

**SUPREME COURT OF NIGERIA**  
10TH JUNE, 1994. SC.71/1992.  
**CORAM:- M. L. UWAI, O. OLATAWURA,**  
**E. O. OGWUEGBU, S. U. ONU, Y. O. ADIO, JJSC**

HIMMA MERCHANTS LIMITED ..... APPELLANT  
AND  
ALHAJI INUWA ALIYU ..... RESPONDENT

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**APPEALS** - Award of interest by trial court - Contrary to the provision of Court Rules - Whether Court of Appeal rightly affirmed the decision.

**COURTS** - Discretion - Payable interest on judgment debt - Under Rules of Court - Circumscribed by the Rule itself stipulating 10% per annum from date of judgment - Whether higher rate of interest can be granted antedating the judgment.

**EVIDENCE** - Rate of interest - Claim for 20% interest per month on the balance amount accruing to plaintiff - In respect of lease of his property to the defendant - Where there is no evidence about rate or computation of interest agreed upon by the parties - Whether the interest claimed ought to be awarded.

**JURISDICTION** - Interest on judgment debt - Award of interest in a manner not provided for under the relevant rule - Whether the Court has jurisdiction.

**PRACTICE & PROCEDURE** - Interest on a sum of money claimed as debt - Two legal ways by which such claim of interest will arise - Where there is no rationale for the claim of interest - It ought to be disallowed.

**PRACTICE & PROCEDURE** - Undefended list - Claim for interest on a debt by mere assertion - Whether burden of proof was fully discharged by plaintiff.

**RULES OF COURT** - Interest on judgment debt - O.40 r. 7 Bauchi State High Court Rules - That provided for applicable rate of interest - Whether the court has discretion to exceed the prescribed rate of interest.

**FACTS**

The Plaintiff/Respondent about the 3rd day of March, 1988, leased his fuel filling station to the Defendant/Appellant at an annual sum of N7,000. 00 with 5 years rent (i.e N35,000.00) payable in advance. Appellant paid N18,000.00, commenced operation at the Respondent's said filling station but neglected to pay the balance of N16,500.00 despite repeated demands. Respondent filed an action before the Bauchi High Court on the undefended list claiming the sum of N16,500.00 from the Appellant together with 20% interest per month from July, 1988, till final payment. There was no evidence that the parties agreed on any rate of interest. The trial court gave judgment in favour of the Respondent as per his claim vide the undefended list.

The Appellant's appeal to the Court of Appeal challenging the rate and time of interest was dismissed by that court. Being dissatisfied, the Appellant has further appealed to the Supreme Court to determine whether there was enough affidavit evidence setting out the grounds for the Respondent's claim for 20% interest. And whether the applicable High Court Rule is wide enough to support the enforcement of 20% interest per month on a judgment debt from a date which antedates the judgment of the court.

**HELD** (Unanimously allowing the appeal)

1. There is no evidence whatsoever about the rate of interest agreed upon by the parties and the basis upon which it is computed. It is for the absence of any rate of interest agreed as between the parties that the trial court and the court below fell into error when they awarded and affirmed the claim of the respondent for 20% interest on N16,500, which is the sum claimed with effect from July, 1988 - the date when the debt accrued, until liquidation of same by the Appellant. (P58 L15)

2. Indeed, there are legally two ways by which a claim for interest on a sum of money claimed as a debt can arise. Firstly, as of right and secondly, where there is a power conferred by statute to do so, in the exercise of the court's discretion. Where therefore there is no evidence whatsoever as in the instant case, that the claim of interest is founded upon any rationale, e.g. merchantile custom or trade usage known to the parties, the claim of interest for 20% per month from

52 HIMMAMERCHANTS LTD. V. ALIYU (1994) 10 KLR 50; (1994)  
July, 1988, which ante dates the judgment passed on 27th October, 1989 by the trial court, is without foundation and ought to have been disallowed by the court below. (P58 L22)

3. Apart from what is borne out on the Writ of Summons and the affidavit in support in the application placed on the “Undefended List”, which cannot be elevated to the pedestal of pleadings by the Respondent, he as it were, has not properly raised his claim for interest save for his bare assertion and in his averments. The burden that lay on him as a party who asserts to prove same, has not been fully discharged. (P59 L32)

4. While Order 40 Rule 7 is wide and gives the Court uninhibited discretion on interest payable, such broad powers and discretion are circumscribed by the Rule itself which stipulates “ten naira per centum per annum” and that the interest rate would have application or commence from the date of the judgment to wit: 27/10/89 in the case in hand or afterwards and not an award antedating the judgment i.e. from July, 1988 or for 20% per month, which is 240% per annum instead of 10% per annum. (P60 L30)

