

SUPREME COURT OF NIGERIA
5TH MARCH, 2010. SC. 330/2008
CORAM:- G. A. OGUNTADE, M. MOHAMMED, W. S. N.
ONNOGHEN, M. S. MUNTAKA-COOMASSIE,
O. O. ADEKEYE, JJSC

CHIEF EMMANUEL BELLO APPELLANT
AND

1. INDEPENDENT NATIONAL ELECTORAL
COMMISSION (INEC)

2. PEOPLES DEMOCRATIC PARTY RESPONDENT

3. MR. HASKE FRANCIS HANNANIYA

WORDS & PHRASES - Actions - "Party" - Meaning - A party is a person whose name is on record - As plaintiff or defendant - Others who may be affected by the suit - Are persons interested not parties (H1)

ACTIONS - Court process - Failure to serve on 2nd respondent - Whether fatal - There was no obligation to serve it - As it was not a party to the action - As such non service on it is not fatal (H2)

JUDGMENTS - Challenge - By persons interested - Option - They should apply to trial court for leave - To appeal against the judgment - As a person having interest in the matter (H3)

FACTS

The plaintiff/appellant initially sued 1st and 2nd respondents as defendants before the Federal High Court Abuja by way of originating summons. Subsequently, appellant sought and obtained leave of the court to amend the originating summons by removing the name of 2nd respondent therefrom, thereby leaving the 1st respondent as sole defendant. The grounds for the summons and questions for determination were also amended accordingly. Appellant's claim as per the amended summons were for sundry orders by which he challenged his disqualification by 1st respondent as 2nd respondent's candidate for the Federal House of Representatives elections in April 2007, which disqualification was done in reliance on a list of persons indicted by

EFCC. Appellant further challenged the consequent substitution of his name with that of 3rd respondent. Eventually trial court granted his reliefs as claimed.

Aggrieved by the judgment of trial court, 2nd respondent filed a motion thereat seeking an order to set aside the judgment on the ground that the court processes culminating in the judgment were not served on it, notwithstanding that its interest would be affected by the judgment eventually. Appellant opposed the motion. But the trial court heard and granted the motion. Dissatisfied, appellant appealed to Court of Appeal against the ruling and the appeal was dismissed. Still dissatisfied, appellant has come on a further and final appeal to the Supreme Court contending, inter alia, that 2nd respondent was not a party to the suit and so was not entitled to be served with the processes of court.

ISSUE FOR DETERMINATION

Whether or not the judgment of the trial Court of 4th April, 2007 is truly a nullity as found by the trial Court and affirmed by the Court of Appeal.

HELD (Unanimously allowing the appeal per **MOHAMMED JSC**) **Actions - "Party" - Meaning**

1. In *Fawehinmi v. N.B.A.* (No. 1) (1989) 2 N.W.L.R. (Pt. 105) 494 at 550, Oputa JSC again in defining a 'party' had this to say

"A party to an action is a person whose name is designated on record as Plaintiff or Defendant, the term party refers to that person(s) by or against whom a legal suit is sought.

Whether natural or legal persons but all others who may be affected by the suit indirectly or consequently are persons Interested and not parties.

Therefore the 2nd Defendant in the first Originating Summons filed by the Appellant, had by the process of the amendment to the Originating Summons granted by the trial Court on 1st March, 2007, ceased to be a party or a Defendant in the action.

It was therefore wrong for the trial Court and the Court below, to have approached and treated this case on the basis that the 2nd Respondent Was a party in the case at the trial Court which was entitled to have been heard. (pp. 839 H/840 D/G)

Court process - Failure to serve on 2nd respondent

2. 2nd Respondent which applied, to set aside the judgment on the ground that it was a Defendant in the action and that it was not put on notice, is not the correct position from the record of this appeal. The 2nd Respondent was indeed not a party in the case. Not being a party in the action of the Appellant as framed in the Amended Originating Summons, there was no obligation on the part of the trial Court to have put the 2nd Respondent on notice. Consequently, failure to put the 2nd Respondent which was not a Defendant in the action on notice, was not fatal to the case of the Appellant at the trial Court to the extent of depriving that Court of its jurisdiction in the case, not to talk of resulting in rendering its decision in the case, a nullity. It was indeed a misconception of the state of the law for the trial Court to have regarded the 2nd Respondent, against which there was no specific relief claimed in the action as a Defendant which ought to have been put on notice. (p. 843 D)

JUDGMENTS - Challenge - By persons interested

3. As from the date of this judgment, the orders in which were not directly addressed to the 2nd Respondent but specifically beamed at the 1st Respondent which was a party, the 2nd Respondent which was not a party to the action, but whose interest is directly in issue, had two options open to it:

(1.) It may stay put and decide to abide by the judgment of the trial Court particularly being responsible in the first place of forwarding the name of the Appellant to contest the election as its candidate or,

(2.) Apply to the same trial Court for leave to appeal to the Court of Appeal within the time prescribed for appealing against the judgment or after the expiration of that time, apply to the Court of Appeal for extension of time to seek leave to appeal, leave to appeal and extension of time to appeal against the judgment as a person having an interest in the matter. (p. 845 D)

NOTABLE POINTS OF INTEREST***MOHAMMED JSC******1. Parties - Nonjoinder does not nullify judgment***

I may observe at this stage that the misconceived course taken by the

2nd Respondent in this case is similar to the course adopted by the Plaintiffs in the case of *Okoye v. Nigerian Construction and Furniture Co. Ltd.* (1991) 2 N.S.C.C. Vol. 22 Part 1 page 422 also reported in (1991) 6 N.W.L.R. (Pt. 199) 501 at 532 where this Court held that failure to join as a party a person who ought to have been joined will not render the proceedings a nullity on ground of lack of jurisdiction or competence of the Court. Akpata JSC specifically stated the position as follows:-

"In my view failure to join a necessary party is an irregularity which does not affect the competence or jurisdiction of the Court to adjudicate on the matter before it. However, the irregularity may lead to unfairness which may result in setting aside the judgment on appeal. Setting aside a judgment or making an order striking out the action or remitting the action for a retrial in such circumstance that will not be for lack of jurisdiction or on the basis of the judgment being a nullity. The trial court itself is incompetent to review the judgment; more so another Court of co-ordinate jurisdiction" (p. 846 C)

OGUNTADE JSC

2. 2nd and 3rd respondents were necessary parties

The combined effect of the provisions of the 1999 Constitution and Electoral Act reproduced above clearly shows that the appellant, a politician knew or ought to know that his Party P. D.P. was the one who caused his substitution and that it was the same party who submitted the name of the 3rd respondent in this appeal as a substitute for the appellant. INEC, the independent electoral commission and arbiter in such matters could not of its own have substituted the appellant.

When viewed from this angle, it is easy to see that the P. D.P. and Haske Hananiya were necessary parties to the suit before the trial court as it was not possible for the suit to be fairly and finally determined without these two being made parties. (pp.858 F/859 C)

3. Necessary parties not joined are not bound

There is no doubt that P.D.P and Haske Hananiya were necessary parties to the suit before the trial court. They were not joined. Not having been joined they could not be bound by a judgment or decision of which they had no notice, and which they could not participate in. As against the

2nd and 3rd respondents in this appeal the judgment given by the trial court impinges their right to fair hearing. They were not served with notice of the proceedings to the said judgment. (p. 861 B)

ONNOGHEN JSC

4. *Trial court was functus officio when it heard application to set aside* B
I therefore hold the considered view that the trial court having entered judgment in the matter in the circumstances of this case became functus officio and therefore incapable of reopening the matter by application. The judgment entered in the circumstance is legally on the merit, not a default judgment. The only avenue open to the 2nd respondent, if it feels really aggrieved, is to appeal against that judgment as an interested party under Section 243(a) of the Constitution of the Federal Republic of Nigeria, 1999. (p. 870 D) C

REPRESENTATION

Mr. Richy Tarfa S.A.N (Mr. H, A. Nganjiwa, Mr. O. Jolaawo Mrs. D. Bassi and Mr. W. Affiah with him) for the Appellant.

Mr. T. M. Inuwa (Mr. A. A. Umar and Mr. Aminu Alkali with him) for the 1st Respondent. E

Chief Olusola Oke (Mr. Odusola and Mr. U. E. Ezeta with him) for the 2nd Respondent.

Mr. Damian D. Dodo S.A.N. (Mr. Audu Anuga, Mr. Terhemba Gbashima and Mr. A. A. Dodo with him) for the 3rd Respondent. F

CASES REFERRED TO

Ayorinde v. Oni (2000) FW.L.R. (Pt. 3) 445 at 464

Igbokwe v. Igbokwe (1993) 2 NWLR pt. 273 pg. 29

Dantata v. Mohammed (2000) 7 NWLR pt. 664 pg. 176 G

Eke v. Ogbonda (2006) 18 NWLR (pt. 1012) 506 at 526

FALADU V. EKWO (2003) 9 NWLR (Part 826) 643 at 654

Adenuga v. Odumero (2003) 8 N.W.L.R. (Pt. 821) 127 at 188

Afribank (Nig.) Ltd. v. Owoseni (1995) 2 NWLR pt. 375 pg. 110

Fawehinmi v. NBA. (No.1) (1989) 2 N.W.L.R. (pt. 105) 494 at 550 H

EZIONWU VS. UGBO (2006) 5 N.W.L.R. part 973 316 at 328 329

Delta State Government v. Dr. Okon (2002) 2 N.W.L.R. (Pt. 752) 682

STATUTES & RULES REFERRED TO

Constitution of the Federal Republic of Nigeria, 1999, s. 243

Court of Appeal Rules 2007, O. 7 & O. 12 r. 5

Federal High Court (Civil Procedure) Rules 2000, O. 38 r. 9

Electoral Act, 2006, ss. 32 & 34

B

LEAD JUDGMENT BY MOHAMMED JSC

The Appellant in this appeal was the Plaintiff at the trial Federal High Court Abuja where by Originating Summons dated 21st February, 2007, he instituted an action against the 1st and 2nd Respondents as the Defendants. By a motion on notice supported by affidavit filed at the trial Court on 28th February, 2007, the Appellant sought the leave of the Court to amend the Originating summons by filing an Amended Originating Summons which removed the name of the 2nd Respondent as a Defendant in the action, leaving the 1st Respondent alone to defend the action. The grounds or questions for determination and the reliefs being sought in the original action were also amended. The parties were duly heard on this application for amendment and the application was granted. The Amended Originating Summons in the action between the Appellant as Plaintiff and the 1st Respondent as the Defendant dated 1st March, 2007 was subsequently heard. After hearing the parties, the trial Court delivered its judgment on 4th April, 2007 granting all the three specific reliefs sought by the Appellant against the 1st Respondent.

However, on 5th June, 2007, by a motion on notice filed at the trial Court, the 2nd Respondent, the name of which was removed from the Appellant's action as originally filed on the orders of the trial Court, sought for an order to set aside the judgment of the trial Court of 4th April, 2007. The Appellant opposed the application and after hearing the parties, the learned trial Judge came to the conclusion in his ruling delivered on 20th July, 2007, that the judgment of the trial Court given on 4th April, 2007 was a nullity and therefore proceeded to set it aside. The Appellant's appeal against the setting aside of that judgment was heard and dismissed by the Court of Appeal Abuja Division in its judgment delivered on 17th December, 2008. Not satisfied with the judgment of the Court of Appeal, the Appellant has now appealed against it on four grounds of appeal from which his learned senior Counsel identified two issues for the determination of the appeal as follows:-

“(i.) whether the Judgment of the trial Court delivered on 4th of April, 2007 amount to nullity as a result of non-joinder and therefore liable to beset aside by the same court at the request of 2nd Respondent (sic) who was the person not joined (Grounds 1, 2 and 3)

“(ii.) whether the judgment of the trial Court was a default judgment liable to beset aside at the instance of a person who was not a party to the proceedings.”

