

**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 FICMC**

**ON MONDAY 17<sup>th</sup> DAY OF FEBRUARY, 2020**

**SUIT NO: FCT/HC/CV/1893/2019**

**BETWEEN:**

**SECURITIES AND EXCHANGE  
COMMISSION (SEC) ..... CLAIMANT.**

**AND**

**FIDELIS ODITAH QC, SAN  
(Practicing Law under the  
name and style of “Fidelis Oditah & Co”) ..... DEFENDANT.**

**RULING**

On 18/5/2019, the Claimant herein took out a Writ of Summons under the Undefended List procedure against the Defendant. He Claims as follows against the Defendant:-

- “(a) The sum of ₦15,750,000.00 (Fifteen Million, Seven Hundred and Fifty Thousand Naira) only being the Defendant’s indebtedness to the Claimant as at 30<sup>th</sup> April, 2019 for services paid for by the Claimant to the Defendant, which services was (SIC-were) never rendered by the Defendant.

- (b) Pre-judgment interest on the said sum of ₦15,750,000.00 (Fifteen Million, Seven Hundred and Fifty Thousand Naira) only at the interest rate of 14% from 13<sup>th</sup> November 2018 till the day of judgment.
- (c) Post judgment interest at the rate of 10% from the day of judgment till final liquidation of the judgment sum.
- (d) The sum of ₦2,500,000.00 (Two Million, Five Hundred Thousand Naira) only being the cost of prosecuting this suit.”

The writ was filed along with an 8-paragraph affidavit deposed to by Edeh Onyedikachi and Pre-action Counseling Certificate.

In response, the Defendant filed a Memorandum of Conditional Appearance, Notice of Intention to defend and a 13-paragraph affidavit deposed to by Samuel Okah on 9/10/2019.

At the hearing on 24/10/2019, Counsel for the parties, relying on their processes, urged the Court for and against the application. Ruling was then reserved.

I have read and digested the averments in the affidavits of the parties vis-à-vis the reliefs claimed in the Writ of Summons by the Claimant. The cardinal issue that calls for determination is whether or not the Claimant has made out a case to justify grant of the reliefs sought. Conversely, can it be said that the Defendant has made out a case to justify being granted leave to

defend the suit and the making of a consequential order transferring the suit from Undefended List Procedure to the Ordinary Cause List for trial.

Order 35 Rules 1 to 5 of the Rules of Court 2018 has made provisions guiding matters commenced under the Undefended List Procedure. Very significant in this regard are Rules 3 and 4. Rules 3(1) and (2) provides:-

- “(1) Where a party served with the Writ delivers to registrar, before 5 days to the day fixed for hearing a notice in writing that he intends 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.
- (2) Where leave to defend is given under this Rule, the action shall be removed from the Undefended List and placed on the ordinary cause list and the Court may order pleadings or proceed to hearing without further pleadings.”

Rule 4 on its part provides:-

“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.”

From the foregoing provisions, it is apparent that a Defendant who has been served with a Writ of Summons under the Undefended List Procedure and who intends to defend the suit is under a duty to file a Notice of Intention to defend along with an affidavit disclosing a defence on the merit. Upon consideration of his affidavit, the Court will make finding that it discloses a defence on the merit in which case leave is granted to him to defend and the case is then transferred to the Ordinary Cause List for trial. Where the Court finds otherwise, the Court will not grant him leave to defend, and judgment may be entered for the Claimant.

In this case, the Defendant upon service of the writ on him filed a Notice of Intention to Defend along with an affidavit on 19/10/2019. In the circumstances, the next question is whether or not the affidavit discloses a defence on the merit.

The issue of whether or not the Defendant's affidavit discloses a defence on the merit in a matter commenced under the Undefended List Procedure has engaged the attention of the Courts in a number of cases.

In **NYA V. EDEM (2000) 8 NWLR (Pt.669) p.349**, the Court of Appeal while dealing with the issue held thus:-

“An affidavit disclosing a defence on the merit does not mean 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 defence must show prima facie that he has a

defence to the Plaintiff 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 the trial.”

In **AKINYEMI V. GOVERNOR, OYO STATE (2003) FWLR (Pt.1140) p.1821**, the Court of Appeal made the point that to constitute a defence on the merit the Defendant’s affidavit must disclose either facts that raise substantial issues of law or disputed material facts that can only be resolved after a full trial in **ATAGUGBA & CO V. GURA NIGERIA LTD (2005) ALL FWLR (Pt.2561) 216**, the Supreme Court explained, inter alia, that it is sufficient if the affidavit discloses a triable issue or a difficult point of law or posits the existence of a dispute as to the facts which ought to be tried or that there is a real dispute as to the amount due which requires the taking of an account to reach a decision or any circumstances showing reasonable grounds of a bona fide defence.

Generally, it is settled that where the Defendant raises issue of lack of jurisdiction, abuse of Court processes, failure to demand for payment of debt, or so much irreconcilable facts that the only way forward is to call oral evidence, such a Defendant can be said to have disclosed a defence on the merit and in the circumstances the leave is granted to the Defendant to defend and the suit transferred to the Ordinary Cause List for trial.

