

IN THE MAGISTRATE COURT OF RIVER STATE OF NIGERIA
IN THE PORT HARCOURT MAGISTERIAL DISTRICT
HOLDEN AT PORT HARCOURT
BEFORE HIS WORSHIP S. S. IBANICHUKA, ESQ
SITTING AT SENIOR MAGISTRATE COURT 6 PORT HARCOURT

PMC/SCC/99/2024

BETWEEN

MR GBAGA LEDUM DAVID

—

CLAIMANT

AND

1. FOUANI NEGERIA LIMITED

2. ACCESS BANK PLC

3. GUARANTEE TRUST BANK PLC

—

DEFENDANTS

JUDGMENT

This suit was instituted via a summons of this court filed on 15-04-24, wherein the Claimant claims against the Defendant is for:

- I. The sum of ₦251,600 (Two Hundred and Fifty One Thousand Six Hundred Naira) only being and representing the money debited from the claimants account by the 1st Defendants Point of Sales machine which transaction receipt showed "decline".
- II. ₦500,000.00 (Five Hundred Thousand Naira) as cost.

By a Motion on notice for joinder brought by the Claimant, dated and filed the 27-5 2024 and granted on 6-6-24, the 2nd and 3rd defendants were joined in this suit. All the Defendants in their respective defence denied any liability to the claims of the claimant against them.

In prove of his claim the claimant called a sole witness CW1 and relied on Exhibits "A" and "B". The defendants also called a sole witness each and relied on documents as some documents namely as follows: DW1 relied on Exhibits C & D, the DW2 relied on Exhibits E,E1, E2,E3, F and F1 respectively, while the DW3 relied on Exhibits G and G. the CW1 was recalled for purposes of being cross examined by the joined parties who were not parties to the suit as at the date the CW1 concluded his evidence in Chief and on 8- 7-24 the witness that was subpoenaed by this court for purposes of tendering the 1st Defendants statement of account also testified before this court. At the close of their respective evidence in chief, all the witnesses were cross examined. The matter was adjourned for adoption of final written addresses and on 19-12-24 the counsels adopted their respective final written addresses with the counsel for the 3rd defendant submitting that the claimant claimant has no cause of action against the 3rd defendant, the 2nd defendants counsel submitted that the claimant is not entitled to his claim against the 2nd defendant and urged the court to dismiss the

claim of the claimant against the 2nd defendant with substantial cost. The 1st defendant's counsel submitted that it has been established that the claims of the claimant against the 1st defendant failed and urged the court to so hold. The claimant's counsel submitted that the court should give life to exhibits A, B and G and hold that its claim before the court has merit.

The summary of the facts of this case is that on 25-5-20 the Claimant went to purchase a gas cooker from the 1st defendant Aba Road shop, that the claimant initiated a payment transaction through the 1st defendant's point of Sale machine issued by the 2nd Defendant for the sum of ₦251,600 (Two Hundred and Fifty One Thousand Six Hundred Naira) that the transaction showed declined for which the claimant had pay for the goods with cash. However to the surprise of the claimant he was debited for the transaction which earlier showed "declined" and the sum of for the sum of ₦251,600 (Two Hundred and Fifty One Thousand Six Hundred Naira) was debited from his account with the 3rd defendant. That despite several demands to the defendants to refund the said for the sum of ₦251,600 (Two Hundred and Fifty One Thousand Six Hundred Naira) the defendant have all failed to do so but have shifted liability to each other, hence this suit.

The Defendants on their part all denied liability of all the claimant's claims against them.

Gleaning from the issues raised by the counsels in their respective final written address I shall raise two issues for determination to wit:

1. ***Whether the claimant has proved his case and thus entitled to the grant of the reliefs sought in this case ?***
2. ***Which of The defendants on record is liable to the claims of the claimant before this court ?***

ISSUE 1.

Whether the claimant has proved his case and thus entitled to the grant of the reliefs sought in this case ?

The law is that in civil cases such as this the claimant only has to prove his case on a preponderance of evidence which is the standard required by law . see **F B N PLC V YERIMA (2020) 8 NWLR (Pt 1725)**

The Claimant's first claim before this court is for the sum of ₦251,600 (Two Hundred and Fifty One Thousand Six Hundred Naira) only being and representing the money debited from the claimant's account by the 1st Defendant's Point of Sales machine which transaction receipt showed "decline".

