

**SUPREME COURT OF NIGERIA**  
29TH JANUARY, 2010. SC. 339/2001  
**CORAM:- A. I. KATSINA-ALU, M. MOHAMMED,**  
**W. S. N. ONNOGHEN, C. M. CHUKWUMA-ENEH,**  
**M. S. MUNTAKA-COOMASSIE, JJSC**

ALFRED ONYEMAIZU ..... APPELLANT  
AND

1. HIS WORSHIP J. A. OJIAKO

Chief Magistrate's Court Ekwulobia ..... RESPONDENTS

2. THE REGISTRAR.

Chief Magistrate's Court Ekwulobia

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PRACTICE & PROCEDURE - Certiorari - Time of hearing - O. 37 r. 5(4) of High Court Rules of Anambra State - Hearing can only be had - After an affidavit of verification of service - Has been filed as required by the rules (H1)

JURISDICTION - Certiorari - Hearing - Non-compliance with O. 37 r. 5(4) of High Court Rules of Anambra State - Such non-compliance erodes the court's jurisdiction - It is not an irregularity that can be waived or cured (H2)

ACTIONS - Certiorari proceedings - Conditions precedent - Effect of Exhibits 9 and 10 - They are worthless documents - As they were not filed in due process of law - Nor were they of the appellant's personal making (H3)

PRACTICE & PROCEDURE - Certiorari proceedings - Affidavits of service - Who should file - As held in *Re-Appolos Udo* - The filing of a verification affidavit is personal to the applicant - It is not for the bailiff (H4)

ACTIONS - Certiorari proceedings - Initiating motion - Competency - Not having been initiated by due process of law - The instant motion is incompetent ab initio (H5)

**FACTS**

The applicant/appellant filed a motion on notice before the High Court of Anambra State sitting at Ekwulobia, praying that court for an order of certiorari to quash the decision of 1st respondent dated 3/11/1993. The undisputed facts were that appellant was arraigned before 1st respondent on a charge of stealing, following which arraignment he was tried, convicted and sentenced accordingly as per the said decision of 3/11/1993. Appellant did not appeal against the decision but rather brought the said motion for certiorari. The motion, having been filed, were served on respondents by a chief Bailiff of the trial High Court, who thereafter swore to and filed affidavits of service. The affidavits of service were lodged in the court's file before the hearing date - 21/4/94.

Respondents however raised a preliminary objection urging the court to strike out appellant's motion on ground of non-compliance with the provisions of Rule 5(2) and (4) of order 37 of Anambra State High Court (Civil Procedure) Rules 1988, in that the affidavit of service ought to have been sworn to by appellant and not a bailiff. On the next adjourned date respondents were heard on the objection but appellant's counsel took a date to answer to the objection. Before that further date, appellant personally swore to affidavits of service - Exhibits 9 and 10 - relying on and exhibiting the affidavits earlier sworn to by the bailiff. He then addressed the court on respondents' objection placing reliance on exhibits 9 and 10 even without leave. The court eventually upheld the preliminary objection but struck out the motion for certiorari. Aggrieved, appellant appealed to Court of Appeal but the appeal was dismissed. Still aggrieved, appellant has come on a further and final appeal to Supreme Court.

**ISSUES FOR DETERMINATION**

Whether the provisions of Rule 5(4) of Order 37 have been complied with or not by the applicant in initiating this application.

**HELD** (Unanimously dismissing the appeal per **CHUKWUMA-ENEH JSC**)

***Certiorari - Time of hearing - O.37 r. 5(4)***

1. A reading of the said provisions shows that it has raised the question of filing by an applicant an affidavit verifying the names and addresses of the persons served the substantive motion on notice,

together with the dates of such service and place of service; this affidavit of verification must be before the court on the hearing of the motion - thus underscoring the point that the motion on notice must be filed before the date fixed for hearing. Therefore these provisions as per Rule 5(4) of Order 37 have prescribed the enabling pre-conditions to be complied with before a court can be said to be properly seized of a matter. (p. 381 C)

***Certiorari - Hearing - Non-compliance with O.37 r. 5(4)***

2. Let me say here that having examined the said provisions closely there can be no doubt that those conditions go to the competence of the motion on notice, all aimed towards achieving compliance with due process and therefore their absence could completely erode the jurisdiction of a court handling the matter and so, the absence of any of them is fatal. They are not mere procedural irregularities that can be waived or otherwise cured on any basis as per the provisions of order 26 Rule 5 to be set out later as has been urged by the applicant. (p. 381 F)

***Certiorari proceedings - Conditions precedent***

3. It is to be noted that the said affidavits i.e. Exhibits 9 and 10 have been filed on 17/7/95 nearly 9 months after the motion on notice with exhibits 8 and 8A exhibited to the said affidavit in support has been filed. They are clearly not filed in due process of law. The appellant has totally misconceived this requirement. Even then Exhibits 9 and 10 are not of the appellant's personal making but that of the Bailiff of the court and secondly, exhibits 9 and 10 do not satisfy Section 79 of the Evidence Act which has clearly stipulated that a party wishing to make use of an affidavit in a proceeding as here must file only the original of the affidavit in court and I couldn't agree more with the court below that under these circumstances exhibits 9 and 10 are worthless documents. (p. 382 D/G)

***Certiorari proceedings - Affidavits of service***

4. The case of Re: Appolos Udo (supra) has construed the foregoing provisions of Rule 1(4) of Order 2 and in a well reasoned judgment of the Court below per Olatawura JCA (as he then was) at P. 126 paragraph D-F.

