IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY ABUJA

IN THE ABUJA JUDICIAL DIVISION (APPELLATE DIVISION)

HOLDEN AT GUDU

BEFORE THEIR LORDSHIPS: HON. JUSTICE MODUPE R. OSHO-ADEBIYI

AND

HON. JUSTICE J. ENOBIEOBANOR

ON THURSDAY THE 2ND DAY OF DECEMBER, 2021

APPEAL NO: CVA/504/2020

SUIT NO.: CV/14/2018

BETWEEN:

ECOBANK NIGERIA LIMITED ---------- APPELLANT

AND

1. ANANUKWA AUGUSTINE CHINEDU ---------- RESPONDENTS
2. FIRST BANK NIGERIA PLC

JUDGMENT

This appeal is consolidated with Appeal No. **CVA/ 506/2020**between **FIRST BANK NIGERIA PLC VS. ANANUKWA AUGUSTINE CHINEDU & 1 OR**. The appeal is against the Judgment delivered by His Worship, Magistrate Elizabeth Jones Wonni, in Suit No. **CV/14/2018** between **ANANUKWA AUGUSTINE CHINEDU** (the 1st Respondent in this Appeal) **VS. 1. FIRST BANK NIGERIA PLC** (hereinafter referred to as the 2nd Respondent in this Appeal) **&2.ECOBANK NIGERIA LIMITED** (hereinafter referred to as the Appellant in this Appeal).

The records show that the 1st Respondent had filed a suit against the Appellant and the 2nd Respondent at the District Court, seeking inter alia for a declaratory relief, that the action of the Defendants (now the Appellant and the 2nd Respondent in this Appeal) in withholding, diverting, and denying the Plaintiff (now the 1st Respondent) the use of his fund in the sum of N10,065.00 (Ten Thousand, Sixty Five Naira) which was debited but was notintentionally reversed by the Defendants (i.e. the Appellant and the 2nd Respondent) is unlawful. The Appellant and the 2nd Respondent filed Statement of Defence, respectively. After Parties have exchanged their pleadings, hearing commenced on 9th May, 2018. The Plaintiff (1st Respondent) testified as the sole witness, the 1st Defendant (2nd Respondent) called one witness and the 2nd Defendant (the Appellant) called one witness at the trial. On 4th November, 2019, they adopted their final written addresses and Judgment was delivered on 10th March, 2020, wherein the learned lower trial Court Ordered inter alia the Appellant and the 2nd Respondent jointly and or severally to immediately reverse to the Plaintiff the sum of N10,065.00 ((Ten Thousand, Sixty Five Naira) only, being the amount the Appellant and the 2nd Respondent failed to reverse and to also pay the Defendant the sum of One Million Naira only as general damages for refusing to reverse the said amount. Cost of 200,000.00 (Two Hundred Thousand) was awarded in favour of the 1st Respondent against the Appellant and the 2nd Respondent.

Being dissatisfied with the Judgment, the Appellant filed a Notice of Appeal on 17th June, 2020 and further filed an amended Notice of Appeal on 14th October, 2020, with the following grounds of appeal.

1. The trial Court erred in law and occasioned a miscarriage of justice when it held that the 1st Respondent satisfactorily proved his case (which was premised on the tort of negligence and fraud) against the Appellant and the 2nd Respondent, thereby entitling

him to the reliefs sought in his Plaint that was before the trial Court.

2. The trial Court erred in law when it held as follows:
"The 2nd Defendant failed to discharge the burden placed on it by not adducing sufficient evidence that will convince the court on whether the sum of N10,065.00 was dispensed or not.This failure tends to make the court to believe that (sic) the sum was intentionally not reversed.

3. The trial Court erred in law when it held as follows:
"On the 22nd day of December 2017, the PWI went to carry out some transactions in the Automated Teller Machine of the 2nd DefendantEco bank using the debit card of the 1 stDefendant. He in all carried out 5 transactions, two transaction with the debit card of the 1St Defendant which was not successful and he used his debit card of United Bank for Africa VBA which 3 other transaction were successful. One of the 2 failed transactions was reversed."