5. The interest claimed and awarded by the trial court is not in accordance with the provisions of Order 40 Rule 7; nor is it within the discretionary powers granted by the Rule to the trial court. The court below was similarly in error to have confirmed the decision of the trial court. (P61 L2)

6. It is clear that there is no jurisdiction in the Bauchi State High Court to award interest on a judgment debt from a date antedating the judgment of the court under Order 40 Rule 7 of the Bauchi State High Court, (Civil Procedure) Rules 1987. The court below therefore was in error to have stated as it did, that the provisions of Order 40 Rule 7 was wide enough to provide for interest antedating the judgment at the rate of 20% per month i.e. 240% per annum - a rate of interest not provided for by the Rules of Court. (P61 L37)

### **NOTABLE POINTS OF INTEREST**

#### **ONU JSC**

***1. Liquidated money demand - Need to set out grounds for the***

***claim***

As the instant case was for the recovery of a debt or liquidated money demand, it is only right that the claimant, that is the Respondent herein, should set “forth the grounds upon which the claim is based” in an affidavit. Such good grounds, as herein stated, must of necessity include that on which the claim of interest is based. (P57 L35)

***UWAIS JSC******2. Court not to act blindly in granting interest***

However, in the present case, an interest of 20 per cent per month from July, 1988 was claimed as quoted above and was awarded by the trial Court. The affidavit in support of the case on the undefended list made no mention of how the Respondent came by that interest. There has to be evidence justifying the claim. The court is not supposed to act blindly by granting the interest as claimed. Since there was no evidence on which to grant the interest claimed, the lower courts were in error in granting it. (P64 L39)

***REPRESENTATION:***

O. Ayodele Esq. SAN, with R. Akanbi Esq. for the Appellant.  
Respondent absent and unrepresented.

***CASES REFERRED TO***

Ekwunife v. Wayne (W.A.) Ltd (1989) 5 NWLR (Part 122) 445  
Akangbe v. W.A.P.I. Co. Ltd. (1975) 1 NMLR. 215 at 218  
Barclays Bank D.C.O. v. Adigun (1961) All N.L.R. (Reprint) 557

***RULES REFERRED TO***

Bauchi State High Court (Civil Procedure) Rules O.23 rr. 3 & 4,  
O.40 r.7, O. 23 r. 1  
Supreme Court Rules O.6 r.8 (1)  
Plateau State High Court (Civil Procedure Rules) O.23 r.8

***LEAD JUDGMENT BY ONU JSC***

This appeal emanates from the Court of Appeal sitting in Jos, which on 2nd March, 1992 dismissed the Defendant/Appellant's, appeal from the decision of the High Court of Bauchi State holden in Bauchi where the Respondent as plaintiff had taken out a Writ on the Undefended List against them (Appellants) as follows:-

*"The plaintiff is the owner of a fuel filling station at Misau Town within the jurisdiction of this Honourable Court while the defendant is an independent petroleum marketer. On or about the 3rd day of March, 1988 the defendant took on lease the plaintiff's filling station together with all the appurtenances there unto belonging for an annual sum of N7,000.00 with 5 years rent (i.e. N35,000.00) payable in advance. The defendant paid N18,000.00 secured the necessary approvals and commenced operation at the plaintiff's filling station but have since failed and neglected to pay the balance of N16,500.00 despite repeated demands. WHEREOF the plaintiff claims the sum of N16,500 together with 20% interest per month from July 1988 till final payment from the o defendant."*

The writ which was dated 3rd January, 1989 was supported by an affidavit of five paragraphs of the same date. The appellants in response, filed a Notice of intention to defend on 5th April, 1989, equally supporting it with an affidavit of the same date. The 15th of June, 1989 being the return date, learned counsel for the respondent asked for judgment as per their writ of summons pursuant to Order 23 rules 3 and 4 of the Bauchi State High Court (Civil Procedure) Rules in the absence of the Appellant who even though it had filed a Notice of intention to defend, had no counsel representing it. The learned trial Judge in acceding to learned counsel for the respondent's request, entered judgment in his favour against the appellants in the following terms. *"Since the defendant has not been given leave to defend by the court, this suit shall be heard on the undefended suit. I will therefore enter judgment for the plaintiff for N16,500.00 being balance of the cost of lease of the plaintiff's Filling Station together with 18% interest per month from July 1988 till the final payment from the defendant."*

Learned counsel for the appellants after judgment initiated action to set it aside and even though learned counsel for the respondent did not oppose the motion filed for the purpose, curiously enough, the printed record of proceedings is bereft of the court's order. Albeit, one is left to conjecture as to whether the judgment was set aside or not. However, on 3rd October, 1989, the date when full notes began to be taken by the learned trial Judge, learned counsel for the appellant moved the court on the notice of intention to defend, urging him to stay proceedings to allow for the enforcement of an arbitration contained in paragraph 18 of the agreement exhibited

by both parties in their affidavits sequel to the suit herein.

