IN THE HIGH COURT OF JUSTICE OF THE FEDERAL CAPITAL TERRITORY
HOLDEN AT MAITAMA, ABUJA
ON WEDNESDAY, THE 23RDDAY OF FEBRUARY, 2022
BEFORE HIS LORDSHIP: HON. JUSTICE MARYANN E. ANENIH
PRESIDING JUDGE.

SUIT NO. FCT/HC/CV/2337/2012

SENATOR ADEFEMI KILA …. PLAINTIFF

AND

KEYSTONE BANK LTD …. DEFENDANT

JUDGMENT

By Writ of Summons and Statement of Claim filed on 9th February 2012, the Plaintiff originally commenced the instant action against the Defendant and a third party. Pursuant to Order of this Court made on 3rd April, 2012, the third party's name was struck out from this suit. The Statement of Claim was subsequently amended with leave of Court.

By Amended Statement of Claim dated and filed on 9th July, 2013 pursuant to leave of Court granted on 4th July 2013, the Plaintiff seeks the following reliefs against the Defendant;

1. *A **Declaration** that the plaintiff was discharged from further performance of the two loan agreements made between the plaintiff and the 1st defendant by virtue of frustration of contract as from the date of removal of the plaintiff from the senate on or about 1st of July 2009 (hereinafter referred to as "the time of discharge").*

2. *A **Declaration** that as from the date of his removal from the senate of the federal Republic of Nigeria in July 2009, the plaintiff was discharged from his obligation to pay further interest rates on the two contracts by virtue of section 4 (2) of the Law Reform (Contract) Act Cap. 517 LFN (Abuja) 1990.*
3. *A **Declaration** that as from the 1st of July 2009 the plaintiff's only outstanding obligation to the defendant was the payment of the principal amount payable on the loan in accordance with section 4 (2) of the Law Reform (Contract) Act Cap. 517 LFN (Abuja) 1990.*
4. *A **Declaration** that the 1st defendant are in breach of the terms of the contract by charging a 22% interest on the two loan agreements from the 10th July 2009 till date rather than the stipulated 20% interest rate.*
5. *A **Declaration** that the debit interest charges by the 1st defendant on plaintiff's account are contrary to section 4 (2) of the Law Reform (Contract) Act Cap. 517 LFN (Abuja) 1990.*
6. *A **Declaration** that the commitment fee and the management fee charged by the 1st defendant are illegal charges contrary to the provisions of the Banking Act. Cap. 28LFN 1990.*
7. *A **Declaration** that the 1st defendant breached their equitable fiduciary duty to the plaintiff's by increasing their interest rate without linking it to an increase in the minimum rediscount rate of the Central Bank of Nigeria.*
8. *A **Declaration** that the 1st defendant breached their equitable fiduciary duty of bankers by charging 2% in excess of the stipulated interest rate of 20% agreed with the customer.*
9. *A **Declaration** that the monies collected by the 1st defendant in excess of the legally permitted interest rate, being ₦15, 244, 055. 47, are monies received by the 1st defendant for the use of the party.*

10. *An **Order** of Court determining the loan agreements from the date of plaintiff's removal from the Senate on June 30th 2009 on grounds of frustration.*
11. *An **Order** of Court discharging the plaintiff from further obligation to make payments under the loan agreements contracts as from the date of his removal from the senate on the June 30th 2009.*
12. *An **Order** of Court directing the 1st defendants to return all sum paid by the plaintiff from the date of discharging in excess of the sum payable by virtue of section 4 (2) of the Law Reform (Contract) Act Cap. 517 LFN (Abuja) 1990 as monies received for the use of the plaintiff.*
13. *An **Order** of general damages in a sum representing the difference between the interest rates stipulated by the 1st defendant and the actual interest rate charged on plaintiff's account.*
14. *An **Order** of general damages in a sum representing the amounts charged as debit interest rate by the 1st defendant to the plaintiff's account.*
15. *An **Order** of general damages against the 1st defendant, and in favour of the plaintiff, representing the amount collected as the commitment fee and management fee.*
16. *An **Order** of Court appointing an independent auditor to verify the claims relating to excess interest charges on the plaintiff's account with the 1st defendant from January 2008 till date of commencement of this suit.*

Upon being served with theoriginating processes in this suit, the Defendantfiled its statement of defence. The Defendant subsequently filed on 19th May, 2020 its 'Further-Further Amended Statement of Defence' in which it incorporated a Counter-claim in respect of which processes leave and deeming order of this Court was granted on 15th September, 2021. By the said Counter-claim, the Defendant/Counter-claimantseeksthe following reliefs against the Plaintiff/Defendant-to-Counter-claim;

a. *The sum of N54,113,793.44 being the outstanding balance as at 30/04/2016 comprising of the unpaid principle and accrued interest on the composite loan facilities granted to the plaintiff by the defendant.*
b. *A sum of N4,500,000.00 being the cost of defending this suit.*

It is pertinent to note that the Plaintiff/Defendant-to-Counter-claim had filed a Reply/Defence-to-Counterclaim on 17th April, 2012.

For ease of reference, I shall continue to refer to the Plaintiff/Defendant-to-Counter-claim simply as the 'Plaintiff' while the Defendant/Counter-claimant shall remain simply the 'Defendant' in the course of this Judgment.

At the trial of this matter, the Plaintiff himself testified as PW1 in support of his case while one Lillian Ukwueze (a staff of the Defendant) testified as DW1 for the Defendant. Both witnesses were cross-examined by respective Counsel. The following exhibits were admitted and marked in evidence;

1. Exhibit A:- CTC of Court of Appeal Order of 30th June, 2009.
2. Exhibit B:- Revenue receipt dated 3/05/2012.
3. Exhibit C:-Offer letter from Bank PHB dated 15th October, 2017.
4. Exhibit D:-Photocopy of Bank PHB Offer letter dated 5th March, 2008.
5. Exhibit E:-Letter of Upward Review of Lending Rates dated 20th February 2009.
6. Exhibit F:-Demand Letter dated 25th March 2010.
7. Exhibit G1:-Request for Asset Acquisition Loan letter from Plaintiff dated 15th October, 2007.
8. Exhibit G2:-Request for Asset Acquisition Loan letter from Plaintiff dated 5th March, 2008.
9. Exhibit H1:-Certificate of Identification from Keystone Bank dated 4th October, 2017.

10. Exhibit H2:-Statement of Account.
11. Exhibit J1:-Certificate of Identification from Keystone Bank dated 20th May, 2016.
12. Exhibit J2:-Statement of Account dated from 01/05/2007 to 29/02/2008.

At the close of evidence, final written addresses of Counsel were filed and adopted by parties in accordance with the Rules of this Court.

The Defendant'sFinal Written Address is dated and filed on 12th March, 2020. ThePlaintiff's finalwritten address is dated 19th April, 2020 and filed on 12th May, 2020 to which the Defendant's Counsel filed a reply address on points of law on 19th May, 2020.

In his final address, learned Counsel to the Defendant, Dr. Sonny Ajala SAN, formulated three issues for the determination of this case to wit;

1. *Whether in the circumstances of the banker-customer relationship between the Defendant and the Plaintiff; the Plaintiff can successfully rely on the restrictive provision of section 4(2) of the Law Reform (Contracts) Act Cap. 517 LFN (Abuja) 1990 to extinguish his loan obligations to the Defendant?*
2. *Whether the Plaintiff's acts of suppression and concealment of the pendency of the law suit challenging his senatorial seat to the Defendant at the time the Plaintiff obtained the aggregate loans of N110,000,000.00 from the Defendant is not materially adverse to the case of the Plaintiff?*
3. *Whether considering the state of pleadings and evidence adduced in this suit, particularly exhibits C,D,E,F and H2;the Defendant on preponderance of evidence has not established that the Plaintiff's suit as constituted is lacking in merit and liable to be dismissed and the Defendant entitled to the award of the counter-claims.*

Learned Counsel to the Plaintiff, A. T. Kehinde SAN, for his part distilled the following two issues as the issues for determination;

1. *Whether the loan contracts enshrined in exhibits D and E were frustrated by the Court of Appeal Ilorin Division Judgment enshrined in exhibit A.*
2. *Whether the Defendant/Counterclaimant proved its counterclaim through admissible, cogent and credible evidence.*

I have carefully perused all the processes before this Court. I am of the view that the instant suit can be determined under two main issues formulated hereunder as follows;

1. Whether the Plaintiff has sufficiently established his claim, to be entitled to the reliefs sought by him against the Defendant.

2. Whether the Defendant has established the Counter-claim to justify entitlement to the reliefs sought therein against the Plaintiff.

The parties' respective issues can be adequately addressed under these two aforementioned issues.

The Plaintiff's case is presented to this Court through his Amended Statement of Claim and his evidence as PW1. In the course of trial, the Plaintiff adopted both his witness statements on oath deposed to on 12th July, 2013 and 26th March, 2019 as his oral testimony in support of his case. Plaintiff's case as presented before this Court is summarised thus:

He is a politician and card carrying member of the Peoples Democratic Party (PDP) who represented Ekiti Central Senatorial District at the Nigerian Senate from May 2007 till 1st July 2009. He operates a current account with the Defendant-bank and obtained a loan of N100 Million from the Defendant vide an agreement dated 15th October, 2017 signed by both parties. The said agreement was admitted in evidence at trial as Exhibit C. The Plaintiff signed a further agreement vide Exhibit D with the Defendant for a further loan sum of N10 Million. He asserted that both loans were for the purpose of asset acquisition by the Plaintiff and

his account with No. 1011005442 was credited with N100 Millionand N10 Million in the months of February and March 2008 respectively. The N100 Million loan was for a tenor of 39 months while the N10 Million loan was for 30 months at an agreed interest rate of 17% floating interest at inception of the loan transactions.

It is the Plaintiff's further testimony that as security for the loan facilities, his entitlements as Senator from the National Assembly were domiciled with the Defendant. That the loans were granted on the basis of his position as a Senator of the Federal Republic of Nigeria and the domiciliation of his monthly income and quarterly allowances from the National Assemblywith the Defendant. That the Defendant claimed to have increased the interest rate on the Plaintiff's loan facilities from the originally agreed 17% up to 20% from March 2009 but was actually charging 22% interest rate on the facilities. A letter dated 20th February 2009 which the Plaintiff pleaded that he received from the Defendant was admitted in evidence as Exhibit E in respect of this averment.

It is further the Plaintiff's case that the Court of Appeal (Ilorin Division) delivered judgment against him and the Peoples Democratic Party in July, 2009 in an appeal from an earlier decision of an Election Petition Tribunal, thereby ending the Plaintiff's tenure as a Senator and ending his further receipt of monthly salary and quarterly allowance from the National Assembly. Exhibits A and B were admitted in evidence as the CTC of enrolled Court of Appeal Order dated 30th June, 2009 and Revenue receipt respectively.

