

SUPREME COURT OF NIGERIA
3RD JUNE, 2005 SC. 245/2000
CORAM:- S. M. A. BELGORE, S. U. ONU, U. A. KALGO,
D. MUSDAPHER, D. O. EDOZIE, JJSC

THOR LIMITED APPELLANT
AND
FIRST CITY MERCHANT BANK LIMITED RESPONDENT

JUDGMENTS - Summary Judgments - Purpose of - Enables a party obtain judgment - Without need for full trial - Where the other party has no defence (H1)

AFFIDAVITS - Summary Judgments - Nature of supporting affidavit - Need not set out all the particulars - Nor verify the facts - Except by reference to statement of claim (H2)

PRACTICE & PROCEDURE - Summary Judgment - Application for - Where the claim disclosed a reasonable cause of action - And it is properly verified by plaintiff's affidavit - It is in compliance with the High Court Rules (H3)

ACTIONS - Courts - Summary Judgments - Defence - If court allows a defence - Upon an application that disclosed no actual defence - The object of summary judgment procedure will be defeated (H4)

PLEADINGS - Statement of defence - Where defendant fails to substantiate its statement - With detailed particulars supported by documents - There is no good defence to the action (H5)

ACTIONS - Summary judgments - Leave to defend - Counter claim - Where groundless - Judgment will be given to the plaintiff (H6)

BANKING - Interest rate - Is deemed to be accepted by a party - Where

he received from the bank periodic statements of account - But did not dispute the accounts (H7)

FACTS

Before the High Court of Lagos State, the plaintiff/respondent claimed against the defendant/appellant as follows:- (a) Sum of N12,303,145.19 being outstanding debit balance on the defendant's account and (b) An interest on the said sum at the rate of 21% per annum from the 1st of January 1994 until the whole amount outstanding is fully liquidated. The defendant in reaction filed a statement of defence and counter claim wherein it denied plaintiff's claim and counter claimed against the plaintiff the sum of N1,943,399.00 being overpayment made by the defendant to the plaintiff over the material time, the sum of US 130,000.00 dollars deposited by Decacia International Limited as Red letter portion of letters of credit issued in favour of defendant and the sum of N2,000,000.00 as damages for breach of contract, to wit, the unlawful and unilateral suspension.

By summons for judgment brought pursuant to Order 10 Rules 1 and 2 of the High Court of Lagos State (Civil Procedure) Rules 1972, the plaintiff bank sought from the trial court, an order entering final judgment in terms of its claims. Attached to the summons for judgment were an affidavit of 38 paragraphs and twenty-two exhibits. In opposition to the summons, the defendant filed affidavit of merit of 38 paragraphs. The trial court gave judgment in favour of the plaintiff, and adjourned the counter claim for trial. Dissatisfied with the judgment, the plaintiff lodged an appeal to the Court of Appeal. The Court of Appeal held that the defendant had not placed before the trial court sufficient facts to entitle it to be granted leave to defend the plaintiff's suit and dismissed the appeal. The defendant has further appealed to the Supreme Court.

ISSUES FOR DETERMINATION

“(i) Whether the plaintiff satisfied the onus on a party seeking summary judgment under Order 10 (now Order 11) High Court of Lagos (Civil Procedure) Rules.

(ii) Whether the defendant was entitled in the circumstances to be

given leave to defend the action.”

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

Summary Judgments - Purpose of

1. The summary judgment procedure, which is similar to the undefended list procedure, is designed to enable a party obtain judgment, especially in liquidated demand cases, without the need for a full trial where the other party cannot satisfy the court that it should be allowed to defend the action. (p. 1816C)

Summary Judgments - Nature of supporting affidavit

2. As regards the nature or content of the affidavit sufficient to verify the claim, this court, in the case of *Sodipo v. Lemminkainen OY* (1986) 1 NWLR (Pt. 15) 230 at 231 adopted with approval the decision in the case of *May v. Chidley* (1894) 1 GB 451 where it was held that the affidavit need not set out all the particulars nor verify the facts except by reference to the Statement of Claim. To the extent that the plaintiff’s Statement of Claim must disclose a reasonable cause of action. (p. 1816E)

