1. WAADE INVESTMENT NIG. LIMITED
2. CHIEFW.A.ADESINA

V.

TRADE BANK PLC.

COURT OF APPEAL (ILORIN DIVISION)

CA/IL/M. 18/03

MUHAMMAD SAIFULLAH MUNTAKA-COOMASSIE. J.C.A. (Presided} ABOYI JOHN IKONGBEH, J.C.A. (Read the Leading Judgment) TIJJAN1 ABDULLAHI. J.C.A.

THURSDAY, 14TH APRIL. 2005

ACTION- *Commencement of action — Writ of summons - Issuance of either under the general cause list or under undefended list*
- Whose function - Whether a Judge can authorize issuance.

ACTION- *Commencement of actions - Writ of summons - Issuance of under undefended list procedure — Procedure therefore -Respective roles of plaintiff, Registrar and court there under.*

ACTION- *Commencement of actions — Writ of summons - Placement of under undefended list - Power of Judge with respect thereto*
- Principles guiding.

ACTION - *Writ of summons - Issuance of- "To issue" - Meaning of.*

PRACTICE AND PROCEDURE-*Commencement of action - Writ of summons — Issuance of either under the general cause list or under undefended list - Whose function - Whether a Judge can authorize.*

PRACTICE AND PROCEDURE-*Commencement of actions-of summons - Issuance of under undefended list procedure -Procedure therefore- Respective roles of plaintiff, Registrar and court there under.*

PRACTICE AND PROCEDURE- *Commencement of actions - Writ of summons - Placement of under undefended list - Power of Judge with respect thereto - Principles guiding same.*

PRACTICE AND PROCEDURE - *Undefended list procedure ~ Issuance of writ of summons there under - Procedure therefore-Respective roles of plaintiff, Registrar and court therefore.*

PRACTICE AND PROCEDURE - *Undefended list procedure -Placement of writ of summons there under- Principles guiding same - Power of Judge with respect thereto.*

STATUTE - *Kwara State High Court (Civil Procedure) Rules, 1988*
- Status of- Whether extant -Whether it has revoked the High Court (Civil Procedure) Rules, 7977.

WORDS AND PHRASES - *"To issue" as in issuance of writ of summons - Meaning of.*

WORDS AND PHRASES - *"To issue" - Meaning.*

Issue:

Whether or not, upon a proper construction of the relevant rules, an order of the court is a precondition for the valid issue of a writ of summons under the undefended list procedure.

Facts:

The respondent had on 19/03/02 applied through its solicitors for the issue of a writ of summons against the appellants, claiming what it regarded as a liquidated money demand. The solicitors made the application by filling out a pro forma writ as in form 1 in the appendix to the High Court of Kwara State (Civil Procedure) Rules, 1988, which was marked at the top "undefended list", and submitted same to the Registrar of the court. The pro forma writ was accompanied with a 16-paragraph affidavit to which were attached some documents by which the respondent conceived that the appellants were indebted 10 it.

On the very day that the pro forma writ was submitted to him, the Registrar signed and dated it, signifying the issuing of it. Three days later, on 22/03/02, the respondent's solicitors filed a motion ex parte on its behalf seeking:

"(i) Leave and order of this Honourable Court placing. Hearing and determining this suit as an undefended list action in line with the undefended list procedure of the rules of the Honourable Court.

(ii) And for such further or other order(s) as the court may deem fit to make in the circumstances." The ex pane order was granted as follows:-

"It is hereby ordered that leave is granted to the plaintiff/ applicant to issue and serve the writ of summons in the case under the "undefended list" and the writ shall be so marked. This case is adjourned to 17th day of May, 2002 for hearing."

The writ together with an attached copy of the rolled-up order containing the above directive was served on the appellants, who, through their own solicitors, filed a notice of preliminary objection on 02/05/02 to the hearing of the suit. The sole ground for the objection was that the court lacked jurisdiction to entertain the suit because the writ of summons was issued before the order of court was made to that effect.

The court, before which the matter eventually came, took arguments for and against the objection, and in its ruling overruled the objection. The appellants were aggrieved by the decision and they appealed to the Court of Appeal.

Order 5 rules 1, 6, 14 and 15 and Order 22 rules 1 and 2 of the High Court of Kwara State (Civil Procedure) Rules. 1988 state as follows:-

"Order 5

1. A writ of summons shall be issued by the Registrar, or other officer of the court empowered to issue summonses, on application. The application shall ordinarily be made in writing by the plaintiff's solicitor by completing Form 1 in the Appendix to these rules, but the registrar or other officer as aforesaid, where the applicant for a writ of summons is illiterate or has no solicitor, may dispense with a written application and instead himself record full particulars of an oral application made and on that record a writ of summons may be prepared signed and issued.

6 Subject to the provisions of these rules or of any written law in force in the State, no writ of summons for service out of jurisdiction, or of which notice is to be given out of the jurisdiction, shall be issued without the leave of court or a Judge in chambers.

14 No writ which, or notice of which, is to be served out of the jurisdiction shall be issued without leave of the court.
Provided that if any claim made by a writ is one which by virtue of an enactment the court has power to hear and determine notwithstanding that the person against whom the claim is made is not within the jurisdiction of the court or that the wrongful act,

neglect or default giving rise to the claim did not take place within its jurisdiction, the foregoing provisions shall not apply to the writ..

15. *Issue of a writ takes place upon its being signed by the registrar or other officer of the court duly authorized to sign the writ.*

"Order 22

1 Whenever application is made to a court for the issue of a writ of summons in respect of a claim to recover a debt or liquidated money demand and such application is supported by an affidavit setting forth the grounds upon which the claim is based and stating that in the deponents belief there is no defence thereto, the court shall, if satisfied that there are good grounds for believing that there is no defence thereto enter the suit for hearing in what shall be called the "undefended list" and mark the writ of summons accordingly, and enter thereon a date for hearing suitable to the circumstance of the particular case.

2 There shall be delivered by the plaintiff to the registrar upon the issue of the writ of summons as aforesaid as many copies of the above mentioned affidavit as there are parties against whom relief is sought, and the registrar shall annex one such copy to each copy of the writ of summons for service."

