

SUPREME COURT OF NIGERIA  
FRIDAY 11TH APRIL, 2014. SC. 71/2006  
CORAM:- M. MOHAMMED, J. A. FABIYI,  
M. U. PETER-ODILI, M. D. MUHAMMAD,  
K. M. O. KEKERE-EKUN, JJSC

CALISTUS OBITUDE ..... APPELLANT  
AND  
ONYESOM COMMUNITY BANK LTD ..... RESPONDENT

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COURTS - Undefended suit - Entry of - Court shall if satisfied that there is no defence to a claim for liquidated money demand - Enter the suit in undefended list - And enter thereon a date for hearing (H1)

ACTIONS - Undefended suit - Transfer to general list - For action to be so transferred - Defendant must establish defence on merit - Disclosing such triable issue that entitles him to leave to defend (H2)

UNDEFENDED SUITS - Summary judgment - Principle - The purpose is that defendant with no real defence to a suit - Should not be allowed to frustrate plaintiff out of judgment (H3)

ESTOPPEL - Estoppel by conduct - Principle - Evidence Act s. 151 - Person who by his act or omission intentionally caused another to act upon a belief - Is not allowed in any proceedings between himself and that other - To deny the truth of that belief (H4)

ACTIONS - Crime - Allegation of - Proof - Concrete materials must back up such an allegation - Before fraud can change the colour of the case of a party alluding thereto (H5)

UNDEFENDED SUITS - Defence - Absence of - Where court finds that defendant has no defence to suit in undefended list - It should enter judgment for plaintiff for the sum of money claimed (H6)

FACTS

This action was brought by plaintiff/respondent before the High Court of Anambra State under the undefended list procedure

pursuant to O. 24 r. 9 of the Rules of the court. Respondent's claim was for a liquidated money demand of the sum of N7,400,595.53 with interest at the rate of 21% per annum from 1st September, 2001 till the date of judgment and thereafter at the rate of 5% per annum till final payment of the debt. The debt was incurred as a result of overdraft facilities granted to defendant/appellant by respondent. To secure the loan, appellant deposited his title documents in respect of his property at Ozalla Layout, Obosi Anambra State. Appellant operated several accounts with respondent bank. Appellant filed affidavit of intention to defend the action. Respondent wrote to appellant demanding the sum of N7, 400,595.53, being the outstanding sum due on his current account no. C/A 2320 in respect of credit facilities granted to him. Later on, respondent wrote to appellant demanding the sum of N18,460,212.25 being his entire indebtedness in respect of his various accounts.

Appellant replied through his solicitors admitting his debts and pleaded for time to liquidate the amount. Appellant wrote several other letters to respondent pleading to be given more time to raise the amount of his indebtedness. However, appellant failed to liquidate the debt. Hence, respondent commenced this action. Appellant admitted being granted overdraft facilities by respondent but averred that the statement of account issued to him by respondent contained irregularities and some illegal charges. While respondent urged the court to enter judgment in its favour, appellant urged that the matter be transferred to the general cause list for hearing on the merits. During the course of the proceedings, appellant paid a sum of N1 million to respondent in an attempt to reduce his indebtedness. At the end of trial, the court taking into account the N1 million naira paid by appellant to reduce the debt, held that appellant had not shown cause for transfer of the suit to general cause list. Judgment was therefore entered for respondent as claimed (but less N1 million). Aggrieved, appellant unsuccessfully appealed to the Court of Appeal. Aggrieved further, appellant appealed to Supreme Court.

#### ISSUE FOR DETERMINATION

1. Was the Lower Court right, having regard to the affidavit evidence/exhibits and admissions in the case in upholding the judgment of the trial Court?

**HELD** (Unanimously dismissing the appeal per PETER-ODILI JSC)

Undefended suit - Entry of

1. Whenever application is made to a Court for the issuance of writ of summons in respect of a claim to recover a debt or liquidated money demand and such an application is supported by an affidavit setting forth the ground upon which the claim is based and stating that in the applicant's view, 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 accordingly and enter thereon a date for hearing, subject to the circumstance of the particular case. (p. 1404 E)

Undefended suit - Transfer to general list

2. If the party served with the writ of summons and affidavit delivers to the registrar a notice 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. However, for an action to be transferred to the general cause list from the undefended list there must be a defence on the merit. It must not be a half - hearted defence.

A defendant to an application for summary judgment under Order 24, Rule 9 (2) and (3) of the High Court of Anambra State, 1988 (Civil Procedure) Rules 1972 must establish that he has a good defence by showing or disclosing in his statement of defence and counter affidavit such triable issue to entitle him to be granted leave to defend the action.

For an Intention to Defend to be regarded as meritorious warranting the matter being transferred from the Undefended List to the General Cause List for a full hearing with the taking of evidence, oral and documentary a certain standard is required of such a defendant and the supporting affidavit of that Intention to defend must contain a defence on the merit.

It is not enough for the defendant merely to deny the claim or aver that some payments he made were not taken into account. He must set out the details and particulars of the defence. (pp. 1404

UNDEFENDED SUITS - Summary judgment - Principle

3. The principles governing an application for summary judgment is that a defendant who has no real defence to a suit should not be allowed to frustrate or cheat the plaintiff out of judgment. In this regard, the court has a duty to assess facts presented before it in order to ensure that there is no abuse of its processes so that there is no delay of justice to a deserving plaintiff. (p. 1405 B)

C Estoppel by conduct - Principle

4. By Section 151 of the Evidence Act provides that when one person has, by his declaration, act or omission, intentionally caused or permitted a thing to be true and to act upon such belief, neither he nor his representative in interest shall be allowed, in any proceedings between himself and such person or such person's representative in interest to deny the truth of that thing. (p. 1406 F)

ACTIONS - Crime - Allegation of - Proof

5. It therefore comes like an approbation and reprobation for the Appellant at this stage to renege and advance fresh or new areas of defence being introduced such as to input fraud on the part of the Respondent in their claim or matters leading thereto. It cannot be left unsaid that fraud being of its gravity, the law insists that concrete materials must back up such an allegation in proof before fraud can change the colour of the case of the party alluding thereto. (p. 1406 H)

UNDEFENDED SUITS - Defence - Absence of

6. Where a trial Court finds as in this case that defendant has no defence to a plaintiff's suit placed under the undefended list, the court has no option other than to enter judgment for the plaintiff for the sum of money claimed. (p. 1407 G)

REPRESENTATION

Appellant and Counsel absent.

