

IN THE HIGH COURT OF JUSTICE OF THE F.C.T.
IN THE ABUJA JUDICIAL DIVISION
HOLDEN AT APO, ABUJA
ON THURSDAY, THE 20TH DAY OF OCTOBER, 2022
BEFORE HIS LORDSHIP: HON. JUSTICE ABUBAKAR HUSSAINI MUSA
JUDGE

SUIT NO.: FCT/HC/CV/1130/2021

BETWEEN:

ETHEL VENTURES LIMITED

CLAIMANT

AND

THE NATIONAL ASSEMBLY

DEFENDANT

JUDGMENT

On the 17th day of June, 2021, the Claimant, Ethel Ventures Limited, instituted this suit against the Defendant, The National Assembly, under the Undefended List procedure seeking the following reliefs:-

- a. *An Order mandating the Defendant to pay to the Claimant the sum of ₦31,779,000.00 (Thirty-One Million, Seven Hundred and Seventy-Nine Thousand Naira) only being the outstanding sum for the supply and installation of four (4) number of Sharp Photocopiers MX M754/MX754N to the National Assembly.*
- b. *And for such further Order(s) as this Honourable Court may deem fit to make in the circumstances of this case.*

In support of the Writ of Summons is a 16-paragraph affidavit deposed to by one Ethel Odimegwu, the Managing Director and Chief Executive Officer of the Claimant. Attached to the affidavit in support of the Writ of Summons are four (4) exhibits. These are the letter from the Tenders

Board of the National Assembly to the Claimant ratifying the provisional award of contract for the supply and installation of the photocopiers, the agreement for the supply and installation of the photocopiers, the letter of demand for immediate payment of the sum of ₦31,779,000.00 (Thirty-One Million, Seven Hundred and Seventy-Nine Thousand Naira) only for the supply and installation of the photocopiers to which is annexed the letter of ratification of the provisional award of the contract, and a pre-action notice from the Claimant to the Defendant. These documentary annexures are marked **Exhibits 1, 2, 3 and 4** respectively.

In the affidavit in support of the Writ of Summons, the deponent averred that the Defendant awarded a contract to the Claimant to supply and install four (4) units of Sharp Photocopiers MX M754/MX754N at the complex of the Defendant at the total cost of ₦63,558,000.00 (Sixty-Three Million, Five Hundred and Fifty-Eight Thousand Naira) only on the 22nd day of August, 2017. The deponent further swore that the Claimant accepted the offer, executed an agreement with the Defendant to that effect, supplied the items and fulfilled all the terms stipulated in the contract.

The Claimant further stated through the deponent that the Defendant paid 50% of the contract sum, specifically, ₦31,779,000.00 (Thirty-One Million, Seven Hundred and Seventy-Nine Thousand Naira) only to the Claimant in 2018 and has, since then, refused to pay the outstanding sum of ₦31,779,000.00 (Thirty-One Million, Seven Hundred and Seventy-Nine Thousand Naira) only being the balance due to the Claimant on the contract. This is notwithstanding the service of several letters of demand for payment from the Claimant on the Defendant. The intransigency of the Defendant, according to the Claimant, left the Claimant with no option than to serve a pre-action notice and letter of demand dated the 3rd of March,

2021 on the Defendant as a precursor to this suit claiming from the Defendant the sum of ₦31,779,000.00 (Thirty-One Million, Seven Hundred and Seventy-Nine Thousand Naira) only and the reliefs contained in the Writ of Summons.

This Court, on the 16th of September, 2021, entered the suit for hearing under the Undefended List and, accordingly, marked the suit as “Undefended List”. It further fixed the 19th of October, 2021 as the return date. Subsequently, the Defendant was served with the originating processes and the hearing notice on the 24th of September, 2021. On the 13th of April, 2022, the Defendant filed its Notice of Intention to Defend with the affidavit disclosing a defence on the merit. It is important to note that the Defendant filed its Notice of Intention to Defend almost seven months after it had been served with the Writ of Summons on the Undefended List and almost six months after the return date, that is, 19th of October, 2021. There was no application from the Defendant for leave to file its processes out of time.

In the affidavit in support of the Notice of Intention to Defend, the deponent, one Aliyu Garba, a legal officer in the Directorate of Legal Services of the Defendant averred that the Defendant did not award any contract to the Claimant and that the 50% payment the Defendant made to the Claimant was made in error. He added that the contract in question, along with other contracts were subjects of investigation by a committee the Defendant set up to interrogate incidents of contract scams. The deponent also denied the validity of the documents the Claimant exhibited in its affidavit in support of its Writ of Summons and the Claimant’s claims that it performed its part of the contract.

It was the case of the Defendant that the Claimant misrepresented facts to

the Court. The deponent asserted that the Defendant was not served with a pre-action notice; and that the Court lacked the jurisdiction to hear and determine the suit since there was an Arbitration Clause in the agreement between the Claimant and the Defendant. It was the position of the Defendant, therefore, that it had raised triable issues in its affidavit in support of its Notice of Intention to Defend.

