

**SUPREME COURT OF NIGERIA**  
FRIDAY 6TH JUNE, 2014. SC. 169/2006  
**CORAM:- I. T. MUHAMMAD, M. S. MUNTAKA-  
COOMASSIE, O. ARIWOOLA, C. B. OGUNBIYI,  
K. B. AKA'AH, JJSC**

ETSAKO WEST LOCAL  
GOVERNMENT COUNCIL ..... APPELLANT  
AND  
ISA OSHIOBUGIE CHRISTOPHER ..... RESPONDENT  
(Substituted for late Mr. Isman Samari  
Isa suing as Isa-Auchi Guest House)

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ACTIONS - Defence - Fair hearing - 1999 Constitution s. 36 provides inter alia - That a person shall be entitled to fair hearing within a reasonable time - By court constituted in a manner as to secure its impartiality (H1)

MOTIONS - Hearing - Time - General practice in courts is that two clear days interval - After confirmation of service on defendant - Must lapse before motion can be entertained (H2)

COURTS - Justice - Upholding of - Edo HC Rules 1(2) - Where a matter arises in which no or adequate provisions exist in the rules - Court shall adopt procedure as may do substantial justice - Between the parties (H3)

COURT PROCESSES - Service - Time - Service is effected between 6am and 6pm - And except in circumstances as may be authorized by Judge - Service shall not be effected on Sunday or public holiday (H4)

ACTIONS - Computation of time - The day of happening of an event is excluded - Where a period is reckoned from that event - As Computation starts from the next day after the event (H5)

ACTIONS - Computation of time - Saturday - It is not one of the days designated as a public holiday - Under Public Holidays Act - It is

only a work free day (H6)

APPEALS - Date - Jurisdiction - Proceedings of CA on 7/5/2005 in the matter is a nullity - As the court was bereft of jurisdiction in the matter on that day - Two days service interval not having elapsed (H7)

APPEALS - Court of Appeal - Power - Court of Appeal Act s. 16 - CA can exercise its full jurisdiction over the whole proceedings - As if the same has been instituted in the court - As court of first instance (H8)

### **FACTS**

Before the High Court of Edo State, plaintiff/respondent commenced this action against defendant/appellant, claiming for specific performance of contract and an order for payment of the sum of N4,925,000.00 with monthly 10% interest rate until judgment is entered in the matter. Respondent alleged that appellant did not file a memorandum of appearance as required by the Rules of the court. Respondent thereafter applied for judgment in default of appearance of appellant. Judgment was subsequently entered for respondent as per his claim. In reaction, appellant made an application to the court to have the default judgment set aside. The application was refused by the court in its ruling.

Consequently, appellant appealed to the Court of Appeal Benin City Division. The appeal was not prosecuted within time permitted by the Rules as brief of argument was never filed by appellant. Upon this premise, respondent filed a motion to the court for the appeal to be struck out for want of diligent prosecution. The motion was heard on the 7<sup>th</sup> February 2005 without any proof of service or hearing notice on appellant. In its ruling on the motion, the court dismissed the appeal for want of prosecution. Aggrieved, appellant lodged appeal in Supreme Court contending inter alia that its right to fair hearing was breached at the Court of Appeal. Meanwhile, appellant's motion for stay of execution of the judgment of the Court of Appeal pending the hearing of the present appeal in the Supreme Court was struck out by the Court of Appeal for being incompetence.

