**ACCES BANK PLC**

**V.**

**SAIDON AFRICA LTD**

COURT OF APPEAL

ON FRIDAY, THE 7TH DAY OF JULY, 2017

CA/L/510A/2014

**LEX (2017) - CA/L/510A/2014**

OTHER CITATIONS

2PLR/2017/11 (CA)

**BEFORE THEIR LORDSHIPS:**

MOHAMMED LAWAL GARBA JCA.

YARGATA NIMPAR JCA,

JOSEPH SHAGBAYOR IKYEGH JCA

**BETWEEN**

ACCESS BANK PLC

AND

1. SAIDON AFRICA LIMITED

2. MR. DIKEOMA OKAFOR

3. MRS. UCHE OKAFOR

**ORIGINATING COURT**

FEDERAL HIGH COURT, LAGOS DIVISION

**REPRESENTATION/LAWYERS**

S. OGWEMOH SAN (with him, O. LADEINDE and A. LAWAL AKAPO) - for the Appellant.

A. A. ADEWALE (with him, A. A. ADELEKE) - for the Respondents.

**ISSUES FROM THE CAUSE(S) OF ACTION**

BANKING AND FINANCE LAW – BANKER-CUSTOMER RELATIONS - INDEBTEDNESS OF A CUSTOMER:- Proof of - Oral evidence by bank – Where inconsistent with the outstanding balance of a customer’s account – In the absence of any of any other document – Legal effect

DEBTOR-CREDITOR LAW - DEBT RECOVERY:- Indebtedness of a Customer to Its Banker - Proof of - Oral evidence – Where not borne out by documentary evidence – Duty of court thereto

**PRACTICE AND PROCEDURE ISSUES**

ACTION – COUNTERCLAIM:- Nature and essence of.

APPEAL - DECISION NOT DEPRIVING A PARTY OF AN ENTITLEMENT:- Right of appeal against - Whether exists.

JUDGMENT AND ORDER - DECISION OF TRIAL COURT:- When would be deemed perverse – Duty of appellate court thereto

JUDGMENT AND ORDER - OBITER DICTUM:- What constitutes – Proper treatment of

WORDS AND PHRASES – “OBITER DICTUM” – Meaning of.

**CASE SUMMARY**

ORIGINATING FACTS AND CLAIMS

The appellant was the defendant in the Federal High Court of Lagos State in an action commenced against it by the respondents. The appellant had granted the respondents a loan facility and when a dispute arose between them, the respondents commenced the action.

The appellant filed a counterclaim, seeking the amount owed by the respondents on the loan facility granted the 1st respondent, and the sum settlement sum paid an engineer as full and final settlement in a suit on the account of the forged certificate of occupancy used by the 1st respondent as security for the loan facilities, as well as pre and post-judgment interests on the sums. The respondents denied owing the appellant.

The trial court dismissed both the main claim and the counterclaim and the appellant, being aggrieved appealed to the Court of Appeal, contending that the lower court erred in dismissing its counterclaim when the evidence showed that the respondents were indebted to it.

**DECISION(S) APPEALED AGAINST**

The trial Court entered judgment against Defendant/Counter-Claimant/Appellant, dismissing the appellant’s counterclaims on the ground that the appellant did not adduce any credible evidence to prove indebtedness on the part of its customer/Respondent, hence the appeal by the Defendant/Appellant.

**ISSUE(S) FOR DETERMINATION ON APPEAL**

*BY APPELLANT:*

“(i) Was the learned trial judge right in dismissing the counterclaim of the appellant at the lower court after having found that the respondents took two separate loan facilities from the appellant in the sum of N1.4 billion which the respondents did not fully pay back to the appellant? This issue is formulated from grounds 1, 2, 3 and 5 of the appellant’s notice of appeal dated 10 April 2014.

(ii) Was the learned trial judge right in directing parties to engage in immediate reconciliation talks after delivering a final judgment in suit No. FHC/L/CS/1111/2011 dismissing the claims of the respondents and the counter claim of the appellant in the suit” This issue is raised from ground 4 of the appellant’s notice of appeal dated 10 April 2014.”

