**TOTAL E & P NIGERIA LIMITED**

**V.**

**MR. NWANKWO EMMANUEL AND OTHERS**

IN THE COURT OF APPEAL OF NIGERIA

THE 28TH DAY OF MARCH, 2014

CA/PH/78/2013

**LEX (2014) - CA/PH/78/2013**

OTHER CITATIONS  
(2014) LPELR-22679(CA)

**BEFORE THEIR LORDSHIPS**

EJEMBI EKO J.C.A

MODUPE FASANMI J.C.A

STEPHEN JONAH ADAH J.C.A

**BETWEEN**

TOTAL E & P NIGERIA LIMITED - Appellants

AND

1. MR. NWANKWO EMMANUEL

2. MS. GLORIA SAMPSON

3. MS. NKIRU ONWUMERE

4. MR. CHRISTOPHER MEJELLI

5. MRS. BLESSING CLETUS

6. MS. LINDA OPRA

7. MS. GRACE ISRAEL

8. MR. SUNDAY IZIUDU

9. MRS. GIFT EDEH

AND

1. MR. KINGSLEY ARADU

2. MR. DOUGLAS ARADU

3. MR. CHIKOBI I. OKENE (For themselves & on behalf of the members of Umu-Azaga Family Oboburu Town Ogba- Egbema/Ndoni LGA, R/State)

AND

1. THE COMMANDANT, YANKEE 9, MILITARY BASE

2. THE G.O.C., NIGERIA ARMY, BORI CAMP BRIGADE Respondents

**ORIGINATING COURT(S)**

RIVERS STATE HIGH COURT SITTING AT AHOADA

**REPRESENTATION**

GOLDEN AWI with O. IYASERE-KAYODE - For Appellant

AND

T. E. AJUBO for 1st set of Respondents

MINAH IGAH for 2nd set of Respondents

P.S.C. AGADA with W. O. ONATE for 3rd set of Respondents

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

COMPANY LAW - REGISTERED NAME OF A COMPANY:- Power of a company to sue and be sued – Need for a company to be sued in the name with which which it is registered and to be served as legally stipulated – Effect of failure thereto

COMPANY LAW – INCORPORATION:- Legal personality of an incorporated entity – How proved – Incorporated name – Legal importance – When a name is neither the synonym nor misnomer of the name of a registered entity – Legal effect of any court action brought in a name different from that registered with the Corporate Affairs Commission

CONSTITUTIONAL LAW - RIGHT TO FAIR HEARING: Service of writ – Importance to fair hearing rights - Whether a party who fails/refuses to attend court or take part in the proceeding after being duly served with the originating process, can complain later that he was denied fair hearing

**PRACTICE AND PROCEDURE ISSUES**

ACTION - SERVICE OF ORIGINATING PROCESS: Effect of failure to serve a court process where service is required

COURT - RULES OF COURT: Effect of failure of not adhering to the rules of court on the issue of service of court processes

COURT - JURISDICTION: Whether the service of court process confers on the court the competence and jurisdiction to adjudicate on a matter

**MAIN JUDGMENT**

EJEMBI EKO, J.C.A. (DELIVERING THE LEADING JUDGMENT):-

On 23rd July, 2012 the Rivers State High Court sitting at Ahoada delivered judgment in the suit No. AHC/60/2012 against two sets of respondents in the said suit. The 2nd set of respondents in that suit comprised

1. THE COMMANDANT, YANKEE 9 MILITARY BASE

2. THE G.O.C., NIGERIA ARMY, BORI CAMP BRIGADE

3. TOTAL EXPLORATION & PRODUCTION CO (NIG) LTD.

It appears none of the 3 parties in the 2nd set of respondents at the court below put up appearance at the court below before judgment in the suit for the enforcement of the applicants/1st set of Respondents fundamental rights was entered for the Applicants against the two sets of Respondents at the court below. The Appellant became aware of the judgment against the 2nd set of respondents at the court below. He, not wanting to be confused for the 3rd party in the 2nd set of respondents at the court below named as TOTAL EXPLORATION & PRODUCTION CO. (NIG) LTD, applied to have the judgment set aside. This step they took to pre-empt and forestall the execution of the judgment against them. They gave their name as TOTAL E & P NIG LTD and not Total Exploration & Production Co. (Nig) Ltd that was sued. The ground for the motion to set aside the judgment is that the Appellant, as the applicant, and the two other parties in the 2nd set of respondents at the court below were neither aware of nor were they served the processes, including the originating processes, culminating in the judgment delivered on 23rd July, 2012.