### **ISSUES FOR DETERMINATION**

*"1. Whether the Court of Appeal acted lawfully when it granted*

*a prayer not claimed in the motion paper before it.*

*2. Whether or not the conditions precedent to the exercise of jurisdiction to order a dismissal under Order 6 Rule 10, Court of Appeal Rules existed as at 7/2/05 when the appeal was dismissed by the Court of Appeal.*

*3. Whether or not the order dismissing the appeal made by the Court of Appeal was in breach of the rule of fair hearing, and therefore unconstitutional, null and void.*

*4. Whether the motion before the Court of Appeal was competent given that it was brought under non-existent rules.”*

**HELD** (Unanimously allowing the appeal per  
**MUHAMMAD JSC**)

*ACTIONS - Defence - Fair hearing*

**1. What amounts to adequate time and facilities which must be afforded to a defendant in a matter before a Court of law, are matters already decided by the Constitution of the Federal Republic of Nigeria, 1999 [as amended]; Court Rules and decided cases. For instance-**

**[i] the Constitution in section 36 therefore, provides as follows:**

***“[1] In the determination of his civil rights and obligations, including any question or determination by or against any government or authority, a person shall be entitled to a fair hearing within a reasonable time by a Court or other tribunal established by law and constituted in such manner as to secure its independence and impartiality.***

***[2] Without prejudice to the foregoing provisions of this section, a law shall not be invalidated by reason only that it confers on any government or authority power to determine questions arising in the administration of a law that affects or may affect the civil rights and obligations of any person if such law-***

***[a] provides for an opportunity for the person whose rights and obligations may be affected to make representations to the administering authority before that authority makes***

2702 Etsako West L.G. Council v. Christopher (2014) 6 KLR  
***the decision affecting that person.***”(p. 2709 E)

*MOTIONS - Hearing - Time*

**2. It is the general practice of the Courts, including the Court below and this Court that there should at least be two clear**  
B **days between the service of the notice of motion and the day**  
**named in the notice for the hearing of the motion unless the**  
**Court gives special leave to the contrary. Although the cur-**  
C **rent Edo State High Court Rules which replaced the ones un-**  
**der which the matter was placed before the trial and by exten-**  
**sion the Court below and although the Court of Appeal Rules**  
**are silent on such number of days before a motion can be heard**  
**after service, it is the general practice in our Courts that two**  
**clear days interval after confirmation of service on the defen-**  
D **dant must lapse before the motion can be entertained.**  
(p. 2710 B)

*Justice - Upholding of*

**3. In the current High Court Rules of Edo State, there is a**  
E **section which provides that where a matter arises in which no**  
**provisions or adequate provisions exist in rules, a Court shall**  
**adopt a procedure as may do substantial justice between the**  
**parties concerned. [High Court of Edo State [Civil Procedure]**  
F **Rules, 2012, Rule 1[2].** (p. 2710 G)

*COURT PROCESSES - Service - Time*

**4. It is the practice as well, in almost all the High Courts and**  
**by necessary extension, the Court below and in this Court,**  
G **that service of Court processes is effected between the hours**  
**of 6.am and 6.pm. And, save in exceptional circumstances**  
**and as may be authorized by a judge, service shall not be ef-**  
**fected on a Sunday or on a public holiday.** (p. 2710 H)

H *ACTIONS - Computation of time*

**5. It is provided in the Rules, that, where by any written law or**  
**any special order made by the Court in the course of any pro-**  
**ceedings, any limited time from or after any date or event is**  
**appointed or allowed for the doing of any act or the taking of**

**any proceeding and such time is not limited by hours, the following rules, among others, in the computation of time shall apply:**

***“[a] the limited time does not include the day of the date of or the happening of the event, but commences at the beginning of the day next following that date.***

**It is to be specifically noted that the day of the happening of an event is excluded where a period is reckoned from that event. The computation starts from the next day after the event.**  
(pp. 2711 B/2712 B)

*ACTIONS - Computation of time - Saturday*

**6. Another issue of paramount importance in the computation of time is the day of Saturday in this country. Is it counted as a public holiday like a Sunday or does it form part of the days to be taken note of while reckoning the exact time as stipulated by law/rule of practice? The correct position is that the days to be kept as public holidays are mentioned in the schedule to the Public Holidays Act, Cap 378 LFN, 1990 [Cap 123, LFN, 2004] Saturday, is not one of the days designated as a public holiday. It is only a work-free day.** (p. 2712 C)

