

The Claimant subsequently filed a Reply to the Defendants' Statement of Defence and the required Additional Statement on Oath on the 11th day of June, 2013.

In the Claimant's Statement of Claim, he claimed the following reliefs against the Defendants jointly and severally vide paragraph seventeen thereof thus:

17) Whereof the Claimant claims against the Defendants jointly and severally as follows:

- a) Judgment in the sum of \$9,500 (Nine Thousand Five Hundred Dollars), equivalent of ₦1,491,500, (One Million, Four Hundred and Ninety-One Thousand, Five Hundred Naira), being balance of the money given to the 1st Defendant to remit to the Claimant.
- b) Interest in the sum of 10% of the said sum, from the commencement of this suit until judgment is delivered and 11% of the judgment sum until the final execution.
- c) Damages in the sum of ₦1,000,000 (One Million Naira) only.

On the 15th day of May, 2013, the Claimant opened his case by testifying on behalf of herself as the C. W. 1. She adopted her Statement on Oath as his testimony in this Suit. Exhibits A, B and C were admitted in evidence through her. Her evidence is reproduced below:

- 51 My name is Mrs. Okoro Ruth an a business woman, of No.8, Okojie Street, Off Jemilla Road, Ikpoba Hill, Benin City, I am the owner of the sum of \$9,500 (Nine Thousand Five Hundred Dollars) equivalent of ₦1,491,500, (One Million, Four Hundred and Ninety-One Thousand, Five Hundred Naira) at 157 naira per dollar, the subject matter in this suit.
2. The 1st Defendant is a businessman, residing at No. 80 Pogah Street, Ohivbe Qtrs, Ikpoba Hill, Benin City, within the Jurisdiction of this Honourable Court.
 3. The 2nd Defendant is a private school owned by the 1st Defendant, which he spent my money on and other undisclosed interests.
 4. That sometime in July, 2012, I travelled to China and placed orders for some baby items (Pampers, baby diapers and Johnson baby wipes), worth \$36,106,880 (Thirty Six Thousand, One Hundred and Six, Eight Hundred and Eighty Dollars), from Rockbrook Industrial Co. Ltd.
 5. That the said purchase which was earlier invoiced on the 30th of July, 2012, by the above company, was not concluded and the entire sum was returned to me through the 1st Defendant in this Suit.

6. That out of the total sum returned to me through the 1st Defendant, the 1st Defendant claimed to have purchase some items for me without receipts and used part of the money for his business without my authority.
7. That the 1st Defendant who unilaterally spent the money that does not belong to him claimed that the balance of my unspent money being returned from China is only \$9,500 (Nine Thousand Five Hundred Dollars) equivalent of ₦1,491,500 (One Million, Four Hundred and Ninety-one Thousand, Five Hundred Naira) and had willingly refused to handover same to me.
8. That the 1st Defendant have spent the money to enhance its business, i.e. the school and other interests of his to the detriment of mine who has suffered numerous losses and had gone ahead to give testimonies in church over the flourishing of this business at the expense of myself.
9. That I had also plead with the pastor of our church to prevail on the 1st Defendant to pay the said amount but the 1st Defendant remain adamant and willfully neglect to pay the said sum.
10. That my monies with the 1st Defendant is beyond the sum of \$9,500 (Nine Thousand Five Hundred Dollars) but I had let go the extra sums but hold the Defendants accountable to the

admitted sum of \$9,500 whereupon he issued dud cheque in satisfaction of part of the said sum.

11. That all attempts made by me to recover the said sum from the defendants have proved abortive.
12. That I am not indebted to the defendants in any material particular, and the defendant could not have held the money in lien of any indebtedness.
13. That I also pleads in evidence the first bank cheque with cheque no: 47421174 which was issued to me b the Defendants as part of the said balance, but the cheque was dishonoured (DAR) by the bank, on the 13th December, 2012.
14. That I pleads the letter of demand served on the defendants on the 16th January, 2013 by my solicitor wherein it erroneously stated ~~₦~~1,200,000 contrary to the \$9,500 equivalent as the sum balance.
15. The Defendants act has badly affected my business whose business capital was diverted and used by the Defendants yet I have spent well over ~~₦~~300,000 (Three Hundred Thousand Naira) to engage a solicitor in the circumstances of this case.
16. That the act of the Defendants had inconvenienced me, thereby losing my business capital, interest and expenditure in

procuring a lawyer, I am entitled to damages/cost of this action in the circumstance.

17. That I would suffer irreparable loss in the circumstance.
18. That it is in the interest of justice to grant this application.
19. That I make this declaration in good faith and in accordance with the Oath Laws of Edo state.ö

On the 22nd day of July, 2013, the P.W.1 continued her evidence by adopting her additional Statement on Oath filed on the 11th day of June, 2013 which is also reproduced below:

öI, MRS OKORO RUTH, Female, Nigerian citizen and a business woman of No. 8, Okojie Street, Off Jemilla Road, Ikpoba Hill, Benin City, Edo State and I hereby State as follows:

1. That I did not plead with the 2nd Defendant to sell any item or goods on my behalf and there was no arrangement or understanding to that effect.
2. That I was never stranded or duped in China as alleged by the 1st Defendant.
3. That I have invoices and number of items I placed order on with Rockbrook & Co. in China and I had never advice the 1st Defendant to purchase any customized items on my behalf.

4. That I have spent 3 weeks in China before the 1st Defendant arrived and he could not have been my saving grace in any material particular.
5. That the 1st Defendant is not a father Chrisman to have issued my husband a cheque of ₦1,200,000.00 (One Million Two Hundred Thousand Naira) except for his indebtedness to me.
6. That the cheque was issued in my name and not my husband.
7. That the 1st Defendant and the wife, Joan Osamudiamhen has visited my house for over 3 times begging for settlement of this matter but each time they promise to send the money they reneged.
8. That I have never pleaded or ask the 1st Defendant to sell any of my weavon or other items whatsoever.
9. That the 1st Defendant had not deny his indebtedness to me except that he is economical with the truth and the claims of sending the goods or items to various churches are only known to his imagination.
10. That the statement of defence of the Defendants is frivolous and should be discountenance.
11. That I make this declaration in good faith.ö

The P.W.1 was subsequently cross-examined by the Learned Counsel to the Defendants, M. O. Oniha (Mrs.). Afterwards, the Claimant closed her case.

