IN THE HIGH COURT OF JUSTICE
IN THE BENIN JUDICIAL DIVISION
HOLDEN AT BENIN CITY
BEFORE HIS LORDSHIP, HON.JUSTICE P.A.AKHIHIERO,
JUDGE, ON WEDNESDAY, THE 30TH DAY OF NOVEMBER, 2016.

BETWEEN: SUIT NO: B/303/2016

1. MR. RICHARD AIMENOHO (JP)
2. MR. RAPHEAL OMORUYI
3. MR. EGHOSA OBAZEE
4. MR. JOHN IDAHOSA
5. MR. MONDAY IYI-EWUARE
6. MR. EMMANUEL ALAKA
7. MR. VINCENT OVBIEBO
8. MR.MONDAY OWENS
9. MR. OSAZEE DAVID
10. MR. FRIDAY OSAZEE
11. MR. OSABUOHIEN ERHAUYI
12. MR. OSAMUDIAMEN IYI-EWUARE
13. MR. FRIDAY OSASUYI
14. MR. AUGUSTINE OBAYUWANA
15. MR. KELLY ODIGIE
16. MR. FRIDAY AIGHEIWI
17. MR. NEWTON OBAZEE

..... APPLICANTS/RESPONDENTS

AND

1. DSP. BALOGUN
2. MR. ABBE
3. COMMISSIONER OF POLICE, EDO STATE
4. THE NIGERIA POLICE FORCE
5. THE INSPECTOR GENERAL OF POLICE
6. POLICE SERVICE COMMISSION

..... RESPONDENTS/APPLICANTS

RULING

This is a Ruling on a Motion on Notice, brought pursuant to Section 97 of the Sheriffs and Civil Process Act, Order 3 Rules 11, Order 20 Rules 13 of the Edo State High Court Civil Procedure Rules 2012, and under the inherent Jurisdiction of this Court.

The Applicants are praying this Court for an order setting aside its judgment delivered on the 18th of October, 2016 against Respondents/Applicants for non-service of the amended originating processes by the Applicants/Respondents.

The application is supported by a 16 (sixteen) paragraphs affidavit sworn to by one Jeffery Saturday Oribhabor Esq. and a Written Address of Counsel.

Moving the application, the learned Counsel for the Applicants, Kenneth Dika Esq., relied on the supporting affidavit and adopted the Written Address as his arguments in the motion.

In his Written Address, the learned Counsel formulated two issues for determination as follows:

1. Whether the Respondents/Applicants are entitled to have the judgment set aside for non service of the amended motion on notice dated 4/7/16; and
2. Whether failure to obtain leave of court to serve outside the jurisdiction of this Honourable court is not fatal to applicants' case.

Before addressing on the issues, Counsel submitted that for the Respondents/Applicants to succeed in this application, they must satisfy the court as to the following:

1. That they did not delay in bringing the application;
2. That there was non-service of the originating motion on notice; and
3. That the Respondents/Applicants have a good defence to the suit.

He submitted that the Respondents/Applicants brought this application timeously and referred the Court to paragraph 10 of the affidavit in support which showed that the Respondents/Applicants were served a certified copy of the judgment on the 26/10/16 and by Monday 31st October, 2016 they filed this application.

Thereafter, he went into the arguments on the two issues for determination.

ISSUE ONE:

He submitted that by virtue of Order 20 Rule 13 of the Edo State High Court Civil Procedure Rules 2012, a judgment of this Court may be set aside on grounds of fraud, non service or lack of jurisdiction.

He submitted that the Applicants/Respondents failed to serve the amended originating process on the Respondents, thus compelling the counsel for the Respondents to address the court on the earlier originating process dated 9th May, 2016 after an oral application for time to file his counter affidavit was refused by the court.

On the effect of a judgment given when no originating process was served on the other party, learned Counsel relied on the decision of Dahiru Musdapher JSC in the case of: *KALU Mark/ Mark Prik Industries Nig. Ltd vs. Gabriel Eke NSCQR volume 17, 2004* where the learned jurist observed thus:

> *"When an order is made or judgment is entered against a defendant who claimed not to have been served with the originating process, such an order or judgment becomes a nullity if the defendant proves non- service of the originating process. 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. If there is no service the fundamental rule of natural justice: audi alterem partem will be breached ".*

On the failure to serve process on a party in a Suit, Counsel further relied on the decision of the Supreme Court in the same case of*: KALU MARK (MAR. PRIK INDUSTRIES) NIG. LTD V GABRIEL EKE, NSCQR VOLUME 17, 2004 PAGE 60*

ISSUE TWO:

The learned Counsel submitted that failure by a party to obtain leave of court before service of any process out of jurisdiction renders such service a nullity. He maintained that in this case, the Applicants delivered their process to

the High Court Registry of the Federal Capital Territory Abuja, which eventually issued the a certificate of service.

