

SUPREME COURT OF NIGERIA
FRIDAY 13TH DECEMBER, 2002 SC. 49/1997
CORAM:- M. L. UWAIS CJN, S. M. A. BELGORE,
A. I. IGUH, S. O. UWAIFO, N. TOBI, JJSC

AUTO IMPORT EXPORT APPELLANT
AND
1. J. A. A. ADEBAYO
(Receiver and Manager, Continental
Motors and Engineering Co. Ltd) RESPONDENTS
2. A. O. OBIKOYA & SONS LTD
3. NATIONAL BANK OF NIG. LTD

APPEALS - Notice of appeal - Filing - Computation of time - Appeal from Court of Appeal to Supreme Court is filed within 3 months - Excluding the date judgment was delivered (H1)

APPEALS - Jurisdiction - Filing appeal out of time - Effect - Failure to appeal within time - Without obtaining extension of time - Constitutes grave irregularity - That there would be no appeal before court (H2)

RULES OF COURT - Purpose - Supreme Court Rules O.10 r.2 - Practice Directions pursuant to the rules - Pertain only to period of filing briefs by parties - And not period within which to appeal (H3)

CONFLICT OF LAWS - Appeals - Statutes - Rules of court - Neither Supreme Court Practice Direction nor rules of court - Can override statutory provisions (H4)

APPEALS - Objection - Incorporated in brief - Propriety - By Supreme Court Rules O.2 r.9 - Notice of preliminary objection may be raised - In respondent's brief of argument (H5)

COURT PROCESSES - Service - Proof - Appellant who did not pay for service - Has onus to establish that he duly served respondent with the process (H6)

COURT PROCESSES - Service - Relevance - Service of writ of summons is condition precedent - To exercise of jurisdiction by court - Out of whose registry the process was issued (H7)

ORDERS OF COURT - Setting aside - Where there is fundamental defect which goes to issue of jurisdiction - Court may regard order made as nullity - And set same aside upon application (H8)

FACTS

This is an appeal by appellant against judgment of the Court of Appeal, against which a notice of Appeal was filed. All three respondents in their briefs of argument raised preliminary objections on points of law to wit that the appeal is not properly before the Supreme Court as the notice of appeal was filed out of time, having been filed after 3 months from the judgment appealed against and without leave of court to appeal out of time. Appellant in its brief of argument argued that on point of fact, it filed a motion on notice seeking various relief among which were an order for leave to appeal, extension of time within which to appeal and an order deeming as properly filed and served, the notice of appeal dated 4th October, 1996, filed on the same date at the registry of the Court of Appeal, Lagos Division against the decision in issue. Learned counsel for appellant pointed out that by an order of Supreme Court made in chambers, the above reliefs were granted.

He therefore contended that there is a proper notice of appeal and that the appeal was properly before the court. In reply, respondents' counsel contended that the order purportedly made in chambers, granting the said reliefs to appellant was a nullity having been made without jurisdiction. Their ground was that the motion on notice was at no time served on them before the application was heard in chambers and the orders made. Counsel for appellant in his reply brief, argued in the alternative that even without an order for extension of time within which to appeal, the appeal was properly before the court. He submitted that time does not run during vacation in Supreme Court and that a substantial part of the three months within which to appeal fell into the court's vacation period.

ISSUES FOR DETERMINATION

1. whether, as contended by the appellant, this appeal was

filed within the time prescribed by law and therefore competent.

2. whether, as contended by the respondents, this court may on ground of want of jurisdiction properly set aside its order of the 17th November, 1998, made in chambers purporting to regularize the appellant's appeal filed out of time.

HELD (unanimously striking out the appeal per **IGUH JSC**)

Notice of appeal - Filing - Computation of time

1. It is crystal clear that the period prescribed by law for the giving of notice of appeal to this court is three months in an appeal against a final decision of the Court of Appeal. From the line of authorities, it is firmly established that although the computation of any period within which to do any act must in individual cases depend on the intention of the law makers as can be gathered from the relevant legislation, as a general rule the date of the event from which the calculation must commence is normally excluded from the reckoning and, consequently, the last day will be included. See too Section 15(2) (a) of the Interpretation Act, Cap. 192, Laws of the Federation of Nigeria, 1990 wherein it is provided thus:-

"15(2) A reference in an enactment to a period of days shall be construed:-

(a) where the period is reckoned from a particular event, as excluding the day on which the event occurs".

It is common ground that the decision of the Court of Appeal appealed against was delivered on the 1st day of July, 1996. Accordingly, in computing the period for the filing of the appeal against that judgment, the date 1st July, 1996, on which the Court of Appeal delivered its judgment must be excluded. Consequently, the calculation must commence on the 2nd of July, 1996 and three months from the date would ordinarily end at midnight of the 1st October, 1996.

However, the said 1st day of October, 1996 was a dies non. Accordingly, having regard to the above provisions of the law, the three months prescribed by law within which the

appellant should have filed his appeal competently as of right must in all the circumstances of the case have ended at mid-night of the next working day. This would be the mid-night of the 2nd October, 1996.

