IN THE HIGH COURT OF JUSTICE
FEDERAL CAPITAL TERRITORY (APPEAL DIVISION)
IN THE ABUJA JUDICIAL DIVISION
HOLDEN AT APO – ABUJA
ON, 12TH DAY OF DECEMBER, 2019.
BEFORE THEIR LORDSHIPS:- HON. JUSTICE A. O. OTALUKA
AND HON. JUSTICE M. OSHO ADEBIYI.

APPEALNO: CVA/199/18

BETWEEN:

1) EDUSHINES INTEGRATED CONCEPT LTD
2) CHINEDU OKONKWO **:..APPELLANTS**

AND

ALWED NIGERIA ENTERPRISES LIMITED:…....RESPONDENT

JUDGMENT.

TheRespondent commenced a suit under default summons filed on 30th January, 2018. The appellant filed a notice of intention to defend with its counter affidavit in defence of the suit on 6th April, 2018, accompanied with a notice of preliminary objection.

On the 2ndMay, 2018, the trial court heard the preliminary objection and gave a ruling on 31st May, 2018, dismissing the preliminary objection as being unmeritorious.

The trail court proceeded to hear arguments and determined the default summons on 26th June, 2018, and adjourned for judgment to 10th July, 2018.

On the 9th July, 2018 the Respondent filed another motion on notice M/149/18 raising five grounds questioning the court's jurisdiction to wit:

a. That there was no letter of demand served by the plaintiff/respondent on the defendants/applicant before the commencement of this suit.
b. That service of a demand letter is a condition precedent for this court to assume jurisdiction in debt cases.
c. That the defendant/applicant's are not indebted to the plaintiff/respondent.
d. That this case is premature and inchoate.
e. That this suit is incompetent and this court lacks the jurisdiction to entertain same.

On the 10th July, 2018, the trial court after a considering the issues in the substantive suit on merit proceeded to deliver his judgment in favour of the Respondent seemingly oblivious of the existence of M/149/18 challenging his jurisdiction.

Being dissatisfied with the decision of the court, the appellant appealed against the judgment of the District Court before His Worship Yusuf Ahmed Ubangari upon the following seven grounds;

GROUND ONE:

The learned trial judge erred in law when he proceeded to entertain the case of the Respondent and to enter judgment in a monetary claim without any evidence of demand first served on the appellants and have refused to pay the debt.

GROUND TWO:

The learned trial judge erred in law when he proceeded to deliver ruling and went ahead to deliver judgment without first of all hear and determine the motion on notice with motion no. M/149/18 filed on the 9th day of July, 2018, pending before him; when the motion is particularly challenging the jurisdiction of

the court to entertain the case, thereby robbing the appellants of right to fair hearing.

GROUND THREE:

The learned trial judge erred in law when he delivered judgment under the default summons application despite the NOTICE OF INTENTION TO DEFEND, AFFIDAVIT WITH EXHIBITS filed by the appellants without any evidence of supply and or delivery of any of the alleged goods to the appellants by the Respondent.

PARTICULARS OF ERRORS

a) The judge erred in law when he entered judgment under the default summons despite the notice of intention to defendant, affidavit disclosing defence on the merit with exhibits contrary to ORDER V RULES 2 OF THE DISTRICT COURT RULES OF FCT, ABUJA.
b) That counter affidavit filed by the Respondent in opposition to affidavit in support of notice of intention to defend is unknown to District Court Rules of FCT, Abuja.
c) That there was no evidence of supply of goods by the Respondent to the Appellants.
d) That there was no evidence of delivery or receipt of the instant goods by the Respondent to the Appellants.

GROUND FOUR:

The judgment of the court is against the weight of evidence having regard to the entire processes filed by the parties in this case before the trial court; the court ought to have considered the admissibility, relevance, credibility, conclusiveness and probability of the evidence by which the weight of the evidence of both parties is determined.

GROUND FIVE:

The learned trial judge erred in law when he granted cost of solicitor's fee of N300,000 and 10% post judgment interest under the default summons proceeding contrary to law.

PARTICULARS OF ERRORS

a) Solicitor's fee cannot be shifted to the appellants without any agreement to that effect.
b) That post judgment interest is not recognised under the District Court Rules of FCT, Abuja.
c) That (A) and (B) are fact that must be specifically pleaded and proved by evidence as there is no provision for (B) under the District Court Rules of FCT, Abuja.

GROUND FIVE:

The learned trial judge erred in law when he struck out paragraphs of the appellants' affidavit in support of NOTICE OF INTENTION TO DEFEND on the ground of error on the date mentioned in paragraph 10 when he has the statutory powers to take judicial notice of the fact of time.

