**AKINYEMI FASUBA**

**V.**

**MRS. F. TAIWO ADUMASI AND ANOTHER**

IN THE COURT OF APPEAL OF NIGERIA

THE 20TH DAY OF MARCH, 2015

CA/B/16/2006

**LEX (2015) - CA/B/16/2006**

OTHER CITATIONS

2PLR/2015/7 (CA)

(2015) LPELR-24548(CA)

­­­­­­­­­­­**BEFORE THEIR LORDSHIPS**

MOJEED ADEKUNLE OWOADE, JCA

MOHAMMED AMBI-USI DANJUMA, JCA

JAMES SHEHU ABIRIYI, JCA

**BETWEEN**

AKINYEMI FASUBA - Appellant

AND

1. MRS. F. TAIWO ADUMASI

2. THE COMMISSIONER OF POLICE ONDO STATE - Respondents

**ORIGINATING COURT(S0**

HIGH COURT OF ONDO STATE, AKURE DIVISION (S. A. Sadiq J., Presiding)

**REPRESENTATION**

O. O. AYENAKIN - For Appellant

AND

* Respondent's Counsel was absent

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

CONSTITUTIONAL LAW – FAIR HEARING: - Civil proceedings - Party against whom judgment is given – Subsequent claim to set aside judgment on claim that name was not in writ of summons and statement of claims and that he was not served any processes and never appeared in the trial – Attitude of court thereto

WOMEN AND CHILDREN LAW: Civic and human rights - Police’s seizure, detention and purported sale of a car belonging to woman – How treated

**PRACTICE AND PROCEDURE ISSUES**

APPEAL **-** GROUNDS OF APPEAL: - Purpose and nature of grounds of appeal – Attitude of court to attempt to argue grounds not related to judgment appealed against

EVIDENCE - ADMISSIBILITY OF EVIDENCE: - Admissibility of evidence of witness taken in earlier proceedings in a later trial – Exceptions to the rule

EVIDENCE - BURDEN OF PROOF: -Civil case - Party with duty to prove the existence of asserted facts – How determined

JUDGMENT AND ORDER - IMPEACHMENT OF JUDGMENT: - Fraud, misrepresentation, deceit, illegality etc. as ground for the impeachment of judgment – Relevant considerations

INTERPRETATION OF STATUTE: - Order 37 Rule 9 of the Ondo State High Court Rules - Who can bring a motion to set aside a judgment of Court

**MAIN JUDGMENT**

MOJEED ADEKUNLE OWOADE, J.C.A. (DELIVERING THE LEADING JUDGMENT):

This is an appeal from the judgment of S. A. Sadiq J. of the Akure Division of the High Court of Ondo State delivered in Akure on 29th September, 2005.

By a Writ of summons and statement of claim dated 2/1/1996, the Appellant as Plaintiff claimed against the Respondents (Defendants) jointly and severally as follows:-

(a) A declaration that the entire proceedings including the judgment therein given on 23rd November, 1994 in suit Number AK/93/92 between the first Defendant as plaintiff on the one hand and the second and the third defendants as well as the Plaintiff as Defendants on the other hand are wrongful, illegal, unconstitutional, null, void and of no effects whatsoever as the same are vitiated by fraud, misrepresentation, substantive and procedural irregularity and illegality.

(b) An order setting aside and nullifying the said proceedings and judgment, they being wrongful, illegal, unconstitutional, null, void and of no effect.

The 1st Respondent in this appeal instituted suit No.AK/93/92 against the Commissioner of Police Ondo state and 2 others whereby she claimed that the seizure, detention and the purported sale of her Peugeot 504 saloon car Registration No. LA 2535 SF by the 1st and 3rd Defendants to the 2nd defendant is null, void, unconstitutional and of no legal effect. An order directing the defendants to deliver the said vehicle in a perfectly motorable condition to the Plaintiff or in the alternative to pay to the Plaintiff the sum of N100,000.00 (One Hundred Thousand Naira) being the current market price of the vehicle Registration No. LA 2535 SF and N300,000.00 (Three Hundred Thousand Naira) as general damages.

