

**IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY
IN THE ABUJA JUDICIAL DIVISION
HOLDEN AT GWAGWALADA-ABUJA
ON MONDAY THE 11TH OF DECEMBER, 2023**

SUIT NO: FCT/HC/CV/0579/2018

BEFORE HIS LORDSHIP: HON. JUSTICE A. I. AKOBI

BETWEEN

MR. FRANK OLUREMI-KIM ALABI.....CLAIMANT

AND

1. MULTICHOICE NIGERIA LIMITED

2. GUARANTEE TRUST BANK

}
}.....**DEFENDANTS**

JUDGMENT

The Claimant initiates this action by means of Writ of Summons dated 08/01/2018 and filed on the 09/01/2018. Reliefs sought are:

1. **A DECLARATION** that the plaintiff is entitled to a refund of the sum of **N16,900,00** from the defendants being the Plaintiff's money illegally deducted by the 2nd defendant from his GT Bank Account No. 0025102588 after the use of 1st defendant's Point of Sales (POS) machine.
2. **A DECLARATION** that the deduction of the sum of **N16,900.00** by the 2nd defendant from the account of the Plaintiff even after the 1st defendant refused, failed and

neglected to renew his subscription is inhumane, wicked, illegal, null and void.

3. **AN ORDER** of court directing the defendants to immediately refund to the plaintiff the sum of N16, 900.00 being the Plaintiff's money illegally deducted by the 2nd defendant from his GT Bank Account No. 0025102588 after the use of 1st defendant's Point of Sales (POS) machine.
4. **AN ORDER** of court directing the defendants to pay to the Plaintiff jointly and severally a sum of **N25, 000, 000.00 (Twenty Five Million Naira only)** being general damages arising from the defendants' illegal deduction, conversion and withholding of the Plaintiff's sum of N16. 9000.00.
5. **10%** interest on the said sum of N16, 900.00 from the date it was illegally deducted till judgment is delivered.
6. **10%** interest on the sum of N16, 900.00 from the date the judgment is delivered till when judgment sum is finally liquidated.
7. **Cost** of the action assessed at N250, 000.00

On being served with the claimant's writ of summons the 1st and 2nd defendants filed their statements of defence and witness statement on oath on 12/09/2018 and 20/03/2018 respectively. However, by an order of the Honourable Court upon an application by the 1st defendant, substituted his sole witness from **Ololade Fafowora** to **Taiwo Ogunkanmi**); the parties after joining issues testified in support of their cases. It will be most appropriate at this point to state briefly

the case of the claimant. It is alleged that sometimes on the 7th day of November, 2017, the plaintiff went to one of the 1st defendant's business outlet situate at Wuse II, Abuja to pay for his DSTV subscription. On getting there, that a staff of the 1st defendant inserted his ATM card issued by the 2nd defendant into the 1st defendant's POS machine; immediately, he received a notification from his phone that a sum of N16, 900.00 had been deducted from his bank account domiciled with the 2nd defendant. Meanwhile, that he received a slip from the POS machine indicating that the transaction declined. The Plaintiff immediately lodged complaint to the attendant of the 1st defendant who advised him to visit his bank. The Plaintiff further alleged how he visited the 2nd defendant at Area 11, Garki, Abuja and lodged his complaint at the customer service of the 2nd defendant. He also alleged that the customer service informed him that it is not the duty of the 2nd defendant to reverse the anomaly but that of **Interswitch** for which he protested that he do not know any Interswitch nor has contract with it. Thereafter, that he waited for more than a month and the defendants refused to credit back his money, then his solicitors wrote formal letter of demand of N16, 900.00 to the 1st and 2nd defendants. The Plaintiff did not receive any reply to his letter from the 2nd defendant while the 1st defendant replied advising that their complaint be directed to the plaintiff's bank. That is what led to the institution of this suit by the claimant against the defendants.

