

SUPREME COURT OF NIGERIA
31ST JANUARY, 1997. SC. 70/1989
CORAM:- M. L. UWAIS CJN, I. L. KUTIGI, E. O. OGWUEGBU,
U. MOHAMMED, Y. O. ADIO, JJSC.

NATIONAL ELECTRIC POWER AUTHORITY DEFENDANT/
APPELLANT

AND

MRS. P.O. ONAH (Trading under the name PLAINTIFF/
and style of EI-PAT HAIR CARE CENTRE) RESPONDENT

JUDICIAL PRECEDENTS - *Stare decisis* - What the cardinal principles thereof entails.

JUDICIAL PRECEDENTS - *Ratio decidendi* - It is only the major principles - That bind courts of concurrent or lower jurisdiction.

PRACTICE & PROCEDURE - *Writ of summons* - Service thereof outside the court's jurisdiction - Without complying with ss. 97 & 99 of the Sheriffs & Civil process Act - Renders both the writ and service thereof null and void.

FACTS

The plaintiff/respondent filed an action before the Benin-City High Court against the defendant/appellant and 8 others claiming N300,000.00 damages for negligent destruction of plaintiff's hair care equipment. The writ of summons was served on all the defendants including the appellant who was the 8th. defendant. The appellant moved the High Court to set aside the service of the writ on it for non compliance with ss. 97 and 99 of the Sheriffs and Civil Process Act.

The trial court in its ruling found that the writ was not endorsed as required by the relevant law for service on the appellant outside the court's jurisdiction. The court however ruled that it is only the service of the writ (and not the writ of summons) that is invalidated. Appellant's appeal to the Court of Appeal was dismissed. Being dissatisfied, appellant has further appealed to the supreme court raising 2 issues.

ISSUES FOR DETERMINATION

"(1) Whether the Court of Appeal was right in holding that the consequence of non-compliance with Order 2 Rule 16 of the High Court (Civil Procedure) Rules of Bendel State, that is, failure in this case, to obtain

the leave of the court or a judge before the writ of summons issued in Bendel State High Court for service on the appellant in Lagos State was signed and sealed, is merely to render the service of the said writ of summons invalid and not null and void. Etc, see p. 205

HELD (Unanimously allowing the appeal per lead judgment of **MOHAMMED JSC**)

Cardinal principle of stare decisis

1. It is a cardinal principle of law under the doctrine of Stare decisis that an inferior court is bound by a decision of a superior court, however sure it may be that it has been wrongly decided - see *Farrell v. Alexander* (1977) A.C. 59. Denning M. R. defined the doctrine of Stare decisis, in his book, 'the Discipline of law' thus: "stand by your decisions and the decisions of your predecessors, however wrong they are and whatever injustice they inflict." (pp. 206 F & 210 G)

Ratio decidendi - Major principles

2. I will explain further in this judgment that the doctrine of precedent ensures that it is only the major principles which the court has decided that bind courts of concurrent or lower jurisdiction and requires them to follow and adopt such principles when they are relevant - per May L.J. in *Ashville Investment Ltd. V. Elmer Contractors Ltd.* (1988) 3 W.L.R. 867. Where there is no discernible ratio decidendi common to the decisions of a superior court and the court has handed down conflicting decisions, the lower court or a court of co-ordinate jurisdiction is free to choose between the decisions which appeared to it to be correct. (p. 206 G)

Writ of summons - Service outside jurisdiction

3. It is quite plain that the opinion of my learned brother, Karibi-Whyte, J.S.C., in *Ezomo's* case was an *Orbiter dictum* and as such of binding effect. Again, this Court's decision in *Ezomo's* case could not be relevant to the decision of this case because the appellant here, on receipt of the Writ of Summons, and without entering appearance, filed a motion and moved the High Court and sought for setting aside the Writ and the service for non-compliance with Section 97 and 99 of the Sheriffs and Civil Process Act. This appeal, for the reasons I have given above in this judgment, succeeds and it is allowed. Both the Writ of summons and the service on the appellant are declared invalid, null and void. (p. 211 E)

REPRESENTATION

Mr. T. A. Ezeobi for the appellant

Respondent absent and not represented by counsel.

