**SKENCONSULT NIGERIA LTD AND ANOTHER**

**V.**

**GODWIN SEKONDY UKEY**

IN THE SUPREME COURT OF NIGERIA

THE 16TH DAY OF JANUARY, 1981

SC. 50/1980

**LEX (1981) - SC. 50/1980**

OTHER CITATIONS

2PLR/1981/27 (SC)

(1981) 1 S.C. (REPRINT) 4

**BEFORE THEIR LORDSHIPS**

GEORGE SODEINDE SOWEMIMO, JSC

CHUKWUNWEIKE IDIGBE, JSC

ANDREWS OTUTU OBASEKI, JSC

KAYODE ESO, JSC

AUGUSTINE NNAMANI, JSC

**BETWEEN**

1. SKENCONSULT (NIGERIA) LTD

2. LARS POUL SKENSVED - Appellant(s)

AND

GODWIN SEKONDY UKEY - Respondent(s)

**ORIGINATING COURT(S)**

1. FEDERAL COURT OF APPEAL

2. BENDEL STATE HIGH COURT, HOLDEN AT BENIN (Ekeruche J., Presiding)

**REPRESENTATION**

ROTIMI WILLIAMS, SAN., with S.A. ASEMOTA - For Appellant

AND

S. S. G. ENEMERI - For Respondent

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

COMPANY LAW:- Proceedings relating to an incorporated company – Court with jurisdiction – Whether Federal High Court by virtue of Section 7(1) (c) (i) of the Federal Revenue Court Act, No.13 of 1973 - Whether the jurisdiction of the State High Court has been ousted by virtue of Section 8(1) of the same Act

**PRACTICE AND PROCEDURE ISSUES**

ACTION **–** REPRESENTATION BY COUNSEL:- Service of writ – Where delivered to counsel not acting for intended recipient – Effect

ACTION **–** SERVICE OF WRITS:- Failure to properly serve on party – Whether mere irregularity, or something worse, which would give the defendant the right to have the order set aside as a failure which goes to the root of the conception of the proper procedure in litigation

ACTION **–** SERVICE OF WRITS:- Mandatory nature - Ex parte applications – Whether exception thereto

ACTION – SERVICE OF WRITS:- Sections 98, 99, and 101 of the Sheriffs and Civil Process Act, Cap. 189, Vol.6, Laws of the Federation of Nigeria,1958 – Non-compliance with stipulations as to period within which respondent is to answer to writ of summons – Whether renders proceedings so conducted premature and a nullity – Justification

ACTION - WRIT OF SUMMONS:Definition of "writ of summons" – Legal implication of

APPEAL - FRESH POINT OF LAW OR PROCEDURE:**-** When not raised in the court of trial – Attitude of court thereto – Where the new points or new grounds involve substantial points of law substantive or procedural which need to be allowed to prevent an obvious miscarriage of justice – How treated

COURT: Competency of court - Proper constitution as regards numbers and qualifications of the members of the bench, and no member is disqualified for one reason or another - Subject matter of the case is within its jurisdiction and no feature in the case which prevents the court from exercising its jurisdiction - Case comes before the court initiated by due process of law, and upon fulfilment of any condition precedent to the exercise of jurisdiction – Whether any defect in competence is fatal

COURT:- Orders of court which are null and void – Whether there is even no need "for an order of the court to set (them)  aside though it is sometimes convenient to have the court declare (them) to be so – Whether every proceeding which is founded on (them) is bad and incurably bad

COURT:-High court – decision of judge of the court – Whether can be set aside by another judge of the court – Whether setting same aside amounts to sitting on appeal over a court of coordinate jurisdiction - Judgment given without jurisdiction – Whether exception thereto

**MAIN JUDGMENT**

A. NNAMANI, J.S.C. (DELIVERING THE LEADING JUDGMENT):

My Lords, the substance of this appeal before your Lordship's court is the setting aside of two orders made by Ekeruche J., (as he then was) on 15th December, 1978 to wit:.

(a) That 42 refrigerated containers stolen at the Gate House, Parking Site Kokey Bendel State belonging to the 1st defendant company (i.e. 1st Appellant in these proceedings) be sold at once by the respondent by private treaty at any price which he can reasonably obtain for them and the proceeds of sale, after deducting the expenses thereof, be paid into court to abide the event in the action.

(b) An injunction to restrain the defendants (appellants) from doing various acts concerned with the management and administration of the 1st appellant company. In fact it was an order to restrain the 1st appellant company and to restrain the 2nd Appellant from carrying on various functions as Managing Director.

The facts which led to the present proceedings are briefly as follows:

The 2nd defendant, LARS POUL SKENSVED,(hereinafter referred to as 2nd appellant) and GODWIN SEKONDI UKEY (hereinafter referred to as respondent) were the Chairman/Managing Director and Director respectively of the Company, SKENCONSULT (NIGERIA) LTD., the 1st defendant in the proceedings in the High Court (hereinafter referred to as 1st appellant). A third party relevant in these proceedings is EMMANUEL OMETAN, a legal practitioner who is the Secretary/Legal Adviser of the 1st appellant. Following serious misunderstanding between the 2nd appellant and the respondent, the respondent instituted an action in the Bendel State High Court, Benin claiming various reliefs (to which I shall make reference in the course of this judgment) against the two appellants. The writ was dated 13th November, 1978 but the return date as endorsed thereon was 24th November, 1978. It is pertinent to mention at this stage that at the time the said suit was instituted, the address of the 1st appellant was 1, Chapel Street, Yaba, Lagos while that of 2nd appellant was 3A, Oduduwa Way, G.R.A., Ikeja, Lagos State.

