

COURT OF APPEAL  
18TH APRIL, 2011. CA/C/107/2010  
CORAM:- K. B. AKAHS, J. MIKA'ILU, I. O. AKEJU, JJCA

1. HARUNA MAMMAN VATSA  
2. JUBRIN MAMMAN VATSA ..... APPELLANTS  
3. AISHA MAMMAN VATSA  
(For themselves and on Behalf of  
the family of Safiya Vatsa Deceased)  
AND  
FIRST BANK OF NIGERIA PLC ..... RESPONDENT

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FAIR HEARING - Breach - Effect - Consequence of the breach in a trial is that - Decision reached thereat is a nullity - And liable to be set aside (H1)

ACTIONS - Writ of summons - Statement of claim - Failure to file means absence of pleadings - Trial court was wrong to find against defendants - For not filing statement of defence (H2)

WRIT OF SUMMONS - Issuance of - Validity - By O.5 r.16 Cross River State H.C. Rules - Writ is invalid if it is improperly issued or not served within 12 months in the first instance - Or within its renewal period for another 12 months (H3)

COURT PROCESSES - Amendment - Effect - Where process is amended - The original process still forms part of the records of court (H4)

### ***FACTS***

Plaintiff/respondent commenced this suit at High Court of Cross River State, Calabar Division via writ of summons filed on 3rd June 1988, wherein it made some claims against defendant, Safiya M. Vatsa (now deceased and substituted by appellants). Respondent did not file any statement of claim but titled the claim in the writ as "*PARTICULARS OF CLAIM*". He sought and obtained the leave of court for substituted service of the writ on defendant. The service was done via publication in a national daily. Appellants did not file any process

in reaction to the service of the Writ. Meanwhile by a motion ex-parte filed in the court, respondent sought and obtained leave of court to amend the particulars of claim within 7 days.

However, respondent failed to file the amended process as ordered by the court. On the contrary, it filed motion on notice for judgment to be entered in its favour since appellants failed to file a defence. Respondent subsequently sought and obtained leave to serve the motion on appellants by substituted means. The court nevertheless struck out the earlier order it made. The court upon granting of the latter leave adjourned the matter to 17th February 1993 for motion for judgment. The court did not sit on the adjourned date and there was no notice to appellants regarding the shifting of the hearing from 17<sup>th</sup> February 1993 to 30th March 1993 when the motion was eventually heard. It should be noted that from 30<sup>th</sup> March 1993 to 13<sup>th</sup> May 1993, when ruling was delivered, appellants were absent from court and were not heard. The court entered judgment in favour of respondent. Aggrieved, appellants have appealed to the Court of Appeal.

### **ISSUES FOR DETERMINATION**

*“1. Whether the proceedings from 13th January, 1993, till judgment were not vitiated by the failure of the court to order and serve hearing notice on the Appellant who was not in court.*

*2. Whether the Writ of Summons/Particulars of Claim upon which the judgment was recovered is valid in the eyes of the law.”*

**HELD** (Unanimously allowing the appeal per **AKEJU**

**JCA)**

*FAIR HEARING - Breach - Effect*

**1. The right to fair hearing is a constitutionally guaranteed right. It was in section 33 (1) of the constitution of the Federal Republic of Nigeria, 1979, which was the existing constitution at the time of the trial of the instant case, and now in Section 36 (1) of the Constitution of Federal Republic of Nigeria, 1999. The principle of fair hearing simply connotes that no man shall be adjudged without being heard. It is a fundamental right under the Constitution and it has its root in the**

**twin pillars of natural justice, that is nemo judex in causa sua (thou shall not be a judge in thy cause) and audi alteram partem (hear the other party). A hearing or trial conducted when one of the parties is not given notice as to the date, time and venue of trial is not a proper trial.**

**The consequence of the breach of the rule of natural justice or the rule of fair hearing is that the decision reached thereat is a nullity and liable to be set aside.**

**The proceedings of the lower court that led to the pronouncement of judgment now on appeal was conducted without notice giving the Appellants an opportunity of being heard and they are null and void. The judgment based thereupon must be set aside. (p. 2932 E)**

