IN THE SUPREME COURT OF NIGERIA

Suit No: S.C. 73/2002

Petitioner: Ezekiel Okoli
And
Respondent: Morecab Finance (Nig)Ltd

Date Delivered: 2007-05-04

Judge(s): Sylvester Umaru Onu, Dahiru Musdapher, Sunday Akinola Akintan, Mahmud Mohammed, Ikechi Francis Ogbuagu

Judgment Delivered

This is an appeal by the Defendant/Appellant against the decision of the Court of Appeal, Enugu Division (hereinafter referred to as the court below) which had on the 17th of January, 2001 upheld the decision of J.N. Ofomata, J. sitting at Onitsha High Court, Anambra State.

The claim before the High Court was for payment of a loan granted by the plaintiff company, Morecab Finance (Nig) Limited to the Defendant, Ezekiel Okoli, plus interest. The claim was made under the undefended list procedure (see page 4 of record of proceedings. The defendant\'s defence is at page 7 of record of proceedings). The plaintiff won the case on 6th of October, 1997 and the defendant appealed against the decision on the 9th October, 1997. He also lost and has now appealed to this court. The four issues the Defendant/Appellant has formulated as arising for determination in this appeal are as follows:

\"1. Whether the court below was right in upholding the judgment of the trial judge that there was no triable issue raised in the appellant\'s defence.

2. Whether the learned justices of the court below were not in error to have ignored the surrounding circumstances of this case which makes it unsuitable to be heard under the undefended list procedure.

3. Whether the court below was right to have dismissed the allegation of fraud against the company without proper investigation.

4. Whether in view of the failure of the respondent to traverse the allegation of fraud this appeal should be allowed.\"

The sole issue the plaintiff/respondent has proffered for our determination is:

\"Did the affidavit in support of the Defendant/Appellant\'s Notice of Intention to Defend the suit disclose a defence on the merits as prescribed by Order 24 Rule 9 of the High Court Rules of Anarnbra State 1988 to justify an order transferring the suit from the Undefended List to the General Cause List'\"

At the hearing of this appeal on 6th February, 2007 both parties were absent but since they had filed their briefs we deemed them as argued.

The sole issue proffered for the argument of the appeal by the Respondent, in my view, will do to dispose of this appeal\'. The main plank of the defence sought to be set up by the Appellant in his Notice of Intention to defend this suit which was placed on the Undefended List, is contained in paragraphs 1 and 28 of the affidavit in support of his said Notice of Intention to defend wherein he deposed as follows:

\"(1) That I am not a loan customer of the plaintiff.

(28) That the amount the plaintiff is claiming from me is non existent and not owed to the plaintiff.\"

The foregoing extracts are mere conclusions and are insufficient to cause the matter to be transferred to the General Cause List. See Wallinsford v. Mutual Society(1880) 5 A.C 685 at 704 cited with approval in John Holt (Liverpool Ltd) v Fajemirokun (1961) ANLR 513. For purpose of emphasis I reproduce hereunder the following paragraphs in Appellant\'s affidavit thus:

\"29. That the truth is that I was owing CCB, Plc a certain sum which I have liquidated after the sale of one of my houses and after the said repayment, CCB, Plc did not return my Deed of Title.

30. So my former good friend and confidant for many years Mr. Kenneth Okonkwo told me and I verily believed him

31. Mr. Kenneth Okonkwo prepared for me and 1 verily believe him the contents of the letter dated 11/10/93 and the same is hereby attached and marked Exhibit K.

32. That when the CCB, Plc aforesaid did not return the Deed of Title the same Mr. Kenneth Okonkwo (sic) for me the contents of the letter dated 5th day of November, 1993. A copy of the said letter is hereby attached and marked Exhibit L.

33. That when the CCB, Plc could not return the deed of title, Mr. Kenneth Okonkwo briefed Barrister Okey Anoh to write on my behalf the letter dated the 14/1/94. A copy of the said letter is hereby attached and Marked Exhibit M.

34. That the alleged debt of N l, 575 million purportedly owed to the plaintiff in those letter (sic) was the brain-child of Mr. Kenneth Okonkwo whose (sic) said allegation of commitment to Morecab Finance Nig. Ltd is made to the tune of N l, 575 million, the CCB, Plc will be forced to return the title deed.

35. Mr. Kenneth Okonkwo also told me and I verily believed him that the inclusion of N5, 000, 000 (five million naira) will form the basis of the letter dated 26/10/93 is attached as Exhibit N.

36. That Mr. Kenneth Okonkwo further briefed and instructed Mr. Okechukwu Anon to file suit No 0/110/94 on my behalf against CCB, Plc. A copy of the statement of claim in the said suit is hereby attached and marked Exhibit O...

37. That all the documents attached by the plaintiffs company counsel to the affidavit verifying the claim in this suit are part of the \'supposed preparation by Mr. Kenneth Okonkwo for Him to assist me to prove my case against the CCB Plc.

''

39. I trusted him so much and do whatever he tells me to do without any doubt or suspicion'

The question is, do the foregoing depositions in the affidavit in support of the Notice of Intention to Defend disclose a defence on the merits within the meaning and intendment of Order 24 Rule 9 of the High Court Rules of Anambra State, 1988 to justify an order transferring the suit to the General Cause List' I am of the view that they do not in as much as the \"defence\" sought to be raked up in the said affidavit are a sham and constitute a clever by half attempt to divert attention from the real issues raised by the respondent\'s claim.

Now, the totality of the averments in the said affidavit in support of the Notice of Intention to Defend revolve around a loan which, as the herein
defendant/appellant alleges he, (i.e. Ezekiel Okoli) owed the CCB PLC and which his friend Mr. Kenneth Okonkwo was assisting him to liquidate. It is the Appellant\'s further claim (in his said affidavit) that the documents exhibited to the affidavit in support of the claim in this suit which is placed on the
Undefended List were made or authorised by his said friend Mr. Kenneth Okonkwo in a bid to assist him out of his problems with CCB PLC.