It is common ground that this appeal was not filed until the 4th October, 1996. It is clear to me that unless the appellant obtained valid leave of court for an extension of time within which to appeal out of time etc., and I will in a moment consider that aspect of this appeal, this appeal was clearly filed two days out of time having regard to the period prescribed by Section 27(2) (a) of the Supreme Court Act, Cap. 424, Laws of the Federation of Nigeria, 1990. (pp. 3365 F/3367 B)

Jurisdiction - Filing appeal out of time - Effect

2. I think I ought to state that it cannot be overemphasized that appeals generally are creations of statute and failure to comply with the statutory requirements prescribed by the relevant laws under which such appeals may be competent and properly before the court will deprive such appellate court of jurisdiction to entertain the appeal. In particular, failure to file an appeal within the statutory period of time prescribed by law without obtaining an extension of time within which to appeal in accordance with the provisions of the Rules or to comply with the statutory requirements which are conditions precedent to the filing of a valid appeal constitutes a grave irregularity, so fundamental that there would be no appeal which the appellate court could lawfully entertain. Such irregularity can by no means be regarded as mere technicality but constitutes an incurable defect that must deprive the appellate court of jurisdiction to entertain the appeal and whether or not the irregularity was noticed or that no objection was taken to it is not an argument which can legitimately be put forward with any effect when the matter comes before the court. (p. 3367 E)

RULES OF COURT - Purpose

3. The above Practice Direction which was rightly issued pursuant to the provisions of Order 10 Rule 2 of the Supreme Court Rules has since been regarded as part of those Rules.

However, that Practice Direction merely pertains to the computation of the period of filing briefs by either parties to an appeal and does not concern the statutory period of time within which to appeal from a decision of the Court of Appeal as expressly provided for under Section 27(2) of the Supreme Court Act, Cap. 424, Laws of the Federation of Nigeria. 1990. B
(p. 3369 B)

CONFLICT OF LAWS - Appeals - Statutes - Rules of court

4. At all events, I need, perhaps to stress that neither Practice Directions nor, indeed, Rules of Court can override Statutory Provisions. Section 27(2) (a) of the Supreme Court Act, Cap 424, Laws of the Federation of Nigeria, 1990, which makes provision in respect of the periods of time within which to appeal has neither stipulated nor suggested that the times therein prescribed shall cease to run during periods of vacation and I do not conceive it the duty of this court to usurp the legislative powers of the National Assembly under whatever guise by amending laws enacted by them other than to interpret them in accordance with the laws of the land. D
(p. 3369 D) E

Objection - Incorporated in brief - Propriety

5. The appellants have also contended that the respondents' preliminary objection is incompetent as it was not brought by way of motion on notice contrary to the provisions of Order 2 Rule 28(1) of the Supreme Court Rules which stipulates that every application to the court shall be by notice of motion supported by affidavit and it shall state the rule under which it is brought and the grounds for the relief sought. I think the submission of the appellants in the regard is clearly without merit and totally misconceived. This is because it is now well settled that a Notice of Preliminary Objection pursuant to the provisions of Order 2 Rule 9 of the Supreme Court Rules may validly be raised to question the competence of an appeal in the respondent's brief of argument. F
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It cannot be disputed that the object of the said Order 2 Rule 28(1) of the Supreme Court Rules is to give an appellant before the hearing of his appeal notice of any preliminary ob-

jection to the hearing of his appeal and the grounds thereof in order to enable him to be prepared to meet the objection at the hearing of the appeal. I think the rule is a safeguard against embarrassing an appellant and taking him by surprise. This is exactly what the Respondents have done in the present appeal by raising their preliminary objection in their briefs of argument. In my judgment, I can see nothing wrong in the procedure the respondents adopted in this appeal by raising their preliminary objection to the appeal in their briefs of argument.
 (p. 3369 G)

COURT PROCESSES - Service - Proof

6. It is common ground that the application in issue was rightly made by the appellant by motion on notice which therefore needed to be served on the respondents before it may properly be heard by the court. All the respondents in their preliminary objection have repeatedly stressed in their respondent's brief of argument that neither themselves nor their learned counsel were served with the relevant motion for leave to appeal, extension of time within which to seek leave to appeal etc. which is now in issue. The appellant in answer to this grave issue has not as much as tendered the affidavit of service of the process or any endorsement of such a service, whether personal or otherwise, on the said respondents or on their counsel. In the circumstance, the court has most carefully studied the original case file of the appeal. The motion in issue is dated the 20th day of April, 1998 but was not filed in the Registry of this court until the 25th August, 1998. There is an affidavit in support of the application. It is apparent from the endorsements on the face of the motion paper that no fees were paid by the appellant in respect of service of the application by the court on the respondents. Neither an affidavit of service nor any endorsement or acknowledgment of such service on the respondents was produced by the appellant. The onus is on the appellant who did not pay for the service of the application by the court to establish that it duly served the respondent or their counsel with the process. This it failed to do. I am satisfied that there was no ser-

vice of the process in issue on the respondents. (p. 3371 A)

COURT PROCESSES - Service - Relevance

7. Now, it is well settled that service of a writ of summons or process is a condition precedent to the exercise of jurisdiction by the court out of whose Registry the writ of process was issued. B

