**A.P.C**

**V.**

**NDUUL**

SUPREME COURT OF NIGERIA

FRIDAY, 19 MAY 2017

SC. 332/2016

**LEX (2017) - SC. 332/2016**

**OTHER CITATIONS**

3PLR/2017/3 (SC)

**BEFORE THEIR LORDSHIPS:**

MARY UKAEGO PETER-ODILI, JSC (Presided)

OLUKAYODE ARIWOOLA, JSC

KUMAI BAYANG AKAAHS, JSC

PAUL ADAMU GALINJE, JSC (Read the Lead Judgment)

SIDI DAUDA BAGE, JSC

**BETWEEN:**

ALL PROGRESSIVES CONGRESS (APC)

**AND**

1. ENGINEER GEORGE T. A. NDUUL

2. BARR. BENJAMIN WAYO

3. INDEPENDENT NATIONAL ELECTORAL COMMISSION (INEC)

**ORIGINATING COURT(S)**

1. THE COURT OF APPEAL, MAKURDI DIVISION, BENUE STATE (an interlocutory ruling delivered on 13 April 2016)

**2.** FEDERAL HIGH COURT, MAKURDI, BENUE STATE

**REPRESENTATION/LAWYERS**

Mr. S. A. Akpehe Esq. (with him, V. T. Uji Esq. and I. R. Adekwagh Esq.) - for the Appellant.

Mr. Alex Ejesieme Esq. (with him, Uchenna C. Oparaugo Esq., Prosperity Nwachukwu Esq., P. D. Adi Esq., C. N.Udengwu Esq., and J. T. Damsa Esq.) - for the 1st Respondent.

Mr. G. T. Yango Esq. (with him, Barr. Benjamin Wayo Esq.) - For the 2nd Respondent.

Mr. Ahmed Raji SAN (with him, Tunde Babalola Esq. And Adeola Adedipe Esq.) - for the 3rd Respondent.

**ISSUES FROM THE CAUSE(S) OF ACTION**

ELECTORAL MATTERS – NOMINATION OF CANDIDATE BY POLITICAL PARTY:- Challenge of a nomination of a candidate for general election made by a political party – Ground that said nominee was not qualified to contest the primary election of the party – How treated

ELECTION MATTERS – INTERLOCUTORY APPLICATION:- Service of process – Hearing notice – Judgment given on basis that party was served notice but failed to put in an appearance – Rebuttal of – Legal effect

CONSTITUTIONAL LAW AND HUMAN RIGHTS LAW - FAIR HEARING:– Lack of – How determined – Failure to serve hearing notice on a party - Implication for competency of court proceeding and reached – Whether correctness of decision reached can cure the defect

**PRACTICE AND PROCEDURE ISSUES**

APPEAL:- Ground of appeal – Rule that ground of appeal must relate to decision of court appealed against - Where ground of appeal raises issue of jurisdiction – Whether exception thereto

APPEAL:- Ground of appeal – Where relates to service of court of process - Whether requires leave of court to raise same on appeal

JUDGMENT AND ORDER - FAIR HEARING:- Determination of court lacking thereof – Legal validity of – Whether correctness of decision reached irrelevant

JUDGMENT AND ORDER:- Decision of court - Whether can be set subsequently aside by the same court on ground for being void.

JURISDICTION:- Essence and fundamental nature of – How determined - Where lacking – Effect of - Whether can be waived.

SERVICE OF PROCESSES:- Requirement that service be served on the other party – Failure thereto – Whether fatal

**CASE SUMMARY**

ORIGINATING FACTS AND CLAIMS

The 1st Respondent/Plaintiff challenged the nomination of the 2nd respondent by the Appellant to contest the primary election of the appellant for Kwande/Ushongo Federal Constituency, Benue State for the Federal House of Representatives on the ground that the 2nd respondent was not qualified to contest the election. The trial court dismissed his claims.

Dissatisfied, the 1st Respondent/Plaintiff appealed to the Court of Appeal and thereafter applied via a motion on notice for an interlocutory order of the court that the appeal be determined based on Respondent/Plaintiff’s brief alone on grounds that the Respondents failed to file their briefs within the time allowed. The Court of appeal granted the prayer.

DECISION(S) APPEALED AGAINST

The Court of Appeal, Makurdi Division gave an interlocutory ruling in favour of the Appellant, ordering that the substantive appeal filed by the 1st Respondent/Plaintiff be determined solely on his brief on grounds that despite being served, the Appellant had failed to file their reply brief.

ISSUE(S) FOR DETERMINATION ON APPEAL

*BY APPELLANT:*

“1. Whether non-service of requisite court process on the appellant cloth the lower court with jurisdiction to have heard and granted 1st respondent’s motion and whether service of a motion which was filed on 11 April 2016 and same heard and granted on 13 April 2016 which was not ripe for hearing occasioned fair hearing on the appellant.

2. Whether the lower court was right to have assured jurisdiction to have granted any application in CA/MK/ 16/2016 on 13 2016 without meeting the condition precedent impose (sic) by law.”

*BY RESPONDENTS*

1ST RESPONDENT

Formulated a single issue thus:

“Considering the fact that the appellant was served with another copy of 1st respondent’s appellant brief of argument in the open court, afforded enough time and enjoined by the justices of the Court of Appeal to file his respondent’s brief after denying earlier service of 1st respondent’s brief of the appellant at the lower court, whether the appellant could still complain of denial of fair hearing and/or pursue the present interlocutory appeal.”

3RD RESPONDENT

[Adopted the two issues formulated by the appellant.]