It is the Plaintiff's testimony that he had paid the total sum of N55,623,507.61 as at 10th July, 2009 as principal payments on the loan of N100 Million and the sum of N4,506,455.98 as principal repayments on the N10 Million loan. That as at the same 10th July, 2009 he had paid a total sum of N21,559,918.09 as interest payments on both loans. That the total amount payable as outstanding principal on the two loans as at 1st July 2009 totalled N49,870,036.31 being N44,376,492 on the N100 Million loan and N5,493,544.02 on the N10 Million loan. That the

Defendant has since 10th July, 2009 withdrawn an amount totalling N55,826,781.69 from the Plaintiff's account to offset the principal and interest on the loan being monies taken from his fixed deposit account and from other deposits into the account. The Plaintiff testified that the Defendant has continually deducted the equivalent value of his monthly income and quarterly allowance, as well as the interest at a rate of 22% even after the Plaintiff's removal from the Senate leading to his account being thrown into debit. Exhibit F was admitted in evidence as letter dated 25th March 2010 (Exhibit F) from the Defendant.

It is the Plaintiff's further testimony that the debit interest being charged on the loans from July 2009 till end of March 2011 totalled N6,435,396.74 and despite all payments made by the Plaintiff, his account balance reads a debit of over N20 Million.

In its Further-Further Amended Statement of Defence, the Defendant admitted entering into the two loan agreements of N110 Million and N10 Million. The Defendant however denies that the Plaintiff is entitled to his claim.

In testifying in support of the Defendant's defence and Counter-claim, DW1 adopted her witness statement on oath deposed to on 8th September, 2016 as her oral evidence. It is the Defendant's defence that the Plaintiff had on 15th October, 2007 applied for and was granted the Asset Acquisition Loan of N100 Millionfor a 39 months' tenor on terms and conditions which the Plaintiff had accepted. That the Plaintiff subsequently on 5th March 2008 applied for and obtained the additional loan of N10 Million for three years tenor. The Plaintiff's letters of requests for the two loan amounts were admitted in evidence as Exhibits G1 and G2. DW1 testified that the Plaintiff utilized the aggregate sum of N110 Million availed to him by the Defendant in acquiring choice assets as was the purpose of the loan facilities. DW1 testified that the repayment source for both loans was <u>not</u> limited to the Plaintiff's quarterly allowances and salary as a Senator (as it was not parties' agreement) but includes rental income together with proceeds from the

sale of the assets acquired by the Plaintiff with the composite loan facility. That the Plaintiff has capacity to liquidate his indebtedness to the Defendant

Denying that portions of the loan agreement is illegal, it is the Defendant's case that there is nothing illegal contained therein as the Plaintiff voluntarily entered into same without any coercion. That the total sum of N81,489,881.85 paid by the Plaintiff on both loans as at 10th July 2009 was the total of both the principal and accrued interest on both loan facilities. That all repayments of the loan facility through the Plaintiff's account with the Defendant was in accordance with the Defendant's statutory obligation to safeguard and preserve depositor's funds availed the Plaintiff as loan. That it is the Defendant's legitimate right to make withdrawals from the said account for the repayment of the loan and no excess interest was ever charged or deducted.

It is the Defendant's case and testimony of DW1 that the Plaintiff's account still has a debit balance of N54,113,793.44 which is the Plaintiff's indebtedness to the Defendant as at 30th April, 2016 and comprising of unpaid principal and interest on the two loans. The Plaintiff's statement of account as at 30th April 2016 and its Identification Certificate were admitted in evidence as Exhibits H2 and H1 respectively. That the Plaintiff however defaulted in liquidating his indebtedness to the Defendant.

It is the Defendant's case that the provisions of the Law Reform (Contracts) ActCap. 517 LFN (Abuja) 1990 is not applicable to the loan facility agreement between the Plaintiff and the Defendant because that law is limited to Abuja while Defendant has the entire Country as its operational base pursuant to provisions of the Company and Allied Matters Act, 1990 and the Banking and Other Financial Institutions Act. It is also the Defendant's case that the instant contract bothers on request for and granting of bank loan.

In addition to the foregoing case made in support of its defence to the Plaintiff's claim, DW1 further testified in support of the Defendant's Counter-claim that the Defendant has by this suit incurred expenses and is therefore entitled to the sum of N4,500,000 sought by the Counter-claim.

It is relevant to note that a statement of account was tendered by the Plaintiff's Counsel through DW1 during her cross-examination and admitted in evidence as Exhibit J2 and its Certificate of Identification as Exhibit J1.

The Plaintiff denied the Defendant's entitlement to its Counter-claim and more or less adopted his case made in respect of his main claim as his defence to the Counter-claim as well. He denied being indebted to the Defendant in whatever sum.

Before launching full swing into his arguments in his final address, learned Counsel to the Defendant observed to this Court that Exhibits J1 and J2 were made by a former employee of the Defendant who was not called as a witness in the proceedings but were tendered through DW1 who was not their maker. He contended that the law is settled that exhibits tendered in a judicial proceeding by a person who is not the maker is unacceptable in law.

Proffering further arguments on behalf of the Defendant in his final address, learned Counsel to the Defendant submitted that Exhibits A and B are totally unconnected and irrelevant to the issue of loan facilities granted to the Plaintiff by the Defendant particularly as Exhibit A was not pleaded in the Plaintiff's Amended Statement of Claim. He contended therefore that Exhibits A was admitted in evidence in error and ought to be expunged from the record of proceedings. He relied on the case of KUBOR V. DISCKSON (2013) 4 NWLR PT. 1345 P. 534. He posited that the Plaintiff has thus failed to establish his alleged removal from office of the Senate by Judgment of the Court of Appeal delivered in July 2009.

It is learned Counsel to the Defendant's further submission that the provisions of Section 4(2) of the Law Reform (Contracts) Act Cap. 517 LFN (Abuja) 1990 is totally unhelpful to the Plaintiff as the two loan contracts between parties i.e. Exhibits C and D do not contain provisions with the intended effect of 'frustration' as contemplated by Section 3(3) of that Act. He argued that the application of the Act is restricted to Abuja – FCT whereas banking is generally regulated by the Bank and Other Financial Institutions Act, LFN 2004 which is of universal application to all States and the Federal Capital Territory. He posited that the language of the Law Reform (Contracts) Act did not intend that ordinary affairs and transactions between a banker and its customer such as loan transactions would be regulated by the Act. He argued that it is Exhibits C and D that regulate the relationship between the Plaintiff and the Defendant. He contended that the Plaintiff did not place any cogent and credible evidence before the Court to establish that the contractual terms in Exhibits C and D have become impossible of performance or been otherwise frustrated as provided for under Section 4(1) of the Act.

Learned Defendant's Counsel further posited that even if the Plaintiff can invoke and rely on the provisions of the Law Reform (Contracts) Act, Section 4(4) thereof empowers the Defendant to recover the value and benefit derived by the Plaintiff under Exhibits C and D. He urged this Court to hold that the Plaintiff cannot successfully rely on the very restrictive provision of Section 4(2) of the Law Reform (Contracts) Act to extinguish his loan obligations to the Defendant.

It is further the Defendant's Counsel's arguments that the concealment and suppression from the Defendant of the pendency of the petition in court challenging his election/seat as a Senator of the Federal Republic of Nigeria at the material time of taking the loan amounts to misrepresentation. He argued further that the Plaintiff cannot now turn around to seek the intervention of this Court to shield him from satisfying his outstanding loan obligations to the Defendant by using Exhibit A as a sword and shield against the Defendant. He pointed out

that it is settled law that equity will not allow the law to be used as an engine of fraud. He cited the case of JADESIMI V. EGBE 10 NWLR PT. 827 P. 1. He contended that it is unconscionable for the Plaintiff to obtain and keep for his estate the choice properties acquired with the loan amount of N110 Million and refuse to service his loan obligations.

Reiterating all his previous submissions, learned Counsel to the Defendant posited that evidence before this Court shows that the Plaintiff voluntarily accepted the loan offers in Exhibits C and D and admitted that his outstanding loan obligation to the Defendant as at 10th July, 2009 was N49,870,036.31. It is his contention that there is nothing in Exhibits H2 and J2 to support the Plaintiff's assertion of having paid N20 Million. That the Plaintiff failed to adduce any evidence or bring before the Court an officer of the Central Bank of Nigeria to establish the alleged illegality of facility fees and excess interest rate applied to the loan facilities of N110 Million. He submitted that the Plaintiff's claim is not only vague but nebulous and ought to be dismissed for failure of the Plaintiff to prove same. He argued however that the Defendant's case presented by its averments and evidence is rock solid. That the Plaintiff having tendered Exhibits C, D, E and F as well as admitted under oath that he did not protest the interest rate stipulated in Exhibits C and D, the Defendant is deemed in law to have discharged the burden of proof that the Plaintiff is still indebted to the Defendant. He urged this Court to hold that the Plaintiff's suit against the Defendant is lacking in merit and liable to be dismissed with cost.

On the Defendant's counter-claim, its Counsel further submitted in his address that DW1 painstakingly demonstrated before this Court how the amount of N54,113,793.44 as shown in Exhibit H2 being the outstanding unpaid principal and accrued interest was arrived at pursuant to Exhibits C, D, E and F. He pointed out that a bank is entitled to charge interest on loans and overdrafts. He argued that DW1's testimony pertaining to the Plaintiff's indebtedness to the Defendant to the tune of N54,113,793.44 as at 30th April 2016 is unassailable. Counsel posited that the Plaintiff failed to place any credible evidence before this Court

in defence to the Defendant's Counter-claim and therefore prayed this Court to enter judgment in favour of the Defendant directing the Plaintiff to liquidate his outstanding indebtedness of N54,113,793.44 as at 30th April 2016.

The Plaintiff's Counsel in his own final address submitted to the effect that the Court of Appeal judgment delivered on 30th June, 2009 by the Ilorin Division removing the Plaintiff from the Senate of the Federal Republic of Nigeria had utterly frustrated the loan contracts enshrined in Exhibits D and E (*sic* C and D actually) between the Plaintiff and the Defendant and thus rendered further performance impossible. He relied on the case of N.B.C.I STANDARD (NIG) ENG. CO. LTD (2002) 8 NWLR PT. 768 P. 104 and a plethora of other cases on the meaning of frustration. He contended that the Plaintiff did not breach Exhibits C and D but was dutifully repaying the loan until the intervening event in Exhibit A terminated his position as a Senator of the Federal Republic of Nigeria without the fault of parties which event was not envisaged by parties at the time of making the contracts. It is Counsel's position that the security for the loan was the domiciliation of the monthly salaries and quarterly allowances of the Plaintiff. That since the Plaintiff is no longer a senator earning monthly salary or quarterly allowance from the National Assembly, repayment of the loans from such salary and quarterly allowance became impossible to perform.

