IN THE HIGH COURT OF JUSTICE

IN THE BENIN JUDICIAL DIVISION

HOLDEN AT BENIN CITY

BEFORE HIS LORDSHIP, HON.JUSTICE P.A.AKHIHIERO,

ON FRIDAY THE

2ND DAY OF AUGUST, 2024.

BETWEEN: ***SUIT NO: B/369/2015***

MR OMORUYI JOHNBULL

(Trading under the Name and

Style of Oruyi-Vine & Company)----------------------------------CLAIMANT

AND

ECO BANK NIGERIA PLC-----------------------------------DEFENDANT

JUDGMENT

The extant pleadings of the Claimant in this suit are the Claimant's Amended Statement of Claim, filed on the 9th of December, 2022, the Defendant's Statement of Defence and Counterclaim filed on the 20th April, 2016 and the Claimant's Reply to the Defendant's Statement of Defence and Counterclaim filed on the 15th November, 2016.

By his Amended Statement of Claim, the Claimant claimed against the Defendant as follows:

(a) ***A Declaration that the Defendant Bank's conduct of unilaterally blocking the Claimant's Account No.4993000695 domiciled at the Upper Siluko Road Branch of the Defendant bank is inequitable, a fundamental breach of the fiduciary duty owed the Claimant by the Defendant's bank and constituted an irreversible injurious impairment on the Claimant's business transactions with Dangote Cement;***

(b) ***A Declaration that the Defendant's Bank conduct of unilaterally blocking the Claimant's Account No.4993000695domiciled at the Upper Siluko Road Branch of the Defendant bank is a fundamental breach of the Loan Agreement between the Claimant and the Defendant entitling the Claimant to damages;***

(c) ***The sum of N10,000,000.00 (Ten Million Naira) only being damages against the Defendant Bank for the damage occasioned to the Claimant's business relations with Dangote Cement by the breach of the Defendant Bank's fiduciary conduct to the Claimant; and***

(d) ***The sum of N10,000,000.00 (Ten Million Naira) only being damages against the Defendant Bank for the damage occasioned to the Claimant's business as a result of the fundamental breach of the Loan Agreement between the Claimant and the Defendant."***

In their Counter-Claim, the Defendant Counter-Claimed against the Claimant as follows:

(i) ***The Sum of N18, 156, 979.95K (Eighteen Million, One Hundred and Fifty Six Thousand, Nine Hundred and Seventy Nine Naira, Ninety Five Kobo) being capital interest and the Bank charges as at April 5, 2016, on the loan facility granted by the Defendant to the Claimant; and***

(ii) ***Interest at 21% (as agreed) upon the said amount until judgment and 20% thereafter until final liquidation of the entire debt.***

At the trial, the Claimant testified and led oral and documentary evidence in support of his Claims.

The Claimant's case as can be deduced from his evidence is that he operates and maintains an account No.4993000695 with the Defendant bank Branch at Upper Siluko Road Benin City, which account was opened for the purpose of executing his distributorship of Dangote Cement in Edo State and neighbouring States.

He said that in furtherance of the said distributorship business, he applied for distributors Finance (Short Term Loan) from the Defendant, to finance the business. He said that the Defendant granted him a distributor's Finance (Short Term Loan) with a maximum borrowing limit of N15,000,000.00 (Fifteen Million Naira) only.

He said that he was required to maintain a minimum monthly turnover of N30, 000,000.00 (Thirty Million Naira) only. He tendered the Loan Agreement which was admitted in evidence as Exhibit “A”.

He said that according to the agreement, the Claimant is supplied cement by Dangote cement, which is guaranteed and/or financed by the Defendant’s facility, the Claimant sells the said quantity supplied to retail outlets and remits the sales proceeds to the Defendant bank for onward transmission to Dangote cement.

He said that in the absence of prompt remittance of proceeds from the sales by a distributor, the distributors stock will not be replenished by Dangote cement and in the absence of a distributors inability to maintain constant supply of stocks to his or her retail outlets, the distributor will suffer loss of patronage, reduced volume of cash flow available and inevitably, loss of profit.

He stated that access to the account to facilitate a constant turnover is a fundamental clause of the loan agreement.

He alleged that the loan Agreement was a pro format Agreement and in practice the Defendant had the discretion to waive any Clause of the Agreement that was not applicable to the circumstances of the business of the party granted the loan. He said that the Defendant exercises this discretion on individual basis and in the case of the Claimant the provision of additional security in the form of Landed Property was waived together with the monthly turnover of N30,000,000.00(Thirty Million Naira) only amongst other conditions for its grant.

He alleged that he was supplied an average monthly truck load of fifty trucks and a truck load consisted of nine hundred (900) bags of cement. He enumerated the cost implications of the entire transactions.

He said that in the course of the transactions, he wrote to Dangote’s Regional Sale Representative mandating the Defendant to collect all authority to collect ATC, as a guarantee for the facility granted the Claimant by the Defendant Bank. He said that the Authority to Collect is the document that enables a Distributor to collect truckloads of cement paid for by the Distributor from the depot of Dangote cement. He maintained that the essence of the ATC is to ensure that the facility is applied for the purchase of Dangote cement solely. He tendered a copy of the letter as Exhibit “B”.

The Claimant alleged that between 29th September 2014 and the 14th of October 2014, he made various attempts to credit his account with the sum of N2,330,000.00 (Two Million Three Hundred and Thirty Thousand Naira) only through the Defendant's Bank branch at Benin Agbor Road, Benin City but his said account was unjustifiably blocked by the Defendant Bank irrespective of several complaints which he made to the Defendant's Branch Manager at Siluko Road, Benin City, where the account was opened and domiciled.

He said that despite the Defendant bank denying him access to his account for the purpose of discharging his obligation under the loan Agreement and his obligation to Dangote Cement, the Defendant wrote him a letter asserting that he needed to improve his turnover on the account since the Account had not witnessed any substantial lodgement for over two weeks . He tendered the letter dated the 16th October, 2014 as Exhibit "C".

