The Undefended List Provisions in the Uniform High Court Civil Procedure Rules

By

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INTRODUCTION:

Prior to 1987, the various states of Nigeria had their own High Court Civil Procedure Rules[1] governing the procedure for Litigation in the various High Courts of the States. Sometime in 1987 the Law Reform Commission, through the Attorney-General of the Federation's Office sent draft Uniform Rules to all the States for promulgation by edicts.[2]

One must state that before this time, there had been various calls by legal Practitioners especially, for a Uniform Rules of Court to govern proceedings in the High Courts of the States. It was in response to this that the Law Reform Commission came up with a draft uniform rule for the States High Courts.

The call of the Legal Practitioners was prompted by the difficulty usually encountered by practitioners whose practice cover more than one state of the Federation.

The difficulty was accentuated by the fact that most of the Southern States except the Eastern States had almost a uniform set of High Court Rules whereas the rules in the Northern States were quite different and distinct.

It was then the practice for lawyers to buy the different rules of court of all states in which they practiced or had the ambition of practising.

The draft of the Uniform Rules contains a unique provision under the "Undefended List" provision. It is with this provision that we are concerned in this paper. It should be pointed out however, that the provision is not novel in that it was contained in all the High Court (Civil Procedure) Rules of all the States in the Northern part of the Country[3] and the rules in the Eastern States[4].

The uniqueness of the Undefended List Provision is its Country wide application in all the States of the Federation including the Federal Capital Territory of Abuja if and when all the States promulgate the Law Reform Commission's draft of the rules of court into Law.[5]

THE UNDEFENDED LIST:

For the purposes of this paper, we shall use the Kwara State High Court (Civil Procedure) Rules 1987[6] (hereinafter called the Rules) as a reference point. The provision embodying this procedure is contained in Order 23 of the Rules and there are 5 rules therein numbered seriatim.

THE REQUIREMENTS OF ORDER 23:

Any litigant that wants to bring an action under the 'Undefended List' has to satisfy certain conditions stipulated by the Order.[7]

Apart from this, the nature of the claim itself will determine whether procedure could be used or not.[8]

The conditions for bringing an action under the Undefended List and the steps to be taken are:

(i) There must be an application for the writ of summons brought by the plaintiff.

(ii) The claim contained in the application for writ of

summons must be for:

(a) A debt, or

(b) A liquidated money demand or

(c) Any other claim.

(iii) The application for writ must be supported by affidavit. The affidavit must set forth "the grounds upon which the claim is based and stating that in the deponent's belief there is no defence thereto".[9]

(iv) The court should be satisfied of the grounds upon which the application is brought.

(v) The court shall enter the suit for hearing on the 'Undefended List'.

(vi) The court shall mark the writ of summons as "Undefended".

(vii) The plaintiff shall deliver to the registrar "upon the issue of the writ of summons as aforesaid, as many copies of the above - mentioned affidavit as there are parties against whom relief is sought"[10].

(viii) The Registrar shall annex one copy each, of the affidavit to each copy of the writ of summons.

It should be noted that the Order does not state the form of the application to be made. However, it is submitted that the application for writ is made like any other application not necessarily by motion or originating summons.

Support for this view could be found in the dictum of COKER JSC in the case of *Olubusola Stores Vs. Standard Bank*[11] where his Lordship said:

> "The Rules prescribes clearly that an action which is meant to be on the "Undefended List" should be commenced by a writ but such writ should be accompanied by an affidavit setting out the facts of the case and other matters discussed in that Rule which would satisfy the court to enter the suit for hearing" in what shall be called the Undefended List". After the writ has been so marked, the usual copy for service would be delivered to the defendant and one of two alternatives would follow...."

The defendant on his own part after the service of the writ and affidavit on him shall do one of the following[12]:

(i) He shall deliver to the registrar a notice in writing that he intends to defend the suit.

(ii) He shall attach an affidavit disclosing a defence on the merit.

(iii) He shall deliver the above not less than 5 days before the day fixed for hearing.

There have been difficulties that came to light in the court's interpretation of the provisions of Order 23 rule 3 (1) of the Rules.

The naughty questions are: When is a suit slated for hearing? Is it when it is put on the causes list for mention or hearing? Is the submission of a Notice of intention to defend a *fait accompli* in that even if there is no defence on merit, the defendant must be let in to defend?

Can a defendant that serves a statement of defence instead of an affidavit with his notice of intention to defend be allowed to defend the suit under the rule? Can the court shut its eyes to a Notice of intention to defend plus the affidavit if filed in default of rule 3(1)? That is, if filed less than 5 days before the day fixed for hearing?

