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

THIS MONDAY, THE 13TH DAY OF JULY, 2020.

BEFORE: HON. JUSTICE ABUBAKAR IDRIS KUTIGI – JUDGE

SUIT NO: FCT/HC/CV/2651/18

BETWEEN

AYODELE BUNMI AKINTOLA .....PLAINTIFF

AND

ZENITH BANK PLC .....DEFENDANT

JUDGMENT

The plaintiffs' claims against the Defendant as contained in the Writ of Summons and Statement of Claim dated 3rd September, 2018 and filed same date in the Court's Registry are as follows:

i. **A Declaration that the several acts of unauthorized withdrawals and or deductions of the sum of N546,733.11 (Five Hundred and Forty Six Thousand, Seven Hundred and Thirty Three Naira, Eleven Kobo) on the 26th June, 2018 and 27th June, 2018 from the Plaintiff's account 1004534704 in the defendant's bank operated, maintained and supervised by the defendant were illegal.**

ii. **A Declaration that the irresponsible acts of inadvertence by the defendant in the operation, maintenance and supervision of the Plaintiff's account 1004534704 with the defendant occasioned the several acts of unauthorized withdrawals of the sum of N546,733.11 (Five hundred and Forty Six**

Thousand, Seven Hundred and Thirty Three Naira, Eleven Kobo) and/or illegal deductions from the Plaintiff's account in the defendant's bank.

iii. An Order directing/mandating the defendant to make an unconditional refund of the sum of N546,733.11 (Five hundred and Forty Six Thousand, Seven Hundred and Thirty Three Naira, Eleven Kobo) being the unremitted amount illegally deducted and withdrawn from the plaintiff's account 1004534704 with the defendant which said account was operated, maintained and supervised by the defendant.

iv. The sum of N50, 000, 000 (Fifty Million Naira) being exemplary damages against the defendant for the untold and avoidable hardship imposed on the plaintiff by the serial and several acts of unauthorized withdrawals and/or illegal deductions of the sum of N546,733.11 (Five hundred and Forty Six Thousand, Seven Hundred and Thirty Three Naira, Eleven Kobo) from the plaintiff's account 1004534704 occasioned by the irresponsible acts of inadvertence of the defendant in the operation, maintenance, supervision of the Plaintiff's account with the defendant's bank.

v. The sum of N257,500.00 (Two Hundred and Fifty Seven Thousand, Five Hundred Naira Only) being the cost of this action.

The defendant in response filed a statement of defence and set up a counter claim against the plaintiff as follows:

1. **A Declaration that, at all times material to the facts giving rise to this action, the Defendant/Counter-Claimant displayed and has been displaying a high degree of responsibility, integrity, credibility and was never negligent, irresponsible, fraudulent, or inadvertent in the operation, maintenance and supervision of the account of the Plaintiff/Defendant to this Counter-claim, or that of any of its Customers.**

2. **A Declaration that the allegation made against the Defendant/Counter-claimant by the Plaintiff/Defendant to this Counter claim, of illegal and fraudulent deductions and withdrawals from his account, operated,**

maintained and supervised by it, is false, malicious and injurious to its business and trade.

3. **A Declaration that the debit card of the Plaintiff/Defendant to the Counter claim was not used at all on the 24th day of June, 2018 whether at the Defendant/Counter claimant's Garki branch or any of its branch, and that the said card is not in its custody at all, but in his own custody.**

4. **A written apology published in 3 newspapers of nationwide circulation, made to the Defendant/Counter-claimant by the Plaintiff/Defendant to this counter-claimant.**

5. **Exemplary, punitive or aggravated damages and general damages of N50, 000, 000.00 (Fifty Million Naira) only, for the injury or damage for the mischievous, malicious or injurious falsehood and lies uttered against the Defendant/Counter-claimant.**

6. **An Order directing the Inspector General of Police to investigate the alleged disappearance of the debit card of the Plaintiff/Defendant to this Counter-claim allegedly trapped at an ATM in Garki, Abuja, but used at Otukpo, Benue State, and possibly prosecute any person(s) involved therein.**

The plaintiff filed a Reply to the defence and defence to the counter claim dated 28th February, 2019 and filed same date in the Registry of Court.

Hearing then commenced. In proof of his case, the plaintiff testified as PW1 and the only witness. He deposed to two (2) witness statements on oath dated 3rd September, 2018 and 18th March, 2019 which he adopted at plenary hearing. He tendered in evidence the following documents:

1. Letter by plaintiff to defendant dated 2nd July, 2018 and the letter by the law firm of Ziphite Chambers dated 9th July, 2018 to the defendant were admitted as **Exhibits P1 a and b.**

2. The identification card of plaintiff with African Development Bank (A.D.B) was tendered as **Exhibit P2.**

3. The statement of account of plaintiff with defendant was tendered as **Exhibit P3.**

4. Letter from A.D.B Nigeria country department to plaintiff and others dated 21st June, 2018 was admitted as **Exhibit P4.**

PW1 was then cross-examined and then re-examined and with his evidence, the plaintiff closed his case.

The defendant on its part also called only one witness. Danladi Abalaka, a staff with defendant testified as DW1. He deposed to two (2) witness depositions dated 8th October, 2018 and 4th April, 2019 which he adopted at plenary hearing. He tendered in evidence plaintiff's statement of account and the Certificate of Compliance which was admitted in evidence as **Exhibits D1 a and b**. DW1 was then cross-examined and with his evidence, the defendant/counter-claimant closed its case.

Parties then filed and exchanged final written addresses. The Defendant/Counter-Claimants address is dated 23rd October, 2019 and filed same date in the Courts' Registry. In the said address, three (3) issues were identified as arising for determination as follows:

1. **Whether the plaintiff proved the alleged irresponsible acts of inadvertence he made against the Defendant by its operation, maintenance and supervision of his account and therefore liable for the several alleged acts (sic) unauthorized withdrawals and or illegal deductions from the said account.**

2. **If the answer to issue No. 1 above is in the negative, whether the plaintiff's suit is liable to be dismissed with substantial costs in favour of the Defendant.**

3. **Whether the defendant is entitled to the Reliefs in its Counter claim in view of the uncontradicted, unchallenged, uncontroverted and undenied evidence of its sole witness as contained in his written statement on oath.**

The address of the plaintiff is dated 14th January, 2020 and also filed same date in the Court's Registry. In the address, three (3) issues were equally streamlined as arising for determination as follows:

1. **Whether the defendant in the operating, maintaining and supervising the plaintiff's account as not been negligent in its Banker duty to the plaintiff.**

2. **Whether the plaintiff is entitled to damages for the acts of negligence by the defendant.**

3. **Whether the defendant has proven his counter claim to be entitled to same.**

The defendant then filed a reply on points of law to the plaintiffs address dated 1st June, 2020 and filed on 2nd June, 2020.