Very significantly, it is the state of the law that the Undefined List Procedure is one meant for liquidated money demands. Where therefore the claim is one not for a liquidated sum, it is transferred to the General Cause List for trial. “Liquidated

Money Demand” is defined as an amount of money that could be ascertained by calculation or fixed by any scale of other positive data or mathematics. When therefore the amount sought to be recovered depends on circumstances and is fixed by opinion or estimate it is not liquidated. In **HOUSEHOLD UTENSILS DEALERS V. IFEANYI CHUKWU VENTURES NIG LTD (2005) ALL FWLR (Pt.257) p.1173**, the Court of Appeal held that a liquidated debt is a debt or other specific sum due and payable by the Defendant to the Plaintiff that must be ascertained or capable of being ascertained as a matter of mere arithmetic. **ABAYOMI V. A-G ONDO STATE (2007) ALL FWLR (Pt.391) p.1683** held that a liquidated demand is “a debt or other specific sum of money usually due and payable which must be already ascertained or capable of being ascertained as a matter of arithmetic without any further investigation. In **NIGERIA POSTAL SERVICES V. INSIGHT ENGINEERING CO LTD (2006) 8 NWLR (Pt.983) p.435**, The Court of Appeal laid it as a guide that where the Claimants Claim is for pre-judgment interest or for interest not defined by an agreement preciously reached that is a claim for recovery of an unliquidated money demand. The suit should not be placed on the Undefended List.

Similar decisions were reached in **NIGERIA POSTAL SERVICES V. IRBOK NIG. LTD (2006) 8 NWLR (Pt.982) p.323**, **NIGERIA SUGAR COMPANY LTD V. MOJEC INT. LTD (2005) ALL FWLR (Pt.262) p.475**; **YA’U V. CITY SECURITY LTD (2003) FWLR (Pt.165) p.498**; **DALKO V. UBN PLC (2003) FWLR (Pt.180) p.500**.

Applying the foregoing to the instant matter, a perusal of the Claimants affidavit shows the crux of its case is that it engaged the Defendant at a fee of ₦35,000,000.00 to prosecute its appeal at the Supreme Court of Nigeria. The sum of ₦15,750,000.00 being 50% of the agreed fee was paid to the Defendant. The Defendant was to handle the Appeal personally as well as avail the Claimant with records of processes filed. He was also to give it updates on the appeal. Regrettably, the Defendant failed to prosecute the appeal as agreed or expected resulting in same being struck out by the Supreme Court for want of diligent prosecution.

The Claimant conveyed its dissatisfaction on this regard to the Defendant in meetings held subsequently. The Defendant attempted to have the appeal re-listed in the Supreme Court Cause List but this failed too.

On account of the foregoing, the Claimant vide its Solicitors letters demanded of the Defendant to pay back to it the said sum of ₦15,750,000.00 being money paid for consideration that failed and negligence. The Defendant demurred despite the Claimant's Solicitors demand letters to him in this regard. For this reason the Claimant instituted the instant suit to recover the said fee.

The gravamen of the Defendant's case as disclosed in his affidavit in support of the Notice of Intention to Defend is that the Claimant's Writ of Summons had expired before it was served on him hence the writ is not valid. That while it was issued on 14/5/2019 and ought to be served within three months,

it was served on him on 26/9/2019 without having been renewed.

Apart from the above jurisdictional issue, the Defendant contended that he did render the services with respect to the Appeal at the Supreme Court for which the Claimant paid him the sum of ₦15,750,000.00 being 50% of the agreed professional fee of ₦35,000,000.00. That the services entailed studying the case file, conducting preliminary researches on issues, preparing and filing of Notice of Appeal and attending the Court of Appeal Registry several times to compile and transmitting records of appeal as well as providing oral advice to the Claimant and preparing and filing of briefs of argument, etc.

It further averred that the instant claim is predicated on negligence and so not cognizable under the Undefended List Procedure.

It was also his contentions that although the appeal was concluded in a manner not liked by the Claimant, the service has been rendered and the balance of his fees is due but he is willing to forgo it. He also did offer to argue another appeal for the Claimant free of charge but the Claimant refused. He is therefore not indebted to the Claimant in the sum claimed.

I have given due consideration to the foregoing averments in the parties affidavits. The Defendant has raised jurisdictional issue regarding the validity of the Claimant's Writ of Summons in his affidavit. That alone is sufficient for the Court to transfer the suit to the Ordinary Cause List to determine whether or not the Claimant's writ is valid. This is because that contention raises a



triable issue which the Court is not allowed to go into and determine at this stage. It discloses a prima facies defence and although it may fail or succeed, it is not part of the business of the Court to embark upon a determination of it in this proceeding. **See: - NYAM V. EDEM** supra.

Besides, the defendant did contend that he did render the services for which the sum claimed was paid to him. He listed the particulars of the services to show the money was not paid for a consideration that failed. This also raises a triable issue which can only be resolved after evidence has been led in a trial.

Beyond these, a look at the Claimants reliefs Nos. (b) and (d) of the Writ of Summons shows that while he claimed the Pre-judgment interest in relief No. b, in relief No. d, he claims payment of ₦2,500,000.00 as cost of prosecuting the suit. Whilst the latter is a specie of special damages which can only be determined upon evidence, the former is a claim on interest which can only be determined by evidence given that there is nothing to show that the parties did agree on the payment of interest in any circumstances and at what rate. These two claims are not liquidated money demand cognizable under the Undefended List Procedure. The foregoing are matters which raise prima facie triable issues against the Claimant's Claim. They cannot be swept aside. They can only be resolved after evidence has been led in the case. For this reason, the Court resolves the sole issue raised above against the Claimant in favour of the Defendant. This being the case and consistent with the provision of Order 35 Rule 3 (2) of the Rules of Court 2018, leave is granted to the Defendant to defend the suit. In

consequences, the suit is transferred from the Undefended List Procedure to the Ordinary Cause List for trial.

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

I make no order as to cost.

**SGND.  
HON. JUDGE  
17/2/2020.**

**LEGAL REPRESENTATIONS**

- (1) H. E. Leonard for the Claimant.
- (2) James Okoh for the Defendant.