**A.C.B. LTD**

**v.**

**OBA**

COURT OF APPEAL, (BENIN DIVISION)

FRIDAY 21ST MAY, 1993.

SUIT NO. CA/B/89/89

**LEX (1993) - CA/B/89/89**

# OTHER CITATIONS

3PLR/1993/4 (CA)

[1993] 7 NWLR (Pt. 304) 173.

**BEFORE THEIR LORDSHIPS**

JOSEPH DIEKOLA OGUNDERE, J.C.A. (Presided)

YEKINI OLAYIWOLA ADIO, J.C.A.

JAMES OGENYI OGEBE. J.C.A. (Read the Leading Judgment)

**BETWEEN**

AFRICAN CONTINENTAL BANK LTD.

**AND**

1. EUGENE N. OBA

2. PETER I. ODIACHI

3. PAULA. ONYA ONIANWA (Trading as Asaba Development Enterprises)

**ORIGINATING COURT**

HIGH COURT ASABA, OLD BENDEL STATE (NOW DELTA STATE)

**REPRESENTATION**

O.N. OJI Esq. - For the Appellant

S.O.S. ANDY-NWANZE Esq. - For the 1st Respondent

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

BANKING AND FINANCE:- Admissibility - Bank’s statement of account- Conditions precedent to admissibility of - Section 97 (2) (e) Evidence Act, 1990 -Requirement of .

BANKING AND FINANCE:- Admissibility - Secondary evidence of a Banker’s book - Admissibility of - Principles governing -Section 97 (1) (h), & (2) (e) Evidence Act, 1990 - Application thereof.

BANKING AND FINANCE:- Banking practices – Recovery of loan made by way of overdraft – Proper treatment of

COMPANY & CORPORATE LAW:- Action – Proper party to proceed against to enforce a contract made with an operation carried on as a registered business name

DEBTOR AND CREDITOR – BANK LOAN:- Recovery of bank loan made by way of overdraft – Relevant and admissible evidence in proof thereof – Competent party to proceed against where debtors trading under a registered business name

**PRACTICE AND PROCEDURE ISSUES**

APPEAL:- Findings of fact and evaluation of evidence by trial court - Trial court failing to properly evaluate the evidence before it - Wrong inference made from admitted facts - Attitude of appellate court thereto.

COURT:- Duty on court not to formulate cases for parties - Need for court to confine its decision to parties’ cases as made out.

EVIDENCE:- Admissibility - Bank’s statement of account - Conditions precedent to admissibility of - Section 97 (2) (e) Evidence Act, 1990 - Requirement of

EVIDENCE:- Admissibility - Secondary evidence of a Banker’s book - Admissibility of - Principles governing - Section 97)1) (h) & (2) (e) Evidence Act, 1990-Application thereof.

EVIDENCE:- Evaluation of evidence - Duty on trial court in respect thereof - Attitude of appellate court thereto.

EVIDENCE:- Proof- Pleadings - Facts admitted in pleadings- Whether still need further proof - Section 75 of the Evidence Act.

PLEADINGS:- Facts admitted therein - Whether still need further proof - Section 75 of the Evidence Act.

**MAIN JUDGMENT**

**OGEBE, J.C.A.** (Delivering the Leading Judgment):-

The appellant company brought an action against the respondents in the Asaba Division of the High Court of the defunct Bendel State jointly and severally for the recovery of the sum of N10,176.92 being the unpaid balance (principal, interest and other bank charges) as at 30th day of September, 1984 of the overdraft granted to the respondents on their own request at Asaba by the appellant. In the writ of summons, the defendants/respondents were sued jointly and severally as trading as Asaba Development Enterprises.

The appellant filed its statement of claim and the 1st defendant/ respondent filed a statement of defence in reply thereto. The appellant later amended its statement of claim. Paragraphs 1 - 6 of the amended statement of claim give the genesis of the transaction which led to this suit. They are reproduced in full below:

“1. The plaintiff is a Banker carrying on business in Nigeria with Head Office at Lagos and Branches throughout Nigeria and in Asaba.

2. The defendants are customers of the plaintiff at Asaba and operate a Current Account No.035 under the name and style of Asaba Development Enterprises of No.37, Nnebisi Road, Cable- point, Asaba. The said Current Account was opened at the request of the defendants after the defendants have completed the necessary forms for opening of a Current Account. The signature cards and other forms completed by the defendants particularly Form CDA 47 shall be relied upon at the trial.

3. The plaintiff opened the said account No. 035 for the defendants and issued the defendants with cheque book.

4. Because the account was opened in the trade name of the defendants Asaba Development Enterprises, the 1st and 3rd defendants guaranteed the said account No. 035 by the execution of the plaintiff’s Form ACB/LD/4 of 21st day of February, 1978. The said Guarantee Deed dated 21st day of February, 1978 shall be relied upon at the trial of this suit.

