SUMMARY JUDGMENT: A CLICHÉ IN SUMMARY DISPOSAL OF CASES IN LIQUIDATED CLAIMS

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Introduction

Summary judgment is one given in favour of a plaintiff without a plenary trial of the action.

The normal steps of filing all necessary pleadings, hearing evidence of witnesses and addresses by counsel thereafter before the court's judgment are not followed. The materials on which such is based are the writ of summons, statement of claim and, sometimes the defence, then the plaintiff's application for judgment by motion or summons with an affidavit in support. There may also be counter-affidavit by the defendant.[1] In the case of *Abivam Limited v Platon Gas Oil*[2], the Supreme Court per Benin JSC held:

"The starting point in an application under this Order is for the court to examine the endorsement on the writ, the statement of claim and the affidavit in support of the application and decide whether the plaintiff has made out what is called a prima facie case to entitle him to the court's decision, even in the absence of defence."

It is provided by Order 14 rules, 1. 2, 3, 5 and 9(1) of High Court (Civil Procedure Rules), 2004 (C.I 47) follows:

"1. Application for summary judgment

Where in an action a defendant has been served with a statement of claim and has filed appearance, the plaintiff may on notice apply to the Court for judgment against the defendant on the ground that the defendant has no defence to a claim included in the writ, or to a particular part of such claim, or that the defendant has no defence to such a claim or part of a claim, except as to the amount of damages claimed.

2. Method of making application

(1) The notice of the application shall set out the reliefs sought by the plaintiff.

(2) The notice shall be supported by an affidavit verifying the facts on which the relevant claim or part of a claim is based, and stating that in the opponent's belief there is no defence to that claim or part of a claim, except as to the amount of any damages claimed.

(3) Notice of the application, a copy of the affidavit in support and thereof of any exhibit relating to it, shall be served on the defendant not less than four clear days before the day named in the notice for hearing the application.

(3) Defendant may show cause

(1) A defendant may show cause against the application by affidavit or otherwise to the satisfaction of the Court.

(2) Where the defendant proceeds to show cause, the court may order the defendant or in

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1 Nwadialo F. Civil Procedure in Nigeria, 2nd ed. page 515
2 [2017]-2018] 1 SCLRG 22

the case of a body corporate, any director, manager, secretary or similar officer of it, or any person purporting to act in such capacity to attend and be examined on oath or to produce any document if it appears to the court that special circumstances make this desirable.

5. Hearing of the application

(1) On hearing of the application the Court may

(a) give such judgment for the plaintiff against the defendant on the relevant claim or part of a claim as may be just having regard to the nature of the remedy or relief sought, unless the defendant satisfies the Court, with respect to that claim or part of it, that there is an issue or question in dispute which ought to be tried or that there ought for some reason to be a trial of that claim or part of it.

9. Setting aside judgment

A judgment given against a defendant who does not appear at the hearing of an application under this Order may be set aside or varied by the Court on such terms as it considers just upon an application brought within fourteen days of the service on the defendant of notice of the judgment."

This paper is to analyse the general procedure under which summary judgment could be granted by the court. Whether it is granted based on the fact that the defendant has no defence. Does a general denial of the defendant's statement of defence inform the court that the defendant does not have defence? In other words, does the court grant the application simply because it wants to simply dispose of cases without delay? As poignantly stated by Benin JSC in Abivam Ltd case supra:

"This appeal brings into focus once more, the scope and limit of Order 14 of the High Court (Civil Procedure Rules), 2004 (CI 47). This rule has become popular even among students of law, because we are made to believe that it is the shortest route to obtain judgment in liquidated claims in particular, without going through the travails of litigation. However, to the unwary judge who falls into that trap, he may be tempted to dismiss a defence to a claim under this order, as it were to save time…"

The author is of the view that even though application for summary judgment is one of the shortest way to obtain judgment without any plenary trial, it should not be granted just for the fact that the defendant has no defence. The author submits that the court should examine the pleadings, writ of summons, statement of defence and affidavit evidence properly before it exercise its discretion of granting the application. Where even a paragraph in the statement of defence raises triable issue the application for summary judgment should not be entertained.

