

IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY ABUJA
IN THE ABUJA GWAGWALADA DIVISION
HOLDEN AT COURT NO. 13 GWAGWALADA
BEFORE HIS LORDSHIP: HON. JUSTICE A. S. ADEPOJU
THIS 31ST DAY OF JANUARY, 2024

SUIT NO: FCT/HC/CV/2457/2020

BETWEEN:

MR. UTI OJUGBELI AUGUSTINE ----- CLAIMANT

AND

UNITED BANK FOR AFRICA (UBA) PLC ----- DEFENDANT

M. G. NDATSU for the Claimant

E. D. OLOLO for the Defendant

JUDGEMENT

The Claimant filed this Suit against the Defendant via a writ of summon dated 24th August, 2020 wherein he sought the following reliefs:

1. An Order of this Honourable Court directing the Defendant to pay the Plaintiff **N4,700,720.00** being the total sum of money debited from the Plaintiff's account by the Defendant without authorization.
2. An Order of this Honourable Court directing the Defendant to pay the sum of **N50,000,000.00** as general damages to the Plaintiff for the trauma, shocks, stroke, severe suffers due to the act of the Defendant.
3. An Order of this Honourable Court directing the Defendant to pay the sum of **N2,000,000.00** as the cost of litigation.

In the statement of claim, the Claimant stated that he is a retired Civil Servant, who resides in Tungan Maje, Anguwar Kwasur, Gwagwalada, FCT –

Abuja. That he retired from the Federal Ministry of Lands, Trades and Investment in 2016 while the defendant is a Company, registered and doing business in Nigeria. The story of the Plaintiff is that he opened a Savings Bank Account No. 2087109287 with the Defendant at its Gwagwalada Branch. That on the 16th June, 2017 his retirement benefits (entitlements) of about **N5,000,000.00 (Five Million Naira Only)** were paid into his aforesaid Bank Account. And that on Saturday the 19th August, 2017 he went to the ATM of the Gwagwalada Branch of the Defendant, inserted his ATM Card, and conducted an automated money transaction, (meant for cash withdrawal) but instead of receiving cash payment, his card was seized by the machine. That after waiting for several hours, and the machine did not release the card, he reported to the Security Officer on guard at the Branch, who directed him to report to the Defendant's Gwagwalada Branch Head of Accounts (Head of ATM) which he did on Monday the 21st August, 2017 being the next working day.

Claimant stated that the then Head of Savings Accounts of the Defendant's Gwagwalada Branch, Mr. Sam (whose Phone number was 0817587900) told him that there is nothing the Branch Could do, therefore he should report to the Nigeria Police. That he felt disappointed and disturbed by the response from the Defendant's Branch because of his money that is being withdrawn using his ATM Card that was seized by the ATM at the said Branch. That from Saturday the 19th August, 2017 to Monday the 21st August, 2017 several Fraudulent withdrawals were made out of his Account without his knowledge and authorization. That despite putting the Defendant on Notice

of the fraudulent dealings with his Account on the 21st August, 2017, the Defendant did nothing to close the Account in order to stop further fraudulent withdrawals until the sum of N4, 700, 720.00 (Four Million, Seven Hundred Thousand, Seven Hundred and Twenty Naira) was fraudulently withdrawn from the Account.

The Claimant further stated that the Defendant owes him the duty of care not to facilitate or enable fraudulent withdrawals from his account aforesaid, but the Defendant failed to keep the said duty. That he reported the fraud to the Nigeria Police, Gwagwalada Police Division, FCT, Abuja, where the then Branch Manager of the Defendant's Gwagwalada Branch was invited and they agreed to cause the stolen money to be reverted and repaid to him, but since then, nothing has been done. That thereafter the Police transferred the matter to the FCT, Command, Garki, Abuja, where inspector Dogara (who gave his phone as 08036007139) investigated the Fraud, but the Defendant failed to do as agreed. That he thereafter wrote to the Economic and Financial Crimes Commission (EFCC) through his counsel Messrs Ultimate Chambers, Omar & Co. to investigate and prosecute the Defendant and any of its staff found to be a party of the fraudulent act. And that since the 19th August, 2017 he did not withdraw any money from the said account; despite the fact that he has no other source of money, having retired from service and the account being the source where he draws income in order to care for himself and his family.

Claimant also stated that the acts of the Defendant caused trauma and shock to him as a result of which he is down with a stroke that he cannot

walk, having been admitted in hospital for medical treatment. That he planned to invest the retirement benefits (entitlements) paid to him by the Federal Government in a business that could sustain him and his family but the fraudulent act of the Defendant defeated his plans; making him and his family to suffer loss, severe pains and hardship. That he could not properly take care of his family, feed well and get better medical treatment for his health because of the state the Defendant pushed him into since the 19th August, 2017 till date.

Lastly the Claimant stated that he believe that the Defendant is clearly responsible for the unauthorized withdrawals of the (Four Million, SevenHundred Thousand, Seven Hundred and Twenty Naira) from his account causing him huge loss; or they were grossly negligent on the issue for at least not blocking the trapped ATM to prevent or frustrate the fraudulent withdrawals. That he instructed his counsel at Messrs Ultimate Chambers, Omar & Co, Parks & Garden Complex, Suleja, Niger State to take up this action for a fee certain.

The Claimant's wife. **Mrs. Roseline Uti Ojugbeli**, also testified as PW2. In her adopted statement on oath she averred as follows:

That she knows that the Plaintiff opened and maintains a Savings Account with the Defendant for years. That in 2017 the retirement benefits of the Plaintiff of about **₦5,000,000.00** were paid into his bank account with the Defendant. That on the **19th August, 2017** the Plaintiff went to the ATM of the Defendant at Gwagwalada Branch to make withdrawal but in the process; his ATM Card was seized by the machine. That the Plaintiff returned

home that same day disturbed that his ATM Card was seized and he was unable to get any money for the family. That within the period from the 19th to the **21st of August, 2017** the Plaintiff became more troubled that several unauthorized withdrawals are being made from his account with the Defendant.

