

COURT OF APPEAL, ENUGU DIVISION
13TH. JANUARY, 2000. CA/E/9/97
CORAM:- E. C. UBAEZONU, S. A. OLAGUNJU, J. A. FABIYI, JJCA

CO-OPERATIVE AND COMMERCE

BANK (NIGERIA) PLC

..... APPELLANT

AND

SAMED INVESTMENT COMPANY LTD.

..... RESPONDENT

JUDGMENTS - *Undefended list - Audi alteram partem principle - Should make Courts give a hearing - To a litigant who wants to be heard.*

JUDGMENTS - *Undefended suit O. 24 r. 9 (4) - Where bonafide issue for trial is not raised - The Rules did not say that judgment shall be entered for plaintiff - Plaintiff shall still give evidence.*

PRACTICE & PROCEDURE - *Undefended list proceeding - Triable issue - Is raised where defendant's affidavit - Throws a doubt on the plaintiff's claim.*

PRACTICE & PROCEDURE - *Undefended list proceeding - Conflict-ing affidavits of the parties - Court requires further evidence to deter-mine which contention is true or false.*

PRACTICE & PROCEDURE - *Undefended suit - Notice of intention to defend - Raised a bonafide issue - And the case should be entered in the general list.*

FACTS

This appeal is against the ruling and judgment of the High Court of Enugu State under an undefended suit proceeding. The plaintiff/respon-dent applied for a national loan which was to be guaranteed by the defen-dant/appellant. The respondent was to mortgage a landed property to

the appellants. Again, 30% of the loan was deposited with the appellant under terms which seem not to be clear from the facts of this case. The respondent sought to withdraw the deposit. Appellant's failure to return the amount made the respondent file an action under the undefended cause list.

The appellant filed a Notice of intention to defend under O. 24 r. 9 (2) of the High Court Rules of Anambra State 1988, applicable in Enugu State. The trial court in a ruling dismissed the Notice of intention to defend and gave judgment for the respondent on the same day. Being dissatisfied, the appellant has now appealed to the Court of Appeal.

ISSUE FOR DETERMINATION

"(i) Whether the appellant raised a triable issue in its affidavit in support of its Notice of Intention to Defend entitling it to be let in to defend the suit pursuant to Order 24 Rule 9 (2) of the High Court Rules of Anambra State 1988 applicable to the said suit.

HELD (Unanimously allowing the appeal per lead judgment of **UBA-EZONUJCA**)

Undefended suit O. 24 - Where bonafide issue for trial is not raised

1. The above quoted rule does not say that where the court is not satisfied that a bona fide issue for trial has been raised, the court shall enter judgment for the plaintiff. It says that when such a situation arises then and in such a case, the suit shall be heard as an undefended suit and judgment given thereon without requiring the plaintiff to summon witnesses to prove his case formally. It is my respectful view that if the intendment of the rule is that as soon as the court is not satisfied that a triable issue has been raised between the parties, the court should enter judgment for the plaintiff based on the affidavit filed in support of the case, the rule would have said so. The rule merely relieves the plaintiff of the burden of summoning witnesses before the court to prove his case formally. It does not relieve the plaintiff of the burden of giving evidence and to be subjected to cross-examination. (p. 126 A)

Undefended list proceeding - Triable issue

2. What is a triable issue in the context of an undefended list proceeding? In my respectful view, a defendant's affidavit is such that the plaintiff will be required to explain certain matters with regard to his claim or where the affidavit throws a doubt on the plaintiff's claim. (p. 127 D)

Undefended list proceeding - Conflicting affidavits of the parties

3. It is clear from the several paragraphs of the affidavits of both parties which are in direct conflict with one another that while the appellant contends that the N765,000.00 deposit is an "additional cash security" the respondent insists that it is a "temporary cash collateral". What I understand both expressions to mean in so far as this case is concerned is that the former is in addition to the mortgage security while the latter is a temporary cash deposit to be withdrawn on 7 days notice on the completion of the loan transaction. It may be one or the other. The contention of one may be true while the contention of the other may be false. Does the court not require further evidence oral or otherwise to determine which contention is true and which is false? I think it does. It must be appreciated that the case is not yet being heard at the stage the court is considering whether a triable issue is made out or not. (p. 129 G)

Undefended suit - Notice of intention to defend

4. However, as far as this appeal is concerned it is my respectful view that there are enough materials raised in the appellant's affidavit for which some explanation shall be required from the respondent's case. When such a situation arises from the defendant's affidavit in support of his Notice of Intention to Defend, then a bona fide issue has arisen between the parties and the case ought to be entered in the general list. (p. 130 E)

Undefended list - Audi alteram partem principle

5. Judges should not be in a hurry to enter judgments for the plaintiff in a case placed on the undefended list. They may however do so in clear cases. The principle of audi alteram partem is a fundamental principle of adjudication of this country, and in Section 36 of the 1999 Constitution.

