

SUPREME COURT OF NIGERIA

11TH JULY, 2008, SC. 176/2002

**CORAM:- N. TOBI, G. A. OGUNTADE, M. MOHAMMED,
F. F. TABAI, J. O. OGEBE, JJSC**

DR. N. E. OKOYE & ANOR. APPELLANTS
AND
CENTRE POINT MERCHANTS
BANK LTD RESPONDENTS

PRACTICE & PROCEDURE - Originating processes - Failure to serve
- Effect - Failure to serve an originating process is not merely an
irregularity - It is a fundamental defect which renders the proceed-
ings a nullity (H1)

EVIDENCE - Proof of service - Affidavit - Value of - Affidavit of ser-
vice is prima facie proof - But where it is disputed by defendant - As
in this case - Court has a duty to satisfy itself that there has in fact
been service (H2)

FACTS

The Plaintiffs/Appellants sued Defendant/Respondent claim-
ing a refund of a sum loaned to the respondent by way of a fixed
deposit from the Appellants and interest thereon till the sum is fully
paid. The suit was brought under the undefended list. When the
matter came up for hearing, counsel to the Appellants informed the
court that Respondent had been served and that there was no
notice of intention to defend. Accordingly he asked for judgment.
There was an affidavit of service in the court's file, sworn to by the
Chief bailiff deposing that Respondent had been served.

However, the affidavit, though it claimed Respondent was
served through its manager, neither contained the name of the man-
ager nor the name of the pointer. More so, the bailiff's dispatch book
showed that the process was purportedly received and signed by a
third, unnamed, party for the manager. The learned trial judge re-
lied on the affidavit as proof of service and gave judgment to Appel-
lants as prayed. Respondent appealed against the judgment to the
Court of Appeal contending non-service of the originating process.

The appeal was allowed. Hence the Appellant has brought this appeal to the Supreme Court.

ISSUE FOR DETERMINATION

"Whether or not the Defendant/Respondent was served".

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

Originating processes - Failure to serve

1. It is settled that service of originating processes such as the Writ of Summons on the Defendant is a fundamental condition precedent to the court's exercise of its jurisdiction to hear and determine the suit. This is so because any judgment or order given against a defendant without service is a judgment or order given without jurisdiction and is therefore null and void. Thus the failure to serve a process is not merely an irregularity but a fundamental defect which renders the proceedings a nullity.

In **UNITED NIGERIA PRESS LTD & ANOR v ADEBANJO** (1969) 6 NSCC 395 at 396 this Court, Per Fatayi-Williams JSC (as he then was) spoke of the object and primary consideration in service of processes. He said:

"In our opinion, the object of all types of services of processes whether personal or substituted, is to give notice to the other party on whom service is to be effected so that he might be aware of and able to resist, if he may, that which is sought against him. Therefore since the primary consideration is an application for substituted service is as to how the matter can be best brought to the attention of the other party concerned, the court must be satisfied that the mode of service proposed would probably, after all practicable means of effecting personal service have proved abortive give him notice of the process concerned." (pp. 2975 H)

EVIDENCE - Proof of service - Affidavit - Value of

2. In this case the trial court, apparently relying on the affidavit of service, came to the conclusion that the Defendant/Respondent was duly served and proceeded to enter judgment as claimed. The Defendant/Respondent denied any service. The court is thus put on inquiry as to whether or not the writ of summons was indeed served on the Defendant/Respondent. I have earlier reproduced the judg-

ment of the trial court at page 8 of the record. There is nothing therein to show that the court thoroughly examined the affidavit evidence of service before entering judgment for the Plaintiffs/Appellants. May be it did. But there is nothing to show that it did.

This issue of service was the main and fundamental issue at the Court of Appeal. It is settled that an affidavit of service deposed to by the person effecting the service, setting out the fact, place, mode and date of service and describing the process or document served shall be prima facie proof of the matters stated in the endorsement or affidavit. Where however the service evidenced in the affidavit of service is disputed by the Defendant, as in this case, the Court of Appeal has a duty to satisfy itself that there had in fact been service on the Defendant. At page 126 of the record the Court per M.D. Muhammad JCA assessed the affidavit of service as follows:-

“The affidavit of service in the instant case shows that the “Manager” of the Appellant was served after he had been pointed to the bailiff by one other. The affidavit of service neither contained the name of this “Manager” that was served nor the name of the pointer who led to him. That was not all. The bailiffs dispatch book belied the contents of the bailiffs affidavit of service. The book indicates that the process was received and signed for by a third party for and on behalf of the Manager. Here again neither the name nor designation of the recipient was indicated. There was so much that was vague about this service that it would be unfair to allow a decision built on it to survive.”

These pungent remarks, no doubt, shows the Court’s critical examination of the affidavit evidence of service. Learned counsel for the Appellants never contested these findings but submitted that since the said documents were not prepared by the Appellants, they cannot be held accountable for lapses contained therein. I do not, with respect, agree with that contention of learned counsel. The affidavit of service, though not prepared by the Appellants, is the very document paraded by them to prove that the Defendant/Respondent was duly served with the originating processes before the judgment was entered against it. And the Dispatch Book was prepared by the Appellants in proof of their assertion that the Defendant/Respondent was served. Therefore if these documents contain materials which

tend to impeach the credibility of their claim that the Defendant/Respondent was served, they cannot be heard to say that they are, after all, not the makers of the documents. The inconsistencies identified by the court below render the case of the Plaintiffs/Appellants unreliable and thus create doubts as to whether the Defendant/Respondent was served. After highlighting the inconsistencies in the affidavit evidence of the Plaintiffs/Appellants the court below at the same page 126 said:

“With these facts the trial judge ought to have entertained doubts as to whether the Appellant had in fact been served to entitle the court to assume jurisdiction. Where any doubt as to whether or not service was or was not properly effected exists, a judgment obtained by a party in the absence of the other such as in the instant case, has to be set aside to ensure that both parties are heard before a decision.