Held *(Unanimously dismissing thee appeal):*

1. ***On Procedure for issuance of writ of summons under the undefended list procedure*** **-**There are no provisions that require the applicant for a writ of summons under the undefended list to apply directly to a Judge or any other person than the Registrar as provided for in Order 5 rule 1 of the High Court of Kwara State (Civil Procedure) Rules, 1988. Whether the writ of summons applied for is in respect of a case for hearing on the general cause list or the undefended list, all that the plaintiff's solicitor is required to do under the rules is to complete and submit the *pro forma* writ to the Registrar, in whose court the ball then falls for action as far as the issuing of the writ of summons is concerned. It is for him and nobody else to complete the process of issuing the writ. Of course, his course of action from that point would depend largely on how the plaintiff's solicitor had played his own part. If the latter had done no more than just submitting the completed *pro forma*, then that would automatically indicate to the Registrar that the matter was one for the general cause list. The latter would accordingly issue the writ, by appending his signature to it and dating it, and sending copies out for service on the defendant. At that point the Judge is not involved because the rules have not assigned him any role to play. If, however, the solicitors had accompanied the *pro forma* with the affidavit specified in Order 22, rule 1, then that would be a clear indication to the Registrar that the matter is one that the plaintiff wished to have placed on the undefended list to be heard by the shorthand procedure provided therefore. He and not the plaintiff would then have the duty of bringing the matter to the attention of the Judge for his decision whether or not the matter is to go to the undefended list or to remain on the general cause list. Whether or not the plaintiff brings a formal application requesting the Judge to consider the matter is immaterial, although prudence requires such course of action to avoid any unnecessary inconvenience that might result to him from any inadvertent default on the part of the Registrar. The rules, however, place

no obligation on the plaintiff to apply formally to the Judge. Order 22 does not lay down a totally different procedure from and unrelated to the one provided for under Order 5. *[Kwara Hotels Ltd. v. Ishola* (2002) 9 NWLR (Pt. 773) 604 referred to] *(Pp. 536-537, paras. B-D)*

2. ***On Power of Judge with respect to placing writ of summons under undefended list*** -A close perusal of Order 22 of the High Court of Kwara State (Civil Procedure) Rules, reveals that it is not at all concerned with the issuing of a writ of summons but with the placement of the writ in the appropriate cause list for hearing. It does not empower the Judge to make any order as to the issuing of the writ. The only power that its clear language vests in the Judge is the power to "enter the suit for hearing in what shall be called the 'undefended list' and mark the writ of summon accordingly, and enter thereon a date for hearing suitable to the circumstances of the particular case." The idea that the Judge has power to order the issuing of the writ is totally alien and extraneous to and not justified by the language of the provision. How and when the writ is issued is strictly governed by the rules and is not left in the discretion of the Judge. The rules do not give the Judge any role in the matter of issuing the writ. That matter is left to the Registrar or other duly empowered officer of the court to handle. *(Pp. 540-541, paras. E-C)*

3. ***On Principles governing placing of matter in the undefended list*** - The placing of a matter in the undefended list is an exercise of judicial discretion on the part of the trial court and it does not share that discretion with any person, including its registrar. Being a judicial matter, the registrar has no jurisdiction to get involved in it. *[Nwakama* v. *Iko L.G.* (1996) 3 NWLR (Pt. 439) 732 referred to.] *(P. 546, paras. C-D)*

4. ***On Prerogative of Registrar in the issuance of a writ of summons*** - The issuance of a writ of summons, either under the general cause list or under undefended list is the prerogative of the Registrar or other officer as authorized by law. The job of the court under Order 22 of the High Court of Kwara State (Civil Procedure) Rules, 1988 is limited to marking the writ so issued and entering same for hearing under the undefended list when satisfied. *[Kwara Hotels Ltd.* v. *Ishola* (2002) 9 NWLR (Pt. 773) 604 referred to:] *(Pp. 538-539, paras. H-A)*

5. ***On When a Judge is empowered to authorize the issuing of a writ of summons*** - There are some instances when the Judge is statutorily empowered to authorize the issuing of a writ. The two instances are provided for in Order 5 rules 6 and 14 of the High Court of Kwara State (Civil Procedure) Rules, 1988, which come into play only in the case of summons for service out of jurisdiction. In the light of the express provision of Order 5 rules 1 and 15, the Registrar's power to issue a writ and the specific exclusion in rules 6 and 14 from the exercise of such power, of a writ for service out of jurisdiction, the reasonable inference is that no writ other than the two specifically excluded from the powers of the registrars is so excluded. *(P. 542 paras. G-H)*

6. ***On Meaning of "to issue"*** - The verb "to issue" means to make something known formally. The expression "to issue" in Order 5, rule 15 of the High Court of

Kwara State (Civil Procedure) Rules, 1988 means to sign. *(P. 542, paras C-D).*

7. ***On Existing Rules governing civil procedure in High Court of Kwara State*** - The High Court of Kwara State (Civil Procedure) Rules, 1988, brought into effect by the High Court (Civil Procedure) Rules Law, Cap. 68, which came into force on 1st August, 1988 revoked the High Court (Civil Procedure) Rules, 1977 and all other corresponding subsidiary legislation applicable in the state and affecting practice and procedure in the High Court and are therefore the existing High Court (Civil Procedure) Rules in the state. *(P. 533, paras. E-F)*

Nigerian Cases Referred to in the Judgment:
Biwater Shellabear (Nig.) ltd. v. *Frank Mac and Bobby Associates* (2000) FWLR. (Pt.11) 1916
Nwakama v. *Iko E.G.* (1996) 3 NWLR (Pt. 439) 732
Kwara Hotels Ltd. v. Ishola (2002) 9 NWLR (Pt. 773) 604
Disu v. Ajilowura (2001) 4 NWLR (Pt. 702) 76

Nigerian Statutes Referred to in the Judgment:
High Court Law, Cap. 68, Laws of Kwara State, 1994

Nigerian Rules of Courts Referred to in the Judgment:
High Court of Kwara State (Civil Procedure) Rules, 1988, 0. 5. rr. 1, 6, 14 and 15, 0.22. rr. 1 and 2
High Court of Kwara State (Civil Procedure) Rules, 1988, O. 23 rr. 1 and 2

Book Referred to in the Judgment:
Oxford Advanced Learner's Dictionary

Appeal:

This was an appeal against the decision of the High Court which overruled the appellants' preliminary objection to the hearing of the respondent's suit. The Court of Appeal, in a unanimous decision, dismissed the appeal.

