

IGWE UZUR & SONS (NIG) LTD. APPELLANT
AND
ROBINSON ONWUZOR
IFEANYICHUKWU ONWUAZOR RESPONDENTS
EKWE UZOR IGWE
BESSIE ONWUAZOR

FACTS

Before the Ebonyi State High Court Abakaliki (Obande Ogbuinya J.), plaintiff/respondent filed an action against the 1st, 2nd and 3rd defendants. Plaintiff claimed to be a beneficiary of the estate of one late Beniah Onwuazor and challenged the sale of family property by the 1st and 2nd Defendants to the 3rd defendant. On 19-7-2001 the Registrar of Court issued the writ of summons which was duly served on the defendants. The matter passed through a history of change in counsel, death of 3rd defendant and grant of leave to plaintiff to file Reply to the amended statement of defence. On 28-2-2003, pursuant to defence counsel's application, appellant was joined to the suit as the 4th defendant, and his counsel was served with an amended writ of summons.

On 4-4-2003 4th defendant vide a motion raised preliminary objection as to the competence of the suit. Counsel on its behalf contended that the writ of summons is incompetent for not bearing the mandatory endorsement prescribed by the High Court Rules. And that there was no affidavit of verification of endorsement of the said mandatory requirements. After hearing argument of counsel on both sides, the trial Judge overruled the objection and dismissed the motion. Being dissatisfied, the 4th defendant has appealed to the Court of Appeal upon seven grounds of appeal.

ISSUES FOR DETERMINATION

"1. WHETHER THE TRIAL JUDGE WAS RIGHT IN HOLDING THAT THE AMENDED WRIT OF SUMMONS ISSUED BY THE REGISTRAR AND SERVED UPON THE APPELLANT WAS BEREFT OF FEATURE (S) NOT FUNDAMENTAL ENOUGH TO VITIATE OR INVALIDATE THE WRIT.

2. WHETHER THE AMENDED WRIT OF SUMMONS SERVED ON THE APPELLANT OCCASIONED ANY MISCARRIAGE OF JUSTICE TO THE APPELLANT.

3. WHETHER THE TRIAL JUDGE RAISED ANY ISSUE SUO MOTU AND IPSO FACTOR, DENIED THE APPELLANT OR ITS COUNSEL FAIR HEARING."

HELD (Unanimously dismissing the appeal per **GALADIMA JCA**)

WRIT OF SUMMONS - Issuance of - Duties

1. It is my respectful view that in both cases, that is where a plaintiff has a solicitor and, or where the plaintiff is an illiterate or unrepresented by a solicitor, neither the plaintiff or his solicitor, nor the illiterate or unrepresented plaintiff has a duty greater than making an application. The duty to issue a writ is that of the Court Registrar. However, for the Registrar, to issue the writ, the plaintiff whether represented or unrepresented or illiterate, would have paid the necessary fees. In the instant case, the plaintiff, represented by a solicitor, made the application by filling “Form 1”, the Court Registrar issued the writ, which was served on the 1st to 3rd defendants. (p. 3436 D)

ACTIONS - Competence - Irregularity

2. The Appellant is now challenging the validity of the writ *a fortiori*, the competence of the entire suit on the ground that the Registrar failed to endorse the writ as provided in paragraph (f) of “Form 1” set out already above. In this case the Registrar failed to endorse the writ before issuing same. I do not see any reason why such failure would be blamed on the plaintiff or her solicitor. In my respectful view such omission or non-inclusion cannot be considered a fundamental irregularity or defect that cannot be cured so as to invalidate the writ and therefore vitiate, the proceedings. I view the omission as an error which the learned trial judge forgave so as to allow for “substantial justice” being guided by several legal authorities, namely *ODUA INVESTMENT CO. V. TALABI* (1991) 1 NWLR (pt. 170) 761; *VULCAN CASES LTD. V. OKUNLOLA* (1993) 2 NWLR (pt. 274) 139.

