

SUPREME COURT OF NIGERIA
27TH FEBRUARY, 2009 SC. 54/2003
CORAM :-G. A. OGUNTADE, M. MOHAMMED, W. S. N.
ONNOGHEN, F. F. TABAI, J. O. OGEBE, JJSC

1. JOEL OKUNRINBOYE EXPORT CO. LTD.
2. SENATOR (CHIEF) REMI OKUNRINBOYE
3. MRS. OLATUNBO OKUNRINBOYE APPELLANTS
4. MR. OLUKAYODE OKUNRINBOYE
AND
SKYE BANK PLC RESPONDENT

UNDEFENDED SUITS - Undefended list procedure - Return date - Meaning of - It is the date fixed for hearing of the action - Except the defendant files a notice of intention to defend - With an affidavit disclosing his defence to the action (H1)

PRACTICE & PROCEDURE - Undefended list procedure - Notice of intention to defend - Time within which to file - It must be filed before the return date or the defendant would be out of time - Requiring leave of court to file it subsequently (H2)

PRACTICE & PROCEDURE - Undefended list procedure - Intention to defend - Filed out of time without leave - Effect of - It is invalid and should be discountenanced by court - Towards maintaining speedy hearing of liquidated suits (H3)

APPEALS - Initiation - Necessity for - Appeals are initiated by notices of appeal in which are stated valid grounds of appeal - Complaining against the decisions being appealed against (H4)

APPEALS - Issues - Role of - Appeals are determined on issues arising from the grounds of appeal - But such issues need not be those formulated by the appellant - They may be those by the respondent or even by the court (H5)

APPEALS - Issues - Raised by respondent - Validity - Where appellant's issues are incompetent - Issues by respondent properly arising from

the grounds of appeal are valid issues - Notwithstanding the invalidity of appellant's issues (H6)

APPEALS - Grounds of appeal - Erroneously struck out - Effect - Where the issues determined eventually actually cover the ground erroneously struck out - The error has no effect on the decision ultimately given (H7)

ACTIONS - Undefended list procedure - Fair hearing - Applicability of - The procedure recognises fair hearing by reserving to the defendant the right to file a notice to defend - It is a different matter where defendant fails to utilize the right (H8)

FAIR HEARING - Opportunity to be heard - Which the law is designed to give - Where a defendant decides not to utilize that opportunity - He cannot turn around to blame the court - As fair hearing should also avail plaintiff (H9)

COURTS - Adjournments - Grant of - Relevant considerations - Court should consider applicant's attitude in the course of the proceedings - As adjournments are not granted for the asking - Particularly under the undefended list where speed is the emphasis (H10)

FACTS

Plaintiff/respondent sued defendants/appellants before the Ondo State High Court claiming certain sums of money being outstanding debt balance of credit loan facilities granted to the 1st appellant and for which the 2nd to 4th appellants stood as guarantors. Upon the application of the respondent, the matter was entered in the undefended list and a return date fixed. Several adjournments followed due to the inability of the court to sit.

Meanwhile, appellants filed a notice of intention to defend together with an affidavit disclosing their defence about a year after the initial return date fixed by the court. This was filed without leave of court extending the time within which to file same. The court discountenanced the notice of intention to defend and entered judgment for the respondent under the undefended list procedure. Aggrieved, appellants appealed to the Court of Appeal which dismissed

the appeal. Appellants have brought this further appeal to the Supreme Court.

ISSUES FOR DETERMINATION

“1. Whether the court below was right when it struck-out as incompetent Ground 1 of the appellants notice of appeal before it, on the premises that the ground alleged both error and misdirection in its particulars considering the adverse effect of this decision on the appellants GROUND 3A.

2. Whether the failure of the appellants to move their motion for extension of time within which to file appellants’ notice of intention to defend can amount to an abandonment of the already filed Notice of Intention to defend with its affidavit in view of Order 23 Rules 1 - 5 of the High Court Civil Procedure Rules, 1987 of Ondo State. GROUND 3B

3. Whether the consideration of the respondent’s issue in determining the appeal after holding that the appellants issue are incompetent is proper and if not, has any miscarriage of justice been occasioned. GROUND 3C.

4. Whether the lower court was right in holding that no duty was imposed on a judge to evaluate and resolve affidavit evidence before entering judgment in matters under the undefended list procedure GROUND 3D.

5. Whether the principle of fair hearing is inapplicable to the undefended list procedure especially with respect to plea for adjournment to enable the appellants obtain the services of another counsel GROUND 3E.

6. Whether the judgment of the trial court confirmed by the lower court is valid in law. GROUND 3F”

HELD (Unanimously dismissing the appeal per **ONNOGHEN JSC**)
Undefended list procedure - Return date

1. The date for hearing so fixed by the court and entered on the writ of summons is what we also call the return date. It is the date fixed for the hearing of the particular action under the undefended list except the defendant(s) take(s) certain steps under the rules which steps are to the satisfaction of the court.

