

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

DELIVERED ON THE 15th DECEMBER, 2021
BEFORE HIS LORDSHIP: HON. JUSTICE ASMAU AKANBI – YUSUF
FCT/HC/CV/328/2019

BETWEEN

TOCHUKWU SAMUEL NWAFOR CLAIMANT

AND

1. ECOBANK NIGERIA LIMITED DEFENDANTS
2. UCHENNA IFEDIORAH

JUDGMENT

By a writ of summons, statement of claim and other processes filed on the 14/11/19, the claimant herein claims against the defendants the following reliefs:

- a. A DECLARATION that the 1st Defendant was negligent in their banking relationship with the Claimant and has breached the banker customer fiduciary duty owed the Claimant.
- b. A DECLARATION that the negligent acts and omissions of the Defendants led to the loss of \$758,826.44 (Seven Hundred and Fifty-Eight Thousand, Eight Hundred and Twenty-Six Dollars and Forty-Four Cents) only by the Claimant.

- c. AN ORDER directing the Defendant to refund to the Claimant the sum of \$758,826.44 (Seven Hundred and Fifty-Eight Thousand, Eight Hundred and Twenty-Six US Dollars and Forty-Four Cents) being the sum total of the total missing lodgments in his accounts.
- d. AN ORDER directing the Defendants to pay the Claimant, General damages for breach of its banker customer fiduciary duty to the tune of ₦50,000,000 (Fifty Million Naira).
- e. AN ORDER directing the Defendant to pay the sum of ₦50,000,000 (Fifty Million Naira) as professional fee for the prosecution of this Suit.
- f. AN ORDER directing the Defendant to pay the Claimant 10% (percent) post Judgment interest on the Judgment sum till the date the Judgment sum is fully and finally paid.

The is defendant filed its statement of defence and other accompanying processes on the 24/2/2020, but same were deemed filed on the 25/2/20 pursuant to the order of this court for an extension of time having been out of time in filing its processes. The 2nd defendant though served through a branch of the 1st defendant, failed and neglected to enter appearance or defend this action.

On the 12/10/2020, the claimant testified as Pw1. He adopted his witness statement on oath of 14/11/2019 as well as the one of 3/3/2020. It is his evidence that the 1st defendant is a financial

institution, whilst the 2nd defendant an employee of the 1st defendant was his account manager, who in the course of his duties managed his account with the 1st defendant. It is his evidence that he has a banker/customer relationship with the 1st defendant; that he had on several occasions entrusted his funds with the 1st defendant for safekeeping. He states that his relationship with the 1st Defendant started from Oceanic Bank PLC and continued after the 1st Defendant acquired Oceanic Bank PLC. He continued that during the normal course of banking transaction with the 1st Defendant, he opened the following accounts with the 1st Defendant:

Nwafor Tochukwu Samuel - 3123003000126 (Domiciliary, Dollar) (old account)
Nwafor Tochukwu Samuel - 3121701700014 (Savings, Naira) (Old account)
Nwafor Tochukwu Samuel - Fixed Deposit Account (Naira)
Desert Spring Investment Ltd - 3121101004865 (Corporate, Naira) Old Account)
Nwafor Tochukwu Samuel - US Dollar Fixed Deposit (2012)

The Pw1 stated further that from the inception of the banker customer relationship, the 1st Defendant assigned the 2nd Defendant as his account officer whose responsibilities included receiving instructions and carrying out same on his behalf; that

periodically, cash were deposited into his accounts and some of the deposits were made through Impact Law Attorneys, the law firm he retained to handle his professional, medical and charity activities in Nigeria. He testified that because he is based in the United States of America, interactions between him and the 1st Defendant's representative were mostly by emails and phone conversations. He states that the subject matter of this suit are accounts known as:

- (i) Nwafor Tochukwu Samuel – 3123003000126 (Domiciliary, Dollar) (old account) and
- (ii) Nwafor Tochukwu Samuel – US Dollar Fixed Deposit (2012)

He continued that prior to 2013 and based on the advice of the 2nd defendant, he maintained a Naira denominated account with a Micro Finance Bank known as Fortis MFB where the wife of the 2nd Defendant worked; that he did so in order to support the career growth of the wife of the 2nd Defendant; that between 2012 and 2014, there were fluctuations in the Naira/USD exchange rate, hence he instructed the 2nd Defendant to close his account with Fortis Bank and transfer the funds to his USD Fixed Deposit account with the 1st Defendant which amounted to a total of over \$700,000 (Seven Hundred Thousand US Dollars); that he also instructed the 1st Defendant through the 2nd Defendant to transfer his existing Naira deposits in his account to his USD Fixed Deposit account.

The Pw1 testified further that he was assured by the 1st Defendant, through the 2nd Defendant that his instructions were carried out; that his account updates were sent to him, which reflected a credit balance of almost \$900,000.00 (Nine Hundred Thousand US Dollars). He stated that he was informed by the 2nd defendant that the 1st defendant's fixed deposit investment product was done in collaboration with Standard Chartered Bank; that the said bank is the custodian of the 1st defendant's USD Fixed Deposit. He stated that sometimes in 2015 and 2016 he requested that some funds from his USD Fixed Deposit Account be liquidated but the 2nd defendant informed him that there were some existing restrictions placed by the government and the 1st Defendant on fund withdrawals from foreign currency accounts, that the transfer can only be carried out in "bits and pieces". He stated that after several oral and electronic requests for transfer of money into his account, he asked Nnamdi Nwafor, Esq. of Impact Law to make physical enquiries from the 1st defendant on why his instructions were not carried out. He continued that in November, 2018, Nnamdi Nwofor, Esq. informed him that from the inquiries he made at the 1st Defendant's office, it appears that there has been an illegal debit in his account; that funds were transferred to an unknown and unauthorized financial institution named Femaz Microfinance Bank. He states that he has no business relationship or banker customer relationship with Femaz Microfinance Bank; that as soon as he got the information, he contacted the Defendants via an email dated 22/10/2018 to express his shock and also requested for all the relevant information of his funds; that the

defendants failed to send the information. The Pw1 states that by his calculations and based on the account updates provided by the 1st defendant through the 2nd defendant and some transfers made to him, the funds in his USD Fixed Deposit Account should have been \$758,726.44 (Seven Hundred and Fifty Thousand US Dollars).

He continued further, that on the 18th of December, 2018, he instructed Nnamdi Nwafor of Impact Law to meet with the 2nd Defendant at the Garki 2 branch of the 1st Defendant in Abuja wherein he was informed that the 2nd defendant resigned the previous week; that he immediately wrote a letter to the 1st Defendant on the 19th December, 2018 and same was received at the Wuse 2 Branch Abuja. He stated that upon his complaint to the 1st defendant, emails were exchanged wherein he was assured that investigation was being carried out; he states that he communicates with the 2nd defendant via email; that he at no time instructed the 2nd defendant to transfer his funds to Femaz Microfinance Bank or any other financial institution.

Again, the pw1 stated that upon his instruction for the transfer of money from his account, the Defendants carried out some transfers by installments while blaming the Central bank of Nigeria for the inability to make single bulk transfer as instructed; that all the money transferred to him in small bits were purportedly made from his USD Fixed Deposit account with the 1st Defendant. He stated that after several requests for his statement of account from the Defendants, the 1st Defendant eventually availed him his statement of account of 10 years but

there were discrepancies and missing records of about seven months that is; from July 2012 to January 2013. He testified that he rejected the statement of account and further requested a comprehensive detail of his account; that upon the receipt of his email [complaint], the 1st Defendant demanded clarification on the complaint which he obliged them; he stated that, that was the last time the 1st Defendant communicated to him and all efforts made by him to obtain the comprehensive account have been futile.

The Pw1 said he wrote a letter to the Consumer Protection Council dated 24th June, 2019 wherein he outlined his grievances against the 1st Defendant; that the 1st Defendant in a letter dated 26th July, 2019 and addressed to the Consumer Protection Commission gave an analysis of their findings. The Pw1 stated that he has also written to several agencies of government but the responses of the 1st Defendant has shown a complete disregard for the duty of care implied in the banker customer relationship. He states that after all his futile efforts, he briefed Greenfield Chambers to recover his funds and also represent his interest; that he instructed his lawyer, Greenfield Chambers, to write a letter to the 1st Defendant; that based on his instruction, his lawyer wrote a letter of demand to the 1st defendant; that the 1st defendant has failed to convey the outcome of their investigation.

