

**IN THE HIGH COURT OF FEDERAL CAPITAL TERRITORY
IN THE FEDERAL CAPITAL TERRITORY JUDICIAL DIVISION
HOLDEN AT JABI FCT ABUJA
SUIT NO: CV/1438/2018**

BEFORE HIS LORDSHIP: HON. JUSTICE BABANGIDA HASSAN

BETWEEN:

HASAL MICROFINANCE BANK LIMITED _____ CLAIMANT

AND

**1. MGSL MORTGAGE BANK LIMITED }
2. DR (MRS) VIRGY ANOHU } _____ DEFENDANTS**

JUDGMENT

By the writ of summons filed under the undefended list procedure dated the 9th day of April, 2018 whereof the claimant claims as follows:

- 1) The sum of ₦55,809,804.83 (Fifty five million, Eight Hundred and Nine thousand, Eight Hundred and four naira, Eighty three kobo) only being the total outstanding amount and accrued interest owed to the claimant by the defendant's facility of ₦15,000,000 (Fifteen Million Naira) granted to the defendant by the claimant;
- 2) Pre-judgment interest at the rate of 3% monthly being the agreement of parties as contained in the offer letter in the said outstanding debt from 26th October, 2017 till final liquidation;
- 3) Post judgment interest at the rate of 10% on the judgment debt until full liquidation;
- 4) ₦1,000,000.00 (One Million Naira) only being the cost of this suit.

The writ is supported by twenty five paragraphed affidavit deposed to by one Suzan Dung, a staff in the employment of the claimant, and in which they rely upon all the paragraphs as are contained therein.

Attached to the writ also are some documents to include:

- 1) application for an overdraft facility (New increment) written by the 1st defendant to the claimant dated the 20th day of January, 2015;

- 2) offer of ₦15,000,000.00 (Fifteen Million Naira only) overdraft/increment facility addressed to the Managing Director of the 1st defendant;
- 3) personal Guarantee filled by the 2nd defendant;
- 4) covenant of stock/Asset take over upon default addressed to the Managing Director of the claimant;
- 5) covenant of cash lodgment signed by the 1st defendant;
- 6) a letter of request for extension of overdraft facility addressed to the Manager of the claimant written by the 1st defendants
- 7) a letter for payment of outstanding facility dated the 16th of October, 2017 by the claimant addressed to the Managing Director of the 1st defendant;
- 8) final demand and pre-action notice written to the 1st defendant by Adetosoye & Co; the solicitor's firm of the claimant;
- 9) statement of account of the 1st defendant with the account number 0013022000885 with the claimant from 3rd of June, 2014 to 28th June, 2017, and this is accompanied by certificate of compliance with the Evidence Act.

The defendants filed a Notice of intention to defend dated the 17th day of May, 2019, this is pursuant to the order of this court granted to the defendants to enter appearance and file their memorandum of conditional appearance, Notice of intention to defend and other court processes in this suit out of time. This order was granted when there is no objection on the part of the counsel to the claimant.

The Notice of intention to defend is accompanied by seven paragraphed affidavit deposed to by one Ike Udom, the Manager of the 1st defendant in this suit.

Attached to the Notice are the following documents marked as exhibits;

- a) EXH. 'Di' which is the certificate of occupancy (Customary) granted to Pearl Homes Ltd accompanied by a sketch map and a schedule;

- b) EXH. 'Dii' being a certificate of occupancy (customary) granted to BDA Ltd accompanied by a sketch map and a schedule;
- c) EXH. 'Diii' being a Customary Certificate of Occupancy granted to the 2nd defendant accompanied by a schedule, regularization of land titles and documents of FCT Area Council acknowledgement with file No. AN 1053, a receipt of payment of ₦5,000.00 issued by AGIS, and a sketch map;
- d) EXH. 'Div' Customary Certificate of Occupancy granted to the 2nd defendant which is accompanied by schedule, regularization of land titles and documents of FCT Area Council acknowledgement with No. AN 1054, receipt of payment of ₦5,000.00 issued by AGIS, and sketch map;
- e) a letter of request for the return of three landed property documents in the possession of the claimant written to the claimant by the 2nd defendant dated the 3rd day of July, 2018 which is marked as EXH. 'D2';
- f) EXH. 'D3' which is a writ of summons under the undefended list dated the 9th day of April, 2018;
- g) EXH. 'D4' which is the ruling per Valentine B. Ashi J. (of blessed memory) dated the 12th day of March, 2019.

