

CASE DIGEST

BANKER – CUSTOMER: FAILURE TO PAY AN ATM REQUEST IS A BREACH OF DUTY OF CARE BY THE BANK.

MR. MOSES G. JWAN v. ECOBANK NIGERIA PLC; UNITED BANK FOR AFRICA PLC

COURT OF APPEAL (NIGERIA)
(LAGOS DIVISION)

(MSHELIA; HASSAN; ALIYU, JJ.CA)

Mr. Jwan (the Appellant), was a customer of the Respondents who are both commercial banks. While the 1st respondent was the appellant's primary bank with which he had an account where his money was lodged, the 2nd respondent is the owner of an Automated Teller Machine (ATM) by which it offered banking services to the public including the appellant, on commission of N100 per transaction. The appellant used his ATM card issued to him by the 1st respondent in the ATM of the 2nd respondent to request for money. His account was debited with the sum of N10,000 as the money withdrawn and N100 as a service charge, but no money was dispensed to him. The appellant immediately reported to the officers of both respondents when the ATM debited his account without paying him the money. His complaint to the officers of the respondents did not yield any positive results. The 1st respondent claimed that their record showed that the appellant was paid the money by the ATM. This aggrieved the appellant and he, therefore, instituted an action against the respondents at the High Court of Plateau State. The appellant claimed against the respondents for the sum of N10,000 (Ten Thousand Naira) which was debited from his account but which he was not paid. He also claimed special and general damages.

At the trial, the appellant pleaded *res ipsa loquitur* and claimed he could not explain how his account could be debited by the 2nd respondent's ATM though the money was not dispensed to him. He tendered exhibit 18 which was his statement of account showing he was debited with the sum of N10,000 as the money withdrawn and N100 as the service charge for the transaction. The respondents denied the appellant's claim that they were negligent. They insisted that by their records, the 2nd respondent's ATM dispensed the sum of N10,000. They pleaded and tendered evidence.

In its judgment, the trial court held that the appellant could not rely on the doctrine of *res ipsa loquitur*. The court also held that the appellant failed to discharge the burden of proof on him with regard to his case. It therefore dismissed the appellant's claims.

Dissatisfied, the appellant by a Notice of Appeal appealed to the Court of Appeal. One of the issues for determination is *Whether the learned trial Judge was right when he held that the respondents were not negligent and in dismissing the appellant's claims.*

Learned Counsel for the appellant argued that the learned trial Judge was wrong when he held that the respondents were not negligent. Since the appellant was the party who asserted the negative to the effect that he was debited and not paid the cash by the respondents, it is they that had the initial burden of proof having asserted the positive. The learned counsel referred to the pleadings of the respondents and the evidence they called to support their claim in their pleadings regarding the records, information, and images of the transaction in issue and argued that the evidence of the respondents to the effect that they were still awaiting an image of the transaction was at variance with their later claim that there was no image of the transaction in issue. That the 2nd respondent's general denial regarding the existence of camera/image of the transaction means that the presence of camera/image of the transaction is deemed admitted by it and that the 2nd respondent is deemed to have the image of the transaction but failed to produce it and it is therefore caught within the web of the provisions of section 167 of the Evidence Act. This means that evidence, which could be produced and was not, would if produced be unfavourable to the party withholding it. It was further argued that the debiting of the account was not in issue between the parties. What was in issue was the fact that the appellant's account was debited, and the transaction was stated to be successful, but no money was paid to him. Counsel urged to note that the two respondents' witnesses both admitted in their evidence, the possibility of a customer's account being debited without being paid which means that the mere debiting of the account does not amount to conclusive evidence of payment to the appellant or the success of the transaction. That the learned trial Judge failed to appreciate this fact leading him to reach the wrong conclusion that there was no evidence suggesting that the appellant was not paid the money in the transaction. The case of **Habib (Nig.) Bank Ltd v. Gifts Unique (Nig.) Ltd. (2005) All FWLR (Pt. 241) 234 at 259; (2004) 15 NWLR (Pt. 896) 408** was cited to support the argument that a statement of account is not a sufficient proof of a customer's debits and lodgements therein. It was posited that clearly, the respondents failed to prove that the appellant was indeed paid and yet they were wrongly believed by the learned trial Judge. The court was urged to intervene and resolve the issue in favour of the appellant.

Learned Counsel to the Respondent argued that the appellant who alleged that the respondents were jointly and severally liable for negligence, which led to his alleged loss, failed to plead the particulars of the negligence and to prove the same. The learned counsel relied on the decisions in the cases of **New Improved Manibank Ventures Ltd. v. First Bank of Nigeria Plc (2009) 16 NWLR (Pt. 1167) 411; Agi v. Access Bank Plc (2014) 9NWLR (Pt. 1411) 121 at 164; NSUTB v. Uzoemena (2007) 1 SCNJ 318** among others to support the argument and to urge upon the court to hold that the appellant alone had the legal and evidential burden of proving his entitlement to the reliefs he sought and he failed woefully in discharging that burden. As such; there is no justification for the judgment of the trial court to be set aside.

In resolving the issue, the Court held that:

It is not in contention that both respondents are bankers to the appellant. The relationship between a customer and his bank was explained by the Supreme Court in the case of *U.B.N. Plc v. Chimaeze (2014) LPELR-22699(SC); (2014) 9 NWLR (Pt.1411) 166* per Ariwoola, JSC at pages 40-41 that:

“... the appellant is a fiduciary to the respondent. It owes the respondent a duty to exercise a high standard of care in managing the respondent’s money. Therefore, for dishonouring his cheque when his account was in credit to accommodate the amount on the cheque, the appellant had breached the fiduciary relationship between them, to which the respondent was entitled to compensation by way of damages.”

Therefore, the respondents as bankers to the appellant owed him a duty to exercise reasonable care, diligence, and skill in carrying his instructions, which duty has been held to extend over a whole range of banking business including ATM transactions in issue. *See Diamond Bank Plc v. Partnership Inv. Com. Ltd. (2009)12 SCNJ 322; (2009) 18 NWLR (Pt. 1172) 67 and Agbanelo v. U.B.N. Ltd. (2000) LPELR-234(SC); (2000) 7 NWLR (Pt. 666) 534.* **The ATM card issued by a bank is akin to a cheque, which must be honoured on request once there is enough funds in the customer’s account, and failure to do that will mean the banker is in breach of the duty of care owed to its customer.** No doubt it is one of banking innovations to use an ATM card by a customer to request for and withdraw cash from his bank account, and indeed a specialized banking service offered by the respondents. Therefore, the issuance of the ATM cards by the banks to its customers carries with it the duty to ensure that both the cards and the ATMs work as they are meant to and where there is a failure of these services to a customer, the banks are duty bound to explain what happened. This is quite common since the ATMs and their operations are under the control and management of the banks.

Issue resolved in favour of the appellants

P.A. Guzol, Esq., for the Appellant

Leo M. Ebi, Esq., for the 1st Respondent

L.E. Anyia, Esq., for the 2nd Respondent

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