*APPEALS - Date - Jurisdiction*

**7. In the appeal on hand, although the appellant failed to give the exact hour of service on the 4th of May, 2005, which happened to be a Friday, reckoning of the required two days before hearing ought to have commenced from the next day which happened to be a Saturday [5th of May, 2005]. The Sunday following [6th of May, 2005], must, as a matter of law, be counted out. Thus, Monday, [07/05/2005 following the Sunday, will complete the required two clear days interval from the day of service, to qualify the Motion to be heard. Thus, the earliest day the motion could be heard was Tuesday, the 8th day of May, 2005. If the motion was heard on that Tuesday, there would not have been an opportunity for the appellant, whether he was present personally in Court or represented, to rely on lack of fair hearing to defeat the proceeding of the Court below held on Monday, the 7th day of May, 2005. This**

***is the last stroke and of course the heaviest that broke the camel's back.***

***Thus, the Court below sat on Monday, the 7th day of May, 2005, on the matter on hand when it was bereft of jurisdiction in the matter. It lacked one of the fundamental factors which confer jurisdiction on a Court, that is, the initiation of the proceeding before it by due process of law.***

***This makes the proceeding of that day by the Court below to be a nullity. The situation can hardly be salvaged as it is.***

***(p. 2712 E)***

***APPEALS - Court of Appeal - Power***

***8. I need to draw attention before I conclude that the Court below has enormous powers conferred on it by the Constitution, the Act creating the Court, the Court's Rules of Procedure particularly section 16 of the Act and Order 3 rules 23 of the rules, such that in exercising its full jurisdiction over the whole proceedings as if the proceedings had been instituted in the Court of Appeal as a court of first instance. The Court of Appeal thus, has power to apply the very laws that are applicable in the High Court from which the case on appeal came. (p. 2713 C)***

### **REPRESENTATION**

***Prof. A.O.O. Ekpū with Ralph Origho, for the Appellant  
Richard O. Ashava, for the Respondent***

### **CASES REFERRED TO**

- Ogundoyin v. Adeyemi (2001) 89 LRCN 2585  
Salu v. Egeibon (1994) 18 LRCN 241  
Udo v. State (1988) 3 NWLR (pt. 82) 316  
Port Harcourt City Local Govt. Council v. Ekoha (2008) All FWLR (pt. 422) 1174  
Anie v. Uzorka (1993) 9 SCNJ (pt. 2) 223  
Madukolu v. Nkemdili (1962) 2 SCNLR 341  
Anyaoke v. Adi (1985) 1 NSCC 461  
Okotiebor v. Okotiebor (1986) 1 SC 4791***

**STATUTES & RULES REFERRED TO**

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

Court of Appeal Act, s. 16

Interpretation Act Cap 123 LFN 2004, s. 15

Public Holidays Act Cap 123 LFN 2004

Court of Appeal Rules, O. 3 r. 23, O. 6 r. 10

Uniform High Court (Civil Procedure) Rules, O. 8 r. 17

High Court of Edo State (Civil Procedure) Rules 2012, r. 1(2)

**LEAD JUDGMENT BY I.T. MUHAMMAD JSC**

A.T. Ndoma, Esq. of counsel for the plaintiff [the respondent herein], took out a Writ of Summons from the Edo State High Court of Justice, holden at Auchi, [the trial Court], against the defendant [appellant herein]. The endorsement on the Writ reads as follows:

*“The plaintiff claims against the Defendants as follows:*

*1. Specific performance of the Defendant’s contractual obligations in Contract Number EWLG/CON.17/25 at 12-6-95; in favour of the plaintiff.*

*2. An Order for payment of the sum of Four Million NINE HUNDRED and TWENTY FIVE THOUSAND NAIRA [N4,925.000.00] by the Defendant to the plaintiff along with 10% interest of the indebted sum per every subsequent month thereof, until Judgment is entered.”*

The Writ was issued on the 22nd of June, 1999. It was alleged by the respondent in his amended brief served with the respondent’s Writ of Summons that the defendant did not file a memorandum of appearance as required by the Rules of Court. Thereafter, the respondent applied to the trial Court for judgment in default of appearance by the appellant. Judgment as per the claim of the respondent was accordingly entered on 23rd of May, 2000.

