**OLASUNKANMI GREG AGBABIAKA**

**v.**

**FIRST BANK OF NIGERIA PLC**

IN THE SUPREME COURT OF NIGERIA

ON FRIDAY, THE 28TH DAY OF JUNE, 2019

SC.6/2007

**LEX (2020) – SC. 6/2007**

**OTHER CITATIONS**

3PLR/2020/38 (SC)

(2019) LPELR-48125(SC)

**BEFORE THEIR LORDSHIPS**

IBRAHIM TANKO MUHAMMAD, JSC

AMINA ADAMU AUGIE, JSC

EJEMBI EKO, JSC

PAUL ADAMU GALUMJE, JSC

UWANI MUSA ABBA AJI, JSC-end!

**BETWEEN**

OLASUNKANMI GREG AGBABIAKA (Substituted for Alhaji S. O. Agbabiaka (Deceased) by Order of Court dated February 25, 2003) -Appellant(s)

AND

FIRST BANK OF NIGERIA PLC - Respondent(s)-end!

**ORIGINATING COURT(S)**

1. COURT OF APPEAL, LAGOS DIVISION

2. LAGOS STATE HIGH COURT -end!

**REPRESENTATION**

Olumide Sofowora, SAN with him, P. E Tagbo, Esq. and G. Sofowora, Esq. - For Appellant

AND

Emoni Williams, Esq. - For Respondent-end!

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

BANKING LAW – BANKER-CUSTOMER RELATIONS – IMPLIED TERMS AS TO OVERDRAFT:- Unpaid overdraft – Where there is no specific date agreed upon for the repayment of an overdraft – Cause of action related thereto – Whether arises only after a demand has been placed or a notice given

BANKING LAW – BANKER-CUSTOMER RELATIONS - INTEREST RATE: Where there is no express agreement as to the rate of interest payable – Whether bank is entitled to charge interest rate on the basis that there is an established custom to that effect

DEBTOR-CREDITOR RELATIONSHIP:- Cause of action related to a debt – Principle that a debt is repayable either on demand or on notice given or upon any other condition agreed upon by the parties – Legal implications for when a cause of action connected to a debt is deemed to have arisen

CONSTITUTIONAL LAW - BREACH OF RIGHT TO FAIR HEARING: Instance where it cannot be said that a right to fair hearing has been breached

CONSTITUTIONAL LAW - RIGHT TO FAIR HEARING: Two-prongs of the Principle of fair hearing -"Audi alteram Partem" and "Nemo Judex in cause" – Meaning and essence of – S. 36 of the Constitution of the Federal Republic of Nigeria 1999 (as amended) – Constitutional basis and criteria – When will not be deemed to avail a litigant

ETHICS – LEGAL PROFESSIONAL – DUTY OF COMPETENCE AND DILIGENCE”—Principle that no Court sits at the convenience of either a party or his counsel, no matter his status or their imagination of their status – Legal implications of – Counsel who with due notice fails to attend a scheduled court session due to conflict with an alleged court appearance elsewhere - Attitude of court thereto – Rules 16, 30, AND 31(1) of the Rules of Professional Conduct for Legal Practitioners, 2007 in review-end!

**PRACTICE AND PROCEDURE ISSUES**

APPEAL - INTERFERENCE WITH CONCURRENT FINDING(S) OF FACT(S): Pure questions of fact - Attitude of the Supreme Court to invitation to interfere with concurrent finding(s) of fact(s) of Lower Courts

EVIDENCE - BURDEN OF PROOF/ONUS OF PROOF:- Principle that "whoever desires any Court to give him judgment, as to any legal right or liability dependent on the existence of facts which he asserts, has the onus of proving that those facts exist – Effect of failure thereto

JUDGEMENT AND ORDER - OBITER DICTUM:- Meaning of an obiter dictum – Distinction from a ratio decidendi - Whether an appeal can lie against an obiter dictum

JUDGEMENT - SUMMARY JUDGEMENT PROCEDURE:- Showing cause in a summary judgement procedure - Meaning of - -end!

