**ADIO ONABIYI & ORS**

**V.**

**I.O.N. PETROLEUM LIMITED**

IN THE COURT OF APPEAL OF NIGERIA

ON WEDNESDAY, THE 22ND DAY OF MARCH, 2017

CA/L/129A/2000

**LEX (2017) - CA/L/129A/2000**

**OTHER CITATIONS**

3PLR/2017/27 (CA)

(2017) LPELR-41922(CA)

**BEFORE THEIR LORDSHIPS**

MOHAMMED LAWAL GARBA J.C.A

JOSEPH SHAGBAOR IKYEGH J.C.A

UGOCHUKWU ANTHONY OGAKWU J.C.A

**BETWEEN**

1. ADIO ONABIYI

2. AKANBI ONABIYI

3. OLAYIWOLA ONABIYI

4. JONATHAN ONABIYI

5. MADAM ALABA ONABIYI

6. FEMI ONABIYI

7. GBENGA ONABIYI (FOR THEMSELVES AND OTHER MEMBERS OF ONABIYI FAMILY) Appellant(s)

AND

I.O.N.PETROLEUM LIMITED Respondent(s)

**ORIGINATING COURT**

HIGH COURT OF LAGOS STATE

**REPRESENTATION/LAWYERS**

AYO OROBOWALE, Esq. For Appellant

AND

Respondent absent and not represented by counsel For Respondent

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

**PRACTICE AND PROCEDURE ISSUES**

APPEAL - UNAPPEALED FINDING(S)/DECISION(S) – Ratio decidendi of court against which there is no appeal - Effect of.

JUDGMENT AND ORDER - DEFAULT JUDGMENT:- Meaning and basis of - Guiding principles for setting aside a default judgment – What constitute.

JUDGMENT AND ORDER - SETTING ASIDE JUDGMENT/ORDER:– Where a party seeks to set aside a finding of court considered crucial and fundamental to a case – Conditions precedent that must be satisfied thereto

SERVICE OF COURT PROCESS(ES):- Fundamental nature of for competency of suit - Effect of failure to serve relevant Court process.

**CASE SUMMARY**

ORIGINATING FACTS AND CLAIMS

The Appellants instituted the action against the Respondent at the High Court, claiming declaration of entitlement to statutory right of occupancy, damages and perpetual injunction in respect of piece or parcel of land situate along Lagos/Abeokuta Expressway, Iyaiye, Ojokoro, Lagos State.  
  
The Respondent did not file any processes. The Appellants thereafter applied to the lower Court for judgment in default of appearance and defence. The application was granted but because the Appellants’ relief was for a declaratory order, the lower Court ordered the Appellants to adduce evidence in respect of the declaration sought. The Appellants called a sole witness after which their counsel addressed the Court and judgment was eventually entered for the Appellants in respect of the reliefs they claimed on 10th December 2009.  
  
Subsequently, on 2nd February 2000 the Appellants levied execution of the judgment. Consequent upon execution being levied, the Respondent filed an application before the High Court on 3rd February 2000 praying, *inter alia*, for the judgment to be set aside on the ground that it was not served with the Court processes.

The Appellants filed affidavits in opposition to the application and the lower Court being of the view that the affidavits filed by the parties were irreconcilably in conflict ordered parties to adduce oral evidence in order for the conflict to be resolved. The Appellants were dissatisfied with this order and appealed against the same.   
  
The High Court nonetheless proceeded with the hearing of the application to set aside its judgment. The said Court directed that the Appellants should adduce evidence towards the resolution of the conflicts in the affidavits. The Appellants declined on the grounds that they were not the applicants in the application and that it was for the applicant to start first. Eventually, the Respondent called evidence in respect of the depositions in the affidavits in support of its application, its witness was cross examined after which the matter was adjourned for address. The Court accordingly called upon the Appellants to now call evidence. The Appellants counsel however declined and elected to address the Court. After counsel had addressed the Court, the lower Court then proceeded to Ruling wherein it granted the application, hence this appeal.

DECISION(S) APPEALED AGAINST

This appeal is against the Ruling of the High Court of Lagos State delivered on 7th April, 2000 in Suit No. ID/1590/98 setting aside the judgment it had entered against the Respondent on the ground that the Court processes were not served on the Respondent.

ISSUE(S) FOR DETERMINATION ON APPEAL

*BY APPELLANT:*

1. Whether the judgment obtained after trial pursuant to Order 33 Rule 2 of the High Court of Lagos State (Civil Procedure) Rules 1994 could be set aside pursuant to Order 25 Rule 15 of the High Court of Lagos State (Civil Procedure) Rules 1994 and Section 36 of 1999 Constitution but not necessarily under Order 33 Rule 4 of the same High Court of Lagos State Rules 1994.