The applicants/judgment creditors at the court below insisted that the Appellant and the two (2) parties in the 2nd set of the respondents at the court were served all the processes. One Loveday Ogbu, said to be the Principal Registrar Customary Court, Ahoada had deposed to affidavit of service on 22nd May, 2012 to the effect that on 21st May, 2012 he served all the processes on the 1st and 2nd sets of respondents at the court below. By that affidavit while all the 3 parties in the 1st set of respondents were served personally; the processes for service on the 3 parties on the 2nd set of respondents at the court below were served on one Maureen Maduka who is said to be Legal Secretary Total E & P Nig Ltd in their Port Harcourt District office.

Appellant says that all the processes meant for service on the 3 parties in the 2nd set of respondents at the court below were served on the Appellant, instead of Total Exploration & production Co. (Nig) Ltd listed as the 3rd of the 3 parties in the said 2nd set of respondents at the court below. Appellant denies any link or relationship with the said Total Exploration & Production Co. (Nig) Ltd.

The application to set aside the judgment as it affects the 3 parties in the 2nd set of respondents at the court below was refused and dismissed by the said court. The summary of that ruling/decision, the subject of this appeal, is:

a. The appellant was duly served all the processes of the court below culminating in its judgment.

b. Total Exploration & Production Company Nigeria Limited is the same with Total E & P Nigeria Limited and that the Appellant has not denied that Maureen Maduka is their staff.

c. Since the Appellant was properly served with the processes before judgment and it opted not to defend the suit the judgment could not be set aside by the same lower court that gave the judgment; and

d. Total Exploration & Production Company Nigeria Limited, the 3rd party in the 2nd set of respondents is the only party complaining about non service of the processes.

The Appellant filed nine (9) grounds of appeal contained in the notice of appeal filed on 30th January, 2013. The Appellant is not insisting on the notice of appeal filed on 19th February, 2013, and it was struck out at their instance on 19th February, 2014.

Four issues for determination of the appeal were formulated out of the 9 grounds of appeal by the Appellant. They are:

a. Whether the High Court of Rivers State had jurisdiction to proceed and deliver the judgment in AHC/60/2012 as against the Total Exploration and Production Company Nigeria Limited and the 3rd set of respondents in this appeal?

b. Whether the judgment in AHC/60/2012 on 23/7/2012 was not a default judgment and in the circumstance of the facts of the Appellant's application to set aside judgment warrants judgment be set aside?

c. Whether the Appellant is the same as Total Exploration and Production Company Nigeria Limited?

d. Whether the Appellant can be bound by the judgment of the High Court of Rivers State in AHC/60/2012.

Service of originating process on the defendant is the sine qua non for the exercise of its jurisdiction over the defendant by the court before which the suit or matter is pending against the said defendant. Therefore, failure to serve court process, where service is required, deprives the court of its jurisdiction to entertain the matter: see **OGUNDOYIN v. ADEYEMI (2001) 13 NWLR (Pt. 1730) 403**. This Court applied this authority in **AUGUSTINE BASSEY ENE v. CHIEF ASUQUO ASIKPO (2009) LPELR 8723** when it set aside a decision delivered against a party who had no service of the processes culminating in the decision. It is also no service in law, if the service of the process was effected in the manner not prescribed by law: see **SKENCONSULT NIG LTD v. UKEY (1981) 1 SC 4** (Reprint), where orders made pursuant to a motion on notice for service outside the state in which the High Court before which the motion was, was set aside on the ground that the purported service of the motion violated the mandatory provisions of Section 99 of the Sheriff and Civil Process Act. A writ of summons, and this includes every originating process, not served according to service rules or as may be directed by the court deprives the court of its jurisdiction over the persons or parties entitled to be served such process: see **UCHENDU v. CHIEF EYO OGBONI (1999) 5 NWLR (Pt.** **603) 337**. The rules, including the Fundamental Rights (Enforcement Procedure) Rules, in most cases emphasize direct personal service on the defendant.

Coming to the instant appeal; and as the Supreme Court emphasized in **A.C.B. PLC v. LOSADA (NIG) LTD** (1995) 7 NWLR (Pt. 405) 26 that it was essential for the originating processes and all the processes in this matter to have been served on all the respondents in the matter since the court has no jurisdiction over a person who has not been served, unless of course he submits to jurisdiction.

