

SUPREME COURT OF NIGERIA
FRIDAY 14TH JUNE, 2013. SC. 96/2008
**CORAM:- W. S. N. ONNOGHEN, M. S. MUNTAKA-
COOMASSIE, S. GALADIMA, O. ARIWOOLA,
M. D. MUHAMMAD, JJSC**

SURVEYOR B. J. AKPAN APPELLANT
(Carrying on business under the
name & Style of Benchmark
Surveys & Engineering Company)
AND
AKWA-IBOM PROPERTY &
INVESTMENT CO. LTD. RESPONDENT

UNDEFENDED SUITS - Listing - Condition for - To place a matter under this procedure - Plaintiff's claim must be liquidated - Or be based on ascertainable debt (H1)

UNDEFENDED SUITS - Liquidated sum - Meaning - Maja's case - It is an ascertained claim or specific amount - That requires no further determination of extent of defendant's liability (H2)

UNDEFENDED SUITS - Liquidated demand - Contentious claims - As the dispute between the parties are contentious - The sum of N12,169, 847.71 and interest of 21% claimed by appellant - Were not liquidated money demand (H3)

UNDEFENDED SUITS - Interest - Proof - Plaintiff's affidavit must disclose - How his right to the interest being claimed accrues - And how the rate thereof was arrived at (H4)

APPEALS - Judgment - Undefended suit - Decision transferring the matter to undefended list - Is correctly adjudged as defective - Even though CA wrongfully ruled that trial court is not bound - To consider documents for such transfer (H5)

UNDEFENDED SUITS - Defence - Notice of - Failure to file - Judgment is not automatically given to plaintiff where defence is not filed

- As trial court must scrutinize the claim - To ensure that it is one that could be heard under the procedure (H6)

FACTS

Before the Uyo Judicial Division of the High Court of Akwa Ibom State, plaintiff/appellant commenced this action via undefended list procedure against defendant/respondent. Appellant's claim is for the sum of N13,169,847.71 being the balance due and payable to appellant by respondent as his professional fees on a Survey Contract awarded to appellant. Appellant further made claim for 21% interest on the aforesaid amount until it is finally liquidated. Appellant's contention is that his claim against respondent was liquidated money demand in view of the terms of the contract in the letter of appointment in which respondent unequivocally stated that the fees for appellant's services shall be based on government's approved scale of fees.

On the other hand, respondent contended that the fact that appellant's fees shall be based on government approved scale of fees, does not mean that whatever bill appellant eventually submitted to respondent, whether in full or partial compliance with the agreed scale shall be sacrosanct or not disputable. Respondent however did not file notice of intention to defend the action. In its ruling, the learned trial Judge entered judgment under the procedure in favour of appellant. Aggrieved, respondent filed appeal in the Court of Appeal, Calabar Division. The court allowed the appeal on the sole ground that the amount claimed by appellant is not a liquidated money demand. The court therefore ordered a retrial of the case under the General Cause List. Appellant being dissatisfied, appealed to Supreme Court.

ISSUES FOR DETERMINATION

"1. Whether the claim of the Plaintiff/Appellant was not one for liquidated money demand having been based on the Scale of Fees agreed by the parties.

2. Whether the Court of Appeal was right in holding that "the order to place the Suit on the undefended list is itself defective, because the facts and annexure to the affidavit show that the sum claimed is not liquidated money demand", in view of the fact that the Fee Advice of the Defendant/Respondent was not based on any Scale

of Fees.

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

UNDEFENDED SUITS - Listing - Condition for

1. One of the conditions precedent to placing a matter on the undefended list is that the plaintiff's claim must be liquidated or be based on ascertainable debt. (p. 2644 H)

UNDEFENDED SUITS - Liquidated sum - Meaning

2. The term “liquidated money demand or liquidated sum” has attracted many judicial definitions. In some cases, it is held to be a sum of money previously agreed upon by the parties to a contract, if the action is based on a breach of contract.

It has also been defined as “a definite settled sum which the defendant cannot deny. However, the phrase “liquidated money demand” was interpreted by the Supreme Court in MAJA v. SAMOURIS (supra) as an ascertained claim or specific amount; which means there is nothing more that needs to be further done to determine the quantum or extent of the defendant’s liability. In EFFANGA v. ROGERS (2003) FWLR (pt.157) 1058 “liquidated money demand” was defined as an amount of money that could be ascertained by calculation or fixed by any scale or other positive data or mathematics. But that when the amount to be recovered depends on circumstances and is fixed by opinion or estimate it is said not to be liquidated. (p. 2645 A)

UNDEFENDED SUITS - Liquidated demand - Contentious claims

3. In the light of the above legal authorities, the question is whether the claim of the Appellant for the sum of N13,169,847.71 plus interest at the rate of 21% was a liquidated money demand. The Appellant has contended that the claim was a liquidated money demand for the reason that the parties had agreed that payment for the land survey contract was to be based on “Government approved Scale of Fees” as

per the letter of award Exhibit ‘A’” In his contention, since the bill of the said sum in Exhibit ‘D’ was submitted by him to the Respondent upon completion of the land survey contract, was based on the said Government approved scale of fees for consultants/surveyors in the Construction Industry 1996, it was a liquidated demand.

