

Brief of Argument was moved and granted on the 12th day of May, 2014. The Respondent did not file his Respondent Brief of Argument.

When the matter came up for hearing on the 10th day of November, 2014, the Appellant was in Court represented by Siaka Kelly Adabora, Loan Recovery Officer while the Respondent was absent. Sylvester Ogbe appeared for the Appellant while there was no Legal representation for the Respondent. On this day, the Learned Counsel to the Appellant informed Court that the Respondent had been served since the 2nd day of April, 2014 and their time has elapsed. He urged Court to allow him to adopt their Brief. The Court then held as follows:

“I am convinced that the Respondent has been duly served with the processes in this case. See Affidavit of Service in this file. The Appellant’s Counsel is called upon to adopt his brief.”

Based on the above Ruling of this Court, the Learned Counsel to the Appellant, Sylvester Ogbe adopted the Appellant’s Brief of Argument dated 2nd April, 2013 and filed the same day and urged

Court to allow the Appeal. The case was subsequently adjourned to today for Judgment.

On the Rule guiding the filing of Briefs before this Court, Order 55 of the Rules of this Court which covers "APPEALS FROM MAGISTRATE'S COURT ETC." comes handy. The Provision of Rule 5 therein is reproduced as follows:

5. Respondent to be supplied with copy of proceedings.

When notifying a party of the day fixed for hearing of the appeal, the Registrar of the Court shall send him a copy of the proceedings.

Filing of brief.

- (a) The Appellant shall file his brief of argument within 30 days of receipt of the record of appeal;
- (b) The brief of argument shall be served on the respondent, who shall file his own brief of argument within 30 days of its receipt;
- (c) The appellant shall upon receipt of respondent's brief of argument, file his

reply on point of law only, if any, within 7 days thereof.

The Court on the day of hearing, if the Appellant Appears, shall proceed to the hearing or further hearing and give judgment according to the merit of the case provided that the Appellant has complied with the requirement precedents to the hearing of an appeal. Otherwise, the Court shall dismiss the appeal and affirm the position against the appellant. See Rule 11 of Order 55 of the Rules of this Court which is reproduced as follows:

õ11. Where appellant appears.

If, on the day of hearing and at any adjournment of the case, the appellant appears, the Court shall, whether the respondent appears or not, proceed to the hearing or further hearing and determination of the appeal and shall give judgment according to the merits of the case without regarding any imperfection or defect in form:

Provided that if it appears or is proved to the Court that the appellant has not complied with the requirements precedent to the hearing of an

appeal hereinbefore contained, the Court shall dismiss the appeal and affirm the position, with or without costs to the appeal against the appellant.”

(Underlining supplied by me for emphasis)

In the appeal before this Court, only the Appellant filed his Brief of Argument. The Respondent never filed any process. Should this Court go ahead and consider solely the Appellant's Brief? If the Appellant has fulfilled the condition precedent required by Order 55 Rule 11 as reproduced above, then, this Court is bound to consider the sole Brief of the Appellant, except the Appellant has not fulfilled the condition precedent.

I believe that one of the conditions precedent to hearing this appeal is the issue of service of the originating processes on the Respondent as failure to serve is fundamental because it will render the Court's proceedings a nullity. See the case of OLORUNYOLEMI AND ANOR VS AKHAGBE (2010) NSCQLR Vol. 41 page 342 where Mukhtar, JSC (as he then was) held at page 356 that:

“Service of process on a party is so fundamental that absence of it may affect the jurisdiction of a Court and render a Court’s proceeding a nullity.”