**CASE SUMMARY**

ORIGINATING FACTS AND CLAIMS

On 16th May, 2006, the Court of Appeal, Lagos Division (the lower Court) affirmed the decision of the Lagos State High Court (the trial Court) delivered on 18th July, 1997 based largely on facts. Uncontested was that the Appellant applied for and was granted by the Respondent a term loan/overdraft of N180,000.00. for "the processing and development of" Appellant’s film business. The Appellant, despite repeated demands for repayment of the loan plus the accrued interest thereon, failed to repay the loan capital and the interest thereon to the Respondent. Thereupon, the Respondent took out, against the Appellant a suit on a Writ of Summons specially endorsed and claiming among others, -

a. A declaration that Clause 2 of Memorandum of Deposit of Deed dated 29th January, 1985 made between the Defendant of one part and the Plaintiff is a binding contract upon the Defendant.

b. An order compelling the Defendant to execute a legal mortgage in respect of his property situate at No. 22, Akinbaiye Street, !solo in favour of the Plaintiff, and to assign the statutory right of occupancy and deposit the certificate thereto to the Plaintiff as security for a loan of N180,000.00 (One Hundred and Eighty Thousand Naira) granted by the Plaintiff to the Defendant on 29th January, 1985 and which has accrued with interest to the sum of N844,207.00 as at 17th June, 1992.

c. The sum of N844,207.00 being the cumulative principal and interest due to the Plaintiff as at 17th June, 1992 as a result of Banking Facilities (term loan overdraft) granted at the request and instance of the Defendant for the sum of N180,000.00 (One Hundred and Eighty Thousand Naira) of the cumulative sum thereof which the Defendant has refused, failed and still refuses, failed and or neglected to pay despite repeated demands.

d. 15% interest on overdraft facility at an implied Bank rate from 29th January, 1985 to date of judgement.

e. 10% per annum interest at the Court rate from date of judgement until the whole judgement debt together with the interest thereon is fully paid.

The Appellant failed to respond to the suit of the Respondent within the period stipulated by the Rules of the trial Court. The Respondent, pursuant to the Rules, filed a motion praying for final judgement against the Appellant in terms of the claims sought. In response, the Respondent filed a 14 paragraph affidavit tending to show cause why "he should, as the Defendant, be allowed to defend the action”.

The learned trial Judge, finding that the Appellant (the Defendant) has not established any satisfactory defence, ruled against granting the leave sought to defend the suit and entered judgement for the Respondent/Plaintiff – a decision which was affirmed by the Court of Appeal. -end!

DECISION(S) APPEALED AGAINST

1. The findings of fact by the trial Court that the loan/overdraft the Appellant took from the Respondent was not interest free;

2. The Appellant's affidavit, intended to show cause why he should be given leave to defend, "did not condescend on particulars" and that it did not disclose any defence to the claim of the Respondent.

3. The Appellant merely made a sweeping general denial of the averments in the Respondent's supporting affidavit without joining issues with specific averments of the Respondent. -end!

ISSUE(S) FOR DETERMINATION ON APPEAL

*BY APPELLANT:*

Issue 1 canvassed by the Appellant is a complaint that the Appellant, from the facts of this case, had established all the factual conditions entitling him to be granted leave by the trial Court to defend the suit.

Issue 2 complains that there were no facts establishing the conditions for the grant of summary judgement under the relevant Rules of trial Court and that Respondent's Form 917 exhibited to the statement of claim did not show any agreement to pay any interest on the principal loan sum.

Issue 3 complains about the strictures on the Appellant's counsel by the lower Court, on account of which strictures, the Appellant was denied fair hearing resulting in the unfavourable judgement the Appellant had from the lower Court. -end!

*BY RESPONDENTS*

*[Not available]*-end!

*AS ADOPTED BY COURT*

[Resolved appeal based on issues distilled by the Appellant]-end!

DECISION OF SUPREME COURT

1. A party given or provided an opportunity to present his case, who failed to utilise the opportunity, cannot complain that he was denied the opportunity to be heard. Fair hearing, within the context of audi alteram partem, means only that the Court should give equal opportunity to both sides to present their respective cases. It does not mean, as audaciously submitted and expected by the Appellant's counsel, that beyond providing the parties an equal opportunity to present their cases that one of the parties or his counsel could hold the Court and his adversary to ransom and insist that the Court sit at his convenience.

