

**SUPREME COURT OF NIGERIA**  
FRIDAY 12TH DECEMBER, 2003. SC. 113/1998  
**CORAM:- S. M. A. BELGORE, U. A. KALGO,**  
**A. I. KATSINA-ALU, S. O. UWAIFO, D. O. EDOZIE, JJSC**

1. PLANWELL WATERSHED LTD ..... APPELLANTS  
2. GOODAY AKHAINE  
AND  
CHIEF VINCENT OGALA ..... RESPONDENT

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UNDEFENDED SUITS - Judgment - Application to set aside - Such application must not only be supported by affidavit - But also the proposed defence to the suit (H1)

UNDEFENDED SUITS - Summary trial - Purpose - It obviates unnecessary wastage of time - In trying a straightforward matter of debt - And plaintiff may move court for judgment - Where notice of intention to defend has disclosed no defence (H2)

**FACTS**

Plaintiff/respondent's case is that he paid the sum of N768,850.00 to defendants/appellants for supply of general goods. However, appellants failed to deliver any of the goods even after repeated demands were made. Hence, respondent instituted this suit at the High Court of Edo State, Benin City, claiming the above stated sum, a 25% interest rate before judgment and 10% interest after judgment. The claim was brought under the undefended list supported by affidavit in accordance with Order 23 High Court (Civil Procedure) Rules, 1988 of Bendel State.

Appellants were duly served with the writ of summons. But within the time set by the rules, appellants did not file any notice of intention to defend. Thereafter, judgment was entered for respondent as per his claim. Subsequently, appellants filed a motion praying the court for extension of time within which to set aside the judgment of the court and extension of time to file notice of intention to defend. However, the court refused the application on the ground that the supporting affidavits did not disclose any proposed defence to the action. Appellants appealed to the Court of Appeal. The ap-

peal was also dismissed. Hence, appellants have come on a further appeal to Supreme Court.

### **ISSUE FOR DETERMINATION**

*“Whether the learned Justices of the Court of Appeal were right in law and on the facts in affirming the decision of the lower court which refused to set aside the judgment obtained against the appellants and in default of the appellants filing a notice of intention to defend the suit.”*

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

*Judgments - Application to set aside*

**1. The application to set aside the judgment, to say the least, is bereft of any defence to the action. It was not sworn by the defendants but by their counsel. The application must not only be supported by an affidavit but also by the proposed defence to the suit filed in undefended cause list. Merely stating that the defendant has a defence is not enough; the proposed defence must on the face of the affidavit be clear and such defence must be attached to the application. The attached affidavit did not satisfy these conditions. The affidavit supporting the application to set aside judgment clearly stated a defence even though the proposed defence was not attached whereby appellate court allowed the defendant to defend. These two cases do not help the appellants in this appeal.** (p. 2819 A)

*UNDEFENDED SUITS - Summary trial - Purpose*

**2. The reason for the rule is to obviate unnecessary wastage of time in trying a straightforward matter of debt or similar claim. Even where a defendant has entered a notice of intention to defend with the proposed defence, the plaintiff may as well move the court for judgment if that notice does not disclose a defence to the suit. In this appeal, no defence is disclosed in the two courts below and none has been disclosed in this court.** (p. 2819 D)

**REPRESENTATION**

A. O. Okeaya-Inneh, Esq. with C. O. Oba, Esq., for the Appellants  
M. E. Esakhile, Esq., for the Respondent

**CASES REFERRED TO**

UTC Nig. Ltd. v. Pamotei (1989) 2 NWLR (Pt. 103) 244  
Essang v. Bank of the North (2001) 6 NWLR (Pt. 709) 384, 399  
A.C.B. Ltd. v. Gwagwada (1994) 5 NWLR (Pt. 342) 25  
Ben Thomas Hotels v. Sebi Furniture (1989) 5 NWLR (Pt. 123) 523  
John Holt & Co. (Liverpool) Ltd. v. Fajemirokun (1961) All NLR 492  
Nishizawa v. Jethwani (1984) 12 SC 234  
Macaulay v. NAL Merchant Bank Ltd. (1990) 4 NWLR (Pt. 144) 283  
Kwaham v. Elias (1960) SCNLR 516

**RULES REFERRED TO**

Bendel State High Court (Civil Procedure) Rules 1988, O. 23, O. 37  
r. 9  
Lagos State High Court (Civil Procedure) Rules Cap 52 of 1973, O.  
10 r. 1(a)