5. On the 7th day of December, 1977, the defendants applied for an overdraft facilities of N2,000.00 (Two Thousand Naira) from the plaintiff and completed the plaintiff’s application form for the overdraft facilities. The application fort dated 7th day of December, 1977 executed by the 1st and 3rd defendants on behalf of the 2nd defendant and themselves shall be relied upon at the trial. The plaintiff granted the said overdraft facilities to the defendants. The defendants agreed to pay interest and other bank charges in respect of the said overdraft.

6. The defendants did receive the said overdraft facilities and utilized same by drawing cheques on it and as at the 30th day of September, 1984, the said sum had been overdrawn by N10,176.92 (Ten Thousand One Hundred and Seventy Six Naira, Ninety-Two Kobo) by the defendants and the said sum represents the defendants’ withdrawals, lodgements and the plaintiff’s interest and other bank charges. The plaintiff at the trial of this suit will rely on the cheques drawn on the said Account by defendants.”

The 1st respondent in his statement of defence admitted that he and the other respondents were trading as Asaba Development Enterprises and were granted an overdraft of N2,000.00 by the appellant. Paragraphs)-3 of a statement of defence are reproduced hereunder:

“1. Save as hereinafter expressly admitted, the 1st defendant denies each and every allegation of facts contained in the statement of claim as if such were set out seriatim and specifically traversed.

2. Save that the 1st defendant admits that the plaintiff is a banker carrying on business at its branch at Asaba, and that the 1st defendant, 2nd and 3rd defendants (trading as Asaba Development Enterprises) operates a correct account at the Branch and further on application, the plaintiff granted overdraft to the sum of N2,000,00 (Two Thousand Naira) to the defendants, the 1st defendant does not admit other facts contained in paragraphs 2, 6, and 7 of the statement of claim and puts the plaintiff to his very strict proof thereof.

3. With further reference to paragraph 2 of the statement of claim, the 1st defendant, and trading under the name of Asaba Development Enterprises duly registered under the Registration of Business Names Act, with its head office at 37, Nnebisi Road, Asaba and are customers of the plaintiff.”

One Okala Bamabas Chukwudi gave evidence on behalf of the appellant and tendered documents to show the indebtedness of the respondents to the bank. He tendered a bank statement Exhibit ‘E’ as one of such documents. The 1st respondent gave evidence on his own behalf. He confirmed that he was in partnership with the other respondents in the running of Asaba Development Enterprises. He said that the firm was granted N2,000.00 overdraft by the appellant: He admitted signing Exhibits D and Dl which were the cheques issued to withdraw money from the firm’s account. He denied owing the appellant any sum.

The counsel representing the parties addressed the trial court after which it gave its judgment dismissing the appellant’s claim for 2 reasons:

(i) That the appellant by failing to sue the Asaba Development Enterprises the action against the respondents was incompetent since they were merely guarantors,

(ii) Exhibit ‘E’ was not properly proved in accordance with Section 96(1) (h), (2) (e) of the Evidence Law.

The appellant was not satisfied with that judgment and has appealed to this Court on 5 original grounds of appeal and with that leave of court 2 additional grounds. I do not consider it necessary to set out these grounds in the judgment. In accordance with the rules of the Court, the parties filed their briefs of argument. In the appellant’s brief 4 issues were formulated for determination as follows:

1. Whether the learned trial Judge was correct in holding that the proper defendants were not before him.

2. Having held that the Asaba Development Enterprises was a necessary party to the action, was the learned trial Judge correct in dismissing the action because it had not been made a party.

3. Whether it was right for the learned trial Judge to formulate suo motu issues for the parties and adjudicate on the issues so formulated without hearing arguments from the parties and proceeded to give judgment on the issues so formulated.

4. Whether the learned trial Judge was right in dismissing the Plaintiff/ appellant’s claims having regard to all the circumstances of the case.

The respondent’s brief formulated only 2 issues for determination as follows:

“(a) Was the learned trial Judge correct in dismissing the action having regard to all the circumstances of the case.

(b) Whether the learned trial Judge was right in dismissing the plaintiff’s claim for failure to comply with Section 96 (1) (h), (2) (e) of the Evidence Law.”

