

SUPREME COURT OF NIGERIA

9TH FEBRUARY, 2007 SC. 33/2002

**CORAM:- A. I. KATSINA-ALU, M. MOHAMMED, A. M.
MUKHTAR, W. S. N. ONNOGHEN, I. F. OGBUAGU, JJSC**

1. CHIEF PETER AMADI NWANKWO APPELLANTS

2. MRS. PATRICIA OBIAGELI NWANKWO

AND

ECUMENICAL DEVELOPMENT

CO-OPERATIVE SOCIETY (EDCS) U.A. RESPONDENTS

APPEALS - Grounds of appeal - Competence - Purpose - A ground that is not related to the ratio decidendi - Will be struck out as incompetent (H1)

UNDEFENDED SUITS - Triable issues - Intention to defend - Where no triable issues were raised - But defendants' affidavit rather supported plaintiff's claim - Leave to defend was rightly refused (H2)

UNDEFENDED SUITS - Defence - Witnesses - Are not required to be called by plaintiff - Where defendant fails to disclose any prima facie defence (H3)

FACTS

Before the Enugu State High Court, the plaintiff/respondent filed an action under the Undefended List procedure against the defendants/appellants who were husband and wife. The appellants entered into a personal contract of guarantee in favour of the respondent, a Netherlands based International non-profit making Organization. Respondent claimed the sum of US \$500,000.00 (and interest thereon) being a loan granted to Amike Ezzangbo Community Farms (Nig.) Ltd, a company owned and operated by the appellants. The loan was released to the principal debtor company by the respondent but the company and the appellants failed to repay the loan together with the accrued agreed inter-

est in spite of repeated demands. Respondent's suit was supported by a 25 paragraphed affidavit that exhibited the relevant documents.

Appellants filed a Notice of Intention to Defend the suit disclosing their grounds in the supporting affidavit. Respondent filed a counter affidavit against appellants' said Notice. Some of the documents exhibited by appellants supported respondent's claim. In his ruling, the trial judge refused appellants' application to transfer the suit to the general cause list, describing their defence as a sham. Appellants' appeal to the Court of Appeal was dismissed. Still dissatisfied, they have further appealed to the Supreme Court.

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

Grounds of appeal - Competence

1. Grounds of appeal are meant to attach findings of a court that have bearing on the case put up by a litigant. In other words it should be related to a decision of the court and contain complaints an appellant rely on to succeed in setting aside a decision the ratio decidendi of a judgment not just observations and passing remarks of a judge in the course of writing a judgment. That the learned trial judge in this case used the expression attacked in the above ground of appeal does not mean that he used moral issue as parameter for deciding the case. There are plethora of authorities on the purport of a ground of appeal, but this reproduced ground (1) of appeal does not certainly fall into the category of a competent ground of appeal.

For the foregoing, I uphold the objection raised and strike out ground (1) of the appeal supra as it is incompetent. (p. 784 C)

Triable issues - Intention to defend

2. The depositions in the supporting affidavit of intention to defend and the annexures are so clearly not cogent enough to warrant the calling for counsel's address on law and facts before judgment, as submitted by learned counsel for the appellants (not even on the issue of limitation). A careful perusal of the supporting affidavit shows that it does not disclose that there are triable issues. Indeed some of the documents exhibited

support and lend credence to the case of the plaintiff. It is trite that unless a defendant in its supporting affidavit of intention to defend a suit on the undefended list states a good defence and the particulars of such defence are adequately set out, and they are such that if proved would constitute such a defence, the court will not transfer the suit to the general cause list, and allow the defendant to defend the suit. In fact the documents exhibited by the appellants virtually nailed their coffins, so to speak. I fail to see that the appellants were denied fair hearing. With the above reproduced excerpt of the ruling of the High Court, one can see that the so called defence was adequately considered; and the decisions of the two lower courts were clearly borne out of law and facts placed before the courts, not morality or sentiments. (p. 787 E)

UNDEFENDED SUITS - Defence - Witnesses

3. The Court of Appeal was clearly in support of the trial court's treatment of the purported defence put up by the defendants/appellants, in its judgment, as is illustrated in a passage of which reads the following:-

“By the provision of Rule 9(4) of Order 24, a plaintiff is not required to call witnesses to prove its case once the Defendant fails to show a triable issue or make a prima facie defence on the merit. The trial court rightly heard and determined the case based on affidavit evidence of the parties and addresses of counsel thereon. Since no triable issue or defence on the merit was shown, there was no need to transfer the suit to the General cause list where pleadings and oral evidence would be warranted. I see no material conflicts on real points in issue in the affidavit of parties before the trial court”.

The court below was quite right in its above stance, and I cannot see that there was any error in it. In the light of the above reasoning the answer to this issue (2) supra is in the negative, and ground (2) of the appeal to which it is married fails. The end result is that this appeal fails in its entirety and it is hereby dismissed. (p. 788 B)

NOTABLE POINTS OF INTEREST

ONNOGHEN JSC

1. Ground of appeal - Definition

It is settled law that a ground of appeal is basically a highlight of the error
B of law or fact or mixed law and fact made by the court in the decision
sought to be set aside in the appeal. It is the sum total of the reasons of
why the decision on appeal is considered by learned counsel for the ap-
pellant to be wrong and liable to be set aside. It follows therefore that for
C a ground of appeal to be capable of achieving the purpose of setting aside
the decision appealed against, it has to be very substantial and must relate
to the ratio of the decision, not directed at the obiter dictum of the court
or in the judgment. (p. 791 H)

2. Undefended suits - What defendant should do

The appellants also stated that they intended to raise a defence of statute
of the limitation as regard the claim of the respondent but did not state the
facts constituting that defence as required by the rules of court. I hold
E the view that for a matter under the Undefended List, the intention of the
defendant is very irrelevant. What he is expected by rules to do is to
depose to facts constituting his defence(s) to the action in an affidavit
disclosing his defence so as to persuade the trial judge to remove the
F matter from the Undefended List to the General Cause List to be dealt
with accordingly. Appellants did not state the dates relevant to a determi-
nation whether the action is caught by limitation of time yet they are
complaining of lack of fair hearing. When you conduct or present your
G case badly you have yourself to blame, not the court when the decision
goes against you. Appellants were given the opportunity to state or dis-
close whatever circumstances to warrant such on intervention which, in
this case, the appellants have failed to do. (p. 794 G)

H OGBUAGU JSC

3. Object of the Undefended list

It need be stressed and this is also settled, that the object of the Rules
under the Undefended List, is to ensure quick dispatch of certain types of

cases such as involving debts or liquidated money claim (as in the instant case). In other words, the object, is to enable a plaintiff whose claim is unarguable in law and where the facts are undisputed and it is inexpedient to allow a defendant to defend for mere purposes of delay, (as in the instant case leading to this appeal), to judgment in respect of the amount claimed. (p. 803 H) B

REPRESENTATION

Mr. D. O. Nweze for the appellants.

