# ACHUZIA v. OGBOMAH

## CITATION: (2016) LPELR-40050(SC)

## In the Supreme Court of Nigeria

ON FRIDAY, 26TH FEBRUARY, 2016

**Suit No: SC.163/2004**

### Before Their Lordships:

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|---|---|
| SULEIMAN GALADIMA | Justice of the Supreme Court |
| MARY UKAEGO PETER-ODILI | Justice of the Supreme Court |
| KUDIRAT MOTONMORI OLATOKUNBO KEKERE-EKUN | Justice of the Supreme Court |
| JOHN INYANG OKORO | Justice of the Supreme Court |
| AMIRU SANUSI | Justice of the Supreme Court |



### Between

OGBUESHI JOSEPH. O. G. ACHUZIA - Appellant(s)

### And

WILSON FIDELIS OGBOMAH - Respondent(s)

## RATIO DECIDENDI

1 **PRACTICE AND PROCEDURE - SERVICE OF COURT PROCESS:** Whether service of Court process on the defendant is a sine qua non to the assumption of jurisdiction by a Court

"...in the process of adjudication in a Court of law, service of processes and hearing notice on the defendant is a sine qua non to the assumption of jurisdiction by a Court except in matters which the laws permit to be heard ex - parte.

In Skenconsult (Nig) Ltd & anor vs Godwin Sekondy Ukey (1981) 1 SC 6, it was held that the service of process on the defendant so as to enable him appear to defend the relief being sought against him and due appearance by the party or any counsel must be those fundamental conditions precedent required before the Court can have competence and jurisdiction. Thus, the Court must satisfy itself of proof of service of8 notice of the hearing before it proceeds to hear the matter and give judgment on the evidence adduced before it. Where a Court fails to do so, and proceeds to hear the case, the proceeding, no matter how well conducted is a nullity. See Alhaji Yusuf Dan Hausa & Co. Ltd vs Panatrade Ltd (1993) 7 SCNJ 100, Olorunyolemi vs Akhagbe (2010) 8 NWLR (pt 1195) 48, Habib Nig Bank Ltd vs Wahab Opomulero & ors (2000) 15 NWLR (pt 690) page 315.

The Court below stated the position of the law succinctly on pages 66 - 67 of the record when Amaizu, JCA, delivering the leading judgment said:

"Having said this, the essence of service of a Court process in a civil suit on a party as in this case, whether personally or by substituted means, is to make that party aware of the reliefs sought against him. And, for that party, if he likes to appear to defend the action brought against him. Consequently, the service of the process is a sine qua non for any effective adjudication of a case. See Mobil Nigeria Plc vs Ezekiel Shut Pam (2000) 5 NWLR (Part 657) p 506. In fact, it is when the process is served on the Parties that a Court has the jurisdiction to hear a case. It follows therefore that failure to serve a party in a case with a hearing date is a fundamental irregularity which vitiates the proceedings."Per OKORO, J.S.C. (Pp. 8-10, Paras. C-A) - read in context

2 **PRACTICE AND PROCEDURE - HEARING NOTICE:** Effect of failure to serve a party with hearing notice

"A Court of law must satisfy itself that all parties had notice of hearing of a matter before it assumes jurisdiction to hear and determine the case. Failure to do so renders the entire proceedings a nullity. See Skenconsult Nig Ltd & anor vs Ukey".Per OKORO, J.S.C. (Pp. 10-11, Paras. F-A) - read in context

3 **CONSTITUTIONAL LAW - RIGHT TO FAIR HEARING:** Implication of the requirement of fair hearing in a matter

"...it is a well settled principle of law that parties to a dispute before a Court of law or any other tribunal for that matter are entitled to a fair hearing. This is a constitutional requirement as enshrined in Section 36(1) of the Constitution of the Federal Republic of Nigeria 1999 (as amended) which states thus:"In the determination of his civil rights and obligations including any question or determination by or against any government or authority, a person shall be entitled to a fair hearing within a reasonable time by a Court or other tribunal established by law and constituted in such manner as to secure its independence and impartiality."

I agree with the learned counsel for the appellant that the requirement of fair hearing implies that each party to a dispute before a Court or tribunal must be afforded adequate opportunity to state his own case. This is what is meant by the principle of audi alterram partem. It is one of the twin pillars of natural justice. Implicit in the requirement of fair hearing is the right of every party to a case before a Court to be given notice of the date and place of hearing, for, according to an African proverb, you cannot shave a man's head in his absence. Even in the Garden of Eden, although God knew that Adam had eaten the forbidden fruit, He still asked him "Hast thou eaten of the tree whereof I commanded thee that thou shouldest not eat?" Gen. 3:11 KJV".Per OKORO, J.S.C. (Pp. 11-12, Paras. B-B) - read in context

4 **PRACTICE AND PROCEDURE - HEARING NOTICE:** Whether failure to serve a party with hearing notice will vitiate the proceedings

"It is trite that failure to serve a party in a case with a hearing notice indicating clearly when and where the Court is to sit is a fundamental irregularity which easily vitiates the proceedings, and makes it a nullity, however well conducted and decided. The defect is extrinsic to the adjudication. See the English decision in CRAIG vs RANSSEN (1943) K. B 25 at pp 262 - 263 cited and relied upon by this Court in SKEN CONSULT (NIG) LTD & ANOR v GODWIN SEKONDY UKEY (1981) 1 SC. pt at p. 15".Per GALADIMA, J.S.C. (P. 14, Paras. A-C) - read in context