The learned trial Judge on 27th October, 1989 in a considered reserved ruling, found for the respondent once more when with an air of unmistakable finality, he said inter alia: *"I hold that there is no valid notice of intention to defend and notice of preliminary objection filed before me, and the supporting affidavit does not disclose 5* *fence (sic) on the merit. Judgment is hereby entered for the sum of N 16,500.00 being the balance of money the defendant failed or neglected to pay together with 20% interest per month from July 1988 till final payment from the defendant."*

As pointed out herein before appellant's appeal to the court 10 below was dismissed in a considered judgment, the high water mark of which at p. 58 of the Record, runs thus: *"As can be seen above the learned trial Judge did not deviate from the claim. O. 40 R. 7 of the Bauchi State Rules supra relied upon by counsel in his argument is 15* *wide and gives the court discretion on interest payable in any judgment entered. I fail to see how the awarded interest by the learned trial Judge can be faulted."*

The judgment of the court below alluded to above is dated 20 2nd March, 1992. The appellant thereafter filed in that court, a Notice of Appeal dated 10th March, 1992. However, on the 14th of May, 1992, appellant applied for leave to file and argue four grounds of appeal contained in the Notice of Appeal to the Supreme Court.

The court below granted same and it was thereafter filed on 25 28th May, 1992. Two questions arise for the determination of this court distilled from the four grounds. They are:- 1. Whether there was enough affidavit evidence setting forth the grounds upon which the respondent's claim for 20k interest on the claim of N16,500.00 from July, 1988 until the entire debt is liquidated is based.

2. Whether the provisions of Order 40 Rule 7 of the Bauchi 30 State High Court (Civil Procedure) Rules is wide enough to support the enforcement of 20% interest per month on a judgment debt from a date which antedates the judgment of the court until the entire sum of money owed is liquidated.

Appellant's solicitors, Ayodele, Gafar & Co. filed an appellant's 35 brief in accordance with the Rules of Court on 26th June 1992. No brief of argument was filed on Respondent's behalf. Thus, when the appeal finally came up for hearing on 14th March, 1994, and no brief was filed on his behalf by a legal practitioner representing him,

only learned Senior Advocate, A. Ayodele Esq for the appellant, proffered oral argument pursuant to Order 6 Rule 8(1) of the Rules of this court to emphasize and amplify the arguments contained in their brief filed on 26th June, 1992. Learned counsel argued that their main complaint centred on the rate of interest. After referring us to page 1 of the Record, learned Senior Advocate drew our attention to pages 2 and 3, more particularly, to the affidavit in support and the exhibits attached thereto at pages 4-9. He thereupon submitted that nowhere did respondent claim 20% interest. He next referred us to page 33 of the Record where the trial court entered judgment for the respondent in the sum claimed. The effect of that judgment learned Senior Advocate contended, can be seen at page 35 of the Record where in paragraph 2(d) of the affidavit in support, he (respondent) had claimed that the judgment debt and costs amounted to N69,530.00. He thereafter argued that it was for this that the appellant appealed to the court below, where his main grouse is at page 55 in ground 5 and the finding of that court after giving due consideration to its complaint, is at page 58 of the Record.

Learned Senior Advocate after referring to Order 40 Rule 7 of the Bauchi State High Court Rules thereafter submitted that the court below erred when it held that the trial court followed the above Rules of court. He thereupon argued that the learned trial Judge breached the Rules in two main particulars. Firstly, he contended, it stated that the interest rate was from July, 1988, a date which antedates the date of the judgment. Secondly, he argued, it awarded 20% per month i.e. 240% per annum interest, a power it does not have. Learned Senior Advocate contended that the lower court therefore erred in law in saying that the rate of interest was correct. He referred us to the case of Reuben Ekwunife v. Wayne (W.A.) Ltd. (1989) 5 NWLR (Pt.122) 422 at 453, adding that the only reason for awarding interest, is as contained in Order 40 Rule 7 of the Bauchi State High Court Rules. He finally urged us to allow the appeal and set aside the decision of the court below. It is pertinent in commencing the consideration of issue one which is distilled from grounds 1 and 3 of the appeal grounds, to point out that the Respondent in the trial court, stated his claim endorsed upon his Writ of summons placed on the undefended List, as being the sum of N 16,500.00 together with 20% interest per month from July, 1988 till final payment. Nowhere in the affidavit attached to the said claim did the respondent state the

basis of his claim for interest at the rate of 20% from July, 1988 until final payment. Further, not even the agreement between the parties called "*Lease and Management Agreement*" (Exhibit 'A'), which forms the basis of the respondent's claim contains any clause on the question of interest. Neither does the correspondence exchanged between the parties for which, see Exhibits B, C and D say anything about interest. Indeed, for the 20% interest per month from July, 1988 until final payment to be justified, either the Writ of summons or the affidavit in support thereof, ought to state the premises upon which the claim for interest at the latter rate is based. In *Akangbe v. W.A.P.I Co. Ltd.* (1975) 1 NMLR 215 at 218, the Western State Court of Appeal held as follows: "*The last question for consideration is that relating to the award of interest from the date of the writ. It is interesting that learned counsel on both sides relied on Order 29 Rule 7 of the High Court Civil Procedure Rules. That Rule provides as follows:*"

