

SUPREME COURT OF NIGERIA
17TH JULY, 1998. SC. 41/1992.
CORAM:- A. B. WALI, I. L. KUTIGI, M. E. OGUNDARE,
S. U. ONU, A. I. IGUH, JJSC.

LEEDO PRESIDENTIAL MOTEL LTD APPELLANT
AND
1. BANK OF THE NORTH LIMITED
2. ALHAJI SHITTU ADAMU RESPONDENTS

***APPEALS** - Brief - Argument - Where based on the grounds of appeal rather than the issues - The court was generous to overlook the defect.*

***JUDGMENTS** - Writ of attachment - The order cannot be made behind the back of the judgment debtor - Without breaching his right to fair hearing.*

***JUDGMENTS** - Nullity - Leave granted to attach immovable property being a nullity - All things done pursuant to it are equally a nullity.*

***JUDGMENTS** - Execution - Sheriffs and Civil Process Law s. 44 - The reasonable diligence required by it - In finding movable property to attach - Has not been complied with.*

***JUDGMENTS** - Possession - Order for possession - Made on an application ex parte - Is clearly a nullity.*

***JUDGMENTS** - Nullity - Null order is incurably bad - There is no need for an order of court to set it aside - But it is sometimes convenient to have the court declare it to be so.*

***PRACTICE & PROCEDURE** - Writ of Execution - Against immovable property - Application for - Although the law is silent on how it is to be made - Judgment debtor is to be put on notice.*

PRACTICE & PROCEDURE - *Ex parte motion* - *When not to be used.*

PRACTICE & PROCEDURE - *Service of process* - *Failure to serve notice of proceeding* - *Is a fundamental defect* - *Which goes to the root of the competence of the court.*

FACTS

The 1st Respondent Bank had sued the Appellant in the High Court of Kano State claiming the amount the Appellant was owing it. The appellant was a customer of the Bank. Consent judgment was entered in the suit on 17/8/87 in favour of the Bank against the Appellant in the sum of N508,336.12 plus 15% (percentum) interest per annum from 17/8/87 until the judgment debt was fully liquidated. On 6/6/88 the Bank through its counsel moved the court ex parte for leave, pursuant to section 44 of the Sheriffs and Civil Process Law, cap 123 Laws of Northern Nigeria, 1963 (applicable in Kano State), to attach and sell the immovable properties of the Appellant situated at Hotoro G.R.A. and plot No.114/116 Airport Road, Extension No-Mans-Land, Kano. It was deposed in the affidavit in support of the ex parte motion that the appellant had only paid the sum of N50,000.00 out of the judgment debt and that the bailiffs made several attempts to attach the movable properties of the appellant without success. Leave was granted as prayed.

Subsequently, the Appellant, on 4/7/88 unsuccessfully moved the court by way of motion on notice for instalmental payment of the judgment debt. It would appear that notwithstanding the dismissal of the Appellant's motion, the parties entered into a private arrangement whereby the Appellant was to liquidate the judgment debt by instalmental payments. The appellant had paid a substantial part of the judgment debt when on 5/4/90 the Appellant's real property at G.R.A. was sold to the 2nd Respondent pursuant to the leave to sell granted ex parte almost 2 years before. The Appellant on 20/4/90, brought the motion leading to this appeal praying the court inter alia, for an order setting aside the execution of the judgment and sale of the immovable property. The Appellant's Managing Director in a series of affidavit in support of the

application averred that the judgment debtor has liquidated almost the entire judgment debt when the house was sold. The 1st Respondent Bank in a series of counter affidavits controverted this. Before the hearing of the motion, however, the appellant sought and obtained on 4/2/91 leave of court to join Shittu Adamu (the purchaser of the property in dispute) in the proceedings as co-respondent. Shittu Adamu had also by motion dated 18/5/90 sought *ex parte*, and obtained on the same 4/2/91, an order of possession of the property in dispute. The order was made by the learned Chief judge before whom the Appellant's motion of 20/4/90 was then pending.

The Appellant's motion was heard and in his ruling, the learned chief judge dismissed the motion but ordered for a stay of further execution until the true position of the applicant's account is known. Being aggrieved with the decision, the Appellant appealed to the Court of Appeal (Kaduna Division) which court dismissed the appeal. The Appellant has further appealed to the Supreme Court raising 5 issues but the court preferred the 5 issues raised by the 2nd respondent which are substantially the same as those of the Appellant but more precise.

ISSUES FOR DETERMINATION

(i) *Whether or not the Court of Appeal took suo motu issues not raised by the parties for the purpose of determining the issues involved in the appeal before it and whether the court failed to consider material questions raised by the Appellant before it.*

(ii) *Whether the order obtained by the 1st Respondent in this appeal for the sale of the immovable property of the Appellant by means of a motion ex parte is a nullity having regard to the Provisions of section 33 (1) and 40 of the Constitution of the Federal Republic of Nigeria 1979 in the light of the facts of this case.*

(iii) *Whether there was proof before the court that movable properties of the appellant had been attached before proceedings against its immovable property.*

(iv) *Whether the order obtained by the 2nd Respondent to take possession of the property of the judgment debtor Appellant which he purchased at the auction sale amounted to the violation of the principle*

of fair hearing in view of the fact that the application made by the Appellant for the setting aside of the court's order, to which he was not a party, was pending before the Court.

(v) *Whether or not there were material irregularities in the conduct of the sale of the immovable property of the Appellant which should have vitiated the sale but which were not considered by the Court of Appeal."*

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

Appeals - Brief - Argument

1. The Court below in its endeavour to do substantial justice between the parties considered the arguments raised in the Appellant's brief. In that brief, Appellant had argued, not the issues formulated therein, but the grounds of appeal. Its brief before the court below was not in compliance with the rules of that court as to brief-writing. The court was generous to overlook the defect and allow the brief to be used for the hearing of the appeal. Rather than being grateful, the Appellant has now turned round to complain, in this court, that the court below wrongly based its judgment on the grounds of appeal instead of on the issues formulated. I think there is no merit in the complaint. I am satisfied that the court below considered the main arguments advanced before it. (p. 2007 C)

Writ of execution - Against immovable property

2. Although section 44 of the Sheriffs and Civil Process Law is silent as to how an application is to be made to the court by a judgment creditor for a writ of execution against the immovable property of the judgment-debtor, it is my respectful view that, as there are many things the court has to satisfy itself about, it is only but fair and just that the judgment-debtor be put on notice of the application. I hold that the Appellant was entitled to be put on notice of motion brought by the judgment creditor to attach and sell her immovable property. (pp. 2012 A/2014 E)

Judgments - Writ of attachment

3. Order iv rule (2) lays down the evidence to be produced. From the nature of the evidence and upon which the court must satisfy itself before a writ of attachment and sale is ordered to issue, the civil rights and obligations of the judgment-debtor must obviously come up for determination. I cannot see how such a determination can be made behind the back of the judgment-debtor without breaching his constitutional right to fair hearing under section 33 (1) of the Constitution. (p. 2012 C) B

Ex parte Motion C

4. An ex parte motion is inappropriate where the interests of the other party will be adversely affected except in a case of extreme urgency and for a limited period only. Justice demands that both sides are heard or given an opportunity to be heard before an order adversely affecting the rights and obligation of one of them is made. This is in accord with the provisions of the Constitution. Natural justice also demands it.(p.2014C) D

Service of Process E

5. Where a party is entitled to notice of a proceeding and there is failure to serve him, the failure is a fundamental defect which goes to the root of the competence (or jurisdiction) of the court to deal with the matter - see: Skenconsult (Nig.) Ltd. & anor. V. Ukey (1981) 1 SC. 6, 27 (p.2015C) F

Judgments - Nullity

6. The leave granted is accordingly a nullity and all things done pursuant to it, that is, the attachment and sale of Appellant's immovable property are equally a nullity.¹ This is so because G

"..... every proceeding which is founded on (a void act) is also bad and incurably bad. You cannot put something on nothing and expect it to stay there." (brackets are mine)

- Per Lord Denning in MacFoy v. U.A.C. Ltd. (1962) AC 152, 160; H

¹ Nullity of judgments was also in issue in Adefulu v. Okulaja (1996) 12 KLR (pt 46) 2065

(1961) 3 WLR 1405, 1409. Being nullities, therefore, I hold that the writ of attachment and sale of the Appellant's immovable property in question in these proceedings are null and void. The 2nd Respondent, therefore, does not derive any interest whatsoever in the said property. (p.2016 A)

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Judgments - Execution

7. The Court of Appeal held, and rightly too, "the reasonable diligence required by section 44 of the Sheriffs and Civil Process Law of Kano State has not been complied with the affidavit in support has fallen short of the standard required by law" per Muhammad J.C.A. at p. 528. It is the same conclusion I arrive at in this case. This is more so that the Appellant Company runs a motel business in Kano. Could it be that, with reasonable diligence, no movable property belonging to the Company, such as items of furniture, air conditioners, refrigerators, vehicles etc, were found. The learned trial Chief Judge ought to have been put on enquiry as to the validity of the statement that the bailiff(s) found no movable property of the Appellant to attach. (p. 2017 G)

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Judgments - Order for Possession

8. The order for possession made by the learned Chief Judge on 4/2/91 was clearly a nullity. What was done was not a mere irregularity but a fundamental defect which went to the root of the competence of the court. It is strange indeed that the court below found nothing wrong in the order for possession made on an application ex parte and in the circumstance that an application to set aside the sale was, at the time of the order, pending. I think the whole procedure was riddled with irregularities and nullities that it would amount to a travesty of justice to uphold the order made in such circumstance. (p. 2018 F)

Null order is incurably bad

H 9. Order 8 rule 11 of the High Court (Civil Procedure) Rules of Kano State provides for the setting aside of an order made on a motion ex parte. This rule only applies where the order is irregular and not where it is a nullity - see MacFoy v. UAC Ltd. (supra). A null order is incurably

bad. "There is no need for an order of court to set it aside. It is automatically null and void without much ado." - Per Lord Denning in MacFoy v. UAC. (supra). The learned and noble Lord, however, added that "... it is sometimes convenient to have the court declare it to be so." (p. 2019 A)

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NOTABLE POINTS OF INTEREST

IGUHJSC

1. When an application ex parte may generally be made.

In this regard, it cannot be over-emphasised that an application ex parte may generally be made where-

(i) from the nature of the application, the interest of the other party will not be adversely affected; or

(ii) When time is of the essence of the application.

