

**IN THE HIGH COURT OF SIERRA LEONE  
(GENERAL CIVIL DIVISION)**

**BETWEEN:**

**Media One Centre** - Plaintiff  
**3 Mammah Street**  
**Freetown**

**AND**

**Electricity Distribution and Supply Authority (EDSA) - 1<sup>st</sup> Defendant**  
**5 Murray Town Road**  
**Freetown**

**Alhaji Kargbo**  
**5 Murray Town Road** - 2<sup>nd</sup> Defendant  
**Freetown**

**Mohammed Jalloh**  
**5 Murray Town Road** - 3<sup>rd</sup> Defendant  
**Freetown**

**Counsel: Fatmata Forster and R. A. Nylender for the Plaintiff/ Respondent  
E. N.B. N'gakui Esq. for the Defendants/ Applicants**

**Ruling on an Application to Set Aside the Writ of Summons Dated 18<sup>th</sup>  
October, 2018, and All Other Subsequent Proceedings, Ex Debito Justitia for  
Non-Compliance with Order 10 Rules 1, 2, 6 (3) and 7 of the High Court Rules,  
Constitutional Instrument NO. 8 of 2007, Delivered on Wednesday, 7<sup>th</sup>  
November, 2018 by Hon. Justice Dr. Abou B. M. Binneh-Kamara**

Procedurally, on 18<sup>th</sup> October, 2018, a writ of summons was issued out of the Master's Office and indorsed by J.B. Jenkins-Johnston and Co. as solicitors for the Plaintiff/Respondent (Media One), whose place of business is NO. 3 Mammah Street, Freetown; against the Defendants/Applicants {Electricity Distribution and Supply Authority (EDSA), Alhaji Kargbo and Mohamed Jalloh}, all of No. 5 Murray Town Road, Freetown. Again, on the 23<sup>rd</sup> October, 2018, the Plaintiff's/Respondent's solicitors again filed in a notice of motion for orders of interim and interlocutory injunctions; as prayed for on the face of the motion. And the said application is supported by three affidavits, deposed to, pursuant to Sub rules (4) and (5) of Rule 1 of Order 35 of the High Court Rules, Constitutional Instrument NO. 8 of 2007 (hereafter referred to as "The Rules").

Essentially, on the 25<sup>th</sup> October, 2018, as required by Rules 4 and 5 of Order 12, N'gakui and Partners, accordingly entered appearance to the said writ of summons.

And on the same day, Benjamin Kofi O' Connor (a solicitor's clerk in N'gakui and Partners), deposed to an affidavit of search (Exhibit ENBN II), which was eventually filed into the court's records. Alas! Paragraph 3 of the said affidavit, confirmed the availability of the writ of summons, pursuant to which the action is begun, in the file, but simultaneously averred that there was no affidavit of service, affirming that the Defendants/ Applicants were actually served; as required by Order 10 of the Rules.

Meanwhile, on the 26<sup>th</sup> October, 2018, armed with this information, E.N.B N'gakui Esq., filed in a notice of motion, supported by the requisite affidavit (Exhibit ENBN I) for the writ of summons (issued on the 18<sup>th</sup> October, 2018) and all subsequent proceedings, to be set aside ex debito justitiae (as a matter of right) with the appropriate cost. Moreover, on the same 26<sup>th</sup> October, 2018, Thomas Humper, a clerk in the Chambers of Jenkins- Johnston and Co., deposed to and filed in an affidavit of service, justifying that the 1<sup>st</sup> Defendant/Applicant (EDSA) was served with the writ of summons, dated Thursday, 18<sup>th</sup> October, 2018, at N0. 5 Murray Town Road, Freetown.

And that it was one Anipha Sawaneh that received the said writ of summons on behalf of the 1<sup>st</sup> Defendant/Applicant. Furthermore, on the 29<sup>th</sup> October, 2018, a solicitor in the Chambers of Jenkins-Johnston and Co. (Fatmata Forster), deposed to, and filed in an affidavit in opposition, to the affidavit supporting the notice of motion, dated 26<sup>th</sup> October, 2018, contradicting the content of Exhibit ENB I in its entirety. However, on the 31<sup>st</sup> October, 2018, in the presence of E.N.B. N'gakui Esq., Fatmata Forster came to be heard on the application for interim and interlocutory injunctions, filed in on the 23<sup>rd</sup> October, 2018.

