

IN THE COURT OF APPEAL
ABUJA JUDICIAL DIVISION
HOLDEN AT ABUJA

ON TUESDAY, THE 6TH DAY OF OCTOBER, 2015

BEFORE THEIR LORDSHIPS:

MOORE A. A. ADUMEIN

TINUADE AKOMOLAFE-WILSON

JOSEPH EYO EKANEM

JUSTICE, COURT OF APPEAL

JUSTICE, COURT OF APPEAL

JUSTICE, COURT OF APPEAL

BETWEEN:

CA/A/307/2013

GAZETTA COMMUNICATIONS LIMITED

... APPELLANT

v.

FEDERAL INLAND REVENUE SERVICES

... RESPONDENT

JUDGMENT

(DELIVERED BY TINUADE AKOMOLAFE-WILSON, JCA)

The appellant was sued by the respondent before the Federal High Court for a disputed tax claim as liquidated money demand under the undefended list on the 26th of September, 2012. Judgment was entered on the 15th of January, 2013 in favour of the respondent. The appellant not satisfied with the judgment of the court has appealed to the Court of Appeal.

The grounds of appeal, shorn of their particulars are –

CTC fees:

₦1,000.00

COURT OF APPEAL

NIGERIA

CASHIER OFFICE

DATE: 13/10/2015

paid

ADEBAYO OLAJUMOKE SHERIFAT
REGISTRAR ¹
COURT OF APPEAL, ABUJA

13/10/15
CERTIFIED TRUE COPY

1. The learned trial judge erred in law and misdirected himself when he failed to consider the defendant's oral argument that the plaintiff's writ of summons was not marked undefended list by the court as enjoined by the rules of court.
2. The learned trial judge erred in law when he allowed the plaintiff to file a further and better affidavit in an undefended list procedure and considered same in arriving at his judgment.
3. The learned trial judge erred in law and misdirected himself when he held that the defendant had no defence to the plaintiff suit under the undefended list procedure.

Briefs were duly filed in this court by the parties. In the appellant's brief settled by Bassey Offiong Esq. two issues were formulated for determination namely –

1. Whether the appellant's affidavit did not disclose a defence on the merit that could warrant the matter to be transferred to the general cause list and to be heard on the merit (Grounds 2 & 3)
2. Whether the Honourable Court had jurisdiction to entertain this suit under the undefended list procedure not having being marked "undefended list" (Ground 1)

The respondent in its brief filed by F.M. Bello Esq. couched three issues thus –

1. Whether the defendant successfully disclosed a defence on the merit in its Notice of intention to Defend.
2. Whether the lower court had jurisdiction to entertain and hear the matter as presently constituted under the undefended list procedure.
3. Whether the lower court relied on the facts deposed to in the further and better affidavit filed by the respondent to reach its decision.

The issues formulated by the parties are similar. Issues 1 and 3 of the respondent's brief are subsumed in issue one of the appellant. I therefore adopt the appellant's brief for the determination of this appeal; but will commence with issue two which deals with **the jurisdiction of the lower court to entertain this suit under the Undefended List, not having being marked "undefended list"**. The grouse of the appellant is that this suit was not so marked as prescribed by Order 12 Rules 1 of the Federal High Court Civil Procedure Rules, 2009 before it could be heard as undefended hence the court lacked the jurisdiction to entertain same. Heavy reliance was placed on the case of **Nwakama v.**

Iko Local Government of Cross River State & Ors. (1996) 3 NWLR (Pt. 439) 732.

In reaction, the respondent referred to page 4 of the Record of Appeal and submitted that the words "Undefended List" were boldly written on top of the writ of summons. It is the contention, in the alternative, that the respondent satisfied the conditions precedent to the application for an Undefended Procedure List as prescribed under the rules. The responsibility of making the writ of summons was that of the court, and if there was an omission the sin should not be visited on the respondent. In support, its learned counsel relied on **Co-operative & Commerce Bank (Nig) Plc v. Attorney-General, Anambra State & Anor. (1992) 8 NWLR (Pt. 261) 528 at 561.** Besides it was argued that this procedural requirement was waived by appellant in that he responded to the procedure without any prior compliant which amounts to a waiver of his rights in respect of the procedural requirement, which does not amount to a nullity. It was contended that the appellant was not in any form misled as to the nature of the proceedings and thus, granting the appeal on this basis will amount to technical justice. On this line of argument he relied on **F. O. Ogbagbe v. First Bank of Nigeria Plc (2005) 18 NWLR (Pt. 957) 357 at 376, Alhaji Saude v. Alhaji Abdullahi (1989) 4 NWLR (Pt. 116) 387** amongst others.