**LEAD JUDGMENT BY BELGORE JSC**

The respondent in this appeal was also respondent at the Court of Appeal and plaintiff at the trial High Court of Bendel State. The claim against the present appellants jointly and severally was “for the sum of N768,850.00 being money paid for a consideration that has wholly failed in that between 17/11/92 at Benin City within Benin Judicial Division the plaintiff paid to the defendant the said sum of N768,850.00 for supply of general goods but the defendants have failed to deliver any of the goods to the plaintiff or at all despite repeated demands”. Also claimed is interest at 25% before judgment and 10% after judgment. The claim was brought under undefended list supported by an affidavit in accordance with Order 23 High Court (Civil Procedure) Rules, 1988 of Bendel State.

The appellants were duly served with the writ of summons. But within the time set by the rules aforementioned the appellants as defendants did not file any notice of intention to defend. On 15th day of July, 1993, the return date, neither the appellants nor their counsel were present in court. The respondent in accordance with

the rules of that court testified to prove his case and judgment was accordingly entered for him as claimed on 22nd day of July, 1993. On 8th September, 1993, the appellants filed a motion praying for:

1. Extension of time within which to set aside the judgment delivered on 22nd July, 1993;

B 2. setting aside the said judgment; and

3. setting aside the writ of summons or alternatively granting the defendants extension of time to file notice of intention to defend.

The application was supported by a seventeen paragraph affidavit sworn to by counsel to the appellants. The main plank of the affidavit is that the defendants were in a criminal matter and therefore in prison custody and that the office of 1st defendant was then closed, even though there is clear admission that the defendants were served with the writ of summons on 8th July, 1993. But despite the C D length of the supporting affidavit, there is no hint of what the proposed defence to the action was. To baldly state that there was intention to defend is certainly not enough. The trial court refused the application.

E Court of Appeal heard the appeal against refusal of trial court to re-list the matter by setting aside the judgment; the appeal was dismissed and thus the appeal to this court. The sole issue formulated for determination by the appellants is:

F *“Whether the learned Justices of the Court of Appeal were right in law and on the facts in affirming the decision of the lower court which refused to set aside the judgment obtained against the appellants and in default of the appellants filing a notice of intention to defend the suit.”*

G The appellants submitted that by their affidavit supporting their application at trial court to set aside the judgment, they clearly stated that they “are willing and ready to defend the suit” without more was enough for trial Judge to set aside his judgment. It should be pointed out that the rule governing the suit is clear in its purport by providing Order 23(3)(1):-

H *“If the party served with the writ of summons and affidavit delivers to the registrar, not less than five days, before the date fixed for hearing a notice in writing that he intends to defend the suit, together with an affidavit disclosing a defence on the merit, the court may give him leave to defend upon such terms, as the court may*

*think just."*

***The application to set aside the judgment, to say the least, is bereft of any defence to the action. It was not sworn by the defendants but by their counsel. The application must not only be supported by an affidavit but also by the proposed defence to the suit filed in undefended cause list. Merely stating that the defendant has a defence is not enough; the proposed defence must on the face of the affidavit be clear and such defence must be attached to the application. The attached affidavit did not satisfy these conditions.*** The case of UTC Nigeria Ltd. v. Pamotei & Others (1989) 2 NWLR (Pt. 103) 244; (1989) 1 NSCC 523 the attached affidavit showed clearly a defence. In Essang v. Bank of the North (2001) 6 NWLR (Pt. 709) 384, 399. ***The affidavit supporting the application to set aside judgment clearly stated a defence even though the proposed defence was not attached whereby appellate court allowed the defendant to defend. These two cases do not help the appellants in this appeal. The reason for the rule is to obviate unnecessary wastage of time in trying a straightforward matter of debt or similar claim. Even where a defendant has entered a notice of intention to defend with the proposed defence, the plaintiff may as well move the court for judgment if that notice does not disclose a defence to the suit. In this appeal, no defence is disclosed in the two courts below and none has been disclosed in this court.***

The appeal has no merit and I dismiss it with N10,000.00 costs to the respondent against the appellants jointly and severally.

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#### **KATSINA-ALU JSC**

I have had the advantage of reading in draft the judgment of my learned brother Belgore, JSC. I entirely agree with it and for the reasons which he has given I also dismiss the appeal with N10,000.00 costs to the respondent.