I agree entirely with the above reasoning and conclusion.
(pp. 2976 F/2977 B/D)

NOTABLE POINTS OF INTEREST

TOBI JSC

1. Non service is an issue of jurisdiction

Learned counsel for the appellants submitted that the Court of Appeal was wrong in entertaining the issue of jurisdiction which was not contested at the High Court. Learned counsel for the respondent submitted that non-service of originating process to a defendant, being an issue challenging jurisdiction of the court can be raised at any stage of the proceedings, even at the Supreme Court, for the first time. Learned counsel for the respondent is right. Learned counsel for the appellants is wrong. Non service is a product of jurisdiction and issue of jurisdiction being the life blood of adjudication can be raised at any time in the proceedings even on appeal at the Supreme Court. This is because where a court has no jurisdiction, the proceedings are a nullity, ab initio. Issue of jurisdiction can be raised suo motu by the court. As long as the parties are given the opportunity to react to the issue, they cannot fault the procedure of the court raising the issue suo motu.

Learned counsel for the appellants submitted that the Court

of Appeal was wrong in attacking the contents of the affidavit of service. He relied on Order 26 Rule 5, Order 7 Rule 4 of the High Court (Civil Procedure) Rules of Anambra State, 1988; section 78 of the Companies and Allied Matters Act, 1990 and the case of Ben Thomas Hotels Limited v Sebi Furniture Limited (1989) 5 NWLR (Pt.123) 523. B

Order 26 Rule 5 of the High Court Civil Procedure Rules of Anambra State provides as follows:

“No proceedings in the court, and no process, order, ruling, judgment issued or made by the court shall thereafter be declared void solely by reason of any defect in procedure or want of form as prescribed by these rules. Rather every court shall decide all issues according to substantial justice without undue regard to technicalities” C

The operative words in Rule 5 are “defect in procedure or want of form” Non-service of writ of summons is not a mere defect in procedure. It is not also one of want of form but rather an incurable irregularity that is intrinsic to the jurisdiction of the court. It is beyond doing technical justice. It goes to the doing of substantial justice, substantial justice is not only for the party in default of the rules of court. E It is also for the adverse party who is the victim of the non compliance with the rules. (pp. 2983 E/2984 A)

2. Affidavit evidence is to be evaluated

I should also say that affidavit evidence is not sacrosanct. It is not above the evaluation of the courts. Like oral evidence, a court of law is entitled to evaluate affidavit evidence in order to ensure its veracity and or authenticity. While uncontradicted affidavit evidence should be used by the court, there are instances when such affidavit evidence clearly tell a lie and the courts cannot be blind to such a lie. F One example will suffice. If a party disposes an affidavit that 1st of April every year is Nigeria’s Independence Anniversary, a court of law will certainly not accept such a deposition as true, as the correct date is 1st of October. I hope I have made myself clear. (p. 2986 D) H

REPRESENTATION

Oraegbunam Anieto, Esq. for the Appellants.

Chike Onyemenam with U. Y. Anozie for the Respondent.

CASES REFERRED TO

- Fubunmi v Abigail (1985) 1 NWLR (Pt.2) 299
Iri v Eserorave (1991) 2 NWLR (Pt 173) 252
B Ogbu v Ani 91994) 7 NWLR (Pt.355) 128
Otti v Otti (1992) 7 NWLR (Pt.252) 187
Nwokoro v Onuma (1990) 3 NWLR (Pt.136) 33
White v. Weston (1968) 2 All ER 824 at 846 CA
C ANYADUBA v NRTC LTD (1992) 5 NWLR (Part 243) 535 at 553
OBIMONURE v ERINOSHO (1966) 1 ALL N.L.R. 250 at 252
SCOT-EMUAKPOR v UKAVBE (1975) 12 SC 41 at 47
ODITA v OKWUDINMA (1969) 1 ALL NLR 228

D STATUTES & RULES REFERRED TO

- Constitution of the Federal Republic of Nigeria, 1979, s s. 24 (1) and 329
Court of Appeal Rules, cap 62, L.FN. 1990 O. 3 r. 2 (1)
High Court Rules of Anambra State 1988, O. 5 r. 4(1), O. 24 r. 15,
E O. 26 r. 5

LEAD JUDGMENT BY TABAI JSC

- This action was commenced at the Onitsha Judicial Division of the High Court of Anambra State on the 6/8/98 when the writ of summons was issued. The Appellants herein were the Plaintiffs. The Respondent herein was the Defendant. The six paragraph claim runs thus:

CLAIM

- G 1. The Plaintiffs are customers of the Defendant merchant bank which carries on merchant banking business in big cities of Nigeria including Onitsha.
2. By confirmation notice given to the Plaintiffs by the Defendant the Defendant is indebted to the Plaintiffs to the tune of
H 2,385,716.75 (two million three hundred and eighty five thousand seven hundred and sixteen naira seventy five kobo).
3. The Defendant merchant bank has failed to pay interest as agreed or at all.

4. The interest rate which is fixed at the rate of 15% per annum is usually withheld by the Defendant and was only paid twice in recent years.

5. Despite repeated demands by the Plaintiffs for the Defendant to pay the entire sum due and payable to them, the Defendant has failed or neglected to pay same over to the Plaintiffs. B

6. Wherefore the Plaintiffs claim as follows:-

(a) The sum of ££2,385,716.75 being the principal sum due to the Plaintiffs.

(b) Interest at the rate of 15% per annum on the sum of C
2,385.716.75 from 24th day of March, 1995 until the sum owed is fully liquidated.

The claim is supported by a 10 paragraph affidavit deposed to by the 1st Plaintiff/Appellant. The suit was entered in the undefended list. D

When the matter came up on the 17/12/98, learned counsel for the Plaintiffs informed the court that the Defendant had been served on the 18/11/98 and that there was no notice of intention to defend. Learned counsel therefore asked for judgment.

In reaction, the learned trial judge K.K. Keazor J said: E

*“The suit is brought under the undefended list procedure. The Defendant was served on 18/11/98. The matter was set down for hearing today. This was well over the prescribed 5 days before hearing after service. The Defendant did not file notice of intention F
to defend. There will be judgment for the Plaintiffs as per their claim for:*

*(a) The sum of N2,385,716.75 being the principal sum; and
(b) Interest at the rate of 15% per annum in the said sum of N2,385,716.75k until the sum is fully liquidated.”* G

Learned counsel for the Plaintiff asked for N2,000.00 costs and the court awarded same. The above represents the judgment of the trial court.