He said that he replied the said letter and formally notified the Defendant that his account was blocked hence he was unable to access the account to build up his turnover as required by the Loan Agreement. He tendered his letter which was admitted as Exhibit "D".

He said that he made several attempts to get the Defendant to unblock his account to enable him deposit money into the account in order to fund the loan agreement but the Defendant failed to unblock the account.

He alleged that in an attempt to make a lodgement into the blocked account, unknown thieves broke into his car and the money was stolen. He said that he lodged a complaint of the theft with the Nigerian Police Force and he tendered a copy of the Extract from the Crime Diary as Exhibit "F".

The Claimant alleged that on the 29th September, 2014, he made an electronic transfer from First Bank Plc in the sum of N600,000.00 (Six Hundred Thousand Naira) only to the said loan account for the purpose of discharging his obligation under the Loan Agreement but the account remained blocked. He attempted to tender a copy of the transfer receipt issued by First Bank Plc but he was unable to tender it.

He alleged that on the 2nd of October, 2014, he made another electronic transfer from Diamond Bank Plc. in the sum N450, 000.00(Four Hundred and Fifty Thousand Naira) only to the said Loan Account but the money did not enter the account.

He said that when his Loan Account was not credited with these electronic transfers, he instructed his solicitors who wrote the Defendant Bank, demanding that his Account be credited with the said sums electronically transferred. The Solicitor's letter dated the 29th of October, 2014 was admitted in evidence as Exhibit "G". He tendered some other correspondences between his solicitors and the Defendant.

He alleged that the Defendant Bank only credited his Account with the aforesaid electronic transfers on the 17th of November, 2014, more than one month after he made the said transfers.

The Claimant alleged that on the 27th of November, 2014, there was a drastic reduction in the price of Dangote cement and in order to take advantage of the reduced price, he transferred the sum of N3, 086,800.00 (Three Million Eighty-Six Thousand Eight Hundred Naira) only into the Loan Account to purchase some consignments of Dangote cement but the Defendant Bank failed to effect the said transfer for a period in excess of a week after payment. He tendered the Deposit Slip of Dangote Cement Plc and the E-Wallet transaction of Dangote Cement Plc. as Exhibits "J" and "J1" respectively at the trial.

He said that due to the negligence of the Defendant Bank in its failure to transfer the said funds, he was unable to benefit from the reduced price of Dangote cement.

The Claimant alleged that his Distributorship with Dangote Cement has been adversely affected by the negligent conduct of the Defendant Bank and that the Bank is in breach of the fiduciary duty owed to him, hence he instituted this suit against them.

At the close of the Claimant's case, the the Defendant led evidence in defence of the Claims and in proof of their Counter-Claim. They fielded one witness, Mr. Imafidon Omoregbe, who also led oral and documentary evidence in their defence and in proof of their Counter-Claim.

In a nutshell, the Defendant's sole witness, the DWI testified that the Claimant was advanced a short term loan overdraft facility in the sum of N15, 000, 000.00 (Fifteen Million Naira) only, by the Defendant, which he duly accepted as contained in Exhibit "A".

He alleged that further to the contract between the Claimant and Defendant as evidenced in Exhibit A, the Claimant went ahead to execute Exhibit "P" (letter of consent to the Defendant to warehouse the Authority to collect goods from Dangote Plc.

He said that to further secure the Defendant's position on the loan contract, the Claimant executed Exhibit "Q" (a loan agreement dated June 2, 2014) and Exhibit "S" (Agreement dated June 2, 2014 allowing the Defendant the right to collection of sales proceeds) in view of the overdraft granted to the Claimant.

DW1 testified that the Claimant failed to live up to expectations in the loan repayment; as he began to default consistently. He said that Exhibit "C", is a letter written to the Claimant to regularize his account; by making payments into it, to remove it from debit position.

He said that despite Exhibit "C", the Claimant failed/refused and/or neglected to put his account in order until the debt incurred in his account piled up and as at April 5, 2016, the outstanding debit balance in his account with the Defendant was N18, 156, 979.95K (Eighteen Million, One Hundred and Fifty Six Thousand, Nine Hundred and Seventy Nine Naira, Ninety Five Kobo).

In proof of their Counter-Claim, the DW1 tendered Exhibits "R1" & "R2" (certification of compliance and statement of account of the Claimant respectively).

The Defendant denied blocking the Claimant's Loan Account and maintained that it was network issues that momentarily affected the Claimant's transactions and the deactivation of Dangote's account by Dangote, on another occasion. They maintained that the Claimant is liable to the Defendant's Counter-Claim in respect of the outstanding debt on the Loan Account which the Claimant has refused to pay in spite of all demands for payment by the Defendant Counter-Claimant.

Upon the conclusion of the evidence, the learned counsel for both parties filed their final written addresses which they adopted as their final arguments.

In his final written address, the learned counsel for the Defendant Counter-Claimant, ***C. Obaro-Umeh Esq.*** formulated two issues for determination as follows:

(i) Whether the evidence of the Claimant on oath can be relied on; same having been deposed to, not before the commissioner for oaths;

(ii) ***Whether the Claimant has proved (with credible evidence) that the Defendant indeed blocked Claimant's account, to entitle him to the reliefs sought.***

Thereafter, the learned counsel argued the two issues seriatim.

ISSUE 1:

Whether the evidence of the Claimant on oath can be relied on; same having been deposed to, not before the commissioner for oaths.

Opening his arguments on this first issue, learned counsel posited that the Claimant under Cross-Examination stated in Exhibit "N" that he signed his witness statement on oath in his office. He said that this offends ***sections 112 and 114 of the Evidence Act***, which makes it mandatory for all oaths to be signed in the presence of the commissioner for oaths.

He said that notwithstanding the fact that the Claimant denied his earlier statement as contained in Exhibit "N" in this present proceedings, the deposition of a witness, signed in his own office, is incompetent and not cognizable by the Court**.** He therefore urged the Court to discountenance the entire evidence of the Claimant and expunge same from its records and relied on the case of ***ALIYU V BULAKI (2019) LPELR-46513***.