Meanwhile, at this stage, it became clear that the court was faced with two distinctively different applications. The first being the application to set aside (ex debito justitiae) the very writ of summons, pursuant to which this action was procedurally commenced and all subsequent proceedings thereafter. And the second being the application for the award of interim and interlocutory injunctions as a matter of urgency. Nevertheless, whether the circumstances that culminated in the urgency that necessitated the application were self-induced, or naturalistic, cannot be determined at this stage.

However, given the two contrasting or competing applications that characterised the continuity or progression of this action, I thought it legally expedient to direct that it would be unreasonable or rather unnecessary for me to listen to the application for interim and interlocutory injunctions, when the very writ of summons, pursuant to which this matter commenced was being contested. Moreover, the contention of the writ of summons dated 18<sup>th</sup> October, 2018, therefore constitutes an overt impediment for the hearing of the application for interim and interlocutory injunctions at this stage. Both counsels purposefully conceded to the direction given that the contention of the said writ of summons should be first determined, before the application for injunction, if at all, is to be heard.

It was against this backdrop, that I allowed E.N.B. N'gakui Esq. to move the court on his notice of motion filed in on the 26<sup>th</sup> October, 2018, for the writ of summons, commencing this action to be set aside ex debito justitiae with cost. Counsel robustly contended that the irregularities, surrounding the whole process, leading to the issuance and service of the writ of summons, were flawed and so fatal; that

they can best be described as 'procedural nullities'; not even 'procedural irregularities' that can in any way be cured by the non-compliance rule, embedded in Sub rules (1) and (2) of Rule 1 of Order 2 of the Rules.

Emphatically, counsel rationalised his submissions for the writ of summons and all subsequent proceedings to be set aside, as a matter of right, with substantial cost on the following procedural issues, germane to the procedural justice of this action:

1. That the Defendants/ Applicants were not served with the writ of summons dated 18<sup>th</sup> October, 2018. The failure to serve the said writ of summons is a manifest and fundamental disregard of Order 10 Rules 1, 2, 6 (3) and 7 of the Rules. Counsel reiterated the extent to which the violation of the aforementioned procedural requirement is fundamental to the dispensation of justice in a civil action, intuiting that there is no way the Defendants/Applicants, could have known that an action has been instituted against them, had they not been served them with the writ of summons. Counsel further asserted that it is only when persons are aware that an action has begun against them that they can strategize and consult with competent solicitors that would enter appearance for them and subsequently defend such actions.
2. The notice of motion for injunction does not contain any attachment of the writ of summons and there is no affidavit of service attached thereto; hence there is nothing before this court to establish that the Defendants/ Applicants were accordingly served with it.
3. A search of the court's records was conducted (after having paid the requisite research fee). And an affidavit of search was meticulously filed, justifying the

indisputable fact that it was only an ordinary writ of summons; with no accompanying affidavit of service that was in the file, when the search was done (see Exhibit ENBN II).

4. The affidavit in opposition sworn to by Fatmata Forster, dated 29<sup>th</sup> October, 2018, contained 'two unmarked attachments', which cannot be easily referenced; indicating an incurable irregularity.
5. The second attachment is an affidavit sworn to by one Thomas Humper. In paragraph 1, the deponent said he only served the 1<sup>st</sup> and not the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants/Applicants herein.
6. The deponent in the said affidavit averred in paragraph 2 that at the time of such service of the writ of summons, a copy thereof was subscribed to and indorsed in the manner and form prescribed by the Rules; but there is no indorsement at the back of the said writ of summons, indicating such. Counsel relies on Order 10 Rule 6 (1) of the Rules in justification of the submission that the indorsement is an indisputable evidence of service
7. The writ of summons is dated 18<sup>th</sup> October, 2018. Assuming without acceding that the 1<sup>st</sup> Defendant was served, counsel on the other side, did not allow time to run for appearance to be entered, before proceeding with the next stage of the procedure. Rather, she filed a motion for interim and interlocutory injunctions, four (4) days after the alleged service of the writ of summons. So the application for interim and interlocutory injunctions at this stage is prematurely made against the Defendants/Applicants, who were not even served with the writ of summons. Counsel relies on Order 12 Rule 11 of the Rules for this submission.

8. Exhibit ENBN II is the affidavit of search, depicting that the court's records were accordingly searched on the 25<sup>th</sup> October, 2018, to ascertain whether there was an affidavit of service in the file. But the affidavit of service of Thomas Humper, was sworn to on the 26<sup>th</sup> October, 2018. This in effect means that the search had been done, before Thomas Humper's purported affidavit of service was sworn to and filed in.
9. The writ of summons (as exhibited) contained the name of one Hanifer Sawaneh, on whom it was purportedly served on behalf of the 1<sup>st</sup> Defendant. And no way book has been produced, confirming that she signed as the person that received the writ of summons on behalf of the 1<sup>st</sup> Defendant.

