

**IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY
IN THE ABUJA JUDICIAL DIVISION
HOLDEN AT JABI-ABUJA**

BEFORE HIS LORDSHIP: HON. JUSTICE BABANGIDA HASSAN

SUIT NO: CV/1921/2020

BETWEEN:

MR. JOSEPH GANA.....CLAIMANT

AND

**1. ENGR. IDOWU LAMIDI
2. DOLLAR CONSTRUCTION NIGERIA LIMITED }DEFENDANTS**

RULING

The claimant filed suit under the undefended list procedure and claims as follows:

1. The sum of N2,000,000.00 (Two Million Naira) only, being the total sum of the money borrowed from the claimant by the defendants.
2. Interest of N600,000.00 (Six Hundred Thousand Naira) only being 30% of the N2,000,000.00 payable to the claimant in four weeks, that is from 23rd of August, 2017, as agreed by the parties in the agreement dated 26th of July, 2017.
3. 10% monthly interest on the sum of N2,000,000.00 (Two Million Naira) only from the 23rd day of August, 2017 until repayment of same as

contained in the loan agreement entered between the claimant and the defendant or until judgment is delivered in this suit.

4. An order of this Honourable court attaching the personal house of the plaintiff situate at Plot No. 241, A13, Villanova Estate Apo (being the collateral for the loan) in satisfaction of the debt as agreed by the parties in the agreement dated 26th of July, 2017.
5. The plaintiff's solicitor's fees on the sum of N1,500,000.00 (One Million, Five Hundred Thousand Naira) only.

The writ is accompanied by an affidavit, and attached to the affidavit are documents marked as EXH- "A" – "F", and notable among which is the Loan Agreement/Contract letter marked as EXH- "B".

The defendants filed their Notice of their intention to defend the action accompanied by an affidavit dated the 7th day of May, 2021. In addition to that the defendants filed a Notice of Preliminary Objection dated the 6th day of July, 2021 and accompanied by an affidavit and a written address.

In the notice of preliminary objection, the defendants seek for the following orders:

1. An order of this Honourable court striking out this suit for been improperly commenced under the undefended list procedure.
2. And for such further or other as this Honourable court may deem fit to make in the circumstances.

The grounds upon which this notice is filed are as follows:

- (i) The claimant not being a Registered money lender cannot charge interest above the statutorily provided rate on a friendly loan.
- (ii) The claimant cannot claim interest not certain under the undefended list procedure.
- (iii) The claimant's prayer for attachment of the defendants' personal house is strange to the undefended list procedure.
- (iv) The claimant's claim for professional fees cannot properly determined in any action commenced under the undefended list procedure.

The claimant filed a nineteen paragraphed affidavit, and a written address of counsel in opposition to the Notice of Preliminary Objection.

It is in the affidavit in support of the preliminary objection that the plaintiff gave the friendly loan of N2,000,000.00 sometime in July, 2017 to the 1st defendant, and that the claimant is not a licenced money lender, and that under the money lenders Act, only a licenced money lender can charge interest on loan.

It is stated that nonlicenced money lenders loan agreements which charges interest are void. That the loan agreement between the claimant and the 1st defendant is void. That the rate of interest charged and claimed by the claimant is unknown to law. That the prayer endorsed in the claimant's writ of summons are not ones reasonable under the undefended list procedure, and that the 1st defendant is not privy to the negotiation between the claimant and his lawyer as to legal fees, and that it is in the interest of justice to transfer this matter to the general cause list.

In his written address the counsel to the defendants formulated these issues for determination, thus:

- 1. Whether the claimant not being a registered money lender can charge interest above the statutorily provided rule as a friendly loan?**
- 2. Whether the claimant can claim interest not certain under the undefended list procedure?**
- 3. Whether the claimant can attach the property of the defendant under the undefended list procedure?**
- 4. Whether the claimant can charge for professional fees in an action instituted under the undefended list procedure?**

On the issue No. 1, the counsel referred to sections 2 & 3 of the money Lenders Act for the definition of a Money Lender, and further referred to section 13 of the Money Lenders Act which provides for the interest chargeable by a money lender or any person other than a money lender, and the interest which may be charged by a money lender shall not exceed the respective rate specified in which pegs it at the rate of 15% per annum for the first one hundred naira or part thereof and at the rate of twelve and –a – half percent per annum on any amount in excess of one thousand naira as loan secured by a charge on any freehold property or shares of any company or by a bill or sale in respect of any goods or by the assignment of any personal rights legally enforceable, or by the indemnity or personal guarantee of a third party.

It is submitted that the interest of loan secured by a second charge on any of the real or personal property or rights referred to in paragraph (a) of this subsection, simple interest at the rate of 17 ½ % per annum for the first N1,000.00 naira or part thereof and at the rate of 15% per annum on any amount in excess of one thousand naira.

