

IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY  
(APPELLATE DIVISION)

IN ABUJA JUDICIAL DIVISION.

HOLDEN AT ABUJA.

ON THE 6<sup>TH</sup> DAY OF DECEMBER, 2016 APPEAL NO. FCT/HC/CVA/57/14

BEFORE THEIR LORDSHIPS:

HONOURABLE JUSTICE FOLASADE A. OJO - (PRESIDING JUDGE)

HONOURABLE JUSTICE D.Z. SENCHI - (HON. JUDGE)

BETWEEN:

MR. PADA ISAAC

APPELLANT

AND

1. DR. MISHARA YUSUF

2. UZOMA OKEZIE EVERGREEN

}

RESPONDENTS

JUDGMENT

OJO, J, Delivering the Judgment of the Court.

In a written application to the District Court of the Federal Capital Territory for a default summons, the 1<sup>st</sup> respondent herein as plaintiff sought the following reliefs:

*“Whereof the plaintiff claims from the defendants jointly and severally as follows:*

*a. A declaration of this Honourable Court that the 2<sup>nd</sup> defendant is a guarantor of the 1<sup>st</sup> defendant in the loan received by the 1<sup>st</sup> defendant from the plaintiff.*

*b. The sum of N700,000 (Seven Hundred Thousand Naira) jointly and severally from the 1<sup>st</sup> and 2<sup>nd</sup> defendants the said sum being the total sum of money lent to the 1<sup>st</sup> defendant and guaranteed by the 2<sup>nd</sup> defendant.*

*c. The sum of N300,000 (Three Hundred Thousand Naira) being the total sum of money agreed upon by the defendants and the plaintiff as the interest on the loan obtained by the 1<sup>st</sup> and 2<sup>nd</sup> defendant as at 10<sup>th</sup> December 2013.*

*d. 15 percent interest on the sum of N1,000,000.00 from the 10<sup>th</sup> day of December 2013 till the date judgment is delivered in this case.*

*e. 10 percent interest on the sum of N1,000,000.00 from the date judgment is delivered in this case till the judgment sum is completely liquidated.*

*f. The sum of N500,000 (Five Hundred Thousand Naira) as cost for maintaining this suit.”*

The above reliefs are contained at page 9 of the record of appeal. The case was heard by the Senior District Court, Wuse Zone 2, Abuja Coram: Odo Celestine Obinna. Judgment was delivered under the default summons procedure i.e. Order V of the District Court Rules on the 27<sup>th</sup> of November 2014 in favour of the 1<sup>st</sup> respondent herein. Dissatisfied with the decision the appellant filed a notice of appeal dated 28<sup>th</sup> November 2014 which was subsequently amended pursuant to leave of Court granted on the 19<sup>th</sup> of September 2016.

The grounds of appeal and its particulars in the amended notice of appeal are as follows:

***“GROUND ONE:***

***ERROR OF LAW:***

*The learned District Judge erred in law when he refused to consider the affidavit of the appellant disclosing a legal defence before delivering judgment against the appellant which error occasioned a miscarriage of justice.*

***PARTICULARS OF ERROR:***

- 1. By the provisions of Order 5 Rule 3 of the District Court Rules, a defendant who is out of the stipulated time of 16 day in filing of notice of intention to defend is allowed to file an affidavit disclosing a legal defence and stating the reasons for his failure or neglect to file a notice of intention within 16 days of being served with a default summons.*
- 2. A district Judge is bound by law to consider such affidavit once it is filed by a defendant before hearing the matter.*
- 3. The District Judge refused to consider the legal defence in the affidavit of the appellant to wit, that matter is not such to be determined under a default summons and instead went ahead to give judgment in favour of the plaintiff/respondent.*

***GROUND TWO:***

***ERROR OF LAW:***

*The learned District Judge erred in law when, after holding that the appellant was out of time in filing his notice of*

