

**SUPREME COURT OF NIGERIA**  
FRIDAY 1ST MARCH, 2002. SC. 72/1997  
**CORAM:- S. M. A. BELGORE, I. L. KUTIGI, A. I. IGUH,**  
**A. I. KATSINA-ALU, U. A. KALGO, JJSC**

DR. OLADIPO MAJA ..... APPELLANT  
AND  
MR. COSTA SAMOURIS ..... RESPONDENT

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JUDGMENTS - Actions - Interlocutory judgment - Correctness of -  
The judgment is proper - As claims are for unliquidated damages  
(H1)

PRACTICE & PROCEDURE - Actions - Default defence - Judgment  
- Correctness of - High Court Rules of Lagos O. 24 r. 11 - Court was  
right to base its decision on statement of claim (H2)

JUDICIAL PRECEDENTS - Authorities - Distinction - Ogunleye v.  
Arewa - The case law is inapplicable to present case - As claim herein  
is for unliquidated damages under High Court Rules of Lagos O. 24  
r. 4 (H3)

JUDICIAL PRECEDENTS - Actions - Declaration of right - Basis -  
Wallersteiner v. Moir - Court makes such declaration upon satisfac-  
tory evidence - That plaintiff is entitled to such right (H4)

RULES OF COURT - Binding nature of - Court and parties are bound  
by the rules - And any complaint on procedural irregularity succeeds  
on appeal - If same caused miscarriage of justice (H5)

WORDS & PHRASES - Contracts - Liquidated demand - Meaning -  
Liquidated demand is ascertainable debt or sum of money payable -  
Without further investigation (H6)

JUDICIAL PRECEDENTS - Actions - Liquidated damages - Claim  
for - Odume v. Nnachi - Claim does not become one for liquidated  
damages - Merely because specific amount of money is claimed (H7)

DAMAGES - Unliquidated damages - Meaning - Damages are unliquidated where court has to assess loss - Or where payable amount is fixed by estimate (H8)

DAMAGES - Unliquidated damages - Claim - High Court Rules of Lagos O. 24 r. 4 - Appellant's claim provided under the rules - Cannot come within O. 24 r. 11 (H9)

JUDGMENTS - Interlocutory judgment - Meaning - Judgment is interlocutory only as to amount - But is final as to the right of plaintiff to recover damages (H10)

DAMAGES - Unliquidated damages - Award of - Basis - Court is not entitled to make the award - Without taking credible evidence from parties (H11)

AFFIDAVITS - Depositions - Source - Need to disclose - Deponent must state source of their information - As court will not act upon such evidence - Save where corroborated by witness from personal knowledge (H12)

COURTS - Jurisdiction - Orders of court - Where court has jurisdiction to make an order - The fact that its power was invoked under wrong rule - Is not ground for refusal (H13)

### **FACTS**

Before the High court of Lagos State, plaintiff/appellant claimed against defendant/respondent the sum of N2,000,000.00 being special and general damages for trespass and nuisance allegedly committed by respondent on appellant's Jetty at Apapa-Lagos. Respondent duly entered appearance but failed to file his Statement of Defence. Consequently, appellant by a motion on notice prayed the court for an order entering final judgment for appellant based on his Statement of Claim. Respondent and his counsel were absent on the day the motion was heard.

Thereafter, the learned trial judge entered default judgment against respondent in the sum of N1,000,000.00 being general damages for trespass and nuisance. Appellant's claim for special damages

was nevertheless dismissed for want of proof. Respondent was dissatisfied with the judgment and thus he lodged an appeal against same at the Court of Appeal, Lagos Division. The main issue calling for determination of the court was whether the trial judge could have properly entered final judgment in default of defence in the absence of specific proof of unliquidated pecuniary damage claimed by appellant. The court allowed the appeal and set aside the judgment of the trial court in its entirety. Aggrieved, appellant appealed to Supreme Court.

### **ISSUE FOR DETERMINATION**

*“Whether the court of Appeal was right in setting aside the default judgment of the trial court in respect of a claim for unliquidated pecuniary damage in which no evidence whatsoever in proof of such damages was neither tendered nor received by the trial court.”*

**HELD** (Unanimously dismissing the appeal per **IGUH JSC**)

*Actions - Interlocutory judgment - Correctness of*

**1. The judgments entered in these classes of cases are interlocutory and not final as the claims are necessarily unliquidated and, consequently, only an interlocutory judgment can be entered. After such a judgment, the plaintiff may then make an application to the court for the ascertainment of the precise amount of damages to which he may be entitled. The trial Judge in such a case may direct any method for such ascertainment although it is usual to direct that evidence be given for this purpose.** (p. 562 E)

*Actions - Default defence - Judgment - Correctness of*

**2. It is evident, pursuant to the said provisions of Order 24 Rule 11, that in the rest of actions other than those specifically mentioned in the preceding Rules 1-10 of Order 24 that if the defendant makes default in filing a defence, the plaintiff may apply to the court for judgment on motion and such judgment shall be given as upon the Statement of Claim as the Court or a Judge in Chambers considers the plaintiff to be**

**entitled. Accordingly, it is the Statement of Claim alone that the court considers for its decision and no evidence is thus taken as the averments in the Statement of Claim are taken to be admitted by the defendant.** (p. 563 B)

**B** *JUDICIAL PRECEDENTS - Authorities - Distinction*

**3. I need only state that the decision of this court in the Ogunleye case is, with respect, totally irrelevant and inapplicable to the issue under consideration in the present appeal.**

**C** **This is because it will presently be shown, in the first place, that the claim in the present appeal is for an unliquidated pecuniary damages which are covered by the provisions of Order 24 Rule 4 *ibid* and does not come within the purview of the provisions under Order 24 Rule 11 of the High Court of Lagos State (Civil Procedure) Rules, 1972. This is unlike the action for declaration of title to land with which the decision in the Ogunleye case was concerned and which, not having been covered by the preceding Rules 1 to 10 of Order 24, clearly comes within the purview of the provisions of Order 24 Rule**  
**E** **11 of the relevant Rules of Court.** (p. 563 E)