He argued that the applicable High Court Rules of Edo State are different from that of the FCT Abuja. He referred the Court to Order 3 Rule 11 of the Edo State High Court (Civil Procedure) Rules 2012 which requires any originating process to be served outside the jurisdiction of the Court to be endorsed by the Registrar of the court with the following notice:

> *"This summons (or as the case may be) is to be served out of Edo State of Nigeria and in the ..... State".*

He maintained that the Applicants process was not so endorsed before the purported service on the 4th -6th Respondents/Applicants in Abuja. According to him, Order 3 Rule 11 of the Edo State High Court Civil, Procedure Rules 2012 is *impari materia* with Sections 96 and 97 of the Sheriff and Civil Process Act Cap S6 Laws of the Federation of Nigeria 2004.

On the effect of failure of the Applicant to seek and obtain the leave of the Court to issue and serve a process outside jurisdiction, he relied on the decision of the Supreme Court per S.M. MUNTAKA Commassie JSC in: *Drexel Energy and Natural Resource Ltd and 2 ors NSCQR Volume 36, 2008 page 1219.*

> *"I hold that failure of the respondent to seek and obtain the leave of the court or the judge to issue and serve the writ of summons outside the jurisdiction of the court amounts to a fundamental defect and not a mere irregularity which can be cured, hence I have no hesitation in declaring both the issuance and the service of the said writ of summons outside the jurisdiction as invalid''*

On the validity of a process for service outside Jurisdiction not endorsed in accordance with the provisions of the Sheriffs and Civil Process Act Cap S6 Laws of the Federation of Nigeria 2004 particularly sections 96 and 97 which govern the service of a Writ of summons in a state other than where it was issued, Counsel relied on the decision of the Supreme Court in: *BEN OBI AND another V JUSTICE OBI OKOYE NSCQR (1988) 1270 PAGE 1.*

Learned Counsel referred the Court to the dictum of AGBAJE JSC in the said case as follows:

> *" it only suffices to state that apart from the mandatory nature of Section 97 of the Act, it is my view that the Writ is incomplete without the required statutory endorsement. Such endorsement is part and parcel of the Writ and without it; it is both defective and incompetent. The endorsement is not a procedural requirement that could be treated as an irregularity capable of being cured by the court`s Registrar".*

In conclusion, Counsel urged the Court to grant the application.

Opposing the Motion, the learned Counsel for the Respondents, P.I.Oiwoh Esq., relied on his Counter Affidavit of nine paragraphs and a Written Address which he adopted as his arguments in opposition to this application.

Counsel formulated the following three issues for determination:

1. Whether the requirement for endorsement or obtaining leave to serve outside jurisdiction is applicable to Applications;

2. Whether the Applicants in this application have not waived their rights to challenge the mode of service; and

3. Whether a party who was served and participated in a matter can turn around to complain that he was not served.

He argued Issues 1 and 2 together.

In a nutshell, Counsel submitted that the issues of endorsement or obtaining leave to serve outside jurisdiction borders on technicalities and referred the Court to the case of: *OKENWA VS MILITARY GOVERNOR OF IMO STATE (1996) 6NWLR Pt. 455 at PG 394* where the Supreme Court warned against over reliance on mere technicality to determine a matter. He also referred to the Supreme Court decision in: *C.T. and F.C vs. NNPC (2002) 14NWLR (PT 786) 133.*

He submitted that the Rules did not make similar provisions with regards to originating summons. He maintained that there are differences between a writ of summons, an originating summons and a motion for application for the

enforcement of Fundamental Right. He maintained that the Sheriffs and Civil Processes Act is not applicable and did not contemplate Applications and Originating summons.

Arguing further, Counsel maintained that there is a distinction between the validity of a writ of summons and the validity of the service of a writ. According to him, if a Writ is valid, a default in service becomes a mere irregularity which may render the Writ voidable but definitely not void. He relied on: *ADEGOKE MOTORS VS ADESANYA (1989) 3NWLR (PT. 109) 250,* per *Oputa JSC.*

Learned Counsel also referred to the following decisions on the point: *BROAD BANK OF NIGERIA LTD. VS ALHAJI S. OLAYIWOLA & SONS LTD. Internet Law Report SC 288|2002; STEEL BELL (NIG) LTD. VS GOVERNMENT OF CROSS RIVERS STATE (1996) 3NWLR PT. 438, 57;*
ODUA INVESTMENT COY LTD. TALABI (1997) SCNJ 600; and *DUKE VS AKPABUYO LOCAL GOVERNMENT (2006) 133 LRCN 108, 137-138 U-A.*

He submitted that a careful examination of the provisions of the Act shows that a writ to be served out of jurisdiction without such endorsement is procedurally irregular and these days the Courts avoid over reliance on mere technicality.

