

IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY
IN THE ABUJA JUDICIAL DIVISION
HOLDEN AT MAITAMA ABUJA

BEFORE HIS LORDSHIP: HON. JUSTICE JUDE O. OKEKE, FICMC

ON THURSDAY THE 12TH DAY OF MARCH, 2020

SUIT NO: FCT/HC/CV/1010/2019

BETWEEN:

UNITED BANK FOR AFRICA (UBA) PLC.....CLAIMANT

AND

(1). VEGOL SEEDS LIMITED }
(2). EMMANUEL OLUFEMI ALAO }DEFENDANTS

RULING

On 5th February 2019, the Claimant took out a Writ of Summons under the Undefended List Procedure against the Defendants. In the Writ, it claims as follows against the Defendants: -

“The Claimant’s claim against the Defendant is for the sum of N61, 787, 289.86 (Sixty One Million, Seven Hundred and Eighty Seven Thousand, Two Hundred and Eighty Nine Naira, Eight Six Kobo) only being the sum of outstanding debt and the accrued interest due to the Claimant as a result of the overdraft loan facility of N137, 000, 000.00 (One Hundred and Thirty Seven Million Naira) only granted to the 1st Defendant by the Claimant under the Growth Enhancement Support (GES) Scheme anchored by the Federal Ministry of Agriculture and Rural Development on the 26th of February 2014 which has remained unpaid till date despite several demands”.

The Writ was filed along with a 26-paragraph affidavit deposed to by Tosin Ogundaro and Pre-action Counselling Certificate.

In response, the Defendants filed a Notice of Intention to Defend and an Affidavit on 24th December 2019.

At the hearing on 28th January 2020, Counsel for the parties relying on their processes urged the Court for and against the application. Ruling was then reserved for today 12th March 2020.

Order 35 Rules 1 to 4 has made provisions guiding actions commenced under the Undefended List Procedure. Under Rule 3(1) of the Order, a Defendant on whom a Writ under the Undefended List Procedure has been served, where he intends to defend the suit is to file a Notice of Intention to Defend along with an affidavit disclosing a defence on the merit before 5 days to the day fixed for hearing. Where the affidavit discloses a defence on the merit, the Court may grant him leave to defend upon such terms as the Court may think just. In Rule 4 of the Order, where a Defendant neglects to deliver the notice of defence and an affidavit disclosing a defence on the merit or is not given leave to defend, the suit shall be heard as an undefended suit and judgment given accordingly.

The issue of a Defendant's affidavit disclosing a defence on the merit has engaged the attention of the Courts in a plethora of cases. One general and basic requirement of it is that the averments must raise a prima facie defence to the Claimant's case or question or cast doubts on his claim which can only be resolved by evidence. Where also the defence raises an issue of law which cannot be resolved except evidence is adduced or challenges jurisdiction of the Court, the defence is said to raise a defence on the merit. The affidavit needs not raise a rock proof or iron cast defence. All that is required is a prima facie or raises substantial issues or disputed material facts. The defence may be weak or strong. It is not the business of the Court to resolve it at that stage but rather after hearing of evidence. See: ***NYA V EDEM (2000) 8 NWLR (PT. 669) P. 349; AKINYEMI V GONERNOR OYO STATE (2003) FWLR (PT. 140) P. 1821; ATATUGBA & CO V GURA NIGERIA LTD (2005) ALL FWLR (PT. 256) P. 1219.*** Also where the Defendant's affidavit raises a triable issue or raises some issues with regard to which the Claimant is expected to explain same, the affidavit can be said to be one that discloses a defence on the merit. See: ***HAIDE V USMAN (2004) ALL FWLR (PT. 201) P. 1765.*** Also a defence which contends that excessive interest was charged and that the Defendant's account was wrongly debited is one which raises a triable issue for which the case should be transferred to the General

Cause List for trial. See: ***EZUMA V NKWO COMMUNITY BANK LTD (2000) FWLR (PT. 28) P. 2243.*** The issues which can clothe the Defendant's affidavit as one disclosing a defence on the merit are of infinite variety. One basic thread that runs through them is whether or not it casts a doubt on the Claimant's Claim or will require oral evidence to be adduced for it to be resolved.

In this case, the gravamen of the Claimant's case as disclosed in its affidavit is that by a written request dated 28th October 2013 (attached as Exhibit A1) the 1st Defendant requested for the sum of N137, 000, 000.00 under the Growth Enhancement Support Scheme anchored by the Federal Ministry of Agriculture and Rural Development. By a letter dated 3rd February 2014 (attached as Exhibit A2) the Claimant made an offer of loan facility in the sum of N137, 000, 000.00 to it. In response, the 1st Defendant executed a Memorandum of Acceptance attached to the Letter of Offer. The 2nd Defendant personally guaranteed the loan facility by executing a Guarantor's form in respect thereof. It is attached as Exhibit A3.

