IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY

IN THE ABUJA JUDICIAL DIVISION

HOLDEN AT MAITAMA COURT 4, F.C.T., ABUJA.

BEFORE HIS LORDSHIP: HON. JUSTICE O. O.GOODLUCK

SUIT NO.: FCT/HC/CV/2306/2017

B E T W E E N:

1. OSARETIN WILLIAMS **2. UNIVERSAL AGRICULTURAL EMPOWERMENT AND DEVELOPMENT INITIATIVE** **3. REGISTERED TRUSTEES OF UNIVERSAL AGRICULTURAL EMPOWERMENT AND DEVELOPMENT INITIATIVE**	**PLAINTIFFS**

AND

1. GUARANTY TRUST BANK PLC **2. THE BRANCH MANAGER, GUARANTY TRUST BANK, STICKS & STONES BRANCH, WUSE 2, ABUJA**	**DEFENDANTS**

J U D G M E N T

The 2nd Plaintiff maintains Account Number 0164981107 under the name, Universal Agricultural Empowerment and Development Initiative with the Defendants, which is being operated under the Defendants Merchant Platform and the GT Pay Service.

In addition to compliance with the Defendants' Account opening documentations, the 2nd Plaintiff executed the Defendants' GT Pay standard terms and conditions.

On the 13th November, 2015, the Defendant placed a lien on the Plaintiff's Account which lien subsists to date. On the 9th March, 2016, the 1st Plaintiff received debit alerts on his mobile phone reflecting several debits by the Defendant in the sum of ₦3,000.00 (Three Thousand Naira) at 7.47 pm, ₦6,000.00 (Six Thousand Naira) at 7.48 pm, ₦100,000.00 (One Hundred Thousand Naira) at 7.48 pm and ₦200,000.00 (Two Hundred Thousand Naira) at 7.48 pm. In all, an aggregate total sum of ₦412,000.00 (Four Hundred and Twelve Thousand Naira) was debited by the Defendant against the 2nd Plaintiffs' Account.

On the 10th March, 2016 at 11.03 pm, an employee of the Defendant, Mr. Oluwaseun Fatugase sent an email through the Defendant's internet portal titled: "Fraudulent Transfers ***IRO UNIV AGRIC EMP & DEV INIT. 0164981107"***. By the said email, the Fraud Desk of Heritage Bank Ltd. was notified that transactions between the Plaintiffs and the recipient, one Mr. Adebola Olu Ogundeko were fraudulent. Similar notifications were also emailed to First Bank, Zenith Bank, Diamond Bank, Access Bank and Sterling Bank.

Aside from the foregoing, the Defendant dishonoured two cheques issued by the 1st Plaintiff without giving any reason. After waiting for the Defendant to retract the email publications, the Plaintiffs' instructed their Counsel, Messrs S. E. Irabor & Associates to write the Defendant with a

request for the reversal of the debits on the 2nd Plaintiff's account as well as a retraction of the email correspondence vide a letter dated 29th March, 2016.

Still on the 14th January, 2016, the Defendant proceeded to "wipe" the sum of $3,123.16 (Three Thousand, One Hundred and Twenty Three Dollars, Sixteen Pence) from the 2nd Plaintiff's Dollars Account, the debits were tagged "fraudulent transaction".

Again, on the 20th April, 2016, the Defendant further "wiped" the sum of ₦4,242,259.59 (Four Million, Two Hundred and forty-Two Thousand, Two Hundred and Fifty-Nine Naira, Fifty-Nine Kobo) from the 2nd Plaintiff's Account. The aforestated debits were noted in the 1st Plaintiff's phone as sms messages of monies withdrawn by the 2nd Plaintiff.

Arising from the unexplained debits, the Defendant's email correspondence to the banks as well as the lien imposed on the 2nd Plaintiff's Account by the Defendant, the Plaintiffs have now instituted this suit against the Defendant and are praying the Court for the following orders.

a) A Declaration that the lien placed on the Plaintiff's account with the Defendant is unwarranted, unlawful and a breach of the Defendants banking relationship with the Plaintiffs.

b) A Declaration that the dishonor of the duly issued cheques of the Plaintiff by the Defendant is unjustifiable, unreasonable unwarranted, unlawful and a breach of the Defendants' banking relationship with the Plaintiffs.

c) A Declaration that the contents of the Defendants publication against the Plaintiffs herein complained of, are false, mischievous unsubstantiated, defamatory and libelious of the Plaintiffs.

d) An Order directing the Defendants to publish a retraction in respect of the said defamatory and libelious publication against the Plaintiffs in at least 2 National Dailies, the Defendant's website and social media page as well as copy same to the recipients of the mails complained of.

e) An Order directing the Defendants to undertake not to indulge in any such false publication against the Plaintiffs in future.

f) An Order directing the Defendants to immediately and unconditionally lift the lien placed on the Plaintiff's account with the 1st Defendant.

g) An Order directing the 1st Defendant to refund the sums of ₦412,000.00 (Four Hundred and Twelve Thousand Naira); $3,123.16 (Three Thousand One Hundred and Twenty-Three

Dollars, Sixteen Pence) and ₦4,242,259.59K (Four Million, Two Hundred and Forty-Two Thousand, Two Hundred and Fifty-Nine Naira, Fifty-Nine Kobo) debited from the Plaintiff's account with the Defendants.

h) Cost of the suit.

i) General Damages of ₦1,000,000,000.00k (One Billion Naira) only as damages against the Defendants and in favour of the Plaintiffs for defamation, libelous publication and breach of banker-customer relationship by the Defendants.

Any other order(s) that the Honourable Court may deem to make in the circumstance.

In reaction to the Plaintiff's claim, the Defendant filed a Statement of Defence wherein it substantially admitted that it debited the 2nd Plaintiff's account and also admitted the lien imposed on the 2nd Plaintiff's account.

On the publication, in the Defendants' portal concerning the alleged fraudulent transaction by the Plaintiffs, the Defendant admitted the fact that it indeed sent the notice by email to the banks.

The last and operational pleadings in this suit are the Amended Writ of Claim and Plaintiff's Amended Joint Statement of Claim dated 20th February, 2018, Defendants' Amended Statement of Defence dated

the 27th February, 2018 as well as the Plaintiff's Reply to Defendant's Statement of Defence dated 22nd May, 2018.

At trial, the 1st Plaintiff, testified as P.W.1 and adopted his Witness Statements respectively dated 28th February, 2018 and 22nd May, 2018. He tendered several documents which included the Defendants Account Opening Documentation for Unincorporated Societies, Clubs, Association which was admitted as Exhibit P.W.1E1-20 for the opening of Plaintiffs' Naira Statement of Account as well as Exhibit P.W.1F1-2. Plaintiffs' Foreign Currency domiciliary account opening Form.

P.W.1 further disclosed in his testimony that the 2nd Plaintiff was registered with the Defendant as a GTB Pay Merchant Platform hence he admitted completing a GT pay Standard Terms and Conditions and GT Pay Merchants Registration Form. Under cross examination by O. Balogun Esq. he admitted that he nominated 2nd Plaintiff's account for the dollars and a naira account on both Platforms. P.W.1 denied knowledge that the 2nd Plaintiff had an Acquired Merchant relationship with the Defendant by virtue of the 2nd Plaintiff's account with Defendants.

