

Setting Aside a Null Judgement — A Call for Review

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- 1. Introduction** - The 1999 Constitution (like that of 1979) vests the judicial power on the law courts. It endows these courts with all the inherent powers and sanctions of a court of law. The courts exercise these powers by hearing cases and dispensing justice by means of orders and judgements emanating from their decisions. These orders and judgements however bind the parties unless and until they are set aside by the courts either on appeal or by means of judicial review.

In some cases however, the order or judgement turns out to be void or invalid for some reasons. In such cases the judgement debtor moves the court or a higher court to set aside the said order or judgement.

Our law reports are replete with decisions setting aside such orders or judgements. This work examines whether an order setting aside such an order or judgement is the proper thing to do in the circumstance.

- 2. Definition of Terms** - It is pertinent to commence this paper with a definition of what a null judgement is or stands for. A judgement or order is said to be null when it is void and/or of no legal consequence. It means that *ab initio* such an order or judgement never existed. The learned authors of Black's Law Dictionary confirm the above position when they defined nullity as follows:

"Nothing; no proceedings; an act or proceeding which the opposite party may treat as not having taken place or which has absolutely no legal effect."¹

It follows from this position that from the date such an order or judgement is pronounced null and void its effect relates back to the date when its effect was supposed to have commenced (if it were valid). Once this is so it means that whatever must have been done on the basis of such an order or judgement must be returned to the *status quo ante*. It is as if

nothing ever happened. Thus in Osborne's Law Dictionary, the authors have defined the word void to mean:

"Of no legal effect, nullity."²

Lord Denning put it bluntly in *McFoy v. UAC*³ when he described such as being not only bad but incurably bad. It stands to reason therefore that when an order or a judgement of a law court is found to be void or nullity, nothing is in existence.

To properly situate the issue it becomes necessary to draw a line of distinction between a null or void order/judgement and a voidable one. Where an order or judgement is said to be voidable it remains valid and subsisting until it is set aside by the court. Here the law presumes that something has come into existence and subsists, but is visited by a vice which makes it voidable. The Osborne's Concise Law Dictionary puts it in proper perspective as:

"(An agreement) or other act which one of the parties to it is entitled to rescind and which until that happens has full legal effect."⁴

Thus in this instance, unless steps are taken to set aside the order or judgement, it remains and its effect in law will continue to operate. It may be further stressed that where a voidable judgement is eventually set aside the effect begins to run from the date when it was set aside.

Accordingly where a party has a voidable order or judgement against him he is bound thereby and must act in consonance thereto until same is set aside. On the other hand, a party who knows that an order or judgement is void (though he defers to the authority of the court) knows that nothing is in existence against him. Hence in *Leedo Presidential Motel Ltd. v. Bank of the North & Ors.*⁵ the Supreme Court held that since the leave granted is a nullity, the respondent derived no interest in the property.

3. Causes of Nullity — This section takes a look at some of the factors that may render an order or the judgement of a court void or a nullity. Though there are many circumstances that could give rise to this situation, it is intended to examine some and not all.

(a) **Locus Standi and Justiciability** — Locus standi refers to the legal capacity of an individual to bring an action before a law court. It denotes the legal competence of a party to invoke the jurisdiction of the court to hear or determine a cause of action. According to Black's Law Dictionary, it means:

"A place of standing in court. A right of appearance in a court of justice on a given question."⁶

Properly conceived the doctrine seeks to ensure that he who moves the court in his favour must have sufficient interest in the matter over which he wants the court to adjudicate.⁷ Conversely where a party lacks sufficient interest on a matter he cannot invoke the jurisdiction of the court.⁸ In that case he is said to lack the locus standi to bring the action which the court if so satisfied will strike out.⁹ In public law the issue of locus standi is more exacting as the litigant would be expected to have suffered far and above all the other members of the public.¹⁰ Thus where a plaintiff lacks locus standi to bring an action, but goes on to do so any order or judgement obtained by him amounts to a nullity. This is because where a party lacks the locus standi to bring an action the court would lack the jurisdiction to hear same. Thus where the court proceeds to do so, any order or judgement emanating from the proceedings is void. The court put it in judicial perspective in the case of *Chief Ogunsanya v. Chief Duda* when it stated as follows:

"The question of locus standi is also an issue of jurisdiction so that if a plaintiff is incompetent to bring an action the court would in turn be incompetent to hear the plaintiff. ..."

