

**SUPREME COURT OF NIGERIA**  
23RD JANUARY, 2004. SC. 35/1997  
**CORAM:- S. M. A. BELGORE, U. MOHAMMED, A. I. IGUH**  
**A. O. EJIWUNMI, D. MUSDAPHER, JJSC**

KALUMARK

MAR-PRIK INDUSTRIES ..... DEFENDANTS/APPELLANTS  
NIG. LTD.

AND

GABRIEL EKE ..... PLAINTIFF/RESPONDENT

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APPEALS - Issues - Right of appeal court to consider an issue - The issue of competency of the suit - Should not have been considered by the lower court - As there was no appeal against the judgment - No grounds to support the issue - And no leave to deal with it as a fresh issue (H13)

COURT PROCESSES - Service of originating processes - Proof of - Service of process is very fundamental - To the issue of the jurisdiction and competence of the court to adjudicate (H6)

COURT PROCESSES - Service of originating processes - Service on a company - Must be at the registered office of the company - And it is bad and ineffective - If it is done at a branch office of the company (H7)

COURT PROCESSES - Service of process - Affidavit of service - Sworn by the bailiff - Was not sufficient proof of service of process on the 2nd appellant in this case (H9)

COURT PROCESSES - Service of process - Condition sine qua non for exercise of jurisdiction - Where the defendant claims non service of originating process - And proves same - The judgment entered against him is a nullity - And can be set aside by the court (H4)

COURT PROCESSES - Service of process - On a company - Procedure for due service - Procedure for substituted service cannot be made to a

corporation (H8)

EVIDENCE - Conflicting affidavit evidence - In the face of direct conflict on crucial and material facts - The trial judge must call for oral evidence from the parties - Especially where there are no material available to enable the court resolve the differences in the affidavit (H12)

JUDGMENTS - Setting aside - Any court including the supreme court - Has inherit jurisdiction to set aside its own judgment - Given in a proceeding in which there has been a fundamental defect - Which goes to the issue of jurisdiction - This can be done by motion and not necessarily by way of appeal (H3)

JUDGMENTS - Undefended list - Judgment entered on the undefended list - Is a judgment on the merits - Not on default - Court has inherent powers to set aside its default judgments (H1)

JUDGMENTS - Undefended list - Null judgment - Setting aside judgment - The judge has no power to set aside his judgment under the undefended list - As if it were a default proceeding - Even if there was a mistake - But he can set it aside - For being a null judgment (H2)

JUDGMENTS - Undefended list - Setting aside judgment - Judgment although obtained under the undefended list - Could be set aside by the court - As the defendant complained of non service which goes to the root of the case (H5)

PRACTICE & PROCEDURE - Service of process - Conflicting affidavits on the issue of service - The trial court should call for oral evidence to enable him determine the truth (H11)

PRACTICE & PROCEDURE - Service of process - Substituted service - On a natural person - When it can be ordered - Procedure for applying for such substituted service (H10)

### **FACTS**

The Respondent herein was the plaintiff before the High court of Abia State holden at Aba, where he claimed against the appellants herein as the defendants jointly and severally as follows:-

“The plaintiff claims against the defendants jointly and severally the sum of N1,992,225.16k (one million nine hundred and ninety two thousand two hundred and twenty five Naira and sixteen kobo) being money had and received by the defendant for a consideration that has failed”.

The plaintiff filed along with the writ of summons the particulars of claim and applied to have the writ placed under the undefended list. The application was accompanied with an affidavit and the trial judge placed the claims under the undefended list. By an ex parte motion dated the 8/11/1993, the plaintiff successfully obtained leave of the trial court to serve the writ of summons and all other relevant court processes on the defendants by substituted means that is by posting or delivering same on any adult employee of the 2<sup>nd</sup> defendant at their office at No. 102 School Road, Aba. On 23<sup>rd</sup> November 1993 a bailiff of the High court, Aba deposed to an affidavit of service on the defendants. On 16/12/1993, the plaintiff moved the trial court that since the defendants were not in court, to enter judgment in favour of the plaintiff. The judge granted the prayer and entered judgment for the plaintiff as per his claims. The plaintiff subsequently applied for the execution of the judgment and levied execution on the defendants' properties. After the execution, the defendants filed an application in the trial Court seeking to set aside the judgment and the execution, claiming that they were never served with the writ of summons and that they only became aware of the suit when the writ of fifa was served on them. The motion was supported by an affidavit sworn to by the 1<sup>st</sup> defendant who showed that there was no pasting of the writ of summons at their office at any time. The claim was also completely denied. The plaintiff filed a counter affidavit in opposition to the motion showing that the defendants were served with the originating summons and attached a copy of the affidavit of service sworn by the bailiff.

After hearing the application, the trial judge in his Ruling refused the application holding that the court was not competent to set aside its own judgment delivered under the undefended list on the merits and that only the court of Appeal could set it aside. The defendant felt unhappy with the refusal and they filed a Notice of Appeal against the Ruling. The court of Appeal in its judgment dismissed in its entirety the defendants' appeal holding inter alia that a judgment obtained under the undefended list procedure cannot be set aside except by way of an appeal. The defendants who were still dissatisfied have now appealed to the supreme court.

**ISSUES FOR DETERMINATION**

*"1. Whether under the laws of Nigeria the only option available to a party disputing a judgment entered against that party under the Undefended List is an appeal against that judgment.*

*2. Whether the conclusion that the appellants were properly served with the Writ of Summons without oral evidence being called to resolve the issues was proper.*

*3. Whether the judgment of the High Court which was sought to be set aside was a competent judgment.*

*4. Whether issue 2.03 in the Court of Appeal had no sustaining ground.*

*5. Whether a bailiff's affidavit of service is a conclusive proof of service, under the law."*

**HELD** (Unanimously allowing the appeal per lead judgment of MUSDAPHERJSC)

***Undefended list judgment - Is a judgment on the merits***

1. Now, there is no doubt that the judgment in this case the appellants wanted to set aside was a judgment obtained against the appellants on the Undefended List. A judgment entered on the Undefended List is a judgment entered on its merits and is not judgment entered on default.  
(p. 416 B)

***Undefended list and default proceeding and null judgment***

2. A judgment obtained on the undefended List is a judgment on the merit

and the procedure adopted in setting it aside in the case of BANK OF NORTH LTD. VS. INTRA BANK supra by relying on the provisions of the old English Rules under Order 14 rule 11 of the said old rules in dealing with default judgment was wrong and the judge would have no power to set aside its judgment under these rules dealing with default proceedings in a matter where the judgment was entered under the Undefended List. So long as the judgment was obtained on the merit, a trial court will not have the jurisdiction to set aside its judgment even if there was a mistake. In LEVENTIS MOTORS VS. MBONO (1961) ALL NLR 539, the plaintiff's claim was for the sum of £ 4204.55.6d defendant did not file a notice of intention to defend nor was he present nor represented at the hearing. Through error, the plaintiff's counsel asked judgment in the sum of £294.2.10 for which judgment was duly entered. It was held that the trial court could not interfere with the judgment in the absence of the agreement of both parties.

