

**SUPREME COURT OF NIGERIA**  
FRIDAY 31ST DAY OF JANUARY, 2003. SC. 135/1999  
**CORAM:- I. L. KUTIGI, M. E. OGUNDARE, U.**  
**MOHAMMED, A. O EJIWUNMI, N. TOBI, JJSC**

EIMSKIP LIMITED ..... APPELLANT  
AND  
EXQUISITE INDUSTRIES NIG LTD ..... RESPONDENT

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COURT PROCESSES - Service - Failure to serve - Effect - Craig v. Kanseen - Where service is required - Such failure is a fundamental vice which invalidates any order made - Against the party not served (H1)

COURT PROCESSES - Service out of jurisdiction - Requirements - Federal High Court Rules 13 & 14 must be complied with - And plaintiff must seek & obtain prior leave to serve (H2)

COURT PROCESSES - Substituted service - Application for - Determination - United Nig. Press Ltd. v. Adebajo - Court must be satisfied that the mode of service - Would give notice to the person to be served (H3)

JURISDICTION - Admiralty - Federal High Court - Applicability - Though the claim came under the jurisdiction - Affidavit in support of plaintiff's motion did not disclose - Appellant's last known address (H4)

**FACTS**

Before the Federal High Court, plaintiff/respondent sued the original defendants in contract and alternatively in tort claiming damages for breach of contract or negligence in that defendants negligently executed a carriage contract that it had with them thereby causing it damages. In the course of the proceedings, respondent applied to the trial court for an order joining appellant as a party to the suit and for a further order that appellant be served all processes through 2nd defendant who was an agent of 1st defendant. The orders were granted as prayed, whereupon appellant, through her

counsel, applied to the court to have the order for the service against her set aside.

The learned trial judge dismissed appellant's application on the ground that she was a necessary party to the suit. In so doing, the court did not address the prayer of appellant asking for a setting aside of the order for service. Appellant's appeal to the Court of Appeal was dismissed for the same reason for which his application was dismissed by trial court. Appellant has come on a further and final appeal to the Supreme Court. She is still contesting the propriety of the order for service on her through 2nd defendant who was not even purported to be her agent.

### **ISSUE FOR DETERMINATION**

Whether the order for service on the party joined by order of court is proper or not.

**HELD** (Unanimously allowing the appeal per  
**OGUNDARE JSC)**

*COURT PROCESSES - Service - Failure to serve - Effect*

**1. The importance of service of process has been underlined in number of cases both in this Country and in England. In *Craig v. Kanseen* (1943) KB 256 at pp. 262-263; (1943) 1 All ER 108 at p. 113 Lord Greene, MR observe:**

***“In my opinion, it is beyond question that failure to serve process where service of process is required goes to the root of our conceptions of the proper procedure in litigation. Apart from proper ex parte proceedings, the idea that an order can validly be made against a man who has had no notification of any intention to apply for it has never been adopted in this country. It cannot be maintained that an order which has been made in those circumstances is to be treated as a mere irregularity and not as something which is affected by a fundamental vice. The affidavit of service in the present case was on the face of it insufficient, and no order should have been completed on the strength of it.”***

**This case was followed by this Court in *Skenconsult v. Ukey* (1981) 1 S.C. 6 at p.26.**

**The rules of the Federal High Court in force at the time of these proceedings required service to be personal unless otherwise directed by the Court Order X rule 3 provided:**  
(p. 148 B)

*COURT PROCESSES - Service out of jurisdiction - Requirements*  
**2. It is not in dispute that the Appellant resided, and still resides, in Iceland out of the jurisdiction of the Federal High Court. It is equally not in dispute that she had no place of business in this Country. It follows that if service of court process had to be served on her, the rules governing service out of jurisdiction must be complied with, that is, there must be compliance with rules 13 and 14. It is futile arguing that the Plaintiff's motion dated 22nd December, 1992 and filed on 23/2/92 seeking to serve the Appellant with Court processes through the 2nd Defendant complied with rules 13 and 14. The affidavit in support of the motion failed to show "in what place or country such defendant is or probably may be found." The motion itself was not for leave to serve processes out of jurisdiction. It is apparent on the face of the motion papers that the Plaintiff was more concerned with her prayer for joinder that she paid little or no attention to the requirements of the rules as to service out of jurisdiction.** (p. 150 B)

*COURT PROCESSES - Substituted service - Application for*  
**3. The Court below cited the case of United Nigeria Press Ltd. & Anor. v. T. O. Adebajo (1969) ANLR 422 and rightly held that the facts therein were dissimilar to the facts of the present case. But the principle upon which that case was decided equally applies here. Fatayi Williams, JSC., (As he then was) delivering the Judgment of this Court in that case said at pages 423-424 of the report:**

**"Since the primary consideration in an application for substituted service is as to how the matter can be best brought to the attention of the other party concerned, the court must be satisfied that the mode of service proposed would probably, after all practicable means of effecting personal service have proved abortive, give him notice of the process con-**

*cerned.” (Underlining are mine)*

*In the case on hand, the affidavit in support was not only silent on where the Appellant resided but stated in clear terms that the 2nd Defendant on whom service was to be effected on behalf of the Appellant, was agent of the 1st Defendant.*

*B How would the Appellant be given notice of the suit against her when service of court processes were to be effected on her through the agent of a third party? I think the two Courts below were grossly in error not to have set aside the order of service made on 6th January, 1993. (p. 150 G)*

*JURISDICTION - Admiralty - Federal High Court - Applicability*

*D 4. No doubt the claim of the Plaintiff would come under the admiralty jurisdiction of the Federal High Court by virtue of Section 2(3)(d) of the Act. However, Order V rule 12 of the Admiralty Procedure Rules, 1993 made under the Act provides:*

