

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

BEFORE HON. JUSTICE J. ENOBIE OBANOR  
ON THIS DAY THE 24<sup>TH</sup> NOVEMBER, 2023

CASE NO.: CV/0180/2017

BETWEEN:

MRS. STELLA OGOGO

..... CLAIMANT

AND

ACCESS BANK PLC  
(Substituted for Diamond Bank Plc)

..... DEFENDANT

**JUDGMENT**

**INTRODUCTION**

By Amended Writ of Summons and Statement of Claim filed at the registry of this Court on 28<sup>th</sup> April, 2023. The Claimant is seeking the following reliefs;

1. A declaration that the Plaintiff did not authorise the consistent deduction and or withdrawal of N20,000 and N65 from her account No. 0059076101 with the defendant from August 2015 to November, 2015.
2. A declaration that the Defendant did all she could to draw the attention of the Defendant to the said unauthorised deductions/withdrawals.
3. A declaration that the Defendant breached the trust and confidence of safe banking they owe the Plaintiff when they

failed refused and or neglected to stop the said unauthorised deductions from August 2015 to November 2015.

4. A declaration that the consistent deduction of N65 from the Plaintiff account is ultra vires and illegal.
5. A declaration that failure of the Defendant to send alert to the Plaintiff concerning the unauthorized deductions/withdrawals from her account aided the encashier to withdraw without challenge.
6. A declaration that the Defendant has no justification for allowing the deduction and withdrawals complained against.
7. A declaration that the Defendant owes the plaintiff a duty of care but failed to discharge such duty.
8. An order directing the Defendant to Refund to the Plaintiff all the money deducted/withdrawn from her account, except the one with her signature, from 1st August 2015 to 30th November, 2015.
9. Interest on the unauthorised deducted/withdrawn sum at the Defendant's lending interest rate from 1st August 2015 to 30th November 2015.
10. The sum of N10 million as general damages.

The Defendant on the other hand filed its Amended Statement of Defence and Witness Statement on Oath on 5<sup>th</sup> June, 2023.

At the hearing of the suit, the Claimant testified as PW1 and was cross-examined by the Defence Counsel.

Exhibits A – M were tendered and admitted through her.

The Defendant opened its case and called one Mr. Joshua Idenyi, an account officer of the Defendant as DW 1 and urged the Court to rely on the evidence of Faith Nwankwo in the former trial of this action before the Honourable Justice O. Goodluck on the 21st and 22nd of May, 2019. The witnesses were cross-examined. Exhibits O – S were tendered through him. He adopted his Statement on Oath and was Cross-examined.

The Court ordered that parties file their Final Written Addresses.

The Claimant's Counsel filed her Final Written Address on 22<sup>nd</sup> September, 2023 wherein he distilled Four (4) issues for determination thus:

1. *Whether the defendant owed the plaintiff the duty of ensuring that her money in the defendant's custody was adequately protected; in other words, whether the defendant being a banker to the plaintiff owed the plaintiff any duty of care in the course of discharging their banking responsibility to the plaintiff.*
2. *Whether the defendant followed the guidelines laid down by the Central Bank of Nigeria in paying out the plaintiff's money under the circumstance.*
3. *Whether the defendant discharged that duty of care substantially enough to be exonerated from liability being claimed against it.*
4. *Whether DW1 and DW2 evidence can be relied on.*

The Defendant filed his final written address on 9<sup>th</sup> October, 2023 in which he canvassed two issues for determination as follows:

- i) *Whether in view of the established fact that access to the Claimant's bank account by ATM was possible only through the use of a password exclusively formulated and kept by the Claimant, there is any basis for holding the Defendant liable in negligence for ATM withdrawals made from it allegedly by third parties?*
- ii) *Whether or not the 10 claims made by the Claimant are not unwarranted and wholly ineffectual as remedies, as a matter of law and in the circumstances of the case?*

The summary of facts of the Claimant's case as averred by the Claimant is as follows:

The Claimant, an Abuja-based farmer, maintains an account with the Defendant bank. In August 2015, after a N500,000 withdrawal, she received a debit alert showing unexpected low balance. Investigation revealed numerous unauthorized deductions: N20,000 and N10,000, approximately 52 times between August and November 2015, and N65 deductions about 30 times. Complaints to the Branch Manager and written appeals to the bank yielded no resolution. The Claimant's account was continually debited despite promises to block the ATM. She lodged a complaint on November 9, 2015, but was given a letter/form instead of help in identifying the culprit. The unauthorized deductions persisted, and no alerts were received. Mediation attempts with the bank and the Consumer Protection