In the Written Address in support of the Defendant's Notice of Intention to Defend, learned Counsel for the Defendant formulated two issues for determination. These are: (1) *Whether the Plaintiff is entitled to the claims he makes in this matter under the undefended list; and (2) Whether the Plaintiff's case ought to be transferred to the regular Court list.*

Arguing the two issues jointly, learned Counsel reiterated the deposition of the Defendant in the affidavit in support of the Notice of Intention to Defend that, until the contract was verified, there was no contract between the Claimant and the Defendant. Counsel submitted that what was required of the Defendant in this circumstance was the presence of a *prima facie* defence and nothing more, adding that the Defendant had satisfied the minimal requirement. He further contended that the debt was not certain and the Court was precluded from speculating on the debt.

On the issue of non-service of the pre-action notice, learned Counsel referred the Court to section 21 of the Legislative Houses (Powers and Privileges) Act, 2017 which required the service of a 3-month pre-action notice prior to the institution of any suit against the legislature. It was his contention that the non-fulfilment of this condition precedent was enough to void the entire suit.

Learned Counsel further submitted that the agreement between the Claimant and the Defendant contained an arbitration clause, adding that

the Claimant was hasty in instituting this action without subjecting the dispute to arbitration as required by the agreement. In view of these positions, learned Counsel urged the Court to transfer the suit to the general cause list. For all his arguments on the issues he formulated, learned Counsel for the Defendant cited and relied on the following cases: ***NIPSS, Kuru v. Sunday Oha (2005) 2 FWLR (Pt. 262) 426; God's Little Tannery v. Nwaigbo (2005) 3 FWLR (Pt. 275) 911 at 933, paras F-G; NIPOST V. Irbok Nig. Ltd (2006) 3 FWLR (Pt. 325) 4499 at 4514-4515; Prince Atolagbe & Another v. Alhaji Awunmi & Others (1997) 9 NWLR (Pt. 522) 536; Mobil v. LASEPA (2003) 1 MJSC 112 at 125; Celtel Nigeria BV v. Econet Wireless Limited & Ors (2014) LPELR-22430 (CA) AND Scott v. Avery.***

This matter came up for the first time in this Court on the 17th of November, 2021 for hearing. Neither the parties nor their Counsel were in Court on that day. The suit was therefore adjourned to the 1st of February, 2022 for hearing with only the Counsel for the Claimant in Court that day, attributing the absence of the Defendant in Court to the non-service of the hearing notice on it. After a series of adjournments, the suit was eventually heard on the 15th of September, 2022 where parties adopted their respective positions for and against the Writ of Summons on the Undefended List.

In his Reply on Points of Law, learned Counsel for the Claimant referred this Court to the case of ***Agro Millers Limited v. Continental Merchant Bank Nig. Plc (1997) 10 NWLR (Pt. 525) 469***. He also adverted the mind of the Court to **Exhibit 4**, that is, the pre-action notice which the Claimant served on the Defendant. He further submitted that the Defendant could not be heard denying the existence of the contract and, at the same time, seeking to rely on the terms of the contract to undermine the suit of the

Claimant. Furthermore, he contended that the Defendant, having taken steps in the suit, could not be heard raising the issue of non-fulfilment of a condition precedent which, in this case, is the reference of the dispute to arbitration. He cited section 5(2) of the Arbitration and Conciliation Act, 2004 and the case of *MV-Panormos Bay v. Olam (2004) 5 NWLR (Pt. 865) 1 SC*. He finally submitted that the failure of the Defendant to challenge **Exhibits 3 and 4**, the exhibits should be deemed admitted by the Court on the authority of *UBA Plc v. Vertex Agro Ltd (2018) LPELR-48742*.

In resolving this dispute, I hereby formulate the following two Issues:

- i. “Whether the Claimant has not satisfied the conditions necessary for this Court to hear this suit on the Undefended List?”*
- ii. “Whether there is no competent Notice of Intention to Defend before this Honourable Court; and if there is, whether the Defendant has not disclosed a defence on the merit in the affidavit in support of the Notice of Intention to Defend?”*

RESOLUTION OF ISSUE ONE

“Whether the Claimant has not satisfied the conditions necessary for this Court to hear this suit on the Undefended List?”

The *terminus a quo* in resolving this issue is a restatement of the provisions of Order 35 Rule 1 of the High Court of the Federal Capital Territory, Abuja (Civil Procedure) Rules 2018. The Rule provides as follows:-

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".

By virtue of this Rule, a Claimant who seeks to obtain reliefs under the Undefended List procedure is required to satisfy two principal requirements. First, the Claimant's claim must be for a liquidated sum, that is, it must be a certain and definite sum. Second, the Claimant must demonstrate objective belief that the Defendant has no defence on the merit to the suit. A third requirement, though not incumbent on the Claimant, is nonetheless worthy of mention; and that is, the endorsement of a return date on the Writ of Summons on the Undefended List. This is seen in Order 35 Rule 2 of the Rules of this Honourable Court.

