

SUPREME COURT OF NIGERIA
7TH DECEMBER, 2012. SC. 11/2007
CORAM:- M. MOHAMMED, M. S. MUNTAKA
COOMASSIE, S. GALADIMA, N. S. NGWUTA,
O. ARIWOOLA, JJSC

1. BONA V. TEXTILE LTD
2. I.O. UZODIKE APPELLANTS
AND
ASABA TEXTILE MILL PLC RESPONDENT

ACTIONS - Undefended list - Commencement - Application for writ of summons for claim for liquidated money demand - Is accompanied by affidavit - Setting out grounds for the claim (H1)

ACTIONS - Undefended list - Ex parte hearing - Court can hear application for such action ex parte - And can enter the suit in the list - Where it is satisfied that there is no defence to plaintiff's claim (H2)

ACTIONS - Undefended list - Defence - Defendant who wishes to defend the action - Must disclose his intention to registrar - With affidavit disclosing defence on merit (H3)

ACTIONS - Undefended list - Leave to defend - Where leave is granted by court - The action is automatically removed from the list - To general cause list (H4)

ACTIONS - Undefended list - Fair hearing - Parties are taken to have been heard - By virtue of affidavits filed - Which are considered by court before deciding to adopt a procedure (H5)

JUDGMENTS - Summary judgment - Meaning - The judgment is granted on a claim or defence - Of which there is no genuine issue of material fact - And upon which the mover can prevail as a matter of law (H6)

APPEALS - Right of appeal - Actions - Undefended list - 1999 Constitution s. 241(2)(a) - No right of appeal exists against order of court

- Transferring suit from the list to general cause list (H7)

ACTIONS - Undefended list - Transfer to general list - Procedure - With order transferring suit to general list - Parties are expected to file their pleadings (H8)

FACTS

Plaintiff/respondent commenced this action against defendants/appellants under the undefended list procedure at the High Court of Delta State, Asaba. Respondent claimed the sum of N5, 562, 875.72 being appellants' indebtedness to respondent and interest rate on the said sum of money. In support of the claim was an affidavit of 19 paragraphs to which various documents were attached and marked Exhibits A to E. Respondent thus argued that appellants have no defence to the action.

However upon being served with the processes, appellants filed their notice of intention to defend the action. Attached to the said notice was an affidavit of 26 paragraphs to which various documents were attached as Exhibits. In its ruling, the trial court having considered all the processes filed, granted appellants leave to defend the action and thereby transferred the suit from the undefended list to the general cause list for hearing and determination. Nevertheless, respondent applied for another summary judgment from the court. The court in its ruling refused the application. Thus, respondent appealed to the Court of Appeal, Benin City. The court allowed the appeal. Aggrieved, appellants appealed to Supreme Court.

ISSUE FOR DETERMINATION

"Whether the Court below was right in allowing the appeal based on an alleged admission of indebtedness by the Appellants to the Respondent in their affidavit in support of their Notice of Intention to defend an action earlier brought under the Undefended List procedure.

HELD (Unanimously allowing the appeal per
ARIWOOLA JSC)

ACTIONS - Undefended list - Commencement

1. In other words, the Procedure under the Undefended List, commences with the plaintiff's application for the issuance of a Writ of Summons for a claim for liquidated money demand which application is to be accompanied by an affidavit setting forth the grounds upon which the claim is predicated and stating that in the belief of the plaintiff or deponent to the affidavit, the defendant does not have any defence to the action.

(p. 3074 H)

ACTIONS - Undefended list - Ex parte hearing

2. It is entirely the duty of the High Court to which the application is made to consider same ex parte without hearing the argument as to whether to hear the matter under the Undefended List or transfer same to the General Cause List to be so dealt with accordingly. Where the court is satisfied, and this is subjective, if I may say so, that there are good grounds for believing that there is actually no defence to the plaintiff's claim, enters the suit for hearing in the Undefended List. The Writ of Summons will then be marked as such and a date for hearing entered thereon. (p. 3075 A)

ACTIONS - Undefended list - Defence

3. Thereafter, the entire processes are to be served on the defendant who if he desires to defend the action, must deliver to the Registrar of the court a Notice in writing of his intention to defend the claim. The Notice must have attached to it, an affidavit disclosing defence on the merit. (p. 3075 C)

ACTIONS - Undefended list - Leave to defend

4. However, after considering the affidavit in support of the defendants' notice of intention to defend the action, the court may on the basis of the facts, disclosed in the affidavit of the defendant, grant leave to defend the action upon such terms as the court may think fit. Where leave to defend is granted by the court, the action is automatically removed from the Undefended List to the General Cause List, bringing an end to the procedure for summary judgment. (p. 3075 D)

ACTIONS - Undefended list - Fair hearing

5. It is note worthy that upon deciding to retain the action on the Undefended List or transfer same to the Ordinary or General Cause List, as a matter of fact, both parties are taken to have been heard by virtue of the affidavits filed along with various annexures, if need be, in compliance with the rules of court which were considered by the court before taking such decision either way. (p. 3075 G)

C Summary judgment - Meaning

6. Summary judgment is a judgment granted on a claim or defence about which there is no genuine issue of material fact and upon which the mover is entitled to prevail as a matter of law. For summary judgment, the court considers the contents of the pleadings, the motions, and additional evidence adduced by the parties to determine whether there is a genuine issue of material fact rather than one of law. This procedural device allows the speedy disposition of a controversy without the need for trial. (p. 3076 F)

