

ALII. ABDULWAHEED AHMED
V.
TRADE BANK OF NIGERIA PLC
COURT OF APPEAL (KADUNA DIVISION)

CA/K/211/94

JAMKS CXIHNYI OGI'UK, J.C.A. (*I'presUttd*)
MAHMUD MOHAMMHD, J.C A. (*feud the Letting Judgment*)
IBRAHIM TANKO MUHAMMAD. J.C.A

MONDAY, 21ST APRIL, 1997

APPEAL - Grounds of appeal - Grounds of appeal based on issues not raised during trial in the High Court - Need to seek and obtain leave to raised on appeal - Failure to so do - Effect.

APPEAL - Issues for determination - Formulation of- Issues formulated outside or not supported by the grounds of appeal - Effect - Arguments based there on – how treated.

PKACHCE AND PROCEDURE - Undefended list suit - Notice of intention to defend filed by a defendand there under - Whether discloses a defence on the merit - How determined - Relevant considerations.

PRACTICE AND PROCEDURE -Grounds of appeal - Grounds of appeal based on issues not raised during trial in the High Court - Need to seek and obtain leave to raise on appeal - Failure to so do - Effect.

PRACTICE AND PROCEDURE -Issues for determination – formulation of Issues - formulated outside or not supported by the grounds of appeal - Effect - Arguments based thereon - How treated.

PRACTICE AND PROCEDURE: -Undefended list suit - Procedure for hearing and determination of - Nature of.

Issue:

Whether the trial court was right in hearing and determining the suit filed by the respondent under the Undefended List having regard to the requirements of the rules of the High Court

Facts:

The appellant was one of the customers of the respondent bank at its Ilorin branch in Kwara State. By a letter dated 8th August, 1991, the appellant applied for a short-term loan of N500,000.00 from the Ilorin branch of the respondent to enable him execute a contract for the supply of kitchen equipment to the Government House, Ilorin. In the application, the appellant gave the undertaking that the proceeds of the execution of the contract would be paid directly to the respondent bank. The respondent, through its letter dated 30th August, 1991 approved the appellant's application and granted him overdraft facility of N500,000.00 payable on 31st October, 1991. Other conditions of the loan such as interest thereon and other charges were contained in the respondent's letter which the appellant signed having accepted the loan on the conditions it was granted.

When the loan remained unpaid up to 7th April, 1992, the respondent wrote on to the appellant demanding for the repayment of the loan which had risen to the tune of "N544,551.94. When more than one year later on 25th May, 1993 the amount due from the appellant rose to N690,500.85 and still there was no effort on the part of the appellant to settle the debt, the respondent then took out a Writ of Summons under the Undefended List and claimed from the appellant as defendant the said outstanding sum with interest.

The marked Writ of Summons on the undefended list was duly served on the appellant together with the affidavit in support of the respondent's claims paragraph 12 of which clearly deposed that

the appellant had no defence to the action. In spite of having been so served with the process of the High Court, the appellant failed to take any step in accordance with the rules of the High Court to file any notice of intention to defend the suit together with an affidavit disclosing his defence on the merit. Accordingly, the suit was heard as an undefended suit and judgment was entered for the respondent in terms of its claims.

Aggrieved by that decision, the appellant, with leave of the Court of Appeal, appealed to the Court of Appeal.

[Held (*Unanimously dismissing the Appeal*):

1. *On Procedure for hearing and determination under the undefended list –*

Under Order 23, Rules 1 to 5 of the Kwara State High Court (Civil Procedure) Rules, 1989, an application to place a suit on the undefended list must be made to the court for the issuance of a Writ of Summons in respect of a claim to recover a debt, liquidated money demand or any other claim. The application must be supported by an affidavit setting forth the grounds upon which the claim is based and stating in one of the paragraphs of the affidavit that in the deponent's belief, there is no defence to the action. The court to which the writ of summons was filed shall examine the claims and the affidavit in support thereof, and if satisfied that there are good grounds for believing that there is no defence to the suit, enter the suit bearing under the undefended list of the court and mark the Writ of Summons accordingly and enter thereon a date for hearing. A copy of the affidavit is served with each copy of the marked Writ of Summons on the defendant or defendants as the case may be. If the defendant is not disputing the claim, he does not need to do anything. In that case, on the date fixed for hearing, judgment will be given for the plaintiff without his calling evidence in proof of his claim unless the court on its own discretion in the interest of justice calls for oral or documentary evidence. [*U.T.C(Nig.)Ltd. v. pamotei* (1989)2NWLR(Pt 103) 244 referred to.] (P. 297, paras. C-F)