CASES REFERRED TO

Skenconsult v. Ukey (1981) 1 S.C. 6

Trustees Ltd.v. Nigergrob Ceramic Ltd. (1987) 3 N.W.L.R.(Part 62) 600

Adegoke Motorsv. Dr. Adesanya (1988) 2 N.W.L.R. (Part 74) 108 at 121

Farrell v. Alexander (1977) A.C. 59

Craig v. Kanseen (1943) 1 All E.R. 108 at 113

Nwabueze v. Obi Okoye (1988) 4 NWLR (Part 91) 644

Pritchard v. Deacon (1963) 1 Ch. 502

LEAD JUDGMENT BY MOHAMMED.JSC

The power to issue and serve writ out of jurisdiction is the matter involved in this appeal. The suit which brought about this appeal was filed in the High Court of Justice, Bendel State with the following claim:

“The plaintiff’s claim against the defendant jointly and severally is for the sum of N300,000.00 being special and general damages in that on the 26th of January, 1987 in Benin City within the jurisdiction of this Honourable Court the 1st, 2nd, 3rd, 4th, 5th, 6th and 7th defendants as agents or servants of the 8th defendant negligently carried out electrical connections at No. 55A New Lagos Road, Benin City which resulted into a big fire that destroyed the plaintiff’s Hair Care equipment. The defendants have failed and/or refused to pay the said sum of N300,000.00 despite repeated demands.

WHEREOF the plaintiff claims against the defendants jointly and severally the sum of N300,000.00; Dated at Benin-City this 19th day of March, 1987.”

A writ of summons was issued and served on all the defendants including the National Electric Power Authority, the 8th defendant and appellant, in this appeal. Soon after service the appellant filed and moved a motion before Joan Aiwerioghene J. of Benin High Court, and prayed for an order setting aside the writ of summons served on NEPA in Lagos and the service thereof, in that the same:

“(a) is a domestic writ having no validity outside Bendel State because it is not properly endorsed for service and served out of the State and in Lagos State where the 8th defendant is resident as required by Section 97 of the Sheriffs and Civil process Act Cap 189 of the Laws of the Federation of Nigeria;

(b) does not prescribe the mandatory minimum of 30 days required by section 99 of the Sheriffs and Civil Process Act Cap 189 of the Laws of the Federation of Nigeria within which a defendant resident outside the State of origin of the summons is required to answer before the court;

(c) was signed and sealed without leave of court when it was meant for service outside the jurisdiction of the court.” .

The learned trial Judge in her ruling, affirmed the submission of the appellant’s counsel, Mr. Theodore Ezeobi, that it was correct that the writ in this action was not endorsed as was required by Section 97 of Sheriffs and Civil Process Act. Also, the period between the date of service and the date when the appellant was required to appear in answer to the writ was not up to thirty days which was the minimum period required by the law. The learned Judge referred to the case of Skenconsult (Nig.) Ltd v. Ukey (1981) 1 S.C.6 and Ezomo v. Oyakhire (1985) 1 NWLR (Pt. 2) 195: (1985) 2 S.C 260 and held that what had been decided in those cases is that failure to comply with section 99 of the Sheriffs and Civil Process Act means that there has been no service and that all the proceedings thereafter are a nullity. The writ itself was not declared a nullity, She concluded her ruling thus:

“As the failure to obtain leave or to allow the required 30 days before appearance of the defendant goes to invalidate the service of the writ on the 8th defendant/applicant, the service is set aside as a nullity and the 8th defendant remains unserved. This being so, there is nothing to call back as there is a return to the status quo ante and it is as if the writ has never left the registry. There is therefore no readily apparent reason why it cannot be properly endorsed and dispatched for service in the appropriate manner. For the above reasons therefore, this application fails but service of the writ of summons on the 8th defendant, NEPA .. is hereby set aside.”