The Pw1 stated that the law firm of Greenfield Chambers charged him the sum of ₦5,000,000 as legal fees; that he has deposited ₦1,000,000.00 into their account with an undertaking

to pay the balance at a later time. He continued that it became imperative for him to institute this suit as he is financially constrained; that it is obvious the Defendants are neither willing to refund the sum missing from his account nor ready to make any detailed investigation as to the actions of the 2nd Defendant.

Responding to the statement of defence of the 1st defendant, the claimant in his reply reiterates his assertions contained in his statement of claim, and further states that the 1st defendant never informed him of the official incapability of the 2nd defendant to deal with his accounts; that the 2nd defendant introduced himself to him as a cash officer and not a customer service or front desk officer. It is his evidence that the 2nd Defendant signs his email as suchenna.ifediorah@oceanicbanknigeria.com

“Uche D. Ifediorah
Cash officer
Treasury House Branch,
Oceanic Bank Int’l Plc, Abuja.
08035003868; 07032141968”

The Pw1 states that in addition to the accounts stated by the 1st Defendant in its statement of account, he operates a United States Dollar fixed deposit account; that the 2nd Defendant confirmed this fact to him via a phone conversation; that he periodically makes deposits on all of his accounts maintained by the 1st Defendant including his United States Dollar Fixed Deposit account; that since the inception of their banker-

customer relationship, he never heard of the “Account Officers” stated in the statement of defence in respect of all his accounts operated by the 1st Defendant; that the alleged personal relationship between him and the 2nd Defendant by the 1st Defendant is baseless and lacks any form of merit as the accounts were in the custody of the 1st Defendant and not the 2nd Defendant; that the 1st Defendant owe him a duty of care, regardless of who was dealing with his accounts, which in this circumstance was a staff of the 1st Defendant. The claimant’s reiterates that the 2nd Defendant forwarded a certificate to him, upon his request for explanation on the illegal debit in his account; that the 2nd Defendant stated that the 1st Defendant operates their United States Dollar Fixed Deposit in collaboration with Standard Chartered Bank. He testified further that the date stated on the Standard Chartered Bank certificate is 21/03/2017 while the purported letter written by FEMAZ MICROFINANCE BANK is dated March, 1st, 2017 to Danifed Investment Limited. He states that he has no relationship with the abovementioned institutions; he only recognizes the 1st Defendant as the custodian of his funds; that the stated funds in the document shows amount of funds that should be in his United States Dollar Fixed Deposit Account (\$924,376.73 Nine Hundred and Twenty-Four Thousand, Three Hundred and Seventy-Six United States Dollars, Seventy-Three Cents); that he was misled into believing that the account was operated in collaboration with the Standard Chartered Bank. The claimant gave the 1st defendant notice to produce the CCTV camera recording of the banking hall of their Garki 2 branch of 18th of

December, 2018. It is further the evidence of the Pw1 that he did not authorize the 2nd defendant to act outside his professional capacity in dealing with him; that no transaction was recorded on his USD account no 0031232202 for the period of July 2012 to January 2013; that it can be gleaned from the statement of account that the 1st Defendant withdrew some funds from the Pw1's account; that the 1st Defendant refused to give reasons for the missing funds during the stated period.

The following documents were tendered and admitted through the Pw1.

1. Email message, sent from Samuel N. snwafor@hotmail.com to Afolayan Olusoji, [ENG-CSIS] OAFOLAYAN@ ecobank.com on Wednesday, January 9, 2019 marked as Exhibit A1.
2. Email from Samuel N. snwafor@hotmail.com to Uchenna Ifediorah, ask4ifediorah@yahoo.com on Monday, October 22, 2018, admitted as Exhibit A2.
3. Accounts updates sent to Tochukwu Nwafor from Uchenna Ifediorah, ask4ifediorah@yahoo.com on August 2, 2018, marked as Exhibit B.
4. Re – Report of Fraudulent Activity on my Bank Deposits at Ecobank Nigeria, dated 19th December 2018 marked as Exhibit C.
5. Correspondence [Emails] from Afolayan Olusoji [ENG-CSIS] OAFOLAYAN@ ecobank.com to Samuel N. snwafor@hotmail.com on the 24th January, 2019, marked as Exhibit D1.
6. Email from Samuel N. [mailto:snwafor@hotmail.com] to Afolayan Olusoji of February 15, 2019, is admitted marked as Exhibit D2.
7. Email from Samuel N. [mailto:snwafor@hotmail.com] to Afolayan Olusoji dated February 15, 2019 and fwd Report of fraudulent Activity on my bank deposits at Ecobank Nigeria marked as Exhibit D3.

8. Statement of account of Nwafor Tochukwu Samuel with account number [0031232202] for the period of 01 – January – 2008 to 01 – January 2019 and Statement of account of Nwafor Tochukwu Samuel with account number [5062000219] for the period of 01 – May – 2012 to 01 – January 2019 marked as Exhibit E.
9. Complaint of fraudulent banking against Ecobank, dated 24th June 2019, marked as Exhibit F1.
10. Re – complaint by Dr. Tochukwu Samuel Nwafor of fraudulent activities on his bank activities dated 26th July, 2019 marked as Exhibits F2.
11. Complaints on banking activities on the account of Dr Tochukwu, dated the 18th September, 2019 marked as Exhibit F3.
12. Re – complaints on banking activities on the account of Dr. Tochukwu, dated September 30, 2019 is admitted in evidence and to be marked as Exhibit F4.
13. Professional fees receipt cash/ cheque receipt, dated 18/9/2019 marked as Exhibit G.
14. Compact Disk marked as Exhibit H.
15. Email from IFEDIORAH UCHENNA, UCHENNA. IFEDIORAH@oceanicbanknigeria.com sent Wednesday, November 26, 2008 to Samuel nwafor and email sent from Uchenna Ifediorah, ask4ifediorah@yahoo.com January 19, 2018 marked as exhibit I.
16. Deal confirmation issued by Standard Chartered Bank dated the 21st April, 2017 marked as exhibit J.
17. Letter of commitment issued by Femaz microfinance bank ltd to Tochukwu Nwafor c/o Danified Investment Ltd, Abuja dated March 1st, 2017 marked as exhibit K.

The pw1 was cross examined. That is the case of the claimant.

On the 15/2/2021, the 1st defendant called its sole witness- Awopetu Olugbolahan testified as Dw1, he is a Banker and cluster Compliance Officer in the 1st defendant. It is his evidence that prior to the institution of this suit, the 2nd defendant had on the 3rd December, 2018 resigned from the employment of the 1st defendant; that while the 2nd defendant was in the employment of the 1st defendant he was officially deployed as a customer service personnel; that the 2nd defendant was not assigned as or functioned as an account officer or relationship manager of any of the 1st defendant customers. He stated that the 2nd defendant being a close and personal family friend of the claimant, the claimant allowed the 2nd defendant to deal with his accounts; that the claimant maintains two [2] personal accounts and is also a signatory to one corporate account with the 1st defendant. The Dw1 listed the accounts as follows:-

1. *Nwafor Tochukwu Samuel -3123003000126 (Domiciliary, Dollar) (old account); 0031232202 (Oceanic Bank Nuban Account); 5062000219 (Ecobank account number)*
2. *Nwafor Tochukwu Samuel - 3121701700014 (Savings, Naira) (Old account); 0031177491 (Oceanic Bank Nuban account number); 5061000487 (Ecobank account number)*
3. *Desert Spring Investment Ltd - 3121101004865 (Corporate, Naira) Old Account); 0043064745(Oceanic Bank Nuban account number); 5062002268 (Ecobank account number)*

