

**IN THE HIGH COURT OF JUSTICE OF THE FEDERAL CAPITAL  
TERRITORY IN THE ABUJA JUDICIAL DIVISION  
HOLDEN AT MAITAMA ABUJA  
BEFORE HIS LORDSHIP: HON. JUSTICE JUDE O. OKEKE**

**ON WEDNESDAY 29<sup>th</sup> DAY OF JANUARY, 2020**

**SUIT NO: FCT/HC/CV/2927/2017**

**BETWEEN:**

**MUKHTAR MOHAMMED DIKKO**

*(Trading under the name and style*

*Of Design Matrix Associates) ..... CLAIMANT.*

**AND**

- |     |                                     |   |                       |
|-----|-------------------------------------|---|-----------------------|
| (1) | <b>NICON HOTELS LIMITED</b>         | } | <b>.. DEFENDANTS.</b> |
| (2) | <b>NICON INSURANCE LIMITED</b>      |   |                       |
| (3) | <b>NICON PROPERTIES LIMITED</b>     |   |                       |
| (4) | <b>NICON GROUP OF COMPANIES PLC</b> |   |                       |
| (5) | <b>ROCKY BASE LTD</b>               |   |                       |

**RULING**

By a Writ of Summons filed on 20/11/2017, the Claimant commenced the instant action under the Undefended List procedure against the Defendants. It claims as follows against them.

- “1. AN ORDER directing the 1<sup>st</sup>-4<sup>th</sup> Defendants jointly and severally to pay to the Plaintiff (SIC-Claimant) the sum of ₦20,538,872.11 (Twenty Million Five Hundred and Thirty Eight Thousand, Eight Hundred and Seventy Two

Naira, Eleven Kobo) being the outstanding sum due to the Claimant for the consultancy and additional services rendered by the Claimant in respect to (SIC-of) the construction of **NICON BANDEATS FOOD PROJECT JABI ABUJA.**

- (2) AN ORDER directing the 1<sup>st</sup> - 4<sup>th</sup> Defendants jointly and severally to pay to the Claimant interest on the judgment sum at the rate of 10% interest per annum from the date of judgment until the judgment debt is fully liquidated.
- (3) AN ORDER directing the 1<sup>st</sup> - 4<sup>th</sup> Defendants jointly and severally to pay to the Claimant his full tax costs of the prosecution of this suit.”

The Writ was filed along with a 34-paragraph affidavit deposed to by the Claimant.

In response, the 1<sup>st</sup> to 4<sup>th</sup> Defendants on 23/12/2017 filed a Notice of Intention to Defend wherein they raised a Preliminary Objection along with a 29-paragraph affidavit deposed to by Mohammed Alil.

On 13/12/2017, the Claimant filed a 3-main paragraph counter affidavit in response to the 1<sup>st</sup> to 4<sup>th</sup> Defendants affidavit along with a Written Address.

On 19/2/2018, the 1<sup>st</sup> to 4<sup>th</sup> Defendants filed a Reply on points of law to the Claimant’s Written Address in support of his counter affidavit.

The 5<sup>th</sup> Defendant did not file any process though served with the Claimant’s and 1<sup>st</sup> to 4<sup>th</sup> Defendants processes.

At the hearing on 6/11/2019, Counsel for Claimant and 1<sup>st</sup> to 4<sup>th</sup> Defendants took their turns to address the Court while relying on their respective affidavits. Ruling was then reserved for today 29/1/2020.

I have give due consideration to the averments in the affidavit of the parties and submissions of their Learned Counsel. The cardinal issue that calls for determination is whether or not the Defendants' affidavits disclose a defence on the merit to justify their being granted leave to defend the suit and the consequential making of an order transferring the suit to the General Cause List for trial.

Order 35 Rules 1 to 5 make provisions guiding actions commenced under the Undefended List procedure.

Order 35 Rule 3(1) provides that:-

“Where a party served with the Writ delivers to registrar before 5days to the day fixed for hearing, a notice in writing that he intend, to defend the suit, 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.”

