

SUPREME COURT OF NIGERIA
FRIDAY 6TH MARCH, 2015. SC. 61/2006
CORAM:- M. S. MUNTAKA-COOMASSIE,
O. RHODES-VIVOUR, O. ARIWOOLA,
K. B. AKA'AH, C. C. NWEZE, JJSC

COMPAGNIE GENERALE DE
GEOPHYSIQUE (NIGLT) CGG NIG LTD APPELLANT
AND
MOSES AMINU RESPONDENT

APPEALS - Fresh issues - Leave - Issues not considered and pronounced on by trial court - Are fresh issues that can only be heard by appellate court - After leave of the court is obtained (H1)

APPEALS - Jurisdiction - Fresh issue of - Can be raised for the first time in CA or SC - And there is no need to seek leave before raising it on appeal (H2)

COURT PROCESSES - Service - Jurisdiction - Where service is needed - Failure to effect same renders the proceedings void - As no court has jurisdiction where any of the parties was not served (H3)

FACTS

This action was commenced at the High Court of Delta State by plaintiff/respondent against defendant/appellant, claiming the sum of N5,000,000.00 as special and general damages for negligence and injuries he suffered while in the course of duty in appellant's company. Respondent was one time staff of appellant. While working in the company, respondent sustained severe wrist injuries. A medical operation was carried out on respondent and at the end of which his wrist became virtually useless. Respondent was forced to initiate the action when appellant was unable to pay compensation for the injuries suffered. When served with the originating processes, appellant entered conditional appearance.

Notwithstanding the fact that appellant's appearance was unresolved, respondent filed a motion on notice asking for an order entering final judgment for him in default of respondent to file its

statement of defence. The court not being aware of the existence appellant's conditional appearance, entered final judgment for respondent as per the motion. In reaction, appellant brought several applications for extension of time to set aside the default judgment. The court heard the application and struck out same for being unmeritorious. Dissatisfied, appellant appealed to the Court of Appeal Benin City Division. Appellant's contention among others is that it was not served with the fundamental originating processes in the matter. The Court heard the appeal and allowed same. The default judgment of the trial court was set aside. From the circumstances of the case, the Court ordered for a trial de novo by another Judge of the trial court. Aggrieved, appellant appealed to Supreme Court, contending inter alia that the Court of Appeal ought to have resolved the issue of jurisdiction and refrain from remitting the suit to the trial Court.

ISSUES FOR DETERMINATION

1. Whether the Court of Appeal ought not to have resolved the issue of jurisdiction and refrain from remitting same to the High Court.
2. Whether the Court of Appeal ought not to have struck out this suit for want of jurisdiction.

HELD (Unanimously dismissing the appeal per **RHODES-VIVOUR JSC**)

APPEALS - Fresh issues - Leave

1. Issues of fact or law not considered and pronounced on by the trial court are fresh issues that can only be heard by an appellate court after leave of the court is obtained. Failure to obtain leave renders the application to raise fresh issues on appeal incompetent. The application would be thrown out.

(p. 802 D)

Jurisdiction - Fresh issue of

2. Jurisdiction is a question of law that can be raised for the first time in the Court of Appeal or the Supreme Court and there is no need to seek leave before raising it for the first

time on appeal. It can be raised informally, but it is desirable that same process is filed so that the adverse party is not taken by surprise.

The issue on jurisdiction can thus be filed and argued with or without the leave of the court, even if it is being raised as a fresh issue on appeal. The defendant/appellant was right to raise the issue of jurisdiction in the Court of Appeal without obtaining leave. (p. 802 F)

COURT PROCESSES - Service - Jurisdiction

3. It has been said in a plethora of cases that failure to give notice of proceedings to the opposing party in a case where service of process is required is a fundamental omission which renders such proceedings void. This is so because the court has no jurisdiction to entertain a case where any of the parties was not served process.

All the proceedings in the trial High Court are void, complete nullities. That explains why the Court of Appeal remitted the case back to the trial High Court for trial de novo, so that the defendant/appellant would have an opportunity to defend the suit brought against him.

Can it be said that the Court of Appeal was right to remit the matter to the High Court for trial de novo? The answer is a resounding YES.