Right of appeal - Actions - Undefended list

7. There is indeed no right of appeal against the Order of the trial court which transferred the suit from the Undefended List to the General Cause List, by whatever means or ways. Section 241(2)(a) of the 1999 Constitution (as amended) is very clear on this and it reads thus:

“Nothing in this section shall confer any right of appeal-

(a) From a decision of the Federal High Court or any High court granting unconditional leave to defend an action.”
(p. 3079 D)

H Undefended list - Transfer to general - Procedure

8. With the Order of the trial court transferring the action from the Undefended List to the General Cause List, both parties had been heard on their affidavits evidence before the court. The only option opened to them therefore was to proceed to

file their pleadings. By the order of the trial Judge the defendants had been granted leave to defend the action which can only be done by filing and exchange pleadings. To have proceeded to file yet another application for summary judgment based on the processes earlier filed which had become spent without the order of the trial court, was, to say the least, a way of circumventing the order of transfer and order that the case be heard on pleadings and by calling witnesses. I am therefore with utmost respect to the Justices of the court below, of the view that they were wrong to have held differently. The subsequent application of the Respondent brought pursuant to Order 30 rule 3(1) of the High Court (Civil Procedure) Rules was brought in bad faith and the court below should have so found and held. (p. 3079 F)

REPRESENTATION

Ejike Ezenwa, for the Appellants

C.O. Erundu Esq., for the Respondent

STATUTE & RULES REFERRED TO

Constitution of the Federal Republic of Nigeria 1999 , s.241(2)(a)
High Court of Delta State (Civil procedure) Rules 1988, O.30 rr.1 & 3(1)

BOOK REFERRED TO

Black's Law Dictionary 9th Ed. p.1573

CASES REFERRED TO

Ejikeme v Ibekwe (1997) 7 NWLR (Pt. 514) 592
Efownornu v Ewdok Eter Mandilas Ltd. (1986) 2 NSCC 1184
Aniagolu, JSC, Kotoye v Saraki (1994) 7-8 SCNJ 524
Chrisdon Ind Co. Ltd v AIB Ltd (2002) 8 NWLR (Pt.768) 152
Mosheshe General Merchant Ltd v. Nigeria Steel Productions Ltd.
Ken Frank (Nig) Ltd v UBN Plc (2002) NWLR (Pt.789) 46
Ekulo Farms Ltd.& Anor v Union Bank of Nigeria Plc (2006) 4 SCNJ 164
Dange, Shuni Local Government Council v Stephen Okonkwo (2008) All FWLR (Pt.415) 1757

Mosheshe General Merchant Ltd. v Nigeria Steel Productions Ltd.
(1987) All NLR 309 National Bank of Nigeria Ltd. v Weide & Co.
Nigeria Ltd 8 NWLR (Pt.465) 150

LEAD JUDGMENT BY ARIWOOLA JSC

B The action that finally led to this appeal emanated from the
High Court of Justice of Delta State in the Asaba Division, holden at
Asaba. The action was initiated by the Asaba Textile Mill Plc as Plain-
tiff, hereinafter referred to as the Respondent while the Appellants
C herein were the Defendants at the trial court. The action was com-
menced by a Writ of Summons under the undefended List Proce-
dure. The plaintiff had claimed by the endorsement on its Writ of
Summons as follows:

“(a) *The sum of Five million, five hundred and sixty two*
D *thousand, eight hundred and seventy five naira, seventy two kobo*
(N5,562,875.72) being the defendants’ indebtedness to the plaintiff
which sum the defendants refused to refund despite repeated de-
mands.

E *(b) Interest on the said N5,562,875.72 at the rate of 20%*
until the entire sum is liquidated.”

In support of the claim was an affidavit of 19 paragraphs to
which various documents were attached and marked Exhibits A to E
respectively. By paragraph 17 of the supporting affidavit, the defen-
dants were said to have no defence to the action. But on the 4th day
F of December, 2003 upon being served with the processes, the De-
fendants filed their “Notice of Intention to Defend” the action. At-
tached to the said Notice was an affidavit of 26 paragraphs to which
various documents were attached as Exhibits. In its ruling of the 5th
G of February, 2004, the trial court having considered all the processes
filed, granted the defendants leave to defend the action and thereby
transferred the suit “*from the Undefended List to the General Cause*
List for hearing and determination”

Thereafter, by a Notice of Motion dated 6th February, 2004
H the Respondent sought the following order from the trial court;
“*To enter judgment for the plaintiff for the sum of*
N1,415,050.01 being the amount admitted by the defendants as
their indebtedness to the plaintiff and so found by the court.”

To the Notice of Motion, the Appellants filed a counter affi-

davit of 9 paragraphs. In its considered ruling on the said application, the trial court held inter alia, thus:

“This court having ruled and transferred this case to the General cause List and cannot go back and by whatever means or name or rule try to reopen that which is closed. It would however have been different if pleadings have settled and this issue were to arise out of the pleadings filed as a result of the transfer of this suit to the General Cause List.”

The refusal of the trial court to enter judgment summarily as sought led to an appeal to the court below on two Grounds of appeal as follows, bereft of the particulars:

“(a) Error in Law

The learned trial judge erred in law by refusing to enter judgment on the admissions made by the respondents in their affidavit evidence.