Under our adversary system of jurisprudence, to hear a case without one of the parties having been served with the necessary process except in a proper ex parte proceedings would render the trial a nullity as service of the court's processes are basic and indispensable to any effective adjudication. Where, as in the present case, service of a process is required, failure to serve it is a fundamental vice and the person affected by the order but was not served with the process, again, as in the present case, is entitled ex debito justitiae to have the order set aside as a nullity. C D

Accordingly, service of a process in proceedings other than in ex parte proceedings is fundamental to the assumption of jurisdiction. Failure to serve a process where service is required goes to the root of proper conception of recognized procedure of litigation. It is a fundamental vice which renders null and void an order made against the party who should have been served as the idea that an order can validly be made against, a party who has no notification of the action against him is one that is clearly undesirable and, indeed, unacceptable in our judicial system. (p. 3371 F) E F

ORDERS OF COURT - Setting aside

8. Learned counsel for the appellant has submitted that the option open to a person who was not served with any process but against whom an order was made or judgment given is to apply to the court to discharge the order or to appeal against the judgment so that it ought be set aside. I agree entirely with this proposition of law. Additionally, however, a court has inherent power to set aside its own order or judgment which is a complete nullity like the order in issue in this present case. Where, therefore, it is shown that there was a funda- G H

mental defect which goes to the issue of jurisdiction or competence of the court, as in the present case, such court has inherent jurisdiction to regard the order made as a nullity and to set it aside upon application. In other words, a court has an inherent power to set aside its own judgment or order which
 B ***is a complete nullity.***

In the present case, the respondents now seek to set aside an order of this court made on the 17th November, 1998, which order was obviously made without jurisdiction for want
 C ***of service of the process on the respondents. That order which purported to grant leave to the appellant to appeal out of time having been made without jurisdiction is invalid, null and void. I think this court in all the circumstances of the case is entitled ex debito justitiae to set it aside and it is hereby set***
 D ***aside.*** (pp. 3372 D/3373 B)

NOTABLE POINT OF INTEREST

TOBI JSC

1. Rules of court are meant to be obeyed

E Rules of court provide for the period or time within which a court process should be filed and the rules expect parties to file the process within the period or time stipulated. Because of human failings, exigencies and contingencies, there could be situations where a court
 F process is not filed within the period or time stipulated by the rules.

Rules of court anticipated such situations and make provision for extension of time within which a court process could be filed. The rules allow a party in default to file a court process out of time if he seeks leave.

G Rules of court are meant to be obeyed. They are not made for the fun of rules qua regulations. Failure to obtain leave for extension of time to appeal within the specified time or period is a substantial irregularity which affects the props and foundations of the appeal. It is beyond mere technicality which this court cannot forgive.
 H (p. 3374 G)

REPRESENTATION

O. M. Sagay, Esq, with Mr. M. S. Agwu, for the appellant

Chief D. Ajayi with A. Ajayi, Esq, for the 1st and 3rd Respondents
J. I. Nweze, Esq, for the 2nd Respondent

CASES REFERRED TO

Nzom v. Jinadu (1987) 1 NWLR (Pt. 51) 533

Babatunde v. Olatunji (2002) 2 SC 9

Azeez Akeredolu v. Lasis Akinremi (1985) 2 NWLR (Pt. 10) 787

Ogidi v. Egba (1999) 10 NWLR (Pt. 621) 42

Salami v. Mohammed (2000) 6 SC. (Pt. II) 37

Saliyim v. Mashi (1975) 1 NMLR 55

Obinomure v. Erinoshio (1966) 1 All NLR 250

Mbadinuju v. Ezuka (1994) 10 SCNJ 109

Skenconsult v. Ukey (1980) 1 SC

Hadkinson v. Hadkinson (1952) 2 All ER 567

Oranye v. Jibowu (1950) 13 WACA 41

Radcliffe v. Bartholomew (1892) 1 QBD 161

Gelmini v. Mariggia (1913) 2 KB 549

Marren v. Dawson Bentley & Co. Ltd. (1961) 2 QB 135

STATUTES & RULES REFERRED TO

Supreme Court Act Cap 424 LFN 1990, 27(2)(a)

Interpretation Act Cap 192 LFN 1990, 15(2)(a)

Evidence Act, s. 74(1)(b)(2)(a)

Public Holidays Act Cap 378 LFN 1990, s.1

Supreme Court Rules 1985, O.2 rr.9(1)28(1)

LEAD JUDGMENT BY IGUH JSC

When this appeal came up for hearing on 7th day of October, 2002, learned counsel for the parties adopted their respective briefs of argument and indicated that they had nothing to add. Of considerable significance, however, is the fact that all three respondents in their briefs of argument raised preliminary points of law which, in the main, turned on the vital issue of jurisdiction. The question canvassed is whether this court has jurisdiction to entertain this appeal. The submission of learned respondents' counsel is that this appeal is improperly before the court, that it is incurably defective and incompetent and that this court is consequently deprived of jurisdiction to entertain it.

