

SUPREME COURT OF NIGERIA
4TH MARCH, 2005. SC. 301/2000
CORAM:- S. M. A. BELGORE, S. U. ONU, A. O. EJIWUNMI,
N. TOBI, D. O. EDOZIE, JJSC

TENO ENGINEERING LIMITED APPELLANT
AND
ALHAJI TALIRU YUSUF ADISA RESPONDENT

FAIR HEARING - Service of process - Hearing notice - Should be served on defendant personally - Or on his solicitor (H1)

EVIDENCE - Affidavits - Hearing notice - Where deposition of non service - Was not controverted - The trial was rightly set aside (H2)

FACTS

Before the High Court Maiduguri, the plaintiff/appellant filed an action against the defendant/respondent. The cause of action involves interest in a Right of Occupancy. Appellant served its Statement of Claim on the respondent. He filed no Statement of Defence and was absent throughout the proceedings. The trial court gave judgment in appellant's favour. Respondent then filed a motion moving the trial court to set aside its judgment and allowed him file a Statement of Defence to the action. He averred in his affidavit that he was never served with the Hearing Notice of the case. The trial court refused to set aside the judgment. Respondent's appeal to the Court of Appeal was allowed, the judgment was set aside and trial de novo before another judge was ordered. Being aggrieved, appellant has now appealed to the Supreme Court.

ISSUE FOR DETERMINATION

“Whether the lower court was right in setting aside the judgment of the trial court having regard to all the circumstances of this case.”

HELD (Unanimously dismissing the appeal per **BELGORE JSC**)

Service of process - Hearing notice

1. The only issue worthy of consideration is whether the respondent had

fair hearing at trial High Court; that is to say, did he have notice of hearing of the case. According to his affidavit when he applied to set aside the judgment, the service was not on him but on his employer. The action was against the appellant in person. If the Hearing Notice was served on him personally or on his solicitor, there would have been no problem.
(p. 769 A)

EVIDENCE - Affidavits

2. The deposition in his affidavit that he was not served the Hearing Notice remains uncontroverted as no affidavit of service was shown to court.

On the basis of his failure to serve the Hearing Notice on the respondent, the Court of Appeal allowed his appeal and ordered trial de novo. This is the right decision and upon this I dismiss this appeal and affirm the decision of the Court of Appeal. (p. 769 C)

NOTABLE POINTS OF INTEREST

TOBI JSC

1. When default judgment may be set aside

When does a court of law set aside a default judgment or a judgment given in default? Where there is an application for a court to set aside its own judgment given in the absence of one of the parties before it, in order to give him opportunity of being heard, different considerations apply. Among other things, the court must consider, (1) the reasons for the applicant's failure to appear at the hearing or trial of the case in which judgment was given in his absence. (2) Whether there has been undue delay in making the application to set aside the judgment so as to prejudice the party in whose favour the judgment subsists. (3) Whether the latter party (i.e. in whose favour the judgment subsists) would be prejudiced or embarrassed upon a course inequitable and (4) Whether the applicant's case is manifestly unsupportable.

In addition to the foregoing factors, the court being asked to exercise its discretion to set aside its own judgment must also be satisfied that the applicant's conduct throughout the proceedings, that is, from the service of the writ upon him to the date of judgment, has been such as to

make his application worthy of a sympathetic consideration. (p. 770 E)

2. Service of process - Precondition to jurisdiction

One reason why the respondent did not participate in the proceedings is that he was not served the court process. Service of court process is precondition to vesting jurisdiction in the court. Where notice of proceedings is required, failure to notify any party is a fundamental omission which entitles the party not served and against whom any order is made in his absence to have the order set aside on the ground that a condition precedent in the exercise of jurisdiction for the making of the order has not been fulfilled. Failure to serve process where service of process is required, is a failure which goes to the root of the jurisdiction of the court. Any proceedings in such cases are a nullity. (771 A)

EDOZIE JSC

3. Need for trial court to ascertain if its ordered hearing notice was served
Indeed even after the court below ordered for hearing notice to be issued on the appellant against the sitting of the court on 6/4/96, the court convened and entertained the case in the absence of the appellants and his counsel without ascertaining whether he was served as previously ordered. With the above fundamental lapses in mind, I am of the firm view the appellant was not accorded fair hearing as enshrined in Section 33 of the Constitution of the Federal Republic of Nigeria 1979.”