The Defendants called a lone witness Ezinne Ndefo of the Defendant's General Processing Centre in Lekki.

She adopted her witness statement on oath and tendered several documents which were admitted in evidence. Amongst the documents

tendered were the GT Pay Standard Terms and Conditions, Exhibit D.W.1A[1-6]. Another document, the Master card Security Rules and Procedures dated 5th February, 2015 was admitted in evidence as Exhibit D.W.1B[1-149] amongst other documents.

Under cross examination, D.W.1 admitted that the objective of opening the account for the Plaintiff was for receiving donations given to the 2nd Plaintiff. She said she didn't know that the 3rd configuration was to ensure that the 2nd Plaintiff did not enter into any fraudulent transaction. According to D.W.1 she said that the 3rd configuration is one of the many security features for the account. D.W.1 also disclosed that the charge back is not a security feature.

D.W.1 further recounted that there was a complaint by a cardholder that he or she has been swindled. For security reasons, D.W.1 explained that they are not allowed to have full details of the card holder however they have access to a max iced pan, which reflects the date of the transaction and the reason for the charge back.

When shown Exhibit D.W.1C[1-2] and Exhibit D.W.1D[1-3], D.W.1 again confirmed that they are documents from Master Card. She explained that the complaint was against Universal Agriculture (the 2nd Plaintiff) that opened the Merchant Account. She said that the name of the 2nd Plaintiff was abbreviated in order for it to be entered on the Platform. D.W.1 recounted that all the 2nd Plaintiff's settlement files

bears Universal Agriculture. She disclosed that the Defendant never wrote Master card on the transaction prior to the reception of Exhibits D.W.1D$^{1-3}$ and D.W.1C$^{1-2}$. She said that the Plaintiff was issued a Merchant ID which is linked to its account number with the Bank.

D.W.1 recounted that by her understanding of the agreement signed, the Defendant is entitled to exercise its right to set off and the bank exercised the right of set off owing to transactions that were deemed fraudulent having regard to Clause 5.1 of the agreement. She maintained that the right to set off entitles the Defendants to debit the Plaintiffs for fraudulent transactions.

At the conclusion of trial both Counsel filed and exchanged final written address.

The Defendants' Counsel Ogunmuyiwa Balogun Esq., filed a final written address dated 7th February, 2019 whilst the Plaintiffs' Counsel S. E. Irabor Esq. filed a written address dated 12th March, 2019.

Thereafter S. E. Irabor Esq. filed Plaintiffs' Reply to Defendants' Statement of Defence dated 22nd May, 2018.

O. Balogun Esq., in the Defendant's final Written Address identified three issues for determination, they are as follows;

a) *Whether having regard to Exhibit D.W.1A and D.W.1B, the Claimants have made out a case of wrongful deduction from*

their account as to entitle the Claimants to the reliefs sought against the Defendants?

b) *Whether the Claimant have made out a case of unlawful dishonor of cheques?*

c) *Whether having regard to Exhibit D.W.1A and the circumstances of this case, the Claimants have made out a case of defamation against the Defendants as to entitle the Claimants to the reliefs sought.*

S. E. Irabor Esq., identified two issues for determination in the Plaintiffs' final written address to wit:

a) *"Whether the Defendants can suo moto fix liability for fraudulent against the Plaintiffs and proceed to take the actions complained of;*

b) *If issue 1 is answered in the affirmative whether the Defendants violated its obligation to the Plaintiff's thereby entitling the Plaintiff to the reliefs sought"*

It being noted that the Defendants' Counsel raised a threshold point in his final written address in relation to the competence of the 1st and 2nd Plaintiffs, I consider it imperative to deal with the submissions of both Counsel on this preliminary point of law first, before proceeding to the substantive issues formulated for determination.

O. Balogun Esq., contends that this suit is predicated on the 2nd Plaintiff's account number 0164981107 which was opened in its name. He recounted that the Plaintiffs' case against the Defendant is that the Defendant placed a lien on the Plaintiff's account without a valid Court order.

It is also recounted that the Defendant dishonoured two cheques issued by the 1st Plaintiff. The Plaintiffs have also sued the Defendant, alleging that the Defendant sent a libelous notification to Heritage Bank Ltd. that some of the Plaintiff's transaction operated through Plaintiffs' account were fraudulent.

O. Balogun Esq. has rightly submitted that the holder of the account is the 2nd Plaintiff and not the 1st and 3rd Plaintiffs. He referred to Exhibit P.W.1E[1-3], the GT Bank Account opening documentation for unicorporated Societies/Clubs/Associations which reflects the 2nd Plaintiff as the holder of the Account Number 0164981107. This Court's attention was similarly drawn to the testimony of P.W.1, the 1st Plaintiff who disclosed in his testimony that the account is not in his name but in the name of the 2nd Plaintiff.

O. Balogun Esq. has further submitted that there is no contractual relationship whatsoever between the 1st Plaintiff and the Defendant entitling the 1st Plaintiff to sue the Defendants. Defence Counsel's submission that the 1st Plaintiff is in misapprehension that by signing the

account documentation on behalf of the 2nd Plaintiff gives him the right to sue is merited. I also find forceful the Defence Counsel's submission that there is no evidence before this Court to the effect that the 1st Plaintiff is a party to the customer banker relationship between the 2nd Plaintiff and the Defendant.

O. Balogun Esq. has rightly submitted that either party to a contract can enforce the terms of the contract and not a stranger thereto as in the instant scenario where the 1st Plaintiff is suing the Defendant where such legal right does not exist.

Much as the 1st Plaintiff has described himself as the "initiator or facilitator" of the 2nd Plaintiff his role is at best that of the agent of a disclosed principal, in this case the 2nd Plaintiff.

S. E. Irabor Esq., has argued to the contrary by contending that the 2nd and 3rd Plaintiffs are not natural persons hence they can only act through natural persons, in this instance the 1st Plaintiff who acted as the 2nd and 3rd Plaintiffs' alter ego.

Plaintiff's Counsel has further submitted that the 1st Plaintiff was in paragraph 1 of the Amended Witness Statement referred to as Austin Osaretin Igbodaro who signs as the President/CEO of the 2nd and 3rd Plaintiffs. Reference was also made to the fact that D.W.1 admitted under cross examination that he thinks that the 1st Plaintiff opened and operated the account for an on behalf of the 2nd Plaintiff. He then urged

this Court to invoke Section 123 of the Evidence Act of 2011 which provides that what has been admitted needs no further proof. Irabor Esq. went on to argue that this Court is bound by its records and documents before it.

I am unable to allude to the submissions of S. E. Irabor Esq. on this note. His submissions and reliance on Section 123 of the Evidence Act is totally misplaced. The fact remains that a person who is acting for and on behalf of a juristic personality, be it as the company's alter ego or in any other representative capacity does not put him on the same pedestal as the company itself, it does not entitle him to sue in a contractual capacity where the parties or a party to the contract is a juristic personality. The 3rd Plaintiff is therefore a disclosed principal hence it is needless for the 1st and 2nd Plaintiffs to sue as co Plaintiffs.