Almost simultaneously with the filing of the writ of summons, the respondent on the 7th and 11th December, 1978 respectively, filed the two motions which resulted in the orders made on 15th December, 1978 and referred to above. The appellants, being totally aggrieved about these orders, filed a motion in the Bendel State High Court, Benin, dated 2nd January, 1979, in the following terms:

"Take Notice that this Honourable Court will be moved on 9th of January 1979 at the hour of 9 o'clock in the fore noon or so soon thereafter as counsel for the defendants/applicants can be heard on their behalf for an order of this Honourable Court:-

Setting aside the order made by this Honourable Court on 15th day of December, 1978 and service of the writ of summons (and) the Motion on Notice dated 11th December, 1978 on the ground that such service was not in accordance with the provisions of the Sheriffs and Civil Process Act and also because the court has no jurisdiction to entertain the plaintiff's claim.

(b) Setting aside the aforesaid order on the alternative ground that there was a misrepresentation to the court in regard to the stand of the above named defendants/applicants on the motion dated 11th December, 1978 ..."

I would like to mention here that although the terms of this motion do not appear to include a prayer for the setting aside of the order on the 42 Refrigerated containers also made on 15th December, 1978, pursuant to the motion filed by the respondent on 7th December, 1978, there is no doubt that the whole contest, both in the court of first instance, and in the Federal Court of Appeal (hereinafter referred to as the Court of Appeal) has been in respect of the setting aside of both orders. Indeed, in an  affidavit supporting the motion set down above, Dickson Dilibe Osuala, a legal practitioner, had in paragraphs 2, 5 and 7 deposed as follows:-

"(2) That the orders of this Honourable Court made on the 15th day of December, 1978 in the above suit were obtained by fraud and deceit...

(5) That the said orders touch on the livelihood of the company and its very existence as a person at law

(7) That unless this application is heard with utmost promptitude and urgency, irretrievable injustice and loss shall be suffered by the defendants/appellants."

In a counter-affidavit sworn to by the respondent, he deposed in paragraphs 8 and 9 as follows:-

"(8) That as soon as the order of this Honourable Court dated 15th December, 1978 was made I acted on it.

(9) That I have sold all the refrigerated containers the subject matter of the said order to third parties and this long before the defendants' motion was served on my solicitor on 9th January 1979".

The motion was set down for hearing on 9th January, 1979 before Ekeruche, J., (as he then was) who made the orders of 15th December, 1978 but hearing was adjourned to 24th January, 1979. After several adjournments before Ekeruche, J., the motion was eventually set down for hearing on 1st February, 1979 before Maidoh, J. In a considered ruling delivered on 1st March, 1979, Maidoh, J., declined to set aside the orders.

He was of the view

"that the applicants in the instant application can only seek a redress by way of appeal."

The Learned Judge concluded that

"having so held that the application is not properly before me, as I have no jurisdiction to entertain it, I do not propose to go into the other grounds argued in the motion."

The appellants appealed to the Federal Court of Appeal but the learned Justices of the Court of Appeal on 22nd May, 1980, affirmed the decision of Maidoh, J. Omoh Eboh, JCA., who delivered the leading judgment, also limited himself to the question whether Maidoh, J., was right in deciding that he had no jurisdiction to set aside the orders made by his brother Judge. According to the learned Justice of the Court of Appeal-

"the question that arises is, who or what court is to decide whether that court (of Ekeruche, J.,) had jurisdiction or not . My answer is "It is the court before which the suit is pending that is the court of Ekeruche, J., or thereafter the Court of Appeal"

It was from the judgment of the Court of Appeal that the appellants appealed to this court.

In urging your Lordships to allow the appeal and set aside the two orders, Chief Williams, SAN., learned counsel for the appellants, relied on two main grounds:-

(1) He contended that the defendants i.e. appellants were not properly served and represented before Ekeruche, J. He argued that the 2nd appellant was not served at all while 1st appellant was not served as required by law.

Referring to the writ of summons, he submitted that where the originating writ of summons is issued in one State for service in another State, the law requires that there should be a period of at least 30 days between the date of service and the date that the defendant is required to appear in court. He referred to the Sheriffs and Civil Process Act (a Federal Law). Chief Williams stated that when the case came before Ekeruche, J. on 24th November 1978, the 30 days mandatory period for return of process under the provisions of Section 99 of the Sheriffs and Civil Process Act had not expired the writ having been issued on the 13th November, 1978. On the respondent's motions pursuant to which the controversial orders were made, service on the appellants, he said, was purported to be effected through "their solicitor" E. O. Ometan. This was inspite of the averment in the affidavit of Mr. Lars Skensved, 2nd appellant, that E. O. Ometan and Miss Oduko had no instruction from the 1st appellant or from himself to appear for the appellants - an averment which was never denied by Mr. Ometan. On the issue of appearance, Chief Williams drew the attention of the court to the fact that throughout all the appearances in these proceedings before Ekeruche, J., up to the date on which the orders in issue were made, there was no appearance by any counsel on behalf of the 2nd appellant. The court endorsements, he said, showed that Miss Oduko appeared for 1st appellant holding brief for Mr. Ometan. This he argued can hardly be appearance for 1st appellant in view of the averment of Mr. Skensved referred to above.