He further submitted that the exhibits tendered by the Claimant should be expunged from the records of the Court because documents attached to an affidavit also form part of the Affidavit and he relied on the case of ***HWANDE V BIEM (2019) 30 WRN 99 at 128***.

He posited that the pleadings of the Claimant are in the light of the above bereft of any evidence to establish them. He referred the Court to the dictum of ***Lord Denning (MR)*** in the case of ***MCFOY V UAC (1962) AC 152*** where he stated thus:

"You cannot put something on nothing and expect it to stay there. It will collapse."

He therefore urged the Court to dismiss this suit summarily.

ISSUE 2:

Whether the Claimant has proved (with credible evidence) that the Defendant indeed blocked Claimant's account, to entitle him to the reliefs sought.

Arguing this issue, learned counsel submitted that the Claimant failed to prove his case against the Defendant on the preponderance of evidence or balance of probability as required in civil cases and he cited the case of ***BAMGBEGBIN & ORS V ORIARE & ORS (2009) LPELR-733 (SC).***

He posited that the pivotal issue in this case is the alleged blockage of the Claimant's account. He said that the Claimant failed to prove that the Defendant blocked his account.

He referred the Court to the several paragraphs of the Claimant's deposition on the alleged blocking of the Claimant's account by the Defendant and submitted that the Claimant failed to tender some of the deposit slips with which he allegedly tried to make some of these deposits. He submitted that he did not do this because there is indeed no deposit slip of N2, 330, 000.00 (Two Million, Three Hundred and Thirty Thousand Naira).

He maintained that it is a notorious fact that cash deposits in Banking halls must first be initiated by filling the necessary Bank Tellers.

He urged the Court to invoke the provisions of ***Section 167 (d) of the Evidence Act*** on withholding evidence against the Claimant and hold that the evidence would have been unfavorable to him if he had tendered it.

Counsel referred the Court to the case of ***KAYDEE VENTURES LTD V THE HON MINISTER OF FEDERAL CAPITAL TERRITORY & 2 ORS (2010) 2-3 SC (PT. 111) 1***, where the Court held that where an averment has not been supported by evidence, that averment is deemed abandoned and must be struck out by the Court.

He urged the Court to hold that the Claimant has failed to prove his (alleged) lodgment of the sum of N2, 330, 000.00 (Two Million, Three Hundred and Thirty Thousand Naira).

Counsel referred to the Claimant's own letter dated 16th of December 2014 which was listed as No.5 in the Claimant's list of documents to be relied upon at trial, but which was not tendered during trial, where the Claimant complained of his alleged inability to make deposits into his loan account, but never made mention of inability to pay the said sum of N2, 330, 000.00 (Two Million, Three Hundred and Thirty Thousand Naira). On the Court's powers to rely on the Claimant's un-tendered letter, and previous evidence, he relied on the case of ***OYEWOLE V AKANDE (2019) ALL FWLR (PT 991).***

Again, on the Claimant's allegation that on the 8th of October, 2014, he went to the Benin-Agbor Road, Benin City, Branch of the Defendant to pay in the sum of N1,900,000.00 (One Million Nine Hundred Thousand Naira), counsel pointed out that no deposit slip was tendered in evidence as proof.

Regarding the Claimant's electronic transfer from First Bank Plc. of the sum of N600, 000.00 (Six Hundred Thousand Naira) only to the Claimant's said account on the 30th of September, 2014, counsel maintained that the issue was interbank network problem which was duly investigated and the Claimant's account was subsequently credited.

He posited that the Defendant adduced the expert evidence of the DW1, a Banker, who reiterated the fact that network issues were the reasons for the failed transfers.

Responding to the Claimant's allegation that on the 2nd of October, 2014, the Claimant made an electronic transfer from Diamond Bank Plc. in the sum of N450, 000.00 (Four Hundred and Fifty Thousand Naira) only to the Claimant's account, counsel posited that there was no documentary evidence to substantiate that allegation.

On the allegation that the Defendant made the Claimant to lose the anticipated profits arising from the sharp drop in the prices of Dangote Cement at a given period, counsel submitted that the Defendant, in rebuttal tendered Exhibit T, which showed that the transaction was successful from the Defendant's end.

Furthermore, on the Claimant's claim for special damages arising from the Defendant's alleged default, counsel submitted that the Claimant did not lead evidence to strictly proof his entitlements. He relied on the case of ***NEWBREED ORGANISATION LTD V J.E. ERHOMOSELE (2006) 2 SCNJ 198,*** where the Court held thus:

"A party claiming a relief should put all his cards on the table vide cogent evidence as absence of such is bound to affect the award of damages where there is monetary relief"

He also relied on the case of ***ACME BUILDERS V WATER BOARD (1999) 2 SCNJ 42***, where the court held that:

"Anticipated profit (in the realm of civil cases) must be established by evidence"

He challenged the mathematical accuracy of the figures quoted by the Claimant and submitted that the special damages were not proved.

Responding to the Claimant's allegation that on the 10th December 2014, he made another transfer to Dangote Cement of the sum of N4, 684, 500.00 (Four Million, Six Hundred and Eighty Four Thousand, Five Hundred Naira) only for the purchase of three (3) Trucks, for which the Defendant failed to avail the Claimant of the printed confirmation of the transfer to enable the Claimant receive the Trucks from Dangote cement; the Defendant contended that there are two (2) major players with respect to the Claimant's business transactions, to wit the Defendant and Dangote Cement. The Defendant contended that it carried out the transaction but that Dangote Cement activates its account (for receiving credits) and deactivate its account (from receiving credits) at will, due to the fluctuation in price which could either be to the advantage of distributors and disadvantage of Dangote Cement or vice versa. He maintained that it is the said deactivation by Dangote Plc. that inhibited the transfer from the Defendant's end. He said that the Defendant cannot bear liability for a transaction that it was unable to complete by virtue of the deactivation of the Dangote Cement's portal.

