**AKAHALL & SONS LIMITED**

**V.**

**NIGERIAN DEPOSIT INSURANCE CORPORATION, N.D.I.C.**

SUPREME COURT OF NIGERIA

20TH DAY OF JANUARY 2017

SC. 302/2006

**LEX (2017) - SC. 302/2006**

OTHER CITATIONS

2PLR/2017/33 (SC)

**BEFORE THEIR LORDSHIPS**

IBRAHIM TANKO MUHAMMAD, JSC (Presided)

OLUKAYODE ARIWOOLA, JSC

KUMAI BAYANG AKA’AHS, JSC (Read Lead Judgment)

CHIMA CENTUS NWEZE, JSC

AMIRU SANUSI, JSC

**BETWEEN**

AKAHALL & SONS LIMITED

AND

NIGERIA DEPOSIT INSURANCE CORPORATION (RECEIVER/LIQUIDATOR OF ALLIED BANK OF NIGERIA

PLC)

**ORIGINATING COURT(S)**

1. COURT OF APPEAL, CALABAR JUDICIAL DIVISION

2. FEDERAL HIGH COURT, UYO JUDICIAL DIVISION

**REPRESENTATION/LAWYERS**

CHIEF CHRIS UCHE SAN [with him, EFFIONG ESU, JAMES ODIBA, EMMANUEL OKORIE, UZOMA NWOSU-IHEME, ISAAC NWACHUKWU, ADOBI EZIOKWU, EMIKE IMUEKHEME, ANGEL UCHE, MOSES UDOH, JAMES EBBI, FRANCIS NSIEGBYNAM and CHIAMAKA AGU] - For the Appellant.

IKANI AGABI (with him, NZUBE EZIDI) - For the Respondent.

**ISSUES FROM THE CAUSE(S) OF ACTION**

ADMINISTRATIVE LAW AND GOVERNMENT – PRE-ACTION NOTICE AND GOVERNMENT AGENCIES – NIGERIA DEPOSIT INSURANCE CORPORATION, NDIC:- Statutory requirement for compliance with pre-action protocols pursuant to the provisions of section 493 of the Companies and Allied Matters Act, 1990, section 32(3), 32(8)(b) and (c) of the Bankruptcy Act,1990, section 27(1) of the Nigeria Deposit Insurance Act, 1990, and rules 70 - 101 of the Company Winding Up Rules, 1983 – Purpose of – Whether non-compliance therewith would rob a trial court of jurisdiction to determine any claim against the NDIC relating to debt of a distressed bank

BANKING AND FINANCE – BANKING OPERATIONS – DISTRESSED BANKS AND NDIC:- Banks under receivership/liquidation – Proof of debt – Conditions precedent before a right of action will be deemed to have accrued - Default judgment secured without complying with the conditions precedent – When would be deemed valid

COMPANY LAW - WINDING-UP COMPANY – LIQUIDATION/INSOLVENCY:- Debt – Statutory procedure for proving debt against debtor – Legal effect of - When creditor may apply to court - Companies Winding Up Rules, 1983 in review

COMPANY LAW – WINDING UP AND INSOLVENCY – DISTRESSED BANK:- Claim against NDIC in regard of its obligations to creditors of a failed bank under its receivership – Combined effect of section 493 of the Companies and Allied Matters Act, 1990, section 32(3), 32(8)(b) and (c) of the Bankruptcy Act,1990, section 27(1) of the Nigeria Deposit Insurance Act, 1990, and rules 70 - 101 of the Company Winding Up Rules, 1983 – Procedure for proving a debt against a company under liquidation

COMPANY LAW – WINDING UP AND INSOLVENCY – DISTRESSED BANK:- Power of the liquidator to examine and admit or reject every proof of debt lodged with it before a creditor dissatisfied therefrom can approach the Court to reverse or vary the decision – Basis of – Duty of the NDIC in securing that power of the liquidator – Effect of failure thereto – When would no longer avail

COMPANY LAW – WINDING UP – DUTY OF RECEIVER/LIQUIDATOR OF DISTRESSED BANK – NDIC:- Duty of diligent prosecution and defence of legal proceedings related to company under liquidation – Failure thereto – Belated invocation of pre-action protocols in order to defeat judgment debt made against it by way of default judgment for failure to enter appearance – Attitude of court to failure to raise the issue immediately after being served with the writ of summons.