(b) Error in Law

The Learned trial judge erred in law in holding that he was functus officio thereby denying him jurisdiction to consider the appellant’s case”

Before the Court below in the said appeal, the Appellant sought the following relief:

“That the ruling of the High court be set aside and judgment entered on the admitted sum of N1,415,040.01 (One million, four hundred and fifteen thousand, fifty Naira, one kobo) by the Respondents in favour of the Appellant.”

In its considered judgment on pages 73-105 of the record, the court below allowed the appeal and finally held as follows:

“I hold that there was an admission of indebtedness of the Respondents to the Appellants to the tune of N1,415.050.01 and that the trial Judge was wrong in his finding that there was no such admission and therefore resolved the sole issue in favour of the Appellants.”

The Respondents were dissatisfied with the decision of the court below leading to the instant appeal to this court. Upon being served with the record of appeal, parties filed their respective brief of argument and exchanged same accordingly.

On the 9th of October, 2012 when this matter came up for hearing, Mr. Ejike Ezenwa, Counsel for the appellants identified his

brief of argument for the appellants. He sought leave of court to abandon issue No.2 formulated on page 2 of the brief with the arguments on page 17-20 of the brief of argument, excluding the conclusion on that page. He sought not to rely on the said argument any longer. Having been abandoned, the second issue formulated on
 B page 3 and the argument of counsel on the said issue on pages 17 to 20 were accordingly struck out. Learned counsel, thereafter referred to the brief of argument he filed on 10/10/2007 but which was deemed properly filed and served on 17/06/2008. He adopted the
 C said brief of argument and sought to rely on the submissions therein to pray the court to allow the appeal and set aside the decision of the court below. Learned appellants' counsel referred to the Preliminary Objection of the respondent and contended that not having been argued by the Respondent its brief of argument, it was of no mo-
 D ment and should be discountenanced.

Mr. C. O. Erundu of Counsel for the Respondent referred to the Notice of Preliminary Objection he filed on 19th September, 2008 though dated 2nd September, 2008. He also referred to the Respondent's brief of argument which was filed on the same 19/09/
 E 2008 attached to the Notice of Preliminary Objection. He adopted the said brief of argument. He referred to the argument of the Preliminary Objection on the first part of the brief of argument with the second part containing the argument on the appeal. He moved his
 F Preliminary Objection and finally urged the court to uphold the Preliminary Objection and then dismiss the appeal in its entirety.

Before I proceed further to consider the appeal, I have considered the Preliminary Objection raised by the Respondent to the appeal. I found no substance in the said Preliminary Objection and
 G therefore without any further ado, being of no moment and lacking in substance and merit the said Preliminary Objection is overruled and dismissed.

Now to the merit of the appeal. The appellants relied on only one issue for determination distilled as follows:

H *"Whether there was clear and unequivocal admission or indebtedness of the sum of N1,415,050.01 by the appellants to the Respondent and whether the Court of Appeal Justices was (sic) right to have entered judgment for the respondent."*

The Respondent in its own brief of argument also distilled a

sole issue for determination of this appeal. The said issue was couched as follows:

“Whether the court of Appeal was right to allow the respondent’s appeal and grant its application for part judgment on the admission of the Appellants.”

As shown above, it is clear that the sole issue distilled by both the Appellants and the Respondent respectively are the same though couched differently. The issue is:

“Whether the Court below was right in allowing the appeal based on an alleged admission of indebtedness by the Appellants to the Respondent in their affidavit in support of their Notice of Intention to defend an action earlier brought under the Undefended List procedure.”

In arguing this issue, the appellants contended that the court below was wrong in setting aside the ruling of the trial court which dismissed the respondent’s Motion for Part judgment based on alleged admission as there was no admission of any indebtedness by the appellants. They contended further that the court below was in error in entering judgment in favour of the Respondent for the sum of N1,415,050.01. They referred to the background of the case from the filing of Writ of Summons under the undefended List Procedure until the case was transferred to the General Cause List having found that there was need to try the case on pleadings. Learned appellants’ counsel submitted that the Order or decision of the trial court transferring the matter to General Cause List is an order directing parties to file pleadings and an order directing that trial shall be by pleadings and calling of witnesses. The appellants contended that the Respondent did not comply with the order for pleadings to be filed and trial conducted. Instead the Respondent filed a Notice of Motion for Judgment for the sum of N1,415,050.01-claiming same to have been admitted by the Appellants out of the Respondent’s claim of N5,562,875.72 under undefended List, a claim which had been transferred to the General Cause List.

Learned Appellants’ counsel submitted that the appeal by the Respondent to the Court below was an indirect appeal against the order of the trial court which directed trial by pleading. He submitted further that there is no right of appeal against an order of court transferring a suit from the undefended list to the general cause

list. He referred to Section 241(2)(a) of the 1999 Constitution of the Federal Republic of Nigeria and submitted that the learned Justices of the Court below failed to appreciate that the Respondent by failing to file pleadings as ordered by the trial court had consciously circumvented the decision and Order of the trial court and by award-
 B ing judgment to the Respondent based on the Respondent's application for part judgment has tactfully encouraged the violation of the Constitution bar imposed by Section 241(2)(a)(i) of the 1999 Constitution (as amended). Learned counsel referred to the controversial
 C paragraph 18 of the appellant's affidavit support of their Notice of Intention to defend the action. He referred also to the preceding paragraphs 1-17 and the succeeding paragraphs 19-20 of paragraph 18 of the said Affidavit and contended that it is the totality of affidavit in support of the Notice of Intention to defend that will be construed
 D to determine whether or not indeed there was an admission of indebtedness by the appellants.

