

SUPREME COURT OF NIGERIA
13TH FEBRUARY, 1996. SC. 11/1990
CORAM:- S. M. A. BELGORE, I. L. KUTIGI, E. O.
OGWUEGBU, U. MOHAMMED, S. U. ONU, JJSC.

ADEBISI MACGREGOR ASSOCIATES LIMITED APPELLANT
AND
NIGERIA MERCHANT BANK LIMITED RESPONDENT

JUDGMENTS - Summary judgment - Where defendant shows he has a fair case for defence - Leave to defend ought to be granted - The summary judgment was rightly set aside.

PRACTICE & PROCEDURE - Summary judgment - Order 10 Lagos High Court Rules - Whether mere filing of affidavit of having a good defence *per se* - Entitles a defendant to leave to defend.

PRACTICE & PROCEDURE - Summary judgment - Defendant's defence - Whether a sham meant to cause delay.

PRACTICE & PROCEDURE - Summary judgment - Document relied up by the plaintiff - Should not be swallowed hook, line and sinker given circumstances - So as to avoid injustice.

FACTS

The plaintiff/appellant sought to obtain summary judgment under Order 10 of High Court of Lagos State Civil Procedure Rules against the defendant/respondent in the sum of N3,321,312.00. This amount is the balance of the price of goods sold by the plaintiff to Bol-Bol & Company Ltd under a letter of guarantee given by the defendant to the plaintiff. The defendant filed an affidavit to show it has a good defence together with statement of defence, raising an issue of fraud.

The plaintiff opposed the defendant's move to be allowed to fend the suit. The trial judge found no defence to the action and entered judgment in favour of the plaintiff. Defendant's appeal to the Court Appeal was allowed as leave to defend the action was granted. Plaintiff now appealed to the Supreme Court raising three issues.

ISSUES FOR DETERMINATION

1. Whether the Court of Appeal was right in failing to consider at all, *main issue for determination before it, namely:- Whether a*

“guaranteed had

by the respondent Bank to the appellant, and if so, whether respondent/Bank had honored its obligation under the said guarantee”

2. Whether Court of Appeal was correct in finding that the rehud raised triable issues when the only issues raised by the Respondent were extraneous and irrelevant to the determination of the action

3. Whether the Court of Appeal was correct in holding that the Court Judge misapplied Order 10 of the Lagos High Court Rules

HELD (unanimously dismissing the appeal per lead judgment of **OGWUEGBU JSC**)

Summary judgment - Order 10 Lagos High Court Rules

1. Where a defendant under Order 10 procedure files his affidavit as require by the rules, the mere fact of such filing does not automatically entitle him to leave to defend. It is the duty and obligation of the court to that the defendant has a good defence to the action on the merit. To satisfy himself as to whether there are facts sufficient to entitle the defendant to defend, he has to look at all the papers filed - the plaintiff's statement of claim, the affidavit sworn to on plaintiffs behalf, the guarantee (Exhibit “AMI” or “A”), the affidavit to show cause and the statement of defence filed by the defendant together with all the exhibits annexed to them (p. 228 A)

Summary judgment – Defendant’s defence

2. This affidavit is not a general defence. It dealt specifically the plaintiff's claim and affidavit. Among the defence relied upon by the defendant is fraud and the particulars of the fraud were given in paragraph 9 of the statement of defence. The procedure established by Order 10 is a peculiar procedure, intended only to apply to cases where there can be no reasonable doubt that a plaintiff is entitled to judgment, and where, it is in expedient to allow a defendant to defend for mere purpose of delay. It is for the plain and straight forward, not for the devious and crafty. The defence in the present case is not sham. (p. 229 C)

Where defendant shows he has fair case for defence

3. I am in complete agreement with the court below. There are circumstances in this case that require to be investigated. There ought to be a trial and judgment which was entered for the plaintiff was rightly set

aside by the Court below. As a general principle where a defendant shows that he has a fair case for defence, or reasonable grounds for setting up a defence, or even a fair probability that he has a bona fide defence, he ought to have leave to defend. (p. 229 H)

Summary judgment - Document relied upon by the plaintiff

4. Exhibit "A" or "AMI" - (the letter of guarantee) should not be swallowed hook, line and sinker. Its contents have to be considered along with all the surrounding circumstances disclosed so as to avoid injustice. In the light of the above conclusion which I have reached, all the three issues for determination formulated by the plaintiff are answered in the affirmative. (p. 230 B)

REPRESENTATION

L. N. Mbanefo, SAN with O. Bayagbona for the Plaintiff
Prof. A.B. Kasunmu, SAN with Femi Blaize and J.U.K. Igwe for the Defendant.

