IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY,
IN THE ABUJA JUDICIAL DIVISION (APPELLATE DIVISION),
HOLDEN AT COURT NO. 12 MAITAMA, ABUJA.
ON THE 9TH DAY OF JUNE, 2016

BEFORE THEIR LORDSHIPS: HON. JUSTICE M.E ANENIH (PRESIDING JUDGE)
HON. JUSTICE JUDE OKEKE (HON. JUDGE).

APPEAL No. CVA/92/2015

SUIT NO. CV/201/2014

BETWEEN:

FIRST CONTINENTAL PROPERTIES LTD ..... **APPELLANT**

AND

BEVICON ASSOCIATES LTD ..... **RESPONDENT**

JUDGMENT

This is an Appeal arising from the Judgment of His Worship Rahmatu A. Gulma (Mrs) of the Chief District Court Holden at Wuse 2 in the Federal Capital Territory judicial division Abuja. The Judgement was delivered on the 29th of September 2014 under the Default summons procedure in favour of the plaintiff/respondent.

The grounds of appeal are as follows:

GROUND 1

The learned magistrate erred in law when she entered judgment in favour of the Plaintiff/Respondent on the ground that the Defendant/Appellant did not filed any process before the court.

Particulars of Error

a. There was a letter dated 22nd September 2014 by the Appellant's counsel applying for certified true copy of the court

processes to enable it prosecute the appellant's case before the court which application was still pending as same was yet to be approved by the lower court as at the date the judgment was entered in favour of the Respondent.

b. The lower court ignored the reason stated in the said letter dated 22nd September 2014 and preceded with the case as if nothing is before the court by given judgment in favour of the Respondent.

c. The lower court having not approved or rejected the application made 22nd September 2014 is not competent to proceed with the matter on the 29th September 2014, when it gave judgment to the respondent.

d. There is nothing on the record of the court showing the application dated 22nd September 2014 was attended to by the court or the registrar thereby violating the right of the appellant's right to fair hearing.

e. It is trite law that court must consider all applications before it and decide same one way or the other before proceeding on the matter.

GROUND 2

The learned magistrate erred in law when she failed to consider the appellant's application seeking for adjournment via letter dated 29th September 2014.

Particulars of Error

a. The Appellant wrote a letter dated 29th September 2014 wherein it sought for adjournment in the matter as the counsel briefed could not come to the court due to urgent family matter,

this vital and compelling circumstances was ignored by the lower court.

b. The said letter dated 29th September 2014 was before the court on that day, the lower court ought to have treated the letter and decide and or rule one way or the other before taken any further step in the matter on that day.

c. That the letter dated 29th of September 2014 is by intents and purposes an application before the court which court failed to consider before proceeded to give judgment thereby violating the right to fair hearing of the applicant.

d. By refusing to treat the letter dated 29th September 2014 for adjournment the fundamental human right to fair hearing to wit: *Audi Alteram Partem* of the appellant has been grossly violated and thus occasioned miscarriage of justice against the Appellant.

e. The action of the learned magistrate has denied the Appellant the opportunity to present its case before being condemned.

f. It is trite law the court is bound to consider all application/motion properly placed before it and resolve same one way or the other before taken further step in the matter as held by the court in the cases of DANDUME L.G.C VS YARO (2011) 11 NWLR PT.1257 PG159@ 190 PARA D-H OR HOLDING 8, ESSIEN VS EDETH 2014 5 NWLR PT.867 PG 519. See also Nalsa's case.

g. It is also a trite law where an application for adjournment is made; the application must first be resolved before a decision is reached as to whether or not to proceed to judgment, that is, the "trial court cannot proceed to give judgment in a case without ruling on the application for adjournment". As held by the court of

appeal AJANAKU VS. WILLIAMS (2009) 3 NWLR PT 1129 PG 617 @ PG633-634.

GROUND 3

The learned magistrate erred in law when she gave default judgment on incompetent processes before the court.

Particulars of error

a. The respondent's process used as Exhibit to the exparte motion for leave dated 21st August 2014 was what the court relied on as valid processes in its judgment.

b. It is trite law that the court cannot deem an exhibit as processes filed for substantive matter before the court.

c. The case of the respondent was not properly constituted at the lower court and therefore not competent before the lower court as to afford the learned trial magistrate to give judgment on the same.

d. The procedure adopted by respondent in seeking the leave of court by using an exhibit as a process validly filed is wrong in law making the suit not competent. The Supreme Court in the case of SAUDE VS ABDULAHI (1989) 4 NWLR PT. 116 PG. 387 @ PG 421-422 PARA. G-B KARIBI-WHYTE JSC declared thus:

> "The question therefore is, when is an action initiated with due process of law? This court has spelt out in MADUKOLU VS NKEMDILIM (SUPRA) the circumstances where the proceedings can be regarded a nullity." These are where:

1. The court is not properly constituted as regards numbers and qualification of the members of the bench;

2. The subject matter of the action is not within the jurisdiction of the court.

3. The case before the court is not initiated by due process of law or that there is a condition precedent of jurisdiction.

> The third of the conditions prescribed, and which is relied upon by the appellant in this appeal is where the action comes before the court of trial without due process of law. There is non-compliance with due process of law when the procedural requirements have not been complied with, or the preconditions for the exercise of jurisdiction have not been complied with. In such a circumstance, as in the other two cases, the defect is fatal to the competence of the trial court to entertain the suit."

GROUND 4

The learned magistrate erred in law when she assumed jurisdiction and gave judgment by relying on the rules which violated the constitutional right of the appellant.

Particulars of error

a. Giving the two letters dated 22nd September 2014 and 29th September 2014 and the reasons and circumstances stated therein, it was wrong for the lower court to have relied on the rules of court in given default judgment to the respondent.

b. The lower court sheepishly followed the rules of court leading to Appellant being denied right of fair hearing thereby occasioning gross miscarriage of justice against the Appellant.

c. It is trite law that "rules of court and practice directions are rules touching the administration of justice. They are designed

for obtaining justice with ease, certainty and dispatch; therefore, they must be consistent the fundamental principles of justice-deciding cases on their merits. They remain an adjunct to the course of justice and the court must not slavishly apply them, the moment rules of court set out to depart from the path leading to justice, a court of justice must be too willing to jettison them…….like any other rules of court, must not be accorded any pride of place such that it will defeat the course of justice" MONYE VS P.T.F.T.M (2002) 15 NWLR PT. 789 PG 209 at page 224 paras B-D

d. The line tolled by the learned magistrate was contrary to the admonition given by NIKI TOBI thus: In General Oil Ltd V. Sunday Oduntan &ANOR (1990) 7 NWLR (PT.153) 423 AT 441, his Lordship, Niki Tobi, JCA (as he then was) in circumstances such as here, admonished thus:

> **"**Rules of court, like rules of a game are meant to be obeyed of course, that is why they are written. There should be no argument about that. But there is a but and it is that obedience of rules cannot and should not be slavish to the point that the justice of the case is destroyed or thrown overboard. The greater barometer, as far as the eagle eyes of the public are concerned is whether justice, that elusive expression and very expensive commodity in the judicial process has been, done to the parties. Therefore, if in the course of doing justice some harm is fone to some procedural rule which eventually hurts that rule, the court should be happy that it took that line of action in pursuance of justice. This court and indeed any other court for that matter, cannot myopically or blindly follow rules of procedure and fall into a mirage, and physically and mental-

ly be absorbed and lost. No. that is not the proper thing to do. It is wrong." Per yakubu, JCA (p 18, para B-G

4. RELIEFS SOUGHT BEFORE THE COURT OF APPEAL

a. The Honourable Court should allow this appeal.

b. AN ORDER of this honourable court setting aside the judgment of the court delivered on the 29th September 2014 in suit number CV/201/2014 for non-service of default Summons in line with the law and compliance with section, 97 Sheriff and Civil Process Act, Order IV Rule 3(1) of the rules of the honourable court.

c. AN ORDER setting aside the whole proceeding of 29th September 2014 in suit number CV/201/2014 for violation of Appellant's right of fair hearing.

d. AN ORDER striking out the plaintiff's/respondent's suit in its entirety in the term set forth in the default summons and all accompanying processes filed in this suit for non-compliance with order V rules 1 and/or 5 of District Court rules.

e. AN ORDER of the honourable court striking out the respondent's case with No: CV/201/2014 for lack of competent processes filed.

f. AN ORDER setting aside the writ of execution dated 16th October 2014 issued against FIRST CONTINENTAL PROPERTIES LTD by the lower court.

g. Cost of this action.

The facts of the case pursuant to the record of appeal are as follows:

The Respondent being the plaintiff at the trial court filed a motion expert before the court on the 21st of August 2014 with accompanying processes inclusive of affidavit in support of the motion exparte and Exhibit A the proposed default summons and other Exhibits.

The said experte application prayed for:

1.) An Order of this Hon. Court granting leave to the plaintiff/applicant to issue default summons against the defendant.

2.) An Order of this Hon. Court deeming the default summons separately filed attached herein as Exhibit **"A"** as properly filed and served the appropriate filing fees having been payed.

3.) And for such further order(s) as the Hon. Court may deem fit to make in the circumstance.

The trial Court after hearing the motion experte granted the application as prayed in the manner set out hereunder:

> **"**Consequently, the application is granted as prayed leave of this Hon. Court is granted the plaintiff/applicant to issue and serve the proposed default summons against the defendant and the proposed default summons is deemed properly filed and served. The Order of this Hon. Court together with the marked default summons should be served on the defendant personally and the matter is adjourned to the 29th day of September, 2014 for hearing.**"**

The plaintiff by a Default Summons claims against the Defendant as follows:

1) The sum of N2,66,188 (Two Million, Sixty Six Thousand One Hundred and Eighty Eight Naira only, being the liquidated amount owed to the plaintiff by the Defendant.

2) An Order for 10% interest on the judgement sum from the date of the judgement until the final liquidation of the judgement debt.

On the 29th of September, 2014 the matter came up for hearing and judgement was entered in favour of the plaintiff against the defendant for failure of the defendant to file a Notice of Intention to defend.

On the 10th of October, 2014, the defendant/appellant filed a motion Experte for stay of execution and a motion on notice for setting aside the judgement entered in favour of the plaintiff/respondent on the 29th of September, 2014.

On the 9th of March, 2015, Ruling was delivered dismissing the application to set aside the Judgement of 29th September, 2014.

It is on the above premise that the defendant/appellant filed notice of Appeal No. CVA/22/15 on the 22nd of April, 2015 to appeal the Ruling refusing to set aside the judgement. And on the 28th of July, 2015, she also filed the instant Notice of Appeal No. CVA/92/15 against the Judgement of 29th September, 2015. And a latter motion for extension of time was filed on 4th August, 2015 to appeal against the judgement of 29th September, 2014 in the manner set out in the Notice of Appeal as enumerated above.

Both parties filed and exchanged briefs of arguments in respect of this appeal.

The counsel to the Appellants in his brief of argument filed on the 25th of November 2015 raised the following issues for determination:

1. Whether or not the lower Court was right in given judgement for failure to file Notice of intention to defend despite pending

application for certified true copy of the process via letter dated 22nd September 2014

2. Whether failure to consider the appellant's letter dated 29th September 2014 seeking for adjournment by the lower court does not amount to a violation of appellant's fundamental human right to fair hearing as enshrined in the 1999 Constitution as amended thereby occasioned a miscarriage of justice.

3. Whether or not the default summon(contained in page 1 to 12 of the record of appeal) being Exhibit "A" attached to affidavit in support of motion for leave(contained in page 14-16 of the record of appeal) can be used as a valid process filed before the Court upon which the lower court can give judgement.

4. Whether or not, the rule of court to wit: Order 5 Rule 1 of District Court Rules relied upon by the lower Court did not occasioned a miscarriage of justice in the face of letters dated 22nd and 29th of September 2014 and thereby denied the Constitutional right to hearing of the appellant.

On the 1st issue raised, whether or not the lower Court was right in given judgement for failure to file Notice of intention to defend despite pending application for certified true copy of the process via letter dated 22nd September 2014, counsel submitted that the lower court was wrong in giving judgement in favour of the respondent on the ground that the appellant has failed to file Notice of intention to defend despite the letter pending before it which was not given any consideration. Counsel referred to the provision of Order 5 Rule 1 of the District Court Rules and DANDUME L,G,C VS YARO (2011) 11 NWLR (PT 1257) PG 159 AT 190 PARA D-H.

That the lower court having failed to treat the application, its decision on the 29th September 2014 is liable to be set aside and the appeal allowed.

On the 2nd issue raised, whether failure to consider the appellant's letter dated 29th September 2014 seeking for adjournment by the lower court does not amount to a violation of appellant's fundamental human right to fair hearing as enshrined in the 1999 Constitution as amended thereby occasioned a miscarriage of justice, counsel submitted that the failure of the lower court not to consider the said letter amount to a gross violation of its fundamental right to fair hearing, has done great damage to appellant's natural right of audi alteram patem and has therefore led to miscarriage of justice. He referred to

AJANAKU VS WILLIAMS (2009) 3 NWLR (PT 1129) PG 617 AT 633-634; PG 631 PARA E; PG 635 PARA A-H

EKITI STATE VS OSAYOMIN (2005) 2 NWLR (PT 909) PG 67; OSIA VS EDJEKO (2001) 10 NWLR PT 720 AT PG 233

ESHENAKE VS GBINIJE (2006) 1 NWLR (PT 961) PG 228 AT 251 PARA B-D

and

STATE VS. ONAGORUWA (1992) 2 NWLR (PT 221) PG 33 AT PG 56

That on the foregoing authorities the decision of the lower court is liable to be set aside.

