

IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY

IN THE ABUJA JUDICIAL DIVISION

HOLDEN AT MAITAMA

BEFORE HIS LORDSHIP: HON. JUSTICE Y. HALILU

COURT CLERKS : JANET O. ODAH & ORS

COURT NUMBER : HIGH COURT NO. 15

CASE NUMBER : SUIT NO: CV/2552/2020

DATE: : MONDAY 25TH OCTOBER, 2021

BETWEEN

D. C. OKIKA (NIGERIA) LIMITED..... CLAIMANT

AND

1. THE CLERK OF THE NATIONAL ASSEMBLY.
2. THE NATIONAL ASSEMBLY

DEFENDANTS



JUDGMENT

By a Writ of Summons filed under the undefended list, on the 4th of September, 2020 but dated the 4th of September, 2020, Claimant claims against the Defendants as follows:-

- a. A sum of N127,575,000.00 (One Hundred and Twenty Seven Million, Five Hundred and Seventy Five Thousand Naira) only being the outstanding sum for the Five (5) 2017 Edition of Peugeot 508 Executive; supplied by the Claimant to the Defendants at the Defendants' request, under the Agreement for supply dated 28th day of November, 2017 between the Claimant and the Defendants which the Defendants have refused to liquidate despite

several written and oral demands by the Claimant.

- b. Ten percent (10%) Post Judgment interest on the unpaid sum of N127,575,000.00 (One Hundred and Twenty Seven Million, Five Hundred and Seventy Five Thousand Naira) until the unpaid sum is finally liquidated.
- c. The sum of N50,000,000.00 (Fifty Million Naira) only, being general damages for breach of contract for the supply of Five (5) 2017 Edition of Peugeot 508 Executive dated 28th day of November, 2017 between the Claimant and the Defendant.
- d. The cost of this suit.

The Managing Director of the Claimant, OkikaUgochukwu Moses, deposed to affidavit of 19 paragraphs in support of the claims.

Certificate of incorporation of Claimant, contract award letter dated the 13th November, 2017, Agreement for supply, cash invoice, Job completion certificate, solicitor's letter to Clerk of the National Assembly and response letter dated the 17th July, 2020 by the National Assembly were all annexed to the affidavit in support of the Claim and marked Exhibits "A" – "G" respectively.

Claimant's counsel equally filed a 15 page written address and a pre-action counseling certificate.

Upon service of the writ on the Defendants, they jointly filed memorandum of conditional appearance, pre-action counseling certificate, notice

of intention to defend, Affidavit in support of the Notice of Intention to defend, written address.

Defendants also filed motion on notice challenging the jurisdiction of the court on the ground that there is an Arbitration clause in the contract agreement between the Claimant and the Defendants.

These processes were all dated the 18th November, 2020. Claimant's counsel filed reply on point of law to the Defendants' affidavit in support of the notice of intention to defend and a written address dated 23rd November, 2020 when this suit came up on the 20th September, 2021, learned counsel for the Defendants was conspicuously absent in court. Otaru, SAN, for the Claimant applied for the motion on notice filed by Defendants' counsel challenging the jurisdiction of the court to be struck – out. Same

was accordingly struck – out. Once the attention of the court was drawn to the fact that Defendants were served hearing notice against the 20th September, 2021 for hearing of the matter.

Learned senior counsel moved the court to give Claimant judgment on the strength of the fact that Defendants are not denying liability except for the reason that they do not have money to pay Claimant at the moment.

Learned counsel equally drew the attention of the court to some paragraphs of Defendants’ affidavit in support of the Notice of intention to defend which he said were offensive to the provision of Section 115 Evidence Act 2011 for being conclusion or argument.

I shall pause at this point to clarify the procedure under the undefended list.

I need to make it very abundantly clear and at this earliest opportunity that the provision of Order 35 of the Civil Procedure Rules of the FCT High Court, 2018 as amended, is settled on what step/steps a Defendant served with a writ of summons under the undefended list shall take.

Rules 3 (1) and (2) of Order 35 of the Rules of this court enjoys a Defendant served with such a writ to deliver to the Registrar of the court, 5 days to the say fixed for hearing of the matter, notice of intention to defend with affidavit disclosing a defence on the merit. Upon consideration of such affidavit filed by Defendant in support of notice of intention to defend, the court may grant leave to the Defendant

upon such terms the court thinks fit and transfer the suit to the general cause list.