DEBTOR AND CREDITOR LAW – DEFAULT JUDGMENT:- Default judgment secured against a legal entity with a statutory requirement for pre-action protocols – Where pre-action requirement not observed – Where there is evidence of service of notice of commencement of action/hearing on the legal entity/administrative agency – Burden of asserting and proving the existence of the pre-action requirement – On whom lies – Failure thereto – Implication for validity of judgment arising from a default judgment proceeding

DEBTOR AND CREDITOR LAW – DEFAULT JUDGMENT:- Judgment secured by way of default judgment – Nature of as judgment on the merit – How may be set aside – Whether open to the trial court to review and set same aside

DEBTOR AND CREDITOR LAW – PROCEEDINGS AGAINST THE NIGERIA DEPOSIT INSURANCE CORPORATION (NDIC):- Proceedings initiated or judgments secured against NDIC – Where shown to in non-compliance with the provisions of section 493 of the Companies and Allied Matters Act, 1990, section 32(3), 32(8)(b) and (c) of the Bankruptcy Act,1990, section 27(1) of the Nigeria Deposit Insurance Act, 1990, and rules 70 - 101 of the Company Winding Up Rules, 1983, which together stipulate procedure for proving debts against a wound up company - Whether nullifies the entire proceedings on ground of lack of jurisdiction of court

**PRACTICE AND PROCEDURE ISSUES**

ACTION - PRE-ACTION NOTICE:- Failure to serve where required - Whether automatically deprives court of jurisdiction

ACTION- DEFENDANT WITH NO DEFENCE:- Impropriety of engaging in delay tactics against a plaintiff.

ACTION - UNDEFENDED LIST PROCEDURE – Scope of - Failure of Defendant to file notice of intention to defend - Legal consequences of

COURT – FUNCTUS OFFICIO:- When a trial court would be deemed functus officio – Condition precedent - Legal effect of - Judgments given by way of the undefended list procedure – Whether can only be reviewed on appeal

COURT – DUTY OF TRIAL COURT:- Where trial court had become functus officio – Evidence of mistake of law in decision – Whether proper for trial court to decline jurisdiction to set aside its judgment erroneously entered

JUDGMENT – DEFAULT JUDGMENT:- Nature of – Justification of – Whether can be reviewed or set aside by trial court which made same – Relevant considerations

JUDGMENT – MISTAKE:- Where a court makes a mistake of law in its decision – Proper treatment of – When would be open to trial court to review same – When can only be corrected through appeal

JURISDICTION – PRE-ACTION PROTOCOLS:- Practice of setting up noncompliance with statutory provisions that stipulate for pre-action notices to be given before the commencement of proceedings in court as jurisdictional matters – Propriety and attitude of court thereto - Distinction between alleged irregularity in the exercise of jurisdiction and total lack of jurisdiction – Legal effect attaching thereto

JURISDICTION – COMPETENCY OF SUIT:- Distinction between jurisdictional incompetence which is evident on the face of the proceedings and one which is dependent on ascertainment of facts – Ignorance of – Attitude of court thereto - When the competence of the court is alleged to be affected by procedural defect in the commencement of the proceedings and the defect is not evident but is dependent on ascertainment of facts – Burden of proving same – On whom lies – Failure thereto – Legal consequences for any attempt to invoke lack of jurisdiction at any other stage of the proceedings or as a plank to set aside judgment arising from the proceeding

JURISDICTION – EX FACIE REGULAR PROCEEDINGS:- Duty of court to presume competence of an action when there is nothing on the face of the proceedings which reveals jurisdictional incompetence of the court – Failure of the party who alleges the court’s incompetence to raise the issue either in his statement of defence in proceedings commenced by writ or by affidavit in cases commenced by originating summons – Validity of judgement arising therefrom

INTERPRETATION OF STATUTE - COMPANIES WINDING UP RULES, 1983 - Debt against wound-up company – Proof of – When creditor may apply to court.

**CASE SUMMARY**

ORIGINATING FACTS AND CLAIMS

The appellant filed an action in the Federal High Court, Cross-River State under the undefended list procedure against the respondent as receiver and liquidator of Allied Bank of Nigeria Plc for money owed it by the latter. The respondent’s preliminary objection challenging jurisdiction of the court was dismissed and judgment entered for the appellant.

Dissatisfied, the respondent appealed to the Court of Appeal. The appeal was allowed and the matter remitted for re-trial.

Following the creation of Akwa Ibom State, the matter was transferred to a Federal High Court in Akwa Ibom State. The respondent failed to appear or file notice of intention to defend and judgment was subsequently granted in favour of appellant. The respondent then filed an application to set aside the judgment on grounds that conditions precedent to commencement of the action were not complied with as stipulated in section 493, Companies and Allied Matters Act, 1990; section 32 of Bankruptcy Act, Cap. 30, Laws of the Federation of Nigeria, 1990 and Companies Winding Up Rules, 1983. Upon hearing the application, the trial court granted the application, set aside the judgment and transferred the matter to the general cause list.