In either of the above cases, a court of law will be entitled in the exercise of its judicial discretion to grant such an application. Where, however, the application ex parte will affect the interest or right of an adverse party, a court of law should insist and order or direct that such adverse party shall be put on notice by the due service of the application on him. In my view, it cannot amount to any other thing else than a gross abuse and breach of the rules of natural justice for a writ of execution or attachment to issue against the immovable property of a judgment debtor without affording him an opportunity to be heard on such an exceptionally grievous and sensitive issue. (p. 2028 E)

2. Service of process is a condition precedent to the exercise of jurisdiction.

I need only state that the service of a writ or process on a defendant is one of the fundamental conditions precedent to the exercise of jurisdiction by a court of law. A simple irregularity in the course of proceedings that are competent and within the jurisdiction of a trial court must be distinguished from proceedings which are manifestly incompetent thereby affecting the jurisdiction of the court. An irregularity which renders the proceedings incurably defective and null and void may not be waived as acquiescence cannot confer jurisdiction. See Skenconsult Nig Ltd and

1992 Leedo Presidential Motel Ltd. v. Bank of The North (1998) 7 KLR
Another v. Godwin Ukey (1981)1 S.C 6 at 26.

In the present case, the service of a vital process, the application for the attachment of the immovable property of the judgment debtor, was not served on him as required by law. This, in my view, is a breach of a fundamental condition precedent to the exercise of jurisdiction by the court and rendered the proceeding a nullity. I am therefore unable to accept that the non-service of the relevant application on the judgment debtor/appellant was a mere irregularity. In my view, it was such that it rendered the proceedings manifestly incompetent and thereby affected the jurisdiction of the court. The breach in question being unconstitutional, could not be waived by the judgment debtor/appellant nor could it seriously be argued to have occasioned no miscarriage of justice. (p. 2030 A)

REPRESENTATION

K. Olatunji Esq., H. M. Ihunde, and K. C. Nwangwu for the appellant
M. 'Gafar, for the 2nd respondent

E 1st Respondent is not represented by counsel but filed a brief

CASES REFERRED TO

MacFoy v. U.A.C. Ltd. (1962) AC 152, 160; (1961) 3 WLR 1405, 1409
F Skenconsult Nig Ltd. v. Ukey (1981)1 S.C 6 at 26
Opubor v. Demiruru (1961) 2 All NLR 436
Koya v. Zawan (1958) NNLR 1
Mutal Aid Society Ltd. v. Oganade (1957) NRNLR 118
Giwa v. Nigeria Loan and Mortgage Co. Ltd 18 NLR 81
G Kotoye v. Central Bank of Nigeria (1989) 1 NWLR 419
Bayero v. Federal Mortgage Bank Nig. Ltd. (1998)2 NWLR 509

STATUTES AND RULES REFERRED TO

H Sheriffs and Civil Process Law, cap 123 Laws of Northern Nigeria, 1963
(applicable in Kano State) ss. 44, and 47
Judgment Enforcement Rules, Order 2 rule 10, Order 5 rule 8 order 5
rule 16 (1) - (3)

Kano State High Court (Civil Procedure) Rules 1988 Order 8 rules 7 and 11, Order 47 rule 2

Constitution of the Federal Republic of Nigeria, 1979 ss. 33 and 40.

LEAD JUDGMENT BY OGUNDARE JSC

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This is an appeal against the judgment of the Court of Appeal (Kaduna Division) given on 5th December 1991 in which that Court dismissed the Appellant's appeal to it.

The Appellant was a customer of the 1st Respondent Bank and was owing the Bank some amount. The Bank sued the Appellant in the High Court of Kano State claiming the amount owing it by the Appellant. Consent judgment was entered in the suit on 17/8/87 in favour of the Bank against the Appellant in the sum of N508,336.12 plus 15% (per centum) interest per annum from 18/3/87 to 16/8/87 and 10% (per centum) per annum from 17/8/87 until the judgment debt was fully liquidated. The Court also awarded N1,300.00 costs in favour of the Bank. On 6/6/88, the Bank through its counsel, moved the court ex parte for leave, pursuant to section 44 of the Sheriffs and Civil Process Law, Cap 123 Laws of Northern Nigeria, 1963 (applicable in Kano State), to attach and sell the immovable properties of the Appellant situated at Hotoro G.R.A. covered by Certificate of Occupancy No. LKN/RES/RC/82/162 and plot No. 114/116 Airport Road Extension No-mans-land, Kano. It was deposed in the affidavit in support of the ex parte motion that the Appellant had only paid the sum of N50,000.00 out of the judgment debt and that bailiffs made several attempts to attach the movable properties of the Appellant without success. Leave was granted as prayed.

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After the grant of leave to sell the Appellant's immovable properties in satisfaction of the judgment-debt, the Appellant, on 4/7/88, moved the court by way of motion on notice for instalmental payment of the judgment-debt. The motion was opposed by the 1st Respondent Bank for the reason that leave to sell immovable properties of the Appellant had been obtained. In a ruling delivered on 5/7/88, the motion for instalmental payment was dismissed. It would appear that notwithstanding the dismissal of Appellant's motion, the parties entered into a private arrange-

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ment whereby the Appellant was to liquidate the judgment debt by instalmental payments. The appellant had paid a substantial part of the judgment debt when on 5/4/90 the Appellant's real property at G.R.A was sold to the 2nd Respondent pursuant to the leave to sell granted ex parte by the court on 4/7/88, almost 2 years before. The Appellant, on 20/4/90, brought the motion leading to this appeal praying the Court for the following orders;

"1. An order extending the time within which to apply to set aside the order granting leave to sell the immovable property of the judgment debtor covered by certificate of Occupancy No. 114/RES/IRC/82/1621.

2. An order setting aside the leave of the Court to sell the immovable property.

3. An order setting aside the execution of the judgment and sale of the immovable property of the judgment debtor.

4. An order staying further proceedings/steps in respect of the property.

5. An order that the judgment debtor's property be restored to him.

6. Any further or other orders."

The motion was brought under order 2 rule 10 and order 5 rule 8 of the Judgment Enforcement Rules, section 47 of the Sheriff and Civil Process Law, order 8 rules 7 and 11, order 47 rule 2 of the Kano State High Court (Civil Procedure) Rules 1988 and section 33 of the constitution of the Federal Republic of Nigeria 1979.

The penultimate paragraphs of the affidavit of Michael Ihunde, the Managing Director of the Appellant company, in support of the motion read:

"2. That I know as a fact that judgment was given in favour of the judgment creditor against the judgment debtor in the sum of N508,336.12 and interest thereon at the rate of 15% per annum from 7th March, 1987 to 17th August, 1987 and thereafter at 10% court's rate plus N1,300.00 costs on 17th August 1987.

3. That between 17th August 1987 and 20th June 1988 when this

court granted the judgment creditor leave to sell the judgment debtor's immovable property covered by certificate of Occupancy number 114/RES/IRC/82/1621 in satisfaction of the judgment sum, the judgment debtor had made some payment to the judgment creditor which was not disclosed to the court by the judgment creditor.

4. *That the judgment creditor did not put the judgment debtor on notice in respect of the application for leave to sell the judgment debtor's immovable property.*

5. *That on the 5th day of April, 1980 the bailiffs of this court sold the judgment debtor's immovable property situate along Hassan Katsina Street Hotoro and covered by Certificate of Occupancy No. 114/RES/IRC/82/1621.*

6. *That the advertisement of the said sale was not brought to the notice of the judgment debtor until three days before the sale took place.*

7. *That prior to the sale of the property, there was an understanding between the judgment creditor and the judgment debtor that the judgment debt would be liquidated instalmentally pursuant to which understanding the judgment debtor made payment totalling more than N400,000.00 as-*

On	12-1-88	N12,000.00
"	18-1-88	8,000.00
"	21-1-88	10,000.00
"	3-2-89	35,000.00
"	8-2-89	15,000.00
"	24-2-89	50,000.00
"	2-4-89	30,000.00
"	3-4-89	10,000.00
"	19-6-89	20,000.00
"	18-7-89	10,000.00
"	16-7-89	10,000.00
"	14-2-90	35,000.00
"	24-1-90	50,000.00

8. *That apart from the above payments, the judgment debtor has made other payments amounting to more than N100,000.00*

9. *That these payments were not made known to the court before the sale of the judgment debtor's immovable property.*

10. *That the immovable property now sold houses my family of about fifteen persons and it is the only residential premises owned by the judgment debtor and assigned to me for residential purposes.*

11. *That the said property was purported to have been sold at about N350,000.00 whereas its open market value as shown on Exhibit 801 annexed hereto is about N870,000.00.*

12. *That the judgment debtor was not given any opportunity to know how much was outstanding against it and upon the dismissal of her application to restrain the sale of the property of 5th April, 1990, the bailiffs rushed and sold property the same day.*

13. *That if the judgment debtor had been given the opportunity to pay after the dismissal of the application referred to in paragraph 12 hereof, it would have paid whatever was outstanding against it.*

14. *That the judgment debtor is ready and willing to pay whatever is outstanding against it if made known to it."*

In his further affidavit in support of the motion, Mr. Ihunde deposed, inter alia, as follows:

"2. *That I have received the Judgment Debtor's Statement of Account from the Judgment Creditors and discovered that some of the lodgments made in liquidation of the judgments debtor's indebtedness were not reflected on the Statement of Account particularly:*

(i) *Lodgment of 3/2/89 for N35,000.00 (photocopy of draft attached) as Exhibit M1 A.*

(ii) *Lodgment of 6/2/89 for N15,000.00 (photocopy of Draft attached) as Exhibit M1 B.*

(iii) *Lodgment of 12/1/88 for N12,000.00 (photocopy of Draft attached) as Exhibit M1 C.*

(iv) *Lodgment of 24/1/90 for N50,000.00 (photocopy of slip attached) as Exhibit M1 D.*

(v) *Lodgment of 2/4/90 for N30,000.00 (photocopy of Draft attached) as Exhibit M1 E.*

(vi) *Lodgment of 14/2/90 for N35,000.00 (photocopy of Draft*

attached) as Exhibit M1 F.