Where on the other hand, the court withholds leave to the Defendant to defend by transferring the suit to the general cause list pursuant to Order 35 Rule 3 (1) and (2), the suit shall be heard as undefended and judgment given accordingly. Pursuant to Order 35 Rule 4 of the Rules of this Court. See ***ATAGUBA & CO. VS GURA NIG. LTD. (2005) 2 S.C (Pt. 11) 101.***

From above provisions, it is spelt that the undefended list procedure does not contemplate the filing and adoption of any written address as done by respective counsel for the Claimant and Defendants in this case.

Needless to say, therefore that the filing and adoption of written addresses by both counsel, is indeed alien to the provision of Order 35 of the Rules aforementioned, and amounts to a waste of time.

There was equally no need at all for any pre – action counseling certificate to be filed by Claimant’s counsel.

I do not know also why Defendants’ counsel filed pre–action counseling certificate amongst the unnecessary processes. This is equally a waste of resources and stationaries.

Now, the facts in support of Claimant’s case is that Defendants awarded a contract for the supply of Five(5) units of Peugeot 508 Executives, 2017 Edition for the House of Representatives, National

Assembly, vide a letter of award dated the 13th day of November, 2017, annexed as Exhibit “B”. Paragraph 1 of the letter of award annexed states as follows:-

**“LETTER OF AWARD OF CONTRACT FOR
THE SUPPLY OF 5NOS. UTILITY VEHICLES
(PEUGEOT 508 2017 EDITION, EXECUTIVE)
TO THE HOUSE OF REPRESENTATIVES,
NATIONAL ASSEMBLY”**

I am pleased to inform you that the National Assembly Tenders Board met on Friday, 4th August, 2017 and granted approval to award to your company the contract for the supply of 5nos. 2017 Edition of Peugeot 508 Executive to the House of Representatives, as utility vehicles for the discharge of the constitutional oversight

responsibilities of their standing committees. The contract is awarded at a unit price of N25,515,000.00 (Twenty Five Million, Five Hundred and Fifteen Thousand Naira) totaling N127,575,000.00 (One Hundred and Twenty Seven Million, Five Hundred and Seventy Five Thousand Naira) only.”

Both parties proceeded to sign a formal agreement after the award letter which was exhibited and marked Exhibit “C”.

Upon delivery of the said vehicles therein mentioned in both the award letter and contract document, Defendants confirmed delivery of the vehicles by issuing a job completion certificate to the Claimant.

The said job completion certificate was signed by one Engr. Mohammed Abubakar who is an Asst.

Chief Engr. and samewas counter –signed by Head of Transport, by name RemiAdewale.

The cash/credit sales invoice in the amount of N127,575,000.00 (One Hundred and Twenty Seven Million, Five Hundred and Seventy Five Thousand Naira) was annexed and marked Exhibit “D”.

Claimant averred that Defendants never made any down payment or mobilize Claimant towards the supply of the vehicles, and that Claimant bore all the logistics and other auxiliary expenses and cost of purchasing the vehicles. That Defendants deliberately refused to liquidate the sum of N127,575,000.00 (One Hundred and Twenty Seven Million, Five Hundred and Seventy Five Thousand Naira) only, owed to the Claimant as consideration for the purchase of 5nos. 2017 Edition of Peugeot

508 Executive, supplied to the House of Representative, National Assembly, and that the refusal to pay Claimant the said money affected Claimant's business negatively, Claimant having not been able to fulfil her obligation to her creditors, and that the business of Claimant has also suffered untold hardship.

Claimant averred further that it has caused a letter of demand of the said money to be written to the Defendants, dated the 1st July, 2020 and annexed as Exhibit "F", and that Defendants vide Exhibit "G" invited Claimant to a meeting on the issue of the payment which has remained unpaid till date, and that Defendants do not have any defence to its claim and that they will not be prejudiced if judgment is entered against them in favour of Claimant under the undefended list as follows:-

- i. N127,575,000.00 (One Hundred and Twenty Seven Million, Five Hundred and Seventy Five Thousand Naira) for the five (5) 2017 edition of Peugeot 508 Executive, supplied by Claimant to the Defendants.
- ii. Ten percent(10%) post judgment interest on the unpaid sum of N127,575,000.00 (One Hundred and Twenty Seven Million, Five Hundred and Seventy Five Thousand Naira) until same is finally liquidated.
- iii. N50,000,000.00 (Fifty Million Naira) being general damages for breach of contract.
- iv. Cost of this suit.