The counsel submitted that the import of the Act is to the effect that where monies are lent by a money lender or any person other than a money lender, interest charged shall contain with the rates as specified above, and he cited the case of **Tabik Investment Ltd & Anor V. GTB Plc (2011) LPELR – SC** with respect to the use of the word “shall” in the Act, which implied mandatory. He submitted further that the mischief behind the regulation of interest rates charged by money lenders and persons other than money lenders is to prevent incidence of exorbitant interest charge on desperate borrowers.

The counsel submitted that a close look at the loan agreement between the claimant and the 1st defendant, the interest of 30% payable within four weeks of the receipt of the loan is way above the interest chargeable of 15%, and where the interest charged by the claimant does not confirm with the statutory rates, then to him, it is illegal, and he then submitted that if the provisions of the law require certain formalities to be performed as conditions precedent for the validity of the transaction, without, however, imposing any penalty for non compliance, the result of failure to comply with the formalities merely renders the transaction void, and if a penalty is imposed, then the transaction is not only void but illegal unless the statute stipulate otherwise, and he referred to the case of **Pan Bisilder Nig. Ltd V. F. B. N. Ltd (2000) LPELR – SC**, and he then submitted that the court is enjoined not to allow itself to be used for the enforcement of an illegal act of contract entered into by the parties, and he cited the case of **Osifo V. Okogbo Community Bank Ltd (2007) All FWLR (pt 372) 1803 at 1832 para. B.**, and to him, this render the interest nugatory.

On the issue No. 2, the counsel submitted that the undefended list procedure is designed for the expeditious hearing of actions for recovery of debts or liquidated money demands and not suitable for contentious matters, and he cited the case of **Micmerah Int'l Agency Ltd V. A- Z Pet. Products Ltd (2012) 2 NWLR (pt 1285) 564 at 601**. He submitted further that the court have in plethora of cases defined liquidated money demand to mean money usually due or payable and its amount must be already ascertained as a matter of arithmetic without any other or further investigation, and he referred to the case of **Micmerah Int'l Agency Ltd V. A – Z Pet. Products Ltd (supra)**, and he also relied on the case of **Effanga V. Rugels (2003) FWLR (pt 157) 1058**.

The counsel on the authority of **Maibet (N. G.) Ltd & Anor V. Access Bank (2018) LPELR (CA)** submitted that the third claim of the claimant contained on the faces of the writ is one that cannot be ascertained by the undefended list procedure, and he cited the case of **Engr. S. U. Adejo & Anor V. Mr. Walter N. Ubesie (2012) LPELR (CA)**.

On the issue No. 3, the counsel submitted that the claimant has prayed for the attachment of the house of the 1st defendant in satisfaction of the debt under the undefended list procedure, and he submitted further that the value of the house is not certain, and that to him, because where the amount to be recovered depends on circumstances and is fixed by opinion or estimate, then it is said not to be liquidated. He then submitted that since the value of the property sought to be attached cannot be ascertained, same cannot be brought under the undefended list.

On the issue No. 4, the counsel referred to the dictum of Tijjani Abdullahi SCA in the case of **Hon. Justice Sontonye**

Denton West V. Chief (Ichie) Chuks Muom A. SAN (2009) LPELR – (CA) to the effect that the amount being claimed must have been ascertained or capable of being ascertained from the agreement between the parties. He then submitted that having a cursory look at the agreement attached to the writ of summons, these appears to be no instance where the defendant agreed to pay incidental solicitors fees arising from any form of litigation, and it is therefore strange to find the claimant laying claim to solicitor’s fees.

The counsel submitted that the court in determining the principles guiding the award of cost for expenses incurred on the services of a counsel, he cited the case of **Miss. Funmilayo Rotala Ayodele Williams V. Glaxos Mithkline Consumer Nigeria Plc (2019) LPELR – CA** to the effect that a claim for professional fees not by solicitor but by his client against an adversary in litigation, which the law frowns at as unethical and an affront to public policy for one party to pass on the burden of his solicitors fees to the other party.

The counsel then urged the court to strike out this matter in its entirety as it is devoid of basic elements required to bring it under the undefended list.

Let me observe that the counter affidavit of the claimant in response to the affidavit in support of the notice of preliminary objection has not been signed by the deponent, and it has not been sworn before a Commissioner for Oaths. I am satisfied that it has not been sworn before a Commissioner for Oath, and I therefore, there is no need to permit the use of the counter affidavit in the instant application. See section 113 of the Evidence Act where it provides:

“The court may permit an affidavit to be used notwithstanding that it is defective in form

according to this Act, if the court is satisfied that it has been sworn before a person duly authorised.”

