

SUPREME COURT OF NIGERIA

18TH JULY, 1997. SC. 31/1991

**CORAM:- M. L. UWAISS CJN, A. B. WALLI, I. L. KUTIGI, M. E.
OGUNDARE, S. U. ONU, Y. O. ADIO, A. I. IGUHI, JJSC**

ODU'A INVESTMENT COMPANY LIMITED APPELLANT
AND
JOSEPH TAIWO TALABI RESPONDENT

COURT PROCESSES - *Waiver - Mandatory enactment - Whether ss. 97 and 99 of the Sheriffs Act can be waived - Will depend on whether the sections are mandatory or directory.*

COURT PROCESSES - *Waiver - Sections 97 and 99 of the Sheriffs Act - Whose object is not of general policy - are directory and can be waived by the defendant.*

COURT PROCESSES - *Writ of summons - Where served in violation of ss. 97 and 99 of the Sheriffs Act - By entering unconditional appearance and filing pleadings - Defendant has waived his right to object.*

PRACTICE & PROCEDURE - *Non compliance or defect - That goes to the jurisdiction of the Court is a fatal nullity - But if it is a mere irregularity - The court may ex debito justitiae set it aside.*

PRACTICE & PROCEDURE - *Non compliance - With ss. 97 and 99 of the Sheriffs and Civil Process Act - Cannot be cured by the application of local rules.*

PRACTICE & PROCEDURE - *Non compliance - With ss. 97 and 99 of Sheriffs Act - And rule of court requiring leave for service of writ out of jurisdiction - Renders the writ and or service of it voidable.*

PRACTICE & PROCEDURE - *Technicalities - Courts would no more allow them make an ass of it and dent the image of justice - Appellant that has taking some steps - Cannot later complain of defect in the service of the writ.*

SUPREME COURT - *Previous decisions - That are not in conflict with later decisions - Will not be overruled.*

FACTS

Before the Lagos High Court, plaintiff/respondent filed an action against the defendants in respect of wrongful termination of his appointment. The second defendant/appellant was served at Ibadan in Oyo State. There was no compliance with ss. 97 and 99 of the Sheriffs and Civil Process Act, and no compliance with O. 2 r. 4 of the High Court of Lagos State Civil Procedure Rules which required leave of court for service out of jurisdiction.

The appellant entered unconditional appearance in the matter, filed its statement of defence and took dates for hearing. It was thereafter that appellant filed a motion seeking to set aside the service of the writ for non-compliance with the Act and the Rules. The trial court dismissed the application for being too late as appellant is deemed to have waived his right to object. Appellant's appeal to the Court of Appeal was dismissed. It has further appealed to the Supreme Court which had to determine the matter based on a single issue.

ISSUE FOR DETERMINATION

Does non-compliance with section 97 and/or section 99 of the Sheriffs and Civil Process Act (now Cap 407 Laws of the Federation of Nigeria 1990 and hereinafter is referred to as the Act) coupled with breach of the rule of Court requiring leave of the court or a Judge for a Writ to be served outside jurisdiction render the Writ and/or service of it a nullity or mere irregularity?

HELD (Dismissing the appeal per lead judgment of **OGUNDARE JSC**, Kutigi JSC dissenting)

Non compliance or defect - That goes to jurisdiction

1. All the authorities are agreed that where an act is void, then it is in law a nullity. It is not only bad, but incurably bad. Any non-compliance or defect that goes to the competence or jurisdiction of a court is fatal; it renders the proceedings a nullity "however well conducted and decided: the defect is extrinsic to the adjudication." When an act is void, waiver does not come in for consideration as the parties cannot consent or waive such irregularity. Where, however, the defect does not affect the competence or jurisdiction of the court, it is a mere irregularity which the court may ex debito justitiae set aside. (p. 1643 E)

Non Compliance with ss. 97 & 99 - Cannot be cured by local rules

2. Non-compliance with sections 97 and 99 of the Act is in a different category. I have set out these two sections in the earlier part of this judgment. They are statutory provisions. Being statutory provisions, non-compliance with them

cannot be cured by the application of local rules similar to the English Order 2 rule 1. (p. 1674 H)

Waiver - Whether the sections are mandatory or directory

3. Coming back to the issue whether sections 97 and 99 of the Act can be waived, I think the better approach is to determine whether they are mandatory or directory. A breach of mandatory enactment renders what has been done null and void. But if the statute is merely directory, it is immaterial, so far as relates to the validity of the thing to be done, whether the provisions of the statute are accurately followed out or not. (p. 1676 H)

Waiver - SS 97 & 99 are directory and can be waived

4. It is the law here in Nigeria as well as in England that if the object of a statute is not one of general policy, or if the thing which is being done will benefit only a particular person or class of persons, then the provisions of the statute are directory and not mandatory. Reading carefully the wordings of sections 97 and 99 of the Act I am of the firm view that the provisions of these sections are for the benefit of defendants alone rather than of the general public. The purpose of section 99 is to give a defendant served in a State outside the one in which the writ was issued sufficient time to enable him make appearance. The endorsement to the writ required by section 97 informs him that the writ was issued in another State. With this view of these sections I cannot say that a breach of any of them is of such incurable nature that cannot be waived by the person for whose benefit they are provided, that is, the defendant. I think he can waive them if he so chooses. (p. 1677 G)

Unconditional appearance - Right to object is waived

5. It follows, therefore, that where a defendant is served with a writ of summons in breach of sections 97 and 99 of the Act, he has a choice either to object to the service by applying to have it set aside and the Court ex debito justitiae will accede to the application or ignore the defect and proceed to take steps in the matter. By entering unconditional appearance and filing pleadings, as in the case on hand, he is deemed to have waived his right to object and cannot later in the proceedings seek to set same aside because of the original defect. (p. 1678 D)

Non - Compliance with ss 97 & 99 - Renders service voidable

6. From all I have been saying, my answer to the question set out in this judgment, therefore, is that non-compliance with section 97 and/or section 99 of the Sheriffs and Civil Process Act and the rule of court requiring leave of the

Court or a Judge for a writ to be served out of jurisdiction renders the writ and/or service of it voidable and the defendant who complains of such non-compliance is entitled ex debito justitiae to have same set aside as was done in Skenconsult, Nwabueze and NEPA, provided he has not taken fresh steps in the matter which will amount to a waiver of the irregularity complained of. Where the latter is the case, his application to set aside must be refused. I need point out, for the avoidance of doubt, that the power to set aside is without prejudice to the power of the Court, to allow, in appropriate cases, such amendments to be made and to make such order dealing with the proceedings generally as it thinks fit. (p. 1679 A)

Technicalities - No more to be allowed to dent justice

7. Turning to the case on hand, the Appellant from the various steps it took in the proceedings after service on it of the writ of summons cannot now be heard to complain of defects in the issue and service of the writ. It is too late in the day to do so. He has waived his right to complain. The trial must go on. Technicalities are a blot upon the administration of the law and the Courts have moved a long way from allowing them to make an ass of it and dent the image of justice. (p. 1679 C)

Supreme Court - Previous decisions

8. As I am satisfied that Ezomo and Adegoke Motors were, on their facts, rightly decided I find no reason to accede to the Appellant's request to overrule them. They are not in conflict either with Skenconsult and Nwabueze. (p. 1679 D)

NOTABLE POINTS OF INTEREST

OGUNDARE JSC

1. Whether defect in service of a writ can make a valid writ voidable

If there is a distinction between the validity of a writ and the validity of the service of the writ, and I agree there is, I am at a loss to fathom how any defect in the service of the writ can make the writ which is valid, to be voidable. I would think it is the service alone that would be voidable. (p. 1667 D)

2. Definition of the word "Waiver"

What is waiver? Defining the word "waiver", Idigbe JSC at page 22 of the Arioris case said:

"By way of a general definition, waiver is the intentional and voluntary surrender or relinquishment of a known privilege and or right; it, therefore, implies a dispensation or abandonment by the party waiving of a

right or privilege which, at his option, he could have insisted upon."

Obaseki, JSC at page 25 added:

"Waiver is according to Words and Phrases, legally defined volume 5 p. 301 1969 edition reprinted 1974 defined as the abandonment of a right. A person who is entitled to the benefit of a statutory provision may waive it and allow the transaction to proceed as though the provision did not exist." (p. 1678 B)

KUTIGIJSC (DISSENTING)

3. Supreme Court - Is only concerned with its ratio decidendi

C But before I start, I must emphasize that a case is only authority for what is actually decided and it is not appropriate to quote it even for a proposition that may seem logically to follow from it. I will also be making a valid point if I say that as a matter of practice this court only concerns itself with the ratio decidendi of its judgment and not obiter dicta in concurring judgments or for D that matter a lead judgment. It is the ratio decidendi of our own judgment that binds us and the lower courts. (p. 1683 A)

4. Defect in court's competence - Renders the proceedings a nullity

Any defect in the competence of a court of law renders the proceedings E before it a nullity, the defect of competence being extrinsic to the adjudication. Consequently the part allegedly played by the defendant in the High Court, that is to say, entering an unconditional appearance, giving address for service within jurisdiction, filing a Statement of Defence and attending to take a date for hearing of the case, were all null and void. The writ of summons being F a nullity, you just simply cannot put something on nothing. It will collapse. I have not been able to find any authority from the decided cases that a condition precedent to the initiation of proceedings as in this case can be waived. The law clearly is that parties cannot even by consent confer jurisdiction on a court. (p. 1686 H)

G

REPRESENTATION

Parties absent and unrepresented

CASES REFERRED TO

H Adejumo v. Military Governor of Lagos State (1970) 1 ALL NLR 183
Skenconsult (Nig.) Ltd. v. Ukey (1981) 1 SC 6
Oke v. Aiyedun (1986) 4 NWLR 664 (1988) 3 NSCC 53
Ariori v. Elemo (1983) 1 SC 13
Madukolu v. Nkemdilim (1962) ANLR (Part 2) 581 at 590

Westminster Bank v. Edwards (1942) AC 529 at 536

NEPA v. Onah (1997) 1 KLR (Pt. 47) 201

National Bank of Nigeria Ltd. v. Shoyoye (1977) 5 SC 181 at 182 - 183

Fawehinmi v. Nigerian Bar Association (1989) 2 NWLR (Pt. 105) 558 at 650

Oke v. Aiyedun (1986) 2 NWLR 548

Demuren v. Asuni (1967) 1 ALL NLR 94 99-100

B

Woodward v. Sarsons (1875) L.R. 10 CP

Quin v. Leathem (1911) AC. 506

Ezomo v. Oyakhire (1985) 1 NWLR (Pt 2) 195

Nwabueze v. Okoye (1988) 4 NWLR (Part 91) 664

C

STATUTES & RULES REFERRED TO

Sheriffs and Civil Process Act Cap. 407 LFN 1990 ss. 97, 99, 96

High Court of Lagos State (Civil Procedure) Rules 1972 O. 2 r. 4, O. 8 r. 11

Rules of Supreme Court England 1960 O. 2 r. 4

Supreme Court Rules O. 6 r. 8(6)

D

Rules of Supreme Court England 1965 O. 2 r. 1

High Court Rules of Bendel State 1976 O. 2 r. 16

High Court Law of Lagos State s. 12

High Court of Lagos State (Civil Procedure) Rules 1994 O. 5 r. 1

High Court Law of Eastern Nigeria 1963 s. 16

E

Constitution of Nigeria 1979 s. 258(1)

BOOK REFERRED TO

Halsbury's Laws of England 4th Ed. Vol. 37 para. 39

F

LEAD.JUDGMENT BY OGUNDARE JSC

Does non-compliance with section 97 and/or section 99 of the Sheriffs and Civil Process Act (now Cap 407 Laws of the Federation of Nigeria 1990 and hereinafter is referred to as the Act) coupled with breach of the rule of Court requiring leave of the court or a Judge for a Writ to be served outside G jurisdiction render the Writ and/or service of it a nullity or mere irregularity? This is the question that calls for determination in this appeal.

Plaintiff had, in the High Court of Lagos State, sued the two Defendants claiming -

"1. An order declaring that the plaintiff is and at all material times H was an employee of the 2nd defendant which said 2nd Defendant seconded the plaintiff to the 1st defendant as Executive Director - Finance and Secretarial Duties.

2. An order declaring as null and void the 1st defendant's letter

referenced MD/NED 1/02317 and dated 18th October, 1984 by which the 1st Defendant purported to terminate the appointment of the Plaintiff as the Executive Director - Finance and Secretarial Duties of the 1st Defendant and that the said termination was malicious and in bad faith.

3. An order compelling the 1st defendant to re-instate the plaintiff B in his post of Executive Director - finance and Secretarial Duties from which he was purported to have been removed with effect from 19th October, 1984.

4. An order compelling the defendant jointly and severally to pay to the plaintiff in full his monthly salary from the 19th day of October, 1984 up to the date of judgment.

C In the alternative the plaintiff claims against the defendants jointly and severally the sum of N500,000.00 being general and special damages for wrongful termination of appointment."

1st Defendant's address was put in the writ as

"Ikorodu Road, Ojota, Lagos."

D 2nd Defendant's address was put as

"Cocoa House Complex Ibadan"

By that address, 2nd Defendant was to be served, and was indeed served, in Ibadan in Oyo State, a place outside the territorial jurisdiction of the High Court of Lagos State. There was no endorsement on the writ as required by

E section 97 of the Act which provides:

"97. Every Writ of summons for service under this Part out of the State or the Capital Territory in which it was issued shall, in addition to any other endorsement or notice required by the law of such State or the Capital Territory, have endorsed thereon a notice to the following effect (that is to

F say) -

"This summons (or as the case may be) is to be served out of the State (or as the case may be) and in the State (or as the case may be)."

The Writ required that appearance was to be made within "eight days after the G service of this Writ on you". Section 99 provides for a longer period. It reads:

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

There was clearly a breach of each of the 2 sections. Equally so, leave of Court or a Judge was not obtained to serve the writ out of jurisdiction as required by Order 2 rule 4 of the High Court of Lagos State Civil Procedure rules, 1972.

The Writ was served on the 2nd Defendant at Ibadan on 6th September 1985 and the 2nd Defendant, by its counsel, Mr. S.A. Onadele entered an unconditional appearance to the Writ on 13th September 1985. Since entering appearance 2nd Defendant's counsel received a copy of the statement of claim and sought, and obtained, pursuant to the rules of court, the consent of Plaintiff's counsel to file 2nd Defendant's statement of defence out of time. B The said statement of defence of the 2nd Defendant was indeed filed out of time on 28th April 1986. Learned counsel for the 2nd Defendant received Court processes and appeared in court when hearing of the action was fixed for dates in June 1986 and subsequently adjourned to October 1986. The 2nd Defendant never at any time, up to this stage, raised any objection to the writ C or its service.

On 19th September 1986, however, the 2nd Defendant through its counsel, Mr. Onadele filed a motion in court praying for

"an order or orders setting aside the service upon the second defendant of the Writ and the Statement of claim, to strike out the writ of summons D and set aside any step already taken in the proceedings in so far as the second defendant is concerned"

The grounds for the application were stated as follows:-

"(i) no leave of this Honourable Court was obtained before the Writ of summons which was to be served outside the jurisdiction of this Court was E issued.

(ii) no leave of this Honourable Court was obtained before the Writ of summons was served outside the jurisdiction of this court, namely, Ibadan, Oyo State

(iii) the Writ of summons was issued in breach of the High Court of F Lagos State Civil Procedure Rules which provided for a Writ with necessary endorsement concerning service out of court's jurisdiction as contained in form No. 3 of Appendix A to the rules;

(iv) the Writ of summons was neither endorsed marked nor served as required by the Sheriffs and Civil Process Act and the Enforcement of G Judgments and Services of Process rules Cap 189 Laws of the Federation of Nigeria and Lagos, 1958;

(v) the time limited for appearance by the Writ was shorter than the period stipulated by the said Act.

(vi) the court has no jurisdiction to entertain the action on account H of paragraphs (i) to (v) above."

In the supporting affidavit the following facts were relied on:

"3. That the said Odu'a Investment Co. Ltd. is a limited liability company with its registered office at Cocoa House, Ibadan, where it carried

on its business.

4. That the Writ of summons filed in this action was served on the second defendant through one of its employees at Cocoa House Annex, Ibadan, Oyo State, on the 6th of September, 1985.