It is contended for the Plaintiff/Respondent that to determine whether the defendant/appellant\'s story (supra) discloses a triable issue, the following questions afford useful guides:

a) On the materials on record, was the defendant/appellant i.e. Ezekiel Okoli indebted to CCB PLC at any time'

b) If the answer to (a) is in the negative, who was so indebted'

c) Is there any relationship between the documents exhibited to the affidavit in support of the Claim on the Undefended List and the documents attached to the Notice of Intention to Defend'

d) If there is no such relationship, could the defendant/appellant be said to have made out a triable issue.

A careful and calm reading of Exhibits \"K\", \"L\", \"M\", \"N\" and \"0\" in support of the affidavit in support of the Notice of Intention to Defend provides a negative answer to the question No: (a) above to wit: who was indebted to CCB PLC' Exhibit \"K\" (supra) is a letter dated 11/10/93 on the letter headed paper of Ezzy Rainbow International Limited written to the Managing Director of CCB making reference to its previous indebtedness which it had repaid and requesting a release of the title documents referred to in the affidavit in support of the Notice of Intention to Defend. It is this letter of 11/10/93 that the defendant/appellant claims to have been prepared for \"me\" in paragraph 31 of the Affidavit in support of his \"Notice of Intention to defend to create an impression that there was a personal loan transaction between him and CCB PLC when, in point of fact, the transaction was between a corporate body (Ezzy Rainbow International Limited) and CCB PLC.

Furthermore, it was stressed, Exhibit \"M\" is the letter written by Barrister Okey Anoh to CCB PLC which the appellant deposed in paragraph 33 of the same affidavit in support of the Notice of Intention to Defend to have been written \"on my behalf to create a misleading impression that the subject matter of the said loan concerned him as an individual. But as the opening sentence of the said letter demonstrates, Okey Anoh Esq (supra) wrote the letter under reference as

\"solicitors for Ezzy Rainbow International Enterprises Nigeria Ltd, a company incorporated under the Laws of the Federal Republic of Nigeria .....\"

Exhibits \"N\" and \"O\" are not different Exhibit N is a letter, from Morecab Finance (Nig) Limited to the Managing Director, Ezzy Rainbow International Limited on the same subject matter. Again, in Exhibit \"O\" is the Statement of Claim in Suit No.0/HO/94 which the defendant/appellant claimed, in paragraph 6 of the said affidavit of his Notice of Intention To Defend-to have, been filed \"on my behalf. The said Statement of Claim shows that the suit has Ezzy Rainbow International Enterprises (Nig) Limited plaintiff. The defendant/appellant (Ezekiel Okoli) is not a party in suit No.0/110/94, neither is Ezzy Rainbow International Enterprises (Nig) Limited a party in the present case. It is elementary that Ezzy Rainbow International (Nig) Limited is different from its members and its liabilities are not ordinarily transferred to defendant/appellant merely because he is a Director thereof and/or signs documents for it. In sum, the materials on record point to one inescapable conclusion: the defendant/appellant was not indebted to CCB PLC. It was Ezzy Rainbow International Enterprises (Nig) Ltd that was so indebted, it was thus idle for the defendant/appellant to attempt to confuse issues in this matter by dragging a transaction between third parties i.e. Ezzy Rainbow Ltd and CCB PLC into this matter as a purported defence.

The matter becomes clearer if one attempts an answer to question No. (c) above, namely: is there any relationship between the documents exhibited to the affidavit in support of the claim on the Undefended List and the documents attached to the Notice of Intention to Defend' The relevance of this question is underscored by the averment in paragraph 37 of the affidavit in support of the Notice of Intention to Defend which alleges that:

\"..... all the documents attached by the plaintiffs Company counsel to the affidavit verifying the Claim in this suit are part of the supposed preparation by Mr. Kenneth Okonkwo for him to assist me to prove my case against CCB PLC'

Now, apart from the fact that the appellant has been shown above not to have my case against CCB PLC, there is no

connection between the documents exhibited to the affidavit in support of the claim on the Undefended List and those attached to the affidavit in support of the Notice of Intention to Defend. In the first place, all documents relevant to the debt owed CCB PLC show that the said transaction took place in or about 1993. Exhibit K to the said affidavit in support of the Notice of Intention to defend which shows that the said debt to CCB PLC had already been paid with the assistance of the financiers of Ezzy Rainbow International Limited was made on 11/10/93. In his letter copied at pages 11(v) -11(x) of the Records, Barrister Okey Anoh wrote that as at the date of the said letter i.e. 14/1/94, his client had already taken a loan of N1 , 575, 000.00 from Morecab Finance (Nig) Limited. The Statement of Claim in Suit No.0/110/94 which in paragraph 16 pleads the same loan ofN l, 575, 000.00k was dated 13/4/94 and filed on the same date. What possible connection could the said loan of N l, 575, 000.00k taken by Ezzy Rainbow ltd which was already in existence as at 14/1/94 and 13/4/94 when Barrister Okey Anoh\'s letter (supra) and the Statement of Claim in Suit No 0/110/94 were written have with a fresh application for facility made in the personal name of the appellant on 8/8/96 i.e. over two years later' (See Application for loan at page 5 of the Records). What connection could the two loan transactions, one may ask, possibly have' One was in or before 1993, while the other was in 1996. The amount involved in one was N l, 575, 000.00 whilst N l, 062, 000.00k was involved in the other. One is owed by a limited liability company whilst the other is owed by an individual. It is not possible to decipher how the documents in the latter loan of 1996 could help the prosecution of Suit No.0/110/94. The Statement of Claim in the last mentioned case is part of the Records and it can be seen the said documents relevant as they are to the instant case, much as they are relevant to the loan subject matter of the instant case) are not therein pleaded and are not therefore admissible in that case. All the foregoing, it is contended, show that even if there is any truth in the allegations leveled against Mr. Kenneth Okonkwo (which is denied) same relates to a completely different transaction from the one which is the subject-matter of the case herein on appeal.

