

SUPREME COURT OF NIGERIA
3RD APRIL, 2009. S.C. 121/2003
CORAM:- A. I. KATSINA-ALU, A. M. MUKHTAR,
W. S. N. ONNOGHEN, P. O. ADEREMI,
C. M. CHUKWUMA-ENEH, JJSC

1. ABIA STATE TRANSPORT
CORPORATION
2. THE GOVERNMENT OF APPELLANTS
ABIA STATE
3. THE ATTORNEY-GENERAL
OF ABIA STATE
AND
QUORUM CONSORTIUM LTD RESPONDENT

RULES OF COURT - High Court of Plateau State - Actions - Applicable rules - The Court is empowered to follow only provisions of the High Court (Civil Procedure) Rules of Plateau State - So those are the applicable rules (H1)

COURT PROCESSES - Filing - Requirements - It should be presented to the court's registry for assessment - The notice of intention to defend was not so presented - Therefore it was not filed before the High Court of Plateau State (H2)

UNDEFENDED SUITS - Undefended list procedure - Notice of intention to defend - Validity - The notice together with an affidavit disclosing a defence - Must be duly assessed and filed - For it to be valid (H3)

EVIDENCE - Proof - Uncontroverted evidence - Attitude of court - As the only facts before trial court were as deposed by respondent - That the transaction took place in Jos - Trial court was right to have assumed jurisdiction (H4)

FACTS

The plaintiff/respondent sued the defendants/appellants at the High Court of Plateau State for the recovery of his professional fees

for consultancy services allegedly rendered to the appellants. It was the case of the respondent that the services were rendered in Jos. The matter was placed on the undefended list.

Appellants filed a notice of intention to defend the suit at the High Court of Abia State and subsequently transmitted the notice to the registry of the High Court of Plateau State, which merely acknowledged receipt of same without assessing it. On the hearing date, appellants were absent and unrepresented. Judgment was given to the respondents under the undefended list. Aggrieved, the appellants appealed to the Court of Appeal which dismissed the appeal. They have brought this further appeal contending that the trial court ought to have considered their notice of intention to defend and not discountenanced it entirely.

ISSUES FOR DETERMINATION

“1. Whether the Court of Appeal was right in its view that non-payment of filing fees by the defendant/appellants nullified the notice of intention to defend the suit filed by the appellants which is a government not ordinarily expected to pay fees upon filing such process.

2. Was the Court of Appeal right when it held that the appellants did not enter appearance and did not file any notice of intention to defend the respondent’s suit when the same was before the court timeously.

3. Whether the Court of Appeal was right when it held that the trial court had the jurisdiction to entertain the suit of the respondent”.

HELD (Dismissing the appeal per **ONNOGHEN JSC**, Chukwuma-Eneh JSC dissenting)

High Court of Plateau State - Actions - Applicable rules

1. It should be noted that by the provisions of section 3(1) of the Civil Procedure Edict of Plateau State 1987, the High Court of Plateau State is empowered to follow only the provisions of the High Court Civil Procedure Rules of Plateau State.

It follows therefore that to determine the issue as to what amounts to filing of processes in the High Court of Plateau State one has to be guided only by the provisions of the High Court of Plateau State Civil Procedure Rules and nothing else. Definitely not the High Court Civil Procedure Rules of Abia State. (p. 982 G/H)

COURT PROCESSES - Filing - Requirements

2. The processes having not been presented to the registry of the High Court of Plateau State for assessment and filing but assessed and filed at the High Court of Abia State, Umuahia and transmitted to the High Court of Plateau State, Jos where it was received and stamped accordingly, the notice of intention to defend was never filed before that court in accordance with the provisions of the Plateau State High Court (Civil Procedure) Rules 1987, the lower court is right in so holding.(p. 984 B)

Notice of intention to defend - Validity

3. For a notice of intention to defend an action under the undefended list procedure of the High Court of Plateau State to be valid, the said notice of intention together with the affidavit disclosing a defence on the merit must be duly assessed and filed at the registry of the court. This clearly confirms what the lower court held on the issue. It therefore follows that a mere delivery of the two processes to and receipt thereof by the registrar of the court without assessment and filing of same is not enough to validate the processes.(p. 985 B)

Proof - Uncontroverted evidence - Attitude of court

4. In view of the failure of the appellants to file the necessary processes disclosing their defence on the merit, it becomes obvious that the necessary facts to support their defence as to the jurisdiction of the trial court are not before the courts.

In paragraph 5 of the supporting affidavit, the respondent deposed as follows:-

"5. The said job was carried out in Jos and by Delivery Note dated the 15th September, 1992, the 2nd defendant through its agent collected the original copy of the Japanese Aid Approval totaling \$2,000,000 US Dollars by the Japanese Government from the plaintiffs in Jos. A copy of the Delivery Note is hereto attached and marked Exhibit "B"."

From the above paragraph and in the absence of anything to the contrary, it is clear that the trial court has the jurisdiction to hear and determine the suit as constituted. (p. 986 D/F)

NOTABLE POINTS OF INTEREST

CHUKWUMA-ENEH JSC (DISSENTING)

1. Judgment should not be automatic in default of defence

B The plaintiff is not automatically entitled to judgment on the argu-
ment as here that the defendant has led no evidence in that he has
not delivered a competent notice to defend and affidavit as required
in such cases under Order 23 Rule 1. The court is entitled, all the
same, to satisfy itself ab initio on the case of the plaintiff; in other
C words, that it suffices to sustain the plaintiffs claim under Order 23
Rule 1, on having met the three conditions that govern claims on the
undefended list to which I shall come anon and which conditions
have to co-exist to sustain a claim as the instant one on the unde-
fended list. (p. 1005 A)

D *2. Claim for interest is an unliquidated claim*

The particulars of claim apart from raising in relief one a claim for the
sum of 200,000 U.S. Dollars for services rendered to the 1st defen-
dant, it also has claimed in relief two 21% interest on the said sum of
E 200,000 U.S. Dollars from 1/10/92 to the date of judgment - thus
putting the instant claim beyond the realm of claims to be brought
on the undefended list. It cannot be said that the latter relief by itself
constitutes a debt or liquidated money demand where as here the
plaintiff appears to be claiming the said 21% interest as of right.
F (p. 1006 G)

3. Trial court erred when it limited the claim suo motu

G The trial court obviously being aware of this limitation vis-a-vis the
said claim has completely ignored the relief of 21% interest in enter-
ing judgment for the sum of 200,000 U.S. Dollars (i.e.
N4,400,000.00) only for the plaintiff suo motu without the plaintiff
firstly amending the particulars of claim of the suit albeit by abandon-
ing reliefs 2 and 3 of the claim. Thus, implying that the plaintiff's claim
H on the whole is ab initio not one covered as a claim for the unde-
fended list. In other words, it is not the duty of the trial court suo
motu as erroneously done here to place only a part of the plaintiffs
claim in this suit on the undefended list. (p. 1007 E)

4. Trial court had no jurisdiction over the 2nd & 3rd defendants

There can be no gainsaying that the trial court therefore has no jurisdiction based on the facts of the claim and the supporting affidavit to order the said claim to be filed against the 2nd and 3rd defendants or either of them in the instant suit on the undefended list ab initio, nor the competence to enter judgment against them on the undefended list when no specific relief has been sought against either or both of them, without firstly amending the claim against the defendants, and so make the defendants liable to the claim either severally or jointly and/or severally. (p. 1008 E)

5. There is no privity of contract between the plaintiff & the 1st defendant

It is clear from the above depositions by the plaintiff in support of the claim that the contract as has been found by the courts below is for the procurement of Foreign Aid from Japanese Government to facilitate the importation of vehicles and spare parts for use of the 1st defendant and has been made between the plaintiff and the 2nd defendant; yet it is against the 1st defendant alone that the plaintiff has issued the instant claim, a party for whose benefit as deposed in paragraph 3 of the affidavit in support of the claim, the contract has been made; howbeit when there is no privity of contract between him, (1st defendant), and the plaintiff. (p. 1009 G)

6. The affidavit does not make out the alleged contract

The respondent has exhibited to his affidavit in support of the claim exhibit A, a copy of the approval letter from the Japanese Government; Exhibit B - a delivery note and exhibits C and C1 as the alleged admission letters. None of these exhibits singly or in combination can suffice in constituting a contract between the plaintiff and 2nd defendant/respondent in respect of the alleged transaction for the Japanese government foreign aid; this is even moreso as there are no express agreement as to the claim of 21% interest and costs contained in any of the said exhibits nor is it contained in the depositions as per the affidavit in support of the claim. (p. 1010 D)

7. The claim is improperly constituted

There can be no doubt that the instant claim as filed against the

defendants is improperly constituted. With these shortcomings, the claim is far from being cognizable under Order 23 Rule 1 (ibid). It is even worse here where the judgment in the suit has been entered against the defendants not severally nor jointly and/or severally. The competency of this suit within the ambit of Order 23 Rule 1 of the rules of the trial court has been seriously faulted in my reasoning above that the initial direction that the suit be placed on the undefended list is seriously flawed. (p. 1011 D)

REPRESENTATION

Chief Okey Amechi, Hon. A-G; Abia State for the appellants with him are C. U. Okoroafor, Esq.; (D.D); Emenike Okoro, Esq.; (C.S.C.) and Nkiru Akinola (Mrs.) (A.C.S.C.)
G. S. Pwul Esq. for the respondent

CASES REFERRED TO

BEN THOMAS HOTEL LTD V. SEBI FURNITURE CO. LTD. (1989)
5 NWLR (Pt.123) 523 AT P. 529

BEN THOMAS HOTEL LTD V. SEBI FURNITURE CO. LTD. (1989)
5 NWLR (Pt.123) 523 AT P.529

NIGERIA AIR FORCE V. JAMES (2002) 2 SCNJ 379 at 383
ISOKWA OIL CO. V. BANK OF THE NORTH (2002) 5 SCNJ 176A
AT 191 PARA. 35

FSB. V. IMANO LTD (2002) 7 SCNJ 68

PROVISIONAL COUNCIL OGUN STATE UNIVERSITY V. MAKINDE
(1991) 2 NWLR (Pt.175) 613

AJA V. OKORO (1991) 7 NWLR (Pt.203) 260

SEVEN-UP BOTTLING COY. LTD. V. YAHAYA (2001) 4 NWLR 47
AT 53

ONWUGBUFOR V. OKOYE (1996) 1 NWLR (Pt.424) 252

STATUTES & RULES REFERRED TO

Evidence Act, s. 132

Plateau State Civil Procedure Edict, 1987, s. 3 |(1)

High Court (Civil Procedure) Rules of Plateau State, 0. 23 r. 1 and 0.
54 r. 1

BOOK REFERRED TO

Nwadialo on Civil Procedure in Nigeria.