The courts have over the years provided guidelines for the invocation of the provisions under Order 14 of the High Court (Civil Procedure) Rules, (2004) which every trial judge must observe lest a defendant should be denied a hearing on merits without justification. Denman J. in the case of *Manger etc v Cash*[3], cautioned that: "The jurisdiction is one to be exercised with great care, so as not to preclude a party from raising any defence he may really have. The judge is

3 (1889) 5 TLR 271

not to make the order if either he is satisfied that there is a defence or that the defendant should be allowed to defend."

In applications under Order 14 r 9 of CI 47, it is not enough for the applicant to show cause that he was not present at the hearing but go further to show that he has a defence to the action or as is peculiar to Order 14 applications, there is some reason for which the action ought to proceed to trial. The learned judge Gbadegbe JSC in the *Roomjin v Boadi* case supra, opined that "in the opinion of the court the practice of the court requiring parties who seek to set aside default judgments to show a defence on the merits equally applies to applications mounted under Order 14, r 9 of CI 47."

By this dictum from the learned judge, it can be argued that the purpose of summary judgment is not just to suppress the defendant because he has no defence and therefore the court should enter final judgment for the plaintiff. The order can be properly be invoked if the applicant demonstrate beyond reasonable doubt that the defendant's defence is sham. Benin JSC in the *Abivams Ltd case* (supra) lamented and said: "The rules of natural justice prevail in all proceedings, hence the requirement that a person should not be made to suffer unless he has been heard in his defence, except by his own showing he does not want to be heard or clearly he has no defence to an action and should therefore not engage in a wild goose chase."

What the court must consider in granting application for summary judgment to plaintiff

In *Halsbury's Law's of England*[4], the learned editors discussed what should be of concern to the court in its consideration before summary judgment application can be granted as:

"The power to give summary judgment under Order 14 is intended to apply in clear cases, where there is no reasonable doubt that the applicant is entitled to judgment and where it is inexpedient to allow a defendant to defend for mere purposes of delay. Leave to defend will therefore be given where the defendant shows that he has a fair case, that there is an issue or question which ought to be tried, or that there are reasonable grounds for setting up a defence or even a fair probability that he has a bonafide defence."

The learned editors statement on the circumstances under which an application for summary judgment should be granted by the court is that "*there must be no reasonable doubt" that the applicant is entitled to judgment.*" This means that the threshold under which summary judgment could be granted is high and not for the fact that the defendant has no defence.

Baffoe-Bonnie JSC pithly set out what must guide the trial judge before whom an application for summary judgment is made in the case of *Sanunu v Salifu*[5]. To determine whether a triable issue has been raised, the court in its duty must be sure that:

"When all the circumstances are looked at…what emerges…is that the appellant (respondent to the application) has put forward a defence which if it can be proved, the action against him must fail. It may be that he will not be able to prove it at the trial that is not the question. The question is the outcome of the action on the assumption that he is able to prove what he alleges.."

4 Vol. 37 (4th edition), paragraph 414 at pages 308-309
5 [2009] SCGLR 586

Summary judgment applications should not be applied just because the defendant has no defence to the suit. I am of the view that trial judges should scrutinize the pleadings, and the affidavit evidence carefully before it can deny the defendant the opportunity to contest the case on its merit. In *Sadwani v Al-Hassan*[6], the Court of Appeal per Wood JA (as she then was) said:

"In applications to sign final judgment, the trial judge was required to examine the pleadings and determine whether there existed a bona fide or good defence known in law. Once any of them is established, it would constitute triable issue. It could be an issue of fact or law…"

In summary judgment applications, the court must be satisfied that on the facts and the law, the defendant ought to be given the opportunity to be heard on its merit, where his defence raises reasonable and arguable points and is not intended merely to cause delay and is not a sham. A complete defence is not required at this stage, but as was held in *Wallingford v Mutual Society*[7], a mere denial is insufficient; the defendant must give sufficient facts and particulars to show that there is a bona fide defence.

