

SUPREME COURT OF NIGERIA
FRIDAY 22ND FEBRUARY, 2013. SC. 98/2004
CORAM:- C. M. CHUKWUMA-ENEH, J. A. FABIYI,
M. U. PETER-ODILI, O. ARIWOOLA,
K. B. AKA'AH, JJSC

CHIEF S.S. OBARO APPELLANT
AND
ALHAJI SALE HASSAN RESPONDENT

UNDEFENDED SUITS - Writ of summons - Issuance of - Writ initiated cannot be issued by Registrar - Prior to presentation and consideration of the application - For issuance of same by court (H1)

UNDEFENDED SUITS - Rules of court - Purpose - FCT H.C. Rules O. 23 - The aim is for obtaining summary judgment - Without proceeding to trial (H2)

UNDEFENDED SUITS - Writ of summons - Definitive affidavit - Where the writ does not have the required separate affidavit - Defendant cannot be said to have been served (H3)

COURTS - Competence of - Court is competent when inter alia - It is properly constituted - With the subject matter of the case within its jurisdiction - And the case initiated by due process of law (H4)

UNDEFENDED SUITS - Motions - Ex parte application - Even where respondent was in court - When the application was being taken - He cannot be heard (H5)

UNDEFENDED SUITS - Fair hearing - Audi alterem partem - Applicability - The principle has no application - In cases tried under the list - As stated in the Rules (H6)

UNDEFENDED SUITS - Judgment - Merit - Judgment handed down under the list - Is one on merit and can only be set aside on appeal - Or by another action in case of fraud (H7)

UNDEFENDED SUITS - Affidavit - Determination - Cases under the list are decided on affidavit but not on pleadings - But pleadings are ordered after court is satisfied - That defendant has good defence (H8)

FAIR HEARING - Concept of - Hearing can be said to be fair - When both parties are given a hearing - Or an opportunity of a hearing (H9)

FACTS

Plaintiff/appellant commenced this action under the undefended list against defendant/respondent at the High Court of the Federal Capital Territory Abuja, with a motion *ex parte* by which he sought the following reliefs *inter alia*, leave to issue the Writ of Summons in the suit for service out of the jurisdiction of the court, to wit: for service on respondent at 202, Gangare, Jos, Plateau State of Nigeria and a further order that the Writ shall have endorsed thereon. Upon hearing the application, the court granted the prayers sought and thus granted the leave requested by appellant.

Appellant made a claim of professional fees together with interest on the specially endorsed writ of summons. Respondent filed counter affidavit in opposition to the *ex parte* application. Respondent equally filed a preliminary objection to the action. In its ruling, the court refused the prayers sought by respondent and rather proceeded to give judgment pursuant to Order 23 rule 4 of the High Court (Civil Procedure) Rules. Dissatisfied, respondent appealed to the Court of Appeal Abuja Division. The court allowed the appeal. Hence, appellant filed appeal to Supreme Court.

ISSUES FOR DETERMINATION

1. Whether the appellant was not denied fair hearing in the determination of the respondent's appeal by the court below.

2. Whether the Court of Appeal was right in the interpretation it gave, Order 23 Rules 1 and 2 of the High Court (Civil Procedure) Rules of FCT in the determination of the respondent's appeal before it.

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

Writ of summons - Issuance of

1. The judge shall order that a writ of summons be issued by the Registrar and to be marked as “Undefended List” after having taken the application and the court, upon consideration of all the bundle of documents filed, is satisfied that the case is one fit to be brought under the undefended list. In other words, the writ of summons as an originating process under Order 23 of the High Court (Civil Procedure) Rules is a specially and peculiarly endorsed writ of summons. It should be noted that the writ of summons initiated pursuant to this rule and under this procedure cannot be issued by the Registrar prior to the presentation and consideration of the application for issuance of same by the court, otherwise it goes without saying, that such writ of summons which is issued before the court’s order so to do becomes incompetent and shall be liable to be declared a nullity by the court. (p. 503 D)

Rules of court - Purpose

2. It is trite that the purpose of Order 23 of the High Court (Civil Procedure) Rules - under Undefended List procedure is for obtaining summary judgment without proceeding to trial requiring calling of witnesses. The rule is for disposing with dispatch, cases which are virtually uncontested. (p. 505 C)

UNDEFENDED SUITS - Writ of summons - Definitive affidavit

3. In other words, the plaintiff is expected to file a definitive affidavit as evidence on oath separately, verifying the cause of action, the amount being claimed and state clearly that the defendant does not have a defence to the action. Where the writ of summons served on the defendant by the court upon issuance under undefended list procedure does not have the required definitive separate affidavit, the defendant cannot be said to have been served with the required processes. (p. 506 E)

COURTS - Competence of

4. This court has settled the matter and has restated it over and over again, that a court is competent when:

B “(a) it is properly constituted as regards numbers and qualifications of the members of the bench, and no member is disqualified for one reason or another;

(b) the subject matter of the case is within its jurisdiction, and there is no feature in the case which prevents the court from exercising its jurisdiction; and

C (c) the case comes before the court initiated by due process of law, and upon fulfillment of any condition precedent to the exercise of jurisdiction.

D Any defect in competence is fatal, for the proceedings are nullity, however well conducted and decided, because the defect is extrinsic to the adjudication.” (p. 506 G)

Motions - Ex parte application

E 5. It is rather unfortunate that the appellant could contend that the respondent did not file counter affidavit to his affidavit in support of his motion exparte. It is trite that even where the respondent was in court when the exparte application was being taken, he cannot be heard by the court. (p. 511 C)

F Fair hearing - Audi alterem partem - Applicability

G 6. Ordinarily, it is the defendant in an action predicated on Undefended List Procedure that should be complaining of not being given fair hearing. Yet it has been held, that the principles of fair hearing embodied in the maxim audi alterem partem have no application in cases tried under the Undefended List. The reason is clearly stated in the rules. (p. 511 F)

Judgment - Merit

H 7. A judgment handed down under the Undefended List is certainly one on the merits and can only be set aside on appeal or by yet another action in the case of allegation of fraud. (p. 511 H)

UNDEFENDED SUITS - Affidavit - Determination

8. It is trite law that cases tried pursuant to Undefended List are decided entirely on affidavit evidence but not on pleadings. Pleadings are to be ordered after the court is satisfied that by his affidavit in support of his notice of intention to defend the action, the defendant has shown that indeed he has a good defence in reaction or response to the facts in support, of the plaintiff's claim. (p. 512 A) B