In prove thereof the claimant called CW1 who gave his evidence in chief on 13-5-24 to the effect that he tried paying for a gas cooker he was about to from the defendant's shop, that the transaction showed "declined" but he was debited for the said transaction to the tune of ₦251,600 (Two Hundred and Fifty One Thousand Six Hundred Naira), this averment of CW1 that he was debited the sum of ₦251,600 (Two Hundred and Fifty One Thousand Six Hundred Naira) was not controverted by any of the defendants when they cross examined CW1, rather all the witnesses in this suit namely DW,DW2 and DW3 all testified that the sum of ₦251,600 (Two Hundred and Fifty One Thousand Six Hundred Naira) was debited from the Claimant's account and that same has not returned to the claimant

ount. The law is that facts admitted require no further prove, see **Amadiume v Ibok (2006) 6 NWLR (Pt 975) 158.**

The claimants 2nd claim before this court is for the sum of ₦500,000.00 (Five Hundred Thousand Naira) as cost of this litigation. Claimant as CW1 also testified before this court that he paid his lawyer the sum of ₦500,000.00 (Five Hundred Thousand Naira) to institute this action, all cross examination questions put to the CW1 in this suit were on the claimants 1st relief before this court, this claim is also not challenged by the defendants or contradicted by way of cross examination as stated earlier, facts admitted need no further proof. See **Section 123 of the Evidence (Amendment) Act 2023.**

In the circumstance I find that the claimant has been able to prove his reliefs sought before this court on the standard required by law and in the circumstance is entitled to same. **Section 134 of the Evidence (Amendment) Act, 2023.**

Accordingly this issue is resolved in favour of the Claimant.

ISSUE 2

“Which of The defendants on record is liable to the claims of the claimant before this court ?

As stated in issue One, the claimant is entitled to his claims before this court.

This issue is formulated to answer a germane question which is who amongst all the defendant is liable for the now established claim of the claimant.

Before delving into resolving this issue, I wish to address a salient issue raised by the counsel to the 2nd defendant in paragraph 4.1.1 to 4.1.2 of counsel final written address filed on 19-12-24. counsel submitted therein that the suit of the claimant was instituted against the 1st defendant and not the 2nd defendant and as such the court cannot grant any relief against the 2nd defendant, this court has the duty to look at and its bound by its records of proceedings on any matter before it and takes notice of their contents in arriving at a just decision. See: **AGBAREH V. MIMRA (2008) 2 NWLR (PT. 1071, 378) (SC).**

Accordingly this court also considered the Claimant/Applicants counsel written address in support of his motion on notice for joinder of the 2nd and 3rd defendant in this suit. In Paragraph 1.4 and 1.5 of the said claimants counsel written address, the claimants counsel argued that the court has the power to grant an amendment of its processes before it at any time in the proceedings. He relied on the case of **Gowon v Ike Okongwo (2003) 6 NWLR (Pt 815) at pg 48 Para G.**

it is on record that none of the defendants on record, particularly the 2nd defendant opposed to the grant of the application for joinder. Joinder of parties is said to be the act of uniting as parties to an action all parties who have the same rights or against whom rights are claimed, as either co plaintiffs or codefendants. See **IFEACHO V INLAND MED CO (NIG) LTD (2000) CA 1 NWLR (Pt 639) 105.**

The motion for joinder was not opposed and same having been granted, all defendants to the suit including the 2nd defendant are from the date of granting the motion for joinder and for the purpose of this suit deemed parties who the claimant has a claim against. I so hold.

To the issue at hand being issue two for determination, the trite law that he who alleges the existence of any fact must prove same. see **AMADI V. AMADI (2017) 7 NWLR (PART 1563) S.C.** It is deduced from the evidence of the claimant who testified before this court as CW1 on 13-5-24 that on 25-5-25 he used his Guarantee Trust Bank (3rd defendant) debit card to purchase a gas cooker from the 1st Defendant via the 2nd Defendants Point of Sale (POS) machine which was operated by DW1 for the 1st Defendant. that the transaction showed "declined" but latter the sum of ₦251,600 (Two Hundred and Fifty One Thousand Six Hundred Naira) was debited from his account with the 3rd Defendant and that he has since been making demands and trying to recover his from all the defendants till date claimant is yet to get back his money. This piece of evidence stands uncontroverted before this court and I find on the strength my resolve on issue and the facts before this court that the claimant has proved his assertion before this court.