Following the dismissal of its appeal by the Court of Appeal, the appellant filed a further appeal to the Supreme Court, contending that the lower court erred by holding that the trial court properly set aside its judgment entered on the merits.

DECISION(S) APPEALED AGAINST

The Court of Appeal entered judgment, dismissing the Appellant’s appeal, holding that the trial court properly set aside its judgment entered on the merits, holding that the plank of the respondent’s case outweigh that of the appellation viz:

“Appellant’s contention is hinged on the fact that a judgement on the undefended list is a judgement on the merit and that the judgement on merit cannot be said to be null and void since Court of Appeal had determined that the suit is competent. On the other hand, the crux of the respondent’s case is that compliance with the provisions of section 493 of the Companies and Allied Matters Act, 1990 which subject claims against a wound-up company to prior proof under section 32(3), 32(8)(b) and (c) of the Bankruptcy Act, Cap. 30, Laws of the Federation of Nigeria, 1990, and section 27(1) of the Nigeria Deposit Insurance Act, 1990, as well as rules 70 - 101 of the Company Winding Up Rules, 1983, stipulating procedure for proving debts against a wound up company were not complied with”.

**ISSUE(S) FOR DETERMINATION ON APPEAL**

*BY APPELLANT:*

1. Whether the Court of Appeal was right in affirming the decision of the trial court in setting aside its judgment entered on the merits on the undefended list.

2. Whether the Court of Appeal was competent to suo motu raise and decide that service on the respondent’s counsel at the High Court was improper service when the trial court had held the service was proper and the point was not appealed on or canvassed on appeal by the parties.

*BY RESPONDENTS*

Whether the Court of Appeal was right when it affirmed the decision of the trial court setting aside its judgment for want of jurisdiction to entertain the appellant’s claim under the undefended list procedure.

DECISION OF THE SUPREME COURT

1. Appellant’s contention was hinged on the fact that a judgement on the undefended list is a judgement on the merit and that the judgement on merit cannot be said to be null and void since Court of Appeal had determined that the suit is competent. On the other hand, the respondent asserted that noncompliance with the provisions of section 493 of the Companies and Allied Matters Act, 1990 which subject claims against a wound-up company to prior proof under section 32(3), 32(8)(b) and (c) of the Bankruptcy Act, Cap. 30, Laws of the Federation of Nigeria, 1990, and section 27(1) of the Nigeria Deposit Insurance Act, 1990, as well as rules 70 - 101 of the Company Winding Up Rules, 1983, stipulating procedure for proving debts against a wound up company made the judgment secured a nullity for lack of jurisdiction in the Court. The Court of Appeal erred in agreeing with the respondent’s position considering the facts of the case.

2. Under the Companies Winding Up Rules, 1983, a debt is proved against a wound-up company by delivering or sending through post to the liquidator, an affidavit verifying the debt, which must contain or refer to the statement of account showing the particulars of the debt and whether the creditor is or is not a secured creditor. The liquidator has the power to examine and admit or reject every proof lodged with it. It is only when a creditor is dissatisfied with the decision by the liquidator that he can apply to the court to reverse or vary the decision. However, those provisions have to do with the procedure and manner of proof of debt and they are defences that could have been proffered by the respondent on the undefended list in order to have the matter transferred to the general cause list.

3. The touting of noncompliance with statutory provisions that stipulate for pre-action notices to be given before the commencement of proceedings in court as jurisdictional matters does not apply to every case.

4. There is difference between alleged irregularity in the exercise of jurisdiction and total lack of jurisdiction and different incidents attach to each. For instance, while the latter can be raised at any stage of the proceedings (even for the first time on appeal), the latter can only avail if set up timeously. The reason is because of the distinction between jurisdictional incompetence which is evident on the face of the proceedings and one which is dependent on ascertainment of facts.

5. When the competence of the court is alleged to be affected by procedural defect in the commencement of the proceedings and the defect is not evident but is dependent on ascertainment of facts, the incompetence cannot be said to arise on the face of the proceedings. The issue of facts if properly raised by the party challenging the competence of the court should be tried first before the court makes a pronouncement on its own competence. Where competence is presumed because there is nothing on the face of the proceedings which reveals jurisdictional incompetence of the court, it is for the party who alleges the court’s incompetence to raise the issue either in his statement of defence in proceedings commenced by writ or by affidavit in cases commenced by originating summons. A judgement given in proceedings which appear ex facie regular is valid.

