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

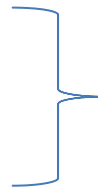
ON WEDNESDAY, 10TH DAY OF APRIL, 2019

BEFORE HON. JUSTICE SYLVANUS C. ORIJI

SUIT NO. FCT/HC/CV/498/2016

BETWEEN

1. MR. NDUBUISI OGBONNA
[Trading under the name and style of I. G. Dubison Enterprises]
2. I. G. DUBISON ENT. NIG.LTD.



PLAINTIFFS

AND

FORTIS MICRO FINANCE BANK PLC. --- DEFENDANT

JUDGMENT

The 1st plaintiff filed this suit against the defendant on 16/12/2016 vide writ of summons. On 12/10/2017, the Court granted the plaintiff's motion to join the 2nd plaintiff in the suit. After the joinder, the plaintiffs filed their amended writ of summons and statement of claim on 16/10/2017. The defendant filed its statement of defence and counter claim on 16/2/2017.On 18/10/2017, the plaintiffs filed their defence to the counter claim.

The claims of the plaintiffs against the defendant are:

1. An order of the Court directing the defendant forthwith to re-open corporate account 3005110235 [IG DUBISON ENTERPRISES] being the account of the plaintiff which was unlawfully blocked by the defendant.

2. The sum of N10,000,000.00 only being special damages for loss of business transactions encountered by the plaintiff as a result of the defendant's freezing or blocking of the plaintiff's corporate account 3005110235 [IG DUBISON ENTERPRISES].

3. The sum of N5,000,000.00 as general damages for breach of trust and breach of contract.

4. The cost of action at the rate of N400,000.00 only.

The counter claims of the defendantagainst the plaintiffs/defendants to the counter claim are:

1. An order of Court mandating the defendants to pay to the counter claimant the sum of N500,000.00 as money had and received being the sum of money mistakenly and erroneously paid into 2nd defendant's account with the counter claimant and withdrawn by the 1st and 2nd defendants.

2. 10% statutory interest of the judgment sum commencing from the date of judgment until the judgment sum is fully liquidated.

3. Cost of action.

At the trial, the 1st plaintiff gave evidence as PW1. He adopted his statement on oath filed on 16/10/2017 and tendered Exhibits A& B. During cross examination of PW1 on 13/12/2017, the defence counsel tendered Exhibits C & D through him. The defendant did not call any witness.

In his evidence, the PW1 stated that the defendant is his banker holding his corporate account No. 300511235 [I. G. Dubison Enterprises] atits Gudu branch, Abuja. In February 2016, Steven Mbonu [managing director of Wind of Favour Ltd.] approached him for a soft loan of N500,000.00 to enable him execute a job given to his company. Steven Mbonu issued a post-dated Atlas Micro-Finance Bank cheque to him. The cheque dated 7/2/2016 is Exhibit A. He lodged the cheque into his corporate account number 3005110235 on 27/7/2016 with defendant. About 3 days later, he went back to the defendant and discovered that the cheque was cleared by the defendant. He withdrew the sum of N500,000.00. He paid the money to his customers in Lagos to supply some tyres.

On 16/8/2016, the defendant wrote him and demanded for the return of the money; that was after an initial visit to his shop by some defendant's staff the previous day asking him to return the money. He refused to return the money because he saw no reason why he should lose his money for the bank's negligence. The defendant then blocked his said account with it. He

knew about it when he issued a cheque to somebody on 10/10//2016 and the cheque was returned with the inscription *"DAR"*. The cheque of 10/10/2016 in the name of NnaemekaIkechukwuCajetanis Exhibit B. Since the freezing of the account, most of his trade connections and customers outside Abuja could not be maintained as they no longer rely on his credibility. In fact, one customer from Enugu called him*'419'* due to that development.

PW1 further stated that he also lost the sum of N10,000,000.00 in cash due to disappointment he faced from his Lagos customers who made it clear to him that they are severing relationships with him due to hisnon-reliability; they said he did not have integrity. His entire business is going down due to loss of his vital customers. He viewed the conduct of the defendant as an act of breach of contract and a breach of trust.

During cross examination, PW1 stated that hisbusiness name [I. G. Dubison Enterprises] and the 2nd plaintiff are registered. Certificate of Incorporation of I. G. Dubison Nigeria Enterprises Ltd. dated 6/8/2009 is Exhibit C; while the Certificate of Registration of I. G. Dubison Nigeria Enterprises dated 11/7/2007 is Exhibit D.He signed his statement on oath in his lawyer's office. When the defendant informed him that Wind of Favour which issued the cheque had no money in its account, he did not go back to Wind of Favourbecause he had no reason to go back to ask in order not to cause problem to himself. It is true that Wind of Favour and its principal [Stephen Mbonu] do business with him in the same Plaza.

