

**SUPREME COURT OF NIGERIA**

FRIDAY 20TH MAY, 2016. SC. 127 /2005

**CORAM:- W. S. N. ONNOGHEN, C. B. OGUNBIYI, K. B.  
AKA'AHs, K. M. O. KEKERE-EKUN, C. C. NWEZE, JJSC**

ESTATE OF LATE CHIEF

HUMPHREY I. S. IDISI

..... APPELLANT

(Substituted by Order of Court  
made on 12/1/16)

AND

1. ECODRIL NIGERIA LTD

2. EXPRO NIGERIA LTD

3. CHIEF GABRIEL OFOTOKUN

..... RESPONDENTS

4. VIC-EMEKS INTEGRATED CO.

NIG. LTD

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LEGAL PRACTITIONERS - Legal process - Misuse of - Salihu v. Gana  
- Lawyers who misuse their knowledge of law - To stultify process of  
administration of justice - Constitute a clog to progress of the profes-  
sion (H1)

COURT PROCESSES - Service - Affidavit of - Where such is de-  
posed to by a person effecting service - Setting out the facts and date  
of service - It shall be prima facie proof of matters stated therein (H2)

COURT PROCESSES - Contentious service - Where service evi-  
denced in affidavit was disputed - Trial Court must satisfy itself that  
the actual originating process it dealt with was duly served (H3)

COURT PROCESSES - Service - Failure of - Where service is re-  
quired and there is failure to effect same - It affects jurisdiction of  
Court to adjudicate on the matter (H4)

JURISDICTION - Fundamentality of - Where there is lack of jurisdic-  
tion - Every step taken in the proceedings amounts to nothing (H5)

**FACTS**

This action was commenced by an originating summons

**2662** Idisi v. Ecodril Nig. Ltd. (2016) 5 KLR (pt. 386) 2661; (2016)

brought by plaintiffs/3<sup>rd</sup> and 4<sup>th</sup> respondents before the High Court of Delta State, Isiokolo Judicial Division. Their claim is for the sum of N250 million. The claim arose from contract entered into between 3<sup>rd</sup> & 4<sup>th</sup> respondents and appellant. 1<sup>st</sup> and 2<sup>nd</sup> respondents who were not privy to the contract, were also made defendants in the matter. However, no originating process was served on 1<sup>st</sup> and 2<sup>nd</sup> respondents. Rather, the bailiff served different originating processes (i.e. writ of summons and hearing notice) on appellant's office.

At the commencement of the matter in the Court, learned counsel for 3<sup>rd</sup> and 4<sup>th</sup> respondents made an application for judgment for his clients. Learned counsel representing appellant and 1<sup>st</sup> & 2<sup>nd</sup> respondents did not oppose the application for judgment. Accordingly, the learned trial Judge entered judgment against appellant and 1<sup>st</sup> & 2<sup>nd</sup> respondents. On being aware of the judgment, 1<sup>st</sup> respondent brought a motion before the court seeking for the judgment to be set aside. The grounds of the application are that 2<sup>nd</sup> respondent is not a juristic person that can sue or be sued, that the originating summons was not served on 1<sup>st</sup> respondent and that there was a breach of fair hearing in the conduct of the matter by the court. Irrespective of the valid grounds raised by 1<sup>st</sup> respondent, the court dismissed the application. Dissatisfied, 1<sup>st</sup> respondent appealed to the Court of Appeal Benin Division. The court gave judgment in its favour. Aggrieved, appellant approached the Supreme Court on appeal.

### **ISSUE FOR DETERMINATION**

Whether the lower Court was right when it held that the first and second respondents were not served with the Originating Summons, taking into consideration the whole circumstances of the case?

**HELD** (Unanimously dismissing the appeal per **NWEZE JSC**)

*LEGAL PRACTITIONERS - Legal process - Misuse of*

**1. My Lords, pray, permit me to adopt the apposite observation of the erudite Abiru JCA who in *Salihi v Gana and Ors (2014) LPELR-23069 (CA) 34-36, stated that “lawyers who misuse their knowledge of the law and legal procedure to stultify the process of administration of justice are a disappoint-***

*ment and constitute a clog to the progress of the legal profession."*

Such is the nature of this appeal which is nothing but an attempt *"to stultify the process of administration of justice"* by counsel who is *"a pitiable mockery of what a great Lawyer really is,"*

It cannot be otherwise. Even in the face of these impeccable far-reaching findings and unimpeachable conclusion, counsel for the appellant, most incautiously, proceeded to irritate the administration of justice with his appeal: an appeal which, due to its frivolous nature constitutes *"a vice rather than a virtue in the administration of justice."* (p. 2675 C)

*COURT PROCESSES - Service - Affidavit of*

2. That notwithstanding, they were made defendants to the action. Instead of serving them with the Originating Summons, the bailiff, by his own deposition in the affidavit of service, served the appellant with entirely alien processes, namely, *"Writ of Summons and hearing notice, not an Originating Summons, which was dealt with by the Court below,"* [page 145 of the record].

This unchallenged finding by the lower Court, effectively, negates the disingenuous submissions of the appellant's counsel that the *"originating Summons... were served on the first and second respondents,"* [page 7 of the appellant's brief]. As the lower Court, rightly held, *"a Writ of Summons and a Hearing Notice cannot be the same as Originating Summons,"* [page 145 of the record].