The appellant filed an Appellant's Reply Brief on 10/6/15 which was deemed as properly filed and served on 7/7/2015. It is observed that the Reply Brief was generally a re-argument of the issues raised in the main appellant's brief and even deliberated on some issues which neither arose

from the proceedings in the lower court, nor from the respondent's brief of argument.

The law is trite that an appellant's reply brief is meant to address new points raised in the respondent's brief of argument and not to further duplicate the content of the appellant's brief. It must also arise from the issues formulated for determination. It cannot be used to repair a lacuna in the appellant's brief. See **Okonji v. Njokanma (1999) 14 NWLR (Pt. 638) 250; Longe v. FBN Plc (2010) 6 NWLR (Pt. 1189) 1; Ajileye v. Fakayode (1998) 4 NWLR (Pt. 545) 184.**

As rightly restated by the appellant, it is trite that jurisdiction is fundamental and it is live blood of any litigation. A trial without jurisdiction is a nullity; no matter how well conducted. See **Ikenne Local Government v. WAPC Plc (2011) 12 NWLR (Pt. 1215) 169 Petojessica Enterprises Ltd. &Ors. v. Leventis Technical Co. Ltd. (1992) 5 NWLR (Pt. 244) 675 at 693.** In the *locus classicus* case of **Madukolu v. Nkemdilim (1962) 2 SCNCR 341**, it was held thus –

"The jurisdiction of court is firmly assumed to be present if all the following conditions are satisfied

- a. The court is properly constituted with respect to the number and qualification of its members.**
- b. The subject matter of the action is within its jurisdiction.**

c. **The action is initiated by the due process of law.**

d. **Any condition precedent to the exercise of its jurisdiction has been fulfilled."**

In the instant case, the complaint of the appellant is that the plaintiff/respondent's writ of summons was not marked undefended list by the court as enjoined by the rules of court. The respondent claims it was so appropriately marked. A perusal at page 4 of the Records of Appeal confirms the respondent's stand. However, if indeed it was not so marked, I agree with the respondent that the sin of the neglect or failure to so mark the writ cannot be visited on the respondent, who properly satisfied the conditions precedent for the application for the writ to be so marked as required by Order 12 Rules 1 and 2 of the Federal High Court (Civil Procedure) Rules 2009. The application is at page 3 of the Records. See **Co-operative & Commerce Bank (Nig) Plc v. A.G, Anambra State & Anor. (Supra); S.I.E.C. Ekiti State v. N.C.P. (2008) 12 NWLR (Pt. 1102) 720; and Fidelity Bank Plc. v. Monye (2012) 10 NWLR (Pt. 1307) 1.** This aside, the appellant without any preliminary objection, responded to the Undefended List Procedure by filing a Notice of Intention to defend and an accompanying affidavit on 9/10/12. See pages 29-33 of the Records. Later on 14/11/12, the appellant filed a written address which was adopted on the 11th day of December, 2012. In all these processes, there was no objection whatsoever to the procedure adopted under the Undefended List.

It is settled law that for a party to set aside any proceedings or processes on ground of irregularity, he must be vigilant and take steps timeously in objecting to the irregular procedure. Any application to set aside such processes or proceedings shall not be allowed unless it is made within a reasonable time and before the party applying has taken any fresh step after becoming aware of the irregularity. He would be deemed to have waived or abandoned his legal right to object to any such irregularity. He would not be allowed to approbate and reprobate. It will be too late and against the interest of justice to raise and rely on such an objection. See **Ariori v. Elemo (1983) 1 SCNLR 1 (1983) 1 SC 13; Bajoga v. The Government of the Federal Republic of Nigeria & Ors. (2008) 1 NWLR (Pt. 1067) 85 at 112 paras. B-G; David v. Jolayemi v. (2011) 14 NWLR (Pt. 1258) 320 at 359 paras F-H; 360 paras. A-E. In the case of Nigerian Universal Bank Ltd. & Ors. v. Samba Petroleum Coy Ltd (2006) 12 NWLR (Pt. 993) 98 at 123 paras. A-C**, this court, per Rhodes-Vivour JCA as he then was stated thus –