LEAD JUDGMENT BY ONNOGHEN JSC

This is an appeal against the judgment of the Court of Appeal holden at Jos in appeal NO. CA/J/322/98 delivered on the 7th day of November, 2002 dismissing the appeal of the appellant against the decision of the High Court of Plateau State in Suit NO. PLD/J153/95 holden at Jos delivered on the 29th day of May, 1995 under the undefended list procedure. B

From the records, the respondent was a business consultant based in Jos whose services was engaged by the 2nd appellant in July, 1992 for the procurement of foreign aid from the Japanese Government to enable the 2nd appellant import some vehicles and spare-parts for use by the 1st appellant as evidenced in exhibit A attached to the affidavit in support of the application for the issue of a writ under the undefended list. It is the case of the respondent that it rendered the service in Jos and by delivery note dated 18th September, 1992, the 2nd appellant through its agent collected the original copy of the Japanese Aid approval totaling Two Million US Dollars (\$2,000,000.00) by the Japanese Government from the respondent in Jos, as evidenced in exhibit B. C D E

The appellants were to pay to the respondent the agreed fee of Two Hundred Thousand US Dollars (\$200,000.00) but when they failed to do so, the respondent instituted the action resulting in the instant appeal, claiming the following reliefs: F

“The plaintiff’s claim is for :-

(1) The sum of 200,000 US Dollars (#4,400,000.00) four million, four hundred thousand being charges for consultancy and sundry services rendered to the 1st defendant by the plaintiff. G

(2) Interest at 21% on the said sum of 200,000 US Dollars from the 1st day of October, 1992 until date of judgment and interest at the rate of 10% from the date of judgment until final liquidation of the debt. H

(3) Cost of this suit”.

The writ of summons was issued and served on the appellants out of jurisdiction upon leave granted on the 29th day of March, 1995 which was duly carried out on the 27th day of April, 1995. On

the 16th day of May, 1995 the appellants filed their Notice of Intention to defend the suit together with an accompanying affidavit at the High Court Registry, Umuahia, Abia State which were later transmitted to the High Court of Plateau State Registry, Jos on the 22nd day of May, 1995.

B When the matter came up for hearing on the 29th day of May, 1995 being the return date, the appellants and counsel were absent while the respondent and their counsel were present in court as a result of which the learned counsel for the plaintiff/respondent Dr. C Ameh, SAN requested the court to enter judgment in favour of the respondent which the trial court obliged. The appellants were dissatisfied with the said judgment and appealed to the Court of Appeal, Jos which dismissed the appeal resulting in the instant further appeal to this court.

D The issues for determination as identified by learned counsel for the appellants, Chief Okoroafor C. Uche in the appellants' brief of argument filed on the 25th day of July, 2003 and adopted in argument of the appeal on the 19th day of January, 2009 are as follows:-

E *"1. Whether the Court of Appeal was right in its view that non-payment of filing fees by the defendant/appellants nullified the notice of intention to defend the suit filed by the appellants which is a government not ordinarily expected to pay fees upon filing such process.*

F *2. Was the Court of Appeal right when it held that the appellants did not enter appearance and did not file any notice of intention to defend the respondent's suit when the same was before the court timeously.*

G *3. Whether the Court of Appeal was right when it held that the trial court had the jurisdiction to entertain the suit of the respondent".*

H In arguing issue 1 learned counsel for the appellants submitted that the appellants are government of a state and state government official and agency who are not supposed to pay fees for filing of processes in court, referring to Order 2 (13) (2) of the Rules of the Supreme Court and Nwadialo on Civil Procedure in Nigeria page 956; that by the provisions of Order 54 of the High Court of Plateau State, it is the duty of the Court Registry to demand and collect fees from litigants and on account of that initial on the process before him

as received; that the Registrar failed to demand fees for the filing which failure ought not to be visited on the appellants, relying on First Bank vs May Clinics (2001) 4 SCNJ 5; that the registrar by not demanding payment is deemed to have waived the right to the payment; that by stamping the document “received” the registry confirmed the document as duly filed and therefore regular. Learned counsel urged the court to resolve the issue in favour of the appellants. B

On his part, learned counsel for the respondent, G. S. Pwul, Esq. submitted that the Court of Appeal is right in holding that a process is not properly filed in the High Court of Plateau State except it is duly assessed and paid for; that Order 54(l)(i) of the High Court of Plateau State Civil Procedure Rules makes payment of fees set out in the first, second, third, fourth and fifth schedules mandatory and condition precedent to the filing of processes before the court; that since no payment was made for the filing of the document in issue, it means the process or documents are not properly before the court and can therefore not be looked into by the court. That there is no provision in the relevant rules of court exempting the appellants from payment of filing fees; that the assessment in this case was not done by the registrar of the High Court of Plateau State but that of the High Court of Abia State who also stamped same with “Fee Official” which amounts to filing the process in the High Court of Abia State sitting in Umuahia; that no officer of the High Court of Abia State has the power to waive fees payable in Plateau State High Court; that the appellants merely transmitted the processes after filing in Abia State to the High Court of Plateau State, Jos registry where the registrar duly acknowledged receiving same; that the mere receipt of the documents by the registrar in Jos does not amount to filing of same without payment of filing fees. Learned counsel urged the court to resolve the issue against the appellants properly before the court and can therefore not be looked into by the court. That there is no provision in the relevant rules of court exempting the appellants from payment of filing fees; that the assessment in this case was not done by the registrar of the High Court of Plateau State but that of the High Court of Abia State who also stamped same with “Fee Official” which amounts to filing the process in the High Court of Abia State sitting in Umuahia; that no officer of the High Court of Abia State has the C D E F G H

power to waive fees payable in Plateau State High Court; that the appellants merely transmitted the processes after filing in Abia State to the High Court of Plateau State, Jos registry where the registrar duly acknowledged receiving same; that the mere receipt of the documents by the registrar in Jos does not amount to filing of same without payment of filing fees. Learned counsel urged the court to resolve the issue against the appellants.

It is not disputed that the assessment for filing and the filing of the notice of intention to defend the action filed in Jos, Plateau State was done by the appellants at the High Court of Abia State, Umuahia and only transmitted to the registry of the High Court of Plateau State, Jos where it was received and stamped accordingly. The documents were therefore not assessed and filed at the High Court of Plateau State. The argument of the learned counsel for the appellants is that by receiving and stamping the documents assessed and filed at the High Court of Abia State, Umuahia but transmitted to the Registry of the High Court of Plateau State, Jos, where they were received and stamped, the documents were, by the rules of court filed at the High Court of Plateau State, Jos particularly as the registrar of that court did not reassess them or demand filing fees for same and the documents were from the government or government agencies that normally do not pay filing fees for processes.

From the facts of this case relevant to the determination of the issue under consideration which have not been disputed, the real issue remains: whether a court process assessed, filed and stamped at the High Court registry, Umuahia, Abia State and transmitted to the High Court registry, Jos, Plateau State where it was stamped received, was properly filed at the High Court of Plateau State. The lower court answered the question in the negative.

It should be noted that by the provisions of section 3(1) of the Civil Procedure Edict of Plateau State 1987, the High Court of Plateau State is empowered to follow only the provisions of the High Court Civil Procedure Rules of Plateau State by enacting as follows:-

“3 (1) The provisions contained in the rules set out in the schedule to this Edict and hereinafter called the Rules shall be the rules of civil procedure to be followed in the High Court of Plateau State.”

It follows therefore that to determine the issue as to what

amounts to filing of processes in the High Court of Plateau State one has to be guided only by the provisions of the High Court of Plateau State Civil Procedure Rules and nothing else. Definitely not the High Court Civil Procedure Rules of Abia State.

Having agreed that what the High Court of Plateau State registry did upon the transmission of the documents was to stamp same received, the question is whether that singular act amounts to filing of the processes. That takes us to a consideration of the provisions of Order 54(1) and (2) of the High Court of Plateau State Civil Procedure Rules. Order 54(1) makes it mandatory that fees set out in the first, second, third, fourth and fifth schedules thereunder shall be payable by any person commencing the respective proceedings or desiring the various services specified in the respective schedules.

Order 54(2) however states that:-

“The regulations set out in the sixth schedule shall be observed by all officers of court concerned with the rendering of services, and or collection of fees payable, under the provisions of the foregoing order.”

However, the sixth schedule referred to in Order 54(2) states as follows:-

“No summons, warrant, writ or subpoena shall except by special order of the court be issued until:-

(a) All fees payable thereon as contained in the appropriate schedule of fees shall have been paid; and

(b) An account thereof, initialed as received, shall have been set forth by the officer issuing the process both in the margin and in the counterfoil thereof.”

During oral arguments the learned Attorney-General of Abia State, Chief Okey Amaechi submitted that since there is no mention of notice of intention to defend in the sixth schedule no filing fee is chargeable for the filing of same. That submission is very beautiful but erroneous because if accepted, it means that every other processes of court not specifically mentioned therein can be filed in the court free of any charge, such as statement of claim, defence, motions and affidavits etc. In any event, by the provisions of the sixth schedule supra, only a special order of court can do away with the payment of filing fees in the High Court of Plateau State. I therefore agree with the lower court when it held at page 71 of these records,

as follows:-

“From the combined provisions of section 3(1) of the Civil Procedure Edict, 1987 and Order 54 Rule 2 of the High Court of Plateau State (Civil Procedure) Rules and schedule six made thereunder, it seems a court process cannot be said to have been properly
B filed in the High Court of Plateau State unless the process is duly assessed and the fees payable are duly paid. Order 54 of the Rules does not exempt anybody from paying fees payable under the sixth schedule on court processes”.

