

**SUPREME COURT OF NIGERIA**  
12TH DECEMBER, 2008. SC. 214/2002  
**CORAM:- D. MUSDAPHER, G. A. OGUNTADE,**  
**I. F. OGBUAGU, P. O. ADEREMI,**  
**M. S. MUNTAKA-COOMASSIE, JJSC**

1. DREXEL ENERGY  
AND NATURAL RESOURCES LTD.

2. MR. ADETUNJI A. SOFESO ..... APPELLANTS

3. MR. KOLAWOLE SOFESO

AND

1. TRANS INTERNATIONAL BANK LTD. .... RESPONDENTS

2. MESSIAH INVESTMENT COMPANY LTD.

3. MOBIL OIL PLC.

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APPEALS - Issues - Not based on appellant's notice of appeal - Validity - It is invalid unless it is shown that the respondent filed a cross appeal - Or respondent's notice upon which it may be seen to be based (H1)

ACTIONS - Commencement - Wrong procedure - Effect - An action wrongly commenced is incompetent - Accordingly it robs the court of jurisdiction to hear and determine the same (H2)

WRIT OF SUMMONS - Issuance & Service - Outside jurisdiction - Failure to obtain prior leave to issue and serve writ outside jurisdiction of court - Is a fundamental defect - Not mere irregularity which can be cured (H3)

APPEALS - Issues - Abatement - Where an issue subsequently becomes academic - By reason of resolution of other issues before it - A court will have no jurisdiction to hear and determine it (H4)

**FACTS**

The plaintiffs/respondents sued the defendants/appellants at the High Court of Oyo State claiming a certain sum as debt owed by the appellants to the respondents. The addresses of service of the appellants as supplied by the respondent and endorsed on the writ

of summons showed that the appellants were outside the jurisdiction of the court. Yet, the writ was issued and served without leave of court. Moreover, service was by substituted means.

On becoming aware of the action, appellants brought a motion on notice challenging the jurisdiction of the court to hear the suit as constituted. The trial court heard and dismissed the motion as it held that there was sufficient compliance with the provisions of the sheriffs and Civil Process Act. Appellants were out of time in appealing against the ruling. Therefore they subsequently applied to the Court of Appeal for extension of time within which to both seek leave and to appeal against the ruling. The court refused the application. This appeal is against the ruling refusing that application.

**ISSUES FOR DETERMINATION**

Issue No. 1

Whether the failure by the respondents to comply with the provisions of Order 5 rule 6 of the Oyo State High Court (Civil procedure) Rules, 1988, is a fundamental defect capable of rendering the writ of summons invalid, and consequently the proceedings before the lower court and this court.

Issue No. 2

Whether the determination of the issue of jurisdiction once raised by a party, can be deferred until the conclusion of the substantive suit.

Issue No. 3

Whether in circumstances of this case the justices of the Court of Appeal exercised their discretion judicially and judiciously in dismissing the Appellants application for leave to appeal.

Issue No 4

Whether the trial court had the jurisdiction to make an order for substituted service of the writ of summons and the statement of claim on the appellants as Defendants, who were at the time of issuing the said process outside the territorial jurisdiction of the trial court.

**HELD** (Unanimously allowing the appeal per **MUNTAKA-COOMASSIE JSC**)

***APPEALS - Issues - Not based on appellant's notice***

1. This court has stated this position of the law severally in its judgments, and I wonder why counsel should continue to err in this re-

gard. A respondent who wishes to raise an issue not covered by the appellant's notice of appeal should either file a cross-appeal or apply that the lower court's judgment be affirmed on other grounds. It is trite that an issue for determination not based or distilled from any ground of appeal is incompetent, this court lacks jurisdiction to determine or resolve such issue.

Applying the above principle of law to this case, and having found that issue nos. 2 and 5 formulated by the 1st and 2nd respondents do not relate or distilled from any of the grounds of appeal, I accordingly strike them out together with the argument or arguments advanced thereunder. (p. 3814 B/E)

### ***ACTIONS - Commencement - Wrong procedure***

2. I must say from the outset that the commencement of a suit is very fundamental to the determination of issue of jurisdiction. An action wrongly commenced is incompetent and this will rob the court the jurisdiction to hear and determine same. (p. 3814 G)

### ***WRIT OF SUMMONS - Issuance & Service***

3. Applying these principles of law to the appeal at hand, I hold that failure of the respondent to seek and obtain the leave of the court or the judge to issue and serve the writ of summons outside the jurisdiction of the court amounts to fundamental defect and not a mere irregularity which can be cured, hence I have no hesitation in declaring both the issuance and the service of the said writ of summons outside the jurisdiction as invalid.

The insertion of 30 days grace in the writ of summons does not change the position. For the avoidance of any possible doubt, the writ of summons and service of same outside the jurisdiction of Oyo State High Court without the leave of the Oyo State Court are bad and invalid. (p. 3816 G)

### ***Where an issue subsequently becomes academic***

4. Having declared issuance of the writ of summons and the service of the writ of summons as invalid and void, any other issues raised for determination in this appeal become mere academic issues which would not affect the outcome of this appeal in any manner. Hence it would not attract our attention. It is trite that when an issue becomes

academic or hypothetical in nature, a court of law will have no jurisdiction to hear or determine it.

Finally this appeal is meritorious and should be allowed, same is allowed by me. (p. 3818 E)

**B** **NOTABLE POINTS OF INTEREST**  
**MUSDAPHER JSC**

*1. Issue of jurisdiction should be resolved timeously*

It is trite law that the issue of jurisdiction can be raised at any time or stage of the proceedings. But where it is properly raised, the court must at the earliest opportunity deal with it before the court embarks on adjudication; this is because, if there is no jurisdiction, all matters and decisions taken are liable to be nullified. (p. 3819 A)

**D** **OGBUAGU JSC**

*2. Issue of jurisdiction should not await conclusion of suit*

From the foregoing, the learned counsel for the parties and in particular for the 1st and 2nd Respondents, can now see and appreciate why I have no difficulty in answering their said Issue No.2 and Issue 1 respectively to the effect that when once the issue of jurisdiction is raised in any court, the determination of that issue, cannot, and should and ought not be deferred until the conclusion of the substantive suit. The reasons for this have been highlighted in the above decided authorities. (p. 3826 B)

**ADEREMI JSC**

*3. Jurisdiction is the legal authority to adjudicate in a matter*

By jurisdiction is meant the authority which a court has to decide matters that are litigated before it, or to take cognizance of the matters presented in a formal way for its decision. Such authority of the court is controlled or circumscribed by the statute creating the court itself. Or it may even be circumscribed by a condition precedent created by legislation which must be fulfilled before the court can entertain the suit. All of the above, touch on the legal authority of the court to adjudicate in the matter. (p. 3832 H)

*4. Demurrer applications are allowed but demurrer is not*

I start by saying that *DEMURRERS* had long been abolished in the

corpus of our laws. What the rules of court now recognise is demurrer application. By it a defendant can demur to a writ of summons, supporting his application by an affidavit. But a defendant in this circumstance must not file a statement of defence nor must he rely on it and neither is he to tender evidence for he is deemed to have accepted as true all the facts pleaded by the plaintiff, but he can only rely on some points of law to defeat the plaintiff's case. Thus, it has now become a well established principle of jurisprudence covered by rules of Court that a defendant is entitled to have plaintiff's suit dismissed without taking evidence or calling for any answer on questions of fact from the defendant where on the face of the statement of claim there is a sound legal or equitable defence to the action. The proceedings of this type are by way of demurrer. Having explained what DEMURRER means the inevitable answer to issue No. 3 in the respondent's brief of argument is in the affirmative. (p. 3835 A)

### **REPRESENTATION**

Mr. Y.C. Marikyan for the appellants with him Mr. M.O. Olorunwola, Miss. P. Y. Tukhur, Miss C. Chukwuma-Eneh, Miss C. Nniyi, Mr. O. Oroh and Mr. A. Mohammed.

Mr. Samuel Zibir for the 1st and 2nd respondents with him Miss Yetunde Ogunbowale.

