

SUPREME COURT OF NIGERIA
22ND JANUARY, 2010. SC.153/2005
CORAM:- G. A. OGUNTADE, F. F. TABAI, J. O. OGEBE,
J. A. FABIYI, O. O. ADEKEYE, JJSC

M/S OLUCHI J. ANYANWOKO APPELLANT
AND
1. CHIEF MRS. CHRISTY O. N. OKOYE
2. NNENNA LUCILLE OKOYE
3. MARK CHUKWUEMEKA RESPONDENTS
OKOYE JUNIOR
4. HIS MAJESTY (ENGR.)
IGWE A.C. OKOYE
5. PROBATE REGISTRAR

COURT PROCESSES - Originating summons - Not signed as required by the Rules - Effects - Such noncompliance amounts to mere irregularity - It has nothing to do with the jurisdiction of the court (H1)

RULES OF COURT - FCT High Court Rules - Originating summons - Contents - O. 6 r. 3(1) requires it to contain either questions for determination - Or statement of reliefs claimed - The instant summons is therefore substantially compliant (H2)

PARTIES - Joinder - Jurisdiction of courts - Effect of nonjoinder - It does not affect jurisdiction of the court - Nor even the competence of the suit - As an application may be made during trial to join appropriate persons (H3)

RULES OF COURT - Noncompliance - Right to set aside suit - Waiver of - Application to set aside suit for irregularity - Shall not be allowed unless made within reasonable time - Before taking further step (H4)

ACTIONS - Commencement - Originating summons - Propriety - It is the claim of a plaintiff that determines propriety of originating process - In view of the instant claim originating summons is proper (H5)

FACTS

The plaintiffs/respondents sued defendant/appellant by a process termed "originating summons" taken out at the High Court of the Federal Capital Territory Abuja. The claim of respondents was, inter alia for a declaration that 1st plaintiff/respondent was the only lawful wife of the deceased, having been married under the Act, as well as an order vacating the caveat filed by appellant at the Probate Registry stopping respondents from obtaining Letters of Administration of the deceased's intestate estate.

Appellant raised a preliminary objection to the competence of the suit on the ground that the claim was contentious in nature and as such the suit ought to have been commenced by writ of summons and not originating summons. It was also appellant's argument that the nonjoinder of all necessary parties, as she alleged, was fatal to the suit. The preliminary objection was argued and the trial court dismissed it for lack of merit. Aggrieved, appellant appealed to Court of Appeal against the ruling of trial court. But the appeal was dismissed. This is a further and final appeal by appellant to Supreme Court.

ISSUES FOR DETERMINATION

1. Whether the suit at the High Court was commenced by due process of law so as to enable the Court assume jurisdiction.

2. Whether the Appellant was estopped from raising an objection as to whether an action had actually been commenced because she had filed a counter affidavit and a further affidavit in the matter.

3. Whether the issues that were placed before the High Court of the Federal Capital Territory for determination are such as could be determined by way of originating summons proceedings.

HELD (Unanimously dismissing the appeal per TABAI JSC)

Originating summons - Not signed as required by the Rules

1. It is not contested that the originating summons was not signed by the Registrar of the Court as enjoined by Order 6 Rule 8 of the Rules of the Court and therefore a breach of the Rules. What however is the legal effect of this breach? On this question the Court of Appeal per Muhammad JCA (as he then was) at pages 93 - 94 of the record said:

The position of the law is very clear that where there is such non-compliance with the Rules of Procedure which merely regulate the exercise of jurisdiction conferred on a court by a Statute, such non-compliance amounts only to a mere irregularity and has nothing

to do with the jurisdiction of that Court.”

I agree entirely with the above opinion of the court below (pp. 95 G/96 B)

FCT High Court Rules - Originating summons - Contents

2. It is clear from the provision of Order 6 Rule 3(1) that an originating summons should contain either a question or questions on which the Plaintiff seeks the court’s determination or direction, or concise statement of the reliefs or remedies claimed. The originating summons contains four reliefs.