On 23/11/1994, S. A. Afonja J. of the Akure Division of the Ondo State High Court granted the Plaintiff's (now 1st Respondent) reliefs in suit No.AK/93/92 found the Defendants therein jointly and severally liable to the plaintiff's claims and held inter alia as follows:-

"2. A declaration that the purported sale of the plaintiff's Peugeot 504 Saloon Car with Registration No. LA 2535 SF by the 1st and 3rd Defendants to the 4th Defendant is illegal null and void.

4. An order that the 4th Defendant shall deliver to the plaintiff immediately or within twenty-one days from this day and in good and road worthy condition the said Peugeot Car with Registration No. LA 2535 SF now in custody of the Defendants or of anybody else through all or any of the Defendants.

5. An order that in the event of a failure of all or any of the Defendants or other person or persons to comply with the above order to deliver the said vehicle No. LA 2535 SF to the plaintiff within the said period and in the said condition as prescribed above, the Defendants shall become liable jointly and severally to the Plaintiff in the sum of N180,000.00 (One Hundred and Eighty Thousand Naira) being the current market price of the said vehicle as claimed by the plaintiff;----"

The Appellant (Plaintiff in suit No.AK/7/96) who was referred to as the 4th Defendant in suit No. AK/93/92 instituted the suit now on appeal that his name was not in the writ of summons and statement of claim in suit No.AK/93/92 that he was never served any processes and that he never appeared in the trial of suit No.AK/93/92. That, in any event, he was not the person who purchased 1st Respondent's vehicle No. LA 2535 SF from the Police auctioneer as to be liable to return the said vehicle or his money worth to the 1st Respondent (plaintiff in suit No.AK/93/92. Pleadings were filed and exchanged by the Appellant and the 1st Respondent in suit No.AK/93/92. The Appellant as Plaintiff gave evidence and called one other witness - PW2. The 1st Respondent also gave evidence. At the trial, Appellant tendered Exhibits P1 - P4.

At the end of the trial, the learned trial judge held at page 43 of the records that:

"In view of all I have said and held above, the plaintiff claims as contained in paragraphs 5(a) and (b) of the amended statement of claim and as constituted in this action lacks merit, incompetent, a nullity and same is accordingly dismissed---"

Dissatisfied with the judgment the Appellant filed a Notice of Appeal (containing five (5) grounds of appeal) in this court on 21st October, 2005. By order of this Honourable Court, the Appellant filed an Amended Notice of Appeal (containing six grounds of appeal on 21/1/2013.

The Appellant's grounds of appeal together with their particulars are reproduced below:

GROUNDS OF APPEAL:

1. The Lower Court erred in law in holding that:-

"The Plaintiff in this case instead of exploring the provisions of Order 37 Rule 9 to set aside the judgment in Suit No. AK/93/92 as a judgment by default, filed this fresh action harboring under a vague andunsubstantiated fraud"

And this led to a miscarriage of justice,

PARTICULARS OF ERROR

(a) Order 37 Rule 9 relates to default judgment give against a party to a case in the absence of that party.

(b) In AK/93/92 herein Plaintiff was not a party as the Writ does not include his name, the Writ was not specially endorsed as when the case was going on at Akure, plaintiff was resident at Kaduna, the Statement of Claim does not include his name: only the judgment includes his name but there was no amendment to the Writ of Summons or Statement of Claim to include plaintiff's name.

(c) The bare statement made by the judge in Exhibit P2 is not enough as the court did not say there was proof of service of anything on the Plaintiff either by a bailiff, or by courier service, by post or otherwise.

(d) if anything was served on Plaintiff these must have been the Writ of Summons and Statement of Claim which do not include Plaintiff's name, which was not specifically endorsed to him at Akure to him in Kaduna and a statement of Claim which does not include his name both of which hence are to him irrelevant.

(e) A motion under Order 37 Rule 9 is an alternative to a new Writ when one wants the court to set aside a judgment give in the absence of a party,

(f) the issue had once been cleared in this case by the Court of Appeal and reported in Fasuba V Adumashi (2001) 17 NWLR (Pt.742) 385.