Defendants equally filed a notice of objection to the suit of the Claimant which was predicated upon the fact that both parties have consented to Arbitration

in the event of any misunderstanding arising from the contract agreement, and therefore Arbitration would have been the first point of call and not the FCT High Court.

I must be swift to mention that the said objection which was dated the 18th November, 2020 was struck – out on the 20th September, 2021 on grounds of abandonment.

Now, supposing without conceding that the said application still subsists, I shall first of all then have to determine the issue of Arbitration which has the potency of barring this court from considering the merits of the present suit.

It is the argument of Defendants/Applicants that both parties in the present suit have signed a contract and agreed to submit themselves to Arbitration in

the event of any misunderstanding, and that having not gone to Arbitration but rather chose to commence litigation before the FCT High Court, this court should decline jurisdiction as parties are bound by their contract.

The authority of ***NNEJI VS ZAKHEM COSTRUCTIONS (NIG.) LTD (2006) 12 NWLR (Pt. 994) 297, 319 – 320 Paras F-H*** was cited in support of above proposition.

On the part of Claimant, a 7 page address on law was filed wherein learned senior counsel, Roland Otaru, SAN, re – stated the law on the jurisdiction of court where there exist an Arbitration clause in a contract Agreement.

Learned senior counsel contended that this court has the jurisdictional competence to determine the present suit.

It is the contention of Otaru, SAN, that contrary to the misunderstanding of most people, that Arbitration clause in an agreement can only be invoked where misunderstanding arise during the performance of such contract and not after the said contract would have been completely performed. It is the argument of senior counsel that the Claimant (his client) in this case, was issued a job completion certificate (Exhibit “E”) signifying satisfaction with the cars Claimant supplied to the Defendants.

Otaru, SAN, relied on the authority of *K.S.M.H VS M.I.E.E (2012) 3 NWLR (Pt. 1287) 587 at page 276* which facts are on all Fours with the present action to

insist that there was no dispute in the contract to have been taken to the Arbitration.

Learned senior counsel also contended that the provision of section 5 (2) of Arbitration and Conciliation Act provides for the discretionary power of court to stay proceedings in appropriate situations and can only be exercised once the court is satisfied:-

- a. That there is no sufficient reason why the matter should not be referred to Arbitration in accordance with the Arbitration agreement, and
- b. That the Applicant was at the time when the action was commenced and still remains ready and willing to do all things necessary to the proper conduct of the arbitration, make an Order staying proceeding.

It is further the argument of Claimant's counsel that the affidavit in support of the said motion is bereft of aforementioned conjunctive elements which shall be established before such a court exercise her discretionary power to stay proceedings pending conclusion of Arbitration. The court was then urged to dismiss the said Defendants' application seeking stay of proceedings.

I have read with interest the arguments of both counsel for Claimant and Defendants on the need to stay proceedings in the present matter while parties are referred to Arbitration pursuant to the Arbitration clause contained in the contract document exhibited as Exhibit "C". I shall deal with the issue frontally in view of its jurisdictional importance. It is instructive to note that Exhibit "C" is the agreement for the supply of 5 pieces of 2017 Edition of Peugeot 508

model between D.C Okika (Nig.) Ltd. and the National Assembly.

Clause 2.0 of the said agreement provides for Arbitration, as follows;

“Any dispute arising from this agreement which cannot be mutually resolved shall be referred to an Arbitration for settlement and such Arbitrator shall be agreed to by both parties, and in the absence of such agreement, Arbitrator, shall be appointed by the Chief Judge of the High Court, Abuja on application by either party in accordance with the Arbitration and conciliation Act Cap. A18, laws of the Federation of Nigeria, 2004.”

In view of the fact that the myth of this argument is centered on Arbitration clause, I shall therefore

reproduce the relevant provision of section 5 of the Arbitration and Conciliation Act, which specifically deals with the issue at hand.

Section 5 (1) of the Act provides:-

“If any party to an Arbitration agreement commences any action in any court with respect to any matter which is the subject of an Arbitration, any party to the arbitration agreement may, at any time after appearance and before delivering any pleading or taking any other step in the proceedings apply to the court to stay proceedings.”

It is on record that Defendants’ counsel filed a joint memorandum of conditional appearance, pre-actions counselling certificate, notice of intention to defend

and an affidavit in support of the said notice of intention to defend the action.

Even though Order 35 of the Rules of this court does not envisage the excess processes file by Defendant i.e memorandum of appearance, pre – action counselling certificate, which I, again view as unnecessary and a waste of precious time and stationeries, Defendants have clearly joined issues with the Claimant by filing above processes and an application on notice challenging the jurisdiction of this court.