Learned Counsel to the Plaintiff further submitted that by virtue of Section 3(1), (2) and (4) of the Law Reform (Contracts) Act Cap. 517, LFN (Abuja) 1990, the Law Reform (Contracts) Act applies to all contracts except those contracts excluded under Subsection 5 of Section 3 of the Act. Counsel contended that the issue of suppression, concealment and misrepresentation of facts raised in Defendant's Counsel's written address ought to have been pleaded, particularized and proved but the failed to do this. He argued that the Defendant's Counsel cannot therefore raise such issues which were neither pleaded nor proved. He contended that the Plaintiff has proved that his contract with the Defendant was frustrated by the event contained in Exhibit A and

that he did overpay and therefore is entitled to the refund of the sum of N15,244,550.47 being the amount paid to the Defendant in excess of the principal and accrued interest. He urged this Court to so hold.

On the Defendant's Counter-claim, Counsel to the Plaintiff posited that the Defendant is the plaintiff in respect of its counter-claim as so must establish the facts upon which its claim is based. Counsel submitted quite categorically that the Defendant has failed to prove its counter-claim. He posited that DW1 tendered a statement of account of the Plaintiff which was admitted in evidence as Exhibit H2. Counsel however argued that Exhibit H2 is not admissible in evidence as it was made during the pendency of the proceedings in this case and as such should be expunged from the records of this Court. Still on the issue of the admissibility of Exhibit H2, Counsel contended that the copy of statement of account which the Defendant had frontloaded along with its pleadings is different from the statement of account which it eventually tendered and which was admitted in evidence as Exhibit H2. He contended that the copy of the statement that was frontloaded by the Defendant is actually Exhibit J2 and Exhibit H2 was not frontloaded as required by Order 17 Rule 1 of the Civil Procedure Rules of this Court.

Counsel to the Plaintiff further argued that the case of the Defendant is self-contradictory in that it claims for the sum of N104,009,946.40 but the evidence it brought as per statement of account is with different figures. He contended that the Defendant had pleaded in its counter-claim that the total unpaid principal and accrued interest on the loan of N110 Million stood at N54,113,793.44 as at 30th April, 2016 but claimed as its relief the sum of N104,009,946.40 being the outstanding balance as at 30th April 2016. It is Counsel's position that with all these contradictions on the Defendant's evidence and pleadings, the Defendant has failed to establish its counter-claim against the Plaintiff.

He also submitted that DW1's testimony amounts to hearsay as she didn't participate in the loan transactions between the Plaintiff and the Defendant and she had admitted this under cross-examination. Counsel

relied on the case of OKPA V. STATE (2014) P. 225 to submit that DW1's testimony is hearsay and thus inadmissible. He urged this Court to expunge same from the Court's record. It is also Counsel's submission that it is trite law that a debit balance in a statement of account does not, without more, amount to the indebtedness of the account holder. He posited therefore that a party relying on a statement of account must adduce evidence to explain the entries in the statement of account. For this position he relied on the case of NAGEBU CO. (NIG.) LTD V. UNITY BANK PLC (2014) 7 NWLR PT. 1405 P. 42.He submitted that the Defendant in this case dumped Exhibits H2 and J2 on this Court without making any effort to explain the debit balances shown therein as the Plaintiff's indebtedness to the Defendant. That DW1 who had a duty to explain the entries in the statement of account could not do so. Plaintiff's Counsel submitted that the Defendant has failed to substantiate its claim that the Plaintiff still owes it the balances contained in the statements of account tendered by it.

Regarding the Defendant's claim of N4,500,000 in its Counter-claim, the Plaintiff's Counsel submitted that there is no proof whatsoever that the Defendant paid its solicitor the sum claimed. He argued in any case that the law is trite that it is against public policy for a litigant to pass his solicitor's fees to the opposing party who has also paid his own solicitor. He relied on the case of GUINESS (NIG) PLC V. NWOKE (2002) 15 NWLR PT. 689 P. 135. He therefore submitted that the Defendant is not entitled to pass on its solicitor's fees to the Plaintiff and urged this Court to grant the Plaintiff's reliefs but dismiss the Defendant's Counter-claim.

Replying on points of law, the Defendant's Counsel repeated part of his earlier arguments on Exhibit A and frustration of contract. He submitted that the Defendant is justified to have raised the cardinal principle of law that a party who deliberately concealed, suppressed and misrepresented a state of fact or series of facts as the Plaintiff did cannot be heard to resile from his undischarged obligation. In respect of the admissibility of Exhibit H2, Counsel contended that the fact that DW1 said she retrieved Exhibit H2 the previous day does not mean she made same then. He

contended that Exhibit H2 was therefore not made in the course or in anticipation of this suit. Pertaining to the frontloading, Counsel argued that the copy of the statement of account that was frontloaded contain the same entries as Exhibit H2. He contended that the Plaintiff's Counsel is resorting to technicalities to defeat Defendant's claim and this Court should do substantial justice. He relied on the case of SA'EED V. YAKOWA (2013) 7 NWLR PT. 1352 P. 124. He argued that the Plaintiff's Counsel's contention that the testimony of DW1 is inadmissible hearsay is totally misconceived. He pointed out that the only statement of account tendered by the Defendant in this case is Exhibit H2. He submitted that the Plaintiff is under the legal duty to settle the outstanding principal loan and accrued interest of N54,113,793.44.

RESOLUTION OF ISSUES:

Having set out the facts and evidence of parties as well as the arguments of their respective Counsel, the first of the main issues for consideration in the determination of this suit is;

> **Whether the Plaintiff has sufficiently established his claim to be entitled to the reliefs sought by him against the Defendant.**

It is pertinent to however first consider some relevant preliminary points which arose in the course of Counsel's arguments.

Counsel to the Defendant has contended that Exhibit A is not relevant and has urged this Court to expunge same from record of proceedings.

The position of the law is that where inadmissible evidence (such as an unpleadedand irrelevant document) is received or admitted in evidence by a trial court, it is its duty when it comes to consider its judgment to treat such inadmissible evidence as if it had never been admitted, i.e. expunge it from the records even when no objection had been raised to

its admissibility. – see the case of**HASHIDU & ANOR V. GOJE & ORS (2003) LPELR-10310(CA) AT PP. 66 – 67 PARAS. D – E**.The principle is that the Court cannot *nolensvolens*(willingly or unwillingly) act on legally inadmissible evidence even with parties' agreement or consent.

The three main criteria governing the admissibility of a document in evidence are;

1. Whether the facts relating to the document have been pleaded
2. Whether it is relevant and
3. Whether it is admissible in law

See **MR. S. ANAJA V. UNITED BANK FOR AFRICA PLC (2011) 15 NWLR PT. 1270 P. 377 AT P. 404 PARAS. D-F**.

See also **ABOABA V. OGUNDIPE (2017) LPELR-42922(CA) AT PP. 14 – 15 PARAS. F-D**.

Exhibit A is an Order of the Court of Appeal in a suit purportedly involving the Plaintiff. By Exhibit A, some other persons other than the Plaintiff was on 30th June, 2009 declared winner of the Ekiti Central Senatorial District and further declared rightful Senator as such.

In the instant case, the Plaintiff pleaded that the Court of Appeal delivered Judgment against him ending his tenure as a Senator and bringing an end to his salary and allowance from the National Assembly (from which he was expected to pay the loan obtained from the Defendant). It is the Plaintiff's pleaded case and evidence that this event has frustrated the loan contract (subject matter of this suit) between him and the Defendant thus discharging him from same. The alleged frustration of the contract between the parties by the said Exhibit A is the gravamen of the Plaintiff's case in this matter.

Considering the Plaintiff's claim therefore, I am of the view that the CTC of enrolled Order of the Court of Appeal admitted in evidence as Exhibit A is not only pleaded, it is also very relevant to this case. Exhibit A is therefore admissible in evidence. The Defendant's Counsel's objection to same in his final address is thus without merit and it is hereby overruled.

Another preliminary point to consider is the admissibility of the testimony of DW1 which issue was raised by the Counsel to the Plaintiff. In his address, learned Counsel to the Plaintiff contended that PW1's testimony before this Court amounts to hearsay and as such must be rejected in evidence and expunged from the record. His reason is that the facts of the transaction between the Plaintiff and the Defendant of which DW1 testified were not within her personal knowledge.

On this point, the position of the law is that evidence of a witness who is not giving evidence of what he knew or did personally but of what he was told by another person amounts to hearsay. The general rule is that hearsay evidence is inadmissible. – see **OKHUAROBO V. AIGBE (2002) 9 NWLR PT. 771 P. 29 AT P. 70 PARAS. B-C**, **JOLAYEMI V. ALAOYE (2004) 12 NWLR PT. 887 P. 322 AT P. 341 PARA. F** and **OJO V. GHARORO (2006) 10 NWLR PT. 987 P. 173 AT PP. 198-199 PARAS. H-D**.

The general rule that hearsay evidence is inadmissible however admits of some exceptions. See the case of **ORJIAKOR & ANOR V. MBACHU & ANOR (2019) LPELR-47713(CA) AT PP. 62 – 63 PARAS. B – A**.

One of such exceptions is evidence admitted on the principle of corporate personality. – see **KATE ENT. LTD. V. DAEWOO (NIG) LTD. (1985) 21 NWLR PT. 5 P. 116**. See also the Supreme Court's decision in the case of **SALEH V. BANK OF THE NORTH LTD. (2006) LPELR-2991(SC) AT PP. 10 – 11 PARAS. F – E** or **6 NWLR PT. 976 P. 316**.

The Defendant is a limited liability company and this much is not in dispute amongst parties. In the eyes of the law, it is a corporate legal entity. Although it is not human, it has its officers to act for it. It was held in the case of **OLOJEDE & ANOR V. OLALEYE & ANOR (2012) LPELR-9845(CA) AT P. 61 PARA. B** that a bank is a juristic person which acts through agents/natural persons.

DW1 is a staff of the Defendant company and she testified as such. The mere fact that she was not the particular staff of the Defendant that was personally involved in the loan transactions between the Defendant and the Plaintiff does not render her testimony or evidence inadmissible. However, as with all pieces of evidence admitted in evidence by the Court, the weight to be attached to each aspect of DW1's testimony is another matter. It is trite that a piece of evidence may be admissible but the weight to be ascribed to it is a different matter. Nonetheless, DW1's evidence before this Court on transactions involving the Defendant-company (her employer) is admissible in evidence as an exception to the general rule of inadmissibility of hearsay evidence. This position of the law has been firmly settled over time. See also the cases of**IMPACT SOLUTIONS LTD & ANOR V. INTERNATIONAL BREWERIES PLC (2018) LPELR-45441(CA) AT PP. 23 – 28 PARAS. F-A**and**BRILA ENERGY LTD V. FRN (2018) LPELR-43926(CA) AT PP. 58 – 62 PARAS. E – D**.

The Defendant's Counsel had also raised in his final address the issue of the admissibility of Exhibits J1 and J2 which he contended were made by an ex-employee of the Defendant (who was not called to testify) but were tendered through DW1 another staff of the Defendant who is not the maker of Exhibits J1 and J2.

