

**SUPREME COURT OF NIGERIA**

16TH DECEMBER, 2005. SC 128/2001

**CORAM:- S. M. A. BELGORE , A. O. EJIWUNMI, I. C. PATS-  
ACHOLONU, A. M. MUKHTAR, I. F. OGBUAGU, JJSC**

MR. G. O. DUKE ..... APPELLANT

AND

AKPABUYO LOCAL GOVERNMENT ..... RESPONDENT

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RULES OF COURT - Nature of - Not immutable - They are meant to be obeyed - But caution should be exercised - To apply them so as not to choke justice (H1)

PRACTICE & PROCEDURE - Irregularity - How often construed - A defect in the nature of unilateral abridgement of time - Will not ordinarily vitiate the proceedings (H2)

ACTIONS - Admission of liability - Courts - Justice - Administration of - Where a party is seen to be indulging - In a method that is antithetical to justice - Court should distance itself from it (H3)

JUDGMENTS - Appeals - Technicalities - Enthronement of justice - Court should not rely on technical slip - Unto a denial of justice (H4)

**FACTS**

Before the High Court, the plaintiff/appellant instituted an action against the respondent/defendant claiming a sum of N150,000.00 for work executed for the defendant but was not paid despite repeated demands. The action was placed on the undefended list and judgment was given to the plaintiff as the defendant failed to file an intention to defend the suit.

After the judgment, the defendant filed two motions, seeking for instalment payments and setting aside the judgment. The defendant later withdrew the two motions and appealed to the Court of Appeal for leave

to appeal against the judgment of the high court as being a nullity. The Court of Appeal upheld the appeal on the ground that the judgment of the Court of trial was a nullity. Aggrieved by this decision, the plaintiff has therefore, appealed to the Supreme Court.

**ISSUE FOR DETERMINATION**

*“Whether the service of a writ of summons less than 8 days before the hearing date would ipso facto render a trial (sic) nullity for want of jurisdiction or is an irregularity which the defendant in this case had waived.”*

**HELD** (Unanimously allowing the appeal per **PATS-ACHOLONU JSC**)  
***RULES OF COURT - Nature of - Not immutable***

1. It is important to understand the nature of Rules of the Court. Our Courts have held that rules of the Court are meant to be obeyed. They provide supports in the administration of justice, but it must be understood that being rules or regulations to assist the Court in its effort to determine issues or controversies before the Court, care must be exercised in not elevating them to the status of a statute as they are subsidiary instruments. They are to be used by the Courts to discover justice and not to choke, throttle or asphyxiate justice. They are not sine qua non in the just determination of a case and therefore not immutable. (p. 2786 E)

***Irregularity - How often construed***

2. The term “irregularity” in respect of procedures, is most often construed by the Court to denote something not being fundamentally tainting or besmirching a proceeding as to render it invalid or a nullity, id est, it is curable. It may be necessary to recapitulate the provision of order 2 Rule 2(1) of the Cross River State High Court (Civil Procedure/Rules) which states as follows:-

*“An application to set aside for irregularity any proceeding, any step taken in any proceedings or any document, judgment order therein shall not be allowed unless it is made within a reasonable time and before the party applying has taken fresh steps after becoming aware of the irregularity”.*

In this case after the Respondent had become aware of the decision of the Court for which it did not file any intention to defend the action, it took three definite steps to wit, (a) it filed a motion for installment payment, and (b) later it filed a motion to set aside the judgment, (c) it withdrew the motions. By taking those steps of filing two motions and withdrawing them, the impression gained is that it had decided to cut its losses by stopping any further prolongation of litigation. Suddenly it appealed to the Court of Appeal on the ground that the trial was a nullity. I must candidly confess that there is something inherently and patently ignoble and I dare say inelegant and ungainly in the procedure or method resorted to by the Respondent. It sought to approbate and reprobate at the same time thereby sending a message of being consistently inconsistent. It is a parody in a quest of agitation of constitutional rights. What it might be asked is what is the nature of the defect in the service for which the Respondent demonstrated such unifying behaviour. To my mind it is a defect which in its very nature in the context of the prevailing circumstances would not ordinarily vitiate any proceedings taken, to wit, that there was unilateral abridgment of time not compatible with the prescription of the rules. (p. 2787 A)

### ***ACTIONS - Admission of liability***

3. In this case the Respondent sent out wholesome misleading signals. It admitted owing the money. There is in Law the ethical content by which justice is seen as representing what is noble in a civilized society and for which the judiciary attempts in its adjudicative duties to enthrone. Having so stated, it cannot be overemphasized that a Court where conscience and ethics are excluded not necessarily by statute or rules that seek to subjugate law and justice to some quaint philosophy but in which the Court rests its adjudication on what it deems is the justice of the case, may still be described as a Court of Justice but certainly not a Court of Law. But such justice so rendered is not necessarily judgment bereft of civilized norms. As much as conceivably possible the tenets of sociological jurisprudence dictates that the Court should be freed from some morbid conception that might adversely affect the rendition of justice premised on the noble

altruistic intention and, not in the alter of abstract concepts that are nihilistic. Where a party is seen to be indulging in a method that is antithetical to due administration of justice, the Court should distance itself from it. (p. 2787 H)

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***Appeals - Technicalities - Enthronement of justice***

4. Over reliance on a technical slip or mistake should not play a part in seeking the enthronement of justice. The empirical element in adjudication is to render justice that has the face and character of humanness and is in accord with ethics. By thus, the law is fashioned out to do what it is conceived to be, i.e. to give people their due recompense or reward for which the Court is called upon to do in its adjudicate process, and not resort to processes that might give the wrong message of being neither egalitarian nor comprehensible. In *Nwosu v Imo State Environment* (Pt 135) (1990) 2 N.W.L.R. 688 at 717, this Court per Nnaemeka Agu JSC. Said,

*“As we have stated several times, the days when parties could pick their way in this Court through naked technical rules of procedure the breach of which does not occasion a miscarriage of justice are fast sinking into limbo of forgotten things.....”*

Having acknowledged the debt but now the Respondent seeks to resort to mere technical factors this Court would not avail it.