The Defendant received the facility via its UBA Account No. 1017905483 and fully utilized same.

The parties agreed that the facility was to last for a period of 12months which has since expired.

Despite several demand letter sent to it after the period for repayment expired, the Defendant have not repaid the loan. The letter are attached as Exhibits A5(I) and (II) .

The Claimant's Solicitors also sent Demand Notices (attached as Exhibits B1 and 2) to the Defendants to pay up the loan to no avail.

The Defendants' total indebtedness to the Claimant as at 26th September 2018 with the accrued interest, is N61, 787, 289.86 as shown in the 1st Defendant's Account Statement from 1st February 2014 to 26th September 2018 attached as Exhibit B4.

The Defendants have no defence to this suit.

In their affidavit in support of their Notice of Intention to Defend, the Defendants averred, inter alia, that the Claimant's claim against the

Defendants are not liquidated as anticipated under the Undefended List. That Nigeria Incentive based Risk Sharing System for Agricultural Lending (NIRSAL), the Nigeria Agricultural Insurance Corporation and the 2nd Defendant guaranteed the said facility which they had fully paid to the Claimant. That Nigeria Agricultural Insurance Corporation (NAIC) equally secured the facility with 20% Bond which it had fully paid to the Claimant while the NIRSAL which secured the facility with 75% Bond has also fully paid same. Further that the 1st Defendant made 10% equity contribution to the facility which it had fully paid to the Claimant.

That though the 1st Defendant applied for the loan aforesaid, what it received through its UBA Account with number 1017905483 and utilize for the purpose it was granted was only the sum of N123, 300, 000.00 out of the total sum of N137, 000, 000.00. The Claimant inexplicably and wrongfully withheld, retained and converted the balance of the agreed/approved facility in the sum of N13, 700, 000.00 to its own use against the agreed terms of the loan. The Claimant failed to give reason for shortchanging the Defendants contrary to the agreed terms of the facility. A copy of the Letter of Offer was attached as Exhibit A.

The Defendants were as a result of the above denied the use of the sum of N13, 700, 000.00 of the agreed/approved sum of N137, 000, 000 while the Claimant continued to calculate interest and/or charges on the whole of N137, 000, 000.00 by which it arrived at the present balance being claimed in this suit against the Defendants.

The Defendants have never failed, refused or neglected to meet their obligation under the said facility as the parties are presently not in agreement with each other on the true position of their indebtedness to each other. The parties are not at ad idem on the claims the Claimant is making against the Defendants in this suit.

There currently exist startling revelations of serious underhand sharp practices on the part of the Claimant against the Defendants in the disbursement, administration and/or management of the 1st Defendant's loan account it maintained with the Claimant which is the subject matter of this suit.

The underhand sharp practices are part of the findings by the forensic auditors engaged by the Defendants to investigate the wrongful debiting

into the 1st Defendant's loan account audit report conducted and produced by the team of forensic experts who audited the loan account of the 1st Defendant shows humongous excess charges to the tune of N8, 456, 949.74 debited into the said loan account of the 1st Defendant contrary to the approved charges and interest by the Central Bank of Nigeria. It was equally discovered by the auditors that the Defendants were denied utilization of 10% equity contribution of N13.7m made by the 1st Defendant towards financing the project as contained in the letter of offer of the loan.

In line with banking practice, the said N13.7m if retained by the Defendants ought to be invested by the Defendants bearing interests for the benefit of the 1st Defendant which should have attracted interest at 4.05% per annum.

Consequent upon the above discoveries, a formal request for refund of the excess charges in the sum of N8, 456, 949.74 debited to the 1st Defendant's loan account on the facility has not been responded to by the Claimant. Copies of the request are attached as Exhibit B.

While the overdraft facility by its terms was a term loan, to last for a period of twelve months, the Claimant in breach of the terms has calculated interests and/or charges beyond the agreed tenor of the facility.

The Defendants deny being indebted to the Claimant in the sum of N61, 787, 289.86 or in any sum whatsoever.

The Claimant's Exhibits B1 is a product of wrongful excess charges on the said loan facility.

Presently, as between the parties, there are irreconcilable claims and Counter Claim in respect of the subject matter of this suit. The parties are currently exploring reconciliatory procedures in order to establish the actual and/or correct indebtedness of each party to the other. The e-mail message exchanged by the parties in this regard are attached as Exhibits C and D.

The Defendants have a good defence to the claim.