2. I will also dismiss, with ignominy, the puerile contention that the trial Court denied the Appellant fair hearing. Counsel for the defendant (Appellant) having at the trial Court without excuse, opted out of the hearing fixed to take place on 7th July, 1997, cannot be heard to complain that his client was denied fair hearing.

3. On the whole, I find no substance in this appeal on all the issues canvassed. Accordingly, the appeal is hereby dismissed in its entirety. The decision of the trial Court as affirmed by the lower Court on 16th May, 2006 in the appeal No. CA/L/49/2001 is hereby further affirmed. Costs at N500,000.00 shall be paid to the Respondent by the Appellant.-end!

**MAIN judgement**

EJEMBI EKO, J.S.C. (Delivering the Leading Judgement):

On 16th May, 2006, the Court of Appeal, Lagos Division (the lower Court) affirmed the decision of the Lagos State High Court (the trial Court) delivered on 18th July, 1997. The decision of the trial Court was largely on facts.

The Respondent was the Plaintiff at the trial Court; while the Appellant was the Defendant. Between the Appellant and the Respondent: the fact is indubitable that on 29th January, 1985, on the application of the Appellant for term loan/overdraft of N180,000.00, the Respondent granted him the said term loan/overdraft of N180,000.00. The Appellant obtained the said term loan/overdraft of N180,000.00 for "the processing and development of" his film business. The Appellant, despite repeated demands for repayment of the loan plus the accrued interest thereon, failed to repay the loan capital and the interest thereon to the Respondent. On 6th December, 1994 the Respondent therefore took out, against the Appellant a suit on a Writ of Summons specially endorsed with the Statement of Claim. The Respondent claimed the following reliefs against the Appellant -

a. A declaration that Clause 2 of Memorandum of Deposit of Deed dated 29th January, 1985 made between the Defendant of one part and the Plaintiff is a binding contract upon the Defendant.

b. An order compelling the Defendant to execute a legal mortgage in respect of his property situate at No. 22, Akinbaiye Street, !solo in favour of the Plaintiff, and to assign the statutory right of occupancy and deposit the certificate thereto to the Plaintiff as security for a loan of N180,000.00 (One Hundred and Eighty Thousand Naira) granted by the Plaintiff to the Defendant on 29th January, 1985 and which has accrued with interest to the sum of N844,207.00 as at 17th June, 1992.

c. The sum of N844,207.00 being the cumulative principal and interest due to the Plaintiff as at 17th June, 1992 as a result of Banking Facilities (term loan overdraft) granted at the request and instance of the Defendant for the sum of N180,000.00 (One Hundred and Eighty Thousand Naira) of the cumulative sum thereof which the Defendant have refused, failed and still refuse, fail and or neglected to pay despite repeated demands.

d. 15% interest on overdraft facility at an implied Bank rate from 29th January, 1985 to date of judgment.

e. 10% per annum interest at the Court rate from date of judgement until the whole judgement debt together with the interest thereon is fully paid.

The Appellant failed to respond to the suit of the Respondent within the period stipulated by the Rules of the trial Court. The Respondent was then constrained to file, on 8th March, 1996, a motion on Notice under Order 10 Rules 1(a) & (b) and Rule 2, and Order 11 Rules 1 & 2 of the High Court of Lagos (Civil Procedure) Rules, 1972 wherein he prayed for final judgement against the Appellant in terms of the claims they sought in the suit. This motion gingered the Respondent to file his a 14 paragraph affidavit showing cause why "he should, as the Defendant, be allowed to defend the action. Paragraphs 4, 5, 6 & 10 of the said affidavit, considered by the trial Court in its decision the subject of this appeal, being germane to this appeal, are herein below reproduced. That is;

4. That it is true that I applied for a loan of N180,000.00 from the Plaintiff but there was no agreement about or payment of any interest whatsoever thereon and the Defendant says that the overdraft loan was interest free.

5. That the purported interest charged on the aforesaid loan/overdraft was/is unilateral on the part of the Plaintiff without the knowledge, consent and agreement of the Defendant and there was no time I was informed before the loan/overdraft was obtained that interest shall be payable on the same.

