A Comparative Analysis of the Default Summons and the Undefended List Procedures

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 full of yawning potholes for the unwary practitioner. One false step, and the whole procedure of a civil case will come tumbling down.

Even though it is harrowing saying that rules of court are the hand maid of justice, many a time they have proved to be the very antithesis of justice.[1]

With the foregoing as our pedestal, it is imperative that the comparative analysis that is to be undertaken herein is meant as a sign post 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,[2] the rules applicable for summary judgement in Lagos, the Western States and Bendel was the default summons[3] whereas in the Northern and Eastern States, the Procedure was by way of the Undefended List[4].

In the present rules of court in those states that have promulgated the Common Procedure Rules, the Undefended List in most cases is incorporated as Order 23.[5]

For ease of reference all references to default summons shall be referable to order 10 of the Lagos State High Court (Civil Procedure) Rules 1973 while reference to Undefended List shall be Order 23 of the Kwara State High Court (Civil Procedure) Rules 1987.

WHAT IS DEFAULT SUMMONS?

There was no definition of what a default summons is under the 1973 Rules of Lagos State but an explanation of what it is, can be gathered from the provision of Order 10.

However for our purposes, the default summons is the special procedure whereby a 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).

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 merit to the action. The plaintiff on the day the suit is slated for hearing can ask for judgement 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 hearing.[6]

One important feature of the two procedures of which more will be said later is that the procedures can only be used where the action is for simple debt or a liquidated sum claim.[7]

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

DEFAULT SUMMONS

It should be noted and stated right away that the procedure by default summons is not the only summary judgement procedure known to the rules of courts in Nigeria.

A plaintiff desiring to bring his action within the default summons procedure must:

(a) File a specially indorsed writ.
(b) File with the writ the statement of claim.
(c) Must also file a verifying affidavit.
(d) Ensure that the defendant is served with all the processes.
(e) Once the defendant fails or neglects to file a defence after entering an unconditional appearance, the plaintiff files a summons with affidavit for leave to enter final judgement.[9]

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[10].

A defendant that intends to defend the action can defeat the procedure by:

(a) 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.
(b) Showing that there

have been some procedural irregularities e.g. failure to file the statement of claim with the writ of summons.

(c) Filing a defence with an affidavit showing that there is an issue or question worth being tried.

Until the supreme court decision in *Nishizawa vs. Jethwani* in 1984, that a controversy as to whether mere filling of statement of defence without an accompanying affidavit will be enough for the purpose of the rule. But that court in the lead judgement of OBASEKI J.S.C.[11] to which the other justices concurred said:

"When an application for judgement is taken under order 10, the defendant ought not to file and serve a statement of defence. See *Hobson Vs. Monks & Anor* (1884) W.N.8. Although I will not go so far as learned 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 of defence against the application for judgement. The question that arises when a statement of defence is filed as in the instant appeal before the consideration of the application for judgement under order 10 is whether it fulfils the requirement of the rule that the defendant may "show cause". With the guidelines given by order 10 rule 3(a), (b) 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 eyes 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.

It is further submitted that the question whether the court can look at a mere defence as opposed to an affidavit in the circumstances 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. Abdullahi that:*

> "But in any event it has been consistently held by this court over a long line of authorities that this court should not be held up by technicalities. Justice can only be done in substance and not by impeding it with mere technical procedural irregularities" [12]

One final point on the 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 is sham, the case will be treated as if he has defaulted in filing the defence.

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 judgement 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 allowed the appeal and entered judgement for the plaintiff.

ANIAGOLU J.S.C. in his concurring judgement[13] remarked thus"

> "In none of his joggling with words, either in the statement of defence he improperly filed, or in the argument of his counsel before the court of first instance or the court of appeal did he meet the case of the plaintiff by a definite answer to the claim. The defendant had clearly not put up a defence, to the plaintiffs 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 of order 10 rules have granted him leave to defend. His inconvenience to the plaintiff would, in such a case, have been remedied by costs".

His *LORDSHIP OPUTA J.S.C.* in the same case[14] laid the matter to rest when he said inter alia.