The record of proceedings in this suit show that Exhibits J1 and J2 were tendered in evidence by the Plaintiff's Counsel through DW1 in the course of her cross-examination on 19th March 2019. There was no objection by the Defendant's Counsel to the admissibility in evidence at

that time and the documents were admitted in evidence. Counsel to the Defendant now seeks to raise the issue of the admissibility of these documents in his final address.

The general requirement of the law is that documents sought to be admitted in evidence ought to be tendered through their maker or at least the maker is called as a witness in the matter in which they are to be admitted. – see **Section 83(1)(b) of the Evidence Act 2011**. This general rule however admits some exceptions as further set out under the proviso to **Section 83(1) of the Evidence Act 2011** such as where the maker of the document is dead, of unsound mind etc. In any case, under **Section 83(2)(a) of the Evidence Act 2011**, the Court has the discretion to nevertheless admit documents in evidence despite that the maker is available but was not called as a witness. See also authorities earlier cited Supra in this regard.

A legally inadmissible evidence is one that the law says is inadmissible under any circumstance. The law forbids the receipt in evidence. A document tendered in evidence without the maker being called may be inadmissible in evidence but it does not fall within the category of 'legally inadmissible evidence' which cannot be admitted under any circumstance. This is because even the Court has discretion under the law to admit same notwithstanding that the maker of the document was not called. The implication is that, unlike legally inadmissible evidence, a document tendered without its maker being called may be admitted in evidence where there is no objection at the time it is tendered in evidence. Where it is admitted in evidence without objection, the party who ought to have objected can no longer be heard to complain about its admissibility on grounds that it was admitted in evidence without calling its maker.See the Supreme Court's decision in the case of **JOHN & ANOR V. STATE (2011) LPELR-8152(SC) AT PP. 17 – 19 PARAS F – A**. See also **SULEIMAN V. ABDULLAHI (2013) LPELR-22090(CA) AT PP. 89 – 92 PARAS. D – A**.

In the instant case, having failed to object to the admissibility of Exhibits J1 and J2 at the time they were tendered for admission in evidence, the Defendant's Counsel can no longer in his final address raise the issue of the admissibility thereof on grounds of the documents having been admitted in evidence through someone who is not the maker.

In any case, Exhibit J2 appears to be a statement of an account with the Defendant-bank. Exhibit J1 claims that it was produced by a staff of the Defendant. At the time the documents were to be tendered under cross-examination of DW1, she (DW1) identified Exhibit J2 as the statement of account that she herself had frontloaded with her Written Witness Statement on Oath. Exhibit J2 was thus tendered through DW1 who is another staff of the Defendant. For all intent and purpose, Exhibits J1 and J2 are the Defendant's documents made by its staff. The Defendant is a corporate body and the mere fact that the documents were tendered through another of its staff who physically did not produce same does not render the documents inadmissible. The documents were in essence made by the Defendant who is a party to this suit and tendered in evidence through one of its staff. This is in substantial compliance with **Section 83(1)(b) of the Evidence Act 2011**.

Consequent to the foregoing, there was no wrongful admission in evidence of Exhibits J1 and J2. Defendant Counsel's objection to same is overruled.

Another point is the Plaintiff's Counsel's objection raised in his final address to the admissibility of Exhibit H2 in evidence. He contended that Exhibit H2 is inadmissible because it was not frontloaded and was made during the pendency of this suit.

Regarding the complaint that Exhibit H2 was made during the pendency of this suit, **Subsection 3 of Section 83 of the Evidence Act 2011**renders any statement inadmissible in evidence if made by a person interested at a time when proceedings are pending or anticipated involving a dispute as to any fact which the statement might tend to

establish. – see the cases of **OMAC OILS NIG LTD & ORS V. EGBADEYI & ANOR (2014) LPELR-24112(CA) AT PP. 35 – 36 PARAS. C-B** and**ARAB CONTRACTORS (O.A.O.) NIG LTD V. UMANAH (2012) LPELR-7927(CA) AT PP. 18 – 20 PARAS. D-A**.

Exhibit H2 is a Statement of Bank Account while Exhibit H1 is a certificate dated 4th October 2017 (in compliance with provisions of the Evidence Act 2011) stating how Exhibit H2 was produced electronically.

The records of proceedings in this case show quite clearly that at the time the documents (Exhibits H1 and H2) were tendered by the Defendant and sought to be admitted in evidence through DW1, learned Counsel to the Plaintiff did not object to the admissibility of same but rather chose to cross-examine DW1. Counsel did not raise objection that Exhibit H2 was made during the pendency of this suit and was therefore inadmissible.

I must here reiterate the position of the law that an objection to the admissibility of a document tendered in evidence is taken immediately the document is placed before the court. It is thus the rule that where objection has not been raised by the opposing party to the reception in evidence of a document, the document would be admitted and the opposing party cannot afterward be heard(except where the law specifically renders the document inadmissible) to complain about its reception in evidence. – see the Supreme Court's decision in **JOHN V. STATE (2017) LPELR-48039(SC) AT PP. 54 – 55 PARAS. E-C**. See also the case of **OLOJEDE & ANOR V. OLALEYE & ANOR (SUPRA)**.

Having failed to raise objection to the admissibility of Exhibit H2 at the time it was tendered and before it was admitted in evidence, the Plaintiff's Counsel cannot now complain of its admissibility on grounds that it was made during the pendency of this suit. See particularly the decision of the Court of Appeal per Tsammani JCA (delivering the lead

Judgment) in the case of **SKYE BANK V. PERONE (NIG) LTD (2016) LPELR-41443(CA) AT PP. 54 – 55 PARAS. B – B** where it was held thus;

> *"Though it is obvious from the evidence on record that PW2 was commissioned and made Exhibit F when the Respondent had instituted this action, there is nothing to show that Exhibit F was made by a person interested. On that score the contention of the Appellant that Exhibit F was made in breach of Section 83(3) of the Evidence Act, 2011 cannot be sustained. I therefore hold that Exhibit F was properly admitted. In any case, the said Exhibit was admitted without objection. The only way the Exhibit can be rejected at this stage is where it is inadmissible under the Evidence Act. The document (Exh. F) is admissible if certain conditions are satisfied, and the Appellant having not objected at the time it was tendered, cannot raise the objection at this appeal stage. See Raimi v. Akintoye (1986) 3 NWLR (pt. 26) p. 97, AboladeAlade v. SalawuOlukade (1976) 1 All N.L.R (pt. 1) p. 172 and Ezomo v. Oyakhire (1985)1 NWLR (pt. 2) p. 195."*

In any case, the testimony of DW1 does not depict her as an 'interested party' within the context of Section 83(3) as interpreted by the Apex Court in several decided cases. With regard to inadmissibility of a document made by an interested party during proceedings or when proceedings was anticipated, it was held in a plethora of authorities of the Apex Court, that the disqualifying interest is a personal and not merely interest in an official capacity. Where the interest is purely official or as a servant without direct interest of a personal nature, there are decided cases to the effect that the document is not thereby excluded. This was the reasoning of the Supreme Court in the case of **HIGHGRADE MARITIME SERVICES LTD. V. FBN LTD (1991) LPELR1364(SC) AT PP. 32 – 33 PARA. F-F** per Karibi-Whyte JSC or **(1991) 1 NWLR PT. 167 P. 290**.

See also

(1) **U.T.C. NIG. PLC V. ALHAJI ABDUL WAHAB LAWAL (2013) LPELR-23002(SC) AT PP. 25 – 26 PARAS. B-A** or **(2014) 5 NWLR PT. 1400 P. 221**.
(2) **LADOJA V. AJIMOBI & ORS (2016) LPELR-40658(SC) AT P. 94 – 95 PARAS. G-A**.
(3) **B.B. APUGO & SONS LTD V. OHMB (2016) LPELR-40598(SC) AT PP. 67 – 68 PARAS. B-F**.
(4) **NIGERIA SOCIAL INSURANCE TRUST V. KLIFCO NIG. LTD (2010) 13 NWLR PT. 1211 P. 307** per ChukwumaEne JSC citing with approval **EVAN V. NOBLE (1949) 1 KB P. 222 AT P. 225**.

The two words forming the phrase "official capacity" have been defined in Black's Law Dictionary, Ninth Edition as follows;

> *"One authorised to act for a corporation or organization, especially in subordinate capacity"*
>
> *"The role in which one performs an act, especially, someone's job, position or duty <in her corporate capacity>"*

Regarding the contention that Exhibit H2 was not frontloaded, it is the **High Court of the FCT, Abuja (Civil Procedure) Rules 2018** that provides for the frontloading of copies of documents to be relied upon at trial. The whole essence of the frontloading system in civil proceedings is to promote speedy trial. It must be noted however that it is the **Evidence Act 2011** that regulates the admissibility of evidence and not the Civil Procedure Rules of this Court. Consequently, there is nothing in the law of evidence that bars the admissibility of a document in evidence simply because it was not frontloaded with the originating process. The true and correct implication of the provisions of the Civil Procedure Rules does not even imply this. Failure to comply with provisions of the Civil Procedure Rules of this Court in deserving situations can be treated as an irregularity which may not substantially

affect the process. – see **Order 5 Rule 1(1) and (2)** of the Rules of this Court.

See also the cases of **SULEIMAN & ORS V. ABUBAKAR TAFAWA BALEWA UNIVERSITY, BAUCHI & ANOR (2019) LPELR-47708(CA) AT PP. 13 – 15 PARAS. C-E** and**OLANIYAN & ORS V. OYEWOLE & ORS (2007) LPELR-8694(CA) AT PP. 25 – 32 PARAS. B-A**.

Even though the Rules of Court are meant to be obeyed, the Plaintiff's Counsel failed to raise his objectionat the appropriate time to the effect that copies of Exhibit H2 had not been frontloaded along with the Defendant's processes in compliance with the Rules. The Plaintiff's Counsel thus deprived this Court of the opportunity of making the appropriate order at the appropriate time which would have been to provide opportunity for the Defendant to comply by frontloading the copies and possibly making consequential orders in favour of the Plaintiff. Having failed to raise objection to the irregularity at the appropriate time, the Plaintiff cannot now complain at this stage that copies of Exhibit H2 were not frontloaded. In any case, it is not a ground for rejecting Exhibit H2 in evidence and I so hold.

Pursuant to all the foregoing, learned Plaintiff's Counsel's objection in his final address to the admissibility of Exhibit H2 on ground of failure to frontload is therefore discountenanced.

Now to the resolution ofthe main issues before this Court.

A careful consideration of the pleadings and evidence before the Court reveals that there are three sub-issues that are apposite to the consideration of Issue One. They are;

a) Whether the evidence before the Court establishes that the contract between the parties was frustrated.

b) Whether the Plaintiff is entitled to refund of Management fee and Commitment fee charged.
c) Whether the Defendant exceeded the terms and covenants of Exhibits C and D in the charge of interest.