*"The court at the time of making any judgment or order .... may order interest at a rate not exceeding five pounds per centum per annum to be upon any judgment commencing from the date thereof or afterwards. We think that this Rule is clear. The interest upon any judgment shall commence from the date of judgment or afterwards. There is no provision for (payment of interest) before the date of judgment. Now, Mr. Somolu submitted that interest was claimed on the writ. This is true but all that was claimed was "the sum of 837 Pounds 18 cent, plus interest at 4 per cent. There is no indication that interest was being claimed or was in fact claimable from the date of the writ, under Ex. B the policy relied upon as a basis for the action itself. There was no evidence led in support of such a claim if that was indeed the claim. We therefore think that the learned Judge erred in awarding interest on the award from the date of the writ instead of from the date of judgment."* (Parenthesis supplied by me).

As the case giving rise to the appeal herein was brought on the Undefended List, the provisions of Order 23 Rule 1 of the Bauchi State High Court (Civil Procedure) Rules come into play. Rule 1 relevantly states: "*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 deponent's 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 "Undefended List" and mark the Writ of summons accordingly, and enter thereon a date for hearing suitable to the circumstance of the particular case".* (Italics mine for emphasis) As the instant case was for the recovery of a debt or liquidated money demand, it is only right that the claimant, that is the respondent herein, should set "*forth the grounds upon which the claim is based*" in an affidavit. Such good grounds, as herein stated, must of necessity include that on which the claim of interest is based.

Hence the court below was clearly in error when it observed in its judgment as follows: "*In the Writ of Summons can be found the following claim whereof the plaintiff claims the sum of N16,500 together with 20% interest per month from July 1988 till final payment from defendant.*" As prayed above, the learned trial Judge entered judgment "for the sum of N 16.500.00 being the balance of money defendant failed or neglected to pay together with 20% interest per month from July, 1988 till final payment from defendant." As can be seen above the learned trial Judge did not deviate from the claim.

True it is that as stated by the court below the learned trial Judge did not deviate. However, the crux of the matter is whether or not there are grounds showing that the claim for 20% interest from July, 1988 is justified either in the claim or in the affidavit evidence. The best method of satisfying a court about the existence of any matter is by adducing credible, sufficient and satisfactory evidence about it. In the case in hand, there is no evidence whatsoever about the rate of interest agreed upon by the parties and the basis upon which it is computed. It is for the absence of any rate of interest agreed as between the parties that the trial court and the court below fell into error when they awarded and affirmed the claim of the respondent respectively for 20% interest on N16,500, which is the sum claimed with effect from July, 1988 - the date when the debt accrued, until liquidation of same by the appellant. Indeed, there are legally two ways by which a claim for interest on a sum of money claimed as a debt can arise. Firstly, as of right and secondly, where there is a power conferred by statute to do so, in the exercise of the court's discretion. Where therefore there is no evidence whatsoever as in the instant case, that the claim of interest is founded upon any rationale, e.g. mercantile custom or trade usage known to the parties the claim of interest for 20% per month from July, 1988, which

ante dates the judgment passed on 27th October, 1989 by the trial court, is without foundation and ought to have been disallowed by the court below. In *Reuben Ekwunife v. Wayne (West Africa) Limited.* (1989) 5 NWLR (Pt.122)422 at 445 Nnaemeka-Agu, J.S.C, stated the law on this matter as follows:-

*“Interest may be claimed as a right where it is contemplated by agreement between the parties, or under a merchantile custom or under a principle of equity such as breach of a fiduciary relationship - See London Chatham and Dover Railway v. S.E. Railway (1893) A.C. 429 at page 434. Where interest is being claimed as a matter of right, the proper practice is to claim entitlement to it on the Writ and plead facts which show such an entitlement in the statement of claim. In Nigeria, as the law is that a statement of claim supersedes the writ (for which see Udechukwu v. Okwuka (1956) 1 FSC 70 at page 71: (1956) SCNLR 189: Ekpana & Anor v. Uyo (1986) 3 NWLR (Pt.26) 63, if even it was not claimed on the writ but facts are pleaded in the statement of claim and evidence given which show entitlement thereto, the court may, if satisfied with the evidence, award interest. Adjudication on the plaintiff’s right to interest in such a case is like on any other issue in the case based on the evidence placed before the court. The evidence called at the trial in such a case will also establish the proper rate of interest and the date from which it should begin to run, whether from the accrual of the cause of action or otherwise.”*