This Court cannot hold the Respondent responsible for an irregularity or this slip in commencement of action caused by the Court Registrar. The learned trial judge was therefore right when he held that the amended writ of summons issued by the Registrar and served on the Appellant was not bereft of any feature, which could be considered fundamental enough to invalidate the writ. (p. 3436 G)

Probate - Procedural requirement

3. While the absence of the endorsement, which the Registrar should have inserted on the writ, may have fallen short of the procedural requirement of “Form 1” in respect of probate action, but this cannot vitiate the writ and indeed render the entire suit incompetent as contended by the appellant’s counsel. The main object for which the procedure is set out is for the attainment of substantial justice. No doubt, the rules of court are meant to be complied with. These rules are mere handmaids to do justice. But they must be flexible. For the principal object of Courts is to decide the rights of the parties and not to punish them for mistakes they may make in the conduct of their case. See *NNEJI V. CHUKWU* (1988) 3 NWLR (pt.81) 184. I am therefore of the respectful view that there is no miscarriage of justice engendered by the writ of summons which was served on the 4th defendant/Appellant. Again, it would be appreciated that the writ was issued in the year 2001 to commence the suit. The 4th Defendant/Appellant never felt misled by the cause of action comprised in the suit. He applied on its own and was joined in 2003, only to turn round to impugn the validity of the writ and also challenge the competence of the suit which had been subsisting against the other 3 defendants/respondents. (p. 3437 E)

Issues - Suo motu raising of - Roles of counsel and the judge

4. As I have said it is quite obvious that Order 2 was raised by the respondent’s counsel. It does not matter whether it was in the main argument or “embedded” in the alternative argument. One should not lose sight of the fact that the roles of the counsel and the judge are separate but interdependent in our adversarial system of justice and in pursuit of the course of justice. A counsel has the duty to refer and draw the attention of a Judge to the law, which has relevance to the facts or issues in contention with the objective of attaining justice. On the other hand, on his part, a Judge has a duty to expound, interpret and pronounce on the law so referred to by counsel and equally state the effect of such law on the case before him. Therefore, I hold the view that the trial judge is quite qualified to do what he did in this instant case. He can on his own search

out any provision of the laws, be it statutory or judicial which can assist him in the determination of the case or application before him, provided, that the counsel had the opportunity of and actually addressed on issues to which the law relates. (p. 3439 E)

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Issues - Rules of Court - Where referred to by both counsel

5. Since both counsel referred to and relied on Orders 2 and 5 of the Rules, the view the trial judge expressed in his decision is the aggregate of their submissions. That cannot be regarded as raising an issue *suo motu*. The learned trial judge interpreted Order 2 Rule 1 of the Rules as it pertains to the preliminary objection raised by the Appellant. He pronounced on the effect of the order on the subject matter of the objection, that is, the amended writ of summons served on the Appellant. I agree that the learned trial judge carefully studied the rules and found that its effect did not vitiate the writ. It would be wrong to say that he held that Order 2 Rule 1 applied with equal force to all cases of non-compliance. He only expressed his view on the application, which he considered.

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In the result, I hold that the appeal lacks merit, and it is hereby dismissed. (p. 3440 A)

REPRESENTATION

Emeka Uwakwe Esq. for the Appellant.

H. O. Eya Esq. for the Respondent.

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CASES REFERRED TO

ODUA INVESTMENT CO. V. TALABI (1991) 1 NWLR (pt. 170) 761
VULCAN CASES LTD. V. OKUNLOLA (1993) 2 NWLR (pt. 274) 139
ANATOGU V. ANATOGU 9 NWLR (pt.519) 49
AGUSIOBO V. ONYEKWELU (2003) 14 NWLR (pt.839) 34
NNEJI V. CHUKWU (1988) 3 NWLR (pt.81) 184
SHAIBU V. NIGERIA-ARAB BANK LTD. (1998) 5 NWLR (pt.551) 582 H
at 596
EKPUK V. OKON (2002) 5 NWLR (pt.760) 445

G

RULES REFERRED TO

Imo State High Court (Civil Procedure) Rules 1988, as applicable to Ebonyi State O.2 r.1(1), O.5 rr.1 & 8(1)