Would it then not be correct to conclude that Defendants have taken morethan enough step to defend this action!

It is most clear that Defendants have compromised their right to the said provision of section 5(1) of

Arbitration and Conciliation Act and cannot be heard to cry wolf by applying for stay of proceedings. It is too late in the day. See ***OBI OBEMBE VS WEMABOD ESTATES LTD. (1977) ALL NLR 130.***

I am no doubt in agreement with the argument of Otaru, SAN.

Defendants have taken morethan enough step in this matter and cannot be accommodated within the provision of section 5 (1) of the said Arbitration and Conciliation Act, which provides for stay of proceedings. I so hold.

It is instructive to note at this juncture that there is really nothing in the affidavit in support of Defendants' application to show that they are truly desirous for arbitration apart from their vague

deposition that the agreement between the Claimant and Defendants provides for Arbitration.

In my view, the mention of Arbitration should not be seen as a draconian monster with the attendant capacity and audacity to cow-down any genuine claim against an evasive Defendant.

This assertion, which is term base, is clearly short of the demand of the law and indeed rendered the application of Defendants irredeemably unsustainable.

Bereft of any merit and or substance, same is refused and dismissed.

Having consigned the said objection of Defendants to a forlorn of legal fossils, I shall now consider the merit of the notice of intention to defend, filed by Defendants.

It is their defence as contained in affidavit in support of notice of intention to defend that Exhibit “E” i.e the job completion certificate given to the Claimant upon supply of the five (5) no cars, is not ascertained to have emerged from the Defendants’ office as same was not authorized and issued by the House of Representatives unit concerned or appropriate officers, and that the documents annexed being public documents ought to have been certified.

Defendants also averred that Claimant ought to have submitted itself to Arbitration as contained in the contract document i.e Exhibit “C” and not to resort so litigation; and that the amount claimed is not due to the Claimant as the job has never been satisfactorily completed and that the claim of Claimant is not in line with Procurement Act.

It is also the averment of Defendants that there is abuse of court process; that due process was not followed, and that the court lacked jurisdiction. Defendants then urge the court to transfer the matter to the general cause list for them to defend.

Otaru, SAN, filed reply on points of law to the notice of intention to defend and affidavit in support.

It is the argument of learned senior counsel that Defendants have failed to disclose and defence on the merit pursuant to Order 35 of the Rules of this Court.

Learned counsel equally argued that Defendants' affidavit in support of notice of intention to defend is in violation of section 115 (1) and (2) of the Evidence Act 2011 on the contents of affidavit.

It is the contention of Otaru, SAN, that paragraphs 15, 17, 18 and 20 of the affidavit of Defendant in support of the said notice of intention to defend is replete with argument, legal conclusion and prayers. Claimant's counsel, on the whole, urge the court to give Claimant judgment as there is nothing to defend.

Let me begin with the said paragraphs 15, 17, 18 and 20 of the affidavit.

I have carefully read the aforementioned paragraphs of Defendants' affidavit in support of notice of intention to defend.

It is already a settled law through a plethora of judicial decisions and statutes that only a certified true copy of public document is admitted in evidence.

See sections 102 and 104 Evidence Act 2011.

See UZOMA VS ASODIKE (2009) LPELR 8421 (CA).

MAGAJI VS NIGERIAN ARMY (2008) 8 NWLR (Pt. 1089) 388 at 396 paragraphs A-C (SC).

When one therefore is compelled to raise objection as it pertains annexing uncertified secondary copies of public documents in support of claim in an undefended list procedure, the proper way to go about it is not to raise such objection in an affidavit in support of notice of intention to defend in view of the fact that by the provisions of section 115 (1) and (2) of the Evidence Act, an affidavit shall not contain extraneous matters by way of objection or prayer or legal argument or conclusion. The proper step to be taken, therefore, is to raise such defence in

a “proposed” statement of defence attached to the Defendant’s affidavit in support of the Notice of Intention to defend. Only certified true copies of public documents are admissible in evidence in legal proceeding and any objection to admissibility of public document not properly certified can be raised during trial.

It was most impossible for Defendants in this case to have raised those legal conclusions and arguments touching on the uncertified annexed documents from the National Assembly without offending the said Section 115 (1) & (2) Evidence Act, 2011.

Indeed to say that a document exhibited to an affidavit is a photocopy (which it should be) and should have been certified before the Court can use it, is a legal argument and prayer, offending the rules

of affidavit, and meant to drag or frustrate a simple case of debt which is not denied.

