

IN THE HIGH COURT OF JUSTICE OF BENUE STATE OF NIGERIA

HOLDEN AT MAKURDI

SUIT NO: MHC/161/16

BETWEEN

BARR. TIMOTHY TION

_____ PLAINTIFF

AND

1. FIRST CITY MONUMENT BANK (FCMB) LTD _____ DEFENDANTS

2. UNITED BANK FOR AFRICA (UBA) PLC

PLAINTIFF'S REPLY TO 1st DEFENDANT'S PRELIMINARY OBJECTION

1.1 BRIEF FACTS

1.2 The Plaintiff tried to withdraw the sum of N8, 000.00 only at the ATM of 2nd Defendant on the night of February 5th 2016. He entered the amount of N8, 000.00 and the ATM partially released cash but before he could pick it up, the cash was retracted by the ATM. Plaintiff sent emails to 1st and 2nd Defendants intimating them of the failed transaction and demanding for a refund. He also visited 1st Defendant and made a complaint by filing an ATM dispense error form.

1.3 However, after much toing and froing over a period of 4 weeks he was informed by 1st Defendant that 2nd Defendant declined his complaint and that the ATM paid him. However, no evidence was provided to prove the claim of payment. The Plaintiff rejected the claim and demanded for evidence of the ATM dispensing cash and him picking it up but the Defendants failed to provide any and he subsequently sued the Defendants.

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1.4 The 1st Defendant filed a motion for extension of time dated and filed on 6/9/16 to file her defence out of time. 1st Defendant also filed a Preliminary Objection (P.O) dated 6/9/16 and filed on the same date. The 2nd Defendant also filed a motion dated and filed on 14/6/16 for extension of time to file her defence out of time.

2.1 **ISSUES FOR DETERMINATION**

2.2 The Plaintiff has raised two issues in replying the P.O. and they are:

2.3 ***Whether there is any law, rule or regulation in Nigeria which prohibits a customer of a particular bank from using the bank's ATM card to withdraw money or perform ATM transactions at another bank's ATM.***

2.4 ***The Plaintiff adopts 1st Defendant's sole issue as issue two, i.e., whether a careful perusal of all the averments of the plaintiff's statement of claim disclose any cause of action against the 1st defendant in this suit.***

3.1 **LEGAL ARGUMENTS/SUBMISSIONS**

3.1.0 ***Whether there is any law, rule or regulation in Nigeria which prohibits a customer of a particular bank from using the bank's ATM card to withdraw money or perform ATM transactions of another bank's ATM.***

3.1.1 The answer to issue one above is that there is no law, rule or regulation which prohibits the customer of a particular bank from using the bank's ATM card issued to him to withdraw money or perform ATM transactions at other bank's ATM.

3.1.2 The Approved Guidelines on Operations of Electronic Payment Channels in Nigeria, 2016, issued by the Central Bank of Nigeria (CBN) pursuant to the powers conferred on her by Sections 2 (d) and 47 (2) of the CBN Act, 2007, to promote and facilitate the development of efficient and effective systems for the settlement of transactions, including the development of electronic payment systems; available at <https://www.cbn.gov.ng/out/2016/bpsd/approved%20guidelines%20on%20operations%20of%20electronic%20payment%20channels%20in%20nigeria.pdf> and accessed on 12/9/2016, provides in **section 1.2** as follows:

(e) No card scheme shall discriminate against any ATM owner or acquirer...

(f) No ATM owner or acquirer shall discriminate against any card scheme or issuer.

(l) All ATMs shall accept all cards issued in Nigeria under CBN regulations for any card-based value added service made available on the machine.

3.1.3 The import of the above provisions is that the ATM debit card of any bank can be used on the ATM of another bank and not only on the ATM of the bank which issued the ATM debit card.

3.1.4 Furthermore, there is the Central Bank of Nigeria (CBN's) cashless policy introduced some years ago (the pilot was run in Lagos State from January 2012 while the policy took effect

in Rivers, Anambra, Abia, Kano, Ogun and the Federal Capital Territory (FCT) on the 1st July, 2013. It was implemented nationwide on July 1st, 2014) which encourages use of electronic channels e.g. ATMs for transactions and insisting on or encouraging customers to use only their bank's ATM as canvassed by 1st Defendant will be against the spirit of the cashless policy as there might not be enough ATMs of certain banks to serve only their customers. The CBN in introducing the Cashless Policy stated thus:

Our economy uses too much cash for transactions for goods and services, especially for buying and selling. This is not how it is done in other progressive countries of the world where there are other payment options like; Debit and Credit Cards, Bank Transfers, Bank Direct Debits, Automated Teller Machines (ATMs) , and even Mobile Phone Money. These achievements have been brought about by the changing needs of their people, competition among banks, and other companies, including changes in technology. Our major focus is to increase the volume of all available payments instruments in Nigeria. There is therefore a need to enlighten the public to choose other available payment options instead of the excessive reliance on cash for transactions. This will promote end-to-end electronic payments in Nigeria.

