

IN THE HIGH COURT OF JUSTICE OF THE F.C.T.
IN THE ABUJA JUDICIAL DIVISION
HOLDEN AT APO, ABUJA
ON THURSDAY, THE 29TH DAY OF SEPTEMBER 2022
BEFORE HIS LORDSHIP: HON. JUSTICE ABUBAKAR HUSSAINI MUSA
JUDGE

SUIT NO.: FCT/HC/CV/748/2022

BETWEEN:

ALLIANZ BRIDGE FINANCE LIMITED

CLAIMANT

AND

1. YIBO ENTERPRISE LIMITED

2. YONTY ETOKHANA

3. MATHEW ETTA AGBOR

DEFENDANTS

JUDGMENT

By a Writ of Summons dated and filed on the 7th of January 2022 and brought under the Undefended List, the Claimant claimed against the Defendants as follows:

- 1) *The sum of ₦15,199,569.89 (Fifteen Million, One Hundred and Ninety-Nine Thousand, Five Hundred and Sixty-Nine Naira, Eighty-Nine Kobo) being the sum indebted to the Claimant.*
- 2) *10% post-judgment interest per month until it is fully liquidated by the 1st, 2nd and 3rd Defendants.*
- 3) *Cost of action as may be awarded by the Court.*

In support of this Writ of Summons on the Undefended List is a 13-paragraph affidavit deposed to by one Emmanuel Aduku Edime, who described himself

therein as the Assistant Manager in the employ of the Claimant. The Claimant also attached two exhibits which it marked **Exhibits 1 and 2**.

According to the deponent who averred to the facts which he believed constituted the case of the Claimant, the Claimant had granted a facility which aggregate sum was ₦23,280,000.00 (Twenty-Three Million, Two Hundred and Eighty Thousand Naira) only. According to **Exhibit 1** which is the Letter of Offer of the facility, this aggregate sum was made up of a consideration of ₦2,400,000.00 (Two Million, Four Hundred Thousand Naira) only, the net facility amount of ₦17,400,000.00 (Seventeen Million, Four Hundred Thousand Naira) only and the default charge of ₦3,480,000.00 (Three Million, Four Hundred and Eighty Thousand Naira) only. Out of this aggregate sum, the amount due to the Claimant from the Defendants as at the 19th of November, 2021, the deponent further averred, was the sum of ₦15,199,569.89K (Fifteen Million, One Hundred and Ninety-Nine Thousand, Five Hundred and Sixty-Nine Naira, Eighty-Nine Kobo) which the Defendants have refused, failed or neglected to pay despite several demands for same. **Exhibit 2** is one of such demands. It is titled "Demand Notice for Payment".

In the written address in support of the Writ of Summons on the Undefended List, learned Counsel for the Claimant formulated one Issue for determination, which is "*Whether from the facts and circumstances of this case, the Claimant has made out a case to entitle the Claimant the (sic) reliefs sought and the judgment of the Honourable Court, since the action brought (sic) under the undefended list*". Arguing this sole issue, learned Counsel provided the appropriate circumstances under which an action for a claim under the undefended list proceeding can be brought. He further submitted that what the Court was required to do in such circumstances was to examine the file to

ascertain whether the affidavit filed in support of the notice of intention to defend had disclosed a defence on the merit. In the absence of such process, he further submitted, the Court had a bounden duty to proceed to give judgment on the basis of the claim of the Claimant.

Learned Counsel referred the Court to the documents attached to the affidavit as exhibits. He further pointed out to the Court that the Defendants have rejected all overtures to pay the due sum. He therefore invited the Court to enter judgment in favour of the Claimant. For all his submissions, learned Counsel cited and relied on the following cases: ***Ben Thomas Hotels Ltd v. Sebi Furniture Ltd (1989) 5 NWLR (Pt. 123) 523 at 525 Ratio 3, Rivers State Government v. Specialist Konsult (2001) FWLR (Pt. 72) 2068 at 2071 Ratio 3, Danfulani v. Shekari (1996) 2 NWLR (Pt. 443) 723 at 726 Ratios 1 and 2, Dala Air Services v. Sudan Airways (2005) 3 NWLR (Pt. 912) 394 Ratio 1, Nya v. Edem (2000) 8 NWLR (Pt. 699) 349, Ataguba & Coy v. Gura (2000) FWLR (Pt. 24) 1522, Udemba v. Morecab Finance Nig. Ltd (2001) FWLR (Pt. 85) 317 at 319 Ratio 4, F.M.S.T. v. F.M.W.H. (2009) 17 NWLR (Pt. 1171) 510 at 513 Ratio 6, Arabambi v. Advance Beverages Ind. Ltd (2005) 19 NWLR (Pt. 959) 1 at 9 Ratio 11 and Amacheree v. Princewill (2008) 12 NWLR (Pt. 1098) 345 at 353 Ratio 8.***

The above is the case of the Claimant. None of the Defendants filed any Notice of Intention to Defend in response to the suit of the Claimant on the Undefended List. Further, none of them appeared in Court, either in person or through their legal representations, throughout the days the matter came up in this Court.

