

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

BEFORE HON. JUSTICE J.E. OBANOR
ON MONDAY THE 20TH DAY OF SEPTEMBER, 2021.

SUIT NO: FCT/HC/CV/794/2021

BETWEEN:

**VISCOUNT MULTIPURPOSE
COMPORATIVE SOCIETY**

.....CLAIMANT

AND

LAU AHMED IBRAHIM

.....DEFENDANT

RULING

On 16/3/2021, the Claimant took out a Writ of Summons under the Undefended List procedure against the Defendant.

It Claims as follows against him:-

1. “ An Order of the court against the Defendant to pay the sum of N86,400,000 being total money due to the Claimant from agreement entered by parties on the loan granted to the Defendant.
2. An Order directing the Defendant to pay 20% interest per month as agreed by parties from the date of maturity 19th of May 2016 on the principal and interest till the date of liquidation.
3. An Order to pay 10% on the judgment sum from the date of judgment until liquidation of the judgment sum.
4. An Order directing the Defendant to pay 5 Million as cost of the suit.”

The Writ was filed along with a 14-paragraph affidavit deposed to by Ode Amieghomwan and Pre-action Counseling Certificate

In response to the claim the Defendant on 5/7/2021 filed a Notice of Intention to defend along with a 14-main paragraph affidavit deposed to by Lau Ahmed Ibrahim.

At the hearing on 6/7/2021, Counsel for the parties relying on their affidavits took turns to address the Court for and against the application.

I have read and digested the averments in the affidavits of the parties and submissions of their Learned Counsel. The cardinal issue that calls for determination is whether or not the Claimant has made out a case to justify a grant of the reliefs sought in the Writ of Summons.

Order 35 Rules 1 to 5 of the Rules of Court 2018 makes provisions guiding claims brought under the Undefended List Procedure. Rule 3(1) and (2) provides thus:-

- 3(1) “Where a party served with the Writ delivers to registrar, before 5 day 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.”

In Rule 4 of the order 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.”

A cardinal element in this provision of Order 35 Rule 3(1) is the need for a defendant who intends to defend the suit to file and serve a Notice of Intention to Defend along with an affidavit disclosing a defence on the merit. In this case as records show, the Defendant filed a Notice of Intention to Defend along with an affidavit.

This said, the next question is whether or not the affidavit discloses a defence on the merit to justify the making of an order granting him leave to defend by transferring the suit to the Ordinary Cause List for trial or an order refusing to grant him leave and entering judgment accordingly.

The phrase the Defendant’s affidavit disclosing “a defence on the merit” has received judicial consideration in a number of cases. In **AKINYEMI V. GOVERNOR, OYO STATE (2003) FWLR (Pt.140) p.1821**, The Court of Appeal held 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 LIMITED (2005) ALL FWLR (Pt.256) p.1219**; the Supreme Court held with regard to the issue, that the affidavit in support of the notice of intention to defend must disclose a prima facie defence. It must not contain a mere general statement that the Defendant has a good defence to the claim. Such general statement must be supported by particular which if proved would constitute a defence. There is a triable issue if this affidavit posits the existence of a dispute as to the facts which ought to be tried.

Judicial authorities are also settled that a mere general denial of indebtedness will not suffice. The Defendant must give details of in case of debt, how much he initially owed, how much he has repaid to the Claimant. **See:- I. T. V. LTD V. ONYESON COMMUNITY BANK**

LTD (2005) ALL FWLR (Pt.253) p.758. Where there is allegation of fraud against the Claimant, the particulars of the fraud must be furnished. **See: - FEDERAL MORTGAGE FINANCE LTD V. RIVER STATE POLYTECHNIC (2005) ALL FWLR (Pt.260) p.9** where there are two or more heads of claim, and the Defendant raises a triable issue in one but fails in the other, the Court can enter judgment against the Defendant with respect to the one he did not raise a trial issue. **See: - IVAN V. BILANTE INT. LTD (1998) 5 NWLR (Pt.550) p.396.** Allegations that excessive interest was charged and that the Defendant's account was wrongly debited are triable issues that raise a defence on the merit. **See: - EZUMA V. NKWO COMMUNITY BANK LTD (2000) FWLR (Pt.28) p.2243.** Once an issue arises that will require oral evidence to be taken, the matter should be transferred to the Ordinary Cause List. **See: - ID AND ABUJA TRANS-NATIONAL MARKET V. ABDU (2007) ALL FWLR (Pt.376) p.657.**