I have set out above the issues as distilled by parties as arising for determination. It is not in dispute that there is a claim and a counter claim. It is trite principle of general application that a counter claim is a separate and distinct course of action and the counter-claimant like the plaintiff, must prove his case before obtaining judgment on the counter-claim. See the cases of **Oyebola V. Esso W.A (1966)1 All NLR 170; Shettimari V. Nwokoye (1991)9 NWLR (pt.216)66 at 71.** In view of this settled principle of law, both the plaintiff and defendant have the burden of proving their claim and counter-claim respectively.

This being so, it would appear that the issues raised by both parties can be properly accommodated under two (2) issues and that is whether the plaintiff has on the preponderance of evidence proven or established that he is entitled to the Reliefs sought. The second issue which is equally on terms as the first issue is whether the defendant has on a preponderance of evidence discharged the evidential burden to entitle them to the reliefs sought.

These issues are not framed in the alternative to the issues raised by parties, but the issues canvassed by parties can and shall be cumulatively considered under the

above issues. See **Sanusi V Amoyegun (1992) 4 N.W.L.R (pt.237) 527.** The issues thus raised will be taken together as it has in the court's considered opinion brought out with sufficient clarity and focus, the pith of the contest which has been brought to court for adjudication.

Let me quickly make the point that it is now settled principle of general application that whatever course the pleadings take, an examination of them at the close of pleadings should show precisely what are the issues upon which parties must prepare and present their cases. At the conclusion of trial proper, the real issue(s) which the court would ultimately resolve manifest. Only an issue which is decisive in any case should be what is of concern to parties. Any other issue outside the confines of these critical or fundamental questions affecting the rights of parties will only have peripheral significance, if any. In **Overseas Construction Ltd V. Creek Enterprises Ltd &Anor (1985)3 N.W.L.R (pt13)407 at 418,** the Supreme Court instructively stated as follows:

"By and Large, every disputed question of fact is an issue. But in every case there is always the crucial and central issue which if decided in favour of the plaintiff will itself give him the right to the relief he claims subject of course to some other considerations arising from other subsidiary issues. If however the main issue is decided in favour of the defendant, then the plaintiff's case collapses and the defendant wins."

It is therefore guided by the above wise exhortation that I would proceed to determine this case based on the issues I have raised and also consider the evidence and submissions of counsel. In furtherance of the foregoing, I have carefully read the final written addresses filed by parties. I will in the course of this judgment and where necessary make references to submissions made by counsel.

Issue 1

Whether the plaintiff has on preponderance of evidence discharged the evidential burden to entitle him to the reliefs sought.

I had at the beginning of this judgment stated both the claim and counter-claim of the parties. On the state of the pleadings and evidence, the case of the plaintiff is

squarely situated on the alleged unlawful withdrawals made from his account without his authorization which occasioned damages to him.

On the other side of the aisle, the defendant completely absolved itself of any blame worthy conduct in the circumstances of this case. Indeed it considered the allegations made by plaintiff spurious and has accordingly predicated its counter-claim on the alleged false allegations made by plaintiff which it also contends occasioned damages to its standing and reputation.

Notwithstanding the volume of the pleadings on either side, the issue to be resolved in this case boils down to who bears responsibility for the alleged unauthorized withdrawals from the account of plaintiff.

In this case, the plaintiff filed a 20 paragraphs statement of claim. I will refer to specific paragraphs, where necessary to underscore any point. The evidence of the plaintiff and sole witness is largely within the structure of his pleadings. The defendant on its part equally filed a 31 paragraphs statement of defence together with a 12 paragraphs counter-claim. The evidence of their sole witness is similarly and largely situated within the structure of the defence and counter-claim.

As earlier stated, the plaintiff filed a Reply to the defence and defence to the counter-claim which sought to accentuate the positions earlier made. I will in this Judgment deliberately and in extenso refer to the above pleadings of parties as it has clearly streamlined or delineated the issues subject of the extant inquiry. The importance of parties' pleadings need not be over-emphasised because the attention of court as well as parties is essentially focused on it as being the fundamental nucleus around which the case of parties revolve throughout the various trial stages. The respective cases of parties can only be considered in the light of the pleadings and ultimately the quality and probative value of the evidence led in support.

Before going into the merits, let me state some relevant principles that will guide our evaluation of evidence. It is settled principle of general application that whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. See **Section 131(1) Evidence Act.** By the provision of **Section 132 Evidence Act**, the burden of proof in a suit or proceeding lies on that person who

would fail if no evidence at all were given on either side, regard being had to any presumption that may arise on the pleadings.

It is equally important to state that in law, it is one thing to aver a material fact in issue in one's pleadings and quite a different thing to establish such a fact by evidence. Thus where a material fact is pleaded and is either denied or disputed by the other party, the onus of proof clearly rests on he who asserts such a fact to establish same by evidence. This is because it is now elementary principle of law that averments in pleadings do not constitute evidence and must therefore be proved or established by credible evidence unless the same is expressly admitted. See **Tsokwa Oil Marketing co. ltd. V. Bon Ltd. (2002) 11 N.W.L.R (pt 77) 163 at 198 A; Ajuwon V. Akanni (1993) 9 N.W.L.R (pt 316)182 AT 200.**

I must also add here that under our civil jurisprudence, the burden of proof has two connotations.

1. The burden of proof as a matter of law and pleading that is the burden of establishing a case by preponderance of evidence or beyond reasonable doubt as the case may be;

2. The burden of proof in the sense of adducing evidence.

The first burden is fixed at the beginning of the trial on the state of the pleadings and remains unchanged and never shifting. Here when all evidence is in and the party who has this burden has not discharged it, the decision goes against him.