(vii) Lodgment of 9/10/87 for N20,000.00 (photocopy of Draft attached) as Exhibit M1 K.

3. That the judgment debtor made other lodgments some through the judgment creditor's solicitors and some direct to the judgment creditor, the proof of which I am unable to produce because while I was being held as a political detainee in 1984, the judgment debtor's business premises at No-man's-land and my residential premises both in Kano were searched several times and vital and valuable documents including payment tellers, photostat copies of bank drafts, cheque stubs, files etc. were removed and not yet returned by Security Agents.

4. That the lodgments shown on paragraph 2 hereof and the lodgments actually posted on the Statement of Account attached hereto as Exhibit M1 G are added together, it will total about N447, 085.44 which the judgment debtor paid to the judgment creditor out of the judgment sum of N508,336.12 between August 1987 when judgment was entered and the date of the purported sale of the judgment debtor's immovable property in April 1990.

5. That the Judgment Creditors were debiting Solicitor's fees to the account of the judgment debtor, an arrangement unknown to the judgment debtor and which indeed increased the indebtedness of the judgment debtor.

6. That the judgment creditor charged more than 10% interest on the judgment debt after judgment contrary to the court's order.

8. That the purported independent Estate Valuer employed by the judgment creditor for the valuation of the judgment debtor's property at plot 472 Hassan Katsina Street, Hotoro G.R.A. Grossly undervalued the judgment debtor's property.

9. That upon being summoned on the 23rd day of May, 1984 by the Recovery of Property special Military Tribunal Kaduna Zone, I gave evidence which led to the imprisonment of the purported independent Estate Valuer Alhaji Garba Sadauki Kibiya who is the Sole and Principal Partner in the firm of Garba Kibiya and Company, together with the then civilian Governor of Kano State and his Deputy, Alhaji Barkin Zuwo and Alhaji Wada Abubakar respectively for enriching the prescribed

Peoples Redemption Party (P.R.P) of Nigeria. A copy of the Record of the Proceedings of that Tribunal showing my evidence is hereto attached as Exhibit M1 H.

10. That after turning down Kibiya's entreaties and promises that I should
B not give evidence for his prosecution on the eve of the trial in Kaduna, Kibiya swore before me that he will never forgive the Judgment Debtor as well as myself as long as he lived.

11. That it was also the same kibiya who without just cause ordered the
C demolition of the Judgment Debtor's developed plot of land in Nomans land when he was the Director General of Lands & Survey Division of the Governor's Office.

12. That for disagreements as to Kibiya's unnecessary demands from the
D Judgment Debtor and the incriminating evidence I gave during his trial, Kibiya and myself hardly see eye to eye and my wife and myself during series of our visits to the judgment Creditor's Solicitors brought these developments to their attention particularly to Mrs. G. Ilo who always assured us that another Estate Valuer apart from Kibiya would be em-
E ployed by the Judgment Creditor for the valuation of the Judgment Debtor's property at Hotoro should the need for such valuation arise.

13. That I continued to rely on Mrs. G. Ilo's assurances and I was never
F informed that it was the same Kibiya who valued the property for the purpose of auctioning the property.

14. That the same property valued for N300,000.00 (Sept. 1989) was in
1983 when the Judgment Creditor advanced the facility in issue to the Judgment Debtor valued and stamped for N960,000.00 and the valuation was accepted by the Judgment Creditor.

G 15. That when the property in issue was constructed in 1982, it cost the judgment Debtor more than one million Naira."

There is a third affidavit sworn to by Mrs. Bridget Ihunde, the wife of Mr. Michael Ihunde in which she deposed facts substantially in line with
H paragraphs 9-13 of Mr. Ihunde's 2nd affidavit.

One Yakubu Ibrahim Tarauni, a staff in the chambers of Mrs. G.R. Ilo, counsel to the 1st Respondent Bank swore to 3 counter-affidavit, in support of the Bank's case. In the 1st affidavit, he deposed inter

alia as follows:

"2. That I am informed by Mrs. G.R. Ilo, our Principal counsel and I verily believe same that she has read the affidavit of one Mrs. Bridget Ihunde Wife to the Chairman and Managing Director of the Judgment debtor Applicant.

3. That I am further informed by Mrs. G.R. Ilo, of counsel, and I verily believe same as to the following facts:-

(a) That the averments in the deponent's affidavit from paragraph 5 through to 15 are false and misleading.

(b) That the affidavit of the deponent is a gross abuse of the Court's process.

(c) That the affidavit is in bad faith.

(d) That it is in the interest of Justice preservation of the sanctity of the Court that this affidavit be disregarded and dismissed."

And in the second, he deposed thus:

"2. That I am informed by Mrs. G.R. Ilo, our Principal counsel and I verily believe same that she has read the affidavit of one Michael Ihunde the Chairman/Managing Director of the Defendant Applicant.

3. That I am further by our Principal counsel an I verily believe same as to the following facts:

(a) That she repeats all the contents of her first counter affidavit.

(d) That the depositions in paragraphs 2 through to 16 of the dependent's affidavit are false.

(c) That the depositions are calculated to frustrate the Judgment Creditor from reaping fruits of litigation.

4. That I am informed by the Manager of the Judgment Creditor/Respondents and I verily believe same as to the following facts:-

(a) That all honoured lodgments from the Judgment debtor are reflected in the Statement of Account sent to him at his request and as attached in his affidavit.

(b) That the Bank's interest rate on bad debts was reduced to 1% since 1988.

(c) That the Court's interest rate of 10% was not included in the

outstanding debt.

5. That the affidavit is in bad faith.

6. That it is in the interest of justice and good conscience to dismiss the affidavit as same is a gross abuse of the Court's process."

B In the 3rd counter-affidavit Tarauni deposed, inter alia, as hereunder:

"3. That I am informed by Mrs. Gogo R. Ilo, of counsel and I verily believe same as to the following facts:-

C *(a) That the averments contained in paragraphs 4,6,7,8,9,10,11,12,13 and 14 of the applicant's affidavit are not true.*

(b) That the applicant did have notice of sale of the property as he has been on service since July, 1989 when it was postponed first to November, 1989 and then to 14th February, 1990 when it was first sold for the sum of N300,000.00 (Three hundred thousand Naira).

D *(c) That the first sale was revoked as the purchaser did not pay up in time.*

(d) That the next date of sale of 5th April, 1990 was duly brought to the notice of the applicant whose staff were present at day of auction.

E *(e) That the application did not bring to the notice of this Chambers any complaints or objections whosoever about the conduct of the Auction sale.*

F *(f) That the purchaser has completed the processes for taking possession of the property after the 21 days.*

G *4. (a) That I am informed by the Deputy Sheriff and I verily believe same that advertisement posters of the notice of sale were posted at the auction site at Hassan Katsina Street, at the High Court premises and Post Office and at strategic positions as required by law. Copy of the last poster dated 9th March, 1990 is attached hereto marked Exhibit Y. I T I.*

H *(b) That the property was sold to the highest bidder at the fall of the hammer for the sum of N350,000.00 (Three hundred and fifty thousand Naira).*

(c) That the applicant never complained about the auction sales nor gave notice of any complaints whatsoever to this office.

5. That an independent estate valuers report on the said property

is attached hereto marked Exhibit Y. I.T 2.

6. That I am informed by the Judgment Creditor and I verily believed same as to the following facts:-

(a) That the sum of about N150,000.00 (One hundred and fifty thousand Naira) is still outstanding against the applicant as owing to the Respondent. B

(b) That the judgment debtor and his representatives were fully aware that as at day of auction the amount outstanding against the applicant stood at about N456,000.00 (Four hundred and fifty six thousand Naira). C

7. That the applicant is bent on frustrating the Judgment Creditor and the purchaser unduly."

It was on these conflicting affidavit evidence that the application proceeded to hearing before the learned Chief Judge of Kano state. D

Before the hearing of the motion, however, the Applicant sought and obtained on 4/2/91 leave of court to join Shittu Adamu in the proceedings as corespondent. Shittu Adamu had also by motion dated 18/5/90 sought ex parte, and obtained on the same 4/2/91, an order of court E that

"Plot No. 427 Hassan Katsina Road Hotoro, Kano be delivered to the purchaser and that any person or persons found to be occupying the same House should be removed from there." F

The order was made by the learned Chief Judge before whom the Appellant's motion of 20/4/90 was then pending. The order for the 2nd Respondent to be joined as corespondent in the proceedings was made after he had obtained ex parte the order of possession to the property in dispute. G

After hearing arguments on the Appellant's motion the learned Chief Judge, in a ruling delivered on 20/3/91 dismissed the motion but ordered as follows:

"The 5th and last prayer is for 'further or other orders.' In refusing the first arm of the 3rd prayer, for an order setting aside the execution of the judgment, I noted that the power under order V rule 8 is not to stay execution and not to set it aside. In view of the averments in H

Chief Michael Ihunde's further and better affidavit showing lodgments not reflected in the statement of account and the fact that the Respondent has not exhibited the account, it is reasonable and equitable to order for a stay of further execution until the true position of the applicant's account is known. This lesser relief may be granted. Consequently a stay of execution of the balance of the judgment debt is hereby granted until the judgment creditor respondent satisfies this court of the true and correct position of the applicant's account taking into consideration all payments, the correct interest rate chargeable to the account under the judgment, payments made into the account towards the settlement of the judgment debt, and the payments as the result of the execution levied on both movable and immovable properties of the judgment debtor so far."

The learned Chief Judge found -

D 1. That the court's order made ex parte on 6/6/88 to sell the immovable property of the Appellant was brought to the notice of the Appellant in court on 4/7/88 when the latter's motion for instalmental payment was being argued.

