

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

**BEFORE HIS LORDSHIP: HON. JUSTICE BABANGIDA HASSAN**

**SUIT NO: CV/774/2020**

**BETWEEN:**

**ALHAJI KABIRU HARUNA.....CLAIMANT**

**AND**

**1. ENGR. SUCCESS OBIOMA }.....DEFENDANT**  
**2. MAX OGAR }.....DEFENDANT**  
(Trading under the name and style  
of Legalmax Solicitors)

**JUDGMENT**

By the writ of summons filed under Undefended Procedure List whereas the claimant claims as follows:

The sum of N13,450,000.00 (Thirteen Million, Four Hundred and Fifty Thousand Naira) only being money received from the claimant by the 1<sup>st</sup> defendant through the 2<sup>nd</sup> defendant in connection with a failed land transaction.

The writ is supported by twenty one paragraphed affidavit deposed to by one Abdulaziz Isah.

In response, the 2<sup>nd</sup> defendant filed a notice of his intention to defend the suit dated the 4<sup>th</sup> day of June, 2020, and this is accompanied by a sixteen paragraphed affidavit deposed to by him.

It is in the affidavit of the claimant that the deponent has the authority of the claimant to depose to the said affidavit as he is conversant with the facts leading to this case and his knowledge owing to his work and family relationship with the claimant. That the claimant an entrepreneur with vast interest in real estate development, while the 1<sup>st</sup> defendant is an engineer, a lawyer and property manager carrying on business within the jurisdiction of this court. That the 2<sup>nd</sup> defendant is also a legal practitioner whose firm is retained by all limited liability companies where the claimant has

interest and has also been representing the claimant in several cases in different courts and in several business transactions.

It is stated that the claimant and one of his principals (Orio Business Connect Limited) went into transaction with the 1<sup>st</sup> defendant over land for estate development and in the process, over N40,000,000.00 (Forty Million Naira) was paid to the 1<sup>st</sup> defendant in connection with the land situate at Kukwuaba District Abuja. That out of the said N40,000,000.00 paid to the 1<sup>st</sup> defendant, the sum of N13,450,000.00 (Thirteen Million, Four Hundred and Fifty Thousand Naira) passed through the 2<sup>nd</sup> defendant. That the payments made to the 1<sup>st</sup> defendant through the 2<sup>nd</sup> defendant's firm account were made in eight transactions. That the sum of N13,450,000.00 paid to the 1<sup>st</sup> defendant through the 2<sup>nd</sup> defendant was not formally acknowledged by the 1<sup>st</sup> defendant making it difficult for the claimant to directly lay claim to it from the 1<sup>st</sup> defendant who did not acknowledge receipt of the money.

It is further stated that some of the lodgments into the account of the 2<sup>nd</sup> defendant were made directly by the claimant's business associates who want their money back and have made reports to anti-graft agencies and even the Nigerian Bar Association erroneously claiming the 2<sup>nd</sup> defendant aided the claimant to swindle them. That the claimant is under an obligation to protect the 2<sup>nd</sup> defendant and his reputation by recovering and returning this money to those who made the payment towards housing units in the estate the claimant was to develop on the land in respect of which the 1<sup>st</sup> defendant was paid the money. That he knows that the 2<sup>nd</sup> defendant is someone good at details and record keeping and as such, he is the only one who can assist the claimant recover the money from the failed transaction with the 1<sup>st</sup> defendant. That a demand has already been made from the 1<sup>st</sup> defendant who is in possession of the money and that he has no justification for keeping same. The deponent added that it would be in the interest of justice for the court to order the 1<sup>st</sup> defendant to return the said sum of ₦13,450,000.00.

The 2<sup>nd</sup> defendant in his affidavit accompanying the notice of intention to defend the action stated that there indeed a transaction between the claimant and the 1<sup>st</sup> defendant which was

geared towards an estate development partnership in respect of a land belonging to a company where the 1<sup>st</sup> defendant has an interest. He confirmed that money exchanged hands between the claimant and the 1<sup>st</sup> defendant and he acted as the solicitor/agent on behalf of the claimant.

It is stated that all the payments made to the 1<sup>st</sup> defendant through his account and were transferred to the 1<sup>st</sup> defendant's account which is domiciled with the First City Monument Bank (FCMB), and to prove this, the 2<sup>nd</sup> defendant annexed the statement of account of Legalmox Solicitors where in the money transferred were highlighted.

