

**SUPREME COURT OF NIGERIA**  
FRIDAY 17TH OCTOBER, 2003. SC. 305/2000  
**CORAM:- S. M. A. BELGORE, U. MOHAMMED,**  
**A. I. IGUH, A. O. EJIWUNMI, D. O. EDOZIE, JJSC**

FAMFA OIL LIMITED ..... APPELLANT  
AND  
1. ATTORNEY-GENERAL OF  
THE FEDERATION ..... RESPONDENTS  
2. NIGERIAN NATIONAL  
PETROLEUM CORPORATION

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COURT PROCESSES - Processing error - Effect on party - Such error should not be visited on a party - Where he has done all that the law requires of him - In respect of the process (H1)

COURT PROCESSES - Originating summons - Purpose - The summons is used where there is no serious dispute as to facts - Save for determination of question of construction - Arising under an instrument (H2)

PRACTICE & PROCEDURE - Procedural irregularity - Effect - Such irregularity should not vitiate a suit - Once it is shown that no party has suffered a miscarriage of justice (H3)

CONSTITUTIONAL LAW - Constitution - Supremacy - Constitution allows for rules of procedure to be made - But does not make procedure to be master of the law (H4)

**FACTS**

Plaintiff/appellant took out an originating summons at the Federal High Court, Abuja, supposedly under order 7 rule 8 of the Federal High Court Rules 2000. However, instead of the summons being signed by the judge as required by the rules, it was signed by a registrar of the court. Upon being served with the summons, 2<sup>nd</sup> respondent raised a preliminary objection contending that the suit was incompetent and liable to be struck out on the basis that the non-signing of the originating summons by the judge rendered the

summons null and void. Appellant argued in response that the non-signing by the judge was a mere irregularity that did not vitiate the proceedings. The trial court in its ruling accepted appellant's argument and held that appellant had done all that was required of him in taking out the summons and that what happened was an administrative error which was a mere irregularity.

Aggrieved, 2<sup>nd</sup> respondent appealed against the ruling of trial court to the Court of Appeal. One of the issues raised by 2<sup>nd</sup> respondent before the Court of Appeal was whether appellant had discharged all its obligations when it paid for and filed the originating summons at the registry. Court of Appeal approached the issue by requiring appellant to prove that he had done all that was required of him. Ultimately the court held that appellant failed to prove as required and thus overturned the ruling of trial court. Dissatisfied, appellant has brought this appeal to Supreme Court.

### **ISSUES FOR DETERMINATION**

*“(i) Whether or not the fact that it was the Registrar and not the Judge who signed the Originating Summons constitutes an incurable irregularity which invalidates the said summons or renders it a nullity.*

*“(ii) In considering the correct answer to Question (i) whether or not it is material whose lapse led to the ‘irregularity’ in the said summons.”*

## **HELD** (Unanimously allowing the appeal per

**BELGORE JSC)**

*COURT PROCESSES - Processing error - Effect on party*

**1. There is no dispute that the appellant went to Federal High Court, Abuja Division, to take out an Originating Summons. He paid all the fees and filed all the papers. The issuance of the summons, under the Rules, should be completed by the judge, sitting in chambers, signing it. The plaintiff taking out Originating Summons deals with court officials, registrars, and not with the Judge. The Registrar is to take the summons to the judge in chambers to sign. It is an administrative affair. The plaintiff in such a situation has no supervisory power over**

**the process leading from the registrar to the judge in chambers. In the instant case, the plaintiff as appellant did all he must do to take out the Originating Summons. The registrar, instead of taking the summons to the Judge in chambers to sign, canceled the printed word "Judge" and superimposed his own signature. Whose failure is this? Certainly the appellant had no hand in this error and should not be visited on it.** (p. 2343 C)

*Originating summons - Purpose*

**2. The very nature of an Originating Summons is to make things simpler for hearing. It is available to any person claiming interest under a deed, will or other written instrument whereby he will apply by Originating Summons for the determination of any question of construction arising under the instrument for declaration of his interest. (Order 38 rule 1 and Order 44 rule 1L). It is a procedure where the evidence in the main is by way of documents and there is no serious dispute as to their existence in the dealings of the parties to the suit. In such a situation, there is no serious dispute as to facts but what the plaintiff is claiming is the declaration of his rights. If there are serious dispute as to facts then a normal writ must be taken out and not Originating Summons.** (p. 2343 F)