In Order 35 Rule 4, it is provided that:-

“Where a Defendant neglects to deliver the notice of defence and an affidavit prescribed by Rule 3(1) or is not given leave to defend by the Court, the suit shall be heard as an undefended suit and judgment given accordingly.”

By the foregoing provisions, the filing of a Notice of Intention to Defend and an affidavit disclosing a defence on the merit are imperative for the Defendant to be granted leave to defend the suit failing which judgment may be entered accordingly for the Claimant.

In this suit, Records show the 1<sup>st</sup> to 4<sup>th</sup> Defendants filed a Notice of Intention to Defend along with an affidavit. They also raised an objection against the competence of the Claimant's suit in their Notice of Intention to Defend. The notice of intention to defend was filed on 23/11/2017 before the suit was heard on 6/11/2019. It is thus properly before the Court.

This said, the next question is whether or not the affidavit discloses a defence on the merit. Judicial authorities have in the course of time laid down guides as to what a defendant's affidavit in an undefended List matter should contain for it to be said to disclose a defence on the merit. Suffice it to say that where a Defendant's affidavit raises a triable issue or disputes in a material form or questions the Claimant's claim such that further light or explanation needs to be shed by the Claimant on his claim, such an affidavit will be said to disclose a defence on the merit. See: - **AKINYEMI V. GOVERNOR, OYO STATE (2003) FWLR (Pt.140) p.1821; ATAGUGBA & CO V. GURA (NIG) LTD (2005) ALL FWLR (Pt.256) p.1217, IKPALA ESTATES HOTELS LTD V. NEPA (2004) ALL FWLR (Pt.236) p.362; IVAN V. BILANTE INT. LTD (1998) 5 NWLR (Pt.550) p.96. In NYA V. EDEM (2000) 8 NWLR (Pt.669) p.3491** the Court of Appeal took time to explain what is meant by a Defendants affidavit disclosing a defence on the merit. It held thus:-

“An affidavit disclosing a defence on the merit does not mean that the Defendant must show that his defence must succeed at any event or that he must show a rock proof or iron cast defence. All that it means is that the Defendant must show prima facie that he has a defence to the Plaintiff's action. The

defence may fail or succeed but it is not the business of the Court to determine that at this stage. This can only be done at trial.”

In this case, the gravamen of the Claimants case is that it is a firm of architect, Planners and Consultants which was engaged by the 1<sup>st</sup> Defendant for construction of “**NICON BRANDEAT FOOD PROJECT JABI ABUJA.**” The 4<sup>th</sup> Defendant is the parent company of the 1<sup>st</sup> to 3<sup>rd</sup> Defendants. The 5<sup>th</sup> Defendant is a company which acquired the above named project from the 4<sup>th</sup> Defendant.

On 10/4/2002 the 1<sup>st</sup> Defendant commissioned the Claimant as architects for the construction of the aforesaid project.

On 9/6/2003, the 1<sup>st</sup> Defendant by a letter attached as Exhibit B appointed the Claimant as Consultants on turnkey basis.

Following offers and Counter Offer between the parties as evidenced in letter attached as Exhibits C to E, on 29/4/2004, the 1<sup>st</sup> Defendant vide its Internal memo attached as Exhibit F approved a professional fee of ₦40,500,000.00 for the project in favour of the Claimant. The 1<sup>st</sup> Defendant paid a total sum of ₦33,716,166.39 out of the agreed professional fee of ₦40,500,000 to the Claimant leaving an outstanding balance of ₦7,081,015.29 even as the Plaintiff completed its work as required by the 1<sup>st</sup> Defendant.

Subsequently, after extensive discussions, the 1<sup>st</sup> Defendant engaged the Claimant to carry out renew/additional works and services as disclosed in the Minutes of Meeting attached as Exhibit H.