2. Whether the trial Court was right in holding that because the Plaintiffs/Appellants did not call oral evidence against the oral evidence of the Defendant/Respondent at the oral hearing of the Defendant’s motion dated 3/2/2000 then there was nothing on the side of the Plaintiffs to put on the scale of justice against the evidence of the Defendant.

3. Whether by the totality of evidence before the Lower Court the Application of the Defendant/Respondent dated 3/2/2000 satisfied all the conditions for consideration in an application to set aside a judgement so as to say that the Lower Court properly exercised its discretion in granting the said application of the Defendant and thereby set aside its own judgement of 10/12/99.

*BY RESPONDENTS*

“Whether the trial Court was right in setting aside its own judgment when the Respondent was never served with any Court process.”

*AS ADOPTED BY COURT*

[The Court adopted the Issues presented by the Respondent]

DECISION OF COURT OF APPEAL

1. The originating processes were not served on the Respondent. Since the processes were not served, the conduct of the Respondent in not attending Court or his case being manifestly unsupportable would not arise. This is so because the question of conduct deserving sympathetic consideration would only arise if the Respondent had been served but deliberately chose to stay away.

2. The Appellants submit that they were prejudiced by the setting aside of the judgment since they had levied execution and taken possession of the disputed land. The legal position remains that whenever proceedings are conducted where the Court processes are not served on the other party, the said party is entitled to have the proceedings set aside, *ex debitojustitiae*: The lower Court found and held that the originating processes were not served on the Respondent. The effect of service, which is fundamental, not having been effected is that the proceedings conducted in the absence of service are a nullity. Being a nullity, it is as though the proceedings never took place and no rights were acquired or built on it.

3. In the circumstances the conditions for setting aside the judgment were satisfied by the Respondent and the lower Court rightly exercised discretion in favour of granting the Respondent’s application and setting aside the entire proceedings and judgment for being a nullity.

The appeal is lacking in merit and it is dismissed with N100,000.00 costs in favour of the Respondent. The Ruling of the lower Court delivered on 7th April 2000 is hereby affirmed.

**MAIN JUDGMENT**

**UGOCHUKWU ANTHONY OGAKWU, J.C.A.** (Delivering the Leading Judgment): This appeal is against the Ruling of the High Court of Lagos State inSuit No. ID/1590/98:ADIO ONABIYI & ORS. vs. I.O.N. PETROLEUM LTD delivered on 7th April, 2000. In the said Ruling, the lower Court set aside the judgment it had entered against the Respondent on the ground that the Court processes were not served on the Respondent. The scarified Ruling of the lower Court is at pages 52-58 of the Records.

The Appellants dissatisfied with the said Ruling appealed against the same. The Notice of Appeal which was filed on 7th April 2000 is at pages 59-60 of the Records, while the further grounds of appeal which were filed by the Appellants is at pages 61-64 of the Records.

The facts of this matter as can be gleaned from the cold printed records are that the Appellants instituted the action against the Respondent at the lower Court claiming declaration of entitlement to statutory right of occupancy, damages and perpetual injunction in respect of piece or parcel of land situate along Lagos/Abeokuta Expressway, Iyaiye, Ojokoro, Lagos State.

The Respondent did not file any processes and the Appellants applied to the lower Court for judgment in default of appearance and defence. The application was granted but because the Appellants’ relief was for a declaratory order, the lower Court ordered the Appellants to adduce evidence in respect of the declaration sought. The Appellants called a sole witness after which their counsel addressed the Court and judgment was eventually entered for the Appellants in respect of the reliefs they claimed on 10th December 2009.

Subsequently, on 2nd February 2000 the Appellants levied execution of the judgment. Consequent upon execution being levied, the Respondent filed an application before the lower Court on 3rd February 2000 praying, *inter alia*, for the judgment of the lower Court to be set aside upon the ground that it was not served with the Court processes. The Appellants filed affidavits in opposition to the application and the lower Court being of the view that the affidavits filed by the parties were irreconcilably in conflict ordered parties to adduce oral evidence in order for the conflict to be resolved. The Appellants were dissatisfied with this order and appealed against the same. This is in Appeal No. CA/L/129/2000: ADIO ONABIYI vs. I.O.N. PETROLEUM LTD**.**Judgment in the said appeal has been delivered by this Court this morning.