H B. A. Obiora (Miss), for the Respondent

CASES REFERRED TO

- Agueze v. P. A. B. Ltd. (1992) 4 NWLR (pt. 233) 76  
Nishizawa Ltd. v Jethwani (1984) 12 SC 234  
Ehidimhen v. Musa (2000) 8 NWLR (pt. 669) 540  
Essang v. Bank of the North (2001) 6 NWLR (pt. 709) 384  
Aro v. Aro (2000) 3 NWLR (pt. 649) 443  
Ntukidem v. Oko (1986) 5 NWLR (pt. 45) 909 B  
Adigun v. A-G Oyo State (1987) 1 NWLR (pt. 53) 678  
Gwani v. Ebule (1990) 5 NWLR (pt. 149) 201  
UTC Nig. Ltd. v. Pamotei (2002) FWLR (pt. 129) 1557  
Kenfrank (Nig.) v. UBN (2002) 8 NWLR (pt. 789) 46 C  
Tahir v. J. Udeagbala Holdings Ltd (2004) 2 NWLR (pt. 857) 438  
Adebayo v. Ighodalo (1996) 5 NWLR (pt. 450) 507  
Egonu v. Egonu (1978) 11-12 SC 111  
Chinwendu v. Mbamadi (1980) 3-4 SC 31  
Obibu v. Guobadia (1984) 10 SC 130 D

STATUTE & RULES REFERRED TO

- Evidence Act 1990, ss. 9, 20, 151  
High Court Rules of Anambra State 1988, O. 24 r. 9(4) E

LEAD JUDGMENT BY PETER-ODILI JSC

The Plaintiff/Respondent instituted this action against the Defendant/Appellant which was placed on the undefended list. The defendant/appellant filed an affidavit and Notice of Intention F to defend the suit. At the end of the hearing based on the affidavit evidence of the parties, the learned trial judge entered judgment for the plaintiff/respondent in the sum of N7,400,595.53k (Seven Million, Four Hundred Thousand, Five Hundred and Ninety-Five Naira, Fifty-Three Kobo) less N1,000,000.00 (One Million Naira) paid by G the defendant on 13/9/2002 during the pendency of this suit with interest at the rate of 5% per annum from the date of judgment until the total payment of the judgment debt.

Dissatisfied with the judgment the defendant appealed to the Court of Appeal also known hereafter as Court below, which H dismissed the appeal, upholding the judgment of the Court of trial.

Not satisfied once more the Appellant has appealed to the Supreme Court.

FACTS:

The plaintiff granted the defendant an overdraft facility in his personal account NO. 2320 from the 4th day of September, 2000, up to the 13th day of August, 2001 by allowing the defendant to overdraw his account to the tune of Seven Million, Four Hundred Thousand, Five Hundred and Ninety - Five Naira, Fifty-Three Kobo (N7,400,595.53) with interest and the defendant utilised the aforesaid amount for his benefit. The defendant by equitable mortgage secured the said overdraft by depositing his Customary Right of Occupancy in respect of his property at Ozalla Layout, Obosi, Anambra State. On the 15th August, 2001, the plaintiff wrote to the defendant to repay his indebtedness of N7, 400,595.53k but the defendant failed to do so. On the 24th of October, 2001 the plaintiff through its solicitors wrote the defendant demanding the payment of his entire indebtedness to the plaintiff regarding the account aforesaid and two other indebted accounts of the defendant. On the 1st day of November, 2001, the defendant through his solicitor admitted his entire indebtedness to the plaintiff and pleaded with the plaintiff to give him up to the 31st of October, 2001 to liquidate his entire indebtedness to the Plaintiff.

On the 2nd of May, 2002, one Mr. S. C. Ohajianya at the instance of the defendant wrote to the plaintiff and attached thereto a letter dated 10th day of April, 2002 from the defendant and pleaded with the plaintiff to exercise patience with the defendant over the defendant's indebtedness to the plaintiff. However, the defendant failed to liquidate the debt and the plaintiff instituted this suit.

The defendant filed a Motion on Notice dated 14/5/2002 praying the court to strike out the above stated suit on grounds of it being premature in that the plaintiff had not given a demand notice to the defendant before instituting the action. In the supporting affidavit, defendant admitted taking the overdraft facility but his only grouse was that no demand notice was given him by the plaintiff for the repayment of the debt.

In the course of the proceedings at the High Court, the defendant in further admission of indebtedness to the plaintiff paid in the sum of One Million Naira (N1, 000,000.00) to the plaintiff thus reducing the amount owed to the plaintiff to N6, 400,595.53k.

The version as put forward by the defendant is that the overdraft facility was for the sum of N3.5 million naira and the defendant withdrew various sums of money at different dates just as he paid in

moneys to service the account. He also ran three separate accounts in the plaintiff's bank. That the three separate accounts were operated interchangeably in that the plaintiff transferred sums of money from one account to the other without the authority or knowledge of the defendant and without explanation for so doing.

He tendered what he contended to be examples of such irregular transfers which were Exhibits B, B(a), B14, B17, Exhibits C, C 49 - 3. B

After hearing in the suit, the trial Court entered judgment against the appellant, who aggrieved went to the Court below which dismissed the appeal as lacking in merit hence the current appeal to this Court. C

On the 13th day of January, 2014 date of hearing, learned counsel for the appellant was absent, though notified by hearing notice of the hearing and so the appeal had to go on. The Appellant's Brief of Argument settled by Chief A. B. Onyekwelu and filed on 16/5/06 was deemed argued by the Court. In it were framed two issues for determination, viz:- D

1. Whether having regard to the state of the statements of account tendered by both the appellant and the respondent which the Court of Appeal never adverted to, but based its judgment on the previous admissions of the appellant, the appellant can be said to have got a fair hearing by the Court. E

2. Is it correct that having regard to all the exhibits before the Court, the appellant's allegation of irregularities and illegal charges were merely peripheral. F

Learned counsel for the Respondent, Miss B. A. Obiora adopted their Brief of Argument settled by Jude Obiora Esq. And filed on 16/8/06. He crafted a single issue as follows:- G

Was the Lower Court right, having regard to the affidavit evidence/exhibits and admissions in the case in upholding the judgment of the trial Court?

This sole issue as framed by Respondent seem adequate for the determination of this appeal and it is only right that it be so used. H

In answering the question of the act of the Court of Appeal upholding the judgment of the trial court in view of the affidavit evidence, exhibits and admissions available, learned counsel for the appellant submitted that the Court below was wrong. He contended

that the Court of Appeal did not have regard to the exhibits in respect to the statements of account which in general were the complete and fatal answer to the claims of the Respondent. That Exhibits A, B, C, D, E & F wherein the appellant anchored his complaints about irregularities and illegal charges were made out.

B He referred to the prominent irregularities and illegal charges which he had highlighted in this Brief of Argument in the FACTS as set out by him. That the appellant's case is unassailable having regard to the exhibits before the Court below, irrespective of his apparent admissions to the debt.

C For the appellant was posited that the Court below misconstrued or gave a wrong interpretation to the exhibits before it which ought to have persuaded the trial Court to return the case to the general cause list, because there is a triable issue in the light of the questionable interests and charges. The issue raised in those questioned interests and charges needed the input of accounting experts to unravel. He cited *Agueze v P. A. B. Ltd. (1992) 4 NWLR (Pt. 233) 76 at 87*; *Nishizawa Ltd v Strichand Jethwani (1984) 12 SC 234 at 241, 244*, *Ehidimhen v Musa (2000) 8 NWLR (pt. 669) 540 at 556*.

E For the appellant was contended that when he made the discovery of the irregularities, he sought the service of a chartered accountant to protect his interest and reconcile the account but the respondent was not co-operative and respondent did not refute the allegation. He said since the trial court did not consider these allegations as it did not enter the matter in the general cause list, an unfair judgment on the undefended list procedure ensured which anomaly should be now rectified.