Mr. Abiodun Olaeru for the respondent. C

CASES REFERRED TO

Akibu v. Oduntan 2000 13 NWLR part 685 page 446

Iloabachie v. Iloabachie 2000 5 NWLR part 656 page 178 D

Erivo v. Obi 1993 9 NWLR part 35 page 60

Metal Construction (W.A.) Ltd. v. Migliore 1990 1 N.W.L.R. part 126 page 299

Osolu v. Osolu 1998 1 N.W.L.R. part 535 page 535 E

Saude v. Abdullahi 1989 4 NWLR part 116 page 387

Abisi v. Ekwealor 1993 6 NWLR part 302 page 643

Nfor v. Ashaka Cement Co. Ltd. 1994 1 NWLR part 319 page 222

Akpan v. State 1994 9 NWLR part 368 page 347 F

Ariori v. Elemo 1983 1 SCNR 1

Okafor v. A-G Anambra State 1991 6 NWLR part 200 page 659

Military Governor of Imo State v. Nwaunwa 1997 2 NWLR part 490 page 675

Okpala v. D.G. of National Commission for Museums and Monuments and Ors. 1996 4 NWLR part 444 page 585 G

Opara v. Chuda 1996 2 NWLR part 432 page 527

John Wallingford v. The Directors, & C. of the Mutual Society H

RULES REFERRED TO

Anambra State High Court (Civil Procedure) Rules 1985 O. 24 R. 9(2)

LEAD JUDGMENT BY MUKHTAR JSC

The respondent who was the plaintiff in the High Court of Enugu State applied for issuance of a writ of summons under the undefended list, and the particulars of its claims against the defendants jointly and severally were as follows:-

“(a) *The sum of \$500,000.00 (five hundred Thousand US Dollars) being the principal sum of the loan due from the first and second/ Defendants to the Plaintiff under a personal guarantee executed by the Defendants to secure a loan granted by the Plaintiff to Amike Ezzangbo Community Farms Limited under a loan granted by the plaintiff to Amike Ezzangbo Community Farms Limited under a loan Agreement dated 18th January, 1990 payment of which sum the First and Second Defendants have failed, refused and/or neglected to pay despite repeated demands.*

“(b) *Interest on the principal sum of \$500,000.00 (Five Hundred Thousand US Dollars) at the agreed rate of 9% (nine percent) per annum from January 22, 1991 till date of judgment.*

“(c) *Interest thereafter at the rate of 6% (six percent) per annum from the date of judgment until the entire judgment sum is finally liquidated.”*

A twenty five paragraphed affidavit in support of the application was sworn to by one Eze-Ozims Madufor, and quite a number of documents were exhibited thereto. The pertinent paragraphs of the affidavit are:

“3. *That under and by virtue of a Loan Agreement dated 18th January, 1990 executed between the Plaintiff/Applicant and the Amike Ezzangbo Community Farms Limited (hereinafter referred to as “the company”), the Plaintiff agrees to make available to the company a loan in the sum of \$500,000.00 (Five Hundred Thousand US Dollars) for the purpose of financing the purchase of equipment, vehicle and working capital requirements for the development of the company’s agricultural project at Amike Ezangbo, Ishielu, Enugu State. The loan Agreement dated 18th January 1990 is herewith attached and marked Exhibit A.*

10. *That consequent upon the above, the Plaintiff on the 22nd January 1991 disbursed the loan to the Company through its Domiciliary*

Account No. 192/05 with First Bank of Nigeria Plc, Isolo Branch, Mushin, Lagos State, Nigeria through their Head Office No. 29/30 King Street, London EC2 V8 8E 11.

11. *That the Company since utilized the said loan for the purchase of capital equipment and its working capital requirement in accordance with the terms and tenor of the Loan Agreement.* B

13. *That rather than pay the installment due on the Principal sum as agreed by the Plaintiff and the Company, the Company on the 12th of October, 1992 and 1st November 1993 apply (sic) to the Plaintiff for a Maintenance and Stabilization Fund Loan and Authority to borrow more fund from other sources which application was never granted by the Plaintiff. The Company's letters of 12th October, 1992 and 1st November, 1993 are attached herewith and marked Exhibit D1 & D2 (sic) respectively.-* C

14. *That on the failure of the Company to discharge its obligation under the Loan Agreement and Legal Mortgage regarding the repayment of the outstanding principal sum and interest in compliance with the terms and tenor of the Loan Agreement, the firm of Bentley Edu & Co. on the instruction of the Plaintiff, on 19th April, 1995 caused a letter of demand to be written to the Company demanding a remittance of the outstanding principal sum and interest on the loan facility. The Plaintiffs said former solicitors letter of 19th April, 1996 is herewith attached and marked Exhibit E.* D

16. *That rather than discharge the several installments of the principal sum and accrued interest that have fallen due, the Company vide its letter of 12th May, 1995 applied to the Plaintiff for a rescheduling of the loan and for further funding. The Company's letter of 12th May 1995 is herewith attached and marked Exhibit F.* F

20. *That on the default of the Company to repay the loan and the accrued interest, the Plaintiff Solicitors, Messrs George Ikoli & Okagbue by letters dated 29th July, 1996 demanded from the First and Second defendants an immediate redemption of their obligation under the executed guarantee by paying the principal sum and the accrued interest on the loan granted to the Company, payment of which sum they guaranteed. The Plaintiffs Solicitors Letters of 29th July, 1996 are herewith at-* G H

tached and marked Exhibit 1(a) & 1(b)."

The defendants filed a Notice of Intention to Defend the suit under Order 24 Rule 9(2) of the High Court Civil Procedure Rules of Anambra State (applicable to Enugu State), disclosing their grounds of defence in the supporting affidavit. The plaintiff filed a counter affidavit against the Defendants' notice of intention to defend. The salient depositions in the affidavit in support of the notice of intention to defend the suit are as follows:-

"2. That the loan agreement was not executed on 18th January 1990.

3. That a copy of the letter showing that the loan agreement was not executed even in 1991 is herein shown as Exhibit ECO1.

4. That by a letter dated 10th August, 1990 addressed to S. A. Edu Esq. Counsel for the plaintiff - a copy of which is shown herein as Exhibit ECO2 the Amike Ezzangbo Community farms withdrew from the project since the loan was not released.

5. That by letter dated 6th July, 1990 a copy of which is herein shown as Exhibit ECO3 counsel for the plaintiff refused to give approval for the loan.

6. That there are other documents which the defendants will use at the trial to show that there was no contract between the plaintiffs and the defendants.

7. That the defendants/respondents have good defence against the claim.

8. That even if there was a valid contract the defendant will raise issue of expiration of time within which the plaintiff may take out this suit".

On the other hand the salient depositions in the counter-affidavit are as follows:-

7. That I deny paragraph 2 of the affidavit in support and state that the loan Agreement was indeed executed on 18th January 1990 that attached and marked Exhibit EDCS1 is the loan agreement showing that it is was duly executed by the parties.

8. That contrary to the averments in paragraph 3 of the affidavit in

support, the letter dated 22/1/92 is a letter from the plaintiff to its former solicitors' thanking them for sending the loan Agreement and legal mortgage which have been executed by both parties.