That said, I now turn to the status of the 2nd Plaintiff, S. E. Irabor Esq., has submitted that the 2nd Plaintiff is registered pursuant to Part C of the Companies and Allied Matters Act, CAMA. He posits that the inclusion of the 2nd Plaintiff is in line with a long line of decisions which is to the effect when a litigant is in awe of the parties to sue, it is important to exercise abundant caution by suing all necessary persons or entities. Plaintiffs' Counsel commended this Court to the ratio of Centus Nweze JSC in the case of **BARR. FRANC FAGAH UTOLO v. APC & ORS.**

(2018) L.P.E.L.R. – 44353 (SC) at page 4 para. D where the Supreme Court held:

"All said and done, where Counsel is unsurefooted, or finds himself or herself in a dilemma in this characterization, he or she should apply for leave to do so for abundans cautela non nacet – abundant or sufficient caution does not harm"

O. Balogun Esq., however argued that the 2nd Plaintiff lacks the legal capacity to sue as it is not a juristic person capable of being sued. This Court's attention has been drawn to the fact that the Plaintiffs in their statement of claim referred to the 2nd Plaintiff as a Non Governmental Organization, relying on Section 596 CAMA, Balogun Esq., reasons that the only entity that has the legal capacity to sue on behalf of a Non Governmental Organization being entities registered under part C of CAMA is their Registered Trustees. He then commended this Court to **DASRO v. REGISTERED TRUSTEES T.A.D., LAGOS (2018) 1 N.W.L.R. (PART 1599) page 62 at 76, para. C and 84 paras. A – B.**

Flowing from his submissions he has urged this Court to hold that the 2nd Plaintiff is a nonexistent body. Defendants' Counsel has rightly submitted that for a Court to be competent and have jurisdiction over a matter, the necessary, proper and competent party must be before it. In effect, he posits that the 2nd Plaintiff lacks the competence to institute

this action, accordingly both the 1st and 2nd Plaintiffs should be struck out.

Having considered the submissions of both Counsel, I must state here that the submission of the Plaintiffs' Counsel that the 2nd Plaintiff is registered under Part C of CAMA will be discountenanced by this Court. It is long settled that the submission of Counsel no matter how brilliant is no substitute for evidence. In so far as there are no fact in the Plaintiffs' pleadings to support the Plaintiffs' Counsel's submission, his argument regarding the legal status of the 2nd Plaintiff is hereby discountenanced.

I however allude to the submission of O. Balogun Esq., that the 1st and 2nd Plaintiffs are not juristic personalities, going by their averments in their pleadings, the party seised with competence to sue and be sued is the Registered Trustees of Universal Agriculture Empowerment and Development Initiative, the 3rd Defendant in this suit, accordingly the 1st and 2nd Plaintiffs are hereby struck out for want of competence.

I must however state here that the misjonder of the 1st and 2nd Plaintiffs does not fetter the hearing of the substantive suit in the face of the 3rd Plaintiff who is a competent party before this Court. It is noteworthy to restate here, Order 13 Rule 18(c) of the High Court of the FCT Civil Procedure Rules, which provides thus;

"No proceedings shall be defeated by reason of misjoinder or nonjoinder of parties, and the Court may deal with the matter in

controversy so far as regards the rights and interest of the parties actually before them.

Order 13 Rule 28(2) provides that the Court may at any stage of the proceedings, either upon or without the application of either party and on such terms as may appear to the Court to be just, order that the name of any party improperly joined be struck out"

That said, I now turn to the issues formulated for determination as it relates to the substantive suit. Having carefully examined the issues for determination, the state of the pleadings filed by both parties and the evidence elicited at trial, I am of the view that the issues for determination formulated by the Defendants' Counsel embodies the real issue in controversy which calls for determination by this Court. However, minded that the Defendants contends that the "Plaintiffs' account was diversely debited and a lien was placed on the Plaintiffs account because of the Plaintiffs' alleged fraudulent transactions, the Defendants' issue one will be amended for the purpose of this Judgment thus; (see Order 27 Rule 6 of these Court Rules).

1) "Whether the Defendant has established the allegation of fraudulent transactions by the Plaintiff thus entitling it to debit the Plaintiff's account pursuant to the terms in Exhibits D.W.1A and D.W.1B.

I am minded to bring in the allegation of the fraudulent transactions into the issue for determination as it is the crux upon which the debits are predicated. It will be noted that parties are consensual that the Plaintiff's accounts were diversely debited. Parties are also commonly agreed on the execution of the terms and conditions of the operation of the account which entitles the Defendant to be indemnified by way of lien, set offs and charge backs. The bone of contention is whether the Plaintiff was fraudulent in the operation of the accounts thereby entitling the Defendant to invoke its rights to indemnity as provided in Exhibits D.W.1A and D.W.1B. In effect, issues are joined on the fraudulent transaction(s) allegedly perpetuated by the Plaintiff. This Court is thus enjoined, to determine whether the Plaintiff was engaged in fraudulent transactions in the operation of its account with the Defendant. Since the debits can only be faulted on fraud, it is imperative that the issue of fraud (or otherwise) must be incorporated into the first issue for determination. In other words the proprietary or otherwise of the debits and or charge back is a condition precedent to the valid exercise of the Defendant's right to be indemnified pursuant to Exhibits D.W.1A and B.

Putting it another way, where the allegation of fraudulent transaction succeeds the debits and the lien created are justified and in the exercise of the Defendant's rights under Exhibits D.W.1A and D.W.1B.

Nonetheless, this Court will examine all the submissions of Counsel on all the issues noted for determination together with the amendment on issue one formulated supra.

The Defendants' Counsel in arguing issue one has submitted that a party asserting must prove and he specifically relied on Section 131 of the Evidence Act, which provides that: *"whoever desires any Court to give Judgment as to any legal right or liability dependant on the existence of fact must prove that those facts exists"*

Defence Counsel has commended this Court to the decision in **OJAH v. KAMALU (2005) 18 N.W.L.R. (PART 55) page 523 at 560 paras. F – G** where the Supreme Court, per Tobi, JSC held thus:

"*It is elementary law that the burden of proof is on the party who alleges the affirmative of the issue. In other words, the burden of proof is on the party to proof the facts he relied upon to succeed in the case. In most cases, that party is the Plaintiff"*

O. Balogun Esq., went on to submit that Exhibit D.W.1A[1-6] defines the bank – customer relationship between the 2nd Plaintiff (hereinafter referred to as "UAE", the (Universal Agricultural Empowerment and Development Initiative) having hitherto struck out the 2nd Plaintiff in this Judgment.

It is further submitted by the Defendants' Counsel that UAE (Universal Agricultural Empowerment) was also registered as a

"Merchant" with the Defendant being the acquiring Bank for the Defendant's GT Pay Platform described as "a secure internet payment gateway solution to facilitate on line payments to merchants from merchant customers using debit cards issued by specified local and international card issuers including Master card international leading to a Merchant – Acquire relationship between Universal Agricultural Empowerment and the Defendants.