*C It follows therefore that **the processes having not been presented to the registry of the High Court of Plateau State for assessment and filing but assessed and filed at the High Court of Abia State, Umuahia and transmitted to the High Court of Plateau State, Jos where it was received and stamped accordingly, the notice of intention to defend was never filed before***
*D **that court in accordance with the provisions of the Plateau State High Court (Civil Procedure) Rules 1987 and that the lower court is right in so holding.***

E On issue 2, learned counsel for the appellants referred to Order 23 Rule 3(1) and submitted that the only thing required of a defendant who intends to defend an action commenced under the undefended list is to “deliver” to the registrar a notice in writing that he intends to defend the suit together with an affidavit disclosing a defence on the merit not that the said notice of intention must be
F filed in the registry of the court; that Rule 4 of Order 23 cannot be invoked except the defendant failed to “deliver” the notice of intention to defend together with an affidavit disclosing the defence on the merit; that in the instant case, the appellants did deliver to the registrar the required processes which were duly received and stamped
G accordingly and as such the processes were valid and ought to have been taken into consideration before entering judgment for the respondent; that even if the processes were irregularly filed the court ought not to have closed its eyes to them, relying on E.S.B vs IMANO LTD (2000) 7 SCNJ 65 at 69, and urged the court to resolve the
H issue in favour of the appellants.

On his part, learned counsel for the respondent submitted that by the combined effect of Order 23 Rule 3(1) and Order 54 Rules 1 and 2, processes to be used in a proceeding before the High Court of

Plateau State must be assessed and filed at the Plateau State Registry and nowhere else and that a mere delivery of a document at the High Court of Plateau State Registry without assessment and filing of same by payment of the necessary fees cannot be said to be a compliance with Order 23 Rule 3(1) and urged the court to resolve the issue against the appellants. B

Actually, issue 2 has been resolved substantially during the consideration of issue 1 supra. I have already found and held that **for a notice of intention to defend an action under the undefended list procedure of the High Court of Plateau State to be valid, the said notice of intention together with the affidavit disclosing a defence on the merit must be duly assessed and filed at the registry of the court. This clearly confirms what the lower court held on the issue. It therefore follows that a mere delivery of the two processes to and receipt thereof by the registrar of the court without assessment and filing of same is not enough to validate the processes.** C
It follows therefore that the delivery talked about in Order 23 Rule 3(1) supra does not simply mean handing over of the processes to the registrar of the court but filing same at the registry of the court after due assessment and payment of the assessed filing fees by the defendant. Anything short of that will not satisfy Order 23 Rule 3(1) supra, and I so hold. D E

In the circumstance, I resolve issue 2 against the appellants.

On issue 3, learned counsel for the appellants submitted that an issue of jurisdiction is fundamental to adjudication; that the appellants contend that the High Court of Plateau State, Jos has no jurisdiction to entertain the matter since the contract was entered at Umuahia, Abia State and ought to have been performed in Lagos and not in Jos; that the Court of Appeal did not satisfactorily resolve the issue of jurisdiction as raised in this suit; that it is the claim of the plaintiff that vests jurisdiction on a court to entertain a matter, relying on Abu vs Odugbo (2001) 7 SCNJ 262 at 267; that the lower court was in error when it resolved the issue of jurisdiction on the affidavit of the respondent alone and urged the court to resolve the issue against the respondent and allow the appeal. F G H

On his part, learned counsel for the respondent submitted that the lower courts, without evidence to the contrary were right in relying on the facts deposed to in paragraph 5 of the respondent's affi-

davit in support of the claim to hold that the trial court has the jurisdiction to entertain the matter as it is the claim of the plaintiff that determines the jurisdiction of the court, relying on Adeyemi vs Opeyori (1976) 9-10 S.C. 31 at 49 and urged the court to resolve the issue in favour of the respondent and dismiss the appeal,

B I have already affirmed the decision of the lower court in respect of issues 1 and 2 supra, as it is a fact that the appellants failed to file their notice of intention to defend the suit together with an affidavit disclosing a defence on the merit in accordance with the provisions of the Plateau State High Court (Civil Procedure) Rules 1987, C as a result of which the trial court had no alternative, under Order 23 Rule 4 of the Rules of that court, than to enter judgment on the claim in favour of the respondent.

The present issue is whether the trial court had the jurisdiction D to entertain the matter as the same is said by the appellants to be based on contract allegedly entered in Abia State to be executed or carried out in Lagos. It should, however, be noted that ***in view of the failure of the appellants to file the necessary processes disclosing their defence on the merit, it becomes obvious that E the necessary facts to support their defence as to the jurisdiction of the trial court are not before the courts.*** It is settled law that jurisdiction is determined by the nature of the plaintiff's claim before the court. In the instant case the plaintiffs claim is for a liquidated money demand under the undefended list procedure which F demands the filing of an affidavit in support of the claim, which was done in the instant case.

In paragraph 5 of the supporting affidavit, the respondent deposed as follows:-

G ***"5. The said job was carried out in Jos and by Delivery Note dated the 15th September, 1992, the 2nd defendant through its agent collected the original copy of the Japanese Aid Approval totaling \$2,000,000 US Dollars by the Japanese Government from the plaintiffs in Jos. A copy of the Delivery Note is hereto attached and marked Exhibit "B"."***

H ***From the above paragraph and in the absence of anything to the contrary, it is clear that the trial court has the jurisdiction to hear and determine the suit as constituted and, I hold the further view that the lower court is right in holding at page***

62 of the record inter alia as follows:-

“Since it is not obvious on the face of the claim and since the claim was brought under the undefended list procedure and supported by affidavit and exhibits it appears to me on the authorities of Adeyemi vs Opeyori (1976) 9-10 S.C 31 at 51-51 and Anthony vs The Secretary of Assemblies of God Mission, Ewu Ishan (1952) 14 NACA 185 at 186, that the learned trial judge would be right to rely on the affidavit evidence in support of the claim for the purpose.....

As indicated earlier in this judgment, it seems to me from a close study of the affidavit in support of the claim and Exhibits “A”, “B”, “C1” and “C2” attached thereto, the contract between the parties was entered into by the parties in Jos and that the respondent also performed its own part of the contract in Jos, Plateau State”.

I am of the considered view that the above holding cannot be faulted and is consequently affirmed by me. I therefore resolve the issue also against the appellants.

All the issues haven been resolved against the appellants, it is obvious that the appeal is without merit and is accordingly dismissed by me with costs assessed and fixed at #50,000.00 (fifty thousand naira) against the appellants, in favour of the respondent.

Appeal dismissed.

KATSINA-ALU JSC

I have had the advantage of reading in draft the judgment of my learned brother Onnoghen JSC in this appeal. I agree with it and for the reasons he gives, I, too, dismiss the appeal with =N=50,000.00 costs in favour of the Respondent.

MUKHTAR JSC

The Respondent who is the plaintiff in the Plateau State High Court of Justice took out a writ on the undefended list, claiming the following reliefs against the appellant:-

“1. The sum of 200,000 U.S. Dollars (N4,400,000.00) being charges for consultancy and sundry services rendered to the first defendant by the plaintiff.

2. Interest at 21% on the said sum of 200,000 U.S. Dollars from the 1st day of October, 1992 until date of judgment and interest at the rate of 10% from the date of judgment until final liquidation of the debt.

3. Cost of this suit. ”

B An affidavit in support of the claim was sworn to by the managing director of the plaintiff company, who inter alia deposed to the following salient averments:-

C *“5. That the said job was carried out in Jos and by Delivery Note dated 18th September, 1992, the 2nd defendant through its agent collected the original copy of the Japanese Air Approval totaling 2,000,000 U.S. Dollars by the Japanese Government from the plaintiff in Jos. A copy of the Delivery Note is hereto attached and marked Exhibit ‘B’.*

D *6. That by letters dated 3rd August, 1993 and 5th October, 1993 the second defendant admitted their indebtedness to the plaintiff but pleaded for time. The said letters of admission are hereto attached and marked Exhibits ‘C1’ and ‘C2’ respectively.*

E *7. That by letters dated 5th September, 1994 and 9th December, 1994, the plaintiff solicitors demanded for the payment of the said sum. The said letters are hereto attached and marked Exhibit “D1” and “D2” respectively.*

F *8. That the defendants have refused and/or neglected to pay the said sum.”*

G A notice of intention to defend (supported by an affidavit as sworn to by the defendants) was filed, disclosing their defence. The learned trial judge in spite of the notice of intention to defend, and without considering the content therein gave judgment in favour of the plaintiff/respondent in the absence of the defendants who were not represented. The judgment concluded thus:-

H *“The defendants have not entered any appearance in this suit and did (sic) file any intention to defend the plaintiffs claim. Judgment is hereby entered in favour of the plaintiff in terms of the plaintiffs particulars of claim i.e. in the sum of 200,000 Dollars i.e (N4,400,000,00) being charges for consultancy and sundry services rendered to the first defendant by the plaintiff in September, 1992 and costs.”*

The above judgment was affirmed by the Court of Appeal Jos

Division, which entertained the appeal filed and argued by the defendants/appellants. Again the defendant has appealed to this court on four grounds of appeal. The learned counsel for the appellant had wanted to add another ground of appeal vide a notice in the appellants' brief of argument, but this was withdrawn, and so the proposed additional ground of appeal was abandoned. Consequently, one of the issues raised for determination in the appellants' brief of argument was also abandoned. The issues left in the appellants' brief of argument are as follows:-

"1. Whether the Court of Appeal was right in its view that non payment of filing fees by the Defendants/Appellants nullified the notice of intention to defend the suit filed by the appellants which is a government not ordinarily expected to pay fees upon filling such process.

2. Was the Court of Appeal right when it held that the Appellants did not enter appearance and did not file any notice of intention to defend the Respondent's suit when same was before the court timeously.

4. Whether the Court of Appeal was right when it held that the trial court had the jurisdiction to entertain the suit of the respondent."

The respondent also formulated its issues for determination in its brief of argument, I think the appellant's issues are more comprehensive and succinct, so I will adopt them for the treatment of this appeal.