*“12. Where*

*E (a) An action in rem is commenced against a ship or other property which has been abandoned in Nigeria; or*

*(b) An action in personam is filed against a defendant who does not reside in or carry on business in Nigeria through an agent,*

*F The Court may order service on such defendant or the owner of such ship or property at the address of his last known place of business by a reputable courier company operating a courier service between Nigeria and the country of the place of business.”*

*G Surely, this rule is relevant in the action on hand as it is an admiralty action. But the affidavit in support of plaintiff’s motion of December, 1998 did not disclose the last known place of business of the Appellant. Nor was the order made one of service by a reputable courier company. There is again*

*H non-compliance with that rule. (p. )*

**NOTABLE POINT OF INTEREST**  
**TOBI JSC**

***1. Oral evidence should be used in resolving conflicts in affidavits***

It is trite law that where affidavit evidence are in conflict, oral evidence should be led to reconcile the conflict, unless there is documentary evidence which can tilt the contradictory or 'quarreling' evidence one way or the other. In *Chief Atanda v. Olanrewaju* (1988) 10-11 S.C. 1 (1988) 4 NWLR (Pt.89) 394, this court held that where depositions in affidavits of contesting parties conflict, the court is not allowed to prefer one deposition to the other. In cases of such conflict, the only course open to the court in order to resolve the conflict is to hear oral evidence. The learned trial Judge was in grave error when he ruled on the motion to set aside his earlier order of service, without calling oral evidence on, the conflicting affidavit evidence. (p. 155 F)

**REPRESENTATION**

C. A. Candide-Johnson, for the Appellant  
Uche Ohadugba, for the Respondent

**CASES REFERRED TO**

*Oke v. Aiyedun* (1986) 2 NWLR (Pt. 23) 543  
*Okere v. Nlem* (1992) 4 NWLR (Pt. 234) 132  
*Craig v. Kanseen* (1943) KB 256  
*Omisade v. Akande* (1987) 2 NWLR (Pt. 55) 158  
*Ode v. The Diocese of Ibadan* (1966) 1 All NLR 287  
*Harriman v. Harriman* (1987) 3 NWLR (Pt. 60) 244  
*Metal Construction (W.A.) Ltd. v. Migliori* (1979) 6-9 S.C. 163  
*Federal Housing Authority v. Aro* (1991) 1 NWLR (pt. 168) 405  
*Momah v. Vab Petroleum Inc.* (2000) 2 S.C. 142; (2000) 4 NWLR (Pt. 654) 534

**STATUTE & RULES REFERRED TO**

Admiralty Jurisdiction Act, 1991  
Federal High Court Rules (1976), O. X r 3, O. X VI r. 1, O. V r 12

**LEAD JUDGMENT BY OGUNDARE JSC**

The only question that calls for determination in this appeal is as to whether the order for service on the party joined by order of

court is proper or not. The action was originally between the Respondent to this appeal, EXQUISITE INDUSTRIES (NIG) LIMITED, who as Plaintiff had sued the 1st and 2nd Defendants, that is OWNERS OF MOTOR VESSEL BACOLINECI-3 and BRAWAL SHIPPING NIGERIA LIMITED claiming-

- B *"The Plaintiff's as owners of 3,517 Bales of stockfish heads with collarbones lately laden in bad, multiple rusty, putrid and not suitable containers on board the 1st Defendant's ship BACOLINER 1, BACOLINER 2 AND BACOLINER 3 and as holders of Bills of Lading No. C413 dated 14-11- 1990, C 406 dated 12/6/1991, No. C425 26/6/1991, C402 dated 28/8/1991, C414 dated 11/12/1991, C413 dated 25/12/1991, C412 dated 16/10/1991, C403 date 6/3/ 1992 and C419 dated 16/3/1992, whereunder with said Bales of stockfish heads with collarbone were shipped claim damages from*
- C *D the Defendants for loss and/or damages of the said Bales of stockfish heads with collarbone during the voyage to Onne and Port-Harcourt from about the month of July, 1991, to about the month of June 1992, sustained by reason of the Defendant breach of contract and/ or duty and/or negligence in and about the carriage thereof.*
- E *(1) SPECIAL DAMAGES including cost, customs duty, clearing charges, Transport and Bank charges.....\$358,262.72 US.D*
- (2) GENERAL DAMAGES.....N1,000,000 AND the Plaintiff claims the sum of 358,262.72 US Dollars and N1,000,000 together*
- F *with interest at the rate of 35% per annum from the 23rd day of July, 1991, and costs."*

In the course of the proceedings in the case, the Respondent applied to the trial Court - the Federal High Court, for orders-

- G *"1. Joining EIMSKIP who were the original carriers of the containers in dispute as a party to the suit.*
- 2. To serve EIMSKIP all Court processes through the 2nd Defendant who is agent of the 1st Defendant (the final, carriers)".*

In the affidavit in support of the application, one Isioma Okonjo deposed inter alia, as follows:

- H *"That Uche Ohadugha of counsel told me and I verify believe him that:*
- (a) The defendants have been served with the writ of summons in this suit.*
- (b) While going through a series of files and documents con-*

*nected with the transactions leading to this Suit, he discovered that EIMSKIP was the original carrier who conveyed the containers from REYKJAVIK to HAMBURG before the vessels "Bacoliner 2" conveyed same from Human HAMBURG to PORT HARCOURT. A letter written by EIMSKIP with reference No. CLA-IN/BRU VOY 0230-0 of 31-5-1991 to Nordigh Ltd. is hereto annexed and marked Exhibit' B A'.*

*(c) In the letter referred to in paragraph 3(b) above, EIMSKIP disclaimed liability for the damaged goods and shifted same unto owners of Bacoliner'*