CASES REFERRED TO

Nishizawa Ltd v. Strichand N. Jethwani (1984) 12 S.C. 234
E U.T.C. (Nig.) Ltd. v. Pamotei (1989) 2 NWLR (Pt. 103) 244 at 268
Saw v. Hakim 5 T.L.R. 72
Ward v. Plumbley 6 T.L.R. 198
Ray v. Karker 4 Ex. D. 279

RULES REFERRED TO

Supreme Court Rules of England 0.14
High Court of Lagos State Civil Procedure rules 1972 0.10 rr. 1 & 2

LEAD JUDGMENT BY OGWUEGBU JSC

This is an appeal against the judgment of the Court of Appeal, Lagos Division dated 30/11/89. The appellant herein was the respondent in the court below and the plaintiff in the court of trial.

The plaintiff's claim is for judgment against the defendant in the sum of N3,321,312.00 being the balance of the price of goods sold by the plaintiff to Messrs Bol-Bol & Company Ltd. under a letter of guarantee dated the 2nd April, 1986 given to the plaintiff by the defendant, and interest thereon at the rate of 13% from the 15th day of June, 1986 until judgment and thereafter interest at the same rate until the whole debt is settled.

On 17/3/86 the plaintiff entered into an agreement with Bol-Bol &

Co. Ltd for the importation and supply of 14,000 bales of Norwegian stockfish to the latter for a total sum of =N=11,445,000.00. The plaintiff averred that by a letter of guarantee dated 2/4/86, the defendant gave an undertaking to the plaintiff as follows:

*"Messrs Adebisi MacGregor Associates Ltd.,
Macgregor House,
Ilawo,
Off Ago-Ika,
Road,
P.O. Box 2706,
Abeokuta, Ogun State.
Dear Sir,*

RE: BOL-BOL & CO. LIMITED 14,000 BALES OF NORWEGIAN STOCKFISH YOUR PROFORMA INVOICE NO. 020/86 OF 12/3/86

We have been appointed Bankers and Trustees to the above named Company in respect of the importation and sale of the above consignment. In pursuance of this, we hereby guarantee that the sum of N11,445,000.00 (Eleven Million, Four Hundred and Forty-Five Thousand Naira only) will be placed to the credit of your account with us for disbursement in accordance with your instructions on presentation of complete set of ORIGINAL SHIPPING DOCUMENTS and within two working days of arrival of the carrying vessel in Nigeria.

*Yours faithfully,
pp: NIGERIA MERCHANT BANK LIMITED
(SGD)
S.G. PEPREIRA
SENIOR MANAGER
(OPERATIONS DIVISION)"*

The 14,000 bales of stockfish arrived at Apapa port in two separate vessels on 28th May and 6th June, 1986 respectively and the original shipping documents were received simultaneously by the defendant in compliance with the above letter. Apart from the initial deposit of N200,000.00 paid into the account of the plaintiff by Bol-Bol and Co. Ltd., no other money was paid into the account of the plaintiff either by Bol-Bol & Co. Ltd. or the defendant.

In paragraphs 7, 8 and 9 of the statement of claim, the plaintiff averred as follows:-

"7. On failure of Bol-Bol & Company Limited to take delivery of

the aforesaid 14,000 bales of stockfish two days after the arrival of the aforesaid vessels or at all, the plaintiff, with the agreement of Bol-Bol & Company Limited and the defendant offered to sell the said stockfish to other buyers in order to mitigate the losses. The plaintiff's letter to the defendant ref. 5086/366 dated 11th August 1986 will be founded upon.