*Statement of claim - Failure to file means absence of pleadings*

**2. Apart from the requirement of stating the facts in the Statement of Claim, the Plaintiff is also required by Order 25 Rule 12 (2) to state specifically in the Statement of Claim the relief which he claims on the Writ of Summons and may make general claim therein. The Statement of Claim thereby supersedes the Writ of Summons.**

**It is the Statement of Claim that really triggers the action or the contest between the parties, while Writ of Summons introduces the suit. It is therefore the Statement of Claim that the Defendant reacts to by filing a Statement of Defence. It was therefore erroneous for the lower court to have given judgment against the Appellants on basis that they had no defence to the action when there were no pleadings before the court in the absence of a statement of claim.**

**(pp. 2934 B/2935 B)**

*WRIT OF SUMMONS - Issuance of - Validity*

**3. As for the validity of the writ, the answer again is in the High Court (Civil Procedure) Rules 1987. The issuance, service and validity of a writ of summons are guided by the Rules of court. By Order 5 Rule 16 of the Rules cited above, a writ can only be invalid or void if it is either improperly issued, or not served within 12 months in the first instance or within its**

**period of renewal for another period of 12 months.**

**The writ in the instant case was validly issued and served within the period allowed by the Rules. It had been the basis of the action at the lower court. A writ that is regular and valid cannot be rendered otiose because of the length of the case.**

B (p. 2935 C)

*COURT PROCESSES - Amendment - Effect*

**4. At the proceedings of 2/6/89, the lower court granted leave to the Respondent to amend its particulars of claim subject to payment of fees assessed by the Registrar Litigation. The Respondent however did not file as ordered while the court later struck out the motion by which the order was made. With respect, I do not see whose interest is affected here other than the Respondent, that cannot for any purpose rely on the process it failed to amend but must be left with the original process. The law is that even where the process is amended the original process still forms part of the record of court.**

**The subsequent striking out of the motion already granted is in my view not more than an irregularity in the proceedings which can by no means render the proceedings void.**

(p. 2935 E)

## F NOTABLE POINT OF INTEREST

### **AKEJU JCA**

#### ***Commencement of action in High court – Procedures***

**1. Now to issue No. 2. By the provision of Order 1 Rule 1 of the High Court of Cross River State (Civil Procedure) Rules 1987 (hereinafter called the Rules), an action may be begun by writ, Originating Summons, by Originating Motion or Petition. The Respondent chose to commence the present action by the Writ issued on 6th June, 1988 (though paid for on 3/6/88).**

**The issuance of a writ is covered by Order 5 Rule 10 of the Rules and it provides:**

*“Before a writ is issued, it shall be endorsed:*

*(a) With a Statement of Claim, or if the Statement of Claim is not endorsed on the Writ, with a concise Statement of the nature of*

*the Claim or the remedy required in the claim begun thereby;*

*(b) Where the claim made by the Plaintiff is for a debt or a liquidated demand only, with a statement of the amount claimed in respect of the debt or demand and for costs.”*

(p. 2933 B)

B

**REPRESENTATION**

Joe Agi Esq. SAN for the Appellants

Alex Umoh Esq. for the Respondent

**CASES REFERRED TO**

Kotoye V. CBN (1989) 1 NWLR (Pt. 98) 419

Idiata v. Ejeko (2005) 11 NWLR (Pt. 936) 349

Ezike v. Egbuaba (2003) 11 NWLR (Pt. 1099) 627

Olatunbosun v. NISER (1988) 3 NWLR (Pt. 80) 25

Onwuka v. Omolewa (2001) 7 NWLR (Pt. 713) 695

Ndukuba v. Kolomo (2005) All FWLR (Pt. 248) 1602

Mobil (Nig) Ltd. v. Pam (2002) 4 NWLR (Pt. 657) 506

Agbahomovo v. Edueyegbe (1999) 3 NWLR (Pt 94) 170

A.G. Rivers State v. Ude (2006) 17 NWLR (Pt. 1008) 436

Andy Sons & Co. Ltd v. Mfon (2006) 12 NWLR (Pt. 995) 461

Ogundoyin v. Adeyemi (2001) 13 NWLR (Pt. 730) 403 Bamigboye

v. University of Ilorin (1990) 10 NWLR (Pt. 622) 290

Omnia Nigeria Ltd. v. Dyktrade Ltd (2007) All FWLR (Pt. 394) 201

Ajayi v. Military Administrator, Ondo State (1997) 5 NWLR (Pt. 504)