LEAD JUDGMENT BY GALADIMA JCA

B

The Respondent, as plaintiff instituted this suit at the Abakaliki High Court, Ebonyi State, sometime in 2001 against the 1st, 2nd and 3rd Defendants claiming to be a beneficiary of the estate of one late Beniah Onwuazor and also challenging the sale of a family property by the 1st and 2nd Defendant to 3rd defendant. On 19/7/2001 the Registrar of Court issued the writ of summons, which was duly served on the respective defendants. Then Plaintiffs Statement of Claim was served on the defendants through the then 3rd defendant (J. A. Nduagubu now late) who was also their counsel. Later on 18/7/2002 this counsel withdrew his legal representation for the defendants whereupon the present counsel took over. When the said J. A. Nduagubu died, his name was struck out of the process of court on 29/10/2002. On 29/11/2002, E. Uwakwe Esq. of counsel moved for the amendment of the statement of defence of the then remaining three defendants shown above. The trial court allowed the counsel for the plaintiff to file Reply to the amended statement of defence.

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On 28/2/2003, the learned counsel for the defendants by his own application urged the court to join the appellant as the 4th defendant. This application not opposed the court granted the application. His counsel was therefore served with an amended writ of summons on behalf of the 4th defendant. On 4/4/2003, the counsel filed a motion wherein he raised preliminary objection to the competence of the suit on the ground that the writ of summons is incompetent in that:-

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“(a) The writ of summons served on the Defendant/ Appellant does not bear the endorsement mandatorily prescribed by the High Court Civil Procedure Rules.

(b) There was no affidavit of verification of endorsement of the mandatory requirements of the High Court Civil Procedure Rules.”

After taking the arguments of both counsel for the defendant/

applicant and the plaintiff/respondent, the learned trial Judge in his considered ruling overruled the objection and consequently dismissed the motion.

Dissatisfied with this ruling of the trial judge, the defendant has appealed to this Court upon seven grounds of appeal out of which he B formulated four issues for determination as follows:

“3.1 Whether the learned trial Judge was right when he held that the absence of the endorsement on the writ of summons together with the Affidavit of verification in this suit was the fault of Registrar of court C who issued the writ and which cannot be visited on the litigant.

3.2 Whether the learned trial Judge was justified in suo motu raising and relying on an issue during his ruling and which issue both counsel for the parties did not address him on but at the same time declining to rule on an issue duly submitted before him by counsel to the D parties.

3.3 Whether the learned trial Judge having held that the Appellant was not guilty of delay and did not take any step in the proceeding before raising his objection, exercised his discretion judicially and judiciously in relying on Order 2 Rule 1(1) of High Court Rules as enabling it to treat all cases of non compliance with the Rules of Court as an irregularity that cannot nullify any proceeding or document.

3.4 Whether the learned trial judge was right in treating the absence of endorsement on the writ and affidavit of verification specifically prescribed by the Rules of Court in probate actions as mere irregularity that cannot vitiate the validity of a writ of summons.” F

The Plaintiff/Respondent in his brief of argument formulated the following three issues for determination of this appeal as follows: G

“1. WHETHER THE TRIAL JUDGE WAS RIGHT IN HOLDING THAT THE AMENDED WRIT OF SUMMONS ISSUED BY THE REGISTRAR AND SERVED UPON THE APPELLANT WAS BEREFT OF FEATURE (S) NOT FUNDAMENTAL ENOUGH TO VITIATE OR INVALIDATE THE WRIT.

2. WHETHER THE AMENDED WRIT OF SUMMONS SERVED ON THE APPELLANT OCCASIONED ANY MISCARRIAGE OF JUS-

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TICE TO THE APPELLANT.

3. WHETHER THE TRIAL JUDGE RAISED ANY ISSUE SUO MOTU AND IPSO FACTOR, DENIED THE APPELLANT OR ITS COUNSEL FAIR HEARING.”

B Issues formulated by the learned counsel on behalf of the parties are similar. However, the issues set out by the Respondent for determination are considered relevant and apt to determine this interlocutory appeal. The first and second issues will be taken together.

