

IN THE HIGH COURT OF JUSTICE OF THE F.C.T.

IN THE ABUJA JUDICIAL DIVISION

HOLDEN AT ZUBA, ABUJA

ON FRIDAY THE 28TH DAY OF OCTOBER, 2022

BEFORE HIS LORDSHIP: HON. JUSTICE K. N. OGBONNAYA
JUDGE

SUIT NO.: FCT/HC/CV/444/2014

BETWEEN:

RED BRICKS CONSULTANTS LIMITED ----- CLAIMANT

AND

ZENITH BANK PLC ----- DEFENDANT

JUDGMENT

This matter was transferred to this Court on the 7th day of February, 2018 from the then Court 6.

In this Suit the Claimant, Fred Bricks Consultants Limited claims the following against the Defendant, Zenith Bank PLC:

- 1. An Order of this Court directing the Defendant, Zenith Bank PLC to refund the sum of Eighty One Thousand, Nine Hundred and Seventy Eight Naira, Sixty Three Kobo (₦81, 978.63) to the**

**Claimant's Account Number: 1012372693
without further delay.**

**2. Payment of Ten Million Naira (₦10, 000,000.00)
as Damages against the Defendant for the
fraudulent and negligent management of the
Claimant's Account.**

The Claimant is a customer of the Defendant in its Area 7 Garki, Abuja Branch. The Claimant alleged that on the 25th of July, 2014 the sum of Eighty One Thousand, Nine Hundred and Seventy Eight Naira, Sixty Three Kobo (₦81, 978.63) was withdrawn by unknown persons. That their Managing Director alerted the Bank – Defendant. That he was directed to fill forms in order to enable the Defendants retrieve the money and to investigate how the money was withdrawn and who did it. That its ATM Card was replaced sometime in September 2014. That the Defendant refused to refund the said sum of Eighty One Thousand, Nine Hundred and Seventy Eight Naira, Sixty Three Kobo (₦81, 978.63) (hereinafter called the sum in issue). The Claimant caused their Solicitor to write a letter to the Defendant on 17th October, 2014 demanding a refund. They had stated in the said letter that they never made any withdrawal on the 25th of July, 2014 from its Account through any ATM Card or Credit Card or any other means. That they never gave or revealed the ATM Card PIN Number to any other person as it is only its Managing Director that knows it. That by the replacement

of the Claimant's former ATM Card shows that it is only the Defendant that the insecurity associated with the changed ATM Card as at the time of its issuance before the fraudulent withdrawal of 25th July, 2014 occurred. That the Defendant has not done anything in a bid to retrieve the said sum in issue.

The Claimant called a Witness and tendered a document. The Defendant called a Witness who testified in chief and was not Cross-examined because the said Witness had left the service of the Defendant. The Defendant Counsel applied for change of Witness. The Defendant Counsel never called the Witness, and after several adjournments the Court foreclosed the Defendant as the Court cannot wait in perpetuity. The Court adjourned for adoption of Final Written Addresses. The Defendant filed its Final Written Address on the 15th day of June, 2021. The Claimant was served on the 9th September, 2021. The Claimant Counsel never filed their Final Written Address until 30th March, 2022. The Defendant tendered 2 documents marked as EXH 2 & 3 respectively. The Court had awarded Twenty Thousand Naira (₦20, 000.00) cost against the Defendant for wasting the time of the Court. They paid same.

In their Final Written Address the Claimant raised 2 Issues for determination which are:

- (1) Whether the Claimant is entitled to the refund of the money fraudulently withdrawn from its Account on the 25th day of July, 2014?**
- (2) Whether or not the Claimant is entitled to Ten Million Naira Damage against the Defendant.**

On Issue No. 1, they submitted that it has through the testimony of PW1 and document tendered proved that its money was fraudulently tampered with on the 25th July, 2014. That it is evidently clear that there was a fraudulent withdrawal as shown in EXH 1 tendered by the Claimant on the said date while the money was in the custody of the Defendant. That the Defendant was negligent in the management of the Claimant's Account. That the Claimant never carried out any transaction on the Account and never used ATM of the Defendant or any other that day. That the Defendant has not taken any step to retrieve the money till date. That the Defendant is liable for their negligence. They relied on the cases of:

UBA V. Ntuk

(2004) All FWLR (PT. 234) 1985 @ 2004

Enterprise Bank V. MNL

(2015) All FWLR (PT. 773) 1995 @ 2039 Paragraphs G – H

UBA V. Yaro Bakiyawa Yahuza

(2014) LPELR – 23976 (CA)

That since the Claimant had established that the Defendant was negligent, that the Defendant is liable and the Claimant is unarguably entitled to the sum in issue. They urged Court to so hold and resolve the Issue No. 1 in its favour.

