

**IN THE HIGH COURT OF JUSTICE OF BENUE STATE OF NIGERIA
IN THE BENUE JUDICIAL DIVISION
HOLDEN AT MAKURDI
ON THE 24TH DAY OF MAY, 2018
HIS LORDSHIP HON. JUSTICE T.A. IGOCHE - JUDGE**

SUIT NO: MHC/198/2014

BETWEEN:

KUME BRIDGET ASHIEMAR----- PLAINTIFF

AND

**1. GUARANTY TRUST BANK PLC }
2. UNITED BANK FOR AFRICA PLC } -----DEFENDANT**

JUDGEMENT

By a writ of summons filed on 20/5/2014 the Plaintiff sued the 1st defendant but by Motion No. **MHC/3067M/2015** filed on 30/10/15, the 2nd defendant was joined. The statement of claim which was amended via motion No. **MHC/4493M/2016** filed on 5/10/16 and granted on 18/10/16 seek the following reliefs against the defendants jointly and severally;

- (i) An order directing the Defendants jointly and severally to forthwith refund the sum of N90,000.00 (Ninety thousand Naira) debited/withdrawn from the Plaintiff's account in spite of the fact that the ATM which the Plaintiff carried out the transactions did not dispense the said amount to the Plaintiff.
- (ii) An order awarding to the Plaintiff against the Defendants jointly and severally, damages of N10,000,000.00 (Ten Million Naira) for the untold hardship and inconveniences suffered by the Plaintiff as a result of the breach of the duty of care the Defendants owe the Plaintiff and/or breach of the contract between the Plaintiff and the Defendants by the Defendants' failure to make available to the Plaintiff moneys she attempted to withdraw via ATM even though the Plaintiff had adequate funds in her account.
- (iii) Interest rate on the judgment sum at the current interest rate per annum from the 3/10/2013 to the date of judgment and thereafter interest at 10% per annum as allowed by the High Court of Benue State (Civil Procedure) Rules 2007 on the entire judgment sum from the date of judgment till the entire judgment sum is finally liquidated.

The facts leading to this action, as pleaded by the Plaintiff, in summary, are that the Plaintiff holds, maintain and operates savings Account No 0136120145 with the 1st Defendant (Guaranty Trust Bank Plc) but on 3/10/2013, she used her Automated

Teller Machine (ATM) card at the 2nd defendant's ATM located at its North Bank Branch, Makurdi to withdraw the sum of N20,000.00 without success as she was informed via a message to the effect that she did not have sufficient funds in her account; that the same information was given to her on 4/10/2013 when she tried to withdraw N20,000.00 and even N10,000.00; that she was amazed because she had been informed of her balance being N95,213.07 (Ninety-five thousand, two hundred and thirteen naira, seven kobo) on 2/10/2013 when she withdrew N15,000.00 using the same ATM; that upon her complaint to the 1st Defendant on 8/10/13, she discovered that her account was debited in the sum of N90,000.00 for the three times she attempted to withdraw N20,000.00 each on 3/10/13 and N20,000.00 and N10,000.00 on 4/10/13 even though the money was not dispensed to her by the ATM; that she was advised to fill a form which she promptly did and then used the 1st Defendant's ATM to withdraw N5,000.00 that day: that all her efforts to recover the N90,000.00 from the 1st Defendant's proved abortive and that she has suffered immense hardship; embarrassment and financial/economic deprivation by spending transport fare going to and from the 1st Defendant's in a bid to recover the money.

To prove her case, the Plaintiff testified alone and tendered Exhibit '1' Her testimony is as summarized above when cross examined by the 1st Defendant's counsel, the Plaintiff agreed that ATM withdrawals can be done only if one knows the PIN and that she had been withdrawing money using the ATM card whose PIN is known to her alone. Answering questions from the 2nd defendant's counsel, the Plaintiff admitted that she owed the Bank a duty to protect the ATM card and her PIN. She added that she had been using that ATM successfully and that she received an SMS alert after the transaction of 1/10/13 but did not get for the transactions of 3/10/13 and 4/10/13, neither did she request for receipt for the transactions on further cross examination, she said that the transactions on 3/10/13 and 4/10/13 were done between 7-8 am but she could report the failure until 8/10/13 because of the weekend and the pressing issue she had on Monday following.

