IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY
IN THE ABUJA JUDICIAL DIVISION
HOLDEN AT APO

CLERK: CHARITY ONUZULIKE
COURT NO. 15

SUIT NO: FCT/HC/CV/2183/10
DATE: 15-2-2021

BETWEEN:

MR. FOMSI BARIKI BARI……PLAINTIFF

AND

ECOBANK NIGERIA PLC……DEFENDANT

JUDGMENT
(DELIVERED BY HON. JUSTICE SULEIMAN B. BELGORE)

This case has had a chequer history. We battled with several Motions to settle preliminary matters and gave opportunity of fair hearing to both parties at the on-set of hearing. The statement of claim was amended three (3) times. That was on 7/2/12, 6/3/13 and 2/7/14.

Even when the Plaintiff finally settled on the content of their pleading, there was the problem of service of the amended statement of claim. When that was sorted out, the parties mooted the idea of settlement out of court.

On 30/4/13, learned Counsel to the Defendant Mr. Ikechukwu Odanwu while asking for an adjournment informed the Court thus:

> *"We have just been served with the amended statement of claim. They raised some facts which we intend to react to. We are even contemplating settlement with them. In the circumstances, I am asking for a short adjournment to enable us proceed with settlement or file our own amended statement of defence".*

On 18/6/13, when the case came up in Court for hearing, the Plaintiff's witness was not in Court. And Plaintiff's Counsel asked for an adjournment.

The Defendant's Counsel did not oppose the application for adjournment by saying simply:

> *"Infact, settlement is in progress. So, no objection.*

On the 5/2/14 when the matter came up, the Defendant and their Counsel were absent. It was then, Mr. N. A. Idakoro of Counsel to the Plaintiff informed the Court that settlement had failed.

On 13/5/14, we started hearing and PW1 by name Fomsi Barika Bari was put in the witness box. Not quite some minutes when he started testifying on oath with the Bible, his counsel ran into some murky waters. He quickly sought for an adjournment to enable him put his house in order. There was no objection from the Defendant's Counsel and an adjournment was granted to 2/7/14.

By 2/7/14, the Plaintiff's Counsel had filed another Motion on Notice number M/5451/14, praying for a further amendment

to the statement of claim. The application was moved and granted. We adjourned to 23/10/14.

On 23/10/14, the case could not go on due to the absence of the Plaintiff's witness in Court. We adjourned to 10/12/14. On 10/12/14, it was the same story.

We reconvened in Court for trial to proceed on 18/3/15. Alas, the Defendant and their Counsel were absent in Court and we took a further adjournment.

On 26/10/16, the PW1 who was put in the witness box for the 2nd time could not proceed further after adopting his two previously sworn statements on oath as his evidence. The reason for the punctuation or brake in his testimony was given by the Counsel to the Plaintiff thus:

> *"At this juncture, I apply for a short adjournment. This is because of the conflicting dates i.e. 10/10/12, 25/5/11, and 26/6/12 and the cancelling in the years to reflect 2014 as found in the witness statement on oath as a result of the various amendments of our statement of claim. We regret the errors and confusion. We intend to put our house in order before the next adjourned date".*

The next adjourned date was 9/2/17 on that 9/2/17, there was another mixed up as regard the new statement on oath made by the PW1. Learned Counsel to the plaintiff apologised to the Court profusely and said;

> *"I take responsibility for all these errors and mixed-up. I started this case and*

along the line, I was involved in something else. That explains why some of these things are happening. We intend to put our house in order……"

We adjourned to 21/3/17. By 21/3/17, another Motion on Notice – M/3169/17 was filed at the instance of the Plaintiff's Counsel. It was to enable them file another statement on oath of the witness. The application was granted and we adjourned to 11/5/17 for continuation of hearing. PW1 eventually completed his testimony on that 11/5/17.

Another very important reason why this case suffered the long delay is the Tribunal Assignment this Court was saddled with in 2015, 2016 and 2019. It would be re-called that I served in Bayelsa, Ekiti and Edo States as Chairman Election Petition Tribunal.

The above preamble is to give us an hindsight of why a case that started in 2010 is just being concluded today.

Be all the above as it may, what do I found in this case? The Plaintiff in his statement of claim (as amended) prayed for the following four (4) reliefs:

(1) An Order for payment of the sum of N2,437,000.00 (Two Million, Four Hundred and Thirty-Seven Thousand Naira) only, being the amount fraudulently drawn from the Plaintiff's account held with the Defendant.