History of the Case:

Court of Appeal:

Division of the Court of Appeal to which the appeal was brought: Court of Appeal, Ilorin
Names of Justices that sat on the appeal: Muhammad Saifullah Muntaka-Coomassie, J.C.A. *(Presided):* Aboyi John Ikongbeh, J.C.A. *(Read the Leading Judgment);* Tijjani Abdullahi, J.C.A
Appeal No.: CA/IL/M. 18/03
Date of Judgment: Thursday, 14th April, 2005
Names of Counsel: A. Akintoye, Esq. *(with him,* S. Olorukoba, Esq.) *-for the Appellants* Y. O. Ali, Esq., SAN *(with him, T.* Ahmed, Esq.; B. Ajanaku, Esq.; M. O. Ekundayo [Miss] and O. O. Olubakinde [Miss]) *-for the Respondent*

High Court:

Name of the High Court: High Court of Kwara State, Ilorin

Name of the Judge: Afolayan, J.
Date of Ruling: Friday, 8th November. 2002

Counsel:
A. Akintoye, Esq. *(with him,* S. Olorukoba, Esq.) *-for the Appellants*

Y. O. Ali, Esq., SAN (with him, T. Ahmed, Esq.; B. Ajanaku, Esq.; M. O. Ekundayo [Miss] and O. O. Olubakind

***IKONGBEH, J.C.A. (Delivering the Leading** Judgment) the*
appellants herein were the defendants before the High Court of Kwara State, sitting at Ilorin. This appeal is from the ruling of that court refusing to strike out the respondent's writ of summons at the appellants' instance. The respondent, as plaintiff had. on 19/3/02 applied through its solicitors for the issue of a writ of summons against the appellants, claiming what they regarded as a liquidated money demand. The solicitors made the application by filling out a pro forma writ as in Form 1 in the appendix to the Kwara State High Court (Civil Procedure) Rules, 1988, which was marked at the top '"undefended list, " and submitting same to the registrar of the court. The pro forma writ was accompanied with a 16-paragraphed affidavit to which were attached some documents by which the plaintiff conceived that the defendants were indebted to it.

On the very day that the pro forma writ was submitted to the registrar he signed and dated it, signifying the issuing of it. Three days later, on 22/03/02, the plaintiff's solicitors filed a motion ex pane on its behalf seeking -

"(i) Leave and order of this Honourable Court, placing, hearing and determining this suit as an undefended list action in line with the undefended list procedure of the rules of the Honourable Court.

(ii) And for such further or other order(s) as the court may deem fit to make in the circumstances." (Italics mine).

The motion was supported by an 8-paragraphed affidavit and was heard and granted by J. A. Olaiya, J., on 11/04/02. His ex pane order read:

"It is hereby ordered that leave is granted to the plaintiff/ applicant to issue and serve the writ of summons in the case under the "undefended list" and the writ shall be so marked.

This case is adjourned to 17th day of May, 2002 for hearing." (Italics mine).

The writ, issued as aforesaid, together with an attached copy of the rolled-up order containing the above directive, was served on the defendants, who through their own solicitors, filed a notice of preliminary objection on 02/05/02 to the hearing of the suit. The sole ground for the objection was that -

"The Honourable Court cannot exercise jurisdiction to entertain this suit, the writ of summons having been issued before the order of court was made to that effect. " (Italics mine).

As can be seen from the stated ground, the complaint on behalf of the defendants was not that the registrar did not issue the writ by
signing ft\& pro forma as he was expected to do under the rules. The complaint was that he issued it prematurely and without what in the f defendants' counsel's view, was the requisite authority. It was clearly I the view of the solicitors that an order of court was required for the writ to be validly issued. As the writ in this case was issued at a lime
when the court was yet to make any order to that effect, it was, the
argument went, a nullity.

M. A. Afolayan, J., before whom the matter eventually came, took arguments for and against the objection on 14/10/02. The learned Judge delivered his ruling on 08/11/02, overruling the objection on two main grounds. It was his view, firstly, that the power of the Judge to give directives regarding matters to be placed on the undefended list did not in any way detract from the registrar's powers under the rules to issue a writ by signing it in his own time. It was his view also that, in any case, the allegedly premature signing of the writ by the registrar was, in the circumstances of this case, a mere irregularity, which had not been shown to have occasioned any miscarriage of justice. On the first point he observed and ruled thus at page 61 of the record:

> *"It is to be noted that it was after the filing on 19th March, 2002 that motion ex pane brought pursuant to Order 8 rule 1 and Order 23 rule 1 dated 22nd day of March, 2002 was brought for placing, hearing and determining this suit under the undefended list. To my mind and sense of justice in this matter in the interpretation of Order 23 rule 1, the application for placement of a writ of summon under the undefended list is when the formal application is made to court for same. In my respective (sic) view the motion ex pane dated 22nd March, 2002 and filed 25th March. 2002 with the attached affidavit in support satisfies the requirement of Order 23 rule 1.*
>
> *And with the granting of the application on 11th April, 2002 the said writ dated 19th March. 2002 is now considered issued and placed under the undefended list by the order of the court made on 11th April. 2002. To hold otherwise will occasion a miscarriage of justice. Therefore hold that the filing of the writ in this case dated 19th March. 2002 even though signed and dated by the registrar 19th March, 2002 and the order for issuance of same was granted on 11th April, 2002 is not fatal to the adjudication of this suit. What is of paramount importance and cannot be compromised is the necessary discretion of court in* placing the suit under the undefended list, *the decision which is arrived at after the judge has perused and considered the facts in the affidavit in support as sufficient for the order to be so granted." (Italics mine).*

On the second point he said at pages 61-62:

> *"The signing of the writ tantamount to issuance in this case can be treated as a mere irregularity because it has not been shown that the defendant suffers any prejudice or that the discretion of the court in arriving at its decision whether or not to place the suit under the undefended list is fettered in any way. I therefore consider any error in the issuance of this writ as a mere irregularity."*

Aggrieved, the defendants have appealed to this court. Mr. A. Akintoye II, who filed a brief of argument on their behalf, has submitted the following issues for consideration and determination by us:

"1. Whether the issuance of the writ of summon in respect of the case brought under the undefended list before the grant of leave to place same under the undefended list is fatal to the proceeding. Or

What is the effect of issuance of a writ that was brought under the undefended list before the leave to place same under the said list was granted.