FAIR HEARING - Concept of

9. On the complaint of the appellant on being denied fair hearing, he says his brief of argument was not considered at all by the court below. Indeed, a hearing can only be fair or said to be fair when both parties to the dispute are given a hearing or an opportunity of a hearing, that is, fair hearing does not necessarily mean oral hearing. If one of the parties is refused or denied a hearing or not given an opportunity to be heard, the hearing cannot be qualified as fair hearing. Therefore, when the parties in an appeal are not heard or given an opportunity of being heard in the appeal, the hearing by the Court of Appeal cannot be said to be fair. (p. 512 C) C
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NOTABLE POINTS OF INTEREST

ARIWOOLA JSC

1. Court can reformulate issues for clarity sake

Generally, it is settled that the main purpose of the formulation of issues for determination is to enable the parties to narrow down the issue or issues in controversy in the grounds of appeal filed. This is in the interest of accuracy, clarity and brevity. The court is therefore at liberty to reformulate the issues for determination in order to give it precision and clarity and achieve substantial justice in the resolution of the matter in controversy. (p. 501 E) F

2. Summary judgment – Requirements for

However, for the Rules on Undefended List procedure to successfully apply and enable the court to proceed to summary judgment, the following preliminary requirements must exist. H

(i) The defendant must not only have been served with the required processes, he must also have entered appearance.

(ii) A claim must have been indorsed on, or attached to the writ of summons served upon the defendant.

(iii) There must be a definitive affidavit (which is evidence on oath) verifying the cause of action and the amount claimed and also that the defendant has no defence to the action.

(iv) The defendant must not have filed a defence to the action. (p. 505 D)

C REPRESENTATION

Chief S.S. Obaro, for the Appellant

Prince Orji Nwafor-Orizu, with S.N. Anichebe, Esq; U.C. Ndubusi Esq; Esther Abbey-Ollo (Mrs), Ugo Chukwu Ife Akandu Esq., for the

D Respondent

CASES REFERRED TO

Musa Sha (Jnr.) V. DaRap Kwam (2000) 8 NWLR (pt. 670) 685

Unity Bank Plc V. Bonari (2008) 2 SCM 193

E Yadis Nig. Ltd. V. Great Nig. Insurance Company Ltd. (2007) 10 SCM 183

Cash Affairs Finance Ltd. V. Inland Bank (Nig) Plc (2000) 5 NWLR (pt. 658) 568

Idris V. Archibong (2001) 9 NWLR (pt. 718) 447

F Bayero V. Mainasara & Sons Ltd. (2006) 8 NWLR (pt. 982) 391

Madukolu V. Nkemdilim (1962) 1 All NLR 587

Mark V. Eke (1997) 11 NWLR (pt. 527) 501

SLB Consortium Ltd. V. NNPC (2011) 9 NWLR (pt. 317)

G Nwakanma V. Ikot L. G. Authority (1996) 3 NWLR (pt. 439)

Agueze V. Pan African Bank (1992) 4 NWLR (pt. 233) 76

U.T.C Nig Ltd. V. Pamotei (1989) 3 SCNJ 79/124

Otapo V. Sunmonu (1987) NWLR (pt. 58) 587

H STATUTES & RULES REFERRED TO

High Court of FCT (Civil Procedure) Rules, O. 5 r. 14, O. 12 r. 5(b), O. 23 r. 1

Sheriffs & Civil Process Act Cap 407 LFN 1990, s. 97

LEAD JUDGMENT BY ARIWOOLA JSC

This is an appeal against the decision of the Court of Appeal, Abuja Division, herein after called, Court below, delivered on May 2nd, 2003. The appellant was the plaintiff while the respondent was the defendant before the trial court. The court below had allowed the respondent's appeal against the decision of the trial court. The facts of the case that led to this appeal are as follows:

The appellant had commenced an action before the High Court of the Federal Capital Territory, holden at Abuja with a motion exparte by which he sought the following reliefs:

"1. Granting plaintiff/applicant leave to issue the Writ of Summons in this suit for service out of the jurisdiction of this court, to wit: for service on the defendant at 202, Gangare, Jos, Plateau State of Nigeria, and a further order that the Writ shall have endorsed thereon: THIS SUMMONS IS TO BE SERVED OUT OF THE FEDERAL CAPITAL TERRITORY, ABUJA AND IN PLATEAU STATE."

2. Entering this suit for hearing in the "Undefended List" and marking the Writ of Summons, and entering thereon a date for hearing accordingly.

3. Deeming the Writ of Summons filed with this application as having been properly and regularly filed the requisite filing fees in respect thereof having been duly and fully paid.

4. Granting leave for service of the Writ of Summons and all other processes in this suit on the defendant through his present counsel/agent, Prince Orji Nwafor - Orizu of suite 68, Cornerships, Area 7A, behind Cultural Centre, Garki, Abuja and such service to be deemed proper service on the defendant.

And for such further or other order(s) as to this Honourable Court may deem fit and just having regard to all the circumstances of this case"

In support of the application exparte was an affidavit of 22 paragraphs. Attached to the affidavit are documents marked Exhibits SS01, SS02, SS03, SS04 and SS05 respectively. On page 12 of the record of appeal is a specially endorsed writ of summons dated 15/5/ 2000 and signed on the same date. Endorsed on the top of the said writ of summons is the following:

"THIS WRIT IS FOR SERVICE OUT OF THE JURISDICTION OF THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY,

ABUJA AND IN PLATEAU STATE, NIGERIA PURSUANT TO COURT ORDER DATED 23RD DAY OF MAY, 2000. ”

On 23rd May, 2000 the appellant had moved his *ex parte* application under Order 5 rule 14, Order 23 rule 1 and Order 12 rule 5(b) of the High Court (Civil Procedure) Rules and under section 97 of Sheriffs and Civil Process Act, Cap 407, Laws of the Federation of Nigeria, 1990.

Upon hearing the application, the trial High Court granted the prayers sought in the following terms enrolled on page 16 of the record.

“The application is *HEREBY GRANTED* as prayed. Leave is *HEREBY GRANTED* to the plaintiff/applicant to issue and serve the defendant with the writ of summons and all other court processes in Plateau State an area outside the jurisdiction of this Honourable Court.

The Writ of Summons is also marked under undefended List. Leave is granted to the plaintiff/applicant to serve the writ of summons and other court processes on the defendant through his counsel/agent “Prince Orji Nwafor - Orizu and this service shall be deemed proper service on the defendant. Case adjourned to 10th July, 2000 for hearing. Given under the hand and seal of the honourable High Court Judge dated this 23rd day of May, 2000.”

The appellant had claimed on the specially endorsed Writ of summons against the Respondent as follows:

“The Plaintiff’s claim against the defendant is for N5, 770,875.00 being professional fees together with interest thereon up to 15th May, 2000 and interest thereon thereafter.

PARTICULARS OF CLAIMS

1(i) Settlement of Bill of Professional charge dated 31/1/97 and served on the defendant on the same date for professional legal services rendered to Defendant at his request by plaintiff as counsel in Suit No. FCT/HC/CV/566/97 Alhaji Sale Hassan V. Alhaji Jibrila Jauro at the Federal Capital Territory High Court, Abuja between 1994 and 1997..... N2,805,000.00.