Jurisdiction is a question of law which can be taken by the trial court or an appeal court provided the parties are properly before the court.

In this case the defendant/appellant complains that he was not served originating processes. The Court of Appeal agreed with the defendant/appellant. There is no appeal from the decision of the Court of Appeal which stated clearly that the defendant/appellant was not served originating processes. In the absence of an appeal, the decision of the Court of Appeal is inviolate. In the light of the finding by the Court of Appeal, no court has jurisdiction to make pronouncements on an issue in which the defendant/appellant ought to be a party but was not, because he was not served originating processes. That explains why this court cannot decide the proper court

to hear the plaintiff/respondents claim, and why agreeing with the Court of Appeal that the case be remitted for trial de novo is correct.

When the case goes back to the trial court, the appellant would be properly served with the originating process. It is only then that parties are properly before the court, and the court would now have jurisdiction to hear any issue. It must be elementary now that parties (i.e. plaintiff and defendant) must be properly before the court before the court can entertain an application to decide which is the proper court to hear the case or indeed any application. (pp. 803 E/804 F)

NOTABLE POINTS OF INTEREST

RHODES-VIVOUR JSC

1. Grounds of appeal – Filing – Basis

The position of the law is that grounds of appeal are filed against a decision. It must challenge the ratio of the case. Put in another way, it must be connected with the disagreement between the parties.
(p. 802 D)

2. Conditional appearance – Meaning of

The defendant/appellant entered a conditional appearance in the trial court. The entry of conditional appearance is an appearance under protest and usually means an appearance to object to the courts jurisdiction.

I earlier on in this judgment alluded to the fact that the defendant/appellant entered a conditional appearance and I explained that the entry of conditional appearance is an appearance under protest and usually means an appearance to object to the court's jurisdiction, in this case the non service of originating processes on the defendant/appellant. The issue of conditional appearance must be addressed by the trial judge before he proceeds to hear any application. It is only when the defendant is properly served originating process that his appearance becomes unconditional by implication and the court becomes competent to hear and resolve the issue of proper court to hear the merits of the case. (pp. 803 B/804 C)

3. Competence of court

In *Madukolu & Ors. v. Nkemdilim* (1962) 2 NSCC p.374 this court per Bairamain FJ made some observations on jurisdiction and the competence of a court. His lordship said that a court is competent 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 B

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 C

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. (p. 804 A)

4. Supreme Court – Powers

By the provisions of Section 22 of the Supreme Court Act this Court is conferred with jurisdiction to make any order necessary for the determination of the real question in controversy in an appeal as if the matter is prosecuted in the Supreme Court as a court of first instance. By this Section the court can make or give an order that the court below can make without sending the case back for a retrial. The section can only be invoked if there is no feature in the case which prevents this court from exercising its wide jurisdiction; and if the proceedings in the court below justify invoking the said Section 22 (supra). (p. 805 D) D

REPRESENTATION

D. I. Ajaba, for the Appellant

D. Lamikuro, SAN with T. Adebayo, E. Akwuruoaha, for the Respondent G

CASES REFERRED TO

C.G.G. Nig. Ltd v. Ogu (2005) 8 (pt. 927) 366 H

Ejifodomi v. Okonkwo (1982) vol. 13 NSCC 422

Timothy v. FRN (2012) 6 SC (pt. iii) 159

Intercontinental Bank Plc v. Olam (Nig) Ltd. (2013) 1-2 SC (pt. iii) 52

- Onyemaizu v. Ojiako (2010) 1-2 SC 41
- Adim v. NBC Ltd. (2010) 3-5 SC (pt. iii) 155
- Obiakor v. State (2002) 10 NWLR (pt. 776) 612
- Gaji v. Paye (2003) 5 SC 53
- Obimonure v. Erinosho (1966) 1 ANLR 250
- B Scott-Emuakpori v. Ukaube (1975) 2 SC 41
- Haruna v. Ladeinde (1987) 4 NWLR (pt. 67) 941
- Madukolu v. Nkemdilim (1962) 2 NSCC 374
- Ucha v. Elechi (2012) All FWLR (pt. 628) 237
- C Inakoku v. Adeleke (2007) 1 SC (pt. i) 128
- Dapianlong v. Dariye (2007) 4 SC (pt. iii) 168