The Dw1 states that the claimant never at anytime maintained a United States Dollar Fixed Deposit Account either with the 1st defendant or the legacy Oceanic Bank PLC; that there is no other account maintained by the 1st defendant to which the claimant is a signatory; that he knows that in the course of regular banking activities cash deposits were made into the accounts belonging to the claimant; that the only USD domiciliary account maintained by the claimant with the 1st defendant is account number 3123003000126[5062000219]; that the claimant doesn't maintain any fixed United States Dollar account with the 1stdefendant; that the claimant failed to produce any official certificate issued to him by the 1st defendant. He states that the 1st defendant was neither a party nor privy to any personal dealings between the claimant, the 2nd defendant and Fortis Microfinance Bank; that the claimant never instructed the 1st defendant to make deposit; that there was no deposit or transfer of the sum of \$700, 000 [Seven Hundred Thousand United States Dollars] or any other sum into the claimant's nonexistent USD fixed deposit account with the 1st defendant. He continued that the 1st defendant never received any instruction from the claimant to transfer any funds into his nonexistent USD fixed deposit account domiciliary with the 1st defendant; that the transactions between the claimant and the 2nd defendant were purely personal as no funds were ever

routed through the 1st defendant either as an investment or deposit. He testified further that the account updates stated in the statement of claim never emanated from the 1st defendant; that the 1st defendant is not aware of the transactions which led to the sums stated in the statement of claim or the personal email correspondence between the claimant and the 2nd defendant. He states that neither the sum of \$900,000 (Nine Hundred Thousand Dollars) nor \$864,726.44 (Eight Hundred and Sixty Four Thousand, Seven Hundred and Twenty Six dollars, Forty Four Pence) were ever maintained in an account belonging to the claimant domiciled with the 1st defendant or the erstwhile Oceanic Bank PLC. Going further, he testified that by virtue of his employment with the 1st defendant, it is a fact that the 1st defendant does not maintain any fixed deposit investment product in collaboration with Standard Chartered Bank; that the letter from Standard Chartered Bank to the claimant did not emanate from the 1st defendant; that the claimant did not at anytime make any request either orally or electronically to the 1st defendant requesting the liquidation of the funds in the claimant's purported fixed deposit USD account with the 1st defendant. He admits that the 1st defendant received the claimant's letter dated 19th December, 2018 and in compliance with the standard banking practice, the claimant commenced investigation into the complaints raised by the claimant. It is the

evidence of the Dw1 that by virtue of his employment and having perused of the documents in this suit, he is aware that the 1st defendant was neither a party nor privy to any correspondence or transactions between the claimant, the 2nd defendant and Femaz Microfinance Bank; that upon a review of the correspondences between the 2nd defendant and the claimant, it is shown that some transactions referred to by the claimant in his statement of claim were personal transactions between him and the 2nd defendant which explicitly excluded the 1st defendant; that the aforementioned personal transactions between the claimant and the 2nd defendant involved investments in microfinance banks which served as avenues for bulk foreign currency transfers to the claimant.

The Dw1 continued further that the statement of account forwarded to the claimant is complete and accurate; that there are no discrepancies; that an account statement only captures actual transactions that took place in an account and where there is no transaction in an account for a relevant period, there would be no narration in the account statement for such period. Again, the Dw1 states that upon receiving the email of the claimant complaining about the statement of account sent to him, an investigation was further carried out on the claimant's accounts wherein it was discovered that the earlier statement of account forwarded to the claimant was accurate and without any

missing record or discrepancies. He states that the 1st defendant responded to the claimant's complaint before the Federal Competition and Consumer Protection Commission; that the 1st defendant has never shown disregard for the duty it owes its customers. He states that upon receipt of the claimant's letter of 18th September, 2019, the 1st defendant issued a holding letter on the 30th September, 2019 which is a common practice by the 1st defendant to its customers. He stated that the claimant is privy to the letter the 1st defendant forwarded to the Federal Competition and Consumer Protection Commission in respect to the complaints of the claimant.

The following documents were admitted through the Dw1

1. Documents tagged Mails of 7th January, 2019 (Awopetu Olugbolahan (ENG – Compliance) marked as Exhibit D1 (12).
2. Documents tagged Mail Correspondence between the Claimant & Mr. Olusoji Afolayan marked as Exhibit D2 (8 in nos)
3. Documents tagged letter of employment (August 1, 2008 marked as Exhibit D3. (5 in nos).
4. Documents certificate of compliance made pursuant to section 84 of the Evidence Act is marked Exhibit D4.
5. Documents tagged Eco Bank's letter to the FCCPC dated the 26th July 2019 marked as Exhibit D5 (5 in nos).

The Dw1 was also cross examined.

In the course of the trial, counsel for the claimant caused a subpoena to the Branch Manager, Ecobank Nigeria Ltd of Plot

685, Aminu Kano Crescent, Wuse II, Abuja to produce the following documents:

1. Ecobank Staff Handbook/Manual in use as at 2012 – 2015.
2. Account Opening documents for Tochukwu Samuel Nwafor, Account No. 0031177491 including the signature mandate.
3. Instrument authorizing transfer/withdrawal in favour of Uchenna Ifediora on 11th May, 2009 for the sum of #20,000.00 (Twenty Thousand Naira) only from Account No: 0031177491 belonging to Tochukwu Samuel Nwafor
4. Instrument authorizing transfer/withdrawal in favour of Uchenna Ifediora on 26th May, 2010 for the sum of #17,950,000.00 (Seventeen Million, Nine Hundred and Fifty Thousand Naira) only from Account No: 0031177491 belonging to Tochukwu Samuel Nwafor
5. Instrument authorizing transfer/withdrawal in favour of Uchenna Ifediora on 19th April, 2011 for the sum of #150,000.00 (One Hundred and Fifty Thousand Naira) only from Account No: 0031177491 belonging to Tochukwu Samuel Nwafor
6. Instrument authorizing transfer/withdrawal in favour of Uchenna Ifediora on 29th April, 2011 for the sum of #1, 820,000.00 (One Million, Eight Hundred and Twenty Thousand NairaTwenty Thousand Naira) only from

Account No: 0031177491 belonging to Tochukwu Samuel Nwafor

7. Account opening documents for Tochukwu Samuel Nwafor domiciliary Account No: 0031232202 including the signature mandate.
8. Instrument authorizing transfer/withdrawal in favour of Uchenna Ifediora from the domiciliary account No: 00312322302 belonging to Tochukwu Samuel Nwafor on 23rd December, 2008 for the sum of \$50,000. 00 (Fifty Thousand Naira) only.
9. Instrument authorizing transfer/withdrawal in favour of Uchenna Ifediora from the domiciliary account No: 00312322302 belonging to Tochukwu Samuel Nwafor on 24th December, 2008 for the sum of \$35,000. 00 (Fifty Thousand Naira) only.
10. Instrument authorizing transfer/withdrawal in favour of Uchenna Ifediora from the domiciliary account No: 00312322302 belonging to Tochukwu Samuel Nwafor on 20th January, 2009 for the sum of \$25,000. 00 (Fifty Thousand Naira) only.
11. Instrument authorizing transfer/withdrawal in favour of Uchenna Ifediora from the domiciliary account No: 00312322302 belonging to Tochukwu Samuel Nwafor on

23rd January, 2009 for the sum of \$49,000. 00 (Fifty Thousand Naira) only.

The 1st defendant produced these documents;

1. The Ecobank Group Human Resources Policies, September 1999 marked as Dw6.
2. Oceanic Bank Executive Savings Account Signature Card in the name of Tochukwu Samuel Nwafor marked as exhibit Dw7

At the close of evidence, parties filed their final written addresses. Learned counsel for the 1st defendant filed a final written address dated the 27th July, 2021 as well as a Reply on Points of Law dated the 18/08/2021, wherein a sole issue was formulated; that is:

Whether the claimant is entitled to the reliefs sought in his statement of claim dated 14th November, 2019.

On the part of the claimant, counsel for the claimant filed a written address on the 12/8/21 wherein he formulated these issues for determination;

1. *Whether the claimant has led credible and substantial evidence in proof of his case.*
2. *Whether admitted facts need further proof*

3. *The failure of the 1st defendant to produce the subpoenaed documents*
4. *Whether exhibit H is admissible as proof of the admissions made therein, relevant and ought to be relied upon by this Honourable court.*
5. *Whether in the circumstances of this case the claimant is entitled to reliefs sought herein and damages claimed.*

Learned counsel on both sides argued and adopted their respective written addresses and matter was adjourned for Judgment.

I have considered the processes filed on behalf of the parties as well as the evidence before the court; I am of the view that the sole issue formulated by counsel for the 1st defendant shall resolve the issues in dispute. However I shall treat and resolve the issue raised by the claimant's counsel in paragraph 4.2.3 of his written address as a preliminary matter; the other issues raised by the claimant can be subsumed in the issue formulated by counsel for the 1st defendant

The preliminary issue

Whether exhibit H is admissible as proof of the admissions made therein, relevant and ought to be relied upon by this Honourable court

I have read and digested the arguments for and against the admission and the weight to be attached to Exhibit H by both parties. Firstly, it is on record that the compact disc was tendered alongside other documents produced by the claimant in the proceedings of 12th October, 2021. The Pw1 in paragraph 9 of his witness statement on oath stated

“That because I am based in the United States of America interactions between the 1st defendant, represented by the 2nd defendant, and I were mostly by emails and phone conversations. Copies of the emails and phone conversations hereby pleaded and shall be relied on during the trial of this suit.”

