

SUPREME COURT OF NIGERIA

30TH JUNE, 2000. SC. 3/1995

**CORAM:- A. B. WALI, M. E. OGUNDARE, A. I. IGUH, A. I.
KATSINA-ALU, S. O. UWAIFO, JJSC**

COTIA COMMERCIO EXPORTACAO RESPONDENT
E IMPORTACAO S.A.

AND

SANUSI BROTHERS (NIGERIA) LIMITED APPELLANT

ACTIONS - Claim - Debt - Defence - It is not enough for the defendant to show a case of hardship - Nor a mere inability to pay.

ACTIONS - Claim - Specially endorsed writ - Defence - Legal Objection - Where legal objection is raised - The fact and the point of law arising therefrom - Must be clearly and adequately stated

EVIDENCE - Affidavit - Conflict - Where the facts pleaded have been adequately supported by relevant documentary evidence - It does not require the calling of oral evidence - To resolve the conflict in the affidavit evidence

PRACTICE & PROCEDURE - Claim - Order 10 Proceedings - The essence of proceedings under Order 10 - Is to give judgment for admitted claim.

SUMMARY JUDGMENTS - Specially endorsed writ - Defence on the merit - Defendant's affidavit - Must as far as possible deal specifically with the plaintiff's claim - And should also clearly and concisely state what the defence is.

SUMMARY JUDGMENTS - Claim - Specially endorsed writ - Statement of defence - The fact that a defendant has served a statement of defence - Can only be sufficient to allow him to defend the claim - If it is

not a sham defence.

FACTS

In the Lagos Judicial Division of the High Court of Justice, Lagos State the plaintiff/respondent filed a specially endorsed writ claiming against the defendant/appellant the sum of \$560,358.73 (US Dollars) being interest payable on overdue bills in respect of goods sold and delivered by the plaintiff to the defendant. Sometime between 1981 and 1982 the plaintiff sold to the defendant some goods. The goods were shipped to the defendant who received them and enjoyed the benefit thereof but refused to honour the bills as and when due. As a result of the default in the payment of the bills at due dates, interest accrued on the debts which further attracted further interests. Hence the plaintiff sued the defendant claiming as aforesaid. The defendant has by various letters dated the 26th day of July, 1984, 10th day of November, 1984, 29th day of November 1984 and the 26th day of February 1985 respectively, acknowledged that the rate of interest payable are as stipulated in various proforma Invoices issued by the plaintiff and that interest on the sum still owed are still outstanding.

The plaintiff subsequently brought a motion under Order 10 of the Lagos High Court (Civil Procedure) Rules 1972 for summary judgment, supported by copious affidavit evidence and documents. One of the documents, exhibit D, contains details of the debt and when each bill was due to be paid. The defendant filed a counter-affidavit in opposition to the motion for summary judgment. From the pleadings and the affidavits and counter-affidavit with the document exhibited, the transactions and the delivery of goods were not denied by the defendant. Rather in its counter-affidavit, the defendant raised the impossibility of meeting its obligation under the contract, that is paying sums of money to the plaintiff which represented interest payments on over due debts because of regulations issued out by the Central Bank of Nigeria/Federal Ministry of Finance. No identifiable reference to such regulations was provided or annexed to the defendant's counter-affidavit.

In a considered ruling, the learned trial judge granted the applica-

tion for summary judgment. Aggrieved, the defendant appealed to the Court of Appeal, Lagos Division. The appeal was unanimously dismissed. The defendant has further appealed to the Supreme Court raising three issues but the appeal was determined on a sole issue.

ISSUE FOR DETERMINATION

Whether having regard to the Statement of Claim, the Statement of Defence, the affidavit in support and its annexures and the counter affidavit filed, the Defendant/Appellant had, prima facie disclosed a defence to the plaintiff's/respondent's claim on merit to entitle him for an order of unconditional leave to defend. See F. M. G. v. SAN (1990) 4 NWLR (pt. 14) 688.

