IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY
IN THE ABUJA JUDICIAL DIVISION
HOLDEN AT GUDU - ABUJA
ON WEDNESDAY THE 23RDDAYOF FEBRUARY, 2022.
BEFORE HIS LORDSHIP; HON. JUSTICE MODUPE OSHO-ADEBIYI

SUIT NO. CV/3415/2020

MOTION NO. M/2995/2021

BETWEEN

FOLORUNSHO MICHAEL BABAJIDE----PLAINTIFF/RESPONDENT

AND

FIRST BANK OF NIGERIA LIMITED ------DEFENDANT/APPLICANT

RULING

The Applicant filed this application praying this Court for the following orders: -

1. AN ORDER of this Honourable Court striking out this Suit for want of jurisdiction due to failure of the Plaintiff/Respondent to first seek and obtain leave of Court before Her Writ of Summons in this Suit was issued against the Defendant/Applicant, which has her registered address outside the jurisdiction of this Honourable Court.
2. AN ORDER of this Honourable Court striking out this Suit for want of jurisdiction due to the Plaintiff/Respondent's noncompliance with the law regulating endorsements on her Writ of Summons, issued against the Defendant/Applicant which has her registered address outside the jurisdiction of this Honourable Court.
3. AND for such further Order(s) as the Honourable Court may deem fit to make in the circumstances.

The grounds upon which the application is brought are that theDefendant/Applicant has her registered office at No. 35 Marina Road, Lagos, outside the jurisdiction of this Honourable Court; that the

Plaintiff/Respondent did not obtain the leave of this Honourable Court before his Writ of Summons was issued and served on the Defendant/Applicant at Lagos, outside the jurisdiction of this Honourable Court; that the Writ of Summons issued in this Suit was not marked as required by Section 97 of the Sheriffs and Civil Process Act, LFN 2004; that the 14 (fourteen) days limited by the Plaintiff/Respondent for the Defendant/Applicant to respond to his Writ of Summons, is way below the 30 (thirty) days period prescribed by Section 99 of the Sheriffs and Civil Process Act and that the Honourable Court lacks the jurisdiction to entertain this Suit due to incompetence of the writ of Summons.

Accompanying the application is an affidavit of 7 paragraphs deposed to by one Ajibola Abioye, a Litigation secretary in the law office of R. C. Ojiaku& Co. Rossbevionic Chambers, Counsel to the Defendant/Applicant and a written address.The applicant averred thatthe Plaintiff/Respondent was mandated by law to obtain the leave of this Honourable Court to issue his Writ of Summons against the Defendant/Applicant, the Defendant/Applicant being outside the jurisdiction of this Honourable Court.That the Plaintiff/Respondent failed to obtain the leave of this Honourable Court to issue and then serve his Writ of Summons, for service on the Defendant/Applicant, outside the jurisdiction of this Honourable Court. That the Writ of Summons issued and served in this Suit on theDefendant/Applicant, in Lagos State, outside the jurisdiction of this Honourable Court, was issued and served without the Plaintiff/Respondent first seeking and obtaining leave of this Honourable Court to do so.That the Writ of Summons purportedly served on the Defendant/Applicant in Lagos State, was not marked for service outside the jurisdiction of this Honourable Court, as required by law.That the time (14 days) limited by the Plaintiff/Respondent, on her Writ of Summons, for the Defendant/Applicant to respond to his processes is well below the requirement of law, which is 30 days.That the facts stated above is a glaring and indeed palpable attempt by the Plaintiff/Respondent to

deny the Defendant/Applicant fair hearing in this Suit.That failure of the Plaintiff/Respondent to obtain leave to issue his Writ of Summons against the Defendant/Applicant has robbed this Honourable Court of the jurisdiction to entertain this Suit.