It is observed that although the 1st Respondent, Independent National Electoral Commission which was the sole Defendant in the proceedings resulting in the judgment of 4th April, 2007, the setting aside of which at the instance of the 2nd Respondent that gave rise to the present appeal was represented by a team of learned Counsel at the hearing of this appeal, no Respondent’s brief was filed on its behalf. Leading Counsel to the 1st Respondent merely told this Court that his client was ready to abide by the out-come of the appeal. However, in the Respondent’s brief of argument filed by the 2nd Respondent, only one issue for determination was formulated from the Appellant’s four grounds of appeal. The issue reads-

“Whether in all the circumstances of this case the lower Court was not justified in upholding the decision of the Federal High Court, Abuja Division setting aside her judgment delivered on 4th day of April, 2007.”

In the same vein, the learned senior Counsel for the 3rd Respondent also saw only one issue for determination which was framed thus -

“1) Whether the decision Of the lower Court is justified in law having regard to the facts and circumstances of the case.”

Since the complaint against the setting aside of the judgment of the trial Court of 4th April, 2007 by the same Court at the instance of the 2nd Respondent is a common factor in the two issues formulated in the Appellant’s brief of argument, I shall take the arguments in support of the two issues together. This is because whether or not the judgment of the trial Court of 4th April, 2007 was set aside on the ground of being a nullity or on the ground of its being a default judgment as stated in the two issues in the Appellants brief, the end result of the setting aside of that judgment is the central issue for determination.

Mr. Rickey Tarfa, learned senior Counsel for the Appellant has observed that it is not in dispute between the parties in this appeal that the 2nd Respondent was not a party to the suit of the Appellant at

the trial Court on the Amended Originating Summons which by law was deemed to have taken effect from the date of filing of the first Originating Summons on 21st February, 2007. This view was supported by the cases of Rotimi v. McGregor (1964) N.S.C.C. page 542 at 552 lines 1-16 and Katio v. C.S.N. (1995) 5 S.C.N.J. page 21 lines 36; that the trial Court and the Court of Appeal appeared to have placed more emphasis on the first Originating Summons in which the 2nd Respondent was a party; that the effect of the order granting the amendment is that the 2nd Respondent had ceased to be a party in the Appellant's action that not being a party in the action; the 2nd Respondent could not have availed itself of the provisions of Order 38 Rule 9 of the Federal High Court (Civil Procedure) Rules 2000, to apply to set aside the judgment of 4th April, 2007 not being a party, having regard to the decisions in Green v. Green (1987) N.S.C.C. 115 at 129 and Fawehinmi v. NBA (No.1) (1989) 2 N.W.L.R. (pt. 105) 494 at 550. Learned senior Counsel therefore argued that since the 2nd Respondent was not a party to the case that led to the judgment, the only remedy available to it was to appeal against that judgment with the leave of the trial Court or of the Court of Appeal as a party having interest in the case under Section 243(a) and (b) of 1999 Constitution and Order 7 of the Court of Appeal Rules 2007; that even if the 2nd Respondent were a necessary party to the action, failure to join it as a party was not fatal to the case to the extent of rendering the judgment of the trial Court a nullity if the cases of Ayorinde v. Oni (2000) F.W.L.R. (Pt. 3) 445 at 464 and Okoye v. Nigerian Construction and Furniture Co. Ltd. (1991) 2 N.S.C.C. 422 at 438, are taken into consideration. Learned senior Counsel concluded by submitting that since the 2nd Respondent was not a party at the trial Court in the action, the judgment of the trial Court of 4th April, 2007 not being a default judgment and not being a nullity in law, the Court of Appeal was in error in its judgment of 17th December, 2008 now on appeal, in affirming the decision of the trial Court setting aside the judgment of 4th April, 2007 and therefore urged this Court to allow the appeal.

H It appears from the contents of paragraph 1.2 of the Respondent's brief of argument filed for the 2nd Respondent, the 2nd Respondent is an unwilling party which had been forced by circumstances of this case to defend the judgment of the Court of Appeal in this Court. Paragraph 12 of the Respondent's brief reads at page 1-

"Facts on pages 419 - 426 show clearly the unwillingness off the 2nd Respondent to be party to or to continue to be party of the appeal at the lower Court because the matter relates to dispute between her members over nomination. Having been made a party against her desire and a judgment entered in her favour, it becomes necessary and desirable to defend the judgment. No more, no less." B

For the above reasons given in defending the judgment of the Court below in this Court, the learned Counsel for the 2nd Respondent in support of the lone issue for determination as distilled in the 2nd Respondent's brief of argument explained that since the 2nd Respondent is the party that has the right in law, to sponsor its candidate to contest any election, it was, a necessary party to the Appellant's action against the 1st Respondent challenging his substitution as a candidate in the elections; that failure to join the 2nd Respondent in the action clearly robbed the trial Court of its jurisdiction to adjudicate in the matter thereby making the judgment of the trial Court of 4th April, 2007 a nullity; that the judgment being a nullity, the 2nd Respondent has the right to apply to the trial Court to have that judgment set aside as the reliefs granted to the Appellant were directly against the interest of the 2nd Respondent; that looking at the case from another angle, since the order made by the trial court on 4th April, 2007 was; against a person who was not a party in the Appellant's case, the judgment was nullity by virtue of the decisions of this Court in *Adenuga v. Odumero* (2003) 8 N.W.L.R. (Pt. 821) 127 at 188 and *Kekerowo v. Lagos State Government* (2001) 11 N.W.L.R. (Pt. 123) 246. Learned Counsel relying on the cases of *Ifezue v. Nbadugha* (1984) 1 S.C.N.L.R. 247; *Odi v. Osafire* 91985) 1 N.W.L.R. (Pt. 1) 17, *Green v. Green* (1987) 3 N.W.L.R. (Pt. 61) 480 and *Eke v. Ogbonda* (2006) 18 N.W.L.R. (Pt. 1012) 526, pointed out that a person who was affected by an order which can be described as a nullity, as the 2nd Respondent in the present case, is entitled *ex-debito* to *justitiae*, to have the order set aside. Referring to the case of *Okoye v. Nigerian Construction and Furniture Company Limited* heavily relied upon by the Appellant, learned Counsel observed that the case is not applicable in the present case whose facts, are different and whose situation calls for need to do justice to the 2nd Respondent rather than hanging on technicalities to cause a miscarriage of justice. Counsel therefore urged this Court to consider the modern trend in *Okoiyo v. Odje* (1985) 10 S.C. 267

and Nwosu v. Imo State Environmental Sanitation Authority & Ors. (1990) 2 N.W.L.R. (Pt. 135) 688 at 717, and do justice in this case by dismissing this appeal.

For the 3rd Respondent, its learned senior Counsel Mr. D. D. Dodo, is of the view that having regard to the facts and circumstances of this case, the decision of the Court below in affirming the decision of the trial Court setting aside its judgment of 4th April, 2007, is quite justified in law; that where a party who ought to have been joined in a suit but was not joined and an order was made affecting the party, the party so affected by the decision is entitled to *ex-debito Justitiae* to have it set aside as was done in the present case in line with decision in *Afric Mining Co. Ltd. V. N.I.D.B. Ltd.* (2000) 2 N.W.L.R. (Pt. 646) 626. It was observed by the learned senior Counsel that the original action filed by the Appellant on 21st February, 2007, the 2nd Respondent was clearly a party therein; that by withdrawing the case against the 2nd Respondent in the Amended Originating Summons, the 2nd Respondent was deliberately denied a hearing in a matter in which it was a necessary party whose interest were clearly seen in the orders made by the trial Court on 4th April, 2007 thereby justifying the application by the 2nd Respondent to set aside the judgment; that the trial Court has therefore inherent power to set aside that judgment by virtue of many decisions of this Court including *Menakaya v. Menakaya* (2001) 16 N.W.L.R. (pt.738) 255, - without resorting to any appeal against the judgment because the judgment or ruling was a nullity. On when a judgment of a superior Court can be declared a nullity, learned senior Counsel referred to *Rossek v. ABC Ltd.* (1993) 8 N.W.L.R. (Pt. 312) 437 - 438 and urged this Court to hold that since the 2nd Respondent and 3rd Respondent who were necessary parties in the Appellant's case were not heard, the Court below was right in law in affirming the decision of the trial Court setting aside the judgment of 4th April, 2007, and therefore urged this Court to dismiss the appeal since the failure of the Appellant to have joined the 2nd and 3rd Respondents as parties to the action, was fatal to the action thereby depriving the trial Court of competence or jurisdiction to have determined the action. A number of cases such as *Rossek v. A.B.C Ltd.* (supra); *Mozie v. Mbamalu* (2006) 7 S.C.N.J. 411 at 423; *Adisa v. Oyinwola* (2000) 6 S.C.N.J. 322 and *Henry Awoniyi v. The Registered Trustees of the Rosicrucian Order of Amorc (Nigeria)* (2000)

6 S.C.N.J. 14, were brought to the attention of the Court in support of this submission. In concluding his submissions, learned senior Counsel for 3rd Respondent stressed that the fact that the orders of the trial Court of 4th April, 2007 had affected the rights of the 2nd Respondent, that alone had given the 2nd Respondent the competence to apply and set aside that judgment having regard to decisions in *Societe General Bank Nigeria Limited v. Adewumi* (2003) 10 N.W.L.R. (Pt.829) 526; *Delta State Government v. Dr. Okon* (2002) 2 N.W.L.R. (Pt. 752) 682; *Edun v. Odan Community* (1980) N.S.C.C. 279; *Emi Trading Services Limited v. Yuriy* (1998) 11 N.W.L.R. (Pt. 573) 284 and *Adeniyi v. Police Commission* (1967) 1 All N.L.R. 67. B C

As I have earlier observed in this judgment, the main issue calling for determination in this appeal is whether the judgment of the Abuja Division of the Federal High Court or trial Court given on 4th April, 2007 was a default judgment which is also a nullity as affirmed on appeal by the Court of Appeal by virtue of the non service of the originating processes on the 2nd Respondent which was entitled as of right, to apply to the trial Court and have that judgment set aside. The law regarding the position of any judgment or order of Court which is a nullity for any reason whatsoever, is that the Court in its inherent jurisdiction is entitled *ex-debito Justitiae* to have that judgment or order set aside on the application of an affected or aggrieved party or even *suo-motu*. See *Ademuluyi & Anor. v. African Continental Bank Ltd.* (1965) N.W.L.R. 24; *Obinmonure v. Erinoshio* (1966) 1 All N.L.R. 250; *West African Auto-mobile & Engineering Co. Ltd. V. Ajanaku* (1972) 2 U.I.L.R.335; *Skenconsult H. (Nigeria) Ltd. V. Ukey* (1981) 1 S.C. 6 and *Adegoke Motors Ltd. v. Adesanya* (1989) 3 N.W.L.R. (Pt. 109) 250. In other words on the applicable procedure, the Court in exercise of its inherent jurisdiction, can set aside its own judgment or order which is a nullity without necessarily resorting to appealing against that judgment or order by the affected party. What I have to determine in this issue is whether or not the judgment of the trial Court of 4th April, 2007 is truly a nullity as found by the trial Court and affirmed by the Court of Appeal. D E F G H

In the present case, the grounds upon which the 2nd Respondent went to the trial Court to have the judgment of that Court of 4th April, 2007 set aside, are set out in its application quoted in the Ruling of the trial Court of 20th July, 2007 at pages 155 - 156 of the

record where the 2nd Respondents claims are stated-

"(1.) An order extending time within which the Defendant/Applicant may apply to set aside the judgment of the Court dated 4th day of April 2007.

(2.) An order of Court Setting aside the entire proceedings and the judgment of the Court dated 4th day of April, 2007 the Defendant.

(3.) Any other order(s) as this Honourable Court may deem fit to make the circumstances".

The prayers were predicated on two (2) grounds:

"(a.) Failure to serve the 2nd Defendant/Applicant the Originating Process or any Processes in this suit.

(b) Breach of the Fundamental rights off fair hearing of the Defendant/Applicant."

