

IN THE HIGH COURT OF JUSTICE OF THE F.C.T.
IN THE ABUJA JUDICIAL DIVISION
HOLDEN AT APO, ABUJA
ON TUESDAY, THE 08TH DAY OF MARCH 2022
BEFORE HIS LORDSHIP: HON. JUSTICE ABUBAKAR HUSSAINI MUSA
JUDGE

SUIT NO.: FCT/HC/CV/3179/2019

BETWEEN:

T AND TOMO LIMITED

CLAIMANT

AND

**1) MECHATRONIC AUTO TECH SERVICES
CENTER LIMITED**

2) MR ALAIN ZOGHZOGHY

DEFENDANTS

RULING

This Ruling is on the Undefended List Procedure brought by the Claimant against the Defendants.

The Claimant has commenced this suit by way of Writ of Summons claiming against the Defendants the following reliefs:

- 1) The sum of ~~₦~~150,000,000.00 (One Hundred and Fifty Million Naira) being the sum due to the Claimant as loan advanced to the Defendants by the Claimant, which loan the Defendants have since refused and/or neglected to repay to the Claimant.*
- 2) Post-Judgement interest at the rate of 10% per annum from the date of Judgement until the entire sum is liquidated.*

The Writ of Summons is supported by a 24-paragraph affidavit deposed to by one Mr John Owotomo, the manager of the Claimant, which had Exhibits attached thereto and marked as **Exhibits A, Exhibits B-P, and Exhibit Q** respectively. These exhibits are a copy of the said agreement between the Claimant and the 1st Defendant, 15 copies of the Heritage Bank Cheques issued by the Defendant in favor of the Claimant, and an acknowledgement copy of the letter served on the Defendant.

Briefly, the facts as stated in the affidavit in support are as follows: The Claimant is a limited liability Company duly incorporated under the Company and Allied Matters Act and having business within the jurisdiction of this Honorable Court. Some time in October 2018, the Defendants and the Claimant went into a loan agreement which was executed by the parties, in which the Defendants requested from the Claimant a loan of a sum of ₦150,000,000.00 (One Hundred and Fifty Million Naira only), by presenting to the Claimant an Award Letter issued in favor of the 1st Defendant by Heritage Bank Plc for the supply of 25 (twenty-five) Toyota Hilux Trucks. In furtherance to the agreement, the Defendants issued in favor of the Claimant 15 (fifteen) Heritage Bank Cheques of ₦10,000,000.00 (Ten Million Naira) each totaling the sum of ₦150,000,000.00 (One Hundred and Fifty Million Naira). It was also agreed by the parties that the Defendants would deposit with the Claimant their Range Rover Velar Car as collateral for the loan released for the contract.

The Claimant further claimed that the said Range Rover Velar Car had yet to arrive the shores of Nigeria according to the Defendants and that based on the assurances given by the Defendants to comply with the terms of the Agreement, the Defendants have failed and/or neglected to repay to the Claimant the loan sum despite the expiration of the time mutually agreed for the repayment of the loan. It was the case of the Claimant that the Solicitors to the Claimant wrote to the Defendants, giving them 7 (seven) working days to repay the money due to the Claimant, whereupon the 2nd Defendant came to the Claimant's Solicitors' office and appealed to them to give him a period of 60 (sixty) working days to repay the money. After all that had transpired, the Claimant was still not paid the money due. The deponent averred that he was certain that the Defendants have the financial resources to offset the loan and that the Defendants have no defense on a merit.

In their response, the Defendants filed a 21-paragraph affidavit showing what they believe to be a defence on the merit. The affidavit had four exhibits attached and marked as **Exhibit A and A1, Exhibit B, and Exhibit C**. The affidavit was deposed to by the 2nd Defendant, Mr Alain Zoghzoghy, who is the Managing Director and Chief Executive Officer of the 1st Defendant. The 2nd Defendant averred that there is still a business relationship between Mr Sunday Tomilola Owotomo and himself; that Mr Sunday Tomilola Owotomo is the Chairman and Chief Executive Officer of the Claimant, and that the business relationship between them is in relation to repair of Mr Sunday's fleet of exotic cars.

The 2nd Defendant further averred that Mr Sunday Tomilola Owotomo, on one occasion, approached the 2nd Defendant and informed him that he had some loose cash to invest. Upon this information, the 2nd Defendant informed him that he had a mandate from Heritage Bank for the supply of 25 Toyota Hilux Trucks. It was upon this fact that Mr Sunday Tomilola Owotomo agreed to finance the purchase of the 25 Toyota Hilux Trucks with the sum of ₦100,000,000.00 (One Hundred Million Naira only) with interest of ₦50,000,000.00 (Fifty Million Naira), which made the parties to enter into an agreement dated 15th of October 2018.