G Chief Onyekwelu, of counsel submitted that account No. 2320 cannot be treated in isolation from account numbers 2349, 3098 and 1135 since the four accounts were run inter-dependently or interchangeably and the irregularities introduced by the respondent in transferring sums of money from one account to the other. That the issue of transferring sums of money from one account to the other is irregular and confusing and its consequences can only be sorted out by an accountant and so the need for trial through pleadings and or evidence whereby cross-examination would take place. He said the Rules of Court provided for suits to be placed on the undefended list are for the quick dispensation of justice and not

at that the expense of the justice of the case and the principle of fair hearing. He referred to *Essang v Bank of the North* (2001) 6 NWLR (Pt. 709) 384 at 399; *Aro v Aro* (2000) 3 NWLR (pt. 649) 443 at 453; *Ntukidem v Oko* (1986) 5 NWLR (pt. 45) 909 at 922; *Adigun v A. G. Oyo State* (1987) 1 NWLR (pt. 53) 678.

Learned counsel for the Respondent, Jude Obiora Esq. submitted that once a debt is admitted by a defendant debtor who has benefited from the largess provided by the plaintiff creditor and the defendant debtor unequivocally acknowledged in writing his indebtedness, but also pleaded for and did get mercy, he is therefore stopped from wriggling out of the debt and the judgment there from.

He cited *L. T. Thadant v National Bank Ltd* (1972) 1 SC 105 at 112 - 113; *Bank of the North Ltd v Alhaji Bala Yau* (2004) 4 MJSC 49 at 71 etc.

That the law is that proof of entry in a banker's book is the appropriate method of establishing by the Bank of the indebtedness of its customer. He cited Section 97 (1)(h) and 2 (e) of the Evidence Act. 1990, *Barclays Bank D. C. O. V Hassan* (1961) All NLR (Reprint) 865 at 866.

It was stated for the Respondent that the Defendant/appellant's attempted defence which he abandoned was filing a Motion on Notice of 14th May, 2002 asking the Court to strike out the suit on the grounds that no demand notice was given to him to repay the said debt. That the appellant later withdrew the said motion upon being over-whelmed by the Respondent's counter affidavit to the said motion.

Mr. Obiora of counsel stated on that in a business transaction between parties, once a party invites the other party by letter stating the state of affairs of the transaction, the failure of the other party to rebut same amounts to admission by conduct or representation which is what took place in this case. He referred to *Sale Gwani v. Emmanuel M. Ebule* (1990) 5 NWLR (Pt. 149) 201; *Suni Vaswani v C. A. Candide Johnson Esq.* (2001) 11 NWLR (pt. 679) 582 at 588 - 589.

That sequel to the acknowledgment of indebtedness and admissions of indebtedness by the appellant, it will be unjust and contrary to Sections 19 and 20 of the Evidence Act 1990 and Order 24, Rule 9 (4) of the High Court Rules 1988 Anambra State to

allow appellant to dribble the Respondent out of the judgment and postpone the liquidation of his indebtedness to the Respondent. He cited *Agro Miller v. Continental Merchant Bank (Nig.) Plc* (1997) 10 NWLR (Pt. 525) 469 at 477 - 478; *Franchal (Nig.) Ltd v Nigerian Arab Ltd* (2004) 2 NWLR (pt. 857) 434 at 451.

B Learned counsel for the Respondent then referred to the contents of Exhibits B, C, D, E, F1, F2 and F3 contending that none of those Exhibits availed the Appellant so he could not get off the debts. That Appellant has not shown how Section 36 (i) of the  
C 1999 Constitution of the Federal Republic of Nigeria was infringed in relation to his right of fair hearing in the circumstances. That a matter on the undefended list cannot be transferred to the general cause list just for the asking without a defence to hang onto as in the present case. He cited *Ground Cereals and Oil Mills Ltd v As-Ahel Int. Marketing and Procurement Ltd* (2004) 4 NWLR (Pt. 652) 310  
D at 321 - 322 etc.

Mr. Obiora of counsel went on to canvass that the facts and argument of appellant in the brief of Argument in most of the paragraphs were not supported by the affidavit evidence and so counsel's address in a brief cannot take the place of evidence nor can counsel  
E present a case different from the materials of contest at inception. He cited *Kenfrank (Nig.) v UBN* (2002) 8 NWLR (Pt. 789) 46 at 74; *Thor Ltd v First City Merchant Bank Ltd* (2005) 14 NWLR (Pt. 946) 696 at 717.

F He submitted further that the allegation of fraud in the counsel's brief cannot be taken as established as that is not the law as fraud was not raised at the trial Court. He cited *Wallingford v Mutual Society* 5 AC 658 at 697.

For the Respondent was submitted that it is not enough for the defendant to merely deny a claim or aver that some payments he  
G made were not taken into account as in this case to warrant the matter being moved from the undefended list to the general cause list. He referred to *Haruna Tahir & Anor v Udeagbala Holdings* (supreme) 451 and 452.

H Learned counsel for the Respondent urged the Court to affirm the concurrent findings of facts and decisions in the two Courts below as there is nothing on which to base an interference by this Court. He relied on *Adebayo v. Ighodalo* (1996) 5 NWLR (pt. 450)

507 at 516; Chief L. Oyelakin v Alhaji Busari Amubikahun (1989) 3 NWLR (Pt. 107) 18 at 29.

Having set out the summary of the submissions from the opposing sides, it seems necessary to get back into the Record and reproduce as much as possible the relevant documentary materials for a clearer picture of what is at stake. First in the list of such materials is of course the supporting affidavit of the Claim of the Plaintiff/Respondent that was initiated under the undefended list and it is recast as follows:-

**"AFFIDAVIT IN SUPPORT OF CLAIM**

I, Clifford Igbo of Plot A/B Ogbaru Road, Niger Bridge Head, Onitsha, Bank Manager, Nigerian, make oath and say as follows:

1. That I am the Bank Manager of the Plaintiff Bank at Onitsha and I am conversant with the facts of this case.

2. I make this affidavit for and on behalf of the Plaintiff and with its authority.

3. The Defendant opened and operates a current account No. 2320 with the plaintiff.

4. The Plaintiff granted the Defendant overdraft facilities by allowing the defendant to overdraw his account from the 4th day of September, 2000.

5. The Plaintiff granted to the 1st Defendant at his request overdraft facilities amounting to N7,400,595.53k (Seven Million, Four Hundred Thousand, Five hundred and Ninety-Five Naira, Fifty-Three Kobo) with interest as at the 13th day of August, 2011, which the 1st defendant utilised.

6. The Defendant by equitable mortgage deposited his Customary Right of Occupancy in respect of his piece and parcel of land and premises thereof situate at Ozalla Layout, Obosi, Anambra State measuring approximately 463,106 square metres as delineated in Survey plan No. ECAS/891/82 attached to the said Customary Right of Occupancy granted by the Idemili Local Government Authority for a term of 99 years with effect from 1/1/84 and registered as No. 42 at page 42 in Volume 1132 at the lands Registry formerly in the Office at Enugu but now in the office at Awka to Secure the payment of all the money then owing or to be owing by himself as the defendant/plaintiff for or in respect of bills or notes discounted or paid or other loans payment, Credits advances on banking account

or otherwise made to or on account of or for the accommodation or at the request of the defendant or for interest discount commission or other lawful charges and expenses which the plaintiff may in the course of its business charge for the matters hereinabove mentioned.

B 7. Exhibited and marked Exhibit A is the photocopy of the said Right of Occupancy in respect of the said property otherwise known as 5, Nwokediuko Street, Awada.

C 8. The defendant utilised the facilities granted to him by the plaintiff but failed to repay his indebtedness to the plaintiff. By August, 2001, the debt standing against the defendant in the books of the plaintiff was N7, 400,595.53k (Seven Million, Four Hundred Thousand, Five Hundred and Ninety-Five Naira, Fifty-Three Kobo). Exhibited and marked Exhibit B is Photostat copy of the 1st defendant's statement of account.