The Defendants opened and closed their case on the 28th day of October, 2013. They called D.W.1 and D.W.2 and tendered Exhibits 1, 2, 3 and 4 in evidence. D. W. 1 was on Joan Osamudiamen who adopted her Statement on Oath filed on the 15th day of May, 2013 as her evidence before this Court. The D. W. 1's evidence is reproduced below:

I JOAN OSAMUDIAMHEN, Female, Christian, Businesswoman, citizen of Nigeria and resident at No.80, Pogan Street, Ikpoba-Hill, Benin City, do hereby make oath and state as follows:

1. That the 1st Defendant is my husband.
2. That the Claimant is our neighbor.
3. That sometimes in 2012, I heard a phone conversation between my husband telling the Claimant that he cannot travel to China until August 2012 and that he wish the Claimant the best in her journey to China.
4. That during the middle of the month of July 2012, there were several calls from the Claimant in China to my husband pleading passionately with my husband to travel down to China in order to assist her with the purchase of her goods from China.

5. That due to the continuous calls and plea from the Claimant expressing the difficulty she is faced with in China over her deposit for goods and Chinese company not wanting to give her the goods or return the money, my husband decided to travel to China to assist the Claimant.
6. That my husband initially planned to travel in August 2013 but decided to travel at the end of July in order to assist the Claimant.
7. That while my husband was in China he called me to inform me that the Claimant was back to Nigeria and that she could not purchase the goods she went for neither has her money been returned to her.
8. That the Claimant has directed two persons one Mr. Lucky Kator and Mr. Ganiyu to help her collect the money.
9. That my husband later called me to tell me that Claimant has pleaded with him to help her collect the total sum of ₦5,712,960.00 (Five Million, Seven Hundred and Twelve Thousand, Nine Hundred and Sixty Naira) from the said Mr. Lucky Kator and Mr. Ganiyu.
10. That a week and some days after the Claimant returned to Nigeria, my husband told me that he has recovered the

Claimant's money from the said Mr. Lucky Kator and Mr. Ganiyu.

11. That my husband also called me to inform me that the Claimant refused the money being sent to her that instead my husband should use it to purchase goods for her.
12. That I asked my husband the reason the Claimant wanted him to purchase goods for her he told me if the money is sent to the Claimant she will loose so much money and her purpose for travelling to China will be in vain.
13. That during the transaction between the Claimant and my husband I went to visit the Claimant and she told me she was very pleased with the goods my husband purchased for her.
14. That the Claimant went further to inform me that the only goods remaining for my husband to send to her were the ones with description which will take sometime to produce and that she thank God who brought my husband to help her.
15. That sometime in September 2012, my husband returned from China and he told me he could not wait any longer for the goods to be produced.
16. That sometime in December, three (3) months after my husband returned to Nigeria from China the last expected goods arrived.

17. That on arrival my husband called the Claimant to take delivery of her goods but instead she pleaded that my husband should assist her with the sale of the goods.
18. That my sister-in-law and I including my husband and some members of our church took the goods to various churches in order to sell the goods due to the fact that the goods arrived when demand and sale was low.
19. That my husband offered to assist the Claimant with the sale due to the relationship and also members of the same church.
20. That one fateful morning Mr. Elvis Okoro, Claimant's husband came to our house to plead with my husband to issue a cheque for the balance sum of money remaining in the goods that have not been sold.
21. That my husband told Claimant's husband that the total amount of goods together with the expectant profit is ₦1,200,000.00 (One Million, Two Hundred Thousand Naira).
22. That the Claimant's husband continued to plead with my husband to issue a cheques for the amount remaining but my husband refused on the ground that there was no money in his account and besides the goods have not been sold.

23. That the Claimant's husband told my husband that he needed to use the cheque to settle the loan he gave his wife to invest in her business.
24. That the Claimant's husband went further to say that if my husband does not issue the cheque he may lose his job and that if the cheque is issued he knows how to handle the issue with his bank.
25. That after much plea with my husband he reluctantly issued the cheque to the Claimant's husband.
26. That sometimes in March 2013, my husband realized the sum of ₦200,000.00 (Two Hundred Thousand Naira) from the sale of goods deposited to the various churches.
27. That my husband sent the said sum of ₦200,000.00 (Two Hundred Thousand Naira) to the Claimant but she refused to accept it.
28. That the dispute between the Claimant and my husband arose from a business transaction wherein the Claimant pleaded with my husband to assist her purchase and sell goods.
29. That I depose to this Affidavit conscientiously believing same to be true and correct by virtue of the Oaths Act, Laws of the Federation of Nigeria, 2004.

The D. W. 1 was cross-examined by the Learned Counsel to the Claimant, Odiana Eriata, Esq. Afterwards, the 1st Defendant testified as D. W. 2. He adopted his Statement on Oath filed on the 15th day of May, 2013 as his evidence before this Court. This evidence is reproduced below:

ōI GIDEON OSAMUDIAMHEN, Male, Christian, Businessman, citizen of Nigeria and resident at No.80, Pogan Street, Ikpoba-Hill, Benin City, do hereby make oath and state as follows:

1. That I am 1st Defendant in this case virtue of which position I am familiar with the facts of this case.
2. That the 2nd Defendant is my school.
3. That the 2nd Defendant generates money that is used for the day to day running of the 2nd Defendant.
4. That apart from being the Owner of the 2nd Defendant I am also an International Businessman who deals on goods.
5. That sometime in July the Claimant pleaded with me to accompany her to China to purchase goods since I was used to traveling to China frequently to purchase goods.
6. That I told the Claimant I could not embark on the journey in July due to the graduation ceremony that was taking place in the 2nd Defendant in early July.