BY THE COURT

The Court disposed of the appeal based on a sole issue distilled by it viz:

“Whether the lower court had jurisdiction to hear and determine the application filed on 11 April 2016”

DECISION OF SUPREME COURT

1. Even though the appellant admitted that the motion dated and filed on 11 April 2016 was served on it, on the same date that is not borne out by the record of appeal, as the motion that is admittedly served on the appellant is different from the one served on it.

2. The issue of non-service of the 1st respondents brief of argument on the appellant was raised by the appellant. This information was not available to the lower court and therefore was not capable of influencing its decision. The failure to serve the motion on notice dated and filed on 11 April 2016 on the appellant has rendered the ruling of the lower court null and void. The sole issue formulated by me is hereby resolved in favour of the appellant. Accordingly, this appeal shall be and it is hereby allowed. The ruling of the lower court delivered on 13 April 2016 is set aside. There shall be no order on costs.

Appeal allowed

**MAIN JUDGMENT**

**GALINJE JSC** (Delivering the Lead Judgment):

This is an interlocutory appeal against the ruling of the Court of Appeal, Makurdi Division which was delivered on 13 April 2016. Learned counsel for the 1st respondent herein who was the appellant at the lower court, by a motion on notice filed on 11 April 2016, sought for the following prayers:

“An order of this honourable court to hear the appeal in appeal No: CA/MK/16/2016 between Engr. George T. A. Nduul v. Barr. Benjamin Wayo solely on the appellant/applicant’s brief of argument.”

When this application came up, the 1st respondent who was the applicant was in court. The appellant herein and the 2nd and 3rd respondents who were respondents at the lower court were absent. The Registrar informed the court that the respondents were served with hearing notice on 23 March 2016. Since the respondents were on notice and failed to put up appearance, the lower court proceeded to hear learned counsel for the appellant, who moved in terms of the sole prayer as reproduced elsewhere in this judgment.

Thereafter, their lordships, Omoleye, Ogbuinya and JomboOfo JJCA, ruled as follows:

“The appellant/applicant’s application is granted as prayed. The appeal is adjourned to 28 April 2016 for hearing. Hearing notice to issue on all the respondents.”

It is against this ruling that the appellant who was the 2nd respondent at the lower court has brought this appeal. Its notice of appeal at pages 51-54 of the printed record of this appeal contains three (3) grounds of appeal. I reproduce these grounds of appeal without their particulars as follows:

“1. The lower court (Court of Appeal) erred in law, when it heard the application of the 1st respondent and granted same, that the appeal of the 1st respondent before it be heard on the 1st respondent’s brief, without giving the appellant fair hearing and this occasioned a miscarriage of justice.

2. The lower court erred in law, when it came to conclusion that the appellant was served with the requisite process before it, warranting the hearing of the appeal of the 1st respondent on his brief of argument alone, and this occasioned a miscarriage of justice.

3. The Court of Appeal lacked the jurisdiction to have entertained the application of the appellant, to have his appeal heard on the basis of his brief of argument alone, when the brief of argument was not served on the appellant and even the application that was heard and granted by the lower court was not ripe for hearing for the lower court to have entertain (sic) same against the 2nd respondent before the lower court.”

Parties filed and exchanged briefs of argument. At page 2 of the appellant’s brief of argument settled by V. T. Uji Esq., of counsel for the appellant, and filed on 13 June 2016, but deemed filed on 11 January 2017, two issues for determination of this appeal were formulated as follows:

“1. Whether non-service of requisite court process on the appellant cloth the lower court with jurisdiction to have heard and granted 1st respondent’s motion and whether service of a motion which was filed on 11 April 2016 and same heard and granted on 13 April 2016 which was not ripe for hearing occasioned fair hearing on the appellant.

2. Whether the lower court was right to have assured jurisdiction to have granted any application in CA/MK/ 16/2016 on 13 2016 without meeting the condition precedent impose (sic) by law.”

The 1st issue is said to have been formulated from the 1st and 2nd grounds of appeal, while the 2nd issue is formulated from the 3rd ground of appeal.

The 1st respondent’s brief of argument filed on 10 January 2017 and deemed filed on 11 January 2017 is settled by Alex Ejesieme Esq. of counsel for the 1st respondent. At page 6 of the brief aforesaid, a preliminary objection to the competence of this appeal is issued as follows:

“Take notice that the 1st respondent shall contend as a preliminary objection that grounds 1, 2 and 3 of the notice of appeal dated 21 April 2016 and filed on the same day are grounds of mixed law and fact, for which no leave of court was obtained and therefore, incompetent, as well as the two issues distilled therefrom.

The 1st respondent shall also contend that ground two of the notice and grounds of appeal did not arise from the decision of the Court of Appeal.”

Learned counsel argued the preliminary objection at pages 6 - 8 of the 1st respondent’s brief of argument, and in case the preliminary objection is overruled, he thereafter formulated one issue for determination of this appeal, as follows:

“Considering the fact that the appellant was served with another copy of 1st respondent’s/appellant’s brief of argument in the open court, afforded enough time and enjoined by the justices of the Court of Appeal to file his respondent’s brief after denying earlier service of 1st respondent’s appellant’s brief of argument at lower court, whether the appellant could still complain of denial of fair hearing and/or pursue the present interlocutory appeal.”

The 3rd respondent’s brief of argument, settled by Ahmed Raji SAN, was filed on 15 December 2016, but deemed filed on 11 January 20117. Learned senior counsel merely adopted the two issues formulated by the appellant’s learned counsel. The 2nd respondent did not file any brief of argument. Learned counsel for the appellant filed a reply brief to the 1st respondent’s brief of argument on 7 February 2017.