Summary Judgment - Application for

3. Accompanying and in support of the application for summary judgment is the plaintiff’s verifying affidavit to which were exhibited 22 exhibits evidencing the various transactions forming the basis of the plaintiff’s claim. The affidavit evidence not only referred to the Statement of Claim but repeated all the paragraphs therein and in paragraph 38, it deposed that the defendant had no defence to the action. In my view, the plaintiff’s Statement of Claim disclosed a reasonable cause of action and as the claim was properly verified by the plaintiff’s affidavit, and having regard to all the other requirements already mentioned, the plaintiff application for summary judgment under Order 10 Rule 1 of High Court of Lagos (Civil Procedure) Rules was in compliance with the said Order 10 Rule 1. Accordingly, the first issue for determination is resolved in favour of the plaintiff against the defendant. (p. 1817D)

Summary Judgments - Defence

4. In my view, if the court were to let in a defendant to defend upon a mere application for interrogatories and notice to admit fact, that would defeat the object of the summary judgment procedure as such an application could be nothing but a ploy to give a semblance of a defence to the action when none exists. A desire to investigate alleged obscurities and a hope that something will turn up after the investigation cannot separately or in unison amount to sufficient reason for refusing to enter judgment for the plaintiff. (p. 1820E)

C ***PLEADINGS - Statement of defence***

5. The next complaint of the defendant is the allegation that the plaintiff utilized the cash collateral deposited with it. It was further alleged that collaterals offered by the defendant were adequate to cover the sums owing and as such judgment should not have been entered against the defendant. Unfortunately, the defendant did not either in its Statement of Defence or 'Affidavit of Merit' give detailed particulars with respect to the amount of the collaterals, when they were deposited and subsequently utilized. By failing to substantiate its bare statement with detailed particulars supported by documents, the defendant did not show that it has a good defence to the action on the merits neither did it disclose facts that would have been deemed sufficient to entitle it to be granted leave to defend the action. The plaintiff averred and this was not controverted that statements of its account with the defendant were sent to the latter regularly. These Statements of Account had not been falsified and therefore are presumed to be correct. (pp. 1820H & 1821G)

G ***Summary judgments - Leave to defend***

6. The case of *Anglo Italian Bank v. Wells* (1878) 38 L 7, 197 is authority for the proposition that the mere fact that the defendant has a counter-claim does not necessarily entitle him to leave to defend. Where, therefore, there is no defence to the plaintiff's claim and there is no arguable set-off or bona fide counter-claim, judgment would be given to the plaintiff. In other words, if the counterclaim set up by the defendant is clearly groundless, it will be disregarded: In my view, the defendant's counter-

claim is manifestly unarguable and not having been made bona fide should not operate to disentitle the plaintiff to judgment. (p. 1822B/G)

BANKING - Interest rate

7. Finally, the defendant alleged there were manipulations in the Statement of Account of the defendant with the plaintiff's bank and that interest and exchange rates used by the plaintiff were exorbitant. But as noted earlier, the plaintiff regularly furnished the defendant a Statement of Account in respect of the subject matter of this suit. The defendant did not dispute receiving the Statement of Accounts. There is no evidence that it challenged any entry in the said Statement of Accounts, in the case of Barclays Bank D.C.O. v. Hassan (1961) 1 All NLR 836, it was held thus:-

“A party will be deemed to have accepted the rate at which interest on a bank overdraft was calculated if he received from the bank periodic Statement of Accounts in which the interest charged was shown as a debt and he did not dispute the account shown by the statements.”

As the defendant raised no objection in respect of the statements of account, the complaint about manipulations and wrong interest charges is a mere afterthought.

In the light of the foregoing, it is my judgment that the Court of Appeal was right in affirming the trial High Court's decision to the effect that the defendant did not show a good defence to the plaintiff's action neither did it disclose sufficient facts to entitle it to defend the action. (p. 1822G)

REPRESENTATION

Stephen Kola-Balogun, Esq., for the Appellant.

Chief M. O. Ayorinde, (with him, K. F. Elah, Esq.), for the Respondent.