Dissatisfied with the decision the learned counsel for the appellant went before the Court of Appeal on three grounds of appeal. He formulated the following issues in that court for the determination of the appeal:

“1. Whether in view of the decisions of the Supreme Court in Skenconsult (Nig.) Ltd & Anor. v. Godwin Sekondy Ukey (1981) 1 S.C. 6 of the Court of Appeal in NNPC v. Jacoh Aziegbihin unreported FCA/109/83 of 29/3/84 and U.B.A. Trustees Ltd. & Anor v. Nigergrob Ceramic Ltd (1987)3 NWLR (Pt.62) 600 at 615, 617 and 620, each definitively binding on the learned trial Judge, she was right or entitled to hold in effect that the provisions of SS.97 and 99 of the Sheriffs and Civil Process Act Cap 189 of the Laws of Federation, 1958 are not mandatory and that failure to comply with them in this case did render the affected writ of summons fundamentally defective and nullity.

2. *Whether the learned trial Judge was right in holding that the effect of failure to obtain leave of the court or a Judge before signing and sealing a writ of summons to be served out of jurisdiction pursuant to Order 2 Rule 16 of the High Court (Civil Procedure) Rules of Bendel State is merely to invalidate the service of but not the writ of summons itself.*"

In its judgment, the Court of Appeal. per Isa Ayo Salami, JCA B .., with which Ndoma Egba and Ejiwunmi. JJCA., concurred, reviewed the judgments in Skenconsult and Ezomo (supra) and the decisions of the Court of Appeal in NNPC v. Jacob Aziegbihin FCA/B/109/83 (unreported but delivered on 24/3/84) and UBA Trustees Ltd. and Anor v. Nigergrob Ceramic Ltd (1987) 3 NWLR (Pt. 62) 600. The learned justice reproduced an excerpt from the judgment of Nnamani J.S.C. in Skenconsult (Nig.) Ltd v. Ukey (Supra) and held that this court, in that case, did not pronounce the writ of summons a nullity. What it did was to set aside the service and any order made in consequence thereof for non-compliance with Section 99 of the Sheriffs and Civil Process Act. D The learned justice went further and said:

"The writ in the instant case although it is not endorsed and served properly, has properly commenced this action and it so remains until it is set aside."

Mr. Ezeobi is still not satisfied with the conclusion reached by E the Court of Appeal. His main grouse against the decision of the Court of Appeal is its affirmation of the High Court's view that the writ in this case was still alive and not void. The learned counsel has now finally reached this court and, for the determination of the appeal, has formulated the following issues:

"(1) Whether the Court of Appeal was right in holding that the consequence of non-compliance with Order 2 Rule 16 of the High Court (Civil Procedure) Rules of Bendel State, that is, failure in this case, to obtain the leave of the court or a Judge before the writ of summons issued in Bendel State High Court for Service on the appellant in Lagos G State was signed and sealed, is merely to render the service of the said writ of summons invalid and not null and void.

(2) Whether the Court of Appeal was right in holding in effect that it was open to the learned trial Judge not to follow the clear and unambiguous decisions of the Court of Appeal on the effect of non compliance with S.97 of the Sheriffs and Civil Process Act in NNPC v. Jacob Aziegbihin FCA/109/83 of 23/3/84 (unreported) and UBA Trustees Ltd. & Anor v. Nigergrob Ceramic Ltd. (1987) 3 NWLR (Pt.62) 600 which were cited to and binding on the learned trial Judge."

The respondent had not bothered to file any brief and therefore this appeal will be considered on the submissions and arguments in the appellant's brief only.

The arguments in support of this appeal are the same as those advanced before the Court of Appeal and the submissions are based on two decisions of this court which I referred to above, viz Skenconsult Nigeria Limited (supra) and Ezomo v. Oyakhire (supra). The learned counsel, Mr. Ezeobi, drew our attention to two decisions of the Court of Appeal in which that court decided that failure to comply with the provisions of sections 97 and 99 of the Sheriffs and Civil Process Act are fundamental defects which would result in setting aside the writ itself. The Court of Appeal held that view in the cases of NNPC v. Jacob Aziegbihin (supra) and UBA Trustees v. Nigergrob Ceramic Ltd (supra). Mr Ezeobi argued that the High Court was bound to follow those decisions and that the Court of Appeal was wrong to hold that the learned trial Judge was right in not following the opinions expressed by the Court of Appeal in those decisions in respect of non-compliance with section 97 of the Sheriffs and Civil Process Act.

