

SUPREME COURT OF NIGERIA
22ND JANUARY, 2010. SC. 351/2002
CORAM:- M. A. MUKHTAR, F. F. TABAI, I. T. MUHAMMAD,
J. A. FABIYI, O. O. ADEKEYE, JJSC

AGIP (NIGERIA) LTD. APPELLANT
AND

1. AGIP PETROLI INTERNATIONAL & ORS.
2. UNIPETROL (NIGERIA) PLC
3. OTUNBA ADEKUNLE OJORA
4. MR. ANTHONIO COMBIOTTI
5. MR. CONFORTI MASSIMO RESPONDENTS
6. CENTRAL SECURITIES CLEARING
SYSTEM LTD.
7. NIGERIAN STOCK EXCHANGE
8. SECURITIES & EXCHANGE COMMISSION

IN RE:

1. CHIEF C. EZENDU
2. MR. ALEX AROKODERE
3. MALLAM M.A. JIMETA
4. MR. A.A. THOMAS
5. MR. C.A. EZENNADILI
6. ALHAJI IBRAHIM GARUBA
7. ELDER OLATUNJI OYEBANJO
8. APOSTLE (DR.) C.J.A. ADEBAJO
9. ALHAJI K.A. DANJUMA
10. THE ASIWAJU AKINTUNDE ASALU
*[President Nigerian Shareholders Solidarity
Association (NSSA)
(Representing All the Members of NSSA)]*

BETWEEN:

AGIP (NIGERIA) LTD APPELLANT
AND

1. AGIP PETROL1 INTERNATIONAL
2. UNIPETROL (NIGERIA) PLC RESPONDENTS
3. OTUNBA ADEKUNLE OJORA CROSS-APPELLANT

- APPEALS - Grounds - Nature - Whether of law - Where a ground raises an issue of legal interpretation of words - Or inferences drawn

thereof - It is a ground of law (H6)

APPEALS - Issue of illegality - Failure of court of Appeal to pronounce on - Propriety - The court was right not to have pronounced thereon - As it would have amounted to deciding a substantive matter - At the interlocutory stage (H7)

COMPANY LAW - Company Proceedings Rule - Rule 2(1) - Whether directory - In view of the use of the word "shall" in the provision - The provision is mandatory not merely directory (H8)

APPEALS - Respondents' Notice - Relief thereon - Propriety of refusal - Since the relief was predicated on the writ being validly issued - It cannot be granted in view of the conclusion that the writ was not validly issued (H9)

FACTS

The minority share holders of the appellant company sued the respondents on behalf of the company in a derivative action before the Federal High Court Lagos in a bid to restrain the sale of 60% (sixty percent) shareholding in the 1st respondent company to the 2nd respondent company. It is not in dispute that the registered office of 1st respondent was in Amsterdam i.e. outside the jurisdiction of the court. It was also not in dispute that no prior leave of court was sought or obtained before the issuance of the writ of summons. However, plaintiffs had brought two *ex parte* applications one of which prayed for an interlocutory injunction and order for substituted service, *inter alia*, on 1st respondent and 14 others through the company secretary, while the second prayed for leave to bring the action on behalf of the appellant company.

Upon hearing both applications, trial court in its ruling thereon granted the applications and ordered *suo motu* that 1st respondent be served in its registered office in Amsterdam. Aggrieved, 2nd respondent appealed against the ruling to Court of Appeal challenging the jurisdiction of trial court in that the action was not properly commenced. It also challenged the order for substituted service. Court of Appeal held that the issuance and service of the writ was null and void for want of prior leave of court to issue and serve same outside

jurisdiction. Though 3rd respondent/cross appellant had filed a Respondent's Notice to have trial court's ruling sustained on other grounds, Court of Appeal refused the reliefs in the Notice. Aggrieved, plaintiffs have brought this appeal against the judgment of Court of Appeal. 3rd respondent/cross appellant has also cross appealed arguing that the writ was originally intended to be served within jurisdiction by substituted means but trial court *suo motu* ordered its service outside jurisdiction.

ISSUES FOR DETERMINATION

APPEAL:

Whether in the prevailing circumstance the Court of Appeal was right or erred in declaring that the issuance and service of the writ of summons in this case are null and void.

CROSS-APPEAL:

"(1) Whether the court below was right in setting aside the *ex parte* order of injunction granted by the Federal High Court whereby the 1st, 3rd and 16th respondents were restrained from selling the shares of the 3rd respondent held in the 2nd respondent to the 1st respondent when the transaction was shown to be tainted with illegality.

(2) Whether the Court of Appeal was right in law in declaring the issuance and service of the Writ of Summons in this case null and void for failure to obtain leave to issue same for service outside jurisdiction when the writ of summons was originally intended by the plaintiffs for service within jurisdiction and it was the trial judge who *suo motu* ordered that the writ be served on the 1st respondent outside jurisdiction.

(3) Whether the Court of Appeal was right in declaring the Writ of summons issued in this case void on the ground that the action was not properly constituted as a derivative action.

(4) Whether the refusal by the court below of the 3rd respondent/cross-appellants, respondents Notice was not wrong in the circumstance."

HELD (Unanimously dismissing both the appeal and the cross appeal per **ADEKEYE JSC**)

APPEALS - Grounds - Nature - Whether of law

1. In my candid view after gleaning through the particulars of the

ground of appeal the central issues involved are: -

(a) Obtaining leave of court before the issuance and service of the writ of summons.

(b) That the application for leave to commence a derivative action should have been brought by originating summons on Notice to the defendants.

Both these issues are conditions precedent to be fulfilled before a court can exercise jurisdiction in this suit. These are consequently threshold issues - issues of jurisdiction - which in turn is a radical and crucial question of competence.

The sole ground of appeal being an issue touching upon jurisdiction is purely on issue of law. The objection of the 2nd respondent is hereby overruled. (p. 20 C)

Writ of summons - Service outside jurisdiction - Procedure

2. The foregoing confirms that the 1st respondent is a foreign company with its business office out of jurisdiction of the Federal High Court. Issue of service of process is an essential aspect of our procedural law as it is a jurisdictional issue.

The issue of service of process under the Nigeria Legal System is basically statutory. It is aptly covered by our Rules of Court both at State and Federal level. The Rules of Court are part of the machinery of justice evoked by the courts to regulate their proceedings.

On the application of the Writ of Summons to the proceedings in the Federal High Court under Order 6 of the Federal High Court Civil Procedure Rules, 2000.

Order 6 Rule 12(1) stipulates that: -

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

(pp. 22 A/F/23 C)

ORDERS OF COURT - Efficacy - Suo motu order

3. The learned trial judge gave the order suo motu obviously influenced by the averment in the pleadings and relevant facts before the court that the 1st respondent be served at its registered office in Amsterdam out of the jurisdiction of the court. The appellant thereby concluded that the leave of the court was in fact obtained before the issuance and service of the Writ of Summons on the 1st respondent.

I regard this as a glowing misconception by the appellant as the directive of court in the circumstance of this case does not tantamount to leave being granted. It is proper that for the appellant to comply with this order and the relevant provisions of Order 6 Rule 12(1) of the Federal High Court Rules the proper step is to apply for the requisite leave before issuance and service of the writ of summons, which is to be performed at the court registry and to be endorsed thereafter by a judge. There was no evidence of taking these steps by the appellant on Record. (p. 23 E)

C *Derivative actions - Commencement - Procedure*

4. It is consequently imperative that a minority shareholder who intends to bring a derivative action in the name of the company must first and foremost apply for leave of court by way of originating summons on notice to the Company. The company must be made a defendant to the claim for the technical requirement of ensuring that the company is bound by any judgment given. The company must be given notice of such hearing so that the company or the director may be able to appear to present their view of the shareholder's case. This renders impeccable the position of the conclusion of the judgment of the Court of Appeal which reads: -

"It is clear from Rule 2 (1) that the applicants ought to have brought the application for leave to sue in a derivative form on an originating Summons instead of a writ of summons. The non-compliance with the above rules which amounts to denial of principles of fair hearing is a justification for pronouncing the process a nullity." (p. 26 H)

G *Derivative actions - Defect in commencement - Effect*

5. The submission of the appellant that the action commenced by a writ of summons instead of an originating summons is an irregularity at best, is misconstruing the relevant provision of CAMA and as regards derivative action and the Company proceedings Rules.

H In this case accessing the court by an originating summons is the due process of law and condition precedent required to be satisfied by the applicant in a derivative action before a court can exercise jurisdiction in respect of the suit. Where by a rule of court, the doing of an act or taking a procedural step is a condition precedent to the

hearing of a case such rule must be strictly followed and obeyed. Non-compliance with a condition precedent is not a mere technical rule of procedure it goes to the root of the case.

In the outcome, the court will not treat it as an irregularity but as nullifying the entire proceedings. This court has no reason to deviate from this well established practice. (pp. 27 E/28 A)

APPEALS - Grounds - Nature - Whether of law

6. The question raised by ground 2 of the cross-appeal and the issue for determination distilled from same is whether the lower court had jurisdiction to declare null and void the writ of summons issued in this case meant for service within jurisdiction. This to my mind is an issue of law, as determination of same is based on the writ of summons and statement of claim of the appellant before the court. Nwadike v. Ibekwe (1987) 4 NWLR pt. 67 pg. 718 at pg. 744 paragraphs C - F where it was held inter alia that: -

"Several issues that can be raised on legal interpretation of deeds, documents, terms of art, words or phrases and inferences drawn thereof are grounds of law." (p. 44 E)

Appeals - Issue of illegality - Failure to pronounce on

7. I agree that the cross-appellants adequately pleaded the issue of the illegality in the transaction between the 1st and 2nd respondents in this case in its statement of claim in their substantive action, and also in the affidavit in support of the motion ex-parte dated the 11th of February 2002.

The lower court obviously and rightly did not make any pronouncement on same because it would at that stage of the proceedings be clearly premature. It will amount to the court pronouncing or deciding at an interlocutory stage on the matter it is supposed to determine in the substantive suit of the case. It is a long standing principle of court pronounced in numerous decided cases that - A court must be cautious in its judgment at an interlocutory stage not to make pronouncements or observations on the facts which might appear to predetermine the main issue or issues in the proceedings yet to be concluded by the court. (p. 45 F)

Company Proceedings Rule - Rule 2(1) - Whether directory

8. The cross-appellant wrongly argued that the provisions of the Companies Proceedings Rules particularly Rule 2 (1) is merely directory and not mandatory. I disagree with this view because of the word SHALL in the provision. The word *shall* in the ordinary meaning is a word of command which is normally given a compulsory meaning because it is intended to denote obligation. When the word shall is used in a statute it is not permissive it is mandatory, it imports that a thing must be done. (p. 53 G)

Appeals - Respondents' Notice - Relief thereon

9. The reliefs in the Respondents' Notice was predicated on the Writ of Summons being validly issued and that the suit itself was properly commenced as a derivative action. In issue two, the trial court and the lower court found that the issuance and service of the writ was a nullity being a writ meant for service outside the jurisdiction of the Federal High Court.

Under Issue 3, this court and the lower court found that the suit was improperly commenced as a derivative action. When an action has been held to be a nullity any subsequent proceedings in the matter would be a nullity. The court below could not in the alternative have granted the relief contained in the Respondents' Notice as maintained by the cross-appellant. (p. 55 B)

NOTABLE POINT OF INTEREST
FABIYI JSC

Courts should not grant reliefs not sought

It is pertinent at this point to express it clearly that a court should not grant a prayer that is not contained in a motion paper. By extension, a court should not award that which was not claimed. This is because a court is not a charitable organisation.

I have taken a close look at the *Ex-parte* applications filed by the appellant herein at the trial High Court on 11th February, 2002 and 18th February, 2002 respectively. I cannot see any prayer in any of the applications for an order granting the appellant as plaintiff leave to serve the 1st respondent out of jurisdiction in far away Amsterdam. The trial Judge granted the appellant unsolicited bonus. Such was inappropriately made and the appellant should not benefit

from same to the detriment of the 1st respondent. (p. 61 C)

REPRESENTATION

Mr. O. Akinwande holding Olusina Sofola's brief for the appellant.
Mr. Tayo Oyetibo, SAN with him, C. I. Umeche for the 3rd Respondent/Appellant. B

Mr. A. Adegbonmire with Bukola Okusanya, A. Mohammed, M. A. Olajide for the 1st, 4th and 5th respondents.

Mr. Olumide Aju for the 2nd respondent.

Mr. Olumide Sofowora with C. Ejiofor for the 11th respondent. C

Mr. J. O. Odubela with him; O. Jolaamo, O. Chukwuma-Ene (Miss.), F. Zuofa (Miss.) for the 9th and 10th respondents.

CASES REFERRED TO

Ekput v. Okon 2002 5 NWLR pt. 760 pg. 445 D

Anderson Ltd. v. Daniel (1924) 1 KB 138 at 147

Ezeafor v. Okeke (200) 7 NWLR pt. 665 pg. 363

Nwadike v. Ibekwe (1987) 4 NWLR pt. 67 pg. 718 at 744

Odofin v. Agu (1992) 3 NWLR pt. 229 pg. 350 at pg. 369

Madukolu v. Nkemdilim (1962) 2 SCNLR pg. 341 at pg. 348 E

Nwabueze v. Okoye (1988) 4 NWLR pt. 9 pg. 664 at 667 - 668

Dawodu v. Ologundudu (1986) pg. 659 4 NWLR pt.33 pg. 104

Bamgboye v. University of Ilorin (1999) 10 NWLR pt. 622 pg.290

Ugwu v. Ararume (2007) 12 NWLR pt. 1048 pg. 367at pgs 441 - 442 F

Ekwunife v. Wayne (WA) Ltd (1989) 5 NWLR pt. 122 page 422 at 450

Shanu v. Afribank (Nig) Plc (2002) 17 NWLR pt. 795 pg. 185 at pg. 230 - 231 G

Duke v. Akpabuyo Local Government (2005) 19 NWLR pt. 959 pg. 130 at pgs 148 -157

Okoye v. Nigerian Construction and Furniture Co. Ltd. (1991) 6 NWLR pt. 199 pg. 501 at 539 H

STATUTES & RULES REFERRED TO

Companies and Allied Matters Act, Cap 59, L. F. N. 1990, ss. 45, 56-59 and 303

Companies Proceedings Rules, 1992, Rule 2

Federal High Court (Civil Procedure) Rules, 2000, O. 6 r. 12, O. 13 r. 5

Constitution of the Federal Republic of Nigeria, 1999, s. 36

Securities and Exchange Act, ss. 105, 109 and 122

B

LEAD JUDGMENT BY ADEKEYE JSC

The appeal and cross-appeal are against the ruling of the Lagos Division of the Court of Appeal delivered on the 22nd of July 2002. At the court of trial, the Federal High Court Lagos, the minority share holders of the appellant sued the respondents on behalf of the company, in a derivative action and the cassus belli was meant to restrain the sale of 60% (sixty per cent) shareholding in the 1st respondent company, Agip Petrol International B.V. to the 2nd respondent Unipetrol Nigeria Plc. In the endorsement on the writ filed by the plaintiffs against the defendants jointly and severally, the claim read as follows: -

(1) A declaration that the purported sale of the 1st defendants' 225,902,969 (two hundred and twenty-five million, nine hundred and two thousand, nine hundred and sixty nine) shares in the plaintiffs at the instance of the Directors who are in control and the other defendants in this suit in favour of the 2nd defendants is illegal, unlawful and constitute a fraud on the plaintiffs and its members and other persons having interest therein.