The burden of proof in the second sense may shift accordingly as one scale of evidence or the other preponderates. The onus in this sense rests upon the party who would fail if no evidence at all or no more evidence, as the case may be were given on the other side. This is what is called the evidential burden of proof.

In succinct terms, it is only where a party or plaintiff adduces credible evidence in proof of his case which ought reasonably to satisfy a court that the fact sought to be proved is established that the burden now shifts to or lies on the adversary or the other party against whom judgment would be given if no more evidence was adduced. See **Section 133(2) of the Evidence Act.** It is necessary to state these principles to allow for a proper direction and guidance as to the party on whom the burden of proof lies in all situations.

Now a convenient starting point is to understand the precise situational basis of the relationship of parties. The pleadings of parties which has streamlined the issues and facts in dispute provides a fair take off point. Happily on this point, there is not much dispute.

On the pleadings and evidence on both sides, there is a clear consensus that there exists a Banker Customer relationship between parties. The defendant in paragraph 1 of its defence admitted paragraphs 2 and 3 of the statement of claim of plaintiff with respect to the fact that the plaintiff maintains a current account number 1004534704 with them. It is from this account that the alleged unauthorized withdrawals were made and which is the crux of the grievance subject of this action.

There is therefore no difficulty in holding as already alluded to that there exists a bank customer relationship between parties. This relationship is one founded on a banker and customer contract. It involves a specie of contract with special usages with particular reference to monetary or commercial transactions. See **Linton Ind. Trading Co. (Nig.) Ltd V C.B.N (2015) 4 NWLR (pt.1449) 94.**

Within this contextual construct, it cannot therefore be over emphasised that the relationship between a banker and customer where a bank accepts money either in savings, current or deposit account from its customer, is a relationship of debtor and creditor and the relationship is essentially contractual. See **Balogun V. N.BN Ltd (1978)II NSCC 135; 3SC 155; Afri Bank (Nig) Plc V. A.I. Investment (2002)7 NWLR (pt.765)40.**

On the authorities also, because of the nature of the relationship, the customer has neither **"custody"** or **"control"** of monies standing in his credit in an account with the bank. What the customer has is a contractual right to demand repayment of such monies. See **Purification Tech. (Nig) Ltd V. A.G. Lagos State & 31 Ors (2004)9 NWLR (pt.879)665; Wema Bank V. Osilaru (2008)10 NWLR (pt.1094)150 at 170; Yesufu V. ACB (1981)1 SC 74.**

Let me quickly add that the above principles and dynamic must necessarily be slightly altered in relation to this modern technological devices such as the ATM. By the issuance of the ATM debit cards which allows the customer to formulate his own chosen and secret pass code allowing access to these funds at any time and

indeed anywhere using the ATM, the customer too now has some measure of "control" as to how his funds are accessed and utilised. The debit card usually on issuance comes with a default password and the customer is mandated to formulate his own secret code immediately before he starts using the card. This code is exclusively known only to the customer who formulates same except of course he furnishes same to a third party. This new dynamic now therefore places responsibility on the customer to safe guard his card and his password and ensure prompt report to the defendant in the event that the card is lost, stolen or compromised in any manner. These principles both the established and the novel, now provides a legal and factual template to situate the duties and responsibilities of parties and to resolve the extant dispute.

Now it must be made clear at the onset that notwithstanding the submissions on negligence on both sides of the divide, this case is essentially one predicated on alleged breach of contractual duty to take care of plaintiff's deposits. At the risk of sounding prolix, a banker/customer relationship it must be underscored is inherently and essentially contractual. In law a distinguishing feature of the tort of negligence is accordingly the breach of duty to take care. This distinguishes it from a breach of contract. In law, a contract as exemplified by this action may contain an obligation to take care in the performance of its terms but the obligation arises from the agreement or the presumed agreement of the parties, whereas a tortuous duty of care arises from an objective view of given facts, of which an agreement may be one.

Accordingly where a contract term imports a duty to take reasonable care in performance, it can be concurrent with a duty to take care in tort, but it is by no means the case that every breach of contract involves a breach of tortuous duty as well. See **Charleswoth and Percy on Negligence (10th ed.) at Pg. 10 Par. 1-15.**

As a logical corollary to the above, it may be necessary to also state the settled principle that where a cause of action and a relief is properly claimed, a claimant cannot be refused simply because he has not stated or wrongly stated the head of the law under which he is seeking the remedy. In other words, a wrong must not necessarily be remediable under a known head of law before it is justiciable. It is a well known legal truism that where there is a wrong, there is a remedy and the courts nowadays are propelled more by the imperatives of doing substantial justice

unfettered by technicalities which only serve to subvert the cause of justice. In **S.P.D.C Nig V. Okodeno (2008)9 N.W.L.R (pt.1091)85 at 118 C-F,** the Court of Appeal instructively stated as follows:

"**In the instant case, the learned trial judge was right when he held that the nomenclature of torts will not be allowed to blur its consideration of the clear averred facts of the case before it. That it is irrelevant in the determination of this case whether the claim is based on tort of detinue or is based on tort of trespass. I do not see this pronouncement as an abdication of lawful duties to make findings on the issue by the learned trial judge as submitted by the learned senior counsel for the appellant. The stand of the learned trial judge cannot be faulted. The court today is concerned with doing substantial justice on the matter before it, rather than place reliance on hard rules of technicality based on the principle of law that where there is a right, there is a remedy. The maxim being *ubi jus, ibi remedum*. The distinction that the trial court is called upon to make and subtitles have no substance and justification in them, but are nothing more than a dangerous inheritance from the days when forms of action and of pleadings held the legal system in their clutches."**

I need not add to the above.

The contention that the case of plaintiff must fail due to failure to plead particulars of negligence lacks legal traction and is discountenanced.

