**ADOSCO NIGERIA LTD. & ANOR**

**V.**

**CHILEWA INVESTMENT LTD.**

IN THE COURT OF APPEAL OF NIGERIA

THE 7TH DAY OF DECEMBER, 2011

CA/PH/398/2007

**LEX (2011) - CA/PH/398/2007**

OTHER CITATIONS

2PLR/2011/5 (CA)

**BEFORE THEIR LORDSHIPS**

MUSA DATTIJO MUHAMMAD, JCA

PAUL ADAMU GALINJE, JCA

TUNDE OYEBANJI AWOTOYE, JCA

**BETWEEN**

1. ADOSCO NIGERIA LTD.

2. ELDER CHRIS ADOLOR - Appellant(s)

AND

CHILEWA INVESTMENT LTD. - Respondent(s)

**REPRESENTATION**

C. E. ONYEBUKWA - For Appellant

AND

G. OKORO - For Respondent

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

COMMERCIAL LAW - CONTRACT: Claim for recovery of outstanding balance owed pursuant to a contract for hire and use of machinery – How treated

**PRACTICE AND PROCEDURE ISSUES**

ACTION - COMMENCEMENT OF PROCEEDINGS:- "Failure to commence a proceeding with a valid writ of summons – Legal effect of – Whether goes to the root of the case

ACTION - COMMENCEMENT OF PROCEEDINGS:- Proceeding commenced via an invalid writ - Order emanating therefrom - Whether liable to be set aside as a nullity

ACTION - COMMENCEMENT OF PROCEEDINGS - DEFECT IN ORIGINATING PROCESS:- Settled law that where a non compliance or defect in the originating process goes to the competence or jurisdiction of the court, any subsequent proceeding will be a nullity no matter how well the case is decided – Where the defect does not affect the competence or jurisdiction of the court – Whether a mere irregularity

ACTION - COMMENCEMENT OF PROCEEDINGS- DEFECTIVE WRIT OF SUMMONS:- Party served with a defective writ of summons or a summons that is in breach of statutory requirement and who seeks to raise any objection – Duty thereon to take prescribed steps – Effect of failure thereto - Implication where a party decides to take part in the proceedings commenced by an irregular writ of summons

**COURT - JURISDICTION:-** Principle of law captured under order 5 rule 1 (1) and (2) of the High Court of Rivers state (Civil Procedure) Rules 2006 - - When defect in the writ of summons does not affect the competence or jurisdiction of the trial court but a mere irregularity – Duty of judge thereto – Whether in a position to direct that the defect be regularized – Effect of failure of court to so direct

COURT - NON-COMPLIANCE WITH RULES OF COURT:- Where there is a breach, or non compliance with any of the provisions of the Rules of court – Implications for the writ of summons and service of same on the defendant – Proper order for court to make where the defendant acted timeously and had not waived his right to object by taking a step in the proceedings

COURT - TRIAL COURT:- Failure of the trial judge to order the regularization of a defective writ of summons – Placement of suit on the undefended list leading to the abridgment of defendant’s time for entering a proper appearance – Legal effect

**MAIN JUDGMENT**

PAUL ADAMU GALINJE, J.C.A (DELIVERING THE LEADING JUDGMENT):

By a writ of summons dated 23rd April 2007 and filed on the 24th of April 2007, the Respondent herein claimed from the Appellant, the sum of N717, 500.00 being outstanding balance owed it by the Appellant for hiring and using its 12 a gradermachine and interest at the rate of 10% per month on the principal sum from the date of judgment until the judgment sum is full paid.

In support of the writ is an affidavit in support of claim under the undefended list. Annexed to the affidavits aforesaid are the, following documents:-

1. Equipment Hiring/Leasing Agreement,

2. Invoice for N330, 000

3. A copy of a cheque for N1,317,500 issued by the 1st Appellant.

4. Another copy of a cheque issued by the 1st Appellant.

5. A copy of invoice for N717,500 issued by the Respondent being outstanding balance.

6. Demand for Immediate payment by Godwin Okoro Esq.

By a motion ex-parte dated 23rd April 2007 and filed on the same 25/4/2007, Learned Counsel for the Respondent, Mr. Godwin Okoro applied that the suit be placed on the undefended list and be so marked. This motion which was supported by a 6 paragraph affidavit was also accompanied with a written address dated 23rd April 2007 and filed on the 25/4/2007.