On Issue No. 2, they submitted that the Claimant is entitled to the payment of Damages. That the Defendant did not lead evidence to buttress its Statement of Defence. That the Foreclosure Order against the Defendant/Defendant Counsel was not contested by it. Hence, the Defendant did not challenge the case of the Claimant. Hence, the Claimant's case is unchallenged and should be accepted by Court. He referred to the cases of:

Yakubu V. MWTAS

(2005) All FWLR (PT. 267) 1388 @ 1431

Dunosaro V. Ayorinde

(2005) All FWLR (PT. 260) 167 @ 182 SC

That the Claimant is entitled to payment of Ten Million Naira (₦10, 000,000.00) Damages which flow from the wrong complained of to assuage the loss suffered by the Claimant. They referred to the case of:

Union Bank V. Ajagbule

(2012) All FWLR (PT. 611) 1413

He urged Court to grant the Reliefs sought and enter Judgment for the Claimant.

On their part, the Defendant filed their Final Written Address on the 15th June, 2021. It is the story of the Defendant that the fraudulent transaction in the Account of the Claimant of 25th July, 2014 was done through a Point of Sale (POS) payment and that such transaction must have been with the Claimant's ATM Card and Secret PIN which is known to no other person or even the Defendant but to the Claimant at all times material to this case as the Claimant is the sole custodian of the said secret PIN. That the money lost was as a result of the Claimant's negligence and that the Claimant cannot benefit from its own negligence as they are liable. Hence, the Defendant is not liable and should not refund the money or pay any damages for the said withdrawal.

That it is not in contention that the Claimant has custody of its ATM Card and its PIN. That the PIN has been divulged to a 3rd party at the instance and/or negligence of the Claimant. That the Claimant changed its PIN combination to an unknown combination which is not known to the Defendant. That the Claimant has the duty and responsibility to protect and keep the said PIN combination at all time safe which it did not, hence the fraudulent withdrawal from the Account.

In their Final Written Address, the Defendant raised 2 Issues for determination which are:

- (1) Whether the Claimant was negligent with the PIN to its ATM Card?**

(2) Whether the Claimant has discharged the burden of Proof and therefore entitled to the Reliefs sought based on its facts and evidence before this Court?

On Issue No. 1, the Defendant submitted that the Claimant was negligent in handling of the secret PIN of its ATM Card. That it is incumbent on the Claimant to establish negligence since he who alleges must prove. They referred to the cases of:

SPDC V. Okeh

(2018) 17 NWLR (PT. 1649) 420 @ 425

Universal Trust Bank V. Ozoemena

(2007) 3 NWLR (PT. 1022) 448

Kella V. Jarmakani Trangist Limited

(1961) All NLR 747

That the Defendant handled the Account with utmost care and in strict compliance with the mandate on the Account. That the Defendant or its staff did not commit any infraction on the Account. That from the evidence of PW1, the Claimant failed to establish through its Witness or by document tendered that the Defendant committed any infraction in management of Account of the Claimant. That there is no evidence to show that the Defendant/staff colluded with any 3rd party or was

negligent in the management of the Account that caused the said fraudulent withdrawal.

They urged the Court to so hold as the Claimant failed to prove the Tort of Negligence against the Defendant in this case and resolve the Issue in favour of the Defendant. That evidence of the PW1 was based on what the Managing Director of the Claimant told him. That the Claimant failed to present the Managing Director to testify as a Witness in this Suit to give evidence. That the PW1 evidence is hearsay and should not be admitted. They relied on the case of:

**Samaki V. Federal Republic of Nigeria
(2018) 16 NWLR (PT. 1646) 405 @ 421**

They urged the Court to discountenance the evidence of PW1 in its entirety and resolve Issue No. in favour of the Defendant.