In the face of the above findings of the court below against which there is no appeal, it cannot be seriously contended that the conclusion it arrived at is assailable. Failure to serve process in a case where such service is required is a serious omission which goes to the root of the jurisdiction of the court and entitles an aggrieved party *ex debito justitiae* to have proceedings in such a case set aside. (p. 772 D)

REPRESENTATION

S. I. Ameh, (with him, A. A. Ibrahim, H. C. Ayanbok, P. C. Duru and Miss M. V. Chigbo), for the Appellant.

R. O. Yusuf, (with him, E. B. Asukwo, Miss P. A. Obumia and Miss F.

Bello), for the Respondent.

CASES REFERRED TO

Williams v. Hope Rising (1982) 1-2 S.C. (Reprint) 70 (1982) 1-2 S.C. 145

B Ugwu v. Aba (1961) All NLR 438

Doherty v. Doherty (1964) NMLR 144

Scott-Emuakpor v. Ukaybe (1975) 12 S.C. (Reprint) 31; (1975) 12 S.C. 41

Sken Consult v. Ukey (1981) 1 S.C. (Reprint) 4; (1981) 1 S.C 6

C Oditia v. Okwudinma (1969) 1 All NLR 228

Obimonure v. Erinoshio (1966) 1 All NLR 250

LEAD JUDGMENT BY BELGORE JSC

D An action on General Cause List at the High Court of Borno State, sitting at Maiduguri was filed by the appellant. The cause of action involves interest in certain right of occupancy. The appellant, as plaintiff served the Statement of Claim on the respondent. Respondent, instead of filing Statement of Defence, did nothing. The appellant then proved his case on his pleadings and trial court gave judgment in his favour. The E respondent, as defendant, by way of motion, moved the trial court to set aside its judgment and allow him file the statement of defence to the action. The supporting affidavit clearly alleged that he was never served with the Hearing Notice of the case; the action being a personal one. Trial court F refused to set aside the judgment and an appeal was lodged at the Court of Appeal, Jos Division.

G All issues argued before the Court of Appeal in the main rested on the propriety of the grounds of appeal and the issues on them which that court dealt with extensively and resolved in favour of the respondent. H However, there was a major issue as to whether, in a personal action the respondent as defendant was never served with Hearing Notice for each day of hearing at the trial court. This is a fundamental defect of trial in default of Statement of Defence. Trial court never indicated in its record whether the appellant was actually served with Hearing Notice. It is on this issue that the Court of Appeal set aside the judgment in default and ordered trial de novo before another judge of Borno High Court. This grounds the appeal to this court.

The only issue worthy of consideration is whether the respondent had fair hearing at trial High Court; that is to say, did he have notice of hearing of the case. According to his affidavit when he applied to set aside the judgment, the service was not on him but on his employer. The action was against the appellant in person. If the Hearing Notice was served on him personally or on his solicitor, there would have been no problem. The deposition in his affidavit that he was not served the Hearing Notice remains uncontroverted as no affidavit of service was shown to court.

On the basis of his failure to serve the Hearing Notice on the respondent, the Court of Appeal allowed his appeal and ordered trial de novo. This is the right decision and upon this I dismiss this appeal and affirm the decision of the Court of Appeal. I award N10,000.00 as costs in this appeal.

ONU JSC

I agree entirely.

EJIWUNMI JSC

I have had the privilege of reading before now the judgment just delivered by my learned brother, Belgore, JSC. From the reasons given in the said judgment, I have no reason to depart from them.

I, therefore, also dismiss the appeal and abide with the consequential orders made in the said judgment.

TOBI JSC

The appellant as plaintiff filed an action against the defendant who is the respondent in this court. He sought inter alia for a declaration

that he is entitled to the assignment of landed property covered by the Certificate of Occupancy No. NE/12384.

B After filing his Statement of Claim, the appellant called evidence in proof of his case. The respondent did not call any evidence. He did not even file a Statement of Defence. The learned trial Judge gave judgment in favour of the appellant. It was after the appellant obtained judgment that the respondent became aware of the proceedings.

C The respondent thereafter applied to the High Court to have its judgment set aside. That court refused to set aside the judgment. On appeal, the Court of Appeal set aside the default judgment of the trial Judge. The Court of Appeal also remitted the case to the Chief Judge of Borno State for hearing de novo before another Judge of competent jurisdiction.

D Dissatisfied, the appellant has come to this court. He formulated five issues for determination. The respondent filed only one issue and it is “*whether the lower court was right in setting aside the judgment of the trial court having regard to all the circumstances of this case,*” I think this only issue is adequate to deal with this appeal.