9. That contrary to the impression sought to be created by paragraph 4 of the affidavit in support, the Amike Ezzangbo Community Farms Limited did not by its solicitors letter of 10th August, 1990 withdraw from the project but merely complained about the delay in advising the plaintiff to release the loan to the Amike Ezzangbo Community Farms Limited when all necessary securities have been put in place. B

10. That I deny paragraph 5 of the affidavit in support and state that Exhibit ECO3 referred to in the said paragraph 5 and attached to the affidavit is a letter dated 6th July, 1990 from the plaintiff former solicitors to Amike Ezzangbo Community Farms Limited complaining about the insufficiency of the securities put in place by the company to facilitate the disbursement of the loan by the Plaintiff to the company. C D

13. That indeed regardless of the plaintiff's former solicitors position in Exhibit ECO3 attached to the affidavit in support of the Defendants Notice of Intention to Defend the suit, the Plaintiff actually disbursed the loan to Amike Ezzangbo Community Farms Limited. E

14. That Amike Ezzangbo Community Farms Limited had by letter dated 12th May, 1995 admitted that it borrowed from the plaintiff, a total sum of US\$500,000.00 and that it had regrettably defaulted paying the installments of principal sum due and accrued interest. Attached and marked Exhibit EDC83 is Amike Ezzangbo-Community Farms Limited letter dated 12th May, 1995. F

15. That I deny paragraph 6 of the affidavit in support and aver that there was indeed a contract between the Plaintiff and the Defendants as evidenced by the guarantee duly executed by the Defendants in favour of the Plaintiff to secure the loan Agreement entered into between the Plaintiff and Amike Ezzangbo Community Farms Limited. G

16. That in answer to paragraph 7 of the affidavit in support I say H that the Defendants have no defence against the claim as they actually guaranteed the payment of the loan of US\$500,000.00 given by the Plaintiff to Amike Ezzangbo Community Farms with interest and which the

company have defaulted in paying in spite of repeated demands by the Plaintiff.

17. That the First defendant executed the personal guarantee which was incorporated in the said loan agreement (page 16 - 21). ‘Exhibits
B EDCS1 hereof on 19th October, 1989, while the second defendant executed same on 16th October, 1996.

18. That the defendants are directors of the said Amike Ezzangbo Community Farms Limited, the borrower and the loan Agreement was signed by the first defendant in his capacity as director of the borrower.
C

19. That contrary to the impression sought to be created in paragraph 8 of the affidavit in support of the notice of intention to defend, the action was instituted well within the time allowed by law”.

The learned trial judge after a careful consideration of the proceedings and documents before him refused the defendants’ application to transfer the suit to the general cause list, describing their defence as a sham. Unhappy about the decision the defendants appealed to the Court of Appeal. The Court of Appeal dismissed the appeal, and the defendants
E again appealed to this court. Learned counsel for the parties exchanged briefs of argument. The appellants formulated issues for determination which were adopted at the hearing of the appeal. The issues for determination in the appellants’ brief of argument are as follows:-

“1. *Whether the Court of Appeal applied moral persuasion instead
F of legal rules in determining the appeal before it?*

2. *Whether the Appellants in this case in the High Court were denied fair hearing which resulting (sic) in perverse justice?”*

The respondent in his brief of argument raised by way of preliminary objection, the competence of ground one (1) of the Appellants’ ground of appeal together with their particulars. The learned counsel for the respondent has contended that they are incompetent and ought to be struck out, and so is issue (1) in the appellants’ brief of argument, which
G
H I have already reproduced above. The grounds of objection set out by learned counsel are as follows:-

“a. *The said ground of appeal is vague, general in terms and does not disclose a reasonable ground of appeal.*

b. The particulars furnished in support of the ground of appeal, specifically (iii) and (iv) are unrelated to the ground and are therefore incompetent.

c. The issue of morality or otherwise does not arise from the decisions of the Court of Appeal being appealed against.

B

d. The statement quoted in paragraph (i) of the particulars even in support of ground 1 in the grounds of appeal did not constitute a decision of the Court of Appeal but was only an obiter dictum (a passing remark) made by the court and the same is not appealable.

e. The particulars furnished by the appellant numbered (iii) and (iv) in the 'particulars of Error' in support of ground 1 contain fresh points on which no arguments were canvassed at either the court of trial or the court below.

C

f. The appellants require leave of this Honourable court to raise such an issue.

g. The requisite leave to raise these points for the first time is neither sought nor obtained."

For a clearer understanding of this objection on ground (1) of appeal, it is pertinent that I reproduce the said ground of appeal and its particulars at this juncture. The ground of appeal reads thus :-

"the court of appeal erred in law by using moral persuasion instead of legal justice in determining the success or failure of the appeal.

F

Particulars of Error

(i) The following question from the judgment was the expressed position of the court below:-

"It is not for me to fathom the inscrutable working of providence. But I can guess as a mortal. It appears to me that the appellants thought that they created an equidistant Triangle with their pet ideas as stated above such standing at angle 60 degrees."

G

(ii) The issue before the court at all material times was not a moral issue but legal issues.

H

(iii) The court below erred in law when it failed to, examine and interpret the agreement between the parties before confirming the judgment of the High Court.

(iv) *The clauses in the agreement from (sic) part of the proceedings.*”

Having set out his grounds of objection on ground (1) of appeal in his brief of argument, learned counsel for the respondent went on to
 B formulate issues in respect of the objection, which I consider to be absolutely unnecessary. The exercise of trying to convince this court of the incompetence of the said ground of appeal became a tedious one, for the argument on this complaint took learned counsel on a voyage that spanned
 C over 5 years (which translated into seven pages of the brief), when it could have taken only a few hours. All for what? That one single ground. It looks to me that learned counsel simply wants to make a mountain out of molehill. I will consider the attacked ground of appeal to determine its efficacy and its validity. **Grounds of appeal are meant to attach findings of a court that have bearing on the case put up by a litigant. In other words it should be related to a decision of the court and contain complaints an appellant rely on to succeed in setting aside a decision the ratio decidendi of a judgment not just observations and**
 D **passing remarks of a judge in the course of writing a judgment.** See Akibu v. Oduntan 2000 13 NWLR part 685 page 446, Iloabachie v. Iloabachie 2000 5 NWLR part 656 page 178 and Erivo v. Obi 1993 9 NWLR part 35 page 60. In the course of writing a judgment a judge
 E analyses sequence of events as they recur and in the process makes some observations and comments. After all he is a human being who is bound by feelings and to express such feelings is not forbidden, as long as he is careful as not to be swayed by it. In other words a judge cannot
 F be put in a straight jacket and expected to be so restricted without the liberty to put his thoughts into writing. **That the learned trial judge in this case used the expression attacked in the above ground of appeal does not mean that he used moral issue as parameter for deciding the case. There are plethora of authorities on the purport of**
 G **a ground of appeal, but this reproduced ground (1) of appeal does not certainly fall into the category of a competent ground of appeal.** See the cases of Metal Construction (W.A.) Ltd. v. Migliore 1990 1 N.W.L.R. part 126 page 299, and Osolu v. Osolu 1998 1 N.W.L.R. part

535 page 535 relied upon by learned counsel for the respondent. See Saude v. Abdullahi 1989 4 NWLR part 116 page 387; Abisi v. Ekwealor 1993 6 NWLR part 302 page 643.