Due to their long-standing business relationship, Mr Sunday Tomilola Owotomo transferred the sum of ₦100,000,000.00 (One Hundred Million Naira) to the account of the 2nd Defendant with Heritage Bank on the 10th of October 2018 with the payment of the sum of ₦50,000,000.00 (Fifty Million Naira only) as interest on the borrowed sum to enable the 2nd Defendant supply the 25 Toyota Hilux Trucks being the contract awarded to him. The agreement entered into by Mr Sunday Owotomo and the 2nd Defendant, according to the deponent, was entered into by the parties using these names, T and Tomo Nigeria Limited and Mechatronic Auto Tech Services Limited as seen from the agreement dated 15th of October 2018.

The deponent further averred that the agreement entered into by the parties was termed 'Interest-Free Loan Agreement' for the supply of the 25 Toyota Hilux Trucks; and that Mr Sunday Tomilola Owotomo agreed to give the Defendants ₦100,000,000.00 (One Hundred Million Naira) on payment of interest of ₦50,000,000.00 (Fifty Million Naira) on or before sixty days from the date of the

agreement notwithstanding, captioning the agreement 'interest-free loan'. Furthermore, the 2nd Defendant swore that the Claimant and the 1st Defendant agreed that the 2nd Defendant shall secure the loan with his Range Rover Velar 2018 with Chassis Number SALYL2V1JA713319 upon payment of the borrowed sum.

It was further averred by the deponent that the 2nd Defendant paid the sum of \$250,000.00 (Two Hundred and Fifty Thousand Dollars) cash to Mr Sunday Tomilola Owotomo on his prompting that the Economic and Financial Crimes Commission was after him for a case of cybercrime, and that his account had been restricted by the Commission. Upon the receipt of the \$250,000.00 (Two Hundred and Fifty Thousand Dollars), Mr Sunday Tomilola Owotomo immediately returned the Range Rover Velar 2018, used as collateral by the 2nd Defendant. This was because Mr Sunday Tomilola Owotomo got to know that the supply of the 25 Toyota Hilux Trucks by the 2nd Defendant to Heritage Bank Plc did not materialize. The deponent further stated that Mr Sunday Tomilola Owotomo was aware that the reason for lending the sum of the ₦100,000,000.00 (One Hundred Million Naira) to the Defendants fell apart hence the reason Mr Sunday Tomilola Owotomo accepted the sum of \$250,000.00 (Two Hundred and Fifty Thousand Dollars) from the 2nd Defendant while the balance was to be paid in the shortest possible time.

The deponent further stated that the 2nd Defendant never at any time pleaded with the Claimant's Solicitor or anybody whatsoever to be given 60 (sixty) working days to repay the money. He added that the 2nd Defendant has been inundated by some

persons in the past who claimed to be brothers of Mr Sunday Tomilola Owotomo as well as his Solicitors or business associates for the payment of the outstanding indebtedness necessitating the 2nd Defendant's refusal to respond to any other person except Mr Sunday Tomilola Owotomo who the 2nd Defendant had direct dealing with. He further stated that he believes that some persons who have no dealings with the transaction are trying to take advantage of the transaction considering the facts that they do not have complete information of the transaction with Mr Sunday Tomilola Owotomo. He asserted that there is need to join Mr Sunday Tomilola Owomoto in the action as a necessary party to the suit as the matter cannot effectually be determined without him as a party to the suit. Finally, it was averred by the deponent that, the Defendants have a defence on the merit to this suit and intends to counter-claim against the Claimant and it is therefore necessary and in the best interest of justice to transfer this suit to the General Cause List to properly determine the rights of the parties.

The above are the cases for the parties in respect of this application. Clearly, what this Court is invited to determine is this issue:

“Whether the Defendants have not disclosed a defence on the merit to enable the court transfer the suit on the undefended list to the general cause list?”

