

SUPREME COURT OF NIGERIA
FRIDAY 31ST MAY, 2013. SC. 89/2005
CORAM:- I. T. MUHAMMAD, C. M. CHUKWUMA-ENEH,
S. GALADIMA, M. D. MUHAMMAD,
C. B. OGUNBIYI, JJSC

1. DANGOTE GENERAL TEXTILE
PRODUCTS LTD

2. ALHAJI MUSA ABUBAKAR

3. MOHAMMED LABBO DANGOTE APPELLANTS
AND

1. HASCON ASSOCIATES NIG. LTD

2. ALHAJI HASSAN BUHARI

(TAFIDAN MARADUN) RESPONDENTS

UNDEFENDED SUITS - Appeal - Court - Exercise of discretion - Interference - CA ought to have interfered - On the basis that the discretion exercised by trial court - Was neither judicial nor judicious (H1)

UNDEFENDED SUITS - Defence - Leave - Conditions for grant - A judge must objectively consider the justice of the case - As against technicalities that negates the principle of justice (H2)

UNDEFENDED SUITS - Defence - Materials for - Court is guided by facts of the case - Parties' affidavit evidence - Notice of intention to defend disclosing the defence (H3)

UNDEFENDED SUITS - Use of "shall" - Interpretation of - The word as used in the HC Rules O. 22 r. 3(1) is not absolute - It should not be interpreted as mandatory but directory (H4)

UNDEFENDED SUITS - Defence - Fair hearing - UTC v. Pamotei - Where defendant intends to defend but has taken improper step - Adjournment may be given to rectify the defect - To enable court consider his defence (H5)

JURISDICTION - Fundamentality of - It can be raised at any stage of

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a proceeding - And cannot be compromised - As court that acts without jurisdiction - Acts in futility (H6)

APPEALS - Jurisdiction - Fresh issue of - Awuse v. Odili - Being a fundamental principle - Leave is not required to raise jurisdiction at any stage of the proceedings (H7)

CONTRACTS - Dispute - Court - Jurisdiction - Where performance of the contract took place in Kano State - It is Kano and not Zamfara State High Court that has jurisdiction (H8)

FACTS

Plaintiffs/respondents brought this action under the undefended list procedure at the High Court of Zamfara State, wherein they made several monetary claims against defendants/appellants in respect of contract made between the parties. At the trial proceedings, appellants informed the court of their pending application praying the court to hear and consider their notice of intention to defend the suit. Their motion was accompanied by an affidavit disclosing their defence on merit.

They also prayed orally and urged that the court should treat the late filing of their application as an irregularity in accordance with Order 2(1) of the Sokoto State High Court (Civil Procedure) Rules 1987 (applicable in Zamfara State) and there upon extend the time within which appellants are to file their Notice of Intention to Defend and also the affidavit in support thereof. Respondents vehemently opposed the application. The court in its ruling refused the application of appellants and granted the claims of respondents. On appeal initiated by appellants at the Court of Appeal, Kaduna Division, the court affirmed the decision of the trial court and dismissed the appeal. Aggrieved further, appellants filed appeal to Supreme Court.

ISSUES FOR DETERMINATION

“ISSUE NO. 1

Whether in view of the trial Court’s refusal to consider the Defendants’ affidavits, which were before him and thus denying the said Defendants fair hearing, the learned Justices of the Court of Appeal did not err in their view that the learned trial judge properly exercised his discretion in the case before him.

ISSUE NO. 2

Whether the issue of jurisdiction was not rightly raised and for the first time before the Learned Justices of the Court of Appeal

ISSUE NO.3

Whether the learned Justices of the Court of Appeal did not err in their refusal to determine the issues before them as to whether the affidavit evidence adduced by the plaintiffs/respondents (in view of the contradictions therein) was adequate to support the judgment of the trial court.

ISSUE NO.4

Whether the learned Justices of the Court of Appeal were not wrong in formulating and resolving issues suo motu in the appeal before them without giving the parties an opportunity to furnish argument on the said issue.

HELD (Unanimously allowing the appeal per **OGUN-BIYI JSC**)

Appeal - Courts - Exercise of discretion - Interference

1. Their Lordships in otherwords held as proper the invocation of order 22 under undefended list and affirmed the judgment by the trial court. The relevant question to pose at this juncture is, on the totality of the proceedings as revealed on the record of appeal, can it rightly be said that the Court of Appeal erred in affirming the exercise of discretion by the trial court as alleged by the appellants? I hasten to restate the position of the law at this point which is settled that an appellate court will not ordinarily interfere with the exercise of discretion by the trial court, unless it can be shown that such exercise was either made arbitrarily (not based on any principle of law) or not in accordance with terms of justice.

With all respect therefore, I beg to differ and hold that their Lordships of the Court of Appeal at page 123 of their judgment reproduced earlier, greatly erred in confirming the discretion exercised by the trial court. The exercise in otherwords was neither judicial nor judicious and thus a proper case for the lower court to have interfered therewith and set it aside.

The said 1st issue in my view ought to and is resolved in favour of the appellants. (pp. 2062 H/2069 E)

UNDEFENDED SUITS - Defence - Leave - Conditions for grant

2. In the light of the foregoing pronouncement by the trial court judge especially the phrase “failure of the defendants to file notice of intention to defend”, same I hold, is not exactly correct especially where at page 17 of the record it is clearly stated that the notice of intention to defend was filed on the 13/3/2002, the same date the undefended suit was heard. The provision of Order 22 Rule 3(1) on undefended list procedure, by nature seeks to ensure that the trial judge must satisfy himself having regard to all the materials placed before him that the defendant has no defence to the uncontested liquidated sum claimed. This exercise which involves the use of discretion must however be judicious and judicial; it must be objective and not subjective. The section in my view is not watertight and its interpretation should not be draconian in nature. It rather envisages that consideration should be taken of all the facts placed before the court as disclosed on the affidavits of parties to the action. The judge as he sits in court to adjudicate is expected to be absolutely convinced and satisfied within his conscience and exhibit objectivity in the same way that he is expected in weighing evidence of parties on an imaginary scale in the course of deciding which party’s evidence is to be believed on the balance of probability.