2. *On Procedure for /tearing and determination of suit Undefended list -*

Under the undefended list, where the defendant on being served with the marked Writ of Summons and the affidavit in support of the plaintiffs claim containing a date fixed for hearing of the suit, feels that he has a defence to the suit he is required by the rules to file a notice of intention to defend the suit supported by an affidavit disclosing his defence on the merit to the action before or on the date fixed the hearing, the first duty of the trial court is satisfied that the defendant's affidavit to see if it really disclosed a defence on the merit to the action. If the trial court is satisfied that defendant's affidavit has disclosed a defence on the merit to the action the merit to the action action, the suit is thereupon transferred to the ordinary, cause list for hearing after exchange of pleadings between, the parties. Where, however, the trial court is satisfied that no defence on the merit to the action has been disclosed in the affidavit in support of his notice of intention to defend the suit, then the case is heard as an undefended suit and judgment given thereon to the plaintiff. [*Ben Thomas Hotels Ltd. V, Sebi Furniture Ltd.* (1989) 5 NWLR (Pt. 123) 523 at (Pp. 297-298. paras. f-A)

Per MOHAMMED J.C.A. at page 298, paras. A-D:

"In the present case, the marked Writ of Summons and the supporting affidavit together

with the document exhibited to the affidavit, particularly the appellant's the application to the respondent for a N500,000.00 loan and the respondent's reply granting the appellant overdraft facility of N500,000.00 payable within a given period which the appellant signed and accepted, there is no doubt whatsoever that the respondent's claim in the instant case was one for the recovery of debt with contemplation of rule I of Order 23 of the Kwara state Court(Civil Procedure) Rules 1989. The record of the lower court shows plainly that the appellant who was the debtor, was duly served with the Writ of Summons containing the claims of the respondent against him together with the supporting affidavit in which it was deposed that the appellant had no defence to the action. Therefore by failing to avail himself of the opportunity provided by Rule 3 of Order 23 of the High Court Rules 1989 by filing a notice of intention to defend the action together with affidavit disclosing his defence on the merit to the action, the appellant as defendant was deemed to have admitted that he had no defence to the action. The learned trial Judge therefore was right in entering judgment for the respondent without calling upon it to lead evidence, oral or documentary."

3. *On Principles guiding formulation of issues for determination on appeal -*

Issues for determination in an appeal are framed from the grounds of appeal filed by the appellant. Consequently, any issue, argument or other part of the brief which has no ground or grounds of appeal to support it, or which is based on a ground of appeal for which no leave was sought and obtained is not only incompetent but also completely useless for Hit-purpose of the appeal. In the instant case, no Issue was framed on ground one of the appellant's grounds of appeal which complained on the absence of proper parties before the High Court and as the case was heard and determined under the undefended list without the appellant taking any step under the rules of the High Court to file any notice of intention to defend the suit with an affidavit of defence disclosing such defence on the merit, the appeal cannot be heard on appeal on an issue of absence of proper parties at the trial which issue was not raised at the High Court without leave granted by the High Court or the Court of Appeal. Thus, all the arguments advanced by the appellant on this ground of appeal in the appellant's brief will be ignored in the determination of the appeal. Similarly, as the arguments touching on the issue of the alleged non-service of court processes and hearing notices on the appellant relate to matters which have not been raised in either of the two grounds of appeal filed by the appellant, they are plainly irrelevant for the purpose of the appeal. [*Idika v. Erisi*: (1988) 2 NWLR (Pt. 78) 563 at 579-580; *Oniah v. Onyia* (1989) 1 NWLR (Pt.99) 514; *Ifediorah v. Umeh* (1988) 2 NWLR (Pt. 74) 5; *Omagbemi v. Guinness (Nig.)Ltd.* (1995) 2 NWLR (Pt.377) 258 at 268 referred to.] (P. 296, paras. B-E;G-H)

Nigerian Cases referred to in the Judgment:

- Den Thomas Hotels Ltd. v. Sebi Furniture Ltd.* (1989) 5 NWLR (PU23) |2J
- Idika V. Erisi* (1988) 2 NWLk (Pt.78) 563
- Ifediorah v. Umeh* (1988) 2 NWLR (Pt. 74) 5
- Omagbemi v. Guinness (Nig.) Ltd.* (1995) 2 NWLR (Pt. 377) 258
- Oniah v. Onyia* (1989) 1 NWLR (Pi.99) 514
- U.T.C (Nig.) Lid. v. Pamotei* (1989) 2 NWLR (Pt.103) 244

Nigerian Rule of Court Referred to in the Judgment:

Kwara Suite High Court (Civil Procedure) Rules, 1989,0.23, rr.1-5.