(2) The trial court erred in law in holding that:

"The Plaintiff has failed to discharge the burden of proof placed on him with regards to the non service of the Writ of Summons and other processes in Suit No.AK/93/92 on him. The Plaintiff has failed to place before this Honourable Court the records of Suit No.AK/93/92 wherein the evidence of service of the processes could be found. The learned trial judge who had access to the case file at page 2 Exhibit P2 has this to say :the 4th Defendant was served with all the processes but did not care to show up in court, either in person or through his Counsel.

And this led to a substantial miscarriage of justice.

PARTICULARS OF ERROR

(a) Plaintiff tendered the Writ of Summons in AK/93/92 which does not bear his name,

(b) the said Writ of Summons was not specifically endorsed to him in Kaduna where he was living while the case was in Akure, Ondo State.

(c) Plaintiff tendered the Statement of Claim in AK/93/92 which does not include his name,

(d) there are no amended Writ of Summons and Statement of Claim, which include Plaintiff's name,

(e) Exhibit P2 does not show the mode of the alleged service on Plaintiff either by a bailiff or by post or by courier,

(f) in a situation like this plaintiff did give prima facie evidence of non-service,

(g) consequently, the onus shifts on the defendant to disprove non-service, by tendering any amended Writ of Summon which include plaintiff's name,

(h) this is moreso that if anything was served on plaintiff they must be processes not bearing his name and which are hence irrelevant to him and which he could legitimately discountenance,

(i) Defendant pleaded that plaintiff was served with all processes without being specific as to which processes,

(j) Defendant testified that she did not sue plaintiff but the court joined him but there is no evidence of joinder.

(3) The trial court erred in law in holding that:

(a) "The Plaintiff has failed to discharge the burden of proof placed on him with regards to the non-service of the Writ of Summons and other processes in Suit No. AK/93/92 on him----"

(b) It is trite law that where in accordance with the Rules of Court and order for substituted service is made as in this case, and service is effected in compliance with such order, proof that the Defendant actually had knowledge of the processes is unnecessary,"

(c) "The Plaintiff....files this fresh action harbouring under a vague and unsubstantiated fraud."

PARTICULARS OF ERROR

(a) Defendant both in her Statement of Defence and her oral evidence in court did not specifically deny or controvert the facts pleaded in paragraph 12 of the Statement of Claim.

(b) Defendant tendered no copy of Amended Writ to include Plaintiffs name as fourth Defendant.

(c) Defendant tendered no copy of amended Statement of Claim which includesthe name of Plaintiff as fourth defendant.

(d) Defendant tendered no copy of the Writ specially endorsed as required by law for service on Plaintiff who was then living in Kaduna.

(e) The mode of service referred to in Exhibit P2 was never stated and what was allegedly served were not specified.

(f) postal services is not one of the modes of services by the rules of Ondo State High Court.

(g) there is need here to prove that plaintiff had knowledge of the case especially as there is no Writ of Summons or Statement of Claim before court which includes the name of the Plaintiff in which case if anything was served at all, but which is denied, they must be Writ and Statement of Claim which do not include Plaintiff's name.

(h) surely in the face of the foregoing it cannot be said that there is no fraud or misrepresentation or irregularity or deceit or illegality has been perpetrated, and in such a situation the court should be reached through a Writ.

(4) The learned trial judge erred in law when he held that:-

"It is trite law that the record of criminal proceedings in which party is a victim and in which the party testified is not admissible in a subsequent trial in a civil action".

PARTICULARS OF ERROR

(a) no record of the earlier criminal proceedings was tendered in the case,

(b) what were tendered are documents tendered in an earlier criminal case by a witness who is now dead and would have tendered same in this succeeding civil case Exhibit P3 is also needed as a witness in the subsequent case but who unfortunately had died and can no more testify in the civil case.

(c) such evidence is covered by Section 34 (1) of the Evidence Act.

(d) the trial court admitted the exhibits and can no more be against them.

(e) the case of Nigerian Telecommunications PLC V Emmanuel Awala, 2002 3 NWLR (pt.753) 1 at 5, Ration 6 relied on by the trial court is not applicable to the case herein.