The appellant applied to the trial Court on the 4th of September, 2000, to get the default Judgment set aside. In his ruling, on the 6th of May, 2002, AMAIZE, J., to whose court the matter was transferred, refused the appellant’s application. The appellant then filed an appeal against the said ruling. The appeal was not prosecuted within time permitted by the Rules as brief of argument was never filed by the appellant. The respondent filed a motion to the Court below for the appeal to be struck out for want of prosecution. The

motion was taken on the 7th of February, 2005, and the Court below having heard the respondent dismissed the appeal for want of prosecution.

Aggrieved with the decision of the Court below, the appellant appealed to this Court. Meanwhile, the appellant filed a motion for  
B stay of execution of the Judgment of the Court below pending the hearing of the appeal. That motion, too, was struck out by the Court below for incompetence.

In this Court, briefs were settled by the parties. On the hearing  
C date, learned counsel for the respective parties each adopted and relied on the brief filed. The learned counsel for the appellant, Professor Ekpū, set out the following issues for determination by this Court:

*"1. Whether the Court of Appeal acted lawfully when it granted  
D a prayer not claimed in the motion paper before it. [This issue encompasses ground 1 of the appeal].*

*2. Whether or not the conditions precedent to the exercise of  
jurisdiction to order a dismissal under Order 6 Rule 10, Court of  
Appeal Rules existed as at 7/2/05 when the appeal was dismissed by  
E the Court of Appeal. [This issue encompasses ground 3 of the appeal].*

*3. Whether or not the order dismissing the appeal made by  
the Court of Appeal was in breach of the rule of fair hearing, and  
therefore unconstitutional, null and void. [This issue encompasses  
F ground 4 of the appeal].*

*4. Whether the motion before the Court of Appeal was competent given that it was brought under non-existent rules. [This issue encompasses ground 2 of the appeal].*

My lords, I think I should consider appellant's issue No 3 first  
G which poses a challenge against the competence of the Court below to entertain the Motion which led to the dismissal of the appellant's appeal. That issue is related to ground No.4 of the Grounds of Appeal which reads as follows:

*"4. The Court of Appeal erred in law in entertaining the  
H plaintiff's motion in the absence of the motion and/or hearing of it was served on the defendant on the last working day preceding the hearing date.*

**PARTICULARS**



*[a] The notice of the hearing of the motion and the Motion itself were served on the defendant in the afternoon of Friday, 4th February, 2005 and the Motion was heard on Monday, 7th February, 2005."*

Appellant's issue No.3 as above tallies with respondent's issue No 3. B

Learned counsel for the appellant submitted that the respondent's motion was heard and determined by the Court below on the 7th of February, 2005, in the absence of the appellant. That, as at that date, no proof of service of the motion and or the hearing notice on the appellant was available to that court. The justices of the Court below, failed to ascertain whether the appellant had been served and, if so, when it was served in order to determine whether the appellant had been afforded adequate opportunity of being heard. This omission, argued learned counsel for the appellant, led to a denial of fair hearing to the appellant as guaranteed by section 36 of the 1999 Constitution. He cited and relied on the case of OGUNDOYIN VS. ADEYEMI (2001) 89 LRCN at page 2585 at page 2597 and 2599 Learned counsel argued that the motion was served on a junior worker of the appellant at Auchu in the afternoon of Friday, 4th February, 2005, at a time when most officers had left for the Mosque. The motion was heard on Monday, the 7th of February, 2005, in the absence of the appellant and its counsel. Thus, no hearing, let alone fair hearing, was afforded the appellant before its appeal was dismissed. The step taken, was unconstitutional and illegal. Learned counsel referred to some cases including SALU VS. EGEIBON [1994] 18 LRCN 241 at page 260, 262, 273; UDO VS THE STATE [1988] 3 NWLR [Part 82] 316. The steps taken, it was further argued, did not serve ends of justice, and in fact, defeated and negated the very essence of justice. The Court below ought to have adjourned the matter as there was no proof of service of the motion on the appellant. Learned counsel argued further that Order 6 Rule 10 under which the Court below proceeded to dismiss the appeal was introduced Suo Motu by the Court without affording the parties an opportunity to be heard. This, he said, amounted to a denial of fair hearing and was in breach of Section 36 of the Constitution and the outcome of the procedure should not be allowed to stand. C D E F G H