5. That the second defendant has been informed by its solicitor in this action and verily believes that after a thorough search at the High Court Registry at Ikeja the Registry could not find any order having been obtained by the plaintiff prior to the service of the said Writ at Ibadan.

6. That the said Writ did not contain any endorsement as notice to the effect that it was meant for service outside the jurisdiction of this Honourable Court.

7. That the said Writ commanded the second defendant to appear to it within eight days of the date of service.

8. That the second defendant has been informed by its solicitor in this action and it verily believes that the procedure adopted in the service of the said writ and other court process on the second defendant is irregular and vitiates the exercise of jurisdiction by this Honourable Court."

In his counter-affidavit, Mr. Adesina, counsel to the Plaintiff, deposed -

"3. That since the Writ of summons was served on the 2nd Defendant at Cocoa House Annex, Oyo State on the 6th day of September, 1985 as deposed to in paragraph 4 of the affidavit in support, the 2nd defendant by its counsel Mr. Samuel Adetayo Onadele entered an unconditional appearance on 13/9/85.

4. That by the said unconditional appearance the 2nd defendant indicated an address for service within the jurisdiction of this Honourable Court, to wit c/o Dr. F.A. Ajayi's chambers, 5th Floor, Western House, Lagos.

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6. That since the filing of Exhibit A by the 2nd defendant all subsequent processes in this matter has been served on it through the address for service indicated within the jurisdiction as exemplified by a photocopy of the affidavit of service of the statement of claim sworn to by one Tunde Adelenu, Bailiff of the High Court, Ikeja on the 18th October, 1985 attached hereto and marked Exhibit B.

7. That on the 28th April, 1986 the 2nd defendant's counsel, Mr. Adetayo Onadele wrote a letter a copy of which is attached and marked 'Exhibit C' to me seeking consent for the its (sic) statement of defence to be filed out of time after already filing the said statement of defence.

8. That by letter dated 7th May, 1986 attached hereto and marked 'Exhibit D' I as Plaintiff's counsel gave the consent sought by the 2nd Defen-

dant.

9. *That summons for Direction was filed in this matter and on the 13th/1/86 the matter was fixed for hearing on the 3rd, 4th and 5th of June, 1986.*

10. *That on the 3/6/86 all parties were in court represented by their respective counsel, including Mr. Adetayo Onadele for the 2nd defendant B who did not raise any objection as to irregularity or otherwise, and all parties agreed that the matter be fixed for hearing on fresh dated of 23rd and 24th October, 1986.*

11. *That I verily believe that by the actions of the 2nd defendant C deposed to in paragraphs 3,4,5,7 and 10 above, and the 2nd defendant has waived its right to seek that service of the Writ of summons be set aside and has submitted itself to the jurisdiction of this Honourable court, and that this motion is misconceived, frivolous and an abuse of the process of this Honourable Court."*

By this counter-affidavit the Plaintiff impliedly admitted the irregularities complained of in the affidavit in support of the motion. The Plaintiff also filed a notice of preliminary objection to the application. The objections raised were:

1. *That the application should have been brought by way of originating summons and not by way of motion.*

2. *That it is too late to bring the application after the 2nd defendant E has entered unconditional appearance to this suit."*

He relied on Order 8 rule 11 of the High Court of Lagos State Civil Procedure rules. 1972 for the preliminary objection.

Both the application and the notice of preliminary objection were heard together by Balogun J. who, in a reserved ruling, struck out the first F ground of the preliminary objection in that it was misconceived. He held, following Adejumo and Anor. v. Military Governor of Lagos State (1970) 1 All NLR 183, that any application to the High Court to set aside or stay any proceedings as being irregular, should be by motion. He considered the second ground of objection along with the main application. After a review of a G number of authorities, the learned Judge held:

"I think in this present case it is equally too late for the 2nd Defendant/Applicant to raise, at this later stage in the proceedings, the issues H which it is now raising on this present motion, and the applicant must be deemed to have waived whatever procedural rights it had under the sections 97 and 99 of the Sheriffs and Civil Process Act and under all the other enactments and rules of court still relied upon by it on this application. I do not think it is entitled at this stage of the proceedings in the circumstances of this case to complain any longer about any defects still relied upon by his

counsel on this application (or on any defect originally raised by it but which has now been abandoned).

It is for all those reasons (and the other reasons stated herein after in this ruling) that I accept all the submissions of Mr. Aderemi Adeshina, learned counsel for the plaintiff/Respondent, that the present application is
 B *totally misconceived and an abuse of the process of the Court."*

On waiver, he held:

"..... the 2nd Defendant/Applicant having knowledge of all his right or rights under the provisions of sections 97 and 99 of the Sheriffs and Civil Process Act, rules 4 and 6 of the Enforcements of Judgments and service of Process rules, Cap 189, Laws of the Federation of Nigeria and Lagos
 C *1958, Order 7 rule 1 of the High Court of Lagos State (Civil Procedural) Rules, 1972 and any other applicable law or rule (relating to procedure), to have applied under Order 12 rule 8 of the Rules of the S.C. of the U.K. (applicable in Lagos State) to this court for an order setting aside the Writ*
 D *or service of the Writ or notice of the writ on it, or declaring that the Writ or notice of the Writ had not been duly served on it, before entering an appearance therein. The 2nd Defendant/Applicant having failed to do so within the period limited by law in that behalf, and having instead proceeded to enter an appearance (and thereafter to file a statement of Defence) in the*
 E *action, is estopped from raising any objection in that behalf thereafter. It is deemed to have waived all its rights to do so. After entering an unconditional appearance to the Writ, it is too late for the 2nd Defendant/applicant to object to any irregularity in the issue or service of the Writ or as to irregularity in its form. This is because appearance is a fresh step in the action."*
 F He made a brief foray into the provisions of Order 2 rules 1-3 of the rules of the Supreme court (England) and observed:

"The language of that Order seems to me very clear. Indeed, it was as a result of the decision of the Court of appeal in England in the case of Re Pritchard (deceased) (1963) Ch. 502 that that rule was substituted for the
 G *old rules 1 and 2 of the previous order 2 (sic) Under the new rule, the old distinction between nullity and mere irregularity disappeared; at any rate in regard to a failure to comply with the requirement of those rules. It may still be that there are other failures or improprieties of these Rules, so serious as to be contrary to natural justice and to render the proceedings in*
 H *which they occur, and any order made there in a nullity. But the rule today; generally speaking, is that any non-compliance with the Rules will not render the proceedings a nullity, but will be treated as mere irregularity which the court may cure; or which a party by taken (sic) a fresh step in the proceedings would be deemed to have waived. Thus, the entry of an uncondi-*

tional appearance constitutes a waiver to (a) any objection to the jurisdiction of the Court; any irregularity in the commencement or service of the proceedings. See generally Sheldon v. Brown etc. Ltd. (1933) 2 QB 300. (Writ not served within 12 months after issue); Re Chittendon (deceased) (1970) 1 WLR 1618; (1970) 3 ALL ER 562 (service of Originating summons after expiration of 12 months) but were (sic) an order for extension of time had been made. In each of the cases appearance was held to constitute a waiver of the irregularity." (Underlining is mine)

On jurisdiction, the learned judge held:

"As the grounds why it is said that this Court lacks jurisdiction to hear and determine the action are based on the said alleged irregularities, which I have held cannot now be raised by the Applicant, the objection (on) ground of lack of jurisdiction must also fail."

In the end, the learned Judge dismissed the application with costs.

The 2nd Defendant (who is hereinafter referred to as the Appellant) appealed against the decision to the Court of Appeal. That court, per Tobi, JCA with whom the other Justices agreed, in an admirable and well researched judgment, reviewed earlier decisions of this Court in Skenconsult (Nig.) Ltd. & Anor. v. Ukey (1981) 1 SC 6; Ezomo v. Oyakhire (1985) INWLR (Pt. 2) 195; Oke v. Aiyedun (1986) 4 NWLR 664; (1988) 3 NSCC 53 Adegoke Motors Ltd. v. Adesanya (1989) 3 NWLR 250 and that of the Court of Appeal in U.B.A. Trustees Ltd. v. Nigergrob Ceramic Ltd. (1987) 3 NWLR 600 and came to the conclusion that there was no conflict in the decisions of the Supreme Court on the matter in issue. Tobi JCA observed:

"In my humble opinion, there is no conflict in the line of decisions, starting from Skenconsult and ending with Adegoke, Nwabueze, there was no issue of waiver. The parties who sought the nullification of the court processes were not guilty of any waiving conduct and so the Supreme court did not go into the issue of waiver as an ameliorating factor. I go further. In Nwabueze, the Supreme Court said:

'It should be noted that except where there is a submission to the jurisdiction of the court it has no jurisdiction over a person who has not been served with the Writ of summons.'

The opposite situation of this sentence lends support to the view that if Nwabueze involved a waiving conduct on the part of the appellants, the court should have arrived at a similar decision as in Ezomo and Adegoke. I should say here that the court was clearer on the issue in respect of not raising the waiver conduct in the court of first instance. Although Nwabueze sounded complete and final, without anticipating the consequences of waiver on a null and void court process, that does not detract from the fact that

there is no conflict in the line of decisions."

The learned Justice of Appeal discussed the issue of waiver and came to the conclusion that -

"In the circumstances of this case, I hold that the appellant clearly waived his legal rights in the matter and it is too late in the day for him to B back out of the bargain. He is already in and he cannot get out."

The Court dismissed the appeal.

The Appellant had now further appealed to this Court upon 6 grounds of appeal which I need not set out in this judgment. In his Brief filed pursuant to the rules of Court, the Appellant set out the following questions as arising C for determination:

"(1) Whether the Court of Appeal is right in holding that the principles of waiver applies to non-compliance with ss.97 and 99 of the Sheriffs & Civil Process Act Cap. 189 particularly where before trial the defendant objects to exercise of jurisdiction.

D *(2) Whether it was open to the Court of Appeal in all the circumstances of this case to follow the Supreme Court decision in the cases of Ezomo v. Oyakhire (1985) 1 NWLR (Pt. 2) p. 195 and Adegoke Motors Ltd. v. Adesanya (1989) 3 NWLR (Pt. 109) p. 250 instead of Skenconsult (Nig.) Ltd. v. Ukey (1981) 1 SC. 6 and Nwabueze v. Okoye (1988) 4 NWLR (Pt. 91) E p. 664.*

3. Whether it is right for the Court of appeal to raise suo motu and decide against the appellant facts constituting estoppel by conduct which did not arise from the appeal.

4. At what stage in the proceedings could the court admit objections as to non-compliance with the provisions of ss. 97 or 99 of Cap. 189.

5. Whether the Supreme Court should overrule its decisions in the Ezomo's case and Adegoke's case in so far as they suggest that breaches of ss. 97 and 99 Cap. 189 are mere irregularities which could be waived."

The Plaintiff adopted the above questions but added another in his Brief. The G additional question reads -

"Whether the Appellant had not submitted to the jurisdiction of the Lower Court.

(a) Entering an unconditional appearance to the suit.

(b) Giving an address for service within the jurisdiction of the lower H court and accepting service of processes subsequently threat (sic).

(c) Filing a Statement of Defence without raising therein any objection to the non-compliance and

(d) Attending and participating in proceedings for summons for Directions and taking mutually acceptable dates for hearing."

The 1st Defendant did not participate in the proceedings right from the High Court to this Court as he is not affected by the issue raised in these proceedings. In his Brief, the Appellant invited us to overrule our decisions in Ezomo and Adegoke Motors Ltd. (supra).

At the oral hearing of this appeal, learned counsel for the parties made no appearance and in accordance with Order 6 rule 8(6) of the Supreme court rules the appeal was taken as argued on the briefs already filed in court.

Learned counsel for the Appellant, in his brilliant written brief of argument, strenuously argued that Skenconsult and Nwabueze had decided that non-compliance with sections 97 and 99 of the Sheriffs and Civil Process Act would render the issue and service of the Writ of summons incompetent, thus depriving the Court of jurisdiction. He urged us to follow those decisions. He submitted that the doctrine of waiver had no place in proceedings that are a nullity and that, therefore, it is irrelevant that the party complaining has taken, or defaulted in taking, part in the proceedings. He added that where proceedings were a nullity, the resultant judgment was also a nullity but would nevertheless remain binding until set aside in the same or other proceedings due to its very nature as the judgment of a superior court of record and not because of waiver. Learned counsel argued that the obiter dicta of this Court in Ezomo and Adegoke Motors on the applicability of the doctrine of waiver in proceedings conducted in breach of section 97 and section 99 of the Act were erroneous and ought to be overruled. He further argued that objection to the competence or lack of jurisdiction of a court could be raised at any stage of the proceedings even at the appeal stage for the first time or where appropriate, by commencing a fresh suit impugning such judgment. He finally submitted that in cases of non-compliance with section 97 or section 99 of the Act both the issue and the service of the Writ might be affected and could be struck out. He urged us to allow the appeal, set aside the judgments of the Courts below and grant Appellant's application in the trial High Court, thereby striking out the Writ of summons and all proceedings thereon.

Learned counsel for the Plaintiff, on the other hand, argued in his written brief of argument that the Courts below were right in their decisions. This was because the Appellant, aware of the defects in the service of the writ of summons and non-compliance with the provisions of sections 97 and 99 of the Sheriffs and Civil Process Act, did not take any step to nullify the proceedings but it rather took steps which gave the impression that the writ and the service of it on the Appellant were regular and in accordance with the law. Learned counsel conceded that this Court had decided in Skenconsult and Nwabueze that non-compliance with section 99 of the Act was not a mere irregularity but a fundamental defect which went to the issue of jurisdiction

and competence of the Court. Counsel however argued that the situation in those cases was different from the one in the case on hand. He observed that in Skenconsult, there was no service at all of the writ on the 2nd Appellant and in Nwabueze the 1st Appellants was not served as required by law. And in both cases, the Appellants acted timeously by taking immediate steps to nullify the proceedings. He argued that in Adegoke Motors where there were violations of the provisions of sections 97 and 99 of the Act, this court held, inter alia, that when a defendant desired to object to the regularity of the proceedings by which the plaintiff sought to compel his appearance, he might either enter a conditional appearance or enter an appearance under protest and then apply to the trial court to set aside the service of the writ. Learned counsel submitted that on the authorities, where the court would nullify a writ of summons issued or served in violation of the provisions of the act, it was not open to a defendant who upon being served with such a writ took steps in the proceedings in vindication of the Writ, to apply to have the same writ set aside on the ground of the non-compliance. He cited Ezomo in support of his submission. To the submission of Appellant's counsel that as sections 97 and 99 were mandatory, strict observance was enjoined and no waiver was permissible. Learned counsel for the Respondent replied that any provision could be waived by the person entitled to its benefits or protection whether it is statutory, constitutional or otherwise. The choice, he submitted, was definitely that of the person entitled to the right or benefit. He relied on Ariori v. Elemo (1983) 1 SC 13 for this submission. He observed that in both Skenconsult and Nwabueze, the issue of waiver did not arise for determination as the parties concerned in those cases took immediate steps to nullify the proceedings. Concluding his argument, learned counsel submitted:

"It is submitted that the intention of the legislature in enacting s. 99 of the Sheriffs and Civil Process Act was merely to ensure that litigants (Defendant) in a distant location from the jurisdiction of the Court have enough time to come within the jurisdiction or otherwise arrange that an appearance is entered where there is an intention to defend the suit and not to create a condition precedent to the validity of the Writ itself or the service thereof.

In this particular case in hand, the Defendant was based in Ibadan Oyo State about 136 kilometers from Lagos, and it arranged for an appearance to be entered on its behalf to the Writ now being complained about. No injustice has been done, and the Defendant had by entering appearance and by subsequent actions in the proceedings made the plaintiff and the Court to believe that it intended and had waived or at least ignored the non-compliance with the statutory provisions and was proceeding with the suit in spite

or despite them, and thus submitted itself to the jurisdiction of the lower Court.