She averred further that she is aware of the effort the plaintiff made in order to stop the fraudulent withdrawal of his money with the Defendant, but the Defendant's negligence led to the loss of his **₦4,700,720.00**. That the Plaintiff reported the fraud to the Nigeria Police Force, Gwagwalada, and then it was transferred to the FCT, Command, Abuja but when no result was coming she resolve with him as a family to get the services of a lawyer to help him take up the case against the Defendant. And he engaged the services of the lawyers in Messrs Ultimate Chambers Omar & Co. in Parks and Garden Complex, Suleja, Niger State. That the Plaintiff who intended to invest the money for the good of his family could not because of what happened with his money in the possession of the Defendant. That the Plaintiff became ill and has been down with stroke due to the trauma and stress he was made to pass through by the Defendant, most especially his inability to take proper care of his own dear family. That she have been the one taking care of him since his health complications started seeking medical attention in the Hospital for him to survive. That she believe the Defendant contributed greatly in putting the Plaintiff in the present worst condition of ill health and financial (economic) challenge.

In support of his claim, the Claimant tendered and had admitted the following documents, to wit:

- i. Statement of Account - **EXHIBIT A**
- ii. The documents of medical treatment - **EXHIBIT B1, B2, B3**
- iii. Client's consultation form containing
Professional charges - **EXHIBITB4**

The Claimant's witnesses were cross examined and thereafter discharged by the court.

In rebuttal of the Claimant's claim, the Defendant filed a statement of defence where it averred follows:

That the Claimant operates a savings account 2087109287 domiciled at 39, Faskari Street Area: 3, Garki Abuja. The account was opened on February, 29th 2016. That instant debit card was issued on the Claimant account and activated on May 24, 2017. That the transaction being the subject matter of this suit were carried out with customer's account linked to the debit card issued to the claimant. And that the Claimant's account statement confirms that said transaction forming the subject of this transaction is totalling NGN4,175,434.43 (Four Million, One Hundred and Seventy Five Thousand, Four Hundred and Thirty Four naira, Forty Three kobo) (Charges inclusive), contrary to the Claimant's claims that the repudiated transactions amounted to NGN4, 700,720.00

(Four Million, Seven Hundred Thousand, Seven Hundred and Twenty naira).

The Defendant in their statement of defence also stated that preliminary investigation of the Defendant via info pool Finance Transaction application review indicated that the transactions forming the subject of this suit were Customer Induced (CI) ATM and POS transactions, carried out at the following terminals.

S/N	Terminal ID	Transaction Type	Acquire Bank	Location
1	17012886	ATM	FBN	Otukpo6 Benue in Nigeria
2	10572018	ATM	ZENITH	AHMADU BELLO WAY OT, Nigeria
3	12140442	ATM	FCMB	FCMB Abuja2 ATM2 Ogbomo street in Nigeria
4	10583972	ATM	GTB	GTBank Plot 1088 Cadastral

				A1G in Nigeria
5	10320373	ATM	UNION	HADEJIA CLOSE ABUJA -3 Abuja in Nigeria
6	10331817	ATM	UBA	COMMERC IAL RD BO ATM 7 BENUE in Nigeria
7	20397735	POS	IBTC	OHONYET A THRIFT & LO BE in Nigeria
8	201129EA	POS	FBN	Mercy Communic ation BE in Nigeria
9	20500626	POS	ECO	DE PAYLESS SUPERMA RK FC in Nigeria
10	22147B41	POS	FCMB	VALGOZ VENTURES

				LIMITED in Nigeria
11	2058Y414	POS	GTB	MEHDI GLOBAL SERVICES LFC in Nigeria.

That the ICC card was read by the ATM terminal, confirming the person who carried out the repudiated transactions had custody of the physical card containing customer's sensitive details, in combination with her valid Personal Identification Number (PIN). That access to Claimant's account using the card was successful (with no evidence of hacking or brute forcing attempts for PIN), indicating that the person who carried out the repudiated transactions had prior knowledge of the customer's PIN. Claimant's PIN is privy to her only.

Also that ATM transfer transactions revealed that the sum of NGN750,000.00 were moved to FBN beneficiary's account 3114675087 belonging to Abdullahi Usman, the sum of NGN 100,000.00 were transferred to Access Bank beneficiary's account 0031086067 belonging to Abubakar Mohammad and the sum of NGN650,000.00 were moved to UBA beneficiary's account 1005692179 belonging to UKER UNONGU. And that incident containment efforts were not successful on UBA beneficiary's account as fund was fully drawn down. That Access bank and FBN are yet to respond to inquiry sent to them on the incident.

The defendant further averred that Claimant's card and PIN form a two factor authentication, which are required to successfully consummate the ATM and POS transactions, implying that the sensitive authentication data of the card and the corresponding four digit PIN were compromised and used to initiate the transactions. That at all times material to this case, the Claimant was in sole possession of his PIN of his ATM card and no transaction can be successfully consummated without imputing the PIN. That all its ATM machines are programmed to display reminder messages warning users not to reveal their ATM PIN.

The defendant averred that from the CCTV footage submitted to the Police, it was established that the customer had a conversation with a stranger/bystander and gave his ATM to the said stranger/bystander when he was trying to initiate transaction at UBA branch Gwagwalada Abuja on Saturday, 19th August, 2017. That from the CCTV footage, the customer's debit card must have been swapped and the PIN compromised when he handed it over to stranger/bystander while he was trying to initiate an ATM transaction at the Gwagwalada, Abuja and the card was later used together with compromised PIN to carry out repudiated ATM and POS transactions. That the Claimant's ATM must have been swapped by the bystander who assisted the customer at the ATM point and the card that was trapped was not that of the Claimant. That all the debits on the customer's account was were carried out during non-working hours of the Defendant being Saturday 19th

August, 2017, Sunday 20th August, 2017 and before 8am of Monday, 21st of August, 2017. That the said incidence of repudiated transactions forming the subject of this transaction was never brought to the attention of the Defendant until the repudiated transactions had been completed.