For the foregoing, I uphold the objection raised and strike out ground (1) of the appeal supra as it is incompetent. Consequently B
issue (1) supra married to the said ground of appeal now has no ground of appeal related to it, and so it has no place in law. The settled law is that an issue formulated for determination must be distilled from a ground of appeal, and where it has no ground of appeal to release to, then it has no C
part to play in the determination of the appeal and so the appellate court has no option than to disregard the said issue. Issue (1) in the appellant's brief of argument also because incompetent and it is discountenanced. See Nfor v. Ashaka Cement Co. Ltd. 1994 1 NWLR part 319 page 222, and Akpan v. State 1994 9 NWLR part 368 page 347. D

That leaves us with only issue (2) in the appellant's brief of argument. The respondent in its brief of argument formulated two issues for determination, in the event that their notice of preliminary objection is E
overruled. The first issue is related to the ground of appeal that has been struck out above, and so it must also go. The second issue for determination is "*whether in an undefended suit matter, the dismissal of a Defendants Notice of Intention to Defend the action against him and the subsequent' entry of judgment for the plaintiff (without more) amounts to an F
infraction of that Defendant's rights to a fair hearing guaranteed under the constitution?*"

This issue is virtually the same as the appellant's issue (2). In arguing the said issue (2) the learned counsel for the appellant submitted that if the trial judge had called on the Appellants' counsel to address the G
court on the law and facts before judgment, the trial court would have not come to the conclusion giving judgment for the plaintiff in the sum of five hundred thousand US Dollars etc. Learned counsel further argued that because there should be no legal argument in an affidavit, the duty of H
the trial judge was to call on the appellants to address him on the issue of limitation, and if he did not want to do that he would have considered the exhibits before him on his own to come to a just decision. This I suppose

would have constituted fair hearing. Learned counsel placed reliance on the cases of *Ariori v. Elemo* 1983 1 SCNR 1, *Okafor v. A-G Anambra State* 1991 6 NWLR part 200 page 659, and *Military Governor of Imo State v. Nwaunwa* 1997 2 NWLR part 490 page 675. Learned counsel also argued that as much as it is the obligation of a plaintiff in a civil suit to prosecute his matter diligently and establish his case against the defendant, the duty of the defendant who denies the claim made against him is to call evidence before the court to disprove the plaintiff's case, as referred to in the cases of *Okpala v. D.G. of National Commission for Museums and Monuments* and *Ors.* 1996 4 NWLR part 444 page 585, and *Opara v. Chuda* 1996 2 NWLR part 432 page 527. On the other hand, Learned counsel for the respondent has argued that the defendant in an undefended list suit can be let in to defend the action only if he delivers a notice of his intention to defend the suit and accompanies the same with an affidavit which discloses a defence on the merits. In that case, the court may allow him to defend the suit. He referred to Order 24 Rules 9(2) and (4) of the High Court Rules of Anambra State 1985, applicable to Enugu State, wherein the suit was initiated. I will reproduce the rules hereunder. They read:-

"24(9)(2). 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 setting out the grounds of his defence and the court is satisfied that there is a triable issue, then and in such a case the suit shall be entered in the General list and pleadings shall be filed.

.....

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

Indeed the learned trial judge examined, the defendants' notice of intention to defend, (and most carefully too) as is reflected in the follow-

ing excerpt of his ruling :-

“The plaintiffs affidavit in support of the application to place the suit on the undefended list was served on the defendants. In the said affidavit the plaintiff exhibited exhibits ‘D2’ and ‘F. These documents were made on behalf of the Amike Ezzangbo Community Farms Nigeria B Limited by the 1st defendant as its Chief Executive. The 1st defendant did not in his affidavit expressly deny making the said documents. In Exhibit 132, the defendant writing on behalf of the said company expressly admitted that the company received from the plaintiff the loan of \$500,000.00 C dollars in two batches of \$250,000.00 dollars each and proceeded to ask for a further loan of \$734,018 US dollars. The very first sentence in exhibit ‘F’ is most explicit. It reads:-

‘We acknowledge the fact that the Amike Ezzangbo Community Farm (Nig) Limited borrowed from EDCS a total sum of U.S. \$500,000.00 D and that the company regrettably had defaulted in paying the installments of principal due and accrued interest’.

It is therefore amazing that the defendants are now attempting to deny the disbursement of the loan sum”. E

The depositions in the supporting affidavit of intention to defend and the annexures are so clearly not cogent enough to warrant the calling for counsel’s address on law and facts before judgment, as submitted by learned counsel for the appellants (not even F on the issue of limitation). A careful perusal of the supporting affidavit shows that it does not disclose that there are triable issues. Indeed some of the documents exhibited support and lend credence to the case of the plaintiff. It is trite that unless a defendant in its supporting affidavit of intention to defend a suit on the undefended G list states a good defence and the particulars of such defence are adequately set out, and they are such that if proved would constitute such a defence, the court will not transfer the suit to the general cause list, and allow the defendant to defend the suit. See Jipreze H v. Okonkwo 1987 3 NWLR part 62 page 737, Nishizawa Ltd. v. Jethwani 1984 2 SC. 234, and John Wallingford v. The Directors, & C. of the Mutual Society, and the Official liquidator 1880 5 A.C. page 685 at page

704. In fact the documents exhibited by the appellants virtually nailed their coffins, so to speak. I fail to see that the appellants were denied fair hearing. With the above reproduced excerpt of the ruling of the High Court, one can see that the so called defence was adequately considered; and the decisions of the two lower courts were clearly borne out of law and facts placed before the courts, not morality or sentiments. The Court of Appeal was clearly in support of the trial court's treatment of the purported defence put up by the defendants/appellants, in its judgment, as is illustrated in a passage of which reads the following:-

"By the provision of Rule 9(4) of Order 24, a plaintiff is not required to call witnesses to prove its case once the Defendant fails to show a triable issue or make a prima facie defence on the merit. The trial court rightly heard and determined the case based on affidavit evidence of the parties and addresses of counsel thereon. Since no triable issue or defence on the merit was shown, there was no need to transfer the suit to the General cause list where pleadings and oral evidence would be warranted. I see no material conflicts on real points in issue in the affidavit of parties before the trial court".

The court below was quite right in its above stance, and I cannot see that there was any error in it. In the light of the above reasoning the answer to this issue (2) supra is in the negative, and ground (2) of the appeal to which it is married fails. The end result is that this appeal fails in its entirety and it is hereby dismissed. The judgments of the lower courts are affirmed. The costs of N10,000.00 are awarded to the respondent against the appellants.

KATSINA-ALU JSC

I have had the advantage of reading in draft the judgment delivered by my learned brother Mukhtar, JSC in this appeal. I entirely agree with it.

For the reasons given in the judgment, I also dismiss the appeal with costs of N10,000.00 to the respondents.

MOHAMMED JSC

I have had a preview before today of the judgment just delivered by my learned brother Mukhtar, JSC. I agree with her that there is no merit at all in this appeal which must be dismissed. From the affidavits in support of the respondent's application as the plaintiff to hear its action under the undefended list of the trial court and the affidavit of the defendants now appellants in support of their notice of intention to defend the suit, the defendants/appellants have no defence whatsoever to the respondent's action against them. It is for this reason and the reasons contained in the lead judgment that I also hereby dismiss this appeal with N10,000,00 to the respondent.

ONNOGHEN JSC

This is an appeal against the judgment of the Court of Appeal Holden at Enugu in appeal No.CA/E/166/98 delivered on the 21st day of June, 2001 in which it dismissed the appeal of the appellant against the decision of the High Court of Enugu State Holden also at Enugu in suit No.E/728/96 delivered on the 30th day of July, 1997 by R. C. AGBO J. as he then was.