Council were futile. The bank claimed to have evidence of the Claimant's daughter making the withdrawals, but it was unrelated and insufficient. The matter was referred to the Central Bank, but the evidence provided was limited and irrelevant. The Claimant asserts the bank failed to protect her funds, allowing unauthorized withdrawals, and wrongly charged N65 per unauthorized transaction, totaling about 30 instances, with additional unauthorized deductions of N20,000 and N10,000, amounting to approximately 52 occurrences. The Defendant's claim of crediting the Claimant's account in October 2017 was contested, as it was not reflected in her statement. In summary, the Claimant alleges repeated unauthorized deductions, insufficient bank response, and challenges the bank's evidence, arguing for proper refund.

The summary of facts of the Defendant's case as averred by the Defendant is as follows:

The Defendant argues that the Claimant, like all electronic banking users, is responsible for safeguarding her access details. They cite Central Bank of Nigeria guidelines, stating that liability for fraud primarily falls on the cardholder unless they can prove unauthorized disclosure of their PIN. The Defendant emphasizes the automated nature of electronic banking and refutes specific complaints. They attribute N65 charges to the Claimant's account usage pattern and cite delays in obtaining footage from other banks. The Defendant denies any loan transaction and asserts that the Claimant's account was compromised due to her negligence. They claim the account was credited for withdrawals,

relying on the statement of account, and urge the Court to dismiss the Claimant's suit.

### ARGUMENTS:

The Claimant submitted that the Defendant did not properly discharge its duty of care to her, as it did not guarantee the safety of her funds in the Defendant's custody. She stated that the Defendant made unauthorized withdrawals between 1<sup>st</sup> August to 30<sup>th</sup> November, 2015 for which she did not receive a debit alert unlike the other transactions she did over the counter which she received alerts. He cited the case of Heritage Bank V.Okorie (2017) 32 WRN P.130.

The Defendant in response stated that it had thoroughly carried out its duty of care and it was the Claimant that was negligent and did not carry out her duty to keep her ATM card's details safe from third parties, as she disclosed the details of the card to her daughter. He cited the case of Agi v. Access Bank Plc [2014] 9 NWLR (pt 1411) 121, 155. The Defendant raised doubts about the accuracy of the Claimant's interactions with the bank manager, highlighting a significant distinction between "withdrawals" and "deductions" in banking terminology. The Defence further contended the Claimant was negligent for not filing a complaint timeously.

### RESOLUTION:

I have formulated three pivotal issues aimed at elucidating the contentions presented by both parties, as follows:

1. *Whether the Defendant, as the Claimant's banker, has a duty of care to safeguard the Claimant's funds held in their custody, and did they fulfill this duty adequately, thus justifying exoneration from the claimed liability?*
2. *Whether the Defendant adhered to the Central Bank of Nigeria's stipulated guidelines in disbursing the Claimant's funds under the prevailing circumstances, and can the evidence provided by DW1 and DW2 be considered reliable and trustworthy in evaluating this adherence?*
3. *Whether there is a valid basis for attributing negligence to the Defendant for alleged ATM withdrawals from the Claimant's account by third parties, given that access required a password known only to the Claimant? Are the ten claims by the Claimant legally ineffective considering the circumstances?*

## **ISSUE 1**

*Whether the Defendant, as the Claimant's banker, has a duty of care to safeguard the Claimant's funds held in their custody, and did they fulfill this duty adequately, thus justifying exoneration from the claimed liability?*

It is imperative to reiterate a well-established principle in civil matters. The Burden of Proof squarely rests on the Claimant, for it is incumbent upon the party making an assertion to substantiate it with evidence. This fundamental tenet underscores the need for the Claimant to furnish compelling proof in support

of her claims, thereby demonstrating the veracity of her contentions before the court.

This principle was succinctly articulated in the precedent of **NEWBREED ORGANISATION LTD v. ERHOMOSELE (2006) LPELR-1984(SC)** Per **ALOMA MARIAM MUKHTAR, JSC (Pp 25 - 26 Paras F - A)**, wherein it was stated:

*"In all civil suits, the onus to prove a particular fact or a case in general is on the party who asserts, and since civil suits are determined on balance of probability and preponderance of evidence, a party who proves his case will obtain judgment based on such preponderance of evidence and balance of probability in his favour. See Elebute v. Odekilekun (1969) 1 All NLR 449, Elias v. Omo-Bare (1982) 5 SC 25, and Arase v. Arase (1981) 5 SC 33."*

Sections 131 to 134 delineate the burden and standard of proof in legal matters, affirming that the party making an assertion bears the evidentiary responsibility. This framework ensures fairness and integrity in legal proceedings.