O. Balogun Esq., went on to submit that there is uncontroverted evidence that a GTB Pay Merchant Registration Form was completed and executed on behalf of UAE, Universal Agricultural Empowerment by the 1st Plaintiff. The operation of the account is governed by Exhibit D.W.1A$^{1-6}$, the GT Pay Standard Terms and conditions which UAE is bound by its terms and conditions.

The Defendants' Counsel also recounted in his written address that by virtue of Clause 4 of Exhibit D.W.1A$^{1-6}$ the use of UAE's GT pay service will be governed by the procedure and rules established by Master card International i.e. the Master Card Security Rules and Procedures together with other applicable rules and standards prescribed by the card associations and acceptable use policy.

Defendants' Counsel rightly submitted that the Plaintiffs were gravely mistaken when they averred in their reply that they did not enter into any agreement with Master Card, in all, Counsel argued that P.W.1

was in error when he said that he is unaware of a Merchant Acquirer relationship between the 3rd Claimant and the Defendants.

Defendants' Counsel went on to add and, quite rightly too, that Exhibit D.W.1A and Exhibit D.W.1B, the Master card Security Rules and Procedures form the basis of the Merchant Acquirer relationship between UAE's account and the Defendants in relation to the GT Pay service. Having admitted by P.W.1 during cross examination that he i.e. P.W.1 signed Exhibit D.W.1A, the GT Standard Terms and Conditions and the GT Pay Registration Form, O. Balogun Esq., has submitted that UAE is liable to the Master card Security Rules and Procedure, Exhibit D.W.1B having regard to Clause 4 of Exhibit D.W.1A which provides inter alia that: *"Any charge back to the Merchant will be in accordance with the procedures and rules established by Master card International and modified from time to time"*

In the light of the foregoing I am inclined to allude to the submission of O. Balogun Esq. that the terms and conditions in Exhibits D.W.1A and D.W.1B forms part of the contract between the UAE or better still, the 3rd Plaintiff and the Defendants. In so far as the UAE account belongs to the 3rd Defendant, the 3rd Defendant is a proper party who is liable for the acts of UAE.

Learned Counsel for the Defendants further submitted that by reason of the Plaintiff's use of the GT Pay service the Defendant was

debited a total of USD $328,974.37 (Three Hundred and Twenty-Eight Thousand Nine Hundred and Seventy-Four Dollars Thirty-Seven Pence) by Master card following Master Card's finding in accordance with the questionable Merchant regime of Exhibit D.W.1B.

Balogun Esq. further submitted that UAE had agreed to indemnify the Defendant and conferred on the Defendant a right to set off by UAE's execution of the Account Opening Form (Exhibit P.W.1E) and Clause 13 of Exhibit D.W.1A. besides, Counsel contends that the indemnity in Clause 13 of Exhibit D.W.1A covers not just actual loss but extends to "imminent loss" He reasons that the loss in respect of which the Defendant had a right under Clause 5 of Exhibit D.W.1A to set off against or make deductions from the 2nd Claimant's account to make itself whole or apply a charge back.

Defence Counsel also submitted that the phrase "imminent loss" in Clause 13 of Exhibit D.W.1A is an indemnification which is triggered when loss is imminent and not only when the loss has crystallized, consequently once Master card notifies the Defendant of an imminent loss it was well within the Defendant's right to place a lien as a first step towards safeguarding the Defendant's right to indemnification. Attention was drawn to the Defendant's right of lien and/or set off further provided under the account Opening Form Exhibit P.W.1E.

O. Balogun Esq. further submitted that the deduction made from the UAE's account were in line with Clause 5.1 and 13 of the Exhibit D.W.1A which the Plaintiffs agreed to indemnify the Defendant, against any loss (including imminent loss) liability or loss which the Defendant may incur as a result of the UAE's noncompliance with any of the governing rules. Balogun Esq., has submitted that the naira and dollar accounts of the 2nd Claimant were designated as the settlement accounts for the GT Pay service, hence the Defendant was within its rights to set off against and make deductions from both accounts.

Defence Counsel also submitted that the Plaintiff did not rebut the Defendant's assertion that it was debited by Master card pursuant to Section 84 of Exhibit D.W.1B which is operational by virtue of exhibit D.W.1A on account of the finding that the 2nd Plaintiff is a questionable Merchant.

On the Plaintiffs' Counsel contention that it was not notified of the allegation of fraud before its account was debited, Counsel for the Defendant submitted that the Defendant's right to deduct from Plaintiff's account is not conditional to notification of the Claimants. He argued that Clause 5 of Exhibit D.W.1A entitles the Defendant to exercise the right to set off *"upon receiving notification from user cardholders or a participating bank without any requirement for any obligation to obtain further proof thereof"*

O. Balogun Esq., has argued that Master card having debited the Plaintiff for its fraudulent activities, the Defendant's right to indemnification under Clause 13 and right of set off under Section 5(1) automatically becomes available to the Defendant without the fulfillment of any condition precedent. This Court's attention was drawn by Learned Counsel for the Defendant to the debit alerts of 01/14/2015, 2/14/2016 shown in Exhibit P.W.1D, MIGS CHGBK Fraudulent Transactions MIGS CHBK for non receipt of Merchandise with CHBK which Counsel for the Defendant contends to be the abbreviation for charge backs.

The Defendant's Counsel also submitted that the Defendant is not under any obligation to report fraudulent activities to any security or law enforcement agencies before pursuing its contractual remedies.

Much as the Defendants' Counsel has exhaustively justified the mechanisms put in place to recover its loss or liability occasioned by the Plaintiff's fraudulent use of the Merchants Platform, it is clear that the deduction stems from what the Defendant described as

"…Notifications from users (cardholders) complaining about fraud and other irregularities in respect of transactions with the 2nd Plaintiff through the GT Pay Service of the Defendant subscribed to the UAE" See paragraphs 19.1 – 19.8 of the Defendants' Amended Statement of Defence.

There, the Defendant asserted that it received a Questionable Merchant Audit programm (QMAP) enquiry on UAE's transaction under the GT Pay Service from Master card International pursuant to Section 8.4 of the Master card Procedures and Rules. The QMAP according to the Defendant sets the minimum standards of acceptable merchant behaviour and identifies merchants that fail to meet the minimum standard by participating in collusive or otherwise fraudulent or inappropriate activity.

The Defendant further asserted that it acted on the notifications from cardholders and the receipt of QMAP enquiring the Defendant restriction of UAE from making withdrawals from its account as a precautionary step to preserving the Defendant's rights and interest.