I am therefore persuaded by the submission of learned counsel for the Respondents that the originating summons is in substantial compliance with the Rules of the Court. (p. 97 B/D)

Jurisdiction of courts - Effect of nonjoinder

3. On this issue of the non-joinder of all the necessary parties in the suit the learned trial Judge Hussein Muktar J in his ruling at page 19 of the record had this to say:

“The last ground is premised on non-joinder of some children who are claimed to be children of the deceased and who should be interested person. The law is trite that non-joinder per se does not affect the jurisdiction of the court nor the competence of the suit. An application may be made to join or disjoin any person who must be a proper party or who ought not be a party but has been wrongly joined respectively.”

The Court below agreed with this reasoning and conclusion, finding that it was unassailable. I also endorse the reasoning and conclusion. (p. 98 A)

Noncompliance - Right to set aside suit - Waiver of

4. The non-compliances complained of are merely breaches of Procedural Rules. An application to set aside a suit for irregularities shall not be allowed unless it is made within a reasonable time before the applicant takes any fresh step after noticing the irregularity. This is the purport of the provisions of Order 2 Rule 2(1) of the High Court of the Federal Capital Territory Rules. In this case the Appellant filed a counter affidavit dated 17th September 2003 and a further affidavit on the 10th October 2003. (p. 98 G)

ACTIONS - Commencement - Originating summons

5. The first principle of law is that jurisdiction in any suit is determined by the nature of the Plaintiffs claim.

B In this case therefore it is the claim of the Plaintiffs/Respondents that determines whether the matters submitted for determination can appropriately be taken by an originating summons.

C In so far as the Plaintiffs/Respondents are concerned the marriage between 1st Respondent and the deceased was statutory and all that they required the court to determine was the legal incidents of such a marriage. For the purpose of the proof of her case the 1st Respondent needed only to tender the marriage certificate. The substance of the case of the Respondents is that since, apart from the statutory marriage between the 1st Respondent and the deceased, there can be no other marriage between the deceased and any other person including the Appellant, an originating summons would suffice to establish their claim. (p. 99 D/H)

REPRESENTATION

E Emeka Okoro Esq. for the Appellant.
Emeka Okpoko Esq. for the Respondent.

CASES REFERRED TO

Uku v. Okumagba (1974) 1 All NLR 475
F Kalu v. Odili (1993) 5 NWLR pt. 240 pg. 130
Bango v. Chado (1998) 9 NWLR pt. 564 pg. 139
Ajay v. Omonogbe (1993) 6 NWLR pt. 301 pg. 512
Duke v. Akpabuyo L. G. (2005) 19 NWLR pt. 959 pg.130
Nnonye v. Anyichie (2005) 2 NWLR (Pt. 910) 623 at 647
MADUKOLU v NKEMDILIM (1962) 2 SCNLR 345 at 348
G NWABUEZE v NWORA (2005) 8 NWLR (Part 926) 1 at 26
AGWULGWU v AKPO (2001) 5 NWLR (Part 706) 280 at 292
CLEMENT v IWUANYANWU (1989) 3 NWLR (Part 107) 39 at 50
MOBIL v CHIEF MONOKPO & ORS (2002) 18 NWLR (Part 852) 345
C.C.B. (NIG) PLC v ANAMBRA STATE (1992) 8 NWLR (Part 260)
528
H FAMFA OIL LTD, v A. G. FEDERATION (2003) 18 NWLR (Part 852) 453

MUSTAPHA v GOVERNOR OF LAGOS STATE (1987) 2 NWLR (Part 58) 539

A.G. ANAMBRA STATE v A.G. OF THE FEDERATION (1993) 5 NWLR (Part 302) 692 at 74

RULES OF COURT REFERRED TO

Federal Capital Territory High Court Rules 1989, O. 2 r. 2, O. 6 rr. 3 & 6

LEAD JUDGMENT BY TABAI JSC

This action was commenced at the High Court of the Federal Capital Territory Abuja on or about the 29th of July 2003 by a process described and headed as “originating summons”. The Plaintiffs were the Respondents at the Court below and also the Respondents here. The Defendant was the Appellant at the lower Court and also the Appellant before this Court. In the originating summons the Respondents prayed for:-

- (1) A declaration that the 1st Plaintiff is the lawful wife of the deceased, having been married under the Act.
- (2) An order of Court vacating the caveat filed by the Defendant and her Solicitor at the Probate Registry stopping the Plaintiffs from obtaining Letters of Administration of the deceased estate.
- (3) An order granting accelerated hearing of this suit.
- (4) And for further and other orders as this Honourable Court may deem fit to make in the circumstances.