D 9. The total amount owed by the defendant to the plaintiff now stood at N7, 400,595.53 (Seven Million, Four Hundred Thousand, Five Hundred and Ninety-Five Naira, Fifty-Three Kobo) which sum the defendant utilised and secured with the defendant's aforementioned property.

E 10. The Plaintiff will found and rely on the said statements of account of the defendant account from the ordinary books of the plaintiff in the custody and control of the plaintiff the entries into which were made in the ordinary course of banking business and which said statements of account having been duly examined with F the original entries in the aforesaid ordinary books of the plaintiff are correct.

G 11. The plaintiff is entitled to its claims against the defendant in the sum of N7, 400,595.53 (Seven Million, Four Hundred Thousand, Five Hundred and Ninety-Five Naira, Fifty-Three Kobo) with interest at the rate of Twenty-One per centum from the 1st day of September, 2001, up to the date of judgment and thereafter at the rate of Five per centum per annum until the final payment of the judgment debt.

12. The defendant have (sic) failed, refused and or neglected to pay the debt despite repeated demands.

H 13. The defendant has no defence to this action."

The Defendant/Appellant took out a Motion on Notice with the prayer for the Court to strike out the Claim or process of the

Plaintiff/Respondent on the ground that the Respondent had not given a reasonable notice to settle the account before approaching the Court. In his supporting affidavit the Appellant averred inter alia, thus in the following paragraphs, viz:-

“2. That I took an overdraft from the plaintiff/respondent at different periods but the amount is staggering. B

3. That I took the overdraft between the year 2000 and 2001.

4. That between the periods in question I made some lodgements into my account.

5. That those lodgements were not reflected in the statement of account attached as Exhibit “B” in the plaintiff’s affidavit. C

6. That I was informed by my counsel E. N. S. Okpalugo Esq. and I verily believe that under the Nigerian Law the plaintiff cannot rush to court without giving me reasonable notice to settle the account. D

7. That I intend to challenge the statement of account whilst settling the account.

8. That overdrafts granted to me by the plaintiff have no fixed date of redemption.”

The Plaintiff/Respondent had deposed to a Further Affidavit to back their claim with particulars and a counter affidavit to the Appellant’s motion for striking out. Thereafter the Appellant withdrew his Motion and the trial Court struck it out. He then took out a Further Affidavit in support of Notice of Intention to defend and Reply to counter affidavit. I think it necessary to reproduce this Affidavit of the Appellant and it is as follows:- E

“1. That I am a long time customer to the plaintiff’s bank.

2. That I operated three different current Accounts with the plaintiff, as follows:- (a) CA No. 3098, (b) CA No. 2320 and (c) AC/2349. F

3. That I operate Account No. CA/2320 alone and CA/2349 together with my wife.

4. That I had wanted to open one Current Account Number with the plaintiff but it was the Manager of the bank who advised me to open three separate accounts so as to comply with the Central Bank directives on Community Bank. H

5. That I operated Account No. CA/3098 together with my company registered as IFEANYICHUKWU TRADING INVESTMENT

VENTURES LTD.

6. That in consequence thereof the three accounts were being operated from the onset as if they are one.

7. That the overdrafts in the three accounts were granted to me in the year 2000.

B 8. That in 2001 the overdrafts were renewed in writing which are here exhibited as Exhibits A and B respectively.

9. That I was granted an overdraft facility of N7, 000,000.00 (Seven Million only).

C 10. That since taking the overdrafts in the three current accounts, I have been making reasonable deposits into the plaintiff's bank to avoid having troubles with the plaintiff. See Exhibit C which is a statement of account in respect of Account No. CA/3098.

11. That in respect of Account Number CA/2320, I have also made reasonable deposits. See also Exhibit D.

D 12. That in respect of Account Number CA/2349, I have also made reasonable deposits. See Exhibit E.

13. That while the suit was pending in this court, I also made another deposit of N2 Million, See Exhibit F.

E 14. That what prompted me to pay the said sum of N2 Million to the plaintiff while the case is in court is that the plaintiff's manager advised me that once I paid the money they will withdraw the case in court.

F 15. That after paying the money the plaintiff instead of withdrawing the case became more aggressive by filing and serving on my counsel series of affidavits on the 15/1/2003.

16. That on the said 15/1/2003 I was in Port Harcourt, Rivers State, and I only met my counsel on the 19/1/2003.

G 17. That when I went through the statements of Account supplied to me by the plaintiff's bank, I discovered a lot of irregularities and illegal charges made against me.

18. That throughout the months of September - December 2002, I have been negotiating with the plaintiff's bank towards a possible way of settling these matters out of court but the plaintiff was not cooperative at all.

H 19. That we are not owing the plaintiff the alleged sum of N18, 460,212.25 or at all.

20. That the issue of N18, 460,212.25k arose only in the

year 2001 when the plaintiff's bank discovered that the overdraft was used by me to finance a road construction contract with the Anambra State Government.

21. That it was the plaintiff's manager who suggested that the indebtedness could be raised to N18, 460,212,25k since it will eventually be paid by the government and when I refused, he urged me to agree. B

22. That the said sum of N18, 460,212.25 is a bogus claim intended to achieve some ulterior motives.

23. That the sum of N10, 08093.18k is a bogus claim prepared by the plaintiff in support of the said N18, 460,212.25k. C

24. That the sum of N7, 400,595.53k is also a bogus claim in support of N18, 460,212.25k.

25. That I have engaged the services of a Chartered Accountant to protect my interest and reconcile the account but the plaintiff is not co-operative. D

26. That the Chartered Accountant firm is Ambrose Ekoh & Co. Of No. 168 Oguta Road, Onitsha.

27. That I was informed by the said Chartered Accountant and I verily believe him that all the Statement of Account so far given to me contains illegal charges and interests. E

28. That the said sum of N857, 523.54k is a bogus claim prepared by the plaintiff in support of the said sum of N18, 460,212.25k.

29. That the said sum of N960, 000.00 allegedly transferred from A/C No. 2349 to A/C 2320 is false since the 1st defendant, my wife told me that she did not give any such instructions and I did not receive any such money. F

30. That the 1st defendant my wife told me and I verily believe that she did not make Exhibits D and D1 of the further affidavit." G

There were annexures including correspondences between the parties including warning letters and demand notices from the Respondent to the Appellant. Instructive is a letter the Appellant's lawyer, P. O. T. Okojah to the Respondent dated 1/11/2001, wherein was admitted the indebtedness and a plea to be given time up to 31/10/2001 to liquidate the indebtedness. Counsel stated that the Appellant was awaiting the payment of the contract sum from the Anambra State Government and ended thus:- H

"As soon as this amount is paid, we shall not hesitate to liq-

update the aforesaid sum please. Your further kind patience is highly solicited”.

Considering the numerous documents including the back and forth communications between the parties and in relation to the affidavit evidence for the Respondent’s undefended list process and the Appellant’s Intention to defend and the accompanying affidavit, the learned trial judge, Ijem Onwuamegbu J. held as follows:-

“Although the defendant herein sought to defend this suit, he failed to file a Notice of Intention to Defend within the time limited by Order 24 Rule 9 (2) of the High Court Rules. He however filed one on the 23rd of January, 2003 and had in fact filed a day previously on 22nd January, 2003 a document titled “Further Affidavit in Support of Notice of Intention to defend and Reply to Counter Affidavit.