Our courts should bend back-wards to accommodate a litigant who wants to be heard, and should give him a hearing. To shut him out in the circumstances of this case or one like it is not fair. It is not right. It is not justice. He may eventually fail and lose the case as often happens but let him be heard. If he is heard and he loses, he goes home satisfied that he has been heard and that justice has been done which is what the court is for. (p. 130 G)

NOTABLE POINT OF INTEREST
OLAGUNJU JCA

1. Indiscriminate resort to undefended list procedure may be counter productive

The rash of cases on the undefended list coming on appeal to this court lately is indicative of a new vogue of indiscriminate resort to that procedure by a section of the legal practitioners in instances where it is obvious that summary procedure is inappropriate. Slowness in the conduct of cases under the regular procedure may partly account for the attraction to a procedure that is seen to be time-saving. But the craze may not offer any real advantage to the litigants; on the contrary, it may be counterproductive. (p. 135 A)

REPRESENTATION

Chief O. Ugolo for the appellant

Chief O. Nzewi for the respondent

CASES REFERRED TO

- Jipreze v Okonkwo (1987) 3 NWLR (Pt. 62) 737 at 744
U. T. C v Pamotei (1989) 2 NWLR (Pt. 103) 244 at 299
Agueze v Pan African Bank Limited (1992) 4 NWLR (Pt. 233) 76 at 87
Ekuma v Silver Eagle Shipping Agencies Limited (1987) 4 NWLR (Pt. 65), 472 at 484
Agwuneme v Eze (1990) 3 NWLR (Pt.137) 242, 254
Federal Administrator - General v Daniel (1958) SCNLR 472
Abiola Federal Republic of Nigeria (1995) 3 NWLR (Pt 382) 203 at 226

Commissioner of land v Edo-Osagie (1973) 6 SC 155

U.B.A Ltd v Majeed Taan & Anor (1993) 4 NWLR (Pt. 287) 368 at 379

U. T. C Nigeria Ltd v Pamotei (1989) 2 NWLR (Pt. 103) 244

STATUTES & RULES REFERRED TO

High Court Rules of Anambra State 1988 O. 24 r. 9

Constitution of Nigeria 1979 ss. 33, 36

LEAD JUDGMENT BY UBAEZONU JCA

This is an appeal from the ruling and judgment of the High Court of Enugu State in Enugu Judicial Division delivered on 30th November, 1994 by Edozie, J. The case was a suit filed in the undefended list. On the said 30th November, 1994, the learned trial Judge delivered both a ruling and a judgment in the said suit. This appeal is against the said ruling and judgment.

The plaintiff/respondent is a limited liability company which applied for loan from the National Economic Reconstruction Fund (hereinafter referred to in this judgment as "Nerfund" for short). The said loan was to be guaranteed by the defendant/appellant. The amount of the loan was N2,550,000 (two million and five hundred and fifty thousand naira). The respondent was to mortgage a landed property to the appellant to secure the loan. Again, 30% of the loan amounting to N765,000 (seven hundred and sixty-five thousand naira) was deposited with the appellant under terms which do not seem to be clear from the facts of this case. The terms do not seem to be clear in the sense that the appellant called the deposit one thing while the respondent called it another thing. It is the fog which beclouds the nature of this deposit that has given rise to this case in the lower court. The respondent sought to withdraw the deposit. The appellant was not forthcoming. Consequently, the respondent sued to recover the deposit under the undefended list cause. The appellant in opposition to the suit filed a Notice of Intention to Defend under Order 24 Rule 9 (2) of the High Court Rules of Anambra State 1988 applicable in Enugu State. The learned trial Judge heard argument from counsel on both sides and in a ruling dismissed the Notice of Inten-

tion to defend. Thereupon she gave judgment for the respondent on the same day. From the said ruling and judgment the appellant has appealed to this court. The appellant has also filed a brief of argument wherein its counsel formulated three issues for determination thus:

B *"(i) Whether the appellant raised a triable issue in its affidavit in support of its Notice of Intention to Defend entitling it to be let in to defend the suit pursuant to Order 24 Rule 9 (2) of the High Court Rules of Anambra State 1988 applicable to the said suit.*