*Procedural irregularity - Effect*

**3. A procedural irregularity should not vitiate a suit once it can be shown that no party has suffered miscarriage of justice.**

**There is no allegation of any miscarriage of justice in this matter; in fact the 1st respondent had filed unconditional appearance to the Originating Summons. To my mind, the procedural irregularity like this one which has clearly shown what the plaintiff has as its complaint should not vitiate the proceedings. Procedure is to guide orderly and systematic presentation of a cause, it is to help the substantive law and not to enslave it.** (p. 2344 C)

*Constitution - Supremacy*

**4. It is true, the Constitution allows for the Rules of Procedure to be made but it does not make procedure to be master of the law. After all, all laws have the Constitution as their fountain and they exist only due to the Constitution. The insertion of Section 254 in the Constitution of Federal Republic of Nigeria 1999, is to provide not only for the obvious but to empower who is to make the Rules. Certainly it has not made the rules superior to any law or made the rules more fundamental than any law.** (p. 2344 E)

## NOTABLE POINTS OF INTEREST

### **BELGORE JSC**

#### ***1. He who asserts must prove***

The decision that the appellant had to prove that he did all he had to do, in the circumstance of this case, is a great error. Therefore, in allowing the appeal and holding that the appellant did not prove that he did all he had to do to take out the Originating Summons is shifting the burden of proof on a wrong party. The evidential principle of who asserts must prove has stayed with us for long that it is too late now to change the rule. The second respondent wants the burden to be on the appellant. Thus the appeal to this court that the lower court was in error deserves to be looked into. (p. 2342 G)

### **MOHAMMED JSC**

#### ***2. Breach of rule of practice is mere irregularity***

A breach of the rule of practice can only render a proceeding an irregularity and not a nullity. What happened in the Registry was a technical error and should not be a ground for nullifying proceedings. Where the facts are glaringly clear the court should ignore mere technicalities in order to do substantial justice to the case. (p. 2345 G)

### **IGUH JSC**

#### ***3. Plaintiff's responsibility ends with payment of fees***

I think I ought to stress that once a prospective plaintiff has properly made his claim as required by law, delivered the same to the Regis-

trar for the assessment of the necessary fees payable and such fees are fully paid, his responsibility ceases. What is left to be done, such as the signing of the relevant process or the writ of summons or the issuing of an Originating Summons by a judge or other officer empowered by law to sign them are entirely the domestic affairs of the court and its staff and a plaintiff may not in the interest of justice be unduly penalized for mistake of the court and its staff in connection with such internal matters particularly where no miscarriage of justice, as in the present case, is occasioned. (p. 2348 B)

### **REPRESENTATION**

Chief F.R.A. Williams, SAN with Chief Ladi Williams, SAN, T.E. Williams, SAN, Dan Anyanwu, Esq., Kunle Williams. Esq., and Mohammed Sakah, Esq., for the Appellant  
Adetunji Oyeyipo, Esq., with Olabisi Soyeto (Mrs.) and Miss Bimbo Omotosho), for the 2nd Respondent  
Kolapo Adabale Esq. (Director Civil Litigation) with W.C. Ukelonu (Mrs.) (ACCO), F.K. Bebu (ACCO) and I.C. Ezirim, for the 1st Respondent

### **CASES REFERRED TO**

Falobi v. Falobi (1976) 1 NMLR 169  
Alawode v. Semoh (1959) SCNLR 91  
Doherty v. Doherty (1968) NMLR 241  
Okonjo v. Dr. Odje (1985) 10 S.C. 267  
Sken Consult (Nig) Ltd. v. Ukey (1981) S.C. 6  
Onifade v. Orayiwola (1990) 7 NLR (Pt. 161) 130  
Finnegan v. Cementation Co. Ltd. (1953) 1 QB 688  
Ojukwu v. Onyeador (1991) 7 NWLR (Pt. 203) 286  
Consortium M.C. v. N.E.P.A. (1992) 6 NWLR (Pt. 246) 132  
Saude v. Abdullahi (1989) 7 S.C. (Pt. II) 116  
Bello v. A-G Oyo State (1986) 6 NWLR (Pt. 45) 828  
Okoye v. Nig. Construction Co. Ltd (1991) 6 NWLR (Pt.199) 501  
Western Steel Works Ltd. v. Iron and Steel Workers Union (1986) 3 H NWLR (Pt.30) 617