I will consider the preliminary objection before I consider the argument of parties in respect of the main appeal. In arguing the preliminary objection, learned counsel for the 1st respondent submitted that the 1st, 2nd and 3rd grounds of appeal are of mixed law and fact for which no leave of either the lower court or this court was obtained before raising them. According to the learned counsel, the three grounds of appeal aforesaid are incompetent for failure of the appellant to apply for and obtain leave before they were filed. In aid, learned counsel cited section 233(1)(2)(a) of the 1999 Constitution of the Federal Republic of Nigeria, (as amended) and the authorities in KTP Ltd v. G & H Nigeria Ltd (2005) 13 NWLR (Pt. 943) 680; Ojeme v. Momodu (1983)1 SCNLR 188 at 205; Maigoro v. Garba (1999)10 NWLR (Pt. 624) 555 at 568; Akwiwu Motors Ltd v. Sangonuga (1984) 5 SC 184 at 188; Ekunola v. C.B.N. (2013) All FWLR (Pt. 703) 1861, (2013) 15 NWLR (Pt. 1377) 324 at 260, paragraphs E - F.

In a further argument, learned counsel submitted that the 2nd ground of appeal did not arise from the decision of the Court of Appeal. It is the learned counsel’s contention that a ground of appeal that does not arise and flow or related to the judgment against which the appeal lies is incompetent and the court can not listen to the appellant.

In support of the argument herein, learned counsel cited Odom v. People’s Democratic Party (2015) All FWLR (Pt. 773) 1962, (2015) 6 NWLR (Pt. 1456) 527 at 551, paragraphs C - D; Veepee Industries Limited v. Cocoa Industries Ltd (2008) All FWLR (Pt. 425) 1667, (2008)13 NWLR (Pt. 1105) 486; Ogbe v. Asade (2009) 18 NWLR (Pt. 1172) 106, Oriorio v. Osain (2012) All FWLR (Pt. 636) 437, (2012) 16 NWLR (Pt. 1329) 560; Adeogun v. Fasogbon (2011) All FWLR (Pt. 576) 485, (2011) 8 NWLR (Pt. 1250) 427. Still in argument, learned counsel submitted that the appellant’s 1st issue is distilled from incompetent ground 2 which did not arise from and related to the decision of the lower court and the first ground of appeal, as such it is incompetent also. Finally, learned counsel urged this court to dismiss the appeal.

In reply, learned appellant’s counsel submitted that the three grounds of appeal are complaining that the lower court has no jurisdiction to hear and determine the motion on notice filed on 11 April 2016 and that the appellant, 2nd and 3rd respondents were not given fair hearing at the lower court. According to the learned counsel, an appellant whose grounds of appeal complain about lack of jurisdiction on the part of the court that handled his matter and a breach of his fundamental right does not require leave to raise and file such grounds of appeal.

In aid, learned counsel cited Elugbe v. Omokhafe (2004)18 NWLR (Pt. 905) 319 at 334; State v. Onagorowa (1992) 2 SCNJ (Pt. 1) 1 at 308.

In a further argument, learned counsel referred to the proceedings of the lower court on 5 May 2016 and submitted that the said proceedings were conducted without jurisdiction since this appeal was entered in this court on 25 April 2016. I wish to state straight away that the record of appeal before this court does not contain the alleged proceedings of 5 May 2016. That proceeding is not in contention before this court, and the argument touching on it goes to no issue. However, the 1st, 2nd and 3rd grounds of appeal touch on the issues of service of court processes. The law is settled that where service of process is required, failure to serve it is a fundamental vice that touches on the jurisdiction of the court that is seised with the matter. See Auto Import Export v. Adebayo (2002) 18 NWLR (Pt. 799) 554; Mbadinuju v. Ezuka (1994) 8NWLR (Pt. 384) 535; Skenconsult (Nig.) Ltd v. Ukey (1980) 1 SC 6; Obimonure v. Erinosho (1966) 1 All NLR 250.

The three grounds of appeal before this court complained that the appellant was not served with the necessary processes including the 1st respondent’s brief of argument. To that extent, the grounds of appeal are raising jurisdictional issues. The law is settled that a failure to serve the opposing party with the necessary process which will facilitate the hearing of a case connotes that the condition precedent to the exercise of jurisdiction of the court is not fulfilled. In other words, absence of service of court processes, where those processes are required to be served, is a fundamental vice that goes to the jurisdiction of the court. A party who complains that he has not been served with necessary court processes does not require [leave] from the leave lower court or this court to raise it in his ground of appeal.

See Auto Import Export v. Adebayo (2002) 18 NWLR (Pt. 799) 554 at 583, paragraphs B - D. Also, ground of appeal which raises the issue of jurisdiction does not necessarily have to relate or flow from the decision against which the appeal lies. This is so because jurisdiction is the soul of adjudication, and if a court has no jurisdiction, it does not matter whether the question was raised during the proceedings or not, a party will not be prevented from raising it in this court. The three grounds are therefore competent. The preliminary objection is accordingly overruled.