Even on this score alone, the first and second respondents were relieved of the burden of proving non-service since the bailiff's ipse dixit settled the conundrum in their favour that they were not served with the Originating Summons. After all, it is settled that an affidavit of service deposed to by the person effecting the service, setting out the fact, place, mode and date of service and describing the process or document served shall be prima facie proof of the matters stated in the endorsement or affidavit. (p. 2676 A)

*COURT PROCESSES - Contentious service*

**3. I must pause here to emphasise the point that, where as in the instant case, the service evidenced in the affidavit of service was disputed by the respondents, the trial Court had a duty to satisfy itself that the actual originating process it dealt with, that is, the Originating Summons had, in fact, been served.**

**Regrettably, the trial Court, woefully, failed to do so. Thankfully, the Lower Court, rightly, out-distanced the trial Court in this regard. After its painstaking scrutiny of the processes, it found that the bailiff effected service of an alien process, namely, “Writ of Summons and hearing notice, [and] not [the] Originating Summons, which was dealt with by the Court below,” [page 145 of the record, italics supplied]. Its approach is in tandem with settled authorities. (p. 2676 F)**

*COURT PROCESSES - Service - Failure of*

**4. In effect, the conclusion of the lower Court is irreproachable. It has been settled that the failure to serve process, where the service of process is required such as in this case, is a failure which goes to the roots of the case.**

**On this premise, I find no justification for interfering with the lower Court’s conclusion for it is the service of the process of the Court on the defendant that confers on the Court the competence and the jurisdiction to adjudicate on the matter. Put differently, due service of the process of the Court is a condition precedent to the hearing of the suit. Where, as in this case, as the first and second respondents were not served with the originating process, that is, the Originating Summons, they were entitled ex debita justitiae to have the trial Court’s judgment set aside as a nullity.**

**It is a nullity because the service of the originating process is a condition sine qua non to the exercise of any jurisdiction on the defendant. Since there was no service on them, the fundamental rule of natural justice audi alteram partem was breached when the trial Court proceeded to enter judgment against them.**

**Accordingly, the trial Court’s judgment against the first and second respondents, without service, was a judgment given**

***without jurisdiction and is therefore null and void. That failure to serve the said originating process, the Originating Summons, was not merely an irregularity. It was a fundamental defect which rendered the proceedings a nullity.*** (p. 2677 A)

*JURISDICTION - Fundamentality of*

***5. In all, the point must be noted here that jurisdiction is of paramount importance in the process of adjudication. As such, where there is a deficit in regard thereof, everything done or every step taken in the proceedings amounts to nothing.***

***Put differently, jurisdiction is the life-wire of any proceeding in Court and everything done in its absence is, simply, a nullity. That is the fate of the Ruling of the trial Court [Akoro, J] as, rightly, found by the lower Court.*** (p. 2678 E)

## **REPRESENTATION**

A. K. Osawota, for the Appellant

Olumide Aju for 1st and 2nd Respondents

Kunle Edu, Esq. for 3rd and 4th Respondents

## **CASES REFERRED TO**

Kisari Invest. Ltd. v. Laterminal Co. Ltd. [2001] FWLR (pt. 66) 766

National Electoral Commission v. Izuogu [1993] 2 NWLR (pt. 275)

Adewunmi v. A. G. Ekiti State [2002] FWLR (pt. 92) 1835

Mohammed v. Kpelai [2001] FWLR (pt. 69) 1404

United Nig. Press v. Adebanjo (1969) 1 All NLR 422

Craig v. Kanssen (1943) KB 256

Mbadinuju v. Ezuka [1994] 8 NWLR (pt. 364) 5

Salihu v. Gana (2014) LPELR-23069 (CA) 34-36

Williams v. Akintunde (1995) 3 NWLR (pt. 381) 101 (CA)

Ogboru v. Uduaghan (2014) LPELR – 23080

Launi v. Ezeadua [1983] 6 SC 370

Okesuji v. Lawal [1991] 1 NWLR (pt. 170) 661

Mark v. Eke (2004) LPELR -1841 (SC) 25-26

Odutola v. Inspector Kayode [1994] 2 NWLR (pt. 324) 1

## **STATUTES & RULES REFERRED TO**

Companies & Allied Matters Acts Cap 59 LFN 1990, ss. 66(1), 78

High Court Civil Procedures Rules of Bendel State (as applicable to Delta State), O. 12 rr. 8

**LEAD JUDGMENT BY NWEZE JSC**

By an Originating Summons, the third and fourth respondents  
B in this appeal (as plaintiffs) commenced an action against the appel-  
lant (as first defendant) at the High Court of Delta State, Isiokolo  
Judicial Division. They claimed the sum of N250, 000, 000.00 (Two  
Hundred and Fifty Million Naira) “being monies (sic) due to the ap-  
C pellant” from the first and second respondents. For its bearing on the  
questions canvassed by the parties, I shall set out the ipsissima verba  
of the main relief as expressed on the said Summons:

An order for the sum of N250, 000, 000. 00 (Two Hundred  
and Fifty Million) against the first defendant which monies are not  
D being contested by the first defendant but in possession of the sec-  
ond and third defendants; as monies (sic) due and shall fall due to  
the first defendant from the second and third defendants as facilita-  
tor and chairman of the second and third defendants’ companies;  
being monies/amount/sum owed the plaintiffs by the first defendant  
E for items supplied by the second plaintiff to the first defendant and  
was fully paid for and satisfied (sic) by the first plaintiff to the second  
plaintiff on behalf of the first defendant - the facilitator and chairman  
of the second and third defendants between the period of 1998 to  
F 1999, on running supply contracts within the jurisdiction of this Court;  
which the first defendant has refused and/or failed to make good till  
date to the first plaintiff [Page 11 of the record, Italics supplied for  
emphasis]

From the tenor of the italicized subordinate clause in the above  
G relief, it is not in doubt that the claim was anchored on an alleged  
contract entered into between the appellant and the third and fourth  
respondents: a contract from which the sum due, namely, N250,  
000, 000.00 (Two Hundred and Fifty Million Naira), eventuated.  
Put differently, the third and fourth respondents [as plaintiffs] sued  
H on the contract which they entered into with the appellant. In effect,  
the first and second respondents, not being privy to the said con-  
tract, were total strangers to it.

That notwithstanding, the originating processes were not served  
on them [that is, the first and second Respondents]. Rather, the bai-

liff dropped copies of an alien process in the appellant's office at Sapele.

Curiously, he [for himself and on behalf of the first and second respondents] engaged the services of one A. K. Osawota who, at the hearing of the matter at the High Court on February 3, 2000, purportedly represented not only the appellant but also the first and second respondents. In what evidently smacked of unprofessional conduct, he did not oppose the application of the plaintiffs' counsel for judgment. The trial Court, accordingly entered judgment against the appellant and the first and second respondents.

Upon becoming aware of the judgment, the first respondent beseeched the trial Court with an application for stay of execution of the judgment and for an order to set it aside. The Trinitarian Grounds of the application, which should have called for considerable circumspection on the part of the trial Court, were as irreproachable as they were formidable:

(i) The second respondent is not a juristic person capable of suing or being sued in a Court of law;

(ii) The Originating Summons in this action was not served on the first respondent as prescribed by law;

(iii) There was a breach of fair hearing as the first respondent was neither heard nor given an opportunity to be heard before the Order of Court dated 3rd February, 2000 was made against it. [*Italics supplied for emphasis*]

The trial Court, even in the face of these weighty grounds that raised formidable constitutional questions, chose to dismiss the application, whereupon the applicants approached the Court of Appeal, Benin Division [hereinafter, simply referred to as "the lower Court"] with their complaints. The judgment of the lower Court, which favoured the applicants, prompted the appellant's appeal to this Court. He framed four issues for the determination of his appeal, viz:

1. Whether the findings/consideration of facts in the supplementary records by the lower Court after admitting that the records are not in the file, has not occasioned miscarriage of justice, particularly, in the light of the dismissal of the preliminary objection?

2. Whether the lower Court was right when it held that the first and second respondents were not served the originating summons taking into consideration the whole circumstances of this case?

3. Whether the learned Justice (sic) of the Court of Appeal were right when they held that the third and fourth respondents did not disclose any cause of action against the first and second respondents?

4. Whether the learned Justices of the Court of Appeal were right by setting aside the judgment and ruling of the trial Court dated 3/21/000 and 29/5/2000, respectively?

Unarguably, against the background of the complaint of the first and second respondents, encompassed in the Grounds of the application to set aside the trial Court's judgment, only the second issue would suffice in the determination of this appeal namely,

Whether the lower Court was right when it held that the first and second respondents were not served with the Originating Summons, taking into consideration the whole circumstances of the case?

**ARGUMENTS ON THE SOLE ISSUE - APPELLANT'S ARGUMENT**

When this appeal was heard on February 29, 2016, counsel for the appellant, A. K. Osawota, adopted the Amended Appellant's brief filed on February 10, 2016. On this issue, he contended that, upon filing of the originating summons, it was served on the first and second respondents through the appellant who is the alter ego and Chairman of the first and second respondents, citing page 16 of the record.

He pointed out that the address for service indicated in the originating summons for the first and second respondents, including the appellant, was Enerhen Road, Enerhen-Effurun, Delta State, within the jurisdiction of the trial Court. He noted that the first and second respondents were served through the appellant at Sapele, which is within jurisdiction of the High Court of Justice, Delta State.

In his view, the trial Court was right when it held that *"from the address endorsed on the Originating Summons, it is clearly stated that all the defendants are living in Warri within the jurisdiction of this Honourable Court."*

He maintained that the first and second respondents admitted the fact that the appellant was their Chairman, citing page 32, paragraph 10 of the record. He submitted that the service of the originating summons on the first and second respondents, through the appellant, was valid and proper, citing Section 78 of the Companies



and Allied Matters Acts Cap 59 LFN 1990 and Order 12 Rules 8 of the High Court Civil Procedures Rules of Bendel State (as applicable to Delta State).