The 1st Defendant's defence to the suit in her Amended Statement of Defence is that the Plaintiff who has exclusive possession of her ATM card and knows her 4 digits secret pin alone withdrew the sum of N90,000.00 on 3/10/13 and 4/10/13 vide 2nd defendant's ATM. The 1st Defendant's called one witness in the person of Aondoaver Ikyoh, her Relationship Manager as DW1. He adopted his deposition on oath which is the same as the pleaded facts. He tendered Exhibits '2' and '3'. When cross examined by the Plaintiff's counsel, he said that he had worked as an ATM custodian. He agreed that the amount dispensed by the ATM will often times be less than the amount recorded in the journal. He also agreed that it is possible that a customer's account will be debited by the ATM without the cash being dispensed. He admitted that looking at Exhibit '3', he could not see cash being received by anybody. He also agreed that there is a Central Bank directive that all commercial Banks operating the ATM should install cameras that will capture all the transactions by customers. On cross examination by the 2nd Defendant's counsel, DW1 said that he could not make a conclusive statement on whether the 2nd Defendant's complied with that CBN directive

totally. He added that customers are given a window of up to 6 months to complain if there are challenges with the ATM, which would be forwarded to the Reconciliation Team, which would then forward it to the appropriate Bank; and that when the Plaintiff complained, it was forwarded to the 2nd Defendant who replied that transaction was successful. He said, the debits were sent from the 2nd Defendant and to the 1st Defendant's and it is the responsibility of the 1st Defendant to send an SMS alert to the Plaintiff.

DW2 is John Obazee who testified on behalf of the 2nd Defendant whose defence is that cash was presented to the Plaintiff on each occasion of her transactions in question and that the 2nd defendant is full compliant with the CBN Guidelines for card issuance and usage in Nigeria; but that due to power failure which occurred in the 2nd defendants Bank sometime in 2014, the Hard Disk Drive of the ATM camera which had stoned all the footages since 2011, crashed and that the copy that was given to the Plaintiff was available. The DW2 tendered Exhibits 4,5 and 6 when cross examined by the Plaintiff's counsel, the witness said he did not see the Plaintiff taking any money from the ATM. According to him, the duties of an ATM custodian include balancing the records between the ATM and the I. Journal. He admitted that sometimes the journal will bear more cash dispensed than what the ATM has dispensed. He maintained that the CBN guideline on the devices the Banks should have to capture customers collecting money was made in 2016. On further cross examination by 1st Defendant's counsel, he said that the I. Journal and camera footage perform the same function. At the close of the case of the apties, their respective counsel filed written addresses.

For the 1st Defendant's, leaned counsel, Olufunke Shankyura Esq formulated one issue for determination as; whether or not the Plaintiff has proved her case upon a preponderance of evidence as to be entitled to the judgment of this Honourable court. She answered the question in the negative. Citing the case of AGI VS ACCESS BANK PLC (2014) 4 NWLR (PT.1411) 121 at 154 paras E-F, counsel submitted that in an allegation of Negligence, the Plaintiff is expected to plead and lead credible, compelling and conclusive evidence to prove that;

- (i) The 1st Defendant's owed her a duty of care,
- (ii) There was a breach of the duty, and
- (iii) The breach caused her injury or damage

On the first ingredient, counsel submitted that the 1st Defendant's has a duty of care over the Plaintiff's money in its custody but the Plaintiff has the duty of care over her ATM card. She cited the cases of NIGERIAN PORTS PLC V B.P. PLC LTD (2002) 18 NWLR (PT. 1333) 454, OKOYE V KPAJE (1992) 2 SCNJ 290, (1992) 2 NWLR (PT. 226) 633 and ANEM BEEIOR JOSPEH VS. UNITY BANK PLC (unreported) suit No MHC/412/2013 OF 22/12/2014 PER Kakian J. She submitted further that the Plaintiff must plead negligence and give particulars of same and then establish same by credible, reliable compelling and conclusive evidence. She cited the cases of UMUDJE VS SPDC (NIG) (1975) 9-11 SC 155 and UNIVERSAL TRUST BANK OF

NIGERIA V OZOEMENA referred to in AGI V ACCESS BANK (P. 164; Para F-H). She maintained that the 1st Defendant's was neither negligent nor careless in safeguarding the Plaintiff's account as only the Plaintiff is the custodian of the said ATM card.