"A person who takes part in proceedings, filing applications, moving and defending them, and defending applications filed by the adverse party, in the eyes of the law does so as if all is well. He would not be allowed after taking part in the proceedings to turn round to complain about things left undone that should have been done. He would be deemed to have abandoned his legal right to object by

his conduct: He is now estopped from objecting. The abandonment of his legal right to object to the irregularity amounts to waiver."

In the case at hand, a perusal of the Records, (pages 68-69) show that the appellant, not only filed a Notice of Intention to contest the suit, in response to the so called irregular process, it also adopted the written address filed in support of its case before it ever complained about any irregular procedure. The appellant only woke up after it had concluded its case to complain about the procedure. The very fact that he responded to the writ of summons as appropriate under the special undefended list procedure shows that he was not misled by the process served on him. The appellant at this stage cannot expect the proceedings to be set aside after it had fully and completely participated in the proceedings. This is more so when there is no evidence of injustice sustained from the alleged irregular procedure. He is estopped from raising any objection. See **Ogbaegbe v. First Bank Nigeria Plc (supra)** at page 376 where the court stated thus –

"The prerequisite step, the condition precedent under Order 23 is an application accompanied by an affidavit. Once this step is taken, it is recognized that the plaintiff seeks a hearing under the "undefended list", because this procedure is peculiar... Thus, an

application, as an application is an application! Whether the application be made under Order 5 or Order 8, provided no party is misled and thereby placed at a disadvantage. The appellant was not misled in this suit. He filed a notice of intention to defend in response to the special procedure under Order 23."

The case of **Nwakama v. Ikom Local Government of Cross River State (supra)** decided by this court, heavily relied upon by the appellant is distinguishable from the facts of the instant case. In that case, it was the registrar of the court that decided by himself to place the suit in Undefended List without passing same to the judge for signature. The decision to place a case on the undefended list is essentially a matter of the judge's discretion which cannot be exercised by any other officer of court. In the situation presented in **Nwakama's case (supra)** where the registrar on his own accord granted the order for the suit to be heard under the undefended list, the procedure was incompetent and rightly liable to be set aside. In the instant case, it is not disputed that it was the trial court that satisfied itself that the suit ought to be placed for hearing on the undefended list. The trial court had the jurisdiction to entertain the suit as constituted under the undefended list procedure.

Issue 2 is resolved in favour of the respondent.

Issue One

"Whether the appellant's affidavit did not disclose a defence on the merit that could warrant the matter to be transferred to the general cause list and to be heard on the merit."

It is the contention of the appellant while stating the general principles of the Undefended List procedure, that the procedure of filing a better and further affidavit in an Undefended List procedure is alien to the rules of court while filing of same is a clear indication for the matter to be heard on the merit; especially when the trial court relied on same for its judgment instead of discountenancing it. The cases of **Mat Holdings Ltd. v. UBA Plc (2003) 2 NWLR (Pt. 803) 71**, **Yahaya v. Waje Community Bank Ltd. (2001) FWLR (Pt. 46) p. 804 at p. 814** were cited in support.

References were made to the processes before the court by the respondent. It was submitted that by the affidavit in support of the notice of intention to defend, in comparison to the affidavit of the respondent, the appellant had disclosed a defence on the merit upon which the suit ought to be transferred to the general cause list.