*Actions - Declaration of right - Basis*

**4. In the second place, a consideration of the decision of this court in the Ogunleye case in 1960 cannot be fully and adequately treated without reference to the much later decision of this same court in Vincent Bello v. Magnus Eweka (1981) 1 S.C. 101. In the latter case, this court held, following the decision in Wallersteiner v. Moir (1974) 3 All E.R 217 that the**  
**G** **court does not make declarations of right either on admission or in default of defence without hearing evidence and being satisfied by such evidence to the plaintiff's entitlement to such a right.** (p. 563 H)

**H** *RULES OF COURT - Binding nature of*

**5. In dealing with this question it must be borne in mind that although the courts now pursue the course of substantial justice between parties instead of taking refuge in unnecessary legal technicalities, Rules of court, as far as the conduct of**

**proceedings is concerned, are generally binding on the parties and the court and a party would be allowed to complain of a procedural irregularity on appeal if, inter alia, it can be shown that it materially affected the merits of the case or that he suffered a miscarriage of justice by reason of such irregularity in the proceeding.** (p. 564 E) B

*Contracts - Liquidated demand - Meaning*

**6. A liquidated demand is a debt or other specific sum of money usually due and payable and its amount must be already ascertained or capable of being ascertained as a mere matter of arithmetic without any other or further investigation. Whenever, therefore, the amount to which a plaintiff is entitled can be ascertained by calculation or fixed by any scale of charges or other positive data, it is said to be “liquidated” or made clear. Again, where the parties to a contract, as part of the agreement between them, fix the amount payable on the default of one of them or in the event of breach by way of damages, such sum is classified as liquidated damages where it is in the nature of a genuine pre-estimate of the damage which would arise from breach of the contract so long as the agreement is not obnoxious as to constitute a “penalty” and it is payable by the party in default. The term is also applied to sums expressly made payable as liquidated damages under a statute.** (p. 565 D) C D E F

*Actions - Liquidated damages - Claim for - Propriety*

**7. In Eko Odume and others v. Ume Nnachi and others (1964) 1 All N.L.R 329** G

**“We think, however, that the description by learned counsel of a claim for #300 damages for trespass, as one for “liquidated damages” is erroneous. A claim for damages does not become one for “liquidated damages” merely because a specific amount of money is claimed”.** (p. 565 G) H

*Unliquidated damages - Meaning*

**8. But in every other case, where the court has to or assess the damages or loss, whether pecuniary or non-pecuniary, the**

**damages are unliquidated. So, too, when the amount to be recovered depends on all the circumstances of the case and on the conduct of the parties and is fixed by opinion or by an estimate or what may be judged reasonable, the damages are said to be “unliquidated”. Accordingly, the amount ultimately recoverable in a claim for unliquidated damages is incapable of prior ascertainment and may only be known at the end of the trial as the same is based on the estimate or opinion of the trial court. It is also right to say that because of the subjective nature of the assessment of unliquidated damages, two different courts can hardly award the same amount in the same claim.**

**The appellant’s action in general damages against the respondent for alleged trespass and nuisance is therefore a claim in unliquidated pecuniary damages. It is not different from the claim of general damages for trespass which this court in *Eko Odume and others v. Ume Nnachi* (supra) per Idigbe, JSC described as “erroneous” on the part of the respondent’s counsel “to refer to it as a claim in liquidated damages.” He concluded as I have earlier pointed out that a claim for damages, does not become one for “liquidated damages” merely because a specific amount of money, like in the present case, has been claimed and that the claim in that case was one for unliquidated damages. In my view, it cannot be disputed that the appellant’s claim in issue in this appeal is an action for unliquidated damages and I so hold. (p. 566 A/F)**

*Unliquidated damages - Claim*

**9. It seems to me clear having regards to the express provisions of Order 24 Rule 11 of the relevant Rules of court, that the appellant’s action cannot be covered thereunder. This is because by the unambiguous wordings of Order 24 Rule 11 under which the appellant obtained his summary and final judgment in default of defence, its applicability is expressly confined or made subject to the qualification that actions therein covered must be other than those for which specific provisions have already been made in the proceeding Rules of the said Order 24 Rule 11. The appellant’s claim for unliquidated**

**pecuniary damages having been fully provided for by the provisions of Order 24 Rule 4 which precede those of Order 24 Rule 11, *ibid*, cannot therefore come within the purview of the provisions of the said Order 24 Rule 11. (p. 567 C)**

*Interlocutory judgment - Meaning*

**10. The term “interlocutory judgment” means that such a judgment is interlocutory only as to the amount, but is final as to the right of the plaintiff to recover damages. Thereafter the appellant would be entitled to make an application to the court for the ascertainment of the precise amount of damages to which he might be entitled. As I have already observed, the trial Judge in such a case may direct any method for such ascertainment but it is usual to direct that evidence be given for this purpose. These, the appellant failed to do in the present case. (p. 567 G)**

*Unliquidated damages - Award of - Basis*

**11. It cannot be over-emphasized that a court is not entitled to enter summary or default judgment on a claim based on a relief for payment of unliquidated pecuniary damages without taking evidence for the assessment of the amount of damages that may be proved as such a claim must be established by credible evidence. This is because it is not enough for the court to simply award damages in an unliquidated pecuniary damages claim without giving any reason as to how it arrived at what in its opinion amounted to reasonable damages. Damages are awarded on sound and well-settled legal principles and not on sentimental or arbitrary grounds and it have been held to be wrong for a trial court in a claim for unliquidated damages to make an award without taking evidence from the parties. See *Imo Broadcasting Corporation v. Lambert Iwueke* (1995) 1 N.W.L.R (Part 372) 488 where it was restated that in a claim for unliquidated damages, the plaintiff is not entitled to summary final judgment in default of defence as the quantum of damages the plaintiff is entitled to must be assessed and proved by credible evidence. (p. 568 A)**

