

**A CRITIQUE OF THE DEFAULT SUMMONS & THE UNDEFENDED LIST  
PROCEDURES IN THE UNIFORM HIGH COURT (CIVIL PROCEDURE)  
RULES**

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## **1. INTRODUCTION**

The rules pertaining to practice and procedure in our high courts is the veritable Achilles' heels of the green wig. The terrain of the rules is not only slippery but also full of yawning potholes for the unwary practitioner. One false step and the whole procedure for a civil case will come tumbling down.

Even though it is an axiomatic saying that rules of court are the handmaid of justice, many a time they have proved to be the very antithesis of justice.

With the foregoing as our pedestal, it is imperative that the comparative analysis that is to be undertaken herein is meant as a signpost for legal practitioners, to enable them know the differences, similarities and the legal consequence(s) of the procedures by way of default summons and the undefended list.

Until the promulgation of the Common or Uniform Procedure Rules,<sup>2</sup> the rules applicable for summary judgment in Lagos, the Western States and old Bendel was the

default summons<sup>3</sup>, whereas in the old Northern and Eastern States, the Procedure was by way of the undefended List procedure.<sup>4</sup>

In the present rules of court in those states that have promulgated the Common Civil Procedure rules, the Undefended List in most cases is incorporated in Order 23 of the rules<sup>5</sup>.

For ease of reference, all references to default summons shall be referable to order 10 of the defunct Lagos State High Court (Civil Procedures) Rules 1973, while reference to Undefended List shall be Order 23 of the Kwara State High Court (Civil Procedures) Rules 1989.

## **2. WHAT IS DEFAULT SUMMONS?**

There was not definition of what default summons was under the 1973 Rules of Lagos State high court but an explanation of what it was, could be gathered from the provision of Order 10 of the said rules.

However for our purpose, the default summons is the special procedure whereby plaintiff, by the use of the

specially indorsed writ, to which a statement of claim is attached, plus a verifying affidavit, can ask for judgment by summons, if the defendant who has been served with the processes fails or neglects to take the steps prescribed under order 10 rules 3 (a) and (c) of the 1973 rules of Lagos High Court.

### **3. WHAT IS UNDEFENDED LIST?**

This is a special procedure where a plaintiff when filing or making application for a writ of summons, in addition, files an affidavit verifying the claim and stating that in his belief, the defendant has no defence on the merit to the action. The Plaintiff on the day the suit is slated for hearing can ask for judgment once the defendant does not file a Notice of Intention to defend with an accompanying affidavit delivered to the Registrar 5 clear days before the date fixed for the hearing.<sup>6</sup>

One important feature of the two procedures of which more will be said later is that procedures can only be used where the action is for simple debt or a liquidated sum demand.<sup>7</sup>

We shall presently embark on the workings of these procedures to enable us sift similarities and differences at a later part of this paper.

### **4. DEFAULT SUMMONS**

It should be stated and noted right away, that the procedure by default summons is

not the only summary judgment procedure known to the rules of courts in Nigeria.<sup>8</sup>

A plaintiff desiring to bring his action within the default summons procedure must: File a specially indorsed writ; File with the writ the statement of claim: must also file verifying affidavit; Ensure that the defendant is served with all the processes.

Once the defendant fails or neglects to file plaintiff file a defendant after entering an unconditional appearance, the plaintiff files a summons with affidavit evidence for leave to enter final judgment.

He must state in the accompanying affidavit that to the best of his knowledge and believe, the defendant has no defence to the action.<sup>9</sup>

It is submitted that if the defendant is not served or where served, enters a conditional appearance or appears in protest the procedure will be abated

A defendant that intends to defend the action can defeat the procedure by: showing that the case does not fall within the scope of the applicable rules. The rules it should be noted exempted some actions like libel; file the statement of claim with the writ of summons: filing a defence with an affidavit showing that there is an issue or questions worth being tried.

Until the Supreme Court decision in *Nishizawa vs Jethwani* in 1984, there was

a controversy as to whether the mere filing of statement of defence without an accompanying affidavit would be enough to defeat the procedure for the purpose of the rule.

But that Court in the lead judgment of Obaseki J.S.C<sup>11</sup> to which other justices concurred said:

“When an application for judgment is taken under order 10, the defendant ought not to file and serve a statement of defence. See *Hobson vs Monks & Anor.*<sup>12</sup> Although I will not go so far as Appellant’s counsel to say that it is not permissible to file a statement of defence. I will and I do hold that order 10 does not authorize the filing of a statement against the application for judgment. The question that arises when a statement of defence is filed as in the instant appeal before the consideration of the application for judgment under order 10 is whether it fulfil the requirement of the rule that then defendant may “show cause”.