(2) Learned counsel for the appellants in the second arm of his grounds submitted that the questions raised in the writ of summons and in the motions filed by the respondent (pursuant to which the orders were made) relate to the operation, management and administration of the appellant company. These questions he argued are not within the competence of a State High Court because they are matters within the exclusive jurisdiction of the Federal Revenue Court (now Federal High Court). He relied on Sections 7 (1) (c)(i) and 8(1) of the Federal Revenue Court Act No.13 of 1973. Chief Williams made the point that neither Maidoh, J., nor the learned Justices of the Court of Appeal dealt with these two broad grounds. They rather decided the suit solely on the ground that Maidoh, J., was not competent to take the application in view of the orders made by his brother judge, Ekeruche, J. This he argued was wrong and he relied on the case of *Marion Obimonure v. Ojumoola Erinosho and Anor (1966) 1 All NLR 250.*

In his reply, learned counsel for the respondent, Dr. S. S. G. Enemeri, submitted as follows:-

(1) On the issue of service of the writ, he claimed that it was served on the appellants. He conceded that the return date on the writ did not comply with the Sheriffs and Civil Process Act but he asked the court to regard it as an irregularity arising from administrative problems in the High Court Registry. He thought that it did not invalidate the writ ipso facto and did not invalidate the service. He submitted that the endorsement as to service is binding on the parties. He was of the view that even if the return date was less than 30 days it did not matter. He submitted that Section 99 of the Sheriffs and Civil Process Act dealt with time to answer the summons, not service. He conceded, however, that the writ was not properly endorsed. On the motions, learned counsel for the respondent argued that Section 99 of the Sheriffs and Civil Process Act did not apply. He conceded that throughout there was no appearance by counsel for 2nd appellant but claimed that he served the motion on appellants through Mr. Ometan because he thought that Miss Oduko who appeared during the mention of the suit holding Mr. Ometan's brief was appearing for both defendants.

(2) On the issue of the ouster of the jurisdiction of the State High Court, Dr. Enemeri submitted that lack of jurisdiction is not apparent on the face of the claim. He argued that all the claims (this was later amended to most) of the respondent fell outside Part IV of the Companies Act, 1968. He therefore argued that the Federal Revenue Court Act 1973 did not apply. He submitted that the issue of jurisdiction was prematurely raised and that nothing ex facie the claim takes it within the Federal Revenue Court Act. He relied on *Barclays Bank of Nigeria Ltd. v. Central Bank of Nigeria (1976) 6. S.C.175.*

Before dealing with the various arguments of learned counsel, I would wish to dispose of the complaint of the learned counsel for the respondent that the points raised in argument before us were never raised by the appellants before the trial court and the Court of Appeal. It is clear that this court will not allow a party on appeal to raise a question not raised in the court of trial or grant leave to a party to argue new grounds not canvassed in the lower courts except where the new points or new grounds involve substantial points of law substantive or procedural which need to be allowed to prevent an obvious miscarriage of justice. See K. Akpene and Barclays Bank of Nigeria Limited and Anor (1977) 1 S.C. 47;  Debesi Djukpan v. Rhorhadjor Orovuyovbe and Anor (1967) 1 All N.L.R. 134 at 137. Also see Re Cowburn Ex parte Firth (1881-85) All E.R. 987, at 991. The rationale of this attitude is that it is desirable for your Lordships to have the benefit of the views on such points in issue of their Lordships of the lower court. But in the instant case there is no question of new questions being raised. All the matters raised before us were argued by the appellants before Maidoh, J., and the learned Justices of the Court of Appeal. With all due respect, their Lordships failed to advert their minds to those points but were content to reach their decision by merely dealing with the question of whether a judge was competent to set aside orders made by another judge of concurrent jurisdiction. Indeed, they saw no merit in examining the various submissions now made to us on which the appellants base their plea to have the orders set aside. Maidoh, J. as stated above had no intention of going into the other grounds argued in the  motion. Omoh-Eboh, JCA., dwelt at length on this

The learned Justice observed:-

"To my mind learned counsel to (sic) the applicants labours under the misconception arising from an erroneous impression prematurely formed in his own mind that the two orders made by the court of Ekeruche, J,. on 15.12.78 are nullities, that is, are null and void on the ground that he had no jurisdiction to make them because the provisions of the Federal Revenue Court Decree No.13 of 1973 prevent any High Court of a State from entertaining the substantive suit between the parties. If only he (counsel) can appreciate that it must necessarily in the circumstances of this case be first decided by a court of competent jurisdiction that the court of Ekeruche, J., had no jurisdiction to entertain the suit, for it is then, and then only that his contentions can have a valid basis....

This is of necessity the course dictated by proper procedure for it is for a defendant or a party to a suit to raise the issue of jurisdiction of the court in the pleading or by a formal application on notice challenging directly the jurisdiction of the court in that court where the suit is pending. There is no doubt that this is not the position. Rather another court presided over this application to set aside certain orders which were previously made by Ekeruche, J. and to rule that Ekeruche, J., had no jurisdiction to entertain the substantive action in which he made those orders and to set aside the same orders on the ground of lack of jurisdiction. I must say that such a procedure seems to me novel and since it does not appear to me to be backed by any authority or based on any precedent it ought not (to) be allowed as it has the effect of constituting one High Court as Court of Appeal over another branch of the High Court or a court of co-ordinate jurisdiction..."