STATUTES & RULES REFERRED TO

- Constitution of the Federal Republic of Nigeria 1999, ss. 30(1), 251
- D Court of Appeal Act, s. 16
- Supreme Court Act, s. 22
- High Court (Civil Procedure) Rules of Bendel State 1988 (applicable in Delta State), O. 27 r. 7

LEAD JUDGMENT BY RHODES-VIVOUR JSC

- The plaintiff was an employee of the defendant. In the course of his employment he suffered severe injuries on his wrist. After an operation, the wrist became virtually useless. When all attempts by the plaintiff to convince the defendant to pay compensation failed he took out a Writ of Summons accompanied by statement of claim against the defendant claiming the sum of N5,000,000.00 (Five Million Naira) as special and general damages for the negligence and injuries he suffered while in the course of duty in the defendant company. After these originating processes were served on the defendant, the defendant entered Conditional Appearance on the 1st of November 1999. Notwithstanding the fact that defendant's appearance was unresolved the plaintiff filed a Motion on Notice on 4/1/99 under Order 27 rule 7 of the High Court (Civil Procedure) Rules of Bendel State 1988 (applicable in Delta State) for:

1. An order of Court entering final judgment for the plaintiff in default of the defendant/respondent to file its statement of defence.

And for such further order or orders that this honourable court may deem fit to make in the circumstances.

On the 17th day of November, 1999 apparently oblivious of conditional appearance entered by the defendant, the learned trial judge, after hearing learned counsel for the plaintiff, F.K. Ogbimi Esq., entered final judgment for the plaintiff default of the defendant to file its statement of defence.

The Court ordered as follows:

“Application granted as prayed. Final judgment is hereby entered in favour of the plaintiff/applicant in whose favour judgment is hereby entered in the sum of N5,000,000.00 (Five Million Naira) against the defendant based on Special and General damages for negligence and injuries suffered by the plaintiff in the course of his employment as an employee in the defendant’s company. In order words judgment is entered for the plaintiff as per paragraph 37 of the statement of claim.”

In rapid succession, the defendant filed applications asking for extension of time to set aside the default judgment, to set aside writ of attachment, to stop further execution etc. Finally on the 23rd of January 2010 the trial judge heard a motion on Notice brought under Order 37 rule 9, Order 47 rule 1 of the High Court Rules, Section 30(1) of the 1999 Constitution for:

1. Extension of time within which applicant can apply to set aside the default judgment dated 17/11/99.
2. Setting aside the said default for suit (sic)
3. An order setting aside the writ of attachment or execution, include attachment of applicants vehicles, in execution of default judgment.
4. An order discontinuing further execution of applicant’s properties.

And on 11/4/2001 the learned trial judge found the application to be unmeritorious and struck it out with costs of N1,000 in favour of the plaintiff/respondent. Dissatisfied with the refusal of the learned trial judge to set aside the default judgment the defendant/appellant lodged an appeal. The Court of Appeal (Benin City Division) heard the appeal and in a considered judgment delivered on the 6th day of December, 2005 allowed the appeal and ordered as follows:

“The default judgment of the lower court dated 17/11/99 and the orders dated 11/4/2000 are hereby set aside. The suit No. HCH/

14/99 is sent back to the High Court of Delta State for trial de novo by a judge other than Onajite-Kuejubola J.”

This appeal is against that judgment. Briefs of argument were filed and exchanged. The appellant filed an appellant’s brief and a reply brief on the 11th day of April 2006 and the 12th of March, B 2007 respectively. The respondent’s brief was filed on the 12th day of July 2006.

Learned counsel for the appellant formulated two issues for determination. They are:

C 1. Whether the Court of Appeal ought not to have resolved the issue of jurisdiction and refrain from remitting same to the High Court.