Meanwhile, the lower Court proceeded with the hearing of the application to set aside its judgment. The lower Court directed that the Appellants should first adduce evidence towards the resolution of the conflicts in the affidavits. The Appellants declined on the grounds that they were not the applicants in the application and that it was for the applicant to start first. (See page 42 of the Records).Eventually, the Respondent called evidence in respect of the depositions in the affidavits in support its application, its witness was cross examined after which the matter was adjourned for address. See pages 43-46 of the Records. Thereafter, the lower Court reviewed the matter and took the view that it was the Respondent, as applicant, that was to call evidence first. The Court accordingly called upon the Appellants to now call evidence. The Appellants counsel however declined and elected to address the Court. (See pages 46-47 of the Records). After counsel had addressed the Court, the lower Court then proceeded to Ruling wherein it granted the application, hence this appeal.

Upon the compilation and transmission of the Records of Appeal, the parties filed and exchanged briefs of argument. The briefs on which the appeal was argued are the Appellants’ Amended Brief of Argument filed on 8th September 2015 and the Amended Respondent’s Brief of Argument filed on 25th November 2011 but deemed as properly filed on 6th February 2017. At the hearing of the appeal, the Respondent though duly served with hearing notice was absent, whereupon the Court treated the appeal as having been argued pursuant to Order 19 Rule 9(4) of the Court of Appeal Rules, 2016.

The Appellants distilled three issues for determination as follows:

*1. Whether the judgment obtained after trial pursuant to Order 33 Rule 2 of the High Court of Lagos State (Civil Procedure) Rules 1994 could be set aside pursuant to Order 25 Rule 15 of the High Court of Lagos State (Civil Procedure) Rules 1994 and Section 36 of 1999 Constitution but not necessarily under Order 33 Rule 4 of the same High Court of Lagos State Rules 1994.*

*2. Whether the trial Court was right in holding* *that because the Plaintiffs/Appellants did not call oral evidence against the oral evidence of the Defendant/Respondent at the oral hearing of the Defendant’s motion dated 3/2/2000 then there was nothing on the side of the Plaintiffs to put on the scale of justice against the evidence of the Defendant.*

*3. Whether by the totality of evidence before the Lower Court the Application of the Defendant/Respondent dated 3/2/2000 satisfied all the conditions for consideration in an application to set aside a judgement so as to say that the Lower Court properly exercised its discretion in granting the said application of the Defendant and thereby set aside its own judgement of 10/12/99.*

On its part the Respondent formulated a sole issue for determination, namely:

*“Whether the trial Court was right in setting aside its own judgment when the Respondent was never served with any Court process.”*

I find the issue as distilled by the Respondent distensible such that it encompasses and subsumes the three issues formulated by the Appellants. In view of the succinct nature of the formulation of the issue by the Respondent, it is on the basis of the said issue that I will consider the submissions of learned counsel and determine this appeal.

ISSUE FOR DETERMINATION

*Whether the trial Court was right in setting aside its own judgment when the Respondent was never served with any Court process.*

SUBMISSIONS OF THE APPELLANTS COUNSEL

The Appellants argue that the lower Court having agreed that its judgment could not be set aside under Order 33 Rule 4 of the High Court of Lagos State (Civil Procedure) Rules, 1994,because the application was not brought within six days of the judgment, was in error to have set aside the judgment under Order 25 Rule 15 of the Rules. It was stated that the lower Court having declined to enter judgment under Order 25 because the relief was declaratory, it could not therefore set aside the judgment under Order 25. It was contended that the lower Court having held that the Respondent’s application was not in compliance with Order 33 Rule 4 ought to have dismissed the same. The cases of WILLIAMS vs. HOPE RISING VOLUNTARY FUNDS SOCIETY (1982) 1-2 SC 145 at 159 and SANUSI vs. AYOOLA (1992) 9 NWLR (PT 265) 275 at 296 were relied upon.

It was opined that the judgment envisaged under Order 25 is one obtained by way of a motion against a defendant who fails to enter appearance and file a statement of defence, but that the lower Court having gone to trial and evidence called, Order 25 was no longer applicable and Order 33 became the applicable Order and any application to set aside the judgment must be brought under Order 33 Rule 4. The case of AKINNULI vs. ODUGBESAN (1992) 8 NWLR (PT 258) 172was referred to on the procedure in setting aside a judgment obtained in default of pleading and one obtained in default of appearance after pleadings have been filed. It was asserted that the Respondent refused to file a Statement of Defence and the time limited for filing had expired and in consequence the judgment entered for the Appellants was under Order 33 Rule 2 and can only be set aside pursuant to Order 33 Rule 4.