The Defendant, having thus got the Plaintiff and the Court to take further steps and decisions in the matter in reliance on its representation is now estopped from going back on that representation and raising a complaint on the non-compliance with statutory provisions." B

I have read all the relevant authorities cited not only in the judgments of the two Courts below but also in the written briefs of learned counsel for the parties. Much has been written on the doctrine of Waiver. I do not, however, think that, for the purpose of this appeal, I need go into all that beyond what is required for the determination of this appeal. In Ariori v. Elemo C (supra) this Court has exhaustively dealt with it.

It is conceded that the Respondent did not obtain leave to serve his Writ on the appellant outside the territorial jurisdiction of the High court of Lagos State. It is also conceded that the writ was not endorsed as required by section 97 of the Act nor was the return date 30 days or more as required by section 99. It is equally not in dispute that the Appellant, on being served with the writ, took several steps (from entering unconditional appearance to filing a statement of defence) before applying to have the Writ struck out for non-compliance. D

All the authorities are agreed that where an act is void, then it is in law a nullity. It is not only bad, but incurably bad. Any non-compliance or defect that goes to the competence or jurisdiction of a court is fatal; it renders the proceedings a nullity "however well conducted and decided: the defect is extrinsic to the adjudication." - per Bairamian, FJ (as he then was) in E

Madukolu & Ors. v. Nkemdilim (1962) ANLR (Part 2) 581 at 590. See also MacFoy v. U.A.C. (1962) AC 152 at 160 PC. **When an act is void, waiver does not come in for consideration as the parties cannot consent or waive such irregularity.** See: Westminster Bank Ltd. v. Edwards (1942) AC 529 at 536; (1942) 1 All ER 470 at 474 where Lord Wright observed: F

"Now it is clear that a court is not only entitled but bound to put an end to proceeding if at any stage and by any means it becomes manifest that they are incompetent. It can do so on its own initiative, even though the parties have consented to the irregularity, because, as WILLES, J., said in London Corpn. v. Cox, in the course of giving the answers of the judges to this House, 'mere acquiescence does not give jurisdiction.'" G

Where, however, the defect does not affect the competence or jurisdiction of the court, it is a mere irregularity which the court may ex debito justitiae set aside. As Bairamian FJ put it in Madukolu: H

"If the court is competent, the proceedings are not a nullity, but

they may be attacked on the ground of irregularity in the conduct of the trial; the argument will be that the irregularity was so grave as to affect the fairness of the trial and the soundness of the adjudication. It may turn out that the party complaining was to blame, or had acquiesced in the irregularity; or that it was trivial; in which case the appeal court may not think fit to set aside the judgment. A defect in procedure is not always fatal." (Underlining is mine)

In Macfoy, Lord Denning delivering the judgment of the Privy Council also said:

....."But if an act is only voidable, then it is not automatically void. It is only an irregularity which may be waived. It is not to be avoided unless something is done to avoid it. There must be an order of the court setting it aside: and the court has a discretion whether to set it aside or not. It will do so if justice demands it but not otherwise. Mean-while it remains good and a support for all that has been done under it. So will this statement of claim be a support for the judgment, if it was only voidable and not void."

Coincidentally, Madukolu and MacFoy were decided in the same year but in different jurisdictions! If the defects or non-compliance complained of in this appeal, went to the competence or jurisdiction of the trial court, then the proceedings therein would be null and void and it is no moment that the appellant had taken steps in the proceedings before complaining. If, however, the defects or non-compliance amounted to mere irregularity, by the steps taken by the Appellant he would be taken to have waived the irregularity and it would be too late in the day for him to seek to set the writ and proceedings subsequent to its service aside.

To answer the question posed in the opening paragraph of this judgment I shall now consider the relevant decisions of this Court on the subject. On one side of the spectrum are such cases as Skenconsult, Nwabueze and NEPA v. ONAH (1997) 1 NWLR 680 [(1997) 1 KLR (pt. 47) 201]. On the other side are Ezomo and Adegoke Motors.

In Skenconsult, the plaintiff, had sued the company and its chairman/managing director claiming various reliefs. The respondent was at the time a director of the company and had taken his action in the High Court of former Bendel State. The Writ of summons was dated 13th November 1978 but the return date as endorsed thereon was 24th November 1978. At the time the suit was instituted, the address of the company was I, Chapel Street Yaba, Lagos while that of the Chairman/Managing Director was 3A Oduduwa Way G.R.A. Ikeja, Lagos State. Almost simultaneously with the filing of the Writ the plaintiff filed two motions on 7th and 11th December 1978 respectively asking for some orders which were made by the trial judge on 15th December 1978.

Aggrieved by the orders the defendants applied to the trial court to set them aside as well as the service of the writ and motion papers dated 11th December on the grounds (i) "that such service was not in accordance with the provisions of the Sheriffs and Civil Process Act and also because the Court had no jurisdiction to entertain plaintiff's claims and (ii) alternatively, for misrepresentation. The application was turned down on 1/3/79 for the reason that the application was not properly before the court. An appeal to the court of Appeal failed.

On further appeal to this court, it was contended, among other issues raised, that the 2nd defendant was not served at all while 1st defendant was not served as required by law, that is, section 99 of the Act. Nnamani, JSC delivering the lead judgment of the Court (with which the other Justices agreed) declared at page 20:

"Where a Writ of summons originates in one state for service in another State it is mandatory that there should be a period of at least 30 days between the date of service and the date that the defendant is required to appear in Court."

Expatriating further, he observed at page 22:

"With respect to Section 99, I do not think that that section can be interpreted as referring to a 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. In this I seem to agree with learned counsel for the respondent. But the matter does not rest there. The return date was less than the 30 days prescribed by Section 99 and was clearly in breach of it. In my view the proceedings on 24th of 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." (Underlining are mine)

The learned Justice of the Supreme Court held at page 25:

"The learned counsel for the respondent in the course of his argument before us conceded that there had been no compliance with Section 99 of the Sheriffs and Civil Process Act but has asked us to regard it as an irregularity due to administrative problems of the High court Registry. I am of the contrary view and I think that all the breaches in the instant case of the regulations relating to service and appearance are fundamental defects and go to the question of the competence and the jurisdiction of the court which pronounced the orders sought to be set aside. I may add that even if they were irregularities mere acquiescence of the parties (as claimed by

learned counsel for the respondent) cannot give the court competence or jurisdiction." Underlining are mine)

After citing, with approval, Westminster bank (supra) and Madukolu (supra), the learned Justice went on to say at page 26:

"The service of process on the defendant so as to enable him appear to defend the relief being sought against him and due appearance by the party or any counsel must be those fundamental conditions precedent required before the court can have competence and jurisdiction. This very well accords with the principles of natural justice."

Concluding this issue, the learned Justice said at pages 27-28:

"In the instant case, the appellants were not properly served in law with the Writ of summons. They were neither served with the motions pursuant to which the two orders were made nor were they present or represented by counsel when the said orders were made. My Lords, I am of the view that on all these grounds the first arm of chief Williams' argument must succeed and the orders ought to be set aside." (Underlining is mine)

The sum total of the decision of this Court in Skenconsult and as relating to the question under consideration, is that non-compliance with section 99 of the Act was not a mere irregularity but a fundamental defect which went to the root of the jurisdiction and competence of the Court. Learned counsel for the Respondent admitted as much but the Court appeared to be equivocal on this conclusion going by the dicta of Nnamani JSC.

The next case is Nwabueze where in an action for libel brought against the appellants in Anambra State High Court, the defendants' addresses for service as shown in the Writ of summons were in Lagos State. Leave to issue the Writ was not sought nor obtained. After the issue of the Writ the respondent applied for substituted service by sending the processes in the action to the appellants by registered post. The application was duly granted.

By a motion, the appellants sought to have the Writ and service of it set aside on grounds, inter alia, that the Writ was irregularly issued by reason of failure to comply with the Act and that the defendants in the action were resident outside the jurisdiction of the Court. The trial Court held that the service of the writ of summons was improper and set aside the service of the writ for non-compliance with S. 97 of the Act because it was not endorsed for service outside Anambra State and ordered that the Writ be endorsed and that steps be taken to serve the writ after the endorsement. On appeal to the Court of appeal Enugu the Court dismissed the defendants' appeal and affirmed the findings of the lower court. The defendants still not satisfied with the decision of the Court of Appeal appealed to the Supreme court attacking the court of Appeal's decision on the grounds inter alia that a writ of summons cannot

be issued against a defendant outside Anambra State without leave of court and service of same writ of summons must be by leave, that these are conditions precedent for a validly issued writ of summons. Further that the Sheriffs and Civil Process Act Cap. 189 Laws of the Federation are mandatory provisions which a High court has to comply with.

It was held inter alia, (i) that where a defendant is out of jurisdiction B no writ for service out of jurisdiction can be issued except by leave of the court. In Re Eager, Eager v. Johnstone (1882) 22Ch.D 86 was distinguished (ii) that where a court is called to act outside its territorial jurisdiction in respect of a matter in which there is a cause of action plaintiff must satisfy the conditions prescribed for doing so. (iii) The issue of Writ of summons and the C service of the same Writ on a defendant are conditions precedent for the exercise of a court's jurisdiction over the defendants. In the instant case, a condition precedent for the issue of the writ of summons against the defendants who are resident outside the area of territorial jurisdiction of the High court of Anambra State and with whom, neither of them carries on business D within that area of jurisdiction, is that leave of the State High Court had to be first obtained before the Writ was issued. Section 96(1) and (2) of the Sheriffs and civil Process Act provides authority for the service of the writ of summons in this case issued in the Anambra State High Court for service on the defendants who reside outside the Anambra State but within Nigeria, but it E had nothing to do with the issue of the writ of summons itself, a matter evidently within the area of jurisdiction of the House of Assembly of a State, whilst service of a writ of summons outside the State but within Nigeria is within the area of jurisdiction of the National Assembly which must be deemed to have enacted the Sheriffs and Civil Process Act. Agbaje, JSC read the lead F judgment. He observed at p. 64:

"Generally courts exercise jurisdiction only over persons who are within the territorial limits of their jurisdiction (Re Busfield (1886), 32 Ch.D., per Cotton, L.J. at p. 131; Re Anglo African S.S. Co. (1886), 32 Ch., D, at p. 350; Berkeley v. Thompson (1886), 32 Ch.D. at 32 Ch.D, at p. 350; Berkeley G v. Thompson (1884) 10 App. Cas. at p. 49; Ex p. Blain, Re Sawers (1879), 12 Ch.D 522). It should be noted that except where there is a submission to the jurisdiction of the court it has no jurisdiction over a person who has not been served with the writ of summons. The court has no power to order service out of the area of its jurisdiction except where so authorized by H statute or other rule having force of statute. See Tassell v. Hallen (1892) 1Q.B. 321; Matthews v. Kuwait Bechtel corporation (1959) 2 Q.B. 57)." (underlining is mine)

The learned Justice referred to section 96 of the Act which provides

"96. (1) A writ of summons issued out of or requiring the defendant to appear at any court of a State or the capital Territory may be served on the defendant in any other State or the Capital Territory.

(2) Such service may, subject to any rules of court which may be made under this Act, be effected in the same manner as if the writ was served on the defendant in the State or the Capital Territory in which the writ was issued."

and observed at pp 65-66-

"These are clear statutory provisions for the service of a writ of summons outside the territorial jurisdiction of a State High Court which issued it but within the Federation of Nigeria. So section 96(1) and (2) of the Sheriffs and Civil Process Act provides authority for the service of the writ of summons in this case issued in the Anambra State High Court for service on the defendants who reside outside of Anambra State but within Nigeria."

The learned Justice reviewed the state of the law in Anambra State and came to the conclusion that the English Order 2 rule 4 RSC 1960 applied; this rule required leave of court to be obtained before a writ of summons to be served out of jurisdiction was issued. He then commented on pp 67 - 68:

"It follows from what I have just been saying in this judgment that the issue of a writ of summons and the service of that writ of summons on a defendant in a case are conditions precedent for the exercise of the jurisdiction which a court may have over the subject-matter of an action over the defendant. In the case of Anisminic Ltd. v. The Foreign Compensation Commission & Anor. (1969) 1 ALL E.R. 208 at p. 233 it was said, *inter alia*, as regards various ways in which lack of jurisdiction may arise in a case:- 'There may be an absence of those formalities or things which are conditions precedent to the tribunal having any jurisdiction to embark on any enquiry.'"

Turning to the case before the Court, the learned Justice observed at pp 68-69:

"I can now go back to the consideration of issue 2 in defendants' brief of arguments. I have held that the provisions of Order 2 rule 4 of the rules of the Supreme Court of England (1960) which provides that no writ of summons for service outside of the jurisdiction of which notice is to be given out of jurisdiction shall be issued without the leave of the court or a Judge. By the endorsement on the writ of summons in the case in hand the addresses of the defendants for service are outside of Anambra State, to wit, their addresses for service are in the case of the 1st defendant in Lagos State and in the case of the 2nd defendant in Lagos State and/or Imo State. In other

words on the showing of plaintiff himself the defendants are outside the area of territorial jurisdiction of the High Court of Anambra State. So because of the provisions of Order 2 rule 4 R.S.C. (1960) England the plaintiff had to obtain the leave of the Anambra High Court before he could issue or cause the writ of summons to be issued. It is common ground in this case that no such leave was obtained by the plaintiff before the writ was issued or before the plaintiff caused the writ to be issued. B

As I have said the issue of a 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 of summons 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 that area of jurisdiction, is that leave of the State High Court had to be first obtained before the writ was issued. C

Leave to issue a writ 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. Other matters are (1) the question of comparative costs and convenience (see Longan v. Bank of England (1906) 1 K.B. 141 C.A.) and (2) the fact, if it exists, that proceedings in respect of same subject-matter are already pending elsewhere. See The Hagen (1908) p. 189 at 202. 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 had been issued without due process of law accordingly has to be set aside." D E F

He next considered the effect of section 97 of the Act and held that G non-compliance with the section vitiated the whole of the service in that it went into the very root of the service but not the writ itself as the Act has nothing to do with the issue of the writ of summons (a matter within the competence of the State legislature) but with the service of the writ outside the State but within Nigeria (a matter for the National Assembly to legislate H on).

Obaseki JSC agreed with the judgment of Agbaje JSC. He said at p. 71:

"I have had the advantage of reading in draft the judgment just

delivered by my learned brother, Agbaje J.S.C., and I agree that the appeal be allowed and the action struck out, the writ of summons having been issued without the leave of court as required by the Rules of Court

The short point argued in this appeal is whether under the rules of court governing the Practice and Procedure in the High Court of justice of Anambra State, leave of the court of Judge must be obtained to issue out a writ of summons to be served outside the jurisdiction of the court." (Underlining is mine)

The learned Justice resolved the "short point" at page 80 of the report wherein he said:

"The main question for decision in this matter is whether the issue of writ for service outside the jurisdiction of the court without leave is valid. Neither the rules nor the High Court Law made specific provision to regulate the issue. The absence of rules to cater for such a situation was envisaged by section 16 of the High Court Law and the solution provided by it is to apply the provisions of the 1960 English Rules. The English Rules made it mandatory to obtain leave of the court or Judge to issue the Writ of summons for service outside jurisdiction. In other words, unless leave of the court or Judge is first obtained, the writ cannot issue. There is therefore substance in the contention of the appellants that the issue of the writ without leave is null and void. In matters of jurisdiction, the common law rules apply as between States within the Federation of Nigeria. See: (1) British Bata Shoe Co. Ltd. v. Melikan (1956) 1 F.S.C. 100 per Jibowu, F.C.J. at 102 and per Nageon de lestant, F. J. at 105 - 106; (2) Nigerian Ports authority v. Panalpina World Transport Nigeria Ltd. (1974) N.M.L.R. 82 per Coker, JSC. The writ of summons in this matter was issued without leave at the time of issue. The issue of the writ without leave is therefore invalid and null and void." (Underlining are mine)

On the third question before the Court, that is, "whether the High Court of Anambra State has jurisdiction to test noncompliance with the mandatory provisions of the Sheriffs and civil Process Act Cap 189 Laws of the Federation as mere irregularity and relieve the plaintiff of the consequences attaching at law to such non-compliance with the provisions of the statute," Obaseki JSC at p. 80 declared:

"But I will answer the third question in the negative in that the service of the writ is a nullity (See Skenconsult Nigeria Ltd. & Anor. v. Godwin Sekondy Ukey (1981) 1 SC 6)."