Counsel also submitted that the delay in bringing this application without leave to extend time renders the application incompetent and liable to be dismissed with substantial cost.

On issue 3, he submitted that the practice where a party participates in a trial and later turns around to fault same on the frivolous ground that he was not served should be highly condemned and discouraged. He stated that the Applicants have brought this application, simply to have a second bite at the cherry.

He further submitted that this is not a case of default of appearance for want of service for which this Court can exercise its discretion to set aside its well considered ruling. He maintained that the Court is now *functus officio* and its decision can only subject to appeal.

He finally urged the Court to dismiss this application with crushing cost.

I have carefully considered all the processes filed in this application, together with the arguments of the learned counsel for the parties.

Now, the law has been settled by a line of authorities that every Court of record has the inherent jurisdiction and power, upon a proper application, to set aside its judgments or orders given without jurisdiction or competence. See the cases of: *Skenconsult vs, Ukey (supra); Tabaa vs.Lababedi (1974) 4 S.C. 139; Yakubu vs. Governor of Kogi State (1997) 7 NWLR (Pt.511) 66 at 87*: and *Kperanisho vs. Aloko (2015) 14 NWLR (Pt.1478) 153 at 158.*

Furthermore, by virtue of *Order 20 Rule 13 of the Edo State High Court Civil Procedure Rules 2012*, a default judgment of a Court may be set aside upon application to the Judge on grounds of fraud, non-service or lack of jurisdiction upon such terms as the Court may deem fit.

The present application was brought *inter alia*, pursuant to the aforesaid *Order 20 Rule 13 of the Edo State High Court Civil Procedure Rules 2012*.

The learned Counsel for the Respondent has challenged the competence of this application on the ground that it was brought outside the time stipulated under the Rules of Court and without leave to extend the time. He has urged me to declare the application incompetent and dismiss same with substantial costs.

Curiously, the learned Counsel for the Respondent did not refer the Court to the particular rule of Court in support of his objection. However, I am aware of the provisions of *Order 42 Rule 5 of the Edo State High Court Civil Procedure Rules 2012* which stipulates that:

> ñ*An application to set aside or remit an award may be made at any time within six weeks after such award has been made and published to the parties: Provided that the Court or Judge in chambers may by order, extend the said time either before or after it has elapsed."*

The Ruling which they seek to set aside was delivered on the 18th of October, 2016 and the application to set aside same was filed on the 31st of October, 2016.Clearly, the Applicants filed the application within the stipulated period of six weeks. The objection of the Respondent's Counsel is therefore unfounded and it is accordingly overruled.

Consequently, I will now consider the application on its merits.

The issues for determination in this application are as follows:

1. Whether the Applicants are entitled to have the judgment set aside for the alleged non service of the amended motion on notice dated 4/7/16; and
2. Whether the failure to endorse the process and to obtain the leave of Court to serve outside the jurisdiction of this Court is fatal to the application.

ISSUE 1:

It is settled law that the primary aim of service of originating process is to put the adverse party on notice of the action against him, and to afford him the opportunity to respond to the action. See the case of*: Mohammed vs. Babalola (2012) 5 NWLR (Pt.1293) 395 at 434.*

There is however a distinction between non-service of a Court process and improper service of same.Non-service of an originating process on a defendant can result in severe consequences under certain circumstances. Such non-service goes to the root of the matter to affect the substantive jurisdiction of the Court.

On the other hand, where a process has been served in an improper manner, the question that arises is that of procedural jurisdiction which does not go to the root of the matter. The *locus classicus* on the point is the case of: *Skenconsult vs. Ukey (1981) 1 S.C 6.*

As a matter of fact, it is settled law that proper service is dispensed with where the adverse party has entered appearance in Court. See the case of: *C.B.N vs. Interstella Comms.Ltd. (2015) 8 NWLR (Pt.1462) 456 at 465*.

Coming to the instant case, the complaint of the Applicants is on both non-service and improper service of the Originating Process. In the first instance, they have alleged that the Amended Application to Enforce Fundamental Rights filed on the 4th of July, 2016 was not served on them, thus compelling their counsel to address the court on the earlier originating process dated 9th May, 2016.This is a serious complaint.

