

IN THE HIGH COURT OF JUSTICE OF THE F.C.T.
IN THE ABUJA JUDICIAL DIVISION
HOLDEN AT APO, ABUJA
ON WEDNESDAY, THE 19TH DAY OF OCTOBER, 2022
BEFORE HIS LORDSHIP: HON. JUSTICE ABUBAKAR HUSSAINI MUSA
JUDGE

SUIT NO.: FCT/HC/CV/2716/2021

BETWEEN:

MR OLAYINKA OLAIYA COLLINS

CLAIMANT

AND

MR CHUKWU ERASMUS NZUBE

DEFENDANT

JUDGMENT

On the 18th day of October, 2021, the Claimant, MrOlayinkaOlaiya Collins, instituted this suit against the Defendant, MrChukwu Erasmus Nzube, under the Undefended List procedure seeking the following reliefs:-

- a. A refund of the sum of ₦13,000,000.00 (Thirteen Million Naira) only being the sum of money advanced by the Claimant to the Defendant in respect of a failed/voided contract for the purchase of a property described as House No. 3 alongside 361 Road, FHA, Kubwa Estate, Phase 3, Abuja arising from a defect in the title of the Defendant.*
- b. 10% of the Judgment sum monthly from the date of the Judgment until the Judgment sum is fully liquidated.*

In support of the Writ of Summons is a 22-paragraph affidavit deposed to by the Claimant himself, MrOlayinkaOlaiya Collins. The facts upon which

the Writ of Summons on the Undefended List is founded contained in the said affidavit. Briefly, according to the Claimant, some time in 2017, the Defendant, purporting to be the owner of the property described as House No. 3, alongside 361 Road, FHA, Kubwa Estate, Phase 3, Abuja, proposed to sell same to the Claimant at the cost of N13,000,000.00 (Thirteen Million Naira) only. To satisfy himself that the Defendant was the owner of the property, the Claimant retained the services of a legal practitioner who carried out a search at the Federal Housing Authority, Asokoro on the 22nd day of February, 2017. The result of the search disclosed one Chief Mrs Anastasia C. Nweze as the original allottee of the property.

In order to explain how he became the owner of the property, the Defendant adduced a Deed of Assignment and a Power of Attorney both executed by the named Mrs Anastasia C. Nweze and which purported to convey the interest in the property to the Defendant. It was on the basis of these documents that the Claimant paid the sum of N13,000,000.00 (Thirteen Million Naira) only to the Defendant. Both the Claimant and the Defendant executed a Deed of Assignment and a Power of Attorney transferring the title to the property to the Claimant.

According to the Claimant, no sooner had he paid the money and attempted to take physical possession of the property than officials of the Federal Housing Authority appeared, took over the property and evicted the Claimant from the property. He further averred that he was informed, upon inquiry, that the said Chief Mrs Anastasia C. Nweze lodged a complaint to that effect. He also swore that the complainant also lodged a criminal complaint, adding that he and the Defendant were arraigned in Court for conspiring to commit a crime and that the criminal case was still pending.

Meanwhile, he added, the said Chief Mrs Anastasia had taken possession of the property and had even renovated the house with the materials he purchased for that purpose.

It was the case of the Claimant that since the title of the Defendant was defective, the transaction had failed and he, the Claimant was entitled to a refund of the ₦13,000,000.00 (Thirteen Million Naira) only which he paid to the Defendant. He asserted that he had demanded from the Defendant a refund of the money but the Defendant had neither refunded the money to him nor honoured the agreement they executed with respect to how the fund would be returned to the Claimant. It was on the basis of these facts that the Claimant believed the Defendant had no defence to the suit, hence, the institution of this suit under the undefended list procedure.