Now to the issue of fraud. This issue was raised in paragraph 23 of the Further Affidavit in support of Notice of Intention to defend the suit. Therein, the defendant/appellant deposed:

\"23. That the documents were forged and the photocopies attached to the Claim.\"

It is further submitted and I entirely agree that this allegation of fraud does not advance the position of the defendant/appellant a little bit. This is because, as already pointed out herein, the documents alleged to have been made on the direction of Mr. Kenneth Okonkwo vide paragraphs 1, 22, 23, 28, 29, 30, 31, 38, 43, 27, 2 and 9 of the Affidavit in support of the Notice of Intention to Defend and which were relied upon in paragraph 4.0.8 (p.6) of Appellants Brief of Argument particulars of the alleged Fraud are different from those giving rise to this suit. Nowhere in the affidavits deposed to by him in this matter did the appellant deny signing the documents on which the debt now sought _to be recovered from him arose. It is also disquieting that the appellant would seek to set up fraud allegedly perpetrated by Mr. Kenneth Okonkwo (who is not a party to this suit) in collusion with himself and seek to rely on same to the detriment of the respondent. There is nothing to suggest that in the alleged fraudulent act of trumping up documents to mislead CCB Plc (supra), the said Mr. Kenneth Okonkwo acted for and at the direction or instigation of the respondent. It is, in the foregoing circumstances, difficult to see how the alleged collusion of the appellant and a non-party to this suit to forge and utter documents to CCB Plc (another non-party to this suit) which can be said to constitute a defence on the merits in this matter. For an allegation of fraud to avail a defendant in a suit 13 placed on the Undefended List, it must be on matters relevant to the case set up by the plaintiff. See John Holt (Liverpool Ltd) v Fajemirokun (1961) ANLR(Reprint) 513 which approved of the decision in Wallinsford v Mutual Society (1880) A.C 685 at 704 where Lord Blackburn said:

'If you swear that there was fraud, which will do. It is difficult to define it but you must give.....extent of definite facts pointing to fraud as to satisfy the judge that those are facts which make it reasonable that you should be allowed to- raise the defence.'

In the case in hand, the plaintiff, a Finance House, has exhibited all its books and documents with which the appellant applied for and was granted a loan. These range from his handwritten application for the said facility, to an agreement drawn and executed between him and the bank to the vouchers and lodger cards showing how he operated his account with the respondent and incurring the liability subject-matter of this suit. He (defendant/appellant) does not deny his signature on the documents. He did not also establish a nexus between the set of documents exhibited to the affidavit in support of the plaintiff/respondent\'s claim which was placed on the Undefended List which were made in 1996 and the documents bearing on his story about CCB PLC which were made in 1993. His allegation of fraud was left with nothing

to give flesh to it. It is little wonder then that the Court of Appeal found that same was insufficient to cause the matter to be transferred to the General Cause List.

I cannot but agree with and in effect, solemnly affirm and ratify the decision of the Court of Appeal. This is because the courts have, over the years, treated allegations in affidavits in Defendants\' Notices of Intention To Defend with circumspection, to the effect that:

".. a defendant who has no real defence to the action should not be allowed to dribble and frustrate the plaintiff and cheat him out of judgment he is legitimately entitled to by delay tactics aimed, not at offering any real defence to the action but at gaining time within which he may continue to postpone meeting his obligation and indebtedness.\" See Agro-Millers Ltd v. CMS Ltd (1997) 10 NWLR (Pt.525) 469 at 477-478'.

I therefore ratify, confirm and approve of the above statement of the Court of Appeal and hold that the purported defence raised in the Notice of Intention To Defend in the present suit amount\' to no more than the trick identified in Agro-Millers Ltd v. CMB Ltd (supra) and finally that I agree, with the Respondent that the Points raised in paragraphs 7.01 to 7.03 of the Appellant\'s Brief are non sequitur As already pointed out, there is nothing to show that, in advising the appellant to prepare any documents with which to deceive CCB PLC, Kenneth Okonkwo acted for or on the authority of the plaintiff/respondent. The appellant\'s own affidavit evidence showed that he dealt with Mr. Kenneth Okonkwo as his friend and confidant. See paragraph 30 of the affidavit in support of the Notice of Intention to defend. The defendant/appellant failed both in the High Court and in the court below to mislead them into transferring the suit to the General Cause List by resorting to stories involving two non-parties to the suit (i.e., CCB PLC and Kenneth Okonkwo) and in hoping thereby to secure a transfer of the matter to the General Cause List. The court below saw through the appellant\'s scheme or deviousness and held -

\"..... too many irrelevant and unnecessary materials have been dumped into this case by the appellant with the obvious intention of kicking up unnecessary dust so as to confuse or obscure the main issue in controversy in this case. The case .against the Appellant was simply that on 12/8/96 he obtained a loan of N l, 062, 000.00 from the Respondent Company - a Finance House known as Morecab Finance (Nig) Limited. He duly submitted a letter of application for loan written by him by hand, and also completed the usual formal application form, Facility Form, Loan Agreement and Payment Voucher, all duly signed by him. The whole amount was to be refunded in six months together with the agreed interest of 21%. At the expiration of the six months period the Appellant did not refund a single kobo either as principal or interest. The owners of the money therefore instituted this action against the Appellant at the Onitsha High Court for recovery thereof.\"

It is trite law that charges of fraud or commission of other crimes or any fact showing illegality must be specifically pleaded. In United Africa Company Ltd v James Eggay Taylor (1936) 2 WACA 70 at 71 the Privy Council held as follows:-

\"In the opinion of their Lordships there is no rule which is less subject to exception than the rule that charges of fraud and ..... charges of criminal malversation or felony against a defendant ought not to be made at the hearing of an action unless in the case where there are pleadings, those charges have been definitely and clearly alleged so that the defendant, comes into court prepared to meet them.\"

This was followed in Emmanuel Nelson Tanakloe v.The Basel Trading Co. (1940) 6 WACA 231 and Oyebisi Afolabi Usenfowokan v. Idowu (1969) NMLR 77.

