IN THE HIGH COURT OF JUSTICE OF THE F.C.T.
IN THE ABUJA JUDICIAL DIVISION
HOLDEN AT APO, ABUJA
ON TUESDAY, THE 14TH DAY OF JUNE, 2022
BEFORE HIS LORDSHIP: HON. JUSTICE ABUBAKAR HUSSAINI MUSA
JUDGE

SUIT NO: FCT/HC/CV/030/2021

BETWEEN:

KASOWARI NIGERIA LTD **CLAIMANT**

AND

1. **SIVAN DESIGN D. S. LTD**
2. **BAYELSA STATE GOVERNMENT** **DEFENDANTS**

RULING

By a Writ of Summons brought under the Undefended List Procedure, the Claimant herein seeks for the following reliefs:-

1. *An Order directing the 2nd Defendant to pay the Claimant the sum of ₦217,279,855.00 (Two Hundred and Seventeen Million, Two Hundred and Seventy-Nine Thousand, Eight Hundred and Fifty-Five Naira) only being 0% balance of ₦434,559,710.00 (Four Hundred and Thirty-Four Million, Five Hundred and Fifty-Nine Thousand, Seven Hundred and Ten Naira) only which is for work done on the Bayelsa State Land*

Information System and for which the Claimant is entitled to a commission based on the agreement between the Claimant and the 1st Defendant in the memorandum of understanding dated 2nd June, 2013.

2. *An Order directing the 2nd Defendant to pay to the Claimant thirty per cent (30%) pre-judgment interest on the ₦217,279,855.00 (Two Hundred and Seventeen Million, Two Hundred and Seventy-Nine Thousand, Eight Hundred and Fifty-Five Naira) only. The interest to be calculated from 31st October 2016 when the said sum became due to the Claimant to the date of Judgment.*
3. *An Order directing the 2nd Defendant to pay to the Claimant thirty per cent (30%) post-judgment interest on the Judgment debt in Relief Nos 1 and 2 above.*
4. *An Order authorizing the 2nd Defendant to pay directly to the Claimant the judgment debt in this suit, the amount is to be paid from the outstanding fees due to the 1st Defendant from the 2nd Defendant for the strenuous services rendered by the Claimant by the facilitation, aggregation, implementation, re-orientation and navigation with National Security Organisations and International standardization of the Bayelsa State Land Information System (BYLIS).*

5. *An Order deeming that the money paid by the 2nd Defendant to the Claimant under Relief No. 4 above is money paid by the 2nd Defendant to the 1st Defendant i. e. the 2nd Defendant is discharged from paying the same money to the 1st Defendant.*

The Writ of Summons on the Undefended List is supported by an affidavit of 17 paragraphs deposed to by one Queen Akasoba Duke, mni who described herself as the Chairman of the Claimant in this suit. The Claimant also attached one exhibit to the affidavit which is the Court Order issued by this Honourable Court coram I. U. Bello, CJ (as he then was) in the Garnishee proceedings in *Suit No. FCT/HC/CV/1499/2017* in respect of the Motion on Notice with *Motion No. FCT/HC/M/7861/2010*.

According to the Deponent, the Claimant and the 1st Defendant had, on the 2nd of June, 2013, executed a Memorandum of Understanding wherein it was agreed that the Claimant would facilitate the award of the contract for the development of the Bayelsa State Land Information System to the 1st Defendant by the 2nd Defendant. The contract sum was stated in the affidavit to be ₦1,693,400,000.00 (One Billion, Six Hundred and Ninety-Three Million, Four Hundred Thousand Naira) only exclusive of VAT and other tax charges. The Claimant, it was agreed, would be paid 25% of this

sum, that is, ₦423,000,000.00 (Four Hundred and Twenty-Three Million Naira) only. According to the agreement, the Claimant would be paid 25% of every tranche the 2nd Defendant paid the 1st Defendant in liquidation of the contract sum. According to the deponent, the Board of the Claimant, via a resolution decided that all monies due and payable to the Claimant by the 1st Defendant should be paid into the corporate account of Akasoba Law Firm domiciled with First City Monument Bank (FCMB).

