

IN THE HIGH COURT OF JUSTICE OF THE F.C.T.
IN THE ABUJA JUDICIAL DIVISION
HOLDEN AT APO, ABUJA
ON WEDNESDAY, THE 18TH DAY OF JANUARY 2023
BEFORE HIS LORDSHIP: HON. JUSTICE ABUBAKAR HUSSAINI MUSA
JUDGE

SUIT NO.: FCT/HC/CV/3421/2021

BETWEEN:

IFEDI AK NIGERIA LIMITED

CLAIMANT

AND

1. AMUDAT DESIGN AND BUILDING LIMITED

DEFENDANTS

2. MS JEMILA SERIKI

RULING

The Claimant instituted this action against the Defendants on the 10th of December 2021 under the Undefended List Procedure seeking this relief:

- 1. A Declaration that the Defendants having unilaterally terminated the contract as contained in the memorandum of agreement between the parties in this suit, the Claimant is entitled to the sum of ₦40,000,000.00 (Forty Million Naira only) being the exact sum paid to the Defendants as part-payment for the purchase of Plot No 52 File No MISC 128849,*

Cadastral Zone D06, Karsana West District, Abuja FCT, before the said repudiation.

In support of the Writ of Summons is a 20-paragraph affidavit deposed to by Abazie Ifeanyi Kingsley, the Claimant's Chief Executive Officer. Attached to the affidavit are seven exhibits. These are a memorandum of agreement between Amudat Design and Building Limited and the Claimant, a copy of the transaction or payment receipt, letter of extension on Karsana land payment, a letter of extension of time to effect full payment, a letter for termination of the contract, another letter from the Defendant pleading and requesting for time to refund the money, and a letter of demand from the Claimant. These documentary annexures are marked **Exhibit AK1, AK2, AK3, AK4, AK5, 16 and AK7** respectively.

Briefly, the facts deposed to by the deponent in the affidavit in support of the Writ of Summons is that the Claimant and the 1st Defendant entered into a contract and executed a memorandum of agreement for the purchase of a plot of land known as Plot No. 52 File No. MISC 128849, Cadastral Zone D06 Karsana West District, Abuja, for the sum of ₦120,000,000.00 (One Hundred and Twenty Million Naira) only. In line with some paragraphs of the memorandum of agreement, the Claimant was to make two installments to the Defendants, the first being the sum of ₦40,000,000.00 (Forty Million Naira) and

the second being the sum of ~~₦~~80,000,000.00 (Eighty Million Naira) which was to be paid within one month after the payment of the first installment.

The Claimant made the payment of the first installment. Thereafter it discovered that the Defendants were unable to reach settlement agreement with the Gwari/Gbagyi natives, as a result of which the parties could not access the plot known as Plot No. 52 File No. MISC 128849, Cadastral Zone D06 Karsana West District, Abuja, FCT. This discovery made the Claimant to temporarily suspend the complete payment for the transaction pending the resolution of the issues between the Defendants and the Gwari/Gbagyi natives. In view of this, the Claimant's Counsel wrote a letter for an extension of time to effect the payment of the balance to which the Defendants wrote a reply terminating the contract and promising to refund the Claimant the already paid sum of ~~₦~~40,000,000.00 (Forty Million Naira).

It was further averred that, the Defendants have failed, refused or neglected to pay back the sum of money to the Claimant till date. The Claimant's deponent also swore that he had repeatedly called the 2nd Defendant to refund the said money but she had refused to answer her calls till date. The deponent finally averred that the Defendants through their Counsel wrote a letter to the Claimant's Counsel pleading and requesting for two months of extended time within which to refund the said ~~₦~~40,000,000.00 (Forty Million Naira). It is the

case of the Claimant that the two months have elapsed since then and the money has not been refunded to the Claimant as proposed by the Defendants; and that the Claimant's Counsel has written a letter of demand letter to the Defendants without eliciting a response from them.

The Defendants were served with the originating process and hearing notice after the Court, on the 26th of January, 2022, had entered the suit for hearing under the Undefended List. The Defendants filed their Notice of Intention to Defend with a 4-paragraph affidavit in support which was deposed to by one Ekene Ngene of Messrs O. J. Aboje & Co, and a written address in support.