In this case, the Claimant averred inter alia, in its affidavit in support of the writ, that sometimes on the 20th of January 2016 the Defendant applied for loan from the Claimant company. That the claimant by a letter signed by her representative approved the loan of N54,000,000.00 (Fifty Four Million Naira) which was to attract 20% interest and a repayment of N86,400,000.00 (Eighty Four Million Naira) and the Defendant acknowledged collecting the sum of N54,000,000(Fifty Four Million Naria) from the Claimant company on the agreement that the said amount of money shall yield 20% interest monthly within 90days. The said letter of approval of the loan is hereby marked as Exhibit A. The Defendant issued cheques amounting to the sum of N86,400,000 (Eighty-Four Million Naira) in favour of the Claimant sometime 5th day of October 2016. All these cheques were not honoured due to lack of funds in the Account. The defendant knew that there is no funds in his account issued dud cheques, till date failed to repay the loans he collected from the claimant. The money is long overdue and interest have continued to yield and also the Defendant has deliberately failed to pay the money with the agreed interest. The cheques issued to the claimant by the Defendant are hereby marked as Exhibit B1 and 2 Respectively. Since then the Defendant has neglected and deliberately failed to pay these

monies. The Claimant has been demanding payment of these monies from the Defendant, but the Defendant has refused to yield these demands.

The Defendant has no defence to this case. It will be in the interest of justice to grant all the reliefs as prayed in the writ of summons.

In their affidavit filed in support of the Notice of Intention to defend, the Defendant averred, inter alia, that sometimes in January 2016, his friend Alhaji Sani Agba Muhammed introduced one Mr Sam Olatola Omotola to him as his business partner and told him, that Mr Sam Olatola Omotola was awarded a contract of Rural Electrification in Lokoja, Kogi State but did not have the financial capacity to execute the contract at the moment. That Mr Sam Olatola Omotola wished to secure a bank loan and was in a dire need of a collateral to cover the loan and that they will appreciate if he can give them the Certificate of Occupancy of his residential property situate at House 6A No 5 Uruguay Street, Maitama Abuja. Having considered the purpose for which the loan was needed, he consented to their request. About 2(two) weeks later, Alhaji Sani Agba Muhammed and Mr Sam Olatola came to him with some representatives of the Claimant and informed him that the management of the Claimant have approved the loan but preferred that it should be given in his name since he is the owner of the property to be used as collateral in securing the loan. The loan approved by the management of the Claimant is N30,000,000.00 (Thirty Million Naira) only and not N54,000,000.00 (Fifty Four Million) only as contained in paragraph 4 of the affidavit in support of the Claimant's writ. The circumstances that led to the approved loan amount contained in paragraph 4 of the affidavit in support of the Claimant's writ and Exhibit A in support thereof are as follows; That Alhaji Sani Agba Muhammed and Mr Sam Omotola had earlier collected a loan of N24,000,000.00 (Twenty Four Million Naira) from the Claimant using a collateral from another source. They did not liquidate the loan facility upto the time they approached him and sought for a collateral from him to be used to secure another loan. When the management of the claimant approved the later N30,000,000.00 (Thirty Million Naira) loan for which his residential