The steps the defendant(s) can take after service on him/them of the writ, to avoid the case being heard on the date fixed for hear-

ing (return date) is as provided for under Order 23 Rule 3(1), that is by filing a notice of intention to defend the action together with an affidavit disclosing a defence on the merit. (p. 491 C)

Undefended list procedure - Notice of intention to defend

- B 2. It is clear from the above that the filing of the notice of intention to defend together with an affidavit disclosing a defence on the merit must be done on or before the date fixed for hearing the undefended suit, otherwise the defendant would be out of time in doing so. In other words, where a defendant fails or neglects to file the notice of intention to defend together with an affidavit disclosing a defence on the merit on or before the date fixed for the hearing of the case, he can only do so upon being granted an extension of time to that effect upon a proper application. This is so because on the date fixed for the hearing if no such notice and affidavit have been filed, Rule 4 of Order 23 empowers the court to enter judgment in favour of the plaintiff as the suit would truly be undefended. (p. 491 F)

Intention to defend - Filed out of time without leave

3. In the instant case the appellants contend that their purported notice of intention to defend the action together with an affidavit filed more than a year after date fixed for the hearing of the writ of summons under the undefended list and without the leave of the court granting extension of time to do so, is valid and ought to have been considered in deciding whether to enter judgment for the respondent or not. I hold the firm view that they are wrong. To agree with their interpretation is to make complete nonsense of the provisions of Order 23 and the purpose it was designed to serve - that of speedy hearing of actions based on liquidated money demand or simple debt claims. (p. 492 A)

APPEALS - Initiation - Necessity for

- H 4. It is settled law that valid appeals are initiated by notices of appeal in which are stated the grounds of appeal constituting the complaints of the appellant against the decision of the court appealed against. (p. 493 E)

APPEALS - Issues - Role of

5. It is also settled law that appeals are not determined on the grounds filed but on issues formulated from the grounds of appeal. In other words, if an issue for determination is found not to have risen from any of the grounds of appeal, it is said to be incompetent and liable to be struck out. Issues for determination of appeal are usually formulated by the appellant, respondent and, where need be, by the appellate court i.e. where the issues formulated by the parties are incompetent or do not reflect the complaint of the appellant in the grounds of appeal before the court. (p. 493 F)

APPEALS - Issues - Raised by respondent - Validity

6. It is not the case of the appellants that the issues formulated by learned counsel for the respondent did not arise from the grounds of appeal declared competent by the lower court, neither have they demonstrated to this court that in fact, the issues so formulated do not relate to the said grounds of appeal. What the appellants are saying is that since the respondent did not cross appeal, it cannot in law submit any issue for determination of the appeal particularly where the issues of the appellants have been struck out for being incompetent. I hold the firm view that the learned counsel for the appellant is in error in that submission. (p. 493 H)

Grounds of appeal - Erroneously struck out

7. The issues formulated by counsel for the respondent arose from the grounds of appeal and did include the complain of the appellants in Ground 1 of the grounds of appeal erroneously struck out by the lower court. The striking out of Ground 1 therefore had no effect on the decision of the lower court as the issue raised therefrom was considered by the lower court in the consideration of the issues formulated by counsel for the respondent. (p. 494 E)

Undefended list procedure - Fair hearing

8. Order 23 does not take away the right to fair hearing of any party to the undefended list procedure rather it confers equal right to fair hearing to the parties, in particular Order 23 (3) (1) confers express right to file a notice of intention to defend the action placed under the undefended list by virtue of Rule 1 of Order 23, upon service of

the processes on him and, the court after going through the affidavit, may grant him leave to defend the action and remove the suit from under the undefended list to the general cause list to be dealt with accordingly. If the above is not a recognition of a defendant's right to fair hearing under the undefended list procedure, I wonder what is better.

Is the failure or neglect of a defendant to avail himself of the opportunity to be heard a denial of the right to fair hearing? I hold the view that it is not. (pp. 495 H/496 C)

FAIR HEARING - Opportunity to be heard

9. It is clear that the appellants were given the opportunity to be heard which they decided not to utilize - they abandoned their motion for extension of time to file notice of intention to defend together with an affidavit disclosing a defence as required by the rules more than two years after the return date for hearing of the action under the undefended list. The law is designed to give opportunity to parties to be heard. It is left to them to decide either to utilise the opportunity or not. When a party decides not to utilize the opportunity, he cannot turn round later to blame the court or any other person for his failure. It must also be borne in mind that the principles of fair hearing do not apply only to the defendant only but also to the plaintiff who has initiated action for judicial relief. (p. 496 D)

COURTS - Adjournments - Grant of

10. On the issue of adjournment, one may ask, adjournment for what? The appellants had more than two years to offer whatever defence they had, if any, but squandered it. There was no defence to the action known to law before the court on the date fixed for hearing and after the court had warned the appellants on the previous adjourned date to ensure that they came to court with their counsel, which they failed to do. We must always remember that adjournments are not granted for the asking particularly under the undefended list where speed is the emphasis. (pp. 496 G/497 A)

REPRESENTATION

O.S. Aderimigbe, Esq. for the appellants
Adekola Olawoye Esq. for the respondent.