CASES REFERRED TO

Nishizawa Ltd. v. Jethwani (1984) 12 S.C. 234

Macaulay v. NAL Merchant Bank (1990) 4 NWLR (Pt. 144) 283, 314

Pan Atlantic Shipping & Transport Agencies Ltd. v. Rhein Mass GMBH (1997) 3 NWLR (Pt. 493) 248.

Sodipo v. Lemminkainen OY (1986) 1 NWLR (Pt. 15) 230 at 231

Lady Anne Tenant v. Associated Newspapers (1979) 5 Fleet Street Reports p. 298 at 303

Anglo Italian Bank v. Wells (1878) 38 L 7, 197

B Barclays Bank D.C.O. v. Hassan (1961) 1 All NLR 836

Anglo-Italian Bank v. Wells 38 LT 1977

Wallingford v. Mutual Society (1980) 5 App. Laws 685 at 704

Codd v. Delap (1905) 92 LT 810

C

LEAD JUDGMENT BY EDOZIE JSC

In the High Court of Lagos State, in Suit No. LD/1389/94, the respondent as plaintiff by its Writ of Summons and Statement of Claim, claimed against the appellant as defendant the following reliefs:-

D “(a) The sum of N12,303,145.19 (Twelve Million, Three Hundred and Three Thousand, One Hundred and Forty-Five Naira, Nineteen Kobo), being the outstanding debit balance on the defendant’s Account No. 5049400/820 with the plaintiff as at 31st of December, 1993, in
E respect of various credit facilities (Banker’s Acceptance, Revolving Credit and Overdraft) granted by the plaintiff to the defendant between December, 1987, and February, 1989.

(b) Interest on the said sum at the rate of 21% per annum from the
F 1st of January, 1994, until the whole amount outstanding is fully liquidated.”

In reaction, the defendant filed a Statement of Defence and counterclaim wherein it denied the plaintiff’s claims and by paragraphs 2-4 of the counter-claim, the defendant claimed against the plaintiff as
G follows:-

“(1) The defendant counter-claims against the plaintiff the sum of N1,943,599.00 being overpayment made by the defendant to the plaintiff over the material time.

H (2) The sum of US 150,000.00 dollars deposited by Decacia International Limited as Red letter portion of letters of credit issued in favour of the defendant.

(3) The sum of N2,000,000.00 as damages for breach of contract, to wit,

the unlawful and unilateral suspension.

By summons for judgment brought pursuant to Order 10 Rules 1 and 2 of the High Court of Lagos State (Civil Procedure) Rules 1972, the plaintiff bank sought from the trial court, an order entering final judgment in terms of its claims. Attached to the summons for judgment were an affidavit of 38 paragraphs and twenty-two exhibits. In opposition to the summons, the defendant filed affidavit of merit of 38 paragraphs. The motion was moved and argued on 17th June, 1994, and by its reserved ruling delivered on 9th December, 1994, the learned trial Judge gave judgment in favour of the plaintiff bank thus:-

“Accordingly, an order is hereby made empowering the plaintiff to enter judgment in the sum of N12,303,145.19. The plaintiff also claimed interest at the rate of 21% per annum, from the 1st of January, 1994, until the final liquidation of the whole debt with costs. It is obvious to me that the plaintiff in this case is being kept out of money which ought to have been paid to her. On the strength of the principle established in the case of N.G.S.C. Ltd. v. N.P.A (1990) 1 NWLR (Pt. 129) 341 at 748, I hold that the plaintiff is entitled to interest at the rate of 15% per annum from the 1st of January, 1994, until this day and hereafter at the rate of 10% per annum until judgment debt is finally liquidated. Costs assessed at N2,000.00 is awarded in favour of the plaintiff.”

The court adjourned the counter-claim for trial. Dissatisfied with that judgment, the plaintiff lodged an appeal to the Court of Appeal, Lagos Division, and the sole issue canvassed before that court was whether the defendant was entitled to be let in to defend the claim of the plaintiff on the basis of the affidavit of merit and the Statement of Defence before the trial court. In a unanimous decision, the Court of Appeal held that the defendant had not placed before the trial court sufficient facts to entitle it to be granted leave to defend the plaintiff’s suit and accordingly dismissed the appeal.