Learned counsel for the Respondent has not agreed with the submission of the Appellant’s Counsel on this point. I agree with him. The fact, that the parties agreed that the appellant’s fees shall be based on “Government Approved Scale of fees,” does not mean that whatever bill the appellant eventually submitted to the respondent whether in full or partial compliance with the agreed scale should be accepted without dispute. The Respondent has the right to vet the appellant’s bill to ascertain whether the items contained therein are actually in line with the agreed approved Government Scale of Fees vis-à-vis his particular job already executed.

No doubt the disagreement between the parties was contentious, so much that, the Appellant in rejecting the Respondent’s vetting of his bill wrote in Exhibit ‘F’ at page 17 of the Record, thus:

“I would be glad to come over to your office when you so desire to iron this out. In the alternative, you may direct the matter to appropriate Government office for arbitration”

In the light of the foregoing, I am of the view that the court below was right in holding that the sum of N13,169,847.71 claimed by the Appellant as well as interest of 21% was not a liquidated money demand. Accordingly, issue (1) one is resolved in favour of the Respondent and against the Appellant.

(pp. 2646 A/2647 A/G)

UNDEFENDED SUITS - Interest - Proof

4. Generally, a claim for interest under the undefended list bears the same principles as in a claim under the general cause list. Any Plaintiff claiming interest under the undefended list must disclose in his affidavit how his right to interest accrues and how the rate thereof was arrived at. (p. 2647 E)

Judgment - Undefended suit

5. In issue 2, the main point of the Appellant Counsel's argument is that the court below was wrong in holding that the order to place the suit on the undefended list is itself defective because the facts and annexure to the affidavit show that the sum claimed is not liquidated money demand. The correctness of this finding by the Court below cannot in any way be faulted. I have clearly shown this while considering the argument and submissions of the learned counsel for the respective parties under issue No. 1, above. The Court found as a fact that the trial court did not scrutinize the Appellant's claim to ensure that it was one for a liquidated money demand.

The Appellant has admitted that since the court below had in its lead Judgment at page 189 of the record ruled that "the court does not have to forage into the file," to see whether the documents tendered by the applicant for the application to place the suit on undefended list before the court makes the order, the court ought to have affirmed the decision of the trial court which was in favour of the appellant. Although the court below made this ruling in its lead Judgment, the court at the same page 189 went ahead to qualify, so to say, the said ruling, thus:

"The Judge, however, has to ensure before placing the suit on the undefended list that the claim of the Plaintiff against the defendant is for liquidated money demand".

Even though the court below went on a bridle path to hold that the trial court was not bound to "forage into the file to see whether the documents tendered by the applicant suffice to place the case on the undefended list", it is my view that this in itself cannot be sufficient ground to set aside the final decision of the court below, which is adjudged to be correct. The question really is, whether the Judgment appealed against is right or wrong. In this case, as I have said, the correctness of the findings by that court cannot be faulted. (p. 2647 H)

UNDEFENDED SUITS - Defence - Notice of - Failure to file

6. Finally, I have noted that the Appellant has harped so much, particularly in his Reply Brief, on the failure of the Respon-

dent to file their Notice of Intention to defend his claim and affidavit in support of the Notice. I have read the cases and the findings of those courts and the passages adumbrated in paragraphs 5.02 (iv) and 5.02 (vi) of the Respondent's brief of argument. In sum, the authorities state the correct position of the law. It is incorrect to contend that when a defendant fails to file Notice of Intention to defend the suit the court must automatically enter judgment for the plaintiff. That is not the decision in the case of BEN THOMAS HOTELS LTD v. SABE FURNITURE LTD. (1987) 12 SCNJ 171, cited and relied upon by the Appellant. The trial court was bound to scrutinize the Appellant's claim to ensure that it is one that could be heard under undefended list. Again, in the light of the foregoing, this issue is resolved in favour of the Respondent. (p. 2648 G)

NOTABLE POINTS OF INTEREST

ARIWOOLA JSC

1. Undefended List Procedure – Purpose of
 Generally, Undefended List Procedure is usually provided for in the rules of trial courts. The purpose of the procedure under the Undefended List as opposed to General Cause List is to enable the plaintiff, initiating the action, obtain summary judgment without resort to trial where the case is patently clear and unassailable. (p. 2651 D)

2. Summary judgment – Meaning of
 Summary Judgment therefore is a judgment granted on a claim or defence about which there is no genuine issue of material fact and upon which the movant is entitled to prevail as a matter of law. For this type of judgment, the court will only consider the contents of the pleadings, the motions and additional evidence adduced, such as documents produced as Exhibits, by the parties rather than one of law. This procedural device allows speedy disposition of a controversy without the need for trial. (p. 2651 F)

