

SUPREME COURT OF NIGERIA
FRIDAY 26TH JUNE, 2015. SC. 59/2005
CORAM:- M. S. MUNTAKA-COOMASSIE,
O. RHODES-VIVOUR, N. S. NGWUTA, O. ARIWOOLA,
K. B. AKA'AH, JJSC

1. IFEANYICHUKUWU TRADING
INVESTMENT VENTURES LIMITED
2. CALLISTUS OBITUBE APPELLANTS
AND
ONYESOM COMMUNITY BANK LIMITED RESPONDENT

UNDEFENDED SUITS - Objective of - It enables court to deal summarily with plaintiff's claim and enter quick judgment - Once there is no defence on merit - Thereby saving time and cost (H1)

UNDEFENDED SUITS - Notice of defence - Filing - Defendant must file notice of intention to defend the suit and affidavit in support - And once triable issue is disclosed - Suit is transferred to general list (H2)

UNDEFENDED SUITS - Notice of defence - Failure to file - Once defendant fails to deliver the notice and affidavit in support - Plaintiff is entitled to judgment (H3)

RULES OF COURT - Compliance with - The rules are to be obeyed - And in the event of non compliance which is not explained - Court must not grant any indulgence (H4)

UNDEFENDED SUITS - Debt - Acknowledgment of - Failure of appellants to file affidavit with notice of intention to defend - Was clear admission of indebtedness and the sum claimed (H5)

DOCUMENTS - Admissibility - Letters of counsel - By virtue of the correspondence not marked without prejudice - Appellants should not deny their admission - And acknowledgment of indebtedness (H6)

FACTS

Before the High Court of Anambra State Holden at Onitsha, plaintiff/respondent commenced this action against defendants/^{2nd} appellant via undefended list procedure, claiming for the repayment of the sum due and interest rate on loan granted to appellants. ^{2nd} appellant is a business man trading under the name Ifeanyichukwu Trading Investment Ventures Ltd i.e. 1st appellant. He took an overdraft facility and became indebted to respondent to the tune of N10,080,093.18. He failed to meet his obligations despite repeated demands when the amount became due. Consequently, respondent commenced the action. Appellants were served with respondent's specially endorsed writ of summons, commanding them to file in their intention to defend the action not later than five days before the day fixed for hearing. Thereafter, a day before the hearing date, appellants brought an application seeking to strike out the suit on the ground that it was premature, as no Demand Notice was given by respondent to appellants before instituting the action.

Respondent filed counter-affidavit in response. The court was informed by respondent's counsel of the parties' intention to settle out of court. Upon the failure of settlement, the court dismissed appellants' application for an order striking out the suit. The court therefore proceeded to hear the suit under the undefended list, as there was no notice of intention to defend same by the appellants. The matter was then fixed for judgment. On the date of judgment, appellants informed the court of another application to stay execution of its earlier ruling, dismissing their application to strike out the suit. The court nevertheless proceeded in the matter and gave its judgment. Respondent's claim was granted. Dissatisfied, appellants appealed to the Court of Appeal Enugu Division. The appeal was dismissed. Hence, appellants' further appeal to Supreme Court.

ISSUE FOR DETERMINATION

"Whether the court below was right, despite the notice of Intention to defend an affidavit evidence of the appellants, in dismissing the appeal and affirming the decision of the trial court when the matter was heard under Undefended List."

HELD

(Unanimously dismissing the appeal per

ARIWOOLA JSC)

UNDEFENDED SUITS - Objective of

1. As I stated earlier, this action was commenced under the Undefended List procedure rules. It is trite law that the purpose or object of this procedure is to enable the court to deal summarily with the plaintiff's claim and enter quick judgment once it is clear that the defendant does not have any defence to such claim, in order to save time and avoid unnecessary expense on litigation trial. In other words, the procedure under undefended list rules is designed to secure justice and avoid the injustice likely to occur when there is indeed no genuine defence on the merits to the plaintiff's claim. The procedure is employed to shorten the hearing of a suit where the claim is for liquidated sum. (p. 2199 C)

UNDEFENDED SUITS - Notice of defence - Filing

2. After service of the Writ of Summons and other required documents, the rule expected the defendants/appellants to deliver to the Registrar, not less than five days before the day fixed for hearing, their Notice, in writing of their intention to defend the suit. This was expected to be filed along with an affidavit setting out and clearly disclosing the grounds of their defence. The trial court was then expected to consider the said notice and affidavit evidence accompanying it, to see whether the defendant has a triable issue. Once the court discovers in the affidavit evidence, an issue that will require an investigation or explanation from the plaintiff on the claim, or where the affidavit in support of the Notice of Intention to defend throws a doubt on the claim, then the parties are said to be brought within the concept of joining issues. In the situation where a triable issue is disclosed, then the case can no longer be tried or heard under Undefended list but must be transferred to the general list for trial on pleadings.

(p. 2199 H)

UNDEFENDED SUITS - Notice of defence - Failure to file

3. There is no doubt, the appellants did not file any Notice in writing in accordance with the rules to show that they intended to defend the respondent's action. The law and procedural rule are clear on this matter. Under the applicable rule, once
B **the defendant in an action such as the instant fails to deliver the notice of defence and affidavit and is not let in to defend, the plaintiff is entitled to judgment, in particular, once the affidavit in support of the application for Writ of Summons shows**
C **that the defendant has no defence to the action. (p. 2200 H)**

RULES OF COURT - Compliance with

4. The rule had required them to file a Notice of their intention to defend the action upon service of the Writ of Summons on
D **them at least five days before the return date. The failure to file the said Notice in writing and the accompanying affidavit meant a non compliance. It is trite law that the rules of court are to be obeyed and complied with. In the event of a non**
E **compliance with the rules and it is not explained away, then, unless the non compliance is of a minimal kind, the court must not grant any indulgence. (p. 2201 H)**

UNDEFENDED SUITS - Debt - Acknowledgment of

5. There is no doubt that the failure of the appellants herein to
F **file an affidavit to their belated Notice of Intention to defend the respondent's action cannot be said to be of a minimal kind, deserving an indulgence by the court. There was no defence to the claim in whatever form.**

Indeed, there was a clear admission directly on one hand
G **by the appellants, of the indebtedness and on the other hand, an admission of the sum claimed through respondent's counsel. The correspondence between counsel was not denied by the appellants. This therefore is not a case that the defendants**
H **should be allowed longer time to continue to delay the settlement of their indebtedness. It will be an unwarranted indulgence by the court and this may result into injustice to the respondent whose money the appellants had benefited from and refused to pay back. (p. 2202 C)**

DOCUMENTS - Admissibility - Letters of counsel

6. This was the correspondence between counsel to both parties. Mr. Obitube is the 2nd appellant and the Chairman/Managing Director of the 1st appellant company. However, it should be noted that the above correspondence was not marked as “without prejudice” which may have rendered the letter inadmissible against the appellants. They actually meant what it contains and gave the instruction to their Solicitor. They should not be further indulged to cheat on the respondent by now denying their admission and acknowledgment of their indebtedness. (p. 2203 E)

REPRESENTATION

Chief H. B. Onyekwelu, for the Appellants D
B. A. Obiora (Miss) with H. U. Obi-Obiora (Mrs.), for the Respondent