The appellants referred to the further affidavit filed by the respondent in reply to the affidavit of the Appellants in support of their Notice of Intention to defend the action. They contended that it
 E was in fact the obvious contradictions and facts that made the trial Judge hold that the affidavit evidence has not helped the court in resolving the difference, hence oral evidence should be adduced by both parties upon pleadings. He submitted that that was the reason
 F for the transfer of the suit from the Undefended List to the General Cause List. The Appellants referred to paragraph 5, 6, 7, 8, 9 and 10 of the affidavit in support of the Notice of Intention to defend to the effect that the plaintiff dumped its low quality goods with the defendants to sell. In other words, that the 1st Appellant was merely assist-
 G ing the plaintiff to market low quality or sub-standard goods and contended that there is nowhere in the entire 7 paragraph further affidavit filed by the Respondent that the averments were denied. He submitted that where a material fact in an affidavit is not controverted by the opposing party, then the facts are deemed admitted.
 H He relied on Ejikeme vs. Ibekwe (1997) 7 NWLR (Pt. 514) 592 at 598. Learned counsel referred to Order 30 Rules 1 & 3(1) of the Bendel State of Nigeria High Court (Civil procedure) Rules, 1988 applicable to Delta State and submitted that for an averment or statement to be considered as an admission of fact by the court, it must be

solemn and unequivocal as to the exact details of what is being admitted. Learned counsel submitted further that an admission against interest envisages a conscious act, a direct and unequivocal acceptance of the state of facts put forward by the other party. It must be clear and definite acceptance of facts stated. If there is possibility of doubt or uncertainty or discrepancy, it definitely cannot amount to an admission. The appellants contended that the appellants' affidavit as well as the Respondent's further affidavit obviously raised triable issues in the action which led the trial court to transfer the suit from Undefended list to the general cause list.

The appellants referred to the mutually agreed method of off-setting the balance of the old outstanding in their account, based on the 80:20 formula. They contended that the Respondent breached this agreement, and this is deposed to in their affidavit in support of their intention to defend the action.

The appellants further contended that the fair and just resolution of the issue at stake must necessitate the proper construction of the said 80:20 formula agreement and whether or not the contract has been determined by the act of the Respondent. They submitted that this can only be done by full trial evidence but not on affidavit evidence. Learned appellants' counsel submitted that the court below was duty bound to consider and determine all issues placed before it for determination in order to find out whether there was clear and unequivocal admission. And by failing to consider other paragraphs of the Appellants' affidavit, the court below failed to consider and determine whether paragraph 18 amounts to an admission and that even if it does, whether there was a defence disclosed in support of the notice of intention to defend. They relied on *Efownornu Vs Ewdok Eter Mandilas Ltd.* (1986) 2 NSCC 1184 at 1209 - 1215, per Aniagolu, JSC, *Kotoye Vs Saraki* (1994) 7-8 SCNJ 524 at 560, per Onu, JSC

In the final analysis, the Appellants urged the court to set aside the decision of the court below and to restore the decision of the trial court transferring the matter to the general cause List for hearing and determination.

On this issue as formulated by the Respondent, it was submitted that the Respondent properly invoked the jurisdiction of the trial court to request for part judgment on the admitted sum after the

transfer of the substantive matter to the general cause list. Reliance was placed on *Chrisdon Ind Co. Ltd Vs AIB Ltd (2002) 8 NWLR (Pt.768) 152 at 187*. The rule of court referred to in the said case was impari material with Order 30 Rule 1 of the Bendel State High Court (Civil Procedure) Rules 1988 applicable to Delta State which the Respondent invoked under the general cause List. Learned counsel to the Respondent contended that the trial Judge was not functus officio as the court believed, after having transferred the matter to the General cause list. He submitted that indeed the General cause list gave the trial judge the jurisdiction to entertain the said application. He cited *Mosheshe General Merchant Ltd Vs. Nigeria Steel Productions Ltd. (1987) A; NLR 309 at 319 Per Aniagolu, JSC*. Learned Counsel conceded and submitted that it is settled law that an Order granting unconditional leave to defend or transferring the undefended list to the general cause list is not appealable. He referred to Section 241(2)(a) of the 1999 Constitution (as amended). He however contended that this was not an issue before the two courts below. Learned counsel referred to paragraph 18 of the appellants' affidavit support of the Notice of intention to defend the action of the Respondent at the trial court and submitted that the court below was right to hold that paragraph 18 amounts to a clear and unequivocal admission of indebtedness by the appellants to the respondent. He referred to the 80:20 formula alluded to by the appellants as a mode of repayment but contended that it does not derogate from the admission. He cited *Ken Frank (Nig) Ltd Vs UBN Plc (2002) NWLR (Pt.789) 46 at 73*. He submitted that the court below was right to allow the Respondent's appeal and grant its prayers. He urged the court to dismiss the appeal and affirm the decision of the court below.

As earlier indicated, the Respondent, as Plaintiff commenced the action under the Undefended List Procedure pursuant to Order 23 of the High Court (Civil Procedure) Rules, 1988 of old Bendel State which Rules were applicable to Delta State. The Plaintiff filed a Writ of Summons to which an affidavit of 10 paragraphs was attached with various documents annexed as Exhibits.

