IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY
IN THE ABUJA JUDICIAL DIVISION
HOLDING AT MAITAMA
BEFORE HIS LORDSHIP: HON. JUSTICE H. B. YUSUF

SUIT NO: FCT/HC/CV/2764/16

BETWEEN:

BARRISTER NWODU OKEKE……PLAINTIFF

AND

1. MTN NIGERIA COMMUNICATIONS LTD)
2. NIGERIAN COMMUNICATIONS COMMISSION).DEFENDANTS

JUDGMENT

The Plaintiff is a Senior Legal Practitioner duly called to the Nigerian Bar in 1985. He subscribed to the 1st Defendant's mobile network when the facility was introduced in Nigeria sometimes in 2003 and parties have had a history of long standing relationship. However the Plaintiff has alleged that in recent times the 1st Defendant has formed the habit of forwarding short message services (SMS) to notify him of subscription to diverse third party products on the platform of the said 1st Defendant with consequential service charges/deductions from the Plaintiff's account. The Plaintiff has alleged that he had at no time subscribed for any of such products, yet the 1st Defendant has "recklessly and ceaselessly" continue to

make deductions from his "hard earned money and causing the Plaintiff embarrassment, loss of business and hardship".

Plaintiff also alleged that the unsolicited messages from the 1st Defendant has affected his productivity and professional capacity on account of the attendant emotional and psychological harassment associated with the messages from the 1st Defendant. He has in consequence approached this Court vide a Writ of Summons filed on 18th October, 2016 seeking the reliefs set out at paragraph 25 of the amended statement of claim filed with leave of Court on 31st May, 2018, to wit:

(1) N20,000,000.00 (Twenty Million Naira) damages for trespass.

(2) N16,000,000.00 (Sixteen Million Naira) damages for unlawful deprivation of the Plaintiff's money.

(3) N20,000,000.00 (Twenty Million Naira) exemplary/aggravated/punitive damages.

Upon the receipt of the originating process, the 1st Defendant denied liability vides its amended statement of defence filed on 16th November, 2018. The record of the Court revealed that the 2nd Defendant was served with the Writ of Summons on 19th December, 2016 but it elected not to file any process in opposition to the claim of the Plaintiff and did not participate at the trial of this case.

At plenary the Plaintiff personally testified as PW1 while the 1st Defendant called one Aisha Lawal Abdullahi, a Senior Customer Relationship Partner who testified as DW1. Both witnesses were duly cross examined.

Upon the close of the case for parties, final written addresses were filed, exchanged and adopted in the open Court. The 1st Defendant identified three issues for determination as set down below:

1. Has Claimant proved that 1st Defendant breached any obligation or terms of the mobile telephony contract or has Claimant shown that 1st Defendant has in any way been fraudulent, capricious or acted unlawfully in its dealings with Claimant's mobile phone account?

2. Is there any evidence before the Honourable Court of trespass committed against Claimant by 1st Defendant?

3. Did Claimant lead credible evidence to show that he is entitled to the relief claimed in this suit?

On his part the learned counsel to the Plaintiff put forward two issues, to wit:

(a) Has the 1st Defendant proved that the Claimant subscribed to the products necessitating the deduction?

(b) If the answer to (a) is in the negative, what is the quantum of damages available to the Claimant.

After a painstaking perusal and calm scrutiny of the state of pleadings and evidence led in support I form the view that the respective issues formulated by parties may be effectively synthesized to read as follows:

Whether the Plaintiff has discharged the burden of proof in this case to warrant the grant of his reliefs.

As a take off point I need to remind the Plaintiff of the well established position of the law that he who alleges must proof. The law is clear that the plaintiff has the burden to lead credible evidence to determine his entitlement to the reliefs sought in this case.

On this point of law see Section 131-133 of the Evidence Act, 2011 and the following cases:

1. **ELIAS V. DISU (1962) 1 SCNLR 361;**
2. **UNIVERSITY PRESS LTD V. I. K. MARTINS NIG. LTD (2004) 4 NWLR (PT.654) 584;and**
3. **DALHATU V. A-G, KATSINA STATE (2008) ALL FWLR (PT.405) 1651.**

To discharge this burden the Plaintiff has pleaded and led evidence to establish that several unsolicited messages/subscriptions were

received from the 1st Defendant through Plaintiff's mobile line with regard to third party products and money deducted for such services even when the Plaintiff did not subscribe for same. In other words the Plaintiff is saying that the 1st Defendant unilaterally subscribed for third party products on Plaintiff's behalf without his consent or authorization. Paragraphs 4 to 11 of the Plaintiff's amended statement of claim chronicled this allegation as follows:

4. The Plaintiff is a subscriber to the 1st Defendant's mobile telephone network with mobile No. 08037146277.

5. The Plaintiff has a long history of relationship with the 1st Defendant that dates back to the beginning of mobile telephone communication network in Nigeria.