2. Whether the Court of Appeal ought not to have struck out this suit for want of jurisdiction.

D Learned counsel for the respondent formulated a sole issue for determination. It reads:

1. Whether in the light of the fact that jurisdiction being a fresh point, not previously canvassed in the court of trial, the court below was wrong to have remitted the entire suit back to the court of trial E for “*trial de novo*” which trial would necessarily include the consideration of the issue of jurisdiction.

I have examined the issues presented by both sides for determination of the appeal. I am satisfied that both set of issues ask the same questions. I shall in the circumstances consider the two issues F formulated by the appellant and they shall be taken together. At the hearing of the appeal on the 16th day of December 2014 learned counsel for the appellant, Mr. D. I. Ajaba adopted the appellant’s brief and reply filed on 11/4/06 and 12/3/07 respectively and urged G this court to allow the appeal.

Learned counsel for the respondent, Mr. D. Lamikanra, SAN adopted the respondent’s brief filed on 16/12/14 and urged this court to dismiss the appeal and affirm the judgment of the Court of Appeal.

H The concluding part of the judgment of the Court of Appeal reads as follows:

“In summary I hold that there is no proof of service on the writ of summons and/or the motion for judgment on the appellant. The failure of the court below to consider the appellant’s statement of

claim is a breach of the appellant's right to a fair hearing. The appeal is meritorious and is hereby allowed. The default judgment of the lower court dated 17/11/99 and the orders dated 11/4/2000 are hereby set aside. The suit No. HCH/14/99 is sent back to the High Court of Delta State for trial de novo by a judge other than Onajite Kuejubola J..." B

The two issues formulated by the appellant which shall be considered in this appeal reads:

1. Whether the Court of Appeal ought not to have resolved the issue of jurisdiction and refrain from remitting same to the High Court. C

2. Whether the Court of Appeal ought not to have struck out this suit for want of jurisdiction.

What is the issue of jurisdiction that the Court of Appeal ought to have resolved? D

The appellant annexed a statement of defence to his application to set aside the default judgment. The issue of jurisdiction was raised in the statement of defence. The application was refused by the trial court. No pronouncement was made on the issue of jurisdiction raised in the statement of defence. On appeal, the Court of Appeal set aside the judgment (allowed the appeal) by setting aside the default judgment and remitting the case to the trial court for trial de novo. E

Before the Court of Appeal was a Preliminary Objection on the issue of jurisdiction of the trial court sitting in Delta State to try the case. The Court of Appeal refused to hear the issue of jurisdiction. The court said. F

"A decision on the Preliminary Objection on the issue of jurisdiction will necessarily involve a pronouncement on same material points in the case. This would preempt the trial court in case of hearing de novo and jeopardize the interest of one of the parties. G

That explains the issue of jurisdiction that the Court of Appeal refused to address.

Learned counsel for the appellant submitted that the Court of Appeal ought to have invoked Section 16 of the Court of Appeal Act and determine the issue of jurisdiction. He argued that the Delta State High Court lacks jurisdiction to try this suit as it is clear that the respondent's injuries arose from his job as a re-driller during seismic H

and other oil exploration operations, and it was in the course of his work that he was injured. He submitted that by Section 251 (n) of the Constitution, only the Federal High Court has jurisdiction to try the case as the cause of action is from mines, and minerals. He urged this court to invoke Section 22 of the Supreme Court Act, set aside
 B the judgment of the Court of Appeal and strike out Suit No. HCH/14/99 for want to jurisdiction. Reliance was placed on C.G.G. Nig. Ltd v. Ogu (2005) 8 (Pt. 927) p.366. Replicando, learned counsel for the respondent observed that the issue of jurisdiction was not
 C raised in the trial court, contending that it can only be raised on appeal as a fresh point after leave of court must have been obtained. Reliance was placed on Ejifodomi v. Okonkwo (1982) vol. 13 NSCC p.422; C.G.G. (Nig) Ltd v. Ogu (2005) 8 NWLR (Pt. 927) p.366. He urged this court to uphold the decision of the Court of Appeal which
 D ordered that the case be sent back to the trial court for trial de novo.

The position of the law is that grounds of appeal are filed against a decision. It must challenge the ratio of the case. Put in another way, it must be connected with the disagreement between the parties.