*AFFIDAVITS - Depositions - Source - Need to disclose*

**12. In this regard, it ought to be stressed that deponent in affidavit evidence must, where the facts deposed to are from their information and belief, state their source of such information and belief. Such evidence ought not to be acted upon unless the court can ascertain the source of the information and belief and unless the facts deposed to are corroborated by someone who speaks from his own personal knowledge. The depositions of the said Litigation Manager which were not from his personal knowledge, although irrelevant on the question of the unliquidated pecuniary damages claimed, were not corroborated by anyone who testified from his own personal knowledge and is to that extent irrelevant and weightless.** (p. 569 D)

*Jurisdiction - Orders of court*

**13. Without doubt, where a court has the jurisdiction to make an order, the fact that the power of the court is invoked under a wrong Rule of court or law is no good reason for refusing to make the order. But there must be jurisdiction in the court in the first place to make the order as prescribed by the Law and Rules. Such jurisdiction must also be exercised in accordance with the terms, stipulations and conditions for its invocation. More significantly, the express stipulation and conditions enshrined under the provisions of Order 24 Rule 4, *ibid*, for the exercise of the court's jurisdiction in respect of the appellant's application for summary judgment were neither complied with nor observed. In my view the issue that has arisen in the present case is not one of invoking the power of the court under a wrong Rule of court or Law but that of failure to comply with the stipulated necessary terms and conditions for the exercise of jurisdiction over the appellant's application.** (p. 570 A)

## NOTABLE POINTS OF INTEREST

### IGUH JSC

**1. Judgment entered for a debt or liquidated demand is final**



***judgment***

I should perhaps state that as the plaintiff's claim under Order 24 Rule 2 must be in respect of a debt or liquidated demand, that is to say, an ascertained or specific amount, the judgment entered thereunder would necessarily be a final judgment for there is nothing more that needs to be further done to determine the quantum or extent of the defendant's liability. (p. 562 A) B

***2. Motion for judgment - When court may insist on oral evidence***

A declaratory claim is not only a discretionary relief, the court has a discretion whether or not to grant a motion for judgment in default of defence in respect of such a claim, the fact that the plaintiff is entitled to such judgment on the fact of his Statement of Claim notwithstanding. It therefore seems to me that the court may in the overall interest of justice properly insist on oral evidence in the case of applications for judgments in default of defence in a declaratory action. (p. 564 C) C

**REPRESENTATION**

Chief R. A. O. Oriade, with N. A. Oriade Esq. for the Appellant  
N. I. Quakers Esq. for the Respondent E

**CASES REFERRED TO**

Motunwase v. Sorungbe (1988) 4 NWLR (Pt. 92) 90 F  
Charles v. Shepherd (1892) 2 Q.B. 622  
Nwora v. U.B.A Ltd (1978) 11-12 SC 1  
Erisi v. Idika (1987) 9-11 SC 170  
Odume v. Nnachi (1964) 1 All NLR 329 G  
Ogunleye v. Arewa (1960) WRNLR 11  
Young v. Thomas (1892) 2 Ch. 134  
Bello v. Eweka (1981) 1 SC 101  
Wallersteiner v. Moir (1974) 3 All ER 217  
Consortium M.C v. NEPA (1992) 6 NWLR (Pt. 246) 132 H  
Falobi v. Falobi (1976) 9&10 SC 1  
Oke & Ors v. Aiyedun & Anor (1986) 4 SC 61  
Bello v. A-G Oyo State (1986) 6 NWLR (Pt. 45) 828  
Umunna v. Okwuraiwe (1978) 6-7 SC 1

Olurotimi v. Ige (1993) 8 NWLR (Pt. 311) 257

### **RULES REFERRED TO**

High Court of Lagos State (Civil procedure) Rules 1972, O. 24 rr. 2, 4, 11

<sup>B</sup> English Supreme Court Rules 1883, O. 27 r. 4

### **LEAD JUDGMENT BY IGUH JSC**

<sup>C</sup> The proceeding leading to this appeal were first instituted in the High Court of Justice, Lagos State. In that court, the plaintiff claimed against the defendant the sum of N2,000,000.00 (Two million Naira) being special and general damages for trespass and nuisance allegedly committed by the defendant on the plaintiff's Tomaro Island Jetty at Marine Road, Apapa, Lagos. The particulars of the damages claimed are averred in the plaintiff's Statement of Claim as follows:

	(i) Special Damages for loss of earnings	N200,000.00
	(ii) General Damages for trespass	N1,000,000.00
<sup>E</sup>	(iii) General Damages for Nuisance	N 800,000.00
	Total	N2,000,000.00

<sup>F</sup> The defendant duly entered appearance as prescribed by the Rules of court but failed to file his Statement of Defence in the suit. Consequently, the plaintiff, by a motion on notice filed on the 28<sup>th</sup> day of January, 1994, prayed the court for an order pursuant to the provisions of Order 24 Rule 11 of the High Court of Lagos State (Civil Procedure) Rules, 1972) entering final judgment for the plaintiff in terms of his writ and Statement of Claim in default of filling <sup>G</sup> any Statement of Defence by the defendant.