In respect of issue (1) supra I will reproduce the provision of Order 54 Rule 2 of the High Court Civil procedure Rules of Plateau State hereunder. It reads as follows:-

"54(2) The Regulations set out in the sixth schedule shall be observed by all officers of court concerned with the rendering or services, and provisions of the foregoing order."

The said sixth schedule mentioned above makes the following provision:-

"No summons, warrant, writ or subpoena shall except by special order of the court be issued until:-

(a) all fees payable thereon as contained in the appropriate schedule of fees shall have been paid; and

(b) an account thereof, initialed as received shall have been set

forth by the officer issuing the process both in the marrying and in the counterfoil thereof."

When the processes of notice of intention to defend and its supporting affidavit were filed in the High Court of Abia State, it seems the registry did not consider it necessary to comply with the
 B above provisions, basically because that is what probably obtains in that court, when such processes involving Government officials are concerned are filed. Besides, one would ask, why submit the notice of intention to defend in Umuahia, when the suit he was seeking to
 C defend was filed and initiated in the High Court of Plateau State? It does not make much sense to me. By filing it in one state and then delivering same to another state, this very act raises some form of curiosity.

It was incumbent on the appellants to submit themselves to the rules
 D of the court they had litigation in. The settled law is that rules of court of each court are not made for fun, but to be obeyed. Once such rules are in place they must be adhered to and not contravened or ignored. This is most especially in matters or procedures of fundamental importance like in the instant case. See Musa v. Hamza 1982
 E 7 SC. 118, and Edun v. Odan Community 1980 8/11 SC. 103.

Failure of the appellants to pay for the necessary court fees and the filing of the notice of intention to defend and its supporting affidavit in the High Court of Plateau State was tantamount to the
 F said processes having not been filed. In this wise, I am in tandem with the lower court, when it found as follows in its lead judgment:-

"I think the failure of the Appellants to file the notice of intention to defend the suit and the affidavit in support thereof in the High Court of Plateau State in accordance with the Rules of the court is
 G fatal to the appellants' defence. The purported notice of intention to defend the suit, together with the affidavit in support of the defence was not properly before the court.

In the circumstance, the learned trial judge was right in my view when he said inter alia, in his judgment that:-

H "the defendants were served on the 27th April, 1995. The defendant have not entered appearance in this suit and did (sic) file any intention to defend the plaintiffs claim"

Having found, rightly in my view, that the appellants did not enter appearance and did not file notice of intention to defend the

respondent's claim, I am satisfied that the trial judge was entitled to enter judgment in accordance with Order 23 (4) of the Plateau State High Court Civil Procedure Rules, 1987, as he did.

I think the above discussions about wraps up the whole appeal. I have read carefully the lead judgment delivered by my learned brother Onnoghen, JSC in advance, and I am in complete agreement with him that the appeal lacks merit and should be dismissed. I also dismiss the appeal, and abide by the consequential orders made in the lead judgment.

ADEREMI JSC

This appeal is against the judgment of the Court of Appeal [Jos Division] in Appeal No. CA/J/322/98; ABIA STATE TRANSPORT CORP. & 2 OTHERS Versus QUORUM CONSORTIUM LTD. delivered on the 7th day of November, 2002 dismissing the appeal lodged by the present appellants against the decision of the High Court of Plateau State sitting in Jos, which decision was delivered on the 29th of May 1995. The respondent, who was the plaintiff at the trial court, had brought an action on the UNDEFENDED LIST for the sum of \$200,000.00 (two hundred thousand US Dollars) as its charges for consultancy and sundry services rendered to the 1st appellant, who was the 1st defendant before that court. It also claimed 21% interest on the said sum from October 1992 till the date of judgment and interest at the rate of 10% from the date of judgment until final liquidation of the debt. Sequel to the grant of the plaintiff/respondent's application for service outside jurisdiction on the 29th of March 1995, the plaintiff/respondent caused to be served on the defendants/appellants the writ of summons and verifying affidavit on the 27th of April 1995. Upon the receipt of the said process, the defendants/appellants filed their Notice of Intention to defend the suit accompanied by an affidavit at the High Court Registry, Umuahia, Abia State which processes were later forwarded to the High Court of Plateau State Registry, Jos on the 22nd of May 1995.

The case came up for hearing on the 29th May 1995, which was the return date. The respondent and his counsel were present in court but the appellants and the counsel were absent. The plaintiff/respondent's counsel consequently prayed the court to enter judg-

ment for his client. The trial court acceded to the prayer. Dissatisfied with the judgment of the trial court, the appellants appealed to the court below which, in a considered judgment, dismissed the appeal. Again being dissatisfied with the judgment of the court below, the appellants have appealed to this court.

B Three issues were raised in the appellants' brief of argument for determination and as set out in the said brief filed on 25th of July 2003, they are as follows: -

C *"(1) Whether the Court of Appeal was right in its view that non-payment of filing fees by the defendants/appellants nullified the Notice of Intention to defend the suit filed by the appellants which is a government not ordinarily expected to pay fees upon filing such process.*

D *(2) Was the Court of Appeal right when it held that the appellants did not enter appearance and did not file any Notice of Intention to defend the respondent's suit when the same was before the court timeously.*

E *(3) Whether the Court of Appeal was right when it held that the trial court had the jurisdiction to entertain the suit of the respondent."*

The respondent identified four (4) issues for determination by this court and as set out in its brief of argument filed on the 11th of February 2005, they are in the following terms: -

F *"(1) Whether the Court of Appeal was not right in holding that for a court process to be properly filed, it must be assessed and fees payable paid in accordance with Order 54 Rule 2 of the High Court of Plateau State (Civil Procedure) Rules 1987, Schedule 6 of the same Rules and Section 3 (1) of the Civil Procedure Edict, 1987.*

G *(2) Whether the Justices of the Court of Appeal were not right by holding that the Notice of Intention to defend together with an affidavit filed in Umuahia, Abia State, though subsequently received in the Registry of Plateau State High Court did not amount to filing within the meaning of Order 23 Rule 3 (1) of the Plateau State High Court (Civil Procedure) Rules, 1987 and that the appellant failed to enter appearance before the trial High Court.*

H *(3) Having regards to the facts that the appellants were served with the respondent's suit on the undefended list and given ample opportunity to be heard but absented themselves from court on the*

29th May, 1995 without any representation by counsel or any excuse made to the trial High Court, was the lower court not right in its view that the appellants were given fair hearing.

(4) Having found that the contract ought to be performed in Jos, Plateau State, whether the Court of Appeal was not right to hold that the Plateau State High Court had jurisdiction to determine the case.” B

Counsel for both parties, through their respective briefs of arguments canvassed arguments in support of the issues they have raised. I have had an in-depth study of the said arguments. I only wish to state the facts of this case which, by the parties are not in dispute; they are; The assessment for filing and the filing of the Notice of Intention to defend the action filed in Jos, Plateau State was done by the appellants at the High Court of Abia State, Umuahia and only transmitted to the Registry and accordingly stamped there. It is therefore obvious that the processes were not assessed and filed at the High Court of Plateau State. The question posed by Issue No. 1 arising from the facts that I have set out, is whether process of court assessed and filed and stamped at the High Court Registry, Umuahia, Abia State and later transmitted to the High Court Registry, Jos, Plateau State where it was stamped received, could be said to have been properly filed at the High Court of Plateau State? Suffice it to say that the court below answered this question in the negative; hence this appeal. I wish to say that generally, payment of a prescribed filing fee, by all litigants except the government, is a pre-condition to the validity of any process filed in the court. Unless the pre-condition is satisfied, the court will lack the jurisdiction to entertain a process the prescribed filing fee of which has not been paid. The High Court of Plateau State Registry, upon the receipt of the processes transmitted to it, only affixed its official stamp on it indicating that same was received. Certainly, this official act did not tantamount to payment of official fees. Indeed, Section 54 (1) and (2) of the High Court of Plateau State Civil Procedure Rules puts it beyond peradventure that prior payment of filing fees upon assessment, confers validity on the said process and gives jurisdiction to entertain same; the provisions of the said Order 54 (1) of the said Rules makes it mandatory for parties to litigation in court to pay the fees set out in the first, second, third, fourth and fifth schedules. Order 54 (2) also states: -

“The regulations set out in the sixth schedule shall be observed by all officers of court concerned with the rendering of services, and/or collection of fees payable under the provisions of the foregoing order.”

(Underlining mine for emphasis)

B The sixth schedule referred to in Order 54 (2) provides: -

“No summons, warrant, writ or subpoena shall except by special order of court be issued until:

(a) *All fees payable thereon as contained in the appropriate schedule of fees shall have been paid; and*

C (b) *An account thereof initiated as received, shall have been set forth by the officer issuing the process both in the margin and in the counterfoil thereof.”*

D That the payment of the prescribed filing fee of process to be filed by litigants other than the government is a sine qua non to the entertainment of that process by a court of law was affirmed by this court in its decision in ONWUGBUFOR & ORS V. OKOYE & ORS. (1996) 1 NWLR (pt.424) 258 at page 292 by Iguh JSC said:

E *“A court shall not entertain a relief claimed without payment of the prescribed requisite fees unless such fees have been waived or remitted by the Court or such fees are payable by any Government Ministry of non-Ministerial Government Department or Local Government pursuant to the provisions of the said High Court Rules of Anambra State. If the default in payment is that of the plaintiff, the claim in respect of which such prescribed fees have not been paid cannot be said to be properly before the Court and should be struck out in the absence of an appropriate remedial action or application to regularise such anomaly. In the present case, no payment whatsoever was made by the appellants in respect of their new claim for forfeiture, payment of the prescribed fees being a condition precedent to the filing of a valid claim before the court, it seems to me clear that the claim for forfeiture in the present suit is incompetent, improperly before the court and to be struck out.....”*

H Again, in OKOLO & ANOR V, UBN LTD (2004) 3 NWLR (pt.859) 87, this court in following its decision in ONWUGBUFOR (supra) said per TOBI, JSC at page 109:-

“In the light of the above, I have not the slightest difficulty in accepting the invitation of Chief Akpofure to strike out the new reliefs

Nos 21E and D and I hereby accordingly strike them out."