Appeal;

This was an appeal against the judgment of the Kwara State High Court given in favour of the respondent under the undefended list. The Court of Appeal, in a unanimous decision, dismissed the appeal.

History of the case:

Court of Appeal;

Division of the Court of Appeal to which the appeal was brought
Court of Appeal, Kaduna.

Names of Justices that sat on the appeal: James Ogenyi Ogebe, J.C.A:
(*Resided*)-, Mahmud Motunmed J.C.A. (*Read the Leading Judgment*);
Ibrahim Tanko Muhammad J.C.A

Appeal No: CA/K/211/94

Date of Judgment: Monday, April 21, 1997

Names of Counsel: Appellant absent and unrepresented

Yusuf Alii, Esq. (with him, S. Solagberu and M. M. Alabekwe)- for
the Respondent.

Counsel:

Appellant absent and unrepresented

Yusuf Alii, Esq. (Sikiru Solagberu and M.M. Alabekwe with him) *-for the*

MOHAMMED, J.C.A. (Delivering the Leading Judgment): The appellant to this appeal was one of the customers of the respondent Bank at its Ilorin branch in Kwara State. By a letter dated 8th August, 1991, the appellant applied for a short term loan of N500,000.00 from the Ilorin branch of the respondent to enable him to execute a contract for the supply of kitchen equipment to the Government House Ilorin. In this application, the appellant gave the undertaking that the proceeds of the execution of the contract was to be paid directly to the respondent Bank, respondent, through its letter dated 30th August, 1991 approved the appellant's application and granted him overdraft facility of N500,000.00 payable on 31st October, 1991. Other conditions of the loan such as the interest thereon and other charges were contained in the respondent's letter which the appellant signed as having accepted the loan on the conditions it was granted. When the loan remained unpaid up to 7th April, 1992, the respondent wrote to the appellant demanding for the Prepayment of the loan which by then had arisen to the tune of N544,551.94. When more than one year later on 25th May 1993 the amount due from the appellant rose to N690,500.85 and still there was no effort on the part of the appellant to settle the debt, the respondent then took out a Writ of Summons under the undefended list and I claimed from the appellant as defendant the following reliefs

"The claim of the plaintiff against the defendant is for the sum of N690,500.85 being the principal sum plus agreed interest on the loan/overdraft facilities granted to the defendant at his request and which he has failed, neglected and refused to pay despite repeated demands.

Whereof the plaintiff claims:-

- (i) The sum of N690,500.85 being the debt outstanding on the defendant's current account at 25th May, 1993.
- (ii) Interest at the rate of 35% per annum from 26th May, 1993 till the date of judgment,
- (iii) 10% interest per annum on the "judgment debt from the date of judgment until final liquidation." the marked writ of summons on the undefended

list was duly served on the defendant now appellant in this appeal together with the affidavit in support of the respondent's claims paragraph 12 of which clearly deposed that the defendant/appellant had no defence to the action. In spite of having been so served with the process of the Lower Court, the appellant failed to take any step in accordance with the rules of the lower court to file any notice of intention to defend the suit together with an affidavit disclosing his defence on the merit. Accordingly, the suit was heard as an undefended suit and judgment entered for the respondent in terms of his claims on 29/11/93. Aggrieved by that decision, the appellant with the leave of this court granted on 13/7/95 had appealed against it. Contained in the notice of appeal are the following two grounds of appeal without their particulars:-

" 1. The learned trial Judge erred in law when she entered judgment for the plaintiff and treated the suit as undefended *when the proper parties for the determination of the case as such whose presence are mandatory are not made parties to the suit.*

2. The learned trial Judge erred in law in that the judgment entered as undefended list in favour of the respondent is a clear inadvertence violation of the rule relating to action treated as undefended list." Although briefs of argument were duly filed and served by both parties to this appeal before it came up for hearing on 19-3-97, the appellant was not presented at the hearing in spite of his counsel having been put on notice. The appeal was therefore deemed to have been argued by the appellant while the learned counsel to the respondent merely adopted the respondent's brief of argument and urged this court to dismiss the appeal.