The plaintiff testified for himself after adopting two of his witness statements on oath, deposed to on 9/1/2018 and 26/11/2018 respectively. He tendered the following documents:

- a. A letter from Multichoice addressed to Messrs Gbenga Adeyemi & Co. dated 27/12/2017: Re: Illegal debiting/deduction of the sum of N16, 900,00 from Account of Mr. Frank Oluremi-Kim Alabi **Exhibit A**
- b. 10 pages Statement of Account of Alabi, Frank Oluremi_Kim, from the period of 01/11/2017 to 30/11/2017 from GT Bank **Exhibit B**
- c. A letter from Gbenga Adeyemi & Co addressed to the Managing Director, Multi-Choice Nigeria Ltd dated 15/12/2017 **Exhibit C1**
- d. Letter from Gbenga Adeyemi & Co. addressed to the Managing Director, Guarantee Trust Bank Plc **Exhibit C2.**

Under cross examination the PW1 admitted that 1st defendant offers a pay TV service for which service can only be rendered upon payment. He also admitted that the payment he made was not successful and he was given receipt evidencing it. He was asked to produce the said receipt he could not for the reason that it became faded. On whether the 1st defendant is in-charge of his account in GT Bank, the answer is in the negative. Also under cross examination, the witness testified that it is the 1st defendant that owns the POS; he conceded that the alert he received was sent by 2nd defendant and that it is the 2nd defendant that can deduct his

money. It was also disclosed under cross examination that the money in issue was reverted to the claimant, though 6 months after the commencement of this suit. The counsel to the 1st defendant tendered **exhibit DW1** (Terms and conditions of subscription to the DSTV) through PW1 during cross examination.

During cross examination of PW1 by the counsel to the 2nd defendant, the following question and answer took place:

Yakubu: You are customer of 2nd defendant?

PW1: Correct.

Yakubu: You applied and was issued ATM card by 2nd defendant?

PW1: Yes

Yakubu: the only way to access your account through your ATM card is by use of your pin code?

PW1: Yes

Going further, he testified that the pin code is only known to him and admitted that he used the pin code during this transaction by imputing the pin code into POS machine to authorize the debit of his account. He also admitted under cross examination that by exhibit B (statement of account), the 2nd defendant carried out his instruction by debiting his account with the sum of N16, 900.00. He also admitted that the amount was later reversed. To show the reversal, the 2nd defendant tendered a CTC statement of account of GT Bank which shows that N16, 900.00 was credited to the plaintiff account on 02/03/2018 from FCMB, it is admitted as exhibit **DW2**. After the

cross examination of PW1, the plaintiff closed his case and the defendants opened their defense after series of adjournments.

Mr. Taiwo Ogunkenmi who was substituted as the sole witness to the 1st defendant, a Regional Customer head for North Central region for the 1st defendant adopts his witness statement on oath deposed to on the 06/10/2021 as his evidence in chief in the matter. In the course of evidence he tendered some documents admitted in evidence as **exhibits DW1**(Documents of agreement for subscription) and **DW2** (POS receipt) and was cross examined.

Under cross examination the 1st defendant was accused of not doing anything to rectify the problem after having received a letter of complaint from the claimant. The witness contrary to that view told the court how they did something by replying to the letter wherein they advised the claimant to engage his financial institution. He stated how money paid through POS goes directly to the first defendant account if the transaction is successful. The witness further testified that the claimant was not rendered service because they did not receive payment from him for the service to be rendered. He confirmed after examining exhibit B (statement of account) that GT Bank debited the claimant with N16, 900.00. The 1st defendant under cross examination admitted that the claimant is their customer and FCMB is their bank but that they did not write letter to their bank (FCMB) about the complaint of the claimant even though they were aware of it.

The 2nd defendant opened its defense on the 13/10/2022 wherein their sole witness Regina Ameh, a banker with the GT Bank adopt her witness statement on oath as her evidence in chief. The witness under cross examination testified that FCMB is an agent of the 1st defendant and that the reversal came from 1st defendant through FCMB. The witness admitted that when transaction decline, it means the transaction is not successful so the 1st defendant did not get value of it.

After the evidence in chief of the 1st and 2nd defendants and cross examination, the parties filed and adopt their final written addresses as their oral argument in support of their case.