On allegation of fraud, counsel submitted that fraud cannot be a crime and ought to be proved beyond reasonable doubt even in civil cases. She relied on order 15 Rule 3 (1) of the Rules of this court and the case of OMOTOSHO V OBADEIRO (2014) ALL FWLR (PT. 145) 210 at 237 para A and 236 para F-H. For the third ingredient counsel referred to section 131(1) and (2) of the Evidence Act Cap E 14 LFN to say that the Plaintiff has a duty to prove her assertion but that she has failed to do so and in consequence her claim of damages must fail as it has no pedestal to stand on. She urged the court to dismiss the Plaintiff's claim.

For the 2nd Defendant, two issues are formulated by learned counsel, F.M. Ebofume Nezan Esq. They are;

1. Whether the Plaintiff is a credible witness whose evidence should be believed and relied upon by this Honourable court.
2. Whether Plaintiff has proved her case by preponderance of evidence adduced before this Honourable court to warrant judgment in her favour against the 2nd defendant.

In issue No 1, counsel answered the question in the negative for the reasons that; (i) the narration by her of the facts and circumstances leading to this case are not validated by the documentary evidence before the court, and (ii) the plaintiff failed to make a prompt complaint of the alleged incident until 8/10/2013, 5 days after.

She urged the court to prefer the documentary before it to the oral evidence of the plaintiff on the issue of the ATM displaying "insufficient funds" on 3/10/2013 and 4/10/2013. She cited the case of FASHANU V ADEKOYA (1974) 1 ALL NLR 32 at 37-38, UKAEGBU V NWOLOLO (2009) ALL FWLR (PT. 466) 1852 at 1891 para E and EYA V. OLOPADE (2011) ALL FWLR (PT. 584) 28, (2011) 11 NWLR (PT. 1259) 505 at 533 counsel reasoned further that if the Plaintiff's story that she went to the ATM at 7-8 am on both 3/10/13 and 4/10/13, and the ATM displayed that her account had insufficient fund' Exhibit 5 could not have recorded that she was paid N20,000.00 each at 9:51:30, 9:32:36 and 9:53:24 on 3/10/13 and 15:32:21 on 4/10/13 as well as N10,000.00 at 15:34:01 on 4/10/13. She referred to Exhibit 2. Counsel added that the Plaintiff's failure to promptly request for her balance or report the matter to her banker makes her story incredible. On meaning of credible evidence, counsel referred to the case of YOUNG V CHEVRON (NIG) LTD (2014) ALL FWLR (PT. 747) 620 at 639 paras D-E. After a detailed examination of the Plaintiff's evidence, counsel urged the court to hold that the plaintiff is not a witness of truth and should not be believed.

In issue No. 2, counsel also answered the question in the negative. She referred the court to sections 131 and 133 of the Evidence Act, 2011 and the cases of ALOA V KURE (2000) FWLR (PT. 6) 889, BUHARI V. INEC (2008) 18 NWLR (PT. 1120) 246 at 369-370 and EGBAREVBA V OSAGIE (2010) ALL FWLR (PT. 513) 1277 paras A-E. On

the plaintiff's claim of money for breach of contract between the plaintiff's and the 2nd defendant and further that the plaintiff did not plead negligence. She further submitted that there is also no priority of contract as regards the 2nd defendant she cited UBA PLC & ANOR V JARGABA (2007) ALL FWLR (PT. 380) 1419 at 1433 para B. In conclusion counsel submitted that the Plaintiff has failed to discharge the evidential burden placed on her by law to establish her claim and so her case must be dismissed.