Agbaje, J.S.C. for his part, said the following at pages 453 to 454 of the Report:- *“So in my judgment for a claim for interest to property (sic) exist for determination the High Court of Plateau State, it must be stated in the endorsement of the claims to the Writ of Summons or in the statement of claim whether the claim for interest is based on contract or statute and the grounds upon which the claim is based. A defect in this regard in the endorsement to the writ can be cured in the statement of claim since the latter supercedes the writ.*

*I have copied above paragraph 7 of the plaintiff’s statement of claim, where there is only a bare statement as to claim for interest in the sum of N16,000 claimed by the plaintiff.*

*It is not stated whether the claim for interest is based on contract or statute. Nor are the grounds of the claim for interest shown on the statement of claim. Because of what I have just said my conclusion would be that the plaintiff has not properly raised his claim for interest in this case, at least, up to the date of judgment. So, the*

*trial court in my judgment was wrong to have awarded interest at all on the amount claimed by the plaintiff up to the date of judgment”.*

In the instant case, apart from what is borne out on the Writ of Summons and the affidavit in support in the application placed on the “Undefended List.” Which cannot be elevated to the pedestal of  
 5 pleadings by the respondent, he as it were, has not properly raised his claim for interest save for his bare assertion and in his averments. The burden that lay on him as a party who asserts to prove same, has not, in my view, been fully discharged. It is for these reasons that the facts in Ekwunife’s case (supra) although not too dissimilar to the  
 10 case in hand, are distinguishable in the sense that pleadings were filed in that case from the onset.

My answer to Issue One is accordingly in the negative. In answering Issue 2 which bears relation to grounds 2 and 4 of the grounds of appeal and so emanates therefrom, it is pertinent firstly, to set out  
 15 Order 40 Rule 7 of the Bauchi State High Court (Civil Procedure) Rules 1987 before I examine its scope. It provides:- Order 40:-

*(7) The Court at the time of making any judgment or Order or at any time afterwards, may direct the time within which the pay-  
 20 ment or other act is to be made or done, reckoned from the date of the judgment or order, or from other point of time, as court thinks fit, and may order interest at a rate not exceeding ten naira percent per annum to be paid upon any judgment, commencing from the date thereof or afterwards, as the case may be.”*

Secondly, would a High Court seized of a case involving the award of interest sitting in Bauchi State, in the light of the above Rule, be invested with the power to make an award other than as provided by the Rule? In the view of the court below, which was affirming the decision of the trial court, its answer is “*As can be seen  
 30 above the learned trial Judge did not deviate from the claim. Order 40 Rule 7 of Bauchi State Rules supra relied upon by counsel in his argument is wide and gives the court discretion on interest payable in any judgment entered. I fail to see how the awarded interest by the learned trial Judge can be faulted.*” (Italics is also mine for comments).

35 The question which naturally arises from the Italicised words above is, whether Rule 7 is as wide and at large as attributable to it and whether counsel relying on it is entitled thereby to invoke the unfettered judicial as well as the judicious exercise by a trial court of its discretion, to award such interest? The answer would seem to me

clear (a) that while Order 40 Rule 7 is wide and gives the court uninhibited discretion on interest payable yet, such broad powers and discretion are circumscribed by the Rule itself which stipulates "ten Naira per centum per annum" and (b) that the interest rate would have application or commence from the date of the judgment to wit: 27/10/89 in the case in hand or afterwards and not an award antedating the judgment i.e. from July, 1988 or for 20% per month, which is 24% per annum instead of 10% per annum. In the instant case, by the order made by the trial court and affirmed by the court below, the rate of interest in effect was to have been running for a period of about 15 months before the date judgment was entered.

This is clearly wrong. I am therefore of the view that the interest claimed and awarded by the trial court is not in accordance with the provisions of Order 40 Rule 7; nor is it within the discretionary powers granted by the Rule to the trial court. The court below was similarly in error to have confirmed the decision of the trial court.

This court in Ekwunife's case (supra) placed in a similar situation, interpreted Order 27 Rule 8 of the Plateau State (Civil Procedure) Rules which is in pari materia with Order 40 Rule 7 of the Bauchi State High Court (Civil Procedure) Rules.