PARTICULARS OF ERRORS

a. That the affidavit in support of notice of intention to defend was filed on the 6th day of April, 2018, and referred to 15th day of August, 2018, as against the 15th day of August, 2017.
b. That the respondent's exhibit B, which is the appellants' cheque clears the doubt as per the error on the date in paragraph 10 of the appellants' affidavit as the cheque bear 15th day of August, 2017 and not 2018.

c. That the court had the power to have taken judicial notice of the fact that the year has not gotten to August of this year, 2018.
d. That the judge erroneously struck out paragraph 11 to 18 of the appellants' affidavit when it only paragraph 10 that bears the erroneous date of 15th day of August, 2018, as against 15th day of August, 2017 and went ahead to enter judgment against the appellants.

GROUND SEVEN:

Other grounds of Appeal shall be filed on the receipt of the records of proceedings.

4. RELIEF SOUGHT: SETTING ASIDE THE WHOLE DECISION of the District Court Judge presided over by Hon. Ahmed Yusuf Ubangari, delivered on the 10th day of July, 2018.

One of the recondite issues raised by the appellant in ground two was that the trial judge proceeded to deliver judgment without first of all hearing and determining the Motion on Notice M/149/18 filed on the 9th July, 2018, pending before him, which was challenging his jurisdiction;

> ***"On whether the courts in Nigeria have the powers to expand or reduce o even waive jurisdiction".***

The Supreme Court in **Tukur v. Govt of Gongola State (1989) 4 NWLR (Pt 117) 517** held that all courts without exception have no powers to prescribe jurisdiction to themselves neither do they have powers to expand or reduce their area of jurisdiction.

AND I add that they also lack powers to waive their jurisdiction that no court has the vires to confer to itself or waive the jurisdiction conferred upon it by Constitution or statute nor can

such jurisdiction be vested on the court by agreement of the parties.

Thus,jurisdiction is described in the case of **Gafar v. Govt of Kwara State &Ors (2007) LPELR 8073 (SC)**

> ***"Therefore jurisdiction is described variously as the life wire, blood, bedrock and/or foundation of adjudication and that once it is challenged, the issue must be settled first before taking any further step in the matter. It is however, the case or claim of the plaintiff that determines the jurisdiction of the court. See Adeyemi v. Opeyemi (1976) 6-10 SC 31, Tukur v. Govt of Gongola State (1989) 4 NWLR (Pt 117) 517, Magaji v. Matari (2000) 5 SC 57"*** per Onnoghen, JSC.

Duty of the Judge to hear all applicants.

In **General Electric Coy v. Harry AyoadeAkande&Ors (2010) LPELR 80971 (SC),** Rhodes-Vivor, JSC penned –

> ***"A judge must hear all applicants, no matter how simple or frivolous they may appear, it isonly after a counsel is afforded a hearing that an order striking out the motion can be said to be appropriate".***

In another vein, it is the duty of the court to facilitate the hearing of any case or application before it. Thus, Ademola, JSC in **Bello Adeleke v. FaladeAwoliyi&Anor**held;

> ***"It is part of the duty of a judge to see that everything is done to facilitate the hearing of an action pending before him. Whenever it is possible to cure an unintentional blunder in the circumstances of a case and it will help to expedite the hearing of an action, the court is to award cost against any diligent party***

rather than dismiss or strike out a case for a default in proceedings prior to hearing of the case…".

In agreeing with the above dictum,however, the records show that the application was not brought to the notice of the court by the appellant's counsel.

In the instant case, it is my opinion that as a result of oversight on the part of the trial Magistrate, the applicationchallenging jurisdiction of the lower court was not heard.Though it is the duty of the counsel to draw the attention of the court to applications pending before it but it is also the responsibility of a court whose attention was not drawn to pending applications challenging his jurisdiction to peruse through his file and dispose of pending applications before judgment particularly where it involves jurisdiction of the court which is pivotal and fundamental to the proceedings. It was therefore wrong of the trial court to proceed without determining the application challenging his jurisdiction in this case.

Thus the Court of Appeal in its decision in **Dr.AkinolaOgunlare v. UBA PLC (2016) LPELR 41450 (CA)** puts the nail in the Square hole.

"I agree that a counsel filing an application late in the proceedingswhen the matter has been adjourned for judgment should formally draw the attention of the judge through the register of the pendency of the motion. That would befair to the court and the other party. But that does not absolve the court from glossing over such a process. In this case the motion was properly filed…. As to when a court process is presumed to be before the court, see the case ofNITEL PLC V. MAYAKI (2007) 4 NWLR (1023) 173 where Agbo, JCA had this to say, I must however emphasis

that once a process is filed in the registry of a court, the party that filed has done all what is required of him. The process is therefore presumed to be before the court. It is the duty of the party claiming that the judge is unaware of the existence of this process to establish it".