### **STATUTE & RULES REFERRED TO**

Constitution of the Federal Republic of Nigeria, 1999, s. 254

Federal High Court Rules 2000, O. 7 r. 8

Uniform Rules of High Courts, O. 2 r. 1

**BOOK REFERRED TO**

Aguda - "Practice and Procedure of the Supreme Court, Court of  
B Appeal and High Courts of Nigeria" 1995 Ed

**LEAD JUDGMENT BY BELGORE JSC**

The appellant was plaintiff at the trial Federal High Court, Abuja  
C Division. It took out an Originating Summons ostensibly under Or-  
der 7 Rule 8 of the Federal High Court Rules 2000. That Rule pro-  
vides:

*"An Originating Summons is issued upon its being signed by a  
judge in chambers."*

D Due to an unexplained reason, the Originating Summons sent  
to the defendants (now respondents) was not signed by the judge,  
rather, a registrar of the court by name Ojo, signed the summons.  
When the Originating Summons as signed by the aforesaid registrar  
was served on the respondents, the 1st respondent, the Attorney-  
E General of the Federation, reacted by entering an unqualified ap-  
pearance. The Nigerian National Petroleum Corporation, 2nd re-  
spondent herein, through its counsel, Abdullahi Ibrahim and Co.,  
raised preliminary objection attached to its conditional appearance  
as follows:

F *"That the suit is improper and incompetent and should ac-  
cordingly be struck out."*

**GROUND**

- G 1. Non compliance with Order 7 Rule 8 of the Federal High  
Court (Civil Procedure) Rules, 2000; and  
2. Non-compliance with the statutory provisions for resort to  
arbitration.

At the hearing of the preliminary objection, the 2nd respon-  
dent withdrew the second leg of the objection. The 1st respondent  
H who filed an unconditional appearance, turned round to support the  
preliminary objection of 2nd respondent.

In arguing the objection, learned Senior Advocate, Ibrahim,  
submitted that only a judge must sign the Originating Summons and  
the signature of the registrar instead of the judge on the summons

rendered it null and void. He posited that non-compliance with the Rules of Court rendered the Originating Summons null and void and in consequence incompetent. Thus, according to this line of argument, there was no competent suit before court of trial. The court can only have competent suit before it if the procedural requirements for initiating an action are complied with; therefore if the correct procedure has not been complied with, the court was duty bound to strike out the matter. This is because only correct compliance with the Rules confers jurisdiction on the court. He relied on *Sken Consult (Nig) Ltd, v. Ukey* (1981) S.C. 6, 25; *Western Steel Works Ltd, v. Iron and Steel Workers Union* (1986) 3 NWLR (Pt.30) 617, 627d; *Onifade v. Orayiwole* (1990) 7 NLR (Pt. 161) 130, 1669; *Ojukwu v. Onyeador* (1991) 7 NWLR (Pt. 203) 286, 305, 321. In response to this argument, Ladi Williams, Esq., SAN, submitted that what actually happened with the Originating Summons applied for and taken out by the appellant as plaintiff, was a mere irregularity which did not vitiate the proceedings. He cited Aguda's "Practice and Procedure of the Supreme Court, Court of Appeal and High Courts of Nigeria" 1995 Edition in Chapter 3 where Uniform Rules of Court Order 2 rule 1 was cited and it says:

*"Where in the beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of anything done or left undone, been a failure to comply with the requirements of these rules in respect of time, place, manner, form or content or in any other respect, the failure may be treated as an irregularity and if so treated, will not nullify the proceedings, or any document, judgment or Order therein."*

This is what is contained in the Uniform Rules of High Courts adopted by many states. The Rules of Federal High Court, in Order 3 rule 1 makes similar provision ad verbatim. Learned trial Judge, in his ruling on this preliminary objection, observed correctly that the appellant as plaintiff did all he was required by the Rules of Court in taking out Originating Summons and it was the administrative error of a court official, the Registrar, that committed the "blunder" (as he called it), whereby instead of the judge in chambers he signed the Originating Summons. He overruled the objection and held the error was not fatal to the Originating Summons and was a mere irregularity. This prompted the respondents' appeal to Court of Appeal,

Abuja Division.

The following issues were raised for determination at the Court of Appeal

(1) Who signed the Originating Summons, was it the respondent, its counsel or an official of the court.