In a judicial illumination of the above provisions, the Supreme Court in the case of ***G.M.O.N. & S. Co. v. Akputa (2010) 9 NWLR (Pt. 1200) 443 at 463***, stipulated the factors to be considered in determining whether a claim is for liquidated money demand when it held as follows: ***"The factors for determining are as follows: (a) the sum must be arithmetically ascertainable without further investigation; (b) if it is in reference to a contract, the parties to the contract must have mutually and unequivocally agreed on a fixed amount payable on breach; (c) the agreed and fixed amount be known prior to the breach."*** This position was adopted by the Court of Appeal in the recent case of ***Kingtony Ventures (Nig.) Ltd & Anor v. E-BARCS Microfinance Bank Ltd (2022) LPELR-57087 (CA) at pp. 15 – 16 paras A – D per Tsammani, JCA*** where the Court held that,

***“Before a claim can be situated under the undefended list, the claim must be either a debt or a liquidated sum or money demand. A liquidated money demand is a claim for a sum certain or specific amount and there is nothing more that needs to be done to determine the quantum or effect of the defendant’s liability. It therefore means that when the claim or amount to be recovered, if the claim succeeds, has not been agreed upon but depends on circumstances or is determined by opinion or estimate, it will not be a claim for liquidated money demand. In other words, the amount claimed must be ascertained or capable of being ascertained as a matter of simple arithmetic or calculation without any further investigation.*”**

In this suit, the Claimant is seeking for “*an Order mandating the Defendant to pay to the Claimant the sum of ₦31,779,000.00 (Thirty-One Million, Seven Hundred and Seventy-Nine Thousand Naira) only being the outstanding sum for the supply and installation of four (4) number of Sharp Photocopiers MX M754/MX754N to the National Assembly.*” This claim is ascertainable. The sum is a liquidated sum because it is definite, specific and, in the words of the Court of Appeal in ***Kingtony Ventures Nig. Ltd & Anor v. E-BARCS Microfinance Bank Ltd (2022), supra***, “***ascertained or capable of being ascertained as a matter of simple arithmetic or calculation without any further investigation.*” It is my view, and I so hold, that the Claimant has satisfied the first requirement for an action to be placed under the Undefended List.**

Secondly, the Claimant, in its affidavit in support of the Writ of Summons on the Undefended List, deposed to specific facts which, in its belief, justified the commencement of the suit under the Undefended List

procedure. Paragraphs 5, 7, 8, 9, 11 and 12 are relevant. I have reproduced the paragraphs:-

5. That the Defendant made an award to the Claimant on 22nd day of August, 2017 and requested that the Claimant supply her and installation (sic) 4 (four) numbers (sic) of Sharp Photocopiers MX M754/MX754N to the National Assembly for a consideration of ₦63,558,000.00 (Sixty-Three Million, Five Hundred and Fifty-Eight Thousand Naira) only. The letter of award is hereby attached and marked as Exhibit 1.

7. That the Claimant supplied all the goods requested by the Defendant as to specification and same was accepted by the Defendant.

8. That the Defendant paid 50 per cent of the total contract sum leaving the sum of ₦31,779,000.00 (Thirty-One Million, Seven Hundred and Seventy-Nine Thousand Naira) only unpaid up till this moment.

9. That after the Defendant paid the sum of ₦31,779,000.00 (Thirty-One Million, Seven Hundred and Seventy-Nine Thousand Naira) only in 2018, the Defendant went mute on the indebtedness despite several demands by the Claimant.

11. That the Claimant made a demand through her Solicitors in a letter dated 1st December, 2020 to which the Defendant received but failed and refused to honour by paying the Claimant the outstanding sum of ₦31,779,000.00 (Thirty-One Million, Seven Hundred and Seventy-Nine Thousand Naira) only. The Letter of Demand is hereby attached and marked as Exhibit 3.

12. That the Defendant after waiting for over 3 months wrote another demand letter and pre-action notice to the Defendant through her Solicitor in a letter dated 3rd of March, 2021 to which the Defendant failed and refused to honour the said demand letter. The Notice of Pre-Action Notice and letter of demand dated 3rd March (sic) is hereby attached and marked Exhibit 4.

In view of the foregoing paragraphs, it is my considered view, and I so hold, that the affidavit of the Claimant disclosed supportable grounds for the Claimant's belief that the Defendant has no defence to its suit.

Lastly, this Court, on the 16th of September, 2021 marked this suit with the endorsement "Undefended List" and endorsed the 19th of October, 2021 as the return date for hearing. There is no doubt in my mind that the Claimant has discharged the duty incumbent on him by virtue of Order 35 Rules 1 and 2 of the Rules of this Honourable Court, 2018 in relation to the commencement of this suit and the hearing of same under the Undefended List Procedure. I therefore resolve the first issue I have formulated herein in favour of the Claimant.

RESOLUTION OF ISSUE TWO

"Whether there is no competent Notice of Intention to Defend before this Honourable Court; and if there is, whether the Defendant has not disclosed a defence on the merit in the affidavit in support of the Notice of Intention to Defend?"

The Rules of this Honourable Court provide a guide to what a Defendant in a suit commenced under the Undefended List Procedure is required to do after they have been served with the Claimant's Writ of Summons. Order 35 Rule 3(1) provides that,

“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.”