Learned leading counsel for the 1st and 3rd respondents, Chief Duro Ajayi, did give notice of his preliminary objection to this appeal in his brief of argument. Relying on the provisions of Order 2 rule 9(1) of the Supreme Court Rules, 1985, learned counsel duly gave notice of his preliminary objection. It was argued in his brief of argument that this appeal is not properly before the courts as the Notice of Appeal was filed out of time on the 4th day of October, 1996, whereas the judgment of the court below appealed against was delivered on the 1st day of July, 1996. Chief Ajayi submitted that this is contrary to the provisions of Section 27(2) (a) of the Supreme Court Act, Cap. 424. Laws of the Federation of Nigeria, 1990, which, in an appeal in a civil case prescribe 3 months within which to appeal against a final decision of the Court of Appeal. He argued that reckoning from the 2nd July, 1996, this appeal which is against a final decision of the Court of Appeal ought to have been filed on or before the 1st October, 1996. He conceded that as the 1st of October of every year is a public holiday, in this country, this appeal ought to have been filed the next working day which, in the present case, is the 2nd of October, 1996. He submitted that this appeal was not filed until the 4th day of October, 1996, two clear days out of time. Learned counsel called in aid various decisions of this court, inclusive of *Tunji Bowaje v. Moses Adediwura* (1976) 6 S.C. 143 at 146 and *Nalsa and Team Associates v. NNPC* (1991) 8 NWLR (Part 212) 652 at 678 in support of his contention. He stressed that the competence or otherwise of any appeal touches on the issue of the jurisdiction of the appellate court to entertain the cause. He argued that in so far as the notice of appeal in the present proceeding was filed out of time, the appeal is incompetent and ought to be dismissed.

Learned counsel for the 2nd respondent, Ifeanyi Nweze, Esq, in his brief of argument substantially raised by way of preliminary objection the same points canvassed by Chief Ajayi. He pointed out that the judgment appealed against was delivered on the 1st day of July, 1996, whilst the Notice of Appeal against the decision was filed on the 4th October, 1996. He submitted that the Notice of Appeal was filed more than three months after the delivery of the judgment appealed against. He stated that to his knowledge there was no application to this court for extension of time within which to file this appeal. He therefore submitted that the appeal is incompetent.

Learned counsel referred to the decision of this court in *Akeredolu v. Akinremi* (1985) 2 NWLR (Pt. 10) 787 in support of his contention and he urged the court to strike out the appeal.

Learned counsel for the appellant, O. M. Sagay, Esq, in his reply brief of argument submitted that the Notice of Preliminary Objection raised by the respondents is totally misconceived. He argued that the appellant on point of fact filed a motion on notice dated the 20th day of April, 1998, seeking for various reliefs. The reliefs included an order for leave to appeal, extension of time within which to appeal and an order deeming as properly filed and served the Notice of Appeal dated the 4th October, 1996, filed on the same date at the Registry of the Court of Appeal, Lagos Division against the decision in issue. Learned counsel pointed out that by an order of this court made in chambers on the 17th day of November, 1998, the above reliefs were granted. He therefore contended that the respondents could not be right to suggest that there is no proper Notice of Appeal or that this appeal is incompetent by virtue of the fact that it was filed out of time without the leave of court.

In further argument, Chief Duro Ajayi, in his amended respondents' brief submitted that the order made in chambers on the 17th day of November, 1998, purportedly granting the appellant leave to appeal, extension of time to seek leave to appeal and extension of time within which to appeal against the decision of the Court of Appeal in issue is a complete nullity, having been made without jurisdiction. The contention of the respondents is that the said order which was made upon a motion on notice dated the 20th April, 1998, was at no time served on them or on their counsel whether personally or by whatever means. They submitted that the non-service of the process on them before the application was heard in chambers by the court and the relevant orders made constituted a gross irregularity which rendered the entire proceedings of the 17th November, 1998, incurably defective and null and void. They argued that the said orders of this court made on the 17th November, 1998, which purported to regularise the appeal is totally without effect and null and void. In this regard, reliance was placed on the decision of the court in *Madukolu v. Nkemdilim* (1962) All NLR (Pt. 2) 581. This court was finally urged to uphold the respondents' notice of Preliminary Objection and to strike out this appeal on ground of incompetence.

There was finally the appellant's reply to Chief Ajayi's further argument which Mrs. Sagay dismissed as misconceived. Mr. Sagay contended in his *"appellant's reply to the preliminary objection raised in the amended brief of argument of the 1st and 3rd respondents filed on the 19th September, 2002"*, that the appellant's Notice of Appeal which the preliminary objection is challenging is properly before the court even without any order for extension of time within which to fill the appeal. He point out that the judgment appealed against was delivered on the 1st July, 1996; and that a substantial part of the three months within which to appeal fell into the vacation period of the Supreme Court. He submitted that it is common knowledge by virtue of the Practice Direction issued by the Honourable Chief Justice of Nigeria that time does not run during vacation in the Supreme Court. He submitted that the motion for extension of time within which to appeal filed by the appellant on the 20th April, 1998, was therefore superfluous. He referred to the provisions of Order 2 Rule 28(1) of the Supreme Court Rules, 1985, whereby every application to the court shall be by notice of motion and pointed out that the respondents failed to adopt this procedure. Citing the decision in *Nzom v. Jinadu (1987) 1 NWLR (Pt. 51) 533*, learned counsel argued that assuming that the respondents were not served with the motion on notice for extension of time within which to appeal, the appellant having done all that was expected of it cannot be blamed for the non-service. He concluded by relying on the decision of this court in *Babatunde v. Olatunji (2002) 2 SC. 9; (2000) 2 NWLR (Pt. 646) 557 at 559* in which it is stated that the option open to a person against whom an order was made or judgment given is to apply to the court to discharge the order or appeal against the judgment so that it might be set aside as the case may be. He pointed out that the order of the 17th November, 1998, not having been appealed against by the respondents with a view to setting it aside by a court of competent jurisdiction remained valid and binding. He relied on the obiter dictum of Romer, LJ, in the English case of *Hadkinson v. Hadkinson (1952) 2 All ER 567* where the learned Lord Justice observed thus:-