It is also stated that he is not indebted to the claimant on whose instruction he dealt with the 1<sup>st</sup> defendant in their cause of their business transaction which has obviously failed and that the 1<sup>st</sup> defendant has not declined receiving the said sum of ₦13,450,000.00 through him. That he is ready to accept the money in issue from the 1<sup>st</sup> defendant through the said account for onward transmission to the claimant in order to keep the record straight. That he is not liable to the claimant in any way as he is only a witness to what happened and that he has a defence to this suit. He said it will be in the interest of justice for this suit to be transferred to the ordinary cause list to enable parties state their case.

The 1<sup>st</sup> defendant did not deem it appropriate to file a notice of his intention to defend the action.

**Now the question for determination is: whether the claimant is entitled to judgment or the matter be transferred to the general cause list?**

Thus, as said earlier on that the 1<sup>st</sup> defendant after being served with the writ of summons and the affidavit accompanying the writ, did not deem it appropriate to file a notice of his intention to defend the action, while the 2<sup>nd</sup> defendant filed his notice of his intention to defend the action dated and filed the 4<sup>th</sup> day of June, 2020.

By the proof service, it can be seen that the service was effected on the 1<sup>st</sup> and 2<sup>nd</sup> defendants on the 17<sup>th</sup> February, 2020.

By the Rules of this court governing the procedure under the undefended list, and more particularly Order 35 Rule 3, the defendant, upon being served with the writ and the accompanying

affidavit, has only five days to respond by filing his notice of his intention to defend the action and the Rule provides:

**“where a party served with the writ delivers to the Registrar, before 5 days to the day fixed for hearing, a notice in writing that he intends to defend the suit together with the affidavit disclosing a defence on the merit the court may give him leave to defend upon such terms at the court may think first.”**

By the above quoted rule, it could be inferred that a party upon being served with the writ has only 5 days within which for him to file his notice in writing that he intends to defend the action, and while he fails to do so, then he has to seek for the leave of the court to do so. In the instant case the 2<sup>nd</sup> defendant did not seek the leave of this court to enable him file his notice in writing that he intends to defend the motion, and this leave should have come by way of filing an application in writing to seek for an extension of time to enable him file his notice in writing, and in such situation, it is when such is given, that is when the 2<sup>nd</sup> defendant would have filed his notice. Looking at the dates of service of the writ of summons and the file of the notice of intention to defend, it could be seen that it is barely more than three months which is beyond the period of five days as prescribed by the Rules of this Court. See also Order 35 Rule 4 of the Rules.

**“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.”**

By the above rule, it could be inferred that the failure on the part of the 2<sup>nd</sup> defendant to have filed the notice of intention to defend the suit within 5 days as prescribed in Rule 3(1) of the Rules of this court, judgment shall be given in favour of the claimant. It is pertinent to note that the word used in the rule is “shall” which is mandatory on the part of the court to enter judgment in such a situation in favour of the claimant. See the case of **Fortune Int’l Bank Plc V. City Express Bank Ltd (2013) All FWLR (pt 679) p. 1129 at 1139 paras. B-D** where the Court of Appeal, Lagos Division held that if a

party served with the writ of summons and affidavit delivers to the registrar, not later than five days before the date 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. Where any defendant neglects to deliver the notice of defence and affidavit is not given leave to defend by the court, the suit shall be heard as an undefended suit and judgment given thereon, without calling upon the plaintiff to summon witnesses before the court to prove his case formally. In the instant case, I hold the view that the defendant is to be shut as a result of the delay in filing his notice of intention to defend the motion. While the 1<sup>st</sup> defendant is also to be shut for not filing of notice of his intention to defend the motion having been served with the writ of summons and its accompanying affidavit. See the case of **Ugwuagba C.B. Ltd V. N.I.V. Ltd (2014) All FWLR (pt 746) 552 at 561 paras. A-B** where the Court of Appeal, Enugu Division held that under the undefended list procedure, where no notice of intention to defend is filed with an affidavit disclosing a defence and the case is heard, the court can proceed to judgment.

