

IN THE HIGH COURT OF FEDERAL CAPITAL TERRITORY

IN THE FEDERAL CAPITAL TERRITORY JUDICIAL DIVISION

HOLDEN AT JABI FCT ABUJA

SUIT NO: FCT/HC/CV/1093/2019

BEFORE HIS LORDSHIP: HON. JUSTICE BABANGIDA HASSAN

BETWEEN:

HON. DR. JOSEPH HARUNA KIGBU _____ CLAIMANT

AND

1. ALHAJI YAHAYA USMAN UMAR

2. CHEDI CONSTRUCTION COMPANY LTD

3. B.B. JADEJA (TRADING UNDER THE

NAME & STYLE OF TIRUPATI ENTERPRISES)

DEFENDANTS

Appearances:

Wilson E. Efora Esq appeared for the claimant.

Austin U. Nwora Esq appearing with Victor Izibili Esq appeared for the 1st and 2nd defendants.

JUDGMENT

By the writ of summons filed under the undefended list procedure dated the 14th day of February, 2019 whereof the claimant claims against the defendants as follows:

- 1) A declaration that the action of the defendants amount to conversion;
- 2) An order by this Honourable court directing the defendants to immediately refund the sum of Five Hundred and Forty Thousand United States of America Dollar (\$240,000) to the plaintiff being payment for the purchase of DTE Drilling Rig;
- 3) The sum of N2, 500,000 (Two Million, Five Hundred Thousand Naira only) being the cost of this suit.

The writ is accompanied by thirty three paragraphed affidavit deposed to by one Dr. Joseph Kigbu, being the claimant and he relies upon all the averments as are contained therein.

Attached to the writ are the following documents:

- a) The claimant's First Inland Bank statement;

- b) Claimant's First City Monument Bank Account statement;
- c) Claimant's First Bank Account statement;
- d) Claimant's Acknowledgement or receipt of the sum of Fifteen Thousand Dollars on behalf of the claimant;
- e) Email from the 1st defendant to the claimant;
- f) Letter of demand from claimant's solicitor to the 1st and 2nd defendant's solicitors;
- g) Receipt of professional fees paid by the claimant to his solicitors;
- h) Forms CAC 2 and CAC 7

The 1st and 2nd defendants filed a notice of intention to defend the suit which is accompanied by three paragraphed affidavit deposed to by Anthony Abba, the litigation secretary in the law firm of the counsel to the 1st and 2nd defendants, and in which they rely upon all the paragraphs as are contained therein. Attached to the notice of intention are the following documents:

- a) Evidence of transfer (TT copy) dated 27/04/12;
- b) Evidence of transfer (TT copy) dated the 3/06/2012;
- c) Evidence of transfer (TT copy) dated 04/09/2012;
- d) Evidence of transfer (TT copy) dated 21/12/2012;
- e) commercial invoice dated the 10th day of August, 2012;
- f) Commercial Packing list dated 10th August, 2012;
- g) E-mail dated 20/02/2017;
- h) Solicitors letter dated 21/06/2017;
- i) Letter of complaint to the IGP, dated the 01/03/2018.

The 3rd defendant was later served after an order of this court was granted for the service to be effected by substituted means, that is to say, by pasting all the court processes at the entrance gate or door of No. 28, Nouakchott street, Wuse Zone I Abuja and or by publication in a national newspaper and or to the e-mail address of the 3rd defendant which is waterdrilling@yahoo.com and was deemed a proper and effective service, however, the 3rd defendant did not file any notice of his intention to defend the suit.

Thus, let me at this juncture compare the affidavits of both the claimant and the 1st and 2nd defendants with a view to see whether there are disputed facts which will warrant this court to transfer this

matter to the general cause list. See the case of **Setraco (Nig) Ltd & 3 Ors v. Hildefma Global Resources Ltd (2017) All FWLR (pt 871) p. 1242 at 1263 paras. E – G.** and in doing that this court 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.

It is in the affidavit of the claimant that the 1st defendant introduced the 3rd defendant to the claimant, that the 3rd defendant owns a manufacturing company in India, and in which the claimant indicated interest in buying a DTE Drilling Rig, and the 3rd defendant agreed to manufacture a new DTE Drilling Rig for the claimant at the rate of Two Hundred and Forty Thousand dollars (\$240,000).