7. That on the 31st day of July, 2012, I traveled to China due to the plea and pressure from the Claimant of her inability to purchase the goods or money deposited with Rockbrook Co.
8. That the Claimant informed me that she has directed one Mr. Lucky Kator and Mr. Ganiyu to collect the said sum she deposited with Rockbrook Co.
9. That the Claimant told me that the said Mr. Lucky Kator and Mr. Ganiyu collected the money on her behalf from Rockbrook Co due to the company inability to produce the goods she ordered for and her visa has expired.
10. That on getting to China the claimant told me to assist her collect the sum of \$26,606 (Twenty-Six Thousand, Six Hundred and Six Dollar) which is equivalent to ~~₦~~4,256,960.00 (Four Million, Two Hundred and Fifty-Six Thousand, Nine Hundred and Sixty Naira) and the sum of \$9,100 (Nine Thousand One Hundred Dollar) which is equivalent to ~~₦~~1,456,000.00 (One Million, Four Hundred and Fifty-Six Thousand Naira).
11. That I offered to assist the Claimant get back her money from the said Mr. Lucky Kator and Mrs. Ganiyu.
12. That after several demands from Mr. Lucky Kator and Mr. Ganiyu, I collected the Claimant's Money.

13. That the total sum of money collected from the said Mr. Lucky and Mr. Ganiyu is \$35,760 (Thirty-Five Thousand Seven Hundred and Sixty Dollar) which is equivalent to ₦5,721,600.00 (Five Million, Seven Hundred and Twenty-One Thousand, Six Hundred Naira).
14. That after collecting the said amount I called the Claimant to send her Account Number to enable me pay the money into her account.
15. That the Claimant pleaded with me to use the money to purchase goods for her from China.
16. That the Claimant sent the specification of goods required to me through calls, text messages and emails.
17. That there were several correspondences between me and the Claimant of the transaction between us. I shall at the trial rely on the computer printout of the emails dated 23/8/2012, 15/8/2012; 26/8/2012 and 19/8/2012 which the Claimant sent to me.
18. That some of the goods requested for by the claimant were the type of goods I deal on which usually take some time before they are produced because they are customized.

19. That the goods requested for by the Claimant that were available were delivered to the Claimant in Nigeria and the Claimant acknowledged receipt of the goods.
20. That the remaining goods which were customized where not readily available before I returned to Nigeria.
21. That my goods were also part of the goods that were not available at the time I returned to Nigeria.
22. That sometime in December, 2012 the company in China called me to inform me that the goods were available.
23. That on arrival of the goods from China I called the Claimant to take delivery of her goods.
24. That instead of the Claimant taking delivery of the goods, she pleaded with me to assist her with the sale of the goods.
25. That at the time the goods arrived and duo to the nature of the goods demand and sale of the goods reduced drastically.
26. That as a result of low demand and slow sales of the said goods I dispatched them to various Christian bookshops and outlets.
27. That my goods are also part of the goods dispatched and sent to various bookshops since my own and the Claimant's goods are of the same type.
28. That the Claimant even though aware that the goods have not be sold however keeps mounting pressure on me for the

remaining sum of N1,200,000.00 (One Million, Two Hundred Thousand Naira).

29. That I calculated the value of the goods remaining and the expected profit at the rate of ~~N~~1,200,000.00 (One Million, Two Hundred Thousand Naira) which I communicated to the Claimant due to our relationship.
30. That the cheque issued was mutually agreed between me, the Claimant and Claimant's husband when the Claimant's husband pleaded with me to issue him a cheque in that he took the sum of ~~N~~1,200,000.00 (One Million, Two Hundred Thousand Naira) from the bank where he is working and gave to his wife.
31. That I refused to issue the cheque since the money was not in the bank and the goods have not been sold but the Claimant's husband pleaded with me passionately to issue the cheque and he knows how to handle the issue of the cheque with his bank where he took the loan and gave to his wife for the business.
32. That sometime in March, 2013 I had the sum of ~~N~~200,000.00 (Two Hundred Thousand Naira) from the sale of the goods dispatched to various churches.
33. That I took the said sum to the Claimant's house.

34. That on handing the said sum to the Claimant she refused and starting shouting that she needed the complete sum of ₦1,200,000.00 (One Million, Two Hundred Thousand Naira).
35. That despite my explanation to the Claimant as regards the low demand of the goods presently in the market the Claimant refused to listen instead started insulting and throwing stones at me.
36. That the Claimant refused to collect the said sum of ₦200,000.00 (Two Hundred Thousand Naira) which is the sum sold so far from the goods of both the Claimant and I.
37. That I shall at trial rely on every legal and equitable defences available to me.
38. That the Claimant goods are still and she could take deliverey of them if she wants.
39. That we are not indebted to the Claimant in any form but I was only giving a helping hand to the Claimant to help her dispose of her goods.
40. That I shall contend that this action lacks merit, frivolous, misleading and shall urge this Honourable Court to dismiss same with substantial cost.

41. That I depose to this Affidavit conscientiously believing same to be true and correct by virtue of the Oaths Act, Laws of the Federation of Nigeria 2004.

The Learned Counsel to the Claimant equally cross-examined the D. W. 2. Subsequently, the Defendants closed their case while the case was adjourned for adoption of Written Addresses.