But, however, if the judgment is a nullity the court which made it can set it aside on a motion **suo motu** or on an application by any party affected by it. See LAWANI ALADEGBEMI VS. JOHN FASANMADE (1988) 3 NWLR (PT. 129)

What the authorities state is that judgment on the Undefended List is a judgment on the merits and cannot be set aside as merely a default judgment entered in the absence of a party or in the default of a defendant to take a procedural step. (p. 416 F/ 419 C)

***Any court can set aside its own defect judgment***

3. The law is settled that any court of record including the Supreme Court, see OLABANJI VS. ODOFIN (1996) 2 SCNJ 242 AT 247, has the inherent jurisdiction to set aside its own judgment given in any proceedings in which there has been a fundamental defect, such as one which goes to the issue of jurisdiction and competence of the court, See SKENCONSULT (NIG) LTD VS. UKEY (supra) A.C.B. PLC VS. H LOSADA (NIG) LTD (1995) 7 SCNJ 158 AT 168. Such a judgment is a nullity. A person affected by it is therefore entitled EX DEBITO JUSTITIAE to have it set aside. The court can set it aside suo motu and

the person affected may apply by motion and not necessarily by way of appeal. See ADEIGBE VS. KUSIMO (1965) NMLR 284 EZEOKA FOR VS. EZEKO (1999) 6 SCNJ 209, at 225. This is common sense that if a court makes an Order which it has no jurisdiction or competence to make, it has the jurisdiction to rescind the Order so as to restore the status quo. (p. 417 D)

***Service of process - Condition for exercise of jurisdiction***

4. A judgment or order which is a nullity owing to failure to comply with an essential provision, such as, service of process, can be set aside by the court which gave it or made the order see ANATOGO VS. IWEKA II (1995) 9 SCNJ 1 at 33-34 or (1995) 8 NWLR (PT. 415) at 547. At 586, Ogundare JSC said:-

*"The general rule is that the Court has no power under any application in the action to alter or vary a judgment or order drawn up, except so far as is necessary to correct error in expressing the intention of the Court or under the slip rules" xxxxxxxxxxxxxxxx. There are, however, exceptions to this rules some of which are:-*

*(1) A judgment or order which is a nullity owing to failure to comply with an essential provision such as service of process can be set aside by the Court which gave the judgment or made the orders. xxxxxxxxxxxxxxxxxxxx."*

See also SCOTT- EMUAKPOR VS. UKAUBE (1975) 12 SC 435. When an order is made or judgment is entered against a defendant, who claimed not to have been served with the originating process, such an order or judgment becomes a nullity if the defendants proves non service of the originating process. It is a nullity because the service of the originating process is a condition sine qua non to the exercise of any jurisdiction on the defendant. If there is no service the fundamental rule of natural justice audi alteram partem will be breached see SKENCONSULT CASE supra. (p. 417 G)

***Setting aside undefended list judgment by the court***

5. In view of the above, both the court below and the trial court were in

error to have held that the trial court had no power to set aside the judgment because the judgment in this matter was a judgment obtained under the Undefended List. Where as in this case the aggrieved defendant complains of non-service of the process, he is raising a fundamental issue which goes to the jurisdiction and the competence of the court to enter the judgment. In such a case, where the defendant proves non service on him, the whole proceedings becomes a nullity and the trial court has the jurisdiction to set it aside. It needs to be emphasised, that it is now settled law that the failure to serve process, where the service of process is required such as in this case, is a failure which goes to the roots of the case see CRAIG VS. KANSEEN 1943 K.B. 256 at 262. It is the service of the process of the court on the defendant that confers on the court the competence and the jurisdiction to adjudicate on the matter . It is clear that due service of the process of the court is a condition precedent to the hearing of the suit. Therefore if there a is failure to serve the process, where the service of the process is required the person affected by the order, but not served with process, is as mentioned above entitled EX DEBITO JUSTITAE to have the order set aside as a nullity. See MBADINOJU VS. EZUKA (1994) 8 NWLR (PT. 364) 5. I accordingly resolve issue number one against the respondent. Under the circumstances both the trial court and the Court of Appeal were in error to have held that they could not set aside the judgment in this case merely because, the judgment was obtained under the Undefended List procedure. (p. 418 E)

***Service of process is fundamental to jurisdiction***

6. Now, where a process has been served, it is necessary for the court to have before it evidence of that fact. Service of the process especially the originating process is an essential condition for the court to have the competence or the jurisdiction to entertain the matter. Further failure to comply with this condition would render the whole proceedings, including the judgment entered, and all subsequent proceedings based therein, wholly irregular, null and void. That is why the proof of the service of the process on a defendant is very fundamental to the issue of the juris-





VS GOVERNMENT OF NEW ZEALAND (1875) 1 CPD 563, HILLYARD VS. SMYTH (1889) 36 WR 7. (p. 420 G)

***Service of process - Affidavit of service***

9. So, no matter how you look at it, the 2nd defendant, the 2nd appellant B  
herein, could not be said to have been properly served. The affidavit  
sworn by the bailiff could not be sufficient proof of service of the proc-  
ess on the 2nd appellant. So in the situation such as this, there is even no  
need for the trial judge to call for oral evidence to resolve the contradic- C  
tory positions taken by the parties, the respondent had offered no cred-  
ible evidence to show that the 2nd appellant was served with the originat-  
ing process. Therefore based on the available credible evidence the 2nd  
appellant had shown that it had not been served with the originating proc-  
ess. (p. 421 C) D

***Substituted service - On a natural person***

10. Now, with reference to the 1st appellant, a natural and juristic per-  
son, an order of substituted service of the process could be ordered E  
where it was found necessary to adopt the procedure. The procedure for  
substituted service is invoked where the defendant is untraceable or is  
evading service. But the rules provide that the court must be satisfied,  
that personal service cannot be conveniently effected. Where it is neces- F  
sary to adopt the procedure of substituted service, the plaintiff makes an  
application to the court by an ex-parte motion. The affidavit in support  
should state the grounds on which the application is based. The abortive  
efforts to personal service must also be recounted. (p. 421 E) G

***Conflicting affidavits on the issue of service***

11. In any event, as shown, the bailiff swore that he pasted the Writ on  
the door of the premises of the appellants, against that is the affidavit H  
sworn to by the 1st appellant, that no such thing was done and that he  
only became aware of the existence of the suit when the respondent  
went to attach certain goods in the execution of the purported judgment.  
The trial court was clearly faced with two conflicting affidavits on the

issue of service, on the one hand, the appellants claimed not to have been served and the respondent by the bailiff's affidavit assert that there was service, in such a situation in my view, the trial court should have called for oral evidence to enable him determine the truth. See NATIONAL BANK VS. ARE BROTHERS (1977) 6 SC 97 (p. 421 H)

***Conflicting affidavit evidence - What court must do***

12. It is now elementary law that in the face of direct conflict on crucial and material facts, the learned trial judge must call for oral evidence from the defendant or such other witnesses as the parties may call. Both the learned trial judge and the lower court were in error to have glossed over the issue and adjudge the issue as an after thought. The lower court was also in error to have held that there were sufficient facts upon which the court could come to the conclusion that the appellants were served, when the lower court failed to mention the other pieces of evidence. Such a finding is perverse since it is not supported by any evidence on the printed record. I am of the view that there was no material available to enable the lower court resolve the differences as contained in the two affidavits, recourse must be had to calling oral evidence to arrive at the truth whether the appellants were served with the originating process or not. I accordingly resolve the 2nd and 5th issues in favour of the appellants.(p. 422 C)