For the plaintiff, the learned counsel, Bem Hanaze Esq., adopted the 1st defendant's lone issue and the 2nd defendant's issue No. II. In his argument, he referred to section 134 of the Evidence Act, 2011 and the case of OSUJI V. EKEOCHA (2009) ALL FWLR (PT. 490) 614 at 643 paras E-H on the standard of proof in civil case of being on the balance of probabilities or preponderance of evidence. Also referring to section 126 of the Evidence Act 2011, counsel contended that the plaintiff adduced direct oral evidence of the failure of the ATM to dispense money to her. On the existence of contract between the Plaintiff and the defendants, counsel cited the case of COMPAGNE GENERALE DE GEOPHYSIENE NIG LTD V OKPARAVERO MEMORIAL HOSPITAL LTD (2011) LPELR-CA/P/329/2015 and MAJEKODUNMI VS NATIONAL BANK OR NIG LTD (1978) 3 SC 119 at 127 and submitted that the contract between the plaintiff and the 1 defendant is that of banker/Customer while that of 2nd defendant's is revolutionary. On breach of duty of care, counsel submitted that both defendants owed her a duty of care and referred to the CBN Guidelines for the Operation of the ATM, 2010, requiring every ATM to have cameras. He submitted that the defendants breached their duty of care and so the plaintiff is entitled to damages. He cited the cases of UBN LTD V ODUSOTE BOOK STORES LTD (1995) 9 NWLR (PT. 421) 558, CAMEROON AIRLINES V MR. MIKE E. OTUTUIZU (2011) LPELR-SC 217/2004, (2011) 4 NWLR 512 (incomplete) and BALOGUN V NATIONAL BANK OF NIGERIA LTD (2009) ALL FWLR (PT. 479) 427 at 447. He contended that the cases cited by the defendants are distinguishable as they relate to withdrawals by unauthorized persons. While this deals with failure of the ATM to dispense cash to the Plaintiff. Counsel appraised the evidence of the 1st defendant and urged the court to hold that the 1st defendant has not proffered a defence to the Plaintiff's case.

Appraising the evidence of the 2nd defendant, counsel submitted that exhibit 4 does not help the 2nd defendant as there is no denying the fact of the use of the ATM by the plaintiff. He contended that Exhibits 3 and 4 are worthless documents in this trial. According to him Exhibits 2, 3, 4 and 6 have given inconsistent accounts of the same event. On the effect of documentary evidence on oral evidence, he cited the case of GBLLEVE & ANOR VS MRS NGUNAN ADDINGI & ANOR (2014) LPELR SC 193/2012 and DAMO V STATE (2016) LPELR. 40239 (CA) as well as the American case of JUDD V CITIBANK, NY CITY civ Ct, 435 NYS 2d 210; 1980 NY Misc Lexis 2282 He referred to the admission of the defence witnesses that there could be error in the i-Journal to show that the documents relied on by the 2nd defendant are not error free. On allegation of contradiction in the Plaintiff's evidence, counsel submitted that they are mere discrepancy and not material contradiction and that such mere

discrepancies cannot adversely affect the case of the party. He referred to the evidence of the defendant that there could be failure of the ATM to dispense cash even though the account is debited and submitted that the most reliable evidence of a successful ATM withdrawal is visual (video and photo) evidence and that the defendants have failed to offer such cogent and credible evidence to prove that the plaintiff got value for her withdrawal transactions. He urged the court to hold that the plaintiff has proved her case against the defendants to warrant entry of judgment in her favour in this suit.