5 **PRACTICE AND PROCEDURE - SERVICE OF COURT PROCESS:** Whether service of process is sine qua non for effective adjudication of a case

"I agree with the learned counsel for the appellant that generally the service of process is sine qua non for an effective adjudication of a case. The service on the defendant is to enable him appear to defend the relief being sought against him. Personal appearance by a party or his counsel must be those fundamental conditions precedent required before the Court can have competence and jurisdiction. This accords with the principles of justice and fair hearing enshrined in Section 36{1) of the Constitution of the Federal Republic of Nigeria 1999 (as amended). See ARIYEFA NWOSU vs IBEJIUBA NWOSU (2000) 4 NWLR Pt (653) 3591".Per GALADIMA, J.S.C. (Pp. 14-15, Paras. D-A) - read in context

6 **PRACTICE AND PROCEDURE - HEARING NOTICE:** Whether failure to serve a party with hearing notice will amount to denial of fair hearing

"...the requirement of fair hearing implies that each party to a dispute before a Court or tribunal must be accorded adequate opportunity to state his own side of the case under the principle of "audi alteram partem", an immutable principle and the other leg of natural justice. This position was well expatiated in the case of Ariayefah Nwaosu vs Ibejimba Nwaosu (2000) 4 NWLR (pt. 653) 351 at 359 where it was stated as in this case in hand that the Court cannot without issuing and serving hearing notice on the party affected, proceed to abridge the time and hear evidence in the absence of the party to be affected. See also Obimonure vs Enrinosho & Anor (1966) All NLR 245 at 247

The import of service of process on the defendant is well captured in Skenconsult (Nig.) Ltd & Anor vs Sekondy Ukey (1981) 1 SC 6 wherein this Court held thus:-

"The service of process on the Defendant so as to enable him appear to defend the relief being sought against him and due appearance by the party or any counsel must be those fundamental conditions precedent required before the Court can have competence and jurisdiction. This very well accords with the principles of natural justice".

What I am trying to say in effect is that when there came about that failure to serve notice of the date of hearing on the Appellant it means that the requirement of fair hearing has not been observed and the resultant decision that followed is a nullity and cannot be allowed to stand. See Wema Bank Nigeria Limited & Ors vs S. O. Odutaja & Ors (2000) FWLR (pt. 17) 138 at 142 - 143; A. C. B. Plc vs Losada Nig. & Anor (1995) 7 SCNJ 158 at 167". Per PETER-ODILI, J.S.C. (Pp. 22-23, Paras. D-F) - read in context

7 **CONSTITUTIONAL LAW - RIGHT TO FAIR HEARING:** Effect of denial of fair hearing in a proceeding

"The right to fair hearing is one of the two pillars upon which the principles of natural justice rest:, audi alterem partem (hear the other side) and memo judex in causa sua (let no man be a judge in his own cause). The consequence of the denial of the right to fair hearing is that the proceeding, no matter how well conducted would amount to a nullity and is liable to be set aside. See: Saliu vs Egeibon (1994) 6 NWLR (pt.348) 23 @ 44; Adigun vs A.G. Oyo State (1987)1 NWLR (pt,53) 678".Per KEKERE-EKUN, J.S.C. (P. 25, Paras. B-D) - read in context

8 **PRACTICE AND PROCEDURE - SERVICE OF COURT PROCESS:** Effect of failure to effect service of a process on an opposing party

"It is also settled that parties must be afforded every opportunity to present their case without let or hindrance. See. Alsthom vs Saraki (2005) 1 SC (pt.1) 1 @ 14; Isiyaku Mohammed vs Kano Native Authority (1968) 1 All NLR 424.In this vein, it cannot be gainsaid that service of hearing notice on a party notifying him of the date and place of hearing is a sine qua non for the just disposal of the cause or matter. The service of Court processes on all parties is fundamental. We operate an adversarial system of adjudication. Therefore failure to effect service of a process on an opposing party, where service is required in law, amounts to non-fulfillment of a condition precedent to the exercise of jurisdiction by the Court. It is a fundamental vice that goes to the root of the entire adjudication and renders the proceedings and any order made therein null and void. See: Obimonure vs Erinosho (1966) 2 SCNLR 228: Skenconsult vs Ukey (1981) 1SC 26; A.B.C. Plc vs Losada (1995) 7 SCNJ 158 @ 167; Nwaosu vs Nwaosu (2000) 4 NWLR (pt.653) 351 @ 359".Per KEKERE-EKUN, J.S.C. (Pp. 25-26, Paras. E-C) - read in context

9 **PRACTICE AND PROCEDURE - HEARING NOTICE:** Right of a party to be notified of the dates his matter will be heard

"No matter how tardy a party might be in the prosecution or defence of his case before the Court, he has a constitutional right guaranteed by Section 36 (1) of the 1999 Constitution to be notified of the dates when the cause or matter will be heard". Per KEKERE-EKUN, J.S.C. (Pp. 26-27, Paras. F-A) - read in context

10 **COURT - DUTY OF COURT:** Duty of Court to put a party on notice of the date of an adjourned matter