Counsel submitted that the Claimant eventually received the truckloads by his own showing (allegedly after a week) but he failed to show what he suffered as a result of the alleged delay in excess of a week. He relied on the case of ***IJEBU-ODE LOCAL GOVERNMENT V ADEDEJI BALOGUN & CO. (1991) 1SC (PT1) 1,*** where the Court held thus: ***"Damages are awarded to restore the plaintiff as far as money can, to the position he would have been if there had been no breach."***

Addressing the Court on their Counter-Claim, learned counsel submitted that the DWI testified that the Claimant was advanced a short term loan overdraft facility in the sum of N15, 000, 000.00 (Fifteen Million Naira) only, by the Defendant, which he duly accepted as contained in Exhibit "A".

He posited that despite Exhibit "C", the Claimant failed/refused and/or neglected to put his account in order until the debt incurred in his account piled up and as at April 5th, 2016, the outstanding debit balance in his account with the Defendant was N18, 156, 979.95K (Eighteen Million, One Hundred and Fifty Six Thousand, Nine Hundred and Seventy Nine Naira, Ninety Five Kobo).

In proof of its Counter-Claim, the Defendant relied on and tendered Exhibits "R1" & "R2" (certificate of compliance and statement of account of Claimant respectively).

He maintained that from the length and breadth of the Claimant's Defence to the Counter-Claim, the Claimant did not deny or traverse the averments of facts in the Defendant's Counter-Claim, he only blamed the poor state of his loan account on the alleged blockage of same by the Defendant.

He submitted that the Claimant's failure to deny these averments in the Counter- Claim amounts to admission of the averments therein contained. Thus, the Claimant has admitted the binding loan contract (between him and the Defendant) and the resultant obligations (as captured in Exhibit "A"), chief of which, is the repayment of the loan advanced to him. Counsel relied on the case of ***ATTORNEY GENERAL OF ANAMBRA STATE V C.N. ONUSELOGU ENTERPRISES LTD (1987) 9-11 SC 197*** and urged the Court to uphold the Counter-Claim of the Defendant.

In his written address, the learned counsel for the Claimant, ***U.T. Udochi Esq.*** formulated three issues for determination as follows:

I. Is the statement of oath of the Claimant, before this Honourable Court, competent?;

II. On the preponderance of the oral and documentary evidence before this Honourable Court is the Claimant entitled to judgment as claimed?; and

III. On the preponderance of the documentary and oral evidence before this Honourable Court is the Defendant entitled to judgment in respect of the Defendant's Counter-claim?

Thereafter, the learned counsel argued the three issues seriatim.

ISSUE 1:

Is the statement of oath of the Claimant, before this Honourable Court, competent?

Arguing this issue, learned counsel submitted that the fact that the Claimant admitted in an earlier proceedings that he signed his witness statement on oath in his office is of no moment but a mere storm in a teacup.

He submitted that the oath taken before this Honourable Court by the Claimant obviates any assertion that he was not under oath as at the time he adopted his statement on oath and was cross examined.

Furthermore, he submitted that the time to object to admissibility of a statement on oath is before it is adopted; that once adopted and the Defendant cross-examined the witness, that amounts to a waiver and acquiescence and no objection ought to be entertained thereafter and he referred to the Court of Appeal decision in the cases of ***AUL-2-KALA GLOBAL RESOURCES LIMITED & ORS v. SURUFADPETROLEUM LIMITED (2021) LPELR-56826 (CA)***; ***ALHAJI AUWALU BIU v. ALHAJI SALISU DAHIRU (2021 LPELR-55718 (CA) 3404.***

He submitted that on the face of the Claimant's statement on oath, the said statement on oath was signed before the Commissioner for oath. He submitted that the decision in the **ALIYU case** (supra) is not relevant to the facts and circumstances of the instant case and is clearly distinguishable from this case and ought not to be applied and followed.

He maintained that in the instant case, there is no admissible evidence to prove that the Claimant signed the said statement in his unnamed lawyer's office.

On the said Exhibit “M”, learned counsel submitted that admissibility is entirely different from weight or probative value to be ascribed to an exhibit. He maintained that a previous statement of a witness is generally inadmissible to prove any matter in issue in a subsequent proceeding, save and except, to contradict the witness in accordance with ***Section 232 of the Evidence Act*** and he relied on the decision of the Supreme Court in the case of ***DR. OLAWALE ALAKIJA & ORS v. ALHAJI ABDULAI (1998) LPELR-404(SC).***

He also relied on the case of ***CHIEF S.L. DUROSARO v. T.A.A.AYORINDE (2005) LPELR-967(SC).***

Thereafter, learned counsel argued his Issues 2 and 3 together and submitted that in determining the case of the parties the entire pleadings have to be read and viewed holistically and the attempts in the Defendant's address to compartmentalize the pleadings of the Claimant is unknown to law. He referred the Court to the Supreme Court's decision in the case of ***ALLIANCE INTERNATIONAL LIMITED v. SAAM KOLO INTERNATIONAL ENTERPRISES LIMITED (2022) LPELR-57984(SC).***

He submitted that a holistic reading of the Claimant's pleadings would reveal that the Claimant's claims are premised on his inability to credit his loan account with the Defendant's Bank to defray the loan credited to the account and carry on his business with Dangote Cement, while the loan account continued to incur interest rates and other charges being credited to the said account and the Claimant's business with Dangote Cement was irreparably damaged, eliciting the Claimants claims for damages.

He posited that paragraph 30 of the operative Claimant's Statement of Claim states thus: ***"the Claimant's Distributorship with Dangote cement has been adversely affected by the negligent conduct of the Defendant's Bank. The Claimant states that the Defendant's Bank is in breach of the fiduciarv duty owed the Claimant."***

He referred to the case of ***UNITED BANK FOR ARICA PLC*** *V. ENER-GYMINERAL* ***RESOURCES LTD & ANOR (2009) LPELR-8382*** where the Court of Appeal stated *inter-alia* thus:

"A fiduciary relationship arises whenever confidence is reposed on one side and domination and influence result on the other the relation can be legal, social, domestic or merely personal."