He noted that the parties are ad idem on the fact that the appellant is the facilitator, financier and Chairman of the first and second respondents and consequently a principal officer in the said companies. B

He submitted that service of the originating summons on the first and second respondents through the appellant, whether inside or outside their premises is proper service, *Kisari Investments Ltd v Laterminal Company Ltd* [2001] FWLR (pt. 66) 766, 770. According to him, this must be the position because Order 12 Rule 8 of the High Court Rules does not expressly provide that the Director, Secretary or Principal Officer of the company must be served within the company's premises, or at its office. C

He pointed out that the first and second respondents have the onus of proving that there is a contrary mode of service adopted by them with respect to service of the Court processes. He submitted that, in the absence of such proof, reliance on Order 12 Rule 8 is proper and such service is deemed to be personal service on the first and second respondents. He inveighed against the lower Court's judgment. D

He further submitted that the appellant, having accepted service for and on behalf of the first and second respondents, whatever subsequent act he did in respect of the suit was their act and binding on them, Section 66 (1), CAMA ; *Odutola v Ladejobi* [2006] 5 SCNj 63, 86. E

He contended that the first and second respondents, having entered appearance through counsel to wit, Chief A. K. Osawota, had waived whatever irregularity inherent in the service of the processes. In his submission, where a defendant entered appearance on the strength of an irregular service of an otherwise valid originating summons, it constituted not only a waiver of the irregularity but also a submission to the jurisdiction of the Court, F

*Kisari Investments Ltd v Laterminal Company Ltd* (supra) 1771. G

He pointed out that the appellant, being a major shareholder in the first and second respondents, and their principal officer, was the alter ego of the Company, the service on him is deemed proper H

service on the 1st and 2nd Respondents. More so, upon appearance of A.K. Osawota for them, there was in law a presumption of having been briefed by the parties whom he entered appearance for. He cited *Haston Nig Ltd v A. C. B. Plc [2002]* as authority on the importance of the position of the Chairman of a Company as regards the  
B affairs of the Company.

He pointed out that it was in pursuance of the appellant's duty to timeously protect the interest of the first and second respondents that he duly briefed A.K. Osawota, Esq. to appear for them. By doing this, he [appellant] had complied with the provisions of the law.  
C

In his view, whether the appellant exercised his power and discretion wrongly cannot constitute a ground to appeal and/or set aside the trial Court's decision. He further, submitted that service on a director or principal officer of a company whose interest was in  
D conflict with that of a company was proper service because mere sentiments and domestic policies of a company cannot waive statutory provisions, thus *National Electoral Commission v Izuogu and Ors [1993] 2 NWLR (Pt 275) (sic)* was inapplicable to this appeal.

He urged the Court to discountenance *National Electoral Commission v Izuogu and Ors (supra)* as being irrelevant and inapplicable to this matter.  
E

He submitted that the non production of three proofs of service indicating the number of defendants sued and served, or whether it was a writ of summons (not originating summons) that was served  
F on the first and second respondents was not fatal but a mere irregularity which did not affect the substance of this matter, Order 2 Rule 1, High Court Civil Procedure Rules of Defunct Bendel State applicable to Delta State.

He pointed out that the purported irregularity was waived by the appearance of A.K. Osawota, Esq. for the appellants without protest and even the first and second respondents never complained that it was a writ of summons but not originating summons that was served on them. He pointed out that it was on record that all the  
G parties to the suit knew the processes that were issued and none of them was misled by the endorsement on the proof of service.  
H

He observed that, the first and second respondents, having entered appearance through counsel and participated in the hearing of the summons, cannot resort to legal technicalities and engage each

other in a whirling of technicalities, technicalities having for long been committed to mother earth by the need to do substantial justice, *Adewunmi v. A. G. Ekiti State* [2002] FWLR (pt 92) 1835.

Counsel further contended that two or more proofs of service on the defendants were unnecessary in this case. In his view, since the appellants acted on their behalf in accepting service, the production of one proof of service was sufficient. He pointed out that this was indicated on the proof of summons which was served on defendants, through the first defendant. According to him, the argument that there must be equal number of proofs of service commensurate with the number of defendants was stretching the law too far and was not all embracing and admits of exception, and this matter was clearly one of them.

He contended that, in view of his position as Chairman of the first and second respondents, he was sufficiently clothed with legal and equitable authority to act for and on their behalf.

He canvassed the view that the principle of *audi alterem partem* was not a massive shield to circumvent the due process of the law or shielding a litigant from the consequences of litigation at his whims and caprices. In his view, a litigant must show that he was deliberately by-passed and excluded from proceedings before he can succeed in invoking the principle, *Mohammed v. Kpelai* [2001] FWLR (pt 69) 1404, 1407. He pointed out that the first and second respondents never contested the appellant's power to appoint counsel for them.

He maintained they did not establish by way of evidence that they were denied fair hearing and the second respondent, having denied its own existence, cannot make a somersault and argue that it was not afforded fair hearing because a purported non existing person cannot hear nor speak, page 26; pages 2, 5 and 6 of the record, *Kunle Edu*, for the third and fourth respondents, did not file any brief of argument,

#### FIRST AND SECOND RESPONDENTS' CONTENTION

On his part, counsel for the first and second respondents, *Olumide Aju*, adopted the Brief of Argument filed on February 2, 2016. In the said brief, he submitted that the lower Court was right when it held that the first and second respondents were not served with the Originating Process, and therefore all the proceedings against them at the trial Court were vitiated on account of lack of fair hear-

ing.