(2) An Order for the payment of the sum of N5,000,000.00 (Five Million Naira) only being General and Exemplary damages against the defendant, for negligence and for the psychological and emotional trauma caused by the Plaintiff.

(3) The sum of N200,000.00 (Two Hundred Thousand Naira) only being the cost of this suit.

(4) An Order for payment of 15% bank interest on the total sum illegally drawn on the account being N2,437,000.00 (Two Million, Four Hundred and Thirty-Seven Thousand Naira) from the date of last withdrawal till the final liquidation and the account, made free and operational.

In prove of the above claim, the plaintiff – Mr. Fomsi Barika Bari – testified for himself as PW1. He is a Christian, Adult, Nigerian and lives at No. 26, Lord Lugard Street, Area 11, Abuja. He made two sworn statement on oath variously on 26th October, 2016 and 10th February, 2017. He adopted the two statements as his evidence in Court.

Three letters were admitted in evidence through him as exhibits. They were marked as follows:

Exhibit A: A letter headed "Fraudulent Withdrawal on account number 0071060103484401 dated 6/4/10"

Exhibit B: A letter headed "Re-withdrawal on account number: 0071060103484401 – Fomsi Barika" dated 15/4/10.

Exhibit C: A letter headed "Re-account No: 0071060103484401 – Fomsi Barika Bari dated 15/5/10.

Under cross-examination, the PW1 said as follows:

> *"I operate savings account. I am the only person that can make withdrawal from it. I opened the account when I was in Presidential Hotel Port Harcourt. I have*

never authorised anybody to make withdrawal for me. I made the report in Port Harcourt. They did not reply me officially. I made verbal complaints. And I was made to put down something at Presidential on a plain sheet of paper. I was never invited to any panel of investigation. I made the report the day I got the alert of the last withdrawal. It was when they check, they now discovered previous withdrawal of which I did not get any alert. Withdrawal were made at Dei-Dei, while I was in Port Harcourt".

PW1 under re-examination maintained that he made an oral report initially but was given a paper to put it into writing.

On 4/10/17, we were to take the subpoenaed witness of the plaintiff but he was absent. As a result, the plaintiff closed their case and we adjourned for defence.

The Defendant Bank in their statement of defence, denied liability. And in prove of their denial, they called only one witness. No document was tendered.

The Defendant Bank's witness is Mr. Benjamin Abu, a paying Teller staff with Ecobank Nigeria Limited. He lives at Madalla in Niger State but work in the Dei-Dei Branch in Abuja. This witness, who testified under oath with the Bible as DW1, and adopted his sworn statement as his evidence-in-chief in this case. It was a brief testimony but was grilled at length during cross-examination which was very revealing and illuminating. Part of it reads:

"I am the Teller who paid the plaintiff on all the 4 transactions. All the transactions were not made in one day……
……
……..
In our Bank, w have CCTV Cameras in the Banking hall and sensitive areas in the Bank……
…
……
……..
My Branch is in Dei-Dei market. The number of customers we attend to in a day is not so much high.
We have record of our customer's transactions. It is possible for the Bank to produce the record. I said the sum withdrawn was subsequently paid into the Bank.
I attended to the customer on that day and can identify him. Yes, I know the customer. He has never come to the branch before. In the course of investigation, we look at all the transactions of the customer. We also look at the CCTV Cameras during investigations. The teller is available in the Bank……"

The DW1 was not re-examined. All attempts to call the 2nd witness for the Defendant tragically failed. The witness was not in Court on 7/12/17, 28/2/18 and we were told on 25/6/18 that the intended witness died in motor accident.

The deceased was the Branch Manager of the Defendant at Dei-Dei. Consequently, the Defendant closed their defence. We adjourned for address.

Subsequently, I proceeded on Tribunal assignment which I alluded to in the earlier part of this judgment and we only resumed back in this Court for final address on 17/2/20.

On the 17/2/20, the two counsel adopted their written addresses as their final argument in support of their respective cases. We adjourned to 30/4/20 for judgment.

Before that due date, COVID-19 lockdown occurred, End-SARS protest surfaced which occasioned a lot of disruptions to the Court sittings.

Ikechukwu Odanwuof Counsel to the Defendant filed the written address and adopted it has his argument in Court. Learned Counsel submitted two issues for determination; to wit:

(1) Whether the plaintiff has proved that the withdrawals made in his account 0071060103 on 29/12/09, 31/12/09 and 8/01/10 were not made by him.