The determining bottom line and guiding principle in deciding whether or not to grant the leave to defend is the justice of the case which should overrule and not technicalities which application operates inimically and negates the principle of justice. In otherwords, while the need for procedure may be relevant in itself for operational guiding purposes, it must not however be seen to replace justice which is the very foundational basis and reason upon which our entire judicial system is founded and anchored. (pp. 2063 D/2064 F)

UNDEFENDED SUITS - Defence - Materials for

3. The requisite materials that will readily assist the court in

its just determination include the facts of the case coupled with the affidavit evidence by parties which must all be placed before the court; also relevant are the notice of the intention to defend if any, which must be accompanied by an affidavit of facts, disclosing the defence. (p. 2066 C)

B

UNDEFENDED SUITS - Use of "shall" - Interpretation of

4. The use of the word 'shall' in Order 22 rule 3(1) of the Rules in this context is in my view neither in itself conclusive nor sacrosanct or absolute. In other words it should not be interpreted as mandatory but directory or permissive. (p. 2066 E)

C

UNDEFENDED SUITS - Defence - Fair hearing

5. The Constitutional provision of the Federal Republic of Nigeria by section 36 is very explicit and paramount on the concept of fair hearing which must be given to all the contending parties before a court. For instance, in the case of U.T.C (Nig.) Ltd. V. Pamotei supra, the defendant had filed a notice of intention to defend but omitted to attach a supporting affidavit thereto. In taking a very liberal view, this court at page 299 laid down the principle that where a defendant intends to defend but has taken an improper or insufficient step, he may be given an adjournment to give him an opportunity to rectify the defect and enable the trial court consider his defence.

D

E

(p. 2068 B)

F

JURISDICTION - Fundamentality of

6. The determination of the said issue is very simple and straightforward especially wherein the law is trite and well settled on the issue of jurisdiction which is very fundamental and constitutional. It is not, in this context, procedural and therefore cannot be compromised. It cannot also be conferred by consent of parties or waived. Where a court acts without jurisdiction it acts in futility. This may explain the reason behind the principle that the issue of jurisdiction could be raised at any stage of a proceeding even for the 1st time in this court. This principle is well entrenched by this court in a long line of decided authorities. For instance the case of Awuse V. Odili

G

H

(2004) FWLR (Pt 193) p. 325 is very instructive, wherein this court held as a matter of law that the issue of jurisdiction can be raised at any time or stage without the leave of court.
(p. 2070 H)

B *Jurisdiction - Fresh issue of - Awuse v. Odili*

7. With reference made to the decision in the case of Awuse V. Odili as well as the other related sister cases supra, the answer to the 1st line of contention advanced by the lower court is obvious. In otherwords the leave of Court of Appeal was not desirable or necessary for purpose of raising the ground as a new issue. By the very nature of the issue being jurisdictional the law presupposes that it is competent. It serves an exception to the general rule that leave must be obtained before new issues are raised. The application of the general rule to the question of jurisdiction will operate a negative set back and thus undermining the fundamental effect of proceedings conducted without jurisdiction which is a nullity. The reasoning and refusal by the lower court is not in accordance with the tenets of the principle laid down. (p. 2071 F)

CONTRACTS - Dispute - Court - Jurisdiction

8. The next point for consideration relates to the territorial jurisdiction wherein the lower court arrived at a conclusion that there was no material placed before it to ground the issue of jurisdiction. It is not in dispute but agreed by all parties that the goods the subject matter of the plaintiffs/respondents complaint were to be delivered at Bompai, Kano in Kano State. This is evidenced per the documents relevant to the contract between the parties in particular the local purchase order dated 23/03/2001 at page 21 of the record which describes the subject matter of the contract as 'Nigerian Cotton Lint. Transport charges included payment after delivery.' One of the delivery notes contained at page 24 of the record confirms the receipt by the store keeper, Bompai KANO. As rightly submitted by the learned counsel for the appellants it is clear on the record that the plaintiffs/respondents were to perform the contract by delivering the goods in Kano. It

goes without further saying therefore that it is the Kano High Court that has the jurisdiction to adjudicate in the event of a dispute arising out of the contract.

From the foregoing deductions, I hold a firm view that the lower court could not be correct in concluding that there was no material placed before it to ground the issue of jurisdiction. The court in that behalf, I hold, was in great error. This is because sufficient and overwhelming materials availed before it that the territorial jurisdiction is vested in the High Court of Kano State and not the Zamfara State High Court. The said issue 2 is also resolved in favour of the appellants.
(pp. 2072 A/G/2073 E)

REPRESENTATION

Nelson Uzuegbu with Ezenwa Managwa and Ngozi Okafor, for the Appellants

Iliyasu Idris, for the Respondents

CASES REFERRED TO

- U.B.A. v. Dike Nworah (1978) 11 & 12 SC 1
Jammal Engrn. Ltd v. MISR Nig. Ltd. (1972) All NLR (Reprint) 326
Olubusola Stores v. Standard Bank (Nig) Ltd. (1975) All NLR 123
Nishizawa Ltd. v. Jethwani (1984) All NLR 470
U.T.C (Nig.) Ltd v. Pamotei (1989) 2 NWLR (pt. 103) 244
Ben Thomas Hotels Ltd. v. Sebi Furniture C. Ltd. (1989) 5 NWLR (pt. 123) 523
Macgregor Assurance Ltd. v. Nig. Merchant Bank Ltd. (1996) 2 NWLR (pt. 431) 378
Kalu Anya v. African Newspaper Nig. Ltd. (1992) 7 SCNJ (pt. 1) 47
Adewumi v. Ekiti State (2002) FWLR (pt. 92) 1835
Agwuneme v. Eze (1990) 3 NWLR (pt. 137) 242
Obadiegwu v. Lion Bank of Nigeria Plc (2003) FWLR (pt. 165) 140
Enekebe v. Enekene (1964) 1 All NLR 102
Solanke v. Ajibola (1968) 1 All NLR 46
Awuse v. Odili (2004) FWLR (pt. 193) 325
Ezomo v. Oyakhire (1985) 2 SC 260

STATUTES & RULES REFERRED TO

Constitution of the Federal Republic of Nigeria 1999, ss. 36, 270(1), 272(2)

Sokoto State High Court (Civil Procedure) Rules 1987, O. 2(1)

Zamfara State High Court Rules (Civil Procedure), O. 22 r. 1 - 5

B

LEAD JUDGMENT BY OGUNBIYI JSC

This is an appeal against the judgment of the Kaduna Division of the Court of Appeal delivered on the 16th day of December, 2004 wherein the court dismissed the appellants' appeal and affirmed the judgment of the Zamfara State High Court in suit No. ZMS/GS/8/2002 delivered on the 26th day of March, 2002. In the said suit, the plaintiffs now respondents claimed against the defendants now appellants various sums of money as follow:-

(i) The sum of N2,087,435.00 (Two Million, Eighty-Seven Thousand, Four hundred and Thirty-Five Naira only) plus interest on the said sum at 24% per annum calculated at monthly rate from 26/3/2001 until judgment and thereafter at 10% until final liquidation.

(ii) The sum of N274,000.00 (Two Hundred and Seventy-Four Thousand Naira) had and received of the 2nd Respondent by the 2nd and 3rd Appellants in order to facilitate the payment of (i) above; plus interest at 24% per annum calculated at monthly rate from 3/5/2001 until judgment and thereafter at 10% until final liquidation.

(iii) Cost assessed at N5, 000.00 (Five Thousand Naira only).

From the Writ of Summons and as shown on the record, the proceedings in the trial court were instituted on an undefended list.