*BY RESPONDENTS*

“2.01 Whether the appellant discharged the burden of proving its counterclaim as required by law? This issue arises from grounds 1, 2, 3 and 5 of the appellant’s notice of appeal.

2.02 Whether the pronouncement by the learned trial judge that “the parties should engage in immediate reconciliation talks” constitutes a decision for the purposes of appeal? This issue arises from ground 4 of the appellant’s notice of appeal.”

*AS ADOPTED BY COURT*

[The Court adopted the Issues presented by the Parties].

DECISION OF COURT OF APPEAL

1. “The counter-claim failed to produce any form of evidence to show the alleged indebtedness of the Defendant/Respondent to the counter-claim, neither did Appellant prove how they arrived at the sum claimed.

2. A defendant who claims the existness of a loan has the burden of proofing it and of placing a demand for same. The Appellant/Counter-claimant failed in that regard.

3. The outstanding balance of a customer’s account is the only document that could reveal a bank customer’s status – including alleged indebtedness in the absence of any other document to the contrary.

**MAIN JUDGMENT**

**GARBA JCA** (Delivering the Lead Judgment):

This appeal is by the respondent in appeal No. CA/L/510/14 against the same judgement by the Federal High Court in suit No. FHC/L/CS/1111/ 2011 delivered on 31 January 2014, between the same parties in which the appellant now, as defendant, made counterclaims against the now respondent, as plaintiff. The lower court in the said judgment dismissed the appellant’s counterclaims on the ground that the appellant did not adduce any credible evidence to prove them. The counterclaims, set out in the statement of counterclaim dated 25 February 2013, filed on 26 February 2013, are:

“1 The sum of N864, 926, 386.24 (eight hundred and sixty-four million nine hundred and twenty six thousand three hundred and eighty six naira twenty four kobo) being the amount owed the counter claimant as at December 2011 on account of the facility granted to the 1st defendants to counter claim.

2. The sum of N750,000.00 (seven hundred and fifty thousand naira) the counter claimant paid to Engineer Gladstone A. Longe in full and final settlement of suit No. LD/381/2009 on the account of the forged certificate of occupancy used by the 1st defendants as security for the credit facilities.

3. Interest on the said sum claimed at the rate of 17% per annum from 1 December 2011 till judgment and thereafter at the rate of 15% until after liquidation of the judgment sum.

4. Legal fees and out-pocket expenses in the sum of N5,000.000.00 (five million naira).

5. The cost of this suit.” In the eight (8) paragraphs defence to the counterclaim which is contained in the reply and defence to the counterclaim dated 25 May 2012, the respondent denied being indebted to the appellant.

Instead of the appellant to file a cross-appeal in No. CA/L/510/2014, being dissatisfied with the part of the judgement of lower court dismissing its counter claims, it brought this appeal by the notice of appeal dated and filed on 10 April 2014, containing five (5) grounds of appeal.

Two (2) issues are said to arise for determination by the court from the grounds of appeal in the appellant’s brief filed on 4 August 2014, as follows:

“(i) Was the learned trial judge right in dismissing the counterclaim of the appellant at the lower court after having found that the respondents took two separate loan facilities from the appellant in the sum of N1.4 billion which the respondents did not fully pay back to the appellant? This issue is formulated from grounds 1, 2, 3 and 5 of the appellant’s notice of appeal dated 10 April 2014.

(ii) Was the learned trial judge right in directing parties to engage in immediate reconciliation talks after delivering a final judgment in suit No. FHC/L/CS/1111/2011 dismissing the claims of the respondents and the counter claim of the appellant in the suit” This issue is raised from ground 4 of the appellant’s notice of appeal dated 10 April 2014.”

In the respondent’s unpaginated brief filed on 25 May 2014, the issues for decision in the appeal are said to be:

“2.01 Whether the appellant discharged the burden of proving its counterclaim as required by law? This issue arises from grounds 1, 2, 3 and 5 of the appellant’s notice of appeal.