6. That contrary to the facts deposed to in paragraph 4 of the affidavit in support dated 8th March, 1996 I have no knowledge of any interest accruing and which amounted to N877,207.00 or any sum at all as there was no time statement of account or any advice was sent to me by the Plaintiff...

10. That I am not liable to pay any interest on the aforesaid loan and overdraft of N180,000.00.

The Appellant, as the deponent of the foregoing affidavit, had admitted in paragraph 8 of the affidavit that he did not file any defence to the suit, having been advised by his Counsel that he was "not entitled to file any defence to this action as of right".

The learned trial Judge upon considering the statement of claim and the affidavit supporting the motion for judgement vis-a-vis the Appellant's affidavit, part of which I earlier reproduced, found as a fact as follows -

"In the first place, the affidavit of the Defendant does not condescend upon particulars. He admits applying for a loan of N180,000.00 from the Plaintiff but contends that it was interest free. He has exhibited no document to satisfy the Court that the loan was indeed interest free.

It was held in the case of Ayansina v. Co-op. Bank Ltd.(1994) 5 NWLR (347) 742 that "by usual custom of banking, a banker has the right to charge interest at a reasonable rate on overdraft and to debit the interest on the overdrawn account.

The Defendant in his affidavit does not dispute the amount or rate of interest charged but contends that no interest was chargeable on the loan. That would be against the normal banking interest practice.

The onus is on the Defendant to properly set out the facts on which he relies for his defence in order to satisfy the Court that he ought to be given leave to defend the action.

He has not challenged any of the documents exhibited by the Plaintiff. As stated in Macaulay v. NAL Merchant Bank (supra) a mere general denial by the Defendant that he is not indebted to the Plaintiff is not sufficient to meet the requirement of Order 11 Rules 3 of the Civil Procedure Rules.”

The learned trial Judge, finding that the Appellant (the Defendant) has not established any satisfactory defence, ruled against granting the leave sought to defend the suit.

The lower Court affirmed the findings of fact by the trial Court that the loan/overdraft the Appellant took from the Respondent was not interest free; that the Appellant's affidavit, intended to show cause why he should be given leave to defend, "did not condescend on particulars" and that it did not disclose any defence to the claim of the Respondent. The lower Court further found, in agreement with the trial Court, that the Appellant merely made a sweeping general denial of the averments in the Respondent's supporting affidavit without joining issues with specific averments of the Respondent. This appeal is inter alia against these concurrent findings of fact by the two Courts below.

Issue 1 canvassed by the Appellant is a complaint that the Appellant, from the facts of this case, had established all the factual conditions entitling him to be granted leave by the trial Court to defend the suit. The concurrent findings of fact by the two Courts below are to the effect that he failed to disclose sufficient facts on which the leave sought to defend the suit on the merits will be granted to him. The material question should be; whether the concurrent findings of facts are perverse; that is, whether there are special circumstances that would warrant this Court hearing arguments seeking to disturb the concurrent findings of facts. It is trite that this apex Court will not, on pure question of fact, lightly interfere with concurrent findings of fact: OMETA v. NUNA (1934) 11 NLR 18; SERBEH v. KARIKARI (1939) 5 WACA 34; KWASI v. TWUM (1953) 12 WACA 309; DAWODU V. DANMOLE (1962) 1 ALL NLR 702. This judicial policy is informed by established presumption that, on facts, the Courts below are right and the Respondent is prima facie entitled to a judgement dismissing the appeal. The Appellant bears the burden of establishing in what ways he suffered a miscarriage of justice by the concurrent findings of fact.

The Appellant, admittedly averred in paragraph 8 of his affidavit that he filed no defence to the claims of the Respondent having been advised by his Counsel that he was not "entitled to file any defence to this action as of right". The fact of his taking the term loan/overdraft of N180,000.00 from the Respondent is indubitable. He admitted that fact. In his affidavit he did not disclose how much he had repaid the Respondent out of his indebtedness. The Appellant, as submitted by the Respondent's Counsel, admitted taking the loan facility but complained that the loan was interest free without adducing any iota of evidence to back up the assertion in order to displace the normal banking custom. The two Courts below found so as a fact. The concurrent finding of fact is not perverse. Whoever desires any Court to give him judgment, as to any legal right or liability dependent on the existence of facts which he asserts, has the onus of proving that those facts exist: Sections 134(1) and 135 of the Evidence Act, 1990 LFN (now Sections 131(1) and 132 of the Evidence Act, 2011.