6. The Nigeria Deposit Insurance Corporation was already the receiver/liquidator of Allied Bank of Nigeria Plc when the action was filed and before the Court of Appeal made the order for re-trial. It is inconceivable that the NDIC/respondent would rather wait until judgement is entered for the plaintiff on the undefended list before invoking the Companies and Allied Matters Act, the Bankruptcy Act, the Nigerian Deposit Insurance Corporation Act and the Companies Winding Up Rules to have the judgement set aside instead of raising the issue immediately after being served with the writ of summons.

7. A trial court has no jurisdiction to sit on appeal over its own judgement entered on the merits since a judgement entered in favour of the plaintiff on the undefended list is a judgement on the merit and can be overturned only on appeal. The failure on the part of the respondent/NDIC to deliver a notice of intention to defend means only one thing: that is, that the defendant has no defence to the plaintiff’s claim. Therefore failure to file or deliver a notice of intention to defend as provided by the rules is tantamount to an admission by the defendant of the plaintiff’s claim and it is settled law that facts admitted need no proof. In the instant case since the respondent failed to file the notice of intention to defend the affidavit, the appellant need not lead evidence to prove the debt.

8. Furthermore where a court makes a mistake of law in its decision, that mistake can be corrected only through appeal except where the judgement is given without jurisdiction. In this instant appeal, it was wrong for the trial judge to set aside her judgment under the undefended list and for the Court of Appeal to affirm that decision. The trial court had become functus officio and should have declined setting aside the judgment entered on the undefended list.

Appeal therefore has merit and it is accordingly allowed. The order by the Court of Appeal affirming the setting aside of the judgment entered on the undefended list is set aside while the judgment of the trial court entered in favour of the plaintiff on the undefended list is restored.

**MAIN JUDGEMENT**

AKA’AHS JSC (DELIVERING THE LEAD JUDGMENT):

The appellant instituted an action under the undefended list procedure against the respondent as receiver and liquidator of Allied Bank of Nigeria Plc for monies owed it by Allied Bank of Nigeria Plc.

Judgment was entered in favour of the appellant following the dismissal of the respondent’s preliminary objection challenging the jurisdiction of the court to hear the matter. An appeal to the Court of Appeal, Calabar was allowed for breach of the respondent’s right to fair hearing. The court made an order for the matter to be heard de novo before a different Judge of the Federal High Court.

At the time the order for re-trial was made, Akwa Ibom State had been created from Cross River State, resulting in the matter being transferred to the Uyo Division of the Federal High Court. Following the failure of the respondent to put in an appearance or file notice of intention to defend, judgment was entered against the respondent under the undefended list.

Following the judgment, the respondent brought an application for the judgment to be set aside on the ground that certain conditions precedent to instituting the action had not been complied with, as the appellant had failed to comply with section 493 of the Companies and Allied Matters Act, 1990, that subjects all claims against a wound-up company to prior proof under the Bankruptcy Act, Cap. 30, Laws of the Federation of Nigeria, 1990; section 32(2)(8)(b) and (c) of the Bankruptcy Act; the Nigerian Deposit Insurance Corporation Act, 1990, that gives the Nigerian Deposit Insurance Corporation the power to prove claims made against a failed bank and rules 70 - 101 of the Companies Winding Up Rules, 1983, that stipulate the procedure for proving debts against a wound-up company. After hearing the application, the learned trial judge set aside the judgment and transferred the matter to the general cause list. Dissatisfied with the decision, the appellant appealed to the Court of Appeal, Calabar Division which dismissed the appeal. The appellant decided to further appeal to the Supreme Court. The notice of appeal filed on 25 September 2006 contained three grounds from which the following two issues were formulated:-

1. Whether the Court of Appeal was right in affirming the decision of the trial court in setting aside its judgment entered on the merits on the undefended list. (Grounds 1 and 2).

2. Whether the Court of Appeal was competent to suo motu raise and decide that service on the respondent’s counsel at the High Court was improper service when the trial court had held the service was proper and the point was not appealed on or canvassed on appeal by the parties. (Ground 3).

The respondent submitted a sole issue for determination which is:-

Whether the Court of Appeal was right when it affirmed the decision of the trial court setting aside its judgment for want of jurisdiction to entertain the appellant’s claim under the undefended list procedure.