Ordinarily, the position of the law is that the general burden of proof in civil cases lies on the party against whom judgment would be entered if no evidence was adduced by either party. – see **EZINWA V. AGU (2003) LPELR-7238(CA) AT P. 14 PARAS. A – B**. The general burden of proof principally therefore lies on the plaintiff as the initiator of a claim – see **IYAMU V. ALONGE (2007) LPELR-8689(CA) AT PP. 45 – 53 PARAS. D–C**. It is also elementary principle of law that he who asserts must prove – see **ACTION ALLIANCE & ORS V. INEC (2019) LPELR-49364(CA) AT PP. 27 – 28 PARAS. F – D**.

The main reliefs sought by the Plaintiff in this case are declaratory in nature (see reliefs nos. 1 – 9 of the Amended Statement of Claim). It is trite position of the law that a party seeking a declaratory relief must succeed on the strength of his own case and not on the weakness of the defence, as a declaratory relief is not to be granted to a party on the admission or default of defence of the other party. – see the cases of **ALAO V. AKANO (2005) LPELR-409(SC) AT P. 9 PARAS. B–C** and **OKONJO V. NWAUKONI (2018) LPELR-44839(CA) AT PP. 15 – 16 PARAS. D–B**.

It is not in dispute in this case that the Plaintiff is a customer of the Defendant-bank and in 2007 and 2008 obtained two loan facilities of N100 Million and N10 Million respectively (totalling N110 Million) from the Defendant for a term at agreed interest rates.Exhibits C and D are offer of terms of the loans duly signed and executed by the parties i.e. the Plaintiff and the Defendant. It is not in dispute that Exhibits C and D contain the terms of the loan facilities. There also seems to be no dispute that the Plaintiff was a Senator of the Nigerian Senate at the time material to obtaining these loan facilities from the Defendant.

It is the major part of the Plaintiff's contentionbefore this Court however that the Court of Appeal decision/order (Exhibit A) of 30th June 2009 which ended his tenure as a Senator frustrated the loan contract between him and the Defendant and discharged any further payment of interest thereunder as at 1st July 2009. He relied on Section 4(2) of the Law Reform (Contracts) Act Cap. 517 LFN (Abuja) 1990 for this position.

Apparently,**Part II of the Law Reform (Contracts) Act, Cap. 517 Laws of the FCT, Nigeria 2006** provides for frustrated contracts. The relevant provisions of this Act would be reproduced hereunder for better understanding.

Section 4(1) and (2) under Part II of the Law reform (Contracts) Act provides thus;

> *4(1) Where a contract governed by law has become impossible of performance or been otherwise frustrated, and the parties thereto have for that reason been discharged from the further performance of the contract, the following provisions of the section shall, subject to the provisions of section 3 of this Act, have effect in relation thereto.*
>
> *(2) All sums paid or payable to a party in pursuance of the contract before the time when the parties were so discharged (in this Part of this Act referred to as "the time of discharge") shall, in the case of sums so paid, be recoverable from him as money received by him for the use of the party by whom the sums were paid, be recoverable from him as money received by him for the use of the party by whom the sums were paid, and, in the case of sums so payable, cease to be so payable.*

The Defendant's Counsel has however argued per contra that the provisions of the Law Reforms (Contract) Act is not applicable to the case at hand. That the Act is made for the Federal Capital Territory and

is inapplicable to the loan contract, subject matter of the instant suit which borders on banking transaction.

I find the provisions of **Sections 3(1), (2) and (5) of the Law Reform (Contracts) Act**to be very relevant to the issue of applicability of Part II of the Act. They provide as follows;

> *3(1) This Part of this Act shall apply to contracts, whether made before or after the commencement of this Act, as respects which the time of discharge occurs on a date not earlier than two months before the commencement of this Act, but not to contracts as respects which the time of discharge is before the said date.*
>
> *(2) This part of this Act shall apply to contracts to which the State is a party in like manner as to contracts between subjects.*
>
> *…….*
>
> *(5) This Part of this Act shall not apply –*
>
> *(a) To a charter-party, except a time charter-party or a charter-party by way of demise, or a contract (other than a charter-party) for the carriage of goods by sea; or*
>
> *(b) to a contract of insurance, except as is provided by subsection (6) of section 4 of this Act; or*
>
> *(c) to a contract to which Section 7 of the Sale of Goods Act, 1893 of the United Kingdom (which avoids contracts for the sale of specific goods which perish before the risk has passed to the buyer) applies, or to any other contract for the sale, or for the sale and delivery, of specific goods, where the contract is frustrated by reason of the fact that the goods have perished.*

There can be no gainsaying that the Law Reforms (Contracts) Act, being a law of the Federal Capital Territory, must apply to contracts entered

into in the FCT or meant to be performed within the geographical boundary of the FCT.

The subject matter of the instant suit i.e. of the main claim and the counter-claim, are two loan agreements entered into between the Plaintiff and the Defendant. I have perused the loan agreements (Exhibits C and D). I have also read the Plaintiff's applications to the Defendant for the loans (i.e. Exhibits G1 and G2). There is no reason to believe that the two loan contracts were made outside Abuja and therefore fall outside the territorial application of the **Law Reform (Contracts) Act, Cap. 517 Laws of the FCT, Nigeria 2006**.

On the contention that banking matters do not fall within the province of the provisions of the Law Reform (Contracts) Act, even though the Defendant may be a bank (whose affairs are overseen by the Central Bank of Nigeria as with all other banks in Nigeria) and the Defendant is its customer, it appears the loan agreements between them is nothing more than a contract between an individual customer and his bank.

On the nature of a loan contract,it was held by the Court of Appeal per Garba JCA in the case of **EKONG V. ISHIE COMMUNITY BANK (NIG) LTD & ANOR (2014) LPELR-22961(CA)AT PP. 58 – 59 PARAS. D-A**as follows;

> *"Ordinarily, in modern banking practice, when a customer of a bank requests or applies for a loan or overdraft facility from the Bank, it is the bank that would make an offer of the facility stating and setting out clearly and specifically, the terms and conditions thereof, to the customer. An unqualified acceptance of the offer duly communicated to the bank by the customer in respect of all the terms and conditions thereof, would result to a valid and binding legal contract between them on the loan facility. See Uba v. Lion Bank Plc (2006) ALL FWLR (293) 330."*

See also **YARO V. AREWA CONSTRUCTION LTD & ORS (2007) LPELR-3516(SC)** per Onnoghen JSC **AT P. 74 – 75 PARAS. G-B**.

Where therefore there is no such intention expressly set out therein, a loan agreement between a customer and his bank (such as in the instant case) cannot be elevated beyond the status of a contract. The subject matter in this case is thus about a contractual relationship simpliciter and not about banking *per se*. It is necessary to draw that distinction going forward because I have noticed that both parties appear to have confused the two in making their arguments before the Court.

The provisions of **Section 3(5) of the Act**(which I have earlier reproduced) specifically provides and mentions the contracts that are excluded from the application of **Part II of the Act**. Banking or banks are not mentioned in **Section 3(5)(a) – (b)**. This Court is not in a position to include that which the law has specifically not included in the circumstances.

Essentially, in order for a contract to fall under the provisions of **Part II of the Law Reform (Contracts) Act** in the first place, the performance of same must have been rendered impossible or must have been frustrated.

The pertinent question therefore is this; has performance of the loan contracts between the Plaintiff and the Defendant been frustrated by the Plaintiff's removal as a Senator vide the Order of the Court of Appeal (Exhibit A) as contended by the Plaintiff?

In law, frustration of contract is the premature determination of an agreement between parties lawfully entered into, and in course of operation at the time of its premature determination, owing to the occurrence of an intervening event or change of circumstances so fundamental as to be regarded by law both as striking the root of the agreement, and as entirely beyond what was completed by the parties when they entered into the agreement. – see the cases of **FEDERAL**

MINISTRY OF HEALTH V. URASHI PHARMACEUTICALS LTD (2018) LPELR-46189(CA) AT PP. 13 – 14 PARAS. E – E and **NOSPECTO OIL & GAS LTD V. KENNEY & ORS (2014) LPELR-23628(CA) AT PP. 30 – 34 PARAS. G – F**.

The doctrine of frustration of a contract becomes operational where subsequent to its formation, a change of circumstances makes it legally, physically or commercially impossible to fulfil the contract. I find further support for this position in the clarification by Prof. I. E. Sagay (SAN) in his book, The Nigerian Law of Contract at page 565.

The learned author further at pages 566 to 567 analysed *inter alia* the decision of Blackburn J in **TAYLOR V. CALDWELL (1863) 3 B & S 826**(or **122 ER 309**)on the introduction of implied terms and later inclusion of supervening events other than destruction of subject matter of the contract which were not anticipated at the time of entering the contractual relationship.

The following events have generally been identified by the courts to constitute frustration:

(1) Subsequent legal changes or statutory impossibility;
(2) Outbreak of war;
(3) Destruction of the subject matter of the contract or literal impossibility;
(4) Government acquisition of the subject matter of the contract;
(5) Cancellation by an unexpected event like where either party to a contract for personal service, dies or where either party is permanently incapacitated by ill-health, imprisonment etc from rendering the service he has undertaken.

See **OKEREKE & ANOR V. ABA NORTH LGA (2014) LPELR-23770(CA) AT PP. 32 PARAS. A – D**.

It is a time honoured legal principle that in construing the rights and obligations of parties under a written contract, it is the terms of said written contract that the Court is bound to read and apply. – see the Supreme Court's case of **BILANTE INTL LTD V. N.D.I.C (2011) LPELR-781(SC) AT PP. 21 – 22 PARAS. E-A**.

In the case of **AONDO V. BENUE LINKS (NIG) LTD (2019) LPELR-46876(CA) AT P. 39 PARAS. A – B** the Court of Appeal held as follows;

> *"Where the relationship between the parties is governed by written agreements the Court has to resort to their terms to know what the parties had appended their respective signatures with date and to see whether the claims of the plaintiff and defendant can be supported with the documentary exhibits."*

I have carefully scrutinized the contents of the loan agreements between the Plaintiff and the Defendant in the instant suit i.e. Exhibits C and D. The only mention of salary and/or allowance is in the clause containing 'Security/Support' and 'Repayment Source' under 'Summary of the Terms and Conditions of the Facility'. It is provided therein as follows;

"SECURITY/SUPPORT: Domiciliation of salary / allowances"
"REPAYMENT SOURCE: From quarterly allowances and salary"

Giving something as security in legal parlance simply means it is given as assurance of fulfilment of an obligation. In the instant case, the domiciliation of Plaintiff's salary/allowances with the Defendant-bank is to give the Defendant an assurance of the Plaintiff's commitment to pay repay the loan. Repayment Source also connotes that the repayment would be made from quarterly allowance and salary.

Having read through the entire loan agreements Exhibits C and D, it is obvious that there is nothing therein contained by which parties could be

said to have agreed that the repayment of the loan (principal loan or accrued interest thereunder) would be limited to only the Plaintiff's salary/allowances let alone salary/allowances from the Senate. To hold otherwise would amount to allowing extrinsic evidence to vary the clear terms of Exhibits C and D. The law does not permit this. See **AONDO V. BENUE LINKS (NIG) LTD (SUPRA) AT PP. 14 – 19 PARAS. F – E**.