The Defendant further averred that the Claimant was negligent in the use of the Automated Teller Machine card issued to him by the Defendant and the authorization PIN. And listed the particulars of negligence as follows:

- I. The Claimant having applied for and accepted the use of an Automated Teller Machine card, has a duty to keep the ATM card and the authorization PIN in safe custody at all times.
- II. That the Claimant is not expected to disclose the details of the Card and the authorization PIN to another person.
- III. The Claimant failed in that duty when he beckoned on a stranger/bystander to assist him in conducting an ATM transaction on the 19th of August, 2017 at the ATM terminal of the Defendant located at Gwagwalada, Abuja.
- IV. That it was in the course of the Claimant conversing and meddling with the stranger/ bystander that his ATM was swapped and the PIN compromised.
- V. The Claimant failed to take immediate steps to have the ATM Card cancelled/ blocked by calling the 24 hours toll free customer

service lines of Defendant where immediate actions would have been taken to cancel/ block the card.

- VI. That the Claimant waited until the usual working hours of the Defendant bank to report the incident, by which time all the repudiated transactions had been completed.
- VII. That the Defendant bank is not negligent as the repudiated transactions forming subject of this suit were duly initiated and authorized with the ATM card issued to the Claimant and PIN known to him only.
- VIII. That the Defendant is not liable to the Claimant for any purported sum at all no matter howsoever conceived.

The Defendant's sole witness, Handel Ogbuji in support of the Defendant's case tendered two exhibits to wit:

1. Statement of Account of the Claimant – Exhibit D1.
2. Certificate of Compliance with Section 84 of Evidence Act – Exhibit D2.

He was also cross-examined by the Claimant's Counsel.

Defendant's final written address was settled by Okechukwu Ajunwa Esq and a sole issue was formulated for determination by the Court to wit:

"Having regards to pleadings and evidence led in this case, whether the Claimant is entitled to the reliefs sought."

In arguing his case, Learned Defence Counsel stated that It is trite law that the burden of proof in civil cases rest on the party who asserts and cited Section 131(1) of the Evidence Act, 2011 states thus:-

“Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that these facts exist.”

And Further, Section 132 of the Evidence Act states thus-

“The burden of prove in a suit or proceeding lies on the person who would fail if no evidence at all were given on either side.”

He also referred the Court to the case of **ALADESIUN V. FADAHUNSI & ORS (2013) LPELR-21852 (CA)** where the court held as follows-

“It is settled and beyond dispute that invariably in most cases, the onus of proof in civil cases, lies on the plaintiff who has to satisfy the court that he is entitled on the evidence adduced by him to the claim he asserts. He must also rely on the strength of his own case and not on the weakness of the defence if any. Thus, it is equally the correct position of the law on the issue of burden of proof in civil cases, that the onus rests upon the party who would fail if no evidence, as the case may be, were given on either side of the divide/scale. Such onus therefore rests, before evidence is gone into, upon the party asserting the affirmative of the issue and it rests after evidence is given, upon the party against whom the Court at the time the question arises, would give judgment if no further evidence were adduced...”

That in the adjectival system of law in operation in this country, it is always, more often than not that the Claimant is required by the law to plead and support what he has pleaded by credible and convincing evidence, and that such evidence should preponderate in civil matters before his claims. That The first claim of the Clamant is for a **“an order of this Honourable Court directing the Defendant to forthwith pay the Plaintiff N4, 700, 720.00 being the total sum of money debited from the Plaintiff’s account by the Defendant.** That to determine whether this head of claim has been proved, an examination of the oral and documentary evidence tendered in this case is required. It is clear from the state of pleadings that the sum of money and the subject transaction of this suit was withdrawn from the Claimant’s account via his ATM card without any trace of hacking or forced attempt. The Defendant stated on oath thus-

“That the ICC card by the ATM terminal, confirming the person who carried out the repudiated transactions had custody of the physical card containing customer’s sensitive details, in combination with her valid personal identification number (PIN)”

That access to the customer’s account using the card was successful (with no evidence of hacking or brute forcing attempts), indicating that the person who carried out the repudiated transactions had prior knowledge of the customer’s pin.

Counsel stated further that it is settled that once a banker opens an account with the bank and deposits money into the account, a banker customer relationship can be said to have been established. This is seen as a

contractual relationship in which the bank is under an obligation to honour a request from the customer to withdraw from the account once the account is funded. He relied on the Court of Appeal decision in the case of **G.T.B v ALEOGENA 2019 LPELR 46922 CA**. That Firstly, the parties agreed that the Claimant maintains an account with the bank and was issued an ATM card in respect of the said account. And that the Claimant during cross-examination also agreed and confirmed that there was a Personal Identification Number (PIN) solely within the personal knowledge of the Claimant. He also referred the Court to the case of **CHUKWUDEME V UBA PLC & ANOR 2020 LPELR 51898 CA** where the Court of Appeal held as follows;

“...The burden of proof of therefore still rest on the Appellant since the Respondents denied liability. I agree with the submission by the respondents' counsel that this case is technical and special as it relates to the liability of a bank for the use of ATM Card by a customer. It is judicially noted and accepted that an ATM Card has imbued in it personal Identification Number (PIN) known only to the holder of the card. Thus the ATM Card can only be operated or used if the holder uses it with the personal identification number known to him alone or if he allows any other person to use it by revealing the PIN. The facts in this case is unlike the operation of a normal account where the account holder writes a cheque and present it on the counter for payment in which case the bank cashier verifies the signature and runs other checks before payment. ATM transaction is done when the withdrawals are done by the card holder outside the banking premises and even after banking hours. The moment

the correct personal identification number is used then money can be accessed from the account. It is my finding that the burden of proving that the withdrawals were not made with her ATM Card and her personal identification number rests squarely on the Appellant since those facts are within her personal and exclusive knowledge. The Respondents had no knowledge of the Appellant's personal Identification Number. The Appellant did not shift that burden, it still rests on her. This position of the law as provided by Section 133 of the Evidence Act is unassailable. Therefore, the learned trial Judge was right when he held that the burden of proving that the withdrawals were not made by her rests on the Appellant considering her pleadings in paragraphs 13 and 16 of her statement of claim that at all material times she was in possession of her ATM Card and her personal identification number was configured by her and known only to her." Per SANGA ,J.C.A (Pp. 29-30 paras. A)

That from the foregoing, it means that the Personal Identification Number of the Claimant's card being within the exclusive knowledge of the Claimant, no money or monies could have been withdrawn from the Plaintiff's account without his due authorization.