This suit came up for hearing for the first time on the 19th of May, 2022. On that day, learned Counsel for the Claimant moved the Motion *Ex Parte* with

Motion Number M/2546/2022 which was dated the 3rd of March, 2022 but filed on the 7th of March, 2022 praying for an Order of Mareva injunction against the Defendants, an application this Court granted. The Court, thereafter, adjourned the suit to the 7th of July, 2022 for hearing. On that day, however, learned Counsel for the Claimant, after praying the Court to discharge the respondent banks from the Mareva injunction so that this Court could proceed with the substantive suit – an application the Court granted – proceeded to argue his Writ of Summons on the Undefended List. This Court, after the submissions of learned Counsel for the Claimant, accordingly adjourned this suit to today, the 29th of September, 2022, for Judgment.

In determining this suit, I shall formulate one Issue to guide the Court in this regard. The Issue is this: ***“Whether the Claimant has not established the liability of all the Defendants to it in respect of the liquidated sum claimed in the Writ of Summons under the Undefended List Procedure?”*** In resolving this Issue, it is important to consider the relevant provisions of the High Court of the Federal Capital Territory, Abuja (Civil Procedure) Rules, 2018. The relevant Order is Order 35. Rule 1(1) of the Order provides that,

“Where an application in Form 1, as in the Appendix is made to issue a Writ of Summons in respect of a claim to recover a debt or liquidated money demand, supported by an affidavit stating the grounds on which the claim is based, and stating that in the deponent’s belief there is no defence to it, the judge in chambers shall enter the suit for hearing in what shall be called the “Undefended List”.”

In *Kingtongy Ventures (Nig.) Ltd & Anor V. E-BARCS Microfinance Bank Ltd (2022) LPELR-57087(CA)* at pp. 13 – 15, paras C - A, the Court of Appeal Per Haruna Simon Tsammani, JCA held that,

“The purpose of allowing actions under the undefended list procedure, is to ensure justice to the claimant by avoiding delay where there is obviously no defence to his claim... Of course, it is not debatable that, rules of Court are meant to ensure justice to the parties by hearing their cases on the merit with minimum delay. See *University of Benin v. Kraus Thompson Organisation Ltd (2007) 14 NWLR (Pt. 1055) 441, United Bank for Africa Plc. V. Jargaba (2007) 11 NWLR (Pt. 1045) 247, G.M.O. Nworah & Sons Co. Ltd. v. Afam Akputa Esq (2010) 9 NWLR (Pt. 1200) 443 and Obaro v. Hassan (2013) 8 NWLR (Pt. 1357) 425. See also Bona v. Textile Ltd. & Anor v. Asaba Textle Mill Plc. (2013) 2 NWLR (Pt. 1338) 357...”*

The Supreme Court per Rhodes-Vivour, JSC had held earlier in *MC Investment Markets Ltd v. Core Investments & Capital Markets Ltd (2012) LPELR-7801 (SC)* that,

“The procedure ... is designed to prevent delay in cases where the plaintiff has a clear case and the defendant has no defence. So, where the plaintiff satisfies the Court with affidavit evidence which the defendant cannot answer, the Court would enter judgment for the plaintiff thereby avoiding a full blown trial with the usual expense, frustrations and delay. If the defendant files an affidavit disclosing a defence on the merit, he would be granted leave to defend by the Court, and if there are conflicts in

the affidavits of both parties, the suit would be taken out of the undefended list and placed in the general list for hearing in the well-known way. It prevents worthless and sham defences...

