

# In The Supreme Court of Nigeria

On Friday, the 13<sup>th</sup> day of October 1978

## Before Their Lordships

Atanda Fatayi Williams ..... Justice, Supreme Court  
Mohammed Bello ..... Justice, Supreme Court  
Kayode Eso ..... Justice, Supreme Court

**S.C. 185/1976**

## Between

Alhagi Uba Kano ..... Appellant

## And

Bauchi Meat Products Co. Ltd ..... Respondent

## Judgement of the Court

Delivered by  
Kayode Eso. J.S.C

On the 26<sup>th</sup> of June, 1978, when this matter came before us, we allowed the appeal and indicated that we would give our reasons later. We now set out our reasons for allowing the appeal.

The plaintiffs, in High Court of the North-Eastern State, sitting in Bauchi, took, out a writ of summons in the undefended list against the Defendant. The particulars of the claim with supporting affidavit and to which a Statement of Account of the defendant with the plaintiffs was attached are as follows:

"The Plaintiffs claim against the Defendant is for the sum of the sum of ~~₦~~8,496.31 being the balance of the cost of goods sold and delivered to the Defendant at the request of the Defendant which said amount the Defendant has refused and or neglected to pay to the Plaintiff together with the costs this action."

In an affidavit, sworn to by the Chief Clerk of Plaintiffs' Solicitor, it was stated that the claim arose as a result of purchases made on credit basis by the defendant from the Plaintiffs which the Defendant failed to pay off after repeated demands. The affidavit also indicated that the plaintiffs have a good cause of action and that the defendant had no defence to the action. The writ was served, following an Order of Court, by substituted service and having regard to the fact that the defendant filed the Statement of Defence on the 25<sup>th</sup> of February 1973, he must have been served not only the writ but also the Statement of Claim which was dated 7<sup>th</sup> of December 1972. What followed could be seen from the record which reads:

"Odoma for Plaintiff. Defendant absent, not served.

Odoma: I will apply for adjournment to come with a notice for substituted service. I ask for Friday 20/9/74.

Court: Adjourned for 'M' to 30/9/74."

Obviously, there was a hearing notice issued for the 7<sup>th</sup> of September 1974 and this was not served on the Defendant. On the 20<sup>th</sup> of November, 1974, the plaintiffs applied for a motion to have the defendant served by way of substitution. The Court granted the application and the case was adjourned for mention to the 10<sup>th</sup> of January, 1975. Nothing happened till the 13<sup>th</sup> of January 1975 however. On that day, both parties were represented by counsel. The court record shows:

"On 20/4/74 there was an order for substituted service. Court Clerk states there's an affidavit of service to the effect that defendant was served personally on 25/10/74. Makanjuola and Odoma both agree that defendant in this case (NEB/8/74) has sued the plaintiff in another case NEB/11/74. Odoma states has been served with writ on NEB/11/74."

The court record also shows that Odoma, who appeared for the plaintiffs, then addressed the court as follows:

"Since defendant has been shown to have been served in this suit and he has not filed a notice of intention. I ask for judgement under 0.3 r.13 S.C.R."

In reply to Mr. Odoma's submission, Mr Makanjuola stated that the hearing notice which he got in respect of the case was for the 3<sup>rd</sup> of February 1975. Mr. Odoma then confirmed this and the case was adjourned for mention till the 3<sup>rd</sup> of February, 1975.

On the adjourned date, that is 3<sup>rd</sup> February, 1975, Mr. Odoma moved for judgement on the ground that the notice of intention to defend which was filed by the Defendant was filed out of time. Mr. Makanjuola, for his part, urged the court to apply Rule 12 or Order 3 of the Supreme Court (Civil Procedure) Rules which were the Rules applicable to the case and allow him leave to defend the suit on merit. The court however, ruled as follows:

"The so called notice of intention to defend was filed on 20/1/75. By 0.11 r.1 (c), the five days required by 0.3 r.11 started to run from 30/1/75 and by 0.11 r.1 (c) today 3/2/75 is the 4th day. Even if Sunday 2/2/75 could be counted by virtue of 0.11 r.1 (a) the notice of intention to defend is still out of time as today is the day fixed for the hearing of this case. There is therefore no notice of intention to defend, at least I am not entitled to presume that there is or to look at it or its accompanying affidavit. There is further no mention disclosing any reason for this neglect to justify the application of 0.3 r.12. This case was mentioned on 13/1/74 and defendant has more than 2 weeks within which to file his notice of intention to defend within time. He did not do that and by 0.3 r.13 the plaintiffs are entitled to judgement in terms of their suit. Accordingly judgement is hereby entered for plaintiffs against the defendant in the sum of N8,496.31. I will hear counsel on costs."