(2) An order nullifying and/or invalidating such purported sale, alienation and/or transfer of the said shares from the 1st defendant to the 2nd defendant.

(3) An order restraining the defendants whether by themselves and/or their agents, privies, representatives or any person acting for and or through them or on their behalf from dealing in the 1st defendants shares of the plaintiffs.

(4) An order that the plaintiffs bear the cost of the legal representatives in this suit.

The plaintiffs brought two exparte applications on the 11th of February 2002 and the 18th of February 2002 respectively.

The application filed on the 18th of February prayed the trial court for the undermentioned orders: -

(1) An order of interlocutory injunction restraining the defendant by themselves, agents, privies, representatives whomsoever act-

ing for them and or on their behalf from selling, alienating, disposing, transferring and/or parting with possession of the shares led by the 1st defendants in the plaintiffs pending the hearing and determination of the suit.

(2) An order to serve the 1st, 3rd - 15th defendants by substituted means through the Company Secretary of the plaintiffs and such services be deemed as proper. B

(3) An order of interim injunction restraining the defendants whether by themselves, agents, privies, representatives and whomsoever acting for and on their behalf from selling, alienating, disposing, transferring and/or parting possession with the shares held by the 1st defendant in the plaintiff company pending the hearing and determination of the motion on notice. C

In the application filed on the 18th of February 2002, the plaintiff prayed the court for: - D

“An order pursuant to section 303 of the Companies and Allied Matters Act (CAMA) Cap 59 Laws of the Federation 1990 granting leave to the applicant to bring this action in the name and or on behalf of the plaintiffs i.e. Agip Nigeria Plc.”

In view of the foregoing applications, the trial court on the 27th E of February 2002 in its considered ruling held that: -

“I have carefully read through the entire processes filed with respect to the applications. I have taken a very hard look at the various paragraphs of the affidavits in support of these applications and the copious exhibits attached thereto while looking and reading through the paragraphs of the affidavit I am satisfied that the applicants are entitled to be granted leave to bring this action on behalf of and in the name of the plaintiff. I am equally satisfied that the applicants have prima facie shown that they have a legal right which could F appropriately be protected by an injunction. It is also evident that there is real urgency in the matter as the applicants may not be adequately compensated by an award of damages. I have taken particular recognition to the averments in paragraphs 17, 18, 19, 20, 21, 22, 23, 24, 25, 27, 28, 29, 30, 37, 38, 39, 41, 42, 43, 45, 48 H and 49 of the affidavit of Akintunde Asalu the 10th Applicant, which affidavit is dated 11/2/02. In consequence of the foregoing, I hereby order that the 1st defendant be served at its registered office in Amsterdam, while I grant the prayer for 3^d - 13th defendants to be

served by substituted means through the company secretary of the plaintiff the 3^d relief on the motion papers is granted in terms. The defendants are restrained by themselves, their agents, privies or howsoever from selling, alienating, disposing, transferring and/or parting with the shares hold in the plaintiff by the 1st defendant pending the hearing and determination of the motion on notice herein.”

Being dissatisfied with the Ruling, the 2nd defendant before the trial court appealed to the Court of Appeal Lagos. Parties identified three issues for determination as follows: -

(1) Whether the court can exercise jurisdiction in the action having regard to the manner in which it was commenced.

(2) Whether the applicants had disclosed sufficient grounds to justify the order for substituted service made by the lower court.

(3) Whether the applicants had disclosed sufficient case of urgency to justify the ex-parte order of interim injunction granted by the lower court.

In the considered judgment, the lower court held that the writ of summons was incurably bad and therefore a nullity. All orders and judgment made in pursuance of a void writ are themselves void. All the issues raised in the applicants’ brief are answered in the negative as every proceeding, order or judgment founded on a void writ is itself void. The relief and prayer contained in the Respondents’ Notice cannot find any favour in law. The appeal was allowed as being meritorious while the issuance and service of the writ was declared null and void.

An appeal was filed against the decision of the Court of Appeal Lagos to this court. The appellant in this appeal filed a notice of withdrawal of appeal dated the 5th of September 2003 against some of the respondents. The parties against whom the appeal is pending are as reflected in the 1st, 4th and 5th Respondents’ brief filed on the 7th of July 2006. The appeal was withdrawn against the 9th, 10th, 11th, 12th and 13th respondents during the proceedings of the 9th February 2004. At the hearing of the appeal on the 27th of October 2009, sole issue for determination reads: -

“Whether the Court of Appeal was right in setting aside the writ of summons, the issuance and service thereof.”

Mr. Akinwande who appeared for the appellant adopted and relied on the appellants brief filed on 27/11/06 and the reply brief

filed on 1/4/09.

Mr. Olumide Aju adopted and relied on the 2nd respondent's brief filed on 24/2/06, the Notice of Preliminary Objection filed on 8/7/09. The sole issue raised for determination in the appeal is -

"Whether the Court of Appeal was right in the circumstance of this case to have nullified the Writ of Summons and the orders made by the learned trial judge." B

Mr. Adegbonmire adopted and relied on the brief of the 1st, 4th and 5th respondents in the main appeal filed on 7/7/06. The issue for determination formulated in the brief reads: -

"Whether the Court of Appeal was right in setting aside the writ of summons, the issuance and service thereof." C

Mr. Odubela adopted and relied on the brief of the 9th - 10th respondents filed on 27/11/06. The issue formulated therein for determination reads: -

"Whether the learned justices of the Court of Appeal were right in holding that the Writ of Summons, the issuance and service of same are null and void." D

Mr. Sofowora adopted and relied on the brief of the 11th respondent filed on 1/12/08, The only issue raised in this application is: E

"Whether the learned justices of the Court of Appeal were wrong in declaring that the issuance and service of the Writ of Summons in this case are null and void."

It is pertinent to emphasize that this appeal is against the unanimous decision of the Court of Appeal Lagos delivered on the 22nd of July 2002. The appellant, Agip (Nigeria) Plc withdrew its appeal against some of the respondents in the appeal thus reflecting the correct position of the parties in the main appeal as stated in the appellants' brief filed on 7/7/2006, and the affidavit of compliance of the 1st, 4th and 5th respondents filed on 28/11/06. The parties in the main appeal are Agip Nigeria Plc and twelve other respondents. In the cross/appeal against the same judgment, the 3rd respondent in the main appeal Otunba Adekunle Ojora became the cross-appellant with the twelve other parties as the cross-respondents. F G H

The first germane question for consideration in the main appeal is whether failure to apply for leave before issuance and service on the 1st respondent at its registered office in Amsterdam is out of

jurisdiction of the court. By way of factual background of the cause of action before the Federal High Court, ten individuals reflected as members of the Nigerian Shareholders solidarity Association instituted an action on behalf of the appellant in the main appeal, Agip (Nigeria) Plc to prevent Agip Petrol International the 1st Respondent from transferring or selling the 60% shares it owned in the appellant to Unipetrol Nigeria Ltd, the 2nd respondent through purchase. There was an International Bid involving other companies in the transfer. The plaintiffs now respondents filed a writ of summons before the Federal High Court and two ex parte applications, the cumulative purpose was to prevent the alienation of the shares, to put parties on notice by substituted means and to bring the action on behalf of the plaintiff Agip (Nigeria) Plc pursuant to Section 303 of Companies and Allied Matters Act (CAMA) Cap 59 Laws of the Federation 1990. On the 27th February 2002 the Federal High Court gave orders as follows: -

- (1) An order granting leave to the applicant to bring the action in the name and/or on behalf of Agip Nigeria Plc i.e. the plaintiffs.
- (2) An order to serve the 1st defendant at its registered office in Amsterdam and substituted service on the 3rd - 13th defendants through the Company Secretary of the plaintiff.
- (3) An ex parte injunction restraining the defendant by themselves, agents, privies, representatives, whomsoever acting for them and on their behalf from selling, alienating, disposing, transferring and/or parting with the shares held in the plaintiff by the 1st defendant pending the determination of the motion on notice.

The foregoing brought reactions from the respondents, whereupon the 1st respondent, Agip Petroli (International), Unipetrol (Nig.) Plc 7th - 10th and 12th respondents appealed to the Court of Appeal by the Notices of Appeal filed on the 8th of March 2002, and 12th of March 2002 respectively, (vide pages 263 - 266 and pages 274 - 277) of the Records.

The 3rd respondent, Otunba Adekunle Ojora filed a respondent's notice to vary the decision of the learned trial judge. The two appeals were thereafter consolidated. The lower court heard and determined the appeals. The lower court nullified the Writ of Summons by which the action was commenced. This led to a spate of reaction by the parties filing appeals and cross/appeals to this court.

The Court of Appeal held that: -

(a) Leave of court was not obtained before the issuance of the writ of summons but that this error was an irregularity which could only lead to setting aside of the writ of summons and its service thereof.

(b) The application for leave to commence a derivative action should have been brought by Originating Summons on Notice to the defendants and that this omission made the writ of summons intrinsically bad for non compliance with the provisions of the Companies Protecting Rules 1992. Vide pages 492 - 493 of the Record.

In the main appeal before this court, the major issue for determination raised by the appellant reads: -

“Whether in the circumstance of this case and in the light of the materials before the court, the Writ of Summons the issuance and the service of same are null and void.”

The appellant argued that leave of court was obtained before the issuance and service of the writ relying on the cases of

Ndoma-Egba v. Government of Cross River State (1991) 4 NWLR pt. 188 pg. 723.

Caribbean Trading Fidelity Corporation v. N.N.P.C. (2002) 14 NWLR pt.786 pg. 123.

The appellant cited the provisions of Order 6 Rule 12 of the Federal High Court Procedure Rules 2000 and its Order 3 Rule 1 and the case of ACB Plc. v. Hasten (1997) 7 NWLR pt. 515 pg.110 and urged this court to hold that the writ could not have been rendered a nullity simply because no application was sought to issue and serve the writ of summons out of jurisdiction. Further more the learned justices declared the process a nullity because it was commenced by a writ of summons instead of an originating summons. The Writ of Summons was served on all parties - it can only at its best amount to an irregularity. The appellant made reference to the provision of Section 23 of the Interpretation Act 1964 Cap 192 of the Laws of the Federation 1990 and that using a writ to commence an action instead of an originating summons was not done with an intention to mislead enough to declare the whole process a nullity. The courts have now moved away from using technical justice to defeat substantial justice. The rules of court are merely used to guide. Commencing an action by Originating summons instead of writ of summons does not by itself occasion a miscarriage of justice and the pro-

cess was saved and sustained. The learned counsel cited cases like
 Ekput v. Okon 2002 5 NWLR pt. 760 pg. 445
 NBN v. Alakija 1978 (2) LRN pg. 78.

The objection could only be raised at the Federal High Court
 as opposed to the Court of Appeal. The appellant urged this court to
 B allow the appeal upon the consideration of the above.

The 2nd respondent raised a preliminary objection that the sole
 ground of appeal contained in the notice of appeal dated 23rd of July
 2002 be struck out as it raises issues of mixed law and fact. The ap-
 C peal cannot be entertained unless leave of the appellate court or the
 lower court is first sought and obtained. In ascertaining whether a
 ground of appeal is of mixed fact the particulars of the ground of
 appeal has to be examined thoroughly. After examination of the par-
 ticulars in the sole ground of appeal it came to the conclusion that the
 D issues are of mixed law and fact and it is imperative that leave of
 court must be sought and obtained hence the appeal is incompetent.
 The 2nd respondent referred to the case of

Metal Construction West Africa Limited v. Migliore 1990 1
 NWLR pt. 126 pg. 299.

E The 2nd respondent argued in the main appeal that the judg-
 ment of the court of appeal - established that the appellant did not
 obtain leave of court before the Writ of Summons was issued - which
 error amounts to an irregularity and the effect is to set aside the writ
 and its service thereof. The respondent relied on the case of

F Caribbean Trading Fidelity Corporation v. N.N.P.C. (2002)
 14 NWLR pt.786 pg. 133.

Secondly that a shareholder who decides to sue in order to
 remedy a wrong done to the company may do so by bringing a
 G derivative action where the wrongdoers are in control and prevent
 the company from suing. By virtue of section 303 of the Companies
 and Allied Matters Act 1990 leave to commence a derivative action
 ought to have been by originating summons instead of a Writ of
 Summons. What was in contention was the question of how a de-
 H rivative action is commenced.

The 2nd respondent concluded that the lower court was there-
 fore right in declaring that the Writ of Summons was invariably bad
 for non-compliance with the proper procedure for commencing a
 derivative action. The procedure to be adopted is as specified in the

Companies Proceeding Rules 1992. The appellant failed to comply with the procedure by commencing a derivative action by way of motion ex-parte which process excluded an inter-party hearing. The court is urged to dismiss the appeal as the appellant failed to commence derivative action by Originating Summons so as to afford the Company and the wrong doers a hearing.

The 1st, 4th and 5th respondents in their joint brief raised a sole issue for determination in this appeal which is:-

“Whether the Court of Appeal was right in setting aside the Writ of Summons, the issuance and service thereof.”

The submission of these respondents confirm that of the 2nd respondent as expressed above to the extent that: -

(1) The issuance and service of the writ of summons before the Federal High Court has to be set aside as the court cannot exercise jurisdiction in the action because of fundamental conditions precedent to its jurisdiction have not been observed.