After hearing the parties on the application, the learned trial Judge came to the conclusion that its judgment of 4th April, 2007 was a nullity and therefore proceeded to set it aside on the application of the 2nd Respondent described in the application as a "Defendant/Applicant." The relevant part of the ruling of the trial Court at pages 167 - 168 of record reads -

"On the final issue, Order 38 Rule 9 of the Federal High Court Civil Rules 2000 provides:

"Any judgment obtained where one party does not appear at the trial may be set aside by the Court upon such terms as may seem just, upon an application made within six days after the trial or within such longer period as the Court may allow for good cause shown."

The Court certainly has power to set aside a default judgment. As it is this is a default judgment that affected the interest of a necessary party who was initially made a party but whose name was withdrawn by the Plaintiff possibly to shield it from the proceedings. The failure to include a necessary party in a suit has been held to be fatal to the case of a Plaintiff and robs the court of jurisdiction.

See EZIONWU VS. UGBO (2006) 5 N.W.L.R. part 973 316 at 328 329

A court cannot make an Order against a non-party.

See ADENUGA VS. ODUMERU (2002) 8 N.W.L.R. PART 821 163 AT 187 - 188

On the whole, I uphold the applicants Motion for the rea-

sons stated above. The judgment delivered on the suit on 4th April, 2007 is hereby set aside.

B. O. KUFWUMI JUDGE 20/7/2007

When the Appellant appealed against the ruling of the trial Court to the Court of Appeal, the only issue that was placed before that Court for determination was - B

“Whether the trial Judge was not in error when he set aside judgment of 4th April, 2007 upon an application, by persons who were not parties and who did not apply to be joined in the proceedings.” C

In resolving the lone issue for the determination of the appeal the Court of Appeal agreed with the Respondents that the trial Court was right to have given the 2nd Respondent the right of hearing and setting aside the default judgment particularly when that judgment and the earlier withdrawal were not served on the party, the 2nd Respondent. The Court below also agreed with the findings of the trial Court on the affidavit evidence before it that the judgment of 4th April, 2007, was ab-initio a nullity which could have been set aside without much ado. Therefore, in dismissing the Appellant’s appeal, the Court below was also of the view that since the judgment of the trial Court was a nullity, the 2nd Respondent, as a party which was affected by the order of the trial Court which order is a nullity, is entitled, ex-debito-justitiae to have that judgment set aside. D

The first question for determination in the present appeal from the single issue earlier identified in this judgment, is whether the 2nd Respondent was a party to the Appellant’s action and proceedings in the Amended Originating Summons that culminated in the judgment of 4th April, 2007, which is the subject of this appeal. In *Green v. Green* (1987) N.S.C.C. 115 at 121, Oputa JSC had cause to define parties as – E

“Persons whose names appear on the record as Plaintiff or Defendant.” F

Similarly, ***in Fawehinmi v. N.B.A. (No. 1) (1989) 2 N.W.L.R. (Pt. 105) 494 at 550, Oputa JSC again in defining a ‘party’ H had this to say***

“A party to an action is a person whose name is designated on record as Plaintiff or Defendant, the term party refers to that person(s) by or against whom a legal suit is sought.

Whether natural or legal persons but all others who may be affected by the suit indirectly or consequently are persons Interested and not parties.

It is quite clear from the record of the trial Court that although the 2 Respondent was a party to the Appellant's action in the B 1st Originating Summons filed at the trial Court as the 2nd Defendant in the action, the steps taken by the Appellant as the Plaintiff in the action by an application under the rules of the Court to drop the 2nd Respondent as a Defendant in the action, was duly granted by that C Court resulting in deeming the Amended Originating Summons with Independent National Electoral Commission as the only Defendant in the action, as duly filed and served. The Amended Originating Summons at pages 46-47 of the records clearly reflects the parties in the action as the Appellant's being the Plaintiff while I.N.E.C. was the D only Defendant. ***Therefore the 2nd Defendant in the first Originating Summons filed by the Appellant, had by the process of the amendment to the Originating Summons granted by the trial Court on 1st March, 2007, ceased to be a party or a Defendant in the action.*** The reason given by the Appellant in his affidavit in support of the E amendment to the Originating Summons was that having received additional facts in connection with his action, he decided to drop the name of the 2nd Respondent and the claims against it from the action. In other words by the amendment, the Appellant was saying that he had no dispute with his party the 2nd Respondent since the action as framed against F the 1st Respondent alone was sufficient for his purpose. The Appellants case in the amended Originating Summons was therefore heard against the 1st Respondent alone as the Defendant. The record of proceedings at the hearing which culminated in the judgment of the trial Court of 4th G April, 2007 reflected only the Appellant and the 1st Respondent as parties in the case and no more. In short, the 2nd Respondent was not a party in the action that gave birth to the judgment of the trial Court of 4th April, 2007 which is the subject of the present appeal. ***It was therefore wrong for the trial Court and the Court below, H to have approached and treated this case on the basis that the 2nd Respondent Was a party in the case at the trial Court which was entitled to have been heard.***

In the determination of the question of who were the parties in the action heard on the Amended Originating Summons by the trial

Court, it is also relevant to examine the questions asked for determination by the trial Court and the reliefs sought by the Appellant as Plaintiff against I.N.E.C. as the only Defendant. The question for determination and the relief sought as framed are as follows at pages 46 – 47-

Whether by virtue of Section 6 (6) (b), Sections 36, 65, 66^B of the 1999 Constitution and Section 32 of the Electoral Act, 2006, the List of indicted persons by E.F.C.C. without being found guilty by any court of law can constitute the basis of disqualification of the Plaintiff or a candidate for the Gombi/Hong Federal Constituency of Adamawa State for the April, 2007 general election, by the Defendant.^C

1. If the answer to issue 1 is in the negative whether the Defendant can insist that any person whose name appear in the said list must be changed or substituted having regard to section 34(1)(2)^D of the Electoral Act.

WHEREOF THE Plaintiff seeks the following reliefs:

a. An order setting aside the decision of the Defendant to rely on list of indicted persons which include the Plaintiff as basis of disqualification.^E

b. An order direction the Defendant having first screened and cleared the Plaintiff, to restore the Plaintiff's name unlawfully and illegally removed by the Defendant.

c. An order of injunction restraining the Defendant, its agents^F and servants from tempering or doing anything of like nature with the name of the Plaintiff already submitted to the Defendant by his party as the candidate to the Federal House of Representatives for Gombi/Hong Federal Constituency of Adamawa State in the forthcoming April,^G 2007 general election.

As can be seen from the questions for determination above, all the Appellant wanted to know is whether the 1st Respondent could rely on the list of the alleged indicted persons containing the name of the Appellant, to disqualify him from contesting the election as member of the House of Representatives for Gombi/Hong Federal Constituency of Adamawa State. All the three reliefs sought by the Appellant were against the 1st Respondent namely, to set aside its decision to rely on the E.F.C.C. list of indicted persons to disqualify the Appel-^H

lant; order on the 1st Respondent to restore the Appellant's name unlawfully and illegally removed by the 1st Respondent, and an injunction restraining the 1st Respondent and its agents from tampering with the name of the Appellant already submitted to the 1st Respondent by his own Political Party the 2nd Respondent to contest the election. Thus, from the questions for determination and the reliefs sought in the action as framed in the Amended Originating Summons heard and determined by the trial Court, the Appellant as the Plaintiff had no quarrel or dispute whatsoever with his Political Party, the 2nd Respondent which forwarded his name to the 1st Respondent that screened and cleared him to contest the election. As no relief was sought directly against the 2nd Respondent which Was not a party in the action and as the reliefs granted by the trial Court in its judgment of 4th April, 2007 also did not directly affect the 2nd Respondent coupled with the absence of any evidence on record showing that the 2nd Respondent was no longer in support of the Appellant as its own candidate in the election held on 21st April, 2007 before that election was held, the trial Court and the Court below were clearly in error in regarding the 2nd Respondent as a party in the Appellant's case. This is because the Amended Originating Summons by law is deemed to have taken effect from the date of filing the first Originating Summons on 21st February, 2007. See Rotimi Mcgregor (1964) N.S.C.C. 542 at 552.

The next question for determination is whether or not the 2nd Respondent was right in going to the trial Court to apply for the setting aside of the judgment of 4th April, 2007 in the circumstances of this case. From the motion on notice filed by the 2nd Respondent on 5th June, 2007 at the trial Court asking for the setting aside of the judgment of that Court of the 4th April, 2007, the reliefs sought and the two grounds upon which the application was brought, were as follows:-

"(1) An order extending time within which the Defendant/Applicant may apply to set aside the judgment of the Court dated 4th day of April, 2007.

(2) An order of Court setting aside the entire proceedings and the judgment off the Court dated 4th day off April, 2007 against the Defendant.

(3) Any other order(s) as this Honourable Court may deem fit to make in the circumstances."

The two grounds upon which the application was brought are

“(a) *Failure to serve the 2nd Defendant/Applicant the Originating Process or any processes in this suit.*

(b) *Breach of the Fundamental right of fair hearing of the Defendant/Applicant.*” B

The records show that at the end of the hearing of this application, the trial Court in its ruling of 20th July, 2007, held that its judgment of 4th April, 2007 was a nullity because it affected the interest of the 2nd Respondent which was not put on notice being a necessary party in the case and that the failure to join the 2nd Respondent in the suit had robbed the trial Court of its jurisdiction. The ruling of the trial Court setting aside its judgment of 4th April, 2007 on the grounds stated by that Court was affirmed on appeal by the Court of Appeal resulting in the present appeal. C D

The question to be answered now is whether or not the judgment of the trial Court of 4th April, 2007 is a nullity having regard to the circumstances of this case. In the first place the **2nd Respondent which applied, to set aside the judgment on the ground that it was a Defendant in the action and that it was not put on notice, is not the correct position from the record of this appeal. The 2nd Respondent was indeed not a party in the case. Not being a party in the action of the Appellant as framed in the Amended Originating Summons, there was no obligation on the part of the trial Court to have put the 2nd Respondent on notice. Consequently, failure to put the 2nd Respondent which was not a Defendant in the action on notice, was not fatal to the case of the Appellant at the trial Court to the extent of depriving that Court of its jurisdiction in the case, not to talk of resulting in rendering its decision in the case, a nullity. It was indeed a misconception of the state of the law for the trial Court to have regarded the 2nd Respondent, against which there was no specific relief claimed in the action as a Defendant which ought to have been put on notice.** For the same reason, the accusation of the 2nd Respondent that the trial Court denied it its Fundamental Right of fair hearing in an action in which it was not a party, has no basis at all in law. E F G H

Learned Counsel to the 2nd Respondent who stated in his brief of argument which was initially unwilling to participate in the

Appellant's action at the trial Court and the appeal at the Court below in an attempt to remain neutral in the dispute between its members on the question of nomination of candidates for the April 21st 2007 election, found itself defending the judgments of the trial Court and the Court below in the present appeal because both judgments were in favour of the 2nd Respondent. That is why the learned Counsel found himself as he explained, agreeing with the Court below that any order made by a Court against a person not a party to a case is a nullity and liable to be set aside upon an application by the person affected. This line of argument seems to agree with the real position of the 2nd Respondent in this case of not being a party to the case but that the judgment affected its interest which gave it the right to apply to the trial court to have the null judgment of 4th April, 2007, set aside. However, the judgment of the Court below appeared to have gone even further to state that an application by the person affected may not even be necessary before the judgment may be set aside. This is what the Court said in its judgment at page 453 of the record-

"It is unthinkable as postured by the Appellant that the 2nd Respondent, the P.D.P, that put the name of Appellant to INEC, the 1st Respondent would not be affected by a judgment and orders concerning that nomination within the 2nd Respondent whose flag would be flown at the election proper. It is for that crucial position that a joinder of 2nd Respondent needs not be applied for nor granted before the judgment without the 2nd Respondent would be set aside."