A notice of preliminary objection dated 10/10/03 was filed. It prayed that the suit be struck out for being incompetent and a flagrant abuse of court process. The grounds for objection were stated to be:

1. That the Court lacks the jurisdiction to hear the case.
2. That the suit was not commenced in accordance with the prescribed Rules of Court.
3. That the claim being contentious involves substantial dispute of facts; and
4. That all necessary parties and material facts are not before the Court.

The preliminary objection was argued. In its ruling on the 12th of December 2003 the objection was dismissed for lack of merit.

The 1st Defendant proceeded on appeal to the Court below.

By its unanimous decision on the 24th of March 2005 the appeal was dismissed.

She has come on further appeal to this Court. The parties have, through their counsel, filed and exchanged their briefs of argument. The Appellant's Brief of Argument was prepared by Emeka Okoro of the law firm of Chief Chris Uche (SAN) & Co and same was filed on the 6th of October 2005. The 1st - 4th Respondents' Brief of Argument was prepared by Emeka Okpoko of G.N. Uwechue (SAN) & Co and it was filed on the 28th of January, 2008.

In the Appellant's Brief of Argument Mr. Emeka Okoro formulated the following three issues for determination:

1. Whether the suit at the High Court was commenced by due process of law so as to enable the Court assume jurisdiction.

2. Whether the Appellant was estopped from raising an objection as to whether an action had actually been commenced because she had filed a counter affidavit and a further affidavit in the matter.

3. Whether the issues that were placed before the High Court of the Federal Capital Territory for determination are such as could be determined by way of originating summons proceedings.

On behalf of the 1st - 4th Respondents Emeka Okpoko formulated only two issues in their Brief. The issues are:

1. Whether the Court of Appeal was right in upholding the ruling of the trial Court that the suit was commenced by due process of the law to enable the Court assume jurisdiction.

2. Whether the Court of Appeal was right in dismissing the appeal on the ground that the filing of a counter affidavit by the Appellant wherein issues were joined with the Respondents amounted to taking steps in the proceedings to constitute a waiver of her right.

It does appear to me that the Respondents do not have an issue that flows from the complaint in ground 4 of the Notice of Appeal. I would therefore adopt the issues as proposed by learned counsel for the Appellants.

On the first issue of whether the suit was commenced by due process of law to have invoked the jurisdiction of the Court, learned counsel for the Appellant submitted that there were three defects which deprived the Court of jurisdiction. The first is that the summons was not signed by the Registrar of the Court and which

defect offends the provisions of Order 6 Rule 8 of the Federal Capital Territory High Court Rules 1989. The second, according to counsel, is that the summons did not contain statement of questions for determination and which offends Order 6 Rule 3 of the Rules. And the third is that not all persons, whether adult or minor, entitled to share in the estate of the deceased are made parties. It was his submission that the non-compliances are fundamental and have therefore failed to invoke the jurisdiction of the High Court. For the various submissions learned counsel relied on *NWABUEZE v NWORA* (2005) 8 NWLR (Part 926) 1 at 26; *SALEH v MONGUNO* (2003) 1 NWLR (Part 801) 221, *MADUKOLU v NKEMDILIM* (1962) 2 SCNLR 345 at 348; *REIS v MOSANYA* (1964) LLR 19; *MOBIL v CHIEF MONOKPO & ORS* (2002) 18 NWLR (Part 852) 345. It was counsel's further submission that *FAMFA OIL LTD v A.G. OF THE FEDERATION* (2003) 18 N.W.L.R. (Part 852) 453 does not apply.