(2) The applicants failed to seek leave under Order 6 Rule 12 of the Federal High Court (Civil Procedure) Rules 2000 before they issued the writ of summons for service on a defendant resident abroad.

(3) The derivative action brought by the applicants was done without due compliance with the provisions of Section 303 of the Companies and Allied Matters Act which rendered the proceeding related to it null and void.

(4) By Rule 2(1) of the Company Proceedings Rules 1992 every application for a derivative action shall be made by Originating Summons.

(5) Leave granted upon an ex-parte motion on the 27th of February 2002 is fundamentally flawed as leave to commence a derivative action can only be granted after an inter partes on the company Agip Nig. Plc prior to obtaining the leave. There is an apparent breach of the 1st respondent's right to fair hearing.

(6) There was lack of proper service on the 1st respondent being a foreign Company with no evidence of incorporation or a place of business in Nigeria going by Section 54 (1) of the Company and Allied Matters Act.

The Respondents urged the court to dismiss the appeal.

A single issue for determination formulated by the 6th and 7th respondents is: -

“Whether the learned justices of the Court of Appeal were right in holding that the Writ of Summons, the issuance and service are null and void.”

In the argument in support, the 9th and 10th respondents submitted that the plaintiff/appellant averred that the 1st respondent resides and has its office outside the jurisdiction of the court at 449 Via
B Laurentina in Rome, Italy. Order 6 Rule 12 (1) of the Federal High Court Civil Procedure Rules 2000 provides that

“No Writ or Notice of which, is to be served out of jurisdiction shall be issued without leave of court.”
C

The requirement of obtaining leave by the plaintiff/appellant to issue and serve its Writ of Summons outside the jurisdiction on the 1st defendant/respondent is a condition precedent without which the court would not be conferred with jurisdiction over the subject-matter in dispute. Both ex-parte orders or leave granted by the trial court
D were different from the one required by Order 6 Rule 12(1) of the Federal High Court Rules.

The appellant admitted that leave was not sought but that the court granted such suo motu. It is trite that a court must not grant a
E party a relief which he has not sought. The respondents urged the court to dismiss this appeal as it has now become an academic exercise. The respondents cited judicial authorities.

A.G. Anambra State v. A.G. Federation (1993) 6 NWLR pt. 302 pg. 692 at 737.
F

Ekpenyong & Ors v. Nyong & Ors (1978) NSCC pg. 28 at pg. 29.

Fasikun U. v. Oluronke II. (1999) 2 NWLR pt. 589 pg. 1 at pg. 28.

Global Trans Oceanico S.A. v. Free Ent. (Nig.) Ltd. (2001) 5
G NWLR pt. 706 pg. 426 at 440.

Nwabueze v. Okoye (1988) 4 NWLR pt. 9 pg. 664 at 667 - 668.

Odua Investment Co. Ltd v. Talabi (1997) 10 NWLR pt. 523
H pg. 1 at pg. 21.

The 8th Respondent through its counsel Mr. O. O. Sofowora like the other respondents settled one issue for determination, which reads: -

“Whether the learned justices of the Court of Appeal were

wrong in declaring that the issuance and service of the Writ of Summons in this case are null and void.”

The 8th respondent made similar submissions to that of the other respondents based on the residence and place of office of the 1st respondent outside jurisdiction at 449 Via Laurentina Rome, Italy and the effect of Order 6 Rule 12 (1) of the Federal High Court Civil Procedure Rules 2000 and Section 54 (1) of the Company and Allied Matters Act. Section 303 of the same law in relation to Derivative Actions, and Rules 2 (1) and (2) of the Company Proceedings Rules 1992 in respect of the mode of commencement of a derivative action. The respondent came to the conclusion that the decision of the Court of Appeal cannot be faulted, and consequently urged this court to dismiss the appeal. The judicial authorities cited by the 8th respondent include: -

Nwabueze v. Okoye (1988) 4 NWLR pt. 91 pg. 664.

Ndoma-Egba v. Government of Cross River State (1991) 4 NWLR pt. 188 pg. 723.

Nigerian Arab Bank Ltd. V. Barn Engineering (1995) 8 NWLR pt. 413 pg.257.

Okoye v. Nigerian Construction and Furniture Co. Ltd. (1991) 6 NWLR pt. 199 pg. 501 at 539

The foregoing is the resume of the submission of parties in the main appeal, by the appellant Agip (Nigeria) Plc and the eight respondents indicated as parties in the Affidavit of Compliance filed by the 1st, 4th and 5th respondents on 28/11/06.

At the hearing of the appeal, the 2nd respondent raised a preliminary objection to the sole ground of appeal contained in the Notice of Appeal. The sole issue of the appellant is

“whether in the circumstance of this case and in the light of the materials before the court, the writ of summons, the issuance and service of same are null and void.”

On the analysis of the particulars of the ground of appeal, the 2nd respondent submitted that it borders on issues of mixed law and fact and the leave of this court or the lower court is necessary before filing such a ground. Since no such leave was sought or obtained, the appeal is incompetent. This court is urged to strike out the appeal as the sole ground of appeal is incompetent. The 2nd respondent cited the case

Metal Construction (West Africa) Limited v. Migliore 1990 1 NWLR pt. 126 pg. 299.

The appellant in his reply brief submitted that the sole issue raised in his appeal is on issue of law for which no leave is required. The question whether the appellants should have applied for leave of court before the issuance of the writ of summons is solely a question of law. The issue whether the appellants should have sought leave to commence a derivation action by originating summons on notice to the defendants is also issue of law. This court is urged to dismiss the preliminary objection.

In my candid view after gleaning through the particulars of the ground of appeal the central issues involved are: -

(a) Obtaining leave of court before the issuance and service of the writ of summons.

(b) That the application for leave to commence a derivative action should have been brought by originating summons on Notice to the defendants.

Both these issues are condition precedent to be fulfilled before a court can exercise jurisdiction in this suit. There are consequently threshold issues - issues of jurisdiction - which in turn is a radical and crucial question of competence.

Madukolu v. Nkemdilim (1962) 2 SCNLR pg. 341 at pg. 348

The sole ground of appeal being an issue touching upon jurisdiction is purely on issue of law. The objection of the 2nd respondent is hereby overruled.

The universal issue raised by all the parties - both appellant and the eight respondents is the germane poser for consideration by this court in this appeal. This is whether in the prevailing circumstance the Court of Appeal was right or erred in declaring that the issuance and service of the writ of summons in this case are null and void.

The decision of the lower court was the outcome of the appeal on the order of the trial court sequel two ex-parte applications filed before it by Agip Nigeria Plc on the 11th and the 18th of February 2002 respectively. The parties in the appeal before the Court of Appeal were the plaintiff/appellant - Agip Nig. Plc, and the 2nd, 7th, 10th and 12th respondents. The trial court gave order to the parties as follows: -

(i) That the 1st respondent Agip Petroli International B.V. should

be served outside jurisdiction at its registered office in Amsterdam,

(ii) All the other Directors be served by substituted means through the company secretary of the plaintiff.

(iii) The defendants are restrained by themselves, their agents, privies or howsoever from selling, alienating, disposing, transferring and/or parting with the shares held in the plaintiff by the 1st defendant pending the hearing and determination of the motion on Notice.

In order to cut a clearer picture on the foundation of the applications, I need to explain that there was a move by the 2nd respondent, Unipetrol Nigeria Plc to acquire the 60% of the shares held by the 1st respondent in the total share capital of the appellant - Agip (Nigeria) Plc. There was an international bid to this effect, and the sale was to the knowledge and with the connivance of the Directors of the appellant. The remaining 40% of the shares of Agip (Nigeria) Plc are owned by Nigerians. The 60% proportion are 255,902,769 shares in number. The ordinary shareholders regard the move as a fraud on them and other people having interest in the company. They thereby sought to abort the sale by legal means on the processes before the court and the pleadings, it is apparent that some of the parties in the suit reside outside the jurisdiction of the court. According to the Statement of Claim - the residence of the principal parties in this suit, are as follows -

(1) The plaintiffs are a Public Liability Company with sixty percent (60%) of its shares owned by the 1st defendant and 40% owned by Nigerians with its registered office at Engineering Close, Victoria Island and are in the business of providing and distributing fuel and lubricants all over Nigeria.

(2) The 1st defendants are the 60% owners of the shares of the plaintiff company with its office at 449 Via Laurentina, Rome, Italy.

(3) The 2nd defendants are a public liability company in Nigeria with its office at Station House, 2 Ajose Adeogun Street, Victoria Island, Lagos and are in the business of providing and distributing fuels, LPG and lubricants all over Nigeria.

(4) The 2nd - 13th defendants are directors of the plaintiff.

The order of the Federal High Court was made sequel to two ex-parte applications and it was meant to put the parties on notice pending the hearing of a motion on notice and fulfillment of the

condition precedent to the hearing in the substantive claim.

The court ordered that the 1st respondent be served at its registered office in Amsterdam, while paragraph two of the statement of claim records the business address as 449 Via Laurentina Rome, Italy.

The foregoing confirms that the 1st respondent is a foreign company with its business office out of jurisdiction of the Federal High Court. Issue of service of process is an essential aspect of our procedural law as it is a jurisdictional issue. It is a condition precedent to the competency of court in assuming jurisdiction, and adjudicating over the legal rights of litigants. Any matter or proceedings affected by lapse in the service of process suffers a fundamental flaw. It is therefore a radical and threshold issue. It is the door to the inner chambers of adjudication. Hence it is the conclusion in numerous judicial authorities that it is the fulfillment of such condition precedent like service of process which clothes the courts with competency. It equally gives the party served the opportunity of being heard, present his case and call witnesses.

Obimonure v. Erinosh (1996) 1 ALL NLR pg. 250

Okafor v. A-G Anambra State (1991) 6 NWLR pt. 200 pg.659

Olubusola Stores v. Standard Bank (1975) 1 ALL NLR pg. 125

Wema Bank Ltd. v. Odulaja (2000) 7 NWLR pt. 663 pg. 1

It is therefore imperative that some of the processes of court be effected on particularly the 1st respondent - Agip Petrol International Ltd being an indispensable and necessary party in this suit.

The issue of service of process under the Nigeria Legal System is basically statutory. It is aptly covered by our Rules of Court both at State and Federal level. The Rules of Court are part of the machinery of justice evoked by the courts to regulate their proceedings. These Rules are like statutes subject to the interpretation of the courts. They are designed to obtain justices with ease, certainty and dispatch. The courts and parties must strictly adhere to the Rules and they must be understood as made to be consistent with the fundamental principles of justice.

In the judgment of the Court of Appeal, the lower court placed heavy reliance on the Rules of court and relevant statutes to declare the writ, its issuance and service of all processes and orders thereon null and void. Vide pages 477 - 494 of the Record of Appeal. On

pages 489 (last paragraph) and 490 (first paragraph) the lower court has this to say -

“Having not been placed in a position where it could be said to have its office within the jurisdiction of this court, seeking and obtaining the leave of court is a condition precedent to the issuance and service of the writ of summons on the 2nd respondent. Evidently there was no such leave applied nor was one granted. That defect, as was said in

Madukolu v. Nkemdilim (1962) 1 ALL NLR pg. 587 was fatal.”

On the application of the Writ of Summons to the proceedings in the Federal High Court under Order 6 of the Federal High Court Civil Procedure Rules, 2000.

Order 6 Rule 12(1) stipulates that: -

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

One of the ex-parte applications made before the Federal High Court was for an order to serve the 1st, 3rd and 15th defendants by substituted means through the Company Secretary of the plaintiff. But ***the learned trial judge gave the order suo motu obviously influenced by the averment in the pleadings and relevant facts before the court that the 1st respondent be served at its registered office in Amsterdam out of the jurisdiction of the court. The appellant thereby concluded that the leave of the court was in fact obtained before the issuance and service of the Writ of Summons on the 1st respondent. I regard this as a glowing misconception by the appellant as the directive of court in the circumstance of this case does not tantamount to leave being granted. It is proper that for the appellant to comply with this order and the relevant provisions of Order 6 Rule 12(1) of the Federal High Court Rules the proper step is to apply for the requisite leave before issuance and service of the writ of summons, which is to be performed at the court registry and to be endorsed thereafter by a judge. There was no evidence of taking these steps by the appellant on Record.***

Black’s Law Dictionary 6th Edition at pg 591 defines leave of court as *“Permission obtained from a court to take some action.”*

The appellant failed to obtain this permission in the prevailing

circumstance which is an initiating process. The case of *Caribbean Trading Fidelity Corporation v. NNPC (2002) 14 NWLR pt. 786 pg. 133* where the court regarded a similar lapse as an irregularity which can be cured in the exercise of the courts discretion is not applicable to this appeal for reasons to be revealed seriatim.

B Going by the evidence on Record, there is nothing to show that the 1st respondent, Agip Petroli International Ltd was ever incorporated in Nigeria for the purpose of carrying on business in Nigeria and that its office is within the jurisdiction of the court and in that situation, it still remains a foreign Company. Section 54 (1) of the
C Companies and Allied Matters Act provides that: -

*“Subject to Sections 56 to 59 of this Act, every foreign Company which, before or after the commencement of this Act, was incorporated outside Nigeria, shall take all steps necessary to obtain
D incorporation as a separate entity in Nigeria for that purpose, but until so incorporated, the foreign Company shall not carry on business in Nigeria or exercise any of the powers of a registered company and shall not have a place of business or an address for service of documents or processes in Nigeria for any purpose other than the
E receipt of notices and other documents, as matters preliminary to incorporation under this Act.”*

Furthermore, the appellant filed two ex-parte applications before the trial court. In the ex-parte application filed on 18th of February 2002, the appellants prayed the trial court for relief as follows: -
F

“An order pursuant to Section 303 of the Companies and Allied Matters Acts (CAMA) Cap 59, Laws of the Federation 1990, granting leave to the applicants to bring this action in the name and or on behalf of the plaintiff i.e. Agip Nigeria Plc.”

G Vide pages 206 - 209 of the Record.