The procedure under which the Defendant’s counsel filed a further affidavit even before a Notice of Intention to Defend was filed and in the absence of an affidavit accompanying the said notice is novel and yet to be incorporated into our statute books.

Nevertheless the documents are before me and will be considered.

I have carefully read and considered the defendant’s said further affidavit in support of notice of intention to defend and reply to counter affidavit filed on the 22/1/2003 and note that the defendant has not in any of the 32 paragraphs or 8 exhibits denied making and/or authorizing the making of Exhibits C1, D, and D1 attached to the plaintiff’s further affidavit in support of claim.

“The said Exhibit C1 is a letter from the defendant’s solicitor to the plaintiff’s solicitor admitting the defendant’s indebtedness.

Exhibit D is a letter from a third party (Anambra State Government) to the plaintiff prevailing on the plaintiff to exercise patience with the defendants who are owed by the said third party.

While Exhibit D1 is a letter to the said third party prompting it to write Exhibit D.

Although the Defendant stated in paragraph 30 of the said further affidavit in support of notice of intention to defend...”

“That the 1st defendant my wife told me and I verily believe her that she did not make Exhibits D and D1 of the further affidavit”. I observe that exhibit D shows clearly a letter on the letter headed paper of the Anambra State Government signed by one Ohajianya

S. C. While Exhibit D1 shows a letter on the letter headed paper of one Ifeanyichukwu Trading Ventures (Nigeria) Ltd, signed by the defendant herein himself.

These exhibits do not show any nexus with the defendant's wife and could not have been made by her.

A careful perusal of the exhibits annexed to the defendant's further affidavit in support of notice of intention to defend... show that Exhibit A relates to the defendant's account the subject matter of this suit and contradicts paragraph 19 therein.

Exhibit B relates to the account of one Ifeanyichukwu Trading Ventures Limited who is not a party to this suit.

Exhibit C is the statement of account of the said Ifeanyichukwu Trading Ventures limited who is not a party to this suit.

Exhibit D is the statement of account of the defendant's account the subject matter of this suit.

Exhibit E is the statement of account of one Adinuba Maureen who is unknown to this suit.

Exhibit F1 is evidence of money paid into the account the subject matter of this suit on 13/9/2002.

Exhibit F2 relates to the account of one Ifeanyichukwu Trading Ventures limited who is not a party to this suit.

Exhibit F3 is a cheque drawn in-favour of the defendant herein.

It is therefore my considered view that exhibits B, C, E, F2 and F3 are not relevant to this suit and do not constitute a defence to this suit. However, Exhibits A, D and F1 are relevant but merely confirm the existence of the overdraft giving rise to this suit and payment made therein and to my mind do not constitute a defence.

Although leave to defend would ordinarily be given where the issue of account is called to question, the admissions in Exhibits C1 and D2 attached to the plaintiff's further affidavit in support of claim, which exhibits are not denied foreclose the issue.

I have therefore come to the conclusion that the defendant has failed to discharge the primary obligation on him to satisfy this court that there is a triable bona fide issue or question in this suit.

There will be judgment for the plaintiff as follows:-

The Defendant shall pay to the plaintiff the sum of N7, 400,595.53k (Seven million, Four hundred thousand, Five hundred

and Ninety-five naira, fifty-three kobo) less N1 million naira (One Million Naira) paid by the defendant on 13/9/2001 during the pendency of this suit with interest at the rate of five per centum per annum from the date of judgment until final payment of the judgment debt.”

B On appeal by the Appellant to the Court of Appeal or Court  
below, that court in a judgment which lead was delivered by Mu-  
ka’ilu JCA agreed totally with the trial Court and concluded that the  
Appellant who had filed his notice of intention to defend and whose  
affidavit had not raised any substantial issue requiring further ex-  
C planation cannot be heard to say that his constitutional right to fair  
hearing had been infringed and so there was no merit to the appeal  
which the Court below did not hesitate in dismissing.

D Having brought out all that had transpired at the two Courts  
below and tackling the questions that have arisen as set out in the sub-  
missions of counsel from either side, some guides need be explored  
to find on which side of the divide the justice of the case resides.

Whenever application is made to a Court for the issuance of  
writ of summons in respect of a claim to recover a debt or liquidated  
money demand and such an application is supported by an affidavit  
setting forth the ground upon which the claim is based and stating  
E that in the applicant’s view, 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 accordingly and enter thereon  
F a date for hearing, subject to the circumstance of the particular case.  
If the party served with the writ of summons and affidavit delivers to  
the registrar a notice 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.  
However, for an action to be transferred to the general cause list from  
G the undefended list there must be a defence on the merit. It must  
not be a half - hearted defence. See Tahir v. J Udeagbala Holdings  
Ltd (2004) 2 NWLR (Pt. 857) 438 at 451 per Ba’aba JCA, Franchal  
(Nig.) Ltd v N. A. B. Ltd (1995) 1 NWLR (Pt. 412) 172.

H What is really at play here is a call for summary judgment in  
this undefended list procedure. The case of:- Sunil Vaswani & Anor  
v C. A. Candide - Johnson (CA) (2000) 11 NWLR (Pt. 679) 582 at  
586 - 587 is instructive and it was therein held:-

The principles governing an application for summary judgment is that a defendant who has no real defence to a suit should not be allowed to frustrate or cheat the plaintiff out of judgment. In this regard, the court has a duty to assess facts presented before it in order to ensure that there is no abuse of its processes so that there is no delay of justice to a deserving plaintiff. *Nishizawa v. Jethwani* (1984) 12 SC 234; *Macaulay v. NAL Merchant Bank* (1990) 4 NWLR (pt. 144) 283. B

A defendant to an application for summary judgment under Order 24, Rule 9 (2) and (3) of the High Court of Anambra State, 1988 (Civil Procedure) Rules 1972 must establish that he has a good defence by showing or disclosing in his statement of defence and counter affidavit such triable issue to entitle him to be granted leave to defend the action. See *Sunil Vaswani v. Candide Johnson* (supra) at 587. C D

For an Intention to Defend to be regarded as meritorious warranting the matter being transferred from the Undefended List to the General Cause List for a full hearing with the taking of evidence, oral and documentary a certain standard is required of such a defendant and the supporting affidavit of that Intention to defend must contain a defence on the merit. E

It is not enough for the defendant merely to deny the claim or aver that some payments he made were not taken into account. He must set out the details and particulars of the defence. *Tahir v J. Udeagbala Holdings Ltd* (2004) 2 NWLR (Pt. 854) 438; *Adegoke Motors Ltd v Adesanya* (1989) 3 NWLR (Pt. 109) 250; *Nishizawa Ltd v. Jethwani* (1984) 12 SC 234; *UTC v. Pamotei* (1989) 1 NWLR (Pt. 103) 244; *John Holt & Co. (Liverpool) Ltd v. Fajemirokun* (1961) 1 All NLR 492. F G

In the case in hand, the trial Court made a comprehensive consideration of the materials available to it and came to the logical conclusion that there was no defence which would direct the hand of the court towards a hearing under the general cause list. The Court below agreed with that finding, thus the issue of concurrent findings of the two Courts coming into view. H

As a matter of practice, the Supreme Court will not ordinarily disturb concurrent findings of fact by the two Lower Courts except in special circumstances such as the commission of error in substantive

or procedural law. *Adebayo v. Ighodalo* (1996) 5 NWLR (Pt. 450) 507 at 516, 527 - 530 (SC), *Egonu v. Egonu* (1978) 11 - 12 SC 111 at 129; *Chinwendu v. Mbamadi* (1980) 3 - 4 SC 31 at 53; *Obibu v. Guobadia* (1984) 10 SC 130; *Balogun v. Amubikanhun* (1989) 3 NWLR (Pt. 107) 18, *NICON v. P. I. E. Co. Ltd* (1986) 1 NWLR (Pt. 14) 1; *Enang v. Adu* (1981) 11 - 12 SC 25.