The summary of the argument of the appellant in respect of the issues formulated on its behalf is that the Asaba Development Enterprises has no legal personality and could not be sued. It was a trade name used by the respondents and the 1st respondent admitted that much in the statement of defence and evidence in court. The trial court was, therefore, wrong to have held that the case against the respondents was incompetent for failure to join the Asaba Development Enterprises. It was argued that the respondents did not challenge the capacity in which they were sued and the trial court should not have suo motu raised that issue. It was also argued that since the 2nd and 3rd defendants did not file any statement of defence nor defend the suit, the trial court should have entered judgment against them. It was finally argued that the appellant’s only witness did substantially comply with Section 96(1) (h), (2) (e) of the Evidence Law in tendering Exhibit ’E’ which was admitted without objection, and the trial court was wrong in expunging it from the record. The following cases were cited in support of the appellant’s submission: Onibudo v. Abdullai (1991) 2 NWLR (Pt. 172) 230 at pp. 242 & 245; Abakaliki LGC v. Abakaliki RMO (1990) 6 NWLR (Pt. 155)182 at 192; Fed. Capital Dev. Authority (FCDA) v. Naibi (1990) 3 NWLR (Pt.138) 270 at 281; Ochonma v. Unosi (1965) NMLR 321 at 281 & 283; Emegokwue v. Okadigbo (1973) 4 SC 113 at 117; Olawuyi v. Adeyemi (1990) 4 NWLR (Pt.147) 746 at 785 - 786.

The summary of the reply in the 1st respondent’s brief is that the trial court was right in holding that the cause was incompetent against the respondents since the principal debtor was not made a party to the case. It was submitted that the Asaba Development Enterprises being an unincorporated association may sue and be sued. The case of Fawehinmi v. N.BA. (2) (1989) 2 NWLR (Pt. 105) 558 was cited in support. It was also submitted that the trial court rightly rejected Exhibit ’E’ for non-complaince with the provisions of Section 96(1) (h), (2) (e) of the Evidence Law.

In my respectful view, only 2 issues call for determination in this appeal, the first is -

“Whether the trial court was right in raising on its own the matter of the competence of the respondents in the action.”

From the state of the pleadings before the trial court, the capacity of the respondents to the action was not an issue. The 1st respondent in paragraph two of his statement of defence quoted earlier in this judgment admitted that he and the other respondents were trading as Asaba Development Enterprises. That admission confirmed without any shadow of doubt that they were proper defendants before the trial court. That admission equally confirmed that the name Asaba Development Enterprises was a mere business name which was not a legal personality that can be sued. I have read the record of the trial court very carefully and nowhere in the address of the learned counsel for the 1st respondent before that court, did he challenge the capacity in which the 1st respondent was sued.

It is trite law that a trial court should not formulate cases for the parties. It is not for a trial court to engage itself in a hypothetical case or make a defence for a party or invent a case for the parties. The duty of the trial court is to try the specific issues set out by the parties in their pleadings as supported by credible evidence -

See the case of Aguocha v. Aguocha (1986) 4 NWLR (Pt.37) 566. I am clearly of the view that the action against the respondents before the trial court was competent and the trial court was wrong to have held otherwise. In fact, that issue was not before the trial judge and he should not have raised it suo motu.

The Second issue is:

“whether the rejection of Exhibit ‘E’- the statement of account was sufficient reason for the dismissal of the appellant’s claim.”

When Exhibit ’E’ was admitted there was no objection to its admissibility. It was a routine bank statement which should normally not be disputed. The evidence of P. W. I who tendered it is pertinent. It is at pages 33 to 34 of the printed record and reads as follows:-

“As at 30/9/84 the account had been overdrawn to the tune of N 10, 176.92.”

The figure represents entries made in the bank’s book which at the time of the making was one of the bank’s books. The book was in the custody and control of the bank.

The entries were made in the ordinary course of business prepared out of the entries in the ledger, by an officer of the bank.

The entries were examined and compared with the original entries in the ledger and found to be correct. Statement of Account tendered and admitted without objection. It is marked Exhibit “E’.” Section 96 (now Section 97) (1) (h), (2) (e) of the Evidence Act, 1990 reads:

(1) Secondary evidence may be given of the existence, condition or contents of a document in the following cases:

(h) when the document is an entry in a banker’s book.

(2) The secondary evidence admissible in respect of the original documents referred to in the several paragraphs of subsection (I) is as follows:

(e) in paragraph (h) the copies cannot be received as evidence unless it be first proved that the book in which the entries copied were made was at the time of making one of the ordinary books of the bank, and that the entry was made in the usual and ordinary course of business, and that the book is in the custody and control of the bank, which proof may be given orally or by affidavit by a partner or officer of the bank, and that the copy has been examined with the original entry and is correct, Much proof must be given by some person who has examined the copy with the original entry and may be given orally or by affidavit.”