Uwais JSC (as he then was) in his own contribution at p. 82 observed:

"From the facts of this case which have been well stated in detail in

the judgment of my learned brother Agbaje, JSC, 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-Whye JSC in an exhaustive discourse on the issues raised in the appeal, declared at pages 91-92 of the report:

"This rule of court (id est order 6 r. 7(1) of the 1960 RSC (England) is Mandatory in terms. Thus where the defendant is out of jurisdiction no writ for service out of the jurisdiction can be issued except by leave of the court. See Re Eager, Eager v. Johnstone (1882) 22 Ch.D. 86. It may be argued that since the procedure for the issue of writs in Anambra State and in England are different, the rule should not be applicable. In Anambra State the plaintiff commences an action by application to the Registrar for the issue of the writ of summons and pays the prescribed fees. He also provides the endorsement on the summons, the claim and the addresses of the defendants. Once the requirements Order II have been satisfied, any errors in the issue of the writ of summons cannot be visited on the plaintiff - See Alawode v. Semoh (1959) F.S.C. 27. The position is different in England where plaintiff issues the writ of summons and is not regarded as a judicial Act - See Clarke v. Bradlaugh 8 Q.B.D. at p. 69. However, since the court is being called upon to act outside its territorial jurisdiction, in respect of a matter in which there is a cause of action, plaintiff must satisfy the conditions prescribed for doing so. Accordingly the application for leave to issue the writ is a condition for the issue of the writ of summons. An action is only commenced when the writ of summons has been validly issued. See The Espanoleto (1920) p. 223, Alston v. Underhill (1833) Cr. & M. 493."

Later in his judgment, Karibi-Whye JSC said at p. 93:

"The contention in the instant appeal also is that the defect complained of amounts only to a curable irregularity. I do not think so. I have already pointed out that the pre-October 1st, 1960 practice and procedure of High Court of England applied in the High Court of Anambra State and the case of Re Pritchard (Dec'd) (supra) did not distinguish between non-compliance resulting in a nullity and those which were curable. The posi-

tion is that where a pre-condition for the doing of an act has not been complied with no act subsequent thereto can be regarded as valid. This is because the act to which it is subject has not been done: It is however a different consideration where the non-compliance relates to a condition not fundamental to the constitute (sic) elements but is subsequent to the act sought to be done. This is because the act is not conditional as to the performance of the act not complied with. This last mentioned non-compliance is a mere irregularity. See Pontin v. Wood (1962) 1 ALL E.R. 294. Concisely put, where the law prescribed the doing of a thing as a condition for the performance of another, the non-doing of such thing renders the subsequent act void - see Sken-consult v. Ukey (supra)."

Wali, JSC agreed with his learned brethren that the writ of summons issued in the case without leave of court as required by Order 2 rule 4, rules of the supreme court (England) 1960 was incompetent. On non-compliance with section 97 of the Act the learned Justice declared at p. 99:

"As regards the issue of non-compliance with the provision 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."

So far with Nwabueze for now. It is to be observed that the effect of the English rule that governed the action was changed in 1964 soon after Re Pritchard (Deceased) (supra) was decided. The new Order 2 rule 1 RSC. 1964 which provides:

"1. - (1) Where, in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of any thing done or left undone, been a failure to comply with the requirements of these rules, whether in respect of time, place, manner, form or content or in any other respect, the failure shall be treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings, or any document, judgment or order therein.

(2) Subject to paragraph (3), the Court may, on the ground that there has been such a failure as is mentioned in paragraph (1), and on such terms as to costs or otherwise as it thinks just, set aside either wholly or in part the proceedings in which the failure occurred, any step taken in those

proceedings or any document, judgment or order therein or exercise its powers under these rules to allow such amendments (if any) to be made and to make such order (if any) dealing with the proceedings generally as it thinks fit.

(3) The Court shall not wholly set aside any proceedings or the writ or other originating process by which they were begun on the ground that the proceedings were required by any of these rules to be begun by an originating process other than the one employed."

has now swept away the old distinction between nullity and mere irregularity.

The latest decision of this Court on the issue is NEPA v. Onah (supra) where there was non-compliance with sections 97 and 99 of the Act and Order 2 rule 16 of the High Court rules of Bendel State 1976 which provides:

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

This Court, once again, held that non-compliance with section 97 of the Act and Order 2 rule 16 of the High Court Rules of Bendel State that requires leave of court or a Judge before a writ for service out of jurisdiction is signed and sealed is a fundamental breach of statutory requirement. The Court followed Nwabueze and distinguished Ezomo. In his lead judgment Mohammed, JSC said at page 690:

"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."

He cited In re Pritchard, (Decd) (1963) 1 Ch. 502 at 526 where 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 (or is some interlocutory proceeding in an already pending action) is that it must be issued with the seal of the issuing office. If the proceeding is issued from the wrong office and the statute or the rules give power to transfer to the right office, that may cure the defect, but there are no such powers in this case. It seems to me that in Lord Herschell's words, 'it is much more than an irregularity.' I think it is a nullity, and it is not possible for the defendants to waive that defect."

Uwais, CJN, in his judgment, observed at p. 693:

"It is settled by the decision of this Court in Nwabueze & Anor v. Obi Okoye, (1988) 4 NWLR (Pt. 91) 664 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 B they failed to declare null and void the writ taken out by the respondent, as plaintiff, without leave."

Kutigi, JSC at p. 693 said:

"At the material time when the writ of summons was issued for service against the defendant/appellant outside the jurisdiction, the provisions C 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 D 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 E 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 page 53"

F Ogwuegbu, JSC another member of the Panel that heard the appeal, held at p. 694:

"In this case, the writ of summons which initiated the proceedings 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 Rules 16 of the High Court (Civil Procedure) Rules of G 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.

H 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 Nwabueze & Or. v. Obi-Okoye (1988) 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."

These are weighty and definitive pronouncements given by this Court B only in January this year. I may, however, mention with respect that some confusion seems to arise from the dictum of Mohammed JSC wherein he said at p. 693:

"..... the appellant here, on receipt of the writ of summons, and without entering appearance, filed a motion and moved the High Court and C sought for setting aside the writ and the service for non-compliance with Sections 97 and 99 of the Sheriffs and Civil process Act.

The impression is given that the learned Justice took into account the fact that the appellant had not taken any step in the proceedings when it applied to have the writ set aside. Going however by the definitive pronouncements of D Uwais CJN, Kutigi and Ogwuegbu JJ.SC. that the defects rendered the writ and service of it a nullity, it would not matter that the appellant had or had not taken any steps in the proceedings since service on it before applying to set the writ aside.

I now turn to cases on the other side of the coin that have been taken E to decide the contrary of the above three cases.

First is Ezomo where the appellant, a Senior State Counsel in the Ministry of Justice, Enugu, Anambra State of Nigeria was sued for slander by the Respondent. The slander was uttered in the presence of more than 30 persons by the appellant in Okpokhumi-Emai village in Owan Local Govern- F ment area in the Auchi Judicial division of Bendel State - the home town of the Appellant. Both parties are from the same village. The address for service of the writ on the Appellant was that within jurisdiction but claimed that he was served in Enugu. The appellant was found liable and was ordered to pay damages for the defamation. His appeal to the Court of Appeal, Benin was G dismissed as lacking in merit. On further appeal to this Court, the appellant raised a number of legal issues one of which was that the service of the writ on him was irregular in that the service of the writ offended against section 99 of the Act. It was held, among other things, that as the writ of summons born the address for service within jurisdiction, a presumption of regularity prevails H and in the absence of contrary evidence, the writ was properly served. Aniagolu JSC who read the lead judgment, observed at pp. 201-202.

"The appellant, who appeared for himself in all the courts right up to this Court, argued his ground 6 with no less fervour than he did with

ground 4. Under this ground he contended that the writ commencing the action and served outside Bendel State was invalid by reasons, he argued of the provisions of Order 2 rule 16 of the Bendel High Court rules and that the Court of Appeal was wrong in law in upholding the judgment of the Bendel State High Court, Auchi, which was based on the 'invalid writ'. The said B Order 2 Rule 16 provides that

'No writ of summons for service outside the jurisdiction shall be signed or sealed without the leave of the court or a judge.'

Again, the appellant contended that there was no compliance with S.99 of the Sheriffs and Civil Process Act, Cap. 189 Volume VI Laws of the Federation in that the period between the service of the writ of summons on a defendant outside the jurisdiction and the return date of the summons, should not be less than 30 days. He was served with the writ of summons at Enugu on 11th August 1978 and the return date on the Writ was 8th September 1978 - a period of 28 days - two days short of the statutory period.

D In respect of his argument under Order 2 rule 16, appellant called in aid the decision of this Court in Skenconsult (Nig.) Ltd. and anor. v. Godwin Sekondy Ukey (1981) 1 S.C. 6 as per the lead judgment of Nnamani, JSC. beginning at p. 9, and (in respect of his contention on service of the writ and the return date) the observation of my learned brother, Obaseki, JSC in E National Bank (Nig.) Limited and anor. v. John Akinkunmi Shoyoye and Anor. (1977) 5 S.C. 181 at 192-3 that there was no evidence in that case that leave of the judge was obtained 'to seal the writ for service out of jurisdiction' as was required by Order 4 rule 16 of the then Western State Civil Procedure rules.

F To answer to these points, dealing first with order 2 rules 16, it is to be observed that the judgment of the trial judge on it was a complete answer. He held that there was no evidence (as indeed there was not) that the writ was signed or sealed without the leave of the Court or a Judge. The writ was not tendered in evidence. 'This Court', he said, 'cannot conjecture evidence, G and the presumption of regularity prevails in the absence of contrary evidence.'

Karibi-Whyte, JSC at p. 208 observed:

"In arguing ground 6, appellant submitted that the writ commencing the action and served outside Bendel State was invalid by virtue of H Order 2 rule 16. He contended that the Court of appeal was wrong in law in upholding the judgment of the court which was based on an invalid writ.

Order 2 r.16 relied upon provides as follows-

'No writ for service outside the jurisdiction shall be signed or sealed without the leave of the Court or a Judge.'

Appellant cited *ad relied on* Skenconsult (Nig.) Ltd. v. Sekondy Ukey (1981) 1 S.C. 6 and National Bank (Nig.) Ltd. v. Shoyoye & Anor. (1977) 5 S.C. 181 at 182-3. It is pertinent to observe that the endorsement for service on the writ of summons as copied at page 2 of the printed record indicated. For service on the Defendant, either at Okpokhumi-Emai, Owan Local Government Area, Bendel State or Ministry of Justice, Enugu, Anambra State. Prima facie, the writ of summons is valid, since it has an address for service within the jurisdiction. In such a circumstance leave of the Judge or Court would seem not to be required in order to sign the writ. The presumption of regularity relied upon by the trial judge in rejecting the contention of the appellant is most appropriate in this case. Appellant has not led any evidence to show that he has no address for service within the jurisdiction. Indeed all the evidence at the trial point conclusively that appellant has an address for service within the jurisdiction. On the face of the writ of summons, it is not a writ for service outside the jurisdiction, and in my opinion did not require leave of the Court or Judge for signing or sealing." D

On the facts of the case as found by their Lordships, it cannot be said that there was any non-compliance with Order 2 rule 16 or section 99 of the Act. In National Bank of Nigeria Ltd. & Anor v. John Akinkunmi Shoyoye & Anor (1977) 5 SC 181 at 182-183; (1977) ANLR 168 at 171 referred to in the judgments of their Lordships, the facts showed that "from the fact of the writ of summons (that) the addresses for service of the plaintiffs and the defendants were within Western Nigeria and within the jurisdiction of the High Court of Western Nigeria." - per Obaseki JSC. Although non-compliance was not raised in that case, on the facts as found it could not have arisen. E

There are dicta of their Lordships in Ezomo which have given rise to the suggestion that that case is in conflict with Skenconsult and created doubts as to the correct state of the law on the subject. Aniagolu JSC after having decided as quoted above, went on to observe at pages 202-203 thus: F

"Apart from this fact of there being no evidence, there is the additional fact that the appellant did not object but filed his pleadings in which G he raised the issue, and proceeded to a full trial on the merits. It was in his address, after the conclusion of trial and after he had fully fought the case on the merits, that he raised the issue of the signing and sealing of the writ under order 2 rule 16. Surely, it will then be too late in the day to start raising that issue. In both the National Bank (Nig.) Limited v. Shoyeye and H Skenconsult (Nig.) Ltd. v. Ukey (supra) the issue was raised by motions as preliminary objections - in the National Bank (Nig.) Ltd., that the High Court, Abeokuta, had no jurisdiction and in Skenconsult (Nig.) Ltd., that the order of the High Court Benin city for service on the defendant be set

aside.

This court has lately, in R. Ariori & Ors. v. Muraino B. O. Elemo and Ors. (1983) 1 S.C. 13 dealt with the consequences of waiver by a party in a case in respect of procedural requirements, although the Court found that the appellants in that case had, in fact, not waived their rights. The concept of waiver, the court held, is that a person who is under no legal disability and having full knowledge of his rights or interests, conferred on him by law, and who intentionally decides to give them (or some of them) up, cannot be heard to complain that he has not been permitted the exercise of those rights or that he has been denied the enjoyment of those interests.

As respects the point that S. 99 of the Sheriffs and Civil Process Act was not complied with as regards service and return date, the same reply applies on the freedom of a party to waive his procedural right arising out of a rule enacted for his interest. S.99 reads:

'99. The period specified in a writ of summons for service under this Part as the period within which a defendant is required to answer before the court to the writ of summons shall be not less than 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 that longer period.'

By contesting the case to the full, no the merits, without earlier taking preliminary objection before trial, the appellant must, be deemed to have waived whatever right he had under that section."

Obaseki, JSC. at pages 204-205, said:

"The appellant's complaint about the irregularity in the service on him of the writ of summons did not make much impression either. He appeared in court to answer the claim over 30 days after service of the writ of summons was served on him although the return date stated on the Writ of summons made it about two days less than the 30 days required by section 99 of the Sheriff's and Civil Process Act Cap Laws of the Federation, 1958.

The cases of skenconsult (Nig.) Ltd. and Anor. v. Godwin Ukey (1981) 1 SC.6; and National Bank (Nig.) Ltd. and Anor. v. John Akinkunmi Shoyoye and Anor. (1977) 5 SC. 181 at 192-3 cited by learned counsel are not on all fours with the instant appeal. In those two cases, the court was moved to set aside the service of the Writ by notice of motion. The lack of evidence that the writ was signed sealed and served without the leave of the court or judge is a complete answer to the appellant's complaint.

Having waived his right to have the writ set aside in the High Court, he cannot now be heard to complain. See R. Ariori & Ors. ;v. Muraino B. O. Elemo & Ors. (1983) 1 SC. 13. He contested the case to the

full on the merits notwithstanding the irregularity in the service of the Writ of summons"

Karibi-Whyte, JSC went a little further. At pages 208-209 he opined:

"Even if it is conceded that the writ of summons required leave of the Court for purposes of service outside the jurisdiction, what is the effect of non-compliance? There is no doubt that the main reason for the rule is to authenticate the writ of summons and the process to bring the defendant to court.

Consequently the most effective remedy of the defendant is not to enter appearance and to use the non-compliance as a ground for setting aside the service of the writ of summons. This was the procedure adopted by the defendants and endorsed by this Court in National Bank (Nig.) Ltd. v. Shoyoye (supra) and Skenconsult v. Sekondy Ukey (supra). In each of these cases the issue was raised by preliminary objection. The service of the writ of summons was in each case set aside. Service of writ of summons outside the jurisdiction without leave of the Judge or Court, does not render the writ itself a nullity. All that is affected is the service which is irregular and can be set aside. In such a situation, the defendant entering appearance on the strength of the irregular service constitutes a waiver of the irregularity. - See Ariori & Ors. v. Elemo & Ors. (1983) 1 SC. 13. In Allen v. Quigley 12 Ir. L.T. 46 (cited at p. 47, in the Supreme Court Practice 1979, Vol. 1, Ord. 6/2/ 18), it was also stated that appearance is a waiver of the irregularity. Admittedly defendant in paragraph 1 of his statement of defence indicated that the Court had no jurisdiction and in his motion for dismissal of the action expressly relied on this provision, his filing a statement of defence is by itself, a waiver of his right to ignore the writ of summons. His appearance is submission to the jurisdiction. As was stated in Ariori & Ors. v. Elemo & Ors. (supra) at pages 48-49 per Eso, JSC.