The Defendant was aggrieved by the judgment and went on appeal to the court below. By its judgment on the 21/12/2001 the appeal was allowed. The Plaintiffs were aggrieved by the judgment and have come on appeal to this Court. In the Notice of Appeal dated 16/1/2002 and filed on the 4/2/2002 the Appellants raised H

seven grounds of appeal.

The parties have, through their counsel, filed and exchanged their briefs of argument. The Appellants' Brief dated 15/5/2002 and filed on the 12/8/2002 was prepared by Oraegbunam Aniето. He proposed seven issues for determination which he couched as follows:-

1. Whether the Court of Appeal was right in allowing the Defendants-Respondents' appeal when the said Defendants-Respondents failed to argue their ground 6 of appeal which complained of specific fin

2. Whether the Court of Appeal has the jurisdiction to entertain an issue not contested at the trial High Court and decision reached thereat.

3. Whether the Court of Appeal was right by attacking the contents of affidavit of service in view of-

(i) Order 26 Rule 5 of the High Court Rules of Anambra State 1988.

(ii) Section 78 of the Companies and Allied Matters Act 1990, and

(iii) (Order 7 Rule 4(1) High Court Rules of Anambra State 1988.

4. Whether the Court of Appeal has the right to make a finding on the issue of jurisdiction outside the record placed by the parties before the trial court?

5. Whether the Court of Appeal can over-rule the decision of the Supreme Court as it did in this matter of service of writ of summons on a company?

6. Whether the Court of Appeal can, in fairness to the appellants, ignore the contents of records before it?

7. Whether the judgment of the Court of Appeal is not perverse?

The Respondent's Brief dated the 22/10/2002 and filed on the 24/10/2002 was prepared by Chike Onyemenam. In the brief the following five issues for determination were formulated.

1. Did the Respondents fail to formulate and argue the issue of non-service of the Writ of Summons as complained in their ground of appeal

2. Is the Court of Appeal robbed of jurisdiction to entertain a complaint of non-service of an originating process simply because the issue was not contested and decided at the trial High Court?

3. Was there sufficient proof of service of the Writ of Summons/Claim on the Defendant/Appellant at the court below?

4. Did the Court of Appeal introduce a ground of appeal and formulate an issue suo motu and decide on same without hearing the parties? B

5. Did the Court of Appeal overrule its judgment and that of the Supreme Court on any issue thereby making its judgment perverse? C

On behalf of the Appellants Oraegbunam Aniето proffered arguments the substance of which are as follows:

On their 1st issue counsel referred to the finding of the learned trial judge to the effect that the writ of summons was served on the Defendant/Respondent and ground 6 of the grounds of appeal and submitted that since no issue was formulated therefrom, the Court of Appeal had no right to interfere with that finding, especially when the finding was not found to be perverse. For this submission learned counsel relied on DAVID FABUNMI v ABIGAIL ADE AGBE (1985) 1 NWLR (Part 2) 299; ANYADUBA v NRTC LTD (1992) 5 NWLR (Part 243) 535 at 553; OYIBO IRIRI & ORS v EZERORAYE (1991) 2 NWLR (Part 173) 252 at 265. D

With respect to the Appellants' second issue, it was the submission that the issue of the non-service of the writ of summons ought to have been first contested at the trial court by an application to set aside the judgment and that it is only after the trial court had decided the issue that the Court of Appeal would be vested with jurisdiction to entertain and determine the issue of service. It was counsel's submission therefore that the court had no jurisdiction to entertain the appeal. He relied on Order 24 Rule 15 of the High Court Rules of Anambra State 1988, Sections 24(1) and 329 of the Constitution, Order 3 Rule 2(1) of the Court of Appeal Rules Cap 62 Laws of the Federation of Nigeria 1990, WIMPEY (NIG) LTD & ANOR v ALHAJI DELANI BALOGUN (1986) 3 NWLR (Part 280 324 AT 334; BEN THOMAS HOTELS LTD v SEBI FURNITURE LTD (1989) 5 NWLR (Part 123) 523 at 531. E
F
G
H

As respects the Appellants' third issue learned counsel referred to Order 26 Rule 5 of the High Court Rules of Anambra State 1988 and submitted that the affidavit of service, being a process made by the court, the Plaintiffs/Appellants cannot, in fairness, be held accountable for lapses therein if any. Counsel relied further
 B on Order 5 Rule 4(1) of the High Court Rules Anambra State 1988 and contended that there was nothing wrong with the affidavit of service since it is stated therein that service was effected on the manager of the Defendant/Respondent bank. He relied once more on
 C BEN THOMAS HOTELS LTD v SEBI FURNITURE LTD (supra) at page 539, NELSON v EBANGA (1998) 8 NWLR (Part 563) 701 at 722, JAMMAL STEEL STRUCTURES LTD v A.C.B. LTD (1973) 11 SC 77 at 85; ABRAHAM OYENIRAN & ORS v JAMES EGBETOLA & ANOR (1997) 5 NWLR (Part 504) 122 at 131. It was wrong there-
 D fore for the Court of Appeal to insist on a named manager and a named pointer, counsel argued.

On the 4th issue it was the submission for the Appellants that there was no complaint about a conflict between Exhibit 'A' and 'B' and that it was therefore wrong for the court below to suo motu
 E introduce conflict between the two Exhibits and resolving same without calling on the parties to address on it. It was the submission that the procedure occasioned great miscarriage of justice. Reliance was placed on U.B.A. LTD v NWOKOLO (1995) 6 NWLR (Part 400) 127 at 148-149; NDIWE v OKOCHA (1992) 7 NWLR (Part 129).
 F In the Appellants' 5th issue it is the submission of the counsel that the procedure adopted by the trial court was in compliance with the provisions of Order 24 Rule 9(4) of the High Court Rules of Anambra State 1988.