CASES REFERRED TO

Korede vs Adedokun (2001) 7 S.C. (Pt. III) 68 at 76- 77
 Akpan vs State (1992) 6 NWLR (Pt 248) 439 at 457
 Neka BBB Manu Coy. Rid vs A.C.B Ltd (2004) ALL FWLR (Pt.198) 1175 at 1188 B
 Aderounmu vs Olowu (2000) 75LR CN425 at 439
 Agueze vs. Pan African Bank Ltd (1992) 4 NWLR (Pt.233) 76 at 88

STATUTES & RULES REFERRED TO

Constitution of the Federal Republic of Nigeria, 1979, s. 33(1) C
 Court of Appeal Rules, 2002, O. 2 r. 2 (2)
 High court (Civil Procedure) Rules of Ondo State, O. 23

LEAD JUDGMENT BY ONNOGHEN JSC

This is an appeal against the judgment of the Court of Appeal, holden at Benin City in appeal NO.CA/B/237/99 delivered on the 9th day of December, 2002 in which the court dismissed the appeal of the appellant against the judgment of the High Court of Ondo State, holden at Owo in Suit NO. HOW/35/96 delivered on 12/10/98 against the appellants who were the defendants before that court. By a writ of summons later entered for hearing under the undefended list procedure, the plaintiff/respondent claimed against the appellants jointly and severally the following reliefs:- E

“(1). The sum of N51,425,791.81 (Fifty-one Million, Four Hundred and Twenty-five Thousand, Seven Hundred and Ninety-one Naira, Eighty-four Kobo) being the outstanding debt balance (principal plus interest) of the credit loan facilities granted the 1st defendant at its own request for its cocoa produce business purpose between G 1993-1995 cocoa sessions which credit loan facilities the 2nd to 4th defendants stood as guarantors for repayment and despite repeated demands, the 1st defendant and, its said guarantors have failed, refused and or neglected to pay same.

(2) Interest at 21% per annum from the date of writ until judgment and thereafter at 10% per annum until judgment debt is finally liquidated. H

(3) Other remedies available to the plaintiff in law and or equity as the justice of this case demands”.

The suit was entered under the undefended list following the grant of an application to that effect by *FALODUN J* on the 2nd day of July, 1996. The return date was fixed for 6th August, 1996 which incidentally fell within the legal vacation of the court and was consequently adjourned to 30th October, 1996. On the 11th day of July, 1996, the defendants filed a Motion on Notice praying the court to set aside the order entering the suit under the undefended list and the dismissal of the suit which motion was, after many adjournments' at the instance of the defendants/applicants, withdrawn by them on 30th June, 1997 - almost one year after the suit was entered under the undefended list and the filing of the motion in question. On the 30th day of June, 1997 the defendants filed another motion on notice, this time seeking extension of time within which to file their notice of intention to defend together with an affidavit disclosing their defence to the action which application was adjourned to the 29th day of July, 1997. On the 29th day of July, 1997, the defendants filed another motion for leave to file their memo of appearance out of time which motion was eventually struck out by the court and the case adjourned to 23rd October, 1997 for hearing.

On the 23rd day of October, 1997 a new counsel was engaged by the defendants in the person of *Prince L. O Fagbemi, SAN* who proceeded to file a motion on notice challenging the competence of the suit and a Notice of Intention to defend the suit both dated 23/7/97 which applications necessitated the adjournment of the suit to the 11th day of December, 1997. Following the engagement of the trial judge on a national assignment the court did not sit until 13th July, 1998 when the suit was adjourned to 28th September, 1998 as the learned senior counsel for the defendants was not in court. When the case was called for hearing on 28/9/98 learned counsel for the defendants withdrew his appearance for the defendants as his brief had not been perfected and the matter was again adjourned to the 12th day of October, 1998 for hearing in the presence of all the parties to the action. The defendants were warned by the court to look for another counsel before the adjourned date see page 26 of the record.

When the case came up on the 12th day of October, 1998 for hearing all the parties were present but the defendants were not represented by counsel despite the warning of the court. The defen-

dants, however wrote a letter seeking an adjournment of the case which application was opposed by the learned counsel for the plaintiffs resulting in the trial judge refusing the application for adjournment and proceeding to hear the learned counsel for the plaintiffs after which the court entered judgment in favour of the plaintiffs as endorsed in the writ of summons earlier reproduced in this judgment but with 5% post judgment interest, per annum. The defendants were not satisfied with that judgment and consequently appealed to the Court of Appeal which dismissed their appeal and affirmed the judgment of the trial court resulting in the instant further appeal to this court. B C

In the appellants' brief of argument deemed filed on the 28th day of February, 2005 and signed by *Olusegun S. Aderigbe Esq.* the following six issues have been submitted to the court for the determination of the appeal. D

"1. Whether the court below was right when it struck-out as incompetent Ground 1 of the appellants notice of appeal before it, on the premises that the ground alleged both error and misdirection in its particulars considering the adverse effect of this decision on the appellants GROUND 3A. E