2.02 Whether the pronouncement by the learned trial judge that “the parties should engage in immediate reconciliation talks” constitutes a decision for the purposes of appeal? This issue arises from ground 4 of the appellant’s notice of appeal.”

An appellant’s reply brief was filed on 29 January 2015, deemed on 27 April 2017. The facts of this appeal and the appeal No. CA/L/510/2014 are the same and as a reminder, the appellant granted the respondent loan/overdraft facilities in respect of which an account was opened and operated with the appellant. In the course of the operation of the account, a dispute arose between them which led to the case before the lower court at the end of which the aforementioned judgement was delivered. Because the issues raised by counsel are essentially the same, I would deal with them as couched by them. In so doing, I would consider issues as formulated in the appellant’s brief, beginning with issue 2.

Issue 2:

(ii) Was the learned trial judge right in directing parties to engage in immediate reconciliation talks after delivering a final judgment in suit No. FHC/L/CS/1111/2011 dismissing the claims of the respondents and the counterclaim of the appellant in the suit” This issue is raised from ground 4 of the appellant’s notice of appeal dated 10 April 2014.”

Appellant’s submissions:

After reference to the definition of a decision in section 318(1) of the Constitution of the Federal Republic of Nigeria,1999 (as amended) and the word “or”in Black’s Law Dictionary,6th Edition, section 18(3) of Interpretation Act and the cases of Military Governor, Lagos State v. Adeyiga (2012) All FWLR (Pt. 616) 396, (2012) 5 NWLR (Pt. 1293) 291 at page 319, (2012) 2SC (Pt.1) 68 and Izedonmwen v. U.B.N. Plc (2012) 6 NWLR (Pt.1295) 1 at page 35, it is submitted that the lower court erred in law to have made a recommendation for immediate reconciliation talks by the parties after dismissing the claims and counterclaims made in the case before it. The recommendation is said to be inappropriate in the circumstances of the case and the court is urged to allow the appeal on the issue.

Respondent’s submissions:

Relying on the cases of Afro-Continental (Nig.) Ltd v. Ayantuyi (1995) 9 NWLR (Pt. 420) 411, (1995) 12 SCNJ 1; Sande v. Abdullahi (1989) 4 NWLR (Pt. 116) 387; Bamgboye v. University of Ilorin (1991) 8 NWLR (Pt. 207) 1 and Amobi v. Nzegwu (2013) 12 SCNJ 91, (2013)12 SC (Pt. 1) 142, (2014) All FWLR (Pt. 730) 1284, on the distinction between “ratio decidendi” and “obiter dictum/dicta” of a decision by a court of law, it is submitted that the passing remark made by the lower court after dismissal of the claims before it, has no bearing or relationship with the dispute between the parties and so an obiter dictum from which there can be no appeal. That the remark was outside the facts and issues before the lower court and so is at best, advisory, at the discretion of the parties without fear of a legal consequence or sanction. Ground 4 and the issue 2 are said to be incompetent for being against an obiter dictum instead of the ratio decidendi of the judgement by the lower court.

In the appellant’s reply brief, it is maintained that the recommendation by the lower court with the use of the word “immediate” is a decision under section 318(1) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) against which an appeal lies to the court.

The basis of the complaint under the issue is the following portion of the judgement by lower court:

“On the whole, I hold that both claims i. e. the plaintiff’s claims and the defendant’s claims ought to be dismissed. No credible evidence supports the claim and the counterclaim. The parties should engage in immediate reconciliation talks. The claim and the counterclaim fail and they are both hereby dismissed.”

As can be easily discerned from the above portion of the judgement by the lower court, the sentence that “The parties should engage in immediate reconciliation talk” was made after the finding or holding that the claims and counter claims ought to be dismissed because there was no credible evidence to support both.