"It is the plain and unqualified obligation of every person against, or in respect of, whom an order is made by a court of competent jurisdiction to obey it unless and until that order is discharge. The uncompromising nature of this obligation is shown by the fact

that it extends even to cases where the person affected by an order believes it to be irregular or even void”.

Learned counsel therefore urged the court to dismiss this preliminary objection.

A number of important issues have been canvassed by the parties in this preliminary objection. One of the more important of the issues deals with *whether, as contended by the appellant, this appeal was filed within the time prescribed by law and therefore competent.*

The second question will only arise if the answer to the first issue is in the negative. This concerns *whether, as contended by the respondents, this court may on ground of want of jurisdiction properly set aside its order of the 17th November, 1998, made in chambers purporting to regularize the appellant’s appeal filed out of time.* There are one or two other side issues which were also contested by the parties in the course of this preliminary objection. These issues will now be considered. I will firstly deal with whether or not this appeal was filed within the time prescribed by law.

The periods prescribed for the giving of notice of appeal to this court in civil cases are stipulated in Section 27(2) (a) of the Supreme Court Act, Cap. 544, Laws of the Federation of Nigeria, 1990. This provides as follows:-

“27(2) *The periods prescribed for the giving of notice of appeal or notice of application for leave to appeal are:-*

(a) in an appeal in a civil case, fourteen days in an appeal against an interlocutory decision and three months in an appeal against a final decision.”

Accordingly, ***it is crystal clear that the period prescribed by law for the giving of notice of appeal to this court is three months in an appeal against a final decision of the Court of Appeal. From the line of authorities, it is firmly established that although the computation of any period within which to do any act must in individual cases depend on the intention of the law makers as can be gathered from the relevant legislation, as a general rule the date of the event from which the calculation must commence is normally excluded from the reckoning and, consequently, the last day will be included.*** See *Radcliffe v. Bartholomew (1892) 1 QBD 161, Gelmini v. Marigga*

(1913) 2 KB 549, *Marren v. Dawson Bentley & Co. Ltd.* (1961) 2 QB 135. **See too Section 15(2) (a) of the Interpretation Act, Cap. 192, Laws of the Federation of Nigeria, 1990 wherein it is provided thus:-**

B “15(2) A reference in an enactment to a period of days shall be construed:-

(a) where the period is reckoned from a particular event, as excluding the day on which the event occurs”.

C It is common ground that the decision of the Court of Appeal appealed against was delivered on the 1st day of July, 1996. Accordingly, in computing the period for the filing of the appeal against that judgment, the date 1st July, 1996, on which the Court of Appeal delivered its judgment must be excluded. Consequently, the calculation must commence on the D 2nd of July, 1996 and three months from the date would ordinarily end at midnight of the 1st October, 1996. See *Azeez Akeredolu and Others v. Lasin Akinremi* (1985) 2 NWLR (Pt. 10) 787 S.C., a full court decision of the Supreme Court. However, as earlier stated, the 1st day of October of every year is a public holiday **E in Nigeria. This is a notorious fact of which this court is entitled to take judicial notice of pursuant to the provisions of Section 74(1) (g) of the Evidence Act, Cap. 112, Laws of the Federation of Nigeria, 1990, whereby the court is enjoined to take judicial notice inter alia of the “public Festivals, fasts and holidays notified in the official gazette or fixed Act.” See too Sections 74(2) (a) and 74(1)(b) of the Evidence Act and Section 1 of the Public Holidays Act, Cap. 378, Laws of the Federation of Nigeria, 1990, wherein it is expressly provided that the days mentioned in the Schedule to that Act which include “National Day, 1st October” shall be observed as public holidays throughout Nigeria.**

Attention must be drawn at this state to Sections 15(2) (b) and 15(3) of the Interpretation Act, *ibid*, which provide as following:-

H “15(2) A reference in an enactment to a period of days shall be construed:-

(b) where apart from this paragraph the last day of the period is a holiday, as continuing until the end of the next following day which is not a holiday.

