6 Rule 5 provides inter alia in its concluding words that "*unless the court or Judge in Chambers otherwise directs.*" This of course presupposes the fact that the court should be moved by a party or his legal practitioner or as the court itself should direct. The words "*to direct*" in Webster's Dictionary of the English language, Delux Encyclopedic Edition, mean "*to turn (something) in a certain direction,*" "*to supervise*", and they imply that the order for defaulting judgment must not be given automatically in the Registry. Thus, in construing service of Motion for Judgment, Order 6 Rule 5 to be meaningful, ought not to be read in isolation since the Rule should be complemented by Order 6 Rule 2 which makes provisions for how a Writ of Summons, originating summons or any other originating process shall be served personally by delivery to the person to be served; Order 9 Rules 2, 3 and 14(3) relating to default of appearance generally and endorsement of liquidated demand and leave in actions by money-lenders under the Money Lenders Act, Cap. 124; Order 24 Rules 2 and 15 respecting claims for debt or liquidated demand and setting aside judgment by default as well as Order 40 Rules 1, 5 and 6 regarding application by motion, length of notice of motion and dismissal or adjournment of motion, where necessary notice is not given, respectively. Treating Order 6 Rule 5 in isolation is capable of wreaking injustice or doing substantial violence to the administration of justice. Hence, in the instant case, the application to set aside the judgment obtained behind the back of the Respondents predicated on averments that the Writ of Summons, the statement of claim and the Motion for Judgment were not served on them, and which the trial court that gave the earlier judgment granted, is in my view, well founded. The court below in confirming those findings therefore rightly held, inter alia, that -

"The view I take is that the motion for judgment has not been served at all on the respondents. The purported mode of serving it has not been sanctioned by the court and whether the appellant chooses to call such

purported service as being irregular or not the fact remains that such irregularity is a fundamental vice which goes to the jurisdiction of court."

Referring to the observation of Greene, M.R. in the case of *Craig v. Kanssen* (1943) K.B. 256, this Court in *Sken Consult Ltd. V. Godwin Sekondy Ukey* (1981) 1 S.C. 6 quoted the Master of the Rolls as saying that -

"The 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, the failure to serve process where service of process is required, is a failure which goes to the root of our conception of the procedure in litigation. Apart from proper Ex- parte proceedings, the idea that an order can validly be made against a man who has no notification of any intention to apply for it is one which has never been adopted in England. To say that an order of that kind is to be treated as a mere irregularity and not something which is affected by a fundamental vice, is an argument which, in my opinion, cannot be sustained."

While adopting the above dictum as most apposite to the instant case and as such a befitting affirmative answer to Issue 1 hereof. I need only add that to uphold the Appellant's appeal is to open wide the sluice or give room for the perpetuation of myriads of evil in relation to obtaining judgments by default. Furthermore, the order of the trial court in relation to the Motion for Judgment imbibing *"all writs, notices, pleadings, orders, Summonses, warrants and other documents"* vide Order 6 Rule 5 of the Rules, ought not to be construed as extending to *"judgments."* To so hold is to elevate the Rules which after all constitute subsidiary legislation as overriding the provisions of the Constitution of the Federal Republic of Nigeria, 1979. See *Din v. Attorney-General of the Federation* (1988) 4 NWLR (Pt. 87) 147.

Thus, in order to afford the Respondents the right of audi alteram partem or hearing as enshrined in Section 33(1), the trial court, rightly in my view, set aside the case herein and the court below was justified, in my opinion, to have affirmed the same. See *Paul Unongo v. Aper Aku* (1983) 2 SCNLR 332; (1983) 11 S.C. 129 and *Ntukidem v. Oko* (1986) 5 NWLR (Pt. 45) 909.

On the second issue as to the propriety of the learned trial Judge raising the issue of service or non-service suo motu, it is enough to rely and adopt the dictum in *Chief Harold Sodipo v. Lemminkainen & Anor.* (1986) 1 S.C. 197 at Page 217; (1986) 1 NWLR (Pt. 15) 220 at 234 wherein this Court stated inter alia as follows:-

"A judge exists to determine disputes and to examine with due care and microscopic sense all matters before him in his pursuit of justice. He is there not to trap any party or to set in motion what the parties have not

Thus, for the trial court to have closed its eyes to any irregularity latent or patent on the record without suo motu dealing with it, would have amounted to injustice. See *Ijebu Ode Local Government v. Adedeji Balogun & Co. Ltd.* (1991) 1 NWLR (Pt. 166) 136 at 153; *Utih v. Onoyivwe* (1991) 1 NWLR (Pt. 166) 166 and *Ajalyn Shoes Ltd. V. Akinwande* (1991) 2 NWLR (Pt. 174) 432 C.A.

The court below was therefore right and justified, in my view, to have upheld the decision of the trial court when it held inter alia that -

"It would be in my opinion the pursuit of great injustice if the learned Judge discovering the irregularity in the service of the motion for judgment, had allowed the sleeping dogs to lie."

The decisions of the two courts below constitute, in my view, concurrent findings of facts which cannot be faulted. The issue is therefore answered in the affirmative.

Since the answers to issues 1 and 2 are in the positive and not in the negative, the answer to issue 3 is rendered otiose or of mere academic purport.