On Issue No. 2, the Defendant submitted that the Claimant has statutory Judicial Obligation to prove its case as he who alleges must prove with credible testimony and Exhibit as the circumstance warrants. They relied on the case of:

**Muhammed V. DHL International Limited
(2001) All FWLR (PT. 38) 1321 CA**

That it is incumbent on the Claimant to prove its case on preponderance of evidence that the Defendant committed grave infraction or colluded in the false withdrawal or that

the Defendant was negligent in the management of the Account of the Claimant. That the Claimant failed to present before the Court that the Defendant promised to refund the said sum in issue fraudulently withdrawn from the Account of the Claimant. They relied on the case of:

Akinyele V. Afribank

That the Claimant was in charge and custody of the PIN of the ATM Card at all times. That the Defendant proved that there was no impropriety on the part of the Defendant or its staff in this case. That the Claimant did not place before this Court anything to prove or link the Defendant to the alleged withdrawal. That the Defendant proved that the fraud happened through a POS transaction on the 25th of July, 2014 which is in the custody of the Claimant. That it can only happen with the use of the secret PIN by the Claimant or any person authorized by it. That the evidence was not challenged as the Claimant did not Cross-examine the DW1. They referred to the cases of:

WAEC V. Oshinebo

(2006) 12 NWLR (PT. 994) 258 @ 263

Mil Admin of Lagos V. Adeyiga

(2012) 5 NWLR (PT. 1293) 291 @ 305

They urged Court to hold that the Defendant did not commit any infraction, impropriety or collude with any 3rd party in the purported fraudulent withdrawal in this case

and that the Claimant failed to prove that the Defendant agreed to refund the said sum in issue. That the burden of proof remains on the Claimant. They relied on the cases of:

Ayorinde & Or V. Sogunro & Ors
(2012) LPELR – 7808 (SC)

Iman V. Sheriff
(2005) 4 NWLR (PT. 914) 80 @ 86

Okoye & Or V. Nwankwo
(2014) LPELR – 23172 (SC)

Nsefik V. Muna
(2007) 10 NWLR (PT. 1043) 502 @ 518

They urged Court to dismiss the case of the Claimant and resolve the Issue No. 2 in Defendant's favour.

COURT

It is important to note that lawyers who appear before should at all times be civil in their behavior before the Court. It is only in the Legal Profession that Practitioners are addressed as Gentlemen. The gentleness of a lawyer should be seen in and out of the Court but especially in the Court. Therefore, lawyers should always checkmate their emotion whenever they are representing anyone. In appearing in Court to defend anyone, lawyers should bear in mind that they have been hired like any other worker to execute the job they are paid for. This applies even

when a lawyer is doing a case pro bono. There should be decorum in and out of the Court. But moreso in the face of the Court.

In this case, the record showed that the Court had foreclosed the Claimant Counsel from filing its Final Written Address having refused to do so more than One (1) year and Six (6) months after he was supposed to have done so. The Court had also ordered the Claimant Counsel to make an oral submission since he could not file his Final Written Address after the Defendant Counsel had served him theirs over 6 months earlier on the 9th of September, 2021. It is very unbecoming of the Claimant Counsel to have disobeyed the Order of Court and unashamedly but stealthily filed his Final Written Address after close to one year when he was supposed to do so.

This Court decided to consider and do a survey of the said Final Written Address by the Claimant Counsel in the interest of fair-hearing for the Claimant who the said Counsel – Waheed Gbadamosi Esq. represented in this case.

It has been held in plethora of cases and had been the practice that a party/Defendant may rely on the case of the Plaintiff and anchor its Defence on the evidence or case of the Plaintiff. In that case, the Defence will only be entitled to file a Final Written Address. That can happen even if the Defendant had filed several Statements on Oath. Such situation happens when the Defendant out of

its own volition decide not to call any of its Witnesses to testify in Court. It can also happen where the Court had foreclosed the Defendant from fielding its Witnesses. This is common where the Defendant had wasted the time of the Court and has no defence as such. Whatever the reason, the Defendant still has right to file a Final Written Address. There are instances where a Defendant may not even file a Defence but will file a Final Written Address at the end of the close of Hearing. So when such situation arises, the fact that the Defendant did not call Witness does not mean it has no defence to the case of the Plaintiff. Besides, a Defendant may not Cross-examine the Plaintiff's Witness. It can decide to do so during Final Written Addresses. Not calling a Witness or opening and closing the Defence does not mean that the Defendant does not challenge the case of the Plaintiff. So the Claimant's contention that their case is unchallenged because the Court foreclosed the Defendant from opening its case does not hold any water.

The Defendant challenged the case of the Claimant. They filed a Statement of Defence. They called a Witness – Harry Ekeoma who testified in chief on behalf of the Defendant. The Defendant did not call the 2nd Witness which they promised to do. After several months the Court foreclosed them from doing so. Besides, the other Witness had left the service of the Defendant by then.