In the appellant's brief of argument, two issues were formulated from the two grounds of appeal. The issues read:-

1. Whether the trial court was right in determining the suit under undefended list.

2. Whether the judgment of the court can be sustained."

In the respondent's brief of argument however, only one issue was identified, the determination of the appeal. The issue is:-

"Whether the learned trial Judge was not right to have placed the suit on the undefended list and to have given judgment accordingly having regard to the circumstances of the case."

It was observed in the respondent's brief that the two issues framed in the appellant's brief of argument are not related to the grounds of appeal filed by the appellant. This statement is not correct because the two issues raised by the appellant are virtually the same complaining in the main against the determination of the appellant claim under the undefended list. However what had been brought out quite clearly by the issues as framed by the appellant is the fact that no issue was framed on ground one of the appellant's grounds of appeal which complained on the absence of proper parties before the lower court. Taking into account the nature of this case which was heard and determined under the undefended list without the appellant taking any step under the rules of the lower court to file any notice of intention to defend the suit with an affidavit of defence disclosing such defence on the merit, it is difficult to see how the appellant can now be heard on appeal on an issue of absence of proper parties at the trial which was not raised at the lower court without leave granted by the lower court or this court. It is settled law that issues for determination in an appeal are framed from the ground of appeal filed by the appellant. Consequently, any issue, argument or other part of the brief which has no ground or grounds of appeal to support it, or which is based on a ground of appeal for which no leave was sought and obtained is not only incompetent but also completely useless for the purpose of the appeal. See *Idika v. Esiri* (1998) 2 NWLR .R (pi. 78) 565 at 579 5X0. Therefore taking into consideration that no leave was granted to the appellant to raise ground one of the grounds of appeal as a fresh point before this court, coupled with the fact that no issues were formulated by the appellant from that ground of appeal, all the arguments advanced by the appellant on this ground in the appellant's brief are to be ignored in the determination of this appeal.

In short, having regard to the circumstances of this case, there is only one issue for determination as identified in the respondent's brief of argument which issue is virtually the same as the two issues framed in the appellant's brief of argument, the lone issue that has to be determined is whether the learned trial Judge was, right in hearing and determining the suit filed by the respondent under the undefended list having regard to the requirements of the rules of the lower court. It was argued the appellant that having regard to the contents of paragraphs 7 and 13 of the respondent's affidavit in support of its claims which stated that the Government had given an undertaking for the domiciliation of the account, the lower court ought to have transferred the matter to the general cause list for hearing

This is the only argument in the appellant's brief which is relevant to this appeal. All the remaining arguments in the brief touching on the issue of the alleged non service of court processes and hearing notices on the appellant relate to matters which have not been raised in either of the two grounds of appeal filed by the appellant, with no ground or grounds of appeal from which issues were formulated to support arguments, the arguments are plainly irrelevant for the purposes of this appeal, see *Oniah v. Onyia*(WM) 1 NWLR (Pt. 99)514; *Ifediorah v. Vine* (1988) 21 7-1) 5 and *Oim & Iietiii v. Guinness (Nigeria)Ltd.* (1995) 2 NWLR (Pt. 377) 258 at 268. It was submitted for the respondent that the claim of the respondent against the appellant being one for the recovery of debt within Order 23 Rule 1 of the Kwara state High Court Rules 1989, was properly placed under the undefended list and properly heard as such. A number of cases including *Kotoye v. Saraki* (1994) 7 -R (Pt. 357) 414 at 443 were cited and relied upon in support of this argument, learned counsel to the respondent had contended that since the appellant was duly served with the claims of the respondent duly supported by an affidavit but failed to file his notice of intention to defend the action together with an affidavit closing his defence on the merit, the lower court was right in proceeding to enter judgment for the respondent having regard to order 23 rule 3 of the rules of the lower court and the cases of *Uba Kano v. Bauchi Meat Production Ltd.* (1978) 9 and 10 SC | and *First Bank Ltd. v. Khaladu* (1993) 9 NWLR (Pt. 315) 44 at 55-57.