He said that the Claimant pleaded and led uncontroverted and unchallenged oral and documentary evidence as to how he sought to pay in the sum of N2,330,000.00 (Two Million and Three Hundred and Thirty Thousand Naira) only between 29th September 2014 to 14th October, 2014 into his loan account.

Counsel posited that what the Claimant said in the earlier proceeding was that he filled the deposit slip and not that he had the slip in his custody. He said that it is a notorious fact that **a** deposit slip is to lodge money and once given to the cashier, it is endorsed and returned to the customer only on completion of the deposit process. He said that in the ordinary course of events, a deposit slip is not returned to a customer where the transaction is not completed or fails. He said that payment or lodgment of money is proved by deposit slips, not non-payment or non-lodgment and he referred to the case of ***LATEEF ATOBATELE ALI V.UNITED BANK FOR AFRICA PLC (2014) LPELR 22635(CA).***

He contended that payment of money into an account may be proved either by oral evidence of the person who actually made the payment personally to the bank or by the production of bank tellers or an acknowledgement showing on the face of it that the bank had received the payment and he cited the following cases ***AEROFLOT SOVIET AIRLINES VS. UBA PLC (1986 3NWLR (PT.27) 188 AT 190: FBN PLC VS. MAINSARA (2005) 2 NWLR (PT.909) 42: ISHOLA VS. S.G. (NIG.) LTD.VS.IGWE (2012)1 NWLR 222 at 23 and OKPOKO COMMUNITY BANK LTD. VS IGWE (2012) 1 NWLR 222 at 234.***

Counsel also referred to ***Section 167 (c) of the Evidence Act,*** on the presumption that the common course of business has been followed in particular cases.

He submitted that the authority of ***OYEWOLE V.AKANDE (2019) ALL FWLR (PT.911)*** cited by the Defendant urging the Court to consider an exhibit not tendered by the parties to this Suit is distinguishable from the facts and circumstances of this case. He submitted that if the Defendant felt that an exhibit was material to its case, it was duty bound to tender the same through its witness or through the Claimant under cross examination. He maintained that a Court of Law cannot make use of an Exhibit frontloaded and not tendered and he relied on the Supreme Court's decision in the case of ***JEJE OLADELE & ORS v. OBA ADEKUNLE AROMOLARAN II & ORS (1996) LPELR-2546(SC).***

Counsel posited that the Claimant led uncontroverted evidence that flowing directly from his inability to access his account, the sum of N1, 000,000.00 (One Million Naira) only was stolen from his car, and he tendered a copy of the police extract. He also referred to the delays in crediting his loan account with the electronic transfer from First Bank of the sum of N600, 000.00 (Six Hundred Thousand Naira) on the 29th September, 2014 and the sum of N450, 000.00 (Four Hundred and Fifty Thousand Naira) on the 2nd of October, 2014.

Counsel posited that the rules, regulations and guidelines of the Central Bank of Nigeria made pursuant to the Central Bank of Nigeria constitute subsidiary legislation which this Honourable Court ought to take judicial notice of within the meaning of ***Section 122(2) of the Evidence Act,*** without further proof. He submitted that the operative guideline of the Central Bank of Nigeria at all times relevant to the Claimant's action is the ***Guideline on Electronic Banking in Nigeria made in August, 2003.***

He posited that the Defendant Bank was obligatorily mandated to comply with the said guidelines and exercise a standard of care in the management of the Claimant's account consistent with the fiduciary relationship that subsist between the Claimant and the Defendant Bank. He urged the Court to reject the Defendant's excuse that the transaction was done through NIP platform and did not impact the Claimant's account immediately **"due to challenges with NIP platform at the material** time" or as the pleadings of the Defendant contends **"network problems".** He maintained that the conduct of the Defendant amounts to an unreasonable and inappropriate standard of care exhibited by the Defendant in the management of the Claimant's account which is inconsistent with the fiduciary relationship that exists between the Claimant and the Defendant Bank.

He referred to ***section 1.4.10 b. of the Guideline on Electronic Banking in Nigeria made in August, 2003*** which provides thus: ***"Operators must conduct periodic control and evaluations of the switch and the network and ensure daily settlement of switch activity and balancing of network activity....."*** . He also referred to ***Section 1.6. of the said Guideline*** which provides for safeguard measures that the Defendant bank must comply with to ensure proper service delivery.

Counsel posited that the Defendant Bank who claimed that Dangote deactivated its account did not provide any evidence to support this assertion.

On the Defendant's Counter-Claim, counsel submitted that this Honourable Court has no vires to entertain the Counter-claim of the Defendant because their right to invoke the jurisdiction of this Honourable Court to recover the debt has not arisen. He said that the action of the Defendant is pre-mature in the absence of a formal demand letter or notice as envisaged by Clause 10.2.1 of Exhibit "DE" tendered by the Defendant's witness which provides thus:

"By a written notice to the Borrower declaring that the Loan shall have become immediately due and payable, demand for immediate repayment of

same where upon the same shall become so payable with interest accrued thereupon."

He submitted that Exhibit "C", tendered by the Claimant, relied upon by the Defendant as a demand notice, requiring the Claimant to improve his **"turn over with the bank through daily lodgement as this will be a pre-condition to renew your facility"** is not a demand notice that the **Loan has become immediately due and payable,**

He maintained that there is no nexus between the sum claimed by the Defendant being N18,156,979,95 kobo (Eighteen Million One Hundred and Fifty-Six Thousand Nine Hundred and Seventy-Nine Naira Ninety-Five kobo) and the Sum stated in Exhibit "C", which is N13, 973,965.12K (Thirteen Million Nine Hundred and Seventy-Three Thousand Nine Hundred and Sixty-Five Naira Twelve kobo) only.