With utmost respect, this is not the correct position of the law on the subject where a Court of law gives judgment or order against a person who is not a party in the case. The remedy of such a person lies in availing himself of the provisions of the 1999 Constitution where Section 243 (a) and (b) state -

"243. Any right of appeal to the Court of Appeal from the decision of the Federal High Court or a High Court conferred by this constitution shall be -

(a.) exercisable in the case of civil proceedings at the instance of a thereto, or with leave of the Federal High Court or the High Court or the Court of Appeal at the instance of any other person having an interest in the matter, and in the case of criminal proceedings at the instance of an accused person or; subject to the provisions of this Constitution and any powers conferred upon the Attorney-

General of the Federation or the Attorney-General of a State to take over and continue or to discontinue such proceedings at the instance of such other authorities or persons as may be prescribed.

(b) exercised in accordance with any Act of the National Assembly and rules of Court for the time being in force regulating the powers, practice and procedure of the Court of Appeal.” B

In the present case, it is not at all in doubt, that having regard to the nature of the dispute between the Appellant and the 1st Respondent as contained in the Amended Originating Summons adjudicated upon and determined by the trial Court, the 2nd Respondent being the Political Party that forwarded the name of the Appellant to the 1st Respondent to contest the election before the alleged disqualification and substitution of the Appellant's name by the 1st Respondent relying on the E.F.C.C. list of indicted persons containing the name of the Appellant, indeed qualified as a person having D interest in the matter heard and determined by the trial Court in its judgment of 4th April, 2007. **As from the date of this judgment, the orders in which were not directly addressed to the 2nd Respondent but specifically beamed at the 1st Respondent which was a party, the 2nd Respondent which was not a party to the action, but whose interest is directly in issue, had two options open to it:** E

(1) It may stay put and decide to abide by the judgment of the trial Court particularly being responsible in the first place of forwarding the name of the Appellant to contest the election as its candidate or, F

(2) Apply to the same trial Court for leave to appeal to the Court of Appeal within the time prescribed for appealing against the judgment or after the expiration of that time, apply to the Court of Appeal for extension of time to seek leave to appeal, leave to appeal and extension of time to appeal against the judgment as a person having an interest in the matter. G

It is apparent from the record of this appeal, particularly the observation of the learned Counsel to the 2nd Respondent in his Respondent's brief of argument, that the 2nd Respondent initially did not want to participate in the case at the trial Court and the Court below, that the 2nd Respondent opted for the first option of staying H

put by abiding with the judging of the trial Court. This explains its inaction on the matter until 5th June, 2007 some weeks after the election of 21st April, 2007 to go to Court with the application to set aside the judgment. Whatever, prompted the 2nd Respondent to challenge the judgment of the trial Court of 4th April, 2007 of which it was not a party
 B but a party or person having interest in the matter, ought to have come properly to join in the case as a party before it could have found the appropriate platform to attack the judgment on appeal which could have yielded the same relief of setting aside of that judgment if the grounds for
 C doing so have been established to justify the Court of Appeal granting the relief.

I may observe at this stage that the misconceived course taken by the 2nd Respondent in this case is similar to the course adopted by the Plaintiffs in the case of Okoye v. Nigerian Construction and Furniture Co. Ltd. (1991) 2 N.S.C.C. Vol. 22 Part 1 page 422 also reported in
 D (1991) 6 N.W.L.R. (Pt. 199) 501 at 532 where this Court held that failure to join as a party a person who ought to have been joined will not render the proceedings a nullity on ground of lack of jurisdiction or competence of the Court. Akpata JSC specifically stated the position as follows:-

E *"In my view failure to join a necessary party is an irregularity which does not affect the competence or jurisdiction of the Court to adjudicate on the matter before it. However, the irregularity may lead to unfairness which may result in setting aside the judgment on
 F appeal. Setting aside a judgment or making an order striking out the action or remitting the action for a retrial in such circumstance that will not be for lack off jurisdiction or on the basis off the judgment being a nullity. The trial court itself is incompetent to review the judgment; more so another Court of co-ordinate jurisdiction".*

G See also Laibru Ltd. v. Building & Civil Engineering Contractors (1962) 2 S.C.N.L.R. 118; Ekpere v. Aforije (1972) 1 All N.L.R. (Pt. 1) 220 referred to and applied) pp. 530 para. H).

H It is quite clear that the whole approach of the 2nd Respondent to the Appellant's action in which it was not a party resulting in the motion at the trial Court to set aside the judgment and the appeal at the Court of Appeal against the setting aside of the judgment of 4th April, 2007, the 2nd Respondent and unfortunately the two Courts below, laboured under a fundamental misconception of the assumed rights of the 2nd Respondent which regarded itself as a party to the

Appellant's action against the 1st Respondent and as such the 2nd Respondent thought that it was entitled to be put on notice of the case and proceedings thereof claiming that the failure to have done so, should lead to the setting aside of the judgment. The position of the law is well settled that no cause of matter shall be defeated by reason of mis-joinder or non-joinder of parties and the Court may in every cause or matter deal with the matter in controversy so far as regards the rights and interest of the parties actually before it. See *Peenock Investment Ltd. V. Hotel Presidential* (1982) 12 S.C. I. B

It is also observed that one of the reasons for setting aside the judgment of the trial Court of 4th April, 2007 is that it is a default judgment. It was not only the 2nd Respondent which filed its application to set aside the judgment trial regarded it as a default judgment under Order 38 Rule 9 of the Federal High Court (Civil Procedure) Rules, 2000, but that both the trial Court and the Court of Appeal also proceeded on the basis that the judgment is a default judgment. A default judgment is one given in default of appearance or pleadings against a Defendant or a Plaintiff in a cross-action whose names appear as such Defendant or Plaintiff in the record of the trial Court. In the instant case where the Appellant and the 1st Respondent who were the only parties as Plaintiff and Defendant in the action were present or duly represented by their learned Counsel before the trial Court throughout the proceedings up to the point of judgment in question, that judgment cannot be described as a default judgment. It is clearly a judgment on the merit which in law, can only be set aside on appeal. See *Alapa v. Sanni* (1967) N.M.L.R. 397. The Courts below are therefore in error in regarding and treating the judgment of the trial Court of 4th April, 2007 as a default judgment capable of being set aside by the trial Court on the application of the party not heard at the hearing. C D E F G

Having regard to the circumstances of this case, the appropriate remedy for the 2nd Respondent if it wants to still challenge the candidature of the Appellant in the 21st April, 2007 election, is for it to avail itself of the remedy under section 243 (a) and (b) of the 1999 Constitution as a person having interest in the matter. I may wish to observe at this stage that the cases relied upon by the Respondents is in this appeal in support of their submissions that the judgment of the trial Court of 4th April, 2007 was a nullity, are all H

cases in which persons who were parties to an action and who were therefore entitled to service of the initiating process and other processes or notice of hearing had not been served at all. The cases have no relevance to the present case in which the 2nd Respondent which was not a party in the case was complaining of not being put on notice. In the same vain, the case of *Adenuga v. Odumeru* (2002) 8 N.W.L.R. (Pt. 821) 163 also relied up on by the Respondents where this Court decided that a Court of law has no power to make an order against the interest of persons who were not parties before it as such an order is not in law binding on such parties, is also not relevant to the present case as no specific order was made against the interests of the 2nd Respondent in the judgment of the trial Court of 4th April, 2007 as no interest of the 2nd Respondent, was made known as at the date of the judgment regarding the nomination of the Appellant to contest the election as the candidate of the 2nd Respondent.

On the whole, taking into consideration that the main ground upon which the 2nd Respondent challenged the judgment of 4th April, 2007 as being a nullity was the failure of the trial Court to put it on notice for the hearing of the matter, as it has been shown quite clearly from the record of this appeal that the 2nd Respondent was in fact not a party in the case, the ground for regarding the judgment of the trial Court as being a nullity has been completely swept away thereby justifying the Appellant's appeal being allowed. The appeal has merit and it is therefore allowed. The Ruling of the trial Court of 20th July, 2007 setting aside the judgment of the Court of 4th April, 2007 which decision was affirmed on appeal by the judgment of the Court of Appeal of 17th December, 2008 are hereby set aside. In place of the Ruling and Judgment of the Courts below now set aside there shall be entered an order striking out the 2nd Respondent's motion filed at the trial Court on 5th June, 2007, asking the trial Court to set aside its judgment of 4th April, 2007, as that Court has no jurisdiction to do so.

I do not regard it as appropriate having regard to the circumstances of this case to make any order on costs.

OGUNTADE JSC

The appellant on 21 -02-07 Issued an originating summons claiming some reliefs against the Independent National Electoral Com-

mission (hereinafter referred to as INEC) and Peoples Democratic Party (hereinafter referred to as PDP) as 1st and 2nd defendants. On 28-02-2007, the appellant brought an application to file an amended originating summons. In the amended originating summons filed, the name of PDP was removed as the 2nd defendant. In effect INEC became the only defendant. The reliefs sought against INEC on the amended originating summons were:

“(a) An order setting aside the decision of the defendant to rely on the list of indicted persons which included the name of the Plaintiff as basis of disqualification.

“(b) An order directing defendant wing first screened the Plaintiff to restore Plaintiff's name cleared but unlawfully and illegally removed by the defendant.

“(c) An order of injunction restraining the defendant, its servant and privies from tampering or doing anything of like nature with the name of plaintiff already submitted as candidate of his party as the candidate for the Federal House of Representatives for Gombi/Hong Federal Constituency in the forthcoming April, 2007 General Election.”

At the conclusion of hearing, the trial court on 4th April, 2007 entered judgment in favour of the Plaintiff in the following terms:

“1. That the decisions of the defendant where based on the EFCC list of indicted persons without more cannot stand and it is hereby set aside.

2. That the defendant is hereby directed to restore plaintiff's name which is not changed in accordance with section 34(1) and (2) of the Electoral Act, 2006 which is the law relating to the change of candidates in the 2007 General Election.

3. Relief (c) is granted.”

On 5-06-07, P.D.P. brought an application to set aside the judgment of the trial court on the grounds of non-service of the originating summons and breach of fair hearing. On..... after listening to counsel's arguments, the trial court held that the judgment it had earlier given in favour of the appellant was a nullity. It accordingly set aside the judgment.

The appellant was dissatisfied with the judgment of the trial court. He brought an appeal against it before the Court of Appeal, Abuja (hereinafter referred to as the 'court below'). On 17-12-08, the court below dismissed the appellant's appeal. Still dissatisfied, the

appellant has come on a final appeal before this Court. In the appellant's brief filed by the appellant's counsel, the issues for determination in this appeal were identified as the following:

B *"(i) Whether the judgment of the trial court on 4th of April, 2007 amounts to a nullity as a result, of non-joinder and therefore liable to be set aside by the same court at the request of 2nd Respondent who was the person not joined.*

C *(ii) Whether the judgment of the trial court was a default judgment liable to be set aside at the instance of a person who was not joined to the proceedings."*

The above two issues will be considered together, It is important that the full facts of this case be exposed in advance of the applicable principles of law.

D The appellant as stated earlier had filed an originating summons on 4-04-07. In that originating summons, the reliefs which the appellant sought were these:

E *"1. A declaration that the Plaintiff having been lawfully nominated and his candidature accepted by the 1st defendant, he is entitled to fair hearing as to any reason given by the 2nd defendant for his replacement or substitution with any other person.*

F *2. A declaration that the 1st defendant cannot change the Plaintiff as the 2nd defendant's candidate for the April, 2007 House of Representatives election for the Gombi/Hong Federal Constituency of Adamawa State without divine any cogent reason.*

3. A declaration that 1st Defendant cannot accept any replacement or substitution of the Plaintiff by any person whatsoever without the 2nd defendant giving any cogent reason.

G *4. A declaration that failure of the 1st and 2nd defendant to give the plaintiff an opportunity to defend himself for any reason given amounts to denial of fair hearing.*

H *5. An order setting aside any substitution whatsoever made by the 2nd defendant to the 1st defendant as the 2nd defendant's House of Representatives candidate for the Gombi/Hong Federal Constituency of Adamawa State in the forth coming April 2007 general election.*

6. An order of injunction restraining the Defendants, their agents or servants from tampering with or doing anything whatsoever to the name or otherwise of the plaintiff as already verified and

cleared as the 2nd defendant's House of Representative candidate for Gombi/Hong Federal Constituency of Adamawa State in the April, 2007 general election."