E 2. That as the property in dispute was sold pursuant to the said court's order due to the Appellant's delay in challenging the order, it would not be reasonable to grant the first prayer.

F 3. That having refused the first prayer, it "automatically follows the 2nd prayer cannot be granted, and must also be refused. Thus the property was sold with leave of the Court and the order for setting the leave is hereby refused."

G 4. "It is therefore not in dispute that when the writ of execution was issued the judgment debt was not settled. Consequently the writ of execution was lawfully issued and cannot be set aside. The first arm of the 3rd prayer is therefore also refused.

H 5. "I have carefully considered all the affidavit evidence before me and the arguments and submissions of both counsel, and I am of the view that there is no material irregularity in the conduct of the auction sale to warrant setting aside the sale under S. 47 of the Sheriffs and Civil Process Law. Even if the property was undervalued by Alhaji Garba Kibiya as alleged, the fact that the applicant knew of the auction three

days before the auction took place nothing could stop the applicant from calling or even arranging for higher bidding at the auction. At the auction, sale was to the highest bidder, and the fact that there is no reserve price, the valuation of the property has little significance in this matter."

B

6. That as the three affidavits in support of the Appellant's motion failed to aver that the prior consent of the Military Governor was not obtained to the sale by auction, the 2nd arm of the 3rd prayer was refused"

C

7. "The 4th prayer is for 'an order staying further proceedings steps in respect of the property.' Having refused the 2nd and 3rd prayers above there is no basis for granting this prayer too. Although no counter affidavit is filed by the purchaser. I see no basis for tampering with my order of 4/2/91 that the property sold be delivered to the purchaser. The 4th prayer is hereby refused."

D

Being aggrieved by the above decision of the learned Chief Judge, the Appellant appealed to the Court of Appeal (Kaduna Division) which Court [coram: Mohammed JCA (as he then was) Musdapher and Okunola JJCA dismissed the appeal. In the judgment of Musdapher JCA (with which the other Justices agreed), it was held-

E

1. "In my view, the learned trial judge was right to refuse to set aside the order. It is common ground that the appellant knew about the order. The appellant did nothing to cause the order to be set aside, even before the sale was conducted. It has been held that a defendant will succeed in a defence of laches where the plaintiff by his conduct had done what may be regarded as a waiver or by his conduct and neglect has put the defendant or a third party in a position in which it would be unreasonable and unjust to place him if the remedy asked for by the plaintiff were to be granted. See Akanni v. Makanju (1978) 11-12 SC. 13; Fagbemi v. Aluko (1968) All NLR 233.

F

G

As I said above, where a party, who has full knowledge of a procedure adopted for the enforcement of a right against him, and fails to object to the procedure on the grounds of irregularity he can no longer be heard to raise the objection especially where an innocent third party

H

has acquired some interest, see generally Adebayo v. Johnson (1969) All NLR 176. The inherent jurisdiction of a court to set aside its judgment or order is limited to cases where the judgment or order is a nullity see Ogbu v. Orum (1981) 4 SC.1.

B In my view, the procedure adopted by the 1st respondent in applying for leave to attach the immovable properties of the appellant is not a nullity."

C 2. "Assuming for one moment, that the law requires a judgment creditor to put on Notice, the judgment debtor while embarking on the process to sell the immovable property of the judgment debtor to satisfy a judgment debt, the fact that, the judgment debtor was not put in Notice, especially under the peculiar facts of this case, and especially when the D judgment debtor was fully aware of the steps taken or to be taken, amounts to a mere irregularity. The fact that there is an irregularity in law or procedure adopted does not by itself mean that there is an error in law. The irregularity only becomes an error in law if it results in miscarriage E of justice."

3. "I am of the opinion that the learned trial Chief Judge was right in refusing to set aside the ex parte order made by him on the 17th of August, 1987 and the 20th day of June, 1988."

F 4. "..... Section 47 is concerned only with material irregularity at the conduct of the sale and there were no materials placed before the lower court upon which to decide if there were material irregularities."

G 5. "It was only after the 2nd respondent had obtained the order to enter into possession that he was made a party to these proceedings. There is no evidence whatever, to indicate that the 2nd respondent was aware of the proceedings, pending in court when he made his application ex parte. It was only after he successfully obtained leave to enter into H possession that he was made a party to these proceedings as 'corespondent."

The Appellant has now further appealed to this court after obtaining the leave of the Court below so to do and sought from this court

the following reliefs:

"1. An Order setting aside the judgment of the Court of Appeal dated 5th December 1991 and that part of the ruling of Hon. Justice Sale Umar Minjibir C.J. Kano High Court appealed against to the Court of Appeal Kaduna.

B

2. An Order setting aside the execution and sale of the appellant's immovable property at Plot 472, Hassan Katsina Road Hotoro G.R.A. Kano.

3. Costs."

And in the Appellant's brief the following 5 questions are raised as calling for determination, to wit:

C

"1. Whether or not taking together the failure of the court below to consider a crucial ground of appeal duly argued, and failing to rule on the preliminary objection raised by the Appellant and argued as well as the error in raising and formulating issues and facts suo motu not canvassed by the parties and basing it's decision thereon without hearing the appellant does not amount to a denial of fair hearing to the appellant by the court below expected to give a dispassionate consideration to the appellant's case.

D

2. Whether or not in the circumstances of this case, the ex parte order of the High Court Kano obtained by the Respondents on 6th June, 1988 at the back of the Appellant for leave to sell the immovable property of the Appellant at plot 472 Hassan Katsina Road, GRA Kano and relied on by the Respondent in purportedly selling the said property on 5th April, 1990 is not a nullity incapable of being waived and the purported sale also a nullity.

F

3. Whether or not the court was right in refusing to set aside the ex parte order of the court of first instance for leave to sell the Appellant's immovable property when the conditions precedent before applying for such order as provided in S.44 of the Sheriff and Civil process Law Cap 123 Laws of Northern Nigeria was not complied with.

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4. Whether or not the 2nd Respondent who was not a party to the proceedings before the Court of first instance as at 4th February, 1991 could obtain an absolute order divesting the Appellant of it's right to its

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immovable property upon an ex parte application not served on the Appellant giving possession of the appellant's immovable property to him in the same suit before the same judge when the Appellant's proceedings to set aside sale was pending and whether the said ex parte order is not a nullity.

5. *Whether or not in the circumstances of this case there were material irregularities to vitiate the purported sale of the appellant's immovable property."*

The 1st Respondent, in its brief, adopted Questions 3 & 5 above but argued that the other issues did not arise. I am not sure the 1st Respondent understands how issues arise for determination. Issues or question raised must be predicated on the grounds of appeal and that is precisely what the Appellant has done in this case, although the questions as formulated are too winding and verbose.

The question raised in the brief of the 2nd Respondent are substantially the same as those formulated in the Appellant's brief. They are, however, to be preferred as they are more precise and cover the grounds of appeal. The questions are:

(i) *Whether or not the Court of Appeal took suo motu issues not raised by the parties for the purpose of determining the issues involved in the appeal before it and whether the court failed to consider material questions raised by the Appellant before it.*

(ii) *Whether the order obtained by the 1st Respondent in this appeal for the sale of the immovable property of the Appellant by means of a motion ex parte is a nullity having regard to the Provisions of section 33 (1) and 40 of the Constitution of the Federal Republic of Nigeria 1979 in the light of the facts of this case.*

(iii) *Whether there was proof before the court that movable properties of the appellant had been attached before proceedings against its immovable property.*

(iv) *Whether the order obtained by the 2nd Respondent to take possession of the property of the judgment/debtor Appellant which he purchased at the auction sale amounted to the violation of the principle of fair hearing in view of the fact that the application made by the*

Appellant for the setting aside of the court's order, to which he was not a party, was pending before the Court.

(v) Whether or not there were material irregularities in the conduct of the sale of the immovable property of the Appellant which should have vitiated the sale but which were not considered by the Court of B Appeal."

I adopt them for the purpose of this judgment.

Question (i):

The main complaint here is that the Court below, per Musdapher C JCA, rather than decide the appeal before it on the issues put before it considered the grounds of appeal. The Appellant highlighted a number of misdirection arising out of this approach to the appeal made in the lead judgment of the court below. I Find no substance in the complaint. **The Court below in its endeavour to do substantial justice between the D parties considered the arguments raised in the Appellant's brief. In that brief, Appellant had argued, not the issues formulated therein, but the grounds of appeal. Its brief before the court below was not in compliance with the rules of that court as to brief-writing. E The court was generous to overlook the defect and allow the brief to be used for the hearing of the appeal. Rather than being grateful, the Appellant has now turned round to complain, in this court, that the court below wrongly based its judgment on the F grounds of appeal instead of on the issues formulated. I think there is no merit in the complaint. I am satisfied that the court below considered the main arguments advanced before it.** Whether it decided rightly is a different question which will come for determination when considering the other issues raised in this appeal. G

Question (i) is resolved against the Appellant.

Question (ii)

This is the major issue to be decided in this appeal. It is not in dispute that the 1st Respondent obtained the trial court's leave to sell the H immovable properties of the Appellant pursuant to a motion ex parte brought by it. The Appellant had no notice of the motion and was not heard on it. Two questions readily come to mind. Was the procedure in obtaining the

leave right? If not, what is the effect?

Before answering these questions I need to correct an observation made by the court below. Musdapher, J.C.A. had observed:

"In the event, the question of whether the motion was irregular
B or whether it was void because of Constitutional provisions did not arise
before the trial court. It is a fresh issue in this appeal, in which leave of
court must first be obtained before it can be canvassed and argued. An
appellate court will not allow an appellant to raise for the first time on
C appeal a condition precedent to the commencement of the action or any
step in the action which has not been raised at the trial court."

I think this observation is misleading. That the Appellant was not put on
notice before the 1st Respondent obtained the leave of court to sell her
immovable properties was made an issue in the trial court. In the 1st
D affidavit of Mr. Michael Ihunde he deposed in paragraph 4 thereof that-

"4. That the judgment creditor did not put the judgment debtor
on notice in respect of the application for leave to sell the judgment
debtor's immovable property."