On the 3rd issue raised, whether or not the default summon(contained in page 1 to 12 of the record of appeal) being Exhibit "A" attached to affidavit in support of motion for leave(contained in

page 14-16 of the record of appeal) can be used as a valid process filed before the Court upon which the lower court can give judgement, counsel submitted that an exhibit attached to an affidavit of a motion cannot be deemed as a valid process in court, that such document remains exhibit for all intents and purposes and does not matter that the said process was separately filed.

He urged the court to hold that the said default summons was not validly filed hence no valid summons was before the lower court upon which its default judgement can stand.

On the 4th issue raised, whether or not, the rule of court to wit: Order 5 Rule 1 of District Court Rules relied upon by the lower Court did not occasioned a miscarriage of justice in the face of letters dated 22nd and 29th of September 2014 and thereby denied the Constitutional right to hearing of the appellant, counsel submitted that the lower court was duty bound in the face of letters dated 22nd and 29th September 2014 to exercise restraint in applying or invoking Order 5 Rule 1. He referred to:

MONYE VS. P.T.F.T.M (2002) 15 NWLR PT 789 PG 209 AT PG 224 PARAS B-D

GENERAL OIL LTD V. SUNDAY ODUNTAN & ANOR (1990) 7 NWLR (PT 153) 423 AT 441

In conclusion, counsel urged the court to hold in appellant's favour on all the issues raised and allow the appeal and the prayers in the interest of justice.

The respondent's counsel in response to the Appellant's brief of argument filed Respondent's brief of Argument on the 14th of December 2015 wherein he formulated one issue for determination

and adopted issues 2, 3, and 4 formulated by the appellant as follows:

1. Whether the lower court was right when it entered judgement against the appellant for failing to file Notice of intention to defend within the time stipulated by the rules of Court.

Issues 2, 3 and 4 are exactly the same as those of the appellant enumerated hereinbefore.

Respondent's counsel before going into the arguments on his issues formulated, submitted that the notice of appeal on the face of it is ex-facie grossly incompetent and urged the court to dismiss the appeal with substantial cost.

He stated that:

The said Notice of appeal with Appeal No. CVA/92/15 filed on the 28th of July, 2015 after about 11 months from the date of judgement was filed out of time without the leave of the Honourable court, that the purported Notice of Appeal the appellant relied and argued on is against a default judgement delivered on the 29th of September, 2014, while the judgement delivered by His Worship Rahmatu A. Gulma (Mrs) on the 29th of September, 2014 under the default summons was a judgement on the merit, and no appeal was instituted against the summons. And that the appellant's separate briefs of arguments on a consolidated appeal are unknown to law and liable to be struck out.

He went further without conceding to the competency of the purported appeal to marshall out his arguments on the issues for determination, if the court is mindful of considering the incompetent appeal.

On the first issue raised, whether the lower court was right when it entered judgement against the appellant for failing to file Notice of intention to defend within the time stipulated by the rules of Court, counsel submitted that the lower court was right, that Order 5 rules 1(2) empowers the lower court to enter judgement in favour of the plaintiff, if the defendant does not within sixteen days after service of the summons, give notice in writing signed by himself or his legal practitioner to the registrar of the court of his intention to defend the suit. He submitted that DANDUME'S case referred to by the appellant is not applicable as there was not a pending motion at the lower court before it delivered judgement.

On the 2nd issue raised, whether failure to consider the appellant's letter dated 29th September 2014 seeking for adjournment by the lower court does not amount to a violation of appellant's fundamental human right to fair hearing as enshrined in the 1999 Constitution as amended, thereby occasioning a miscarriage of justice, counsel submitted that the Supreme court opined in plethora of cases that when parties have been duly notified of a hearing date and a party for no justifiable reason decides to opt out of proceedings, the case of the other party once not discredited should be considered on the merit. He referred to

IBEKENDU VS. IKE (1993) 6 NWLR (PT 299) 28, NEWSWATCH COMM LTD VS. ATTAH (2006) 12 NWLR (PT 993) 144 AT 17, 173 AND 175.

That a defendant who absented himself from proceedings up to judgement cannot complain that he was not availed his constitutional right of fair hearing. He referred to

MUHAMMED V. KPALAI (2001) FWLR (PT. 69) P. 1404 RATION 2 AT P. 1415 PARAS C-D

Counsel urged the court to reject the arguments of the appellant on her issue 2 as misdirected and misconceived and not relevant to the instant case.

On the 3rd issue raised, whether or not the default summon (contained in page 1 to 12 of the record of appeal) being Exhibit **"**A**"** attached to affidavit in support of motion for leave (contained in page 14-16 of the record of appeal) can be used as a valid process filed before the Court upon which the lower court can give judgement, counsel submitted that the argument of the appellant is misconceived with the aim to misdirect this court. That the default summons which can be seen from pages 1-12 was separately filed after assessment. And he urged the court to so hold that same was properly filed and served on the appellant in line with Order 5 of the District court rules.

On the 4th issue raised, whether or not, the rule of court to wit: Order 5 Rule 1 of District Court Rules relied upon by the lower Court did not occasioned a miscarriage of justice in the face of letters dated 22nd and 29th of September 2014 and thereby denied the Constitutional right to hearing of the appellant counsel adopted his argument on issue 2, on the basis that issue 2 and 4 of the appellants brief is one and the same and a mere repetition of argument.

And he further submits for emphasis that Order 5 rule 1 of District court rules relied upon by the lower court did not occasion any miscarriage of justice nor deny the appellant its fundamental right of fair hearing.

In conclusion counsel urged the court to dismiss the incompetent appeal with a substantial cost and uphold the judgement of the lower court.

On the appellant's reply brief filed on the 21st of December 2015, appellant submitted on the issue of competence of the Appeal that even though Appeal No: CVA/22/15 and CVA/92/15 were consolidated, each of the appeal retained their separate identity and the Court must deliver separate judgement in each. He relied on:

HADO NIGERIA LTD & ANOR VS CHSIRSBROWN INT'L LTD & ANOR 2013 LPELR 21171 CA P. 18 PARA A

DIAB NASR VS. COMPLETE HOME ENTERPEISE (NIG) LTD (1977) 5, S.C 1 AT 11, D.S.C. VS OWNERS OF ADITYA PRABHA (1991) 3 NWLR (PT 179) PG 369

He continued that the contention that the respondent filed separate brief for the consolidated Appeal is misconceived and unfounded in law and should be discarded. That the respondent did not support its contention with any authority to that effect.

And he argued further that Order 5 rule 1(2) cannot be interpreted to deny a party his right to enter conditional appearance where the process was not served as required by law.

Counsel in conclusion submitted that it is not in doubt and not contented that the lower court was ignorant of the said letter on 29th September 2014. That the Magistrate was fully aware of the said letter. And in conclusion he stated that the respondent has not in any way contradicted the contentions put forward by the appellant in this case.