G The Appellants' 6th issue is predicated mainly on the decision in BEN THOMAS HOTELS LTD v SEBI FURNITURE LTD (supra) which, counsel said, is apposite to the facts of this case and contended that the court below was bound to follow it.

H On the 7th issue, learned counsel referred to the reaction of the Defendant/Respondent on the very day of the judgment of the trial court when two of its officials visited the 1st Appellant in his office and urged a finding that it was not only served but that its officials were even in court when judgment was entered against it.

The substance of the arguments of Chike Onyemenam for the Respondent are as follows. On the Appellants' first issue of whether the Respondents as Appellants at the court below formulated any issue arising from the 6th ground of appeal, it was argued that issues 1 and 2 at page 94 of the record properly raised the issue of whether or not there was prima facie proof of service and whether there was evidence of service in law. With respect to the Appellants' second issue, it was the submission of learned counsel that non-service of originating summons is an issue of jurisdiction which can therefore be raised at any stage of the proceedings. He relied on OREDOYIN v AROWOLE (1989) 4 NWLR (Part 114) 172 at 187. B C

In response to the Appellant's argument on their issue three, counsel contended that an affidavit of service merely raises a rebuttable presumption of service and that grounds (i) (ii) (iv) and (vi) were attacks on the purported service to rebut the presumption. It was contended therefore that the Court of Appeal properly examined the affidavit of service and relying on WIMPEY (NIG) LTD v BALOGUN (1986) 3 NWLR (Part 28) 394 at 387 rightly found against any service in law. It was his submission that where the evidence is merely affidavit evidence the appellate court is in as vantage a position as the trial court to evaluate it and make findings therefrom and contended that the Court of Appeal adopted the right procedure to arrive at a just decision. Counsel relied on OGUNLEYE v ONI (1990) 2 BWLR (Part 135) 745 at 785, With respect to the Appellants' issues 5 and 6 counsel argued that there was nothing the Court of Appeal did which is contrary to the principle on BEN THOMAS HOTELS LTD v SEBI FURNITURE LTD (supra). And on the Appellants' 7th issue, it was argued that the Court of Appeal rightly ignored the extraneous matters sought to be introduced by the Appellants therein in arriving at its decision. In conclusion, counsel urged that the appeal be dismissed. D E F G

I have considered the address of counsel for the parties. The very fundamental issue in this appeal is that of service and I would start my deliberation with this issue of *whether or not the Defendant/Respondent was served. It is settled that service of originating processes such as the Writ of Summons on the Defendant is a fundamental condition precedent to the court's exercise of its jurisdiction to hear and determine the suit. This is so because* H

any judgment or order given against a defendant without service is a judgment or order given without jurisdiction and is therefore null and void. See ALHAJI J.A. ODUTOLA v INSPECTOR KAYODE (1994) 2 NWLR (Part 324) 1 at 15; **Thus the failure to serve a process is not merely an irregularity but a fundamental defect which renders the proceedings a nullity.** See OBIMONURE v ERINOSHO (1966) 1 ALL N.L.R. 250 at 252; SCOT-EMUAKPOR v UKAVBE (1975) 12 SC 41 at 47; ODITA v OKWUDINMA (1969) 1 ALL NLR 228; SKENCONSULT (NIG) LTD v UKEY (1981) 1 SC 6 at 26.

In UNITED NIGERIA PRESS LTD & ANOR v ADEBANJO (1969) 6 NSCC 395 at 396 this Court, Per Fatayi-Williams JSC (as he then was) spoke of the object and primary consideration in service of processes. He said:

"In our opinion, the object of all types of services of processes whether personal or substituted, is to give notice to the other party on whom service is to be effected so that he might be aware of and able to resist, if he may, that which is sought against him. Therefore since the primary consideration is an application for substituted service is as to how the matter can be best brought to the attention of the other party concerned, the court must be satisfied that the mode of service proposed would probably, after all practicable means of effecting personal service have proved abortive give him notice of the process concerned."

In this case the trial court, apparently relying on the affidavit of service, came to the conclusion that the Defendant/Respondent was duly served and proceeded to enter judgment as claimed. The Defendant/Respondent denied any service. The court is thus put on inquiry as to whether or not the writ of summons was indeed served on the Defendant/Respondent. I have earlier reproduced the judgment of the trial court at page 8 of the record. There is nothing therein to show that the court thoroughly examined the affidavit evidence of service before entering judgment for the Plaintiffs/Appellants. May be it did. But there is nothing to show that it did.

This issue of service was the main and fundamental

issue at the Court of Appeal. It is settled that an affidavit of service deposed to by the person effecting the service, setting out the fact, place, mode and date of service and describing the process or document served shall be prima facie proof of the matters stated in the endorsement or affidavit. See MARTIN SCHRODER & Co. v MAJOR & COMPANY (NIG) LTD (1989) 2 NWLR (Part 101) 1 at 11. **Where however the service evidenced in the affidavit of service is disputed by the Defendant, as in this case, the Court of Appeal has a duty to satisfy itself that there had in fact been service on the Defendant.** See ALHAJI UMARU LAUNI v EZEADUA (1983) 6 SC 370; MADAM ALICE OKESUJI v FATAI ALABI LAWAL (1991) 1 NWLR (Part 170) 661 at 673. It is clear from the records of proceedings in this case that the Court of Appeal was not only conscious of but also committed to its duty of ensuring that the Defendant/Respondent against which there was the subsisting judgment was in fact served with the originating processes. **At page 126 of the record the Court per M.D. Muhammad JCA assessed the affidavit of service as follows:-**

“The affidavit of service in the instant case shows that the “Manager” of the Appellant was served after he had been pointed to the bailiff by one other. The affidavit of service neither contained the name of this “Manager” that was served nor the name of the pointer who led to him. That was not all. The bailiffs dispatch book belied the contents of the bailiffs affidavit of service. The book indicates that the process was received and signed for by a third party for and on behalf of the Manager. Here again neither the name nor designation of the recipient was indicated. There was so much that was vague about this service that it would be unfair to allow a decision built on it to survive.”