In the affidavit hi support of the original originating summons, the appellant in paragraphs 1 to 10 deposed thus:

"1. That I am a registered and bone fide member of the Peoples Democratic Party, the 2nd defendant herein. A copy of my membership card of the 2nd defendant is attached herein as Exhibit 'A'.

2. That by virtue of my membership of the defendant, I contested the 2nd defendant's party's primaries for the House of Representatives election for Gombi/Hong Federal Constituency of Adamawa State and won and was duly sponsored by the 2nd defendant to the 1st defendant, as its candidate for the April, 2007 election in Adamawa State. Attached herein as Exhibit 'B' is the list of candidates sponsored by the 2nd defendant to the 1st defendant containing my name.

3. That upon the submission of my name by the 2nd defendant to the 1st defendant, the 1st defendant as required by law published my name both at its headquarters and my Federal Constituency as the authentic candidate of the 2nd defendant for the April, 2007 National Assembly House of Representatives election.

4. That upon the aforesaid publication no person has raised any complaint or objection to my qualification as required by law.

5. That the 2nd defendant duly submitted my name to the 1st defendant which has in turn cleared me after verification for the said election.

6. That surprisingly sometime about the 12th and 13th day of February, 2007 the 1st and 2nd defendants commenced moves to substitute my name as the candidate of the 2nd defendant with another person without any cogent reason offered by the 2nd defendant and without notice to me as to why they seek to substitute my name. That the defendants seek to rely upon a purported list from the EFCC containing names of indicted candidates by the EFCC. A copy of same is attached herewith as Exhibit 'C'.

7. That up till date I have not been confronted with any allegation of crime whatsoever nor has any been brought to my knowledge to warrant any such substitution.

8. That I have subsequently upon my adoption by the 2nd de-

fendant and clearance by the 1st defendant commenced electioneering campaign and have spent millions of Naira in the course of the campaign.

9. That I have no criminal record whatsoever as I have never been convicted by any court or panel to warrant the said indictment.

B *10. That if effect is given to the said purported indictment, it is going to cause me severe damage mentally, physically, psychologically and financially which no monetary compensation can assuage".*
(underlining mine)

C In the affidavit in support of the originating summons above, the appellant clearly deposed that he contested to be the candidate of the 2nd defendant P.D.P. and won but that the 1st and 2nd defendants (on the original originating summons) commenced moves to substitute him. It is therefore clear that the appellant knew that only
D his party could substitute him validly with another candidate provided the applicable provisions of the electoral Act, 2006 were followed.

On 1 -03-2007, appellant brought an amended originating summons. On the amended originating summons, the name of the
E P.D.P. as the 2nd defendant was no longer added. The reliefs sought had been amended to read:

"a. An order setting aside the decision of the defendant to rely on list of indicted persons which include the plaintiff as basis for disqualification.

F *b. An order directing the defendant having first screened and cleared the plaintiff, to restore the plaintiff's name unlawfully and illegally removed by the defendant.*

c. An order of injunction restraining the Defendant, its agents
G *and servants from tempering or doing anything of like nature with the name of the plaintiff already submitted to the defendant by his party as the candidate to the Federal House of Representatives for Gombi/Hong Federal Constituency of Adamawa State in the forthcoming April, 2007 general election."*

H In the affidavit in support of the amended originating summons, the appellant still acknowledged that the P.D.P. was his party and that it was the P.D.P. that tried to substitute him. To put the matter beyond any doubt, INEC swore to a counter-affidavit which reads:

"I Ahmad Gumi, male, Nigerian, Muslim of plot 436, Zambezi

Crescent, Maitama, Abuja, do hereby make oath and state as follows:

1. I am a Principal Executive Assistant in the office of the defendant in charge of records, by virtue of which fact I am conversant with the facts of this case.

2. I have the authority of the defendant to depose to this counter affidavit. B

3. I know that contrary to paragraph 6 of the counter affidavit the Defendant has never rejected any candidate's name, once duly forwarded by the Political Party sponsoring him. C

4. That paragraphs 8 and 9 of the counter affidavit are matters within the knowledge of the plaintiff.

5. I know that contrary to paragraphs 10 and 11 of the counter affidavit, the name of the plaintiff was substituted with another by his Political Party, PDP. A copy of the letter of substitution is herein annexed as exhibit INEC A. D

6. That it will not be in the interest of justice to grant the reliefs sought by the plaintiff in the originating summons.

7. That it depose to this affidavit in good faith believing its content to and be true to the best of my knowledge, information and belief, and in accordance with the Oaths Act" E

Further I.N.E.C. exhibited as its affidavit the letter sent to it by P.D.P. The said letter reads:

PEOPLE DEMOCRATIC PARTY (PDP) Michael Okpara F
Street, Wuse Zone 5, Abuja.

February 5, 2007.

Prof. Maurice Iwu,

Chairman,

INEC,

Abuja. G

**SUBSTITUTION: PDP CANDIDATE FOR GOMBI/HONG
FEDERAL CONSTITUENCY, ADAMAWA STATE**

This is to confirm that Barr. Haske Hananiya is the PDP Candidate for Gombi/Hong Federal Constituency Adamawa State. Barr. Haske Hananiya substitutes the earlier name for the afore-mentioned constituency which was submitted without enough information. H
This is for your necessary action.

(Sgd.)

Sen. (Dr.) Amadu Ali, GCON
National Chairman

(Sgd.)

Ojo Maduekwe, CFR
National Secretary”

The trial High Court on 4-4-2007 notwithstanding that it was aware that it was P.D.P. that substituted another candidate Barrister B Haske Hananiya for the appellant proceeded to make orders in these words:

“1. That having regard to the combined effect of the provision of sections 36, 65 and 66 of the Constitution of the Federal Republic of Nigeria 1999 & Section 34 of the Electoral Act, 2006, the 2nd defendant can not without given any reason whatsoever change the candidature-ship of the Plaintiff as earlier submitted as the 2nd defendant’s House of Representatives flag bearer for Gombi/Hong Federal Constituency of Adamawa State in the April, 2007 general D elections.

2. That the defendant is hereby directed to restore plaintiff’s name which was not changed in accordance with section 34(1) and (2) of the Electoral Act 2006 which is the law relating to the change of Candidates in the 2007 election.

E 3. The plaintiff is entitled to know and defend himself on any reason given whatsoever by the 1st defendant for his substitution or replacement.”

On 20-07-2007, following an application brought by P.D.P., F the judgment given in favour of the appellant on 4-04-2007 was vacated and declared a nullity. In setting aside the judgment earlier given, the trial court at pages 164-168 reasoned thus:

“This was based on the grounds of non-service of the Originating process or any process on the applicant and that this has led to G a breach of its fundamental rights to fair hearing. The response of the plaintiff is that the applicant has been withdrawn against way back on 27th February, 2007 and was not even served with any process before the said withdrawal.

It is agreed between the parties that:

H (1) The 2nd defendant was on the Originating process filed on 21/2/07.

(2) That the 2nd defendant was never served.

(3) That the plaintiff withdraw the case against the 2nd defendant on 27/2/07.

The issue now to be determined as (sic) these:

(A) The validity of the withdrawal of 27/2/07 vis-a-vis non service of the 2nd defendant with any process in this suit.

(B) Whether the judgment of 4/4/07 affect the applicant.

(C) Whether the said judgment can be set aside.

On the first issue, where notice of a proceedings is required, B failure to notify any party concerned is a fundamental omission which entitles the party not served and against whom any order is made in his absence to have the order made in his absence set aside on the ground that a condition precedent to the exercise of jurisdiction for C making the order has not been fulfilled.

See FALADU V. EKWO (2003) 9 NWLR (Part 826) 643 at 654.

On this issue, I agree with applicant's counsel that once the applicant or any person had been made a party in a suit, such party D ought to be served with all processes involving him.

On the other issue, can it be said that the applicant is not concerned with the decision of this court on 4/4/07? I think not.

See paragraphs 1, 2 and 3 of the affidavit in support of the Amended E Originating Summons.

I, CHIEF EMMANUEL BELLO, Male, Adult and a Nigeria citizen of Gombi/Hong Federal Constituency of Adamawa State, do hereby make oath and state as follows:

1. That I am a registered and bona fide member of the Peoples F Democratic Party. A copy of my membership card of the 2nd defendant is attached herein as Exhibit 'A'.

2. That by virtue of my membership of the 2nd defendant, I contested the 2nd defendant's party's primaries for the House of Representatives election for Gombi/Hong Federal Constituency of G Adamawa State and won and was duly sponsored by the 2nd defendant to the 1st defendant as its candidate for the April, 2007 election in Adamawa State. Attached herein as Exhibit 'B' is the list of candidates sponsored by the 2nd defendant to the 1st defendant containing H my name.

3. That upon the submission of my name by the 2nd defendant to the 1st defendant the 1st defendant as required by law published my name both at its headquarters and my Federal Constituency the authentic candidate of the 2nd defendant for the April, 2007

National Assembly House of Representatives election after I had undergone screening and verification.

B These averments indicate that the plaintiff is known to the applicant and also sought to occupy a seat sponsored by the applicant - a Political Party. The applicant in my view should have been a necessary party in this case but for the tacit withdrawal by the plaintiff of the case against it. I hold that the Judgment of 4/4/07 affects the interest of the applicant.

C On the final issue, Order 38 rule 9 of the Federal High Court Civil Rules 2000 provides:

'Any judgment obtained where one party does not appear at the trial may be set aside by the Court upon such terms as may seem just, upon an application made within six days after the trial or within such longer period as the Court may allow for good cause shown.'

D The court certainly has power to set aside a default judgment. As it is, this is a default judgment that affected the interest of a necessary party who was initially made a party but whose name was withdrawn by the plaintiff possibly to shield it from the proceedings. The failure to include a necessary party in a suit has been held to be fatal to the case of a plaintiff and robs the court of jurisdiction.

E See Ezionwu v. Ugbo (2006) 5 NWLR (Part 973) 316 at 328, 329.

A court cannot make an order against a non-party.

F See Adenuga v. Odumeru (2002) 8 NWLR (Part 821) 163 at 187-188.

On the whole, I uphold the applicants Motion for the reasons stated above. The judgment delivered in this suit on 4/4/07 is hereby set aside."

G The court below in its judgment affirming the judgment of the High court reasoned thus:

H *"Therefore the court below was right to have given the 2nd respondent the right of hearing them and setting aside that default judgment especially since that judgment and earlier withdrawal were not served on the party which in this case is the 2nd respondent P.D.P. I refer to Edun v. Odan Community (1980) NSCC 279; CMI Trading Services Ltd. v. Yuriy (1998) 11 NWLR (pt. 573) 284; Adeniji v. Police Service Commission (1967) 1 All NLR 67.*

It needs be re-emphasised here because the Facts or evi-

dence both in the affidavits and the findings of the court below are that the judgment set aside was *ab initio* a nullity. It is unthinkable as postured by Appellant that the 2nd Respondent, PDP that put up the name of the Appellant to INEC, the 1st Respondent would not be affected by a judgment and orders concerning that nomination within the, 2nd Respondent whose flag would be flown at the election proper. It is for that crucial position that a joinder of 2nd Respondent needs not be applied for not granted before the judgment without 2nd Respondent would be set aside. See *CMI Trading Services Limited v. Panchenko Yuriy* (1998) 11 NWLR (pt. 573) 284.

If a judgment or order of a court is a nullity, it can be set aside without much ado. A person who is affected by an order which can properly be described as a nullity is entitled, *ex debito justitiae*, to have it set aside *Eke v. Ogbonda* (2006) 18 NWLR (pt. 1012) 506 at 526; *Obimonure v. Erinosh* (1966) 1 All NLR 250; *Skenconsult (Nig.) Ltd. v. Ukey* (1981) 1 SC 6; *Adegoke Motors Ltd. v. Adesanya* (1989) 3 NWLR (pt. 109) 250; *Okoye v. Nigeria Construction and Furniture Co. Ltd.* (1991) 6 NWLR (pt. 199) 501".