It is the further submission of the Appellants that for the provisions of Section 36 of the 1999 Constitution relied upon by the lower Court to be applicable, the Respondent ought to have complied with the provision of Order 33 Rule 4 by applying within time or obtaining an order for extension of time. It was asserted that non-compliance with Order 33 Rule 4 was fatal. The case of SANUSI vs. AYOOLA (supra) was cited in support.

The Appellants contend that the lower Court was wrong in holding that the Appellants failed to put anything on their side of the imaginary scale of justice since they did not lead evidence to reconcile the conflicting affidavits. It was stated that the oral evidence was not to replace the affidavit evidence but to resolve conflicts and that the affidavits filed by the Appellants were still relevant for consideration by the Court in the determination of the application. It was therefore submitted that it was the duty of the lower Court to evaluate and consider the totality of the evidence before it, including the proofs of service in the file. The case of SHELL PETROLEUM DEVELOPMENT CO. LTD vs. OTOKO (1990) 6 NWLR (PT 159) 639 at 707 was referred to.

The conditions which have to be satisfied for a judgment to be set aside as laid down in WILLIAMS vs. HOPE RISING VOLUNTARY FUNDS SOCIETY (supra) at 160 were referred to and it was submitted that the Respondent did not satisfy all the conditions to be met before a judgment could be set aside.

SUBMISSIONS OF THE RESPONDENT’S COUNSEL

The Respondent submits that the lower Court made a specific finding of fact that the Respondent was not served with the writ of summons and statement of claim and that the Appellants did not appeal against this finding, which remains the resolution of the question of service on the Respondent. The cases of KOYA vs. UBA (1997) 1 NWLR (PT 481) 251, NIGERIA CUSTOMS SERVICE vs. BAZUAYE (2006) 3 NWLR (PT 367) 303, LEVENTIS TECHNICAL vs. PETROJESSICA (1999) 6 NWLR (PT 605) 45 and ISERIE vs. CATHOLIC BISHOP (1997) 3 NWLR (PT 495) 517 were referred to. It was then posited that having held that there was no service, the lower Court was right in setting aside the default judgment. The Respondent maintained that in holding that the originating processes were not served the lower Court considered the affidavits filed by the parties as well as the affidavit of service filed by the bailiff. It was stated that a defect arising from a failure of service of originating processes is a fundamental vice which entitles a defendant in the proceedings to have the judgment set aside *ex* *debitojustitiae*. The cases of ODUTOLA vs. KAYODE (1994) 2 NWLR (PT 324) 1 and SKENCONSULT vs. UKEY (1981) 1 SC 6among others were relied upon.

It was contended that since the originating processes were not served on the Respondent, the Appellants action was not initiated by due process of law and the lower Court did not have jurisdiction to adjudicate on the case and was right in setting aside the judgment. The cases of MADUKOLU  V. NKEMDILIM (1962) 1 ANLR 587 and NWOSU vs. IMO STATE ENVIRONMENTAL SANITATION AUTHORITY (1990) 2 NWLR (PT 135) 688 were referred to. The principles guiding exercise of discretion in an application to set aside a judgment were set out and it was submitted that all the requirements must be met and that the Respondent’s application cannot be faulted on the ground of the said principles. The cases of WILLIAMS vs. HOPE RISING VOLUNTARY FUNDS SOCIETY (supra), OGOLO vs. OGOLO (2006) SC (PT 1) 61 at 65 and ARO vs. LAGOS ISLAND LOCAL GOVERNMENT COUNCIL (2002) 4 NWLR (PT 757) 387 at 417among others were cited in support.

The Respondent maintained that the lower Court was right in setting aside its judgment since the Respondent was not served in order to afford all the parties a hearing or opportunity of a hearing. It was stated that non-service on the Respondent denied the Respondent a hearing and that it was a judicial and judicious exercise of discretion for the lower Court to set aside the judgment, which discretion is not to be interfered with as the appellate Court is not to substitute its own discretion for that of the lower Court simply because it may have exercised the discretion differently. The case of EFETIROROJE vs. OKPALEFE II (1991) 5 NWLR (PT 193) 537-538 was relied upon. It was contended that the lower Court was correct to consider and grant the Respondent’s application under Order 25 Rule 15 of the Rules as the judgment was a default judgment obtained upon an application for judgment for default of appearance and defence. It was asserted that the case before the lower Court had not reached trial stage as pleadings had not been filed and exchanged and issues joined, therefore that at that stage it was Order 25 Rule 15 that was applicable. The case ofAKINNULI vs. AYO-ODUGBESAN (1992) 8 NWLR (PT 258) 172 at 186 was cited in support. It was posited that the fact

that the Appellants had to testify because they claim a declaration did not change the legal status of the judgment from one in default of appearance and pleadings to one on the merit. It was stated that this was so because since a declaratory relief was sought, evidence must be given before such a relief can be granted, notwithstanding any admission in the pleadings or a default of pleadings. The case of ARO vs. LAGOS ISLAND LOCAL GOVERNMENT COUNCIL (supra) at 418-419 was referred to.