In ***Kwara State Government & Others v. Guthrie Nigeria Limited (2022) 13 NWLR (Pt. 1846) 189***, the Court had reason to examine the provisions of Order 23 Rule 3(1) of the Kwara State (Civil Procedure) Rules 2005 which contains provisions that are equivalent to the provisions of Order 35 Rule 3(1) of the Rules of this Court, 2018. At **page 210, paragraphs B-E** of the law report, the Court went on to hold that ***“If the defendant in an undefended list action intends to defend the suit, he must file a notice in writing together with an affidavit disclosing a defence on the merit. The affidavit should contain enough facts and particulars to satisfy the court to remove the case from the undefended list to the general cause list. Where the affidavit discloses no defence, then the case would not go on the general cause list.”***

In this case, the Defendant was served with the Writ of Summons on the 24th of September, 2021. Though this Court endorsed the 19th of October, 2021 as the return date for hearing, it was not until the 13th of April, 2022 that the Defendant filed its Notice of Intention to Defend. Ordinarily, the Defendant ought to have filed its Notice of Intention to Defend before five (5) days to the 19th of October, 2021, that is, the return date. That much is the import of the pronouncement of the Court of Appeal in the case of ***Jafaru Muhammadu Ladan v. Alhaji Zubairu Adamu (2022) LPELR-56569(CA) at page 15 para A - C*** where it held that

“By law, a case placed on the Undefended List, is due for hearing on the return date, once there is no Notice of Intention to defend the suit, backed by Affidavit, disclosing credible defence on the merit. And even where the Notice of Intention to defend is filed, together with an Affidavit of facts to disclose a defence on the merits, the trial Court still has a right to hear the case and consider the defence raised by the Defendant, on the date of the hearing.”

By virtue of this pronouncement, therefore, the Defendant ought to have filed its Notice of Intention to Defend at least five days to the return date which was 19th of October, 2021 and which this Honourable Court fixed for hearing. The failure of the Defendant to file its Notice of Intention to Defend within the stipulated window permissible under the Rules of this Court, 2018, therefore, means there is no competent Notice of Intention to Defend before this Court. This is more so as the Defendant did not seek for the leave of the Court for extension of time before it filed its Notice of Intention to Defend as it did on the 13th of April, 2022.

This finding is valid notwithstanding the fact that this Court did not sit on the return date. No doubt, the Court is bound by its record. It is instructive, however, to note, as I have pointed out earlier, that this case was heard for the first time in this Court on the 17th of November, 2021. None of the parties was in Court on that day; and the Defendant had not filed its Notice of Intention to Defend as of that date. On the 1st of February, 2022 when this case came up again, only the Counsel for the Claimant was in Court. He informed this Court that the Defendant was not served with the hearing notice against that date. The Court did not sit on the 1st of March, 2022 when this suit was adjourned to; but it sat on the 14th of June, 2022. Counsel for both parties were in Court; but the case could not proceed. It

was accordingly adjourned to the 12th of July, 2022. The matter could not be heard on that day. It, however, came up on the 15th of September, 2022. It was on that date that the parties, through their respective Counsel, argued their positions in respect of the suit.

In the case of ***Right Choice Electronics Limited v. Kelvin Festus International Limited (2012) LPELR-19726(CA)***, the Court of Appeal held *inter alia* per Joseph Tine Tur, JCA at ***pp. 40-47, paras. A-E*** that

“Thus, where the suit was fixed for hearing on the return day, if the party served failed or neglected to file a notice of Intention to Defend the suit supported with an affidavit disclosing a defence on the merit, it would be perfectly right for a learned trial Judge to enter judgment in favour of the claimant... Fixing a date for hearing a suit initiated under the Undefended List Procedure is a condition precedent to be proved by a claimant before a Court is called upon to enter judgment in favour of a claimant in the absence of a Notice to defend the suit coupled with an affidavit disclosing a defence on the merit. Moreover, there is no provision for fixing a suit for mention under the Undefended List procedure. A suit entered on the Undefended Cause List can only be fixed for hearing.”

Similarly, in ***Communication Trends Limited v. Mikemore Investment Limited (2012) LPELR-7904(CA)*** the Court of Appeal put the matter in clearer perspective when it held per Mohammed Lawal Garba, JCA at ***pp. 21-22, paras. F-D*** that

“The attitude of the Courts in the interpretation and application of the provisions of the undefended list

procedure as they relate to the requirements of Order 23, Rule 3(1) above, has always been that on the return date for the hearing of the suit placed under the undefended list, where a Defendant neglects to file a notice of intention to defend the action as required under Order 23 Rule 4 above, the only business or duty of the Court, is to enter judgment in favour of the plaintiff without calling on him to call evidence in support of the claim. For instance, this Court in the case of Maley v. Isah (2000) 5 NWLR (658), 651 at 667 had held that- “therefore on the date fixed for hearing of an undefended suit, the only business of the day is to proceed to give judgment if there is no defence.” Similarly, in the case of Gidado v. Daku (2006) ALL FWLR (292) 25 at 40, this Court had held that where or if a Defendant fails to avail himself of the provisions which provide him the opportunity to defend the action by the return date, the trial Court is obliged under the provisions of the Rules, to hear the case as undefended and enter judgment with or without calling oral evidence as it may deem fit, whether the Defendant was present in Court or not. See also the cases of Atakulu v. Fawibe (2001) 9 NWLR (717) 179 at 186 - 7; Okunrinboye v. Co-Operative (2009) 2 - 3 MJSC, 42.”

I therefore hold that date for hearing contemplated in Order 35 Rule 3(1) of this case was the 19th of October, 2021, which was the return date. It therefore means that the Notice of Intention to Defend which the Defendant filed on the 13th of April, 2022 along with the supporting affidavit disclosing a defence on the merit is incompetent. Similarly, all the submissions of the learned Counsel for the Defendant on the 15th day of

September, 2022 when both parties in this case, through their respective Counsel, adopted their written briefs and, in the case of Counsel for the Claimant, replied orally on points of law, go to no moment as one cannot put something on nothing and expect it to stand. See ***Mcfoy v. UAC (1962) AC 152***.