Defendant in their pleadings asserts that by Master card's letter of the 3rd March, 2016, Defendant was notified of Master Card's preliminary determination that the UAE is a *"Questionable Merchant" as defined by Section 8.4 of the Master card Procedure and Rules – finding inter alia that the "fraud to sales ratio of transactions conducted by users with the 2nd Plaintiff to be 91.42 as and a (Fraud – Decline + Referral) to approved Ratio" of 635%, to this end, Defendant tendered Exhibit D.W.1C1-2 titled: "Re: Master card QMAP Preliminary Determination – case 2015 – 101 Universal Agriculture"*

In sum, UAE's account was finally determined as a Questionable Merchant of the Master card and the sum of USD $326,974.37 (Three Hundred and Twenty-Six Thousand, Nine Hundred and Seventy-Four Dollars Thirty-Seven Pence) was debited to Defendant's on account of fraud losses attributable to the fraudulent transactions engaged by UAE.

In reaction to the Defendants' allegation of the fraudulent transactions, the Plaintiff filed a reply wherein they vehemently joined issues with the Defendant. Plaintiff maintained that Defendant never confronted it with any particulars of loss or liability even when its Counsel wrote Exhibit P.W.1C[1-5].

The Plaintiff also maintained that it never defrauded any card holder(s) and therefore puts the Defendant to the strictest proof. See paragraphs 4, 5 and 6 of the Plaintiffs' Reply to the Defendants' Statement of Defence.

Learned Counsel for the Defendant has hitherto submitted that whoever desires any Judgment as to any legal right dependant on the existence of facts shall prove those facts exist, specifically this principle enshrined in Section 131 of the Evidence Act.

That notwithstanding, it must be reemphasised that the burden of proof shifts in civil cases as encapsulated in Section 133 of the Evidence Act, it provides thus:

Section 133(1) In Civil Cases the burden of first proving the existence or non existence of a fact lies on the party against whom Judgment of the Court will be given if no evidence were produced on either side, regard being had to the presumption that may arise on the pleadings.

Section 133 (2): *"If the party referred to in subsection (1) of this section advances evidence which ought reasonably to satisfy the Court that the fact sought to be proved is established, the burden lies on the party against whom Judgment would be given if no more evidence were adduced, and soon successively until all the issues in the pleadings have been dealt with"*

In the instant case, the Plaintiff contends that its account was debited and a lien was placed on it whilst two of its cheques were dishonoured. It is contended that there is no reason for the Defendant's conduct. The Defendant on the other hand maintains that the deductions and lien was placed on UAE's account as a result of the fraudulent transactions perpetuated by UAE. Ordinarily, the onus is on the Plaintiff to prove that there was no cause for debits and the lien.

In the instant case, the Plaintiff has nothing to prove as no evidence can be led on a nonexistent fact, consequently the burden of proof shifted to the Defendant who is alleging fraud to prove that the

deductions were borne out of the fraudulent transactions carried out by the Plaintiff,

Putting it another way, the Plaintiff is not under an obligation to elicit evidence of a fact that is nonexistent. It is the Defendant who is asserting the positive by way of an allegation of fraud that is, under an obligation to prove the fraud.

It is settled law that the burden of proof rests with the party who asserts the positive and not one who affirms the negative. The maxim "he who asserts must prove" operates thus: "a man cannot be expected to prove a negative assertion. The latin saying sums up the matter as follows: Eiineumbit probation qui licit non qui negats; cum per naturam factum negants probitio mulla sit. Meaning *"the proof lies upon him who affirms, not upon him who denies since, by the nature of things he who denies a fact cannot produce any proof"* per Salami JCA page 13 paragraphs B – G. **NSEFIK & ORS v. MUNA & ORS. (2007) L.P.EL.R**. CA.

This reasoning was further reechoed in the case of **HABU v. ISA (2012) L.P.E.L.R. (CA)** per Aniagolu JSC held thus:

"...We entertain no doubt that the Respondent as Plaintiffs had no burden to prove the negative averment ***JOLASUN v. BAMGBOYE (2011) ALL F.W.L.R. (PART 5951) 203, 219*** *because the law has long settled that the burden of proving a particular fact lies on the party who,*

substantially asserts the affirmative of the issue, see ***PHIPSON on Evidence (11th Edition)...”***

Flowing from the reasoning in the aforementioned decisions the onus of proving the fraudulent transactions alleged by the Defendant against the Plaintiff is on the Defendant and it must be strictly proved. It is settled that the standard of proof required for the commission of crime in civil cases are the same as in criminal cases. The allegation of fraud by the Defendant has all the colourations of a crime which is an offence, accordingly the burden of proof lies on the Defendant to establish the fraud allegedly perpetuated by UAE in the operation of the 3rd Plaintiff’s account. The particulars of the fraud must be pleaded and the law is sacrosanct that if the commission of crime is directly in issue, the party alleging must prove it beyond reasonable doubt.

Where as in this case, the Defendant alleges fraudulent transaction, he is enjoined to state the particulars of fraud in his pleading. Defendant’s assertion that it received *“notifications from numerous cardholders about fraud and other irregularities”* occasioned by the Plaintiff would not suffice, specific details of how the fraud was conducted, the monetary figures involved and the role played by the Plaintiff ought to have been pleaded. The particulars of the alleged *“collusion or otherwise fraudulent or inappropriate activity of the Plaintiffs which informed the QMAP standard of acceptable behaviour of merchant*

*behavior" mu*st be pleaded with the graphic details of each and every transaction giving rise to the debits and deductions. The numerous cardholders must appear to give evidence of the fraud allegedly reported to the Defendant.

Besides, the Defendant failed to give particulars of the activities of the Plaintiff that led to Master card's verdict of "final determination" that UAE was a "Questionable Merchant" This Court is thus left to conjecture how the diverse sums debits arose aggregating to the sum of USD $328,974.37 (Three Hundred and Twenty-Six Thousand, Nine Hundred and Seventy-Four Dollars Thirty-Seven Pence) which allegedly represents the fraud loses attributable to the fraudulent transaction carried out by UAE. Indeed, the letter of the 1st April, 2016 wherein Master card notified the Defendant of its final determination of UAE as a questionable Merchant was not tendered in evidence and those tendered were abstract as the letters did not specify or disclose details of the fraud.

In **OTUKPO v. JOHN & ANOR. (2012) L.P.E.L.R. -25053 (SC)** it was held thus:

"Fraud is defined as an intentional perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or surrender a legal right. It is something dishonestly and morally wrong: "Fraud has to be pleaded with

particularity and established in evidence. A person alleging fraud is not only required to make the allegation in his pleadings but must set out particulars of establishing the alleged fraud, so that the Defendant goes into Court prepared to meet them. ***OLUFUMISE v. FALANA (1990) 3 N.W.L.R. (PART 136) page 1 UAC v. TAYLOR (1936 2 W.A.C.A. page 170"***

It was further had that Section 138 of the Evidence Act stipulates as follows:

> *"If the commission of a crime by a party to any proceeding is directly in issue in any proceeding civil or criminal, it must be proved beyond reasonable doubt. The burden of proving that any person had been guilty of a crime or wrongful act is subject to the provisions of Section 141 of this Act, on the person who assert is which the commission of such act is or is not directly in issue in the action. If the prosecution proves the commission of a crime beyond reasonable doubt the burden of proving reasonable doubt shift on the accused. It is clear from the foregoing provision of the Evidence Act that fraud being crime in nature must be proved beyond reasonable doubt. The burden is on the person who asserts that a person is guilty of a crime"*