6. For a long time in recent times, the 1st Defendant has been using its platform to recklessly and ceaselessly deprive the Plaintiff of the Plaintiff's hard earned money and causing the Plaintiff embarrassments, loss of business and hardship.

7. For quite some time now, there has been ceaseless, unwarranted, frustrating and embarrassing deprivation of money in the Plaintiff's account which borders on outright robbery of the Plaintiff's hard earned money and which has not only caused the Plaintiff loss of money but untold emotional and psychological pains and loss of business. The untold pains

in this matter is not helped by the fact that this has become protracted.

8. Summarily, the Plaintiff has been receiving SMS messages informing the Plaintiff of his subscription to products and deduction of money from the Plaintiff's account for the said subscription. THE FACT IS THAT AT NO TIME DID THE PLAINTIFF SUBSCRIBE TO THE PRODUCTS.

9. Therefore, the Plaintiff is being ceaselessly charged for products he never needed in the first place, and therefore did not subscribed to.

10. The Plaintiff's avers that the hurt, emotional and psychological torture, pain and losses he has suffered for this ceaseless act/conduct from the defendant can best be imagined. The Plaintiff avers that the injury is untold.

11. The Plaintiff avers that what is more annoying, hurting, painful and embarrassing is that while he was being told to UNSUBSCRIBED to the product if he desired to do so (A PRODUCT HE NEVER SUBSCRIBED TO IN THE FIRST PLACE,) THE PLAINTIFF will follow the instruction to unsubscribe and the message he will get is that the UNSUBSCRIPTION FAILED.

The Plaintiff went further to plead at paragraphs 12 to 17 of the amended statement of claim thus:

12. The Plaintiff avers, for the avoidance of doubt, that he did not subscribe to any of the products mentioned and that he was not getting them. Even if the Plaintiff was getting them, it is a disturbance to the Plaintiff's emotion, thinking and work because they adversely affect the Plaintiff's concentration on his work, and because the Plaintiff did not subscribe to them.

13. The Plaintiff is a Legal Practitioner and has been in practice for 31 years. Therefore, the Plaintiff is a very busy person and need concentration. The Plaintiff does not need the harassment and distraction of products he did not subscribe to.

14. This practice by the Defendant has been going on for a long time. It is an unwarranted deprivation of the Plaintiff's money. It has caused the Plaintiff untold embarrassment, inconvenience and stress.

15. The Plaintiff avers that the untold embarrassment, psychological and emotional stress he was subjected to by being deprived of his money with reckless abandon by the Defendant can best be imagined.

16. The Plaintiff avers that the 2nd Defendant is liable to the Plaintiff's damages by covert and overt weak regulatory frame work and/or negligence, allowing the 1st Defendant to continue in the injury the 1st Defendant has subjected the Plaintiff. In the alternative, the Plaintiff avers that there is active connivance by the 2nd Defendant with the 1st Defendant to foist on the Plaintiff the injury complained of.

17. The Plaintiff avers that the 2nd Defendant could have stopped the injury to the Plaintiff if the 2nd Defendant wanted.

To further demonstrate the allegation of unsolicited subscription and deduction (against the 1st Defendant) the Plaintiff pleaded and reproduced 41 unsolicited messages from the 1st Defendant. See paragraph 19 of the Amended Statement of Claim. Evidence led by the Plaintiff is substantially the same with pleaded facts.

The 1st Defendant both in its pleadings and evidence in defence of Plaintiff's claim admitted that messages in connection with third party products and subscription were indeed forwarded to the Plaintiff and money accordingly deducted for such services. But went further to say that all the services were duly subscribed/authorized by the Plaintiff as the 1st Defendant being a responsible corporate organization would not unilaterally subscribe the Plaintiff to any of its third party products without due

authorization. The 1st Defendant in its amended statement of defence supplied detailed particulars of the respective dates and time the Plaintiff allegedly subscribed to the disputed third party products as captured by paragraphs 8 to 13 as follows:

8. Claimant vide Short Messages Services (SMS) Channel with Short Code No. 55006 Subscribed for Career Tips Service on the 10th of December, 2016 at about 5:18:42, which in accordance with 1st Defendant's Terms and Conditions for same was automatically renewed on the following dates in the absence of a request by Claimant to unsubscribe from it:
    (1) 17th December, 2016 at about 5:18:45,
    (2) 24th December, 2016 at about 5:18:59,
    (3) 31st December, 2016 at about 5:18:42,
    (4) 7th January, 2017 at about 5:18;42.