The trial court granted this order. The mode of commencement of the action brought in the name of the plaintiff became a bone of contention. The Court of Appeal upon relying on the provisions of the applicable statutes held: -

H *“It is deaf from Rule 2 (1) that the applicants ought to have brought the application for leave to sue in a derivative form on an originating summons instead of a writ of summons, that would have afforded the other sides the right to be heard in the matter. The rule referred to supra touches on fair hearing, the non-compliance with*

the above rules which amounts to a denial of the principle affair hearing is a justification for pronouncing the process of nullity. See the decisions in

(1) *Okoye v. Nigesia Construction Furniture Co. Ltd (1991) 6 NWLR pt. 199 pg. 501 at 539 and*

(2) *Okafor v. A-G Anambra State (1991) 6 NWLR pt. 200 B 659 at 678 to 679. The writ is incurably bad, it is a nullity."*

I wish to examine the controversy here from two perspectives -

(1) Leave of Court prayed for by the applicants to bring a derivative action on behalf of the plaintiff i.e. Agip Nigeria Plc on an ex-parte application. C

(2) Mode of commencement of a Derivative Action.

A derivative action also known as a shareholder derivative suit is a law suit brought by a shareholder on behalf of a company against a third party. Often the third party is an insider of the corporation D such as the directors or executive officers. For over 150 years the rule in *Foss v. Harbottle (1843) 2 Hare 461* has been a familiar part of the company landscape. The rule prevents claims by shareholders for reflective losses and provides that if a wrong is done to a company then the company is usually the proper claimant in respect of that wrong. Derivative suits are unique because under the traditional corporate law, management is responsible for bringing and defending the corporation against suit. The two basic requirements at common law for a derivative action are: -

(1) That the alleged wrong or breach of duty is one that is incapable of being ratified by a simple majority of the members and F

(2) That the alleged wrong doers are in control of the company, so that the company which is the claimant cannot claim by itself. G

A derivative action may only be brought where the wrong complained of -

(a) Amounts to a fraud on the minority and the wrong doers are in control of the company.

(b) Activities by the directors, officers and employees causing harm to the company, breach of duty etc. that cannot be ratified by ordinary resolution or H

(c) Is outside the company's objects and so cannot be ratified under any event.

As the very nature of these suits vary the traditional roles of management and shareholders, many jurisdictions have implemented various procedural requirements to derivative suits. A derivative action is recognized in our company law in Nigeria. The Rule in *Foss v. Harbottle* is now part of our law and embodied in the Company and Allied Matters Act, 1990, particularly sections 299 - 303.

By virtue of Section 303 of CAMA - derivative actions are recognized and the Act stipulates that: -

(1) Subject to the provisions of subsection

(2) of this section, an applicant may apply to the court for leave to bring an action in the name or on behalf of a company or to intervene in an action to which the company is a party, for the purpose of presenting, defending or discontinuing the action on behalf of the company.

(2) No action may be brought and no intervention may be made under subsection (1) of this section, unless the court is satisfied that

(a) The wrong doers are the directors of who are in control and will not take necessary action.

(b) The applicant has given reasonable notice to the directors of the company of his intention to apply to the Court under subsection (1) of this section if the directors of the company do not bring, diligently prosecute or defend or discontinue the action.

(c) The applicant is acting in good faith and

(d) It appears to be in the best interest of the Company that the action be brought prosecuted, defended or discontinued.

The procedure for obtaining the requisite leave is not embodied in the ordinary Rules of Court of the Federal High Court 2000, but can be found in the Companies Proceedings Rules 1992.

Rule 2 of the Companies Proceedings Rule states: -

(1) Except in the case of the application mentioned in Rules 5 and 6 of these Rules and applications made in proceedings relating to the winding up of companies, every application under the Act, shall be made by Originating Summons.

(3) An Originating Summons under these rules shall be in Form I specified in the Schedule to the Rules.

It is consequently imperative that a minority shareholder who intends to bring a derivative action in the name of the

company must first and foremost apply for leave of court by way of originating summons on notice to the Company. The shareholders will require the courts consent to sue. The derivative action must be commenced with the claim form referred to in Rule 2 (2) of the Company Proceedings Rules 1992 and an application by the shareholder for the courts permission or leave to continue the claim. **The company must be made a defendant to the claim for the technical requirement of ensuring that the company is bound by any judgment given.** The hearing of the shareholders application will thereafter proceed in the manner of an ordinary interim application with both sides being afforded the opportunity to submit evidence and submission. **The company must be given notice of such hearing so that the company or the director may be able to appear to present their view of the shareholder's case. This renders impeccable the position of the conclusion of the judgment of the Court of Appeal which reads: -**

"It is clear from Rule 2 (1) that the applicants ought to have brought the application for leave to sue in a derivative form on an originating Summons instead of a writ of summons. The non-compliance with the above rules which amounts to denial of principles of fair hearing is a justification for pronouncing the process a nullity."

The submission of the appellant that the action commenced by a writ of summons instead of an originating summons is an irregularity at best, is misconstruing the relevant provision of CAMA and as regards derivative action and the Company proceedings Rules. The courts abhor misconstruing the provision of a statute so as to confer jurisdiction on them.

African Newspapers of Nigeria v. Federal Republic of Nigeria (1995) 2 NWLR pt. 6 pg 137.

Ogunmokun v. Mil. Administrator Osun State (1999) 3 NWLR pt. 594 pg. 261.

A line of distinction though very faint has always been drawn between procedural irregularity and a nullity. A judgment may be set aside for irregularity where the irregularity consists of non-compliance with the Rules. Where the non-compliance is however fundamental, it vitiates the proceedings thereafter resulting in a nullity. A nullity is a void act with no legal consequence - so also a proceeding

which has been declared a nullity is void and without any legal effect.

Dawodu v. Ologundudu (1986) pg. 659 4 NWLR pt.33 pg. 104;

Okafor v. A-G Anambra State (1991) 6 NWLR pt. 200.

In this case accessing the court by an originating summons is the due process of law and condition precedent required to be satisfied by the applicant in a derivative action before a court can exercise jurisdiction in respect of the suit. Where by a rule of court, the doing of an act or taking a procedural step is a condition precedent to the hearing of a case such rule must be strictly followed and obeyed. Non-compliance with a condition precedent is not a mere technical rule of procedure it goes to the root of the case.

In the outcome, the court will not treat it as an irregularity but as nullifying the entire proceedings. This court has no reason to deviate from this well established practice.

By the community reading of sections 303 of the Companies and Allied Matters Act and Rule 2 (1) and (2) of the Companies proceedings Rules proceedings in an application for leave to prosecute a derivative action is to be commenced by an originating summons but not otherwise. Where any proceedings are begun other than as provided by the Rules, such proceedings are incompetent. Once there is a defect in competence, it is fatal and the proceedings are a nullity.

Ajao v. Alao (1986) 5 NWLR pt.45 pg. 802

Asore v. Lemonu (1994) 7 NWLR pt.356 pg. 284.

Udene v. Ugwu (1997) 3 NWLR pt. 491 pg. 57.

Finally in the process of effecting service on a party out of jurisdiction through compliance with the rules is imperative, non compliance denies the other party the opportunity to be heard and present his case. Under the Nigeria Legal System - fair hearing is not only a common law right but also a fundamental constitutional right. By virtue of Section 36 (1) of the Constitution of the Federal Republic of Nigeria a breach of it particularly in trials vitiates such proceedings rendering same null and void.

Okafor v. A-G, Anambra State (1991) 3 NWLR pt. 200 59.

Mohammed v. Kano Native Authority (1968) 1 ALL NLR pg.

Bamgboye v. University of Ilorin (1999) 10 NWLR pt. 622 pg.290

Deduwa v. Okorodudu (1976) 9-10 SC 329

Military Governor Imo State v. Nwonu (1997) 2 NWLR pt. 490 pg. 675.

This being a derivative action, an ex-parte application is inapplicable - as the Rule in *Foss v. Harbottle* raises an issue of locus standi of the plaintiff in a derivative action which should be decided at a pre-hearing stage before the substantive trial of the action. The lower court has rightly exercised its discretion in pronouncing that the entire process adopted by the applicants before the trial court was a nullity for non-compliance with the process prescribed by the Statute and Rules of Court. This appeal is hereby dismissed for being unmeritorious. The judgment of the Court of Appeal Lagos is hereby affirmed.

This cross-appeal was filed by the 3rd respondent in the main appeal, Otunba Adekunle Ojora against the appellant, Agip Nig. Plc in his capacity as Chairman of the Board of Directors of the appellant Company. The cross-appeal is against the 1st, 2nd, 7th, 8th, 9th, 10th, 12th, 14th, 15th and 16th respondents. The cross-appeal is against the judgment of the Court of Appeal, Lagos delivered on the 22nd of July 2002. The bedrock of the course of action are on similar set of facts as in the main appeal. I shall refrain from restating them for the avoidance of tautology in the entire judgment.

However, for the sake of emphasis I will repeat that the derivative action which was filed by a group of shareholders of Agip (Nigeria) Plc in the name of company on 12/2/02 was designed to challenge the sale by the 1st respondent in the main appeal, Agip Petroli International B.V. of its 255,902,769 ordinary shares of 50k each held in the plaintiff company. The sale was made to the 2nd respondent under a sale and purchase Agreement dated the 5th December 2001. The action was instituted at the Federal High Court, Lagos by a Writ of Summons and Statement of Claim. The plaintiff/appellant filed simultaneously an ex-parte motion seeking injunctive reliefs and an order of substituted service of the processes on the 1st respondent and other Directors of the appellant through the Company Secretary of the plaintiff. The application was accompanied by an affidavit of urgency. Another ex-parte application was filed on the 18th of Feb-

ruary 2003 to bring a derivative action in the name of and on behalf of the appellant pursuant to the provisions of Section 303 of the Companies and Allied Matters Act (CAMA). The Federal High Court, as the court of trial gave orders that: -

B (1) The 1st Respondent - Agip Petroli International - be served at its Registered Office out of jurisdiction in Amsterdam.

(2) The other Directors to be served through the Appellant's Company Secretary.

C (3) The Respondents - Directors were restrained from parting with the shares of the 1st Respondent held in the appellant pending the hearing and determination of the Motion on Notice.

The 1st and 2nd respondents filed separate appeals against the foregoing orders.

D The 3rd respondent, now cross-appellant, then filed a Respondent Notice that the decision of the trial court be varied in the event of the appeal being allowed. In the judgment delivered on the 22nd of July 2002, the Court of Appeal refused the reliefs sought by the 3rd respondent in the Respondents' Notice. Being aggrieved by this decision, the 3rd respondent in that appeal filed a cross-appeal on the E Notice of Cross-Appeal deemed filed on the 24th of January 2007.

F At the hearing of this appeal, the learned senior counsel for the appellant, Mr. Tayo Oyetibo adopted and relied on the cross-appellant's brief filed on 28/11/08 and the cross-appellant's Reply Brief filed on 26/10/09.

The 3rd respondent/cross-appellant raised issues for determination in the cross/appeal as follows: -

G "(1) *Whether the court below was right in setting aside the exparte order of injunction granted by the Federal High Court whereby the 1st, 3rd and 16th respondents were restrained from selling the shares of the 3rd respondent held in the 2nd respondent to the 1st respondent when the transaction was shown to be tainted with illegality.*

H (2) *Whether the Court of Appeal was right in law in declaring the issuance and service of the Writ of Summons in this case null and void for failure to obtain leave to issue same for service outside jurisdiction when the writ of summons was originally intended by the plaintiffs for service within jurisdiction and it was the trial judge who suo motu ordered that the writ be served on the 1st respondent out-*

side jurisdiction.

(3) *Whether the Court of Appeal was right in declaring the Writ of summons issued in this case void on the ground that the action was not properly constituted as a derivative action.*

(4) *Whether the refusal by the court below of the 3^d respondent/cross-appellants, respondents Notice was not wrong in the circumstance."* B

Mr. Adegbonmire adopted and relied on the brief of the 1st, 4th and 5th respondent/cross-respondents filed on 7/10/09. The Respondents adopted the same issues for determination as formulated by their 2nd respondents in the brief which are:- C

(a) Whether on the materials placed before the lower court an ex-facie case of illegality was made out as to prevent the lower court from setting aside the ex-parte order of injunction granted by the trial court. D

(b) Whether the Court of Appeal was right in law to have nullified the issuance and service of the writ of summons.

(c) Whether the Court of Appeal was right in holding that the action was not properly constituted as a derivative action and therefore declaring the writ a nullity. E

(d) Whether the Court of Appeal was right in refusing the reliefs contained in the Respondent Notice.

The 2nd Respondent/Cross-Respondent's brief was deemed filed on 14/7/09. The brief filed is in respect of the 3rd Respondents Notice of cross-appeal dated 6th of April 2004. This cross-respondent filed a preliminary objection contending that grounds 1, 2, and 4 of the Notice of cross-appeal be struck out for being incompetent for the following reasons: - F

(a) Ground one does not arise from the judgment. G

(b) Ground 2 is not a ground of mixed law and fact.

(c) Ground 4 is unclear and ambiguous.

Thereafter, the 2nd respondents formulated the same issues as the 1st, 4th and 5th respondents in the cross/respondents brief. The 10th and 11th cross-respondents brief was filed on 18/2/09. In the brief the 10th and 11th cross-respondents adopted the four issues for determination formulated therein and relied on them for the purpose of the cross/appeal. H

The 12th cross-respondent filed the cross/respondents brief on

5/8/09. The 12th cross-respondent adopted and relied on the same four issues settled for determination by the other cross-respondents in the cross-appeal.

Issue No. 1

B *"Whether the court below was right in setting aside the ex parte order of injunction granted by the Federal High Court whereby the 1st, 3^d - 6th respondents were restrained from selling the shares of the 3^d respondent held in the 2nd respondent to the 1st respondent when the transaction was tainted with illegality."*

C The cross-appellant submitted in support of this issue that the learned trial court gave an injunctive order to forestall facts averred in his pleadings at pages 68 - 75 of the Record in respect of the sale of the 60% shares of Agip Nig. Plc to the 2nd Respondent. The merger or take-over of Agip by the 2nd respondent, Unipetrol (Nig.) Ltd was D regarded as a fraud on the minority shareholders. The proper statutory preconditions had not been complied with - in accordance with Section 105, 109 and 122 (1) (a) of the Securities and Exchange Act. In view of the illegality attached to the transaction, the lower court ought not to set aside the interim injunction, as it is trite law that E a court will not lend its aid to the perpetrators of any illegality. The courts must protect transaction conducted in contravention of statutory requirement on grounds of public policy. The cross-appellants cited cases like

F *Thirwell v. Oyewunmi* (1990) 4 NWLR pt. 144 pg. 384 at 400.
Ekwunife v. Wayne (WA) Ltd (1989) 5 NWLR pt. 122 page 422 at 450.