See *Frequently Asked Questions on Cash-less Nigeria*, available at <https://www.cbn.gov.ng/cashless/Cash-Less%20FAQs.pdf> accessed on 12/9/2016.

3.1.5 It is a fact that in some states in Nigeria, banks have only one branch situated in the capital of the state and is meant to serve all persons of banking age in the whole state. However, according to the 1st Defendant if for e.g. a customer of 1st Defendant in Gboko, Benue State wishes to make a purchase of certain items he should travel to the state capital where the 1st Defendant has its only branch in Benue State to withdraw money for the purchase whereas with his ATM he could make withdrawals on the ATM of another bank which has a branch in Gboko. This would mean withdrawing and carrying cash and travelling back to Gboko (with the attendant risk of travelling or attack by highway armed robbers) to make a purchase which is clearly against the cashless policy which seeks to discourage too much use of cash for transactions and encourages Nigerians to **“choose other available payment options instead of the excessive reliance on cash for transactions”**.

3.1.6 In fact insisting or encouraging customers to use only their bank's ATMs as submitted by 1st Defendant will be equal to returning bank customers back to the days when there was no electronic banking. May we not be returned back to such days! The beauty of electronic banking is that one is able to carry out transactions through electronic channels like ATMs, internet or mobile banking in any location without having to

visit one's bank. Therefore, insisting or encouraging bank customers to use only their bank's ATMs is not only against the CBN's cashless policy but also against electronic banking.

3.1.7 We submit with due respect that the suggestion by the 1st Defendant in grounds 1 and 2 of her P.O that the Plaintiff has no cause of action because he did not use the 1st Defendant's ATM is rather absurd and not backed by law or sound reasoning.

3.2.0 whether a careful perusal of all the averments of the plaintiff's statement of claim discloses any cause of action against the 1st defendant in this suit.

3.2.1 The law is trite that in the determination of whether a suit discloses a cause of action, the court examines the Statement of Claim to see whether on the face of it it discloses facts which if proved would entitle the Plaintiff to a remedy. See the cases of **EGBUE V. ARAKA (1988) 3 NWLR (PT. 84) 598, BRIGHT MOTORS V. HONDA MOTORS (1998) 12 NWLR (PT. 577) 230.**

3.2.2 My Lord, in paragraphs 40, 41 and 43 of the Statement of Claim, the Plaintiff pleaded that the Defendants jointly and severally owe the Plaintiff a duty to protect his funds deposited in the 1st Defendant's custody and that the Defendants are jointly and severally liable for debiting his account without giving him value for the debit. Also, in paragraph 7 of the Statement of Claim, the Plaintiff has pleaded these facts.

3.2.3 The vital question for the Honourable Court to resolve is whether or not if the Plaintiff proves against the 1st Defendant the allegation contained in paragraphs 7, 40, 41, 42 and 43 of the Claim, the Plaintiff would still not be entitled to a remedy against the 1st Defendant. Our answer to this question is that if the Plaintiff proves his pleadings he will be entitled to a remedy against the 1st Defendant. In **MOBIL PRODUCING NIGERIA UNLIMITED V. L.A.S.E.P.A(2003) FWLR (Pt. 137) 10 SC**, the Supreme Court held that even if the Plaintiff's case is weak, it does not mean the same has not disclosed a reasonable cause of action.

3.2.4 The case of **S.P.D.C.N V. NWAMAKA (2003) ALL FWLR (Pt. 144) 506** cited in 1st Defendant's written address in support of her P.O is rather against the simplistic posture of the 1st Defendant in the P.O. The Plaintiff has pleaded that the Defendants owe him a duty to protect his funds especially in the 1st Defendant's custody. The duty was breached when the account was debited without him having value for the transaction and this is all that is needed in disclosing a cause of action. The Plaintiff thus ought to be given an opportunity to prove his claims.

3.2.5 My Lord, it is regrettable that the 1st Defendant is calling on the Honourable Court to determine the substance of this suit on her assumptions rather than laid down rules of law.

4.0 CONCLUSION

My Lord, the P.O is manifestly of no moment! It is respectfully submitted that the averments in the Plaintiff's Statement of

Claim discloses a reasonable cause of action against the Defendants in this suit and therefore the P.O filed by 1st Defendant should be discountenanced as it is only a ploy by the 1st Defendant to avoid the hearing of this suit on the merits and accordingly escape liability.

Dated this 14th day of September, 2016



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