B *8. The defendant handed over the relevant original documents to the plaintiff and the plaintiff effected sale of the portion of the aforesaid stockfish which had not deteriorated from lengthy abandonment on the quay side. A survey of the condition of the said stockfish was commissioned by the plaintiff and Lloyds Surveyors effected the survey.*

C *9. A total sum of N8,123,688.00 was realised from the said sale leaving a loss of N3,321,312.00"*

Based on the above facts, the plaintiff instituted an action in the High Court of Lagos State to recover the difference between the amount guaranteed by the defendant and the sum realised from the sale. Having been served with the writ of summons accompanied by a statement of claim, the defendant entered an un-conditional appearance. The plaintiff filed a summons for judgment under Order 10, Rules 1 and 2 of the High Court of Lagos State Civil Procedure Rules, 1972 for summary judgment. This application was supported by an affidavit of eleven paragraphs.

E The defendant filed an affidavit to show cause and a statement of defence. In paragraphs 4 to 12 of the affidavit, the defendant deposed as follows:

"4. That the defendant/respondent denies all the averments in paragraphs 6, 7, 8, 9 and 10 of the plaintiff's affidavit.

F *5. That by the condition of the Guarantee dated 2nd April, 1987, the defendant guaranteed payment to the plaintiff on the condition that the importation of the bales of stockfish was to be for sale to Bol-Bol and Company Limited. The defendant's customer, but not to a third party.*

G *6. That the 14,000 bales of Norwegian stockfish were never made to Bol-Bol and Company Limited but to Cornwell International in respect of whom the Guarantee was not issued.*

7. That the shipping documents relating to the said consignment were fraudulently collected from the defendant by the plaintiff who deceived the defendant into believing that there was an agreement between it and Bol-Bol and Company Limited that the documents should be collected.

H *8. That the Lloyds report of the condition of the bales of stockfish was made available to Bol-Bol and Company Limited after the sale had been carried out without any prior invitation to Bol-Bol and Company Limited to attend the survey.*

9. The issue of selling price had not been finally agreed with the

plaintiff at the time of the purported sale by the plaintiff. The document now shown to me and marked Exhibit "A" is the letter dated 14th July, 1986 from Bol-Bol to both the plaintiff and the defendant on the matter.

10. *There was no agreement by either Bol-Bol and Company Limited or the defendant with the plaintiff that the said consignment of stockfish should be sold to other buyers.*

11. *That the decision to take over and sell the 14,000 bales of stockfish to a third party who is not covered by the Guarantee given by the defendant was solely that of the plaintiff as the defendant was not a party to such sale.*

12. *That contrary to the conditions of the Guarantee, the proceeds realised from sale of the consignment of stockfish after the collection of the shipping documents by the plaintiff were not paid into the escrow account or the plaintiff's account with defendant Bank, and no reconciliation of account has taken place ever since and the defendant is therefore not in a position to ascertain the actual amount realised from the sale. The documents now shown to me and marked Exhibits "B", "C" and "D" are letters dated 8th April 1986, 28th August, 1986 and 23rd June 1987 exchanged between the parties on the issue of sale of the consignment and the payment of the proceeds of sale."*

On the service of the affidavit to show cause, the plaintiff filed a reply headed "Counter-Affidavit". In the said counter-affidavit, the plaintiff stated the circumstances under which it collected the shipping documents from the defendant, which the plaintiff in turn handed over to Cornwell International (Nig.) Ltd. The plaintiff further deposed that the defendant endorsed it the shipping documents to Cornwell International (Nig.) Ltd. It further deposed that the sale of the consignment of stockfish to Cornwell International (Nig.) Ltd. was with the knowledge and approval of the defendant; that the survey was carried out by an independent surveyor and was attended by representatives of Cornwell International (Nig.) Ltd. and Bol-Bol & Company Ltd.

The learned trial Judge heard the submissions of both counsel on Order 10 of the High Court of Lagos State Civil Procedure Rules. In a reserved ruling dated 8/4/88, the learned trial Judge; Olusola Thomas, J. found no defence to the action and entered judgment for the plaintiff for the sum of N3,121,312.00 after making necessary deductions admitted by the plaintiff.

The defendant was dissatisfied with the decision and appealed to the Court of Appeal. The appeal was allowed and defendant was given

leave to defend the action before another Judge.