On the 13th March, 2002 and at the trial court's proceedings, the defendants/appellants informed the court of their pending application before it. Their motion prayed the court to hear and consider their notice of Intention to defend supported by an affidavit disclosing their defence on the merit. They also prayed orally and urged that the court should treat the late filing of their process as an irregularity in accordance with Order 2(1) of the Sokoto State High Court (Civil Procedure) Rules 1987 (applicable in Zamfara State) and there upon extend the time within which the defendants/appellants are to file their Notice of Intention to Defend and also the affida-

vit in support thereof. The appellants also filed a motion for extension of time to enter appearance, supported by an affidavit wherein they sought to explain their delay in filing.

The totality of the application was vehemently opposed to by the plaintiffs' learned counsel and he urged the court to enter judgment in their favour. The court thereafter adjourned the matter for ruling which was on the 26th March, 2002 and ruled in favour of respondents. The trial court in otherwords refused to oblige the defendants' application for being out of time. Consequently, judgment was therefore entered for the plaintiffs/respondents in terms of all their claims.

On appeal by the Defendants/Appellants to the Court of Appeal, Kaduna Division, the learned Justices of that Court affirmed the decision of the trial judge and dismissed the appellants appeal on the 16th December, 2004.

The appellants were dissatisfied with the outcome at the lower Court and hence the appeal now before us which notice was dated the 22nd December, 2004 and containing six grounds of appeal and their particulars.

In compliance with the Rules of this Court, parties filed and exchanged briefs of arguments. By the appellants' brief filed on the 15th June, 2006 and adopted in argument of the appeal on the 5th March, 2013, learned counsel for appellants, Nelson Uzuegbu, Esq. formulated the following four issues for the determination of the appeal:-

"ISSUE NO. 1

Whether in view of the trial Court's refusal to consider the Defendants' affidavits, which were before him and thus denying the said Defendants fair hearing, the learned Justices of the Court of Appeal did not err in their view that the learned trial judge properly exercised his discretion in the case before him.

This issue arises from grounds 3 and 5 of the Notice of Appeal.

ISSUE NO. 2

Whether the issue of jurisdiction was not rightly raised and for the first time before the Learned Justices of the Court of Appeal

This issue arises from ground 2 of the Notice of Appeal.

ISSUE NO.3

Whether the learned Justices of the Court of Appeal did not err in their refusal to determine the issues before them as to whether the affidavit evidence adduced by the plaintiffs/respondents (in view of the contradictions therein) was adequate to support the judgment of the trial court.

B *This issue arises from grounds 1 and 4 of the Notice of Appeal.*

ISSUE NO.4

C *Whether the learned Justices of the Court of Appeal were not wrong in formulating and resolving issues suo motu in the appeal before them without giving the parties an opportunity to furnish argument on the said issue.*

This arises from ground 6 of the Notice of Appeal.”

D On behalf of the respondents, one main issue was formulated as follows:-

“Whether the learned justices of the Court of Appeal were right in affirming the judgment of the trial court whereby he awarded judgment against the defendants (now Appellants before this Honourable Court) under the undefended list for failure of the Defendants/Appellants to file their Notice of Intention to defend within 5 days before the date of hearing as required by Zamfara State High Court Civil Procedure Rules, coupled with the fact that the Defendants/Appellants did not file any motion for extension of time to file their notice of intention to defend.”

F The said issue arose from grounds 1, 3 and 5 of the grounds of appeal. The respondents by their brief of argument from all indications only deemed it fit to respond to the appellants’ issue 1 and only a part of issue 3 as it relates to ground 1 of the grounds of appeal. The respondents outrightly did not consider issues 2 and 4 relating to grounds 2 and 6 of the grounds of appeal.

H The 1st issue raised by the appellant’s questions whether the lower court was in order by affirming the trial court’s exercise of discretion when it refused to consider the defendants’ affidavit and thus denying them fair hearing. The appellants by their submission alleged that the trial court’s exercise of discretion in that behalf was tantamount to a denial of fair hearing which the lower court ought to, in the circumstance, have condemned and set aside.

Submitting to substantiate the alleged injustice against the

appellants, their counsel related copiously to the record of appeal and in particular the proceedings of the court which resulted in the judgment appealed against. The counsel narrated a graphic and background events of the case whereby the Defendants/Appellants were duly served with a Writ of Summons on the undefended list to which a version of Order 22 Rules 1 - 5 was attached thereto; that Rule 3^B (1) of the order did not specify a time limit within which the defendants are to file their Notice of Intention to Defend. The counsel in further submission re-affirmed the existence of their Motion on Notice seeking for an extension of time within which to file their memorandum of appearance and evidenced at pages 39 - 42 of the record.^C Reliance was also made on the Notice of Intention to Defend filed on the 13th March, 2002 and supported by an affidavit. Specific reference was made at paragraphs 13 and 16 of the affidavit wherein the plaintiffs were alleged to have claimed what was not their entitlement.^D

Counsel's further line of argument poses a proposition that, had the learned trial judge considered the defendants defence on the merit, it would have revealed a triable issue. In reference to substantiate the argument, reliance was made to the decision of this Court^E in the case of *U.B.A. V. Dike Nworah* (1978) 11 7 & 12 SC 1 wherein courts are enjoined to always lean in favour of hearing the other side in matters before them and granting an extension of time in situations where there are needs to do so; that based on Order 2 Rule 1^F of the Sokoto State High Court Civil Procedure Rules, the counsel urged the court to treat the late filing of the Notice of Intention to Defend and affidavit as mere irregularity. The learned trial judge by his ruling delivered on the 26/3/2002, counsel submitted, had sacrificed the interest of justice at the altar of technicalities. The counsel^G cited Section 36 of our Constitution 1999, wherein fair hearing should be given all the contending parties before a court of law. To further buttress his submission, counsel drew attention to the emphasis made by this Court in the following line of authorities amongst others:- *Jammal Engineering Ltd V. MISR Nig. Ltd.* (1972) All NLR (Reprint) 326; *Olubusola Stores V. Standard bank (Nig) Ltd.* (1975) All NLR 123; *Nishizawa Ltd. V. Jethwani* (1984) All NLR 470; *U.T.C (Nig.) Ltd V. Pamotei* (1989) 2 NWLR (Pt. 103) 244; *Ben Thomas Hotels Ltd. V. Sebi Furniture C. Ltd.* (1989) 5 NWLR (Pt. 123) P. 523 and^H

Macgregor Assurance Ltd. V. Nig. Merchant Bank Ltd. (1996)2 NWLR (Pt. 431) 378.

The totality of the submission advanced by appellants' counsel questions the learned justices of the Court of Appeal wherein they failed to consider the issue of fair hearing raised by the appellants; that their Lordships of that court, counsel argued, ought to have set aside the judgment of the learned trial judge for the purpose of considering the appellants defence on the merit which was clearly disclosed on the affidavit placed before the trial court. Counsel therefore urged that the appeal be allowed on this issue.