2. Whether the failure of the appellants to move their motion for extension of time within which to file appellants' notice of intention to defend can amount to an abandonment of the already filed Notice of Intention to defend with its affidavit in view of Order 23 Rules 1 - 5 of the High Court Civil Procedure Rules, 1987 of Ondo State. GROUND 3B F

3. Whether the consideration of the respondent's issue in determining the appeal after holding that the appellants issue are incompetent is proper and if not, has any miscarriage of justice been occasioned. GROUND 3C. G

4. Whether the lower court was right in holding that no duty was imposed on a judge to evaluate and resolve affidavit evidence before entering judgment in matters under the undefended list procedure GROUND 3D. H

5. Whether the principle of fair hearing is inapplicable to the undefended list procedure especially with respect to plea for adjournment to enable the appellants obtain the services of another counsel GROUND 3E.

6. *Whether the judgment of the trial court confirmed by the lower court is valid in law. GROUND 3F*

In the respondent's brief filed by the learned counsel *Kola Olawoye Esq.* on the 11th day of March, 2005 the following four issues have been identified for determination:-

B "1. *Whether it is proper in law for its particulars attached to ground one (1) of the appellant's notice of appeal at the lower court to simultaneously allege error in law and misdirection without due compliance with Order 3 Rules 2(2)(4) of the Court of Appeal Rules, 2002? Covers Ground A.*

C "2. *Whether the lower court was right in affirming the judgment of the trial court that failure of the appellants to move their motion on notice seeking for an extension of time within which to file their Notice of Intention to defend this action is an abandonment of same in view of the conducts, and attitude of appellants throughout this undefended list procedure? Covers Ground B.*

E "3. *Whether it is right and proper in law for the lower court, judging from the evidence on the record and the appraisal of same to uphold the findings of facts made by trial judge solely upon the issues formulated by the respondent thereby dismissing this (sic) appeal? Covers Ground C.*

F "4. *Whether the rights of the appellants to fair hearing and fair trial in this case have been infringed upon by the decisions in the judgment of the trial court which were upheld by the lower court? Cover Grounds D, E and F*".

G It is important to note that learned counsel for the respondent has contended, contrary to the record before this court that the appellants did not obtain leave before filing this appeal and that there is no record of appeal properly so called before this court in the sense that the record compiled by the appellants was not certified "or *certified adequately*" neither was any leave of court obtained to depart from the rules and finally that the bundle of papers presented as the record of appeal is incomplete in that certain relevant documents H have been omitted by the appellants and urged the court to strike out the appeal. I consider it a waste of time to go into the preliminary objection which is raised only in the respondent's brief of argument and from the summary of its contention *supra* is obviously without merit. It is accordingly summarily overruled by me.

On issue 1, learned counsel for the appellants submitted that the lower court was in error when it struck out ground one (1) of the grounds of appeal before it on the alleged ground that the ground in question complained both of error and misdirection in its particulars; that it was in ground 2 that a complaint of misdirection was made; that in any event, it is no longer the law that a ground containing complaints of error in law and misdirection in fact must be struck out, relying on Aderounmu vs Olowu (2000) 75 LRCN 425 at 439; that the striking out of the said ground 1 occasioned a miscarriage of justice as the issue formulated therefrom was not considered by the court and urged the court to resolve the issue in favour of the appellant.

On his part, learned counsel for the respondent referred to particular C to ground one (1) of the grounds of appeal before the lower court and submitted that it does not complement the ground but raised completely different issue from the complaint in the said ground one (1); that the particulars of the alleged error and misdirection were not stated contrary to Order 2 Rules 2 (2) of the Court of Appeal Rules, 2002 and urged the court to resolve the issue against the appellants.

I have carefully gone through the record before this court and can confirm that the learned counsel for the respondent is very economical with the truth when he argued in support of the position of the lower court on the issue under consideration.

The lower court had at page 37 of the record found/held *inter alia*, thus:

“In the case in hand, it is not ground one (1) of the grounds of appeal that alleges error in law and misdirection but the particulars attached to the said ground. Since the particulars have simultaneously allege (sic) error in law and misdirection it seems to me that they have contaminated that ground of appeal and rendered it useless The net result of the preliminary objection of the respondent is that grounds one (1) and four in the Notice of Appeal are defective and should be struck out. I therefore strike them out”.

The question is whether the lower court is right in its finding/holding supra. Ground one (1) of the grounds of appeal in question complains as follows:-

“ 1. The learned trial judge erred in law by refusing and ne-

glecting to consider the defendant's Notice of Intention to defend together with the supporting affidavit, which were before the court.

PARTICULARS OF ERROR

A. The defendants had filed a Notice of Intention to defend as required under Order 23 by the Ondo State High Court (Civil Procedure) Edict, 1987.

B. There was enough pleadings in the supporting affidavit to show that the defendants had a defence to the suit.

C. The trial judge erred in law and came to a wrong decision, when he held without recourse to the notice of intention to defend the supporting affidavit, that the defendant's had no serious defence to the suit".