In his reply on point of law, the 1st defendant's counsel repeated his argument in the main address and added that the Plaintiff failed to plead particulars of the alleged breach/negligence He cited the case of IDUFUEKO V PFIZER 12 NWLR (PT. 1420) 96 to submit that the Plaintiff has failed to establish and/or prove the terms of contract between her and the 1st defendant. In the 2nd defendant's Reply address, the learned counsel submitted that section 126 of the Evidence Act relied on by the Plaintiff is irrelevant. She placed reliance on section 125 of the Act instead and urged the court to prefer the documentary evidence in Exhibits 3,4 and 5 to the plaintiff's oral evidence citing the case of NJIKONYE V MTN NIG. COMM LTD, (2008) ALL FWLR (PT. 413) 1343 at 1364 paras D-E, counsel submitted that the plaintiff ought to establish that there actually exists a legally binding contract between them and that it was breached, but that she has woefully failed to so establish. On the principle of law regarding the creation of a valid contract, counsel cited the case of BETA GLASS PLC V EPACO HOLDINGS LTD (2011) ALL FWLR (PT. 579) 1173 at 1192. Counsel maintained that the case of ECO BANK NIG PLC V ELDER DOMINIC EKPERIKPE (Supra) and SUDAN COMMERCIAL BANK V EL DADIG MOHAMMED EL SADIQ (Supra) are irrelevant as the plaintiff is not the 2nd defendant's customer. She then cited the case of OLORUNTOBA-OJU V ABDUL-RAHEEM (2009) ALL FWLR (PT. 497) 1 at 41 paras E-H counsel also submitted that the case of DAMO V STATE (supra) does not avail the Plaintiff as it relates to contradictions. On the plaintiff's reliance on the American authority of JUDD V CITIBANK, NYCITY Civ at (supra), counsel submitted that it is misplaced as that case relates to the phenomenon of cloned cards, which is not the plaintiff's case here and that the said authority is only persuasive, being foreign. She urged this court to refuse to follow it. Counsel urged the court to discountenance the images under the heading CBN standard Guidelines for the operations of ATM 2010 cited by Plaintiff's counsel in his address on the ground that it amounts to counsel giving evidence in the course of final written address, which is contrary to the settled position of the law that the address of counsel cannot attain the acceptability of primary evidence from witnesses whose testimonies have been subjected to the fire of cross examination she cited the cases of CITIZENS INT'L BANK LTD V SCOA NIG. LTD (2006) ALL FWLR (PT. 323) 1680 and SALZGITTER STAHI G MBH V TUNJI DOSUNMU IND. LTD (2010) ALL FWLR (PT. 529) 1024

From the pleadings of the parties and the evidence, both oral and documentary, the facts which are establish and which need no further proof are that; the plaintiff and the 1st defendant have a Banker/Customer relationship and she used her 1st

defendant's ATM card to withdraw money from the 2nd defendant's Automated Teller Machine (ATM) and she carried out the transactions on 3rd and 4th October 2013. The defendants admitted these facts and so they need no further proof. See BAALO V FRN (2016) LPELR 40500 (SC) where it is held, per Peter-Odili JSC at pages 42-43 paras F-A that;

“It is well settled that facts admitted need no further proof.”

All the parties have put the issue for determination as whether the Plaintiff has proved her case against the defendants to warrant entry of judgment in her favour the 2nd defendant added the question, ‘whether the plaintiff is a credible witness whose evidence should be believed and relied upon by this honourable court: I view the above stated issue as an omibus one and I wish to narrow the issue down to whether the plaintiff has proved that money was not dispensed to her when she operated the 2nd defendant's ATM with her ATM card. I have considered the evidence of the parties carefully and studied the bogus final written addresses and Reply addresses of counsel which I have summarized above. The story of the plaintiff is that she withdrew N15,000.00 from her account, using her ATM card at the 2nd defendant's ATM on 2/10/2013 and was informed that her balance was N95,213.07, but when she tried to withdraw N20,000.00 on 3/10/2013, a text displayed on the ATM informing her that she had insufficient funds in her account. She tried a second time and she got the same information the following day being 4/10/2013, she returned to the ATM and tried again to withdraw N20,000.00 and then N10,000.00 but she was still informed of the insufficient fund in her account. It was on 8/10/2013 that she went to complain to the 1st Defendant and discovered that she had only N5,000.00 in her account instead of N95,000.00. Exhibit ‘2’ is the Plaintiff's statement of account for the period 2/10/2013 to 31/10/2013. It shows an entry of withdrawal of N15,000.00 on 2/10/13 and a balance of N95,213.07 on that day. Then on 3/10/2013, withdrawals of N20,000.00 each in three transactions and on 4/10/2013, withdrawals of N20,000.00 and N10,000.00 in two transactions, leaving a balance of N5,213.07. In the Remark column, the transaction is stated to be “Cash withdrawal from others ATM UBA North Bridge BO ATM Benue NG “ Exhibit 5 is the 1-Journal for 539983---4619 Kume Bridget on 03 and 04/10/2013 tendered by the 2nd defendant to show the transactions on the Plaintiff's ATM card on 3rd and 4th October, 2013. It shows that on 3/10/2013, pin was entered at 09:51:06 and cash presented at 09:51:27 and N20,000.00 was withdrawn leaving a balance of N75,000.00 and cash taken at 09:51:30. Pin was again entered at 09:52:13, cash presented at 09:52:14, cash of N20,000.00 taken at 09:52:36 leaving a balance of N55,000.00 Pin was again entered at 09:53:00, cash presented at 09:53:21 and taken at 09:53:24 leaving a balance of N35,000.00. At 09:53:31 card was taken and the transaction ended at 09:53:31. At 09:53:39, Transaction started at 09:53:31. At 09:53;39, Transaction start, then cash taken at 15:32:29, card taken at 15:32:36, transaction end at 15:32:38. No figure/amount is shown against this entry. On 4/10/2013, it is shown that pin was entered at 15:32:59 and cash was presented at 15:33;19 and taken at 15:33:21 in the sum of N20,000.00 pin was entered again at 15:33;40, cash presented at 15:33:59 and N10,000.00 taken at 15:34:01 with transaction ending at 15.34.08. Exhibit ‘1’ is the letter of complaint/demand or Notice