The first issue to determine at this stage is whether the Respondents were served with the amended process. At paragraph 8 of the Counter

Affidavit in opposition to this application, the Respondents/Applicants debunked the claim of the Applicants and asserted that when the motion for amendment was taken, the Applicant's Counsel, J.S.Oribhabor Esq. was present and he did not object to the amendment.

To ascertain the true position, I was constrained to examine the records of this Court. It is settled law that a Court is entitled to take judicial notice of its records and to look at its own proceedings on any matter and to take notice of their contents. See the case of: *USMAN ALI MAITSIDAU vs.ENGR. HAMISU IBRAHIM CHIDARI & 22 OTHERS (2008) EPR VOLUME-6 Page 808.*

Upon going through the records, I discovered that on the 12th of July, 2016, when the learned Counsel moved the motion for amendment, the said J.S.Oribhabor Esq. was present in Court and informed the Court that he was not opposing the application. Consequently, the Court granted the application and the amended process was deemed properly filed and served.

Consequently, I agree entirely with the learned Counsel for the Respondents that the Applicants cannot complain of non-service of the amended process. The records of the Court state otherwise.

I therefore resolve Issue 1 in favour of the Respondents.

ISSUE 2:

This issue is on the alleged failure of the Respondents to endorse the process and to obtain leave of the Court to serve the Originating Process outside the jurisdiction of the Court.

The Applicants have seriously challenged the validity of the issuance and the service of the Originating Process. They contend that the Process was not endorsed as required by law and that the leave of Court was not obtained before the purported service on the 4th -6th Respondents/Applicants in Abuja as required by Order 3 Rule 11 of the Edo State High Court civil, procedure rules 2012 which is *impari materia* with Sections 96 and 97 of the Sheriffs and Civil Process Act Cap S6, Laws of the Federation of Nigeria, 2004.

It is not in dispute that the Originating Motion was not endorsed as required by Order 3 Rule 11 and section 97 of the Sheriffs and Civil Process Act. Furthermore, the Respondents did not obtain the leave of Court to serve the process out of jurisdiction.

I wish to first address the issue of the alleged failure to obtain the leave of Court to serve out of jurisdiction. It is pertinent at this stage to refer to the provisions of the relevant rule. Order 3 Rule 11 of the Edo State High Court Civil Procedure Rules, 2012 provides as follows:

"*11. Service outside Edo:*

Subject to the provisions of the Sheriffs and Civil Process Act, a writ of summons or other originating process issued by the Court for service in Nigeria outside Edo State shall be endorsed by the Registrar of the Court with the following notice:

'This summons (or as the case may be) is to be served out of Edo State of Nigeria and in the….. State' "

Now, it is pertinent to observe in the said provision that there is no express stipulation on the requirement for leave to serve the originating process out of jurisdiction. This is very much unlike the provisions of the former High Court Civil Procedure Rules of Bendel State, 1988 which was applicable to Edo State.

For the avoidance of doubt, ***Order 5 Rules 6 & 14 of the 1988 Rules*** provide as follows:

"6. Subject to the provisions of these rules or of any written law in force in the State, no writ of summons for service out of the jurisdiction, or of which notice is to be given out of the jurisdiction, shall be issued without the leave of Court or a Judge in chambers.

14. No writ which, or notice of which, is to be served out of the jurisdiction shall be issued without leave of the Court."

The current Edo State High Court Civil Procedure Rules of 2012 does not contain any of such above quoted provisions on the need for leave either to issue or to serve out of jurisdiction. As a matter of fact, Order 6 Rule 10 of the 2012 Rules provides as follows:

"10. ***Concurrent originating process for service within and out of jurisdiction:***

An originating process for service within jurisdiction may be issued and marked as a concurrent originating process with one for service out of jurisdiction, and an originating process for service out of jurisdiction may be issued and marked as a concurrent originating process with one for service within jurisdiction."

In a very similar situation, in Anambra State where the rules were recently changed, the Court of Appeal clarified the current position of the law in the case of: *Complete Comm Ltd, vs. Onoh (1998) 5 NWLR (Pt.549) 197 at 224*.Therein, Salami JCA explained the position thus:

"The combined effect of the two rules set out above is that it is no longer a requirement of the law that the issuance of any class of writ of summons be it for service within or outside jurisdiction should be with leave of the Court. It follows that writs of summons can be issued and served outside a State without first seeking and obtaining leave of Court."

This position was reaffirmed by the Supreme Court in its decision in the very recent case of: *B.B.Apugo & Sons Ltd. vs. O.H.M.B. (2016) 13 NWLR (Pt.1529) 206 at 220,* where the Court held that:

"…where the defendant resided outside Anambra State but within Nigeria, leave was not required to effect service on him."