With the guidelines given by order 10 rules 3 (a) and (c) in mind, a statement of defence simplicities is not a manner of showing cause against a statement of

claim verified by affidavit. The only problem is whether the judge or court can shut his or its eye against the statement of defence. The clear answer is that faced with the difficult task of deciding that the defendant has no defence to the action he cannot shut his eyes against it. This must not be taken as elevating statement of defence to the requirement of the rule.

It is our opinion that it is a correct approach to the problem, since the court is not only a court of justice but also a court of equity. The holding had gone a long way in upholding the values of natural justice especially the audi alterem pattern rule.

It is further submitted that the question whether the court can look at a mere defence as opposed to an affidavit in the circumstance is a mere technicality which should not deny the defendant justice. The Supreme Court put this new approach beyond doubt when it held in the case of *Saude vs Abdulahi* that:

“But in any event, it has been consistently held by this court over along line of authorities that this court should not e held up by technicalities. Justice can only be done in substance and not by impeding it with mere technical procedural irregularities.”<sup>13</sup>.

one final point on this issue is that even where the defendant takes the correct step of filing a defence plus an affidavit but it is found that the defence. In order words what the rule envisages is a defence that discloses substances.

In the *Nishizawa's case*, the defendant in an action brought pursuant to order 10 only filed a statement of defence which the trial court held was in accord with order 10 rule 3(a) (b) and (c) and took the defence into consideration and refused to enter judgment under the rule.

The Court of Appeal took the same view but at the Supreme Court the learned justices looked at the defence and having found that it was no defence to the action in substance allowed the appeal and entered judgment for the plaintiff. It is apparent that notwithstanding the procedural error of the defendant highlighted above, if the statement of defence had disclosed a substantive defence to the action, the Supreme Court would have held differently. Aniagolu J.S.C. in his concurring judgment<sup>14</sup> brought this out clearly when his Lordship declared ex-cathedra thus:

“In none of his joggling with words, either in the statement of defence be improperly filed, or in the argument of his counsel before the court of first instance or the court appeal, did he meet the case of the

plaintiff by a definite answer to the claim. The defendant had clearly not put up defence, to the plaintiff's demand on the claim... had he put up a real defence to the claim I would, certainly, notwithstanding that he might not have come by way or order 10 rule 3 have granted him leave to defend. The inconvenience to the plaintiff would, in such a case, have been remedied by costs.”

His Lordship Oputa J.S.C. in the same case<sup>15</sup> laid the matter to rest when he said inter alia:

“Again he interest of justice between the parties demands that when a statement of defence has been filed through irregularly, the learned trial judge would not shut his eyes to the facts alleged therein, and in good conscience shut the defendant out on a mere technical point...”

in the peculiar circumstances of this case and having regard to the primary fundamental duty of the courts to do substantial justice by deciding not on a

mere technicality at the expense of hearing on merits, I hold that the trial judge was entitled to look at the respondent's statement of defence (notwithstanding the fact that it was irregularly filed against the letter of order 10 rule 3 but not the spirit of order 10 rule 1) to see if the defendant has thereon disclosed a defence on the merits."

This we submit is the correct approach and position of the law. Not only is it in accord with equity but also with the justness of the law and justice it also accords with the right to fair hearing provision in our constitution.

## **5. UNDEFENDED LIST**

A plaintiff that intends to initiate his claim for a debt or liquidated money demand will have to fulfil the following conditions before his case can be entered on the Undefended List:

The conditions are:

- (a) There must be an application for writ of summons
- (b) The application for writ must be accompanied with a verifying affidavit.
- (c) File an ex-parte application praying the court to enter the suit on the undefended list for hearing.

- (d) Upon the fulfilment of the above, the court on its part, will take the following steps: Satisfy itself upon the grounds of the application: shall enter the cause on the undefended list after making same as undefended list: shall fix the return date for hearing.

Thereafter the plaintiff shall to the registrar as many copies of the writ of summons to which are attached the affidavits in support.

The registrar upon receipt of the writ of summons and affidavit shall attach one affidavit to each. One point of importance is the question: what happens after the plaintiff has fulfilled all the conditions for entering his suit on the undefended list but the court or Registrar for whatever reason fails to carry out their own duty to perfect the processes? For example failure to enter the suit on the undefended List?

It is our view that once the plaintiff does all the things required of him under the rules to have his case treated as undefended suit but the Court or Registrar fails to perfect the processes either by failure to mark the writ as undefended list or to attach the affidavit to the writ, that will be purely an administrative lapse on the part of the court or Registrar which it is submitted, will not affect the competence of the suit..