With respect to the second issue of whether the filing of a counter-affidavit and a further affidavit by the Appellant constituted a waiver as to preclude her from raising this preliminary objection, the substance of the argument of learned counsel is that jurisdiction is determined by the originating processes filed by the Plaintiff and not by steps taken by the Defendant in a case and therefore that the filing of affidavits by the Defendants would not create jurisdiction which the Plaintiffs/Respondents failed to invoke by their purported "originating summons". He relied again on *MOBIL PRODUCING (NIG) LIMITED v MONOKPO* (2005) 18 NWLR (Part 852) 346.

On the third issue of whether the issues placed before the Court were such that could be determined by way of originating summons, it was the submission of learned counsel that in view of the questions as to:

- (a) who as between the Appellant and the 1st Respondent is the lawful wife of the deceased;
 - (b) who are the children of the deceased;
 - (c) who ought to be the administrator/administratrix of the estate of the deceased, and
 - (d) those entitled to share from the estate of the deceased;
- the proceedings would involve the resolution of hotly disputed facts for which origination summons proceedings is inappropriate, Learned

counsel relied again on FAMFA OIL LTD, v A. G. FEDERATION (2003) 18 NWLR (Part 852) 453. It was the contention of counsel that the matters raised in the affidavit of the parties require pleadings and viva voce evidence and all the incidents of a full trial. It was counsel's submission in conclusion that" only a writ of summons can properly
B be used to commence actions of this nature.

Mr. Emeka Okoro urged finally that the 'appeal' be 'allowed.

On behalf of the 1st - 4th Respondents Mr. Emeka Okpoko made the following submissions. On the first issue he quoted extensively portions of the judgment of the Court of Appeal and submitted that it was perfectly right in its findings and conclusions. He
C referred to Order 6 Rule 3(1) of the Federal Capital Territory High Court Rules 1989 and submitted that the originating summons is in substantial compliance with the Rules. It was his further" submission that Rule's of Court "are merely Rules of Procedure and that they
D do not themselves alone confer jurisdiction, contending that they merely regulate the exercise of jurisdiction conferred by Statute! For this submission reliance was placed on CLEMENT v IWUANYANWU (1989) 3 NWLR (Part 107) 39 at 50. Learned counsel argued that the affidavit evidence has sufficient particulars identifying the cause
E or causes of action giving rise to the reliefs and remedies claimed. What the Rules of Court governing originating summons require is substantial compliance, counsel argued.

With respect to the failure of the Registrar to sign the originating summons learned counsel for the Respondents submitted that
F under Order 6 Rule 8 (supra) it is the duty of the court officials and not that of the Plaintiffs/Respondents to sign the originating summons, contending that the law only enjoins the Plaintiffs/Respondents to submit enough copies to the Registrar after paying the necessary fees and which copies were indeed submitted to the Registrar. Learned
G counsel pointed out that the copies given to them and that in the court's file were duly signed and sealed.

On the issue of whether the subject matter was appropriate for the issuance of originating summons, learned counsel contended that the issue submitted to the Court for determination is "who is the lawful wife of late Chief Mark Okoye?" and for which determination a
H Statutory Marriage Certificate was exhibited. In the circumstances the matter can properly be determined under the originating summons

proceedings, counsel argued. It was counsel's farther submission that even if there is any non-compliance, it is one as to form only and not of substance and amounts only to an irregularity curable by Order 2 Rule 1 of the High Court Rules. He cited in support CLEMENT v IWUANYANWU (supra) and AGWULGWU v AKPO (2001) 5 NWLR (Part 706) 280 at 292. Still on non-compliance with Rules of Court or procedural irregularity counsel further referred to SAUDE v ABDULLAHI (1989) 3 NWLR (Part 116) 387 and A.G. BENDEL STATE & ORS v AIDEYAN (1989) 4 NWLR (Part 118) 646 at 681. B

On the second issue of whether the Appellant's filing of a counter affidavit and a further affidavit amount to taking steps in the proceedings to constitute a waiver of her right to the preliminary objection, learned counsel for the Respondents answer it in the affirmative. It was his submission that a party who becomes aware of non-compliance with the Rules of Court is to apply to strike out D same before taking any further step in the proceedings. He relied for this submission on C.C.B. (NIG) PLC v ANAMBRA STATE (1992) 8 NWLR (Part 260) 528. He urged in conclusion that the appeal be dismissed.