On the main appeal, having read through the record of appeal and the briefs of argument filed by the parties in this appeal, I am of the firm view that the only issue calling for determination of this appeal is whether the lower court had jurisdiction to hear and determine the application filed on 11 April 2016. In arguing the appeal, learned appellant’s counsel submitted that the lower court lacked jurisdiction to hear and determine the 1st respondent’s motion on notice since the appellant was not served with the requisite processes. According to the learned counsel, the appellant was not served with the 1st respondent’s brief of argument before the order to hear the appeal on the 1st respondent’s brief alone was made on 13 April 2016. Learned counsel admitted that the appellant was served with the 1st respondent’s motion filed on 11 April 2016 on the same day, but that the motion was not ripe for hearing. In a further argument, learned counsel submitted that the lower court erred in law when it came to conclusion that the appellant was served with the requisite process warranting the hearing of the 1st respondent’s appeal on his brief alone. It is learned counsel’s contention that the service of court process is fundamental, without which the lower court lacked jurisdiction to proceed with the hearing and determination of the application. In aid, learned counsel cited Eke v. Ogbonda (2007) All FWLR (Pt. 351) 1456; Ben Anachebe vs. Kingsley Ijeoma (2015) All FWLR (Pt. 784) 183, (2015) 240 LRCN 69 at 77 - 78; Mobil Prod. (Nig) UnLtd v. Monokpo (2003) 18 NWLR (Pt. 852) 346 at 434 - 435.

On whether the lower court denied the appellant fair hearing, learned counsel submitted that the appellant was not given fair hearing because the motion filed on 11 April 2016 was not ripe for hearing by virtue of section 5(a)(b) and (c) of the Court of Appeal Practice Direction, 2013. Learned counsel submitted further that the grant of the motion on 13 April 2016 offended Order 7, rule 8 of the Court of Appeal Rules 2011, which gives a respondent 7 days within which to reply, as stated in Court of Appeal Practice Direction, 2013 and common law principle of audi alteram paterm which is incorporated in section 36 of the 1999 Constitution of the Federal Republic of Nigeria (as amended).

Still in argument, learned counsel submitted that the Registrar of the lower court gave a wrong information with regard to the date of service and in compiling the record, the registrar failed to include proof of service of the motion which was granted on 13 April 2016, which clearly offends section 167(d) of the Evidence Act. Finally, learned counsel urged this court to allow the appeal. Alhaji Ahmed Raji, learned senior counsel for the 3rd respondent took a neutral stand in this appeal even though he adopted the two issues formulated by the appellant. I take it therefore, that the brief of argument filed on behalf of the 3rd respondent did not pray for any relief. It is accordingly discountenanced.

The proceedings that led to this appeal is so short. For the sake of clarity, I reproduce same as follows:

“Appellant is present.

Kelechi Udeoyibo with him, Kenechukwu and P. D. Adifor Appellant.

Respondents and counsel absent.

Registrar-Respondents served on 23 March 2016.

Udeoyibo - Our motion dated and filed on 11 April 2016 is for the order of court to hear the appeal on the appellant/applicant’s brief of argument only the respondent having failed to file their brief of argument within the time specified under the Rules of this court. I move in terms.

Court: The appellant/applicant’s application is granted as prayed. The appeal is adjourned to 28 April 2016 for hearing. Hearing notice to issue on all the respondents.”

From the proceeding reproduced herein above, it is very clear that the registrar misled the lower court, when he told the court that the respondents were served. However if the lower, court had paid careful attention to the Registrar’s information, it information, it would have come to conclusion that it was impossible to serve the motion dated and filed on 11 April 2016 on the respondent on 23 March 2016, a date when the motion aforesaid had not been filed. The motion which the Registrar said he served on 23 March 2016 must have been a different motion and not the motion that was moved and granted by the lower court. There is therefore no evidence that the motion dated and filed on 11 April 2016 was served on the respondent. I therefore agree with learned counsel for the appellant that the motion dated 11 April 2016 was not ripe for hearing and the lower court had no jurisdiction to hear and determine the application. In Auto Import Export v. Adebayo at page 582, paragraphs C - F this court had this to say:

“Where as in the present case, service of process is required, failure to serve it is a fundamental vice and the person affected by the order but was not served with the process, again as in the present case is entitled ex-debito justitiate to have the order set aside as a nullity. See Obimonure v. Erinosho & Anor. (1966) 1 All NLR 250; Mbadinuju v. Ezuka (1994)8 NWLR (Pt. 364) 535, (1994) 10 SCNJ 109 at 128;

Skenconsult v. Ukey (1980) 1 SC at 26. Accordingly, service of a process in proceedings is fundamental to the assumption of jurisdiction. Failure to serve a process where service is required goes to the root of proper conceptions of recognized procedure of litigation. It is a fundamental vice which renders null and void an order made against the party who should have been served, as the idea that an order can validly be made against a party who has no notification of the action against him is one that is clearly undesirable and, indeed unacceptable in our judicial system.”

The option opened to the appellant was to apply to the Court of Appeal to discharge the order it made that the appeal be heard on the appellant’s brief alone or to appeal against the ruling of the court. The appellant opted to appeal, a process deployed to delay the hearing of the substantive matter still pending in that court.

This I think is not the best approach. As a general rule, every court of record has inherent jurisdiction on application and in appropriate cases and circumstances to set aside its judgment or decision, where the judgment or decision is null and void ab-initio or where there was a fundamental defect in the proceedings which vitiates and renders same incompetent and invalid. See Alhaji Taofeek Alao v. A.C.B. Limited (2000) FWLR (Pt.11) 1858, (2000) 2 SCNQR 1067 at 1071; Salami Omokewu & Ors. v. Abraham Olabanji & Anor. (1996) 3 NWLR (Pt. 435) 126; Skenconsult Nig. Ltd v. Ukey (1981) 1 SC 6.