It is very clear, from the reproduced ground one (1) together with its particulars that the ground and particulars never complained of error in law and misdirection as found/held by the lower court. It is very unfortunate that learned counsel for the respondent mislead the lower court in submitting that the ground complained of both error in law and misdirection in fact though that court ought to have taken care not to fall into such a cheap trap. I don't need to say more except that what happened in that court and the attempt to repeat it in this court is not only unfortunate but very regrettable. However, the submission as to whether the striking out of the ground of appeal in question together with the issue formulated therein resulted in any miscarriage of justice will be dealt with later in this judgment. Suffice it to say at this stage that the lower court was in error when it struck out ground one (1) of the grounds of appeal on the unfounded ground that the particulars complain both of error in law and misdirection. On issue 2 learned counsel for the appellants referred the court to Order 23 of the Ondo State High Court (Civil Procedure) Rules and submitted that the lower court was in error when it held that the appellants abandoned their motion for extension of time within which to file their Notice of Intention to defend and affidavit disclosing a defence to the action as the appellants had, in fact, on the 23rd day of October, 1997 filed a Notice of Intention to defend together with an affidavit in support particularly as Order 23 supra does not contain any time limit for the filing or delivery of any notice of intention to defend; that the Ondo State Rules, unlike other state High Court Rules, does not contain the limitation of five (5) days

within which a defendant under the undefended list procedure who desires to defend the action to file his notice of intention to so defend together with an affidavit disclosing the said defence; that there being no such limitation, the notice of intention to defend together with the affidavit filed on 23/10/97 was properly before the court and that the lower court was therefore in error in holding that no such notice existed; that the lower court ought to have looked at it even if irregularly filed and urged the court to resolve the issue in favour of the appellants. B

On his part, learned counsel for the respondent referred to the provisions of the said Order 23 and submitted that the rules require the appellants to file their notice of intention to defend the action together with the affidavit before the return date which was fixed for 6/8/96 and that the appellants failed to do so; that by not moving their application for extension of time to file the notice of intention to defend, the lower court was right in holding that the appellants abandoned the said motion and that they had no defence to the action and urged the court to resolve the issue against the appellants. C D

It is not part of the case of the appellants that the lower courts were in error in not allowing them to move their motion for extension of time within which to file their notice of intention to defend together with an affidavit disclosing the defence to the action but that the appellants already had a valid notice of intention to defend the action together with an affidavit disclosing the defence. In other words, the appellants agree that they had abandoned their motion for extension of time within which to file their notice of intention to defend the action on the ground that they already had a valid notice of intention to defend and an affidavit disclosing that defence. E F

What does the relevant Rules of Court say? Order 23 of the High Court of Ondo State (Civil Procedure) Rules provides as follows: - G

1. *Whenever application is made to a court for the issue of a writ of summons in respect of a claim to recover a debt or liquidated money or any other claim and such application is supported by an affidavit setting forth the grounds upon which the claim is based and stating that in the defendant's belief there is no defence thereto, the court shall, if satisfied that there are good grounds for believing that there is no defence thereto, enter the suit for hearing in what shall be* H

called the “undefended, list”, and mark the Writ of Summons accordingly, and enter thereon a date for hearing suitable to the circumstance of the particular case.

2. There shall be delivered by the plaintiff to the registrar upon the issue of the Writ of Summons as aforesaid, as many copies of the above mentioned affidavit as there are parties against whom relief is sought, and the registrar shall annex one such copy to each copy of the writ of summons for service.

3. (1) If the party served with the Writ of Summons and affidavit delivers to the registrar a notice in writing that he intends to defend the suit, together with an affidavit disclosing a defence on the merit, the court may give him leave to defend upon such terms as the court may think just.

(2) Where leave to defend is given under this rule, the action shall be removed from the undefended list and placed on the ordinary cause list, and the court may order pleadings, or proceed to hearing without further pleadings.

4. Where any defendant neglects to deliver the notice of defence and affidavit prescribed by Rule 3 (1) or is not given leave to defend by the court, the suit shall be heard as an undefended suit, and judgment given thereon, without calling upon the plaintiff to summon witnesses before the court to prove his case formally.

5. Nothing herein shall preclude the court from hearing or requiring oral evidence, should it so think fit, at any state of the proceedings under Rule 4".

Emphasis supplied.

The relevant rules to the determination of the issue under consideration are 3(1)(2) and 4 supra. From the records it is clear that the appellants not only filed a notice of motion for enlargement of time within which to file their notice of intention to defend together with an affidavit which motion they admittedly abandoned on the ground that it was unnecessary under the rules, but that they actually filed a Notice of Intention to defend the action together with an affidavit disclosing a defence on the merit of the suit as required by the rules. From the records it is an undisputed fact that the return date of the writ of summons so issued under the undefended list was 6/8/96 while the alleged notice of intention to defend the action together with the affidavit disclosing the defence were filed on 23/10/97. It is

the argument of the appellants that the filing of the Notice of Intention to defend the action etc. more than one year after the return date mentioned in the summons is within the contemplation of the Rules of Court. The question is whether the appellants are correct in their interpretation of the relevant rules? I am of the firm view that the are wrong.