*intention to defend, went further to hold that the affidavit filed by the appellant in accordance with the Rules of Court under Order 5 Rule 3 ought to have been filed alongside the notice of intention to defend and that same was not filed on time.*

***PARTICULARS OF ERROR:***

- 1. The matter came up for hearing on 27/11/2014 and before hearing, the appellant had filed his affidavit disclosing a legal defence.*
- 2. All that the Rules of the District Court require is that the affidavit disclosing a legal defence be filed before the matter is heard.*
- 3. The learned District Judge delivered judgment in the matter without giving the appellant a fair hearing contrary to the provisions of Order 5 Rule 3 of the District Court Rules applicable in the District Court of the Federal Capital Territory, Abuja.*

***GROUND THREE***

***ERROR OF LAW***

*The learned District Judge erred in law when he failed to decline jurisdiction in Suit No. CV/71/2014 when a similar matter was already pending before the High Court of the Federal Capital Territory, Abuja in Suit No. CV/71/2014.*

**PARTICULARS OF ERROR:**

- 1. It is trite principle of law that multiplicity of suits against the same party on the same issue amount to an abuse of Court process.*
- 2. Plaintiff had, on 16/5/2014, filed an action at the High Court of the Federal Capital Territory Abuja in Suit No. CV/71/2014 and without first withdrawing it filed a similar action at the District Court of the Federal Capital Territory, Abuja on 12/6/2014 in Suit No. CV/71/2014.*

**GROUND FOUR:**

**ERROR OF LAW:**

*The learned trial District Judge erred in law when he held the appellant jointly liable with the 2<sup>nd</sup> respondent as guarantor of the loan granted the 2<sup>nd</sup> respondent by the 1<sup>st</sup> respondent when the 1<sup>st</sup> respondent did not satisfy the Court of the legal requirement for a contract of guarantee nor did the Court determine the question of whether appellant was guarantor of the loan and in fact did not grant relief (a).*

**PARTICULARS OF ERROR:**

- 1. Even when a matter is undefended, it is legally required that a plaintiff's evidence must sustain his claim to be entitled to judgment.*
- 2. Only parties to a contract can enjoy the benefit and bear the burdens of such contract afterwards.*

3. *The loan contract between the 1<sup>st</sup> and 2<sup>nd</sup> respondent executed on 18/10/2013 does not have a guarantor and nothing can import that into the contract.*
4. *When a document is executed by a person, subsequent alteration of such document affecting his liability without his subsequent ratification or confirmation renders the document unenforceable against him as regards the alteration or discharges him from any obligation under the document especially as regards the alteration.*
5. *A contract of guarantee must always be written.*
6. *The Court did not grant relief 1 and therefore left the issue of whether or not appellant was a guarantor undetermined.*

The reliefs sought by the appellant in this appeal are as follows:

1. *An order of this Honourable Court setting aside the judgment of the Senior District Court delivered on 27/11/2014 in its entirety.*

***ALTERNATIVELY:***

2. *AN ORDER OF THIS Honourable Court remitting the suit for a retrial before another Judge of the District Court of the Federal Capital Territory.*
3. *And for such further order or orders as this Honourable court may deem fit to make in the circumstance of this case.”*

The appellant was granted leave to file his brief of argument out of time. The Appellant's brief of argument is dated 18<sup>th</sup> September 2015. The 1<sup>st</sup> respondent's filed a 1<sup>st</sup> respondent's brief of argument dated 14<sup>th</sup> October 2016. The appellants counsel filed a reply on points of law to the 1<sup>st</sup> respondent's brief of argument dated 14<sup>th</sup> October 2016. The 2<sup>nd</sup> respondent who was represented at the hearing of the appeal did not file any brief of argument. He informed the Court that he did not support the judgment and urged us to allow the appeal.

At the hearing counsel to the appellant and that of the 1<sup>st</sup> respondent adopted their respective briefs of argument as their oral arguments.