I can say here without more that the construction of Order 2 Rule 1(4) as stated above should be applied mutatis mutandis to the construction of the provisions at Rule 5(4) Order 37. The above construction of Order 2 Rule 1(4) cannot be faulted. And so, with approval of the decision in *Re Appollos Udo* (supra) I adopt the above reasoning in construing the instant Rules 5(4) Order 37. In this regard, therefore I hold that the filing of a verification affidavit is personal to the applicant/appellant in this matter and not that of the Bailiff. (pp. 383 D/384 D)

***Certiorari proceedings - Initiating motion - Competency***

5. As I have anticipated above in the body of this judgment any failure to comply strictly with the provisions of Rule 5(4) of Order 37 goes to the competency of the motion. In other words, it renders the motion incompetent and so deprives the court of the necessary vires to entertain the matter. What I am trying to say here is that the substantive motion on notice for an order of certiorari to quash the decision of His Worship J. O. Ojiako given on 3/11/93 not having been initiated by due process of law, that is, upon the fulfillment of all conditions precedent and as co-existing as set out above for the exercise of the court's jurisdiction, the instant motion on notice is incompetent ab-initio and a non starter. (p. 385 F)

***NOTABLE POINT OF INTEREST***  
***ONNOGHEN JSC***

*Appeals - Fresh issues require prior leave*

From the record, it is clear that the issue of waiver or per incuriam were never raised by the appellant at the trial court neither did that court make any decision on them. The lower court was therefore, in the circumstance, right in holding that for the issues to be raised before it, the leave of that court was required and that since the appellant never obtained such leave the issue was incompetent and consequently struck same out. That decision is supported by numerous decisions of this court. (p. 387 G)

***REPRESENTATION***

Chief C. B. Onyebuchi, for the Appellant

G. E. Ezeuko Esq., with him O. B. Mbamsi (Mrs.) for the Respondent

**CASES REFERRED TO**

- ONAJOBI V. OLANIPEKUN (1985) 4 SC. 156 at 163  
 OLUBODE V. SALAMI (1985) 2 NWLR (Pt.7) 282  
 UOR V. LOKO (1988) 2 NWLR (part 77) 430 at p 437  
 SAUDE V. ABDULLAHI (1991) 20 NSCC 177 at 200 B  
 F.C.D.A. V. SULE (1994) 3 NWLR (Pt. 332) 256 at 282  
 MADUKOLUM V. NKEMDILIM (1962) 1 NWLR 587  
 EZEOKÉ V. NWAGBO (1988) 1 NWLR (Pt. 72) 616 at 626  
 SAPARA V. U.C. H. BOARD (1988) 4 NWLR (Pt. 56) 58 at 61 C  
 OYEYIPO V. CHIEF OYINLOYE (1987) 1 NWLR (Pt. 50) 357  
 SAUDE V. ABDULLAHI (1989) 4 NWLR (Pt. 116) 387 at 425 and  
 437  
 WAPIN V. NIGERIA TOBACCO CO. LTD. AND ANOR. (1987) 2  
 NWLR (Pt. 56) 299 at 306 D  
 ADEWUNMI V. ATTORNEY-GENERAL OF EKITI STATE (2002)  
 FWLR (Pt.92) 1835 at 1868  
 IFEANYI CHUKWU (OSONDU LTD. V. SOLEH BOUSH LTD.  
 (2000) 5 NWLR (Pt.656) 322 at 352  
 UNIVERSITY OF IFE V. FAWEHINMI CONSTRUCTION CO. E  
 LTD. (1991) 7 NWLR (Pt. 201) 26 at 36  
 PAVEX INT. CO. LTD. V. AFRIBANK LTD. & ANOR. (2000) and 4  
 SC (Pt.II) 1961; (1985) 4 SC 156 at 163

**RULES REFERRED TO**

- Anambra State High Court (Civil Procedure) Rules, O. 26 r. 5, and  
 O. 37 r. 5  
 Fundamental Human Rights (Enforcement Procedure) Rules 1979,  
 O. 2 r. 1 F  
 G

**LEAD JUDGMENT BY CHUKWUMA-ENEH JSC**

This appeal is against the decision of the Court of Appeal (Enugu Division) delivered on 2/2/2000 upholding the decision of the Anambra State High Court sitting at Ekwulobia striking out the substantive motion on notice otherwise an application in this matter praying for an order of certiorari to quash the decision of His Worship J. O. Ojiako dated 3/11/1993. H

The applicant and the respondents in the said motion are re-

spectively the appellant and the respondents in this court.