Besides, in this case where fraudulent transaction are alleged, the Defendant is obliged to state the particulars of fraud having regard to Order 15 Rule 7 of the High Court of the FCT, Civil Procedure Rules, 2018 which prescribes thus:

1) *All grounds of defence or reply which makes the action unmaintainable or if not raised will take the opposing party by surprise or will raise issues of fact that arising out of the preceding pleadings shall be specifically pleaded.*
2) *Where a party raises a ground which makes a transaction void or voidable or such matters as fraud, limitation law, release, payment performance, facts showing insufficiently in contract or illegality either by any enactment as by common law, he show plead specifically plead it"*

The Defendant palpably failed in this regard, even where this Court is to consider aspects of the Defendants' pleadings relating to the allegation of fraudulent transaction and notification of fraud and irregularities allegedly perpetuated by the Plaintiff, the Defendants assertions are devoid of facts or acts of the Plaintiff constituting the fraud. Indeed, there are no facts or evidence led to justify the diverse debits in UAE's account. As hitherto noted, no notification by card users alleging that they had been swindled were presented in evidence, no

evidence was elicited of acts or manipulation of the account by UAE leading to the Plaintiff's classification of Plaintiff as a Questionable Merchant. The letter of the 12th November 2015 allegedly written by Master card was not presented at trial. Defendant relied heavily on Exhibit D.W.1D1-3 and D.W.1C1-2 in pivoting Defendant's case of the fraudulent transaction perpetuated by the Plaintiff. I have read both documents for the umpteenth time and I am unable to decipher the "activities or role played by the Plaintiff culminating to the Defendant's allegation of fraudulent transactions"

For instance in Exhibit D.W.1D1-3, Master Card's letter titled: *"Re: Master card QMAP final determination CASE 2015 – 101 Universal Agricultural"* meets the criteria of a questionable Merchant as defined in Section 8.4 of the Security Rules and Procedure manual. The facts discovered in the course of the investigation, informing Master card's decision to categorize UAE as a questionable merchant, what were the facts discovered during investigation? They are unexplained. Again, the attachment A titled: Rules and Assessment in Exhibit D.W.1D1-3 states thus:

"The Questionable Merchant Audit Program (QMAP) establishes minimum standards of acceptable merchant behaviours and identified merchants that may fails to meet such minimum standards by participating in collusive or otherwise fraudulent or inappropriate activity"

Attachment A- Rules and Assessments

Guaranty Trust Bank ICA 11677
Case 2015-101 Universal Agriculture

Rule	Rule Summary	Category	Amount (USD)
Section 8.4: Questionable Merchant Audit Program (QMAP)	The Questionable Merchant Audit Program (QMAP) establishes minimum standards of acceptable Merchant behavior and identifies Merchants that may fail to met such minimum standards by participating in collusive or otherwise fraudulent or inappropriate activity. The QMAP also permits an Issuer to obtain partial recovery of up to one-half of actual fraud losses resulting from fraudulent Transactions at a Questionable Merchant, based on SAFE reporting.	Total Fraud Losses per SAFE Total charge backs paid by Acquirer to Issuer(s) Total Eligible Fraud Losses for Recovery Partial recovery Percentage QMAP Issuer Fraud Recovery (A)	1,318.911.51 3,014.02 1,315,897.49 x.25 328,974.37
Section 8.4.9: QMAP Fees	Master Card charge an Acquirer an Audit fee not to exceed USD 2,500 for each identification of a Merchant as a Questionable Merchant.	QMAP Audit Fee (B)	2,500.00
		SUB TOTAL Fees (A-B)	331,474.37
		Mitigation (C)	(2,500.00)
		Total Assessment (A+B+C	USD 328,974.37

What are the acts or omission by UAE constituting, collusion or involvement or activities engaged in by the UAE. What are the "minimum standards" applied at arriving at the fraudulent or inappropriate activities of the UAE. How does Exhibit D.W.1D[1-3] translate to the Defendant's allegation of fraudulent transaction?

Exhibit D.W.1C[1-2] is equally unhelpful in discerning the alleged fraudulent transaction, the letter has subtitles such as criteria: description, criteria, threshold and Universal Agricultural and percentages set out there under.

Re: Master Card QMAP Preliminary Determination –Case 2015-101 Universal Agriculture

Dear Sir Madam:

Master Card has made a preliminary determination that Universal Agricultures the criteria of a Questionable Merchant as defined in Section 8.4 of the security Rules and Procedure manual.

Criteria Description	Criteria Threshold	Universal Agriculture
Fraud to Sales Ratio	Greater than 70%	91.42%
Authorization Decline: Ratio	Greater than 20%	84.91%
Merchant Transactional Activity	Less than 6 months	241 Days
(Fraud-Decline***Referral) to Approved Ratio	Greater than 100%	635%

One would have expected D.W.1 to have demystified all what is being said in the letter i.e. Exhibit D.W.1C and D.W.1D by linking it to the allegation of fraudulent transaction allegedly carried out by the UAE.

It is little wonder that D.W.1 was reticent on the fraud in her testimony since she is not the maker of the documents tendered by her she could not have established through clear evidence the nexus between Exhibit D.W.1C and D.W.1 and the fraud: Not a single swindled card user appeared at trial. I find it pertinent to restate here the attitude of our Court to documents tendered in Court without the necessary oral evidence of the witness in assisting the Court in linking the contents of the document with the facts in the pleadings.

In the case of **OKEREKE v. UMAHI & ORS. (2016) L.P.E.L.R. 40035 SC** the Court made this telling remark:

"Now on the issue of dumping these documents on the Tribunal, this Court decided in replete of numerous authorities to the effect that in any case whether election or non election matter, any party tendering documentary evidence has the task of linking such document to the specific aspect of his case for which such document so tendered be leading evidence of the purport of the document in relation to the aspect of the case.

In other words, he should not merely dump them in Court or Tribunal and expect the Tribunal or Court to embark on speculation in determining the purport for which it was tendered or to which aspect of the case such documents relate, without being guided by oral evidence led in open Court"

In fact, this Court in the case of **ACTION CONGRESS OF NIGERIA ACN v. LAMIDO & ORS. (2012) L.P.E.L.R. 782** per Fabiyi JSC held at page 38.

*"It is not in doubt that the stated exhibits were not demonstrated in open Court. They were the type of documents which this Court affirmed as rightly expunged by the Court of Appeal in **BUHARI v. INEC (2008) 19 N.W.L.R. (PART 112) page 246 at 414.***

This is so, as there is dichotomy between admissibility of documents and the probative value to be based on relevancy, probative value depends not only on relevancy but also on proof. Evidence has

probative value if it tends to prove an issue. "I must say, that it is not the duty of a Court or Tribunal to act within the realm of conjecture in determining what a document relates to, or for what purpose it was meant to serve by tendering it, or to proceed to embark on making inquiry into the case outside the Court not even by examining such documents which are in evidence but not examined in open Court. A judge is an adjudicator not an investigator see ***QUEEN v. WILCOX (1961) 1 SC W.L.R. 96.*** *The petitioner's Appellants failure to lead evidence to link the documents with what he pleaded in the petition therefore justifiers the Tribunal to refuse to act on them as it is not the tribunals function to speculate on what a such documents were meant to specifically establish or prove per Sanusi, JSC (pp 65-67 paras. D-C)"*

Drawing lessons from the reasoning of our Apex Court, I am unable to attach any speculative or probative or evidentiary value in proof of the allegation of fraudulent transaction upon which parties have joined issue. In the absence of a clear, credible and persuasive evidence on the fraud allegedly perpetuated by the Plaintiff, I am unable to hold that a case of fraudulent transaction has been made against the Plaintiff.