I must emphasise, with respect, that the learned counsel is not correct to say that the Court of Appeal was in error in not finding fault with the trial High Court for its failure to follow the decisions of the cases cited above. It is quite clear that the decision of the Court of Appeal in Adegoke Motors Ltd v. Dr. Babatunde Adesanya & Ors. (1988) 2 NWLR (Pt. 74) 108 at 121, was in conflict with that court's other decisions in NNPC v. Jacobs Aziegbihin (supra) and UBA Trustees v. Nigergrob Ceramic Ltd (supra).

It is a cardinal principle of law under the doctrine of stare decisis that an inferior court is bound by a decision of a superior court, however sure it may be that it has been wrongly decided- see Farell v. Alexander (1977) A.C. 59. Denning M.R. defined the doctrine of Stare decisis, in his book, "the Discipline of Law" thus: "*stand by your decisions and the decisions of your predecessors, however wrong they are and whatever injustice they inflict.*" I will explain further in this judgment that the doctrine of precedent ensures that it is only the major principles which the court has decided that bind courts of concurrent or lower jurisdiction and requires them to follow and adopt such principles when they are relevant - per May L.J. in Ashville Investment Ltd v. Elmer Contractors Ltd (1988) 3 WLR 867.

Where there is no discernible ratio decidendi common to the decisions of a superior court and the court has handed down conflicting decisions, the lower court or a court of co-ordinate jurisdiction is free to choose

between the decisions which appeared to it to be correct.

I will now consider the issue on non-compliance with the provisions of Order 2 Rule 16 of the High Court (Civil Procedure) Rules of Bendel State and Sections 97 and 99 of the Sheriffs and Civil Process Act on the issuance of the writ of summons and service thereof on the appellant. It is relevant before considering the submissions to reproduce the provisions of both Order 2 Rule 16 of the High Court (Civil Procedure) Rules of Bendel State 1976 and Sections 97 and 99 of the Sherriffs and Civil Process Act, Cap 189 Laws of the Federation of Nigeria, 1958.

Order 2 Rule 16 of the High Court (Civil Procedure) Rules 1976 reads:

“16 No writ for service outside the jurisdiction shall be signed and sealed without the leave of the court or a Judge.”

Sections 97 and 99 of the Sheriffs and Civil Process Act provide as follows:

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

“This summons (or as the case may be) is to be served out of the state (or as the case may be) and in theState.”

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

There is no dispute over the invalidity of the service of the writ of summons on the appellant because the two lower courts have made concurrent findings of fact that the failure to obtain leave or to allow the required 30 days appearance of the appellant had rendered the service a nullity. The decision which is the subject of this appeal is where the Court of Appeal affirmed the decision of the High Court that failure to comply with Order 2 Rule 16 of the High Court (Civil Procedure) Rules of Bendel State and sections 97 and 99 of the Sheriffs and Civil Process Act rendered service on the appellant a nullity but not the writ itself. The two courts relied heavily on two decisions of this court which I have referred to above in this judgment. In *Skenconsult Nigeria Limited and Anor. v. Godwin Sekondy Ukey* (supra) this court, per Nnamani

JSC., interpreted failure to comply with the provisions of section 99 of the Sheriffs and Civil process Act in the following words:

"With respect to Section 99, I do not think that the section can be interpreted as referred to writ of summons for service. All that it is concerned with in my view is the period within which the defendant is to answer to the writ of summons. The return date was less than the thirty days prescribed by Section 99 and was clearly in breach of it. In my view the proceedings on 24th November 1978 were premature and by virtue of the mandatory provisions of section 99 of no effect. They must therefore be regarded as a nullity. In fact I am also of the view notwithstanding the stand I have taken as to the true import of section 99 that failure to comply with the provisions of it as was the case here, really means that there has been no service."