CASES REFERRED TO

Unity Bank Plc. v. Bouari (2008) 12 SCM (pt. 2) 159 E
Saraki v. Kotoye (1990) 4 NWLR (pt. 143) 144
Ntukidem v. Oko (1986) 5 NWLR (pt. 45) 909
Agwunedu v. Onwumere (1994) 1 NWLR (pt. 321) 375
Akinola v. Faseun (1973) All NLR 146
Macaulay v. NAL Merchant Bank Ltd (1990) 4 NWLR (pt. 144) 283 F
Omezini v. Oko (2004) 13 NWLR (pt. 890) 287
Nishizawa v. Jethwani (1984) 12 SC 234
Adebayo v. Ighodalo (1996) 5 NWLR (pt. 450) 507
Balogun v. Amubikahun (1986) 3 NWLR (pt. 107) 18 G
Obaro v. Hassan (2013) 8 NWLR (pt. 1357) 425
Graham v. Esumai (1984) 15 NSCC 733
Ehimare v. Emhonyon (1985) 1 NWLR (pt. 2) 777
Nworah & Sons Ltd. v. Akputa Esq. (2010) 4 SCM 31
Kalu v. Odili (1992) 6 SCNJ 76 H

RULES REFERRED TO

Anambra State (Civil Procedure) Rules 1988, O. 5 r. 14, O. 24 r. 9

LEAD JUDGMENT BY ARIWOOLA JSC

This is an appeal against the judgment of the Court of Appeal, Enugu Division delivered on the 28th day of October, 2004 Coram: Galadima, Adekeye, JJCA (as they then were) and Mika’ilu, JCA.

The appellants herein were the defendants/appellants at the courts below, while the respondent was the plaintiff/respondent. They shall therefore henceforth be referred to as appellants and respondent respectively.

The respondent had commenced an action before the trial High Court, Onitsha under the Undeferred List. It had claimed, as endorsed on the Writ of Summons, as follows:

“N10,080,093.18 (Ten Million, Eighty Thousand, Ninety-Three Naira, Eighteen Kobo) with interest at the rate of Twenty-One per centum from 1st day of September, 2001, up to the date of judgment and at the rate of five per centum per annum”

Upon consideration of the respondent’s application for the issuance of the specially endorsed Writ of Summons, the writ was so issued and marked as Undeferred. It was then ordered to be served on the appellants and commanded as follows:

“...that if you dispute the claim, you shall not less than five days before the day fixed for hearing, file in the registry of the court, the original and copies for service on the plaintiff, a notice that you intend to defend the suit, together with an affidavit setting out your defence.”

The suit was accordingly set down for hearing on Thursday the 16th day of May, 2002. The appellants were further notified as follows:

“That if there be no notice to defend the suit or if there be such notice but the court is not thereby satisfied that there is a triable issue, the plaintiff may proceed and judgment may be given in your absence or the insufficient notice notwithstanding.

*Dated this 18th day of April, 2002”*See; page 1 of the record of appeal.

Subsequently, on the 15th day of May, 2002, (a day before the return date), the appellants filed an application before the trial court seeking an order striking out the suit on the ground that it was premature, in that no “Demand Notice” was given by the plaintiff to the defendants before instituting the said action.

The respondent filed a counter affidavit to which various documents were attached including Letters of Demand and notification of balance in the defendants' overdraft account. When the application came up for hearing on 16/5/2002, the court was informed by the plaintiff's counsel that the defendants had approached the plaintiff for settlement out of court. Upon confirmation by the defendants' B counsel, the court adjourned the application to 2nd July, 2002 for report of settlement or for hearing of the suit under Undefended List. The defendants' application suffered couple of adjournments until 11th December, 2002 after the settlement failed. On the 23rd January, 2003, the court duly considered the plaintiff's application for an C order striking out the suit and same was dismissed. As there was no notice of Intention to defend the suit by the appellants, the court proceeded to hear the suit under the Undefended List.

As clearly shown on the record, both parties were represented D in court by counsel and they made respective submissions on the case. The matter was adjourned for ruling or judgment to the 30th January, 2003.

On the day fixed for ruling or judgment, just before the court could proceed, the learned counsel for the appellants referred the E court to yet another application dated 07/01/2003 which the court fixed for hearing that morning. The application was for an order staying the execution of the Ruling of the trial court given on 23/01/2003 which dismissed the appellants' application for striking out of the suit, F pending the determination of the appeal they had filed against the said ruling.

However, on 30/01/2003, the date the trial court had fixed for ruling or judgment, the court delivered its judgment in the following G terms:

"...the defendants have failed to discharge the primary obligation on them to satisfy the court that there is a triable bona fide issue or question in this suit. In the circumstance, there will be judgment for the plaintiff as follows:

The defendants shall pay to the plaintiff the sum of H N10,080,093.18 (Ten Million, Eighty Thousand, Ninety Three Naira, Eighteen Kobo) less N1,000,000.00 (One Million Naira) paid by the defendant during the pendency of this suit on 13/9/2002 with interest at the rate of five per centum per annum from the date of judg-

ment until payment of the judgment debt.” See page 59 of the record.

The appellants’ dissatisfaction with the judgment led to their appeal to the court below which on 28/10/2004 in a unanimous decision dismissed the appeal for lacking in merit and affirmed the decision of the trial court.

The appellants were further dissatisfied with the decision of the court below, hence they filed an appeal to this court on two grounds.

On the appeal, both parties filed and exchanged their respective brief of argument.

When this appeal came up for hearing on 31/3/2015, learned counsel for the appellants introduced the brief of argument which was settled by Chief Onyekwelu and filed on 03/6/2005. He adopted and relied on same to urge the court to allow the appeal, set aside the judgment of the court below and remit the case to another Judge within Onitsha Judicial Division to hear the case afresh on the general cause list.

On the other hand, learned counsel for the respondent adopted the brief of argument settled by Jude Obiora, Esq. and filed on 11/7/2005. He relied on same to urge the court to dismiss the appeal and affirm the decision of the court below.

In the appellants’ brief of argument of only four (4) pages, learned counsel formulated a sole issue from the two grounds of appeal they had earlier filed along with their notice of appeal as follows:-

Issue for determination

“Did the appellants raise a prima facie defence to the suit to warrant the suit being transferred to the general cause list.”

In like manner, the respondent also in its brief of argument distilled a sole issue as follows:

“Was the Court of Appeal right, having regard to the affidavits evidence and admissions in the case, in dismissing the appellants’ appeal and affirming the judgment of the trial court?”