On the unchallenged facts in this case, I had already found that on the pleadings and evidence, there exists an undoubted banker customer relationship. It is also admitted fact in evidence that the plaintiff maintains a current account with the defendant. By the nature of this relationship, it is the bank that ordinarily has "custody" or "control" of these deposits. As stated earlier, this modern devices like the ATM have now strategically altered the dynamic in the relationship in terms of easy access to the funds or deposit outside the four walls of the Bank. The only limitation is the access to the debit card and a secret password. It then follows that on the evidence, it appears there is no dispute that the defendant has the primary duty of care to ensure the protection of the funds entrusted in its care. The bank therefore has a basic duty to watch over the money(s) in their custody

and to ward of any attempt to meddle with such money, however subtle. See **UBA Plc V. Utuk (2004) AII FWLR (pt. 234) 1988 at 2004 and 2007.**

On the scope of duty owed by a bank to its customers, I cannot do any better than quote the instructive observations of Adekeye JCA (as she then was) in **S.T.B Ltd V. Anumnu (2008)AII FWLR (pt.399)405 at 428-429** as follows:

"I have to emphasise also that a bank has a duty under its contract with its customer to exercise reasonable care and skill in carrying out its duty with regards to the operations within its contracts with customers. The duty to exercise reasonable care and skill extends over the whole range of banking business within the contract with the customer."

On the evidence, I don't think there is really any issue joined on the fact that the defendant owes the plaintiff a duty of care with respect to his deposit and this obligation clearly arises from the agreement. This duty now however must be situated within the context of the operational realities of these modern technological devices which makes for ease of transaction.

I now come to the crux of this dispute relating to whether there has been a breach of this contractual duty. I now evaluate the evidence on both sides of the aisle.

Now in this case and on the pleadings, plaintiff stated that on 21st June, 2018 he received a letter via his employers tendered as Exhibit P1 for him to proceed to Lagos and Ibadan to attend to their president who was visiting Nigeria from 24th June, 2018. That on 24th June, 2018 he went to the Area 7 branch of the defendants bank to carry out a transaction through the Automated Teller Machine (ATM) located at Abiriba Close, Area 7 Abuja using the **debit card** issued to him by the defendant. That the ATM machine **"dispossessed"** the plaintiff of the card and that all efforts made to recover the debit card from the ATM machine proved abortive and he was forced to take his leave after staying there for about 30 minutes without retrieving the card but that before leaving, he contacted the agents of the defendant present within the vicinity who informed him that nothing would be done at the material point in time to recover the debit card.

On the evidence, he also stated that further to the instructions by his employers to proceed to Lagos, the sum of N547, 718,18 (Five Hundred and Forty Thousand, Seven Hundred and Eighteen Naira, Eighteen Kobo) only was paid into his account on **26th June, 2018**. That while on transit and to his shock he started receiving unauthorized debit alerts and withdrawals which were streamlined in paragraph 12 of the claim and his evidence. These withdrawals were clearly also reflected and referred to in the statements of account vide Exhibits P3 and D1a tendered by both parties. The alleged unauthorized withdrawals were effected between 26th and 27th June, 2018. The plaintiff said since he was then on transit, he had to immediately contact his account manager who he said told him that he had to come physically to the bank to lay his complaints before they could act on it. He stated that the security pass code issued to him is only known to him and the defendant through their staff and information technology (IT) experts. Further that he did not make the withdrawals himself and did not give anybody the security pass code to make any withdrawals on his behalf.

The case of defendant through DW1 is simply that a review of the activities carried out on the debit card showed that it was not used at all on 24th June, 2018 at its Automated Teller Machine (ATM) located at Abiriba Close, Area 7 Garki Abuja branch or any of its other branches and so could not have been "trapped" there. Further that the said "trapped" card was in fact used in Benue State on 26th and 27th June, 2018. The defence further added that the plaintiff only made a complaint to its employee on 28th June, 2018 well after the withdrawals have been concluded and so he was informed that there cannot be a reversal of the withdrawals he demanded at that point until he writes officially and an investigation is conducted.

DW1 stated that the first formal complaint received was on 2nd July, 2018 by plaintiff and the second was on 12th July, 2018 through plaintiffs solicitor and on receipt of these complaints an investigation was carried out and the summary of the transaction itemized in paragraph 19 of the defence show that the sum of N546, 300, 000 was withdrawn. Further that upon investigations, fund transfers totaling **N330, 000** were done through a UBA Plc terminal to one Ocholi Yakubu with Account number 0010820818 in Access Bank and that when the Bank was contacted, they responded that the funds have been fully withdrawn.

The defendant then stated all the **ATM's** at its Garki branch were opened and searched thoroughly but that the card was not found and that it was only the plaintiff who had access to the secret pass code of his debit card and that he was the only one that can divulge same.

I have above deliberately stated in some detail the narrative on both sides of the aisle. Let us now give careful judicial scrutiny to the narrative but in doing so let me quickly say that the **substantive reliefs** sought on both sides are declaratory reliefs. In law declaratory reliefs are in the nature of special claims or reliefs to which the ordinary rules of pleadings particularly on admissions have no application. Indeed it would be futile when Declaratory reliefs are sought to seek refuge on the proposition that there were admissions by the adversary on the pleadings. The authorities on this principle are legion. I will refer to a few.

In **Vincent Bello V. Magnus Eweka (1981)1 SC 101 at 182,** the Supreme Court stated aptly thus:

"It is true as was contended before us by the appellants counsel that the rules of court and evidence relieve a party of the need to prove what is admitted but where the court is called upon to make a declaration of a right, it is incumbent on the party claiming to be entitled to the declaration to satisfy the court by evidence not by admission in the pleading of the defendant that he is entitled to the declaration."

The law is thus established that to obtain a declaratory relief as to a right, there has to be credible evidence which supports an argument as to the entitlement to such a right. The right will not be conferred simply upon the state of the pleadings or by admissions therein.

In **Helzgar V. Department of Health and Social Welfare (1977)3 AII ER 444 at 451; Megarry V.C** eloquently stated as follows:

"The court does not make declarations just because the parties to litigation have chosen to admit something. The court declares what, it has found to be the law after proper argument, not merely after admissions by the parties. There are no declarations without argument. That is quite plain."

I may also refer to the observations of Nnamani J.S.C of blessed memory in **Sorungbe V. Omotunwase (1988)3 N.S.C.C (vol.10)252 at 262 (1988)5 N.W.L.R (pt.92)90** as follows:

"The court of Appeal relied on the decision of this court in Lewis & Peat (N.R.I.) Ltd V. Akhimien (1976)7 SC 157 to the effect that an averment which is not expressly traversed is deemed to be admitted. Admittedly, one does not need to prove that which is admitted by the other side, but in a case such as one for declaration of title where the onus is clearly on the plaintiff to lead such strong and positive evidence to establish his case for such a declaration, an evasive averment...does not remove the burden on Plaintiff. See also Eke V. Okwaranyia (2001)12 N.W.L.R (pt.726)181; Akaniwo V. Nsirim (2008)9 N.W.L.R (pt.1093)439; Maja V. Samouris (2002)7 N.W.L.R (pt.765)78 at 100-101."