REPRESENTATION

M. D. Uyoh Esq., for the Appellant
 Respondent though served with Hearing Notice on 2/1/2013, was

absent and no appearance for him

CASES REFERRED TO

- Koiki v. Magnusson (2001) FWLR (pt. 63) 167
Olaoye v. Balogun (1990) 5 NWLR (pt. 133) 385
Obiami Brick & Stone Nig. Ltd. v. ACB Ltd. (1992) 3 NWLR (pt. B
229) 260
Allied Trading Co. Ltd. v. G.B.N. Line (1985) 5 NWLR (pt. 5) 74
Oyenuga v. Intr'l Computers Nig. Ltd. (1991) 1 NSCC 202
Okechukwu v. Onuorah (2001) FWLR (pt. 33) 219
Ogun State Govt. v. Danlami Nig. Ltd. (2007) All FWLR (pt. 266) C
438
Ben Thomas Hotels Ltd. v. Sabe Furniture Ltd. (1989) 12 SCNJ 171
Maja v. Samouris (2002) 3 SC 37
Akinyemi v. Governor Oyo State (2003) FWLR (pt. 140) 1821 D
Johnny v. Edoja (2007) All FWLR (pt. 365) 527
Nortex Nig. Ltd. v. Frame Tools Co. Ltd. (1997) (pt. 501) 603
Ya'u v. City Security Ltd. (2003) FWLR (pt. 501) 603
Effanga v. Rogers (2003) FWLR (pt. 157) 1058
Abayomi v. A-G Ondo State (2007) All FWLR (pt. 391) 1683 E

RULES REFERRED TO

Akwa Ibom State High Court (Civil Procedure Rules) 1989, O. 23 r.
3(1)

F

BOOK REFERRED TO

Black's Law Dictionary 8th Ed. p. 246

LEAD JUDGMENT BY GALADIMA JSC

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This is an appeal against the Judgment of the Court of Appeal (now referred to as the Court below) in Suit No.CA/C/141/2004 delivered on 28th June, 2007. The Appellant herein, as plaintiff had instituted through an undefended list procedure against the Respondent as Defendant at the Uyo High Court (Akwa Ibom) in Suit No.HV/UND.3/2/2004 claiming N13,169, 847.71 (thirteen Million, One Hundred and Sixty Nine Thousand, Eight Hundred and Forty Seven Naira, Seventy one Kobo) being the balance due and payable to the Plaintiff by the Defendant as his professional fees on a Survey Con-

H

tract awarded to the Plaintiff and 21% interest on the said amount claimed, until it is finally liquidated.

The learned trial Judge entered Judgment in an undefended list action in favour of the Appellant. The Respondent company which could not file notice of intention to defend the cause was not satisfied with the Judgment and so appealed to the court below, which in a unanimous Judgment upheld the appeal on the sole ground that the amount claimed by the Plaintiff is not a liquidated money demand and accordingly ordered a retrial of the cause under the General Cause List.

It is against this Judgment of the court below that plaintiff has appealed to this Court on the following two grounds with the particulars:

“(1) ERROR IN LAW

The Court erred in law in allowing the appeal on the ground that the proceedings in the Court below was a nullity as the matter on which the trial Court ruled is not a liquidated money demand.

PARTICULARS

(a) The appellate Court did not take into consideration the terms of contract between the parties to wit, “the fees for your services shall be based on the Government’s approved scale of fees”. (Exhibit “A”).

(b) The bill submitted by the Plaintiff/Respondent/Appellant was based on the Government approved fees for consultants in the construction Industry 1996 (Exhibit “D”).

(c) The pay advice from the Defendant/Appellant/Respondent was not based on any government approved scale of fees or any scale of fees at all (Exhibit “E”).

(d) The reaction by the Plaintiff/Respondent/Appellant to the pay advice suggesting meeting with the Defendant/Appellant/Respondent or an arbitration was not admission that the money was not liquidated in view of the fundamental flaws highlighted by Plaintiff/Respondent/Appellant (“Exhibit “F”),

(2) ERROR IN LAW:

The Court erred in law in setting aside the Judgment of the trial Court on the ground that the affidavit in support of the application to place the suit on undefended list did not disclose facts which render the Defendant/Appellant/Respondent liable to the claim of

the Plaintiff/Respondent/Appellant.

PARTICULARS:

(a) *The submission of the Defendant/Appellant/Respondent that the annexure to the Applicant request to place the Suit on the undefended list should have made the trial Judge refuse the application was overruled by the Appellate Court.* B

(b) *The same annexure were served on the Defendant/Appellant/Respondent that refused or neglected to file any notice of intention to defend under Order 23 Rule.*

(c) *The bill submitted by the Plaintiff/Respondent/Appellant based on Government Approved Scale of fees was one of the annexure which objection was refused by the Appellate Court.* C

(d) *The pay advice of the Defendant/Appellant/Respondent was one of the annexure used in obtaining leave to place the suit on the undefended list.* D

(e) *The pay advice was not based on any scale of fees.”*

From the two grounds of appeal the Appellant raised three issues for determination as follows:

“1. *Whether the claim of the Plaintiff/Appellant was not one for liquidated money demand having been based on the Scale of Fees agreed by the parties.* E

2. *Whether the Court of Appeal was right in holding that “the order to place the Suit on the undefended list is itself defective, because the facts and annexure to the affidavit show that the sum claimed is not liquidated money demand”, in view of the fact that the Fee Advice of the Defendant/Respondent was not based on any Scale of Fees.* F

3. *Whether the reply of the Plaintiff/Appellant to the Fee Advice of the Defendant/Respondent and the suggestion of the Plaintiff/Appellant that the matter be referred to an arbitration made the claim of the Plaintiff/Appellant an unliquidated money demand.”* G

The learned counsel for the Respondent has submitted that the Appellant was wrong to have raised three issues for determination of his two grounds of appeal. He has, however deemed it appropriate to formulate two issues for determination of the appeal as follows: H

“1. *Whether the Court of Appeal was right in holding that the plaintiff/appellant’s claim before the trial court was not “a liqui-*

dated money demand” going by the affidavit and documentary evidence put forward by the appellant and so ought not to have been heard under the undefended list.

