

REVISITATION OF DECISION ON SERVICE OUTSIDE JURISDICTION BY SUPREME COURT OF NIGERIA

By Folabi Kuti

It is not often that the final court gets to review its decisions. When it does make a departure, and a welcome one at that, from a previously taken position of law, it is an event that is greeted with much excitement by many an enthusiastic legal commentator.

The moment is made even more profound when the decision being departed from appeared flawed from the outset or was accorded an unintended wide amplitude by subsequent decisions that dutifully followed the pattern.

In what appears a biting departure from its previous holding, the Supreme Court, in Appeal No. SC. 341/2019 *Biem v Social Democratic Party* (judgment delivered on Tuesday, 14 May 2019), held that an originating process issued by the Federal High Court in one territorial jurisdiction (within Nigeria) cannot be considered to be service outside jurisdiction when served in a different territorial jurisdiction and will thus not require to be endorsed for service outside a State and marked as a concurrent writ (as stipulated by sections 97 & 98 of the Sheriffs & Civil Process Act Cap S6 LFN 2004 [hereafter, SCPA]).

The enduring sails of *MV Arabella*

It began exactly eleven years ago when the Supreme Court, in *Owners of the M.V. Arabella v. N.A.I.C.* (2008) 11 N.W.L.R. (pt. 1097) 182, set aside the writ of summons which was not ‘properly’ issued and served outside the territorial jurisdiction of the Federal High Court (hereafter, FHC) for failure to seek leave of court.

The holding from *MV Arabella* soon met many an otherwise meritorious action filed at the Federal High Court with a roughshod sail indeed. Navigating the rough waters of timeous procedural objections on any of the grounds often associated with the holding from *Arabella*, soon became most perilous.

Biem v Social Democratic Party to the rescue?

In *Biem v SDP* the pointed question in the main appeal was whether the failure to mark an originating process issued by the FHC, Warri for service in Abuja as ‘concurrent’ (section 98 SCPA), was capable of voiding the originating process.

The apex Court, per Justice Akaahs who wrote the leading judgment, intoned a discernable ratio decidendi at pp.43-44 of the judgment thus: ‘The service of any process issued by the Federal High Court can be carried under the Sheriffs and Civil Process Act, if such service is to be executed outside the territory of Nigeria. Order 6 Rule 31 of the Federal High Rules interprets outside jurisdiction to mean outside the Federal Republic of Nigeria. Thus to hold that an originating summons which was issued out of the registry of the Federal High Court, Warri which was addressed for service at Abuja outside Delta State where the originating summons was issued from should be nullified because it did not comply with section 97 of the Sheriffs and Civil Process Act as this Court did in *Izeze v INEC* (2018) 11 NWLR (Pt. 1629) 110 at 132 did

not take cognisance of Section 19 of the Act and Order 6 Rule 31. I am of the considered view that the Originating Summons issued by the Federal High Court, Makurdi which is to be served in Abuja cannot be considered to be service outside jurisdiction and therefore does not require to be endorsed as a concurrent Writ’

A new dawn?

Roundabout present day, in *Boko v Nungwa*, decision made on 13 July 2018, reported as (2019) 1 NWLR (Pt.1654) SC 395, the apex Court was confronted with a number of issues for determination. The related issues of whether the portions of the Federal High Court (Civil Procedure) Rules 2009 dealing with service and execution of process derived their force from sections 94 and 96(2) of the SCPA, and whether in view of the provisions of the Federal High Court (Civil Procedure) Rules 2009 the case of *Arabella v NAIC* was still applicable to vitiate an originating process, were flagged as Issues No. 2 & 3. The leading judgment, delivered by Okoro JSC, resolved the main appeal, answering in the affirmative the jurisdictional question raised as Issue No.1. Having resolved the appeal on an all-encompassing jurisdictional point, the Court, understandably, did not as much as consider the other issues. The other Justices on the panel, coram Rhodes-Vivour, Sanusi, Bage JJSC, with the exception of Peter-Odili JSC, wrote terse concurring opinions.