(2) Whether the plaintiff has made out a case entitling him to the reliefs sought.

On his part, Mr. Steve Emelieze of Counsel to the Plaintiff, filed adopted their written address and submitted a lone issue for determination, to wit:

"Whether the plaintiff has proved that the Defendant breached their duty of care to

him, by preponderance of evidence, and therefore entitled to all the reliefs sought".

In my humble view and in order to remain focus on the core dispute between the parties, only one issue calls for determination in this case. And that all embracing issue is the second issue presented by the Defendant's Counsel – Ikechukwu Odanwu. The issue is:

"Whether the plaintiff has made out a case entitling him to the reliefs sought".

Before I proceed further in this judgment, I consider it appropriate to state the established facts in this case. They are the facts to which all the parties have agreed. I mean facts not in controversy. They are:

(1) The plaintiff is a customer of the Defendant Bank

(2) The plaintiff has a savings account with number 0071060103484401 with the Defendant and it is domiciled in Trans Amadi Branch Port Harcourt, Rivers State.

(3) The following withdrawals were made from the plaintiff's account at Defendant's Dei-Dei Branch:

   (a) N87,000.00 (Eight Seven Thousand Naira) only.
   (b) N1,500,00.00 (One Million, Five Hundred Thousand Naira) only.
   The above two withdrawals were made on the 29th December, 2009 but at different time.
   (c) N850,000.00 (Eight Hundred and Fifty Thousand Naira) only. This was made on 31st December, 2009

(d) N1,850,000 (One Million Eight Hundred and Fifty Thousand Naira) only. This was effected on the 8th January, 2010.

(4) When the plaintiff became aware of the withdrawals in (3) above on 8/1/2010 he lodged a complaint to the Defendant and dissociated himself from the withdrawals claiming he did not authorise them.

(5) Upon receipt of the plaintiff's complaint, the Defendant credited the plaintiff's account with the sum of N1,850,000 (One Million Eight Hundred and Fifty Thousand Naira) only and caused an investigation into the matter by setting up a Committee.

(6) The Defendant has not allowed the plaintiff to operate the account and make use of the money therein because of the on-going internal investigation and this pending suit in Court.

(7) The cumulative or total amount alleged to have been withdrawn fraudulently from the plaintiff's account stood at N4,287,000.00 (Four Million, Two Hundred and Eighty-Seven Thousand Naira) only, out of which N1,850,000.00 (One Million, Eight Hundred and Fifty Thousand Naira) only was put back into the plaintiff's account by the Defendant Bank. Meaning, that the balance of N2,437,000.00 (Two Million, Four Hundred and Thirty-Seven Thousand Naira) only is yet to be paid back to the plaintiff's account. Hence, this suit at the instance of the plaintiff.

Now, I had earlier said only one issue calls for determination in this case. That is, Whether or not the plaintiff is entitled to all the reliefs he is seeking from this suit.

Both parties agreed on all the above seven (7) enumerated facts. The only area they disagreed vehemently is the fact of who made the various withdrawals. It is the contention of the plaintiff that some staff of the Bank must have made the withdrawal while the Bank insisted the plaintiff himself showed up in the Bank and withdrew the total sum from his account.

Ikechukwu Odanwu Esq, of Counsel to the Defendant argued that the plaintiff is not entitled to any of the reliefs sought in this case. Learned Counsel submitted that the burden of proof is on the plaintiff to show that he did not withdraw the money nor authorise the withdrawal of same. And that the withdrawal was fraudulently made. Also, that the plaintiff must prove or show by evidence that the Bank was negligent in allowing the withdrawal.

Counsel to the Defendant submitted at paragraphs 4.3 his written address thus:

> *"4.3……*
> *……...*
> *……...*
> *To succeed in this suit the plaintiff would have to show that not only that he neither withdrew the said money nor authorised its withdrawal, he must go further to prove that the said money was fraudulently withdrawn, in that the Defendant intentionally deprived him of his money. The onus is therefore on him to substantiate the allegations of*

Defendant's negligence and fraudulent withdrawal from his account".

On the claim of the plaintiff that he was in Port Harcourt at the material dates of withdrawal from his account in Abuja, Mr. Odanwu said the plaintiff has not given any evidence of this fact of *alibi;* this is the way learned Counsel put it at paragraph 4.6 of his written submission;

"4.6……
……..
…….
We further submit that apart from Exhibits A and C before the Court which has not proved that the Defendant was not the person that made the said withdrawals, the plaintiff again failed to lead further evidence whether direct or circumstantial in support of his alibi, thus there is nothing before the Court that will aid the Court in coming to a conclusion that the withdrawals were not made nor authorised by the plaintiff".