B (a) If it is the Registrar or an official of the court, can the 1st respondent be punished for the mistake of the court.

(b) and if it is the counsel to the first respondent, can the respondent be punished for the mistake of its counsel.

C (2) Whether or not the first respondent has discharged all its obligations and or burden imposed upon it by the Rules of Court when it paid for and filed the Originating Summons at the Registry of the Court.

(3) Did the signing of the Originating Summons by another D person other than the Judge amount to an irregularity or a nullity and if it amounts to irregularity, can the irregularity be cured.

The same argument as proffered at trial court was raised in support of the issues. In essence it was submitted that Rules of Court are meant to be obeyed or complied with. A further argument E touched on Section 254 of the Constitution of the Federal Republic of Nigeria, 1999, which gives the head of courts the power to make the rules. What this means, according to the submission, is that the Rules of Court have constitutional force. I will deal with this submission later in this judgment.

F What are the obligations of a party who asked the court for issuance of Originating Summons? The way the issues were framed in Court of Appeal by second respondent as appellant has, to my mind, overstretched what a party must do in the circumstances. The G lower court however resolved the issue by asking for more evidence from the party applying for Originating Summons that he did all he had to do by law, whether substantive or procedural. The decision that the appellant had to prove that he did all he had to do, in the circumstance of this case, is a great error. Therefore, in allowing the H appeal and holding that the appellant did not prove that he did all he had to do to take out the Originating Summons is shifting the burden of proof on a wrong party. The evidential principle of who asserts must prove has stayed with us for long that it is too late now to change the rule. The second respondent wants the burden to be on the ap-

pellant. Thus the appeal to this court that the lower court was in error deserves to be looked into.

The issues in this court by appellant are:

*“(i) Whether or not the fact that it was the Registrar and not the Judge who signed the Originating Summons constitutes an incurable irregularity which invalidates the said summons or render it a nullity.*

*“(ii) In considering the correct answer to Question (i) whether or not it is material whose lapse led to the ‘irregularity’ in the said summons.”*

**There is no dispute that the appellant went to Federal High Court, Abuja Division, to take out an Originating Summons. He paid all the fees and filed all the papers. The issuance of the summons, under the Rules, should be completed by the judge, sitting in chambers, signing it. The plaintiff taking out Originating Summons deals with court officials, registrars, and not with the Judge. The Registrar is to take the summons to the judge in chambers to sign. It is an administrative affair. The plaintiff in such a situation has no supervisory power over the process leading from the registrar to the judge in chambers. In the instant case, the plaintiff as appellant did all he must do to take out the Originating Summons. The registrar, instead of taking the summons to the Judge in chambers to sign, canceled the printed word “Judge” and superimposed his own signature. Whose failure is this? Certainly the appellant had no hand in this error and should not be visited on it.**

**The very nature of an Originating Summons is to make things simpler for hearing. It is available to any person claiming interest under a deed, will or other written instrument whereby he will apply by Originating Summons for the determination of any question of construction arising under the instrument for declaration of his interest. (Order 38 rule 1 and Order 44 rule 1L). It is a procedure where the evidence in the main is by way of documents and there is no serious dispute as to their existence in the dealings of the parties to the suit. In such a situation, there is no serious dispute as to facts but what the plaintiff is claiming is the declaration of his rights. If there are serious dispute as to facts then a normal writ must**

- be taken out and not Originating Summons*** - Doherty v. Doherty (1968) NMLR 241. In matters where facts are not in issue the originating summons, which must be supported by an affidavit of the facts, must be taken out and will become operative once a judge in chambers has signed it thus giving direction for its service. The applicant is not the one to take the summons to the judge, this is a purely administrative matter of the court's registry which does not involve the applicant. Thus, failure of the Judge to sign the Originating Summons is mere procedural irregularity and it cannot by fig of imagination be placed on the shoulders of the plaintiff. Alhaji Dahiru Saude v. Alhaji Hakim Abdullahi (1989) 7 S.C (Pt.11) 116, (1989) 3 NSCC (Vol. 20) 177, 178. ***A procedural irregularity should not vitiate a suit once it can be shown that no party has suffered miscarriage of justice.***
- There is no allegation of any miscarriage of justice in this matter; in fact the 1st respondent had filed unconditional appearance to the Originating Summons. To my mind, the procedural irregularity like this one which has clearly shown what the plaintiff has as its complaint should not vitiate the proceedings. Procedure is to guide orderly and systematic presentation of a cause, it is to help the substantive law and not to enslave it. It is true, the Constitution allows for the Rules of Procedure to be made but it does not make procedure to be master of the law. After all, all laws have the Constitution as their fountain and they exist only due to the Constitution. The insertion of Section 254 in the Constitution of Federal Republic of Nigeria 1999, is to provide not only for the obvious but to empower who is to make the Rules. Certainly it has not made the rules superior to any law or made the rules more fundamental than any law.***