The findings or holdings did not constitute the final decision by the lower court on both the claims and counter claims. In the claims and counter claims, the parties did not raise or join issues and no evidence was placed before the lower court for consideration and finding, on reconciliation talks between the parties. The sentence for parties to engage in immediate reconciliation talks does not purport to be based on any evidence placed before the lower court and so cannot, by any stretch of reasonable imagination, be said to be a finding or holding by lower court. It is not even a recommendation by the lower court but merely a passing advice that is not predicated on any issue and evidence adduced by the parties and is no way related to or tied to the findings preceding it. It is absolutely of no value to the findings by the lower court. The remark or advice is absolutely unnecessary and irrelevant in the determination of the issues in dispute in the case before the lower court and so I agree with the learned counsel for the respondent that it is merely obiter dictum made by lower court. In the case of Salami v. New Nigerian Newspapers Ltd (1999) 13 NWLR (Pt. 634) 315, it was held that:

“An obiter dictum is an observation by a judge on a legal question suggested by the case before him but not arising in such manner as to require a decision. It is therefore no binding as a precedent”

Then in the later case of Enang v. Umoh (2012) LPELR 8386 (CA), it was held that: “An obiter dictum is an observation, statement or opinion expressed by a court in its decision which is not related to the issues submitted to that court for resolution or determination. It is a view expressed by a court which does not affect its decision on the issues that was held that arise to be decided in the case. The cases of Akibu v. Oduntan (2000) FWLR (Pt. 12) 1982, (2000) 13 NWLR (Pt. 685) 446; Abacha v. Fawehinmi (2000) FWLR (Pt. 4) 533, (2000) 4 SC (Pt. II) 1, (2000) 6 NWLR (Pt. 660) 228 and Owhonda v. Ekpechi (2003) FWLR (Pt. 181) 1565, (2003) 9 SCNJ 1, were relied on for the decision. See in addition, Bamgboye v. University of Ilorin (1999) 10 NWLR (Pt. 622) 290, (1999) 6 SC (Pt. II) 72, (2001) FWLR (Pt. 32) 12; Nguma v. Attorney-General, Imo State (2014) 7 NWLR (Pt. 1405) 119, (2014) LPELR 22252 (SC) and Prince Onafowokan v. Wema Bank Plc (2011) All FWLR (Pt. 585) 201, (2011) 12 NWLR (Pt. 1260) 24, (2011) 5 SC (Pt. II) 1.

More importantly, the statement on reconciliation was made before and not after the final decision by the lower court on the claim and counterclaim before it. The final decision by the lower court against which the present appeal was brought is that:

“The claim and the counter-claim fail and they are both hereby dismissed.”

For the purpose of the right of appeal vested by the provisions of section 241(1)(a) and (b) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended), which are applicable to this appeal, in a party to the proceedings, such as the appellant here, the remark by the lower court on reconciliation is neither a finding, recommendation or decision to be the subject of an appeal to this court.

In the case of United Agro Ventures Ltd v. FCMB (1998) 4NWLR (Pt. 574) 546, it was held that to amount to a decision within the context of section 318 of the Constitution, there must be a determination by the court which settles a point in favour or against the parties respectively. See also Dike v. Aduba (2000) FWLR (Pt. 6) 1044, (2000) 2 SCNJ 41 at page 48, (2000) 3NWLR (Pt. 647) 1; Nitel v. Jalau (1996) 1 NWLR (425) 392 at page 403; Ige v. Olunloyo (1984) 1 SC 258, (1984) 1 SCNLR 158.

Then in the case of Ogunkunle v. Eternal Sacred Order C & S (2001) FWLR (Pt. 62) 1866, (2001) 12 NWLR (Pt. 727) 359, (2001) 6 SC 145, (2001) 12 NWLR (727 359, it was held by the apex court that:

“The right of appeal conferred by the Constitution is a right against the decision of a court adversely affecting a party. It therefore goes without any argument that for a person to claim any right of appeal as envisaged, that person must show that the decision of the court is against him or against his interest.”