Now to a consideration of the issues. I get the impression that the appellant's counsel in his brief did not seem to appreciate the full extent and nature of the wrong doing or impropriety done to the judicial process by the appellant.

Section 221 of the 1999 Constitution provides:

"221. No association other than apolitical party shall canvass for votes for any candidate at any election or contribute to the funds of any political party or to the election expenses of any candidate at an election."

Sections 32 and 34 of the Electoral Act, 2006 provides:

"32.-(1) Every political party shall not later than 120 days before the date appointed for a general election under the provisions of this Act, submit to the Commission in the prescribed forms the list of the candidates the Party proposes to sponsor at the elections.

(2) The list shall be accompanied by an Affidavit sworn to by each candidate at the High Court of a State, indicating that he has fulfilled all the constitutional requirements for election into that office.

(3) The Commission shall within 7 days of the receipt of the personal particulars of the candidate, publish same in the constitu-

ency where the candidate intends to contest the election.

(4) Any person who has reasonable grounds to believe that any information given by a candidate in the Affidavit is false may file a suit at the High Court of a State or Federal High Court against such person seeking a declaration that the information contained in the Affidavit is false.

(5) If the Court determines that any of the information contained in the Affidavit is false the Court shall issue an Order disqualifying the candidate from contesting the election.

(6) A political party which presents to the Commission the name of a candidate who does not meet the qualifications stipulated in this Section, commits an offence and is liable on conviction to a maximum fine of N500,000.00.

(7) Every political party shall not later than 14 days before the date appointed for a bye-election by the Commission submit the list of candidates from the party for the bye-election.

.....
34.- (1) A political party intending to change any of its candidates for any election shall inform the Commission of such change in writing not later than 60 days to the election.

(2) Any application made pursuant to subsection (1) of this Section shall give cogent and verifiable reasons.

(3) Except in the case of death, there shall be no substitution or replacement of any candidate whatsoever after the date referred to in subsection (1) of this Section."

The combined effect of the provisions of the 1999 Constitution and Electoral Act reproduced above clearly shows that the appellant, a politician knew or ought to know that his Party P.D.P. was the one who caused his substitution and that it was the same party who submitted the name of the 3rd respondent in this appeal as a substitute for the appellant. INEC, the independent electoral commission and arbiter in such matters could not of its own have substituted the appellant.

Assuming that the position of the law did not convey to the appellant and his lawyers that the parties who ought to be the legitimate defendants to his suit are P.D.P. and the 3rd respondent in this appeal Barrister Haske Hananiya, the counter affidavit filed by INEC to resist appellant's suit was revealing enough. The counter-affidavit

was a perfect answer to the suit of the appellant.

More intriguing is the nature of the judgment made by the trial court under paragraph II. For emphasis, the judgment reads:

“That the defendant is hereby directed to restore plaintiff’s name which was not changed in accordance with section 34(1) and (2) of the Electoral Act which is the law relating to the change of candidates in the 2007 Election.”

It is manifest that the above order could only have been directed against P.D.P and by extension against the candidate substituted for the appellant by P.D.P. INEC being an independent body created under the Nigerian Constitution could not of its own have substituted another candidate for the appellant - when viewed from this angle, it is easy to see that the P.D.P. and Haske Hananiya were necessary parties to the suit before the trial court as it was not possible for the suit to be fairly and finally determined without these two being made parties.

In the nature of the case before the trial court, P.D.P. and Barrister Haske Hananiya are not only desirable parties for a full and effective adjudication of the case brought by the appellant, they are also necessary parties. This is because the relief which the appellant sought from the court through his amended originating summons would in their nature affect the substantive rights of the two. As I observed earlier, it is the prerogative of P.D.P. to nominate a candidate to contest in its name at the elections; and P.D.P. having nominated Haske Hananiya, he had a vested interest which could not be taken from him unless he was first heard by the court. As I observed earlier, INEC could not on its own under the law restore or remove a candidate’s name on the list of candidates.

Order 12 rule 5(1) of the Federal High Court Rules provides:

“5-(1) If it appears to the court at or before the hearing of a suit, that all persons who may be entitled to or who claim some share or interest in the subject-matter of the suit, or who may be likely to be affected by the result have not been made parties, the court may adjourn the hearing of the suit to a future day, to be fixed by the court, and direct that such persons shall be made either plaintiffs or defendants in the suit, as the case maybe.”

In *Peenok v. Hotel Presidential* (1983) N.C.L.R. 122 at 146, this Court considered the meaning of a necessary party in a case and referred to the opinion of Devlin J. in *Amon v. Raphael Tuck & Sons Ltd.* (1956) 1 Q. B. 357 at 380 where he said:

“of course, whatever the object, it is the words of the rule that now govern the matter and it is true that the words ‘all the questions involved in the cause or matter’ are very wide.. They are so wide that no one suggests that they can be read with some limitation. The limitation is not something that is left to be settled by the court in its discretion. It is there in the words of the rule, the person to be joined must be someone whose presence is necessary as a party. What makes a person a necessary party? It is not, of course, merely that he has a relevant evidence to give on some of the questions involved; that would make him a necessary witness. It is not merely that he has an interest in the correct solution of some questions involved and has thought of some relevant arguments to advance and is afraid that the existing parties may not advance them adequately. That would mean that on the consideration of a clause in a common form contract many parties would claim to be heard, and if there were power to admit any, there is no principle, of discretion by which some would be admitted and others refused. The court might often think it convenient or desirable that some of such persons should be heard so that the court should be sure that it had found a complete answer, but no one would suggest that it is necessary to hear them for that purpose. The only reason which makes it necessary to make a person a party to an action is that he should be bound by the result and the question to be settled therefore must be a question in the action which cannot be effectually and completely settled unless he is a party” [see *Amon v. Raphael Tuck & Sons Ltd. (1956) 1 QB 357 at 380*]

Similarly in *Green v. Green [1987] 2 N.S.C.C. 1115 at 1123*, this Court discussed the meaning of “proper parties”, “desirable parties” and “necessary parties”. This Court said:

“A distinction must be drawn between the desirability of making a person a party and the necessity of making him one. In *Settlement Corporation supra* it was held that joining a person as a party to proceedings did not arise merely because the relief sought in the cause or matter might affect someone who was not a party in respect of his rights at common law or inequity. In *Peenok v. Hotel Presidential (1983) 4 N.C.L.R. 122* this Court per Idigbe, J.S.C. and Obaseki, J.S.C. drew the necessary distinction between what it is desirable to do and what it is necessary to do and came to me conclusion that

although it was desirable to join the Rivers State Government whose Edicts Nos. 15 and 17 were under attack, it was not necessary to join them before the court could decide on the claims of the parties before it."

There is no doubt that P.D.P and Haske Hananiya were necessary parties to the suit before the trial court. They were not joined. Not having been joined they could not be bound by a judgment or decision of which they had no notice, and which they could not participate in. As against the and 3rd respondents in this appeal the judgment given by the trial court impinges their right to fair hearing. They were not served with notice of the proceedings to the said judgment. In *Skenconsult (Nig.) Ltd. & Anor. v. Godwin Secondary Ukey [1981] 1 S.C. 4 at 15*, this Court per Nnamani JSC discussing the importance of service of the processes in a case said at pages 15-16:

"A court can only be competent if among other things all the conditions precedent for its having jurisdiction are fulfilled. In *Madukolu and Ors. v. Nkemdilim (1962) 1 All N.L.R. 587 at 594* Bairamian, FJ., (as he then was) stated the principles which have been accepted in successive cases in this court.

'A court is competent', he said, when:-

(1) *It is properly constituted as regards numbers and qualifications of the members of the bench, and no member is disqualified for one reason or another; and*

(2) *The subject matter of the case is within its jurisdiction, and there is no feature in the case which prevents the court from exercising its jurisdiction; and*

(3) *The cases comes before the court initiated by due process of law, and upon fulfillment of any condition precedent to the exercise of jurisdiction. Any defect in competence is fatal, for the proceedings are a nullity however well conducted and decided: the defect is extrinsic to the adjudication.'*

The service of process on the defendant so as to enable him appear to defend the relief being sought against him and appearance by the party or any counsel must be those fundamental conditions precedent required before the court can have competence and jurisdiction. This very well accords with the principles of natural justice.

The importance of service of process has been underlined by Lord Green M.R. in Craig v. Kanssen (1943) K.B. 256 at pp. 262-

263; (1943) 1 All E.R. 108, at p. 113. This was a case in which the issue was whether the High Court could set aside an order made by another judge of the same High Court giving the plaintiff leave to enforce a judgment under the Courts (Emergency Powers) Act, (1939) of England or whether the remedy lay only in appeal. In the course of his speech holding that the court could set aside its own order, the learned Master of the Rolls observed:

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

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

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

And at page 21 - 22, the court said:

"It is my view that looking through the authorities, it would seem that the issue can be resolved depending on whether in the course of proceedings there has been a fundamental defect, such as we have had in the instant case, which goes to the issue of jurisdiction and competence of the court. In such a case, the proceedings are a nullity and any orders made would also be nullities. If of course the court is competent and the order is the result of exercise of the judge's judicial discretion after hearing evidence, the decision will only be appealable. In Chief Uku's case (*supra*), the court that made first

order was competent and made its order after examining conflicting affidavits and taking argument. Amanambu's case was a case of amendment and to interfere with the order made was tantamount to sitting on appeal over it. From the deduction I have made from the authorities, Warrington, J., ought to have set aside the orders made by Romer, J., which he found had been made without jurisdiction and which were treated as nullities. The principle of fundamental defect is clearly the rationale of the decision of the Court of Appeal in England in Craig v. Kanssen (supra) in which Lord Greene, Master of the Rolls, had drawn the distinction 'between proceedings or orders which are nullities and those in respect of which there has been nothing worse than an irregularity.' In the case of the former, it was his View that a person affected by such an order is entitled ex debito justitiae to have it set aside. It could be set aside by court which made it."

In the instant case there was a defendant INEC. But its being named a defendant is at best cosmetic. It is a shell defendant in the circumstance. It was not the duty of INEC to nominate candidates for parties. That role belongs in this case to P.D.P. The order made by the trial court that the appellant's name be restored as a candidate was in reality an order against P.D.P and Haske Hananiya. The argument of appellant's counsel is that the 2nd and 3rd respondents should have appealed against the judgment rather than bring an application for its being set aside. The appellant's counsel never argued that the procedure by which judgment was given which primarily affected a party who had no notice of the proceedings in which it was given was correct. The trial court acknowledged that it was wrong to have obtained the judgment in the manner in which the appellant. The court below equally did the same. Before us, it was not disputed that notice of the proceedings was not given to the 2nd and 3rd respondents.

Rather, the argument has been that P.D.P. should have brought an appeal to set it aside. In my humble view, I think that the just approach is to focus attention on the irregularity and impropriety of giving judgment which affected a person not made a party to the proceedings rather than the procedure adopted to vacate the order. I think that the justice of this case demands that serious examination be made as to the motives of the appellant and to consider whether it is in the interest of justice desirable that a person who has know-

ingly and willfully been unjust to the others should be allowed to reap the reward or benefit of his mischief.

I observed earlier that the plaintiff in his original originating summons joined the P.D.P. as the 2nd defendant. In the affidavits filed in support of his original and amended originating summons, the
 B appellant made depositions that P.D.P. and INEC wanted to substitute him. Apart from this, INEC filed a counter-affidavit wherein it stated that it was the appellant's party P.D.P. that wrote to substitute the appellant. The said letter was exhibited. The appellant retained a
 C senior counsel- a Senior Advocate of Nigeria to handle his case. It seems to me that unless the appellant had set out to do a mischief, he would not have failed to join the 2nd and 3rd respondents to the suit. Clearly in my view, the appellant set out to obtain a judgment clandestinely.