The Applicant in their written address raised two (2) issues for determination to wit:

1. *Whether the Plaintiff/Respondent's failure to obtain leave of this Honourable Court before his Writ of Summons was issued and served on Defendant/Applicant, outside the jurisdiction of this Honourable Court, does not rob this Honourable Court of the jurisdiction to entertain this Suit?*
2. *Whether the Plaintiff/Respondent's failure to comply with Sections 97 and 99 of the Sheriffs and Civil Process Act in endorsing his Writ of Summons as required by law does not rob this Honourable Court of the jurisdiction to entertain this Suit?*

The Respondent did not file a counter affidavitor a reply on points of law.

Learned counsel relied on a number of cases in driving home his point, including; **Jumba V. Idris (2017) LPELR-43120 (CA); Sanbell Investment Ltd V. Emlo Holdings Ltd &Ors (2014) LPELR-22991 (CA) and Odu'a Investment Co. Ltd V. Talabi (1997) LPELR-2232 (SC).**

Counsel filed objectors' reply on points of law to the counter affidavit and written address wherein counsel reemphasised his stance. Counsel submitted that the only permissible manner of serving the originating process in the instant suit is as provided in Order 7 Rule 8 of the Rules of the court and that the writ of summons is incompetent as it palpably failed to comply with the provisions of Section 99 of the Sheriff and Civil Processes Act. finally, counsel submitted that the instant suit is incompetent and liable to be dismissed and/or struck out. He cited **PDP V. INEC (2018) LPELR-4473 (SC); MARK & ANOR V. EKE (2004) LPELR-1841 (SC); EMEKA V. OKOROAFOR & ORS (2017) LPELR-41738 (SC) and ADENIYI & ANOR V. TINA GEORGE INDUSTRIES LTD & ORS (2019) LPELR-48891 (SC)** amongst others.

Likewise, the Respondent in their written address raised four (4) issues for determination to wit:

1. Whether the Writ of Summons dated May 14, 2020 was properly issued and served on the Defendants/Applicants in line with the requirements of the High Court of the Federal Capital Territory Civil Procedure Rules, 2018 and the Sheriffs and Civil Processes Act LFN 2004.
2. Whether the Honourable Court can validly make an Order for the service of the Originating Processes on the Defendants/ Applicants by substituted means, via publishing in National Dailies.
3. Whether a Writ of Summons issued and served in compliance with the High Court of the Federal Capital Territory Abuja (Civil Procedure) Rules, 2018 will be invalidated for differing in

form (not substance) with the form stipulated in the Sheriffs and Civil Processes Act LFN2004.

4. Whether the instant suit is not competent.

Learned counsel submitted that the writ of summons in this suit was properly issued and served on the Defendants as provided by Section 97 of the Sheriffs and Civil Process Act and Order 2 Rule 4 of the High Court of the FCT (Civil Procedure) Rules 2018. Counsel submitted that the court should be more interested in substance rather than form is trite. In buttressing their point in support of their submissions learned counsel also relied on **PDP V. INEC (2018) LPELR-4473 (SC); MARK & ANOR V. EKE (2004) LPELR-1841 (SC) and OKWUEZE V. EJIOFOR (2000) LPELR-5803** amongst others.

I have examined the affidavit and written address filed by respective Counsel and the issue to be determined is: -

"Whether the Defendant have made out a case for the grant of his application".

It is trite that a Court is functus officio subsequent to delivering its judgment as a Court cannot sit on appeal over its own decision. The only circumstance permitted by law for a Court to set aside its own order is when;

a) The order is a nullity owing to failure to comply with an essential provision such as service of process.
b) When the order was made against a party in default.
c) When the order has been obtained by fraud or misrepresentation.

d) When fresh evidence has been discovered which, if tendered at the trial, will have an opposite effect on the judgment. Per OgundareJSc in **ANATOGU VS. IWEKA II (1995) 8 (NWLR (PT.415) 549 @585 para H; 586 para A-C.**

The Applicant in his written address has submitted that it is the position of the law that obtaining the leave of court to issue a writ of summons which is to be served out of jurisdiction is a condition precedent to the actual issuing of such writ. He referred the court to the case of **PDP V. INEC & ORS (2018) LPELR-4473 (SC)** where the Supreme Court held;