It is pertinent to note that the Claimant's claim before this Court borders on allegations of negligence against the Defendant. Generally, negligence in law connotes an omission or failure to do something which a reasonable man, under the same circumstance, would do or doing of something which a reasonable and prudent man would not do. see **UNILORIN TEACHING HOSPITAL V. ABEGUNDE (2013) LPELR-21375(CA) AT PP. 29-**



30PARAS. E-Band ABI V. CBN & ORS (2011) LPELR-4192(CA) PP. 36-37, PARAS. F-B.

Any breach of duty of care, whether grave or slight, which causes a loss constitutes negligence.

In Access Bank Plc v. Mann (2021) 13 NWLR (Pt. 1792) 160 at p. 177, paras E – F, the Court of Appeal held that “Negligence is a tort that deals with a breach of duty to take care. It is the failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation. It is a conduct which falls below the standard by law for the protection of others against unreasonable risk or harm. Negligence is a breach of duty of care which causes a loss. It is strictly a question of fact which must be decided in the light of its own facts. What amounts to negligence depends on the facts of each case.”

Thus, the three fundamental ingredients that a Claimant must prove to succeed in an action for negligence are as follows;

1. The defendant owed the plaintiff a duty to exercise due care.
2. That the defendant failed to exercise due care;
3. The defendant’s failure was the cause of the injury suffered by the plaintiff.

On how the tort of negligence is proved, the Courts have stated in a plethora of decisions that the facts of negligence must be specifically proved. In other words, the Claimant who prays the Court to hold that the Defendant owes him a duty of care and that he has suffered damages as a result of the breach of that

duty must prove these elements strictly. See **Access Bank Plc v. Mann** (Supra).

According to the Claimant in the case before me sometime in August 2015, she made a withdrawal of N500,000 over the counter and discovered that the balance of her bank account was far below what it was expected to be. She averred that she immediately requested for her bank account statement and realized that several unauthorized deductions had been made. Claimant further averred that she made an oral complaint to the bank who promised to block the ATM card to prevent further unauthorized deductions but unfortunately noticed weeks after that the unauthorized deductions were still being carried out despite her complaint and continued till November, 2015. She gave evidence that while the unauthorized deductions were being carried out she did not receive any debit alerts from the Defendants.

The mere denial of the Defendant in Paragraphs 13 and 14 of the Statement on Oath of Joshua Idenyi that the Claimant did not make an oral complaint to the Manager of the Bank was not backed with sufficient evidence to traverse the evidence adduced by the Claimant.

The Defendant in Paragraph 16 of its evidence before the court stated as follows:

*16. Diamond bank blocked the Claimant's ATM card to prevent its use after it received the letter of complaint on 13/11/15 and proceeded to act on the complaint".*

The failure of the Defendant to act when the Claimant first laid an oral complaint to the Defendant and allowing the unauthorized deductions to continue bestowed liability on the Defendants. Going by paragraph 16 above, the Defendant only blocked the account after it received Exhibit C on 13/11/2015.

The Claimant in her evidence stated that she did not get any debit alerts for the transactions in dispute between August 2015 and November 2015. This fact, not challenged by the Defendant with evidence is vital to the case at hand as it would have saved the Claimant of the of the burden of proving unauthorized transactions during that period. The absence of debit alerts suggests a potential lapse in the bank's notification system, raising questions about the accuracy and security of the Claimant's account activity.

The Defendant in its Statement on Oath averred that the Claimant made several withdrawals from various banks to make the court see reasons why the several deductions of N65 were made but failed to adduce sufficient evidence to proof these assertions.

It is undisputed that the Defendant held the role of the Claimant's banker. Within the established framework of a banker-customer relationship, it is crucial to underscore that the Defendant, in their capacity as the Claimant's banker, assumed a legal obligation towards the Claimant. This duty encompasses various responsibilities aimed at safeguarding the Claimant's

interests and financial assets, a standard expectation in such commercial relationships.