Even though the appellant admitted that the motion dated and filed on 11 April 2016 was served on it, on the same date that is not borne out by the record of appeal, as the motion that is admittedly served on the appellant is different from the one served on it.

The issue of non-service of the 1st respondents brief of argument on the appellant was raised by the appellant. This information was not available to the lower court and therefore was not capable of influencing its decision. The failure to serve the motion on notice dated and filed on 11 April 2016 on the appellant has rendered the ruling of the lower court null and void. The sole issue formulated by me is hereby resolved in favour of the appellant. Accordingly, this appeal shall be and it is hereby allowed. The ruling of the lower court delivered on 13 April 2016 is set aside. There shall be no order on costs.

**PETER-ODILI JSC**:

I am in complete agreement with the judgment just delivered by my learned brother, Paul Adamu Galinje JSC and to underscore my support for the reasoning, I shall make some remarks.

This is an interlocutory appeal against the ruling of the Court of Appeal, Makurdi Division delivered on 13 April 2016, granting the 1st respondent’s prayer to hear the substantive appeal on the 1st respondent’s (appellant at the lower court) on the appellant’s brief alone.

Facts briefly stated

The 1st respondent as plaintiff instituted the action at the Federal High Court, Makurdi by an originating summons against the appellant and the 2nd and 3rd respondents herein as defendants, challenging the nomination or selection of the 2nd respondent by the appellant to contest the primary election of 10 December 2014 of the appellant for the Kwande/Ushongo Federal Constituency, Benue State for the Federal House of Representatives. The challenge was based on the qualification of the 2nd respondent to contest the said election for failure to comply with the guidelines and constitution of the appellant and for allegedly presenting false information to the 3rd respondents.

This was considered by the 1st respondent as plaintiff as noncompliance with the provisions of the appellant’s constitution and consequently the provisions of the Electoral Act, 2010 (as amended).

The trial court after hearing arguments and considering all the processes filed by all the parties delivered its judgment on 10 December 2015 and dismissed 1st respondent’s case as lacking in merit.

Dissatisfied with the said decision, the 1st respondent appealed to the Court of Appeal or lower court and during the pendency of the said appeal, 1st respondent filed a motion for the court to order hearing of the substantive appeal on his brief alone as appellant, for failure of all the respondents to file their briefs of argument after service on them of the appellant’s brief, and expiration of 30 days. The lower court granted the prayer and aggrieved with the ruling, the appellant has come before this court challenging that unfavourable decision.

On 22 February 2017, date of hearing, learned counsel for the appellant adopted its brief of argument filed on 13 June 2016 and deemed filed on 11 January 2017 and a reply brief of argument to 1st respondent’s brief which appellant had filed on 7 February 2016. The appellant identified two issues for determination which are thus:

“1. Whether non-service of requisite court process on the appellant clothed the lower court with jurisdiction to have heard and granted the respondent’s motion, and whether service of a motion which was filed on 11 April 2016 and same heard and granted on 13 April 2016 which was not ripe for hearing occasioned fair hearing on the appellant (Ground 1 and 2 of the grounds of appeal)

2. Whether the lower court was right to have assumed jurisdiction to have granted any application in CA/MK/ I6/2016 on 13 April 2016 without meeting the condition precedent imposed by law (Ground 3 of the grounds of appeal).”

Alex Ejesieme Esq. of counsel for the 1st respondent adopted his brief of argument filed on 10 January 2017. In the brief of argument, the 1st respondent argued the notice of preliminary objection which response thereto are in the reply brief of the appellant.

It needs no saying that the preliminary objection which raises concerns on the competence of the appeal and by implication the jurisdiction of the court has to be dealt with first before anything can be done by this court.

Preliminary objection

Learned counsel for the 1st respondent contends that grounds 1, 2 and 3 of the notice of appeal filed on 21 April 2016 are grounds of mixed law and fact for which no leave of court was obtained. That a community reading of the three grounds of appeal as well as their particulars will clearly show that they are of mixed law and facts. He cited section 233(1) (2) (a) and (3) of the 1999 Constitution of the Federal Republic of Nigeria (as amended). That without the leave of court, the appeal is incompetent and along with it, the competence and jurisdiction of the Supreme Court to embark on the adjudication. He cited KTP Ltd v. G & H Nig. Ltd (2005) 13 NWLR (Pt. 943) 680; Ojeme v Momodu (1983) 1 SCNLR 188 at 205 etc.

For the 1st respondent, it was further contended that ground 2 of the grounds of appeal did not arise from the decision of the Court of Appeal and so appellant cannot be heard on it. He relied on Odom v. PDP (2015) 6 NWLR (Pt. 1456) 527 at 551, Yet Pet Ind. Ltd v. Cocoa Ind. Ltd (2008) 13 NWLR (Pt. 1105) 486 etc. It follows learned counsel for the 1st respondent said, that the two issues formulated from grounds 1, 2 and 3 of the notice of appeal are also incompetent. He referred to Jev v. Iyortyom (2014) All FWLR (Pt. 747) 749, (2014) 14 NWLR (Pt. 1428) 575 at 608 - 609; Bob v. Akpan (2010) All FWLR (Pt. 501) 896, (2010) 17 NWLR (Pt. 1223) 421 etc.