In the course of the trials the seven Exhibits admitted in evidence were as follows:

1. EXHIBIT A - Proforma Invoice of Rockbrook Ind. Co. Ltd, Hongkong in favour of Okoro Ruth Ifeyinwa dated 30th July, 2012.
2. EXHIBIT B - Photocopy of First Bank cheque No. 47421174 in favour of Okoro Ruth for ₦1.2m dated 13th December, 2012.
Payee: Nonpareil Group of School.
3. EXHIBIT C - Claimant's Solicitor's Letter to the 1st Defendant dated 16th January, 2013.
4. EXHIBIT D - Photocopy of an online print out from Claimant to Defendants dated Monday, 13 August, 2012 at 21:44
5. EXHIBIT D1 - Photocopy of an online print out from Claimant to Defendants dated Wednesday, 15 August, 2012 at 21:51
6. EXHIBIT D2 - Photocopy of an online print out from Claimant to Defendants dated Thursday 16 August, 2012 at 10:27
7. EXHIBIT D3 - Photocopy of an online print out from Claimant to

Defendants dated Sunday 19 August, 2012 at 19:37

On the 24th day of February, 2014, Learned Counsel to the Defendants, F. S. Onegbedan (Mrs.) adopted the Defendants' Written Address filed on the 18th day of November, 2013 and their Reply to Claimant's Address filed on the 11th day of December, 2013 as her argument before this Court. Likewise, the Learned Counsel to the Claimant, F. O. Uhunwa Orhue (Mrs.) equally adopted the Claimant's Written Address filed on the 3rd day of December, 2013 as his argument before this Court.

In the Defendants' Written Address, the Learned Counsel representing him canvassed one issue for determination which is reproduced below:

“Having regard to the evidence of the Claimant and the 1st Defendant and from the circumstances of this case whether the Claimant is entitled to the reliefs claimed.”

In arguing this lone issue, Learned Counsel submitted that in a civil case, the standard of proof required is on the preponderance of evidence and it is he who asserts that proves; that whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist; that the burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person. He cited the case of **OSADIM VS TAWO** (2010) ALL FWLR (part 534) page 146 at 150 Ratio 7. Learned Counsel then concluded on this that from the totality of the

evidence led, the Claimant had failed to prove that the Defendants were indebted to her in any form.

Finally, the Learned Counsel submitted that the evidence of the D. W. 1 as to the cheque (Exhibit 8B) issued by the 1st Defendant was unchallenged and therefore remains uncontradicted and deemed admitted. He cited **OLANIYAN VS OYEWOLE** (2011) ALL FWLR (part 589) page 1076 at 1081 R 7 and 8.

On his own part, the Learned Counsel to the Claimant, Odiana Eriata, Esq. adopted his written address filed on the 3rd day of December, 2013 and canvassed three issues for determination which were as follows:

1. Whether the Claimant has discharged the burden of proof on her, sufficient for the grant of the reliefs sought.
2. Whether the 1st Defendant's issuance of a dud cheque to cover the sum allegedly owed the Claimant is inconsistent with his indebtedness to the Claimant.
3. Whether from the totality of available facts and evidence before this Honourable Court the Claimant is entitled to general damages/cost of this action in the circumstance.

Before proffering argument on any of the above issues, Learned Counsel first argued under what he titled: "PRELIMINARY ISSUE" wherein he submitted that the Court is bound by its record and as such the Statement of Defence of the Defendants, having been filed out of time without leave, is incompetent. He cited **AGBAREH AND ANOR VS MIMRA AND 2 ORS** (2008) 1 S. C. (part 111)

88; Order 15 Rule 1 (2) of the High Court (Civil Procedure) Rules 2012; Order 42 Rules 3 (1) of same. He therefore urged Court to discountenance the said Statement of Defence as no reason whatsoever was given for the non-compliance with rules and that there is no material evidence for the Court to waive the non-compliance. He cited the case of **WILLIAMS VS HOPE RISING** (1982) 1 -2 S. C 145 at 153; **ONWUGBUFOR VS OKOYE** (1996) 1 NWLR (part 424) 252 at 292 and **KINFAU VS KINFAU** (2006) 6 NWLR (part 975) page 200.

Learned counsel further submitted that the failure of Defendants to file Statement of Defence after an order of this Court does not admit any excuse on ground of technicality or doing of substantial justice as it is basically the protection of the sanctity of the Court and its orders or directive. He cited the case of **OGUNSOLA VS NICON** (2010) LPELR 6 SC. 231/2003.

He finally submitted that the rules of Court and/or its order are binding on parties and must be obeyed, citing the case of **OWNERS OF THE MV ARABELLA VS NIAC** (2008) 11 NWLR (part 1097) 182.

After the submission on his "PRELIMINARY ISSUE" the issues canvassed by Learned Counsel were now argued by him seriatim in case his preliminary issue is overruled by this Court.

On his issue one, he submitted that the Claimant has satisfied the requirement of Section 134 of the Evidence Act, 2011 and the *onus* on the Claimant shifts on the Defendants to rebut Claimant's claim. He cited the cases of **INDEPENDENT NATIONAL ELECTORAL COMMISSION VS IFEANYI**

(2008) LPELR 6 CA/E/EPT/2A/2008; **HONIKA SAWMILL (NIG.) LTD VS. HOFF** (1994) 2 NWLR (part 326); **DALHATU VS A. G. KATSINA STATE** (2008) ALL FWLR (part 405) 1651 at 1672 6 1678, paragraphs H 6 B (C. A). He further submitted that Claimant's Exhibits "A" and "B" were admitted and unchallenged by the Defendants respectively and therefore deemed admitted. He cited the cases of **MATANMI VS DADA** (2013) 31 WRN 5; **OMOREGBE VS LAWANI** (1980) 3 6 4 SC. 108 at 117; (1986) 12 NSCC 164; **FASORO VS BEYIOKU** (1988) 2 NWLR (part 76) 263; (1988) 1 NSCC (Vol. 19) (part 1) 705; (1988) 4 SCN 23 at 271.