The facts of this matter are not in dispute. The applicant has been arraigned before His Worship J. A. Ojiako charged with the offence of stealing some quantity of corn worth about N500 from a farm and on having been convicted of the offence and sentenced to  
B 6 months imprisonment or to pay a fine of N1000 in the alternative, the applicant did not appeal the decision; rather he has filed an application for leave to apply for an order of certiorari to quash the said decision of 3/11/1993; no specific ground for seeking the relief has  
C been set out in the body of the motion *ex parte*. The trial court obliged accordingly. In consequence thereof, the applicant has filed on 28/3/94 and served on the respondents a substantive motion on notice supported by an affidavit and annexed to it are exhibits 7, 8 and 8A for an order of certiorari to quash the said decision. The said  
D motion on notice has been filed, served on the respondents by a Chief Bailiff of the Ekwulobia High Court and he has filed an affidavit of service sworn to by the said bailiff. The said affidavit of service has been lodged in the court's file before 21/4/94, the date fixed for hearing of the motion on notice. The respondents, on their part, in  
E consequence thereof have filed and served on the applicant a notice of preliminary objection praying the trial court to strike out the applicant's motion on notice on the ground of non-compliance with the provisions of Rule 5(2) and (4) of Order 37 of the Anambra State High Court (Civil Procedure) Rules 1988. Meanwhile, the matter  
F has been adjourned to 25/4/95 for hearing. On 25/4/1995 i.e. the date fixed for hearing of the application, the preliminary objection has been moved; however, on an application for a date by the applicant his reply to the preliminary objection has been adjourned  
G to 24/7/1995. In the interim, the applicant on 17/7/95 without leave of court has filed an affidavit deposed to by the applicant himself; it has been headed "Affidavit of Service of motion on Notice filed in Court of 28/3/94" and exhibited to it are two "Affidavits of Service" marked exhibits 9 and 10 being the certified copies of the exhibits 8  
H and 8A of the affidavit filed with motion of 28/3/94. Exhibits 9 and 10 show that the 1<sup>st</sup> and 2<sup>nd</sup> respondents have each been served a "Writ of Notice" and "Motion on Notice" respectively. The impression has thus been created by the applicant of having complied with Rule 5(4) of Order 37 in support of the application. This is the gist of

the controversy in this appeal.

It is noteworthy that the affidavit of 17/7/95 has been filed after the motion on notice has been fixed for hearing on 21/4/95 but before his reply to the objection adjourned to 25/4/95 and without leave of court. The trial court nonetheless upheld the preliminary objection and in my view rightly struck out the said motion on notice in its entirety. B

The applicant being dissatisfied with the decision has appealed to the Court of Appeal which also has dismissed his appeal. He now has appealed to this court by a notice of appeal dated and filed on 27/4/2000 and containing 6 grounds of appeal. The parties have filed and exchanged their respective briefs of argument. The appellant in his brief of argument filed on 28/3/2007 has raised five issues for determination as follows: C

*“1. Whether the Court of Appeal was right in treating non-compliance with Order 37 Rule 5(1) as mandatory instead of directory.*

*2. Was the Court of Appeal right in holding that per incuriam and waiver not canvassed in the High Court, if it was right, is it true that no leave was obtained from the Court of Appeal before canvassing them?* E

*3. Was the Court of Appeal right in its interpretation of Section 79 of the Evidence Act.*

*4. Was the Court of Appeal right in treating a mere misnomer, at page 144 of the record of proceedings, as fatal to the service on the respondents of the originating motion (notice of motion)?* F

*5. Whether a lower court can in no circumstances depart from the decision of a higher court?”*

The respondents on their part also have in their joint brief of argument filed on 15/4/2008 therein have raised in substance five issues for determination similar and coterminous in every respect with the five issues raised by the applicant. I find no useful purpose their being replicated here. G

The appellant in his brief of argument in arguing his case has rambled all over the place that it is not easy to harness his submissions under the respective headings of the six issues he has raised for determination in this appeal. For reasons which will become obvious later in this judgment, I have decided to consider issue one only in H

detail as a pronouncement on it is capable of resolving the matter in controversy in this appeal particularly as it touches on the competence of the application and otherwise capable of eroding a court's vires to deal with the case. See: F.C.D.A. V. SULE (1994) 3 NWLR (Pt. 332) 256 at 282 A-D, ORE V. FALADE (1995) 5 NWLR (Pt.396) 385 at 407; IFEANYI CHUKWU (OSONDU LTD. V. SOLEH BOUSH LTD.) (2000) 5 NWLR (Pt.656) 322 at 352 and SAPARA V. U.C.H.BOARP (1988) 4 NWLR (Pt. 56) 58 at 61. He has argued on issue one that on a community reading of Rule 5(5) of Order 37 on the backdrop of Order 26 Rule 5 supports interpreting the provisions of Rule 5(4) of Order 37 as directory and not mandatory thus avoiding all technicalities.

