

**IN THE HIGH COURT OF JUSTICE FEDERAL CAPITAL TERRITORY
IN THE JUDICIAL DIVISION ABUJA
HOLDEN AT LUGBE, ABUJA
BEFORE HIS LORDSHIP: HON. JUSTICE ASMAU AKANBI – YUSUF.
SUIT NO: FCT/HC/CV/2489/2018
FCT/HC/M/2741/2019**

BETWEEN:

DIAMOND BANK PLC-----APPLICANT

AND

1) ALIBRO TRANSPORT SERVICES LTD }
2) AIR VICE MARSHAL EMMAUEL }-----RESPONDENTS
ROBERTS EJEH }

JUDGMENT

Date: 21ST MARCH, 2019

The plaintiff took out a writ under the undefended suit dated the 3rd August, 2018 and by this the plaintiff is claiming against the Defendant as follows.

- 1) The sum of ~~₦~~98,103,795.75 as of 26/7/18 plus interest accruing thereon at the rate of 45% per monthly until full settlement of the debt plus cost of action.

The matter was first heard on the 17/01/19 One U.C Onuoha of Counsel, held brief for Victor Giwa for the Defendants. However, the matter was adjourned to the 30th January, 2019 for Hearing. On the adjourned date neither the defence nor the defendants were in Court. The defendants did not also file any notice of intention to defend and an affidavit disclosing defence on the merit as referred by the provision of the Rules of this

Court. See **Ben Thomas Hotels Ltd vs. Sebi Furniture Co. Ltd (1989) 12 SC page 160.**

This Court heard the plaintiff application and matter was adjourned for judgment. However, on the day the judgment was to be delivered, the defendants had filed a preliminary objection and a notice of intention to defend, together with an affidavit in support.

The subject of this ruling is the preliminary objection filed and dated the 4th March, 2019. The grounds for the application are as follows;

- (1) The suit is not connected to liquidated sum as provided by the Rules.
- (2) That the suit relates to pre – judgment interest as at the time of instituting this action.

In support of the preliminary objection is a 14 paragraph affidavit deposed to by one Emmanuel Daudu, a legal practitioner in the law firm of Victor Giwa & Associate, which had attached to it an Exhibit marked Exhibit “A”.

Also attached is a written address. Learned Counsel to the Defendants/Applicants relied on all the averment contained in the Affidavit and adopted the written address as their oral argument. He urged the Court to dismiss the application on the ground that the Court lacks jurisdiction to hear the suit under the undefended suit.

The plaintiff counsel on other hand filed a 6 paragraphs counter affidavit in opposition to the application.

It is dated the 5th March, 2019. Attached are 5 exhibits. Learned Counsel also filed a written address in support of the counter affidavit. He relied on all the paragraphs

of the Affidavit and adopted the written address as their oral argument.

He urged the Court to dismiss the application.

I have gone through the Notice of Preliminary Objection, the averment in the affidavit in support of the counter affidavits and the address of Counsel, the contention of the Applicants is that this Court lacks the jurisdiction to entertain the suit under the undefended procedure, as the action relates to pre – judgment interest. Learned Counsel to the Applicants argued that it is the plaintiff's claim in the writ of summons and the averment in the statement of claim that determines whether or not a particular case is within the jurisdiction of the Court.

That there are contentious issues which can only be entertained through viva voce evidence. That the claim of 45% interest has to be determined through viva Voce evidence.

I agree with the Defendant/Applicant that jurisdiction is the bedrock of adjudication and that it is the plaintiff's claim in the writ of summons and the averment in the statement of claim that determines whether or not a particular case falls within the jurisdiction of a Court. I place reliance on the case of **Madukolu Vs. Nkemdilim**, cited by the Plaintiff/Respondent Counsel.

I have gone through the writ of summons and the Affidavit in support, it is clear that the claims are within fall under the jurisdiction of this Court. The undefended suit is a Special Procedure. It is meant to ensure speedy

and summary trial in action for recovery of liquidated money demand.