of intention to sue written to the 1st defendant on behalf of the plaintiff. A copy of the plaintiff's statement of Account is attached to it is said to show the wrongful/unauthorized debit/withdrawals' from the Plaintiff's account between 3/10/2013 and 4/3/2013 I have looked at it and compared it with Exhibit '2'. I observe that the contents are the same. As stated earlier, the question for determination, to my mind, is whether the plaintiff has shown that the money was not dispensed to her, it is the contention of the defendants that Exhibits 2 and 5 are documentary evidence which is superior to oral evidence which is not allowed to contradict the contents of documents. Counsel referred to section 125 of the Evidence Act 2011 which states;

“All facts, except the contents of documents, may be proved by oral evidence”.

The cases cited by the 2nd defendant's counsel are relevant as they relate to the superiority of documentary evidence. In FASHANU VS ADEKOYA (supra), the court of trial is enjoined to test the probability of the case of either of the parties by reference to relevant documents which represent evidence of some more or less permanent or perhaps unassailable character. In doing this, I have considered and examined the evidence of the plaintiff along with her conduct as well as the documents before me and I am of the view that on the balance of probability, Exhibits 2 and 4 weigh more than the plaintiff's oral evidence. I say this because, it beats my imagination that the plaintiff who believed that she had a balance of N95,000.00 in her account the previous day being 2/10/2013 continued to try to withdraw money even when she was informed that she did not have sufficient fund, without going to her bank immediately to complain. It is unreasonable for her to have gone to the same ATM the following day to attempt to withdraw money after being told the previous day that she did not have sufficient fund in her account instead of going to her Bank to find out the cause of the information she was getting from the ATM, more so that the said ATM is not that of her Banker when asked why she did not complain immediately, the plaintiff told the court that the transaction fell into the weekend and she could not report until 8/10/2013 because she had a pressing issue on Monday and could not report on that day, which was the next working day. Evidence before the court shows that the transactions of 3/10/13 and 4/10/2013 were carried out during office hour on working days yet the plaintiff who believed she had N95,000.00 simply walked away after being told by the Machine that she did not have sufficient fund in her account. She did not disclose the nature of that pressing issue that could be more important than the issue of the refusal/failure of the Bank to pay her money she requested for through the ATM. I am tempted to agree with the 2nd Defendant's counsel that the only logical explanation as to why the plaintiff did not immediately complain to the 1st defendant is that she got value for her transactions on 3/10/13 and 4/10/2013. In the case of YOUNG V CHEVRON (NIG) LTD (supra) cited by counsel, the court of Appeal held, on credible evidence thus;

“credible evidence is evidence worthy of belief and evidence to be worthy of credit must not only proceed from a credible source but must in addition be 'credible' in itself, by which is meant that it should be so

natural, reasonable and probable in view of the transaction which it describes or to which it relates as to make it easy to believe it. See Black's Law Dictionary, 6th Edition”.