The respondent, as plaintiff in the trial court, instituted an action under the Undefended List procedure claiming the following reliefs:-

"The plaintiff claims against the Defendants jointly and severally as follows :-

(a) The sum of \$500,000.00 (Five Hundred Thousand US Dollars) being the principal sum of the loan due from the first and second Defendants to the plaintiff under a personal guarantee executed by the Defendants to secure a Loan granted by the plaintiff to Amike Ezzangbo Community Farms Limited under a loan agreement dated 18th January, 1990 payment of which sum the first and second Defendants have failed, refused and/or neglected to pay despite repeated demands.

(b) interest on the principal sum of \$500,000.00 (Five Hundred

Thousand US Dollars) at the agreed rate of 9% (Nine percent) per annum from January 22nd 1991 till date of judgment.

(c) interest thereafter at the rate of 6% (Six percent) per annum from the date of judgment until the entire judgment sum is finally liquidated”.

As required by the relevant rules of court, the writ of summons in the case was accompanied by an affidavit deposing to facts relevant to the relief’s claimed. From that affidavit, the relevant facts included the following:-

The appellants entered into a personal contract of guarantee in favour of the respondent to guarantee a loan of US \$500,000.00 granted by the respondent to Amike Ezzangbo Community Farms (Nig.) Limited being a company owned and operated by the appellants, who were also husband and wife. The 1st appellant is the Chief executive of the said Company. Contract of guarantee was in writing as evidenced in exhibit A and extends to the principal sum plus interest and other expenses. The principal aim was released to the principal debtor company by the respondent but the company and the appellants failed and or neglected to repay the loan together with the accrued agreed interest inspite of repeated demands.

Upon being served with the writ together with the affidavit in support, the appellants caused a Notice of Intention to Defend the action to be filed contending (a) that the contract of guarantee failed because the plaintiff/respondent refused to disburse the loan; (b) that the trial court has no jurisdiction to make an award in foreign currency; (c) that the defendants/appellants intend to raise a defence of limitation of time and (d) that the court had no territorial jurisdiction over the matter since the locus of the transaction is in Ebonyi State, and urged the court to transfer the matter from the Undefended List to the General Cause List to be dealt with accordingly.

As stated earlier in this judgment, the trial court found no defence disclosed in the affidavit filed in support of the Notice of Intention to Defend and therefore entered judgment for the plaintiff/respondent. The appeal of the appellants against that judgment was dismissed by the Court

of Appeal. Issues for determination as disclosed in the Appellants' Brief of Argument filed on 26/8/03 and adopted in argument of the appeal on the 13th day of November 2006, are as follows;

"1. *whether the Court of Appeal applied moral persuasion instead of legal rules in determining the appeal before it* B

2. *whether the appellants in this case in the High Court were denied fair hearing which resulted in perverse justice?"*

The appellants' brief was filed by CHIEF ENECHI ONYIA, SAN, OON.

In the respondent's brief of argument filed on 18/1/05 and adopted in argument, learned counsel for the respondent ANTHONY GEORGE IKOLI Esq. raised a preliminary objection to ground 1 of the grounds of appeal and issue No.1 formulated therefrom and urged the court to strike them out for being incompetent. D

The complaint in ground 1 of the grounds of appeal is as follows:-

"GROUND 1

The Court of Appeal erred *in law* by using moral persuasion instead of legal justice in determining the success or failure of the appeal. E

PARTICULARS OF ERROR

(i) *the following quotation from the judgment was the expressed position of the court below: "It is not for me to fathom the inscrutable working of Providence. But I can guess as a mortal. It appears to me that the appellants thought that they created an equidistant triangle with their pet ideas as stated above suit standing at angle 60 degrees".* F

(ii) *the issue before the court at all material times was not a moral issue but legal issues.*

(iii) *the court below erred in law when it failed to examine and interpret the agreement between the parties before confirming the judgment of the High Court.* G

(iii) *the clauses in the agreement from (sic) (form) part of the proceedings".* H

It is settled law that a ground of appeal is basically a highlight of the error of law or fact or mixed law and fact made by the court in the decision sought to be set aside in the appeal. It is the sum total of the

reasons of why the decision on appeal is considered by learned counsel for the appellant to be wrong and liable to be set aside. It follows therefore that for a ground of appeal to be capable of achieving the purpose of setting aside the decision appealed against, it has to be very substantial and must relate to the ratio of the decision, not directed at the obiter dictum of the court or in the judgment.

The question that calls for determination presently is what is the decision of the Court of Appeal in the appeal before it. The answer is as contained at pages 237 to 239 of the record as follows:-

"To constitute a triable issue it has been stated that an affidavit in support of Notice of intention to defend must set a defence on the merit; not a sham intended to delay and frustrate justice. See Macaulay v. Nal Merchant Bank Ltd. Supra at page 325; Agro Millers Ltd. v. C.M.B. Nig. Plc supra at pages 477-478. A defendant who has no tenable defence should not be allowed to rely on a farce to postpone the day of reckoning.

As can be garnered from pages 140-143 of the record of proceedings, learned counsel on both sides of the divide (sic) divide addressed the trial judge on salient legal points as deemed fit. Addresses by counsel started on 10-2-97 - the return date and ended on 17-6-97 when the case was adjourned of 30-6-97 Ruling. It is therefore not correct to say that the parties' counsel were to allowed to address the trial Court on matters of legal importance.

The learned trial judge, in his Ruling now under fire, dealt with the defences raked up by the Appellants in their sequence. He found that the Appellants did not deny that they signed the guarantee-part of Exhibit 'A'. And by the letter dated 12-5-95 - Exhibit 'F' the 1st Appellant admitted the disbursement of the loan and the fact that the same is outstanding.

I agree perfectly with the Respondent's counsel that the Appellants were not denied fair hearing as the trial Judge properly considered their affidavit and heard submissions from both counsel to the parties before delivering his judgment.

The trial judge's treatment of the issues put up by the Appellant

appears concise and to the point Appellants put up the issue that the claim was in foreign currency. The trial Judge reminded them that the Supreme Court in Koya v. U.B.A. Ltd (1997) 46 L.R.C.N. I clearly stated that courts can make awards in foreign currencies.

The Appellants said they intended to raise a defence as to limitation of time. The learned trial judge rightly said that what the law required was for them to place their defence before the Court and not to announce their intention. The same was properly discountenanced.

On the issue of competence, the learned trial judge said his court had jurisdiction based on the residential address of the Appellants who confirmed same as being in Enugu. Earlier in this judgment, I pronounced on the point. I only need to say that I am at one with the trial judge.

By the provision of Rule 9(4) of Order 24, a plaintiff is not required to call witness as to prove its case once the defendant fails to show a triable issue or make a prima facie defence on the merit. The trial Court rightly heard and determined the case based on affidavit evidence of the parties and addresses of counsel thereon. Since no triable issue or defence on the merit was shown, there was no need to transfer the suit to the General Cause List were (sic) pleadings and oral evidence would be warranted. I see no material conflicts on real point in the affidavit of parties before the trial Court.

The learned trial judge found that the defences put up by the Appellants equated to a sham. I completely agree with him

It appears that the Appellants also complained that judgment was immediately given to the Respondent after delivering the Ruling refusing the intention to defend the suit. This court, in C.C.B Nig Plc v. Samed Investment Co. Ltd. (supra) at page 31 had cause to pronounce on a similar situation. As therein, see nothing wrong in what the learned trial judge, did in this regard as he followed his Rule of court as applicable to the matter.