*(d) If EIMSKIP is joined as a party in this suit all matters in controversy in this suit will be effectually and effectively determined.*

*(e) If the said EIMSKIP is joined it will be bound by the final decision of this court in this Suit.*

*(f) If the processes of Court in this Suit are served through the 2nd defendant who is agent of the 1st Defendant, they will get to the party sought to be joined.*

*(g) It will serve the ends of justice to join EIMSKIP as a party to this suit as the defendants on record will not be prejudiced."* (Underlining is mine)

The learned trial Judge, (Mamman Kolo, J.), granted the prayers as prayed and ordered as follows:

*"IT IS ORDERED that EIMSKIP, the original carriers of the containers in dispute is hereby joined as the 3rd Defendant in this Suit.*

*IT IS ALSO ORDERED that all the relevant Court processes so far in this suit and any such processes hereafter be served on the said EIMSKIP through the present 2nd Defendant."*

On learning of the orders made for her joinder, EIMSKIP who is appellant in this appeal and shall hereinafter be so referred, brought a summons through her counsel, C.A. Candide-Johnson, Esq, seeking the following orders:

*"(1) Setting aside the order for services on the 3rd Defendant of the Writ of Summons and other processes herein as well as all and any proceedings against the 3rd Defendant subsequent thereto AND*

*(2) Striking out or dismissing the claim against the 3rd Defendant on grounds that the Federal High Court of Nigeria Has no jurisdiction over the 3rd Defendant in respect of the subject matter of the claim or the relief or remedy sought in the action.*

*That the Plaintiff do pay to the defendant costs of this action."*

In the affidavit in support one Jimmy Uffot deposed, inter alia, as hereunder-

B *"(2) That on 6th January, 1993, this Honourable Court made an order joining the 3rd Defendant as a party to this action and ordered that service of all processes be effected by service on the 2nd Defendant, Brawal Shipping Limited.*

C *(3) That this fact only came to the knowledge of the 3rd Defendant accidentally in the course of transactions in the United Kingdom whereupon counsel was instructed to obtain details.*

*(4) That the Defendant contests the jurisdiction of the Federal High Court of Nigeria to entertain the proceedings against it.*

D *(5) That the subject matter of the putative claim against the 3rd Defendant as alleged by the plaintiff in its own affidavit sworn to on 23rd December, 1992, is a contract of carriage performed between Reykjavik in the Kingdom of Iceland and Hamburg in Germany.*

E *(6) That the said subject matter has no connection whatsoever with Nigeria having been entered into in Iceland and being performed by the 3rd Defendant exclusively outside Nigeria.*

*(7) That the 3rd Defendant made no contract of carriage with the Plaintiff but with one Nordfish Limited of Iceland.*

F *(8) That neither the claim nor the defence can be established without calling evidence including the officers of the said Nordfish Limited in Iceland, officers, agents and compendious documents of the 3rd Defendant which are also in Iceland and in Germany.*

*(9) That the 3rd defendant is not party to the alleged contractual relationship between the Plaintiff and the 1st or 2nd Defendants.*

G *(10) That the 3rd Defendant is not resident within the jurisdiction of this Court, has no branches, subsidiaries or assets herein, neither has it traded to this jurisdiction and it therefore has no connection whatsoever with this jurisdiction.*

H *(11) That Brawal Shipping Limited is not and has never been, an agent of the 3rd Defendant.*

*(12) That if all these facts had been put before this Honourable Court by the Plaintiff neither the order to join the 3rd Defendant or the order to serve processes through Brawal Shipping Limited within Nigeria upon a person outside the jurisdiction would have been made.*



(Underlining are mine)

There was a counter-affidavit sworn to by one Kalu Okuro in which he deposed inter alia-

*"3. That by various Bills of Lading issued in respect of Plaintiff's goods by the 3rd Defendant, the 3rd Defendant acknowledged the various shipments aboard their vessels in apparent good order and condition for carriage to and delivery to Port-Harcourt. The copies of the various Bills of Lading are hereto annexed and marked Exhibits 'A1 - 9'.*

*(4) That the freight for the whole transport and/or carriage of the Plaintiff's goods to Port-Harcourt was paid and collected by the 3rd Defendant.*

*(5) That following the complaints regarding damages and losses incurred by the plaintiff as a result of provision of scrap and old containers for the carriage of Plaintiff's goods from Reykjavik to Port-Harcourt, the 3rd Defendant made an undertaking on the 6th May, 1992, to provide Sea worthy containers. This document dated 6th May, 1992, is hereto annexed and marked Exhibit 'B'.*

*(6) That the Plaintiff sustained serious damage and losses to his goods despite the undertaken (sic) aforesaid in paragraph 5.*

*(7) That the 3rd Defendant has always been informed through the 2nd Defendant and the Shipper of the losses and damages and had continued to push the blame to the 1st Defendant. A letter to the Shipper by the 3rd Defendant dated 31-5-1991 is hereto annexed and marked Exhibit 'C'.*

*(8) That in their relay race, the Plaintiff is not in a position to know or determine at what point in the journey to Port-Harcourt, water penetrated the container and caused damage to the stockfish.*

*(9) That the Plaintiff as owners, receivers, consignee and/or holder of the said Bills of lading is a Nigerian company.*

*(10) That all documents and evidence in this case survey then issued by Port Inspectors, Nigerian Customs and Independent surveyors with respect to the goods and particularly as to quality are in Nigeria, and or the balance of convenience better for Nigerian Courts to exercise jurisdiction.*

*(11) That the Plaintiff's claim has through the 2nd Defendant always been made known to the 1st and 3rd Defendants who have employed all tactics to frustrate the same. Letters from Shipowners*