In this wise he has adverted to a number of English cases and their decisions thereof as PEARSE V. MONAICE (1834) 2A and E 84 D at page 96, BUSSIEX PEERAGE CLAIM (1844) 11 CL & F.83 and CURTIS V. STOVIN (1889) 22 QBD 513 to urge that the said affidavits i.e. exhibits 8 and 8A having satisfied the provisions of Rule 5(4) of Order 37 should be given effect particularly as Rules 5(5) of Order 37 has given the court the necessary discretion in such matters. He E submits that the trial court has acted in error to strike out the motion on notice rather peremptorily. He refers to the affidavit sworn to on 17/7/95 and also relies on it and has thus submitted that parties excepting the 1<sup>st</sup> respondent have been present in court in respect of this case obviously sequel to the service of the application and so F having waived their rights thereof cannot be heard to say they have not been properly served the processes. He draws a distinction as against where the requirement is statutory, and so is mandatory and the rules of court that are usually construed permissively, and even G moreso in this case in the light of Order 26 Rule 5. And so, on matters of practice and procedure generally he also has posited that technicality must yield place to substantial justice, and concludes that the court below has acted in error for not hearing the matter on the merits. This court is urged to exploit Order 8 Rule 12(2) and Section H 22, Supreme Court Act 1960 to do substantial justice in this matter. See: SURAKATU V. NIGERIA HOUSING DEVELOPMENT CORPORATION SOCIETY LTD. AND ANOR. (1981 1 SC. 26, 33-35, SAUDE V. ABDULLAHI (1989) 4 NWLR (Pt.116) 387 at 425 and 437 paras. A/C NEMI V. STATE (1994) 10 SCNJ 1 at 18 (supra). Also it is sub-

mitted against the background of the exhibits 8 and 8A annexed to the main motion that respondents have not been misled by strict non-compliance with Order 37 Rule 5(4). See: WAPIN V. NIGERIA TOBACCO CO. LTD. AND ANOR. (1987) 2 NWLR (Pt. 56) 299 at 306 (para. C-I) and volume 15 Halsbury Laws of England (3<sup>rd</sup> Ed.) P.335 para. 609. B

Furthermore, the appellant has opined that there is a substantial conformity with the provisions of Order 37 Rule 5(4) particularly when by a community reading of Order 37 Rule 5(5) and Order 37 Rule 5(4) shows that compliance is not mandatory. He observes that even in a worse case scenario - that proof of service can be dispensed with if an affidavit of service is connected to the court file as a court is obliged to take judicial notice of documents in its file. C

He has also gone on to emphasize on the instant objection that since the respondents have appeared at the hearing of the matter D without protesting the non-compliance with Order 37 they cannot be heard to do so now albeit belatedly and relies on UNIVERSITY OF IFE V. FAWEHINMI CONSTRUCTION CO. LTD. (1991) 7 NWLR (Pt. 201) 26 at 36.

Respondents' case on the brief is carefully and systematically E dealt with. The respondents on issue one of their joint brief of argument have examined Order 37 Rule 5(4) under three headings, that is to say, who ought to file the affidavit?; when must the said affidavit be filed?; what is the legal consequences of failure to file the affidavit F in the manner prescribed by the Rule?. Construing Rule 5(4) of Order 37 they have pointed out the failure of the appellant personally to swear to an affidavit of service as required by Rule 5(4) and refer to the case of STATE V. COMMISSIONER OF POLICE AND AN- OTHER in Re: Appolos Udo (1987) 4 NWLR (Pt. 63) 127 which case G has interpreted Order 2 Rule 1 (4) of the Fundamental Human Rights (Enforcement Procedure) Rules 1979 in pari materia with the instant Order 37 Rule 5(4). They have also pointed out that in regard to when the affidavit must be filed that the affidavit being relied upon H has been filed on 17/7/93 belatedly some days after the adjournment at the appellant's instance to render his reply to the preliminary objection and even then the matter has been variously fixed for hearing on various dates to wit 21/9/94, 13/10/94, 15/12/94 and 25/4/95. They have posited that the provision is mandatory and that failure to

comply accordingly is fatal to the motion on notice and have relied on ADEWUNMI V. ATTORNEY-GENERAL OF EKITI STATE (2002) FWLR (Pt.92) 1835 at 1868 paragraph H; ONAJOBI V. OLANIPEKUN (1985) 4 SC. 156 at 163, OLUBODE V. SALAMI (1985) 2 NWLR (Pt.7) 282, GWONTO V. STATE (1983) 1 SCNLR B 142, BANKOLE V. PLU (1991) 6 NWLR (Pt. 211) 545, CHIEF FEZUE V. MBADIUGHA (1984) 1 SCNLR 427, OYEYIPO V. CHIEF OYINLOYE (1987) 1 NWLR (Pt. 50) 357. On the legal effect they submit that failure to comply with the mandatory requirement is fatal to the proceedings and they rely on MADUKOLUM V. NKEMDILIM C (1962) 1 NWLR 587.