RESOLUTION

The question as to the applicable Order of the High Court of Lagos State (Civil Procedure) Rules, 1994 under which the lower Court could proceed to set aside its judgment can be threshold in its consequence. This is on account of the fact that different considerations as to the time within which to apply to set aside a judgment are embedded in Order 25 Rule 15 and Order 33 Rule 4 of the Rules. While there is no time limit under Order 25 Rule 15, Order 33 Rule 4 stipulates a time limit of six days after judgment, which time may however be extended on good cause being shown. The Respondents did not file their application to set aside the judgment within six days of the judgment. They also did not seek extension of time within which to apply to set aside the judgment. So effectively, if Order 33 Rule 4 is the applicable provision on which the judgment entered against the Respondent can be set aside, then the Respondent’s application to set aside is dead on arrival. See WILLIAMS vs. HOPE RISING  VOLUNTARY  FUNDS SOCIETY (supra) and SANUSI vs. AYOOLA (supra).

For ease of reference, let me reproduce the stipulations of Order 25 Rules 2, 7 and 15 and Order 33 Rules 2 and 4 of the High Court of Lagos State (Civil Procedure) Rules, 1994. The said provisions read:

Order 25 Rule 2:

*If the plaintiff’s claim be only for a debt or liquidated demand, and the defendant does not, within the time allowed for that purpose, file a defence, the plaintiff may, at the expiration of such time, enter final judgment for the amount claimed, with costs:*

*Provided that in actions by a moneylender or an assignee for the recovery of money lent by the moneylender or the enforcement of any agreement or security relating to any such money, judgment shall not be entered in default of defence unless the leave of* *the Court or of a Judge in Chambers has been obtained in accordance with the provisions of Rule 16 of this Order.*

Order 25 Rule 7:

*In an action for the recovery of land, if the defendant makes default as mentioned in Rule 2, the plaintiff may enter a judgment that the person whose title is asserted in the writ of summons shall recover possession of the land, with his costs.*

Order 25 Rule 15:

*Any judgment by default, whether under this Order or under any other [sic] of these Rules, may be set aside by the Court or a Judge in Chambers, upon such terms as to costs or otherwise as such Court or Judge in Chambers may think fit, and where an action has been set down on motion for judgment under Rule 11 of this Order, such setting down may be dealt with by the Court or a Judge in Chambers in the same way as if judgment by default had been signed when the case was set down.*

Order 33 Rule 2:

*If when a trial is called on, the plaintiff appears, and the defendant does not appear, then the plaintiff may prove his claim, so far as the burden of proof lies upon him.*

Order 33 Rule 4 *Any judgment obtained where one party does not appear at the trial may be set aside by the Court upon such terms as may seem fit, upon an application made within six days after the trial or within such larger period as the Court may allow.*

The pertinent question is: which provision is applicable to the Respondent’s application to set aside the judgment? The Appellants motion for judgment was for judgment in default of defence. It was brought pursuant to Order 25 of the Rules (See page 6 of the Records). In granting the application the lower Court, because the Appellants claimed a declaratory relief ordered that the Appellants lead evidence in proof thereof. It is trite law that where a declaratory relief is sought, evidence must be adduced of entitlement to the declaration irrespective of any admission or default of pleadings. MOTUNWASE vs. SORUNGBE (1988) 5 NWLR (PT 90) 90 at 102, DUMEZ NIGERIA LTD vs. NWAKHOBA (2008) 18 NWLR (PT1119) 361 at 376 and ARO vs. LAGOS ISLAND LOCAL GOVERNMENT (supra).The question is whether the fact that the lower Court in the face of this settled state of the law ordered the Appellants to lead evidence in respect of the declaratory relief, transmogrified the process from a judgment in default of pleadings to a judgment after a trial in which issues had been joined? We will find out in a trice.