Accompanying the Notice of intention to defend is a written address proffered by the counsel to the defendants.

The counsel to the claimant filed a twenty three paragraphed further and better affidavit deposed to by Suzan Dung, a staff in the employment of the claimant.

Accompanying the further and better affidavit are the following documents;

- a) EXH. 'A & C 01' which is the Board resolution of the claimant;
- b) EXH. 'A & c 02' which is a Notice of Appeal filed against the ruling of Valentine B. Ashi J. dated the 4th day of April, 2019.

Thus, let me appraise and summarize the affidavits of both parties more particularly that of the defendant with a view to see whether there is a defence on the merit to warrant this court to transfer the matter to the general cause list. See the case of **Amede V. U.B.A. Plc (2018) All FWLR (pt 936) 1571 at 1580 paras. C-F** where the Supreme Court held that in an

action brought under the undefended list procedure, the court is required to consider only the evidence contained in the affidavit filed by the defendant in support of the notice of intention to defend the suit. It is stated in the affidavit in support of the writ that the 1st defendant as a customer of the claimant, applied through its letter dated the 20th day of January, 2015 for an overdraft facility of ₦15,000,000.00 (Fifteen Million Naira) to enable the defendant breach (bridge) cash flow gap for its business, and the facility was granted to the 1st defendant for overdraft of the said sum, and that the offer letter contained the following terms below:

- a) Lender – Hasal Microfinance Bank Limited;
- b) Facility type – overdraft/increment
- c) Borrower – MGSL Mortgage Bank Limited,
- d) Amount – N15,000,000.00,
- e) Tenor – 90 days,
- f) Purpose – to enable customer breach (bridge) cash flow gap;
- g) Interest – 3% monthly,
- h) Repayment – monthly repayment of interest and bullet repayment of principal at the end of the facility period.

It is also deposed to the fact that the terms were accepted by the 1st defendant in a letter dated the 21st day of January, 2015 and the 2nd defendant executed a personal guaranty securing the credit facility of ₦15,000,000.00, and the 1st defendant in compliance with the terms executed covenant of stock/Asset takeover upon default and covenant of cash lodgment in favour of the claimant.

It is deposed to the fact that the 1st defendant upon the expiration of the 90 days defaulted and failed to liquidate the indebtedness.

It is also in the affidavit that after several demands from the claimant, the 1st defendant on the 8th of May, 2015 two months after the expiration of the overdraft applied for extension of the facility for a period of 180 days, and the application was considered by the claimant and still at the expiration of the six months, the 1st defendant failed or refused to pay the facility, and all attempts were

made by the loan Recovery department of the claimant but the defendants refused.

It is stated that considering the amount involved and the interest rate in the facility, the claimant through its Board of Directors resolved that the defendants should provide a substantial collateral to secure the facility of the balance be immediately paid, and that the defendants failed to pay.

It is in the affidavit that now the facility has risen to the tune of ₦55,809,804.83k (Fifty five million, Eight hundred and Nine thousand, Eight hundred and four, Eighty three kobo).

The defendant in his affidavit in support of the notice of intention to defend this action stated that the 2nd defendant acted on the capacity of an agent of the 1st defendant or no more.

It is also stated that before granting a loan facility of ₦15,000,000.00 to the 1st defendant by the claimant, it was agreed with the claimant that if the 1st defendant is unable to repay the loan, the claimant shall be at liberty to dispose of the 1st defendant's collateral title documents at plot No. 29, measuring 38.96 hectares and plot No. 28, measuring 37.95 hectares both created at Dobi Kaida Estate, Gwagwalada Abuja respectively, and the title documents are in possession of the claimant.

It is also in the affidavit that the 2nd defendant gave to the claimant plot No. 1786 measuring 5.970m², plot No MF1711 measuring 1.50m² and plot No. 1710, measuring 1.502m² all located at Bamashi Layout, Kuje, Abuja and plot No. MF 26 measuring 8000m² located at within Outer Northern Express way Kubwa, with the understanding to return the original certificate of occupancy for Dobi Kaida Estate plots at Gwagwalada to enable the 2nd defendant to sell, and the claimant collected two plots of land located at Kuje, Abuja, and the value is in the sum of ₦200,000,000.00.