Learned counsel to the appellant in his address distilled two issues for determination to wit:

- 1. Whether the Court below was right in holding that the affidavit to disclose legal defence filed by the appellant was not proper before the Court and in failing to consider the said affidavit.*
- 2. Whether even in the absence of the appellant being heard, the 1<sup>st</sup> respondent proved the legal ingredients of a contract of guarantee upon which the Court could hold the appellant liable for the loan debt of the 2<sup>nd</sup> respondent to the 1<sup>st</sup> respondent.*

For his part learned counsel to the 1<sup>st</sup> respondent in his brief of argument formulated the following issues for determination:

- 1. Whether the trial Court was right to foreclose the appellant from defending the matter.*

2. *Whether the trial Court was right to determine the suit under the default summons procedure.*
3. *Whether an appeal can rescind a judgment given on merits of the case and already executed.*

Relying on the provisions of Order 5 Rule 1(1) of the District Court Rules, counsel to the appellant argued that a defendant who is out of time in filing a notice of intention to defend may file an affidavit disclosing a legal defence to explain the reason for his failure to do so within the time allowed. He submitted that the district judge is bound to consider such affidavit. He relied on a plethora of authorities including MIDEN SYSTEM LTD VS EFFIONG (2011) 2 NWLR Pt. 1231 Pg. 354 and F.A.A.N VS W.E.S. (NIG.) LTD (2011) 8 NWLR Pt. 1249 Pg. 219.

He submitted further that the 1<sup>st</sup> respondent was under legal obligation to prove that the appellant guaranteed the loan between the 1<sup>st</sup> and 2<sup>nd</sup> respondents. He argued further that the lower Court erred when it granted relief (b) of the 1<sup>st</sup> respondent's claim without a consideration of whether or not the appellant guaranteed the loan. It is his position that reliefs (a) & (b) of the claim are inseparable. He finally urged us to find merit in this appeal and hold as such.

Learned counsel to the 1<sup>st</sup> respondent for his part submitted that the lower Court complied with the provision of Order V Rule 1 of the District Court Rules in the conduct of the proceedings. He submitted that the appellant who was the 2<sup>nd</sup> defendant did not comply with the rules by filing his affidavit within time. He urged us to hold that the lower Court was right in ignoring his affidavit which was filed out of time.

He submitted that rules of Court are meant to be obeyed and that failure of the appellant to apply for enlargement of time within which to



file his notice of intention to defend was fatal to his case. It is his position that the lower Court was right in foreclosing the appellant and entering judgment in favour of the 1<sup>st</sup> respondent. He relied on the provisions of Order 13 Rule 1 of the District Court Rules as well as the case of DALA AIR SERVICES VS SUDAN AIRWAYS (2005) 3 NWLR Pt. 912 Pg. 394. He finally urged us to hold that this appeal lacks merit and dismiss same.

The judgment of the Court appealed against is at pages 77-79 of the transcript record of appeal. The issue of a similar matter pending before the High Court of the Federal Capital Territory was raised in a notice of preliminary objection filed by appellant at the trial Court.

The grounds of the objection are as follows:

- 1. The action is an abuse of Court process because similar action by the same party is already at the High Court of the Federal Capital Territory, Abuja in Suit No: CV/1537/14 filed on the 16<sup>th</sup> May 2014 and should be struck out.*
- 2. This action is incompetent for failure to fulfill the condition precedent to the institution of this action.*

In a ruling delivered on the 5<sup>th</sup> of November 2014, the preliminary objection was dismissed. See pages 69 - 76 of the record. There is no appeal against the said ruling. Ground three of this appeal is a complaint bordering on the pendency of a similar matter before the High Court which had been dealt with by the trial Court in it's ruling of 5<sup>th</sup> November 2014. We are of the view that this ground does not arise from the judgment the subject matter of this appeal. We find ground 3 incompetent and same is struck out.