2. *Whether the holding of the Court of Appeal at page 189 lines 21 - 26 that the trial High Court was not under a duty to forage into the file to see if the documentary evidence in support of the application to place the case on the undefended list makes the order was in conflict with the Court’s eventual finding that the claim of the appellant was not a liquidated money demand and if so whether this was fatal to the decision?*

On the 18th day of March, 2013 when this appeal came up for hearing, learned counsel for the Appellant M. D. Uyoh Esq. identified the Appellant’s brief of argument filed on the 30th April, 2008 and Reply Brief filed on 1/7/2008. Having adopted and relied on both briefs, sought for leave of the Court to abandon the third issue formulated by the Appellant, without further amplification on the other two issues, learned counsel then urged the court to allow the appeal. It is however noted that although brief of the Respondent has been prepared and served on the appellant and Hearing Notice duly issued out, he was absent to adopt same. The brief was accordingly deemed argued.

On proper scrutiny of the two issues distilled by the respective parties, it is clear that the said issues are similar.

On the first issue, the Appellant has contended that his claim against the Respondent was liquidated money demand in view of the terms of the contract in the letter of appointment in which the Respondent unequivocally stated that the fees for Appellant’s Services “shall be based on government’s approved scale of Fees”. That the Appellant submitted his bill based on the only scale of fees known to the Respondent. Since the Respondent failed and/or neglected to provide any other scale of fees other than the 1996 scale of fee, the Appellant was entitled to the Judgment. The learned counsel for the Appellant submitted therefore that the court below was in error to have set aside the Judgment of the trial Court. That in the absence of any evidence to the contrary, the court below was bound to interpret the clause in the letter of appointment based on the bill submitted by the Appellant. Reliance was placed on the cases of KOIKI v. MAGNUSSON (2001) FWLR (Pt. 63) 167 at 193 - 194 and OLAOYE

v. BALOGUN (1990) 5 NWLR (Pt. 133) 385 to the effect that where the parties have embodied the terms of their agreement in a written document extrinsic evidence is not admitted to add, vary or subtract from or contradict the terms of the written instrument. In other words, that where the parties enter into a contract, they are bound by the terms thereof and it is unfair to read into such a contract terms on which there is no agreement. Further reliance was placed on the cases of OBIAMI BRICK & STONE (NIG.) LTD. v. ACB LTD. (1992) 3 NWLR (Pt.229) 260 at 264, ALLIED TRADING CO. LTD. v. G.B.N. LINE (1985) 5 NWLR (Pt.5) 74.

It is argued that the fee advice of the Respondent was not based on any scale of fees. It is contended that item B - "CONSULTANCY" at page 14 of the Record, was in agreement with the bill under item 'A' - "CONSULTANCY" submitted by the Appellant. That the contention of the Appellant at the trial was that the Respondent had agreed that his fees will be based on Government approved scale of fees, and the bill submitted was based on that scale of fees, while the fee advice was not based on any scale of fees. Learned counsel has submitted that in the absence of any scale of fees other than what the Appellant submitted to the Respondent, which scale of fees is known to the Respondent, the Appellant was entitled to Judgment based on the bill submitted to the Respondent. Assuming, though not conceding that there was no agreement at all on the fees, it is contended that the Appellant would still be entitled to the fees claimed by him. Reliance was placed on the case of DEJI OYENUGA v. INTERNATIONAL COMPUTERS (NIGERIA) LTD. (1991) 1 NSCC 202. That in this case the Appellant submitted his bill based on the said 1996 Federal Government Approved Scale of Fees for Consultants/Surveyors in the Construction Industry. It is finally submitted that on the authorities of OKECHUKWU v. ONUORAH (2001) FWLR (Pt.33) 219 at 230 and OGUN STATE GOVERNMENT v. DANLAMI NIGERIA LTD. (2007) All FWLR (Pt.266) 438 at 468, the courts below were bound to give effect to the terms of agreement between the parties.

On the second issue, learned counsel for the Appellant has submitted that the annexure used in obtaining the leave of Court to place the suit on the undefended list were sufficient to render the Respondent liable to the Appellant's claim. The court below was taken

to task on the statement it made at page 189 of the Record to the effect that:

“The court does not have to forage into the file to see whether the documents tendered by the applicant for the application to place the suit on the undefended list before the court makes the order.

B Therefore, the submission of the defendant/appellant that the annexure to the applicant request to place the suit on the undefended list should have caused the judge to refuse the application does not avail him.”

C In the light of the above, the learned counsel for the Appellant has observed that the same annexure used in obtaining leave to place the suit on the undefended list was the ones used in the substantive suit, which judgment was entered for the Appellant. It is submitted that the lower court having overruled the submission of the
D Respondent herein on those annexure, the proper order to make was to affirm the decision of the trial court which was in favour of the Appellant. It is argued that in appealing against the Judgment of the trial court the Respondent did not adduce any fresh facts other than what was presented by the Appellant at the court below. It was further
E contended that the Respondent having failed to file notice of intention to defend within the days allowed by Order 23 Rule 3(1) of the Akwa Ibom State High Court (Civil Procedure Rules) 1989, the trial court was right to have entered Judgment in favour of the Appellant on the authority of **BEN THOMAS HOTELS LTD. v. SABE**
F **FURNITURE LTD.** (1989) 12 SCNJ 171 at 172.