Let me proceed to deliberate on the issues raised. E

With respect to the first issue, the first ground of the objection is that the summons was not signed by the Registrar of the Federal Capital Territory High Court as required by Order 6 Rule 8 of the Rules of that Court and that by reason of the aforesaid non-signing F no summons was, in law, issued. Order 6 Rule 8 provided that:

"An originating summons is issued upon its being signed by the Registrar or other officer of the court duly authorised to sign summons."

It is not contested that the originating summons was not G signed by the Registrar of the Court as enjoined by Order 6 Rule 8 of the Rules of the Court and therefore a breach of the Rules. What however is the legal effect of this breach? On this question the Court of Appeal per Muhammad JCA (as he then was) at pages 93 - 94 of the record said: H

"On the issue of non-signing of the summons by the Registrar of the lower court or any official thereof, I agree with the submission of learned SAN for the 1st - 4th Respondents and the learned trial judge that it is the duty of the court and not that of the Plaintiffs/

Respondents. It is a lapse on the side of the Registrar of the Court below and not that of the Plaintiffs/ Respondents. The requirement of Order 6 Rule 8 of the Rules is that an originating summons is issued upon its being signed by the Registrar or other officer of the court duly authorised to sign summons. ***The position of the law is very clear that where there is such non-compliance with the Rules of Procedure which merely regulate the exercise of jurisdiction conferred on a court by a Statute, such non-compliance amounts only to a mere irregularity and has nothing to do with the jurisdiction of that Court.***

I agree entirely with the above opinion of the court below. In CLEMENT v IWUANYANWU (1989) 3 NWLR (Part 107) 39 at 50 this Court per Oputa JSC articulated this principle when he declared:

“I think it is trite law that Rules of Court are Rules of J Procedure. They do not by themselves and of themselves alone confer jurisdiction. They merely regulate the exercise of a jurisdiction aliunde.....”

It is untenable therefore for the Appellant to contend that the breach of the provisions of Order 6 Rule 8 of the Rules of court robbed the court of any jurisdiction. The jurisdiction of a court donated either by the Constitution or by Statute remains unaffected by breaches of Rules of Court. The sustained challenge of this issue of jurisdiction founded on the breach of Order 6 Rule 8 of the Federal Capital Territory High Court Rules was, with respect, grossly misplaced, not worth the time and trouble of the Court and even counsel for the parties.

The second ground for the objection is “that the originating summons did not contain statement of questions for determination” contrary to Order 6 Rule 3 of the Federal Capital Territory High Court Rules.

It does appear, with respect, that learned counsel for the Appellant failed to read the entire provisions of Order 6 Rule 3(1) of the Rules. Order 6 Rules 3(1) of the Rules provides:

“3(1) Every Originating Summons shall include a statement of the question on which the Plaintiff seeks the determination or direction of the Court or, as the case may be, concise statement of the relief or remedy claimed in the proceeding begun by originating summons with sufficient particulars to identify the cause or causes of the action in respect of which the Plaintiff claims that relief or remedy.”

It is clear from the provision of Orders 6 Rule 3(1) that an originating summon should contain either a question or questions on which the Plaintiff seeks the court's determination or direction, or concise statement of the reliefs or remedies claimed. The originating summons contains four reliefs, the first two of which are:

(1) "A declaration that the 1st Plaintiff is the lawful wife of the deceased, having been married under the Act. B

(2) An order of Court vacating the caveat filed by the Defendant and her solicitor at the Probate Registry stopping the Plaintiffs from obtaining Letters of Administration of the deceased." C

In my view these are concise statements of the reliefs or remedies within the meaning of the second ambit of Order 6 Rule 3(1) of the Rules. I am therefore persuaded by the submission of learned counsel for the Respondents that the originating summons is in substantial compliance with the Rules of the Court. D

The third ground for the objection is that not all persons, adult or minor, entitled to share in the estate of the deceased are made parties. On this issue the Court below at page 96 of the record relying on the provisions of Order 11 Rule 5(1) of the Federal Capital Territory High Court Rules opined: E

"It is essential that the names of every Plaintiff and every defendant whom it is proposed to make parties to the action should be set out. However any mistake or omission in not mentioning some of the proposed parties is not fatal and it may be corrected subsequently..." F