"The concept of waiver must be one that presupposes that the person who is to enjoy the benefit or who has the choice of two benefits is fully aware of his rights to the benefit or benefits, but he either neglects to exercise his right to the benefit, or where he has a choice of two, he decided to take one but not both - see Vyvyyan v. Vyvyyan 30 Bear, 65 as per John Romilly MR. at p. 74.'

It seems clear from the circumstances of the appellant that he waived his right not to appear in response to the service on him of the writ of summons. I do not think he is entitled to complain any longer about its being defective.

Ground 1 is closely associated with ground 6. As I indicated earlier in this judgment, appellant raised this point of law for the first time in

this Court. His complaint was that s. 99 of the Sheriffs and Civil Processes Act was not complied with, with regard to the service of and return date of the writ of summons. s. 99 provides as follows:-

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

The reasons I have advanced for dismissing ground 6 of the grounds of appeal applies also to this ground of appeal." (Underlining is mine)

They all referred to Skenconsult and appeared to say that the letter case was decided on the peculiar fact that objection to the writ was taken before the defendants took any steps and that if objection had been taken at a later stage the decision in the case might have been otherwise.

D Tobi JCA, in his lead judgment in the Court below, dwelt at some length on the seeming conflict in the two cases. In a brilliant exposition, he asked:

"Are there really conflicts in the line of decisions? What are the conflicting decisions?"

E And answered:

"I think, I should take time off to examine this important aspect. And here, I should be forgiven for sounding a bit academic in my analysis. The discussion admits just that. A learned author sees some conflict in the line of decisions of the Supreme Court. He is Professor M. I. Jegede, one of F the finest law teachers of our times. He took up the Supreme court in his article entitled, "Service of Process out of jurisdiction" in Professor M.A. Ajomo's edited Book, Fundamentals of Nigerian Law (1988) pages 107-123. The learned Professor sees a conflict between the decisions of the court in Ezomo and Nwabueze. In his words:

G 'In Ezomo's case, the Supreme Court considered and accepted the doctrine of waiver thereby regarding non-compliance with Order 2 Rule 16 of the Bendel High Court rules as mere irregularity which can be waived whilst in Nwabueze v. Okoye the doctrine of waiver was emphatically rejected as being inapplicable. Indeed there is a conflict and the conflict is H patently real.'

That is not all. Professor Jegede also sees a conflict between Skenconsult and Ezomo. He is not alone in that one. This court also saw a conflict in the two decisions. It is this Division of the Court. That was in the case of Adegoke & Ors. v. Adesanya (1988) 2 NWLR (Pt. 74) 108. And it was a

majority decision of the court. Akpata, JCA (as he then was) dissented.

The issue of conflict was raised in the Supreme Court. It was in the case of Adegoke Motors Ltd. v. Adesanya (supra). The Court did not see any conflict in the line of decisions. Agbaje, JSC., in my view, assiduously and dexterously distinguished the factual situations between Skenconsult and Ezomo."

He found no conflict even though at the end for reason given the learned Justice of Appeal followed Ezomo.

Ademola JCA in his lead judgment (with which Mohammed JCA as he then was, agreed) in Adegoke Motors Ltd., v. Adesanya (1988) 2 NWLR 108 at 121-122 was of the opinion that there was conflict. He opined:

"My understanding of the decision in Skenconsult is that non-compliance with section 99 of the Sheriff and Civil Process Act coupled with non service of processes on parties made the Order made in the case a nullity as well the proceedings leading on to it. On the other hand the Ezomo's case decided that such non-compliance with section 99, if not objected to by way of preliminary objection, is an irregularity which is capable of been waived and it is waived by the other side taking further steps after he had been aware of the regularity. There is in my view a world of difference in a situation of one thing be (sic) nullity and the same thing being described as irregular.

The learned counsel for Respondent has sought to distinguish the instant case from the Skenconsult case by saying that if the Applicant took no step to set aside a writ which fails to comply with section 99 of the Sheriff and Civil Process Act as regard the period of return date being less than 30 days, the filing of a memorandum of appearance as was done here and the fact that the case reached of finality, constitute a waiver of any irregularity. In my opinion this submission is correct and supported by the ratio decidendi of the judgment in Ezomo's case.

With some trepidation, I say that there is some confusion in the Skenconsult case about the concept of nullity and irregularity as it applies to a writ issued by a court. A writ issued from a court cannot become a nullity because of irregular service, it can only be nullity (or a spent force) if it is not served within one year and is not re-newed before the expiration of that period. Karibi-Whyte JSC rightly observed in Ezomo case at page 284 of the report in (1985) 2 SC. thus. 'Service of Writ of Summons outside the jurisdiction without leave of the judge or the court does not render the Writ itself a nullity. All that is affected is the service which is irregular and can be set aside' Therefore all talk of the Writ filed in this case being null and void for non-compliance with section 99 of the Sheriff and Civil Process Act is

inapt and incorrect."

Akpata JCA (as he then was) though he agreed with the conclusion finally reached by Ademola, JCA, differed on the view of the latter on Ezomo vis-a-vis Skenconsult. He observed at pages 125-127:

"I however wish to make certain observation as to whether or not there are conflicts in the pronouncements of the Supreme Court in Ezomo v. Oyakhire (1985) 2 SC 260 vis-a-vis the decision of the same court in Skenconsult (Nig.) Ltd. & Anor. v. Godwin Ukey (1981) 1 SC.6.

In Skenconsult's case at page 22, Nnamani JSC in his lead judgment had this to say:

"With respect to Section 99, I do not think that that section can be interpreted as referring to a 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. In this I seem to agree with learned counsel for the respondent. But the matter does not rest there. The return date was less than the 30 days prescribed by Section 99 and was clearly in breach of it. In my view the proceedings on 24th of November, 1978 were premature and, by virtue of the mandatory provisions of section 99 of no effect. They must, therefore, be regarded as 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."

In effect Nnamani JSC said that since the return date on the Writ of summons was less than 30 days contrary to the provision of Section 99 there was no service of the writ of summons in law and that the proceedings of the court on 24th of November 1979 were premature and of no effect.

At page 25 the learned Justice of the Supreme Court noted that counsel had argued that non-compliance with section 99 was an irregularity. His Lordship went on to say:

"I am of the contrary view and I think that all the breaches in the instant case of the regulations relating to service and appearance are fundamental defects and go to the question of the competence and the jurisdiction of the court which pronounced the orders sought to be set aside. I may add that even if they were irregularities mere acquiescence of the parties (as claimed by learned counsel for the respondent) cannot give the court competence or jurisdiction.

Then came Ezomo v. Oyakhire in which the defendant took part in the proceedings to the very end. Aniagolu JSC who delivered the lead judgment when the case went on appeal to the Supreme Court, after advert- ing to Section 99 observed at page 276 thus:

'By contesting the case to the full on the merit, without earlier taking preliminary objection before trial, the appellant must be deemed to have waived whatever right he had under that Section.'

The learned Justice of the supreme Court did not question, certainly not directly, the validity of the far reaching pronouncement of Nnamani JSC in Skenconsult's case.

B

Obaseki JSC who presided in Ezomo's case had this to say at page 261-262. 'The appellant's complaint if about the irregularity in the service on him of the writ of summons did not make much impression either. He appeared in court to answer the claim over 30 days after service of the writ of summons was served on him although the return date stated on the writ of summons made it about two days less than the 30 days required by section 99 of the Sheriff's and Civil Process Act Cap. 189 Laws of the Federation, 1958.

The cases of Skenconsult (Nig.) Ltd. & Anor v. Godwin Ukey (1981) 1 SC. 6; and National Bank of Nigeria Ltd. & Anor. v. John Akinkunmi Shoyoye & Anor. (1977) 5 SC. 181 at 192-3 cited

D

by learned counsel are not on all fours with the instant appeal. In those two cases the court was moved to set aside the service of the writ by notice of motion.'

Here again it cannot be said that Obaseki JSC deferred from the pronouncement in Skenconsult's case. At page 8 in Skenconsult in his contribution he firmly said:

E

'My Lords, I have had the advantage of reading, in draft, the judgment delivered this morning by my learned brother, Nnamani JSC I agree with it. Certainly I have no doubt in my mind that the High Court has inherent jurisdiction to set aside its null orders on a proper application to it.'

To complete the record it is appropriate to state, I think, that apart from Obaseki JSC, Sowemimo Idigbe and Eso JJ.SC. all agree with the judgment of Nnamani JSC in Skenconsult. It was a unanimous decision.

G

In respect of Ezomo, I also wish to state that apart from Obaseki JSC, Kawu and Oputa JSC also agree with Aniagolu JSC without qualification. They also did not disagree pointedly with the pronouncements in Skenconsult.

It was only Karibi-Whyte JSC who, in his contribution at page 284 H to which my learned brother Ademola JCA has referred, unequivocally opined thus:

'Service of Writ of summons outside the jurisdiction without leave of the Judge or court, does not render the writ itself a nullity. All that is affected

is the service which is irregular and can be set aside. In such a situation, the defendant entering appearance on the strength of the irregular service constitutes a waiver of the irregularity.'

Granted that the opinion of Karibi-Whyte JSC was a complete departure from the ratio in Skenconsult, which I doubt, I hold the view that the ratio in the judgment of a single Justice of the Supreme Court can only pass as the ratio of the Supreme Court in that case if it was expressed in the lead judgment with which a majority of the justices agree or if it appears that the majority of the Justices share view in their judgment even though it was not the lead judgment.

Therefore, in the light of the totality of the decision of the Supreme Court in Ezomo's case, Skenconsult is still valid. Proceedings embarked upon in the absence of the defendant who was served with a writ of summons not in accordance with Section 99 would be null. It can however be set aside on the application of the defendant. Where however the defendant is served with a writ which does not meet the requirement of Section 99 and he enters appearance in accordance with order 10, as if the writ has been properly endorsed or takes part in the proceedings as in Ezomo's case, he cannot be heard to complain of the breach of Section 99.

Then there is however the pronouncement of Nnamani JSC in Skenconsult at page 25 with which his brethren in that case fully agreed, and which was not directly disagreed with in Ezomo's case, except in a sense by Karibi-Whyte JSC, that 'even if they were irregularities mere acquiescence of the parties cannot give the court competence or jurisdiction. It was in the light of this *ratio decidendi* vis-a-vis the 'waiver' pronouncements in Ezomo that this Court, per Nnaemeka-Agu JCA, (as he then was) in U.B.A. Trustees Ltd. v. Nigeria-Grob Ceramic Ltd. (1987) 2 NWLR (Pt. 62) 600 at page 618 took the view that 'any pronouncements on waiver in Ezomo's case (*supra*) was *Obiter* and could not have over ruled the deliberate, well considered, and unanimous judgment of the Supreme Court in Skenconsult case.' As a member of the five-man panel at page 625 I agreed 'largely with his reasoning and conclusion.' Perhaps Nnaemeka-Agu JCA considered it a folly to dance where angels feared to tread."

This Court took the opportunity of Adegoke Motors when it came before it to clam any uneasiness created by the dicta of their Lordships in Ezomo. At least, so it was thought. The facts as appearing in the headnotes read:

"The plaintiffs/respondents claimed against the defendant/appellant the sum of N60,280.00 being damages for negligence. The Writ of summons specially endorsed was issued from the High Court of Lagos State and both the Writ and Statement of Claim were served on the defendant out of

jurisdiction at Ibadan in Oyo State. The defendant through its solicitor entered appearance to the Writ of summons. The defendant through its solicitor entered appearance to the writ of summons. The respondents then filed a summons for judgment under Order 10 of the High Court Rules of Lagos State, which summons was served on the appellant's solicitors at Ibadan.

B

On the return date for the summons for judgment, 9th March, 1987, there was no appearance for the appellant and judgment was consequently entered against it on that day. The appellant thereafter moved the trial court for an order setting aside the judgment in default of defence. The application failed. At the High Court the appellant did not challenge the writ issued and served as being served in violation of the provisions of sections 97 and 99 of the Sheriffs and Civil Process Act. Neither was any such question dealt with in the judgment of the High Court.

The appellant herein appealed to the Court of Appeal against the judgment delivered on 9th March, 1987. In the court of Appeal, counsel on both sides addressed the court on the effect of a writ of summons served out of jurisdiction without the required endorsement on the writ. The question was whether such a writ was a nullity or merely irregular. The Court of Appeal then considered the decisions of the Supreme Court in Skenconsult (Nig.) Ltd. v. Ukey (1981) 1 SC. 6 and Ezomo v. Oyakhire (1985) 1 NWLR E (Pt. 2) 195 and by a majority of two to one held that the two decisions were conflicting. The court then held that the entry of appearance to the writ by the appellant herein constituted a waiver to whatever irregularities attached to the writ. The court of Appeal then allowed the appeal in part - see (1988) 2 NWLR (Pt. 74) 108.

F

Being dissatisfied with the decision of the Court of Appeal, the appellant appealed to the Supreme court, contending that non-compliance with the provisions of either Sections 97 or 99 of the Sheriffs and Civil Process Act would render any subsequent proceedings in the case null and void in any event. It was also contended that the writ of summons did not specify on it the mandatory minimum period of 30 days within which the appellant was required to enter appearance as required by section 99 of the Sheriffs and Civil Process Act.

It was held inter alia -

(i) that there is a distinction between the issuance of a writ and the service of that writ. A writ may be valid while its service may suffer from some defect. It may also happen that both are invalid.

(ii) the sheriffs and Civil Process Act deals only with service of writ and not with its issuance;

(iii) if a writ is valid, any defect in service becomes a mere irregularity which may make such service of the writ voidable but definitely not void;

(iv) if a writ is merely voidable (but not void for being incurably bad), the entry of an appearance by the defendant may constitute a waiver thus validating an otherwise invalid service.

B (v) an order which is a nullity is something which the person affected by it is entitled to have set aside ex debito justitiae.

Before I quote from the dicta of their Lordships in this case, it is pertinent to mention that, like in the appeal on hand, the rule of court relevant in Adegoke Motors is Order 2 rule 4 of the High Court of Lagos State (Civil C Procedure) rules, 1972 which provided:

"4. Subject to the provisions of Part 7 of the Sheriffs and Civil Process Act no writ of summons for service out of the jurisdiction, or of which notice is to be given out of the jurisdiction, shall be issued without the leave of the Court or a Judge in Chambers."

D I need mention also that section 12 of the High Court Law of that State which provided:

"12. The jurisdiction vested in the High Court shall, so far as practice and procedure are concerned, be exercised in the manner provided by this or any other enactment, or by such rules and orders of court as may be E made pursuant to this or any other enactment, and in the absence of any such provisions in substantial conformity with the practice and procedure for the time being of the High court of Justice in England."

incorporates into the Rules of Court the rules of the Supreme Court of England in so far as they are not inconsistent with local rules. By this incorporation F Order 2 rule 1 of the English rules became part of the rules of court of Lagos State. Thus, as pointed out by Karibi-whyte JSC in Nwabueze at p. 93, and quite rightly in my humble view, Order 2 rule 1 RSC (England) 1965 applies equally to the case on hand as it applied to Adegoke Motors. I need mention that section 12 has now been amended to read:

G *"12. The jurisdiction vested in the High Court shall, so far as practice and procedure are concerned, be exercised in the manner provided by the Constitution of the Federal Republic of Nigeria."*

But Order 2 rule 1 is now expressly embodied in the High court of Lagos State (Civil Procedure) rules, 1994 as order 5 rule 1 thereof.

H With this preliminary observation, I proceed to consider the dicta of their Lordships in Adegoke Motors in so far as they relate to the question to be determined in this appeal.

Oputa JSC who read the lead judgment quoted at page 265 of the report from the notes he made at the close of arguments. He had then written:

"There must be a different and distinction between the validity of a writ of Summons and the validity of the Service of the self same Writ. If a Writ is valid, any defect in Service becomes a mere irregularity which may make such a writ voidable but definitely not void. A writ can only be voided by an intrinsic and substantial defect in the writ itself. If a Writ is merely voidable, (but not void for being incurably bad), the entry of an appearance by the defendants may constitute a waiver thus validating an otherwise invalid service."