2. Whether the High Court of Justice of Kwara State was right when it ruled that issuance of a writ by the registrar of a writ of summons brought under the undefended list procedure before the court granted the leave to place same under the undefended list was a mere irregularity which was not fatal to the adjudication of the suit." Mr. K. K. Eleja, for the respondent, formulated the sole issue -

"Whether the trial court was not right in ruling that the signing of the writ of summons by the registrar in the circumstances of this case was a mere irregularity and in dismissing the objection of the appellants as being a mere technicality and

distinguishing the case of Nwabueze v.Okoye *in the process."*

On the first issue, the appellants' counsel has advanced before us much the same argument as he had done before the lower court. His ultimate contention is, as it was before the lower court, that the writ of summons issued by the registrar in this case is a nullity. He based this conclusion on his understanding and interpretation of the relevant rules of court. The argument leading to his conclusion is as follows:

The rules of court make two different sets of provisions. One is to govern an application for the issue of a writ of summons for cases to be heard on the general cause list. The other is to govern an application for the issue of a writ of summons for cases to be heard on the undefended list. Unlike under the general cause list procedure, where the application for the issue of a writ of summons is normally made to the registrar, under the undefended list procedure such application "is made to the court, i.e., the Judge directly". It is alter the Judge has looked into the writ of summons "filed but not issued" and the supporting affidavit and satisfied himself that the defendant has no defence to the plaintiff's claim that he would order the issue *and marking of the writ as one for hearing on the undefended list. In other words, it is the order of the court, and not any act of the registrar, that renders the writ deemed duly issued. It is only as a matter of administrative practice that the registrar is allowed to append his signature to such a writ of summons.*

The point being made here is, in learned counsel's view, clearly brought out by the wording of Order 23. rule 2 of the Kwara State High Court (Civil Procedure) Rules, 1989, which requires that -

"There shall be delivered by the plaintiff to the registrar upon the issue of the writ of summons as aforesaid, as many copies of the above mentioned affidavit as there are parties against whom relief is sought." In learned counsel's view, "this rule here in the opening statement shows clearly that the registrar has no power to issue a writ of summons under undefended list without the order of the court to that effect."

To show that it was infact the Judge who in the present case directed that the writ be issued learned counsel drew attention to the terms of the ex pane *order by the Judge granting leave -*

> *"... to the plaintiff/applicant to issue and serve the writ of summon in this case under the undefended list and the writ of shall be marked so."*

The argument then proceeded thus: Since it was the order of the court that was supposed to give directive to the registrar to issue the writ, and since at the time the registrar issued the writ on 19/03/ 02 the Judge was yet lo see the papers, let alone give any directive on it. it followed that the registrar had made his move prematurely and without authority. The writ, in the circumstances, is incurably defective, especially as there has been no application by the plaintiff/ respondent requesting the court to have the writ irregularly issued deemed duly issued.

Counsel cited in support of his stand the decision of this court in Biwater Shellabear (Nig.) Ltd. *v.* Frank Mac and Bobby Associates *(2000) FWLR (Pi. 11) 1916, at 1925, and the earlier decision, also of this court in* Nwakama *v.* Iko Local Government *(1996) 1 DTCR (Pt. 1) 112, cited therein. I do not pretend to know what report that this citation refers to, but the case is also reported in (1996) 3 NWLR (Pt. 439) 732, and that is the report that I shall be referring to.*

Mr. Eleja, for the respondents, does not agree with the interpretation by Mr. Akintoye II of the rules and his conclusions based thereon. In learned counsel's view, "from a perusal of Order 23 rule 1 ... it is crystal clear that what the provision seeks to preserve is the discretion of the trial court in relation to placing a matter on the undefended list, marking the writ of summons accordingly and entering a date for the hearing of the case" *and sees nothing in it that mandates a trial Judge or court to issue or give directive for the issue of a writ of summons in an undefended list action. To him, that rule is not even concerned with allocating powers in relation to the issuing of writs, which is the prerogative of the registrar by virtue of the provisions of Order 5 rule 1(1) and* (2) *of the rules. Learned counsel has seen no proviso to Order 5 rule 1(1) & (2) which has deprived the registrar of*

the vires *to issue writs of summons, even in an undefended list action. It is counsel's submission that, by issuing the writ in this case at the time he did, the registrar did not in any way interfere with the Judge in the exercise of his discretion whether or not lo place the plaintiff's/respondent's action for hearing on the undefended list, as the Judge had no control over him in the exercise of his own power to issue writs. Counsel relied for his contentions and submissions on the decision of this court in* Kwara Hotels Ltd, *v.* Ishola *(2002) 9 NWLR (Pt. 773) 604 at 626, which he urged us to follow in preference to the earlier decisions in* Biwater Shellabear (Nig-) Ltd. *v.* Frank Mac & Bobby Ass., *relied on by the appellants' counsel.*

Before 1 go any further, I must clarify one point. Learned counsel for the parties made reference to the Kwara State High Court (Civil Procedure) Rules, 1989, Order 23 of which, according to them, makes provision for the undefended list procedure. My efforts, even at the High Court, to locate a copy of these rules have proved abortive. What everybody shows me as the 1989 Rules is a copy of the rules, which proclaims itself to be the "High Court (Civil Procedure) Rules, 1987." *It was brought into effect by an Edict signed into law by Col. Ahmed Abdullahi on 2nd June, 1987. Almost without exception, every copy that 1 was shown had the year "1987" crossed out in ink and replaced with the year "1989". I looked in the Laws of Kwara Stale of Nigeria, 1994, containing the statutes in force on the 1st day of September, 1991 but saw no reference whatsoever to the 1987 Rules or the alleged 1989 Rules. What I find there is the High Court (Civil Procedure) Rules,* 1988, *brought into effect by the High Court (Civil Procedure) Rules Law, Cap.* 68, *which came into force on 1st August, 1988. It revoked the High Court (Civil Procedure) Rules, "1977" and all other corresponding subsidiary legislation applicable in the Slate and affecting practice and procedure in the High Court". The implication of this is that the* 1987 *and* 1989 *Rules, if. the latter ever existed, and I have my doubts that it ever existed, stood revoked on the coming into force of the 1988 Rules.*

I have stressed this point because of the material differences between the 1988 Rules and the alleged 1989 Rules now being used in the State. While Order 17 in the alleged 1989 Rules deals with "Detention of Ships and Reparation for Needless Arrest", this subject is completely omitted from the 1988 Rules. Consequently, Order 17 of the latter Rules deals with "Accounts and Inquiries", which is dealt with in Order 18 of the alleged 1989. This is how the undefended list procedure got assigned to Order 22 in the 1988 Rules while ii remains in Order 23 in the alleged 1989.

Since the latter has been revoked, all reference by me will be to the 1988 Rules.

As can be gathered from the contentions on behalf of the parties, one of the crucial questions is whether or not, upon a proper construction of the relevant rules, the order of the court is a precondition for the valid issue of a writ of summons under the undefended list procedure.