Responding on the first issue, the learned counsel for the Respondent has submitted that the court below was perfectly right in holding that the claim of the Appellant before the trial High Court
G was not a liquidated money demand and it cannot be adjudicated on the undefended list. Reliance was placed on the Black’s Law Dictionary 8th Edition on the definition of “a liquidated” and “unliquidated claim” and the cases of **MAJA V. SAMOURIS** (2002) 3 SC. 37. **AKINYEMI v. GOVERNOR OYO STATE** (2003) FWLR (Pt. 140) 1821
H at 1823. It is further submitted that where the claim is not a liquidated money demand it is immaterial that the defendant did not file Notice of Intention to defend, as it is the claim that confers jurisdiction on the court. Respondent does not agree with the contention of the appellant that since the bill of N13,169,847.71 (Exhibit ‘D’), sub-

mitted by the appellant to the respondent upon completion of the land survey contract was based on the agreed government approved scale of fees for Consultants/Surveyors in the Construction Industry, 1996, it was a liquidated money demand. Learned Counsel has argued that the fact that the appellant's fees shall be based on "government approved scale of fees" does not mean that whatever bill the appellant eventually submitted to the respondent, whether in full or partial compliance with the agreed scale shall be sacrosanct or not disputable. Learned Counsel has mentioned some areas of disagreements between the parties to include the following: the amount of mobilization given by the respondent company to the appellant in Exhibits 'D' and 'E' of the Appellant and the respondent respectively; the stage of the execution of the contract, absence of express interest of 21% on the amount claimed. It is in the light of the foregoing that the Respondent felt that the court below was perfectly right when it held that the sum claimed with interest are disputed and cannot be claimed in an undefended list action.

On the second issue, learned counsel for the Respondent has submitted that since it is very clear and correct that the claim of the appellant was not one for a liquidated money demand, the earlier findings of the court below that the trial court was not bound to look at the documentary evidence before deciding whether to place the case on the undefended list is of no moment and immaterial, since this is wrong reason for the correct judgment. On the whole the respondent has submitted that the appeal lacks merit and should be dismissed.

I must as well note that the Appellant filed a Reply Brief on 1/7/2008. It is essentially a Reply to issue No.1 in the Respondent's brief of argument. The Appellant adopted the definition of "liquidated money demand" in the Black's Law Dictionary 8th Edition referred to and cited by the Respondent. Appellant however, submitted that the amount claimed by him in Exhibit 'D' at page 10 - 12 of the Record was agreed by the parties in Exhibit 'A' at page 7 of the Record. It is contended that the definition of "liquidated money demand" in the said Dictionary further states; which can be precisely determined by operation of law.

Therefore, the law that is applicable in the instant case and binds the parties is, the Appellant contended, the Government Ap-

proved Fees for Consultants in the Construction Industry and that the case of *MAJA v. SAMOURIS* (supra) supports the claim of the Appellant as the amount claimed was capable of being ascertained from the terms of the contract.

B On the interest of 21% awarded by the trial court learned counsel for the Appellant in the Reply brief, has submitted that the appeal before this court does not raise any issue on interest of 21% awarded by the trial court, and the Court of Appeal did not make any pronouncement on the 21% interest; and since the Respondent C has not filed any cross-appeal challenging the interest on this Court, it is urged on this Court to discountenance the submission of the Respondent on the award of 21% interest by the trial court.

I shall take the two issues formulated and argued by the respective parties serially.

D On the first issue, I hereby reproduce the passage in the Judgment of the court below when it upheld the Respondent's appeal. It held inter alia, at page 190 paragraph 2 of the Record thus:

E *"The order to place the Suit on the undefended list is itself defective because the facts and annexure to the affidavit show that the sum claimed is not a liquidated money demand. Even if the file (sic) was an intention to defend, it would not have cured the defect of the proceedings to place the hearing in the undefended list. Since the plaintiffs claim is an unliquidated money demand, and not a liquidated sum, it cannot be adjudicated on the undefended list. Parties F cannot on their own agree to confer on the court jurisdiction over an undefended list of an unliquidated money demand. See CHARLES EYOKE v. NWANKWE 16 SCNJ 87. The proceedings in the court below is therefore null and void for lack of jurisdiction of the court as G the matter on which the court ruled is not for a liquidated money demand. NATIONAL BANK OF NIG. LTD. v. WEIDE & CO. (1996) 4 SCNJ 147."*

H The above holding of the lower court forms the basis of the Appellant's complaint in issue No.1 of the parties. The issue of whether the claim of the Appellant herein is a liquidated money demand or not is central and is the main plank of this appeal.

One of the conditions precedent to placing a matter on the undefended list is that the plaintiff's claim must be liquidated or be based on ascertainable debt.