It is the law and it is trite that whoever alleges must prove the allegation with facts and evidence material and

otherwise as the case may be. The failure to prove will make the Court to hold that there is no merit in the case and as such the Claimant will therefore not be entitled to its claim. Otherwise the Court will hold that there is merit where the Claimant proves its claim. Where a party fails to prove, the Court will discountenance both the testimony of such party and evidence laid before the Court. To prove the testimony must be credible, watertight and not contradictory. See the case of:

**Muhammed V. DHL International Limited
(2001) FWLR (PT. 38) 1321 (CA)**

Such proof must be on preponderance of evidence presented before the Court. See the case of:

Akinyele V. Afribank Supra

With the advent of Electronic Money transaction, all Bank customers and the Banks had decided to be more vigilant than before. This is known in the local parlance that everybody now shines their eyes. By the E-money transaction which is now the order of the day, customers to banks now has more responsibility to keep and secure their ATM Card which they use for banking transaction.

A typical example is where a customer had applied for ATM Card. Once the Card is generated and is issued to the customer, it is incumbent on the customer to safeguard such Card. He changes immediately the ATM Card PIN so that even the Bank does not know the PIN.

That means that anyone who will use the Card can only get the Pin through the owner of the Card. Anything outside this means that the PIN was gotten through the person who authorized and who has the exclusive custody of such Card and PIN. In that case, the duty of the Bank ends once the customer takes hold of such Card and PIN. So where there is any tampering in the Account of the customer, it is incumbent on such customer to alert the Bank as soon as possible so that the Account will be blocked. Upon a report on such incident, the Bank will initiate investigation to find out who tampered with the Account. But it is incumbent on the Account holder to safeguard and protect its Card. It is not the responsibility of the Bank to do so. It is so much so that after a Bank had issued an ATM Card and the customer has taken possession of same and had changed the initial PIN that the Bank has no right to even retrieve the Card from such customer unless there is report of fraud or that the Card is malfunctioning.

In this case, it is not in doubt that the Claimant has an Account at the Defendant's Bank going by **EXH D2 - marked as EXH 3** in this case which is the Account Opening Statement presented by the DW1 in the cause of the Proceeding. Again, it is not in doubt that the Claimant had run the Account for sometime going by the Statement of Account tendered by the Claimant marked as **EXH 1**. So also there is evidence that there was a transaction in the Account via POS on the 25th July, 2014. That

transaction was done on the 25th of July, 2014. It was for payment of purchase made at CVS Pharmacy. In it, it was written:

**POS International – CVS Pharmacy
#7459 – Q03 – 11A6A8 – 25/7/14**

The amount of the transaction was **Eighty One Thousand, Nine Hundred and Seventy Eight Naira, Sixty Three Kobo (₦81, 978.63)**. The purchase was made in Naira which means it was within Nigeria. The value date was on 25th July, 2014 while the date it was posted was on 31st July, 2014. The **Eighty One Thousand, Nine Hundred and Seventy Eight Naira, Sixty Three Kobo (₦81, 978.63)** is the amount in issue which the Claimant alleged that was fraudulently withdrawn from its Account. It is strange that the said transaction was the only POS purchase made and it was posted almost Six (6) clear days – 31st July, 2014 after the transaction was made.

Again, there was a transaction of Cheque withdrawal by the Rasheed Obatoyinbo for **One Hundred and Fifty Thousand Naira (₦150, 000.00)** made after the POS transaction. The date posted was same 25th July, 2014. Again, there was another Cheque paid to Kingsley Edom Egba for **One Million, One Hundred and Twenty Five Thousand Naira (₦1, 125,000.00)** on the same day – 25th July, 2014. That was also posted on the same day. But

strangely, the POS transaction was posted on the 31st July, 2014.