It is the case of the Claimant that the Claimant discharged its obligation under the Memorandum of Understanding when it facilitated the award of the contract by the 2nd Defendant to the 1st Defendant. The deponent averred that on the 12th of August, 2013, the 1st Defendant transferred the sum of ₦108,702,727.00K (One Hundred and Eight Million, Seven Hundred and Two Thousand, Seven Hundred and Twenty-Seven Naira) only representing 25% of the sum of ₦434,559,710.00K (Four Hundred and Thirty-Four Million, Five Hundred and Fifty-Nine Thousand, Seven Hundred and Ten Naira) only into the FCMB account of Akasoba Law Firm as agreed.

The deponent further stated that she found out, on the 31st of October, 2016, that the 1st Defendant had received from the 2nd Defendant a second

tranche of ₦434,559,710.00K (Four Hundred and Thirty-Four Million, Five Hundred and Fifty-Nine Thousand, Seven Hundred and Ten Naira) only, but had failed to remit the agreed 25% of the said sum to the Claimant. She swore that the Claimant was entitled to receive the sum of ₦217,279,855.00 (Two Hundred and Seventeen Million, Two Hundred and Seventy-Nine Thousand, Eight Hundred and Fifty-Five Naira) only from the being 50% of the above tranche and the final payment on the contract. She averred that the 1st Defendant had some monies left with the 2nd Defendant and swore that the 1st and the 2nd Defendants did not have any defence to the suit of the Claimant.

The 1st Defendant did not file any process in response to the Writ of Summons on the Undefended List. The 2nd Defendant, on the 10th of February, 2022, filed its Notice of Intention to Defendant. In the 20-paragraph Affidavit in support of the Notice of Intention to Defend deposed to by one TubuOpaliAmakubuakuro who described himself as "a civil servant of Accounts Department, Ministry of Justice, Bayelsa State Liaison Office (Izon Wari)", the 2nd Defendant through the deponent admitted that it entered into a contract with the 1st Defendant to the exclusion of the Claimant to establish its geographic Information Systems, in Yenegoa, Bayelsa State. It however stated that the total contract value was

₦971,367,155.00 (Nine Hundred and Seventy-One Million, Three Hundred and Sixty-Seven Thousand, One Hundred and Fifty-Five Naira) only.

The deponent averred that the 2nd Defendant had been liquidating the contract sum from earnings from the Geographic Information Systems and that the balance due to the 1st Defendant on the contract as at 6th October, 2020 was ₦248,701,254.49 (Two Hundred and Forty-Eight Million, Seven Hundred and One Thousand, Two Hundred and Fifty-Four Naira, Forty Kobo). The Deponent swore that the 2nd Defendant was not aware of any agreement between the 1st Defendant and the Claimant regarding the contract between the 1st Defendant and the 2nd Defendant, since it was not a party to the said Memorandum of Understanding; and only became aware of the said contract of facilitation when the Claimant obtained Judgment against the 1st and 2nd Defendants in *Suit No. FCT/HC/CV/1499/2017: Kasowari Nigeria Limited v. Sivan Design Limited & Anor*.

The deponent contended that the Memorandum of Understanding between the Claimant and the 1st Defendant was unenforceable against the 2nd Defendant since it was not a party to the said Memorandum of Understanding. He averred further that the 2nd Defendant filed an appeal

with *Appeal No. CA/A/362/2020: Bayelsa State Government v. Kasowari Nigeria Limited & Anor* and a Motion for Stay of Execution. He swore that notwithstanding the pending appeal and the Motion on Notice both pending before the Abuja Division of the Court of Appeal, the Claimant initiated Garnishee proceedings in which the Garnishee Order Nisi was made absolute its opposition to the proceedings notwithstanding. He further swore that the 2nd Defendant had also appealed against the Order Absolute and had filed a Motion for Stay of Execution of the said Order Absolute.