The Appellant's Counsel submits that the trial Court, in giving judgement to the Respondent, gave judgement for interest at compound rate and not a reasonable rate, and that this "was clearly illegal". I do not see how this argument can be accommodated under this issue, distilled from grounds 1 and 2 of the Amended Notice of Appeal which complain that there were no facts establishing the conditions for the grant of summary judgement under the relevant Rules of trial Court and that Respondent's Form 917 exhibited to the statement of claim did not show any agreement to pay any interest on the principal loan sum.

The said Form 917, Exhibit A8, gave notice to the Appellant, as the borrower, that "all usual bank charges and commission and interest would be charged on the loan contrary to the Appellant's averment that he had no knowledge that the loan would attract any interest thereon and that he was not liable to pay any interest on the loan. He executed Form 917, Exhibit A8. The concurrent findings of fact on this, by the two Courts below, are therefore not perverse.

The Respondent having by the processes filed, including the statement of claim, prima facie disclosed a triable issue against the Appellant; it does not avail the Appellant to aver, as he did, that he was, as of right, not entitled to defend the action. I cannot therefore fault the holding of the trial Court, affirmed by the lower Court, that the onus was on the Appellant to properly set out the facts on which he relies for his defence inorder to satisfy the Court that he ought to be given leave to defend the action. The evidence discloses a prima facie case when it is such that, if uncontradicted and if believed, it is not only sufficient to support the case of the Plaintiff against the Defendant; it also entitles the Court to proceed to judgement in favour of the Plaintiff. The totality of the facts in the statement of claim and the other processes, unless sufficiently contradicted by the Appellant, entitle the Respondent to the judgement it got against the Appellant.

The relevant Rules of the trial Court under which it entered judgement, the subject of this appeal, in favour of the Appellant required the Respondent, as the defendant, to show cause why judgement should not be summarily entered for the Respondent against him the Plaintiff having in the processes filed, disclosed prima facie case entitling it to judgment. Showing cause in a summary judgement procedure means the production of satisfactory explanation or excuse by defendant in connection with the action or suit of the plaintiff. In MACAULAY v. NAL MERCHANT BANK LTD (1990) 4 NWLR (pt. 147) 688; (1990) 1 NSCC 433 this Court held that, in a summary judgement procedure whereby the defendant is required, upon an affidavit, to show cause why judgement should not be entered against him; the defence he is obligated to disclose is a real defence on the merits and not a sham defence intended only to dribble and frustrate the Court and the plaintiff and thereby delay the disposal of the action.

The case of the Respondent was that the Appellant was owing them a total of N844,207.00 made up of the loan principal of N180,000.00 and interest thereof. The Appellant admitted that he took loan. He, however, insisted inspite of Form 917 Exhibit A8, and the prevailing banking practice or custom, that he did not know that he was obligated to pay interest on the loan. He made only one payment of the agreed monthly instalments vide Exhibit B and stopped servicing the loan thereafter inspite of his undertaking in Exhibit A2 to continue keeping "a good account performance", and his further undertaking in Exhibit A1 "to abide by all - (the) conditions and terms of repayment". Exhibit A1 corroborates Exhibit A8 Form 917, that the Appellant was aware of his obligation to repay the loan with interest thereon.

I do not agree with the Appellant that the trial Court misapplied the principle in MACAULAY v. NAL MERCHANT BANK LTD (supra). The sham defence he had put up in the affidavit to show cause cannot avail him. Accordingly, I resolve issue 2 in favour of the Respondent.