The plaintiff appealed to this court against the decision of the Court of Appeal. Three issues were submitted for determination in the appeal, namely:

B 1. Whether the Court of Appeal was right in failing to consider at all the main issue for determination before it, namely:- Whether a “*guarantee had been supplied by the respondent Bank to the appellant, and if so, whether the respondent/Bank had honoured its obligation under the said guarantee.*”

C 2. Whether Court of Appeal was correct in finding that the respondent had raised triable issues when the only issues raised by the Respondent were extraneous and irrelevant to the determination of the action.

3. Whether the Court of Appeal was correct in holding that the learned High Court Judge misapplied Order 10 of the Lagos High Court Rules.

D The defendant identified one issue as arising for determination in the appeal viz:-

“Whether the learned Justices of the Court of Appeal were right in setting aside the lower Court’s Judgment and giving leave to the Respondent to defend the action having regard to the circumstances of this case.”

E The plaintiff is the appellant in this court and the defendant is the respondent. I will continue to refer to them as plaintiff and defendant throughout the judgment.

F It seems to me that the first issue to be determined in this appeal is the proper construction of Order 10 Rule 1(a) of the Lagos State High Court Civil Procedure Rules, 1972 having regard to the facts and circumstances of this case. The current rules of court, namely, the High Court of Lagos State (Uniform Civil Procedure) Rules, 1987) which came into force on 7/12/87 was in operation at the time when the action was heard. The provision of Order 11 rule 1 (a) of the 1987 Rules are identical with those of Order 10, Rule 1(a). Order 10, Rule 1(a) reads:-

G *“1(a) Where the defendant appears to a writ of summons specially indorsed with or accompanied by a statement of claim under Order 3, rule 4, the plaintiff may on affidavit made by himself or by any other person who can swear positively to the facts, verifying the cause of action and the amount claimed (if any liquidated sum is claimed), and states that in his belief there is no defence to the action except as to the amount of damages claimed, if any, apply to a judge in Chambers for liberty to enter judgment for such remedy or relief as upon the statement of claim the plaintiff may be entitled to. The judge thereupon, unless the defendant shall satisfy him that he has*

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a good defence to the action on the merits or shall disclose such facts as may be deemed sufficient to entitle him to defend the action generally, may make an order empowering the plaintiff to enter such judgment as may be just, having regard to the nature of the remedy or relief claimed."

In this case, the plaintiff and the defendant complied with the obligations imposed on them under Order 10, rules (1), (2) and (3). The plaintiff filed a writ of summons accompanied by a statement of claim and the defendant entered an unconditional appearance to the writ. The plaintiff applied to the judge for liberty to enter judgment for the amount claimed on the writ and there was filed in support of the application an affidavit by a deponent who swore positively to the facts verifying the cause of action and the amount claimed. The defendant filed an affidavit to show cause.

The next obligation under Order 10 is on the judge. He is to be satisfied that the defendant has a good defence to the action on the merits or has disclosed such facts as may be deemed sufficient to entitle him to defend the action generally. This is the only question for determination formulated by the defendant which is also covered by issue three identified by the plaintiff.

The learned trial judge in his considered ruling found no defence to the action but the court below set aside the said ruling and gave the defendant leave to defend the action. On whether the learned trial judge was entitled to enter summary judgment under Order 10 of the Lagos State High Court Rules, learned senior - counsel appearing for the plaintiff referred the court to the judgment of this court in *Nishizawa Ltd. v. Strichand N. Jethwani* (1984) 12 SC 234, particularly at pages 243,276,279 and 297 -299. He submitted that *Jethwani* case is largely on all fours with the present appeal.

It was his further submission that the defendant bank did not raise any serious issue to be tried because it failed to honour a valid letter of guarantee which it gave to the plaintiff by defaulting to pay the debt under the letter of guarantee.