> "…the matter is fundamental that the absence of the leave of the trial court before signing or sealing of the writ for service out of the jurisdiction of Delta State is a breach which extinguished the life of the writ…"

The Counsel to the Claimant/Respondent argued that neither the Sheriff and Civil Process Act LFN 2004 nor the FCT High Court (Civil Procedure) Rules 2018 has any provision whatsoever that requires a Claimant to first seek the leave of Court to issue a writ of summons or even serve a writ outside the jurisdiction of the FCT High Court. Counsel therefore holds the view that the above authorities cited by the Applicant are not relevant to the case at hand as the case of **PDP V. INEC (Supra)** considered the Delta State High Court Civil Procedure Rules 2009.

At this juncture, it is necessary to pauseand take a look at the rules of this court. I have gone through the **High Court of the Federal Capital Territory (Civil Procedure Rules) 2018** and there is no provision that

provides that leave of the Court must first be sought and obtained before a writ is issued for service outside the FCT. The Applicant has not cited either in his motion or his written address where in the FCT High Court (Civil Procedure Rules) 2018 or in the Sheriff and Civil Process Act such provision for leave to issue out of jurisdiction is provided for.

Unlike in the **FCT High Court (Civil Procedure) Rules 2004**wherein**Order 4 Rule 6** provided for**"LEAVE TO ISSUE OUT OF JURISDICTION".**The order provides as follows;

> "Subject to these Rules or any written law in force in the Federal Capital Territory, Abuja, 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 leave of a Court or Judge in Chambers".

This provision is not in the present **High Court of the Federal Capital Territory (Civil Procedure Rules) 2018.** The 2018 Rules appears to have whittled down the provision for **leave to issue out of jurisdiction.** The provision for writ of summons to be served outside FCT is provided for in **Order 2 Rule 4 High Court of the Federal Capital Territory (Civil Procedure Rules) 2018**which provides thus;

> "subject to the provision of the Sheriff and Civil Process Act, a writ of summons or other originating process issued by the court for service in Nigeria outside the FCT shall be endorsed by the Registrar of the court with the following notice".

Section 97 of the Sheriff and Civil Process Act provides;

> "This summons (or as the case may be) is to be served out of the Federal Capital Territory and in the ……. State".

The above said inscription is on page 3 of the writ of summons filed by the Claimant before this Court. I am of the view and I so hold that the writ of summons filed in this suit is properly issued.

It is trite that proper service of writ of summons or any other originating process is jurisdictional and therefore a threshold issue. It is a pillar or bedrock upon which the entire proceeding is built. Once there is no proper service of originating processes the entire proceedings no matter how beautifully conducted is rendered a nullity.Both parties here agreed that the 1st defendant being a Limited Liability Company, service of originating processes on it is covered by the provision of **Section 104 of the Companies and Allied Matters Act 2020**and **Order 7, Rule 8 of the Federal Capital Territory Civil Procedure Rules 2018** . The parties have also submitted various decided authorities to the court.

The Defendants counsel placed heavy reliance on the decision of the Supreme Court in the case of **MARK V EKE (2004) ALL FWLR (Pt. 200) 1455,** that an order of substituted service cannot be ordered against non-juristic person such as the 1st defendant. The Claimant's counsel is however of the view that where service cannot be effected on a company by delivery at its registered address, a court has the powers to grant an order for substituted service where it seems just. Counsel Placed

reliance on **Order 7 Rule 11 of the Rules of court** that provides for substituted service.