In support of the depositions in the affidavit, the Claimant annexed a number of documentary exhibits. These are the receipts of payment and the search report collectively marked as Exhibit A, the Irrevocable Power of Attorney donated by Chief Mrs Anastasia C. Nweze to MrChukwu Erasmus Nzube, the Defendant herein marked as Exhibit B, an Irrevocable Power of Attorney which the Defendant donated to the Claimant herein marked as Exhibit C and a Settlement Agreement/Undertaking between the Claimant and the Defendant marked Exhibit D.

On the 24th of February, 2022, this Honourable Court marked the suit as “Undefended List” and placed it on the Undefended List. The Court also fixed the 15th of June, 2022 as the return date. The Defendant, on the 8th of June, 2022 filed his Notice of Intention to Defend and an affidavit disclosing

a defence on the merit. The Defendant, though, erroneously described the affidavit as a 'Counter-Affidavit'.

In the affidavit disclosing a defence on the merit, the Defendant, MrChukwu Erasmus Nzube, who deposed to the affidavit, denied paragraphs 2, 3, 11, and 12 of the affidavit in support of the Writ of Summons on the Undefended List while admitting the depositions in paragraphs 4, 5, 6, 7, 8, 9, 10. The Defendant contended that his title was not defective while, according to him, "paragraphs 13, 14, 15 and 16 of the affidavit in support of the Undefended List did not represent the true position of things." He however, averred that he had instituted an action in Court with Suit Number Cv.1106/2017 to assert his title over the property. he concluded that he had disclosed a defence on the merit and urged the Court to transfer the suit to the General Cause List. In support of the depositions in the affidavit in support of the Notice of Intention to Defend, the Defendant attached one exhibit, which is, the Writ of Summons in Suit Number CV/1106/2017.

This suit came up for the first time in this Court on the 15th of June, 2022, that is, the return date. Parties were represented by their Counsel, though only the Claimant was in Court on that day. The Court, however, adjourned the matter to the 28th of September, 2022 for hearing. On the 28th of September, 2022, the parties were represented by their Counsel. Again, the Claimant was in Court, but the Defendant was not in Court. This Honourable Court took legal submissions from the Counsel on the Undefended List and, thereafter, adjourned this suit to the 19th of October, 2022 for either Ruling or Judgment.

In determining whether to hear and determine this suit under the Undefended List Procedure, or to transfer it to the General Cause List, this Court hereby formulates the following sole Issue: “Whether the Defendant has not disclosed a defence on the merit to justify the transfer of this suit from the Undefended List to the General Cause List?”

In resolving this sole Issue, this Court will consider the provisions of Order 35 of the High Court of the Federal Capital Territory, Abuja (Civil Procedure) Rules 2018. The Order provides as follows:-

Section 35

“1. (1) Where an application in Form 1, as in the Appendix is made to issue a writ of summons in respect of a claim to recover a debt or liquidated moneydemand, 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”.

(2) A writ of summons for a suit in the undefended list shall contain the return date of the writ.

2. A claimant shall deliver to a registrar on the issue of the writ of summons, as many copies of the supporting affidavit, as there are parties against whom relief is sought, for service.

3. (1) Where a party served with the writ delivers to registrar, before 5 days to the day fixed for hearing, a notice in writing

that he intends to defend the suit, together with an affidavit disclosing a defence on the merit, the court may give him leave to defend upon such terms as the court may think just.

(2) Where leave to defend is given under this Rule, the action shall be removed from the Undefended List and placed on the ordinary Cause List; and the Court may order pleadings, or proceed to hearing without further pleadings.

4. Where a defendant neglects to deliver the notice of defence and an affidavit prescribed by Rule 3(1) or is not given leave to defend by the court the suit shall be heard as an undefended suit and judgment given accordingly.

5. A court may call for hearing or require oral evidence where it feels compelled at any stage of the proceedings under Rule 4.”