The deponent averred that in spite of the pending appeals and the applications for stay of execution against the Judgment in *Suit No. FCT/HC/CV/1499/2017: Kasowari Nigeria Limited v. Sivan Design Limited & Anor*, the Claimant levied execution of the said Judgment to the tune of ₦160,551,892.33 (One Hundred and Sixty Million, Five Hundred and Fifty-One Thousand, Eight Hundred and Ninety-Two Naira Thirty-Three Kobo). As if that was not enough, the deponent averred that the Claimant herein instituted two other proceedings before this Court in *FCT/HC/CV//2937/2020* pending before this Honourable Court *coram*Oriji, J. and *FCT/HC/CV/030/2021* which is the present suit. He also swore that the Claimant voluntarily withdrew *Suit No. FCT/HC/CV/2937/2020* and the

Court *coram*Oriji, J. awarded a cost of ₦100,000.00 (One Hundred Thousand Naira) only which the Claimant had yet to pay.

The deponent asserted that the transaction between the Claimant and the 1st Defendant had occasioned serious embarrassment to the 2nd Defendant to the point that the 2nd Defendant, in October, 2020, had to stop further payments to the 1st Defendant when it found that the Claimant and the 1st Defendant were colluding to bankrupt the 2nd Defendant by receiving monies without performing its part under the agreement it had with the Claimant. In conclusion, he added that the 2nd Defendant had suffered serious loss and, as a result, was willing to defend the suit on the merits so that the facts could be fully determined.

Responding to the Notice of Intention to Defend the 2nd Defendant filed, the Claimant, on the 23rd of March, 2022, filed a Further and Better Affidavit in support of the Writ under the Undefended List. In the said Further and Better Affidavit, the deponent, one Elias Audu of H. M. International Law Firm, while neither denying nor affirming the facts contained in paragraphs 1, 2, 3, and 10 of the Affidavit in support of the Notice of Intention to Defend, however, challenged the veracity of the claims in paragraphs 4, 5, 6, 7, 8, 9, 11, 12, 13, 14, 15, 16, 17, 19, 19, 20, 21 and 22 of the said

affidavit. According to the deponent, the Defendants, on the 10th of September, 2021, wholly withdrew their appeals with *Appeal Number: CA/A/362/20* and that the processes in *Suit No. FCT/HC/CV/1499/2017* were duly served on the Defendants.

The deponent further stated that the 2nd Defendant acknowledged its indebtedness to the Claimant which, according to the deponent, could be seen from the correspondence from the office of the Governor of Bayelsa State to the Attorney-General of the State and also the the letter titled "Acceptance of Settlement of Payment on behalf of Bayelsa State Government". He drew the attention of the Court to the settled position of the law that mere filing of an application for stay of execution was not a barricade to a successful litigant enjoying the fruits of their litigation. He added that the reason for the withdrawal of the suit with *Suit No. FCT/HC/CV/2937/2020* was partly because the parties were trying to resolve the matter amicably and partly because there was a change of Counsel.

Responding to the Further and Better Affidavit of the Claimant, the 2nd Defendant, on the 30th of March, 2022, filed a Further Affidavit in support of its Notice of Intention to Defend. The said Further Affidavit was deposed to

by the same TubuOpaliAmakubuakuro. In the said Further Affidavit, the deponent denied paragraphs 1, 2, 3, and 4 of the Claimant's Further and Better Affidavit and challenged the veracity of the averments in paragraphs 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17 and 18. He insisted that the Claimant was never a party to the contract between the 2nd Defendant and the 1st Defendant. He added that the initial contract sum was ₦1,693,400,000.00 (One Billion, Six Hundred and Ninety-Three Million, Four Hundred Thousand Naira) only but same was renegotiated and settled at ₦971,367,155.08K (Nine Hundred and Seventy-One Million, three Hundred and Sixty-Seven Thousand, One Hundred and Fifty-Five Naira, Eight Kobo) only, adding that as a result of this renegotiation of the contract sum, the Claimant was not entitled to any sum from the 1st Defendant and the 2nd Defendant was not under any obligation to report to the Claimant.