To qualify for hearing under the Undefended List Procedure, the following conditions must be satisfied. First, the sum due and claimed must be a liquidated sum, that is, it must be a certain and definite sum and same must have accrued. Second, the Claimant must believe that the Defendant has no defence on the merit to the suit. This belief must not be subjective, but, rather, must be borne out of the facts of the suit as disclosed in the affidavit in support of the Writ of Summons. Once the Claimant's suit satisfies these conditions, then, the Claimant is entitled to the activation of Order 35 of the Rules of this Court for a quick and speedy recovery of the debt or liquidated money demand. See the case of ***Kingtong Ventures (Nig.) Ltd & Anor V. E-BARCS Microfinance Bank Ltd (2022) supra at pp. 15 – 16 paras A – D per Tsammani, JCA*** where the Court held that,

“Before a claim can be situated under the undefended list, the claim must be either a debt or a liquidated sum or money demand. A liquidated money demand is a claim for a sum certain or specific amount and there is nothing more that needs to be done to determine the quantum or effect of the defendant's liability. It therefore means that when the claim or amount to be recovered, if the claim succeeds, has not been agreed upon but depends on circumstances or is determined by opinion or estimate, it will not be a claim for liquidated money demand. In other words, the amount claimed must be ascertained or capable of being ascertained as a matter of simple arithmetic or

calculation without any further investigation. See Etukudo & Anor v. Akpan (2013) LPELR - 20414 (CA), Maja v. Samouris (2002) 7 NWLR (Pt. 765) 78, Effanga v. Rogers (2003) FWLR (Pt. 157) 1058, Champion Breweries Plc. V. Matsgal Nigeria Ltd (2009) LPELR- 8704 (CA) and Wema Securities & Finance Plc. v. Nigeria Agricultural Insurance Corp. (2015) 16 NWLR (Pt. 1484) 93. In the case of G.M.O.N. & S. Co. v. Akputa (2010) 9 NWLR (Pt. 1200) 443 at 463, the Supreme Court stipulated the factors to be considered in determining whether a claim is for liquidated money demand as follows: “The factors for determining are as follows: (a) the sum must be arithmetically ascertainable without further investigation; (b) if it is in reference to a contract, the parties to the contract must have mutually and unequivocally agreed on a fixed amount payable on breach; (c) the agreed and fixed amount be known prior to the breach.” It therefore means that, where the amount claimed can be ascertained by arithmetical calculation or is fixed by a scale of charges, or other positive data before the Court, it can be said that the claim is for liquidated money demand and therefore a proper case for determination under the undefended list.”

How has the suit of the Claimant satisfied these conditionalities?

First, the claim of the Claimant is for a liquidated sum. In the Writ of Summons, the Claimant is claiming *inter alia* “The sum of ₦15,199,569.89 (Fifteen Million, One Hundred and Ninety-Nine Thousand, Five Hundred and Sixty-Nine Naira, Eighty-Nine Kobo) being the sum indebted to the Claimant”. This is a liquidated sum. By virtue of **Exhibits 1 and 2**, the sum due to the Claimant

from the 1st and 2nd Defendant is the sum contained in the claim as stated above. Second, there is no doubt as from whom this liquidated sum is due and to whom it is due. Third, by virtue of **Exhibit 2**, the Claimant made a demand for this liquidated sum but the 1st and 2nd Defendants had yet to accede to this demand for payment, thereby leading the Claimant to bring this suit to recover the said sum.

It is instructive to note that none of the Defendants filed a Notice of Intention to Defend disclosing a defence on the merit. In such a circumstance, the provisions of Order 35 Rule 4 of the Rules of this Honorable Court automatically becomes applicable. Order 35 Rule 4 provides as follows:

“Where a defendant neglects to deliver the notice of defense and an affidavit prescribed by Rule 3 or it is not given leave to defend by the court, the suit shall be heard as an undefended suit and judgment shall be given accordingly.”

In ***Jafaru Muhammadu Ladan v. Alhaji Zubairu Adamu (2022) LPELR-56569(CA) at p. 15, paras A – B***, the Court of Appeal per Ita George Mbaba, JCA held that

“By law, a case placed on the Undefended List is due for hearing on the return date once there is no Notice of Intention to defend the suit, backed by Affidavit, disclosing credible defence on the merit.”

It is settled that the Court is at liberty to treat as admitted averments in the affidavit of the Claimant in support of its claim where the Defendant had opportunity to counter the said averments but chose to tread the path of indifference and inaction. In such circumstances, the affidavit of the Claimant,