Finally, the apex court in the case of Mobil Producing (Nig.) Unlimited v. Monokpo (2003) 18 NWLR (Pt. 852) 346, (2003) 12 SCNJ 206, (2004) All FWLR (Pt. 195) 575, (2004) 2 MJSC 9, had held that:

“A party to proceedings cannot appeal a decision thereat which does not wrongly deprive him of an entitlement or something which he had a right to demand. Unless there is a grievance, he cannot appeal against a judgement which has not affected him since the whole exercise may turn out to be academic.”

See also Jadesinmi v. Okotie-Eboh In Re Lessey (1989) 4 NWLR (Pt. 113) 113; In Re: Chief FRA Williams No. 1 (2001) 9NWLR (Pt. 718) 329 at page 340; Ojora v. Agip (Nig.) Plc (2005) All FWLR (Pt. 267) 1433, (2005) 4 NWLR (Pt. 916) 515.

In this appeal, the appellant has not shown that the remark by the lower court on reconciliation talks by the parties is either a decision within the context of section 318(1) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) or that it is aggrieved by the remark in the sense it was deprived of something or that it affected his right or title to something. On both of these grounds, the ground 4 of the notice of appeal and the issue 2 of the appellant are incompetent. Because the arguments on the ground and issue have been considered on the merit, they are liable to be dismissed. They are.

Issue 1:

“(i) Was the learned trial judge right in dismissing the counterclaim of the appellant at the lower court after having found that the respondents took two separate loan facilities from the appellant in the sum of N1.4 billion which the respondents did not fully pay back to the appellant?

This issue is formulated from grounds 1, 2, 3 and 5 of the appellant’s notice of appeal dated 10 April 2014”

Appellant’s submission:

Reference was made to sections 131, 132, 133 and 136 of the Evidence Act, 2011 and among others, the cases of UTB Nigeria Limited v. Ajabule (2006) 2 NWLR (965) 447; F.A.T.B. Limited v. Partnership Investment Company Limited (2003) 18 NWLR (Pt. 851) 35 at page 73, (2004) FWLR (Pt. 192) 167 and Neka B. B. B. Manufacturing Co. Ltd v. A.C.B. Ltd (2004) All FWLR (Pt. 198) 1175, (2004) 2 NWLR (Pt. 858) 521 at page 540, on the burden and standard of proof in civil cases and it is argued that the respondent’s defence to the appellant’s counterclaim was a mere general traverse to the specific statements of facts averred in the 2nd amended statement of defence and counterclaim of the appellant which does not constitute a defence. In addition, it is the case of the appellant that the evidence adduced by it before the lower court in proof of the counterclaim, was not controverted in any material particular and the burden of proof was thereby, discharged as required by the law. According to learned senior counsel for the appellant, there was no dispute from the pleadings and evidence before the lower court that the respondent was granted loan/overdraft facilities by the appellant and that evidence of DW1, who testified in support of the counterclaim even under cross-examination, shows that the respondent is indebted to the appellant. The lower court was said to be wrong, after finding that there was evidence of the facility granted to the respondent and that there was no evidence that the respondent has fully repaid the facility, to turn round to say that there was no credible evidence to prove the counter claim by the appellant. It is the further submission of the learned silk that since the respondent did not controvert or even dispute being indebted to the appellant, it is deemed to have admitted its indebtedness and so there was no burden on the appellant to prove same. Inter alia, Akpan v. Umoh (1999) 7 SCNJ 154, (1999) 11 NWLR (Pt. 627) 349 at page 365 and Cardoso v. Daniel (1986) 2 NWLR (Pt. 20) 1, (1986) 2 SC 491 were cited and it is argued that the decision by the lower court to dismiss the appellant’s counter claim is perverse and an error in law. The court is urged to set aside that decision which is said to be inconsistent with the findings that the respondent enjoyed the facility which it failed to show has been fully repaid back to the appellant. The court is also urged to resolve the issue in appellant’s favour and allow the appeal.