The Court relied on Order 11 Rule 5(1) of the Rules which states:

"If it appears to the Court, at or before the hearing of a suit that all the persons who may be entitled to or who claim some share or interest in the subject matter of the suit or who may be likely to be affected by the result, have not been made parties, the court may adjourn the hearing of the suit to a future date to be fixed by the Court and direct that those persons shall be made Plaintiffs or Defendants in the suit as the case may be." G H

On this issue of the non-joinder of all the necessary parties in the suit the learned trial Judge Hussein Muktar J in his ruling at page 19 of the record had this to say:

"The last ground is premised on non-joinder of some

children who are claimed to be children of the deceased and who should be interested person. The law is trite that non-joinder per se does not affect the jurisdiction of the court nor the competence of the suit. An application may be made to join or disjoin any person who must be a proper party or who ought not be a party but has been wrongly joined respectively.”

The Court below agreed with this reasoning and conclusion, finding that it was unassailable. I also endorse the reasoning and conclusion. The non-joinder or mis-joinder of a necessary party is only a procedural irregularity which can be corrected in the course of the proceedings by recourse to the relevant Rules of Court and does not in any way affect the jurisdiction of the court or competence of the suit.

In view of the foregoing considerations I resolve the first issue in favour of the Respondents.

The second issue pertains to whether the Appellant was precluded from raising the preliminary objection in view of the steps he had taken in the proceedings by filing a counter affidavit and a further affidavit. The substance of the argument of the Appellant is that the Plaintiffs/Respondents having failed to invoke the jurisdiction of the Court in the manner prescribed by the Rules of Court, the Appellant’s filing of affidavits cannot operate to confer jurisdiction where there is none. This issue is substantially answered in the first issue of jurisdiction. As I have held earlier on in this judgment, the jurisdiction of the court to hear and determine the suit remains intact notwithstanding the breaches of Order 6 of the Rules. The non-compliances complained of are merely breaches of Procedural Rules. An application to set aside a suit for irregularities shall not be allowed unless it is made within a reasonable time before the applicant takes any fresh step after noticing the irregularity. This is the purport of the provisions of Order 2 Rule 2(1) of the High Court of the Federal Capital Territory Rules. In this case the Appellant filed a counter affidavit dated 17th September 2003 and a further affidavit on the 10th October 2003. On this issue the Court of Appeal reasoned:

“The practice is that where a party has become aware of non-compliance, or where a writ is defective he should apply for striking out of same before taking any further steps in the proceedings.

Otherwise he will be estopped from raising the issue of defect”

The Court relied on a number of authorities in reaching its decision. It therefore endorsed the position taken by the trial Court to the same effect. I do not think I have any reason to impugn the findings and conclusions of the two courts below which I therefore also endorse. This issue is therefore also resolved in favour of the Respondents. B

With respect to the third issue of whether the matters presented to the Court were such that could be determined by way of originating summons proceedings, the first principle of law is that jurisdiction in any suit is determined by the nature of the Plaintiffs claim. See ADEYEMI v OPEYORI (1976) 9-10 SC 31. A.G. ANAMBRA STATE v A.G. OF THE FEDERATION (1993) 5 NWLR (Part 302) 692 at 742; MUSTAPHA v GOVERNOR OF LAGOS STATE (1987) 2 NWLR (Part 58) 539; TUKUR v GOVERNMENT OF GONGOLA STATE (1989) 4 NWLR (Part 117). C
D

In this case therefore it is the claim of the Plaintiffs/Respondents that determines whether the matters submitted for determination can appropriately be taken by an originating summons. The 1st Respondent claimed: E

(1) A declaration that the 1st Plaintiff is the lawful wife of the deceased having married under the Act.