This stance was exemplified in the precedent set by the case of **AGBANELO v. UBN LTD (2000) LPELR-234(SC)** Per **EMMANUEL OLAYINKA AYOOLA, JSC (Pp 17 - 18 Paras G - B)** stated as follows:

*"A bank has a duty under its contract with its customer to exercise reasonable care and skill in carrying out its part with regard to operations within its contracts with its customers. The duty to exercise reasonable care and skill extends over the whole range of banking business within the contract with the customer. Thus the duty applies to interpreting, ascertaining and acting in accordance with the instructions of the customer." (See Cresswell et al: Encyclopedia of Banking Law C. 21), Selangor United Rubber Estates Ltd. v. Cradock (No.3) (1968) 2 All ER 1073)."*

Consequently, I find that the Defendant, in its capacity as the Claimant's bank, was entrusted with a duty of care which it ultimately neglected to fulfill.

## **ISSUE 2**

*Whether the Defendant adhered to the Central Bank of Nigeria's stipulated guidelines in disbursing the Claimant's funds under the prevailing circumstances, and can the evidence provided by DW1 and DW2 be considered reliable and trustworthy in evaluating this adherence?*

The Defence Counsel in his Reply to final written address urged the Court to expunge Exhibit DW 1 B1 - 9 from its record on the grounds that the said document being a public document, the only admissible secondary form of the document is a Certified True Copy (CTC) of the said document and not a photocopy as admitted by the Court. Exhibit DW 1 B1 – 9 is hereby expunged.

I agree with the submission of the Defence Counsel that the said CBN Guidelines is a public document and so should be a certified True copy.

See **DANGURU v. UNITY BANK PLC (2014) LPELR-23987(CA)** Per **ABDU ABOKI, JCA (Pp 23 - 23 Paras D - F)**, wherein it was stated thus:

*"It is also trite law that photocopies of public documents must be certified before they can be admissible. In the instance case, there is no doubt that Exhibit E (public document) tendered by the Appellant is a photocopy and was not certified. Therefore inadmissible. See; Magaji V. Nigerian Army (2008) 8 NWLR (pt. 1089) pg. 338 at 396."*

The above notwithstanding, I am of the view that by virtue of Section 122 (2) of the Evidence Act the court has the prerogative to take judicial notice of the CBN Guidelines. See

**BAYELSA STATE CAPITAL CITY DEVELOPMENT AUTHORITY v. ECOBANK PLC(2023) LPELR-59833(CA)** wherein **OBANDE FESTUS OGBUINYA, JCA (Pp 35 - 35 Paras A - D)** held:

*"In the wide landscape of commerce, the CBN, the banker of banks, is the financial supervisor of all financial institutions and regulator of interest rate, see CBN v. Aribo (2018) 4 NWLR (Pt. 1608) 130. However, the law does grant the Court the unbridled licence to take judicial notice of CBN Guidelines, see UBN Ltd. v. Sax (Nig) Ltd. (1994) 8 NWLR (Pt. 361) 150; UBN PLC v. Ajabule (2011) 18 NWLR (Pt. 1278) 152; Daniel Holdings Ltd. v. UBA PLC (2005) 13 NWLR (Pt. 943) 533; Amede v. UBA PLC (2018) 6 NWLR (Pt. 1614) 29."*

Article 1.5 (a) and (g) of the Central Bank of Nigeria Guidelines stipulates that all ATM should have a camera installed and shall record transactions being carried out on the machine, except for the recording of key strokes of customers. It further stipulated that where the ATM user blocks his image from the camera, the ATM should be able to abort the transaction.

The Defendant in this case tendered in evidence photographs of the Claimant's daughter carrying out a transaction via ATM prior to 1<sup>st</sup> August to 30<sup>th</sup> November, 2015 but failed to produce photographs of the other ATM transactions involving the use of the Claimant's card as provided by Article 1.5 (a) and (g) of the Central Bank of Nigeria Guidelines. Their refusal to present the said photographs despite their claims of being in possession of the them is suspicious.

I hold that the Defendant did not comply with the Central Bank of Nigeria (CBN) Guidelines, resulting in a breach of regulatory standards.

### **ISSUE 3**

*Whether there is a valid basis for attributing negligence to the Defendant for alleged ATM withdrawals from the Claimant's account by third parties, given that access required a password known only to the Claimant? Are the ten claims by the Claimant legally ineffective considering the circumstances?*

An aspect of the Defense Counsel's argument relies on the assertion that the Claimant displayed negligence and a lackadaisical approach in her handling of the Complaint.