(ii) Interest thereon at the rate of 21% per annum effective from 1st March, 1997 up to 15th May, 2000..... N2, 865,325.00

2(i) Settlement of Bill of Professional charges dated 18th November, 1999 and served on the defendant on 20th November, 1999 for professional legal services rendered to defendant at his request as

counsel in connection with Appeal No. CA/A/25/99: Alhaji Sate Hassan V. Alhaji Jibrilla Jauro, at the Court of Appeal, Abuja between 1997 and until defendant purportedly terminated Plaintiff's retainer in November 1999 ... N1, 012,000.00.

(ii) Interest thereon at the rate of 21% per annum effective from 20th December, 1999 up to 15th May, 2000 N88, 550.00 B N5,220,825.00

3. Interest at the rate of 21% per annum on the total outstanding claims at 15th May, 2000 until judgment is given in this suit and thereafter at the rate of 10% on the judgment debt and costs until the same is fully paid and satisfied." C

Sometime on 31st May, 2000, the defendant had filed a motion on notice seeking from court the following:

"1. Order of Court striking out the writ of summons served on the plaintiff marked "Undefended List" for being irregular and incompetent as there is no affidavit verifying the facts to be tried as "Undefended List".

2. Order of the court dismissing or striking out the suit for non-compliance with the conditions precedent for filing of an action for recovery of professional fees by a legal practitioner under the Legal Practitioner's Act. E

3. Any such further or other orders as this Honourable court will deem fit to make in the circumstances."

The application was supported by an affidavit of 12 paragraphs. F In opposing the application, the respondent filed a counter affidavit of 7 paragraphs on 10th July, 2000. On the return date of 10th July, 2000 when the matter came up for hearing, the respondent drew the attention of the court to his preliminary objection earlier referred to in this judgment. Notwithstanding the initial objection to the hearing of the respondent's application, the trial court took the application and adjourned for ruling on 24/07/2000. G

In its ruling, the trial court refused the prayers sought by the respondent and proceeded to give judgment pursuant to Order 23 rule 4, High Court (Civil Procedure) Rules. The trial judge held as H follows:

"This case was placed under the undefended Cause List. Instead of filing their (sic) Notice of Intention to defend before the return date which was fixed for 10/1/2000 (sic) the learned counsel for

the defendant filed a Motion on Notice seeking court to strike out and or dismiss the case for being incompetent. The Court has ruled against the motion hence the court is left with no alternative than to rely under (sic) Order 23 Rules 4 by giving judgment in favour of the plaintiff as the case has not been removed out of the Undefended Cause List. The judgment is therefore hereby entered in favour of the plaintiff as per his claim against him.

The endorsed claim No. 1 and 2 are hereby granted with 10% interest from 20/12/99 to 15/5/2000 and at 10% from today till the amount is finally liquidated."

The respondent on 3rd August, 2000 filed a Notice of Appeal of six grounds against the decision of the trial High Court delivered on 24/7/2000. The judgment of the Court below, Abuja Division on the appeal delivered on 2/5/2003 which allowed the appeal, led to the instant appeal, by the appellant who was the plaintiff before the trial Court. Pursuant to the relevant rules of this court, briefs of argument were filed and exchanged.

On the 4th of December, 2012 when the matter came up for hearing, both counsel identified their briefs, adopted and sought to rely on their respective brief of argument. In the appellant's brief of argument filed on 1st June, 2004, four (4) issues were distilled from the six grounds of appeal earlier filed. The said issues are: Issues for Determination

1. Whether the Court below had jurisdiction to consider and determine the correctness or otherwise of the

Rulings of the learned trial Judge dated 23/5/2000 and 24/7/2000 and using the Affidavits which were used in these Rulings when there was no appeal against those Rulings and thereafter basing its judgment solely on the outcome of that consideration.

2. Whether the appellant herein had a fair hearing in the court below. And if not, whether that failure occasioned a miscarriage of justice to the appellant.

3. Whether the Court below was right in holding that under Order 23 Rule 1 of the Federal Capital Territory, Abuja High Court Rules, an applicant praying that his Writ of Summons be placed in the Undefended List must (apart from, or in addition to, the affidavit in support of the (exparte) application setting out the grounds of his application and stating that in his belief, the defendant has no de-

fence also file “a separate affidavit verifying his cause of action” and that failure to file that separate verifying affidavit would render the suit incompetent.

4. Whether the Court below was right in striking out the appellant’s suit in the circumstances of this case and having regard to the provisions of Order 23 Rules 3 and 4 of the FCT High Court (Civil Procedure) Rules. B

The respondent in his brief of argument filed on 3rd August, 2004 also formulated two issues for determination as follows:

“(i) whether the conclusion of the court below that the Writ as irregularly commenced under the undefended list procedure is correct.” C

“(ii) if the answer to issue one that the procedure was incorrect whether reference or non reference to other matters in the judgment occasioned miscarriage of justice in the case.” D

I have examined the issues formulated for determination of the appeal by both parties, in particular, by the appellant. The issues as couched by the appellant appear clumsy and unclear, in particular, issues 1 and 3.

Generally, it is settled that the main purpose of the formulation of issues for determination is to enable the parties to narrow down the issue or issues in controversy in the grounds of appeal filed. This is in the interest of accuracy, clarity and brevity. The court is therefore at liberty to reformulate the issues for determination in order to give it precision and clarity and achieve substantial justice in the resolution of the matter in controversy. See Musa Sha (Jnr.) & Anor V. DaRap Kwam & Ors. (2000) 8 NWLR (pt. 670) 685, (2000) 2 NSCQR 802, (2000) LPELR 3031; Unity Bank Plc & Anor V. Bonari (2008) 2 SCM 193; Yadis Nig. Ltd. V. Great Nig. Insurance Company Ltd. (2007) 10 SCM 183. E
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I shall therefore reformulate the issues for determination in this appeal from the grounds of Appeal filed by the Appellant as follows:

1. Whether the appellant was not denied fair hearing in the determination of the respondent’s appeal by the court below (Grounds 1, 2 and 3). H

2. Whether the Court of Appeal was right in the interpretation it gave, Order 23 Rules 1 and 2 of the High Court (Civil Procedure) Rules of FCT in the determination of the respondent’s appeal before

it. (Grounds 4, 5 and 6).