He further averred that the appeal of the 2nd Defendant with *Appeal No. CA/A/362/2020* was in respect of the Judgment in *FCT/HC/CV/1499/2017* which was delivered without regard for due process, insisting that the 2nd Defendant was never served. He swore that the Claimant proceeded to execute the Judgment of the Court in *Suit No. FCT/HC/CV/1499/2017* to the tune of ₦160.551,892.33 (One Hundred and Sixty Million, Five Hundred

and Fifty-One Thousand, Eight Hundred and Ninety-Two Naira, Thirty-Three Kobo) against the 2nd Defendant notwithstanding that its appeal against the Judgment and its application against the execution of the Judgment were still pending. He explained that the execution of the said Judgment automatically rendered the appeal and the application for stay of execution nugatory, thereby compelling the 2nd Defendant to withdraw the appeal and the application for stay of execution on the 10th of September, 2021.

The deponent swore that the undefended list procedure was for a liquidated money demand in cases where the Defendant has no defence to the suit on the merit. He added that since there was a conflict in the affidavit evidence in respect to this suit as presently constituted, there was need to call oral evidence to resolve the conflict. He insisted that the 2nd Defendant had shown a defence on the merit and was willing to defend same. He urged the Court to move the suit to the general cause list where the facts could be contested on the merits.

These are the arguments of the Claimant and the 2nd Defendant in respect of the Writ of Summons brought under the Undefended List Procedure.

Two issues easily lend themselves for determination by this Honourable Court. The issues are:-

1. ***Whether, by virtue of the failure of the 1st Defendant to file a Notice of Intention to Defend, the Claimant was not entitled to recover the sums claimed in the Writ of Summons against the 1st Defendant?***
2. ***Whether by virtue of the totality of the facts disclosed in the Affidavit in support of the Notice of Intention to Defend and the Further Affidavit in support of same, the 2nd Defendant has not disclosed a defence on the merit to warrant this suit being transferred to the general cause list?***

Issue One:

The *terminus a quo* in resolving this issue is to consider the provisions of the High Court of the Federal Capital Territory, Abuja (Civil Procedure) Rules 2018 touching on the Undefended List Procedure. Order 35 Rules 1, 3, and 4 provide as follows:-

1. ***(1) 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 the grounds on which the claim is based, and stating that in the deponent's belief there is no defence to it, the judge in chambers shall enter the suit for hearing in what shall be called the "Undefended List".

3. ***(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.

4. ***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.***

It is important for this Court to delve albeit briefly into the history of this case. This case came up for the first time on the 14th day of December, 2021. Parties were absent and this Court struck out the case from the Court's docket for want of diligent prosecution. On the 19th of January, 2022, however, Counsel for the Claimant and the 2nd Defendant were in Court; whereupon Counsel for the 2nd Defendant applied that the originating processes be served on them to enable them respond accordingly. On the 20th of January, 2022, Counsel for the Claimant moved its Motion *Ex Parte* with Motion Number M/481/2022 dated and filed on the 19th of January, 2022 praying this Court for an Order re-listing the Writ of Summons which was struck out on the 14th of December, 2021. The Court heard and granted the prayers as contained on the face of the Motion papers. Because the life of the Writ of Summons in this suit had expired, the Claimant through its Counsel brought an application vide Motion *Ex Parte* with Motion Number M/1564/2022 dated and filed on the 11th of February, 2022 praying this Court for an Order renewing the life of the Writ of Summons. The Court heard this application on the 16th of February, 2022 and granted the reliefs sought therein. It was upon the renewal of the Writ of Summons in this suit that the suit became valid and the parties proceeded to argue their respective positions.