He advanced the following reasons. In the first place, the first respondent herein is a limited liability company. He cited Section 78 of the Companies and Allied Matters Act Cap 59 Laws of the Federation of Nigeria 1990, which governs service of processes on companies. He equally, drew attention to Order 12 of the High Court of Bendel State (Civil Procedure) Rules 1988, applicable in Delta State, citing *Bello v NBN* [1992] 6 NWLR (pt 246) (sic).

He pointed out that the pertinent question for consideration in this issue is whether a company can be served through any of his directors. He posed the question: whether it would be proper service where a director and his company were sued as defendants in an action, and the relief sought as stated in the Originating Summons indicated a conflict of interest between that company and the director if the company is served through that director. He referred to the principal relief sought as stated in the Originating Summons (*supra*).

He observed that the above relief, clearly, showed that the intention of the Plaintiff, at the trial Court, was to sue only the appellant in order to recover the money he owed to the third and fourth respondents. He explained that the appellant was sued in respect of a contract he entered into in his private capacity and for his own intents and purposes. The first and second respondents were joined in the suit at the High Court, presumably, because the Appellant had told the third and fourth respondents that he had some money due from the first and second respondent's companies wherein he is a director. In his view, this clearly showed that there was a conflict of interest between the appellant and them.

He wondered if, in the above circumstance, whether it was proper service to serve the appellant with the Originating Summons meant for the first and second respondents. He noted that the fact that the Summons were served on the appellant in his personal office at Sapele was strong evidence that he was the main appellant to the Suit at the trial Court. That he made no effort to send the Summons to the registered office of the 1st Respondent in Port Harcourt was further evidence of the conflict of interest.

He submitted, on behalf of the first and second respondents, that, in such circumstance as the above, it would not be proper service on the company to serve the summons on the director, because

he had an interest in the subject matter of the suit which was in conflict with the interest of the company. According to him, under the circumstance, service on the director should not qualify as service on the company since both of them were defendants in the action, *NEC v Izuogu and Ors* [1993] 2 NWLR (pt 275) 286.

He contended that where service of an originating process was in issue, the Court had to be satisfied that there was service by asking for proof of service, citing Order 12 Rule 28 of the High Court of Bendel State Civil Procedure Rules, 1988. B

He maintained that where more than one defendant is sued, there must be proof of service on each defendant in such capacity, except there is an order of Court to the contrary. This, in his view, is because the object of all types of service of process is to give notice to the party on whom service is to be effected so that he might be aware of and able to resist, if he may, that which is sought against him, *United Nigeria Press v Adebajo* (1969) 1 All NLR 422, 423. C

#### RESOLUTION OF THE RADICAL SOLE ISSUE OF NON-SERVICE

As indicated at the outset of this judgment, when the first and second respondents were apprised of the judgment against them, they repaired to the trial Court with an entreaty to it to set aside its judgment obtained when the originating process was not served on them. In effect, they interrogated that Court's jurisdiction and impugned its competence to enter judgment as it did against them. *Craig v Kanssen* (1943) KB 256, 262; *Mbadinuju v. Ezuka* [1994] 8 NWLR (pt. 364) 5. D

In the main, their complaint was woven around the question of non-service of the Originating Summons. E

They thus raised a fundamental issue which went to the jurisdiction and competence of the Court to enter the judgment, as it did. They set out the Grounds for their application: grounds which, inter alia, complained that: G

(iv) The Originating Summons in this action was not served on the first respondent as prescribed by law; H

(v) There was a breach of fair hearing as the first respondent was neither heard nor given an opportunity to be heard before the Order of Court dated 3rd February, 2000 was made against it.

On the first question, the lower Court found as follows “[i] an

affidavit of service dated 28/2/2000, a bailiff of the lower Court [that is, the trial Court] swore that on 19th January, 2000 at 2 O'clock, he served 'upon the defendant at Sapele three copies of Writ of Summons and hearing notice... by delivering the same personally to the defendant at his office at Sapele'; [page 132, italics supplied for emphasis].

At page 145 of the record, the lower Court, further found as follows:

"Though there were three defendants, the third respondent and the two appellants, the affidavit of service shows that the process was served on the defendant; It was stated in the affidavit that the three copies of Writ of Summons and Hearing Notice were served on the defendant at his office at Sapele. Granted that the third respondent was described as the facilitator of Expo Nig Ltd, he was sued in his personal capacity and though sued together with the appellant, his interest in the suit is adverse to that of the appellants. In any case, if it can be said that service on the defendant at his Sapele office means service on the three defendants, including the appellants..., what were served were a Writ of Summons and hearing notice, not an Originating Summons, which was dealt with by the Court below. It is my considered view that, going in (sic) affidavit of service, the appellants were not served directly or indirectly even the Originating Summons. A Writ of Summons and a Hearing Notice cannot be the same they (sic) as Originating Summons." [Italics supplied for emphasis]

Not done yet, the Lower Court made these crucial and damning findings:

"In view of the adverse interests of the third respondent behind their back, a reasonable person watching the proceedings and being aware that what the bailiff sworn (sic) he served on the 'defendant' at his office were three copies of a Writ of Summons and hearing notice, not the Originating Summons taken by the Court, that the appellants were not served either the Originating or the Writ of Summons, that counsel who was foisted on the appellants behind their back by the third respondent who has interest adverse to the appellants' interests in the matter merely addressed the Court on behalf of the third respondent and said nothing about the appellants, nor did the Court hear from them since counsel who purported to

*appear for them failed to speak on their behalf, will definitely leave the Court worried and disappointed that justice had not been done to the appellants. The originating process, be it Originating Summons or Writ of Summons, ought to have been served on the appellants. It cannot be said that the appellants were given a fair hearing because the decision against them was based on the Originating Summons which was not served on them or through the third respondent on whom the Writ of Summons and Hearing Notice were served. Furthermore, counsel brief for them, without their knowledge and consent, did not represent them.*" [page 146, italics supplied for emphasis]

**My Lords, pray, permit me to adopt the apposite observation of the erudite Abiru JCA who in *Salihu v Gana and Ors* (2014) LPELR-23069 (CA) 34-36, stated that "lawyers who misuse their knowledge of the law and legal procedure to stultify the process of administration of justice are a disappointment and constitute a clog to the progress of the legal profession."**

**Such is the nature of this appeal which is nothing but an attempt "to stultify the process of administration of justice" by counsel who is "a pitiable mockery of what a great Lawyer really is,"** per Pats-Acholonu JCA (as he then was) in *Williams v Akintunde* (1995) 3 NWLR (Pt 381) 101, 115.

**It cannot be otherwise. Even in the face of these impeccable far-reaching findings and unimpeachable conclusion, counsel for the appellant, most incautiously, proceeded to irritate the administration of justice with his appeal: an appeal which, due to its frivolous nature constitutes "a vice rather than a virtue in the administration of justice."** Ogboru and Anor v. Uduaghan and Ors (2014) LPELR - 23080 (SC).

As shown above, the third and fourth respondents in this appeal (as plaintiffs) commenced an action against the appellant (as first defendant) through an Originating Summons at the High Court of Delta State, Isiokolo Judicial Division. The claim, as already shown above, was anchored on an alleged contract which they entered into with the appellant; a contract from which the sum due, namely, N250, 000,000.00 (Two Hundred and Fifty Million Naira), eventuated. In effect, the first and second respondents, not being privy to the said

contract, were total strangers to it.

***That notwithstanding, they were made defendants to the action. Instead of serving them with the Originating Summons, the bailiff, by his own deposition in the affidavit of service, served the appellant with entirely alien processes, namely,***  
 B ***“Writ of Summons and hearing notice, not an Originating Summons, which was dealt with by the Court below,”*** [page 145 of the record].

***This unchallenged finding by the lower Court, effectively,***  
 C ***negates the disingenuous submissions of the appellant’s counsel that the “originating Summons... were served on the first and second respondents,”*** [page 7 of the appellant’s brief].  
***As the lower Court, rightly held, “a Writ of Summons and a Hearing Notice cannot be the same as Originating Summons,”***  
 D ***[page 145 of the record].***

***Even on this score alone, the first and second respondents were relieved of the burden of proving non-service since the bailiff’s ipse dixit settled the conundrum in their favour that they were not served with the Originating Summons. After***  
 E ***all, it is settled that an affidavit of service deposed to by the person effecting the service, setting out the fact, place, mode and date of service and describing the process or document served shall be prima facie proof of the matters stated in the endorsement or affidavit.*** Schroder and Co v Major and Com-  
 F ***pany (Nig.) Ltd [1989] 2 SC (pt. II) 138; 2 NWLR (Pt. 101) 1, 11.***

***I must pause here to emphasise the point that, where as in the instant case, the service evidenced in the affidavit of service was disputed by the respondents, the trial Court had a***  
 G ***duty to satisfy itself that the actual originating process it dealt with, that is, the Originating Summons had, in fact, been served.***

***Regrettably, the trial Court, woefully, failed to do so. Thankfully, the Lower Court, rightly, out-distanced the trial Court in this regard. After its painstaking scrutiny of the processes, it found that the bailiff effected service of an alien process, namely, “Writ of Summons and hearing notice, [and] not [the] Originating Summons, which was dealt with by the Court below,”*** [page 145 of the record, italics supplied]. ***Its approach is in tandem with settled authorities.*** Umaru Launi v. Ezeadua



Idisi v. Ecodril Nig. Ltd (2016) 5 KLR Nweze JSC 2677  
[1983] 6 SC 370; Okesuji v. Lawal [1991] 1 NWLR (pt. 170) 661,  
673.

***In effect, the conclusion of the lower Court is irreproachable. It has been settled that the failure to serve process, where the service of process is required such as in this case, is a failure which goes to the roots of the case.*** Craig v. Kanssen <sup>B</sup>  
(1943) KB 256 at 262.