Because of the similarity of both Rules, the opinion expressed on the Plateau State Rules (ibid) by Nnaemeka-Agu, J.S.C. at page 447 of the Report, is in my view, relevant and apposite. He said:-

*"Clearly this rule, like the judgment Act of 1838, and unlike the Act of 1934, deals with payment of "out-standing judgment debts." It has nothing to do with a claim of interest as a right either under a contract or mercantile custom or a principle of equity. Like the Plateau State (Civil Procedure) Rules, 1976, is a statutory authority for a court to award interest at 10% per annum on the outstanding judgment debt. I do not therefore agree with the learned justices of the Court of Appeal that it is an authority for the court to award interest from a date antedating the judgment for the simple reason that there cannot be a judgment debt as at that date."*

In his own contribution Agbaje, J.S.C. elaborated on the matter at page 454 of the Report thus:-

*"In other words, Order 27 Rule 8 provides for statutory interest on judgment debt. The said provisions are mandatory. It follows inevitably in my judgment, that the statutory interest will only begin to run from the date of the judgment. This statutory interest on judg-*

*ment debt is distinct and separate from the interest which a plaintiff must include in the statement of his claim to the Writ as being based on contract or on statute as the case may be, before he can hope to recover it.*

*As I have just said, the statutory interest can only run from the*  
5 *date of judgment. In my judgment therefore, there is no jurisdiction in the High Court of Plateau State to award interest on a judgment debt under Order 27 Rule 8."*

I cannot agree more. From the foregoing, it is clear that in the same way, there is no jurisdiction in the Bauchi State High Court to  
10 award interest on a judgment debt from a date antedating the judgment of the court under Order 40 Rule 7 of the Bauchi State High Court, (Civil Procedure) Rules 1987. The court below therefore was in error to have stated as it did, that the provisions of Order 40 Rule  
15 7 was wide enough to provide for interest antedating the judgment at the rate of 20% per month i.e. 240% per annum - a rate of interest not provided for by the Rules of Court. The award of the rate of interest being arbitrary, unsupported by evidence and not being in accordance with the rules of court, issue 2 is accordingly resolved  
20 against the Respondent.

The result of all I have been saying is that this appeal succeeds and it is accordingly allowed. There shall be judgment for the respondent in the sum of N 16,500.00 with interest at the rate of 10 per cent per annum commencing from 27th October, 1989, the date of the judgment hereof  
25 and that shall be the judgment of the court below. Costs to the respondent are assessed at N1,000.00 only.

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### **UWAIS JSC**

30 The respondent in this appeal took out a writ of summons on the 3rd day of January, 1989 on the undefended list, against the appellants, in which he claimed as follows:-

*"WHEREOF the plaintiff claims the sum of N 16,500.00 together with 20% interest per month from July, 1988 till final payment from the*  
35 *defendant."*

The action by the respondent was based on a claim of arrears of rent in respect of a petrol filling station situated in Misau Town, which was let to appellants for a period of 5 years on a rent of N7,000.00 per annum.

The Appellants filed a notice in the High Court of intention to de-

fend the action. But the application did not succeed. After rejecting the application, the learned trial Judge (Ozoh. J) proceeded on the 27th day of October, 1989 to enter judgment for the respondent on the undefended list in the following terms-

*"Judgment is hereby entered for the plaintiff for the sum of N16,500.00 being the balance of money the defendant have failed or neglected to pay, together with 20% interest per month from July 1988 till final payment from (sic) the defendant."*

The appellants appealed to the Court of Appeal complaining inter alia that the learned trial Judge erred in law in awarding 20% interest per month from July 1989 to the Respondent, instead of 20% interest with effect from the date of the judgment. In dismissing the appeal, the lower Court (Katsina-Alu, Mukhtar and Okezie JJ.C.A.) held as follows per Mukhtar J.C.A.:-

*"As can be seen, the learned trial Judge did not deviate from the claim, Order 40 Rule 7 of the Bauchi State Rules (supra) relied upon by counsel on his argument is wide and gives the court discretion on interest payable in any judgment entered. I fail to see how the awarded interest by the learned trial Judge can be faulted."*

On a further appeal to this court, the appellant formulated two issues for determination, to wit-

*"(I) Whether there was enough affidavit evidence setting forth the grounds upon which the respondent's claim for 20% interest on the claim of N16,500.00 from July 1988 until the entire debt is liquidated is based."*

*(II) Whether the provisions of Order 40 Rule 7 of the Bauchi State High Court Civil Procedure Rules is wide enough to support the enforcement of 20% interest per month on a judgment debt from a date which antedates the judgment of the court until the entire sum of money owed is liquidated."*