The respondent on its part also made references to some averments in the affidavits of both parties and submitted firmly that the appellant's affidavit in Support of Notice of Intention to Defend failed to raise any valid defence on the merit as required by law. It was submitted while restating

the principles governing the Un defended List Procedure, that **"for a defendant to be granted leave to defend a suit under the undefended list, his affidavit in support of the Notice of Intention to defend must not contain merely a general statement that he has a good defence to the action but that such general statement must be supported by particulars which if proved would constitute a defence. He must as far as possible deal specifically with the plaintiff's claim and state clearly what the defence is and what facts and documents he relied on."**

It was submitted that Exhibit FIRS 10 at page 28 of the appellant's accompanying affidavit did not object to the years of assessment in issue. This, its learned counsel argued, constitutes admittance of the respondent's claim. It was further contended for the respondent that the appellant failed to attach documents to support its case that its payment of N100,000.00 was correct and adequate tax liability without showing the details of how it arrived at the amount. The appellant's denial it was argued therefore is a sham defence raised to elongate litigation. He relied on **Amede v. UBA (2008) 8 NLWR (Pt. 1090) 623 at 662 paras B-A; John-Holt & Co. (Liverpool) Ltd. v. Fajemrokin (1961) ALL NLR 492; ACB Ltd. v. Gwagwada (1994) 5 NWLR (Pt. 342) 25.**

On the issue of filing a further and better affidavit by Mr. Bello, for the respondent, referred to the judgment of the lower court and submitted that it is totally false to contend that the lower court relied on further affidavit to arrive at its decision. He urged the court to dismiss this appeal.

The Undefended List Procedure is a special procedure meant for the recovery of debt or liquidated money demand. It is designed to enable a plaintiff obtain summary judgment without lengthy trial when it is perceived that the defendant could not possibly have any defence to the claim. It is a procedure meant for quicker dispensation of justice. See **Garba v. Sheba Int. (Nig) Ltd (2002) 1 NWLR (Pt. 748) 372; Haaido v. Usman (2004) 3 NWLR (Pt. 859) 65; Fortune Int'l Bank Plc v. City Exp. Bank Ltd (2012) 14 NWLR (Pt. 1319) 86 at 105-106, paras H-B; Ed-of (Nig) Ltd. v. Snig (Nig) Ltd. (2013) 9 NWLR (Pt. 1359) 276 at 288, paras. E-F.** A defendant who intends to defend an action brought under the Undefended List Procedure is expected to file a notice of intention to defend together with an affidavit disclosing a defence on the merit or a triable issue. The defence must not contain merely a general statement that the defendant has a good defence to the action. Rather, the averments in the affidavit must be supported by particulars which if proved will constitute a defence. See **Atagbua & Co. v. Gura (Nig) Ltd (2005) 8 NWLR (Pt. 927) 429, Federal Military Government v. Sanni (1990) 7 SCNJ 150; UBA & Anor. v. Jargaba (2007) 11 NWLR (Pt. 1045) 247.**

A perusal of the affidavit in support of the writ of summons of the plaintiff/respondent shows that the respondent carried out an audit exercise on the appellant's company in respect of tax assessment for the year 2000-2005 and found the appellant liable to pay the plaintiff/respondent the sum of ₦26,494,565.81 in which ₦100,000.00 only was paid leaving the balance of ₦26,394,565.81 which was the claim at the

lower court. The respondent's claim was adequately supported by figures and documents. The appellant on the other hand, merely swore to several paragraphs in the accompanying affidavit for intention to defend the suit to state in the main, that the assessment was arbitrary and that the total assets and business turn over since inception is not up to the amount assessed. Its accounting officer assessed the adequate tax payable to be ₦100,000.00. In all these claims, no figures or documents were attached to substantiate its defence. The learned trial judge in consideration of the case appropriately held thus –

"I am of the considered view that the averment in the defendant's affidavit are nothing but empty denials that are not supported with any evidence. I said this, because, the defendant ought to have annexed documents that would show its affairs for the purpose of determining whether the amount being claimed against it as tax liabilities, if paid, would throw the defendant in perpetual bankruptcy."

It is established that for an action to be transferred from the Undefended List to the general cause list, there must be a real and concrete defence on the merit and details and particulars of the defence must be set out. It is not enough for the defendant to merely assert that he has a good defence to the action without deposing to relevant facts disclosing such defence. 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 are being relied on to support it. The affidavit must show that the grounds for requesting to be heard in defence, are not frivolous, vague or designed to delay the trial. In **UBA v. Jargaba (2007) 11 NWLR (Pt. 1045) 247 at 272-273 paras. H-C**, the Supreme Court stated thus –

"For an action to be transferred from the undefended list to the general cause list, there must be a defence on the merit and details and particulars of defence must be set out. It must not be a half-hearted defence. It must not be a defence which is merely fishing for skirmishes all over the place. It must be a real defence on the merit and not a caricature of it."