To be able to tackle this question beneficially it is, I think, necessary to examine the relevant rules closely. The learned trial Judge and counsel for the parties referred to some of them. They are Order 5, rules 1,6, 14 and 15, and Order 22, rules 1 and 2 of the 1988 Rules' which provide: "Order 5

1. *A writ of summons shall be issued by the Registrar or other officer of the court empowered to issue summonses, on application.* The application *shall* ordinarily be made in writing by the plaintiff's solicitor by completing Form 1 in the Appendix to these rules *but the registrar or other officer as aforesaid, where the applicant for a writ of summons is illiterate, or has no solicitor, may dispense with a written application and instead himself record full particulars of an oral application made and on that record a writ of summons may be prepared, signed and issued.*
6. *Subject to the provisions of these rules or of any written law in force in the State, no writ of summons for service out of jurisdiction, or of which notice is to be given out of the jurisdiction, shall be issued without the leave of court or a Judge in chambers.*

14. *No writ which, or notice of which, is to be served out of the jurisdiction shall be issued without leave of the court.*
Provided that if an)' claim made by a writ is one which by virtue of an enactment the court has power to hear and determine notwithstanding that the person against whom the claim is made is not within the jurisdiction of the court or that the wrongful act, neglect or default giving rise to the claim did not take place within jurisdiction, the foregoing provisions shall not apply to the writ.
15. *Issue of a writ lakes place upon its being signed by the registrar or other officer of the court duty authorised to sign the writ.*

Order 22

1. Whenever application is made to *a court for the issue* of a *writ* of summons *in respect of a claim to recover a debt or liquidated money demand and such application is supported by an affidavit setting forth the grounds upon which the claim is based and stating that in the deponents belief there is no defence thereto,* the court shall, *if satisfied that there are good grounds for believing that there is no defence thereto* enter the *suit for hearing in what shall be called the "undefended list" and mark the writ of summons accordingly, and enter thereon a dale for hearing suitable to the circumstance of the particular case.*
2. *There shall be delivered by the plaintiff to the registrar upon the issue of the writ of summons as aforesaid as many copies of the above mentioned affidavit as there are parties against whom relief is sought, and the registrar shall annex one such copy to each copy of the writ of summons for service." (Italics mine for highlight).*

The first point I observe about the appellants' counsel's submissions is that he appears to think that a totally different set of rules governs the undefended list procedure from the set that governs the genera] cause list procedure. In other words, he appears to me to be of the view that the provisions of Order 5 are to be read and considered in isolation from those of Order 22. This can be clearly gathered, inter alia, *from his rather confident contention that "under the undefended list procedure the application for issuing of a writ of summons is made to the court i.e. the Judge directly and not the registrar as done under the general cause list" It is clearly his view that the normal application required under Order 5, rule 1, does not apply if one were applying for a writ under the undefended list. It appears to be his view that in the latter case one has to apply direct to the Judge for the issue of the writ.*

With all due respect to learned counsel, I do not think he has read the rules in the correct light. In my humble view, the provisions of the two orders are to be read together and seen as complementing and supplementing one another. When so considered it will be seen that Order 22 does not lay down a totally different procedure from and unrelated to the one provided for under Orders 5.

Now. to come to specifics, I am inclined to agree with the respondent's counsel that the appellants' counsel has read more into the rules than is warranted by the ordinary meaning of the word used. I see nothing in any of the provisions set out a short while ago and counsel for the appellant has not drawn my attention to any

other provisions, that require the applicant for a writ of summon under the undefended list to apply direct to the Judge or any other ' person than the registrar as provided for in Order 5, rule 1. In my view, whether the writ of summons applied for is in respect of a case for hearing on the general cause list or the undefended list all that the plaintiff's solicitor is required to do under the rules is to complete and submit the pro forma *writ to the registrar, in whose court the ball then falls for action as far as the issuing of the writ of summons is concerned. It is for him and nobody else to complete*

the process of issuing the writ. Of course, his course of action from that point would depend largely on how the plaintiff's solicitor had played his own part. If the latter had done no more than just submitted the completed pro forma, *then that would automatically indicate to the registrar that the matter was one for the general cause list. The latter would accordingly issue the writ, by appending his signature to it and dating it, and sending copies out for service on the defendant. At this point the Judge is not involved because the rules have not assigned him any role to play. If, however, the solicitors had accompanied* {he pro forma *with the affidavit specified in Order 22, rule 1, then that would be a clear indication to the registrar that the matter is one that the plaintiff wished to have placed on the undefended list to be heard by the shorthand procedure provided therefore. He and, in my humble view, not the plaintiff, would then have the duty of bringing the matter to the attention of the Judge for his decision whether or not the matter is to goto the undefended list or to remain on the general cause list. Whether or not the plaintiff brings a formal application requesting the Judge to consider the matter is immaterial, although prudence requires such* ex abundanti cautela *course of action to avoid any unnecessary inconvenience that might result to him from any inadvertent default on the part of the registrar. The rules, however, place no obligation on the plaintiff to apply formally to the Judge.*

In the light of this, therefore, I cannot accept the contention of the appellants' counsel that the opening of Order 22, rule 1 requires Indifferent type of application for the issue of a writ under that order from the one required under Order 5. As I demonstrated before, the openin2 words of Order 22. rule I do not introduce the requirement' of a different application from that under Order 5, rule 1. It is the application made by the plaintiff's solicitor under Order 5, rule 1 by completing and submitting Form 1 to the registrar that carries through, whether the action is for hearing on the general cause list or to be placed on the undefended list. To read such a requirement into the rules is to read more than the words used warrant.

This court expressed this same view in the earlier case of Kwara Hotels Ltd. v. Ishola (supra). *One of the questions that called for direct answer by the court was whether or not an independent application for the issue of a writ of summons on the undefended list is different from the one made by the completion and submission to the registrar of the* pro forma *writ in accordance with Order 5, rule 1, was a condition precedent. The court,* per *Onnoghen, JCA, answered in the negative. After setting out the terms of Order 22, rule 1, and making some preliminary observations the court continued on pages 625 - 626:*

> *"It is clear from the above pro vision of the rules of court that in an action for recovery of debt or liquidated money demand, there must be an application to the court for the issue of .a writ of summons ... However Order 22 rule 1 does not contain the meaning of application or what constitute an application for the issue of a writ of summons. The learned counsel for the appellant has submitted that the application under that rule must be by way of* ex pane *application while learned counsel for the respondent contends that it cannot be since the application concerned is an originating process it cannot be interlocutory as envisaged by Order 8 rule 2 of the High Court Rules, 1989. The learned SAN, however did not proffer any meaning of that word or what it constitutes.*

However when one looks at the provisions of Order 5 rule 1 ... if becomes clear that the application contemplated by Order 22(1) of the High Court Rules is the one done by the completion of Form 1 in the appendix to the rules. ... *It is therefore my considered opinion that the completion of Form 1 coupled with an* affidavit constitute the application on which the court, if satisfied, will enter the suit under the undefended list mark the writ so issued accordingly. *In short to insist on a separate formal ex pane motion for the purpose separate formal ex parte motion for the purpose of entering the suit under the undefended list is in my new, superfluous and an unnecessary burden, the rules having provided what is meant by application for the issue of a writ of summons.* What is very important under Order 22 rule 1 is the affidavit setting

forth the grounds on which the claim is based because that is what the trial Judge will concern himself with in deciding whether the matter is a proper one for the undefended list or not. I am therefore of the view that the court can either *sun motu,* after going through the affidavit accompanying the application for the issue of a writ of summons, or upon an oral application by learned counsel for the plaintiff, enter the suit under the undefended list and take every appropriate step to ensure it is for the undefended list. The order so made is then served on the defendant along with the writ and affidavit stating the grounds for the claim.