15(3) where by an enactment any act is authorised or required

to be done on a particular day and that day is a holiday, it shall be deserved to be duly done if it is done on the next following day which is not a holiday”

In the light of all the above, it is plain that the mid-night of the 1st October, 1996, was ordinarily the last date the prescribed period of three months within which the appellant was entitled to appeal as of right against the relevant decision of the Court of Appeal in question would have ended. **However, the said 1st day of October, 1996 was a dies non. Accordingly, having regard to the above provisions of the law, the three months prescribed by law within which the appellant should have filed his appeal competently as of right must in all the circumstances of the case have ended at mid-night of the next working day. This would be the mid-night of the 2nd October, 1996.**

It is common ground that this appeal was not filed until the 4th October, 1996. It is clear to me that unless the appellant obtained valid leave of court for an extension of time within which to appeal out of time etc., and I will in a moment consider that aspect of this appeal, this appeal was clearly filed two days out of time having regard to the period prescribed by Section 27(2) (a) of the Supreme Court Act, Cap. 424, Laws of the Federation of Nigeria, 1990.

I think I ought to state that it cannot be overemphasized that appeals generally are creations of statute and failure to comply with the statutory requirements prescribed by the relevant laws under which such appeals may be competent and properly before the court will deprive such appellate court of jurisdiction to entertain the appeal. See Kudiabor v. Kudanu 6 WACA 14. In particular, failure to file an appeal within the statutory period of time prescribed by law without obtaining an extension of time within which to appeal in accordance with the provisions of the Rules or to comply with the statutory requirements which are conditions precedent to the filing of a valid appeal constitutes a grave irregularity, so fundamental that there would be no appeal which the appellate court could lawfully entertain. Such irregularity can by no means be regarded as mere technicality but constitutes an incurable defect that must deprive the appellate court of jurisdiction to

entertain the appeal and whether or not the irregularity was noticed or that no objection was taken to it is not an argument which can legitimately be put forward with any effect when the matter comes before the court. See Oranye v. Jibowu (1950) 13 WACA 41. So, too, in Ohene Moore v. Akeseh Tayee 2

B WACA 43 the Judicial Committee of the Privy Council was concerned, not with any extension of time but with failure by the appellant to fulfil certain statutory conditions requisite for the purposes of the appeal. The first appellate court would appear to have dismissed such failure as mere technicality which could be ignored in order that substantial justice might be done but, Lord Atkin, delivering the judgment of the Judicial Committee of the Privy Council at page 45 of the report made it quite plain that such was not the proper view. Said the noble Lord:-

D *“It is quite true that their Lordships, as every other court, attempt to do substantial justice and to avoid technicalities; but their Lordships, like any other court, are bound by the statute law, and if the statute law says there shall be no jurisdiction in a certain event, and that the event has occurred, then it is impossible for their Lord-*
E *ships or for any other court to have jurisdiction”.*

The appeal was accordingly allowed and the proceedings and judgment of the then first appellate Supreme Court were declared a nullity. I have gone thus far to emphasis in the clearest terms the very grave and serious consequences that necessarily result from filing an appeal out of time without taking steps to have the time extended in accordance with the Rules of Court or from failure by the appellant to comply with statutory mandatory conditions requisite for the purpose of an appeal.

G Learned counsel for the appellant did however attempt to avoid the disastrous consequences that must visit his purported appeal if, in fact, the same was filed out of time. He submitted that the appeal was filed well within the time stipulated by law, that the common practice in the Supreme Court is that during annual vacation, time does not
H run and that if the period of vacation of either the Court of Appeal or the Supreme Court is subtracted and the 4th October, 1996, when the Notice of Appeal was filed, it would be seen that the said Notice of Appeal was filed well within time.

It would seem to me that the Practice Direction learned coun-

sel for the appellant appears to be alluding to is that issued by the Honourable. The Chief Justice of Nigeria which took effect from the 24th day of June, 1985. It went inter alia as follows:-

“In giving effect to the provisions of Order 6 Rule 5 of the Supreme Court Rules, 1985, the period of the vacation which is declared between July and September each year shall not be taken into account for computation of the period of filing briefs by either the appellant or the respondent in an appeal before the court.” (Underlining supplied for emphasis)

The above Practice Direction which was rightly issued pursuant to the provisions of Order 10 Rule 2 of the Supreme Court Rules has since been regarded as part of those Rules. However, that Practice Direction merely pertains to the computation of the period of filing briefs by either parties to an appeal and does not concern the statutory period of time within which to appeal from a decision of the Court of Appeal as expressly provided for under Section 27(2) of the Supreme Court Act, Cap. 424, Laws of the Federation of Nigeria. 1990.

At all events, I need, perhaps to stress that neither Practice Directions nor, indeed, Rules of Court can override Statutory Provisions. Section 27(2) (a) of the Supreme Court Act, Cap 424, Laws of the Federation of Nigeria, 1990, which makes provision in respect of the periods of time within which to appeal has neither stipulated nor suggested that the times therein prescribed shall cease to run during periods of vacation and I do not conceive it the duty of this court to usurp the legislative powers of the National Assembly under whatever guise by amending laws enacted by them other than to interpret them in accordance with the laws of the land.