The principle above conceptualized within the ambit of the facts before court where there is an abundance of documents including those made by the Appellant wherein he admitted in full measure the indebtedness alleged by the Respondent. As earlier reproduced, the affidavit emanating from the Appellant and the letters written on his behalf by counsel, he admitted without equivocation that he owed the Respondent as claimed by them and acknowledged the Respondent had been patient with him in the delay in repayment and pleaded for further forbearance.

By Section 151 of the Evidence Act provides that when one person has, by his declaration, act or omission, intentionally caused or permitted a thing to be true and to act upon such belief, neither he nor his representative in interest shall be allowed, in any proceedings between himself and such person or such person's representative in interest to deny the truth of that thing. *Ehidimhen v. Musa* (2000) 8 NWLR (Pt. 669) 540 per Kalgo JSC at 556 - 557.

It therefore comes like an approbation and reprobation for the Appellant at this stage to renege and advance fresh or new areas of defence being introduced such as to input fraud on the part of the Respondent in their claim or matters leading thereto. It cannot be left unsaid that fraud being of its gravity, the law insists that concrete materials must back up such an allegation in proof before fraud can change the colour of the case of the party alluding thereto.

The situation brings in view the caution which I find apt for our purpose here in the case of:- *Aro v Aro* (2000) 3 NWLR (Pt 649) 443 at 457 per Onnoghen JCA (as he then was).

"The argument of counsel to a party, however brilliant cannot form or be valued as evidence in favour of a party or take the place of evidence which is lacking in his case". See *Ishola v Ajiboye* (1998) 1 NWLR (Pt. 532) 71; *Chukwujekwu v Olalere* (1992) 2 NWLR (Pt. 224) 86; *Bello v N. B. N. Ltd* (1992) 6 NWLR (Pt. 246) 206; *Ugorji v. Onwuka* (1991) 4 NWLR (Pt. 237) 226.

What has happened here is an over-zealous counsel hoping to get an advantage for his client putting up a case different from that initiated and defended at the trial court with the mistaken approach, that something can be made at this stage to enhance the case of the appellant, forgetting that the case here at the Apex Court is a mere continuation of the case first initiated at the High Court where the tune had been set. B

In this regard is relevant the case of Kenfrank (Nig.) Ltd v. UBN (2002) 8 NWLR (Pt. 789) 46 at 74 which seemed to have had the case at hand in mind when the Court of Appeal per Ikongbeh JCA held as follows:- C

“I am not happy that Senior Counsel should lend his name to such underhand conduct. By all means, counsel had the right and duty to throw all his endeavours behind his client’s cause. In my view, however, the line must be drawn somewhere, where as in this case, the defendant had unequivocally admitted indebtedness in writing and expressed willingness to pay up, counsel should encourage along the path of honour rather than employ any legal brinkmanship to defeat the cause and course of justice.” D

Where a trial Court finds as in this case that defendant has no defence to a plaintiff’s suit placed under the undefended list, the court has no option other than to enter judgment for the plaintiff for the sum of money claimed. *Tahir v J Udeagbala Holdings Ltd* (supra) 451-452. E

The conclusion I see is that the Appellant’s affidavit to support his attempt with his intention to defend lacked particularity or details which lapses were to be filled, I guess by the Court which I do not know how that would have been done. The situation was all the more worsened by the various admissions of the Appellant which this later day about face cannot change for his good. There being no perversity in the concurrent findings of the two Courts below or any shadow of a miscarriage of justice or a wrong application of the law, there is no other option open to this Court than to uphold those findings. It is for that, that I resolve the issue here against the Appellant and as a follow up, this appeal lacks merit and I do not have any hesitation in dismissing it. F G H

Appeal is hereby dismissed and I affirm the decision of the Court of Appeal which in turn affirmed the Judgment and Orders of

the Trial High Court.

I award N100,000.00 costs to the Respondent to be paid by the Appellant.

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B —

MOHAMMED JSC

The undisputed facts of this case as captured in the judgments of the trial Court and the Court below are that the Appellant had been and is still a customer of the Respondent. The Appellant was granted over-draft facility in his personal Account No. 2320 by allowing him to overdraw this account to the tune of N7, 400,595.53 which he utilized. On 15th August, 2001, the Respondent wrote to the Appellant demanding the payment of the debt due to the Respondent. On 1st November, 2001, the Appellant through his Solicitor wrote a letter Exhibit C1 to the Respondent admitting the indebtedness of the Appellant and pleaded for time to allow the Appellant to settle or liquidate the overdraft. On 2nd May, 2002, another letter Exhibit D was also written to the Respondent on behalf of the Appellant admitting his indebtedness to the Respondent and pleading for time to liquidate the same. In spite of his admission to the debt, the Appellant failed to take the promised steps to liquidate the debt resulting in the Respondent instituting the suit on the Undefended list at the trial Court against him.

Although the Appellant on being served with the Respondent's claims responded by filing a motion to strike out the suit on the ground that it was pre-mature for the alleged failure of the Respondent to demand for payment, the trial court was satisfied that the Appellant had no defence to the Respondent's claims against him.

Accordingly the trial Court entered judgment for the Respondent on taking into consideration that the Appellant having admitted the claims against him and had already started liquidating the debt by the payment of the sum of N1, 000,000.00, there was no need under the law to hear the case on pleadings. No wonder, the Appellant's appeal to the Court of Appeal against the judgment of the trial Court was dismissed to give rise to the present appeal.

On these undisputed facts, it is my view that the trial Court was right when it found that having regard to the provisions of Or-

der 24 Rule 9(4) of the High Court (Civil Procedure) Rules, 1988 of Anambra State, to allow the Appellant who had no defence whatsoever to the action against him, to frustrate the case of the Respondent and deny it judgment, was unattainable. This is in line with the decisions in many cases including the case of *Macaulay v. Nal Merchant Bank Ltd* (1990) 4 N.W.L.R. (Pt. 144) 283 at 311 on the Law on the Undefended Action procedure. B

For the forgoing reasons, I am of the strong view that this appeal is frivolous which deserves nothing but a dismissal as decreed in the lead judgment of my learned brother Peter-Odili, JSC which I have had the opportunity of reading before today and with which I entirely agree that this appeal must be dismissed. I also dismiss it and abide by the orders contained in the lead judgment including the order on costs. C

D

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FABIYI JSC

I had a preview of the judgment just delivered by my learned brother - Peter-Odili, JSC. I agree with the reasons advanced therein to arrive at the conclusion that the appeal lacks merit and should be dismissed. E

I wish to chip in a few words of my own in support of the comprehensive judgment. The appellant borrowed money from the respondent bank. As the sum of ₦7,400,595.53 was outstanding against the appellant, the respondent commenced its action before the trial court in the undefended list. As extant in the record of appeal, the appellant admitted that he took overdraft from the respondent. His solicitor admitted his indebtedness in Exhibit C1 as follows:- F

“...It is not in doubt that our client is indebted to your client to the tune of the amount herein stated. May we bring to your notice that our client is willing to liquidate the above sum so as not to put your bank in distressed position as you humbly contended. Our client has instructed us to urge you to give him up to 31/10/2001 to liquidate the indebtedness... Your further kind patience is highly solicited.” G H

Further to the above, on 2/5/2002, at the instance of the appellant, one Mr. S. C. Ohajanya, Special Assistant to the Execu-

B
 tive Governor of Anambra State, on transport wrote Exhibit D and annexed Exhibit D1 written to him by the appellant admitting his indebtedness to the respondent. He pleaded with the respondent in Exhibit D to exercise patience with the appellant. As can be seen in Exhibit 'E.1', the appellant made a part-payment of the sum of =N=1,000,000:00 to reduce his debt to the respondent.