By Rule 1 of Order 23, the court, when satisfied that there are good grounds for believing the plaintiff that there is no defence to the action, shall enter the suit for hearing in the undefended list and mark the writ of summons accordingly and shall enter on the said writ of summons “a date for hearing suitable to the circumstance of the particular case”. **The date for hearing so fixed by the court and entered on the writ of summons is what we also call the return date. It is the date fixed for the hearing of the particular action under the undefended list except the defendant(s) take(s) certain steps under the rules which steps are to the satisfaction of the court.**

The steps the defendant(s) can take after service on him/ them of the writ, to avoid the case being heard on the date fixed for hearing (return date) is as provided for under Order 23 Rule 3(1), that is by filing a notice of intention to defend the action together with an affidavit disclosing a defence on the merit. It is when the court goes through the affidavit and comes to the conclusion that it discloses a defence on the merit that it would give leave to the defendant to defend the action and remove the suit from the undefended list to the general cause list to be dealt with according to the rules of court. **It is clear from the above that the filing of the notice of intention to defend together with an affidavit disclosing a defence on the merit must be done on or before the date fixed for hearing the undefended suit, otherwise the defendant would be out of time in doing so. In other words, where a defendant fails or neglects to file the notice of intention to defend together with an affidavit disclosing a defence on the merit on or before the date fixed for the hearing of the case, he can only do so upon being granted an extension of time to that effect upon a proper application. This is so because on the date fixed for the hearing if no such notice and affidavit have been filed, Rule 4 of Order 23 empowers the**

court to enter judgment in favour of the plaintiff as the suit would truly be undefended.

In the instant case the appellants contend that their purported notice of intention to defend the action together with an affidavit filed more than a year after date fixed for the hearing of the writ of summons under the undefended list and without the leave of the court granting extension of time to do so, is valid and ought to have been considered in deciding whether to enter judgment for the respondent or not. I hold the firm view that they are wrong. To agree with their interpretation is to make complete nonsense of the provisions of Order 23 and the purpose it was designed to serve - that of speedy hearing of actions based on liquidated money demand or simple debt claims. It would amount to holding that a defendant would be granted licence to employ whatever delay tactic he can muster to frustrate the action of the plaintiff under the undefended list only to be allowed at the end of the day to stroll in and defend the action when the intention is obviously to frustrate the plaintiff. In the circumstance, I resolve the issue against the appellant.

On issue 3 learned counsel for the appellants submitted that the lower court was in error when it struck out the four issues formulated by the appellants after coming to the conclusions that the said issues were incompetent and proceeded to determine the appeal on the issues formulated by the learned counsel for the respondent when what it ought to have done is to have struck out the appeal; that appeals are usually determined on the issues distilled from the grounds of appeal and that where issues cannot be married to any of the grounds as found by the lower court, the proper order is that of striking out of the appeal; that the respondent did not file a cross appeal from which his issues could have been distilled; that the method adopted by the lower court occasioned a miscarriage of justice as it has prevented the appellants from representing their case by re-instating the appeal, and urged the court to resolve the issue in favour of the appellants.

On his part learned counsel for the respondent submitted that it is not the law that appeal must be determined solely on the issues formulated by the appellant; that it was not all the grounds of appeal that were struck out as grounds 2 and 3 were declared competent

and did sustain the appeal; that the issues formulated by the respondent and which the lower court used in determining the appeal arose from the competent grounds of appeal and as such valid relying on Korede vs Adedokun (2001) 7 S.C. (Pt. III) 68 at 76- 77; Akpan vs State (1992) 6 NWLR (Pt 248) 439 at 457; that the courts are also empowered by law to formulate issues for determination where the issues formulated by the parties are wrong or incompetent relying on Neka BBB Manu Coy. Rid vs A.C.B Ltd (2004) ALL FWLR (Pt.198) 1175 at 1188 and urged the court to resolve the issue against the appellants.

It should be noted from the onset that it is not the case of the appellants that the lower court was in error in holding that the four issues formulated by the appellants for determination were incompetent. It follows therefore that the appellants accept the holding that the said issues are incompetent. What the appellants are complaining is about the consequences that flow from the finding that the four issues were incompetent. To the appellants the proper thing for the lower court to have done in the circumstance was to strike out the appeal instead of proceeding to determine the appeal on the issues formulated by the respondent.

The question is whether the learned counsel for the appellants is right in his postulation.

It is settled law that valid appeals are initiated by notices of appeal in which are stated the grounds of appeal constituting the complaints of the appellant against the decision of the court appealed against. It is also settled law that appeals are not determined on the grounds filed but on issues formulated from the grounds of appeal. In other words, if an issue for determination is found not to have risen from any of the grounds of appeal, it is said to be incompetent and liable to be struck out. Issues for determination of appeal are usually formulated by the appellant, respondent and, where need be, by the appellee i.e. where the issues formulated by the parties are incompetent or do not reflect the complaint of the appellant in the grounds of appeal before the court.