Contrariwise, Fatmata Forster, chose to sequentially respond to the aforementioned contentions with the following submissions:

1. An affidavit in opposition, dated 29<sup>th</sup> October, 2018 (containing two unmarked exhibits), was sworn to and filed in by the said solicitor for and on behalf of the Plaintiff/Respondent. The first exhibit is the copy of the writ of summons (dated 18<sup>th</sup> October, 2018), pursuant to which this action was commenced; and the second is the copy of the affidavit of service (dated 26<sup>th</sup> October, 2018) and sworn to by Thomas Humper. Counsel thus relies on the said affidavits in their entirety.
2. On the controversy that no reference is made to the writ of summons or to the service thereof in the Exhibit marked ENBN I, which is the copy of the notice of motion filed for and on behalf of the Plaintiff/ Respondent; counsel submits that in an application for an injunction, there is no requirement in the rules, that the writ of summons or the affidavit of service thereof must

be exhibited and attached to the application. Order 35 Rule 1 (3) of the Rules, gives the Plaintiff in an action, the option to apply for an injunction, even before the issuance of the originating process.

3. On the submission that on perusal of the affidavit in opposition and the affidavit of service attached thereto, it appeared that only the 1<sup>st</sup> Defendant was served; counsel submits that though the Rules require that all the Defendants must be served, there is nothing in the Rules that says they must all be simultaneously served; noting that there is still time for the other Defendants/Applicants to be served. Counsel relies on Order 10 of the Rules in its entirety.
4. On the contention that assuming without conceding that the writ of summons was served on the 1<sup>st</sup> Defendant/Applicant, time should have been allowed to run for the Defendant to enter appearance, before the application for injunction ought to have been made; counsel refers the court to Order 35 Rule 1 (1) of the Rules.
5. On the argument that the writ of summons and all subsequent proceedings be set aside because the writ of summons was not allegedly served on the Defendants, counsel contends that the writ was served on the 1<sup>st</sup> Defendant; and maintains that it is not a requirement that all the Defendants must be simultaneously served. Counsel relies on the second unmarked exhibit, which is attached to the application; and urges the court to look at Order 10 Rule 6 (3) for the validity of the said affidavit of service.
6. Counsel submits that the lack of service of a writ or any other originating process is not a ground for setting aside the writ of summons; pontificating that Order 6 Rule 10 (1) and (2) are quite instructive on this.



Having carefully presented the contentions that permeated the arguments of both counsels, I will now attempt to unpick and analyse the main issues that I think this court must not allow to fester unaddressed at this stage. Significantly, the principal issue which this court must resolve is whether the first order prayed for in the notice of motion filed in on the 26<sup>th</sup> October, 2018, for the writ of summons, commencing this action and all other proceedings therein must be set aside ex debito justitiae with cost.

Even though counsel has seriously contended that the irregularities, surrounding the whole process, leading to the issuance and service of the writ of summons, were flawed and fatal that they can best be described as 'procedural nullities'; not 'procedural irregularities' that can be cured by Order 2 of the Rules; this court takes the position that irregularities on the content or service of a writ of summons are not sufficient enough to nullify any proceedings.

Therefore, assuming without acceding that serious irregularities, characterised the content or service of the writ of summons in this action, such irregularities cannot be deemed to have been fatal enough to nullify the said writ of summons and service thereof. The court's position on this issue contextually dovetails with the provision in Sub rule (1) of Rule 1 of Order 2 of the Rules, which states thus:

*Where in the beginning or purporting to begin any proceedings or at any stage in the cause of or in connection with any proceedings there has, by reason of anything done, or left undone, been a failure to comply with the requirement of these rules, whether in respect of time, place, manner, form or content, or in any other respect, the failure shall be treated as an*

*irregularity and shall not nullify the proceedings, any step taken in the proceedings, or any document, judgment, or order in therein.*

The authors of the Supreme Court Practice, 1999, which is a replication of Sierra Leone's High Court Rules, 2007, clearly made the distinctions between 'procedural nullity' and mere irregularity in page 9. And they contentiously and specifically referenced the case of **Harkness v. Bell's Asbestos and Engineering Ltd. (1967) 2 K.B 729** on this point. They also referenced a plethora of cases between pages 9 and 11, explaining the positive strides, which the courts have made in their liberal interpretation of the non-compliance rule, embedded in Order 2 of the Rules.