In view of this finding, therefore, I have no hesitation in holding that the Notice of Intention to Defend which the Defendant filed on the 13th of April, 2022 along with the supporting affidavit disclosing a defence on the merit is not competent, having being filed later than the five (5) days stipulated in the Rules. In other words, there is no Notice of Intention to Defend before this Court. Issue Two is hereby resolved against the Defendant.

The Writ of Summons on the Undefended List with the supporting affidavit, by virtue of my finding above, is, therefore, unchallenged. In ***Wonah Construction Company Limited v. Nasarawa State Government & Ors (2019) LPELR-48357(CA)***, the Court of Appeal per Jummai Hannatu Sankey, JCA held *inter alia* at ***pp. 14-35, paras. D-C*** that

“As has been rightly stated by the Appellant, the purport of the Undefended List procedure is to obviate the usual delays encountered by parties in the prosecution of their cases where the claim is for a liquidated money demand and ascertainable debts. Thus, once a matter is placed on the Undefended List for hearing and the Defendant fails to file a Notice of intention to defend the suit, along with an affidavit disclosing a defence on the merits within the time prescribed for doing so, if any, the trial Court may on the return date, upon a consideration of the processes filed by the Plaintiff, enter Judgment without calling for evidence.”

The Court held further that

“Thus, once a matter is placed on the Undefended List for hearing and the Defendant fails to file a Notice of intention to defend the suit, along with an affidavit disclosing a defence on the merits within the time prescribed for doing so, if any, the trial Court may on the return date, upon a consideration of the processes filed by the Plaintiff, enter Judgment without calling for evidence. The Rules regulating the hearing of cases on the Undefended List are meant for the speedy disposal of cases for the recovery of liquidated money demands which are uncontested or which, from the affidavit evidence, are unassailable. However, since justice must never be jettisoned for the sake of speed, where the facts or issues are contentious, the case would be transferred to the general cause list to be dealt with appropriately. See: Obitude v. Onyesom Community Bank Ltd (2014) LPELR-22693(SC) 49, per Kekere-Ekun, JSC; Obaro v. Hassan (2013) LPELR-20089-(SC) per Ariwoola, JSC; Akpan v. Akwa Ibom PIC Ltd (2013) LPELR-20753(SC); & Imoniyame Holdings Ltd v. Soneb Enterp. Ltd (2010) LPELR-1504(SC) 16, per Onnoghen, JSC (as he then was). Consequently, the main intention of the Undefended List procedure is to enable a plaintiff, whose claim is incontestable in a case for a liquidated sum to obtain judgment expeditiously; so that a defendant who does not have a real defence to the action will not be allowed to frustrate the plaintiff who is entitled to his claim. See NMCB (Nig.) Ltd v. Obi (2010) 14 NWLR (Pt. 1213) 169; Okoli v.

Morecab Finance (Nig.) Ltd (2007) 14 NWLR (Pt. 1053) 37. Therefore, it is the law and it is undisputable that by the provisions of Order 15 Rules 1 to 5 of the High Court (Civil Procedure) Rules of Nasarawa State (supra), a plaintiff, such as the Appellant herein, in a claim for a liquidated money demand, can file a suit along with an affidavit stating that to the best of his belief, the Defendant has no defence to the action. Upon being served such process, where the Defendant fails and/or neglects to file a Notice of intention to defend the suit along with an affidavit revealing a defence to the claim on the merit, the trial Court can hear the action as an undefended suit. The main bone of contention in this Appeal, as contended by the Appellant, is that where a defendant fails to file a Notice of intention to defend supported by an affidavit disclosing a defence on the merit, on the return date, the only duty of the Court is to enter Judgment for the plaintiff as per his claim. The question therefore has arisen as to whether the trial Judge has any discretion to exercise in the matter. Put another way, does the trial Judge have the discretion to consider any extenuating circumstances as to why Judgment should not be instantly entered for the plaintiff without giving any consideration whatsoever to the reason for the defendant's failure to file the necessary processes to contest the claim. The law is long since settled that Rules of Court are meant to be obeyed, as they are not made for fancy. Rules are made for the regulation of cases before the Court and to assist parties to present their cases within the procedure in order to ensure a just and speedy trial. This is in addition to

specific Rules such as in Order 15 instant, which is specially designed to ensure speedy trial and a quick dispensation of justice in matters filed on the Undefended List. The Court therefore ordinarily does not ignore or treat with levity any failure or laxity to comply with Rules of Court. Hence, Courts lean towards the obedience of Rules of Court, and there are a host of authorities in this regard. See Onwuka v. Ononuju (2009) 11 NWLR (Pt. 1151) 174, 203, per Chukwuma-Eneh, JSC; ASTC v. Quorum Consortium Ltd (2009) 9 NWLR (Pt. 1145) 1, 29; & Abubakar v. Yar'Adua (2008) 4 NWLR (Pt. 1078) 465, 611.”