On the 25<sup>th</sup> April, 1994, neither the defendant nor his learned counsel was in court for the hearing of the motion although served. The plaintiff duly moved his application and the learned trial Judge, Sahid, J. entered default judgment against the defendant in the suit <sup>H</sup> in the sum of N1,000,000.00 (One million Naira) being general damages for trespass and nuisance. The plaintiff's claim of N200,000.00 for alleged special damages was dismissed for want of proof. Said the learned trial Judge:

“..... as to the damages claimed, the plaintiff/applicant

*has failed to prove the special damages of N200,000.00 specially and so that claim is dismissed.*

*For the separate claims of 1,000,000.00 for trespass and N800,000.00 for nuisance, there shall be awarded damages of N500,000.00 and N500,000.00 respectively.*

*Accordingly, it is hereby adjudged that plaintiff/applicant do recover against the defendant/respondent the sum of N1,000,000.00 damages and there shall be N500.00 costs in favour of the plaintiff/applicant.”* B

Dissatisfied with this judgment of the trial court, the defendant lodged an appeal against the same to the Court of Appeal, Lagos Division. C

Before the Court of Appeal, one single issue was formulated by the defendant/appellant and endorsed by the plaintiff/respondent as arising for the determination of the appeal. This issue was framed thus:- D

*“Whether the learned trial Judge could properly have entered final judgment against the appellant in default of defence as he did in the absence of specific proof of the unliquidated pecuniary damage claimed by the respondent.”* E

The defendant/appellant had in his Notice and Grounds of Appeal to the Court of Appeal claimed three reliefs, as follows:

(i) An order of the Court of Appeal allowing his appeal and setting aside the judgment of the trial court dated the 25<sup>th</sup> April, 1994. F

(ii) Consequent upon order (i) above, a further order setting aside the executions levied on the defendant/appellant on the 8<sup>th</sup> June and the 22<sup>nd</sup> September, 1994 respectively and any other action taken pursuant to the said judgment. G

(iii) Consequent upon orders (i) and (ii) above, an order directing the plaintiff/respondent to repay to the defendant/appellant the total sum of N245,160.00 realized from the sale of the defendant's property on the 8<sup>th</sup> June, 1994 in execution of the said judgment of the 25<sup>th</sup> June, 1994. H

The Court of Appeal in a unanimous judgment at the conclusion of hearing on the 10<sup>th</sup> day of July, 1996 allowed the appeal of the defendant, set aside the judgment of the trial court and the writ of execution thereupon and ordered the refund to the defen-

dant of the sum of N245,160.00 realized from the sale of his goods pursuant to the abortive judgment of the trial court.

Aggrieved by this decision of the Court of Appeal, the plaintiff has now appealed to this court. I shall hereinafter in this judgment refer to the plaintiff and the defendant simply as the appellant and the respondent respectively.

Five grounds of appeal were filed by the appellant against the decision of the court of Appeal. It is unnecessary to reproduce them in this judgment. It suffices to state that the parties pursuant to the Rules of this court filed and exchanged their respective written briefs of argument.

The five issues distilled from the appellant's grounds of appeal set out on his behalf for the determination of this appeal are as follows:

"1. *Whether the learned Justices of the Court of Appeal should have dismissed the Appeal No. SC/L/280/94 when the only ground of Appeal and the only issue for determination showed that the Defendant/Respondent did not appeal against the substance of the judgment in suit No. LD/1722/92 but against non-compliance with the provisions of order 24 Rule 4 of the High Court of Lagos State (Civil Procedure) Rules, 1972 before the judgment was delivered.*

2. *Whether the Plaintiff/Appellant who applied to the trial court for final judgment under Order 24 Rule 11 of the High court of Lagos (Civil Procedure) Rules, 1972 was obliged to adduce oral evidence as required by Order 24 Rule 4 thereof before the decision given by the learned Trial Judge could be said to be final and appealable.*

3. *Whether Order 24 Rule 11 of the High Court of Lagos State (Civil Procedure) Rules, 1972 enjoined the plaintiff/appellant to adduce oral evidence to establish that the Defendant/Respondent committed nuisance.*

4. *Whether the Honourable Court of Appeal of Nigeria had jurisdiction to reduce the amount of damages awarded by the trial court from N1,000,000.00 to N1,000.00 when the Defendant/Appellant did not appeal against the quantum of damages awarded by the trial Court.*

5. *Whether the Honourable Court of Appeal of Nigeria should*

*have dismissed the Appeal No. CA/L/280/94 when the Affidavit evidence of the Plaintiff/Appellant was not challenged by the Defendant/Respondent.”*

The respondent in his own brief of argument submitted that there was only one single issue that arises in this appeal for the determination of this court. This is framed thus:

*“Whether the Court of Appeal was right in setting aside the default judgment of the trial court in respect of a claim for unliquidated pecuniary damages in which no evidence whatsoever in proof of such damages was neither tendered nor received by the trial court.”*

I have given a close study to the issues set out in the respective briefs of argument of the parties and it is clear to me that a consideration of the one issue formulated on behalf of the respondent would practically cover all five issues set out in the appellant’s brief. This will become evident in the course of this judgment. I therefore propose to adopt the issue formulated by the respondent in my determination of this appeal.

At the oral hearing of the appeal before us, both learned counsel for the parties adopted their respective briefs of argument and proffered additional submissions in amplification thereof.