Since this court is entitled to reframe issue(s) formulated by the appellant from the grounds of appeal filed for the purpose of narrowing down the issue in controversy in the interest of clarity and brevity, I desire to reframe the issue for determination of this appeal. See *Unity Bank Plc & Anor Vs Bouari (2008) 12 SCM (Pt.2) 159.*

Upon consideration of the grounds of appeal filed by the appellants, the issue that can be distilled and is hereby distilled for determination of this appeal is as follows:-

“Whether the court below was right, despite the notice of Intention to defend an affidavit evidence of the appellants, in dismissing the appeal and affirming the decision of the trial court when the matter was heard under Undefended List.” B

In arguing the issue for determination, learned appellants’ counsel submitted that the learned trial court gave a very restricted or narrow interpretation to Order 24 Rule 9 of the Anambra State (Civil Procedure) Rules, 1988 when it held that the appellants had not made out a prima facie case to warrant placing the suit on the general cause list. He contended that the court below fell into the same error by dismissing the appeal against the judgment of the said trial court. C

Learned counsel referred to Exhibits C, D, E, F, G, G1 and H on admissions by the appellants upon which the trial court and the court below relied to give judgment against the appellants but contended that in their further affidavit in support of their notice of intention to defend, the appellants had shown that they operated three accounts number 2320, 2349 and 3098 with the respondent. He conceded that the appellants actually made admission of the indebtedness earlier but on subsequent receipt of the statement of Account, that is, the respondent’s Exhibit B from the respondent and studying same closely, they discovered a lot of irregularities and illegal charges made against them. He went further that upon engagement of a firm of chartered Accountants, they were convinced that illegal charges and interests were imposed on the appellants by the respondent. D

Learned counsel contended further that a careful look at pages 10(c)-10(e) of Exhibit B - the statement of Account showed that the charges of interest were unprecedented and above the Central Bank Guidelines. He submitted that, that was one of the complaints of the appellants that called for investigation and scrutiny which could only be achieved by placing the suit on the general cause list. E

Learned counsel referred to page 112 of the record where the court below found that the debt standing against the 1st appellant in the books of the respondent was N10,080,093.18 as shown in Exhibit B but contended that the amount is not a genuine debt balance F

but a product of illegally charged interests and multi irregularities.

He referred to Order 24 Rule 9 (5) of the Anambra State (Civil Procedure) Rules, and contended that it enjoins the trial court where it thinks fit, at any stage of the proceedings, for the suit to be transferred to the general list on the ground that the suit is not suitable for placement in the undefended list. He submitted that the provisions of Rule 9(5) of the Rules is merely discretionary but that the discretion must be exercised judiciously and not by whims and caprices of the Judge. Learned counsel submitted further that where the discretion was exercised on a misunderstanding or misinterpretation of the law, then an appellate court will interfere with the discretion of the lower court, relying on *Saraki vs Kotoye* (1990) 4 NWLR (Pt.143) 144; *Ntukidem Vs Oko* (1986) 5 NWLR (Pt.45) 909.

Learned counsel contended that the court below did not give due attention to the case of the appellants but placed undue reliance on the documents tendered at the trial notwithstanding the complaint of the appellants on their discovery of over charging and irregularities of interest. He submitted that the court below was wrong to have dismissed the appeal and affirmed the decision of the court below. He urged the court to allow the appeal and set aside the judgment of the court below and remitting the case to the trial court to be heard afresh by another Judge of Onitsha Judicial Division of the Anambra State High Court.

In arguing the sole issue for determination, learned counsel for the respondent referred to the facts that led to this appeal and contended that once a debt is admitted by a defendant debtor who has benefited from the largess provided by the plaintiff credit and the defendant debtor unequivocally acknowledged in writing his indebtedness, but also pleaded for and did get mercy, he will not be allowed to dribble the plaintiff out of the judgment which the plaintiff was lawfully entitled to.

He referred to the various defendants. Letters of acknowledgment of indebtedness to the plaintiff and submitted that they are bound by the contents of the said letters. He relied on a couple of decided cases, including - *Agwunedu & Ors Vs Onwumere* (1994) 1 NWLR (Pt.321) 375 at 401 - 402, *S.O. Akinola Vs D.A. Faseun* (1973) All NLR 146 at 151-152; *Macaulay Vs NAL Merchant Bank Ltd* (1990) 4 NWLR (Pt.144) 283 at 311.

Learned counsel referred to the Statement of Account of the 1st appellant as Exhibit B showing the period of the overdraft facility granted to the appellants from 5th January, 2001 up to 13th August, 2001 with interest. The appellants, overdrew their current Account No.3098 and utilized same for their benefit. He contended that the appellants had secured the said overdraft facility by equitable Mortgage, by depositing his Customary Right of Occupancy in respect of his land and same is marked as Exhibit A to the action. B

Reference was further made to the record, to show that formal demand of payment of indebtedness was made on the appellants by the respondent and the appellants in unmistakable terms admitted the said indebtedness. He relied on Exhibits C and D respectively. He contended that appellants did not in any of the paragraphs of their affidavit in support of their defence deny writing the letter of admission of the indebtedness. He submitted that the court below was therefore right in dismissing the appeal of the appellants and affirming the judgment of the trial court in favour of the respondent. C D

Learned counsel referred to the processes earlier filed by the appellants when they challenged the action of the respondent praying the court to strike out the suit. He contended that in the said processes, the appellants had admitted their indebtedness to the respondent, but that they needed to be given demand notice before they could be sued for the money. He submitted that a statement made by a party on oath in a particular proceeding for one purpose may be used against him as an admission in a subsequent part of the same proceedings. A party is therefore entitled to rely on his opponent's admission as an admission against interest. He relied on *Omezini & Ors Vs. Sunday Oko & Anor* (2004) 13 NWLR (Pt.890) 287 at 305 and the Motion on Notice dated 14/5/2002 filed on 15/5/2002 by the appellants, with the affidavit in support, in particular paragraphs 3,4 and 7. He submitted that the appellants' admission of their indebtedness to the respondent is unequivocal and it is too late in the day to argue otherwise in their brief of argument. E F G

Learned counsel referred to the correspondence between the respondent and appellants on the demand of the payment of their indebtedness through their respective counsel. Exhibit E is the demand letter while Exhibit F is the response by the appellants' counsel whereby they asked for more time up to 31/10/2001 to liquidate the H

indebtedness. He submitted that in view of the acknowledgment of indebtedness and admission of same by the appellants to the respondent, it will be unjust and contrary to Order 24 rule 9(4) of the High Court Rules of 1988 of Anambra State to allow the appellants to dribble the respondent out of judgment and postpone the litigation of their indebtedness to the respondent. He further submitted that the learned trial Judge was perfectly right and justified in entering judgment for the respondent and the court below was right in affirming the decision of the trial court.

Learned counsel referred to Exhibits C, D, E, F, G, G1 and H on pages 16 lines 5-72 of the record of appeal and contended that the appellants have failed to disclose any defence or triable issue in this matter hence the trial court was right in giving judgment for the respondent. He submitted that a defendant who has no real defence to an action should not be allowed to frustrate the plaintiff and cheat him out of judgment he is legitimately entitled to by delay tactics aimed, not at offering any real defence to the action but at gaining time within which they may continue to postpone meeting their obligation and indebtedness.

Learned counsel submitted further that under the undefended list procedure, the defendant's affidavit in support of intention to defend must condescend upon particulars and should as far as possible deal specifically with the plaintiffs' claim and documents relied on. He relied on *Agro Miller Ltd Vs. Continental Merchant Bank (Nig) Plc.* (1997) 10 NWLR (Pt.525) 469 at 477-478; *Nishizawa Vs Jethwani* (1984) 12 SC 234 at 270.

Learned counsel contended that the affidavit evidence and the documents attached as Exhibits thereto by the appellants did not disclose any defence or answer to the respondent's claim. Reference was made to all the Exhibits (A, B, C, D, E, F, F2, & F3) attached to the appellants' said affidavit and contended that a mere general denial of the respondent's claim is devoid of any evidential value and such would not have disclosed any defence which will at least throw some doubt on the respondent's claim. He submitted that there is no iota or single conflict in the affidavits evidence and documents before the Court of Appeal. He further submitted that the respondent proved its claim before the trial court clearly and the appellants were unable to set up a bona fide defence or raise any issue against the respondent's

claim which ought to be tried.