The learned respondents' counsel in response applauded the Court of Appeal decision which affirmed the judgment of the Zamfara State High Court. In his recapitulation of the historical background of the case he re-iterated affirmatively that Order 22 Rules 3(1) of the Zamfara State High Court Civil Procedure Rules was strictly adhered to and appropriately applied. For purpose of affirming his stand, counsel has called on this court to relate closely to the record of appeal at page 31 lines 35 to 38. He further re-iterated that rules of court are meant to be obeyed and not for mere decoration; also that the duty of the court is to apply the laws as they are made. For the purpose of buttressing his position further, the following authorities are cited in support:- DIM V. Adibuah 2002 FWLR Pt. 107 at page 1112 at 1278; Kalu Anya V. African Newspaper Nig. Ltd. 1992 7 SCNJ part 1 page 47 at 48 and Adewumi V. Ekiti State 2002 FWLR Pt. 92 1835 at 1842; that the moment a defendant is served with a Writ of Summons under the undefended list he is required to comply with a procedure to wit, filing of Notice of Intention to Defend within 5 days before the date of hearing. The case of Agwuneme V. Eze (1990) 3 NWLR Pt. 137 page 242 was cited in reference. Other further related authorities also relied upon by the learned counsel are: Ben Thomas Hotel Ltd Vs. Sebi Furniture's Ltd 1990 1 BMLR 104; Nigeria Sugar Company Ltd V. Mojec International Ltd. 2005 All FWLR Part 264 page 475; and Obadiogwu V. Lion Bank of Nigeria Plc (2003) FWLR Pt. 165 page 140; that the learned justices of the Court of Appeal rightly held that the High Court accorded the appellants fair hearing.

In further submission, counsel emphasized the call to strictly comply with the rules of court and finally drew the curtain by submitting that the purpose behind the putting of this procedure in place is

to ensure that cases are determined with quick dispatch. Counsel in the result therefore, craves for the dismissal of the appeal while the judgment of the Zamfara State High Court should be affirmed.

The determination of the 1st issue raised is squarely predicated on the provision of Order 22 of the Zamfara State High Court (Civil Procedure) Rules 1987, which various subsections are reproduced as follows:-

"1. Whenever application is made to a court for the issuance of a writ of summons in respect of a claim to recover a debt or liquidated money demand and such 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 in what shall be called the "Undefended List," and mark the writ of summons accordingly and enter thereon a date for hearing suitable to the circumstance of the particular case.

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

3(i) If the party served with the writ of summons and affidavit as provided in Rules 1 and 2 hereof delivers to the Registrar not less than 5 days before the date 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 undefended list and placed on the ordinary cause list; and the court may order pleadings or proceed to hearing without further pleadings.

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

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

ceedings under rule 4.”

At page 34 of the record of appeal the trial court per its judgment in favour of the plaintiffs held and said:-

“The learned counsel for the defendants has conceded that the notice of intention to defend in our case has not been filed within time. It is therefore undoubtedly clear that the notice of defence and its supporting (sic) are out of time. The question is whether in such a situation order 2 of the rules can be invoked to remedy the situation so that the failure to file notice of intention to defend can be treated as an irregularity in our case. The defendants were served about two months before the hearing date. It was only on the said date for hearing the defendants filed their notice of defence out of time. No leave has been sought to file the notice of defence out of time and no leave has been granted. The learned counsel for the defendants urges the court to do justice and consider the notice of intention to defend. I am of the view that the only justice the court can do is to abide by the rules of the court. The application of order 2 must be based upon reasons. There is nothing before this court to assist in applying the said order (sic) no application for leave before this court and there is nothing justifying the failure of the defendants to file notice of intention (sic) defend within time. Consequently the court is bound by rule (4) of order 22. Having considered the writ of summon with its supporting affidavit and the failure of the defendants to file notice of intention to defend, I am satisfied that the defendants have no defence to the suit. The plaintiffs are therefore entitled to judgment. Accordingly, judgment is hereby entered in favour of the plaintiffs as per the claims in the writ of summons.” (The emphasis is mine).

In affirming the conclusion arrived at by the trial court *supra*, the lower court in its judgment at page 123 of the record also said:-

“Since the learned trial judge has properly exercised his discretion in reaching his decision as can clearly be seen from the portion of the judgment reproduced in this judgment, this court, as an appellate court, should not interfere with the exercise of discretion of the trial court...”

Their Lordships in otherwords held as proper the invocation of order 22 under undefended list and affirmed the judgment by the trial court. The relevant question to pose at this juncture is, on the totality of the proceedings as revealed on

the record of appeal, can it rightly be said that the Court of Appeal erred in affirming the exercise of discretion by the trial court as alleged by the appellants? I hasten to restate the position of the law at this point which is settled that an appellate court will not ordinarily interfere with the exercise of discretion by the trial court, unless it can be shown that such exercise was either made arbitrarily (not based on any principle of law) or not in accordance with terms of justice. B

See the cases of Enekebe V. Enekebe (1964) 1 All NLR 102 and Solanke V. Ajibola (1968) 1 All NLR 46.

With due regard to the judgment of the trial court at page 34 of the record earlier reproduced supra, the following phrase therefrom is of relevant reference point wherein the judge amongst others said:- C

“Having considered the writ of summons with its supporting affidavit and failure of the defendants to file notice of intention to defend, I am satisfied that the defendants have no defence to the suit.” D

In the light of the foregoing pronouncement by the trial court judge especially the phrase “failure of the defendants to file notice of intention to defend”, same I hold, is not exactly correct especially where at page 17 of the record it is clearly stated that the notice of intention to defend was filed on the 13/3/2002, the same date the undefended suit was heard. E

In otherwords, as at the date of hearing the suit, the defendants/appellants had in fact filed their notice of intention to defend and served same on the respondents’ counsel. This fact was drawn to the attention of the trial judge per the submission of counsel in court. It is also on record that the defendants’ counsel orally applied and urged the court to extend the time within which to file the said notice and to invoke the provisions of Order 2 Rule 1 of the High Court Civil procedure Rules under which the application was brought. The trial court was further urged to treat the late filing of the notice as an irregularity, especially having regard to the facts deposed to in the affidavit in support of their notice of Intention to defend. The said notice was confirmed as served on the plaintiffs’ counsel, Mr. Alabi, on the said date the case was heard as undefended. This was confirmed by the counsel himself at pages 30 - 31 of the record. The F G H

entire proceeding relating the existence of the notice of intention to defend per above is clearly borne out and evidenced at pages 30 - 32 of the record of appeal before us.

In addition to the scenario that took place supra, reference can also be drawn to the document Order 22 of the rules of court which was annexed to and served along with the writ of summons. Specifically at page 10 of the record, it will be noticed that rule 3(1) did not ex facie stipulate any time limit within which the defendants are expected to file the Notice of Intention to Defend. The reproduction of rule 3(1) which was served along with the writ on the defendants will give a better insight.