Support for this view can be found in the old Supreme Court case of *Alawode v. Semoh*<sup>16</sup> where it was held that failure to sign the writ by court officials was a registry irregularity which did not concern the plaintiff who had paid the necessary fees with his application and particular of claim.

It is trite that a breach of a rule of practice can only render a proceeding an irregularity and not a nullity. Such irregularity can only be set aside if the party affected takes timely steps to have it set aside: *Niger-Benue transport Company Ltd vs Narumal & Sons Ltd* 17.

On the part of a defendant that wants to defend the action he shall: Deliver to the Registrar a Notice of intention in defence: The Notice shall be accompanied with an affidavit disclosing a defence on merit. The two documents above shall be so delivered not later than five days before the day fixed for hearing

It is our view and submission that based on authorities starting with *Federal Administrator General; v. John Bankole Daniel*<sup>18</sup> up to the *Nishizawa v Jethwani*<sup>19</sup> it is now settled that where a defendant wants to defend, the defence, filed must be a defence on the merit that notwithstanding any irregularity in the mode of filing a

defence, once it is a defence on merit, filed before judgment, the court should not close its eyes against it.<sup>20</sup>

## **6. SIMILARITIES AND DIFFERENCES BETWEEN THE TWO PROCEDURES**

From all that have been said for, it is not difficult to discern areas common to the two procedures and other areas where there are clear distinctions.

One feature of the two procedures is that they are summary judgment procedures. They are summary judgment because once the defendant fails to fulfil the minimum requirement under the rules; the plaintiff will be entitled to judgment without much-ado. The use of affidavit evidence is one obvious similar area of operation of the two procedures.

When one talks of similarities and differences of the two procedures, one can hardly do better than quote in extenso what *Nnaemeka-Agu JSC* said in *U.T.C Ltd v Pamotei* as to the main features of the undefended list procedures when he stated the position thus:<sup>21</sup>

“The procedures for the sets of Rules are different. Under Undefended List, an application is made to the court for issue of a writ of summons in respect of a claim to recover a debt or liquidated demand. The application is supported by an affidavit,

which is filed along with the writ, and which sets out the grounds of the claim and states that in the deponent's belief, the defendant has no defence to the action. Once the court is satisfied that there are good grounds for believing that there is no defence thereto, it shall be marked accordingly.

A copy of the affidavit is served with each copy of the writ. If the defendant is not displaying the claim, he does not need to do anything. In that case, on the date fixed for hearing, judgment will be given to the plaintiff without his calling evidence in proof of his claim, unless the court, of its own direction, in the interest of justice, calls for oral or documentary evidence. Such as judgment is one on the merits, which can be set, aside only on appeal or by another action say in the case of fraud: *U.A.C Technical Ltd v Anglo Canadian Cement Ltd*. From this state of affairs, it is clear that there is some justification for saying that a defendant who allowed a judgment to be entered against him under Undefended List acted deliberately. For even where he takes on improper or sufficient step such as merely filing a notice not supported by an affidavit, he may get an adjournment to give him a chance to take the proper step to enable the court consider his notice of

intention to defend: *John Holt & Co. (Liverpool Ltd v Fajemirokun*.<sup>22</sup>.

In the case of summary judgments, the procedure, scope and in my view effect are different. Provisions therefore in, say, Lagos State follow closely those under order 14 procedure in England. It is available for most action, which could be assigned to the Chancery or the Queen's Bench division in England. The writ must be specially endorsed and be endorsed with accomplished by a statement of claim.

There is similarly an affidavit by the plaintiff. The defendant has equally an opportunity of filling an affidavit to show cause why summary judgment should not be entered against him. But there are two significant differences in procedure between the two. The plaintiff, in case of a summary judgment must file an application by summons for leave to enter final judgment. Also Other 10 procedure, leave to defend may be given unconditionally or upon terms: there is no such provision under Undefended List. Indeed it is recognized that a judgment under the English equivalent of Order 10 is a form of judgment in default."

One area that the differences in the two procedures are more noticeable is the legal effect of judgments delivered under each procedure. It is the view of the courts that any judgment entered under

the fault summons procedure is not a final judgment and can be set aside by the court if the defendant acting timeously and filing a good defence on merit prays for it to be set aside.

On the other hand, a judgment under the Undefended List is a final judgment, which can only be set aside on appeal and not by the trial court.

That the above position on the legal effect of a judgment under the Undefended List is the correct view, has been judicially affirmed with finally in the case of *Bank of the North Ltd v Intra Bank S.A.*<sup>24</sup> where the court said inter alia:

“We now come to consider the effect of judgment obtained under the Undefended List. It is clear from the rules (order 3 rules 9-14) that judgment entered under this procedure is a judgment on merit. It is not the same as, and the procedure differs from, judgment entered in default proceedings, as in Order XL, rule 5 of the Rules.