4. The trial Court erred in law when it held as follows:
"It is one thing for a transaction to be successful and another for the cash to be dispensed. After the reversed transaction of 10,065.00 the other transactions with UBA, debit card is not issue before the court."

5. The trial Court erred in law when it held as follows:

"The I Stand 2nd Defendants in this suit are jointly and severally ordered to pay the sum of One Million Naira only as damages for refusing to reverse the Plaintiff's money which is the sum of 10,065.00 (Ten Thousand Sixty Five Naira). The sum is also to be paid forthwith".

6. The Judgment of the trial Court is against the weight of evidence.

The reliefs sought from this Court by the Appellant are as follows:-

a. An Order allowing this appeal.
b. An Order setting aside the entire judgment delivered by the trial Court.
c. And such further or other order(s) as this Honourable Court may deem fit to make in the circumstances of this appeal.

At the hearing of this appeal, the Appellant Counsel adopted his brief of argument. The 1st and 2nd Respondents adopted and relied on their brief of argument filed before this Court.

ISSUES FOR DETERMINATION:

In his brief of argument, the Appellant formulated 3 issues for the determination of this appeal to wit:-

1. Whether the trial Court was right when it ordered the Appellant and the 2nd Respondent to reverse the sum of N10,065.00 (Ten Thousand, Sixty-Five Naira) to the 1st Respondent, despite the failure of the 1st Respondent to prove his case?
2. Whether the trial Court was right when it held that the Appellant failed to discharge the burden placed on it by law?
3. Whether the trial Court was right when it awarded general damages of N1,000,000.00 (One Million Naira) against the Appellant and the 1st Respondent jointly and severally?

The Appellant filed a reply brief dated 24/08/2020 where counsel further argued their case.

On the other hand, Counsel for the 2nd Respondent, who is the Appellant in CVA/506/2020, proposed the following issues for determination, which are as follows:-

1. Whether the Court below had the jurisdiction to deliver its judgment after 90 days of adoption of final written addresses and whether the delivery of the said judgment after 90 days of the adoption of final written addresses did not occasion a miscarriage of justice against the Appellant?
2. Whether the Court below was right when it ordered the Appellant to jointly with the 2nd Respondent, reverse the sum of 10,000.00 (Ten Thousand Naira) to the 1st Respondent?
3. Whether the Court below was right when it ordered the Appellant (who is the 2nd Respondent in this Consolidated Appeal) to, jointly and severally, with the 2nd Defendant (who for the purpose of this Appeal is referred to as the Appellant), to pay the 1st Respondent the sum of N1,000,000.00 (One Million Naira) against the Appellant as general damages and 200,000.00 (Two Hundred Thousand Naira) as cost of action?
4. Whether the judgment of the trial Court is not against the weight of evidence adduced before the Court below?

The 1st Respondent, in his response to the Brief of argument to the Appellant (Eco Bank Nigeria Limited) under this consolidated suit canvassed the following issues for determination:

1. Whether the learned trial district court Judge was right in holding that the Appellant and the 2nd Respondent failed to prove that the 1st Respondent got value for the said unreversed amount of N10,000.00 (Ten Thousand Naira) and further ordered that same should be reversed to the 1st Respondent by the Appellant and 2nd Respondent jointly and severally?
2. Whether the lower court was right in holding that the 1st Respondent did prove his case against the Appellant and the2nd Respondent to be entitled to the judgment of the court on the 10th day of March, 2020, and if the judgment thereof was not in tandem with the weight of evidence adduced at the lower court?

3. Whether the order made by the lower court against theAppellant and 2nd Respondent to jointly and/or severally pay to the 1st Respondent the sum of 1,000,000.00 (One Million Naira) only, as general damages was not just and proper, upon holistic appraisal of the evidence before the lower court in view of the circumstance of the case?