(2) An order of Court vacating the caveat filed by the Defendant and her solicitor at the Probate Registry stopping the Plaintiffs from obtaining Letters of Administration of the deceased. F

It is clear from the originating summons and the documents attached to the affidavit in support thereof that in so far as the Plaintiffs/Respondents are concerned the marriage between 1st Respondent and the deceased was statutory and all that they required the court to determine was the legal incidents of such a marriage. For the purpose of the proof of her case the 1st Respondent needed only to tender the marriage certificate. The substance of the case of the Respondents is that since, apart from the statutory marriage between the 1st Respondent and the deceased, there can be no other marriage between the deceased and any other person including the Appellant, an originating summons would suffice to establish their claim. Her suit is without prejudice to the defences and/or counter-claim by the 1st Defendant/Appellant. It is my view therefore that G
H

from the perspective of the Plaintiffs an originating summons was appropriate and sufficient to ventilate her grievances. The result is that I also resolve this issue in favour of the Respondents.

In conclusion I hold that the appeal lacks merit and ought to be dismissed. The result is that I affirm the concurrent decisions
B of the two court below and the appeal is accordingly dismissed with N50,000.00 costs in favour of the 1st- 4th Respondents.

C _____

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. I agree with his reasoning and conclusion. I would also dismiss this appeal as unmer-
D itorious. I subscribe to the order on costs made in the lead judgment.

E

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. I see no merit in the appeal and I hereby dismiss it with costs
F of N50,000.00 in the favour of the Respondents.

FABIYI JSC

I have had a preview of the judgment just delivered by my learned brother, Tabai, JSC. I agree with the reasons advanced
G therein to arrive at the conclusion that the appeal is devoid of merit and should be dismissed.

Put briefly, the respondents herein as plaintiffs at the High Court of the Federal Capital Territory, Abuja initiated an action against the appellant as defendant vide an 'originating summons' which was
H not signed by the Registrar of the court or other officer of the court duly authorized to sign summons as mandated by Order 6 R. 8 of the Rules of the trial court. An application to strike out the suit, ostensibly

based, inter alia, on the point was refused by the learned trial judge. He found that the goof by the court official was a mere procedural irregularity which should not obliterate the jurisdiction of the court. The defendant appealed to the Court of Appeal (court below) which maintained the same stance and dismissed the appeal. The defendant has further appealed to this court. B

It occurs to me that the issue of non-signing of the originating summons by the Registrar of the trial court or an officer of that court duly authorised to sign same is a mere lapse on the side of the Registrar of the trial court. It is a non-compliance with the court Rules of Procedure which regulate the exercise of jurisdiction conferred on a court by a statute. It has nothing to do with the jurisdiction of that court. See: *Clement v. Iwuanyanwu* (1989) 3 NWLR (Pt. 107) 39. C

In short, I endorse the stance taken by the two courts below as they both acted on a firm ground. D

The next issue is whether the filing of a counter affidavit and a further affidavit by the defendant/appellant after the service of the originating summons on her amounted to taking steps in the proceedings to constitute waiver of her rights.

The learned trial judge found that the steps taken by the 1st defendant in filing a counter affidavit and a further affidavit after becoming aware of the irregularity complained of amounted to waiver of her rights to complain about the defect in the originating summons. The court below maintained the same poise. E

I am of the considered view that they were right. For where a party is aware of non-compliance or where a writ is defective it is the duty of the party to act timely to apply to strike out the suit before taking any further step in the proceedings. When the appellant noticed the surmised irregularity, he should have taken the necessary steps to avoid being roped by what is often referred to as waiver which is defined in *Black's Law Dictionary*, 5th Edition as the intentional or voluntary relinquishment of a known right; the renunciation, repudiation, abandonment or surrender of some claim, right, privilege or the opportunity to take advantage of some defect, irregularity of wrong. *Atlas life Insurance Co. v. Schrimsher* 179 OKI 643, 66 page 2d 944, 984. See: *Nwoye v. Nigerian Road Construction Ltd* (1966) NMLR 254. F

Perhaps I should further say it that irregularity can certainly H

be waived. If the beneficiary fails to raise objection timely, he will be deemed to have waived his right. See: *Katsina Local Government v. Makudama* (1971) NSCC 119 at 124; *Nnonye v. Anyichie* (2005) 2 NWLR (Pt. 910) 623 at 647; 666; *Ariori v. Elemo* (1983) 1SC 13.

In short, as the appellant failed to act instantly on the surmised irregularity pinpointed by her, she is deemed to have waived her right. She should not approbate and reprobate at the same time. The issue is resolved against her.