Issues of fact or law not considered and pronounced on
 E ***by the trial court are fresh issues that can only be heard by an appellate court after leave of the court is obtained. Failure to obtain leave renders the application to raise fresh issues on appeal incompetent. The application would be thrown out.***
 F See Timothy v. FRN (2012) 6 SC (Pt. iii) p.159, Intercontinental Bank PLC v. Olam (Nig) Ltd. (2013) 1-2 SC (Pt. iii) p.52, Onyemaizu v. Ojiako & Anor (2010) 1-2 SC p.41, Adim v. NBC Ltd. & Anor (2010) 3-5 SC (Pt. iii) p.155. ***Jurisdiction is a question of law that can be raised for the first time in the Court of Appeal or***
 G ***the Supreme Court and there is no need to seek leave before raising it for the first time on appeal. It can be raised informally, but it is desirable that same process is filed so that the adverse party is not taken by surprise.*** See Obiakor v. State (2002) 10 NWLR (Pt. 776) p.612, Gaji v. Paye (2003) 5 SC p.53.

H ***The issue on jurisdiction can thus be filed and argued with or without the leave of the court, even if it is being raised as a fresh issue on appeal. The defendant/appellant was right to raise the issue of jurisdiction in the Court of Appeal without obtaining leave.***

Heavy reliance was placed on the case of CGG (Nig) Ltd. v. Ogu (2005) 8 NWLR (Pt. 927) p.366, by learned counsel for the appellant to justify this court invoking Section 22 of the Supreme Court Act and making a finding on the jurisdictional issue rather than remit the case for trial de novo in the trial court. In the case cited above this court per Tobi, JSC said that the Court of Appeal ought to resolve an issue of jurisdiction rather than remitting the case to trial court for trial de novo, and for that court to resolve the issue of jurisdiction. B

The defendant/appellant entered a conditional appearance in the trial court. The entry of conditional appearance is an appearance under protest and usually means an appearance to object to the courts jurisdiction. C

What was the defendant/appellant objecting to?

Learned counsel for the defendant objected to the fact that there was no service of the Writ of Summons, motion for judgment on the defendant/appellant. The defendant/Appellant was not served these fundamental processes. The Court of Appeal agreed with the defendant/appellant and ordered the case remitted to the trial court for trial de novo. Why did the Court of Appeal order the case remitted to the trial court for trial de novo? D E

It has been said in a plethora of cases that failure to give notice of proceedings to the opposing party in a case where service of process is required is a fundamental omission which renders such proceedings void. This is so because the court has no jurisdiction to entertain a case where any of the parties was not served process. See Obimonure v. Erinosho (1966) 1 ANLR p.250, Scott-Emuakpori v. Ukaube (1975) 2 SC p.41, Haruna v. Ladeinde (1987) 4 NWLR (Pt. 67) p.941. F G

All the proceedings in the trial High Court are void, complete nullities. That explains why the Court of Appeal remitted the case back to the trial High Court for trial de novo, so that the defendant/appellant would have an opportunity to defend the suit brought against him. H

Why can't this court invoke its powers under Section 22 of the Supreme Court Act and decide whether it is the State High Court or the Federal High Court that has jurisdiction to hear the respondents claim in view of Section 251 (n) of the Constitution?

In Madukolu & Ors. v. Nkemdilim (1962) 2 NSCC p.374 this court per Bairamain FJ made some observations on jurisdiction and the competence of a court. His lordship said that a court is competent 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 case comes before the court initiated by due process of law, and upon fulfillment of any condition precedent to the exercise of jurisdiction.

I earlier on in this judgment alluded to the fact that the defendant/appellant entered a conditional appearance and I explained that the entry of conditional appearance is an appearance under protest and usually means an appearance to object to the court's jurisdiction, in this case the non service of originating processes on the defendant/appellant. The issue of conditional appearance must be addressed by the trial judge before he proceeds to hear any application. It is only when the defendant is properly served originating process that his appearance becomes unconditional by implication and the court becomes competent to hear and resolve the issue of proper court to hear the merits of the case. I now ask the question.

Can it be said that the Court of Appeal was right to remit the matter to the High Court for trial de novo? The answer is a resounding YES.