HELD (Unanimously dismissing the appeal per lead judgment of **WALI JSC**)

Summary judgments - Specially endorsed writ

1. Since it is a specially endorsed Writ, it is for the defendant/appellant to support his counter affidavit with the particulars of the relevant laws, rules and regulations referred to in his Statement of Defence. They would have afforded the trial court an opportunity to consider whether he has raised a prima facie defence on the merit. The defendant's affidavit must condescend upon particulars and as far as possible deal specifically with the plaintiff's claim and affidavit, and should also clearly and concisely state what the defence is. (p. 2408 D)

Claim - Debt

2. A mere denial by the defendant of the plaintiff's indebtedness is not enough: Wellingford v. Mutual Society (1880) 5 APP 704. It is also not enough for the defendant to show a case of hardship, nor a mere inability to pay: Besant v. Townsend 22 L.R. Ir 389. (p. 2408 F)

Defence - Legal objection

3. In all cases the defendant must provide sufficient particulars to show that there is a bona fide defence. Where legal objection is raised, the fact and the point of law arising there from must be clearly and adequately

stated. See Macaulay v. NAL Merchant Bank (1990) 4 NWLR (pt. 44) 283. (p. 2408 G)

Summary judgments - Defence should not be a sham

B 4. The fact that a defendant has served a statement of defence can only be sufficient to allow him defend the claim if it is not a sham defence. See Mclandy v. Slateum (1890) 24 Q.B 504. On the materials placed before him, it is my view that the conclusion arrived at by the learned trial judge earlier referred to, cannot be faulted. (p.2408 H)

Claim - Order 10 proceedings

D 5. *The essence of proceedings under Order 10 is to give judgment for admitted claim. On the facts of this case and having regard to the exhibits tendered the learned trial Judge found that the Appellant received the goods and admitted the claims of the Respondent. The Appellant was unable to show that he had defences on merit to the action. In circumstances such as this, the Court should give judgment to the plaintiff as E was rightly done by the learned trial Judge in this case.*" (p. 2409 C)

Evidence - Affidavit

F 6. All relevant facts pleaded by the plaintiff/respondent have been adequately supported by relevant documentary evidence which does not require calling any oral evidence to resolve any inconsequential conflict in the affidavit evidence. See Kanno v. Kanno (1986) 5 NWLR (part 40) 138. (p. 2409 E)

G **NOTABLE POINTS OF INTEREST**
UWAIFO JSC

1. To condescend upon particulars - What it implies

H To show that he has a good defence to the claim on the merits, the defendant must disclose facts to satisfy the court, usually by affidavit. To achieve this, he is required to condescend upon particulars per Lord Blackburn in Wallingford v. Mutual Society (1880) 5 App. Cas. 685 at p. 704 and the defence must not be seen as "frivolous and practically moonshine" to use

the expression of Lord Lindley in Codd v. Delap (1905) 92 L.T. 810. To condescend upon particulars implies a true and real disclosure of facts from which the court can readily discern a good defence. (p. 2414 F)

2. Defence on the merit - What it entails

B

Again, the further alternative defence in para. 13 that "the defendant denies that the sums stated as being interest due on the said invoices are correct and the plaintiff is put to strict proof of all the sums claimed" cannot avail the appellant. The law is that such mere general denial of indebtedness will not suffice. The affidavit should state why the defendant is not indebted in full or in part, and then state the true position. In the present case the appellant's own calculation of the interest due should have been meticulously made: see Re General Rail Syndicate (1900) 1 Ch. 365 per Lindley M.R. at p. 369; see also Wallingford v. Mutual Society (supra) D per Lord Blackburn at p. 704. (p. 2415 B)

REPRESENTATION

B. O. Ogundipe Esq. for the defendant/appellant

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I. D. Azeke Esq. for the plaintiff/respondent

CASES REFERRED TO

F. M. G. v. SAN (1990) 4 NWLR (pt. 14) 688

F

Wellingford v. Mutual Society (1880) 5 APP 704

Besant v. Townsend 22 L.R. Ir 389

Macaulay v. NAL Merchant Bank (1990) 4 NWLR (pt. 44) 283

Mclandy v. Slateum (1890) 24 Q.B 504

Kanno v. Kanno (1986) 5 NWLR (part 40) 138

G

Codd v. Delap (1905) 92 L.T. 810

RULES REFERRED TO

High Court of Lagos (Civil Procedure) Rules, 1972; Ord. 10 rule 1.

H

LEAD JUDGMENT BY WALI JSC

The respondent as plaintiff filed in the High Court of Justice, in the Lagos Judicial Division a specially indorsed Writ wherein he claimed as follows:-

B *"The Plaintiff's claim as indorsed on the Writ reads as follows -*
 The Plaintiff's claim against the Defendant is for Five hundred
 and sixty thousand three hundred and fifty-eight dollars and seventy-
 three cents (\$560, 358.73) (United States Dollars), being the currency of
C *account and payment, or its current equivalent in Naira under the Sec-*
 ond Tier Foreign Exchange Market, for interest payable on overdue bills
 in respect of goods sold and delivered by the plaintiff to the Defendant at
 the request of the Defendant, made up as follows:-

 (i) *The sum of three hundred and seventy-nine thousand four*
D *hundred and seventy-five dollars and seventy-three cents (\$379,475.73)*
 United States Dollars) being the overdue interest; and

 (ii) *The sum of One hundred and eighty thousand eight hundred*
 and eighty- three dollars and forty-two cents (\$180,883.42) (United States
E *Dollars), being interest payable on the above sum of money from the*
 26th day of February, 1985 till the 26th day of April, 1987 or until the
 date of judgment.