Learned counsel for the appellant responding stated that the objection is misconceived as in considering the matter, the nature of the appeal which subject matter is non-service of the requisite court process that goes to jurisdictional defect and fair hearing are at play. That a look at the three grounds of appeal shows they are all grounds of law and nothing more and so covered by section 233(2) (a) of the 1999 Constitution Federal Republic of Nigeria, whereby no leave of the lower court is required before proceeding on the appeal. He cited Eluabe v Omokfaje (2004) 18 NWLR (Pt. 905) 319 at 334; Mobil Producing Nig. Unlimited v Monokpo (2003) 18 NWLR (Pt. 852) 346 at 436. That ground 2 of appellant’s ground of appeal flows from or relates to the decision of the Court of Appeal.

What is in issue in this preliminary objection is that of jurisdiction which can be raised at any stage of the proceedings even on appeal up to the Supreme Court and in that regard, it is not mandatory that leave of court be obtained before the issue of jurisdiction can be raised. This appeal has to do with the issue of breach of fair hearing, which when at play would render the proceedings no matter how well conducted come to naught. The reason being that the right to fair hearing is a fundamental constitutional right deeply entrenched and an infraction of which vitiates such proceedings rendering same null and void. I shall refer to the stance of this court in this matter in the case of Elugbe v. Omokfaje (2004) 18 NWLR (Pt. 905) 319 at 334. In the case of State v. Onagorowa (1992) 2 SCNJ (Pt. 1) 1 at 308, Belgore JSC (as he then was) stated:

“The red light to court to be cautions is the jurisdiction and it must be settled by proper hearing of parties before further proceedings in a matter can be embarked upon. Similarly, there are occasions after a matter has been before the court for long before the issue of jurisdiction arises, some in the middle of the entire proceedings or towards its tail end in that case the jurisdiction must first be settled before proceedings further. It is therefore never too late to raise the issue of jurisdiction and in the case of this nature, it is never premature to raise it ... The preliminary objections as to jurisdiction ought to have been taken first and decided upon.” See also Olufeagba v. Abdul-Raheem (2009) 40 NSCQR 634 at 724 per Mukhtar JSC (as he then was).

On whether a party can waive the issue of a lack of jurisdiction, this court in Mobil Producing Nig. Unlimited v. Monokpo (2003) 18 NWLR (Pt. 852) 346 at 436 - 435. Tobi JSC said:

“The law is elementary that a party cannot or has not the competence to waive lack of jurisdiction of the court. Where a court lacks jurisdiction, the entire proceedings, however, well conducted are a nullity and a party cannot in law resuscitate or revive a nullity by waiver. Jurisdiction is basic to the entire adjudication. It affects the power of the court to adjudicate on the matter. Where a court lacks jurisdiction, no amount of indolent conduct on the part of any of the parties, particularly the defendant, can ripen into the defence of waiver. It is my view that the jurisdiction of a court, where there is none, cannot be enlarged either by estoppel or waiver.

Jurisdiction, being the forerunner of the judicial process, cannot, by acquiescence, collusion, compromise, or as in this case, waiver, confer jurisdiction on a court that lacks it. Parties do not have the legal right to denote jurisdiction on a court that lacks it.”

Considering the paramount nature of jurisdiction or competence of an appeal and as a follow up, the vires of court thereby, the issue of jurisdiction is taken as such that leave is not needed to raise it. Also, because of its fundamental position can be brought up at any level of the proceedings even for the first time on appeal whether at the Court of Appeal or Supreme Court. It would therefore be self-defeating, if there must be leave of court before it can be raised or that where the leave has not be obtained previously to raise it, the proceedings are vitiated. That cannot be part of our adjudicatory system. See Federal Republic of Nigeria v. Ifegwu (2003) FWLR (Pt. 167) 703, (2003) 15 NWLR (Pt. 842) 113 at 212.

I shall make further references to some dicta of this court for emphasis. Bello CJN in Uti v. Onoyiwe (1991) 1 SCNJ 25 at 49 aptly captured its fundamental nature in adjudication. He viewed it in an organic form thus:

“Moreover, jurisdiction is blood that gives life to the survival of an action in a court of law and without jurisdiction; the action will be like an animal that has been drained of its blood. It will cease to have life and any attempt to resuscitate it without infusing blood into it would be an abortive exercise.”

Okoro v. Egbuoh (2006) All FWLR (Pt. 332) 1569, (2006) 15 NWLR (Pt. 1001) 1 at 23 - 24 per Tobi JSC stated thus:

“Although jurisdiction is a word of large purport and significance in the judicial process, it is not a subject of speculation or gossip ... It is a matter of strict and hard law donated by constitution and statutes. It is a threshold issue, the blood that gives life to the survival of the action and occupying such an important place in the judicial process ...”

There is no need beating about the bush in this matter and it is only right to discountenance the preliminary objection, so the meat of the matter can be handled. The objection is overruled.

Main appeal

Issue 1 and 2 Whether non-service of requisite court process on the appellant clothed the lower court with jurisdiction to have heard and granted the 1st respondent’s motion and whether service of a motion which was filed on 11 April 2016 and same heard and granted on 13 April 2016, which was not ripe for hearing occasioned fair hearing on the appellant.

Whether the lower court was right to have assumed jurisdiction to have granted any application in CA/MK/16/2016 on 13 April 2016 without meeting the condition precedent imposed by law.