As earlier indicated, the appellant had commenced this action before the trial High Court under the undefended list procedure, pursuant to Order 23 of the High Court of the Federal Capital Territory, Abuja (Civil Procedure) Rules then applicable, but now Order B 21 of 2004 which rule provides thus:

“1. Whenever application is made to a court for the issue of a writ of summons in respect of a claim to recover a debt, liquidated money demand or any other claim and the application is supported by an affidavit setting forth the grounds upon which the claim is based and stating that in the deponent’s belief, there is no defence thereto, the court shall, if satisfied that there are good grounds for believing that there is no defence thereto, enter the suit for hearing, on what shall be called the “Undefended list” and mark the writ of summons accordingly and enter thereon a date for hearing suitable to the circumstances of the particular case.

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

3(i) If the party served with the writ of summons and affidavit delivers to the registrar, not less than five days before the day fixed for hearing, a notice in writing that he intends to defend the suit, together with an affidavit disclosing a defence on the merit, the court may give him leave to defend upon such terms as the court may think just.

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

4. Where any defendant neglects to deliver the notice of defence and affidavit prescribed by rule 3(i) of this order or is given leave to defend by the court, the suit shall be heard as undefended suit and judgment given thereon without calling on the plaintiff to summon witnesses before the court to prove his case formally.

5. Nothing herein shall preclude the court from hearing or requiring oral evidence should it so think fit, at any stage of the pro-

ceedings under rule (4) of this Order.”

I shall take and deal with the second issue above first on the way the court below handled the appellant’s case and the interpretation it gave to Order 23 rules 1 and 2 of the FCT High Court (Civil Procedure) Rules earlier quoted above.

As earlier noted, the appellant’s action was commenced under a special procedure known as “Undefended List Procedure”. By this procedure, generally the action is commenced by an application by the plaintiff for issuance of a writ of summons by the Registrar of the High Court concerned. The application is usually made *ex parte*, though it could be by ordinary application, whereby the other party is not to be involved at that stage of the proceedings. The application is to be supported by an affidavit to which the proposed claim against the defendant must be attached with any other documents considered relevant and available to the applicant as exhibits.

The judge shall order that a writ of summons be issued by the Registrar and to be marked as “Undefended List” after having taken the application and the court, upon consideration of all the bundle of documents filed, is satisfied that the case is one fit to be brought under the undefended list. In other words, the writ of summons as an originating process under Order 23 of the High Court (Civil Procedure) Rules is a specially and peculiarly endorsed writ of summons. It should be noted that the writ of summons initiated pursuant to this rule and under this procedure cannot be issued by the Registrar prior to the presentation and consideration of the application for issuance of same by the court, otherwise it goes without saying, that such writ of summons which is issued before the court’s order so to do becomes incompetent and shall be liable to be declared a nullity by the court. See; Cash Affairs Finance Ltd. V. Inland Bank (Nig) Plc (2000) 5 NWLR (pt 658) 568 at 587, Idris V. Archibong (2001) 9 NWLR (Pt.718) 447 at 457 and 459, Equity Bank of Nigeria Ltd. V. Halilco Nigeria Ltd. (2006) 7 NWLR (pt 980) 568; Bayero V. Mainasara & Sons Ltd. (2006) 8 NWLR (Pt.982) 391 at 425; (2006) 36 WRN 136.

In the instant case, a careful perusal of all the processes filed shows that the appellant’s application for leave of the court to issue the writ of summons in the suit by the trial court was filed on 15th

May, 2000. The said application, being an *ex parte* application which does not require the defendant/respondent's presence, was taken by the court on 23rd May, 2000. This is clearly shown in the order on pages 15 - 16 of the record. It is noteworthy that the writ of summons had been issued by the Registrar on 15th May, 2000 before the court so ordered. This is apparent on page 14 of the record and would have rendered the writ of summons improperly issued and thereby incompetent. Ordinarily, the writ of summons had not been properly issued and being an originating process it affects the competence of the trial court in the first place.

However, this point had never been taken up by the Respondent before the two courts below and not even before us now. Worthy of note is that the instant appeal is by the plaintiff who caused the said writ of summons to be issued and served. Neither the trial court nor the court below raised it as they are entitled to do, even when it was not raised by the defendant/respondent. I shall come back to this anon.

Perhaps my Lords, I must say it here clearly that the respondent did not even directly complain that the Writ of Summons was not properly issued nor that he was not served with the appellant's writ of summons. His grouse is that the said writ of summons was not accompanied with a verifying affidavit upon which he would have based his defence, if he had any.

Indeed, the respondent admitted that he was served with the writ of summons, copy of the motion *ex parte* and the enrolled order of court. In its judgment, the court below had found as follows:

"...the plaintiff in his counter affidavit did not depose that he filed any affidavit as a separate process "setting forth the grounds upon which the claim is based and stating that in the deponent's belief, there is no defence thereto....." as provided under Order 23 rule 1 of the FCT, Abuja High Court Rules."

Still in the judgment of the court below, it was opined as follows:

"Although the affidavit filed in support of the ex parte application contained the substance and material needed as a verifying affidavit, it is not in accordance with the Rules of Court to convert an ex parte affidavit used for obtaining leave to place a writ on the undefended list as an affidavit verifying the cause of action... the attempt

made by the plaintiff was to use his affidavit in support of the motion ex parte to serve a dual purpose. He wanted to use the same affidavit as the one postulated under Order 23 rule 1 of the FCT High Court Rules."

There is no doubt that the appellant did not file a separate affidavit in support of the writ of summons after the writ was ordered to be issued and became issued. At least there is nothing on record to so indicate. The said affidavit referred to in Order 23 rule 2 as "the above-mentioned affidavit" is no doubt the same affidavit containing the same facts setting forth the grounds upon which the plaintiff's claim is based. And as required, the registrar is to annex a copy of the said affidavit to the writ of summons for service on the defendant upon issuance of the said Writ pursuant to the court's Order to do so.

It is trite that the purpose of Order 23 of the High Court (Civil Procedure) Rules - under Undefended List procedure is for obtaining summary judgment without proceeding to trial requiring calling of witnesses. The rule is for disposing with dispatch, cases which are virtually uncontested.

However, for the Rules on Undefended List procedure to successfully apply and enable the court to proceed to summary judgment, the following preliminary requirements must exist.

(i) The defendant must not only have been served with the required processes, he must also have entered appearance.

(ii) A claim must have been indorsed on, or attached to the writ of summons served upon the defendant.

(iii) There must be a definitive affidavit (which is evidence on oath) verifying the cause of action and the amount claimed and also that the defendant has no defence to the action.

(iv) The defendant must not have filed a defence to the action. See Chief Harold Sodipo V. Lemnin Kainen Oy & Anor (No. 2) (1986) 1 NWLR (pt 15) 220 at 230-231, per Eso, JSC.

On the action initiated pursuant to the Rules on Undefended List Procedure, this Court had opined as follows - per Eso, JSC at page 231 of Chief Harold Sodipo V. Lemnin Kainen (supra)

"An action in the undefended list, following these Rules, is not a real substitute to trial of actions, but it serves the purpose of reducing congestion in the courts, by way of creating an avenue for the speedy determination of actions. If a defendant is served with a writ

and a statement of claim, and he enters an appearance to the action, having read the affidavit that he has no defence, he cannot be seen to complain after, that he has not had a fair trial."