Particulars of claim are as contained in the Annexure attached
F *hereto and the interest thereon as stated in Clause (ii)."*

 After service of the Writ and its annexures, the defendant filed his
Statement of Defence and an application on notice dated 9th July, 1987 in
which he was asking for the plaintiff to give security for costs; it being a
foreign Corporation carrying on business in Brazil with no tangible assets
G within the jurisdiction of the High Court of Lagos State. The application
 was fixed for hearing on 14/9/87.

 The plaintiff on his part by an application dated 21/8/87, filed on
31/8/87 and fixed for hearing on 12/10/87 (sought) for leave and Order of
H the Court to enter judgment against the defendant as per the Writ of Sum-
 mons and Statement of Claim.

 The record did not show whether the application for security for
costs was moved or abandoned. But by a considered Ruling of the trial

court delivered by Ayorinde J, (as he then was), the application for leave to sign judgment against the defendant was granted on 9/6/88 as prayed. In the Ruling the learned Judge concluded as follows -

"In respect of Order 10, leave of Court is required to allow the Defendant to defend. But leave will only be granted upon the defendant satisfying the court that he has a good defence to the action on the merit or upon the Defendant disclosing such facts as may be deemed sufficient to entitle the Defendant to defend generally. Such facts are required to be given on oath or affidavit. But an issue of law constituting a good defence need not be given by affidavit.

The Defendants have failed to disclose such fact upon affidavit which are sufficient to entitle them to defend generally. The agreement showed that the Defendant had to pay 11% interest in respect of the 1st 180 days on overdue debts and thereafter 22% for 360 days. These are well calculated and computed. There are no facts challenging these averments.

The plaintiff does not prove such fact beyond reasonable. In this country sections 134 - 136 of the Evidence Act govern the burden of proof. There is no defence on the merit and there is insufficiency of fact to enable them defend generally. There is nothing. The Defendant raised the Defence of Frustration and Illegality. The first part is based on an imagination that the Nigerian Government made a Regulation prohibiting payment of interest over and above 180 days. The court takes judicial Notice of all Laws and Regulation. The burden or onus of bringing such Regulation to the Notice of the Court as a special Defence is on the Defendant. They have failed in this respect. I hold that such Regulation did not exist in light of Exhibit C where the Defendant obtained permission in Form 17. There is no frustration. This is tied up with illegality. There is no evidence or fact of any illegal deal. The plaintiff dealt with the Defendant through an authorized agent i.e U.B.A. Ltd. It was not illegal to pay interest on over due account. There is no defence on the merit and mere filing of a sham defence can not stop the court from giving judgment. On the question of Rate of Exchange, Miliangos case settles the issue that it should be from the date of the writ of summons or

the date the order of judgment is made. In this case, I hold it should be from date claimed by the plaintiff in the statement of claim i.e. date of the writ of summons.

Finally, there will be final judgment for the plaintiff as per the Statement of Claim with costs."

Aggrieved by the trial court's decision, the defendant filed an appeal in the Court of Appeal, Lagos Division. The Court of Appeal after hearing the parties on their respective briefs and orally, unanimously dismissed the appeal. In the lead judgment of the court delivered by Babalakin JCA [as he then was and with which Ogundere and Awogu JJCA agreed], the learned Justice opined and concluded -

"As a matter of fact, what happens in this case cannot strictly be described as trial under Order 10 proceedings in that both counsel argued the defences put forward by the Appellant and the learned trial Judge after a careful consideration of counsel's submissions made a finding of fact that they were sham defences. A finding with which I agree. And when one remembers that under Order 10 proceedings only defences on merit are allowed, it is not difficult to agree with the learned trial Judge's conclusions which are ably supported by the above quoted decisions of the Supreme Court in the case of Macaulay v. NAL Merchant Bank Limited (supra). The defence put forward by the Appellant are not tenable defences under trial under Order 10 proceedings.

For the above reasons, this appeal is dismissed.

The Ruling of Ayorinde J. (as he then was) delivered on 9th June, 1988 giving judgment o the Respondent is hereby affirmed."

The defendant has further appealed to this Court.