See also the decision of the West African Court of Appeal in OHENE MOORE V. AKESSEH JAYEE 2 WACA 43 which is on all fours with what I have been saying. Based on the provisions of the Rules of Court referred to and of course, the decisions of this court and the old West African Court of Appeal that I have referred to ^B supra, I cannot but agree with the decision of the court below that the processes filed by the defendants/appellants were not properly before the court for reason of non-payment of the prescribed requisite filing fees. I therefore answer Issue No. 1 in the appellants' brief in the affirmative and I answer Issue No. 1 in the respondent's brief in a ^C similar manner.

Issue No. 2 on each of the briefs of the appellants and the respondent, both of which are materially similar have, in my respectful view, been answered during my consideration of Issue No. 1 on each of the briefs aforesaid. Mere deposit of Memorandum of Appearance in the Registry is not enough, a defendant, in an Unde-
fended suit who would like to be heard by the court must show, through the process filed, that he has a defence on the merit. There was no such process before the court and again, as I have held, no ^E filing fee was paid in respect of same. Issue No. 2 on the appellants' brief is resolved against the appellants and the same Issue No.2 on the respondent's brief is resolved in its favour.

I shall now proceed to Issue No. 3 in the appellants' brief and ^F Issues Nos. 3 and 4 in the respondent's brief; which issues raise the question as to whether the trial court had the jurisdiction to entertain the suit and also whether having regards to the facts of this case, the appellants were given fair hearing. Let me here say that the only defence put up by the defendants/appellants was that the contract ^G was to be executed in Lagos and not Jos; hence their contention that the High Court of Justice sitting in Jos had no jurisdiction to entertain the suit. But a careful reading of Exhibits A, B, C1 and C2 attached to the affidavit in support of the claim shows beyond any doubt that the contract between the appellants and the respondent was entered ^H and performed in Jos, Plateau State. So, the High Court sitting in Jos has the jurisdiction to entertain the suit. Again, having been served with all processes for use in the court and a date for hearing properly communicated to him, a party cannot be heard to complain that he

was not granted fair hearing. Issue No.3 in the appellants' brief of argument is therefore resolved against them. While Issues Nos, 3 and 4 on the respondent's brief of argument are hereby resolved in its favour.

B It is for the little I have said above and most especially for the
exhaustive consideration given to all the issues by my learned brother,
Onnoghen JSC in the lead judgment with which I am in full agree-
ment, that I also say that this appeal lacks merit. It must be dismissed
and I accordingly dismiss it. I endorse all the consequential orders
C including the order as to costs contained in the lead judgment

CHUKWUMA-ENEH JSC

D In this matter the plaintiffs claim against the Defendants as per
the endorsement to the writ of Summons as at p.3 of Record is for:-

*"1. The sum of 200,000 U.S. Dollars (N4,400,000.00) being
charges for consultancy and sundry services rendered to the first
Defendant by the Plaintiff.....*

E *2. Interest at 21% on the said sum of 200,000 U.S. Dollars
from the 1st day of October, 1992 until date of judgment and inter-
est at the rate of 10% from the date of judgment until final liquida-
tion of the debt.*

3. Cost of this suit. "

F Also filed along with the claim is an affidavit of eleven para-
graphs verifying the Plaintiffs claim. The Plaintiff at the same time as
filing the writ has filed an ex-parte application praying to serve the
Defendants out of the jurisdiction of the court and to place the claim
on the Undefended list.

G The trial court in granting the ex-parte application as per P. 16
of the Record stated thus:

*"The application to issue and serve the Writ of Summons in
this suit out of the jurisdiction of this court is granted. The application
to place the said suit on the undefended list for hearing is also granted.
H The said suit is fixed for hearing on the 29th May, 1995."*

On the return date, that is, the 29th day of May 1995, the trial
court has been informed that the Defendants have been served on
27/4/95 and have not filled any memorandum of appearance nor
have they filed any notice of intention to defend. The Plaintiff has

therefore moved for judgment to be entered in his favour under Order 23 Rule 4 of the Plateau State High Court (Civil Procedure) Rules 1987, in terms of the particulars of claim as endorsed on the Writ of Summons. See BEN THOMAS HOTEL LTD V. SEBI FURNITURE CO. LTD. (1989) 5 NWLR (Pt.123) 523 AT P529.

The trial court proceeded to enter judgment for the plaintiff as follows:

“The Plaintiff’s claim against the Defendant is for the sum of 200,000 U.S. Dollars i.e. N4,400,000.00 being charges for consultancy and sundry services rendered to the first Defendant of (sic) the Plaintiff.

The Plaintiff also claims 21% interest on the said sum of 200,000 U.S. Dollars from the 1st October 1992 until the date of judgment and thereafter at 10% until the whole debt and costs are finally liquidated.

The Defendant were served on the 27th April, 1995. The Defendants have not entered any appearance in this suit and did (not) file any intention to defend the Plaintiff’s claim.

Judgment is hereby entered in favour of the plaintiff in terms of the plaintiff’s particulars of claim, i.e. in the sum of 200,000 U.S. Dollars i.e. (N4,400,000.00) being charges for consultancy and sundry services rendered to the first Defendant by the Plaintiff in September 1992 and costs.”

(word in brackets supplied by me).

The Defendants, upon the foregoing facts have brought an application for a stay of the said judgment pending appeal against the decision arguing that since a notice of intention to defend has been filed along with an affidavit in support the trial court ought not to have given judgment to the plaintiff even though the defendants have been absent on the return date as their notice of intention to defend has been delivered to the Registrar within the ambit of Order 23 Rule 3(i) of said the Rules together with an affidavit disclosing a defence on the merit. And in further reply to the plaintiff’s argument in this matter the defendants have posited that as Government and a government agency and a department of Government no filing fee is payable by the Defendants for filing the instant process, that is, the Notice of intention to defend and the accompanying affidavit in this case. The plaintiff has argued furthermore, that the notice of inten-

tion to defend is irregular, having been assessed and filed as official in the High Court, Umuahia in Abia State against the clear intendment of the Plateau State High Court Civil Procedure Rules 1987 and that the instant process has to be filed in the Registry of the High Court of Plateau State as prescribed under Section 3(1) of the Civil Procedure B Edict 1987 and paragraph 5 of the sixth Schedule to the said Rules. The trial court in its ruling on the application for a stay of execution held as per p.24 and P.25 LL. 1-10 of the Record as follows:

C *“1. It did not appear that counsel’s reason for saying there was no Notice of Intention to defend was because the papers of the defendants were not filed in this Registry. In any case, the fact is that the defendants did not file their Notice of Intention to defend this suit in the Registry here.*

(underling mine for emphasis)

D *2. Apart from giving a copy to the registry to be put in the file there is nothing to show that the said Notice of Intention to defend was assessed, paid for and filed in the High Court Registry of Plateau State and I so hold.*

E *Section 3(1) of the Civil Procedure Edict 1987 cited by Counsel for the Plaintiff is as follows:-*

‘3(1) The provisions contained in the Rules set out in the schedule to this Edict and herein after called the Rules shall be the Rules of Civil Procedure to be followed in the High Court of Plateau State.’

F *I hold that the said Notice of Intention to defend this suit ought to have been filed in the Registry here in the High Court and not at the High Court Registry Umuahia, Abia State. The sixth Schedule to the said Edict of 1987 contains Regulations for payment of fees.*

G *Paragraph 5 provides as follows:-*

‘No document in respect whereof a fee is payable shall be used in any legal proceeding unless it shall have been initialed aforesaid by the Registrar or other officer or unless the court shall be otherwise satisfied that the proper fees in respect thereof have been paid.’

H *(underlining for emphasis).*

This provision is to ensure that proper fees are paid for all the documents meant to be used in proceedings in the High Court of Plateau State.

I therefore uphold the submission of Counsel for the Plaintiff

that the purported Notice of Intention to defend this suit was not properly before the court. I hold that there was no Notice of Intention to defend this suit.”

The application for a stay of the said judgment as per the foregoing has been dismissed with costs. The Defendants/Appellants have not appealed this decision. Further facts of this matter are as in the body of the judgment. B

The Defendants are aggrieved by the decision of 29/5/1995 and have appealed to the Court of Appeal (court below) on a Notice of Appeal dated 23/8/95 containing three grounds of appeal. Both parties have filed and exchanged their respective briefs of argument in the appeal. The court below has dismissed the appeal holding at P.70 of the Record LL. 8-30, inter alia that; C

“what the Rules require is that the Notice must be filed with an affidavit disclosing a defence on the merit and I think, it can only be properly filed in the court where it is to be used. However, Section 3(1) of the Civil Procedure Edict of Plateau State 1987 restricts the High Court of Plateau State to follow only the High Court Civil Procedure Rules of Plateau State.....

Order 54 Rule 1 (i) of the High Court of Plateau State Civil Procedure Rules, 1987 makes it mandatory that fees Set out in the First, Second, Third, Fourth and Fifth Schedules thereunder shall be payable by any person commencing the respective proceedings or desiring the respective services for which they are specified in those schedules”. E F

And finally that:

“Order 54 of the Rules does not exempt anybody from paying fees payable under the sixth schedule on court processes”

The Defendants/Appellants further aggrieved by the decision of the court below on a Notice of Appeal dated 8/11/2002 filed in this matter have raised four grounds of appeal against the said decision. The Defendants/Appellants also as a follow up have filed their joint appellants brief of argument and have distilled four issues for determination as follows: H

“1. Whether the Court of Appeal was right in its view that Non payment of filing fees by the Defendants/Appellants nullified the notice of intention to defend the suit filed by the appellants.

2. Was the Court of Appeal right when it held that the Appel-

lants did not enter appearance and did not file any notice of intention to defend the Respondent's suit when same was before the court timeously.

3. *Whether the Court of Appeal was right on its view that the Appellants were given a fair hearing when the merits of the Defence raised by the appellants were not considered before Judgment was entered against them.*

4. *Whether the Court of Appeal was right when it held that the trial court had the jurisdiction to entertain the suit of the Respondent."*

The Respondent in his brief of argument filed in this matter has also raised four issues for determination they are identical in content as the issues raised by the Appellants as above although differently framed; I need not therefore set out the same here.