Sodipo v. Lemminkainen Oy (1986) 1 NWLR pt. 15
U.B.N. Ltd. v. Odusote Bookstores Ltd. (1995) 9 NWLR pt. G 421 pg. 558 at pg. 595.

Anderson Ltd. v. Daniel (1924) 1 KB 138 at 147.

The 1st, 4th and 5th cross/respondents replied by drawing attention to the pleadings of the appellant where illegality was not averred in compliance with the provisions of Order 26 Rule 5 and 6 of the H Federal High Court (Civil Procedure) Rules 2002. Whereas Order 26 Rules 5 and 6 of the Federal High Court (Civil Procedure) Rules 2002 make it mandatory for a plaintiff who alleges illegality to specifically plead same.

If the cross-appellant did not make it an issue before the trial

court he cannot now turn round to make same an issue at an appellate level. It was only described in paragraph 14 of the supporting affidavit to the appellant's ex-parte application as -
Parag. 14 "The proposed sale is fraudulent."

In effect, there was no material placed before the lower court which related to any act of illegality. The lower court was therefore legally right to have set aside the ex-parte order of injunction granted to the appellant by the trial court. The cross-appellant relied on cases to buttress the foregoing submission like: -

Okoli v. Morecab Finance (Nigeria) Limited (2007) 14 NWLR pt. 1053 pg. 33 at pages 61.

Ekwunife v. Wayne (WA) Ltd. 1989 5 NWLR pt. 122 pg. 422.

Ibrahim v. Osim (1988) 3 NWLR pt. 83 pt. 257 at pg. 272.

Belvoir Finance Company Limited v. Harold Cole & Co. (1969) 2 ALL E.R. 904.

The 2nd respondent/cross-respondent filed notice of Preliminary Objection against the cross-appeal wherein it was contended that Grounds 1, 2 and 4 of the Notice of Cross-Appeal be struck out as being incompetent in law. Ground 1 of the Notice of Cross-Appeal when read together with the particulars complained against the decision of the lower court for setting aside the order of injunction made by the trial court and the ex-facie illegality disclosed on the Statement of Claim and affidavit evidence. Issue I raised therefrom also argued the question of illegality. The cross-appellant submitted that the issue was not pressed before the trial court and cannot now become an issue at the appellate level. The cross-appellant portrayed illegality as an error arising from the judgment. A ground of appeal which does not arise from the judgment must be struck out.

Ground 2 of the ground of appeal, when read together with the particulars, particularly parag. 2 (b) the court needs to investigate the fact. It is consequently a ground of mixed law and fact as the court has to investigate whether the Writ of Summons was issued and served. The cross/appellant referred to the case of Nwadike v. Ibekwe (1987) 4 NWLR pt. 67 pg. 718 at 744.

The 2nd cross-appellant submitted that Ground 4 of the Notice of Cross/Appeal is equally incompetent being vague, inchoate and ambiguous. Pursuant to the law, all grounds of appeal must be separate, distinct, not vague or imprecise. A ground of appeal must be

understood without reference to another ground. The ground in unclear, vague and imprecise and cannot stand without reading it together with some other ground of appeal in the Notice. Cases were cited in support of this submission -

Central Bank of Nigeria & Anor v. Aite Okojie & 5 ors (2002) 8 NWLR pt. 768 pg. 48.

The 2nd cross-respondent urged the court to upheld the objection and strike out the cross-appeal as incompetent.

On the first issue for determination, the 2nd cross-respondent submitted that on the materials placed before the court no issue of illegality was disclosed as to prevent the lower court from setting aside the ex-parte order of injunction. The averment in the pleadings before the court on the acquisition of 60% shareholding in the 1st respondent company will amount at best to mere speculations. The transaction got the approval of Securities and Exchange Commission and Nigeria Stock Exchange and does not also offend any Nigerian law. The court is urged to resolve issue 1 in favour of the respondent and discountenance the cases cited as being irrelevant.

The 10th and 11th cross-respondents were of the impression that if the Court of Appeal had upheld the interim orders of injunction as granted by the trial court on the strength of the illegality disclosed in the affidavit in support of the ex-parte motion, it would have amounted to a determination of the substantive suit and consequently a dissipation of the Res in the suit. The courts should refrain from determining issues or taking far reaching pronouncements on issues on which the ultimate determination of the substantive matters depends. Cases referred to include: -

Egbe v. Onogun (1972) 296 pg. 90 at 93
NDIC v. CBN (2002) 4 MJSC 66 at pg. 81
Shanu v. Afribank (Nig) Plc 2002 17 NWLR pt. 795 pg. 185 at 230-231

A-G Fed. V. A-G Abia State (2001) 11 NWLR pt. 725 pg. 689 at 742

Oduntan v. General Oil Ltd. (1995) 4 NWLR pt. 387 pg. 1 at pg. 13

University Press Ltd v. I.K. Martins (Nig.) Ltd. (2000) 4 NWLR pt. 654 pg. 584 at 595.

The 12th cross-respondent submitted that at that stage the fun-

damental issue before the court was that of issuance and service of the writ of summons. The cause of action on the other hand, may have arisen from the illegality of transaction leading to the issuance of the writ. The trial court simply expressed that the applicants have legal rights which could appropriately be protected by injunction. Any pronouncement on the issue of the purported illegal transfer of the shares would certainly have amounted to deciding the substantive issue at an interlocutory stage. Once a writ is set aside, anything done thereafter amounts to a nullity. The lower court was right to have declared the issuance and service of the writ null and void. The cross/appellants cited the case of *Kida v. Ogunmola* (2006) 13 NWLR pt. 997 377 at 394. The court is urged to resolve Issue One in favour of the respondents.

Issue No. 2

Whether the Court of Appeal was right in law in declaring the issuance and service of the Writ of summons in the case null and void for future to obtain leave to issue same for service outside jurisdiction when the writ of summons was originally intended by the plaintiff for service within jurisdiction and it was the trial judge who suo motu ordered that the writ be served on the 1st respondent outside jurisdiction.

The cross-appellant referred to the order of the trial court that the writ of summons be served on the 1st defendant-respondent at its registered office in Amsterdam, while on the 3rd - 13th defendants-respondents by substituted means through the Company Secretary of the plaintiff. The lower court declared the writ void as the issuance and service did not comply with Order 6 Rule 12(1) of the Federal High Court Civil Procedure Rules.

The cross-appellant submitted that the lower court was wrong in law in making such order. The reason being that when the writ was issued on 11th of February 2002, it was not meant to be served out of the jurisdiction so as to require leave of court. The writ contemplated in Order 6 Rule 12 (1) is a writ endorsed for service outside jurisdiction. The cross-appellant quoted from the dictum of Ogbuagu JSC in the Supreme Court case of *Owners of the M.V. "Arabella" v. Nigeria Agricultural Insurance Corporation* (2008) 11 NWLR part 1097 pg. 182 at 206.

The cross-appellant contended that the order of the trial court

for service at the 1st respondent's office in Amsterdam constituted the leave. What the lower court should have concerned itself with was the leave for service outside jurisdiction of a writ issued for service within jurisdiction. The lower court used its inherent power to allow the writ to be served outside jurisdiction. The lower court should not have declared the writ void but should have allowed it to remain as it was issued for service within jurisdiction and directed that service be made by substituted means, in accordance with Order 13 Rule 5 (b) of the Rules of the Federal High Court 2002. The lower court should have set aside service of the writ and leave the appellants with the discretion to take convenient steps in respect of same. The court was wrong to have declared the writ void when it was validly issued. The court is urged to decide this issue in favour of the cross-appellant.

The 1st, 4th and 5th cross-respondents in their reply considered the provisions of Order 6 Rules (1) and (2) of the Rules of the trial court as to the procedure for the issuance of Writ and the format. The plaintiff-appellant must ensure that the name and place of abode and the registered office of the defendants/respondents must be reflected on the writ. Regardless of the fact that the appellant pleaded the correct address of the 1st respondent in the Statement of Claim it however stated the address for service as
c/o the Company Secretary
Agip (Nig) Plc
Plot 43 Engineering Close
Victoria Island.

The foregoing is flagrantly in breach of the Rules of Court. The cross-respondents further submitted that the essence of the provisions of Order 6 Rules 1 and 2 of the rules of the trial court is to ensure that the constitutional rights of the Respondents to fair hearing in line with Section 36 (1) of the 1992 Constitution are complied with. Furthermore failure of the appellant to endorse the writ with a proper address is an abuse of the process of court, as he deliberately failed to comply with the Rules of court. The leave required relates particularly to the issuance of the writ. Provision of Order 13 Rule 5 (b) of the Rules which relate to substituted service does not avail the appellant in view of Order 6 Rules 1 and 2. The appellant cannot rely on the wrong address of the 1st respondent to seek an order for

substituted service. The address endorsed on the original writ of the 1st respondent is a substitute address. The court is urged to find this issue in favour of the 1st, 4th and 5th respondents.

The 2nd cross-respondent drew attention to the submission of the cross-appellant that the writ was valid as it was meant for service within jurisdiction. The evidence on record did not support this as no address was stated on the Writ of Summons filed to commence the suit. The cross-appellant gave an address outside jurisdiction - 449 via Laurentina, Rome Italy. It was indicated that the 1st respondent would be served through an address in Nigeria. The obligation to serve anybody outside jurisdiction cannot be discharged through service within jurisdiction - and leave must be sought to this effect. In this case though leave was granted to serve outside jurisdiction, leave for its issuance has not been granted and Order 6 Rule 12 (1) makes that leave mandatory. It is a condition precedent to a valid institution of a suit. Moreover a single writ could not have been issued for all the defendants in the action, the appellant is also required to have issued a concurrent writ on the defendants that are outside jurisdiction. The order of the lower court nullifying the issuance and service of the writ was rightly made. The 2nd cross-respondent cited cases

Madukolu v. Nkemdilim (1961) 1 All NLR 587

Nwabueze v. Okoye (1988) 4 NWLR pt. 91 pg. 664

The 10th and 11th cross-respondents replied on this issue that the appellant's writ which was to be served on the 1st defendant outside jurisdiction, to be valid, must have obtained the leave of the court to issue and serve same on the 1st respondent. The appellant did not obtain any leave to issue and serve the Writ of Summons outside jurisdiction on the 1st respondent and this robbed the trial court of jurisdiction to entertain the suit. Order 13 Rule 5 (b) of the Federal High Court Civil Procedure Rules (2000) apply to service of process within the Federal High Court jurisdiction. Procedure for obtaining this leave to service outside jurisdiction is as stated in Order 13 rule 13 (g) of the Rules of the trial court. The appellant did not comply with the procedure for obtaining the leave as stipulated in Order 13 Rule 14 (1) of the Rules of Court before the trial court. There is no paragraph in the supporting affidavit of the motion - *ex parte* stating the place or country the defendant is or may be found. The cross-appellants submitted that this appeal has become an academic ques-

tion or exercise as the complaint of the appellant in the court of first instance which has been determined by the judgment of the court is no longer feasible. The 10th and 11th cross-appellants cited cases -

Odu'a Investment Co. Ltd. v. Talabi (1997) 10 NWLR pt. 523

1 at pg. 21

B A-G Anambra State v. A-G Federation (1993) pt. 302 pg. 692 at 73 7

Nwabueze v. Okoye (1988) 4 NWLR pt. 91 pg. 664 at 667-668

C NEPA v. Onah (1997) 1 NWLR pt. 484 pg. 680 at 694
Afribank (Nig.) Plc v. Akwara (2006) 5 NWLR pt. 974 pg. 619 at 656.

The 12th cross-respondent submitted that the Court of Appeal was right in declaring that the issuance and service of the writ of summons in this case were null and void in view of Order 6 Rule 12 (1) of the Federal High Court (Civil Procedure) Rules 2000. The 1st respondent whose 60% shares became subject of litigation has its office at 449 via Laurentina Rome, Italy, outside the jurisdiction of the Federal High Court. The appellant should have sought leave of court before the issuance and service of the Writ of Summons on the 1st respondent. It is a condition precedent specifically laid down by the Rules and failure to comply bereft the court of jurisdiction to entertain the case. By virtue of Section 54 (1) of the Company and Allied Matters Act, the 2nd Respondent remains a foreign company.

F The 12th cross-respondent cited cases
 Madukolu v. Nkemdilim (1962) 1 ALL NLR pg. 587 Nwabueze v. Okoye (1988) 4 NWLR pt. 91 pg. 664 at pg. 685

G Ndoma-Egba v. Government of Cross River State (1991) 4 NWLR pt. 188 pg. 773
 Issue 3

Whether the Court of Appeal was right in declaring the writ of summons issued in this case void on the ground that the action was not properly constituted as a derivative action.

H The cross-appellant submitted that the provision of Rule 2 (1) of the Companies Proceedings Rules 1992 that an application for a derivative action shall be made by Originating Summons except otherwise provided is directory and not mandatory. By virtue of Section 303 (1) of CAMA leave of court must first be sought to bring the

action in question. The leave sought by the appellant by *ex parte* application did not violate the respondents' right to a fair hearing. Rule 18 of the Companies Proceedings Rules makes the use of a writ of summons rather than originating summons to commence the action a procedural irregularity. The lower court ought not to declare the writ a nullity. The cross-appellant further submitted that breach of the Rules of fair hearing normally render the proceedings and the process a nullity. The court below ought to have allowed the action to be maintained as a personal action in the names of the ten applicants named on the Writ of Summons rather striking same out. The court is urged to resolve the issue in favour of the cross/appellant. On issue 3, the cross-appellants cited cases. B C

Essang v. Bank of the North (2001) 6 NWLR pt. 10 pg. 384 at pg. 397;

Provisional Liquidator of Tapp Ind. Ltd. v. Tapp Ind. Ltd. (1995) 5 NWLR pt. 393 pg. 9 at pg. 36; D

7-Up Bottling Co. Ltd. & Ors. v. Abiola & Sons Nig. Ltd. (1995) 3 NWLR pt. 384 pg. 257 pg. 276

National Bank of Nigeria v. Alakija (1978) 2 LRN At pg. 90

Otapo v. Sunmonu (1987) 2 NWLR pt. 58 pg. 587 E

The 1st, 4th and 5th cross-respondents replied under this issue that the cross-appellant misconstrued the provisions of Rule 2 (1) of the Companies Proceedings Rules 1992 Sections 303 (1) and 304 of CAMA as to the commencement of derivative action. Rule 2 (1) of Companies Proceedings Rules does not provide for the making of an *ex-parte* originating summons. The nature of the powers to be exercised by bringing a derivative action pursuant to the provisions of section 304 makes it mandatory for the company to be put on notice of the intention of its shareholders to commence an action in its name. G As the company did not authorize the bringing of the action through its proper organ, but it shall be bound by its outcome. The respondents concluded that the Court of Appeal was therefore, right to have declared the writ a nullity for reason of failure of the appellant to put the respondents on notice when it sought leave to institute a derivative action. H

The 2nd cross-respondent argued that the writ of summons is bad in law because the conditions precedent to using the name of the company in litigation were not complied with. The cross-respon-

dent stated the steps to be followed by a minority share holder who intends to bring a derivative action in the name of the Company. There must first be an application for leave of court by originating summons on notice to the company and alleged wrong doers. This will be followed by a preliminary application after the applicant would
 B have satisfied the conditions laid down in section 303 (2) of CAMA. Where the court is satisfied it would grant leave to commence the action in the name of the company and make ancillary orders. The applicant would then file their writ of summons and other court processes.
 C Under the circumstance of inter-party hearing, the procurement of leave by way of ex-parte proceedings denies the persons whose right is affected of fair hearing. The lapse cannot be treated as an irregularity under Rule 18 of the companies Proceedings Rule as it is a breach of condition precedent to instituting an action. The 2nd
 D cross-appellant submitted further that a personal action cannot be predicated on an improperly commenced suit. The court is urged to uphold the decision of the Court of Appeal.