In other words, the Procedure under the Undefended List, commences with the plaintiff's application for the issuance of a Writ of Summons for a claim for liquidated money demand which application is to be accompanied by an affida-

vit setting forth the grounds upon which the claim is predicated and stating that in the belief of the plaintiff or deponent to the affidavit, the defendant does not have any defence to the action. It is entirely the duty of the High Court to which the application is made to consider same ex parte without hearing the argument as to whether to hear the matter under the Undefended List or transfer same to the General Cause List to be so dealt with accordingly. Where the court is satisfied, and this is subjective, if I may say so, that there are good grounds for believing that there is actually no defence to the plaintiff's claim, enters the suit for hearing in the Undefended List. The Writ of Summons will then be marked as such and a date for hearing entered thereon. Thereafter, the entire processes are to be served on the defendant who if he desires to defend the action, must deliver to the Registrar of the court a Notice in writing of his intention to defend the claim. The Notice must have attached to it, an affidavit disclosing defence on the merit.

However, after considering the affidavit in support of the defendants' notice of intention to defend the action, the court may on the basis of the facts, disclosed in the affidavit of the defendant, grant leave to defend the action upon such terms as the court may think fit. Where leave to defend is granted by the court, the action is automatically removed from the Undefended List to the General Cause List, bringing an end to the procedure for summary judgment. See Ekulo Farms Ltd. & Anor Vs. Union Bank of Nigeria Plc (2006) 6 SCM 78 at 100; (2006) 4 SCNJ 1641 (2006) All FWLR (Pt.319) 895; Dange, Shuni Local Government Council Vs Stephen Okonkwo (2008) All FWLR (Pt.415) 1757 at 1775.

It is note worthy that upon deciding to retain the action on the Undefended List or transfer same to the Ordinary or General Cause List, as a matter of fact, both parties are taken to have been heard by virtue of the affidavits filed along with various annexures, if need be, in compliance with the rules of court which were considered by the court before taking such decision either way.

In the instant case, after the defendants were served with the

B specially endorsed Writ of Summons of the Plaintiff along with the supporting affidavit and other annexures, indicating that the claim against them was to be heard as Undefended, the defendants filed a Notice of Intention to defend the suit with an affidavit of 26 paragraphs to which couple of documents were attached and marked as Exhibits. The Plaintiff in turn filed a further affidavit in reply. The trial court after considering the processes filed by both parties came to the following conclusion.

C *“The question for my determination is whether the affidavit and exhibits attached to the Notice of Intention to defend disclosed a prima facie defence and not whether the defence will succeed at this stage. I must point out here that the defendant admits in paragraph 18 of the affidavit in support of his application that the balance outstanding in his account is N1,415.050.01 and not N5,562,875.72*
D *which is the claim of the plaintiff. The affidavit evidence has not helped the court in resolving the difference. Oral evidence should be adduced by the plaintiff and the defendant hence the need to transfer the suit from the Undefended List to the General Cause List.*

E *Consequently, the defendant is granted leave to defend this action and this suit is transferred from the Undefended List to the General Cause List for hearing and determination.”*

F There is no doubt, by the Order of the trial court transferring the suit from the Undefended List to the General Cause List, that Order has brought an end to the procedure for summary judgment. See Ekalo Farms Ltd & Anor Vs. Union Bank of Nigeria Plc (supra). **Summary judgment is a judgment granted on a claim or defence about which there is no genuine issue of material fact and upon which the mover is entitled to prevail as a matter of law. For summary judgment, the court considers the contents of the pleadings, the motions, and additional evidence adduced by the parties to determine whether there is a genuine issue of material fact rather than one of law. This procedural device allows the speedy disposition of a controversy without the need for trial.**
G
H See Black’s Law Dictionary, Ninth Edition, page 1573.

It was after the trial court ordered the transfer of the suit from the Undefended List to the General Cause List having been satisfied that there was a good reason from the processes filed by the defendant for the court to believe that there was a prima facie de-

fence to the plaintiff's claim, though not necessarily a valid defence on the merit, that the plaintiff filed a Notice of Motion for an order of the trial court as follows:

"to enter judgment for the plaintiff for the sum of N1,415,050.01 being the amount admitted by the defendants as their indebtedness to the plaintiff and so found by the court" B

It is necessary to point out here that before the trial court took a decision on the defendants' Notice of Intention to defend, the plaintiff filed a further affidavit of 7 paragraphs to the affidavit in support of the Notice of Intention to defend the claim. The facts and affidavit evidence contained therein were considered by the court along with those deposed to in the affidavit of the Defendant. It is noteworthy, that the issue of admission of part of the claim by the defendants was not raised. I am therefore of the view that the trial court can no longer try the same case on the affidavit evidence it had earlier considered and ruled upon to transfer the action from the Undefended List to the General Cause List to give a partial summary judgment to the plaintiff. This is a summary judgment that is limited to certain issues in a case and that disposes of only a portion of the whole case. See Black's Law Dictionary, Ninth Edition, P.1573. As I stated earlier, the transfer of the action to the general cause List from Undefended List has brought an end to the procedure for summary judgment and any application for such is incompetent and should be so dealt with. C D E

After due consideration of the plaintiff's application for judgment, the trial court came to the conclusion, inter alia, as follows:- F

"This court having ruled, and transferred this case to the General Cause List, cannot go back and by whatever means or name or rule try to reopen that which is closed." G

In my respectful view, the trial court was right to have declined jurisdiction or competence and dismissed the application for judgment. It was the dismissal order or the application that led to the appeal to the court below, which held differently. The court below relied on the case of Mosheshe General Merchant Ltd. vs. Nigeria Steel Productions Ltd. (1987) All NLR 309 at 319. Rightly relying on the above, the court below opined that that is the position of the law. And held further as follows: H

"The learned trial Judge having transferred this suit from the

undefended list to the General Cause List, the appellant was at liberty to ask for part payment of the amount claimed in the Summons if there was an admission by the Respondents of indebtedness of part of the sum so claimed.”