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#### **KALGO JSC**

I have had the opportunity of reading in draft the judgment

just delivered by my learned brother Belgore, JSC in this appeal and I entirely agree with him that there is no merit in the appeal.

The case was brought on the undefended list in the trial court in accordance with Order 23 of the High Court (Civil Procedure) Rules, 1988 of the then Bendel State. Subsection (3)(i) of Order 23 provides:

*"If the party served with the writ of summons and affidavit delivers to the registrar, not less than five days, before the date fixed for hearing, a notice in writing that he intends to defend the suit, together with an affidavit disclosing a defence on the merit, the court may give him leave to defend upon such terms as the court may think just."*

By this provision, a defendant in an undefended list proceeding must show in his affidavit not only that he intends to defend the action but also he discloses his defence to the action on the merits of the case. It is not enough merely to assert that he has a good defence to the action without giving full details of the actual defence he intends to put forward to the court. See *A.C.B. Ltd. v. Gwagwada* (1994) 5 NWLR (Pt. 342) 25 at p. 36; *Ben Thomas Hotels v. Sebi Furniture* (1989) 5 NWLR (Pt. 123) 523; *John Holt & Co. (Liverpool) Ltd. v. Fajemirokun* (1961) All NLR 492. In the instant case the appellant has passed the first test of expressing an intention to defend but failed awfully the second and most important test of stating the details of the defence he intends to make in the action on the merits. The latter is the backbone of his defence and without it the learned trial Judge was entitled to proceed as he did in this case. I am also satisfied that the Court of Appeal was perfectly right in upholding the decision of the trial Judge and dismissing the appeal before it.

In the circumstances, I also find no merit in the appeal. I dismiss it with N10,000.00 costs to the respondent against the appellants.

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## H **UWAIFO JSC**

The facts of this appeal are very short. The plaintiff (now respondent) claimed from the defendants (now appellants) a liquidated sum of N768,850.00 as endorsed in the writ of summons which was filed in the High Court, Benin City, supported by affidavit for the

purpose of listing the suit under the undefended list. This is by virtue of Order 23(1) of the High Court (Civil Procedure) Rules, 1988 of Bendel State, applicable in Edo State (1988) Rules. The affidavit adumbrated a breakdown of the various sums making up that amount paid to the defendants for goods which they failed to supply as follows: B

17/9/92	N92,950.00	for goods to be supplied on 25/12/92	
17/9/92	N149,050.00	for goods to be supplied on 25/12/92	
17/11/92	N252,450.00	for goods to be supplied on 18/1/93	
19/11/92	N19,800.00	for goods to be supplied on 18/1/93	C
1/12/92	N7,700.00	for goods to be supplied on 1/2/93	
9/12/92	N39,600.00	for goods to be supplied on 12/2/93	
15/12/92	N36,000.00	for goods to be supplied on 12/2/93	
15/12/92	N300.00	for goods to be supplied on 15/2/93	
21/12/92	N55,800.00	for goods to be supplied on 22/2/93	D
21/12/92	N15,600.00	for goods to be supplied on 22/2/93	
21/11/92	N99,600.00	for goods to be supplied on 22/2/93	
Total N768,850.00			

The defendants were served but failed to enter an appearance. On 15th July, 1993, the court took evidence and on 22nd July gave judgment for the plaintiff for the said amount of N768,850.00 with interest of 10% per month. On 8th September, 1993, the defendants filed an application seeking an extension of time within which to set the judgment aside, for an order setting the judgment aside and an order setting the writ of summons aside or in the alternative granting the defendants extension of time within which to file a notice of intention to defend the suit. In the affidavit in support sworn by defendants' counsel, clement Ikpefuan Giwa-Amu, he claimed that the 2nd defendant, the Managing Director of the 1st defendant, had been in prison custody without bail for allegedly operating an illegal bank although admitting that he was duly served with the writ of summons together with the attached affidavit. Among other depositions in the affidavit was that in paragraph 15 as follows: F

*"That the defendants/applicants are willing and ready to defend this suit."* H

On 7th February, 1994, the learned trial Judge refused the application whereupon an appeal was lodged at the Court of Appeal, Benin Division against that refusal. In a rather lengthy judgment

delivered on 8th December, 1995, that court dismissed the appeal. The defendants have now appealed to this court. I shall hereafter refer to the parties as the appellants and respondent respectively. The appellants have raised a sale issue for the determination of the appeal as follows:

B *“Whether the learned Justices of the Court of Appeal were right in law and on the facts in affirming the decision of the lower court which refused to set aside the judgment obtained against the appellants and in default of the appellants filing a notice of intention to defend the suit.”*

C The respondent has adopted this issue. I do not consider it necessary to set out the arguments proffered on behalf of the appellants and the respondent. The issue is a very narrow one.