This is a further appeal to this court by the defendant. The appeal is predicated upon on a Notice of Appeal dated 25th January, 2000, to which were subjoined two grounds of appeal. The grounds of appeal were subsequently regularized as they were alleged to be grounds of facts or mixed law and facts for which no leave of court was sought and obtained

before filing them in contravention of Section 233(3) of the Constitution of the Federal Republic of Nigeria, 1999. Parties by their counsel filed and exchanged briefs of argument. In the defendant/appellant's brief, the two issues identified for determination are as follows:-

B “(i) *Whether the plaintiff satisfied the onus on a party seeking summary judgment under Order 10 (now Order 11) High Court of Lagos (Civil Procedure) Rules.*

C “(ii) *Whether the defendant was entitled in the circumstances to be given leave to defend the action.*”

On its part, the plaintiff identified the following two issues:-

“(i) *Whether the plaintiff complied with the provisions of Order 10 Rule 1 (a) of the High Court of Lagos Civil Procedure Rules 1972 in bringing its application for judgment, subject-matter of this appeal.*

D “(ii) *Was the Court of Appeal right in upholding the High Court's decision that the defendant did not show a good defence or defences to the plaintiff's action on the merits, neither did it disclose sufficient facts to entitle it to defend the action generally.*”

E Dealing with the first issue for determination, learned counsel for the defendant contended in his brief of argument that under Order 10 of the High Court of Lagos (Civil Procedure Rules), a plaintiff has the onus to establish in his Statement of Claim a prima facie case and must by an
F affidavit verify the cause of action. It was further contended that the Order 10 procedure is not designed for a complicated case as the one in hand. It was contended that the plaintiff did not make out a prima facie case in his pleadings, in that, there was no evidence that the amount claimed or any part thereof had actually been drawn down. There was no evidence of how
G the collaterals given as security for the credit facilities were utilized, the plaintiff did not indicate in any material particular the interest rate chargeable on the loans nor did it attach any exhibits to substantiate interest rate on the loans. Referring to the case of *Sodipo v. Lemminkainen OY*
H (1986) 1 NWLR (Pt. 15) 220 at 231, it was submitted that proof of the actual amount claimed is a preliminary requirement of the said Order 10 and that the two lower courts were in error in assuming that a mere technical compliance with the form of Order 10 amounts to sufficient

verification of the claim. Learned counsel then proceeded to highlight what he regarded as deficiencies in the plaintiff's affidavit evidence including its failure to account for the cash securities given as collaterals for the various loans and credit facilities the subject-matter in litigation. Finally, it was argued that no explanations were given in respect of several debts reflected in the Statement of Accounts, Exhibit AB18. B

In response to the above, learned counsel for the plaintiff in his brief of argument contended that the plaintiff's claim is in compliance with the procedure provided for under Order 10 of the Lagos High Court (Civil Procedure) Rules (Rules for short). C

The issue under consideration calls for the proper interpretation of Order 10 of the Rules to determine what its requirements are from the point of view of what the plaintiff is expected to do.

For better appreciation, Order 10 Rule 1 of the Rules has two limbs, D the first of which reads:

(a) Where the defendant appears to a Writ of Summons specially indorsed with or accompanied by a Statement of Claim under Order 4 rule 4, the plaintiff E may on affidavit made by himself or by any other person who can swear positively to the facts, verifying the cause of action and the amount claimed (if any liquidated sum is claimed); and stating that in his belief there is no defence to the action except as to the amount of damages claimed, if any, F apply to a judge in chambers for liberty to enter judgment for such remedy or relief as upon the Statement of Claim the plaintiff may be entitled to".

As is evident from the above provision, the following are the preliminary requirements of the Order:-

"(a) A Statement of Claim must have been indorsed on, or attached G to the Writ of 3 Summons served on the defendant.

(b) The defendant must not only have been served, he must also have entered appearance.

(c) There must be an affidavit made by the plaintiff or by any person H who can swear positively to the facts verifying the cause of action and the amount claimed with a statement that the defendant has no defence to the action."