E True enough, the learned trial Chief Judge did not consider this aspect of
the matter in his judgment. That is not to say, however, that the issue
was never raised. That disposes of the observation.

I now turn to the question of the procedure adopted by the 1st
F Respondent in obtaining the order for leave to sell Appellant's immovable
properties. The court below did not think there was anything wrong in
the procedure of applying ex parte to sell immovable property of a judg-
ment debtor. It is the contention of the Appellant that the proceeding
which led to the order to divest her of her right and interest in her im-
movable property ought to be conducted by putting the appellant on no-
G tice and served with all court processes. It is submitted that the leave
granted is an infraction of the Appellant's fundamental rights as guaran-
teed under sections 33(1) and 40 of the 1979 constitution as the Appel-
H lant was not heard at all before the said order was made. It is further
argued that from the tenor of the provisions of sections 33 and 40, an ex
parte absolute order affecting the right and interest in the immovable
property of any person in Nigeria is unconstitutional. It is finally submit-

ted that the provisions of section 44 of the Sheriffs and Civil Process Law do not permit an application of such a nature to be brought ex parte. The following authorities are relied on: Opubor v. Demiruru (1961) 2 All NLR 436; Koya v. Koloya Zawan (1958) NNLR 1; Mutal Aid Society Ltd. v. Oganade (1957) NRNLR 118; Alhaji Nu Giwa v. Nigeria Loan and Mortgage Co. Ltd. 18 NLR 81; Kotoye v. Central Bank of Nigeria & Ors. (1989) 1 NWLR 419 and Kabiru Bayero v. Federal Mortgage Bank Nig. Ltd. & Anor. (1998)2 NWLR 509.

The 1st Respondent was not represented by counsel at the oral hearing of the appeal. In her brief, however, it is argued that Question 2 is a fabrication and speculation of the present counsel to the Appellant. It is pointed out that the Appellant had actual, constructive, imputed notice of the application for leave to sell immovables. It is submitted that the order for leave was valid and effective and that there was no breach of the Appellant's constitutional right to fair hearing. I pause here to comment on the assertion in the brief of the 1st Respondent to the effect that the Appellant "had actual, constructive, imputed notice of the application" for leave to sell immovables. This assertion runs against the affidavit evidence of the parties and the judgments of the two Courts below. It is never in dispute that the 1st Respondent approached the trial court for leave by way of an ex -parte motion and obtained same without the Appellant being put on notice nor heard. The 1st Respondent is not to be taken seriously in the assertion now contained in her brief.

The 2nd Respondent argued in his brief that the order for leave to sell the immovable property of the Appellant was not unconstitutional merely because it was obtained ex-parte. It was argued that the rights of the Appellant had been determined in the substantial suit. At the oral hearing of the appeal, however, Mr. 'Gafar, learned council for the 2nd Respondent conceded it that Bayero v. Federal Mortgage Bank (supra) is good law, that is, he agreed with it.

I now set down the constitutional and statutory provisions relevant to the determination of the question under consideration.

(a) Section 33 (1) of the 1979 constitution:

"In the determination of his civil rights and obligations, includ-

ing any question or determination by or against any government or authority, a person shall be entitled to a fair hearing within a reasonable time by a court or other tribunal established by law and constituted in such manner as to secure its independence and impartiality."

B (b) section 40 of the 1979 constitution:

"40 (1) No movable property or any interest in an immovable property shall be taken possession of compulsorily and no right over or interest in any such property shall be acquired compulsorily in any part of Nigeria except in the manner prescribed by law and for the purposes prescribed by a law that, among other thing-

C (a) *requires the prompt payment of compensation therefor; and*
(b) *gives to any person claiming such compensation a right of access for the determination of his interest in the property and the amount*
D *of compensation to a court of law or tribunal or body having jurisdiction in that part of Nigeria.*

(2) Nothing in subsection (1) of this section shall be construed as affecting any general law-

E (e) *relating to the execution of judgments or orders of courts;"*

(c) Section 44, Sheriffs and Civil Process Law:

"44. If sufficient movable property of the judgment debtor can be found in Northern Nigeria to satisfy the judgment and costs and the costs of execution, shall not issue against his immovable property, but if
F *no movable property of the judgment debtor can with reasonable diligence be found in Northern Nigeria, or if such property is insufficient to satisfy the judgment and costs and the costs of execution, and the judgment debtor is the owner of any immovable property, the judgment creditor may apply to the court for a writ of execution against the immovable property of the judgment debtor, and execution may issue from the court against the immovable property of the judgment debtor in accordance with the provisions of this Law, and any rules made thereunder:"*
G

H (d) Order IV rule 16 (1) - (3) The Judgment (Enforcement) Rule:

"16. (1) when a judgment creditor desires a writ of attachment and sale to be issued against the immovable property of the judgment debtor he shall apply to the High Court.

(2) *The application shall be supported by evidence showing-*

(a) *What steps, if any, have already been taken to enforce the judgment, and with what effect; and*

(b) *What sum now remains due under the judgment; and*

(c) *that no movable property of the judgment debtor, or none sufficient to satisfy the judgment debt, can with reasonable diligence be found.*

(3) *If upon the hearing of the application it appears to the court that a writ of attachment and sale may lawfully issue against the immovable property, the court shall make an order accordingly."*

The Court below held that the procedure of obtaining ex parte an order of court for leave to sell the immovable property of a judgment debtor was proper. The court either distinguished a number of authorities cited to it or observed that the others were obita dicta. Even an obiter dictum, though not binding, can be persuasive. The Court below did not consider the merit of the obiter dictum of Idigbe „J. (as he then was) in Opubor v. Demiruru (supra); it merely commented that it was an obiter dictum. In that case Idigbe, J. had observed at page 437 of the report:

"Again it is my view that applications of this nature must be by Motion on Notice so that the debtor who has the property can be heard and all other parties who may be interested in the property can be heard. This was the view of the Court in Alhaji Nu Giwa v. Nigeria Loan and Mortgage Company Limited. 18 NLR 81."

I think the court below should have done *much better*.

In The Nigerian Loan and Mortgage Co. Ltd. v. Alhaji Nugiwa (supra) at page 85, referred to in Idigbe J's dictum above, Brooke J. Made this observation when dealing with a matter not dissimilar to the one now on hand. The learned Judge said:

"It remains to say a few words as to the new practice. It was thought by counsel when the new rules came into force that it would be a mere matter of a formal application to obtain the writ against the immovable property especially as it is in general terms. It was pointed out that the alteration in the rules was intended to put the Court upon inquiry and that such applications should be upon notice to all the parties inter-

ested as the court required to be satisfied of something more than merely the fact that such property existed within the jurisdiction."

I think there is much wisdom in the views of the learned judges in the two cases above. **Although section 44 of the Sheriffs and Civil Process Law is silent as to how an application is to be made to the court by a judgment creditor for a writ of execution against the immovable property of the judgment-debtor, it is my respectful view that, as there are many things the court has to satisfy itself about, it is only but fair and just that the judgment -debtor be put on notice of the application. Order iv rule (2) lays down the evidence to be produced. From the nature of the evidence and upon which the court must satisfy itself before a writ of attachment and sale is ordered to issue, the civil rights and obligations of the judgment-debtor must obviously come up for determination. I cannot see how such a determination can be made behind the back of the judgment-debtor without breaching his constitutional right to fair hearing under section 33 (1) of the Constitution.** For the effect of order iv rule 16(2) see Mutual Aid Society Ltd. v. Ogonade (supra); Osunkwo v. Ugbogbo (1966) NWLR 184 where Idigbe, CJ held, and quite rightly in my view, that leave to attach immovable property is not granted as a matter of course. In Z.A. Koya v. Koloja Zawan (supra) the judgment debtor was put on notice and heard before the court made its order.

It is of interest to mention that the Court of Appeal (Kaduna Division) did not follow its earlier decision in the instant case although it claimed to distinguish the latter case. In Bayero v. Federal Mortgage Bank of Nig Ltd. (supra), the court held that where immovable property of a judgment debtor is to be attached, the judgment debtor is entitled to be put on notice of the judgment creditor's application for that purpose. Mohammad JCA in his lead judgment with which the other Justices agree, had this to say at page 530 of the report:

"In the present appeal, it is not in dispute that the 1st respondent is entitled to enjoy the fruits of the ruling delivered in its favour. However, caution must be exercised when realising the judgment debt such that immovable properties of the judgment debtor are not made the 1st

object in satisfaction of the judgment debt. Even though, the Kano State High Rules; the State Sheriffs and Civil Process Law and other statutory provisions do not expressly prohibit attachment of immovable properties in satisfaction of judgment debt, the general practice insists that it must be done in the right manner. I think in a situation where immovable property of a judgment debtor is to be attached, the judgment debtor is entitled to be put on notice. In other words, the motion shall be one on notice to the judgment debtor against ex parte motion. See Odunkwo v. Ugbogbo (1966) NMLR 184; Opubor v. Demiruru 5 ENLR 27 Onagoruwa v. I.G.P. (1991) 5 NWLR (pt. 193) 593. I think this is only being fair to the judgment debtor as this will afford him an opportunity of being heard on the crucial issue as to whether or not he still has, within the trial court's jurisdiction, enough movable property to satisfy the judgment debt. This will also accord with the rules of natural justice, fair hearing and the Constitution."

The learned Justice of Appeal had earlier in his judgment, drawn a distinction between motions on notice and motion ex parte and when they can be applied. He said at pages 529-530 of the report:

"Motions generally are of two types: Motion on Notice and Ex parte motion. A motion is on notice where the applicant has put on notice or awareness the attention of the other party or parties involved of the existence of the motion. An ex parte motion is one in which the applicant for some cogent reasons, cannot put the other party or parties on notice or awareness of its existence. Both are acceptable in law. The general practice however is that motions are filed in court on notice. ex parte motions are filed but sparingly considered by the court in extreme or special circumstances. The decision whether an application should be brought ex parte or on notice is one to be considered in the light of the prevailing circumstances and not to be based on the dictates of the applicant's or the Judge's whims. An application ex parte could be made in two main circumstances:-

- (i) when, from the nature of the application, the interest of the adverse party will not be affected
- (ii) when time is the essence of the application and

In these two situations a court will be right in exercising its discretion in granting a motion ex parte. But where the motion brought before the court will affect the interest of the adverse party, a court of law should insist and order that the adverse party be put on notice. This can be done

B *in either of two ways:-*

(i) the court orders that the application ex parte be served on the adverse party which automatically makes it a motion on notice; or

(ii) the applicant files a separate motion on notice."

