

**SUPREME COURT OF NIGERIA**  
FRIDAY 16TH DECEMBER, 2016. SC. 83/2007  
**CORAM:- W. S. N. ONNOGHEN Ag. CJN, M. PETER-  
ODILI, O. ARIWOOLA, K. B. AKA'AH, K. M. KEKERE-  
EKUN, JJSC**

CHIEF LEO DEGREAT MGBENWELU..... APPELLANT  
AND  
AUGUSTINE OLUMBA  
(Suing by his Attorney  
CHIEF W. C. OKORIE) ..... RESPONDENT

---

RECOVERY OF POSSESSION - Service of writ - Challenge to affidavit of service is by way of counter affidavit - And not by motion for adjournment - Or preliminary objection to dismiss the suit (H1)

COURTS - Affidavit - Reliance on - Court ought not to act on affidavit bereft of facts - Showing source of information of deponent - Where he was not deposing from personal knowledge (H2)

AFFIDAVITS - Conflict - Resolution - As there is no conflict to what bailiff deposed to - Issue of calling for oral evidence to resolve conflicts did not arise (H3)

FAIR HEARING - Right to - Conditions - Where a party has not satisfied conditions required for hearing his case - Court will not be competent to hear him (H4)

RULES OF COURT - Breach - Effect - Interest of justice cannot be used as excuse - Where a party has by his action or inaction - Exhibited disregard to the rules of Court (H5)

***FACTS***

Before the High Court of Imo State sitting in Owerri, plaintiff/respondent instituted this action against defendant/appellant, seeking to recover possession of the premises, arrears of rent/damages

for breach of tenancy agreement and mesne profits. Appellant was a yearly tenant occupying a floor in the house of respondent situate at No. 4 Wetheral Road, Owerri, Imo State at a yearly rent of N70,000.00. Appellant was in arrears of rent for three years and respondent made demands which were not fruitful. Hence, the action was filed in the Court. Upon his receipt of the writ and statement of claim, appellant entered a conditional appearance and did not file a statement of defense. Subsequently, respondent filed a motion for judgment in default of defence to which appellant did not file a counter-affidavit but rather filed a notice of preliminary objection contesting the jurisdiction of the trial Court to entertain the suit on the ground that no proper service was made on him of the writ of summons.

Upon respondent's motion for judgment being moved, appellant's counsel applied for an adjournment stating that he was not ready to make a reply to the motion. The Court refused the application for adjournment and adjourned for judgment. Later on appellant filed some applications to stop the delivery of the judgment. The Court obliged him to move the motions. In one of the motions, appellant applied that the suit be dismissed on the ground that the writ of summons was not personally served on him. The Court heard both counsel on the motion. In its ruling, the Court dismissed the applications of appellant. As there are no pending applications, the Court delivered its judgment granting all respondent's prayers except that of damages. Dissatisfied, appellant appealed to the Court of Appeal. The appeal was dismissed. Aggrieved further, appellant appealed to the Supreme Court.

### **ISSUES FOR DETERMINATION**

1. Whether the learned justices of the Court of Appeal were right in law when they held that the Appellant produced nothing to rebut the presumption of personal service on him raised by the bailiff's affidavit of service.

2. Whether the learned justices of the Court of Appeal were right in law when they held that the trial court did not breach the right to fair hearing of the Appellant.

**HELD** (Unanimously dismissing the appeal per **PE-**

**TER-ODILI JSC)***WRIT OF SUMMONS - Service - Challenge - Means*

**1. From the record it is clear not only that the Court below x-rayed all that the learned trial Judge did but agreed that the Court of first instance was on the right course and covered all areas before proceeding to enter the judgment while motion on it was pending. Indeed appellant provided a bare affidavit devoid of necessary materials to show that he had a serious contention on who was served. In other words, a rebuttal of the presumption of proper service to which the affidavit of service of the bailiff before court provided. That is that before appellant can debunk the service which prima facie the affidavit of service brought up is to supply adequate particulars of the papers which he said his clerk in office was served with to prove the point. Appellant failed to do that and merely made a plain skeletal deposition on not being served personally but that it was his clerk who was served. Even the circumstances of what he alludes were left hanging in the air. This is outside what is expected which is that such a challenge is by way of a counter affidavit to that affidavit of service and not as happened here where appellant was pushing by way of his own motion for adjournment or preliminary objection to dismiss the suit. (p. 4266 G)**

*Affidavit - Reliance on*

**2. In the case of Maja v Samouris (2002) 3 SCNJ 29 at 49, this Court restated the law on affidavit evidence as cited above and that the court ought not to act on an affidavit bereft of facts showing the source of information of the deponent where he was not deposing from personal knowledge and that is the situation in this instance. (p. 4267 H)**

*AFFIDAVITS - Conflict - Resolution*

**3. Furthermore, the affidavit of the appellant did not produce any conflict since there did not exist a conflicting affidavit to what the Bailiff of Court deposed to. Therefore the issue of calling for oral evidence to resolve conflicts did not arise, as**

***the presumption of proper service which the affidavit of service produced was not debunked. (p. 4268 A)***

*FAIR HEARING - Right to - Conditions*

- 4. The two Courts below clearly were of same mind that no breach of appellant's right to fair hearing had occurred. It is to be noted that the principle of fair hearing is not such as could be called up in the abstract and at the whim of a party just like a magician producing a pigeon from his breast pocket. It is a serious fundamental rule of natural justice which must be based on rock solid facts before the Court and available to one who has satisfied the conditions of being heard. This is because if that party has not satisfied the conditions required for hearing his case, the Court will not be competent to hear him, he is not qualified for the right to be heard. The Court just cannot give a party the right to be heard where the right does not exist. (p. 4270 A)***