“3(1) if the party served with this writ of summons and affidavit delivers to the Registrar a notice in writing that he intends to defend the suit together with affidavit disclosing a defence on the merit, the court may give him leave to defend upon such terms as the court may think just.”

By the very act of attaching the said rule whether rightly or wrongly, the defendants/appellants should not be made to suffer for the lapses occasioned by the plaintiffs/respondents themselves.

The learned trial court judge in my view, should have been more liberal and not relied strictly on time limit principle in his judgment without due consideration to other factors.

Be that as it may, a further relevant and pertinent question to raise is, in the circumstance of the case as shown on the record, was it just and equitable for the trial court judge to have shut both his eyes against a defence, even if filed out of time, which was at the material time of hearing the suit, physically before the court?

The provision of Order 22 Rule 3(1) on undefended list procedure, by nature seeks to ensure that the trial judge must satisfy himself having regard to all the materials placed before him that the defendant has no defence to the uncontested liquidated sum claimed. This exercise which involves the use of discretion must however be judicious and judicial; it must be objective and not subjective. The section in my view is not watertight and its interpretation should not be draconian in nature. It rather envisages that consideration should be taken of all the facts placed before the court as disclosed on the affidavits of parties to the action. The judge as he sits in court

to adjudicate is expected to be absolutely convinced and satisfied within his conscience and exhibit objectivity in the same way that he is expected in weighing evidence of parties on an imaginary scale in the course of deciding which party's evidence is to be believed on the balance of probability.

The determining bottom line and guiding principle in deciding whether or not to grant the leave to defend is the justice of the case which should overrule and not technicalities which application operates inimically and negates the principle of justice. In other words, while the need for procedure may be relevant in itself for operational guiding purposes, it must not however be seen to replace justice which is the very foundational basis and reason upon which our entire judicial system is founded and anchored.

The concept of justice is the backbone and life wire of a peaceful co-existence in any given society and it cannot therefore be underestimated. A just society is an embodiment of God's attribute and as the Holy Scriptures put it: - "God's throne is built on justice and righteousness." Technicality should not therefore be used to erode or sacrifice justice on the altar of procedure. The view held by the learned jurist Aniagolu JSC in the case of Nishizawa V. Jethwani supra at page 493 is very instructive wherein he said:-

"A trial judge, in determining whether to grant the defendant leave to defend ... must be guided by the overall interest of justice, bearing in mind always that, while appreciating the need for procedural requirements to be obeyed, the ultimate dictates of justice must over-ride niggling technicalities."

A further authority is the case of Ben Thomas Hotels Ltd. V. Sebi Furniture Co. Ltd supra wherein this court held that even where a defendant neglects to deliver a notice and affidavit as required by the rules within the specific time, but files same before judgment, he may on affidavit disclosing a defence be let in to defend on terms.

The absence of fair hearing can be viewed from many dimensions. In the situation at hand, it was in my view occasioned by the wrongful exercise of judicious and judicial discretion by the learned trial court judge and which same was erroneously adopted and affirmed by the lower court justices.

The Blacks law Dictionary Ninth Edition at page 789 defines

the phrase fair hearing as: *“A judicial or administrative hearing conducted in accordance with due process.”*

The said definition should be read along side order 22 rule 3(1) of the rules of court governing the undefended list procedure which operation I hold, presupposes that it is not enough that the deponent should state his belief of the absence of any defence; the court, in its capacity has the onerous duty to satisfy itself that there are in fact good reasons for believing that there is no defence to the action. The reason for the exercise is to serve and put in place the checks and balances which will ensure that the court is properly informed and guided on its belief before entering the suit as undefended. The bottom line is aiming at the justice of the case; no more, no less.

The requisite materials that will readily assist the court in its just determination include the facts of the case coupled with the affidavit evidence by parties which must all be placed before the court; also relevant are the notice of the intention to defend if any, which must be accompanied by an affidavit of facts, disclosing the defence.

The use of the word ‘shall’ in Order 22 rule 3(1) of the Rules in this context is in my view neither in itself conclusive nor sacrosanct or absolute. In other words it should not be interpreted as mandatory but directory or permissive.

This view was held by this court in the case of UBA V. Dike Nworah (1973) 11 & 12 SC 1.

Curiously and also revealed on the record at pages 39 - 42, the defendants/applicants motion on notice dated 7th March, 2002 was also filed on the 13th March, 2002. The two reliefs sought from the trial court were:

“(1) An order for extension of time for the Defendant (sic) to file his Memorandum of Appearance out of time.

(2) An order of this court deeming the said Memorandum of Appearance as properly filed and served.”

The said application was supported by an affidavit of seven paragraphs. Specifically and by paragraphs 3, 4, 5 and 6 of the affidavit, the defendants did depose and gave their reasons why they were late in reacting to the plaintiffs’ writ and entering a defence. Also on the same date the 13th March, 2002, at pages 17 - 20 of the

record, the defendants' notice of intention to defend was filed and supported by an affidavit of 22 paragraphs annexed thereto. For purpose of clearer understanding of the position of the defendants/appellants, recourse should be had to paragraphs 13 and 16 of their affidavit in support of the notice of intention to defend which are reproduced hereunder as follows-

"13. That the second consignment of the cotton lint was never delivered to the 1st Defendant at all, and that the plaintiffs are not entitled to any payment in the sums claimed or in any sum at all. That the invoice No. 104 referred to in paragraph 4 (b) of the plaintiffs, affidavit is not related to this transaction and is the product of an after thought on the part of the plaintiffs."

16. That for reasons and facts deposed in this affidavit, the goods could not have been consumed by fire in the Defendants factory. The goods were never at the defendants' factory. The goods never even got to the Defendants, factory. Neither did the Defendants inform any Insurance Company of any matter. It was for the plaintiffs to do so if they wished."

With the depositions of the facts at paragraphs 13 and 16 supra, was it therefore fair, equitable and just for the trial court judge to have made an order of payment against a party (the defendants/appellants herein) who had placed factual reasons before the court, wherein they denied taking delivery and receipt of the product they are called upon to pay? The law relating to contractual obligation is only binding when there are offer, acceptance as well as consideration without which no valid contract can exist. From the facts revealed on paragraphs 13 and 16 supra, same should have put the judge on the guard or alert and suggestive that there was more to the claim which should not have been heard as undefended. There was, in other words, a need for further explanation by way of oral evidence. The paragraphs indicate that the defendants have a defence to the suit.

It is on record, I again emphasize, that the attention of the learned trial court judge was, on the 13th March, 2002 drawn to both the Notice of Intention to Defend and also the defendants' motion for extension of time within which to file their memorandum of appearance out of time. This was the same date the suit was heard as undefended. The court by shutting its eyes to the applications, was, I

hold, very high handed and rigidly applied Order 22 rule 3(1) over and above the concept of justice. This court again in the case of UBA V. Dike Nworah supra is in favour of hearing both sides on the merit which same principle should also have applied to the case at hand in the interest of justice.