C *(ii) Whether the learned trial Judge was right in law when she found as follows:*

D *"To guarantee the loan, the plaintiff mortgaged its properties at kilometre 4, Onitsha-Owerri Road, Onitsha to the defendants ... This is the condition for guaranteeing the loan. But because of the long delays which usually occur in perfecting mortgages the defendants acting cautiously requested plaintiff to place cash deposit of 30% of the loan as interim security pending the completion of the said mortgage."*

E *(iii) Whether the learned trial Judge was right in law when she wrote a ruling dismissing the Notice of Intention to Defend and on the same date wrote another ruling of the same tenor and then entered judgment for the respondent."*

F Arguing the first issue which is the most important issue in this appeal and on which this appeal may stand or fall, learned counsel for the appellant submits that a triable issue is an issue which if raised the defendant will necessitate calling for an explanation from the plaintiff before the defence of the defendant can be rejected. He relies on (1987) 3 NWLR (Pt. 62) 737 at 744 per Olatawura JCA (as he then was). It is submitted by the appellant that as soon as the loan was approved and while the appellant was making efforts to secure the release of the loan to the respondent, the respondent started demanding the refund of the N765,000. The appellant argued that as the mortgage had not been per-
G fected it was premature to refund the N765,000 deposit which the appellant described as "additional cash security" for the said NERFUND loan. The respondent in its affidavit described the deposit as "temporary cash collateral." This is the bone of contention between the parties. The ap-
H

pellant submits that these two contentions between the parties call for explanation on the part of the respondent who is the plaintiff in the case before the defence of the appellant can be rightly rejected. The appellant's affidavit, it is contended, has thrown some doubt on the case of the respondent. Counsel refers to *U.T.C. v. Pamotei* (1989) 2 NWLR (Pt. B 103) 244 at 299; *Agueze v. Pan African Bank Limited* (1992) 4 NWLR (Pt. 233) 76 at 87; *Ekuma v. Silver Eagle Shipping Agencies Limited* (1987) 4 NWLR (Pt. 65), 472 at 484; *Agwuneme v. Eze* (1990) 3 NWLR (Pt. 137) 242, 254 - 255.

On issue No. 2, the appellant complains about a statement made by the learned trial Judge in her ruling which statement is set out in issue No. 2. It is argued that the mortgage of the respondent's property was not the only condition of the loan. There were other conditions which are not contained in Exh. 001. When therefore the Judge stated in her ruling that the mortgage of the landed property".. was the condition for guaranteeing the loan", she acted in error. Certain depositions in the appellants' affidavit were in conflict with those in the respondent's affidavit. Oral evidence was therefore necessary to reconcile the conflict- see *Falobi v. Falobi* (1976) 1 NMLR 169. The learned trial Judge failed to do this before resolving the conflict in favour of the respondent.

On issue No. 3, the appellant complained that the learned trial Judge wrote a ruling and at the same date and sitting delivered a judgment in the said case. I would have dismissed this issue with a wave of hand but the fact that the correct interpretation of Order 24 Rule 9 (4) of the High Court Rules of Anambra State may arise. Counsel criticised the production of the two documents - a ruling and judgment. He refers to the case of *Federal Administrator-General v. Daniel* (1958) SCNLR 472; (1958) 3 FSC 115 at 118; *Abiola v. Federal Republic of Nigeria* (1995) 3 NWLR (Pt. 382) 203 at 226 - 7; *Commissioner of Lands v. Edo-Osagie* (1973) 6 S.C. 155; (1973) 1 All NLR 715.

The respondent also filed a respondent's brief and therein formulated a lone issue for determination. The respondent in stating the facts of the case said that the appellant informally requested the respondent to make an investment deposit of 30% of the facility under a fund manage-

ment with the appellant to act as a temporary cash collateral pending when the respondent would provide adequate and acceptable title documents to its properties as proper security to be covered by a mortgage. The respondent maintained in its brief that the investment deposit was a different transaction and/or contract from the NERFUND facility. After furnishing proper collateral for the NERFUND facility the respondent applied for the refund of the investment deposit. The appellant at first promised to refund the deposit but later became evasive. After paying interest on the deposit, the appellant unilaterally terminated the deposit as an investment deposit and converted same as additional cash security in breach of the arrangement between the parties. The respondent as a result, sued the appellant to recover the deposit. The lone issue of the respondent, in the light of the above facts is

"In the circumstance of this appeal and with the totality of evidence and materials placed before the court below, whether the appellant's Notice of Intention to Defend was rightly dismissed and judgment entered in favour of the Respondent in accord with substantial justice."