Mr. Ezeobi referred to the decision of Nnamani J.S.C.. above and submitted that it was limited to the provisions of S.99 of the Sheriffs and Civil Process Act. That legal exposition did not touch section 97 of the Act. He submitted further that the case of Craig v. Kanseen (1943) 1 All ER 108 at 113 had nothing to do with an invalid writ. The learned counsel is right in both submissions. Section 97 of the Sheriffs and Civil Process Act is the section which deals with the issuance of a writ and coupled with the provisions of Order 2 Rule 16 of the High Court (Civil procedure) Rules of Bendel State it is abundantly clear that signing or sealing a writ for service outside the jurisdiction without the leave of the court or a Judge is a fundamental breach of statutory requirement. In the case of In re Pritchard, Deed. (1963) 1 Ch. 502 at page 526 Upjohn L J. held:

"There has been a fundamental failure to comply with the requirements of the statute relating to the issue of the proceedings; it was not a mere irregularity. The all important and essential requirement of the issue of a proceeding; whether it initiates the action is that it must be issued with the seal of the issuing office. It is much more than irregularity; I think it is a nullity and it is not possible for the defendant to waive the defect."

Learned counsel for the appellant referred us to a recent decision of this court which was delivered about three months before the judgment of the Court of Appeal in case in hand. This is the case of Nwabueze & Anor v. Justice Obi Okoye (1988) 4 NWLR (Pt. 91) 664. The facts of that case are in all fours with present case and I shall explain it briefly. In that case, which was a libel action, the defendants addresses for service as shown in the writ of summons were in Lagos State. However, leave to issue the writ was not applied for nor obtained. After the

issue of the writ the plaintiff applied for substituted service which was accordingly granted. Soon after service, learned counsel for the defendants, Chief F.R.A. Williams, S.A.N. by a motion on notice, moved the Enugu High Court and sought for the writ and service of the writ to be set aside on grounds inter alia, that the writ was irregularly issued by reason of failure to comply with the mandatory provisions of the Sheriffs and Civil process Act which governs service out of jurisdiction. The trial High Court held that the service of the writ was improper for non-compliance with section 97 of the Sheriffs and Civil Process Act. The high Court however did not nullify the writ. It ordered that it should be endorsed and served on the defendants.

On appeal to the Court of Appeal, Enugu Division, the decision of the high court was affirmed. On a further appeal to this court Agbaje J.S.C held:

“As I have said the issue of writ of summons and the service of the same writ on a defendant are conditions precedent for the exercise of a court’s jurisdiction over the defendants. And from what I have been saying so far a condition precedent for the issue of the writ against the defendants in this case who are resident outside the area of territorial jurisdiction of the High Court of Anambra State and who, again, neither of them carries on business within the area of jurisdiction, is that leave of the state High Court had to be first obtained before the writ was issued. Leave to issue a writ which is to be served out of the jurisdiction is not granted as a matter of course under the English Rules. For the discretion to grant the leave sought is exercised judicially and with great care. See Williams v. Cartionright (1885) 1 Q.B. 142 C.A.; Bowlong v. Cox (1926) A.C. 751, 754. And as Chief F.R.A. Williams, S.A.N. points out to us in his arguments in this appeal the question which is the forum convenient for the trial is one of the matters to be considered by court in the exercise of this discretion So the application for leave to issue a writ which is to be served out of jurisdiction is not a mere formality. Since leave was not first obtained before it was issued, I must hold and I do hold that the writ of summons has been issued without due process of law and accordingly has to be set aside.”