However, the situation in the above case is not the same with the case on hand. That case was fought on pleadings. The narrow issue in the appeal was as to the binding nature of a solemn admission made by counsel on behalf of his client, before pleadings were served. The court had ordered parties to file pleadings. The plaintiff filed its statement of claim but this had not been served on the defendant when its counsel admitted on behalf of his client to be owing part of the amount claimed but that a part had also been paid by cheque. The statement of claim filed did not contain the admission and the Statement of defence subsequently filed did not contain the admission. The trial court dismissed the case in its entirety and the court below reversed the decision. On appeal to this court, the court held as follows:

“(1) Where as in the instant appeal, the claim is for a definite sum alleged owed by the defendant, and the defendant admits owing part of this sum, no difficulty should arise in the court entering judgment for the sum admitted leaving the balance to be contested. In such a case, the judgment could be entered upon an oral application to the court provided that the court on its own discretion, may, having regard to the circumstances of the case grant the application and enter judgment there and then, or order the Applicant to formally move the court. Yet the admission in such a case is a solemn declaration of indebtedness of the defendant to the plaintiff in the sum admitted, for the purpose of the remainder of the trial of that action.”

It is interesting to note in the instant appeal, that in the application for judgment by the plaintiff after the suit was transferred to the General Cause List from the Undefended List, the affidavit in which the alleged or purported admission of indebtedness by the Defendant was made was not annexed to the application. Reference was only made to a paragraph 18 of an affidavit which had concluded its own assignment to show that the defendant intended to defend the action.

The application for judgment was said to have been predi-

cated on Order 30 Rule 3(1) & (2) of the High Court (Civil Procedure) Rules but not on Order 23 of the High Court (Civil Procedure) Rules meant for Undefended List Procedure matters. The said Order 30 Rule 3(1) reads thus:

“Where admission of fact are made by a party either by his pleadings or otherwise, any other party may apply to the court for such judgment or order as upon those admissions he may be entitled to without waiting for the judgment or make such order on the application as it thinks fit.”

The court below had agreed with the Respondent that ordinarily there was no right of appeal against the decision of the trial court transferring the suit from the Undefended List to the General cause List, hence the reason for predicating the application for part judgment on a different Rule of Court, - Order 30 Rule 3(1) of the High Court Civil Procedure Rules (Supra).

There is indeed no right of appeal against the Order of the trial court which transferred the suit from the Undefended List to the General Cause List, by whatever means or ways. Section 241(2)(a) of the 1999 Constitution (as amended) is very clear on this and it reads thus:

“Nothing in this section shall confer any right of appeal-

(a) From a decision of the Federal High Court or any High court granting unconditional leave to defend an action.”

With the Order of the trial court transferring the action from the Undefended List to the General Cause List, both parties had been heard on their affidavits evidence before the court. The only option opened to them therefore was to proceed to file their pleadings. See Ekulo Farms & Anor Vs UBN Plc (Supra) at pages 101 and 106. By the order of the trial Judge the defendants had been granted leave to defend the action which can only be done by filing and exchange pleadings. To have proceeded to file yet another application for summary judgment based on the processes earlier filed which had become spent without the order of the trial court, was, to say the least, a way of circumventing the order of transfer and order that the case be heard on pleadings and by calling witnesses. I am therefore with utmost respect to the Justices of the court below, of

the view that they were wrong to have held differently. The subsequent application of the Respondent brought pursuant to Order 30 rule 3(1) of the High Court (Civil Procedure) Rules was brought in bad faith and the court below should have so found and held.

B In the case of National Bank of Nigeria Ltd. vs. Weide & Co. Nigeria Ltd 8 NWLR (Pt.465) 150, the Appellant therein had filed an action at the Lagos High Court claiming monetary reliefs against the Respondents therein, pursuant to the relevant Rules of Court. The Writ of Summons was therefore specially endorsed and had a State-
C ment of Claim attached thereto and served on the 1st -3rd Defendants who thereafter entered an unconditional appearance. The 4th Defendant could not be served with the processes. The Appellant later applied to the trial court for summary judgment pursuant to
D Order 10 rule 1 of the Lagos State High Court (Civil Procedure) Rules, 1972. The Respondents filed their counter-affidavit to oppose the summons for judgment and annexed a Statement of Defence. On the other hand, the 3rd Defendant filed a Motion praying the court to strike out his name from the proceedings. The applications
E were taken together by the trial court which dismissed both applications and granted the Respondent's unconditional leave to defend the action. The appellant was dissatisfied with the Ruling and appealed to the Court of Appeal which dismissed the appeal.