The law is clear, that under the Undefended List procedure, the issue of formal admissibility or inadmissibility of document does not arise.

See ILORIN EAST LOCAL GOVT. (2012) LPELR VS. ALH. WOLI ALASINRIN & ANOR 8400(CA).

The observation of Otaru, SAN for the Claimant that the said depositions in paragraphs 15,17,18 and 20 of affidavit in support offends Section 115(1)&(2) Evidence Act, 2011 is germane, timely and is accordingly upheld. The said paragraphs aforementioned are consequently hereby struck-out.

The undefended list procedure is a truncated form of ordinary civil hearing peculiar to our adversary system where the ordinary hearing is rendered

unnecessarily due in the main to the absence of an issue to be tried or the quantum of Plaintiff's claim disputed to necessitate such a hearing. It is designed to quicken justice and avoid the injustice likely to occur where there is no genuine defence on the merits to the Plaintiff's case.

It is a procedure meant to shorten hearing of a suit where the claim is for liquidated money demand. See *UBA PLC. VS. JARGABA (2007) 5 SC 1*.

An action begun under the undefended list, is no less a trial between the parties and where a Defendant is properly served, he has a duty to disclose his defence to the action. *ATAGUBA & CO. VS. GURA (2005) 2 SC. (Pt. 11) 101*.

However, notice of intention supported by affidavit so filed must condescend to issues stated in affidavit

in support of the claim of the Plaintiff. A mere empty affidavit in support of the Notice of Intention to defend which disclose no defence shall certainly not sway the Court into transferring the matter to general cause list for trial.

Simply put, the Defendant's affidavit must condescend upon particulars and should as far as possible, deal specifically with the Plaintiff's affidavit and state clearly and concisely what the defence is and what facts and document are relied on to support it.

Such affidavit in support of Notice of Intention to defend must be necessity disclose facts which will, at least throw some doubt on the Plaintiff's case.

A mere denial of Plaintiff's claim or liability or vague insinuation devoid of evidential value does

not and will not suffice as facts, which will throw doubt on Plaintiff's claims. See *UBA PLC. VS. JARGABA (Supra)*.

The remaining paragraphs of Defendants' affidavit in support of the Notice of Intention to defend this suit of Claimant has clearly not condescend to the fact that Claimant supplied the said 5 Nos. Peugeot Executive Cars to Defendants. Defendants who were most satisfied with the state of the cars issued certificate of job completion to Claimant but have refused to pay him as agreed.

A Defendant who has no defence under the Undefended List Procedure, shall not be given opportunity to dribble and cheat a Claimant who desire and deserves Judgment. Indeed the

Undefended List procedure is not a game of chess where only the craftiest goes home with the trophy.

Defendants have ran from pillar to post all with a view of dribbling the Claimant and frustrate him from Judgment. What the Defendant have put forward in this case is a sham defence which does not avail them at all. In ***SANUSI BROS (NIG) LTD. VS. COTIA C.E.I.S.A (2000) 11 NWLR (Pt. 679) 566, Uwaifor, JSC***, stated as follows:-

“The law is clear that if a Defendant decides to go on stage to contest an application for summary Judgment, he cannot rely on a sham defence.”

I am morethan satisfied in the end, that Claimant supplied 5 Nos. Peugeot 508 Executive Cars to the Defendant which Defendants have refused to pay

him. This is within the realm of liquidated money demand. Pursuant to Order 35 of the Rules of this Court, I hereby enter Judgment for the Claimant as per relief No. 1, i.e N127,575000,00 only being outstanding sum for the 5 No. 2017 Edition of Peugeot 508 Executive supplied to Defendant by Claimant which has remained unpaid.

The next relief is that of 10% post Judgment interest. I have the statutory power to grant same Pursuant to Order 29 Rule 4 of the Rules of this Court.

I have considered the devastating devaluation of our currency. I have considered the nature of the commercial transaction between Claimant and Defendants. I form the opinion that Claimant deserves post Judgment interest. The reliefs is hereby granted.

On the issue of damages, which is the 3rd relief, same is refused for the reason that it wasn't contemplated in the agreement and therefore not grantable under Order 35 of the Rules of this Court.

On cost of this action, I make bold to say that evidence ought to be led to prove this head of claim. Same is refused.

Justice Y. Halilu
Hon. Judge
25th October, 2021

APPEARANCES

Fatima Mala Atuman, Esq. with O.M Eluyera, Esq.
– for the Claimant.

Defendants not in Court and not represented.