It is not the contention of the defendant that the above requirements had not been met. Its contention is that the plaintiff has to prove a prima facie case that its claim is true before the onus can shift to the defendant to supply affidavit of intention to defend. It was contended that whereas in a simple and straightforward case, the verification of the plaintiff's affidavit could refer generally to the Statement of Claim, in a complicated case like the one in hand, the plaintiff's verifying affidavit "must clearly and systematically establish the factual basis of his claim and the right to each relief claimed". The above contentions have raised the question about the nature of the plaintiff's affidavit verifying the cause of action in terms of Order 10 rule 1. In this regard, it must be borne in mind that the object of the said order is to enable a plaintiff obtain quick judgment when there is no defence to the action. **The summary judgment procedure, which is similar to the undefended list procedure, is designed to enable a party obtain judgment, especially in liquidated demand cases, without the need for a full trial where the other party cannot satisfy the court that it should be allowed to defend the action.** See *Nishizawa Ltd. v. Jethwani* (1984) 12 S.C. 234; *Macaulay v. NAL Merchant Bank* (1990) 4 NWLR (Pt. 144) 283, 314; *Pan Atlantic Shipping & Transport Agencies Ltd. v. Rhein Mass GMBH* (1997) 3 NWLR (Pt. 493) 248. **As regards the nature or content of the affidavit sufficient to verify the claim, this court, in the case of *Sodipo v. Lemminkainen OY* (1986) 1 NWLR (Pt. 15) 230 at 231 adopted with approval the decision in the case of *May v. Chidley* (1894) 1 GB 451 where it was held that the affidavit need not set out all the particulars nor verify the facts except by reference to the Statement of Claim. To the extent that the plaintiff's Statement of Claim must disclose a reasonable cause of action,** I agree with learned counsel for the defendant that the plaintiff must make a prima facie case before the onus of proof shifts to the defendant for rebuttal. A careful perusal of the Statement of Claim duly verified by affidavit as set out at pages 26-32 of the record of appeal reveals the detailed particulars of the plaintiff's cause of action. Paragraphs 3,4, 5 and 6 thereof state clearly how the initial N1.2 million credit was applied for and the terms thereof. Paragraphs 7, 8, 9 and 11 deal with the additional

N4 million facility as well as the terms relating thereto. Paragraphs 12-16 relate to a further request for N2.3 million credit and the conditions attaching to the credit. Finally, in paragraphs 18-21 are averments relating to a further request for N13.5 million facility and the terms thereof. The aggregate credit facilities extended by the plaintiff to the defendant totalling N21 million was then structured as pleaded in paragraph 22 of the Statement of Claim. The applicable interest rates were pleaded in paragraphs 24 and 29 of the Statement of Claim while in paragraph 26 thereof it was pleaded that the defendant made use of all the facilities but defaulted in repayment with the result that as at 21st December, 1993, the debit balance on the account of the defendant with plaintiff stood at N12,303,145.19, being the principal sum claimed.

Finally, the plaintiff pleaded in paragraph 30 of the Statement of Claim that periodic statements of account were sent to the defendant without any query against any entry therein. **Accompanying and in support of the application for summary judgment is the plaintiff's verifying affidavit to which were exhibited 22 exhibits evidencing the various transactions forming the basis of the plaintiff's claim. The affidavit evidence not only referred to the Statement of Claim but repeated all the paragraphs therein and in paragraph 38, it deposed that the defendant had no defence to the action. In my view, the plaintiff's Statement of Claim disclosed a reasonable cause of action and as the claim was properly verified by the plaintiff's affidavit, and having regard to all the other requirements already mentioned, the plaintiff application for summary judgment under Order 10 Rule 1 of High Court of Lagos (Civil Procedure) Rules was in compliance with the said Order 10 Rule 1. Accordingly, the first issue for determination is resolved in favour of the plaintiff against the defendant.**

The second issue has to do with the requirement of a defendant who wishes the court to let him defend the plaintiff's suit under the summary judgment procedure. In this connection, the second limb of Order 10 Rule 1 of the High Court of Lagos State (Civil Procedure) Rules *supra* is pertinent. It deals with the discretion of the court to allow such a defendant

to defend the action in these words:-

“.....the Judge thereupon unless the defendant shall satisfy him that he has a good defence to the action on the merits or shall disclose such facts as may be deemed sufficient to entitle him to defend the action
B generally, may make an order empowering the plaintiff to enter such judgment as may be just, having regard to the nature of the remedy claimed.”