### **CASES REFERRED TO**

Intra Motors Nig. Plc v. Akinloye (200) 6 N.W.L.R. (pt. 708) 61 at 72 - 73

Eimskip Ltd. v. Exquisite Ind. (Nig.) Ltd. (2003) 4 NWLR (pt. 809) 88

Broad Bank (Nig.) Ltd. v. Alhaji S. Olayiwola & Sons Ltd. (2005) 3 N.W.L.R. (pt.911) 434 at 453

NEPA v. Olagunju (2005) 3 N.W.L.R. (pt. 913) 602

Akegbejo v. Ataga (1998) 1 N.W.L.R. (pt. 534) 459

Senate President v. Nzeribe (2004) 9 N.W.L.R. (pt. 897) 274

Alamieyeseigha v. CJN (2005) 1 N.W.L.R. (pt. 906) 60

Omobare v. N.N.B. Ltd. (1968) 1 N.S.C.C. 32 at 36

Dahuwa v. Adeniran (2003) 17 N.W.L.R. (pt. 849) 376

NEPA v. Eze (2001) 3 N.W.L.R. (pt 701) 606 at 619

Ita v. Nyang (1994) 1 N.W.L.R. (Pt. 318) 56 at 72

Nwabueze & Ors. V. Obi Okoye (1988) 4 N.W.L.R. (Pt. 91) 664  
Madukolu v. Nkemdilim (1962) 3 S.C.N.L.R. 34  
Rossele v. A.C.B. Ltd. (1993) 8 N.W.L.R. (pt. 312)  
Apadi v. Banuso (2008) 13 N.W.L.R. (pt. 1103) 204 at 219

**B STATUTES & RULES REFERRED TO**

Sheriffs and Civil Process Act, s. 99  
Oyo State High (Civil Procedure) Rules 1988, O. 5. rr. 6 & 14  
Supreme Court Rules 1999 (as amended), O. 6 r.7

**C**

**LEAD JUDGEMENT BY MUNTAKA-COOMASSIE**

The respondents who were the plaintiffs in the trial court claimed in their joint writ of summons dated 21/3/98 and filed at the High Court of justice, Ibadan, Oyo State the sum of N20,058,304 as debt owed them by the Appellants, who were the defendants at the trial court. The addresses of the service as supplied/endorsed in the said writ of summons are stated as follows:

*“1st to 3rd defendants 9A Raymond Njoko Road, Ikoyi, Lagos. 4th defendant Lekki Express way Victoria Island Lagos.”*

The writ of summons was filed and issued without the leave of the trial High Court. The same writ was served on the appellants by means of substituted service by publishing same in the Guardian Newspapers. On becoming aware of the suit, the Appellants filed a motion on Notice dated 19/4/99 in which the trial High Court was prayed for the following reliefs:

(i) An order dismissing and/or striking out this action for want of jurisdiction.

(ii) And for such further order(s) as this Honourable Court may deem fit to make in the circumstances.

” The grounds for the application were stated as follows:

(1) That 30 (thirty) days period prescribed by the provisions of section 99 of the Sheriffs and Civil process law of the Federation, 1990 have not become complied with.

(2) The subject matter of the suit is a contract entered into in Lagos to be performed in Lagos and

(3) All the Defendants/Applicants reside and carry on business in Lagos and it will not be convenient for any trial in respect of the subject matter of any other matter to be tried in Oyo State or any

other state except where the defendants are resident and or carry on business.

On the 30/7/99, the trial High Court per Adekola, C.J. dismissed the application. In his ruling on this application, learned trial judge held as follows:

*"In the circumstances, the plaintiff has complied with the provisions of section 99 of the Sheriffs and Civil process Act by the endorsement of 30 days within which the defendants are to enter appearance after the service of the writ of summons on them. There is difference and distinction between the validity of a writ of summons and the validity of service of the writ itself. See Adegoke Motors Limited v. 1. Dr. Babatunde Adesanya, 2. Mr. P.O. Odesanya [1989] 3 N.W.L.R. (pt. 109) 250"*

On the issue of the defendants residing in Lagos, the learned trial High Court held thus:-

"Regarding whether or not the contract was entered into in Lagos and was to be performed in Lagos, that issue cannot be safely determined at this stage of the proceedings. When one looks at the wordings of the writ of summons and the averments contained in the statement of claim, it will be premature for the Court to say that the place where the contract was entered into was Lagos and that Lagos was also the place where the contract was to be performed. That point of objection as to lack of Jurisdiction on the part of the Court being premature is hereby refused See page 28 of the Record.

The appellants were out of time in appealing against this ruling, consequently an application was filed before the Court of Appeal, Ibadan Division, praying amongst others for:-

(1) Extension of time within which to seek leave to appeal against the ruling delivered by the then Honourable Justice Adekola C.J. on the 30th day of July, 1999.

(2) Leave to appeal against the ruling delivered by then Honourable Justice Adekola C.J, on the 30th day of July, 1999.

(3) Extension of time within which to file the Notice and ground of appeal."

In its short ruling, the lower court refused the application and dismissed it. The lower court concluded as follows; "As the issue of jurisdiction can be taken at any stage, it is therefore believed that the present application should be refused so that the claim now still pend-

ing at the lower court could be expeditiously concluded. The applicants could then raise the point of jurisdiction in any appeal against the final judgment of the court in case they lost at the lower court.

This stand is strengthened on the ground that the applicants have not shown that the ruling of the lower court now in issue *ex-facie* defective or that the lower court's assumption of jurisdiction is patently illegal. In the result, the application is refused and accordingly dismissed" See pp. 66 - 67 of the Record.

It is against this ruling that the applicants have appealed to this court by a Notice of Appeal dated 21/6/2001 containing three grounds of appeal after obtaining leave of the lower court. The Appellants also applied to this court to raise fresh issues, which was granted.

In accordance with the provisions of this court, Order 6 Rule 4 of the Supreme Court Rule 1999, both parties filed and exchanged their respective brief of argument. The Appellants in their briefs of argument dated 5/5/2005 formulated four (4) issues for determination as follows:

Issue No. 1

Whether the failure by the respondents to comply with the provisions of Order 5 rule 6 of the Oyo State High Court (Civil procedure) Rules, 1988, is a fundamental defect capable of rendering the writ of summons invalid, and consequently the proceedings before the lower court and this court-

Issue No. 2

Whether the determination of the issue of jurisdiction once raised by a party, can be deferred until the conclusion of the substantive suit.

Issue No. 3

Whether in circumstances of this case the justices of the Court of Appeal exercised their discretion judicially and judiciously in dismissing the Appellants application for leave to appeal.

Issue No 4

Whether the trial court had the jurisdiction to make an order for substituted service of the writ of summons and the statement of claim on the appellants as Defendants, who were at the time of issuing the said process outside the territorial jurisdiction of the trial court.

The 1st and 2nd respondents in their brief of argument dated 1st day of February, 2000 formulated five (5) issues for our consid-

eration of this appeal thus: -

(1) *Whether the determination of the issue of jurisdiction once raised by a party can be deferred until the conclusion of the substantive suit.*

(2) *Whether the appellants' Counsel had a right of audience before the trial court without first entering appearances before arguing the preliminary objection.* B

(3) *Whether the preliminary objection brought by way of a demurrer was competent.*

(4) *Whether the trial court had jurisdiction to hear or entertain the action.* C

(5) *Whether the appellants could be allowed to seek protection under the Veil of technicality to wriggle out of their financial commitment to the 1st respondent."*

At the hearing of this appeal, the learned counsel to the Appellants adopted their brief of argument and urged this court to allow the appeal. D

On the issue 1 for determination learned counsel referred to the provisions of Order 5 Rule 6 of the Oyo State High Court (civil procedure) Rules of 1988 and submitted that the action is not competent as no leave of the trial High Court was obtained before it was issued being an action which Notice is to be given out of the jurisdiction. E

The requirement for leave is mandatory and it is a condition precedent to the exercise of the Court' jurisdiction over the plaintiffs' claims, He relied on the case of *Intra Motors Nig. Plc v. Akinloye* (200) 6 N.W.L.R. (pt. 708) 61 at 72 - 73. Consequence of failure to seek and obtain the leave is that a condition precedent for the assumption of jurisdiction by the trial court was not satisfied, the case of *Nwabueze v. Okoye* (1988) 4 N.W.L.R. (pt. 91) 685 was cited. This failure to seek leave, it was submitted, was not a mere irregularity but one that renders the entire process a nullity, the case of *Eimskip Ltd. v. Exquisite Ind. (Nig.) Ltd.* (2003) 4 NWLR (pt. 809) 88; and *Broad Bank (Nig.) Ltd. v. Alhaji S. Olayiwola & Sons Ltd.* (2005) 3 N.W.L.R. H (pt.911) 434 at 453 per pats-Acholonu, J.S.C. were cited by the appellants counsel.

On the second issue, the learned counsel submitted that once the issue of jurisdiction is taken or raised by a party, that issue must

be determined before any other proceedings can be conducted in the matter. He referred to the decisions in *NEPA v. Olagunju* (2005) 3 N.W.L.R. (pt. 913) 602; *Akegbejo v. Ataga* (1998) 1 N.W.L.R. (pt. 534) 459; *Senate President v. Nzeribe* (2004) 9 N.W.L.R. (pt. 897) 274.