Let me state that in both WILLIAMS vs. HOPE RISING VOLUNTARY FUNDS SOCIETY (supra) and SANUSI vs. AYOOLA (supra), pleadings were filed and exchanged and issues joined. So the matter had reached the trial stage in those cases. In the instant case, no statement of defence had been filed. Issues had not been joined so the trial stage had not been reached. Order 33 of the Rules deals with proceedings at trial. The fact that the declaratory relief sought by the Appellants was such that they had to lead evidence before judgment could be entered against the Respondent for default of pleadings does not mean that the trial stage had been reached so as to make Order 33 dealing with proceedings when the trial stage had been reached the applicable provisions. The decisions of the apex Court in WILLIAMS vs. HOPE RISING VOLUNTARY FUNDS SOCIETY (supra) and SANUSI vs. AYOOLA (supra)are accordingly distinguishable because as already stated, in the said cases pleadings had been filed and exchanged, issues joined and the trial stage had been reached which brought into play the operations of Order 32 of the Rules therein (which are in *parimateria* with Order 33 herein). In this matter, the trial stage had not been reached as the defence had not been filed and issues had not been joined. So the matter had not reached the stage of applicability of the provisions of Order 33 of the Rules.

I derive fortification for this view I hold from the decision of this Court in AKINNULI vs. AYO-ODUGBESAN (supra) at 185-187. On account of its very instructive nature as it relates to the quodlibet in this matter, I will reproduce extensively the dictum of *Ubaezonu, JCA,* where he construed,analysed and explained the application of the provisions of Orders 24 and 32 of the High Court of Lagos State (Civil Procedure) Rules, 1972, which are in *pari materia* with Orders 25 and 33 of the High Court of Lagos State (Civil Procedure) Rules, 1994, which are the applicable Rules in this matter as follows:

*A different consideration applies in setting aside or applying to set aside a judgment obtained under Order 24 Rules 4 and 11 from that obtained under* *Order 32 Rule 2. Both are default judgments but different procedures and considerations apply in applying to set them aside or in setting them aside.  
I shall now examine the Rules to show why I hold the view that the learned Judge of the High Court misapplied the decision in the Hope Rising case (supra). A Judgment obtained under Order 24 Rules 2 and 11 is a judgment obtained in default of pleading. Order 24 is so headed “DEFAULT OF PLEADING”  
The procedure for setting aside such a judgment is as provided by Rule 15 of the same order. It provides as follows:*

*15. Any judgment by default, whether under this Order or under any other of these Rules, may be set aside by the Court or a Judge in chambers, upon such terms as to costs or otherwise as such Court or Judge in Chambers may think fit, and where an action has been set down on motion for Judgment under Rule 11 of this Order, such setting down may be dealt with by the Court or a Judge in Chambers in the same way as if judgment by default had been signed when the case was set down.*

*I must observe that it is not clear how a plaintiff can enter final judgment in case* *of default as provided by Order 24 Rule 2 without an order of the Court. However, whether the amount claimed is a liquidated sum or not the practice in our Courts is for the plaintiff to proceed under Rule 11 by moving the Court for judgment.*

*Now, it will be observed that Rule 15 of Order 24 which deals with setting aside a judgment does not place anytime limit within which to bring an application to set aside such a judgment. Where however the case has reached a trial stage, the position is different. The case has reached a trial stage when pleadings have been filed and exchanged, and issues have been joined. At that stage Order 24 no longer applies. The relevant order is Order 32. It is headed PROCEEDING AT TRIAL. The plaintiff may obtain a judgment in default of appearance (not pleading) under Order 32 Rule 2 which provides as follows:*

*2. If, when a trial called on, the plaintiff appears, and the defendant does not appear, then the plaintiff may prove his claim, so far as the burden of proof lies upon him.*

*Such a default judgment may be set aside as provided in Rule 4 of the same Order. It provides:*

*4. Any judgment* *obtained where one party does not appear at the trial may be set aside by the Court upon such terms as may seem fit, upon an application made within six days after the trial or within such longer period as the Court may allow.*   
*Thus where a case has reached a trial stage, an application to set aside a judgment obtained thereon must be within six days after the trial or within such longer period as the Court may allow. There is a time limit within which to bring such an application in such a case. In the Hope Rising case (supra) the position was as follows:*

*(i) Pleadings have been filed and exchanged and issues joined.*

*(ii) On the day the case was fixed for hearing the defendant was absent.*

*(iii) The plaintiff proved his case by evidence as provided by rules of Court.*

*(iv) The Court gave judgment.*

*(v) Application to set aside the judgment was filed more than 3 weeks after judgment.*