The issue formulated by the 1st defendant for the court's resolution is: **Whether the Claimant has sufficiently proved his case and placed material facts before this Honourable Court to entitle him to the reliefs sought as shown in both his Writ of Summons and Statement of Claim.** The 1st defendant answered the sole issue in the negative and restates the position of law relying on section 131 of the Evidence Act, to the effect that whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts he asserted must prove that those facts exist; he supported the principle of law with judicial authority: **Okonkwo & anor v. Izuchukwu & Ors (2019) LPELR-49102 (CA)**; and then submitted that the claimant in the instant case has the duty to prove his case not for the defendant to disprove same. For the allegation against the 1st defendant for being fraudulent and responsible for the deduction of

the amount in issue; is still the duty of the claimant to prove this fact. The learned counsel to the 1st defendant Daramola Alaba Esq contends for a party seeking declaratory reliefs, he must adduce cogent evidence in prove of same. In the instant case, that the claimant has not shown sufficient evidence to warrant the court to grant the reliefs sought against the 1st defendant. Cited **Ali v. Dasong (2020) LPELR-52749 (CA)**; The Court in this case observed thus:

“Each of the parties claimed for a declaratory relief and some other reliefs; it is the law that declaratory reliefs are not granted as a matter of course and on platter of gold. They are only granted when credible evidence has been led by the plaintiff or person seeking the declaratory relief...” He also on the same principle cited a Supreme Court case of **Amobi v. Ogide Union (Nig) & Ors (2021) LPELR-57337(SC)**.

In this case, that the claimant is seeking a declaration that he is entitled to a refund of the sum of N16,900 from the defendants on the fact that his money was **illegally deducted by the 2nd defendant**. They aligned themselves with an age long maxim which reads: **Ubi jus, ibi remedium** meaning that where there is right, there is a remedy. That is to say, it is only where a party has a right and same to being violated that such a party has a right to seek remedy. The 1st defendant pleaded that she is not a financial institution and by extension, she does not have the power to manage and/or administer the cash inflow and out flow of any person's bank

account. It is therefore submitted on their behalf that the liability of the 1st defendant can only be invoke when the customer has successfully paid his subscription fees. In the instant case, that even the claimant confirmed that the attempt to make payment failed and he was issued with a slip which indicate declined; that is to say the transaction was unsuccessful; at that point that there is nothing connecting the claimant and the 1st defendant as to demand for a refund of a failed transaction. It is further submitted that the evidence of the 1st defendant that she does not have control over the deduction of the sum of money belonging to the claimant remains unchallenged. On the principle of law that unchallenged or uncontroverted evidence will be accepted as proof, he cited inter alia the case of **Military Gov. of Lagos State & Ors v. Adeyiga & Ors (2012) LPELR-7836 (SC); Mogaji v. Cadbury (FRY) Ltd (1972) 2SC 97. Etc.** The 1st defendant therefore submitted that the Claimant has not disclose any reasonable cause of action against the 1st defendant. On the definition of cause of action and in determining whether an action discloses a cause of action or reasonable cause of action the court is referred to **Nwosu v. APP & Ors (2019)LPELR-49206 (CA)** and **Daily Times (Nig) Plc v. Arum (2021)LPELR-56893(CA).**

The 1st defendant made it clear that she has no hand in the deduction of the claimant money from his account domiciled with the 2nd defendant. Based on the above facts, the 1st defendant concluded that the claimant has no cause of action or locus standi to file this suit against the 1st defendant. The 1st defendant

considered this as a case of misjoinder as she is not a proper party in the suit.

The 2nd defendant also formulated a sole issue for the determination of the court thus: **Whether from the facts and circumstance of this suit the claimant has proved, on the preponderance of evidence, any case against the 2nd defenedant as to entitled him to the reliefs sought before this Honourable Court.** It is the contention of the 2nd defendant that the claimant's principle reliefs which other reliefs are founded are declaratory reliefs which requires him to prove the claims and not to rely on the weakness of the opponent's case. Cited **Dumez Nigeria Limited v. Nwakhoba (2009) All FWLR (PT.461)842 at 850.** The 2nd defendant referred the court to paragraphs 14, 15 and 16 of the statement of claim and reliefs 1 and 2 where the claimant is said to have alleged fraud and illegal deduction of N16, 900.00 from his account against the 2nd defendant. It is the further contention of the 2nd defendant that allegation of fraud or theft raised by the claimant are allegation of crime and that the law is settled that where a party raised allegation of crime, even in civil cases, the burden is on the party to prove the criminal allegation beyond reasonable doubt, they urged the court to so hold. They cited section 135 of the Evidence Act 2011 and the case of **Okoro & Anor v. Ejiofor (2022) LPELR-57270 (CA).** The learned counsel to the 2nd defendant Suleiman Yakubu Esq, alleged in paragraph 3.06 of their final written address that under cross examination the claimant's evidence against the 2nd defendant was