Factually, it cannot be disputed, even though Fatmata Forster argued contrariwise, that the Defendants/ Respondents, had not been served, up to the time that the search on the court's records was done and an affidavit of search (see Exhibit ENBN II) duly filed in. It must be reckoned that failure to serve originating or any other processes to the other side in any inter parte application mounts to a manifest irregularity. The provisions in Order 10 of the Rules are very instructive on this. But, is such irregularity fatal enough to nullify the proceedings? The answer is no. This is so because of the non-compliance rule referenced above. So the failure to serve the writ of summons on all Defendants/Applicants, is deemed to be an irregularity that is curable in the face of Order 2 of the Rules.

So, the first order as prayed on the face of the notice of motion dated 26<sup>th</sup> October, 2018, does not hold good; as this action and all subsequent proceedings cannot be set aside as of right in the light of the said Order 2. Meanwhile, it must be noted that E.N.B. N'gakui Esq. has already entered appearance for all the Defendants/Applicants in this action. This essentially presupposes that they are

now aware about the existence of this matter in this court. But must that be construed as a waiver of their right to be served with the requisite process, pursuant to which this action began? The answer is no. Thus, Rule 15 of Order 12 of the Rules is instructive on this; though one may be tempted to rely on Sub rule (3) of Rule 3 of Order 10 to answer the question in the affirmative.

Analytically, the other issue which this court must resolve is whether the affidavit in opposition sworn to by Fatmata Forster, dated 29<sup>th</sup> October, 2018, containing the 'two unmarked attachments', which cannot be easily referenced; amount to an incurable irregularity. Practice demands that every exhibit that is produced in any court of competent jurisdiction has to be marked for ease of reference by the Bench and even the solicitors. So, the unmarking of the aforementioned affidavit is tantamount to an irregularity that can as well be cured. This irregularity is by extension salvaged by the same Order 2 Rule 1 of the Rules. And the said affidavit can be accepted by this court in its defective form.

The next point which this court must resolve is whether sufficient time was allowed to run for appearance to be entered, before the motion for interim and interlocutory injunctions was filed in. Nevertheless, it should be noted that I hitherto indicated in this ruling that I am only minded to first listen to the application, contesting the very process, pursuant to which this action began; before entertaining the application for interim and interlocutory injunctions. Since this point is cognate with the issue of injunction, I will tentatively hold it in abeyance; and address it after the present application is determined.

On the final issue which this court must resolve, a careful perusal of Exhibit ENBN II, which is the affidavit of search, depicts that the court's records were accordingly

searched on the 25<sup>th</sup> October, 2018, to ascertain whether there was an affidavit of service in the file. But the affidavit of service of Thomas Humper (a clerk in the Chambers of Jenkins-Johnston and Co.), was sworn to on the 26<sup>th</sup> October, 2018. This in effect means that the search had been done, before Thomas Humper's purported affidavit of service was sworn to and filed in. And I will acknowledge E. N. B. N'gakui's submission here that the copy of the said affidavit of service was not subscribed to and indorsed in the manner and form prescribed by Sub rule (1) of Rule 6 of Order 10.

Purposefully, having clearly unraveled all the contentious legal issues, germane to the motion dated 26<sup>th</sup> October, 2018, for the writ of summons, dated 18<sup>th</sup> October, 2018, and all subsequent proceedings thereto, to be set aside ex debito justitiae, I will order as follows:

1. That order 1 prayed for on the face of the notice of motion dated 26<sup>th</sup> October, 2018, is hereby refused.
2. That the fact that E.N.B N'gakui Esq. entered appearance does not presuppose that he has waived the Defendants/Applicants right to be personally served with the writ of summons, originating this action. He entered appearance as a matter of right to enable him to file the motion dated 26<sup>th</sup> October, 2018, for this action to be set aside. He would not have had any legal justification under the Rules to contest the legality of the originating process of this action, had he not entered appearance.
3. That all the Defendants/ Applicants be served with the writ of summons in this action, in accordance with the provisions of the Rules.

4. That counsel for the Plaintiff/Respondent is at liberty to move the motion for an injunction dated 23<sup>rd</sup> October, 2018, after the writ of summons has been served on all the Defendants/Applicants.
5. That counsel for the Defendants/Applicants is at liberty to file an affidavit in opposition to the application dated 22<sup>nd</sup> October, 2018.
6. That the affidavit in opposition sworn to by Fatmata Forster on the 29th October, 2018, containing the two unmarked attachments, shall be received by this court in its defective form.
7. There shall be cost in the cause.

Hon. Justice Dr. Abou B. M. Binneh-Kamara

26/11/18

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