In his own contribution, Obaseki J.S.C., held that the writ of summons was issued without leave at the time of issue. The issue of the writ without leave is therefore invalid and null and void. Uwais, J.S.C., H (as he then was) also took part in the hearing of that appeal and his opinion is as follows:

“From the facts of this case which have been well stated in detail in the judgment of my learned brother Agbaje, J.S.C., and which I

do not wish to recapitulate here, it is obvious that the learned trial judge was in error not to adhere to the provisions of Order 2 rule 4 of the English Supreme Court Rules, 1960. The writ of summons as issued and endorsed by the High Court was issued not only in violation of the provisions of section 16 of the High Court Law, Cap 61, Order 2 rule 4 of the English Rules but also the provisions of section 239 of the 1979 Constitution. This appeal must therefore succeed, the writ of summons issued in Anambra State by the respondent for service on the appellants in Lagos State must be declared null and void since it was issued by the High Court of Anambra State when it lacked jurisdiction”

Karibi-Whyte, J.S.C., whose opinion in Ezomo v. Oyakhire (supra) during the hearing of the appeal in hand was extensively quoted was a member of the panel that sat to hear Nwabueze’s appeal and he concluded his judgment thus:

“The plaintiff in this case in the absence of leave from the court lacked the capacity to issue the writ of summons in respect of defendants outside the jurisdiction - See Burns v. Campbell (1951) 2 All ER 965.”

Wali, JSC., in his contribution to the lead judgment explained in a succinct narrative the import of the provisions of sections 97 and 99 on the issuance and service of writ outside jurisdiction, in the following opinion:

“As regards the issue of non-compliance with the provisions of the Sheriffs and Civil Process Act, Cap. 198 Laws of the Federation of Nigeria 1958, particularly sections 96 and 97, which govern the service of a writ of summons in the state other than in which it was issued, it only suffices to state that apart from the mandatory nature of section 97 of the Act, it is my view that the writ is incomplete without the required statutory endorsement. Such endorsement is part and parcel of the writ and without it, it is both defective and incompetent. The endorsement is not a procedural requirement that could have been treated as irregularity capable of being cured by the Court’s registrar.”

It is pertinent to repeat what I have said earlier in this judgment, that the decision in Nwabueze’s case was given three months before the Court of Appeal delivered its judgment which is the subject of this appeal. The lower court is therefore bound to follow that decision under the doctrine of stare decisis.

It is also relevant to point out that my learned brother, Karibi- Whyte, J.S.C, in Ezomo v. Oyakhire made his speech, per incuriam in a contribution to the lead judgment which was written by my Lord Aniagolu, J.S.C. The facts of Ezomo’s case are not in any way similar to the case in hand. My learned brother, Oputa, J.S.C in Adegoke Motors Ltd v. Adesanya and Anor (1988) 2

NWLR (Pt. 74) 108; (1989) 2 N.S.C.C. 327 at 339 put in a word of caution in the why opinion of Judges are made reference of in the following words:

"I can say now, that the expression of every Judge including Justices of this Court, must be taken with reference to the facts and peculiar circumstances of the case on which he decides, otherwise the law will get into extreme confusion one can be very careful and avoid quoting B pronouncements of Justices of this Court outside the parameter of the facts of those decisions and principles decided. In Ezomo's case like this case, the defendant entered an appearance, not a conditional appearance, not on protest. He did not move to set aside the writ. Rather, he contested the case and participated fully until judgment. My noble and C learned brother, Karibi-Whyte, J.S.C. in his contribution in Ezomo's case at page 208 principally said inter alia:-

" On the face of the writ of summons, it is not a writ for service outside jurisdiction and in my opinion did not require leave of the court or Judge for service outside jurisdiction" D

It was after so deciding above that my noble and learned brother then added:

"Service of a writ of summons outside jurisdiction without leave of the Judge or court does not render the writ a nullity. All that is affected is the service which is irregular and can be set aside."

It is quite plain that the opinion of my learned brother, Karibi-Whyte, J.S.C. in Ezomo's case was an obiter dictum and as such of E no binding effect. Again, this court's decision in Ezomo's case could not be relevant to the decision of this case because the appellant here, on receipt of the writ of summons, and without entering appearance, filed a motion and moved the High Court and sought for F setting aside the writ and the service for non-compliance with Sections 97 and 99 of the Sheriffs and Civil process Act.