By a notice of preliminary objection dated and filed on the 1/6/2007, Mr. C.E. Onyebukwa, Learned Counsel for the Appellants prayed the lower court for an order striking out the suit on the ground that same was incompetent having been commenced by an invalid writ of summons. Written addresses in support and against the preliminary objection were filed and exchanged. The Trial Judge heard arguments from learned counsel for both sides who adopted the written addresses on the 19/7/2007. In a considered ruling which was delivered on the same day, the preliminary objection was overruled for being frivolous.

Having overruled the preliminary objection, the Learned Trial Judge went ahead to deliver judgment in the main suit since the return date which was on the 18/6/2007 had since elapsed and the Appellants failed and or neglected to file a notice of intension to defend the suit. The Learned Trial Judge granted the claims of the Respondent and ordered the Appellants to pay to the Respondents cost of prosecuting the case which was assessed at N8, 000.

The Appellants are dissatisfied with the judgment and have therefore brought this appeal the notice of appeal which is at pages 32-34 of the record of Appeal, contains two grounds of appeal which I reproduce hereunder without their particulars as follows:-

"1. The Learned Trial Judge erred in law when he proceeded to enter judgment for the claimant upon dismissing the preliminary objection of the Defendants/Appellants without affording the Defendants an opportunity to be heard on the merits [sic] of the substantive suit, thereby denying the Defendants their constitutional right to fair hearing.

The Learned Trial Judge erred in law when he dismissed the preliminary objection filed by the Defendant as frivolous and an attempt to secure a technical victory."

Learned Counsel for parties filed and exchanged briefs of argument. Appellants formulated two issues for determination of this appeal. They read thus:-

"i. whether the lower court was right in upholding the validity of the writ of summons in this suit which abridged the time provided by the Rules of court for the Defendant to enter appearance from 42 days to 8 days

ii. whether the lower court was right in entering judgment against the Appellants after overruling their preliminary objection without giving the Appellants opportunity to defend the suit on the merit."

Issues 1 and 2 are distilled from grounds 2 and 1 respectively.   
For the Respondent, two issues have been formulated for determination of the appeal.

They read as follows:-

"1. whether is [sic in] view of order 5 rule 1 [1] and [2] of the High court [civil procedure] Rules 2006 of Rivers State, the lower court was not right in holding that the defects in the writ of summons filed in this suit were mere irregularities that can be ignored.

2. Whether the lower court was right in entering judgments against the Appellants after overruling their preliminary objection without giving the Appellants opportunity to defend the suit on the merit."

The two issues herein are formulated form ground 2 and 1 respectively.  
The issues formulated by parties in this appeal are similar. I therefore adopt those issues formulated by the Appellant for determination of this appeal. I will treat the issues in the order in which they are argued by parties.

On issue 2, Mr. Onyebukwa, Learned Counsel for the appellants submitted that the 8 days set out in the Respondent's writ of summons within which the appellants were to enter appearance, is contrary to the provision of order 3 rule 3 of the High court [Civil Procedure Rules of Rivers State 2006 which provides that the writ of summons to be used shall be in form 1 with such modification or variation as circumstances may require. In Form 1 which is at page 165-167 of the schedule to the aforementioned High Court Rules 2006, 42 days is provided within which a defendant in a writ of summons shall enter appearance. It is the further submission of Learned counsel that the to lower court has no jurisdiction to entertain the suit because same has not been initiated by due process of law and that the law does not require a party to show he has suffered prejudice before that party can complain of breach of the rules of Court. Learned Counsel insists that the noncompliance with order 3 rule 3 of the Rules of court vitiated the validity of the summons and amounted to a denial of fair hearing, since the order made on the 15/5/07 where the suit was placed on the undefended list to be heard on the 18th June 2007 was so made within less than 42 days given to the Appellants by the rules. According to the Learned Counsel the abridgment of the time has resulted in the denial of the Appellants right to fair hearing within the period stipulated by the Rules of court and constitutes enough prejudice to entitle the Appellants to complain before the lower court. In aid Learned Counsel cited Madukolu v. Nkemdilim (1962) 2 SCNLR 342, Leonard Okoye & Ors v. Nigeria Construction and Furniture Co. Ltd & Ors (1991) 6 NWLR (pt 199) 501 at 539. Still in argument, Learned Counsel submitted that the lower court was in error when it relied on order 11 Rule 10 of the Rules in holding that the Appellants were only entitled to 5 days before the return date to file their defence. Learned Counsel set out the provision of order II Rule 10 and contended that the rule mandates a defendant to file his defence not later than 5 days before the date fixed for hearing and submitted that the Rules of court are made for the orderly conduct of cases in court and they must be obeyed.