The foregoing represents the state of the parties' cases in this appeal. The applicant/appellant in his brief of argument has raised a number of issues for determination - five issues in all. It appears to D me on a thorough perusal of those issues that the appellant has paid very little heed to the settled principle of law that it is not every slip or mistake of a court in a judgment that leads ultimately to upturning of its decision in a case. In that regard, based on numerous authorities, a mistake or slip in such circumstance has to be shown to affect or E influenced the decision. See: PAVEX INT. CO. LTD. V. AFRIBANK LTD. & ANOR. (2000) and 4 SC (Pt.II) 1961; (1985) 4 SC 156 at 163; EZEKE V. NWAGBO (1988) 1 NWLR (Pt.72) 616 at 626; OSAFILÉ V. ODE (NO.1) (1990) 3 NWLR (Pt. 137) 130. In all seriousness, it is in that light that I understand issues 2, 3, & 5. The F appellant, to put it more bluntly, has not shown how each or every-one of the said issue with regard to the mistake(s) of the court below therein encompassed has affected or influenced its decision. I have no hesitation in holding that these issues particularly issues 2, 3 and 5 G are lacking in circumspection. I shall come to them later on in this judgment.

The fate of this appeal, if I must say, hangs on whether the provisions of Rule 5(4) of Order 37 have been complied with or not by the applicant in initiating this application. In other words, what has H an applicant in an application of this nature under Order 37 Rule 5(4) got to do and the time limit within which he has to do them. In this regard issue one of the appellant's brief of argument is closely identical to issue one of the respondents' brief; both issues have nailed on head the crux of the question to be decided in this appeal. In

dealing with it I have to set out the relevant provisions of the Rules applicable. Rule 5(4) of Order 37 of the Anambra State High Court Rules provides as follows:

*“An affidavit giving the names and addresses of, and dates of service on, all persons who have been served with the notice of motion or summons shall be filed before the motion is entered for hearing and, if any person who ought to be served under this Rule has not been served, the affidavit shall state that fact and the reasons for it, and the affidavit shall be before the court on the hearing of the motion”* (underlining mine for emphasis). B

The above provisions are plain and clearly are not ambiguous. C  
**A reading of the said provisions shows that it has raised the question of filing by an applicant an affidavit verifying the names and addresses of the persons served the substantive motion on notice, together with the dates of such service and place of service; this affidavit of verification must be before the court on the hearing of the motion - thus underscoring the point that the motion on notice must be filed before the date fixed for hearing. Therefore these provisions as per Rule 5(4) of Order 37 have prescribed the enabling pre-conditions to be complied with before a court can be said to be properly seized of a matter;** specifically an applicant must satisfy the following three conditions: D

1. Who is enjoined to file the affidavit under the provisions. F
2. When must the affidavit be filed; and
3. What is the legal effect of failure to file the affidavit in the manner prescribed under the provisions.

**Let me say here that having examined the said provisions closely there can be no doubt that those conditions go to the competence of the motion on notice, all aimed towards achieving compliance with due process and therefore their absence could completely erode the jurisdiction of a court handling the matter and so, the absence of any of them is fatal. They are not mere procedural irregularities that can be waived or otherwise cured on any basis as per the provisions of order 26 Rule 5 to be set out later as has been urged by the applicant** See: SAUDE V. ABDULLAHI (1991) 20 NSCC 177 at 200. The provisions of Order 26 Rule 5 heavily relied upon by the G  
H

appellant in urging that Order 37 Rule 5(4) ought to be construed permissively run as follows:

“Order 26 Rule 5 of Anambra State High Court Rules 1988, provides no proceedings in the court and no process, order ruling judgment issued or made by the court shall thereafter be declared void solely by reason of any defect in procedure or writ or form as prescribed by those Rules. Rather, every court shall decide all issues according to substantial justice, without undue regard to technicality.”

The inapplicability of the foregoing Rule to the facts of this case will become obvious in the course of this judgment.