Before consideration of the issues raised for determination in this Appeal, we would first and foremost address the contention as to incompetence of this appeal raised in the respondent's brief of argument. The respondent's counsel therein argued that the Notice of Appeal No. CVA/92/15 filed on 28/07/15 was filed out of time without the

leave of this Honourable court. The appellant responded to this contention of the respondent by referring to the records of the court.

That it's on record that on the 17th of November, 2015, Motion No. M/9309/15 was moved whereupon the court made an order regularising the Notice of Appeal. The argument of the respondent's counsel that the Notice of appeal was filed out of time without leave of court is therefore unfounded and not borne out by the records of the court. Even if that were the case this court still has the powers and thus would so enlarge the time to file same by virtue of Order 43 Rule 30 and 46 rule 1 of the Federal Capital Territory (Civil Procedure Rule) 2004.

The further contention that the appellant filed separate Briefs for the consolidated Appeal to our minds does not one way or the other affect the merits of this Appeal, as all the Briefs of Arguments filled are clearly titled and admits of no ambiguity apropos of the order for consolidation.

Suffice to say that we do not find the Notice of Appeal No. CVA/ 92/15 incompetent as canvassed by the respondent.

We would now proceed to consider the issues raised for determination. The issues raised by both parties are at par on all fours, in that regard therefore we adopt for consideration here the four issues as formulated by the appellant for consideration. They are:

1. Whether or not the lower Court was right in giving judgement for failure to file Notice of intention to defend despite pending application for certified true copy of the process via letter dated 22nd September 2014.

2. Whether failure to consider the appellant's letter dated 29th September 2014 seeking for adjournment by the lower court does not amount to a violation of appellant's fundamental human right to fair

hearing as enshrined in the 1999 Constitution as amended thereby occasioned a miscarriage of justice.

3. Whether or not the default summon(contained in page 1 to 12 of the record of appeal) being Exhibit "A" attached to affidavit in support of motion for leave(contained in page 14-16 of the record of appeal) can be used as a valid process filed before the Court upon which the lower court can give judgement.

4. Whether or not, the rule of court to wit: Order 5 Rule 1 of District Court Rules relied upon by the lower Court did not occasioned a miscarriage of justice in the face of letters dated 22nd and 29th of September 2014 and thereby denied the Constitutional right to hearing of the appellant.

The 1st, 2nd and 4th issues are of similar content, we would therefore adopt a consolidated yet composite approach to their consideration.

The first and second issues are premised upon the refusal of the lower court to postpone the hearing of 29th September, 2015 at the instance of the defendant/appellant, by virtue of the appellant's letters of 22/09/14 and 29/09/14.

The argument of the appellant on this issue is that the court did not act one way or the other on the letter dated 22nd September, 2014 seeking to obtain the certified true copies of court processes, before it proceeded to hearing of the Default summons. That the decision reached by the lower court is therefore liable to be set aside for failure to exercise restraint and warn itself that it was not safe to give judgement in favour of the respondent notwithstanding the provision of Order 5 Rule 1 of the District Court Rules. In the same vein he argued that failure of the court to consider or act upon the appellant's letter for adjournment of 29th September, 2014 amounts to a gross violation of the fundamental rights of the appellant. That the lower court was bound to rule

on the letter one way or the other before proceeding to judgement. This is the gravamen of the fourth issue.

For effective resolution of these issues there should be a recourse to the Rules for the default summons procedure, the appellants letters itemised above vis a vis the proceedings of the said 29th September, 2014.

It is settled that the default summons procedure is a special procedure for the dispensation of quick justice where there's not likely to be any defence in a liquidated money demand claim.

This procedure is of a special genre and Order V of the District Court Rules specifically prescribes the steps to be followed in an action instituted under this genre of civil actions. A perusal of the provision of the said Order V clearly reveals that it envisages that actions instituted therein be treated with dispatch either by transferring to the general cause list where there appears to be a defence on the merit or proceeding to judgement where defendant is unable to proffer a tangible defence. This is a procedure similar to the undefended list procedure in the High court.

For purpose of clarity Order V Rule 1 (1) & (2) of the District Court Rules are reproduced hereunder:

> *(1) In an action in a District court for a debt or liquidated money demand, the plaintiff may, at his option, cause to be issued a summons in the ordinary form or , filing an affidavit to the effect set forth in form 12 in the First Schedule to these rules and subject to the provisions of subrule (3) of this rule, a summons in the form to the effect given in Form 13 in the First Schedule to these Rules, and if such last mentioned summons be issued it shall, unless otherwise ordered by the court, be personally served on the defendant.*

(2) If the defendant does not within sixteen days after the service of the summons, inclusive of the day of service, give notice in writing, signed by himself or his legal practitioner, to the registrar of the court from which the summons issued, of his intention to defend, the plaintiff may, after sixteen days and within two months from the day of service upon proof of service or of an order for leave to proceed as if personal service had been effected, have judgement entered up against the defendant for the amount of his claim and costs."

The appellant has not referred to any law or authority for its contention that the court ought not to proceed with hearing where an application has been made for Certified True Copies of record of proceedings by a party. The Rules have provided for the procedure to adopt in order to attain quick justice when there's no defence. The whole essence of this procedure is to avoid unnecessary delay where the defendant has no genuine defence. The procedure for default summons adopted in this matter at the trial court is one of such instance and can also be likened to the undefended list procedure at the High court. Credence was given to this procedure in;

AMEDU V. U.B.A (2008) 8 NWLR (Pt.1090) 623 at 666, paras. B-C (CA) where his lordship Abba Aji JCA had this to say

"A court should not allow a defendant who has no real defence to an action on the undefended list to dribble and frustrate the plaintiff and cheat him out of the judgment he is legitimately entitled to by delay tactics aimed, not at offering any real defence to the action, but at gaining time within which he may continue to postpone meeting his obligation and indebtedness."

In view of the above holding of the Court of Appeal, the issue of adjournment at the trial court under the circumstance would have to be at the discretion of the court, albeit the exercise of which should be a

judicial act premised on well established legal principles, principal of which should entail the employment of the fundamentals of fair hearing. The question that would naturally arise here is whether the attitude of the court in respect of the proceedings of that day (29th September, 2014) reflects that the appellant was granted fair hearing within the contemplation of a reasonable man. On this standard for the principle for fair hearing. See

MFA & ORS v. INONGHA(2014) LPELR-22010(SC).

CHIEF BUSARI AKANDE V. THE STATE (1988) 7 SCNJ 314 (1988) 3 NWLR (Pt. 85) 681.

OGUNDOYIN & ORS V. ADEYEMI(2001) 13 NWLR (Pt.730) 403 or (2001) LPELR-2335(SC)P. 21, paras. C-F.