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Daniel Holdings Ltd. v. U.B.A plc (2005) All FWLR (Pt. 277) 895

**STATUTES & RULES REFERRED TO**

Constitution of Federal Republic of Nigeria 1979, s. 33 (1)

Constitution of Federal Republic of Nigeria 1999, s. 36 (1)

High Court of Cross River State (Civil Procedure) Rules 1987, O.1

r.1, O. 5 rr. 2, 10 & 16, O. 25 rr. 1, 2, 4 & 12 (2)

**LEAD JUDGMENT BY AKEJU JCA**

The Appellants are children of one Safiya Vatsa, the defendant in Suit No. C/83/88 commenced by the Respondent at the Calabar Judicial Division of the Court of Cross River State through the Writ of

Summons filed on 3rd June, 1988.

The Respondent claimed as follows:

*“(a) N449,906.19 and interest at the rate of 11 % per centum calculated at monthly rests (sic) until the principal sum and interest are finally liquidated.*

**B AND BY WAY OF SPECIFIC PERFORMANCE**

*(b) An order that the defendant executes an Equitable Mortgage of the property as registered as 31/31/160 in the Calabar Lands Registry, to the Plaintiff.”*

C The Respondent did not file any statement of claim but headed the claim in the writ as “PARTICULARS OF CLAIM”. The Respondent sought and obtained the order of court to serve the writ by substituted means which was effected through publication in the 11th November 1988 edition of the Daily Newspaper called the Nigerian chronicle. The Defendant (Appellants) did not file any process in reaction to the service of the Writ.

Meanwhile by the motion ex-parte filed on 3rd April, 1989, the Respondent sought:

1. to amend the PARTICULARS OF CLAIM,
- E 2. to deem the particulars of claim attached to the motion as properly filed,
3. to have judgment entered for the Plaintiff upon the amended particulars of claim.

F After hearing the Application, the Court by its order of 2nd June, 1989 granted leave to amend the Particulars of Claim within 7 days and to deem the amended Particulars of Claim so filed as properly filed *“subject to the payment of the requisite fees to be assessed by the Registrar Litigation.”* The leg seeking judgment was refused, G and the suit was adjourned to 30th June, 1989 for mention.

The record shows that the Amended Particulars of Claim was to alter the leg (b) of the claim to read:

*“(b) An order of foreclosure and/or sale of the property registered as 31/31/160 which PARTICULARS the defendant gave to the H Plaintiff.”*

The Respondent did not file the amended process as ordered by the court, but filed a motion on notice on 15th April, 1992 for:

*“Judgment to be entered for the Plaintiff in this suit in line with the particulars of claim/writ of summons herein for defendant’s fail-*

*ure to attend court to defend same.”*

The leave sought by the Respondent to serve the motion by substituted means was granted on 24/11/1992 and the motion was published in the National Concord of Monday 1st January, 1993. On 24/11/92 when the leave to serve was granted, the court adjourned the case to 13th January, 1993 for mention when it was adjourned to 17th February, 1993 “for motion for judgment” but court did not sit on 17/2/1993. There was no notice to the Defendant regarding the shifting of the hearing from 17/2/93 to 30th March, 1993 when the motion was eventually heard, and from 30/3/93 to 13/5/1993, when the Ruling was delivered. The Defendant was absent from court and was not heard. B  
C

In the Ruling delivered on 13/5/1993, the lower court entered judgment in favour of the Respondent for the sum of N449, 906.19 with 11% interest but refused the claim for execution of the equitable mortgage. D