The main argument of learned counsel for the appellant, Chief R. A. O. Oriade, is that the court below was in error by not dismissing the appeal lodged by the respondent against the decision of the trial court in this case when the only issue for determination before it showed that the respondent did not appeal against the substance of the judgment of the trial court but against the compliance with the provisions of Order 24 Rule 4 of the High Court of Lagos State (Civil Procedure) Rules, 1972. In this regard, he called in aid the decision of this court in *Odume v. Nnachi* (1964) 1 All N.L.R. 329 and he contended that the non-compliance complained of was not fatal to the judgment of the trial court. In particular, learned counsel submitted that the respondent’s complaint of non-compliance by the appellant with the procedure for entering judgment under the provisions of Order 24 Rule 4 of the High Court of Lagos State (Civil Procedure) Rules, 1972 was not fatal to judgment obtained under the provisions of Order 24 Rule 11 thereof. He drew attention to the decisions of this court in *Nwora v. U.B.A Ltd.* (1978) 11 - 12 S.C. 1 at 9-10 and *Erisi v. Idika* (1987) 9-11 S.C. 170 and he stressed that

the courts need concern themselves only with doing substantial justice between the parties instead of taking refuge in unnecessary legal technicalities. He contended that the appellant who applied for final judgment in respect of his claim for damages for trespass and nuisance under the provisions of Order 24 Rule 11 of the High Court of Lagos (Civil Procedure) Rules, 1972 was not obliged to adduce oral evidence as required by the provisions of Orders 24 Rule 4. In the alternative, he argued that the affidavit in support of the application for final judgment was a form of evidence which ought to receive due weight especially where, as in this case, there was no counter-affidavit to controvert it. Citing the decisions in *Ogunleye v. Arewa* (1960) W.R.L.R. 11 and *Odume v. Nnachi* (supra) at 332, learned appellant's counsel drew the attention of the court to the fact that the procedure whereby a plaintiff who filed an application for final judgment in default of Statement of Defence in a declaration of title to land action and a claim for injunction under the provisions of Order 27 Rule 4 of the Rules of the Supreme Court (England) which came into force on January 1, 1964 was required to adduce oral evidence to establish his claims was described as untenable in law. He submitted that no oral evidence is either necessary or required in an application for final judgment under Order 24 Rule 11 of the High Court of Lagos State (Civil Procedure) Rules, 1972 and that the court below was in error to have ruled to the contrary thereby allowing the respondent's appeal before it.

He pointed out that the court below was equally in error when it reduced the award of damages to the appellant from N1,000,000.00 to N1,000.00 when the respondent did not appeal against the quantum of damages awarded to the appellant. Learned counsel urged the court to allow this appeal.

Learned counsel for the respondent, N. I. Quakers Esq. In his reply submitted that the claim of the appellant before the trial court was essentially for unliquidated pecuniary damages which were not covered by the provisions of Order 24 Rule 11 of the High Court of Lagos State (Civil Procedure) Rules, 1972 under which the application for final judgment in this case was made. He pointed out that the liquidated money demand is Order 24 Rule 2 of the said Rule. He argued that the appellant's claim before the trial court is for damages for trespass and nuisance, a claim in unliquidated pecuniary

damages for which the appellant was required to adduce credible evidence in proof thereof. He pointed out that the appellant's claim for unliquidated pecuniary damages although clearly not within the purview of Order 24 Rule 11 is governed by the provision of Order 24 Rule 4 of the relevant Rules of Court. He stressed that under order 24 Rule 4, *ibid*, the appellant is only entitled to an interlocutory judgment in default of defence with final judgment to be entered after the appellant would have given evidence in proof of his entitlement. Learned counsel referred to the decision in *Nigeria Airways Ltd. v. Ahmadu* (1991) 6 N.W.L.R (Part 198) 492 and submitted that the court cannot enter judgment without evidence for the amount of damages as may be proved and assessed. He argued that the court below was not satisfied with the trial court's assessment of damages for the trespass and nuisance claimed which was not supported by any material and credible evidence and that it rightly allowed the respondent's appeal before it. It therefore urged the court to dismiss this appeal.

Now, as already indicated, the central issue in this appeal turns entirely on whether the court below was right in setting aside the default judgment of the trial court against the respondent in the sum of N1,000,000.00 in respect of a claim for unliquidated pecuniary damages in trespass and nuisance when there was no evidence on the damages claimed. In this regard reference would be made to the provisions of Order 24 Rule 2 of the High Court of Lagos State (Civil Procedure) Rules, 1972 which deal with default of pleadings and stipulate as follows:

*"If the plaintiff's claim be only for a debt or liquidated demand, and the defendant does not, within the time allowed for that purpose, file a defence, the plaintiff may, at the expiration of such time, enter final judgment for the amount claimed with costs."*

There is a proviso to the above Rule. This proviso, however, has no relevance to the question under consideration in this appeal. It suffices to say that pursuant to the provisions of Order 24 Rule 2, where the plaintiff's claim is only for a debt or liquidated demand, and the defendant fails or neglects within the time allowed for that purpose or any extension of that time granted to him by the court to file a Statement of Defence in answer to the plaintiff's Statement of Claim, the plaintiff may, at the expiration of such time, enter final

judgment for the amount claimed with costs. I should perhaps state that as the plaintiff's claim under Order 24 Rule 2 must be in respect of a debt or liquidated demand, that is to say, an ascertained or specific amount, the judgment entered thereunder would necessarily be a final judgment for there is nothing more that needs to be further  
 B done to determine the quantum or extent of the defendant's liability.

There are, on the other hand, the provisions of Order 24 Rule 4 of the High Court of Lagos State (Civil Procedure) Rules, 1972 which stipulate thus:

C *"If the plaintiff's claim be for pecuniary damages only, or for detention of goods with or without a claim for pecuniary damages, and the defendant, or all the defendants, if more than one, make default as mentioned in Rule 2, the plaintiff may enter interlocutory judgment against the defendant or defendants, and the value of the  
 D goods and the damages, or the damages only, as the case may be, shall, on the application in chambers of any party, be ascertained in any way which the court or a Judge in Chambers may direct."*

Under the provisions of Order 24 Rule 4, *ibid*, therefore, if the plaintiffs claim is for pecuniary damages only or for an action in  
 E detainue with or without a claim for pecuniary damages and the defendant makes default in pleadings, the plaintiff may enter only interlocutory judgment against such defendant and subsequently make application for the ascertainment of the amount of damages to which he may be entitled. ***The judgments entered in these classes of  
 F cases are interlocutory and not final as the claims are necessarily unliquidated and, consequently, only an interlocutory judgment can be entered. After such a judgment, the plaintiff may then make an application to the court for the ascertainment of the precise amount of damages to which he may be  
 G entitled. The trial Judge in such a case may direct any method for such ascertainment although it is usual to direct that evidence be given for this purpose.***