The Appellants dealing with the first issue, have submitted that the two lower courts have agreed that the Appellants have filed their Notice of Intention to defend and the affidavit disclosing defence on the merit timeously but that the process has been improperly filed for non-payment of filing fees. The Appellants are a State government, an official of the Government of Abia State and a department of that State Government who are not obliged to pay filing fees as is the case of Order 2 Rule 13(2) of the Rules of this court. That on the combined reading of Order 54 Rules 2 and Order 52 Rule 2 (b) of the Plateau State High Court (Civil Procedure) Rules they submit that it is the duty of the Registrar to demand and collect filing fees from litigants and so initial on the process as received; for this, they rely on the case of FIRST BANK OF NIGERIA PLC. V. MAY MEDICAL CLINICS (2001) 4 SCNJ 5 RATIO 9. Moreover that since the said process has been officially so marked and initialed as received as required by the Rules of the trial court, it has raised a presumption of regularity which has not been rebutted by the registrar of the trial court, particularly as there is no evidence to the contrary from the Registrar to that effect. And so, the official stamping and initialing of the said process as received on the face of the process have thus raised a presumption of regularity which commonly has been resorted to with respect to official acts as in this instance. See: NIGERIA AIR FORCE V. JAMES (2002) 2 SCNJ 379 at 383. They make the point unchallenged that no fees have been paid nor demanded for the instant

motion for a stay of execution argued in this matter so soon thereafter to the instant process as an acknowledgment that the appellants are not required to pay filing fees in respect of filing the instant process. They also contend that it is no sound argument to say that the process has already been assessed by the Registrar of the Abia State High Court as nothing has prevented the Registrar of the trial Court if fees are payable for the said process from re-assessing the process before stamping it as received. They also have contended that the two lower courts have showed undue reliance on procedural irregularity and that reliance on mere technicality is now frowned upon by the courts. See: ISOKWA OIL CO. V. BANK OF THE NORTH (2002) 5 SCNJ 176A AT 191 PARA. 35 and FSB. V. IMANO LTD (2002) 7 SCNJ 68 ratio 4.

On issue 2, having recited the instant procedure under Order 23 and advertng to the requirements under the said Rule they have resorted to Rule 3(i) (ibid) which says “*where any Defendant neglects to deliver the notice of defence and affidavit prescribed by Rule 3(i) or is not given leave to defend by the court, the suit shall be heard as undefended suit.....*”; to submit that the said process has been duly delivered as prescribed by the said Rule, thus the process has otherwise been duly stamped and initialed as received on 22/5/95 - one week before the return date and that it is conclusive official evidence of due filing of the process. They submit as settled that where a Defendant served with a writ and affidavit as in the circumstances under the undefended list has delivered to the Registrar not later than five days before the return date a notice of defence and affidavit setting out the grounds of his defence which prima facie raises a defence on the merits, the case shall without more be entered in the general cause list for hearing on the merit. See: AGUEZE Y.A.B. LTD. (1992) 4 NWLR (Pt.233) 78 that is to say, whether or not the defendant is present on the return date. They therefore contend that before 25/5/95 the said process has been duly lodged in the trial court file in compliance with the said Rule and that the trial court ought not in the circumstances to have shut its eyes to it. See F.S.B. V. IMANO (supra).

It is to be noted that during the oral hearing of this matter on 19/1/2009 in the open court, issue 3 of the appellants’ brief has been withdrawn by the appellants along with the application filed to regu-

larize the said issue and it has therefore been struck out with the argument predicated upon it in their brief.

On issue four which touches on jurisdiction, the Appellants have contended that the trial court lacks the jurisdiction to entertain this matter since the contract the central issue in this regard has been entered at Umuahia Abia State and is to be performed in Lagos and not in Jos; and so, the trial court is not the proper court to entertain the matter. And that the court below at p.62 LL.3-5 of the Record has conceded on the issue of jurisdiction as not obvious on the face of the instant particulars of claim but that the trial court has rightly relied on the affidavit evidence in support of the application as this is an action filed on the undefended list. They acknowledge that a court will be vested with the jurisdiction to entertain a suit, only on the basis of the plaintiffs' claim and they have relied on ABU V. ODUGBO (2001) 7 SCNJ 262 at 267; however they submit that it is wrong in this instance to do so without letting in the evidence as per the notice to defend and affidavit of the Appellants/Defendants that is, the other side to the matter as the issue ought to be considered first and on hearing both sides. They submit that it is no use relying on exhibits A and B annexures to the affidavit in support of the claim to determine the issues of when the alleged contract has been made and with whom and how and where it has to be performed. They contend that the contract has been entered in Umuahia to be performed in Lagos and refer to a copy of the contract signed by the plaintiff. They contend that exhibit B cannot be the binding and conclusive evidence of performance of the contract and even then and more importantly that all the defendants reside in Umuahia a factor that should have finally determined where to institute the action but certainly not Jos; and so the action has been improperly initiated in the trial court which has no jurisdiction to entertain the suit. They therefore submit that the action is incompetent and should be struck out as null and void. Finally, the court, is urged to allow the appeal set aside the judgment of the court below and grant the relief sought.

The Respondent on issue one submits that the instant process cannot be used in the trial court unless it is duly assessed and the filing fees payable on it are paid. He refers to Section 3(1) the Civil Procedure Edict of Plateau State 1987 and Order 54 Rule 1 (1) of the Plateau State High Court Civil procedure Rules, which he sub-

mits are mandatory and a condition precedent otherwise the Court is incompetent to deal with the matter. See: PROVISIONAL COUNCIL OGUN STATE UNIVERSITY V. MAKINDE (1991) 2 NWLR (Pt.175) 613; AJA V. OKORO (1991) 7 NWLR (Pt.203) 260. SEVEN-UP BOTTLING COY. LTD. V. YAHAYA (2001) 4 NWLR 47 AT 53; ONWUGBUFOR V. OKOYE (1996) 1 NWLR (Pt.424) 252. B

He Says that there is no provision in the Rules of the trial court exempting the appellants from paying filing fees, and that the process has been assessed and stamped as filed in the Abia State High Court. See: TUKUR V. GOVERNMENT OF GONGOLA STATE (1988) 1 C NWLR (pt.68) 39 at 50 and VINCENT V. IWUANYANWU (1989) 3 NWLR (Pt.107) 39 at 51- 64. In the circumstances, he submits that the appellants have not filed the notice to defend and affidavit in compliance with the Rules of the trial Court and therefore the process is incompetent. D

On issue two he submits that the action has been filed on the undefended list with the leave of the trial court pursuant to Order 23 of the Rules of the trial Court and that the appellants have not complied with Rule 3(i) of Order 23 of the trial court by filing their Notice of Intention to defend and the affidavit at the registry of the trial court. He has pointed out that by the combined reading of Order 23 Rule 3(1) and Order 54 Rules 1 and 2 of the trial court any process to be used in the trial court must be assessed by and filed in the trial court. To debunk the appellants' submission that his case is resting on mere irregularity, the court is reminded that non-payment of filing fees for any process as here is one fundamental departure from the clear procedure as prescribed by law. See: RAYMONDS DANGTOE V. CIVIL SERVICE COMMISSION, PLATEAU STATE & ORS (2001) F 86 LRCN 1203 at 1232; furthermore, that the appellants' case has G been compounded by their absence on 29/5/95, (the return date). He submits that on no circumstances will mere receipt of the process in the trial court amount to filing of the process and that the acknowledgement of the process by stamping on it "received" is not sufficient evidence that the process has been duly filed without paying filing fees. Nor can it be said in the circumstances, that the Registrar of the trial court has waived the payment of filing fees. He submits that the competence of any proceedings in court cannot be H waived. See: MENAKAYA V. MENAKAYA (2001) 43 WLR at 49 para

1-5 and even then that the act of waiver by the Registrar cannot be used to challenge the particular manner the law has prescribed in discharging a public duty i.e. as per Section 3(1) (ibid) and Order 54 of the Rules of the trial court. See: ODOFIN V. AGU (1992) 3 NWLR (Pt.229) 350; ORANREWAJU V. GOVERNOR OF OYO STATE (1992)

^B NWLR (pt.265) 335. The court is urged to apply the Rule without sympathy or sentiment. See: KRANS THOMPSON ORGANISATION V. NNPS (2004) 17 NWLR (pt.901) 44 AT 60-61.

^C Issue three in pari materia with the appellants' issue three has to be discountenanced and consequently struck out. It is struck out with the same argument raised thereunder for the same reason for striking out issue three of the appellant's.

^D Issue four raises the question of jurisdiction of the trial court to deal with this matter which is to be considered on the background of the plaintiff's claim. The respondent refers to paragraph 5 of the affidavit in support which says that the job in this suit has been carried out in Jos and that the delivery note conveying the Japanese Aid approval has issued from the respondent's office in Jos, and that the trial court has rightly assumed jurisdiction, although on the face of ^E the particulars of claim the issue of jurisdiction cannot be determined without reference having been had to the affidavit in support of the respondent's claim and that the trial court has rightly adverted to the same as it has the jurisdiction on the facts before it to deal with the matter.

^F The court is urged to dismiss the appeal and affirm the decision of the court below.

^G The foregoing paragraphs of this judgment have attempted to cover the grounds of the respective cases of the parties so as to enable me examine them in the widest perspectives limited, of course, by the issues raised by the parties in this appeal. Issue two for determination of the appellants' brief of argument is particularly pertinent as I take all the issues together to avoid repeating myself.

^H Firstly, I must restate the obvious that this is the final court in this matter. And in that circumstance it is the paramount duty of this court to aim at doing substantial justice in this as well as in any other matter before it as the courts have gone past the age of technical justice.