I therefore find that this appeal had great merit and I allow it. I must state that the preliminary objection as to the issues vis-a-vis the ground of appeal has no merit. The nature of this appeal warrants what looks like an irregularity. The appellant admits the Originating Summons was not signed by the Judge, but urges the court to hold that the error was not fatal to the originating summons it is only an irregularity that could be cured. The court can cure it or admit it only as irregularity. Trial court found it as irregularity, though Court of

Appeal held it was fatal to the case, this judgment has seen it as mere error amounting to curable irregularity and it was the fault of court's administration not caused by the appellant. In all irregularities concerning procedure, the main suit should not be vitiated unless miscarriage of justice will thereby be occasioned. The parties to this suit understood what the plaintiff taking out Originating Summons asked for. The fact that an administrative error occurred through the fault of the registry will not destroy the suit. The court should correct its administrative error. B

I allow this appeal and set aside the decision of Court of Appeal. I restore the ruling of trial Federal High Court. The trial Judge shall sign the Originating Summons relating back to when it was taken out. I award N5,000.00 as costs in Court of Appeal and N10,000.00 as costs in this court. C

D

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### **MOHAMMED JSC**

I entirely agree. There is merit in this appeal and for the reasons given in the judgment of my learned brother, Belgore, JSC., the appeal ought to be allowed. Okeke, J., is quite right that the administrative blunder of the registrar signing the Originating Summons instead of the judge as required by Order 7 Rule 8 of the Federal High Court (Civil Procedure) Rules, is a mere irregularity. It is wrong of a court to punish a party for a mistake committed, not by the party, but by the Registry of the court. The Court of Appeal committed an error in trying to distinguish the decision of this court in Saude v. Abdullahi (1989) 7 S.C. (Pt.11) 116; (1989) 3 NSCC 177 from the case in hand. In that case, this court held that failure of a judge to sign an Originating Summons is a procedural irregularity. This court's decision in Saude v. Abdullahi (supra), is therefore on all fours with the situation in the present case. A breach of the rule of practice can only render a proceedings an irregularity and not a nullity. What happened in the Registry was a technical error and should not be a ground for nullifying proceedings. Where the facts are glaringly clear the court should ignore mere technicalities in order to do substantial justice to the case. Singleton, LJ., commenting on a technical issue in the case of *finnegan v. Cementation Co. Ltd.* (1953) 1 QB 688 at 699 observed: E  
F  
G  
H

*“... these technicalities are a blot upon the administration of the law, and everyone except the successful party dislikes them. They decrease in number as the years go on, and I wish that I could see a way round this one.”*

B There is a way round this technical decision of the Court of Appeal and the answer is that the lower court is wrong. Okeke, J., is right to rule that the appellant must not be penalized for the administrative error of the Registrar of the court. For these reasons and fuller reasons in the judgment of my learned brother, Belgore, JSC., I allow the appeal, set aside the judgment of the Court of Appeal and restore the ruling of the trial High Court. I abide by all the consequential orders made in the lead judgment including the assessment and award of costs.

D

### **IGUH JSC**

E I have had the privilege of reading in draft the judgment of my learned brother, Belgore, JSC., just delivered and I am in complete agreement with him that this appeal had merit and ought to be allowed.

F The facts of the case are fully set out in the leading judgment and no useful purpose will be served by my recounting them all over again. It suffices to state that the main issue that has arisen for resolution in this appeal is whether or not the fact that it was the Registrar and not the judge who signed the Originating Summons with which the suit was commenced, constitutes an incurable irregularity that invalidates the summons or renders it a nullity.

G In this regard, Order 7 Rule 8 of the Federal High Court (Civil Procedure) Rules, 2000, provides as follows

*“An Originating Summons is issued upon its being signed by a Judge in Chambers.”*

H It is thus clear that an Originating Summons cannot be said to have been properly issued unless it has been duly signed by a Judge as provided for under the Rules.