*Mutual Protection and Indemnity Association to Standard Club London and the 2nd Defendant dated 23rd July, 1992, are hereto annexed and marked Exhibits 'D and E'.*

B (12) *That Courts in Germany and/or Iceland cannot entertain this Suit on ground of procedural difficulties with regard to the same being time-barred.*

C (13) *That this Honourable Court made an order on the 6th January, 1993, properly joining the 3rd Defendant as a party to the suit and for service of the Court processes to the affected through the 2nd Defendant.*

(14) *That the 3rd Defendant has been so joined as a party to the suit and has notice of the proceedings in this Court.*

D (15) *That it will serve the ends of justice if all the parties involved in the transaction and carriage of the goods are joined in this Suit.*

(16) *That neither the Plaintiff nor the Defendants would be prejudiced if all the facts and issues particularly the loss and damage suffered and gross negligence exhibited in this matter are properly brought before the Court."*

E In a further affidavit sworn to by one Churchill Oliseh, it was averred that-

"(2) That the plaintiff relies entirely on bills of lading issued by the defendants for its claim.

F (3) *That none of the bills exhibited by the plaintiff shows a contract between the plaintiff and the third defendant and all the documents show that the liability and performance of the third defendant was between Iceland and Germany.*

G (4) *That in performing the last of its obligations at Hamburg, the third defendant trans-shipped goods as freight forwarded on behalf of Nordfish Limited and has never acted for the plaintiff*

*(5) That third defendant repeats that it has no relationship at all with Brawal Limited and since it does not trade in Nigeria at all it has no obligation in Nigeria for which an agent is needed.*

H (6) That the letter dated 6th May, 1992, is not an undertaking of any kind but an assertion in response to claims on bill of lading No. C403 but this like the most part of the plaintiffs averments concern the merits of it's claim and not the simple issue of jurisdiction." (Underlining are mine)

Kalu Okoro swore to a further counter-affidavit in which he deposed:

*“3. That the 3rd Defendant had always known about the claims in the above suit.*

*4. That on or about the 15th February, 1992, a representative of the Plaintiff among others visited Iceland from Nigeria in respect of these losses and damage to goods and met with the 3rd Defendant. A copy of the letter to the Shipper from the 3rd Defendant is annexed herewith and marked Exhibit ‘F’.*

*5. That in all cases of damage to Plaintiff’s goods liner Bills of lading were issued for the containers by the 1st defendant with 3rd Defendant as Shippers and 2nd Defendant named as consignee in respect of all. The copies of these documents are annexed herewith and marked Exhibits”*

It would be observed from the counter-affidavit that all that Plaintiffs sought to show was that the Appellant was a necessary party to the action, No attempt was made to deny that the 2nd defendant through whom the Court had earlier ordered that service be effected on the Appellant, was not an agent of the latter. This fact, notwithstanding, the learned trial Judge in his ruling delivered on 1/4/93 dismissed the Appellant’s application. He held:

*“1. That the 3rd Defendant, as things stand now, has been properly joined as a party, its denial of liability as between it and the other Defendants notwithstanding.*

*2. That since it is not now clear as to when and where the damages occurred, I do not see the justification in letting out, as at now, the 3rd Defendant as a party, the fact that its own duty was between Iceland and Germany notwithstanding. After all it will be in its own interest to get cleared judicially.*

*3. Admittedly, the 3rd Defendant said somewhere that the containers were seaworthy from Iceland. But then if at the end of the case it is not found to be so, especially no affidavit evidence so far showing that there were changes in the containers, it may be too late at that time to ask that the 3rd Defendant be made a party. So once again it is, in my humble and candid opinion, in the interest of the 3rd Defendant to be a part now to show that the said containers were, in actual fact, seaworthy during and when they were under care from Iceland and Germany.*

4. *In respect of the jurisdiction of this court to hear the 3rd Defendant, this has been amply taken care of by the provisions of the Admiralty Jurisdiction Decree No. 59 of 1991 in its Sections 3, 19 and 20(a), (b), (f) and (h). ”*

It will be observed that the learned trial Judge did not address prayer (1) seeking to set aside the order for service.

The Appellant appealed to the Court of Appeal, which in a unanimous decision, dismissed the appeal. The grounds of appeal were based on the failure of the trial Judge to set aside the order of service and challenged the correctness of the Judge’s decision on jurisdiction. The Court of Appeal, in the lead judgment of Aderemi, JCA., found:

*“The point is that the presence of the appellant in this suit is necessary for the effectual and complete determination of all the issues arising in this case. The conclusion I arrive at on this point is that the lower court was right in joining the appellant as a party.”*

2. *“The appellant has also contended that the service of processes on it was not proper in law maintaining therefore that the lower court ought to have set the service aside. Two letters dated 23rd July, 1992, from Shipowners Mutual Protection and Indemnity Association to Standard Club of London and the 2nd defendant show that the 2nd defendant has always been the medium through which correspondences were sent to the appellant. I have read the decision of the Supreme Court in United Nigeria Press Limited & Anor. v. J. O. Adebajo (1969) 1 All NLR 431 and I am of the view that the facts in that case are quite dissimilar to the facts of the instant case. It was clearly asserted in the aforementioned exhibits that the appellant was always reached through the 2nd defendant although in an affidavit before the counter-affidavit to which the said exhibits were attached the appellant had denied that the 2nd defendant was its agent, there was no reaction to the counter-affidavit evidence. The service of the process on the appellant through the 2nd defendant cannot therefore be faulted.”*

3. *“The result of all I have said supra is that with the conveyance of good from Iceland to Port-Harcourt, Nigeria as far as the respondent is concerned, a fact to which the appellant by its act has consented, the appellant, was at the material time carrying on business in Nigeria and it has thus submitted to jurisdiction and on the*