Since sections 97 and 99 of the act deal with service of a writ of summons in the circumstances of the case before their Lordships it would appear that His Lordship was saying that non-compliance with those sections would amount to a mere irregularity only. If I am correct in my interpretation of His Lordship's dictum, then he would be saying something in conflict with Skenconsult and Nwabueze where this court had held that non-compliance with sections 97 and 99 of the Act rendered service of the writ null and void. Again, I am in some difficulty in reconciling the first sentence of the above dictum with the second. If there is a distinction between the validity of a writ and the validity of the service of the writ, and I agree there is, I am at a loss to fathom how any defect in the service of the writ can make the writ which is valid, to be voidable. I would think it is the service alone that would be voidable.

Oputa JSC went at great length to show that there was no conflict between Skenconsult and Ezomo. He observed at pp. 265-266:

"From the arguments put forward, both in the briefs and oral submissions of the parties, it is evident that the parties interpreted our various decisions where sections 97, 98 and 99 of the Sheriffs and Civil Process Act were mentioned; especially Skenconsult (Nig.) Ltd. and anor. v. Ukey (1981) 1 S.C. 6 and Ezomo v. Oyakhire (1985) 2SC. 260; (1985) 1 NWLR (Pt. 2) 195 differently and arrived at different conclusions as to what exactly this court decided in those cases. It also appeared in rather bold relief that there is now a tendency among our lawyers, and sometimes among some of our Judges, to consider pronouncements made by Justices of the Supreme court in unnecessary isolation from the facts and surrounding circumstances of those particular cases in which those pronouncements were made. I think it ought to be obvious by now, that it is the facts and circumstances of any given case that frame the issues for decision in that particular case. pronouncements of our Justices whether they are rationes decidendi or obiter dicta must therefore be inextricably and intimately related to the facts of the given case. Citing those pronouncements without relating them to the facts that induced them will be citing them out of their proper context, for, without known

facts, it is impossible to know the law on those fact.

The facts and circumstance of the recent case of Ben Obi Nwabueze & anor. v. Justice Obi Okoye (1988) 4 NWLR (Pt. 91) 664 and the decision and pronouncements of this Court in that case, all too clearly illustrate the point here being made - that court's decisions and pronouncements derive their strength, their persuasive potency, their inspiration and therefore their value as precedent from the facts of the case as pleaded and as presented. In Nwabueze's case (as in this case) the writ was issued in one jurisdiction for service in another jurisdiction. In Nwabueze's case (supra), when the writ was served on the defendants, they promptly applied to the High Court that issued the writ for:-

- (i) An order setting aside the Writ of Summons.
- (ii) An order setting aside the order of substituted service (the defendants were served by substituted means).
- (iii) An order setting aside the purported issue and service of the Writ of Summons on each of the defendants.

It thus became clear and apparent, from the word go, that the defendants questioned both the validity of the Writ as well as the validity of the Service of the self same Writ. These then became Issues, in the case, calling for a decision. These Issues, framed as they were from and by the facts and the steps promptly taken by the defendants, formed the basis of this Court's pronouncements and decision in Nwabueze's case supra. To rely on any pronouncements or on the decision in Nwabueze's case supra in a subsequent case, it is incumbent on counsel so relying to show that the facts of his case are similar to those of Nwabueze's case and (this is very important) that he took promptly the necessary steps to question the validity of the writ or the validity of its service or both as was done in Nwabueze v. Okoye (supra). If he does not succeed in doing this, he will be citing those pronouncements out of their proper context and he will thus be asking the court to misapply them. In this case the appellants did not do what was done in Nwabueze's case (supra)"

Agbaje JSC after a painstaking examination of Skenconsult, Ezomo and Nwabueze, concluded at pages 294-295:

"So in Skenconsult's case there was no question of the party not properly served in Law with a process of a court contesting the proceedings subsequent to the service without demur as was the case in the case of Ezomo v. Oyakhire. On the grounds on which this court held in Skenconsult's case that the trial court had no jurisdiction in the matters before it, it is implicit that the question of submission to the jurisdiction of that court did not arise.

The conclusion I reach therefore is that the decision of this court in

Skenconsult's case is not in conflict with the decision of this court in the case of Ezomo v. Oyakhire. I venture to add that the two cases are in line with the recent decision of this court in Nwabueze v. Obi-Okoye (supra). In my view both skenconsult's case and the case of Ezomo v. Oyakhire were rightly decided on the facts of each case. In the case in hand all I need do is to apply the decision in both cases. The writ of summons in this case was endorsed for service outside the territorial limit of Lagos State from where it emanated. So the provisions of s. 99 of the Sheriffs and Civil Process Act which provide that the period specified in such a writ of summons as the period within which a defendant is required to answer before the court to the writ of summons shall not be less than 30 days after service of the Writ has been effected will apply here. In the instant case the writ of summons did carry a return day. And there is no allegation that it was called in court less than 30 days after its service. The motion for judgment in default of defence was dated 6th February, 1987. Its return date was 9th March, 1987. It appears that the defendants were served with the motion on 11/2/87 through their counsel, Damidele Aiku Esqr. This means that the defendant had less than 30 days from 11/2/87 to answer in court to the summons for judgment on 9/3/87. On the authority of Skenconsult's case the provision of section 99 will apply where service of the motion papers outside the jurisdiction of the court from which it originates, as it is here, is involved. But the same case acknowledges it that there is a discretion in a court under section 101 of the Sheriffs and Civil Process Act to take an application of this nature without compliance with the prescribed period after service of the application and the return date, provided the writ of summons has in the first place been served on the defendant under the relevant provisions of the Sheriffs and Civil Process Act and the defendant made no appearance to it. A fortiori the discretion would apply where a writ of summons with a statement of claim had been duly served on a defendant who subsequently entered appearance to that writ of summons but failed to file a defence to the statement of defence. The latter is the position here. The case of Skenconsult also decides it that even where there has been proper service of the writ of summons and the defendant failed to appear in a proceeding of this nature, notice of which was given to him, the court by subsection 2 of section 101 has a discretion on the application of the defendant to set aside, rescind or annul any order it may have made and that the court would also presumably exercise that discretion where there has been an erroneous impression in the court that the defendant has been served but does not appear and an order was in fact consequently made against him." (Underlining are mine)

Nnamani, JSC (who had delivered the lead judgment in Skenconsult)

in a short judgment said at page 282:

"I had before now had the privilege of reading in draft the lead reasons for judgment of my learned brother, Oputa, JSC, as well as the concurring reasons for judgment by my learned brother, Agbaje, JSC I entirely agree with those reasons and adopt them as my own. I wish only to say that
B *I too see no conflict between the decisions of this court in Skenconsult (Nig.) Ltd. and Anor. v. Ukey (1981) 1 SC. 6 and Ezomo v. Oyakhire (1985) 1 NWLR (Pt. 2) 195, each decision having been made on its own peculiar facts."*

Be it noted that Agbaje JSC delivered the lead judgment in Nwabueze.

After reading the judgments in Adegoke Motors, the confusion raised
C by Ezomo becomes more confused. It is little wonder, therefore, that their Lordships of the two Courts below dwelt so much on these cases in their judgments. It is necessary to clear the muddle by reference to the facts and the law in each case. As Oputa JSC put it in chief Gani Fawehinmi v. Nigerian Bar Association & Ors. (No.2) (1989) 2 NWLR (Pt. 105) 558 at 650:

D *"Our case law is the law of the practitioner rather than the law of the philosopher. Decisions have drawn their inspiration and their strength from the very facts which framed the issues for decision. Once made, these decisions control future judgments of the Courts in like or similar cases. The facts of two cases must be either the same or at least similar before the*
E *decision in one can be used and even there as a guide to the decision in another case. What the former decision establishes is only a principle not a rule. Rules operate in an all or nothing dimension. Principles do not. They merely form a principium, a starting point. Where one ultimately lands will then depend on the peculiar facts and circumstances of the case in hand.*

F Perhaps, I may add what Sir James Bacon, V.C. said in Green's case (1874) L.R. 18 Eq C.A. 428: at 433:

"Case have been referred to, and there have been various expressions of different Judges in those cases; but the worst of it is, that in the judgments which Judges pronounce, this is inevitable, that, having their
G *minds full, not only of the cases before them, but of the principles involved in the cases which have been referred to, it very often happens that a Judge, in stating as much as is necessary to decide the case before him, does not express all that may be said upon the subject. That leaves the judgment open sometimes to misconstruction, and enables ingenious advocates, by taking*
H *out certain passages, to draw conclusions which the Judge never meant to be drawn from the words he used."*

I shall now consider the cases and what they decide. In Skenconsult, the 2nd defendant was not served at all. The 1st defendant who was served was served irregularly in that leave of court to serve outside the territorial

jurisdiction Bendel State as required by Order 4 rule 1 of the High Court Rules of that State, was not obtained before the writ was issued. Further, the return date on the writ was less than 30 days provided for in section 99 of the Act. Both Defendants moved that Court at the earliest opportunity, since becoming aware of the suit to set aside the writ. This Court declared the writ and the proceedings subsequent to its service null and void. B

As regards the case of the 2nd Defendant, there can be no doubt that not having been served at all with the writ before plaintiff obtained certain court orders against him, the whole proceedings offended against our sense of justice and the proceedings were rightly, in my respectful view, set aside. The 2nd defendant was entitled ex debito justitiae to have the proceedings set aside; see Oke & Ors. v. Aiyedun (1986) 2 NWLR 548; Craig v. Kansen (1943) 1 KB 256; he did not submit himself to the jurisdiction of the court. C

The case of the 1st defendant is different. The writ was served on it even though in breach of Order 4 rule 1 of the rules of Court which provides:

"service out of the jurisdiction of writ of summons or notice of a writ of summons may be allowed by the court or a Judge whenever" D

By this rule, leave of Court or a Judge is required before a writ meant for service out of the jurisdiction can be effected. This rule is in pari materia with the English rule dealing with service out of jurisdiction. A breach of the English rule prior to 1964 (that is Order 70 rule 1) would render the writ a nullity, E and therefore void, has having been issued in breach of a condition precedent, that is, leave of court or a Judge - see: In re Pritchard, Decd (supra). With the introduction of Order 2 rule 1 into the English rules after In Re Pritchard, Decd such non-compliance no longer renders the proceedings a nullity but a mere irregularity that will render the writ merely voidable. Order 2 rule 1 was F incorporated into the High Court Rules of Bendel State by Order 35 rule 10 thereof which provides -

"Where no provision is made by these rules or by any other written laws, the procedure and practice in force for the time being in the High Court of Justice in England shall, so far as they can be conveniently applied, G be in force in the court:

Provided that no practice which is inconsistent with these rules shall be applied."

See: Whyte v. Commissioner of Police (1966) NMLR 215 on the meaning of the phrase "for the time being" in that rule. See also Z. O. Demuren v. Ashimi Asuni & Anor, (1967) 1 ALL NLR 94, 99-100; (1967) ANLR 101, 106-107 where this Court, relying on Order 35 rule 10 of the High Court (Civil Procedure) Rules of Western Nigeria (which is in pari material with section 12 of the High Court Law of Lagos State (Cap 52 Laws of Lagos State 1972, applicable in this

case), applied the English practice and procedure prevailing at the time (that is, Order 3 rule 5 RSC (1967) to the case before it. Delivering the judgment of this Court, Lewis JSC said:

"In our judgment, however, although the argument was never submitted to us or to Madarikan J. for reasons which we will not set out B Madarikan J did have the power to extend the time within which to file the memorandum of the grounds of appeal. Section 49(1)(j) of the High Court Law of Western Nigeria (Cap. 44) enabled rules of court to be made -

'(j) for regulating and prescribing the procedure on appeals from any court or person to the High Court, and the procedure in connection with C the transfer of proceedings from any court to the High Court or from the High Court to any other court.'

and under that power rule 10 of Order 35 of the High Court (Civil Procedure) Rules lays down -

'10. Where no provision is made by these rules or by any other D written laws, the procedure and practice in force for the time being in the High Court of Justice' in England shall so far as they can be conveniently applied, be in force in the High Court; provided that no practice which is inconsistent with these rules shall be applied.'

The Customary Courts Law and rules thereunder would fail within E the meaning, of the Words 'or by any other written laws' and provision was not there made for extending the time within which to file a memorandum of grounds of appeal. As there was no provision in respect of it one is taken to the present English practice and procedure " (underlining is mine)

Order 2 rule 1 was introduced into the English rules in 1964 to negative Re F Pritchard and to prevent mere non-compliance with the requirements of the rules being treated as a nullity by which the Court regarded itself as disabled from amending or curing the alleged defect on the principle that ex nihilo nihil fit (nothing can come out of nothing). The new rule "does away with the old distinction between nullities and irregularities. Every omission or mistake in G practice or procedure is henceforward to be regarded as an irregularity which the court can and should rectify so long as it can do so without prejudice. It can at last be asserted that 'it is not possible for an honest litigant in Her Majesty's Supreme Court to be defeated by any mere technicality, any slip, any mistaken step in his litigation.' See Pontin v. Wood (1962) 1 Q.B. 594; per H Holroyd Pearce L.J. at p. 609. That could not be said in 1963* see In re Pritchard, decd. (1963) Ch. 502. But it can be in 1966. The new rule does it." - per Lord Denning M.R. In Harkness v. Bell's Asbestos and engineering Ltd. (1967) 2 Q.B. 729 at 735-736. For instances of irregularities within the rule see the cases cited in note 2 to paragraph 36 of Halsbury's Laws of England 4th

edition vol. 37. There are, of course, some defects, that are still so fundamental that they render proceedings a nullity. Upjohn L.J. listed three classes of such defects in Re Pritchard (supra) at p. 523-524. The learned Lord Justice said:

"The authorities do establish one or two classes of nullity such as the following. There may be others, though for my part I would be reluctant to see much extension of the classes. (i) Proceedings which ought to have been served but have never come to the notice of the defendant at all. This, of course, does not include cases of substituted service, or service by filing in default, or cases where service has properly been dispensed with: see, for example, Whitehead v. Whitehead (orse. Vashor) (1962) 3 W.L.R. 884; (1962) C 13. (ii) Proceedings which have never started at all owing to some fundamental defect in issuing the proceedings. (iii) Proceedings which appear to be duly issue but fail to comply with a statutory requirement: see, for example, Finnegan v. Cementation Co. Ltd. (1953) 1 Q.B. 688."

I think the above classification of nullity is still valid today notwithstanding Order 2 rule 1 of the English rules and our local counterparts. The third category is, however, subject to whether the statutory requirement is mandatory or directory. For it is not the law that every breach of a statutory provision renders the act void. To be void, the provision must be not merely directory but mandatory.

In compliance with Order 2 rule 2 of the English rules applicable (by virtue of Order 35 rule 10) in Bendel State at the time Skenconsult was decided, the 1st defendant promptly moved the court to set aside the proceedings of that Court for non-compliance with Order 4 rule 1 of the rules of that Court. The defendant was entitled, ex debito justitiae to have the proceedings set aside as it had not taken any fresh step in the action since becoming aware of the defect. Where first steps have been taken by the defendant, the weight of judicial opinions both in England and this country and, indeed, other common law jurisdictions seem to agree that he would be deemed to have waived his right to have the writ or other proceedings set aside. See: paragraph 39 of vol. G 37 Halsbury's Laws of England 4th edition and the cases cited therein; Ezomo; Adegoke Motors.

The above observation is, I think, the sense in which the decision of this Court in Skenconsult should be seen. Nnamani JSC who read the lead judgment in the case participated and concurred in the judgment in Adegoke Motors which is not too dissimilar with Skenconsult except in the major area that in Adegoke Motors, the defendant was found to have taken fresh steps since becoming aware of the non-compliance with the rule of court requiring leave of court before service of writ out of jurisdiction. There was no waiver

in Skenconsult and, in my respectful view, that case was rightly decided.

Nwabueze was decided on the 1960 English rules which rendered service of writ and other processes out of jurisdiction without leave a nullity - see Re Pritchard (supra) The 1960 English rules were applicable in Anambra State at all time relevant to Nwabueze by virtue of section 16 of the High Court B Law of Eastern Nigeria Cap 61, Laws of Eastern Nigeria 1963 (applicable in Anambra State) which provided:

"16. The jurisdiction vested in the Court shall be exercised (as far as regards practice and procedure) in the manner provided by this Law and in any other written law or by such rules and orders of Court as may be made C pursuant to this Law or any other written law, and, in default thereof, in substantial conformity with the law and practice (for) observed in England in the High Court of Justice, on the thirtieth of September, 1960."