Learned counsel for the respondent submitted that it is an is-

sue of serious importance that every party to an action is bound to attend the Court to prosecute or defend the suit involving him irrespective of whether or not he filed relevant processes such as a counter-affidavit. Non-filing of such a process, learned counsel maintained, cannot excuse the party from attending the Court on the day of  
B hearing of the motion. The hearing of the motion on the 7th of February, 2005, by the Court below, in spite of the absence of the appellant and his counsel, could not amount to a denial of fair hearing as enshrined in the 1999 Constitution.

C There is filed a reply brief by the appellant which seeks to answer some of the new points raised by the respondent in his brief of argument. He replied on issue 3 that the report of the bailiff of the High Court showed clearly that he did not meet the officials of the appellant in charge. Secondly, it has never been the law that a party  
D should be fixed with notice of a process only because he evaded service. The case of PORT HARCOURT CITY LOCAL GOVERNMENT COUNCIL VS. EKOHA [2008] ALL FWLR [Part 422] 1174 at page 1190 was cited in support. The process for the appellant was served on an Officer of the Council instead of the Secretary. The  
E Court held that the service was defective and therefore, robbed the Court of jurisdiction.

Yes! It is true that the Hearing Notice, along with the motion were served on the appellant/defendant on the 4th and heard by the Court below on the 7th of February, 2005. Appellant himself admitted this fact in his submissions in the brief of argument:  
F

*"The motion was served on a junior worker of the Appellant at Auchu in the afternoon of Friday, 4/2/2005 at a time when most of officers had left for the Mosque. The motion was heard on Monday, 7/2/2005 in the absence of the Appellant and its counsel."*  
G

The respondent argued on the issue as follows:

*"The respondent's motion to strike out the appellant's appeal was served on the appellant on the 4th of February, 2005, see page 115 of the Record for the Hearing Notice. Even the appellant swore  
H on Oath at page 124 of the Record that the Motion was served on it on the said date. The Motion was heard on 7th February, 2005 and the appeal was dismissed- The appellant had more than 48 hours to file a counter affidavit in opposition to the Motion which he failed to do."*

I have myself, observed from the record of appeal before this Court that the Court below sat on the 7th day of February, 2005. Following is the proceeding that took place on that date:

*"Appeal No. CA/B/96/04.*

*Isman Samai Isa*

*vs.*

*Etsako West L.G.A.*

*Chief Oji Esemokhai for the applicant,*

*Respondent served but absent.*

*Esemokhai moves in terms*

*Court: The appeal is hereby dismissed under Order 6 R 10 for want of prosecution.*

*SGD".*

From the above, therefore, no one from the parties, and neither the Court below was denying service on the appellant. Although it is not clear from the proceedings of the Court below what was actually served on the appellant; was it the motion on Notice in question or, was it the Hearing Notice, or both? The presumption is that both were served on the appellant on the 4th of February, 2005. Such inference is clearly drawn from the submissions of the learned counsel for the respective parties [as shown above]. Service of the said processes therefore, is not at all in contention. What is in contention is whether, adequate time and facilities were afforded the appellant as defendant to put up appearance for his defence. ***What amounts to adequate time and facilities which must be afforded to a defendant in a matter before a Court of law, are matters already decided by the Constitution of the Federal Republic of Nigeria, 1999 [as amended]; Court Rules and decided cases. For instance-***