He submitted that the Plaintiff has neither through the use of oral or documentary evidence proven that the sum of N4, 700, 720.00 which was withdrawn from his account through the use of his ATM card to which he alone was in custody of the pin was done without his consent. That it is right to hold that the testimony of the Defendant is to be preferred to that of the Claimant. The reason for this is that the Defendant's position is not just an

ipse dixit dangling alone without support, but rather one which is supported and consistent with documentary evidence against which the veracity of oral evidence can be tested. That **Exhibit D1** (the Defendant's Statement of Account corroborates the Defendant's testimony and makes it more probable and believable by showing that the withdrawals made from the Claimant's account via ATM and POS transactions. That on the other side, the Claimant's testimony on this point is not supported by any credible evidence and thus does not command believability. He urged the court to find that the Defendant is not indebted to the Claimant to the sum of N4, 700, 720.00.

That it is worthy to note that the Claimant admitted to having the exclusive knowledge of his ATM pin. And Under cross-examination, the Claimant responded as follows-

Question: *You were given a PIN right?*

Answer: *Yes*

Question: *Does anyone know your pin?*

Answer: *No, not even my wife.*

Defence Counsel submitted that the entire case of the Claimant is based on mere *ipse dixit* devoid of the necessary documentary evidential support. He relied on the case of **DEBS & ORS V. CENICO (NIG) LTD (1986) LPELR- 934 (SC)** where the court addressing this kind of evidence posited thus-

“...ipse dixit literally means he himself said it. It is thus a bare assertion resting on the authority of an individual. There can be no question that a “mere ipse dixit” is admissible evidence but it is evidence resting on the assertion of the one who made it. Where there is need for further proof” a mere ipse dixit may not be enough.

That there is no doubt that issues were joined on the issue of the alleged withdrawal made from the Claimant’s account thus there was need for the Claimant to provide further evidence on this issue in support of his case and this was not done. That the duty to provide evidence is one that rest on the shoulders of the Claimant and one which he must discharge without recourse to any perceived weakness in the case of the Defendant. He further referred to the case of **ALADESIUN V. FADAHUNSI & ORS (Supra)**. That the Claimant having failed to discharge this duty, he urged the court to dismiss the case of the Claimant as it is not the duty of the court to go out of its way to fish out facts or evidence. And the court cannot also rely on instinct, intuition or speculation that evidence that was not provided must have existed. He cited the case of **KATTO V CBN (1991) 11-12 S.C. PAGE 89**, wherein Akpata JSC (of blessed memory) stated as follows:

“In the administration of justice, the court have not the liberty to act on instinct, cases are decided on proof by admissible and credible evidence and not evidence not made available to the court...”

That in this regard, the testimony of the Defendant is more logical and more probable. That the case of the Defendant is a simple one where the Defendant simply says that the withdrawal were made with the Plaintiff’s

ATM card without any traces of force or hacking and the Defendant could not have refused to honour the withdrawal request made through the ATM Machine as the conditions for such withdrawal which was the ATM Pin was provided correctly. That It is only when the Claimant has discharge the burden of showing how the sum of **N4, 700, 720.00** was withdrawn and debited from his account without his consent or approval that the evidential burden will shift to the Defendant. Counsel submitted that the Claimant in this case, failed to do so. That in spite of this, the Defendant did not rest on its oars. Rather the Defendant took a step further by providing the Court with **ExhibitD1** which is the Statement of Account of the Claimant which goes to show how the withdrawals were made from the Claimant's account on different dates and at different ATM stands and POS point.

Defendant's Counsel further submitted that the Defendant could not have dishonoured the request made through the Claimant's card to withdraw from the Claimant's account as that would amount to a breach of the duty of care the Defendant owes to the Claimant. He relied on the authority of **JWAN v ECOBANK & ANOR (2021) 10 NWLR PT 1785** where it was held as follows;

“on the effect of failure to honour an ATM card transaction where there is sufficient funds in the account of the customer ”...Therefore, the respondents as bankers to the appellant owed him a duty to exercise reasonable care, diligence and skill in carrying his instructions, which duty has been held to extend over a whole range of banking business including ATM transaction in issue. See Diamond Bank Plc v. Partnership Inv. Com.

Ltd. (2009) 12 SCNJ 322; (2009) 18 NWLR (Pt. 1172) 67 and Agbanelo v. U.B.N. Ltd. (2000) LPELR-234(SC); (2000) 7 NWLR (Pt. 666) 534. The ATM card issued by a bank being akin to a cheque, which must be honoured on request once there is enough funds in the customer's account, and failure to do that will mean the banker is in breach of the duty of care owed to its customer. No doubt it is one of banking innovations to use an ATM card by a customer to request for and withdraw cash from his bank account, and indeed a specialized banking service offered by the respondents. Therefore, the issuance of the ATM cards by the banks to its customers carry with it the duty to ensure that both the cards and the ATMs work as they are meant to and where there is failure of these services to a customer, the banks are duty bound to explain what happened. This is quite common since the ATMs and their operations are under the control and management at the banks." Per ALIYU ,J.C.A (Pp. 39-40 paras. A-A)

That it is clear therefore from the tenor of **ExhibitD1** that the monies were withdrawn from the Claimant's account using his ATM card to which the Claimant alone has the exclusive knowledge of the PIN. Counsel submitted that

Exhibit D1 is of fundamental importance to the resolution of the issue of whether or not the monies withdrawn from the Claimant's account was with or without his consent. That the Claimant failed to provide any rebuttal evidence to **Exhibit D1** and in fact also tendered his Statement of Account which narration shows that the withdrawal's made were ATM withdrawals. He urge the court on the strength of the foregoing to hold that the

withdrawals sought to be repudiated were made by the Claimant using the PIN which is in the exclusive knowledge of the Claimant.