He submitted that the court below was therefore right and justified in dismissing the appellants' appeal and affirming the decision of the trial court.

On the finding of facts by the two courts below, learned counsel submitted that where there are concurrent findings of facts by the two courts below, this court will only interfere with those findings if it can be shown on the record that the findings are not justified by the evidence and that the error in coming to those findings led to a miscarriage of justice. He relied on *Adebayo Vs. Ighodalo* (1996) 5 NWLR (Pt.450) 507 at 516; *Oyelakin Balogun Vs. Busari Amubikahun* (1986) 3 NWLR (Pt.107) 18 at 29.

Learned counsel referred to the submissions of the appellants in paragraphs 4.13 and 4.14 of their brief of argument and contended that they arose out of their misconception of the provisions of the Rules of Court that was applicable and applied to this case. He submitted that the trial court exercised its discretion on the matter judicially and judiciously after a full and exhaustive consideration of the affidavit of defence of the appellants and rightly gave judgment for the respondent which the court below rightly affirmed. He referred to the concurrent findings of facts by the court below that the appellants had admitted their indebtedness to the respondent and that they failed to show any triable or bona fide issue in the matter by the evidence before the court. He urged the court not to interfere with the decision of the court below. He finally urged the court to dismiss the appeal and affirm the decision of the court below.

There is no doubt, the action was commenced before the trial court under the undefended list procedure, pursuant to the applicable rules of court. The respondent had claimed from the appellants jointly and severally as follows:-

"the sum of N10,080,093.18k (Ten Million, Eighty Thousand, Ninety Three Naira, Eighteen 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 final payment of the judgment debt."

The applicable rule is the Anambra State High Court (Civil Procedure) Rules, in particular Order 24 Rule 9 which provides as follows:-

Order 24 rule 9 -

“(1) The hearing of a suit placed in the undefended list shall be as prescribed in this rule.

(2) If the party served with the Writ of Summons and affidavit delivers to the Registrar, not less than five days before the day fixed for hearing, a notice in writing that he intends to defend the suit, together with an affidavit setting out the grounds of his defence, and the court is satisfied that there is a triable issue, then and in such case the suit shall be entered in the general list and pleading shall be filed.

(3) Where any defendant neglects to deliver the notice of defence and affidavit, as described in the sub rule (2) within the time fixed by the said rule, the court may at any time before judgment is entered, on an affidavit disclosing a defence on the merits and satisfactorily explaining his neglect, let in the defendant upon such terms as the court may think just.

(4) Where any defendant neglects to deliver the notice of defence and affidavit, prescribed by sub rule (2), within the time fixed by the said rule, and is not let in to defend in accordance with the provisions of sub rule (3), or where he delivered the notice and affidavit but the court is not satisfied therefrom that there is raised any bona fide issue for trial between the plaintiff and the said defendant, then and in such case, the suit shall be heard as an undefended suit, and judgment given thereon without calling upon the plaintiff to summon witnesses before the court to prove his case formally.

(5) Nothing herein shall preclude the court from making an order, should it so think fit, at any stage of the proceedings for the suit to be transferred to the general list on the ground that the suit is not suitable for placement in the undefended list.”

It is clear from the record that upon the issuance of a Writ of Summons under the undefended list on 18/4/2002 the appellants as defendants were served with the said Writ of Summons on 13/5/2002.

Two days thereafter on 15/5/2002 the appellants filed an application praying the trial court for an order striking out the suit on the ground that it is premature in that no demand notice was given to them by the respondent before the action was commenced. The said application was then fixed for hearing by the trial court on 16/5/2002 but on that date parties instead of proceeding to the hearing

sought an adjournment to explore settlement out of court and the suit was adjourned to 02/7/2002.

Unfortunately, the suit was caught up with the industrial action embarked upon by the staff of the Anambra State Judiciary and the transfer to another judicial division of the former presiding Judge.

Thereafter, the case was listed for call over on 11/12/2002 but on that day neither the defendants nor their counsel was present and the court was duly informed by the plaintiff's counsel that settlement had failed. He prayed for hearing date and urged the court to order fresh hearing notice to issue and be served on the defendants. The case was then adjourned to 23/01/2003.

On the return date of 23/01/2003, the appellant's application of 14/5/2002 was heard by the trial court but same was dismissed for lacking in merits. Accordingly, the respondent prayed for judgment since the suit was already placed under the undefended list. Reference was made to the claim, the affidavit of 13 paragraphs, a further affidavit of 12 paragraphs and the Exhibits attached thereto.

It is interesting to note that as shown clearly on record, as at the 23rd January, 2003 when the trial court proceeded to hear the case under the undefended list, there was no Notice of Intention filed to show that the appellants intended to defend the case as required. Indeed, on the 18th day of September, 2002 after the service of the Writ of Summons, the appellants had proceeded to pay the sum of N1,000,000.00 (One Million Naira) into the bank as part of their indebtedness.

However, on 22/01/2003, the appellants filed a further affidavit and a Reply to counter affidavit. Though they claimed and described the said further affidavit as supporting their so called Notice of Intention to Defend, it is clear from the record that, while the said further affidavit was filed on 22nd day of January, 2003, the purported Notice of Intention to Defend pursuant to (as they described it) Order 24 rule 9 (1) and (2) High Court (Civil Procedure) Rules, was filed later on the 23rd day of January, 2003. In other words, the cart was put before the horse, whereas it is the horse that pulls the cart that should have come first.

What is more, there is nothing to show that there was an affidavit to which the further affidavit was meant to support.

Perhaps, it is apposite to note that the trial court had found

and it is clear on the record that the appellants had unequivocally admitted that they indeed filed their further affidavit before filing the Notice of Intention to defend. And that the said Notice of Intention was filed and served on the respondent in court on the 23rd day of January, 2003 with an affidavit in support. But no such affidavit in support was filed. That was misleading, to say the least. Indeed, the trial court had found as follows:-

"Although the defendants herein sought to defend this suit, they failed to file a Notice of Intention within the time limited by Order 24 Rule 9 (2) of the High Court Rules. They however filed one on the morning this suit was due for hearing and had in fact filed a day previously a document titled "Further Affidavit in support of Notice of Intention to Defend and Reply to Counter affidavit" The procedure under which the defendants' counsel filed a further affidavit even before a Notice of Intention to Defend was filed and also when there was no affidavit at all accompanying the said Notice is novel and yet to be incorporated into our statute books." See page 57 of the record.

Notwithstanding the above findings, the trial court had in the interest of justice, considered whatever the appellants thought they had as defence to the respondent's action. The court had carefully considered the various Exhibits produced by the appellants in details and found as follows:-

"I am in agreement with counsel for the plaintiff that Exhibits A, B, E, F1 and F3 attached to the defendant's further affidavit in support of Notice of Intention to Defend... are not relevant to the suit and do not constitute a defence to this suit. Exhibits, B, C and F2 though relevant do not constitute a defence as they merely confirm the existence of the overdraft giving rise to this suit and payment made therein."