It is clear from the grounds of appeal and the issues formulated thereon by the appellant's counsel that the complaint of the appellant in the main is on the procedure adopted by the trial Judge. The complaint in grounds 1 and 2 of the appeal is that the trial senior District Judge failed to comply with the provisions of Order 5 Rule 3 of the District Courts Rules which deals with default summons Procedure. Specifically that the Court failed to consider the affidavit of the appellant which was before it in its judgment. The complaint in ground 4 is that the issue of the appellant's liability as a guarantor was not one that could be determined in a default summons procedure and was not considered at all by the trial Court.

We are therefore of the view that the sole issue for determination in this appeal is:

*"Whether the trial Court was right to hear and determine the suit under the default summons procedure and enter judgment for the 1<sup>st</sup> respondent against the appellant."*

All the issues raised in the briefs of counsel are encompassed in this one issue.

The trial judge in his judgment at page 79 of the record of Appeal stated as follows:

*"Having said so, I will proceed to judgment in this case as applied by the plaintiff's counsel pursuant to Order V of the District Court Rules. Therefore having gone through the deposition in the affidavit filed before the Court by the plaintiff as well as the documents attached thereto. I am satisfied that the claims is about debt or liquidated money demand and the facts deposed thereto support the claim."*

*To that effect, I hereby enter judgment in favour of the plaintiffs against the defendant as per the plaintiff's claims in paragraph (b) of the application for default summons. And I hereby order as follows:*

- 1. The defendants are to pay the plaintiff jointly and severally the sum of N700,000 forthwith being the debt owed to the plaintiff in the interest of justice.*
- 2. No order as to cost."*

It is clear from the record of proceedings and the judgment that the trial was conducted under the default summons procedure.

Order V of the District Courts Rules provide for the default summons Procedure. Order V Rule 1(1) provides as follows:

*"In an action in a District Court for a debt or liquidated money demand, the plaintiff may, at his option, cause to be issued a summons in the ordinary form or, on filing an affidavit to the effect set forth in Form 12 in the first schedule to these Rules and subject to the Provisions of Paragraph (3) of this rule, a summons in the form to the effect given in Form 13 in the schedule to these Rules, and if such last mentioned summons be issued it shall, unless otherwise ordered by the Court, be personally served on the defendant."*

The procedure under Order V above is one by which summary judgment without trial may be obtained by a plaintiff where his claim is either for a debt or liquidated money demand. Liquidated money demand includes a debt and means a specific amount which has accrued in favour of the plaintiff from the defendant and such sum must have accrued and must be ascertained. See ONADEKO VS UBN PLC (2005) 4 NWLR Pt.

916 Pg. 440. For a claim to qualify to be heard under the above rule it must be one for the recovery of debt or a liquidated money demand.

In the case of ENYE VS OGBU (2003) 10 NWLR Pt. 828 Pg. 403 while dealing with summary judgment procedure similar to the provision of Order 5 of the District Court Rules, the Court held that in such matters the Court should satisfy itself that the claim concerns “a claim to recover a debt or liquidated money demand.” In that case Ubaezonu JCA held as follows at Pgs. 427 - 428:

*“As regards the case in this appeal, and indeed in every other case of an undefended list claim, the first and foremost matter in respect of which a trial Court should satisfy itself is that the claim concerns “a claim to recover a debt or liquidated money demand.” If the claim is not, then it shall not be entertained under an undefended list procedure. In the case in this appeal, the case concerns a sum of money said to be a “loss occasioned by the defendants negligence or bad faith.” The facts further show that the claim arises out of an audit report which at one stage showed a loss of N1,374,395 and at another stage showed a shortage of N200,000 and finally ended up at N161,192. The appellant in nowhere acknowledged that he was indebted to the respondent in any of the above sums of money or at all. The claim says that the amount arose out of the appellant’s “negligence or bad faith.” That smacks of a tort. The undefended list cause does not envisage a claim for damages in tort. By no stretch of imagination*

*could the claim in this appeal be maintained under the undefended list cause.”*

The reliefs claimed before the trial Court have been set out in the earlier part of this judgment. Relief (a) is as follows:

*“a. A declaration of this Honourable Court that the 2<sup>nd</sup> defendant is a guarantor of the 1<sup>st</sup> defendant in the loan received by the 1<sup>st</sup> defendant from the plaintiff.”*

The complaint of the appellant in Ground 4 of the appeal is that the trial Judge did not consider the issue of his guarantorship. Appellant’s counsel submitted that such issue is not one that could be determined under the default summons procedure.