Para 4a claimant’s witness statement on oath of 3rd March, 2020
“In addition to the accounts stated by the 1st defendant, I operated a United States Dollar fixed deposit account with the 1st defendant which the 2nd defendant confirmed in a phone conversation with the claimant. An electronic copy (in a compact diskette) of the recorded conversation between the 2nd defendant and me on the 29th of November, 2018 is hereby pleaded and will be relied on during the subsistence of this suit”

Going by the records, it is not in evidence that the compact diskette admitted as exhibit H was played by the claimant to the

hearing of the court and the opposing party; it would therefore be absurd for the court to retire to chambers and begin to watch or listen to what was not played or viewed in the open court. How is the court expected to form an opinion or evaluate the conversations therein? The Court of Appeal stated the position of the law as regards admissibility in evidence of audio cassettes/ tape recording in *GEO MEMORIAL MEDICAL CENTRE & ANOR v. NATIONAL DIRECTORATE OF EMPLOYMENT* (2013) LPELR-20796(CA) Per CHINWE EUGENIA IYIZOBA, JCA (Pp. 33-34, paras. D-C)

"...With all due respect to learned counsel, that is a complete misconception of the law regarding admissibility in evidence of audio cassettes. An audio cassette to be relevant and constitute evidence which the learned trial Judge can use, it must be played in open court to the hearing of the parties and the presiding Judge. When that is done, then opportunity is given to the opposing party to cross-examine on the audio cassette. Without such procedure being adopted, tendering the audio cassette in evidence without objection is as good as not tendering the audio cassette at all because the trial judge is ignorant of the contents of the audio cassette and will accordingly not make use of it. Learned counsel for the Respondent is consequently right that there is no evidence to be evaluated or appraised by the Trial Court from the audio

cassettes, the contents of which were unknown. See Sijuade v. Oyewole (2011) LPELR - 4869(CA). If the Appellants' Counsel wanted to enlighten the Court on the contents of the purported admitted cassettes, it was his duty to draw the attention of the Court to the said evidence." [Underlined emphasis mine]

In the case at hand, the claimant failed to bring to the notice of the court, the content of the compact diskette. I never had the opportunity of listening to same in the open court; therefore the claimant's counsel having failed to properly tender exhibit H, this court is estopped from making use of same in evidence. Thus, no probative value will be attached to exhibit H as the claimant failed to demonstrate the content of same in open court for all to see or hear.

I now proceed to deal with the substantive issue.

Whether the claimant is entitled to the reliefs sought in his statement of claim dated 14th November, 2019.

It is established by the admission of the 1st defendant that the claimant operates the following accounts with the 1st defendant:

1. *Nwafor Tochukwu Samuel -3123003000126 (Domiciliary, Dollar) (old account); 0031232202 (Oceanic Bank Nuban Account); 5062000219 (Ecobank account number)*

2. *Nwafor Tochukwu Samuel* - 3121701700014 (Savings, Naira) (Old account); 0031177491 (Oceanic Bank Nuban account number); 5061000487 (Ecobank account number)
3. *Desert Spring Investment Ltd* - 3121101004865 (Corporate, Naira) Old Account); 0043064745(Oceanic Bank Nuban account number); 5062002268 (Ecobank account number)

See paragraph 6 of the claimant's witness statement on oath and also paragraph 6 of the 1st defendant witness statement on oath. Hence, there is no dispute to the above facts, as it is the law that facts admitted need not be proved. See SECTION 123 EVID ACT; AROMOLARAN V OLADELE (1990) 7 NWLR (PT.162) 262 AT 368; BIEZAN EXCLUSIVE GUEST HOUSE LTD V UNION HOMES SAVINGS & LOANS LTD (2011) 7 NWLR (PT. 1246) 246 AT 285.

In CHIEF DENNIS AFOR OGAR & ORS v. CHIEF J.I. IGBE & ORS(2019) LPELR-48998(SC) p. 10. The Supreme Court restated the age long position of the law thus:

“The Plaintiffs, now Appellants, failed to join issues on these adverse facts. The law is trite: facts not disputed are taken as admitted, and facts admitted are taken as established. They need no further proof. Therefore the averments (including Exhibits JA2 & JA3) in paragraphs 3 & 4 of the affidavit in support of Defendants' preliminary objection are no longer in controversy. Those facts are deemed to have been admitted, and therefore established.”

The accounts in issue as pleaded by the claimants are:

1. *Nwafor Tochukwu Samuel* -3123003000126 (Domiciliary, Dollar) (old account) and;

2. *Nwafor Tochukwu Samuel - US Dollar Fixed Deposit (2012)*

The law is that, whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts shall prove that those facts exist. Section 131 (1) EVIDENCE ACT and 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. See *BULLET INT'L (NIG) LTD & ANOR V OLANIYI & ANOR (2017) LPELR 42475 (SC)* where it was held

“Whoever desires a court of law to give him judgment as to any legal right, dependent on the existence of facts he asserts, has the burden or onus of proving that those fact exist. Failure to prove or establish positively asserted facts leads to assumption, admittedly that those positively asserted facts do not in fact exist.”

In the instant case, the claimant must first prove the existence of the united state dollar fixed deposit account with the 1st defendant and also ascertain that he had \$758,826.44 [Seven Hundred and Fifty Eight Thousand, Eight Hundred and Twenty Six Dollars, Forty Four cents]in his accounts with the 1st defendant. See *ENGR. MUSTAPHA YUNUSA MAHAJA v. ALHAJI IBRAHIM GAIDAM & ORS (2017) LPELR-42474(SC)*

"Section 131(1) of the Evidence Act, 2011 provides that whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts shall prove that those facts exist. Put streetwise, he who asserts must prove his assertion. It therefore logically follows that what is alleged without proof can be denied without proof. When a fact is asserted without proof then the existence of the alleged fact is not established. That is why Section 132 of the Evidence Act provides further that 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."

The claimant in this case, assert that he operates a dollar fixed deposit account with the 1st defendant; that the 1st defendant assigned the 2nd defendant as his account officer and the responsibility of the 2nd defendant is to receive instructions as well as carry out same on his behalf. See paragraph 7 of the statement of claim. He further states that he never heard of the account officers mentioned in the statement of defence of the 1st defendant. See paragraph 3 c of the claimant's reply. The claimant however failed or neglected to produce the evidence or document exhibiting how the 2nd defendant was assigned to him by the 1st defendant to act as his account officer. A careful review of the questions elicited during the cross examination of

the Dw1, shows how an account officer is appointed or nominated for the customers of the 1st defendant.

Q: can you tell the court how the claimant was notified of his account officers

A: it is the duty of the account officer when being appointed as one, to reach out to the customer

Q: so the bank never notified the claimant officially from the file you read

A: I can't say

Q: what is the official practice of the bank appointing an account officer for a customer

A: that is why I said it is the duty of the account officer to reach out to his own client

Q: in other words, any staff of the bank can call the customer and the customer is obligated to believe the person

A: no

Q: tell us what will happen

A: there is a way to transmit it either through email or sms

Q: are you saying the bank transmitted the details of the account officer to the claimant

A: I can't say

The above questions and answers appear not to be in favour of the claimant; the reason is that the Dw1 testified that it is the duty of an account officer to reach out to a customer and this could be through email or sms. The claimant here asserts that it was the 1st defendant who assigned the 2nd defendant to him as his account officer; the burden is on him to show or produce evidence reflecting the way and/or manner the 2nd defendant was introduced or assigned to him. This he failed to do! All he said was that the 1st defendant assigned the 2nd defendant to him as his account officer whose role was to receive and carry out instructions; contrary to the assertions of the claimant, it can be gleaned from exhibit C that the claimant on his own chose the 2nd defendant as his account officer. Exhibit C is the letter written by the claimant on the 19th December, 2018 and addressed to the Managing Director, Ecobank Nigeria. I find it pertinent to reproduce some parts of exhibit C

“... I have reasons to believe that I have become a victim of a massive fraudulent banking scheme which was carried out by a staff of Ecobank Mr Uchenna Daniel Ifediorah who at all times has been my account officer and also gives me advice on banking issues. He had also held long time relationships with my family members as bank account officer.