The 10th and 11th cross-respondents urged the court to disregard the cases cited by the cross-appellant as arguments canvassed
 E therein that non-compliance with the rules would only amount to an irregularity. Where an action is brought on behalf of the Section 2 (1) of the Companies Proceedings Rules of 1992 provide that it must be commenced by an originating summons, failure to comply with the Rule is not a mere irregularity but renders the proceedings a nullity.
 F The respondents cited the cases of

Okolo v. Union Bank of Nigeria Ltd. (2004) 1 SC pt. I pg I at pg. 30

Lahan v. A-G Western Region (1963) 1 ALL NLR pg. 226
 G Obajimi v. A-G Western Nigeria (1967) 1 ALL NLR pg. 33
 This court is urged to resolve this issue in favour of the 10th and 11th respondents.

The 12th cross-respondent referred to the arguments of the cross/appellant that: -

H (a) The provisions of the Companies Rules 1992 particularly Rule 2 (1) thereof is directory and not mandatory.

(b) The commencement of the suit by a writ of summons instead of an originating summons is a mere irregularity.

(c) The cross-appellant argued that the breach of the rules of

fair hearing normally renders the proceedings a nullity and as such it was wrong for the Court of Appeal to have declared the Writ of Summons process a nullity. The word “shall” in its ordinary meaning is a word of command which is normally given a compulsory meaning because it is intended to denote obligation.

The 12th respondent disagreed with the above arguments and held that the use of word “shall” in Rule 2(1) and (2) makes compliance with the rule mandatory. The cross-respondent cited the cases

Ugwu v. Ararume (2007) 12 NWLR pt. 1048 pg. 367 at pgs 441 - 442

Col. Kaliel (Rtd.) v. Alhaji Akero (1999) 4 NWLR pt. 597 pg. 139

On the second point raised, the 12th cross-respondent replied that where a statute or rule of court provides for a procedure for the commencement of an action, failure to follow that procedure renders any suit commenced incompetent. The defect complained about in this appeal was very fundamental to the competence or jurisdiction of the trial court so as to render the writ and the subsequent proceedings null and void. The cross-respondent cited cases in support

Obasanjo v. Yusuf (2004) 9 NWLR pt. 877 pg. 144 at pg. 221

Obajinmi v. A-G Western State (1968) NMLR pg. 96

Odofin v. Agu (1992) 3 NWLR pt. 229 pg. 350 at pg. 369

Odu’a Investment Co. Ltd v. Talabi (1997) 10 NWLR pt. 523 pg.1 at pgs. 21-22.

The cross-respondents argued on the breach of fair hearing, the appellant did not comply with the procedure envisaged for the commencement of a derivative action by the filing of a derivative action on notice to the Directors of the appellant who were in control and will not take necessary action. The applicants filed a motion ex-parte which is not within the contemplation of CAMA and the Rules. Such non-compliance with the procedure laid down by law amounts to a breach of the company’s right to fair hearing as guaranteed by Section 36 of the 1999 Constitution. This nullifies the entire proceedings. The Court is urged to hold that the Court of Appeal was right in declaring the Writ of Summons issued in this case void as the action was not properly constituted as a derivative action.

Issue No. 4

Whether the refusal by the court below of the 3rd Respondent/Cross-Appellants/Respondents' Notice was not wrong in the circumstance.

The cross-appellant argued that the court below ought in the alternative to have granted the relief contained in the Respondents' Notice by which relief is sought to restrict the order of injunction granted by the trial court to the 2nd respondent, Unipetrol Nigeria Plc. There was no complaint against the order of injunction on the merit. This court is urged to invoke Section 22 of the Supreme Court Act and grant the relief. The cross/appellant urged this court to set aside the judgment of the court below and restore the order of the Federal High Court or at least grant the relief in the respondents' notice.

The 1st, 4th and 5th cross-appellants submitted on this issue that the order prayed for by the 3rd respondent in its respondents' notice could only have been lawfully made if an action was still alive at the trial court. The resultant effect of the striking out of the writ by the lower court was that there was no longer a substantive action upon which the order prayed for by the 3rd respondent could rest. The order of injunction can only be made if there is a substantive cause of action - an order contained in the 3rd respondent's notice would have amounted to an order in futility since the writ on which it was predicated had been declared a nullity by the lower court. The cross-appellants concluded that the Court of Appeal was right to have refused to grant the prayers contained in the 3rd respondent/cross-appellant's notice.

The 2 cross-respondent submitted that the lower court rightly found that the issuance of the writ and the service was faulty; hence the entire suit was incurably bad. In the circumstance the respondent's notice seeking to vary the injunctive reliefs was properly refused by the lower court. The lower court also considered the competence of the court to assume jurisdiction in the matter having regard to the manner by which the derivative action was commenced. This court is urged to resolve this issue in favour of the 2nd cross-respondent.

The 10th and 11th cross-respondents contended that since the lower court declared the writ of summons a nullity, it was right to have refused the cross-appellant respondent's notice. When an action has been held to be a nullity, any subsequent proceedings in the matter would be, a nullity. The cross-respondent cited cases.

Matsy v. VAC (2961) 3 ALL ER 1169 at 1172

Leedo Presidential Motel v. B.O.N. Ltd. (1998) 10 NWLR pt. 520 pg. 353

A-G Anambra State v. Okafor (1991) 6 NWLR pt. 200 pg. 659

The 12th cross-respondent submitted that the cross-appellant by the respondents' notice requested that the order of injunction made by the trial court be restricted to the 2nd respondent alone - Unipetrol (Nigeria) Plc. Since the Court of Appeal declared the issuance and service of the writ null and void, there is nothing upon which the relief sought can be placed. The writ of summons has been nullified therefore the action founded upon it has been extinguished. The Court of Appeal rightly refused the cross-appellants respondent's notice in the circumstance of this case. The 12th cross-respondent urged this court to dismiss the 3rd respondent/cross-appellant's cross-appeal.

I have carefully considered the argument and submission of all parties for and against all the issues raised for determination in this cross-appeal. The 2nd cross-respondent filed notice of preliminary objection on 8/7/09 which was argued in his brief deemed filed on the 14th of July 2009. This court intends to determine this preliminary objection which affects grounds 1, 2 and 4 of the grounds of appeal and the issues formulated thereupon. The 2nd cross-respondent argued that ground one of the ground of appeal and issue one raised therefrom is solely on the question of illegality which did not arise from the judgment of the lower court. Interestingly enough the 2nd cross-respondent in the argument on this objection said that: -

"The 3rd respondent concedes that the cross-appellant at the lower court canvassed some argument about illegality during the hearing of the appeal. However, the lower court never considered this point in its judgment. At best the proper complain before this court should only be a complaint on the failure to determine the issue of illegality raised before the court. What the cross-appellant did in ground 1 i.e. to touch the issue of illegality as an error arising from the judgment."

Vide paragraph 4.02 at page 4 of the 2nd cross/respondent's brief.

In my view, the germane argument of the cross-appellant is that in the face of illegality disclosed by the affidavit in support of the

motion ex-parte in the Federal High court, the court below ought in law not to have set aside the order of interim injunction. The cross-appellant argued further that illegality once brought to the attention of the court overrides all other questions and the court would not close its eyes against such illegality. Vide paragraphs 4.4 and 4.5 at pg B 9 of the cross-appellant's brief. The submission of the cross-appellant tallies with contention of the 2nd cross-respondent on this issue.

There is also the objection that ground 2 of the Notice of cross-appeal is also incompetent because it is at its best a ground of mixed law and fact and no leave was obtained for it to be filed and argued. C The 2nd cross-respondent further submitted that the cross-appellant made an application on the 31st of May 2005 for leave to appeal on questions of mixed law and fact, leave of court was granted in respect of grounds 1 and 3. It is my view that if ground 3 was also a ground D of mixed law and fact, the court in doing substantial justice would have extended such leave to ground 2. Ground 2 of the ground of appeal is a complaint against the issuance and service of a writ of summons which in my view and in conformity with decided cases is purely a ground of law which does not require or call for an investi- E gation as to whether the writ of summons issued was for service within or outside the jurisdiction of court. It is a question of the format of the writ issued in the Registry. ***The question raised by ground 2 of the cross-appeal and the issue for determination distilled from same is whether the lower court had jurisdiction to declarer null and void the writ of summons issued in this case meant for service within jurisdiction. This to my mind is an issue of law, as determination of same is based on the writ of summons and statement of claim of the appellant before the court.***

F ***Nwadike v. Ibekwe (1987) 4 NWLR pt. 67 pg. 718 at pg. 744 paragraphs C - F where it was held inter alia that: -***

"Several issues that can be raised on legal interpretation of deeds, documents, terms of art, words or phrases and inferences drawn thereof are grounds of law."

H Nigerian National Supply Co. Ltd v. Establishment Sima of Vaduz (1990) 7 NWLR pt. 164 pg 526 at 529

MPDI v. Okonkwo (2001) 3 SC 76 at pg. 87.

The 2nd cross-respondent concluded that ground 4 of the ground of cross-appeal and the issue distilled therefrom is vague,

inchoate and ambiguous. The cross-appellant further argued that each ground of appeal is separate and distinct from one another and must not be vague or imprecise. I agree with the pronouncement of this court in the case *Central Bank of Nigeria & Anor v. Aite Okojie & 5 Ors* (2002) 8 NWLR pt. 768 SC 48 that

“vagueness of a ground of appeal may arise where it is couched in a manner which does not provide any explicit standard for its being understood or when it is not susceptible of being understood.”

The cross-respondent held that the ground cannot stand on its own and recourse will have to be heard to some other ground of appeal in the Notice of Appeal to make any meaning.

I cannot pinpoint any ambiguity in either the ground of appeal and the particulars or the issue raised from it. The issue formulated from the ground was properly and clearly argued by all the parties. I regard this preliminary objection as time wasting and lacking in merit and I consequently dismiss same in its entirety. This renders the coast clear to consider the issues raised in the cross-appeal. I have reviewed the argument and submission of all parties earlier on.

Issue One

In respect of issue one, the vital submission of the cross-appellant is that the issue of the illegality of the transaction was brought to the attention of the lower court which failed to consider same in its judgment. The cross-appellant at pages 443, 444 and 478 (b) of the Record of Appeal drew attention of the court below to the facts giving rise to the issue of illegality in the transaction between 1st and 2nd cross-respondents in this case. The court below in the circumstance ought not to have set aside the order of interim injunction. ***I agree that the cross-appellants adequately pleaded the issue of the illegality in the transaction between the 1st and 2nd respondents in this case in its statement of claim in their substantive action, and also in the affidavit in support of the motion ex parte dated the 11th of February 2002.***

The lower court obviously and rightly did not make any pronouncement on same because it would at that stage of the proceedings be clearly premature. It will amount to the court pronouncing or deciding at an interlocutory stage on the matter it is supposed to determine in the substantive suit of the case. It is a long standing principle of court pronounced in

numerous decided cases that - A court must be cautious in its judgment at an interlocutory stage not to make pronouncements or observations on the facts which might appear to pre-determine the main issue or issues in the proceedings yet to be concluded by the court.

- B Ojukwu v. Governor of Lagos (1986) 2 NWLR pt. 26 pg. 39
- Iweka v. SCOA (Nig) Ltd. (2000) 7 NWLR pt. 664 pg. 325
- NDIL v. SEN Plc (2003) 4 NWLR pt. 41 pg. 311
- Egbe v. Omogun (1972) 2 SC pg. 90 at pg. 93 NDIC v. CBN (2002) 4 MSC pg. 66 at pg. 81
- C Shanu v. Afribank (Nig) Plc (2002) 17 NWLR pt. 795 pg. 185 at pg. 230 - 231
- A-G Federation v. A-G Abia State (2001) 11 NWLR pt. 725 pg. 689 at pg. 742
- D Oduntan v. General Oil Ltd. (1995) 4 NWLR pt. 387 pg. 1 at pg. 13
- University Press Ltd. v. I.K. Martins (Nig) Ltd. (2000) 4 NWLR pt. 654 pg. 584 at pg. 595.
- A.C.B. v. Losade (Nig) Ltd (1995) 7 NWLR pt. 405 pg. 26
- E Ogbonna v. President of Nig. (1990) 4 NWLR pt. 142 pg. 143
- Akintunde v. Ojo (2002) 4 NWLR pt. 757 pg. 284
- Ezeafor v. Okeke (200) 7 NWLR pt. 665 pg. 363
- It is also settled and the principle is still evergreen that illegality once brought to the attention of court overrides all other questions and the court would not close its eyes against such illegality. Neither will the court lend its aid to the perpetrators of any illegality.
- F Belvoir Finance Co. Ltd. v. Harold Cole & Co. (1969) 2 All E.R. at 908
- G Thirwell v. Oyewunmi (1990) 4 NWLR pt. 144 pg. 384 at pg. 400
- Ekunife v. Wayne West Africa Ltd. (1989) 5 NWLR pt. (122) pg. 422 at pg. 450
- ACB v. Alao (1994) 7 NWLR pt. 358 pg. 614 at pg. 631
- H Jethwani v. Nigeria Wire Ind. Plc. (1999) 5 NWLR pt. 602 pg. 326 at pg. 355

It is worthy of note that the court in going through the Record of Appeal might have noticed that the contract for the sale of shares is not ex facie illegal. As paragraph 17 of the Counter affidavit before

the trial court sworn to on the 24th of September 2002 by the 3rd respondent at page 73 of the Supplementary Record reads, that: -

“Contrary to paragraph 25 of the affidavit, the transaction is not illegal, and is not a merger or acquisition but a mere transfer of shares from one person to another which had been approved by the 15th and 16th respondent in their capacity as regulatory agencies.” B

The Securities Exchange Commission, the 12th respondent and the Nigerian Stock Exchange, the 11th respondent in the cross appeal had on the 6th of February 2002 and 20th of February 2002 both issued approval to the transaction and confirmed that it did not offend any Nigerian law at that time. In effect the issue of illegality canvassed might turn out to be bemusedly speculative. C

It is trite principle also that a court should not decide a case on mere conjecture or speculation. Courts of laws are courts of facts and laws. They decide issues on facts established before them and on D laws. They must avoid speculation.