9. The fee charged by 1st Defendant for each subscription for Career Tip Service is N50. 00 (Fifty Naira) only.

10. Claimant subscribed to Business News Weekly Service vides SMS Channel with Short Code No. 55341 on December 12th 2016 at about 1:52:37 at a cost of N50. 00 (Fifty Naira) only per subscription, which in accordance with 1st Defendant's Terms and Conditions for same was automatically

renewed on the following dates in the absence of a request by Claimant to unsubscribe from it:

(1) December 19, 2016 at about 1:52:37,

(2) December 26, 2016 at about 1:52:37,

(3) January 2nd , 2017 at about 1:52:49,

(4) January 9th, 2017 at about 1:52:49.

11. On November 21, 2016 at about 01:22:23 Claimant subscribed to 1st Defendant's Gemalto Phone Backup Service which among other services include Complete Sport Weekly and the Music, which in accordance with 1st Defendant's Terms and Conditions for same was automatically renewed on the following dates in the absence of a request by Claimant to unsubscribe from it:

a. December 5, 2016 at about 9:26:50,

b. December 19, 2016 at about 15:40:03,

c. January 2, 2017 at about 21:28:31,

d. January 17, 2017 at about 01:24:14,

e. January 31, 2017 at about 09:40:34,

f. February 28, 2017 at about 21:35:30,

g. March 15, 2017 at about 01:54:05

12. The SMS referred to and reproduced by Claimant in his claim were notices routinely sent to Claimant upon successful subscription to the services.

13. Claimant subscribed to the all the services for which 1st Defendant debited him for or charged him through SMS and USSD Channels vide his mobile phone number: 08037146277.

Now the point must be made that civil cases are fought on the basis of pleadings filed by parties. See the case of **OGBOGU & ORS V. UGWUEGBU & ANOR (2003) 10 NWLR (PT.827) 189; (2003) 4 S.C (PT.1) 69** where Ejiwunmi, JSC stated the Law as follows:

> **"In consideration of the issue raised I must, in my view, begin with the principle that in a civil action tried on pleadings, parties and the court are bound by their pleadings filed in the case. And they will not be allowed to set up cases different from their pleadings."**

See also:

1. **N.I.P.C. LTD. & ANOR. V. BANK OF WEST AFRICA (1962) 1 ANLR (PT.4) AT P. 556;**
2. **KALIO & ORS. V. KALIO (1975) 2 S.C. 15; and**
3. **GEORGE & ORS. V. DOMINION FLOUR MILLS LTD.(1963) 1 SCNLR 117; (1963) 1 ANLR 71.**

This point of Law was also succinctly captured in **OLATUNJI V. ADISA 1995 2 NWLR (PT.376) 167; (1995) 2 SCNJ 90** by Iguh, JSC as set down below:

> **"In civil case, both the parties as well as the trial Courts are bound and guided by the issues as settled in the pleadings."**

Where therefore averments in pleadings are not denied they are deemed admitted and therefore established. See the case of the **A.C.B PLC V. NWANNA TRADINGS STORES (NIG) LTD (2007) 1 NWLR (PT.106) 596** where it was stated that:

> **"It is trite that when averments are not denied or controverted they are deemed to be admitted."**

In the statement of defence filed on behalf of the 1st Defendant it was averred that the Plaintiff indeed subscribed to the products and services in dispute. It was also averred that he was given instructions and codes on how to unsubscribe and opt out if he so desires. This is no doubt a fresh issue in the pleadings of parties. Consequently if the Plaintiff does not admit those averments he ought to have file a Reply to statement of defence. This he has failed to do. In my view this amount to admission.

See **OBOT V. CENTRAL BANK OF NIGERIA (1993) 8 NWLR (PT.310) 140**, where the Supreme Court held as follows:

(i) In general, it is not necessary for a plaintiff to file a reply if his only intention in doing so is to deny any allegations that the defendant may have made in the statement of defence.

(ii) A reply to merely join issues is not permissible. If no reply is filed, all material facts alleged in the statement of defence are put in issues.

(iii) The proper function of a reply is to raise, in answer to the defence, any matter which must be specifically pleaded, which makes the defence not maintainable or which otherwise might take the defence by surprise or which raised issues of fact not arising out of defence. Also a reply is the proper place for meeting the defence by confession and avoidance.