(5) The judgment of the court is against the weight of evidence.

(6) If Defendant-Respondent has any claim at all against Plaintiff-Appellant which is however denied, such a claim had become statute barred before Defendant-Respondent came to court in AK/93/92 and the court erred in law not making a finding on the point.

PARTICULARS

(a) police seized the car of Defendant-Respondent as suspected stolen car in May, 1991.

(b) police sold the car by Auction on 20th September, 1991

(c) Defendant-Respondent filed her action in AK/93/92 on 29th April, 1992

(d) thus the claim in out was filed seven (7) months after the auction sale

(e) by the Police Act the claim ought to have been made within six (6) months of the sale.

(f) the trial court made no findings on this in spite of the fact that the fact was pleaded and counsel to Plaintiff-Appellant pleaded the fact and raised it in his final address before court.

Appellant's brief of argument dated 6th April, 2006 was filed on the same day.

On 13/10/2013, the Appellant secured an order from this Honourable court to argue the appeal on the Appellant's brief alone for failure of the Respondents to file briefs of argument.

Learned counsel for the Appellant, O. A. Akanle SAN distilled five (5) issues from the six (6) grounds of appeal contained in the Amended Notice of Appeal. They are:

1. Whether the action should have been brought by a motion or by a Writ of Summons especially in view of Fasuba V Adumasi (2001) 17 NWLR (Pt.742) 185 (Ground 1).

2. Whether or not Plaintiff proved by preponderance of evidence that no Writ or Statement or any other process was served on him in relation to suit Number AK/93/92 (Grounds 2 and 3).

3. Whether or not the Lower Court was right in holding that evidence and Exhibits tendered in a criminal case cannot be later tendered in a civil case based on the same facts as those of the criminal especially when the person who tendered them originally had died before the civil case came on (Ground 4).

4. Whether or not the judgment of the Lower Court accords with the evidence led before the court (Ground 5).

5. Whether or not any claim Defendant-Respondent may have against Plaintiff-Appellant is Statute Barred.

Let me be quick to observe that Ground No. 6 of the Appellant's Notice and Grounds of Appeal did not arise from the judgment appealed against. Grounds of Appeal are the reasons for considering a decision of court wrong. Thus, the purpose of the grounds is to isolate and accentuate, for attack, the basis of the reasoning of the decision being challenged. Like pleadings, parties are bound by their grounds of appeal and are not at liberty to argue grounds, which are not related to the judgment appealed against.

See:- Saraki v. Kotoye (1992) 9 NWLR (Pt.264) 156; Bhojsons Plc V Daniel-Kalio (2006) 5 NWLR (Pt.923) 330.

Appellant's Ground No. 6 and Issue No. 5 based on it are struck out.

Also, I have carefully gone through the record of appeal and the brief of argument, I am convinced that the justice of the appeal would be met by considering the first three (3) issues in the Appellant's brief of argument. This is because Issue No. 2 based on Ground 2 and 3 and Issue No 4 based on ground 5 of the Notice and grounds of appeal tend to achieve the same purpose.

Learned Counsel for the Appellant argued issues 1 and 2 together as follows. Order 37 Rule 9 of the Ondo State Rules of the High Court provides for the benefit of a party to a case in the absence of whom a judgment was given and whom can bring a motion to set aside judgment. In the case on hand, however, the plaintiff-Appellant was never made a party in spite of the insinuation that he was served certain processes fact but which was not proved. The original writ of summons (Exhibit P1) was never amended to reflect the name of plaintiff, Appellant as fourth Defendant.

This, counsel said is contrary to order 11 Rule 15 of the High Court Rules of Ondo State. Equally, said counsel, the writ in the case was never specially endorsed for purposes of service on plaintiff Appellant who was in Kaduna, Northern Nigeria while the court was sitting at Akure, Ondo State, South West Nigeria.

He referred to Section 97 of the Sheriffs and Civil Process Act and also to the case or Porbeni v Dabod Finance & Invest Co. Ltd (2002) NWLR (Pt.155) 452 at 469.