The appellants have also contended that the respondents’ preliminary objection is incompetent as it was not brought by way of motion on notice contrary to the provisions of Order 2 Rule 28(1) of the Supreme Court Rules which stipulates that every application to the court shall be by notice of motion supported by affidavit and it shall state the rule under which it is brought and the grounds for the relief sought. I think the submission of the appellants in the regard is clearly without merit and totally misconceived. This is because it is now well

settled that a Notice of Preliminary Objection pursuant to the provisions of Order 2 Rule 9 of the Supreme Court Rules may validly be raised to question the competence of an appeal in the respondent's brief of argument. See Ajide v. Kelani (1985) 3 NWLR (Pt. 12) 248 at 257 and 258 and Fawehinmi v. NBA No. 1 B (1989) 4 SC. (Pt. 1) 1; (1989) 2 NWLR (Pt. 105) 494 at 515-516. See too Ogidi v. Egba (1999) 10 NWLR (Pt. 621) 42 at 71 and Salami v. Mohammed (2000) 6 SC. (Pt. II) 37; (2000) 9 NWLR (Pt. 677) 469.

It cannot be disputed that the object of the said Order 2 Rule 28(1) of the Supreme Court Rules is to give an appellant before the hearing of his appeal notice of any preliminary objection to the hearing of his appeal and the grounds thereof in order to enable him to be prepared to meet the objection at the hearing of the appeal. I think the rule is a safeguard against embarrassing an appellant and taking him by surprise. This is exactly what the Respondents have done in the present appeal by raising their preliminary objection in their briefs of argument. In my judgment, I can see nothing wrong in the procedure the respondents adopted in this appeal by raising their preliminary objection to the appeal in their briefs of argument. C D E

Learned appellant's counsel raised yet another fascinating point. He argued that even if the notice and grounds of appeal in this case were filed out of time on the 4th October, 1996, the appellant duly F filed a motion dated the 20th April, 1998 for various reliefs which included an order for extension of time within which to appeal against the decision of the Court of Appeal etc. together with an order to deem as properly filed and served the Notice of Appeal dated the 4th G October, 1996, already filed and served. He stated that these reliefs were granted by an order of this court made in chambers on the 17th November, 1998. He therefore submitted that it could not be right to say that there is no proper Notice of Appeal in this case or that the present is incompetence.

H Learned counsel for the respondents, on the other hand, submitted that the said Order of 17th November, 1998, granting appellant leave to appeal, extension of time within which to seek leave to appeal and extension of time within which to appeal is a nullity, having been made without jurisdiction for non-service of the process.

It is common ground that the application in issue was rightly made by the appellant by motion on notice which therefore needed to be served on the respondents before it may properly be heard by the court. All the respondents in their preliminary objection have repeatedly stressed in their respondent's brief of argument that neither themselves nor their learned counsel were served with the relevant motion for leave to appeal, extension of time within which to seek leave to appeal etc. which is now in issue. The appellant in answer to this grave issue has not as much as tendered the affidavit of service of the process or any endorsement of such a service, whether personal or otherwise, on the said respondents or on their counsel. In the circumstance, the court has most carefully studied the original case file of the appeal. The motion in issue is dated the 20th day of April, 1998 but was not filed in the Registry of this court until the 25th August, 1998. There is an affidavit in support of the application. It is apparent from the endorsements on the face of the motion paper that no fees were paid by the appellant in respect of service of the application by the court on the respondents. Neither an affidavit of service nor any endorsement or acknowledgment of such service on the respondents was produced by the appellant. The onus is on the appellant who did not pay for the service of the application by the court to establish that it duly served the respondent or their counsel with the process. This it failed to do. I am satisfied that there was no service of the process in issue on the respondents.

Now, it is well settled that service of a writ of summons or process is a condition precedent to the exercise of jurisdiction by the court out of whose Registry the writ of process was issued. See *Skenconsult Nig. Ltd., and Another v. Godwin Ukey* (1981) 1 S.C. 6 at 26. See too *Adeigbe and Another v. Guthrie* (1993) 4 SCNJ 1 at 17.

Under our adversary system of jurisprudence, to hear a case without one of the parties having been served with the necessary process except in a proper ex parte proceedings would render the trial a nullity as service of the court's processes are basic and indispensable to any effective adjudica-

tion. Where, as in the present case, service of a process is required, failure to serve it is a fundamental vice and the person affected by the order but was not served with the process, again, as in the present case, is entitled *ex debito justitiae* to have the order set aside as a nullity. See *Obinomure v. Erinsho B & Anor.* (1966) 1 All NLR 250, *Mbadinuju v. Ezuka* (1994) 10 SCNJ 109 at 128, *Skenconsult v. Ukey* (1980) 1 SC. at 26.

Accordingly, service of a process in proceedings other than in *ex parte* proceedings is fundamental to the assumption of jurisdiction. Failure to serve a process where service is required goes to the root of proper conception of recognized procedure of litigation. It is a fundamental vice which renders null and void an order made against the party who should have been served as the idea that an order can validly be made against, a party who has no notification of the action against him is one that is clearly undesirable and, indeed, unacceptable in our judicial system. See *Management Enterprises Ltd. v. Otusanya* (1987) 2 NWLR (Pt. 55) 179.