No brief of argument has been filed by the respondent, nor is he present in court at the hearing or represented by counsel. The appellants are represented by Chief Ayodele, SAN. They contend in their brief that there are only two ways in which a claim of interest based on a claim of sum of money can arise. These are firstly as of right and secondly where by statute a power is conferred on the claimant, to claim interest. It is, then, submitted that there was no evidence to establish that the parties had at any time contemplated that the agreement between them would attract interest. Therefore, the award of 20% by the lower courts had no foundation whatsoever. The case of Ekwunife v. Wayne (West Africa) Ltd. (1989) 5 NWLR (Pt.122) 422 at ppA22 and 453-454 was cited to emphasise the

importance of calling evidence in support of any claim of interest on liquidated sum of money. It is further submitted that the courts below had no jurisdiction, in view of the provisions of Order 40 rule 7 of Bauchi State High Court (Civil Procedure) Rules, 1987, to award interest on a judgment debt to cover a period which precedes the date of the judgment itself.

5 There is undoubtedly, considerable force in the submissions made on behalf of the appellants. Order 40 rule 7 of the Bauchi State High Court (Civil Procedure) Rules 1997 provides:

“7. *The Court at the time of making any judgment or order, or at any time afterwards, may direct the time within which the payment or*  
 10 *other act is to be made or done, reckoned from the date of the judgment or order, or from some other point of time, as the court thinks fit, and may order interest at a rate not exceeding ten percent per annum to be paid upon any judgment, commencing from the date thereof, or afterwards, as the case may be.*”

15 It is clear from the foregoing that the rate of the interest to be awarded is fixed at 10% per annum at the highest. The court may award a lesser rate but certainly not higher than 10% per annum. Secondly, the interest to be ordered by the court becomes chargeable from the date of the judgment or a date after the Judgment. It cannot accrue on a date preceding or in  
 20 advance of the judgment. I find support for this view in the dictum of Nnaemeka-Agu, J.S.C. in Ekwunife v. case (supra) on page 447 thereof which was expressed whilst interpreting the provisions of Order 27 rule 8 of the Plateau State High Court (Civil Procedure) Rules, 1976 which is in pari material with Order 40 rule 7 of the Bauchi State High Court (Civil Proce-  
 25 dure) Rules, 1987.

Therefore, the Court of Appeal as well as the High Court were in serious error when they awarded 20% interest to the respondent which was back-dated to July, 1988. thus pre-dating the judgment of the High Court. Consequently, the appeal succeeds.

30 It is to be observed that although both Order 40 rule 7 and Order 27 rule 8 of the Plateau State High Court (Civil Procedure) Rules, 1976, prescribe the award of 10% interest per annum on judgment debt, there is substantial difference in their wordings. Order 27 rule 8 reads:

“8. *Unless otherwise ordered by the court, interest shall be paid on*  
 35 *outstanding judgment debts at the rate of 10 percent from the date judgment whether or not the debtor is allowed to pay or to pay (sic) by installments.*”

The word “shall” in order 27 rule 8 was held in the Ekwunife (supra) at p.447 thereof to be “directory only and not mandatory.” and Nnaemeka-

Agu, J.S.C. made the following remark in the same page -

*“In my view, as the power to award interest under the rule is one which derives from the rule itself, it is not obligatory that interest thereunder must be claimed on the writ or pleaded in the statement of claim. So, it is different from when it is claimed as a right. But before a court can depart from this power and award interest at the rate different from 10% per annum, under a discretion envisaged by the opening clause of the rule, there must be facts and/or circumstances to justify such a course.”*

Similarly, it is not necessary in the case of Order 40 rule 7 of the Bauchi State High Court (Civil Procedure) Rules for the interest awardable on judgment debt to be claimed in the writ of summons or statement of claim, However, in the present case, an interest of 20 percent per month from July 1988 was claimed as quoted above and was awarded by the trial court. The affidavit in support of the case on the undefended list made no mention of how the respondent came by that interest.

There has to be evidence justifying the claim. The Court is not supposed to act blindly by granting the interest as claimed. Since there was no evidence on which to grant the interest claimed the lower courts were in error in granting it.

However, this is not to say that the respondent was not entitled to interest on the judgment debt awarded to him, because Order 40 rule 7 has provided the trial court the discretion to award interest of up to 10% per annum. Learned counsel for the appellant has conceded in the brief of argument *“that Order 40 Rule 7 is wide and gives the court discretion on interest payable in any judgment entered. This is so far as the rate of interest does not exceed in the words of the Rule “ten percent per annum”*. It is also part of the rule that the interest rate would commence from the date of the judgment or afterwards as the case may be.” In my view, the justice of the case is that the respondent is entitled to an interest on the judgment debt of N16,500.00 in accordance with commercial practice and as authorised by Order 40 rule 7. I will therefore make an award of 10% interest per annum on the judgment debt with effect from the date of the judgment of the High Court, which is 27th October, 1989.