Attention must finally be drawn to the provisions in Order 24  
 H Rule 11 of the same High Court Rules pursuant to which the appellant, as plaintiff before the trial court, applied for and obtained final judgment in default of defence against the respondent. They provide thus:

*"In all actions, other than those in the preceding Rules of this*



*Order mentioned, if the defendant makes default in filing a defence, the plaintiff may set down the action on motion for judgment, and such judgment shall be given as upon the Statement of Claim the Court or a Judge in Chambers shall consider the plaintiff to be entitled to". (Underlining supplied for emphasis)*

***It is evident, pursuant to the said provisions of Order 24 Rule 11, that in the rest of actions other than those specifically mentioned in the proceeding Rules 1-10 of Order 24 that if the defendant makes default in filing a defence, the plaintiff may apply to the court for judgment on motion and such judgment shall be given as upon the Statement of Claim as the Court or a Judge in Chambers considers the plaintiff to be entitled. Accordingly, it is the Statement of Claim alone that the court considers for its decision and no evidence is thus taken as the averments in the Statement of Claim are taken to be admitted by the defendant. See Young v. Thomas (1892) 2 Ch. 134 at 137.***

Learned counsel for the appellant attempted to justify the judgment of the trial court in favour of the appellant in default of defence in the present case without receiving evidence and in this regard relied heavily on the decision of this court in *Ogunleye v. Arewa* (supra). ***I need only state that the decision of this court in the Ogunleye case is, with respect, totally irrelevant and inapplicable to the issue under consideration in the present appeal. This is because it will presently be shown, in the first place, that the claim in the present appeal is for an unliquidated pecuniary damages which are covered by the provisions of Order 24 Rule 4 ibid and does not come within the purview of the provisions under Order 24 Rule 11 of the High Court of Lagos State (Civil Procedure) Rules, 1972. This is unlike the action for declaration of title to land with which the decision in the Ogunleye case, was concerned and which, not having been covered by the preceding Rules 1 to 10 of Order 24, clearly comes within the purview of the provisions of Order 24 Rule 11 of the relevant Rules of Court. In the second place, a consideration of the decision of this court in the Ogunleye case in 1960 cannot be fully and adequately treated without reference to the much later decision of this same court in Vincent Bello***

**v. Magnus Eweka (1981) 1 S.C. 101. In the latter case, this court held, following the decision in Wallersteiner v. Moir (1974) 3 All E.R 217 that the court does not make declarations of right either on admission or in default of defence without hearing evidence and being satisfied by such evidence to the plaintiff's entitlement to such a right.** See too *Motunwase v. Sorungbe* (1988) 4 N.W.L.R (Part 92) 90. This court further explained that the requirement for oral evidence arises from the fact that the court has a discretion to grant or refuse a declaratory relief and that its success depends entirely on the strength of the plaintiff's own case and not on defence. A declaratory claim is not only a discretionary relief, the court has a discretion whether or not to grant a motion for judgment in default of defence in respect of such a claim, the fact that the plaintiff is entitled to such judgment on the fact of his Statement of Claim notwithstanding. See *Charles v. Shepherd* (1892) 2. Q.B. 622 at 624. It therefore seems to me that the court may in the overall interest of justice properly insist on oral evidence in the case of applications for judgments in default of defence in a declaratory action. I will now consider whether or not the provisions of Order 24 Rule 11 which the appellant entirely relied upon in obtaining judgment in default of defence before the trial court are applicable to the present action.

**In dealing with this question it must be borne in mind that although the courts now pursue the course of substantial justice between parties instead of taking refuge in unnecessary legal technicalities (See *Esiri v. Idika* (1987) 9-11 S.C 170 at 179; *Nworah v. U. B. d.* (1978) 11-12 S.C 1 at 9; *Bello v. A-G Oyo State* (1986) 6 N.W.L.R (Part 45) 828; *Consortium M. C. v. N.E.P.A.* (1992) 6 N.W.L.R. (Part 246) 132 at 142), Rules of court, as far as the conduct of proceedings is concerned, are generally binding on the parties and the court and a party would be allowed to complain of a procedural irregularity on appeal if, inter alia, it can be shown that it materially affected the merits of the case or that he suffered a miscarriage of justice by reason of such irregularity in the proceeding.** The contention of the respondent in the present case is that the trial court erred in law by entering final judgment in default of defence in favour of the appellant in a claim for unliquidated pecuniary damages when no evi-

dence in proof thereof was taken as provided under Order 24 Rule 4 of the High Court of Lagos State (Civil Procedure) Rules, 1972, that this materially affected the merits of the case and that he hereby suffered a miscarriage of justice.

Now, before I proceed to consider the applicability or otherwise of the provisions of Order 24 Rule 11 to the present claim, it is desirable to determine the precise nature of the appellant's claim for damages against the respondent. This will go a long way in the resolution of the issue under consideration in this appeal.

The particulars of the appellant's action and the damages claimed have earlier been set out in this judgment. It is clear that what is in dispute between the parties in this appeal is the N1,800,000.00 general damages claimed by the appellant against the respondent for alleged trespass and nuisance. The question is whether or not the appellant's claim constitutes liquidated pecuniary damages or demand.