*decision of the Supreme court in American International Insurance Co. v. Ceekay Traders Limited (1981) 5 S.C. 81, the Federal High Court has jurisdiction to entertain this suit and the appellant is a necessary party who has been properly joined."*

It must again be observed that the joinder of the appellant was not an issue properly arising from the grounds of appeal before the Court. B

The Appellant, being dissatisfied with the judgment of the Court of Appeal has further appealed to this Court upon two grounds of appeal which, read: C

**"GROUND ONE**

*The Honourable Justices misdirected themselves when they concluded that the Appellant was a necessary and proper party to the action.*

*Particulars* D

*(a) The learned Justices confused the ex parte order of the Federal High Court dated 6th January, 1993 with the ruling of 1st March, 1993 which arose from the Appellant's challenge to part of the order of 6th January, 1993.*

*(b) The Appellant did not challenge the part of the decision of 6th January, 1993 dealing with joinder and did not complain of misjoinder in its appeal against the decision of 1st March, 1993.* E

*(c) No issue of joinder arose from any ground of appeal filed by the Appellant.*

**GROUND TWO** F

*Particulars*

*(a) The Respondent's claim is for breach of contract contained in a bill of lading and there was no basis for the confusing importation of the so-called 'neighbourhood principle' from the distinct tort of negligence and on which basis the justices concluded that the Appellant owed a duty of care actionable in Nigeria.* G

*(b) The entry into contract of carriage between Reykjavik, Iceland and Port Harcourt, Nigeria (with the right, validly exercised to tranship on a different carrier in Hamburg, Germany) does not on fact or law amount to carrying on business in Nigeria and the Appellant never carried on business in Nigeria.* H

*(c) The performance of the Appellant of the bill of lading contract terminated by contemplation of the parties when the goods were*

*transhipped to the 1st and 2nd Defendants vessel in Hamburg, Germany.*

(d) *There was no actionable act attributable to the Appellant within the territory of Nigeria.*

(e) *It was never denied that one Brawal Shipping Limited (as Nigerian Company upon which service for the Appellant was purportedly effected) was not agent of the Appellant for purposes of service or for purposes of doing business in Nigeria.*

(f) *Neither the alleged letters from Shipowners Mutual Protection and Indemnity Association and Standard Club of London or the said Brawal Shipping Limited purported to appoint Brawal as the Appellant's agent and the inference of agency purportedly made by the Honourable Justice from this medium of communication is entirely unwarranted.*

(g) *No leave was sought to serve the Appellant extra territorially or by substituted means and there was no provision in the Federal High Court (Civil Procedure) Rules warranting the purported service ordered by the learned Judge on 6th March, 1993.*

(h) *The service was a device to overreach the limits expressly made for assertion of extra territorial jurisdiction.*

(i) *There was no ground to assert personal jurisdiction over the Appellant.*

(j) *The jurisdiction asserted is so strange to private international law principles that it will not be effective in the jurisdiction where it must be enforced, i.e. the Kingdom of Iceland".*

From these two grounds of appeal, the Appellant has in her brief, distilled two questions for determination, to wit:

"1. *Whether delivery to Brawal (who is not its agent) is proper service on a foreign Defendant outside the physical territory and who is not doing business in Nigeria either with, or (as in this case) without leave of the Federal High Court.*

2. *Whether the Appellant has submitted to jurisdiction by terms of the through bill of lading or because letters sent to Brawal after the dispute arose is alleged to have come to its attention"*

I pause here to observe that as there is no specific ground of appeal challenging the decision of the Court below on jurisdiction, question (2) does not arise for consideration. Particulars (i) and (j) to Ground 1 should have been made a separate ground of appeal. At

the oral hearing of the appeal, learned counsel for the Appellant did say he was only concerned with the propriety of the order of service made by the trial court. I shall, therefore, confine myself to that issue only.

The Plaintiffs, however, in her brief formulated three issues as arising for determination, that is to say:

*“1. Whether the Appellant would be required at any time to adduce cogent evidence of the stage in the contract of carriage of the Respondent’s goods and/or cargo from Iceland to Port-Harcourt, at which the loss and or damage occurred and whether there were any factors which could link the Appellant to the same.”*

*2. Whether Brawal Shipping (Nig.) Ltd., (The 2nd Defendant in the proceedings at the lower Court) constitute the Agent of the 3rd Defendant, the contract of carriage of the Respondent goods from REYJKYAVIK ICELAND to Port-Harcourt and has in any way at all justified the order of Court which permitted or allowed service of process on her in compliance with Federal High Court (Civil Procedure) Rules.*

*3. Whether the Federal High Court of Nigeria could rightly assert and claim jurisdiction over the appellant and/or in this matter through such other powers and/or as conferred by the admiralty Jurisdiction Decree, 1991.”*

Issues 1 and 3 do not arise from the Appellant’s grounds of appeal before us. Only her issue 2 appears to raise the issue of service and that is the only issue arising in this appeal.

I have carefully considered the arguments advanced by learned counsel for the parties, both in the Appellant’s Brief, Respondent’s Brief and Appellant’s Reply Brief and in oral arguments. The pith and kernel of arguments of learned counsel for the Appellant is that Plaintiff could not serve the Appellant through the 2nd Defendants, Brawal Shipping (Nig.) Limited as the latter was not the agent of the Appellant as required both by the Federal High Court (Civil Procedure) Rules, 1976, then in force at the time of the proceedings in this case. It was contended that the Plaintiff did not seek leave to serve the Appellant by substituted service. It was, therefore, argued that the order for service made by the learned trial Judge was irregular and ought to be set aside.