I have stated earlier in this Ruling that the 1st Defendant did not file any process in defence of this suit. When a Court is confronted with a situation where a Defendant fails to appear in Court to defend the suit against them, such as in this case, it is the Court's bounden and sacred responsibility to satisfy itself that a Defendant is, indeed, aware of the pendency of a suit against them before it proceeds to hear the matter in their absence or to enter Judgment against them. This is what is called fair hearing. Every party before a Court is entitled to same. This right is enshrined in section 36 of the Constitution of the Federal Republic of Nigeria 1999. One of its principles is the doctrine of *audialterempartem* – let the other party be heard. The other party can be heard only when they have been given the opportunity to defend themselves. It is a different situation where the other party has been given the opportunity to defend themselves but they failed, for whatever reason, to take advantage of the opportunity given to them to defend themselves. In that case, they cannot be heard to complain that they have been deprived of their right to fair hearing. See ***Esezoobo v. Aji&Ors (2016) LPELR-41289 (CA); Akura v. Akpom (2021) LPELR-55495 (CA)***.

I have carefully gone through the processes in the case file and I am unable to find evidence that the 1st Defendant was served with the

originating processes in this suit. The Rules of this Court and the Companies and Allied Matters Act 2020 provide for how service of originating processes can be effected on a corporate entity. Order 7 Rule 8 provides that

> "***Subject to any statutory provision regulating service on a registered company, corporation or body corporate, every originating process requiring personal service may be served on a registered company, corporation or body corporate, by delivery at the head office or any other place of business of the organisation within the jurisdiction of the Court.***"

Section 104 of the Companies and Allied Matters Act 2020 provides that

> "***A court process shall be served on a company in the manner provided by the rules of court and any other document may be served on a company by leaving it at, or sending it by post to, the registered office or head office of the company.***"

A community reading of the two provisions above readily reveals that the mode of service on a body corporate is "***delivery at the head office or any other place of business of the organization within the jurisdiction of the Court***."In a long list of judicial authorities, the Court of Appeal and the

Supreme Court have consistently held that service on a corporate entity must be done in terms as prescribed by law for service of Court process on legal *persona* and that corporate entities cannot be served by substituted means. See ***Savannah Bank (Nig.) Plc v. Saba (2018) 14 NWLR (Pt. 1638) 56 CA at 84 – 85, paras F – B; Mark v. Eke (2004) 5 NWLR (Pt. 865) SC 54 per DahiruMusdapher, JSC (as he then was);*** and ***R.F.G. Ltd v. Skye Bank Plc (2012) LPELR-7880 (CA), (2013) 4 NWLR (Pt. 1344) 251***.

There is no doubt that the 1st Defendant, by its nomenclature, is body corporate. The address for service as provided for in the Writ of Summons is "93 Obafemi Awolowo Way, Rukayat Plaza, Jabi, Abuja, FCT." The service of the process, therefore, ought to be at this address.

As to how the service of processes, originating and otherwise, can be established, Order 7 Rule 13 provides that

> ***(1)*** "***The process server shall after serving any process promptly depose to and file an affidavit setting out the fact, date, time, place and mode of service, describing the process served and shall exhibit the acknowledgment of service.***

(2) Proof of service by email shall be evidenced by an affidavit with a printout of an email notifier attached thereto.

(3) ***The affidavit shall be prima facie proof of service.***"

I have carefully gone through all the endorsement and returns contained in the case file as well as the Certificate of Service completed by the Bailiff of this Honourable Court. I neither find where the 1st Defendant acknowledged service of the originating processes served on it nor any Certificate of Service where the Bailiff of this Court deposed to the fact of service of the Originating Processes on the 1st Defendant. The only evidence of service of any Court process on the 1st Defendant is the certificate of service of hearing notice on the 1st Defendant and the endorsement and return of the service of the 2nd Defendant's Notice of Intention to Defend and the Further Affidavit in Support of the Notice of Intention to Defend on the 1st Defendant. This, in my considered opinion, cannot take the place of service of originating process on the 1st Defendant.