Issue 3 is all about the complaints over the strictures on the Appellant's counsel by the lower Court. It was submitted, on account of the said strictures, that the Appellant was denied fair hearing and that those observations ultimately resulted in the unfavourable judgement the Appellant had from the lower Court. Those comments on the Appellant's counsel are apparently obiter dictum. Those were the lower Court's reaction to the allegedly unacceptable language used by the Appellant's counsel to describe or refer to the learned lady trial Judge. The party directly aggrieved should have been the Appellant's counsel, and not the Appellant. In the apparent proxy-battle, the learned Appellant's Counsel coming nicodemusly, under the umbrage of the Appellant, his client, has submitted that those comments on the counsel affected the disposition of the lower Court in the final judgement against the Appellant.

An obiter dictum is a statement made in passing which does not form part of the ratio decidendi of the decision appealed. It does not decide the live issue (s) in the matter:

OSHODI v. EYIFUNMI (2000) 7 SC (2) 145; ORUGBO v. UNA (2002) 9 - 10 SC 61; ODUNUKWE v. OFOMATA & ANOR (2010) 18 NWLR (pt. 1225) 404. Not being a ratio decidendi an appeal, generally, cannot lie against an obitum dictum: ODUNUKWE v. OFOMATA (supra). Accordingly, grounds 4, 5 & 7, from which issue 3 has been distilled, are incompetent. The incompetence of the said grounds denies issue 3 any legitimacy or competence. Both the issue and its base grounds, being incompetent, are hereby struck out.

In any case, the invitation of the learned Appellant's counsel to this Court to depart from the decision of this Court in GLOBAL TRANSPORT OCEANICO S. A. v. FREE ENTERPRISES (NIG) LTD (2001) 5 NWLR (pt. 706) 426 at 442 where Kalgo, JSC, posited that it was discourteous for a counsel to use the pronoun "she" for a Lady Judge supported the exception taken by the lower Court to the Appellant's counsel's use of the same pronoun "she" for the presiding lady trial Judge. I will not press further; the issue being now superfluous.

The complaint, articulated in ground 6 of the Amended Notice of Appeal, that the Appellant was denied fair hearing by the trial Court because, on the day the motion for judgement was heard, the Appellant's counsel was arguing another motion elsewhere in another Court, the trial Court should have adjourned the matter to another date to give the Appellant an opportunity to offer his final address instead of foreclosing that right by the trial Court adjourning the matter for Ruling/Judgment. The lower Court approved of what the trial Court did. The Appellant's counsel had disingenuously stretched issue 4, arising from ground 6 of the Amended Notice of Appeal, to issue 3. He submitted that flowing from issue 3, the Appellant could not be said to have received fair hearing by the Court of Appeal. How? If I may ask. The lower Court, apart from affirming what the trial Court did earlier in its proceedings, did not share or partake in the decision of the trial Court in relation to the adjournment the subject of this appeal.

The grant or refusal to grant adjournment is a matter of discretion and it depends on the facts and circumstances of each case: ODUSOTE v. ODUSOTE (1971) 1 NWLR 228; N.P.A v. CONSTRUZIONI G.F. COGEFAR SPA (1974) 12 SC 81 at 91; SALU v. EGEIBON (1994) 6 NWLR (pt. 348) 23. No Court sits at the convenience of either a party or his counsel, no matter his status or their imagination of their status. I agree with the Appellant's Counsel that this Court, in NDUKAUBA v. KOLOMO (2005) ALL FWLR (pt. 248) 1602, held that at the close of the case and in accordance with the relevant rules, a party must have the same right as given to his adversary to offer his final address or summation. That is not the issue here.

On 14th May, 1997 the counsel for respective parties were in Court and agreed with the Registrar of the trial Court that the matter be heard on 7th July, 1997. But at the resumed hearing on 7th July, 1997 the Appellant's counsel was absent without any courtesy or excuse to either the Court or the Counsel for the Plaintiff/Respondent. The trial Court, however, graciously stood the matter down for hearing later that day. At 12.10 pm when it resumed hearing, the counsel for the defendant/Appellant was still absent, notwithstanding the indulgence of the trial Court to stand down and wait for him. The appellant had the notice of the hearing of the matter fixed for 7th July, 1997. He waived his right to be heard on the motion for summary judgment. He cannot therefore be heard to say that he was not given an opportunity to present his client's case. He does not deny that he was aware of the adjourned date.