For the Plaintiff, learned counsel, Mr. Ohadugha argued that

the 2nd Defendant was the agent of the Appellant in and for the purpose of the transaction of carriage of Plaintiff 's goods and the trial court acted correctly under the Federal High Court Rules (1976) and the Admiralty Jurisdiction Act, 1991, in making the order that service of processes in the case be effected on the Appellant through the 2nd Defendant. He urged us to affirm the decision of the Court below.

***The importance of service of process has been underlined in number of cases both in this Country and in England.***

In *Craig v. Kanseen* (1943) KB 256 at pp. 262-263; (1943) 1 All ER 108 at p. 113 Lord Greene, MR observe:

*"The question, therefore, which we have to decide is whether the admitted failure to serve on the defendant the summons on which the order of January 18, 1940, was based was a mere irregularity, or whether it gives 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 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 has never been adopted in this country. It cannot be maintained that an order which has been made in those circumstances is to be treated as a mere irregularity and not as something which is affected by a fundamental vice. The affidavit of service in the present case was on the face of it insufficient, and no order should have been completed on the strength of it."*

This case was followed by this Court in *Skenconsult v. Ukey* (1981) 1 S.C. 6 at p.26 where Nnamani, JSC., observed:

*"The service of process on the defendant so as to enable him appear to defend the relief being sought against 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 rules of the Federal High Court in force at the time of these proceedings required service to be personal unless otherwise directed by the Court Order X rule 3 provided:***



*“3. Unless in any case the Court thinks it just and expedient otherwise to direct, service shall be personal; that is, the document to be served shall be delivered to the person to be served himself. Provided that where a party is represented by a legal practitioner or by some person permitted under rule 1 of Order XVI to appear on his behalf, service of any document may be effected on his representative unless the Court shall have otherwise ordered.”* B

The proviso to the rule is not relevant in this case. Rule 5(b) of the Order provided-

*“5. Where it appears to the Court (either after or without an attempt at personal service) that for any reason personal service cannot be conveniently effected, the Court may order that service be effected either-* C

*5.(b) by delivery thereof to some person being an agent of the person to be served, or to some other person, on it being proved that there is reasonable probability that the document would be in the ordinary course, through that agent or other person, come to the knowledge of the person to be served;”* D

Other rules of the Order X relevant to the issue of service are:

Rule 11, E

*“11. Where the suit is against a defendant residing out of, but carrying on business within the jurisdiction in his own name or under the name of a firm through an authorised agent, and such suit is limited to a cause of action which arose within the jurisdiction, the writ or document may be served by giving it to such agents, and such service shall be equivalent to personal service on such defendant.”* F

Rule 12,

*“12. Service out of the jurisdiction may be allowed by the Court whenever all or any part of the cause of action arose within the jurisdiction.”* G

Rules 13.,

*“13. Every application for an order for leave to serve a writ or notice on a defendant out of the jurisdiction shall be supported by evidence by affidavit or otherwise showing in what place or country such defendant is or probably may be found, and the ground upon which the application is made”.* (underlining are mine) H

and Rule 14.

*“14. Any order giving leave to effect service out of the jurisdic-*

*tion shall prescribe the mode of service, and shall limit a time after such service within which such defendant is to enter an appearance, such time to depend on the place or country where or within which the writ is to be served, and the Court may receive an affidavit or statutory declaration of such service having been effected as prima facie evidence thereof."*

***It is not in dispute that the Appellant resided, and still resides, in Iceland out of the jurisdiction of the Federal High Court. It is equally not in dispute that she had no place of business in this Country. It follows that if service of court process had to be served on her, the rules governing service out of jurisdiction must be complied with, that is, there must be compliance with rules 13 and 14. It is futile arguing that the Plaintiff's motion dated 22nd December, 1992 and filed on 23/2/92 seeking to serve the Appellant with Court processes through the 2nd Defendant complied with rules 13 and 14. The affidavit in support of the motion failed to show "in what place or country such defendant is or probably may be found." The motion itself was not for leave to serve processes out of jurisdiction. It is apparent on the face of the motion papers that the Plaintiff was more concerned with her prayer for joinder that she paid little or no attention to the requirements of the rules as to service out of jurisdiction.*** Undoubtedly, on the facts of this case the relevant rules are rules 12, 13 and 14 of Order X. As there was non-compliance by the Plaintiff with those rules, her prayer (2) for service of court processes ought to have been refused by the learned trial Judge and he should have set the same aside on the application of the Appellant. The Court below too ought not to have affirmed the order for service made by the learned trial Judge but should have set it aside following the refusal of the latter to do so.

***The Court below cited the case of United Nigeria Press Ltd. & Anor. v. T. O. Adebajo (1969) ANLR 422 and rightly held that the facts therein were dissimilar to the facts of the present case. But the principle upon which that case was decided equally applies here, Fatayi Williams, JSC., (As he then was) delivering the Judgment of this Court in that case said at pages 423-424 of the report:***

*"In our opinion, the object of all types of service of processes,*

*whether personal or substituted service is to give notice to the other party on whom service is to be effected so that he might be aware of, and able to resist, if he may, that which is sought against him. Therefore, since the primary consideration in an application for substituted service is as to how the matter can be best brought to the attention of the other party concerned, the court must be satisfied that the mode of service proposed would probably, after all practicable means of effecting personal service have proved abortive, give him notice of the process concerned.*” (Underlining are mine)

**In the case on hand, the affidavit in support was not only silent on where the Appellant resided but stated in clear terms that the 2nd Defendant on whom service was to be effected on behalf of the Appellant, was agent of the 1st Defendant. How would the Appellant be given notice of the suit against her when service of court processes were to be effected on her through the agent of a third party? I think the two Courts below were grossly in error not to have set aside the order of service made on 6th January, 1993.**