***Issues - Right of appeal court to consider an issue***

13. I am of the view that the lower court was wrong to have considered the competency of the suit when, there was no appeal against the judgment. It was also wrong for the Lower Court to deal with the matter when there was no ground of appeal to support the issue. It was also wrong for the Court of Appeal to consider the issue since no leave was sought and obtained to deal with it as a fresh issue. I accordingly decline to consider the third issue as it is not relevant and it did not properly arise for determination in the Court below. It is the law that neither a party nor a court is permitted to argue or deal with an issue not related to any ground of appeal. See ONIAH VS. ONYIA (1989) 1 NWLR (PT. 99) 514. (p. 423 E)

## NOTABLE POINT OF INTEREST

### EJIWUNMI JSC

#### *1. When a court is said to have jurisdiction to hear a matter*

In upholding this appeal, it is, I think right to note that a Court can be said to have jurisdiction and competence to hear matters when (1) it is properly constituted as regards numbers and qualifications of the members of the bench, and no member is disqualified for one reason or another; (2) the subject matter of the case is within its jurisdiction, and there is no feature in the case which prevents the court from exercising its jurisdiction and (3) the case comes before the court initiated by due process of law, and upon fulfilment of any condition precedent to the exercise of jurisdiction. See Madukolu & Ors v. Nkemdilim (1962) The ANLR, 589-590. (p. 427 E)

### CASES REFERRED TO

UTC (NIG) LTD. VS. CHIEF PAMOTEL (1989) 2 NWLR (P1 103) P. 224 AT 299

ADIWEU V. AYINDE (1993) 8 NWLR (Pt. 313) 516 at 512

SKENCONSULT LTD. VS. UKEY (1981) NSCC (Vol. 12) 1 AT 16

OKAFOR AND OTHERS VS. A. G. ANAMBRA STATE & OTHERS (1991) 6 NWLR (Pt. 200) 659, 680

BANK OF THE NORTH LTD VS. INTRA BANK S.A. 1969 1 ALL NLR 91

UAC TECHNICAL LTD. VS. ANGLO CANADIAN CEMENT LTD. (1966) NMLR 349

J. BAERTHLE & CO. LTD. VS. LIMA SERVICES LTD. (1992) 1 NWLR (Pt. 217) 273

CHIEF B.C. AGUEZE VS. PAN AFRICAN BANK LTD. (1992) 4 NWLR (PT. 233) 176

EZE CHRISTIAN N. NWANOSIKE VS. DR. L. O. UWECHEA (1981) 1 H MSLR 52

ACB LTD. VS. M. E. OGON (1973) 3 ECSCR (PT. 1) 125

**LEAD JUDGMENT BY MUSDAPHER JSC**

Gabriel Eke, the respondent herein was the plaintiff before the High Court of Abia State in the Aba Judicial Division holden at Aba, when he claimed against the appellants herein as the defendants jointly and severally as follows:-

*"The plaintiff claims against the defendants jointly and severally the sum of N1,992,225.16k [One million nine hundred and ninety two thousand, two hundred and fifty five naira and sixteen kobo] being money has and received by the defendant for a consideration that has failed."*

The plaintiff filed along with the Writ of Summons the PARTICULARS OF CLAIM - thus:-

*"(1) The plaintiff is a businessman and resident at Aba and has office at No. 86 Azikiwe Road, Aba within the jurisdiction of this honourable Court.*

*(2) The first defendant is the Managing Director and Chief Executive of the 2nd second defendant which has its registered office at 102 School Road, Aba within the jurisdiction of this honourable court.*

*(3) The plaintiff claims against the defendants jointly and severally the sum of N1,992,255.16k [One million nine hundred and ninety-two thousand two hundred and fifty five naira and sixteen kobo] being money had and received by the defendants for a consideration that has failed."*

Following Order 23 High Court (Civil Procedure Rules) 1998 of Imo State, Applicable in Abia State, the plaintiff applied to have the writ placed under the Undefended List. The plaintiff accompanied the application with an affidavit and the learned trial judge placed the plaintiff's claims under the Undefended List.

By an ex-parte motion dated the 8/11/1993, the plaintiff successfully obtained leave of the trial court to serve the Writ of summons and all other relevant court processes on the defendants by substituted means that is to say by "pasting same at the door of the office of the defendants at No. 102 School Road Aba, or by delivering same on any adult employee of the 2nd defendants at the office of the 2nd defendant at No. 102 School Road Aba." On the 23rd November 1993 a bailiff of the High

Court, Aba deposed to an affidavit of service on the defendants as follows:-

*Make Oath and say that on the 23rd day of November, 1993 at 11.30 a.m, I pasted upon the defendant's doors the Writ of Summons/ Statement of claim, a true copy whereof hereunto annexed issued out of this court, High Court Registry, Aba upon the defendant by pasting the same personally to the defendant's address No. 102 School Road, Aba. xxxxxxxxxxxxxxxx"*

The return date earlier ordered by the court was 7/12/1993. It was however on the 16/12/1993, that the plaintiff moved the trial court that since the defendants were not in court, to enter judgment in favour of the plaintiff. Hon. Justice G.U. Kalunta granted the prayer and entered judgment as follows:-

*"The suit which was brought on the Undefended list was served on the defendants by pasting at the last known address at No. 102, School Road, Aba. The suit was served on the defendant on the 23/11/1993. After service of the Writ of Summons, none of the defendant (s) sic filed an intention to defend the suit consequently counsel for the plaintiff has now applied for judgment.*

*After a careful consideration of the affidavit filed in support of this claim, I am of the view that the defendant's have no defence. I will therefore enter judgment for the plaintiff in the sum of N1,992,255.16 being money had and received by the defendant's for a consideration that has wholly failed."*

The plaintiff subsequently applied for the execution of the judgment and on Friday, 7th January 1984, the execution was levied on the defendants' properties in the presence of the plaintiff accompanied by the Court bailiffs and several police men. After the execution, the defendants filed an application in the Court of trial seeking to set aside the judgment and the execution, claiming that they were never served with the Writ of Summons and that they only became aware of the suit when the Writ of FIFA was served on them. The motion filed on the 10/1/1994 prayer for the following reliefs:-

*"1. SETTING ASIDE THE JUDGMENT of this Honourable Court*

*in this suit delivered on the 16/12/1993 as the DEFENDANTS WERE NOT SERVED WITH ANY SUMMONS OR PROCESS IN THE SUIT WHATSOEVER BEFORE JUDGMENT WAS OBTAINED.*

2. *STAYING THE EXECUTION OF THE SAID JUDGMENT AND*  
 B *SETTING ASIDE THE WRIT OF EXECUTION ISSUED IN THIS SUIT.*  
 3. *RELEASING FROM ATTACHMENT ALL PROPERTIES OF*  
*THE DEFENDANTS, AND THOSE OF OTHERS IN THE DEFEND-*  
*ANTS' CUSTODY."*

C The affidavit in support of the Motion sworn to by the he 1st  
 defendant KALU MARK showed by paragraph 4 that the defendants were  
 not served with the originating summons whatsoever, and that there was  
 no pasting of the Writ of Summons at their office at any time. The claim  
 was completely denied and that the 1st defendant went on to explain the  
 D circumstances leading to their joint venture and how the matter was  
 mutually settled and terminated. The plaintiff filed a counter-affidavit in  
 opposition to the motion wherein by paragraph 5 of the said counter-  
 affidavit he showed that the defendants were served with originating  
 E summons by pasting the same on the door of their office at No. 102  
 School Road Aba and a copy of the affidavit of service sworn to by the  
 bailiff was attached to the counter-affidavit.