It is for this reason, therefore, that I hereby enter Judgment in favour of the Claimant against the Defendant as follows:-

- 1. THAT an Order is hereby made mandating the Defendant to pay to the Claimant the sum of ~~₦~~31,779,000.00 (Thirty-One Million, Seven Hundred and Seventy-Nine Thousand Naira) only being the outstanding sum for the supply and installation of four (4) number of Sharp Photocopiers MX M754/MX754N to the National Assembly.**
- 2. THAT the Defendant is hereby ordered to pay 10% post-judgment interest on the Judgment sum from the date of Judgment until same is fully liquidated.**

However, the Defendant has filed a Notice of Intention to Defend; though it filed same out of time and without seeking for leave of this Court for extension of time within which to file same as permitted under Order 49 Rule 4 of the Rules of this Court. For the sake of justice, this Court will consider same. When a Defendant has filed a Notice of Intention to

Defend supported by an affidavit disclosing a defence on the merit, it is the duty of the Court to examine the affidavit in order to satisfy itself that the affidavit did indeed disclose a defence on the merit. The Rules did not explicate on the expression '*defence on the merit*'. The Courts, however, in a long line of judicial authorities, have provided an insight into the nature of the defence that can make the Court to move the suit to the general cause list. In the case of ***Aruwa v. Abdulkadir (2002) FWLR 677 Ratio 3***, it was held, concerning the defendant's affidavit, thus:

“... The defendant's affidavit must condescend upon particulars and should as far as possible specifically deal with the plaintiff's claim and the affidavit in support thereof and state clearly and concisely what the defence is and what facts are relied upon to support it. The same affidavit defence should also state whether the defence relates to the whole or part of the claim, and in the latter case, it should specify that part of the claim. A mere general statement or denial, that the defendant is not indebted to the plaintiff is not enough to constitute a defence, unless the grounds on which the defendant relies as showing that he is not indebted are stated in the affidavit.”

In the case of ***Job Charles Nig. Ltd v. Okonkwo (2002) FWLR 1062 Ratio 8 and 10***, the Court approached the definition of '*a defence on the merit*' from the angle of the affidavit in support of the Notice of Intention to Defend disclosing a triable issue when it held that ***“if there is such a triable issue the matter would be transferred to the general cause list for trial on pleadings. If however the learned trial Judge comes to the conclusion that there is no triable issue disclosed, he will enter judgment in favour of the plaintiff as per his claim.”***

In the case of ***Onoeyo v. U.B.N. Plc (2015) 10 NWLR (Pt. 1466) 104***, the Court of Appeal, following the decision in ***Lewis v. UBA (2006) 1 NWLR (Pt. 962) page 546 at pp. 563-564 paras. F-D*** which, in itself, followed earlier decisions of the Supreme Court in ***Sanusi Bros (Nig.) Ltd. v. Cotici C.E.I.S.A. (2000) 11 NWLR (Pt. 679) 566 at 580*** while applying its earlier decisions in ***Macaulay v. NAL Merchant Bank Ltd. (1990) 4 NWLR (Pt. 144) 283*** and ***Nishizawa v. Jethwani (1984) 12 SC 234*** laid down the following conditions which an affidavit in support of a Notice of Intention to Defend must fulfill before a defence on the merit can be made out:

“For a notice of intention to raise a defence on the merit under the undefended list such a notice of intention must satisfy the following conditions:

- a. Condescend upon particulars as far as possible, deal specifically with the plaintiffs’ claim and affidavit, and state clearly and concisely what the defence is and what facts are relied on as supporting it.***
- b. Where the defence is that the defendant is not indebted to the plaintiff, state the grounds on which the defendant relies as showing that he is not indebted. A mere general denial that the defendant is not indebted will not suffice.***
- c. Where the affidavit states that the defendant is not indebted to the plaintiff in the amount claimed or any part thereof, state why the defendant is not so indebted, and so state the real nature of the defence relied on.***
- d. Where the defence relied on is of fraud, state clearly the***

particulars of the fraud. A mere general allegation of fraud is useless.

e. If a legal objection is raised, state clearly the facts and the point of law arising thereon.

f. In all cases, give sufficient facts and particulars that there is bona-fide defence.

g. Matters of hear-say are admissible provided that the sources and grounds of information and belief are disclosed; and

A case of hardship that creates no enforceable right e.g. past promise by plaintiff unsupported by valuable consideration, or a mere inability to pay or an allegation that the plaintiff has given time for payment which of course constitute no defence unless there be consideration, will not constitute defence on the merit.”

I will now proceed to examine the contents of the affidavit disclosing a defence on the merit to determine whether, indeed, the Defendant has disclosed a defence on the merit. The Defendant through the deponent in paragraph 4 of the affidavit in support of the Notice of Intention to Defend “denied ever awarding to the Plaintiff the alleged contract for the supply and installation of 4(four) numbers of Sharp photocopiers MX M754/MX754N to the National Assembly at the cost of ₦63,558,00.00 (sic) as the contract is among those contracts being investigated.” In paragraph 18, it stated that “the Defendants (sic) have full and complete defence to the claims of the Plaintiff, as same is premature and have no base, foundation or even structure and is unfair and unreasonable in the

face of steps already taken by the Defendants to verify claims for payment without resorting to litigation but rather arbitration as contained in the purported contract.” In paragraphs 5, 6, 7, 8, 9, 10, 12, 13, 14, and 15, the Defendant vacillated from the categorical but general denial in paragraphs 4 and 18 to a series of assumptions and speculations relating to the subject matter of the Claimant’s claim.