C I think the learned Justice is right in the two passages above. I should myself think that **an ex parte motion is inappropriate where the interests of the other party will be adversely affected except in a case of extreme urgency and for a limited period only. Justice demands that both sides are heard or given an opportunity to be**

D **heard before an order adversely affecting the rights and obligation of one of them is made. This is in accord with the provisions of the Constitution. Natural justice also demands it.** I am impressed by the reasoning of their Lordships of the court below in BAYERO and I have

E no hesitation in agreeing with them and adopting the statement of law pronounced by them. And it is very gallant and honourable of learned counsel, Mr "Gafar that he readily and candidly accepted the soundness of the decision in BAYERO even though it is against the interest of his

F client, the 2nd Respondent. **I hold that the Appellant was entitled to be put on notice of motion brought by the judgment creditor to attach and sell her immovable property.**

What is the effect of the failure to put the Appellant on notice of the motion? The court below was of the view that it was a mere irregularity. With respect I do not share this view. The failure is a defect that affected the competence of the trial High Court. A court is competent when -

G *" (1) It is properly constituted as regards numbers and qualifications of the members of the bench, and no member is disqualified for one reason or another; and*

(2) the subject matter of the case is within its jurisdiction, and there is no feature in the case which prevents the court from exercising its

jurisdiction and

(3) the case comes before the court initiated by due process of law, and upon fulfillment of any condition precedent to the exercise of jurisdiction.

Any defect in competence is fatal, for the proceedings are a nullity however well conducted and decided: the defect is extrinsic to the adjudication."

-See Madukolu v. Nkemdilim (1962) ANLR 581 at pp. 589-590. Condition (3) was breached in this case and the whole proceedings leading to the grant of leave to attach and sell are a nullity. **Where a party is entitled to notice of a proceeding and there is failure to serve him, the failure is a fundamental defect which goes to the root of the competence (or jurisdiction) of the court to deal with the matter - see: Skenconsult (Nig.) Ltd. & anor. V. Ukey (1981) 1 SC. 6, 27** where the dictum of Lord Greene, M.R. In Craig v. Kansen (1943) KB 256K at pp 262-263; (1943) 1 All ER 108, 113 was cited with approval. Lord Greene had said:

"The question we have to deal with is whether the admitted failure to serve the summons upon which the order in this case was based was a mere irregularity, or whether it was something worse, which would give the defendant the right to have the order set aside. In my opinion, it is beyond question that failure to serve process where service of process is required, is a failure which goes to the root of our conceptions of the proper procedure in litigation. Apart from proper ex parte proceedings, the idea that an order can validly be made against a man who has had no notification of any intention to apply for it is one which has never been adopted in England. To say that an order of that kind is to be treated as a mere irregularity, and not something which is affected by a fundamental vice, is an argument which, in my opinion, cannot be sustained."

As Nnamani, JSC rightly pointed out in Skenconsult, (supra), the above is also the attitude of Nigerian courts on the issue of proper procedure. The learned Justice of the Supreme Court, said at p. 26 of the report:

"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."

The leave granted is accordingly a nullity and all things done pursuant to it, that is, the attachment and sale of Appellant's immovable property are equally a nullity. This is so because

"..... every proceeding which is founded on (a void act) is also bad and incurably bad. You cannot put something on nothing and expect it to stay there."

(brackets are mine)

- Per Lord Denning in MacFoy v. U.A.C. Ltd. (1962) AC 152, 160; (1961) 3 WLR 1405, 1409. Being nullities, therefore, I hold that the writ of attachment and sale of the Appellant's immovable property in question in these proceedings are null and void. The 2nd Respondent, therefore, does not derive any interest whatsoever in the said property.

This conclusion is enough to dispose of this appeal but I need say a few words on Questions (iii) and (iv).

QUESTION (iii)

The proceedings of the trial court leading to the grant of leave to attach are not before us. But going by the extract of it from the judgment of the trial court in these proceedings it would appear that all that was contained in the affidavit in support of the motion ex parte for leave was a bland averment in the affidavit evidence in support of the motion "that only the sum of N50,000.00 was paid out of the Judgment Debt and Bailiffs made several attempts to attach the movable properties of the Judgment Debtor without success." If that was all that was relied on in support of the application for leave, the learned trial Chief Judge was clearly in error to have granted leave - see: Opubor v. Demiruru (supra); Mutual Aid Society Limited v. Ogonade (supra); Osunkwo v. Ugbogbo (supra); Koya v. Koloja Zawan (supra); Alhaji Nu Giwa v. Nigerian Loan & Mortgage Co. Ltd. (supra) Bayero v. Federal Mortgage Bank Nigeria Ltd. (supra) where at page 527 of the report, Mohammad JCA observed, and I agree entirely with him:

The phrase 'reasonable diligence' used in the section may, in my view, be interpreted to mean a fair, proper and due degree of care and activity, measured with reference to the particular circumstances. It is such diligence, care or attention as might be expected from a man of ordinary prudence and activity. It is a corollary of reasonable care. See: Pampas v. Cambridge Mut. Fire Ins. Co. La App. 169 So 2d 200, 201. In this respect therefore, the supporting affidavit for a motion to attach an immovable property of a judgment debtor, in order to show that reasonable diligence had been exercised, must satisfy the court of the step, if any, already taken to enforce the judgment debt outstanding, and that throughout the state no movable property of the judgment debtor or none sufficient to satisfy the debt, can with reasonable diligence be found. It is not enough for the affidavit to contain a bare averment that no movable property of the judgment debtor can with reasonable diligence be found. It is for the court not the defendant to say whether reasonable diligence has been exercised. The affidavit must therefore contain evidence of what has been done to discover the judgment debtor's movable property. See: Osunkwo v. Ugbogbo (1966) NMLR 184; Mutual Aid Society Limited v. Ogonade (1975) NMLR 118; Opubor v. Demiruru 5 ENLR 27."

In that case, the evidence relied on by the trial Judge to satisfy section 44 of the Sheriffs and Civil Process Law was a report by the Bailiff to the following effect:

"On the 13/12/94.

We the Bailiff (sic) of the High court Kano proceed (sic) to No. 4 Gidado Road to Attach the Defendant (sic) properties in a Company of plaintiff solicitor (sic) and found nothing to be Attached the pronusises (sic) therefore we returned the writ of fifa to court four (sic) your advice and inspection."

The Court of Appeal held, and rightly too, "the reasonable diligence required by section 44 of the Sheriffs and Civil Process Law of Kano State has not been complied with the affidavit in support has fallen short of the standard required by law" per Muhammad J.C.A. at p. 528. It is the same conclusion I arrive at

in this case. This is more so that the Appellant Company runs a motel business in Kano. Could it be that, with reasonable diligence, no movable property belonging to the Company, such as items of furniture, air conditioners, refrigerators, vehicles etc, were found.

B The learned trial Chief Judge ought to have been put on enquiry as to the validity of the statement that the bailiff(s) found no movable property of the Appellant to attach.

QUESTION (iv)

C As stated earlier in this judgment, the 2nd Respondent who bought the property of the Appellant at an auction sale applied ex parte to the High Court for an order of possession and the learned trial Chief Judge made an order which runs thus:

D *"UPON READING Motion Ex parte filed on 18/5/90 together with accompany affidavit (sic) Alhaji Shitu Adamu duly sworn to;*

AND UPON HEARING G.R. ILO ESQ. of counsel for the J/Creditor/Applicant (sic)

IT IS HEREBY ORDERED THAT:-

E *Plot No. 427 Hassan Katsina Road, hotoro, Kano be delivered to the purchaser and that any person or persons found to be occupying the same house should be removed from there."*

F Neither the judgment debtor (Appellant) nor any of those then living in the house was put on notice. I cannot fathom under what law or rule of court the learned Chief Judge proceeded in this matter. One would think that the proper course would be for the purchaser to sue for possession and join all those in possession as defendants. **The order for possession made by the learned Chief Judge on 4/2/91 was clearly a nullity.**

G **What was done was not a mere irregularity but a fundamental defect which went to the root of the competence of the court. It is strange indeed that the court below found nothing wrong in the order for possession made on an application ex parte and in the**
H **circumstance that an application to set aside the sale was, at the time of the order, pending. I think the whole procedure was riddled with irregularities and nullities that it would amount to a travesty of justice to uphold the order made in such circumstance.**

In conclusion, this appeal succeeds and it is allowed by me. I set aside the judgments of the two courts below. It remains for me to determine what orders to make. **Order 8 rule 11 of the High Court (Civil Procedure) Rules of Kano State provides for the setting aside of an order made on a motion ex parte. This rule only applies where the order is irregular and not where it is a nullity - see MacFoy v. UAC Ltd. (supra). A null order is incurably bad. "There is no need for an order of court to set it aside. It is automatically null and void without much ado." -Per Lord Denning in MacFoy v. UAC. (supra). The learned and noble Lord, however, added that " it is sometimes convenient to have the court declare it to be so."** In view, therefore, of the conclusions I reached in this judgment, and ex debito justitiae, I declare the order made by the Kano State High Court on 6/6/88 granting leave to the 1st Respondent to attach and sell the Appellant's immovable property, null and void. I also declare the attachment and sale of the Appellant's property null and void. The purported order for possession made on 4/2/91 in favour of the 2nd Respondent is equally declared a nullity. I consequently set aside each and every one of them. It is also ordered, as prayed in prayer (5), that the Appellant's immovable property situate at Hotoro G.R.A. Kano and covered by Certificate of Occupancy No. LKN/RES/RC/82/162 be restored by the 2nd Respondent to the Appellant immediately.