In his application for a summary judgment under Order 10 rule 1(a) of the High Court of Lagos [Civil Procedure] Rules, 1972, the plaintiff filed along with it, an affidavit in support sworn to by one Armando Mange, Managing Director of Cotia Nigeria Ltd; which was described as a sister company to the plaintiff. The deponent deposed to the following facts -

"2. That I have the authority of the Plaintiff Company to depose to this affidavit.

3. *That sometime, between 1981 and 1982 the plaintiff sold to the Defendant some goods and for this purpose issued Commercial Invoices Nos. EXP. 537/81, EXP.538/81, EXP. 539/81, EXP. 540/81, EXP. 541/81, EXP. 561/81, EXP. 562/81 and EXP. 098/82.*

4. *The Documents shown to me and marked Exhibits A1-A8, are the photostat copies of the said Commercial Invoices.*

5. *The goods were shipped to the Defendant who received them and enjoyed the benefit thereof but refused to honour the said bills as and at when due.*

6. *That shown to me and marked Exhibits B1-B6, are photostat copies of the clean report of findings issued by Societe Generale de Survilance (S.G.S. BRAZIL).*

7. *As a result of the default in the payment of the said bills at due dates, interest accrued on the said debts which further attracted further interests.*

8. *That shown to me and marked Exhibits C1-C8, are the photostat copies of the debit advices, showing dates of payments of the said bills.*

9. *That the total amount of interest that accrued as a result of the default in paying at due dates was the sum of three hundred and seventy-nine thousand four hundred and seventy-five dollars and seventy-three cents (\$379,475.73) (United States Dollars).*

10. *That shown to me and marked Exhibit "D", is the summary of or details of the said debt.*

11. *That the above debt further attracted an interest of Twenty-two per centum (22%) per annum from the 26th day of February, 1985 when payment on the principal sum for goods sold were liquidated, till the 17th day of April, 1987 which is a period of Twenty-six (26) months.*

12. *That the total indebtedness of the Defendant to the Plaintiff is the sum of Five hundred and sixty thousand three hundred and fifty-eight: dollars seventy-three cents (\$560,358.73) as stated in paragraphs 9 and 11 of this affidavit as well as the Writ of Summons and the Statement of Claim.*

13. *The Currency of account and payment is the United States*

Dollars, as shown in Exhibits A1-A8 and C1-C8.

B *14. The Defendant has by various letters dated the 26th day of July, 1984, 10th day of November, 1984, 29th day of November, 1984 and the 26th day of February, 1985 respectively acknowledged that the rate of interest payable are as stipulated in various Proforma Invoices, that is to say, Exhibits A1 - A8 attached to the original affidavit dated the 17th day of July, 1987.*

15. The Defendant also by the letters referred to above, acknowledged that interest on the sum owed are still outstanding.

C *16. The documents shown to me and marked Exhibits E1, E2, E3 and E4 are the letters referred to above.*

17. The said interests have not yet been paid.

18. The transactions were carried out in strict compliance with D the Nigerian Exchange Control Laws.

19. That shown to me and marked Exhibit "G", is a letter dated the 23rd day of February, 1985 forwarding the application to purchase foreign currency form "M" to the authorized dealer, the United Bank for E Africa Limited.

20. That I was informed by the Plaintiff's Counsel, M. F. Alakija Esq., and I verily believe him that the Defendant, having failed to honour its obligation as and at when due in accordance with stipulations contained in Exhibits A1-A8 and B1-B6 as well as the acknowledgment contained in Exhibits E1-E4, the Defendant has no defence to this claim."

The defendant filed a counter affidavit sworn to by Abdul Sanusi, the Executive Vice - Chairman of the defendant in which he deposed as follows:-

G *"3. For the reasons hereinafter set out the Defendant denies that it is liable to pay the Plaintiff the sums claimed in the Writ of Summons and Statement of Claim.*

4. The Defendant was prevented, in 1984, from paying sums of H money to the plaintiff which represented interest payments on overdue payments as a result of Central Bank of Nigeria/Federal Ministry of Finance regulations.

5. The Defendant is advised by its Solicitors and verily believes

that this Governmental intervention rendered the Defendant's obligation to pay the said interest impossible of performance and thereby discharged the Defendant therefrom.

6. *After the issue of the Writ in this action and before the issue of the Summons herein, the Defendant's Solicitors served on the Plaintiff's Solicitors a Statement of Defence setting out the grounds upon which the Defendant relies for its defence to this action. I crave the leave of this Honourable Court to refer to the said Statement of Defence which forms part of the Record of this Court in this action.*

7. *Having regard to the matters aforesaid, I verily believe that the Defendant has a good defence on the merits to the Plaintiff's claim, and I accordingly ask that the Defendant may be given unconditional leave to defend herein."*

From the counter-affidavit the defendant raised in paragraphs 4 and 5, the impossibility of meeting his obligation under the contract to wit: paying sums of money to the plaintiff which represented interest payments on overdue payment because of regulations issued out by the Central Bank of Nigeria/Federal Ministry of Finance. As deposed in the Counter-Affidavit this type of defence was raised in paragraphs 5, 6 and 7 of the Statement of Defence (supra).