...when I wanted to open a bank account in Nigeria during one of my visits to Nigeria, I was introduced to Mr Uchenna Ifediorah sometime before 2008 by my family members at which time he was working with Oceanic Bank in Abuja”

Underlined emphasis mine

It is glaring from the above that the claimant was introduced to the 2nd defendant by his family members. He cannot be allowed to turn away from his own evidence. I therefore do not hesitate to hold that the claimant voluntarily chose the 2nd defendant to be his account officer.

Again, before an act of negligence can arise against the 1st defendant in respect of the subject matter, the claimant must have placed before the court documents evidencing he operates a dollar fixed deposit account with the 1st defendant. I have earlier held that exhibit H is inadmissible to prove the facts alleged by the claimant as same was dumped on this Court. It is therefore against common sense and reasoning for the claimant to prove the opening of a United States dollar fixed deposit account and amount pleaded by word of mouth as suggested by both parties in their respective final written addresses; I do not want to tow their paths or are they suggesting that deposits made into the account were also by word of Mouth!

Upon being cross examined, the Pw1 stated thus

Q: see Para 11 witness statement on oath dated 14th November, 2019

A: the statement is correct

Q: did you take the advice as that of the 1st defendant

A: to me it was a combined advice from both the 1st defendant and my account officer

Q: so you take the advice as that of the 1st defendant and the account officer

A: that is correct

Q: how was the advice communicated to you

A: it was a telephone conversation and I believe there must be email correspondences as well

Q: Do you think it was part of the 2nd defendant professional duty to advise you to open an account with another bank

A: I cannot speak to the job specification of the 2nd defendant. I don't have an opinion.

Q: Did you at any time request the 2nd defendant to make that sum available to Nnamdi Nwafor and invest the balance.

A: there were a couple of instructions in which Barrister Nnamdi Nwafor, would have been the beneficiary. I may have made instructions to pay #1.6M to Nnamdi Nwafor, but it was not in 2015, not in July and was not from Fortis Micro finance Bank. From the best of my recollections, that instruction, would have been made from my Eco Bank account.

Q: The 2nd defendant assisted you in opening the account with Fortis Micro finance bank

A: Yes my lord, there were some form of assistance

Q: In whose name was that account opened

A: I believe it was in my name.

Q: Were you in Nigeria as at the time the account was opened

A: I don't recall exactly, but I do not think so.

Q: How much did you request to be transferred or withdrawn from Fortis Microfinance Bank to any other Bank?

A: They were two different transferred, one from the Fortis Bank, and the other was the Naira deposit in Eco Bank. From my recollection, it was the combined sum of liquidation from my Fortis account and transfer of the naira account from my Eco Bank that amounted to \$700,000 but I would have to refer to the relevant documents to refresh my memories as to the exact account.

Q: see paragraph 12 witness statement on oath 14/11/2020; how did the 2nd defendant withdraw the total over \$700,000

A: I am not sure of how he did that

Q: so you gave him an instrument that you do not know how he is going to carry it out

A: I am not trained in banking procedure; I am not sure how he carries out technical transfers.

The combined reading of the above evidence and exhibits A1, A2, B& C will confirm that the claimant transacted with the 2nd defendant in his personal capacity; it can also be gleaned from

the record of court that some email correspondences were sent from the 1st defendant's domain. It is trite that the essence of cross examination is to test the correctness of the testimony of the claimant. JONATHAN NNADI v. THE STATE (2016) LPELR-41032(CA)

Going further, Exhibit A1 the email account of the 2nd defendant is ask4ifediorah@yahoo.com wherein the account update was allegedly sent by the 1st defendant through the 2nd defendant, the mail was sent on the Thursday, August 2, 2018 1:28AM. The account balance was sent on a plain paper which is devoid of the features known of the 1st defendant, that is; the logo, stamp, address etc and also no details of the claimant appeared on it. If the claimant was careful and thorough, he ought to have noticed that the email account of the 2nd defendant was not from the official domain of the 1st defendant. Secondly, the purported balance has no indication whatsoever that it emanated from the 1st defendant. I cannot but also agree with the 1st defendant's position that the claimant related with the 2nd defendant on a personal ground. See also exhibit C. It is clear that the claimant herein accepted the advice of the 2nd claimant at his own risk; see paragraph 11 of the witness statement on oath, therefore he cannot be allowed to hold the 1st defendant liable for his own act of negligence. He himself averred that he opened an account with Fortis Micro Finance Bank so as to boost the career of the

wife of the 2nd defendant and he wants this court to believe that the 1st defendant agreed to this! That will be preposterous! Also the claimant stated that between 2012 and 2013, he instructed the 2nd defendant to close his account with Fortis Bank and transfer the funds to his USD Fixed Deposit Account with the 1st defendant which totaled \$700,000 [Seven Hundred Thousand US Dollars]; the claimant did not state the exact amount he had in his domiciliary or USD Fixed Deposit Account with the 1st defendant. Also as of the time he said he gave instructions to the 2nd defendant, he didn't state the amount that was transferred from Fortis Bank to his account with the 1st defendant. There is also no evidence to confirm that funds were even transferred from Fortis Bank to the claimant's account with the 1st defendant. The responses of the claimant that *"he was not sure how the 2nd defendant carries out technical transfers; that they were two different transfers, one from the Fortis Bank, and the other was the Naira deposit in Eco Bank and from my recollection, it was the combined sum of liquidation from my Fortis account and transfer of the naira account from my Eco Bank that amounted to \$700,000 but I would have to refer to the relevant documents to refresh my memories as to the exact account; that he is not sure how did the 2nd defendant over \$700,000; that he is not trained in banking procedure."*

The above is not tenable in law or how is the court expected to know the funds transferred from Fortis Bank to the account of the claimant with the 1st defendant or what was the claimant's account balance with the 1st defendant as of the time he instructed the 2nd defendant to effect the transfer. Again, is the 2nd defendant also a staff of Fortis Bank or how was the 2nd defendant, a staff of the 1st defendant then expected to receive or transfer funds in the custody of another bank to the 1st defendant? The questions are unending! I do not know how the claimant arrived at \$700,000 pleaded in the statement of claim and it is not the duty of the court to act on speculations. See STAG ENGINEERING COMPANY LIMITED v. SABALCO NIGERIA LIMITED & ANOR (2008) LPELR-8485(CA)

Furthermore, in the same exhibit A1, the email account where the claimant on Wednesday, January 9, 2019 6:38 PM forwarded the concocted balance alleged to have been sent to him by the 2nd defendant, belong to one Afolayan Olusoji with email account OAFOLAYAN@ecobank.com. Afolayan Olusoji is a staff of the 1st defendant and his email account has the domain of the 1st defendant. The 2nd defendant used his personal email yahoo account in Exhibits A2 and B; and the claimant was at peace with the account balance sent from a personal email account and also on a plain sheet of paper. Is it not too late for the claimant to turn around and complain about the activities of the 2nd defendant to the 1st defendant? The claimant averred in

paragraph 2e of his reply that “The 2nd defendant did not introduce himself to the claimant as a customer service, front desk but as a cash officer. The 2nd defendant signs his emails sent from his address UCHENNA.IFEDIORAH@oceanicbanknigeria.com as “Uche D. Ifediorah

*Cash officer
Treasury House Branch,
Oceanic Bank Int’l Plc, Abuja.
08035003868; 07032141968”*

The claimant tendered exhibit I to support the above fact. I consider it necessary to reproduce exhibit I.

From: IFEDIORAH UCHENNA- FCT< UCHENNA.IFEDIORAH@oceanicbanknigeria.com>

Sent: Wednesday, November 26, 2008 6:04AM

To: Samuel nwafor

Subject: RE: FIXED DEPOSIT

Hi, Tochukwu,

Hope your week has been lovely. Below is a breakdown of all the funds in your ESA account;

#3,000,000.00 (paid in by Nnamdi)

#3,964,000.00 (paid by Obum)

#5,000.00 (account opening balance)

Total #6,969,000.00

I’ll need you to confirm the next step,

- i) If the money will still increase to the initial projection of #8,000,000.00
- ii) If it will be rounded to #7,000,000.00
- iii) Or I should go ahead and invest immediately for your fixed deposit

I'll advise we book the deposit ASAP to avoid losing more interest and unfavourable changes in interest rate considering Dec. 31 ending of financial year.