The Claimant in her evidence before the Court stated that she was not aware of the fact that monies from her bank account with the Defendant were being deducted without her authorization because she did not receive an alert for the said unauthorized deductions. The Claimant further averred that she only became aware when she went to withdraw the sum of N500,000 over the counter and immediately made an oral complaint.

The Defendant in Paragraph 23 of its statement before the court stated that the Claimant's letter dated 7<sup>th</sup> December, 2015 was an impatient reminder to the Defendant but subsequently retracted her statement.

Now, in the Oxford Advanced Learner's Dictionary, 6<sup>th</sup> Edition, the word retract is defined thus: "To say that something you have said earlier is not true or correct or that you did not mean it." In

Black's Law Dictionary, Seventh Edition, page 1318 the noun retraction from the verb retract is defined to wit: "1. The act of taking or drawing back; 2. The act of recanting; a statement in recantation or 3. Withdrawal of a renunciation."

See also **SHOFOLAHAN v. STATE (2013) LPELR-20998(CA)** Per **RITA NOSAKHARE PEMU, JCA (Pp 30 - 30 Paras A - C)** wherein it was stated:

*"I adopt the authority cited by the Appellant in the Supreme Court case of EYO v. ONUOHA (2011) 11 NWLR Pt. 1257. 1 at 27, where it was held, that any witness who reneges under cross-examination from evidence he has earlier given, or contradicts himself by falsifying his earlier evidence ought not to be regarded as a credible and reliable witness by the Court."*

The Claimant in a bid to recover the monies deducted from her bank account from 1<sup>st</sup> August, 2015 to 30<sup>th</sup> November, 2015 without authorization, wrote to the Defendants on more than one occasion and subsequently laid a complaint at the Consumer Protection Council.

Learned Counsel for the Defendant made a heavy weather of the fact that the Defendant disclosed her ATM Pin to her daughter and asked her to make withdrawals on her behalf prior to the period in contention between 1<sup>st</sup> August, 2015 and 30<sup>th</sup> November, 2015.

It is my view that the fact that the Claimant had asked her daughter to make withdrawals prior to the period in contention,



that is, August 2015 to November, 2015, does not absolve the bank of its duty to safeguard the Claimant's account and prevent unauthorized transactions. The onus remains on the bank to provide evidence of due diligence in carrying out its duty of care. Therefore, the Defendant's argument does not exonerate the bank from its responsibility for the disputed transactions within the specified period.

During the proceedings, the Defendants presented photos depicting the Claimant's daughter making withdrawals using the Claimant's ATM card, albeit before the period in question. However, they neglected to submit the photographs from the specific period in question, which they purportedly possessed and which would have provided valuable insight into how the funds were deducted from the Claimant's account. Such evidence could have greatly benefited their case.

It is my view that the Defendant failed to discharge the duty of care on it in line with the CBN Guidelines and so is liable.

In the case of **GTB v. DASHUWAR (2020) LPELR-52435(CA), ADZIRA GANA MSHELIA, JCA (Pp 19 - 19 Paras A - E)** held as follows:

*"...The Appellant owes the Respondent a duty of care in managing the Respondent's money. See UBN Plc v Chimaeze (2014) LPELR - 22699. This Court also in the case of U.B.A Plc v YaroBakiyauYahuza (2014) LPELR -23926 had this to say: "It is trite law that customers' monies in the hands of the banker are not in the custody or under the control of the customer and such*

*monies remain the property in the custody and control of the banker and payable when a demand is made. Thus if anything happens to the money thereafter e.g. theft of money or unauthorized withdrawal, it is the banker and not the customer that bears the loss." See also Wema Bank Plc v Osilaru (2008) 10 NWLR (Pt.1094) 150; Jukok Int'l Ltd v Diamond Bank (2016) 8 NWLR (Pt.1507) 55, 80 at 111 paras A-B."*

The case of the Claimant has merit and judgment is hereby entered in her favour. Accordingly, reliefs 1-8 is hereby granted as prayed. Furthermore, the unauthorize interest deductions and withdrawals sum made on the account of the Claimant at the Defendant's lending interest rate from 1st August, 2015 to 30th November, 2015 should be paid to the Claimant until the said sum is liquidated.

In addition, the sum of N2,000,000 (Two Million Naira) is hereby awarded as general damages and 10% interest on the Judgment sum until same is paid.

That is the Judgment of this Court.



HON. JUSTICE J. ENOBIE OBANOR

Hon. Judge

Appearance:

For the Claimant P.A.N Ejiofor, Esq.

For the Defendant John M. Omughele, Esq.