B On the third issue for determination, the learned counsel submitted that the determination of an application for the grant of leave to appeal involves the exercise of discretionary power of the court, the case of *Alamieyeseigha v. CJN* (2005) 1 N.W.L.R. (pt. 906) 60 was cited.

C In the instant case, the issue in point is jurisdiction bordering on the failure to serve originating process on the appellants as required by the Rules of Court and the Sheriffs and Civil Process Act 1990, such a defect raises the issue of fair hearing, which is fundamental for the exercise of the court's jurisdiction. Learned counsel referred to *Dahuwa v. Adeniran* (2003) 17 N.W.L.R. (pt. 849) 376 and *NEPA v. Eze* (2001) 3 N.W.L.R. (pt 701) 606 at 619.

The learned counsel to the 1st and 2nd respondents, also adopted his Brief of argument and urged this court to dismiss the appeal, in arguing his appeal on issue 1, he submitted that the lower court was correct in dismissing the appellants' application as issue of jurisdiction could be taken at any stage of the proceedings. He therefore submitted that the appellants should have waited until the final determination of the case after which he would raise the issue on appeal, if they are dissatisfied with the judgment of the trial court.

F On the 2nd issue the learned counsel submitted that the counsel to the appellants having failed to file memorandum of appearance has no right of audience, hence the objection as to the jurisdiction is premature. The counsel referred to the Practice and Procedure of the Supreme Court, Court of Appeal and High Court of Nigeria 2nd edition by T. Akinola Aguda on page 194.

G On the 3rd issue for determination, the learned counsel submitted that the demurrer had been abolished in Oyo State by virtue of the provisions of Order 24 Oyo State High Court (Civil Procedure) Rules 1988. The Appellants ought to have filed their statement of defence and therein raise the point of law after forming the ground or basis of the preliminary objection before filing same in form of motion. The case of *Fadare & Ors. v. A-G Oyo State* (1982) N.S.C.C.

52 at 59 was cited.

On the fourth issue for determination, he submitted that the trial court has jurisdiction to hear this matter based on the averment contained in paragraph 6 of the counter affidavit to the effect that the contract for the payment of the sum of N17 million ought to have been performed in Ibadan, he referred to the provisions of order 10 Rule 2 of Oyo State High Court (Civil Procedure) Rules. <sup>B</sup>

Finally on the fifth issue for determination the learned counsel submitted that a party should not be allowed to seek protection under the veil of technicalities to deny the other party justice. The case of Timothy “ Omobare v. N.N.B, Ltd. (1968) 1 N.S.C.C. 32 at 36; <sup>C</sup> and Broad Bank Ltd. v. Alh. S. Olayiwola & Sons Ltd. (supra), also reported in (2005) 1 S.C. (pt. II) 1 at 87 were cited.

In reply on point of law, the learned counsel filed appellants reply brief dated 11/1/07 which was adopted at the hearing of this appeal. <sup>D</sup>

The learned counsel to the appellants submitted that issue Nos. 2 and 5 formulated by the 1st and 2nd respondents were not based on any of the grounds of appeal and as such they are incompetent. The respondents did not cross-appeal and as such they could not raise any issue not borne out of the grounds of appeal <sup>E</sup>

On the issue of not filing a memorandum of appearance or entering an appearance before filing the preliminary objection, the learned counsel submitted that it does not deprive the appellants from moving their preliminary objection, the case of Ita v. Nyang <sup>F</sup> (1994) 1 N.W.L.R. (Pt. 318) 56 at 72 was cited. The learned counsel further submitted that any application challenging the jurisdiction of the court to entertain a suit is not a demurrer. The judgment of the court in Arjay Ltd. v. A.M.S, Ltd. (2003) 7 N.W.L.R. (pt. 820) 572/ <sup>G</sup> 601 was cited.

My Lords, the above were the submissions of the learned counsel to the parties. I will also wish to point out that the 3rd respondent did not file any brief in his appeal, hence the appeal would be determined based on the facts contained in the record and the briefs of <sup>H</sup> argument Filed in the court,

It was the contention of the learned counsel to the appellants that issue for determination nos. 2 and 5 formulated by the 1st and 2nd respondents counsel were not based on any of the grounds of

appeal contained in the notice of appeal, and as such they are incompetent.

I have painstakingly perused the grounds of appeal contained in the amended notice of appeal, and I have not been able to identify any of the grounds of appeal that form the basis on which those issues for determination were based and neither were they distilled from any of the grounds. ***This court has stated this position of the law severally in its judgments, and I wonder why counsel should continue to err in this regard. A respondent who wishes to raise an issue not covered by the appellant's notice of appeal should either file a cross-appeal or apply that the lower court's judgment be affirmed on other grounds. It is trite that an issue for determination not based or distilled from any ground of appeal is incompetent, this court lacks jurisdiction to determine or resolve such issue.*** This court, in the recent case of *Odeh v. Federal Republic of Nigeria* (2008) 13 N.W.L.R. 15 (pt. 1103) 1 at 19-20 reinstated this trite principle of law. Per Musdapher, J.S.C. as follows:-

*"Every issue for determination must be formulated from and related to or distilled from a competent ground of appeal. In other words, an issue not distilled from any of the grounds of appeal, is 20 incompetent and must be discountenanced together with the argument or arguments advanced thereunder."*

***Applying the above principle of law to this case, and having found that issue nos. 2 and 5 formulated by the 1st and 2nd respondents do not relate or distilled from any of the grounds of appeal, I accordingly strike them out together with the argument or arguments advanced thereunder.***

The appellants have argued that this case was not properly initiated in accordance with the rules of the trial High Court. Surprisingly, the 1st and 2nd respondents did not rely neither did they submit to the contrary. ***I must say from the outset that the commencement of a suit is very fundamental to the determination of issue of jurisdiction. An action wrongly commenced is incompetent and this will rob the court the jurisdiction to hear and determine same.***

Order 5 Rule 6 of the. Oyo State High Court (Civil Procedure) Rules 1986 provided as follows:-

“Subject to the provisions of these rules or of any written law in force in the state, no writ of summons for service out of jurisdiction, or of which notice is to be given out of the jurisdiction, shall be issued without the leave of court or a judge in chambers.

” In the instant case, the following are not in dispute:-

(i) The Defendants/Appellants’ address for service is in Lagos, B outside the jurisdiction of the Oyo State High Court of Justice.

(ii) No leave of court was sought or obtained before the writ of summons was issued.

The appellants have strenuously submitted that the absence of the leave of the trial court to issue the writ of summons is fatal to this case. It is a well settled principle of law that a court is said to have C jurisdiction and therefore competent to determine a suit when:-

a) It is properly constituted as regard members and qualification of the members of the bench and no member is disqualified for D one reason or the other.

b) The subject-matter of the case is within its jurisdiction, and there is no feature in the case which prevents the court from exercising its jurisdiction, and

c) The case comes before a court initiated by due process of E law, and upon fulfillment of any condition precedent to the exercise of jurisdiction. See *Madukolu v. Nkemdilim* (1962) 3 S.C.N.L.R. 34; *Roselle v. A.C.B. Ltd.* (1993) 8 N.W.L.R. (pt. 312) and *Apadi v. Banuso* (2008) 13 N.W.L.R. (pt. 1103) 204 at 219.

I think that these pre-conditions are conjunctive and the non F fulfillment or absence of any of them automatically robs the court the jurisdiction to hear and determine the suit. The pertinent question to be answered in this case is did the respondent fulfill all these conditions in commencing this suit? The answer is in the negative. As I G earlier pointed out, the writ of summons was addressed to be served outside the jurisdiction of the Oyo State High Court i.e. to be served in Lagos, and the leave of that court was not sought and obtained before it was issued. In the case of *Intramotors Nig. Plc v. Akinloye* [2001] 6 N.W.L.R. (pt. 708) 61 at 72, the Court of Appeal in consid- H eration of the same rules of the Oyo State High Court held as follows:

*“After careful consideration of the above submissions in the two briefs, the 1st issue, I will begin by reiterating the settled law that*

where the address of the defendants is outside the jurisdiction of the trial High Court and the said defendant is thus residing outside the court's jurisdiction, it is condition precedent for the exercise of court's jurisdiction over him that a valid writ of summons must be issued and served on him. Also in that circumstance and under the appropriate rules of court, the issuance of such a writ and its service on the said defendant can only be valid where the leave of the High Court was sought and obtained for the issuance of the said writ of summons and for its service on the defendant. See *Nwabueze v. Okoye* (1988) 4 N.W.L.R. (Pt 91) 664, *7up bottling Co. Ltd. v. Trio Commodities Co. Ltd.* (1996) 6 N.W.L.R. (Pt. 455) 441; *Aermachhi S.P.A. V. Aic Ltd.* (1986) 2 N.W.L.R. (Pt. 23) 443. In the present case, the relevant rule which makes it mandatory to obtain leave to issue and serve writ of summons on the defendant who resides outside the jurisdiction of the court is Order 5 Rules 6 and 14 of the High Court (Civil Procedure) Rules of Oyo State 1988."