In one of the older editions of the English Supreme Court Annual Practice known as the *White Book*[8], under the heading 'leave to defend', the learned authors made it clear that leave to defend should be given in clear terms. They said as follows:

"Leave to defend is to be given unless it is clear that there is no real substantial question to be tried (*Codd v Delap* 1905, 92 LTHL) that there is no dispute as to facts or law which raises a reasonable doubt that the plaintiff is entitled to judgment, *Jones v Stones*[9]

As a general principle where a defendant shows that he has a fair case for defence or reasonable grounds for setting up a defence or even a fair probability that he has bonafide defence he ought to have leave to defend."

Furthermore, at page 192 the learned authors writing under the heading "Question of fact", cite the following as instances in which leave to defendant has been granted. "Uncertainty as to the amount actually due:[10]

Again, Giles Francis Harwood in his well-known book *Odgers Principles and Practice in Civil Actions in the High Court of Justice*[11], buttresses the points I have already made. He writes:

"The defendant is not bound to show a good defence on merits. He must however satisfy that there is an issue or question which ought to be tried or that there ought for some reason to be trial of the claim. If therefore the defendant shows such a state of facts as leads to the inference that at the trial of the action he may be able to establish a defence to the plaintiff's claim he ought not to be debarred of all power to defend the demand made upon him…and leave to defend may be granted on such terms as may be thought just.[12][13]

6 [1999-2000] 1 GLR 19 CA
7 (1880) 5 App Cas 685; 29 WR 81 HL
8 Page 191
9 (1984) AC 122.
10 Lynde v Waithman [1985] 2 QB 180
11 (19th ed) at p. 63
12 (Per Brett LJ in Ray v Baker
13 [1897] 4 Ex D

More importantly, in *Wilson v Smith*[14], Anin JA (as he then was) states the principles which govern applications of this nature. True the application was brought under the old Order 14 r 1 of the High Court (Civil Procedure) Rules, 1954 (LN 140A) whose wording is different from the new. But the circumstance remains unchanged and the same legal principles govern their respective applications. His stated position at 161 was that:

"While it is true that the rationale behind summary judgment procedure under Order 14 LN, 140A is to provide the plaintiff with a speedy mode of recovery of judgment…provided of course there is no arguable defence to the action…nevertheless, the Order was not intended as an engine for the suppression of the defendant."

According to the learned judge, the defence filed "ought to be scrutinized for any triable issues." It follows that once the defence is found to contain any such issues, the application ought to be turned down and the defendant asked to defend the action.

I submit that while judgment procedure is a useful tool, especially in commercial cases, to avoid waste of time and resources in cases where it is clear in law and fact that no defence exists for which the court should put its resources to hold a full trial, it is not meant to enable the plaintiff or the court to cavalierly disregard a defence that calls for a determination on the merits by the court. In *GIMPA v Koans Buildings Limited*[15], Agyeman JA held as follows:

"In our judgment, having regard to all the matters, the affidavit in support of and against the application, the attached documents and the statement of defence which raised matters of non-performance of the contract as set out in the MOU, the defendant raised reasonable and arguable points requiring the determination of the court, and was clearly not a ploy to cause delay, nor was it a sham."

The learned judge continued on the same page as follows:

"In our review of the evidence, it seems to us that the learned trial judge did not concern himself with the matters raised by the defendant at all for which determination would be required by the court. In our view, the learned trial judge's neglect thereof, resulted in the grave injustice of refusing to permit the first defendant who had raised pertinent contentious matters, the right to defend the suit. This notwithstanding the doubtful fact of whether the second application could have been brought in a suit in which the first application for summary judgment was brought, and was apparently concluded with an amicable settlement…..The summary judgment entered for the plaintiff at the court below…..is hereby set aside."