The trial court came to the final conclusion that the appellants failed woefully to discharge the primary obligation on them to satisfy the court that there was a triable bona fide issue or question in the suit. The trial court accordingly gave judgment for the plaintiff/respondent as per its claim.

On appeal to the court below upon being dissatisfied with the judgment of the trial court, the court considered the only issue distilled for their determination which was - *"Whether or not the affida-*

its evidence of the parties are materially in conflict,” which was the issue the court below utilized or employed to determine the appeal. The facts deposed to in the affidavits and further affidavit and the various Exhibits annexed to them were beautifully considered by the court below which in their unanimous decision came to the final conclusion as follows:

“...that the affidavits evidence of the parties in this case are not materially in conflict. The appellants/defendants have failed to disclose triable issues. Consequently, the trial court was right in entering judgment in favour of the respondent. I therefore find no merit in the appeal. The appeal is therefore dismissed and the judgment of the trial court is hereby affirmed.”

As I stated earlier, this action was commenced under the Undefended List procedure rules. It is trite law that the purpose or object of this procedure is to enable the court to deal summarily with the plaintiff’s claim and enter quick judgment once it is clear that the defendant does not have any defence to such claim, in order to save time and avoid unnecessary expense on litigation trial. In other words, the procedure under undefended list rules is designed to secure justice and avoid the injustice likely to occur when there is indeed no genuine defence on the merits to the plaintiff’s claim. The procedure is employed to shorten the hearing of a suit where the claim is for liquidated sum. See; United Bank for Africa & Anor Vs Alhaji Babangida Jargaba (2007) 11 SCM 169; Imoniyame Holdings Ltd & Anor Vs Soneb Enterprises Ltd & Ors (2010) 4 NWLR (Pt.1185) 561; (2010) 1 SCM 67; Obaro Vs. Hassan (2013) 8 NWLR (pt.1357) 425; (2013) 4 SCM 145; (2013) 2 SCNJ 788.

In this case, upon consideration of the application of the respondent for a Writ of Summons to be issued under and marked as Undefended List, the trial court entered the respondent’s claim on the undefended list as on pages 2-4 of the record. The said Writ along with the claims and the supporting verifying affidavit were served on the appellants.

After service of the Writ of Summons and other required documents, the rule expected the defendants/appellants to deliver to the Registrar, not less than five days before the day fixed for hearing, their Notice, in writing of their intention to

defend the suit. This was expected to be filed along with an affidavit setting out and clearly disclosing the grounds of their defence. The trial court was then expected to consider the said notice and affidavit evidence accompanying it, to see whether the defendant has a triable issue. Once the court discovers in the affidavit evidence, an issue that will require an investigation or explanation from the plaintiff on the claim, or where the affidavit in support of the Notice of Intention to defend throws a doubt on the claim, then the parties are said to be brought within the concept of joining issues. See Graham Vs Esumai (1984) 15 NSCC 733 at 743; Ehimare Vs. Emhonyon (1985) 1 NWLR (pt.2) 777. **In the situation where a triable issue is disclosed, then the case can no longer be tried or heard under Undefended list but must be transferred to the general list for trial on pleadings.** See; Nworah & Sons Ltd. Vs. Akputa Esq. (2010)4 SCM 31.

However, instead of the appellants in the instant case to file their Notice of Intention to Defend with affidavit, they filed yet an application praying the court for an order striking out the suit on the ground that it is premature as no demand notice was given to the appellants by the respondent before the action was commenced. As expected, the application was seriously opposed and in a considered ruling was dismissed by the court and the matter was adjourned to 23/01/2003 for hearing. It was on the return date - the 23rd January, 2003 that the appellants now filed their Notice of Intention to Defend, which was said to be pursuant to Order 24 rule 9 sub rules (1) and (2), but unfortunately there was no affidavit in support of the said notice. This was certainly in contravention and violation of the rules, leaving the trial court with no other option than to give judgment to the respondent as claimed.

Amazingly, the appellants admitted to have filed further affidavit before they filed their Notice of Intention to defend to which there was no affidavit in support.

There is no doubt, the appellants did not file any Notice in writing in accordance with the rules to show that they intended to defend the respondent's action. The law and procedural rule are clear on this matter. Under the applicable rule, once the defendant in an action such as the instant fails to

deliver the notice of defence and affidavit and is not let in to defend, the plaintiff is entitled to judgment, in particular, once the affidavit in support of the application for Writ of Summons shows that the defendant has no defence to the action. See

Ben Thomas Hotels Ltd Vs. Sebi Furniture Company Ltd (1989) NWLR (Pt.123) 523.

Ordinarily, even though the appellants were not entitled to the consideration of their so called Notice of Intention to defend, which was filed on the hearing date and without an affidavit in support which was to show whatever defence, if any, they may wish to adduce, yet the trial court went out of its way to give consideration to the further affidavit and the annexure filed by the appellants, even before filing their purported Notice. The trial court had in its judgment stated as follows:-

"I have carefully read and considered the defendants' 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 defendants have not in any of the 32 paragraphs or 8 Exhibits denied making and or authorizing the making of Exhibits D, F, G and G1 attached to the plaintiff's Further Affidavit in support of claim. The said exhibit D is a letter from the defendants to the plaintiff wherein the defendants admitted the indebtedness to the plaintiff while Exhibit F is a letter from the defendants' solicitor to the plaintiff's solicitor admitting the defendants' said indebtedness."

It is certainly clear from the record that the appellants failed to comply with the rules of court in this matter as earlier enumerated.

It is note worthy that having considered the application of the respondent for the issuance of a Writ of Summons and placement of same in the undefended list, the trial court had placed the claim in the said list and ordered it to be so served. It presupposes that the trial court was then satisfied that at that stage, except the contrary was clearly shown by the defendants in their affidavit which was expected to be filed along with a Notice of Intention to be filed not less than five days before the day fixed for hearing, the plaintiff was entitled to judgment as per its claim.

But the appellants herein failed to comply with the rules of court.

The rule had required them to file a Notice of their inten-

tion to defend the action upon service of the Writ of Summons on them at least five days before the return date. The failure to file the said Notice in writing and the accompanying affidavit meant a non compliance. It is trite law that the rules of court are to be obeyed and complied with. In the event of a non compliance with the rules and it is not explained away, then, unless the non compliance is of a minimal kind, the court must not grant any indulgence. See N.A. Williams & Ors Vs Hope Rising Vol. Society (1982) 1 All NLR (Pt.1) 1 at 5; Onwuka Kalu Vs. Victor Odili & Ors (1992) NWLR (Pt.340); (1992) 6 SCNJ 76.

There is no doubt that the failure of the appellants herein to file an affidavit to their belated Notice of Intention to defend the respondent's action cannot be said to be of a minimal kind, deserving an indulgence by the court. There was no defence to the claim in whatever form.

Indeed, there was a clear admission directly on one hand by the appellants, of the indebtedness and on the other hand, an admission of the sum claimed through respondent's counsel. The correspondence between counsel was not denied by the appellants. This therefore is not a case that the defendants should be allowed longer time to continue to delay the settlement of their indebtedness. It will be an unwarranted indulgence by the court and this may result into injustice to the respondent whose money the appellants had benefited from and refused to pay back.