The term “liquidated money demand or liquidated sum” has attracted many judicial definitions. In some cases, it is held to be a sum of money previously agreed upon by the parties to a contract, if the action is based on a breach of contract. See JOHNNY v. EDOJA (2007) ALL FWLR (pt. 365) 527 and NORTEX NIG. LTD. v. FRAME TOOLS CO. LTD. (1997) pt.501 603 at 609. It has also been defined as “a definite settled sum which the defendant cannot deny. See YA’U v. CITY SECURITY LTD. (2003) FWLR (Pt.501) 603 at 609. However, the phrase “liquidated money demand” was interpreted by the Supreme Court in MAJA v. SAMOURIS (supra) as an ascertained claim or specific amount; which means there is nothing more that needs to be further done to determine the quantum or extent of the defendant’s liability. In EFFANGA v. ROGERS (2003) FWLR (pt.157) 1058 “liquidated money demand” was defined as an amount of money that could be ascertained by calculation or fixed by any scale or other positive data or mathematics. But that when the amount to be recovered depends on circumstances and is fixed by opinion or estimate it is said not to be liquidated. See further: HOUSEHOLD UTENSILS DEALERS v. IFEANYICHUKWU VENTURES NIGERIA LIMITED (2005) All FWLR (pt.257) 1173 and ABAYOMI v. ATTORNEY-GENERAL OF ONDO STATE (2007) All FWLR (Pt. 391) 1683 at 1694.

All said and done, the bottom line is that the amount claimed must be ascertainable, and if based on a contract, it must have been accepted upon by the parties thereto.

Recourse may be had to the definition of the phrase “liquidated money demand” in the Black’s Law Dictionary 8th Edition. According to the said Dictionary at page 246 the phrase means:

“An amount previously agreed on by the parties or that can be precisely determined by operation of law”

At the same page it defines unliquidated claims as:

“A claim in which the amount owed has not been determined”

The Rules of various High Courts in Nigeria have provided for a procedure for a claim under undefended list. In this case, the applicable Rule is found in Order 23 Rule 1 of the High Court (Civil Procedure) Rules, Akwa Ibom State, 1989. It clearly provides for a claim to recover “debt” or a liquidated money demand.”

In the light of the above legal authorities, the question is whether the claim of the Appellant for the sum of N13,169,847.71 plus interest at the rate of 21% was a liquidated money demand. The Appellant has contended that the claim was a liquidated money demand for the reason that the parties had agreed that payment for the land survey contract was to be based on “Government approved Scale of Fees” as per the letter of award Exhibit ‘A’ In his contention, since the bill of the said sum in Exhibit ‘D’ was submitted by him to the Respondent upon completion of the land survey contract, was based on the said Government approved scale of fees for consultants/surveyors in the Construction Industry 1996, it was a liquidated demand.

Learned counsel for the Respondent has not agreed with the submission of the Appellant’s Counsel on this point. I agree with him. The fact, that the parties agreed that the appellant’s fees shall be based on “Government Approved Scale of fees,” does not mean that whatever bill the appellant eventually submitted to the respondent whether in full or partial compliance with the agreed scale should be accepted without dispute. The Respondent has the right to vet the appellant’s bill to ascertain whether the items contained therein are actually in line with the agreed approved Government Scale of Fees vis-à-vis his particular job already executed.

It would appear to me that the dispute or disagreement between the parties was not over the applicable scale but over the inclusion of items such as “contouring of site”, “Detail survey” “connection to government control land” and “Acquisition of land” Exhibit ‘D’ in the Appellant’s bill found at pages 10 - 12 and the Respondent Company consultancy vetted version Exhibit ‘E’ at pages 13 - 15. The Appellant’s consultancy fees computation in respect of Direct cost, on Perimeter Survey, Deciduous regions, Contouring Direct cost as well as reimbursements were all accepted by the Respondent. These are not disputed. See pages 10 - 15 of the record.

From the foregoing, I cannot fathom the reason why the Appellant had still contended that the respondent’s computation as per Exhibit ‘E’ was not based on the agreed Government approved scale of fees.

No doubt the disagreement between the parties was contentious, so much that, the Appellant in rejecting the Respondent's vetting of his bill wrote in Exhibit 'F' at page 17 of the Record, thus:

"I would be glad to come over to your office when you so desire to iron this out. In the alternative, you may direct the matter to appropriate Government office for arbitration" B

There was yet another subject of disagreement between the parties, that is, the amount of mobilization given to the appellant by the Respondent. Appellant, put the amount in his bill Exhibit 'D' at N300,000, which the Respondent Company in their computation as per Exhibit 'F' put the amount at N500,000.00. Other areas of disagreement between the parties were over the stage at which the execution of the contract had reached. There were four stages as contended by the Respondent and that the Appellant had only done stages 1 and 2 which is 70%. Appellant on the other hand, had claimed that he completed all the stages hence he submitted a bill of N13,169,847.71 via Exhibit 'D', whilst the Respondent accepted to pay only N6,411,345.84 in Exhibit 'E'. Clearly the parties have not agreed on the stage at which the execution of the contract was. E

On the question of interest of 21% on the amount claimed by the Appellant, Respondent has contended that there was no evidence on record that the parties had agreed that the fee for survey shall be subject to interest payment. ***Generally, a claim for interest under the undefended list bears the same principles as in a claim under the general cause list. Any Plaintiff claiming interest under the undefended list must disclose in his affidavit how his right to interest accrues and how the rate thereof was arrived at.*** F The Respondent is disputing the claim for interest made by the Appellant without further particulars. G

In the light of the foregoing, I am of the view that the court below was right in holding that the sum of N13,169,847.71 claimed by the Appellant as well as interest of 21% was not a liquidated money demand. Accordingly, issue (1) one is resolved in favour of the Respondent and against the Appellant. H

In issue 2, the main point of the Appellant Counsel's argument is that the court below was wrong in holding that

the order to place the suit on the undefended list is itself defective because the facts and annexure to the affidavit show that the sum claimed is not liquidated money demand. The correctness of this finding by the Court below cannot in any way be faulted. I have clearly shown this while considering the argument and submissions of the learned counsel for the respective parties under issue No. 1, above. The Court found as a fact that the trial court did not scrutinize the Appellant's claim to ensure that it was one for a liquidated money demand.