In the instant case, ***it is not the case of the appellants that the issues formulated by learned counsel for the respondent did not arise from the grounds of appeal declared competent***

by the lower court, neither have they demonstrated to this court that in fact, the issues so formulated do not relate to the said grounds of appeal. What the appellants are saying is that since the respondent did not cross appeal, it cannot in law submit any issue for determination of the appeal particularly where the issues of the appellants have been struck out for being incompetent. I hold the firm view that the learned counsel for the appellant is in error in that submission. In the case of Neka BBB Coy. Ltd vs ACS Ltd supra at 1188, this court stated the relevant law as follows: -

“It is not all occasions that a court must inevitably accept the issues framed by the appellant as though they are immutable particularly when the issues formulated by the respondent address the points in consideration or in controversy much more squarely. Indeed the court may decide in an appropriate case to suo-motu frame issues which though do not and ought not in any way depart from the contents or purport and ramifications of the issues already framed by the parties, and distilled from the grounds of appeal, but are much more succinct, precise and readily understandable” - per PATS - ACHOLONU. JSC (of blessed memory).

In fact **the issues formulated by counsel for the respondent arose from the grounds of appeal and did include the complain of the appellants in Ground 1 of the grounds of appeal erroneously struck out by the lower court. The striking out of Ground 1 therefore had no effect on the decision of the lower court as the issue raised therefrom was considered by the lower court in the consideration of the issues formulated by counsel for the respondent.**

The next issue to be determined is whether the rights of the appellants to fair hearing have been breached by the decisions of the lower courts which issue takes care of appellants’ issues 4, 5 and 6.

It is the case of the appellants that the non consideration of their notice of intention to defend the action together with an affidavit disclosing a defence on the merit breach their right to fair hearing; that the trial court failed to rule on the appellant’s application for adjournment and proceeded to deliver judgment in the matter thereby denying the appellants the right to be heard on the matter. Learned counsel finally urged the court to resolve the issue in favour of the

appellants and allow the appeal.

On his part, learned counsel for the respondent submitted that the appellants were given ample opportunity to present their case before the trial court which opportunity was wasted by them; that instead of filing a notice of intention to defend together with an affidavit as required by the rules of court, the appellants preferred to file a motion on 11/7/96 for setting aside the order granting leave to the respondent to put the suit under the undefended list and for an order dismissing the suit, which motion was withdrawn on 30/6/97; that the issue as to whether a court should grant or refuse to grant an adjournment is within its exclusive discretion which it must exercise judiciously and judicially and is dependent on the facts of the case; that the trial court was right, on the facts and circumstances of the case, in refusing the adjournment sought and proceeding to enter judgment in the suit. In a rather strange way, learned counsel for the respondent submitted as follows:-

"We further submit further that regardless of the provision of section 33(1) of the 1979 Constitution which has now been re-enacted as section 36(1) in the 1999 Constitution of the Federal Republic of Nigeria the principle of fair hearing embodied in the maxim "Audi Alteram Partem" has no application in an action brought and heard, under the undefended list" and cited and relied on the Court of Appeal decision in Agueze vs. Pan African Bank Ltd (1992) 4 NWLR (Pt.233) 76 at 88. Finally, learned counsel urged the court to resolve the issue against the appellant and dismiss the appeal.

I consider the submission on the application of the principles of fair hearing, particularly the rule of *audi alteram partem* as to proceedings under the undefended list strange because the principle of fair hearing is not only fundamental to adjudication but also a constitutional requirement which cannot be legally wished away. It is a fundamental right of universal application. The fallacy in the submission also becomes apparent when one looks at the provisions of Order 23 of the High Court (Civil Procedure) Rules 1987 earlier reproduced in this judgment. The said **Order 23 does not take away the right to fair hearing of any party to the undefended list procedure rather it confers equal right to fair hearing to the parties, in particular Order 23 (3) (1) confers express right to file a notice of intention to defend the action placed under the**

undefended list by virtue of Rule 1 of Order 23, upon service of the processes on him and, the court after going through the affidavit, may grant him leave to defend the action and remove the suit from under the undefended list to the general cause list to be dealt with accordingly. If the above is not a recognition of a defendant's right to fair hearing under the undefended list procedure, I wonder what is better.

It is only when the defendant fails or neglects to avail himself of the opportunity offered him by Order 23 (3) (1) that the court is empowered by Order 23(4) to enter judgment in the suit, in which case, it is obvious that truly the defendant has no defence to the action of the plaintiff. **Is the failure or neglect of a defendant to avail himself of the opportunity to be heard a denial of the right to fair hearing? I hold the view that it is not.**

In the instant case, **it is clear that the appellants were given the opportunity to be heard which they decided not to utilize - they abandoned their motion for extension of time to file notice of intention to defend together with an affidavit disclosing a defence as required by the rules more than two years after the return date for hearing of the action under the undefended list. The law is designed to give opportunity to parties to be heard. It is left to them to decide either to utilise the opportunity or not. When a party decides not to utilize the opportunity, he cannot turn round later to blame the court or any other person for his failure. It must also be borne in mind that the principles of fair hearing do not apply only to the defendant only but also to the plaintiff who has initiated action for judicial relief.**