Jurisdiction is a question of law which can be taken by the trial court or an appeal court provided the parties are properly before the court.

In this case the defendant/appellant complains that he was not served originating processes. The Court of Appeal agreed with the defendant/appellant. There is no appeal from the decision of the Court of Appeal which stated clearly that the defendant/appellant was not served originating processes. In the absence of an appeal, the decision of the Court of Appeal is inviolate. In the light of the finding by the Court of Appeal, no court has jurisdiction to make pronouncements on

an issue in which the defendant/appellant ought to be a party but was not, because he was not served originating processes. That explains why this court cannot decide the proper court to hear the plaintiff/respondents claim, and why agreeing with the Court of Appeal that the case be remitted for trial de novo is correct. B

When the case goes back to the trial court, the appellant would be properly served with the originating process. It is only then that parties are properly before the court, and the court would now have jurisdiction to hear any issue. It must be elementary now that parties (i.e. plaintiff and defendant) must be properly before the court before the court can entertain an application to decide which is the proper court to hear the case or indeed any application. C

By the provisions of Section 22 of the Supreme Court Act this Court is conferred with jurisdiction to make any order necessary for the determination of the real question in controversy in an appeal as if the matter is prosecuted in the Supreme Court as a court of first instance. By this Section the court can make or give an order that the court below can make without sending the case back for a retrial. E The section can only be invoked if there is no feature in the case which prevents this court from exercising its wide jurisdiction; and if the proceedings in the court below justify invoking the said Section 22 (supra). See Ucha v. Elechi (2012) ALL FWLR (Pt. 628) p.237, Inakoju v. Adeleke (2007) 1 SC (Pt. i) p.128, Dapianlong v. Dariye (2007) 4 SC (Pt. iii) p.168, Imonikhe v. A.G. Bendel State (1992) 7 SCNJ (Pt. i) p.197 F

In view of the fact, and position of the law that no court has jurisdiction over a party not served in proceedings that are not ex-parte proceedings, this court cannot exercise its jurisdiction under Section 22 supra since the defendant/appellant is not properly before the court. The fundamental feature of non service of process denies this court from exercising jurisdiction. G

The position of the law as stated by Tobi, JSC in CGG Nig Ltd. H v. Ogu 2005 8 NWLR (Pt. 927) p.366. That the Court of Appeal rather than remitting the case back to the trial court should make a finding on jurisdiction is correct, provided the court is competent as observed by this court in Madukolu v. Nkemdilim (supra). This court

and the trial court are not competent to make a finding on the proper court to hear the plaintiff/respondent claim because the defendant/appellant is not properly before the court. He has not been served originating processes.

The course to take

B This case goes back to the trial court for trial de novo. The plaintiff ensures that he serves the defendant with originating processes. It is only then that the court has jurisdiction to hear the case. It is only then that the defendant/appellant can file an application under section 251 (n) of the Constitution to contend that the proper court to hear the case is the Federal High Court and not the State High Court. Any proceedings short of the above would be putting the cart before the horse.

Once again, before the issue of jurisdiction of a court to hear a matter or indeed any application is heard, the parties must be properly before the court. In line with the decision in *Madukolu v. Nkemdilim* (supra) non service of originating processes on the defendant is clearly a feature in the case which prevents the trial court and this court from exercising its jurisdiction to decide the proper court to hear the plaintiff/respondents case. All that I have been saying has answered both issues.

There is no merit in this appeal. It is hereby dismissed with costs of N100,000 to the respondent.

F —————

MUNTAKA-COOMASSIE JSC

I read in advance this illuminating lead judgment rendered by my learned lord, Olabode Rhodes-Vivour, JSC. I entirely agree with the reasons and conclusions provided in his lordship's lead judgment. I adopt same. I have nothing to add.

I too agree that this particular appeal is devoid of any merit. It therefore deserves to be dismissed. I dismiss same.

H —————

ARIWOOLA JSC

I had the privilege of reading in draft the leading judgment just delivered by my learned brother, Rhodes-Vivour, JSC. I am in total agreement with the reasoning therein and the conclusion that the

appeal is devoid of merit and deserves to be dismissed.