C
 Based on the admissions by, and on behalf of the appellant, the trial court found that it will be unjust and contrary to the dictate of Order 24 Rule 9(a) of the High Court Rules, 1988, Anambra State to allow the appellant whose affidavit failed to establish valid issues to dribble the respondent out of judgment and postpone the liquidation of his indebtedness. This is as pronounced variously in Thadant v. National Bank Ltd. (1972) 1 SC 105 at 113; Agwunedu & Ors. v. V. Onwumere (1994) 1 NWLR (pt. 321) 375 at 401-402; Macaulay v. Nal Merchant Bank Ltd. (1990) 4 NWLR (Pt. 144) 283
 D
 at 311 and, others cited by learned counsel to the respondent. The Court of Appeal rightly affirmed the stance of the trial court. That is how it should be.

E
 Let me observe it briefly that the appellant's counsel tersely alluded to issue of fraud. He argued that 'not only that baseless interests were charged, but they were fraudulently inflated'. The appellant must appreciate that fraud must be pleaded with particulars supplied and evidence must be led on same. See: George v. Dominion Flour Mills Ltd. (1963) All NLR 70 at 77 and Aina v. Jinadu (1992) 4 NWLR
 F
 (pt. 233) 91 at 106. Apart from the above, since fraud is a crime, it must be proved beyond reasonable doubt.

The appellant did not establish a case of fraud before the trial court and the court below. There should be consistency in prosecuting cases at the trial court as well as on appeal. There should be no somersault. See: Ajide v. Kelani (1985) 3 NWLR (Pt. 12) 248.

G
 The two courts below concurrently found that the respondent clearly depicted the appellant's indebtedness. The appellant failed to disclose any tenable defence. He failed to raise any concrete issue in the matter. The trial court was justified in its findings of fact. Equally, the court below was right in affirming the stance of the trial court.
 H
 The concurrent findings are not, in any respect, perverse. I cannot interfere with same under any guise. See: Anaeze v. Anyaso (1993) 5 NWLR (Pt. 291) 1.

For the above remarks and of course the lucid reasons adumbrated in the lead judgment which I hereby adopt, I too feel that the appeal is devoid of merit and should be dismissed. I order accordingly. I endorse all consequential orders contained in the lead judgment; that relating to costs inclusive.

B

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MUHAMMAD JSC

I read in draft the lead judgment of my learned brother Ukaego Peter-Odili JSC and agree with the reasoning and conclusion therein that this appeal lacks merit and same be dismissed.

I must restate that a plaintiff who has taken out a writ under the undefended list must have his way if the defendant fails to disclose a defence on the merit to the claim. The principle has and justice dictates it must so remain that the defendant who has no defence to the plaintiff's claim is not allowed to push the matter needlessly into full trial thereby not only cheating and frustrating the plaintiff but abusing the process of the court as well. See *Nishizawa V. Jethwani* (1984) 12 SC 234 and *Macaulay V. NAL Merchant Bank* (1990) 4 NWLR (Pt 144) 283.

In the case at hand, the appellant failed to disclose any defence to respondent's claim and the two courts are right to have held him responsible for the sum.

It is for the foregoing and the fuller reasons articulated in the lead judgment that I also hold that the concurrent findings of the two courts below must persist. I dismiss the unmeritorious appeal at the same cost assessed in the lead judgment in favour of the respondent.

KEKERE-EKUN JSC

I have had the benefit of reading before now the lead judgment of my learned brother, PETER-ODILI, JSC, just delivered.

I agree with the reasoning and conclusion that the appeal lacks merit and should be dismissed. In support of the lead judgment I wish to add a few comments for emphasis.

The respondent's suit at the trial court was brought under the Undefended List procedure pursuant to Order 24 Rule 9 of the Anambra State High Court (Civil Procedure) Rules 1988. It was for

the liquidated sum of N7, 400, 395.53 (Seven Million Four Hundred Thousand Three Hundred and Ninety-Five Naira Fifty-Three kobo only) with interest at the rate of 21% per annum from 1st September, 2001 till the date of judgment and thereafter at the rate of 5% per annum till final payment of the debt. The debt was incurred as a result of overdraft facilities granted to the appellant by the respondent. The appellant deposited his title documents in respect of his property at Ozalla Layout, Obosi, Anambra State to secure the facilities. He operated several accounts with the respondent.

The following sequence of events occurred: On 15/8/2001 the respondent wrote to the appellant demanding the sum of N7, 400,595.53, being the outstanding sum due on his current account no. C/A 2320 in respect of credit facilities granted to him. On 24/10/2001, the respondent, through its Solicitors, wrote to the appellant demanding the sum of N18, 460, 212.25 being his entire indebtedness in respect of his various accounts. On 1/11/2001, the appellant, through his Solicitors, P.O.T. Okeiah & Co., admitted his indebtedness as stated in the letter of 24/10/2001 (Exhibit B1) and pleaded for time to liquidate the amount. On the 2/5/2002, one Mr. S.C. Ohajianya, Special Assistant to the Governor of Anambra State, at the appellant's instance wrote the respondent (vide Exhibit D) and pleaded with it to be patient with the appellant over his indebtedness. Attached to the letter was a letter written by the appellant to the Commissioner for Works and Transport, Awka, dated 10/4/2002 (Exhibit D1) stating that he was indebted to the respondent in the sum of N18, 460, 212.25 and that he was still awaiting payment from the State Government in respect of a contract executed by him. He urged the Commissioner to prevail upon the respondent not to dispose of his property. The appellant failed to liquidate his indebtedness. The respondent therefore instituted an action against him under the Undefended List at the High Court of Anambra State sitting at Enugu. The claim for N7, 400,595.53 was in respect of only one of his accounts i.e. Current Account No. C/A 2320.

The appellant filed a Notice of Intention to defend the suit and a further affidavit in support. His defence to the claim was that though he maintained several accounts with the respondent, they

were operated interchangeably as one account. He denied owing the sum of N18, 460, 212.25, which amount, incidentally, was not the amount claimed in the suit. He admitted being granted overdraft facilities by the respondent but averred that the statement of account issued to him by the respondent contained irregularities and illegal charges.

While the respondent urged the court to enter judgment in its favour, the appellant urged that the matter be transferred to the general cause list for hearing on the merits.