*RULES OF COURT - Breach - Effect*

- 5. Again to be said is that the interest of justice cannot be used to excuse a flagrant breach of the rules of court and the party has himself to blame and cannot dump the fault at the doorstep of the court when by his own action or inaction he exhibited a disregard of the rules of Court. In this case at hand, appellant failed to file a statement of defence in breach of the Rules and to make matters worse did not file a motion for extension of time to do so when the time to file his defence expired. He was therefore caught in the sanction provided under Order 27, Rule 1 (1) of the Imo State High Court (Civil Procedure) Rules, 1988 and there was no wriggling out as the resultant effect is the judgment rightly entered against the appellant. (p. 4270 E)***

## **REPRESENTATION**

L. M. Alozie with C. A. Amokaha (Mrs.), for the Appellant  
Chidi B. Nworka, for the Respondent

Martin Schroeder & Co. v. Major & Co. Ltd. (2002) FWLR (pt. 128)  
1304

Pharmacist Board v. Adebisin (1975) 5 SC 43

Wema Bank v. Abiodun (2006) All FWLR (pt. 317) 430

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

Opara v. Chida (1996) 2 NWLR (pt. 432)

Apatira v. Lagos Island L.G.C. (2006) All FWLR (pt. 328) 755

Ajayi v. Omoregbe (1993) 7 SCNJ (pt. 1) 168

Chime v. Ude (1996) 7 SCNJ 81

## Evidence Act, s. 115

Imo State High Court (Civil Procedure) Rules 1988, O. 12 r. 2, O. 27 r. 1(1)

This is an appeal against the judgment of the Court of Appeal, Port Harcourt division on 13<sup>th</sup> of April, 2006 Coram : V. A. O. Omage, M. D. Muhammad and I. Thomas JCA with the lead judgment delivered by V. A. O. Omage JCA, affirming the judgment of High Court of Imo State sitting in Owerri judicial division presided over by Chioma Nwosu-Iheme J (as he then was) on the 9<sup>th</sup> day of May, 2001.

The trial Court entered judgment against the defendant now appellant in favour of the defendant now respondent.

FACTS:

Appellant was a yearly tenant occupying a floor in the house of the respondent situate at No. 4 Wetheral Road, Owerri, Imo State at a yearly rent of N70,000.00. Appellant was in arrears of rent for

three years and the respondent made demands which were not fruitful, thus he took out this action against the appellant to recover possession of the premises, arrears of rent, damages for breach of tenancy agreement and mesne profits, See the writ of summons at pages 1 - 3 of the Record of Appeal.

B On being served with the writ on 16-1-2000 and statement of claim on 9-2-2001, appellant entered a conditional appearance on 27-2-2001 and did not file a statement of defence. On the 27-3-2001 Respondent filed a motion for judgment in default of defence to which appellant did not file a counter-affidavit but on 20<sup>TH</sup> April, C 2001, appellant filed a notice of preliminary objection contesting the jurisdiction of the trial court to entertain the suit on the ground that no proper service was made on him of the Writ of Summons.

The motion for judgment in default of defence came up for D hearing on the 23<sup>RD</sup> April, 2008 at which the learned counsel for the appellant informed the Court that he had filed a notice of preliminary objection which was found not to have been served and the trial court allowed respondent's counsel to move his motion for judgment.

E On the motion being moved, appellant's counsel applied for an adjournment stating that he was not ready to make a reply to the motion. The trial court refused the application for adjournment and adjourned for judgment. Between 23-4-2001 and 9-5-2001, appellant filed some motions to stop the delivery of the judgment and on F 9-5-2002 appellant's counsel applied to move those motions which the Court obliged. Appellant then moved a third motion applying the suit to be dismissed on the ground that the writ of summons was not personally served on him. The court heard both counsel on the G motion and ruled, dismissing the application and there being no pending application delivered the judgment granting all prayers except that of damages. The appellant aggrieved appealed to the Court of Appeal which dismissed the appeal and affirmed the decision and orders of the trial court. Again dissatisfied appellant has come before H the Supreme Court to ventilate his grievance.

On the 29<sup>th</sup> September, 2016 date of hearing, learned counsel for the appellant L. M. Alozie adopted the Brief of Argument of the appellant filed on the 29<sup>th</sup> June 2007 wherein he identified two

issues for determination which are thus:-

1. Whether the learned justices of the Court of Appeal were right in law when they held that the Appellant produced nothing to rebut the presumption of personal service on him raised by the bailiff's affidavit of service.

2. Whether the learned justices of the Court of Appeal were right in law when they held that the trial court did not breach the right to fair hearing of the Appellant. B

Chidi B. Nworka, learned counsel for the respondent adopted his Amended Respondent's Brief of Argument filed on the 26/11/08 and deemed filed on the 15/5/2012. He also adopted the issues as formulated by the appellant. C

I shall utilise the issues as so crafted by the appellant in the determination of this appeal.