The Court is properly constituted with regards to the subject matter of the dispute between the parties. The position of the law in respect of cases under the undefended list procedure is very clear. See **Order 35 Rule 3 (1) High Court Rule 2018.**

At this point the Court would refrain from considering whether the suit borders on pre – judgment interest. This issue is to be determined when considering the affidavit evidence upon which the decision of this Court should determine the dispute as contained in the undefended suit. Accordingly, I hold the view that this Court has jurisdiction to entertain the suit and that the matter before the Court is competent. Thus preliminary objection fails and it is hereby dismissed.

On the claim which is under the undefended list, the case of the plaintiff was that the 1st defendant applied for and was granted a term loan facility in October, 2013 with a repayment tenor of 36 months to enable it complete the finishing of its transport terminal and multipurpose shopping mall located at Ekukinam street, Utako District, Abuja and to also liquidate N15. 6 million outstanding balance equity release. The letter of offer and acceptance dated 24th October, 2013 is marked as exhibits “A”.

The cardinal terms of the agreement in exhibit “A”, is that the borrower agreed that the loan shall be repaid by;

- (i) The cash flow generated from operation of the transport services and proceeds from the rent of the mall.
- (ii) Other sources of cash flow that is acceptable to the bank.

Also as security for the loan transaction, the defendant created a legal mortgage on the property located at Gwarinpa 1 District FCT Abuja. Exhibit "B" (Deed of legal mortgage).

Furthermore, the following documents were executed by the defendants.

- (a) Deed of guarantee by the 2nd defendant dated the 25th October, 2013, Exhibit "C"
- (b) Guarantee and indemnity dated 9th October, 2015, Exhibit "D"
- (c) Resolution of the Board of Directors dated the 25th October 2013, Exhibit "E"
- (d) Irrevocable Domiciliation of Payment Agreement dated 25th October 2013, Exhibit "F"
- (e) The defendant letter of request for extension of material principal dated 10th November 2014 as Exhibit "G"
- (f) Resolution of the Board of Directors dated 20th November 2014, marked as Exhibit "H".
- (g) The plaintiff attached a copy of the letter written by 2nd defendant to the plaintiff, i.e. Authority to sell a property dated 6th June 2018, marked as Exhibit "I".

The plaintiff's Solicitor vide a letter date the 7/6/2018, RE:- Authority to sell mortgaged property and your company's indebtedness to Diamond Bank PLC in the

sum of ₦93,810,633.11 as of 7/5/18 plus accruing interest charges marked as Exhibit “J”.

The plaintiff attached a copy of the letter of demand to the defendant dated October 30, 2017 marked as Exhibit “k”. Also a Demand Notice on outstanding indebtedness with Ref. JMC /BB/ID/02/06/15 was marked as Exhibit “L”.

The plaintiff averred that the claim against the defendant is for liquidated sum as shown by the letters of offer; defendants to board resolutions accepted the loan and that statement of account.

That the defendants have no defence to the action. Learned Counsel to the plaintiff urged the Court to enter judgment in its favour as per the writ of summons.

It is trite that an action begun by way of undefended list is designed to recover liquidated money claim or debt where it is shown that the defendant does not have any defence to the plaintiff's claim.

This procedure saves both the time of the Court and the litigants.

See Kehinde vs. Okparaonu (2013) LPELR 21926 CA

Order 35 Rule 3 (1) High Court Rules 2018;

Where a party served with the writ delivers to registrar before 5 days to the date fined 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.

Paragraph 6 of the affidavit in support of the notice of intention to defend states that the facility I took from the Plaintiff/Applicant was **N6, 250, 000 (Six Million, Two Hundred and Fifty thousand Naira only)** as contained in the “offer of credit” dated 11th November 2014 as shown in the plaintiff’s Exhibit “A”

Paragraph 7; that the interest rate was at 22.59% within 90 days.

Paragraph 11; that I have paid the principal sum and interest within 2014 and 2015.

Paragraph 12; that between November 2014 June 2014 as shown in page 33, 34 and 35 of the plaintiff Exhibit “M” and I had paid **N14, 000.000.00 (Fourteen Million Naira only)** to the plaintiff which covers for the principal and interest.