*Thus, the applicant having not filed his application within six days as required by the Rules of Court had to ask for extension of time within which to apply to set aside the judgment. The position is vastly different from the case in this* *appeal. Judgment was given in default of pleading. The case had not reached a trial. In such a case no time limit is prescribed for the bringing of the application to set aside the judgment. A trial Judge may, in the exercise of his discretion, refuse to set aside such a judgment if the delay in bringing the application is unreasonable, among other reasons. The learned Judge of the High Court was therefore clearly in error in holding that in a case as this, “the applicant must ask for extension of time within which to apply for leave to set aside the said judgment.” Or that “without a prayer for extension of time to apply for leave the application for leave to set aside cannot be granted. I may ask extension of time from what time? What time limit has been breached? The sanctuary which the learned Judge tried to find in the Hope Rising case is misplaced.” The position of the law therefore is as follows:*

*In an application to set aside a judgment obtained in default of pleading under the High Court of Lagos (Civil Procedure) Rules it is not necessary to ask for leave for extension of time. But in an application* *to set aside a judgment in default of appearance after pleadings have been filed and the case has reached a trial stage, an order for extension of time within which to apply to set aside the judgment must be obtained if the application is made after the expiration of six days from the date of the judgment."*

I agree with this dictum so eloquently asseverated by my noble Lord, *Ubaezonu, JCA.*

In the light of the foregoing, I make bold to hold that the lower Court rightly considered the Respondent’s application under Order 25 of the Rules which did not provide for any time limit within which to bring the application. But the matter does not end there, at least not yet. The next consideration is whether the Respondent met the requirements which it had to satisfy in order for the judgment to be set aside.

An applicant for an order to set aside the judgment of a Court must meet and satisfy the following conditions in order for discretion to be exercised in his favour:

*1. The reasons for the Applicant’s failure to appear at the hearing or trial of the suit or case that resulted in judgment given in his absence;*

*2. Whether* *there has been an undue delay in making the application to set aside the judgment so as to prejudice the party in whose favour the judgment subsists;*

*3. Whether the party in whose favour the judgment subsists would be prejudiced or embarrassed upon an order for rehearing of the suit being made, so as to render such a course inequitable:*

*4. Whether the applicant’s case is manifestly unsupportable; and*

*5. Whether applicant’s conduct throughout the proceedings, that is, from the service of the writ upon him to the date of judgment has been such as to make his application worthy of sympathetic consideration.*

See IDAM UGWU vs. NWAJI ABA (1961) ALL NLR 438, DOHERTY vs. DOHERTY (1964) NMLR 144 at 145, MOMOH vs. GULF INSURANCE CORPORATION (1975) 1 NNLR 184 at 186 and WILLIAMS vs. HOPE RISING VOLUNTARY FUNDS SOCIETY (supra).

Taking the first condition which is the reason for the Respondent’s failure to appear at the hearing; the Respondent stated that the originating processes were not served on it. The lower Court, taking the view that the affidavits filed were in conflict took oral evidence to resolve the conflict. In deciding the issue of whether the Respondent was served the originating processes, the lower Court duly took into consideration the affidavits filed by the parties, the affidavit of service as well as the evidence adduced towards resolving the conflict in the affidavits. It was only in evaluation of the evidence adduced in resolving the conflicting affidavits that the lower Court stated that there was nothing to place on the Appellants side of the imaginary scale of justice. The lower Court then conclusively held that the Respondent was not served. Hear the lower Court at page 57 of the Records:

*There is in the Court’s file an affidavit of service sworn to on 19/10/98 by RASAQ AJAO, bailiff of this Court, that at 4.22 p.m. of 12/10/98 he posted the said processes at the Defendant’s petrol station situate along Lagos-Abeokuta Road, Ojokoro.*

*It is clear from the counter-affidavit deposed to by ADIO ONABIYI, the 1st Plaintiff herein that he did not accompany the said bailiff to effect service, so really his depositions are of no value in resolving the issue.  
As against the bailiff’s affidavit of service are the affidavits of* *the Defendants as well the evidence its witness ABRAHAM GBADAMOSI.  
As I stated earlier despite being given the change[sic] on three occasions to put forward oral evidence to prove service, learned counsel to the Plaintiffs declined to do so for reasons which in my view are plainly ridiculous.*

*Be that as it may, the result is that the Plaintiffs have failed to put anything on the other side of the imaginary scale to weight against that of the Defendants.  
The legal burden placed upon the Defendant in proof of its assertion that it was not served is thus considerably lessened.*