***A liquidated demand is a debt or other specific sum of money usually due and payable and its amount must be already ascertained or capable of being ascertained as a mere matter of arithmetic without any other or further investigation. Whenever, therefore, the amount to which a plaintiff is entitled can be ascertained by calculation or fixed by any scale of charges or other positive data, it is said to be "liquidated" or made clear. Again, where the parties to a contract, as part of the agreement between them, fix the amount payable on the default of one of them or in the event of breach by way of damages, such sum is classified as liquidated damages where it is in the nature of a genuine pre-estimate of the damage which would arise from breach of the contract so long as the agreement is not obnoxious as to constitute a "penalty" and it is payable by the party in default. The term is also applied to sums expressly made payable as liquidated damages under a statute. In Eko Odume and others v. Ume Nnachi and others (1964) 1 All N.L.R 329 at 333 this court stated per Idigbe J.S.C. as follows:***

***"We think, however, that the description by learned counsel of a claim for #300 damages for trespass, as one for "liquidated damages" is erroneous. A claim for damages does***

*not become one for “liquidated damages” merely because a specific amount of money is claimed”.*

***But in every other case, where the court has to quantify or assess the damages or loss, whether pecuniary or non-pecuniary, the damages are unliquidated. So, too, when the amount to be recovered depends on all the circumstances of the case and on the conduct of the parties and is fixed by opinion or by an estimate or what may be judged reasonable, the damages are said to be “unliquidated”. See Eko Odume and others v. Ume Nnachi and others, (supra). Accordingly, the amount ultimately recoverable in a claim for unliquidated damages is incapable of prior ascertainment and may only be known at the end of the trial as the same is based on the estimate or opinion of the trial court. It is also right to say that because of the subjective nature of the assessment of unliquidated damages, two different courts can hardly award the same amount in the same claim.***

It is plain in the present case that the N1,800,000.00 claimed is in respect of general damages for trespass and nuisance. It is neither a debt nor an already ascertained or precise amount fixed by any positive data which the appellant is entitled to from the respondent as a result of the alleged trespass and nuisance. It is not therefore a claim in respect of liquidated pecuniary damages. On the contrary, the appellant’s action is of a category where the court has to quantify or assess the damages claimed. The amount to be awarded would depend on all the circumstances of the case and on the conduct of the parties and must be fixed by the opinion of or by what may be judged as reasonable by the trial court. ***The appellant’s action in general damages against the respondent for alleged trespass and nuisance is therefore a claim in unliquidated pecuniary damages. It is no different from the claim of N300.00 general damages for trespass which this court in Eko Odume and others v. Ume Nnachi (supra) per Idigbe, JSC described as “erroneous” on the part of the respondent’s counsel “to refer to it as a claim in liquidated damages.” He concluded as I have earlier pointed out that a claim for damages, does not become one for “liquidated damages” merely because a specific amount of money, like in the present case, has been***

***claimed and that the claim in that case was one for unliquidated damages. In my view, it cannot be disputed that the appellant's claim in issue in this appeal is an action for unliquidated damages and I so hold.***

Having now held that the claim in issue is one for unliquidated damages, the next question must be whether the court below was right in setting aside the default judgment of the trial court over the unliquidated pecuniary damages claimed against the respondent without taking evidence on the question of damages. B

As already pointed out, the provisions of Order 24 Rule 2 and 4 of the High Court of Lagos State (Civil Procedure) Rules, govern, inter alia, actions in liquidated and unliquidated damages respectively. ***It seems to me clear, having regards the express provisions of Order Rule 11 of the relevant Rules of court, that the appellant's action cannot be covered thereunder. This is because by the unambiguous wordings of Order 24 Rule 11 under which the appellant obtained his summary and final judgment in default of defence, its applicability is expressly confined or made subject to the qualification that actions therein covered must be other than those for which specific provisions have already been made in the proceeding Rules of the said Order 24 Rule 11. The appellant's claim for unliquidated pecuniary damages having been fully provided for by the provisions of Order 24 Rule 4 which precede those of Order 24 Rule 11, ibid, cannot therefore come within the purview of the provisions of the said Order 24 Rule 11. The appellant's claim being one for unliquidated pecuniary damages and coming within the purview of the provisions of Order 24 Rule 4, the appellant was entitled to apply for an interlocutory and not final judgment in default of defence.*** C D E F G

***The term "interlocutory judgment" means that such a judgment is interlocutory only as to the amount, but is final as to the right of the plaintiff to recover damages. Thereafter the appellant would be entitled to make an application to the court for the ascertainment of the precise amount of damages to which he might be entitled. As I have already observed, the trial Judge in such a case may direct any method for such ascertainment but it is usual to direct that evidence be given for*** H

**this purpose. These, the appellant failed to do in the present case.**

**It cannot be over-emphasized that a court is not entitled to enter summary or default judgment on a claim based on a relief for payment of unliquidated pecuniary damages without taking evidence for the assessment of the amount of damages that may be proved as such a claim must be established by credible evidence. This is because it is not enough for the court to simply award damages in an unliquidated pecuniary damages claim without giving any reason as to how it arrived at what in its opinion amounted to reasonable damages.** See *Umunna v. Okwuraiwe* (1978) 6-7 S.C. 1; *Victor Olurotimi v. Felicia Ige* (1993) 8 N.W.L.R (Part 311) 257 at 268 etc. **Damages are awarded on sound and well-settled legal principles and not on sentimental or arbitrary grounds and it has been held to be wrong for a trial court in a claim for unliquidated damages to make an award without taking evidence from the parties. See *Imo Broadcasting Corporation v. Lambert Iwueke* (1995) 1 N.W.L.R (Part 372) 488 where it was restated that in a claim for unliquidated damages, the plaintiff is not entitled to summary final judgment in default of defence as the quantum of damages the plaintiff is entitled to must be assessed and proved by credible evidence.**

In the case of the *Eko Odume and others v. Ume Nnachi and others* (supra), a case involving a claim for unliquidated pecuniary damages for trespass, just as in the present case, this court in respect of the judgment in default of defence entered in the suit held that it was not Rule 2 but Rule 4 of Order 27 of the English Supreme Court Rules, 1883 the provisions of which are in pari materia with those of the Order 24 Rules 2 and 4 of the High Court of Lagos State (Civil Procedure) Rules 1972 which applied and that the trial court should have heard evidence before entering final judgment in the suit. Said Idigbe, J.S.C.:

“In the case now on appeal, the learned trial Judge entered final judgment for the respondents in respect of the claim for damages for trespass without receiving evidence on that claim and we think he was clearly in error”

Learned counsel for the appellant did however argue that

the depositions in the affidavit in support of the appellant's motion for final judgment in default of defence were form of evidence before the trial court which that court was entitled to act upon.