PW1 further testified under cross examination that the word *"DAR"*written on the cheque [Exhibit B] means that his attention was needed. He wrote another cheque in his name. When he went to cash the cheque, he was told that the account has been blocked.*"DAR"* does not mean that his account is blocked. He issued the cheque [Exhibit B] to Mr.NnaemekaIkechukwuCajatan, his lawyer.

At the end of the trial, Isaac E. ItaEsq. filed the defendant's final address on 13/9/2018; while F. A. ObainokeEsq. filed the plaintiffs' final address on 19/9/2018. On 24/1/2019, Isaac E. ItaEsq. adopted the defendant's final address. Due to the absence of the plaintiffs and their counsel, the Court deemed the plaintiffs' final address as adopted by virtue of Order 33 rule 4 of the Rules of the Court, 2018.

In the defendant's final address, Isaac E. ItaEsq. formulated one issue for determination, which is:

> Whether from a calm consideration of the facts, evidence before the Court and state of the law, the plaintiffs have proved their case and are entitled to their claims.

On the other hand, F. A. ObainokeEsq. formulated these two issues for determination in the plaintiffs' final address:

1. Whether there is a breach of trust and contract by the defendant.

2. Whether the plaintiffs have made out a case and therefore entitled to the reliefs claimed.

The Court is of the view that there are two issues for determination. The first is whether the plaintiffs are entitled to their reliefs and the second is whether the defendant is entitled to its counter claims.

ISSUE 1

Whether the plaintiffs are entitled to their reliefs

One of the submissions of the learned defence counsel is that the statement on oath of the PW1 dated 16/10/2017 - which he adopted on 13/12/2017 - is incompetent and inadmissible having not been signed before a Commissioner for Oaths as prescribed by law. He referred to the evidence of PW1 during cross examination that he signed his statement on oath in his lawyer's office. Mr. Isaac E. Itaurged the Court to expunge the statement on oath of PW1 from the records of the Court. He relied on the cases of **Buhari v. INEC [2008] 19 NWLR [Pt. 1120] 246** and **Erokwu&Anor. v. Erokwu [2016] LPELR-41515 [CA].**It was submitted that the inevitable conclusion is that the plaintiffs did not adduce any evidence in support of their case since the only evidence on record is liable to be struck out. Therefore the case of the plaintiffs has failed.

In the plaintiffs' final address, F. A. ObainokeEsq. ignored this submission and said nothing about it.

The question that arises from the submission of defence counsel is whether the statement on oath of the PW1 dated 16/10/2017, which he adopted on 13/12/2017, is incompetent; and if the answer is in the affirmative, what is the effect on the plaintiffs' claims. In other words, what is the position of the law where a written statement on oath is shown not to have been sworn before a Commissioner for Oaths, like that of PW1 in this proceeding? Sections 112 and 117[4] of the Evidence Act, 2011 are relevant to the issue under focus.

Section 112 of the Evidence Act, 2011 reads:

> *An affidavit shall not be admitted which is proved to have been sworn before a person on whose behalf the same is offered, or before his legal practitioner, or before a partner or clerk of his legal practitioner.*

Section 117[4] thereof provides:

> *An affidavit when sworn shall be signed by the deponent or if he cannot write or is blind, marked by him personally with his mark in the presence of the person before whom it is taken.*

In the case of **Erokwu&Anor.v. Erokwu [supra],**My Lord,*Helen MorenkejiOgunwumiju, JCA*held that the concept of oath taking involves:

- i. *The deponent making a statement in writing.*
- ii. *The document is taken to a Commissioner for Oaths or any person duly authorized to take the oath.*

iii. *The Commissioner for Oaths requires the deponent to swear on a holy book particular to the deponent's faith or a mere declaration for a deponent whose faith forbids him to swear.*

iv. *The Commissioner for Oaths then asks the deponent to verify what has been stated.*

v. *The deponent afterwards signs in the presence of the Commissioner for Oaths who witnesses that the Affidavit was sworn to in his presence. This explains the phrase "Before me" usually signed by the Commissioner for Oaths.*

Before now, I held the opinion - with regards to sections 112 and 117[4] of the Evidence Act, 2011 -that a witness statement on oath is markedly different from an affidavit. This is because usually, awitness statement on oath is adopted in a court or tribunal before thewitness gives evidence after taking oath or making an affirmation. The statement on oath is not useful until it has been adopted by the witness. On the other hand, an affidavit contains facts or evidence, which the court or tribunal can rely on in a proceeding without adoption by the deponent or maker.