I have carefully considered the contents of the affidavit in support of the Writ of Summons on the Undefended List as well as the affidavit in support of the Notice of Intention to Defend. It is instructive to note that the claim of the Claimant is specifically for “a refund of the sum of ₦13,000,000.00 (Thirteen Million Naira) only being the sum of money advanced by the Claimant to the Defendant in respect of a failed/voided contract for the purchase of a property described as House No. 3, alongside 361 Road, FHA, Kubwa Estate, Phase 3, Abuja arising from a defect in the title of the Defendant.” The affidavit in support of the Writ of Summons contains the grounds upon which the Claimant believes the Defendant does not have a defence to his claim. In paragraph 8 of the affidavit, the Claimant averred

that he paid the sum of N13,000,000.00 (Thirteen Million Naira) only to the Defendant for the property in question. Following an encumbrance in the property, he demanded for a refund of the said sum from the Defendant. That the Defendant is, indeed, indebted to the Claimant in respect of the above sum could be seen from the deposition in paragraph 18 of the affidavit in support of the Writ of Summons and the contents of Exhibit D, which is an undertaking by the Defendant to refund the above sum to the Claimant on or before the 31st of October, 2017.

On the other hand, the case of the Defendant as disclosed in his affidavit in support of his Notice of Intention to Defend is that he sold a property that was free of encumbrance to the Claimant and that he has taken steps towards asserting his proprietary rights over the property. This he reinforced by the annexure of **Exhibit A** which is the Writ of Summons which he took out against the Federal Housing Authority and Person Unknown designated as the 1st and 2nd Defendants respectively. It is instructive to note that the Defendant did not deny paragraphs 8 and 18 of the Claimant's affidavit in support of the Writ of Summons on the Undefended List. In paragraph 6 of the affidavit in support of the Notice of Intention to Defend, he swore that "*paragraphs 4, 5, 6, 7 and 8 of the affidavit of Undefended List are true.*" In paragraph 11, he further deposed that "*in response to paragraphs 17, 18 and 19 of the affidavit in support of Undefended List, since I knew that my title is not defective I sue the case to Court to show that my title is not defective. The Suit No: CV/1106/2017 between me and Federal Housing Authority is hereby attached and marked as Exhibit A.*" This paragraph, in my humble view, and I so hold, did not

address the issue of the undertaking which the Claimant attached as an exhibit.

I must say something about the affidavit in support of the Notice of Intention to Defend. The Defendant in the said affidavit dwelt so much on the issue of his title to the property which was the subject of the transaction between him and the Claimant that he failed to address the claim of the Claimant that he, the Defendant, is indebted to him to the tune of ₦13,000,000.00 (Thirteen Million Naira) only. When the Rules of this Court stipulates that the Defendant must disclose a defence on the merit before the Court can move the suit from the Undefended List to the General Cause List, it did not invite the Defendant to furnish a blanket defence that do not address the particular claim for a liquidated money demand, or debt, of the Claimant. The claim before this Court is not one for declaration of title. The Claimant is asking for a refund of the money which he paid to the Defendant for a consideration which has failed. The elaborate depositions of the Defendant which revolve round the question of title, while avoiding the claim of ₦13,000,000.00 (Thirteen Million Naira) only cannot qualify as a defence on the merit to the claim of the Claimant.

In the case of ***Julius Berger (Nig.) Plc v. A.P.I. Ltd. (2022) 11 NWLR (Pt. 1841) 201 S.C. at 251, paras C - E***, the Supreme Court per Mary Peter-Odili, JSC held that

“Under the undefended list procedure, the defendant’s affidavit must condescend upon particulars and should as far as possible deal specifically with the plaintiff’s claim and affidavit and state clearly and concisely what the defence is

and what facts and documents relied on to support it. The affidavit in support of the notice of intention to defend must of necessity disclose facts which will at least throw some doubt on the case of the plaintiff. A mere general denial of the plaintiff's claim and affidavit is devoid of any evidential value and such would not have disclosed any defence which will at least throw some doubt on the plaintiff's claim."