And this, places on the court a special responsibility to be wary

in scrutinizing a plaintiff's claim which otherwise has to confer upon the court as in the instant matter the jurisdiction to deal with the claim under Order 23 Rule 1 (ibid). I am of the opinion that in any case as the instant one the plaintiff is not automatically entitled to judgment on the argument as here that the defendant has led no evidence in that he has not delivered a competent notice to defend and affidavit as required in such cases under Order 23 Rule 1. The court is entitled, all the same, to satisfy itself ab initio on the case of the plaintiff; in other words, that it suffices to sustain the plaintiffs claim under Order 23 Rule 1, on having met the three conditions that govern claims on the undefended list to which I shall come anon and which conditions have to co-exist to sustain a claim as the instant one on the undefended list. The court should not be seen to sit on the fence as the instant trial court has done here but should dispose of any preliminary questions that have arisen in the claim timeously more so, on the question of its jurisdiction and such other questions as I have raised in the course of this judgment before dealing with the substantive matter in regard to placing the suit on the undefended list and entering of summary judgment for the plaintiff in the suit.

Having so said, I make bold to say that this matter has been wrong-footed right from the trial court. Firstly, the question to answer is whether this suit as per the particulars of claim is one cognizable under the said Order 23 Rule 1 (ibid). The plaintiffs' claim has been placed on the undefended list pursuant to Order 23 Rule 1 which provides:

"(1). Whenever application is made to a court for the issue of writ of summons in respect of claim and such application is supported by affidavit setting forth the grounds upon which the claim is based and stating that in the deponents 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 called the undefended list....."

The foregoing provision is clearly unambiguous and it contemplates that in appropriate cases where the suit is for a "debt or liquidated money demand" and is supported by an affidavit verifying the facts of the claim that so soon thereof on the application of the plaintiff, the Registrar has to enter the suit on the undefended list and I must add there has to be a deposition that the defendant has no

defence to the claim. This is so as the procedure under the undefended list even though designed to quicken the recovery of liquidated money demands clearly derogates from the rights of the parties in regard to the principle of audi alteram partem vis-a-vis fair hearing. In this wise, the plaintiff is obliged to meet strictly the conditions of bringing his claim on the undefended list. Anything short of strict compliance with the Rules will not suffice nor sustain the claims under the Rules. The three requirements that have arisen from the above provisions, which I shall deal with anon must be strictly construed in their application to suits brought on the undefended list. They are, firstly that the claim must be for a debt or liquidated money demand, including account stated to be cognizable under the undefended list procedure thus excluding for example unliquidated damages as in claims in torts and special damages arising howbeit from any cause of action as they must be specially pleaded and strictly proved.

Secondly, the claim for a debt or liquidated money demand must be supported by an affidavit verifying the claim; and thirdly the affidavit must contain a deposition to the effect that in the belief of the plaintiff the defendant has no defence to the claim. Once these conditions are met the claim is otherwise qualified to be placed on the undefended list. It is settled that the competency of a claim on the undefended list must pass the test of the three conditions as outlined above; this is so as the provisions of Order 23 Rule 1 (ibid) must be strictly construed meaning that an application to place a suit on the undefended list ought to be refused ab initio where the Three conditions have not been satisfied.

The first question on the facts of this claim is whether the plaintiff's claim is for a debt or liquidated money demand.

I would say that upon a closer look at the plaintiffs claim it is evident that the particulars of claim apart from raising in relief one a claim for the sum of 200,000 U.S. Dollars for services rendered to the 1st defendant, it also has claimed in relief two 21% interest on the said sum of 200,000 U.S. Dollars from 1/10/92 to the date of judgment - thus putting the instant claim beyond the realm of claims to be brought on the undefended list. It cannot be said that the latter relief by itself constitutes a debt or liquidated money demand where as here the plaintiff appears to be claiming the said 21% interest as of

right. This court in ALFATRIN LTD. V. A.G. FEDERATION (1996) 9 NWLR (Pt.975) 667 held that at Common Law and as a general Rule, interest is not payable on a debt or loan in the absence of express agreement or some course of dealing or custom to that effect. See also LONDON CHATHAM & DOVER RAILWAY V. SOUTH EASTERN RAILWAY (1893) 146-429; HILL V. SOUTH STAFF RAILWAY (1874) L.R. 18 EC 154, EKWUNIFE V. WAYNE (W.A.) LTD. (1989) 5 NWLR (Pt.122) 422 at 445. The implication of these cases to the instant case is that neither in the supporting affidavit to the claim nor in the particulars of claim annexed to the writ of summons can it be pointed to any express agreement or course of dealing between the parties to ground the claim for 21% interest in this matter. The claim of 21% cannot be sustained under Order 23 Rule 1 (ibid). Until the facts upon which that relief of the claim is based are pleaded, proved and adjudged upon, it cannot constitute a liquidated money demand ascertainable by mere arithmetical calculation and even more so being a right based on the contract between the aforesaid parties; the contract has to be scrutinized before hand in regard to the claim for 21% interest. At a glance therefore, the said relief cannot come within the ambit of the claim of a debt or liquidated money demand under the provisions of Order 23 Rule 1. The trial court obviously being aware of this limitation vis-a-vis the said claim has completely ignored the relief of 21% interest in entering judgment for the sum of 200,000 U.S. Dollars (i.e. N4,400,000.00) only for the plaintiff suo motu without the plaintiff firstly amending the particulars of claim of the suit albeit by abandoning reliefs 2 and 3 of the claim. Thus, implying that the plaintiff's claim on the whole is ab initio not one covered as a claim for the undefended list. In other words, it is not the duty of the trial court suo motu as erroneously done here to place only a part of the plaintiffs claim in this suit on the undefended list. There is nowhere in the proceedings the plaintiff has amended his claim. It is unclear what has become of the remaining part of the plaintiff's claim. The entire claim ought to have been immediately transferred to the general cause list for pleadings to be ordered and for hearing on the merit. This court on many occasions without number has reminded the courts below not to make a case for a party unsolicited and even more so not to proceed thereupon to decide the same without hearing the parties. The instant claim as framed if I

may repeat, is not one that can be amenable to or can be accommodated under the provisions of Order 23 (i) (ibid) and so cannot ab initio be placed on the undefended list.

The application to place the suit on the undefended list, therefore cannot stand. Secondly, the next question is whether the affidavit in support of the claim has verified the facts of the said debt vis-à-vis with regard to the plaintiff and the defendants on record. The answer is in the negative. The plaintiff has showed want of careful consideration in regard to the parties to this suit. Although, it is settled that where more persons than one have joint interest in a claim whether as plaintiff's or defendants, all such persons ought to be made parties to the action; the plaintiff clearly in the instant claim has claimed against the 1st defendant alone. For ease of reference the claim is reproduced as follows:

D *"The plaintiffs claim is for -*
 (1) The sum of 200,000 U.S. Dollar (N4,400,000.00) being
 charges for consultancy and sundry services rendered to the first
 Defendant by the Plaintiff."

(underlining for emphasis)

E The 2nd and 3rd defendants have therefore, no claims filed against them. The necessary corollary arising from this situation is as to whether there are any justifiable reason for joining them or making them parties to the action. There can be no gainsaying that the trial court therefore has no jurisdiction based on the facts of the claim and the supporting affidavit to order the said claim to be filed against the 2nd and 3rd defendants or either of them in the instant suit on the undefended list ab initio, nor the competence to enter judgment against them on the undefended list when no specific relief has been sought against either or both of them, without firstly amending the claim against the defendants, and so make the defendants liable to the claim either severally or jointly and/or severally. This relief as it stands does not warrant a judgment on the undefended list against the 1st, 2nd and 3rd defendants as the plaintiff has not so claimed and the court cannot therefore, grant to the plaintiff what he has not claimed or asked for. See: OMOTUNDE V. OMOTUNDE (2001) FWLR (Pt.126) 926 at 936 DE. In the result as the claim stands the 2nd and 3rd defendants should have been struck off the suit, before the placement of the claim on the undefended list, if at all.

Not even in widest exercise of its inherent jurisdiction could the trial court override a fundamental rule of law as expounded in the above cited case to grant the claim against the 2nd and 3rd appellants even as it is trite that non-joinder or mis-joinder of parties to a suit does not defeat a claim. See: ONAYEMI V. OKUNUBI (1961) 1 ANL 362. B

This is even more so on the obvious conflict between the particulars of claim as set out above and the depositions of the plaintiff as per paragraphs 3, 4, 5, and 6, of the affidavit in support of the claim, which ought to have been given serious consideration by the trial court before the suit is placed on the undefended list and certainly before judgment and I set out these paragraphs as follows: C

“3. That I know as a fact that on or about the month of July, 1992, the second defendant retained the services of the plaintiff for the procurement of foreign Aid from Japanese Government to enable it import vehicles and spare parts for use by the first defendant. Copy of the Approval letter is hereto attached and marked Exhibit “A”.

4. That the plaintiff accepted the offer and prosecuted same effectively. E

5. That the said job was carried out in Jos, and by Delivery Note dated 18th September, 1992, the 2nd defendant through its agent collected the original copy of the Japanese Aid Approval totaling 2,000,000 U.S. Dollars by the Japanese Government from the plaintiff in Jos. A copy of the Delivery Note is hereto attached and marked Exhibit “B”. F

6. That by letters dated 3rd August, 1993 and 5th October, 1993 the second defendant admitted their indebtedness to the plaintiff but pleaded for time. The said letters of admission are hereto attached and marked Exhibits “C1” and “C2” respectively.” G

(underlining for emphasis)

It is clear from the above depositions by the plaintiff in support of the claim that the contract as has been found by the courts below is for the procurement of Foreign Aid from Japanese Government to facilitate the importation of vehicles and spare parts for use of the 1st defendant and has been made between the plaintiff and the 2nd defendant; yet it is against the 1st defendant alone that the plaintiff has issued the instant claim, a party for whose benefit as deposed in H

paragraph 3 of the affidavit in support of the claim, the contract has been made; howbeit when there is no privity of contract between him, (1st defendant) and the plaintiff. Much as nonjoinder or misjoinder of parties will not lead to striking out of a claim; surely on the facts of this case a mis-joinder of parties against the strict compliance with the provisions of the said Order 23 Rule 1 makes the claim one not fit to be placed on the undefended list but on the general cause list where amendment as to parties and reliefs claimed could easily be effected in the course of the proceedings. Without amending the instant claim as to the constitution of parties and cause of action it is in my respectful opinion not fit for placement on the undefended list and the trial court has acted in error for doing so.