Suddenly, he argued, the plaintiff Appellant appeared on the judgment given on 23rd November, 1994. That apart from all these, nobody came to give evidence of service of processes on plaintiff; there is no document of service either affidavit or postal evidence. Counsel referred to the case of Muhammed V Mustapha (1993) 5 NWLR (Pt.202) 222 at 232 and submitted that service of process on defendant must be strictly proved, and that mere statement of a Judge that service was effected is not sufficient.

Learned senior counsel submitted further that in the case herein even if anything was served it must be the original writ and statement of claim both of which are worthless as far as Plaintiff Appellant is concerned as they do not bear his name. But, that even if Appellant was made a party in the case and judgment was given in his absence he could still come by way of WRIT to set aside such a judgment especially if he alleges 'FRAUD, MISREPRESENTATION, IRREGULARITY AND DECEIT' all of which are alleged here viz:- that Plaintiff (Appellant) is a party to Suit Number AK/93/92 when he was not, that plaintiff (Appellant) has the vehicle whereas it was sold by police Auction to one Akinyemi Micheal Babalola as evidence by the receipt of the Auctioneer-Exhibit P3.

Learned Senior Counsel referred to the cases of Olufunmise v. Falana (1990) 3 NWLR (Pt.136) 1 at 10; Iweka v. Onatogu (1991) 4 NWLR (Pt.185) 305 at 315 to show that a judgment which has been obtained by fraud can be impeached by an action without leave.

Finally, said counsel, the matter here is res judicata in Fasuba v Adumasi (2001) 17 NWLR (pt. 743) 589 at 599 where this very particular matter was decided by the Court of Appeal.

I do agree with the Learned senior counsel for the Appellant in relation to issues No. 1 and 2. First, that there was no evidence in Suit No AK/7/95 that the Plaintiff/Appellant was ever a party to suit No.AK/93/92. Secondly, that the learned trial judge was wrong to have held that the plaintiff's Appellant's action in the present suit was improperly brought.

On the first, paragraphs 5, 11 and 12 of the plaintiff's (Appellant's) Amended Statement of Claim aver as follows:

5. Sometimes between September and November, 1995, a copy of the enrolment of the judgment in suit No. AK/93/92 was served on Plaintiff who was then serving as a police officer in Kaduna.

11. On enquiry plaintiff got to know that:-

(a) First Defendant filed Suit No. AK/93/92 in the High Court Akure on 27th April, 1992.

(b) She sued the Ondo State Police Commissioner, one S.K.A. Oshode, a policeman, and one Alhaji Yusuf, a licensed auctioneer as Defendants.

(c) Her claim was for a declaration that the seizure and detention of her Peugeot 504 Saloon Car Number LA 2535 SF by second Defendant herein between October and December, 1999 and since May 1991 until the taking of the action was unconstitutional, a declaration that the sale of the vehicle was unconstitutional, an order that the vehicle be delivered to her or alternatively that special and general damages be awarded to her.

(d) On 12th October, 1993, the court ordered the plaintiff herein be joined as fourth Defendant.

(e) On 20th June, 1994, plaintiff herein already joined was ordered to deposit the said car with the Court Registrar.

(f) On 25th November, 1994 the court gave judgment to first Defendant as plaintiff, virtually as per her claim.,

12. Plaintiff shall, at the trial contend that entire proceedings including the judgment are vitiated by fraud, misrepresentation, substantive and procedural, irregularities, deceit and illegalities.

PARTICULARS OF FRAUD, MISREPRESENTATION, IRREGULARITIES, DECEIT AND ILLEGALITIES

(a) after Plaintiff was ordered to be joined as fourth Defendant neither the writ nor the statement of claim was amended to reflect the joinder even though this was ordered by court in its order of 12th October, 1993.

(b) Plaintiff was not served with a copy of the motion for joinder or the consequent order.

(c) Neither the Writ nor the Statement of Claim was served on the Plaintiff.

(d) The Writ was not specially endorsed showing the plaintiff was to be served in Kaduna where he was then a police officer.