The point from the above authorities is simply that declarations are not made because of the stance or position of parties in their pleadings but on proof by credible and convincing evidence at the hearing.

Now back to the facts. The plaintiff said that his debit card got "trapped" in the process of using the defendant's ATM located at Area 7 Abuja. Now there is no clarity as to when or the time this incident happened but he said that when it happened, he informed the agents of the defendant there who informed him that they could not recover the debit card at the material time. The defendant denied they had such ATM agents around their ATM point at weekends as in the instant case which allegedly occurred on Sunday 24th June, 2018.

The plaintiff did not provide any evidence of any kind to support his narrative that any agent or agents of defendant attended to him on 24th June, 2018, a Sunday and in the circumstances, that narrative clearly lacks credibility.

Now the debit card may have been trapped but the defendant again have joined issues with this assertion. The defendant stated that a review of the activities carried out on the card showed that on the said 24th June, 2018 when the card was said to have been trapped, there is no record anywhere of the card been used on that day. Further that all the ATM's at its Garki branch were opened and searched

thoroughly but the card was not found including the very ATM plaintiff alleged the card was trapped in.

Again, there is really nothing to show or prove before court that the debit card of plaintiff got trapped in the defendants ATM machine at Abiriba close Area 7, Abuja on the day in question. Under cross-examination, he said someone accompanied him to the ATM machine but he did not identify him or present him to give evidence to corroborate this assertion that his debit card got trapped and add or lend credibility to it. Now it may be argued that these are mechanical devices and to the unskilled, he may not know what to do at the point of the entrapment beyond laying a complaint. That may be fair argument, but subsequent actions taken by the plaintiff would provide a fair template to analyze whether his narrative should have any traction or value and be accorded weight and credibility.

Now if in this case, the debit card got trapped on a Sunday the 24th June, 2018, what action or steps did the plaintiff now take? On the evidence, it would appear the plaintiff did nothing. Apart from the unproven and discountenanced claim that he reported to some unidentified agents of defendant at the vicinity, he never reported the entrapment of his debit card to anybody. Under cross-examination, he said he did not ask anybody to retrieve the "trapped" debit card. Indeed under further cross-examination, he only called his account officer on "27th June, 2018 around 10am" nearly three (3) days after the alleged entrapment. Again there is no evidence of how this complaint was made. Was it through a phone call, or was he physically in the defendants office? The defendant on its part stated that the call by plaintiff was on 28th June, 2018. Here too, there is no evidence showing this complaint was indeed on 28th June, 2018 and how it was made. The court obviously cannot speculate but on the evidence, the plaintiff wrote a formal letter of complaint vide Exhibit P1 (a) on 2nd July, 2018 days after the alleged entrapment of his debit card and the unlawful withdrawals. The solicitors letter of demand then followed some days later vide Exhibit P1(b) dated 9th July, 2018.

One here finds it difficult to reconcile the actions of plaintiff with one whose debit card was really trapped. If his card was trapped on a **Sunday**, one would expect that if he cannot get to his account's manager that Sunday, that first thing the following Monday morning, he contacts the manager or the Bank itself to block any further transaction on the account. The plaintiff never made any report or call

his accounts manager until **27th June, 2018** after the alleged unlawful withdrawals. Again what is strange is that from the pleadings and statement of accounts vide Exhibits P3 and D1a, the withdrawals started on 26th June, 2018. Indeed by the pleadings and evidence, six (6) withdrawals were allegedly made on 26th June, 2018, yet the plaintiff did not complain or call his account's manager or make a complaint to anybody until the 27th June, 2018 when the withdrawals continued and the funds in his account were exhausted. Is it logical or rational that plaintiff will receive "shocking debit alerts" and choose to simply sleep over it until the 27th June, 2018? I just wonder.

It is true that by Exhibit P1, he was expected to proceed to Lagos on 24th June, 2018, the date the incident of entrapment of his card allegedly happened but the defendant has offices all over the country; so the question of having an opportunity to report the entrapment of the card was always there. Secondly and most importantly, it is curious that the plaintiff chose or elected not to inform his employers that his debit card got trapped and as such because of such compromising situation, any or further payment(s) into the account should not be made. By his evidence, payments was then made into the same account two (2) days after the alleged entrapment and indeed two (2) days in which the plaintiff strangely and deliberately chose to keep his silence and did not make any report to his Bank and or his account manager. As stated earlier, these modern contraptions places some measure of responsibility on the customer. The plaintiff himself under cross-examination agreed that he has a duty to guard his debit card very well and report to the Bank if it gets lost. There was no such report here of any entrapment of his debit card. If a card is trapped and moneys are withdrawn illegally through these ATM devices, how is the bank to know if no complaint is made and bearing in my mind the secret code known only to the customer which grants him access to the account in the first place. Without any prompt complaint or report, the Bank will logically assume and rightly so, that the customer simply accessed his deposit with the Bank which the ATM now allows at any time and indeed anywhere.

Now what is even strange about the case of plaintiff and buttresses the contention of defendant that the card was not used at all on 24th June, 2018 and that there was no entrapment is the fact that as at 24th June, 2018, the balance of the account was only **N985.07 (Nine Hundred and Eighty Five Naira, Seven Kobo)** vide Exhibits P1 and D1a, the statements of account of plaintiff with defendant. The defendant

stated that out of this sum, N500 is the maximum that can be withdrawn by plaintiff except a transfer of the entire amount is made to another account. There is no clarity either in the pleadings or evidence what transaction plaintiff conducted on 24th June, 2018 when the debit card was allegedly trapped in view of the paltry sum in the account. Similarly there is no pleadings or evidence that he ordered for the transfer of the entire amount to another account. Under cross-examination, plaintiff said he went to conduct a transaction on the account on the day in question but he said he did not know the amount he had left in the account. I note that in the final address of the plaintiff, learned counsel sought to explain why the plaintiff went to use the ATM on the day in question. That he went to "…confirm if the inflow had come into the account through the defendants ATM". This belated explanation was neither pleaded and the plaintiff never gave evidence now been advanced in the final address. In the circumstances, the explanation must suffer the consequence of been discountenanced. The conduit of an address is no platform to give evidence or to expand the remit of any grievance beyond that streamlined in the pleadings. It is trite law that evidence of matters not pleaded goes to no issue.