Kindly send your response as a formal letter for me to use as sufficient instruction to book your deposit as agreed.

Hope to hear from you soon.

Warm regards,

Uche

Regards,
Uche D. Ifediorah
Cash officer
Treasury House Branch,
Oceanic Bank Int'l Plc, Abuja.
08035003868; 07032141968"

I have carefully examined exhibit I, it is not reflected therein that the content of same was sent to any email account. The email account of Samuel nwafor is not stated on exhibit I. Therefore I

cannot place reliance on exhibit I to hold that the 2nd defendant introduced himself as a cash officer.

Assuming I agree with the claimant, that the 2nd defendant sent an email to the claimant using the Oceanic bank platform on the 26th November, 2008, [Exhibit I]. The mail sent from UCHENNA.IFEDIORAH@oceanicbanknigeria.com contains the breakdown of the monies and names of persons who deposited Naira into the Claimant's ESA account; it is dated November 26, 2008. It is a fact that the email exchange between the claimant and the 2nd defendant cannot amount to a statement of account, account balance or deposit slips filled by the three (3) persons mentioned in the email. This cannot by any stretch of imagination prove the existence of the United Fixed Dollar Account and I so hold. See section 131, 132 & 133 (1) Evidence Act

Again, the claimant states in paragraph 3b of his reply that he periodically makes deposits on all his accounts maintained with the 1st defendant including the United States Dollar Fixed Deposit Account; the claimant again failed to provide evidence to buttress the above claim. Having discountenanced Exhibit H, same cannot avail the claimant. If truly the claimant wants this court to believe that he made periodic deposits on all his accounts including the United States Dollar Fixed Deposit

account, then it is his duty to provide documentary evidence to prove his assertion.

It is preposterous for the claimant to argue that the 2nd defendant admits his claim; therefore judgment be given against the defendants. For any admission to be useful and reliable in law, the facts allegedly admitted must be a fact capable of being believed. See SECTION 133 (1), 136 (1) & (2) EVID ACT. How on earth does the claimant expect a reasonable person to believe his assertions, particularly with his level of exposure as a medical doctor in private practice in the United State of America, that he operates a United States Dollars Fixed Deposit account with the 1st defendant either \$700,000 or \$900,000 and has no credible evidence to show for it! He failed to corroborate his evidence with a certificate issued to him or evidence of deposit of any dollar into the said USD Fixed Account. See paragraphs 12 & 16 of the statement of claim. *Credible evidence is reasonable, probable and cogent evidence in respect of the transaction or event it describes, given from a credible course which makes it easy to believe. AGBI v. OGBE (2005) 8 NWLR (926) 40 at 134.* See ARAB CONSTRUCTION LTD. & ANOR v. ASUQUO SUNDAY ISAAC (2012) LPELR-9787(CA)

The claimant further states that the updates of his account with the 1st defendant were sent to him by the 2nd defendant; Can exhibits A1, A2, I & B suffice as statements of account of the

claimant? The answer is certainly No! The documents paraded by the claimant as far as this court is concerned are personal notes between him and the 2nd defendant which cannot take the place of official document of the 1st defendant and this leads me to the issue of the subpoenaed documents.

It is the submission of the claimant that the 1st defendant was only able to produce 2 sets of document out of 11 of the subpoenaed documents. He submits that it is shocking that the 1st defendant who is in charge of keeping customers record found it difficult to produce the documents subpoenaed. He submits that the reason given by the 1st defendant isn't sufficient reason as the bank is mandated to keep records; that it is negligence on the part of the bank and a breach of the duty of care owed to the claimant. Learned counsel for the claimant argued that the two documents produced by the 1st defendant, particularly the account opening document for Tochukwu Samuel Nwafor with account number 0031177491 were opened when the bank was still known as Oceanic Bank; that also the 1st defendant claimed it conducted an internal audit of the claimant's complaint; that how did the 1st defendant carry out the audit without the subpoenaed documents. He is of the opinion that the documents would have revealed the true state of things as it concerns the complaint of the claimant. He submits that no internal audit was properly carried out by the 1st defendant. He

submits that the 1st defendant produced the account opening documents Tochukwu Samuel Nwafor's account No. 0031177491 including the signature mandate; that had the 1st defendant produced the subpoenaed documents listed in Nos 3 & 6 of the subpoena, this Hon. court would have known who authorized the said transactions and whether the signature contained in the account opening documents for Tochukwu Samuel Nwafor's account No. 0031177491 including the signature mandate and signature contained in the said instrument contained in Nos 3 to 6 of the subpoena are one and the same and to also know if there were authorizations for the transaction or not. He continued further that the 1st defendant failed to produce the account opening documents for the claimant's domiciliary account number 0031232202 including the signature mandate as stated in the documents listed as Nos: 7 to 11 on the subpoenaed documents.

He submits that the failure of 1st defendant's to produce the subpoenaed documents amount to withholding evidence as same would have helped the court arrive at a just determination of this case. He referred to *SECTION 167 (D) EVIDENCE ACT; UZOHO V TASK FORCE, HOSPITAL MGT (2004) 5 NWLR (PT 867) 627; THE PEOPLES OF LAGOS STATE V UMARU (2014) 7 NWLR (1407) 584* to buttress his argument on this issue. He argued that the 1st defendant having admitted during cross examination that they have the

documents, the court should hold that the 1st defendant willfully refused to produce the subpoenaed documents as same are favourable to the 1st defendant.

The 1st defendant is not in agreement with the claimant. Counsel for the 1st defendant submits that the 9 documents termed by the claimant as instrument authorizing transfer/withdrawal are regarded as written payment orders to a bank. He referred to *ABEKE V STATE* (2007) 9 NWLR (PT. 1040) 411 AT P.432, PARA H. He submits that the nine documents being instruments of payment, they are subject to the Nigerian Bankers' Clearing System Rules 2018 made pursuant to *SECTIONS 2(D), 33(1) (B) & 47(2) CBN ACT*. He states that paragraphs 7.6 of the NBCS Rules provides thus;

The retention period of physical cheques by the presenting bank shall be minimum of five (5) years.

He argued that the 1st defendant is only mandated to retain the subpoenaed documents for at least five (5) years; that the 1st defendant can only be held negligent if it did not retain the documents for a minimum of 5 years. He submits that the documents subpoenaed were made in 2009 -2011, that the subpoena duces tecum was issued in 2021; that there is nothing in the NBCS rules that requires the 1st defendant to keep the documents for a period of over 10 – 12 years, thus the 1st defendant is only lawfully bound to retain the subpoenaed

documents for at least 5 years. He is of the opinion that the evidence elicited by the claimant's counsel during the cross examination of the Dw1, on this issue is immaterial; that the questions asked on this issue did not specifically ask whether the bank has the documents requested for by the claimant.

Counsel submits that the address of counsel cannot substitute or replace evidence before the court. On this note, he referred the court to *SHARING CROSS E.S LTD V UMARU ADAMU ENT. LTD (2020) 10 NWLR (PT. 1733) 561 AT P. 590, PARAS B – C AND NIGER CONSTRUCTION LTD V OKUGBENI (1987) 4 NWLR (PT.67) 787 AT 792.*

He argued further that none of the documents listed in subpoena referenced a USD Fixed Deposit Account or stated an account number in respect of same. He is of the opinion that since the basis of the claimant's complaint is in respect of the USD Fixed Deposit Fund Account and funds allegedly missing from same, that the claimant has failed to show the court how the non production of documents relating to other accounts is germane to his complaint and the investigation of same. He argued further that it is wrong that the 1st defendant failed to produce findings of its investigation; that the 1st defendant tendered its response on the complaint of the claimant in its letter to the Federal Competition and Consumer Protection Commission dated 26th July, 2019; email sent by the 1st

defendant to the claimant dated January 24, 2019. Counsel for the 1st defendant argued that before the presumption of withholding evidence can validly arise it must be shown

- a. That the adverse party suppressed a document and
- b. That the document has been proven to be in the possession of the adverse party.