See also Brett, JSC in the case of Usen v. Bank of West Africa Ltd (1965) 1 All NLR 244. At page 247 of the Report the learned Justice held that

\"Fraud may be presumed from the nature from the nature of the bargain ..... the circumstances and condition of the parties contracting, weakness, one sided, extortion and advantage taken of that weakness on the other. Fraud in such cases does not mean deceit or circumvention; it means unconscionable use of the power arising out of the circumstances and condition of the parties. See Adimora v. Ajufo (1988) 3 NWLR 1 at 13.

If irregularity and/or fraud is alleged, it has to be particularised, pleaded and proved. See Akin Omoboriowo & ors. v. Chief Michael Adekunle Ajasin (1980) 1 SC 206 at 248 and Fabunmi v. Agbe (1985) 1 NWLR 299 at 1 SC 206 at 248.

For as Thesiger, J. said in Davy v. Jarret (1877) 7 Ch.Div. 473 at 489:

'In the common law courts, no rule was more settled than that fraud must be distinctly alleged and distinctly proved and that it was not allowable to prove fraud to be inferred from the facts.'

In Aylford (Earl) v. Morris (1873) 8 Ch.App (1861 - 1893) A.E.R 300 (Reprint) it was held that:

\"fraud may be presumed from the nature of the bargain the circumstances and condition of the parties contracting, weakness on one side, extortion and advantage taken of that weakness on the other. Fraud in such cases does not mean deceit or circumvention, it means an unconscionable use of the power arising out of the circumstances and condition of the parties.\"

The attitude of the courts on the issue of fraud has been total and unequivocal condemnation of the conduct. See Clermont v Tas Burgh 37 ER 318/321, this sometimes is subject to certain conditions on the part of the defendant: where the defendant has assented to the fraud or has waived his right to object. See Clapham v. Shillito 49 ER 1019.

It is the law that fraud unravels everything vide per Lord Denning M.R in Lazarus Estate v. Beaslev (1956) 1 All E.R 341; it must be specifically pleaded and its particulars given failing which the evidence obtained thereof would not be admissible. See Fabunmi v. Agbe (supra) and Adeoye v. Ibidun Jinadu (1975) 5 SC 43 at 48 -49.

Since in the instant case the Appellant neither particularised, pleaded nor proved fraud, his case is devoid of any iota of proof and it must therefore fail.

From all I have been saying, I find no merit in this appeal and it is accordingly dismissed.

Appeal dismissed with N 10,000 costs to the Respondent.

Judgment delivered by
Dahiru Musdapher. J.S.C.

I have read before now the judgment of my Lord Onu, J.S.C just delivered in this matter and I agree with his conclusion that this appeal is completely lacking in merit. I merely want to contribute my own view on the matter.

By a Writ of Summons placed on the Undefended List pursuant to Order 24 rule 9 (2) of the High Court Rules, Anambra State of 1988, the plaintiff, the respondent herein claimed liquidated sums of money plus interest against defendant, the appellant herein. The appellant filed a Notice of Intention to defend the action. The trial court found that the appellant did not raise any legitimate defence to the action and accordingly entered judgment as per the claims against the appellant. The appellant appealed to the Court of Appeal and the issue submitted to the court for determination of the appeal was:-

' Whether the trial judge was right in holding that the defendant did not raise any triable issues in his defence, in the face of paragraphs 22, 23, 28,37 and 40 of the defendant\'s affidavit in support of the Notice of Intention to defend and paragraphs 20, 24 of his further affidavit on the issue.'

In its determination of the issue the Court of Appeal per the judgment of Akpabio J.C.A. of blessed memory said at page 79 of the printed record:-

' I have carefully considered all the evidence placed before the trial court, as well as the legal argument made by learned

counsel on both sides, in this court, and must say in the first instance that by far too many irrelevant and unnecessary materials have been dumped into this case by the appellant with the obvious intention of kicking up unnecessary dust so as to confuse or obscure the main issue in controversy in this case ""

The learned Justice proceeded to hold that the appellant did not raise any credible or legitimate defence to the action. The denial of appellant of the debt was not direct, it was evasive and that was not enough. The Court of Appeal dismissed the appellant\'s appeal and this is a further appeal to this court. Having regard to the judgment of the court of appeal, the only germane issue for the determination of the appeal is the issue formulated by the respondent which reads:-

'Did the affidavit in support of the appellant\'s Notice of Intention to defend the suit disclose a defence on the merits as prescribed by Order 24 Rule 9 of the High Court Rules of Anambra State 1988 to justify an order transferring the Suit from the Undefended List to the General Cause List''

Of the 4 issues formulated by the appellant only the 1 issue appear to be relevant. In an action filed on the undefended List, where a defendant wanted to defend the action, the only issue for consideration is whether the defendant has disclosed a defence to justify transferring the matter to General Cause List or not. In an action placed in the Undefended List where the plaintiff claims repayment of loan, the only defences open to the defendant are only two. (1) That the defendant had refunded the entire loan by the production of receipts, bank tellers or any other document showing that the debt was totally repaid or (2) That he never borrowed the money in the first place, he never applied for the loan or debt, he never obtained any money and that any purported application of the loan or receipt for the loan issued by him is a forgery. In the instant case, the appellant\'s defence as revealed in the affidavit was never direct, it was always evasive. He never categorically stated in clear terms, that he did not borrow the money and against this, the respondent produced his application for loan in writing and his acceptance of the loan as evidenced by the vouchers he signed. I have carefully examined the appellant\'s 46 paragraphs affidavit in support of the Notice of Intention to defend the action and 24 paragraphs further affidavit, the appellant, did not directly and specifically deny receiving the loan and neither did he show that he repaid the loan. This does not mean that if the appellant has any claims against the respondent, he could not claim them in an appropriate manner.