There can be no question of the correctness of the decision in that case. It is of no moment that the defendants in that case applied promptly before any D fresh step was taken by them. The rule of court in Anambra State has since been changed. Even with the change of the rule to bring it in line with the English Order 2 rule 1, the decision would still have been the same as the defendants were found not to have taken any fresh step since becoming aware of the defect.

E NEPA v. Onah was decided on the rules of court of the former Bendel State which, as I have pointed out when discussing Skenconsult had imported into it Order 2 rule 1 of the English rules. The defendant, NEPA, applied to have the writ set aside for non-compliance before taking any step in the proceedings. Mohammed JSC who read the lead judgment brought this out clearly. The F Authority was entitled, ex debito justitiae to have the writ set aside. The decision of this Court was, in my respectful view, correct on the facts.

On the facts in Ezomo the defendant could not have succeeded in his application to have the writ and other proceedings set aside because the writ, on the face of it, was not one to be served out of jurisdiction. It was, therefore, G not a case of non-compliance. The dicta of their Lordships in that case touching on the effect of non-compliance with the rule of court providing for leave of court before a writ meant for service out of jurisdiction could issue, were mere obiter - The dicta, however, do not, in my respectful view, conflict with Skenconsult which was decided on its own peculiar facts.

H From the state of the law as expatiated by me earlier in this judgment Adegoke Motors was correctly decided and was, in no way, in conflict with Skenconsult on the issue of non-compliance with rules of court.

Non-compliance with sections 97 and 99 of the Act is in a different category. I have set out these two sections in the earlier part of this judg-

ment. They are statutory provisions. Being statutory provisions, non-compliance with them cannot be cured by the application of local rules similar to the English Order 2 rule 1.

This Court (sitting as a Full Court) has in Ariori v. Elemo (1983) ANLR 1, decided that when a right is conferred either by the Constitution or a Statute solely for the benefit of an individual he should be able to forgo the right or, in other words, waive it either completely or partially depending on his free choice and the extent to which he has forgone his right would be a matter of fact and each will depend on its peculiar facts. Eso JSC who delivered the lead judgment with which the other Justices agreed, said at page 12:

"The next enquiry is the extent to which a person could waive rights conferred upon him by law. When a right is conferred solely for the benefit of an individual there should be no problem as to the extent to which he could waive such right. The right is for his benefit. He is sui juris. He is under no legal disability. He should be able to forgo the right or in other words waive it either completely or partially, depending on his free choice. The extend to which he has forgone his right would be a matter of fact and each case will depend on its peculiar facts. A simple example could be seen in a right which has been conferred by contract. A person who is a beneficiary to a contract, whereby the benefit is principally for him, has full competence to waive that right. What obtains in the case of a contract should go for benefits conferred by statute. A beneficiary under statute should have full competence to waive those rights once the rights are solely for his benefit. The only exception I can think of is where the statute itself forbids waiver of its statutory provisions."

The law appears to me to be that a person who is sui juris can waive a right conferred upon him by a statute where the right is for his sole benefit and the State has no interest. Where the State has an interest in the matter in the Sense that public policy is involved, such a right cannot be waived. As Bello JSC (as he then was) put it in Attorney General of Bendel State v. Attorney-General of the Federal & 22 others (1981) 10 SC 1 at p. 54, and I agree,

"the law does not permit a person to contract himself out of or waive the effects of a rule of public policy."

In the same sense, the parties to a suit cannot, by consent, confer jurisdiction on a court where it has none. For the issue of jurisdiction of a court is a matter of public policy.

This leads me to the question whether sections 97 and 99 of the Act confer rights for the exclusive benefit of a defendant and which he will have the competence to waive or are the rights conferred completely within the competence of the court (an organ of State) in which case a defendant has

nothing to waive. This question was considered by the Court of Appeal in Full Court in U. B. A. Trustees v. Nigegrob Ceramic (supra). Nnaemeka-Agu J.C.A. (as he then was) who read the lead judgment, and the other Justices of Appeal concurred in the judgment, found that the facts of the case were in line with the facts in Skenconsult in that the objection to the writ was in the case B raised in limine by a notice of preliminary objection supported by an affidavit and to which a counter-affidavit was sworn. On that finding he was of the view, and quite rightly for that matter, that it was unnecessary to go into the question of waiver. He however, did not stop there. And like in Ezomo where the issue of waiver was unnecessary, the learned Justice of Appeal went on to C discuss whether sections 97 - 99 of the Act could be waived and whether they were, in fact, waived in the action.

In the process, the learned Justice opined at page 619:

"I should now consider the result of a breach of Sections 97 and 99 of the Sheriffs and Civil Process Act. The decision of the Supreme Court, per D Nnamani, JSC in Skenconsult Case (supra) at pp. 22 and 25 put it beyond argument that the result of a breach of section 99 is to render the writ a nullity. I am of the view that a breach of the provisions of section 97 by omitting the mandatory statutory requirement prescribed by that section has the same effect."

E He cited Hamp-Adams v. Hall (1911) 2 KB. 942 and In Re Pritchard Deceased (supra) in support of his view. The snag here is that these authorities were decided before 1964 under the old Order 70 rule 1 and before RSC 1964 incorporated the new Order 2 rule 1 into the English rules. The new rule has swept away the old distinction between proceedings that were nullities and those F that were mere irregularities. The Court of Appeal was, in 1987, still relying on those old authorities to pronounce on nullity here. It is well to remember the dictum of Eso JSC in Attorney-General of Bendel State v. Attorney-General of the Federation & 22 ors. (supra) at pp. 187-188:

"Gone should be the days, if ever they were, when the decisions of G other Courts in any common law country are to be accepted in this country as precedents in the like of the Delphic oracle. The decisions of any court, other than those of this court, are only to be treated as the respected opinions of those courts, which were given in their wisdom, under given circumstances and given environmental and cultural background, and no more. H They are, at best, to give a guidance of what those courts did in those circumstances, and the wisdom to be drawn from them by this Court would be reflected in its dealing with the peculiar problems of this country, to which the constitution which this country operates is peculiar."

Coming back to the issue whether sections 97 and 99 of the Act can

be waived, I think the better approach is to determine whether they are mandatory or directory. A breach of mandatory enactment renders what has been done null and void. But if the statute is merely directory, it is immaterial, so far as relates to the validity of the thing to be done, whether the provisions of the statute are accurately followed out or not. In Woodward v. Sarsons (1875) L.R. 10 CP 733, 746 it was said that

"an absolute enactment must be obeyed or fulfilled exactly, but it is sufficient if a directory enactment be obeyed or fulfilled substantially."

The difficulty has always been to determine what is mandatory or obligatory. As Lord Campbell, L.C. put it in Liverpool Borough Bank v. Turner 29 LJ (Ch.) 827; 30LJ (Ch.) 379; 2 De GF. & F 502;

"No universal rule can be laid down for the construction of statutes, as to whether mandatory enactments shall be considered directory only or obligatory, with an implied nullification for disobedience. It is the duty of courts of justice to try to get at the real intention of the legislature by carefully attending to the whole scope of the statute to be construed."

A statutory provision may be mandatory in part and directory in another part. Example of this is section 258(1) of our 1979 Constitution which provides:

"258(1) Every court established under this Constitution shall deliver its decision in writing not later than three months after the conclusion of evidence and final addresses, and furnish all parties to the cause or matter determined with duly authenticated copies of the decision on the date of the delivery thereof."

In Ifezue v. Mbadugha (1984) 1 SCNLR 427; (1984) ANLR 256 this Court held that the first limb which contains the words "shall deliver in writing not later than three months" is mandatory and the second limb which contains the words furnish delivery thereof" is directory "in view of the logistics involved in getting up a judgment, that is taking into account the vagaries of a third world country" per Irikefe JSC (as he then was) at p. 278

It is the law here in Nigeria as well as in England that if the object of a statute is not one of general policy, or if the thing which is being done will benefit only a particular person or class of persons, then the provisions of the statute are directory and not mandatory - see: Ariori v. Elemo (supra); Wilson v. Mackintosh (1894) AC 129, 133. See also Craies on Statute Law (7th edition) page 269.

Reading carefully the wordings of sections 97 and 99 of the Act I am of the firm view that the provisions of these sections are for the benefit of defendants alone rather than of the general public. The purpose of section 99 is to give a defendant served in a State outside the one in which the writ was

issued sufficient time to enable him make appearance. The endorsement to the writ required by section 97 informs him that the writ was issued in another State. With this view of these sections I cannot say that a breach of any of them is of such incurable nature that cannot be waived by the person for whose benefit they are provided, that is, the defendant. I think he can
B waive them if he so chooses.

What is waiver? Defining the word "waiver", Idigbe JSC at page 22 of the Arioris case said:

"By way of a general definition, waiver is the intentional and voluntary surrender or relinquishment of a known privilege and or right; it, therefore, implies a dispensation or abandonment by the party waiving of a right or privilege which, at his option, he could have insisted upon."

Obaseki, JSC at page 25 added:

"Waiver is according to words and Phrases, legally defined volume 5 p. 301 1969 edition reprinted 1974 defined as the abandonment of a right. A person who is entitled to the benefit of a statutory provision may waive it and allow the transaction to proceed as though the provision did not exist."

It follows, therefore, that where a defendant is served with a writ of summons in breach of sections 97 and 99 of the Act, he has a choice either to object to the service by applying to have it set aside and the Court ex debito
E justitiae will accede to the application or ignore the defect and proceed to take steps in the matter. By entering unconditional appearance and filing pleadings, as in the case on hand, he is deemed to have waived his right to object and cannot later in the proceedings seek to set same aside because of the original defect. I am not unmindful of the fact that in Skenconsult and
F Nwabueze this Court had held that non-compliance with these sections would render the proceedings null and void. It would appear that this declaration was unnecessary in those cases as the defendants were ex debito justitiae entitled to have the proceedings set aside because (1) in Skenconsult there was no service at all on the 2nd defendant and the service on the 1st defendant was irregular and he did not waive the irregularity and (2) in Nwabueze,
G the service on the defendants were irregular and they did not waive the irregularity. In NEPA there was indication in the lead judgment of Mohammed JSC that there was no waiver which would suggest that had there been waiver the decision might have been otherwise.

H In Skenconsult, Nwabueze and NEPA, there was no waiver and this Court, in those cases, rightly in my respectful view, set aside the defective service on the application of the defendants. In Adegoke Motors, there was waiver and this Court rejected similar application. And rightly, too, in my humble view.

From all I have been saying, my answer to the question set out in this judgment, therefore, is that non-compliance with section 97 and/or section 99 of the Sheriffs and Civil Process Act and the rule of court requiring leave of the Court or a Judge for a writ to be served out of jurisdiction renders the writ and/or service of it voidable and the defendant who complains of such non-compliance is entitled ex debito justitiae to have same set aside as was done in Skenconsult, Nwabueze and NEPA, provided he has not taken fresh steps in the matter which will amount to a waiver of the irregularity complained of. Where the latter is the case, his application to set aside must be refused. I need point out, for the avoidance of doubt, that the power to set aside is without prejudice to the power of the Court, to allow, in appropriate cases, such amendments to be made and to make such order dealing with the proceedings generally as it thinks fit.

Turning to the case on hand, the Appellant from the various steps it took in the proceedings after service on it of the writ of summons cannot now be heard to complain of defects in the issue and service of the writ. It is too late in the day to do so. He has waived his right to complain. The trial must go on. Technicalities are a blot upon the administration of the law and the Courts have moved a long way from allowing them to make an ass of it and dent the image of justice. As I am satisfied that Ezomo and Adegoke Motors were, on their facts, rightly decided I find no reason to accede to the Appellant's request to overrule them. They are not in conflict either with Skenconsult and Nwabueze.

This appeal fails and it is hereby dismissed by me with N1,000.00 costs in favour of the Respondent.

UWAIS CJN

I have had the advantage of reading in draft the judgment read by my learned brother Ogundare, J.S.C. I entirely agree that this appeal lacks merit and that it should be dismissed.

For the reasons contained in the judgment, which I adopt as mine, I too hereby dismiss the appeal. I confirm the judgment of the Court of Appeal with N1,000.00 costs to the Respondent.

WALI JSC

I have read before now the lead judgment of my learned brother Ogundare, JSC with which I entirely agree.

Having nothing more useful to contribute, I adopt his reasoning as

mine and hereby dismiss the appeal with N1,000.00 costs to the respondent.

KUTIGI JSC (DISSENTING)

The facts of this case are quite simple. The plaintiff issued a writ of summons at the Ikeja High Court, addressed to the defendant with an Ibadan B address. The writ was served in Ibadan. The defendant entered an unconditional appearance and filed a statement of defence. The plaintiff then took out a summons for directions and the same was heard by the learned trial judge who then fixed dates for the trial of the case. Before the hearing date the defendant brought a Motion on Notice to strike out the writ of summons and C other proceedings in the suit. The grounds for the application were stated to be -

"(i) No leave of this Honourable Court was obtained before the writ of summons which was to be served outside the jurisdiction of this court was issued.

D *(ii) No leave of this Honourable Court was obtained before the writ of summons was served outside the jurisdiction of this court, namely, Ibadan, Oyo State (on the 2nd Defendant).*

E *(iii) The writ of summons was issued in breach of the High Court of Lagos State (Civil Procedure) rules (1972), which provides for a writ with necessary endorsement concerning service out of the Court's jurisdiction, as contained in form No. 3 of Appendix A to the said rules.*

F *(iv) The writ of summons was neither endorsed, marked nor served as required by the Sheriffs and Civil Process Act and the Enforcement of Judgments and Service of Process rules, Cap. 189, Laws of the Federation of Nigeria and Lagos, 1958.*

(v) The time limited for appearance by the Writ was shorter than the period stipulated by the said Act.

(vi) The court has no jurisdiction to entertain the action on account of paragraphs (i) to

G *(v) above "*

The motion was heard. The learned trial judge in a considered ruling found no merit in the motion when he concluded his ruling thus -

H *"For all these reasons which I have endeavoured to give, I hold that the present application is incompetent and is an abuse of the process of the Court. I accordingly make an order striking it out."*

Dissatisfied with the ruling of the learned trial judge, the defendant appealed to the Court of Appeal, Lagos Judicial Division. In a reserved judgment the Court of Appeal unanimously dismissed the appeal as Niki-Tobi, JCA., who delivered the lead judgment concluded thus -

"In the circumstances of this case, I hold that the appellant clearly waived his legal rights in the matter and it is too late in the day for him to back out of the bargain. He is already in and he cannot get out. I will therefore dismiss the appeal with N250.00 costs in favour of the respondent."

Aggrieved by the decision of the Court of Appeal the defendant has further appealed to this court. Parties on both sides filed and exchanged their briefs of argument as provided by Rules of Court. Learned counsel for the defendant in his brief submitted five issues as arising for determination in the appeal. The plaintiff's counsel adopted them and added another issue of his own. I have carefully read all the issues and in my view the two issues to be resolved in this appeal are -

1. Whether the Court of Appeal was right in holding that the principle of waiver applies to non-compliance with Order 2, Rule 4 of the High court of Lagos State Civil Procedure, rules 1972.

2. Whether the Court of Appeal was right in holding that the principle of waiver applies to non-compliance with sections 97 and 99 of the Sheriffs and Civil Process Act, Cap. 407 (old cap. 189, 1958 Laws) Laws of the Federation of Nigeria, 1990.

The defendant/appellant said waiver does not apply and that the appeal should be allowed because -

(i) The Supreme Court has authoritatively declared in its decisions in both the Skenconsult case and Nwabueze's case that non-compliance with sections 97 and 99 of Cap. 189 will render the issue and the service of the writ of summons incompetent, thus depriving the court of jurisdiction.

(2) The equitable doctrine of waiver has no place in proceedings that are a nullity and it is irrelevant that the party complaining has taken, or defaulted in taking, part in the proceedings.

(3) Where proceedings are a nullity, the resultant judgment is also a nullity.