I am unable to surmise how the Appellants were denied fair hearing in the prevailing circumstance of the case. I also resolve the issue relating to lack of fair hearing against the Appellants herein.”

From the above pages it is very clear that the complaint of the

appellants in ground one of the grounds of appeal is not directed at the ratio in the decision of the Court of Appeal but at the obiter dictum and therefore very irrelevant and incompetent and liable to be struck out. I order accordingly. It follows therefore that issue No. 1 formulated from the said ground No.1 of the grounds of appeal is very incompetent and is consequently struck out.

Secondly, it should be noted that learned counsel for the appellants has filed no reply brief in this appeal which means that he is deemed to have conceded the point(s) raised and argued by his learned friend in the preliminary objection. Either way the ground of appeal together with issue No .1 cannot stand.

On the merit of the appeal, it is not in doubt that the appellants personally guaranteed the loan in issue which was duly paid to the principal debtor. From exhibit 'F' is the evidence that the principal debtor received from the respondent the loan of \$500,000.00 dollars in two installments of \$250,000.00 dollars each and even proceeded, like Oliver Twist, to ask for more loan of \$734,018.00 US Dollars. Exhibit D2 was written by the 1st appellant on behalf of the principal debtor.

In exhibit 'F' the 1st appellant also writing on behalf of the principal debtor stated this:

"We acknowledge the fact that the Amike Ezzangbo Community Farms (Nig.) Limited borrowed from EDCS, a total sum of U.S \$500,000.00 and that the Company regretablely (sic) had defaulted in paying the installments of principal due and accrued interest".

The above is a clear admission of the debt in issue and it becomes obvious that the purported 'defence' raised by the appellants is, as found by the trial judge and affirmed by the Court of Appeal, a sham.

The appellants also stated that they intended to raise a defence of statute of the limitation as regard the claim of the respondent but did not state the facts constituting that defence as required by the rules of court. I hold the view that for a matter under the Undefended List, the intention of the defendant is very irrelevant. What he is expected by rules to do is to depose to facts constituting his defence(s) to the action in an affidavit disclosing his defence so as to persuade the trial judge to remove the

matter from the Undefended List to the General Cause List to be dealt with accordingly. Appellants did not state the dates relevant to a determination whether the action is caught by limitation of time yet they are complaining of lack of fair hearing. When you conduct or present your case badly you have yourself to blame, not the court when the decision B goes against you. Appellants were given the opportunity to state or disclose whatever circumstances to warrant such on intervention which, in this case, the appellants have failed to do.

I therefore have no hesitation in agreeing with the conclusion of C my learned brother MUKHTAR JSC that the appeal lacks merit and should be dismissed. I accordingly dismiss same with costs as assessed and fixed in the said lead judgment.

Appeal dismissed.

D

OGBUAGU JSC

The Respondent who is the Plaintiff in the Suit leading to this appeal and is/was based in Netherlands, is an International non-profit E making Organization for Development of Third World Countries and committed to assist poor people and encouraging Co-operatives all over the world agreed to advance and did in fact advance to the AMIKE F EZZANGBO COMMUNITY FARMS (NIG.) LTD. (hereinafter called “the Company”), a loan of the sum of \$500,000.00 (Five Hundred thousand Dollars (i.e. half a million US. Dollars) for the purpose of financing the purchase of an equipment, vehicle and working capital for the development of the Company’s Agricultural Project at Amike Ezzangbo, Ishielu, G Enugu in Enugu State of Nigeria - (now in Ebonyi State) at the time of the contract.

The agreement executed between the Respondent and the Company evidencing the said loan, is dated 18th January, 1990. The Company also mortgaged to the Respondent, its landed property also situate at H Amike Ezzangbo.

I note that as a further security for the said loan, the Appellants who are promoters, shareholders and Directors of the Company in which

the 1st Appellant, is the Chairman/Managing Director, executed their personal Guarantee which was incorporated into the said Loan Agreement. By the Guarantee, the Appellants, undertook to repay the principal sum and the interest at the rate of nine per cent (9%) per annum, in the event, B the Company failed or were unable to repay the loan and interest for any reason whatsoever.

When the Company defaulted in the repayment in spite repeated demands in writing and the appellants failed, refused and/or neglected to honour their said Guarantees, the Respondent sued and filed a suit under C the Undefended List supported by an affidavit for the recovery of the debt and interest. On being served, the Appellants, filed a Notice of Intention to Defend the suit also supported by an affidavit. The Respondent reacted to the counter-affidavit by filing a counter-affidavit. The Appellants D filed a Reply to the said counter-affidavit. On 10th February and 17th June, 1997 respectively, Counsel for all the parties, addressed the trial court. On 10th February, 1997, Chief Enechi Onyia (SAN) appeared with two other counsel, for the Appellants while Anthony George-Ikoli with E. O. Madufor Esqr., appeared for the Respondent. At page 2 of the Appellants' Brief of Argument, it is conceded thus -

"..... *The application to defend the suit was argued and rejected by the High Court.....*".

F But the complaint of the Appellants, is that after the addresses by both Counsel for the parties and the Notice of Intention to Defend, was rejected by the learned trial Judge, that -

"the High Court without hearing the appellants entered judgment in favour of the Respondent".

G This is what constitutes to the Appellants and their learned counsel denial of fair hearing. This is their Issue 2 in their said brief.

However, the trial court, on 30th July, 1997, in its Ruling entered judgment in favour of the Respondent. Aggrieved by the said Ruling, the H Appellants filed an appeal to the Court of Appeal, Enugu Division dated 12th March, 1998. In a unanimous decision, the Court of Appeal (herein-after called "*the court below*"), on 21st June, 2001, dismissed the appeal. It is against the said decision, that the Appellants, have appealed to this

Court on two (2) grounds of appeal. Without their particulars, they read as follows:

“The Court of Appeal erred in law by using moral persuasion instead of legal justice in determining the success or failure of the appeal.

2. The court below erred in law when it held that the defendants/ appellants were not denied fair hearing “learned counsel on both sides of the divide addressed the trial judge on salient legal points as deemed just”. (there is no closing quotation mark shown in the Records).

The Appellants formulated two (2) issues for determination, namely,

“1. Whether the Court of Appeal applied moral persuasion instead of legal rules in determining the appeal before it?

2. Whether the Appellants in this case in the High Court were denied fair hearing which resulting (sic) in perverse justice?