On **CLAIM 2** the Counsel to the Defendant submitted that it is trite in law that damages mean monetary compensation obtainable by a party that succeeded in an action which is either tort or breach of contract but inherent in this definition is the fact that a party to qualify or be entitled to damages, he must have proved his case or in other words be a successful party in the case. He relied on the case of **ACCESS BANK v SIJUADE 2016 LPELR 40188 CA.**

On whether the Claimant proved that there was a tort of negligence, Counsel submitted that the law is fully settled that what is required to succeed in a claim based on the tort of negligence is to prove the existence of a legal duty of care and to go further to establish that there was a breach of such duty of care consequent upon which a damage, injury or economic loss was suffered. That it is also a settled principle of law that in an action based on negligence, the Claimant must show that the Defendant owed him a duty of care and that he suffered damages in the cause of the Defendant's failure to care. He cited the case of **IYERE v BENDEL FEED & FLOUR MILL LTD 2008 LPELR 1578 SC** where the apex court held as follows:

“the burden of proof of negligence is on the Plaintiff and the onus as is in all other civil matters which is not static does not shift to the defendant until the Plaintiff's proof the Defendant's negligence. What the Plaintiff must proof in this case are ;(1) that the defendant owes him a duty of care (2)that there is a breach of that duty (3)an injury to the Plaintiff has

occurred and between which and a breach of duty a casual connection must be established. "

That the established legal position is that the Onus of proving negligence is on the Claimant who alleges. Thus, where a Claimant pleads and relies on negligence by conduct or action of the Defendant, he or she must prove by evidence the conduct or action and the circumstances of its occurrence giving rise to the breach of the duty of care. That It is only after this is proved that the burden shifts to the Defendant to adduce evidence challenging the negligence. Defendant's Counsel submitted that the Claimant, by being a customer of the Defendant, the Defendant owes him a duty of care. However, even though the Claimant has proven the existence of a duty of care between him and the Defendant, the Claimant has however failed to establish that there was a breach of that duty consequent upon which a damage, injury or economic loss was suffered.

He stated further, it was not proved by that the Defendant directly or indirectly caused monies to be withdrawn from the account of the Claimant as the withdrawals were made smoothly without any traces of force, hack or even a trace of inputting a wrong PIN at the point of withdrawals. Rather it was clearly shown by the narrations contained in **Exhibit D1** tendered by the Defendant and **Exhibit A** which is the Statement of Account of the Claimant that the withdrawals were made via the ATM and POS. Also, the Claimant also confirmed during cross-examination that he alone has the exclusive knowledge of this PIN. He submitted that if there was an incident, a court of law considering a claim on negligence must while considering the evidence

before it, ask and answer the question of whose conduct substantially caused the event. He relied on the case of **N.P.A V RAHMAN BROTHERS LIMITED(2010) LPELR-8962 (CA)**.

With respect to the question posed above, Defendant's Counsel submitted that it is conduct of the Claimant that substantially contributed to the event. And this he did in the following ways:

- a. The Claimant having applied for and accepted the use of an Automated Teller Machine Card, has a duty to keep the ATM card and the authorization pin in safe custody at all time.*
- b. The Claimant is not expected to disclose the details of the card and the authorization pin to another person.*
- c. That after the alleged withdrawals was made from the Claimant's account, the Claimant failed to take immediate steps to have his ATM Card cancelled/blocked by calling the 24 hrs toll free customer service lines of the Defendant where immediate actions would have been taken to cancel the blocked card.*
- d. The Claimant waited until the usual working hours of the Defendant bank to report the incident, by which time all the repudiated transactions had been completed.*

That in addition to the foregoing, the Claimant was also negligent when he handed over his debit card to a stranger/bystander while he was trying to initiate an ATM transaction at the Gwagwalada Abuja branch of the Defendant which resulted into the card been used together with

compromised PIN to carry out the repudiated transaction. That on this the Claimant failed to traverse or rebut by filing a reply.

Learned Defendant's Counsel submitted that failure of the Claimant to file a reply to averments in the Statement of Defence which has not been taken care of by the averments in his Settlement of Claim, he would be deemed to have admitted the averments in the Statement of Defence. He relied on the case of **BINDIR V BASHAR & ORS 2019 LPELR 48991 CA**. He also referred the Court to refer my Lord to the case of **ALIBI V AUDU 2017 LPELR 4287 CA** where the Court of Appeal held as follows:

"The primary purpose of pleadings is to prepare the minds of the parties and the Court to know the case to be presented at the trial by each party, and to define and delimit with clarity and precision the real matters in controversy between the parties upon which to prepare and present their respective cases. It is designed to bring the parties to an issue upon which the Court will adjudicate between them. See Kyari v. Alkali (2001) 11 NWLR (Pt.724) 412 at 433-434 paras. H-A. It is therefore of utmost importance that both parties be comprehensive and accurate in their pleadings. In that regard, a plaintiff's averment of facts must be met by the defendant frontally and categorically. The essential averments in the statement of claim should be specifically traversed. In order to raise any issue of fact, there must be a proper traverse; and a traverse must be made either by a clear denial or non-admission, either expressly or by necessary implication. A denial of a very material allegation of fact must not be general or evasive, but specific. Therefore, every allegation of fact, if not denied

specifically or by necessary implication shall be taken as admitted and established. Putting it in a different way, where a party fails to join issues on material averments, he is deemed to have conceded the points made in those averments.

Counsel submitted that the Claimant has failed to prove a breach of the duty of care owed to him by the Defendant as well as the damages or economic loss incurred as a result of the alleged breach *and* urged the court to so hold and to dismiss claim 2 on the Claimant's Statement of Claim.

On **CLAIM 3** Learned Defence Counsel submitted that a claim for solicitor's fee is not a cognizable relief and cannot be granted by this court. It offends public policy for a party to an action to foist on his adversary the cost of his solicitor's fees in the absence to of an agreement on this. He cited the decision in **SUFFOLK PETROLEUM SERVICES LTD. V ADNAN MANSOOR NIG. LTD. & ANOR (2019) 2 NWLR (PART 1655) 1 CA** where the Court held thus-

"There is no basis for the award of professional fees allegedly paid by a party in respect of a case and the other party cannot be made liable for fees paid by the party. It is an unusual claim and difficult to accept in Nigeria. The issue of damages as an aspect of solicitor's fees is not one that lends itself to support in a court of law. [Nwanji v. Coastal Services (Nig.) Ltd. (2004) 11 NWLR (pt. 885) 552; Ihekwoaba v. ACB Ltd. (1998) 10 NWLR (pt. 871) 590 referred to.] (P. 33, paras D-F)."