By this decision it can be argued that the disclosure of cogent defence was the pertinent matter to consider in the exercise of the court's discretion whether to grant or refuse the application.[16]

In *Ballast Nedam v Horizon Marine Construction*[17], the Supreme Court per Gbadegbe JSC also made the observation that even though summary judgment applications are meant to curtail trial if the there is no good defence by the defendant it should be exercised with extreme care. The learned judge held (Holding 1):

14 [1980] GLR 152 CA
15 [2020] 158 GMJ 184 CA
16 Abivams Ltd v Platon Gas Oil (Ghana Ltd) supra
17 [2010] SCGLR 435

"Although the procedure for summary judgment under Order 14 of the High Court (Civil Procedure) Rules, 2004 (CI 47), enables the plaintiff to obtain speedy and summary judgment without trial even in cases where the defendant to the action expresses an intention to defend the action, the court may only grant the application in cases where the defendant is not able to set up a good defence or raise an issue which ought to be tried. In the instant case, the allegation by the defendant-respondent that the mode of payment to the plaintiff-appellant was subject to the plaintiff satisfying the requirement contained in clause 4 of the agreement was a good defence to the action under rule 3(1) of Order 14 as rightly decided by the Court of Appeal; it also raised an issue which under rule 5(1)(a) of Order 14 comes under the description "there ought for some other reason to be a trial of that claim or part of it." However, the power conferred on the trial court under Order 14, r 3(2) is to be exercised in exceptional circumstances."[18]

The question of setting aside summary judgment entered in the absence of a party

There is the question regarding Order 14 r 9 of (CI 47) by which a summary judgment entered in the absence of a party may be set aside. The critical issue to be decided turning on this provision is what constitutes "absence" within the meaning of Order 14 r 9 of CI 47.

This can be considered by first considering the obligation placed on a respondent to an application for summary judgment as provided in Order 14 r 3(1) of CI 47 in the following words:

3. Defendant may cause

(1) A defendant may show cause against the application by affidavit or otherwise to the satisfaction of the court

This entitles the plaintiff to do so, as the rule says a party may show cause either by affidavit or otherwise. In *Abivams Ltd* case supra, the Supreme Court per Benin JSC held that: the expression 'otherwise' includes the pleadings so far filed on record. On the same point, in the case of *Ray v Newton*[19]Hamilton LJ, held the view that defendant's affidavit is not conclusive and does preclude him from relying on defences not raised in it. The appellant is given much latitude to introduce any plausible or credible defence to the claim, subject of course to the test of relevancy, in order not to be shut out. And he may do so in an affidavit or by reference to existing pleadings or other acceptable ways of introducing evidence in court. And the court is bound to have regard to everything the appellant has to offer to guide it in making a determination.

In an earlier case of State Construction Corporation v Boakye[20], the Court relied on an English Supreme Court Rules, which was in force at the time and held that: "Any judgment given against a party who does not appear at the hearing of an application under Rule 1 or Rule 5 may be set aside or varied by the Court on such terms as it thinks fit."

The facts were that the court entered judgment for the plaintiffs against the defendant under Order 14 r 1 of High Court (Civil Procedure) Rules, 1954 (LN 140A). On the same day a motion to set aside the judgment was filed by the defendant. According to learned judge, "it is not surprising to me that a motion to set aside the judgment could be filed the same day the judgment was given because my

18 Anglo-Italian Bank v Wells; Anglo-Italian Bank v Davies (1878) 38 LT 197; Roberts v Plant [1895] 1 QB 597 cited.
19 [1913] KB 258, 249
20 [1976] 1 GLR 126

own recollection of the matter is that immediately after I had entered judgment for the plaintiffs in the absence of the defendant's counsel, he appeared in court and was told of what had happened."

However, counsel for the plaintiffs, raised a preliminary objection to the application to set aside the judgment, the substance of his objection is that a judgment obtained under Order 14 r 1 cannot be set. In effect counsel is saying that such a judgment is conclusive against the defendant and it cannot be set aside. He can only appeal if he so desires. Counsel relied on an English case of *Spira v Spira*[21] and a Ghanaian case, *Mansah v Kaawuoh*[22]. The English case of *Spira v Spira* in effect decided that a judgment obtained under Order 14r 1 of the rules of the High Court could not be set aside. It is not a judgment by default as under Order 27 r 16. In the local case of *Mansah v Kaawuoh supra*, Djabanor J. as he then was relied on *Spira v Spira* and also held that a judgment obtained by Order 14 r 1 of the High Court (Civil Procedure) Rules, 1954, could not be set aside.