Learned counsel for the appellant has submitted that the option open to a person who was not served with any process but against whom an order was made or judgment given is to apply to the court to discharge the order or to appeal against the judgment so that it ought be set aside. I agree entirely with this proposition of law. Additionally, however, a court has inherent power to set aside its own order or judgment which is a complete nullity like the order in issue in this present case. Where, therefore, it is shown that there was a fundamental defect which goes to the issue of jurisdiction or competence of the court, as in the present case, such court has inherent jurisdiction to regard the order made as a nullity and to set it aside upon application. See *Ogbu v. Urum* (1981) 4 S.C. 1, *Ojiako v. Ogueze* (1962) 1 SCNLR 112 or (1962) 1 All NLR 58. **In other words, a court has an inherent power to set aside its own judgment or order which is a complete nullity.** See too *Salisu Idris Saliyim and Ors. v. Alhaji Mashi and Others* (1975) 1 NMLR 55 at 58.

In *Craig v. Kanssen* (1943) KB 256, it was restated by the Court of Appeal in England that a failure to notify or serve the opposing

party of the institution of any proceeding, other than one which is properly brought ex parte connotes that a condition precedent to the exercise of jurisdiction has not been fulfilled and that in such a situation, the party not served is entitled ex debitor justitiae to have it set aside by the court which made it. I must say that I agree entirely with this proposition of the law. B

In the present case, the respondents now seek to set aside an order of this court made on the 17th November, 1998, which order was obviously made without jurisdiction for want of service of the process on the respondents. That order which purported to grant leave to the appellant to appeal out of time having been made without jurisdiction is invalid, null and void. I think this court in all the circumstances of the case is entitled ex debito justitiae to set it aside and it is hereby set aside. C D

The position, as I see it, is that this appeal was filed by the appellant on the 4th day of October, 1996, out of the prescribed period stipulated by law. The order of this court made on the 17th November, 1998, for leave to appeal, extension of time within which to seek leave to appeal, extension of time within which the appellant may appeal etc. having been declared a nullity, has now been set aside by this very court that made it. In these circumstances it seems to me that these preliminary objections are bound to succeed. The order granting leave to the appellant to appeal out of time is invalid, null and void. The consequence is that there is no valid appeal before this court. Accordingly, this appeal is incompetent and the same is hereby struck out with N10,000.00 costs to each set of respondents against the appellant. E F

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UWAIS CJN

I have had the opportunity of reading in draft the judgment read by my learned brother, Iguh, JSC. I entirely agree that the preliminary objections raised by the Respondents have merit. Accordingly, for the reasons contained in the said judgment, I too uphold the preliminary objections. The purported appeal by the Appellant is incompetent and it is hereby struck out with N10,000.00 cost to each set of Respondents against the Appellant. H

BELGORE JSC

The Order made in Chambers by this Court to extend time to appeal, etc, was made without jurisdiction as the respondent to the Motion on Notice was never given notice of the motion. That being
B the case, the appeal filed on the authority of that order made in Chambers is a nullity. I therefore agree with my learned brother, Iguh, JSC., there is no competent appeal before this Court and the preliminary objections succeed. I also struck out the appeal with
C N10,000.00 costs to respondents.

UWAIFO JSC

I read in advance the judgment of my learned brother, Iguh,
D JSC., with which I agree. It seems to me that not enough has been shown by the appellant that this notice of appeal was filed within the time prescribed by law. It is true time was extended by this court within which to file the notice but the respondents have alleged that the motion on notice which enabled this is to be done was not served
E on them. The appellant has not been able to demonstrate that this was not so. That would render the order for extension of time a nullity. The position is that the notice of appeal was filed out of time and this means, unfortunately, the appeal is incompetent.

I too hereby strike out the appeal and abide by the order for
F costs made by my learned brother, Iguh, JSC.

TOBI JSC

Rules of court provide for the period or time within which a
G court process should be filed and the rules expect parties to file the process within the period or time stipulated. Because of human failings, exigencies and contingencies, there could be situations where a court process is not filed within the period or time stipulated by the
H rules.

Rules of court anticipated such situations and make provision for extension of time within which a court process could be filed. The rules allow a party in default to file a court process out of time if he seeks leave.

Section 27(2) of the Supreme Court Act, Cap. 424, Laws of the Federation of Nigeria, 1990, provides as follows:-

“The period of the giving of notice of appeal or notice of application for leave to appeal are:

(a) in an appeal in a civil case, fourteen days in an appeal against an interlocutory decision and three months in an appeal against a final decision.”

The provision of Section 27(2) (a) is clear. While an appellant must within a period of fourteen days file his notice of appeal in respect of interlocutory decision, he is expected to file his notice of appeal in respect of a final decision within three months.

The appellants filed his appeal on 4th October, 1996, instead of 2nd October, 1996. As correctly indicated by my learned brother in the lead judgment, Iguh, JSC, the appeal was filed two days out of time vide Section 27(2) (a) of the Supreme Court Act. In the circumstances, I expected the appellant to seek leave to appeal out of time. That was not done.

Rules of court are meant to be obeyed. They are not made for the fun of rules qua regulations. Failure to obtain leave for extension of time to appeal within the specified time or period is a substantial irregularity which affects the props and foundations of the appeal. It is beyond mere technicality which this court cannot forgive.

In the light of the above and the fuller reasons given by my learned brother, Iguh, JSC., in the lead judgment, the preliminary objection succeeds. The order granting leave to the appellant to appeal out of time is invalid, null and void. The appeal is incompetent and is struck out with N10,000.00 costs to each set of respondents against the appellant.

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