Before I treat this issue formulated herein, it is necessary to dwell briefly on the nature of the undefended list procedure. The undefended list procedure is provided

for in Order 35 of the Federal Capital Territory High Court (Civil Procedure) Rules 2018. Rule 1(1) of the Order provides as follows:

“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 grounds on which the claim is based and stating that in the deponent’s belief there is no defense to it, the judge in chambers shall enter the suit for hearing in what shall be called the Undefended list”

The Undefended List Procedure is resorted to for quick and speedy recovery of debt or liquidated money demand, especially in cases relating to simple, uncontested debt or liquidated money demand or monetary claims. In the case of ***WEMA SECURITIES AND FINANCE v. N.A.I.C (2015) LPELR-24833 (SC) 67-70 E-C, (2015) 16 NWLR (Pt 1484) 93 at page 140-141 paras B-C***, the Supreme Court held that:

“...the undefended list procedure is a truncated form of the civil litigation process peculiar to the adversarial judicial system. Under the said procedure, ordinary hearing is rendered unnecessary due, in the main, to the absence of an issue to be tried. U.B.A. & Anor v. Jargaba (2007) LPELR-3399 (SC), (2007) 11 NWLR (Pt. 1045) 247; Agwuneme v. Eze (1990) 3 NWLR (Pt. 137) 242. Essentially, therefore, it is designed to secure quick justice and to avoid the

injustice likely to occur when there is no genuine defence on the merits to the plaintiff's case. International Bank for West Africa Limited v. Unakalamba (1998) 9 NWLR (Pt. 565) 245.

"It is, usually, meant to shorten the hearing of a suit where the claim is for a liquidated sum. Cooperative and Commerce Bank (Nig.) Plc v. Samed Investment Co. Ltd. (2000) 4 NWLR (Pt. 651) 19."

A suit qualifies for hearing under the Undefended List Procedure upon the fulfillment of certain conditions. 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. Where these conditions are satisfied, the Court will mark the Writ of Summons as "Undefended" and place it on the Undefended List.

But, by virtue of Order 35 Rule 3 of the Rules of this honorable Court, a Defendant who wishes to defend an action on the Undefended List shall before 5 days to the day fixed for hearing of the suit, file a Notice of Intention to Defend with an affidavit disclosing a defence on the merit. If the Court is satisfied with the defence on the merit disclosed in the affidavit in support of the Notice of Intention to Defend, it will order that the suit be transferred to the General Cause List. The affidavit in support of the Notice of Intention to Defend must disclose a triable issue or a defence on

merit. In the case of **AMEDE v. UBA (2008) 8 NWLR (Pt 1090) pg 623 at paras A-B**, Abba-Aji JCA held as follows:

“A triable issue or defence on merit under the undefended list procedure is disclosed where a defendant’s affidavit in support of the notice of intention to defend is such that the plaintiff will be expected to explain some certain matters with regard to his claim or where the affidavit throws a doubt on the plaintiff’s claim”

In resolving the issue formulated by the Court to determine this matter, the Court must look at the Rules of Court which has made provisions guiding the hearing and determination of a suit commenced under the Undefended List Procedure. Order 35 Rule 3(1) provides as follows:

“Where a party served with the writ delivers to the registrar, before 5 days to the day fixed for hearing, a notice in writing that he intends to defend the suit together with the affidavit disclosing a defence on 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”

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”

In this case however, the Defendants filed their Notice of Intention to Defend along with their affidavit in support, and the crucial question will therefore be, if the affidavit discloses a defense on merit *vis-à-vis* the Claimant’s claim to justify the suit being transferred to the Ordinary Cause List for trial or judgement to be entered for the Claimant.

The phrase “affidavit disclosing a defense on merit” has received a lot of judicial consideration in several cases. In the case of ***DELTA HOLDINGS NIGERIA LTD v. ROBERT ATIMI OBORO (2013) LPELR-21242 (CA)***, the Court of Appeal held that:

“Where a defendant can show in his affidavit that he has a defence on merit, he will be granted leave to defend the suit. To entitle a defendant leave to defend, his affidavit in support of the notice of intention to defend must not contain mere general or empty statements that he has good defence to the action. Such a general statement must be weighty and substantial and must be supported by particulars which if proved would constitute a defence.”