Much as the Defendant has extensively established the elaborate and intricate mechanisms put in place vide Exhibit D.W.1A and D.W.1B to safeguard fraud and impose charge backs, deductions,

indemnification e.t.c. from UAE pursuant to Clauses 5.1. 4 and 13 of the GT Pay Standard Terms and Conditions, I am unpersuaded that the Defendant has elicited evidence in proof of the alleged fraudulent transaction that warrants the invocation of any of the Clauses in the GT Pay standard Terms and Condition, Exhibit D.W.1A[1-6] and Exhibit D.W.1B[1-140].

In the light of the foregoing considerations, this Court's answer to the Defendant's issue one which was amended by this Court is answered in the negative, I hold that the Defendant has not discharged the onus of proof in establishing their defence of fraudulent transactions by the Plaintiff that entitles it to debit UAE's account pursuant to terms and conditions of Exhibit D.W.1A and D.W.1B. Having held that the fraudulent transactions were not proved beyond reasonable doubt, the Plaintiff's account in my view and I will so hold were wrongly debited by the Defendant.

That said, I now turn to the Defendant's Counsel issue two, that is, whether the Claimant has made out a case of unlawful dishonor of the cheque. It is recounted that the Plaintiff in paragraph 10 of its statement of claim contended that the Defendant against standard banking practice and in flagrant disregard of the banker – customer relationship dishonoured both cheques.

One would have expected a member of the Questionable Merchant Audit Team that conducted the preliminary determination to have appeared as a witness before this Court. Whilst admitting that the cheques were presented for payment Defendant contend that both cheques, were presented at a time when the Defendant had exercised its right under the GT Pay Service Standard Terms and conditions, by reason of such exercise, UAE sufficient funds in its account. Though the Defendant asserted in its defence that the cheques were dishonoured owing to insufficiency of funds D.W.1 failed to prove this assertion when she tendered Exhibit D.W.1F the Statement of Account of UAE, Universal Agricultural Empowerment and Development Initiative, D.W.1failed to elicit oral evidence in proof of its assertion in that regard. One would have expected her to draw the attention of the Court to the specific period the cheques were presented by the Plaintiff and link same with UAE's statement of account at the time of presentation to show that there was indeed insufficient funds in the account. As hitherto noted in this ruling, it is not the duty of the Court to ponder into documents tendered by a witness in order to identify relevant facts in proof of a party's assertion. This Court will further draw strength from the decision in **GOVERNOR OF KWARA STATE v. EYITAYO (1997) 2 N.W.L.R. (PART 485) page 115 at 129** was cited with approval, it was held thus:

"The Appellant simply tendered Exhibit 'C' without leading any evidence to connect it with the case. They did not refer the Court to any relevant portion of Exhibit C. It is not the duty of the Court to do its own independent investigation of Exhibit C and come out with the result of its private investigation. It is the duty of the party that tenders a document to establish before the Court its relevance and what it expects the Court to do with it. In this case, the Appellants failed to establish the probative value of Exhibit C and even before this Court, they have not made any attempt to satisfy us of the value of Exhibit C"

Taking a que from the foregoing decision and similar decisions on the duty of a party tendering documents at trial, I am of the view that the Defendant has not led credible evidence in support of its assertion that the Plaintiff did not have sufficient funds at the time the cheques were dishonoured.

Be that as it may, the Defendant's assertion of fraudulent transactions and notification allegedly reported by card holders has not been proven beyond reasonable doubt, not a single card holder came to testify on how they were swindled vide the use of the UAE's account consequently Defendant's invocation of its rights under the GT Pay Service standard Terms and Conditions was unwarranted and wrongful.

In the light of this Court's evaluation of evidence of witness and Exhibits tendered at trial, I am of the view that the Plaintiff has made out a case of wrongful dishonor of its cheques.

Finally, on the third issue for determination formulated by the Defendant's Counsel, that is, on whether a case of defamation has been made out by the Plaintiff entitling it to the relief sought.

O. Balogun Esq. has submitted that the 1st Plaintiff cannot bring an action for defamation considering that he lacks the locus standi. The incompetence of the 1st and 2nd Plaintiffs has hitherto been determined earlier on in this Judgment and the 1st and 2nd Plaintiffs have been struck out for the reasons already given in this Judgment.

It is recounted that the 3rd Claimant, being a juristic personality has been held by this Court to be a competent party before this Court. 3rd Plaintiff can sue and be sued in respect of the acts of the 2nd Plaintiff, UAE.

O. Balogun Esq., has submitted that the libelous posts mailed by the Defendant to the fraud Desk of Heritage Bank Ltd. First Bank, Zenith Bank, Diamond Bank, Access Bank and Sterling Bank are true and raised the defence of justification in his final written address. The Defence Counsel has further submitted that the alleged publication is true and argued that justification is a compete defence to any relief sought by a party who alleges defamation. I have exhaustively perused

the Defendant's amended statement of defence and note that a plea of justification or an assertion that the publication is true has not been raised as a defence. Justification only reared its head for the first time in the Defendant's final written address. It is trite that a defence of justification must be specifically pleaded as a ground of defence by anyone relying on it.

Order 15 Rule 17 of the High Court of the FCT mandates a party who contends that a defamatory remark is true or justification to plead same in his defence, it provides thus:

"Where in an action or libel or slander the Defendant alleges that the words complained of consists of statement of facts, they are true in substance and in facts and where they consists of expression of a position, they are fair comment on a matter of public interest or pleads to the like effect, he shall give particulars stating which of the fact and matters he relies on in support of the allegation that the words are true"

It would thus appear that the Defence of justification that the libelous remark is true is an afterthought which arose in the course of the Defendant's address.

The essence of raising the defence of justification, the truth or fair comment is to put the Plaintiff on notice of the defence that is to be relied upon at trial and enable the Plaintiff react one way or the other by way of a reply.

Learned Counsel recounted the testimony of D.W.1 wherein she disclosed that the Defendant received complaints from card holders who initiated NIPS transactions and NEFT Transfers in favour of the 2nd Claimant. Not one of such card holders testified at trial neither were the NIPS transactions and NEFT Transfers allegedly initiated in favour of the UAE presented at trial. It is settled that the contents of a documents must be proved by the production of the document itself. See Sections 85, 86 and 87 of the Evidence Act of 201. The onus is more compelling where the document is required in proof of a criminal allegation such as fraud.