Briefly, the facts as stated in the affidavit were that the 2nd Defendant joinder in the suit is wrong as she is different from the 1st Defendant who entered into a transaction with the Claimant. The deponent added that **Exhibit AK1** attached to the Claimant's affidavit is between the Claimant and the 1st Defendant and that the claim of the Claimant is a declaratory relief and not a liquidated money demand or claim which cannot be determined by the Court under the Undefended List Procedure.

It is also the case of the Defendant that the Claimant violated the fundamental rights of the 2nd Defendant by actively instigating the Nigerian Police Force and its operatives to harass, coerce and intimidate the 2nd Defendant upon the facts

and circumstances founding the claims before this Court. The Defendants expressed the intention to counter-claim in this action to the tune of ₦60,000,000.00 (Sixty Million Naira) only against the Claimant for the violation of their rights to fair hearing, dignity of their person, and harassment using the Nigeria Police Force upon the facts founding this action.

Furthermore, it was averred by the deponent that the Defendants are not owing the Claimant. According to the deponent, the Claimant entered the 1st Defendant's land when the transaction which she claimed had not been completed and started disposing the 1st Defendant's land to sub-buyers without the consent of the 1st Defendant. The deponent denied paragraphs 8 to 19 of the affidavit of the Claimant. It was further stated that the Claimant delayed beyond the timeline agreed within which it was required to pay the outstanding purchase price on the land such that the contract the 1st Defendant was billed to enter with the Bank of Industry with funds from the Claimant got frustrated. The Defendants claimed that they are entitled to a set-off in respect of the sum claimed by the Claimant.

In the written address in support of the affidavit of the Notice of Intention to Defend, learned Counsel for the Defendants argued that the Claimant seeks a

declaratory relief in respect of the failed purchase of the 1st Defendant's land. According to the Counsel, the agreement entered into between the Claimant and the 1st Defendant evinced a transaction on the plot strictly between the Claimant and the 1st Defendant. He added that the 2nd Defendant has been misjoined in the suit. He urged the Court to strike out the 2nd Defendant from the suit. Counsel relied on the case of **LSBPC v Purification Tech (Nig.) Ltd (2013) 7 NWLR (Pt. 1352) 82 at 109 paras H.**

Counsel further submitted that the affidavit evidence of the Defendants shows that the Claimant violated the Defendant's right to fair hearing for which the Defendants have set-off to the tune of ₦60,000,000.00 (Sixty Million Naira) which they intend to make in this action, adding that the claim of set-off is a valid action in a pending matter. Counsel relied on the cases of **Ogolo v. Ogolo (2006) All FWLR (PT 313) P1 PP at 13 paras H-A** and **Dumez Nig. Ltd v Nwakhoba (2008) 18 NWLR (Pt. 1119)361 at 374 paras A-E.**

It was also argued by the learned Counsel that the case before the Court is one in which the Claimant has approached the Court by an action to be tried on affidavit evidence and same is made worse by the Claimant's claim of declaratory relief in the sum of ₦40,000,000.00 (Forty Million Naira) only. He contended that the claim as presently constituted ought to be taken out of the

Undefended List. Counsel relied on the case of ***Akpan v. A.I.P. & Inv. Co. Ltd (2013) 12 NWLR (Pt. 1368)377 at 393 para F.***

Counsel concluded his arguments by submitting that a sum to be declared as claimed by the Claimant cannot in anyway be a liquidated sum. He also submitted in his conclusion that the Defendants have clearly denied owing the Claimant the sum claimed, adding that they have a set-off due to the violation of their fundamental rights by the Claimant and truncating a transaction the Defendants had with the Bank of Industry.

The above are the cases for the parties in respect of this suit and clearly what this Court is invited to determine is this issue:

“Whether the Notice of Intention to Defend and the supporting affidavit filed by the Defendants are not competent; and if they are competent, whether the Defendants have not disclosed a defense on the merit therein?”

Before I treat this issue formulated herein, it is necessary to dwell briefly on the concept of the Undefended List Procedure is all about. 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 and I quote:

“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 ***NEMA 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 and I quote:

“...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 defense 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 fulfilment 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 defense 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.