The above case is on all fours with the instant case. The process was filed a day before judgment and forms part of the Appeal records, though the attention of the court was not drawn to it before delivering judgment but that does not absolve trial Magistrate from glossing over such an important motion.

There are plethora of cases to this effect.

- **Suleman Mohammed v. Madachagwa&Ors (2018) LPELR 44493 (CA).**

- **EFCC v. Dr. Erastus Akingbola (2015) LPELR 24546 (CA)** (Duty of the court to hear and determine all applications before it).

- **AlhShehuPetel&Or v. AlhAbdullahi Ibrahim Maturare(2014) LPELR (2014) 24164 (CA).**

(a court of law has the legal duty to hear all applications before it even if it is brought late).

However, the Supreme Court has held in **Oliyide& Sons Ltd v. ObafemiAwolowo University, Ile Ife (2018) LPELR 43711 (SC)**

"An issue of jurisdiction like the one at hand is not a fresh issue and it is settled law that such can be raised at any time by various means even viva voce for the first time on appeal" per Ogunbiyi JSC.

In this respect, despite the fact that the issue of jurisdiction was not raised by the counsel and not determined by the lower court, the appellant has by ground one of this appeal raised same issue bothering on jurisdiction for determination on appeal.

Thus, on authority of **Oliyide& Sons Ltd v. O.A.U (supra)** this appeal court would consider the same issue and determine it before proceeding to consider other recondite issues raised.

The question, is **whether a demand letter in law serves as a condition precedent to the service of a default summons?** Again,**how does a non-service of demand letter affect the jurisdiction of the court?**

In paragraph 8 and 11 of the affidavit in support of default summons the plaintiff/respondent averred that oral demands were made. These paragraphs were never contradicted by the defendant/appellant.

In other words there was no specific denial by the Defendant/Applicant of paragraphs 8 and 11 of the plaintiff/respondent affidavit in support of the default summons, thus implying admission.

The Court of Appeal in**Austin Laz& Coy Ltd &anor v. Aliyu Ahmed (2018) LPELR-44714 (CA)** held,

> ***"It is trite that where fact in an affidavit is not specifically denied the court is enjoined to accept and act on such unchallenged uncontroverted averments".***

The law is very clear, that the effect of the uncontroverted averments is that the affidavit of the defendant/respondent is believed and accepted. We are also of the opinion that failure of a formal demand letter before payment of a debt is made is

not a material defect to the matter neither at the lower court nor on appealand therefore does not affect the jurisdiction of the court. Again, there was no contractual agreement between the parties that a formal letter of demand must be first made to the Defendant/Applicant. Therefore, oral demands made are good enough demands.

Having sorted out the grounds challenging jurisdiction of the lower court, which is also a reflection of the motion on notice M/149/18 in respect of jurisdiction of the court to entertain this suit.We hold that the lower court has jurisdiction to hear the substantive suit.

We will proceed to consider the other grounds of appeal. Learned counsel to the appellant is contending that the trial court erred in law by proceeding to entertain the case and enter judgment in a monetary claim withoutany evidence of demand first served on the appellants.

From the fact and evidence before this appeal, we observed that all averments in the affidavit in support of the default summons were unchallenged and uncontroverted. More importantly, it was in admission by the defendant/appellant that he issued a cheque of same amount owed which cheque was dishonoured.

The act of issuing a cheque for an amount owed can only be held to be an admission of indebtedness. There is evidence that both parties have been enjoying contractual relationship from the undocumented and implied contract of supply and payment of goods to the supplier. It is therefore, morally despicable and unequitable for a party that has beenbenefitting from an undocumented and informal ‘business arrangement’ to turn around and allege that formal letters of demand ought to have been served on him when such was never part of their

agreement. It is trite that a party cannot take advantage of an irregularity he acquiesced in … see **Hydro-Quest (Nig) Ltd v. Bank of the North Ltd (1994) 1 NWLR (Pt 318) pg 41 @ pg. 40 para C**per KatsinaAlu, JCA (as he then was). We are notconstrained to agree with the lower court that the cheque issued by the Appellant to the Respondent is an admission of indebtedness going by the circumstances of this case. Moreover, the sum on the face of the cheque is in tandem with the amount claimed by the Respondent on the face of the originating processes. It is a lame defence that defendant/appellant issued the said cheque to the plaintiff/respondent as a favour in order to help the respondent balance its account books and that respondent was not supposed to present the cheque to the bank. This defence is considered incredible and weightless. The learned Magistrate was right in not believing the defence and viewing it as irrelevant and not admitting same as the true state of affairs. Evidence generally must command such probability in keeping with the surrounding circumstances of the case at hand. As Oputa JSC held in **Onwuka v.Ediala (1989) 1 NWLR (Pt. 96) 182 @ pp. 208/209**