He submitted that the action was not initiated in accordance with due process of law, and the condition precedent for its institution was not fulfilled by the Defendant Bank and he referred to the cases of ***WEMA BANK v. OWOSHO (2018) LPELR-43857(CA);*** and ***GABRIEL MADUKOLU & ORS. V. JOHNSON NKEMDILIM (1962) LPELR-24023(SC).***

Furthermore, counsel posited that assuming but without conceding that the Defendant's Counterclaim is competent, he submitted that the Defendant is bound to comply with the interest rates as determined by the Central Bank of Nigeria and the Claimant having put the interest rates in issue on the state of the pleadings, the Defendant ought to have led evidence of the how the interest rates and Bank charges were affixed to the Claimant's account. He referred to the Supreme Court's decision in the case of ***UNION BANK OF NIGERIA PLC v. ALHAJI ADAMS AJABULE &ANOR (2011) LPELR-S239 (SC).*** He also referred to the decision of the Court of Appeal in the case of ***MR.OLORUNSOLA OLADEMO VS. LAGOS BUILDING INVESTMENT COMPANY LIMITED (2010) LPELR-4735(CA).***

He urged the Court to hold that the Defendant has failed to prove the alleged indebtedness of the Claimant. He urged the Court not to speculate on the alleged principal sums and the rate of interest thereon accruing to the Claimant's account, more so, when the cross examination of the Defendant's witness demonstrated clearly, that there were debits on the Claimant's account which were inconsistent with the agreed terms.

He therefore urged the Court to resolve Issues 2and 3 in favour of the Claimant, to grant the Claimant's Claims and dismiss the Counter-Claim of the Defendant.

I have carefully examined all the Court processes filed in this suit together with evidence led and the addresses of the learned counsel for the parties.

The two issues that arise for determination in this suit are as follows:

1) ***Whether the Claimant is entitled to the reliefs which he seeks against the Defendant in this suit; and***
2) ***Whether the Defendant is entitled to the reliefs which they seek against the Claimant in their Counter-Claim in this suit.***

I will proceed to resolve the two issues seriatim.

ISSUE 1:

Whether the Claimant is entitled to the reliefs which he seeks against the Defendant in this suit.

Before I determine the merits of the Claimant's case, I wish to address the issue raised by the learned counsel for the Defendant on the validity of the Claimant's deposition in these proceedings. He tendered the Claimant's previous testimony where he alleged that the Claimant admitted that he signed his deposition in his lawyers office before same was filed in the Court. The certified true copy of the Claimant's previous evidence was admitted as Exhibit "M".

With regards to the Defendant's contention that the Claimant's deposition was signed in the lawyer's office, upon a cursory examination of the record of the previous proceedings admitted as Exhibit "M", I observed that the Claimant did not categorically say that he signed his deposition in his lawyer's office. What he stated is as follows: "***I signed the oath in my office deposition in court (sic)".*** To be candid, it is difficult to understand the meaning of that statement. The statement is both ambiguous and ambivalent. The use of the words "office" and "court" in the same sentence makes it capable of two meanings, to wit: that the deponent signed it in his office and that he signed it in the court. I cannot rely on such a nebulous statement to invalidate the Claimant's deposition which he has adopted as his evidence in this Court after being sworn on oath before me.

Consequently, the objection of the learned counsel for the Defendant cannot be sustained.

Essentially, the fulcrum of the Claimant's case is the alleged blocking of his account No.4993000695 domiciled at the Upper Siluko Road Branch of the Defendant bank which he alleged is in breach of the fiduciary duty of the Defendant, resulting in an injurious impairment on the Claimant's business transactions with Dangote Cement.

Like in all civil suits, the burden is on the Claimant to prove the alleged breach by the Defendant.

The relationship between a bank and its customers is essentially contractual. Therefore any alleged breach by the Defendant is a breach of contract. In essence the substratum of the Claimant's case against the Defendant is for breach of contract.

It is elementary law that the burden is on the Claimant to prove that there was a contract between him and the Defendant and that the contract was breached to his disadvantage. Thereafter, the Claimant has to lead evidence to prove damages. A Claimant who fails to prove breach and subsequent damages will fail in his action. In a contract which is in writing, a Claimant has to prove the breach by leading evidence based on the written contract. This is because the parties are bound by the contract. As it is not the function of a Court of law to make a contract for the parties or to change their contract as made. See the cases of ***Orji Vs Anyaso (2000)2 NWLR (part 643) page 1*** and ***Arfo Construction Co. Ltd vs. Minister of Works & Anor (2018) LPELR-46711(CA) (Pp. 23 Paras. B).***

In the instant case, the Claimant tendered the Contract Document (Exhibit "A") which is a Letter from the Defendant, dated 2nd of June, 2014 addressed to the Claimant, stipulating the terms of a Short Term Loan Facility with a maximum sum of N15,000,000.00 (Fifteen Million Naira) to enable the Claimant to finance the regular purchases of Dangote Cement. The tenor of the facility was stated to expire on the 30th of May, 2015 and each drawdown amount must be repaid within 90 days. The interest rate was stated as 21% per annum subject to review by the Bank from time to time in line with prevailing market conditions, The Loan Agreement also stipulated a Management Fee of 0.5% per annum payable upfront and a Commitment Fee of 0.5% flat payable upfront upon acceptance of the facility.

The said Loan Agreement (Exhibit "A") also stipulated several terms and conditions such as the domiciliation of the Borrower's sales proceeds with the Bank and the issuing of Post-dated cheques of the Borrower to cover the principal sum and interest.

According to the Claimant, the loan Agreement was executed on the 2nd of June 2014 and the said loan Account with the Defendant became active on the 1st of July 2014. Thereafter, the Claimant began to transact his business with Dangote Cement with funds from the Loan Account in accordance with the terms of the Loan Agreement.