Our attention has been drawn by learned counsel for the Plaintiff to the Admiralty Jurisdiction Act, 1991. No doubt the claim of the Plaintiff would come under the admiralty jurisdiction of the Federal High Court by virtue of Section 2(3)(d) of the Act. However, Order V rule 12 of the Admiralty Procedure Rules, 1993 made under the Act provides:

*“12. Where*

*(a) An action in rem is commenced against a ship or other property which has been abandoned in Nigeria; or*

*(b) An action in personam is filed against a defendant who does not reside in or carry on business in Nigeria through an agent,*

*The Court may order service on such defendant or the owner of such ship or property at the address of his last known place of business by a reputable courier company operating a courier service between Nigeria and the country of the place of business.”*

Surely, this rule is relevant in the action on hand as it is an admiralty action. But the affidavit in support of plaintiff’s motion of December, 1998 did not disclose the last known place of business of the Appellant. Nor was the order made one of service by a reputable

courier company. There is again non-compliance with that rule.

For the reasons given above, I allow this appeal, set aside the judgment of the Court of Appeal affirming the refusal of the trial court to set aside its order of January, 1993, relating to the service of court processes on the Appellant. I order that that order be set aside.

B I award to the Appellant N10,000.00 costs of this appeal, N3,000.00 costs in the Court of Appeal and N2,000.00 costs in the trial Federal High Court.

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**KUTIGI JSC**

I read in advance the judgment just delivered by my learned brother, Ogundare, JSC. I agree with him to allow the appeal and set aside the orders of the lower Courts relating to service of Court processes on the Appellant. I endorse the order for costs.

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**MOHAMMED JSC**

E I entirely agree with my learned brother, Ogundare, JSC., that this appeal should be allowed. It is abundantly clear that the proper procedure was not followed in serving the court process on the appellant. Where there is fundamental failure to comply with the requirement of a statute the issue is not of irregularity, but a nullity. The issue is that requirement of initiation of proceedings must start with  
F the seal of issuing office. Proceedings which appear to be duly issued but failed to comply with a statutory requirement for initiation of proceedings are null and void.

I allow this appeal. I set aside the judgment of the Court of  
G Appeal in which it affirmed the refusal of the trial High Court to set aside its order which was given contrary to the court rules on service of court processes. I award the appellant N10,000.00 costs of this appeal; N3,000.00 costs in the court below and N2,000.00 costs in the Federal High Court.

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**EJIWUNMI JSC**

I was privileged to have read the draft of the judgment just delivered by my learned brother, Ogundare, JSC. I have therefore

had the opportunity of considering the judgment in terms of the facts and the issues raised in this appeal. Being satisfied that my learned brother has fully considered all the issues raised in the appeal, I am in full agreement with him that the appeal has merit. I will therefore also allow the appeal and I abide with other consequential order made in the said judgment.

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**TOBI JSC**

I have read the judgment of my learned brother, Ogundare, JSC., and I agree with him that this appeal should be allowed.

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The appellant is an Iceland Company. It is based in Reykjavik, Iceland. It has no business office or any connection with any business in Nigeria. It is at all times physically outside the territory of the Federal Republic of Nigeria.

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By order of the Federal High Court of Lagos, the appellant was joined as a defendant in proceedings against the Vessels MV Bacoliners 1 -3 (as 1st defendant) and their agent in Nigeria, one “Brawal” (as 2nd defendant) in respect of a claim on contract of carriage by sea. The goods were carried from Iceland and discharged in Hamburg according to terms of the bill of lading. In Hamburg they were “transhipped” according to express terms on the face of the bill of lading contract and carried to Nigeria on the Vessels MV Bacoliners 1-3 by principals of Brawal.

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The learned trial Judge ordered that delivery of original processes on Brawal who is not agent and with whom the appellant has no business relationship is sufficient service on the appellant. The appellant’s motion to set aside the service and dismiss the claim for want of in personam jurisdiction was dismissed by the trial Judge. An appeal to the Court of Appeal was dismissed.

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In his lead judgment, Aderemi, JCA., said at page 159 in the penultimate paragraph:

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*“The result of all I have said supra is that with the conveyance of goods from Iceland to Port Harcourt, Nigeria as far as the respondent is concerned, a fact to which the appellant by its act has consented, the appellant, was at the material time carrying on business in Nigeria and it has thus submitted to jurisdiction and on the decision of the Supreme Court in American International Insurance Co. v.*

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*Ceekay Traders Limited (1981) 5 S.C. 81, the Federal High Court has jurisdiction to entertain this suit and the appellant is a necessary party who has been properly joined."*

Dissatisfied with the judgment, the appellant has come to this court., Briefs were filed and duly exchanged. Counsel presented oral arguments in vindication of their briefs.

Although the issue of service was raised in the court below, the court did not specifically deal with it, particularly on the issue of substituted service. The learned Justice referred to the issue of service at page 155 of the Record when he said:

*"On the fourth question, the learned counsel contended that the irregularities in the service vitiated the service so effected. Public International Law does not authorise such service and if effected is not recognisable by private international law. The appellant, he further argued, has not submitted to the jurisdiction. It was his final submission that without proper service been effected, the Federal High Court of Nigeria has no jurisdiction over a person who is outside its physical power and that the provisions of the Admiralty Jurisdiction Act, 1991 do not help the situation."*

In an apparent reference to service outside the jurisdiction, the learned Justice said at page 158:

*"The next points I wish to take up are whether the appellant being outside the territorial jurisdiction of Nigeria service of process could be effected on it and if so whether it could be effected through a body ordinarily resident in Nigeria whom the respondent contends is the agent of the appellant a fact which the appellant denied."*

The court thereafter dealt with the principles of jurisdiction and obedience to jurisdiction on the part of all persons, without dealing specifically with the issue of service by substitution raised by the appellant.