The appellant referred to several authorities in driving home her point that the decision of the court ought to be set aside for want of consideration of the letters of 22nd September, 2014 and 29th September, 2014 by the court. He referred inter alia to the cases of

DANDUME LGC V. YARO (2011) 11 NWLR PT. 257 PG. 159 @ 190 PARA D-H per ORJI-ABADUA JCA

AJANAKU V. WILLIAMS (2009) 3 NWLR PT. 1129 PG. 617 @ 633 - 634

ESHENAKE V. GBINIJE (2006) 1 NWLR PT. 961 PG. 228 @ 251 PARA B-D.

We have taken time to go through these decisions and find that they all seem to deal with the issue of fair hearing, particularly the case of AJANAKU V. WILLIAMS which appears to be most at par with the issue in the instant appeal that the lower court failed to rule one way or the other on the appellant's application for adjournment. However the circumstances of that case is still distinguishable from the present

one. In that case the record of proceeding at the lower court clearly showed that the letter for adjournment was mentioned and objected to in the course of the proceeding by the opposing counsel, before the court went ahead to order that the matter proceeds on the principle that justice delayed is justice denied, without specifically recording a ruling of either a refusal or grant of the application for adjournment. In the instant appeal however the records of 29th September, 2014 at page 32 and 130-131 of Record of Appeal respectively does not at all refer to any application for adjournment by the appellant nor is there reflected on the copy of the said letter for adjournment at page 17 of the record any acknowledgement of receipt of the letter for adjournment on that day by the court. The record of proceeding of the said 29th September, 2014 is reproduced hereunder for proper guidance.

" Record of Proceeding."

"Court resumes sitting 29th September, 2014.

Yagazi Obinna :Plaintiff

The matter is for hearing under default summons, the defendant has been served, and they have not filed anything within the stipulated time, we urge the court to under order 5 r 1 of DCR enter judgement for the plaintiff.

JUDGEMENT

In the absence of any notice of intention to defend filed by the defendant and in view of the proof of service of the order of this Honourable court, on the Defendant placing this matter under the default summons procedure on the 10th day of September, 2014.

Judgement is hereby entered for the plaintiff against the Defendant.

The Defendant is hereby ordered to pay the plaintiff the sum of Two Million Sixty Six Thousand One Hundred and Eight-Eight Naira only. (N2,066,188.00) forthwith been the cost of goods supplied to the Defendant."

It is not clear from the above circumstance whether the letter for adjournment was drawn to the attention of the court on that day and if it was, there's also nothing on record to indicate what the reaction of the court was to same. The case of AJANAKU (supra) thus would not avail the appellant as a precedent for its position that the lower court ought to have ruled one way or the other on its application, vis: letter for adjournment, when the record of proceedings is totally silent on the said letter.

With regard to the case of Dandume LGC V. YARO (Supra) the decision of the court relied on by appellant is specifically to do with application or motion properly before the court with particular emphasis on a court process, which is not the situation here. The letter for adjournment under this circumstance does not qualify as a court process in that regard as it did not issue from the court. We find support for this in the case of EYEMI & ANOR V. ONAH & ANOR (2013) LPELR-CA/C/148/2011 Pg. 17 Para A-C per TUR JCA

where the court defines court process or process in line with the High Court (Civil Procedure Rules) of Cross Rivers state 2008 as including writ of summons, originating summons, originating process, notices, petitions, order, motion, summons, warrants, and all documents or written communications etc

See also

BELLO V. ADAMU & ORS (2011) LPELR-CA/K/235/09 Pg. 17-18 Para G-APer ORJI-ABADUA JCA where the court defined a Legal Process as follows:

" Legal process as defined by Black's Law Dictionary, 7th Edition at page 1205 includes a summons, writ, warrant, mandate or other process issuing from a Court."

The letter for adjournment cannot therefore be classified a 'court process' under the circumstance to which the case of Dandume V. Yaro (supra) can apply.

The cases of ESHENAKE V. GBINIJE (supra) and STATE V. ONAGORUWA (supra) are in support of the respondent's argument that in fair hearing cases a complaint of denial of fair hearing cannot stand when the party complaining was given opportunity to appear but failed to utilise same. We concede that it is the duty of the court to avail parties with the opportunity for a fair hearing however the court cannot force parties to take advantage of such opportunity. We are fortified in this view by the holding of the supreme court in HRH EZE FRANK ADELE V. MR GODFREY CHIZIEZE OGBONDA (2007) 1 MJSC PG 160 @ 181 per TOBI JSC Para A-B

The Supreme court while considering the duty of the court to give parties fair hearing postulated that:

" The duty of a court is to create the environment for fair hearing in an egalitarian manner for the benefit of the parties. A court of law cannot force parties to take advantage of the principles. once the court create the environment, it's duty stops and the parties are at liberty to take advantage of the environment created by the court. If the parties fail to take advantage of the environment created by the court, they cannot be heard on appeal to com plain that they were denied fair hearing".

See also;

AKINDURO V. ALAYA (2007) ALL FWLR (Pt. 381)1653 at 1672 - 1673; Paras G - A (SC) where his lordship Tabai JSC held that:

"The duty of the court is to create the environment for fair hearing and it is the decision of a party to take advantage of the environment created. A party cannot blame the court if he fails to take advantage of the environment created by the court. In the instant case, the appellant (as respondent before the Court of Appeal) had all the time to respond to the first issue in the appellant's brief in the Court of Appeal, he did nothing. He only made a statement of concession which did not help him in anyway. He cannot complain now of fair hearing".

See also

FORGO BATTERY COMPANY LTD v. ADEBAYO & ANOR(2014) LPELR-22530(CA)Pp. 8-9, paras. G-B.

In the light of the foregoing and considering that the proceeding before the court was in respect of a default summons which ought to be treated with the dispatch, we are of the humble view that the court did not fail in its duty of according fair hearing to the defendant/appellant and neither was a miscarriage of justice occasioned against the appellant when the court proceeded with the matter on 29th September 2014 in the absence of the defendant/appellant despite their letters of 22nd September, 2014 and 29th September, 2014. This is more so when this court cannot speculate on the attitude of the trial court to the letter for adjournment in the absence of any record in the proceedings to that effect. We cannot under the circumstance agree with the appellant that the trial court failed to consider it's application for adjournment when same is not borne out by the records of the court. It is also a well settled principle of law that adjournments are not meant to be granted as a matter of course. See

ALSTHOM S.A. & ANORV. SARAKI (2005) LPELR-435(SC)Pp. 27-28, Paras. E-A.

OKEKEV. ORUH (1999) 6 NWLR (Pt.606) 175 at 188.