Orhue v. NEPA (1998) 5 NWLR pt. 55 pg. 187

Oguonze v. State (1998) 7 NWLR pt. 551 pg. 521

Anyashaun v. UCH (1996) 10 NWLR pt. 476 pg. 65

Adefulu v. Okulaja (1996) 9 NWLR pt. 475 pg. 668 E

Overseas Construction Co. Ltd. v. Greek Enterprises (Nig) Ltd. (1985) 3 NWLR pt. 13 pg. 407.

Agbir v. Ogbeh (2006) 11 NWLR pt. 900 pg. 65

The lower court cannot therefore entertain the issue of illegality in setting aside the ex-parte injunction when it was based on mere speculation, and not considered on merit by the trial court. I resolve F Issue One in favour of the cross-respondents.

Issue Two

Issue Two is on the essence of and failure to obtain leave for G the issuance and service of writ of summons out of jurisdiction. The core issue for consideration was whether the Court of Appeal was right in law to have nullified the issuance and service of the Writ of Summons in this particular case in hand. I have considered this issue extensively in the main appeal. I will only specify the proper laws in H support of my contention, which will serve the same purpose and adequately dispose of this issue.

All parties agreed that obligation can only be discharged by obtaining the requisite leave. The cross-appellant argued that according

to the Ruling and Order of the lower court, the 1st defendant had to be served in Amsterdam and that order amounts to giving the requisite leave. I disagree right away with the submission as the order of the trial court is to the effect that: -

B *“(i) The respondent Agip Petroli International B.V. should be served outside jurisdiction at its registered office in Amsterdam.*

(ii) All other Directors be served by substituted means through the Company Secretary of the plaintiff.”

C The foregoing order of court was made in the face of the error of the cross-appellant to issue any Writ of Summons for service on the 2nd respondent and 1st cross-respondent at its business office outside the jurisdiction of court. All writs issued by the appellant was for service within jurisdiction including the Writ of Summons meant for service on the Agip Petroli International B.V. which in the eyes of the D Company and Allied Matters Act is a foreign company with no known address in Nigeria. Any writ of summons issued for service on it within jurisdiction can never be applicable. The appellant ought to have issued a concurrent writ for service outside the jurisdiction of the Federal High Court, as by the appellant’s pleadings the address was indicated as 449 Via Laurentina, Rome Italy.

E The appellant wrongly issued writ for service on the 1st defendant-respondent and 3rd - 13th defendant-respondents, which writ of summons now imbibe all the cross-respondent for service on them at the address stated as: -

F c/o The Company Secretary
Agip (Nig.) Plc
Plot 23, Engineering Close
Victoria Island, Lagos

G The order of court cannot constitute the leave for the purpose of serving outside jurisdiction as the affected writ was issued for service within jurisdiction only. It was an order made by the trial judge exercising his inherent powers to correct the mistake of a party in the issuance of a writ and to bring it in line with the address pleaded in the statement of claim. Hence as observed in the case of *Erisi v. Idika* H (1989) 4 NWLR pt. 66 pg. 503 at pg. 512 the court clarified the air as to the inherent powers of court that: -

“Inherent powers enure to a superior court of record enabling it to make such orders or take such actions as will protect or enhance

the dignity of the court or promote the speedy or fair dispensation of justice.”

The cross/appellant also argued that the lower court should have invoked Order 13 Rule 5 (b) of the Federal High Court Rules 2000 to permit substituted service of the Writ on the 1st, 3rd - 15th defendants-respondents including the cross-respondents through the Company Secretary of the plaintiffs. The reasons given were embodied in paragraphs 40 - 41 of the affidavit in support of the ex-parte application (vide page 74 of the Record). Paragraph 40 “The 1st Defendants are residing outside Nigeria.”

Paragraph 41

“The Company Secretary of the plaintiffs is in close contact with the 1st Defendant and service of court processes on the Company Secretary of the plaintiffs will come to the knowledge of the 1st defendant.”

The format of the Writ of Summons issued for service within and outside jurisdiction will not permit the foregoing.

Order 6 Rule (5) provides that: -

“For the purpose of writ of summons or for any other process relating to an action in the court, the whole Federation is within the jurisdiction of the court.”

The relevant provisions to issuance and service of Writ in the Federal High Court Rules 2000 are as follows: -

Order 6 Rules (1) (2) and 2 (a) and (b).

Order 6 Rule 1 “A writ of summons shall be issued by the Registrar or other officer of the court empowered to issue summons on application.

(2) The application shall ordinarily be made in writing by the plaintiffs solicitor by contemplating Form I in Appendix 6 to those Rules, but the Registrar or other Officer empowered to do so may where the applicant for a writ of summons is illiterate, or has no solicitor, dispense with a written application and instead himself record full particulars of an oral application made and on that record a writ of summons may be prepared, signed and issued.

Order 6 Rule 2. The Writ of Summons shall -

(a) Contain the name and place of abode of the plaintiff and defendant so far as they can be ascertained and

(b) State briefly and clearly

(i) The subject matter of the claim and the relief sought, and

(ii) The date of the writ and place (called the return place) of hearing Order 6 Rule 9 (2)

"Before A writ is issued in an action brought by a plaintiff who is bringing it i.e. acting by order or on behalf of an person resident outside of jurisdiction, it shall be endorsed with a statement of that fact and with the address of the person so resident."

Order 6 Rule 13

"Issue of a writ takes place upon its being signed by a judge in Chambers."

Order 6 Rule 12(1)

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

Order 13 Rule 13 (g)

"Service out of jurisdiction of a writ of summons on notice of a writ of summons may be allowed by the court or a Judge in Chambers whenever: -

(g) Any person out of jurisdiction is a necessary or proper party to an action properly brought against some other party within the jurisdiction."

Order 13 Rule 14 (1) provides that: -

"Every application for leave to serve a writ or notice on a defendant out of jurisdiction shall be supported by affidavit or other evidence stating that in belief of the deponent the plaintiff has a good cause of action and showing in what place or country the defendant is or probably may be found and the grounds upon which application is made."

As agreed by the parties - such leave as defined in Black's Law Dictionary 6th Edition means "permission obtained from the court to take some action. Such permission must be obtained before taking the requisite step."

Ndoma-Egba v. Government of Cross River State (1991) 4 NWLR pt. 188 pg. 773.

It is a well established principle that issuance of a writ and service of same are distinct legal process in civil litigation though they are both invoked in the process of putting the other party on notice. Going by the foregoing Rules of the Federal High court 2000, it is crystal clear that issuance and service of the Writ by the appellant were not in compliance with the Rules. The Writ was not regularly

issued as a writ meant for service out of jurisdiction. The lower court was in order to have declared the issuance and service of the Writ of Summons null and void. This court has held in numerous decisions that rules of court must be obeyed by litigants -and they are binding on all the parties before the court. Rules of court are not mere rules, but one by nature akin to subsidiary legislations by virtue of Section 18(1) of the Interpretation Act and therefore have the force of law. B

Oba Aromolaran & Anor v. Oladele & 2 Ors (1990) 7 NWLR pt. 162 pg, 359

Bango v. Chado (1988) 9 NWLR pt. 564 pg. 139

Duke v. Akpabuyo Local Government (2005) 19 NWLR pt. 959 pg. 130 at pgs 148 -157

Owners of the M. V. Arabella v. Nigerian Agricultural Insurance corporation (2008) 11 NWLR pt. 1097 pg. 182 at pgs. 205-206.

Issue two is resolved in favour of the Cross-Appellants.

Issue Three

The live question for determination is whether the Court of Appeal was right in declaring the summons issued in the case void on the ground that the action was not properly constituted as a derivative action. E

For the purpose of a derivative action, the Company and Allied Matters Act, Cap C 20 Laws of the Federation 2004 and Rule 2(1) Company Proceedings Rules 1992 expect the defendants - who are the Directors of the Company or the alleged wrong doers to be affected by the outcome of the suit to be properly put on notice, as non-compliance with the law amounts to a breach of the right to a fair hearing as guaranteed by Section 36 (1) of the 1999 Constitution. F

Parties are at one that the action before the Federal High Court was a derivative action. There is a procedure laid down by law for the commencement of a derivative action. Such procedure as laid down by statute or Rule of Court for the commencement of a suit becomes a condition precedent, and failure to invoke and follow it renders the suit commenced incompetent and any proceedings based on such null and void. At page 493 of the Record the lower court held that: G H

“The non-compliance with the above rules which amounts to a denial of principles of fair hearing is a justification for pronouncing the process a nullity.”

Section 303 of the Company and Allied Matters Act stipulates that: -

"Subject to the provisions of section (2) of this section, an applicant may apply to the court for leave to bring an action in the name or on behalf of a company or to intervene in an action to which the company is a party, for the purpose of prosecuting, defending or discontinuing the action on behalf of the company.

(2) No action may be brought and no intervention may be made under sub-section (1) of this section, unless the court is satisfied that: -

(a) The wrongdoers are the directors who are in control and will not take necessary action.

(b) The applicant has given reasonable notice to the directors of the company of his intention to apply to the court under subsection (1) of this section if the directors of the company do not bring, diligently prosecute or defend or discontinue the action.

(c) The applicant is acting in good faith and

(d) It appears to be in the interest of the company that the action be brought, prosecuted, defended or discontinued.

Section 304 provides that: -

(1) "In connection with an action brought or intervened under section 303 of this Act, the court may at any time make any such order or orders as it thinks fit.

(2) Without prejudice to the generality of subsection (1) of this section, the court may make one or more of the following orders, that is an order -

(a) authorizing the applicant or any other person to control the conduct of the action by giving directions for the conduct of the action.

(b) Giving directions for the conduct of the action.

(c) Directing that any amount adjudged payable by a defendant in the action shall be paid in whole or in part, directly to former or present security holders of the company instead of the company.

(d) Requiring the company to pay reasonable legal fees incurred by the applicant in connection with the proceedings."

Rule 2 (1) of the Companies Proceedings Rule 1992 provides that: -
"Except in the case of the application mentioned in Rules 5 and 6 of these Rules and applications made in proceedings relating to the wind-

ing up of Companies, every application under the Act shall be made by originating summons.”

(2) An originating summons under these Rules shall be in Form I specified in the schedule to these Rules.

With the community reading of the provisions of section 303 (1) of CAMA and Rule 2 (1) of the Companies Proceedings Rule 1992, the application must be commenced with an originating summons on notice, and not an ex-parte application engaged by the appellant. I have to explain at this juncture that this issue relates to an interparty hearing. A preliminary stage in a derivative action where it is determined whether there is substance in the main action. The effect of the provision of section 301 (1) is to deprive the Directors of the Company the power as duly authorized organ of the company, to authorize the bringing of an action in the name of the company. The action is that brought by the minority shareholder in the name of the company. An order which has the effect of stripping the Directors of their statutory right must be one in respect of which they should be given the right to be heard before it is made as their civil rights and obligations would be affected. Consequently, it is right to give them fair hearing as enshrined in section 36 (1) of the 1999 Constitution. The leave to be granted in the application referred to in Rule 2 (1) of the Companies Proceedings Rule relates to the rights of the company whose name shall be employed in the capacity of the plaintiff. The case of *Provisional Liquidator of Tapp Industries Limited v. Tapp Industries* (1995) 5 NWLR pt. 393 pg. 9 at pg. 36, a minority shareholders petition and not a derivative action is not applicable in the circumstance of this case.

The cross-appellant wrongly argued that the provisions of the Companies Proceedings Rules particularly Rule 2 (1) is merely directory and not mandatory. I disagree with this view because of the word SHALL in the provision. The word shall in the ordinary meaning is a word of command which is normally given a compulsory meaning because it is intended to denote obligation. When the word shall is used in a statute it is not permissive it is mandatory, it imports that a thing must be done.

Nigerian LNG Ltd. v. African Development Insurance Co. Ltd. (1005) 8 NWLR pt. 416 pg. 677.

Col. Kaliel (Rtd.) v. Alhaji Aliero (1999) 4 NWLR pt. 597 pg. 139

More important is that where a statute or Rule of court provides for a procedure for the commencement of an action, failure to follow that procedure renders any suit commenced otherwise incompetent. In the case of Obasanjo v. Yusuf (2004) 9 NWLR pt. 877 pg. 144 at page 221, the Court decided that: -

“It is elementary law that a plaintiff in the commencement of an action must comply strictly with the provisions of the enabling law. He cannot go outside the enabling law for redress.”

In effect, to commence a suit by a writ of summons instead of originating summons as enacted in a Statute cannot be overlooked as a mere irregularity by virtue of Rule 18 of the Companies Procedure Rules 1992 as argued by the cross-appellant.

Lawani v. Oladokun (2003) 2 NWLR (p. 804) pg. 271 at pg.

D 287

Obajinmi v. A-G Western State (1968) NMLR pg. 96

Odofin v. Agu (1992) 3 NWLR pg. 229 pg. 350 at pg. 369

Odu’a Investment Co. Ltd v. Talabi (1997) 10 NWLR pt. 523

pg.I at pgs. 21-22

E Harkness v. Bell Asbestos & Engineering Ltd (1967) 2 QB 729 at pg. 735

Okolo v. Union Bank of Nigeria (2004) 1 SC pt. 1 pg.I at pg. 30

F Lahan v. A-G Western Nigeria (1963) 1 ALL NLR pg. 226.