He argued that the claimant herein has shown nothing before this court that the 1st defendant intentionally suppressed the subpoenaed documents. He argued that the two subpoenaed documents i.e that the 1st defendant's handbook/manual is owned by the 1st defendant and the second document is the foundational document for an account owned by the claimant with the 1st defendant. He states that the remaining nine documents not produced are all bank instruments dealing with specific transactions across different years; that the inability of the 1st defendant to produce the other documents was due to the documents being untraceable following the acquisition of Oceanic Bank by the 1st defendant, more so, as they deal with specific transactions across different years. He reiterates the fact that the law does not mandate the 1st defendant to keep the instruments beyond five years. He also argued that the claimant failed to prove how the nine documents requested for are in possession of the 1st defendant. He states that the inability of

the 1st defendant to provide the nine documents cannot automatically create a presumption that the 1st defendant indeed withheld evidence. He relied on the case of *OGUONZEE V THE STATE* (1998) 5 NWLR (PT.551) 521 AT P. 553; *PML SEC. CO. LTD V F. R. N* (2015) 4 NWLR (PT. 1450) 551 AT P. 569.

A Subpoena is an Order of Court or a legal document commanding a person to lay aside all pretences and excuses; and appear before a Court named, at a date and time mentioned, to testify for a party named, subject to penalty for failure to comply. Subpoena duces tecum is a subpoena that orders a person to appear in a named Court to produce documents, records, or things. See *ALHAJA AYO OMIDIRAN v. ETTEH PATRICIA OLUBUNMI & 343 ORS* (2010) LPELR-9160(CA)

In the case at hand, the branch manager, Ecobank Nigeria Limited of plot 685, Aminu Kano Crescent, Wuse II Abuja at the instance of the claimant was ordered to produce the following documents:

1. Ecobank Staff Handbook/Manual in use as at 2021 – 2015.
2. Account Opening documents for Tochukwu Samuel Nwafor, Account No. 0031177491 including the signature mandate.
3. Instrument authorizing transfer/withdrawal in favour of Uchenna Ifediora on 11th May, 2009 for the sum of

- #20,000.00 (Twenty Thousand Naira) only from Account No: 0031177491 belonging to Tochukwu Samuel Nwafor
4. Instrument authorizing transfer/withdrawal in favour of Uchenna Ifediora on 26th May, 2010 for the sum of #17,950,000.00 (Seventeen Million, Nine Hundred and Fifty Thousand Naira) only from Account No: 0031177491 belonging to Tochukwu Samuel Nwafor
 5. Instrument authorizing transfer/withdrawal in favour of Uchenna Ifediora on 19th April, 2011 for the sum of #150,000.00 (One Hundred and Fifty Thousand Naira) only from Account No: 0031177491 belonging to Tochukwu Samuel Nwafor
 6. Instrument authorizing transfer/withdrawal in favour of Uchenna Ifediora on 29th April, 2011 for the sum of #1,820,000.00 (One Million, Eight Hundred and Twenty Thousand NairaTwenty Thousand Naira) only from Account No: 0031177491 belonging to Tochukwu Samuel Nwafor
 7. Account opening documents for Tochukwu Samuel Nwafor domiciliary Account No: 0031232202 including the signature mandate.
 8. Instrument authorizing transfer/withdrawal in favour of Uchenna Ifediora from the domiciliary account No: 00312322302 belonging to Tochukwu Samuel Nwafor on

23rd December, 2008 for the sum of \$50,000. 00 (Fifty Thousand Naira) only.

9. Instrument authorizing transfer/withdrawal in favour of Uchenna Ifediora from the domiciliary account No: 00312322302 belonging to Tochukwu Samuel Nwafor on 24th December, 2008 for the sum of \$35,000. 00 (Fifty Thousand Naira) only.
10. Instrument authorizing transfer/withdrawal in favour of Uchenna Ifediora from the domiciliary account No: 00312322302 belonging to Tochukwu Samuel Nwafor on 20th January, 2009 for the sum of \$25,000. 00 (Fifty Thousand Naira) only.
11. Instrument authorizing transfer/withdrawal in favour of Uchenna Ifediora from the domiciliary account No: 00312322302 belonging to Tochukwu Samuel Nwafor on 23rd January, 2009 for the sum of \$49,000. 00 (Fifty Thousand Naira) only.

It is not in contention that the 1st defendant was only able to produce the Ecobank Group Human Resources Policies and Oceanic Bank Executive Savings Account Signature Card. The 1st defendant's witness stated before the court that they were yet to lay their hands on the documents. Therefore, I do not hesitate to disagree with counsel for the 1st defendant that the evidence of Dw1 on this issue is immaterial; even though counsel tried to justify why the nine subpoenaed documents

were not produced before the court, address of counsel cannot substitute evidence. It is presumed that the Dw1 who testified for the 1st defendant is conversant with the facts of the case.

On the 15/2/21, the Dw1 while been cross examined stated:

Q: In standard banking practice, the bank keeps records of instrument issued by customer. Yes or No

A: Yes

Furthermore, on the 8/7/21, the Dw1 whilst under cross examination, was asked thus:

Q: You remembered the court subpoenaed you to bring some documents, please tell the court if you have the documents No 3 – 11 on the face of the subpoena

A: we tried our best to get those documents, but as at now we have not been able to get hold of them.

Can the above excerpts be replaced with the address of counsel? Certainly not! The Dw1 did not state in evidence that the subpoenaed documents were no longer in the custody of the 1st defendant or that they had complied with the Nigerian Bankers' Clearing System Rules 2018. Thus this court will not replace the evidence of the Dw1 with the address of counsel. The law is clear that address of counsel is not evidence and same cannot be relied upon by a court for purpose of proof in a claim before it. HARKA AIR SERVICES (NIGERIA) LIMITED v.

EMEKA KEAZOR ESQ (2005) LPELR-5693(CA).Per HARUNA SIMON TSAMMANI ,JCA (Pp. 52-53, paras. E-B)

Therefore I find as a fact that the argument of the 1st defendant on this issue is of no moment and same shall be discountenanced.

That being said, before the court can invoke the provision of section 167 (d) Evidence Act, a review of the evidence placed before the court must first be done and upon a careful perusal of the testimony of witnesses, exhibits vis a vis the documents subpoenaed; it is discovered in exhibit E, the statement of account of the claimant that is account no: 0031232202 Tochukwu Samuel Nwafor withdrawals were made on the 23rd& 24th December, 2008; 20th January 2009 & 23rd January, 2009. A further examination of the exhibit E, it is seen that the claimant was charged for sms alerts on the 25th July, 11 August, 16th September, 8th November, 2010, 5th January, 2010, 3rd March, 2010 & 17th March 2010. It is clear that as at 17th March, 2010 the claimant was aware of the status of his account no: 0031232202, which was \$680.98 [Six Hundred and Eighty dollars, Ninety – Eight Cents] He had the opportunity at the time the sms alerts were sent to him to raise any complaint, but he kept mute probably because of his personal dealings with the 2nd defendant. He instead chose to rely on exhibits A1 & B as his statement of account; that he did at his own peril! The claimant also had the opportunity of cross examining the Dw1 on the issue of the sms alerts charges stated in exhibit E, but chose not to do so.

Also in respect to the documents listed in Nos: 3 to 6 of the subpoena which are the instruments authorizing transfer/ withdrawal of funds from Account No: 0031177491, the claimant failed to tender the statement of account or any other document for the court to look into and make an assessment or evaluate the assertions of the claimant. The court of Appeal in MR. OLUMUYIWA SAMOND BUSARI & ANOR v. MR. SUNDAY ADEPOJU & ORS (2015) LPELR-41704(CA)

"... it is not the law that where a person or party fails to answer to a subpoena, the Court should make adverse finding against him. Rather, the law is settled that where a party fails to produce a document required in a subpoena, the law only gives liberty to the party making the demand to lead secondary evidence of the document so demanded. The failure to produce the document cannot form a basis for invoking the principle of withholding evidence pursuant to Section 167(d) of the Evidence Act, 2011. See Buhari v. Obasanjo (2005) 13 NWLR (Pt. 941) p.1 at 257 and 310."

It is not in dispute that the claimant operates account 0031177491 with the 1st defendant, however the claimant here failed to place credible evidence or documents before the court to show that monies were transferred or withdrawn from Account No: 0031177491 to another account. The production of the subpoenaed documents would still not have resolved the issue because there has to be a statement to compare same with the content of the subpoenaed documents. The burden is absolutely on the claimant to present the document before the

court; so that same can be compared with the subpoenaed documents. I therefore hold that SECTION 169 (D) EVID ACT cannot be invoked against the 1st defendant.