I have nothing more to add. I also dismiss the appeal and abide by the consequential order including order on costs.

AKA'AHS JSC

B

My Lord, Rhodes-Vivour, J.S.C. made available to me in draft the judgment just delivered that the issue of service of the writ of summons was not settled when the trial Judge delivered judgment in favour of the plaintiff/respondent for default by defendant in filing the statement of defence. The appellant tried unsuccessfully to set aside the judgment before appealing against it to the Court of Appeal. Although the issue of jurisdiction of the trial court to entertain the suit was raised on appeal, the lower court was right to remit the suit to the High Court for hearing de novo since the issue of service of the originating process on the defendant is a condition precedent to any effective adjudication between the parties to the case. See *Madukolu v. Nkemdilim* (1962) 2 SCNLR 342; *Nwabueze v. Okoye* (1988) 4 NWLR (Pt. 91) 664. C D

If there was irregular service of the Writ, e.g. where the service is effected on the Branch Office and not the headquarters of the company or where the service is done on an employee and not a principal officer of the company, the irregular service can be waived but in a situation where the appellant complains of lack of fair hearing because of failure of service of the Writ, an appellate court without first settling the issue of service of the Writ, cannot delve into the issue of the proper court to entertain the action. E F

A court must be imbued with jurisdiction to hear a case before it can proceed to rule on whether that jurisdiction is excluded by statute like the one the appellant is seeking to raise in this appeal. In other words, a court must first establish that the defendant is aware of the suit against him or it before proceeding to entertain the defendant's objection to the jurisdiction of the Court. G

I therefore agree with the leading judgment of my learned brother, Rhodes-Vivour, J.S.C. that the appeal lacks merit and it is accordingly dismissed. I abide with the order made on costs. H

NWEZE JSC

I had the advantage of reading the draft of the leading judgment which my Lord, Rhodes-Vivour JSC, just delivered now. I agree with His Lordship that this appeal is unmeritorious and should be dismissed.

B As demonstrably shown in the leading judgment, the defendant was neither served with the originating process, the Writ of Summons nor the motion for judgment. The lower court was thus right to have ordered that the matter should be remitted to the trial court for trial de novo. The law has long been settled that where service of C processes is not effected on a party, who is supposed to be served, before a Court makes an order against him, such an order is afflicted with a fundamental vice and he is entitled *ex debito justitiae*, to have the order set aside. *Eke v. Oghonda* (2007) All FWLR (Pt. 351) 1456, D 1452.

This must be so for the entire proceedings would have been vitiated. It would be immaterial that it was well conducted, *Habib Nig Bank Ltd. v. Opemulero and Ors* [2000] 15 NWLR (Pt. 690) 315; *Sken Consult Nig Ltd. v. Ukey* [1981] 1 SC 6; *Mbadinuju and Ors v. Ezuka and Ors* [1994] 10 SCNJ 109; [1994] 8 NWLR (Pt. 364) 535; *Folorunsho v. Shaloub* [1994] 3 NWLR (Pt. 333) 413.

This prescription is premised on the radical nature of the right enshrined both in the common law principle of *audi alteram partem*, F *Omabuwa v. Owhofatsho* [2006] 5 NWLR (Pt. 972) 40, 67; *Tubonemi v. Dikibo* (2006) 5 NWLR (Pt. 974) 565, 587-588; *A-G Rivers State v. Ude* (2006) 17 NWLR (Pt. 1008) 436; *Bamgboye v. UNILORIN* (1990) 10 NWLR (Pt. 622) 290; *Deduwa v. Okorodudu* [1976] 9-10 SC 329 and Section 36(1) of the Constitution of the Federal Republic of Nigeria, *Ukpo v. Imoke* (2009) 1 NWLR (Pt. 1121) 90, G 171; *Salau v Egeibon* (1994) 6 NWLR (Pt. 348) 32; *Ceekay Traders Ltd v. G.M.C. Ltd* (1992) 2 NWLR (Pt. 222) 132.

It is for these, and the more detailed, reasons in the leading judgment that I too, shall enter an order dismissing this appeal. I H abide by the consequential orders in the leading judgment.