In addition, the Defendant also raised alternative defence of waiver in paragraph 9 as follows:-

"9. *In the alternative to the foregoing, the Defendant avers that it offered, by letter dated 10th November, 1984, to pay to the Plaintiff's agent in Nigeria - Cotia (Nigeria) Limited - the equivalent in local currency of the outstanding interest at the said date. The said sum was N117,377.85.*

The offer referred to at paragraph 9 hereof, which was made as a gesture of goodwill to the Plaintiff, was never accepted by the Plaintiff."

Both parties, in compliance with Rules of this court filed and exchanged briefs of argument. In the defendant/appellant's brief three issues were formulated as follows-

(i) *Whether the Appellant had, by the Statement of Defence and*

affidavit showing cause, disclosed facts which, if established at trial, would have afforded the Defendant an absolute defence to the claims of the Respondent;

(ii) *Whether the Court of Appeal was in error in failing to consider the facts put forward by the Appellant for the purpose of determining whether those facts could constitute valid defences to the Respondent's claims: and*

(iii) *Whether the Court of Appeal was in error in treating the application for summary judgment as an occasion to determine the truth or otherwise of dispute issues of fact."*

The Plaintiff/Respondent raised the following seven issues in his brief -

"1. *Whether mere filing of a Statement of Defence that is nothing but a sham defence will entitle the Defendant to an Order granting leave to defend.*

2. *Whether mere filing of a Statement of Defence will prevent the plaintiff from making an application for summary Judgment under Order 10 of the Lagos High Court Civil Procedure Rules.*

3. *Whether the plaintiff has by its Statement of Claim together with the affidavit in support of its Motion satisfied the Court on all the requirements of Order 10 of the Lagos High Court Civil Procedure rules.*

4. *Whether from the facts ad materials before the Court, contained in the Statement of Claim and the Affidavit in support of the Motion for Summary Judgment, the Statement of Defence and the Counter Affidavit opposing the Motion for Judgement together with submissions of Counsel during the argument of the motion, the Defendant has given a satisfactory answer to the Plaintiff's claim, or has only made an attempt "to dribble and frustrate the Plaintiff and cheat him out of the judgment he is legitimately entitled to by delay tactics aimed, not at offering any real defence to the action but at gaining time within which he may continue to postpone meeting his obligation and indebtedness"; and/or*

5. *Whether there was any material evidence before the Lower Court that needed to be examined and which would have tilted the scale of justice in favour of the Appellant.*

6. *What is the proper order to be made by the Court on an application for Judgment under Order 10 of the Lagos State High Court Civil Procedure Rules when it finds that the Defence put up by Defendant is nothing but a Sham Defence?*

7. *Alternatively, whether the Plaintiff has not satisfactorily countered or answered ALL the said defences put up by the Defendant namely; Illegality; Frustration; and the Equitable Defence."*

In the Reply brief by the Defendant/Appellant objection was raised to issues 1, 2, 6 and 7 in the Plaintiff's/Respondent's brief as not arising out of the grounds of appeal and asked that they be struck out.

In my view issues 1, 2 and 6 of the Plaintiff/Respondent's brief speak of one and same thing, which is what will be the court's approach to a Statement of Defence described as a sham Defence when the procedure under Order 10 rule 1 (a) is put in motion? The issues are mere repetition and come under the umbrella of ground 1 (b) of the Ground of Appeal. Issue 7 objected to is also covered by Ground 1 (a) of the said ground. The objection is misconceived and accordingly over-ruled.

But this notwithstanding, and having regard to the solitary, ground of appeal filed in this appeal the real issue in controversy is whether having regard to the Statement of Claim, the Statement of Defence, the affidavit in support and its annexures and the counter affidavit filed, the Defendant/Appellant had, prima facie disclosed a defence to the plaintiff's/respondent's claim on merit to entitle him for an order of unconditional leave to defend. See F. M. G. v. SAN (1990) 4 NWLR (pt. 14) 688.