Now, in Kwara State, the procedure for the hearing and determination of an undefended suit is as provided by Order 23 Rules 1 to 5 of the Kwara State High court (Civil Procedure) Rules 1989. By these rules of order 23, an application to place a suit on the undefended list must be made to the court for the issue of a writ summons in respect of a claim to recover a debt, liquidated money demand or any other claim. The application must be supported by an affidavit setting forth the facts upon which the claim is based and stating in one of the paragraphs of the affidavit that in the deponent's belief, there is no defence to the action. The court which the Writ of Summons was filed shall examine the claims and the affidavit in support thereof, and if satisfied that there are good grounds for believing that there is no defence to the suit, enter the suit for hearing under the undefended list the court and mark the writ of summons accordingly and enter thereon a date for hearing. A copy of the affidavit is served with each copy of the marked writ of summons on the defendant or defendants as the case may be. If the defendant is not disputing the claim, he does not need to do anything. In that case, on the date fixed for the hearing, judgment will be given for the plaintiff without his calling evidence in proof of his claim unless the court on its own discretion in the interest of justice calls for oral or documentary evidence. See *U.T.C. (Nigeria) Ltd. v. Pamotei* (1989) 2 NWLR (Pt. 103) 244.

However, where the defendant on being served with marked writ of summons in support of the plaintiff's claim containing a date fixed for hearing of the suit, felt that he has a defence to the suit, he is required by Rule on Order 23 of the rules to file a notice of intention to defend the suit supported by an affidavit disclosing his defence on the merits of the action before or on the date fixed for hearing. It is important to note that the provision in the old rules requiring the filing of such notice of intention to defend at least 5 days to the date fixed for hearing of the suit is not applicable in the current rules. Such notice and affidavit can now be filed by a defendant

even on the very day the case is fixed for hearing. At the hearing, the first duty of the learned trial Judge is to examine the defendant's affidavit to see if it really disclosed a defence on the merit to the action. If the trial Judge is satisfied that the defendant's affidavit has disclosed a defence on the merit to the action, the suit is there upon transferred to the ordinary cause for hearing after the exchange of pleadings between the parties. Where however the learned trial Judge is satisfied that no defence on the merit to the action had been disclosed in the defendant's affidavit in support of his notice of intention defend the suit, then the case is heard as an undefended suit and judgment given *there on to the plaintiff*. *Ben Thomas hotels ltd. V. Sebi furniture Ltd (1989) 5 NWLR (pt. 123) 523 at 529.*

In the present case, the marked writ of summons and the supporting together with the documents exhibited to the affidavit. particularly the appellant's application to the respondent for #500,000.00 loan and the respondent's reply granting the appellant overdraft facility of #500,000.00 payable within a given period which the appellant sign and accepted, there is no doubt what so ever the respondent's claim in the instant case was one for the recovery of debt within the contemplation of rule 1 of order 23 of the Kwara state high court(civil procedure) Rule 1989. The record of the lower court shows plainly that the appellant who was the debtor who was die debtor, was duly served with the writ of summons containing the claims of the respondent against him together with the supporting affidavit in which it was deposed that the appellant had no defence to the action Therefore by failing to avail himself of the opportunity provided by Rule 3 of Order 23 of the high Court Rules 1989 by filing a notice of intention to defend me action together with affidavit disclosing his defence on the merit to the action, the appellant as defendant was deemed to have admitted that he had no defence to the action. The learned trial Judge therefore was right in entering judgment for the respondent without calling upon it to lead evidence, oral or documentary. see *U.T.C. (Nigeria) Lid. v. Pamotei (.supra)*. For this reason, I am of the firm view that the present action was properly placed and heard as an undefended suit by the lower court. Accordingly, the judgment entered by the learned trial Judge in favour of the respondent us the plaintiff without calling oral or documentary evidence w, quite proper being i a accordance with Rule 4 of Order 23 of the Kwara State High Court (Civil Procedure) Rules 1989.

In the result, I find no merit at all in this appeal, which I hereby dismiss, the judgment of the lower court of 29,11,93 is hereby affirmed. There shall be #1000.00 cost to the respondent. OGEBE, J.C.A.:I read the advance the lead judgment of my learned brother . Mahmud Mohammed, J .C.A. just delivered and I agree entirely with his reasoning and conclusion. This is an appeal which should not have been brought at all. It lacks merit and I dismiss it and endorse all the consequential orders including the order of cost made in the lead judgment. MUHAMMAD, J.C.A After reading in draft the judgment just delivers by my learning brother Mohammed, J.C.A. I agree with his reasoning and, conclusion that the appeal lacks meal and is hereby dismissed by me. I affirm the lower court decision. The respondent is entitled to N 1,000 costs in the appeal.

Appeal dismissed