These pungent remarks, no doubt, shows the Court’s critical examination of the affidavit evidence of service. Learned counsel for the Appellants never contested these findings but submitted that since the said documents were not prepared by the Appellants, they cannot be held accountable for lapses contained therein. I do not, with respect, agree with that contention of learned counsel. The affidavit of service, though not

prepared by the Appellants, is the very document paraded by them to prove that the Defendant/Respondent was duly served with the originating processes before the judgment was entered against it. And the Dispatch Book was prepared by the Appellants in proof of their assertion that the Defendant/Respondent was served. Therefore if these documents contain materials which tend to impeach the credibility of their claim that the Defendant/Respondent was served, they cannot be heard to say that they are, after all, not the makers of the documents. The inconsistencies identified by the court below render the case of the Plaintiffs/Appellants unreliable and thus create doubts as to whether the Defendant/Respondent was served. After highlighting the inconsistencies in the affidavit evidence of the Plaintiffs/Appellants the court below at the same page 126 said:

“With these facts the trial judge ought to have entertained doubts as to whether the Appellant had in fact been served to entitle the court to assume jurisdiction. Where any doubt as to whether or not service was or was not properly effected exists, a judgment obtained by a party in the absence of the other such as in the instant case, has to be set aside to ensure that both parties are heard before a decision. See WIMPEY LTD v BALOGUN (supra).”

I agree entirely with the above reasoning and conclusion. In the affidavit in verification of facts deposed to by Mr. Wilson Abia, the Onitsha branch manager of the Defendant/Respondent, he made very crucial assertions in denial of the purported service. In paragraphs 2-7 he deposed:

2. I have read the affidavit of service sworn to by one Uyanwanne G. the Chief Bailiff of the Onitsha High Court wherein he falsely claimed to have served the writ of summons in this suit on the manager by delivering same to the manager after one unknown person identified me. A copy of same is exhibited and marked as exhibit “A”.

3. The aforesaid deposition by the said Bailiff is false as neither myself nor any staff of the Appellants bank was served with any writ of summons in this suit.

4. It would be foolhardy and stupid of me after being served with a claim against my bank involving over N2,000,000.00 (Two Million Naira) not to inform my head-office and/or brief our bank's solicitor, Chike Onyemenam Esq. who is based here in Onitsha.

5. The aforesaid Bailiff never came into the Appellant's bank to serve any process whatsoever in relation to this case and we were consequently not aware of its pendency until a staff of the Onitsha High Court came and informed me that judgment has been delivered against our bank.

6. I verily believe that the affidavit of service was deposed to in bad faith so as to deprive us of an opportunity of being heard.

7. I challenge the aforesaid Bailiff to produce his service book and show the Honourable court where myself or any of the bank staff signed as he claims to have delivered same to me personally. There was no reaction from the Chief Bailiff to the above assertions. They remain essentially unchallenged. In view of the foregoing averments which remain practically unchallenged and the internal cracks in the affidavit evidence of service, the finding of the court below about there being no proper proof of service of the processes on the Defendant/Respondent cannot be faulted. The result is that I resolve this issue of service in favour of the Defendant/Respondent.

Having resolved this issue of whether or not there was proper service in favour of the Respondent and against the Appellants, it serves no useful purpose to deliberate on the remaining issues. The resolution of this issue of service determines the appeal and a deliberation on the other issues would be nothing more than a mere academic exercise. Since there was no proof of service of the originating processes on the Defendant/Respondent the judgment of the learned trial judge K.K. Keazor J on the 1712/98 was without jurisdiction and is therefore null and void.

In the event, the appeal is dismissed and the judgment of the court below of the 20/12/2001 be and is hereby affirmed. The judgment of the trial court of the 17/12/98 is set aside. The suit itself be and is hereby remitted back to the Onitsha Division of the High Court of Anambra State for trial by another judge. I make no orders as to costs.

TOBI JSC

Banker customer relationship existed between the parties. The respondent was the Banker. The appellants were the customers. The appellants had a fixed deposit of N2,385,716.75 with the respondent. The respondent could not pay any interest on the deposit. The appellants therefore demanded to withdraw their fixed deposit with the respondent. The respondent could not refund the money.

The appellants sued. They sued on the undefended list. The respondent did not file any intention to defend the action. Judgment was entered in favour of the appellants by the learned trial Judge. An appeal to the Court of Appeal was allowed on the ground that the issues involved in the matter were substantive. M. D. Muhammad, JCA said at page 129 and 130 of the Record:

“The undefended list procedure provides for non-contentious matters, hi the instant case all cannot be said to be certain from the writ taken out by Respondents and the affidavit in support of the writ to automatically entitle the claimant to judgment under rules of court. If the trial court had evaluated the evidence provided by the affidavit in support of the Respondents’ claim it would have detected the serious issue of credibility which the two annexures thereto have brought to bear on the case sought to be made out. In that regard, the trial court would have realized how unsafe it was to act on the averments in the supporting affidavit as unchallenged and uncontradicted as they have been. See Orhue v Edo (1996) NWLR (Pt.473) 475.”

Dissatisfied, the appellants have come to this Court. Briefs were filed and exchanged. Appellants formulated seven issues. Respondent formulated five issues. Although both Briefs put together have twelve issues, the crux of this appeal is whether there was service of the writ of summons. Most of the issues formulated are exaggerations of this issue and appurtenant to it.