In the case of Kenfrank (Nig) Ltd. Vs U.B.N. Plc. (2002) 8 NWLR (Pt.789) 46 which facts are *impari materia* with this case where even though the appellants had admitted their indebtedness and acknowledged same in their correspondence with the respondent, yet they appeared not willing to pay, the court had beautifully opined as follows:-

"To allow the appellants to get away with the denial of peripheral facts, when the meat of the matter was left unanswered would be to allow them to dribble the plaintiff out of judgment to which it was lawfully entitled. I condemn in the strongest terms this attempt. It shows ingratitude of the highest order on the part of the defendants/appellants. They benefited from the largess provided by the plaintiff/respondent.

They acknowledged this in the numerous letters they wrote. They not only acknowledge indebtedness, but also pleaded for and did get mercy...

In the instant case upon receipt of the respondent's letter of demand from the appellants for payment of their outstanding balance on their overdraft account, the appellants, through their counsel, had written the following to the respondent, not only admitting their indebtedness but asking for more time to pay up and liquidate the indebtedness.

"We have been consulted and our services retained by Mr. Callistus Obitube, of B.3/1 Atani Road, Bridgehead, Onitsha (hereinafter called "our client") and we write on his behalf, authority and full instruction.

Our client has passed to us your letter dated 24/10/2001, on the above subject matter with instruction to reply same accordingly. 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." (See; Exhibit F attached to the respondent's further affidavit in support of its claim).

This was the correspondence between counsel to both parties. Mr. Obitube is the 2nd appellant and the Chairman/Managing Director of the 1st appellant company. However, it should be noted that the above correspondence was not marked as "without prejudice" which may have rendered the letter inadmissible against the appellants. They actually meant what it contains and gave the instruction to their Solicitor. They should not be further indulged to cheat on the respondent by now denying their admission and acknowledgment of their indebtedness.

Now on the concurrent finding of facts by the two courts below, it is already well settled that this court will not ordinarily disturb the findings of facts of the two courts below unless and except there is manifest error which leads to some miscarriage of justice, or a violation of some principles of law or procedure. See Adaku Amadi Vs Edward N. Nwosu (1992) NWLR (Pt.241) 273; (1992) 6 SCNJ 59,

Onwujuba Vs Obieniu (1991) 4 NWLR (Pt.188) 16; Odofin Vs Ayoola (1984) 11 SC 72; Ogundipe Vs Awe (1988) 1 NWLR (Pt.88) 188.

In other words, where there is sufficient evidence to support concurrent findings of fact by two lower courts, such findings should ordinarily not be disturbed, unless there is a substantial error which is
B apparent on the record, that is, the findings have been clearly shown to be perverse, or some miscarriage of justice or some material violation of some principle of law, or of procedure is shown. See; Kenneth Ogoala Vs The State (1991) 2 NWLR (Pt.175) 509; (1991) 3 SCNJ 61; (1991) 3 SC 80, Sobakin Vs. The State (1981) 5 SC 75; Nwiboko
C Vs The State (1985) 4 SC (Pt.11) 183; Ikem Vs The State (1985) 1 NWLR (Pt.2) 378 at 388.

In *Engineer Goodnews Agbi & Anor Vs Chief Audu Ogbeh & Ors* (2006) 11 NWLR (Pt.990) 65; (2006) 7 SCM 1; this court held
D that where there are concurrent findings of both the trial court and the Court of Appeal and there was sufficient evidence in support of such findings, this court will not normally tamper with such findings, unless it is clearly shown that they were perverse or were not supported by evidence or were reached as a result of applying a wrong
E approach to the evidence or as a rebuilt of a wrong application of a principle of substantive law or procedure. See also *Abimbola Vs Abatan* (2001) 5 SCMJ; (2001) 9 NWLR (Pt.717) 66 at 77; *Evans Vs Adu* (1981) 11-12 SC 25 at 42.

In this case, the two courts below already concurrently found
F on facts that on the affidavit and documentary evidence on record, the appellants clearly and unequivocally admitted and acknowledged their being indebted to the respondent to the tune of its claim and that they have no defence to the respondent's action but only trying
G to buy time and continue to dribble the respondent on its entitlement. It is now trite law that where there are concurrent findings of fact or decisions by the two courts below, the attitude of this court is not to disturb or interfere with the same. See; *Uzoечи Vs. Onyenwe* (1999) NWLR (Pt.587) 339; *Anwoyi & Ors Vs Shodeke & Ors* (2006)
H 13 NWLR (Pt. 996) 34; (2006) 6 SCM 1. This court will not interfere with the concurrent findings of the facts which led to the conclusion appealed against. There is no evidence of any perversion, or miscarriage of justice or wrong application of the rules to have called for interference with the concurrent findings of facts of the two courts

below.

The respondent was therefore entitled to judgment by the trial court, in compliance with the rule, pursuant to which the action was instituted. The sole issue is accordingly resolved against the appellant, as the trial court was right to have given judgment to the respondent as claimed and the court below was right and correct in affirming the decision of the trial court. B

In the final analysis, the appeal is devoid of merit and liable to dismissal. Accordingly, it is dismissed. The judgment of the court below is hereby affirmed which had affirmed the decision of the trial court that gave judgment for the respondent. C

As costs follow events, there shall be costs of N100,000.00 against the appellants but in favour of the respondent.

D

MUNTAKA-COOMASSIE JSC

The Court of Appeal Enugu Division coram: Galadima, Adekeye and Mikailu as they then were delivered its judgment on the 28th day of October, 2004. The Court of Appeal hereinafter called court below. The respondent herein was the plaintiffs before the High Court Onitsha under the undefended list. It could have been otherwise had the defendant filed a notice of intention to defend the suit. The court proceeded to hear suit under the undefended list. Both counsel on behalf of the parties made submissions on the case. E

After motions and counter motions the trial court entered judgment in favour of the plaintiff. See p. 59 of the record. F

The defendants/appellants un-successfully appealed to the Court of Appeal Enugu Division, herein referred to as court below. On 28/10/2004 the court below unanimously dismissed the appeal for lacking in merit and affirmed the decision of the trial court. G

The appellants being dissatisfied with the decision of the court below lodged an appeal to the Supreme Court and filed a Notice of Appeal containing two grounds of appeal. Both parties distilled issues for the determination of this appeal by this court. H

On 31/3/2013 learned counsel for the appellants adopted his brief of argument and urged this court to allow the appeal, set aside the judgment of the court below and also to remit the case to another Judge to hear the case de novo on the general cause list.

The respondent's counsel adopted their brief of argument filed on 11/7/2005 and urged on us to dismiss the appeal and to affirm the decision of the court below and also to remit the case to another Judge to hear the case de novo on the general cause list.

B After our conference on the appeal Hon. Justice Ariwoola JSC was asked to produce a draft which he obliged and rendered a lead judgment of which I was privileged to have read before now.

C After thoroughly analysing the lead judgment and issues sent to us I found myself unable to improve on this judgment. My learned brother Ariwoola JSC as usual has left no stone un-turned I agree with the reasoning and conclusions which led him to hold that the appeal lacks substance. I therefore dismiss the appeal in its entirety. I endorse the order as to costs given by Hon. Justice Ariwoola JSC in his lead Judgment.