(e) At the proceedings were conducted on the absence of plaintiff and without his knowledge,

(f) Plaintiff was wrongly joined as co-defendant in the case as he was not the one that bought the car and which was not in his possession,

(g) The court of trial was deceived and misled into giving judgment against plaintiff who is in no way liable to first defendant as to the car or otherwise.

The 1st Respondent (as 1st Defendant vehemently denied paragraphs 5, 11 and 12 of the Plaintiff's Amended statement of claim in her Amended Statement of Defence. And averred further in paragraphs 4 and 5 as follows:

"4. The Defendant avers that she was plaintiff in Suit No.AK\93\92 having instituted the action in which the present plaintiff was, by the order of the Honourable High Court of Ondo State made a party as 4th Defendant,

5. In further answer to paragraph 12 which the Defendant has vehemently denied, the Defendant says that the plaintiff as 4th Defendant in case No. AK\93\92 was served with all the processes but did not care to show up in court either in person or through his Counsel as borne out in the judgment in the above mentioned 1992 case".

At the trial, the Appellant as plaintiff tendered amongst other documents Exhibit P1, the writ of summons in Suit No. AK\93\92 does not contain the name of the Appellant and it was not specially endorsed for service.

In spite of the apparent lack of absence of the Appellant's name on the summons writ of Exhibit - P1, the learned trial judge held at page 40 of the record as follows:

"The plaintiff has failed to discharge the burden of proof placed on him with regards to the non - service of the Writ of Summons and other processes in Suit No.AK\93\92 on him. The plaintiff has failed to place before this Honourabre court the records of Suit No.AK\93\92 wherein the evidence of service of the processes could be found."

The learned trial judge who had access to the case file at page 2 of Exhibit P2, has this to say:

"The 4th Defendant was served with all the processes, but did not show up in the court, either in person or through his counsel"

The plaintiff is the 4th Defendant as shown in Exhibit P2. The learned trial judge also at page 9 of Exhibit 'P2' stated that the processes in the said case were ordered to be served on the 4th Defendant through substituted service to wit: Nigerian Postal Service and that postal service receipt was duly filed in the case file as evidence of service on the 4th defendant----"

The above passage shows clearly that the learned trial judge misconstrued the incidence of burden of proof in relation to the case on hand. It was the 1st Respondent (Defendant) and not the Appellant (plaintiff) that asserted positively by paragraph 5 of the Amended Statement of Defence that the plaintiff in suit No. AK\93\92 (that is the Appellant) was served with court processes. It was therefore wrong for the learned trial judge to shift the burden of proof of service of court processes on the Appellant who merely denied or made a negative assertion as to non-service of processes on him. This is more so when the Appellant successfully buttressed his denial or negative assertion of service of court processes on him by the production of the writ of summons Exhibit -p1 which in fact does not bear his name and was not specially endorsed for the possibility of any form of service in Kaduna outside the jurisdiction of the trial court.

By virtue of Section 135 of the Evidence Act Cap. 112 LFN 1990 (now Section 131 Evidence Act 2011) whoever desires any court to give judgment as to any legal right liability or dependent on the existence of facts which he asserts must prove that those facts exist. And, when a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

In other words, he who asserts must proof. See: Longe v. F.B.N. Plc (2006) 3 NWLR (Pt.967) 228; Daodu v. N.N.P.C. (1998) 2 NWLR (Pt.538) 355; Braimah v. Abasi (1998) 13 NWLR (Pt.581) 167; Alhaji Otaru & Sons Ltd v. Idris (1999) 6 NWLR (Pt.606) 330; Itauma v. Akpe-Ime (2000) 7 S.C. (Pt.11) 24.

Furthermore, in civil cases, the ultimate burden of establishing a case is as disclosed in the pleadings. The person who would lose the case, if on completion of pleadings and no evidence is led has the general burden of proof. So it is that the burden of proof lies upon the party who substantially asserts the affirmative of the issue. See: A. K. Fadillarah v. Arewa Textiles Ltd (1997) 8 NWLR 546; Murana Elemo & Ors V Fasasi Omolade & Ors (1968) N.M.L.R 359.