As to how exhibits attached to an affidavit are treated by the Court, the apex Court, in the leading judgment delivered by Aboki, JSC in ***Zakhem Oil Serve Ltd. v. Art-in-Science Ltd. (2021) 18 NWLR (Pt. 1808) 341 S.C.*** held at ***p. 358 para A*** that ***"The exhibits attached to an affidavit form part of the affidavit."*** Since the Defendant did not challenge the validity of ***Exhibit D***, the contents are deemed admitted. In ***Comrade Kiri Mohammed & Anor v. Comrade Benson Ekasa&Ors (2022) LPELR-57133(CA)***, the Court of Appeal ***perUchechukwuOnyemenam, JCA at p. 20, paras. D-F*** held that ***"The position of the law is settled that the content of an affidavit can only be challenged by a counter-affidavit. The Court is required to treat unchallenged and uncontroverted depositions of facts in an affidavit as duly established."*** See also ***Lagos State University & Anor v. TaiwoAdegboyegaGaniyu (2022) LPELR-56873 (CA) at pp. 24 – 26, paras D – A per Obande Festus Ogbuinya, JCA; and Central Bank Of Nigeria v. Dauda D. Jubril&Ors (2022) LPELR-57185(CA) at pp. 33-35, paras F-A per D. Z. Senchi, JCA.***

In a situation where the Defendant has filed a Notice of Intention to Defend with an affidavit disclosing a defence on the merit, it is the duty of the Court to scrutinize the processes filed and satisfy itself that the Defendant's

affidavit in support of his Notice of Intention to Defend did disclose, or did not disclose a defence on the merit. In this instant case, I have painstakingly scrutinized the affidavit in support of the Notice of Intention to Defend. It is my considered view, and I so hold, that the affidavit in support of the Defendant's Notice of Intention to Defend did not, in the words of the Supreme Court, 'condescend upon the particulars' of the Claimant's affidavit in support of the Writ of Summons on the Undefended List. This is particularly so in the face of the depositions in paragraphs 8 and 18 of the affidavit in support of the Writ of Summons on the Undefended List and the contents of **Exhibit D** attached thereto. In **Zakhem Oil Serve Ltd. v. Art-in-Science Ltd. (2021) 18 NWLR (Pt. 1808) 341 S.C.**, the Supreme Court, speaking through Abba Aji, JSC in his concurring judgment, held at **pp. 363-364, paras. H-D** that

“Unless a defendant in its affidavit of intention to defend a suit on the undefended list states a good defence and particulars of such defence are adequately set out, and they are such that if proved would constitute such a defence, the court will not transfer the suit to the general cause list, and allow the defendant to defend the suit. Thus it does not lie on the appellant to cry and protest that it was denied fair hearing simply because its case under the undefended list procedure was not transferred to the general cause list as expected. In other words, where the court is not satisfied that there is raised, any bona fide issues for trial between the plaintiff and the said defendant, the suit shall be heard as an undefended suit and judgment given thereon without calling

upon the plaintiff to summon witnesses before court to prove his case formally. It is therefore the court that has to be satisfied that there is raised any bonafide issues for trial and in that event, the suit shall be heard as an undefended suit.”

In view of the foregoing therefore, I have no hesitation in holding that the Defendant has not disclosed a defence on the merit. The suit of the Claimant therefore qualifies to be heard and determined on the Undefended List and is accordingly heard and determine as such. To this end, therefore, 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 refund to the Claimant the sum of ₦13,000,000.00 (Thirteen Million Naira) only being the sum of money advanced by the Claimant to the Defendant in respect of a failed contract for the purchase of the property properly described as House No. 3 alongside 361 Road, FHA, Kubwa Estate, Phase 3, Abuja**
- 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.**

This is the Judgment of this Honourable Court delivered today the 19th day of October, 2022.

HON. JUSTICE A. H. MUSÀ

JUDGE
19/10/2022

APPEARANCES:

FOR THE CLAIMANT:

KenechukwuObiezu Esq.

FOR THE DEFENDANT

Ngozi S. Odigadafu(Mrs) Esq.