Based on the undisputed facts of this case, the appellant\'s appeal must fail. I accordingly dismiss the appeal and affirm the decisions of the courts below. I award the respondent costs assessed at N10,000.00.

Judgment delivered by
Sunday Akinola Akintan. J.S.C

The main issue raised in this case is whether the appellant had disclosed sufficient defence to the claim against him which was placed on the undefended list to justify or warrant transferring the case from, the undefended list to the general cause list. The respondent had sued the appellant for specific sum lent to the said appellant and which the said appellant failed to refund.

The appellant filed an affidavit in support of his request that the matter be transferred from the undefended list to the general cause list. The learned trial Judge held that he failed to disclose a good defence to the claim. An appeal to the court below against that ruling was dismissed, hence the present appeal.

The law is settled that in an action filed under the undefended list, before the defendant\'s application for a transfer of the action from the undefended list to the general list could succeed, he must present a defence to the action on the merit. It is not enough for the defendant merely to deny the claim or aver that some payments he made were not taken into account. He must set out the details and particulars of all such payments. Failure of a defendant to set out a good defence satisfactory to the trial court, his application would be considered as rightly and justifiably refused: See Franchal (Nig.) Ltd., v. N.A.B Ltd. (1995) 8 NWLR (Pt. 412) 176; Adegoke Motors Ltd v. Adesanya (1989) 3 NWLR (Pt. 109) 250; John Holt & Co. (Liverpool) Ltd. v. Fajemirokun (1961) 1 All NLR 492; and UTC v. Pamotei (1989) 2 NWLR(Pt.

103) 244.

In the instant case, the defence put up by the appellant in his affidavit was totally evasive as he failed to present a defence to the plaintiffs claim on the merit. I therefore hold that the application for transfer of the action from the undefended list was rightly rejected. I had the privilege of reading the draft of the lead judgment written by my learned brother, Onu, J.S.C. I entirely agree with his reasoning and conclusion that there is no merit in the appeal. I also dismiss the appeal with costs as assessed in the lead judgment.

Judgment delivered by
Mahmud Mohammed, J.S.C.

This appeal is against the judgment of the Court of Appeal, Enugu Division, delivered on 17/1/2001, dismissing an appeal against the judgment of the trial AnambraState High Court of Justice sitting at Onitsha delivered on 6/10/1997.

In the suit commenced at the trial High Court under the undefended list procedure, the Respondent in this appeal as the plaintiff claimed against the defendant who is now the appellant before this court, the sum of N1, 178,503.00, being balance of outstanding loan granted to the defendant by the plaintiff which the defendant failed to pay the plaintiff. Interest at the rate of 21% per annum until judgment and 5% per annum thereafter until the entire sum was liquidated, was also claimed in the writ of summons dated 8/3/1997.

At the trial, the affidavit in support of the plaintiffs claim with the relevant documents exhibited therewith, shows quite clearly that the plaintiff received the sum being claimed against him in the undefended suit as a loan from the plaintiff which still remained unpaid. The defendant\'s Notice of Intention to defend the suit supported by an affidavit and a further affidavit with documents as exhibits, instead of disclosing a defence to the suit on the merit as claimed by the defendant, only further confirmed the plaintiffs claim against the defendant. It is not surprising therefore that the learned trial judge Ofomata J. of the Anambra State High Court, Onitsha, after carefully considering the evidence contained in the affidavit and further affidavit in support of the Notice of Intention to defend the suit, came to the conclusion that no defence to the action had been disclosed in the evidence contained therein and consequently entered judgment in the undefended suit in favour of the plaintiff. This follows the finding by the learned trial judge that the existence of the loan granted to the defendant by the plaintiff which remained unpaid, had been proved against the defendant.

Dissatisfied with this judgment, the defendant appealed against it to the Court of Appeal, Enugu Division, which after hearing the appeal, in a unanimous decision handed down on 17/1/2001, found the appeal lacking in merit and dismissed the same. Still quarrelling with the judgment of the Court of Appeal against him, the Defendant, now appellant, has further appealed to this court attacking the judgment of the Court of Appeal on grounds of appeal from which the following four issues were formulated in the appellant\'s brief of argument.

'1. Whether the court below was right in upholding the judgment of the trial Judge that there was no triable issue raised in the appellant\'s defence.

2. Whether the learned justices of the court below were not in error to have ignored the surrounding circumstances of this case which makes it unsuitable to be heard under the undefended list procedure.

3. Whether the court below was right to have dismissed the allegation of fraud against the company without proper investigation.

4. Whether in view of the failure of the respondent to traverse the allegation of fraud this appeal should be allowed.\"

The plaintiff at the trial court which was the respondent at the court below and in this court, in its respondent\'s brief of

argument filed on its behalf by its learned counsel, only one issue was identified for determination from the grounds of appeal filed by the appellant to challenge the decision of the court below in this court. This issue states:-

'Did the affidavit in support of the Defendant/Appellant\'s Notice of Intention to defend the suit disclose a defence on the merits as prescribed by Order 24 Rule 9 of the High Court Rules of Anambra State 1988 to justify an order transferring the suit from the undefended list to the General Cause List.'

Closely looking at the four issues formulated in the appellant\'s brief of argument, it is quite plain that issue one which complained of triable issues raised in the appellant\'s defence, issue two complaining of the unsuitability of the respondent\'s suit being heard under the undefended list and issues three and four which are quarrelling on the failure of the court below to investigate and consider the allegation of fraud raised, in the appellant\'s affidavits of defence, all boiled down to nothing more than the comprehensive single issue raised in the respondent\'s brief of argument. In other words the grouse of the appellant against the judgments of the court below and of the trial court is that the two courts below were wrong in holding that the facts deposed to in the affidavit and further affidavit in support of his Notice of Intention to Defend\' the suit did not disclose a defence on the merits to justify transferring the respondent\'s suit to the General Cause List of the trial court for hearing. In this respect, I entirely agree with the learned counsel to the Respondent that there is only one real issue for determination in this appeal as identified in the respondent\'s brief of argument.