On the issue of adjournment, one may ask, adjournment for what? The appellants had more than two years to offer whatever defence they had, if any, but squandered it. There was no defence to the action known to law before the court on the date fixed for hearing and after the court had warned the appellants on the previous adjourned date to ensure that they came to court with their counsel, which they failed to do. By the operation of Order 23(4) the court had no alternative having regards to the facts and circumstances of the case then to enter judgment for the respondent as the suit was clearly undefended and fixed

for hearing on that date. ***We must always remember that adjournments are not granted for the asking particularly under the undefended list where speed is the emphasis.***

In conclusion, I find no merit whatsoever in this appeal which is accordingly dismissed in spite of the resolution of issue 1 in favour of the appellants. I assess and award the sum of N50,000.00 (Fifty Thousand Naira) as costs in favour of the respondent.

Appeal dismissed.

OGUNTADE JSC.

I have had the advantage of reading in draft a copy of the lead judgment by my learned brother Onnoghen J.S.C. I agree with his reasoning and conclusion. I would also dismiss this appeal as unmeritorious. I subscribe to the order on costs made in the lead judgment.

MOHAMMED JSC

I had a preview of the judgment just delivered by my learned brother Onnoghen, JSC and I am in complete agreement with his reasoning and conclusions in resolving all the issues arising for determination in this matter which resulted in the dismissal of the Appellants appeal.

The action of the Respondent which was the Plaintiff at the trial High Court against the Appellants who were the Defendants was brought under the undefended list procedure of the Rules of the trial Court. The whole purpose of these rules is to facilitate the obtaining of short and quick judgment without proceeding to trial. The rules are therefore for disposing, with dispatch, cases which are virtually uncontested having regard to the nature of the dispute between the parties. The Appellants in the present case who were given adequate opportunity to defend the action filed against them by the Respondent but flagrantly failed to use the opportunity, cannot now be heard to complain of the denial of fair hearing. The appeal is indeed without merit. I also dismiss the appeal and abide by the orders in the lead judgment including the order on costs.

TABAI JSC

I have had the benefit of reading, in advance, the lead judgment of my learned brother Onnoghen, JSC and I agree that the appeal lacks merit.

B The proceedings of the trial court on the 28/9/98 at page 103 and on the 12/10/98 at pages 104-105 of the record are instructive as to the facts leading to the judgment. Several times counsel who appeared for the Defendants/Appellants withdrew their appearances because of the Appellants' failure to perfect their instructions. On the C 28/9/98 they had changed counsel for the 4th time. On the 12/10/98 there had been 19 appearances and the Defendants/Appellants were not represented. Chief Afe Babalola, S.A.N. who apparently represented them also withdrew and they wrote for another adjourn- D ment. When the suit was entered on the undefended list the return date was fixed for 8/7/96. The Defendants/Appellants were expected to file their Notice of Intention to Defend within 5 days upon service of the writ of summons on them. They never did until the 23/10/97, more than a year after when they filed a purported Notice of Inten- E tion to defend. There was also a motion for extension of time within which to file Notice of Intention to defend. It was never moved. Rather counsel representing them withdrew and they only wrote for ad- journment.

F In his judgment at page 105 of the record of proceedings the learned trial judge, in reaction, had this to say:

"In view of all the foregoing this Court is convinced that the defendant has no defence to the suit. Accordingly judgment is hereby entered in the sum of N51,425,791.84 in favour of the Plaintiff herein. G The judgment debt shall bear interest at the rate of 5% per annum from 10/6/96 until the judgment debt is totally liquidated....."

H At the Court below, the above judgment was upheld in its entirety and the appeal was dismissed. In my view, given the facts and circumstances herein above stated, there is no basis for interfering with the concurrent judgments of the two courts below. Instead of filing their Notice of Intention to Defendant within 5 days upon service of the writ of summons on them as required under the Rules of Court, they filed theirs on the 23/10/97, more than a year after. Even at that, they never demonstrated any clear willingness to de-

fend. There had been 19 appearances and as at the 12/10/98 when judgment was entered for the Plaintiff/Respondent, their 5th counsel had returned the case file to them also indicating his withdrawal. Worse still they did not attend court and only had to write for yet another adjournment. The trial court was convinced that the Defendants/Appellants had no defence to the suit and entered judgment for the Plaintiff/Respondent accordingly. The trial Court's conviction and finding, in my view, is the only conceivable conclusion from the facts and circumstances of the case. I hold therefore that it was rightly affirmed by the court below.

The result is that I also affirm the concurrent judgments of the two courts below. The appeal is accordingly dismissed for lack of merit. I also award costs which I assess at N50,000.00.

OGEBE JSC

I had a preview of the lead judgment of my learned brother Onnoghen, JSC just delivered and I agree with his reasoning and conclusion. I also see no merit in this appeal and I hereby dismiss it with costs as assessed in the lead Judgment.