E When does a court of law set aside a default judgment or a judgment given in default? Where there is an application for a court to set aside its own judgment given in the absence of one of the parties before it, in order to give him opportunity of being heard, different considerations apply. Among other things, the court must consider, (1) the reasons for the applicant’s failure to appear at the hearing or trial of the case in which judgment was given in his absence. (2) Whether there has been undue delay in making the application to set aside the judgment so as to prejudice the party in whose favour the judgment subsists. (3) Whether the latter party (i.e. in whose favour the judgment subsists) would be prejudiced or embarrassed upon a course inequitable and (4) Whether the applicant’s case is manifestly unsupportable.

H In addition to the foregoing factors, the court being asked to exercise its discretion to set aside its own judgment must also be satisfied that the applicant’s conduct throughout the proceedings, that is, from the service of the writ upon him to the date of judgment, has been such as to make his application worthy of a sympathetic consideration. See Williams

v. Hope Rising (1982) 1-2 S.C. (Reprint) 70 (1982) 1-2 S.C. 145; Ugwu v. Aba (1961) All NLR 438; Doherty v. Doherty (1964) NMLR 144.

One reason why the respondent did not participate in the proceedings is that he was not served the court process. Service of court process is precondition to vesting jurisdiction in the court. Where notice of proceedings is required, failure to notify any party is a fundamental omission which entitles the party not served and against whom any order is made in his absence to have the order set aside on the ground that a condition precedent in the exercise of jurisdiction for the making of the order has not been fulfilled. See Scott-Emuakpor v. Ukavbe (1975) 12 S.C. (Reprint) 31; (1975) 12 S.C. 41. Failure to serve process where service of process is required, is a failure which goes to the root of the jurisdiction of the court. Any proceedings in such cases are a nullity. See Sken Consult v. Ukey (1981) 1 S.C. (Reprint) 4; (1981) 1 S.C 6; Odita v. Okwudinma (1969) 1 All NLR 228; Obimonure v. Erinoshio (1966) 1 All NLR 250.

I think this should take care of the appeal. I need not go any further. It is for the above reason of non-service of court process and the other reasons given by my learned brother, Belgore, JSC., in his judgment that I too dismiss the appeal. I award N10,000.00 costs to the respondent.

EDOZIE JSC

The material facts of this case are not complex. The appellant as plaintiff in Suit No. M/66/95 before the Borno State High Court sued and obtained judgment against the respondent, therein defendant who did not file a Statement of Defence nor appeared in court to defend the suit. Upon the respondent's application to the High Court to set aside the said judgment, on the ground; inter alia, that he was not served with hearing notices and other court processes, the application was refused. On appeal against the refusal by the respondent to the Court of Appeal, Jos Division, that court held that the respondent was denied a fair hearing. Consequently, it allowed the appeal, set aside the judgment of the High Court and ordered a trial de novo by another judge of the Borno State High Court.

The present appeal by the appellant is against that judgment of the court below and it turns on whether or not the respondent had a fair hearing before the trial High Court.

In addressing that issue, the court below after reviewing the proceedings in the High Court, at pages 211 and 212 of the record commented thus:-

“From the foregoing, it can be clearly realized that apart from 1/4/96 when the appellant was said to be absent though duly served, all subsequent sittings were held in absence of the appellant and his counsel and without proof of service on either of them. Indeed when P.W.2 and P.W.3 were taken on 17/4/96, the clerk of court hinted the court that the appellant was absent as he was on the last date of hearing. There is, however, nothing on record to indicate whether the appellant was served with hearing notice particularly because his counsel was also absent. So two of the only three witnesses for the respondent were taken without any evidence of service of hearing notice on the appellant. Indeed even after the court below ordered for hearing notice to be issued on the appellant against the sitting of the court on 6/4/96, the court convened and entertained the case in the absence of the appellants and his counsel without ascertaining whether he was served as previously ordered. With the above fundamental lapses in mind, I am of the firm view the appellant was not accorded fair hearing as enshrined in Section 33 of the Constitution of the Federal Republic of Nigeria 1979.”

In the face of the above findings of the court below against which there is no appeal, it cannot be seriously contended that the conclusion it arrived at is assailable. Failure to serve process in a case where such service is required is a serious omission which goes to the root of the jurisdiction of the court and entitles an aggrieved party ex debito justitiae to have proceedings in such a case set aside; see *Odita v. Okwudinma* (1969) 1 All NLR 228, *Sken Consult v. Ukey* (1981) S.C 6, *Scott Emuakpor v. Ukavbe* (1975) 12 S.C (Reprint)31; (1975) 12 S.C. 41.

In the light of the foregoing, I agree with my learned brother, Belgore, JSC., that the appeal lacks substance. I endorse the consequential orders in his leading judgment.