After the hearing of the Application in his Ruling delivered on the  
 F 20/1/1990, the learned trial judge refused the application. He held in part  
 of his Ruling thus:-

*"The suit which was placed in the undefended list was duly served*  
*on the defendants by pasting same at their place of business at No. 102*  
*School Road, Aba. After the Writ of Summons was served, the defend-*  
 G *ants never entered appearance or file intention to defend.*

*It has now been settle beyond controversy that a court cannot*  
*entertain an application to set aside its own judgment delivered under*  
*the undefended List on the merits. The only court that is competent to set*  
 H *aside is the Court of Appeal. Counsel on both sides have agree that this*  
*court is certainly not competent to set aside its judgment obtained under*  
*the Undefended List. In a long line of cases, the Supreme Court had*  
*ruled that a judgment entered on an Undefended List is a judgment en-*

tered on its merit and is not a judgment on default see the case of UTC (NIG) LTD. VS. CHIEF PAMOTEL (1989) 2 NWLR (P1 103) P. 224 AT 299. It seems to me that it would amount to the Court exceeding its jurisdictions, if it were to review its judgment."

On the issue of the Service of the Originating Process, the learned trial judge continued:-

"The other issue which was vigorously canvassed by counsel on both sides is whether the defendants xxxxxxxx were served with the WRIT OF SUMMONS. Following an application that the WRIT OF SUMMONS be served by pasting same at the door of the defendants xxxxxxxx at 102 School Road, Aba, or by delivering same to any adult employee of the defendants, the court on the 11th of November, 1993, granted the application that the Writ be pasted and the bailiff swore to an affidavit to that effect on the 23rd of November, 1993. The mode of service adopted was based on order 12 rule 5 of the high Court Rules which stipulated thus:-

"(1) Where it appears to the Court (either after or without an attempt at personal service) that for any relevant reasons personal service cannot be conveniently effected the court may order the service be effected.

(a) By delivering of the document to Some adult inmate at the usual or last known place of abode or business the person to be served."

(2) "It seems to me that where a bailiff or any officer of the court whose duty is to serve the process, swears to an affidavit of service, that service was effected in accordance with Order 12 rule 4 that affidavit of service is in my view a prima facie proof of the matter stated or endorsed therein. It will therefore be wrong for the court to go behind the endorsement contained in the affidavit of service except where it could be established that the bailiff never effected service but merely swore to a false affidavit of service.

"In the instant case it does appear to me that service of the Writ of Summons was duly effected on the defendant in accordance in accordance with the order of the Court for substituted service. The denial of

*service by the defendant is a mere after thought and ought to be rejected."*

The learned trial judge then proceeded to refuse the application. The defendants felt unhappy with the turn of events, they filed a Notice of Appeal against the ruling. The Notice of Appeal was amended and the court of Appeal considered the following issues for the determination of the appeal:-

*"1. Whether it was proper for the trial court to have concluded that there was service of the Writ of Summons on the defendant without calling oral evidence to resolve the conflict in the affidavits of the parties on the fundamental issue of service of the process.*

*2. Whether, considering the evidence before the trial court, the conclusion that there was due process was proper.*

*3. Whether it was proper for the trial judge to have refused to set aside a judgment entered under the Undefended List, when from the substance of the affidavits of the parties before him the amount was not liquidated."*

The Court of Appeal in its consideration of the issues placed before it in its judgment delivered the 6/3/1997 dismissed in its entirety the defendants' appeal. The Lower Court affirmed the court by holding (1) a judgment obtained under the Undefended List procedure cannot be set aside except by way of an appeal. (2 Permitting litigant to challenge affidavits of service by bailiffs or other officers of the Court would open up a floodgate of cases (3) that the learned trial judge had sufficient materials before him to resolve the conflict in the parties affidavits in relation to the question of service of the Writ of Summons without the need to call for oral evidence.

The defendants (hereinafter referred to as the appellants and the plaintiff as the respondent) still felt disgruntled with the judgment of the Court of Appeal and have now appealed again to this Court. It was with the leave of this court that an Amended Notice of Appeal was filed on 13/1/1998. the grounds of appeal contained in the Amended Notice of Appeal aforesaid said:-

*"(1) GROUND ONE*

*ERROR OF LAW*



The Court of Appeal erred in law when it upheld the trial court's decision that the appellants were properly served the Writ of Summons in the suit in the court blow and thus the rule of fair hearing was not breached.

PARTICULARS OF ERROR

(a) The Appellants denied being served either by personal service or by pasting on the door as ordered by the court.

(b) The respondent relied on affidavit of service which contained claim of service of a non-existent process, namely, a statement of claim.

(c) There was no oral evidence called to explain the circumstances of the service and resolve the conflict between the parties.

GROUND TWO:

ERROR OF LAW

The Court of Appeal erred in law when it concluded thus; in the lead judgment-

*"Applying the above cases in the instant appeal after a careful consideration and critical look, the conflict as to service or no-service is not irreconcilably in conflict thereby required the taking of oral evidence by the learned trial judge as he had sufficient materials before him thereby making the taking of oral evidence unnecessary as to take or not to take oral evidence depends on the facts and circumstances of this case except where the court finds the conflict in the affidavit irreconcilably in conflict."*

PARTICULARS OF ERROR

(a) The learned justices failed to appreciate that the circumstance of the instant case made the affidavit of service the germane issue before the court.

(b) There was no other fact than the challenged affidavit of service upon which any resolution could have been based, and no other evidence that was used to reconcile the conflict.

(c) The conflict whether there was service or not was irreconcilable, and was not reconciled before a decision was reached.

(d) The Court of Appeal failed to appreciate the fact that appellants were denied the opportunity to rebut the claim of service by the failure of the trial court to allow oral evidence to prove or disprove serv-

ice.

GROUND THREE: ERROR OF LAW

The Court of Appeal erred in law when it sustained a decision that was incompetent.

B PARTICULARS OF ERROR

(a) The appellants were not served the Writ of Summons.

(b) The judgment emanating from such a proceeding offends the rules of fair hearing which renders the decision null and void.

GROUND FOUR: MISDIRECTION

C The Court of Appeal misdirected itself in law which occasioned a miscarriage of justice when it held in the lead judgment, thus:

*"It is pertinent to state that ground 2 of the amended grounds of appeal was set up in this judgment. Looking at the ground critically, the issue 2.03 upon which appellants based the issue, with respect, did not correlate or accentuate the said ground of appeal. As there is no nexus between the ground of appeal and issue 2.03 with respect to the Senior Advocate as the issue has not been based on competent ground of appeal, it lacks potency and incompetent, so issue 2.03 lacks merit as there is no correlation between it and ground 2 of the amended grounds of appeal issue 2.03 is unmeritorious and lacking in substance leading to its rejection."*

F PARTICULARS OF MISDIRECTION

(a) The same judgment had earlier held the ground 2 of the amended Grounds of appeal as competent.