Turning now to the submissions made to us by learned counsel for the appellants, I shall deal with the main issues one after the other. On service of the writ of summons, it has been established that copies of the summons were collected from the High Court Registry, Benin for onward transmission to the Lagos State High Court. Service on the appellants was to take place in Lagos - outside Bendel State - as it has already been shown that both appellants were resident in Lagos. The return date for appearance in court was 24th November,1978 while the writ of summons was dated 13th November, 1978. Where a writ of summons originates in one State for service in another State, it is mandatory that there should be a period of at least 30 days between the date of service and the date that the defendant is required to appear in court. See Sections 98, 99, and 101 of the Sheriffs and Civil Process Act, Cap. 189, Vol.6, Laws of the Federation of Nigeria,1958. The sections provide as follows:-

"98. A writ of summons for service out of the Region or part of the Federation in which it was issued may be issued as a concurrent writ with one for service within such Region or part of the Federation and shall in that case be marked as concurrent.

99. The period specified in a writ of summons for service under this part as the period within which a defendant is required to answer before the court to the writ of summons shall be not less than thirty days after service of the writ has been effected, or if a longer period is prescribed by the rules of the court within which the writ of summons is issued, not less than that longer period.

101(1). When no appearance is made by a defendant to a writ of summons served on him under this part, if it is made to appear to the court from which the writ was issued...

(g) that the writ was personally served on the defendant, or in the case of a corporation, served on its principal officer or manager or secretary within the Region or part of the Federation in which service is effected; or

(h) that reasonable efforts were made to effect personal service thereof on the defendant and that it came to his knowledge or in the case of a corporation that it came to the knowledge of such officer as aforesaid (in which case it shall be deemed to have been served on the defendant), such court may on the application of the plaintiff order from time to time that plaintiff shall be at liberty to proceed in the suit in such manner and subject to such conditions as the court may deem fit and thereupon the plaintiff may proceed in the suit against such defendant accordingly.

(2)   Any such order may be rescinded or set aside or amended on the application of the defendant."

With respect to Section 99, I do not think that section can be interpreted as referring to a writ of summons for service. All that is  concerned with, in my view, is the period within which the defendant is to answer to the writ of summon. In this I seem to agree with learned counsel for the respondent. But the matter does not rest there. The return date was less than the 30 days prescribed by Section 99 and was clearly in breach of it. In my view the proceedings on 24th of November, 1978 were premature and, by virtue of the mandatory provisions of Section 99 of no effect. They must, therefore, be regarded as a nullity. In fact, I am also of the view, notwithstanding the stand I have taken as to the true import of Section 99, that failure to comply with the provisions of it as was the case here, really means that there has been no service.

As regards the two motions pursuant to which the orders were made, service on the two appellants was in care of Mr. Ometan. The endorsement for service read:

"FOR SERVICE ON THE 1st and 2nd Defendants /Respondents through their Solicitors, E. Ometan & Co. No 11, Pearse Street, Off Tejuosho Street, Surulere, Lagos"

They were served on Mr. Ometan who purported to receive them on behalf of appellants on 13th December, 1978. It is pertinent to mention that he did not in fact forward them to the Appellants until 9.30 p.m. on the 14th of December, a few hours before the date on which the orders were made! As already stated, there was an instruction of the 2nd appellant to Mr. Ometan not to appear for the appellants. In paragraph 8 of his affidavit in support of the motion to set aside the orders, 2nd appellant had deposed as follows:-

"That Mr. E.O. Ometan and Miss Oduko had no instruction from either the Defendant Company or myself to appear on our behalf. On the contrary, E.O. Ometan who received service of the summons and motion papers was instructed by me not to appear either on behalf of the company or myself, as we had retained the services of other lawyers. Chief Rotimi Williams, S.A.N. and Mr. Dickson Osuala for the 1st Defendant and Kayode Ogunnekan and Solomon Asemota for the 2nd Defendant."

Apart from this, Mr. Ometan had, in fact, at the hearing on 24th November, 1978 not put himself forward as counsel for the 2nd Defendant. Yet he accepted service of the respondent's motions on behalf of the 2nd defendant. The effect of this is that the appellants (more particularly the 2nd appellant) were not served. It is also pertinent at this stage to mention that on the 15th December, 1978, before Ekeruche, J., appearance of counsel were recorded as follows: (as shown in the court's records)

"Plaintiff present. Dr. Enemeri for him, defendants absent, served. Oduko for Ometan for 1st Defendant".... "Miss Oduko says she does not oppose the motion."

There can be no argument at least in respect of the 2nd defendant that he was neither served with the motion papers nor was he present in court on the date the controversial orders were made nor was he represented by any counsel. Learned counsel for the respondent had argued that Section 99 (and I should imagine Section 101) of the Sheriffs and Civil Process Act does not apply to motions. I do not agree with this having regard to the definition of 'writ of summons' in Section 95 Part VII of the Sheriffs and Civil Process Act. It is defined thus:

"Writ of summons includes any writ or process by which a suit is commenced or of which the object is to require the appearance of any person against whom relief is sought in a suit or who is interested in resisting such relief"

If the motion papers are to be served outside Bendel State in another State of the Federation as was the case here, even though service was through a solicitor, I agree with Chief Williams that Sections 98, 99 and 101 of the Sheriffs and Civil Process Act will apply. The discretion given to the Court in Section 101 will only apply when the defendant has been served with the writ of summons and fails to appear. That is not the case in this suit. Even where there has been proper service and the defendant fails to appear, the court by sub-section 2 of Section 101 has a discretion, on the application of defendant, to set aside or rescind or amend any order it may have made. The court would also presumably exercise that discretion where there has been an erroneous impression in the court that the defendant has been served but does not appear and an order was, in fact, consequently made against him. That is closer to the position in the instant case.