It is further stated that the 1st defendant guaranteed the delivery of the DTE Drilling Rig to the claimant within Six months from the date of the payment of the sum of N240,000= to the 3rd defendant through the 1st defendant.

It is also stated that the 1st defendant guaranteed the transaction by giving his company account details Chedi Construction company Ltd with RC Number 661730.

It is in the affidavit that on the 24th April, 2012 the claimant paid two cheques of N2,500,000= which was equivalent to Fourteen Thousand, Five Hundred United State American Dollars, and also the sum of N10,000,000= which was equivalent to \$ 60,000= dollars to Chedi Construction Company Ltd a company owned by the 1st defendant, it is further stated that on the 30th of May, 2012 the claimant made a payment of N5,200,000= which was equivalent to \$30,000= dollars to the same company in which the 1st defendant is the Managing Director and Chief Executive, and further, on the 30th of August, 2012 the claimant made payment of N8,000,000= which was equivalent to \$48,000= dollars to one Auwal Suleman Yusuf, who is a relative of the 1st defendant at the instance of the 1st defendant.

It is stated that on the 20th December, 2012, and on the instruction of the 1st defendant, the claimant made a payment of \$15,000= dollars in cash to 1st defendant's son by name Abdullahi Umar, and further on two occasions the claimant paid to the 1st defendant a total sum of \$72,500= dollars at the business premises of the 1st defendant at Gwarimpa, Abuja. It is then stated that the

claimant made a cumulative payment of the sum of \$240,000= dollars to the 1st defendant for a new DTE Drilling Rig. However, the 1st and 3rd defendants are yet to deliver the DTE Drilling Rig to the claimant despite incessant demands.

It also in the affidavit that on the 2nd January, 2013 the 1st defendant email the 3rd defendant that the claimant was yet to receive the DTE Drilling Rig, and the response of the 3rd defendant was forwarded to the claimant by the 1st defendant.

It is stated that the 1st and 3rd defendants kept up reassuring the claimant that the Rig was on transit and in which the 1st defendant sent to the claimant an email in Hausa Language informing the later that the Bill of lading has been sent to him, but later the 1st and 3rd defendants sent a message to the claimant that the Rig was lost due to an accident during the shipment, and on the 21st August, 2013 the 1st defendant sent an e-mail to the claimant apologizing for what had happened, and that the money paid was not lost.

It is stated that all efforts made to the defendants to refund the claimant's money, if they cannot deliver the DTE Drilling Rig, failed, and in which on the 12th June, 2017, claimant instructed his solicitors to write a demand letter to the 1st and 2nd defendants, and on the 21st June, 2017 the solicitors to the 1st defendant wrote a letter to the claimant in paragraph 4 of that letter, it was acknowledged the receipt of the sum of \$240,000= from the claimant.

It is also in the affidavit that the claimant has paid to his solicitors a part payment of the professional fees of N1,500,000= out of the sum of N2,500,000= charged.

It is stated that the claimant instructed his solicitors to conduct a search at the Cooperate Affairs Commission Abuja to determine the actual owners of the 2nd defendant and it was discovered that the 1st and 3rd defendants are substantial shareholders and Directors of the 2nd defendant (Chedi Construction Company Ltd) which this fact was concealed to the claimant, and the copies of forms CAC 2 and 7 of the 2nd defendant are attached and marked as Exh. 'P' and 'O' respectively.

The 1st and 2nd defendants stated in the affidavit attached to the notice of intention to defend this suit stated that it was one Abdullahi Gosh and the 3rd defendant that introduced the claimant

to the 1st defendant, and that the 3rd defendant and the claimant had concluded arrangement for the purchase of DTE Drilling Rig before approaching the 1st defendant requesting that the purchase price be transferred into the of the 1st defendant to the 3rd defendant, and that the transaction was purely between the claimant and the 3rd defendant, but that the 1st defendant was only a witness.