***[i] the Constitution in section 36 therefore, provides as follows:***

***"[1] In the determination of his civil rights and obligations, including any question or determination by or against any government or authority, a person shall be entitled to a fair hearing within a reasonable time by a Court or other tribunal established by law and constituted in such manner as to secure its independence and impartiality.***

***[2] Without prejudice to the foregoing provisions of this***

***section, a law shall not be invalidated by reason only that it confers on any government or authority power to determine questions arising in the administration of a law that affects or may affect the civil rights and obligations of any person if such law-***

***B [a] provides for an opportunity for the person whose rights and obligations may be affected to make representations to the administering authority before that authority makes the decision affecting that person.”***

***C [ii] It is the general practice of the Courts, including the Court below and this Court that there should at least be two clear days between the service of the notice of motion and the day named in the notice for the hearing of the motion unless the Court gives special leave to the contrary. Although the D current Edo State High Court Rules which replaced the ones under which the matter was placed before the trial and by extension the Court below and although the Court of Appeal Rules are silent on such number of days before a motion can be heard after service, it is the general practice in our Courts E that two clear days interval after confirmation of service on the defendant must lapse before the motion can be entertained. [See: Order 8 Rule 17 of the uniform High Court [Civil Procedure] Rules. In particular, section 17 of Order 10 of the Laws of the [former] Bendel State of Nigeria, Cap 65 thereof, which provides as follows: F***

***“17 Unless the Court gives special leave to the contrary there shall be at least two clear days between the service of a notice of motion and the day named in the notice for hearing the motion.”***

***G This appeal emanated from Edo State which was part of the defunct Bendel State. In the current High Court Rules of Edo State, there is a section which provides that where a matter arises in which no provisions or adequate provisions exist in rules, a Court shall adopt a procedure as may do substantial justice between the parties concerned. [High Court of Edo H State [Civil Procedure] Rules, 2012, Rule 1[2].***

***It is the practice as well, in almost all the High Courts and by necessary extension, the Court below and in this Court, that service of Court processes is effected between the hours of 6.am and 6.pm. And, save in exceptional circumstances***

**and as may be authorized by a judge, service shall not be effected on a Sunday or on a public holiday.**

There are identical rules for computation of time so stipulated or prescribed in the uniform High Court Rules, Edo State High Court [Civil Procedure] Rules etc. such rules are substantially identical with the provisions on the same subject matter in Section 15 of the Interpretation Act, Cap 378 LFN 1990 [Cap 123, 2004, LFN] and the corresponding sections in the interpretation Laws of the various States of the Federation. B

**It is provided in the Rules, that, where by any written law or any special order made by the Court in the course of any proceedings, any limited time from or after any date or event is appointed or allowed for the doing of any act or the taking of any proceeding and such time is not limited by hours, the following rules, among others, in the computation of time shall apply:** C D

***“[a] the limited time does not include the day of the date of or the happening of the event, but commences at the beginning of the day next following that date.***

*[b] the act or proceeding must be done or taken at least on the last day of the limited time;* E

*[c] where time limited is less than six days, no public holiday or Sunday shall be reckoned as part of the time,*

*[d] when the time expires on a public holiday or Sunday, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards not being a public holiday or Sunday.”* F

To put it more succinctly, section 15 of the interpretation Act provides: G

***“[2] A reference in an enactment to a period of days shall be construed:***

*[a] where the period is reckoned from a particular event, as excluding the day on which the event occurs;*

*[b] where apart from this paragraph the last day of the period is holiday, as continuing until the end of next following day which is not holiday.* H

***[3] Where by an enactment any act is authorized or required to be done on a particular day and that day is a holiday, it shall be***