In the present case, it is not in dispute that it was the registrar and not a judge who signed the Originating Summons. It is therefore apparent that the signing of the said Originating Summons by the registrar instead of a judge is a violation or contravention of the pro-

visions of the said Order 7 Rule 8 of the Federal High Court (Civil Procedure) Rules, 2000. The real question for determination is the effect of the error by the Registrar signing the appellant's Originating Summons instead of a judge.

Learned Senior Advocate of Nigeria, Chief F.R.A. Williams, did submit that the answer to this question can be found in the provisions of Order 3 Rule 1 of the Federal High Court Rules. That section of the Rules provides thus –

*“Where in beginning or purporting to begin any proceedings ..... there has, by reason of anything done or left undone, been a failure to comply with the requirements of these rules, whether in time, place, manner, form or content or in any other respect, the failure may be treated as an irregularity and if so treated, will not nullify the proceedings, or any document, judgment or order therein.”*

It cannot be disputed that the above section of the Rules confers a discretionary power on the court to treat a wide range of failure to comply with the rules therein specified as “an irregularity”. The learned trial Judge, Okeke, J., was clearly not oblivious of the provisions of the said Order 3 rule 1 of the Federal High Court (Civil Procedure) Rules, 2000, for after a well reasoned consideration of the issue that arose in the case, he concluded thus:-

*“The administrative blunder of one of the Court Registrar who signed the Originating Summons which he is not empowered to do instead of the judge as provided for by the Rules is therefore treated as an irregularity.”*

The above observation of Okeke, J., is in total conformity with the spirit and intent of the rule under consideration. In my view, the fact that it was the registrar who erroneously signed the Originating Summons instead of the Judge did not constitute an incurable irregularity and did not render the process a nullity as the Originating Summons could have been rectified quite easily at such initial stage of the proceedings by the Judge signing the same as required by the Rules. I think, with respect, that the court below was in error to have held otherwise.

Another aspect of this matter is the obvious fact that the appellant, as plaintiff, in the Originating Summons duly initiated its action as prescribed by the Rules. The plaintiff did all that was required of it by law to commence the action. Its Originating Summons was duly

prepared and delivered to the registrar in the usual way for the assessment of the court fees payable. It was duly assessed by the registrar and the necessary fees were fully paid. It is also not in dispute that the plaintiff did comply with all that was required of it by law and the Rules of Court to commence or initiate its action appropriately.

B I think I ought to stress that once a prospective plaintiff has properly made his claim as required by law, delivered the same to the Registrar for the assessment of the necessary fees payable and such fees are fully paid, his responsibility ceases. What is left to be  
C done, such as the signing of the relevant process or the writ of summons or the issuing of an Originating Summons by a judge or other officer empowered by law to sign them are entirely the domestic affairs of the court and its staff and a plaintiff may not in the interest of justice be unduly penalized for mistake of the court and its staff in  
D connection with such internal matters particularly where no miscarriage of justice, as in the present case, is occasioned. See *Alawode v. Semoh* (1959) SCNLR 91.

I should perhaps mention in the above regard that this court for quite some time now has consistently shifted away from the narrow technical approach to justice which characterized some earlier  
E decisions of courts on various matters and now pursues, instead, the course of substantial justice. Accordingly, courts of law should not be unduly tied down by technicalities, particularly where no miscarriage of justice would be occasioned. Justice can only be done in substance  
F and not by impeding it with mere technical procedural irregularities that occasion no miscarriage of justice. See *Consortium M.C. v. N.E.P.A.* (1992) 6 NWLR (Pt. 246) 132 at 142, *Falobi v. Falobi* (1976) 1 NMLR 169; *Bello v. Attorney-General of Oyo State* (1986) 6 NWLR  
G (Pt. 45) 828, *Okonjo v. Dr. Odje* (1985) 10 S.C. 267.

In my view, the fact that the registrar in the present case erroneously signed the Originating Summons instead of the Judge is a technicality that should not be allowed to defeat the cause of justice in the case, particularly when a judge seised of the matter can quite  
H easily sign the same at this stage of the proceedings to enable the hearing of the case to commence and the suit determined on its merits.