Where this court will dispense with the delay on the part of the 2<sup>nd</sup> defendant in filing his notice of intention to defend the suit, it can consider the notice and the affidavit with a view to see whether there is a defence on the merit. See the case of **Dasofunjo V. Ajiboye (2017) All FWLR (pt 911) p. 513 at 528 paras. B-C** where the Court of Appeal, Ilorin Division held that the undefended list procedure is special procedure meant to enable a plaintiff whose claim is unarguable in law and the facts undisputed, not to allow a defendant to defend for the mere purposes of delay, and to enter judgment in respect of the amount claimed. The procedure is clearly meant to enable the claimant obtain judgment where his case is patently clear and unassailable. The procedure cannot however be used to shut out a defendant who can show that there is a triable issue, which, must be shown from the defendant's affidavit in support of his notice of intention to defend as required by the rules of court.

In paragraph 6 of the affidavit accompanying the notice of intention to defend of the 2<sup>nd</sup> defendant, it is admitted by the 2<sup>nd</sup> defendant that the sum total of N13,450,000.00 was paid to him

through the account of Legalmax Solicitors, and he made transfers into the account of the 1<sup>st</sup> defendant which is domiciled with the First City Monument Bank (FCMB). That the 2<sup>nd</sup> defendant in paragraph 12 of the affidavit accompanying the notice of his intention to defend that he is ready to accept the money from the 1<sup>st</sup> defendant through the same account for onward transmission to the claimant and by paragraph 13, the 2<sup>nd</sup> defendant denied being liable to the claimant in any way.

Thus, it could be inferred that the 2<sup>nd</sup> defendant has admitted to the claim. That the money was paid through him to the 1<sup>st</sup> defendant. It is pertinent to note that the claimant made the 2<sup>nd</sup> defendant as a defendant. See Order 13 Rule 4 of the Rules of this court which provides:

**“Any person may be joined as defendant against whom the right to any relief is alleged to exist, whether jointly, severally or in the alternative. Judgment may be given against one or more of the defendants as may be found to be liable, according to their respective liabilities without any amendment”**

By the above quoted rule, it could be inferred that irrespective of making the 2<sup>nd</sup> defendant as a party (defendant) by the claimant, the court can still go ahead with the case without amending the name of the 2<sup>nd</sup> defendant and judgment be given against the 1<sup>st</sup> defendant as he may be found liable. To my mind, the 2<sup>nd</sup> defendant did not raise any triable issue in his affidavit accompanying the notice of his intention to defend.

By also deposing to the affidavit that he denies the liability is also not a good defence on the merit. See the case of **Obidigwe V. K.K.C. Ltd (2016) All FWLR (pt 815) p. 266 at 301 para. C** where the Court of Appeal, Enugu Division relying on the case of **John Holt & Co. (Liverpool) Ltd V. Fajemirokun (1961) All NLR 492** held that general statement or averment in an affidavit in support of notice of intention to defend, without elucidation of the defence on the merit, on a general averment to the effect that the defendant does not owe the plaintiff, will not be enough to satisfy the requirement for a defence on the merit. In the instant case the mere denial on the part

of the 2<sup>nd</sup> defendant that he is not liable to the claim is not a defence on the merit, and I therefore, so hold.

As said earlier, the 2<sup>nd</sup> defendant admitted to the fact that the money was paid to the 1<sup>st</sup> defendant through him, by this it could be inferred that he has direct link with the 1<sup>st</sup> defendant, and to this, I refer to the case of **Fortune Int'l Bank Plc V. City Express Bank Ltd (supra)** where the court held that a defendant can so admit to the claim if he so wishes in his affidavit accompanying the notice of intention to defend. In the instant case, the 2<sup>nd</sup> defendant admitted that the sum of ₦13,450,000.00 was paid by the claimant through his law firm account of Legalmax Solicitors with No. 0237550018 of FCMB.

On the whole and based upon the foregoing analyses, I have come to the conclusion that the defendants are liable to the claim of ₦13,450,000.00.

Judgment is hereby entered in favour of the claimant to the tune of ₦13,450,000 (Thirteen Million, Four Hundred and Fifty Thousand Naira) only.

The 1<sup>st</sup> defendant should pay the sum of ₦13,450,000 (Thirteen Million, Four Hundred and Fifty Thousand Naira) through the 2<sup>nd</sup> defendant for onward delivery to the claimant.

Signed  
Hon. Judge  
30/3/2021

Appearances:

Dominic Anyiador Esq appeared for the claimant.