The Claimant later presented its bill for the renew/additional works in the sum of ₦1,586,827.53 as well as fees for additional services rendered after the initial contract period and additional designs in the sum of ₦11,871,029.29. The bill is attached as Exhibit J.

The 1<sup>st</sup> Defendant's total indebtedness to the Claimant regarding the project thus stands at ₦20,538,871.11. Attached as exhibit K is the Claimant's invoice showing the details of the indebtedness to the 1<sup>st</sup> Defendant.

The Claimant later gathered that the 2<sup>nd</sup> Defendant had acquired the majority shares and control of the 1<sup>st</sup> Defendant and intended to sell the project.

As a result of this, the Claimant vide a letter dated 23/9/2015 briefed the 2<sup>nd</sup> defendant of the project and demanded for payment of the outstanding debt owed to it which is in the sum of ₦20,538,871.11. A copy of the letter is attached as Exhibit M.

By a letter dated 5/10/2015, (attached as Exhibit N) the 2<sup>nd</sup> Defendant replied the Claimant's above mentioned letter and requested for further documents to enable it treat its demand. By a letter dated 15/10/2015 (attached as Exhibit O) the Claimant furnished the 2<sup>nd</sup> defendant, the documents requested of it.

The 2<sup>nd</sup> Defendant thereafter neither treated the Claimant's demand nor replied the Claimants said letter of 15/10/2015.

On 7/6/2016, the Claimant wrote another letter (attached as Exhibit P) to the 2<sup>nd</sup> Defendant for payment of the said debt but the letter was not responded to.

By a letter dated 15/7/2016 and attached as Exhibit Q, the 5<sup>th</sup> Defendant wrote to the Claimant informing it that it has acquired the project from the 4<sup>th</sup> Defendant and wanted to engage its services.

On 17/8/2016, the Claimant's Solicitors wrote a final demand letter to the 2<sup>nd</sup> Defendant. The letter is attached as Exhibit R. By a letter dated 2/9/2016 attached as Exhibit S, the 2<sup>nd</sup> Defendant denied owning the project.

The Defendants have no defence to the suit.

In their affidavit, it was averred on behalf of the 1<sup>st</sup> to 4<sup>th</sup> Defendants that paragraphs of the Claimant's affidavit in support of the claim are denied except those expressly admitted. The Defendants deny paragraphs 1 and 2 of the Claimant's affidavit and admit paragraph 3 only to the extent that the 1<sup>st</sup> Defendant is a limited liability company and subsidiary of the 4<sup>th</sup> Defendant.

The Defendants admit paragraph 5 to 12 of the Claimants affidavit. However purported Internal Memo emanating from the 1<sup>st</sup> Defendant marked Exhibit F in the affidavit support of the Claimant's Writ did not emanate from the 1<sup>st</sup> Defendant.

The 1<sup>st</sup> to 4<sup>th</sup> Defendants admit paragraph 14 of the Claimant's affidavit only to the extent that the 1<sup>st</sup> Defendant paid the Claimant a cumulative sum of ₦33,756,166.39 being his professional fees. They are not indebted in any way to the Claimant in the sum of ₦7,081,015.29.

The Defendants deny paragraphs 15, 16, to 30 of the Claimant's affidavit but admit the correspondences mentioned therein.

The 1<sup>st</sup> to 4<sup>th</sup> Defendants are not owing the Claimant any sum of money as they have paid him in full for the consultancy services he rendered to them.

The 2<sup>nd</sup> Defendant in its letter to the Claimant dated 2/9/2016 stated in clear terms that it is not aware of the project to which the Claimant is basing his claims.

From the Claimant's affidavit, his cause of action arose in 2005 when he alleged that the 1<sup>st</sup> to 4<sup>th</sup> Defendants paid him the sum of ₦33,756,166.39 leaving a purported balance of ₦7,081,015.29. By virtue of statute of limitation for contract in FCT, the Claimant ought to

have filed his action within 6years after the cause of action arose. The Claimant filed his Writ of Summons on 20/9/2017 – 12years after the cause of action arose. The Claimants cause of action has been in consequence caught up by the statute of limitation and consequently it is statute barred and liable to be dismissed. In the circumstances the Court lacks jurisdiction to entertain the Claimant’s suit.