The 1st Respondent's Counsel in response to the 2nd Respondent (i.e. Appellant's Brief in CVA/506/2020), formulated four issues for determination as follows:

1. Whether the learned District court Judge was right in holding that the Appellant and the 2nd Respondent failed to prove that the 1st Respondent got value for the said unreversed amount of N10,000.00 (Ten Thousand Naira) and further ordered that same should be reversed to the 1st Respondent by the Appellant and 2nd Respondent jointly and severally?
2. Whether the lower court was right in holding that the 1st Respondent did prove his case against the Appellant and the2nd Respondent to be entitled to the judgment of the court on the 10th day of March, 2020, and if the judgment thereof was not in tandem with the weight of evidence adduced at the lower court?
3. Whether the order made by the lower court against theAppellant and 2nd Respondent to jointly and/or severally pay to the 1st Respondent the sum of 1,000,000.00 (One Million Naira) only, as general damages and 200,000.00 (Two Hundred Thousand) only, as cost was not just and proper?
4. Whether the delivery of the Judgment of the lower Courtof10th day of March, 2020, after 90 (ninety) days of adoption of FinalWritten addresses by parties did in any way occasion any miscarriage of justice against the Appellant nor the 2nd Respondent?

Counsel of respective parties relied on a number of case laws to buttress their points.

Having read and gone through all the processes filed in this suit, the issues for determination as distilled from this appeal are: -

1. **whether the trial court erred in law and occasioned miscarriage of justice when it held that the 1st Respondent satisfactorily proved his caseand thereby awarded N1,200,000.00 (One Million, Two HundredThousand Naira) against the Appellant and 2nd Respondentfor damages and cost of action.**
2. **Whether the delivery of the Judgment of the lower Court of 10th day of March, 2020, after 90 (ninety) days of adoption of Final Written addresses by parties did in any way occasion any miscarriage of justice against the Appellant nor the 2nd Respondent?**

On the first issue, The Appellant contended that the 1st Respondent having not specifically pleaded and strictly proved the case on which his cause of action at the trial court was premised, which are negligence and allegations of fraud against the Appellant and the 2nd Respondent the trial court erred when it ordered the Appellant and the 2nd Respondent to reverse the sum of N10,065.00 (Ten Thousand, Sixty Five Naira) to the 1st Respondent.

I agree with Appellant and 2nd Respondent Counsel's assertion (only as a general rule) that in the tort of negligence, particulars of facts constituting negligence must be specifically pleaded in a Plaintiff's statement/particulars of claim/plaint and strictly proved during the cause of trial. According to the Appellant's counsel, the law is also emphatic on the point that a blanket allegation of negligence against a Defendant (as was the case at the trial Court) Will not suffice in a claim alleging tort of negligence. He referred us to the case **Kabo Air Ltd. v Mohammed (2005) 5 NWLR (Pt. 1451) 38 at 65-66 paras. H-B.** He

further contended that for an action in negligence to succeed, the Plaintiff must specifically plead and prove the following:

i. That a duty of care was owed to the Plaintiff by the Defendant;
ii. The duty of care owed to the Plaintiff was breached by the Defendant;
iii. The Plaintiff suffered damages or injury as a result of the breach of the duty of care owed to him by the Defendant.

In providing an exception to the above general rule, the Court in the case of **Moses Jwan v Ecobank Nigeria (2020) LPELR-55243 CA,** which is imparimateria with the present case held as follows:

> *"The general rule of evidence is that a plaintiff who alleges negligence has the duty to prove specific acts or omissions on the part of the defendant that will qualify as negligent conduct that caused him damages. However, sometimes circumstances of a case may warrant the Court drawing inference of negligence against the defendant without hearing detailed evidence of what he did or did not do. In such circumstance, the inference connotes that in the absence of explanation from the defendant, the plaintiff has discharged his burden of proof. This iswhat is Where the doctrine of res ipsa loquitur is invoked. Res ipsa loquitur means the thing speaks for itself... There are certain happenings that do not normally occur in the absence of negligence, and upon proof of these, a Court will probably hold that there is a case to answer. " The plea of res ipsa loquitur by the plaintiff is therefore meant to raise an inference of negligence on the part of the defendant in view of the circumstances of the case. Whether or not the maxim applies in a particular case depends on the strength of the inference and the duty of care that the defendant owed the plaintiff. In fact, it is not even necessary to specifically plead the maxim for it to apply. The effect of its application would*

entitle the plaintiff to judgment unless the defendant rebuts the inference and exonerates himself by showing firstly, how the event happened, and secondly, that there was no lack of care on his part or on the part of other persons for whom he is responsible."