A party given or provided an opportunity to present his case, who failed to utilise the opportunity, cannot complain that he was denied the opportunity to be heard. Fair hearing, within the context of audi alteram partem, means only that the Court should give equal opportunity to both sides to present their respective cases: CHAMI v. U.B.A PLC (2010) 2 3 SC (pt. II) 92 at 95. It does not mean, as audaciously submitted and expected by the Appellant's counsel, that beyond providing the parties an equal opportunity to present their cases that one of the parties or his counsel could hold the Court and his adversary to ransom and insist that the Court sit at his convenience. Rule 16 of the Rules of Professional Conduct for Legal Practitioners, 2007, which enjoins a lawyer to competently represent his client in Court, also directs that the lawyer shall not neglect a legal matter entrusted to him. Rules 31(1) and 30 of the same Rules of Conduct obligated the lawyer to always treat the Court with respect, dignity and honour and not to "do any act or conduct himself in any manner that may obstruct, delay or adversely affect the administration of justice."

The unwholesome antecedents of the counsel for the Appellant at the trial Court, as listed in the lead judgement of the lower Court (Denton-West, JCA) and the minutes of the trial, clearly suggest a conduct unbecoming of the said counsel at the trial Court. He was nonetheless accommodated with maturity by the learned trial Judge. The polite resentment of this conduct was expressed in the concurring judgement of Garba, JCA, at page 231 of the record, to the effect that the learned counsel for the defendant (Appellant) though was quite aware, since 14th May, 1997, that the matter was set down for hearing on 7th July, 1997, still absented himself from the hearing on the ground that he was busy arguing another motion before another Court on the date and time. With ignominy therefore, the complaint and submissions that the motion was fixed for mention on the 7/7/97 are unserious and therefore untenable - - -. Judicial commonsense, logic and normal or usual course of proceedings would not accept such a puerile contention.

I will also dismiss, with ignominy, the puerile contention that the trial Court denied the Appellant fair hearing. Counsel for the defendant (Appellant) having at the trial Court without excuse, opted out of the hearing fixed to take place on 7th July, 1997, cannot be heard to complain that his client was denied fair hearing: ADEYEMI v. LAN & BAKER (2000) 7 NWLR (pt. 663) 33; OMO v. J. S. C (2000) 12 NWLR (PT. 682) 444; MMS v. OTEJU (2005) 5 SC(pt. 1) 55; CHAMI v. U. B. A PLC (2010) (supra).

On the whole, I find no substance in this appeal on all the issues canvassed. Accordingly, the appeal is hereby dismissed in its entirety. The decision of the trial Court as affirmed by the lower Court on 16th May, 2006 in the appeal No. CA/L/49/2001 is hereby further affirmed. Costs at N500,000.00 shall be paid to the Respondent by the Appellant.

**IBRAHIM TANKO MUHAMMAD, AG. C.J.N.:**

My Learned brother, Eko, JSC, has afforded me an opportunity of reading before now the judgement just delivered. I am in agreement with my lord that the appeal is lacking in merit and ought to have been dismissed. I too, hereby dismiss the appeal. I abide by all orders made in the leading judgement including the one on costs.

**AMINA ADAMU AUGIE, J.S.C.**:

I had a preview of the lead judgement just delivered by my Learned brother, Eko JSC, and I agree with his reasoning and conclusion.

My learned brother addressed the Issues raised by the parties for and against their respective positions meticulously, and I see no reason to belabour the point. Suffice it to say that I adopt what he said and it is on that premise that I will also dismiss this Appeal and abide by the Order on costs. The Appeal is hereby dismissed.

**PAUL ADAMU GALUMJE, J.S.C.:**

I have had the privilege of reading in draft, the judgement just delivered by my Learned brother, Ejembi Eko, JSC and I entirely agree with the reasoning contained therein and the conclusion arrived thereat. Where there is no express agreement as to the rate of interest payable, the bank is entitled to charge interest rate on the basis that there is an established custom to that effect. See Barclays Bank of Nigeria Ltd v. Alhaji Maiwada Abubakar (1977)10 SC.13. Learned Counsel for the Appellant is wrong when he submitted that the terminal loan of N180,000.00 granted to the Appellant was interest free. The Respondent is established with the sole aim of doing business in order to earn profit. It will be playing the role of Father Christmas if it dishes out loan without charging interest.