The purpose of the service of originating process on a Defendant, as has been established in a long line of judicial authorities, is to bring to their attention the case against them. It is the process through which the

jurisdiction of the Court is properly invoked. In ***Registered Trustees of Presbyterian Church of Nigeria v. Etim (2017) 13 NWLR (Pt. 1581) 1 SC at 29 para H***, the Supreme Court per **I. T. Muhammad JSC (as he then was)** graphically described the intrinsic relationship between service of processes in a suit and the competency of the Court to hear the suit in the following memorable words: "***Service of Court process in a trial, is what the spinal cord is to a human being***." In ***Dike v. Kay-Kay Construction Ltd (2017) 14 NWLR (Pt. 1584) 1 CA at 65 – 66, paras H – B***, the Court of Appeal held that the issue of service of a Court process on a party where service was required was not an issue of technicality. It went on to add that "***the jurisdiction of the Court can only be activated by proper service of a Court process especially an originating process such as the writ of summons and any other process which by law is required to be served on the other party***."

In ***Savannah Bank (Nig.) Plc v. Saba (2018) 14 NWLR (Pt. 1638) 56 CA at 84 – 85, paras F – B***, the Court of Appeal held that "***service of an originating process is a threshold issue impacting on the vires of the Court to entertain the suit at all. Service of process, where service is required, is crucial and fundamental. Service is a pre-condition to the exercise of jurisdiction by the Court. Where there has been no service***

of Court process or there is a procedural default in service, the subsequent proceedings amount to a nullity."

In ***Ezim v. Menakaya (2018) 9 NWLR (Pt. 1623) 113***, the Supreme Court reiterated the primal position of service of process in an adjudicatory process when it held at ***page 126, paras F – H*** that "***service of the initiating process of a suit or its hearing notice constitutes the foundation, on which the whole structure of litigation or appeal is built, and in its absence, the entire proceeding is rendered void and any decision reached thereon is a nullity. The service of an initiating process… is so central, fundamental, and very germane to the proceedings springing or emanating from such processes***." On the effect of failure to serve court process where service is required, the Supreme Court held, at ***page 132, paras B – D***, that "***where notice of any proceeding is required, failure to notify any party is a fundamental omission which entitled the party not served and against whom any order is given in his absence to have the order set aside on the ground that a condition precedent to the exercise of jurisdiction for the making of the order has not been fulfilled; such an order is regarded as a nullity***."

In view of the foregoing, therefore, this Court, having found that the 1st Defendant was never served with the originating process in this suit, cannot enter Judgment in favour of the Claimant against the 1st Defendant merely because the 1st Defendant did not file a Notice of Intention to Defend. To do so will amount to treading the path of error. I hereby resolve the first Issue against the Claimant. As a corollary, this Court hereby orders that the originating process in this suit be served on the 1st Defendant and the evidence of service filed in this suit.

Issue Two:

Order 35 Rule 3 (1) and (2) provide as follow:

> ***3. (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.

What is the nature of defence on the merit that a Defendant to an action commenced under the Undefended List is required to disclose in their Notice of Intention to Defend? 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 the case of ***Delta Holdings Nigeria Ltd v. Robert AtimiOboro (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."

Instructively, 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."

I have given serious thoughts to the facts disclosed in the affidavit in support of the Notice of Intention to Defend, the Further and Better Affidavit in support of the suit on the Undefended List and the Further Affidavit in support of the Notice of Intention of Defend. I have also examined all the exhibits attached thereto. In paragraphs 3 and 4 of the affidavit, the 2nd Defendant swore that the contract in question was between the 2nd Defendant and the 1st Defendant and that the Claimant was not a party to