The two issues formulated by the Respondent in its Brief of Argument in my respectful view, are substantially, the same as those raised by the Appellants although differently couched. That being the case. I will not bother myself in reproducing them in this Judgment. However, the Respondent, has raised a Preliminary Objection in its said Brief as to the competence of Ground one (1) of the Appellants’ Ground of Appeal with its particulars and it has contended that the same are incompetent and ought to be struck out. The grounds upon which the Objection is brought, are stated to be as follows:-

“a. The said ground of appeal is vague, general in terms and does not disclose a reasonable ground of appeal.

b. The particulars furnished in support of the ground of appeal, specifically (iii) and (iv) are unrelated to the ground and are therefore incompetent.

c. The issue of morality or otherwise does not arise from the decision of the Court of Appeal being appealed against.

d. The statement quoted in paragraph (i) of the particulars given in support of ground in the grounds of appeal did not constitute a decision of the Court of Appeal but was only on obiter dictum (a passing remark) made by the Court and same is not appealable.

e. The particulars furnished by the Appellant (sic) numbered (iii)

and (iv) in the ‘Particulars of Error’ in support of ground 1 contain fresh points on which no arguments were canvassed at either the Court of trial or the court below.

f. *The Appellants require leave of this Honourable Court to raise such an issue.*

g. *The requisite leave to raise these points for the first time was neither sought nor obtained’.*

I note that discussion, arguments and two issues raised in respect of this objection, have spanned from pages 4 to 14 of the Respondent’s Brief. In my respectful view, they amount to a dissipation of unnecessary energy in respect of a ground of appeal that is palpably, obvious and hopelessly incompetent. This is because, as far as I am concerned, the issue of morality as rightly stated in ground C of the grounds for the objection, does not arise from the decision of the court below being appealed against. At the worst, it is/was a mere obiter dictum or a passing remark as again stated in grounds of the grounds for the objection.

On the 13th of November 2006 when the appeal came up for hearing, Nweze, Esqr., who appeared for the Appellants, formally adopted their Brief and urged the court to allow the appeal Oladeru, Esq. - learned counsel for the Respondent, referred to their said Preliminary Objection and urged the Court to strike out the said ground one (1) of the appeal.

As regards the appeal proper, he cited and relied on the case of *Fortune International Bank Plc v. Pegasus Trading Office (GmbH) & 2 ors. (2004) 4 NWLR (Pt.863) 369 @ 389; (2004) 1 SCJN.....(2004) 1 S.C (Pt.II) 164* as an Additional Authority in respect of Guarantee in that one can proceed against the Guarantor and he referred to page 19 of their Brief in respect of the above case. Learned Counsel pointed out that the Appellants, did not file a Reply Brief to the Preliminary Objection. He urged the court to dismiss the appeal. Not surprising, Mr. Nweze told the court that he has nothing more to add. Although, if the matter was left for me, I should have immediately thereafter, upheld the objection on a Bench Ruling and in fact, dismiss the appeal as being most frivolous and unmeritorious, but the court decided to reserve its considered Judgment till today.

Now, there is no doubt and this is settled, as to the meaning and purpose of a ground(s) of appeal against a decision and the need for a ground or grounds of appeal, to challenge the *ratio decidendi* of a case or decision of a court. In other words, a ground or grounds of appeal against a decision, must relate to the decision appealed against and should be a challenge to the validity of the *ratio decidendi* of the decision reached either by a trial or an appellate court. See the case of *Alhaji Ishola v. Ajiboye (1998) 1 NWLR (Pt.532) 71 @ 79 C.A.* cited and relied on in the Respondent's Brief.

However, since the Appellant did not file a Reply Brief to the Preliminary Objection and as I had noted hereinabove, Mr. Nweze told the Court that he had nothing more to say after Mr. Oladeru had concluded his submissions in respect thereof, it is deemed by the Court and especially by me, that he and his clients, have admitted or rather conceded as correct and meritorious, the said objection. On this ground again, I therefore, uphold the objection and I accordingly strike out ground one (1) of the grounds of appeal together with the said issue formulated in respect thereof.

I had noted earlier in this Judgment, that the Appellants executed a personal Guarantee in favour of the Respondent. The Guarantee reads inter alia, as follows:

"..... We CHIEF PETER AMADI NWANKWO AND MRS. PATRICIA OBIAGELI NWANKWO " We hereby guarantee to you the payment on demand of all sums which now are or at anytime or times hereafter may become due or owing or may be accruing or become due to you by the Borrower (i.e. the Company) either alone or jointly We agree to pay to you interest of 9% percent per annum on all sums due from us..... PROVIDED ALWAYS that the total liability ultimately enforceable against us either jointly or severally under this Guarantee is limited to the principal sum of Five Hundred Thousand US Dollars plus interest, fees, and other expenses thereon, as aforesaid".

In Black's Law Dictionary, 7th Edition at page 711. Guarantee is stated to be.

"1. The assurance that a contract or legal act will be duly carried

out”

“Guarantee Clause” is stated to be,

“1. A provision in a contract, deed, or mortgage by which one person promises to pay the obligation of another”.

B In the recent case of *Auto Import Export v. Adebayo & 2 ors.* (2005) 19 NWLR (Pt.959) 44 @ 126-127; (2005) 12 SCNJ. 106 @ 161; (2005) 24 NSCQR 618 @ 690-691; (2005) 12 SCM 110 @ 168-169; (2006) 1 FWLR (Pt.307) 1846 @ 1926-1927; (2006) Vol.134 LRCN 455 @ 544-545; and (2006) Vol. 2 MJSC 124 @ 195-197. I dealt with the
C meaning of a Guarantee and referred to the case of *Trade Bank Plc v. Khalid Barakat Elami* (2002) 13 NWLR (Pt.836) 158 & 216. I also referred to *Fortune International Bank Plc v. Pegasus Trading Office (GmbH) & 2 ors.* (supra) - where it was stated by Uwaifo, JSC, that the
D tendency, is that the law appears to have moved to the centre to make the right of the creditor, less conditional. That the creditor, is now entitled to proceed against the Guarantor without or independent of the incident of the default of the principal debtor. I also referred to the observation of
E Ayoola, JSC, in the case of *African Insurance Development Corporation v. Nigeria (LGN) Liquidified Natural Gas Ltd.* (2000) 4 NWLR (Pt. 653) 494 @ 505-506; (2000) 2 SCNJ. 119; (2000) 2 S.C 57. I then stated that it is settled that the liability of a Guarantor, becomes due and mature,
F immediately the debtor/borrower, becomes in able to pay its/his outstanding debt. That the Guarantor’s liability, is then said to have crystallized. I referred to some other decided authorities in this regard and stated that a Surety or Guarantor, is bound by the written agreement it/he entered into.

G I note that both the Appellants at page 3 of their Brief and the Respondent at page 16 of its Brief, reproduced what the court below stated inter alia, at page 232 of the Records after it had referred to and reproduced Order 3 Rule 6 (2) of the Anambra State High Court Rules,
H 1988, applicable in Enugu State, thus:

“It occurs to me that by putting their hands on paper to sign the guarantee agreement, the appellants promised to answer for the outstanding debt of the principal obligor. They undertook to make good the debt of

Amike Ezzangbo Farms alone or jointly with other person or persons. This means that they knew that they could be sued alone to pay the outstanding debt of their Company.....”