See also paragraph 5.2 of his address. Mr. Odanwu further emphasised that the evidence of their witness – DW1 – Mr. B. Abu that he personally paid the plaintiff on all the four times of the transactions were not challenged by the plaintiff. And thus, evidence not challenged must be accepted by the Court. He put it this way at paragraph 5.4 of his address:

"5.4 The material and weighty averments made by the Defendant in its statement of defence as well as borne out by viva voce evidence in Court were neither denied nor

challenged by the plaintiff. The testimony of the Defendant's witness was borne out by the pleadings of the parties as well as the Defendant's uncontroverted and unchallenged evidence. The Court ought to act on same……"

For all his submissions, learned Counsel cited and relied *inter alia* on thecases of **BAYELSA STATE VS.A.G. RIVERS STATE (2006) 18 NWLR (PT. 1012) 596; EMEKA VS CHUBA-IKPEAZU & ORS (2017) LPELR – 41920 (SC); CHUDI VERDICAL CO. LTD VS IFESINACHI INDUSTRIES (NIG) LTD & ANOR (2018) LPELR-44701(SC); OKOROCHA VS PDP & ORS (2014) LPELR-22058(SC); HON. INAKOJU & ORS VS. ADELEKE (2007) ISCNJ; BUHARI VS OBASANJO (2005) 2 NWLR (PT. 910) 241; CHIME VS CHIME (2001) 3 NWLR (PT. 701) 527; MOHAMMED VS KLARGESTER (NIG) LTD (2002) 14 NWLR (PT. 987) 335; OKI VS OKI (2001) 13 NWLR (PT. 783) 89 ETC.**

Finally, learned Counsel urged me to resolve the issue in favour of the Defendant and dismiss the plaintiff's claim as it amounts to gold digging, vexatious and disclosed no reasonable cause of action.

As for the learned Counsel to the Plaintiff, Mr. Steve the onus is on the Defendant to show or prove that he (plaintiff) personally made the withdrawals in question. Mr. Steve further submitted that although they concede that the burden of proving a particular fact rest on the party who asserts it, but that it shifts from side to side where necessary and that the onus of adducing further evidence is on the person who will fail if such evidence is not adduced. The Counsel went further to say the Defendant ought to have placed before the Court, sufficient and material evidence to show that indeed, it was the plaintiff

who drew his funds from the Bank especially that they have been served with a subpoenaed to present documents. See paragraph 4.8 and 4.9 of his address. Mr. Steve put the point frontally at paragraph 4.24 of his address.

For all his submission, he cited the case of **UNION BANK OF NIGERIA VS. OZIGI (1994) 3 NWLR (PT. 333) 385; AND OKUBULE VS OYAGBOLA (1990) 4 NWLR (PT. 147) 723.**Learned Counsel finally urged me to grant the plaintiff's claims.

I have considered these two divergent submissions.

Section 131 of the Evidence Act, 2011, deals with the Burden of Proof. The section provides:

> *(1)"Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts shall prove that those facts exists".*
>
> *(2)"When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person".*

Proof connotes in legal sense the process by which a fact is established to the satisfaction of the Court. The general principle that is trite in this country is that he who alleges or asserts must prove. See S.132 of the Evidence Act. It provides:

> *"The burden of proof in a suit or proceedings lies on that person who would fail if no evidence at all were given on either side".*

See **KOKOROOWO VS OGUNBAMSI (1993) 8 NWLR (PT. 313) 627; JALICO LTD VS OWONIBOYS (1995) 4 SCNJ 256.**

The burden of proof or onus does not remain static but shifts from side to side. See Section 133(1) of the Evidence Act, 2011; **ELEMA VS AKENZUA (2001) 6 SC (PT. 111) 26.**

I have said it herein before, that the onus or burden of adducing further evidence is on the person who would fail if such evidence were not produced.

This leads me now to the most strong and most important question in this case. Who carried out the withdrawal of the plaintiff's money from his account? Is it the plaintiff himself or some faceless individuals? The plaintiff asserted without mincing words that he was in Port Harcourt at the material period of the withdrawal at Dei-Dei, Abuja. The Defendant, through a staff at their Dei-Dei Branch in Abuja (DW1), asserted very powerfully that it was the plaintiff himself that made the withdrawal. DW1 was the paying cashier at the branch at the relevant time.