the said contract. It also claimed ignorance, in paragraphs 6, 7, 8 and 14 of the same affidavit, of the Memorandum of Understanding between the Claimant and the 1st Defendant, adding that it became aware of the Memorandum of Understanding when the Claimant enforced the Judgment against them in *Suit No. FCT/HC/CV/1499/2017: Kasowari Nigeria Limited v. Sivan Design Limited & Anor* in respect of the Claimant's 25% commission on the payment by the 2nd Defendant to the 1st Defendant of the second tranche of the contract sum; a suit whose pendency, it further claimed, it was not aware of and against which it lodged an appeal with *Appeal No. CA/A/362/2020: Bayelsa State Government v. Kasowari Nigeria Limited & Anor*. In paragraph 20 of the affidavit, the 2nd Defendant averred that it suspended further payments to the 1st Defendant in October, 2020 "*when it discovered that the 1st Defendant was in collusion with the Claimant to undo the Government when they have received millions from the Government without keeping faith with what they signed with the Claimant*." It also alleged in paragraph 21 that it "*has suffered severe loss and damage as a result of the level of impunity displayed by the Claimant in this matter.*" It also stated that notwithstanding the pendency of its appeal and its application for stay of execution of the Judgment in *Suit No.: FCT/HC/CV/1499/2017*, the Claimant levied execution against the 2nd

Defendant and filed two other suits against the 1st and 2nd Defendants herein with Suit Numbers *FCT/HC/CV/2937/2020*which was pending before the Honourable Justice Orijiand *FCT/HC/CV/030/2021* being the present suit. It supported its averments with nine documentary exhibits.

In its Further and Better Affidavit, the Claimant denied almost all he averments in the affidavit in support of the Notice of Intention to Defend. It further stated that the 2nd Defendant had withdrawn its appeal. It also insisted that the contract sum of ₦1,693,400,000.00 and not ₦971,367,155.00 as claimed by the 2nd Defendant. In response to the claim of the 2nd Defendant that the Claimant had filed a multiplicity of suits against the same parties and in respect of the same subject matter, the Claimant averred that "*parties were trying to reach an agreement. And there was a change of counsels* (sic)."

In its Further Affidavit in support of the Notice of Intention to Defend, the 2nd Defendant insisted that the Claimant was never a party to the contract between the 2nd Defendant and the 1st Defendant. It also explained that the contract sum was renegotiated from the initial sum of ₦1,693,400,000.00 to ₦971,367,155.08K. It also added that the 2nd Defendant was impelled to withdraw its appeal with *Appeal Number CA/A/362/2020* against the Judgment in *Suit Number FCT/HC/CV/1499/2017* because the Claimant

had already executed the Judgment in the said Suit and had by so doing rendered the appeal nugatory. He furthered stated that the suit of the Claimant was not for a liquidated sum since it was asking for both pre-judgment and post-judgment interests.

I must state here that the 2nd Defendant has, indeed, raised triable issues in its affidavit in support of its Notice of Intention to Defendant. The averments in its affidavit are not general, sweeping denials; they are specific and touch on several aspects with both legal and factual import and signification. First is the issue of privity of contract. Whether the Claimant is a party to the contract between the 1st Defendant and the 2nd Defendant and whether the 2nd Defendant is a party to the Memorandum of Understanding between the Claimant and the 1st Defendant are issues that can be resolved only by evidence.

Second is the issue of whether the withdrawal by the 2nd Defendant of its appeal with *Appeal Number CA/A/362/2020* was tantamount to admission of its liability to the Claimant as per the claims in this suit. Third is the allegation of abuse of Court process against the Claimant as evinced in the filing of multiple suits against the same parties in respect of the same subject matter. Though the Claimant had denied the averments in

paragraphs 16, 17 and 18 of the affidavit in support of the Notice of Intention to Defend, it had informed this Court, in the course of its submissions on the 7th of April, 2022, that it had made a payment to the 2nd Defendant. In the case file is a receipt of payment of the sum of ₦100,000.00 (One Hundred Thousand Naira) made by the Claimant to the 2nd Defendant on the 4th of April, 2022.