I shall first deal with the Statement of Defence. Apart from the general denial of the plaintiff's claim, the defendant/appellant did not specifically deny the plaintiff's claim. Rather, he raised in paragraphs 5 - 7 of the Statement of Defence the question of prohibition of payment to the plaintiff as a non-resident person under the Exchange Control Act, 1962 without the permission of Ministry of Finance or Central Bank of Nigeria, the arrears of interest claimed. In the affidavit sworn to by Abdul Sanusi, which infact and substance is a counter-affidavit to the affidavit sworn to

by Armando Edward Mange in support of plaintiff/respondent's application for summary judgment under Order 10 Rule 1 (a) of the Lagos High Court [Civil Procedure] Rules, 1972, the defendant/appellant repeated the same defence of his inability to settle the plaintiff's Claim due to the
 B Central Bank of Nigeria/or Federal Ministry of Finance regulation. No identifiable reference of such regulations was provided or annexed to the defendant/appellant's affidavit. Even paragraphs 5 - 7 of the Statement of Defence did not state that the defendant was going to produce and rely
 C on such regulations at the trial.

From the pleadings and the affidavits and counter-affidavit with the documents exhibited with them, the transactions and the delivery of goods were not denied by the defendant/appellant. What he was disputing is the extra payment of 22% current commercial bank interest on the amount
 D due for the periods covered by the delay in making the payment of said amount claimed at the time when each became due. See Exhibit D attached to the plaintiff/respondent's Statement of Claim. **Since it is a specially endorsed Writ, it is for the defendant/appellant to support his**
 E **counter affidavit with the particulars of the relevant laws, rules and regulations referred to in his Statement of Defence. They would have afforded the trial court an opportunity to consider whether he has raised a prima facie defence on the merit. The defendant's affidavit**
 F **must condescend upon particulars and as far as possible deal specifically with the plaintiff's claim and affidavit, and should also clearly and concisely state what the defence is. A mere denial by the defendant of the plaintiff's indebtedness is not enough: Wellingford v. Mutual Society (1880) 5 APP 704. It is also not enough for the defendant to show a case of hardship, nor a mere inability to pay: Besant v. Townsend 22 L.R. Ir 389. In all cases the defendant must provide sufficient particulars to show that there is a bona fide defence. Where legal objection is raised, the fact and the point of law arising there**
 G **from must be clearly and adequately stated. See Macaulay v. NAL Merchant Bank (1990) 4 NWLR (pt. 44) 283. The fact that a defendant has served a statement of defence can only be sufficient to allow him defend the claim if it is not a sham defence. See Mclandy v.**
 H

Slateum (1890) 24 Q.B 504.

On the materials placed before him, it is my view that the conclusion arrived at by the learned trial judge earlier referred to, cannot be faulted.

Similarly the Court of Appeal rightly concluded after considering the defendant/appellant's Statement of Defence and the counter affidavit when it opined thus -

"The learned trial Judge (as he then was) has been fair in his approach to issues raised in the Statement of Defence. Both counsel addressed him extensively on the defences raised by the Appellant in their proposed Statement of Defence which he discovered to be a sham defence." C

The essence of proceedings under Order 10 is to give judgment for admitted claim. On the facts of this case and having regard to the exhibits tendered the learned trial Judge found that the Appellant received the goods and admitted the claims of the Respondent. The Appellant was unable to show that he had defences on merit to the action. In circumstances such as this, the Court should give judgment to the plaintiff as was rightly done by the learned trial Judge in this case." D E

All relevant facts pleaded by the plaintiff/respondent have been adequately supported by relevant documentary evidence which does not require calling any oral evidence to resolve any inconsequential conflict in the affidavit evidence. See Kanno v. Kanno (1986) 5 NWLR (part 40) 138. The Court of Appeal is therefore right in its conclusion that - F

"And when one remembers that under Order 10 proceedings only defences on merit are allowed, it is not difficult to agree with the learned trial Judge's conclusions which are ably supported by the above quoted decisions of the Supreme Court in the case of Macaulay v. NAL Merchant Bank Limited (supra). The defence put forward by the Appellant are not tenable defences under trial under Order 10 proceedings." G H

For the above reasons, this appeal is dismissed."

The decisions involve concurrent findings of fact with which I find no valid reason to interfere. The appeal is therefore dismissed. The

judgment of the Court of Appeal confirming the Ruling of the trial court is hereby affirmed. I award N10,000.00 costs to the plaintiff/respondent against the Defendant/Appellant

B

OGUNDARE JSC

I agree entirely with the judgment of my learned brother Wali JSC just delivered. For the reasons given by him, which reasons I hereby adopt as mine, I, too, dismiss this appeal as totally lacking in merit. I affirm the judgment of the Court below and abide by the order for costs made by my learned brother Wali, JSC.