Was there any service of the processes on the Appellant in this matter before the judgment complained of? The Appellant says it is not Total Exploration & Production Company Nigeria Limited at which or to whom the process served on Maureen Maduka, Legal Secretary of Port Harcourt Division of the Appellant was directed.

The Appellant produced their certificate of incorporation No. RC.2979, which attests to the incorporation of Total E & P Nigeria Limited. The onus therefore shifts to the 1st set of Respondents in this appeal, who were the applicants at the court below, to prove that the Total Exploration & Production Co. (Nig) Ltd was, and is, the incorporated outfit or entity called Total E & P Nig Ltd with certificate of incorporation No. RC.2979. They have not produced the certificate of incorporation of Total Exploration & Production Co. (Nig) Ltd. Rather, they rely on the Counter Affidavit of one Adolphus Akwumakwuhie of 6th March, 2012 filed in another suit no AHC/5/2012 before the same Rivers State High Court at Ahoada wherein Total Exploration & Production (Nig) Ltd, not Total E & P (Nig) Ltd or Total Exploration & Production Co. (Nig) Ltd, was sued as the 4th Respondent, to suggest that Total E & P (Nig) Ltd and Total Exploration & Production Co. (Nig) Ltd are one and the same person. The court below agreed with them. I do not think the court below was right in this categorical statement that was predicated largely on mere assumption. There is no empirical evidence on which this highly presumptuous finding was founded. I do not think it is right to even suggest and/or hold that Total Exploration & Production Co. (Nig) Ltd is either a synonym or misnomer of Total E & P Nig Ltd. Therefore, contrary to the finding by the court below that Total Exploration & Production Co. (Nig) Ltd is one and the same person called Total Exploration & Production (Nig) Ltd, in order to make the Appellant, who is Total E & P Nig Ltd liable for the damages or judgment awarded against Total Exploration & Production Co. (Nig) Ltd, I am of the strong view that Total E & P Nig Ltd with Incorporation Certificate No RC.2979 is completely a different person or entity from Total Exploration & Production Co. (Nig) Ltd. One is neither a misnomer nor synonym of the other.

The 1st set of Respondents were the applicants or claimants at the court below. They originated the processes for service on the respondents to their suit.  
Before us here the 1st set of Respondents submit, through their counsel, that a party who deliberately disregards practice rules and refuses to attend court or take part in the proceeding after being duly served with the originating process, cannot complain later that he was denied fair hearing. I have read the authorities including **KADUNA TEXTILES LTD v. UMAR (1994) 1 NWLR (Pt. 319) 163**; **MOHAMMED v. KPALATI (2001) FWLR (Pt. 69) 1404 at 1515** relied upon for this submission. I agree that is the position of the law. A party, served the originating process or motion in a suit who elects not to contest it and absents himself from the proceedings he is very much aware of cannot complain that he was denied fair hearing if the decision, therefrom, goes against him. That is not the situation in the instant appeal.

The 3 parties in the 2nd set of respondents at the court below, including the Appellant deny being served the processes culminating in the decision appealed. The importance of serving originating process in fundamental rights enforcement proceedings is underscored by Order V Rule 2 of the Fundamental Rights (Enforcement Procedure) Rule, 2009 that provides: that the originating application "must be served on all parties directly" even though it adds that "a service duly effected on the Respondent's agent will amount to personal service on the Respondent". I agree, as submitted by T. E. Ajubo of counsel for 1st set of Respondents in this appeal, that service of an originating application in a fundamental right action, under the rules, can either be effected directly on the respondent in the suit or his agent. This, however, does not diminish the pre-eminent effect of service of the originating process on the respondent and the jurisdiction of the court. From the authorities, including **A.C.B. PLC v. UGORJI (2001) LPELR-521; ONYEMAZU v. OJIAKO (2010) 1-2 SC 41; MEDEYINLO v. JEMBI (2011) LPELR 4480; DAMINABO v. ALALIBO (2011) LPELR 4525** the settled principle of law is: where the rules require service of a process, unless service is done as directed by the rules, the proceedings will be a nullity as non-compliance with the rules, and of course the rules of fair hearing too, will be fatal. Put in other words; where the rules of court or statute provide procedure for doing an act before a case can be heard, compliance with the said procedure for doing the said act before the case can be heard is a sine qua non procedurally for the court to exercise its jurisdiction.