There is no doubt the procedure under undefended list Rules is a bit technical and must be understood properly to be of benefit to parties employing it and the court. As clearly shown in the Rules, an application being made to court for issuance of a writ of summons is to be accompanied with a supporting affidavit and other necessary and relevant documents to be considered by the court to make a firm decision, before the adversary is brought in, whether or not the action is fit for trial under the undefended list. Yet, after the court is convinced that with the facts disclosed in the endorsed claim, the affidavit and if any, the documents attached as exhibits, a writ is ordered to be issued by the Registrar, there shall then be delivered by the plaintiff to the Registrar upon the issue of the writ of summons as stated in rule 1 of Order 23, as many copies of the said affidavit as there are parties against whom relief is sought, and the Registrar shall then annex one such copy of the affidavit to each copy of the writ of summons for service on the defendant(s). See; Order 23 rule 2 (*supra*).

In other words, the plaintiff is expected to file a definitive affidavit as evidence on oath separately, verifying the cause of action, the amount being claimed and state clearly that the defendant does not have a defence to the action. Where the writ of summons served on the defendant by the court upon issuance under undefended list procedure does not have the required definitive separate affidavit, the defendant cannot be said to have been served with the required processes.

My Lords, one may then ask, will the trial court be competent to adjudicate on such matter when all the required processes were not served on the defendant? When then does a court become competent to assume jurisdiction to adjudicate over a matter?

This court has settled the matter and has restated it over and over again, that a court is competent when:

"(a) it is properly constituted as regards numbers and qualifications of the members of the bench, and no member is disqualified for one reason or another;

(b) the subject matter of the case is within its jurisdic-

tion, and there is no feature in the case which prevents the court from exercising its jurisdiction; and

(c) the case comes before the court initiated by due process of law, and upon fulfillment of any condition precedent to the exercise of jurisdiction.

Any defect in competence is fatal, for the proceedings are nullity, however well conducted and decided, because the defect is extrinsic to the adjudication.” See Gabriel Madukolu & Ors. V. Johnson Nkemdilim (1962) 1 All NLR 587; (1962) 2 SCNLR 341; (1962) 2 NSCC 374, Mark V. Eke (1997) 11 NWLR (pt 527) 501, SLB Consortium Ltd. V. Nigerian National Petroleum Corporation (2011) 9 NWLR (pt) 317, (2011) 5 SCM 187.

From the records, it is clear that the appellant did not file the required definitive affidavit separately in support of the writ of summons setting forth, the grounds upon which the claim is based and stating that in the deponent’s belief, there is no defence thereto. This is a condition precedent to enable the court, on the return date, proceed to judgment, in the absence of the defendant’s defence properly filed before the return date.

Indeed, the appellant admitted in a way, that he did not file a separate affidavit in support of the writ in his personally deposed counter affidavit to the respondent’s application which sought an order of court striking out the said writ. In paragraph 3, the appellant stated those documents that were served on the respondent as follows:

“That in answer to paragraphs 2 and 3 of the said affidavit in support of this motion, the documents served on the defendant/applicant herein somewhere in the second half of May 2000 by the bailiff of this honourable court were (i) My specially endorsed writ of summons marked by this court “Un defended List”: Return date 10/7/2000, (ii) My motion exparte dated 15/5/2000 together with the supporting affidavit and exhibits SS01, SS02, SS03, SS04 and SS05 attached hereto and (iii) the Enrolment of Order of this court dated 23/5/2000 granting all the prayers in my motion exparte aforesaid.”

The court below had found on page 73 of the record as follows:

“It is note worthy that the plaintiff in his counter affidavit did not depose that he filed any affidavit as a separate process “setting

forth the grounds upon which the claim is based and stating that in the deponent's belief, there is no defence..." as provided under Order 23 rule 1 of the FCT Abuja High Court Rules. Although the affidavit filed in support of the *exparte* application contained the substance and material needed as a verifying affidavit, it is not in accordance with the Rules of court to convert an *exparte* affidavit used for obtaining leave to place a writ on the undefended list as an affidavit verifying the cause of action."

The court below went further on page 74 of the record to hold as follows:

"...the affidavit filed in support of the Motion *exparte* was not one to which the defendant could react under Order 23 rule 1 above. The said affidavit in support of the motion *exparte* was only for use as between the plaintiff and the court and its life was terminated when the lower court used it for the only purpose for which it was filed. It could not be expected that the defendant would file an affidavit disclosing a defence on the merits in reaction to an affidavit *exparte* which life had expired..... the plaintiff had irregularly commenced his writ. To allow the writ to stand when it had no verifying affidavit would occasion grave injustice to the defendant as the defendant was precluded thereby from meeting plaintiffs claim in accordance with the rules."

In his brief of argument, the appellant after referring to the procedure he employed in commencing his action before the trial court, quoted the learned justices of the court below on his failure to file a separate affidavit in support of the writ of summons. Learned Counsel referred to the way the court below set out the provisions of Order 23 of the FCT High Court (Civil Procedure) Rules and contended that reading through it, he could not see anything to suggest that an applicant/plaintiff under that rule must file a separate affidavit verifying his cause of action apart from the affidavit in support of his *exparte* application under Order 23 rule 1.

He contended further that Order 23 rule 2 makes it clear that it is the same affidavit in support of the *exparte* application that must be delivered in sufficient numbers.

There is no doubt, the appellant who incidentally is a counsel himself has, to say the least, misconceived the Rules under reference. Curiously, the appellant had also contended that Order 23 rule 1

does not say whether the writ shall be issued before or after the court's order. Indeed, this is not only a misconception but misleading, to say the least. As earlier stated in this judgment the issuance of writ of summons pursuant to Order 23 under undefended list procedure cannot precede the order of court so to do. In other words, contrary to the misconception of the appellant even though the writ of summons is issued by the Registrar, he cannot issue one before the court so orders. It is a judicial function that cannot be delegated to an officer. See *Nwakanma V. Ikot Local Govt. Authority* (1996) 3 NWLR (pt 439) 732. Such a Writ of Summons that was issued before judicial decision so to do, upon consideration of an application become incompetent and will ordinarily rob the trial court of its competence to try the matter. It is like a Notice of Appeal, which requires leave before being filed, to be filed without leave of court; it shall be incompetent and be so declared by the court as a nullity. *Mohammed D v. Olawunmi & Ors.* (1990) 2 NWLR (pt 133) 458. Writ of Summons therefore being an originating process must be initiated properly to enable the court assume jurisdiction over the matter.