***On this premise, I find no justification for interfering with the lower Court's conclusion for it is the service of the process of the Court on the defendant that confers on the Court the competence and the jurisdiction to adjudicate on the matter. Put differently, due service of the process of the Court is a condition precedent to the hearing of the suit. Where, as in this case, as the first and second respondents were not served with the originating process, that is, the Originating Summons, they were entitled ex debita justitiae to have the trial Court's judgment set aside as a nullity.*** Mbadinuju v. Ezuka [1994] 8 NWLR <sup>C</sup>  
(pt. 364) 5. <sup>D</sup>

***It is a nullity because the service of the originating process is a condition sine qua non to the exercise of any jurisdiction on the defendant. Since there was no service on them, the fundamental rule of natural justice audi alteram partem was breached when the trial Court proceeded to enter judgment against them.*** Mbadinuju v. Ezuka [1994] 8 NWLR (pt.364) <sup>E</sup>  
5; Mark and Anor v Eke (2004) LPELR -1841 (SC) 25-26. <sup>F</sup>

***Accordingly, the trial Court's judgment against the first and second respondents, without service, was a judgment given without jurisdiction and is therefore null and void.*** Odotola v. Inspector Kayode [1994] 2 NWLR (pt.324) 1, 15. ***That failure to serve the said originating process, the Originating Summons, was not merely an irregularity. It was a fundamental defect which rendered the proceedings a nullity.*** Obimonure v. Erinoshoh <sup>G</sup>  
[1966] 1 All NLR 250, 252; Scot-Enuakpor v. Ukavbe [1975] 12 SC 41, 47; [1975] 12 SC (Reprint) 31; Odita v. Okwudinma (1969) 1 <sup>H</sup>  
All NLR 228; Skensconsult (Nig.) Ltd. v. Ukey [1981] 1 SC 6, 26; [1981] 1 SC (Reprint) 4.

That must be so for failure to serve a process, where service of a process is required, renders any order made against the party who

should have been served with the process null and void, Craig v. Kanseen (1943) 1 All ER 108, 113; Madukolu and Ors. v. Nkemdilim [1962] 2 SCNLR 341, S.G.B. (Nig.) Ltd. v. Aina [1999] 9 NWLR (pt. 619) 414; U.B.A. Plc. v. Ajileye [1999] 13 NWLR (pt. 633) 116, 12, Oke v. Aiyedun [1986] 2 NWLR (pt. 23) 548, 99l; Okoye and Okoye B v CPMB Ltd (2008) LPELR 1.

My Lords, before concluding this judgment, permit me to make one final observation. It would seem obvious that the appellant's counsel read the lower Court's judgment very perfunctorily, if not with unproductive superficiality. That explains why the import of the said Court's sublime findings was lost on him. At the risk of wearisome repetition, I am constrained to set out the lower Court's trenchant finding that the bailiff effected service of an alien process namely, *"Writ of Summons and hearing notice, [and] not [the] Originating D Summons, which was dealt with by the Court below,"* [page 145 of the record, italics supplied].

That notwithstanding, counsel opted to expend his energy on the applicability of Section 78 of the Companies and Allied Matters Act (supra) on service of processes on limited liability companies. E With profound respect, I find against the background of the above finding of the lower Court, that his entire submissions on CAMA are at best, hypothetical; or, at worst, otiose!

***In all, the point must be noted here that jurisdiction is of F paramount importance in the process of adjudication. As such, where there is a deficit in regard thereof, everything done or every step taken in the proceedings amounts to nothing.*** Attorney General for Trinidad and Tobago v. Erichie (1893) AC 518, 522; Timitimi v Amabebe 14 WACA 374; Mustapha v Governor of G Lagos State [1987] 2 NWLR (pt 58) 539; Utih v Onoyivwe [199l] 1 NWLR (pt 166) 206.

***Put differently, jurisdiction is the life-wire of any proceeding in Court and everything done in its absence is, simply, a nullity.*** Jumang Shelim and Anor v. Fwendim Gobang [2009] 7 SCM H 165; [2009] 12 NWLR (pt 1156) 435. ***That is the fate of the Ruling of the trial Court [Akoro, J] as, rightly, found by the lower Court.***

I find no merit in this wantonly, frivolous and utterly vexatious appeal. I hereby enter an order dismissing it with costs assessed and

fixed at N500, 000 (Five Hundred Thousand Naira) only to be paid personally by the appellant's counsel. I hereby affirm the judgment of the lower Court delivered on March 3, 2005. Appeal dismissed

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**ONNOGHEN JSC**

B

I have had the benefit of reading in draft the lead Judgment of my learned brother NWEZE JSC just delivered. I agree with his reasoning and conclusion that the appeal lacks merit and should be dismissed.

C

My learned brother has exhaustively dealt with the relevant issues raised in the appeal particularly the fundamental issues of service of originating processes thereby leaving me with nothing useful to comment on.

I therefore dismiss the appeal and affirm the Judgment of the lower Court delivered on the 23rd day of February, 2005. Appeal dismissed.

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**OGUNBIYI JSC**

E

I read in draft the lead judgment of my learned brother Nweze, JSC. I agree that the appeal is devoid of any merit and should be dismissed.

This is an appeal against the judgment of the Court of Appeal (Benin Division) delivered on 23rd February, 2005. In that judgment, the lower Court set aside an earlier judgment of the trial Court made in favour of 3rd and 4th respondents herein in a suit instituted by them against the appellant and the 1st and 2nd respondents herein who were the defendants at the trial Court.