By the foregoing averments in the Defendant's affidavit, it is apparent that it not only joined issues with the Claimant with regard to the actual sum disbursed to them out of the approved facility of N137, 000, 000.00 but very

significantly, that the Claimant withheld and converted to its own use the sum of N13, 700, 000.00 out of the said sum of N137, 000, 000.00 agreed to be granted to it in the Letter of Offer attached as Exhibit A to their affidavit and attached as Exhibits A2 to the Claimant's affidavit.

The Defendants equally dispute the sum being claimed against them by the Claimant in this suit on the ground that same is a product of excess charges made on the facility granted to them contrary to the Central Bank of Nigeria Guidelines.

It is equally their contention that following the audit conducted on the loan account by their forensic auditors, the Claimant is indebted to them in the sum of N8, 456, 949, 74 following the wrongful retention of their N13.7M by the Claimant with the attendant loss of revenue at the rate of 4.05% per annum.

They equally contend that by reasons of the foregoing contentions the parties are currently unable to determine who is indebted to who and in what sum hence they have engaged in meetings to resolve same as shown in their Exhibits C and D. That they have a good defence to the Claimant's claim.

I have given a serious thought to the foregoing Defendants' contentions vis-à-vis the averments in the Claimant's affidavit in support of its writ. There is no gainsaying the fact that these contentions monumentally put questions marks on the Claimant's claim. They not only cast doubts on the sum claimed but also the basis for the sum claimed. They seriously dispute the Claimant's claim and raise prima facie defence to the claim. The defence, as aforesaid, needs not be iron cast or foolproof. They may be weak or strong but it is not the business of the Court to resolve that at this stage. It is for this reason that evidence ought to be led to determine the issues raised by both parties.

What the foregoing findings translate to is that the Defendants have in their affidavit disclosed a defence on the merit on the bases of which the Court ought to grant them leave to defend in line with the provision of Order 35 Rule 3(1) of the Rules of 2018.

Before leave is granted to the Defendants and the suit in consequence transferred to the General Cause List for trial, the Court recalls that the

learned Claimant's Counsel at the hearing mentioned that the Defendants filed their Notice of Intention to Defend and supporting affidavit out of time. Although the learned Claimant's Counsel did not proceed to illustrate this for the guidance of the Court, the Court upon perusal of its records observes that while the suit was scheduled for hearing on 17th April 2019, the Claimant served its Writ of Summons on the Defendants on 19th September 2019. The matter was on 17th April 2019 adjourned to 6th June 2019 for failure of the Claimant to serve the Writ on the Defendants. On 6th June 2019 the Claimant applied for and was granted leave to serve the Defendants with the Writ by substituted means and they carried out the Order on 19th September 2019 as aforesaid. The Defendants filed their Notice of Intention to Defend and affidavit on 24th December 2019 and served it on the Claimant's Solicitors on 27th January 2020. This suit was heard on 28th January 2020.

By Order 35 Rule 3(1) of Rules of Court, the Defendant is expected to serve their defence before five days to the day fixed for hearing. In ***ALALE V OLU (2001) 7 NWLR (PT. 711) P. 119***, the Court held that in an action commenced under, the Undefended List procedure, the return date and any subsequent adjourned date is always regard as the date fixed for hearing until judgment is entered in the suit or transferred to the General Cause List.

In this case, the Claimant's Writ having been served on the Defendants on 19th September 2019 while the Defendants filed and served their defence on 24th January 2020 and 27th January 2020 respectively against the scheduled hearing date of 28th January 2020, the Defendant certainly did not file and serve the defence before five days to the day fixed for hearing as required by Order 35 Rule 3(1) of Rules of Court. The learned Defendants Counsel at the hearing however orally applied to the Court to grant them extension of time to file and deem their processes as properly filed and served.

The learned Claimant's Counsel did not respond to the application despite the opportunity availed her.

Order 5 Rule 1(1) of the Rules of Court 2018 given the Court a discretion to treat as mere irregularity any failure at any stage of the proceedings to comply with the requirement of the Rules with regard to time, place,

manner or form and to give any direction as it thinks fit to regularize the step.

In this case, the learned Claimant's Counsel having failed to respond to the Defendants oral application to extend their defence and deem same as properly filed and served, it implies she is not aversed to such a discretion being exercised in favour of the Defendants. This being the case, the Defendants' Notice of Intention to Defend and affidavit filed and served out of time are deemed duly filed and served given this Court's interest in doing substantial justice as opposed to technicalities.

All said, the Court holds the Defendants' affidavit discloses a defece on the merit.

In consequence 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. By reasons of this and in line with Order 35 Rule 3(2) of the Rules, the case is removed from the Undefended List and transferred to the General Cause List for trial.

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

No order as to cost.

Signed
Hon. Judge
12/3/2020

LEGAL REPRESENTATIONS:

- (1). I. J. Okechukwu for the Claimant.
- (2). S. O. Ojo Esq for the Defendants.