In the case of *Leventis Motors Ltd v G.C.S Mbonu* (19662) N.N.L.R. 119. Reed J. (as he then was) treated a judgment in an Undefended List as a consent judgment although the defendant did not appear and

give his consent. He therefore held that judgment so obtained couldn't be set aside by way of motion.”

It can be seen that the procedure by way of the Undefended List is less cumbersome than the Default summons procedure but it is more advantageous in terms of the 'finality' of the judgment obtained under it.

The purpose and intendment of the procedures are the quick and causes where there is no defence.<sup>25</sup>

However, it is our view that a judgment under the default summons should be treated as a judgment on the merit. That this is likely to be the effect is borne out by the dictum of Eso J.S.C. in *Lemminkainen's* case when he opined thus:

“If a defendant is served with a writ and a statement of claim and he enters appearance to the action, yet he files no defence, he cannot be seen to complain later that he has not had a fair trial.”<sup>26</sup>

One then is at a loss to marry the above with the dictum of his Lordship Oputa J.S.C. in *Pamotei*<sup>27</sup> when he said.

“In my humble view, such a judgment is certainly a judgment in default and by default. It is a default

judgment and not a judgment on the merits of this case as pleaded in the plaintiff's statement of claim and the defendant's Statement of Defence."

It is humbly submitted that the view of Oputa J.S.C. should not be taken as the correct position of the law. A party, who is fully aware of a pending case against him, served with the writ of summons statement of claim and verifying affidavit but refuses to take any step but waits until judgment is entered under Order 10 before asking for setting aside should not be allowed to take any advantage of his tardiness.

It is our view that where it is proved that the defendant has simple opportunity to file his statement of defence and affidavit but fails and neglects to do same, any judgment entered under Order 10 should be treated as a judgment on his merits.

A party that fails to submit his case for adjudication by his failure to take timeous steps of filing processes cannot complain of lack of fair hearing<sup>28</sup>. The only requirement of the rule of fair hearing is the opportunity of a hearing within a reasonable time. It is not a right without boundary.

It will be a serious error and injustice to a Plaintiff who has done everything required of him under order 10 and thereafter obtains judgment due to the failure of the defendant to file his defence only to have

such judgment set aside later as a matter of course.

It is our view that rather than embrace the *carte blanche* dictum of Oputa J.S.C.<sup>29</sup> quoted above, each should be treated on its peculiar fact.

Furthermore, it is our view that a judgment so obtained under Order 10 in which the defendant is shown to be tardy cannot be said to have been given without the court deciding the rights of the parties.

The dictum of Lord Broe in *Copper v Smith*<sup>30</sup> will be most inapposite to a judgment entered under 10. Such judgment should be treated as a judgment on the merit until the defendant otherwise shows cause. In-fact an aggrieved defendant should have his remedy by way of an appeal, except if the judgment was obtained by fraud or a fundamental misrepresentation by the plaintiff.

## **7. CONCLUSION**

We have seen that even though the procedures known by the names of default summons and the Undefended List have many things in common like the use of affidavits attached to the writ of summons nevertheless, the differences are well defined.

The consequences that flow from the judgments entered under each procedure makes the Undefended List procedure

'Superior' in a way to the default summons procedure.

As argued earlier, there is no logical reason in law or equity that should disqualify a judgment obtained under the default summons procedure to be one on the merit. To hold otherwise is like a distinction without any difference.

It is our view that what Oputa J.S.C said in *U.T.C. v. Pamotei*<sup>31</sup> should be equally applicable to a judgment under the default summons and the Undefended List procedures. He said:

“A judgment on merits is one rendered after argument and investigation and when it is determined, which party is in the right, as distinguished from a judgment rendered upon some preliminary or formal or merely technical point or by default and without trial. A judgment on the merits is one based on legal right distinguished from mere matters of procedure or jurisdiction. A judgment on the merits is thus a decision that was rendered on the basis of the evidence led by the parties in proof or disproof of the issues in controversy between them.

Normally, a judgment based solely on some procedural error is not, as a general rule, considered as a judgment on the merits. A judgment on the merits is therefore one arrived at, after considering the merits of the case the essential issue, the substantive right presented by the action, as contra-distinguished from mere questions of practice and procedure.

Therefore where a defendant in a default summons procedure after entering appearance fails to file his defence and affidavit, the judgment thereafter given should be held as a judgment on the merit as is the case with a judgment under the Undefended List Procedure. To hold otherwise is in my view making a distinction between six and half a dozen.