as in this case, will be treated for all purposes as unchallenged and uncontroverted evidence. In **Comrade Kiri Mohammed & Anor v. Comrade Benson Ekasa & Ors (2022) LPELR-57133(CA)**, the Court of Appeal held at **p. 20, paras D – F** per Uchechukwu Onyemenam, JCA that, **“The position of the law is settled that the content of an affidavit can only be challenged by a counter-affidavit. The Court is required to treat unchallenged and uncontroverted depositions of facts in an affidavit as duly established. See Mabamije v. Otto (2016) 13 NWLR (PT. 1529) 171 (SC), Ogoejefo v. Ogoejefo (2006) 3 NWLR (PT.966) 205 (SC), Ujomu v. Olafimihan (2021) 19 NWLR (PT. 1784) 331 CA.”** In **Central Bank of Nigeria v. Dauda D. Jubril & Ors (2022) LPELR-57185(CA)** at **pp. 33 – 35, paras F - A**, the Court of Appeal held per D. Z. Senchi, JCA held that **“On the effect of uncontroverted facts in an Affidavit, this Court held in the case of NIPCO Plc v. Hensmor (Nig.) Ltd (2011) LPELR-9264 as follows: “Once averments in an Affidavit are not effectually denied or controverted, the Court is bound to accept and act upon such depositions as representing the correct and true position of the facts so deposed...”**

Similarly, in **Lagos State University & Anor v. Taiwo Adegboyega Ganiyu (2022) LPELR-56873(CA)** at **pp. 24-26, paras. D-A**, the Court of Appeal, speaking through the Honourable Justice Obande Festus Ogbuinya, eloquently stated the position of the law as follows:-

“It is imperative to observe, pronto, that the record, the bedrock of the appeal, revealed that the appellants were duly served with all the processes encompassed in the respondent's application. Curiously, the appellants, in their infinite wisdom, failed to file a counter-affidavit or any process to neutralise the critical

averments in the application. Put simply, the appellants starved the lower Court of any evidence refuting the allegations levelled against them. In essence, the crucial averments in the respondent's affidavit were not controverted. In the eyes of the law, those pungent depositions remained unchallenged. The law grants the Court the unfettered liberty to act on unchallenged affidavit. See Olofu v. Itodo (2010) 18 NWLR (Pt. 1225) 545; Uzodinma v. Izunaso (No.2) (2011) 17 NWLR (Pt. 1275) 30; Eyiboh v. Abia (2012) 16 NWLR (Pt. 1325) 51; Tukur v. Uba (2013) 4 NWLR (Pt. 1343) 90; Inegbedion v. Selo-Ojemen (2013) 8 NWLR (Pt. 1356) 211; Danladi v. Dangiri (2015) 2 NWLR (Pt. 1442) 124; APC v. INEC (2015) 8 NWLR (Pt. 1462) 531; Ezechukwu v. Onwuka (2016) 5 NWLR (Pt. 1506) 539; Owuru v. Adigwu (2018) 1 NWLR (Pt. 1599) 1. The caustic effect of the appellants' costly neglect is plain. They failed to deflate the respondent's claim of ownership of the toyota bus. In the mind of the law, in the absence of a counter-affidavit, the appellants admitted in toto all the respondent's assertions inclusive of his ownership of the toyota bus. What is admitted does not need further proof. In the presence of the undiluted admission, the lower Court paid due allegiance to the law when it granted the respondent's reliefs relating to the seized toyota bus.”

Such is the fate of the Defendants in this suit; and, certainly, that is the fate that must, perforce, befall the 1st and 2nd Defendants as can be seen from paragraphs 8, 9 and 10 of the affidavit in support of the Writ of Summons on the Undefended List and **Exhibits 1 and 2** attached to the affidavit. But, can same be said of the 3rd Defendant?

I have gone through the affidavit in support of the Writ of Summons on the Undefended List. The contract for the grant of loan facility is between the Claimant and the 1st Defendant with the 2nd Defendant standing in as the alter-ego of the 1st Defendant. The only paragraph where the 3rd Defendant was mentioned specifically was paragraph 7. In that paragraph, the Claimant, through the deponent, sought to establish a cause of action against the 3rd Defendant when the deponent averred that *“That I know of a fact that the 3rd Defendant is the marketer that procured and packaged the facility, persuading the Plaintiff thereof, presenting the 1st and 2nd Defendants as being capable of paying back the facility if granted hence the need to make the 3rd Defendant a party to this action.”* Apart from this paragraph, the Claimant did not exhibit any agreement of indemnity between the Claimant and the 3rd Defendant wherein the 3rd Defendant indemnified the Claimant in the event of default by the 1st and 2nd Defendant. There is no undertaking or a guarantee by the 3rd Defendant that he would be liable to the Claimant in respect of the full sum or the sum outstanding from the 1st and 2nd Defendants in the event of any default on the 1st and 2nd Defendants to liquidate the sum. In the absence of any of these documents, the Claimant cannot proceed against the 3rd Defendant merely on the ground that the 3rd Defendant, acting in the ordinary course of his business as a marketer, introduced the 1st and 2nd Defendants to the Claimant.