I now turn to examine each condition closely in relation to the facts of this case. On the first condition, the appellant has contended that having filed an affidavit on 17/7/95 (albeit belatedly) and deposited to by the appellant to which are exhibited exhibits 9 and 10 i.e. the certified copies of the Bailiffs affidavits of service marked exhibits 8 and 8A that as per Rule 5(4) of Order 37 the first condition has been satisfied. **It is to be noted that the said affidavits i.e. Exhibits 9 and 10 have been filed on 17/7/95 nearly 9 months after the motion on notice with exhibits 8 and 8A exhibited to the said affidavit in support has been filed** and clearly moreso, after the respondents have completed their argument on the preliminary objection but before the applicant’s reply has opened as the matter has to be adjourned at the instance of the applicant for his reply. In the interim, the applicant has filed the said affidavit on 17/7/95 without even the leave of court and deliberately to overreach the respondent’s submissions on the belated filing of the verifying affidavit after the date fixed for hearing and for not being before the court at the hearing of the motion on notice as prescribed under Order 37 Rule 5(4). **They are clearly not filed in due process of law. The appellant has totally misconceived this requirement. Even then Exhibits 9 and 10 are not of the appellant’s personal making but that of the Bailiff of the court and secondly, exhibits 9 and 10 do not satisfy Section 79 of the Evidence Act which has clearly stipulated that a party wishing to make use of an affidavit in a proceeding as here must file only the original of the affidavit in court and I couldn’t agree more with the court below that under these circumstances exhibits 9 and 10 are**

**worthless documents.**

The next point to consider under this heading is whether an applicant's affidavit is required to be filed by the applicant personally. The appellant has canvassed the question that it is not expressly so provided and therefore that any reliance on Re: Appolos Udo (supra) in that regard is misplaced and unsustainable. The respondents have canvassed that the case of Re: Appolos Udo (Supra) has construed the provisions of Order 2 Rule 1 (4) of the Fundamental Human Rights (Enforcement Procedure) Rules 1979 which provisions are in pari materia with the said Rule 5(4) of Order 37. The said Rule 1(4) of Order 2 provides as follows:

*"An affidavit giving the names and addresses of, and the place and date of service on, all persons who have been served with the motion or summons must be filed before the motion or summons is listed for hearing, and, if any person who ought to have served, under paragraph 3 has not been served, why service has not been effected and the said affidavit shall be before the court or Judge on the hearing of the motion or summons."*

***The case of Re: Appolos Udo (supra) has construed the foregoing provisions of Rule 1(4) of Order 2 and in a well reasoned judgment of the Court below per Olatawura JCA (as he then was) at P. 126 paragraph D-F***

His Lordship said and I quote in extenso.....

*"It is the contention..... that it is not the duty of the appellant to effect service of process but on the officers of the court and therefore it will be patently unjust to deny the appellant a relief which he may otherwise be entitled to purely on such a technical defect due not to his own error. Where a rule of court provides for the doing of any act before a case can be heard, it is my view that that Rule of Court must be followed strictly. Rules of Court are made to be obeyed it would be seen from the later part of Order 2 Rule 1(4) where -*

*".....if any person who ought to have been served in paragraph 3 has not been served, the affidavit must state the fact and the reason why service has not been effected"*

*that it is not the duty of the officer of the court (apparently in this case a Bailiff) who should state the reason in the affidavit. The affidavit must be deposed to by the applicant (in this case the appel-*

lant) or any person who has his authority to do so. To construe otherwise is to make an officer of the court who ordinarily is to report process of service to state reasons why process of court has not been served. It is therefore my view that the affidavit must be filed and sworn to by the applicant before the motion can be heard or listed for hearing.”

There can be no doubt that Rule 5(4) of Order 37 and Order 2 Rule 1(4) are in pari material; that is a common ground of the parties. I have also come to the same conclusion. Having closely scrutinized the two provisions, they are similar in a substantial particular and so, the cited case is binding on the trial court. And as Bracton in his book said:

“if however similar things happen to take place, they should be adjudged in a similar way, for it is good to proceed from precedent to precedent.”

And I couldn't agree more. **I can say here without more that the construction of Order 2 Rule 1(4) as stated above should be applied mutatis mutandis to the construction of the provisions at Rule 5(4) Order 37. The above construction of Order 2 Rule 1(4) cannot be faulted. And so, with approval of the decision in Re Appollos Udo (supra) I adopt the above reasoning in construing the instant Rules 5(4) Order 37. In this regard, therefore I hold that the filing of a verification affidavit is personal to the applicant/appellant in this matter and not that of the Bailiff.** I must however observe that the appellant rather than distinguish the instant case from Re Appollos Udo (supra) has without basis alleged that the case of Re Appollos Udo (supra) has been decided per incuriam without making out any solid reasons in support for so submitting. I have no doubt that the appellant's submission in this regard is totally misconceived. I reject the submission that the cited case has been decided per incuriam. It is otherwise rightly decided and binding on the trial court that has rightly relied on it in deciding the instant case. I have therefore inevitably come to the conclusion that the applicant has not satisfied this condition.