It is stated that the 1st defendant never agreed to guarantee the delivery of said DTE Drilling Rig to the claimant prior to the transaction as he has never represented himself as the representative of the 3rd defendant to the claimant. It is further stated that it was when the claimant mounted pressure on the 1st defendant when the 3rd defendant could not deliver as agreed the 1st defendant reassured claimant that he was going to do his best to ensure that the 3rd defendant delivers the product to the claimant.

It is stated that the claimant sent the money to the 1st defendant, and it was immediately transferred to the 3rd defendant, and in which the 3rd defendant acknowledged the receipt of the money and an email was sent to the claimant, and this terminates the relationship of the 1st defendant in the said transaction after the transfer of the money to the 3rd defendant, and further that the 3rd defendant through his company Tipupati Enterprise, sent a Commercial Invoice and Commercial packing cost to the claimant.

Thus, it was held by the Supreme Court in the case of **Amede V. U.B.A. Plc (2018) All FWLR (pt 936) p. 1571 at 1580 paras. C- F** 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. Once court comes to a conclusion that the affidavit does not disclose a defence on the merit or a triable issue, then the court is to proceed with the hearing of the suit as an undefended suit and enter judgment accordingly without calling on the defendant even if present in court to answer or be heard.

It is on the above authority that I have to further have recourse to the affidavit evidence of the defendant in support of his notice to defend the suit with a view to see whether the defence is on merit or that it discloses triable issues.

Under this procedure what is expected of the defendant by the law is to set out the defence and particulars of his defence. See the case of **Jolabon Investment Nigeria Ltd & 2 Ors v. Oyus International Company Nig. Ltd (2015) All FWLR (pt 788) pp. 840 – 841 para. C – C.**

By the affidavit in support of the notice of intention to defend by the defendant, it could be inferred that there was an agreement between the claimant and the 3rd defendant to manufacture DTE Drilling Rig to the claimant at the value of \$240,000= dollars.

It was also agreed by the claimant, the 1st and 3rd defendant that the money would be paid into the account of 2nd defendant which the 1st defendant is the Managing Director and Chief Executive.

It is also in the affidavit that the said sum of \$240,000= dollars was paid by the claimant to the 1st defendant through the account of the 2nd defendant, and this was acknowledged by the 1st defendant. It can also be inferred that the DTE Drilling Rig was not delivered to the claimant in spite of the complete payment of the sum of the \$240,000= made for the 1st defendant for onward delivery to the 3rd defendant.

It is also in evidence that both the 1st and 3rd defendant are the shareholder, and Directors of the 2nd defendant in whose account the sum of \$240,000= dollars was paid to, and these facts are not denied by the 1st and 2nd defendants in their affidavit, rather it was admitted.

What is left in contention is the link between the 1st and 3rd defendants and it was not the 1st defendant that introduced the 3rd defendant to the claimant, however, going by paragraph 30 of the affidavit accompanying the writ which this fact has not been denied by the 1st and 2nd defendants is that the 1st and 3rd defendants are the shareholders and directors of the 2nd defendant, and moreso, it was in the affidavit of the 2nd defendant that part of this sum of \$240,000.00 was paid to, and the rest of this amount was paid to the 1st defendant, one Abdullahi Umar and another Auwal Suleiman Yusuf, and all these facts are not denied by the 1st and 2nd defendants in their affidavit accompanying the notice of intention to defend. By all these, it could be inferred that there is a link between the 1st and 3rd defendant. Moreso, by the part payment out of the

\$240,000.00 which was made to the 1st defendant, it could also be inferred that there is a link between the 1st and 3rd defendants.

In addition that the 1st and 2nd defendants deposed to the fact in their affidavit accompanying the notice of intention to defend this suit that it was when the claimant mounted pressure on the 1st defendant when the 3rd defendant could not delivered as agreed that the 1st defendant assured him that the 3rd defendant could not deliver as agreed that the 1st defendant assured him the 3rd defendant could deliver the product and by this, it could be inferred to mean that there is a link between the 1st and 3rd defendants in respect of the transaction between the claimant and the 3rd defendant, and to this I so hold.