Respondents’ submission:

It is submitted that being a separate claim, the appellant had the burden to prove its counter claim which it failed to do before the lower court. Sections 131-134 of the Evidence Act as well as cases among which are Gowon v. Ike-Okongwu (2003) FWLR (Pt. 147) 1027, (2003) 1 SC (Pt. III) 57 and Mini Lodge Ltd v. Ngei (2009) 18 NWLR (Pt. 1173) 254, (2010) All FWLR (Pt. 506) 1806, (2009) 12 SC (Pt. 1) 94 at page 129, were cited. It is contended that the appellant tendered a statement of the respondent’s account showing that the balance thereon was zero (0) as was confirmed by DW1 and so it was an admission against interest under sections 20 and 24 of the Evidence Act and by the authority of Cappa and D’alberto Ltd v. Akintilo (2003) FWLR (Pt. 160) 1565, (2003) 9 NWLR (Pt. 824) 49 and Adewunmi v. Plastex (Nig.) Ltd (1986) 3 NWLR (Pt. 32) 767, (1986) Vol. 17 (Pt. 11) NSCC 852. Arguments were made on allegations of forgery and fraud by the respondents in order to obtain the facility from the appellant which are of no moment to the issue of proof of the counter claims. It is the case of the respondent that the law requires the appellant to succeed on the strength of its evidence on the counter claim and cannot rely on the weakness of the respondent’s case and so the alleged general traverse by the respondent would not avail the appellant’s lack of proof. Saleh v. Bank of the North Ltd (2006) All FWLR (Pt. 310) 1600, (2006) 6 NWLR (Pt. 976) 316, (2006) 2 - 3 SC 1 at pages 5 - 6; Ishola v. Societe Generale Bank (Nigeria) Limited (1997) 2 NWLR (Pt. 488) 405, (1992) 2 SCNJ 1 and Aeroflot v. U.B.A. (1986) 3 NWLR (Pt. 27) 188 were referred to for the argument that the mere ipse dixit of DW1 that the respondent owes the appellant is inadequate, in the absence of a statement of account showing the debit balance.

The appellant’s reply brief did not deal with any new points arising or raised in the respondents’ brief as stipulated under Order 18, rule 5 of the Court of Appeal Rules, 2011, but rather embarked on argument and further arguments of the issue already canvassed in the appellant’s brief. For that reason, the reply is liable to be and is discountenanced on the issue. See Abubakar v. Nasamu (No. 2) (2011) 11-12 SC (Pt. 1) 1, (2012) All FWLR (Pt. 630)1207, (2012) 17 NWLR (Pt. 1330) 523; Rasaki v. State (2011) 16 NWLR (Pt. 1273) 251; Odon v. Barigha-Amange (2010) All FWLR (Pt. 509) 469, (2010) 12 NWLR (Pt. 1207) 13.

Learned counsel for the respondent is right, because the law is trite, that counterclaim, for the purpose of proof, is a separate and distinct claim or action from the main action in which is usually incorporated as required by the rules of many trial courts.

In a counterclaim therefore, the counter claimant takes the place of the plaintiff in the main action who bears the burden of proving the counterclaim as the party who asserts and desires the court to enter judgement in his favour based on the assertions. See Obi v. Biwater Shellabear (Nig.) Ltd (1997) 1 NWLR (Pt. 484) 722; Jeric (Nig.) Ltd v. U.B.N. Plc (2000) 15 NWLR (Pt. 691) 447, (2000) 2 SC (Pt. II) 113, (2001) FWLR (Pt. 31) 2913; Attorney-General, Cross River State v. Attorney-General, Federation (2005) All FWLR (Pt. 279) 1226, (2005) 15 NWLR (Pt. 947) 71; Nsefik v. Muna (2007) 10 NWLR (Pt. 1043) 502.