It is submitted for the respondent that the claim by the respondent against the appellant arose out of a banking transaction in which the appellant failed to meet with its obligations by describing the investment deposit as part of the collaterals required to secure the NERFUND credit facility. This is as per the appellant's letter of 7th July, 1993 by which the appellant paid the respondent an interest on the deposit and informed the respondent of the decision of the Board of the appellant that the deposit was a requirement of NERFUND facility. It is submitted that it was this letter that sparked off this suit. At no time before this letter did the appellant tell the respondent that the deposit was part of the collateral of the NERFUND loan.

As regards any possible conflicts in the affidavit of the parties, the respondent submits that oral evidence to resolve such a conflict is not necessary where documentary evidence is available to resolve the issue as in the instant case - see *U.B.A.Ltd. v. Majeed Taan & Anor* (1993) 4 NWLR (Pt. 287) 368 at 379. See also *U.T.C. Nigeria Ltd. v. Pamotei* (1989) 2 NWLR (Pt. 103) 244; *Nishizawa v. Jethwani* (1984) 12 S.C.

234; Olubusola Stores v. Standard Bank (Nig.) Ltd. (1975) 4 S.C. 51; U.B.A. Ltd. v. Majeed Taan (supra). It is further submitted that the Fund Management Slip (page 13 of the record) in no where states that the deposit is part of the collateral.

The respondent also dealt with the appellant's brief in its B (respondent's) brief. Counsel submits that the appellant's Notice of Intention to defend together with the accompanying affidavit did not raise a triable issue. The purported triable issue of the appellant is merely fanciful or an after-thought. The respondent also explained the circumstance C under which the learned trial Judge wrote a ruling and a judgment on the same day in the same matter. It is submitted that the contention in the appellant's issue No. 3 does not affect the merits of the case.

The undefended list proceeding is meant to shorten the hearing of a suit where the claim is for a liquidated sum. It is designed to avoid the D technicalities of pleadings attendant on a normal hearing in the High Court. It has however, in recent times, created more problems than it was intended to obviate. This may be due to not very clear language of Order 24 Rule 9 of the High Court Rules of Anambra state of 1988 and, at E times, due to the hasty attitude of some Judges of the lower court to dispose of a matter before them. I shall therefore attempt to examine more critically the provisions of the rule. All references are to Order 24. I shall therefore not repeat "Order 24" in this judgment unless it becomes F absolutely necessary. The relevant rule is rule 9 of the said Order. There is no problem with sub-rule (2) of rule 9. It is for the court to be "satisfied" that there is a "triable issue". The modalities for being "satisfied" are however not spelt out. Sub-rule (3) of rule 9 seems to be clear and G does not create much problems. The problems with the rule seems to me to arise with the second section of sub-rule (4). It provides:

"... or where he delivered the notice and affidavit but the court is not satisfied therefrom that there is raised any bona fide issue for trial H between the plaintiff and the said defendant, then and in such case, the suit shall be heard as an undefended suit, and judgment given thereon, without calling upon the plaintiff to summon witnesses before the court to prove his case formally." (Italics mine for emphasis)

The above quoted rule does not say that where the court is not satisfied that a bona fide issue for trial has been raised, the court shall enter judgment for the plaintiff. It says that when such a situation arises then and in such a case, the suit shall be heard as an undefended suit and judgment given thereon without requiring the plaintiff to summon witnesses to prove his case formally. It is my respectful view that if the intendment of the rule is that as soon as the court is not satisfied that a triable issue has been raised between the parties, the court should enter judgment for the plaintiff based on the affidavit filed in support of the case, the rule would have said so. The rule merely relieves the plaintiff of the burden of summoning witnesses before the court to prove his case formally. It does not relieve the plaintiff of the burden of giving evidence and to be subjected to cross-examination. Suppose the court says that it is not satisfied that a triable issue has been raised in the defendant's affidavit, what prevents defence counsel from applying to cross-examine the plaintiff on his affidavit? Can the court rightly refuse such an application having regard to the way the sub-rule is worded? I shall rest at that until such a situation arises otherwise my views may be purely academic. Another difficulty created by the sub-rule is the use of the word "heard". How is a suit heard? Is a suit heard by the Judge merely entering judgment for one of the parties without hearing any of them? This is a question, which will be asked and answered when the proper situation arises.