> ***"This scale though imaginary is still the scale of justice and the scale of truth. Such a scale will automatically repel and expel any and all fake evidence. What ought to go into that scale should therefore be noother than credible evidence. What is therefore necessary in deciding what goes into the imaginary scale is the value, credibility and quality as well as probative essence of the evidence. If any evidence is disbelieved, then such evidence has no probative value and should not therefore go into the imaginary scale."*** And we so hold in the instant case.

Justice Oputawent further in the case of **Dibiamaka&Ors v. Osakwe&Ors (1989) LPELR-940 (SC) pp 16 paras D-E.**

> ***"When evidence is improbable, it can easily be dismissed as untrue as probability has always been the surest road to the shrine of truth and justice. The balance of probability will thus reflect also the balance of truth. When this happens, it then becomes the balance of justice."***

Applying the above Supreme Court decisions to this present Appeal, it is completely unbelievable and beyond human comprehension that Appellant who in paragraph 6-15 of his affidavit accompanying notice of intention to defend, acknowledged the fact that it had a business arrangement with the Respondent which borders on appellant buying goods from Respondent and Respondentsupplying same on an informal agreement to be paid for immediately in cash or on delivery on credit to be paid by the appellant to the Respondent at a later date. The defence of the Defendant/appellant is to the contrary.

The trial Magistrate was correct in finding no merit in the notice of intention to defend as there were no triable issues raised.

On the issue of cost, trial Magistrate (see p. 44 of the records of Appeal) did not award cost for solicitors fees to be paid by the appellant, rather the learned Magistrate awarded 'cost in the sum of N300,000 being cost of the action'. The cost of instituting an action is completely different from 'solicitors fees'. Costs of instituting an action which courts are prone to awarding are meant to indemnify a successful party for his out-of-pocket expenses.See **Doyin Motors Ltd v. SPDC (Nig) Ltd &Ors (2018) LPELR-44108 (CA) PP 48-52 paras E.**

Moreover, the award of cost is entirely at the courts discretion; hence placing reliance on the above cited case of **Doyin Motors (Supra)**the cost of instituting the suit in the sum of N300,000 as awarded by the learned trial judge was in his discretionary powers.

With regards to ground five of the grounds and particulars of appeal,we agree with the appellant that post judgment interest is not recognised under the District Court Rules of FCT, Abuja. Therefore, the learned magistrate erred in law when he granted the 10% post judgment interest under the default summons proceedings.

On this not and in conclusion, the appeal partly succeeds. Considering each of the grounds:-

On Ground one, on whether the trial Magistrate erred in law to enter judgment in a monetary claim without any evidenceof demand letter first served on the appellant. This ground of appeal is dismissed as a formal demand letter is not a condition precedent to a monetary claim under default summons in the absence of any contractual agreement to that effect.

On Ground two, that the trial Magistrate erred in law in delivering the judgment without first hearing the motion on notice M/149/18, filed a day to the judgment. For the reasons given in the body of the judgment the issue of jurisdiction being raised in the ground of appeal is has been addressed by this court and dismissed.

On Grounds three, four and six, that the trial Magistrate erred in law when judgment was delivered based on the application under default summons,it is our decision that the trial Magistrate did not err in law delivering judgment in favour of the

plaintiff/respondent having delivered the said judgment on merits of the case.

On Ground five, it partly succeeds with respect to the N300,000 cost awarded as cost of action against the defendant/appellant.

On the order to pay 10% post judgment interest, under default summons proceedings, it is contrary to the District Court Rules of FCT, Abuja. Therefore the appeal partly succeeds and theDistrict Court Rules of FCT does not confer power on the trial Magistrate to order for 10% post judgment interest under the default summons. Therefore, payment of 10% post judgment interest is dismissed.

Grounds 1,2,3,4 and 6 of this Appeal are dismissed with a cost of N100,000 against the appellant. This appeal terminates with ground 6 since the appellant did not file any other ground underground 7.

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HON. JUSTICE A. O. OTALUKA
12/12/2019.

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HON. JUSTICE M. OSHO ADEBIYI
12/12/2019.