The Court's ruling was influenced by the fact there is no provision under Order 14 (which consists of ten rules) permitting judgment thereunder obtained to be set aside. The court continued thus:

"Nevertheless, Order 74 of the High Court (Civil Procedure) Rules, 1954 provides as follows:

"Where no provision is made by these rules the procedure, practice and form in force for the time being in the High Court of Justice in England shall, so far as they can be conveniently applied, be in force in the Supreme Court of Ghana."

According to the Court when Spira v Spira supra was decided in 1939 in England, Order 14 consisted of ten rules only as our own, and was in identical terms. But since 1962 an additional rule had been made to the English rules which now number eleven as against our own ten rules.

In effect this decision was based on the English rules which to my estimation interpreted "absence" to be physical "absence" of counsel and not for filing affidavit or otherwise.

However, in the case of *Roomjin v Boadi*[23], the Supreme Court per Gbadegbe JSC in interpreting "absence" within the meaning of Order 14 r 9 of CI 47 held thus:

"In our opinion, applications for summary judgment are intended to cater for situations in which a defendant has no defence to the action and emphasized by the manner in which such a party may show cause against the application as provided for in Order 14 r 3 of CI 47. Accordingly, the defendant or any respondent to an application who is served and files an answer to the application by affidavit or otherwise has placed before the trial judge the necessary materials to enable the court determine if the application may be granted. Once such a process is filed as indeed, was done by counsel for the defendant in the matter herein, the court is seised of the application in which case the judge who hears the application has to decide whether on the processes before him, the defendant has satisfied him that there is any question or dispute which ought to be tried or for some other reason there ought to be trial…"

The learned judge continued on the next page of the report as:

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21 [1939] 3 All ER 924 CA
22 [1961] GLR (Pt. II) 777
23 [2017-2020] 2 SCGLR 581

" A defendant who having been served with notice of an application for summary judgment files an affidavit in answer to the application as the facts in the instant appeal portray but does not attend the hearing of the application cannot say that the judgment rendered by the court is on account of his absence. The correct position discernible from the settled practice in applications for summary judgment is that the decision in such case was reached by the court after careful consideration of the application and the answer thereto and the reasonable inference is that the defendant did not satisfy the court that he has a defence to the action or for some other reason the matter ought to proceed to trial. The defendant's obligation to show cause against the application must appear from the affidavit or otherwise. It is apparent from the rules that the means by which the defendant's burden to show cause is by a process filed in answer to the application and that the defendant's absence within the context of Order 14 r 9 of CI 47, must be interpreted to mean failure to provide an affidavit or other document in answer to the application. Where a defendant, for example intends to raise a point regarding the competence of the application, he is required as a matter of practice discernible from reading of Order 14 of CI 47 as a whole document to indicate same in the affidavit or other process by which he seeks to show cause against the application for summary judgment."

Can this interpretation from Order 14 r 9 of CI 47 mean that 'absence' does not mean physical absence of counsel but failure to file affidavit or otherwise (pleadings and any relevant document). Further it can be argued that if the respondent files an affidavit in answer and does not physically attend court the court will be seised of the matter and hear the application.

The question is if the respondent does not file an affidavit in answer or opposition to the application can it be interpreted to mean that the application cannot be heard because the respondent is "absent" within the context of Order 14 r 9 of CI 47? If the answer to my question is in the affirmative then lawyers will take advantage of that and delay the hearing of the application by not filing an affidavit in answer especially if they know that they may not be able to attend court. I submit that the Supreme Court in coming to the conclusion in the *Roomjin v Boadi* case supra took inspiration from the case of *Republic v Court of Appeal: Ex parte Eastern Alloys*[24], where his Lordship Atuguba JSC opined as follows:

"It is trite law that the rules of natural justice can be waived. In the instant case, there is no suggestion that the applicant company, seeking orders for certiorari and mandamus on grounds of natural justice, as unaware of the hearing date of the motion for stay of execution, yet it absented itself without even representation by counsel. A clearer case of waiver of the right to a hearing could not be imagined. Furthermore, the right to move a motion is the same as the right of the applicant to be heard on the motion, and if the right to be heard is waived, it must follow that the right to move the motion is also waived. The established practice, however, is that in such a situation the motion is normally struck out for want of prosecution. But there is no rule of law that a court cannot in such circumstances elect to hear and decide the motion on its merits, unless it is moved by the applicant who chooses to be absent on the hearing day of the motion. Every judge, subject to particular rules, has the right to control the proceedings of his or her court. Therefore how a motion should be dealt with is within the discretion of the court."