I award to the Appellant N10,000.00 costs of this appeal and N100.00 and N750.00 costs in the High Court and Court of Appeal respectively, against each Respondent.

WALI JSC

I have had the privilege of reading in advance, a copy of the lead judgment of my learned brother Ogundare, JSC and I agree entirely with the reasons he gave for allowing the appeal.

For the same reasons ably stated I also hereby allow the appeal and endorse the consequential orders, that of costs inclusive, made in the lead judgment.

KUTIGI JSC

I read in advance the judgment just delivered by my learned brother, Ogundare, JSC. I agree with his reasoning and conclusions.
B The appeal is meritorious and must be allowed. The appellant (Judgment debtor) herein, is clearly entitled to be put on notice of the application by the 1st respondent (judgment creditor), to sell or attach appellant's immovable property. An ex-parte application or motion is therefore inappropriate (see BAYERO V. FEDERAL MORTGAGE BANK OF NIGERIA LTD. (1998) 2 NWLR (part 538) 509; OPUDOR V. DEMIRURU (1961) 2 All NLR . 436). Failure to put the appellant on notice undoubtedly renders the entire proceedings a nullity vide SKENCONSULT & ANOR. V. UKEY (1981) 1 SC. 6. The leave granted to 1st respondent to
D attach and sell appellant's immovable property and the consequent sale of the immovable property in question to the 2nd respondent, are therefore null and void. I set them aside. I endorse the consequential orders contained in the lead judgment.

E _____

ONU JSC

I had the advantage of a preview of the judgment of my learned brother Ogundare, JSC just delivered before now and I am in entire agreement with him that this appeal is meritorious and ought to succeed.
F

I only wish to add the following words of emphasis to the judgment of my learned brother which is most comprehensive on the matters therein raised and handled with the dexterity it deserves. In doing so, I wish to commence from that part of the judgment of the Court of Appeal
G (hereinafter referred to as the court below) as exemplified in the faulty and erroneous pronouncements made by Musdapher, JCA who wrote the lead judgment and concurred in by Mohammed, JCA as he then was and Okunola, JCA. Said he:

H *1. "The main issue is whether a judgment creditor acting under the provisions of Section 44 of the Sheriffs and Civil Process Law could apply by an ex-parte motion to sell the properties of the judgment debtor who has defaulted in the settlement of the judgment debt."*

2. "I have carefully read the judgment of the court and it appears to me that the legality/constitutionality of the order of sale was never canvassed and argued before him and there was no evidence in the three affidavits indicating or showing any materials for the reasons asking for extension of time within which to set aside the sale" B

3. "In any event, the question of whether the motion was irregular or whether it was void because of Constitutional provisions did not arise before the trial court. It is a fresh issue in this appeal, in which leave of court must first be obtained before it can be canvassed and argued I am of the opinion that the learned trial Chief Judge was right in refusing to set aside the ex-parte order made by him on the 17th of August, 1987 and the 20th day of June, 1988." C

4. "In my view, the learned trial Judge was right to refuse to set aside the order. It is common ground that the appellant knew about the order. The appellant did nothing to cause the order to be set aside, and even before the sale was conducted. It has been held that a defendant will succeed in a defence of laches where the plaintiff by his conduct had done what may be regarded as a waiver or by his conduct and neglect has put the defendant or a third party in a position in which it would be unreasonable to and unjust to place him if the remedy asked for by the plaintiff were to be granted. See Akanni v. Makanju (1987) 11-12 SC. 13; Fagbemi v. Aluko (1968) All NLR 233. As I said above, where a party, who has full knowledge of a procedure adopted for the enforcement of a right against him, and fails to object the procedure on the grounds of irregularity he can no longer be heard to raise the objection especially where an innocent third party has acquired some interest, see generally Adebayo v. Johnson (1969) All NLR 176. The inherent jurisdiction of a court to set aside its judgment or order is limited to cases where the judgment or order is limited to cases or order is a nullity. See Ogbu v. Urum (1981) 4 SC. 1 D E F G

In my view, the procedure adopted by the 1st respondent in applying for leave to attach the immovable properties of the appellant is not a nullity." H

5. "Assuming for one moment, that the law requires a judgment

creditor to put on Notice, the judgment debtor while embarking on the process to sell the immovable property of the judgment debtor to satisfy a judgment debt, the fact that the judgment debtor was not put on Notice, especially under the peculiar facts of this case, and especially when the judgment debtor was fully aware of the steps taken or to be taken, amounts to a mere irregularity. The fact that there is an irregularity in law or procedure adopted does not by itself mean that there is an error in law. The irregularity only becomes an error in law if it results in a miscarriage of justice."

6. "..... Section 47 is concerned only with material irregularity at the conduct of the sale and there were no materials placed before the lower court upon which to decide if there were material irregularities."

7. "It was only after the 2nd respondent had obtained the order to enter into possession that he was made a party to these proceedings. There is no evidence whatever, to indicate that the 2nd respondent was aware of the proceedings, pending in court when he made his application ex parte. It was only after he successfully obtained leave to enter into possession that he was made a party to these proceedings as 'co -respondent'."

The issue for determination in this appeal are as adopted by my learned brother Ogundare, JSC in his judgment which I too adopt in their wholeness in considering this appeal.

If as conceded by M.'Gafar Esq.' learned counsel to the 2nd respondent at the oral hearing of this appeal on 11th May, 1988, the case of Kabiru Bayero v. Federal Mortgage Bank of Nigeria Ltd & Anor. (1998)2 NWLR (Part 538) 509 is good law and that he agreed with it in toto then, not only had the appellant no actual, constructive or imputed notice of the application for leave to sell the immovables at the instance of the 1st respondent, but that he (1st respondent) and to the knowledge of the 2nd respondent, obtained leave to attach and sell the appellant's immovable properties by the back door. If therefore Bayero's case, a decision of the Court of Appeal of the same Division (Kaduna) that heard the instant appeal applies then, similar considerations also apply, to wit: as Muhammad, JCA rightly put it:-

"In the present appeal, it is not in dispute that the 1st respondent is entitled to enjoy the fruits of the ruling delivered in its favour. However, caution must be exercised when realising the judgment debt such that immovable properties of the judgment debtor are not made the first object in satisfaction of the judgment debt. Even though the Kano State High Court Rules; the State Sheriffs and Civil Process Law and other statutory provisions do not expressly prohibit attachment of immovable properties in satisfaction of Judgment debt, the general practice insists that it must be done in the right manner. I think in a situation where immovable property of a judgment debtor is to be attached, the judgment debtor is entitled to be put on notice. In other words, the motion shall be one on notice to the judgment debtor as against ex-parte motion. See Ogunkwo v. Ugboabo (1966) NMLR 184; Opubor v. Demiruru 5 ENLR 27; Onagoruwa v. I.G.P.(1991) 5 NWLR (part 193) 593. I think this is only being fair to the judgment debtor as this will afford him an opportunity of being heard on the crucial issues as to whether or not he still has, within the trial court's jurisdiction, enough movable property to satisfy the judgment debt. This will also accord with the rules of natural justice, fair hearing and the Constitution." (Underlining is mine for emphasis).

The underlining above is to exemplify how, not only in the instant case, the hearing of the ex-parte motion for the attachment and sale of the appellant's immovable property on 6th June 1998 without his being put on notice, amounted to utter breach and travesty of the rules of natural justice as enshrined in Section 33 (1) of the 1979 Constitution, but also an insensitive compulsory acquisition of his property in flagrant breach of his constitutional rights vide Section 40 of the 1979 Constitution. See Oyeyemi v. Commissioner for Local Government, Kwara State (1992)2 NWLR (part 226) 661.

Furthermore, in so far, as the deposition of the Chairman/Managing Director of the judgment debtor/appellant Company, Chief Micheal Ihunde, contained facts before the trial court to the effect inter alia that between 12th January, 1988 and 24th January, 1990, that Appellant made instalmental payments to the 1st respondent amounting to N400,000.00

and another sum to the tune of N100,000.00 vide paragraphs 7&8 of Michael Ihunde's affidavit, It is unconscionable and completely wrong for the court below to have affirmed the decision of the trial court which said that it had no knowledge that these instalmental payments were ever brought to its notice and to have upheld that decision that the sale of the immovable property was in order. There can be nothing further from the truth. Thus, the reliefs sought by the Appellant in its appeal before this court (having sought the leave of the court below so to do) to wit:

"1. An order setting aside the judgment of the Court of Appeal dated 5th December, 1991 and that part of the ruling of Hon. Justice Sale Umar Minjibir, C.J. Kano High Court appealed against to the Court of Appeal Kaduna.

2. An Order setting aside the execution and sale of the appellant's immovable property at Plot 472, Hassan Katsina Road, Hotoro G.R.A., Kano .

3. Costs."

are, in my considered view, well grounded. This is because in the face of the preponderance of conflicting affidavit evidence before him, the learned Chief Judge nonetheless proceeded (having earlier on 4/2/91 granted Appellant's prayer to join the 2nd Respondent as a party to the proceedings) to order that:-

"Plot No.472 Hassan Katsina Road, Hotoro, Kano be delivered to the purchaser and that any person or persons found to be occupying the same House should be removed from there."

He finally ruled by refusing among others, the prayer asking for an order to set aside the execution of the judgment, thus resting on his ruling in the application emanating from the ex-parte application. By so ruling against the Appellant he was riding roughshod over his (Appellant's) legal rights as preserved in section 33 (1) of the Constitution (Ibid) and Order IV Rule 16(1) - (3) Judgment Enforcement Rules and Section 44 of the Sheriff's and Civil Process Law of Kano State, the latter which provides that :-

"44. If sufficient movable property of the judgment debtor can be found in Northern Nigeria to satisfy the judgment and costs and the

costs of execution, execution shall not issue against his immovable property of the judgment debtor which can with reasonable diligence be found in Northern Nigeria, or if such property is sufficient to satisfy the judgment and costs and the costs of execution, and the judgment debtor is the owner of any immovable property, the judgment creditor may apply to the court for a writ of execution against the immovable property of the judgment debtor, and execution may be from the court against the immovable property of the judgment debtor in accordance with the provisions of this law, and any rules made thereunder"

Order IV Rule 16(1) - (3) of the Judgment (Enforcement) Rules provides:

"6(1) When a judgment creditor desires a writ of attachment and sale to be issued against the immovable property of the judgment debtor he shall apply to the High Court.