It is for the above and the more detailed reasons contained in the judgment of my learned brother, Belgore, JSC., that I, too, allow this appeal, set aside the judgment and orders of the court below and

restore the decision of the trial court dated the 22nd day of January, 2001. It is hereby ordered that this case be remitted to the trial court for a judge to sign the Originating Summons as required by the Rules, to enable the hearing of the suit to commence without delay. It is further ordered that this case be given an accelerated hearing before the trial court. I abide by the order for costs made in the leading judgment. B

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### EJIWUNMI JSC

As I have had the privilege of reading before now the draft of the judgment just delivered by my learned brother, Belgore, JSC., it is my view that the appeal deserves to be allowed for the reasons given in the said judgment. C

The question that was agitated in this appeal is in my respectful view quite straightforward. The question as raised in the appellant's brief reads thus:- D

*“(i) Whether or not the fact that it was the registrar and not the Judge who signed the Originating Summons constitutes an incurable irregularity which invalidates the summons or render (sic) it a nullity. E*

*(ii) In considering the correct answer to question (i), whether or not it is material whose lapse led to the “irregularity” in the said summons.”*

The questions so raised for the determination of this appeal sufficiently cover what has been agitated from the trial court to this court. It is not disputed that the plaintiff duly applied for an Originating Summons to commence the proceedings in this matter against the respondent. It is not also in dispute that the Originating Summons, which was so filed by the plaintiff, was signed by a registrar of the court. But the signing of the Originating Summons by the registrar of the court is clearly in violation or contravention of Order 7 rules 8 of the Federal High Court Rules which provides that:- F

*“an Originating Summons is issued upon its being signed by a judge in chambers.”* H

At the Federal High Court, the respondents took a preliminary objection to the hearing of the matter as it was argued that the Originating Summons was not properly issued as required by the Rules of the Federal High Court. The learned trial Judge, Okeke, J., of the

Federal High Court in the course of his ruling, formed the view that the registrar of the court did not have the requisite power to sign the Originating Summons and said thus:-

B *“The administrative blunder of one of the court Registrars who signed the Originating Summons which he is not empowered to do instead of the judge as provided for by the rules is therefore treated as an irregularity”*

The learned Judge dismissing the preliminary objection then concluded thus:

C *“I have not seen any injustice that the defendants suffered or will suffer as a result of the administrative error of an overzealous registrar of the court who signed the Originating Summons that he is not supposed to sign. That is a domestic affair of the court and the plaintiff should not be penalized for it. Interest of justice demands*  
D *that the preliminary objection be overruled.”*

As the respondent was not satisfied with the outcome of the preliminary objection, an appeal was lodged with the lower court. That court in upholding the appeal after collating the facts which mainly are the undisputed facts already referred to in the judgment  
E decided by Oduyomi, JCA., said thus:-

*“In that state of the facts, the burden is on the 1<sup>st</sup> respondent who filed the document to show, as is now being argued by the counsel, that the fault is to be traced either to the doorstep of the Registry of the court or in the alternative, to counsel for 1st respondent before arguing that in either case 1st respondent should not be penalized for the mistake of the Registry of the court or of its counsel. This can only be done by the production of cogent and admissible evidence - oral, documentary or by affidavit. None of these steps was*  
F *taken between 25th September, 2000, when appellant gave notice of preliminary objection that it was going to challenge the competence of the suit on the ground of non-compliance with Order 7 r. 8 which requires the signature of Judge in chambers on the Originating Summons and 12th December, 2000, when the preliminary objection was argued. In fact nor evidence of any kind was presented to*  
G *the court on which it could act. He who asserts must prove. In the circumstance, the matter did not involve an issue of fact or evidence upon which the lower court had an advantage over this court of having heard and seen the witnesses. The matter is entirely one of*  
H

*decision on the situation disclosed in the cold printed record and upon which this court is in as good a position as the lower court to evaluate. In the event, I hold that even if it is held that the error on the face of the summons is one of irregularity in procedure, the lower court came to its decision without any evidence in support of that decision. This has been to the prejudice of the appellant. I hold that Originating Summons which initiated the proceedings in suit no. FHC/ABJ/CS/275/2000 has not issued.”*

It does seem to me in my humble view, that one of the questions that must be determined in this appeal is whether the appellant needed to call evidence as required of him by the lower court. This is because upon the view of the court below, it is for the appellant to contend that as the Originating Summons was improperly signed by a clerk of the trial court and not the presiding Judge of that court, it ought to have led evidence on the point.