The learned counsel for the respondent in the course of his argument before us conceded that there had been no compliance with Section 99 of the Sheriffs and Civil Process Act but has asked us to regard it as an irregularity due to administrative problems of the High Court Registry. I am of the contrary view and I think that all the breaches in the instant case of the regulations relating to service and appearance are fundamental defects and go to the question of the competence and the jurisdiction of the court which pronounced the orders sought to be set aside. I may add that even if they were irregularities mere acquiescence of the parties (as claimed by learned counsel for the respondent) cannot give the court competence or jurisdiction. (*See Westiminster Bank Limited v. Edwards (1942) A.C. 529 at 536; (1942) 1 All E.R.470 at 474* where Lord Wright observed-

"Now it is clear that a court is not only entitled but bound to put an end to proceedings if at any stage and by any means it becomes manifest that they are incompetent. It can do so on its own initiative, even though the parties have consented to the irregularity because as WILLES, J., said in *London Corp. v. Cox (1867) L.R. 2 H.L. 239* in the course of giving the answers of the judges to this House, "mere acquiescence does not give jurisdiction." (Underlining mine)

A court can only be competent if among other things all the conditions precedent for its having jurisdiction are fulfilled. In Madukolu and Ors. v. Nkemdilim (1962) 1 All N.L.R. 587 at 594 Bairamian, FJ., (as he then was) stated the principles which have been accepted in successive cases in this court.  
  
"A court is competent", he said, "when:-

(1)   It is properly constituted as regards numbers and qualifications of the members of the bench, and no member is disqualified for one reason or another; and

(2)   the subject matter of the case is within its jurisdiction, and there is no feature in the case which prevents the court from exercising its jurisdiction; and

(3)   the case comes before the court initiated by due process of law, and upon fulfilment of any condition precedent to the exercise of jurisdiction. Any defect in competence is fatal, for the proceedings are a nullity however well conducted and decided: the defect is extrinsic to the adjudication." (Underlining mine)

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

The importance of service of process has been underlined by Lord Greene M.R. in *Craig v. Kanssen (1943) K. B. 256 at pp.262 - 263; (1943) 1 All E.R. 108, at p. 113.* This was a case in which the issue was whether the High Court could set aside an order made by another judge of the same High Court giving the plaintiff leave to enforce a judgment under the Courts (Emergency Powers) Act, (1939) of England or whether the remedy lay only in appeal. In the course of his speech holding that the court could set aside its own order, the learned Master of the Rolls observed:

"...The question we have to deal with is whether the admitted failure to serve the summons upon which the order in this case was based was a mere irregularity, or whether it was something worse, which would give the defendant the right to have the order set aside. In my opinion, it is beyond question that failure to serve process where service of process is required, is a failure which goes to the root of our conception of the proper procedure in litigation. Apart from proper ex parte proceedings, the idea that an order can validly be made against a man who has had no notification of any intention to apply for it is one which has never been adopted in England. To say that an order of that kind is to be treated as a mere irregularity and not something which is affected by a fundamental vice, is an argument which, in my opinion, cannot be sustained." (Underlining mine)

(see also *White v Weston (1968) 2 All ER 824 at 846 C.A)*

It is fair to say that that had always been the conception of the Nigerian courts on the issue of proper procedure. In the instant case, the appellants were not properly served in law with the writ of summons. They were neither served with the motions pursuant to which the two orders were made nor were they present or represented by counsel when the said orders were made. My Lords, I am of the view that on all these grounds the first arm of Chief Williams' argument must succeed and the orders ought to be set aside.

As regards the second arm of Chief Williams' submission, it seems clear to me that even on the face of them the respondent's claim, and his motions (or at least his 2nd motion) contain matters which relate to the management and administration of the appellant company. I pray the indulgence of your Lordships to set down just a few of the paragraphs to underline my point. In the writ itself the respondent had claimed:

"1. A declaration that in terms of the Memorandum and Articles of Association of the Defendant Company, the plaintiff as a co-promoter and the only living Nigerian subscriber to the said Memorandum and Articles of Association of the Defendant company as also its Deputy Chairman/Director is jointly entitled with 2nd Defendant to the administration and management of the affairs of the Defendant Company and in particular to the operation of the Banking accounts of the Defendant Company...

4. A declaration that in terms of the Memorandum and Articles of Association of the Defendant Company, the 2nd Defendant is not competent to release or give valid discharge for debts or other obligations owing and due to the Defendant company, and that in particular the undated Deed of Release executed by the 2nd Defendant purportedly on behalf of the Defendant Company with the Nigerian National Fish Company Limited is null and avoid and of no effect whatsoever...

11. A declaration that a decision taken at the Board meeting of the Defendant Company on Tuesday 12th September 1978 adopting and accepting the accounts of the company as presented by the  2nd Defendant and audited by Messrs Osunbade Okiti and Co. with its apparent inaccuracies and discrepancies, is invalid and of no effect whatsoever...."

In the 2nd motion, the respondent prayed the court for an injunction -

“(1)    as against both defendants restraining them from

(a)   summoning or holding any meetings whether general, extraordinary or Board of Directors meeting of the Defendant company or acting on any resolutions of any such meeting whether already  summoned or to be summoned.