I now come to the second condition as set out above, that is, when must the affidavit of service as prescribed under Rule 5(4) Order 37 be filed. In this regard I refer to certain crucial clauses in Rule 5(4) of Order 37 to wit “shall be filed before the motion is entered

for hearing” and “shall be before the court on the hearing of the motion”. These clauses of the said provisions leave no one in any doubt that the provisions as a whole have to be construed as mandatory. Besides, the word “shall” imports command and is mandatory as against directory. The said Rule construed as a whole has clearly prescribed the doing of certain acts before the court can be properly B  
seised of the matter and by expressing these requirements by the word “shall” they have to be strictly complied with.

Again, I am at-one with the finding in Re; Appolos Udo (supra) in that vein these steps must be followed strictly. The facts of this C  
case show that the motion has already been set down for hearing i.e. on 21/9/94 and again on 13/10/94 also on 15/12/94. The preliminary objection to the motion has been taken in court on 25/7/95. The verification affidavit has been belatedly filed on 17/7/95 about 9 months after the motion has been set down for hearing and indeed D  
without leave of court ostensibly with a view to overreach. The court below has depreciated this blunder of filing of exhibits 9 and 10 in the circumstances in strong terms and I quote:

*“That is far and away outside the time prescribed for filing an affidavit and doing so by stealth. It is unconscionable, to say the least.”* E

It is clear that filing the affidavit of 17/7/95 without leave of court and proceeded to use the same without leave of court is most unacceptable. The appellant not having complied strictly with this requirement, it is beyond argument that the motion is incompetent F  
as it has not complied with due process of law. See: MADUKOLUM V. NKEMDILIM (Supra).

The third condition relates to the legal effect of failing to comply accordingly. ***As I have anticipated above in the body of this judgment any failure to comply strictly with the provisions of Rule 5(4) of Order 37 goes to the competency of the motion. In other words, it renders the motion incompetent and so deprives the court of the necessary vires to entertain the matter. What I am trying to say here is that the substantive motion on notice for an order of certiorari to quash the decision of His*** G  
***Worship J. O. Ojiako given on 3/11/93 not having been initiated by due process of law, that is, upon the fulfillment of all conditions precedent and as co-existing as set out above for the exercise of the court’s jurisdiction, the instant motion on*** H

**notice is incompetent ab initio and a non starter.** Again this condition has not been complied with.

The above finding and conclusion with regard to the motion have more or less foreclosed any further discussion of the remaining issues for determination raised in this matter moreso as issue one touches on the competency of the instant motion and the consequent erosion of the court's vires to entertain the same and so also the appeal. There is therefore no useful purpose to be served by dealing with the rest of the issues for determination raised in this matter as no favourable findings in that regard could resuscitate the application.

In the result, this appeal is unmeritorious and a sheer waste of the time of this Court. The judgments of the court below and trial court are hereby affirmed and the application is accordingly struck out with N50,000 costs to the Respondents. Appeal dismissed.

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**KATSINA - ALU**

I have had the advantage of reading in draft the judgment of my learned brother Chukwuma-Eneh in this appeal. I agree with it and, for the reasons given therein I also affirm the appeal with N50,000.00 costs to the Respondent.

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**MOHAMMED JSC**

The judgment of my learned brother Chukwuma-Eneh J.S.C. just delivered was read by me in draft before today. I completely agree with him that this appeal is devoid of merit and therefore deserves to be dismissed. This is because the failure of the appellant to comply with the mandatory provisions of Order 37 Rule 5(2) and (4) of the Anambra State High Court (Civil Procedure) Rules 1988, in his application for certiorari order at the trial court, had rendered that application incompetent thereby depriving the trial court of its jurisdiction to hear and determine the application. The trial court was therefore properly guided by law in striking-out the incompetent application. For same reasons relied upon by the trial court, the Court of Appeal was also well guided in dismissing the appellant's appeal which I also regard unmeritorious and which accordingly is hereby dismissed. The decision of the trial court finding the appellant's application incompetent and striking out the same and which decision was

affirmed on appeal by the court below, is hereby further affirmed with N50,000.00 costs for the Respondent.

### ONNOGHEN JSC

I have had the benefit of reading in draft, the lead judgment of my learned brother *CHUKWUMA-ENEH, JSC*, just delivered. I agree with his reasoning and conclusion that the appeal has no merit and should be dismissed. B

My learned brother has exhaustively dealt with all the five (5) issues calling for determination of the deal leaving me with virtually nothing to add except to make a comment on one or two of the issues raised. C

On the question of raising of fresh issues in appeal, it is settled law that parties are not allowed to raise fresh issues on appeal without first and foremost obtaining the leave of the appellate court to raise same. In the instant case, the question is whether the issue as to whether a decision of a superior court of record was rendered per incuriam and that of waiver were raised for the first time before the Court of Appeal thereby requiring the leave of that court for the issues so raised to be competent D

Learned counsel for the appellant contends that the issues were raised before the trial court and that they were therefore not fresh issues before the lower court. On the other hand, learned counsel for the respondents contends that the lower court was right in holding that they were fresh issues for which the leave of that court was required. E