And the decision in **GUINNESS (NIG) PLC V. NWUDE (2000) 15 NWLR (PT. 689) 150** wherein the Court posited thus:

“It is unethical and an affront to public policy for the litigant to pass on the burden of his solicitor’s fees to his opponent in a case.”

And also the apex court decision in **NWANJI V. COASTAL SERV. (NIG.) LTD (2004)11 NWLR (PT. 885) 561 @ 569** per Uwaifo JSC:

“The issue of damages as an aspect of solicitor’s fees is not one that lends itself to support in this country... I think the above observation remains valid and do endorse it.”

And urged the court to dismiss this head of claim also. In conclusion Defendant’s Counsel urged the court to resolve the issue raised and arguments canvassed thereon in favour of the Defendant and dismiss the case of the Claimant with substantial cost

The Claimant’s Counsel on his part also raised a sole issue for determination to wit:

Whether the Claimant has proved his case against the Defendant to be entitled to the reliefs sought?

In arguing his case, the Claimant’s Counsel answered this question in the affirmative that he has proved his case against the Defendant and that he is entitled to all the reliefs sought by him before this Honourable Court. That during cross-examination of the Claimant, it was affirmatively established that the account from which the sum of N4,700, 720.00 was fraudulently withdrawn was the salary account of the claimant which was converted by the Defendant (at the instance of the Claimant) to a savings account. That

also, during cross-examination of the Claimant by the Defendant's Counsel, it was established that the Claimant was issued A.T.M card by the Defendant, and that he was using the card to withdraw money from his account until the 19th of August, 2017 when the Defendant's A.T.M swallowed the Claimant's card. That the Claimant denied calling on somebody (a total stranger) to help him on the transaction of the 19th August, 2017 and that he did not disclose his A.T.M. PIN to anybody.

That the efforts by the Defendant to establish before this Honourable Court that the Claimant has compromised his A.T.M PIN yielded no positive result. That the Claimant clearly stated before this Honourable Court that no body, "No, not even his wife" knows his A.T.M Card PIN. That the Defendant failed to lead evidence to prove to the contrary that indeed, the Claimant has compromised his A.T.M PIN.

Learned Claimant's Counsel submitted that from the foregoing, it is not in doubt that the Claimant had and maintains a savings Account **No: 2087109287** with the Defendant (UBA) as admitted by the Defendant in paragraph 3 of its Statement of Defence and paragraph 4 of its Witness Statement on Oath respectively. That it is also not in doubt that the sum of **N4, 175, 434.43 (Four Million, One Hundred and Seventy-Five Thousand, Four Hundred and Thirty-Four Naira, Forty-Three Kobo)** was without authorization and fraudulently withdrawn from the Claimant's savings account with the Defendant. That This was the admission of the Defendant in paragraph 9 of its Statement of Defence and paragraph 7 of its Witness Statement on Oath respectively.

Counsel further submitted the Defendant's witness (DW1), was cross-examined by Counsel to the Claimant based on its defence before this Honourable Court, and it was clearly established that the Defendant's Defence is baseless (having no substance). That the Defendant stated in paragraph 13 and 14 of its Statement of Defence the different sums and amount transferred from the Claimant's Bank account to different Bank Accounts (First Bank, Access Bank and UBA Bank Accounts) respectively and to different persons; and that incident containment effort were not successful on UBA beneficiary account as fund was fully drawn down. That Access Bank and FBN are yet to respond to inquiry sent to them on the incident. But that when DW1 was asked during cross-examination, whether he has placed in evidence before this Honourable Court anything to show that the Defendant (UBA) has sent any inquiry to Access Bank or FBN? His answer was "Yes, but not presented to the Court". Learned Counsel to the Claimant submitted that, the Defendant in paragraph 10 of its Statement of Defence mentions eight (8) Banks in total, but no evidence was placed before this Honourable Court to show that the Defendant has indeed taken urgent steps in conjunction with these Banks to save the Claimant the huge loss. That the conduct of the Defendant shows clearly that it has compromised its position as the Claimant's Bank.

Counsel stated further that in paragraphs 18 and 19 of the Defendant's Witness Statement on Oath, the Defendant, through its Witness, mentioned CCTV footage it submitted to the police and that the said footage established that the Claimant had a conversation with a stranger/bystander

and gave his ATM Card to the said stranger who swapped it with another ATM card. But when the DW1 was asked during cross-examination on whether he has placed in evidence before this Honourable Court the said CCTV footage, his answer was “No”. and also when DW1 was further asked whether he has placed in evidence the ATM card that was swapped by the stranger/bystander with that of the Claimant which the DW1 said it was trapped by the Defendant’s ATM his answer was “No”. That this clearly shows that the Defendant is wanting and has failed to exonerate itself from liability for the loss suffered by Claimant. Counsel argued that the Claimant insisted that his ATM Card was seized by the Defendant’s ATM (Machine) and was then used by insiders. That the Defendant has failed to produce the stranger’s or bystander’s ATM Card that it has alleged that was swapped with that of the Claimant. He submitted that the failure on the part of the Defendant to produce contrary evidence in this regard amounts to an admission of liability.

Learned Counsel further argued that it was established during cross-examination of DW1 that the Defendant operates in line with the Central Bank of Nigeria (CBN) cashless policy. Also, when DW1 was asked whether there is a limit to the amount a customer of the Defendant can withdraw in a day by ATM or transfer; he said “Yes”. And when DW1 was further asked whether the Claimant (as a customer to the Defendant) was exempted from the limit, his answered was “No”. Yet the Defendant negligently allowed withdrawals from the Claimant’s account of over N4,000,000.00 in just a day (being 21st August, 2017). He urged the Court not to allow the Defendant

escape from liability of the loss it has caused the Claimant. That the Defendant presented itself as being competent and has systems that cannot be compromised, but in the Claimant's case, it has failed. Its systems could not limit or stop any further withdrawals exceeding the limit placed on Claimant's savings account.