(iv) On order to allow a party to file a reply the trial court must be satisfied that both the statement of claim and the statement of

> **defence filed by the parties have not, when read together, sufficiently disclosed and fixed the real issues between the parties and that further pleadings in the reply to be filed will achieve the purpose of bringing the parties to an issues."**

The apex Court went further to say that:

> **"It is clear from the foregoing that the purpose of filing the reply is to join issue on the allegations made in the statement of defence. As pointed out above issues are deemed joined in respect of allegations made in the statement of defence even where no reply is filed."**

The net effect of the foregoing point of Law is that the Plaintiff who failed to join issue with the Defendant on the allegation that he duly subscribed the disputed services is deemed to have admitted the allegation of the Defendant to that effect. This reasoning is borne out of the fact that although the Plaintiff pleaded in paragraph 11 of the Statement of Claim that he attempted severally to unsubscribe and got a response that the unsubscription failed. No evidence of such unsuccessful attempt was tendered before the Court. To me the

mere averment that he tried to unsubscribe to the sms messages does not discharge the burden posed by the contention of the 1st Defendant that he subscribed.

In my view if the Plaintiff was to establish his claim to such failed attempt the printed copies of such messages which obviously is recorded in his cell phone ought to be tendered.

On this account it is my view and I hold that the Plaintiff did not unsubscribe to the offensive messages and I hold as such.

However, this is not the end of the matter. The Plaintiff pleaded at paragraph 18 of his amended statement of claim that he wrote a letter of complaint to the 1st Defendant about the unsolicited messages and services being extended to him and that the 1st Defendant ignored this protest and continues to impose unsolicited messages and services on him. For the avoidance of doubt paragraph 18 of the amended stated of claim is reproduced as captured below:

> **"The Plaintiff wrote a letter dated 30th August, 2016 to the 1st Defendant, complaining of the 1st Defendant's conduct which the 1st Defendant ignored and treated with levity. The said letter is pleaded."**

This letter was tendered by the Plaintiff as exhibit "1". There is an endorsement by the Defendant on the face of the exhibit that it was received on 19th September, 2016 at 3:32pm. As a matter of fact the above averment with respect to exhibit "1" was not denied by the 1st Defendant which in essence means that the point therein is established. I take it therefore that effective from 30th August, 2016 the 1st Defendant became aware that the Plaintiff did not and does not want to subscribe to the offensive messages and products. Accordingly messages that were sent to him bordering on services he did not subscribe to from that date would amount to a breach of contract between the Plaintiff and the 1st Defendant.

Unfortunately the Plaintiff's claim is not predicated on breach of contract. His claim is rather curiously based on damages for trespass. In fact the first relief is for N20,000,000.00 (Twenty Million Naira) damages for trespass.

I have carefully scrutinized this claim against the backdrop of the elements of trespass and I have to remind myself that the core element of trespass is unjustifiable interference upon a parcel of land in possession of another. It is a wrongful or unauthorized invasion of the private property of another. The claim is rooted in exclusive possession. And the burden of proving exclusive possession rest squarely on the Plaintiff. On this point of Law see the

Supreme Court case of **OGUNBIYI V. ADEWUNMI (1988) 5 NWLR (PT.93) 215 and ADELAJA V. FANOIKI (1990) 2 NWLR (PT.131) 137.**

In a related development the Supreme Court in **OMORHIRHI & ORS. VS. ENATEVWERE (1988) LPELR-2659 (SC)** aptly captured the nature and essence of trespass to person as follows:

> **"Trespass is a wrongful act, done in disturbance of the possession of property of another, or against the person of another, against his will. To constitute a trespass the act must in general be unlawful at the time when it is committed....Whoever is in possession, may maintain an action of trespass against a wrong doer to his possession. Every unlawful entry by one person on the land in the possession of another is a trespass for which an action lies ... (and) a person trespasses upon land if he wrongfully set foot on, or rides or drives over it, or pulls down or destroys anything permanently fixed to it or wrongfully takes minerals from it."**

Trespass in some cases may manifest as trespass to person in the form of assault and battery. And in such situation the Plaintiff will be

required to plead and lead evidence to establish the following elements:

(a) That the Plaintiff was put in fear of apprehension that force was about to be directly applied to the body of the Plaintiff by the Defendant;

(b) That force was directly applied by the Defendant to the body of the Plaintiff; and

(c) That the force was intentional.

Looking at this principle of Law in relation to trespass generally it is clear that the claim of the Plaintiff herein cannot be properly ventilated under the canopy of trespass. This is an improperly claimed relief which is not the same as situations where a Plaintiff has a proper claim before the Court but erroneously presented same under a wrong Law.