Having held that the Defendant has not established a case of fraudulent transactions against the Plaintiff a plea of justification (albeit unpleaded) cannot enure to the Defendant. Putting it another way the allegation of fraud is unfounded. It follows that the defamatory comment contained in the email sent to the bank are untrue, in the circumstance the decision in **ESIKA v. MEDOLU (1997) 1 N.W.L.R. (PART 485) page 54 at 67 para. E** is inapplicable here.

In the case of **AFOLABI v. ADEREMI (2011) L.P.E.L.R. 8894 CA** it was held that whenever a defence of justification or qualified privilege is raised in a case of libel, the party raising the defence is understood to be admitting that he published the words complained of but contends that the words published are true and is therefore not guilty of

defamation. At common law, under a plea of justification, the Defendant must prove the truth of the material statement in the libel, the Defendant must prove the truth of all the facts in statement in the libel. There must be a substantial justification of the libel. See **DUMBO & ORS. v. IDUGBOE (1983) ALL N.LR. 37, (1983) 2 SC 14 AYENI v. ADESINA (2007) ALL 8 W.L.R. 370 1451 at 1471 E**. Here, the Defendant has failed to establish fraud against the Defendant accordingly I hold that the defence of justification is unsustainable by the Defendant.

In now find it apt to reflect on the submission of Counsel for the Plaintiff on his issue two formulated by him regarding Plaintiff's allegation of defamation. Samuel Irabor Esq. relied on the case of **DAURA v. DANHUAWA (2011) 17 F.W.L. (PART 558) at page 991 at 1000** where the ingredients of defamation were to restated.

The Court had that in a case of defamation, the Plaintiff must prove three things which include the following:

1. That the words complained of where defamatory
2. That the words referred to him
3. That the words were published to at least one person other than the Plaintiff.

Learned Counsel for the Plaintiff contends that as soon as the Plaintiff proves publication of the defamatory remark and that the defamatory publication is false, Plaintiff's Counsel has submitted that the

law presumes the falsity of such publication unless and until proven otherwise by the Defendant.

It follows that the Plaintiff must establish that the three ingredients of defamation exist. It is trite that a presumption that the defamatory words are untrue lies in the Plaintiff's favour.

Going by the evidence before this Court I am of the view and will so hold that the 3rd ingredient in the Daura's case, that is, the publication of the defamatory words was not established by the Plaintiff.

In the case of **BEKEE & ORS. v. BEKEE (2012) L.P.E.L.R. page 21270 CA,** it was held that:

"Publication means the act of making a defamatory statement known to any person or person other than the Plaintiff himself. It is not required that there should be any publication in the popular sense of making a statement public... A communication to the person defamed himself is not sufficient publication on which to found, civil proceedings the three elements must be satisfied;

a) The defamation was communicated by the defendant to a third person other than the Plaintiff

b) The material identified the Plaintiff (identification) and

c) The information/material contain matter that is defamatory regardless of whether the material was intentionally published or nor defamatory matter"

In the instant case, the Plaintiff relied of the testimony of P.W.1 who described himself as the Plaintiff's initiator, facilitator and trustee of the 3rd Plaintiff. He was the only witness who testified for the Plaintiff on all the facts in contained in the statement of claim which is inclusive of the defamatory publication. Being one of the Plaintiff's trustees and initiator, he stands on the same footing as the alter ego of the 3rd Plaintiff. He does not qualify as a person other than the Plaintiff. In satisfying the 3rd ingredient of defamation, a person aside from the Plaintiff must have read the publication, for example any of the officials of the banks the email was addressed to can testify that he read the publication in the email. The Plaintiff being a juristic person a person other than its alter ego must give evidence of the publication. The Plaintiff failed to present evidence of the communication of the defamatory words to a third party.

The evidence of P.W.1 on the defamatory email is like the Plaintiff giving evidence of publication to itself in its personal capacity. This being the case a salient ingredient of defamation has not been satisfied by the Plaintiff. The three ingredients of defamation are coterminous and unless all the ingredients are established, a case of defamation cannot be sustained. The Plaintiff's case of defamation against Defendant accordingly fails.

Before I proceed to consider the reliefs sought by the Plaintiff, I must state here that the issues formulated by Plaintiff's Counsel are not of much assistance for the determination of the real issues in controversy in this suit hence issue one has been largely discountenanced by this Court, so also is his issue two. Counsel for the Plaintiff is by issue one urging this Court to determine whether the Defendant can suo moto fix liability for fraud and proceed to take actions complained of. On the second issue, the Plaintiff's Counsel went on a different tangent from his issue two and proceeded to make submissions of defamation.

As this Court sees it, issues are joined by parties on the allegation of fraudulent transaction, upon which basis the Defendant proceeded to invoke its rights under the GT Standard Terms and conditions, Exhibit D.W.1A[1-6] and the Master card Security Terms and Procedures Exhibit D.W.1B[1-49]. The Plaintiff contended that it was not fraudulent nor was there any justification for the debits. The issue arising thereat is whether the Plaintiff was fraudulent (or otherwise) I see no usefulness in both of the Plaintiff's Counsel's issues in this regard.

The illuminating remarks of Rhodes –Vivour JSC in **OGUNSANYA v. THE STATE (2011) L.P.EL.R. page 2349 SC** is quite apt here His Lordship held inter alia that: *"The main purpose of an address is to assist the Court, and is never a substitute for compelling evidence, failure to*

address will not be fatal or a miscarriage justice. This is so because whether Counsel addresses a Court or not the Court must still do its own research with the sole aim of seeking the truth and determining which side is entitled to Judgment"

I now turn to the reliefs sought by the Plaintiff.

1. It is hereby declared that the lien placed on the Plaintiff's account with the Defendant is unwarranted and a breach of the Defendants banking relationship with the Plaintiffs.
2. It is declared that the dishonor of the duly issued cheques of the Plaintiff on account of the lien placed by the Defendant is injustified and in breach of the Defendants' banking relationship with the Plaintiffs.
3. Leg '3' which is for a declaration that the Defendant publication against the Plaintiff are false and malicious fail having regard to the fact that the Plaintiff's case for defamation fails the truth or falsehood does not arise and is hereby dismissed.
4. Plaintiffs' prayer for an order of retraction of the Defendant's email correspondence fails.
5. It is hereby ordered that the lien placed on the Plaintiffs' account be lifted forthwith.

6. The Defendant is hereby ordered to reverse the debits in the sum of ₦412,000.00 (Four Hundred and Twelve Thousand Naira), $3,123.16 (Three Thousand One Hundred and Twenty-Three Dollars, Sixteen Pence) and ₦4,244,259 (Four Million Two Hundred and Forty-Four Thousand Two Hundred and Fifty-Nine Naira) by crediting the Plaintiffs' account in the aforestated sums by the Defendants.
7. I award the sum of ₦100,000.00 (One Hundred Thousand Naira) general damages against the Defendants.

O.O. Goodluck,
Hon. Judge.
25th September, 2019.

APPEARANCES

Parties absent

S. E. Irabor Esq.: For the Plaintiffs.

Ogunmuyiwa Balogun Esq. with me is Godwill Iwajoku and Samuel Ezenwoye Esq.: For the Defendants.