To begin with, both counsel agree that the law relevant to the issue under consideration is that a fresh issue cannot be raised on appeal except with the leave of the appellate court; that where an issue is raised without leave such is incompetent and is liable to be struck out. F

From the record, it is clear that the issue of waiver or per incuriam were never raised by the appellant at the trial, court neither did that court make any decision on them. The lower court was therefore, in the circumstance, right in holding that for the issues to be raised before it, the leave of that court was required and that since the appellant never obtained such leave the issue was incompetent G

H

and consequently struck same out. That decision is supported by numerous decisions of this court including *Apene vs Barclays Bank of Nigeria (1977) 15 S.C 47*; *Djukpan vs Orovu Yovbe (1967) 1 ALL NLR 134 at 137 - 138*; *Makanjuola vs Balogun (1989) 3 NWLR (Pt. 108) 192*; *Edokpolor & Co. Ltd. Vs Sem-Edo Wires Industry Ltd (1989) 4 NWLR (Pt. 116) 473*; *Oniah vs Onyia (1989) 1 NWLR (Pt. 99) 514*.

On Issue NO. 5, I hold the considered view that the issue is academic. It is not a live issue at all. The issue reads:-

C “Whether the lower court can in no circumstances depart from the decision of a higher court.”

I wonder what effect a positive resolution of that issue would have on the fortunes of the appeal. In any event it has been held that the issue of per incuriam was raised for the first time in the lower D court without the leave of that court thereby rendering same incompetent and liable to be struck out.

In conclusion, I too find no merit in the appeal which is accordingly dismissed with costs as assessed in the lead judgment of my learned brother.

E I abide by other consequential orders made in the said lead judgment.

Appeal dismissed.

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### **MUNTAKA-COOMASSIE JSC**

I have had the opportunity of reading in draft the judgment just delivered by my learned brother Chukwuma-Eneh JSC. I entirely agree with his Lordship’s reasoning and conclusion that this G appeal lacks merit. I adopt both reasons and conclusion as mine.

I completely agree that the issue of waiver or incuriam were never taken or discussed during the trial of the matter, neither by the appellant nor the trial court. If those issues were to be raised in the Court of Appeal leave of the said court must be sought and ob- H tained. I cannot lay my hand on where and when such leave was obtained. I therefore agree with my learned brother Chukwuma-Eneh JSC that those issues as they stand are incompetent and same are liable to be struck out. In the case of *Edokpolor & Co. Ltd V. Sem-Edo Wires Industries Ltd (1989) 4 NWLR (part 116) 473*, in

which the case of UOR V. LOKO (1988) 2 NWLR (part 77) 430 at p 437 was referred to:- Wali JSC made the following statement:

*"It is now firmly established through many decided cases that no substantial point that has not been taken and argued in the courts below will be allowed to be raised for the first time before this court excepts special circumstances are shown. See Ejiofodomi V. Okonkwo (1982) 11 SC. 74 at 93-98; Djukpan V. Orovuyovbe (1967) 1 All NLR 134; Abinabina V. Enyimadu 12 WACA 171 and John Ikinbor Dweye & 2 Ors V. Joseph Iyomahan & 3 Ors (1983) 8 SC. 76. It is not in dispute that the issue of the applicability of Section 36 of the Land Use Act. 1978 was not raised either in the trial court or in any of the courts below. The parties fought the case all through on question of ownership according to the customary law applicable in the area. The evidence adduced in the trial court was evaluated and findings of fact were made in favour of the Respondent which were subsequently confirmed by both the High Court, Benue State and the Court of Appeal, Jos Division".*

In the case of Edokpolo V. SEM-Edo (Supra) Ogundare JCA as he then was blessed memory has this to say: -

.... After referring to United Marketing V. Kara (Supra) the learned Justice went to say, at page 438'.....

*"A point not taken in the trial court but raised for the first time in the court of Appeal should be most jealously guarded. At the discretion of the court, a party may be debarred from raising a point which was not raised in the trial court or in the courts below. To allow the Appellants at this stage to raise the issue of applicability of the Land Use Act, will be tantamount to affording them an opportunity of arguing a case in consistent with and contradictory to the case previously argued, even though the evidence in the trial court may support the new issue raised. Exparte Reddish. In re Walton (1887) 5 Ch. D 882. Also in Ejiofodomin V. Okonkwo (1982) 11 SC. 74 Per Aniagolu JSC at pages 96 and 97; See also Obaseki JSC in his own illuminating contribution in that case at pages 439 - 440."*

For the above little contribution and the more detailed analysis by my learned brother Chukwuma-Eneh JSC, in the lead judgment, I too hold that the appeal lacks merit same is dismissed by me. I abide by the consequential orders as adumbrated he lead judgment. I also endorse the orders as to costs.