IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY

HOLDEN AT JABI ABUJA

DATE: 26TH DAY OF NOVEMBER, 2020
BEFORE: HON. JUSTICE M. A. NASIR
COURT NO: 9
SUIT NO: PET/273/2017

BETWEEN:

OLUFUNKE ALETAN ---- PETITIONER/RESPONDENT

AND

OLUWASHINA AYOMI ADEYEMI ---- RESPONDENT/APPLICANT

RULING

Before this Court is a Notice of preliminary objection filed by the 3rd defendant

Before this Court is a motion on notice filed on the 13/9/2019 pursuant to the provisions of Order 43(1) and (2) of the Rules of this Court, 2018, Section 6(6)(B) of the 1999 Constitution and under the inherent jurisdiction of this Court. The applicant is praying this Court for the following:

1. An order setting aside the judgment of this Court dated 27/11/2018 in suit No. PET/HC/273/2017 on the grounds of non service, misrepresentation of facts and fraud.
2. An order setting aside the Decree Absolute of this Court dated 27/2/2019 in suit No. PET/HC/273/2017 on the grounds of non service, misrepresentation of facts and fraud.
3. And for such further and other orders as this Court may deem fit to make in the circumstance.

The grounds of the application are as follows:

"1. That the applicant was never served with the originating processes or any other process in this suit, or aware of the existence of the pendency of the suit. Despite being in constant communication with the Petitioner/ respondent.

2. *That Petitioner/respondent fraudulently misrepresented facts before the Court.*

3. *The Court lacks the requisite jurisdiction to entertain the suit."*

The application is supported by a 10 paragraphs affidavit and a written address filed by **Emeka Ibeneme Esq** and duly adopted by **Victor Emenike Esq** on the 12/10/2020. Two issues were raised therein for determination as follows:

"1. Whether this Court has the jurisdiction ab initio to entertain this suit as presently constituted for lack of service.

2. *Whether the Respondent/applicant was accorded fair hearing in the circumstance."*

In response the Petitioner/respondent filed 18 paragraphs counter affidavit with one annexure. **Madeh Yakubu Esq** adopted the written address filed on behalf of

the Petitioner/respondent. Counsel formulated a sole issue for determination. The issue is:

> *"Whether this Court having heard and determined the said suit thereby became functus officio on 27/11/2018 can rehear the same suit as sought by the instant application by the applicant and if there exist any such special circumstance to warrant hearing of same."*

The applicant filed a reply on points of law on the 13/12/2019.

Upon perusal of the averments in the supporting affidavit and the counter affidavit and after considering the submissions of counsel across the divide, the only issue for determination is:

> *"Whether this Court can grant this application."*

Service of originating process or any process of Court on the parties is fundamental to vesting a Court with the

jurisdiction to entertain an action. See West African Oilfield Services Ltd vs. Gregory (2019) LPELR – 47292 (CA).

The law is settled that failure to serve process where service is required goes to the root of the Court's conceptions of the proper procedure in litigation. Service of process on the defendant so as to enable him appear to defend the relief being sought against him is a fundamental condition precedent to the Courts acquisition of jurisdiction and competence. Where there is no service or there is a procedural irregularity in service, the subsequent proceedings are a nullity ab initio. See Emerald Engineering Services Ltd & anor vs. Intercontinental Bank Plc (2010) LPELR – 19782 (CA).

In EIMSKIP Ltd. vs. Exquisite Ind. Ltd (2003) 4 NWLR (Part 809) 88 at 122-123 Tobi JSC had this to say;

"Service is a pre-condition to the exercise of jurisdiction by the Court. Where there is no service

or there is a procedural fault in service, the subsequent proceedings are a nullity ab initio. This 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. If after service he does not put up a defence the law will assume and rightly too for that matter, that he has no defence. But where a Defendant is not aware of a pending litigation because he was not served, the proceedings held outside him will be null and void."

See also Craig v. Kanseen (1943) 1CB 256; Skenconsult (Nig) Ltd v. Ukey (1981) 1 SC 6; Oke V. Aiyedun (1986) 2 NWLR (PT. 23) 548.