The PW1 who testified before this Court had told Court that he is not signatory to the Account and that it is the Managing Director of the Claimant that has the custody of the ATM Card. He equally told the Court that that the same Managing Director tells them in the office whenever any transaction is done in the Account. This Court finds it difficult to believe that the Managing Director of a company will dutifully tell or inform an employee of a company – a lead Consultant in the Claimant. He is not the Managing Director. He told Court that he is not the signatory to the Account and yet does not know the PIN of the ATM Card of the Claimant's Account. He stated that he was not aware whether the PIN was changed after it was issued to the Claimant. He confirmed that the PIN was known only to the Managing Director of the Claimant and not to anyone else and that the same Managing Director had been in exclusive possession of the ATM Card ever since it was issued by the Defendant. He claimed to be with the Managing Director of the Claimant on the day the transaction took place – 25th July, 2014 and that the said Managing Director informed him of the transaction alert that day and that the Managing Director showed him the said alert. Meanwhile, he could not remember the date the transaction took place. Meanwhile, he does not live in the same house with the Managing Director. He also does not know if there could be delay

after transaction is consummated as in the present case. He claims that the Managing Director informs the office of every transaction in the Account. This Court finds it difficult to believe that statement by PW1. Meanwhile, he is not signatory to the Account though he claimed to be one. He also had told Court that he never participated in the opening of the Account.

Again, he had also told Court that he was not the person that completed the Complaint Form – **EXH 2**. Under Cross-examination, he informed the Court that as at the time the fund in issue was withdrawn that he was not a signatory to the Account. That it was a signatory to the Account that completed the Complaint Form. Meanwhile, he had earlier told the Court that he is a signatory to the Account. He confirmed that he did not receive any transaction notification on his phone on that fateful day – 25th July, 2014.

This Court finds it strange that the person who had exclusive possession of the ATM Card and the PIN, and who it was alleged receives transactions notification on the Account and who also at it were runs the Account, did not come to this Court to testify in this case. This Court finds it very difficult to place any credence on the testimony of the PW1 who from all indication has presented before this Court a hearsay evidence. Meanwhile, the evidence of the PW1 is full of contradiction. In one breath he said that he is a signatory

to the Account. Meanwhile, he did not present any evidence to show that he is a signatory to the Account.

Again, he had stated that he does not live with the Managing Director and of course cannot know if the Managing Director had done any of transaction carried out on the same day. He never received any alert of transaction and therefore can only rely on hearsay of what the Managing Director told him. He did not present any evidence to show that the Managing Director tells him, a mere employee, about every transaction on the said Account. Even his claim on being a signatory after the fund was withdrawn, was not substantiated as he said that he did not play any role in the Claimant's opening of the said Account in the Defendant's Bank. He did not sign or fill the Complaint Form alerting the Bank of the transaction. He was not even referred to in the said Form. The said PW1 can best be described as a "Hired Witness" who was tutored to represent the Claimant in this Suit going by the numerous contradictions in his testimony.

No Court decides a case based on hearsay evidence. The testimony of the PW1 is pure hearsay evidence. He is not a signatory as he confirmed. He did not fill Complaint Form too. He does not live in the same place/house with the Managing Director. Even his claim that he was with the Managing Director on the fateful day was not buttressed as he did not tell Court whether they were at the Managing Director's house or somewhere else that

fateful day. **EXH 3** – Account Opening Statement showed that he is not signatory to the Account. The same **EXH 3** confirmed that the Managing Director is in exclusive possession of the ATM Card and the PIN; hence confirming what the PW1 had said. From all indication, the PW1 never know and never had access to the ATM Card. He never know the PIN too. He had confirmed these facts under the fire of Cross-examination.

The Defendant had through the Examination in chief of the DW1 established that the PW1 is unknown to them as far as the Account in issue and complaint on the withdrawn fund is concerned.

From all indication, the evidence/testimony of the PW1 is hearsay evidence. It is equally full of contradictions. The testimony is not credible and this Court cannot rely on it or place any evidential value on it. Besides, it is a known secret that it is the responsibility of a customer to safeguard its ATM Card and the PIN. These information and document are at the exclusive possession of the customer. Once the PIN is changed the Banks has no knowledge of it and cannot have access to it. It is when there is a complaint, that the Bank can block the use of the ATM Card; even then, the Bank has no access to the PIN.

From the evidence/testimony of the PW1 which is a hearsay evidence, the Claimant have not established its claim that it was negligence of the Bank – Defendant that

caused the withdrawal of the said fund from its Account domiciled in the Defendant – Bank.

It is the humble view of this Court that the Defendant was not negligent. That it was the carelessness of the Claimant that caused the said withdrawal of the fund as the Claimant was careless with its ATM Card and its PIN.

The Claimant was negligent and failed in its duty and responsibility to safeguard the PIN and ATM Card.

That being the case, the case of the Claimant is not meritorious as it fails to prove same. The Claimant is therefore not entitled to its claims.

This is the Judgment of this Court.

Delivered today the ___ day of _____ 2022 by me.

K.N. OGBONNAYA
HON. JUDGE