F It is my view that in the light of the foregoing the judgment of the Court of Appeal cannot be sustained. (p. 2788 H)

**NOTABLE POINTS OF INTEREST**

**EJIWUNMI JSC**

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***1. When irregularity in procedure is deemed as waived***

H It is in my view very clear that the respondent to this appeal is caught by the doctrine of waiver in the circumstances of this case. It is a settled principle that where a beneficiary of a rule failed to challenge the correctness of the procedure at the commencement of the proceedings, the adoption of a wrong procedure will be no more than an irregularity and would not render the entire proceedings a nullity *Adebayo V. Johnson* (1969) 1 ANLR 176 at 190. See also *Ariori v. Elemo* (1983) 1 S.C. 13 at

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Having regard to the principles rendered above, I hold per force that the service of the writ of summons on the respondent as disclosed in this case is a mere irregularity. That irregularity has not in my humble view, caused any miscarriage, of justice to compel the Court below to set aside B the judgment of the trial Court. (p. 2791 E)

### **OGBUAGUJSC**

#### *2. Validity of a writ - How defect in service is viewed*

A writ may be valid, while its service, may be defective. Where a Writ of C Summons is itself valid, any defect in its service, is treated by the Court, as a mere irregularity, which cannot, ipso facto render the proceeding void. In the case of Adegoke Motors Ltd. v Dr. Adesanya & anor. (1989) D 3 NWLR (pt.109) (not (pt.90) as appears in the Appellant's Brief at page 4) at 250 @ 270 (1989) 5 SCNJ. 80 @ 87, 89 - per Oputa, JSC, it was held that if a writ is valid, any defect in service, become a mere irregularity which may make such service of the writ, voidable but definitely not void.

In the instant case leading to this appeal, it is not disputed by the E Respondent and their learned counsel, that the writ is valid. It is the mistake of the Court's Registry through its bailiff, to have served the said writ at the time it did. There is no evidence that the Appellant, was a party to the said service or that he knew or was acquainted with the Rules of the Court F as to the period of service of the said Writ of Summons.

In other words, the Court will not visit the "sin" of the Court's Registry, on a litigant or his counsel, unless, it was shown that the litigant and/or his counsel, was a party thereto or had full knowledge of the "sin": G or mistake, and encouraged /instigated/condoned/ approved the said action/act. (p. 2794 H)

#### *3. When non compliance with the Rules will not render the proceedings void*

H It need be stressed, that the practice of giving eight (8) days to enter appearance, is not a mandatory rule of law or of any law or indeed, a rule of Court. I agree with the learned counsel for the Appellant, that it is a mere

matter of practice. Afterwards, it is now firmly settled, that a breach of a rule of practice, can only render a proceeding an irregularity and not a nullity. See *Alhaji Saude v Alhaji Abdullahi* (1989) 4 NWLR (pt.116) 387; (1989) 7 SCNJ. 216, (1989) 2 S.C. 216. There is a world of difference, between non-compliance which amounts to an irregularity and therefore, can be taken care of by Order 2 Rule (1) of the Cross Rivers State High Court Rules 1988, because, it does not render the proceedings void, and those which constitute a nullity. (p. 2796 A)

C *4. Proper time to oppose procedural irregularity*

The appropriate time at which a party to a proceeding, should raise an objection based on procedural irregularity, is at the commencement of the proceedings or at the time when the irregularity, arises. If the party “sleeps” on that right, and allows the proceedings to continue on the irregularity to finality, (as happened in this case leading to this appeal), then the party, cannot be heard to complain at the concluding or concluded stage of the proceedings or on appeal thereafter, that there was procedural irregularity which vitiated the proceedings. The only exception to this general rule, is that the party would be allowed to complain on appeal, if it can show that it had suffered a miscarriage of justice by reason of the procedural irregularity. So said this Court in *Saude v. Abdullahi* (supra). I shall come to this exception again later in this Judgment i.e. that there is no allegation or complaint by the Respondent or their learned counsel, whatsoever, of it suffering of any miscarriage of justice by reason of the said irregularity. (p. 2798 C)

G **REPRESENTATION**

O. Wale for the Appellant.  
Joe Agi for the Respondent.

H **CASES REFERRED TO**

*Nwosu v Imo State Environment* (Pt 135) (1990) 2 N.W.L.R. 688 at 717  
*U.T.C. (Nig) Ltd. v Pamotei* (1989) (Pt 103) 2 N. W. L. R. 244 at 296  
*Salami v Bunginimi & An.* (1998) 9 N. W. L. R. (Pt 565) 235 - 8