Going further, the claimant relied on exhibit J & K to prove his assertions. I find it pertinent to reproduce them.

Exhibit J
STANDARD CHARTERED BANK

Deal Confirmation
Date 21-Apr-2017

Tochukwu Nwafor,
Block B25 Plat 6,
Zone 3, Games Village,
Abuja, Nigeria.

Deal Number: 33047427811

Dear Customer,

We have the pleasure in confirming the details of your Fixed Deposit Other as follows:

Currency	US Dollar
Principal Amount	924,376.73
Start Date (dd/mm/yyyy)	21/03/2017

Term (No. of Days)	60
Maturity Date (dd/mm/yyyy)	22/05/2017
Interest Rate % p.a.	1.6900
Next Repricing Date (if any)	
Interest Application Frequency (if any)	
Total Interest Payable	2,610.79
Less: Tax Due	261.08
Net Interest Payable	2,349.71
Net maturity Amount	926,726.44

Exhibit K

Femaz

Microfinance Bank Ltd
RC: 1253223

March 1st, 2017,
TOCHUKWU NWAFOR,
C/O Danifed Investment Ltd
Abuja.

Cc:

The Director,
Other Financial Institution Supervision Department
Central Bank of Nigeria

Dear Sir,

LETTER OF COMMITMENT

We write to acknowledge your investment of ₦332,775,622.80 (Three Hundred & Thirty Two Million, Seven Hundred & Seventy Five Thousand, Six Hundred & Twenty Two Naira, Eighty Kobo Only) with Femaz MFB and earnestly apologize for our inability to pay back your investment and accrued interest as at when due.

The Bank however wishes to state its commitment to pay 35% of your Principal Investment at the end of March, 2017, and the balance of 65% by end of April, 2017.

As we crave your indulgence to bear with us in accepting the above commitment, please be assured of our highest regards.

Yours Faithfully,

For: Femaz Microfinance Bank Limited

Sandra Nwugo

MD/CEO

The 1st defendant denied knowledge of the above exhibits. See paragraph 16 of the statement of defence wherein the 1st defendant put the claimant to the strictest proof of same. The burden again is on the claimant to prove that those exhibits emanated from the 1st defendant. On the face of the exhibits, it is glaring that the exhibits are not from the 1st defendant, thus cannot be binding on the 1st defendant. An agreement can only

bind the participants. It cannot bind outsiders and no Court has the power force it on such outsiders. See DASON MULTI-PURPOSE CO-OPERATIVE SOCIETY (NIG) V. IMEKANSON TRADECO & PRESS LTD & ORS (2002) LPELR-12697(CA)

The claimant's response was that it was the 2nd defendant who forwarded exhibit J to him. Under cross examination, the pw1 was asked these questions

Q: see para 17 wso 14/11/2019

A: The statement is correct

Q: were there formal communications from the 1st defendant to you

A: there was communication from the 1st defendant through the 2nd defendant

A: why did you seek clarification

A: I sought clarification because I didn't open an account with standard chartered bank neither did I open an account with femaz bank, therefore when I saw those documents I asked questions and at the time I was satisfied with the answer that I received.

Q: how did you seek the clarification

A: there were telephone conversations and there may also have been some emails

Q: you also stated in evidence that you got responses and you were satisfied; who responded or clarified that issue

A: the 2nd defendant, my bank officer

Q: take a look at exhibit J; is there anywhere ecobank or oceanic is written on the document

A: no, I can't see

Q: who sent this document to you

A: I believe it was my bank officer, the 2nd defendant

Q: did you confirm the authenticity of this document

A: yes I did, I sought clarification and spoke with my bank officer, the 2nd defendant

Q: did you confirm the authenticity from Standard Chartered Bank

A: I didn't

Q: it is safe to conclude that you trusted the 2nd defendant so much to not seek the clarification of this document exhibit J

A: the answer to that question is quite to the contrary, I trusted the 1st defendant so much that I took the word of their officer

It is not in doubt that the 2nd defendant was an employee of the 1st defendant as of the time/period the claimant was issued with exhibits J & K; however it seem the claimant was so comfortable doing business or relating with the 2nd defendant in respect to his accounts with the 1st defendant that he failed to have recourse to the 1st defendant or the Standard Chartered Bank. The claimant who alleged that he opened a USD Fixed Dollar Account with the 1st defendant in 2012 and, in 2017 was issued

with documents on the letter heads of other banks, failed to carry out due diligence to verify the authenticity of the documents. Also a review of paragraphs 15, 16 & 17 of the statement of claim shows some inconsistencies in the evidence of the claimant. In one breadth he states that he was sent his account updates. He tendered exhibit I of January 19, 2018 See paragraphs 15 & 16 of the statement of claim and in another breadth in paragraph 17 of the statement of claim he states that he was informed by the 2nd defendant that the 1st defendant fixed deposit account investment was operated in collaboration with the Standard Chartered Bank. He relied on exhibit J of 21 April 2017; it is also clear from the two documents that the time lag between the dates was more than a year, meaning the claimant waited for more than a year to sought clarification of Exhibit J. Exhibit J speaks for itself and as stated earlier the 1st defendant was/is a party to the document; not even the logo or stamp of the 1st defendant is on exhibit J. Same argument goes for exhibit K. The 1st defendant not being a party to exhibit K cannot be held liable for the content stated therein. DASON MULTI-PURPOSE CO-OPERATIVE SOCIETY (NIG) V. IMEKANSON TRADECO & PRESS LTD & ORS (supra)

Also in paragraphs 4 a& b of the claimant's witness statement on oath attached to the Reply to the 1st defendant's statement of defence thus:

Para 4a claimant's witness statement on oath of 3rd March, 2020
"In addition to the accounts stated by the 1st defendant, I operated a United States Dollar fixed deposit account with the 1st defendant which the 2nd defendant confirmed in a phone conversation with the claimant. An electronic copy (in a compact diskette) of the recorded conversation between the 2nd defendant and me on the 29th of November, 2018 is hereby pleaded and will be relied on during the subsistence of this suit"

Para 4b

"I periodically make deposits in all of my accounts maintained with the 1st defendant including the United States Dollar Fixed Deposit account"

The claimant failed to produce the certificate issued to him by the 1st defendant evidencing the Dollar Fixed Deposit Account. A certificate, deposit slip or evidence of transfer from an account to the said Dollar fixed deposit account with the 1st defendant would have settled the knotty issue in this proceeding. Unfortunately, the claimant failed to produce any document to buttress his facts. The claimant was also not specific with dates. There is no evidence of when the USD Fixed Deposit Account was opened; the date money was transferred to and from Fortis Bank Microfinance Bank. Also, he alleged that he makes deposits to all his accounts, including the United States Dollar Fixed Deposit Account. Pw1 stated in evidence that based on

his instruction for transfer of money from his account, the defendants carried out some transfers by installments; that the monies transferred to him were purportedly made from his USD Fixed Deposit Account with the 1st defendant. These facts were told to the claimant by the 2nd defendant and nothing more! How did he instruct the defendants? Was it in writing or orally? The claimant didn't provide answers to these questions and it is not the duty of the court to act on speculations. The law is that 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. See TSOKWA OIL MARKETING CO. NIGERIA LIMITED v. BANK OF THE NORTH LIMITED (2002) LPELR-3268(SC)

I must also state that the failure of the 2nd defendant to participate in this proceeding will not stop the claimant from proving the existence of his claim. A party who desires a court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts shall prove that those facts exist. See s. 131 (1) Evidence Act. In this case, the claimant has a bounden duty to prove his assertions; he is to rely on the strength of his own case and not to depend on the weakness of the defendant's case. He has the duty to plead and prove every material fact that is necessary by credible evidence for the success of his case and the duty of the court is to weigh the evidence placed before it on an imaginary scale of justice before arriving at a decision.

The success of the claimant's case is for him to prove the opening and operation of the United States Dollar Fixed Deposit Account with the 1st defendant and as I have somewhere in the judgment found that the claimant failed to prove the salient facts that he maintained the said account with the 1st defendant; these facts remain unproved; the case of the claimant is therefore begging for dismissal against the defendants.

Accordingly, the claims of the claimant fail and are dismissed. Parties shall bear their cost.

ASMAU AKANBI – YUSUF

[HON. JUDGE]