The Appellants by a motion on notice filed at the lower court on 31/7/2009 applied for an order substituting them for Safiya M. Vatsa their mother who was said to have died in 2007. That application for substitution was granted on 10th September 2009 whereupon the Appellants applied to this court for an order to file their appeal out of time, which was granted on 23rd November, 2009. The Appellants thereafter filed Notice and Grounds of Appeal on 24/2/2010 with three grounds while time was further extended on 18/10/10 and the Notice of Appeal was deemed as regularly filed and served. E  
F

In the Appellants’ Brief of Argument settled by Joe Agi, SAN, two issues were formulated for determination as follows:

“1. Whether the proceedings from 13th January, 1993, till judgment were not vitiated by the failure of the court to order and serve hearing notice on the Appellant who was not in court (Ground 1). G

2. Whether the Writ of Summons/Particulars of Claim upon which the judgment was recovered is valid in the eyes of the law.” H (Grounds 2 & 3)

On the first issue, the learned, SAN submitted that the court owed the Appellants a duty to issue and serve a hearing notice on them when it did not sit on 17/2/1993 but sat on 30/3/1993 to take

the motion for judgment in their absence. According to the Senior Counsel, the proceedings violated the right of the Appellants to fair hearing and were on that basis void. He relied on *John Andy Sons & Co. Ltd v. Mfon* (2006) 12 NWLR (Pt. 995) 461; *A.G. Rivers State v. Ude* (2006) 17 NWLR (Pt. 1008) 436; *Mobil (Nig) Ltd. v. Pam* (2002) 4 NWLR (Pt. 657) 506; *Onwuka v. Omolewa* (2001) 7 NWLR (Pt. 713) 695; *Idiata v. Ejeko* (2005) 11 NWLR (Pt. 936) 349; *International Bank Plc v. Onwuka* (2009) 8 NWLR (Pt. 1144) 462.

On the second issue, i.e. whether the writ of summons/particulars of claim upon which the judgment was delivered was valid, the learned SAN submitted that the issuance of the writ without a statement of claim violated the provision of order 5 Rule 10 and order 25 Rule 1 of Cross River State High Court (Civil Procedure) Rules, 1987 which mandatorily requires that a Plaintiff should file a statement of claim within 30 days or within any extended period granted by the court.

The Learned senior Advocate submitted that the lower court was in error by entering judgment on a process whose life had expired as more than four years had elapsed prior to the date of judgment. The cases of *First Bank of Nigeria Plc v. Abraham* (2008) 18 NWLR (Pt. 1116) 172; *Onwuka v. Ononuju* (2009) 11 NWLR (Pt. 1151) 174 were relied upon. He submitted also that the word 'shall' in order 1 Rule 10 and order 25 Rule 1 of the Rules cited by him has made it mandatory that those Rules ought to be obeyed and that as at 13/5/93 when the court was delivering its judgment predicated on a writ issued in 1988, the writ had no longer value in the eyes of the law in the absence of pleadings. He submitted that a Defendant answers to a statement of claim and not to a writ of summons, citing *Ezike v. Egbuaba* (2003) 11 NWLR (Pt. 1099) 627.

The learned SAN submitted that the court entered judgment on a non-existent writ of summons or particulars of claim.

On amendment to the particulars of claim, the learned SAN submitted that having granted the prayer and the Respondent did not show any interest, the proper order was to strike out the suit instead of the motion already granted. He said the decision to strike out an application that had been granted was/is void since the lower court could not vary, review or alter its order already granted to amend the particulars of claim. He referred to *Onwuka v. Ononuju* (2009)



11 NWLR (Pt. 1151) 174; Nigerian Army v. Iyela ( 2008) 18 NWLR (Pt. 1118) 115. He urged this court to allow the appeal and strike out the suit.

In the Respondent's Brief of Argument, Alex Umoh Esq. of counsel also set down two issues for determination as follows:

*"1. Whether the learned trial judge was right in the circumstances of this case to enter judgment against the Appellants.*

*2. Whether the Writ of Summons/Particulars of Claim upon which the judgment was recovered was not valid in law."*

Appellants who were duly put on notice of judgment and became aware that judgment against them refused to come to court. The learned counsel, submitted that the proceedings at the lower court leading to the judgment was valid since the Appellant who were duly put on notice of the motion for judgment and became aware that might be given against them refused to come to court. He argued that the Appellants had a duty to follow up the case and cannot blame the court for not serving hearing notice. He cited Telepower (Nig) Ltd. v. Banna (2002) FWLR (Pt.95) 255 for the submission that the trial court was not bound to address hearing notice to the Appellants in the circumstances of the case.