Thus there is a causal connection between locus standi and jurisdiction such that in the absence of locus standi, jurisdiction will also be lacking.

Closely connected to but different from locus standi is the concept of justiciability. The concept of justiciability seeks to ascertain whether the subject matter sought to be canvassed before the court is such as the court can entertain. It often happens that a law or the constitution may declare certain subjects as non-justiciable.¹¹ Where this is the case, the courts are barred from hearing let alone making orders or giving judgement on them. The net effect is to deprive the court of the jurisdiction to hear such a case. Thus any orders or judgements made by it on the subject would be null and void.

- (b) **Jurisdiction** — The most important factor that renders the decision of a law court void or a nullity is the want of jurisdiction, on the part of the court to adjudicate on a matter. Primarily a court must have jurisdiction over a cause before it may proceed to adjudicate on it. Where such jurisdiction is lacking whatever the court purports to do with respect to that case would be a nullity no matter how well

conducted. It is as if nothing ever happened and the parties are back to their status quo ante.¹² Upon that determination whatever order it made or judgement entered in, the suit is of no legal moment being a nullity. The absence of jurisdiction could be on ground of subject matter or territory. More often than not the statute establishing a court goes on to stipulate the subjects over which it has jurisdiction.¹³ By parity of reasoning where the court veers off this area of jurisdiction to decide cases on subjects over which it lacks jurisdiction its orders or judgements would be void.¹⁴ Further still, the jurisdiction of a court could come into focus on grounds of territory. Where a court is set up with a territorial limit and it proceeds to handle cases outside its geographical territory, any decisions so reached would be null and void for want of jurisdiction. Thus in *Imad & Ors v. Salami*¹⁵, the court of appeal held that:

"Where the proceedings and the ruling of a trial court are done without jurisdiction, they are incompetent and therefore void."

- (c) **Functus Officio** — It is the law in this country that once a court has delivered its judgement in a case, it becomes functus officio thereof. By this is meant that the said court is thence divested of the power to reopen the case except for the purpose of making ancillary orders.¹⁶ Accordingly, any order or decision further made or reached by the court after this stage, would be null and void as it would lack the authority to do so.¹⁷
- (d) **Limitation of Action** — In some cases, laws are passed by the legislature for the purpose of stipulating a period of time within which proceedings must be initiated. Where a litigant fails to bring an action within the stipulated time, the effect is that the claim becomes statute barred.¹⁸ In that instance, the effect is to deprive the court of the jurisdiction to hear the suit. Where it does, any order or judgement recorded will be void and of no legal effect. Akintan, JCA delivering the lead judgement in *Ita v. Archibong*¹⁹ held that:

"The question whether an action is instituted within the time laid down by the limitation law is an important pre-condition which must be met before a court can assume jurisdiction. It is thus an issue that goes to jurisdiction and it can be raised at any stage of the proceedings."

Articulating the basis for law of limitation, the court in the case of *Nwadiaro v. Shell Petroleum*²⁰ stated that:

- (i) Long dormant claims have more cruelty than justice in them;
- (ii) A defendant might have lost the evidence to dispose a stale claim;
- (iii) Persons with causes of action should pursue them with reasonable diligence.

This issue has always attracted all the seriousness of our law courts and a court that goes on to adjudicate when the action has become time barred, would be acting in vain.²¹

- (e) **Constitutional Time for Judgement** — In compliance with the adage which is hoary with age that justice delayed is justice denied, our constitution has taken some steps to ensure that this applies to our legal system. This it has done by stipulating the time frame within which judgements of our law courts must be delivered after address by counsel. The provision reads thus:

"Every court established under this constitution shall deliver its decision in writing not later than ninety days after the conclusion of evidence and final addresses and furnish all parties to the cause or matter determined with duly authenticated copies of the decision within seven days of the delivery thereof."²²