(b) Issue 2.03 is related to ground 2 of the grounds of appeal.

G (c) The misdirection as to competence and non relation led the Court of Appeal to fail to consider a ground of appeal before it.

(d) The appellants were entitled to having all their grounds of appeal considered.

GROUND FIVE: ERROR OF LAW

H The Court of Appeal erred in law when it sustained a judgment of a high court made on the Undefended List when the sum claim therein was not liquidated.

(a) The affidavit filed with the Writ of Summons stated clearly

that what was in issue was a joint business transaction between the parties.

(b) The jurisdiction of a High Court to enter judgment in the Undefended List is limited to claims for liquidated sums.

GROUND SIX: MISDIRECTION

B

The Court of Appeal Misdirected itself which misdirection led to a miscarriage of justice when in the leading judgment, Onoalaja J.C.A held:

*".....It is trite law that an aggrieved party against whom a judgment is entered under UNDEFENDED LIST procedure can only complain by way of an appeal against that said judgment based of the principle that the trial judge cannot sit on appeal against this own judgment."*

C

PARTICULARS OF MISDIRECTION

(a) A judgment to which the "trite law" stated in the quotation above applied would have been a competent judgment, abinitio. D

(b) An infringement of the rules of natural justice will have the same nullifying effect on a judgment obtained under the Undefended List as it would have on a judgment after hearing. E

(a) A party has an option to appeal against a judgment which the party believes to be a nullity, or to apply before the same court to have it set aside.

(b) A judgment obtained in the Undefended List is not excluded in the exercise of this option. F

GROUND SEVEN: ERROR OF LAW

The Court of Appeal erred in law when in the leading judgment, ONOLAJA J. C. A. held:

*"there has not been established by the fact of any act of impropriety or official falsity of the affidavit of service deposed to by the bailiff any finding to the contrary will open a flooding-gate to litigants of deposing to affidavit of non-service thereby rendering the work of bailiff impotent leading to delay in the administration of justice."*

G

H

PARTICULARS OF ERROR

(a) An affidavit of service that purports to have served a process that was not in existence is a false affidavit.

(b) An affidavit of service without annexure of what was served is contrary to the rules and thus irregular.

(c) A Court of Law in its decision making must be devoid of sentiment: ADIWEU V. AYINDE (1993) 8 NWLR (Pt. 313) 516 at 512.

B      (d) Affidavit of service is only a reputable prima facie Evidence of service."

Now, the appellants have identified, formulated and submitted to this Court the following issues as arising for the determination of the appeal:-

C      *"1. Whether under the laws of Nigeria the only option available to a party disputing a judgment entered against that party under the Undefended List is an appeal against that judgment.*

D      *2. Whether the conclusion that the appellants were properly served with the Writ of Summons without oral evidence being called to resolve the issues was proper.*

*3. Whether the judgment of the High Court which was sought to be set aside was a competent judgment.*

E      *4. Whether issue 2.03 in the Court of Appeal had no sustaining ground.*

*5. Whether a bailiff's affidavit of service is a conclusive proof of service, under the law."*

F      The learned counsel for the respondent had in the respondents' brief adopted similar issues for the determination of the appeal. I shall consider this appeal by reference to the issues as formulated by the appellants.

ISSUE NO. 1

G      Now, in its judgment per Onolaja JCA concurred to by Katsina-Alu JCA [as he then was] and by Rowland JCA, the lower court observed:-

H      *"I confirm the Ruling of Kalunta J, of 20th January, 1994 wherein he refused to set aside his judgment delivered on the 16th of December, 1993 in the Undefended List against the appellants who in any event have not complied with appealing against the judgment entered in the Undefended List, it is trite law that an aggrieved party against whom a*

*Judgment is entered under the Undefended List procedure CAN ONLY COMPLAIN BY WAY OF AN APPEAL against the said judgment of the trial based on the principle that a trial judge cannot sit on appeal against his own judgment. This must have motivated the appellants to pray to set aside the judgment for non- service which contention failed in this appeal see UTC (NIG) LTD. VS. PAMOTEI (1989) 2 NWLR (Pt. 103) P. 244."* B

Now, the appellants have argued that, where a judgment had been entered on the Undefended List, an aggrieved party may still apply to set it aside the same court to its judgment so entered on the grounds for example that the judgment entered was a nullity. A court has always the jurisdiction to set aside its null orders. Learned Counsel referred to SKENCONSULT LTD. VS. UKEY (1981) NSCC (Vol. 12) 1 AT 16. OKAFOR AND OTHERS VS. A. G. ANAMBRA STATE & OTHERS D (1991) 6 NWLR (Pt. 200) 659, 680. It is finally submitted that it is a serious misdirection of law for the Court of Appeal to hold that the only way the appellants could attack the judgment in this case was only by way of appeal and it was that attitude that led the Court of Appeal to treat E the issue of service for the process in this case with levity.

The learned counsel for the respondent, on the other hand argued that a judgment entered on the undefended list cannot be set aside by way of motion, there must be a fresh action or an appeal. BANK OF THE F NORTH LTD VS. INTRA BANK S.A. 1969 1 ALL NLR 91. Learned counsel also referred to the UTC VS. PAMOTEI case supra and submits further that a judgment obtained under Undefended List is one on merits which can be set aside only on appeal or by another action. Learned G counsel further referred to the following cases in support of the submission. UAC TECHNICAL LTD. VS. ANGLO CANADIAN CEMENT LTD. (1966) NMLR 349 J. BAERTHLE & CO. LTD. VS. LIMA SERVICES LTD. (1992) 1 NWLR (Pt. 217) 273 CHIEF B.C. AGUEZE VS. PAN H AFRICAN BANK LTD. (1992) 4 NWLR (PT. 233) 176., EZE CHRISTIAN N. NWANOSIKE VS. DR. L. O. UWECHEA (1981) 1 MSLR 52, ACB LTD. VS. M. E. OGON (1973) 3 ECSR (PT. 1)125.

It is again argued that the case of SKENCONSULT LTD VS. UKEY

supra relied heavily in this appeal by the appellants is irrelevant and inapplicable. It is not a case based on Undefended List but a matter based on section 98, 99, and 101 of Sheriffs And civil Process Act in a declaratory action, nor was the case of OKAFOR VS. A. G. ANAMBRA STATE  
B supra applicable. It is finally submitted that the decision in BANK OF THE NORTH VS. INTRA BANK and UTC VS. PAMOTEI (supra) should be followed.