> "Again the interest of justice between the parties demands that when a statement of defence has been filed, though 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 respondents 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 position of the law. Not only is it in accord with equity but also with the justness of the law and justice.

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.

Upon the fulfilment of the above the court on its part, will take the following steps:

(a) Satisfy itself upon the grounds of the application.
(b) Shall enter the cause on the Undefended List after making same as Undefended List.

Thereafter the plaintiff shall deliver 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 on affidavit to each writ.

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 vs. Semoh*[15] where it was held that delay in the issue of a writ is an administrative matter which did not concern the plaintiff who has paid the necessary fees with his application and particulars 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 timorous steps to have it set aside: *Niger – Benue Transport Company Ltd. Vs. Narumal & Sons. Ltd.* [16]

On the part of a defendant that wants to defend the action he shall:

(a) Deliver to the Registrar a Notice of Intention to defend.
(b) The Notice shall be accompanied with an affidavit disclosing a defence on merit.
(c) The two documents above shall be so delivered not later than 5 days before the day fixed for hearing.

It is our view and submission that based on authorities starting with *Federal Administrator General Vs. John Bankole Daniel*[17] up to the case of *Nishizawa Vs. Jethwani*[18] it is now settled that where a defendant wants to defend, the defence filed must be a defence on merit not just a sham.

Moreover, the authorities above especially *Nishizawa* is emphatic on the point that notwithstanding any irregularity in the mode of filing a defence, once it is a defence on merit, filed before judgement, the court should not say yes against it. [19]

SIMILARITIES OR DIFFERENCES BETWEEN THE PROCEDURES

From all that have been said so far, 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 judgement

procedures. They are summary judgement because once the defendant fails to fulfil the minimum requirements 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 *extent* what *NNAEMEKA-AGU JSC* said in *U.T.C. Ltd. Vs. Pamotei* that:[20]

> "The procedures for the two 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 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 enter the suit for hearing under Undefended List and it will be marked accordingly. A copy of the affidavit is served with each copy of the writ. 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 to the plaintiff without his calling evidence in proof of his claim, unless the court, of its own discretion, in the interest of justice, calls for oral or documentary evidence. Such a 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. (supra). From this state of affairs it is clear that there is some justification for saying that a defendant who allowed a judgement to be entered against him under Undefended List acted deliberately.* For even where he takes an improper or insufficient such as merely filling 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: see, *John Holt & Co. (Liverpool Ltd. V. Fanemirokun (1961) All N.L.R. 492.*

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 actions 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 or accompanied by a statement of claim.* There is similarly an affidavit by the Plaintiff. *The defendant has equally an opportunity of filing 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 leaver to enter final judgment. Also under Order 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 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 default 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.[21]

On the other hand, a judgement under the Undefended List is a final judgement 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 finality in the case of *bank of the North Ltd. Vs. Intra Bank S.A.*[22] where the court said: inter alia:

"We now come to consider the effect of judgements obtained under the Undefended List. It is

> clear from the rules (order 3 rules 9 – 14) that judgement 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 Motor Ltd. Vs. G.C.S. Mbonu (1962) N.N.L.R. 19, 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 judgement so obtained cannot 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 judgement obtained under it.

The purpose and Intendment of the two procedures is the quick and straight forward disposal of simple debt or liquidated demand causes where there is no defence.[23]

However, it is our view that a judgment under the default summons should be treated as a judgement on merit. That this is likely to be the effect is borne out by the dictum of *ESO J.S.C.* in *Lemminkainen* where he said:

> "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".[24]

One then is at a loss to marry the above with the dictum of his Lordship OPUTA J.S.C. in Pamotei[25] 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. cannot be 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 wait until judgement 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 ample opportunity to file his statement of defence and affidavit but fails and neglects to do same, any judgement entered under Order 10 should be treated as a judgement on the merits.