(b) issuing orders for the call-up of the unpaid up issued share capital of the Defendant Company or any portion thereof whether by any notice already issued or to be issued for that purpose or otherwise receiving payments for any such calls or shares."

And as against the 2nd defendant only:

"(a) signing any cheque or orders by whatever mandate for the withdrawal of money from the account of the defendant company...

(b)    ....

(c) managing the business of the defendant company as for a managing director or otherwise doing all and sundry in that wise without the participation or refusal to participate in writing of the plaintiff/deputy chairman of the defendant company."

These are in my view matters which fall within the exclusive jurisdiction of the Federal High Court by virtue of Section 7(1) (c) (i) of the Federal Revenue Court Act, No.13 of 1973 and in respect of which the jurisdiction of the State High Court has been ousted by virtue of Section 8(1) of the same Act. Sections 7(1)(c)(i) and 8(1) of Act No. 13 of 1973 provide as follows:-

"7 (1) The Federal Revenue Court shall have and exercise jurisdiction in civil causes and matters-

.........................................

(c) arising from –

(i)   the operation of the Companies Decree 1968 or any other enactment regulating the operation of companies incorporated under the Companies Decree1968.

8 (1) In so far as jurisdiction is conferred upon the Federal Revenue Court in respect of the causes or matters mentioned in the foregoing provisions of this part the High Court or any other court of a State shall, to the extent of that jurisdiction is so conferred upon the Federal Revenue Court, cease to have jurisdiction in relation to such causes or matters."

Learned counsel for the respondent as already pointed out had strenuously argued that the Revenue Court Act, did not apply to his client's claim (although in the course of argument he conceded that at least some of the claims dealt with the Companies Act). He first argued that the use of the word management and administration in his claim is merely descriptive and not definitive of the subject matter of the respondent's claim as these fall outside matters covered under that heading by part IV of the Companies Act, 1968. I am afraid that after careful perusal of the heads of claim some of which have been set out above, I cannot accept this contention. As regards the word "operation" in Section 7(1) (c)(i) of the Revenue Court Act I am unable to find any authority directly in point as to its proper meaning. This court was concerned specifically with the meaning of Section 7(i) (b) (iii) and generally with Section 7 of the Act in *Jammal Steel Structures Ltd. v. African Continental Bank Ltd. (1974) (1) N.M.L.R. 1* but I am inclined to agree with Chief Williams that "Operation of the Companies Decree" can mean no more than operation of the Companies Decree (now Act) in relation to companies incorporated thereunder. This would include management of such companies and their assets.

Learned counsel for the respondent had raised the point that jurisdiction was raised prematurely because he contends that the issue of jurisdiction could only be determined after exchange of pleadings and taking of evidence. For this he relied on Barclays Bank of Nigeria Limited v Central Bank of Nigeria (supra). In that case, this court overruled a decision by the President of the Federal Revenue Court, that his court had no jurisdiction to entertain an originating summons brought by the plaintiffs determining whether their right to be reimbursed of certain monies had been extinguished by the Banking Obligations (Eastern States) Decree 1970. The judgment of the court that evidence had to be taken before deciding whether there was ouster of jurisdiction pursuant  to Section 8(2) of the Decree, was based on the view of the court that while the plaintiffs were of the view that the undischarged liabilities are not extinguished by the provisions of the Banking Obligations (Eastern States) Decree, the defendants i.e the Central Bank held a contrary view. This difference of opinion, the court held, could only be resolved by the court. As Fatayi -Williams, JSC., (as he then was) delivering the judgment of the court said at pp. 192-193.

“...As for the second part which provides that the jurisdiction of the court is ousted in respect of any rights which are extinguished under the Decree, it is our view  that this part can only be invoked if the court is satisfied from the evidence before it that such rights are extinguished ... It therefore follows that before the learned President of the Federal Revenue Court can determine whether or not the court has jurisdiction to entertain the claim, he must first of all examine what the plaintiffs/appellants contended to be their undischarged liabilities to their customers and determine, after pleadings have been delivered and evidence adduced in support of the facts pleaded, whether these undischarged liabilities relate to banking obligations, and, if they are, whether they are banking obligations which have been extinguished ..."

This case must in my respectful view be distinguished from the instant one. As already stated, the matters in the respondent's claim and motion ex facie relate to the operation of the Companies Act and I do not see that there is any need to exchange pleadings or take evidence before deciding whether the jurisdiction of the State High Court was ousted. I hold that the jurisdiction of the Bendel State High Court was ousted pursuant to Section 8(1) of Act No. 13 of 1973. All the proceedings before Ekeruche, J., are, accordingly, a nullity and the orders ought to be set aside. I should add that my decision on the issue of jurisdiction is only to the extent that is necessary in deciding whether the two orders made by Ekeruche, J., ought to be set aside. I say this because the substantive suit is not before us and is still pending in the Bendel State High Court Benin, although I trust that that court will take cognizance of my findings on the issue of jurisdiction when the suit subsequently comes before it.