My Lords even though this decision is merely persuasive in nature, I agree with the reasoning therein stated. This court in the case of *NEPA v. Onah* (1997) 1 S.C.N.L 220 after considering earlier decision in *Nwabueze v. Okoye* supra, held per Mohammed, J.S.C. as follows:-

"Section 97 of the Sheriffs and Civil Process Act is the section which deals with the issuance of writ and coupled with the provisions of Order 2 Rule 16 of the High Court (Civil Procedure) Rules of Bendel State, it is abundantly clear that signing or sealing a writ for service outside jurisdiction without leave of the court or a judge is a fundamental breach of statutory requirement."

In conclusion at page 231, his Lordship held as follows:-".... Both the writ of summons and the service on the appellant are declared invalid, null and void."

**Applying these principles of law to the appeal at hand, I hold that failure of the respondent to seek and obtain the leave of the court or the judge to issue and serve the writ of summons outside the jurisdiction of the court amounts to fundamental defect and not a mere irregularity which can be cured, hence I have no hesitation in declaring both the issuance and the service of the said writ of summons outside the jurisdiction as invalid.**

***The insertion of 30 days grace in the writ of summons does not change the position. For the avoidance of any possible doubt, the writ of summons and service of same outside the jurisdiction of Oyo State High Court without the leave of the Oyo State Court are bad and invalid.***

I am satisfactorily fortified by the eloquent decision of my learned brother, Ogwuegbu, J.S.C. in *NEPA v. Onah* supra at p. 694 thus:-

*"In this case, the writ of summons which initiated the proceedings leading to this appeal was irregular in failing to comply with section 97 of the Sheriffs and Civil Process Act, Cap. 407, Laws of the Federation of Nigeria, 1990 and Order 2 Rule 16 of the High Court (Civil Procedure) Rules of the former Bendel State of Nigeria applicable in Edo State. The issuance of the writ of summons for service on the 8th defendant who is in Lagos and outside the jurisdiction of the court in Benin without the leave of the court is a fundamental irregularity. The writ of summons having been signed and sealed without leave, the plaintiff has not issued any proceedings in the manner prescribed by the rule. The writ is a nullity and the court cannot cure the defect. In effect, there are no proceedings before the trial court. See Nwabueze & Ors. V. Obi Okoye (1988) 4 N.W.L.R. (Pt. 91) 664 and Pritchard v. Deacon & Ors. (1963) 1 Ch. 502. Non-compliance with order 2, Rule 16 of the High Court (Civil Procedure) Rules of Bendel State renders the writ of summons a nullity. Non-compliance with section 97 of the Sheriffs and Civil Procedure Act renders the service on the 8th defendant null and void also.*

"Uwais C.J.N. supports the position in his statement at p. 693 of that case, thus:-

*'It is settled by the decision of this court in Nwabueze & Anor v. Obi Okoye, (1988) 4 N.W.L.R. (pt. 91) 664 that where the Rules of High Court provide that before a writ of summons, to be served out of jurisdiction, is issued leave of the High Court must be obtained; and if no such leave is obtained prior to the taking out of the writ then, the writ is vitiated and would be declared null and void. The decision is binding on all courts by the doctrine of stare decisis. The lower courts were, therefore, in error when they failed to declare null and void the writ taken out by the respondent, as plaintiff, without leave.'*

Finally, Kutigi. J.S.C. as he then was emphatically said at p. 693 paragraph E - G of the NEPA v. ONAH Supra:-

*"At the material time when the writ of summons was issued for service against the defendant/appellant outside the jurisdiction, the provisions of order 3 rule 16 of the Bendel State High Court (Civil Procedure) Rules, 1976 ought to have been complied with. It is trite that where a defendant is out of jurisdiction, no writ for service can be issued except with leave of the court. The issue of the writ of summons and service of the same writ on a defendant are conditions precedent to the exercise of a court's jurisdiction over a defendant. In the instant case a condition precedent to the issue of the writ of summons against the defendant/appellant was that leave of the High Court had to be obtained first before the writ could be issued. It is not disputed that the defendant/appellant is outside the jurisdiction of Bendel State High Court, the plaintiff therefore had to obtain leave of the High Court before the writ of summons could be issued. This he failed to do. The entire writ of summons served on the defendant/appellant in this case was therefore clearly a nullity and ought to be set aside. And it is hereby set aside. (See Nwabueze & Anor; V. Obi-Okoye (1988) 4 N.W.L.R. (Pt. 91) 664; (1988) N.S.C.C. vol. 19 part 3."*

**Having declared issuance of the writ of summons and the service of the writ of summons as invalid and void, any other issues raised for determination in this appeal become mere academic issues which would not affect the outcome of this appeal in any manner. Hence it would not attract our attention. It is trite that when an issue becomes academic or hypothetical in nature, a court of law will have no jurisdiction to hear or determine it.** See Zenith Plastic Industries Ltd. v. Samatech Ltd. (2007) 16 N.W.L.R. (pt.1060) 315 at 341; Lawani Alli & Anor v. Gbadamosi Alesinloye (2000) 4 S.C.N.J. 264 at 297 per Iguh, J.S.C.

**Finally this appeal is meritorious and should be allowed, same is allowed by me.** The issuance and the service of the writ of summons addressed for service on the appellants who reside in Lagos outside the jurisdiction of the trial High Court and dated 31/3/98 are bad and accordingly declared invalid, null and void and consequently struck out with N50,000.00 costs to the Appellants.

### **MUSDAPHER JSC**

I have read before now the judgment of my Lord Muntaka-Coomassie, J.S.C. just delivered with which I entirely agree. It is trite law that the issue of jurisdiction can be raised at any time or stage of the proceedings. But where it is properly raised, the court must at the earliest opportunity deal with it before the court embarks on adjudication; this is because, if there is no jurisdiction, all matters and decisions taken are liable to be nullified. B

In sum, the trial court was devoid of legal competence to adjudicate on the matter brought before it by the respondents. I accordingly declare the entire proceedings conducted at the trial a nullity; consequently both the decisions and orders of the trial court and the Court of Appeal are set aside. C

In their places, I strike out the respondents claims. The issuance and the service of the Writ of Summons were fundamentally defective. I accordingly allow the appeal and abide by the order of costs proposed in the aforesaid judgment. D

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### **OGUNTADE JSC**

I have had the advantage of reading in draft a copy of the lead judgment by my learned brother, Muntaka-Coomassie, J.S.C. I agree with his reasoning and conclusion. I would also allow the appeal with costs as ordered in the lead judgment. E F

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### **OGBUAGU JSC**

This is another Interlocutory appeal in a suit/matter for the recovery of an alleged debt guaranteed by the 2nd and 3rd Respondents filed since 31st March, 1998. It is against the on the Bench Ruling of the Court of Appeal, Ibadan Division (hereinafter called “the court below”) delivered on 18th June, 2001. Part of the said Ruling, read as follows: H

*“.... It is clear from the affidavit evidence placed before us that the Ruling of the lower court in issue was an objection to jurisdiction of the court to entertain the claim. The court over-ruled the application, hence, the present application.*

As the issue of jurisdiction can be taken at any stage, it is therefore believed that the present application should be refused so that the claim now still pending at the lower court could be expeditiously concluded.

The Applicants could then raise the point of jurisdiction in any appeal against the final judgment of the Court in case they lost at the lower Court. This stand is strengthened on the ground that the Applicants have not shown that the Ruling of the lower Court now in issue is ex-facie defective or that the lower Courts assumption of jurisdiction is patently illegal. In the result, the application is refused and the motion is dismissed”.