ISSUE NO. 1:

Whether the learned justices of the Court of Appeal were right in law when they held that the Appellant produced nothing to rebut the presumption of personal service on him raised by the bailiff's affidavit of service. D

L. M. Alozie of counsel for the appellant contended that Order 12, Rule 2 of the Imo State High Court (Civil Procedure) Rules 1988 which made personal service of originating processes of court mandatory. That Rule 5 of the same Order 12 provides for substituted service which Order was not made and since personal service was not made, the trial Court's jurisdiction was ousted. He referred to Order 12, Rule 28 requiring for the affidavit of service of the bailiff or other officers of court who effected service of court process and Rule 31 providing for the keeping of a book for recording service by the Court official of any process of Court. He cited *Idiata v Ejeko* (2005) 11 NWLR (Pt. 936) 349; *Martin Schroeder & Co v Major & Co Ltd* (2002) FWLR (Pt. 128) 1304 at 1317-1318. E

That when the trial court was faced with a denial of personal service by the appellant on oath he was bound to call for oral evidence in order to resolve the conflict in the affidavit evidence before him. That it is trite law that where depositions in affidavit of contesting parties conflict, the court is not allowed to prefer one deposition to the other and that the only course open to the Court in order to F  
G  
H

resolve the conflict is to hear oral evidence. He cited *Eimskip Ltd v Exquisite Ind. Ltd* (2003) 4 NWLR (Pt.809) 88 at 121 - 122; *Asonye v Registered Trustees of Christ Apostolic Church Nigeria* (1995) NWLR (Pt. 379) 623 - 634 etc.

B For the appellant it was further submitted that the affidavit of the appellant denying personal service of the writ of summons was sufficient challenge of the bailiffs affidavit of service which conflict must be settled by calling oral evidence. *Kalu Mark v Gabriel Eke* (2004) 5 NWLR (Pt. 865) 54; *Pharmacist Board v Adebesin* (1975) 5 SC 43 etc referred to.

C Mr. Chidi Nworka of counsel for the Respondent submitted that there was nothing to show that it was appellant's clerk that was served with the writ of summons. That affidavit of service of the bailiff is prima facie evidence of service and so to contradict that assertion, D appellant ought to have deposed to a counter affidavit exhibiting and showing who had been served. That what appellant set in motion by way of application to dismiss the suit on the ground that he was not personally served would not suffice. He cited *Uko v Ekpenyong* (2006) All FWLR (Pt. 324) 1927 at 1950.

E That by Order 2, Rule 1 of the Imo State High Court (Civil Procedure) Rules 1988 improper service of a writ of summons as opposed to non service can only amount to an irregularity which cannot nullify the writ or the proceedings taken thereafter. He referred to *Dongtoe v Civil Service Commission, Plateau State* (2001) F 4 SCNJ 131 at 151; *Wema Bank v Abiodun* (2006) All FWLR (Pt. 317) 430 at 463.

In a nutshell, the stance of the appellant is that the trial court relied solely on the bailiff's affidavit of service to hold that the appellant was served personally with the writ of summons in this case and that the Court of Appeal was wrong to agree with that position. That the two contending stands of the appellant on the one hand and that of the respondent as seen in the affidavit evidence ought to have been resolved by the calling of oral evidence. Also that appellant's H preliminary objection ought to have been taken first and then the motion for extension of time to file the defence before the trial court would take the motion for default judgment.

Respondent's position is that appellant had not properly chal-



lenged the affidavit of service filed by the bailiff in the trial Court and thereby failed to rebut the presumption set up by that affidavit that he was served personally with the writ of summons. That both the trial Court and the Court of Appeal were right to hold that he was so served and to dismiss his preliminary objection.

In brief, the grouse of the appellant is based on the fact that he alleged that personal service of the writ of summons was not made on him but rather on the clerk in appellant's office which appellant contends would not take the place of the statutorily provided need of personal service of such a vital initiating process. This is buttressed by a supporting affidavit of 3<sup>rd</sup> May 2001 which relevant particulars are thus:-

- 1) That I am the applicant in this motion.
- 2) That I was sued by the Respondent,
- 3) That the Writ of Summons was not served on me. D
- 4) That a clerk in my office informed me that a man came into the office and told him that he has a mail for me.
- 5) That he signed for it and collected it and later opened it and it turned out to be summons.
- 6) That my clerk realized that the man might be a court bailiff. E
- 7) That I entered conditional appearance in this suit which was filed and dated 27<sup>th</sup> February, 2001.
- 8) That I filed a motion for preliminary objection on 20<sup>th</sup> April, 2001. F

The Preliminary Objection appellant raised has to do with asking the Court to dismiss the respondent's suit on the ground that there was no service of the writ of summons. This objection which was set off to delay the moving of the motion for judgment was found by the trial Court not to have been served on the other party or even the Court being seised thereof. The learned trial judge thereafter stated as follows at page 13 of the Record thus;-  
COURT:

*"The Clerk of Court says there is no proof of service on the said motion for preliminary objection. Since there is no proof of service, and counsel for the plaintiff/applicant denies being served, in the absence of proof of service, I have no option than to believe*

*counsel for the plaintiff/applicant that there is no service. Accordingly, counsel for the plaintiff/applicant may go ahead and move his motion for judgment.”*

I shall show the proceedings of 23/4/2001 for clarity and it is as follows:-

B *“MOTION;*

*This is a motion on notice brought under Order 27, Rules 4, 7 and 8 of the High Court Civil Procedure Rules of 1988. The motion is praying the Court to enter judgment for the plaintiff as the defendant/respondent has failed to file his statement of defence in this suit.*

C *COURT:*

*There is no justification whatsoever why I should adjourn this simple motion for judgment. Adjournments are not just granted for fun. They should, and must be granted when there are cogent and concrete reasons to do so. Accordingly this application for adjournment lacks merits, as I see no reason why a counsel who left his chambers this morning cannot reply to a simple motion for judgment. This case now stands adjourned to 9<sup>th</sup> of May, 2001 for Judgment”.*

D  
E What transpired in Court as shown at pages 31 and 32 of the Record of Appeal is instructive and I shall state them verbatim hereunder thus:-

*“This is a Motion on Notice brought under the inherent jurisdiction of this court for an order dismissing the suit of the respondent. On the ground that there was no service of the Writ of Sum-*

F  
G *mons.*  
*There is a thirteen paragraph affidavit deposed to by the applicant. The issue is whether this court has jurisdiction as to entertain this matter, taken into consideration the fact that there has not been service of the Writ of Summons.*