The bottom line is that there is no clarity on the evidence with respect to the key contention of the entrapment of plaintiffs debit card at defendants ATM at Area 7. Now with respect to the alleged unlawful withdrawals, it is obvious that for the withdrawals to be able to take place, someone must have access to the debit card and most importantly the **secret pass code** known only to the plaintiff.

The plaintiff contends that apart from him, the staff of defendants in the I.T Department have access to the secret code. The defendant denied this and puts the plaintiff to the strictest proof. The plaintiff did not however proffer any scintilla of evidence showing how the defendant's I.T staff could have access to his secret pass code and the court cannot speculate. The narrative of defendant on how the cards are issued and how a customer has exclusive privilege or preserve to formulate his secret pass code has more credibility here. The unchallenged evidence of DW1 which has more traction is that when an ATM card is issued to a customer, it comes with a default password which password the customer must change to his own secret chosen password before he can use the card.

DW1 further stated that once the default password is changed by the customer himself, no other person will know the new password except the customer and those he divulge the secret password too. It was also in evidence as already highlighted that ATM card holders have the sole responsibility for the safe keeping of their cards and passwords, including the duty to report to the Defendant promptly whenever their cards are stolen, missing, trapped or if anything happens to their cards.

As stated earlier, this evidence relating to the exclusivity of the password of the debit card was not in any manner challenged or impugned by the plaintiff. In law where material evidence again by a party to any proceedings was not challenged or rebutted by the opposite party who had the opportunity to do so, it is always open to the court seized of the matter to act on such unchallenged evidence before it. See **Insurance Brokers of Nigeria V ATMW (1996) 8 NWLR (pt.466) 316 at 327 G**. Indeed the position of the law is that evidence that is neither challenged or debunked remains good and credible evidence which should be relied upon by the trial judge who would in turn ascribe probative value to it. See **Kopek Construction Ltd V Ekesola (2010) 3 NWLR (pt.1182) 618 at 663; Adeleke V Iyanda (2001) 13 NWLR (pt.729) 1 at 22-23.**

On the evidence, when the plaintiff chose or elected to report the incident nearly two or three days after the card got "trapped", the defendant said they conducted an investigation and found that funds transfer totaling NN330, 000, 100.00 (Three Hundred and Thirty Thousand One Hundred Naira only) was done through a United Bank Plc terminal to one Ocholi M. Yakubu with Account Number: 001082-878 in Access Bank and when they were contacted to salvage the funds transferred to the Bank, the Bank said that the funds had by then been fully withdrawn.

As stated earlier, I have found that there is no clear evidence before court that the debit card of plaintiff was "trapped" in an ATM Machine at defendant's Garki Office branch. The plaintiff did not proffer any credible evidence on this alleged entrapment. The defendants on their part said they carried out an investigation wherein they opened and searched thoroughly all the ATM's at the Garki branch including the ATM plaintiff allegedly used but that it did not reveal any "trapped" debit card as alleged.

Now if this same card was allegedly used, as is the complaint here, then in the absence of any counter evidence to the contrary, I will have no difficulty in holding that it could only have been used by the plaintiff who has exclusive knowledge of the secret password but since he was on transit then to Lagos, then the card could only have been used by someone whom he gave the password too. Even if by some "magic" someone has access to the alleged "trapped" debit card, in the absence of knowledge of the secret password, having the debit card will of itself be of no value at all.

Yes I agree that the defendant has a duty of care to protect the funds of depositors with them as earlier highlighted but that same degree of responsibility must be exacted from the customers with respect to the safe keeping of their cards and password including the duty to report to the defendant promptly whenever anything untoward happens to the debit card for example where it is stolen, gets missing or indeed where it is "trapped" as in this case. A party cannot absolve himself of blame in a situation where a card is trapped as in this case but the customer refuses to promptly report the case but chooses to play the ostrich and keep quiet until days after when withdrawals were allegedly made. The banking institution is not a "magical" institution or an institution with metaphysical powers and so the responsibility must clearly lie with the customer to report immediately to the bank if anything happens to his debit card. If he or she does not report, how is the Bank then in a position to take immediate, positive and remedial actions to safeguard the integrity of the deposits with them. I incline to the view that courts in the land in matters relating to the use of these modern devices like ATM and use of debit cards must exact from Banks and Customers as much diligence and responsibility with regards to the safety and security of deposits as would enable the reduction if not complete eradication of this type of acts of criminality touching on funds, deposits of customers.

On the whole, the case of plaintiff as demonstrated above is fluid, unclear on critical elements of his case which undermines the case and makes it difficult to pin any blameworthy conduct on the defendant in the circumstances.

Again, the debit card of plaintiff may have been "trapped" but there is absolutely no evidence of any entrapment. If per chance it was "trapped" and taken by some criminals, the account had barely up to N1000 on the date of the entrapment and

there is clearly no incentive to the criminals here to keep a card that is not serviced or that has no credit. No less important is that the criminal(s) here are not in a position to know that moneys will be subsequently paid into the same account because the usual practice is that where a debit card is reported to the bank to have been stolen or that it may be compromised in any respect, such account will usually be blocked by the bank immediately.

In this case, the **debit card** was said to have been trapped on **24th June, 2018**. The plaintiff did not report this entrapment and did not do anything even when illegal withdrawals were made on the 26th April, 2018. He did not even tell his **employers** not to make payments into the account despite been aware of the present danger to the account caused by the entrapment of the card. Indeed on the evidence he only reported the incident of the entrapment on 27th April, 2018 after the alleged unlawful withdrawals. I see here a complete abdication of responsibility by the plaintiff in the lack of action(s) on his part to make immediate report of the entrapment of his debit card to safeguard his deposit and this unfortunately undermines his claims.

The law is settled that a court can only grant to a plaintiff what he has claimed on the basis of his pleadings and having creditably proved his entitlement to the reliefs as sought. The grant of any relief cannot be predicated on conjecture or guess work. See **Ajikanle V Yusuf (2008) 2 NWLR (pt.1071) 301.**

As already stated but it needs be underscored at the risk of prolixity that the substance of the **Reliefs** sought in this case are **declaratory reliefs** which are granted on the basis of credible evidence which supports an argument as to the entitlement of such right or claims. Unfortunately there is no such evidence of quality to put the court in a commanding height to grant the reliefs of plaintiff.