Dissatisfied with the said Ruling, the Appellants who are the defendants in the said suit, have appealed to this Court on three (3) Grounds of Appeal. They later, with the leave of this Court, added a fourth (4th) Ground of Appeal. They have formulated four (4) issues for determination, namely:

*“Issue No. 1 Whether the failure-by the Respondents to comply with the Provisions of Order 5 Rule 6. of the Oyo State High Court (Civil Procedure) Rules, 1988, is a fundamental defect capable of rendering the Writ of Summons invalid, and consequently the proceedings before the lower Court and this Court.*

Issue No. 2

*Whether the determination of the issue of jurisdiction once raised by a party, can be deferred until the conclusion of the substantive suit.*

Issue No. 3

*Whether in the circumstances of this case the Justices of the Court of Appeal exercised their discretion judicially and judiciously in dismissing the Appellants (sic) application for leave to Appeal.*

Issue No. 4

*Whether the trial Court had the jurisdiction to make an order for substituted service of the Writ of Summons and the Statement of Claim on the Appellants as Defendants, who were at the time of issuing the said processes outside the territorial jurisdiction of the trial court.*

On their part, the 1st and 2nd Respondents, formulated five (5) issues for determination. They read as follows:

*“1. whether the determination of the issue of jurisdiction once*

*raised by a party can be deferred until the conclusion of the substantive suit.*

*2. whether the Appellants' counsel had a right of audience before the trial court without first entering appearance before arguing the preliminary objection.*

*3. whether the preliminary objection brought by way of a demurrer was competent.* B

*4. whether the trial court had jurisdiction to hear or entertain the action.*

*5. whether the appellants could be allowed to seek protection under the veil of technicality to wriggle out of their financial commitment to the 1st Respondent".* C

" On 7th October, 2008 when this appeal came up for hearing, the leading learned counsel for the appellants - Maikyau, Esq., adopted their brief and he urged the court, to allow the appeal, while Zibiri, Esq. - leading counsel for the 1st & 2<sup>nd</sup> Respondents, also adopted their Brief and he urged the Court to dismiss the appeal. Since the 3rd Respondent and its learned counsel who were absent although served, did not file any Brief, Judgment was reserved till today. E

Before going into the merits of the appeal, I observe firstly, that the 1st and 2nd Respondents, formulated five (5) issues but they and their learned counsel, failed to state under which ground or Grounds of Appeal, such issues were distilled or formulated. It has been stated and restated in a line of decided authorities by this Court and the Court of Appeal, that any issue or issues not formulated or distilled from a Ground of Appeal or covered by a Ground of Appeal, is incompetent and will be struck out. See the cases of Calabar East Co-operative Thrift and Credit Society Ltd. & 3 ors v. Etim E. G Ikot (1999) 14 NWLR (Pt.638) 225 @ 240, 241, 248, (1999) 12 SCNJ. 321 @ 340 - per Achike, JSC (of blessed memory). It was further held that if an issue is incompetent, it should be struck out as to do otherwise and give consideration to the issue, is to embark on a worthless academic exercise; Alli & Anor. v. Chief Alesinloye & 8 H ors. (2000) 6 NWLR (pt.660) 177@ 212; (2000) 4 SCNJ. 264 - per Iguh, JSC, citing the case of Management Enterprise & ors. v. Otusanya (1987) 2 NWLR (Pt. 55) 177 also reported in (1987) 4 SCNJ. 110; Mojekwu v. Mrs. Iwuchukwu (2004) 4 SCNJ 180 and Ikegwuoha v.

University of Jos (2005) All FWLR (Pt.280) 1573

Secondly, there are four Grounds of Appeal and five issues have been formulated. It is settled that no party to an appeal, is allowed to formulate more than one issue from one Ground of Appeal. See the case of *ACB. PLC v. Odukwe* (2005) All FWLR (Pt.276) 804. In other words, neither party, is allowed to formulate more issues than the Grounds of Appeal as contained in the Appellant's Grounds of Appeal. See the case of *Gwar v. Adole* (2003) FWLR (Pt.176) 747 @ 760. The exception is in special cases where the Grounds of Appeal, dictate. But it is not the case in the instant appeal.

Thirdly, I have not seen either in the Appellants' Brief or in a separate sheet, the List of Authorities, relied on by the Appellants contrary to the provisions in Order 6 Rule 7(1) of the Rules of this Court 1999 (as Amended). It is mandatory to forward such List to the Registrar in-charge of Litigation.

Having made these observations, I will now deal with some of the issues of the parties notwithstanding the said lapses on the part of the learned counsel for the parties. This is in the interest of justice to the litigants/clients. In my respectful view, Issue 2 of the Appellants, is the same with Issue 1 of the 1st and 2nd Respondents. Issue 5 of the 1st and 2nd Respondents, with respect, appears to me to be of no moment. This is because, issue of jurisdiction, is not determined on sentiments. Once there is no jurisdiction, the merits of the case, become irrelevant.

Issue 2 of the Appellants and Issue 1 of the 1st and 2nd Respondents, is the crux of the instant appeal as also found as a fact, by the two lower courts. There appear to be two seemingly or very narrow (if at all) two distinct decisions of this Court in respect thereof - i.e. to be decided when the point is taken or that it can be raised at any stage even on appeal (the later; is the view of the court below). See also the cases of *Eguamwense v. Amaghizemwein* (1993) 9 NWLR (Pt. 315) 1; (1993) 11 SCNJ. 27 and *Ogigie & 3 ors v. Obiyan* (1997) 10 SCNJ. I, just to mention a few. Ex facie, they appear conflicting, but they are not, although both of them, in my respectful and humble view, are aimed at the need for quick or speedy disposal of cases of parties. The first view, is very old and is salutary in my view. It is time honoured and has been the stance of the Appellate Courts starting

from the West African Court of Appeal (WACA).

In the case of Mgboma Adoni & anor. v. Njoku Igwe (1959) 2 FSC 87 @ 88 it was held, per Lastang F.J. that when to decide whether the court has jurisdiction or not, is when the point is taken. See also the case of Ankra v. Chochoe 12 WACA 469 where it was held that although the Court of Appeal is bound to entertain such objection even though it be raised before that Court for the first time in the course of the proceedings, that it is desirable that it should be raised before the earliest possible moment in order that if it be upheld, the parties shall be saved the time and expense of litigation in a court which has not jurisdiction to adjudicate. In the case of Chief Oloba v. Akereja (1988) 3 NWLR (Pt.84) 508 @ 510; (1988) 7 SCNJ. (Pt.1) 56 @ 60, (1988) 7 SC. (Pt.) 1 @ 11. It was held that the issue of jurisdiction is very fundamental to the competence of a Court or Tribunal. That it is therefore, an exhibition of wisdom to have the issue of jurisdiction or competence determined before embarking on the hearing and determination of the substantive matter or action itself for where a Court, has no competence or jurisdiction to entertain a matter or claim or suit, it is a waste of valuable time for the court to embark on the hearing and determination of the suit, matter or claim. That the issue can be raised at any stage or by the court itself suo motu.

From the above decisions, it could be seen that the issue of jurisdiction, can be raised by any party for the first time at any stage even on appeal to this Court. See also the cases of Pan Asian Co. Ltd. v. NICON (1982) 9 S.C.; Alhaji Tukur v. Government of Gongola State (1989) 4 NWLR (Pt.117) 57; (1989) 9 SCNJ. 1, Federal Republic of Nigeria v. "Lord" Chief Ifegwu (2003) 15 NWLR (Pt.842) 113; (2003) 5 SCNJ. 217; (2003) 12 LRCN 2233 and Chief Elugbe G v. Chief Omokhafa & 2 ors. v. The Military Administrator, Edo State of Nigeria & 2 Ors. (2004) 12 SCNJ, 106 @ 113 (2004) 11-12 SC. 60; (2004) 20 NSCQR 355 just to mention but a few. BUT once it is raised, it must be dealt with first or when the point is taken before any other thing. See the cases of Adani v. Igwe (supra); Chief Oloba v. Akereja (supra); S.N. Timitimi & 6 Ors. V. Chief Amabebe & anor. 14 WACA 374. i.e. it must be taken expeditiously. See also the Cases of Obikoya v. Registrar of Companies ( 1975) 4 SC. 32; Alhaji Olaniyi v. Aroyehun & Ors. (1991) 5 NWLR (Pt. 194) 652; (1991) 7 SCNJ.

40; Okafor & ors. v. The Attorney-General & Commissioner of Justice & Ors. (No.1) (1991) 6 NWLR (Pt.20) 659; (1991) 7 SCNJ. 345; The State v. Dr. Onagoruwa (1992) 2 NWLR (Pt.221) 33 @ 48, (1992) 2 SCNJ. 1 @ 46, 48, 52, citing therein, some other cases Funduk Engineering Ltd. v. McArthur & ors (1995) 4 NWLR (Pt.392) B 640 (a~ 651; (1995) 4 SCNJ, 240; Galadima v. Alhaji Tambai & 11 Ors. (2000) 6 SCNJ. 190 @ 200, 203; Jeric. Nig. Ltd. v. Union Bank of Nigeria Plc. (2000) 12 SCNJ. 184 citing the case of Bronik Motors v. Wema Bank Ltd. (1993) 1 SCNLR 296 (1) 390 and too many C others to be mentioned.