Counsel further argued that when DW1 was confronted with **Exhibit PW1** (Claimant's Bank Statement of Account) during cross-examination and was asked to show where the Claimant's Bank Account was debited on the 19th August, 2017 and 20th August, 2017, DW1 failed to show any withdrawal on the said dates. Even though it was clear (as per **Exhibit C1**) that over **N4,000,000.00 (Over Four Million Naira)** was withdrawn (using ATM/POS) on the same 21st August, 2017, DW1, dishonestly said that it was **N50,000.00 (Fifty Thousand Naira)** only that was withdrawn on the 21st August, 2017; this shows that the DW1 is not a witness of truth.

He argued that, by the Claimant's Statement of Claim and the evidence placed before this Honourable Court, it has been established that the Defendant acted negligently, and has indeed aided the fraudulent withdrawals of the **N4,700,720.00 (Four Million, Seven Hundred Thousand and Seven Hundred and Twenty Naira)** only out of the Claimant's Savings Account with the Defendant in few hours. The Defendant (on its own) allowed such huge amount (Millions of Naira) to be withdrawn and transferred in just a day, in excess of and exceeding the transaction limit on the Claimant's savings account. That this is a violation of the duty of reasonable care that the Defendant owes the Claimant. That a Bank has a

duty to exercise reasonable care and skills in carrying out its part with regards to the operations with its customers. He relied on the authority of **U.B.A PLC VS. G.S. IND. (NIG) LTD. (2011) NWLR (PT.1250) P.590** and submitted that the negligent act of the Defendant has caused great loss to the Claimant. That the reality of losing his entire life savings being his retirement benefits, caused severe pain, trauma and hardship to the Claimant and his entire family; which also lead to the Claimant present health situation of having to battle with stroke. That the Claimant ought to have been undergoing (regular) medical treatment in order to gain strength to walk normal, but because of financial challenges, his stroke condition is still there. That **Exhibits B1, B2 and B3** are documents of medical treatment to show that the Claimant is not fit and healthy. He submitted that the Defendant is liable to pay **N50,000,000.00 (Fifty Million Naira)** as general damages to the Claimant in negligence and for the pains, trauma, economic hardship and health challenges that that it has caused the Claimant. He relied on the cases of **O. M. T. CO. LTD. V. IMAFIDON (2012) 4 NWLR (PT.1290) P.332; TAYLOR V. OGHENEOKO (2012) 13 NWLR (PT.1316) P.46** and submitted that it is trite that were a banker present itself as being professionally competent and skilled to execute certain obligations inherent in a transaction, but eventually shirks that responsibility; it shall constitute a prima-facie act of negligence, having failed in the duty of care it primarily owes its customers. He also relied on the cases of **LINTON IND. TRADING CO. (NIG) LTD. V. CBN (2015) 4 NWLR (PT.1449) P.49; FIRST BANK NIG. LTD V. AFRICAN PETROLEUM LTD (1996) 4 NWLER (PT.443) P.438.**

The Claimant's Counsel argued further that Claimant has discharged his burden of proof in this case as imposed upon him under Section 133 of the Evidence Act (2011). That he has established that he maintains a savings account with the Defendant, he also established that over Four Million Naira was fraudulent and without his authorization, withdrawn from the said savings account, caused by the Defendant's negligence. That the Claimant has also established that the Defendant failed in keeping to the duty of reasonable care and skills that it owes the Claimant; instead, it has chosen to act negligently. That the Claimant has physically appeared before this Honourable Court in his health condition as a stroke patient (having difficulty in walking) and showing the pains he and his family has been passing through. He urged the Court to hold that the Claimant has proved his case against the Defendant and that he is entitled to the reliefs sought. He also relied on the cases of **AKANDE V. ADISA (2012) 15 NWLR (PT.1324) P.538 (SC); AYORINDE V. OGUNRO (2012) 11 NWLR (PT.1312) P.460 (SC).**

Learned Counsel to the Claimant argued that the Defendant has failed to show that it has not acted negligently. That it has indeed, by its Statement of Defence and Witness Statement on Oath before this Honourable Court shown that it has acted negligently, having done nothing at all to stop the huge withdrawals and transfers made from the Claimant's Savings Account. That the Defendant cannot hide under the failure of the Claimant to file a Reply to its Statement of Defence. That the said Statement of Defence is a corroboration of what the Claimant has suffered in the negligent hands of the Defendant. Counsel argued that the Defendant is liable to pay the

N2,000,000.00 cost of this action, the Claimant has made several efforts since 2017 to see if the Defendant could choose the path of amicable settlement of this matter, but the Defendant refused. That the Claimant as a customer should be held in high esteem by the Defendant, but it was not so. That the Claimant has no other option but to approach this Honourable Court to seek reliefs.

In conclusion, Counsel submitted that based on the facts (pleadings) and the evidence placed before this Honourable Court, and the judicial authorities; it is clear that the Claimant has proved his case to be entitled to all the reliefs sought. He urged the Court to enter judgment in favour of the Claimant as per his claims.

This court have calmly considered the testimonies of the plaintiff and his witness, the defendant's witness with exhibits tendered. I have also perused the argument of counsel to the parties as contained in their respective written addresses. A deep evaluation of the testimonies of the plaintiff's witness clearly evince a case of lack of diligence and duty of care on the part of the defendant. The Claimant (PW1) in his narration to the court and as contained in his witness statement on oath stated:

"That on Saturday the 19th April 2017, I went to the ATM of the Gwagwalada Branch of the Defendant and inserted my ATM card and conducted an automated money transaction meant for cash withdrawal but instead of receiving cash payment my card was seized by the machine. That I waited for several hours, but the machine did not release the card, I reported to the Security Officer on guard at the Branch, who directed him to report to the

Defendant's Gwagwalada Branch Head of Accounts (Head of ATM) which I did on Monday the 21st August, 2017 being the next working day."

The witness apart from being asked under cross-examination whether the ATM machine swallowed his card or not, to which he answered in the affirmative, the witness was not cross-examined on his assertion that he reported to a guard on duty at the bank and he was asked to report to the defendant's Gwagwalada Branch Head of Accounts (Head of ATM) which he did on Monday the 21st August, 2017. It is a material fact upon which the case of the plaintiff was built, and one would have expected the defendant to cross-examine the Claimant on this fact rather than the defendant unsustainable defence that the plaintiff asked a stranger to help him with the transaction on that day.