D It was this judgment that the appellant obtained improperly that he produced to INEC to obtain a Certificate of Return to now sit in the House of Representatives notwithstanding that he was not the one voted for or declared Winner at the election by INEC. He has been in the National Assembly since 2007 and the life of that parliament will expire in
 E 2011. If the appellant had accepted the judgment of the trial court, the suit would have been reheard with the 2nd and 3rd respondents as parties. His resistance through successive appeals to the court below and this Court has enabled him to keep a seat in the National Assembly for which
 F he was not sponsored by P.D.P. It seems to me that it would be obnoxious and unjust to allow the appellant hold on to the seat whilst the appellant engages the 2nd and 3rd respondents in endless litigations. The order made by the trial court setting aside the judgment it gave on 4-4-2007 would only have enabled the appellant to lay out his claim with the 2nd and
 G 3rd respondents as defendants.

I am not unaware that there are cases inclining to the view that where necessary parties to a suit are not joined, the decision is not necessarily a nullity. It may give the parties affected by the non-joinder to take steps to appeal against it. Cases in this class include Leonard Okoye &
 H Ors. v. Nigerian Construction Furniture Co. Ltd. [1991] 6 NWLR (Pt. 199) 501 where this Court said at pp. 548-549:

"In my view it is obvious from the facts of this case that the appellants were not originally parties to the action and it is a misconception to suggest that because they are not made parties to the

proceeding the said judgment should be set aside. Strictly speaking they are third parties as far as that judgment was concerned. They have erroneously assumed that they are already parties to the proceedings. This is not so. They still have to take steps to be joined as parties to the action or take an alternative step of seeking leave of court to appeal against the judgment as interested parties. In any event to join them as parties will not render the judgment obtained in that proceeding a nullity. See the case of Bohsah v. Arikpo [1966] 1 All N.L.R. 161."

Similarly in *Ayorinde & Ors. v. Oni & Anor.* [2000] 3 NWLR (Part 649) pg. 348, this Court in a case where the parties were not joined observed:

"Learned counsel for the appellants had inter alia submitted that where a necessary party to an action for one reason or the other was not joined, the non-joinder will not render the judgment a nullity. This is a correct statement of the law. In my opinion, failure to join a necessary party in an action is a procedural irregularity which does not affect the competence or the jurisdiction of the court to entertain the matter before it. But where the irregularity leads to injustice or unfairness to the opposing party, it may lead to setting aside the judgment on appeal. It is pertinent to emphasize the fact that the failure to join the descendants of Yisa Giwa in the action leading to this appeal did not render the judgment a nullity on the ground of lack of jurisdiction."

See also *Chief J. S. Ekpere and 3 Ors. v. Chief Okada Aforeja & 4 Ors.* [1972] All N.L.R. 224 at 231.

But this Court has not always followed that approach. In *Oloriode v. Oyebe* [1984] 1 S.C.N.L.R. 390 where a party affected by a judgment was not brought in as a party to the proceedings this Court per Uwais J.S.C. (as he then was) preferred the option of striking out plaintiff's suit. At page 409 of the report, this Court observed:

"From the foregoing, it is clear that not all the parties interested in the land in dispute were joined in each of the consolidated actions. To dismiss or grant the claims made would amount to giving judgment against the branches of the families that were not joined in the action. This will undoubtedly cause hardship to the families of Osu Kehinde and Olusegun who have not had the opportunity of contesting the cases. I accordingly agree that the proper order to

have been made by the trial court was to strike out both claims instead of dismissing the appellant's case and entering judgment in part of the respondent."

I would agree with the lead judgment that this appeal be allowed. I however take the view that it is desirable that this Court at the earliest opportunity should re-examine its position in cases as this where it is manifest that the exclusion of a necessary party in proceedings which will affect the interest of such party is deliberate. In such situation the judgment obtained should be treated as a nullity.

I agree with the lead judgment and subscribe to the order made on costs.

ONNOGHEN JSC

I have had the benefit of reading in draft, the lead judgment of my learned brother MOHAMMED, JSC. Just delivered. I agree with his reasoning and conclusion that the appeal has merit and should be allowed.

It is not disputed that the appellant originally issued an originating summons dated 21st February, 2007 against the 1st and 2nd respondent's claiming as follows:-

"1. A declaration that the plaintiff having been lawfully nominated and his candidate accepted by the 1st defendant, he is entitled to fair hearing as to any reason given by the 2nd defendant for his replacement or substitution with any other person.

2. A declaration that the 1st defendant cannot change the plaintiff as the 2nd defendant's candidate for the April, 2007 House of Representatives election for the Gombi/Hong Federal Constituency of Adamawa State without giving any cogent reason.

4. A declaration that the 1st defendant cannot accept any replacement or substitution of the plaintiff by any person whatsoever without the 2nd defendant giving any cogent reason.

5. A declaration that the failure of the 1st and 2nd defendants to give the plaintiff an opportunity to defend himself for any reason given amounts to a denial of fair hearing.

6. An order setting aside any substitution whatsoever made by the 2nd defendant to the 1st defendant as the 2nd defendant's House of Representative candidate for the Gombi/Hong Federal Constituency of Adamawa State in the forth coming April, 2007 general

election.

7. *An order of injunction restraining the defendants, their agents or servants from tampering with or doing anything whatsoever to the name or otherwise of the plaintiff as already verified and cleared as the 2nd defendant's House of Representatives candidate for the Gombi/Hong Federal Constituency of Adamawa State in the April, 2007 general elections*". B

However and before service could be effected on the 2nd defendant, the plaintiff applied for and was granted leave to withdraw or discontinue the action against the 2nd defendant as a result of which the name of the 2nd defendant was struck out of the proceedings. The plaintiff subsequently filed an amended originating summons in which the issues for determination and reliefs sought are stated thus:- C

ISSUES FOR DETERMINATION

 D

"(1) *Whether by virtue of Sections 6(6)(b), Section 36, 65, 66 of the 1999 Constitution and Section 32 of the Electoral Act, 2006, the list of indicted persons by EFCC without being found guilty by any court of law can constitute the basis of disqualification of the plaintiff as a candidate for the Gombi/Hong Federal Constituency of Adamawa State for the April, 2007 general election by the defendant.*

(2) *If the answer to Issue 1 is in the negative whether the defendant can insist that any person whose name appears in the said list must be changed or substituted having regard to Section 34(1) and (2) of the Electoral Act.* F

WHEREOF the plaintiff seeks the following reliefs:-

a. *An order setting aside the decision of the defendant to rely on list of indicted persons which include the plaintiff as basis for disqualification.* G

b. *An order directing the defendant having first screened and cleared the plaintiff, to restore the plaintiff's name unlawfully and illegally removed by the defendant.*

c. *An order of injunction restraining the defendant, its agents and servants from tampering or doing anything of like nature with the name of the plaintiff already submitted to the defendant by his party as the candidate for the Federal House of Representatives for Gombi/Hong Federal Constituency of Adamawa State in the forth-* H

coming April 2007 general election”.

Thereafter the matter proceeded to trial and judgment was entered in favour of the plaintiff in the following terms:-

“1. That the decision of the defendant were based on the EFCC list of indicated persons without more cannot stand and it is hereby set aside.

2. That the defendant is hereby directed to restore plaintiffs name which is not changed in accordance with Section 34 (1) and (2) of the Electoral Act, 2006 which is the law relating to the change of candidates in the 2007 General Election.

3. Relief C is granted”.

The above judgment was delivered on the 4th day of April 2007.

However, on the 5th day of June, 2007, the original 2nd defendant who is the present 2nd respondent filed a motion at the trial court in which it sought an “order extending time within which the 2nd respondent shall apply to set aside the decision of the trial court of 4th of April, 2007, an order setting aside the entire proceedings and the judgment of 4th April, 2007”.

The application is said to be granted on non-service of the originating processes on the applicant breach of its right to fair hearing. The trial court consequent to the application set aside the judgment in question on the ground that the same is a nullity. The appellant was dissatisfied with that decision and consequently appealed to the Court of Appeal which dismissed his appeal resulting in the instant further appeal.

Learned senior counsel for the appellant, RICKY TARFA ESQ., SAN has submitted two (2) issues for the determination of the appeal. These are as follows:-

“(i) Whether the judgment of the Trial Court delivered on 4th of April, 2007 amounts to a nullity as a result of non-joinder and therefore liable to be set aside by the same court at the request of 2nd Respondent who was the person not joined (Grounds 1, 2 and 3).

(ii) Whether the judgment of the Trial Court was a default judgment liable to be set aside at the instance of a person who was not a party to the proceedings. (Ground 4)”.

It is not in dispute at all that the 2nd respondent ceased to be a party in the proceedings following the amendment of the originat-

ing summons at the trial court when the name of the 2nd respondent was struck out on 27th February, 2007. It was, in the circumstance very erroneous for the 2nd respondent to have applied to the trial court on the basis that it was a party action to set aside its judgment on the ground that it was not heard first to the judgment being entered on the 4th day of April, 2007. Since the name of the 2nd respondent had been struck out of the proceedings it ceased to be a party in the proceedings and therefore cannot legally take advantage of the provisions of Order 38 Rule 9 of the Rules of Court as it purported to do. B

However, though the 2nd respondent was not a party to the proceedings, it could still have, in appropriate circumstances, been admitted or allowed to apply to set aside the said judgment if, for instance, it is established that the 2nd respondent is a person interested in the outcome of the proceedings particularly where his interest may be affected by the suit either directly or indirectly. See *Fawehinmi vs NBA (No.1) (1989) 2 NWLR (Pt. 1051) 494 at 550.* C D

In the instant case when one looks at the reliefs claimed in the amended originating summons it is very clear that there is nothing that can be said to affect directly or indirectly the interest of the 2nd respondent to qualify it to apply as a person interested to set aside the said judgment. E

Where, however, a person interested in the outcome of any proceeding intends to initiate action or processes to protect or guarantee his interest, he has first and foremost to apply to the court to be joined in the proceedings. The 2nd respondent did not do so. It simply applied to set aside the judgment on the assumption that, it is a party in the proceedings, which it was not. In any event, there being no complaint or relief against the 2nd respondent in the claims of the appellant, the 2nd respondent cannot be said to be a necessary party to be joined in the proceedings either upon its application or suo motu by the court. F G

It should also be pointed out that failure to join a necessary party to a proceeding does not render any judgment entered therein a nullity nor render the court in question incompetent to adjudicate in the matter- see *Atuegbu vs Awka South local Govt. (2002) 15 NWLR (Pt. 791) 635; Orayemi vs. Okunubi (1965) 1 ALL NLR 362; Ayorinde vs. Oni (2000) 3 NWLR (Pt. 649) 348; Onibudo vs Abdullahi (1991) 2 NWLR (Pt. 172) 230.* H

Though the trial court has the inherent power to set aside its judgment or order where it becomes obvious *ex facie* that it was rendered without Jurisdiction or it is otherwise fundamentally defective thereby rendering same null and void and ineffective, in the instant case, the trial court had the jurisdiction to entertain the action and there was nothing fundamentally defective in the proceedings leading to the judgment in question to have clothed the trial court with the requisite jurisdiction to do what it did. The question of non service of originating process and other processes on the 2nd respondent prior to the entering of the judgment in question would have been a fundamental defect which would have robbed that court of the jurisdiction to entertain the matter to judgment if the 2nd respondent were to have been a party in the proceedings. As we had earlier found out, the 2nd respondent was not a party in the proceedings. I therefore hold the considered view that the trial court having entered judgment in the matter in the circumstances of this case became *functus officio* and therefore incapable of reopening the matter by application. The judgment entered in the circumstance is legally on the merit, not a default judgment. The only avenue open to the 2nd respondent, if it feels really aggrieved, is to appeal against that judgment as an interested party under Section 243(a) of the Constitution of the Federal Republic of Nigeria, 1999.

In the circumstances and having regards to the more detailed reasons assigned in the lead judgment of my learned brother MOHAMMED JSC just delivered and with which I am in complete agreement, I hold the considered view that the lower court was in error when it failed to set aside the decision of the trial court setting aside its earlier judgment delivered on the 4th day of April, 2007.