The Appellant has admitted that since the court below had in its lead Judgment at page 189 of the record ruled that "the court does not have to forage into the file," to see whether the documents tendered by the applicant for the application to place the suit on undefended list before the court makes the order, the court ought to have affirmed the decision of the trial court which was in favour of the appellant. Although the court below made this ruling in its lead Judgment, the court at the same page 189 went ahead to qualify, so to say, the said ruling, thus:

"The Judge, however, has to ensure before placing the suit on the undefended list that the claim of the Plaintiff against the defendant is for liquidated money demand. M. U. GOMBE v. PW NIGERIA LTD & ORS (1995) 7 SCNJ 19"

Even though the court below went on a bridle path to hold that the trial court was not bound to "forage into the file to see whether the documents tendered by the applicant suffice to place the case on the undefended list, it is my view that this in itself cannot be sufficient ground to set aside the final decision of the court below, which is adjudged to be correct. The question really is, whether the Judgment appealed against is right or wrong. In this case, as I have said, the correctness of the findings by that court cannot be faulted.

Finally, I have noted that the Appellant has harped so much, particularly in his Reply Brief, on the failure of the Respondent to file their Notice of Intention to defend his claim and affidavit in support of the Notice. He submitted that the cases of GOMBE v. PW NIG. LTD. & ORS. (supra) ACB v. EMEDO (2003) FWLR (Pt. 177) 862 at 865 and KABIRU v. IBRAHIM (2004) 2 NWLR

(Pt. 857) 326 at 330 are not applicable. ***I have read the cases and the findings of those courts and the passages adumbrated in paragraphs 5.02 (iv) and 5.02 (vi) of the Respondent's brief of argument. In sum, the authorities state the correct position of the law. It is incorrect to contend that when a defendant fails to file Notice of Intention to defend the suit the court must automatically enter judgment for the plaintiff. That is not the decision in the case of BEN THOMAS HOTELS LTD v. SABE FURNITURE LTD. (1987) 12 SCNJ 171, cited and relied upon by the Appellant. The trial court was bound to scrutinize the Appellant's claim to ensure that it is one that could be heard under undefended list. Again, in the light of the foregoing, this issue is resolved in favour of the Respondent.***

Having regards to the resolution of Issues 1 and 2 in favour of the Respondent, the only option open to the appellant is to pursue his redress by issuing a writ of summons under the general cause list to be heard, not under undefended list.

In conclusion, I find no merit, whatsoever, in the appeal. It is accordingly dismissed. It is ordered that parties bear their costs.

ONNOGHEN JSC

I have had the benefit of reading in draft, the lead judgment of my learned brother GALADIMA, JSC just delivered. I agree with his reasoning and conclusion that the appeal is without merit and should therefore be dismissed.

The main issue in this appeal, as I see it is whether the lower court is right in holding that the sum of N13,169,847.71 claimed by appellant under the undefended list procedure was not a liquidated money demand.

By the provisions of order 23 Rule 1 of the High Court Civil Procedure Rules of Akwa Ibom State only a claim to recover "a debt" or "liquidated money demand" can be entertained under the Undefended List Procedure.

In *Maja v. Samouris* (2002) 95 LRCN 341 at 344 the term liquidated money demand is said to be "*a debt or other specific sum of money usually due and payable and its amount must be already ascertained or capable of being ascertained as a matter of arithmetic*

without any other or further investigation.”

In the instant case, the sum claimed has not been agreed upon by the parties as can be verified from the contents of exhibit ‘F’ particularly the last paragraph thereof wherein the respondent suggested that parties meet to ‘iron out’ their differences or get the “ap-
B appropriate government office” to arbitrate thereon.

The above clearly shows that parties are not ad idem as to the sum payable thereby rendering what appellant claimed in this case an unliquidated sum.

In the circumstance, the proper/appropriate procedure to be
C adopted by appellant to effect redress is to issue a writ of summons under the general cause list to be heard accordingly not under the undefended list.

If learned Counsel had accepted the decision of the lower
D court much time would have been saved as the instant appeal is a complete waste of time and energy.

I therefore dismiss the appeal and abide by the consequential orders made in the lead judgment including the order as to costs.
Appeal dismissed.

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MUNTAKA-COOMASSIE JSC

I had a preview of the judgment of my learned Brother
F Galadima, JSC just delivered. I entirely agree with his lordship’s reasoning that the appeal lacks merit and should therefore be dismissed.

Since I have agreed with the lead judgment there is no need for me to review the facts and reasons herein this judgment. I too dismiss the appeal as unmeritorious. I abide by the consequential
G orders made in the lead judgment including order as to costs.

ARIWOOLA JSC

In this appeal against the decision of the Court of Appeal,
H Calabar division, hereinafter called, court below, the appellant was the plaintiff before the trial court of Akwa Ibom wherein he had claimed the sum of thirteen million, one hundred and sixty nine thousand, eight hundred and forty seven Naira, seventy one Kobo (N13,169,847.71) against the respondent as the defendant, being

the balance due and payable to the appellant by the respondent as his professional fees on a survey contract awarded to the appellant and at 21% interest on the sum claimed until the final liquidation of the sum.