As at the 10th of February, 2022 when the 2nd Defendant filed its Notice of Intention to Defend, it claimed that the Claimant had yet to comply with the Order of this Honourable Court *coram*Oriji, J. made on the 6th of July, 2021 mandating it to pay the cost of ₦100,000.00 (One Hundred Thousand Naira) to the 2nd Defendant when the Claimant withdrew its suit with *Suit Number: FCT/HC/CV/2937/2020*. On the 23rd of March, 2022 when the Claimant filed its Further and Better Affidavit in support of the suit on the Undefended List, it denied the veracity of the averments in paragraphs 16 – 22 and described them as "*false and a desperate attempt to misled* (sic) *this Honourable Court.*" Yet, on the 4th of April, 2022 it made a payment of ₦100,000.00 (One Hundred Thousand to the 2nd Defendant and brought this fact to the attention of this Court on the 7th of April, 2022 in the course of hearing this suit.

Of equal significance is the fact that the Claimant in Relief No. 2 is seeking for "*Thirty per cent (30%) pre-judgment interest on the ₦217,279,855.00 (Two Hundred and Seventeen Million, two Hundred and Seventy-Nine Thousand, Eight Hundred and Fifty-Five Naira) only. The interest to be calculated from 31st October 2016 when the said sum became due to the Claimant to the date of Judgment.*" It is a settled principle of law that a party seeking for pre-judgment interest must lead evidence to establish their entitlement to same. In the case of ***Peugeot Automobile (Nig.) Ltd & Anor v. Abubakar (2016) LPELR-41602 (CA)***, the Court of Appeal per Abba Aji JCA (as he then was) held that "***It was held in Farasco Nigeria Ltd & Anor v. Peterson Zochonis Industries plc (2010) LPELR-4142 (CA) that "…regarding the pre-judgment interest at the rate of 21% awarded by the trial Court, it is pertinent to note that pre-judgment interest must not only be pleaded but must be strictly proved." Again, it was held in Henkel Chem. Ltd v. AG Ferrero & Co. (2003) 4 NWLR (Pt. 810) at 306 that: "The law is settled on the pre-requisite for the award of pre-judgment interest. The interest must have been claimed in the Writ and Statement of Claim, and evidence must have been led in support of the claim." See also F.B.N. Plc v. Excel Plast. Ind. Ltd (2003) 13 NWLR (Pt. 837) 412.***" By virtue of this settled position of the law,

the relief for pre-judgment interest, in itself, has removed the suit from the purview of the Undefended List Procedure which is for a liquidated money demand. In other words, the monetary claim must be definite and certain. See ***Nema Securities & 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***.

Besides, the fact that the Claimant found it necessary to file a Further and Better Affidavit in support of the Suit on the Undefended List and the 2nd Defendant, in response, had to file a Further Affidavit in support of its Notice of Intention to Defend is an indication that the suit is, indeed, contentious. Where there are such manifest conflicts, it is only appropriate that the Court calls for oral evidence. Section 116 of the Evidence Act 2011 provides that,

> "***Where there are before a Court, affidavits that are irreconcilably in conflict on crucial facts, the Court shall for the purpose of resolving the conflict arising from the affidavit evidence, ask the parties to proffer oral evidence as to such facts, and shall hear any such oral evidence of the deponents of the affidavits and such other witnesses as may be called by the parties***."

In view of the foregoing, therefore, it is my considered decision, and I so hold, that the 2nd Defendant has disclosed a defence on the merit. In so doing, it has raised quite a number of triable issues which can be resolved effectively and effectually only if the case is transferred to the General Cause list. I hereby resolve the second Issue herein in favour of the 2nd Defendant.

Accordingly, this suit is hereby transferred to the General Cause List for hearing. Parties are hereby ordered to file and exchange their pleadings within the timeframes stipulated for same in the Rules of this Court. The Claimant is hereby ordered to serve on the 1st Defendant the originating processes and every process it filed and will file in this suit. It must also ascertain that hearing notice is served on the 1st Defendant against each hearing date. The 2nd Defendant is also ordered to ensure that its processes are also served on the 1st Defendant. The proof of such service must be filed in this suit.

This is the Ruling of this Court delivered today, the 14thday of June, 2022.

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HON. JUSTICE A. H. MUSA
JUDGE
14/06/2021