D This matter comes under the undefended list which is subject to the summary judgment procedure. It is without dispute the law that any judgment given against a party under that procedure, whereof the party did not appear at the hearing, may be set aside under Order 37 rule 9 of the 1988 Rules which provide that:

E *“Any judgment obtained where one party does not appear at the trial may be set aside by the court upon an application made within six days after the trial or within such longer period as the court may allow for good cause shown.”*

F There is also a provision in Order 14 of the 1988 Rules which provides that where judgment is entered pursuant to any of the proceeding rules of the said Order, it shall be lawful for the court to set aside or vary such judgment upon such terms as may be just. This is similar to Order 14 rule 11 of the Rules of the Supreme Court of England which states:

G *“Any judgment given against a party who does not appear at the hearing of an application under rule 1 or rule 5 may be set aside or varied by the court on such terms as it thinks just.”*

H This court in U.T.C. (Nig.) Ltd. v. Pamotei (1989) 2 NWLR (Pt. 103) 244; (1989) 1 NSCC (Pt. 20) 523 considered the provision in Order 10 rule 1(a) of the High Court of Lagos State (Civil Procedure) Rules, Cap. 52 of Law of Lagos State, 1973 and held that where any judgment is entered for a plaintiff under that rule in the absence of the defendant who failed to enter an appearance, it may be set aside upon an affidavit filed by such defendant showing that



he has a good defence to the action. The case of *Spira v. Spira* (1939) 3 All ER 924 was considered. The case decided that a judgment obtained under the summary judgment procedure was not a default judgment and it was suggested that it could only be subject of appeal or, in the alternative, proceedings should be taken to have it set aside. This court, quite rightly, was not persuaded by that authority. In fact Order 14 rule 11 (RSC) later reversed it so that in England, a judgment given under the summary procedure can be set aside in an appropriate case. B

However, to be able to set aside a summary procedure judgment, the defendant must show by affidavit which must “condescend upon particulars”, a clearly and concisely stated defence, and the facts supporting it; and in addition state whether the defence goes to the whole or part of the claim: see *Nishizawa v. Jethwani* (1984) 12 SC 234 at 260; *Macaulay v. NAL Merchant Bank Ltd.* (1990) 4 NWLR D (Pt. 144) 283 at 306-307. In the present case, learned counsel Mr. Okeaya-Inneh for the appellants correctly stated and discussed the applicable law. His obvious difficulty was the affidavit relied on at the trial court in an attempt to set the judgment aside. Admittedly, the affidavit was not prepared by him. Indeed, he is a new counsel in the matter. However, he has argued that the 1st appellant, the Managing Director of the 2nd appellant, was incarcerated at all material times and was unable to put in the defence. He relied on *Kwaham v. Elias* (1960) SCNLR 516 which dealt with judgment by default of statement of defence. In that case at page 524 Abbott FJ, in allowing the appeal, observed: E F

*“In my view the defendant by his agent Alfred Kwaham, has been grossly negligent in putting forward his defence to the plaintiff’s claim, and I have in this judgment indicated various directions in which I consider that negligence is to be found. The defendant must consider himself very fortunate that he has not been entirely shut out from defending the plaintiff’s claim.”* G

I have made it clear that under the summary judgment procedure, the defendant must disclose his defence by affidavit. The defendants (now appellants) in this case did no more than say that they were willing and ready to defend the suit if the judgment was set aside. They have not disclosed any defence. Not having done so, no discretion can be exercised in their favour. A court of equity must be H

fully apprised of facts relevant for the exercise of its discretion otherwise it will be in breach of the principles upon which it can properly act if it were to exercise that discretion.

For the reasons given and those succinctly stated by my learned brother Belgore, JSC, I too find no merit in this appeal and I accordingly dismiss it. I award the respondent N10,000.00 costs.

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***EDOZIE JSC***

I had a preview of the leading judgment just delivered by my learned brother, Belgore, JSC, and I agree with his reasoning and conclusion in dismissing the appeal. I also, dismiss the appeal with costs as proposed in the leading judgment. Appeal dismissed.

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