He alleged that between 29th September 2014 and the 14th October 2014, he made various attempts to fund the loan account with the sum of N2, 330,000.00 (Two Million Three Hundred and Thirty Thousand Naira), but the account was unjustifiably blocked by the Defendant Bank irrespective of several complaints which he made to them.

He alleged that the blockage of his account by the Defendant prevented him from meeting the minimum turnover as stipulated under the Loan Agreement. He narrated how he made several attempts to fund the loan account but was unable to do so because the Defendant had unilaterally blocked his account. He alleged that in the process, he was unable to make his regular purchases from Dangote Cement and as a result he suffered some financial losses.

On the part of the Defendant, they denied ever blocking the Claimant's Loan Account. They alleged that it was network issues that momentarily affected the Claimant's transactions and the deactivation of Dangote account by Dangote Cement, on another occasion.

From the tenor of the Claimant's case, it is apparent that the Claimant's case is based mainly on the allegation that the Defendant blocked the Claimant's account thus preventing the Claimant from funding same to facilitate the contract financing arrangement for the purchase of Dangote Cement.

The issue to be determined at this stage is whether the Claimant has proved that the Defendant blocked his account as he has alleged.

As earlier stated, the relationship between a banker and its customer being contractual, it means that, the parties are bound by the terms of the contract and none of the parties is permitted to deviate from the terms thereof. Where the terms are clear, the Court is enjoined to interpret it as such without recourse to any help outside the written terms of the contract. That being so, the bank is bound to carry out the instructions of the customer within the ambit of the contractual relationship between them. Thus, where the bank acts outside the instructions of the customer, it may be liable for any loss incurred by the customer. See the cases of ***Wema Bank v. Alhaji Tiamiyu Oyekanmi (2017) LPELR - 50503 (CA)*** and ***Tom Total (Nig.) Ltd, v. Skye Bank Plc, (2017) LPELR - 41953.***

In the case of ***GTB V. GARBA (2015) LPELR-41656 (CA)*** regarding a banker and customer relationship ***GEORGEWILL, J.C.A*** held follows:

"A Bank is thus under law bound to carry out the instructions of its Customer within the ambit of the law that governs their Banker - Customer relationship. This duty, which I say emphatically is one that carries with it a high degree of duty of care and must be diligently exercised by the Bank, since in all the predominant business of Banking in the main consist of receipt of money on accounts, current or deposit and the payment of cheques drawn on it as well as the collection of cheques paid in by its Customers."

See also the following cases: ***Joachin vs. Swiss Bank Corporation (1921) 3 KB 110 @ p. 127;*** and ***Standard Trust Bank Ltd. V. Anumnu (2008) 14 NWLR (Pt. 1106) 150 @ p. 151.***

In the instant case in a bid to prove that the Defendant blocked his account, the Claimant tendered a letter which he wrote to the Defendant to formally inform them that his account was blocked hence his inability to fund same. The said letter was admitted as Exhibit "D" at the hearing.

He said that he made several attempts to get the Defendant to unblock his account to enable him deposit money into the account in order to fund the loan account but the Defendant failed to unblock the account.

He alleged that on the 29th September, 2014, he made an electronic transfer from First Bank Plc in the sum of N600,000.00 (Six Hundred Thousand Naira) only to the said loan account for purposes of discharging his obligation under the Loan Agreement but the account remained blocked. He attempted to tender a copy of the transfer receipt issued by First Bank Plc but he was unable to tender it.

He alleged that on the 2nd October, 2014, he made an electronic transfer from Diamond Bank Plc in the sum N450, 000.00(Four Hundred and Fifty Thousand Naira) only to the said Loan Account but the money did not enter the account.

He also tendered a letter from his Solicitor demanding that his Account be credited with the said sums electronically transferred. The Solicitor's letter was admitted in evidence as Exhibit "G". He tendered some other correspondences between his solicitors and the Defendant.

In the face of all these allegations, the Defendant consistently maintained that they never blocked the Claimant's account, In response to the Claimant's correspondences on the allegation that they blocked his account, the Defendant replied vide Exhibit "C" to inform the Claimant that his account was overdrawn to the tune of N13, 973,965.12 (Thirteen Million, Nine Hundred and Seventy-Three Thousand, Nine Hundred and Sixty Five Naira, Twelve Kobo) as a result of non-payment into the loan account. They implored him to take urgent steps to improve his turn over through daily lodgements into the account.

In another letter which was admitted as Exhibit "H", the Defendant informed the Claimant's Solicitor that they were investigating the complaint of the blockage of the Claimant's account.

Again in a letter admitted as Exhibit "I" the bank explained that the two transfers from First Bank and Diamond Bank which the Claimant complained about did not enter the Claimant's account immediately because of some challenges on the NIP platform at the material time. However, they informed him that his account has since been credited with the aforesaid transfers.

Upon a juxtaposition of the evidence of the Claimant on his allegations that the Defendant wilfully blocked his account, and the explanation of the Defendant denying same, I am of the view that the Defendant's explanations appear more plausible. I do not see any reason why the Defendant will deliberately block the account of a customer who is willing to deposit funds into the said account. Moreover, there is evidence vide Exhibit "C" to show that the Defendant was imploring the Claimant to urgently fund the account which was seriously overdrawn to the tune of N13, 973,965.12 (Thirteen Million, Nine Hundred and Seventy-Three Thousand, Nine Hundred and Sixty Five Naira, Twelve Kobo) as a result of non-payment into the loan account. The total amount which the Claimant was trying to transfer into the loan account was not up to Six Million Naira. I think the Claimant was already facing some financial challenges which became compounded by his inability to transfer some available funds into the loan account.

Where a person has admitted taking a loan, the onus of proving that such loan has been paid or he did not take same, is on him. In the case of ***Macaulay v. NAL Merchant Bank Ltd (1990) 4 NWLR (Pt.144) P. 283 @ 308***, the Court inter alia held as follows:

"In an action to enforce the repayment of a loan, once the defendant admits the receipts of the loan, the burden of proof as to repayment or as to the reasons for non-payment is on him."