See also **Agro Millers Ltd. v. Continental Merchant Bank (Nig) Plc (1997) 10 NWLR (Pt. 525) 469** the cited case of **Olou v. Morecab Finance Nig. Ltd (2007) 14 NWLR (Pt. 1053) 37 at 60 paras C-F**; **N.M.C.B (Nig.) Ltd v. Obi (2010) 14 NWLR (Pt. 1213) 169**; **Fortune Int'l Bank Plc v. City Exp. Bank Ltd. (2012) 14 NWLR (Pt. 1319) 86 at 105-106**; **International Bank Ltd. v. Brifma Ltd. (2012) 13 NWLR (Pt. 1316) 1.**

In this case, as rightly contended by the respondent in paragraph 4.30 of its brief of argument, the respondent showed in the court below that the debt owed by the appellant was determined by the provision of the 5th Schedule, paragraph 13(1), (2), (3) of the Federal Inland Revenue Service (Establishment) Act 2007. Also Section 58 of the Companies Tax Act 2007 as amended, which provides that any person who is aggrieved with an assessment done against him may appeal to the Tax Appeal Tribunal within 30 days from the date of the decision of the plaintiff/respondent.

However, at the expiration of the 30 days period, the assessment becomes final and conclusive, which also attracts separate charges as Penalty and Interest. The undisputed facts from records did not show any evidence that objection was raised within 30 days of the tax assessment. Rather, the objection was made in 2012 after six years of the assessment. Worse still, though the period for which the respondent requested for settlement of its tax assessment was for 2000-2005, its response, through its chartered accountant, by Exhibit FIRS 10; reference was made to the years 2007-2011. (See p.28 of the record of appeal). I agree that this constitutes an admittance of the debt as assessed by the respondent for the assessed period of 2000-2005 since there was no objection. In **David v. Jolayemi (2011) 14 NWLR (Pt. 1258) 320 at p. 368**, the court held thus –

"A defence on the merit for the purposes of the Undefended List Procedure may encompass a defence in law as well as on

fact. The defendant must put forward some facts which cast doubt on the claim of the plaintiff."

In the instant case, the affidavit of intention to defend this suit was a mere sham with no defence whatsoever either on facts or law. It is very porous, puerile and lacks any substance as a defence to the concrete allegations made in the respondent's claim for nonpayment of tax assessment for the period of 2000 – 2005. There was no substance in the defence to warrant the court to transfer the matter to the general cause list for consideration. The trivial explanation rendered by the appellant in paragraph 2.3.6 of his reply that *"under the rules of court governing the undefended list procedure Order 12 Rule 3(i) of the Federal High Court Civil Procedure Rules 2009, the appellant affidavit in support of his notice of intention to defend was to be filed less than five days before the hearing date. This time window was not sufficient for the appellant/defendant to prepare a comprehensive audit of its assets and liabilities for the period under dispute as the trial court expected it to do in page 87 and 88 of the records of appeal"* is of no moment and ought to be discountenanced. This was not the case at the lower court. It neither arose in the judgment, the notice of appeal, issues formulated nor in the appellant's brief of argument. It also did not arise from the respondent's brief of argument. It is hereby discountenanced.

The essence of the procedure for Undefended List is for the court to expeditiously try matters on the face of the affidavits of both parties which are not contentious for liquidated sums of money which do not warrant the

taking of evidence. It is to prevent unnecessary delay in proper cases or where the claim of the plaintiff from the affidavit evidence is clear and unassailable. In the instant case, the facts and documents exhibited by the respondent to support the debt owed by the appellant were not controverted by any material particulars. The court was therefore right to have granted the respondent's claim as prayed on the Undefended List.