On issue of service as stated earlier both parties here agreed that the 1st defendant being a Limited Liability Company, service of originating processes on it is covered by the provisions of **Section 104 of the Companies and Allied Matters Act 2020** and **Order 7, Rule 8 of the Federal Capital Territory Civil Procedure Rules 2018** which are reproduces below;

Section 104 of the Companies and Allied Matters Act 2020 provides:

> *"A court process shall be served on a company in the manner provided by the rules of court and any other document may be served on a company by leaving it at, or sending it by post to, the registered office or head office of the company".*

And **Order 7, Rule 11(1) of theFederal Capital Territory Civil Procedure Rules 2018** provides:

> *"Where service of an Originating Process is required by the Rules or any other enactment and the court is satisfied that prompt service cannot be effected, the court may upon application by the claimant make such order for substituted service as may seem just."*

This rule is a complete detour from the provision of **Order 5, Rule 1 of the 2004 Rules** which limited an application for substituted service to

when personal service cannot be conveniently effected.My understanding of the **Order 7 Rule 11 of theFederal Capital Territory Civil Procedure Rules 2018**is that an order of substituted service of originating process can be sought and obtained when the court is satisfied that prompt service cannot be effected. It is not limited to where personal service cannot be conveniently effected as obtained in the 2004 Rules. There are situations where personal service by delivery of originating process at the head office or other place of business of a company becomes impossible; Does this mean, a company cannot be served by substituted means? How then would such a company be served? Thankfully, a combined reading of **Section 104 of the Companies and Allied Matters Act 2020** and **Order 7 Rules 8 and 11of theFederal Capital Territory Civil Procedure Rules 2018**has catered for it; for instance as in this case, the Claimant in their affidavit in support of their motion exparte for substituted service paragraph 4 (b) to the motion exparte No. M/9798/20 and paragraphs e and j of the counter affidavit in opposition to this motion hadaverred that the Bailiff of this Honourable Court was prevented from leaving the originating processes at the registered address of the 1st Defendant and at another time the Bailiff was prevented from pasting the originating processes at the registered address by the management of the shopping mall on the grounds that the Defendants/Applicants no longer trade in their shopping mall. In such a situation, **Order 7, Rule 11** may be employed to save the situation. I will like to point out that the decision in **MARK V EKE (Supra)** was based on **Section 78 of the Company and Allied Matters Act and Order 12, Rule 5 of the High Court Civil Procedure**

Rules 1998 of Imo State which is in pari-material with **Order 11, Rule 5 of the Federal Capital Territory High Court Civil Procedure Rules 2004** which is no longer in operative. Following the provision of **Section 104 of the Companies and Allied Matters Act 2020** and **Order 7, Rule 8 and 11 of the Federal Capital Territory Civil Procedure Rules 2018**, I hold that the Order for substituted service of Originating process on the 1st defendant made on the 15th of September, 2020 and 26th November, 2020 are valid. Consequently, the order subsists and service on the 1st Defendant is deemed proper service.

On the issue of non-filing of a certificate of pre-action counselling alongside with the writ of summons, it is glaring that**Order 2 Rule 2 (2)of the Federal Capital Territory Civil Procedure Rules 2018**provides for documents accompanying a writ of summons and paragraph (e) provided for certificate of pre-action counselling. However, **Order 2 Rule 2 (5)of the Federal Capital Territory Civil Procedure Rules 2018**provides *"except in the cases in which different forms are provided in these rules, the writ of summons shall be in form 1 with such modifications or variations as circumstances may require as in form 33 (Fast Track)".*This action was commenced under the undefended list procedure which is governed by **Order 35 of the Rules of Court 2018**and after careful scrutiny of the provisions of **Order 35 Rule 1 of the Rules of Court** which provides thus; *"where an application in form 1, as in the Appendix is made to issue a writ of summons in respect of a claim to recover a debt or liquidated money demand, supported by an affidavit stating the grounds on which the claim is based, and stating that the*

deponent's belief there is no defence to it, the judge in chambers shall enter the suit for hearing in what shall be called the "undefended lists". What a Claimant coming under the undefended list provision is required to file is a writ of summons, an affidavit in support stating the grounds and deposition in the affidavit that the deponent belief's that the Defendant has no defence to the claim.

The provisions as stated above tallies with the Claimant's processes before this Court being a suit filed for recovery of debt or liquidated money demand to my strong believe this suit is proper before this Court, the Applicant misconceived the procedure of bringing suit under undefended list procedure and that of general suit brought under writ of summons i.e. Under **Order 2 of F.C.T High Court civil procedure Rules 2018.**I therefore hold that filing of certificate of pre action counseling is not required under the undefended list procedure.