The only question left for me to decide is whether both Maidoh, J., and the learned Justices of the Court of Appeal were right in holding, as they did, that Maidoh, J., had no jurisdiction to set aside orders made by his brother Judge, Ekeruche, J. There is a general proposition that, in the absence of statutory authority, one judge has no power to set aside or vary the order of another judge of concurrent or co-ordinate jurisdiction. There are several authorities local and English in support of this principle. In *Grace Amanabu v Alexander Okafor and Anor. (1966) 1 All N.L.R. 205 at 207,* this court refused to allow an amendment made by a judge to be treated as a nullity. Onyeama, JSC., delivering the judgment of the court said :

"We think that Betuel, J., erred in treating the amendment made by Reynolds,  J., as a nullity: for it was made in the presence of both parties, and Betuel, J.,  had no power to review it as if he were sitting on appeal from that order of amendment..."

The Supreme Court took a similar view in *Chief Uku and Ors. v D.E. Okumagba and Ors. (1974) 1 All N.L.R. part 1 475.* There one judge had granted an application for appellants to represent the defendants sued in a representative capacity and another judge, upon the application of the respondent in that suit to join as co-defendant and replace the appellants, set aside the  other order and granted the application.

As for the English cases, I would only refer to In *Re Hambroughs Estate: Hambrough v Hambrough (1909) 2 CH 620 and Re G.M. Holdings Ltd. (1941) 3 All E.R. 417.* In the earlier case where the issue was the validity of two orders made by Romer. J. mortgaging an infant's interest in a settled estate for his maintenance, Warrington, J. held that the orders were made per incuriam and without jurisdiction. He was however, quick to add

"strictly speaking, I am not asked in this action to set aside the order. All I am asked to do is to say that notwithstanding the mortgage the land  remains limited to the same uses as it was before the extension of the mortgage. I agree I cannot set aside the order" (Underlining mine)

In G. M. Holdings case (supra) Morton, J. rejected an application to set aside an order for stay of execution granted by Bennet, J. He said at p.418 -

"The order upon the application has been made by him and passed and entered. He has exercised his jurisdiction as to the amount of the security which should be given and I am disposed to think that he is functus officio. I think that it would be a strange position if a judge were at liberty to reconsider his position and grant a stay of execution after he had made an order refusing it. I think that, when a judge has made an order such as that in the present case, the only remedy for the respondent, if he is dissatisfied with the order, is to go to the Court of Appeal which in this case he did not do. In my view, neither Bennet, J., if he were sitting today, nor myself has jurisdiction to make the order asked for."

It is my view that looking through the authorities, it would seem that the  issue can be resolved depending on whether in the course of proceedings there has been a  fundamental defect, such as we have had in the instant case, which goes to the issue of jurisdiction and competence of the court. In such a case, the proceedings are a nullity and any orders made would also be nullities. If of course the court is competent and the order is the result of exercise of the judge's judicial discretion after hearing evidence, the decision will only be appealable. In Chief Uku's case, supra, the court that made first order was competent and made its order after examining conflicting affidavits and taking argument. Amanambu's case was a case of amendment and to interfere with the order made was tantamount to sitting on appeal over it. From the deduction I have made from the authorities, Warrington, J., ought to have set aside the orders made by Romer, J., which he found had been made without jurisdiction and which were treated as nullities. The principle of fundamental defect is clearly the rationale of the decision of the Court of Appeal in England in *Craig v. Kanssen (supra)* in which Lord Greene, Master of the Rolls, had drawn the distinction "between proceedings or orders which are nullities and those in respect of which there has been nothing worse than an irregularity." In the case of the former, it was his view that a person affected by such an order is entitled ex debito justitiae to have it set aside. It could be set aside by court which made it.

This must also be taken to be the rationale of the Supreme Court case of Marion Obimonure v. Ojumoola Erinosho and Anor. supra, in which Craig and Kanssen was followed. It is pertinent to mention that Onyeama, JSC., who delivered the judgment of this court in Amanambu's case, supra, was also a member of the panel in Obimonure's case. The Editor's Note in the Report of Erinosho's case states:

"This case (i.e the Obimonure's) differs from *Grace Amanambu v. Alexander Okafor and Anor. ante p.205,* there, the order to amend was not a nullity" (Underlining mine).

In Erinosho's case the defendants appealed to the High Court from a judgment in plaintiff's favour. Their notice of appeal was served on the legal practitioner who represented the plaintiff in the trial court. He did not know the whereabouts of the plaintiff and filed an affidavit deposing to such facts. In spite of this, Charles, J., before whom the matter came in the High Court of Western Nigeria directed that the hearing of the appeal should proceed. He allowed the appeal and ordered a non-suit. An application for an order to set aside this order of Charles, J. was rejected by Beckley, J., On appeal, this court was of the view that failure to serve process was a fundamental vice and the person affected is entitled to have the order set aside. It also decided that service on the legal practitioner was insufficient and the High Court had inherent jurisdiction to grant plaintiff's application. Brett, JSC., delivering the judgment of the court stated at p. 251

"Beckley, J. first considered whether jurisdiction to set aside a judgment given on appeal was conferred by any statute or rule of court and we agree with his conclusion that it is not ...

Beckley, J., following the judgment of the Divisional Court in *Hession v. Jones (1914) 2 K.B. 421* where it was held that the former Order 36, rule 33 of the English Rules of the Supreme Court did not apply to proceedings on appeal and we agree with what he said on the point. Beckley, J., went on to consider whether there was inherent jurisdiction to set aside a judgment given on appeal in the absence of the respondent and held that there was not. In this matter he again followed the decision in Hession and Jones ... We think however that the cases can be distinguished. In *Hession  v. Jones* the respondent to an appeal had been duly served with notices of the appeal, and it was through the inadvertence of his solicitor that he was not represented at the hearing. In such a case it cannot be said that there was any fundamental defect in the proceedings which it is sought to set aside." (Underlining mine).