C The first issue the appellant contends that the learned trial judge erred in law when he attributed the absence of the required endorsement on the writ of summons together with affidavit of verification in probate actions to the fault of the Registrar of Court who issued the writ and which cannot be visited on the litigant. Reliance was placed on the following case of **AGUSIOBO V. ONYEKWELU (2003) 14 NWLR (pt. 839) 341** and the provisions of Order 5 Rule 1 of the Imo State High Court (Civil procedure) Rules 1988, as applicable to Ebonyi State. On the other hand, the learned counsel for the Respondent having set out the relevant provisions of the rules submitted that there is a gross misconception of the law in the contention of the appellant’s counsel on the role to be played by a plaintiff acting without solicitor, vis-a-vis the Registrar in issuance of writ of summons. It is contended that it is the duty of the Registrar to insert the words in the Note under paragraph (f), on Form 1. It is therefore submitted that if the Registrar failed to endorse the writ before issuing same, it would not be blamed on the plaintiff or the solicitor. And therefore the learned trial judge was right when he held that the Amended writ of summons issued by the Registrar and served on the Appellant was not bereft of any features which could be considered fundamental enough to invalidate the writ: Reliance was placed on the cases of **PAMFA OIL LTD. V. ATTORNEY-GENERAL FEDERATION (2003) FWLR (pt.184) 195; ANATOGU V. ANATOGU (1997) 9 NWLR (pt.579) 49**, and **AUSIOBO V. ONYEKWELU (2003) 14 NWLR (pt.839) 341**. The contention of the appellant’s counsel on this issue is supported by the provisions of Order 5 Rule 1 of the Imo State High Court (Civil Procedure) Rules, 1998, as applicable to Ebonyi State (which will herein-

after be called “the Rules”). This issue will be better appreciated if Rules 1 and 8(1) of the order are set out. RULE 1 provides thus:

“A writ of summons shall be issued by the Registrar or other officer of the court empowered to issue summonses, on application. The application shall ordinarily be made in writing by the plaintiffs solicitor by compelling FORM 1 in the appendix to the Rules; but the Registrar or other officer aforesaid, where the applicant for a writ of summons is illiterate or has no solicitor, may dispense with a written application and instead himself record full particulars of an oral application made and on that record a writ of summons may be prepared, signed and sealed. (Underlining for emphasis).

RULE 8 (1) states this:

Every writ shall be in FORM 1, 2, 3 or 4 or forms to the like effect in all matters. Causes and proceedings to which they are applicable, with such variations as circumstances may require.”

Also relevant to the consideration of this issue is a note on the contents of writ of summons Form 1 at pages 176 - 178 of the Rules. This is set out on page 4 of the Respondent’s brief thus:

“(f) Probate Actions - In these actions the endorsement of claim must show the nature of the plaintiffs interest under which he claims, and the alleged interest of the defendant. Before the writ is issued the following certificate must be endorsed on it: ‘The Registry, High Court of Imo State. In the ...Judicial Division. A sufficient affidavit in verification of the endorsement on this writ to authorize the sealing thereof has been produced to me thisday of.....19.....

*.....
Signature of Registrar’.”*

The learned counsel for the appellant has submitted that it is the responsibility of the plaintiff, being represented by solicitor, to issue the writ of summons having not discharged that duty correctly, in that the writ served on the appellant does not bear the contents or features adumbrated at pages 176-178 of the Rules, that is Form 1, the writ is therefore void and invalid. In considering this submission, I have carefully read Rules 1 and 8(1) of order 5 and Form 1 at pages 176 - 178 reproduced

above. This has shown that one initiatory step in the commencement of civil proceedings in the High Court is the application made to the Registrar. This is just a step. For there to be an actual commencement of the proceedings, there must be another step. That is the issuance of the writ. Clearly, here lies dichotomy of functions in commencing an action under the Rules, between plaintiff, as an applicant and the Registrar. Whether a plaintiff has a solicitor or not, there must be in application. The only difference is that, in the case of a plaintiff who has a solicitor the solicitor has to fill in "Form 1" while in the case of an illiterate or a plaintiff who is not represented by a solicitor, an oral application must be made by him and recorded. In both cases the application in Form 1, or recorded oral application, must form the basis upon which the issuance of writ must be hinged. This is done only and only if and when the Registrar issues and seals (signs) the writ not the application. See Rule 15, which bears this proposition.