The crux of this appeal is centered on issue 1 in the lower court’s judgment at page 449; Ngwuta JCA (as he then was) held that the non-compliance with the provisions of the legislations cited prior to the institution of the suit rendered the suit incompetent and robbed the trial court of jurisdiction to hear it.

Learned senior counsel for the appellant conceded in paragraph 4.05 that where any kind of decision of any court was reached without jurisdiction or is a nullity, that court has inherent jurisdiction to set it aside. He however submitted that no such case was made out to warrant the Court of Appeal affirming the setting aside of the judgment of the trial court as it was given on the merit since it was a judgment on the undefended list. He argued that the non-application of purportedly applicable laws by a court in the determination of a case is not a matter of jurisdiction. He also contended that the non-advertence to purportedly applicable laws does not confer jurisdiction on a trial court to sit on appeal over its judgement entered on the merits and that what the two lower courts did in this case is an affront to the system of appellate justice in Nigeria. It is the learned senior counsel’s further contention that the fact that a court may have made a mistake of law in its decision does not give it the power to sit on appeal over its decision so as to correct the error. He relied on the pronouncements of Obaseki JSC and Othman Mohammed JSC in Umunna v. Okwuraiwe (1978) 6 - 7 SC 1 at 11 and Obioha v. Ibero (1994) 1 NWLR (Pt. 322) 503 at 532 respectively. He referred to the cases of Mark v. Eke (2004) All FWLR (Pt. 200) 1455, (2004) 5 NWLR (Pt. 865) 54 at 77 and Ben Thomas Hotels Ltd v. Sebi Furniture Co. Ltd (1989) 5 NWLR (Pt. 123) 523 and submitted that what would justify a trial court setting aside its own judgement is if there is absence of service or if the rules of that court provide for it.

In its consideration of the arguments by counsel for the appellant and respondent on the validity or nullity of the judgement delivered by the trial court on 29 July 2004, the lower court stated at pages 447 - 448 of the records:

“Appellant’s contention is hinged on the fact that a judgement on the undefended list is a judgement on the merit and that the judgement on merit cannot be said to be null and void since Court of Appeal had determined that the suit is competent. On the other hand, the crux of the respondent’s case is that compliance with the provisions of section 493 of the Companies and Allied Matters Act, 1990 which subject claims against a wound-up company to prior proof under section 32(3), 32(8)(b) and (c) of the Bankruptcy Act, Cap. 30, Laws of the Federation of Nigeria, 1990, and section 27(1) of the Nigeria Deposit Insurance Act, 1990, as well as rules 70 - 101 of the Company Winding Up Rules, 1983, stipulating procedure for proving debts against a wound up company were not complied with”.

The lower court in considering the arguments reproduced above went on to hold that non-compliance with the provision of the Acts referred to above would deprive the trial court of jurisdiction to determine the appellant’s claim and placed reliance on the case of In re: Mbamalu (2002) FWLR (Pt. 85) 246, (2001) 18 NWLR (Pt. 744) 143.

Section 493 of the Companies and Allied Matter Act provides as follows:

“493:In the winding up of an insolvent company registered in Nigeria, the same rules shall prevail and be observed with regard to the respective rights of secured and unsecured creditors and to debts provable and to the valuation of annuities and future and contingent liabilities as are in force for the time being under the law of bankruptcy in Nigeria with respect to the estates of persons adjudged bankrupt, and all persons who in any such case would be entitled to prove for and receive dividends out of the assets of the company may come in under the winding up and make such claims against the company as they respectively are entitled to by virtue of this section”.

Section 32(2) and (8)(b) and (c) of the Bankruptcy Act stipulates:-

“32(2) A person having notice of any act of bankruptcy against the debtor shall not prove in bankruptcy for any debt or liability contracted by the debtor subsequently to the date of his so having the notice.

(8) For the purposes of this Act, “liability” includes:-

(b) any obligation or possibility of an obligation to pay money or money’s worth, on the breach of any express or implied covenant, contract, agreement or undertaking, whether the breach does or does not occur, or is not likely to occur or capable of occurring, before the discharge of the debtor;

(c) generally, any express or implied engagement, agreement or undertaking to pay or capable of resulting in the payment of money or money’s worth, whether the payment is, as respects amount, fixed or unliquidated, as respects time, present or future, certain or dependent on anyone contingency or on two or more contingencies, or as, to mode of valuation, capable of being ascertained by fixed rules or as matter of opinion”.