On 6/2/2007, when this appeal came up for hearing in this court, not only were all the parties absent in court inspite of their having being duly served with the respective notices for the hearing of the appeal that day but that their learned counsel through whose addresses the parties were served, were also absent at the hearing. However, since the learned counsel had duly filed the appellant\'s brief of argument, the respondent\'s brief of argument and the appellant\'s reply brief of argument, in compliance with the provisions of Order 6 Rule 8(6) of the Supreme Court Rules as amended which reads:-

'8(6) When an appeal is called and no party or any legal practitioner appearing for him appears to present oral argument, but briefs have been filed by all the parties concerned in the appeal, the appeal will be treated as having been argued and will be considered as such.'

the appeal was deemed heard on the respective briefs of argument filed by the parties.

Indeed the only issue for determination in this appeal as I have already stated, is whether the affidavits in support of the Appellant\'s Notice of Intention to defend the suit had disclosed a defence on the merits as prescribed by Order 24 Rule 9 of the Anambra State High Court (Civil Procedure) Rules 1988, to justify an order transferring the suit from the undefended list to the General Cause List for hearing. By this provision of the High Court Rules, a defendant in an undefended suit proceedings must show in his affidavit in support of his Notice of Intention to defend the suit not only that he intends to defend the action, but that the affidavit also discloses a real defence to the action on the merits. It is certainly not enough for such a defendant to merely assert that he has a good defence to the action without deposing to the relevant facts disclosing such defence. See A.C.B Ltd v. Gwagwada (1994) 5 N.W.L.R. (Pt 342) 25 at 36. In the present case, while the appellant by filing his Notice of Intention to defend the suit supported by affidavit and further affidavit might have shown his intention to defend the suit, the facts deposed to in those affidavits woefully failed to disclose any defence on the merits to the action as required by Order 24 Rule 9 of the Rules of the trial High Court.

For the foregoing reasons and the fuller reasons given by my learned brother Onu J.S.C. in his leading Judgment, I entirely agree with him that both the trial court and the court below were right in holding that the appellant had failed to disclose any defence to the respondent\'s action in the affidavits in support of the Notice of Intention to defend the action. As the appeal lacks merit, I also dismiss it with Nl0,000.00 costs in favour of the Respondent.

Judgement delivered by
Ikechi Francis Ogbuagu. J.S.C.

The case leading to the instant appeal, in my respectful view, is one in which the Court, will not and ought not to allow a sham or non-existent defence to talk of a good defence, raised in order to gain time or for the prolongation of litigation as has been the stance of the Appellant. This is now firmly settled. See the case of Jones v. Stone (1894) A.C 122 (a), 175. It is also settled that defendant who has no real defence to the action, should not be allowed to dribble and frustrate the plaintiff and cheat him out of the judgment he is legitimately entitled to, by delay tactics, aimed, not at offering any real defence to the action, but at gaining time within which he may continue to postpone meeting his obligations and indebtedness. See the cases of Ben Thomas Hotels Ltd, v. Sebi Furniture Co. Ltd. (1989) 5 NWLR (Pt.23) 523; (1989) 12 SCNJ. 172; Macaulay v. NAL Merchant Bank Ltd. (1990) 4 NWLR (Pt.44) 283; (1990) 6 SCNJ. 117 and The Federal Military Government of Nigeria & 3 ors. v. Mallam Sanni (1990) 4 NWLR (Pt.147) 688; (1990) 7 SCNJ. 139. This is exactly, what the Appellant has been doing though unsuccessfully, right from the trial court to the Court of Appeal, Enugu Division (hereinafter called \"the court below\") and up to this Court. See also the decision of this Court in the case of Ataguba&Co v. Gura Nig. Ltd. (2005) 2 SCNJ. 139; (2005) 2 S.C. (Pt.l) 101 (a), 141- 148.

The court below at pages 81 and 82 of the Records,, stated inter alia,, as follows:

\"The sum total of what is being said above is that throughout the length and breadth of Appellant\'s 46 paragraphs Affidavit of Intention to defend as well as the 26 -paragraphs \"Further Affidavit in support of Intention to Defend\"the Appellant did not sufficiently deny ever receiving a loan of Nl,062,000.00 from the Respondent, and under our law, a fact or allegation not denied is deemed to have been admitted See Alagbe v. Abimbola (1979) 2 S,C. 39 at 40; Omoregbe vLawani (1980)3 & 4 S.C. 108, 117; Ajomale v. Yaduat No. 2 (1990) 5 NWLR (Pt.191) 266 S. C.) This clearly accounted for why the learned trial judge had no difficulty in holding that there was no triable issue in the case. Rather than address the main and indeed the only issue as to whether he obtained or did not obtain the loan complained about, the appellant spent a disproportionately long time talking about his being the Chairman and Financier of the Respondent Company, as if being Chairman and Financier of a Finance Company entitled him to obtain money in the said company without refunding same .....\".