It is submitted that 'hearing' as used in the rule is technical and restrictive in the sense that it denotes only the day the particular matter is slated for hearing on the court's causes list.

The above assertion will appear to contradict the dictum of DE COMARMOND Ag. C.J. in the West Africa Court of Appeal case of *Ezebwa V. Mazeli*[13], where he said:

> "I see no reason for restricting the meaning of the term "hearing" as suggest by Mr. Taylor. I consider that a trial judge may where necessary, re-open the hearing before delivering his final decision".

From the above his Lordship was suggesting that 'hearing' of a case is from the time of its filing to its conclusion. With respect, this definition will be too wide and unacceptable for the purposes of Order 23. The Supreme Court in the case of *Olubusola Stores Vs. Standard Bank Nigeria Limited*[14] said:

> "Besides this, however is the fact that the Order made on the ex-parte application on the 11th day of June, 1973, had fixed the case only for mention on the 9th day of July 1973. If, as indeed it was the case, the suit was only to be mentioned on that day, the learned trial judge clearly wrongly treated that date as a date fixed for the haring of the action and erred in law as the entry of judgment on that day was on that day was in breach of the provisions of Rule 13".

It is submitted that the above dictum is the correct interpretation of the word 'hearing' as used in Order 23. It is significant that the appeal in the *Olubusola's case* was allowed by the Supreme Court solely on this point[15].

A careful reading of the provisions of rule 3(1) and (2 will reveal that a Notice of Intention to defend plus the affidavit in support must disclose a real defence.

It is submitted that if it is otherwise, the whole purport of the rule will be totally defeated. This will lead to the ridiculous level of a defendant who has no defence whatsoever to an action under the rule just filing any spurious defence with a view to delay the plaintiff and the court in getting and entering a judgement.

If this course of action is allowed it will do violence to the avowed aim of the rule which is:

> "The object of these rules is for quick dispatch of certain types of cases, e.g. debt or liquidated money demand…."[16]

It is therefore submitted that the defendant has a duty to satisfy the court to place the suit on the general cause list. It is not done for the asking; that this is the correct interpretation of the rule is amply supported by the dictum of ADEMOLA F.C.J., in the case of *Federal Administrator General V. John Bankole Daniel* where his Lordship said:

> "Now, the affidavit consists of only four paragraphs. Paragraph 1 states that he is the defendant in the action. Paragraph 2 states the amount Plaintiff claims: paragraph 3 states that he (defendant) was not indebted to the plaintiff

in the said amount or any other amount and finally paragraph 4 states that the claim, if any, was unenforceable. ….it is clear the whole affidavit is vague, it discloses no defence whatever[17].

Thus it can be seen that the defendant will not only be required to serve a notice of intention to defend plus an affidavit to a suit brought pursuant to the Undefended List, the defence contained in the affidavit must be a defence in substance.

It is submitted that a defendant who for any reason submits a statement of defence in answer to a suit on the Undefended List should be allowed to defend the action notwithstanding the fact that such course of action is not in strict compliance with the rule *U.T.C. Ltd. V. Chief J.P. Pamotei & 4 ors.* [18].

This of course means that there must be a substantial defence in the statement of defence. This latitude it is submitted, will be in line with the new approach of our Supreme Court to relaxing of strict adherence to the technicalities in the law with a view to do substantial justice.

That court in the case of *Erisi and 3 Ors. Vs. Idika and 11 ors. 19 said:*

> "… that substantial and well reasoned as this objection had been it is nevertheless a further journey into the arena of technicalities. This court has resolutely set its face against them, preferring in numerous decisions off which *Nofiu Surakatu vs. Nigeria Housing Development Society Ltd. And Anor. (1981) 4SC 26,* may be one of those marking the beginning of that stance to do substantial justice between parties.
> The courts are courts of law but may the day never come when they cease to courts of justice".

One can therefore make hold to say, based on the above, that any form of defence filed to a suit under the Undefended List once it discloses a substantial defence notwithstanding a failure of form will be looked at by the court.

However, from the foregoing, we are not in any way equating the statement of defence so filed, to an affidavit in which the defence is on oath. That a statement of defence cannot enjoy the same status as an affidavit in such cases is well borne out by the decision of the Supreme Court in *Nishizawa Limited Vs. Strichand N. Jethwani* where the court said:

> "The failure of the defendant therefore to file an affidavit disclosing a good defence places the defendant in an intolerably weak position to satisfy the judge or court that he has a good defence"[20].

It should be noted that even if the court disregards the failure to follow the rule strictly, that is where a defendant files a defence instead of an affidavit, the court will still look at the defence to determine if it is a good defence to the action. If the defence is not good or does not sufficiently answer the case, the court will be entitled to disregard it.