It is elementary law that a defendant must be served the writ of summons before he can enter appearance. That is the only notice to him that a case is filed against him and that he should make an appearance in the court specified on the date and time stated therein. Where the defendant is not served with the writ of summons, the subsequent trial of the case is a nullity. The proceedings however

ably conducted cannot be saved in favour of the plaintiff. As a matter of law and in the eyes of the law, there are no proceedings in the case at all. Where a defendant is not served with the writ of summons, the court is deprived of jurisdiction to hear the case. In order to vest the court with jurisdiction, the defendant must be duly served with the writ of summons. In other words, service of writ of summons is a precondition to the court assuming jurisdiction. It is a forerunner to jurisdiction. B

Service of writ of summons can be undertaken in two ways, personal or substituted service. As the name implies, personal service is service on the defendant in person or as a person. Substituted service is service made in substitution of the defendant. It is service undertaken on another person other than the defendant. C

The law provides for the way corporate or artificial person is served. If the law provides for a particular way or method, non compliance in that particular way or method will nullify the service ab initio. As a corporate or artificial person does not exist as a human being, the law provides for service on a representative of the body, be ; the Chairman or the Secretary or another person as the case may be. D E

Because a person cannot be condemned unheard, the importance of service as the first action in the judicial process cannot be over-emphasised. Service of a process is an exact thing which must be undertaken with all the exactitude or exactness in the judicial process. Because of its exactness, the plaintiff has the burden to prove exactly that the writ of summons was served on the defendant. Proof of service is by affidavit. The Affidavit must depose very clearly that the defendant was served with the writ of summons. This can be proved by the signature of the defendant himself. Where a defendant refuses to accept personal service, the law allows the bailiff to drop the writ > the face and presence of the defendant. F G

The first issue raised by the appellants is that the respondent failed to formulate an issue on Ground 6 in the Notice of Appeal in the Court of Appeal. Ground 6 reads: H

“The Learned trial Judge erred by holding that the Defendant/Appellant had been served with the writ of summons and then went ahead to enter judgment in favour of the plaintiffs/Respondents in

the absence of the Defendant/Appellant.”

In the appellants amended brief in the Court of Appeal, the following two issues are relevant for the purpose of Issue No.1 formulated by the appellants in this court. They read:

- B *“(i) Whether there was prima facie proof of personal service of the writ of summons/claims on the Defendant/Appellant’s Manager*
(ii) If the answer to (i) is in the affirmative, whether having regard to the bailiffs affidavit of service and his dispatch book there was proper service according to the law and on the facts on the Defendant/Appellant.”

C Both Ground 6 and the above two issues deal with service of the writ. And so, I do not agree with the submission of counsel for the appellants that no issue was formulated on Ground 6. That is not correct. On the contrary, I entirely agree with learned counsel for the D respondent that Issues 1 and 2 at page 94 of the Record, are manifestly clear that the appellants at the court raised the issue as to whether or not there was prima facie proof of service.

E Learned counsel for the appellants submitted that as the trial court has the exclusive competence to make a finding of fact in the case before it and the court rightly and clearly made findings of fact of service of the writ of summons, it is not the duty of the Court of Appeal to deal with error in the decision or judgment of the trial court. He cited Fubunmi v Abigail (1985) 1 NWLR (Pt.2) 299; Iri v Eseroraye (1991) 2 NWLR (Pt.173) 252; Ogbu v Ani 91994) 7 NWLR (Pt.355) 128; Otti v Otti (1992) 7 NWLR (Pt.252) 187 and Nwokoro v Onuma (1990) 3 NWLR (Pt.136) 33

F I entirely agree with the submission of learned counsel that the Court of Appeal has the right to interfere with the findings of the trial G court where they are perverse. It is in this respect, I am unable to go along with his earlier submission that the High court has the exclusive competence to make findings of fact in a case before it I should add a caveat and it is that the exclusivity of the competence of the trial court to make findings of fact is subject to appellate review by an H appellate court, such as the Court of Appeal.

The proceedings of the High Court are at page 8 of the Records. Let me copy them here for ease of reference.

“Mr Anieto: The matter is brought under the undefended list

procedure. There is an Affidavit. Refers Order 24 Rule 9(4). The Defendant was served on 18/11/98. Asks for judgment. There is no notice of intention to defend. Court: The suit is brought under the undefended list procedure. Defendant was served on 18/11/98. The matter was set down for hearing today. This was well over the prescribed 5 days before hearing after service. The defendant did not file notice of intention to defend. There will be judgment for the Plaintiffs as per their claim for:

(a) *The sum of N2,385,716.75 being the principal sum and*
(b) *Interest at the rate of 15% per annum in the said sum of N2,385,716.75 from 24/3/95 until the sum is fully liquidated.*

Mr. Anieto: Our out of pocket expenses is N53

7. We ask for N2000 costs.

Court: There will be N2000 costs to Plaintiffs."

I do not see where the learned trial Judge in the words of counsel for the appellants "rightly and clearly made a finding of fact of service of writ of summons" He correctly made reference to the same page 8. I do not see any pronouncement by the learned trial Judge on the service of the writ of summons. The learned trial Judge did not deal with the issue of service and so counsel, with respect, was wrong in arguing that the court "rightly and clearly made a finding of fact of service of writ of summons" Issue No. 1 fails.

Learned counsel for the appellants submitted that the Court of Appeal was wrong in entertaining the issue of jurisdiction which was not contested at the High Court. Learned counsel for the respondent submitted that non-service of originating process to a defendant, being an issue challenging jurisdiction of the court can be raised at any stage of the proceedings, even at the Supreme Court, for the first time. Learned counsel for the respondent is right. Learned counsel for the appellants is wrong. Non service is a product of jurisdiction and issue of jurisdiction being the life blood of adjudication can be raised at any time in the proceedings even on appeal at the Supreme Court. This is because where a court has no jurisdiction, the proceedings are a nullity, ab initio. Issue of jurisdiction can be raised suo motu by the court. As long as the parties are given the opportunity to react to the issue, they cannot fault the procedure of the court raising the

issue suo motu. Issue No.2 fails.

On Issue No.3, learned counsel for the appellants submitted that the Court of Appeal was wrong in attacking the contents of the affidavit of service. He relied on Order 26 Rule 5, Order 7 Rule 4 of the High Court (Civil Procedure) Rules of Anambra State, 1988; section 78 of the Companies and Allied Matters Act, 1990 and the case of Ben Thomas Hotels Limited v Sebi Furniture Limited (1989) 5 NWLR (Pt.123) 523.