The sole issue raised with respect to plaintiffs case is thus answered in the negative. The plaintiffs **Reliefs (i) – (v)** clearly are all not availing. If the declarations with respect to the alleged unlawful withdrawals have not clearly and sufficiently been proven, then the orders for re-fund, damages and cost of action predicated on the success of the declaratory reliefs must fail. You cannot put something on nothing and expect it to stand is a well known legal truism.

This then now takes us to the issue raised with respect to the counter claim of defendant. The issue is simply whether the counter-claimant has on a preponderance of evidence discharge the evidential burden to entitle them to the reliefs sought on the counter-claim. I had in the substantive action stated that the counter claimant must like the plaintiff in the main action establish its case on the same principles to entitle them to the declarations they also seek.

I had also at the beginning of this judgment stated the terms of the counter-claim. I need not repeat the claims. The substantive Reliefs 1-3 on the counter-claim are also **declaratory reliefs** which must be proved on the same legal threshold earlier highlighted. The substance of the counter-claim is that the defendant was not in any manner culpable in the supervision of the account of plaintiff and that they cannot be blamed for the alleged unlawful withdrawals from the account and further that the allegation that plaintiffs debit card was trapped in there ATM machine is in-correct. At the risk of prolixity, I must again emphasise the fact that declaratory reliefs are special claims to be established within a precisely defined threshold. Declarations are not granted as a matter of course or on speculations. There must be credible basis putting the court in a commanding height to grant the declarations prayed for.

Now there is no dispute as already demonstrated in the substantive claim that the plaintiff and defendant had a banker and customer relationship. The plaintiff opened a current account and was issued a debit card for ease of transactions. The use of this cards comes with attendant responsibilities as already highlighted. Now on the evidence, the plaintiff may have not taken immediate steps to notify defendant of what allegedly happened to his card and this contributed in undermining his claims but on the evidence this oral report was finally made on either 27th or 28th April, 2018 and backed up formally on 2nd and 12th July, 2018 by letters of plaintiff and that of his solicitors. Now after these formal complaints, DW1 in his deposition said they now took these steps:

"19. Upon the receipt of the said letters, the Defendant/Counter-claimant promptly carried out investigation into the alleged fraudulent withdrawals, and discovered that the transactions occurred between the 26th and 27th June, 2018, via ATM and POS, as shown by the summary of transactions on the account of, and from the Statement of Account of the

Plaintiff/Defendant to the Counter-claim, pleaded in the statement o defence and counter-claim of the Defendant/counter-claimant.

20. Funds transfers totaling N330, 100.00 (Three Thousand, One Hundred Naira) only, were done through a United Bank for Africa (U.B.A) Plc terminal, to one Ocholi M. Yakubu with Account Number: 0010820878, in Access Bank Plc. The said Bank was contacted in order to salvage the said funds transferred to that Bank, but it responded that the funds have been fully withdrawn.

21. In addition to the above steps taken by the Defendant/Counter-claimant to retrieve the debit card of the Plaintiff/Defendant to the Counter-claim, all the ATMs at the former's Garki branch, were opened and searched thoroughly but the card was not found in any of them, including the very ATM the latter alleged the card was trapped in."

Now like the plaintiff who did not back up his assertions with clear and concrete evidence, the case of defendant similarly suffers from the same defect. It must be pointed out that the plaintiff filed a reply and defence to the counter-claim joining issues with defendant and these contested assertions can only be resolved on the basis of clear and credible evidence. In additions, as stated severally, the substance of the counter-claims are in the realm of **declarations** which must be proved with cogent evidence. Declarations cannot be granted on admissions as seem to be propagated by counsel to the defendant.

The contention that the plaintiff's counsel did not cross-examine the defence witness on the counter-claim and so the evidence with respect to the counter-claim is undefended, unchallenged or deemed admitted is with respect misconceived.

First, this submission flies in the face of the well established principles earlier highlighted that declarations cannot be granted on admission(s) in pleadings or failure on the part of the adversary to take a particular position. Secondly, there is no where in the cross-examination of DW1, where plaintiff's counsel specifically delineated any aspect of his cross-examination as limited to either the statement of defence or the counter-claim. It is difficult to then see how defence counsel can in his chambers determine that the cross-examination was only limited to an aspect of a particular case.

As stated earlier, the plaintiff filed a Reply to the statement of defence and defence to the counter-claim and filed depositions in respect of both causes which plaintiff adopted at trial.

Now because both the claim and counter-claim are inextricably intertwined, raising common questions of law and facts, any attempt to seek to demarcate or compartmentalize as it were, the evidence led and the cross-examination would clearly be an exercise in futility. In any event, the counter-claim too at the risk of sounding prolix must be determined on the basis of clear, convincing and qualitative evidence. No more. Where such evidence is lacking, the case must fail notwithstanding the presence or absence of the plaintiff or the stance he or she adopted at the trial.

Now beyond the bare viva voce evidence of DW1, nothing was put forward to support the conclusions in paragraphs 19-21 (supra).

As severally alluded in this case, ATM machines may be modern technological devices to ease withdrawals of sums of money and transactions. The fact that they are at different locations does not however derogate from the duty and responsibility of the banks to secure those devices and ensure that nobody has access to customers deposit except the customer himself or somebody he authorises by release of the debit card and the secret pass code to such a person.

Now in this case, the defendant contends that the alleged entrapment of the plaintiffs debit card is incorrect as all the search they conducted on all ATMs at the branch did not show or reveal any trapped debit card. Nothing was however put in evidence showing the modalities for this search and who conducted the search and how. Most importantly DW1 agreed that the ATM machines has a mechanical device or a CCTV which captures whoever comes to make withdrawals. There is nothing in the evidence or pleadings to show that the defendants bank have this device on its ATM. If the device or CCTV exists, why was the material footage of those that used the said Garki branch ATM not tendered? If the footage was presented in evidence, it would have demonstrated clearly if the plaintiff used the said machine on 24th April, 2018 or not. The failure to present the evidence of what the CCTV captured on the said date points to the fact that the bank does not

have the security device or if it has it, the production of the material footage would have been unfavourable to their case. See **Section 167(d) of the Evidence Act.**

Now on even the investigations said to have been carried out to look into the alleged unauthorized withdrawals, there is no report streamlining the findings. If certain withdrawals were traced to a certain **Ocholi Yakubu** with an identified account at Access Bank, why then was a formal report not made by the bank to the police to look into who **Ocholi Yakubu** is and how he got the money transferred to his account.