After quoting with approval the comments of Bairamian, JSC., in *Madukolu's case*, *supra,* and Lord Greene in *Craig v. Kanssen, supra,* the learned Justice concluded:

"In our view the High Court in the present case had jurisdiction to make the order sought" (Underlining mine)

It is significant that the learned Justices of this court in the Obimonure case had in their decision put emphasis on the High Court not on the individual Judges. It is the High Court of Western Nigeria which was to make the order sought although the matter was before Beckley, J. They expressed the hope that "in view of the reasons for our decision we take it that the motion will now be granted as a matter of course by the High Court". The emphasis on the High Court agrees with the view of Lord Greene that the order can be set aside by the court which made it. It is, therefore, my view that it is the High Court from which the order complained of emanated that must set it aside not necessarily the judge of that High Court who originally made the order. In the circumstances of this case, I hold that the High Court of Bendel State presided over by Maidoh, J., ought to have set aside the offending orders.

My Lords, for all the reasons given above. I am of the view that this appeal ought to succeed. The appeal is accordingly allowed. The ruling of Maidoh, J., dated 1st March, 1979, and the judgment of the Federal Court of Appeal, Benin Judicial Division dated 22nd May, 1980 (Omo Eboh; Ete, Okagbue, JJCA), are hereby set aside. I hereby further order that the two orders made by Ekeruche, J. on 15th December,1978, which orders, were enrolled and drawn in the Bendel State High Court, Benin on the same 15th December, 1978 be and are hereby set aside. The orders for costs are as contained in the judgment of my Lord Sowemimo, JSC.

**G. S. SOWEMIMO, J.S.C.:**

I agree with the judgment now read by my brother Nnamani, JSC. For the reasons which he has given, the appeal is allowed and the following orders are hereby made:

1. The two orders made by Ekeruche, J., (as he then was) on 15th of December, 1978 are hereby set aside.

2. The Order made by Maidoh, J., with his award of N200 costs against  the appellants is hereby set aside. If the costs of N200 had been paid, the respondent should refund the amount to the appellants.

3. The judgment of the Federal Court of Appeal, Benin, is hereby set aside with N100 costs to the appellants.

4. Costs assessed at N548 are hereby awarded to the appellants against the respondent.

**C. IDIGBE, J.S.C.:**

I agree with the judgment just delivered by my brother, My Lord, Nnamani, JSC., and only wish to add as follows. The orders in question made by Ekeruche, J., had not the backing of the relevant law, the Sheriffs and Civil Process Act Cap. 189 Vol. 6 of the 1958 Edition of the Laws of the Federation, nor the rules made thereunder. In the words of Fry, L J., in *Analby v. Pretorius (1888) 20 Q.B.D. 764 at 769* they amount to judgments delivered "independently of any of the (relevant) rules; the plaintiff (here, the respondent) had no right to obtain" them. (Brackets are mine.) The position then is, as My Lord, Nnamani, JSC., has said, that the said orders are, in each case, null and void. As was stated in *Macfoy v. U.A.C. (1962) A.C. 152 at 160* the orders being void, there is even no need "for an order of the court to set (them) aside ... though it is sometimes convenient to have the court declare (them) to be so. And every proceeding which is founded on (them) is bad and incurably bad" - per Lord Denning (brackets and underlining are mine). I agree that the High Court of Bendel State (not merely Ekeruche, J., or Maidoh, J.,) had inherent power to set aside the orders in question. I would also allow the appeal and I agree with the orders made by my lords, Sowemimo and Nnamani, JJSC.

**A. O. OBASEKI, J.S.C.:**

My Lords, I have had the advantage of reading, in draft, the judgment delivered this morning by my learned brother, Nnamani, JSC.  I agree with it. Certainly, I have no doubt in my mind that the High Court has inherent jurisdiction to set aside its null orders on a proper application to it.

The appeal succeeds and I hereby allow it. The Ruling of the High Court, Benin City (Maidoh, J.), dated the 1st day of March, 1979, together with the orders as to costs and the judgment of the Federal Court of Appeal (Omo-Eboh, Ete  and Okagbue, JJCA) dated 22nd day of May, 1980, affirming the ruling of Maidoh, J., together with the orders as to costs are hereby set aside.

The applications made by the appellants to set aside the two orders made by Ekeruche, J., on the 15th day of December, 1978, which orders were drawn up and enrolled in the Bendel State High Court, Benin City on the 15th day of December, 1978 succeed and are hereby granted. The said orders are hereby set aside and this shall be the order of the High Court, Benin City. The appellants are entitled to costs in the Federal Court of Appeal assessed at N100.00 (One Hundred Naira) and in this court which is assessed at N548 (Five Hundred and Forty-Eight Naira).

**K. ESO, J.S.C.:**

I have had the advantage of reading in draft the judgment delivered by my learned brother, my Lord Nnamani, JSC., I agree with the judgment and the reasons adduced by His Lordship. The words of Lord Denning in *MacFoy v. U.A.C. Ltd. 1962 A.C. 152* a Privy Council case, which went on appeal from the West African Court of Appeal, readily, come to mind. There the learned law Lord delivering the judgment of the Board in which Lord Devlin and the Rt. Hon. L. M. D. de Silva were also present said, and I approve

"If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without much ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse." (see page 160 Ibid)