"The law is trite that a Court should always put a party on notice of date of its adjournment of any matter by sending hearing notice to him/it once he was not in Court or represented on a given previous adjourned date. Whenever proceedings in a case or matter resumes and a party or his counsel is absent, the Court must ascertain whether or not the party absent was aware that the case was coming up on that resumed sitting day. It is not a matter of assumption. Rather, it must be inquired into in open Court and if it became apparent that the party absent was not notified of that day, the Court must adjourn the matter for him/it to appear. see Sunday Melake Rex vs Chief Emmanuel Eyo Inang (2003) FWLR(pt 170) 1469 at 1489 Adebayo Ogundiyin & 2 ors vs David Adeyemi (2001) FWLR(pt 71) 1741 at 1755".Per SANUSI, J.S.C. (Pp. 28-29, Paras. D-B) - read in context

11 **PRACTICE AND PROCEDURE - HEARING NOTICE:** Effect of failure to serve a party with hearing notice

"Failure to serve a hearing notice of date for hearing of a case on a party runs riot and violent to the principle of fair hearing as enshrined in the 1999 Constitution and any proceedings held or taken in the absence of a party who was not put on notice of the date of such proceedings is a nullity and therefore must be annulled. See Motel Nigeria plc vs Ezekiel Shut Pam (2000) 5 MWLR(pt 657) 506 at 529; Wema Bank Nigeria Limited & 2 ors vs S.O. Odulaja & 4 ors (2001) FWLR (pt 17) 138 at 142/143".Per SANUSI, J.S.C. (P. 29, Paras. B-D) - read in context

***JOHN INYANG OKORO, J.S.C.*** **(Delivering the Leading Judgment).:** This an appeal against the judgment of the Court of Appeal Benin Division delivered on 13th February, 2004 wherein the lower Court upheld the judgment of the High Court of Delta State holden at Asaba. At the trial Court, the plaintiff's claims were as follows:

"***(a) A declaration of the Plaintiff is entitled to the grant of statutory right of occupancy in respect of all that parcel of land known as No. 37 Nnebisi Road, Cable Point, Asaba;***

***(b) An injunction to restrain the defendant whether by himself, his servant or agents or otherwise from further entering of demolishing the said house situated at No. 31 Nnebisi Road, Asaba Cable Point, Asaba.***

***c) Three million Naira (N3,000,000,00) special damages for the destruction caused on the property by the defendant,***"

Upon being served with the writ of summons, the appellant as defendant, entered a conditional appearance through his counsel. The respondent who was the plaintiff filed his statement of claim on the 17th day of May, 2001. The appellant did not file his statement of defence. Simultaneously with the filing of statement of claim, the

respondent filed a motion for interlocutory injunction, which was argued in the absence of the appellant and his counsel. It was then adjourned to the 23rd day of July, 2001 for ruling.

On 23rd July, 2001, the learned trial judge delivered his ruling on the respondent's application for interlocutory injunction and adjourned the case to the 9th October, 2001 for mention. Neither the appellant nor his counsel was in Court. On that date, the Court adjourned the case to the 24th October 2001 for hearing. No hearing notice was issued and served on the appellant or his counsel informing them of the date of hearing. As at 9th October, 2001 when the matter was adjourned for hearing to 24th October, 2001, the respondent did not file an application for judgment to be entered against the appellant in default of defence as required by ***Order 27 Rule 8 (1) of the Bendel State High Court (Civil Procedure) Rules 1998*** (as applicable to Delta State). Without serving hearing notice on the appellant, the trial Court heard the case and entered judgment for the plaintiff, now respondent.

In an appeal to the Court of Appeal, the lower Court set out relevant portions of the

proceedings before the trial Court which confirmed non - service of hearing notice on the appellant. The lower Court however, held that since the appellant was aware of the ruling of the trial Court delivered on 23/7/2001 and the order adjourning the case to 9/10/2001 for mention the trial Court was right not to have ordered the service of fresh hearing notice on the appellant or his counsel when the matter was eventually adjourned for hearing on 24th October, 2001.

On the issue whether the trial Court could adjourned the case for hearing when pleadings had not been closed, the Court below referred to ***Order 27 Rule 4 of the Bendel State High Court (Civil Procedure) Rule*** and held that the trial Court was right to have adjourned the case for hearing when pleadings had not been closed and in absence of any application for judgment. The Court then upheld the judgment of the trial Court. The judgment of the Court below was delivered on the 13th day of February,2004 and on 28th, February, 2004, the appellant filed notice of appeal. Three grounds of appeal were filed out of which two issues have been distilled for the determination of this appeal.

The two issues nominated by the appellant are as follows:

'***1. Whether the learned Justices of the Court of Appeal were right in holding that there was no need for the learned trial judge to order the service of hearing notice on the Appellant or his counsel in this case.***

***2. Whether the learned Justices of the Court of Appeal were right in applying the provisions of Order 27(4) of the Bendel State High Court (Civil Procedure) Rules 1988 to the facts of this case.***

The learned counsel for the Respondent also distilled two issues for determination. The two issues are the same as those of the appellant but couched differently as follows:

"***1. Whether the learned Justices of the Court of Appeal were right in holding that "lt is not each time a case is adjourned in the absence of a party that a Court should order fresh notice to be issued on the absenting party...***

"***2. Whether the learned Justices of the Court of Appeal were right in applying the provisions of Order 7(4) of the Bendel State High Court (Civil Procedure) Rules 1988, applicable to Delta State of Nigeria, to the facts of this case***"

Having perused the record of appeal and the briefs filed by both parties, Particularly the issues

formulated for determination, I am of a firm view that issue one in both parties' briefs can effectively determine this appeal and I shall proceed to do so.