Coupe v Edwards (1878) L. R. P. D. 103 at 142

Adebayo v Johnson (1969) 1 ANLR 176 at 190

Ariori v. Elemo (1983) 1 S.C. 13 at 50

Alhaji Saude v Alhaji Abdullahi (1989) 4 NWLR (pt.116) 387; (1989) 7 SCNJ. 216, (1989) 2 S.C. 216

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Long- John v Chief Blakk & 2 Ors (1998) 6 NWLR (pt.555) 524

Banqo v Chado (1998) NWLR (pt.564) 139

The Hon. Justice Kalu Anyah v African Newspapers of Nig. Ltd. (1992) 7 SCNJ. (pt.1) 47

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Ajayi & anor. v Umorogbe (1993) 7 SCNJ. (pt.168)

Chief Eboh & Ors. v Akpatu (1968) 1 ANLR 220

Chief Kalu v Chief Odili & Ors. (1991) 5 NWLR (pt.240) 130 @ 143

Ezera v Ndukwe (1961) 1 ANLR 564

Adegoke Motors Ltd. v. Adesanya 1989 3 N. W. L. R. (Pt 90) 250

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Bank of Ireland v. Union Bank (1998) 7 SCNJ. 385 at 396

### **RULES REFERRED TO**

Cross River State High Court (Civil Procedure Rules) 1988 O. 2 r. 2(1) E

### **LEAD JUDGMENT BY PATS-ACHOLONU JSC**

The Appellant as a plaintiff had instituted a suit against the Respondent claiming a sum of #150,000.00 for work executed for the Respondent but which despite repeated demands was not paid. The action was placed on the undefended list. Judgment was thereafter given to the Appellant as the Respondent for reasons best known to it refused or failed to file an intention to defend the suit. After the judgment was delivered the Respondent filed two motions viz:- one seeking prayers for installment payment and, surprisingly another to set aside the judgment. Curiously enough it admitted owing the Appellant of the sum claimed in its affidavit for installment payment. It then made a sort of somersault and withdrew the two motions. The matter did not end there as it applied to the Court of Appeal for leave to appeal against the decision stating that the judgment of the High Court was a nullity because as it contended, the writ of summons was served less than 8 clear days to the hearing date, and that interest ought

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not to have been awarded. The Court of Appeal upheld the argument that the judgment of the Court below it was a nullity for non observance of the 8 days period because the Respondent was served with the writ 6 days before the date fixed for the hearing of the case. Piqued by the decision of the Court of Appeal the Appellant then appealed to this Court and framed only one issue for Consideration which is:-

*“Whether the service of a writ of summons less than 8 days before the hearing date would ipso facto render a trial (sic) nullity for want of jurisdiction or is an irregularity which the defendant in this case had waived.”*

The Respondent on its own part decided to adopt the sole issue framed by the Appellant.

The Appellant has argued that with the enrolled order of the High Court having been made, the effect is that the case would be heard in the undefended list as it should be taken that the enrolled order had superseded the endorsement on the writ of summons which he argued was a mere matter of form. It is the contention of the learned counsel for the Appellant that where a writ is ex facie valid any defect on service would be a matter of form. For this proposition of the law, he cited Adegoke Motors Ltd. v. Adesanya 1989 3 N. W. L. R. (Pt 90) 250, and Bank of Ireland v. Union Bank (1998) 7 SC NJ. 385 at 396.

**It is important to understand the nature of Rules of the Court.**  
**Our Courts have held that rules of the Court are meant to be obeyed. They provide supports in the administration of justice, but it must be understood that being rules or regulations to assist the Court in its effort to determine issues or controversies before the Court, care must be exercised in not elevating them to the status of a statute as they are subsidiary instruments. They are to be used by the Courts to discover justice and not to choke, throttle or asphyxiate justice. They are not sine qua non in the just determination of a case and therefore not immutable.**

Let me pause here and dwell tritely on the contention or argument of the learned counsel for the Respondent. He argued with verve that

*“The service of the writ of summons on the defendant less than*



*eight days before the return date from the totality of the above Supreme Court decisions was clearly an irregularity”*

**The term “irregularity”** in respect of procedures, is most often construed by the Court to denote something not being fundamentally tainting or besmirching a proceeding as to render it invalid or a nullity, id est, it is curable. It may be necessary to recapitulate the provision of order 2 Rule 2(1) of the Cross River State High Court (Civil Procedure/Rules) which states as follows:-

*“An application to set aside for irregularity any proceeding, any step taken in any proceedings or any document, judgment order therein shall not be allowed unless it is made within a reasonable time and before the party applying has taken fresh steps after becoming aware of the irregularity”.*

In this case after the Respondent had become aware of the decision of the Court for which it did not file any intention to defend the action, it took three definite steps to wit, (a) it filed a motion for installment payment, and (b) later it filed a motion to set aside the judgment, (c) it withdrew the motions. By taking those steps of filing two motions and withdrawing them, the impression gained is that it had decided to cut its losses by stopping any further prolongation of litigation. Suddenly it appealed to the Court of Appeal on the ground that the trial was a nullity. I must candidly confess that there is something inherently and patently ignoble and I dare say inelegant and ungainly in the procedure or method resorted to by the Respondent. It sought to approbate and reprobate at the same time thereby sending a message of being consistently inconsistent. It is a parody in a quest of agitation of constitutional rights. What it might be asked is what is the nature of the defect in the service for which the Respondent demonstrated such unedifying behaviour. To my mind it is a defect which in its very nature in the context of the prevailing circumstances would not ordinarily vitiate any proceedings taken, to wit, that there was unilateral abridgment of time not compatible with the prescription of the rules. In this case the Respondent sent out wholesome misleading signals. It admitted owing the money. There