At this point, it is necessary to state the brief fact of the Plaintiffs case who is now the 1st Respondent as it reflects in his evidence-in-chief and cross examination. The Plaintiff, a Legal Practitioner, testified as the PWI where he said that the Defendants are known to him. The 1st Defendant is his Financial Institution while the 2nd Defendant, Eco Bank, is known to him by virtue of the transaction he carried out on the 22nd of December, 2017, using their Automated Teller Machine (ATM) outlet with his First Bank Debit (ATM) card. He carried out the first transaction of 10,000.00 (Ten Thousand Naira) and he was debited instantly but the money was not dispensed. He carried out another transaction immediately of Ten Thousand (Ten Thousand Naira), and was debited but money was also not dispensed making a total of N20,000.00 (Twenty Thousand Naira) and each transaction was N10,065.00 (Ten Thousand, Sixty Five Naira). So, he retrieved his first Bank ATM card and slotted in, his United Bank for Africa (UBA), ATM debit card and carried out three transactions of N10,000.00 (Ten Thousand Naira) each and each of the transaction was successful. On the same day, 22nd December, 2017, N10,000.00(Ten Thousand Naira) only was reversed leaving the sum of N10,000.00(Ten Thousand Naira) only, unreversed. After writing series of letters to the 1st and 2nd Defendants, who are the 2nd Respondent and Appellant in this appeal, the said money was not reversed up till date.

It is trite law that the relationship between a customer and his/her bank is a fiduciary relationship as held in **U.B.N. Plc v. Chimaeze (2014) LPELR-22699(SC); (2014) 9 NWLR (Pt. 1411) 166 per Ariwoola, JSC at pages 40-41.** In defining the word "negligence", the Court of

Appeal in the case of **AGI V. ACCESS BANK PLC (2013) LPELR-CA**, held as follows:

> *"By way of prefatory remarks, aimed at understanding the purport of negligence generally, in law, connotes am omission or failure to do something which a reasonable man, under the same circumstance, would do or doing of something which a reasonable and prudent man would not do".*

Flowing from the facts stated above we hold that tort of negligence can be inferred from the facts, the 1st Respondent need not expressly plead negligence. Moreover, as particulars of negligence has been pleaded. See **IFEANYICHUKWU (OSONDU) CO. LTD V. SOLEH BONEH (NIG.) LTD (2000) 5 NWLR (Pt. 656) Pg. 322 at Pg. 360 per Onu JSC.**

It is also the contention of the Appellant that there is no contractualrelationship between the Appellant and the 1st Respondent since the 1st Respondent was not a customer Of the Appellant to warrant the Judgment entered by the lower Court against them. The Appellant further buttressed that the only party the Appellant had a relationship/agreement with is the 2nd Respondent, being a commercial bank with ATM cards that can be used to carry out transactions in any of the Appellant's ATM machines.Having perused the Plaint filed by the 1st Respondent,it is clear in his Plaint and even in his testimony that he used the Appellant's ATM (i.e., Eco Bank Nigeria Limited). It is also clear that in all the transactions he made, N65.00 was deducted by the Appellant as charges for rendering services. Thus, in the examination-in-chief of the 1st Respondent, he said:

> "… the Defendants are known to me. The 1stDefendant is my financial Institution, the 2ndDefendant is known to me by virtue of the transaction that I carried out using one of their ATM outlets".

From the above testimony of the 1st Respondent, which was uncontroverted it simply infers that the Appellant owes the 1st Respondent a duty of care by virtue of the fact that the Appellant displayed its ATM for prospective ATM Card users to use and that such ATM are in proper condition for use. For that alone, the Appellant and indeed the 2nd Respondent cannot deny the fiduciary relationship that subsist between them and the 1st Respondent. Thus fiducial relationship places the banks in a position to ensure due diligence and duty of care in discharging their duties. Accordingly, we hold the View that the Appellant submission that there was no contractual relationship between her and the 1st Respondent since the 1stRespondent was not a customer of the Appellant to warrant the Judgment entered by the lower Court against them is misconceived of no moment and we so hold.