Also pertinent is Order 10 Rule 3(a) and (b) of the said rule which
C provides as follows:-

“(a) The defendant may show cause against such application by affidavit, or the Judge may allow the defendant to be examined upon oath.

(b) The affidavit shall state whether the defence alleged goes to the whole or part only and (if so) to what part of the plaintiff’s claim.”

D In construing the above provisions of Order 10 Rules 1-3(a) and (b) of the said rules, this court, in the case of *Macaulay v. NAL Merchant Bank Ltd.* (1990) 4 NWLR (Pt. 144) 283 at 306 following its earlier decision in *Nishizawa Ltd. v. Jethwani* (Supra) had this to say:-

E “The defendant’s affidavit must “condescend upon particulars” and should, as far as possible, deal specifically with the plaintiff’s claim and affidavit, and state clearly and concisely what the defence is, and what facts are relied on as supporting it. It should also state whether the defence
F goes to the whole or part of the claim, and in the latter case it should specify the part.

A mere general denial that the defendant is indebted will not suffice. (*Wallingford v. Mutual Society* (1880) 5 App Cas, per Lord Blackburn at p. 704; *Re-General Rail Syndicate, Whiteley’s Case*, (1990) 1 Ch per
G Lindley, MR., at p. 369 Anon, (1875) WN 249 per Quain, J., at p. 250) unless the grounds on which the defendant relies as showing that he is not indebted are stated (ibid). If the affidavit commences, as it may, with a statement that the defendant is not indebted to the plaintiff in the amount
H claimed, or any part thereof, it should proceed to state why the defendant is not so indebted and to state the real nature of the defence relied on (*Re General Rail, Syndicate*, supra)

Again, it is not enough for the defendant to show a case of hardship

but creating no enforceable right e.g. past promise by plaintiff unsupported by valuable consideration (*Woolston v. Baines* (1876) WR 74), nor a mere inability to pay (*Besant v. Townsend*, 22 LR Ir 389) nor an allegation that the plaintiff has given time for payment which, of course, constitutes no defence, unless there be consideration (*Hookham v. Nayer* (1905), 22 B TLR 241).

If the defence relied on is fraud, the affidavit should state the particulars of the fraud (*Wallingford v. Mutual Society* (1830) 5 App li Cas 685). A mere vague general allegation of fraud is useless (*ibid*). C

Similarly, if a legal objection is raised, the facts and the point of law arising thereon must be clearly stated.

Indeed, in all cases, sufficient facts and particulars must be given to show that there is a bona fide defence (*Wallingford v. Mutual Society* (1880), 5 App Cas. 685 see judgment of Lord Blackburn at p. 704; *Harrison v. Bottenhein*, 26 WR 362; *Ray v. Barker*, 4 ERD 283; *Shurmur v. Young* (1889), 5 TLR 155). Matter of hearsay is admissible in the defendant's affidavit (*Harrison v. Bothenhein* (1978) 26 UR 362 CA), provided that the sources and grounds of information or belief are disclosed. See Rule 4(2), E supra and the *Young Manufacturing Co.* (1900) 2 Ch 753, CA and of O. 41. r. 5. D

The defendant's affidavit is not conclusive and will not preclude him from relying on defences not raised in it (*Ray v. Newton* (1913) 1 KB F per Hamilton, CJ., at p. 258)."

The nature of the defendant's defence that will satisfy the court to let him defend the suit is further exemplified by the decision of this court in the case of *Sanusi Bros (Nig.) Ltd. v. Cotia C. E. I. S. A.* (2000) 6 S.C. (Pt. III) 43; (2000)11 NWLR (Pt. 679) 566 at 530 thus- G

"A defendant must show a bona fide or good defence on the merits under the summary judgment procedure and not engage in manipulative and delaying tactics. See Macaulay v. NAL Merchant Bank Ltd. (1990) 4 NWLR (Pt. 144) 283. To show that he has a good defence to the claim on the merits, the defendant must disclose facts to satisfy the court usually by affidavit. To achieve this, he is required to condescend upon particulars, per Lord Blackburn in Wallingford v. Mutual Society (1980) 5 App. H

Laws 685 at 704, and the defence must not be seen as frivolous and particularly “moonshine” to use the expression of Lord Lindley in Codd v. Delap (1905) 92 LT 810. To condescend upon particulars implies a true and real disclosure of facts upon which the court can readily discern a good defence.”