The learned trial Judge stated further on record as follows:-

*“Order 12, rule 2 of the High Court Rules refers. That the service was effected on a clerk of the defendant, and not the defendant himself. He refers to Olutola v Kayode 1994, 2 NWLR (Pt. 324) paragraph 5. He refers also to the case of Ogbaru v Otti 2000, 8 NWLR (Pt. 670) 584. That the issue of jurisdiction is to be determined first. He urged the court to dismiss the suit.*

*In his reply counsel for the plaintiff says he filed a ten paragraph*

*affidavit. That paragraph 3 of the affidavit is the affect that defendant was served personally. That is the reason the defendant is in court. There is an affidavit of service on the court file very clear for the court to see. The affidavit says that the defendant was served personally. The applicant should have exhibited a certified true copy of the affidavit of service. To say that the writ was served on the clerk is neither here nor there; he should have exhibited the affidavit of service. This application is just a waste of the time of the court. He urged the court to dismiss the application with heavy costs.*

**RULING:**

*I have listened to both counsel, I have carefully gone through the affidavit in support of the application, and the affidavit in opposition. I have particularly seen the endorsement on the file showing clearly that the defendant was served personally. The defendant has exhibited nothing whatsoever showing that it was his clerk, and not him that was served. The only thing he exhibited is by coming to court in obedience to the writ served on him.*

*This application not only lacks merit, it does not hold water and brought deliberately to play for time in the absence of nothing else. It is an abuse of the process of court and most mischievously brought. It must therefore fail woefully. Accordingly it is dismissed.....*

*The judgment already fixed for today therefore must be delivered". On appeal to the Court of Appeal or Court below, that court per Omage JCA at pages 99 - 100 stated thus:-*

*"The record shows that motion for preliminary objection; and or for dismissal of the judgment was filed on 24/4/2001. It is relevant to note the materiality of the date of filling of the preliminary objection which seeks to dismiss or set aside the judgment. As on 23/4/2001 when the motion for judgment on the plaintiffs claim was heard in court, the preliminary objection had not been filed and judgment in the motion was reserved to 9<sup>th</sup> May, 2001. In the affidavit in support of the motion seeking a dismissal of motion for judgment, which also raises a preliminary objection to the claim, the defendant deposed that the writ of summons in the suit was served and signed for by a clerk in his office. That the defendant entered a conditional appearance in the suit on 27/3/2001. That the writ of summons was not served on the defendant personally. The defendant filed on 5/5/*

*2001 dated 2/5/2001 another application seeking a dismissal of the plaintiffs claim on the ground that there was no service of the writ of summons. The motion was supported by an affidavit on which the defendant relied.*

*On 4/5/2001 the plaintiff through his attorney denies the averments made in the defendant's affidavit that the defendant was not in person He deposed as above that a proper service of the writ of summons was duly made and served personally on the defendant on 16/1/2001 and the statement of claim was duly served on the defendant on 9/2/2001, that the defendant's counsel was in court when the motion for judgment was argued and judgment reserved to 9/5/2001.*

*On pages 1, 2 and 3 are the affidavit of service made before the Commissioner of Oaths by one Justus Egbrihuzor, the Chief bailiff of High Court, Owerri who deposed that he served the defendant who was pointed out to him as the defendant in person at his office in Wetheral Road, Owerri, when the defendant answered his question that he was Chief Leo D. Mgbenwelu. The proof of service for the writ of summons is dated 16/1/2001. The statement of claim for 9/2/2001; hearing notice 17/4/2001.*

*In the ruling of the court which is the final judgment in the claim, the trial court ruled: "I have particularly seen the endorsement on the life showing clearly that the defendant was served personally. The defendant has exhibited nothing whatsoever showing that it was his clerk and not him that was served. The only thing he exhibited is by coming to court showing he was served the writ of summons. This application not only lacks merit it does not hold water. It is an abuse of process of the court. The application is an abuse of process of court and most mischievously brought. It must fail woefully. It is dismissed"*

***From the record it is clear not only that the Court below x-rayed all that the learned trial Judge did but agreed that the Court of first instance was on the right course and covered all areas before proceeding to enter the judgment while motion on it was pending. Indeed appellant provided a bare affidavit devoid of necessary materials to show that he had a serious contention on who was served. In other words, a re-***

**buttal of the presumption of proper service to which the affidavit of service of the bailiff before court provided. That is that before appellant can debunk the service which prima facie the affidavit of service brought up is to supply adequate particulars of the papers which he said his clerk in office was served with to prove the point. Appellant failed to do that and merely made a plain skeletal deposition on not being served personally but that it was his clerk who was served. Even the circumstances of what he alludes were left hanging in the air. This is outside what is expected which is that such a challenge is by way of a counter affidavit to that affidavit of service and not as happened here where appellant was pushing by way of his own motion for adjournment or preliminary objection to dismiss the suit.** See the case of Uko v Ekpeyong (2006) All FWLR (Pt. 324) 1927 at 1950.