F Upon a further appeal to this court, the court raised suo motu, the issue whether the appellant has a right of appeal to the Court of Appeal from the decision of the High Court and invited counsel to address it. In resolving the issue, the Supreme Court held that the wordings of Section 220(2) of the 1979 Constitution (now Section
G 241(2) of 1999 Constitution (as amended), are very clear, in that the sub-section bars a right of appeal, whether as of right or with leave in two cases listed in paragraphs (a) and (b) and that there is no right of appeal to the Court of Appeal from a decision of any High Court granting unconditional leave to defend an action. In that case, this
H court went further to hold that the decision of the Court of Appeal was a nullity since the appellant had no right of appeal it purportedly exercised. In Ekulo Farm & Anor Vs. U B.N Plc (supra) this court when considering the same Section 220(2)(a) of 1979 Constitution (now Section 241(2)(a) of 1999 Constitution, as amended) held that

the trial Judge was right in proceeding to order pleadings after considering the affidavit evidence before him and coming to the conclusion that the affidavit of the appellant disclosed a defence on the merit and thereby granted him unconditional leave to defend. And that the decision so reached by the trial Judge was by virtue of the provisions of sections 220(2)(a) of the 1989 Constitution not subject to any appeal by either party. B

In the instant case, the court below assumed the jurisdiction it does not have entertaining the appeal of the Respondent. This issue on Section 241(2)(a) of the 1999 Constitution arose from the decisions of the Court below to assume jurisdiction, hence it cannot be said to have been taken suo motu by this court requiring the invitation of Counsel's addresses. In effect, the sole issue whether the court below has right in allowing the appeal based on an alleged admission of indebtedness by the Appellants to the Respondent in their affidavit in support of their Notice of Intention to defend an action earlier brought under the Undefended List Procedure is resolved in favour of the Appellants. The court below was wrong to say the least, and I so hold. C D

In the final analysis, this appeal is meritorious and ought to be allowed. Accordingly, the appeal is allowed. The judgment of the court below delivered on 30th day of May, 2006 is hereby set aside being a nullity. The decision of the trial court in transferring the suit from Undefended List to the General Cause List and granting leave to the defendants to defend the action is restored and affirmed. The suit is hereby remitted to the Chief Judge of Delta State for the matter to be heard on the merit by another Judge of the state. As costs follow events, there shall be costs of N100,000.00 in favour of the appellants against the Respondent. E F G

MOHAMMED JSC

The appeal arose from the decision of the trial High Court of Justice of Delta State Asaba given on 5th February, 2004 in which that Court after considering the Defendants' affidavit in supporting of Notice of intention to defend the suit brought under the undefended list procedure of the Court by the Plaintiff, granted leave and to the Defendants to defend the suit and transferred the suit in accor- H

dance with the rules of the Court to the general cause list for hearing on pleadings. The Plaintiff, without complying with the order of the trial Court in filing pleading, brought an application urging the Court to enter judgment for the Plaintiff the sum of money said to have been admitted by the Defendants in the affidavit in support of Notice
 B of Intention to defend the suit. The application was dismissed by the trial Court and the Plaintiff's appeal to the Court of Appeal Benin against the Ruling of the trial Court was allowed by entering judgment for the plaintiff in the sum said to have been admitted while the
 C balance of the amount claimed under the undefended suit was to be heard on pleadings as ordered by the trial Court. The Defendants who were aggrieved by the decision of the Court of Appeal are now on appeal to this Court.

Although two issues have been raised in the brief of argument
 D filed by the learned Counsel for the Appellants, taking into consideration the surrounding facts and circumstances of this case and appeal which originated from the decision of the trial High Court giving unconditional leave to the Defendants now Appellants to defend the action brought against them under undefended list procedure of the trial High Court by the Plaintiff now Respondent, is
 E whether infact there was a competent appeal before the Court below leading to the judgment of the Court now on appeal. The answer of course lies in the Constitutional provisions of Section 241(1) and
 F (2)(a) of the 1999 Constitution of the Federal Republic of Nigeria which state-

"241(1) An appeal shall lie from decision of the Federal High Court or a High Court to the Court of Appeal as of right in the following cases -

G *(2) Nothing in this Section shall confer any right of appeal (a) from a decision of the Federal High Court granting unconditional leave to defend an action. "*

From the records of this appeal, it is quite plain that the appeal that was brought to the Court of Appeal, was substantially against
 H the decision of the trial High Court granting unconditional leave to the Defendants to defend the action against them now still pending at the Court. Thus, on the plain language of Section 241(2)(a) of the 1999 Constitution of the Federal Republic of Nigeria, the appeal of the Respondent which was heard and determined by the Court of

Appeal, was done without jurisdiction resulting in making that judgment or decision a complete nullity in the absence of the required right of appeal in the Respondent which was the Appellant in the Court of Appeal. See *National Bank of Nigeria Ltd. v. Weide & Co. Nigeria Ltd.* (1996) 8 NWLR (Pt.465) 150 at 167 - 168.

In the result, I entirely agree with my learned brother Ariwoola, JSC in his leading judgment that there is merit in this appeal which ought to be allowed. Accordingly, I also allow this appeal and declare the judgment of the Court of Appeal delivered on 30th May, 2006 in the absence of jurisdiction, a nullity. This development leaves the decision of the trial Court to hear the case between the parties on pleadings firmly on the ground. The case is therefore remitted to the trial High Court for hearing on pleadings by another Judge.