Learned Counsel also submitted on what he headed, "ON HEARSAY EVIDENCE" wherein he urged this Court to disbelieve the evidence of the D. W. 1 as hearsay evidence. He cited Section 227 of the Evidence Act, 2011. He further submitted that the evidence of the D. W. 1 was inadmissible and to be taken with a pinch of salt, citing the cases of **ENGINEER KWALE VS STATE** (2003) FWLR (part 159) 1504 at 1522 CA; **REMN OIL SERVICES LTD VS. ENDWELL TRADING VS OBASANJO** (2005) 7 NWLR (part 910) 24 at 434; **PRISE VS OLUSANYA** (1987) NSCC 577 and **OFEM AND ANOR VS EWA AND ORS** (2012) LPELR 6 CA/C/NAEA/278/2011.

On his issue two, Learned Counsel submitted that Exhibit "B" was a bill of exchange under Section 3 (1) of the Bill of Exchange Act LFN 2005. He further submitted on Exhibit "B" that oral evidence cannot take the place of the contents

of documentary evidence as it is not allowed in law, citing **AGBAKOBA VS INEC** (2008) NWLR (part 1119) 489 S.C.

Learned Counsel further submitted on Exhibit 6B that the issuance of cheque is a way of proving indebtedness, citing the case of **F.A.T.B VS. PARTNERSHIP INVESTMENT Co. LTD.** (2003) 18 NWLR (part 851) 31, (2003) 12 S.C. (part 1) 90, (2003) LPELR 6 SC 293/2011; **BOLANLE ABEKE VS STATE** (2007) ALL FWLR (part 366) 644 at 657, paragraphs H 6 A (SC). He further submitted that paragraphs 30, 31, 32, 33, 34, 36 and 38 of Defendants' Statement of Defence and paragraphs 29, 30, 32, 33, 34 and 36 of 1st Defendant's Statement on Oath and Exhibits 6D, 6D1, 6D2 and 6D3 did not show that Claimant requested for customized goods as alleged by the Defendants; that parties are bound by their pleadings and that submission of Learned Counsel cannot take the place of evidence; no matter how brilliant. He cited the cases of **P.A.S AND T.A LTD VS. BABATUNDE** (2008) 8 NWLR (part 1089) 267 at 296; **INYANG VS. CHUKWUOGOR** (2007) ALL FWLR (part 344) 165 at 180 paragraphs A 6 C and **F.B.N PLC VS. AKPAVABONG COMM. BANK** (2005) LPELR 6 CA/C/03/2004; that 1st Defendant was not a Father Christmas to issue Exhibit 6B and should not be allowed to approbate and reprobate, citing **UBN PLC VS LUOBAL (NIG.) LTD** (2008) 2 NWLR (part 1071) 257; **H. K. S.F. VS. AJIBAWO** (2008) 7 NWLR (part 1087) 511 at 530, paragraphs C 6 D and **OLADAPO VS. BANK OF THE NORTH LTD** (2000) LPELR 6 CA/160/98.

On his issue three, Learned Counsel to the Claimant submitted that where a party incurs injury, pains, sufferings and losses from the act of another, general damages flows naturally, citing MMA INC. VS NMA (2013) 29 WRN 40; NBC PLC AND ANOR VS ORESANYA (2009) 16 NWLR (part 1168) 564 C.A; that the award of damages are within the discretionary powers of the Court to be exercised judicially and judiciously by considering the surrounding circumstance of the case. He cited TOA AND SONS IND. LTD VS GOV. OF OYO STATE AND ANOR (2010) LPELR 6 CA/1/240/2006.

Learned Counsel then prayed Court to answer the three issues he canvassed in favour of the Claimant.

The Defendants' Reply to Claimants Address on Points of Law which the learned Counsel to the Defendants adopted was first directed to the Claimant's Preliminary issue of incompetent Statement of Defence. To this end, Learned Counsel to the Defendants submitted that non-compliance with rules of Court does not vitiate the Statement of Defence; that it is a mere irregularity effectively cured by Order 5 Rules 1 and 2 of the Rules of this Court. He also cited order 3 of the Federal High Court (Civil Procedure) Rules 2000; MAKERI S. Co. LTD VS. ACCESS BANK (NIG) PLC (200) NWLR (part 766) 447 at 474 paragraphs B & C Ratios 10, 11 and 12. Learned Counsel further argued that the Court has the duty to remain Court of justice by doing substantial justice rather than resorting to technicalities. He cited OLOWOKERE VS AKINSIKU (2004) ALL FWLR (part 2012) page 1970 at 1972 Ratio 2, ADDAX PETROLEUM

DEVELOPMENT (NIG.) LTD VS DUKE (2010) ALL FWLR (part 542) page 1636 at 1638 Ratio 4; **EKPUK VS. OKON** (2002) 5 NWLR (part 760) page 445 at 473, 481, Ratios 9 and 10.

Learned Counsel further submitted that the Claimant did not make the application to set aside the Statement of Defence of the Defendants within a reasonable time as required by Order 5 Rule 3 (1) of the Rules of this Court; that having taken a step in the proceeding after the breach of the rules, he is said to have waived the breach. He cited **EKPUK VS OKON** (Supra) Ratio 11; **OKWUEZE VS EJIOFOR** (2001) FWLR (part 48) page 1277 at 1281 R 7. He further submitted that the act of the Claimant in this regard is too late in the day which this Court should discountenance on the strength of order 5 Rules 3 (2); **ATANDA VS AJANI** (1989) 3 NWLR (part 111) page 511.

Secondly, on the issue of hearsay evidence of D. W. 1 raised in the Claimant's Address, Learned Counsel to the Defendants submitted that evidence of a statement made to a witness will be inadmissible if it seeks to establish the truth of what is contained in the Statement but admissible if made solely to establish in evidence that the Statement was made. He cited the case of **UNION BANK PLC VS ISHOLA** (2001) FWLR (part 81) page 1868 R 14; **MOSES VS STATE** (2003) FWLR (part 141) page 1169 at 1975 R 10.