As regards the said contract; the fulcrum of this case, no sufficient details of it has been deposed to in the said affidavit in support of the claim so as to enable the trial court ascertain therefrom its nature and whether it is capable of sustaining the claim under the undefended list as it must. The respondent has exhibited to his affidavit in support of the claim exhibit A, a copy of the approval letter from the Japanese Government; Exhibit B - a delivery note and exhibits C and C1 as the alleged admission letters. None of these exhibits singly or in combination can suffice in constituting a contract between the plaintiff and 2nd defendant/respondent in respect of the alleged transaction for the Japanese government foreign aid; this is even moreso as there are no express agreement as to the claim of 21% interest and costs contained in any of the said exhibits nor is it contained in the depositions as per the affidavit in support of the claim. If this proposition had worked on the mind of the trial court the instant claim would not have been allowed nor to be commenced on the undefended list. The instant suit as per the verifying affidavit in support of the claim is a claim founded on a contract. Both sides are agreed on this point. I make this point as it is the nature of the contract that has to bring the suit within the provisions of Order 23 Rule 1 (ibid) which does not cover contract for unliquidated damages and special damages in tort and contract which have to be pleaded and strictly proved.

And where indeed there is a contract and it is written for that matter as alleged in this case, the plaintiff ought to have exhibited the same to the affidavit in support of the claim as where the evidence of

its contents is given in any other manner than by producing it is not legal evidence of it and is unacceptable, videlicet Section 132 of the Evidence Act; and where the contract is verbal the plaintiff ought to have given details of the agreement, that is to say, as to what has been agreed between the parties in this regard between the plaintiff and 2 defendant by way of depositions in the affidavit evidence in support of the claim so as to enable the defendants/respondents admit or deny the same and the court to make a specific finding upon it. The plaintiff has defaulted in this regard. It is trite that the court is not allowed to indulge in speculating as to the contents thereof of a document as the said contract here. Again this makes this suit unfit to be placed on the undefended list, without more. The said contract between the parties in this matter should have provided the answers to all relevant questions being raised in this matter; and I see the presumption under Section 149(d) of the Evidence Act being invoked as it avails in the circumstances.

There can be no doubt that the instant claim as filed against the defendants is improperly constituted. With these shortcomings, the claim is far from being cognizable under Order 23 Rule 1 (ibid). It is even worse here where the judgment in the suit has been entered against the defendants not severally nor jointly and/or severally. The competency of this suit within the ambit of Order 23 Rule 1 of the rules of the trial court has been seriously faulted in my reasoning above that the initial direction that the suit be placed on the undefended list is seriously flawed. It has therefore knocked off the foundation of placing the suit on the undefended list ab initio as well as the judgment given upon it. I have reached these conclusions as can be seen based so far on the plaintiff's own showing. It is my opinion that until the plaintiff has properly situated his claim within the ambit of the provisions of Order 23 Rule 1, his claim is not cognizable to be placed on the undefended list. And so, an appellate court as this court has the power to reverse any purported placement of such suit on the undefended list in the interest of averting an obvious miscarriage of justice as here.

The other serious issue is as to the question of want of jurisdiction of the trial court to deal with the matter. I think that this is an issue which on settled principles can be raised at any stage of the proceedings even in this court for the first time. Jurisdiction is the

enabling power of a court to deal with a matter before it. And so, it goes without saying that without jurisdiction the court and the parties labour in vain no matter how much good work they respectively have put in the case. It is of futile effect. Hence the court can take the point suo motu and has to determine that question at the earliest time it becomes clear to the court that its jurisdiction is in issue and to decide that question one way or the other before taking any further steps in the matter. And it is mostly to be determined on plaintiff's statement of claim; in this case, on the particulars of claim as attached to the writ of summons. See: OLORIODE V. OYEBI (1984) 1 SCNLR 390; ADEFULU & OR. V. OYESILE & ORS. (1989) 20 NSCC (Pt.III) 371 at 393 and OREDYOIN V. AROWOLO (1989) 4 NWLR (Pt.114) 172.

In the instant case it is enjoined on the trial court to satisfy itself that it has the power to deal with this matter placed on the undefended list in the face of obvious constraining factors present in the matter as highlighted above. The court below rightly in my opinion appreciated the presence of these factors and the court's predicament in the circumstances, hence it has stated in this regard at P62 LL.3-9 of the record thus:

"Since it is not obvious on the face of the claim and since the claim was brought under the undefended list procedure and supported by affidavit and exhibits it appears to me on the authorities of ADEYEMI V. OPEYOR, (1976) 9/10 SC. 31 at 31 and ANTHONY V. THE SECRETARY OF ASSEMBLIES OF GOD MISSION, EWU ISHAN (1952) 14 WACA 183 at 186 that the learned trial Judge would be right to rely on the affidavit evidence in support of the claim for the purpose. I think it is well settled that the type of evidence required to resolve issue of jurisdiction could be oral or affidavit. See: L.K. MARTINS (NIG.) LTD. V. U.P.L. (1992) 1 NWLR (Pt.217) 322 at 322."

The next best thing the court below should have done would have been to remit the claim back to the trial court to be heard on the merits.

However, before the above abstract at P60 LL. 27-29; P61 LL.1-5 the court below opined thus:

"In the circumstances, a close study of Exhibits, A, B, C1 and C2 attached to the affidavit in support of the claim seems to show

that the contract between the Appellant and the Respondent was entered and performed in Jos, Plateau State for the procurement of Foreign Aid from Japanese Government..... The proposal in relation to the procurement of the Foreign Aid was made in Jos and the original copy of the said Japanese Aid approval was collected from the Respondent by the Appellants in Jos, Plateau State. It seems to me that the contract between the parties was entered by the parties and performed in Jos, Plateau State.

With all due respect, I think the court below has in its reasoning as per the foregoing abstracts fallen into a grave error of indulging in mere speculation in so far as its surmises as per the above abstracts have portrayed it as raising the foregoing reasoning in vacuo, that is, without seeing and/or examining the said alleged contract. Having found as between the plaintiff/respondent and the 2nd defendant/appellant that there subsists a binding contract - the next question is, what is the nature of the contract and the next best poser is whether it is written or oral. Where the contract is reduced to writing as is being alleged here, then it ought to have been exhibited to the affidavit in support of the claim and where it is verbal contract then sufficient facts of what have been agreed upon by the said parties have to be deposed to in the supporting affidavit to the claim. In the absence of either of the above as I have canvassed in this judgment, it is fatal to determining the issue of jurisdiction as between the trial court vis-a-vis the High Court of Abia State and so, it is precarious to rest the question of jurisdiction of the trial court on mere speculation. The plaintiff has deposed to no reasons for defaulting in these respects. In the light of this reasoning there is therefore no basis for the court below finding on jurisdiction to deal with the matter on paragraph 5 of the affidavit in support of the claim. And it is fatal to put the matter on the undefended list. These questions are issues that would have been dealt with on the pleadings. It is settled law that the venue of an action in contract depends on three alternatives that is:

- (a) where the contract is made.
- (b) Where the contract ought to have been performed, or
- (c) Where the defendant resides. See: LK. MARTINS (NIG.) LTD. V. U.P.L. (1992) 1 NWLR (Pt.324) at 325.

Also see Order 10 Rule 3 of the High Court Rules of Plateau State which is in agreement with the three alternatives mentioned

above.

The two lower courts ought to have observed that this is a question that could only be resolved on the issue joined on the pleadings and not by adverting attention to pieces of papers as per exhibits A, B, and C and C1 which neither singly nor together can substitute the true binding contract made between the plaintiff and the 2nd defendant in this matter. Clearly, the jurisdiction of the trial court has to be determined based on the said contract. And since the contract is extant it is on it that the jurisdiction of the trial court has to be determined. This is a case where pleadings ought to have been ordered so that these issues can be settled on the pleadings.

My reasoning above again has showed that this claim is not one that can be contemplated under Order 23 of the said Rules. It is therefore wrong to have so marked the said claim “undefended list” and to have so marked it to be heard on the undefended list. Furthermore to hear it and to enter judgment according to the claim.

As regards the third condition for placing a claim on the undefended list ‘it is not being contested as there is a deposition in the affidavit supporting the claim that the defendant has no defence to the claim. The merits of the said deposition is a matter to be canvassed on the pleadings.

In the fullness of discussing this matter under Order 23 Rule 1 (ibid) it is clear that the three conditions that must co-exist before a claim can issue on the undefended list having been so marked are as follows:

“(1) The claim is for a debt or liquidated money demand including account stated.

(ii) An affidavit verifying the grounds upon which the claim is based; and

(iii) A deposition in the said affidavit stating to the effect of the deponent’s belief the defendant has no defence to the action.

In this regard I approve and refer to the case of A.I.B. V. PACKOPLAST (2001) 30 WRN 141 At 142.”

In order not to prejudice the trial on the merits of this matter and in view of the order I intend to make in the same, I should not go beyond examining as I have done above the conditions that have to co-exist for bringing the instant claim on the undefended list.

Accordingly, I find merit in the Appeal. Now faced with the

order to make in the appeal, I am to be guided by the principles as decided in ABODUNDU V. QUEEN (1959) 1 SCNLR 162 as expounded and followed in DURU V. NWOSU (1989) 4 NWLR (Pt.113) 24 and the FIRST BANK OF NIGERIA PLC V. MAY MEDICAL CLINICS (2001) 9 NWLR (Pt.717) 28 at P44 to the effect that there are no sufficient grounds in this suit to enable me come to the conclusion that the instant summary trial is a nullity nor could it be said that there has not been a miscarriage of justice in the matter. In the cited cases retrial of the actions has been resorted to as the better option. And I agree.

In the result, this appeal should be allowed. I allow it, the decisions of the two lower courts are hereby set aside including costs. I think I should order a retrial of the matter by another judge of the Plateau State High Court to be decided by the Chief Judge of the State; furthermore the instant claim be and is hereby transferred to the general cause list for pleadings to be ordered and the matter to proceed from there to conclusion on the merits; and I so order.

I have before now read in draft a copy of the lead judgment of my learned brother Onnoghen JSC and it is for the above reasoning and conclusions I beg to disagree with him that the appeal should be dismissed.

Mindful of providing a level playing ground for both sides I make no order as to costs.

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