

IN THE HIGH COURT OF JUSTICE
OF EDO STATE OF NIGERIA
IN THE UROMI JUDICIAL DIVISION
HOLDEN AT UROMI
BEFORE HIS LORDSHIP, HON.JUSTICE P.A.AKHIHIERO,
ON WEDNESDAY THE
18TH DAY OF DECEMBER, 2019.

BETWEEN

SUIT NO: HCU/10/2015

MRS. RITA PIUS

SUING THROUGH HER ATTORNEY

MR. JAMES UWAGWU

AND



-----CLAIMANT

UNION OF BANK OF NIGERIA PLC

-----DEFENDANT

JUDGMENT

The Claimants instituted this suit *vide* a Writ of Summons and Statement of Claim dated and filed on the 20 of October, 2015, claiming as follows:

- a) The sum of One Million, Four hundred and Ninety Nine thousand, Twenty Eight Naira Ninety Five Kobo (N1,499,028.95) being the sum of money removed or withdrawn by an unknown person from the Claimant's account Number 0035978692 without the consent of the claimant;
- b) The sum of fifty million naira (N50, 000,000.00) against the defendant for the breach of duty of care owed to the claimant;

- c) 21% percent interest on the said sum of One Million, Four hundred and Ninety Nine thousand, Twenty Eight Naira Ninety Five Kobo (N1,499,028.95) from the date of filing this suit until judgment; and
- d) 21% percent interest on the said sum of One Million, Four hundred and Ninety Nine thousand, Twenty Eight Naira Ninety Five Kobo (N1, 499,028.95) from the date of judgment until the amount is finally paid.

The Defendant in response filed its statement of Defence dated the 30th day of March, 2016 but filed on the 31st March, 2016.

On 5/4/2017, the Claimant opened her case wherein the Claimant's Attorney, James Uwagwu testified and was cross-examined.

While testifying, the witness adopted his depositions and tendered the following documents:

- (i) Power of Attorney dated 12th August 2015 which was admitted in evidence as Exhibit A;
- (ii) Letter from C.F. Ebu & Co. dated 9/3/15 which was admitted in evidence as Exhibit B;
- (iii) Union Bank Plc. Statement of Account which was admitted as Exhibit C;
- (iv) Mandate on Account No. 0035978692 admitted in evidence as Exhibit D; and
- (v) Letter from the defendant dated 28/10/15 which was admitted in evidence as Exhibit E.

Under cross examination the witness stated *inter alia* that the Claimant is the holder of Acc. No. 0035978692 with the Defendant. That he is not a joint holder of that account with the Claimant and he does not operate the said account. That the Claimant's address is No. 1 White Street, Agbor, Delta State and her name is Rita Pius. He does not know whether the Claimant also uses the name Pius Rita. That the Claimant does not have an ATM card in respect of this account. That he has an ATM card and knows how to use his ATM card. That the PIN of his ATM card is

known to him alone. That he cannot see any portion of Exhibit C where one Mrs. Rose Pius withdrew money from the Claimant's account. That his phone number is 08035649160 and he is not the owner of phone numbers +33673914800, +3363720380.

On 10/7/2018 the Defendant opened their case wherein the DW1 testified but was not cross-examined owing to the absence of the Claimant's Counsel. The matter was then adjourned for cross examination. When this matter came up on the 7th of November, 2018, the Claimant and her Counsel were not in Court to cross examine the Defence witness. The matter was then adjourned to the 14th of January, 2019 for the last time for cross examination of the Defence witness. On the adjourned date, they were again absent without any explanation and the Claimant was foreclosed from cross examination and the suit was adjourned for final addresses.

The learned counsel for the Claimant did not file any Written Address. The learned counsel for the Defendant filed a Written Address wherein he formulated a sole issue for determination as follows:

“Whether the Claimant proved their case upon the preponderance of evidence?”

Arguing the sole issue for determination, the learned counsel for the Defendant ***Idemudia Iueminosen Esq.*** submitted that it is trite law that he who asserts must prove. See: ***GBAFE V. GBAFE (1996) 6 NWLR (PT. 455) page 417 at 432 paras D-F per Adio JSC.***

That it is also trite law that a Claimant should prove his case through evidence and not rely on the weakness of the Defendant's case even where the Defendant did not lead any evidence. See: ***HEALTH CARE PRODUCTS (NIG) LTD. V BAZZA (2004) 3 NWLR (PT. 861) page 582 at 605-606 paras H-D per SANUSI JCA.***

He posited that in civil actions, before the Court comes to a decision it must put the totality of the testimony on an imaginary scale, that of the Claimant on one side and that of the Defendant on the other side, to see which is heavier. That it does not depend on the number of witnesses called by each party but on the quality and probative value of the evidence of those witnesses. See: ***ONOWHOSA V***

ODIUZOU (1999) 1 NWLR (PT. 586) page 173 at 183 paras A-B per OGWUEGBU JSC.