The effect of noncompliance with the above provision is that such a decision is a nullity. Under that constitution, there was no room for any considerations once there was failure to comply with the provision by the court. However, the 1999 constitution has a proviso by which nullity of such a judgement is now conditioned on the party complaining having suffered a miscarriage of justice as a result.²³ Further, where such judgement is not signed it is also a nullity.²⁴

- (f) **High Court Rules** — The various high court rules regulate the litigation process before our high courts. Some of these rules are permissive in the sense that where they are not complied with the courts may rectify the anomaly and allow the case to proceed.^{24a} Where however the rule is peremptory such must be complied with by the litigants.²⁵ In this case, where there is non-compliance any judgement so entered will be void as the court would lack the jurisdiction to entertain such suit. Accordingly, where by the rules a defendant has not been served a court process, the court would lack the jurisdiction to hear the suit.²⁶ In the circumstance any judgement by

the court when the defendant is unaware of the suit is thus void as being in breach of rules of fair hearing.

(g) **Rules of Fair Hearing** — These rules although having their origin in the common law of England have a constitutional recognition in Nigeria.²⁷ Our courts construe the rules by reference to the two rules which insist that:

(a) No man be a judge in his own case.

(b) No man be condemned unheard.²⁸

So fundamental are these rules to the administration of justice in Nigeria that where any or both of them is or are infringed, such a judgement would be voided on appeal.^{28a}

Our courts while referring to the *Nemo Judex* rule as the rule against bias has often referred to the other arm as the rule of fair hearing. Section 36(1) of the 1999 constitution which embodies both rules provides thus:

"In the determination of his civil rights and obligations including any question or determination by or against any government or authority, a person shall be entitled to a fair hearing within a reasonable time by a court or other tribunal established by law and constituted in such manner as to secure its independence and impartiality."

This principle has been given teeth by our courts in various decisions.²⁹ Besides, our courts have gone on to state that our constitutional provision on the rules of fair hearing, though embodying the rules of natural justice, go beyond these rules.³⁰ Thus whenever there is an infraction of these rules, such a decision would be set aside as being null and void.³¹ A variant of the above situation also arises where in a civil litigation a party is not served with the necessary court process to put him on notice of a suit against him.³² Similarly, where an accused person is tried in absentia and it is not on record that he misbehaved himself, such a trial is a nullity.³³ As the Supreme Court per Aniagolu, JSC, put it in *LPDC v. Fawehinmi* (1985) 2 NWLR 300 sc p. 334 (supra):

"... He would have been the accuser and the judge all at the same time. Such a proceeding would obviously have been null and void on that score as being an infringement of the principle of *nemo judex in causa sua*."

Thus, whenever a court makes an order or gives a judgement which infringes the rules of natural justice, such is void.

4. **Voidable Orders and Judgements** — These are cases where the order or judgement emanating from the court will remain valid until set aside.
 - (a) **Court Rules** — Where an order or judgement of a court is made out of a mistake in procedure which occasions substantial miscarriage of justice, such a judgement or order is voidable and not void.^{33a} Thus it is not every irregularity that automatically nullifies an entire proceedings. This is particularly so where the irregularity did not in any way materially affect the merits of the case or occasion miscarriage of justice.³⁴
 - (c) **Wrongful admission and Rejection of evidence** — In a situation where there has been a mistake in the application of the law by the court, but the mistake is not of such a nature as to render the proceedings void and the court itself is not in a position to say whether there has been a miscarriage of justice such a decision is voidable. Here the upper court would set aside the judgement and most probably order a retrial. Thus where there is a mistake in the admission or rejection of evidence which has led to miscarriage of justice, the judgement is not a nullity but would be set aside.³⁵
 - (d) **Failure to join a necessary party** — If a necessary party to an action has not been joined in the action, that does not render the judgement or proceedings a nullity. This of course is a case of irregularity but not of the class that deprives the court of jurisdiction as to amount to a nullity. Rather the appeal court will set aside the judgement and (may be) order a retrial as the judgement is clearly voidable.³⁶ Though there is no ended list as to circumstances that could render a court proceeding or order/judgement void or voidable, the aforementioned suffice as illustrations thereof.
5. **The Nigerian Judicial Attitude** — The present disposition of the Nigerian judiciary has been that of blurring the distinction between a void judgement and a voidable one. Our law reports are replete with decisions of our higher bench where in the courts, set aside judgements are nullities. They have consistently maintained that a judgement remains subsisting and binding until it is set aside. This according to the courts is regardless of whatever vices visiting such a decision.