In the present appeal there is evidence on record that the respondent's counsel did apply for the issue of a writ of summons by completing Form 1 as required by the rules and by also filing an affidavit but did not obtain the order of the court to enter the suit under the undefended list before marking the writ undefended *suo motu.* It is my considered opinion that the learned counsel for the respondent abandoned his intention to have the suit entered and heard under the undefended list by subsequently filing a statement of claim. This clearly indicates the intention that the matter is for the general cause list. It is my view that the fact that learned counsel, *suo motu* marked the writ 'undefended' does not render the writ so marked void as contended by learned counsel for the appellant. This is so because a writ of summons is valid if endorsed on Form 1 and is signed by the Registrar or other officer as provided under Order 5. *It must he noted that the issuance of a writ of summons, either under the general cause list or under undefended list is the prerogative of the registrar or other officer as authorized by law. The job of the court under Order 22 is limited to marking the writ so issued and entering same for hearing under the undefended list when satisfied. "(Italics mine).* The learned Justice of the Court of Appeal referred to Order 22 instead Of 23. This is because he used the rules published with the High Court Law. Cap. 68. Laws of Kwara State. 1994. Even *Biwater Shellabear (Nig.) Ltd.* v. *Frank Mac & Bobby Ass.,* relied on by the appellants, supports this view. This court, per Mustapher, J.C.A., as he then was, dealt with the point at pages; 1926-1927 thus:

"Now, the question which is to be decided is whether any formal application is required in addition to the application for the issuance of the writ under the provisions of Order 22 of the aforesaid rules. In the case of serving a writ outside the jurisdiction of the court under Order 12, by rule 15 thereof, there is no doubt that there must be a formal application supported with an affidavit stating among other things the place where the defendant may be found outside the territorial jurisdiction of the court. *See NEPA* v. *Onah (*1997) 10 NWLR (Pt. 484) 680; *F.N.B. Ltd. v. Njoku* (1995; 3 NWLR (Pt. 384) 457; *Odua Investment Ltd.* v. Talabi (1997) 10 NWLR (Pt.523) 1, *NNPCv. Elwnai* (1997) 3 NWLR. (Pt. 492) 195.

In the *Odua case (supra),* it was held that there is a distinction between 'issuance' of a writ of summons and service thereof. I have above reproduced Order 22 rule 1. The beginning of rule 1 reads thus: 'Whenever *application* is made to a *court for the issuance of a writ of summons'*

The application under the rule is an application for the issuance of a writ of summons. *In my view there is no requirement for any application for leave, as explained above as under the provisions of Order* 72. *In other words, leave of court is not necessary for a plaintiff who desires to apply for a writ under the undefended list.* Under the rule, an application to place a suit on the undefended list must be made to the court for the issuance of a writ of summons in respect of a claim to recover a debt, liquidated money demand or any other claim. The application must be supported by an affidavit setting forth the grounds upon which the claim is made The court in which the claim is filed shall examine the claims and the affidavit and if satisfied that there are good grounds for believing that there is no defence to the suit, enter the plaint in the undefended list. See *IJTC (Nig.) Ltd.* v. *Pamotei (supra). On the issue of a formal application the rule, in my view, does not provide, either expressly or by implication, the requirement of any other formal application before the writ is filed. The writ and the affidavit normally contain the application to place the plaint under the undefended list procedure. I* accordingly find no merit in this complaint. I resolve the issue against the appellant." (Italics mine). In his own contribution at page 1927, Munlaka-Coomassie J.C.A., added that -

"the application for the issuance of a writ of summons does not require any leave of the court and does not need any administrative fiat before it is issued."

With all due respect, another clear fallacy that I see in the contentions of the appellants counsel is the assertion that "it is ...the Judge... that... *will order the issuance* ...of the writ of summons under the undefended list" and that "It is then the writ entered under the undefended list procedure is deemed issued i.e. it is the order of the court that deems it issued.' Here, again, I must agree with the respondent's counsel that the appellants' counsel has read more into Order 22 than is warranted. A close perusal of Order 22 will reveal that it is not at all concerned with the issuing of a writ of summons but, as rightly pointed out by the respondent's counsel, with the (placement of the writ in the appropriate cause list for hearing. That being the case, there is no way that it could be said to have empowered the Judge to make any order as to the issuing of the writ. The only power that its clear language vests in the Judge is the power to "enter the suit for hearing in what shall be called the 'undefended list' and 'mark the writ of summon accordingly, and enter thereon a date for hearing suitable to the circumstances of the particular case." I see nothing either expressly or by necessary implication to suggest that the Judge is to have and exercise the power to issue or to direct the issue of a writ of summons. The idea that the Judge has power to order the issuing of the writ is totally alien and extraneous to and not justified by the language of the provision. This is why I must, again agree with the respondent's counsel that the appellants' counsel has read more into the rules than warranted. The language of the rule does not admit of the contention that the Judge may give orders for the issuing of the writ. How and when the writ is issued is strictly governed, as we have seen, by the rules, and is not left in the discretion of the Judge. The rules do not give the Judge any role in the matter ' of issuing the writ. That matter is left to the registrar or other duly empowered officer of the court to handle. With respect, it would be j a gross abuse of language to equate a Judge, in the context of this provision, with the Registrar or other duly empowered officer of the court.

With respect, I cannot accept the appellants' counsel's rather contrived argument leading to his contention that the opening statement in Order 22, rule 2 "shows clearly that the registrar has no power to issue a writ of summons under undefended list without the order of the court to effect". Reference by learned counsel to the portion of the Judge's order granting leave to the plaintiff *" to issue* and serve the writ of summons in this case under the undefended list...." is with respect, of no assistance. The plaintiff did not by its *ex pane* application, seek leave of the court to issue the writ. Its application was, as we saw at the beginning of this judgment, for "leave and order of this Honourable Court, *placing, hearing and determining this suit as an undefended list action* in line with the undefended list procedure of the rules of the Honourable Court". And, as we have seen, the rules do not authorise the Judge to make any order for the issuing of the writ, except in the limited instances that we will see anon. If the Judge had no power, and the plaintiff never asked him to invoke powers he did not have, I fail to see how the appellants can make a song and dance of the fact that the Judge [invoked such power, that is if indeed he did, especially if, as it turned out, the registrar, who had issued the writ in the case already had statutory powers to issue it without any unsolicited assistance from the Judge.