I agree. This is because and it is also settled, that judgment should only be ordered where assuming all the facts are in favour of the defendant, they do not amount to a defence in law. See Macaulay v. NAL Merchant Bank Ltd. (supra). This is why it is said that the Rules as regards matters placed on the Undefended List, is designed to enable a plaintiff, to obtain summary judgment without trial in those cases where the plaintiffs case is unassailable (as in the instant case). See Cow v. Cassey (1949) 1 K.B. 481 and the defendant, cannot, show a defence which will lead to a trial of the case on its merits. See the cases of Roberts v. Plant (1895) 1 W.B. 599 and U.T.C. Nig. Ltd, v. Chief Pamotei & ors. (1989) 2 NWLR (Pt. 103) 244 @ 277. 282. Thus, a claim will not be transferred to the General List for hearing on the merits where the defendant\'s affidavit does not disclose a defence on the merit. See the cases of franchal Nig. Ltd, v. Nigeria Arab Bank (1995) 8 NWLR (Pt.412) 176 @ 188 and Jos North Local Government v. Daniyan (2000) 10 NWLR (Pt. 675) 281 (a), 282 -284 C.A. This is why and it is settled that a court, must be satisfied that the 3 defendant has deposed to facts, which disclose a prima facie or reasonable defence in order to be let in to defend the suit. See the cases of John Holt & Co. (Liverpool)\'Ltd, v.Fajemirokun (1961) ANLR 427; U.N.N. v. Qrazulike Trading Co. (1989) 5 NWLR (Pt.119) 11 (a), 13: Agwuneme v.Eze (1990) 3 NWLR (Pt.137) 242 (a), 254, 257;Okamba Ltd, v. Alhaji Sule (1990) 7 NWLR (Pt.160) 1; (1990) 11 SCNJ. 1 (a), 7 just to mention but a few.

I note that the Appellant, never, denied his obtaining the said loan: I see at page 5 A of the Records, his application in his own writing dated 8th August, 1996 and signed by him for the said loan. The period of the loan, is stated at page 58 thereof as six (6) months from 12th August, 1996 to 11th February, 1997 and the source for repayment of the loan, is stated to be \"From Business\". He \' also signed the \"Facility Form\" in which these facts are contained. I also see at page 5C - \"Loan Agreement\" also signed by him. He also signed the \"Pay Voucher\" where he acknowledged the receipt of the said loan on 12th August, 1996. The Respondent at the trial court produced the documentary evidence in respect of my findings. The learned trial Judge considered the defence of the Appellant as contained in the affidavit in support of his Intention to defend the suit and found no triable issues. The relevant averments in paragraphs 29 to 37 of the said affidavit, were also reproduced in the Respondent\'s Brief. At page 267 of the Records, the learned trial Judge stated inter alia, as follows:

\"I have read the grounds of defence as per the defendant\'s affidavit. This court has to observe that the defendant\'s claim that he is a co-owner and financier of the plaintiff\'s company is no answer to his liability to pay the admitted debt. That the defendant gave unspecified sums of money to the plaintiff \'does not make him not liable to the debt. The defendant is at liberty to sue the company if he is owed any debt by the Company\".

[the underlining mine]

I agree. This is because and it is settled that once the defendant admits the indebtedness or the receipt of the loan, the burden as to repayment or as to the reasons for non-payment, is on the defendant. See the case of Federal Military Government of Nigeria v Sani (supra). I note that the Appellant, never counter-claimed.

Before concluding this Judgment, I will deal even briefly, with the issue of fraud. At page 83 of the Records, the court below stated inter alia, as follows:

\"In the instant case the learned trial Judge carefully considered the allegations of fraud and forgery leveled against Mr. Kenneth Okonkwo, and found they did not hold water. The signature of Appellant on all the documents in support of the claim were all the\" same \'as appellant\'s signature on the affidavit in support of intention to defend, and so required no further investigation, and I agree with him. On the totality of the foregoing, I am of the firm view that this appeal must fail\".

I have also noted in this Judgment, the relevant documents produced at the trial court which were/are all signed by the Appellant. All the documents relied on by theAppellant, I note and hold, have nothing to do with all those documents/exhibits concerning the application for the loan by the Appellant and his receipt of the same. Both the CCB PLC and Mr. Kenneth Okonkwo, are not parties to this suit leading to this appeal. It is now firmly established that an allegation of fraud in civil matters, must be pleaded with particulars. See the cases of Ottih v. Nwanekwe (1990) 3 NWLR (pt. 140) 550 @ 560. Adeoye v. Jinadu (1975) 5 S.C. 102- Onafowokan v.Idowu (1969) 1 ANLR 125 Adimora v, Asufo (1988) 3 NWLR (Pt.80) J; (1988) 6 SCNJ. 18 and many others. In the case of Usen v. B.W.A. Ltd. (1965) 1 ANLR 244, it was held that who ever intends to prove fraud, must plead it expressly and if he had not done so, he will not be allowed to produce evidence which points unequivocally to fraud and nothing else.

It is settled also that courts must be careful in the way they accept the use of the word \"fraud\" by litigants in proceedings before them. That the word \"fraud\" is so elastic in meaning as to cover the commission of crime as well as Incidents of mere impropriety. That it is often loosely used to cover both situations. That when an allegation of fraud is made, it would have to be supported by particulars. That it is not unusual to allege fraud in civil cases without imputing any crime. See also the observation of Lord Herschell in the famous case of Perry v. Peek (1899) 14 A.C. 337@ 369.

I finally note that there are concurrent findings of fact by the two lower courts and it is the attitude of this Court not to interfere, I will therefore, end this Judgment by reproducing part of the findings and holdings of the court below at pages 79 and 80 of the Records, inter alia, as follows:

\"I have carefully considered all the evidence placed before the trial court, as well as the legal arguments made by learned counsel on both sides, in this court, and must say in the first instance that by far too many irrelevant and unnecessary material have been dumped into this case by the appellant with the obvious intention of kicking up unnecessary dust so as to confuse or obscure the main issue in controversy in this case. The case against the Appellant was simply that on 12/8/96 he obtained a loan of N1, 062,000.00 from the respondent\'s Company a Finance House known as Morecab Finance (Nig,) Ltd- He duly submitted a letter of application for loan, written by him by hand, and also completed the usual formal Application Form, Facility Form, Loan Agreement and payment voucher, all duly signed by him. The whole amount was to be refunded in six months together with the agreed interest of 21%. At the expiration of the six month\'s period, the Appellant did not refund a single kobo either as principal or interest. The owners of the money therefore instituted this action against the Appellant at the Onitsha High Court for the recovery thereof\".

Although I had noted some of these facts earlier in this Judgment, the above supports my finding and holding that this appeal, with respect, is a frivolous and sham one, designed to purposely and deliberately, delay the Respondent, from

recovering from the Appellant, a loan/debt voluntarily admitted by him and which transaction, is evidenced by documents whose contents are clear and unambiguous.