is in Law the ethical content by which justice is seen as representing what is noble in a civilized society and for which the judiciary attempts in its adjudicative duties to enthrone. Having so stated, it cannot be overemphasized that a Court where conscience and ethics are excluded not necessarily by statute or rules that seek to subjugate law and justice to some quaint philosophy but in which the Court rests its adjudication on what it deems is the justice of the case, may still be described as a Court of Justice but certainly not a Court of Law. But such justice so rendered is not necessarily judgment bereft of civilized norms. As much as conceivably possible the tenets of sociological jurisprudence dictates that the Court should be freed from some morbid conception that might adversely affect the rendition of justice premised on the noble altruistic intention and, not in the alter of abstract concepts that are nihilistic. Where a party is seen to be indulging in a method that is antithetical to due administration of justice, the Court should distance itself from it.

In U.T.C. (Nig) Ltd. v Pamotei (1989) (Pt 103) 2 N. W. L. R. 244 at 296 this Court per Belgore JSC stated as follows:

*“Rules of Procedure are made for the convenience and orderly hearing of cases in Court. They are made to help the cause of justice and not to defeat justice. The rules are therefore aids to the Court and not masters of the Court. For Courts to read rules in the absolute without recourse to the justice of the cause, to my mind will be making the Courts slavish of the cause. This is certainly not the raison de tre of Rules of Court”*

See also Salami v Bunginimi & An. (1998) 9 N. W. L. R. (Pt 565) 235 - 8. and Coupe v Edwards (1878) L. R. P. D. 103 at 142; In Saude v Abdullahi (1989) N.W.L.R. (Pt. 116) 387, this Court held that :-

*“It is well settled law that a breach of a rule of practice can only render a proceeding an irregularity and not a nullity. Such an irregular proceeding can only be set aside if the party affected acted timeously and before taking a fresh step since discovery of the irregularity”.*

**Over reliance on a technical slip or mistake should not play a**

part in seeking the enthronement of justice. The empirical element in adjudication is to render justice that has the face and character of humanness and is in accord with ethics. By thus, the law is fashioned out to do what it is conceived to be, i.e. to give people their due recompense or reward for which the Court is called upon to do in its adjudicate process, and not resort to processes that might give the wrong message of being neither egalitarian nor comprehensible. In *Nwosu v Imo State Environment (Pt 135) (1990) 2 N.W.L.R. 688 at 717*, this Court per Nnaemeka Agu JSC. Said,

*“As we have stated several times, the days when parties could pick their way in this Court through naked technical rules of procedure the breach of which does not occasion a miscarriage of justice are fast sinking into limbo of forgotten things.....”*

Having acknowledged the debt but now the Respondent seeks to resort to mere technical factors this Court would not avail it.

It is my view that in the light of the foregoing the judgment of the Court of Appeal cannot be sustained. I therefore allow the appeal and set aside the judgment of the Court below. I hereby restore the judgment of the High Court. There will be cost to the Appellant assessed at N10,000.00 in the court and in the High Court of Appeal for N2,000.000.

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### BELGORE JSC

The Akpabuyo Local Government clearly acted in breach of their contractual agreement and no legal technicality should be allowed to frustrate clear cause of justice. Just as this Court will not adhere to formulary system once the clear intention of the parties is manifest in their claim thus showing the clear battle line between the parties, technical defects will not be allowed to defeat justice of the case.

I also allow this appeal by setting aside the judgment of Court of appeal. I hereby restore the judgment of trial High Court. I award N10,000.00 as costs in this Court and N5,000.00 as costs in Court of Appeal.

**EJIWUNMIJSC**

I have had the privilege of reading in advance the draft of the judgment just delivered by my learned brother, Acholonu JSC. The facts of this case are not in dispute. What the appeal has however raised is the very disturbing point as to whether it is right and equitable for a party to question a judgment by raising what amounts to the use of technicality to deny the award of a judgment to which that party had not only recognized as a judgment duly recorded against it, but had also sought to liquidate by discharging the judgment by instalmental payments.

In this appeal, the pertinent facts of the case would be restated briefly. On the 19<sup>th</sup> of August 1992, the appellant was by a letter of that date awarded the contract of bulldozing and grading of eight-kilometre farm road. The total order of this jobbing order was N150,000.00. The appellant accepted the offer and duly performed the contract per specification. But the respondent for some unexplainable reasons failed or neglected to pay the appellant the contract sum as agreed. As the appellant was not paid his dues, he commenced this action before the High Court of Cross Rivers State holden at Calabar. Though the respondent was duly served with the writ of summons, it failed to enter an appearance. The action was then heard and determined as a matter on the undefended list. The learned trial judge, following that order entered judgment in favour of the appellant as per his writ of summons in the sum of N150,000.00 with interest at 21% from 1st of August, 1993 until the final liquidation of the judgment debt. Pursuant to that judgment, the appellant in seeking to enforce his judgment took out Garnishee proceedings against the respondent. But when the matter was mentioned, the Court following representations made to the Court that the judgment debtor was prepared to settle the matter out of Court, the appellant through his learned counsel withdrew the application before the Court. Although the matter was adjourned several times for the report of settlement, no such report was presented to the Court.