Learned counsel pointed out that in the instant case, the Claimant failed to prove their claims upon the balance of probabilities or the preponderance of evidence.

He submitted that the evidence of CW1 did not establish the following salient facts:

1. That there is any “Pius R” who is a member of the staff of the Defendant Bank different from the Claimant; and
2. That there exists anywhere in Exhibit ‘C’, the statement of account where the said alleged “Pius R” has been withdrawing money from the said account at various branches of the Defendant Bank and other banks nationwide through the use of Automated Teller Machine Card (ATM) from the 30th day of January, 2014 to the 30th day of January, 2015 respectively without the consent or approval of RITA PIUS as alleged in the Claimant’s amended statement of claim dated 23/11/2016 and filed same day.

Counsel submitted that the CW1 under cross-examination said: “I cannot see where Rose Pius withdrew any money from Exhibit C”.

That it is a settled principle of law that an averment in pleadings is not evidence and can never be so construed and must be proved by evidence subject however to admission by the other party. See: ***INSURANCE BROKERS OF NIGERIA V. ATLANTIC TEXTILES MANUFACTURING COMPANY LTD (1996) 8 NWLR (Pt. 466) 316 at 328 -329, paras H-A per IGUH JSC.***

He submitted that in the instant case, it is not enough for the Claimant to allege in their pleadings that there exists one “PIUS R” who is a member of staff of the Defendant Bank; and that the said “PIUS R” made withdrawals from the said account with the use of Automated Teller Machine Card (ATM) without the consent or approval of RITA PIUS, without proving before the Court through witnesses and documents.

Counsel posited that it is a long settled principle of law that a party must be consistent with his case/evidence. That no witness is entitled to the honour of “credibility” when he has two materially inconsistent evidence given on oath by him on record. That such a witness does not deserve to be described as truthful. See: ***MONOPRIX (NIG) LTD V. OKENWA (1995) 3 NWLR (PT. 383) P. 325 AT 341 PARA. C Per Katsina – Alu JSC*** (as he then was).

Learned counsel referred the Court to paragraphs 10 and 11 of the C.W 1's statement on oath of 20th October, 2015 where he stated thus:

“10. The Claimant further avers that several withdrawals had been made in her savings account by one “Mrs. Rose Pius” a staff of the Defendant, who happens to bear the same name and initials with the Claimant.

11. The Claimant states that the said Mrs. Rose Pius has been withdrawing her money at various branches of the defendant Bank and other Banks nationwide through the use of an Automatic Teller Machine Card (ATM Card) from the 30th day of January 2014 to the 30th day of January 2015 respectively without the consent of the claimant”.

Again, counsel referred to paragraphs 10 and 11 of the C.W 1's Statement on oath filed on the 23rd November, 2016 where he stated thus:

“10. That after several withdrawals has been made in her savings account by one “Pius R” a staff of the Defendant Bank that shares same initials with her.

11. That the said “Pius R” has been withdrawing her money at various branches of the defendant bank and other bank nationwide through the use of Automatic Teller Machine Card (ATM) from the 30th day of January, 2014 to the 30th day of January, 2015 respectively without her consent or approval and the defendant bank have never sent any alert to her”.

Learned counsel pointed out that in one breath, the CW1 stated that it was one ‘Mrs. Rose Pius’ that was withdrawing money from the account while in another breath he stated that it was one ‘Pius R’ that was withdrawing money from the account via ATM.

He submitted that the CW1 is not a witness of truth. That he is not a reliable witness, his evidence is speculative and the Court should not to appropriate any probative value to his evidence.

Counsel submitted that where a witness is unchallenged under cross-examination, the Court is entitled to act on such evidence provided it is not

incredible. That where the adversary fails to cross-examine a witness upon a particular matter, the implication is that he accepts the truth of that matter as led in evidence See: *OFORLETE V. STATE (2000) 12 NWLR (Pt. 681) 415 at 436, paras B-c per ACHIKE JSC; GAJI v. PAYE (2003) 8 NWLR (Pt., 823) 583 at 605, paras A-C per EDOZIE JSC.*

That in the instant case, on 14/1/2019 the Court foreclosed the Claimant from cross-examining the DW1 thus leaving the DW1's testimonies uncontradicted and un rebutted.