The courts by implications are insisting that a judgement debtor is bound to obey (even) a void judgement until same is set aside irrespective of whatever the outcome of such compliance would be.

This also fails to clarify the distinction as to the fate of actions already taken on the basis of such judgements, prior to their being set aside by the court. Thus in supreme court in *Babanude & Ors v. Olatunji & Ors*³⁷ held:

- (i) "... A judgement of a court of competent jurisdiction remains valid and binding even where the person affected by it believes that it is void until it is set aside by a court of competent jurisdiction."

This court ruled was in line with the presumption of correctness in favour of a court's judgement. Thus in its holding No. 2 it further stated:

"A person who knows that a judgement whether null or valid given against him by a court of competent jurisdiction cannot be permitted to disobey it."

"His unqualified obligation is to obey it unless and until that judgement has been set aside."

The supreme court further took the same position in *Okafor & Or v. A. G. Anambra State & Ors*³⁸ when it held that:

"...the reason for the application to set aside an order or judgement tainted with voidness is that until set aside the order or judgement subsists and remaining effectual and binding."

The same apex court had earlier so stated in *Chukwuka & Or v. Okoronkwo & Ors*³⁹ when it held that the judgement of a competent court subsists and is binding until set aside on appeal or other judicial proceedings. In 1996 it had also maintained the same position in *Olabanji & Or v. Adeoti & Ors*⁴⁰ when it ruled that:

"a court has an inherent jurisdiction to set aside its judgement or decision that is a nullity."

It is clear from the above analysis that the Nigerian courts draw no distinction between void and voidable decision when they set the judgements of lower courts aside.

6. Recommendations and Conclusion

The superior courts in Nigeria (including the supreme court) always set aside a judgement where same is found to be void or voidable. The

effect of this has been to blur the important distinction between these obviously two different situations.

First, where a judgement is void, this means that nothing has come into existence as the situation is one of nullity. The judgement debtor knows that the judgement has settled nothing between him and the judgement creditor. He is not bound to honour such a judgement.

However, because of the presumption of validity of court judgements, the judgement is said to subsist and bind the parties until same is set aside. It follows that when it is set aside the parties are back to their *status quo ante*. Whatever may have taken place as a result of such judgement is reversed as if nothing had happened.

On the other hand, where a voidable judgement is later set aside a slightly different consideration applies. Here for all intents and purposes, a judgement has come into being and the parties are bound thereby and must act in accordance thereto until same is set aside. Where this happens the effect begins to run from the date of such pronouncement and not earlier. Thus the circumstance of the parties arising from the judgement prior to its being set aside will remain. It is for this reason that in most cases the courts make an order of retrial with a view to bringing the parties to their *status quo ante bellum*, with a view to avoiding a possible miscarriage of justice.

In the circumstance, it is submitted that where the court order or judgement is voidable the court will set same aside. This is because there is something in existence (which for some reasons need to be vacated) to avoid a miscarriage of justice.

On the other hand, where the appellate court finds that the order or judgement of the lower court is void, the proper thing is to declare same void. It cannot set same aside as there is nothing in existence to be set aside. Not even the so-called presumption of validity can justify this. This is because the presumption is merely a theoretical clock devised to arrest the anarchy that would result if parties are allowed to disregard court orders or judgements which they believe to be void. Besides such parties obey the orders or judgements to avoid the wrath of the court by way of committal for contempt.

It is concluded that where the judgement is found a nullity the office of the appellate court is merely to declare it void. This is so for there is nothing in existence to be set aside.

On the other hand, an order or judgement could be set aside where same is found to be voidable. Lord Denning had this in mind when he stated the position clearly in *McFoy v. UACo. Ltd.*⁴¹ (1961) 3 All E.R. 1169 at 1172 thus:

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

Only by complying with the dictates of the above dictum will the clear distance between the two different situations above highlighted be kept alive.