What I am discussing above is closely associated with the appellant's 3rd issue which does not go to the merits of this appeal. On the 30th November, 1994 the learned trial Judge delivered a reserved ruling. The ruling was reserved following the submission of counsel on both sides. This is borne out by the first two pages of the ruling - see from the bottom of page 48 to the top of page 50 where the learned trial Judge reviewed the submissions of counsel. It should be noted that the record was compiled by the appellant - see the motion for departure attached to the record. Apparently, the appellant omitted that part of the record that contained the arguments of both counsel. Having delivered her ruling on

30th November 1994 dismissing the Notice of Intention to Defend, the learned trial Judge proceeded to enter judgment for the plaintiff on the same day. This accounts for the ruling and judgment on the same day, that is, 30th November, 1994. I see nothing wrong in what the learned trial Judge did in this regard.

As regards issue No. 2 of the appellant, although the statement complained of may not be an ideal statement by the judge, I am unable to see how it affects her judgment one way or the other. It is not every slip of a trial Court that affects the merits or otherwise of its judgment. I resolve issues 2 and 3 against the appellant.

I now come to the all important issue in this appeal, that is, whether the appellant raised a triable issue in its affidavit in support of its Notice of Intention to Defend. **What is a triable issue in the context of an undefended list proceeding? In my respectful view, a defendant's affidavit is such that the plaintiff will be required to explain certain matters with regard to his claim or where the affidavit throws a doubt on the plaintiff's claim.** Let me examine the appellant's affidavit in this appeal vis-a-vis the affidavit in support of "verification" of the claim to see whether the claim remains unassailable in the absence of any explanation.

It would seem that both parties are agreed on the purpose for which the respondent deposited the sum of N765,000 with the appellant, for while the respondent deposed in paragraph 3 of its affidavit that the appellant was required to guarantee the loan by NERFUND the appellant deposed in paragraph 3 of its own affidavit that the deposit was to secure the loan. Whether the deposit is meant as a guarantee or a security, I regard the purpose as the same.

In paragraph 6 of the appellant's affidavit it deposed as follows:

"6. That the plaintiff was aware right from the onset of the transaction that the deposit would be additional cash security for the said NERFUND LOAN as shown in Exhibit 'C' annexed to this affidavit which H is a photostat copy of the defendant's letter 7/7/93 forwarding a cheque for the interest paid on the said Deposit." (Italics mine).

Exh. C referred to in the said paragraph of the said affidavit merely con-

veys to the respondent decision of the Board of the appellant not to continue paying interest on the deposit. Paragraph 7 of the appellant's affidavit states that " ...until the NERFUND LOAN was received by the plaintiff (appellant) the tenor of the deposit would be Seven-Day call..." (word in bracket mine). This paragraph suggests that deposit could be withdrawn within seven days before the loan is received. This deposition is meant to re-enforce the preceding paragraph 6 of the affidavit which says that the deposit is an "additional cash security." Paragraph 8 of the appellant's affidavit says that the appellant who is a guarantor to the loan says that ever before the appellant processed the loan the respondent knew that the deposit would be " additional cash security" as soon as the respondent received the loan. In paragraph 12 of its affidavit the appellant deposed as follows:

"12. That the said deposit was not a temporary cash collateral, rather it was a temporary investment Deposit meant to become cash collateral as soon as the said NERFUND Loan was disbursed to the plaintiff and that the plaintiff was fully aware of this fact."

In paragraph 16 of its affidavit the appellant states why it is necessary for the appellant to demand cash collateral as additional security to NERFUND loan. In paragraph 18 and 19 the appellant deposed that even at the time of commencement of this suit, the mortgage had not been perfected, and that the only security the appellant could fall back to was only the cash security the refund of which the respondent was demanding. The said cash security was only 30% of the actual loan to the respondent which was guaranteed by the appellant.

The above depositions may be true or false but they are against the respondent's case that the deposit was a temporary cash collateral. In paragraph 8 of its affidavit the respondent contends that Exh. 001 (see page 11 of the record) contains the terms of the said loan. That cannot be correct. Exh. 001 contains the terms as between the NERFUND and the guarantor of the loan i.e. the appellant. It is not a term of contract between the guarantor (appellant) and the borrower (respondent). Consequently, Exh. 001 does not contain anything about the deposit which is the cause of action in this suit or the mortgage of the respondent's prop-

erty to the appellant. This is borne out by paragraph 9 of the respondent's affidavit in which the respondent deposed as follows:

"9. That under another arrangement between the defendant and the plaintiff the defendant required the plaintiff to submit to and deposit with them (the defendant) the title documents of some of the plaintiff's assets and properties to be mortgaged as proper security to the defendant for guaranteeing the said NERFUND loan." B