The contention of the appellant that the lower court relied on the further-affidavit to arrive at its decision is not borne out by the records of the court. A perusal at the judgment of the court at pp 79-90, particularly at pages 80 and 84 showed glaringly that learned trial judge appropriately considered only the plaintiff's/respondent affidavit in support of the writ of summons and affidavit of the defendant/appellant in arriving at its judgment.

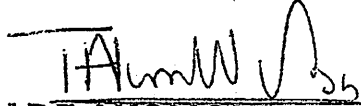
It is true as contended by the appellant that the undefended list procedure does not envisage the use of further affidavit to counter the depositions in affidavit of the defendant to defend the action. Where the plaintiff files a further affidavit to answer the depositions in the defendant's affidavit in support of the notice of intention to defend, that is tantamount to conflict in the affidavits of the parties. In such a situation, the court should transfer the case to the general cause list for trial. See **Yahaya v. Waje Community Bank Ltd (supra)**. However, the filing of further affidavit is not expressly barred under Undefended List procedure. What is material is whether the court made use of it and whether the defendant's affidavit in support of his notice of intention to defend, discloses a triable

issue. See **Majry Odu & Anor. v. Mrs. Tina Agbor-Hemeson (No. 2) (2003) 2 NWLR (Pt. 804) at 383.**

In the instant case, the further affidavit of the respondent was not relied upon by the lower court and the appellant's affidavit did not disclose a defence to this suit. Issue one is also resolved in favour of the respondent. Having resolved both issues against the appellant, I consider this appeal as lacking in merits.

This appeal is unmeritorious and it is hereby dismissed.

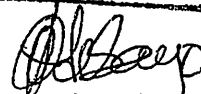
Parties to bear their respective costs.


TINUADE AKOMOLAFE-WILSON
JUSTICE, COURT OF APPEAL

COUNSEL:

B.E. Offiong Esq. for Appellant with him S.E. Esekhaigbe Esq.

Mrs B.H. Oniyangi, with Miss E.M. Bello and E. Udoh Esq. for Respondent

ADERAYO OLAJUMOKE SHERIFAT
REGISTRAR
COURT OF APPEAL, ABUJA 18
 13/10/15
CERTIFIED TRUE COPY

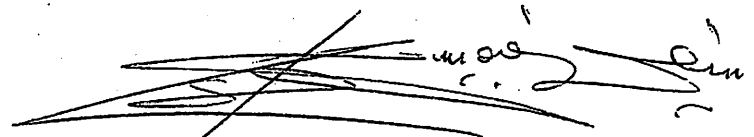
CA/A/307/2013

(MOORE A.A. ADUMEIN, JCA)

I had a preview of the judgment just delivered by my learned brother, **Tinuade Akomolafe-Wilson, JCA.**

I agree that the respondent's suit was properly heard and determined under the "**Undefended List**" procedure and, by the affidavit in support of its notice of intention to defend, the appellant did not disclose that it had any defence to the respondent's claim. It is for these reasons and the very elaborate reasons given by my learned brother that I also dismiss this appeal for lack of merit.

I abide by the order as to costs.



MOORE A.A. ADUMEIN, JCA

JUSTICE, COURT OF APPEAL

DEBAYO OLAJUMOKE SHERIFAT
REGISTRAR
COURT OF APPEAL ABUJA

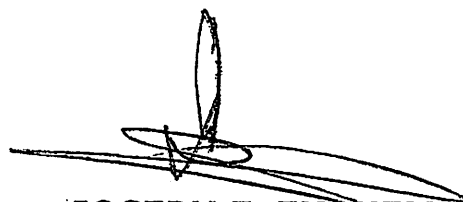
13/10/15
CERTIFIED TRUE COPY

CA/A/307/2013

JOSEPH E. EKANEM, JCA

I had the privilege of reading in draft the judgment just delivered by my learned brother, **Tinuade Akomolafe – Wilson, JCA**. I agree with the reasoning and conclusion therein.

I also dismiss the appeal as unmeritorious and abide by the order as to costs contained in the lead judgment.



JOSEPH E. EKANEM
JUSTICE COURT OF APPEAL

ADEBAYO OLAJUMOLE SHENI
REGISTRAR
COURT OF APPEAL, ABUJA

Adayo 13/10/15
CERTIFIED TRUE COPY