It is my respectful view that in both cases, that is where a plaintiff has a solicitor and, or where the plaintiff is an illiterate or unrepresented by a solicitor, neither the plaintiff or his solicitor, nor the illiterate or unrepresented plaintiff has a duty greater than making an application. The duty to issue a writ is that of the Court Registrar. However, for the Registrar, to issue the writ, the plaintiff whether represented or unrepresented or illiterate, would have paid the necessary fees. In the instant case, the plaintiff, represented by a solicitor, made the application by filling "Form 1", the Court Registrar issued the writ, which was served on the 1st to 3rd defendants. Upon his application for joinder, the 4th defendant/Appellant was joined and pursuant to the order joining him it was served an "amended writ of summons". The Appellant is now challenging the validity of the writ *a fortiori*, the competence of the entire suit on the ground that the Registrar failed to endorse the writ as provided in paragraph (f) of "Form 1" set out already above. In this case the Registrar failed to endorse the writ before issuing same. I do not see any reason why such failure would be blamed on the plaintiff or her solicitor. In my respectful view such omission or non-inclusion can-

not be considered a fundamental irregularity or defect that cannot be cured so as to invalidate the writ and therefore vitiate, the proceedings. I view the omission as an error which the learned trial judge forgave so as to allow for “substantial justice” being guided by several legal authorities, namely ODUA INVESTMENT CO. V. TALABI (1991) 1 NWLR (pt. 170) 761; VULCAN CASES LTD. V. OKUNLOLA (1993) 2 NWLR (pt. 274) 139; ANATOGU V. ANATOGU 9 NWLR (pt.519) 49 and AGUSIOBO V. ONYEKWELU (2003) 14 NWLR (pt.839) 34.

This Court cannot hold the Respondent responsible for an irregularity or this slip in commencement of action caused by the Court Registrar. The learned trial judge was therefore right when he held that the amended writ of summons issued by the Registrar and served on the Appellant was not bereft of any feature, which could be considered fundamental enough to invalidate the writ.

As I have already observed, the second issue formulated by the Appellant cannot be separated from the first. The attitude of the Court that it would not allow itself to be shackled by the omission in the procedure, which is not considered fundamental, has been given special emphasis in this second issue on the question of miscarriage of justice. While the absence of the endorsement, which the Registrar should have inserted on the writ, may have fallen short of the procedural requirement of “Form 1” in respect of probate action, but this cannot vitiate the writ and indeed render the entire suit incompetent as contended by the appellant’s counsel. The main object for which the procedure is set out is for the attainment of substantial justice. No doubt, the rules of court are meant to be complied with. These rules are mere handmaids to do justice. But they must be flexible. For the principal object of Courts is to decide the rights of the parties and not to punish them for mistakes they may make in the conduct of their case. See NNEJI V. CHUKWU (1988) 3 NWLR (pt.81) 184; SHAIBU V. NIGERIA-ARAB BANK LTD. (1998) 5 NWLR (pt.551) 582 at 596; EKPUK V. OKON (2002) 5 NWLR (pt.760) 445. I am therefore of the respectful view that there is no miscarriage of justice

engendered by the writ of summons which was served on the 4th defendant/Appellant. Again, it would be appreciated that the writ was issued in the year 2001 to commence the suit. The 4th Defendant/Appellant never felt misled by the cause of action comprised in the suit. He applied on its own and was joined in 2003, only to turn round to impugn the validity of the writ and also challenge the competence of the suit which had been subsisting against the other 3 defendants/respondents.

The third issue formulated by the Respondent is whether the learned trial judge raised any issue *suo motu* and *ipso facto*, denied the appellant or its counsel fair hearing.