I agree also with what the learned counsel for the respondent submitted that if appellant was not present at the time the said service to his clerk was made and so the necessity to deposing how he came about the information in line with Section 115 of the Evidence Act. Also there was need for an explanation as to why that clerk himself did not depose to a counter affidavit to show his version of what occurred. I shall hereunder refer to Section 115 of the Evidence Act. 2011 viz:-

*“115 (1) - Every affidavit used in the court shall contain only a statement of fact and circumstances to which the witness deposes, either of his own personal knowledge or from information which he believes to be true.*

*(3) When a person deposes to his belief in any matter of fact, and his belief is derived from any source other than his own personal knowledge, he shall set forth explicitly the facts and circumstances forming the ground of his belief.*

*(4) When such belief is derived from information received from another person the name of his informant shall be stated and reasonable particulars shall be given respecting the information and time, place and circumstance of the information”.*

**In the case of Maja v Samouris (2002) 3 SCNJ 29 at 49, this Court restated the law on affidavit evidence as cited**

***above and that the court ought not to act on an affidavit bereft of facts showing the source of information of the deponent where he was not deposing from personal knowledge and that is the situation in this instance.***

***Furthermore, the affidavit of the appellant did not produce any conflict since there did not exist a conflicting affidavit to what the Bailiff of Court deposed to. Therefore the issue of calling for oral evidence to resolve conflicts did not arise, as the presumption of proper service which the affidavit of service produced was not debunked.*** See *Eimskip v Exquisite* (2003) 1 SCNJ 317 at 341.

ISSUE NO.2:

Whether the learned justices of the Court of Appeal were right in law when they held that the trial court did not breach the right to fair hearing of the Appellant.

In making his submission learned counsel for the appellant traced the journey of appellant's memorandum of conditional appearance, his motion for extension of time within which to file his statement of defence, his application for adjournment after respondent moved his motion for judgment and the notices of preliminary objection on 24/5/2001 and 3/5/2001 over the non personal service of the writ of summons on him and its impact contended that the Court below did not assess the situation correctly hence that court came to a wrong conclusion. That a breach of the appellant's fundamental right to fair hearing had occurred when the trial court ignored the appellant's processes especially on the issue of service of process which infraction ousted the jurisdiction of the trial court. He cited *Odutola v kayoed* (1994) 2 NWLR (Pt. 324) 1 etc. That the trial Court's refusing the application for adjournment was a discretion wrongly exercised. He cited *Essien v Edet* (2004) NWLR (Pt. 687) 519 at 537 - 538, *Opara v Chida* (1996) 2 NWLR (Pt. 432) etc. That the primary consideration in granting or refusing applications for adjournment is the interest of fair hearing in a matter. He relied on *NEPA v EZE* (2001) 3 NWLR (Pt 701) 608, *Saleh v Monguno* (2003) NWLR (Pt. 801) 221 etc.

Responding, learned counsel for the respondent stated that the application by counsel which the trial Court granted before strik-

ing out those earlier motions was one to withdraw and not to move them as recorded. That the three motions prayed for virtually the same thing and on the same ground.

It was further stated for the respondent that the principles of fair hearing is not applied in the abstract rather it is based on the facts before the court which facts will determine the applicability or inapplicability of that principle. He cited *Apatira v Lagos Island L.G.C.* (2006) All FWLR (Pt. 328) 755 at 767. B

That the interest of justice cannot be resorted to, in flagrant breach of the rules of court and where a party has himself to blame. That appellant in breach of the Rules failed to file a statement of defence nor an extension of time to so file and so the sanction provided in Order 21, Rule 2 (1) of the Imo State High Court (Civil Procedure) Rules, 1988 applied. He cited *Olowu v Abolore* (1993) 6 SCNJ (Pt. 1) 1 at 22; *Ajayi v Omoreqbe* (1993) 7 SCNJ (Pt.1) 168 at 179. C D

The view of the appellant is that the trial Court denied the appellant the opportunity of defending the case on the merits overruling the preliminary objection and that the Court below ought to have corrected the error and so appellant's right to fair hearing was breached. E

That view was rejected by the respondent as appellant's motions challenging jurisdiction were duly determined by the trial Court before the Court entered judgment against him. F

The Court below upholding what the trial Court did state at page 106 of the Record thus:-

*"The delivery of judgment is the final phase for the determination of a suit should not precede the existence and hearing of a pending motion It is therefore the duty of a trial judge to treat and determine all pending applications before judgment: Adeoye v Adjob Trading Stores Ltd v Aina (1986) 5 NWLR (Pt 233); Adeyemi v Yrs. Ikeoluwa & Sons Ltd (1993) 8 NWLR (Pt. 309) 27. The above situation did not occur in the Instant appeal and the trial court did not breach any right of fair hearing of the appellant. The substance of the appellant's complaint in the Court below of improper service of the writ of summons, even if it is true and the trial court has ruled it to be untrue; Is art irregularity which may be waived. See Adegoke Ulabu* G H

*Ltd v Adesanya (1989) 3 NWLR (Pt 109) P. 250 The appeal lacks substance, it has no merit. It is dismissed with costs in favour of the Respondent of N5,000.00".*

**The two Courts below clearly were of same mind that no breach of appellant's right to fair hearing had occurred. It is to be noted that the principle of fair hearing is not such as could be called up in the abstract and at the whim of a party just like a magician producing a pigeon from his breast pocket. It is a serious fundamental rule of natural justice which must be based on rock solid facts before the Court and available to one who has satisfied the conditions of being heard. This is because if that party has not satisfied the conditions required for hearing his case, the Court will not be competent to hear him, he is not qualified for the right to be heard. The Court just cannot give a party the right to be heard where the right does not exist.** See *Carew v Oguntokun (2011) All FWLR (Pt. 568) 895 at 918 - 919; Apatira v Lagos Island L.G.C. (2006) All FWLR (Pt. 328) 755 at 767; Chime v Ude (1996) 7 SCNJ 81 at 91; Jbn'ason v Charles MOH Ltd (2002) 10 SCNJ 1 at 11.*

**Again to be said is that the interest of justice cannot be used to excuse a flagrant breach of the rules of court and the party has himself to blame and cannot dump the fault at the doorstep of the court when by his own action or inaction he exhibited a disregard of the rules of Court. In this case at hand, appellant failed to file a statement of defence in breach of the Rules and to make matters worse did not file a motion for extension of time to do so when the time to file his defence expired. He was therefore caught in the sanction provided under Order 27, Rule 1 (1) of the Imo State High Court (Civil Procedure) Rules, 1988 and there was no wriggling out as the resultant effect is the judgment rightly entered against the appellant.** See *Olowu v Abolone (1993) 6 SCNJ (Pt.1) 1 at 22; Ajai v Omeregbe (1993) 7 SCNJ (Pt. 1) 168 at 179; Okoebor Police H Council (2003) 5 SCNJ 52 at 68.*

For a fact appellant's right to fair hearing was not breached in any way and I see no reason to interfere with the concurrent findings of the two Courts below and I resolve this issue 2 in



favour of the respondent and against the appellant.