See also paragraph 10 of the respondent's affidavit in support of its claim. Paragraph 11 of the respondent's affidavit brings out the bone of contention or point of disagreement between the parties in this suit. The respondent deposed as follows: C

"11. That pending the completion of the processes related to the plaintiff's title documents, and the said valuation of their concerned properties and to enable the loan process proceed and show plaintiff's commitment the defendant earlier reached an interim understanding with the plaintiff by which the Plaintiff was required to deposit with the defendant the sum of N765,000.00 being 30% of the said NERFUND loan, as a temporary cash collateral to be managed by the defendant under a management fund with it's usual terms and conditions." D E

In paragraph 12 of its affidavit the respondent deposed that it was made to understand that as it provided proper proprietary security as collateral as required by the appellant, the respondent could withdraw its said deposit. The respondent maintains that the deposit is subject to 7 - day call as contained in Exh. 003 even after the loan was made to it while the appellant insists otherwise. F

It is clear from the several paragraphs of the affidavits of both parties which are in direct conflict with one another that while the appellant contends that the N765,000.00 deposit is an " additional cash security" the respondent insists that it is a "temporary cash collateral." What I understand both expressions to mean in so far as this case is concerned is that the former is in addition to the mortgage security while the latter is a temporary cash deposit to be withdrawn on 7 days notice on the completion of the loan transaction. It may be one or the other. The contention of one G H

may be true while the contention of the other may be false. Does the court not require further evidence oral or otherwise to determine which contention is true and which is false? I think it does. It must be appreciated that the case is not yet being heard at the stage the court is considering whether a triable issue is made out or not. As I had pointed out earlier in this judgment, and at a risk of being tautologous, on a strict construction of the second part of Order 24 Rule 9 (4) which I had set out in this judgment, when the court is

"not satisfied ... that there is raised a bona fide issue for trial ... then the suit shall be heard as an undefended suit and judgment given thereon without calling on the plaintiff to summon witnesses to prove his case formally." (Italics mine)

It is when the court comes to the conclusion that a bona fide issue for trial is not raised or made out, or to put it in another way, when the court is not satisfied that a triable issue has been made out that the suit shall be "heard" as an undefended suit. The rule does not expressly or specifically state how it should be "heard" as an undefended suit but states that judgment shall be given without calling on the plaintiff to summon witnesses to prove his case formally. **However, as far as this appeal is concerned it is my respectful view that there are enough materials raised in the appellant's affidavit for which some explanation shall be required from the respondent's case. When such a situation arises from the defendant's affidavit in support of his Notice of Intention to Defend, then a bona fide issue has arisen between the parties and the case ought to be entered in the general list.**

I cannot end this judgment without reference to some pertinent points of law in the adversary system of adjudication in our courts. **Judges should not be in a hurry to enter judgments for the plaintiff in a case placed on the undefended list. They may however do so in clear cases. The principle of audi alteram partem is a fundamental principle of adjudication of this country, and in Section 36 of the '1999 Constitution. Our courts should bend back-wards to accommodate a litigant who wants to be heard, and should give him a hearing. To shut him out in the circumstances of this case or one**

like it is not fair. It is not right. It is not justice. He may eventually fail and lose the case as often happens but let him be heard. If he is heard and he loses, he goes home satisfied that he has been heard and that justice has been done Which is what the court is for.

As Lord Collins M. R. said in Coles v. Ravenshear (1907) 1 K. B. 1 at 4 B

"Although the rules of court stand as a guide to the court in conducting contract business, the court must not hold it as a "mistress" but as a "handmaid".

See also Nishizawa v. Jethwani (1984) 12 S.C. 234 at 284-285 as per C
Saidu Kawu, JSC. The principle that no man is to be judged unheard is as "old as the Garden of Eden." Thus, in R v. Chancellor of University of Cambridge (1723) 1 Str. 557 at 567 we find Fortescue, J. affirming that

"Even God himself did not pass sentence upon Adam before he was called upon to make this defence ..." D

And what was Adam's defence? It was this:

"The woman whom thou gavest to be with me, she gave me the fruit of the tree, and I did eat." - Genesis 3:12

God did not also condemn Eve unheard. On being questioned, her defence was:

"The serpent beguiled me and I did eat." Genesis 3:13.