*See: A. I EGBUNIKE V. A.C.B LTD (1995) 2 NWLR (Pt. 375) 34; BURAIMOH V. BAMGBOSE (1989) 3 NWLR (Pt. 109) 352; U.B.A. LTD. V. MISS NGOZI ACHORU (1990) 6 NWLR (Pt. 156) 254 at 289.*

*That being the case I have no hesitation in accepting the evidence of the Defendant/Applicant’s witness and I hold that there was no service of the Writ of Summons and Statement of Claim in respect of this suit on the Defendant/Company.*

The Respondent has rightly submitted that the Appellants did not appeal against the finding of the lower Court that there was no service of the Writ of Summons and Statement of Claim on the Respondent. The said finding remains binding on the parties. See ANYANWU vs. OGUNEWE (2014) LPELR (22184) 1 at 47 (SC), IYOHO vs. EFFIONG (2007) 11 NWLR (PT 1044) 31 at 55, UNITY BANK vs. BOUARI (2008) 7 NWLR (PT 1086) 372 at 400 and OGUNYADE vs. OSUNKEYE (2007) ALL FWLR (PT 389) 1175 at 1206-1207. Concomitantly, the condition of the reason for failure to appear at the hearing being on account of non-service of the originating processes was satisfied.

The next condition is whether there was delay in making the application. The lower Court had found that the originating processes were not served and there has been no appeal against this finding. This necessarily implies that the Respondent was not aware of the pendency of the action. The Respondent deposed that it was only when execution was levied on 2nd February 2000 that it became aware that there was an action. The application to set aside was filed on 3rd February 2000 so there had clearly not been an undue delay.

The satisfaction of the conditions that the Respondent’s case is not manifestly unsupportable and that the conduct of the Respondent throughout the proceedings, id est, from service of the writ to the date of judgment is easily traceable to the unchallenged finding of the lower Court that the originating processes were not served on the Respondent. Since the processes were not served, the conduct of the Respondent in not attending Court or his case being manifestly unsupportable would not arise. This is so because the question of conduct deserving sympathetic consideration would only arise if the Respondent had been served but deliberately chose to stay away.

The Appellants submit that they were prejudiced by the setting aside of the judgment since they had levied execution and taken possession of the disputed land. The legal position remains that whenever proceedings are conducted where the Court processes are not served on the other party, the said party is entitled to have the proceedings set aside, *ex debitojustitiae*: see SKENCONSULT NIG LTD vs. UKEY (supra).Once again the lower Court found and held that the originating processes were not served on the Respondent. The effect of service, which is fundamental, not having been effected is that the proceedings conducted in the absence of service are a nullity. Being a nullity, it is as though the proceedings never took place and no rights were acquired or built on it.

Be that as it may, the judgment obtained by the Appellants was in the absence of the Respondent. The Respondent seeks to have an *inter partes* determination of its civil rights and obligations on the merits. The Appellants however hanker after the retention of the said default judgment. In the immortal words of*Olatawura, JSC*in USIKARO vs. ITSEKIRI LAND TRUSTEES (1991) 2 NWLR (PT 172) 190:

*Let no man walk out of our Courts disappointed in the administration of justice. He will prefer to lose a case on its merits than to allow his opponent win by default. There is no provision for a walkover in our adversary system. It is not a game of football or a tennis competition. It must be shown and seen that any party has a fair trial.*

The even handed administration of justice, upon its being established that the Respondent was not served the originating processes, requires that the matter should be heard on the merits. No amount of perceived prejudice or embarrassment will justify denying the Respondent a fair trial by having the matter heard on the merits.

In the circumstances the conditions for setting aside the judgment were satisfied by the Respondent and the lower Court rightly exercised discretion in favour of granting the Respondent’s application and setting aside the entire proceedings and judgment for being a nullity. The conflating and concatenation of the foregoing is that the issue for determination is resolved against the Appellants. The appeal is lacking in merit and it is dismissed with N100,000.00 costs in favour of the Respondent. The Ruling of the lower Court delivered on 7th April 2000 is hereby affirmed.

**MOHAMMED LAWAL GARBA, J.C.A**.:

Undoubtedly, this appeal is abjectly wanting in merit for reasons adumbrated in the lead judgment delivered by my learned brother *U. A. Ogakwu, JCA,* with which I agree.

The appeal is dismissed by me too in all the terms of the lead judgment.

**JOSEPH SHAGBAOR IKYEGH, J.C.A**.:

I too agree with the succinct judgment prepared by my learned brother, **Ugochukwu Anthony Ogakwu, J.C.A**., which I had the benefit of reading in advance.