Learned counsel for the appellant, P. A. Ogana Esq who prepared the brief submitted on the 1st issue that the view expressed by the learned Justices of the Court of Appeal on pages 70 to 71 of the record that since the appellant filed an appeal against the order of interlocutory injunction made by the trial Court, he was deemed to be aware of that part of the said ruling which adjourned the case to 9/ 10/2001 for mention, really missed the point in issue. According to him, the real issue was whether the appellant had notice of the date the case was fixed for hearing and not the date to which it was adjourned for mention. He opined that even if the appellant was aware that the case was adjourned to 9/10/2011 for mention, since he was not in Court on the said date and was not represented by counsel, it could not be seriously argued that he was aware of the subsequent date of 24/ 10 /2001, to which the case was adjourned for hearing.



Learned counsel further submitted that a Court ought not to assume that a

party served with a Court process at one stage must be aware of the hearing date and that the trial Court owed a duty to examine its record on 24/10 /2001 so as to satisfy itself whether the appellant was served with hearing notice but deliberately chose not to appear in Court or through his counsel. Learned counsel cited the cases of ***Sunday Malaka Rex vs Chief Emmanuel Eyo Inang*** **(2003) FWLR (pt 170) 1469 at 1486,** ***Agene vs Katseen*** **(1998) 3 NWLR (pt 543) 560 at 656 and** ***Adebayo Ogundoyin & 2 Ors vs David Adeyemi*** **(2001) FWLR (part 71) 1741 at 1755.**

It was further submitted that failure to serve the appellant with hearing notice deprived him of his constitutionally guaranteed right to fair hearing. That lack of fair hearing in a trial renders the entire proceedings a nullity no matter how well conducted, relying on the cases of ***Skenconsult Nig Ltd & anor vs Godwin Sekondy Ukey*** **(1981) 1 SC 6 or (2001) 6 NSCQR (Part 11) 1108 at 1119;** ***Marion Obimonure vs Ojumoola Enrinosho & anor*** **(1966) All NLR 245 at 247,** ***African Continental Bank Plc vs Losada Nig. Ltd & anor*****, (1995) 7 SCNJ 158 at 162,** ***Mobil Producing Nig. Plc vs Ezekiel Shut Pam*** **(2000) 5 NWLR (pt 657)**

**506 at 529 *Wema Bank Nig. Ltd vs Odulaja & ors* (2000) FWLR (pt 17) 138 amongst others.**

Learned counsel finally submitted on the issue that since from the records of the trial Court the appellant and his counsel were not in Court on 9/10/2001 when the case was adjourned to 21/10 /2001 for hearing, and there being no record of any previous service of any hearing notice on the appellant. He urged this Court to hold that both the learned trial judge and the Court below were wrong in holding that it was not necessary to serve hearing notice on the appellant.

In his response, the learned counsel for the respondent, **Okey Anwadike Esq** submitted that the Court below was right to hold that the Learned trial judge had the jurisdiction to hear the matter since the appellant was served all the processes filed in this suit. Also that the learned trial judge complied fully with the Provisions of ***S. 36(1) of the 1999 Constitution of the Federal Republic of Nigeria*** in hearing the case when he did, thereby ensuring that the patties were given fair hearing within reasonable time.

Learned counsel further submitted that the appellant, by his conduct intended to delay the hearing of

the suit within a reasonable time. According to him, this appeal is based on mere technicalities. That Courts now do substantial justice, relying on the case of ***Mathew Obakpolor vs The State*** **(1991) 1 SCNJ 91 at 104; *Jonason Triangle Ltd & anor vs Charles Moh & Partnels Ltd*** **(2002) 10 SCNJ, 1.** According to learned counsel, the cases cited by the appellant's counsel do not apply to this case. He urged the Court to resolve this issue against the appellant.

In resolving this issue, let me state categorically that in the process of adjudication in a Court of law, service of processes and hearing notice on the defendant is a ***sine qua non*** to the assumption of jurisdiction by a Court except in matters which the laws permit to be heard ***ex - parte.***

In ***Skenconsult (Nig) Ltd & anor vs Godwin Sekondy Ukey*** **(1981) 1 SC 6,** it was held that the service of process on the defendant so as to enable him appear to defend the relief being sought against him and due appearance by the party or any counsel must be those fundamental conditions precedent required before the Court can have competence and jurisdiction. Thus, the Court must satisfy itself of proof of service of

notice of the hearing before it proceeds to hear the matter and give judgment on the evidence adduced before it. Where a Court fails to do so, and proceeds to hear the case, the proceeding, no matter how well conducted is a nullity. See ***Alhaji Yusuf Dan Hausa & Co. Ltd vs Panatrade Ltd*** **(1993) 7 SCNJ 100,** ***Olorunyolemi vs Akhagbe*** **(2010) 8 NWLR (pt 1195) 48,** ***Habib Nig Bank Ltd vs Wahab Opomulero & ors*** **(2000) 15 NWLR (pt 690) page 315.**

The Court below stated the position of the law succinctly on pages 66 - 67 of the record when Amaizu, JCA, delivering the leading judgment said:

***"Having said this, the essence of service of a Court process in a civil suit on a party as in this case, whether personally or by substituted means, is to make that party aware of the reliefs sought against him. And, for that party, if he likes to appear to defend the action brought against him. Consequently, the service of the process is a sine qua non for any effective adjudication of a case. See Mobil Nigeria Plc vs Ezekiel Shut Pam (2000) 5 NWLR (Part 657) p 506. In fact, it is when the process is served on the Parties that a Court has the jurisdiction to hear a case. It follows***

***therefore that failure to serve a party in a case with a hearing date is a fundamental irregularity which vitiates the proceedings."***

I am surprised that the lower Court, having brilliantly stated the principle of law above, went into grave error to hold that the learned trial judge was right to have heard the case on 24/10/2001 without a hearing notice being served on the appellant. In coming to that conclusion, the Court below held as follows:

***"It is not each time a case is adjourned in the absence of a party that a Court should order fresh hearing notice to be issued on the absenting party."***

With due respect to the Court below, I do not agree. The record of appeal shows that when the case was adjourned to 9/10/2001, it was for mention. Appellant was not in Court on that date. Neither was his counsel in Court. The matter was subsequently on 9/10/2001 adjourned to 24/10/20011for hearing. No hearing notice was issued the appellant or his counsel and none was served on them.

There is no dispute about the facts as presented. Even the Court below was able to honestly state the facts and the law as it is. A Court of law must satisfy itself that all parties had notice of

hearing of a matter before it assumes jurisdiction to hear and determine the case. Failure to do so renders the entire proceedings a nullity. **See *Skenconsult Nig Ltd & anor vs Ukey* (supra).**

Moreso, it is a well settled principle of law that parties to a dispute before a Court of law or any other tribunal for that matter are entitled to a fair hearing. This is a constitutional requirement as enshrined in ***Section 36(1) of the Constitution of the Federal Republic of Nigeria 1999 (as amended)*** which states thus:

***"In the determination of his civil rights and obligations including any question or determination by or against any government or authority, a person shall be entitled to a fair hearing within a reasonable time by a Court or other tribunal established by law and constituted in such manner as to secure its independence and impartiality."***

I agree with the learned counsel for the appellant that the requirement of fair hearing implies that each party to a dispute before a Court or tribunal must be afforded adequate opportunity to state his own case. This is what is meant by the principle of ***audi alterram partem.*** It is one of the twin pillars of natural justice.

Implicit in the requirement of fair hearing is the right of every party to a case before a Court to be given notice of the date and place of hearing, for, according to an African proverb, you cannot shave a man's head in his absence. Even in the Garden of Eden, although God knew that Adam had eaten the forbidden fruit, He still asked him "Hast thou eaten of the tree whereof I commanded thee that thou shouldest not eat?" Gen. 3:11 KJV.

My deduction in this matter is that the learned trial judge was infuriated by the way and manner the appellant conducted his defence before him and he felt he did not require any hearing notice. The Court below also fell into the same error.



Since the record shows that the appellant and his counsel were not in Court on 9/10/2001 when the case was adjourned to 24/10/2001 for hearing and there is no record of any previous service of hearing notice on the appellant, this was a deserving case for issuance of hearing notice. The Learned trial judge was in error when he failed to order that hearing notice be issued on the appellant, his intransigence notwithstanding.

Also, the learned Justices of the Court of Appeal, having examined the

record as they did, and failed to see any evidence of service of hearing notice on the appellant or his counsel, were also in error to have upheld the decision of the trial judge which is tainted with a fundamental vice and is therefore a nullity. I accordingly resolve this issue in favour of the appellant.

Having resolved this issue in favour of the appellant, and that the entire proceeding was a nullity, there is no need to go into the next issue which is just going to be an academic exercise. I hold that this appeal is meritorious and is hereby allowed. I set aside the judgment of the Court below delivered on 13th February, 2004, which upheld the judgment of the trial Court. I order that suit No A/ 42/2001 be remitted back to the Chief Judge of Delta State to be heard *de novo* by a Judge of the Delta State High Court except Hon. Justice P. M. Okoh who heard this case earlier. There shall be no order as to costs.



***SULEIMAN GALADIMA J.S.C.*:**

I have read before now the judgment of my brother *OKORO JSC*, just delivered.

One unfortunate aspect of this suit which was of declaration of title to a piece of land in Asaba instituted by the

respondent as plaintiff since sixteen years ago, has not till date seen the light of the day, for the simple reason that there had not been a valid hearing, notice served on the appellant. It is trite that failure to serve a party in a case with a hearing notice indicating clearly when and where the Court is to sit is a fundamental irregularity which easily vitiates the proceedings, and makes it a nullity, however well conducted and decided. The defect is extrinsic to the adjudication. See the English decision in ***CRAIG vs RANSSEN*** *(1943) K. B 25 at pp 262 - 263 cited and relied upon* by this Court in ***SKEN CONSULT (NIG) LTD & ANOR v GODWIN SEKONDY UKEY*** *(1981) 1 SC. pt at p. 15.*



I agree with the learned counsel for the appellant that generally the service of process is sine qua non for an effective adjudication of a case. The service on the defendant is to enable him appear to defend the relief being sought against him. Personal appearance by a party or his counsel must be those fundamental conditions precedent required before the Court can have competence and jurisdiction. This accords with the principles of justice and fair hearing enshrined in ***Section 36(1)***

*of the Constitution of the Federal Republic of Nigeria 1999 (as amended)*. See *ARIYEFA NWOSU vs IBEJIUBA NWOSU* **(2000) 4 NWLR Pt (653) 3591**.