It is for these and the reasons contained in the judgment read by my learned brother Onu, J.S.C. the draft of which I read in advance, that I too will allow this appeal, by setting aside the decision of the Court of Appeal as well as that of the High Court. I grant to the respondent 10% interest per annum on the judgment debt in accordance with the provisions of Order 40 rule 7. The appellants are entitled to costs, which I assess at N1,000.00 a



**UWAIS JSC (PRONOUNCEMENT)**

The honourable Justice Olatawura, who sat with us on the 14th day of March, 1994 to hear this appeal, retired on the 3rd day of May, 1994. Before his retirement, he took part in the conference which we held on the 23rd day of March, 1994 on the appeal and he was of the opinion that the  
 5 appeal should be allowed and that interest of 10% of the judgment debt per annum be awarded to the respondent.

In accordance with the provisions of the proviso to section 258 subsection (2) of the Constitution of the Federal Republic of Nigeria 1979 Cap. 62, I hereby pronounce the opinion of Honourable Justice Olajide Olatawura  
 10 that the appeal be allowed and that interest of 10% per annum on the judgment debt be granted to the respondent.

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**OGWUEGBU JSC**

I have had the advantage of a preview of the judgment just delivered  
 15 by my learned brother Onu, J.S.C. I agree with him that the appeal be allowed.

It is only to emphasise the point that the court below was carried away in awarding interest by the bare averment of the plaintiff/respondent in his particulars of claim which reads:-  
 20 *"Wherefore the plaintiff claims the sum of N 16,500.00 together with 20% interest per month from July, 1988 till final payment from the defendant."*

On Close examination on the claim, the affidavit in support of the claim (as the claim was in the undefended list), and Exhibits "A" to "D"  
 25 annexed to the affidavit, the plaintiff did not state any ground for his claim for interest. He also failed to lead evidence on the rate of interest. The trial court on 15/6/89 entered judgment for the plaintiff as follows:

*"Since the defendant has not been given leave to defend by the court, this suit shall be heard as an undefended suit. I will therefore enter  
 30 judgment for the plaintiff for N16,500.00 being balance of the cost of lease of the plaintiff's filling station together with 18% interest per month from July, 1988 till the final payment from the defendant."*

On 27/10/89, the learned trial judge delivering a ruling on a notice of the defendant's intention to defend the suit and stay of proceedings held  
 35 thus: *"Judgment is hereby entered for the plaintiff for the sum of N16,500 being (sic) the balance of money defendants have failed or neglected to pay together with 20% interest per month from July, 1988 till final payment from the defendants."*

On appeal by the defendants to the Court of Appeal, Jos Division,

that court in dismissing the appeal, stated thus at p.58 of the record of appeal:- *"As can be seen above the learned trial Judge did not deviate from the claim. Order 40 Rule 7 of the Bauchi State Rules supra relied upon by counsel on his argument is wide and gives the court discretion on interest payable in any judgment entered. I fail to see how the awarded interest by the learned trial Judge can be faulted."* 5

There were no materials in the plaintiff's case upon which interest could have been awarded by the courts below. Therefore, the only basis for awarding interest in this case is by virtue of Order 40 Rule 7 of Bauchi State High Court (Civil Procedure) Rules, 1987 which provides:-

*"(7) The Court at the time of making any judgment or Order or at any time within which the payment or other act is to be made or done, reckoned from the date of the judgment or order, or from other point of time as the court thinks fit, and may order interest not exceeding ten naira percent per annum to be paid upon any judgment, commencing from the date thereof or afterwards, as the case may be."* (Italic is for emphasis 15 only).

The Court of Appeal purported to rely on the above rule in confirming the award of interest made by the trial court but with respect fell into grave error in failing to apply the rule correctly. On a proper construction, the rule means that the court may grant time within which to pay a judgment debt and may when making such an order also order interest to be paid thereon from the date of the judgment or afterwards, but not otherwise. The rate of interest cannot exceed 10% per annum. See Barclays Bank D.C.O. v. Adigun (1961) All NLR (Reprint 557 at 559. 20

Order 40 Rule 7 is in pari materia with our then Supreme Court 25 (Civil Procedure) Rules Order XLVI. r.7.

For the above reasons and the more detailed reasons contained in the judgment of my learned brother Onu, J.S.C., I allow the appeal and set aside the decisions of the courts below. In accordance with the provisions of Order 40, rule 7 of the aforesaid High Court (Civil Procedure) Rules, I 30 grant the respondent 10% interest per annum on the judgment debt from the date of the judgment. I also awarded N1,000.00 costs to the appellant against the respondent.

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### ADIO JSC

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I have had the advantage of reading, in draft, the judgment just delivered by my learned brother, Onu, J.S.C. and I agree with it. I too allow the appeal and abide by the order for costs.