This appeal, for the reasons I have given above in this judgment, succeeds and it is allowed. Both the writ of summons and the service on the appellant are declared invalid, null and void. The G appellant is entitled to the costs of this appeal which I assess at N 1000.00.

UWAIS CJN

I have had the opportunity of reading in draft the judgment read H by my learned brother Mohammed J.S.C I entirely agree.

It is settled by the decision of this court in Nwabueze & Anor v. Obi Okoye, (1988) 4 NWLR (Pt.91) that where the Rules of High Court provide that before a writ of summons, to be served out of jurisdiction, is

issued leave of the High Court must be obtained; and if no such leave is obtained prior to the taking out of the writ then, the writ is vitiated and would be declared null and void. The decision is binding on all courts by the doctrine of stare decisis. The lower courts were, therefore, in error when they failed to declare null and void the writ taken out by the respondent, as plaintiff, without leave.

I too hereby allow the appeal with N1,000.00 costs to the appellant against the respondent.

C

KUTIGI JSC

At the material time when the writ of summons was issued for service against the defendant/appellant outside the jurisdiction, the provisions of order 2 rule 16 of the Bendel State High Court (Civil Procedure) Rules, 1976 ought to have been complied with. It is trite that where a defendant is out of jurisdiction no writ for service can be issued except with leave of the court. The issue of the writ of summons and the service of the same writ on a defendant are conditions precedent to the exercise of a court's jurisdiction over a defendant. In the instant case a condition precedent to the issue of the writ of summons against the defendant/appellant was that leave of the High Court had to be obtained first before the writ could be issued. It is not disputed that the defendant/appellant is outside the jurisdiction of Bendel State High Court, the plaintiff therefore had to obtain leave of the High Court before the writ of summons could be issued. This he failed to do. The entire writ of summons served on the defendant/appellant in this case was therefore clearly a nullity and ought to be set aside. And it is hereby set aside. (See *Nwabueze & anor v. Obi-Okoye* (1988) 4 NWLR (Pt. 91) 664; (1988) NSCC Vol.19 part 3.

For these and the reasons given in the lead judgment of my learned brother Mohammed J.S.C which I read before now, and with which I agree, I also allow the appeal. The decisions of the High Court and the Court of Appeal are accordingly set aside. I endorse the order for costs in the said judgment.

H

OGWUEGBU JSC

I had a preview of the judgment just delivered by my learned brother Mohammed, J.S.C. I agree with his reasoning and conclusion.

In this case, the writ of summons which initiated the proceed-

ings leading to this appeal was irregular in failing to comply with section 97 of the Sheriffs and Civil Process Act, Cap. 407, Laws of the Federation of Nigeria, 1990 and Order 2 Rule 16 of the High Court (Civil Procedure) Rules of the former Bendel State of Nigeria applicable in Edo State. The issuance of the writ of summons for service on the 8th defendant who is in Lagos and outside the jurisdiction of the court in Benin without the leave of the court is a fundamental irregularity.

The writ of summons having been signed and sealed without leave, the plaintiff has not issued any proceedings in the manner prescribed by the rule. The writ is a nullity and the court cannot cure the defect. In effect, there are no proceedings before the trial court. See *C Nwabueze & Or. v. Obi-Okoye* (1988) 4 NWLR (Pt.91) 664 and *Pritchard v. Deacon & Ors.* (1963) 1 Ch. 502.

Non-compliance with Order 2, Rule 16 of the High Court (Civil Procedure) Rules of Bendel State renders the writ of summons a nullity. Non-compliance with section 97 of the Sheriffs and Civil Process Act renders the service on the 8th defendant null and void also.

I would also allow the appeal and abide by all the orders contained in the judgment of my learned brother Mohammed, J.S.C

E

ADIO JSC

I have had the opportunity of reading in draft, the judgment just read by my learned brother, Mohammed, J.S.C., and I agree that the appeal succeeds. I allow it and abide by the consequential orders, including the order as to costs.

Appeal allowed.

G

H