As shown above, the issue on the time to issue a writ was raised by the appellant himself but was not directly determined by the court below. In other words, in a case initiated pursuant to the relevant Rules on "Undefended List", due process of law and fulfillment of condition precedent to the exercise of jurisdiction will include the properly issued writ of summons and filing of a 'definitive' affidavit verifying the plaintiff's cause of action. Where this is not done or not shown to have been done, the case cannot be said to have been initiated by due process of law and a condition precedent could not have been said to be fulfilled to enable the trial court proceed to adjudicate on the matter.

I am therefore not in the slightest doubt that the court below was right to have held that failure of the appellant to file a separate affidavit verifying the cause of his action robbed the trial court of competence. This issue is resolved against the appellant.

On the other issue, whether the appellant was not denied fair hearing by the court below, the learned appellant contended that the court below failed to consider the issues raised in argument as respondent before it on the necessity to file a separate verifying affidavit. He contended further that the issue was well canvassed in his

paragraphs 3.05 and 3.06 of the respondent's brief of argument in particular, page 62 of the record.

In his said brief of argument in paragraph 3.05 he states, inter alia, as follows:

B *"It is quite clear from the facts of this case that the appellant did not file any affidavit in opposition to respondent's deposition in his affidavit in support of the application to have the Writ of Summons in this suit placed in the Undefended List. The appellant seems to have lost sight of the fact that this appeal is against the Judgment delivered by the learned trial Judge of the High Court of the Federal Capital Territory, Abuja dated 24th day of July, 2000 NOT against the Ruling dismissing or refusing his application to have the suit dismissed/struck out for lack of jurisdiction. See; The Notice of Appeal and paragraph 1.02 of the Appellant's brief... After the disposal of that Application, the only live documents before the court were the Writ of Summons and the Supporting affidavit. There was no counter affidavit to that affidavit..."*

E *There can therefore be no doubt that the learned trial Judge, was right in relying on the respondent's affidavit in support of the Summons to give him judgment."*

F As shown above, the appellant has referred to his writ of summons as having been filed and served along with an affidavit supporting same. This stance and contention of the appellant is also embarrassingly misleading, to say the least, bearing in mind the fact that the appellant himself is a Legal Practitioner of very many years standing having been called to the Nigerian Bar in July, 1968, as deposed in his affidavit. He was expected to know better.

G On pages 1-4 of the record is the Motion Exparte with which this action was initiated before the trial High court. In support of the Motion was an affidavit headed - "AFFIDAVIT IN SUPPORT OF EXPARTE APPLICATION". As earlier stated, in a counter affidavit personally deposed to by the appellant, he had referred to the three documents that were served on the respondent as follows:

H (i) Specially endorsed Writ of Summons marked by the court "Undefended List". Return date 10/7/2000.

(ii) Motion Ex-parte dated 15/5/2000 together with the supporting affidavit and Exhibits SS01, SS02, SS03, SS04 and SS05 attached thereto, and

(iii) The Enrolment of Order of this court dated 25/5/2000 granting all the prayers in the Motion Ex-parte.

There is no doubt that there was no definitive and separate affidavit filed in support of the writ of summons and none was served on the respondent. The Motion Exparte and the supporting affidavit had been dealt with to grant leave to issue the writ of summons and mark same as Undefended. The particular supporting affidavit no longer has life. It had become spent. It was meant, or made to accompany the writ of summons with the Enrolled order to show that the leave was sought and granted to issue the writ of summons. The same affidavit that supported the application cannot be used, as headed, to support the writ of summons as a verifying affidavit. A separate affidavit was required.

It is rather unfortunate that the appellant could contend that the respondent did not file counter affidavit to his affidavit in support of his motion exparte. It is trite that even where the respondent was in court when the exparte application was being taken, he cannot be heard by the court.

The appellant has argued that the court below did not consider the argument of the appellant, as respondent in the court below, on any of the issues raised. The appellant contended that a reasonable person who has read his brief of argument before the court below as respondent and the judgment of the court will come away with the impression that the appellant's case was not given any consideration at all, not to talk of fair consideration by the lower court. He submitted that there was violation of his fundamental right to fair hearing which has led to a miscarriage of justice against him.

Ordinarily, it is the defendant in an action predicated on Undefended List Procedure that should be complaining of not being given fair hearing. Yet it has been held, that the principles of fair hearing embodied in the maxim audi alterem partem have no application in cases tried under the Undefended List. The reason is clearly stated in the rules. See Sodipo V. Lemnin Kainem, Oy & Anor (Supra), Jipreze V. Okonkwo (1987) 3 NWLR (pt.62) 737 at 744, Agueze V. Pan African Bank (1992) 4 NWLR (Pt.233) 76 at 98.

A judgment handed down under the Undefended List is certainly one on the merits and can only be set aside on ap-

peal or by yet another action in the case of allegation of fraud.
 See U.T.C Nig Ltd. V. Pamotei (1989) 3 SCNJ 79/124; (1989) 2 NWLR (Pt.103) 244.

It is trite law that cases tried pursuant to Undefended List are decided entirely on affidavit evidence but not on pleadings. Pleadings are to be ordered after the court is satisfied that by his affidavit in support of his notice of intention to defend the action, the defendant has shown that indeed he has a good defence in reaction or response to the facts in support, of the plaintiff's claim.

On the complaint of the appellant on being denied fair hearing, he says his brief of argument was not considered at all by the court below. Indeed, a hearing can only be fair or said to be fair when both parties to the dispute are given a hearing or an opportunity of a hearing, that is, fair hearing does not necessarily mean oral hearing. If one of the parties is refused or denied a hearing or not given an opportunity to be heard, the hearing cannot be qualified as fair hearing. Therefore, when the parties in an appeal are not heard or given an opportunity of being heard in the appeal, the hearing by the Court of Appeal cannot be said to be fair.

"Without fair hearing, the principles of natural justice are abandoned and without the guiding principles of natural justice, the concept of the Rule of law cannot be established and grow in the society."

In Alhaji Chief Yekini Otapo V. Chief R. O. Sunmonu & Ors (1987) NWLR (pt.58) 587, (1987) LPELR 2822, on the test of fairness in the trial and appellate courts, this court per OBASEKI, JSC states as follows:

"The test of fairness in appeal proceedings must of necessity differ from the test of fairness in proceedings at the court of first instance. While in the court of first instance the true test of a fair hearing is the impression of a reasonable person who was present at the trial, whether from his observation, justice has been done in the case, the true test of fair hearing in the Court of Appeal is whether having regard to the rules of court and the law, justice has been done and appears to have been done to the parties."