My Learned brother has as usual thoroughly considered all the issues submitted for determination of this appeal in such a way that any further comment by me will result in repetition. I find no merit in this appeal. Accordingly, same shall be and it is hereby dismissed. I endorse all the consequential orders made in the lead judgement, including order as to costs.

**UWANI MUSA ABBA AJI, J.S.C.:**

I have had a preview of the judgement of my learned brother, Ejembi Eko, JSC and I completely lend my support to the reasons and conclusions arrived at therein.

The Appellant was given a term loan of N180,000.00 in 1985 and despite repeated demands by the Respondent, he failed to liquidate same. The Appellant was sued on 6/12/1994 and having failed to file his defence, judgement was entered against the Appellant. Interesting is the fact that he also lost at the lower Court and my learned brother has re-affirmed the concurrent decisions of the Courts below. The Appellant having collected the loan from the Respondent without denial, cannot now on technical grounds of fair hearing be let off the noose on ground of denial of fair hearing. Per SANUSI, JSC in DARMA V. ECO BANK (2017) LPELR-41663 (SC), in a similar scenario with the present appeal encapsulated the principles of fair hearing as provided in the Constitution. The time honoured principle of fair hearing has, for time immemorial, been entrenched in our laws. The cardinal principle of fair hearing are twofold (s) and are expressed in the following maxims (a) "Audi alteram Partem" meaning that the Judge before whom the complaint or grouse is taken must hear the two parties to the dispute, and (b) "Nemo Judex in cause" meaning that there should be no evidence of bias, so that one should not be a Judge in one's own cause. The Constitution of the Federal Republic of Nigeria 1999 (as amended), had entrenched by its Section 36, the principle of fair hearing under those provisions which clearly give the criteria of fair hearing which are as follows:-

(i) That the Court shall hear both sides to a case and also must consider the case of both parties too.

(ii) That the Court must also hear all material issues before reaching its decision which may be prejudicial to any party in the case.

(iii) The Court must give equal treatment opportunity to all the Parties.

(iv) That the proceedings shall be held in public and all concerned shall have access and be informed of such place of public hearing.

(v) In every material decision of the case, Justice must be seen to have been manifestly done and not merely done.

The Appellant who has slept over his case cannot complain of denial of fair hearing. Fair hearing is a 2 way traffic and for the benefit of the parties involved in the contest and not only for one. He who comes to equity must have clean hands.

It is on record that the Respondent has made several demands on the Appellant for the principal and interest on the loan facility but all to no avail before this suit was instituted. Generally, a debt is repayable either on demand, or on notice given or upon any other condition agreed upon by the parties. It is also an implied term in the relationship between a banker and his customer that there should be no right of action for the repayment of an overdraft until there has been a demand or notice given. The cause of action does not arise until there has been a demand made or notice given. When therefore there is no specific date agreed upon for the repayment of an overdraft, a demand should be made or notice given. In other words, a cause of action on an unpaid overdraft is not deemed to accrue where no specific date for payment is agreed upon until there has been a demand made or notice given. See Per IGUH, JSC inISHOLA V. SOCIETE GENERALE BANK (NIG) LTD (1997) LPELR-1547(SC). The Appellant should rather settle his indebtedness to the Respondent than clinging to delay tactics and technicalities.

Besides, I have nothing to do but stand with the concurrent decisions of the two Courts below. It is trite that where there are concurrent findings of a trial Court and the Court of Appeal, then unless the findings are –

(i) found to be perverse; or

(ii) not supported by the evidence; or

(iii) reached as a result of a wrong approach to the evidence; or

(iv) a result of a wrong application of a principle of substantive law or procedure,

this Court, even if disposed to come to a different conclusion upon the printed evidence, cannot do so.

I therefore agree with the decision and reasons reached by my learned brother, Ejembi Eko, JSC and fully abide with the order as to costs.

The appeal is dismissed.-end!