And section 27(1) of the Nigerian Deposit Insurance Corporation reads as follows:-

“27(1) Where an insured bank fails on account of inability to meet the demands of its depositors, payment of the insured deposit in such bank shall be made by the corporation as soon as possible either:-

(a) by cash; or

(b) by making-available to each depositor, a transferred deposit in a new bank in the same area, or in another insured bank in an amount equal to the insured deposit of such depositors:-

Provided that:-

(i) Where the corporation is liable to make payment in pursuance of this, it shall at its discretion require proof of claim from all depositors with the insured bank; and

(ii) Where the corporation is not satisfied as to the validity of a claim for an insured deposit, it may require the final determination by a court of competent jurisdiction before paying such claim”.

Under the Companies Winding Up Rules, 1983, a debt is proved against a wound-up company by delivering or sending through post to the liquidator, an affidavit verifying the debt, which must contain or refer to the statement of account showing the particulars of the debt and whether the creditor is or is not a secured creditor. The liquidator has the power to examine and admit or reject every proof lodged with it. It is only when a creditor is dissatisfied with the decision by the liquidator that he can apply to the court to reverse or vary the decision.

As argued by learned senior counsel for the appellant, the provisions stated above have to do with the procedure and manner of proof of debt and they are defences that could have been proffered by the respondent on the undefended list in order to have the matter transferred to the general cause list. The noncompliance with statutory provisions that stipulate for pre-action notices to be given before the commencement of proceedings in court are usually touted as jurisdictional matters. However this court in Mobil Producing (Nig.) Unlimited v. L.A.S.E.P.A. (2002) 18 NWLR (Pt. 798) 1, (2003) FWLR (Pt. 137) 1029 explained the difference between alleged irregularity in the exercise of jurisdiction and total lack of jurisdiction and the incidents that attach to each. In the lead judgement by Ayoola JSC, he explained the correct position of the law at pages 31- 32 as follows:-

“Much stress has been placed on the argument that non-compliance with provisions such as section 29(2) of the Act (Federal Environmental Protection Agency Act) leads to a question of jurisdiction which can be raised at any time and which if resolved against the appellant, renders the entire proceedings a nullity.

This rather mechanical approach to the issue which tends to ignore the distinction between jurisdictional incompetence which is evident on the face of the proceedings and one which is dependent on ascertainment of facts, leads to error ... When the competence of the court is alleged to be affected by procedural defect in the commencement of the proceedings and the defect is not evident but is dependent on ascertainment of facts, the incompetence cannot be said to arise on the face of the proceedings. The issue of facts if properly raised by the party challenging the competence of the court should be tried first before the court makes a pronouncement on its own competence. Where competence is presumed because there is nothing on the face of the proceedings which reveals jurisdictional incompetence of the court, it is for the party who alleges the court’s incompetence to raise the issue either in his statement of defence in proceedings commenced by writ or by affidavit in cases commenced by originating summons. A judgement given in proceedings which appear ex facie regular is valid”.

It is rather surprising that the respondent whose appeal to the Court of Appeal was allowed and the suit sent back to the Federal High Court for re-trial did not seize the opportunity to defend the action. And so on 29 July 2004, the learned trial judge, Olotu J. in her judgement traced the history of the case and made her findings before entering judgement in the undefended list at page 337 of the records as follows:-

“The case first came up in this court after its sojourn to the Court of Appeal on 26 January 2004 and I ordered hearing notice to be served on the defendant following the plaintiff’s application that the court should enter judgement in its favour. From the records of the court, the defendant was duly served with the hearing notice vide its solicitors, Kanu G. Agabi & Associates on 28 January 2004. When the case was called again on 27 July 2004, the plaintiff repeated his application that judgment should be entered in its favour as per its claim under Order 24, rule 4 Federal High Court (Civil Procedure) Rules, 2000, since the defendants have not filed any notice of intention to defend.

I confirm from the records of the court that the defendant has not filed any notice of defence as prescribed by Order 24, rule 3(1), therefore this suit will be heard as undefended suit as prescribed under Order 24, rule 4 and I hereby enter judgement for the plaintiff as per its claim in paragraphs 1 and 2 and then in paragraph 3 subject to the following –

“1. 21% interest on the total sum from 7 August 1998 until the date of this judgement.

2. 10% post-judgement interest on the judgement debt from the date of this judgement until same is fully liquidated.”

It is to be noted that the Nigeria Deposit Insurance Corporation was already the receiver/liquidator of Allied Bank of Nigeria Plc when the action was filed and before the Court of Appeal made the order for re-trial. This court, per Mukhtar JSC (as he then was) expressed the view in Intercontinental Bank Ltd v. Brifina Ltd (2012) All FWLR (Pt. 639) 1192, (2012) 13 NWLR (Pt. 1316) 1 at 21 that -

“... when one considers the issue of receivership raised in the conditional memorandum of appearance, one will really see that a triable issue is manifested therein, and in the circumstances, the suit should have been transferred to the general cause list by virtue of Order 24, rule 9(5) of the High Court of Anambra State (Civil Procedure) Rules, 1988”.