Learned counsel for the appellant contended that this court lacks jurisdiction to have heard and granted 1st respondent’s requisite process on the appellant. That the appellant was not served with the appellant’s brief of argument before the order to hear the appeal on appellant’s (that is, 1st respondent’s herein) brief alone was made on 13 April 2016 and meanwhile the 1st respondent’s motion (appellant at the lower court) was served on the here appellant on 11 April 2016 and same heard two days later on 13 April 2016. That the service of court process is fundamental, without which the court lacks jurisdiction to proceed with the hearing and determination of the matter. He cited Eke v. Ogbonda (2007) All FWLR (Pt. 351) 1456; Ben Anachebe v. Kingsley Ijeoma (2015) Vol. 240 LRCM 69 at 77 - 78; Mobil Producing (Nig.) Unlimited v Monokpo (2003) 18 NWLR (Pt. 852) 346 at 434 - 435; section 5(a), (b) and (c) of the Court of Appeal Practice Direction 2013.

The 1st respondent had raised a single issue which is thus:

Sole issue

Considering the fact that the appellant was served with another copy of 1st respondent’s appellant brief of argument in the open court, afforded enough time and enjoined by the justices of the Court of Appeal to file his respondent’s brief after denying earlier service of 1st respondent’s brief of the appellant at the lower court, whether the appellant could still complain of denial of fair hearing and/or pursue the present interlocutory appeal.

Learned counsel for the 1st respondent stated that what the appellant is pushing forward is akin to a chess game to explore and exploit the rules of court to outsmart the other side, which is not permitted. He cited Ajide v. Kelani (1985) 3 NWLR (Pt. 12) 249 at 269 per Oputa 1. That in the circumstances of this case as borne out by the record, no miscarriage of justice occurred and the appellant was afforded enough time to present the reaction to the said appellant’s brief and cannot complain of denial of fair hearing. He cited Government of Gongola State v. Tukur (1989) 4 NWLR (Pt. 117) 592; Commissioner For Works Benue State v Devcon Ltd (1988) 3 NWLR (Pt. 83) 407; Orugbo & Anor. v. Una & 10 Ors (2002) FWLR (Pt. 127) 1024, (2002) 9 - 10 SC 61 at 85 - 86; Adebayo v. Attorney-General, Ogun State (2008) All FWLR (Pt. 412) 1195, (2008) 7 NWLR (Pt. 1085) 201 at 221 - 222; Order 2, rules 1, 5 and 6 of the Court of Appeal Rules, 2011.

For the 1st Respondent, it was submitted that a party who has been afforded the opportunity to put across his defence and who fails to take advantage of such opportunity cannot later turn round to complain that he was denied a right to fair hearing. The cases of Newswatch Communications Ltd v. Attah (2006) 12 NWLR (Pt. 993) 144; A.S.T.C. v. Quorum Consortium Ltd (2009) All FWLR (Pt. 474) 1444, (2009) 9 NWLR (Pt. 1145) 1 at 35; Universal Trust Bank Limited v. Dolmetsch Pharmacy (Nig.) Ltd (20070 All FWLR (Pt. 385) 434, (2007) 16 NWLR (Pt. 1061) 520 at 544; Union Bank of Nigeria Plc. v. Astra Builders (W.A.) Ltd (2010) All FWLR (Pt. 518) 865, (2010) 5 NWLR (Pt. 1186) 1 at 34, were cited in support.

Learned counsel for the 3rd respondent said they were maintaining their neutrality being the umpire.

In considering this interlocutory appeal, there has to be a revisit to the facts leading to it. The appellant was the 2nd respondent before the court of first instance, the Federal High Court, Makurdi in suit filed by the 1st respondent as plaintiff. On 10 December 2015, the trial court gave judgment dismissing the suit. The 1st respondent appealed to the Court of Appeal or court below by a notice of appeal which was entered as appeal No. CA/ MK/16/2016, which notice was served on the appellant at All Progressive Congress (APC) National Headquarters at Wuse II, Abuja on 22 December 2015.

On 27 January 2016, the 1st respondent served on the appellant the compiled records at the same APC Headquarters. The 1st respondent served the appellant’s brief of argument on Iorver Gideon Esq. of No. 16, Dansulaiman Street, Utako on 1 March 2016, purported to be service on the appellant. The 1st respondent filed a motion on notice dated 11April 2016 and served on the same date at the APC Headquarters at Wuse II, Abuja.

However, the Registrar of the court below omitted to include the proof of service in the record of appeal. The 1st respondent counsel’s submission that on 13 April 2016, the court heard the application of 1st respondent as appellant before it on 11 April 2016 and granted same setting the appeal down for hearing on the 28 April 2016, on the 1st respondent’s brief of argument alone.

Interestingly, 1st respondent’s motion filed on 11 April 2016 and heard and granted by the court below raised the question whether it was ripe for hearing on 13 April 2016.

Upset by the ruling on 13 April 2016; granting of the setting down the appeal for the appellant who was the 2nd respondent in the court below and who was not served with the appellant’s brief of argument, though served with the respondent’s motion of 11 April 2016, heard and granted on 13 April 2016 has brought this challenge to this court on a breach of fair hearing which has robbed the court of competence and jurisdiction.

The 1st respondent sees no breach of fair hearing and holds the view that there was jurisdiction in the court below to do what it did.

It has to be reiterated even at the risk of repeating what has become trite and perhaps looked upon as over flogged but must be said, that service of court process is fundamental, as without it the court lacks the jurisdiction to proceed with the hearing and determination of the matter. Also, it is the law that jurisdiction is the life wire of any adjudication and therefore not such as can be waived by the parties, and the court with the hearing and determination of the matter. He cited Eke v. Ogbonda (2007) All FWLR (Pt. 351) 1456; Ben Anachebe v Kingsley Ijeoma (2015) Vol. 240 LRCN 69 at 77 - 78.