Another argument of the cross-appellant is that what is affected by the breach of fair hearing is the proceedings and not the process. The reply here is that by non-compliance with the condition precedent to institute a derivative action, both the process and proceedings emanating therefore are rendered null and void.

G *Madukolu v. Nkemdilim (1962) 1 ALL NLR pg. 587.*

Finally, the lower court could not in the interest of justice convert the action to a personal action suo motu, when there was no application by party to that effect. Moreover it would not have served any useful purpose when the suit was improperly commenced. I affirm the finding of the lower court that the writ of summons was a nullity because the condition precedent to using the name of the company in litigation was not complied with. I resolve the third issue in favour of the Respondent.

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Issue Four

The question to be resolved under this issue is

Whether the Court of Appeal was right in refusing the relief contained in the Respondents' Notice.

This court need not belabour this issue as the answer is simple and straightforward. The respondents' notice sought to vary the injunctive reliefs granted by the trial court. ***The reliefs in the Respondents' Notice was predicated on the Writ of Summons being validly issued and that the suit itself was properly commenced as a derivative action. In issue two, the trial court and the lower court found that the issuance and service of the writ was a nullity being a writ meant for service outside the jurisdiction of the Federal High Court.***

Under Issue 3, this court and the lower court found that the suit was improperly commenced as a derivative action. When an action has been held to be a nullity any subsequent proceedings in the matter would be a nullity. The court below could not in the alternative have granted the relief contained in the Respondents' Notice as maintained by the cross-appellant.

A-G Anambra State v. Okafor (1991) 6 NWLR pt. 200 pg. 659

Macfoy v. VAC (1961) 3 ALL England Reports pg. 1169 at pg. 1172

The lower court was right in refusing the cross-appellants/respondents notice in the circumstance. This issue is resolved in favour of the Cross-Respondents.

The 3rd Respondents/Cross-Appeal lacks merit. It is accordingly dismissed. In the final analysis, both the main appeal and cross-appeal are dismissed. The judgment of the lower court is affirmed. N50,000.00 costs of the appeal and N50,000.00 costs of the cross-appeal are to be paid to the Respondents/Cross-Respondents.

MUKHTAR JSC

I have read in advance the lead judgments of my learned brother Adekeye, JSC. I am in full agreement with the reasoning and conclusion reached therein that the main appeal lacks merit, and

ought to be dismissed. In the same vein the cross-appeal also lacks merit and should be dismissed. I therefore also dismiss both appeals, and abide by the consequential orders made in the lead judgments.

B

TABAI JSC

The Appellant, as Plaintiff commenced this action on the 11th of February 2002 .claiming against, the Defendants jointly and severally:

C

(1) A declaration that the purported sale of 1st Defendants 255,902,769 shares in the Plaintiff at the instance of the directors who are in control and other Defendants in this suit favour of the 2nd Defendant is illegal, unlawful and constitutes a fraud on the Plaintiff and its members and other persons having an interest therein.

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(2) An order nullifying and/or invalidating such purported sale alienation and/or transfer of the shares from the 1st Defendant to the 2nd Defendant.

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(3) An order restraining the Defendants whether by themselves and/or by their agents privies representatives or any person acting for and/or through them or on their behalf from dealing in the 1st Defendant's shares of the Plaintiff.

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(4) An order that the Plaintiffs bear the costs of the legal representation in this suit.

F

On that same 11th of February 2002 the Plaintiff/Appellant filed an ex parte motion in which it prayed for:

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1. An order of interlocutory injunction restraining the Defendants by themselves, agents, privies representatives whomsoever acting for them and on or on their behalf from selling, alienating, disposing, transferring and or parting with possession of the shares held by the 1st Defendant in the Plaintiffs pending the hearing and determination of this suit.

H

2. An order to serve the 1st, 3rd - 15th Defendants by substituted means through the Company Secretary of the Plaintiffs and such service be deemed as proper.

H

3. An order of interim injunction restraining the Defendants whether by themselves, agents, privies, representatives whomsoever acting for and or on their behalf from selling alienating, disposing, transferring and or parting possession with the shares held by the 1st

Defendants on the Plaintiff company pending the hearing and determination of the Motion on Notice.

On the 18th of February 2002, the Appellant filed yet another *exparte* motion which prayed for:

“An order pursuant to Section 303 of the Companies and Allied Matters Act (CAMA) Cap 59 Laws of the Federation 1990, granting leave to the Applicants to bring this action in the name and or on behalf of the Plaintiffs i.e. AGIP (NIGERIA) PLC.”

Both application were heard on the 27/2/2002 and granted. In granting the application the learned trial judge stated in part:

“I hereby order that the 1st Defendant be served at its registered office in Amsterdam while I grant the prayer for the 3rd -13th Defendants, to be served by substituted means through the Company Secretary of the plaintiff. The third relief on the motion paper is granted in terms. The Defendants are restrained by themselves, their agents, privies or howsoever from selling alienating, disposing, transferring and/or parting with the shares held in the Plaintiff by the 1st Defendant pending the hearing and determination of the motion on notice herein.

Further to this, I order that the Defendants be served with the writ of summons, statement of claim, motion on notice with its affidavit in support along with these orders for leave, substituted service and interim injunction.”

The 1st, 2nd, 4th and 5th Respondents were not happy with the above decision and proceeded on appeal to the Court below. In its judgment on the 22/7/2002, the appeal was allowed. The writ of commons was held to be incurably bad and a, nullity. The Plaintiffs were aggrieved by the decision of the Court below and have come on appeal to this Court.

This appeal raises two key issues.

The first relates to the provisions of Order 6 Rule 12(1) of the Federal High Court (Civil Procedure Rules 2000. The said Rule provides that:

“No Writ or Notice of which, is to be served out of jurisdiction shall be issued without leave of Court. “

Learned counsel for the Respondents argued that the requirement for leave to issue a writ is a condition precedent to the validity of any suit and relied on *MADUKOLU v NKEMDILIM* (1962) 1 All NLR 587. In *NWABUEZE V OKOYE* (1988) 4 NWLR (Part 91) 664 the

Supreme Court re-emphasised the consequences of a breach of this nature when it said:

“It is common ground in this case that no leave was obtained by the Plaintiff before the writ was issued or before the Plaintiff caused the writ to be issue. As I have said the issue of the writ of summons and service of same on the defendant are conditions precedent for the exercise of a Court’s jurisdiction over the defendants Since leave was not obtained before it was issued, I must hold and I hold that the writ of summons has been issue without due process of law and accordingly has to be set aside.”

I adopt the above opinion in its entirety. The failure to obtain leave to issue the writ out of jurisdiction in this case is a fundamental breach which robs the court of any jurisdiction.

The second key issue relates to the service of the processes out of jurisdiction. I have earlier reproduced the ruling of the trial court whereby the 1st Defendant/Respondent was ordered to be served at its registered office in Amsterdam. I have also earlier reproduced the reliefs sought in the two exparte motions of the 11th and 18th February 2002. None of them sought any relief for service of the 1st Respondent at its registered office in Amsterdam. The result is the trial court granted a relief never sought. The settled principle of law is that the Court cannot grant a relief not claimed. See *ODOFIN v AGU* (1992) 3 NWLR (Part 229) 350, *OLUROTIMI v IGE* (1993) 8 NWLR (Part 311) 257. The trial court was therefore in error to order the service of the processes on the 1st Respondent at its registered office in Amsterdam.

The result is that both the issuance of the writ of summons and the service of the processes were bad in law. The lower court described them as incurably bad in law and I do not see any conceivable reason to fault the reasoning and decision of the Court of Appeal.

For the foregoing and the fuller reasons contained in the judgment of my learned brother, ADEKEYE JSC, I also find no merit in this appeal. The consequence is that I also dismiss this appeal with costs as assessed in the lead judgment.

MUHAMMAD JSC

I have a preview of the judgment of my learned brother, Adekeye, JSC, just delivered. I am in agreement with him in the conclusions reached in both the main and the cross-appeals. I abide by orders made therein including order on costs. B

FABIYI JSC

I have read in advance the judgment just delivered by my learned brother, Adekeye, JSC. I agree with the reasons therein advanced to arrive at the conclusion that the main appeal as well as the cross-appeal are devoid of merit and should be dismissed. C
The relevant facts have been fully set out in the lead judgment. Put briefly, the appellant as plaintiff at the Federal high Court, Lagos D embarked upon a derivative action by filing its Writ of Summons and Statement of Claim on 11th February, 2002. It claimed against the defendants jointly and severally as follows:-

“(1) A declaration that the purported sale of the 1st Defendant’s 255,902,769 shares in the plaintiff at the instance of the directors who are in control and the other defendants in this suit in favour of the 2nd defendant is illegal, unlawful and constitute (sic) a fraud on the plaintiff and its members and other persons having an interest thereon. E

(2) An order nullifying and/or invalidating such purported sale, alienation and/or transfer of the shares from the 1st defendant to the 2nd defendant. F

(3) An order restraining the defendants whether by themselves and/or by their agents, privies, representatives or any person acting for and/or through them or on their behalf from dealing in the 1st defendant’s shares of the plaintiff. G

(4) An order that the plaintiffs bear the costs of the legal representation in this suit.” H

On 11th February, 2002, the appellant, as plaintiff, also filed H along with the Writ of Summons and Statement of Claim an application *Ex-parte* curiously praying for an order of interlocutory injunction restraining the defendants from selling and/or parting with the possession of shares held by the 1st defendant in the plaintiffs pend-

ing the hearing and determination of the suit. He also prayed for an order to serve the 1st, 3rd-15th defendants by substituted means through the Company Secretary of the plaintiffs and such service be deemed as proper. There was a third prayer for an order of interim injunction to restrain the defendants from alienating and/or parting possession with the shares held by the defendant in the plaintiff company pending the hearing and determination of the motion on notice.

The appellant, as plaintiff, also filed another Motion *Ex-parte* on 18 February, 2002 wherein it prayed for:-

“An order pursuant to section 303 of the Companies and Allied Matters Act (CAMA) Cap. 59 Laws of the Federation of Nigeria, 1990 granting leave to the applicant to bring this action in the name, and on behalf of the plaintiffs i.e. AGIP (NIGERIA) PLC.”

The two ex-parte applications were taken in one fell swoop on 27TH February, 2002. The learned trial judge granted the following salient orders, *inter alia*:-

1. That the plaintiff is granted leave to bring this action on behalf of and in name of the plaintiffs.

2. That the plaintiff is granted leave to serve the 1 defendant at its registered office in Amsterdam.

3. That the 3 -15 defendants be served by substituted means through the Company Secretary of the plaintiff.

4. That the defendants are hereby restrained by themselves, their agents, privies or howsoever from selling, alienating, disposing, transferring and/or parting with the shares held in the plaintiff by the 1st defendant pending the hearing and determination of the Motion on Notice.

The 1st, 2nd, 4th and 5th Respondents herein were unhappy with the stance of the learned trial judge. They appealed to the Court of Appeal (Lagos Division). Thereat, briefs of argument were filed and exchanged and the appeal was heard. In its reserved and well considered judgment handed out on 22nd July, 2002, the Court of Appeal declared the issuance and service of the Writ of Summons null and void.

The plaintiff felt dissatisfied and has appealed to this court. Otunba Adekunle Ojora, the 3 respondent in the main appeal, also had cause to file a cross-appeal in this court.

Briefs of argument were filed on behalf of the parties in both

the main appeal as well as the cross-appeal. Shorn of all irrelevances, the real live issue which I wish to refer to as the crux of the two appeals is “whether the Court of Appeal was right in declaring that the issuance and service of the writ of summons in this case are null and void.”

It was observed by the learned counsel for the 11th Respondent in its brief that the order granting the appellant leave to serve the 1st respondent in Amsterdam was not an order sought in any of the *Ex-parte* Motions filed by the appellant. He felt it was, as such, an order that was inappropriately made and which the appellant cannot benefit from. B C

It is pertinent at this point to express it clearly that a court should not grant a prayer that is not contained in a motion paper. See Chief R. A. Okoya v. Santilli & Ors (1990) 2 NWLR (Pt. 131) 172 at 205. By extension, a court should not award that which was not claimed. D This is because a court is not a charitable organisation. See Egonu v. Egonu (1978) 11-12 SC 111 at 133; Babatunde Ajayi v. Texaco Nig. Ltd. (1978) 9-10 SC 1 at 27; Etim Ekpenyong v. Inyang Nyong (1975) 2 SC 71 at 80; Edebiri v. Edebiri (1997) 3 SCNJ 177; (1997) 4 NWLR (Pt. 498) 165. E

I have taken a close look at the *Ex-parte* applications filed by the appellant herein at the trial High Court on 11th February, 2002 and 18th February, 2002 respectively. I cannot see any prayer in any of the applications for an order granting the appellant as plaintiff leave to serve the 1st respondent out of jurisdiction in far away F Amsterdam. The trial Judge granted the appellant unsolicited bonus. Such was inappropriately made and the appellant should not benefit from same to the detriment of the 1st respondent.

In paragraph 2 of the Statement of Claim, the plaintiff averred G as follow:-

“The 1st defendants (sic) are the 60% percent owners of the shares of the plaintiff company with its office at 449 VIA LAURENTINA, ROME, ITALY.”

Order 6 Rule 12 (1) of the Federal High Court (Civil Procedure Rules H 2000 provides that:-

“No Writ or Notice of which, is to be served out of jurisdiction shall be issued without leave of court.”

There is no evidence on record that leave to issue writ for service on the 1st defendant out of jurisdiction was applied for and granted. The defect, no doubt, was fatal as the case was not initiated by due process of law and upon fulfillment of a condition precedent to the exercise of jurisdiction. See *Madukolu v. Nkemdilim* B (1962) 1 All NLR 587 at 595.

It goes without saying that the lack of leave to initiate the process as required by law obliterated the trial judge's jurisdiction to take the matter as any defect in competence is fatal; for the proceedings C are a nullity no matter how well conducted and decided. This is so as the defect is extrinsic to the adjudication. Since leave was not obtained before the writ was issued, I accordingly hold that it has been issued without due process of law and should be set aside. See *Nwabueze v. Okoye* (1988) 4 NWLR (Pt. 91)664 at 685.

D For the above, I am of the considered view that the Court of Appeal was right in declaring the writ of summons null and void. For the above reasons and the fuller ones contained in the lead judgment, I, too feel that the main appeal as well as the cross-appeal lack merit and should be dismissed. I order accordingly and endorse all E the consequential orders inclusive of that relating to costs.

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