I think that approach puts an undue burden on the applicant who in the quest for the issuance of an Originating Summons had done all that the rules provided that it should do, and had properly lodged the Originating Summons with the Registry of the court. Having done so, it became the responsibility and duty of the officials of the court to ensure that the Originating Summons was appropriately signed before it was issued and served on the party to whom the Originating Summons was directed.

In the case in hand, it is manifest that the Originating Summons ought to have been signed by a judge as subjoined to it is the following:-

*“This summons was taken out by F.R.A. Williams Esq., CON, CFR, SAN, of No. 3, Shagamu Avenue, Ilupeju, Lagos for the above-named Applicant.*

*The defendant may appear hereto by entering appearance personally or by a legal practitioner either by handling in the appropriate forms duly completed, at the Federal High Court Registry or by sending them to that office by post.*

*Judge”*

It is manifest from the Record that someone had erased the word “Judge”, and replaced it with “REGISTRAR”. Surely that evidence which would be required to establish that erasure and substitution of “Judge” or “Registrar” must emanate from the Registry of

the federal High Court who it must be presumed had custody of the Originating Summons.

In any event, in a similar situation where an Originating Summons was signed by counsel instead of a judge, this court in *Saude v. Abdullahi* (1989) 7 S.C. (Pt. II) 116; (1989) 3 NSCC 177 at 187, made the following pertinent observation:

*“Surely, neither the plaintiff nor his counsel would be expected to issue these directives to the defendant; for the defendant who is at loggerheads with the plaintiff could ignore such directives and to no consequence, since neither the plaintiff nor his counsel could have any power to carry out or enforce the sanctions contained in the directions, it is only a judge conferred with such coercive powers. It therefore follows that the fundamental Rights (Enforcement Procedure) Rules, contemplate that an Originating Summons issued in the form of Form 2 thereof would be signed by a judge. What would be the effect if any person other than a judge signs the Originating Summons need not bother us here in view of what I intend to state anon. Suffice it to say that it is when a point on procedural irregularity is timeously and properly raised that it becomes necessary for an Appeal Court and indeed a trial court to consider its merit.”*

With that apt observation quoted above in mind, I cannot but reach the conclusion that the court below was wrong to have fastened an unnecessary burden on the appellant in the circumstances of this case. In the result, this appeal deserves to succeed on that point alone. Moreover, the respondents to this appeal have not shown what miscarriage of justice they would suffer if an order be made that the Originating Summons be properly signed by the judge seised of the case.

I will therefore for the above reasons and the fuller reasons given in the leading judgment of Belgore, JSC., allow this appeal. It is also ordered that the Originating Summons be signed by the Judge seised of the case and that the case be given accelerated hearing. I abide with the order made as to costs in the leading judgment.

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### **EDOZIE JSC**

The crucial issue upon which the determination of this appeal rests falls within a very narrow compass. It is simply, whether the

signing of an Originating Summons by the Registrar instead of the Judge in breach of Order 7 Rule 8 of the Federal High Court (Civil Procedure) Rules, 2000, rendered the process null and void or merely irregular. The trial court relying on the provisions of Order 3 Rule 1 of the said Federal High Court (Civil Procedure) Rules, 2000, treated it as a mere procedural irregularity but the Court of Appeal took the opposite view. I have read the leading judgment of my learned brother, Belgore, JSC., and I agree with him that the court below was in grave error to have reversed the decision of the trial court. Any non-compliance with any Rules of Court is prima facie an irregularity and not a ground for nullity, unless such non-compliance amounts to a denial of natural justice: *Okoye v. Nigerian Construction Co. Ltd & Ors.* (1991) 6 NWLR (Pt.199) 501 at 539. It is inconceivable that in the circumstances of this case, there has been a denial of fair hearing, or that any miscarriage of justice has resulted or occasioned to the respondent.

The Court of Appeal had in reversing the decision of the trial court, concluded, inter alia, that even if it is held that the error on the face of the summons is one of irregularity in procedure, the trial court came to its decision without any evidence in support thereof. With profound respect, that statement is irrelevant. The irregularity of the Originating Summons consists of the fact that it was signed by the Registrar instead of the Judge. The fact is evident from the Originating Summons, which speaks for itself. No further evidence was required to prove the irregularity as erroneously held by the Court of Appeal.

It is for the foregoing and the detailed reasons advanced in the leading judgment of Belgore, JSC, that I also allow the appeal. I abide by the orders made in the said judgment.