**Now, there is no doubt that the judgment in this case the appellants wanted to set aside was a judgment obtained against the appellants on the Undefended List. A judgment entered on the Undefended List is a judgment entered on its merits and is not judgment entered on default.** There is indeed inherent power for a court of record to set aside its judgment entered into in default of taking any  
D procedural step such as in default of appearance, generally called default judgment as Lord ATKIN put it in EVANS VS. BARTLAM 1937 AC 480:-

*"The principle obviously is that unless the court has pronounced a  
E judgment upon the merits, or by consent, it is to have the power to revoke the expression of its coercive power where that has only been obtained by a failure to follow any rules of procedure."*

I agree with the learned counsel for the respondent and the decision of the lower court may appear to be right as per the procedure for  
F setting aside default judgment is adopted in setting aside judgment obtained under the Undefended List procedure. **A judgment obtained on the undefended List is a judgment on the merit and the procedure adopted in setting it aside in the case of BANK OF NORTH LTD. VS. INTRA BANK supra by relying on the provisions of the old English Rules under Order 14 rule 11 of the said old rules in dealing with default judgment was wrong and the judge would have no power to set aside its judgment under these rules dealing with de-  
G fault proceedings in a matter where the judgment was entered under the Undefended List. So long as the judgment was obtained on the merit, a trial court will not have the jurisdiction to set aside its judgment even if there was a mistake. In LEVENTIS MOTORS VS.**  
H

MBONO (1961) ALL NLR 539, the plaintiff's claim was for the sum of £4204.55.6d. Defendant did not file a notice of intention to defend nor was he present nor represented at the hearing. Through error, the plaintiff's counsel asked judgment in the sum of £294.2.10 for which judgment was duly entered. It was held that the trial court could not interfere with the judgment in the absence of the agreement of both parties.

But, however, if the judgment is a nullity the court which made it can set it aside on a motion *suo motu* or on an application by any party affected by it. See LAWANIALADEGBEMI VS. JOHN FASANMADE (1988) 3 NWLR (PT. 129) VICTOR ROSSEK & OTHERS VS. A.C.B. LTD. & OTHERS (1993) NWLR (PT. 382) OKOLI OJIAKO & OTHERS VS. ONWOMA OGUEZE & OTHERS (1962) 1 ALL NLR 58. The law is settled that any court of record including the Supreme Court, see OLABNJI VS. ODOFIN (1996) 2 SCNJ 242 AT 247, has the inherent jurisdiction to set aside its own judgment given in any proceedings in which there has been a fundamental defect, such as one which goes to the issue of jurisdiction and competence of the court, See SKENCONSULT (NIG) LTD VS. UKEY (supra) A.C.B. PLC VS. LOSADA (NIG) LTD (1995) 7 SCNJ 158 AT 168. Such a judgment is a nullity. A person affected by it is therefore entitled EX DEBITO JUSTITIAE to have it set aside. The court can set it aside *suo motu* and the person affected may apply by motion and not necessarily by way of appeal. See ADEIGBE VS. KUSIMO (1965) NMLR 284 EZEOKA FOR VS. EZEKO (1999) 6 SCNJ 209, at 225. This is common sense that if a court makes an Order which it has no jurisdiction or competence to make, it has the jurisdiction to rescind the Order so as to restore the status quo. See AKINBOLOLA VS. PLISON FISCO (1991) 1 NWLR (PT. 270) 276. A judgment or order which is a nullity owing to failure to comply with an essential provision, such as, service of process, can be set aside by the court which gave it or made the order see ANATOGO VS. IWEKA II (1995) 9 SCNJ 1 at 33-34 or (1995) 8 NWLR (PT. 415) at 547. At 586, Ogundare JSC said:-

*"The general rule is that the Court has no power under any application in the action to alter or vary a judgment or order drawn up, except so far as is necessary to correct error in expressing the intention of the Court or under the slip rules" xxxxxxxxxxxxxxxx. There are, however, exceptions to this rules some of which are:-*

*(1) A judgment or order which is a nullity owing to failure to comply with an essential provision such as service of process can be set aside by the Court which gave the judgment or made the orders. xxxxxxxxxxxxxxxx."*

See also SCOTT- EMUAKPOR VS. UKAUBE (1975) 12 SC 435. When an order is made or judgment is entered against a defendant, who claimed not to have been served with the originating process, such an order or judgment becomes a nullity if the defendant proves non service of the originating process. It is a nullity because the service of the originating process is a condition sine qua non to the exercise of any jurisdiction on the defendant. If there is no service the fundamental rule of natural justice audi alteram partem will be breached see SKENCONSULT CASE supra.

In view of the above, both the court below and the trial court were in error to have held that the trial court had no power to set aside the judgment because the judgment in this matter was a judgment obtained under the Undefended List. Where as in this case the aggrieved defendant complains of non-service of the process, he is raising a fundamental issue which goes to the jurisdiction and the competence of the court to enter the judgment. In such a case, where the defendant proves non service on him, the whole proceedings becomes a nullity and the trial court has the jurisdiction to set it aside. It needs to be emphasised, that it is now settled law that the failure to serve process, where the service of process is required such as in this case, is a failure which goes to the roots of the case see CRAIG VS. KANSEEN 1943 K.B. 256 at 262. It is the service of the process of the court on the defendant that confers on the court the competence and the jurisdiction to adjudicate on the matter . It is clear that due service of the process of the court is a



condition precedent to the hearing of the suit. Therefore if there is failure to serve the process, where the service of the process is required the person affected by the order, but not served with process, is as mentioned above entitled EX DEBITO JUSTITAE to have the order set aside as a nullity. See MBADINOJU VS. EZUKA (1994) 8 NWLR (PT. 364) 5. I accordingly resolve issue number one against the respondent. Under the circumstances both the trial court and the Court of Appeal were in error to have held that they could not set aside the judgment in this case merely because, the judgment was obtained under the Undefended List procedure, what the authorities state is that judgment on the Undefended List is a judgment on the merits and cannot be set aside as merely a default judgment entered in the absence of a party or in the default of a defendant to take a procedural step.

#### ISSUES NOS. 2 AND 5

Now, I shall deal with issues 2 and 5 together. They are concern with the question of whether under the circumstances of this case when there is conflict on the facts as contained in two opposing affidavits, the learned trial judge ought to have resorted to taking oral evidence in order to arrive at a decision whether the appellants were served with the originating process or not. The subsidiary point is whether the affidavit of service by a bailiff is a conclusive proof of service of the process and not merely a rebuttable presumption. Now, both the lower courts came to the conclusion that the appellants were properly served with the Originating Summons. It is submitted in the affidavits before the trial judge, there are conflicting facts on fundamental issues and to resolve the conflict, the learned trial judge, was obliged to call oral evidence. The learned trial judge merely stated that the complaint of non-service was an after thought when the Court of Appeal asserted that there were sufficient materials before the learned trial judge for him to reach a decision without the necessity of calling for oral evidence. **Now, where a process has been served, it is necessary for the court to have before it evidence of that fact. Service of the process especially the originating process is an essential condition for the court to have the competence**

or the jurisdiction to entertain the matter. Further failure to comply with this condition would render the whole proceedings, including the judgment entered, and all subsequent proceedings based therein, wholly irregular, null and void. That is why the proof of the service of the process on a defendant is very fundamental to the issue of the jurisdiction and competence of the court to adjudicate.