It is at the discretion of the court to grant or refuse such an application. And in this instance where there's no reference to the application for adjournment in the record of appeal, we cannot conclude that there was a wrong exercise of discretion in refusing the application nor that when same was drawn to court's attention on the 29th September, 2014 the court refused to consider it. See

OGUNSANYA V. THE STATE(2011) LPELR-2349(SC)(P.45, para.D) where his lordship RHODES-VIVOUR, J.S.C held that;

> *"The grant or refusal of an adjournment is entirely at the discretion of the trial court."*

In NDU V. THE STATE (1990) NWLR (PT.164) Pg. 550 or LPELR-1975 (SC) Pg. 21 paras. E-G where his lordship Akpata J.S.C postulated as follows:

> *"A trial court in exercising its discretion as to whether to grant an adjournment always bears in mind that it is the duty of the court to minimise costs of litigation and to see to it that justice is not unnecessarily delayed. The court will refuse an application by either party for an adjournment of the hearing if it is of the opinion that the application was made only for purposes of delaying the proceedings." (Underlining mine for emphasis)*

See also

UDOJI NWADIOGBU & ORS V. ANAMBRA/IMO RIVER BASIN DEVELOPMENT AUTHORITY & ANOR. (2010) LPELR-2089 (SC) Pg. 17 Paras A-E or 19 NWLR (Part 1226) Pg. 364.

MFA & ORS V. INONGHA (2014) LPELR-22010(SC) Pg.26, Paras.A.

> *"...When an application for adjournment is unnecessary or not reasonable, the Court may deny same and proceed with the case."*

The resolution of the aforementioned issues one and two also resolves issue four for which we adopt the same reasoning, herein before mentioned.

The Learned applicant's counsel on issue four submitted that the rules of court cannot be applied to sacrifice justice or the merits of a case. While relying on the case of General Oil Ltd V. Oduntan & Anor (1990) 7NWLR (Pt. 153 Pg. 423 @ 441 pg. 18 para B-G), Counsel opined that the lower court blindly or sheepishly followed the Rules of Court leading to a miscarriage of justice. We beg to differ on this and with due respect to learned Applicant's counsel, restate that Rules of Court are meant to be obeyed and not flaunted merely because it slips beyond the convenience of a party. They are not meant for window dressing nor merely for succour appeal at the whims of the parties or the court. In support of our position on the purport of rules of court, we refer to following authorities.

DARIYE V. F.R.N (2010) (CA) LPELR 4022 Pg.18-20 PARA G-D.

THE NIGERIAN NAVY AND ORS V. LAPINGO (2012).LPELR-7868 Pg. 27 para. D-F.

See also;

STOWE & ANOR V. BENSTOWE & ANOR (2012) LPELR-7868 Pg. 24 para. A. where his lordship FABIYI,J.S.C held that:

> **"***Rules of court are meant to guide the court for proper adjudication of cases as presented by theparties. It has been held by this court that Rules of Court are meant to be obeyed.***"**

For the Rules of Court to occasion a miscarriage of justice, it all depends on its application by the court. And in this particular circumstance, we are of the view that the application of the rules of court in proceeding with the hearing of the case at the lower court as shown in

the record of proceedings of 29th September, 2014 did not occasion a miscarriage of justice.

The appellant's call for restraint therefore in the application of the rules by reason of the two (2) letters for certified true copies and adjournment respectively is of no moment to the decision of the court to proceed with hearing on the 29th of September, 2014. And as such, it could not have occasioned a miscarriage of justice.

The Appellant's at Paragraph 4.4.7 of her brief of argument further canvassed that the trial court was aware of the application for adjournment and referred to excerpts from the record of proceedings.

It is to be noted however that the excerpt is not from the substantive trial proceeding but in respect of application made by appellant after judgement had been delivered at the trial court.

Even where it is conceded that the court was aware of the letter of 29th of September, 2014 at this post judgement appeal stage, the fact remains that it is well within the discretionary powers of the court to either grant or refuse an application for adjournment so long as the exercise of such discretion is done judicially and judiciously. See.

ALSTHOM S.A. & ANOR V. CHIEF DR OLUSOLA SARAKI (2005) 3 NWLR (911) PG 208 AT 232 PARA A-C where the Supreme Court reiterated per EIWUNMI J.S.C that:

> **"***It is settled law that adjournments of cases fixed for hearing are not obtained as a matter of course. They may be granted or refused at the discretion of the court. The exercise of such discretion, however, is a judicial act which must be premised on well established legal principles. It is therefore an act against which an aggrieved party may lodge an appeal. To succeed in such an appeal, the appellant must satisfy the appellate court that the trial court acted on an entirely wrong principle or failed to take all*

the circumstances of the case into consideration and that it is manifest that the order would work injustice to the appellant: See Okeke v. Oruh (1999) 6 NWLR (Pt.606) 175 at 188."

See also for the procedure to adopt when defendant fails to appear under Order V (I) and Order (24) XXIV rule 4 (i) of the District Court Rules, which provides that:

Order XXIV Rule 4 (1)

If on the day of hearing or at any continuation or adjournment of the court or cause, the plaintiff appears and the defendant does not appear or sufficiently excuse his absence or neglects to answer when called in court, the District Court Judge may, on due proof of service of the summons and upon his being satisfied that the time between the date of service and the date of hearing was sufficient for the defendant to have appeared had he wished so to do, proceed to the hearing and determination of the cause on the part of the plaintiff only, and the judgement thereon shall be as valid as if both parties had appeared".

Suffice to say therefore that issues one, two and four as distilled from the grounds of appeal are resolved in favour of the respondent.

The outstanding issue is whether or not the default summon (contained in page 1 to 12 of the record of Appeal) being Exhibit A attached to the affidavit in support of motion for leave to file default summons (contained in page 14-16 of the record of Appeal) can be used as a valid process filed before the court upon which the lower court can give judgement. This is the third issue distilled from the third ground of Appeal.

The appellant's argument on this issue is that the respondent ought to have filed a separate default summons which the court would have deemed as having been properly filed. That the default summons that

was deemed properly filled was the one attached as exhibit A and referred to as proposed default summons in the ruling of the court. He opined that the law is very clear that any document used as exhibit in a motion for all intents and purposes remains an exhibit and cannot metamorphous into a court pleading. And that for that reason there was no valid summons before the court upon which its default judgement can stand.

The respondent on the other hand argued that this issue is totally misconceived by the appellant. That the motion exparte seeking leave and the proposed default summons were assessed and filed separately. He referred to pages 1 to 16 of the records of Appeal. And that the lower court at page 33 ordered that the proposed default summons which was separately filed be deemed as properly filed and served, and that same be served on defendants.

The respondent went further at paragraph 4.3.4 to state that the proposed default summons was only attached as Exhibit for the court's perusal before granting the leave and also to enable the court to know if the matter is one that can be heard under the default summons proceedings.

Interestingly this is the gravamen of the appellant's grouse, that for the reason that it was a proposed default summons attached as exhibit A, it cannot suffice as a substantive default summons upon which judgement can be delivered as was entered in this instance.

The respondent opined that having had the process assessed, filed and having obtained court order deeming it properly filed for service, they complied with order 1 of District Court Rules.