In the instant case, it was the 1st Respondent who substantially asserts the affirmative that the Appellant was served with court processes and the learned trial judge was clearly in error to have placed the burden of proving that fact on the Appellant.

In relation to Appellant's Issue No.1, the learned trial judge was equally wrong to have treated the judgment in suit No. AK\93\92 merely as a judgment in default of appearance to which only the provision of Order 37 Rule 9 of the High Court Rules Ondo State becomes the only means of challenging same.

For ease of reference Order 37 Rule 9 reads thus:

"Any judgment obtained where one party does not appear at the trial may be set aside by the court upon such just, terms as may seem upon application made within six days after the trial or within such longer periods as the court may allow for good cause shown".

Assuming without holding that the provision of order 37 Rule 9 is mandatory and perhaps exhaustive as the only remedy for default judgments, the learned trial judge was nevertheless wrong to have declared the Appellant's action based on fraud, misrepresentation etc to be incompetent having not been brought by a motion in accordance with the provision of Order 37 Rule 9 of the applicable High Court Rules of Ondo State.

This is because a defendant whose claim is based on fraud, misrepresentation, deceit, illegality etc as the Appellant in this case can impeach such a judgment by means of an action via Writ of Summons. See: Iweka V Onatogu (1991) 4 NWLR (Pt.185) 305 at 315.

Secondly, and as a general rule, the form of commencement of an action does not make it incompetent. It does not matter whether the Appellant's action was begun by writ of summons or by motion to set aside. What is important is the question of justice of the case. See: F.G.N. V Zebra Energy Ltd (2002) 18 NWLR (pt.798) 162; Famfa Oil Ltd v. A.G Federation (2003) 18 NWLR (Pt.852) 453; Dapialong V. Lating (2007) 5 NWLR (Pt.1026) 199.

In the instant case, giving the circumstances of the case and the claims of the Appellant (as Plaintiff) the learned trial judge was in error to have held at page 43 of the record that "The plaintiff in this case instead of exploring the provision of Order 37 Rule 9 to set aside the judgment in Suit No.AK/93/92 as a judgment by default, filed this fresh action labouring under a vague and unsubstantiated fraud---"

Issues 1 and 2 are resolved in favour of the Appellant.

On Issue 3, Learned Senior Counsel for the Appellant submitted that the third Defendant in this suit (Alhaji Yusuf) who died shortly before the case opened earlier gave evidence in a criminal case involving the Plaintiff-Appellant over his alleged stealing of the car which is in issue in the Civil case herein. That as the said third Defendant had died before he could give evidence in the civil case herein, a certified copy of his evidence in the previous criminal proceeding was tendered in this suit as Exhibit P3. Also, tendered with the evidence are the police letter to the Chief Magistrate for permission to set alleged stolen vehicles and the purchase receipt Defendant gave to the buyer of the car in issue in this case.

All these documents said counsel were received in evidence by the court below at the trial. However, that when writing the judgment, the learned trial judge declared the documents inadmissible being evidence taken in a previous criminal case and this he said without calling on counsel to both parties for a further address on the matter.

Learned senior counsel referred to and applied the provision of Section 34 (1) Evidence Act Cap.112 LFN 1990 (no Section 46 (1) Evidence Act 2011) and submitted that the three provisos to the section are present in the case herein as:

(i) the complainant in the criminal case is plaintiff in AK/93/92.

(ii) the adverse party in the previous proceedings had the opportunity of cross-examination

(iii) the question in issue in both proceedings are substantially the same - the same car alleged stolen and being reclaimed.

He submitted that from the foregoing it is clear that the evidence of third dead Defendant in this earlier case is admissible in this latter civil case. Moreso as regards the three exhibits tendered all of which related to the car in question. He referred to the cases of Nigerian Victory Assurance v. Grains Processing Company (1995) at 15 and urged us to resolve the said issue 3 in favour of the Appellant.