This court has jurisdiction to deal with the issue. Section 22 of the Supreme Court Act is the basis for the exercise of the jurisdiction. By the section, the Supreme Court may, inter alia, from time to time, make any order for determining the real question in controversy in the appeal. See generally *Adeleke v. Cole* (1961) 1 All NLR 35; *Ode v. The Diocese of Ibadan* (1966) 1 All NLR 287; *Metal Construction (W.A.) Ltd. v. Migliori* (1979) 6-9 S.C. 163; *Omisade v. Akande* (1987) 2 NWLR (Pt. 55) 158; *Harriman v. Harriman* (1987) 3 NWLR (Pt.

60) 244.

The Rules of the Federal High Court which were in force at the material time will be helpful. Order X rule II provides that where the suit is against a defendant residing out of, but carrying on business within the jurisdiction in his own name or under the name of a firm through an authorised agent, and such suit is limited to a cause of action which arose within the jurisdiction, the writ or document may be served by giving it to such agent, and such service shall be equivalent to personal service on such defendant. B

As His, for Rule 11 to be invoked, the defendant must be carrying on business within the jurisdiction of the court in his own name or under the name of a firm through an authorised agent. In paragraph 10 of the affidavit in support of the motion to set aside the order for service made by the trial Judge, Jimmy Uffot deposed: C

*“That the 3rd Defendant is not resident within the jurisdiction of this court, has not branches, subsidiaries or assets herein neither has it traded to this jurisdiction and it therefore has no connection whatsoever with this jurisdiction.”* D

On the issue of agency, the deponent deposed in paragraph 11 as follows: E

*“That Brawal Shipping limited is not and has never been an agent of the 3rd Defendant.”*

It is clear from the counter affidavit that the respondents joined issues with the appellant on the above two paragraphs and more. It is trite law that where affidavit evidence are in conflict, oral evidence should be led to reconcile the conflict, unless there is documentary evidence which can tilt the contradictory or ‘quarreling’ evidence one way or the other. In Chief Atanda v. Olanrewaju (1988) 10-11 S.C. 1 (1988) 4 NWLR (Pt.89) 394, this court held that where depositions in affidavits of contesting parties conflict, the court is not allowed to prefer one deposition to the other. In cases of such conflict, the only course open to the court in order to resolve the conflict is to hear oral evidence. See also Military Administrator, Federal Housing Authority v. Aro (1991) 1 NWLR (pt. 168) 405; Okere v. Nlem (1992) 4 NWLR (Pt. 234) 132; Momah v. Vab Petroleum Inc. (2000) 2 S.C. 142; (2000) 4 NWLR (Pt. 654) 534. The learned trial Judge was in grave error when he ruled on the motion to set aside his earlier order of service, without calling oral evidence on, the conflicting affidavit F G H

evidence.

I return to 11. There is no evidence, in the language of Rule 11 that the appellant who resides outside the Jurisdiction of the court, carries out business within the jurisdiction of the court, and that is Nigeria. If anything the evidence is clear that the appellant is not a Nigerian company but an Iceland company based in Reykjavik, Iceland. There is no credible evidence that the appellant carries on business in Nigeria under a firm through an authorised agent. If anything, there is credible evidence that Brawal Shipping Limited is not an agent of the appellant. See paragraph 11 of the affidavit in support by Jimmy Uffot and paragraph 5 of the further affidavit by Churchill Oliseh.

Order X, Rule 5(b) provides that *“where it appears to the court (either after or without an attempt at personal service) that for any reason personal service cannot be conveniently effected, the court may order that service be effected either.....by delivery to some person being an agent of the person to be served...”* By the rule, service by substitution on an agent is not automatic and a trial Judge cannot grant such an order without convincing affidavit evidence. Does the affidavit evidence at page 12 of the Record show that personal service was impossible? All that Isioma Okonjo, the deponent, deposed to essentially was for the joinder of the appellant. Paragraph 3(d), (e), (f) and (g) are clear on this. They all deposed to the need to join the appellant, an issue which is no longer before this court. And so I ask, where did the learned trial Judge get the evidence that personal service will not be possible or feasible?

Service is a pre-condition to the exercise of jurisdiction by the court. Where there is no service or there is a procedural fault in service, the subsequent proceedings are a nullity ab initio. This is based on the principle of law that a party should know or be aware that there is a suit against him so that he can prepare a defence. If after service he does not put up a defence, the law will assume and rightly too for that matter, that he has no defence. But where a defendant is not aware of a pending litigation because he was not served, the proceedings held outside him will be null and void.

In the often cited case of *Skenconsult (Nig.) Ltd. v. Ukey* (1981) 1 S.C. 6, Nnamani, JSC., relying on the English decision of *Craig v. Kanseen* (1943) 1 QB 256, held that failure to serve court process



goes to the issue of competence and jurisdiction of the court and in such a case the proceedings are a nullity and any orders made would also be nullities. In *Oke v. Aiyedun* (1986) 2 NWLR (Pt. 23) 543, the Supreme Court referred to its earlier decision in *Skenconsult* and hold that 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 conception of the proper procedure in litigation B

In my humble view, service of a process on a person who is not an agent of the party in the case, is not proper service in law. In this appeal, the service of the process on *Brawal Shipping Nigeria Limited*, in my view, is not service on the appellant, and I so hold. C

For the reasons I have given above and the fuller reasons given by my learned brother, Ogundare, JSC., I also allow the appeal. I also set aside the judgment of the Court of Appeal affirming the refusal of the trial Court to set aside its order of January, 1993, relating to the service of court process on the appellant. I order that, that order be set aside. I abide by the orders as to costs in the lead judgment. D

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