All the issues resolved against the appellant, I do not hesitate in dismissing this appeal as I affirm the judgment of the Court of Appeal in its upholding the decision and orders of the trial Court. I dismiss the appeal as I award the sum of N150, 000 costs to the respondent. B

---

**ONNOGHEN Ag. CJN**

I have had the benefit of reading in draft, the lead Judgment of my learned brother, PETER-ODILI JSC just delivered. I agree with his reasoning and conclusion that the appeal is lacking in merit and should be dismissed. C

The facts of the case have been stated in detail in the lead Judgment thereby making it unnecessary for me to repeat them herein except as may be needed for the point under consideration. The issues formulated by learned counsel for appellant in the appellant's brief of argument filed on 29/6/2007 and adopted by learned counsel for respondent in the amended respondent brief deemed duly filed on 15/03/13 are as follows:- D E

*"1. Whether the learned Justices of the Court of Appeal were right in law when they held that the appellant produced nothing to rebut the presumption of personal service on him raised by the bailiff's affidavit of service.*

*2. Whether the learned Justices of the Court of Appeal were right in law when they held that the trial court did not breach the right to fair hearing of the appellant"* F

It is the contention of learned counsel for appellant that the lower court erred in law when it upheld the decision of the trial court which relied solely on the affidavit of service by the bailiff to hold that appellant was duly served personally with the writ of summons in the suit and that they were also wrong in their holding that appellant produced no evidence to show that he was not the person served when appellant's affidavit is clear on the issue, that the lower court also erred in not calling oral evidence to resolve the conflicts in the affidavits of the parties on the issue of whether appellant was personally served with the writ of summons and that the lower court erred H

in not so holding, that there were procedural irregularities in the proceedings which resulted in the breach of appellant's right to fair hearing thereby nullifying the entire proceedings and Judgments and orders of the lower courts and urged the court to allow the appeal and transfer the matter to another Judge to be dealt with accordingly.

B On his part, it is the submission of learned counsel for respondent that appellant failed to properly challenge the affidavit of service deposed to by the bailiff at the trial court neither did he rebut the presumption that he was personally served with the writ of summons deposed in the said affidavit; that the lower courts were, in the  
C circumstance, right in holding that appellant was personally served with the writ and dismissed the objection; that appellant's right to fair hearing was not in anyway breached in the proceedings particularly as appellant did not file any application for enlargement of time to  
D file a Statement of Defence; that appellant's motions challenging the jurisdiction of the court were duly determined by the trial court before the court entered Judgment in default of defence as required by the relevant rules of the court and urged that the appeal be dismissed and the decisions of the lower courts affirmed.

E From the briefs of learned Counsel for the parties and the facts as gleaned from the record of appeal, there is no doubt that this further appeal is grounded on the concurrent findings of facts by the lower courts as to whether:

F *(a) there was personal service of the writ of summons on appellant at the commencement of proceedings in the court of trial and*

*(b) whether the facts discussed in the proceedings supports a claim of breach of appellant's right to fair hearing?*

G It is settled law that this Court does not make a practice of interfering with concurrent findings of facts by the lower courts except on exceptional circumstances which must be raised and established by the appellant challenging the said findings.

H The circumstances in which this court can or may interfere with concurrent findings of facts by the lower courts include, but not limited to:

(a) Where the said findings is not supplied by evidence on record or perverse

(b) When it is contrary, either procedural or substantive etc.

I hold the considered view that the two issues formulated for the determination of this appeal can be taken together.

It is settled law that an affidavit of service by a bailiff is prima facie evidence of service and also that prima facie evidence is one which, if uncontradicted, is sufficient to sustain the issue it asserts. B

In the instant case, can it be said that appellant contradicted or challenged the prima facie evidence of personal service raised by the affidavit of service? The answer, as found by the trial court and affirmed by the lower court, is in the negative. The trial court, at page 32 of the record lines 26 - 28 found and held thus: C

*“The defendant has exhibited nothing whatsoever showing that it was his clerk, and not him that was served”.*

In other words, if appellant had evidence to show that it was his clerk that was served with the writ of summons contrary to what was deposed in the affidavit of service, he ought to have produced it before the court to rebut the presumption in favour of the deposition in the affidavit of service. From the record, appellant did not file a counter affidavit to the affidavit of service deposed to by the bailiff but filed a motion for an order dismissing the suit in which he alleged, in the supporting affidavit, that he was not personally served with the writ of summons. The said affidavit contains nothing contradicting the contents of the said affidavit of service - It does not even contain the name of the alleged clerk allegedly served with the writ of summons nor appellant's whereabouts on the date of service in question, etc, etc. Most importantly, the alleged clerk did not swear to an affidavit corroborating appellant's claim that he was not personally served. E F

I hold the view that there being no counter affidavit by appellant challenging the facts in the affidavit of service that appellant was personally served, it cannot be said that any conflict had arisen which could have made it imperative for the trial court to call for oral evidence to resolve same. It follows therefore that the submission that the trial court ought to have called for oral evidence to resolve an imaginary conflict in affidavits evidence is very much misconceived and consequentially untenable. G H