I abide by the order on costs in the leading judgment.

MUNTAKA-COOMASSIE JSC

I was allowed a preview of the judgment delivered by my learned brother Ariwoola JSC. I have seen his reasons and conclusions reached by his lordship I entirely agree with them. The matter was commenced by the plaintiffs as an undefended list procedure before the High Court of Delta State Asaba. The defendant promptly filed a Notice of intention to defend the action with an Affidavit in support. After considering the relevant affidavit and the claims of the plaintiff the trial court ruled that the defendants be allowed to defend the suit. The matter was then transferred to the general cause list for hearing. This is a perfect and lawful order from the trial court. The plaintiffs palpably failed to obey that order and instead brought an application before the same trial High court urging that court to enter judgment in his favour in the sum of money alleged to have been admitted by the defendants in the affidavit in support of the Notice of intention to defend the suit. What a mess.

The application before the trial court was obviously made mala fide and it was dismissed by the same trial court. With all these glaring mis-applications of the legal proceedings the plaintiff appealed to the lower court. The lower court allowed the appeal and entered judgment for the plaintiff in the sum said to be admitted by the de-

pendant. The defendants were aggrieved, as such lodged an appeal to the Supreme Court. The trial court, it should be noted, ruled that the defendants shall defend the action. It is clear that the trial court granted what is called unconditional leave to the defendants to defend the action. No appeal shall lie to the court of Appeal against such decision of the trial court - section 241(2)(a) of the 1999 Constitution as amended. The judgment of the lower court Benin Division against the said constitutional provisions must be a nullity.

The action by the lower court in hearing and determining such an appeal definitely was done in the absence of jurisdiction. The lower court should have declined jurisdiction to entertain the appeal. This is because the plaintiff/Respondent was without “*right of appeal*”. That being the case, I agree with the lead judgment of my learned brother Ariwoola JSC, that the appeal is pregnant with merit, same is allowed by me. I confirm that the judgment of the Court of Appeal Benin Division is, without mincing of words, a nullity. The nullity judgment of the lower court is set aside. The decision of the trial court must, and is hereby restored and affirmed. This particular case is remitted to the Chief Judge of Delta State for hearing as ordered in the first place by the trial court. The trial shall be by another judge.

I endorse the orders as to costs made in the lead judgment by my learned brother Ariwoola JSC.

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GALADIMA JSC

I have had a preview of the judgment of my brother ARIWOOLA JSC. I agree with his reasoning leading to his conclusion allowing the appeal.

G In its considered judgment the court below allowed the appeal and held as follows:

H *“I hold that there was an admission of indebtedness of the respondents to the appellant to the tune of N1,415,050,01 and that the trial Judge was wrong in its finding that there was no such admission and therefore resolved the sole issue in favour of the appellant.”*

The Respondents were aggrieved with this decision and appealed against it to this court. The issue for determination in this appeal is quite narrow. The refusal of the trial court to enter judgment summarily in favour of the Appellant having ruled that the Respon-

dent had a defence to the action in the undefended list led to an appeal in the court below. Having ordered that the case be transferred to the General Cause List, that order has brought the case to an end. See *EKULO FARMS LTD & ANOR v. UNION BANK OF NIGERIA PLC* (2006) 4 SCNJ 164. In other words the trial court can no longer try the same case on the affidavit evidence it had earlier considered and ruled upon to transfer the action from undefended list to the General Cause List to give a partial summary judgment to the plaintiff. There can be no appeal against the order transferring the case to General Cause List. That is the purport of Section 241(1)(a) of the Constitution of the Federal Republic of Nigeria 1999 (as amended).

To have proceeded to file yet another application for summary judgment based on the processes earlier filed which had become spent with the order of the trial court was in my view, an attempt to circumvent the order of transfer earlier made. The application was brought in bad faith and the court below should have so held.

In view of the foregoing and for fuller reasons set out in the lead judgment, I too agree that the lower court was in error to have set aside the ruling of the trial court on the motion filed subsequent to its ruling. In sum, I too allow the appeal and award costs of N100,000 in favour of the Appellants against the Respondent.

NGWUTA JSC

My learned brother, Ariwoola, JSC obliged me with a draft of his lead judgment and having read same before now, I agree with the reasoning and conclusion therein. The narrow issue in this appeal is whether or not the trial Court, having ruled that the then defendant has a defence to the action in the Undefended List and having transferred the case to the General Cause List for hearing and determination, can reopen the case and make any order in respect of part of the claim.

In my view, having made the order of transfer of the case to the General Cause List, the trial Court is *functus officio*. It cannot reopen the matter. Furthermore, there can be no appeal against the order transferring the case to the General Cause List. See S.241(2)(a)

of the Constitution of the Federal Republic of Nigeria 1999 (as amended). The motion to enter judgment in respect of part of the claim in the Undefended List already transferred to the General Cause List is an invitation to review the decision to transfer the matter to the General Cause List. It amounts to asking the trial Court to sit on appeal over its own ruling. It would have been a different matter if the motion for judgment in respect of part of the claim had been brought before, and considered before or simultaneously with the notice of intention to defend the claim.

Based on the above and the fuller reasons in the lead judgment, I agree that the lower Court was in error to have set aside the ruling of the trial Court on the motion filed subsequent to its ruling that the defendants have a defence to the entire claim, not part thereof. I also allow the appeal and abide by the consequential orders in the lead judgment.

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