Having heard both of them, the Almighty God proceeded to pass his sentence. He expects us to do the same. Thus, Coke, that indomitable F
and fearless Lord Justice of the Common Pleas, was able to assert that *audi alteram partem* was a principle of Divine Justice proceeding with

(I) *Vocat*, then (II) *Interrogat*, and finally, (III) *Judicat*. See
Olatunbosun v. NISER (1988) 3 NWLR (pt. 80) 25 per Oputa JSC at 49. G

What the court should do in proper cases is to enter the case in the general list, order pleadings to be filed within the shortest possible time—say 7/7 days for statement of claim and statement of defence respectively since the facts are already deposed to in the party's affidavit, and fix the case for hearing in the immediate future. Such a procedure will H
not only give the defendant a sense of satisfaction that justice has been done, that he has been heard but will also save the parties the hustle of an appeal which now innudates this court, on the undefended list cause.

The plaintiff will not be hurt since the case will be disposed of in a matter of a few months.

The issue No. 1 of the appellant and the only issue of the respondent is thus resolved in favour of the appellant. The appeal is therefore allowed. The ruling and judgment of the lower court are set aside. The case is remitted to the lower court to be heard as a suit on the general list by another Judge. Pleadings shall accordingly be ordered. There will be N2,000.00 costs to the appellant.

C

OLAGUNJU JCA

I have had the privilege of reading in draft the judgment just delivered by learned brother, Ubaezonu, JCA. I agree with his conclusion that this appeal should be allowed and the underlying reasoning which I also share.

The plaintiff/respondent's claims brought under the undefended list entitles her to judgment by virtue of the second limb or sub-rule 9 (4) of Order 24 of the High Court Rules of Anambra State, 1988, but only where upon the defendant delivering notice and affidavit of intention to defend the action the trial court "is not satisfied therefrom that there is raised any bona fide issue for trial between the plaintiff and the ... defendant".

On the facts of the case the asseveration by the plaintiff/respondent that her deposit of N765,000 with the defendant/appellant was a temporary 'deposit' which was traversed by the defendant/appellant in her affidavit of intention to defend the action that the deposit was 'additional cash security' for guaranteeing the loan by NERFUND to the respondent had brought the parties to issue within the concept of 'joining issue' as explained in *Graham v. Esumai* (1984) 15 NSCC 733, 743 and *Ehimare v. Emhonyon* (1985) 1 NWLR (Pt. 2) 177; (1985) 16 NSCC (Pt. 1) 163, 169.

That being the case, a bona fide issue has arisen between the parties on a material point which is the core of their dispute. That issue must be submitted for trial which is finding out by due examination of the

point in issue. That necessity has taken the action out of the confine of the non-contentious procedure of the undefended suit and ought to have been transferred to the General Cause List so as to give the parties the opportunity to contest the action on the merit. Therefore, it is imperative to have a full grasp of the occasion for which undefended list procedure is appropriate. B

Undefended suit procedure is akin to the procedure for specially endorsed writ of summons under the Lagos State High Court Civil Procedure Rules, 1972, which origin is the old practice of the Chancery and Queen's Bench Divisions of the High Court of England. The specially endorsed writ procedure was examined by the Supreme Court in *Nishizawa Ltd. v. Jethwani* (1984) 15 NSCC 877 and in *U.T.C. (Nigeria) Ltd. v. Pamotei* (1989) 2 NWLR (Pt. 103) 244; (1989) 20 NSCC. (Part 1) 523, 562 - 563, the two procedures were contrasted. The two procedure are alike summary in nature in the sense that they do not come under the D trammels of the elaborate procedure of pleadings with its entire panoply of statements of claim and defence, etc.

True enough, the summary procedure has the advantage of speedy E and quick dispensation of justice but it suffers from the limitations that it is not an appropriate procedure in complex cases that are likely to throw up controversial issues. That probably accounts for the unreported decision of this court in *A. G. Leventis v. S. A Bukoye*, case No. CA/E/13M/ 88, delivered on 8/12/88, in which it was laid down that the trial Judge must first certify that the case is a proper one to be placed on the undefended list. That also explains the liberal attitude advocated by the Supreme Court that should guide the trial court in determining whether the defendant has a good defence to the plaintiff's action. In the *Federal Military Government of Nigeria v. Sani* (1990) 4 NWLR (Pt. 147) 688; (1990) 7 SCNJ, 159, that court, per Uwais, JSC., as he then was, at page 699, paras. B-C, charged the trial courts, inter alia, as follows: F

"In determining whether a defendant has a good defence to the action brought against him or he has disclosed such facts as may be deemed sufficient to defend the action, it is not necessary for the trial Judge to consider at that stage whether the defence has been proved. G H