Also in the case of **ATAGUBA & CO v. GURU (NIG) LTD (2005) LPELR-584 (SC)**

the Supreme Court held that:

“A defence on the merit for the purpose of the undefended list procedure may encompass a defence in law as well as on fact. The defendant must put forward some facts which cast a doubt on the claim of the plaintiff. A defence on merit is not the same as success of the defence in litigation. All that is required is to lay some foundation for the exercise of a triable issue or issues.” See also the case of **NISHIZAWA LTD v. JETHWANI (1984) 12 SC 234.**

Furthermore, an affidavit showing cause why a defendant should be granted leave to defend an action must disclose a defence on merit setting out the details and particulars of the defence. The popular expression is that the affidavit must “condescend upon particulars”. The affidavit showing cause must disclose facts which will at least throw some doubt on the plaintiff’s case. See the cases of **U.B.A. PLC v. JARGABA (2007) 11 NWLR (PT 1045) 247, MACAULAY v. NAL MERCHANT BANK LTD (1990) 4 NWLR (PT 144) 283** and **NISHIZAWA LTD v. JETHWANI (1984) supra.**

Being so guided by the authorities stated above, the Court will now proceed to consider the averments in the affidavit of the parties. In the Claimant’s affidavit in support of the Writ of Summons, it was averred on behalf of the Claimant that it lent the sum of ₦150,000,000.00 (One Hundred and Fifty Million Naira) to the Defendants to fund their contract for the supply of 25 Hilux Trucks to Heritage

Bank Plc awarded to the 1st Defendant by Heritage Bank Plc on the understanding as evinced in **Exhibit A** that the Defendants would repay the money on or before the 29th of November, 2018 while also depositing their Range Rover Velar with Chassis Number SALYL2RV1JA713319 with the Claimant as a security for the loan. Years later, the Defendants have failed to repay the loan according to the terms of the agreement.

On the other hand, in the affidavit in support of the Defendants' Notice of Intention to Defend, it was averred by the 2nd Defendant that, one Mr Sunday Tomilola Owotomo is the Chairman/Chief Executive Officer of the Claimant. It was also stated that the loan agreement was between this Mr Sunday Tomilola Owotomo and the Defendants for the sum of ₦100,000,000.00 (One Hundred Million Naira) with an interest of ₦50,000,000.00 (Fifty Million Naira). It was further stated on behalf of the Defendants that the 2nd Defendant paid \$250,000.00 (Two Hundred and Fifty Thousand Dollars) to Mr Sunday when he informed the 2nd Defendant that the EFCC were after him for a case of cybercrime and that all his accounts had been restricted by the Commission. This claim was supported by a notice showing Mr Sunday being declared wanted by the EFCC and marked as **Exhibit C**. Upon the payment of the said \$250,000.00 by the Defendant to Mr Sunday, Mr Sunday returned the Range Rover Velar 2018 used as collateral. Furthermore, the 2nd Defendant had stated that the Defendants have been inundated by some persons in the past who claimed to be brothers to Mr Sunday as well as Solicitors or business associates for the payment of the outstanding balance.

By virtue of the foregoing, the Court holds the view that the Defendants have raised triable issues against the Claimant's claims. As I have pointed out above, the Defendants' affidavit in support of the Notice of Intention to Defend does not need to disclose an iron-cast or rock-proof defence; all that is required is a *prima facie* defence upon which a trial will have to be concluded. In the case of **ATAGUBA & CO v. GURU NIGERIA LTD (2005) *supra*** the Supreme Court held that:

“One of the main problems that often arise in the undefended suit procedure is the consideration of whether the defendant’s affidavit in support of the notice of intention to defend discloses a defence on merit. In this regard, it has been held that it must disclose a prima facie defence. The affidavit must not contain merely a general statement that the defendant has a good defence to the action. Such general statement must be supported by particulars which if proved would constitute a defence. See John Holt & Co Ltd v. Fajemirokun (1961) All NLR 492. It is sufficient if the affidavit discloses a triable issue or a difficult point of law is involved, that there is dispute to the facts which ought to be tried, that there is a real dispute to the amount due which requires the taking of an account to determine or any other circumstances showing reasonable grounds of a bona fide defence. See Nishizawa Ltd v. Jethwani (supra); F.M.G v Sani (1990) 4 NWLR (Pt 147) 688 at 713.”

After a full and exhaustive consideration of the affidavits in support of the Claimant's Writ of Summons and the Defendants' Notice of Intention to Defend, and consistent with the provisions of Order 35 Rule 3(1) of the Rules of this Honorable Court 2018, the Court resolves the sole issue raised above in favor of the Defendants. I find that there are triable issues which have been disclosed. This suit is therefore not maintainable under the Undefended List Procedure. I therefore order the matter to be transferred to the General Cause List for hearing. Parties are hereby directed to file and exchange pleadings in accordance with the provisions of the High Court of the Federal Capital Territory (Civil Procedure) Rules 2018.

This is the Ruling of this Court delivered today the 8th day of March, 2022.

HON. JUSTICE A. H. MUSA

JUDGE

08/03/2022