It is in the affidavit in support of the notice of intention to defend that the 2nd defendant wrote a request dated the 3rd day of July, 2018 for the return of the (3) three landed property which the claimant collected but refused to endorse same.

It is stated that from the overdraft offer letter the processing fee payable upfront is 3% of ₦15,000,000.00 which amounted to

₦450,000,000.00, but the claimant charged the sum of ₦472,500.00 in violation of the terms and conditions of the offer, and that the overdraft offer stipulated the sum of N3.00 for every N1,000 of the old amount which amounts to N45,000 but the claimant charged the 1st defendant N87,000, and that from the above excesses, and obvious charges, it is obvious that the claimant set out abinitio to short change the 1st defendant.

It is stated that the 2nd defendant requested for statement of account of the 1st defendant wherein arbitrary charges outside the terms of the overdraft facility was discovered.

It is also in the affidavit that the pieces of evidences contained in this present suit is totally the same with the one in the case of **Hasal Micro Finance Bank Ltd V. BDA Ltd & 1 or** with suit No. FCT/HC/457/18 already dismissed by His Lordship Valentine B. Ashi J. on the 12th of March, 2019, and that the parties in this suit are the same with the one dismissed, and that the claimant is estopped in law from bringing this action.

It is also stated that no Board resolution of the claimant was sought and obtained before filing this action; and that this action is defeated by the doctrine of estoppel.

Thus, it has become an established principle of law that a plaintiff under the rule has to comply strictly with rules of court while filing a suit under the undefended list procedure. See the case of **Uko V. Eupenyong (2006) All FWLR (pt 324) p. 1931 at 1947 paras. A – B** where the Court of Appeal Calabar Division held that a plaintiff's action under the undefended list procedure has to comply strictly with the relevant rules of court so as to avoid any injustice being occasioned to the defendant whose right to defend the case has then been abridged. It is against this background that I have to look at the propriety of the plaintiff filing a further and better affidavit in this case, and therefore, recourse has to be had to the provisions of Order 35 of the rules of this court. I have combed the whole provisions of Order 35 of the rules of this court, and I have not seen where it is provided that the plaintiff or claimant can file a further and better affidavit, and to my mind, this is an innovation the counsel to the claimant wants to introduce, though not allowed by the rules of this court. See the case of **Inter-markets (Nig) Ltd V. Unity**

Bank Plc (2011) All FWLR (pt 584) p. 189 at pp. 195 – 196 paras. F-F where the Court of Appeal, Kaduna Division held that the undefended list special procedure does not admit of filing of a further and better affidavit because in planning the suit under the undefended list for hearing, it is only the averments in the affidavit filed in support of the claim stating grounds upon which the claim is based that the trial court has to examine.

To this, I will not even waste the time of this court in examining the further and better affidavit filed by the claimant, and to this I so hold.

It is the primary duty of this court, in this action to look at the affidavit with a view to decipher, if the defendant has shown a prima facie defence on the merit of triable issue. See the case of **Federal Polytechnic, Offa V. UBA Plc (2014) All FWLR (pt 737) p. 746 at 776. Paras. D-E**, Therefore, what the defendant in an affidavit needs to show are:

- a) It should condescend upon particular and as far as, possible, deal specifically with the plaintiff's claim and affidavit and state clearly and concisely what the defence is and what facts are relied on as supporting it;
- b) State whether the defence goes to the whole or part of the claim, and in the later case, specify the part;
- c) Where the defence is that the defendant is not indebted to the plaintiff, state the grounds on which the Defendant relies as showing that he is not indebted. A mere general denial that the defendant is not indebted will not suffice.
- d) Where the affidavit states that the defendant is not indebted to the plaintiff in the amount claimed many part thereof, state why the defendant is not indebted, and to state the real nature of the defence relied upon;
- e) Where the defence relied on is fraud, state the particulars of the fraud. A mere general allegation of fraud is useless;
- f) If a legal objection is raised, state clearly the facts and the part of law arising there from;
- g) In all cases, give sufficient facts and particulars to show that there is a bonafide defence. See the case of **Obi Tude**