In the case at hand the record shows that since the appellant were not in Court on 9th October, 2001 when the case was adjourned to 24th October, 2001 for hearing and there was no record of any previous service of hearing notice on him, the learned trial judge was in error when he failed to order that fresh hearing notice be issued on the appellant or his counsel. The Court below having examined the records and could not see any evidence of service of hearing notice on the appellant or his counsel, it was also in error to have upheld the decision of the learned trial judge.
This has vitiated the entire proceedings.



Flowing from the above, I agree with my learned brother *OKORO JSC* with the order made by him setting aside the judgment of the Court below. In effect the appeal has merit. I too will allow it, and I order that Suit No. A/42/2001 be remitted to the Chief Judge of Delta State High Court for expeditious disposal of this suit. I make no order as to costs.

***MARY UKAEGO PETER-ODILI J.S.C.*** **:**

I am in agreement with my learned brother, John Inyang Okoro delivered and in support of the reasonings, I shall make some remarks.

This is an appeal by the Defendant/Appellant against the decision of the Court of Appeal, Benin Division which had on 13th day of February 2004 upheld the decision of P. M. Okoh J. sitting at the High Court, Asaba, Delta State.

The claims before the High Court are stated hereunder, viz:- **a)A declaration that the plaintiff is entitled to the grant of statutory right of occupancy in respect of all that parcel of land known as NO, 31, Nnebisi Road, Cable point, Asaba.**

**b)An injunction to restrain the Defendant whether by himself, his servants or agents or otherwise from further entering and demolishing the said house situate at NO.31, Nnebisi Road Asaba, Cable point, Asaba.**

**c)Three Million Naira (N3,OOO,OOO,OO)special damages for the destruction caused on the property by the Defendant".**



The background facts of this appeal are well stated in the leading judgment and there is no point repeating them.

The learned counsel for the Appellant, H.P. Ogbole Esq. adopted the Brief of the Appellant settled by P.A, Ogana Esq. and filed on the 8/10/04 in

which were formulated two issues which are as follows:-

**1.Whether the learned Justices of the Court of Appeal were right in holding that there was no need for the learned trial Judge to order the service of hearing notice on the Appellant or his counsel in this case.**

**2.Whether the learned Justices of the Court of Appeal were right in applying the provisions of *Order 27 (4) of the Bendel State High Court (Civil Procedure) Rules 1988* to the facts of this case.**

Mr. Anwadike of counsel for the Respondent adopted his Brief of Argument filed on the 1/12/04. He distilled two issues for determination which are thus:-

**1.Whether the learned Justices of the Court of Appeal were right in holding that "It is not each time a case is adjourned in the absence of a party that a Court should order fresh hearing notice to be issued on the absenting party....".**

**2.Whether the learned Justices of the Court of Appeal were right in applying the provisions of *Order 27 (4) of the Bendel State High Court (Civil Procedure) Rules1988*, applicable to Delta State Nigeria to the facts of this case.**

I shall confine myself to issue No. 1, which is thus:-

**Whether the learned Justices of the Court**

**of Appeal were right in holding that there was no need for the learned trial Judge to order the service of hearing notice on the Appellant or his counsel this case.**

Learned counsel for the Appellant contended that the learned justices of the Court of Appeal correctly identified the judicial and jurisdictional importance of service of hearing notice vis-a-vis the competence of the entire proceedings but that they were right to say that since the Appellant filed an appeal against an interlocutory injunction order by the trial Court, he was deemed to be aware of that part of the said ruling which adjourned the case to 9/10/2001 for mention missed the point issued. That the issue was whether the Appellant had notice of the date of the case was fixed for hearing and not the date to which it was adjourned for mention. That it is well settled that each party to a dispute before a Court of law or any other tribunal is entitled to a fair hearing. He cited ***Sunday Malaka Rex vs Chief Emmanuel Eyo Inang*** (2003) FWLR (Pt. 170) 1469 at 1486; ***Agena vs Katseen*** (1998) 3 NWLR (Pt. 543) 560 at 656; ***Section 36 (1) of the Constitution,1999.***

It was contended for the Appellant that

the Court of Appeal Justices having examined the records and failed to see any evidence of service of hearing notice on the Appellant or his counsel were also in error to have upheld the decision of the trial judge, which tainted with a fundamental vice and therefore a nullity.

For the Respondent, it was submitted that the Appellant was served with the Respondent's claim together with the summons and he entered a conditional appearance, That he was also served with the Respondent's notice for interlocutory injunction and appointment of a receiver to manage the property in dispute pending the determination of the suit and so the Court of Appeal was correct holding that the essence of service of a Court process in a civil suit on a party as in this case is to make that party aware of reliefs sought against him. Also for that party if he likes to appear to defend the action brought against him.



Learned counsel for the Respondent said the learned trial judge had the jurisdiction to hear the matter since the Appellant was served all the processes filed in the suit and that ***Section 36 (1) of the 1999 Constitution*** was complied with when the trial judge heard the case.

He said the Court of Appeal was right affirming what the Court of first Instance did. That the Appellant by his conduct intended to delay the hearing of the suit within a reasonable time and this appeal is based on mere technicalities. He cited ***Mathew Obakpolor vs The State*** (1991) 1 5CNJ 91 at 104; ***Johnson Triangles Ltd & Anor vs Charles Moh & Partbers Ltd*** (2002) 10 SCNJ.