(4) The pronouncements of the Supreme Court in the cases of Ezomo and Adegoke on the applicability of the doctrine of waiver in proceedings conducted in breach of sections 97 and 99 of Cap. 189 are obiter.

(5) Objection to the competence or lack of jurisdiction of a court can be taken or raised at any stage of the proceedings even at the appeal stage for the first time.

(6) In cases of non-compliance with sections 97 and 99 of Cap. 189 both the issue and service of the writ may be appealed and the writ would be struck-out.

The plaintiff/respondent on the other hand contended that waiver

applied and that the appeal should be dismissed because the defendant had submitted himself to the jurisdiction of the trial High Court by -

(a) entering an unconditional appearance to the suit;

(b) giving an address for service within the jurisdiction of the trial High Court and accepting service of processes subsequently thereat;

B (c) filing his Statement of Defence without raising therein any objection to the non-compliance; and

(d) attending and participating in proceedings for summon for directions and taking mutually acceptable dates for hearing.

Now, the relevant Order 2, Rule 4 of the High Court of Lagos State C Civil Procedure rules, 1972 provides that -

"4. Subject to the provisions of Part VII of the Sheriffs and Civil Process Act, no writ of summons for service out of the jurisdiction or of which notice is to be given out of jurisdiction, shall be issued without the leave of the Court or a judge in Chambers."

D Sections 97 and 99 of the Sheriffs and Civil Process Act also read -

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

E *"This summons (or as the case may be) is to be served out of the state (or as the case may be) and in the state (or as the case may be)."*

99. The period specified in a writ of summons for service under this part as the period within which a defendant is required to answer before the

F *court to the writ of summons shall not be less than thirty days after service of the writ has been effected, or if a longer period is specified by the rules of the court within which the writ of summons is issued, not less than that longer date."*

As a general rule the Court has no jurisdiction to entertain an action in per-
G sonam against a defendant unless he has been duly served with the writ or other originating process. The main exception to this rule is where the defendant has voluntarily submitted to jurisdiction without such service such as by entering an unconditional appearance or by taking part in the proceedings otherwise than merely to object to jurisdiction.

H It is thus clear from the above provisions of the Rule and the Act, that issuance of civil process and the service of such process are two distinct but inter-related steps. The issuance of process is within the competence of the State House of Assembly while its service outside the State is within the competence of the National Assembly. The mandatory nature of the provi-

sions is also clear and they have all been recognized and interpreted as such by this Court right from SKENCONSULT (NIG) LTD. V. UKEY (1981) 1 SC. 6 up to the latest decision in N.E.P.A. V. ONAH (1997) 1 NWLR (Part 484) 680 [(1997) 1 KLR (Pt. 47) 201]. I will discuss just a few of the cases briefly.

But before I start, I must emphasize that a case is only authority for what is actually decided and it is not appropriate to quote it even for a proposition that may seem logically to follow from it. I will also be making a valid point if I say that as a matter of practice this court only concerns itself with the ratio decidendi of its judgment and not obiter dicta in concurring judgments or for that matter a lead judgment. It is the ratio decidendi of our own judgment that binds us and the lower courts (see QUIN V. LEATHEM (1911) AC. 506. C ODIASE & ANOR. V. AGHO & ORS. (1972) ALL NLR 175).

In the SKENCONSULT case section 99 of the Act was violated when proceedings proceeded in court. In addition two motions which were never served on the appellants were taken and granted. Nnamani, JSC., of blessed memory, who read the lead judgment said -

"In my view the proceedings on 24th of 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."

Further down he continued thus -

"In the instant case, the appellants were not properly served in law with the writ of summons. They were neither served with the motions pursuant to which the two orders were made nor were they present or represented by counsel when the said orders were made. My Lords, I am of the view that on all these grounds the first aim of Chief Williams' argument must succeed and the orders set aside."

In EZOMO v. OYAKHIRE (1985) 1 NWLR (Part 2) 195, (1985) 1 NSCC 280 both Order 2, rule 16 of Bendel State (which is in pari material with Order 2, rule 4 of Lagos State above), and section 99 of the Act were violated. Delivering the lead judgment, Aniagolu, JSC., said -

"to answer to these points, dealing first with Order 2, Rule 16, it is to be observed that the judgment of the trial judge on it was a complete answer. He held that there was no evidence (as indeed there was not) that the writ was signed or sealed without the leave of the court or a judge. The writ was not tendered in evidence."

"The Court," he said "cannot conjecture evidence and the presumption of regularity prevails in the absence of contrary evidence."

Apart from this fact of there being no evidence, there is the additional fact that the appellant did not object but filed his pleadings in which he raised the issue, and proceed to a full trial on the merits. It was in his address, after

the conclusion of trial and after he had fully fought the case on the merits, that he raised the issue of the signing and sealing of the writ under Order 2 Rule 16. Surely it will be too late in the day to start raising the issue This Court has lately, in ARIORI & ORS. v. ELEMO & ORS. (1983) 1 SC. 13 dealt with the consequences of waiver by a party in a case B in respect of procedural requirements, although the Court found that the appellants in that case had in fact not waived their rights.

The concept of waiver, the court held, is that a person who is under no legal disability and having full knowledge of his rights or interests, conferred on him by law, and who intentionally decides to give them (or C same of them) up, cannot be heard to complain that he has not been permitted the exercise of those rights or that he has been denied the enjoyment of those interests.

As respects the point that section 99 of the Sheriffs and Civil Process Act was not complied with as regards service and return date be same D reply applies on the freedom of a party to waive his procedural right arising out of a rule enacted for his interest. By contesting the case to the full, on the merits, without earlier taking preliminary objection before trial, the appellant must be deemed to have waived whatever right he had under that section."

E I shall return to this case later in the judgment being one of the cases dealing directly with waiver.

In NWABUEZE v. OKOYE (1988) 4 NWLR (Part 91) 664, the High Court Rules of Anambra State are silent on whether or not in the circumstances of the case the plaintiff had to obtain leave first before he could issue F the writ of summons. Recourse has to be had to section 16 of the High Court Law of the State which provides for the application in such a situation of the law and practice applicable in the High Court of Justice of England on the 30th day of September, 1960. By Order 2 rule 4 of the Rules of Supreme Court in England, no writ of summons for service out of jurisdiction or of which notice G is to be given out of jurisdiction shall be issued except with the leave of the Court or Judge. The Court held that the issue of a writ of summons and the service of same to a defendant are conditions precedent for the exercise of a court's jurisdiction over a defendant and since in the instant case there was no valid writ of summons issued because leave of court or a judge was not H obtained, there was therefore nothing to serve and that it was not possible to comply with the provisions of the Act above. The writ of summons was declared a nullity and set aside.

In ADEGOKE MOTORS LTD. v. ADESANYA (1989) 3 NWLR (Part 109) 250. The main argument here was whether or not the writ was void for

non-compliance with the provisions of the Act above. The Court held that once a writ is valid, the defect in service becomes a mere irregularity which can be cured or waived. The appeal was dismissed.

In N.E.P.A v. ONAH (1997) 3 NWLR (Part 484) 680 [(1997) 1 KLR (pt. 47) 201. There was non-compliance with Order 2 Rule 16 of the High Court Rules of Bendel State (which is in pari materia with Order 2 Rule 4 of Lagos State above) and the provision of the Act above. This Court has no difficulty in setting aside both the writ and service thereon. As no leave of court or a judge was obtained prior to the issuance of the writ, clearly there was nothing to serve in short. We allowed the appeal.

With this background, one can now consider whether or not there are conflicts in these decisions. The court of Appeal per Niki-Tobi, JCA., who read the lead judgment answered the question thus -

"In my humble opinion, there is no conflict in the line of decisions, starting from Skenconsult and ending with Adegoke, Nwabueze in the middle of the debate. And I mean it."

I think he is right. The chain has now been extended from Skenconsult (1981) to NEPA (1997). There are no conflicts whatsoever.

Reading through the authorities the principles laid down or established by them and relevant to this appeal seem to be clearly that -

1. Non-compliance with sections 97 and 99 of the Sheriffs and Civil Process Act is a mere irregularity which can be cured or waived.

2. Non-compliance with Order 2 Rule 4 or similar Rule which provide that "no writ of summons for service out of the jurisdiction or of which notice is to be given out of jurisdiction shall be issued without the leave of court or a judge in Chambers", renders the writ a nullity.

3. It is for a defendant who alleges that the service of a writ on him was in violation of any of the provisions of the Act to raise the issue at the earliest opportunity as soon as he is served.

4. A defendant will be held to have waived irregularity of service if he has taken a step in the proceedings, such as entering an unconditional appearance, filing a Statement of Defence or otherwise contests the case without any objection.

In this regard it is significant to observe that the Court of Appeal itself found that the provisions of Order 2 Rule 4 (above) and section 97 and 98 of the Act (above) were all violated and not complied with Niki-Tobi, JCA., who read the lead judgment said - "I now come to the legal position as provided for in the enabling statutes. Section 97 provides for endorsement on the writ of summons By section 98 the writ issued within the meaning of section 97 should be marked "Concurrent". Section 99 provides the minimum

period within which a defendant is expected to answer to the writ in court. The minimum period is thirty days after the service of the Writ. By Order 2 Rule 4 of the High Court of Lagos State Civil Procedure Rules, 1972 no writ of summons for service out of the jurisdiction, or of which notice is to be given out of jurisdiction, shall be issued without the leave of the Court or a judge in Chambers. It appears to be common ground that the Writ of summons did not comply with any of the above provisions. It would also appear to have been issued without the leave of the Court or a judge in Chambers."

It is clear to me that on the authorities, the Court of Appeal having properly found that the writ of summons had been obtained without leave contrary to the provisions of Order 2 Rule 4 (supra), it ought to have declared the writ of summons as a nullity, it was null and void. And the writ of summons being a nullity, the provisions of the Act regarding service above could not have been complied with in anyway. The Court of Appeal, I believe came to the wrong conclusion when it held that the appellant had waived his legal rights in the matter having regard to the part he had already played in the matter. As I said, that is wrong. In MADUKOLU & ORS. v. NKEMDILIM (1962) 2 ALL NLR 581, it was held that a court is competent when -

- (a) it is properly constituted with respect to the number and qualification of its member;
- (b) the subject matter of the action is within its jurisdiction;
- (c) the action is initiated by due process of law; and
- (d) any condition precedent to the exercise of its jurisdiction has been fulfilled.

The condition precedent here is the grant of leave by the court or judge in Chambers to issue the writ of summons. No leave was obtained. The writ was a nullity. The grant of leave is not automatic. The application which is normally made ex parte must amongst others be supported by affidavit setting out relevant facts clearly and frankly. The applicant must show that he has a good arguable case on the merits and must satisfy the court that it is proper to exercise its discretion to grant leave. The question which is the appropriate court or "forum conveniens" is a matter usually one of those things considered by the court in exercising its discretion. It cannot therefore be valid to say that the requirement for leave is for the benefit of a defendant only. It is for the benefit of all the parties as well as the court itself. And this is what distinguishes the provisions of the Rule from those of the Act (above).

Any defect in the competence of a court of law renders the proceedings before it a nullity, the defect of competence being extrinsic to the adjudication. Consequently the part allegedly played by the defendant in the High Court, that is to say, entering an unconditional appearance, giving address for

service within jurisdiction, filing a Statement of Defence and attending to take a date for hearing of the case, were all null and void. The writ of summons being a nullity, you just simply cannot put something on nothing. It will collapse. I have not been able to find any authority from the decided cases that a condition precedent to the initiation of proceedings as in this case can be waived. The law clearly is that parties cannot even by consent confer B jurisdiction on a court. The statement of Aniagolu, JSC., in EZOMO above, while discussing the issue of waiver on the part of the appellant must be restricted to the provisions of section 99 of the Act having rightly and properly earlier held that the High Court was right when it found that since the appellant who could not produce the writ, had failed to adduce evidence that C the writ was issued or signed without leave of court or judge, the presumption of regularity prevailed. Therefore the writ must have been treated as valid and that being the principal reason, the additional reason ought to, in my view, be regarded as superfluous because if the writ was regular and therefore valid, the question of waiver of the same writ did not arise at all. As Oputa, JSC., said D in ADEKOKE's case (supra) -

"the manner in which the judge argues the case in his judgment is not what to look for and cite in future cases. Rather it is the principle he is deciding Sometimes the judge expresses more than is required for the decision. When this happens the extra words are superfluous. E One has to be very careful and avoid quoting pronouncements of Justices of this Court outside the parameter of the facts of those decisions and the principles decided."

I agree entirely.

I am bound to follow the earlier decisions of this Court discussed F above. I have no reason to depart from them. It is a cardinal principle of interpretation that where in its ordinary meaning a provision is clear and unambiguous effect should be given to it without resorting to external aid. There is no doubt that the repealed section 12 of the High Court Law of Lagos State Cap. 52 provided that "the jurisdiction rested in the High Court shall, so far as G practice and procedure are concerned, be exercised in the manner provided by this or any other enactment, or by such rules and orders of Court as may be made pursuant to this or any other enactment, and in the absence of any such provision in substantial conformity with the practice and procedure for the time being of the High Court of Justice in England." Therefore the English H Rules applicable were clearly the "current" rules meaning the rules as modified from time to time applicable in the English High Court and in the absence of any provision in the local Nigerian Rules only. Where there are provisions in the local Rules, as in this appeal, resort cannot be made to the English rules

(see ADEMOLA II v. THOMAS 12 WACA 81; PAUL v. GEORGE 4 FSC. 198; PHILLIPS v. ROJAIE (1961) LLR. 115. It is settled that English rules of Court or of practice and procedure are only resorted to by Nigerian Courts on issues where our "local" rules are silent or where such local rules if unclear and ambiguous have not been interpreted or applied by our courts (see for example ODUME v. NNACHI (1964) 1 ALL NLR 329; BANK OF THE NORTH LTD. v. INTRABANK S.A. (1969) 1 ALL NLR 91 at 95-96). It is therefore my considered view that it is not proper under the present circumstances for any court to have resorted to the use of English rules when the local rules on the point which had been in fact interpreted in previous cases above are glaringly before it. For application. What is probably needed here is an amendment of the local Rules, but certainly not the smuggling or unlawful importation of English Rules!

All hope is however, not lost. I observed from the new High Court of Lagos State (Civil Procedure) Rules, 1994, that there is now to be found therein, a new Order 5 which is headed "Effect of Non-Compliance." This Order 5 adequately provides for the remedies for non-compliance with the provision of the Rules such as the one in issue here now. For example Order 5 Rule 1 (1) reads -

"Where in beginning or purporting to begin any proceeding or at any state of or in connection with any proceeding, there has by reason of anything done or left undone, been a failure to comply with the requirements of these rules, whether in respect of time, place, manner, form or content or in any other respect, the failure shall be treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings, or any document, judgment or order therein."

Order 5 Rule 1 (1) above, would thus appear to have already taken care of any harsh effect of the authorities discussed above. I hasten to say that the specific provisions made under the new Order 5 must not however, be confused with the doctrine of waiver which was the issue in this case and some of the cases discussed above.

In conclusion, I think there is merit in this appeal. It succeeds and I allow it. The Ruling of the High Court and judgment of the Court of Appeal are set aside together with their order for costs. The writ of summons served on the defendant/appellant is set aside and the claims struck out. The defendant is entitled to his costs which are assessed at one thousand (N1,000.00) naira only.

ONUJSC

I agree with the reasoning and conclusion reached by my learned brother Ogundare, JSC in the judgment just delivered having had a preview thereof. His treatment of the issues therein raised and considered was exhaustive and comprehensive that I have nothing I can usefully add thereto. I adopt the same as mine and subscribe to all the consequential orders made therein inclusive of costs.

C

ADIO JSC

I have had an advantage of reading in advance, the judgment just read by my learned brother, Ogundare, J.S.C., and I agree that this appeal fails and I too, accordingly dismiss it with N1,000.00 costs in favour of the respondent.

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IGUHJSC

I have had the privilege of reading in draft the leading judgment just delivered by my learned brother Ogundare, J.S.C. and I agree entirely that this appeal must fail.

For the same reasons as are contained in the said judgment, I, too, dismiss this appeal. I abide by the order for costs contained in the leading judgment.

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