The Constitutional provision of the Federal Republic of Nigeria by section 36 is very explicit and paramount on the concept of fair hearing which must be given to all the contending parties before a court. For instance, in the case of U.T.C (Nig.) Ltd. V. Pamotei supra, the defendant had filed a notice of intention to defend but omitted to attach a supporting affidavit thereto. In taking a very liberal view, this court at page 299 laid down the principle that where a defendant intends to defend but has taken an improper or insufficient step, he may be given an adjournment to give him an opportunity to rectify the defect and enable the trial court considers his defence.

Oputa JSC in an earlier view emphasized the guideline which was deprecated and laid down by this court in the case of Nishizawa V. Jethwani supra at page 493 and said:-

“This court has on several occasions insisted that rules of procedure should be obeyed. But all the same, rules should be helpful hand maids and not tyrannical and uncompromising masters. The general view, with which I am in complete agreement, is that it is undesirable to give effect to rules which enable one party to score a technical victory at the expense of a hearing on the merits.”

The concept of the foregoing principle is very ancient as it was firmly grounded and pronounced by Lord Bowen in the case of Cropper V. Smith (1884) Ch. D. 700 at p. 710 where in summary the learned jurist re-affirmed that the principal duty of a court is to decide the rights of parties and not to punish them for mistakes they make in conduct of their cases by deciding otherwise than in accordance with their rights. This principle is inherent and enshrined in our Constitutional provision by Section 6 of the 1999 Constitution which vests the judicial powers of the Federation in the courts; also very succinctly in its subsection 6(b) it provides that the judicial power “shall extend ... to all actions and proceedings relating thereto, for the determination of any question as to the civil rights and obliga-

tions” of persons appearing before the courts.

In the case at hand and for purpose of recapitulation, there was filed on behalf of the defendants/appellants a Notice of Intention to Defend although out of time. The affidavit in support was also placed before the trial court and the facts especially paragraphs 13 and 16 disclosed a defence on the merit. The second affidavit in support of motion for extension of time also explained the reasons for counsel’s delay in filing his papers. As rightly submitted on behalf of the appellants, the judgment entered by the trial court without considering the defendants’ side of the case did not, I hold, do substantial justice in the matter. The submission and contention held by the respondents’ counsel is not in consonance with the view held by his Lordship Oputa, JSC in the case of Nishizawa V. Jethwani (supra). In other words that the rules of procedure are not meant to be “tyrannical and uncompromising masters.”

I concur with Lord Bowen where he said in his earlier view supra that the courts in deciding rights of parties are “to do justice and not punish them for mistakes they make.” The failure to abide by the rules is clearly a mistake of counsel and which should not be visited on client as it will only occasion injustice. The failure to have come within time ought to have been treated as mere irregularity.

With all respect therefore, I beg to differ and hold that their Lordships of the Court of Appeal at page 123 of their judgment reproduced earlier, greatly erred in confirming the discretion exercised by the trial court. The exercise in other words was neither judicial nor judicious and thus a proper case for the lower court to have interfered therewith and set it aside. The said 1st issue in my view ought to and is resolved in favour of the appellants.

The second issue raised by the appellants relates to the question of jurisdiction that is to say:-

“Whether the issue of jurisdiction was not properly raised for the first time before the learned justices of the Court of Appeal.”

The said issue was predicated on ground 2 of the grounds of appeal which questions the propriety of the lower court in refusing to consider and determine the issue of jurisdiction raised by the appellants. The lower court in its judgment at pages 109, 110 and 111 of the record found and said as follows:

“The issue of jurisdiction on the ground that the entire transactions took place in Kano was never raised and decided upon by the trial court. It is therefore a fresh issue or new issue. It is the law that a ground of appeal must stem from the ratio decidendi of the judgment...”

B *Clearly issue one not having been raised at all before the trial court is a fresh issue where any issue is being raised for the first time before this court, the pre-requisite to do so, is the leave of this court. In the instant appeal there was no such leave obtained... The issue of*
C *jurisdiction cannot be decided in vacuum as in the instant appeal where there is no material whatsoever to rely upon in considering the issue of jurisdiction.”*

The learned appellants’ counsel in his submission conceded the fact that at no time was the issue of jurisdiction raised before the
D lower court. However and that notwithstanding, references were made on case laws and statutes which are emphatic that an issue of jurisdiction can be raised at anytime and without obtaining prior leave of court. Further reference was also copiously related to the facts
E deposited to on the affidavit in support of the Notice of Intention to Defend and also on the submission by the respondents’ counsel himself. The various processes filed and grounding the suit are also relevant materials serving as point of reference.

In his final submission the learned counsel highlighted that
F the issue of territorial jurisdiction was rightly raised for the first time before the learned justices of the Court of Appeal. Reliance was again focused on the record which revealed that where the contract was to be performed, and the residence of all the defendants was in Bompai - Kano, Kano State, which is outside the jurisdiction of the Zamfara
G State, it thus rendered it unsuitable for trial on the undefended list; that the learned justices of the Court of Appeal ought to have considered the issue when it was raised before them.

The learned respondents counsel did not on behalf of his clients deem it necessary to join issue with the appellants on this point.

H ***The determination of the said issue is very simple and straightforward especially wherein the law is trite and well settled on the issue of jurisdiction which is very fundamental and constitutional. It is not, in this context, procedural and therefore cannot be compromised. It cannot also be conferred***

by consent of parties or waived. Where a court acts without jurisdiction it acts in futility. This may explain the reason behind the principle that the issue of jurisdiction could be raised at any stage of a proceeding even for the 1st time in this court. This principle is well entrenched by this court in a long line of decided authorities. For instance the case of Awuse V. Odili (2004) FWLR (Pt. 193) p. 325 is very instructive, wherein this court held as a matter of law that the issue of jurisdiction can be raised at any time or stage without the leave of court. Other related authorities are: Senate President F.R.N. V. Nzeribe (2004) All FWLR (Pt. 215) 359; Ezomo V. Oyakhire (1985) 2 SC 260 and Bronik Motors Ltd V. Wema Bank Ltd. N.S.C.C. p.226 at 231 wherein Nnamani JSC made the following pronouncement:-

"It is necessary to point out at this stage that the issue of jurisdiction was never taken before the High Court and the Court of Appeal. There really can be no objection to this since it is well settled that jurisdiction can be raised at any state of the proceedings, the point being taken in this court could not have been taken in the two courts."

I have reproduced the portion of the judgment by the lower court justices as to why they refused to consider and determine the question of jurisdiction. The two reasons predicating their actions were:

(1) That the jurisdictional issue raised was incompetent as the leave of the Court of Appeal was not sought to raise same as a new issue; and (2) That there was no material before the Court of Appeal to ground the issue of jurisdiction.