COURT:

The Claimant in his final Written Address before this Honourable Court has raised a Preliminary issue as to the competence of the Statement of Defence filed

by the Defendant out of time without leave of this Honourable Court. As such, he urged Court to discountenance it. This Preliminary issue has to be first addressed by Court before delving into any another substantive issue(s).

As rightly submitted by Learned Counsel to the Claimant, it is trite that Courts are bound by their records. See **AGBAREH AND ANOR VS MIMRA AND 2 ORS** (2008) 1 SC (part 111) 88. It is also trite that Rules of Court are binding on parties to be obeyed on the authorities of **OWNERS OF THE MV “ARABELLA” VS NIGERIA AGRICULTURAL INSURANCE CORPORATION** (2008) Vol. 162 LRCN 197. On the 17th day of April, 2013, this Court granted an order to the Defendant extending time to 14 days for them to file their Statement of Defence which they complied with on the 15th day of May, 2013, more than a forth night without leave of this Honourable Court. This act of the Defendants is condemnable, to say the least. The Claimant however, knew of this irregularity and waited till the stage of writing her final address before raising this Preliminary issue. Does the extant Rules of Court allow him this luxury of time? Order 5 Rules 3 (1) and (2) are reproduced below:

Order 5 Rule 3 (1) An application to set aside for irregularity any step taken in the course of any proceedings may be allowed where it is made within reasonable time and before the party applying has taken any fresh step after becoming aware of the irregularity.

- (2) An application under this rule may be made by Summons or Motion and the grounds of objection shall be stated in the Summons or Notice of Motion.

(Underlining~~s~~ supplied for emphasis).

The Claimant herein has argued that the Defendants violated Order 42 Rule 3 (1) having first violated Order 15 Rule 1 (2) of the Edo State High Court (Civil Procedure) Rules, 2012. Yet she has not complied with the provisions of Order 5 Rule 3 (1) and (2) on the *modus operandi* of bringing an application of this nature before court. Some cerebral questions are worthy of being asked:

1. Can it safely be said that the Claimant has raised this Preliminary issue within reasonable time?
2. Has she taken fresh step(s) having become aware of the irregularity committed by the Defendants?
3. Has she come by way of Summons or Motion stating the grounds of objection therein?

The above questions can only rationally be answered against the Claimant because by the record of this Court, after the Defendants filed their Statement of Defence on the 15th day of May, 2013, the Claimant was in Court with his Counsel, O. Eriata, Esq. leading F. O. Uhunwa-Orhue (Mrs.) where the evidence of P. W. 1 was concluded and case adjourned to 9th day of October, 2013 for

Defence. On the 28th day of October, 2013, the Defendants opened their case by calling D. W. 1 and D. W. 2 in the presence of Claimant's Counsel, Odiana Eriata, Esq. leading F. O. Uhunwa-Orhue Mrs. who also cross-examined the D. W. 1 and D. W. 2 accordingly.

Most importantly, the Claimant has taken further fresh step having become aware of the irregularity of non-compliance to the Rules of Court by the Defendants. I do not think it is at the final stage of writing her address that she can raise this issue as it is diametrically contrary to the motive behind the enactment of the Rules of this Court which she herself complained the Defendants has recklessly violated. It is trite that he who comes to equity must come with clean hands. On this point the Claimant's hands are also soiled with violation of the Rules of this Court just like the Defendants. Besides, granting of the Preliminary issue seems to me to be technical justice which this Court cannot encourage or perpetuate. I therefore overrule the Preliminary issue raised by the Claimant and hold that the Defendants' Statement of Defence filed on the 15th day of May, 2013 is proper before this Court worthy of being considered.

Having said that, I have carefully considered the Statement of Claim and the Statement of Defence, the evidence led, the exhibits admitted in the course of hearing and the addresses of the respective Counsel to the respective parties. I am of the view that the issue raised by the Defendants is sufficient to determine the case as those of the Claimant seem to be proliferated. The Defendants issue is therefore rephrased and reproduced below:

“Whether having regard to the evidence of the Claimant and the Defendants and the circumstances of this case, the Claimant is entitled to the reliefs she claimed.”

From the evidence led, there was no doubt that there was money belonging to the Claimant which got into the hands of the 1st Defendant. The crux of the matter now is that while the Claimant pleaded and testified that the 1st Defendant admitted owing her \$9,500 (equivalent of N1,491,500 (One Million, Four Hundred and Ninety One Thousand, Five Hundred Dollars) at the rate of N157.00/Dollar), the 1st Defendant contended that he used all the money he collected on behalf of the Claimant to buy items on the instruction of the Claimant and that he owes nothing to the Claimant except the N200,000.00 of the sold items which the Claimant rejected and the unsold items which he is willing to return to the Claimant.

It is trite that in civil cases, the burden of proof rests first on the party who asserts. This burden can only shift when it is discharged. See the case of **INTERCONTINENTAL BANK LTD VS BRITINA LIMITED NSCQLR VOL 50** (2012) page 330 where Ngwuta, JSC held thus:

“In civil cases, the burden of proof rests on the party who asserts. The burden will shift to the Defendant once the Plaintiff discharges his burden.”

Paragraphs 6, 7 and 10 of the Claimant’s Statement of Claim are very germane. I reproduced them:

6. That out of the total sum returned to the Claimant through the 1st Defendant, the 1st Defendant claimed to have purchased some items for the Claimant without receipts and used part of the money for his business without the authority of the Claimant.
7. That the 1st Defendant who unilaterally spent the money that does not belong to him claimed that the balance of the Claimant's unspent money being returned from China is only \$9,500 (Nine Thousand Five Hundred Dollars) equivalent of N1,491,500 (One Million, Four Hundred and Ninety One Thousand Five Hundred Naira) and had willfully refused to handover same to the Claimant.
10. That the Claimant's monies with the 1st Defendant is beyond the sum of \$9,500 (Nine Thousand Five Hundred Dollars) but she had let go the extra sums but hold the Defendants accountable to the admitted sum of \$9,500 where upon he issued dud cheque in satisfaction of part of the said sum.