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 five (5) days to the day fixed for hearing of the suit, file a Notice of Intention to Defend with an affidavit disclosing a defense on the merit. If the Court is satisfied with the defense 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 defense on merit. In the case of **AMEDE v. UBA (2008) 8 NWLR (Pt 1090) 623 at paras A-B**, Abba-Aji JCA (as he then was) held as follows and I quote:

“A triable issue or defense 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) and (2) provides as follows:

“(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 the affidavit disclosing a defense 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 on the 24th of June 2022. Learned Counsel for the Claimant in his oral submission in Court argued that the Defendants filed their process out of time, that was six months after they were served, without applying to the Court for extension of time making the Notice of Intention to

Defend defective. Learned Counsel for the Claimant also argued in Court that the Defendants ought to have filed a counter-affidavit in defense to the evidence of the Claimant. Counsel went ahead and cited Order 11 of the Rules of this Honorable Court, 2018 which, according to him, placed an obligation on the Defendants to file a counter-affidavit if they have an intention to challenge the affidavit of the Claimant.

I have certainly gone through the files, and I have reflected on all the processes in the file. I have observed that though the return date was the 10th of March 2022, the Defendants were not served before that day. On that day however, Counsel for the Claimant informed the Court that he had an application for leave of Court to serve the Defendants with the originating processes by substituted means. Counsel moved the application, the Court granted the prayers sought and thereafter adjourned the suit to the 10th of May for hearing.

Curiously, the Claimant did not serve the Defendants before that date; thereby compelling the Court to adjourned the matter to the 29th of June 2022. I noticed however that the Defendants were eventually served on the 16th of May 2022. The defendants after being served with the processes, filed their Notice of Intention to Defend on the 24th of June 2022. That was exactly five (5) days to the hearing date of 29th of June 2022. Since the defendants were only served

on the 16th of May 2022, the return date ordinarily and reasonably was the 29th of June 2022, which was the date for hearing following the service of the processes on the defendants; and not the 10th of March 2022, which the court fixed as return date, or, even, the 10th of May 2022 for that matter, which the court fixed for hearing after the Order of substituted service was made. see, generally, on this issue the case of ***Wonah Construction Company Limited v. Nasarawa State Government & Others (2019) LPELR-48357(CA) at 14-35, paras. D-C*** per Sankey, JCA.

It is my considered view, and I so hold, that the 10th of March, 2022 and the 10th of May, 2022 could not have been dates for hearing envisaged under Order 35 Rule 3(1) as the Defendants had not been served with the originating processes before those dates. If I may ask, to what process would they be required to file a response to? This is because service of processes is one of the cornerstones of every adjudication. It is intrinsically connected to the jurisdiction of the Court and is intimately linked with the right to fair hearing. The court would not have assumed jurisdiction to hear the suit in the absence of proof of service of the processes on the Defendants. Doing so would amount to a grievous breach on the Defendants' right to fair hearing. See the case of ***Dike v. Key Key Constr. Ltd (2017) 14 NWLR (Pt. 1584) 1 C.A. at 65-66, paras. H-B*** where the Court held that

“The issue of service of a court process on a party where service is required is not an issue of technicality at all. 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. Proper service of a court process is a condition precedent to the exercise of a court’s jurisdiction. Where there is failure to serve a court process or procedural error in the service of a court process, the subsequent proceedings are rendered null and void.”

It is in view of the foregoing, that I take a very dim view of the arguments of Counsel to the Claimant that the Defendants were out of time. The arguments of Counsel to the Claimant is not only specious but also an attempt to mislead the Court. this Court is guided by its records. All the arguments of learned Counsel on this issue, therefore, goes to no issue and therefore undeserving of this Court’s attention. The arguments should be discountenanced and are hereby discountenanced by this Court.

I have noted that, with interest the arguments of learned Counsel for the Claimant that the Defendants ought to file a counter-affidavit pursuant to Order

11 of the Rules of this Court, 2018. Order 11 of the Rules of this Court dwells on summary judgement proceedings. For the sake of clarity, Order 11 Rule 1 states as follows:

“Where a claimant believes that there is no defense to his claim, he shall file with his originating process a statement of claim, the exhibits, the depositions of his witnesses and an application for summary judgement which application shall be supported by an affidavit stating the grounds for his belief and a written brief in support of the application.”