The Plaintiff in this case has not stated that he is bankrupt by virtue of no longer earning salary and allowance from the Senate. The mere fact that he does not earn salary and allowance from the Senate anymore does not in the circumstances automatically mean it is impossible for him to perform his obligation of repaying the principal loan and accrued interests under Exhibits C and D. Going by his evidence, it simply means that what he gave as security to the Defendant under Exhibits C and D, to assure the Defendant of his commitment to repay the loan, has been adversely affected by the event of his removal from office, as Senator of National Assembly of the Federal Republic of Nigeria. That is the implication at the very best.It is however pertinent to observe that both Exhibits C and D do not at all categorically refer to "Salary and/or allowances as Senator of the National Assembly", as this Court is being led to believe by the Plaintiff. The Agreements qua offer of loan facility only referred to 'Salary and Allowances', there was never any mention of it being limited to only salary and allowances as Senator in the National Assembly.

Just as the Plaintiff led no evidence to show that he is bankrupt, he also led no evidence that the Agreements contemplate that the Senate is the only place where he could generate income in the form of salary and allowances. It would therefore amount to speculation and unfounded conjecture for this Court to conclude as such. It is trite position of the law that Courts are enjoined to refrain from relying on speculations nor base their decisions on assumptions or conjecture. See the cases of **ROYAL EXCHANGE ASSURANCE (NIG) PLC V. ANUMNU (2002) LPELR-6071(CA) AT PP. 89 – 90 PARAS. F-A** and

AWOLOLA V. GOVERNOR OF EKITI STATE & ORS (2018) LPELR-46346(SC) AT PP. 46 – 47 PARAS. D-B.

It is undisputed that the loan transaction is guided by Exhibits C and D, the executed offer letters. There is nothing revealed from a careful scrutiny of these contractual relationship indicating that the repayment of the loan facility was limited to Salary and Allowances from the Senate. His vacation of the Senate therefore could not have rightly frustrated the contract.

The Plaintiff has therefore failed in the circumstances to establish that it is *impossible*for him to perform his obligation under Exhibits C and D of paying the principal loan and accrued interest by virtue of his removal from office as Senator and ending his salary and allowance. A contract is not frustrated merely because its execution by one party becomes difficult or more expensive than originally anticipated.A contract is frustrated when it becomes impossible to perform. – see **FEDERAL MINISTRY OF HEALTH V. URASHI PHARMACEUTICALS LTD (SUPRA)** and **OKEREKE & ANOR V. ABA NORTH LGA (SUPRA)**.

Thus, the Plaintiff has failed to establish that the two loan contracts Exhibits C and D between him and the Defendant have been frustrated. In the circumstances, the provisions of **Part II of the Law Reform (Contracts) Act**, particularly **Section 4(2)** upon which the Plaintiff has so strongly relied in making his case, cannot avail the Plaintiff.

In the circumstance therefore, further deliberation on whether the Law Reform (Contracts) Act is applicable to the Defendant being a Bank, would only amount to an academic exercise in futility which courts have been admonished to refrain from in the course of judgment. See the case of **AYODELE V. STATE (2010) LPELR-3895(CA) AT P. 13 PARAS. A-C**.

Whether or not the Act is applicable to Banks has become irrelevant, in view of the finding of this Court that the contract between the parties was not frustrated as contended by the Plaintiff.

The Plaintiff is therefore not entitled to the declaratory reliefs sought by him vide reliefs numbers 1, 2, 3 and 5 which are based on his failed case of frustration of contract. He is also not entitled to the reliefs numbers 10, 11 and 12 which are ancillary orders to the grant of those aforementioned declaratory reliefs.

Relief No. 9 of the Amended Statement of Claim is for a declaration that monies collected by the Defendant in excess of the legally permitted interest rates, being N15,244,055.47 are monies received by the Defendant for the use of the party.

Although the Plaintiff pleaded in his Further-Further Amended Statement of Claim that a total combined excess interest of N15,244,055.47 was charged and deducted from his account between July 2009 and March 2011 the only piece of evidence which he adduced is vide his oral testimony in support of his defence to the Counter-claim. The Plaintiff had testified that the Defendant debited his account in excess of N15,244,055.47 even after he left the Senate. In any case, this allegation was denied by the Defendant while DW1 further testified that the Defendant neither charged nor deducted any excess interest at any time. As it is, on the balance of probabilities, I must say that the Plaintiff who had the onus of proving the allegation, moreso when same has been denied by the Defendant, has failed to adduce sufficient evidence to preponderate the imaginary scale of justice in his favour. See **Sections 131, 133, 134, 136(1) and 140 of the Evidence Act 2011** and on the burden of proof of facts, see **MATOH V. ADMIRAL ENVIRONMENTAL CARE LTD (2015) LPELR-25905(CA) AT PP. 16 – 22 PARAS. C-B**.

Suffice it to say, the Plaintiff has failed to prove his allegation that a total combined excess interest of N15,244,055.47 was charged and deducted from his account between July 2009 and March 2011.

Besides, it is abundantly clear that the Plaintiff's relief No. 9 is sought pursuant to the provisions of**Section 4(2) of the Law Reform (Contracts) Act**.In his address, Counsel to the Plaintiff argued for the grant of this relief by contending that the Plaintiff has proved that his contract with the Defendant was frustrated and, as such, he overpaid the loan and is thus entitled to the refund of N15,244,055.47.

This Court having found that the Plaintiff failed to establish that the loan contracts between himself and the Defendant were frustrated and that he cannot take refuge under the provisions of the Law Reform (Contracts) Act, it follows that relief No. 9 which is also based on such claim must fail.

The Plaintiff also seeks refund of Commitment and Management Fees charged by the Defendant on the two loans and declarations that same are illegal.

The position of the law is that an allegation of illegality must be specifically pleaded. – see the cases of **ISHOLA V. U.B.N LTD (2005) LPELR-1550(SC) AT P. 15 PARAS. B-D** and **OROGUN & ANOR V. FIDELITY BANK (2018) LPELR-46601(CA) AT PP. 38 – 40 PARAS. D-C**.

The Plaintiff in this case averred in his Amended Statement of Claim that the following portions of the loan transactions are illegal;

a. The 1% commitment fee charged by the Defendant on both loans as upront charge is not an approved charge by the Central Bank of Nigeria (CBN) under its powers to approve fees and charges of Banks in the Banking Act Cap. 28 LFN 1990 and is therefore an illegal charge.

b. The 1% management fee charged by the Defendant on both loans is not an approved charge by the Central Bank of Nigeria (CBN) under its powers to approve fees and charges of Banks in the Banking Act Cap. 28 LFN 1990 and is therefore an illegal charge.

The Defendant denied this averment. There is however nothing in the Plaintiff's testimony before this Court to support the above averment. The Plaintiff did not adduce any evidence to support this allegation. As pleadings do not constitute evidence, the position of the law is that mere averments in pleadings, in respect of which no evidence has been adduced in proof thereof, will be deemed as having been abandoned. – see the cases of **HELP (NIG.) LTD V. SILVER ANCHOR (NIG.) LTD (2006) LPELR-1361(SC) AT P. 12 PARAS. D-F**, **VICTOR V. FUTA & ANOR (2013) LPELR-22887(CA) AT PP. 71 – 72 PARAS. F-B** and**ABUE V. EGBELO & ORS (2017) LPELR-43483(CA) AT P. 18 PARAS. A-C**.

In the circumstances, the Plaintiff is deemed to have abandoned his averment on illegality of parts of the loan contracts between the Defendant and himself. The Plaintiff has thus failed to establish his claim to the reliefs relating to that claim.

In any case, I have carefully perused the two written loan contracts in this case i.e. Exhibits C and D vis-à-vis the allegation of illegality of terms contained therein.

Now Exhibit C (by which the loan agreement of N100 Million was entered into by parties) provides as follows as part of its terms and conditions;

"Commitment fee: 1% payable upfront
Management fee: 1% payable upfront

Exhibit D by which the loan agreement of N10 Million was entered into by parties makes the exact same provision.

It is not in dispute that the Plaintiff accepted the terms of the loan agreements Exhibits C and D unconditionally at the time the offers were made to him by the Defendant. Nowhere was it even remotely suggested in the pleadings or in the course of the trial in this case that the Plaintiff rejected any of the terms of Exhibits C and D. In fact, the Plaintiff as PW1 testified under cross-examination that he accepted the offers in Exhibits C and D upon the terms contained therein.

Long after the loan sum was disbursed to him and has been used for the purpose for which it was obtained (as admitted by the Plaintiff under cross-examination), the Plaintiff has now approached this Court alleging that the terms of the loans in respect of Commitment and Management fees are illegal. His reason is that these fees are not approved charges by the Central Bank of Nigeria under its powers to approve fees and charges of banks operating within Nigeria. He seeks general damages amounting to a refund of the sums paid as commitment and management fees.

Now this is a good time to reiterate that a loan agreement between a customer and his bank is nothing more than a contract to which the general principles of contract would apply. Thus, the general principle of the law of contract is that barring proven cases of fraud, duress or misrepresentation,parties are bound by the terms of their contract freely entered into. A party would therefore not be allowed to resile from the terms of his said contract. See the cases of **ATLAS PETROLEUM INTERNATIONAL V. P.M. COMMUNICATIONS (2017) LPELR-41957(CA) AT PP. 32 – 33 PARAS. D – C** and **UBA V. MARCUS (2015) LPELR-40397(CA) AT PP. 41 PARAS. B – D**.

In the case of **IDONIBOYE-OBU V. N.N.P.C. (2003) 2 NWLR PT. 805 P. 589** the Supreme Court held that a party who opened his heart, mind and eye to enter into an agreement is clearly bound by the terms of

the agreement and he cannot seek for better terms midstream or when the agreement is a subject of litigation, when things are no longer at ease. It was further held that although a party may seek for better terms, the court is bound by the original terms of the agreement and will interpret them as such in the interest of justice.

It is trite law that a party who has benefited from an agreement can notchallenge the validity of same orresile from his obligation under such contract on the pretext of illegality. –see the cases of **NURTW & ORS V. FIRST CONTINENTAL INSURANCE CO. LTD (2019) LPELR-48005(CA) AT PP. 39 – 41 PARAS. F-E**, **MAX BLOSSOM LTD V. VICTOR & ORS (2019) LPELR-47090(CA) AT PP. 11 – 23 PARAS. E-F**, **BATALHA V. WEST CONSTRUCTION CO LTD (2001) LPELR-9149(CA) ATPP. 20 – 24 PARAS. D-A** and**ORURUO V. EKE (2019) LPELR-47710(CA) AT PP. 26 – 27 PARAS. A-B**.