That this position has to be so, is supported by the dictum of OBASEKI J.S.C.,[21] in the *Nishizawa* case where he said:

> "This court is in a good position as the High Court in

this application and having considered the statement of defence in the interest of justice, I find that it does not amount to a good defence on the merit".

If we interpose this argument with other things said so far on the issue, it is submitted that where a defendant serves his notice of intention to defend plus affidavit less than the prescribed 5 days before the hearing, the court should allow the defence in.

There are two consequences that flow from the rules if the defendant complies or fails to comply and these are with respect to compliance and non-compliance.

COMPLIANCE:

Once the defendant complies with rule 3(1), then the provision of rule 3(2) comes into operation automatically. That is, the suit will be moved from the Undefended List and placed on the ordinary cause list. The ordering of pleadings and calling of evidence will then follow[22].

NON-COMPLIANCE:

On the other hand, where the defendant fails and neglects to deliver to the registrar a Notice of Intention to defend and a supporting affidavit, the plaintiff on the day the suit is fixed for hearing will move the court to give judgement as per the claim indorsed on the writ. This is the plaintiff will do without the rigours of calling evidence or tendering documents[23].

It must be stated that the order in rule 5 provides:

"Nothing herein shall preclude in the court from hearing or requiring oral evidence, should it so think fit, at any stage of the proceedings under rule 4".

It is our submission that this is a very sensible proviso, not only does it preserve the discretion of the court but allows each case to be decided on it peculiar merits.

The need for the proviso is all the more necessary if one tries to envisage a case in which many complicated accounts are involved in which case haring of *viva voce* evidence from an expert may be desirable.

Moreover, one can also imagine a big contractual obligation where the contractor and the employer are not *ad idem* on the amount outstanding in favour of the contractor. Nothing stops the contractor from claiming he money as debt but there might be a necessity for arbitration as is usually provided in most building contracts.

THE LEGAL EFFECT OF THE JUDGEMENT:

Any judgement obtained under the provisions of Order 23 is a judgement on the merit and an application to set it aside will not succeed like an ordinary judgement obtained in the absence of a defendant.

That this is the correct position cannot be faulted. It is well settled and trite that a case can be proved either by oral or documentary evidence.

For the procedure under the Undefended List, the plaintiff is required to verify the facts of his case by an affidavit duly sworn. There is no doubt that a sworn affidavit in which facts are verified, takes the position of oral evidence on oath given in a regular trial, and serves the same purpose.

It is submitted that the judgement obtained under the Undefended List enjoy the same

status as a consent judgement which is not only final but as a general rule cannot be appealed against without leave. Certainly a consent judgement cannot be set aside by the judge that gave it.

In *Re Affairs of Elstein*[24], a country court judge made a consent order and later one of the parties by way of an application applied to have the consent order varied on the ground of an alleged mistake. The country court judge refused the application and the applicant appealed to the Court of Appeal where LORD GREENE M.R. in affirming the views of the County judge said:

> "I cannot find that this is a case in which we can say that, according to the ordinary practice, the mistake, if it be a mistake, can be remedied by an application in the proceedings, themselves once the order has been completed, as it has been completed in this case,
> If, indeed, there is any remedy in this case, it must be a remedy by independent action on which evidence can be called, and the relevant facts ascertained".

The above position was restated in the Nigerian case of *Leventis Motors Limited Vs. G.C.S. Momodu*[25] where the counsel to the plaintiff brought an action under the Undefended List and when the defendant failed to file a Notice of Intention to defend, the plaintiff's counsel asked for judgement but mistakenly for a smaller amount than claimed.

When he became aware of the true position, he brought an application to set aside the judgement to enable him ask for the full sum originally claimed. The court in refusing the application REED. J. said[26]:

> "In my view, on the authorities which I have cited, there is only one course open to the plaintiff *(that is the applicant)* to obtain the relief they seek, and that is by way of a separate action" (emphasis mine).

A fortiori, it is submitted that a judgement obtained under the Undefended List is a judgement on merit and cannot and should not be set aside by an application by a defendant who fails and refuses to submit his case for adjudication by failure to file the necessary processes.

