

**2IN THE HIGH COURT OF JUSTICE OF THE FEDERAL CAPITAL  
TERRITORY  
IN THE ABUJA JUDICIAL DIVISION  
HOLDEN AT ABUJA  
BEFORE HIS LORDSHIP: HON. JUSTICE I. M. BUKAR**

**SUIT NO. FCT/HC/CV/1609/2013**

Date of delivery: 19<sup>th</sup> February, 2013

**BETWEEN:**

MALIRAY NIG. LTD.....PLAINTIFF

AND

CHRIS MUTKA AYUBA.....DEFENDANT

Mr. Victor Agunzi.....for the Plaintiff

Mr. A. E. Agwu.....for the Defendant

**JUDGMENT**

This is a suit entered under the undefended list. The writ of summons together with the accompanying affidavit were served on the defendant on 11<sup>th</sup> of February, 2013, the return date being 13<sup>th</sup>. The matter was therefore further adjourned to today. The defendant filed their notice of intention to defend today. The learned defendant's counsel made an oral application seeking for leave to extend time to file their notice of intention to defend and for deeming order. He told the court that he was making the application under Order 20 of the Rules of this court.

Opposing the application, the learned Plaintiff's counsel submitted that issue of interlocutory applications are governed by Order 7 of the Rules of this court and that they should be by motion. He gave the case of G. M. O. N & S Co. Ltd v. Akpata (2010)9 NWLR (pt.1200) 443 at pp. 474 – 475 arguing that in cases entered under the undefended list, the court has only one duty on the return date. That is, to see whether the defendant had filed a notice of intention to defend and an affidavit. That if no such notice and affidavit are filed, the court has no option but to proceed to judgment. In the instant case, the learned counsel argued that there is no such notice and affidavit properly filed before the court and oral application is not contemplated by the Rules of this court. He therefore urged the court to refuse the oral application and enter judgment in their favour.

Undefended list procedure is simple, it is technical and it is a special procedure. Failure to comply with any aspect of the procedure renders the act ineffective and it cannot be classified as a mere irregularity which the court can gloss over. See National Assembly v. C. C. I. Co. Ltd (2008)5 NWLR (pt.1081) 519 at 541 – 542. In the instant case, the defendant filed his notice of intention to defend and affidavit today for which Revenue Collector Receipt no. 2009965331 was issued. Service of the said notice was handed to the Plaintiff's counsel in the open court and the court's copy was given to the Registrar. The learned counsel admitted he was out of time but went ahead and orally applied for leave to extend time to file the notice and for a deeming order. What the learned counsel seem to conveniently gloss over is the fact that the act for which the leave

was sought had already been made. There is nothing therefore, left for the court to exercise its discretion upon. To ask the court to legalize what is not before the court, is not within the contemplation of interlocutory applications. It would have been a different matter, if there is a formal application as provided for under Order 7 of the Rules of this court for leave and attaching the proposed notice and the affidavit. The court will under such circumstance, be compelled to consider such application before proceeding to deal with what is provided under Order 21 Rule 3 (1). All the authorities relevant to undefended list procedure insist on strict interpretation of the provisions governing the action. See *Ben Thomas Hotels v. Sebi Furniture Co. Ltd* (1989)12 SCNJ 171 where the Supreme court per Kayode Eso JSC (as he then was) said:

“When a case entered on the undefended list comes to court on the return date, the court has one and only one duty, namely to see whether the defendant has filed a notice of intention to defend and affidavit. If no such notice and affidavit has been filed within five days before the return date, the court has no choice in the matter but to proceed to judgment.”

There is no such notice properly filed in this case. The oral application was made after filing. Such application, as I said before should have been made under Order 7 and not Order 20 and it should be by way of motion as it is the only way the strict compliance requirement of this procedure can be attended to, either to grant or refuse. What is more, even if I were to entertain and consider the application, the guiding rule should be to see if the affidavit

accompanying the notice of intention to defend had disclosed a defence on the merit and also a satisfactory explanation concerning his neglect to file his defence within time. See *G. M. O. N. & S. Co. Ltd v. Akpata* (supra) at pp. 476 – 477. In the instant case, the affidavit did not give any such explanation and no reasonable defence is deposed. The depositions contained in paragraphs 9, 10 and 11 of the Plaintiff's affidavit is not contested. The depositions in paragraph 11 (t) (ii) in the defendant's affidavit does not change the claim of the Plaintiff to justify transfer of the matter to the general cause list as no deposition was made as to how that was done. The claim therefore stands. Either way, I find the action as undefended and the Plaintiff is entitled to judgment. Accordingly, and for all the reasons advanced I now enter judgment for the Plaintiff for the sum of ₦3,100,000.00 being the total outstanding part payment made to the defendant pursuant to a memorandum of understanding dated 22<sup>nd</sup> day of June, 2012. The claim for interest is refused.

Mr. Agunzi - We appreciate the reasoning of the court.

Mr. Agwu - I appreciate the reasoning of the court.

**SGD**

JUDGE

19<sup>th</sup> February, 2013