The decision of the Court of Appeal in the case of **ASIKPO V. ACCESS BANK (2015) LPELR-25845(CA) AT P. 22 PARAS. C–F** is very instructive and apposite to the case before this Court. In that case, the Court of Appeal held as follows;

> *"It may not be unheard of to find a bank which loads un-reasonable charges on its customer. If such charges were not voluntarily agreed upon prior to the grant of the facility, they may not be enforceable. But where a party voluntarily agrees to such unreasonable charges prior to the grant of the facility, the party may not be permitted to retract from it.*
> *Parties are bound by the contents of any lawful written agreement duly executed by them; Anyoegbunam v. Osaka (2000) 3 S.C. 1; African International Bank Ltd v. Integrated Dimensional System Ltd (2012) LPELR-971(SC)."*

The Plaintiff in the instant case wilfully accepted to pay the 1% Commitment and 1% Management fees on the loans offered to him vide

Exhibits C and D. He cannot now complain that such fees are illegal and avoid liability for paying same.

Consequently, he is not entitled to Reliefs Numbers 6 and 15 of the Amended Statement of Claim.

The Plaintiff has also alleged that by a letter dated 20th February 2009 (Exhibit E) the Defendant informed him of an increment in the interest rate applicable to the loan by 3% thus becoming 20%. This fact was admitted by the Defendant.

The Plaintiff seeks declarationsfrom this Court that the Defendant breached the terms of the contract by charging 22% interest rate on the two loan agreements from 10th July 2009 as opposed to the stipulated 20% interest rate. He also seeks declaration that the Defendant breached its equitable fiduciary duty to him by increasing its interest rate and also charging 2% in excess of the stipulated interest rate of 20% agreed with the customer. See reliefs 4, 7 and 8 of the Amended Statement of Claim.

Let me state categorically that nowhere was it pleaded in the Plaintiff's Amended Statement of Claim that the Defendant charged 22% interest on the two loan agreements. Neither was it pleaded that the Defendant charged 2% in excess of the stipulated interest rate of 20% agreed. Even if there is evidence adduced at trial on such unpleaded facts, such evidence would go to no issue and must be discountenanced by this Court because parties did not join issues on such facts. See the cases of **SALAUDEEN V. MAMMAN (2000) LPELR-10771(CA) AT PP. 12 – 22 PARAS. E – C** and **AMODU V. COMMANDANT, POLICE COLLEGE MAIDUGURI & ANOR (2009) LPELR-467(SC) AT PP. 13 – 14 PARAS. E – F**.

The Plaintiff's oral testimony that the Defendant was actually charging 22% interest rate on the facilities therefore go to no issue and must be discountenanced.

Even if the fact was pleaded in the Plaintiff's Amended Statement of Claim, there is nothing to show that the Defendant was actually charging 22% interest rate on the facilities as opposed to 20% communicated vide Exhibit E.

The Plaintiff has thus failed to establish his entitlement to the reliefs Nos. 4 and 8.

Regarding the issue of the Defendant's power to increase the rate of interest agreed to by parties, the law is quite settled that a bank is bound by the interest rate agreed to with the customer and cannot change to a rate different from the one contained in their agreement without the consent or at least knowledge of the customer. Where however the Bank notifies a customer of its change or intention to change the interest rate fixed by their agreement and the customer did not react or object to the change, he would be deemed to have accepted and consented to the change by conduct. See the cases of **AKPAN V. FIRST BANK (2018) LPELR-44340(CA) AT PP. 27 – 34 PARAS. D–E** and **EKONDO COMMUNITY BANK LTD V. ANIETING (2013) LPELR-21139(CA) AT PP. 17 – 18 PARAS. D–G**.

In the instant case, the Defendant did notify the Plaintiff vide Exhibit E of an increase in the interest rate on the loan facilities by 3% effective from 1st March, 2009. There is nothing to show that the Plaintiff objected to this. Consequently, the Defendant is entitled to charge an interest on the loans at an applied increment of 3% rate. This is even more so in this instance when the Plaintiff did not deny the notice of increase via Exhibit E.

In view of this, the Plaintiff has failed to establish his entitlement to Reliefs Nos. 7 and 13 of the Amended Statement of Claim.

Nowrelief No. 16 (which is the last relief) of the Amended Statement of Claim is for an order of this Court appointing an independent auditor to verify the claims relating to excess interest charges on the Plaintiff's

account with the Defendant from January 2008 till date of commencement of the suit.

It is pertinent to make some observations on this relief.

The records show that at the conclusion of evidence of both parties in this case, this Court observed that it would be helpful to the just determination of this case to procure expert report or witness to testify in respect of the Plaintiff's account with the Defendant. This Court through its directive made on 15th November, 2021 thus gave parties another opportunity to bring before this Court, experts agreeable to both parties to testify on the issue of the status of the Plaintiff's account. The parties, through their respective Counsel, however declined this opportunity and rather chose to rely on the evidence of their witnesses already on record in this case. It thus appeared that the Plaintiff abandoned his relief No. 16. The matter was thus adjourned for judgment.

I have carefully perused the reliefs contained in the Plaintiff's Amended Statement of Claim. The Plaintiff has failed to make a case for the grant of his main reliefs that there were excess interest charges made by the Defendant from the Plaintiff's account with it. I observe quite intuitively also that the Relief No. 16 of the Amended Statement of Claim was not claimed separately as an alternative relief. Consequently, it must fail along with the main reliefs in this case.

In the case of**A.-G., BAYELSA STATE V. A.-G., RIVER STATE (2006) LPELR-615(SC) AT P. 63 PARAS. B-D** the Supreme Court held that in civil cases, it is incumbent on a party who is claiming a relief against his opponent to prove what he asserts, for unless he provides good and credible evidence to discharge the burden of proof placed on him by the law, his case is bound to fail. See also **LIBRA IMPORTS (NIG) LTD V. ACCESS BANK (2018) LPELR-46795(CA) AT PP. 6 – 7 PARAS. F-B**.

Consequently, the Plaintiff has failed to establish his claim and his entitlement to the reliefs sought in this suit. The main claim therefore fails.

Issue number One is hereby resolved against the Plaintiff and in favour of the Defendant.

Issue Number Two which I shall now proceed to consider is;

> **Whether the Defendant has established the Counter-claim to justify entitlement to the reliefs sought therein against the Plaintiff.**

I have earlier in this Judgment set out the reliefs sought by the Defendant in its Counter-claim against the Plaintiff.

Ostensibly, it isnot the law that the failure of the Plaintiff's main claim automatically means the success of the Defendant's Counter-claim and its entitlement to the reliefs sought therein.

It is trite law that, for all intents and purposes, a counter-claim is a separate, independent and distinct action and the counter-claimant, like all other plaintiffs in an action, must prove his claim against the person counter-claimed against before obtaining judgment on the counter-claim. – see the case of **JERIC (NIG.) LTD. V. U.B.N. PLC (2000) LPELR-1607(SC) AT P. 25, PARAS. C-E**. See also **ASIKPO V. ACCESS BANK (SUPRA) AT P. 40. PARAS. A-B**.

The same facts and evidence which the Defendant relied on for its defence to the Plaintiff's claim also constitutes its case in respect of its Counter-claim against the Plaintiff.

I have stated earlier (and I must reiterate) that it is not in dispute that the Plaintiff is a customer of the Defendant-bank and in 2007 and 2008 obtained two loan facilities of N100 Million for a term of 39 months and

N10 Million for a term of 3 years respectively (totalling N110 Million) from the Defendant at an agreed interest rate. Exhibits C and D contain the terms of the loan facilities. All these facts are well established before this Court.

By the first relief of the Further-Further Amended Statement of Defence/Counter-claim, the Defendant seeks the sum of N54,113,793.44 being the outstanding balance as at 30th April 2016 comprising of the unpaid principal and accrued interest on the composite loan facilities granted to the Plaintiff by the Defendant.

I have observed that the matters upon which the Plaintiff's Counsel has in his final address contended contradictions in the Defendant's case, evidence and pleadings pertain essentially to the amount pleaded in a Counter-claim (which has since been amended) by the Defendant and the amount upon which evidence was adduced. In its erstwhile Counter-claim, the Defendant had sought vide its first relief the sum of N104,009,946.40 as the amount of the Plaintiff's outstanding indebtedness to it. This has however been amended with leave of Court granted on 15th September, 2021. By the first relief of the Defendant's extant Counter-claim filed on 19th May, 2020 (and deemed properly filed on 15th September, 2021) the Defendant seeks the sum of N54,113,793.44 which is the same amount the Defendant's witness (DW1) gave evidence as the Plaintiff's outstanding indebtedness to the Defendant under the loan contracts. Learned Counsel to the Plaintiff's submissions on contradictions in the Defendant's pleadings and evidence has therefore been overtaken by events. It is thus discountenanced.

Although the Plaintiff in this case admitted receiving the loan of a total sum of N110 Million from the Defendant,he however denies being indebted to the Defendant in the sum claimed or any sum at all.

The general position of the law is that once a defendant admits the indebtedness or receipt of a loan, the burden as to repayment or as to the

reasons for non-payment rests on the defendant. – see the case of **ASIKPO V. ACCESS BANK (SUPRA) AT P. 46. PARAS. D-E**.

In this case however, the Defendant/Counter-claimant is relying on a debit balance contained in a statement of account (Exhibit H2) which is the sum of N54,113,793.44as the outstanding balance due from the Plaintiff/Defendant-to-Counter-claimand claimed by the Defendant/Counter-claimant under the loan agreements.

It has been held that the usual way of proving a debt by a bank is by putting in the statement of account or secondary evidence thereof where it is admissible. – see **ASIKPO V. ACCESS BANK (SUPRA) AT PP. 41 – 44 PARAS. F-A** and **AKPAN V. FIRST BANK (SUPRA) AT PP. 14-19 PARAS. E-F**.

It is however also now settled law that a party relying on a statement of account to support his claim for unpaid debt or loan must not only tender the statement of account in evidence, but must also adduce oral evidence linking the statement with the actual payments made, showing what was owed, what was paid, what is outstanding and how the outstanding sum was arrived at. Thus, mere presentation or dumping of the customer's statement of account on the Court is not sufficient, because the statement of account cannot, on its own, amount to sufficient proof to impose liability on the customer for the overall debit balance shown on a statement of account. – see the cases of **WEMA BANK V. OSILARU (2007) LPELR-8960(CA) AT PP. 29 – 30 PARAS. A-F** and **ABDULAZIZ & ORS V. JINGTEX (NIG) LTD (2017) LPELR-43090(CA) AT PP. 17 – 22 PARAS. F-D**.

See also **ASIKPO V. ACCESS BANK (SUPRA)**and **AKPAN V. FIRST BANK (SUPRA)**.