On the 8<sup>th</sup> of August 2000, learned counsel appearing for the judgment creditor then sought to have the Garnishee Order discharged for reasons which were not made clear as he informed the Court that the judgment debtor was not owing any sum to the judgment creditor. The

Court thereupon on the 8th of August 2000 discharged the Garnishee Order Nisi earlier made by it on 2<sup>nd</sup> of June 1999. In what can be described as a twist of the tail, learned counsel for the respondent then appealed to the Court below against the judgment entered against it by the trial Court. Though several grounds of appeal were filed against the judgment, it became clear from the judgment of that Court, that the Court upheld the argument that the trial Court lacked the jurisdiction to enter judgment against the appellant on the main ground that the judgment was delivered before the expiration of the statutory period allowed by the Rules for the entry of appearance by the appellant who was then the defendant at the trial Court. In this appeal learned counsel for the appellant has sought to persuade this Court that the appeal should be allowed as the respondent had submitted to the judgment rendered against it by the trial Court, the Court below fell into error in discountenancing that fact. It is also argued that the service of the writ of summons by the bailiffs on the defendant less than eight days was an irregularity, which can be waived and should be so regarded in this appeal.

It is in my view very clear that the respondent to this appeal had upon the facts deliberately sought to take advantage of the Rules in order to avoid the consequence of the judgment, which it submitted soon after it was delivered. True enough he sought to have it set aside on appeal. It is in my view very clear that the respondent to this appeal is caught by the doctrine of waiver in the circumstances of this case. It is a settled principle that where a beneficiary of a rule failed to challenge the correctness of the procedure at the commencement of the proceedings, the adoption of a wrong procedure' will be no more than an irregularity and would not render the entire proceedings a nullity *Adebayo v. Johnson* (1969) 1 ANLR 176 at 190. See also *Ariori v. Elemo* (1983) 1 S.C. 13 at 50.

Having regard to the principles rendered above, I hold per force that the service of the writ of summons on the respondent as disclosed in this case is a mere irregularity. That irregularity has not in my humble view, caused any miscarriage, of justice to compel the Court below to set aside the judgment of the trial Court.

For the above reasons and the fuller reasons given in the lead

judgment of my learned brother Acholonu JSC, I also allow the appeal. I abide with the costs as ordered in the said judgment

**MUKHTARJSC**

B I have had the advantage of reading the lead judgment delivered by my learned brother Pats Acholonu, J.S.C. I agree entirely with the reasoning and conclusion reached therein that the appeal is meritorious and ought to be allowed. This court cannot allow some simple technicalities to defeat justice. In this vein I also allow the appeal, and abide by the orders made in the lead judgment.

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**OGBUAGUJSC**

D This is an appeal against the decision of the Calabar Division of the Court of Appeal delivered on 30th January, 2001. The action in the trial High Court, was for the recovery of debt by the Plaintiff/Appellant from the Defendant/Respondent under the undefended list.

E It is not in dispute about the award of the contract by the Respondent to the Appellant to grade a rural road at the agreed contract sum of N150,000.00 (one hundred and fifty thousand naira) to be paid by the Respondent to the Appellant on the completion of the job/grading. The Appellant, duly completed the job/grading to the satisfaction of the Respondent who issued him - the Appellant, with a Final Payment Certificate as an acknowledgment of the said satisfactory completion. - See page 6 of the Records. It reads in part as follows:

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G *“I hereby certify that N150,000.00 as item (9) above is now dues to be paid to the’ Contractor Messrs. GIFTOBASS VENTURES on account of work executed and materials supplied in respect of the above contract”.*

The Certificate was signed by one E. E. Nyong - Head of Works of the Respondent. I note that the Appellant sued thus -

H *“Mr. G. O. DUKE (Trading under the name and style of GIFTOBASS VENTURES)”.*

When the Respondent would not pay in spite of demands -(See pages 7, 8 and 9 of the Records), the Appellant sued and the matter was

placed on the Undefended List and the hearing was fixed for 20<sup>th</sup> May, 1999. However, the Writ of Summons, was served on the Respondent by the Court Bailiff, on 14<sup>th</sup> May, 1999 - i.e. (6) six days before the date of hearing.

It is noted by me that at page 13 of the Records, an Unconditional Memorandum of Appearance, was entered for the Respondent. The Respondent did not file nor did it cause a Notice of intention to Defend the Suit to be filed on its behalf. It did not appear in Court either by itself through its representative/staff or by Counsel on the said date fixed for hearing to protest. No letter was sent to the Court drawing the trial Court's attention to the fact as to the date it was served. Consequently, the learned trial Judge seeing the proof of service, entered judgment on that 20<sup>th</sup> May, 1999 in favour of the Appellant and fixed interest after judgment from 1<sup>st</sup> August, 1993 at 21% - See page 41 of the Records.

It is also noted by me, that after the said judgment, the Respondent's learned counsel, filed a motion for Instalmental payment of the judgment debt on behalf of the Respondent. He later filed another motion for stay of execution and for the trial court to set aside the said judgment on the grounds that the Appellant, had no locus standi to sue in that;

- (a) there was no privity of contract between the parties
  - (b) that Effiom Duke who throughout the proceedings stood as Judgment Creditor is completely different from Mr. G. O Duke. and
  - (c) that the Court lack the jurisdiction to entertain the Suit at all.
- See page 28 of the Records.