In paragraph 5, the deponent presumed that the Claimant must have been paid in error if, indeed, the Defendant paid the 50% of the contract sum as the Claimant claimed in paragraph 8 of its affidavit in support of the Writ of Summons on the Undefended List. Paragraphs 6, 7, 8, 9, 10, 12, 13, 14 and 15 contained imputation of fraud. Somehow, paragraph 11 of the affidavit in support of the Notice of Intention to Defend contained an assertion that is not reconcilable with the deposition in paragraph 5. The deposition in paragraph 16 which should have stood as a defence on point of law has been disproved by **Exhibit 4** attached to the affidavit in support of the Writ of Summons on the Undefended List. Finally, the Defendant, in another attempt to raise a defence on point of law, referred this Court to the arbitration clause contained in Clause 21.00 of **Exhibit 2** attached to the Claimant’s affidavit in support of the Writ of Summons on the Undefended List.

Has the Defendant, in view of the preceding exegesis, disclosed a defence on the merit which is sufficient enough to enable this Court to luxate this suit from the Undefended List to the General Cause List? I have held up the affidavit in support of the Defendant’s Notice of Intention to Defend to the lens of the decision of the Court in ***Onoeyo v. U.B.N. Plc (2015) 10, supra***, where the Court laid down the factors the Court must consider in determining whether the Defendant has raised a defence on the merit. It is my considered view that paragraphs 4, 5, 6, 7, 10, 11, 13,

14, 15 and 18 of the affidavit in support of the Notice of Intention to Defend did not condescend to the particulars of the claim of the Claimant as evinced in the affidavit in support of the Writ of Summons on the Undefended List. Beyond the general denial, the Defendant did not provide any explanation for **Exhibits 1 and 2**. It claimed that a committee had been set up to verify the contracts; yet, it did not provide details of the membership of the committee, when it was set up, its terms of reference, the list of contracts it is investigating or has investigated, and the specifics relating to, in the words of the deponent, *“the steps that have already been put in place to reconcile all contractual liabilities for payment by the Defendants if contract is confirmed to be genuine”* and the nature of the misrepresentations it claimed the Claimant made in its process. Interestingly, it did not exhibit any document to invalidate the exhibits the Claimant attached in its affidavit in support of its Writ of Summons on the Undefended List.

It is now a settled principle of law that it is not in all cases where there are conflicts in the affidavit evidence that the Court must call for oral evidence. Courts have the power to rely on the documents before it to resolve the conflicts in the affidavit evidence before it. In ***Elder Esem Akpan v. Ekanabasi Asibong Ubong (2013) LPELR-20418(CA)***, the Court of Appeal per Mohammed Lawal Garba, JCA at ***pp. 46-47, paras. F-D*** that,

“I would agree with the learned counsel that the general position of the law is that where there is an irreconcilable conflict in the affidavits of parties in cases that are determined entirely on affidavit evidence, then a Court should call for oral evidence in order to resolve such a conflict before relying on any of the affidavits to decide the case. However, the law is now known that it is not in all

cases where such a conflict arises that the need to call oral evidence for the resolution of the conflict would exist. For instance, where in addition to the depositions in the affidavits, there are documents attached to the affidavits which are capable of resolving the conflict in the depositions one or the other, the duty to call for oral evidence to resolve such a conflict would abate and arise. In such a situation, the Court can suo motu use the relevant documents to resolve the conflict in the depositions contained in the affidavits... See Eunskip Ltd. v. Exquisite Ind. Ltd. (2003) 4 NWLR (809) 88; Dana Impex Ltd v. Awukam (2006) 3 NWLR (968) 544; Bawa v Phenias (2007) 4 NWLR (1024) 251; Garba v Unimaid (1986) 1 NWLR (18) 550.”

Furthermore, the Defendant did not state the particulars of fraud when it made imputations of fraud in Paragraphs 8, 9 and 12. The general allegation of fraud, fraudulent transaction, and suspicion that a crime was committed in the process of the award of the contract such as the Defendant deposed is not enough. The Defendant failed to discharge the legal and evidential duty placed on it by law to adduce the particulars of the fraud it alleged was embedded in the contract between it and the Claimant.

Though the Defendant claimed that it was not served with the statutory pre-action notice, a perusal of the process of the Claimant shows that a document titled “PRE-ACTION NOTICE DEMAND FOR IMMEDIATE PAYMENT OF THE SUM OF ₦31,779,000.00 (THIRTY-ONE MILLION, SEVEN HUNDRED AND SEVENTY-NINE THOUSAND NAIRA ONLY) FOR THE SUPPLY AND INSTALLATION OF 4 NO SHARP PHOTOCOPIERS M4M754/MX754N TO THE NATIONAL ASSEMBLY”

dated the 3rd of March, 2021 was received in the Office of the Clerk of the National Assembly on the 05th of March, 2021. A further perusal of the said document, which is annexed as **Exhibit 4** to the Claimant's affidavit, discloses that it satisfies the minimal requirement for a valid pre-action notice, *videlicet*, the names of both the Claimant and the Defendant, the nature of the claim the Claimant intends to seek in Court, the detail of the claim and the stipulation of the statutory period before which the Claimant can seek remedy in the Court should the Defendant fail or refuse to accede to the Claimant's demands. The Defendant's averment in paragraph 16 of its affidavit in support of its Notice of Defend, therefore, goes to no moment. That leaves us with the deposition in paragraph 17 of the affidavit in support of the Notice of Intention to Defend.