It is inconceivable that the respondent would rather wait until judgement is entered for the plaintiff on the undefended list before invoking the Companies and Allied Matters Act, the Bankruptcy Act, the Nigerian Deposit Insurance Corporation Act and the Companies Winding Up Rules to have the judgement set aside instead of raising the issue immediately after being served with the writ of summons.

I am in total agreement with the submission of learned senior counsel for the appellant that these statutes which I mentioned a while ago do not confer jurisdiction on the trial court to sit on appeal over its judgement entered on the merits since a judgement entered in favour of the plaintiff on the undefended list is a judgement on the merit and can be overturned only on appeal. See First Bank (Nig.) Ltd v. Khaladu (1993) 9 NWLR (Pt. 315) 44 at 56. It was explained in First Bank (Nig.) Ltd v. Khaladu at page 55 that the failure to deliver a notice of intention to defend means only one thing that is, that the defendant has no defence to the plaintiff’s claim. Therefore failure to file or deliver a notice of intention to defend as provided by the rules is tantamount to an admission by the defendant of the plaintiff’s claim and it is settled law that facts admitted need no proof. In the instant case since the respondent failed to file the notice of intention to defend the affidavit, the appellant need not lead evidence to prove the debt.

As cautioned in Macaulay v. NAL Merchant Bank Ltd (1986) 5 NWLR (Pt. 40) 216 at 223 -

“A defendant who has no real defence to the action should not be allowed to dribble and frustrate the plaintiff and cheat him out of the judgement he is legitimately entitled to by delay tactics aimed not at offering any real defence to the action but at giving time within which he may continue to postpone meeting his obligation and indebtedness to the plaintiff. It is most inexpedient to allow a defendant who has no real defence to its action to defend for mere purpose of delay”.

Furthermore where a court makes a mistake of law in its decision, that mistake can be corrected only through appeal except where the judgement is given without jurisdiction. See Mark v. Eke (2004) All FWLR (Pt. 200) 1455, (2004) 5 NWLR (Pt. 865) 54 at 77. In this instant appeal, it was wrong for the learned trial judge to set aside her judgment under the undefended list and for the Court of Appeal to affirm that decision. The trial court had become functus officio and should have declined setting aside the judgment entered on the undefended list.

I find that the appeal has merit and it is accordingly allowed. The order by the Court of Appeal affirming the setting aside of the judgment entered on the undefended list is set aside while the judgment of the trial court entered in favour of the plaintiff on the undefended list is restored. Appeal is allowed.

**MUHAMMAD JSC**:

I read before now, the judgment just delivered by my learned brother, Aka’ahs JSC. I agree with him that the appeal should be allowed. I allow the appeal and abide by consequential orders made in the lead judgment.

**ARIWOOLA JSC**:

I have had the preview of the draft of the lead judgment just delivered by my learned brother, Aka’ahs JSC. I am in agreement with the reasoning that led to the conclusion that the appeal has merit and should be allowed. It is hereby allowed by me.

I abide by the consequential orders in the said lead judgment including the order on costs.

**NWEZE JSC**:

My lord, Aka’ahs JSC, obliged me with the draft of the lead judgment just delivered now. I entirely agree with his lordship that a judgment entered in favour of a plaintiff on the undefended list is a judgment on the merits and not a judgment entered in default, Mark & Anor. v. Eke (2004) All FWLR (Pt. 200) 1455, (2004) LPELR - 1841 (SC) 23, paragraphs D - F. As such, the trial court cannot set it aside; U.A.C. (Technical) Ltd v. Anglo Canadian Cement Ltd (1996) NMLR 349; Bank of the North Ltd v. Intra Bank S.A. (1969) 1 All NLR 91.

A contrary approach (that is, to permit the trial court to reopen such a case) would amount to a usurpation of the exclusive prerogative of the appellate court which is the only court empowered to set it aside on appeal. The only alternative method of tampering with such a judgment on the merits would be by yet another action in the case of allegation of fraud, U.T.C. Nig. Ltd v. Pamotei (1989) 3 SCNJ 79, 124, (1989) 2 NWLR (Pt. 103) 244, (1989) LPEL - 3276 (SC), (2002) FWLR (Pt. 129) 1557.