This Court is a Court of justice as well as a Court of law. Though the 3rd Defendant did not file any process in opposition, this Court cannot, in all good conscience, make him liable either alone or jointly with the 1st and 2nd Defendants to the Claimant in respect of the sum claimed in this suit when the Claimant has not made out a cause of action against him. In the case of ***Isah v. State (2022) LPELR-57411 (CA) at p. 23, paras B – E***, the Court of Appeal

per Abiru, JCA held that ***“It is settled law that a Court is obliged to treat unchallenged evidence on a material fact as true, cogent and credible and to act on it, unless the evidence is patently incredible.”*** It is my considered view, and I so hold, that insofar as the evidence of the Claimant relates to the liability of the 3rd Defendant under the contract for loan facility between the Claimant and the 1st and the 2nd Defendants, the evidence of the Claimant against the 3rd Defendant as contained in paragraph 7 of the affidavit in support of the Writ of Summons, though it may be true, is not cogent enough for this Court to act on it.

The Rules of this Court is unambiguous on the requirements that must be satisfied before a person can be joined as a Defendant in a suit. Order 13 Rules 4 and 7 provide that,

(4) “Any person may be joined as defendant against whom the right to any relief is alleged to exist, whether jointly, severally or in the alternative. Judgment may be given against one or more of the defendants as may be found to be liable, according to their respective liabilities, without any amendment.”

(7) “A claimant may at his option join as parties to the same action, all or any of the persons severally or jointly and severally, liable on any contract, including parties to bills of exchange and promissory notes.”

When these provisions are juxtaposed with the averments of the deponent in the affidavit in support of the Writ of Summons on the Undefended List, it becomes immediately obvious that the Claimant has not established the right to any relief against the 3rd Defendant in respect of the contract of loan

between it and the 1st and the 2nd Defendants. See the cases of *A.G. Edo State v. Akere & Others (2018) LPELR-45260 (CA) at 11 – 14, paras E - B; Akio & Others v. Ikogha & Others (2022) LPELR-57101 at pp. 43 – 44, paras C – E; Gold & Another v. AMCON (2022) LPELR-57232 (CA) at p. 45, paras A – E* and *Olusanya v. Abegunde & Others (2019) LPELR-47055 (CA) at p. 16, paras C – E* among others. In view of the foregoing, therefore, I find that the joinder of the 3rd Defendant in this suit is, therefore, improper. I so hold.

In view of this, therefore, the claim of the Claimant, insofar as it relates to the 3rd Defendant, fails. I so hold. Having made this finding, therefore, I hereby exercise my powers under Order 13 Rule 18(2) of the Rules of this Court to expurgate the 3rd Defendant as a party in this suit. Accordingly, the 3rd Defendant is hereby absolved of any liability to the Claimant in respect of the claims contained in the Writ of Summons before this Honourable Court. I so hold.

With regards to the 1st and 2nd Defendant, I find the suit of the Claimant meritorious and, accordingly, enter Judgment in favour of the Claimant and against the 1st and 2nd Defendants as follows:-

- 1. THAT the 1st and 2nd Defendants are hereby ordered to pay to the Claimant jointly and severally the sum of ₦15,199,569.89 (Fifteen Million, One Hundred and Ninety-Nine Thousand, Five Hundred and Sixty-Nine Naira, Eighty-Nine Kobo) being the sum outstanding on the facility which the Claimant granted to the 1st and 2nd Defendants and which sum has remained unpaid.**

2. THAT 10% post-judgment interest per annum is hereby awarded on the liquidated sum from the date of Judgment until the sum is fully liquidated by the 1st and 2nd Defendants.
3. THAT this Court hereby awards the sum of ₦200,000.00 (Two Hundred Thousand Naira) only as the cost of action against the 1st and 2nd Defendants and in favour of the Claimant.
4. THAT the 3rd Defendant is hereby removed as a party in this suit and, accordingly, hereby absolved of any liability to the Claimant with regards to the claims contained in the Writ of Summons before this Court.
5. THAT the Order of Mareva Injunction which this Honourable Court made on the 19th of May, 2022 is hereby set aside.

This is the Judgment of this Honourable Court delivered today the 29th day of September, 2022.

HON. JUSTICE A. H. MUSA
JUDGE
29/09/2022

APPEARANCES:

FOR THE CLAIMANT:

O. N. Kelvin Esq.

FOR THE DEFENDANTS

No legal representation.