In determining Appellant's Issue 3, a distinction must be made between the learned trial judge's rejection of Exhibit P3 and that of Exhibit p4 in evidence in the course of writing his judgment, Exhibit P3 though previously tendered in an earlier proceeding is a letter - document with attachments in which the Commissioner of Police SIIB Akure sought the permission of the Chief Magistrate to dispose unclaimed property.

Exhibit P4 on the other hand is certified true copy of the evidence of one Alhaji Sulaiman Yusuf (now late) in the previous criminal proceeding in which the Appellant was charged with the theft of the 1st Respondent's car.

The learned trial judge was wrong first to have classified the two pieces of documents together in the same category for inadmissibility. There is nothing at law which prevented the admissibility of the document Exhibit P3 in another proceeding civil or criminal merely because it had been tendered in a previous proceeding.

Exhibit P3 unlike Exhibit P4 is a document and not evidence and it is therefore not subject to the provision of Section 34 (1) of the Evidence Act Cap 112 LFN 1990 which provides exception to the hearsay rule for the admissibility of certain evidence for proving, in subsequent proceeding, the truth of facts stated in it.

However, in relation to Exhibit p4, the Learned senior counsel misapplied the provision of Section 34 (1) of the Evidence Act to argue for its admissibility. Exhibit p4 does not satisfy the provision of Section 34 (1) of the Evidence Act and the learned trial judge was right to have expunged same in the course of writing his judgment. First, the parties to the present suit are not the same with the parties in which the Late Alhaji Sulaiman Yusuf testified as DW2 and contrary to the suggestion of the Learned Senior Counsel for the Appellant the issues in both proceedings are not substantially the same.

It is settled law that evidence of a witness taken in earlier proceedings is not admissible in a later trial except for the purpose of discrediting such witness in cross-examination and except where the provision of Section 34 (1) of the Evidence Act applies. See:- L.S.D.P.C V Adold/Stamm Int. LTD (1994) 7 NWLR (Pt.358) 545; Njoku v Dikibo (1998) (1) NWLR (Pt.534) 496; Alakija v Abdulai (1998) 6 NWLR (Pt.552) 1.

In the instant case the learned trial judge was wrong to have expunged Exhibit P3 in evidence but was right to have expunged Exhibit p4 as the admissibility of the latter was not in conformity with the provision of Section 34 (1) of the Evidence Act.

Issue No 3 is partly decided in favour of the Appellant.

In this appeal, Issues Nos. 1 and 2 are in favour of the Appellant, issue 3 is party in favour of the Appellant.

Consequently, the appeal is allowed in part.

Issues Nos. 1 and 2 are however the determinant issues in this appeal. The consequence of deciding issues 1 and 2 in favour of the appellant is that all pronouncements, orders and judgments in suit No.AK\7\96 concerning the Appellant - Akinyemi Fashuba - described as 4th Defendant in suit No.AK\93\92 are null, void and of no effect whatsoever on him, not been a party to the said suit No.AK\93\92.

I make no order as to costs

**MOHAMMED AMBI-USI DANJUMA, J.C.A.:**

I read in draft My Lord M. A. Owoade's JCA lead Judgment and agree that the appeal should succeed in part only and in terms of the leading Judgment which I adopt as mine.

A person cannot have an order of court made against him if he is not a party in the proceedings. The Appellant, who was such a person in the admitted Exhibit P4, could rightly be heard to say that this Document admitted against him be expunged to the extent that he was not a party in that earlier proceeding. The trial court was right in expunging same. Exhibit P3 was however wrongly expunged as the said Document was not the same thing as evidence in previous proceedings and to be regulated by the provisions of S.34 of the Evidence Act.

There is also the recognition of an Appellant's right to be relieved of a burden of proof of a fact that is squarely placed on the shoulder of a person that asserts; in this instance, the Respondent, as against the Appellant at the trial court who claimed non service in accordance with the law instant.

Furthermore, the Appellant as Defendant had a right or option to have a Judgment obtained by fraud, misrepresentation etc set aside even by the process of an action by writ of summons as against only a Motion to set aside or quash.

This later reason, grounds the partial success of this appeal.

**JAMES SHEHU ABIRIYI, J.C.A.:**

I agree.