The DW1 in her evidence on 21-5-24, confirmed that Guarantee Trust Bank (3rd defendant) debit card to purchase a gas cooker from the 1st Defendant via the 2nd Defendants Point of Sale (POS) machine which was operated by DW1 for the 1st Defendant. that the transaction showed "declined" but latter the sum of ₦251,600 (Two Hundred and Fifty One Thousand Six Hundred Naira) was debited from his account with the 3rd Defendant. She added that when transactions on POS fail and the customer is debited that the money goes to the customers bank and not the merchant's bank, that she directed the claimant to go back to his bank (the 3rd defendant), she maintained this position under cross examination as well and that her manager informed her that the money is not in their account.

Further evidence of DW1 before this court on 8-7-24 is that the 1st defendants account officer said the matter has been settled with the 3rd defendant and that the 3rd defendant is with the claimants money and that the account officer of the 1st defendant has been instructed to put the complaint in writing, she relied on exhibits C and D, Exhibit c is the 1st defendants statement of accounts for the period covering the period complained of by the claimant and exhibit C is the 2nd defendants document addressed to the 1st defendant captioned "confirmation of settlement on dispute transaction 539983*****6255" in support of the evidence of DW1 that the 2nd Defendant took a action on the complaint and that the 2nd defendant is not liable to the claims of the claimant. The claimant as CW1 while under cross examination on 13-5-24 also lent his voice to this assertion when he answered that the defendant stated that they have given instruction to the bank to refund me the money, that means the money is with them, yes he showed me his computer to see that he has instructed the bank to refund me the money. "

The 2nd defendant called a sole witness, DW2 in defence of the claimants claim testified on 25-7-24 he stated that unified Payment Services ltd (UPSL) informed the 2nd defendant that the transaction

As been settled to the position of the 3rd defendant, he relied on E1 and E2, under cross examination on 5-8-24 , when I complained my manager informed me that the money is not in our account.

The 3rd defendant through its sole witness DW3, in his evidence in chief on 9-10-24 testified that the DW3 has a relationship with the claimant and that the claimant is their customer, that they received the claimants complaint of a failed POs transaction and upon carrying out their investigation they found out that the money left the claimants account but did not return to the claimants account and that 1st defendant claimed value for the transaction. DW3 relied on exhibits G and G1 respectively. He further stated that the way POS transaction works, is that when money is successfully reversed it reflects back into the the customer's account, this will show on the statement of account.

Under cross examination by the claimant the DW3 answered that the money was not reversed to the claimant's account that the money was reversed back to the 1st Defendants POS account.

However, under further cross examination of DW3 by the 1st defendant on 26-11-24 answered that, failed POS transaction has nothing to do with my line of duty I do not know what UPSL is. The only thing I know is that once a reversal is done it goes back to the customer's account.'

I have carefully considered the evidence of all the defense witnesses, the exhibits they relied on and their answers under the fire of cross examination by opposing parties.

The first conclusion I find irresistible to reach is that in all that is before this court, the evidence of the 2nd defendant in this suit stands unchallenged and that none of the parties to the suit including the claimant has been able to establish any liability against the 2nd defendant, in the circumstance I agree with the 2nd defendants counsel that the 2nd defendant is not liable to the claim of the claimant.

With the defence of the 2nd defendant having been upheld and the 2nd defendant safely out of the way, I proceed further to narrow the issue for determination to the 1st and the 3rd defendants.

As stated earlier, the Defence of the 1st and 2nd defendants appear to complement each other in that the 1st defendant claims it did not get value for the translocation and that it instructed the 2nd defendant to carry out an investigation into the claimants complain and that the 1st defendant did so and came up with a prove of a report that it had carried out the investigation, treated the complaint through UPSL and tendered prove before the court. It is worthy of note that despite how many times UPSL was mentioned in this suit, the said UPSL was not joined in this suit neither was any staff of UPSL called upon to state their position in this suit.