I also note that in the affidavit in support in paragraph 3(c), it was/is averred as follows:

*"That the Applicant is still negotiating the mode of payment to the actual contractor".*

It is important to note, that the learned counsel for the Respondent, later, withdrew the two motions which were accordingly struck out. That upon the execution of the said judgment sometime in September, 2000, the Respondent, appealed to the Court of Appeal after being granted leave to appeal. That Court (hereinafter called "*the Court below*"), allowed the appeal and remitted the suit to the trial Court for retrial by another Judge,

It found out that the rate of interest awardable after judgment, is 10%. At page 104 of the Records, the Court below - per Edozie, JCA, (as he then was), stated, inter alia, as follows:

“.....If I had resolved the first issue for determination in favour of the Respondent, I would have amended the judgment of the Court below to read:

“It is hereby ordered that judgment be and is hereby entered in favour of the Plaintiff as per the writ of summons for the sum of N150,000.00 together with interest thereon at the rate of 10% per annum from the date of judgment until the liquidation of the judgment debt”.

That first issue of the Appellant (at the Court below) reads as follows:

“1. Whether a judgment delivered by a Court before the expiration of time allowed on the writ of summons for defendant, to enter appearance is valid”.

I have deliberately gone this far for reasons that will appear later in this Judgment. Now, the lone issue of the Appellant and which has been adopted by the Respondent, is:

“Whether the service of a Writ of Summons less than eight days before the hearing date would ipso facto render a trial a nullity for want of jurisdiction or is an irregularity which the defendant in this case had waived”.

It is no longer in doubt and this is now firmly settled, that the issuance of a writ or indeed, of civil process and service of it, are distinct though inter-related steps in litigation. A writ may be valid, while its service may suffer from some defect. A defendant, may challenge the writ and/or service of it either by

(a) Entering an appearance on protest or  
(b) Enter a Conditional Appearance and  
(c) then file a motion asking the Court seized of the matter to set aside the purported writ and its purported service on him/it on the ground of an essential invalidity of either the writ or its service or both.

In other words, a writ may be valid, while its service, may be defective. Where a Writ of Summons is itself valid, any defect in its



service, is treated by the Court, as a mere irregularity, which cannot ipso facto render the proceeding void. In the case of Adegoke Motors Ltd. v Dr. Adesanya & anor. (1989) 3 NWLR (pt.109) (not (pt.90) as appears in the Appellant's Brief at page 4) at 250 @ 270 (1989) 5 SCNJ. 80 @ 87, 89 - per Oputa, JSC, it was held that if a writ is valid, any defect in service, B become a mere irregularity which may make such service of the writ, voidable but definitely not void.

In the instant case leading to this appeal, it is not disputed by the Respondent and their learned counsel, that the writ is valid. It is the mistake of the Court's Registry through its bailiff, to have served the said writ at the time it did. There is no evidence that the Appellant, was a party to the said service or that he knew or was acquainted with the Rules of the Court as to the period of service of the said Writ of Summons. C

Indeed, in the case of Long- John v Chief Blakk & 2 ors. (1998) 6 D NWLR (pt.555) 524 (a) 549 ; (1998) 5 SCNJ. 68 ; this Court - per Iguh, JSC, stated inter alia, as follows:

*"....., it is also correct that a vast majority of litigants, literate or illiterate, are completely ignorant of rules of Court. Indeed, as a rule, they E look to their counsel for guidance and are not in a position after briefing counsel to instruct, teach, or direct him as to how or when to take whatever steps the law and the rules of court prescribe in the course of the execution of his professional duties,....."* (the underlining mine) F

As rightly submitted by the learned counsel for the Appellant, it was an administrative error and an irregularity. The learned counsel referred to and relied on the case of Cooperative & Commerce Bank (Nig.) PLC v Attorney-General Anambra State & anor. (not cooperatively Development Bank PLC as appears/cited in the Appellant's Brief) (1992) 8 NWLR G (pt.261) 528 @ 561 (it is also reported in (1992) 10 SCNJ. 137) - per Olatawura, JSC, where the following appear, inter alia, thus:-

*"It will be contrary to all principles to allow litigants to suffer for the mistake of the Court Registry".* H

In other words, the Court will not visit the "sin" of the Court's Registry, on a litigant or his counsel, unless, it was shown that the litigant and/or his counsel, was a party thereto or had full knowledge of the "sin":

or mistake, and encouraged/instigated/condoned/approved the said action/act.

It need be stressed, that the practice of giving eight (8) days to enter appearance, is not a mandatory rule of law or of any law or indeed, a rule of Court. I agree with the learned counsel for the Appellant, that it is a mere matter of practice. Afterwards, it is now firmly settled, that a breach of a rule of practice, can only render a proceeding an irregularity and not a nullity. See *Alhaji Saude v Alhaji Abdullahi* (1989) 4 NWLR (pt.116) 387; (1989) 7 SCNJ. 216, (1989) 2 S.C. 216. There is a world of difference, between non-compliance which amounts to an irregularity and therefore, can be taken care of by Order 2 Rule (1) of the Cross Rivers State High Court Rules 1988, because, it does not render the proceedings void, and those which constitute a nullity.

I concede and this is settled, that Rules of Court, must *prima facie* be obeyed and complied with. See *Banjo v Chado* (1998) NWLR (pt.564) 139; *The Hon. Justice Kalu Anyah v African Newspapers of Nig. Ltd.* (1992) 7 SCNJ. (pt.1) 47 and *Ajayi & anor. v. Umorogbe* (1993) 7 SCNJ. (pt.168) just to mention but a few. But it is also settled that it is not every irregularity or non- compliance with the rules of Court, that will nullify an entire proceedings. See *Chief Eboh & ors. v. Akpatu* (1968) 1 ANLR 220 and *Chief Kalu v. Chief Odili & ors.* (1991) 5 NWLR (pt.240) 130 @143; In other words, non-compliance with any rules of Court, or with any rules of practice for the time being in force, does not generally, render the proceedings void. See *Ezera v. Ndukwe* (1961) 1 ANLR 564.