D

IGUH JSC

I have had the privilege of reading in draft the judgment just delivered by my learned brother, Wali, J.S.C. and I agree entirely that this appeal is without substance and should be dismissed.

E

The court below in dismissing the appeal of the plaintiff from the decision of the learned trial Judge who entered judgment against the defendant as claimed observed thus -

"The learned trial Judge (as he then was) has been fair in his approach to issues raised in the Statement of Defence. Both counsel addressed him extensively on the defences raised by the appellant in their proposed Statement of Defence which he discovered to be a sham defence."

G

The essence of proceedings under order 10 is to give judgment for admitted claims. On the facts of this case and having regard to the exhibits tendered the learned trial Judge found that the Appellant received the goods and admitted the claims of the Respondent. The Appellant was unable to show that he had defences on merit to the action. In circumstances such as this, the court should give judgment to the plaintiff as was rightly done by the learned trial Judge in this case."

H

I am in complete agreement with the above observations of the Court of Appeal and fully endorse the same.

This appeal is devoid of merit and it is hereby dismissed with costs as assessed in the leading judgment.

KATSINA-ALU JSC

I have had the advantage of reading in draft the judgment of my learned brother Wali, JSC in this appeal. I am in complete agreement with his reasoning and conclusion. The appeal is totally devoid of any merits. I also dismiss it with N10,000.00 costs to the Respondent.

UWAIFO JSC

I am in agreement with the reasoning and conclusions of my learned brother Wali JSC in his judgment which I had the opportunity to read in advance. I intend to add a few words of my own in support of the conclusions reached. The appellant was no doubt indebted to the respondent in the form of accrued interest in respect of import transactions between them and in its statement of defence, paras. 5,6,7 and 8, made the following averments:

"5. The Defendant avers that at all material times, its ability to pay the plaintiff (which is a non-resident person under the Exchange Control Act 1962) was subject to the approvals and permissions obtainable from the Federal Ministry of Finance and/or the Central Bank of Nigeria under the Exchange Control Act.

6. The Defendant avers further that delay in remitting sums due to the plaintiff was caused entirely as a result of governmental and/or Central Bank of Nigeria operations regulations and directives and not as a result of any wilful default on the part of the Defendant.

7. The Defendant avers that at the material times, it was a definite policy of the Federal Ministry of Finance and/or the Central Bank of Nigeria not to permit the remittance of any sums due to foreign suppliers of goods to Nigeria which represented interest payments for a period in excess of 180 days. Consequently, the Defendant was prevented by Federal Ministry of Finance and/or Central Bank of Nigeria regulations from

remitting any sums to the plaintiff as representative of interest beyond 180 days. (sic)

8. *By reason of the premises, payment of interest beyond 180 days became impossible and the Defendant is discharged from payment of such interest."*

It had been averred in the relevant paras.3 and 5 of the Statement of Claim that between 1981 and 1982, the goods, upon which the indebtedness was incurred, were sold to the appellant, that it received them, enjoyed the benefits thereof but refused to honour the bills in respect of them as and when due. The appellant admitted it received the goods within the period 1981 and 1982. Therefore, when it pleaded in paras.5 and 7 as above, the question naturally would be what exactly it meant by at all material times." If the bills were to be settled immediately but were not, interest would become due from an agreed date on each bill. It was because this happened and the appellant was unable to meet all its obligations to pay the interest due that the respondent sued on 15 May, 1987 to recover the sum of \$560,358.73 being both interest amounting to \$379,475.73 that had accrued and also the interest payable on that amount.

The respondent subsequently brought a motion under Order 10 of the Lagos High Court (Civil Procedure) Rules, 1972 for summary judgment, supported by copious affidavit evidence and documents. One of the documents, exhibit D, contains details of the debt and when each bill was due to be paid. They were eight bills on the whole: two were due on 28/5/82, three on 20/6/82, two on 24/6/82 and one on 22/9/82. The appellant filed an affidavit in opposition to the motion for summary judgment. It only managed to say on the failure to settle the interest on the overdue payment as follows:

"4. *The defendant was prevented, in 1984, from paying sums of money to the plaintiff which represented interest payments on overdue payments as a result of Central Bank of Nigeria/Federal Ministry of Finance regulations.*

5. *The defendant is advised by its solicitors and verily believes that his Governmental intervention rendered the defendant's obligation to pay the said interest impossible of performance and thereby discharged*

the defendant therefrom."

It is not quite clear from para.4 whether the alleged regulations of the Central Bank of Nigeria/Federal Ministry of Finance were issued in 1984 or that when the appellant wanted in 1984 to pay the amount due it was prevented from doing so having been confronted with the existence B of the regulations and their terms drawn to its attention. It is also not disclosed what month in 1984 this took place. But on 26 July, 1984, the appellant wrote to the respondent's solicitors as follows inter alia:

"We enclose herewith photocopies of our bankers debit advices C dated 25th July, 1984 debiting our account for the full value of the collections and interest added in the proformas and draft.