*duly done if it is done on the next following day which is not a holiday.*

*[4] Where by an enactment any act is authorized or required to be done within a particular period which does not exceed six days, holidays shall be left out of account in computing the period.*

B *[5] In this section “holiday” means a day which is a Sunday or a public holiday.”*

***It is to be specifically noted that the day of the happening of an event is excluded where a period is reckoned from that event. The computation starts from the next day after the event.*** The principle is of general acceptance as established by this Court in the case of AKEREDOLU & ORS. VS. AKINREMI [1985] 11 SC 74 at page 93. ***Another issue of paramount importance in the computation of time is the day of Saturday in this country. Is it counted as a public holiday like a Sunday or does it form part of the days to be taken note of while reckoning the exact time as stipulated by law/rule of practice? The correct position is that the days to be kept as public holidays are mentioned in the schedule to the Public Holidays Act, Cap 378 LFN, 1990 [Cap 123, LFN, 2004] Saturday, is not one of the days designated as a public holiday. It is only a work-free day.*** This is what this court held in the case of ANIE VS. UZORKA [1993] 9 SCNJ [Part 2] 223.

F ***In the appeal on hand, although the appellant failed to give the exact hour of service on the 4th of May, 2005, which happened to be a Friday, reckoning of the required two days before hearing ought to have commenced from the next day which happened to be a Saturday [5th of May, 2005]. The***  
 G ***Sunday following [6th of May, 2005], must, as a matter of law, be counted out. Thus, Monday, [07/05/2005 following the Sunday, will complete the required two clear days interval from the day of service, to qualify the Motion to be heard. Thus, the earliest day the motion could be heard was Tuesday, the 8th***  
 H ***day of May, 2005. If the motion was heard on that Tuesday, there would not have been an opportunity for the appellant, whether he was present personally in Court or represented, to rely on lack of fair hearing to defeat the proceeding of the Court below held on Monday, the 7th day of May, 2005. This is***

***the last stroke and of course the heaviest that broke the camel's back.***

***Thus, the Court below sat on Monday, the 7th day of May, 2005, on the matter on hand when it was bereft of jurisdiction in the matter. It lacked one of the fundamental factors which confer jurisdiction on a Court, that is, the initiation of the proceeding before it by due process of law. See: MADUKOLU VS. NKEMDILIM [1962] 2 SCNLR 341. This makes the proceeding of that day by the Court below to be a nullity. The situation can hardly be salvaged as it is.***

***I need to draw attention before I conclude that the Court below has enormous powers conferred on it by the Constitution, the Act creating the Court, the Court's Rules of Procedure particularly section 16 of the Act and Order 3 rules 23 of the rules, such that in exercising its full jurisdiction over the whole proceedings as if the proceedings had been instituted in the Court of Appeal as a court of first instance. The Court of Appeal thus, has power to apply the very laws that are applicable in the High Court from which the case on appeal came. See: MRS. VICTORIA OKOTIE EBOH & ORS. VS. ADOLLO OKOTIE EBOH & ORS. [1986] 1 SC 4791.***

On the final analysis, I find merit in this appeal. I hereby allow the appeal and remit same for a fair hearing by the Court below. I find no need to delve into other issues which touch on the main appeal. Parties should bear their own costs in this appeal.

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### **MUNTAKA-COOMASSIE JSC**

I was privileged to have read before now the lead judgment rendered by my learned lord Ibrahim Tanko, JSC, I entirely agree with his Lordship's conclusions. I accept that this appeal is meritorious and it shall be allowed. I too allowed same because it is pregnant with a lot of merits.

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### **ARIWOOLA JSC**

I have had the opportunity of reading in draft the lead judgment of my learned brother, Tanko Muhammad, JSC just delivered.

I am in total agreement with the reasoning and conclusion.

The facts that led to the instant appeal has been beautifully stated in the lead judgment that I need not repeat same. The main issue was whether the lower court properly handled the matter in compliance with the law and the rules of court.