Enunciating the rationale for this prescription, this court in Wema Securities and Finance Plc v. NAIC (2015) LPELR - 24833 (SC) 67 - 70, paragraphs E - C, explained (per Nweze JSC) that:

“... the undefended list procedure is a truncated form of the civil litigation process peculiar to the adversarial judicial system. Under the said procedure, ordinary hearing is rendered unnecessary due, in the main, to the absence of an issue to be tried, United Bank for Africa Plc & Anor. v. Jargaba (2007) All FWLR (Pt. 380) 1419, (2007) LPELR - 3399 (SC) 27; Agwuneme v. Eze (1990) 3 NWLR (Pt. 137) 242. Essentially therefore, it is designed to secure quick justice and to avoid the injustice likely to occur when there is no genuine defence on the merits to the plaintiff’s case, International Bank for West Africa Limited v. Unakalamba (1998) 9 NWLR (Pt. 656) 245.

It is usually meant to shorten the hearing of a suit where the claim is for a liquidated sum, Cooperative and Commerce Bank (Nigeria) Plc v. Samed Investment Company Limited (2000) 4 NWLR (Pt. 651) 19. Put differently, the object of the rules relating to actions on the undefended list is to ensure quick dispatch of certain types of cases, such as those involving debts or liquidated money claims, Bank of the North Ltd v. Intra Bank S.A. (1969) 1 All NLR 91; Bendel Construction Co. Ltd v. Anglo Development Co. (Nigeria) Ltd (1972) All NLR (Pt. 1) 153; Olubusola Stores v. Standard Bank (Nig.) Ltd (1975) 1 All NLR (Pt. 1) 125; Nkwo Market Community Bank (Nig.) Ltd v. Obi (2010) All FWLR (Pt. 529) 1094, (2010) LPELR - 2051 (26) 26, which are, virtually, uncontested, Ataguba & Co. v. Gura (Nig.) Ltd (2005) All FWLR (Pt. 256) 1219, (2005) LPELR - 584 (SC) 16 - 17; Macaulay v. NAL Merchant Bank Ltd (1990) 4 NWLR (Pt. 144) 283 at 324 - 325; Nwankwo & Anor. v. Ecumenical Development Cooperative Society UA (2007) All FWLR (Pt. 360) 1448, (2007) LPELR - 2108 (SC) 46; Bank of the North Ltd v. Intra Bank S.A. (1969) 1 All NLR 91; Ataguba & Co. v. Gura (Nig.) Ltd (2005) All FWLR (Pt. 256) 1219, (2005) 8 NWLR (Pt. 927) 429, (2005) 2 SCNJ 139, 157, (2005) 2 SC (Pt. 1) 101.

Such rules are, thus designed to relieve the courts of the rigour of pleadings and burden of hearing tedious evidence on sham defences mounted by defendants who are just determined to dribble and cheat plaintiffs out of reliefs they are normally entitled to because the case is, patently, clear and unassailable, Cow v. Casey (1949) 1 K.B. 482; Sodipo v. Lemminkainen OY (No. 2) & Ors. (1986) 1 NWLR (Pt. 15) 220; United Bank for Africa Plc & Anor. v. Jargaba (2007) All FWLR (Pt. 380) 1419, (2007) LPELR - 3399 (SC) 24; Obaro v. Hassan (2013) LPELR - 20089 (SC); Planwell Ltd v. Ogala (2003) 18 NWLR (Pt. 852) 478, (2003) 12 SCNJ 58, 68. In such a case, it would be inexpedient to allow a defendant to defend for the mere purpose of delay, Sodipo v. Lemminkainen OY (No. 2 (1986) 1 NWLR (Pt. 15) 220; Adebisi Macgregor Ass. Ltd v. N.M.B. Ltd (1996) 2 NWLR (Pt. 43) 378, (1996) 2 SCNJ 72, 81.”

See, also, C.C. Nweze, Law and Procedure in suits on the undefended list (Enugu: Hamson Publishers, 1998) 45.

It is for these, and the more detailed, reasons in the lead judgment that I, too, shall enter an order allowing this appeal. Appeal allowed. I abide by the consequential orders in the lead judgment.

**SANUSI JSC**:

I had the advantage of reading the draft copy of the judgment prepared by my learned brother, Aka’ahs JSC just delivered. His lordship took pains to thoroughly consider the issues canvassed by learned counsel to the parties in this appeal before he advanced his reasons and arriving at the conclusion that this appeal has merit which I entirely agree with; the appeal is accordingly allowed by me. I make no order on costs.

Appeal allowed