In the instant case, one Maureen Maduka, said to be the Legal Secretary at the Port Harcourt District of Total E & P Nig Ltd, and who was served the processes for all the 3 parties in the 2nd set of respondents at the court below, is said to be the agent of all the said 3 parties, including Total Exploration & Production Co. (Nig) Ltd. I had held earlier that Total Exploration & Production Co (Nig) Ltd is neither the synonym nor misnomer of Total E & P Nig Ltd and that the two entities are not one and the same person. They are completely different and distinct entities. Maureen Maduka may be an agent of her employer Total E & P Nig Ltd. That fact, however, does not make her an agent of Total Exploration & Production Co. (Nig) Ltd. I will add also that there is no evidence on which Maureen Maduka could also be held out as agent for the two military out fits called "The Commandant, Yankee, 9 Military Base" and "The G.O.C. Nigeria Army, Bori Camp Brigade". These entities were sued as the 1st and 2nd parties in the 2nd set of Respondents at the court below. They are the 3rd set of Respondents in this appeal.

P.S.C. Agada of counsel representing the 3rd set of Respondents in this appeal, apparently adopting or aligning himself with the position of the Appellant, submits strongly that the 3rd set of Respondents have no legal personality to sue or be sued. As no such issue has arisen in this appeal for determination I shall, on the side of caution, not comment on this issue that appears very fundamental. I earlier stated that the counsel aligned himself with the submissions of the Appellant. This, a respondent, in my view, can do pursuant to his fundamental rights to freedom of expression and personal liberty guaranteed by Sections 39 and 35 of the 1999 Constitution, as amended, read together with his right to fair hearing in Section 36 of the same Constitution. In exercising those rights he is, however, as a respondent, constrained to act within the parameters of the grounds of appeal.

Coming back; my firm view, from the available facts, is that Maureen Maduka was in no way an agent for any or all the 3 parties in the 2nd set of Respondents at the court below for purposes of the Applicants at the court below and the 1st set of Respondents in this serving their originating application on her and she collecting the same for any or all those respondents. The purported service of the originating application on the said 3 parties in the 2nd set of respondents at the court below is invalid and it is accordingly set aside. The said Maureen Maduka is only an employee of Total E & P Nig Ltd; a company incorporated in Nigeria with certificate of incorporation no RC 2979. She is neither a staff of Total Exploration & Production Co. Nig Ltd nor a military personnel. Her purported agency of the 3 parties in the 2nd set of respondents at the court below is dubious and it was not sufficiently proved as to warrant the court below holding that, for purposes of service of the originating application, she was an agent of the said 3 parties. This purported service is therefore fundamentally flawed. The proceedings against the said 3 parties in the 2nd set of respondents at the court below are incurably defective. All proceedings founded or premised on the said service are completely a nullity. The non-service of the originating process on these 3 parties in the 2nd set of respondents at the court below denies that court jurisdiction over those 3 parties. The proceedings, including the decision of the court below, against the said 3 parties are hereby set aside.

Coming, as I do, to the foregoing conclusions my answer to the question whether the Appellant can be bound by the judgment of the Rivers State High Court in suit no AHC/60/2012 delivered on 23rd July, 2012 is emphatically No. In the first place failure to serve the originating application and other processes in that suit on the 3 parties in the 2nd set of respondents before that court deprives or denies that court of jurisdiction it had purportedly exercised over them. Maureen Maduka, on whom those processes were served for the said 3 parties in the 2nd set of respondents in the suit no AHC/60/2012, was and is not an agent of any of or all those 3 parties. Maureen Maduka is an employee of Total E & P Nig Ltd; and not Total Exploration & Production Company (Nigeria) Ltd. These two companies are not one and the same entity. Total E & P Nig Ltd with certificate of incorporation no RC 2979 is not the company called Total Exploration & Production Co. (Nig) Ltd or Total Exploration & Production (Nigeria) Ltd.

It is the duty of the plaintiff suing a company or an incorporated body to sue it in its registered name. The warning or admonition of the Supreme Court in **NJEMANZE v. SHELL BP PORT HARCOURT (1966) 1 ANLR 8** at 10 is quite apt and apposite.