In the case of **FIRST BANK V. MANAGEMENT EDUCATION AND TRAINING LTD (2019) LPELR-47502(CA) AT PP. 20 – 21**

PARAS. B-Dthe Court of Appeal held per Ogakwu JCA (delivering lead judgment) as follows;

> *"It seems to me settled law that a bank statement of account is not sufficient explanation of the debit and lodgements in a customer's account in order to charge the customer with liability for the overall debit balance shown in the statement of account. Any bank claiming a sum of money on the basis of the overall debit balance in a statement of account must adduce both documentary and testimonial evidence to show how the overall debit balance was arrived at. Investigation is not the function of a Court, so there must be testimonial evidence from a bank official familiar with the account explaining how the debit balance was arrived at. See YUSUF vs. ACB (1976) 1-2 SC 49, WEMA BANK vs. OSILARU (2007) LPELR (8960) 1 at 29-30, HABIB NIGERIA BANK LTD vs. GIFTS UNIQUE (NIG) LTD (2004) 15 NWLR (PT 896) 405, BIEZAN EXCLUSIVE GUEST HOUSE LTD vs. UNION HOMES SAVINGS & LOANS LTD (2011) 7 NWLR (PT 1246) 246, BILANTE INTERNATIONAL LTD vs. NDIC (2011) 15 NWLR (PT 1270) 407 and ALBIA TRADING GMBH vs. MADUNKA INTERNATIONAL LTD (2013) LPELR (22312) 1 at 30-32.*
>
> *From the Records, none of the two witnesses called by the Appellant spoke to the entries in the Statement of Account, Exhibit D6 (A). The Appellant merely dumped the statement of account on the Court without any explanation of the entries therein. The lower Court could not have given judgment for the debit balance on the unexplained statement of account. Furthermore, by Section 51 of the Evidence Act, 2011, which is in parimateria with Section 38 of the Evidence Act, 1990, entries in statements of account shall not alone be sufficient to charge any person with liability."*

On how to claim a sum of money on the basis of the overall debit balance of a statement of account, the Court of Appeal held in the case of **ALHAJI HASSAN BELLO & SONS LTD & ANOR V. ZENITH**

BANK (2018) LPELR-43792(CA) AT PP. 17 – 20 PARAs. E-A that the law is that any bank which is claiming a sum of money on the basis of overall debit balance of a statement of account must adduce both documentary and oral evidence explaining clearly the entries therein particularly where the debt is constituted largely by interest charges to show how the overall debit balance was arrived. It was therefore held that evidence needs be adduced on contents of the statement of account because interest charges and other charges are not liquidate, there should be a break down, an analysis of how much of the debt is interest to enable the Court appreciate what is before it without having to do private calculation, an exercise which the law disapproves.

I have carefully perused the statement of the Plaintiff's account tendered by the Defendant as Exhibit H2. The multiple entries consisting of credits and debits contained therein and which culminate in the debit balance (being claimed from the Defendant) are rather overwhelming in number. The relevant question is this; apart from the statement of account tendered by the Defendant and admitted in evidence as Exhibit H2 in this case, is thereany other piece ofevidence explaining the debit charges and transactions making up the debit balance of N54,113,793.44?

I have critically examined the entire evidence before this Court particularly that of the Defendant's only witness (DW1).

All that DW1 said in her examination-in-chief regarding the sum of N54,113,793.44 being claimed as the outstanding balance is captured in paragraphs 25 and 26 of her written witness statement on oath which I reproduce as follows;

> *"25. That as at 30/04/2016, the plaintiff is still indebted to the defendant to the tune of N54,113,793.44 comprising unpaid principal and accrued interest on the composite loan of N100,000,000.00 and N10,000,000.00 respectively.*

26. *That the defendant is entitled to the counterclaimed sum of N54,113,793.44 being the outstanding balance as at 30/04/2016 comprising the unpaid principle and accrued interest on the composite loan facilities granted to the plaintiff by the defendant."*

Aside of this, DW1 said absolutely nothing regarding the Statement of Account Exhibit H2 in her evidence in chief.

Under cross-examination regarding Exhibit H2 by the learned Plaintiff's Counsel, DW1 stated that she neither made the postings nor knew the persons who made the postings in the Statement of Account Exhibit H2. She admitted that, other than knowing that 19% was used for the facility repayment, she can not speak for the other debits in the statement of account Exhibit H2.

I must mention here that it has not escaped my attention that Exhibit J2 is another copy of the Plaintiff's statement of account that was tendered by the Plaintiff's Counsel in the course of the cross-examination of DW1. DW1 had admitted that it is a copy of the statement of account that she had frontloaded with her written witness statement on oath.

I have carefully perused Exhibit J2 and have found that it is the same as a substantial part of Exhibit H2 in that it contains entries covering the period from 1st May 2007 to 29th February 2008. Exhibit J2 is therefore on face value no different from Exhibit H2 in this regard.

Now, apartfromsimply not saying anything to corroborate the debit transactions recorded in Exhibit H2, DW1 has admitted quite frankly that she cannot explain those transactions recorded in Exhibit H2. I believe this admission has succeeded in making the Defendant's case far worse than it already was. As it is, there is nothing before this Court to explain or corroborate the debits or transactions recorded in Exhibit H2 that culminated in the debit balance of N54,113,793.44 which sum the

Defendant is now claiming from the Plaintiff as the outstanding balance on the two loans granted to the Plaintiff.

In other words, the Defendant has done the forbidden in its course of claiming the overall debit balance in the statement of claim Exhibit H2 as the outstanding loan sum. The Defendant has dumped the statement of account Exhibit H2 on this Court without any explanation to corroborate its entitlement to the debit balance of N54,113,793.44 contained in the said statement of account which is now being claimed as the precise sum outstanding under the loan facilities.

It is not the duty of this Court to retire to the recess of its chambers and begin to pore over the entries in the statement of account Exhibit H2 for the purpose of identifying what the transactions recorded therein are, to justify the debit balance of N54,113,793.44 and the Defendant's entitlement to same. No.

Rather it is the duty of the Defendant who is claiming the debit balance as the sum outstanding under the loan to demonstrate in open court how the entries in the statement of account justify the Plaintiff's liability for the overall debit balance. See **Section 51 of the Evidence Act 2011** which provides as follows;

> *"51. Entries in books of accounts or electronic records regularly kept in the course of business are admissible whenever they refer to a matter into which the court has to inquire, but such statements shall not alone be sufficient evidence to charge any person with liability."*

See also the cases of**WEMA BANK V. OSILARU (SUPRA)**,**FIRST BANK V. MANAGEMENT EDUCATION AND TRAINING LTD (SUPRA)**,**ALHAJI HASSAN BELLO & SONS LTD & ANOR V. ZENITH BANK (SUPRA)** and the plethora of other decided cases which I cited earlier on this point.

The resultant effect of the Defendant's failure to call cogent and credible evidence to corroborate the entries in Exhibit H2 is that the Defendant has failed to make a case for its entitlement to the overall debit balance of N54,113,793.44 claimed by it as the outstanding balance of the two loans granted to the Plaintiff in 2007 and 2008.

The Defendant has thus failed to establish its entitlement to the first relief of its Counter-claim by cogent evidence. It ought to be refused. And so is hereby refused.

Now the second relief of the Defendant's Counter-claim is for the sum of N4,500,000,000.00 claimed as cost of defending this suit.

It is a well-established legal aphorism that costs follow the event. Generally speaking, a successful party is entitled to his cost. The Plaintiff's claim in the instant suit has failed. Generally speaking therefore, a defendant who has successfully defended an action brought against him by a claimant ought to be entitled to the cost of defending the action.

The pertinent question therefore is whether the Defendant is entitled to the cost claimed underits second relief?

In support of its relief for N4.5 Million cost, the Defendant pleaded as follows at paragraph 27 of its Counter-claim;

> *"27. That the defendant in this case has incurred a debt of N4,500,000.00 being its solicitor's fee out of which a part payment of N1,500,000.00 has been paid. The receipt of the part payment of the sum N1,500,000.00 is hereby pleaded and shall be relied upon by the defendant during trial."*

It is therefore apparent from the foregoing that what the Defendant claims against the Plaintiff as cost of defending the action is actually solicitor's fees.

The general position that has been held over time is that it is unethical and an affront to public policy for a litigant to pass his solicitors fees in an action to his opponent. This is because solicitors' fees do not form part of the cause of action. Therefore, the current state of the law is that a claim for Solicitors fees which does not form part of the Claimant's cause of action cannot be granted.Where however the obligation to pay the solicitors fees is contractual, such contractual term would be enforced under the law. –see the cases of **BLUENEST HOTELS LTD V. AEROBELL (NIG) LTD (2018) LPELR-43568(CA) AT PP. 61 – 66 PARAS. B-C**and**MICHAEL V. ACCESS BANK (2017) LPELR-41981(CA) AT PP. 48 – 49 PARA. E**.

In the instant case, it is not in dispute that Exhibits C and D contain the terms of the loan agreements between parties. Clause 4 under 'Other Conditions' in Exhibit C provides as follows;

4. *All legal fees, costs and expenses arising from the facility or of enforcing the terms and conditions herein should the occasion ever arise shall be claimed from the obligor.*

Exhibit D makes exactly the same provisions as above in clause 3 under 'Other Conditions'.

It is therefore clear (and agree with Defendant's Counsel) that there was contractual agreement between parties to the effect that the Defendant has a right to recover such fees as solicitor's fees associated with enforcing or defending its rights under Exhibits C and D.

Having crossed that hurdle, the relevant question to now determine is whether the Defendant has sufficiently specifically pleaded and strictly proved such a claim of special damages which happens to be the condition for succeeding in a claim to recover solicitor's fees. – see the case of **NURTW & ORS V. FIRST CONTINENTAL INSURANCE CO. LTD (2019) LPELR-48005(CA) AT PP. 61 – 66 PARAS. B-C**.

The Defendant in this case did not tender any form of documentary evidence to support the claim of N4.5 Million which it alleged as its solicitor's fees. The Defendant failed to produce the receipt which it had pleaded in paragraph 27 of its Counter-claim as evidence of its solicitor's fees. In fact, the only oral evidence in support of the relief for this claim is at paragraph 27 of DW1's written witness statement on oath where she had stated thus;

> *"27. That the defendant is entitled to the counterclaimed sum of N4,500,000.00 being the cost of defending this suit."*

The above rather general statement is insufficient evidence as to constitute strict proof of the special damages of solicitor's fees against the Plaintiff who particularly denied this claim in his pleadings. The Defendant has thus failed to prove its entitlement to the second relief of the Counter-claim as well.

In sum, the Counter-claim fails in its entirety and issue Number 2 herein is thus resolved against the Defendant and in favour of the Plaintiff.

Pursuant to all the foregoing and in consideration of the parties' pleadings, oral and documentary evidence as well as arguments of Counsel before this Court, both the Plaintiff's claim and the Defendant's Counter-claim fail.

Consequently, the Plaintiff's claim and the Defendant's Counter-claim in their entirety are hereby accordingly dismissed.

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Honourable Justice M. E. Anenih

APPEARANCES:

A. T. Kehinde SAN appears with E. J. Okoye Esq, A. O. Aderele Esq, I. C. Nnamdi–Okonkwo Esq and M. C. MuftwangEsq for the Plaintiff/Defendant-to-Counterclaim.

Dr. Sonny Ajala SAN appears with Douglas Ondor Esq for the Defendant/Counter-claimant.