The paragraph refers to the arbitration clause in the agreement the Claimant and the Defendant executed. Learned Counsel for the Defendant has contended that the suit of the Claimant was premature because the Claimant did not explore the option of arbitration prior to the institution of this suit. On the other hand, learned Counsel for the Claimant was of the view that the Defendant, having taken steps in the proceedings, should not be heard complaining that the Claimant did not consider the option of arbitration. He also submitted that the Defendant, having denied the validity of the said contract, cannot be heard to rely on its contents to disprove the Claimant's claims.

First, I disagree with learned Counsel for the Claimant that the Defendant, by filing a Notice of Intention to Defend, has taken steps in the proceedings. In the case of ***Kwara State Government & Others v. Guthrie Nigeria Limited (2022) supra at pp. 204, paras. F-H, 207, para. E; 209, paras. D-F***, the Supreme Court held that ***“Where parties to a contract have, under the terms thereof, agreed to submit to***

arbitration if there is any dispute arising from the contract between them, a defendant who has not taken any steps in the proceedings commenced by the other party, may apply to the court for a stay of proceedings of the action, to enable the parties go to arbitration as contracted. In the instant case, the appellants' act of filing of a notice of intention to defend did not amount to taking a step in the proceeding, contrary to section 5 of the Arbitration and Conciliation Act."

I, however, agree with learned Counsel for the Claimant that a party who contests the validity of a document should not be allowed to benefit from the stipulations contained in the same document. To agree otherwise would amount to allowing a party to approbate and reprobate at the same time. In the case of ***Mohammed v. Farmers Supply Co. (KDS) Ltd. (2019) 17 NWLR (Pt. 1701) 187 at p. 211, paras. F-H***, the Supreme Court per Eko, JSC held that ***"A party to an action would not be allowed to approbate and reprobate."*** Earlier, the Supreme Court per Kekere-Ekun, JSC had stated this position in ***B. B. Apugo Ltd v. Orthopedic Hospital Management Board (2016) 13 NWLR (Pt. 1529) 206 at p. 254, paras B-C*** where it held that ***"A party cannot approbate and reprobate on the same piece of evidence."*** See generally on this: ***Aderonpe v. Eleran (2019) 4 NWLR (Pt. 1661) 141 SC at 158, para H; Awala v. Nig. Telecom (2019) 15 NWLR (Pt. 1695) 372 SC at 391, paras F-G; County & City Bricks Development Company Ltd. v. Honourable Minister, Environment, Housing & Urban Development (2019) 5 NWLR (Pt. 1666) 484 SC at 514, para H; Awala v. Nig. Telecom (2019r) 15 NWLR (Pt. 1695) 372 SC at 391, paras F-G; Thomas Wyatt & Son (North Nig. Ltd) v. Plumstead Investment Ltd (2019) 12 NWLR (Pt. 1687) 540 CA at 553, para G; Sheriff v. PDP***

(2017) 14 NWLR (Pt. 1585) 212 CA at 386 – 387 paras G-A; Anike v. S.P.D.C.N. Ltd. (2011) 7 NWLR (Pt. 1246) 227 CA at 242, paras D-F; Njaba L.G.C. v. Chigozie (2010) 16 NWLR (Pt. 1218) 166 CA at 188, paras F-G; Dingyadi v. Wamako (2008) 17 NWLR (Pt. 1116) 395 CA at 444, paras D-F; and Hong Kong Synthetic Fibre v. Ajibawo (2008) 7 NWLR (Pt. 1087) 511 CA at 530, paras C-D. The reference, therefore, of the Defendant to the arbitration clause in a contract the validity of which it is challenging, is a sham defence and calculated to delay the case of the Claimant.

In view of the foregoing reasoning, therefore, I find no merit in the affidavit in support of the Defendant's Notice of Intention to Defend. In other words, I have no hesitation in holding that the Defendant has not disclosed any defence on the merit in the affidavit in support of the Notice of Intention to Defend to enable this Court exercise its discretion under Order 35 Rule 3(1) and (2) of the Rules of this Court. This Court is satisfied that the Claimant's claims is for a liquidated money demand and that the Defendant has not disclosed sufficient reasons this Honourable Court should not grant all the reliefs the Claimant seeks in this suit. Accordingly, Judgment is hereby entered against the Defendant and in favour of the Claimant on the following terms:-

- 1. THAT an Order is hereby made mandating the Defendant to pay to the Claimant the sum of ₦31,779,000.00 (Thirty-One Million, Seven Hundred and Seventy-Nine Thousand Naira) only being the outstanding sum for the supply and installation of four (4) number of Sharp Photocopiers MX M754/MX754N to the National Assembly.**
 - 2. THAT the Defendant is hereby ordered to pay 10% post-judgment interest on the Judgment sum from the date of**
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Judgment until same is fully liquidated.

This is the Judgment of this Honourable Court delivered today the 20th day of October, 2022.

HON. JUSTICE A. H. MUSA
JUDGE
20/10/2022

APPEARANCES:

FOR THE CLAIMANT:

Okani Ifeanyi Emmanuel Esq.

Jennifer Ogunifor Esq.

Dorothy Anuforo Esq.

FOR THE DEFENDANT

Nwenyi Pius Esq.