I have noted in this Judgment, that the service of the said Writ which was valid, was an irregularity, but from the conduct of the Respondent as stated earlier in this Judgment, it waived the said irregularity. I have noted also that, an unconditional Memorandum of Appearance was later entered by the Respondent. By Exh. 6, at page 6, of the Records, the Respondent, admitted the debt/indebtedness to the Appellant and later withdrew its said application to set aside the said judgment. See also page 8 of the Records, where therein No “(4)”, one of the Respondent’s officers instructed, the raising of the P.V. (payment voucher) for the payment of N100,000.00 (one hundred thousand naira) as part payment of the contract sum. It is

important to note that, the Respondent knew or was aware of the date of hearing of the suit on the Undefended List. It never wrote for an adjournment neither did it put appearance either by one of its staff or learned counsel to protest about the fact that as at 20<sup>th</sup> May, 1994, the eight (8) days stated on the writ for them to put up appearance, was not yet met. B

For the avoidance of doubt, when the Respondent applied for the discharge of the order of Garnishee Nisi which was subsequently, made absolute by the trial court on 2<sup>nd</sup> June, 1999, the following are contained, inter alia. In the supporting affidavit:

*“10. That the very precarious financial position of the Applicant having been aptly explained to the Plaintiff’s Solicitor including the fact that what is in the garnishee account is not sufficient to even meet payment of the N150,000.00 or meet pressing Council requirements and the necessity of giving the new administration a little respite, an agreement was mutually reached to liquidate the debt in two installments of N70,000.00 upon the discharge of the order and N80,000.00 at the end of this month upon the receipt by the Council of its June 1999 - statutory allocation.”* C D E

*11. That the Applicant became cash-trapped after paying staff salaries on the new minimum wage for three months, March, April, May including the outstanding arrears. The exercise gulped more than ninety-five percent of the Applicant’s statutory allocation - a consequence which made it difficult for the Applicant to meet other financial commitments.”* F

*12. That I am informed by my Solicitor and I truly and sincerely believe him that in consideration of the delay in payment of the outstanding balance it will be desirable to pay a reasonable interest to plaintiff as compensation.”* G

*13. That all the facts deposed to in this Affidavit were duly discussed with the new Executive Chairman of the Council and his principal staff on Thursday, June 10, 1999 and his consent obtained in furtherance of this understanding.”* H

*14. That I am further informed by my Solicitor and I truly and sincerely believe him that the only option open to the Court to make it possible for the Council to meet its obligation to the plaintiff in terms of*

*the understanding reached by both parties on Tuesday, June 8, 1999 is by discharging its order (Exhibit 8) made on the day of 1999".*

See also Saude v Abdullahi (supra) and pages 19, 20 and 21 of the Records.

B However, in matters of procedural irregularity such as in the instant case, firstly, it is settled that such an irregular proceeding, can only be set aside, if the party affected, acted timeously and before taking any or fresh step since discovering the irregularity. It is when a point on procedural irregularity is timeously and properly raised, that it becomes necessary for  
C an Appeal Court and indeed a trial Court, to consider its merit.

The appropriate time at which a party to a proceeding, should raise an objection based on procedural irregularity, is at the commencement of the proceedings or at the time when the irregularity, arises. If the party  
D “sleeps” on that right, and allows the proceedings to continue on the irregularity to finality, (as happened in this case leading to this appeal), then the party, cannot be heard to complain at the concluding or concluded stage of the proceedings or on appeal thereafter, that there was procedural  
E irregularity which vitiated the proceedings. The only exception to this general rule, is that the party would be allowed to complain on appeal, if it can show that it had suffered a miscarriage of justice by reason of the procedural irregularity. So said this Court in Saude v. Abdullahi (supra).  
F I shall come to this exception again later in this Judgment i.e. that there is no allegation or complaint by the Respondent or their learned counsel, whatsoever, of it suffering of any miscarriage of justice by reason of the said irregularity. See also the case of Niger-Benue Transport Co. Ltd. v Narumal Sons Ltd. (1986) 4 NMLR (pt.33) 117 also cited and relied on by  
G the learned counsel for the Appellant in their Brief.

I will pause here to state that the Respondent, took the right step, by filing an appeal in the Court below. This is because of the settled law, that a Judgment obtained under the Undefended List, cannot be set aside  
H as it is treated as a Judgment on the merit, except there is a provision in the rule of any particular State in Nigeria, for the setting aside of such Judgment. There are many decided authorities in this regard. But let me just mention the cases of U.A.C. (Technical) Ltd. v Anglo Canadian Cement

Ltd. (1966) NWLR 349; Bank of the North Ltd. v Intra Bank S.A. (1969) 1 ANLR 91; Owena Bank (Nig.) Ltd. v. Akintuli (1992) 8 NWLR (pt.259) 347 @ 354 - 355 C.A. and recently, Kalu Mark & anor. V. Oke (2000) 1 SCNJ. 245 @ 261 - 262, 264. I do not see any such provision in Order 23 of the said Cross River State Rules.