In its Further affidavit filed on 13/12/2017 (erroneously titled “Counter Affidavit” in opposition to the 1<sup>st</sup> to 4<sup>th</sup> Defendants Notice of Intention to Defend), the Claimant averred inter alia, that the 1<sup>st</sup> to 4<sup>th</sup> Defendants are still indebted to the Claimant to the tune of ₦20,538,871.11 and that the cause of action accrued on 23/9/2015 when the Claimant made a demand to the 2<sup>nd</sup> Defendant for payment of the said sum of ₦20,538,871.11. That the cause of action has not accrued before 23/9/2015.

That Section 7(1) (a) of the Limitation Act Cap 522 Laws of FCT 2016 is in applicable to this suit as the Claimant filed the action within 6years from 23/9/2015 after the cause of action accrued. The Claimant’s suit is not caught by statute of limitation.

I have given due consideration to the foregoing averments in the affidavits of the contending parties. From this, it is evident that the Defendants did join issues with the Claimant’s claim of indebtedness to it to the tune of ₦20,538,871.11. They denied being indebted to him whatsoever as they have paid him fully for the consultancy services rendered to them. They also denied being aware of the project to which the Claimant is basing his claim. Although the foregoing denials which were averred in paragraphs 22(1) and (II) of the 1<sup>st</sup> to 4<sup>th</sup> Defendants affidavit are contradictory and ordinarily ought to be discountenanced and the Defendants held liable, the Defendants did further join issues with the Claimant’s claim by contending that the claim is statute barred having been caught by statute of Limitation that the action was filed on 20/9/2017 more than 6years after the cause of action arose in 2005. By this, the jurisdiction of the Court to entertain the suit is challenged.



In **ABDULKADIR V. USMAN (2002) FWLR (Pt.92) p1736** as well as **ABUBAKAR V. MODIBO (2008) ALL FWLR (Pt.400) p.751** the Court of Appeal held that where a Defendant raises issue of jurisdiction in his affidavit in support of Notice of Intention to Defend, that a mounts to a defence on the merit and the only way the Court can resolve it is by transferring the suit to the general cause list. In **UYOETTE V. IBIANO L.G (2003) FWLR (Pt.178) p.1126**, the Court of Appeal made the point that where a Defendant's defence encompasses defence in law as well as facts and will require the Court to consider knotty or difficult areas of law or is such that requires address of Counsel, then such an affidavit can validly be said to have raised triable issues.

In this case, the Defendants contend that the Claimant's suit is caught by statute of limitation the action having been instituted more than 6years after the cause of action accrued contrary to the provision of Section 7(1) (a) of the Limitation Act, Cap 522 Laws of FCT 2006, (whether or not same can be sustained), has raised triable issue for which the suit should be transferred to the General Cause List for determination. There is no gainsaying the fact that contention alone raises a prima facie defence which enures in favour of the Defendants.

By reasons of the foregoing, the Court resolves the sole issue raised above in favour of the Defendants against the Claimant.

In the light of this and consistent with the provision of Order 35 Rule 3(1) of the Rules of Court 2018, leave is granted to the Defendants to defend the suit. This being the case and in line with the provision of the Rule 3(2) of the Order, this action is transferred from the Undefended List Procedure to the General Cause List for trial.

Parties are to file and exchange pleadings in accordance with the provisions of Rules of Court 2018.

I make no order as to cost.

**SGND.**  
**HON. JUDGE**  
**29/1/2020.**

**LEGAL REPRESENTATIONS**

- (1) Olawale Oyebode Esq. for the Claimant.
- (2) James Onoja Esq for the 1<sup>st</sup> to 4<sup>th</sup> Defendants.
- (3) No legal representation for the 5<sup>th</sup> Defendants.