B There is no doubt that the instant case was not properly before the lower court when it assumed jurisdiction to entertain same. As to when a court is competent to entertain a matter, Bairamian, FJ in *Madukolu & Ors Vs Nkemdilim* (1962) 1 All NLR (Pt.4) 587 at 595 had this to say:

C *“Put briefly, a court is competent when:*  
*(1) It is properly constituted as regards members and qualifications of the members of the bench and no member is disqualified for one reason or another, and*  
D *(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*  
E *(3) The case 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”*

F See also *Anyaoke & Ors Vs. Adi & Ors* (1985) 1 NSCC 461; (1985) LPELR 518 (SC) per Irikefe, JSC.

It is clear from the record that the court did not allow for the usual two clear days after the Notice of Motion was filed when it proceeded to hear same. This was an unpardonable error on the part of the court. It is no doubt a condition precedent to the exercise of the court’s jurisdiction that an adversary must have not less than two clear working days, that is, forty eight (48) hours after the said Motion had been properly filed and brought to the attention of the court. In the circumstance, the proceeding of the court on Monday H 7th May, 2005 cannot stand. It is simply a nullity and should be so declared.

For the above reason and the fuller reasons in the lead judgment, I also hold the appeal meritorious and should be allowed.

Accordingly, it is allowed by me. Same is remitted to the lower



court to be heard properly.

I abide by the order on costs in the lead judgment.

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**OGUNBIYI JSC**

I read in draft the lead judgment just delivered by my learned brother I. T. Muhammad, JSC. I agree that the appeal has merit and should be allowed. B

My brother has dealt adequately with the issue relating to the absence of fair hearing which had rendered the lower court bereft of any jurisdiction. In the absence of proper service, the court ought to have advised itself accordingly. It follows therefore that the determination of appellant's issue three is very crucial. The issue has been reproduced in the lead judgment. The question of fair hearing is constitutional and therefore very fundamental as it touches on the very foundation of the case. In other words, the appeal is predicated on whether or not the order of dismissal made by the Court of Appeal was in fact in breach of the constitutional right to fair hearing. C D

It is on record that the respondent's motion was heard and determined by the lower court on 7th February, 2005 in the absence of the appellant, As at that date there was no proof of service of the motion or the hearing notice, The Court of Appeal should have ascertained adequate service on the appellant before proceeding to make the dismissal order. It is certain that a denial of fair hearing had been occasioned contrary to section 36 of our 1999 Constitution. The motion was served on the last working day 4th February, 2005 being a Friday. Same was subsequently heard on Monday following. It is obvious herein that the appellant was not given sufficient time to be heard, Consequently, I therefore agree with my learned brother Muhammad, JSC on his lead judgment that the effect of the breach is to send the case back to the court below for fair hearing. Appeal is hereby allowed in terms of the lead judgment inclusive of the order made as to costs. E F G

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**AKA'AH S JSC**

I read before now the judgment just delivered by my learned brother, Ibrahim Tanko Muhammad JSC. He painstakingly dealt with

the issue of computation of time between the time the motion was served and when it was heard by the court below before dismissing the appeal under Order 6 Rule 10 Court of Appeal Rules. I agree with my Lord's conclusion that the motion was not ripe for hearing when it was taken on 7th February, 2005 as the service was effected  
B on Friday, 4th February, and because of the intervening Sunday which is judicially noticed as a public holiday, the earliest date on which the application would have been taken would be 8th February, 2005. This would have given the appellant the 2 clear days he was entitled to react to the motion to dismiss the appeal. See: Order 8 rule 17  
C Uniform High Court (Civil Procedure) Rules.

There is merit in the appeal and it is hereby allowed.

The order dismissing the appeal under Order 6 Rule 10 made by the Court of Appeal, Benin on 7/2/2005 is set aside.

D The said appeal No. CA/B/96/2004 is remitted back to the Court of Appeal, Benin for hearing. Parties are to bear their own costs.

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