completely discredited, on the basis that the 2nd defendant acted based on the instruction of the claimant upon imputing his pin code into the POS machine. In other words, that the claimant instructed the 2nd defendant to deduct or debit his account in the sum of N16,900.00 and that the 2nd defendant acted on the claimant's instruction by debiting his account with the said sum. They therefore submitted that 2nd defendant after acting on the instruction of the claimant cannot be accused of stealing or fraudulently debiting the claimant's account.

The further argument of the 2nd defendant to exonerate itself from the claimant's claim is that exhibit DW2 has established that the claimant's reliefs 1, 3, 4, 5 and 6 have no bases as the said sum has been reversed into the claimant's account acknowledged and admitted under cross examination that the money came from FCMB. He further submitted that the claimant failed to prove that the delay in refunding the said money into his account is occasioned by the 2nd defendant. Finally, the 2nd defendant posited that she cannot be held liable for performing its legal contractual obligation by honouring the request of the claimant (customer) and urged the court to so hold.

After considering the entire processes filed including the written addresses of the parties, I hereby adopt the issues formulated by the Claimant. They are:

- 1. Whether the duty of banker towards its customers extends to ATM transactions; effect of failure to honour an ATM**

card transaction where there are sufficient funds in the account of the customer.

- 2. Whether the defendants, especially the 2nd defendant as bankers to the claimant do not owe him a duty to exercise reasonable care, diligence and skill in carrying his instructions, which duty has been held to extend over a whole range of banking business including ATM transaction as in this case.**
- 3. Whether the Claimant has not proved his case to enable him entitled for all the reliefs sought in his statement of claim.**

The claimant considered issues 1 and 2 as overlapping and therefore argued them together. On whether the duty of the bank to its customer extends to ATM card transaction, to answer the question, the court is commended to the case of **Jwan v. ECO Bank Nigeria Plc & Anor (2020) LPELR-55243**, wherein the court states as follows:

“...Therefore, the respondents as bankers to the appellant owed him a duty to exercise reasonable care, diligence and skill in carrying his instructions, which duty has been held to extend over a whole range of banking business including ATM transaction. It is further argued on behalf of the claimant that ATM card issued by a banker is like a cheque, which must be honoured on request once there are enough funds in the customer's account, and failure to do that will mean a breach of duty of care owed to its customer.” The claimant also submitted that the 2nd defendant was negligent in its duty of

care to its customer (Claimant), just as the 1st defendant willfully refused and neglected to take all necessary steps required to go to its banker (FCMB) to ensure the immediate reversal of claimant's money. They submitted generally that the defendants were negligent in their duty of care toward the claimant to ensure that his money which was illegally deducted was duly reversed back to his account.

There is no doubt that the relationship between the Claimant and the defendants are contractual in nature. It is in evidence that the 2nd defendant issued the claimant with the ATM which he used for the failed transaction.

Based on the evidence extracted during cross examination and all the relevant facts before me; it is undoubtedly that the claimant inserted his ATM into the POS of the 1st defendant and imputed his pin code directing or instructing the 2nd defendant to debit his account No: 0025102588 in the sum for N16, 900.00 as subscription for DSTV. The 2nd defendant immediately debited the claimant's account with the said amount of money. In prove of this is exhibit B (statement of account of the claimant) which shows that on the 07/11/2017, N16, 900, was paid to Multichoice Nigeria from claimant's account domiciled with the 2nd defendant. The 2nd defendant having acted based on the instruction of the claimant; She cannot be accused of theft or of fraudulently debiting the claimant's account. Hence, the allegation of theft or fraud against the defendants being criminal offence, even though, in civil matter

ought to have been proved beyond reasonable doubt. See **Yisau v. State (2014) LPELR-23099 (CA)**. The failure to discharge that burden, the allegation cannot be sustained and is hereby thrown out.