The above pleadings were given evidential backing vide paragraph 6, 7 and 10 of the Claimant's Statement on Oath filed on the 1st day of March, 2013 and duly adopted before this Court on the 15th day of May, 2013.

The reproduction of some excerpts from the evidence gotten from the Claimant as P. W. 1 during cross-examination is necessary. She said:

öI deposited \$9,500 (Nine Thousand, Five Hundred Dollars) with Rockbrook Company Limited in China and I was to pay \$26,000 (Twenty-Six Thousand Dollars) when the goods were produced. I gave the US \$26,000 to my agent to give to the Company when my goods are ready and to ship them to Nigeria for me. My agent is Mr. Cato. The Defendant collected the sum of US\$36,000 for me. He never told me to send my Account No. I told him to use part of the money to buy me some goods. Our conversation was through phone calls, e-mail and text messages. 1st Defendant came with some of the goods he bought for me and did not give me the receipt of purchase. He told me I had a balance of US \$9,500 and he begged me to use it for his business and that he will pay me in October latest.ö

(Underlining supplied for emphasis)

Further the P.W.1 said still under cross-examination:

öWhen he (1st Defendant) came back in August he never came to me to give analysis of how he bought my goods and to give me receipts so I can know how to sell them. It is not true Defendant sent me N200,000.00. He came to my house with his wife and offered me N200,000.00 and I told him I wanted the complete money.ö

From the above evidence, it is clear that the sum of US\$36,000.00 belonging to the Claimant was received by the 1st Defendant in China of which the

Claimant mandated the 1st Defendant to buy her some items. Exhibits öDö, öD1ö, öD2ö, and öD3ö confirm this and they are reproduced below:

Exhibit öDö is an online communication between Claimant and 1st Defendant wherein the Claimant wrote:

öGood day Sir

Please send me the prices for the different types of weavon you bought

brasilian how may kilo

Indian wave how many kilo

Caribbean how many kilo

lace wig how many kilo

so that I can calculate to know how much is left and if I will make profit from it, pls you can buy recharge card from my money for us to talk more.

thanks.ö

Exhibit öD1ö was another online communication on Wednesday, 15 August, 2012 at 21:51 where the Claimant wrote to the 1st Defendant thus:

öGood day Sir,

How was your day? I hope it wasn't too tedious, i got your mail but i don't know what am expecting hv all the weavon been bought? and what is the quantity am expecting? Have you book for the caftan and other things (Like shoes and bags) as discussed, please try to ensure

that for the caftan that it is the yellow and green pattern (Knitted) different sizes colours and lent. Pls ensure u send me the woman who is coming her numbers and flight time and give her my numbers too. Thanks for ur assistance, you hv been a brother and God sent to me.ö (Underlining supplied for emphasis)

Exhibit öD2ö was also an online communication from the Claimant to the 1st Defendant on Thursday, 16 August, 2012 at 10:27 wherein she wrote:

öGood day Sir,

How was your night, I got your mail thanks for the advice, please buy more of weavon and i like your ideas you can market for me and also tell your sister what ever you decided i am ok with it becos i trust your judgement.

But if we are to buy ask your sister to confirm what length and the types to buy more I realy like the idea. I will be waiting at home to hear from your thanks you are realy a brother i appreciate.ö

Finally, Exhibit öD3ö was also an online communication from the Claimant to the 1st Defendant on Sunday, 19 August, 2012 at 19:37 wherein she wrote thus:

öGood day Sir,

I have received your mail thanks a lot.

I meet your sister and she adviced me on what to buy, she said i should tell you to buy these things for me that we should not buy more weavon accessories like beads necklace scaf belt wrist watch

about 1500 dollars clothings American shops tops gown trousers

about 2000 dollars

shoes she said I should buy more shoes about 3000 dollars like the

once you told her about ie more soes bags about 3000 dollars

the rubber slippers about 500 pieces

the one with bore tie 200 pieces size 38, 39, 40, 41, 42, 43 and

the one that is green i want the black of it and orange pls lets talk if

you areö

It is obvious that the above Exhibits öDö, öD1ö, öD2ö and öD3ö were tendered by the 1st Defendant. A careful perusal of these Exhibits would reveal that the Claimant and the 1st Defendant were communicating not only through email (online) but also through telephone conversations. The 1st Defendant has however chosen to tender only the mails from the Claimant to him and not vice versa. This is quite interesting and strange. That notwithstanding, it has been established that the whole sum of \$36,000 belonging to the Claimant was received by the 1st Defendant of which the Claimant mandated the 1st Defendant to use part of it to buy her some named items. The 1st Defendant complied. But to what extent did the 1st Defendant comply? The Claimant, even in Exhibits öDö and öD1ö maintained she did not know how much the 1st Defendant spent on the items bought and how much of her money was left and the quantity of items she was expecting.

Claimant testified that the 1st Defendant admitted the balance was \$9,500. Should this Court believe this evidence? The Claimant also testified that to begin to defray this debt owed her, the 1st Defendant issued Exhibit 6B6 a cheque for the sum of N1,200,000.00 (One Million Two Hundred Thousand Naira) which turned out to be a dud cheque. Exhibit 6B6 was a First Bank Cheque No. 47421174 belonging to the 2nd Defendant (owned by the 1st Defendant) in favour of the Claimant issued on the 13th day of December, 2012. The 1st Defendant testified that he issued this cheque to the husband of the Claimant on a passionate appeal and plea as a result of the loan the latter borrowed for his wife; that the latter said he knew how to explain to his bank. A close examination of Exhibit 6B6 unmistakably reveals that the cheque issued was in favour of the Claimant and not her husband. I find it difficult to believe the 1st Defendant on this point.