It is submitted that such a defendant cannot complain of lack of fair hearing because a defendant that fails to submit his case for adjudication cannot complain of lack of fair hearing.[27]

CONCLUSION:

To the uninitiated, the procedure of the Undefended List may look weird or cumbersome but it is our opinion that if well mastered, it is a short cut in obtaining justice when claiming for a liquidated sum or for debt. It is our view that once a Plaintiff filed a writ of summons to which a verifying affidavit is attached, such writ should be treated *ipso facto* as a suit on the Undefended List rather than allow the confusing phraseology in order 23 rule 1 that "whenever application is made" to becloud the simple procedure. One can foresee a lot of problems in future as to the interpretation of the first four words of order 23 rule 1. Is the application to be made by motion, originating summons or by a letter?

Another problematic area of the procedure is the meaning of the

"day fixed for hearing"[23]. It is submitted that once a case is marked Undefended List, it should be fixed for hearing immediately it is coming up for the first time in court. It is our view that failure to serve the defendant before the day fixed for hearing should not discourage the practice suggested above.

We are also of the view, that more emphasis should be placed on the defence being filed to be a defence in substance. The whole purpose of expeditious settlement of cases under the procedure will be defeated if anything filed by the defendant will meet the requirement of the rule even if it is a mere sham[29].

It appears reasonable therefore, that the discretion of the court preserved by order 23 rule 5 should be left intact but an improvement can be made on it by specifying the type of cases and/or amount that should be involved in a claim before the provision can be called in aid by a trial court.

FOOTNOTES

1. See for example:
   (i) Oyo State of Nigeria High Court (Civil Procedure) Rules as Amended up to 26th April 1976.
   (ii) Niger State High Court (Civil Procedure) Rules 1977: Niger State of Nigeria Gazette4 No. 2 Vol. 3 of 27th February 1978.
   (iii) Kwara State of Nigeria High Court (Civil procedure) Rules 1975.
2. The information was confirmed by top officials of the Kwara State Ministry of Justice.
3. Order 2 rules 8 – 14 of the High Court (Civil Procedure) Rules of Anambra State.
4. Order 3 rules 8 – 14 of the High Court (Civil Procedure) Rules of Kwara State 1975. Also the same provisions are contained in the order 3 rules 8 – 14 of the Niger State High Court (Civil Procedure) Rules 1977.
5. Only a few of the States have promulgated the new rules. For example States like "Kwara, Oyo, Ogun, Kaduna, Ondo, Lagos" have done so. The new rules are however not being used in Lagos due to its being declared a nullity by a Lagos High Court. In Kwara State, the High Court of the State sitting at Okene Judicial Division had also declared the new rule that is High Court (Civil Procedure) Rules 1987 of Kwara State a nullity by a want of authority on the part of the former Governor that signed the Edict promulgating the new rules. See the unreported decision by Hon. Justice S.A. Olagunju in Suit No. KWS/OK/72/88 in *Alhaji Yakubu, U. Ohere Vs. Dr. J.O.A. Abalaka* delivered on 26th day of April 1989. All the other High Courts in the other 5 Judicial Divisions of Kwara State are still using the new rules notwithstanding Justice Olagunju's declaration of the rules a nullity.
6. Edit No. 6 of 1987 Kwara State.
7. See Rules 1 & 2.
8. Ibid.
9. Ibid.
10. Ibid.
11. (1974) 4 SC 51. 1 at P. 54.
12. Rule 3 (1).
13. (1955) 15 WACA 67 at P. 69.
14. at P. 56.
15. The judgement that was given when the case was for mention on the cause list in the suit was set aside. Also on the point see the case of U.B.A.

Limited Kano Vs. Bauchi meat Products Company Limited (1978) 9 & 10 SC 51.

16. Per Ademola C.J.N. in Bank of the North Vs. Intra Bank S.A. (1969) 1 All NLR 91 at 94.
17. (1958) 3 FSC 115 at P. 117.
18. (1989) 3 S.C.N.J. 79.
19. Per Nnamani JSC (1987) 11 – 12 SCNJ 27 at P. 37.
20. (1984) 12 SC 234 at 261. This is a case dealing with specially endorsed writ. The Plaintiff due to the initial failure of the defendant to file a defence moved the court under Order 10 rules 1 & 2 and Order 40 rule 1 High Court of Lagos Civil Procedure Rules 1973 for leave to enter default judgment. Before the motion for judgment was taken, the defendant filed a defence and the trial court of appeal but without success. On further
21. Appeal to the Supreme Court, the court entered judgement for the Plaintiff Appellant holding among other things that the defence was a sham.
22. Supra at P. 276.
23. Rule 3 (2)
24. Rule 4
25. (1945) 1 All ER. 272.
26. (1962) NNLR 19.
27. Supra at P. 25.
28. *Oyinloye vs. Oyeyipo (1989)* 1 NWLR (Pt. 50) 350 at P. 370.
29. *Olubusola Stores Supra.*

Nishizawa Supra

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