Was the Respondent served the originating process of this appeal? A careful perusal of the case file would unmistakably reveal that the Notice of Appeal in this case filed on the 16th day of October, 2012 was served on the Respondent, C/o Counsel (A. O. Afolabi (Esq.)) where one Ayodele Musa (Secretary) received it and signed the reverse side of the Affidavit of Service (See page 37 of the case file). On the 18th day of June, 2013, the bailiff of this Court served a hearing notice ordered in this appeal by this Court on the Respondent, C/o A. O. Afolabi Chambers where one Musa Ayo received the Court process. (See page 47 of the case file). And at page 74 of the case file, the Appellant’s Motion on Notice for extension of time to file Appellant’s Brief of Argument, which was deemed to have properly been filed, was served on the Respondent, C/o A. O. Afolabi & Co.

From the foregoing, it seems to me that the Respondent was served the Notice of Appeal in this case, the hearing notice ordered by this Court and the Appellant’s Brief of Argument through a Motion on

Notice through his Counsel, A. O. Afolabi & Co. Do these meet the requirement of the law for services of these nature? Before answering this question, I shall first examine the appearances at the Lower Court by going through the Record of Appeal herein. In the Lower Court, the Respondent was neither represented by A. O. Afolabi & Co. nor any other Counsel throughout the whole proceedings. Right from the taking of plea of the Defendant (Respondent herein) on the 11th day of August, 2010 to the 25th day of October, 2011 when the Learned Magistrate at the Lower Court delivered Judgment, that is, fifteen (15) Court sittings, the Defendant/Respondent was unrepresented by Counsel. What happened in those days? On 11th day of August, 2010, Plaintiff Bank was represented by Osawe Raymond; Defendant was represented by Mr. Jacob Egede; C. Agbonkhese, Esq. appeared for the Plaintiff while the Defendant/Respondent took his plea. (See page 3 of the Record of Appeal). On 15th day of September, 2010, Plaintiff Bank represented by R. Osawe (Mr.); Defendant absent and unrepresented by Counsel; C. Agbonkhese, Esq. for Plaintiff and Trial Opened. (See page 3 of the Record of Appeal). On the 4th day of October, 2010, Plaintiff Bank represented by Raymond Osawe; Defendant absent and

unrepresented C. Agbonkhese, Esq. for Plaintiff. (See page 5 of the Record of Appeal). On 19th day of October, 2010, Plaintiff present by Raymond Osawe (L. R.O); Defendant company present represented by Mkemdilim Egede (M.D); C. Agbonkhese, Esq. for Plaintiff. (See page 5 of the Record of Appeal). On 8th day of November, 2010, Plaintiff represent by Raymond O. Osawe (LRO); Defendant present by Mkemdilim Egede (M.D); C. Agbonkhese, Esq. for Plaintiff. (See page 6 of the Record of Appeal). On 15th day of December, 2010, Defendant in Court; C. Agbonkhese, Esq. for Plaintiff. (See page 7 of the Record of Appeal). On 26th day of January, 2011, Defendant present; Plaintiff absent; Ogierhiakhi Ehimwenma, (Miss) for the Plaintiff, when the Defence opened his case and was partly Cross-examined. (See page 7 of the Record of Appeal). On 15th day of March, 2011, parties where present, while Counsel was absent. (See page 9 of the Record of Appeal). On 21st day of April, 2011, Plaintiff was present as well as the Defendant; E. Ogieriakhi, (Miss) for Plaintiff. (See page 9 of the Record of Appeal). On 26th day of May, 2011, parties were present in Court; E. Ogieriakhi, (Miss) for Plaintiff, when Defendant was finally Cross-examined and Learned Counsel