On the application of Order 10 procedure to the peculiar circumstances of this case, the learned defendant's senior counsel replied that the principles of Order 10 Procedure laid down in *Nishizawa Ltd. v. S. N. Jethwani* supra. UTC. (Nig.) Ltd. v. Pamotei (1989) 2 NWLR (Pt.103) 244 at 268 are not applicable to the present case having regard to the issues raised on the materials before the lower court. It was his further submission that UTC. (Nig.) Ltd. v. Pamotei (supra) made it clear that the duty of the court should be to attain justice between the parties by deciding the rights of parties after hearing both sides and trying as much as possible to give way

to substance rather than form.

I will observe straight away that where a defendant under Order 10 procedure files his affidavit as required by the rules, the mere fact of such filing does not automatically entitle him to leave to defend. It is the duty and obligation of the court to satisfy itself that the defendant has a good
 B defence to the action on the merits. To satisfy himself as to whether there are facts sufficient to entitle the defendant to defend, he has to look at all the papers filed, the plaintiff's statement of claim, the affidavit sworn to on plaintiff's behalf, the guarantee (Exhibit "AM 1" or "A"), the affidavit to show cause and the statement of defence filed by the defendant together with all the exhibits annexed to them.

C From a cool and dispassionate consideration of all these, the judge should be able to come to a decision one way or the other. What are the facts disclosed by the defendant which are sufficient to entitle him to defend the action?

D The defendant is not denying the authorship of the letter of guarantee (Exhibit "A"). The defendant in paragraphs 5 to 12 of its affidavit to show cause joined various issues with the plaintiff. The learned trial judge held that the issues raised by the defendant were not relevant to the determination of the application. He held as follows:

E *"There was no other condition in the contract of guarantee as the defendant/bank deposed in their counter-affidavit than that the original shipping documents of the consignment should be presented to them within 3 working days of the arrival of the carrying vessels. The sale of the consignments by the plaintiff/company to a third party other than the Bol-Bol and Company Limited, was also not a fact of the contract of guarantee. If the*
 F *plaintiff/company sold at a price less than what it should be or that the price the plaintiff sold the consignments was not agreed with Bol-Bol & Company Limited or that the agents of Bol-Bol & Company Limited were not invited and no final sales account made, the party to complain is Bol-Bol & Company Limited. It is not part of the contract of guarantee."*

G The court below while allowing the appeal of the defendant held thus:-

H *"The averments in paragraphs 7, 8 of the statement of claim of the respondents were denied in the affidavit showing cause filed by the appellant and also in paragraphs 7-14 of the statement of defence filed wherein fraud, collusion and other defences to the action were stated upon which it does appear that some investigation ought to be gone into to determine which version of the events surrounding the letter of guarantee ought to be believed. In my view the affidavit to show cause and the proposed statement of defence raise triable issues on which the appellant ought to be called*

upon to offer his defence. The learned trial judge has made a short shrift to the appellant's defences to the contract of guarantee when in part of the judgment it said thus; "There was no other condition in the contract of guarantee as the defendant/bank deposed to in their counter-affidavit than that the original shipping documents of the consignment should be presented to them within 3 working days of the arrival of carrying vessels" This is a wrong approach. " B

I have myself read and considered Exhibit "AM1" or "A" - (the letter of guarantee) along with other relevant documents mentioned above. The operative words of the obligation imposed on the trial judge under Order 10 rule (a) are:-

"Unless the defendant shall satisfy him that he has a good defence to the action on the merits or shall disclose such facts as may be deemed sufficient to entitle him to defend the action generally." C

The defendant's affidavit is not a general defence. It dealt specifically with the plaintiff's claim and affidavit. Among the defences relied upon by the defendant is fraud and the particulars of the fraud were given in paragraph 9 of the statement of defence. D

The procedure established by Order 10 is a peculiar procedure, intended only to apply to cases where there can be no reasonable doubt that a plaintiff is entitled to judgment, and where, it is inexpedient to allow a defendant to defend for mere purpose of delay. It is for the plain and straight forward, not for the devious and crafty. The defence in the present case is not sham. E

The words of Order 10, rule 1(a) *"or shall disclose such facts as may be deemed sufficient to entitle him to defend the action generally"* seem to me to give the court adequate powers to confine Order 10 proceedings to being a good servant and prevent it from being a bad master. (italics is for emphasis only) See: the statement of Bramwell L. J. in *Harrison v. Bottenheim* (1878) 2 W.R. 262 at 268 where he said: F

"though a man cannot show a defence, still, if he has shown enough to entitle him to interrogate the plaintiff, the case is not within Order 14, and should not be pursued without his being allowed to defend." G

The above statement was on the old wording of Order 14 of the Supreme Court Rules of England which is identical with Order 10 being considered in this judgment: H

I am in complete agreement with the court below. There are circumstances in this case which require to be investigated. There ought to be a trial and the judgment which was entered for the plaintiff was rightly set aside by the Court below.