I therefore find merit in the appeal which is accordingly allowed by me. I abide by the consequential orders made in the lead judgment of my learned brother including the order as to costs. Appeal allowed.

H **MUNTAKA-COOMASSIE JSC**

I have had the privilege of reading in draft the lead judgment just delivered by my learned brother Mahmud Mohammed JSC and I agree that same ought to be allowed, as having been meritorious.

It is clear that the 2nd Respondent, Peoples Democratic Party

(P. D. P.) was not ab initio a party, and in fact there was no order made by the trial court which affected P.D.P, the judgment of the trial court cannot therefore be regarded as a nullity for the alleged failure of the trial court to put it on Notice for the hearing of the matter. I therefore entirely agree with my Lord Mahmud Mohammed JSC that the appellant's appeal deserved to be allowed. The appeal herein has a lot of merits same is therefore allowed by me. The ruling of the trial court of 20/7/2007 is hereby set aside. That being the case the 2nd Respondent's motion filed at the trial court on 5/6/2007 cannot stand. Same is dismissed; I abide by the consequential orders made in the lead judgment. I too make no order as to costs.

ADEKEYE JSC

I had read in draft the judgment just delivered by my learned brother, Mahmud Mohammed JSC. In the Originating Summons filed by the appellant as plaintiff in the Federal High Court, Abuja on the 21st of February 2007, the independent National Electoral Commission and Peoples Democratic Party were named as defendants. The appellant withdrew the suit against the Peoples Democratic Party, whereupon an Amended Originating Summons was filed and served on INEC as the sole defendant. The matter proceeded to trial on the Amended Originating Summons. In the considered judgment of the court delivered on the 4th of April 2007, the court entered judgment for the plaintiff/appellant as follows: -

(1) That the decisions of the defendant were based on the EFCC list of indicted persons without more cannot stand and it is hereby set aside.

(2) That the defendant is hereby directed to restore plaintiff's name which is not changed in accordance with Section 34 (1) and (2) of the Electoral Act 2006 which is the law relating to the change of candidates in the 2007 General Election.

(3) An order of restraint Relief C was also granted. On the 5th of June 2007, the 2nd respondent, Peoples Democratic Party filed a motion on Notice before the court seeking relief as follows:-

"An order extending time within which the 2nd respondent shall apply to set aside the decision of the trial court of 4th of April 2007, an order setting aside the entire proceedings and the judgment of 4th

of April 2007.”

The 2nd respondent based its argument on the grounds that as a party in the initial originating summons, he was not served with the process, which was a breach of its right of fair hearing. The Federal High Court set aside the judgment of the 4th of April On the ground that it was a nullity. The plaintiff/appellant appealed to the Court of Appeal Abuja against the trial court. The Court of Appeal dismissed the appeal on the 17th of December 2008. The plaintiff/appellant aggrieved by decision of the lower court filed a further appeal to this court.

On a cursory look at the issues raised by the parties, the questions posed for determination by the court are as follows:-

(1) Whether the judgment of the trial court delivered on 4th of April 2007 amounts to a nullity as a result of non-joinder and therefore liable to be set aside by the same court at the request of 2nd respondent who was the person not joined.

(2) Whether the judgment of the trial court was a default judgment liable to be set aside at the instance of a person who was not party to the proceedings.

My brother meticulously dealt with the two issues in the leading judgment. It is however pertinent to note that the plaintiff/appellant in his initial originating summons made Peoples Democratic Party a party to the suit. In an amended originating summons, the suit was withdrawn against the Peoples Democratic Party. It is the prerogative of the plaintiff to determine the defendants in a suit. The liability of each of the parties in the suit would be determined having regards to the pleadings and evidence led by the claimant in the light of the applicable laws. Therefore in order to determine whether a party is a proper defendant to a suit, all the court needs to do is to examine the claim of the plaintiff before the court. It is the plaintiff's claim that gives him the right to initiate the action for the alleged wrongful act.

Dantata v. Mohammed (2000) 7 NWLR pt. 664 pg. 176.

Adekoya v. FHA (2000) 4 NWLR pt. 652 pg. 215.

Ogbebo v. INEC (2005) 15 NWLR pt. 948 pg. 376.

The Rules of court gives the court the discretionary power, suo motu on its own motion to order that a person be added as party to a suit where it considers that such a person ought to be a party to the proceedings. The rule puts the burden on the court to order the

joinder of a party where the joinder of such party will enable the court effectually and completely adjudicate upon and settle all questions before the court.

Peenok Investment Ltd. v. Hotel Presidential Ltd. (1982)12 SC pg.1

Olagunju v. Yahaya (1998) 3 NWLR pt. 542 pg. 501. B

Egonu v. Egonu (1973) 11-12 SC pg. 111

Uku v. Okumagba (1994) 3 SC pg. 35.

Ige v. Akinyemi (1990) 6 NWLR pt. 158 pg. 547.

Igbokwe v. Igbokwe (1993) 2 NWLR pt. 273 pg. 29 C

If a defendant has the feeling that the outcome of the suit will adversely affect his interest, he can apply to be joined before the matter proceeds to trial. The issue of joinder of parties are as embodied in the Rules of Court. The purpose of the principle guiding joinder in the various rules of court is to allow the plaintiff to proceed in the same action against all defendants against whom he alleges be entitled to any relief, whether his claim is brought against the defendants jointly, severally or in the alternative. The person to be joined must be someone whose presence is necessary as a party and the only reason which makes him a necessary party to the action is that he should be bound by the result of the action which cannot be effectually and completely settled unless he is a party. The determining factors on the issue of joinder are- E

(1) Whether the issue that call for determination cannot be effectually and completely settled unless the party sought to be joined is made a party. F

(2) That his interest will be irreparably prejudiced if he is not made a party.

Ajayi v. Olayemi (2001) 10 NWLR pt. 722 pg. 516.

Oduola v. Coker (1981) 5 SC pg. 197. G

Awoniyi v. Registered Trustees of Amorc (2000) 10 NWLR pt. 676 pg. 522.

Osunrinde v. Ajamogun (1992) 6 NWLR pt 246 pg. 156.

The Peoples Democratic Party was the party that sponsored the candidates for the election. It is however noteworthy that a person does not become a necessary party merely because he has an interest in the correct solution of some questions involved, and has thought of some relevant argument to advance, and is afraid that the existing party may not advance same adequately. H

Ugorji v. Onwu (1991) 3 NWLR pt. 178 pg. 177.

Peenok Investments Ltd. v. Hotel Presidential Ltd. (1982)12

SC pg.1

It is the party who raises the issue of the joinder as a necessary party that has the onus to prove that he is not only a necessary party but a desirable party. The appellant did not see the 2nd respondent as a necessary party at the time the originating summons was withdrawn against it. In determining whether to join a person as a defendant in a suit, the court will consider the following questions that is -

(a) Is it possible for the court to adjudicate upon the cause of action set up by the plaintiff unless the person is added as a defendant.

(b) Is the person someone who ought to have been joined as a defendant in the first instance.

(c) Is the cause or matter liable to be defeated for non-joinder.

These questions must be answered in the affirmative for the joinder to be justifiable.

The failure to join as a party a person who ought to have been so joined gives rise to the mistake of non-joinder of party. The fact that a necessary party to the action has not been joined will not render the action a nullity. The proceedings of a court of law will not be a nullity on the ground of lack of competence of the court or lack of jurisdiction merely because a plaintiff fails to join a party who ought to have been joined. The court cannot dismiss a suit because a party who ought to have been joined was left out.

Onibudo v. Abdullahi (1991) 2 NWLR pt. 172 pg. 230.

Atuegbu v. Awka South Local Government (2002) 15 NWLR pt. 791 pg. 635.

Ayorinde v. Oni (2000) 3 NWLR pt. 649 pg. 348.

Ifeanyi Chukwu (Osondu) Ltd. v. Saleh Boneh Ltd. (2000)5 NWLR pt. 656 pg. 322.

Orayemi v. Okunubi & Anor. (1965) 1 ALL. NLR pg. 362.

Warri Refining & Petrochemical Co. Ltd. v. Omo (1999) 12 NWLR pt. 630 pg. 312.

A court has an inherent power to set aside its judgment or order where it has become so obvious that it was fundamentally de-

fective or given without jurisdiction. In such a case, the judgment or order given becomes null and void, thus liable to be set aside.

Okafor v. Okafor (2000)11 NWLR pt. 677 pg. 21.

Skenconsult (Nig.) Ltd. v. Ukey (1981)1 SC pg. 6.

Obimonure v. Erinsho (1966)1 ALL NLR pg. 250.

The power of a court to set aside its judgment is statutory, the court does not have power to set aside its judgment without a statutory provision enabling it to do so. A court of concurrent or coordinate jurisdiction can set aside the judgment or order of another court in circumstances where: -

- (a) The writ or application was not served on the other party or
- (b) the action was tainted with fraud or the court lacks jurisdiction to entertain the action.

Lawal v. Dawodu (1972) 8-9 SC pg. 83.

By the time the Amended Originating Summons was filed, the name of Peoples Democratic Party did not appear on it as a party. The party has no specific interest in the suit, no specific relief was claimed against it and it was no longer necessary to put it on notice not being a party in the suit. It maintained a neutral stance in an action predicated on nomination of its candidates. The judgment delivered on 4th of April 2007 cannot be a nullity for reason of non-joinder of PDP as a party. Can it in the circumstance be referred' to as a default judgment? The High Court Civil Procedure Rules gives the High Court the powers to give judgment in default of pleadings or appearance. Any judgment in default of pleadings or appearance is not a final judgment since both parties were not heard on the merits of the case. The judgment was obtained by failure of the defendant to follow certain rules of procedure. Where the court has not pronounced a judgment on merits or by consent such a judgment may be set aside by any trial court in the judicial division where the judgment was obtained.

Wimpey Ltd. v. Balogun (1986) 3 NWLR pt. 28 pg. 324.

Williams v. Hope Rising Voluntary Funds Society (1982) 1-2 SC pg. 145.

Ugwu v. Aba (1961) I ALL NLR pg.438.

Afribank (Nig.) Ltd. v. Owoseni (1995) 2 NWLR pt. 375 pg.

Nduka v. Chiejina (2003)1 NWLR pt. 802 pg. 451.

The judgment in question is not a default judgment - and therefore cannot be set aside by any judge of the same Federal High Court. It is the valid Judgment of a court which remains valid until set aside on appeal. By virtue of Section 243 subsection (a) & (b) of the 1999 Constitution which reads as follows-

B *“Any right of appeal to the Court of Appeal from the decisions of the Federal High Court or a High Court conferred by this Constitution shall be:-*

(a) Exercisable in the case of civil proceedings at the instance of a party thereto OR with leave of the Federal High Court in the C High Court or the Court of Appeal at the instance for any person having an interest in the matter and in case of criminal proceedings.

(b) Exercised in accordance with any act of the National Assembly and rules of court for the time being in force regulating the D powers practice and procedure of Court of Appeal.

While parties in the case of *Green v. Green* (1987) NSCC pg. 115 at pg. 121 is defined as “persons whose names appear on the record as plaintiff or defendant”, in the case of *Fawehinmi v. NBA* (No.1) 1989 2 NWLR pt. 105 pg. 494 at pg. 550- A party is defined E as follows: -

“A party to an action is a person whose name is designated on record as plaintiff or defendant, the term party refers to that person(s) by or against whom a legal suit is sought whether natural or legal persons but all others who may be affected by the suit indirectly or consequently are persons interested and not parties.” F

Since the definition of interested persons covers, the 2nd respondent, the available option open to him is to take advantage of Section 243 (a) & (b) of the 1999 Constitution to appeal against the G decision of the trial court.

With fuller reasons given by my brother in the leading judgment. I also allow the appeal. The judgment of the Court of Appeal delivered on 17/12/08 affirming the decision of the Federal High Court Abuja of 20/7/07 which set aside the judgment of that court H delivered on 4/4/07 is hereby set aside. I abide by the consequential orders in the leading judgment including the order as to costs.