Peter-Odili JSC agreed with the leading opinion, but in an instructive obiter which now appears to have ignited and set the decision in *Biem* on a firm footing, further considered Issues 2 & 3 highlighted above and concluded at pp. 444-445 of the Report that the Federal High Court does not come within the ambit of sections 91 and 92(2) of the Sheriffs & Civil Process Act’ and that *Arabella v NAIC* is inapplicable in present context ‘since it was decided on the basis of section 97 of the Sheriffs and Civil Process Act and interpreted alongside the Federal High Court (Civil Procedure) Rules, 1976 which have been repealed. The extant Rules of the Federal High Court being the Federal High Court (Civil Procedure) Rules 2009 wherein the requirement for ‘leave to issue’ was removed.’

Without expressly saying so, even as there was an oblique reference to *Boko v Nungwa* in *Biem v Social Democratic Party*, the apex Court appeared not to have pointedly relied on *Boko v Nungwa* in view of the fact that the illuminating obiter statements of Peter-Odili JSC in that case did not form part of the leading judgment.

Biem v Social Democratic Party is the latest authority on the issue(s) under reference. Inevitably, the question which arises is: has the Supreme Court finally departed from its previous holding in *MV Arabella*? The question does not lend itself to an easy answer. Suffice to say that it is pertinent to introspect a little further.

First, it takes a seven-member panel (that is, a Full Court) of the Supreme Court of Nigeria to overrule any previous decision of the court. *Sodeinde v ACB* (1982) 6 SC 137 at 139. Applied to the case under review, *Biem*, just like *Arabella*, was a 5-man panel.

Secondly, in *Biem*, the Court illuminated the discussion bringing into sharp focus the provision of section 19 of the Federal High Court that makes for a single jurisdiction of the Federal High Court as well as power vested in the Head of Court by the Constitution to make Rules of Court. The Court, in what appears an ingenious attempt to depart from its previous position in *MV*

Arabella, concluded that its decision in *Izeze v INEC* (2018) 11 NWLR (Pt. 1629) 110 at 132, failed to take cognisance of the provision of the 2009 FHC (Civil Procedure) Rules.

Izeze v INEC (2018) 11 NWLR (Pt. 1629) 110, was however not alone. And that was equally not the only flawed decision on the matter under reference. *PDP v INEC* was a related appeal to *Izeze*'s. Though not referred to, or considered in *Biem v SDP, PDP v INEC*, with a similar holding as in *Izeze*'s, was also decided on April 13, 2018 (same day as *Izeze*'s). Whilst *Izeze*'s is reported in Part 1629 of NWLR, *PDP v INEC* is reported as (2018) 12 NWLR (Pt 1634) SC 533. In *PDP v INEC*, the apex Court, as in the other cases, went as far as pronouncing an originating summons issued at the registry of the Federal High Court in Warri for service in Abuja without the endorsement in section 97 of the SCPA as worthless and void! Yes, the Court pronounced the originating process, and not service of same VOID by reason of failure to endorse properly FOR SERVICE. This, apparently, is very much against the grain of the substance of the illuminating decision of the selfsame Supreme Court – sitting as a FULL COURT – in *Odu'a Investment Co. Ltd. V. Talabi* (1997) 10 NWLR (PT. 523) P.1 to the effect that it is the 'purported service' and not the writ that will be set aside in the event of a finding of defect as to service.

At the risk of digression, the point being made here is that unless this position is revisited at the earliest opportunity, our adjudicating system being precedent-based, this new position will also likely engender a new wave of decisions pronouncing as void any originating process defective as to service, as it is not open to a lower court to disagree with the decision of the higher court on any point even if the decision of the higher court was reached per incuriam.

Worrisomely, all the cases highlighted here were decisions rendered majorly between 2018 and 2019. Considering the relatively short span of time between the decisions, this should ordinarily provide an opportune time to discuss, review and avoid conflicting positions in decisions bearing on future cases of similar facts pattern.

In the final analysis, *Biem*'s decision is a welcome addition to a growing body of case law on the points decided, not least that 'out of jurisdiction' for the purpose of service of originating process issued from the FHC means 'out of Nigeria'.

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