In the light of the foregoing arguments and authorities, he urged the Court to hold that the Claimant has failed to prove their case upon the preponderance of evidence and thus, dismiss the Claimant's Claim with a crushing cost.

As rightly formulated by the learned counsel for the Defendant, the issue for determination in this suit is: *Whether the Claimant proved her case upon the preponderance of evidence?*

For the purpose of burden of proof in civil suits, *sections 131 to 134 of the Evidence Act 2011* provides as follows:

"131. BURDEN OF PROOF.

(1) 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.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person."

132. ON WHOM BURDEN OF PROOF LIES.

"The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side."

133. BURDEN OF PROOF IN CIVIL CASES.

"(1) In civil cases the burden of first proving existence or non-existence of a fact lies on the party against whom the judgment of the Court would be given if no evidence were produced on either side, regard being had to any presumption that may arise on the pleadings.

(2) If the party referred to in Subsection (1) of this section adduces evidence which ought reasonably to satisfy the Court that the fact sought to be proved is established, the burden lies on the party against whom judgment would be given if no more evidence were adduced, and so on successively, until all the issues in the pleadings have been dealt with.

(3) Where there are conflicting presumptions, the case is the same as if there were conflicting evidence."

134. Standard of proof in civil cases. The burden of proof shall be discharged on the balance of probabilities in all civil proceedings."

Thus the law is settled 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. It is also trite that in civil cases the burden of first proving the existence or non-existence of a fact lies on the party against whom the judgment of the Court would be given if no evidence were produced on either side, regard being had to any presumptions that may arise on the pleadings. See ***Sections 131, 132 and 133 of the Evidence Act, 2011 as amended.***

In the instant case, the Claimant alleged that the sum of one million, four hundred and ninety nine thousand, twenty eight naira ninety five kobo (N1, 499,028.95) was withdrawn from the Claimant's account Number 0035978692 in the Defendant's bank by a staff of the Bank named "Mrs. Rose Pius" or "Pius R" without the consent of the Claimant.

On the part of the Defendant, they denied the allegations of the Claimant and maintained that the any member of their staff did not make any fraudulent withdrawal from the Claimant's account. Incidentally, the learned counsel for the Claimant never cross examined the sole witness for the defence at the trial.

Going through the entire gamut of the evidence adduced by the Claimant, there is nothing to show that there is any staff of the Defendant known as "Mrs. Rose Pius" or "Pius R". Furthermore, the evidence of the Claimant on the identity of the suspected staff appears nebulous and conflicting. In the C.W 1's first deposition made on the 20th of October, 2015 the alleged staff was named "Mrs. Rose Pius". In his additional deposition made on 14th November, 2016 the alleged staff was named "Pius R". However, in the Letter written to the Defendant by the Claimant's solicitor admitted as Exhibit B in these proceedings, the same alleged staff was named "Mrs. Rose Pius".

Juxtaposed with the evidence adduced by the Defendant in denial of the Claimant's allegations, the case presented by the Claimant appears palpably weak, inconsistent and unreliable. I agree entirely with the submission of the learned counsel for the Defendant that the Claimant failed to prove their claims upon the balance of probabilities or the preponderance of evidence. The evidence of CW1 did not establish the following salient facts:

- (i) That any "Mrs Rose Pius" or "Pius R" is a member of the staff of the Defendant Bank; and
- (ii) That there is nothing in Exhibit 'C', the statement of account to show that the alleged member of staff has been withdrawing money from the said account at various branches of the Defendant Bank and other banks

nationwide through the use of Automated Teller Machine Card (ATM) from the 30th day of January, 2014 to the 30th day of January.

On the basis of my finding above, I am of the view that on the preponderance of evidence, the Claimant has failed to prove her Claim. ***The sole Issue for determination is therefore resolved against the Claimant and this suit is dismissed with N50, 000.00 (fifty thousand naira) costs in favour of the Defendant.***

P.A.AKHIHIRO
JUDGE
18/12/19

COUNSEL:

Idemudia Ilueminosen Esq.....Claimant.

E.I.Emordi Esq.....Defendant.