It is trite that summary judgment cannot be given in claims for declaratory reliefs. A Court cannot also make declaration of right either on admission or in default of defence without hearing evidence which entitles the plaintiff to the declarations sought. See NIGERIA AIRWAYS VS AHMADU (1991) 6 NWLR Pt 198 Pg. 992 and ILOBI VS UZOEGWU (2005) ALL FWLR Pt. 285 Pg. 595.

From the affidavit in support of the plaintiff’s claim at the lower Court it is clear he proceeded against the appellant as a guarantor to the loan he granted the 1<sup>st</sup> defendant hence relief (a) claimed. Proof that the appellant guaranteed the loan was therefore essential. It is only then the Court can hold him liable and we so hold. It is also significant to note that the plaintiff’s claim against the defendants was made jointly and severally.

The trial judge did not make any pronouncement on the declaratory relief which is relief (a). We are of the view that this claim cannot be ignored as it is the pedestal on which relief (b) granted stood.

In the case of CHEVRON (NIG) LTD VS. WARRI NORTH L.G.C. (2003) 5 NWLR Pt. 812 Pg. 28 while interpreting provisions for summary judgment similar to Order V of the District Courts Rules, Rowland JCA at Pgs. 44 - 45 Paras. E - A held as follows;

*"I am not in doubt that any defect in competence is fatal, for the proceedings are a nullity however well conducted and decided, the defect is extrinsic to the adjudication.*

*Order 23 of the Bendel State High Court (Civil Procedure) Rules, 1988 applicable in Delta State provided as follows:*

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

*It should be noted that plaintiff's main case is for a declaratory relief.*

*It is not a claim for recovery of a debt or liquidated money demand within Order 23. Plaintiff's declaratory action in this case cannot*

*therefore be brought under the undefended list procedure. Such a procedure for a declaratory relief rendered the court incompetent. Judgment in such circumstance can be set aside by the same Judge.”*

In the instant case, the trial Judge did not consider all the reliefs claimed by the plaintiff. He chose to deal with relief (b) to cloak himself with jurisdiction. He is clearly in error. The claim of the plaintiff in the lower court cannot be entertained under the default summons procedure and we so hold. It was not initiated by due process of law and not maintainable under the default summons procedure.

A consideration of the failure of the trial court to consider the affidavit of the appellant in the present circumstance would be an academic exercise as the Court had no jurisdiction *ab initio* to entertain the suit under the default summons procedure. The Court had a duty to examine the claim side by side with the Rules of Court before making up its mind whether the case is rightly maintainable under the default summons procedure.

Our candid view is that the lower court was in error when it heard and determined the suit under the default summons procedure. We find the Judgment delivered on 27/11/2014 by the trial Senior District Judge a nullity as it was delivered without jurisdiction.

In conclusion, we find merit in this appeal and it is allowed. The judgment of the senior district judge delivered on 27<sup>th</sup> November 2014 is hereby set aside.

**HON. JUSTICE FOLASADE OJO**  
**PRESIDING JUDGE**  
**6/12/2016**

**HON. JUSTICE D.Z. SENCHI**  
**HON. JUDGE**  
**6/12/2016**

David I. Ajaba for the Appellant.

A.A. Ojukwu for the 1<sup>st</sup> Respondent.

R.A. Olutekunbi holding the brief of E.I. Okani for the 2<sup>nd</sup> Respondent.