Order 26 Rule 5 of the High Court Civil Procedure Rules of Anambra State provides as follows:

“No proceedings in the court, and no process, order, ruling, judgment issued or made by the court shall thereafter be declared void solely by reason of any defect in procedure or want of form as prescribed by these rules. Rather every court shall decide all issues according to substantial justice without undue regard to technicalities”

The operative words in Rule 5 are “defect in procedure or want of form” Non-ice of writ of summons is not a mere defect in procedure. It is not also one of want but rather an incurable irregularity that is intrinsic to the jurisdiction of the court. It is beyond doing technical justice. It goes to the doing of substantial justice. Substantial justice is not only for the party in default of the rules of court. It is also for adverse party who is the victim of the non compliance with the rules. Rules of court are meant to be obeyed. They are not in the statute books for the form of it qua policing rules of procedure. I must say that rules of procedure are divided into two categories for purposes of obedience. While non-obedience of some of the rules are able, others are incurable. Rules which affect the jurisdiction of the court, as they affect the props and foundation of the case, come under the category of incurable rules upon disobedience. That is to say that irregularities arising from the category of rules affecting the jurisdiction of the courts are incurable. The irregularity in this appeal is in respect of service. It is the case of the respondent that there was no service or proper /ice. That type of situation does not come under Order 26 Rule 5 of the High court civil Procedure rules, 1988.

Order 7 Rule 4(1) of the High Court (Civil Procedure) Rules reads:

“Service on a limited liability company shall be effected as prescribed in the Company’s Act; provided that subject to or in default of such provision, service may be effected on the company by registered post addressed to its principal office in the state or by delivery to the principal officer wherever he may be found in the state or by delivery at the company’s office in the state to one apparently in charge of such office provided further where the company has no office in the state, service shall be effected by registered post after due compliance with sub-rule (2) of this rule.”

The Court of Appeal dealt with the issue at page 126 of the Record as follows d I quote the court in some detail:

*“The above construction of Order 7 rule 4(1) AND (2) REMAINS GOOD LAW. In the instant case since Appellant had an office within the Jurisdiction of the lower court, three options were available to the Respondent in effecting service to the Appellant. A proof that service had been effected on the Appellant, therefore, must * be proof that the rules of court had been complied with in the choice of any option and executing the option as provided for by the rules. Respondent appear to have elected that option. They chose to serve the Appellant by delivery at the latter’s office within the State wherein the lower court’s jurisdiction was. Any proof of service so effected that fell short of showing that the process had been delivered to any one apparently in charge of such office would be unacceptable. Appellant is all the more on a firm ground when his counsel cited the case of Wimpey (Nig) Ltd. & v Alhaji Kelani Balogun to make their point. The affidavit of service in the instant case shows that the “Manager” of the Appellant was served after he had been pointed to the bailiff by one other. The affidavit of service neither contained the name of this “Manager” that was served nor the name of the pointer who led to him. That was not all. The bailiffs dispatch book belied the content of the bailiffs affidavit of service. The book indicates that the process was received and signed for by a third party for and on behalf of the Manager. Here again neither the name or designation of the recipient was indicated. There was so much that was vague without this service / that it would be unfair to allow a decision * built on to survive.”*

The above is certainly a most adequate answer to the issue

raised by counsel. I cannot improve on it. As the above also covers section 78 of the Companies and Allied Matters Act, 1990,¹ I will now proceed to take the case cited by counsel. It is the case of Ben Thomas Hotels v Sebi Furniture Ltd, supra. In that case, the Supreme Court held from the facts, that the rule was complied with and so the service was held to be good. In this case on appeal, the Court of Appeal found defects or irregularities in the service. This is not a case where the Court of Appeal failed or refused to follow a decision of the Supreme Court. It is rather a case where the decision of the Supreme Court did not apply. The principles of precedent and stare decisis, cannot be determined in isolation of the facts. As a matter of law the facts of a case denote the principle of stare decisis. As the facts of Ben Thomas did not apply to the case, the Court of Appeal rightly refused to follow the case. This court cannot obey the appellants to castigate the Court of Appeal as that court is correct in not following the decision.

I should also say that affidavit evidence is not sacrosanct. It is not above the evaluation of the courts. Like oral evidence, a court of law is entitled to evaluate affidavit evidence in order to ensure its veracity and or authenticity. While uncontradicted affidavit evidence should be used by the court, there are instances when such affidavit evidence clearly tell a lie and the courts cannot be blind to such a lie. One example will suffice. If a party disposes an affidavit that 1st of April every year is Nigeria's Independence Anniversary, a court of law will certainly not accept such a deposition as true, as the correct date is 1st of October. I hope I have made myself clear.

That takes me to Issue No.4. It is that the Court of Appeal is not expected to introduce ground of appeal and formulate an issue suo motu. Learned counsel contended that the Court of Appeal suo motu introduced ground of appeal and formulated the issue of conflict between Exhibits A and B without calling on the parties to address it on the exhibits. Learned counsel did not indicate the ground of appeal and the issue formulated by the Court of Appeal in its judgment. I have also examined the judgment and I do not see any ground of appeal or issue formulated by the Court. Courts of law do not formulate grounds of appeal. They at times and in relevant situation formulate issues; certainly not grounds of appeal.

I was really at a loss on this issue before I read the Brief of the respondent. He referred the court to Ground 3 of the Appellants Grounds of Appeal and Issue No.4 in the Brief at the Court of Appeal and submitted that the Court of Appeal never did such a thing. It is Ground 2, not Ground 3 as stated by counsel for the respondent. The ground is at page 26 of the Record; not at page 94. It is the issue that is at page 94. Ground 2 at page 26 reads:

“The learned trial Judge misdirected himself by failing to evaluate the evidence of the plaintiffs/Respondents so as to determine whether or not the plaintiffs had proved their case and make findings to that effect”

Issue No.4 at page 94 of the Record reads:

“Did the learned trial Judge evaluate the Plaintiffs evidence so as to determine whether or not the Plaintiffs had proved their case before proceeding to deliver judgment in favour of Plaintiffs.”

It is clear that Issue No.4 was formulated from Ground 2. Both have a common denominator hi “evaluation”. That is what the Court of Appeal did when the court evaluated the affidavit of service. That court is entitled to do that. I had earlier mentioned it. I do not want to repeat myself. As the ground and the issue were duly formulated by the respondent in the Court of Appeal, counsel was clearly wrong in passing the buck to the Court of Appeal. Issue No.4 fails.