What connotation has been given to cheques by the law? In the case of **ABEKE VS THE STATE NSCQLR VOL. 29** (2007) page 1267 at 1290, it was held per Niki Tobi that:

6A cheque is a written order to a bank to pay a certain sum of money from ones bank account to oneself or to another person. It is for all intents and purposes an instrument for payment. It metamorphoses into physical cash on due presentation at the bank and that it makes it legal tender.6

After Exhibit 6B6, the Claimant caused exhibit 6C6 to be written to the 1st Defendant dated 16th January, 2013 and titled: 6ISSUANCE OF N1,200,000 (One

Million, Two Hundred Thousand Naira) DUD CHEQUE TO MRS. OKORO RUTH. A reproduction of paragraphs 7, 11, 12 and 14 of Exhibit 6C is necessary:

7. That out of the total sum which you collected on her behalf you claimed to have spent a colossal amount in purchasing some things (i.e. bags, e.t.c) for her and unilaterally spent the balance of ₦1,200,000 (One Million, Two Hundred Thousand Naira) on your own business.
8. That you assured her that the said balance of N1,200,000 (One Million, Two Hundred Thousand Naira) shall be remitted to her as soon as you returned from China.
11. That after much requisition and perhaps pleading for you to pay the said sum, you issued a cheque of ₦1,200,000 (One Million, Two Hundred Thousand Naira) to clear the indebtedness.
12. That the cheque was presented but returned and consequently she could not draw the said amount.
14. In the circumstance, it is our firm's instruction to demand on behalf of our client the immediate payment of ₦1,200,000 (One Million, Two Hundred Thousand Naira) within 7 days from the receipt of this letter.

The 1st Defendant never denied receiving this letter of demand. He did not also ask the Claimant any question on this Exhibit 6C when he had opportunity

during cross-examination. He is therefore taken to have agreed with the contents of Exhibit öCö. See the Supreme Court case of **GAJI & ORS. V. PAYE** NSCQLR Vol. 14 (2003) PAGE 613 where Edozie, JSC held at page 629 thus:

öIt has been said that the effect of failure to cross-examine a witness upon a particular matter is a tacit acceptance of the truth of the evidence of the witness.ö

From the 16th day of January, 2013 to the 1st day of March, 2013 when the Claimant filed this writ of summon and Claim, I cannot find in the record before me where the 1st Defendant replied this Exhibit öCö or did anything in respect of the dud cheque he issued. I am of the firm belief that the issuance of Exhibit öBö by the 1st Defendant is an admission of indebtedness to the Claimant. I so hold.

The Claimant has however pleaded and testified that the amount of indebtedness to her by the 1st Defendant is to the tune of \$9,500 equivalent of ₦1,491,500 at ₦157.00 per one dollar; that the ₦1,200,000 contained in Exhibit öCö was erroneous. This line of evidence and argument is foreign to our law as it is trite that oral evidence is not permitted to discredit or contradict the contents of documentary evidence. See the case of **EGHAREVBA VS OSAGIE** NSCQLR Vol. 40 (2009) page 469 at 503 per Ogbuagu, JSC where he held that:

öIt is now firmly settled that documentary evidence is the Best Evidence. It is the best proof of the contents of such document and no oral evidence will be allowed to discredit or and contradict the contents thereof except where fraud is pleaded.ö

I therefore discountenance the oral evidence from the Claimant to contradict the contents of Exhibits B and C. Beside, the Court is not to take judicial notice of the fact that a dollar as at the time of the transaction between the Claimant and the 1st Defendant was ₦157.00. I believe the 1st Defendant issued Exhibit B to the Claimant to pay off his indebtedness to her and not as a result of persuasion and plea from the latter's husband. Even the D.W.2 said under cross-examination that:

I helped Claimant to sell part of the goods as directed by her and the proceeds for the sale is the ₦200,000 she refused to accept. I am not owing the Claimant, but her unsold goods are about ₦1,200,000. I am aware that the cheque was returned. Claimant's husband did not tell me he was going to cash the cheque.

The above evidence completely damaged the denial of the 1st Defendant that he does not owe the Claimant any money.

I am minded to say that some of the issues addressed by the Learned Counsel to the Claimant in his final address, such as the issue of the evidence of the D. W. 1 being hearsay, are fanciful and misleading. Again, it is trite that the address of Counsel cannot stand as evidence before Court, no matter how brilliant. See the reasoning of Peter-Odili, JSC at page 436 in AMEH VS FRN NSCQLR Vol. 5 (2010) page 418; per Onnoghen, JSC at page 46 in UBN PLC VS AYODARE AND SONS (NIG) LTD AND ANOR NSCQLR Vol. 30 (2007) page 1.

On the whole by the totality of the evidence led, I am of the unalloyed view that the scale of justice undeniably tilts in favour of the Claimant who has proved his case on a preponderance of evidence and I therefore answer the lone issue in his favour and against the Defendants jointly and severally. I order as follow:

1. Judgment in the sum of \$9,500 (Nine Thousand, Five Hundred Naira Dollars), equivalent of ₦1,200,000.00 (One Million, Two Hundred Thousand Naira) effectively covered by Exhibits 6B and 6C herein being balance of the money given to the 1st Defendant to remit to the Claimant.
2. Interest in the sum of 5% per annum of the above sum from the commencement of this suit on 1st day of March, 2013 until today and subsequently at 10% until the final execution.
3. Damages in the sum of ₦500,000.00 (Five Hundred Thousand Naira).

HON. JUSTICE V.O. EBOREIME
JUDGE
13th May, 2014

COUNSEL:

F. O. UHUNWA-ORHUE (MRS.) FOR CLAIMANT
DEFENDANT UNREPRESENTED.