I ask now, who should I believe and why? I have no difficulty and no slight hesitation in believing the plaintiff that he was not the one who made the withdrawal in question. My reason for moving in the company of the plaintiff is obvious and not far fetched. It is as follows:

(1) The onus is on the Defendant to prove to the Court that it was the plaintiff that withdraw his own money. I say this because the plaintiff had asserted the negative while the Defendant asserted the positive. The plaintiff said he made no withdrawal – NEGATIVE. The Defendant said no, you did – POSITIVE. The rule is that

he who assert the POSITIVE OR AFFIRMATIVE must prove. There is no duty generally on a party to prove the NEGATIVE. See the cases of **ODUKWE VS. OGUNBIYI (1998) LPELR – 2239 (SC). B. A. IMONIKE VS. UNITY BANK PLC (2011) 5 SCNJ; OKAFOR VS. EZENWA (2002) LPELR – 2417 (SC).**

Therefore, the burden is clearly, squarely and firmly on the shoulders of the Defendant to prove by credible and convincing evidence that it was indeed the plaintiff that cashed his money himself on those occasion as he was in Dei-Dei and not Port Harcourt.

I can flog this point in another style and way. Once the plaintiff who is not in custody of his money says he did not make or authorise the withdrawals in focus which is the subject of litigation, the burden that he (plaintiff) was not truthful shifts instantly to the Defendant. So, in my view, it is the Defendant who assert the positive or the affirmative that the plaintiff personally came to the Bank that has the heavy burden to prove their assertion. In the case of **VICTOR NDOMA EGBA VS. ACB PLC (2005) 14 NWLR (PT. 944) 79**,the dispute was about who signed a document presented to the Bank. The plaintiff denied the signature while the Defendant pinned him down to the signature. It was held that the Defendant has the onus to prove that it was the plaintiff that signed and not anyone else that did it.

(2) The next potent question in this judgment is; did the Defendant discharged the burden placed upon them by law? Again, the answer is capital No. this is very clear to me from the record and the scanty evidence produced in Court by the Defendant. At this juncture, let me ask some cut-throat questions. Surely, the answers to the questions will erase any doubt about the

liability of the Defendant to the plaintiff. The question now:

(1) Where is the footages of the Close Circuit Television (CCTV) Cameras that was in operation in the Banking hall when the withdrawals were made? None was put in evidence. Perhaps, if the Defendant has obliged the Court with it, we would have seen the plaintiff when collecting the money.

(2) Where are the cheque book leaflets or ledgers or tellers etc used in withdrawing the money? None in evidence. May be if the Defendant has put any of those documents in evidence, we would have seen the Plaintiff signature on them.

(3) Where is the Report of the investigating Committee set-up by the Defendant? No where to be found is the answer. May be the Report indicted the plaintiff. May be not.

(4) Lastly, why did the Bank returned the sum of N1.5 million to the account of the plaintiff if truly they believe he withdrew the money earlier on?

Since the CCTV footages, the cheque leaflets, or ledgers and investigation reports are in the custody of the Defendant Bank and they did not care to tender them in evidence, I have no alternative than to invoke the provision of S.167(d) of the Evidence Act to this case. That section provides:

> "…….
> ……...
> ……...

and in particular the Court may presume that:

(a) ……..

(b) ……..

(c) ……..

(d) *Evidence which could be and is not produced would, if produced, be unfavourable to the person who withhold it;……"*

The only conclusion or inference or presumption open to me is that if the Defendant Bank had presented the above mention documents in Court, they would have been against their interest. I so hold.

These are my twin reasons for believing the plaintiff that he did not withdraw any money from his account. This issue is therefore resolved in favour of the plaintiff and against the Defendant. He is entitled to the following reliefs which I hereby granted. The reliefs are:

(1) Order for payment of **N2,437,000.00** against the Defendant to the Plaintiff.

(2) **N2,000,000.00** – general damages in favour of the plaintiff against the Defendant. The plaintiff has suffered great emotional and financial stress for his inability to access his fund for almost nine years now. This is not due to his fault but the fault of the Defendant.

(3) 15% interest on the total sum of **N2,437,000.00** from the date of last withdrawal bill liquidation and the account made free and operational.

The following reliefs are refused and therefore not granted.

(1) Special damages. This is not even particularised in the statement of claim and not proved either.

(2) **N200,000.00 –** Cost of this suit. It is also not proved.

That is the judgment of this Court.

……
S. B. Belgore
(Judge)09/02/2021