24 [2007-2008] SCGLR 371

I further submit that the decision in the Roomjin v Boadi case will ensure speedy disposal of such applications because the ratio in Ex parte Eastern Alloys case is instructive that regard.

Considerations which the courts apply in proceedings under Order 14 of CI 47

In *Abivams Limited v Platon Gas Oil supra*, the per Benin JSC stated with what the court should consider in an application for summary judgment as:

i. In the case of *Ballast etc v Horizon Marine Construction* (supra), the Supreme Court per Gbadegbe JSC, stated, "the court may only grant the application in cases where the defendant in unable to set up a good defence or raise an issue which ought to be tried.

ii. In *Sadwani v Al-Hassa* (supra), the court spoke of a bona fide or good defence, that means a defence known in law, to entitle a defendant to defeat an application for summary judgment, and also that the court should not rely on affidavit evidence to dispose of triable issues.

iii. In the case of *Jones v Stone*[25], Lord Halsbury stated, that the proceeding established by Order 14 is a peculiar proceeding, intended only to apply to cases where there can be reasonable doubt that a plaintiff is entitled to judgment, and where it is inexpedient to allow the defendant to defend for mere purposes of delay.

iv. In Daimler *Co. Ltd v Continental Tyre & Rubber Co. Ltd (Great Britain) Ltd*[26], where to prevent an unnecessary and protracted trial, it was said the procedure applied, provided there is no arguable defence to the action, nevertheless, where the facts are disputed, this procedure was not appropriate. Among others, the defendant had alleged that the action was commenced without proper authorization.

v. In *Anglo-Italian Bank v Wells*[27], Jessel MR, staed that, "When the judge is satisfied not only that there is no defence, but no fairly arguable point to be argued on behalf of the defendant, it is his duty to give judgment for the plaintiff.

vi. In fact the law is that even when there is a fair probability of a defence, leave to defend should be given.[28]

vii. It is also important to note these significant words of Anin JA, (as he then was), in the case of Wilson v Smith supra

"While it is true that the rationale behind the summary procedure under Order 14 of LN, 140A is to provide the plaintiff with a speedy mode of recovery judgment in cases properly falling under it and thereby to prevent him from being delayed and put to an unnecessary and protracted trial-provided of course there is no arguable defence to the action-nevertheless, the Order was not intended as an engine for the suppression of the defendant. The order is only intended to apply to cases where there is no substantial dispute as to the facts or the law."

25 (1894) AC 122; 70 LT 174
26 [1916] 2 AC; [1916-1] All ER Rep 1917
27 (1878) 38 LT 197 CA at 201
28 See Ward v Plumbley (1898) 6 TLR 198

Conclusion

The power conferred on the court under rule 3(2) of Order 14 is to be exercised in exceptional circumstances in view of the principles espoused from the various authorities discussed in this article. Application for summary judgment is not to be invoked for the mere fact that the defendant does not have a defence. The plaintiff will have to show beyond reasonable doubt that the defendant's defence was a sham in a situation where there is a defence filed. In *Sikasi v Aluminium*[29], Gbadegbe JA (as then was) cautioned that summary judgment application should be granted in exceptional circumstances. The learned judge held as follows:

"A plaintiff who desired to take advantage of the summary judgment process under Order 14 of the High Court (Civil Procedure) Rules, 1954 (LN 140A) as amended by the High Court (Civil Procedure) (Amendment) Rules 1977 (LI 1129 to have proceedings disposed of, had in the ordinary course to apply for summary judgment within a reasonable time after the entry of appearance by the defendant but before the defence was filed, except where the defendant's defence was shown plainly to be a sham…….Consequently, where a defence filed as of right was on the file, the applicant for summary judgment, beyond being able to explain away his delay with a view to clearly demonstrating that the delay was unreasonable, had also to clearly demonstrate that the defence was a sham."

29 [1999-2000] 2 GLR 114 CA