It is against this decision that the Defendant had appealed to this Court.

Learned counsel representing him, Mr. Aluko-Olokun relied on the following ground of appeal:

"The learned trial judge erred in law in entering judgement for the Plaintiff/Respondents a date when the matter was for mention as per his order made on January 13, 1975.

#### Particulars

The judge failed to comply with the requirement of Order 3 Rule 13 of the Supreme Court (Civil Procedure) Rules and the decision of the Supreme Court in *Stores Vs. Standard Bank (1975) 4 S.c. 51.*"

Learned counsel submitted that as the case, which was on the undefended list, was fixed to be mentioned on 3<sup>rd</sup> February 1975 and not for hearing, the court had no jurisdiction to give judgement. Order 3 Rule 11 of the Supreme Court (Civil Procedures) Rules, submitted learned counsel, gave the defendant at least five days before the day fixed for the hearing and not for the mention of the case to deliver a notice signifying his intention to defend. Counsel directed our attention to the decision of this court in *Olubusola Stores Vs. Standard Bank (Nigeria) Limited (1975) 4 S.C. 51* and also the decision of the West African Court of Appeal in, *A. Y. Ojikutu Vs. F.E. Odeh 14 W.A.C.A. 640*. Mr Aluko-Olokun concluded that the defendant should have been permitted to defend the action. The respondent, when called upon said he had no objection to the court sending back the case for retrial.

We were satisfied, on a careful examination of the record, that on 13/1/75 the learned trial judge made an order directing that the case be adjourned to 3/2/75 for mention. We would like to observe here some confusion as regards dates of adjournment in the record. In the proceedings of 13/1/75 is contained the following:

"Odoma: It is true I have been sent a letter from this court that NEB/8/74 has been adjourned for mention to 3/8/74 ...

Court: In the circumstances, I adjourn this matter to 3/8/74 for mention."

We are satisfied however that the confusion arose as a result of the Suit N<sup>o</sup> NEB/8/74. The date of adjournment was inadvertently put down as 3/8/74 in confusion with the Suit N<sup>o</sup> NEB/8/74. A case could not be adjourned on 13/4/75 (the date of the proceedings) to 3/8/74. We have no doubt in our minds that the adjournment date was 3/2/75. Both counsel also agree that it was. Be that as it may, now, Order III, Rules 11 - 13 of the Supreme Court (Civil Procedure) provides:

- "11. If the party served with the writ of summons and affidavit delivers to the registrar, not less than five days before the day fixed for hearing, a notice in writing that he intends to defend the suit, together with an affidavit setting out the grounds of his defence, then and in such case the suit shall be entered in the general list for hearing.
12. Where any defendant neglects to deliver the notice of defence and affidavit, as described in the last preceding rule, within the time fixed by the said rule, the court may at any time before judgement is entered, on an affidavit disclosing a defence on the merits and satisfactorily explaining his neglect, let in the defendant to defend upon such terms as the court may think just.
13. Where any defendant neglects to deliver the notice of defence and affidavit, prescribed by rule 11, within the time fixed by the said rule, and is not let in to defend in accordance with the provisions of rule 12, then and in such case, the suit shall be heard as an undefended suit, and judgement given thereon, without calling upon the plaintiff to summon witness before the court to prove his case formerly."

In *Olubusola Stores Vs. Standard (Nigeria) Limited (1975), 4 S.C. 51* this court considered these rules and it held:

" ..... Besides this, however is the fact that the order made on the *ex-parte* application on the 11<sup>th</sup> day of June, 1973, had fixed the case only for mention on the 9<sup>th</sup> day of July, 1973 if, as indeed it was the case, the suit was only to be mentioned on that day, the learned trial judge clearly wrongly treated that date as a date fixed for the hearing of the action and erred in law as the entry of judgement on that day was in breach of the provisions of Rule 13. As stated before, learned counsel for the plaintiffs before us conceded that he would not have asked for judgement if he had realised that the case was fixed only for mention on the 9<sup>th</sup> July, 1973."

Having held, and as it was indeed conceded, that this case was to be mentioned on 3<sup>rd</sup> February, 1975, the learned trial judge was clearly in error to enter judgment on that day. He was in breach of Rule 13. Incidentally, the defendant in this case has conceded the point.

An so the appeal succeeded and it was allowed and our order was that the judgement and order of Shehu Mohamed, J. including his order as to costs are hereby set aside. We also ordered that there should be a retrial of the case in the High Court at Bauchi and that the Defendant, if so advised, should be allowed to put in a defence. Costs of this appeal were assessed at ₦300. Costs in the High Court shall abide the retrial.

Appeal allowed.

#### **Counsel**

Mr. Aluko-Olokun ..... For the Appellant

Mr. Odoma ..... For the Respondent