This court is well aware of the position held in several supreme court judgements that once a plaintiff has made an application to have his case registered and pays necessary fees, his responsibility stops there. His lordship Agbaje JSC in OBIANWUNA OGBUANYINYA

&ORS. V. OBI OKUDO&ORS (1990) LPELR-SC 111/1988 Pp.44-45, Paras. F-Dadumbrated on the position that in Nigeria for a plaintiff to commence an action all he needs do is to make an application to the Registrar and pay necessary fees after which his responsibility ceases from then on, however he also had an added proviso, which we would advert to later in this judgement.

There is no doubt in the instant case that the leave of court was required for issuance of the default summons. Our duty at this point is to determine whether the default summons was validly issued prior to or after the order of court for issuance of same.

This lead to the curious question of whether there was a valid summons preceding the judgement delivered in respect of the default summons.

After the court heard the exparte application to issue a default summons, the court in line with respondent's application as shown at pages 33-34 of the records made orders as follows:

> *"1. Leave of this court is granted Plaintiff/Applicant to issue and serve the proposed default summons against the defendant and the proposed default summons is deemed properly filed and served. The order of this Honourable court together with the marked default summons should be served on the defendant personally".*

And in line with the Court Order it appears the same Exhibit A referred to as the proposed default summons was served on the Appellant/ defendant. The respondent's Counsel submitted in his brief of argument that it was the properly separately filed default summons that was served on the Appellant/Defendant in accordance with court's Order. And that the default summons was only attached as Exhibit to the exparte application to enable the court know if the matter is one that can be heard under the default summons .

This is where the confusion arises, and the question begging for answer here is whether the proposed default summons, Exhibit A which was only attached as Exhibit for the court's perusal, in it's consideration of the application for leave, would ordinarily at that point metamorphose into a substantive validly issued default summons before the court.

Any questions or issues raised as to the validity of the default summons ought to be given a serious and proper consideration and not to be treated with levity. And this ought to be done in line with the position of the law, as it relates to the competence of the entire suit.

The District court rules upon which this action was instituted at the lower court is a direct product of the District Court Act (Laws of FCT) Cap 495. And for purpose of clarity we would enumerate herein the various rules of court applicable for institution of an action under the default summons procedure.

Firstly we refer to the main Order for default summons vis: Order V Rules 1(1) and (2) which are very clear on the requirement for issuance of a default summons. For purpose of clarity see Order V Rules 1(1) referred to herein before in this judgement:

Order V Rule (1) 4 is reproduced hereunder.

> *(4) A summons as in Form 13 in the First Schedule to these Rules shall not be issued without leave of the District Court Judge where the amount claimed exceeds forty naira, unless the action is for for the price, value or hire of goods which or some part of which, were sold and delivered or let on hire to the defendant to be used or dealt with in the way of his trade or profession or calling".*

Order 111 Rule 5 which provides for possible regularisation of process does so only in cases of misnomer or inaccurate description of a per-

son or place in a plaint or summons and not for defect in issuance of a summons. For purpose of clarity and better understanding, Order 111 Rule 5 is reproduced as follows:

> *"No misnomer or inaccurate description of a person or place in a Plaint or summons shall vitiate the plaint or summons, if the person or place is therein described so as to be commonly known provided that if any misnomer or inaccurate description appears to the court at the hearing to be such that the defendant has thereby been deceived or misled, the court may make a necessary amendment, and, if it is expedient to do so, adjourn the further hearing of the case, upon such terms as it may think fit".*

The above given power of the court is for a misnomer or inaccurate description of a person or place only and not for issuance of summons.

The above are rules of court that have been made to serve as aids in the administration of justice and they are meant to be obeyed, more so when it becomes a fundamental requirement. For support on this position we refer to;

OBARO V. HASSAN (2013) 8 NWLR (Pt. 1357) 425 at Pg.454 Paras. C-D.

AFOLABI V. ADEKUNLE 1983 8 SC. 98. (Reprint) 75.

ASIKA & ORS v. ATUANYA (2013) LPELR-20895(SC) J.S.C. (Pp. 23-24, paras. C-A

Also relevant here for further guidance is the **DISTRICT COURTS ACT** itself which provides at Section 45 on issuance of process as follows:

Section 45(1)

> **"***All summons, warrants, orders and other process in civil proceedings shall be signed by a District Court Judge or such other officer as may be prescribed by rules of court made under section 89 of this Act.***"**

Section 45 (2)

> **"***Every summons or other process in a civil proceeding shall be signed either by a District Court Judge or, if the District Court Judge shall so direct, by the registrar of the District Court.***"**

All the above mentioned provisions of the District Court Act and it's concomitant Rules all point to the imperatives for issuance of summons and other court process and the manner in which such processes are to be issued by the court, to wit: that it shall it shall be signed by the judge or any other authorised officer. In view of the foregoing we refer also to;

BAYARO V. MAINASARA & SONS LTD (2006) 8 NWLR (PT.982) PG. 391 or LPELR-7587 (CA) PG.39-40 PARAS. G-D.

And even where a seemingly divergent view on this was previously held by the supreme court that once a litigant pays fees and registers his processes his responsibility stops, it exempted an instance where leave is required for issuance of court process. See

OGBUANYINYA & ORS V. OKUDO & ORS. (1990) LPELR-2294 (SC) AT PG.44 PARAS. A-C per A.G.O Agbaje JSC while agreeing with the lead judgement of S.M.A Belgore JSC stated further that:

> *"From the time the plaintiff in Nigeria delivers his application to the registrar (provided it is not an action in which the consent of the court is necessary before the writ is issued) and he pays the necessary fees, it will, in my view, be correct to say that an action or a suit has been* **"***commenced***"***.* Underlining mine for emphasis.

The implication of the excerpt of his lordship Agbaje JSC in the above decision would be that where consent of the court is necessary before issuance (as in the instant case) then the delivery of application to the registrar and the payment of the necessary fees would not suffice to commence such action which is still subject to leave of the court for issuance of the writ.

In the instant case leave of court was required for issuance of the default summons and it had not been signed at all by the Registrar or any other duly authorised officer of the court, before the court ordered that it be served.

Thus in line with the District Court Act and it's Rules and the decided cases referred to above the default summons as exhibited in the records of proceedings, for failure to have been properly issued by endorsement of the Registrar's or any other authorised staff's signature falls short of the requirement of the law. The process served also being a proposed default summons attached as Exhibit cannot attain the status of Default Summons as envisaged in ORDER V of the District Court Rules.

We are further guided on the above view by the decision of the supreme court in the case of;

S.S OBARO V. ALH. SALE HASSAN (2013) 8 NWLR (PART 1357) PG. 425 at 419 Paras. D-E and 454 paras. B-E.

That was an appeal which arose from the undefended list procedure which though not all fours with the instant Appeal but is quite instructive and on point as to when a writ of summons is properly issued and the effect of reliance on an exhibit attached to the affidavit in support of the motion exparte for leave, in a substantive suit.