See FALOBI VS FALOBI (1976) 9-10 S.C 13 where Fatayi-Williams, JSC stated the law as follows:

> **"The next question is this. Can a court make an order under the Infants Law notwithstanding the fact that the application to it was made under another statute which is clearly inapplicable? In our view, if a relief or remedy is provided for by any written law (or by the common law or in equity**

for that matter), that relief or remedy, if properly claimed by the party seeking it, cannot be denied to the applicant simply because he has applied for it under the wrong law. To do so would be patently unjust."

This judicial authority is against the claim of the Plaintiff as there is no proper claim before the Court. I agree with the learned counsel to the 1st Defendant that this relief is lacking in merit. It is accordingly refused and dismissed for want of merit.

The next relief is for the sum of N16,000,000.00 (Sixteen Million Naira) damages for unlawful deprivation of the Plaintiff's money. This claim suggests detention of Plaintiff's money thereby leading to deprivation. In other words it is a claim founded on detinue. The question then is whether the money that the Plaintiff is talking about is a chattel. This is crucial because to succeed in an action founded on detinue the Plaintiff must proof the following elements:

a. **That he is the owner of the chattel;**
b. **That he has immediate right to possession of the chattel;**
c. **That the defendant is or was in actual possession of the chattel;**

d. That he, the plaintiff has made a proper demand on the defendant to deliver up the chattel to the plaintiff; and

e. That the defendant without lawful excuse refused or failed to deliver up the chattel to the plaintiff.

See also: **OWENA BANK PLC VS OLATUNJI (2002) 13 NWLR (PT. 781) 326** and **J.E. OSHEVIRE LTD VS TRIPOLI MOTORS (1997) 5 NWLR (PT. 503) 1**where the apex Court stated inter alia that:

> **"The gist of liability in detinue is the wrongful detention of the plaintiff's chattel by the defendant after the plaintiff has made a demand for its return. Without proof of wrongful detention on the part of the defendant a claim in detinue cannot arise.**

Looking at the pleadings and evidence led by the Plaintiff I must say that I have nothing before me to support a claim in detinue. Looking at it from another point of view if the Plaintiff is alleging that the 1st Defendant removed money illegally from his mobile line account he ought to have presented such claim as special damages being a specific and ascertainable head of claim. If that be the case the law is settled that the Plaintiff has a mandatory legal duty to plead sufficient particulars of the claim and support same with cogent and credible evidence including the total amount that had been removed.

See the Supreme Court case of **AJIGBOTOSHO V. R.C.C LTD (2018) LPELR-44774 (SC)** where the law was stated as follows:

> **"To start with, special damages are such damages as the law will not infer from the nature of the act as they do not follow in the ordinary course but exceptional in their character and therefore must be claimed specially and proved strictly. For a claim in the nature of special damages to succeed, it must be proved strictly and the Court is not entitled to make its own estimate on such a claim. It should be noted that special damages should be specifically pleaded in a manner clear enough to enable the defendant know the origin or nature of the special damages being claimed against him to enable him prepare his defence. See DUMEZ (NIG) LTD. VS OGBOLI (1972) 1 All NLR 241 TABER VS BASMA 14 WACA 140. In GONZEE (NIG) VS NERDC (2005) 13 NWLR (Pt. 943) at 639."**

Whichever way this claim for deprivation of money is viewed it has no merit and liable to be and is hereby dismissed.

The last claim is for the sum N20,000,000.00 (Twenty Million Naira) exemplary/aggravated/punitive damages. There is doubt that this

claim is consequential in nature and therefore wholly dependent on the success of the substantive claims which regrettably have failed. That be the case this head of claim again cannot succeed as you cannot put something upon nothing and expect it to stand. It is refused and dismissed for want of merit.

Similarly there is nothing before the Court to support or sustain any claim against the 2nd Defendant. The allegation of regulatory failure is not supported by pleadings and/or evidence led in support. For the avoidance of doubt there is nothing to suggest that the Plaintiff at any point lodged a complaint with the 2nd Defendant against the 1st Defendant over the subject matter of dispute. If that be the case, I must remind the Plaintiff that legal claims are fought and won on cold facts and not on speculative and whimsical instincts. I need say no more other than dismiss the claims against the 2nd Defendant in its entirety and I so hold.

Before I close this Judgment I must say that the Plaintiff did not thoroughly conceive his claims neither did he presents them properly before the Court. If he did perhaps the Court would have found in his favour. As it is the Plaintiff did not left the Court with an option other than to dismiss his claims and is hereby dismissed in its entirety without further assurance.

SIGNED
HON. JUSTICE H.B. YUSUF
(PRESIDING JUDGE)
26/02/2020