Please note that at the time of negotiating the contract, your client had included in the respective proforma invoices and draft the D allowable interest."

Then on 10 December, 1984, the appellant wrote to the respondent adumbrating the payments already made on the various invoices and bills together with interest for deferred payment for 31 months (i.e. some 930 days) as at 25 July, 1984 and promising to pay the balance of interest E promptly. In another letter dated 29 November, 1984 it disputed the interest calculated in the letter from the respondent dated the previous day 28 November, 1984 but ended it with: "However we will commence payment of the interest rate agreed with your company as promised in our letter F dated 10th November, 1984."

Finally, in a letter dated 26 February, 1985 from the appellant to the respondent, it reacted to the overdue interest on the various bills drawn on it as follows:

"We were shocked to receive your letter reference CNL/MD/84/ G 068 dated 6th December, 1984 relating to the above. Repeatedly we calculated the over due interest in accordance to the proforma invoice and drafts executed with your company and under any circumstances we are not liable to the rate used in your own calculations." H

The letter then went on to say,

"Please note that the question of settling the over due interest on our previous business relationship with your company has nothing what-

soever to do with the Federal Government Trade Agreement with Brazilian Government."

It should be noted that these letters were among the various documents exhibited by the respondent in the affidavit in support of its motion for summary judgment.

In none of these letters or any other letter was any indication given that the appellant was prevented by any regulations to settle the interest which had been due well beyond 180 days. Indeed, part of such interest had earlier been settled by it. In its affidavit in opposition to the said motion, those letters were not disowned or even explained. How then one may ask, could the appellant have been making promises even in 1985 to pay the outstanding interest in the currency agreed and demanded if indeed it has become aware in 1984 that it was prevented from doing so by certain Government regulations? It would appear to me that the matter of regulations was an afterthought and was raised in a sham defence to the summary judgment proceeding.

The law is clear that if a defendant decides to go on stage to contest an application for summary judgment, he cannot rely on a sham defence: see Nischizawa Ltd v. Jethwani (1984) 12 S.C. 234; McLardy v. Slateum (1890) 24 Q.B.D. 504. A defendant must show a bona fide or good defence on the merits under the summary judgment procedure and not engage in manipulative and delaying tactics: Macauley v. Nal Merchant Bank Ltd. (1990) 4 NWLR (pt. 44) 283. To show that he has a good defence to the claim on the merits, the defendant must disclose facts to satisfy the court, usually by affidavit. To achieve this, he is required to condescend upon particulars per Lord Blackburn in Wallingford v. Mutual Society (1880) 5 App. Cas. 685 at p. 704 and the defence must not be seen as "frivolous and practically moonshine" to use the expression of Lord Lindley in Codd v. Delap (1905) 92 L.T. 810. To condescend upon particulars implies a true and real disclosure of facts from which the court can readily discern a good defence.

The alternative defence raised in para.9 of the statement of defence to the end that the appellant "offered, by letter dated 10th November, 1984, to pay to the plaintiff's agent in Nigeria - Cotia (Nigeria) Limited -

the equivalent in local currency of the outstanding interest at the said date. The said sum was N117,377.85", does not arise going by the trend of the correspondence which passed between the parties as disclosed by the respondent in its affidavit.

Again, the further alternative defence in para. 13 that "the defendant denies that the sums stated as being interest due on the said invoices are correct and the plaintiff is put to strict proof of all the sums claimed" cannot avail the appellant. The law is that such mere general denial of indebtedness will not suffice. The affidavit should state why the defendant is not indebted in full or in part, and then state the true position. In the present case the appellant's own calculation of the interest due should have been meticulously made: see Re General Rail Syndicate (1900) 1 Ch. 365 per Lindley M.R. at p. 369; see also Wallingford v. Mutual Society (supra) per Lord Blackburn at p. 704.

In view of what the defendant is required to do in such a proceeding as discussed above, I feel compelled to say, with due respect to learned counsel for the appellant, that the defences as revealed upon the facts available are flimsy and frivolous. Upon these facts and in the manner the affidavit in opposition was oblivious to them owing to its lack of condensation upon particulars, it would have been an intolerable indulgence to have granted leave to the appellant to defend the suit. It is for the reasons I have given and for the fuller reasons by my learned brother Wali JSC that I find no merit in this appeal. I, too, would dismiss it with N10,000.00 costs.

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