Now, the appellants denied service of the originating process and only became aware of the existence of the suit, when the respondent together with the bailiffs and policemen went to their premises to attach goods in the execution of the judgment. The respondent swore to an affidavit that service was effected and he attached to his counter-affidavit, the affidavit of service sworn to by the bailiff. Now, the affidavit of service sworn to by the bailiff shows that there are two defendants, one an individual, (The 2nd appellant); the first appellant and two, a limited liability company; the bailiff stated that he effected the service by substituted means. He claims "I pasted upon the defendant's doors xxxxxxxxxxxxxxxx". In my view, this is not good enough. The affidavit of service must be a proper affidavit of service proving due service of the writ. The second appellant as the 2nd defendant is a limited liability company. The mode of service on a limited liability under the relevant rules of court is different from service of process on an a natural person such as the 1st appellant. The Companies and Allied Matters Act by Section 78 makes a provision as how to serve documents generally or any company registered under it. By this, a court process is served on a company in the manner provided by the Rules of Court. A service on a company, as this provided, must be at the registered office of the company and it is therefore bad and ineffective if it is done at a branch office of the company see WATKING VS. SCOTTISH IMPERIAL INSURANCE CO. (1889) 23 QBD 285. The procedure is by giving the writ to any director, Trustee, secretary or other Principal Officer at the Registered Office of the Company or by leaving the same at its office. That is why, I am of the view that the affidavit of service by substituted means sworn to by the bailiff is not enough to prove

that the 2nd appellant was duly served with the Originating Summons. I cannot see the need or the necessity for making a substituted service on a Corporation such as the 2nd appellant. See **BEN THOMAS HOTEL LTD VS. SEBI FURNITURE LTD. (1989) 5 NWLR (PT. 123) 523**. The need for substituted service arise because personal service cannot be effected and since personal service can only be effected on natural or juristic persons, the procedure for substituted service can not be made to a corporation like the 2nd appellant herein **SLOMAN VS GOVERNMENT OF NEW ZEALAND (1875) 1 CPD 563, HILLYARD VS. SMYTH (1889) 36 WR 7**. So, no matter how you look at it, the 2nd defendant, the 2nd appellant herein, could not be said to have been properly served. The affidavit sworn by the bailiff could not be sufficient proof of service of the process on the 2nd appellant. So in the situation such as this, there is even no need for the trial judge to call for oral evidence to resolve the contradictory positions taken by the parties, the respondent had offered no credible evidence to show that the 2nd appellant was served with the originating process. Therefore based on the available credible evidence the 2nd appellant had shown that it had not been served with the originating process.

Now, with reference to the 1st appellant, a natural and juristic person, an order of substituted service of the process could be ordered where it was found necessary to adopt the procedure. The procedure for substituted service is invoked where the defendant is untraceable or is evading service. But the rules provide that the court must be satisfied, that personal service cannot be conveniently effected. Where it is necessary to adopt the procedure of substituted service, the plaintiff makes an application to the court by an ex-parte motion. The affidavit in support should state the grounds on which the application is based. The abortive efforts to personal service must also be recounted. The record of the proceedings in the instant does include the application for the order. In any event, as shown, the bailiff swore that he pasted the Writ on the door of the premises of the appellants, against that is the affidavit

sworn to by the 1st appellant, that no such thing was done and that he only became aware of the existence of the suit when the respondent went to attach certain goods in the execution of the purported judgment. The trial court was clearly faced with two conflicting affidavits on the issue of service, on the one hand, the appellants claimed not to have been served and the respondent by the bailiff's affidavit assert that there was service, in such a situation in my view, the trial court should have called for oral evidence to enable him determine the truth. See NATIONAL BANK VS. ARE BROTHERS (1977) 6 SC 97 PHARMACISTS BOARD VS. ADEBESIN (1975) 5 SC 43, MBADUGHA VS. NWOSU (1993) 9 NWLR (PT. 315) 110. It is now elementary law that in the face of direct conflict on crucial and material facts, the learned trial judge must call for oral evidence from the defendant or such other witnesses as the parties may call. Both the learned trial judge and the lower court were in error to have glossed over the issue and adjudge the issue as an after thought. The lower court was also in error to have held that there were sufficient facts upon which the court could come to the conclusion that the appellants were served, when the lower court failed to mention the other pieces of evidence. Such a finding is perverse since it is not supported by any evidence on the printed record. I am of the view that there was no material available to enable the lower court resolve the differences as contained in the two affidavits, recourse must be had to calling oral evidence to arrive at the truth whether the appellants were served with the originating process or not. I accordingly resolve the 2nd and 5th issues in favour of the appellants.

ISSUE NO. 3 AND 4

Whether the judgment of the High Court which was sought to be set aside was a competent judgment. This is concerned with the refusal of the high court to set aside its judgment on the grounds of competency in that the claims before the court was wrongly placed in the undefended list because the claim was not for debt or ascertained liquidated demand and that no initiating process was served on the appellants. It appears to

me straight away that this is a no issue as it did not arise for determination in the trial Court. In the trial Court, the appellant merely applied to the court to set aside the judgment obtained against the appellants on the grounds that the originating process was not served on the defendants, the applicants to the motion, the subject matter of the ruling. There was B no appeal against the judgment and in his ruling the learned trial judge did not consider the issue of whether the claim was properly placed on the undefended list or not. It was never raised by any of the parties and the learned trial judge did not consider or rule on the competency of the C matter he has placed on the undefended list. Indeed he could not have considered it, since he could not sit on appeal on a matter he had decided.

I have also examined the Amended Notice of Appeal filed by the appellants and I cannot find any ground of appeal that has relevance to the issue now under discussion. The Lower Court dealt with this issue, D i.e. the competency of the suit under undefended list when the amount claimed was not liquidated or ascertained etc. As shown above, this was a fresh issue before the Lower Court and it dealt with it as issue No. 3, when clearly as indicated above, there was ground of appeal to sustain it. E **I am of the view that the lower court was wrong to have considered the competency of the suit when, there was no appeal against the judgment. It was also wrong for the Lower Court to deal with the matter when there was no ground of appeal to support the issue. It was also wrong for the Court of Appeal to consider the issue since no leave was sought and obtained to deal with it as a fresh issue. I accordingly decline to consider the third issue as it is not relevant and it did not properly arise for determination in the Court below. It is the law that neither a party nor a court is permitted to argue or deal with an issue not related to any ground of appeal. See ONIAH VS. ONYIA (1989) 1 NWLR (PT. 99) 514, NWOSU VS. UDEAJA (1990) 1 NWLR (PT.125) 188.** F G

In any event the Court of Appeal is right to have discountenanced H the second ground of appeal in the Amended Notice of Appeal, the ground clearly has no relevance whatever to the ruling the subject matter of the appeal. But having resolved issues 1, 2 and 5 in favour of the appellants,

the appellants' appeal deserves to succeed and I accordingly allow it. The Orders of the lower court are set aside. The judgment of the High Court entered on the 16/1/1994 is hereby set aside and the suit filed by the respondent be heard de novo before another judge. The orders for costs made against the appellants are set aside in the two lower courts. The appellants, are entitled to costs in the trial court, the Court of Appeal and this court assessed at N3,000.00, N4,500.00 and N10,000.00. respectively.

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**BELGORE JSC**

I read in advance the judgment of my learned brother, Musdapher, JSC and for reasons clearly set out therein I also allow this appeal with the same consequential orders as to costs.