I therefore, hold that by the conduct and steps taken by the Respondent and by its unequivocal admission even on oath, of its indebtedness to the Appellant, it had waived its right to complain about the said irregularity. See Re Orr - Ewy (1882) 22 Ch. D. 456 @ 463; Boyle v Backer (1889) 39 Ch. D. 249; Harris v Taylor (1915) 2 K.B. 580 @ 591 - per Bankes L.J and our local case of Mrs. Adejumo v David Hughes & Co. Ltd. (1989) 5 NWLR (pt.120) 146 @ 158 C.A. citing the case of Adebayo v Johnson (1969) 1 ANLR 176 @ 190.

Let me again touch on procedural irregularity. It is now settled that there is the need for a party to a proceeding, to show that the irregularity has materially affected the merit of his case and/or has occasioned a miscarriage of justice or that he has been prejudiced in any way or manner by reason of the said irregularity. See also Dr. Maja v Mrs. Costa Samouris (2002) 3 SCNJ. 29 @ 45.

The Respondent did not file any Notice of intention to defend the Suit or say it had a good defence to the suit and then proceed to exhibit the defence. With profound respect, the alleged/purported "*admission*" the Court below relied on, is not an admission of liability under any error of law or that the said admissions by the Respondent, were obtained by either fraud or any misrepresentation.

Now, if I or one may ask, what is the retrial going to be or meant to achieve? I have already hereinabove, reproduced the pronouncement of the Court below - per Edozie, JCA, (as he then was). Since 1993 - about (12) twelve years ago, in a contract that was executed and a final payment certificate was issued by the Respondent as shown at page 6 of the Records, no payment was made to the Appellant until (4) four years after in 1997, when his Solicitors wrote to the Respondent giving it the pre-action Notice. In its response, the Respondent, instructed that payment voucher be raised in the sum of N100,000.00 (one hundred thousand

naira) as part-payment of the said debt. Is it justice or in accordance with equity, that the suit/case be retried de novo on the unacceptable ground or reason, that the Judgment of the trial court was a nullity? I think not. It is (5) five years now, since the said Judgment of the court below, and the Appellant, is yet to receive or be paid, the contract money or debt, that the Respondent, did not dispute.

This brings me to the issue or question of Technicality and the attitude of this Court to the same. In the case of The Attorney-General of Bendel State & 2 ors v Aideyan (1989) 4 NWLR (pt.118) 646 @ 681; (1989) 9 SCNJ. 80 - Nnaemeka-Agu, JSC, stated, inter alia, as follows

*“In such procedural matters, this Court has moved far away from strict adherence to mere technicalities at the expense of substantial justice. It does not now stand akimbo to watch helplessly in a situation where justice will lie prostrate and be trampled down simply because mere technical rules must be upheld. It will rather lean on the side of the spirit of the rules where to do so will result in real justice to the parties in litigation. I should therefore not allow the appellants to hang on a tenuous twig of technicality and thereby defeat substantial justice “.*

In the case of Adewumi & anor v The Attorney-General of Ekiti State & 6 ors. (2002) 1 SCNJ. 27 @ 46, Wali, JSC, stated, inter alia, as follows

*“..... While recognizing that rules of Court should be observed and followed, it should be emphasized that “justice is not a fencing game in which parties engage each other in a whirling of technicalities”. See Joseph Afolabi & ors. v John Adekunle & anor. (1983) 2 SCNLR 141 ; (1983) 8 S.C. 98(8)117-119 - per Aniagolu. JSC”.*

In the case of Igboke v Nlemchi (1996) 2 NWLR (pt.42.9) 185 @ 202 C.A. the following appear, inter alia:

*“It is settled that once it is not shown that failure to uphold technicalities has not occasioned a miscarriage of justice, the Court would opt to lean against technicalities in the interest of doing substantial justice”.*

See also Anic & 3 ors. v. Chief Uzoka & 10 ors (1993) 8 NWLR (pt.309) 1 @ 24; (1993) 9 SCNJ. 223

In the said case of Dr. Maja v Mr. Samouris (supra); it was held that Rules of Court, as far as the conduct of proceedings is concerned, are generally binding on the parties and a party, would be allowed to complain of procedural irregularity on appeal, if inter alia, it can be shown that it materially affected the merits of the case or that he suffered a miscarriage of justice by reason of such irregularity in the proceeding. B

I hold that the fact that the return date, was less than (8) eight days, did not occasion any miscarriage of justice on or prejudice to the Respondent who in any case, has made no such complaint. Therefore, on the authorities, justice, equity, fairness and good conscience, must persuade me, to hold further, that this appeal deserves to succeed and it in fact succeeds. The court below, with respect, was in error when it based its decision on mere/sheer technicality predicated on procedural irregularity that did not render the proceedings a nullity, but only voidable. Any wonder, the learned Justice, made the said order which I had reproduced hereinabove in this Judgment. C D

It is from/for the foregoing reasons and the fuller detailed lead Judgment of my learned brother, Pats-Acholonu, JSC, that I too/also, E accordingly, and hereby, set aside the said Judgment of the court below. I affirm the Judgment of the trial court, except to hold that the interest awardable as rightly found and held by the court below is (10%) (ten percent) from the date of Judgment until the entire debt is liquidated or as amended by the lower court. I abide by the orders in respect of costs in the Lead Judgment in favour of the Appellant payable to him by the Respondent. I wish the Rules of the Court, should have allowed me to award more and I should have readily done so. F

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