With reference made to the decision in the case of Awuse V. Odili as well as the other related sister cases supra, the answer to the 1st line of contention advanced by the lower court is obvious. In other words the leave of Court of Appeal was not desirable or necessary for purpose of raising the ground as a new issue. By the very nature of the issue being jurisdictional the law presupposes that it is competent. It serves an exception to the general rule that leave must be obtained before new issues are raised. The application of the general rule to the question of jurisdiction will operate a negative set back and thus undermining the fundamental effect of proceedings conducted without jurisdiction which is a nullity.

The reasoning and refusal by the lower court is not in accordance with the tenets of the principle laid down.

The next point for consideration relates to the territorial jurisdiction wherein the lower court arrived at a conclusion that there was no material placed before it to ground the issue of jurisdiction. It is not in dispute but agreed by all parties that the goods the subject matter of the plaintiffs/respondents complaint were to be delivered at Bompai, Kano in Kano State. This is evidenced per the documents relevant to the contract between the parties in particular the local purchase order dated 23/03/2001 at page 21 of the record which describes the subject matter of the contract as ‘Nigerian Cotton Lint. Transport charges included payment after delivery.’ One of the delivery notes contained at page 24 of the record confirms the receipt by the store keeper, Bompai KANO.

With further reference also at paragraphs 7 and 8 of the affidavit in support of the Notice of Intention to Defend the reproduction at page 19 of the record are very revealing and informative:-

“7. That on the contrary, as the officer responsible for placing the aforesaid order from the 1st Plaintiff, I called at the 1st Defendant’s factory in Bompai, Kano in the afternoon of Sunday 25th March, 2001 to ensure that the goods had been delivered, whereupon I was informed that lorry No. AA 861 KTN had delivered the consignment afore-said.

8. That further to the averments in paragraph 7 above I was also informed by our security personnel at the factory that a man had called at the security post to inform them that he was the driver to a second lorry conveying cotton lint from Gusau to our company, the 1st Defendant, in Kano, but that unfortunately his lorry caught fire some where in Kano on his way to our factory.”

As rightly submitted by the learned counsel for the appellants it is clear on the record that the plaintiffs/respondents were to perform the contract by delivering the goods in Kano. It goes without further saying therefore that it is the Kano High Court that has the jurisdiction to adjudicate in the event of a dispute arising out of the contract.

The Constitution of the Federal Republic of Nigeria 1999 has by section 270(1) provided a High Court for each state of the Fed-

eration; section 272(2) of the said Constitution is also relevant and it states:-

*“The reference to civil or criminal proceedings in this section includes a reference to the proceedings which originate in the High Court of a State and those which are brought before the High Court to be dealt with by the court in the exercise of its appellate or super-
visory jurisdiction.”* B

A further relevant and applicable legislation is again the Sokoto High Court Civil procedure Rules 1987 applicable in Zamfara State wherein Order 10 Rule 3 provides that all suits for Specific Performance or upon breach of contracts are to be commenced in the judicial division in which the contracts ought to have been performed or in which the Defendants reside. C

In the instant case, the defendants/appellants' residence is clearly shown to be in Kano which is also the place at which the contract was to be performed. From the writ of summons at page 1 of the record it further reveals that all the defendants were to be served at Maimalari Road, Bompai Industrial Estate Kano. The affidavits of service are all evident at pages 11, 12, 13, 14, 15 and 16 of the record of appeal wherein all the defendants were at Maimalari Road Bompai Industrial Estate, Kano where they reside. D E

From the foregoing deductions, I hold a firm view that the lower court could not be correct in concluding that there was no material placed before it to ground the issue of jurisdiction. The court in that behalf, I hold, was in great error. This is because sufficient and overwhelming materials availed before it that the territorial jurisdiction is vested in the High Court of Kano State and not the Zamfara State High Court. The said issue 2 is also resolved in favour of the appellants. F G

Issues 3 and 4 are very dependant upon issues 1 and 2 respectively and they needed no further examination therefore. In other words, while issue 3 is well integrated into issue 1, issue 4 which seeks to emphasize the view held by the lower court on the jurisdictional competence is also well encompassed within issue 2. H

On the totality and with all the issues having been resolved in favour of the appellants, the appeal has merit and is hereby allowed. In the result, the judgment of the lower court delivered on the 16th day of December 2004 in Appeal No. CA/K/214/2002 and affirming

the decision of the Zamfara State trial High Court in suit No. ZMS/GS/8/2002 is hereby set aside. In its place an order is made that the suit be transferred to the general cause list to be heard on the merit and before a Kano State High Court. A further order is made that the respondents be condemned to costs of N100,000.00k in favour
B of the appellants.

I. T. MUHAMMAD JSC

C I have read before now the judgment of my learned brother Ogunbiyi, JSC. My lord has done full justice to the appeal and I need not add anything.

I agree with him and adopt all the consequential orders made in the lead judgment.

D

GALADIMA JSC

I was privileged to have read in draft the judgment of my learned brother, OGUNBIYI, JSC just delivered. I agree with my
E brother that this appeal has merit and should be allowed.

The appeal is against the judgment of the Kaduna Division of the Court of Appeal delivered on 16/12/2004 wherein the Court dismissed the Appellants' appeal.

F The Court however affirmed the judgment of Zamfara State High Court delivered on 26/3/2002.

In suit No. ZMS/GS/8/2002 brought under undefended list, the Respondents, as plaintiffs, claimed against the Defendants (now the Appellants) various sums of money as follows:

G *"(i) The sum of N2,087,435.00 (Two Million, Eighty-Seven Thousand, Four Hundred and Thirty-Five Naira only).*

(ii) The sum of N274,000.00 (Two Hundred and Seventy-Four Thousand Naira) had and received of the 2nd Respondent by the 2nd and 3rd Appellants in order to facilitate the payment of (i) above; plus interest at 24% per annum calculated at monthly rate from 3/5/2001 until judgment and thereafter at 10% until final liquidation.