The appellant therefore had the duty to prove the counter claims made against the respondent in the case before the lower court. I have at the beginning of the judgement set out the counter claims and the pleadings on the counter claims are to the effect that the respondent has failed and refused to repay the facilities granted to it by the appellant as and when agreed to by the parties in the terms and conditions of the facility. It is also the case of the appellant that as at December 2011, the respondent indebtedness on the facility account stood at N864,926,386.24 (eight hundred and sixty four million nine hundred and twenty six thousand three hundred and eighty six naira and twenty four kobo).

The evidence in support of the counterclaim is contained in the statement on oath of the appellant’s sole witness who testified at the trial.

The counter claim was repeated at paragraphs 22 and 25 of the statement dated 26 February 2013, which was adopted as evidence of the witness at proceedings of 9 December 2013. Through the witness, a copy of the statement of the respondent’s account with the appellant was admitted in evidence and marked as exhibit J1.

The statement of account listed as one of the documents to be relied on by the appellant at the trial of the case is the one copied at pages 353 - 358 of the record of appeal and covers the period between 1 June 2007 to 25 October 2011.

The statement of account was not pleaded by the appellant and it was not mentioned or deposed to in the statement on oath of the appellant’s only witness and so is not identifiable by any other date except the one set out thereon. The closing balance on the said statement of account as at the last date of transaction therein, is shown to be “-0.00”.

Under cross-examination, the appellant’s witness has said among other things, that:

“I know the plaintiff is a customer of the defendant. I am familiar with the accounts of the plaintiff. They opened the account. The request for the loan was given to me. I was involved in packaging the loan. The first published was an overdraft in June 2007. The 2nd was a bank guarantee and overdraft in 2008. The loan publishes were obtained by the plaintiff. The total loan outstanding about N800 million. The first publicity has a high tenure. There is no outstanding balance in an overdraft publicity.”

Although in both pleadings and evidence the appellant claims that as at December 2011, the respondent was indebted to it in the sum of over N800,000,000.00 (eight hundred million naira) on the facility account, the position is not borne out by the only statement of the account put in evidence by the appellant. Parole or oral evidence alone is not in law, sufficient proof of an alleged indebtedness of a customer to a bank where the indebtedness is said to arise from transactions in the customer’s account with the bank. The indebtedness must be demonstrated by and from the statement of the account showing how it was arrived at in the transactions by the customer and period of time covered by the transactions. See Saleh v. Bank of the North (supra) also reported in (2012) IBFLR 357. Whether or not the respondent had specifically or generally denied being indebted to the appellant, there is an admitted denial and in the absence of an express admission in the defence to the counter claim, the appellant bears the legal burden of providing or adducing credible evidence to satisfy the court that, on the balance of probability, the debt is owed in fact, by the respondent. Looking at the respondents’ defence to the counter claim as a whole, a complete denial of indebtedness to the appellant is manifest no matter the form in which it is stated therein. In order to find out the real intention of parties to either deny or admit a claim, the court looks at and considers all the averments in the pleadings, one in relation to the other, i.e. together and not one averment or some only in isolation.

See Eigbe v. N.U.T (2006) 16 NWLR (Pt. 1005) 244; Nwuke v. Union Bank of Nigeria Plc (2009) All FWLR (Pt. 499) 537, (2009) 10 NWLR (Pt. 1148) 1; Kwara Hotels Ltd v. Ishola (2002) FWLR (Pt. 135) 759, (2002) 9 NWLR (Pt. 773) 604; Nigerian Bottling Company Plc v. Oboh (2000) FWLR (Pt. 29) 2379, (2000) 11 NWLR (Pt. 677) 212.

Apart from the ipse dixit of the appellant’s sole witness which does not support and is not in line with statement of account tendered by the witness as the evidence of indebtedness of the respondent to the appellant, there is no other credible evidence before the lower court on the counter claim. In fact, the averment by the appellant in respect of the facilities granted to the respondent as overdrafts and bank guarantee line did not mention the account/s number/s opened by the respondent for the purpose of the facilities and in which transactions were conducted by it giving rise to the alleged indebtedness by the respondent. The only statement of account placed before the lower court in the name of the respondent is in respect of Account No. 0000008422 containing transactions from 1 June 2007 to 25 October 2011 and the closing balance indicated on the statement is “-0.00” as stated earlier. Undoubtedly, the closing balance does not suggest, let alone prove indebtedness in any sum howsoever, on the part of the respondent said to be the account owner. In these premises, the lower court was firma terra; on firma terrain, of the law when it held that:

“The counter-claim failed to produce any form of evidence to show the alleged indebtedness of the defendant to the counter-claim, neither did they prove how they arrived at the sum of N864, 926, 386.24. (eight hundred and sixty four million nine hundred and twenty six thousand three hundred and eighty six naira and twenty-four kobo). No material evidence was placed before this court to that effect save for (Exhibit J1) which is the bank statement. DW under cross-examination could not tell this court the amount outstanding on (Exhibit G1) and (Exhibit G4) and it appears he had no clue as to the position of the alleged outstanding.

DW on oath stated that the defendant made several demands, but the plaintiff refused to yield, when under cross-examination if there was a letter of demand to this effect? He said yes, but he could not produce the said letter of demand in evidence. Furthermore when asked to read out the outstanding balance on (Exhibit J1) to determine the alleged outstanding balance, he read the balance as nil. Apparently, (Exhibit J1) is the only document that could reveal if the defendant to the counter-claim is indebted to the counter-claimant in the absence of any other document to the contrary.

The said document speaks for itself. Oral evidence no matter how couched cannot displace documentary evidence. See the case of Civil Design Construction (Nig.) Ltd v. S.C.O.A. (Nig.) Ltd (2007) All FWLR (Pt.363) 1, (2007) 2 SC 175, (2007) 6 NWLR (Pt. 1030) 300.

In the light of the above, I hold that the counterclaimant have not adduced any credible evidence to prove their claim and the claim ought to be dismissed.”

The above finding and position by the lower court are solidly founded on the evidence placed before it by the appellant itself and cannot seriously, be said to be perverse in law as argued by the learned SAN for the appellant. In the case of N.E.P.A v. Ososanya (2004) All FWLR (Pt. 196) 908, (2004) 5 NWLR (Pt. 867) 601, (2004) 1 SC (Pt. 1) 159, it was held by the apex court that:

“A decision of a court is perverse when it ignores the facts or evidence before it and, when considered as a whole, amounts to a miscarriage of justice.”

In the same vein, it was held in the case of Olowu v. Amayo (2011) LPELR - 4755 (CA), (2012) All FWLR (Pt. 639) 1091, that:

“It is also well settled that a decision or finding is said to be perverse when it was not made upon any credible and admissible evidence on record or, on the application wrong principles of law or consideration of totally extraneous matters and circumstances.”

See also Ejindu v. Obi (1997) 1 NWLR (Pt. 483) 505; Oshinaya v. C.O.P. (2004) 17 NWLR (Pt. 901) 1; N. M. S. Limited v. J. P. Enterprise Limited (2006) 5 NWLR (927) 127; Oladipo v. Moba L.G.A. (2010) 5 NWLR (Pt.1186) 117.

I have no hesitation in holding that the above finding and position by the lower court on the counterclaim made by the appellant against the respondent in respect of the facilities granted to it by the appellant is right and correct in law.

In the result, there is no merit in the arguments by the appellant on the issue and it as resolved against the appellant.

In the final result now, the appeal is dismissed for being bereft of merit.

Parties to bear their costs of prosecuting the appeal.

**IKYEGH JCA:**

I am in full agreement with the meticulous judgment prepared by my learned brother, Mohammed Lawal Garba JCA (Hon. P.J.), in which I respectfully concur with nothing extra to add.

**NIMPAR JCA**:

I was afforded the opportunity of reading the judgment just delivered by my learned brother, Mohammed Lawal Garba JCA.

I agree with the reasoning and conclusion arrived at in the lead judgment.

I also dismiss the appeal and affirm the judgment of the lower court delivered on 31 January 2014. I abide by all the consequential orders made in the lead judgment.

Appeal dismissed