In the light of the above differences, I reasoned that where a statement on oath of a witness is to be adopted again on oath by the maker or witness before his cross examination on it, whatever defect in the original oath in respect thereofhas been cured by the second oath made in court before the

judex. This opinion was supported by the decision of the Court of Appeal in **Uduma v. Arunsi [2012] 7 NWLR [Pt. 1298] 55.** Based on this principle, I was of the view that where the witness did not sign his or her statement on oath before a Commissioner for Oaths, the oath taken in court will cure the defect, in which case the statement on oath will not be adjudged as incompetent.

However, the above position no longer represents the state ofthe law on the issue in the light of the decision of the Supreme Court in **Buhari v. INEC [supra],** which was adopted by the Court of Appeal in E**rokwu&Anor. v. Erokwu [supra].**

In **Buhari v. INEC,** it was held that the depositions of 18 of the witnesses sworn before Val I. Ikeonu, a legal practitioner, violated section 83 of the old Evidence Act [now section 112 of the Evidence Act, 2011] and section 19 of the Notary Public Act. The Supreme Court agreed with the Court of Appeal that all the depositions [of the 18 witnesses] made before Val I. Ikeonu, which were earlier admitted, were rightly expunged from the records of the Court.

In E**rokwu&Anor.v. Erokwu,***His Lordship, Helen MorenkejiOgunwumiju, JCA* held:

> ***"I had hitherto been of the view that even where the witness statement of the Respondent at the trial Court was not sworn to before a person duly authorized to take oaths in contravention of Section 112 of the Evidence Act 2011, the subsequent adoption of the written deposition***

after he had been sworn in open Court to give oral evidence regularizes the deposition. I was of the view that the witnesses' statements which are adopted during oral evidence on oath are different from mere affidavit evidence which stand on their own without any oral backup and which are not subjected to cross-examination. That it is such affidavit evidence which do not meet the requirements of Section 112 Evidence Act 2011 that are intrinsically inadmissible. That where a witness is in Court to say he/she is adopting an irregular written deposition, the implication is that the witness is re-asserting on oath what is contained in the otherwise defective deposition and such adoption on oath makes all the evidence in the written deposition admissible.

However, that previous way of thinking must perforce give way to the opinion of the Supreme Court in Buhari v. INEC [2008] 12 SCNJ 1 at 91. In that case, the Supreme Court unequivocally agreed with the Court of Appeal's decision to strike out the depositions of the Appellant's witnesses sworn before a Notary Public who was also counsel in the chambers of the senior counsel to the Appellant which was in violation of Section 19 of the Notary Public Act and section 83 of the Evidence Act [now Section 112]. …

When a deponent swears to an oath, he signs in the presence of the Commissioner for Oaths who endorses the document authenticating the signature of the deponent. Signatures signed outside the presence of

the Commissioner for Oaths fall short of the requirement of the statute and such document purported to be sworn before a Commissioner for Oaths is not legally acceptable in Court. …

In this case, the Respondent upon cross examination stated when asked where he signed his statement on oath that 'I guess in my counsel's chambers.' This to my mind presupposes that the document was not signed before a commissioner for oaths. … He simply did not sign it in the presence of a Commissioner for Oaths as required by law.

This is not a defect in form as envisaged by Section 113 of the Evidence Act 2011. It is a fundamental and statutory error that cannot be waived. Therefore the witness statement of the Respondent dated 9/10/2008 is incompetent and inadmissible, it is hereby expunged having failed the statutory test of authenticity and admissibility.

It is trite law that where pleadings are not supported by evidence, such pleadings are deemed abandoned since pleadings do not constitute evidence on oath. …

The purport of this situation is that the Respondent never adduced any valid evidence in chief at the trial Court since the evidence on oath is liable to be struck out for being incompetent. …"

From the above decisions - which is binding on this Court by the inflexible doctrine of *stare decisis* - the statement on oath of PW1 dated 16/10/2017,

which was signed in the office of his lawyer,is incompetent and inadmissible. The statement on oath of PW1 is hereby expunged from the records of the Court.Since the evidence of PW1 has been expunged from the records of the Court on ground of incompetence, the effect is that no valid evidence was adduced in support of the plaintiffs' pleadings. That being the case, there is no foundation on which the plaintiff's claims can stand. The plaintiffs' case is dismissed.

ISSUE 2

Whether the defendant is entitled to its counter claims.

As rightly stated by learned plaintiffs' counsel, the defendant's statement of defence was not supported by any evidence. It is trite law that a pleading not supported by evidence is deemed abandoned. See**Agballah v. Chime [2009] 1 NWLR [Pt. 1122] 373.** The implication is that there is no evidence to support the counter claim. It is accordingly dismissed.

HON. JUSTICE S. C. ORIJI
[JUDGE]

Appearance of counsel:

Isaac E. ItaEsq. for the defendant.