D _____

RHODES-VIVOUR JSC

E I have had the benefit of reading in draft the leading judgment prepared by my learned brother Ariwoola, JSC. I agree with his lordship's conclusions that both courts below came to the correct conclusion that the appellants, had no defence to the respondent's claim. The 2nd appellant is a business man trading under the name Ifeanyichukwu Trading Investment Ventures Ltd, the 1st appellant. F He took an overdraft facility and became indebted to the Respondent to the sum of N10, 080,093.18. He failed to meet his obligations despite repeated demands when the sum became due. Owing to the appellants' default the respondent filed an action under the undefended list procedure before an Anambra State High Court for G the repayment of the sum due and interest. The claim read:

"N10, 080.093.18 (Ten Million, Eighty Thousand and Ninety-Three Naira, Eighteen Kobo) with interest at the rate of twenty-one per centum from 1st day of September, 2001, up to the date of judgment and at the rate of five per centum per annum."

H The procedure under Order 5 Rule 14 of the Anambra State High Court Rules, 1988 is for suits under the undefended list, where the plaintiff believes that there is no defence to his claim, and his claim is to recover a debt or liquidated money demand. This summary judgment procedure developed in the 1880s' in England where

judgment is given in favour of the plaintiff, the creditor to deal with dishonored Bills of Exchange. The procedure is geared towards achieving speedy justice. It is a procedure where there is judgment at once and never a trial. It is designed to prevent delay in cases where there is no defence, and to stop the defendant from dribbling and frustrating the plaintiff. So, where the plaintiff can satisfy the court by affidavit evidence, documents that he has a case against the defendant which the defendant has no answer to, judgment is entered forthwith in favour of the plaintiff. The defendant is expected under Order 24 Rule 9(2) and (3) (supra) to show that there are triable issues and that there ought to be a trial. This he does by filing an affidavit disclosing a defence on the merit, if the court is satisfied that the defendant has a defence on the merit or that there are triable issues or if there are conflicts in the affidavits on material points, the Defendant would be granted leave to defend and this entails transferring the suit from the undefended list to the general cause list for trial in the ordinary way. That is to say a full blown trial would be conducted. The procedure prevents worthless and sham defences and stops the defendant from frustrating and dribbling the plaintiffs who has a clear case against him. See *MC Investments Ltd v. Core Investments & Capital Markets Ltd* (2012) 6 SC (pt. 1) p. 185, *Obaro v. Hassan* (2013) 8 NWLR (pt.1357) p.425, *UTC (Nig) Ltd v. Pamotei* (1989) 2 NWLR (pt. 103) p. 244. The undefended list procedure and the Summary judgment procedure are both designed to achieve the same purpose. That explains why the High Court of Lagos State (Civil Procedure) Rules 2004 has only provisions for summary judgment procedure. The undefended list procedure has been removed from the new Rules. A judgment delivered under the undefended list, Order 5 Rule 14 of the Anambra State High Court Rules 1988 is a judgment on the merits that can only be set aside in the usual way, i.e. on appeal or by an action alleging fraud.

Exhibit D is a letter from the Defendants/Appellants' to the Plaintiff/Respondent. Relevant extracts run thus:

"We refer to your letter dated 20/8/01 demanding that we pay the balance of N10, 080,093.00 in our overdraft facility.

We admit owing the amount."

Again in Exhibit F, a letter from the defendants' solicitor to the Plaintiffs solicitor reads in part.

“...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...”

In these letters an admission is implied. The 2nd Appellants’ affidavit and exhibits have no bearing on the Respondents claim. Rather than address the claim for N10, 080,093.16, he is comfortable chasing shadows, all in a fruitless attempt to frustrate and deny the Respondent a judgment it is entitled to. The 2nd Appellant benefited immensely from the Respondents benevolence but when it was time to meet his obligations he proceeded to dribble the Respondent despite numerous acknowledgments earlier by letter that he admits his indebtedness. This is unfortunate and should be condemned in the strongest terms. I condemn the 2nd Appellant’s response to a clear demand for money due.

His deplorable conduct has brought a simple banking transaction into the shabbiest disrepute.

Both courts below found that the Appellants’ are indebted to the Respondent for the sum of N10, 080,093.18k (Ten Million, Eighty Thousand and Ninety Three Naira, Eighteen Kobo) less N1 Million Naira (One Million Naira) paid by the Appellants’ during the pendency of this suit, with interest at the rate of five per centum per annum from the date of judgment until payment of the judgment debt.

The long settled position of the law is that this court rarely upsets findings of fact made by the trial court and affirmed by the Court of Appeal that is concurrent findings by two lower courts. But such findings would be upset where there are exceptional circumstances such as the findings cannot be supported from the evidence before the court, or are perverse, or there is a miscarriage of justice or violation of some principle of law or procedure. See *ACN v. Lamido & 4 ors* (2012) 2 SC (pt. ii) p. 163, *Ugwuanyi v. FRN* (2012) 3 SC (pt. ii) p.95, *Military Gov. of Lagos State & 4 ors v. Adeyiga & 6 ors* (2012) 2 SC (pt. 1) p.68.

The Appellants’ are unable to show that the two courts below are wrong rather the Appellants’ have by their own admission agreed

with both courts below in correspondence before the trial that they are indeed indebted to the Respondent for the amount claimed. The findings of both courts below are in the circumstances not perverse but rather unassailable. The trial court adopted the correct procedure before it established the Appellants' indebtedness, a fact highlighted in the leading judgment of this court. B

For these brief reasons, as well as those more fully given by my learned brother Ariwoola, JSC, I would dismiss the appeal with costs of N100,000 in favour of the Respondent.

C

NGWUTA JSC

I read in draft the lead judgment prepared and just delivered by my learned brother, Ariwoola, JSC. I entirely agree with the reasoning leading to the conclusion that the appeal is bereft of merit and ought to be dismissed. I desire to add only a few words of my own. D

Where the claim is for a liquidated sum of money, the claim is arguable in law and the facts are not in dispute it is appropriate to resort to the Undefended List Procedure. This will ensure that the plaintiff obtains judgment expeditiously and a defendant who has no real defence to the action is not allowed to delay or frustrate the plaintiff's claim. See *Nya v. Edem* (2000) 8 NWLR (pt. 669) 340; *Ataguba & Co v. Gura* (2000) FWLR (pt.24) 1522. Even though the matter is entered in the Undefended List and so marked accordingly, E a defendant who has a defence to the action and intends to defend same is allowed by the rules to file a notice of intention to defend and an affidavit setting out the grounds of his defence. See Order 24 Rule 9 (1) of the Anambra State High Court (Civil Procedure) Rules. The defendant has to comply with the provision not less than five days G before the date fixed for hearing. The facts of this case demonstrate the levity with which learned counsel for the Appellants handled his clients' case at the trial court. He filed a motion to strike out the claim. It did not occur to him that he could lose the motion, nor did he file the notice of intention to defend in case he lost the motion to strike H out the case. He preferred to carry all his eggs in one basket - the motion to strike out the claim - and when he lost he did not deem it diligent to file a notice of intention to defend until the return date - 23/1/2003, at which point in time he was out of time and needed the

leave of court to file the notice. He filed the notice out of time without leave of court first sought and granted. Above all, the notice was filed without the mandatory affidavit disclosing the grounds of defence. This affidavit is required to set up a defence to the plaintiff's claim. See *Dala Air Services v. Sudan Airways* (2005) 3 NWLR (pt. B 912) 394. Without the affidavit, the notice of intention to defend is as good as not filed.