In the first place the 10 paragraph affidavit in support of the appellant's motion for final judgment was sworn to by one Frank Ayinla who described himself as Litigation Manager in the chambers of the appellant's counsel. The depositions he made were expressly stated to be from his "*information and belief*" so that he had no personal knowledge of the same. More importantly, his affidavit did not contain a single fact relating or relevant to the unliquidated pecuniary damages of N1,800,000.00 claimed by the appellant. In the second place, there was no corroboration of any of the matters he deposed to even though they had nothing to do with the unliquidated damages claimed by the appellant.

***In this regard, it ought to be stressed that deponent in affidavit evidence must, where the facts deposed to are from their information and belief state their source of such information and belief. Such evidence ought not to be acted upon unless the court can ascertain the source of the information and belief and unless the facts deposed to are corroborated by some one who speaks from his own personal knowledge. See Re J. L Young Manufacturing Co. Ltd (1900) 2 Ch. 753 at 754. The depositions of the said Litigation Manager which were not from his personal knowledge, although irrelevant on the question of the unliquidated pecuniary damages claimed, were not corroborated by any one who testified from his own personal knowledge and is to that extent irrelevant and weightless.***

It cannot be seriously disputed that the trial court's assessment and award of the unliquidated pecuniary damages of N1,000,000.00 for alleged trespass and nuisance were not supported by any credible and material evidence in proof of the quantum of damages in issue. There was no basis for the amount of damages awarded to the appellant by the trial court. This seems to me a clear error of law.

It was also contended on behalf of the appellant that non-compliance with the procedure for entering judgment under the provisions of Order 24 Rule 4 was not fatal to the judgment obtained

under Order 24 Rule 11. I cannot, with profound respect, accept this submission of law in the present case as well founded. ***Without doubt, where a court has the jurisdiction to make an order, the fact that the power of the court is invoked under a wrong Rule of court or law is no good reason for refusing to make the order.***

<sup>B</sup> See Joseph Falobi v. Elizabeth Falobi (1976) 9 & 10 S.C. 1 at 13; Salawu Oke and others v. Musiliu Aiyedun and Another (1986) 4 S.C. 61 at 68 etc. ***But there must be jurisdiction in the court in the first place to make the order as prescribed by the Law and Rules. Such jurisdiction must also be exercised in accordance with the terms, stipulations and conditions for its invocation.***

<sup>C</sup> In the present case, the court's exercise of jurisdiction over the appellant's application for summary judgment in default of defence is unquestionably governed by the provisions of Order 24 Rules 4 of the High Court of Lagos State (Civil Procedure) Rules 1972. The appellant, nonetheless, founded his application under Order 24 Rule 11 of the same High Court of Lagos (Civil Procedure) Rules, the provisions of which do not apply to unliquidated debt or monetary demand and are therefore totally irrelevant to the application in issue. ***More significantly, the express stipulation and conditions enshrined under the provisions of Order 24 Rule 4, ibid, for the exercise of the court's jurisdiction in respect of the appellant's application for summary judgment were neither complied with nor observed. In my view the issue that has arisen in the present case is not one of invoking the power of the court under a wrong Rule of court or Law but that of failure to comply with the stipulated necessary terms and conditions for the exercise of jurisdiction over the appellant's application.***

<sup>D</sup> It seems to me that under such circumstances the court below was perfectly right to set aside the default judgment of the trial court over a claim for unliquidated pecuniary damages without receiving any evidence on the issue. I must state that I am in complete agreement with the court below that the trial court was clearly in error by <sup>E</sup> so doing.

The conclusion I therefore reach is that this appeal is without substance and the same is hereby dismissed with costs to the respondent against the appellant which I assess and fix at N10,000.00.



**BELGORE JSC**

In cases where damages claimed are of unliquidated nature final judgment cannot be entered in default either under Ord. 24 rule 11 or Order 24 rule 4 of Lagos High Court Civil Procedure Rules. Evidence of how the unliquidated damages had been arrived at must be before the Court. The best judgment in respect of unliquidated damages will be interlocutory not final, as evidence is required to prove the damages. I therefore agree with Iguh JSC that the Court of Appeal was right to allow the appeal. I also dismiss this appeal and award N10,000.00 costs to respondent against the appellant.

**KUTIGI JSC**

I read in advance the judgment just rendered by my learned brother Iguh, J.S.C. I agree with his reasoning and conclusions. I think the Court of Appeal was right when it set aside the judgment of the trial High Court for a claim of unliquidated pecuniary damages without any evidence thereon. The appeal is dismissed with costs as assessed.

**KATSINA-ALU JSC**

I have had the advantage of reading in draft the judgment of my learned brother IGUH, JSC. In this appeal. I agree with it for the reasons given in the leading judgment, I too, dismiss this appeal with 10,000.00 costs to the respondent.

**KALGO JSC**

My learned brother Iguh JSC has in his judgment which I have read earlier fully and lucidly dealt with the main issue for determination in this appeal and I entirely agree with his reasoning and conclusions to the effect that there is no merit in the appeal. I accordingly so hold and hereby dismiss the appeal with N10,000.00 costs in favour of the respondent.