Learned counsel to the applicant submitted that the applicant was not served with the originating processes and therefore the Court lacks the jurisdiction and competence to entertain the suit.

The applicant averred that there has been constant communication and correspondences between the parties throughout the pendency of the suit, but the Petitioner/respondent did not deem it fit to inform him of the pendency of the suit. That service was effected at an address which ceased to be the applicant's last known address despite knowing his current location and his email address. Several email correspondences between the parties were attached as Exhibits G1 – G19. The applicant averred further that he only got to know of this suit vide Whatsapp message sent to him by the Petitioner/respondent after he had taken out a Petition against her. Upon receipt of the Whatsapp message, he applied to get the Certified True Copy of all the processes filed in the suit.

The Petitioner/respondent in the counter affidavit admitted that she informed the applicant via Whatsapp message that the marriage had been dissolved. The she had

informed the Respondent/applicant via email of the pending lawsuit and he said he had no reservation. That it took several concerted efforts to effect service on the applicant but to no avail and she had to seek the leave of Court to effect service by pasting at his last known address in Ogun State.

Learned counsel to the Petitioner/respondent submitted that the Court having entered judgment in this suit is functus officio, and eventhough the Court can set aside its own judgment, the applicants have not met the requirement for the exercise of the Courts discretion. He added that proof of service of several hearing notices as exhibited is inclusive proof that both the Petitioner/respondent and the Court discharged their duties as required by law by according the applicant the opportunity to defend himself.

Learned counsel to the applicant in his reply on points of law made reference to the provisions of Order 7 Rule

12(e) and 17 of the Rules of this Court to submit that the Petitioner/respondent has been communicating with the applicant via e-mail and telephone but she refused to disclose same to the Court.

It is noted herein that the Petitioner/respondent did not deny having the phone number or email address of the applicant, neither has she denied communicating with him during the pendency of this suit. I have seen the various email messages between the parties i.e. Exhibit G1 – G19. It is evidently clear that there was constant communication between the parties during the pendency of the suit. The Petitioner/respondent made this Court to believe that the Respondent was not traceable and his whereabouts unknown in her application for substituted service. This informed the Courts decision to allow for the substituted service by pasting.

It should be noted that the essence of the requirement of service of a Court process on a party is to enable that

party to know what the case is against him and so prepare for its defence. The requirement is aimed at avoiding a situation where a party would be surprised or even condemned on a Court process of which he is unaware. See Saleh & ors vs. Mohammad & anor (2010) LPELR – 11068 (CA).

The purpose of an application to serve process by substituted means is to ensure that the party who is being sued, is served with the process to enable it appear and defend the action. Failure to serve a party sued where service of Court processes are required, is a crucial and fundamental omission, which renders subsequent proceedings void. This is so because the Court will have no jurisdiction to entertain the suit. See NEN Ltd vs. Asiogu (2008) 14 NWLR (part 1108) 587.

From the records of the Court, leave was granted to the Petitioner/respondent to serve the notice of petition and all other processes by substituted means, to wit, by

pasting at the last known address of the applicant. The Bailiff of this Court has sworn to an affidavit to that effect. Now when the bailiff has sworn to the proof of service, it is in law a compelling prima facie proof of service on the applicant of the originating processes. See **Ajidahun vs. Ajidahun (2000) 4 NWLR (PT.654) 605 at 610 – 611.** Having challenged the issue of service of the originating processes served by substituted means, the burden is therefore on the applicant to debunk the presumption of service. It is done by placing materials which enables the Court to decide on the issue of service and require credible evidence on which it is obliged to rely on in arriving on such a decision. See **Egbagbe vs. Ishaku & anor (2006) LPELR – 11656 (CA), Williams & Ors. vs. Hope Rising Voluntary Funds Society (1982) Vol. 13 NSCC 36.**

Now, the right to a fair hearing is one of the twin pillars of natural justice which support the rule of law. It is a fundamental right enshrined in Section 36 (1) of the 1999

Constitution. As stated by **Nnaemeka-Agu, JSC** of blessed memory in **Kotoye vs. CBN (1989) 1 NWLR (part 98) 419 at 448**, the rule of fair hearing is not a technical doctrine. It is one of substance. The question is not whether injustice has been done because of lack of hearing. It is whether a party entitled to be heard had in fact been given the opportunity of a hearing.