The sum of \$240,000= dollars is automatically ascertainable, and it is in respect of a contract for the supply of DTE Drilling Rig and this was well known by all the parties, and to this I so hold that the claim of the claimant is certainly one which constitutes liquidated money demand. See the case of **Chimezie V. Nwaturuocha (2016) All FWLR (pt 823) p. 1963 at 1978 paras. D – H** where the Court of Appeal, Owerri Division held, that it is not in every case in which a defendant files a notice of intention to defend, coupled with an affidavit that the court must transfer the suit from the undefended list to the general cause list. The determining factor usually is whether the affidavit filed by the defendant raises any bonafide defences on the merit, requiring a preliminary trial between the parties.

It is not the duty of the court while considering depositions in the undefended list procedure to determine at that stage whether the defence will succeed or not. Rather the duty of the court at that stage is to look at the facts averred in the defendant's affidavit in support of the notice of intention to defend to see if those facts prima facie support a defence to the action on the merit, in other words, the court is expected to consider the defendant's processes with a degree of liberality. The defendant must disclose sufficient facts from which the court can plainly discern the existence of a good defence as opposed to a sham defence, there must be in existence in the depositions of the defendant material triable issues worthy of further investigation at the plenary. In the instant case, let me reiterate further that the 1st and 2nd defendants are the share-

holders and directors of the 2nd defendant in whose account, part of the money was paid into, and this has not been disputed. It is also a fact that some part of the money was paid to the 1st defendant personally, and was also paid to one Abdullahi Umar, who is the son of the 1st of the defendant, and another Auwal Suleman Yusuf, and this fact is not denied, and the defendant admitted the fact that the sum of \$240,000= was paid to him and he onward delivered same to the 3rd defendant.

Now how could he exonerate himself from being linked to this transaction? Certainly the facts are very clear, and the defence given by the 1st and 2nd defendants is sham which does not need a plenary trial between both parties, and to this, I strongly hold.

The 3rd defendant was served with the writ by a substituted means via his e-mail address waterdrilling@yahoo.com through the e-mail address of one of the counsel to the claimant wilsonetosa@gmail.com, however, the 3rd defendant did not deem it appropriate to file a notice of his intention to defend the action and this places the 3rd defendant in an intolerably weak position to satisfy the court that he has a good defence. See the case of **Ikedigwe V. Fai (2011) All FWLR (pt. 598) p. 850 at 868 paras. B – D** and the ultimate to do by this court is to enter judgment against him. See Order 35 Rule 4 of the Rule of this court.

Thus, the claimant claims a declaration that the action by the defendants amount to conversion, and to this I make bold to say, a claim of declaratory relief does not fall within ambit of the undefended list procedure, this because a party who seeks the relief of a declaration whether of title to land or not, has the burden of proving his entitlement by advancing concrete, cogent and compelling evidence in support of the claim, and the court does not grant a declaratory relief to the claimant upon the weakness of the defence or the defendant's admission. See the case of **Sawaba V. Gaadi (2016) All FWLR (pt 823) p. 1866 at 1880 paras. B – C.** However, this is the case in a claim made under the undefended procedure whereby the court is enjoin to look at the affidavit evidence of the defendant accompanying notice of intention to defend and such affidavit must disclose a defence on the merit. See the case of **Federal Polytechnic Offa V. U.B.A. Plc (2014) All FWLR (pt**

737) p. 745 at 780 paras. B – D. Therefore, I so hold that the claim No. 1 does not fall within the claims that rules of this court envisaged, and it is hereby discountenance.

The claimant further claim the sum of N2,500,000= as cost of this action, to this, I also hold that this type of claim does not also fall within the claims envisaged by the rules of this court under undefended list procedure, this is because there is no receipt attached to the writ, and moreso there is no any consensus between the two parties that cost of litigation will be paid by defendant in the event the claimant is successful. See the case of **Federal Polytechnic Offa V. U.B.A. Plc (supra)**. Therefore, the claim No. 3 is discountenance.

On the whole, I am inclined to giving judgment in favour of the claimant based upon the foregoing considerations and analyses, and to this judgment is hereby entered in favour of the claimant.

The sum of the \$240,000= dollars or its equivalent as at time of the transaction be paid by the defendants to the claimant forthwith.

Signed
Hon. Judge
2/12/2019