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**MOHAMMED JSC**

E I have had the privilege to read in advance the judgment written by my learned brother Musdapher, JSC, in draft. I agree that there is merit in this appeal. I do not have anything more to add.

F The appeal is accordingly allowed. The judgments of both the High Court and the Court of Appeal are hereby set aside. I order the suit filed by Gabriel Eke to be heard de novo before another judge. I abide by the orders made in the lead judgment on costs.

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**IGUH JSC**

I have had the privilege of reading in draft the judgment just delivered by my learned brother Musdapher, J.S.C and I agree that this appeal is meritorious and ought to be allowed.

H Accordingly this appeal is hereby allowed with costs to the appellants against the respondent as assessed in the leading judgment. I subscribe to the rest of the orders therein made.

### EJIWUNMI JSC

This appeal arose from the judgment of the Court below, which has affirmed the ruling of the trial Court. By that ruling of the trial Court, the various prayers of the appellants/defendants that the judgment of the Court be set aside, as the applicants were not served with the originating summons that commenced the action, and were not given a chance to defend the claim against them before the trial Court delivered its judgment. The Court below in affirming the ruling of the trial Court held that (1) a judgment obtained under the undefended list procedure cannot be set aside except by way of an appeal; (2) permitting litigant to challenge affidavits of service by bailiffs or other officers of the Court would open up a floodgate of cases and (3) that the learned trial Judge had sufficient materials before him to resolve in the parties affidavits in relation to the question of service of writ of summons without the need to call for oral evidence.

Now it is not in dispute that a judgment may be obtained on a case that was on the undefended list - see Bank of the North Ltd. v. Intra Bank S.A (1969) 1 ALL NLR 91; UTC v. Pamotei (1989) 2 NWLR (pt.103) p.244; Leventis Motors v. Mbono (1961) ALL NLR 539. But the question that has to be considered in this case is, whether a judgment obtained under the undefended list can be set aside by the court that gave the judgment. It is however argued for the respondent that, so long as the judgment was obtained on its merit, no court of similar jurisdiction possesses the power to set aside its judgment even if there was a mistake. See Bank of the North Ltd v. Intra Bank S.A. (supra); UTC v. Pamotei (supra) and Leventis Motors v. Mbono (supra). On the other hand, it is argued for the appellants that any Court of Record has the inherent jurisdiction to set aside its own judgment given in any proceedings where there has been a fundamental defect, such as one which goes to the issue of jurisdiction and competence of the Court. In support of this submission, reference was made to decisions in Skenconsult (Nig) Ltd. v. Ukey (1981) NSCC (vol. 12)1 at 16; Olabanji v. Odofin (1996) 2 SCNJ 242 at 247; ACB Plc v. Hosada (Nig) Ltd (1995) 7 SCNJ 158 at 1 68; Adeigbe

v. Kusimo (1965) NMLR 284; Akinbolola v. Plisson Fisko (1991) 1 NWLR (pt. 270) 276; Anatogo v. Iweka (1995) 8 NWLR (pt. 415) 547 at 586; Scott Emuakpor v. Ukaube (1975) 12 SC 435. I think from the authorities, that where a defendant to a suit which ended up on the undefended list has the right to challenge the jurisdiction of the Court to have placed the case on its undefended list and to enter judgment against the defendant, it is open to such a defendant to place before that, such matters as would convince the court that the judgment lacked the necessary jurisdiction to act as it had done in the circumstances.

In the instant case, the position of the appellants upon which the trial Court was asked to set aside its judgment was that, they were never served with the originating summons and other documents with which the matter was heard and determined by the trial Court. Before that Court, the appellants filed their affidavit to show that they were not aware of the proceedings in Court until respondent came to execute the judgment on the premises of the 2nd appellant. The respondent as shown in the printed record, also filed a counter-affidavit with which he sought to show that the appellants were duly served. Also the affidavit of the bailiff of the court, who claimed to have pasted the necessary processes on the door of the defendant, was also exhibited.

The learned trial Judge having come to the conclusion that there was no conflict in the affidavit evidence so filed, simply dismissed the application. I think the trial Court was wrong to have come to that conclusion. The Court below also in my respectful view, fell into the same error in affirming the ruling of the trial Court in that regard. It seems clear from the law and the facts, that the appellants could not have been properly served in the circumstance. Firstly, the 2nd appellant being a registered company cannot be properly served as was purported done. This is because there are clear provisions of the law governing the service of processes on a registered company. See Ben Thomas Hotel Ltd v. Sebi Furniture Ltd (1989) 5 NWLR (pt. 123) 523. And even with regard to the service on the 1st appellant, it does not appear manifest that the steps that ought to have been taken by the respondent to entitle him to an order of substituted service was duly taken before the trial Court made



the order. I must therefore observe that had the Court below looked properly at the nature of the case and the affidavits filed by the parties to the suit, it should have become manifest that the service by substituted service of the processes on the appellants were faulty.

It is no doubt settled law that a judge cannot set aside its own judgment even where the case was on the undefended list. In Bank of the North Ltd. v Intra Bank S.A (supra) Ademola CJN, observed thus:

*"As far as we are aware, a judge after passing and entering of his judgment cannot review it. There are a few cases where he can interfere in order to amend some mistakes or correct accidental slips and the like. It is difficult to see how a judge by way of motion could set aside his own judgment. In the case of Ainsworth v. Wilding (1896) 1 Ch. 673, where a motion was brought to set aside a judgment, Romer J. at page 676 of the report said: "The Court has no jurisdiction, after the judgment at the trial had been passed and entered, to rehear the case. That is clear...."*

The learned trial Judge is no doubt bound with this decision and cannot properly, given the circumstances, review its own judgment or set it aside. But surely, had the appellate Court considered carefully as noted above the affidavit evidence before the trial Court, it should have felt compelled to set aside that ruling of the trial Court. But having not done so, it is my view that this Court can properly set aside the judgment of the trial Court in this connection. In upholding this appeal, it is, I think right to note that a Court can be said to have jurisdiction and competence to hear matters when (1) it is properly constituted as regards numbers and qualifications of the members of the bench, and no member is disqualified for one reason or another; (2) the subject matter of the case is within its jurisdiction, and there is no feature in the case which prevents the court from exercising its jurisdiction and (3) the case comes before the court initiated by due process of law, and upon fulfilment of any condition precedent to the exercise of jurisdiction. See Madukolu & Ors v. Nkemdilim (1962) The ANLR, 589-590. It is my humble view clear that the judgment of the trial Court is not sustainable, as it has now been clearly established that the appellants were not served with due process before judgment was entered against them by the trial Court .

Having reached the conclusion that the Court below was in error to have affirmed the ruling of the trial Court, it follows that the judgment of the Court below must be set aside. It is hereby set aside accordingly. It is also ordered that, as the trial High Court was wrong to have entered judgment in favour of the respondent, that judgment delivered on 16/1/94 is also set aside. It is further ordered that the suit filed by the respondent be heard de novo before another judge of the High Court.

It is for this reason and the fuller reasons given in the lead judgment of my learned brother, Musdapher JSC that I also uphold the appeal of the appellants. I abide with the orders made in the lead judgment with regard to costs.

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