Haven found/held as above that there was proof of personal

service of the writ of summons on appellant who took no steps to defend the suit before the court, I find it very difficult to appreciate the submission of learned counsel for appellant on the issue of breach of the rules of fair hearing in this matter, it is settled law that a party served with a writ of summons and Statement of Claim in a matter  
B against him and chooses not to react, cannot later turn round to accuse the court of a breach of his right to fair hearing if the court proceeds, in the circumstance, to hearing and determine the matter. It is not the duty of the court to compel a party duly served with the  
C originating processes to defend the action, where he has no such a desire. All that is required of the court is to create and maintain an enabling environment for parties to exercise or take advantage of their right to fair hearing in any proceeding before it. In the instant case, appellant was afforded the opportunity which he decided not  
D to take advantage of and should therefore not be heard to complain of a breach of his right to fair hearing.

It is for the above reasons and the detailed ones contained in the said lead Judgment of my learned brother, that I too, find no merit in the appeal and consequently dismiss same.

E I abide by the consequential orders made in the lead Judgment including the order as to costs.

Appeal dismissed.

---

F

### **ARIWOOLA JSC**

I have had the preview of the draft of the lead judgment just delivered by my learned brother, Peter-Odili, JSC. I am in agreement with the reasoning that led to the conclusion that the appeal  
G lacks merit and should be dismissed. I too will dismiss the appeal.

Appeal is dismissed.

I abide by the consequential orders in the said lead judgment including the order on costs.

---

H

### **AKA'AHS JSC**

This is a case where the appellant is challenging the affidavit of service which was sworn to by the bailiff of the court but did not

get his clerk whom he maintained was served with the Writ of Summons to depose to a counter-affidavit. Service of an originating process is fundamental which goes to the root of the court's competence to entertain the case. If an originating process is not served on a party, the entire proceedings are a nullity. See: *Obimonure v. Erinosh* (1966) 1 All NLR 250; *Sken consult (Nig) Ltd v. Secondy Ukey* (1981) 1 SC6. B

Where there is a challenge to the service of an originating process, the affidavit of service deposed to by the Court Bailiff is prima facie evidence of such service. It is not conclusive proof but raises a rebuttable presumption which is discharged by credible evidence. A person challenging the service of the originating process on him must depose to a counter affidavit denying the service which must also contain credible facts to rebut the averments in the affidavit of service. In this particular instance the person who should provide the credible evidence is the clerk who received the service. See: *Ahmed* (2013) 15 NWLR (Pt. 1377) 274 The appellant did not provide the required evidence and so the learned trial Judge was right in not calling for oral evidence to resolve any conflicts in the affidavits deposed to by the Court Bailiff and that which was sworn to by the appellant himself. The lower court was right in holding that the appellant's right to fair hearing was not breached. C D E

For this reason and the more detailed reasons contained in the lead judgement of my learned brother, Peter-Odili JSC which I had a preview before now, I too find no merit in the appeal and it is accordingly dismissed. I abide by the order made on costs. F

---

**KEKERE-EKUN JSC**

I have read in draft the judgment of my learned brother, MARY UKAEGO PETER-ODILI, JSC just delivered. I agree with the reasoning and conclusion that the appeal lacks merit and should be dismissed. I shall make some remarks in support. G

Briefly, the facts leading to this appeal are as follows: By a writ of summons dated 8/9/2000 and filed the same day, the respondent, as plaintiff sought the following reliefs against the appellant, as defendant: H

1. Possession of the first floor accommodation of the commercial building at No. 4 Wetheral Road, Owerri.

2. N410,000.00 being arrears of rent, mesne profit and general damages for breach of tenancy agreement.

By paragraph 10 of the statement of claim filed on 6/2/2001 he prayed for:

(i) Possession of the said first floor office accommodation at No. 4 Wetheral Road, Owerri.

(ii) N210,000.00 as arrears of rent for three years.

(iii) N200,000.00 general damages for breach of tenancy agreement.

(iv) N70,000.00 yearly mesne profit commencing from 1/2/2001 till possession of the said accommodation is delivered to the plaintiff.

Although the appellant filed a memorandum of conditional appearance on 1/3/2001, he took no further steps in the matter until the respondent filed a motion for judgment in default of defence on 27/3/2001. The appellant did not file a counter affidavit to the motion. He purportedly filed a notice of preliminary objection on 20/4/2001 challenging the jurisdiction of the court to entertain the suit on grounds of improper service of the writ of summons. It was his contention that he was not served personally; that the process was served on his clerk. However, at the hearing of the motion for judgment in default of defence on 23/4/2008, the trial court found that there was no proof of service of the preliminary objection on the respondent. A request for an adjournment to enable him reply to the motion for judgment was refused by the court. The motion for judgment was moved and ruling reserved till 9/5/2001.

It was the appellant's contention that on the same 23/4/2008 he filed an application for extension of time to file his statement of defence. On 9/5/2001, the date the ruling on the motion for judgment in default of defence was to be delivered, learned counsel for the appellant sought leave to move his two earlier motions. The nature of the two motions was not specified. The proceedings of the court at page 31 of the record reads thus:

*"Counsel applies to move his two earlier motions. The application is granted and the said two earlier motions are struck out."*

Thereafter, the appellant moved a third application seeking the dismissal of the suit for non-service of the writ of summons on him.