At the root of this matter from the beginning and now is whether the guaranteed fair hearing was made available to the Appellant at the commencement of the suit. That is, if the provisions of ***Section 36 (1) of the 1999 Constitution of the Federal Republic of Nigeria*** had been compiled with, I shall cite that Section for emphasis and thus:-

**"36 (1) - in the determination of his civil rights and obligations, including any question or determination by or against any government or authority, a person shall be entitled to a fair hearing within a reasonable time by a Court or other tribunal established by law and constituted in such manner as to secure its independence and impartiality".**

In considering whether or not that constitutional right that is due to the Appellant was not breached, a

recourse to the facts leading to this appeal would be helpful and that is that, after the Appellant was served with the writ of summons, the Appellant entered a conditional appearance through his counsel. The Respondent then filed his statement of claim on the 17th day of May, 2001 with the Appellant yet to file his statement of defence, with the statement of claim, the Respondent had filed a motion for interlocutory injunction which was argued in the absence of the Appellant and his counsel and adjourned to 23rd July 2001 for ruling and on that day the ruling was delivered with the injunction granted and the matter adjourned to 9/10/2001 for mention. At the ruling neither the Appellant nor his counsel was in Court. On that adjourned date of 9th October, 2001 Appellant and counsel were absent and the Court adjourned for hearing for the 24th October 2001 and no hearing notice was issued. on that 24th October,2001 when the hearing took place the learned trial judge did not ascertain whether the Appellant or his counsel was aware of that date of hearing but the Court proceeded and entered judgment for the Appellant.



To these facts, the Respondent's stance is that

the Appellant being aware that the Court processes were in Court, there was no need for a hearing notice for the date of hearing and the conditions intended ***Section 36(1) of the Constitution*** were concerned. That not being present on that hearing date, the Appellant is taken to have by conduct voluntarily opted out of the trial. The appellant disagreeing with that position contends that there was a breach of fair hearing to the disadvantage of the Appellant sufficient to vitiate the proceedings as a hearing notice for that date of hearing was not optional but mandatory. The Court of Appeal agreed with the position of the Respondent, which stance I cannot go along with.



I say so because the requirement of fair hearing implies that each party to a dispute before a Court or tribunal must be accorded adequate opportunity to state his own side of the case under the principle of "*audi alteram partem*", an immutable principle and the other leg of natural justice. This position was well expatiated in the case of ***Ariayefah Nwaosu vs Ibejimba Nwaosu*** (2000) 4 NWLR (pt. 653) 351 at 359 where it was stated as in this case in hand that the Court cannot without issuing and

serving hearing notice on the party affected, proceed to abridge the time and hear evidence in the absence of the party to be affected. See also ***Obimonure vs Enrinosho & Anor*** **(1966) All NLR 245 at 247.**

The import of service of process on the defendant is well captured in ***Skenconsult (Nig.) Ltd & Anor vs Sekondy Ukey*** (1981) 1 SC 6 wherein this Court held thus:-

**"The service of process on the Defendant so as to enable him appear to defend the relief being sought against him and due appearance by the party or any counsel must be those fundamental conditions precedent required before the Court can have competence and jurisdiction. This very well accords with the principles of natural justice".**

What I am trying to say in effect is that when there came about that failure to serve notice of the date of hearing on the Appellant it means that the requirement of fair hearing has not been observed and the resultant decision that followed is a nullity and cannot be allowed to stand. See ***Wema Bank Nigeria Limited & Ors vs S. O. Odutaja & Ors*** (2000) FWLR (pt. 17) 138 at 142 - 143; ***A. C. B. Plc vs Losada Nig. & Anor*** (1995) 7 SCNJ 158 at 167.

The conclusion of

what transpired is that the proceedings at the Court of trial are a nullity which cannot be permitted to stand. From the foregoing and the better reasoning in the leading judgment, this appeal is allowed as I abide by the consequential orders made.

***KUDIRAT MOTONMORI OLATOKUNBO KEKERE-EKUN, J.S.C.*:** My learned brother, OKORO, JSC has obliged me with a draft of the judgment just delivered. I agree with his reasoning and conclusions that the appeal has merit and should be allowed.

The facts leading to this appeal have been adequately summarised in the leading judgment. I adopt the summary. Although the appellant formulated two issues for determination, I am in agreement with my learned brother, OKORO, JSC, that the first issue, if resolved in the appellant's favour is capable of determining the entire appeal.

The crux of this appeal is whether a party who was aware of a date fixed for ruling in an application was entitled to be served with hearing notice in respect of subsequent adjournments of the case made in his absence. The appellant's contention is that his right to fair hearing was breached when the trial Court failed to order hearing

notices to be served on him when the case was adjourned on 9/10/2001 to 24/10/2001 for hearing and on 24/10/2001 when the case was adjourned to 31/10/2001 to enable the plaintiff close his case. He contends that he was also entitled to be served with hearing notice when, on 31/10/2001, the Court reserved judgment 1/11/2001.