From the totality of the evidence adduced by the Claimant, I do not think that he has discharged the burden to prove that the Defendant blocked his account. The Defendant can only be liable for the losses which the Claimant allegedly suffered if they were responsible for his inability to pay money into the loan account.

From the foregoing, it is apparent that the substratum of the Claimant's case has completely collapsed. Consequently, I hold that the Claimant is not entitled to the reliefs which he seeks against the Defendant in this suit. Issue one is therefore resolved against the Claimant.

ISSUE 2:

Whether the Defendant is entitled to the reliefs which they seek against the Claimant in their Counter-Claim in this suit.

In their Counter-Claim, the Defendant/Counter-Claimant is claiming the sum of N18, 156, 979.95K (Eighteen Million, One Hundred and Fifty Six Thousand, Nine Hundred and Seventy Nine Naira, Ninety Five Kobo) being capital interest and Bank charges as at the 5th of April, 2016, on the loan facility granted by the Defendant to the Claimant; and interest upon the said amount.

From the onset of the consideration of this issue, the point must be made that a Counter-Claim is an independent claim, and the standard and burden of proof is the same as that of the main claim.

In proof of their Counter-Claim, the Defendant led evidence to show that the Claimant was advanced a short term loan overdraft facility in the sum of N15, 000, 000.00 (Fifteen Million Naira) only, by the Defendant, which he duly accepted as contained in Exhibit "A". They tendered several documents to prove the terms and conditions of the short term loan.

They alleged that the Claimant failed to live up to expectations in the loan repayment; and that as at the 5th of April, 2016, the outstanding debit balance in his account with the Defendant was the sum N18, 156, 979.95K (Eighteen Million, One Hundred and Fifty Six Thousand, Nine Hundred and Seventy Nine Naira, Ninety Five Kobo).

In proof of their Counter-Claim, the Defendant tendered Exhibits "R1" & "R2" (certificate of compliance and statement of account of the Claimant respectively).

From the tenor of the Defendant's case and the address of his learned counsel, the Defendant has established the fact that the Claimant took a loan facility from the Defendant bank which the Claimant did not deny.

He contended that since the Claimant admitted the binding loan contract (between him and the Defendant) and the resultant obligations (as captured in Exhibits "A"), chief of which, is the repayment of the loan advanced to him, the Court ought to uphold the Counter-Claim of the Defendant.

I am of the view that since the Counter-Claim is for a specific sum which the Defendant alleges is the outstanding debt; the onus is on the Defendant bank to prove the loan and the balance. This is where the bank is required to demonstrate by documentary and oral evidence, and not by merely dumping the Claimant's bank statement on the Court. The Defendant is relying heavily on the bank statements which were admitted as Exhibits "R1" & "R2".

However, no oral evidence was adduced to link the entries in the said exhibits to the figures it claims as the balance of the Claimant's indebtedness to it.

In the case of ***WEMA BANK PLC V. OSILARU (2007) LPELR-8960 (CA)***, the Court of Appeal held *inter alia* as follows:

"Now apart from tendering Exhibits V-V3, statement of account in Court, the appellant did not do anything more than that to establish its claim on the counterclaim at the Court below. It is trite that a bank statement of account is not sufficient explanation of debit and lodgments in a customer's account to charge the customer with liability for the overall debit balance shown in the

statement of account. Any bank which is claiming a sum of money on the basis of the overall debit balance of a statement of account must adduce both documentary and oral evidence to show how the overall debit balance was arrived at. See Yusuf v. A.C.B. (1986) 1-2 SC 49; Habib Nigeria Bank Ltd v. Gifts Unique (Nig.) Ltd (supra). Let me emphasize once again that investigation is not the function of a Court. Therefore, it is not the duty of the Court to embark on a voyage of discovery. In the instant case, it was not sufficient for the DW1 to dump the statement of accounts on the Court without explaining clearly the entries therein particularly since the debt is constituted by interest charged after the final demand notice i.e. exhibit K for the sum of N4,847,697.63k (Four million, eight hundred and forty-seven thousand, six hundred and ninety-seven Naira, sixty-three Kobo).”

See also, the following cases on the point: ***First Bank of (Nig.) Plc v. A. Mamman (Nig.) Ltd (2001) FNLK (Pt. 31) 2890;*** and ***UNITED BANK FOR AFRICA PLC v. OLA-OLUWA AINA WIRE INDUSTRY (NIGERIA) LIMITED & ANOR (2021) LPELR-58515(CA).***

In the instant case apart from tendering Exhibits “R1” and “R2”, the statement of account of the Claimant, the Defendant did not do anything more to lead oral evidence to explain the entries therein particularly since the debt is constituted by interest charged after the alleged demand notice. I must reiterate that it is not the duty of the Court to go into the Statement of Account to find out the actual indebtedness of the Claimant to the Defendant.

It is settled law that it is not the duty of a Court to embark upon cloistered justice by making enquiry into the case outside the open Court, not even by examination of documents which were in evidence but not examined in open Court; a Judge is an adjudicator and not an investigator, See the following cases on the point: ***Duriminiya Vs Commissioner of Police (1961) NRNLR 70; Ivienagbor Vs Bazuaye (1999) 6 SCNJ 235; Onibudo Vs Akibu (1982) All NLR 207;*** and ***Action Congress of Nigeria Vs Lamido (2012) LPELR 7825 (SC).***

In view of the foregoing, I hold that the Defendant is not entitled to the reliefs which they seek against the Claimant in their Counter-Claim in this suit. Issue two is therefore resolved against the Defendant/Counter-Claimant.

Having resolved issues one and two against the Claimant and the Defendant respectively, I hereby dismiss the Claimant's Claims and the Defendant's Counter-Claims. I make no order as to costs.

P.A.AKHIHIERO
JUDGE
2/08/24

<u>COUNSEL:</u>

U.T. UDOCHI ESQ.……………….…………………………..CLAIMANT

C. OBARO-UMEH ESQ……………………………....…DEFENDANT