In the instant appeal, the appellant did not show how he was

denied fair hearing by the court below. The relevant Rules of Court were properly considered by the court with the case presented by the appellant. His submissions in his brief of argument were considered by the court below. Perhaps the appellant may have expected the court below to state word for word in its judgment the arguments he proffered in his brief to show that his argument was considered before the court reached the conclusion. Neither the litigant nor counsel can teach the court how to write its judgment. I am therefore not aware of any clear proof that the appellant was denied fair hearing. The hearing based on the affidavit and documentary evidence was heard by the trial court, who gave him judgment though which was appealed against. In effect, this issue is also resolved against the appellant. He was given the required hearing by the court below with the consideration of his submissions in his brief of argument. His action was not properly initiated in accordance with the Rules.

In the final analysis, having resolved the two issues against the appellant, the appeal is found to be unmeritorious and lacking in substance. It fails totally and liable to dismissal. Accordingly, it is dismissed. The judgment of the court below delivered on 2nd May, 2003 is affirmed. Even though costs follow events, I shall make no order as to costs.

FABIYI JSC

I agree with the judgment just handed out by my learned brother - Ariwoola, JSC. The reasons advanced therein are in tune with the applicable Rules of the trial High Court of the Federal Capital Territory, Abuja.

Let me state it briefly that Order 23 Rule 2 of the stated Rules dictates that the appellant should file copies of affidavit with the Registrar which should be attached to writ of summons for service. The appellant goofed as he failed to act in the right direction. He tried to place premium on the affidavit attached to the ex-parte application; to no avail. This is because the respondent was not a party to same. The respondent had nothing to react to, in the prevailing circumstance as dictated by the inaction of the appellant. The appellant must appreciate that rules of court are very vital in the process of justice administration. They are meant to be obeyed. Failure to do

so, can be counter productive or negatively costly at times. A party who fails to obey court rules does so at his own peril. He can hardly be heard to complain. See: *Afolabi v. Adekunle* (1983) 8 SC. (Reprint) 75; (1983) NSCC 398 at 405; *University of Lagos v. Aigoro* (1985) 1 NWLR (pt. 1) 143.

B The appellant talked about technicality. I am afraid, there is nothing technical to hang on to, with the scenario set up by him. The appellant suggested that the matter could be sent to the general cause list for a full blown trial. I feel strongly that he should appreciate that we are not there yet! Put mildly, the appellant has himself to blame.

C I, too, feel that the appeal lacks merit and should fail. I abide by the consequential orders contained in the lead judgment.

D ***PETER-ODILI JSC, CFR***

This is a final appeal against the decision of the Court of Appeal, Abuja Division delivered on 2nd May, 2003. The appellant was plaintiff in the High Court. The contention between the parties in this court is whether procedure used in commencing the undefended E List action was proper or not.

FACTS BRIEFLY STATED

The plaintiff/respondent/appellant is a legal practitioner and initiated an action stated to be under the undefended list pursuant to order 23 of the Civil Procedure Rules applicable to Federal Capital F Territory, Abuja in order to recover his professional fees.

The plaintiff at the trial court filed a motion ex-parte with four reliefs including leave for service out of jurisdiction; entering the suit in the undefended list; and allowing the suit to be served on the G defendant's solicitor. The motion was supported with a 22 paragraph affidavit and five exhibits marked SS 01- SS05. On the 23/5/2000 the plaintiff moved his motion ex-parte and the court granted the orders as prayed and an enrolled order followed the same day.

The defendant was served the court's process which included;

H (a) Copy of the concluded motion ex-parte with the affidavits and exhibits in support of the application,

(b) Copy of the enrolled order of 23/5/2000

(c) Special endorsed writ with particulars of claim signed by the Registrar on 15/5/2000.

The Defendant objected to the writ and the trial court in its considered ruling refused the objection and immediately delivered its judgment awarding the sum of five million naira and interests thereon in favour of the plaintiff without hearing from the defendant.

The defendant aggrieved filed an appeal to the Court of Appeal with six grounds. Parties filed their briefs and after argument on the 20/2/03 the Court of Appeal unanimously allowed the appeal in a considered judgment on 2nd May 2003 on the ground that the plaintiff irregularly commenced his suit. The court below struck out the suit. B

Now dissatisfied, the plaintiff/respondent/appellant has come to this court. On the 4th December, 2012 date of hearing, Chief S. S. Obaro learned counsel representing himself adopted his brief of argument filed on 1/6/04 wherein he had raised four issues for determination, viz: C

1. Whether the court below had jurisdiction to consider and determine the correctness or otherwise of the Rulings of the learned trial judge dated 23/5/2000 and 24/7/2000 and using the affidavits which were used in those Rulings when there was no appeal against those Rulings and thereafter basing its judgment solely on the outcome of that consideration. D

2. Whether the appellant herein had a fair hearing in the court, below? And if not whether that failure occasioned a miscarriage of justice to the appellant. E

3. Whether the court below was right in holding that under Order 23 Rule 1 of the Federal Capital Territory, Abuja High Court Rules an applicant praying that his writ of summons be placed in the Undefended List must (apart from, or in addition to, the affidavit in support of the (ex-parte) application setting out the grounds of his application and stating that in his belief the defendant has no defence), also file “a separate affidavit verifying his cause of action” and that failure to file that separate verifying affidavit would render the suit incompetent? F

4. Whether the court below was right in striking out the appellant’s suit in the circumstances of this case and having regard to the provisions of Order 23 rules 3 and 4 of the FCT High Court (Civil Procedure) Rules. H

Prince Orji Nwafor-Orizu of counsel for the respondent adopted

their brief filed on 3/8/04 and he crafted two issues for determination which are as follows:

1. Whether the conclusion of the court below that the writ as irregularly commenced under the undefended list procedure is correct?

B 2. If the answer to issue one is that the procedure was incorrect, whether reference or non-reference to other matters in the judgment occasioned a miscarriage of justice in the case.

C Clearly, the issues as framed by the respondent are apt in setting out to answer the questions raised and best taken together. I shall therefore use them.

The appellant submitted that the court of Appeal erroneously misconceived the appeal before it and so its decision should be set aside. That the issues of the Ruling of 24th July, 2000 were of the D necessity to file a separate verifying affidavit, which formed the basis of the decision of the Court of Appeal. That the principles of fair hearing as relating to the appellant were breached. He referred to Mohammed v. Kano Native Authority (1963) 5 NSCC 326.

E Chief Obaro said their arguments in the Court of Appeal were not considered when that court held that there was need for the plaintiff to file a separate affidavit verifying his cause of action, apart from the affidavit in support of his application ex parte to have the writ of summons placed in the undefended list. That order 23 rules 1 and 2 are plain and unambiguous given its ordinary literal meaning. F That there was no reason to import into that Rule two separate affidavits since there is no such provision within it. He cited Ogwuche & ors v. Mba & Ors (1994) 4 NWLR (pt. 336) 75 (CA) at 85.