In aid the authorities in Broad Bank Nig. Ltd v. Alhaji S. Olayiwola & Sons Ltd (2001) 6 NWLR (Pt 701) 742 at 758, N. A. Williams v. Hope Rise Voluntary Society (1982) ANLR 16, Hon. Justice Kalu Anyah v. African Newspapers of Nig Ltd [1992] 7 SCNJ (Pt.1) 47 were cited. Finally Learned Counsel submitted that where a party fails to comply with the Rules and fails to apply to regularize his processes, the court is bound to strike out the said processes provided the objection is taken promptly. In conclusion Learned Counsel urged this court to resolve this issue in favour of the Appellant by holding that the lower court was wrong is upholding the validity of the writ.

For the Respondent, Mr. Godwin Okoro of counsel submitted that the lower court was right when it held that the defect in the writ of summons were mere irregularities which do not deprive the lower court of the requisite jurisdiction to hear and determine the case on merit. Learned Counsel cited order 5 Rule 1 (1) and the authorities in Attorney General of the Federation v. Attorney General of 36 State (2001) 9 SCM 45 at 49, Duke v. Akpabuyo L.G. [2006] All FWLR (Pt 294) 537 at 569 in support of his submission.

In a further argument, Learned Counsel submitted that rules of court are made to aid justice and should not be interpreted to undermine substantial justice. In aid Learned counsel cited Olaba v. Akereja (1998) 2 NSCC 120 at 136, Sale v. Munguna (2006) All FWLR (pt.332) 1411; UTC Nig. Ltd v. Pamotei [1989] 2 NWLR (pt 103) 274 at 296.

Still in argument, Learned Counsel submitted that the invitation by the Appellant to strike out this suit is an invitation to resort to technicality to defeat the merit of the Respondent's case. According to the Learned Counsel, Supreme Court has forbidden resort to technicality by courts in determining cases before them.  
In aid the case of Bello v. A.G. Pup State (1986) 5 NWLR (Pt 45) 829 at 871 is cited, also cited is Saleh v. Munguno [supra] at 1420.

Finally, Learned Counsel submitted that the defect in the writ of summons is a mistake of counsel and that the Respondent should not be punished for the sins of the counsel. In aid the authorities in Bello v. A.G. Oyo State (supra) at 826, Sale v. Munguno [supra] at 1439-1440, Ogundoyin & ors v. Adeyemi (2001) 10 SCM 92 were cited.

In conclusion Learned Counsel urged this court to resolve this issue in favour of the Respondent.

The law is settled that where a non compliance or defect in the originating process goes to the competence or jurisdiction of the court, any subsequent proceeding will be a nullity no matter how well the case is decided. However where the defect does not affect the competence or jurisdiction of the court, it is a mere irregularity.

The principle of law is captured by order 5 rule 1 (1) and (2) of the High Court of Rivers state (Civil Procedure) Rules 2006 which provides as follows:-

"1. (1) where at any stage in the course of or in connection with any proceedings there has by reason of anything done or left undone, been [sic] a failure to comply with the requirements as to time, place, manner, or form, the failure shall be treated as an irregularity and may not nullity such step taken in the proceedings. The Judge may give any direction as he thinks fit to regularize such steps.

(2) The Judge shall not wholly set aside any proceedings or the writ or other originating process by which they were begun on the ground that the proceedings were required by any of these Rules to be begun by an originating process other that the one employed."

In the instant case the defect in the writ of summons does not affect the competence or jurisdiction of the lower court it is therefore a mere irregularity which the judge was in a position to direct that the defect be regularized. It will appear such a directive was not given and the Learned Trial Judge overruled the objection to the writ and went on to deliver judgment in the suit. This I think is an error on the part of the Learned Trial Judge.