I will pause here to state that what is disturbing to me in this appeal, is the confession by the learned counsel for the Appellant who prepared/settled his Brief of Argument both in the court below where he argued the appeal and in this Court, to the effect that he was given a \"dead child\" so to speak, but he decided to take a gamble to see, if he could resurrect or revive the dead child. This is so, because, I see that at page 3 No. 11 of the Brief in this Court, it is stated as follows:

\"We took over this case after the appeal had been entered in the court of Appeal\".

(the underlining mine)

This statement is repeated at page 5 paragraph 4.01 of the said Brief. Under \"Statement of Facts\", the following appear, inter alia,

\"5.01. The appellant stated that he signed the loan document and other documents and narrated the circumstances under which he signed the documents\"

\"50.4. He then explained that it, is these documents that is (sic) now turned against him to defraud him. For all these see para 29, 30, 31, 37, 38 of the affidavit in support of the intention to defend\".

"""""""""""""""".

\"9. One misfortune which has continued to hunt the appellant in the courts is the affidavit evidence of 46 paragraphs and further affidavit evidence of 26 paragraphs with so many irrelevant issues to this case filed by the appellant\".

\"10. The judges (i.e. the Justices) say he brought in those irrelevancies to pull cool (sic) (meaning) wool) over the eyes of everybody The truth however is that it is the error of counsel who stuffed all the facts the appellant narrated to him in respect, of the 4 suits which the respondent instituted against him into the affidavit in support of intention to defend this particular suit. This made the identification of facts to establish triable issues difficult but not impossible\".

"""""""""""""""".

4.02. The former Counsel muddled the Defendant\'s affidavit by putting into this affidavit all the-defendant\'s case against the plaintiff with regard to the four suits instituted against the defendant. It is an unfortunate error of counsel which should not be allowed to work against the appellant. See Ibodo v.Enarofia 5-7 S.C. 42\".

\"4.04. Surely, it is a painful exercise extracting some of the relevant facts from the muddle of an affidavit. Perhaps this explains why the lower courts glossed over them and treated the muddle as a calculated attempt to place wool over the courts eyes \". (Seepage 79 of the Record).

(the underlining mine)

In spite of the above statements (although as it is for a long time, some learned counsel taking over a case/brief, -always find fault about their learned friends who handled the case/brief \'earlier), the Appellant\'s leamed counsel C.N.O. Anikene, Esqr, took the-\"plunge\" to see if he could \"salvage a drowned man\" so to say,. One of his weapons is the allegation of fraud. This is in spite of the fact that it is now settled firstly, that where a person of full age and discretion, signs a document in the full knowledge of the nature and not necessarily knowledge of the contents of the document, it will not avail him to complain that he did not know the contents of the said document. See the case of Eebase v. Oriareghan (1985) 10 S.C. 80 (a). 92; (1986} NLTR 156. Scruthon, L.J. in the case of Blay v. Pollard (1930) 1 K.B.

628(3), 633 observed inter alia, as follows:

\"..... it would be very dangerous to allow a man over the age of legal infancy to escape from the legal effect of a document he has, after reading it, signed, in the absence of an express misrepresentation by the other party of that legal effect\".

About the bindingness of the contents of a document on the person who signed it, See the cases of Davis Contractors Ltd, v. Fareham UDC (1956) A.C. 696; Ezeusov. Ohanyere (1978) 6-7 S.C. 17 1 (a), 184; (1978) 6-7S.C. (Reprint) 115, Aswunedu & 7 ors. v. Onwumene (1994) 1 NWLR (Pt.321) 375 (a), 386-387, 401-402; (1994) 1 SCNJ. 106 - per Qnu. J.S.C and Allied Bank of Nigeria Ltd, v. Jones Akubueze (1997) 6 NWLR (Pt.509) 374 @ 403-404; (1997) 6 SCNJ. 116 (a), 140 just to mention but a few.

Secondly, as stated in the case of Obasuyi & anor. v. Business Ventures Ltd. (2000) 5 NWLR (Pt.668 @, 690); (2004) 4 SCNJ. 20, a Brief, is not the place to give evidence {as has happened in the Appellant\'s Brief). It is supposed to be brief and contain submissions tied to the evidence contained in the Record of Appeal.

Thirdly, as held in the case of K.R. Textile Allied Products Ltd, v. Henry Stephens Stephens Co. ltd. & 2 ors. (1989) 1 NWLR (pt. 95) 115 C.A., where the chances of an appeal succeeding, are extremely remote (as in the instant case and as demonstrated by me hereinabove as to what the learned counsel for the Appellant confessed), it behoves learned counsel in the case, to advise his client of the hopelessness/uselessness of pursing such an appeal which patently, lacks merit. That was why the trial court, advised in its said judgment, that the Appellant can/could sue for the recovery of any alleged debt owed him by the Respondent. Yet, in spite of the findings of facts and holdings of the two lower courts, instead of Mr. Anikeme so advising his client - the Appellant, he decided to embark (with respect), on this unmeritorious appeal and now complains about his taking over the appeal after it had been entered. I note that in the court below, he had even filed an application for the suspension of the order or the sale of the property of the Appellant and sought for an order directing the return of the property of the Appellant. He later withdrew the motion after opting for an accelerated hearing of the appeal with the agreement of the /learned counsel for the Respondent. May be, it was the Appellant that was \'\"pushing\" or urging him to go on with the appeal as delay tactics. But the learned counsel was/is entitled to say No after knowing the obvious.

In conclusion or final analysis, I agree with the conclusion in the lead judgment of my learned brother, Onu. J.S.C, that this appeal is devoid of any merit. It fails and I too, dismiss it with costs of N10,000.00 (Ten thousand naira). If the Rules of this Court had permitted me, I should have enhanced the award in view of all the circumstances as noted by me in this Judgment