During the course of the proceedings, the appellant paid a sum of N1 million (shown on Exhibit E) to the respondent in an attempt to reduce his indebtedness. After considering the affidavit evidence before it and carefully perusing the exhibits annexed thereto, and taking into account the N1 million naira paid by the appellant to reduce the debt, the trial court concluded that the appellant had failed to show that there was a triable bona fide issue for determination in the suit to warrant its transfer to the general cause list. Judgment was therefore entered in the respondents favour in the sum of N7, 400, 595.53 (Seven Million, Four Hundred Thousand, Five Hundred and Ninety-Five naira, Fifty-Three kobo) less N1 Million paid by the defendant on 13/9/2002 during the pendency of the suit with interest at the rate of five per centum per annum from the date of judgment until final payment of the judgment debt.

Dissatisfied with the judgment, the appellant appealed to the Court of Appeal, Enugu Division (the lower court). The appeal was dismissed. The appellant has further appealed to this court. The appellant formulated two issues for the determination of the appeal, while the respondent formulated a single issue. In my view the single issue formulated by the respondent encompasses the issues in contention in this appeal, viz:

Was the lower court right, having regard to the affidavit evidence/exhibits and admissions in the case, in upholding the judgment of the trial court?

It is very well settled that the purpose of the Undefended List procedure in the civil procedure rules of various high courts is to allow a claimant obtain quick justice in respect of a debt or liquidated sum where the facts are clear and there is no genuine de-

fence to the claims. It allows a court to give judgment without the need to go the whole hog of a full trial and the calling of witnesses. It saves judicial time and expense. By the same token, justice must never be jettisoned for the sake of speed. Therefore where the

- B facts or issues are contentious, the case would be transferred to the general cause list to be dealt with appropriately. See: Imoniyame Holdings Ltd. & Anor. Vs SONEB Enterprises Ltd. (2010) 4 NWLR (Pt. 1185) 561; Macaulay v. NAL Merchant Bank Ltd. (1990) 4 NWLR (Pt. 144) 283; Nwankwo & Anor. v. Ecumenical Devt. Co-Operative Society (EDCS) U.A. (2007) 5 NWLR (Pt. 1027) 377; (2007) 1 - 2 SC 145; Sodipo v. Leminkainen & Ors. (1986) 1 NWLR (Pt. 15) 220; Akpan v. Akwa Ibom Property & Investment Co. Ltd. (2013) LPELR-20753 (SC).

- D This court in *Nishizawa Ltd. v. Jethwani* (1984) 12 SC 234 at 260, set out what a defendant's affidavit in a summary judgment procedure wherein he is seeking to be let in to defend the action must show:

- E "a. It should "condescend upon particulars" and as far as possible, deal specifically with the plaintiff's claim and affidavit and state clearly and concisely what the defence is and what facts are relied on as supporting it;
- b. State whether the defence goes to the whole or part of the claim, and in the latter case, specify the part;
- F c. Where the defence is that the defendant is not indebted to the plaintiff, state the grounds on which the defendant relies as showing that he is not indebted. A mere general denial that the defendant is not indebted will not suffice;
- G d. Where the affidavit states that the defendant is not indebted to the plaintiff in the amount claimed or any part thereof, state why the defendant is not so indebted, and to state the real nature of the defence relied on;
- e. Where the defence relied on is fraud, state the particulars of the fraud. A mere general allegation of fraud is useless;
- H f. If a legal objection is raised, state clearly the facts and the point of law arising therefrom;
- g. In all cases, give sufficient facts and particulars to show that there is a bona fide defence;
- h. Also, matters of hearsay are admissible, provided

that the source and grounds of information and believe (sic) are disclosed.” See: Macaulay Vs NAL Merchant Bank Ltd. (supra) at 306 - 307 D - C; Adegoke Motors Ltd. Vs Adesanya (1989) 3 NWLR (Pt. 109) 250 @ 271 - 272 H - A; UTC Nig. Ltd. Vs Pamo-  
tei (2002) FWLR (Pt. 129) 1557; (1989) 2 NWLR (Pt. 103) 244;  
Nkwo Community Bank (Nig.) Ltd. Vs Obi (2010) 14 NWLR (Pt. 1213) 169. B

The affidavits of the parties have been fully set out in the  
lead judgment.

I do not deem it necessary to reproduce them here. Suffice  
it to say that the appellant’s further affidavit failed to ‘condescend  
upon particulars’ as to the specific aspect of the respondent’s  
claim being denied and the alleged irregular and/or illegal interest  
charges in the statements of account issued to him. He merely  
exhibited the statements without highlighting any of the alleged  
irregularities. He made several references to accounts that were not  
the subject of the claim before the court. Furthermore he unequiv-  
ocally admitted his indebtedness to the respondent. Exhibit C1  
attached to the respondent’s further affidavit in support of claim  
at page 17 of the record is the letter dated 1/11/2001 written by  
the appellant’s solicitor in response to the letter of demand dated  
24/10/2001 (Exhibit B1) from the respondent’s solicitor. It reads in  
part: C

“Our client has passed to us your letter dated 24/10/2001  
on the above subject matter with instruction to reply same accord-  
ingly. D

It is not in doubt that our client is indebted to your client to  
the tune of the amount herein stated. May we bring to you notice  
that our client is willing to liquidate the above sum so as not to put  
your bank in distressed position as you humbly contended. E

Our client has instructed us to urge you to give him up to  
31/10/2001 to liquidate the indebtedness. This is in view of the  
fact that HIS EXCELLENCY, DR. C.C. MBADINUJU has promised  
to pay our client the contract sum he expended in the construction  
and tarring of both Ogbo-Efere Road, Okpoko and one of Okija  
any moment from now. F

As soon as this amount is paid, we shall not hesitate to  
liquidate the aforesaid sum please. Your further kind patience is G

highly solicited. Thank you.”

The contents of Exhibit C1 confirm the contents of the letter subsequently written to the respondent by the Special Assistant to the Governor (Exhibit D) pleading for more time on the appellant’s behalf. By Exhibit E1 he paid the sum of N1 million to reduce his indebtedness. Contrary to the appellant’s contention, the averment in his further affidavit that there were irregularities in his statements of account could not in any way put his earlier clear and unequivocal admission of indebtedness in doubt. The trial court was entitled to rely on it in refusing to transfer the suit to the general cause list and the lower court rightly, in my view, affirmed its decision.

It is important to note that the issue of fraud raised by the appellant in his brief of argument before this court was never raised at the trial court nor at the court below. A party must be consistent in presenting his case. An issue not raised at the trial court cannot be raised at the appellate court through the ingenuity of counsel. See: Balogun Vs Adejobi (1995) 1 SCNJ 242; (1995) 2 NWLR (Pt. 376) 131; Olatunji Vs Adisa (1995) 2 SCNJ 90; (1995) 2 NWLR (Pt. 376) 167; Orunengimo & Anor. Vs Egebe & Ors. (2007) 15 NWLR (Pt. 1058) 630; (2007) 7 SC (Pt. II) 197. In any event the particulars of fraud must be specifically pleaded. Being criminal in nature, the allegation must also be proved beyond reasonable doubt. The averments in the appellant’s affidavit were completely bereft of necessary particulars and fell short of this important requirement.

A defendant such as the appellant herein, who has no defence to an action should not be allowed to dribble the plaintiff and waste the time of the court. He has reached the last bus stop and must now settle his debt. It is for these and the more detailed reasons comprehensively advanced in the lead judgment of my learned brother, Peter-Odili, JSC that I also find no merit in the appeal. I dismiss it accordingly and affirm the judgment of the lower court. I abide by the order as to costs.

H