The position of defendant that they contacted Access bank which responded that the money has been already withdrawn and they stopped at that is certainly not good enough. There is here even no evidence of any contact made with Access Bank and there is equally no concrete evidence showing they responded as contended or alleged.

I incline to the view that in the fluid circumstances of this case, the defendant has the primary responsibility to have reported the incident of the alleged unlawful withdrawal(s) to the police particularly since the unlawful withdrawal(s) was said to have been traced to Oturkpo in Benue State. The security devices embedded in the machine would or should have shown and allowed for the raising of valid questions if the person behind the suspicious withdrawals was not the plaintiff. The point to state is that the duty of the police to investigate any act(s) of criminality cannot arise if the report is not made to them. The argument cannot be made and indeed it is even not logical that the plaintiff should have reported to the police himself. It makes more sence that he makes a report of any suspicious activities to the Bank who will in turn look into it and then report to the police where there is need for it as in this case.

Therefore when there are complaints related to the unlawful tampering with deposits of a customer is made, in addition to what internal investigations that may be carried out by the Bank, its duty to protect the funds must necessarily be coterminous and extend to reporting the incident to the police to ensure transparency and accountability.

The Supreme Court in **Haston (Nig) Ltd V. ACB Plc (2002)FWLR (pt.119)SC 1476 at 1493 FH** per Ogundare J.S.C (of blessed memory) stated as follows:

"When Victor Ndoma-Egba reported to the defendant that there had been some fraudulent withdrawals from Account No:05604, one would expect the defendant, as banker, to take a serious view of the matter, to report to the police and carry out internal investigation. She did not have to wait for the plaintiff to demand all these. This is so because the defendant owed the plaintiff a duty of care. This relationship is contractual and has been described as that of debtor and creditor. See Yesufu V ACB (1981)1 SC 7498-99; Balogun V NBN (1978)3SC 153 at 163-164."

Here there is absolutely no evidence of any report to the police and there is no clear evidence precisely streamlining the internal investigations said to have been carried out beyond challenged viva-voce evidence.

The bottom line here too is that like the plaintiff, the defendants substantive declarations in the counter-claim cannot be granted on unclear evidence. The defendant did not demonstrate in a transparent manner the investigations it carried out to situate the alleged withdrawals and who was responsible. They also did not take the matter as sufficiently serious to involve the police and this undermines completely the claim sought under **Relief 1** of the counter-claim.

Similarly in the absence of clear evidence showing that the plaintiff was responsible for the alleged unlawful withdrawals and also that the withdrawals traced to Ocholi M. Yakubu in Access Bank has some link or Nexus with plaintiff, it will again be difficult to hold that the allegation of unlawful deductions made by plaintiff was false and or malicious. **Relief 3** will equally not be availing largely because of the failure of the defendant to produce the CCTV footage or material of the transactions conducted on the particular ATM machine on the day in question. As stated earlier, this footage would have given clear insight as to what happened on the day in question. In the absence of clear evidence in proof of these contested assertions, the court cannot engage in any speculative exercise.

With the failure of **Reliefs 1-3** of the counter-claim, **Reliefs 4 and 5** for a written apology and damages predicated on the success of **Reliefs 1-3** equally fail.

The final **Relief** directing the Inspector General of Police (I.G.P) to investigate the alleged disappearance of the debit card of plaintiff which was trapped in Garki but

used in Otukpo, Benue State and possibly prosecute any person(s) involved is a strange relief and must fail.

First, the I.G.P is not a party to this action. It is difficult to situate how the court can make orders on a party not before the court. Secondly, is this relief a subtle admission by defendant that they did not do all that was required of them in unraveling the mystery of the alleged unlawful withdrawal from the account of Plaintiff? The point to state clearly is that this Relief too projects a failing of responsibility to do the needful on the part of the Bank. The relief as couched is certainly not a matter for the court. It is true and not in doubt that the Nigeria Police has the statutory and constitutional duty to investigate allegations of crime. But the key point which must not be glossed over and I had alluded to it already is that if there is no report to the police, how will they be involved in investigation(s) of the alleged act of criminality? I just wonder. The defendant who own and have custody of these ATM devices are in a better position to know what happened to the machines and not the courts. Where an in-house investigation is done and concluded by the Bank, this should then be presented to the police to evaluate and determine whether a prima facie criminal case is made out against anybody to enable them proceed against such person(s). Until the defendants take this most basic of steps and report the incident to the police, then any pretension or call for prosecution is farfetched and simply wallowing in idle fantasy.

Again the failure to report the matter to the police compromises the claim of defendant's transparency, accountability and indeed the entire counter-claim.

On the whole, the issue raised with respect to the counter-claim is similarly answered in the negative. There is no clear and cogent evidence to ground the Reliefs sought. The Declaratory **Reliefs 1-3** must therefore fail. **Reliefs 4-6** predicated on the success of **Reliefs 1-3** must equally fail. You cannot put something on nothing and expect it to stand.

Before I round up, I note the complaint of plaintiff in his statement of claim that his account has since been placed on hold pending the hearing and determination of this suit and that this has caused considerable inconvenience as streamlined in paragraph 19 of the claim. There is however no clear and precise relief predicated on this complaint, so there is little the court can do here. The only thing perhaps to

add is that now that the matter or case has been finally resolved, there appears hardly any need now to still place a hold on his "accounts". I leave it at that.

In the final analysis and for the avoidance of doubt, I hereby made the following orders:

ON PLAINTIFFS CLAIMS

The Plaintiffs claims fails in its entirety and it is hereby dismissed.

ON DEFENDANTS COUNTER-CLAIM

The Defendants counter-claim equally fails in its entirety and it is hereby dismissed.

…….
Hon. Justice A.I. Kutigi

Appearances:

1. **Collins Marshall, Esq., for the Plaintiff.**

2. **U.C. Ndubuisi, Esq., for the Defendant.**