The rationale for this proposition, is that issue of jurisdiction, deals with and touches on competency or the competence of a court to entertain and deal with the case or matter before it as it has jurisdiction to decide whether or not it has jurisdiction in the case of Kasi- D kwu Farms Ltd. v. Attorney-General Bendel State (1986) 1 NWLR (Pt. 19) 695,697; it was held inter alia, as follows:

*"It is in the interest of the parties to a case to first of all decide the issue of jurisdiction once it arises. To do otherwise will in many cases, lead to unnecessary exercise of taking and evaluating evidence E and to finally come to the iron wall that all that exercise has been wasteful and unjustified as the court had no jurisdiction to look into the matter from the beginning".*

See also the cases of First City Merchant Bank Ltd. & 4 Others, v. Abiola & Sons Bottling Co. Ltd. (1991) 1 NWLR (Pt.165) 14 @ 27 F C.A; Shitta-Bay v. Attorney-General of the Federation & Anor. (1998) 10 NWLR 392; (1998) 7 SCNJ. 264; Nalsa Team Associates v. NNPC (1996) 3 NWLR (Pt.439) 621 at 633, 637; (1996) 3 SCNJ. 50 (Q), 61, For further rationale, see the case of Madukolu v. Nkemdilim G (1962) 1 ANLR 587, 589, 595; (1962) SCNLR. 324 also cited in the case of Adeigbe & anor. v. Kusimo & ors, (1965) NMLR 284 @ 287; (1965) 1 ANLR. 248. The rationale again, is that any defect in competence, is fatal, for the proceedings are a nullity however well conducted and decided. The defect, is said to be extrinsic to the adjudication. If however, the court is competent, the proceedings are not a H nullity, but may be attacked on the ground of irregularity in the conduct of the trial. The above propositions of the law have been restated in the cases of Attorney-General of the Federation & 2 ors v. Sode & 2 ors (1990) 1 NWLR (Pt.128) 500; (1990) 3 SCNJ.1; Osafile

Agu & Anor. v. Odofoin & Anor. (1992) 3 SCNL 161 @ 172.

This is why, when a court finds that it has no jurisdictions to entertain a matter, it does not dismiss the action, but merely strikes it out. See the cases of Okoye & 7 ors. v. Nigerian Construction & Furniture Co. Ltd. 5 & 4 ors. (1991) 6 NWLR (Pt.199) 501 @ 534; (1991) 7 SCNJ. 365 and Chief Eleke V Oko XXVII & anor. (1995) 5 NWLR (Pt.395) 100 @ 109 C.A. just to mention a few. Jurisdiction, it is said, is very fundamental and it is the centre pin of the entire litigation. It is the foundation upon which every litigation hinges upon. This is why, all the courts in Nigeria, are vested with some specific statutory jurisdiction. See the case of Carribbean Trading & Fidelity Corporation & 2 ors. v. NNPC & 2 ors. (1991) 6 NWLR (Pt.197) 352 @ 362 - per Tobi, JCA (as he then was). This is why it is settled that a court, be it a trial or an Appellate court, has a duty, to put an end to any proceedings before it when once it discovers that it lacks jurisdiction to entertain and/or determine it otherwise, it will be a nullity, whatever the merit of the case may be. See the cases of Timitimi v. Amabebe (supra), Mustapha v. Governor of Lagos State (1987) 5 SCNJ 14; Adefulu v. Chief Okulajo (1998) 5 NWLR (Pt.550) 435; (1998) 4 SCNJ 139 and Adesola v. Alhaji Abidoye & Anor. (1999) 12 SCNJ 61 at 79 and many others,

Before I am done, let me refer to the case of NEPA v. John Obayangbona & 6 Ors. v. Mrs. P.G. Onah (1997) 1 NWLR (Pt.484) 680 at 690, (1997) 1 SCNJ. 220 @ 228 where it was held - per Mohammed, JSC, that the signing or sealing of a writ for service out of jurisdiction without leave of the court or a judge, is/was a fundamental breach of statutory requirement. The English case of In Re Pritchard, Deed (1963) 1 Ch. 502 @ 526 - per Upjohn, LJ. was referred to where it was held inter alia, as follows:

*"There has been a fundamental failure to comply with the requirements of the statute relating to the issue of the proceedings; it was not a mere irregularity. The all important and essential requirement of the issue of a proceeding; whether it initiates the action .....is that it must be issued with the seal of the issuing office ..... It is more than irregularity. I think it is a nullity and it is not possible for the defendant to waive the defect"*

Indeed, Agbaje, JSC, in Nwabueze v. Okoye (supra) stated inter alia, that leave to issue a writ which is to be served out of the

jurisdiction, is not granted as a matter of course under the English Rules. That the discretion to grant the leave sought is exercised judicially and with great care. The cases of *Williams v. Cartionright* (1885) 1 Q.B. 142 C.A. and *Bowlong v. Cox* (1926) A.C. 751, 754, were referred to.

B From the foregoing, the learned counsel for the parties and in particular for the 1st and 2nd Respondents, can now see and appreciate why I have no difficulty in answering their said Issue No.2 and Issue 1 respectively to the effect that when once the issue of jurisdiction is raised in any court, the determination of that issue, cannot, and should and ought not be deferred until the conclusion of the substantive suit. The reasons for this have been highlighted in the above decided authorities.

D This should have been the end of this appeal, but I am obliged to deal with Issue No. 1 of the Appellants as the issue, in my respectful view, is crucial and fundamental to the determination of the said action/suit of the Respondents. In my recent Judgment in the case of *Owners of MV "ARABELLA" v. Nigeria Agricultural Insurance Corporation* (2008) 11 NWLR (Pt.1097) 182; (2008) 4-5 S. C (Pt.11) 189 E (Zi) 204 - 209, I dealt also with the issue of Rules of court and the effect of non compliance by a plaintiff initiating an action by a writ and its service on a defendant outside the jurisdiction of the trial court.

F For the avoidance of doubt, I will reproduce the provision of Section 97 of the Sheriffs & Civil Process Act (hereinafter called "the Act") which deals with the issue in controversy in this appeal as it is the applicable law, It reads as follows:

G *"Every Writ of Summons for service under this part out of the State or the Capital Territory in 'which It was issued shall, in addition to any other endorsement or notice required by the law of such State or Capital Territory have endorsed thereon a notice to the following effect (that is to say) -*

H *'This summons (for as the case may be) is to be served out of State (or as the case may be) and in the State (or as the case may be)'".*

This provision is mandatory and therefore, failure to so endorse, is not and cannot be mere irregularity, but a fundamental defect the effect of which is that it renders such a writ incompetent and thus goes to the competence of the court and also goes to the

root of the jurisdiction of the court.

Order 5 Rule 6 of the Oyo State High Court (Civil Procedure) Rules - 1988 (hereinafter called "the Rules") provides as follows:

*"Subject to the provisions of these rules or of any written law in force in the State, no Writ of Summons for service out of the jurisdiction, or of which notice is to be given out of the jurisdiction, shall be issued without the leave of court or a Judge in Chambers".* B

This provision as can be seen, is also mandatory. The Respondents, have not claimed or asserted, that they complied with the mandatory provisions of both Section 97 of the Act and of the Rules or that the prior leave of the trial court, was ever sought and obtained before the said writ was issued and served by substituted service. C

Indeed Rule 14 provides thus -

*"No writ which or notice of which, is to be served out of the jurisdiction shall be issued without leave of court".* D

It is now firmly established that service of a writ and appearance in court, are not matters for the exercise of the court's discretion. Not only are they matters specifically provided for in the rules of court, which provisions, must therefore, be obeyed, they are crucial to the prosecution of an action. See the case of Union Beverages Ltd. v. Adanite Co. Ltd. (1990) 7 NWLR (pt.162) 348 @ 356 C.A. where it was also held that without proper service, it follows without more, that no valid appearance can be entered by a/the defendant. E