NOTES

1. 6th ed. (1990) West Publishing Co. p. 1067
2. P. 344
3. (1961) 3 WLR 1405
4. Op. cit. See also Black's Law Dictionary, P. 1574.
5. (1998) 7 SCNJ 328
6. At page 941
7. Chief Ogunsanya & Or v. Chief Dadu & Ors (1990) 6 NWLR pt. 156 347
8. Senator Adesanya v. The President & Ors (1981) NCLR 258
9. Mrs. Thomas v. Bishop Olufosoye (1986) 1 NWLR 669
10. Olawoyin A. G. Northern Nigeria (1960) NRNL 28
11. Chap. 2 1979 & 1999 constitutions, see also Archbishop Okogie v. A. G. Lagos State (1981) 1 NCLR 218
12. Madukolu v. Nkemdilim (1962) 2 SCNL 341
13. See section 251, 1999 constitution with respect to the jurisdiction of the Federal High Court.
14. Oyediran & Ors v. Egbetola & Ors (1997) 5 SCNJ 94
- 14a. (1998) 7 NWLR Pt. 557 239.
15. Such as: Stay of execution, instalment payment etc.
16. John Andy Cons & Ltd. v. NCRL (1997) 2 SCNJ 157. See also Kaduna Textiles Ltd v. Mrs. J. N. Obi (1999) 10 NWLR Pt. 621 138. Alaka v. Adeleke (1959) L.L.R. 76.
17. Section 2 (a) Public Officers Protection Act, Cap 379, LFN 1990
18. (1995) 4 NWLR 387

19. (1990) 5 NWLR Pt. 150 332
20. *Eroga v. Aliri* (1991) 3 NWLR Pt. 179 204
21. See Section 258 of 1979 constitution.
22. See Section 294(5) 1999 Constitution, together with Sub-section(1)
23. *Awoniyi v. Alaiyeluwa* (1998) 9 NWLR Pt. 564 71.
24. *Odua Invest. Co. Ltd. v. Talabi* (1997) 7 SCNJ 600
25. Orders 42 & 43 of the HCCPR Cross River State, 1987 on contempt proceedings and judicial review.
26. Section 36, 1999 constitution and 33 of 1979 constitution.
27. *Nemo judex in causa sua* and *Audi Alteram partem*.
- 27a. *Adeyemi v. the State* (1991) 7 SCNJ 131
28. See *Nsameka — Agu, Jsc: in Ketoye v. CBN and Ors* (1988) 1 NWLR pt. 98 419
29. *Oriege v. A. G. Ondo State* (1982) 3 NCLR 743.
30. *Garba & Ors v. Univ. of Maiduguri & Ors* (1986) 1 NWLR pt. 18 550; *Denloye v. DMPDC* (1968) 1 ALL NLR 306
31. *ACB Plc v. Losada (Nig) Ltd & Ors* (1995) 7 SCNJ 152; *Abakaliki RMO v. Abakaliki LGC* (1990) 6 NWLR pt. 155 182
32. *Adeoye v. State* (1999) 6 LRCN 746
- 32a. *Fadallah v. Arewa Textile* (1997) 8 NWLR pt. 518 546. *Uzochukuwa v. Eri* (1997) 7 NWLR pt. 514 535.
33. *Egbo v. Agbara* (1997) 46 LRCN 55; *Josiak v. State* (1985) 1 NWLR 125, *Arua Eme v. State* (1965) NMLR 62.
34. *Bakare v. Apena* (1986) 4 NWLR pt. 33 1
35. *Okoye v. Nigerian Construction* (1991) SCNJ 365
36. (2000) 2 SCNJ 26; the underlining is mine.
37. (1999) 7 SCNJ 192
38. (1999) 1 SCNJ 44
39. (1996) 2 SCNJ 242; See also *Sunmonu v. Ayoola* (1992) 11–12 SCNJ 142.
40. (1961) 3 ALL E. R. 119.
41. The underlining is mine.