V. Onyesom Community Bank Ltd (2014) All FWLR (pt 739)p. 1103 at pp 1127 – 1128 paras. D – A.

Thus, it was held in the case of **Chimezie V. Nwaturuocha (2016) All FWLR (pt 823) p. 1963 at 1978 paras. D-H** by the Court of Appeal, Owerri Division that it is the duty of the court while considering depositions in the undefended list procedure to look at the facts averred in the defendant's affidavit in support of the notice of intention to defend and see if those facts prima facie support a defence to the action on the merit. It is based upon the above authority, I have to now have recourse to the affidavit of the defendant with a view to see whether those facts and particulars as are adumbrated above exist or any one of them exist. See also the case of **Wema Securities and Finance Plc V. Nigerian Agricultural Insurance Corporation (2015) All FWLR (pt 807) p. 427 at pp. 459-460 paras. H-D.**

It is in the affidavit in support of the notice of intention to defend that the 2nd defendant acted in the capacity of an agent of the 1st defendant, and that before granting the loan facility of ₦15,000,000.00 to the 1st defendant, it was agreed with the claimant that if the 1st defendant is unable to repay the loan, the claimant shall be at liberty to dispose of the 1st defendant's collateral in respect of lands, and this I refer to paragraph 4(j) of the affidavit, and by paragraph 4 (l) of the affidavit the original title documents are in possession of the claimant.

In paragraph 4(r) of the affidavit it is stated that the 1st defendant is not owing the claimant the alleged sum of ₦55,809,804.83k.

The defendant alleged of lack of sincerity in the transaction as per paragraph 4(s) 4(t) (u) (v) and x of the affidavit, the defendant alleged fraud. Also in paragraphs 5(a) (b) (c) (d) (f) and 6(a) (b) and (f) of the affidavit, the defendant raised issue of law.

The claimant in his claims include the cost of action to the tune of ₦1,000,000.00, and having looked at the documents attached to the affidavit in support of the writ by the claimant, I have not seen any receipt being attached covering such payment of cost of action, and by the affidavit of the claimants, it is not shown that there was a consensus between the claimant and the defendant in

that regard. See the case of **Federal Polytechnic, Offa V. UBA Plc (supra) per Ogunbiyi JCA at pp. 774 – 775 paras. F-A:**

“By the same token, the first respondent’s forth claim, cost of the suit, is miles away from liquidated money demand. To start with, no receipt was attached to show the cost of action. In the second place, the parties were never consensual as the payment of the cost of action. Besides, cost of the suit may be indeterminate or inestimable without further investigation as it can include filing fees for other processes, apart from the writ, and professional fees charged by counsel. In other words, the claim involves a list of variables and it cannot be arrived at without arithmetic calculation.”

Thus, it was held in the case of **S.N. Ltd V. H.G.R. Ltd (2017) All FWLR (pt 871) p. 1242 at 1263 paras E-G** that where a court proceeds under the undefended list procedure, it is desirable that it must call into play a measure of liberality when viewing the affidavit of the defendant in order to determine whether or not a defence on the merit is disclosed. If there are disputed issues of facts disclosed from a comparison of the plaintiff’s and defendant’s affidavits, then the court must transfer the suit to the general cause list for determination on the merits. In the instant case, having compared the affidavits of both parties, I have come to the conclusion that there is an allegation of fraud. See the case of **Chimezie V. Nwaturuocha (supra)**, and case of **Obitude V. O.C.B. Ltd (supra)** as per the criteria a defendant must satisfy in showing a defence on the merit which include in paragraph (e) that where the defence relied on is fraud, there is also an issue of law raised as to whether estoppel in this case operates. See the case of **Massken (Nig.) Ltd V. Amaka (2017) All NWLR (pt 899) p. 287 at 246 paras. D-F** where the court held that where however, serious disputes arise in affidavits on points of law relating to the claim, the trial court ought to exercise caution in entering judgment under the undefended list procedure and should transfer the matter from the undefended list to the general cause list.

Based upon the foregoing considerations, I have come to the conclusion that the defendant in his affidavit has successfully shown a defence on the merit and to that, I will not hesitate to do what is appropriate in the circumstances.

This matter is hereby transferred to the general cause list, and it is recommended that pleadings be filed accordingly.

Hon. Judge

Signed

10/10/19

Appearances:

Omoyele Ajibade Esq appeared for the claimant

I.F. Chude Esq appearing with E.F. Olowofela (Mrs) Esq and

W.I. Achuke Esq for the defendant.