Paragraph 14; that I or not owe the plaintiff the said sum of N98, 103, 795.75.

Paragraph 15; that the interest rate is 22.5% and not 45% as I have not defaulted in any way.

Paragraph 16; That I know of a fact the said facility is a secured facility and that the Plaintiff as a legal mortgage on my property described as plot 471 Gwarinpa I District whose open market Value (OMV) is ₦250 Million and force sale value is ₦180 Million.

Paragraph 17 That I have also issued a power of sale dated 6th June, 2018 to the plaintiff, the letter of sale is marked as Exhibit “O”.

The concern of the Court at this stage is to find out whether the Affidavit in support of the notice of intention has disclosed defence on the merit to warrant the transferring of the suit to the general cause list or enter judgment for the plaintiff.

It is settled that the 1st defendant authorized the plaintiff to sell the property. See Exhibit "I" attached to Affidavit in support of the writ and also received the Exhibit "J". See the Affidavit). The defendant never deemed it fit to respond to the Exhibit "J". I observed in the paragraph 11 & 12 of the Affidavit of notice of intention to defend where 1st defendant, averred that he has paid the plaintiff the principal sum and interest between 2014 and 2015 i.e. N14, 000.000.00 which covers the principal and interest.

The law is that where a party served with a letter containing disputed facts in a correspondence, the party served is deemed to have admitted its content by conduct.

The Court of Appeal in **(First Continental Properties Ltd Vs. Divine Triop Ltd (2017) LPECR 42869 (CA) and Citing the Supreme Court Case of (JOE IGA VS. CHIEF AMAKIRI (1976)1 SC 1,)** held that where a creditor writes a demand letter which the supposed debtor fails to react to, the silence of the letter leads to presumption of admission by conduct. Therefore, the failure of the defendant to react to the plaintiff's letter demanding payment of the balance Exhibit 6, amount to admission by conduct....." the law is clear as rightly held by the trial Court, that in situation like this, the silence of a debtor in the face of a showing direct and unreplied

letter of demand made by a creditor, amounts to admission of contents of the letter....” PER ABOKI JCA.

The defendant in Paragraph 15 of the Affidavit states that the interest rate is 22.5% and not 45% and that he has not defaulted in any way. From the Exhibit “A” attached to the Affidavit in support of the writ of Summons under the undefended suit, the interest rate states.

“22.59% P.A (This shall however be subject to changes in line with money market conditions) While the Repayment Plan.

32 equal monthly repayment of amortized sum of ₦1, 562,500.00 (Principal Pay). The payment of interest will commence immediately after disbursement.

In the same offer of “credit facility” Exhibit “A”. attached to the Affidavit in support of the writ, the Default indemnity clause states;

“If the Borrower fails to pay any sum (of principal, interest or otherwise) due or to become due hereunder, the Borrower shall be liable to a penalty fee of 45% flat per month on un-repaid portion on the facility. This fee, which shall be charged on the 1st working day after the sum is due, will be in addition to the prevailing temporary overdraft interest rate on the unpaid sum from the date when such payment falls due up to the date of payment”

In the instant case, the 1st and 2nd Defendants accepted the terms and condition stated in Exhibit “A”, there is nothing to show that they were not satisfied

with the penalty as stipulated therein. **See Uzor Vs. Ezimuzo Microfinance Bank (NIG) Ltd. 2013 LPELR 21880 (CA).**

In conclusion, all the averments in the Affidavit in support of the notice of intention to defend in this matter has not changed the nature of the plaintiff's claim. In the absence of any other evidence to the contrary, the Court is satisfied that this claim is a justifiable claim, having taken into consideration the evidence proffered in its support.

It is the view of this Court that the defendant has no defence on the merit to the plaintiff's claim, and I hereby enter judgment in favour of the plaintiff as per the claims contained in the writ.

Cost of N100, 000.00 is awarded against the defendants, in favour of the plaintiff.

Signed.

21/03/19.

P/counsel: We are grateful.

D/Counsel: We are most grateful my Lord.

Signed.

21/3/19

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HON. JUSTICE ASMAU AKANBI – YUSUF
(HON. JUDGE)