In considering the written address of counsel for the claimant in support of the counter affidavit, I also observed that the counsel to the claimant is in agreement with the counsel to the defendants to the effect that triable issues are raised by the defendants which cannot be determined without having evidence from both sides, and to him, the appropriate thing to do in the circumstances is to enter and transfer the claims or reliefs No. 2, 3, 4 and 5 to the general cause list while the court should enter judgment with respect to relief No. 1 because the defendants in their affidavit admitted that a loan of N2,000,000 was given to them and he relied on the cases of **Barau & Ors V. Consolidated Tin Mines Ltd & Ors (2019) LPELR – 46806 (CA)**, and **Akinlagun V. Oshoboja (2006) LEPELR – 348 (SC)**. He also relied on section 123 of the Evidence Act, 2011.

Now, having summarised the affidavit evidence of the defendants/applicants and the submission of both counsel in this application, the question that agitates in the mind of this court is: **whether the undefended list procedure allows preliminary objection?**

To this, I refer to the case of **Abdulkadir V. Usman (2002) FWLR (pt 92) at p. 1746, paras. A – B** where the court held that generally, preliminary objection to jurisdiction is not allowed under the undefended list procedure. What is allowed is the affidavit of defence, and whatever defence a party conceives he is entitled to, having regard to the facts of the case, must be disclosed in the affidavit filed along with the notice of intention to defend. In the instant case, and notwithstanding that the defendants filed this preliminary objection, I still have to consider the affidavit accompanying the notice of intention to defend this action,

thereby discountenancing the preliminary objection raised by the defendants. As against the earlier stand of this court that it would first determine the preliminary objection and where it does not succeed, then it would proceed to determine the matter, the preliminary objection is hereby discountenanced.

The affidavit accompanying the notice of intention to defend the action is a replica of the affidavit accompanying the notice of preliminary objection, and therefore I need not to rewrite same.

I have gone through the affidavit accompanying the notice of intention to defend the action, and discovered that the defendants raised the following issues which are triable:

- a. That the rate of interest charged and claimed by the claimant is unknown to law, and this he relies on sections 2, 3 and 13 of the Money Lenders Act to the effect that the non licenced money lender loan agreement which charges interest is void and illegal.**
- b. That the reliefs endorsed on the claimant's writ of summons are not ones recoverable under the undefended list procedure.**

Out of the reliefs sought, let me focus on reliefs Nos. 4 and 5. The claimant in relief No. 4, claims for an order of this Honourable court attaching the personal house of the defendant situated at Plot No. 241, A13, Villa Nova Estate Apo (being the collateral for the loan) in satisfaction of the debt, as agreed by the parties in the agreement dated 26th of July, 2017.

Now the question is: **whether this claim falls within the categories of the claims to be made before a court under the undefended suit?**

Certainly this claim does not relate to recovery of liquidated money demand, rather it is a claim for the purposes of enforcing or executing the judgment of the court in the event the claimant succeeds. See the case of **S. N. Ltd V. H. G. R. Ltd (2017) All FWLR (pt 871) p. 1241 at pp. 1258 – 1259, paras. G – C** where the Court of Appeal, Port Harcourt Division held that for a suit to be placed on the undefended list for hearing, the reliefs sought must be for a liquidated money demand or a debt. In the instant case, the value of the house has not been ascertained, let alone for this court to concede to the placing the suit under undefended list, and in the circumstances, I hold the firm view that relief No. 4 does not fall within the category of the claims that may be filed under the undefended list procedure.

On the relief No. 5, as to whether a claim of solicitor's fee can be brought under the undefended list procedure? I refer to the case of **Fed. Poly., Offa V. U.B.A. Plc (2014) All FWLR (pt 737) per Ogbuinya JCA: pp. 774 – 775, paras. F – A.**

”..... To start with, no receipt was attached to show the cost of action. In the second place, the parties were never consensual on the payment of the cost of action. Besides, cost of suit may be indeterminate or inestimable without further investigation as it can include the filing fees for other processes, apart from the writ, and professional fees charged by counsel. In other words, the claim involves a lot of variables and it cannot be arrived at without arithmetic calculation.”

In the instant, and looking at the loan agreement marked as EXH- “B”, it can be seen that it requires oral

evidence before this court can reach a decision, and to this, I therefore so hold.

Now the defendants in their affidavit accompanying the notice of intention to defend admitted in paragraph 3 that the claimant gave him a friendly loan of N2,000,000.00 (Two Million Naira) on July, 2017. However, in paragraph 6, the defendants raised this issue of law that the said agreement is void. So the court has to determine by evidence or reply that the loan agreement is not void.

In the circumstances of this case, the court is to transfer it to the general cause list as it suffers some defects. See the case of **S. N. Ltd V. H.G.R. Ltd (supra)**. See also the case of **Fed. Poly; Offa V. U. B. A. Plc (supra)** where the court held that one triable issue is sufficient to warrant a transfer of a case from the undefended list to the general cause list for hearing.

The case is hereby transferred to the general cause list and the parties can file pleadings.

Hon. Judge
Signed
31/01/2022

Appearances:

F. O. Onogene Esq appeared for the defendants.