Tobi JSC (of blessed memory) had this to say in Mobil Producing Nig. Unlimited v. Monokpo (2003) 18 NWLR (Pt. 852) 346 at 436 - 435,

“... The law is elementary that a party cannot or has not the competence to waive lack of jurisdiction, the entire proceedings however well conducted are a nullity and a party cannot in law resuscitate or revive a nullity by waiver. Jurisdiction is basic to the entire adjudication. It affects the power of the court to adjudicate on a matter. Where a court lacks jurisdiction, no amount of indolent conduct on the part of any of the parties particularly the defendant, can ripen into defence of waiver.

It is my view that the jurisdiction of a court, where there is none, cannot be enlarged either by estoppels or waiver ...

Jurisdiction being the forerunner of the judicial process, cannot by acquiescence, collusion, compromise, or as in this case confer jurisdiction on a court that lacks it. Parties do not have the legal right to donate jurisdiction on a court that lacks it.”

I shall refer to section 5(a), (b) and (c) of the Court of Appeal Direction, 2013. The said section provides:

“5(a) No party may serve an application or a notice of the preliminary objection on an adverse party on the date scheduled for hearing. Such application must be served not later than 2 days prior to the date scheduled for hearing.

(b) Upon service of any application on the respondent, he may within 3 days file notice of intention not to contest the application and upon such notice the application may be heard by the justices in the chambers without oral argument.

(c) In furtherance of the need to ensure speedy dispensation of justice, electronic means may be employed by the court in order to inform counsel of urgent and case even. Hence, the parties are expected to furnish the court with phone numbers and e-mail addresses of themselves or their counsel:

Provided that these notices should be given at least forty eight (48) hours before the scheduled court date.”

The Rules of the Court of Appeal, 2011, Order 7, rule 8 provides for 7 days to a respondent to make a reply if he so wishes after the service of the process on him. What has come clearly from the facts and the prevailing laws including the Rules of the court below and Practice Direction is that when the motion filed on 11 April 2016 was heard and granted on 13 April 2016 without complying with those Rules as to service and the period of the notice thereof, the right of the notice thereof, the right of the appellant to fair hearing was definitely infracted and the jurisdiction of the court below to so hear the matter was absent. There was and remains no way around the situation as the proceedings are vitiated on account of that.

See Olufeagba v. Abdul-Raheem 49; Okoro v. Egbuoh (2006) 15 NWLR (Pt. 1001) 1 at 23 - 24.

In conclusion, based on the foregoing and the better articulated lead judgment, there is merit in this appeal and I allow it. I abide by the consequential orders as made.

**ARIWOOLA JSC**:

I had the preview of the draft of the lead judgment just delivered by my learned brother, Galinje JSC. I am in agreement with the reasoning that led to the conclusion that the appeal has merit and should be allowed. It is accordingly allowed by me. Appeal allowed.

**AKAAHS JSC:**

My learned brother, Galinje JSC obliged me with the draft of the judgement just delivered. I am one with him in allowing the appeal and setting aside the ruling delivered by the lower court on 13 April 2016. The said ruling was delivered without jurisdiction since the motion of 11 April 2016 was not served and even if it had been served, was not ripe for hearing on 13 April 2016. It is settled law that where service of process is required, failure to serve it is a fundamental vice and touches on the jurisdiction of the court that is seised of the matter. See Obimonure v. Erinosho (1966) 1 All NLR 250; Skenconsult (Nig.) Ltd v. Ukey (1980) 1 SC. 6; Mbadinju v. Ezuka ( 1994) 8NWLR (Pt. 384) 535; Auto Import Export v. Adebayo (2002) 18 NWLR (Pt. 799) 554.

For this reason and the more detailed reasons contained in the lead judgment of my learned brother, Galinje JSC, I also allow the appeal and set aside the ruling of the Court of Appeal, Makurdi delivered on 13 April 2016. I too make no order on costs.

**BAGE JSC**:

I had the privilege of the preview of the judgment just delivered by my learned brother, Galinje JSC, I am in full agreement. I can only add a few words of my own in support. Whether a hearing can be said to be fair if any of the parties to proceedings is denied an opportunity to be heard or present his case or call evidence. Certainly not. The law is settled that a hearing cannot be said to be fair if any of the parties is refused a hearing or denied the opportunity to be heard or present his case or call evidence.

The right to fair hearing is substantially a question of opportunity of being heard. The right lies in the procedure followed in the determination of a case and not in the correctness of the decision arrived in a case. See FBN Plc. v. TSA Ind. Ltd (2010) 4 -7 SC, (Pt. 1) 242; Bamgboye v. University of Ilorin (1999) 6 SC (Pt. 11) 72; Awoniyi v. Regd. Trustees, AMORC (2000) F.W.L.R. (Pt. 25) 1592, (2000) 6 SC (Pt. 1) 108; Araka v. Ejeagwu (2001) FWLR (Pt.36) 830, (2001) 12 SC (Pt. 1) 99; Okafor v. Attorney-General, Anambra State (1991) 7 SC (Pt.11) 138 and Mohammed v. Olawunmi (1990) 4 SC 40. The failure to serve the motion on notice dated and filed on 11 April 2016 on the appellant in the present appeal amounted to a denial of his right to fair hearing. I agree with the lead judgment, that the ruling of the lower court anchored on that motion stands as null and void. For the more detail reasoning contained in the lead judgment, I also allow the appeal, and set aside the ruling of the lower court delivered on 13 April 2016. I abide by the order as to costs contained in the lead judgment.

Appeal allowed.