What is required is simply to look at the facts deposed to in the counter-affidavit or indeed the facts averred in the statement of defence, where applicable, and see if they can prima facie afford a defence to the action. In that regard a complete defence need not be shown. It will suffice
 B *if the defence set up shows that there is a triable issue or question or that for some other reason there ought to be a trial."*

In *Olubusola Stores v. Standard Bank Nigeria Ltd.* (1975) 4 S.C. 51, the same court had earlier explained the rationale why the courts are loath to deny a defence to a defendant in a summary trial. At pages 56 -
 C 57 the court, per Coker JSC., said:

"The provisions dealing with actions on the Undefended List are apparently technical and we think that they are purposely created in that way in order to ensure that by asking the plaintiff to comply strictly with
 D *those rules injustice is being avoided to a defendant whose freedom to defend the case has been rather restricted. The provisions of the Rules are designed as they are in order to ensure the safeguards which must necessarily be available to a defendant if the Rules are followed strictly*
 E *...?"*

On the mechanics of the procedure for summary judgment on the Undefended List action, see *U.A.C. (Tech.) Ltd. v. Anglo Canadian Cement Ltd.* (1966) NMLR 349; *Bentworth Finance (Nig) Ltd. v. Gwambe* (1969)
 F 2 All NLR 192; *Bendel Construction Co. Ltd v. Anglocan Development Co. (Nigeria) Ltd.* (1972) 1 All NLR 153; *Fehintola v. Ikpe* (1977) NNLR 214; *Alhaji Uba Kano v. Bauchi Meat Products Company Limited* (1978) 9 - 10 S. C. 51; (1978) 2 NSCC 481; *Okambah Ltd. v. Sule* (1990) 7 NWLR (P. 160) 1; (1990) 11 SCNJ 1 ; and *Adebisi Macgregor Associates*
 G *Ltd. v. Nigerian Merchant Bank Ltd.* (1996) 2 NWLR (Pt. 431) 378; (1996) 2 SCNJ 72.

With those guidelines on assessment of the state of defence in summary procedure of undefended actions and the underlying philosophy the frontier of liability of the defendant/appellant straddles some considerations that lie in the hidden recesses of the parties' conflicting depositions so much that nothing short of the trial of the issues involved would bring the parties nearer to justice.

One final point on the panorama of the scenario. The rash of cases on the undefended list coming on appeal to this court lately is indicative of a new vogue of indiscriminate resort to that procedure by a section of the legal practitioners in instances where it is obvious that summary procedure is inappropriate. Slowness in the conduct of cases under the regular procedure may partly account for the attraction to a procedure that is seen to be time-saving. But the craze may not offer any real advantage to the litigants; on the contrary, it may be counterproductive.

Nothing illustrates better the illusion than the plight of those with predilection for preliminary objection as a strategy for obtaining 'rapid judgment' but not justice and ended up getting nothing. Particularly instructive in this regard is the epigram of Lord Evershed in *Windsor Refrigerator Co. Ltd. v. Branch Nominees Ltd.* (1961) Ch. 375, 396 that in "adopting this procedure of preliminary issues ... experience has taught me that the shortest cut so attempted inevitably turns out to be the longest way round".

"A snappy short-cut decision, bereft of an examination of the merits of the case often settles nothing but rather exacerbates the conflict" so said Aniagolu, JSC., in Ntukidem v. Oko (1986) 5 NWLR (Pt. 45) 909; (1986) 17 NSCC (Pt. 11) 1303, 1310. It is to be hoped that the learned counsel across the board would heed the admonition. In the meantime, the parties to this appeal would judge by the result.

However that may be, for the view expressed above and for the fuller reasons given in the leading judgment I allow this appeal. I abide by all the consequential orders made in the leading judgment.

FABIYI JCA

I had a preview of the judgment just delivered by my learned brother, Ubaezonu, JCA. I agree with the his reasons leading to the conclusion that the appeal should be allowed.

I need to point it out here that rules of procedure relating to actions in the undefended list are designed for easy dispensation of justice

in liquidated money demands. It is not meant for entering hasty judgments. Where a bona fide defence is depicted, such must be investigated. See *Franchal Nigeria Ltd. v. Nigeria Arab Bank* (1995) 8 NWLR (Pt. 412) 176 at 188. In all cases, 'much haste, less speed' should be avoided.

I support my learned brother in allowing the appeal. I endorse all the consequential orders, including that relating to costs, in the lead judgment.

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