The grouse of the claimant basically is that his account was debited with the sum of N16, 900.00 for DSTV subscription but that the service was not rendered. The Claimant admitted that he was given a slip which shows that the transaction declined. The only witness of the 1st defendant confirmed that the transaction declined; it is their case, that the implication is that the 1st defendant who ought to have been the beneficiary of the amount did not receive the said N16, 900.00, the reason they failed to render the service to the claimant.

The law is long settled that parties are bound by the terms of their agreement. See **Nuhu & anor v. Benneth (2017) LPELR-42634 (CA)**. The 1st defendant tendered terms and condition of subscription where it is provided in paragraph 11 that: "By subscribing to the Multichoice service you agree to be bound by this agreement". It provides in paragraphs 35 and 36 as follows:

Para 35: MultiChoice Nigeria provides the Multichoce service on a pre-paid basis.

Para 36: In order for you to receive the MultiChoice Service, you must pay MultiChoice Nigeria the requisite fees and any vat and all other taxes, duties, levies or charges that may be levied by any government authority directly or indirectly in relation to the MultiChoice Service for the number of months determined by MultiChoice Nigeria in terms of clause 6. It is obvious from the above

clauses that before MultiChoice (1st defendant) can render service, payment must be made in pre-paid basis. In the instance case, the 1st defendant had consistently via evidence denied that he never received the payment for the subscription from the claimant because the transaction declined; the fact that the transaction declined was admitted by the claimant. The 1st defendant by virtue of paragraph 36 of Exhibit DW1 is justified for not rendering the service and I so hold.

The question that needs to be asked is: after the transaction declined why was the money not reverted immediately to the claimant? This takes me to the issue of negligent. The claimant accused the defendants of negligent in their duty of care and set out what he considered as particulars of negligence in this case as follows:

- The defendants failed to treat the Claimant's complaint with any seriousness instead they continue evading liability about the reversal of claimant's money that was illegally deducted.
- The 1st defendant even after being aware of claimant's complaint about the illegal deduction of his money, willfully refused to contact his bank to ascertain the way about the claimant's money that was deducted.
- Both the 1st and 2nd defendants did not take any step to ensure the reversal of claimant's money that was illegally deducted from his account until after about 5 months

when the money was reversed from FCMB (1st defendant's bank) back to the claimant's account.

The exhibits before the court shows that when the money was not reverted for close to a month, the claimant's solicitor wrote letter to the 1st and 2nd defendant lodged complaint about the deduction, and they did nothing to ensure that the money is reverted back. I conceded that the 1st defendant carried out the instruction of the claimant by effecting the deduction, but when the 1st defendant made a report that the money was not received by the beneficiary, the 2nd defendant owe it a duty to the customer(claimant) to investigate the report by tracing the money to where it was sent to. Similarly, the 1st defendant upon receipt of the letter of complaint from the claimant would have acted speedily considering that FCMB is its bank to find out why the money has not been reverted; instead, he advised the claimant to contact his bank as if he has not done so. The contract of the claimant is with the 1st and 2nd defendants and because he has no contract with FCMB he cannot approach FCMB for the refund of his N16, 900.00. To that extent I agree with the claimant that the 1st and 2nd defendant did not exercise reasonable/duty of care in handling the matter. I therefore resolved this issue in favour of the claimant.

On the third issue, the claimant presented almost the same submission, I however did not agree with him that the evidence of the DW1 is hearsay evidence, It is also speculative to say 'sometimes

even when a POS machine printed out a declined transaction receipt, most time the beneficiary still receives the money.'

Having come to the above conclusion, and having received undisputed evidence that the amount of money (N16, 900.00) deducted from the account of the claimant having been reverted back to his account, his reliefs 1, 2, 3, 5 and 6 cannot be granted; the court does not make an order(s) in vein.

Considering the purport or object for award of general damages I hereby award general damages in the sum of N5, 000, 000.00 (Five Million Naira) only jointly and severally against the 1st and the 2nd defendants in favour of the claimant for withholding his N16, 900.00 for about a period of 4 months without explanation.

To grant prayer 7 which is cost of action put at N250, 000.00 after granting general damages will in my opinion amount to double jeopardy, it is hereby refused.

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HON. JUSTICE A.I AKOBI
11/12/2023

APPEARANCE:

Olugbenga Adeyemi with O. O. Alao for the Claimant
A. B Daramola for the 1st Defendant.
Suleiman Yakubu for the 2nd Defendant.