Having stated that the defence of 2nd defendant complements the defence of the 1st defendant in this suit, that is that the DW2 evidence corroborates the evidence of DW1, in circumstances like this, the law allows the opposing party (is defendant) to take advantage of the evidence of the opposing party (2nd defendant) that supports his case to strengthen his own case as long as the evidence corroborates his case. This is the situation that the 1st defendant is in this case. See UMAR V GEIDAM (2019) 1 NWLR (Pt 1652)

however, having evaluated the evidence of the DW3, which are in the records of this court and which I have reproduced some above, I find that the DW3 was throughout his answers to cross examination questions either not the right officer of the 3rd defendant to call as a witness or the DW3 was just being evasive. The superior courts have stated that averments that the defendant is not in a position to admit or deny a fact or an allegation is now without doubt an admission of the fact or allegation see : Ezeokonkwo v okeke (1991), 2 NWLR (Pt 173) 331.

Under cross examination of DW3 he kept answering "I do not know" I am not aware" endlessly. In the case of OWAKAH V R S H P D A,(2022) 12 NWLR (Pt 1845) 463 the supreme court held that the effect of evasive response to questions asked during cross examination by way of a litany of "I don't know," by a witness does constitute any positive or sufficient denial of the other parties averments and evidence. And in fact such amounts to an admission of the opposing parties evidence. I so hold that the answers of the DW3 to questions put to him particularly as regards the workings of the bank when it comes to failed POS transactions amounts to an admission of not the claimants claims but also an admission of the shifting of the blame from the 1st defendant to the 3rd defendant.

The DW3 in evidence before this court did testify on 26-11-24 that upon investigation by 3rd defendant into the complaint of the claimant, that the 3rd Defendant discovered that the 1st defendant received value for the money. Further under cross examination the same DW3 in separate answers to cross questions of the Claimant and the DW2 did answered that what I know is that once reversal is done, it goes back to the customer's account. I find these answers in conflict with each other,

The as upheld in the case of YUSUF V OBASANJO (2005) 18 NWLR (Pt 956) 96 is that where two pieces of evidence , one of which affirms the contrary or opposite of what the other says, they are inconsistent in nature, one contradicts the other and the court cannot pick and choose which one to credit and which one to discredit . the judicial attitude is to reject the two pieces of contradictory evidence as unreliable and of no probative value.

The law is that the burden of proof in civil cases has two distinct facets , the first is the burden of proof as a matter of law and the pleadings, normally termed as "the legal burden of proof", the second is the burden of proof in the sense of adducing evidence usually described as the "evidential burden of proof" (which is what we are concerned with in the circumstances of this case), while legal burden of proof is always static and never shifts, the evidential burden of proof shifts or oscillates consistently as the scale of evidence preponderates. See the case of **APOSTLE PETER EKWEZOR & ORS V. REGISTERED TRUSTEES OF THE SAVIOR APOSTOLIC CHURCH OF NIGERIA (2020) LPLER – 49568 (SC)**

From the evidence before me in the instant case, I am satisfied that the 1st Defendant has discharged the burden of proof required of it to prove that it is not liable to the claim of the claimant.

The burden did shift to the 3rd Defendant and from the facts available to me in this case and the evidence before this court, the 3rd has failed to exculpate itself from liability of the claims of the claimant.

From the forgoing I find that the 1st defendant has been consistent with his defence and I find the defence of the 1st defendant more believable than that of the 3rd defendant whose defence is inconsistent. In the circumstance the 1st defendant is hereby absolved of the claims of the claimant and I find the 3rd defendant liable to the claims of the claimant before this court.

Accordingly it is adjudged that the Claimant is entitled against the 3rd Defendant in the sum of

1. The sum of ₦251,600 (Two Hundred and Fifty One Thousand Six Hundred Naira) only being and representing the money owed the claimant by the 3rd defendant.
2. ₦500,000.00 (Five hundred Thousand Naira) as cost.

I make no further orders.

Parties are reminded of their rights to appeal.

Dated this 30th day of January, 2025

Signed:

S. S. IBANICHUKA, ESQ.

30/01/2025.