It is in the light of the principles enunciated above that one can examine the criticisms contained in the defendant/appellants’s brief alleging that the trial High Court was wrong in its decision in refusing to grant leave to the defendant to defend the suit and that the Court of Appeal was in error to have affirmed the trial court’s decision in that regard. The first complaint of the defendant appears to relate to the ‘notice to admit documents’ and “interrogatories” filed by it (pages 121 and 122 of the record of proceedings). The defendant’s contention is that since all the relevant facts, materials and transactions relating to the defendant’s account with the plaintiff were within the exclusive control and knowledge of the plaintiff, the defendant ought to be given leave “to make discoveries and to interrogate the plaintiff by interlocutory process and by cross-examination rather than being shut out.” It is the case of the defendant that the application for interrogatories and notice to produce documents raised serious questions which if answered in its favour would amount to a complete defence. **In my view, if the court were to let in a defendant to defend upon a mere application for interrogatories and notice to admit fact, that would defeat the object of the summary judgment procedure as such an application could be nothing but a ploy to give a semblance of a defence to the action when none exists. A desire to investigate alleged obscurities and a hope that something will turn up after the investigation cannot separately or in unison amount to sufficient reason for refusing to enter judgment for the plaintiff.** See *Lady Anne Tenant v. Associated Newspapers (1979) 5 Fleet Street Reports p. 298 at 303.*

The next complaint of the defendant is the allegation that the plaintiff utilized the cash collateral deposited with it. It was further alleged that collaterals offered by the defendant were adequate to cover the sums owing and as such judgment should not have been

entered against the defendant. Unfortunately, the defendant did not either in its Statement of Defence or ‘Affidavit of Merit’ give detailed particulars with respect to the amount of the collaterals, when they were deposited and subsequently utilized. By paragraph 15 of the Statement of Defence it was averred, inter alia:-

“From time to time the total sums due to the plaintiff were recovered by realization of the security provided by the defendant alone and from various payments received for credit of the defendant through the plaintiff “

Again, particulars of the security realized, when it was realized and the value of the security were not supplied either in the Statement of Defence or the Affidavit of Merit’. In regard to this line of the defence, the learned trial Judge held at p. 140 as follows:-

“The fact that such collaterals are provided does not mean that the lender’s only relief is limited to the collateral provided. The lender may decide to sue for the amount owing and proceed by way of attachment or by way of garnishee. He may also proceed against security provided by the borrower by way of foreclosure and sale in the case of a mortgage arrangement between the lender and the borrower. The fact that securities were provided in this case is not a bar to the plaintiff’s right to sue for the amount owing. The issue of providing collateral, therefore, is unarguable to justify this matter proceeding to trial. The plaintiff in this case attached all relevant exhibits to establish that the defendant has not paid the money owing. It is, therefore, not sufficient for the defendant to merely claim that the plaintiff has realized and recovered the collateral. It is necessary and essential for the defendant to give and supply details and particulars backed up with documents of such realization and recoveries if any.”

The above reasoning cannot be faulted. **By failing to substantiate its bare statement with detailed particulars supported by documents, the defendant did not show that it has a good defence to the action on the merits neither did it disclose facts that would have been deemed sufficient to entitle it to be granted leave to defend the action. The plaintiff averred and this was not controverted that statements of its account with the defendant were sent to the latter**

regularly. These Statements of Account had not been falsified and therefore are presumed to be correct.