The Appellant and 2nd Respondent also contendedthat the burden of proving that the sum of N10,000.00 (Ten Thousand Naira) was not paid to the 1st Respondent was on the 1st Respondent to establish. They cited sections **Section 131(1) & (2) of the Evidence Act 2011**, which provides as follows;

Section 131(1):

> "Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist".

Section 133 (2):

> "If such party referred to in subsection (1) adduces evidence which ought reasonably to satisfy the court that the fact sought to be proved is established, the burden lies on the party against whom judgment would be given if no more evidence were adduced, and so on successively, until all the issues in the pleadings have been dealt with".

Appellant vehemently contented that the 1st Respondent did not adduce enough evidence for the burden of proof to shift to the Appellant and the 2nd Respondent in this Appeal.

The 1st Respondent on his part in its brief of argument referred the Court to **Section 136 (I) of the Evidence Act 2011**, which provides thus:

> "The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence unless it is provided by any law that the proof of that fact shall lie on any particular person, but the burden may in the court of a case be shifted from one side to the other".

It is settled that in a civil case, the party that asserts in its pleadings the existence of a particular fact is required to prove such facts by adducing credible evidence. If the party fails to do so its case will fail. On the other hand, if the party succeeds in adducing evidence to prove the pleaded fact, it is said to have discharged the burden of proof that rests on him. The burden is then said to have shifted to the party's adversary to prove that the fact established by the evidence adduced could not on the preponderance of the evidence result in the court giving judgment in favour of the party. Thus, the burden is therefore on the customer to first adduce prima facie evidence in support of his case. Where a prima facie case is made out, the burden then shifts to the bank to adduce counter evidence to sustain their defence.

The only logical way in which a bank customer can successfully prove that the ATM of a bank did not pay him cash when he attempted a withdrawal transaction but his account was nevertheless debited is the debit transaction recorded in his statement of account;the onus thereafter shits to the bank to utilize their superior access and control of the ATM coupled with the camera installed to monitor ATM users to prove a successful ATM withdrawal transaction.

The Appellant in their brief of argument stated that due to the nature of an ATM which is automated and computerized, the machine operates itself without human intervention or concurrence. Therefore, when a transaction is carried out using the machine, the machine automatically captures, stores, processes, organises, finds information, and does calculations in respect of that transaction, thereby performing the transaction with 100% accuracy. Hence these duties carried out by the machine can only be proved by the Appellant. We submit,in view of the fact that the technology that controls this transaction was introduced by the bank, the bank being the owner or originator of this technology should be in a better position to give evidence on workings of the ATM bearing in mind that the Respondent has discharged its own burden of proof.

The Appellant in discharging this burden of prove tendered the Closed-Circuit Television (C.C.T.V.) footage for the said exact timeline of the transaction on 22nd December, 2017, as Exhibit DW3 which is annexed in the record of appeal pages 281, 282 and 283. The Appellant stated that the dark image on exhibit DW3 (as put by the District trial court judge)is the PW1 that is the 1st Respondent. The purported image from the CCTV footage is not clear, one cannot identify who is the picture. The Appellant and the 2nd Respondent at the trial court stated that it is only the ATM journal that shows if ATM transaction is successful or not. However, the said journal which is ATM footage Exhibit DW3didnot show the ATM of the Appellant dispensing cash and the 1st Respondent picking up the said cash. In fact, the ATM camera images were so blurred that one could not make out the person in the photo and whether it was in front of an ATM, let alone the ATM of the Appellant. We therefore agree with the learned District Court judge that a closedcircuit Television is also known as a video surveillance and that the video surveillance footage would have been a clear evidence before the court. Hence the Appellant (the 2nd Defendant) failed to discharge the burden by not adducing evidence that the 1st Respondent was paid

on one of the transactions at the ATM and is thereby liable to refund the N10,065.00 (Ten Thousand, Sixty-FiveNaira).