In the earlier cited case of: *Complete Comm. Ltd, vs. Onoh (1998) supra* at page 217, Niki Tobi JCA (as he then was) boldly asserted thus:

"It is no longer the law in Anambra State that a writ of summons for service out of the jurisdiction shall be issued with the leave of Court"

Likewise, under the present Edo State rules, I make bold to assert that:

It is no longer the law in Edo State that a writ of summons for service out of the jurisdiction shall be issued with the leave of Court.

Consequently, the only requirement is for the Registrar to endorse the Process with the notice that it is to be served out of the jurisdiction of Edo State in another State named therein. Incidentally, this endorsement was not made in the instant case.

The pertinent issue which must be addressed at this stage is the effect of the failure to endorse the originating process as required by Order 3 Rule 11 and section 97 of the Sheriff and Civil Process Act Cap S6 Laws of the Federation of Nigeria 2004.

In the old case of: *Ezomo vs. Oyakhire (1985) 1 NWLR (Pt.2) 195*, the Supreme Court, stated thus:

> *"Non-compliance with Sections 97 and 99 of the Sheriff and Civil Process Act, if not objected to by way of preliminary objection, is an irregularity, which is capable of being waived, and it is waived by the other side taking further steps after he had been aware of the irregularity."*

Also, in the case of: *Odu'a Invest.Co.Ltd. vs.Talabi (1997) 10 NWLR (Pt.523) 1 at 51,* Ogundare JSC elucidated further thus:

> *"…where a defendant is served with a writ of summons in breach of Section 97 and 99 of the Act, he has a choice either to object to the service by applying to have it set aside and the Court ex debito justititiae will accede to the application or ignore the defect and proceed to take steps in the matter. By entering unconditional appearance and filing pleadings, as in the case on hand, he is deemed to have waived his right to object and cannot later in the proceedings seek to set same aside because of the original defect."*

From the foregoing, it is evident that non-compliance with Order 3 Rule 11 of the Edo State High Court Civil, Procedure Rules 2012 and Sections 96 and 97 of the Sheriff and Civil Process Act Cap S6 Laws of the Federation of Nigeria 2004 renders the service of the originating process *voidable* and the defendant is entitled *ex debito justitiae* to have the process set aside provided he has not taken any fresh steps in the matter which will amount to a waiver of the irregularity complained of.

Coming to the instant case, the Applicants were served in Abuja; their Counsel took steps and represented them at the proceedings. The said Counsel was present when the Court processes were amended without any objection from him. He was there when the Respondents addressed the Court and he replied before the Court adjourned for Ruling. All through they never complained about any irregularity in the service of the processes. I am of the view that it is too late in the day to complain of irregular service.

I accept the submissions of the learned Counsel for the Respondents that by their conduct, the Applicants have waived their rights to complain. See the following decisions on the point: *Miti vs. N.N.B.Plc. (1997) 3 NWLR (Pt.496); Akumechiel vs. B.C.C.Ltd. (1997) 1NWLR (Pt.484) 695; and F.M.B.N vs. Adesokan (2000) 11 NWLR (Pt.677) 108 at 119.*

Even on the issue of failure to endorse the Originating Process with the notice that it is to be served out of Edo State, it is pertinent to note a salient part the said Order 3, Rule 11 which stipulates thus:

"*11. Service outside Edo:*

Subject to the provisions of the Sheriffs and Civil Process Act, a writ of summons or other originating process issued by the Court for service in Nigeria outside Edo State ***shall be endorsed by the Registrar of the Court*** *(underlining mine) with the following notice:*

'This summons (or as the case may be) is to be served out of Edo State of Nigeria and in the….. State'."

The purport of the underlined portion is to emphasise the salient fact that it is the duty of **the Registrar of the Court** to endorse the process with the magical words. It is certainly not the duty of the Litigant. In such situations the Courts have always decided that where there is an omission by the Court Registrar to endorse a Court process, the error cannot be visited on the litigant. See the cases of: *RMAFC vs. Onwuekweikpe (2009) 15 NWLR (Pt.1165) 592; and Broad Bank of Nig.Ltd. Vs.Alhaji Olayiwola & Sons Ltd. (2005) 3 NWLR (Pt.912) 434.*

On the whole, I am of the view that this application lacks merit and it is accordingly dismissed with N10, 000.00 (ten thousand naira) costs in favour of the Respondents.

P.A.AKHIHIERO
JUDGE
30/11/16

COUNSEL:
KENNETH DIKA ESQ. ……..…APPLICANTS.

P.I.OIWOH ESQ. ……..……. RESPONDENTS.