The right to fair hearing is one of the two pillars upon which the principles of natural justice rest:. *audi alterem partem* (hear the other side) and *memo judex in causa sua* (let no man be a judge in his own cause). The consequence of the denial of the right to fair hearing is that the proceeding, no matter how well conducted would amount to a nullity and is liable to be set aside. See: ***Saliu vs Egeibon*** **(1994) 6 NWLR (pt.348) 23 @ 44;** ***Adigun vs A.G. Oyo State*** **(1987)1 NWLR (pt,53) 678.**



It is also settled that parties must be afforded every opportunity to present their case without let or hindrance. See. ***Alsthom vs Saraki*** **(2005) 1 SC (pt.1) 1 @ 14;** ***Isiyaku Mohammed vs Kano Native Authority*** **(1968) 1 All NLR 424.**

In this vein, it cannot be gainsaid that service of hearing notice on a party notifying him of the date and place of hearing is a *sine*

*qua non* for the just disposal of the cause or matter. The service of Court processes on all parties is fundamental. We operate an adversarial system of adjudication. Therefore failure to effect service of a process on an opposing party, where service is required in law, amounts to non-fulfillment of a condition precedent to the exercise of jurisdiction by the Court. It is a fundamental vice that goes to the root of the entire adjudication and renders the proceedings and any order made therein null and void. See: ***Obimonure vs Erinosho*** **(1966) 2 SCNLR 228:** ***Skenconsult vs Ukey*** **(1981) 1SC 26;** ***A.B.C. Plc vs Losada*** **(1995) 7 SCNJ 158 @ 167;** ***Nwaosu vs Nwaosu*** **(2000) 4 NWLR (pt.653) 351 @ 359.**



The record in this case shows that on 9/10/2001 and 31/1A/2001, the appellant was absent and unrepresented by counsel. There was no order for hearing notice to be issued to him against each of the subsequent adjourned dates. Notwithstanding the fact that the ruling delivered on 23/7/2001 contained the next adjourned date of 9/10/2001, as the appellant was not in Court when the ruling was delivered, an order for service of hearing notice on him ought to have been made.

No matter how tardy a

party might be in the prosecution or defence of his case before the Court, he has a constitutional right guaranteed by ***Section 36 (1) of the 1999 Constitution*** to be notified of the dates when the cause or matter will be heard.

I therefore agree with my learned brother, OKORO, JSC, in the leading judgment that the appellant's right to fair hearing was breached by non-service on him of hearing notices in this case. The proceedings before the trial Court therefore amounted to a nullity and the Court below lacked jurisdiction to affirm it.

I therefore allow the appeal and abide by the consequential orders made in the leading judgment, inclusive of costs.

***AMIRU SANUSI J.S.C.*:** I read in advance, the judgment of my brother **John Inyang Okoro JSC** just rendered. I am at one with his reasons and conclusion.

As could be gathered from the record of appeal it is as clear as crystal and as shown in the printed record of appeal that when the motion for injunction filed by the respondent at the trial tribunal Court neither the appellant nor his counsel was in Court to argue it. After hearing the motion, the trial Court

adjourned the matter to 23rd July, 2001 for ruling.

On that 23/7/2001 ruling on the motion was delivered and the Court then adjourned the matter to 9/10/2001 for mention also in the absence of the appellant and his counsel. But on further adjourned the matter for hearing it did not order that hearing notice should be served on the appellant either. It then further adjourned the matter to 24/10/2006 and the trial Court without ascertaining whether the appellant or his counsel was aware that the case was fixed for that day for hearing before it proceeded with the hearing in the case. There was however no record to show that the appellant or his counsel was aware of the dates of 9/10/2001 and 24/10/2001, as none of them was put on notice.



The law is trite that a Court should always put a party on notice of date of its adjournment of any matter by sending hearing notice to him/it once he was not in Court or represented on a given previous adjourned date. Whenever proceedings in a case or matter resumes and a party or his counsel is absent, the Court must ascertain whether or not the party absent was aware that the case was coming up on that resumed sitting day. It

is not a matter of assumption. Rather, it must be inquired into in open Court and if it became apparent that the party absent was not notified of that day, the Court must adjourn the matter for him/it to appear. see ***Sunday Melake Rex vs Chief Emmanuel Eyo Inang*** (2003) FWLR(pt 170) 1469 at 1489 ***Adebayo Ogundiyin & 2 ors vs David Adeyemi*** (2001) FWLR(pt 71) 1741 at 1755.

Failure to serve a hearing notice of date for hearing of a case on a party runs riot and violent to the principle of fair hearing as enshrined in the 1999 Constitution and any proceedings held or taken in the absence of a party who was not put on notice of the date of such proceedings is a nullity and therefore must be annulled. See ***Motel Nigeria plc vs Ezekiel Shut Pam*** (2000) 5 MWLR(pt 657) 506 at 529; ***Wema Bank Nigeria Limited & 2 ors vs S.O. Odulaja & 4 ors*** (2001) FWLR (pt 17) 138 at 142/143.



In this instant appeal, evidence abound that the appellant was not notified of the hearing dates but yet the trial Court decided to proceed with the hearing in the matter in his absence or that of his counsel. The proceedings are therefore, for those lapses, rendered a nullity. The lower Court was

A therefore wrong in affirming the decision of in the light of those glaring lapses.

B For these few remarks and the elaborate reasons advanced in the leading judgment of my learned brother **John Inyang Okoro JSC**, I also see merit in this appeal and I accordingly allow it. The judgment of the Court below affirming the decision of the trial Court is hereby set aside. I abide by the consequential order made in the leading judgment including one on costs.

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