The trial court, holden at the Uyo High Court in its judgment had allowed the appellant's claim. However, the respondent, even though it did not file, as it ordinarily should, any Notice of intention to defend the action, was dissatisfied with the decision of the trial court, hence appealed to the court below which allowed the appeal on the sole ground that the appellant's claim was not a liquidated money demand hence ordered transfer of the matter from the Undefended List Procedure to the General Cause List to be heard on pleadings. That led to the instant appeal by the appellant who felt aggrieved.

One of the issues distilled for determination of the appeal was: D

"Whether the claim of the plaintiff/appellant was not one for liquidated money demand having been based on the scale of fees agreed by the parties."

Generally, Undefended List Procedure is usually provided for in the rules of trial courts. The purpose of the procedure under the Undefended List as opposed to General Cause List is to enable the plaintiff, initiating the action, obtain summary judgment without resort to trial where the case is patently clear and unassailable. See; Cow v. Casey (1949) 1 K.B. 482; Sodipo v. Leminkainen & Ors. (1986) NWLR (Pt.15) 220. However, this procedure is not designed to shut out a defendant who can show in his affidavit in support of intention to defend or any other means, that indeed there is a triable issue. See; Nishizawa v. Jethwani (1984) 12 SC 124 at 134.

Summary Judgment therefore, is a judgment granted on a claim or defence about which there is no genuine issue of material fact and upon which the movant is entitled to prevail as a matter of law. For this type of judgment, the court will only consider the contents of the pleadings, the motions and additional evidence adduced, such as documents produced as Exhibits, by the parties rather than one of law. This procedural device allows speedy disposition of a controversy without the need for trial. See; Bona V. v. Textile Ltd. & Anor. v. Asaba Textile Mill Plc (2012) 12 SCNJ 28, (2012) 12 SC (pt.1) 25. (2012) 213 LRCN 63; (2013) 2 NWLR (pt.1338) 357; H

Nkwo Market Community Bank (Nig) Ltd (NMCB) v. Obi (2010) 14 NWLR (Pt.1213) 169 SC; (2010) LPELR 2051 (SC).

What then is liquidated money demand? This has been held to be a debt or other specific sum of money usually due and payable, which amount must have already been ascertained or capable of being ascertained as a mere matter of arithmetic without any other further investigation. Therefore, whenever the amount being claimed by a plaintiff can be ascertained by calculation or fixed by any scale of charges or other positive date, it is said to be liquidated. Similarly, where the parties to a contract as part of the terms of their agreement, fix the amount payable on the default of one of them or in the event of breach by way of damages, such sum of money is classified as liquidated damages. See; *Maja v. Samouris* (2002) 7 NWLR (Pt.765) 78, (2002) 4 SCM 1091 (2002) 3 SC 37 (2002) LPELR D SC.72/1997. Therefore, unliquidated debt is one which had not been previously specified or determined. In this instance, summary judgment from undefended list procedure cannot be obtained for this debt.

In the instant case, the respondent had argued in support of the decision of the court below that the appellant's claim was not a liquidated money demand that is appropriate under Undefended List Procedure. It was therefore submitted by the respondent that notwithstanding the failure of the respondent to file Notice of Intention to defend, once the appellant was unable to show that his claim was liquidated, suitable for summary judgment, the court below was right to have held that the appellant's claim must be tried under the General Cause List by filing pleadings. What is more, the respondent had brought out certain areas of disagreements between the parties which included the amount of mobilization given to the appellant by the respondent in Exhibits D and E filed by the appellant and respondent respectively; the stage of the execution of the contract absence of 21% interest expressly claimed on the amount. In other words, the appellant's claim was challenged as not being for liquidated debt but rather unliquidated in nature and substance, even though the respondent did not file a Notice of Intention to defend the claim.

It should be stated clearly here again, that the order that a writ of summons, pursuant to an ex parte application, be issued under

undefended list procedure, and be so marked is a judicial function of the Judge who is handling the matter. However, the discretion whether the writ will be listed under undefended List procedure or transferred to general cause list must necessarily be exercised judicially and judiciously but not arbitrarily.

In the consideration of the plaintiff's application *ex parte*,^B which does not involve the adversary, the court is expected to carefully consider the claim and ascertain whether or not it is a liquidated money demand. This is the reason why the plaintiff is expected to have deposed specifically in his affidavit verifying the facts of his claim to be attached to the Writ of Summons that the defendant does not^C have a defence to his claim whatsoever.

In the instant case, even without the filing by the respondent of a Notice of Intention to defend the action, the trial court ought to have seen from the plaintiff/appellant's claim that it was not a liquidated money demand, hence should have properly transferred it to the general cause list, which transfer, ordinarily will not be appellable. See; Section 241 (2) (a) of the 1999 Constitution (as amended); *Bona V. Textile Ltd v. Asaba Textile Mill Plc* (supra).

For the above reason and the fuller reasoning of my learned brother, Galadima, JSC very well articulated in the lead judgment, which I entirely agree with and adopt as mine, I also hold that this appeal is devoid of any merit and liable to dismissal. Accordingly, it is dismissed by me.

I abide by the consequential order on costs that parties are to^F bear their respective costs.

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