On the second issue which is on the validity of the writ, the learned counsel submitted that Order 5 Rule 10 of Cross River State High Court (Civil Procedure) Rules 1987 regulated the issuance of writ and the writ issued in this case complied with that Rule and was therefore valid. He said the writ shows particulars of claim with a concise statement of the nature of the claim and the amount claimed which did not lead the Appellants into any doubt about the claim but they refused to enter appearance and did not ask for further details. He submitted that the particulars of claim gave the Appellants adequate notice of the case they were to meet devoid of any surprise, citing Ezike v. Egbuaba (2008) 11 NWLR (pt. 1098) 627.

He submitted also that the Appellants did not appeal against the finding of the lower court that the Respondent filed all the necessary documents and served on the Appellants by application in support of which he cited Oshodi v. Eyifunmi (2000) FWLR (pt. 8) 1 27. He urged court not to disturb the finding.

Although the learned counsel for the Respondent has not directly adopted the issues formulated in the Appellants' Brief, it is dif-

difficult to see any fundamental difference between those issues and the two formulated in his Respondent's Brief. I will therefore answer the issues as formulated in the Appellants' Brief of Argument.

The first issue in the Appellants' Brief is about the failure of the lower court to ensure service of hearing notice on the Appellants  
B who were absent from the proceedings that led to the judgment.

The record of appeal is loud and clear about this. The motion for judgment in default was originally fixed for mention on 13th January, 1993, and shifted to 17th February, 1993 for hearing but there  
C is no record of the courts sitting on 17/2/93 and no record of any formal adjournment. It was on 30th March, 1993 that the learned trial judge heard the motion in the presence of the Respondent's counsel while the Appellants were conspicuously absent from court. The court adjourned to 13/5/93 for Ruling. The Ruling was delivered  
D and judgment entered for the Respondent upon the "Particulars of claim" on the writ of Summons. The learned counsel for the Respondent did not dispute the fact that no notice was issued or served on the Appellants in respect of the proceedings of 13/1/93, 17/2/93, 30/3/93 and 13/5/93 when judgment was actually delivered. His con-  
E tention simply is that it was unnecessary to do so in the circumstances of the case.

***The right to fair hearing is a constitutionally guaranteed right. It was in section 33 (1) of the constitution of the Federal Republic of Nigeria, 1979, which was the existing constitution at the time of the trial of the instant case, and now in Section 36 (1) of the Constitution of Federal Republic of Nigeria, 1999. The principle of fair hearing simply connotes that no man shall be adjudged without being heard. It is a funda-  
F mental right under the Constitution and it has its root in the twin pillars of natural justice, that is nemo judex in causa sua (thou shall not be a judge in thy cause) and audi alteram partem (hear the other party). A hearing or trial conducted when one of the parties is not given notice as to the date, time and venue  
G of trial is not a proper trial. See Ogundoyin v. Adeyemi (2001) 13 NWLR (Pt. 730) 403; Bamigboye v. University of Ilorin (1990) 10 NWLR (Pt. 622) 290. The consequence of the breach of the rule of natural justice or the rule of fair hearing is that the decision reached thereat is a nullity and liable to be set aside. See Kotoye***

V. CBN (1989) 1 NWLR (Pt. 98) 419; Ndukuba v. Kolomo (2005) All FWLR (Pt. 248) 1602; Adigun v. Attorney Gen. Oyo State (1987); Olatunbosun v. NISER (1988) 3 NWLR (Pt. 80) 25.