The Supreme Court stated:

This appeal illustrates the need for care in bringing an action. It is common knowledge, or ought to be, that a company is registered under the (Companies and Allied Matters Act) and has a registered name. - This can easily be found out; it has to be shown on a sign board at its place of business - ; and it can be ascertained under (the Companies and Allied Matters Act) from the Registrar.

The applicants at the court below, who are in this appeal the 1st set of Respondents, did not act with caution and due diligence in formulating their suit, through their counsel, against the 3 parties in the 2nd set of respondents at the court below. That error or *laiser faire* manner of doing things is now very fatal. In **USUAH v. G.O.C. (NIG) LTD** (2012) 33 WRN 123 where the party sued is G.O.C. (NIG) Ltd; it was held that the said party cannot by process of amendment be substituted with G.O.C. Enterprises (Nig) Ltd. In likewise manner Total E & P Nig Ltd cannot be a misnomer, synonym or substitute for the party sued - Total Exploration & Production Company Nigeria Limited.

Having held that the judgment delivered in suit no. AHC/60/2012 on 23rd July, 2012 is a nullity as against the 3 parties in the 2nd set of respondents before the said court I will no longer bother myself to determining whether or not the judgment was a default judgment.

I allow the appeal. The decision of the Rivers state High court delivered on 23rd July, 2012 in the suit no. AHC/60/2012 as it pertains to the 3 parties in the 2nd set of respondents in that said suit is hereby set aside.

Parties shall bear their respective costs.

**MODUPE FASANMI, J.C.A.**:

I have had the opportunity or reading in draft the lead judgment of my learned brother **EJEMBI EKO, J.C.A.** just delivered.  
The appeal is meritorious and it is hereby allowed. I abide by the consequential orders contained therein.

**STEPHEN JONAH ADAH, J.C.A.**: I have had the benefit of reading in draft the Judgment just delivered by my learned brother Eko, JCA. I am in total agreement with my brother that the lower Court's decision in the Suit AHC/60/2012 as it pertains to the 3 parties in the 2nd Set of Respondents in the said suit be set aside.  
  
The underlining fact of this case is the non service of Originating process on a party to the suit. Jurisdiction of every Court is fundamental and it cannot in any case be exercised in vacuo. The Court of trial and in fact every Court must ensure that parties are clearly within the ambit of its jurisdiction before it proceeds in matters affecting them. It is well settled that it is the service of the process of the Court on the Defendant that confers on the Court the competence and jurisdiction to adjudicate on the matter. In **Mark v. Eke** (2004) 5 NWLR (Pt. 865) 54 the Supreme Court per Musdapher, J.S.C. (as he then was) held that it is clear that due service of the process of the Court is a condition precedent to the hearing of the suit. Therefore if there is a failure to serve the process, where service of the process is required, the person affected by the order but not served with the process is entitled ex debito justatiae to have the order set aside as a nullity. See also the case of **NBN Ltd. v. Guthrie (Nig) Ltd** (1993) 3 NWLR (Pt. 284) 643.

In the instant case, the lower Court heard the suit involving Total Exploration and Production Co. (Nig) Ltd listed as the 3rd of the 3 parties in the 2nd Set of Respondents. This party was not served with the originating processes. The processes from the affidavit of one Loveday Ogbu, Principal Registrar Customary Court, Ahoada were served on one Maureen Maduka said to be legal secretary Total E & P Nig Ltd in their Port Harcourt District Office. The lower Court, based on that error went ahead and entered judgment against - Total Exploration & Production Company Nig. Ltd, 3rd party in the 2nd Set of Respondents.

When an application was made to the lower Court to set aside the judgment as it affects the 3 parties in the 2nd Set of Respondents; the Court refused and held inter alia that Total Exploration & Production Company Nig. Ltd is the same with Total E & P Nig. The lower Court by this to my mind has fallen into a double edged error. One, the Court gave judgment against a party sued before it who was not served with the process in the case and by virtue of that, was not within the Court's jurisdiction. Two, the judgment delivered in the case was targeted against a person that was not a party before it. The Appellant in this case being a person not before the Court and being afraid of a case of robbing Peter to pay Paul as the saying goes rushed to this Court to have the judgment set aside. This double edged error must not be allowed by this Court to go uncorrected.

It is in view of this and the fuller reasons given in the lead judgment of my learned brother that I also allow this appeal and set aside the decision in the suit No. AHC/60/2012 as it pertains to the 3 parties in the 2nd Set of Respondents. I abide by the consequential order as to costs.