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The process in question which was claimed not served on the 1st and 2nd respondents as defendants, was an originating summons taken out by the 3rd and 4th respondents as plaintiffs. The 1st defendant (appellant herein) was however served. Intriguingly, the process (originating summons) meant to be served on the 1st and 2nd respondents was exchanged however for writ of summons and hearing notice and served again on the appellant.

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Evidence of proof of Service is conclusive where a bailiff deposes to an affidavit to that effect. The proof is by material fact to be

placed before a Court. The absence of an effective and proper service negates the entire proceedings by a Court no matter how well conducted. The law is trite and well settled that when a question of service is in issue, it automatically touches on the jurisdiction of a Court which must be satisfied on the proof thereof.

B In the case at hand, there was no proof of service on the 1st and 2nd respondents either personally or through any of its directors. In fact, since there were three defendants named on the originating summons, prudence demands that there should have been three different affidavits of service in the Court's file in proof of service of the process.

C Order 12 Rule 28 of the High Court of Bendel State Civil Procedure Rules, 1988 provides as follows:-

*"In all cases where service of any writ or document shall have been effected by a bailiff or other officer of Court, an affidavit of service sworn to by such bailiff or other officer shall on production, without proof of signature, be prima facie evidence of service."* See also the cases of Public Finance Securities Ltd V. Jefia (1998) 3 NWLR (Pt 543) 602 at 612 and United Nigeria Press V. Adebajo (1969) 1 All NLR 422 at 423.

Absence of effective service is a fundamental omission being a condition precedent to the exercise of jurisdiction of a Court. See Madukolu V. Nkemdilim (1962) 1 All NLR 587 at 595. Consequently, as rightly submitted by the 1st and 2nd respondents' counsel, the service of the originating summons, (meant for the 1st and 2nd respondents), on the appellant was not proper in law. The lower Court could not therefore be faulted in its finding. Absence of service denotes lack of fair hearing and results in miscarriage of justice. The trial Court lacked jurisdiction to have entertained the matter and the lower Court was in order when it vitiated the entire proceedings against the appellant now before us.

My learned brother Nweze, JSC has resolved all the issues raised in this appeal. With the few words of mine and more particularly on the comprehensive reason and conclusion arrived at in the lead judgment, I also affirm the judgment of the lower Court and dismiss this appeal as lacking in merit. I further abide by the order made as to costs which is to be paid by the appellant's counsel personally.

**AKA'AH'S JSC**

I had a preview of the judgment of my learned brother, Nweze, JSC. I agree with his reasoning and conclusion that the jurisdiction of the trial Court was not properly invoked since the 1st and 2nd respondents were not properly served with the originating processes. The corporate veil of the 1st and 2nd respondents has not been pierced to enable the trial Court ascertain the position of the appellant as the alter ego of the 1st and 2nd respondents. Consequently, it cannot be said that the appellant's interest is coterminous with that of 1st and 2nd respondents. Their legal personalities and interests are still intact and remain divergent. The service of processes meant for 1st and 2nd respondents could therefore not be effected on the appellant. In the result, the judgment entered by the trial Court based on service of the originating processes on the appellant on behalf of 1st and 2nd respondents was entered without jurisdiction and liable to be set aside. What the Court below did was right. There is no merit in the appeal and it is hereby dismissed.

I abide by the award of cost made against the appellant which is to be paid personally by learned counsel because his conduct in the handling of the case smacks of unethical behaviour.

**KEKERE-EKUN JSC**

I have had a preview of the judgment of my learned brother, NWEZE, JSC just delivered. His Lordship has exhaustively considered and ably resolved the only issue that calls for determination in this appeal. I agree with his reasoning and conclusion that this appeal is not only lacking in merit, it is also frivolous and vexatious.

Service on the appellant, who was sued in his personal capacity of originating processes meant for the 1st and 2nd respondents in the circumstances of this case, particularly where it is evident that there is a conflict of interest between the appellant and the said respondent is a fundamental defect that goes to the very root of the trial Court's jurisdiction to entertain the action. The reason is not farfetched.

Failure to serve a process where service is required amounts to a breach of the affected party's right to fair hearing. It is based on the principle of law that a party should know or be aware that there is a

suit against him so that he can prepare a defence. It is a breach of one of the twin pillars of natural justice “audi alteram partem (let the other side be heard). See *Kida Vs Ogunmola* (2006) 13 NWLR (Pt. 997) 377; *Scott-Emuakpor Vs Ukavbe* (1975) 12 SC 41; *Eimskip Ltd Vs Exquisite Nig Ltd.* (2003) 4 NWLR (Pt. 809) 88.

B The situation in this case is further compounded by the fact that the process served, as sworn to by the bailiff of the trial Court, was quite different from the process upon which the Court based its Judgment.

C I fully agree with my learned brother and the Justices of the Court below that the judgment of the trial Court was delivered without jurisdiction and is therefore a nullity. The Court below was right to set it aside.

D For the more detailed reasons well adumbrated in the lead judgment, I also dismiss the appeal and endorse the award of costs to be paid personally by the appellant’s counsel.

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