In response to the application, the respondent filed a counter affidavit to which was attached an affidavit of service deposed to by a bailiff of the court wherein he averred that the appellant was served personally with the writ of summons. The appellant maintained that it was served on his clerk. The court dismissed the application and proceeded to deliver its ruling wherein it granted all the reliefs sought by the appellant except relief (iii). The court held that in the absence of an affidavit of service exhibited by the appellant showing that the writ of summons was served on his clerk, the affidavit of service deposed to by the bailiff prevailed.

The appellant was dissatisfied with the ruling and appealed to the court below, which dismissed his appeal. He is still dissatisfied and has further appealed to this court.

The appellant formulated the following two issues for determination:

1. Whether the learned Justices of the Court of Appeal were right in law when they held that the appellant produced nothing to rebut the presumption of personal service on him raised by the bailiff's affidavit of service.

2. Whether the learned Justices of the Court of Appeal were right in law when they held that the trial court did not breach the right to fair hearing of the appellant.

I shall consider both issues together.

It was contended by learned counsel for the appellant that an affidavit of service sworn to by a bailiff raises a rebuttable presumption of service. That in view of the appellant's affidavit in support of his application to dismiss the suit wherein he denied service, the court ought to have called for oral evidence to resolve the conflict. It was contended that it is when such order is made that the clerk upon whom the process was purportedly served would be called to give oral evidence.

Relying on the authorities of *Uko Vs Ekpenyong* ALL FWLR (Pt.324) 1927 @ 1950 and *Somade Vs Fatokun* (2002) FWLR (Pt.93) 1989 learned counsel for the respondent agreed with the court be-

low that what the appellant ought to have done was to file a counter affidavit challenging the bailiffs affidavit of service. It was argued that the affidavit in support of the application to dismiss the suit was bereft of sufficient particulars and also that the appellant was unable to effectively challenge the averments in the respondent's counter affidavit to his motion.

Moreover, it was argued on behalf of the appellant, that under Order 2 Rule 1 of the Imo State High Court (Civil Procedure) Rules 1988, improper service of a writ of summons, as opposed to non-service, can only amount to an irregularity which would not nullify the writ or any proceedings taken thereafter.

On the call for oral evidence, it was argued that oral evidence would not be necessary to resolve conflicts in affidavit evidence where there is documentary evidence before the court capable of resolving the conflict.

There is no doubt that the service of an originating process, such as the writ of summons in the instant case, is fundamental and goes to the root of the court's competence to entertain the cause or matter. The object of service is to give the defendant notice of the case against him and to afford him an opportunity, if he so desires, to defend the claim. The effect of failure to serve an originating process is that the entire proceedings are liable to be declared a nullity. See: Okoye Vs C.P.H.B. (2008) 15 NWLR (Pt.111) 335; Kida Vs Ogunmola (2006) 13 NWLR (Pt.997) 377; Obimonyre Vs Erinosho (1966) 1 ALL NLR 250; Skenconsult (Nig.) Ltd Vs Ukay (1980) 1 SC 6 @ 26.

However, where the writ is valid but there is a defect in service, such defect is treated as an irregularity, which will not, *ipso facto*, render the proceedings void. The defective service may be set aside. See: Duke Vs Akpabuyo L.G. (2005) 19 NWLR (Pt.959) 130; Adegoke Motors Ltd. Vs Adesanya & Anor. (1989) 3 NWLR (Pt.109) 250 @ 270; Owners of the NV Arabella Vs NAIC (2008) 11 NWLR (Pt.1097) 182.

Where there is a challenge to the service of an originating process, the affidavit of service deposed to by the Court Bailiff is *prima facie* evidence of such service. It is not conclusive proof however. It raises a presumption that is rebuttable by credible evidence to



the contrary. This court in the recent case of Ahmed Vs Ahmed & Ors. (2013) LPELR - SC.279/2012 held that a person challenging the service of an originating process on him must depose to a counter affidavit denying service which must also contain credible facts to rebut the averments in the affidavit of service. A bare denial of service without more, is insufficient. See also; Uko Vs Ekpenyong (2006) ALL FWLR (Pt.324) 1927 @ 1950 E - H. B

In the instant case, the appellant did not file a counter affidavit to rebut the affidavit of service deposed to by the court bailiff, wherein it was specifically averred that the writ of summons was served on the appellant personally on 16<sup>th</sup> January 2001 at 10 am at No. 4 Wetheral Road, Owerri. The bailiff further averred that before the day he effected service, he did not know the appellant personally and that he was pointed out to him by the respondent. See page 44 of the record. C

In order to rebut the presumption of service, the appellant ought to have filed a counter affidavit deposing to facts that specifically identified the clerk who was allegedly served with the process as well as the place, time and manner of service. Or better still, the clerk alleged to have been served could have deposed to relevant facts. This was not done. The court below, at page 32 lines 22 - 28 of the record held thus: D

*"I have listened to both Counsel. I have carefully gone through the affidavit in support of the application, and the affidavit in opposition. I have particularly seen the endorsement on the file showing clearly that the defendant was served personally. The defendant has exhibited nothing whatsoever showing that it was his Clerk and not him that was served"* E F

I entirely agree that there was nothing before the trial court to effectively discredit the averments in the bailiff's affidavit of service. There was no justification in the circumstances for the court to call for oral evidence. I am of the respectful view that the trial court rightly dismissed the application and the lower court rightly affirmed the dismissal. G H

I am in entire agreement with the court below that there was no breach of the appellant's right to fair hearing by the trial court in the manner in which it disposed of the matter before it. In my view, the appellant was merely trying to dribble the court at every turn.

The court saw through the ruse and took control of its proceedings.

For these and the more detailed reasons well adumbrated in the lead judgment, I find the appeal to be devoid of merit.

It is accordingly dismissed by me. I abide by the consequential orders as contained in the lead judgment including the order relating to costs.

C

D

E

F

G

H