A party that fails to submit his case for adjudication by his failure to take timeous steps of filling processes cannot complain of lack of fair hearing.[26]

It will be a serious error and injustice to a Plaintiff who has done everything required of him under Order 10 and thereafter obtains judgement due to the failure of the defendant to file his defence only to have such judgement set aside later as a matter of course.

It is our view that rather than embrace the *carte blanc dictum of OPUTA J.S.C.*[27] quoted above, each case should be treated on its peculiar facts.

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 Vs. Smith*[26] to the effect that:

> "I think is well established principle that the object of courts is to decide the rights of the parties and not to punish them for mistakes they may make in the conduct of their cases by deciding otherwise than in accordance with their rights… Courts do not exist for the sake of discipline but for the sake of deciding matters in controversy...."

Will be most inapposite to a judgement entered under Order 10. Such judgment should be treated as a judgment on the merit until the defendant otherwise shows cause. Infact an aggrieved defendant should have his remedy by way of an appeal.

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 uses of affidavit 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 '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 judgement obtained under the default summons procedure to be one on the merit.

To hold otherwise is a distinction without any difference.

It is our view that what *OPUTA J.S.C.* said in *U.T.C. Vs. Pamote*[29] to the effect that:

> "A judgement 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 judgement on the merits is one based on legal right distinguished from mere matters of procedure or jurisdiction. A judgement 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 judgement based solely on some procedural error is *not, as a general rule,* considered as a judgement on the merits. A judgement 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".

Should be equally applicable to a judgement under the default summons and the Undefended List procedures.

Therefore where a defendant in a default summons procedure after entering appearance fails to file his defence and affidavit, the judgement thereafter given should be held as a judgement on the merits as is the case with a judgement under the Undefended List Procedure.

FOOTNOTES

1. Evans Vs. Barilam (1937) 2 All ER.646 Per Scott and Du Paroq L.JJ.
2. Some States like Kwara, Lagos, Oyo, Ondo, Ogun, Kaduna etc. had implemented the Uniform Procedure Rules in 1987 and 1988. For example see Kwara State High Court (Civil Procedure) Rules 1987.
3. Order 24 A Civil procedure Rules of Oyo, Ondo and Ogun States and

Order 10 Lagos State.

4. See Order 3 rr 9 – 14 Rules of Procedure in the Northern States but not specifically Kwara State and Order 2 rr 8 – 14 Eastern States.
5. See Order 23 Kwara State (Civil Procedure) Rules 1987 and Order 23 Oyo State (Civil procedure) Rules 1987 and Order 23 Oyo State (Civil Procedure) Rules 1988.
6. Order 23 Rules of Court Kwara State 1987.
7. *Nishizawa Ltd. Vs. Jethwani* 1984) 12 SC 234.
8. Order 25A High Court Civil Procedure Rules Oyo State 1976. Judgment given in default of pleadings.
9. Order 10 rules 1(a) & (b) Rules of Court Lagos State 1973.
10. *Sodipo Vs. Lemminkainen OY* (1986) 1 NWLR (Pt. 15) 220 at 230 per Kayode ESQ. J.S.C.
11. *Nishizawa* Supra at P. 256 – 7.
12. (1989)7 SCNJ 216 Per ESO J.S.C. at P. 241.
13. *Nishizawa* Supra at Page 280.
14. *Nishizawa* Supra at P. 294.
15. (1959) 4 F.S.C. 29.
16. (1986) 4 N.W.L.R 117.
17. (1958) 3 F.S.C. 115 at 117.
18. Particularly at 286-287 and 292 – 294.
19. *Nishizawa* Supra Ibid.
20. (1989) 3 S.C.N.J. 79 at p. 124-5.
21. *Pamotei* Supra.
22. (1969) 1 All N.L.R. 91 per Ademola C.J.N. at P. 97.
23. *Sodipo vs. Lemminkainen*
24. At Page 231.
25. *Pamotei* Supra at p. 120.
26. *Oyinloye vs. Oyeyipo* (1987) 1 N.W.L.R. (Pt. 50) 356 at p. 37.
27. *Pamoptei* at p. 120.
28. (1884) Ch.D. 700 at p. 710.
29. At page 119.