A party served with a defective writ of summons or a summons that is in breach of statutory requirement and who seeks to raise any objection has the following steps to take:-

1. Enter conditional appearance; and

2. Raise objection timeously before taking any step.

See N.U.B. Ltd. v. Samba Pet. Co. Ltd. (2006) 12 NWLR [Pt. 993] 98; Niger-Benue Transport Co. Ltd v. Narumal & Sons Ltd (1986) 4 NWLR [Pt. 33] 117.

Where the party raising objection acts timeously the defective writ of summons would be set aside. However where the party decides to take part in the proceedings on the irregular writ to the conclusion of the case, he cannot be heard to complain about the defective writ of summons which in any case is a procedural irregularity. See Nwabueze & Anor v. Justice Obi Okoye [1988] 4 NWLR (Pt 91) 664; NEPA v. Mrs. P.O, Onah & Ors [1997] 1 NWLR [Pt 484] 680.

In the instant case the suit was placed on the undefended list on the 15th of May, 2007 by the ruling of the Learned Trial Judge. Even if service was effected on the same day, the 42 days within which the appellant was to enter appearance would expire on the 26th of June 2007. The Appellant's preliminary objection to the competence of the writ is dated 1st of June 2007 and filed the same date. The objection was raised timeously and this would have informed the Learned Trial Judge of the necessity to strike out the writ or direct that same be regularized.

What then is the effect of the failure of the trial judge to order the regularization of the defective writ of summons? From the proceedings of the lower court, the appellant's period for entering appearance was abridged without the leave of court from 42 days to just 8 days and when the suit was placed on the undefended list on the 15/5/07, 18th June 2007 was made the return date, far short of the 42 days. This is clearly a deprivation of the period given to the appellant to enter appearance.

This is a clear case of shutting the appellant out prematurely from preparing his defence.

Where there is a breach, or non compliance with any of the provisions of the Rules of court, the writ of summons and service of same on the defendant would be set aside provided the defendant acted timeously and had not waived his right to object by taking a step in the proceedings. In the instant case the appellant did not waive his right as such the defective summons could not sustain the complaint. This issue is resolved in favour of the Appellant and the ground of appeal upon which it is formulated is hereby allowed. The writ that commenced the suit at the lower court is defective and it is hereby struck out.  
Now having struck out the writ, a decision on the second issue for determination will only amount to a mere academic exercise, which this court is not prepared to embark upon.

On the whole this appeal is allowed. The decision of the lower court is set aside and quashed.

I make no order as to cost.

**M. DATTIJO MUHAMMAD, J.C.A.:**

My learned brother GALINJE JCA has exhaustively treated the issue this appeal raised. Let me only take the liberty of restating by way of emphasis that a defective writ in respect of which a defendant had timeously objected to is incapable of activating a court's jurisdiction. For this and the more detailed reasons advanced in the lead judgment, I allow the appeal and set aside the lower court's decision arrived at without the necessary jurisdiction. I abide by his lordship's order on costs.

**T. O. AWOTOYE, J.C.A.:**

I had before now the draft of the judgment just delivered by my learned brother P.A. GALINJE JCA.

I am in full agreement with the lucid reasoning and conclusion therein.

Failure to commence a proceeding with a valid writ of summons goes to the root of the case and any order emanating form such proceedings is liable to be set aside as a nullity. See KIDA V. OGUNMOLA (2006) 13 WLR (PT. 997) 377.

The writ of summons served on the appellant/defendant in this appeal was manifestly defective. It does not comply with Order 3 Rule 3 of the High Court of Rivers State (Civil Procedure) Rules of 2006. It is fundamentally different from FORM 1 of the Rules.

Granted, a party served with a defective writ must raise an objection timeously without taking part in the proceeding as if nothing was wrong with the proceeding otherwise he would be deemed to have waived his right to have the writ of summons set aside. See NBN LTD. V. SHOYOYE (1977) 5SC 191.

But in the case on appeal, the objection was timeously raised. The learned trial judge ought to have set aside the writ of summons and not continued to build something on nothing as he did.

I agree that this appeal should be allowed and I so do. The decision of the lower court is hereby set aside.

In its place I order that writ of summons dated 23/4/2007 and filed on 24/4/2007 in PHC/604/2007 CHILEWA INVESTMENT LTD. V. ADOSCO NIGERIA LTD & ANOTHER is struck out.

For the avoidance of doubt suit NO. PHC/604/2007 CHILEWA INVESTMENT LIMITED v. ADOSCO NIG. LIMITED & ANOTHER is struck out.

I make no order as to costs.