In further support of its contention that it ought to have been let in to defend the action, the defendant relied on the counter-claim against the plaintiff for (a) N1,943,599.00 being over payments made by the defendants to the plaintiff (b) USD 150,000 deposited by Decacia International Ltd., being letters of credits issued in favour of the defendant and (c) N2,000,000.00 as damages for breach of contract for unlawful and unilateral suspension. **The case of Anglo Italian Bank v. Wells (1878) 38 L 7, 197 is authority for the proposition that the mere fact that the defendant has a counter-claim does not necessarily entitle him to leave to defend. Where, therefore, there is no defence to the plaintiff's claim and there is no arguable set-off or bona fide counter-claim, judgment would be given to the plaintiff. In other words, if the counterclaim set up by the defendant is clearly groundless, it will be disregarded:** See *Anglo-Italian Bank v. Wells* 38 LT 1977. In the instant case, the counter-claim of about N1.9 million overpayment could not have been made in good faith. This is so because the defendant did not state how much of its securities had been realized and the amount appropriated to settle its indebtedness and in the absence of these, a claim for overpayment is speculative. The other two claims on the counter-claim are also not made bona fide. As averred in paragraph 17 of the Statement of Defence, there was no actual deposit of USD 150,000, rather it was a letter of credit of that amount opened for Decacia International Limited. The third claim, that is, unliquidated damages for N2 million for breach of contract for "unlawful and unilateral suspension" is rather vague and groundless. **In my view, the defendant's counter-claim is manifestly unarguable and not having been made bona fide should not operate to disentitle the plaintiff to judgment.**

Finally, the defendant alleged there were manipulations in the Statement of Account of the defendant with the plaintiff's bank and that interest and exchange rates used by the plaintiff were exorbitant. But as noted earlier, the plaintiff regularly furnished the defendant a Statement of Account in respect of the subject matter

of this suit. The defendant did not dispute receiving the Statement of Accounts. There is no evidence that it challenged any entry in the said Statement of Accounts, in the case of Barclays Bank D.C.O. v. Hassan (1961) 1 All NLR 836, it was held thus:-

“A party will be deemed to have accepted the rate at which interest on a bank overdraft was calculated if he received from the bank periodic Statement of Accounts in which the interest charged was shown as a debt and he did not dispute the account shown by the statements.”

As the defendant raised no objection in respect of the statements of account, the complaint about manipulations and wrong interest charges is a mere afterthought.

In the light of the foregoing, it is my judgment that the Court of Appeal was right in affirming the trial High Court’s decision to the effect that the defendant did not show a good defence to the plaintiff’s action neither did it disclose sufficient facts to entitle it to defend the action. I will, therefore, resolve the second issue for determination in favour of the plaintiff against the defendant.

In the event, the appeal lacks merit and it is accordingly dismissed. I affirm the decision of the two lower courts. The sum of N10,000 costs is awarded to the plaintiff against the defendant.

BELGORE JSC

This appeal totally lacks merit and my learned brother, Edozie, JSC., has clearly set out the facts of the case portraying the unfortunate trend of the case. I have nothing more to add than to adopt his reasoning and conclusions as mine in dismissing this appeal.

ONU JSC

Having been privileged to read before now the judgment of my learned brother, Edozie, JSC., just delivered, I am in agreement with him that the appeal lacks merit and I too accordingly dismiss it.

KALGO JSC

I have read in draft the judgment just delivered by my learned brother, Edozie, JSC., in this appeal. I agree with him that there is no merit in the appeal and it ought to be dismissed. The appellant had never disputed the contents of any of the various Statements of Account sent to him on his account with the respondent over the years, and the 22 exhibits which accompanied the verifying affidavit are in full compliance with Order 10 Rule 1 of the Lagos State High Court (Civil Procedure) Rules 1973. This fully disclosed a proper cause of action on the part of the respondent. The appellant on the other hand, filed an affidavit which in the circumstances of this case, did not disclose any defence to the action on the merits.

For this and the more detailed reasons given in the leading judgment, I also find no merit in this appeal. I dismiss it and affirm the decision of the Court of Appeal.

I award N10,000.00 costs to the respondent against the appellant.

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MUSDAPHER JSC

I have read before now the judgment of my Lord, Edozie, JSC., just delivered. In the aforesaid judgment, his Lordship has comprehensively and completely dealt with all the relevant issues submitted to this court for the determination of the appeal. I adopt his reasonings as mine and I accordingly find no merit in the appeal, and I dismiss it with costs as assessed in the said judgment.

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