It is the submission of counsel for the appellants that the Court of Appeal overruled the decision of the Supreme Court in Ben Thomas Hotels Ltd v Sebi Furniture Ltd (supra). As I have taken the issue above, I should not take it here again. The Court of Appeal has not the competence to overrule the decision of the Supreme Court and that court did not do such a thing. The appellants should not call the court a bad name to make this court ‘hang’ it. Issue No.5 fails.

It is the submission of counsel for the appellants that the Court of Appeal ignored the contents of the records before it. He accused the Court of Appeal of making a finding of fact on the issue of jurisdiction outside the materials placed before the trial court. Counsel called in aid once again the case of Ben Thomas. He submitted that the High Court have exclusive right to determine whether it had jurisdiction to try the case before it based on the plaintiffs claim.

I have seen in the appellants brief a fairly zig-zag arrangement.

He had refused to leave the Ben Thomas case alone. It looks to me like a recurring decimal in algebra. It comes in and out. If counsel can afford to repeat himself, I cannot. I leave Ben Thomas for good. He made a new submission and I will take it. It is that the trial court has exclusive right to determine if it had jurisdiction to try the case before
B it based on the plaintiff's claim. I agree that a trial Judge has the jurisdiction to determine whether it has jurisdiction to try the case of a plaintiff based on the claim before it, and an appellate court has the jurisdiction to determine whether the trial court really has jurisdiction
C to hear the case. Where an appellate court comes to the conclusion that the trial court has no such jurisdiction, it will strike out the matter, thus removing it from the cause list of the trial court. As counsel did not remember this important aspect of the law, I decided to remind him.

D Learned counsel for the appellants urged this court to allow the appeal on the ground that the judgment of the Court of Appeal is perverse. He described paragraphs 9 and 11 of the counter affidavit as bare faced lies. I will not do such a thing. I do not see any perversity in the findings of the Court of Appeal. On the contrary, I
E entirely agree with that court. The Court of Appeal found some contention in the case and it rightly in my view allowed the appeal.

It is for the above reasons and the more detailed reasons given by my learned brother, Tabai, JSC that I too dismiss the appeal. I
F abide by his consequential orders as well as his orders as to costs.

OGUNTADE JSC

I have had the advantage of reading in draft a copy of the lead judgment by my learned brother Tabai J.S.C. He has in the said
G judgment discussed the importance in litigation of the service of the processes leading to a court judgment.

This court per Nnamani JSC in *Skenconsult Nig. Ltd. & Anor. V. Godwin Sekondy Ukey* [1981] 1 S.C. 4 at pages 15-16, observed concerning the importance of service in litigation thus:

H *"The importance of service of process has been underlined by Lord Greene M.R. in Craig v. Kanssen [1943] K.B. 256 at pp. 262-263; (1943) 1 All E.R. 108, at p. 113. This was a case in which the issue was *whether the High Court could set aside an order made by*

plaintiff leave to enforce a judgment under the Courts (emergency Powers) Act, (1939) of England or whether the remedy lay only in appeal. In the course of his speech holding that the court could set aside its own order, the learned Master of the Rolls observed:

‘.....The question we have to deal with is whether the admitted failure to serve the summons upon which the order in this case was based was a mere irregularity, or whether it was something worse, which would give the defendant the right to have the order set aside. In my opinion, it is beyond question that failure to serve process where service of process is required, is a failure which goes to the root of our conception of the proper procedure in litigation. Apart from proper ex parte proceedings, the idea that an order can validly be made against a man who has had no notification of any intention to apply for it is one which has never been adopted in England. To say that an order of that kind is to be treated as a mere irregularity and not something which is affected by a fundamental vice, is an argument which, in my opinion, cannot be sustained.’

(See also *White v. Weston* (1968) 2 All ER 824 at 846 CA.)

It is fair to say that that had always been the conception of the Nigerian courts on the issue of proper procedure. In the instant case, the appellants were not properly served in law with the writ of summons. They were neither served with the motions pursuant to which the two orders were made nor were they present or represented by counsel when the said orders were made. My Lords, I am of the view that on all these grounds the first part of Chief Williams’ argument must succeed and the orders ought to be set aside.”

In the instant appeal, the court below in my view correctly took the position that the proof of service of the processes leading to the judgment against the respondents was shoddy and unsatisfactory. Having come to that finding, there was no other course to be followed except to set aside the judgment given on the basis that the processes were properly served on the respondent.

I would also dismiss this appeal. I subscribe to the order on costs made in the lead judgment by my learned brother Tabai J.S.C. H

MOHAMMED JSC

This appeal is against the judgment of the Court of Ap-

peal, Enugu Division, delivered on 20/12/2001. In the decision, the Court of Appeal allowed the appeal by the Defendant now Respondent in this Court, by setting aside the judgment of the trial High Court of Anambra State sitting at Onitsha in an undefended suit, given in favour of the Plaintiffs now appellants on the ground that the Respondent was not served before the action was heard. In its judgment, the trial Court agreed with the plaintiffs/appellants' counsel, that there was proof of service. However, the Court of Appeal, on closer examination of the same affidavit of service and surrounding facts, found to the contrary. Looking at the affidavit of service and the manner the service was effected, I entirely agree with the Court below that there was no proof of service. I therefore agree with my learned brother Tabai JSC, in his leading judgment, which I had the opportunity of reading before today, that there is no merit in the appeal.

Accordingly, I also dismiss the appeal and abide by the orders made in the leading judgment, including the order on costs.

OGEBE JSC

I read in advance the lead judgment of my learned brother Tabai, JSC just delivered and I agree with his reasoning and conclusion.

This Court frowns at proliferation of issues as presented by the appellants in this appeal. The only issue that calls for consideration is that of whether there was proper proof of service of the originating process on the respondent before judgment was given against it by the trial court. My learned brother has thoroughly considered that issue and resolved it against the appellants.

This is an appeal that should not have been brought to this court especially as the court below merely ordered a retrial. It is devoid of merit and I too dismiss it and endorse the consequential orders made in the lead judgment.

H