Finally, on the issue of inserting 14days for defendants to enter appearance as opposed to 30days as provided by the statute in **Section 99 of the Sheriffs and Civil Process Act.** The said section provides as follows: -

> *"The period specified in a writ of summons for service under this Part as the period within which a defendant is required to answer before the court to the writ of summons shall be not less than thirty days after service of the writ has been effected, or if a longer period is prescribed by the rules of the court within which the writ of summons is issued, not less than that longer period".*

The Applicant submitted that a writ destined for service outside the jurisdiction of the issuing state is mandatorily required to afford the defendant at least 30days to enter appearance and that failure to do so renders the writ void ab initio. He underlined in emphasis the decision of the Supreme Court in **SKENCONSULT (NIG.) LTD V. UKEY (1981) 1 SC cited in ODU'A INVESTMENT CO. LTD V. TALABI (1997) LPELR-2232 (SC).**

The real issue in **Skenconsult (Supra)**was that the case against the defendant was heard in his absence and before the expiry of the minimum of 30 days "after the Service of the Writ has been effected" as required by **Section 99 of the Sheriff and Civil Process Act**. The motions from which and pursuant to which two orders were made by Ekeruche, J., (as he then was) were not served on the Appellant. In that situation, the issue really was the nullity of the issuing proceedings.The ratio decidendi in **Skenconsult (supra)**as beautifully stated by **Nnamani, J.S.C., at p.27** of the Report is as follows:-

> *"In the instant case, the appellants were not properly served in law with the Writ of Summons. They were neither served with the motions pursuant to which the two orders were made nor were they present or represented by counsel when the said orders were made. My Lords, I am of the view that on all these grounds the first arm of Chief Williams' argument must succeed and the orders ought to be set aside".*

The facts of this instant case are totally different from the**Skenconsult (Supra)**case. In the instant case, the Applicant entered a conditional appearance for the 1st Defendant (Home Gyms Equipment

ltd) on the 2nd of March, 2021. Applicant later on the 30th of March, 2021 filed the following processes;

a. Motion on Notice for extension of time to file their notice of intention to defend and affidavit in support of their notice of intention to defend.
b. 1st and 2nd Defendant's notice of intention to defend.
c. Notice of preliminary objection

It is evident that from the date of service of the originating process which was 25th January, 2021 to the date of appearance which was 2nd of March, 2021 it is more than 30days hence the filing of the motion for extension of time and the payment in default inscribed on the said motion for extension of time. On the 9th of September, 2021 the Applicant moved the court via Motion No. M/3271/21 for extension of time to file their notice of intention to defend and the affidavit in support and the said motion was granted. Though the memorandum of appearance was filed as conditional appearance however, the Applicant went further to cure the anomaly by moving the motion for extension of time to file notice of intention to defend having been out of time (more than 30days) and same motion was granted.

In the 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*** *(Supra)* 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 debitojustititiae will accede to the application or ignore the defect and proceed to take steps in the matter..."

From the foregoing, it is evident that non-compliance with Sections 99 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 non-compliance complained of. The Applicant has waived their right by taking further steps by filing and moving the application for extension of time to file their notice of intension to defend before moving this preliminary objection. There was no breach of fair hearing. The Defendant was not prejudiced. The facts of this case are different from the case of ***SKENCONSULT NIG. LTD. & ANOTHER VS. UKEY (Supra)***

In the instant case, I have shown that all the grounds of the Respondent's Objection, which in my view are only hinged on technicalities, have failed. The Courts have since moved away from

technicalities to doing substantial justice. The Preliminary Objection is therefore accordingly hereby dismissed for lacking in merit.

Parties: Absent.

Appearances: ChidubemEzeilo for the Claimants. JamiuAgoro with Francis Agunbiade for the Defendants.

HON. JUSTICE MODUPE R. OSHO-ADEBIYI

JUDGE

3RD NOVEMBER, 2021