It need be borne in mind and this is also settled that all laws or rules of procedure enacted by a State Government, are of no effect in such cases which are governed only by the Act. Therefore, any service effected under a State Law where service is to be effected outside jurisdiction, is therefore, void. See *Skenconsult v. Ukey* (1981) 1 SC. 6 and *Union Beverages Ltd. v. Adamite Co. Ltd.* (supra). So, assuming the Rules do not apply, there is the mandatory Section 97 of the Act. All the same or still yet, it is settled that mandatory rules of court, must be obeyed. Where an act is void, of course, it is a nullity. See the case of *Odua's Investment Co. Ltd. v. Talabi* (1997) 10 NWLR H (Pt.523) 1; (1997) 2 SCNJ. 600. F

Compliance with the said mandatory provision, it is settled, is a condition precedent for the exercise of the court's jurisdiction. In the case of *Intra Motors Nigeria PLC v. Chief A.M.A. Akinloye* (2001) 6

NWLR . (Pt. 708) 61 at 72 cited and relied on and partly reproduced by the Appellants in their Brief, it was held - per Adamu, JCA, inter alia:

“ .....where the address of the defendant is outside the jurisdiction of the trial court and the said defendant is thus residing outside the court’s jurisdiction, it is a condition precedent for the exercise of court’s jurisdiction over him that a valid writ of summons must be issued and served on him. Also in that circumstance and under the appropriate rules of court, the issuance of such a writ and its service on the said defendant can only be valid where the leave of the High Court was sought and obtained for the issuance of the said writ of summons and for its service on the defendant. See *Nwabueze v. Okoye* (1988) 4 NWLR (Pt.91) 664; *7-up Bottling Co. Ltd. v. Irio Commodities Co. Ltd.* (1996) 6 NWLR (Pt.455) 441 and *Aermacchi S.P.A. v. A.I.C. Ltd.* (1986) 2 NWLR (Pt. 23) ..... 443.”

On the undisputed facts of the case leading to this appeal, since it has long been settled in the cases of *Nwabueze v. Okoye & Anor.* at 698 (supra) which is also reported in (1988) 10-11 SCNJ. 60; (1988) NSCC Vol. 9 P3; *Western Street Works Ltd. v. Iron & Steel Workers Union of Nigeria* (1986) 3 NWLR (Pt.30) 617; *Eimskip Ltd. v. Exquisite Industries (Nig.) Ltd.* (2003) 4 NWLR (pt.809) 88 @ 118; (2003) 1 SCNJ. 317 and *United Bank for Africa U.B.A. PLC v. Ekpo* (2003) 12 NWLR (Pt.834) 332 C.A. just to mention but a few. (the last two cases also cited and relied on in the Appellants’ Brief), that issuance of a Writ of Summons and the service of the same on a defendant, are conditions precedent for the exercise of a court’s jurisdiction over a/ the defendant(s) and that where there is a fundamental failure to comply with a mandatory requirement of a statute such as the Act, the issue is not one of irregularity but a nullity. Finally, where a pre-condition for initiating of a legal process is in motion, any suit instituted in contravention of the said pre-condition provision, is incompetent and a court of law, lacks jurisdiction to entertain the same, I also hold, that both the issuance of the writ of summons and the service of the same outside the jurisdiction of the trial court without the prior leave of that court, are invalid, null and void. Issue 1 of the Appellants” is answered by me in the affirmative/positive. This issue, also takes care of the instant appeal. The trial court in the circumstances, had no jurisdiction to hear and entertain the action/suit, Is-

sue No.4 of the Respondents, is therefore, answered in the negative by me.

Also settled, is that where a pre-condition for initiating of a legal process in motion, any suit instituted in contravention of the said pre-condition provision, is incompetent and a court of law, lacks jurisdiction to entertain the same. See the case of United Bank for Africa PLC v. Barrister Eyo Nsa Ekpo (2003) 12 NWLR (Pt.834) 332 @ 342 CA. (cited in the Appellants' Brief page 8 paragraph 5. 1- 10 as U.B.A. v. Ekpo (2003) 12 NWLR. (Pt.832) - per Rowland, JCA.

Comment: There is no such case reported in (Pt.832). Any wonder the page is not stated. Even in the ratios at pages 335 to 337 of the Report, the Editor(s), put the pages at 71-72 and 72-73. There are no such pages even in (Pt.832) of the NWLR, This is not right. The need for all learned counsel to ensure that the cases or authorities they cite and rely on in their Briefs, are correct and not misleading, cannot be over-emphasized by me. The learned Editor, should please also take note of this serious error.

I had the advantage of reading before now, the lead Judgment of my learned brother, Muntaka-Coomassie, JSC just delivered. I agree with his reasoning and conclusion. I too allow the appeal and set also aside, the decision of the court below. I abide by the consequential order in respect of costs.

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### **ADEREMI JSC**

This is an appeal against the interlocutory decision of the Court of Appeal (Ibadan Division) (hereinafter referred to as the court below) delivered on the 18th of June, 2001 refusing the appellant's application dated and filed on the 27th of April, 2001 seeking the following orders:

*"1. Extending the time within which to seek leave to appeal against the ruling of the then Chief Judge of Oyo State delivered on the 30th of July, 1999.*

*2. Leave to appeal against the said ruling*

*3. Extension of time within which to file the Notice of Appeal*

*4. An order deeming the said Notice of Appeal dated 30th March 2001 but filed on the 3rd of April 2001 as having been properly filed and served*

5. *An order granting departure from the Rules of the Court of Appeal*

6. *An order abridging the time within which the parties can file their briefs of arguments*

7. *An order staying further proceedings in Ibadan High Court in suit No. I/ 149/98 pending the hearing and final determination of this appeal.* "The appellants, as defendants before the trial court and who were to be served with the writ of summons were residing outside the territorial jurisdiction of the Oyo State High Court, when the respondents as plaintiffs before the trial in serving the defendants/appellants personally, sought and obtained the leave of that court for an order for substituted service. The aforesaid writ of summons, consequent upon the grant of the application for substituted service, was published on the 26th of February 1999 in the Guardian Newspapers. It was the publication that prompted the defendants/appellants to bring an application challenging the jurisdiction of the High Court of Oyo State on the grounds that:

1. The provision of Section 99 of the Sheriff and Civil Process Act Cap 207 was not complied with.

2. That the subject matter of the suit was a contract entered into in Lagos and was to be performed in Lagos State and

3. All the defendants were resident in Lagos State.

The learned trial Chief Judge after hearing the arguments of counsel as to the grant or refusal of the application, in a reserved ruling, dismissed it holding that since it was a jurisdictional matter, it could be raised at any time and therefore, should await the time of final address after which the issue would be considered. The learned trial Chief Judge further held thus:

"The provisions of Section 99 quoted above (Sheriffs and Civil Process Act) only required a defendant living outside the jurisdiction of the court to enter appearance within 30 days after service of the writ of summons on him. The effect of that provision is that the case cannot be heard until the expiration of thirty days when the defendant is expected to enter appearance."

Though dissatisfied with the said ruling of the learned Chief Judge, time to file an appeal having run out, the defendants/appellants needed an order of the court below to file the Notice of Appeal; hence the application for the seven prayers which I have set out su-

pra.

After taking argument of counsel in the application dated and filed on 27th April, 2001, in a reserved ruling delivered by the court below on the 18th of June 2001, it dismissed the application in toto. In so doing, the court below held inter alia:

“It is clear from the affidavit evidence placed before us that the ruling of the lower court in issue was on an objection to jurisdiction of the court to entertain the claim. The court over-ruled the application, hence the present application B

As the issue of jurisdiction can be taken at any stage, it is therefore believed that the present application should be refused so that the claim now still pending at the lower court could be expeditiously concluded. C

The applicants could then raise the point of jurisdiction in any appeal against the final judgment of the court in case they lost at the lower court. This stand is strengthened on the ground that the applicants have not shown that the ruling of the lower court now in issue is ex-facie defective or that the lower court’s assumption of jurisdiction is potentially illegal. In the result, the application is refused and the motion is dismissed.” E

As I have said, the appellants have appealed to this court against the decision of the court below and raised four issues for determination which are:

1. *Whether the failure by the respondents comply with the provisions of Order 5 Rule 6 of the Oyo State High Court (Civil Procedure) Rules, 1988 is a fundamental defect capable of rendering the writ of summons invalid, and consequently the proceedings before the lower court and this court.* F

2. *Whether the determination of the issue of jurisdiction once raised by a party can be deferred until the conclusion of the substantive case.* G

3. *Whether in the circumstances of this case the Justices of the Court of Appeal exercised their discretion judicially and judiciously in dismissing the appellant’s application for leave to appeal.* H

4. *Whether the trial court had the jurisdiction to make an order for substituted service of the writ of summons and the statement of claim on the appellants as defendants who were at the time of issuing the said processes outside the territorial jurisdiction of the trial*

*court.”*

The 1st and 2nd respondents who filed a brief of arguments on 11th February 2006 initially identified five issues for determination but later abandoned issues Nos 2 and 5.