addressed Court. Case was adjourned for Judgment (See page 10 of the Record of Appeal). On 15th day of June, 2011, Plaintiff was present while the Defendant was absent; Judgment further adjourned. (See page 11 of the Record of Appeal). On 27th day of July, 2011, both parties were absent; Albert Ayewoh, Esq. for Plaintiff; Judgment further adjourned. (See page 11 of the Record of Appeal). On 20th of September, 2011, Plaintiff was present while the Defendant was absent; Dan Ogbegie Esq. for Plaintiff; case adjourned for further address. (See page 11 of the Record of Appeal). On 12th day of October, 2011, parties were present; A. Ayewoh, Esq. for Plaintiff; who apologized to Court that they had no further address but he rather re-adopted their former address of May, 2011. Judgment stood down till 12 noon and later adjourned. (See page 12 of the Record of Appeal). On 18th day of October, 2011 parties were present; A. Ayewoh, Esq. for Plaintiff. (See page 13 of Record of Appeal). On 25th day of October, 2011, parties were present; Plaintiff Counsel was absent; Defendant is unrepresented and Judgment was delivered. (See page 14 of the Record of Appeal).

I have gone to all this length to show that at the Lower Court, the Defendant was not represented by any Counsel. The question to now answer is whether the above meet the requirements of the Law? I am of the view that they do not. Nowhere in the Record of Appeal was A. O. Afolabi, Esq. present in the Lower Court nor was any Counsel from A. O. Afolabi & Co. present to represent the Defendant (Respondent herein). As stated earlier, the name of A. O. Afolabi Chambers was introduced when E. F. Osifo, Esq. of Eghobamien & Co. AND Daniel Ogbegie, Esq. of Ogbegie & Associates filed the Appellant's Notice of Appeal as an alternative address for service.

It is trite that a Notice of Appeal is in the nature of originating process. See the reasoning of the Supreme Court in OKARIAKA AND 4 ORS VS SAMUEL AND ANOR (2013) NSCQR Vol. 53 page 220 where Ogunbiyi, JSC held at page 249 that:

“The nature of a notice of appeal being an originating process is well settled and should not be a matter of controversy.”

It is also trite that originating processes such as the Notice of Appeal in this case, Writ of Summons, etc are to be served either

personally or through substituted means. See also the Supreme Court case of OKOYE AND ANOR VS CENTER POINT MERCHANT BANK LTD (2008) NSCQLR Vol. 35 page 252 where Niki Tobi (as he then was) held at page 275 that:

“Service of Writ of Summons can be undertaken in two ways, personal or substituted services. As the name implies, personal service is service on the defendant in person or as a person. Substituted service is service made in substitution of the defendant. It is service undertaken on another person other than the defendant.”

In the present case, there is nothing to indicate that the Respondent is aware of this appeal as he was neither served the originating processes personally nor through substituted means. Besides, the Counsel, A. O. Afolabi Esq. or his Chambers never filed the Respondent’s Brief of Argument. I am minded to say that even if the Learned Counsel has filed the Respondent’s Brief of Argument, it would not, in my very humble view, have cured the defect of not serving personally or by substituted means the originating processes in this appeal.

The law is trite that failure to serve Court process(es) on an adverse party is a fundamental breach of his right to fair hearing. See OLORUNYOLEMI AND ANOR VS AKHAGBE (Supra) where Onnoghen, JSC held at page 358 that:

“The lack of service of the processes on the appellants constitutes another fundamental defect as it breached the right to fair hearing of the appellants before the Lower Court.”

Having held that there was no service on the Respondent herein, what should be the fate of the appeal before this Court? As reproduced earlier, the Proviso to Order 55 Rule 11 answers the question which is an outright dismissal of the appeal. It is again reproduced for emphasis

“Provided that if it appears or is proved to the Court that the appellant has not complied with the requirements precedent to the hearing of an appeal hereinbefore contained, the Court shall dismiss the appeal and affirm the position, with or without costs to the appeal against the appellant.”

From my reasoning above and the authorities cited, especially Order 55 Rule 11 of the Rules of this Court, I am convinced that the non-service of the originating process in this appeal on the Respondent either personally or by substituted means is fundamental breach of the required condition precedent to the hearing of this appeal. The appeal is hereby dismissed by me.

HON. JUSTICE V. O. EBOREIME
JUDGE
4th December, 2014

COUNSEL:

G. E. ABOYI, ESQ. FOR THE APPELLANT