***The proceedings of the lower court that led to the pronouncement of judgment now on appeal was conducted without notice giving the Appellants an opportunity of being heard and they are null and void. The judgment based thereupon must be set aside.*** B

Now to issue No. 2. By the provision of Order 1 Rule 1 of the High Court of Cross River State (Civil Procedure) Rules 1987 (hereinafter called the Rules), an action may be begun by writ, Originating C Summons, by Originating Motion or Petition. The Respondent chose to commence the present action by the Writ issued on 6th June, 1988 (though paid for on 3/6/88).

The issuance of a writ is covered by Order 5 Rule 10 of the Rules and D it provides:

*“Before a writ is issued, it shall be endorsed:*

*(a) With a Statement of Claim, or if the Statement of Claim is not endorsed on the Writ, with a concise Statement of the nature of the Claim or the remedy required in the claim begun thereby;* E

*(b) Where the claim made by the Plaintiff is for a debt or a liquidated demand only, with a statement of the amount claimed in respect of the debt or demand and for costs.”*

The content of a writ as stated in Order 5 Rule 2 are: F

- (1) the names and places of abode of the parties;
- (2) the subject matter of the claim;
- (3) the Relief the Plaintiff is seeking;
- (4) the date of the writ and the place of hearing.

A writ is also to contain the life span of the writ, the capacity in G which the parties sue or are sued, and the name and address of the Solicitor taking out the writ. See *Omnia Nigeria Ltd. v. Dyktrade Ltd* (2007) All FWLR (Pt. 394) 201.

Order 25 of the High Court of Cross River State (Civil Procedure) Rules deals with pleadings generally and Rule 1 thereof which H relates to filing of statement of Claim provides that:

*“1. Unless the court gives leave to the contrary or the Statement of Claim is endorsed on the writ, the Plaintiff shall serve a Statement of Claim on the Defendant, or if there are two or more Defen-*

*dants, on each Defendant, and shall do so, either when the writ, or notice of the writ is served on that Defendant or at anytime after service of the writ or notice but before the expiration of 30 days after that Defendant enters an appearance”;*

B A Defendant served with a Statement of Claim is to file a Statement of Defence under Order 25 Rule 2 of the Rules.

By Order 25 Rule 4, a Plaintiff is to set out the facts he relies upon for the claim in the Statement of claim as summarily as it is possible.

C ***Apart from the requirement of stating the facts in the Statement of Claim, the Plaintiff is also required by Order 25 Rule 12 (2) to state specifically in the Statement of Claim the relief which he claims on the Writ of Summons and may make general claim therein. The Statement of Claim thereby super-***  
D ***sedes the Writ of Summons.*** See Enigbokan v. American International Finance Co. Ltd. (1994) 6 NWLR (Pt. 348) 1, Udechukwu v. Okwuka (1956) 1 FSC 7; Ajayi v. Military Administrator, Ondo state (1997) 5 NWLR (Pt. 504) 237.

E ***It is the Statement of Claim that really triggers the action or the contest between the parties, while Writ of Summons introduces the suit. It is therefore the Statement of Claim that the Defendant reacts to by filing a Statement of Defence.***

F In Daniel Holdings Ltd. v. U.B.A plc (2005) All FWLR (Pt. 277) 895 at 906, Belgore JSC (as he then was) stated the position clearly thus:

G *“The Writ of Summons opens a case in court; it shows in summary what a plaintiff intends to claim, even though in some cases not all he wants to claim. The real document for contention between the parties is the pleadings. Once a Statement of Claim is filed, the writ of summons is no more of relevance... To the Defendant, Statement of claim setting out in numbered paragraphs the facts on which plaintiff rely for his claim is the case he must react to by Statement of Defence.”*

H In the instant case, the writ was issued on 6th June 1988, the Respondent stated its claim on the writ of summons as “PARTICULARS OF CLAIM” and failed to file any statement of claim up to the date of judgment on 31/5/1993.

In its motion filed on 15th April, 1992 for judgment, the basis

as in the body of the motion was that the Defendant (Appellants) did not attend court to defend the particulars of claim/writ of summons. Also in the Affidavit filed in support of the motion, it was deposed in paragraph 10 as follows:

*“10. That the Defendant has no defence to this action whatsoever and is deliberately delaying the same...”* B

What was to be defended when no issues had been raised and /or joined by way of pleadings?