(2) The application shall be supported by evidence showing-

(a) *What steps, if any, have already been taken to enforce the judgment, and with what effect; and*

(b) *What sum now remains due under the judgment; and*

(c) *that no movable property of the judgment debtor, or none sufficient to satisfy the judgment debt, can with reasonable diligence be found.*

(3) *If upon the hearing of the application it appears to the court that a writ of attachment and sale may lawfully issue against, the immovable property, the court shall make an order accordingly."*

From the foregoing, I hold that there are overwhelming materials before this court to enable me arrive at the conclusion and to order-

(a) *that the judgment of the Court below dated 5th December, 1991 and that part of the ruling of Hon. Justice Sale Umar Minjibir C.J. Kano High Court appealed against to the Court below be and is hereby set aside.*

(b) *That the execution and sale of the Appellant's immovable property at Plot 472, Hassan Katsina Road, Hotoro G.R.A., Kano and is hereby set aside.*

and this by reason for all I have hereinbefore said, the same being null

and void. That substantial miscarriage of justice has been occasioned and I so hold. See A.U. Amadi v. Thomas Aplin Co Ltd. (1972)4 SC. 228 at 237; Anla v. Ayanbola (1977)4 SC. 63 at 69; Total (Nigeria) Ltd & Anor. v. Alfred Nwako & Anor. (1978)5 SC.1 and Adigun v. A.G. of Oyo State (1987)1 NWLR (part 53) 628.

For the reasons given by me and the very detailed ones contained in the lead judgment of my learned brother Ogundare, JSC I allow the appeal. I subscribe to the consequential orders made inclusive of the costs as assessed.

IGUH JSC

I have had the privilege of reading in draft the leading judgment just delivered by my learned brother, Ogundare, JSC. and I agree entirely with his reasoning and conclusion.

The main issue that arises for consideration in this appeal is whether or not an application by a judgment creditor for execution or for leave to sell the immovable property of a judgment debtor pursuant to Section 44 of the Sheriffs and Civil Process Law, Cap. 123, Vol.3, Laws of Northern Nigeria may be made to the court ex parte or otherwise on notice to the judgment debtor. The contention of the appellant is that such an application shall be brought on notice for its validity and constitutionality. The respondents, on the other hand, were of the view that the application may properly be brought ex parte. Learned counsel for the 1st respondent, however, at a stage in the course of his arguments candidly conceded that it would appear erroneous for such an application to be brought ex parte.

Section 44 of the Sheriffs and Civil Process Law, Cap. 123 Laws of Northern Nigeria provides as follows-

"If sufficient movable property of the judgment debtor can be found in Kano State to satisfy the judgment and costs and the costs of execution, execution shall not issue against his immovable property, but if no movable property of the judgment debtor can with reasonable diligence be found in Kano State, or if such property is insufficient to satisfy the judgment and the costs of execution, and the judgment debtor is the

owner of any immovable property, the judgment creditor may apply to the court for a writ of execution against the immovable property of the judgment debtor, and execution may issue from the court against the immovable property of the judgment debtor in accordance with the provisions of this law, and any rules made thereunder."

Of relevance, is the provision of Section 33 (1) of the Constitution of the Federal Republic of Nigeria, 1979 which, with regard to the individual's right to fair hearing, stipulates thus-

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

There is also the provision of section 40(1) of the Constitution of the Federal Republic of Nigeria, 1979 which provides as follows-

"40(1) No movable property or any interest in an immovable property shall be taken possession of compulsorily and no right over or interest in any such property shall be acquired compulsorily in any part of Nigeria except in the manner and for the purposes prescribed by a law that, among other things-

(a) requires the prompt payment of compensation therefor; and

(b) gives to any person claiming such compensation a right of access for the determination of his interest in the property and the amount of compensation to a court of law or tribunal or body having jurisdiction in that part of Nigeria."

Section 44 of the Sheriffs and Civil Process Law thus provides inter alia that if no movable property of the judgment debtor can with reasonable diligence be found in Kano State or if such property is insufficient to satisfy the judgment and costs and the judgment debtor is the owner of any immovable property, the judgment creditor may apply to the court for a writ of execution against such immovable property and execution may issue from the court against the immovable property of the judgment debtor in accordance with the provisions of the law. Neither the provisions of this law nor those of the Judgments (Enforcement)

Rules expressly stipulate whether applications for a writ of execution, sale or attachment of the immovable property of a judgment debtor must be by way of a motion on notice or an application ex parte. The real question in this appeal, therefore, is whether the court below was right to have affirmed the decision of the trial court to the effect that the application by the 1st judgment creditor/respondent for the sale of the immovable property of the judgment debtor/appellant by a motion ex parte in the present case was lawful and in accordance with Section 44 of the said Sheriffs and Civil Process Law.

There can be no doubt that the leave granted to the 1st judgment creditor/respondent in this case to sell the immovable property of the appellant pursuant to an ex parte application is a clear infraction of the appellant's basic fundamental right to fair hearing and a flagrant breach of the audi alteram partem rules as guaranteed under and by virtue of the combined effect of sections 33(1) and 40(1) of the Constitution of the Federal Republic of Nigeria, 1979 as the said judgment debtor/appellant was neither heard nor afforded the opportunity to be heard by the very nature of the application before the court pursuant to which the order under attack was made.

In this regard, it cannot be over-emphasised that an application ex parte may generally be made where-

(i) from the nature of the application, the interest of the other party will not be adversely affected; or

(ii) When time is of the essence of the application.

In either of the above cases, a court of law will be entitled in the exercise of its judicial discretion to grant such an application. Where, however, the application ex parte will affect the interest or right of an adverse party, a court of law should insist and order or direct that such adverse party shall be put on notice by the due service of the application on him.

In my view, it cannot amount to any other thing else than a gross abuse and breach of the rules of natural justice for a writ of execution or attachment to issue against the immovable property of a judgment debtor without affording him an opportunity to be heard on such an exceptionally grievous and sensitive issue.

So, in James Opubor v. Mary Demiruru (1961)2 All N.L.R. 436 or (1961) 5 E.N.L.R. 27, the issue of whether it was proper to obtain the leave of court, for the sale of the immovable property of a judgment debtor by an ex parte application was considered by the High Court of the former Eastern Nigeria. Idigbe, J., as he then was, interpreting the provisions of section 44 of the Sheriffs and Civil Process Ordinance, Cap. 189 which are in pari materia with section 44 of the Sheriffs and Civil Process Law of Northern Nigeria Commented thus-

"Again it is my view that applications of this nature (meaning applications for execution against the immovable property of a judgment debtor) must be by motion on notice so that the debtor who has the property can be heard and all other parties who may be interested in the property can be heard."

The above view was also expressed in the decisions in Alhaji Nugwa v. Nigerian Loan and Mortgage Company Ltd 18 N.L.R. 81 and Osunkwo v. Ughogbo (1966) N.M.L.R . 184. With the greatest respect, I find myself in complete agreement with the above observation which I hereby fully endorse. See too Bayero V. Federal Mortgage Bank Nig. Ltd and Another (1998)2 N.W.L.R. (part 538) 509 at 530. I therefore hold that applications for the attachment of the immovable property of a judgment debtor must be by a motion on notice and not by way of a motion ex parte so that the judgment debtor who is the owner of the property and all other parties who may be interested therein may be heard or afforded the opportunity to be heard. It is also my further view that an order granted following such an application, made ex parte, is patently irregular, erroneous on point of law and unconstitutional. Consequently, it must be regarded as null and void. Learned counsel for the 2nd respondent was therefore entirely in order when, at the middle of his argument, he was obliged, rightly in my view, to concede that the contentious application in the present case for the sale of the appellant/judgment debtor's immovable property, in so far as it was brought ex parte, was improper and without justification.

The court below, in its judgment on the issue under consideration, was of the opinion that the non-service of the application on the

judgment debtor/respondent was a mere irregularity which was waived by the appellant with no resulting miscarriage of justice to him. I need only state that the service of a writ or process on a defendant is one of the fundamental conditions precedent to the exercise of jurisdiction by a court of law. A simple irregularity in the course of proceedings that are competent and within the jurisdiction of a trial court must be distinguished from proceedings which are manifestly incompetent thereby affecting the jurisdiction of the court. An irregularity which renders the proceedings incurably defective and null and void may not be waived as acquiescence cannot confer jurisdiction. See Skenconsult Nig Ltd and Another v. Godwin Ukey (1981)1 S.C 6 at 26, Management Enterprises Ltd and Another v. Jonathan Otusanya (1987)2 N.W.L.R. (part 55) 179, Obimonure v. Erinosho and Another (1966) 1 All N.L.R. 250, Macfoy v. U.A.C. Ltd (1961)3 All E.R. 1169 at 1172.

In the present case, the service of a vital process, the application for the attachment of the immovable property of the judgment debtor, was not served on him as required by law. This, in my view, is a breach of a fundamental condition precedent to the exercise of jurisdiction by the court and rendered the proceeding a nullity. I am therefore unable to accept that the non-service of the relevant application on the judgment debtor/appellant was a mere irregularity. In my view, it was such that it rendered the proceedings manifestly incompetent and thereby affected the jurisdiction of the court. The breach in question being unconstitutional, could not be waived by the judgment debtor/appellant nor could it seriously be argued to have occasioned no miscarriage of justice.

The conclusion I therefore reach is that the application in issue being by way of a motion ex parte cannot be right. In my view, It was manifestly erroneous on point of law. All the orders made thereunder are, in my view, clearly unconstitutional and null and void.

It is for the above and the more detailed reasons contained in the judgment of my learned brother, Ogundare, J.S.C., that I, too, allow this appeal. I abide by all the consequential orders, including those as to costs, made in the leading judgment.