G Appellant further stated that even if there was to be a separate affidavit verifying the cause of action of the plaintiff and such was not so filed, that failure would not render the suit incompetent. That the court below should not have struck out the suit but rather sent it back to the trial court for full trial in the general cause list. Also, that the striking out was not one of the reliefs sought by the respondent in the H Court of Appeal.

Responding, learned counsel for the respondent, Prince Orji Nwafor-Orizu stated that the Court of Appeal went to the sour of the appeal before it and arrived at the proper conclusion. That the Court of Appeal could not have gone into the other issues raised by the

plaintiff/appellant since the suit was not properly fired. He said the ratio decidendi of the decision of the lower court is on the commencement of action under the undefended list under the applicable rules. That the obiter dictum contained in the decision is not so closely linked with the ratio as to be deemed to have radically influenced the ratio. He cited the cases of Ogunbiyi v. Abdulkadir Shola (1996) SCNJ 143 at 153, Adekoba v. UBA Plc (1997) 2 SCNJ 130 at 145; Boothia Maritima Inc. v. Far East Merchantile Co. Ltd. (2001) 4 SCNJ 178. B

For the respondent was contended that the real issues between the parties as per the judgment is whether the suit was properly commenced and nothing more. That reference to other issues by the judge is not relevant to this appeal. That no decision was taken in limine nor was there a breach of the right to fair hearing as the conclusion contained his position in the lower court which was rejected. That the issues raised in the earlier motion to strike out in the trial court and grounds of appeal are the same. C

Having set out the summary of the submissions on either side, what seems to come to the fore as the main bone of contention is whether or not the suit was properly commenced and nothing else since the answer in the negative would end the entire process. The Court of Appeal had held that the supporting affidavit in the motion ex parte was not the one to which the respondent could react to under order 23 Rule (1). The reason being that the life span of that affidavit ends with the determination of the ex-parte motion to which the respondent was not a party and in effect had no notice of. E

It is to be said that the situation of termination of the life of the affidavit on the consideration of the ex parte motion is not a matter in my humble view for debate as the process of undefended list procedure is a special feature to which the components must be complete if there would be a waiver of the taking of oral evidence. It may be taken to be strict technicality but it is one of those areas where such stringent measures as another supporting affidavit is a necessity and cannot be ignored. In that regard I shall quote the applicable order 23 Rule 1 of the High Court (Civil Procedure) Rules of the Federal Capital Territory, Abuja 1989 and it is thus: F

“1. Whenever application is made to a court for the issue of a writ of summons in respect of a claim to recover a debt, liquidated money demand or any other claim and the application is supported G

by an affidavit setting forth the grounds upon which the claim is based and stating that in the deponent's belief, there is no defence thereto, the court shall, if satisfied that there are good grounds for believing that there is no defence thereto, enter the suit for hearing in what shall be called the "Undefended List" and mark accordingly and enter thereon a date for hearing suitable to the circumstances of the particular case.

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

3(1) If the party served with the writ of summons and affidavit delivers to the registrar, not less than five days before the day fixed for hearing a notice in writing that he intends to defend the suit, together with an affidavit disclosing a defence on the merit, the court may give him leave to defend upon such terms as the court may think just.

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

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

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

I have set out the provisions aforesaid leaving out nothing to underscore the fact that the provisions are all embracing and leaving no room for either speculation as to what was intended or how recourse could be anchored on a process well titled "*AFFIDAVIT IN SUPPORT OF EX-PARTE APPLICATION*" for the trial court's consideration in a motion for a writ of summons bearing in mind that the ex-parte process was in the absence and without notice to the defendants and had been determined without further life. Therefore with-

out supporting affidavits, the competence of the application for a writ of summons to be handled as undefended is brought to question and there is no gainsaying that the process is invalid being not properly clothed since there would arise the issue, to what would the defendant base his affidavit challenging what the plaintiff is seeking and the follow up question would be, what material would the court be considering in making up its mind that really there is no defence for which the matter would entered into the undefended List and heard and determined as such without any evidence taken. Also for the court to explore the option to find out if the process is best handled under the general cause list thereby necessitating the taking of evidence. These are issues which make the supporting affidavit to the motion asking for the Undefended List option mandatory. In this regard I place reliance on John Holt & co (Liverpool) Ltd v. Henry Fajemirokun (1961) ALL NLR 492; Ume v Nigeria Renowned Trade Co. Ltd. (1997) 8 NWLR (pt. 516) 344 at 352.

I see no difficulty in going along with what the Court of Appeal did and with that and the fuller reasons of my learned brother, Olukayode Ariwoola, JSC, I dismiss the appeal and affirm the striking out of the writ of summons for incompetence. I abide by the consequential orders in the lead judgment.

AKA'AH S JSC

I was privileged to read in draft the judgment of my learned brother Ariwoola JSC. He has exhaustively discussed what the parties must do when a writ of summons is issued and placed on the undefended list. I agree with his resolution of the issues raised in the appeal.

The appeal falls to be determined on whether the appellant complied with Order 23 Rules 1 and 2 High Court (Civil Procedure) Rules FCT 1990 which is now Order 21 Rules 1 and 2 High Court (Civil Procedure) Rules FCT 2004 before he can be entitled to judgment. The said Order Provides:-

“23 - Rule 1 Whenever application is made to a court for the issue of a writ of summons in respect of a claim to recover a debt, liquidated money demand or any other claim and the application is supported by an affidavit setting forth the grounds upon which the

claim is based and stating that in the deponent's belief, there is no defence thereto, enter the suit for hearing on what shall be called the 'undefended list' and mark the writ of summons accordingly and enter thereon a date for hearing suitable to the circumstances of the particular case.

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

C The rationale of outlining the procedure is simple. At the time the application for the issuance of the writ of summons is made the defendant is presumed to be ignorant of the impending suit since the application is made ex - parte. Secondly, the affidavit in support of
D the application need not exceed one copy. It is after the application has been granted that the plaintiff is expected to produce sufficient numbers of copies of the affidavit to be annexed to the writ on the undefended list which will be served on each of the defendants in the action. So when the motion dated 31st May, 2000 was filed on be-
E half of the defendant seeking to strike out the writ of summons, it was made clear that the writ served was not accompanied by a verifying affidavit. The plaintiff/appellant should have reacted by filing an affidavit showing that he submitted the required number of copies of
F the affidavit to the registrar.

Since the appellant did not react to the motion, it means he did not deliver any copies of the affidavit to be annexed to the writ before being served on the defendant. It is the affidavit evidence annexed to the writ that will necessitate the reaction of the defendant
G to state whether he has any defence to the claim on the undefended list.

The appellant being a qualified legal practitioner knew the implication of the motion to strike out the writ or even dismiss the suit. He has himself to blame for what has happened.

H I find that there is no merit in the appeal and it is accordingly dismissed. I also make no order as to costs.