Comment: I observe that the numbering of many of the page of the Records, are not clear/legible. B

The Appellants and the Respondent, in their respective Briefs, also reproduced part of the 1st Appellant’s letter dated 12th May, 1995 in response to the letter of demand from the Solicitors of the respondent. It reads, inter alia, as follows:

“We acknowledge the fact that Amike-Ezzangbo Community Farms (Nig.) Ltd. borrowed from EDCS, a total sum of US \$500,000 and that the Company regrettably had defaulted in paying the installments of principal due and accrued interest.....” C

The court below, - per Fabiyi, JCA, at the said page 232 and part D of page 233 then stated as follows:

“Having admitted the debt as outstanding, requisite demands were made to the Appellants to honour their covenant as contained in the guarantee freely signed by the duo - a couple who should put on garments of honour. After all, they covenanted to be responsible for the default of their Company alone. It was therefore an eye wash to attempt to compare their liability with that of partner in a partnership. To that extent, the case of Y. Boshall & Co. Ltd. v. Arikpi (supra) cited on behalf of the appellants is not of moment. E F

As soon as the principal obligor could not pay the outstanding debt, the liability of the Appellants crystallized. The Appellants who promised to answer for that debt, and to do so alone, cannot be heard to complain that any other person was not joined with them..... The claim was founded only on redemption of contract of guarantee freely entered by the Appellants. As the debt has been established, and the Appellants did not deny the guarantee, I cannot see how the Amike Ezzangbo Farms Ltd. is a necessary party” G H

I cannot fault the above findings and holdings of the court below. On this ground, I should and ought to have rested this Judgment and dismiss this appeal which I humbly and respectfully maintain, is very

frivolous, but I am obliged to deal even briefly, with the second ground of appeal and Issue 2 of the Appellants at least, for purposes of emphasis.

Order 24 Rule 9(2) and (4) of the said Anambra State Civil Procedure Rules, 1988 applicable in Enugu State, which were also reproduced B by the court below at pages 236 and 237 of the Records and by the Respondent at page 24 of its Brief, provides as follows:

“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 C hearing a notice in writing that he intends to defend the suit, together with an affidavit setting out the grounds of his defence and the court is satisfied that there is a triable issue, then and in such a case the suit shall be entered in the General list and pleadings shall be filed”.

[the underlining mine]

D The above provision is clear and unambiguous. In other words, it is the court that has to be satisfied that there is a triable issue before entering the suit in the General list for hearing/trial.

Order 24 Rule 9(4) of the said Rules, provides as follows:

E “..... Or where he delivered the notice and affidavit but the court is not satisfied therefrom that there is raised any bona fide issues for trial between the plaintiff and the said defendant, then and in such a case, the suit shall be heard as an undefended suit and judgment given F thereon without calling upon the plaintiff to summon witnesses before the Court to prove his case formerly”.

[the underlining mine]

G Again, it is the court that has to be not satisfied that there is raised, any bona fide issues for trial and in that event, the suit shall be heard as an undefended suit. In the instant case leading to this appeal, and as rightly stated at pages 237 and 238 of the Records, the learned trial Judge, considered the affidavit in support of the Notice of Intention to Defend the suit and after hearing addresses from the learned counsel for the parties, H was satisfied that there was no bona fide or good defence raised by the Appellants, before entering summary judgment in favour of the Respondent. The trial court, rightly found as a fact that the Appellants, signed the Guarantee - Exhibit “F” and that the 1st Appellant, admitted the dis-

bursement of the loan and the fact that the same was still outstanding and unpaid. It held that the defence, was a sham. It held that on the decided authorities, a Nigerian court, can award a claim in foreign currency. There are too many authorities in this regard. See *Broadline Enterprises Ltd. v. Monterey Maritime Corporation & anor.* (1995) 9 NWLR (Pt.417) 1; (1995) 10 SCNJ. 1 @ 26, 27; *Koya v. UBN Ltd.* (1997) 46 LRCN 1; (1997) 1 SCNJ. 1, 27, 35., 43; *UBN Ltd. v. Odusote Bookstores Ltd.* (1995) 9 NWLR (Pt.421) 558; (1995) 12 SCNJ. 175; *Mr. Mike Momoh v. VAB Petroleum Inc.* (2000) 2 SCNJ. 200 @ 217; *United Bank for Africa Plc. v. BTL Industries Ltd.* (2004) 18 NWLR (Pt.904) 180 C.A. C

I wish to state that there are too many decided authorities by the Court of Appeal and this Court, as to when a defendant can be let in to defend the suit and in that case, the trial court, will transfer the suit to the General List for hearing. See *Jipreze v. Okonkwo* (1987) 3 NWLR (Pt.62) 737; *Ekuma & anor. v. Silver Eagles Shipping Agencies (P.H.) Ltd.* (1987) 4 NWLR (Pt.65) 472; *National Bank of Nigeria Ltd. v. Weide & Co. Nig. Ltd. & 3 ors* (1996) 9-10 SCNJ. 147 @ 155-156 and *Adebisi Macgregor Associates Ltd. v. Nigeria Merchant Bank Ltd.* (1996) 2 SCNJ. 72 @ 79-80 just to mention but a few. D

The guidelines and principles as to when a trial court will refuse to let a defendant to defend, have been stated and re-stated in a plethora of decided cases. See *Macaulay v. Nal Merchant Bank Ltd.* (1990) 4 NWLR (Pt.144) 283 @ 324-325. C.A. and which went on appeal and is reported in (1990) 7 NWLR (Pt.160) 1 @ 11-13 (1990) 6 SCNJ. 117; *Agwunedu v. Felix Eze* (1990) 3 NWLR (Pt.137) 242 @ 255 C.A. *Okamba Ltd. v. Alhaji Sulle* (1990) 7 NWLR (Pt. 160) 1 @ 13; *Pan Atlantic Shipping & Transport Agencies Ltd. v. Rhain Mass Ind. See Schiffarts Kontor GMBH* (1997) 3 SCNJ. 88 @ 96, 100; *Exportaco E. Importacao S.A. v. Sanusi Brothers (Nig.) Ltd.* (2000) 6 SCNJ. 453 @ 463-464, 468 and many others. F

It need be stressed and this is also settled, that the object of the Rules under the Undefended List, is to ensure quick dispatch of certain types of cases such as involving debts or liquidated money claim (as in the instant case). See the cases of *Bank of the North v. Intra Bank S.A.* G H

(1969) 1 All NLR 91 and recently, Ataguba & Co. v. Gura Nig. Ltd. (2005) 2 SCNJ, 139 @ 157; (2005) 2 S.C. Pt.1) 101. In other words, the object, is to enable a plaintiff whose claim is unarguable in law and where the facts are undisputed and it is inexpedient to allow a defendant to
B defend for mere purposes of delay, (as in the instant case leading to this appeal), to judgment in respect of the amount claimed. See Macaulay v. Nal Merchant Bank Ltd. (supra). This is/was exactly what the trial court did. Surely and certainly, “*that the defendants intend to raise a defence*
C *of limitation of time*”, in my respectful view, is a mere intention, a wish or proposal in future. Unless that intention, materializes or the said defence is raised and particulars given in the affidavit in support of the Notice to defend, it remains an intention not actualized in concrete terms or facts. The Appellants never raised the proposed defence in their said
D affidavit. So, the trial court, could not consider it.

I regret to say that the type of the Appellants, are among those that bring shame and ridicule to this country and inhibit or frighten is foreigners and other willing foreign bodies or institutions, from financially, helping
E some developing countries. In any case, there are concurrent judgments and findings of facts by the two lower courts. The attitude of this Court in such circumstances not to interfere, is now firmly settled, if there is any appeal that is completely devoid of any merit, this is certainly
F one of them. With the utmost respect, it is no credit to the Appellants’ learned counsel.

In the final analysis or result, I have no hesitation in agreeing and subscribing entirely, with the reasoning and conclusion of my learned
G brother, Mukhtar, JSC, in the lead Judgment which I had the privilege of reading before now, that the appeal is unmeritorious. I too dismiss the appeal and I also affirm the decision of the court below affirming the Judgment of the trial court, I abide by the order in respect of cost.

H