B So, the issues upon which they predicated their argument are 1,3 and 4 which as set out in their brief are as follows:

1. Whether the determination of the issue of jurisdiction once raised by a party can be deferred until the conclusion of the substantive suit.

C 3. Whether the preliminary objection brought by way of a demurrer was competent

4. Whether the trial court had jurisdiction to hear or entertain the action.

I have carefully read the briefs of arguments of the two parties.

D The cardinal issue in the whole appeal is whether non-compliance with the provisions of Order 5 Rule 6 of the Oyo State High Court (Civil Procedure) Rules of 1988 is fatal to the service of the writ of summons on the defendants/appellant or not. The arguments of the defendants/appellants as could be garnered from their brief of argument are in the affirmative in respect of their issue No 1 and in the negative in respect of their issues Nos 2, 3 and 4 as set out above.

F They placed reliance on the following judicial decisions: (1) A.G. Federation v. A.G. Abia State & Ors (2001) 7 S C (Pt.I) 102, (2) Magaji v. Matari (2000) 5 S C. 57 (3) Intra Motors Nig. Plc. v. Akinloye (2001) 6 NWLR (Pt.708) 61. (4) Nwabueze v. Okoye (1988) 4 NWLR (Pt.91) 685, (5) Arjay Ltd. v Airlines Management Support Ltd. (2003) 2 -3 SC 1. (5) Ojora v. Odunsi (1964) 1 NLR 55 and (6) Mark v. Eke (2004) 5 NWLR (Pt.865) 54 .

G But the argument of the respondents as could be gleaned from their brief are in the affirmative in respect of issues No. 1 and 4 raised by them and in the negative to the extent to which their issue no 3 is concerned; they prayed in aid of the position they maintained the following cases: 1. NEPA v Olagunju (2005) 3 NWLR (Pt.913) 602, H (2) Akegbejo v. Ataga (1998) 1 NWLR (Pt.534) 459, and (3) Fadare & Ors v A. G. Oyo State (1982) NSCC 52.

The entire arguments or contentions of the parties hinge on the issue of jurisdiction. And by jurisdiction is meant the authority which a court has to decide matters that are litigated before it, or to

take cognizance of the matters presented in a formal way for its decision. Such authority of the court is controlled or circumscribed by the statute creating the court itself. Or it may even be circumscribed by a condition precedent created by legislation which must be fulfilled before the court can entertain the suit. All of the above, touch on the legal authority of the court to adjudicate in the matter. B

The first question to then raise is when can the issue of jurisdiction be raised? The answer to this question has long been decided by this court (Supreme Court) by a long line of its decisions. In *Adani & Ors v Igwe* (1957) 2 F SC 87, the Federal Supreme Court as this court was then called when Nageon De Lestang F. J. said on page 88: C

*"I have always understood the position to be that so long as a court acquires jurisdiction before delivering judgment, its decision cannot be attacked on the ground of want of jurisdiction consequently, the time to decide whether the court has jurisdiction or not is when the point is taken."* D

But because of its importance to adjudication - it touches "at the very foundation of the case - our rules of practice permit the issue of jurisdiction to be raised at any state of the proceedings up to the final determination of an appeal by the Supreme Court. In *African Newspapers of Nigeria Ltd. & Ors. v. The Federal Republic Of Nigeria* (1985) 4 SC. (Pt. 1) 76, this court, per Oputa JSC opined at page 128 thus: E

*"It is trite law that the issue of jurisdiction can be raised at any time and at any stage of the proceedings. It can be raised for the first time in the Supreme Court. That would not preclude the court (the Supreme Court) from considering it,"* F

However, when it is realised that the existence or absence of jurisdiction in the court of trial goes to the root of the matter so as to sustain or nullify the decision or order of the trial judge in respect of the matter before him, the time to decide that issue is when it is raised which in practice, must be before the trial judge enters into adjudication. This must be so if time and efforts are not to be wasted, this was the decision of this court in *Obikoya vs. The Registrar of Companies and Official Receiver of Pool House group (Nigeria) Ltd.* (1975) 4 S.C 31. Consequently, issue No.2 in the appellant's brief and issue No.1 in the respondent's brief are answered in the negative. H

The appellants have argued, in their brief that compliance with

the provisions of Order 5 Rule 6 of the Oyo State High Court (Civil Procedure) Rules 1988 is a sine qua non to the issuance of the Writ of Summons from the Registry for service in the instant case, outside the jurisdiction. That Order provides:

B *“Subject to the provisions of these rules or any written law in force in the State, no writ of summons for service out of the jurisdiction, or of which notice is to be given out of the jurisdiction shall be issued without the leave of court or a judge in chambers.”*

C From the above rule it is potent clear that the leave of court is a desideratum before a writ of summons can be issued from the Court Registry for service outside the territorial jurisdiction of Oyo State. A quick search of the records leaves me in no doubt that no application for such leave was made let alone any leave being granted. Leave of court is therefore a condition precedent to the issuance of a D writ of summons for service outside jurisdiction. The question may be asked What is a *“CONDITION PRECEDENT?”* The answer is not farfetched; when everything has happened which, prima facie, will vest in a party a certain right of action, such as the writ of summons in the instant case which contains materials of the complaint of the plain- E tiff/appellants and yet in this particular case there is something further to be done, or something more must happen before he is entitled to sue either by reason of provision of some statute or because the parties have expressly so agreed - that something more is called F *“CONDITION PRECEDENT.”* The *LEAVE OF COURT* is that condition precedent’ in this case, it is an additional formality without which the writ of summons will remain permanently in the Registry of the Court. The court cannot circumvent it. Rules of court are there commanding respect from all parties to litigation. Failure to comply with G the provisions of Order 5 Rule 6 of the Oyo State High Court (Civil Procedure) Rules of 1988 is a fundamental defect that affects only the service of the writ and not the writ of summons itself. In answering, issue No.1 in the appellant’s brief, I say that the non-compliance with the aforesaid provision affects the service of the writ and not the H writ of summons itself. The proceedings in the trial court are consequently rendered null and void. In a similar vein, since no leave was sought and obtained the order of the trial court for substituted service of the writ of summons is null and void. It is of no legal consequence.

Before I proffer an answer to issue No.3 in the brief of the 1st and 2nd plaintiff/respondents, I feel duty bound to explain what is meant by *DEMURRER*. I start by saying that *DEMURRERS* had long been abolished in the corpus of our laws. What the rules of court now recognise is demurrer application. By it a defendant can demur to a writ of summons, supporting his application by an affidavit. But a defendant in this circumstance must not file a statement of defence nor must he rely on it and neither is he to tender evidence for he is deemed to have accepted as true all the facts pleaded by the plaintiff, but he can only rely on some points of law to defeat the plaintiff's case. Thus, it has now become a well established principle of jurisprudence covered by rules of Court that a defendant is entitled to have plaintiff's suit dismissed without taking evidence or calling for any answer on questions of fact from the defendant where on the face of the statement of claim there is a sound legal or equitable defence to the action. The proceedings of this type are by way of demurrer. See *MOBIL VS I. A. L* 36 I. N.C (2000) 6 NWLR (PT. 659) 146. Having explained what *DEMURRER* means the inevitable answer to issue No. 3 in the respondent's brief of argument is in the affirmative.

I still repeat, it is the issuance of the writ that is fundamentally defective to the extent to which the leave of the court was not sought and obtained before it was issued.

From all I have said above, the trial court was devoid of legal power - jurisdiction to adjudicate in the matter - there being no leave of court to issue the writ from the Registry. Once a court lacks the jurisdiction to entertain a suit any order made by it in the course of any proceedings in the case is null and void and of no effect. Issue No.4 on the appellant's brief and issue No.4 on the respondent's brief are therefore answered in the negative. It also follows that in dismissing the appeal, the lower court did not exercise its discretion judicially and judiciously. Had the lower court averted its mind to the issues of law adumbrated here, it would not have dismissed the appeal.

For all I have said above but more in particular for the reasoning and conclusion of my learned brother, Muntaka-Coomassie, JSC, with which I am in agreement, I declare the entire proceedings conducted at the trial court a nullity. Consequently the ruling of the trial court and the decision of the court below are hereby set aside. I

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repeat, since it is the issuance and service of the writ that are fundamentally defective. I hereby again, set aside same, but not the writ itself.

The appeal is meritorious and thus allowed.

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