This suit is brought under Order 35 of the Rules of this Court which regulates suits under the Undefended List Procedure. The Writ of Summons itself is also marked Undefended List. It is therefore strange why Counsel should import into this proceeding an Order that is clearly inapplicable and unrelated to the present suit and impose an abnormal obligation on the Defendants. This Court believes that there should be an end to sophistry. The arguments of Counsel on this point to all intent and purposes are disingenuous and *non sequitur*. The arguments are hereby discountenanced.

I will now return to the originating processes before me. In the Claimant’s affidavit in support of the Writ of Summons, it was averred that after both parties

had entered into an agreement for the sale of a land known as **Plot No. 52 File No. MISC 128849 Cadastral Zone D06 Karsana West District Abuja, FCT**, for the sum of ₦120,000,000.00 (One Hundred and Twenty Million Naira) only, with the Claimant paying a deposit of ₦40,000,000.00 (Forty Million Naira). Owing to some conflict between the Defendants and the Gwari/Gbagyi natives on ownership of that same plot, the Claimant decided to hold on pending the resolution of the conflict.

On the other hand, the Defendants maintained in the affidavit in support of their Notice of Intention to Defend that the 2nd Defendant ought not to have been joined in this matter. They also averred that the Claimant entered the 1st Defendant's land even though the transaction even though the transaction was inchoate and started selling portions of the land. The Defendants raised issues of breach of contract and infringement of their fundamental rights by the Claimant.

It is my considered view, and I so hold, that the Defendants have raised triable issues against the Claimant's claims. Though the claims for set-off and infringement of the fundamental rights of the Defendants may not have condescended upon the particulars of the Claimant's claim, they, nonetheless, raised what the Court of Appeal called "***intricate points of law***" in the case of

Ofomata v. Onwuzuligbo (2002) 8 NWLR (Pt. 769) 298 C.A. at 313-314, paras. H-A.

Further to this, I agree with the Defendants that embedded in the claim of the Claimant is a declaratory relief. Declaratory reliefs are not granted as a matter of course; they are only granted upon proof by the Claimant of their entitlement to same. See ***Mohammed v. Wammako (2018) 7 NWLR (Pt. 1619) 573 S.C. at 586, paras. A-B; Akande v. Adisa (2012) 15 NWLR (Pt. 1324) 538 S.C. at P. 571, paras. A-E; and Guinness (Nig.) Ltd. v. Udeani (2000) 14 NWLR (Pt. 687) 367 C.A. at p. 392, para. B.*** Because the Claimant is seeking a declaratory relief in addition to the liquidated money demand, the suit ceases to be a case for liquidated money demand simpliciter and has transmogrify into a suit with hybrid claims. Such suits are outside the contemplation of Order 35 of the Rules of this Court. See ***Deutches Haus (Nig.) Ltd. & 1 Other v. Union Homes Savings & Loans Plc (2021) 2 NWLR (Pt. 1759) 148 C.A. at 166, paras. A-D*** where the Court held such suits have to be removed from the Undefended List and placed on the General Cause List to be heard on their merits.

Note that the Defendants' affidavit in support of their Notice of Intention to Defend the suit on its merits does not need to disclose an iron-cast or rock-

proof defense. All that is required is a *prima facie* defense upon which a trial will have to be concluded. In the case of ***Ataguba & Co. v. Guru Nigeria Ltd (2005) LPELR-584 (SC)*** the Supreme Court held that and I quote:

“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 defense on merit. In this regard, it has been held that it must disclose a prima facie defense. The affidavit must not contain merely a general statement that the defendant has a good defense to the action. Such general statement must be supported by particulars which if proved would constitute a defense. 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 (1984)12 SC 234; 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 in compliance 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 the defendant's Notice of Intention to Defend and the affidavit in support are competent and have disclosed a defense on the merit. This suit is therefore not maintainable under the Undefended List Procedure. For this reason, I hereby order that the matter be transferred to the General Cause List for hearing on the merits. Parties are further directed to file and exchange pleadings in accordance with the provisions Order 35 Rule 3(2) of the Federal Capital Territory High Court (Civil Procedure) Rules 2018.

This is the Ruling of this Court delivered today, the 18th day of January, 2023.

HON. JUSTICE A. H. MUSA
JUDGE
18/01/2023