The only witness for the appellant did not testify that he personally examined the statement of account and compared it with the entries in the original bank books and found it to be correct. It follows therefore that even though Exhibit “E” was admitted without objection. it did not comply with all the provisions of Section 97(1) (h), (2) (c) of the Evidence Act and the trial judge rightly expunged it from the record. In the case of Festus Sunmoila Yesufu v .African Continental Bank Ltd (1980) 1 S.C. 49, a bank statement was tendered by a Witness who testified that he did not scrutinize it. The trial court overruled an objection to tender it on the ground that it was not proper secondary evidence of entry in a banker’s book and admitted it. It relied upon that exhibit to give judgment for the claimant. When the defendant appealed to the Supreme Court, that court had this to say on the admissibility of the bank statement at pages 339-341:

“We have considered the scope of this section in The State v. Olomo (unreported but see SC. 1/1970 delivered on 29th October, 1970). We observed in our decision in that case as follows:

“It is not the length of evidence given in tendering a bank statement of account that matters but the substance of the evidence given; nor is it compulsory that the precise words set out in section 96(2)(e) should be used by the witness or the judge taking down his evidence. It is enough that substantially the requirements of the section are observed: e.g.

(i) where it is not possible to produce the books of the bank, a certified copy of the account is enough to satisfy the court that there is a book in existence from where copies were made.

(ii) if certified by an official of the bank giving evidence, this presupposes that he has compared the copy with the original before he certified it, and

(iii) if the books of the bank were produced by the manager or the accountant, this must have been in the custody and control of the bank.”

It is sufficient to point out that, in the case in hand, none of the requirements of section 96 (2) (e) as explained in The State v. Olomo (supra) was complied with by the plaintiffs. All that the 1st PJW. did with the statement of account was “to vet to ensure that all the officers have done their duty before the statement leaves the Bank.” We did not say that he examined it with the original entries and found it correct or that the voucher was one of the books kept by the Bank. On the contrary, the witness testified under cross-examination as follows:

“I did not scrutinises Ex. B and Ex. B 1 before they went out although I saw them. Up till this morning I have never had the opportunity of scrutinising Ex.B”.

For all these reasons, we think that the statement of account should not have been admitted in evidence under that section and the learned trial judge was again in error in admitting it as he did.”

In that case the Supreme Court took the view that as the appellant admitted owing the respondent an unspecified amount, it would not be fair to dismiss the respondent’s claim. It then non-suited the claim.

In the case in hand the 1st respondent admitted in paragraph 2 of the statement of defence that they took an overdraft of N2,000.00 from the appellant. There was evidence that they issued cheques to utilise the facility and no evidence to show that the overdraft had been retired. The 2nd and 3rd respondents though served with processes did not appear in court to defend the suit. The trial court in its rush to dismiss the suit did not properly evaluate all the evidence led before it and the admissions made in the pleadings. When a trial court failed to properly evaluate the evidence before it or made wrong inferences from admitted facts, an appeal court can interfere by making the proper findings of fact justified by the evidence. Seethe case of Highgrade Maritime Services Ltd. v. F.B.N. Ltd (1991) I NWLR (Pt. 167) 290 at page 310.

From the evidence and admitted facts the appellant is entitled at least to judgment in the sum of N2,000.00 and not dismissal of the entire claim. Accordingly I allow this appeal and set aside the judgment of the trial court dismissing the appellant’s claim. In its place I hereby enter judgment for the appellant against the respondent jointly and severally in the sum of N2,000.00 plus interest at the rate of 10% per annum from the date of the lower court’s judgment -30th day of May, 1986 until the judgment sum is liquidated. The appellant is non-suited of the balance of N8,176.92 claimed in the lower court. The appellant is entitled to costs of N250.00 in the court below and N300.00 costs in this court.

**OGUNDERE, J.C.A.:**

I agree with my learned brother Ogebe, J.C.A. that facts admitted in pleadings need no further proof. Section 75 Evidence Act; Okparaeke v. Egbuonu (1941) 7 WACA 53 at 55; Olubode v. Oyesina (1977) 5 SC 79 at 85. Therefore as the 1st respondent admitted owing the plaintiff/appellant Bank N2,000 in paragraph 2 of the statement of defence, the plaintiff having failed to prove satisfactorily by a preponderance of evidence the remaining amount, the appeal succeeds in part. It is non-suited as regards the debt above the admitted N2,000. Pursuant to Section 16, Court of Appeal Act, 1976, judgment is hereby entered for the appellant against the respondents in the sum of N2,000. The appellant Bank is non-suited as regards the debt claimed in excess of N2,000 with N250 costs in the Court below and N300 costs in this Court.

**ADIO, J.C.A.:**

I have had the benefit of reading in advance the judgment just read by my learned brother and I agree entirely with it and abide by the consequential orders including the order for costs.

Appeal partly allowed