I even doubt that, reading the Judge's order carefully, one could say that he had directed the issuing of the writ in the technical sense used under Order 5, rule 15. The order was set out in the appellants' counsel's submissions. For ease of reference, however, I shall set it out again:

> "It is *hereby ordered that* leave is granted to the plaint-applicant *in issue* and serve the writ of summons in this case under the undefended list and the writ of shall be marked so."

I think the problem with learned counsel's stand atomised the sentence, concentrating on the meaning of the component words instead of seeking the broad sense conveyed the combined words read as a whole, especially having regard to the circumstances, instead of finding a meaning for the whole expression "to issue and serve the writ of summon" he pulled the expression "to issue" out of context and tried to ascribe to it its isolated technical meaning indicated in Order 5, rule 15, under which it has the restricted meaning of "to sign". In my view, having regard to the fact that the Judge had no legal power to act in that technical sense and that the registrar had and already exercised such power, the only reasonable interpretation to be given to the Judge's order is to regard it as saying something like "let the writ go forth into the world to those it was intended". After all, the first dictionary meaning of the verb "to issue", is "to make something known formally".

See the *Oxford Advanced Learner's Dictionary.* This sense of the expression is heightened when conjoined to the expression "and serve". Looked at this way, I think the most reasonable way of interpreting the expression "to issue and serve" in the context used by the Judge is to look at the words together as a whole and ascribe the sense most aptly suggested by such whole reading rather than opt for the artificial definition given in Order 5, rule 15, for a specialised purpose. In the present case I think that the more appropriate sense is, as I already said, the idea of notifying the defendants of the writ, not of signing it.

I indicated before that there are some instances when the Judge is statutorily empowered to authorise the issuing of a writ in the technical sense. The two instances that I am aware of are provided for in Order 5. rules 6 and 14. which, as we have seen, come into play only in the case of summons for service out of jurisdiction. In the light of the express provision of Order 5, rules 1 and 15, generally giving the registrar power to issue a writ in the technical sense and the specific exclusion in rules 6 and 14 from the exercise of such power, of a writ for service out of jurisdiction, the reasonable inference is that no writ other than the two specifically excluded from the powers of the registrar is so excluded.

I now come to the reliance placed by the appellants' counsel on cases cited by him. As we have seen, the appellants' counsel [relies on *Biwter Shellabear (Nig) Ltd. v. Frank Mac & Bobby Ass.: itfwakama v. Iko L.G.* We have seen also that the respondent's counsel has urged us to follow *Kwara Hotels Ltd. v. Ishola* instead. This last has been based on a number of factors. Firstly, it is contended that *Kwara Hotels Ltd.* v. *Ishola is* not only more in point, but also more reasonable in its interpretation of the rules, in that a reading of them "leaves no one in doubt that it is on the point that a registrar [-cannot by himself decide to place a matter on the undefended list as [opposed to issuing of the writ of summons" that emphasis is focused, Above all, *Kwara Hotels Ltd. v. Ishola is* later in time than the other [two, so that, in the event of a conflict between it and the other two, 1 the law enjoins that it be followed in preference to the others. For: this, the decision of this court in *Disu* v. *Ajilowura* (2001) 4 NWLR (Pt. 702)76 at 90 is cited.

I have carefully read the authorities over and over again. I have no doubt in my mind at all that the respondent's counsel made a better point with the citing of *Kwara Hotels Ltd.* v. *Ishola.* That case has clearly rendered a far more faithful interpretation of the language of the Rules than *Biwater Shellabear (Nig.) Ltd.* v. *Frank Mac & Bobb v Ass.* Unlike the latter, which read more into the words of the rules than are there, it recognised that there are no words in Order 22, rule 1 from which one could infer that power is therein vested the Judge to direct the issuing of a writ of summons. It recognised' that the provisions relating to how and by whom writs of summons are issued are not contained in Order 22 but in Order *5. Biwater SheUabc'ar(Nig.)Ltd. v. Frank Mac & Bobby Ass. is* purported to be based on *Nwakama v. Iko L.G.A.* close look at the two decisions would, however, reveal that what it decided *is* not what the latter really decided. With all due respect, *Nwakama* v. *Iko L.G.* cannot be authority for the view for which it was cited in *Biwater Shellabear (Nig.) Lid. v. Frank Mac & Bobby* Ass. In this latter case it is said at pages 1924,1925:

> "Similarly, the procedure under Order 22 rule 1 of the aforesaid rules, also requires the intervention of a judicial act before the writ is issued... Thus, the issuance of a writ under the undefended list procedure is an exercise of a judicial discretion on the part of the trial Judge and he does not share that discretion with any person including the registrar. Being a judicial matter, the registrar has no jurisdiction to get involved in it. In the Nwakama's case (supra) at page 740 Niki Tobi said:
>
> The rules are so clear. The application must be made to the Judge who must rule on it. A registrar of a court cannot in the words of paragraph 6 of the supporting affidavit, decide 'by himself to place the suit in undefended list'.
>
> At page 739, Achike, J.C.A. as he then was said: The special procedure of placing certain category of cases under the undefended list, undoubtedly, is a short-cut which facilitates expeditious determination of non-contentious cases.
>
> A close reading of Order 23 and its rules make it very clear that the decision to place a case on the undefended list is essentially a matter at the discretion of the presiding Judge which must be exercised judicially and judiciously. The court's discretion is exercised after giving due consideration to the affidavit of the plaintiff as to the propriety of granting plaintiff's application to place the claim on the undefended list. If the trial judge is satisfied that the case should be

> placed on the undefended list he marks the writ of summons issued in this regard 'undefended list' and endorses it.' It is, therefore, a condition precedent to the validity of such a writ of summons, that the presiding judge is exclusively involved in respect thereof and who must take a judicial decision having regard to the material placed before him in the affidavit. There is no provision under the rules, express or implied, that calls for the action of the 'registrar or any other authorised person'. This is a special procedure which calls for a judicial decision and not the administrative act of the registrar. The procedure under Order 22 is a special procedure, designed to deal with certain categories of cases and is different from the procedure provided under Order *5.* Under Order 5 particularly as provided by rule 15 thereof, a writ of summons is 'issued' when it is signed by the registrar or any other authorised person. While under the special provisions of Order 22, a writ is issued after an exercise of exclusive judicial exercise by the judge. There is no provision under the rules for the registrar to sign a writ of summons under the special procedure in Order 22. The complaint that the writ, in the instant case, was not signed by registrar is not valid at all. The writ became 'issued' only after the judicial act by the Judge. I accordingly answer issue Nos. 1 and 2 in favour of the respondents. A writ of summons under Order 5 and Order 22 arc different and independent of one another."