The 3rd issue raked up by the appellant relates to non-joinder of some alleged children of the deceased. The learned trial judge found that non-joinder or misjoinder of parties can be taken care of a later stage of the proceedings. The court below agreed with same.

I earnestly feel that they were right. The learned trial judge can suo motu join the children at an appropriate time if they are necessary parties to the action. See: *Chinweze v. Anor v. Masi (Mrs.) & Anor* (1989) 1 NWLR (pt. 97) 254 at 266.

To decide on joinder of the children, the court must ask itself the following questions:-

(a) Is the cause or matter liable to be defeated by non-joinder?
(b) Is it possible to adjudicate on the cause or matter unless the 3rd party is added as a defendant?

(c) Is the 3rd party a person who should have been joined in the first instance

(d) Is the 3rd party a person whose presence before the court as a defendant will be necessary in order to enable the court to effectually and completely adjudicate or settle all the questions involved in the cause or matter? See: *Chief Abusi David Green v. Dr. E. T. Dublin Green* (1987) 3, NWLR (Pt. 60) 480:

Let me finally note it here that a judgment made with an order against a person who was not a party to a pending suit even by default is to no avail. It cannot be allowed to stand. See: *Uku v. Okumagba* (1974) 1 All NLR 475.

I also resolve this issue against the appellant and in favour of the respondents.

For the above reasons and the fuller ones contained in the lead judgment, I, too, hereby dismiss the appeal. I endorse all other consequential orders contained therein; that relating to costs inclusive.

ADEKEYE JSC

I had a preview of the judgment just delivered by my learned brother F. F. Tabai, JSC. My Lord had meticulously considered all the issues distilled by the appellant for determination in this appeal. I shall however add a few words. In the area of failure to sign the originating summons contrary to Order 6 Rule 8 of the Federal Capital Territory High Court Rule 1989, it is settled that a matter is only before the court when it is properly filed in the Registry and after payment of the necessary filing fees. The court will not make a practice of penalizing a litigant for the mistake or omission of court officials in the Registry except and only instances where the mistake was instigated, encouraged and condoned by the litigant.

Generally, rules of court are meant to regulate matters in court and help parties in the presentation of their case within a procedure made for the purpose of a fair and quick trial. Rules of court are meant to be obeyed as strict compliance with the Rules makes for quicker administration of justice. It is not every irregularity or non-compliance with the Rules that will nullify an entire proceedings. On the other hand, a judgment may be set aside for irregularity when the irregularity consists of non-compliance with the Rules. However any fundamental non-compliance with the rules vitiates all acts consequently resulting in a nullity.

Bango v. Chado (1998) 9 NWLR pt. 564 pg. 139

Anyah v. A. N. N Ltd 6 NWLR pt. 247 pg. 319

Ajay v. Omonogbe (1993) 6 NWLR pt. 301 pg. 512

Eboh v. Akpotii (1968) 1 ANLR 200

Kalu v. Odili (1993) 5 NWLR pt. 240 pg. 130

Ezera v. Ndukwe (1961) 1 ANLR pg. 564

Long -John v. Black (1998) 6 NWLR pt. 555 pg. 524

Duke v. Akpabuyo L. G. (2005) 19 NWLR pt. 959 pg. 130

It is a misconception to hold that non-compliance with Order 6 Rule 8 of the Rules of Court will go to the root of this matter and deprive the court of its jurisdiction.

Where any proceedings are begun other than as provided by the Rules, such proceedings are incompetent. A court is only competent when a case comes before it by due process of law and

upon fulfillment of condition precedent to the exercise of jurisdiction.

Madukolu v. Nkemdilim (1962) 6 SCNLR, pg. 341

Sken Consult v. Ukey (1981) 1312

Saleh v. Monguno (2003) 1 NWLR pt. 801 pg. 221.

I believe that the suit was appropriately commenced by an
B originating summons in view of the affidavit filed in support and the
documents annexed.

With fuller reasons given in the leading judgment, I agree
that the appeal lacks merit and it is accordingly dismissed. I adopt
C the consequential order as mine.

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