I agree with the learned counsel for the Respondent that the contention of the learned counsel for the appellant in his issue 2 in the brief can be married to his argument on issue No. 3 in the same brief; in that the submissions on the two issues rest on the exposition of the trial judge on Order 2 of the High Court Rules (*supra*). The question to ask is whether the trial judge did raise the issue of effect of Order 2 of the Rules on the writ *suo motu*. To resolve this issue reference must be made to page 13 of the Court Record wherein the learned judge recorded the argument of learned counsel for the Respondent in opposition to the preliminary objection of the Appellant's counsel. The gravamen of the Respondent's counsel's submission was that whatever defect could be manifest in the writ of summons could be cured by the court which can take umbrage under Order 2 of the Rules. In his reply on point of law appellant's counsel failed to address any argument on the issue of whether and what effect Order 2 of the Rules might have on the writ. The learned trial Judge then, on his part, reproduced the arguments of both counsel and accordingly summed up their respective standpoints on the law vis-a-vis the ground of the objection. As expected, it was after the learned trial Judge had laid down the legal framework that he encapsulated the position of the law regarding Orders 5 and 2 of the Rules at page 20 of the Records thus:

“It is significant to consider the position of the law if the defect, omission or inaction on the writ of summons is the fault of a party. The

applicant's counsel in his submission based on Order 5 of the High Court Rules was of the view that the defect on the writ served on the applicant was the fault of the respondent and that even if it was fatal to his case. The Respondent's counsel in his own argument was of the opinion that the defect on the writ was not the fault of the respondent and that even if it was, it was a mere irregularity based on Order 2 Rule 1 of the High Court Rules."

The Appellant's counsel complains that the trial Judge raised the issue of applicability of Order 2 to the writ. This is not so. Order 2 was raised by the respondent's counsel. At page 7 of the Appellant's brief of argument, learned counsel had this to say:

"Counsel For the respondent did not raise the applicability of Order 2 Rules 1(1) of the Rules as attributed to him above by his Lordship. Counsel for the respondent raised the issue as an alternative argument in the sense that there was no defect on the writ of summons but that even if there was such defect, it was to be treated as a mere irregularity that could not vitiate the writ relying on Order 2 Rules 1(1) of the Rules..."

I agree with the learned counsel for the respondent that the above passage does contradict the complaint of the appellant's counsel that the trial Judge raised the issue of applicability of order 2 to the writ. **As I have said it is quite obvious that Order 2 was raised by the respondent's Counsel. It does not matter whether it was in the main argument or "embedded" in the alternative argument. One should not lose sight of the fact that the roles of the counsel and the judge are separate but interdependent in our adversarial system of justice and in pursuit of the course of justice. A counsel has the duty to refer and draw the attention of a Judge to the law, which has relevance to the facts or issues in contention with the objective of attaining justice. On the other hand, on his part, a Judge has a duty to expound, interpret and pronounce on the law so referred to by counsel and equally state the effect of such law on the case before him. Therefore, I hold the view that the trial judge is quite qualified to do what he did in this instant case. He can on his own search out any provision of the laws, be it statutory or judicial which**

can assist him in the determination of the case or application before him, provided, that the counsel had the opportunity of and actually addressed on issues to which the law relates.

Since both counsel referred to and relied on Orders 2 and 5 of the Rules, the view the trial judge expressed in his decision is the aggregate of their submissions. That cannot be regarded as raising an issue *suo motu*. The learned trial judge interpreted Order 2 Rule 1 of the Rules as it pertains to the preliminary objection raised by the Appellant. He pronounced on the effect of the order on the subject matter of the objection, that is, the amended writ of summons served on the Appellant. I agree that the learned trial judge carefully studied the rules and found that its effect did not vitiate the writ. It would be wrong to say that he held that Order 2 Rule 1 applied with equal force to all cases of non-compliance. He only expressed his view on the application, which he considered.

In the result, I hold that the appeal lacks merit, and it is hereby dismissed. I award N5,000 costs in favour of the Respondent.

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ROWLAND JCA

Having been privileged to read in draft from the judgment of my learned brother GALADIMA, JCA. just delivered, I am in agreement with him that the instant appeal has no merit and should be dismissed.

I therefore dismiss it. I endorse the order on costs.

G BADA JCA

I have had the advantage of reading in draft the judgment just delivered by my learned brother SULEIMAN GALADIMA, JCA. I am in complete agreement with his reasoning and conclusions. The appeal lacks merit and same is dismissed by me. I endorse the order on costs.