In that case the Appellant/Plaintiff instituted an action against the respondent/defendant at the trial court under the undefended list proce-

dure. After the trial court granted leave to take out a writ of summons against the respondent/defendant, the Appellant/plaintiff served on the defendant the writ of summons and other processes excluding an affidavit in support of the writ of summons but inclusive of the affidavit attached to the earlier application for leave.

The appellant contended that from Order 23 of the rules providing for the undefended list procedure he couldn't see anything suggesting that a separate verifying affidavit apart from the affidavit in support of the motion exparte for leave must be filed and that it is the same affidavit in support of the exparte application that must be delivered in sufficient numbers. And the Supreme Court per Ariwola JSC while disagreeing with this position of the appellant's counsel posited that the counsel had misconceived the rules under reference and that failure of the Appellant to file a separate affidavit verifying the case of his action robbed the trial court of competence.

In the same vein, his lordship Fabiyi JSC while concurring with the lead judgement also had the following to say at page 454 paras. B-E

> *" The appellant goofed as he failed to act in the right direction. He tried to place premium on the affidavit attached to the ex-parte application to no avail. This is because the respondent was not a party to same. The respondent had nothing to re-act to, in the prevailing circumstance as dictated by the inaction of the appellant. The appellant must appreciate that rules of court are very vital in the process of justice administration. They are meant to be obeyed. Failure to do so, can be counter productive or negatively costly atimes. A party who failed to obey court rules does so at his peril. He can hardly be heard to complain . See: Afolabi V. Adekunle (1983) 8 SC.98 (Reprint) 75; (1983) NSCC 398 at 143, (1983) 2 SCNLR 141."*

*The appellant talked about technicality. I am afraid, there is nothing technical to hang on to, with the scenario set up by him.***"**

It is in line with the foregoing that we find that the failure of the respondent to file a separate default summons other than the one attached as Exhibit A to the exparte application in respect of the substantive suit for service on the appellant, is fatal to his case.

The learned trial Magistrate at page 129 of the records at the trial court in her Ruling on the application held as follows:

"*Consequently the application is granted as prayed leave of this Hon court is granted the plaintiff/applicant to issue and serve the proposed default summons against the defendant and the proposed default summons is deemed properly filed and served. The order of this court Hon. Court together with the marked default summons should be served on the defendant personally and the matter is adjourned to the 29th day of September 2014 for hearing.***"**

A close scrutiny of aforestated Ruling clearly shows that the court made an order deeming the proposed default summons as properly filed and served when same had not been issued at that time. This ought not to be the case as it is akin to putting the cart before the horse. The Supreme court in the same case of Obaro v. Hassan (supra) was of the same view when it held as follows:

"*As earlier stated in this judgement, the issuance of writ of summons pursuant to Order 23 under the undefended list procedure cannot precede the order of court so to do. In other words, contrary to the misconception of the appellant, even though the writ of summons is issued by the Registrar, he cannot issue one before the court so orders. See Nwakama v. Iko Local Govt., Cross Rivers State (1996) 3 NWLR (Pt.439) 732. Such a writ of summons that was issued before judicial decision so to*

do, upon consideration of an application becomes incompetent and would ordinarily rob the trial court of its competence to try the matter. It is like a notice of appeal, which requires leave be fore being filed, to be filed without leave of court, it shall be in competent and be so declared by the court as a nullity. MO HAMMED V. OLAWUNMI & ORS (1990) 2 NWLR (Pt. 133) 458. Writ of summons thereof being an originating process must be initiated properly to enable the court to assume jurisdiction over the matter"

Thus the default summons proceeding at the trial court cannot be said to have been instituted by due process of law. And any such defect would affect the competence of the case of the plaintiff. This position is supported by the Holding of the court in Obaro V. Hassan (supra) at page 447 para. A-E particularly at paras. A and E which reads thus:

"This court has settled the matter and has restated it over and over again, that a court is competent when:

c) the case comes before the court initiated by due process of law, and upon fulfilment of any condition precedent to the exercise of jurisdiction".

See also on this;

GABRIEL MADUKELU & ORS V. JOHNSON NKEMDILI (1962) 1 ANLR 587, (1962) 2 SCNLR 341.

MARK V. EKE (1997) 11 NWLR (PT. 529) PG.501

SLB CONSORTIUM LTD V. NIGERIA NAT PET. CORP (2011) 9 NWLR (Pt.1252) Pg.317.

Suffice to say that for the above reason the proposed default summons marked as Exhibit "A" was erroneously deemed as properly

filed and served by the trial court, when same had not been issued at the time of the said order.

After thoroughly scrutinising the records of Appeal we have not found a separately duly filed and issued default Summons outside the one marked as Exhibit ‘’A”.

We are of the humble view that the answer to the question earlier posed on issue 3 ought to be answered in the negative. The unsigned proposed default summons also marked as Exhibit A could be misleading on it’s purport if served on an adverse party. And cannot therefore stand as a validly issued default summons upon which the court can deliver judgement.

There is nothing from the records of proceedings to show that the default summons was properly issued in accordance with the enabling laws, before or after the order of court for issuance of same.

The trial court in the light of the foregoing is found to have acted without jurisdiction when it entered judgement based on an invalid process. This is because the jurisdiction of the court had not crystallised at that stage. A court is only competent to assume jurisdiction over a matter when the case comes before the court by due process of law. See

OBARO V. HASSAN (Supra) pg.447 paras. A-D where the court pronounced as further on competence of a suit as follows:

> **“***Any defect in competence is fatal, for the proceedings are nullity, however well conducted and decided, because the defect is extrinsic to the adjudication***”**

See also

GABRIEL MADUKOLU &ORS V. JOHNSON NKEMDILIM (1962) 1 ALL NLR 587 (1962)B2 SCNLR 341.(Supra)

SLB CONSORTIUM LTD V. NIGERIAN NATIONAL PETROLEUM CORPORATION (2011) 9 NWLR (PT. 1252) 317.(supra)

It is settled law that any defect in competence to an action is fatal to such action, for then the entire proceedings would be a nullity.

Therefore in view of the fact that the respondent's action at the trial court was not properly initiated, the said action is found incompetent.

In effect this issue four is resolved in favour of the Appellant.

And in the final analysis, having resolved this issue of competence in favour of the appellant, it therefore means that this Appeal succeeds in part but effectively in substance under the circumstance.

And being that the issue resolved in favour of the appellant has to do with competence of the suit the other issues resolved in favour of the respondents have become otiose and of no benefit to her.

Consequently, the said proceedings and Judgement of 29th September, 2014 are hereby struck out for lack of competence and want of jurisdiction.

Signed: Signed:

HON JUSTICE M.E. ANENIH HON JUSTICE JUDE OKEKE

(Presiding Judge) (Hon. Judge)

Appearances:

Kehinde Soremikun Esq. for the Appellant.

Yagazie Obinna Esq., Benjamin B. Chinenye for Respondent.