The issue of damages as a general rule is left at the discretion of the trial Court.In the case of **Anazodo v Pazmeck Inter trade (Nigeria) & Anor (2007) LPELR-5147 CA**, the Court of Appeal held:

> *"The Genera/ principle of law is that an award of general damages is a matter for the trial Court and that normally an appeal Court will not interfere with such an award unless: (1) where the trial Judge has acted under a mistake of law (2) where he had acted in disregard of principle. (3) where he acted under misrepresentation of facts (4) where he has taken into account irrelevant matter or failed to take account of relevant matters or (5) where injustice would result if the appeal Court does not interfere"*

After going through the Judgment of the trial Court and the plaint filed by the Plaintiff and the reliefs sought therein, there is no exceptional ground as canvassed upon which we can exercise our discretion to vary the award of damages complained of, by the Appellant and the 2nd Respondent in this case. Accordingly, the Judgment of the trial Court on award of damages of N1,000,000.00 (One Million Naira) and N200,000.00 (Two Hundred ThousandNaira) as to cost in favour of the 1st Respondent is hereby affirmed.

The second issue was principally raised by the 2nd Respondent in CVA/506/2020, the appeal already consolidated with the present appeal.We agree with the submission of 2nd Respondent's Counsel that by virtue of **Section 294 (1) of the 1999 Constitution of the Federal Republic of Nigeria (as amended)**, the Court below was duty bound (only as a general rule) to deliver its judgment within 90 days after adoption of final written address of parties. 1st Respondent submitted that by virtue of **Section 294 (5) of the 1999 Constitution of the Federal**

Republic of Nigeria (as amended), the Judgment delivered outside the 90 days cannot be rendered a nullity for non compliance except the party complaining has suffered miscarriage of justice.

From the submission of both Counsel, the question raised for determination is whether there was miscarriage of justice to warrant the setting aside of the judgment of the lower Court in line with the provision of **Section 294(1) (2) and (5)of the 1999 Constitution of the Federal Republic of Nigeria (as amended)**?**Section 294 (5) of the 1999 Constitution of the Federal Republic of Nigeria (as amended)** states;

> *"(5) The decision of a Court shall not be set aside or treated as a nullity solely on the ground of noncompliance with the provisions of Subsection (1) of this section unless the Court exercising jurisdiction by way of appeal or review of that decision is satisfied that the party complaining has suffered a miscarriage of justice by reason thereof."*

In the caseof **Laromeke&ors v Omini& Anor, 2018, LPELR-44152 CA**, Hon. Justice Mudashiru Oniyangi, JCAheld:

> *"upon a careful reading of S. 294(1) and (5) of the1999 Constitution of the Federal Republic of Nigeria, it became clear to me that any judgment or decision of a court established under the Constitution delivered in more than 90 days after the conclusion of evidence and address is in contravention of S 294(1). Where it is established that the party complaining has suffered miscarriage ofjustice as a result of the delivery of the judgment outside the 90 days prescribed under S.294(1), such judgment can be declared as a null. It is trite that the onus of proving that the delay has occasioned a miscarriage of justice is on the complainant... "*

The 2nd Respondent in proving the said allegation, argued that the Record of Appeal is replete with what transpired at trial before the

Court below - particularly, as it relates to the 2nd Respondent vis-a-vis the 1st Respondent, including the testimonies of witnesses.The 2nd Respondent did not discharge the burden of proving miscarriage of justice in this case as rightly defined above. Having gone through the entire record and the testimonies of all the witnesses, there is no merit in the allegation submitted by the 2nd Respondent's Counsel and we so hold. Accordingly, the allegation of miscarriage of justice by the 2nd Respondent having not been proved, is hereby dismissed and the secondissue is hereby resolved in favour of the 1st Respondent.

In view of the foregoing, with the resolution of all the two issues for determination in this appeal in favour of the 1stRespondent and against the Appellant and 2nd Respondent, this appeal lacks merit and it is hereby dismissed.

The Judgment of the lower Court on **Plaint No: CV/14/2018 Between ANANUKWA CHINEDU AUGUSTINE VS FIRST BANK NIGERIA PLC & 1OR**, delivered on 10th day of March, 2020, is hereby affirmed.Appeal dismissed.

Parties: Absent

Appearances: A. C. Ananukwa appearing with Ilobi Uchenna for the 1stRespondent.

HON. JUSTICE M. R. OSHO-ADEBIYI **HON. JUSTICEJ. ENOBIE OBANOR**

Presiding Judge **Hon. Judge**

02/12/2021 **02/12/2021**