***It was therefore erroneous for the lower court to have given judgment against the Appellants on basis that they had no defence to the action when there were no pleadings before the court in the absence of a statement of claim.*** C

***As for the validity of the writ, the answer again is in the High court (civil Procedure) Rules 1987. The issuance, service and validity of a writ of summons are guided by the Rules of court. By order 5 Rule 16 of the Rules cited above, a writ can only be invalid or void if it is either improperly issued, or not served within 12 months in the first instance or within its period of renewal for another period of 12 months.*** D

***The writ in the instant case was validly issued and served within the period allowed by the Rules. It had been the basis of the action at the lower court. A writ that is regular and valid cannot be rendered otiose because of the length of the case.*** E

***At the proceedings of 2/6/89, the lower court granted leave to the Respondent to amend its particulars of claim subject to payment of fees assessed by the Registrar Litigation. The Respondent however did not file as ordered while the court later struck out the motion by which the order was made. With respect, I do not see whose interest is affected here other than the Respondent, that cannot for any purpose rely on the process it failed to amend but must be left with the original process. The law is that even where the process is amended the original process still forms part of the record of court. See Agbahomovo v. Eduyegbe (1999) 3 NWLR (Pt 94) 170.*** F G H

***The subsequent striking out of the motion already granted is in my view not more than an irregularity in the proceedings which can by no means render the proceedings void.***

From the foregoing I find that issue no. 1 in the Appellants’

Brief succeeds but issue no. 2 fails.

In consequence, the appeal is allowed. The judgment of the lower court delivered on 13/5/93 is hereby set aside and the case is remitted to the Hon. Chief Judge of Cross River State for reassignment to another judge for fresh hearing. I make no order as to costs.

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### **AKAAHS JCA**

I read in draft the judgment of my learned brother Akeju, JCA.

C I am in agreement with his reasoning and conclusion that the appeal should be allowed in so far as the judgment was given without a Statement of Claim being filed as required by Order 25 Rule 1 of the High Court (Civil Procedure) Rules of Cross River State, 1987 and more importantly for failure to serve the defendant hearing notice D between 17/2/93 and 13/5/93 when the learned trial Judge entered judgment in favour of the Plaintiff/Respondent. In this regard the defendant was not given the opportunity to be heard which offends against the constitutionally guaranteed principle of fair hearing enshrined in Section 33(1) of 1979 Constitution (now Section 36(1) of E 1999 Constitution). The judgment is a nullity and per force must be set aside.

An Order granting leave to the Plaintiff to serve the Defendant the Writ of Summons by publication in the Nigeria Chronicle was F granted by Mbanefo J. on 11/11/88 (see pages 6 and 26 of the records). This was sequel to the ex-parte application dated 26/10/88 but filed on 3/11/88 (page 5). The validity of a writ cannot be called to question once it is served within the period of its life-span which in this case is 12 months. Since it was issued on 3/6/88 and service by G substituted means (i.e. publishing in the Nigeria Chronicle) was carried out on 11/11/88, there can be no argument that it is an invalid writ. It is valid for all times.

Looking at Order 5 Rule 10(b) of the Cross River State High Court (Civil Procedure) Rules 1987 which provides -

H *“Where the claim made by the Plaintiff is for a debt or a liquidated demand only, with a statement of the amount claimed in respect of the debt or demand and for costs.”*

This tends to give the impression that filing of a statement of claim can be dispensed with. But any lingering doubt has been cleared

by Order 25 Rule 1 of the same rules.

It is for these reasons and the more detailed ones contained in the lead judgment of my brother Akeju, JCA that I endorse the order remitting the matter to the Chief Judge of Cross for reassignment to another Judge for hearing.

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**MIKA'ILU JCA**

I have read in draft the lead judgment of my learned brother Isaiah Olufemi Akeju, JCA. I agree with the reasons given in it and the conclusion reached. This appeal therefore succeeds on issue No. 1. The case is remitted to the Hon. Chief Judge of cross River state for reassignment to another Judge for fresh hearing. No order as to costs.

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