In **Bakare vs. Lagos State Civil Service Commission & Anor (1992) LPELR – 711 (SC)** **Karibi-Whyte, JSC** stated:

> *"Section 33 [Section 36 of 1999 Constitution] is an entrenchment in the Constitution of the common law principle of the right of fair hearing which is an inherent and necessary element in the determination of every dispute. The provisions of Sub-section (1) of the section ensures that the rights and obligations of every citizen is finally and conclusively determined, after hearing the person whose rights and obligations are involved and would*

be affected by the decision. It is therefore a fundamental and constitutional right of the person whose rights and obligations would be affected by any determination to be heard before such rights and obligations is conclusively determined... Hence the person whose rights and obligations are in issue must be given an opportunity to be heard in defence of such rights by the Court or Tribunal established for the purpose."

See also Dingyadi vs. INEC (2010) 18 NWLR (PT 1224) 154.

In Duke vs. Government of Cross River State (2013) LPELR (19887) 1 at 18, the apex Court also held as follows:

"The term 'fair hearing', within the context of Section 36(1) of the 1999 Constitution, is that a trial ought to be conducted in accordance with all the legal norms designed to ensure that justice is done at all cost to all the parties. The principle of

fair hearing is that both sides must be given an opportunity to present their respective cases. It implies that each side has the right to know what case is being made against it and be given ample opportunity to react or respond thereto. Fair hearing does not necessarily mean a hearing that involves oral representation. However, a hearing is fair if all the parties are given opportunity to state their case even in writing."

See also Ukachukwu vs. PDP (2014) 1 MJSC (PT II) 132 and Mohammed vs. Kano Native Authority (1968) 1 ALL NLR 424 at 426 or (1968) ALL NLR 411 at 413.

The question is whether the applicant was given the opportunity to be heard. From the averments in support of the application, it is clear that the applicant became aware of this suit when the Petitioner/respondent sent him a Whatsapp message with a picture of the decree absolute. The Petitioner was fully aware of the fact that the applicant

was no longer residing at the address where substituted service was effected. This is evident vide Exhibit F1 attached to the application where the Bailiff deposed to the fact that service was not effected on the Respondent at No. 1, Friendly Street, Lisabi Abeokuta, Ogun State because nobody was bearing the name of the Respondent on the property, or maybe the bearer had moved out from the said address.

If a principle of natural justice is violated, it does not matter whether if the proper thing had been done, the decision would have been the same; the proceedings will be null and void. The decision must be declared to be no decision. The result is that the decision of the Court must be set aside. The case must be heard de novo. See Suru Worldwide Ventures Nig. Ltd vs. Asset Management Corporation of (Nig) Ltd & ors (2019) LPELR – 47958 (CA)

I am of the considered view that the Petitioner/respondent misrepresented the facts by failing to

disclose the address of the Respondent or at least his email contact for him to be served with the Notice of Petition and be able to defend himself. This is moreso since the Rule of Court Order 7 Rule 17 made adequate provision for service by email/SMS. This Court in the circumstance has an inherent power to set aside its judgment or order where it has become so obvious that it was fundamentally defective or given without jurisdiction. In such a case, the judgment or order given becomes null and void, thus liable to be set aside. See Bello vs. INEC (2010) LPELR 767 (SC), Okafor v. Okafor (2000) 11 NWLR pt. 677 pg. 21 Skenconsult (Nig.) Ltd. v. Ukey (1981) 1 SC pg. 6, Obimnure v. Erinosho (1966) 1 ALL NLR pg. 250.

The proceedings of this Court conducted in the absence of the Respondent due to non service of the Notice of Petition and hearing Notices are without jurisdiction and are hereby accordingly set aside.

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Hon. Justice M.A. Nasir

Appearances:

Victor Emenike Esq with Emeka Ibeneme Esq – for the Respondent/applicant

Madeh Yakubu Esq – for the Petitioner/Respondent