For the reasons I have proffered and the fuller ones so ably stated in the judgment of my learned brother Kutigi J.S.C., with which I had earlier signified my concurrence, I dismiss this appeal with the same consequential orders inclusive of costs.

ADIO JSC

I have had the opportunity of reading, in draft, the judgment just delivered by my learned brother, Kutigi, J.S.C., and I fully agree with him that the appeal fails.

In view of the fundamental issues involved in the appeal, I wish to make some comments. My learned brother, Kutigi, J.S.C., has in the lead judgment, given a comprehensive summary of the facts of this case and of the relevant issues. I need not repeat any of them except where it is necessary for the purpose of a better understanding of the point that I want to make.

At a certain stage of the proceedings before the learned trial Judge, the appellant applied to the learned trial Judge for an order allowing the copies of the writ of summons, the statement of claim and other processes to be served on the respondents by substituted service by pasting them on No. 50, Community Road, Akoka, Lagos. The allegation was that it was not possible to effect personal service of them on the respondents. The learned trial Judge granted the leave in relation to all the processes so far filed in the action. The

contention of the appellant was that all that needed to be done to obtain default judgment against the respondents was to file the motion for default judgment in the court's registry. The appellant did not have to serve a copy of the motion on the respondents in view of the provisions of Order 6 Rule 5 of the High Court (Civil Procedure) Rules of the Lagos State. Default Judgment was obtained. Difficulties arose when the judgment was to be enforced as it turned out that the respondents were not at anytime aware of the motion for judgment by default. Consequently, after being addressed on the issue, by the learned counsel for the parties, the learned trial Judge set aside the judgment. The appeal against the ruling of learned trial Judge was dismissed by the Court of Appeal. There is a further appeal to this court. One of the submissions made for the respondents was that the contention of the appellants, on the point, if allowed to stand, would do substantial violence to the administration of justice and the entire judicial process. In the consideration of matters before them the courts should not fail to consider the vital constitutional provision made in Section 33(1) of the Constitution of the Federal Republic of Nigeria, 1979. It was further submitted that the provision of Section 33(1) of the Constitution prevails over any state law or subsidiary legislation which purports to deprive a citizen of Nigeria of his rights under the Constitution. In the circumstances, it was submitted, that the result of any breach of the aforesaid provision in any proceedings is the nullification of such proceedings. The submission made for the appellant was that Section 33(1) of the Constitution did not apply in the present circumstances. The provision of Section 33(1) of the Constitution is as follows:-

"33(1) In the determination of his civil rights and obligations including any question or determination by or against any government or authority, a person shall be entitled to a fair hearing within a reasonable time by a court or other tribunal established by law and constituted in such manner as to secure its independence and impartiality. "

I must say straightaway that I do not agree that the provision of Section 33(1) of the Constitution, quoted above, does not apply in the present circumstances. If, as contended for the appellant, it was enough, for the purpose of obtaining judgment by default, merely to file the motion for it in the court's registry, and not to effect notice of it on the defendant, by virtue of the provision of Order 6 Rule 5 of the High Court (Civil Procedure) Rules of the Lagos State, then the provision of Order 6 Rule 5 of the aforesaid Rules is inconsistent with the provision of Section 33(1) of the 1979 Constitution and is to the extent of the inconsistency void. See Section 1(3) of the 1979 Constitution. It has never been the case in our law that the provision of an ordinary

statute would render nugatory the relevant provision of the Constitution. See *Ishola v. Ajiboye* (1994) 6 N.W.L.R. (Pt. 352) 506 at p. 621; (1994) 19 L.R.C.N. 35. Therefore, if any law of a state including a subsidiary legislation like the aforesaid High Court (Civil Procedure) Rules of Lagos State, is inconsistent with the provisions of the Constitution, the provisions of the Constitution prevail, and that state law is to the extent of the inconsistency void. Therefore, any provision of the Rules which purports to dispense with hearing of a defendant before judgment is given against him will be null and void.

The foregoing is not the end of the matter. If there has been a breach of the principle of fair hearing" as provided in Section 33(1) of the Constitution, the proceeding will be null and void and it does not matter whether the decision reached in the proceeding would have been the same if the principle of fair hearing had been observed. See *Adigun v. Attorney-General Oyo State* (1987) 1 N.W.L.R. (Pt. 53) 678; (1987) 1 S.C.N.J. 346.

There is also the point that the order granting leave to the appellant to serve the writ of summons, the statement of claim and other processes, filed so far, on the respondents by substituted service was unambiguous and very clear. Where the words of an order made by a court are clear and are free from ambiguity in themselves and there is no doubt created as to the subject matter to which they relate, they are to be construed according to their strict, plain and their common meaning. See *Union Bank of Nigeria v. Ozigi*. (1994) 3 N.W.L.R. (Pt. 333) 385.

The leave or permission granted by the learned trial Judge to serve E processes on the respondents by substituted service was limited by the words "filed so far" in the order made by the court to the writ of summons, statement of claim and other processes already filed as at the time that the order was made. The order of the learned trial Judge could not be construed as being applicable to any process filed even immediately after the order was made.

It is for the reasons given above and for the fuller reasons given by F my learned brother, Kutigi, J.S.C., in the lead judgment that I also dismiss