H *(iii) Cost assessed at N5,000.00 (Five Thousand Naira only)."*

On 13/3/2002, when the matter came up for hearing, the

Defendants/Appellants informed the trial Court of their pending application praying the court to consider their defence on the merit as disclosed in the supporting affidavit. They also made oral application relying on Order 2(1) of the Civil Procedure Rules, 1987 (as applicable in Zamfara State) urging the court to treat the late filing of their process as mere irregularity, and there upon extend the time within which they can file their Notice of Intention to Defend the suit. B

Considering, the vehement opposition by the Respondents to the Appellant's applications, and urging the court to enter judgment in their favour, the learned trial judge after adjourning the matter for two weeks ruled in favour of the Respondents thereby entering judgment in their favour in terms of their claim. On appeal, the court below affirmed the decision of the learned trial Judge and dismissed the Appellants' appeal. This further appeal is a complaint against the decision of the court below. C D

In their six Grounds of Appeal, Appellants formulated four issues for determination of the appeal. On their part, the Respondents formulated a single issue for determination as follows:

"Whether the learned Justices of the Court of Appeal were right in affirming the judgment of the trial court whereby he awarded judgment against the defendants (now Appellants before this Honourable Court) under the undefended list for failure of the defendants/Appellants to file their Notice of Intention to Defend within 5 days before the date of hearing as required by Zamfara State High Court Civil Procedure Rules, coupled with the fact that the defendants/Appellants did not file any motion for extension of time to file their notice of intention to defend." E F

In my view the Appellants' 1st issue and the sole issue raised by the Respondents aptly determines the appeal. Understandably in their brief, the Respondents deemed it necessary to respond to the appellants' issue 1 and only a part of issue 3 and this as it relates to Ground 1 of the grounds of appeal. G

The question that was raised in the Appellants' 1st issue is whether the court below was in order by affirming the exercise of discretion by the trial judge which was tantamount to a denial of fair hearing. It is contended that considering the circumstances of this case, the court below should set aside the decision of the learned trial court and not affirming it. H

To substantiate their denial of fair hearing, their learned counsel referred to the record of appeal, particularly the trial court proceedings resulting in the judgment appealed against. It is narrated that the Appellants were served with a writ of summons brought under the undefended list in which Rule 3(1) of Order 22 of the version
B of the State Civil Procedure Rules relied on by the Respondents did not specify time limit within which the Appellants were to file their Notice of Intention to Defend. It was further submitted that there was Motion on Notice seeking for an extension of time within which the
C appellants were to file their Memorandum of Appearance as evidenced in the Record on pages 39 - 42. Reliance was also placed on their Notice of Intention to Defend the suit filed on 13/3/2002 supported by an affidavit particularly paragraphs 13 and 16 of the said affidavit wherein, the claims of the Respondents were vehemently contested.

D On their part learned counsel for the Respondents did not see anything wrong with the lower court affirming the decision of the trial court. It is contended that Order 22 Rule 3(1) of the Zamfara State High Court (Civil Procedure) Rules, was appropriately considered and applied; he called on this court to relate closely with pages
E 31 lines 35 to 38 of the record of appeal; submitting that the provisions of the Rules must be strictly adhered to.

The relevant portion of the judgment of the trial court that has provoked this discourse is at page 34 of the record. It reads thus:

F *“Having considered the writ of summons with its supporting affidavit and failure of the defendants to file notice of intention to defend, I am satisfied that the defendants have no defence to the suit.”*

G The foregoing pronouncement by the trial court cannot be taken as absolutely correct. The Record of appeal at page 17 shows clearly that the Notice of Intention to Defend the suit that was filed on 13/3/2002; the day the undefended suit was heard. It is not in dispute that as at the date of hearing the suit, the Appellants had in fact filed their Notice of Intention to Defend and same was served on the
H respondent’s learned counsel. The learned trial judge’s attention was drawn to this fact per the submission of the counsel in court. The record also shows that the Appellant’s counsel made oral application urging the court to extend the time within which to file the said notice and to invoke the provisions of Order 2 rule 1 of the High Court Civil

Procedure Rules (supra).

I agree with my learned brother that the determination of the Appellant's 1st issue, which arises from grounds 3 and 5 of the Notice of appeal, is crucial. The issue is predicated on the provision of Order 22 of the Zamfara State High Court (Civil Procedure) Rules 1987, paragraphs 1-5 of which have been reproduced in the Lead Judgment. The learned trial judge found himself bound by Rule (4) of O. 22 (supra) and concluded that "defendants have no defence to the suit" and held that respondents were entitled to judgment. B

The court below in affirming the conclusion arrived by the trial court held at page 123 of the record thus: C

"since the learned trial judge has properly exercised his discretion in reaching his decision as can be clearly seen from the portion of the judgment reproduced in this judgment, this court as an appellate court should not interfere with the exercise of discretion of the trial court." D

Quite rightly, it has been settled that an appellate court will not ordinarily interfere with the exercise of discretion by the trial court, unless it can be shown that such exercise was either made arbitrarily, or not predicated on any principle of law. See SOLANKE v. AJIBOLA (1968) 1 All NLR 46. E

I am of the firm view that in the circumstance of this case, this is a clear instance, the court below should have interfered with the exercise of discretion by the trial court, as that exercise was not judicious and judicial. It was unjust and inequitable for the trial judge to have shut out the Appellants who had clearly shown that they had all the materials placed before the court to contest the liquidated sum of money claimed by the Respondents. This was clearly shown in the Appellants Motion on Notice dated 7/3/2012 seeking for an extension of time for the Appellants to file their Memorandum of Appearance. The Application which was supported by an affidavit of 7 paragraphs. The Appellants stated their reasons why they were late in reacting to the Respondents' writ and entering defence. Demonstrating their desire to defend the suit, the Appellants on the same date, that is 13/3/2002, filed a Notice of Intention to defend same and supported it by an affidavit of 22 paragraphs. Paragraphs 13 and 16 of their affidavit read as follows: F G H

"13. That the second consignment of the cotton lint was never

delivered to the 1st Defendant at all, and that the plaintiffs are not entitled to any payment in the sums claimed or in any sum at all. That the invoice No.104 referred to in paragraph 4(b) of the plaintiffs' affidavit is not related to this transaction and is the product of an afterthought on the part of the plaintiffs ..."

B *16. That for reasons and facts deposed in this affidavit the goods could not have been consumed by fire in the defendants' factory. The goods never even got to the Defendants factory. Neither did the Defendants inform any insurance company of any matter...."*

C In the light of the foregoing, I am of the firm view that the trial court, without considering the Appellants' side of the case did not do substantial justice in the matter. The exercise of discretion by the trial court was neither judicial nor judicious. This is a proper case for the lower court to have interfered with and set it aside.

D The second issue raised by the Appellants relates to question of territorial jurisdiction. In the lead judgment the issue has been exhaustively dealt with leading to the conclusion that it is the Kano State High Court that has the jurisdiction to adjudicate in the matter. Appellants' residence is Kano which is also the place at which the contract was to be performed. The writ of summons reveals that all the Defendants/Appellants were to be served at Mai-Malari Road, Bompai Industrial Estate, Kano. Sufficient and overwhelming materials were available before the trial court that the territorial jurisdiction is vested in the High Court of Kano State and not Zamfara State High Court.

F Issues 1 and 2 having been resolved in favour of the Appellants, it is needless for me to consider issues 3 and 4 which are integrated into issue 1 and encompassed with issue 2 respectively.

G It is in the light of the foregoing reasons and the fuller ones given in the lead judgment that I too hold that the appeal is considered meritorious and it is allowed. Consequently, the judgment of the lower court delivered on 16/12/2004 affirming the decision of the trial High Court, Zamfara State, is hereby set aside. It is ordered H that the suit be transferred to the general cause list to be heard on the merit before the High Court of Kano State. I too award costs of N100,000.00, in favour of the Appellants.