Where a party in a case fails to challenge the evidence of its adversary on a material fact, he is deemed to have accepted such facts as the true state of affairs. See the case of **NDULUE V OJIAKOR (2013) 53 (PT. 2) NSCQR 25 " P 40 Per S. S. ALAGUA JSC** where the Court held:

"It is trite law that where a party in a case either fails to give evidence in his case as disclosed in his pleadings or facts to challenge the evidence of his adversary or opposing party, has deemed to have accepted the evidence of the opposing party notwithstanding the general traverse."

See also the cases of **ALHAJI USMAN BUA V BASHIRU DADI (2003) 13 NWLR (PT. 838) 657, FEDERAL CAPITAL DEVELOPMENT AUTHORITY V NAIBI (1990) 3 NWLR (PT. 138) 270 @ 281**. The failure of the defendant to

controvert or challenge the testimony of the PW1 (Claimant) that he reported to the security guard on the 19th of August 2017, that the defendant's ATM machine seized his card, and was directed to report to the defendant's Gwgalada Branch Head of Accounts on Monday 21st August 2017, which he did is an admission on the part of the defendant that indeed, the defendant's machine seized the claimant's ATM card.

The defendant's witness said in his testimony that the claim of the plaintiff that their ATM machine seized his card was investigated and was found out to be untrue. However all the investigations which the defendant claimed they carried out on the account of the claimant was not established by any credible evidence. The defendant failed to place in evidence the CCTV footage which it claimed showed that the Plaintiff had a conversation with a stranger/bystander and gave his ATM card to the said stranger who swapped it with another ATM card. I agree with the submission of learned counsel to the Claimant that the failure of the defendant to produce the stranger or bystander's ATM card that it alleged was swapped with that of the Claimant amount to an admission of liability on the part of the Defendant.

I also endorse the submission of the Claimant's counsel that it was established during cross-examination of DW1 that the defendant operated in line with the Central Bank of Nigeria (CBN) cashless policy. It was the evidence of the defendant's witness that there are limits to the withdrawal of funds from the account of the claimant and their customers in a day and negligently allowed withdrawal of over **N4,000,000 (Four Million Naira)**

from the Claimant's account just one day. From the statement of account of the Claimant tendered, it showed that all the fraudulent withdrawal from the account of the Claimant were carried out in one day on the 21st day of August, 2017; this is contrary to the unproven claim of the defendant's witness that the withdrawal or debits were made on the claimant's account during the non-working hours of the defendant. The statement of account (Exh D1) tendered by the defendant's witness is at variance with the witness's oral testimony.

Therefore I do not believe the evidence of the defendant's witness and hold that it is unreliable, devoid of any probative value. One would expect the defendant to diligently conduct an enquiry on the allegation of the Claimant and found out from the Security Guard on duty if the card of the Claimant was seized by their machine or not. And promptly take action to prevent illegal withdrawals from the Claimant's account. The probability that the Claimant's card was picked by an insider on Monday 21st August 2017 when the bank opened for business was very high. There is no evidence that the Security Guard(s) that were on duty on the 17th day of August 2017, the day of the incident was called to question.

The contention of the defendant that the Claimant must have compromised his PIN number was a figment of the imagination of the Defendant, the Defendant having failed to explain what happened to the Claimant's card that was trapped in their ATM machine is deemed to be liable for the loss caused to the Claimant. It is trite that the standard of proof in civil matters is based on balance of probabilities and preponderance of evidence. See

Section 134 of the Evidence Act 2011, the case of **OKADEGBE V MUHAMED & OR (2021)LPELR 55191 CA, ETSU & ORS V NNAKA & OR (2022) LPELR 57516 CA**. The burden of proof in civil matters is on he who asserts. I am satisfied that the Claimant has proved his case on balance of probabilities and preponderance of evidence. The relationship between the Claimant and the Defendant is that of a Banker-Customer which imposes a high degree of duty of care on the part of the Defendants. The Defendants have breached the duty of care and cannot escape the attendant consequences.

Consequently, I hold that the Claimant's claim succeeds and it is hereby ordered as follows:

- i. The Defendant is hereby directed to pay the Plaintiff **N4,700,720.00 (Four Million Seven Hundred Thousand, Seven Hundred and Twenty Naira)** being the total sum of money debited from the Plaintiff's account by the Defendant.

General damages are awarded to assuage the natural loss occasioned by the act of the Defendant and which is generally unquantifiable and left to the discretion of the Judge. See the case of **UKAM VON, JP V TRANSCORP METROPOLITAN HOTELS & CONFERENCE & ANOR (2021) LPELR 5414 49 CA** where the Court defined general damages as damages that the law presumes to flow from the type of wrong complained about by the victim. Thus they are compensatory damages for harm that so frequently results from either breach of contract or tort for which a party that the harm is reasonably expected and need not be alleged or proved. In other words,

general damages need not be specifically claimed. In **CAMEROON AIRLINES V OTUTUIZU (2011) 4 NWLR (PT. 1238) 512**, Rhode Vivour, JSC said;

“General damages are those laws that flow naturally from the adversary and it is generally presumed by law as it need not be pleaded or proved.”

The Claimant claimed that the withdrawal from his account was his life savings and retirement benefit. It goes without saying that such illegal withdrawal would cause emotional instability, severe pain, and hardship to the Claimant. I have also taken note of Exhibits B1, B2, B3, the medical report that shows that the Claimant is undergoing treatment. As rightly stated in the authority cited, general damages need not be pleaded or proved; it is at the discretion of the Judge to imagine. For trauma and emotional distress which the Claimant is subject to as a result of the negligence and lack of diligence on the part of the Defendant, I hold that the Claimant is entitled to general damages. In consequence thereof, I hereby award the sum of **N20,000,000.00 (Twenty Million Naira)** as general damages for the Claimant.

Finally the sum of **N2,000,000.00 (Two Million Naira)** is awarded as cost of this action.

Sign

**Hon Judge
31/1/2024**