As a general principle, where a defendant shows that he has a fair case for defence, or reasonable grounds for setting up a defence, or even a fair probability that he has a bona fide defence, he ought to have leave to defend. See *Saw v. Hakim* 5 T.L.T. 72, *Award v. Plumbey* 6 TLR 198 and *Ray v. Barker* 4 Ex. D. 279.

B This case is not on all fours with *Nishizawa Ltd. v. S. N. Jethwani* supra. On the basis of the guarantee and the dishonoured cheques, the defendant's statement of defence in that case did not in any way answer the plaintiff's averments on them. The defence was found to be frivolous.

C Exhibit "A" or "AM1" - (the letter of guarantee) should not be swallowed hook, line and sinker. Its contents have to be considered along with all the surrounding circumstances disclosed so as to avoid injustice.

D In the light of the above conclusion which I have reached, all the three issues for determination formulated by the plaintiff are answered in the affirmative. In view of the decision reached by the court below on Order 10 procedure, it was not necessary for that court to consider the nature of the guarantee.

E The appeal is accordingly dismissed. The judgment of the court below is affirmed. The defendant is given unconditional leave to defend the action before another judge of the Lagos State High Court. He is also entitled to N1,000.00 (One thousand naira) costs to be paid by the plaintiff.

BELGORE JSC

F The pinch of Order 10 rule 1 (a) of Lagos State High Court Rules is in the words "*....shall disclose such facts and may be deemed sufficient to entitle him to defend the action generally.*" On the face of the Notice of intention to defend, there certainly appears to be good and substantial reasons that more facts are needed for the Court to deliberate upon and judgment should not be entered peremptorily. Once a defendant by his
G intention to defend has shown clearly that he has issues arguably triable, it is on the side of justice to transfer such matter to the general cause list so that all facts and issues will be properly tried. I therefore agree that on the showing of the respondent in his notice the intention to defend, one cannot
H say there are no triable issues. I therefore agree with my learned brother, Ogwuegbu, J.S.C. in his more elaborate judgment that the Court of Appeal was right in holding that there are triable grounds for the trial Court to look into. I also dismiss the appeal with N1,000.00 costs to the respondent.

KUTIGI JSC

I read in advance the judgment just delivered by my learned brother Ogwuegbu, J.S.C. and agree with him that the appeal ought to be dismissed. I have no doubt at all that both the Affidavit to show cause and the proposed Statement of Defence raise serious triable issues including fraud, on which the defendant/respondent ought to be allowed to offer its defence. The Court of Appeal was therefore right when it set aside the High Court's judgment and giving leave to the defendant to defend the action having regard to the circumstances of the case. B

The appeal is dismissed. I endorse the orders in the lead judgment. C

MOHAMMED JSC

I agree with my learned brother Ogwuegbu, J.S.C. for the reasons given in the lead judgment, just read, that the lower court is right in reversing the summary judgment delivered by the trial High Court in this action. D

It is quite plain that in paragraphs 5-12 of the affidavit showing cause which the respondent filed before the trial High Court the company averred that the appellant was in breach of the agreement reached by the parties over the delivery of shipping documents and the sale of 14,000 bales of Norwegian stock fish. The affidavit and the proposed statement of defence have raised triable issues on which the respondent ought to be called upon to enter his defence to the action. E F

I see no merit in this appeal and it is dismissed. I assess N1,000.00 costs and award same to the respondent.

ONU JSC

I had the opportunity to read in draft the judgment of my learned brother Ogwuegbu, J.S.C. just delivered. I agree with his reasoning and conclusion that the appeal ought to fail and I accordingly dismiss it. G

I make the same consequential orders inclusive of those as to costs. H