I find it difficult to believe the plaintiff that she did not get value for her transactions as the reasonable thing to do after the alleged failure of the 3/10/13 was to go to her Bank to find out why she got the alleged message on the ATM of insufficient funds, and not to go back to the same ATM to make further attempts at withdrawing money. The balance of probability, looking at exhibits '2' and '4' is that the plaintiff got value for her transactions. Whether made her to go to the 1st defendant to complain on the 8/10/13 is best known to the plaintiff. The law is trite that in civil cases, the burden of first proving the claim rests/lies on the plaintiff or he who asserts. See section 133(1) of the Evidences Act 2011. In the case of BUHARI V INEC (supra), the Supreme Court held that;

“The standard of proof in civil cases, including election petitions, is on the preponderance of evidence or the balance of probabilities. See Okuarume V Obabokor (1965) ALL NLR 360; Are V Adisa (1967) 1 ALL NLR 148; Odulaja V Haddard (1973) II SC 357, (1973) 3 S.C. I; (1979) 3- \$ SC. (Reprint) I; Elias V Omobare (1982) 5 S.C 25; (1982) 5 S.C (Reprint) 13. In determining either the preponderance of evidence or the balance of probabilities in the evidence, the court is involved in some weighing by resorting to the imaginary scale of justice in its evaluation exercise. Accordingly, proof by preponderance of evidence adduced by the Plaintiff, (in our context the petitioner or appellant) should be put on one side of the imaginary scale mentioned in Mogaji vs Odofin (1987) 3 S.C. 91; (1978) 4 S.C (Reprint) 149 and the evidence adduced by the defendant (in our context, all the respondents) put on the other side of that scale and weighed together to see which side preponderates. In arriving at the preponderance of evidence, the court of Appeal in its capacity as a court (Tribunal) of first instance need not search for an exact mathematics figure in the imaginary' weighing machine. Because there is in fact and in law no such machine and therefore no figures talk less of mathematical exactness. On the contrary, the court of Appeal, in its capacity as a court (Tribunal) of first instance, should rely on its judicial and judicious mind to arrive at when the imaginary scale preponderates; and that is the standard; though oscillatory and at times nervous.”

I am guided by the above principles in determining this case. Looking at the evidence of the defendants which is mainly documentary and putting it side by side with that of the Plaintiff, I prefer the evidence of the defendant to that of the Plaintiff. While the case of the Plaintiff appears sympathetic the law is

trite that the justice administered in court is not abstract justice but justice according to law and that sympathy and sentiments have no place in the administration of justice. See the case of POATSON GRAPHIC ARTS TRADE LTD & ANOR V NDIC (2017) LPELR - 42567 (CA) at 46-48 para (CA) where the court held inter alia that;

"A court of law does not base its decision on sympathy or sentiments. The situation in which the Appellant finds themselves in its unfortunate, but sentiments command no place in judicial deliberations."

On this note, I hereby hold that the plaintiff has not proved her case to entitle her to the relief sought. Consequently, the case is hereby dismissed.

(SGD)
HON. JUSTICE T.A. IGOCHE
24/5/18

24/5/18

MHC/198/2014

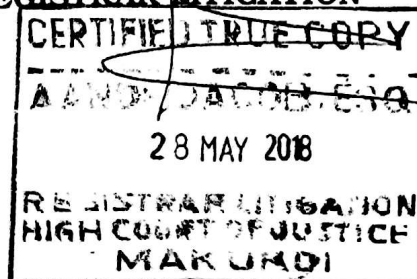
Parties absent

A. Akor Esq for Plaintiff
Amuwa Olatunde Esq (with him E.C Onuora Esq) for 1st defendant
M.G. Nria Esq for 2nd defendant
Court - Judgement is read in open court Order accordingly.

(SGD)
HON. JUSTICE T.A. IGOCHE
24/5/18

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REGISTRAR LITIGATION



Amuwa Olatunde
28¹⁰ 5/18