But the statements of Achike and Tobi, J.I.C.A., as they then were, in *Nwaka case,* which were supposed to have been echoed and applied said something quite different. At page 739 Achike,

J.C.A., said:

> 'We shall endeavour to give a summary of Order 23 and its rules. A close reading of Order 23 and its rules make it very clear that the decision to place a case on the undefended list is essentially a matter at the discretion of the presiding Judge which must be exercised judicially and judiciously. The court's discretion is exercised after giving due consideration to the affidavit of the plaintiff as to the propriety of granting plaintiff's application to place the claim on the undefended list. If the trial Judge is satisfied that the case should be placed on the undefended list he marks the writ of summons issued in this regard 'undefended list' and endorses it. The "writ of summons signed by the Judge or the court order in this regard is attached to the writ of summons and then served on the defendant or defendants. It is therefore a condition precedent to the invocation of its "undefended list" jurisdiction that the trial Judge must be fully involved in respect thereof and must personally take a decision, having regard to the material placed before it, whether or not to place a case in the undefended list. There is no provision -express or implied - that this crucial judicial determination can be delegated to any officer of the court. Not only did the learned trial Judge confirm that the appellant's application was never brought to him, and therefore did not receive the necessary consideration and endorsement or his order endorsed thereon the 1 and 2nd respondents through the deposition of one Ed 0. Asuquo affirmed that it was the registrar of the low court that decided personally to place the suit in the undefended list without passing same to the Judge endorsement. Furthermore, it became conclusive and undisputed that the suit was not marked and endorsed undefended list with the signature of the trial judge endorsed thereon. It is therefore manifest that the exercise of the court's jurisdiction in placing a case on the undefended list was not complied with." And at page 740 Tobi, JCA., said:

"The placement of a matter in the undefended list is an exercise of judicial discretion on the part of the trial Judge and he does not share that discretion with any person, including his registrar. Being a judicial matter, the registrar has no jurisdiction to get involved in it. The rules are so clear. The application must be made to the Judge who must rule on it. A registrar of a court cannot in the words of paragraph 6 of the supporting affidavit, decide 'by himself to place the suit in undefended list'. Since the suit was placed on the undefended list without jurisdiction the trial judge had no jurisdiction to entertain it. Accordingly, the decision of the learned trial Judge placing the suit in the general list is hereby set aside. The case will commence *de novo* before another Judge of competent jurisdiction." It can be clearly seen that none of the learned Justices of the Court of Appeal, as they then were, ever meant to say, or ever said,

or used any words from which it could be inferred that "the issuance of a writ under the undefended list procedure is an exercise of a judicial discretion on the part of the trial Judge and he does not share that discretion with any person including the registrar." Those words were, with the greatest respect to the panel that decided *Biwater Shellabear (Nig.) Ltd. v. Frank Mac & Bobby Ass.* put in their mouths. What, according to the earlier panel, was an exercise of judicial discretion within the exclusive discretion of the Judge was the power to place a case on the appropriate cause list, not the power to issue writs.

The trouble with this latter case. I think, was that it did not keep in proper focus the clear distinction that exists in the Rules between the power to issue a writ and the power to place a writ or Bearing on the appropriate cause lists. The case treated the two powers if they were one and the same thing. That was why the statements *Nwaka case* about the power to place a case on the appropriate cause list was confused with the power to issue a writ by appending [signature. This is the only explanation one can reasonably offer for the inference that –

> "It is, therefore, a condition precedent to the validity of such a writ of summons, that the presiding Judge is exclusively involved in respect thereof and who must take a judicial decision having regard to the material placed before him in the affidavit" drawn by the panel *in Biwater Shellabear (Nig.) Ltd.* v. *Frank Mac & Bobby Ass.* from the statements of Achike and Tobi, JJ.C.A., that –
>
> "A close reading of Order 23 and its rules make it very clear that the decision *to place a case on the undefended list is* essentially a matter at the discretion of the presiding Judge which must be exercised judicially and judiciously.' and that –
>
> "A registrar of a court cannot in the words of paragraph 6 of the supporting affidavit, decide 'by himself *To place the suit in undefended list'. "* The panel in *Biwater Shellabear (Nig.) Ltd.* v. *Frank Mac & Bobby Ass.* did not appear to see that the court in *Nwaka case* was concerned only with the placement of cases on the appropriate cause list and not with the issuing of a writ.

I have demonstrated earlier on that no words can be found in-Order 22 or any other order - of the rules that purport to confer power on the Judge to either issue writs himself or to direct the registrar or any other officer of the court to issue writs. In the circumstances, I have no choice but to agree with the respondents that *Kwara Hotels Ltd.* v. *Ishola,* which is in accord with *Nwaka case,* better represents the true position of the law today than *Shellabear (Nig.) Ltd.* v. *Frank Mac & Bobby Ass.* Furthermore, as the respondent's counsel pointed out, it is later in time than *Shellabear (Nig.) Ltd.* v. *Frank Mac & Bobby Ass.* 7 am, therefore, bound to follow, it rather than *Shellabear (Nig.) Ltd. v. Frank Mac & Bobby Ass.*

Now, if in law the registrar in the present case had validly issued the writ on 19/03/02. it follows that the grant by the Judge later of leave to place the suit on the undefended list had no adverse effect at all on the writ issued on 19/03/02. It remained and still remains valid. That being the case, the second issue raised by the appellants no longer arises. As no irregularity has been shown to have taken place, the question whether or not it is fatal does not arise.

In all the circumstances, I must dismiss this appeal. I accordingly dismiss it. I affirm the decision of Afolayan, J., overruling the preliminary objection.

The appellants shall pay costs of Nl0.000.00 to the respondent.

MUNTAKA-COOMASSIE, J.C.A.: I have had the privilege of reading before now the draft of the judgment delivered by my learned Lord, Ikongbeh, JCA, wherein he dismissed this appeal, I also dismiss the appeal for the reasons given in the said lead judgment. I abide with the other consequential orders made thereon. I endorse the orders as to costs.

ABDULLAHI, J.C.A.: I have had the privilege of reading in draft the judgment of my learned brother Ikongbeh, JCA, delivered in this appeal.

His Lordship has painstakingly dealt with the issues which arose for determination in this appeal and I do not have anything useful to add. I entirely agree with his reasoning and conclusion which I adopt as mine.

I find the appeal devoid of any merit and must be dismissed and same is hereby dismissed accordingly. I endorse the order of costs made in the lead judgment.

Appeal dismissed