The desperation resulting from inattention to details manifested in the learned Counsel for the appellant filing a "further" affidavit on 22/1/2003 in respect of a notice of intention to defend filed later on 23/1/2003. As my learned brother aptly expressed it: "... the cart was put before the horse..." With all respects due to learned counsel for the appellant, how could anyone file a further affidavit when there is no affidavit in the first place?

Above notwithstanding, the learned trial Judge, in compliance with *Justitia Nemini Negando* principle (justice shall be denied to no man) which every Judge must adhere to very strictly, granted the appellant an undeserved indulgence and considered whether or not the appellant has a defence and found none in the processes before the Court.

In my humble view, this is a clear case of legal malpractice for which learned Counsel owes an explanation to his clients.

For the above and the fuller reasons set out in the lead judgment, I also dismiss the appeal for want of merit. I abide by order for costs.

AKA'AH'S JSC

My learned brother, Ariwoola JSC made available to me the draft of his judgment. I fully agree with him that the appeal lacks merit and deserves to fail.

The Defendants/Appellants operated three accounts with the Plaintiff/Respondent Bank and according to the admission which the 2nd Defendant/Appellant made in paragraphs 6 and 7 of the Further Affidavit in support of Notice of Intention to Defend and Reply to Counter-Affidavit dated 22/1/2003, he operated the three accounts namely his personal account No. CA/2320, the joint account with his wife No. CA/2349 and CA/3098 which he operated with the com-

pany registered as IFEANYICHUKWU TRADING INVESTMENT VENTURES LTD (1st Defendant/Appellant) as one. Furthermore he mandated his Solicitors P. O. T. Okejah and Co. to write the Plaintiff/Respondent admitting an indebtedness of N18, 460,212.25k and pleading for time to pay up the debt. This was after he (2nd Defendant/Appellant) had admitted owing the Plaintiff/Respondent an overdraft facility of N10, 080,093.00. The two letters which were annexed as Exhibits "D" and "F" to the further affidavit in support of Writ of Summons on the Undefended List are relevant in this appeal and are reproduced as follows:-

*"IFEANYICHUKWU TRADING VENTURES (NIG) LTD
B3/1 Atani Road, Market, Onitsha
03/09/2001.*

The Manager

Onyesom Community Bank Nigeria Limited

Atani Road

Ogbaru L. G. A.

Dear Sir,

OUR OVERDRAFT FACILITY BALANCING

We refer to your letter dated 20th August, 2001 demanding that we pay the balance of N10, 080,093.00 (Ten Million, Eighty Thousand and Ninety Three Naira) in our overdraft facility. We admit owing the amount.

We plead that you give us up to the end of September, 2001 to effect the payment. We are expecting huge payments before the end of September. Please bear with us.

Yours faithfully,

Signed PRINCE C. A. OBITUBE

Chairman/Managing Director".

Exhibit "F" was written by the Defendants' Solicitors addressed to the Plaintiff's Solicitor in response to a demand for repayment of loan. It goes thus:

"P. O. T. Okejah and Co.

Maluchukwu Chambers

No. 58, Obodoukwu Road

By Ejimikonye Junction

East Niger Layout

Ogbaru L. G. A.

Date 1/11/2001

Mr. J. U. Obiora Esq

No 32A, Awka Road

Onitsha

Anambra State.

B *Dear Sir,*

RE: DEMAND FOR REPAYMENT OF LOAN ACCOUNT BALANCE OF N18, 460,212.25K.

C *We have been consulted and our services retained by Mr. Callistus Obitube of B.3/1 Atani Road, Bridge-Head Onitsha (herein after called "Our Client") and we write on his behalf, authority and full instructions.*

D *Our Client has passed to us your letter dated 24/10/2001 on the above subject matter with instruction to reply same accordingly. 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.*

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 Ogboefere 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 highly solicited.*

Thank you.

G *Yours faithfully,*

pp. P.O.T. OKEJAH and CO.

Signed

P. O. T. OKEJAH ESQ.

(SOLICITOR and ADVOCATE)"

H *The admission by the Defendants/Appellants of their indebtedness to the Plaintiff/Respondent is direct and unequivocal and so the deposition of Callistus Obitube in paragraph 17 of his further affidavit in support of Notice of Intention to Defend and reply to Counter-Affidavit in which he stated-*

“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”- does not show a prima facie defence warranting the suit to be transferred to the General Cause List for hearing. Only a real defence and not a sham intended to delay and frustrate will be allowed. Thus to allow a defendant a right to defend where plaintiff has shown his claim is prima facie unassailable, he must show that he has a fair case which is bona fide and there is a substantial issue which ought to be tried. B

The law on the admission of a debt by the debtor is as stated by learned counsel for the respondent 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 and did get mercy, he will not be allowed to dribble the plaintiff out of the judgment which the plaintiff was lawfully entitled to. The defendant would be bound by the contents of the letters of acknowledgment of indebtedness to the plaintiff. See: Akinola v. Faseun (1973) All NLR 146; Nishizawa v Jethwani (1984) 12 SC. 234; Macaulay v Nal Merchant Bank Ltd (1990) 4 NWLR (pt. 144) 283. In Akinola v. Faseun (supra) the plaintiff’s letter stated the total amount then demanded as principal and interest, also the amount to which the debt would have grown one month later; and the amount claimed in his writ was greater than the two. Referring to those three amounts the Western State Court of Appeal concluded that it was not clear which amount was acknowledged by the defendants and that the action must be dismissed for non-compliance with both of the conditions that an effective acknowledgment under that section must state the amount due and that it must give an undertaking by the debtor to pay that amount. In allowing the appeal this court held per Elias CJN that whilst there might be circumstances in which there is doubt as to what the debtor purported to acknowledge that is not the case here where the plaintiff set out with sufficient particularity in his letter of demand the amount then claimed and the fact that in his subsequent writ he claimed a different amount should not be taken as casting any doubt on the amount actually acknowledged at the date of the demand. F G H

Before entering judgment for the plaintiff/Respondent for N10,

080,093. 18k less N1,000,000.00 paid by the Defendants/Appellants during the pendency of the suit, the learned trial Judge said at pages 58-59 of the record:

B *"I am in agreement with counsel for the plaintiff that Exhibits "A", "B", "E", "P1" and "F3" attached to the Defendants Further Affidavit in support of Notice of Intention to Defend... are not relevant to this suit and do not constitute a defence to this Suit. Exhibit "B", "C" and "F2" though relevant do not constitute a defence as they merely confirm the existence of the overdraft giving rise to this suit and payment made therein. Although leave to defend would ordinarily be given where the issue of account is called to question, the admissions in Exhibits "D", "F", "G" and "G1" attached to the Plaintiffs Further Affidavit in support of Claim which exhibits are not denied foreclose this issue.*

D *I have therefore come to the conclusion that the Defendants have failed to discharge the primary obligation on them to satisfy this court that there is a triable bona fide issue or question in this Suit".*

E This finding was affirmed by the Court below and there is nothing in this appeal that has faulted that finding nor is there any inclination that it is perverse or not borne out by the evidence.

F I too find that the lower court's confirmation of the trial court's finding and resolution of the issue is correct and I further affirm it. It is for this reason and the more detailed reasons contained in the leading judgment of my Lord, Ariwoola JSC that I also dismiss the appeal. I abide by the order made on costs.

G

H