property was to be used as collateral, they also decided that the earlier N 24,000,000.00 (Two Four Million) given to Alhaji Sani Agba Muhammed and Mr Sam Olatola Omotola be subsumed into the later loan of N30,000,000.00 for which his residential property was used as collateral. Neither Alhaji Sani Agba and Mr Sam Olatola Omotola nor the Claimant disclosed to him that there had been an unliquidated loan of N24,000,000.00 (Twenty Four Million Naira) which was to be subsumed into the N30,000,000.00 (Thirty Million Naira) loan for which his property was to be used as collateral. He signed Exhibit A annexed to the Claimant's affidavit on the bases that Alhaji Sani Agba Muhammed and Mr Sam Olatola Omotola requested for increment of the loan from N30,000,000.00 to N54,000,000.00 only. He did not receive the entire N54,000,000,00 (Fifty Four Million Naira) or any part of it from the Claimant. After signing Exhibit A attached to the claimant's affidavit and surrendering the Certificate of Occupancy of his residential property in Maitama Abuja the management of the Claimant also required him to give them post dated cheques to cover the loan amount which are Exhibits B1 and B2 attached to the Claimant's affidavit. Up to the time of this action he has not received the loan amount or any money from the Claimant's company. He has a defence to the Claimant's suit. That there are trial issues in this suit and it is in the interest of justice that this suit be transferred to the general cause list.

I have given due consideration to the averments in the affidavits of the parties. A reading of the Defendants' averments vis-à-vis that of the Claimant shows they joined issues with the Claimant on many issues, notably:-

- (1) That the Defendant did not receive the N54,000,000,00 (Fifty Four Million Naira) or any part of it from the Claimant.
- (2) That up to the time of this action the Defendant has not received the loan amount or any money from the Claimant's company.

- (3) That the loan approved by the management of the Claimant is N30,000,000.00 (Thirty Million Naira) only and not N54,000,000.00 (Fifty Four Million) as contained in paragraph 4 of the Affidavit in support of the Claimant's writ.
- (4) That the circumstances that led to approval of the sum contained in paragraph 4 of claimant's affidavit is to secure another loan of N24,000,000.00(Twenty Four Million Naira) previously collected by Alhaji Sani Agba Muhammed and Mr Sam Omotola which was never paid back by them before he came into the picture and that neither Alhaji Sani Agba and Mr Sam Olatola Omotola nor the Claimant disclosed to him of the unliquidated loan of N24,000,000.00 which was subsumed into the N30,000,000.00 loan for which his property was to be used as collateral

There is no gainsaying the fact that by the foregoing issues raised by the Defendant and which the Claimant did not deny in a Further Affidavit especially the issue of the defendant having not received the loan amount or any money from the Claimant's company that there are triable issues disclosed in the Defendant's affidavit in support of his Notice of Intention to Defend. Moreso in the circumstance where the Claimant alluded to the facts in paragraph 4 of its affidavit that the Defendant acknowledged collecting the sum of N54,000,000.00(Fifty Four Million Naira) and I did painstakingly go through the Claimant's affidavit as well as the documents attached as exhibits and did not find any evidence in support of this allusion either by way of bank statement of account showing the transfer of the sum into the Defendant's account or a written acknowledgment by the Defendant acknowledging receipt of the sum. In **NYA V. EDEM (2000) 8 NWLR (Pt.669) p.349**, the Court of Appeal while dealing with the issue of whether or not the Defendants affidavit discloses a defence on the merit, held thus:-

“An affidavit disclosing a defence on the merit

does not mean that the Defendant must show that his defence will 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 the stage. This can only be done at the trial."

In this case, by reasons of the above issues raised by the Defendant in his affidavit the Court is satisfied that not only did the Defendant substantially join issues with the Claimant's claim, the Defendant did raise prima facie defence which can only be determined after trial. The position of the law is that where there are conflicts in affidavits of parties which could not be resolved through documents attached as exhibits, the courts are enjoined to call oral evidence to resolve same.

In the light of the foregoing, the Court resolves the sole issue raised above in favour of the Defendant against the Claimant. In consequence, leave is pursuant to the provision of Order 35 Rule 3(1) of the Rules of Court 2018 granted to the Defendant to defend this suit. In consequence, the Claimant's claim is transferred 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.

**SGND.
HON. JUDGE
20/9/2020.**

LEGAL REPRESENTATIONS

- (1) Adekunle Oladapo Otitoju Esq for the Claimant.
- (2) Abbas Ajiya Esq. for the Defendant.