

SUPREME COURT OF NIGERIA
2ND SEPTEMBER, 1994. SC, 144/1991
CORAM:- M. BELLO CJN, M. L. UWAIS,
E. O. OGWUEGBU, S. U. ONU, A. I. IGUH, JJSC

CHIEF FESTUS S. YUSUF APPELLANT

AND

CO-OPERATIVE BANK LIMITED RESPONDENT

APPEALS - Declarations granted by the trial court - Where not supported by evidence - Whether Court of Appeal was right to set them aside.

EVIDENCE - Improper consideration of evidence - Whether judgment of trial court can be supported - Having regard to the evidence before it.

LIMITATION OF ACTIONS - Statute Bar - Whether, the action brought by a bank's customer - In respect of his account - Is statute barred based on period of dormancy of his account.

PRACTICE & PROCEDURE - Writ of Summons - Failure to furnish evidence - On the defect in the service of the Writ - Means provision of no materials upon which to determine validity of the writ and jurisdiction issues.

FACTS

The Plaintiff/Appellant filed an action in the High Court Benin-City against Defendant/Respondent. Appellant claimed a declaration that he is not indebted to the Respondent in respect of his account at Ibadan and Benin-City offices of the Respondent. He sought a declaration that he has a credit of N2,211,956.35k with the Respondent, and asked for an order compelling the Respondent to pay him the said amount. The Respondent sought to establish that Appellant ceased to be its customer since 1970 when his account was closed and that it was not owing any amount to the Appellant. The Respondent also pleaded that the Appellant's action is statute barred and contested that the Benin High Court has no jurisdiction, to hear the action relating to Appellants Account in its Ibadan office.

The trial court held that it has jurisdiction to entertain the claim and

that the action is not statute barred. The court granted the declarations sought but refused to order the Respondent to pay the amount to the Appellant. The Respondent appealed to the Court of Appeal and challenged the appointment of a special referee by the trial Judge, whom the Judge called to give evidence. The Court of Appeal allowed the Appeal and ordered a trial de novo. It struck out the cross-appeal of the Appellant. Appellant being dissatisfied has now appealed to the Supreme Court to determine inter alia, whether the Court of Appeal was right in setting aside the judgment of the Trial Court. The Respondent cross-appealed on the issues of jurisdiction, limitation of action and validity of the writ of summons.

HELD (Unanimously dismissing the appeal and cross-appeal)

Issues of jurisdiction and validity of the writ

1. In the case on appeal, the Respondent did not furnish such evidence and has not even asserted in its Brief to the Court the defect in the service of the writ upon which the issues on jurisdiction and the validity of the writ were invoked. It follows from the foregoing that the Respondent has not provided the materials upon which the jurisdiction and the validity of writ issues may be determined. (P.355 L.34)

Whether action of the bank's customer is Statute barred

2. The evidence in this case on appeal shows that the Appellant's current account stood at credit of £534-5-1 at the time of the trial. Though the account had been dormant since 1971, there was no evidence whatsoever that the Appellant had made any demand in relation to the account which the Respondent had failed to meet. Accordingly no foundation was established for the issue relating to the cause of action. The trial judge was right in his finding that the cause of action was not statute barred. (P.357 L.12)

Declarations set aside by Court of Appeal

3. The Court of Appeal, was right to set aside the declarations granted by the trial court. In respect of the Ibadan account, there was no evidence whatsoever to support the declaration that it had a credit of N677,264.15 in Ibadan Branch which was the amount claimed in the amended Statement of Claim, (P.359 L.3)

Improper Consideration of evidence

4. The trial judge did not consider and assess the evidence properly when he

gave judgment for the Appellant in the sum of N1,758,288.00 for the Benin Branch. He did not show in the judgment how he arrived at that amount. He did not give full consideration to the evidence for the defence and Exhs. BB2 to 10 which showed the balance of the account to be N 1,065.02 credit only. It is obvious that the judgment cannot be supported having regard to the evidence. (P. 361 L.9)

NOTABLE POINTS OF INTEREST

BELLO CJN

No evidence on a pleaded issue

1. Learned counsel for the Respondent did not adduce any evidence on the pleading and did not address the trial court on it. It appeared the trial Judge regarded the matter, quite rightly in my view, as abandoned and he did not decide it in his judgment/ (P. 354 L.22)

Need to determine the limitation issue

2. I think, the Court of Appeal made a very serious error of law by its failure to determine the limitation issue. If the cause of action was statute-barred, no proceedings could be brought, to prosecute the action and the order for a retrial made by the Court of Appeal would be abortive. It is therefore essential to decide the issue before the order for a retrial can be upheld. Since the Court of Appeal did not decide it, ordinarily we would remit the case to that Court for that purpose. However, since the issue touches on the competence and jurisdiction of the court to entertain the claim, this Court, for the reason I have earlier stated in this judgment while considering the jurisdiction issue, may as well determine the issue. (P.356 L.23)

Relationship between a banker and its customer

3. The relation between a banker and its customer is that of a debtor and creditor and it is founded on a simple contract. A banker is under an obligation to pay his customer the amount standing to the customer's credit on his current account. It is when a customer has made a demand for payment and the banker has failed to meet the demand that a cause of action for the recovery of the amount can be said to have arisen from the date of the failure to effect payment. (P.357 L.2)

When dismissal will not serve the interest of justice

4. It is elementary principle of law that where a plaintiff fails to adduce an iota

of evidence to prove his case, his claim should be dismissed. Ex facie, the Appellant did not establish his case in respect of the Ibadan account, one may therefore be tempted to dismiss that item of claim. However, the evidence showed the Ibadan and Benin accounts were inter-mingled and therefore in the interest of justice both should be treated together. (P.361 L.18)

REPRESENTATION

Dr. J.S. Okpaluba with J.C. Igwe for the Appellant
Respondent absent and unrepresented

CASES REFERRED TO

Dura v. Nwosu (1989)7 S.C.N.J. 154 at p. 159
Okoduwa v. The State (1988)2 N.W.L.R. Pt. 76 p. 333
Ezemo v. Oyakhire (1985)2 SC 260
Mustapha v. Governor of Lagos State (1987)5 SCJN 143
Saude v. Abdulahi (1989)4 NWLR (Pt. 116)387
Union Beverages Ltd v. Adamite Co Ltd (1990)7 NWLR (Pt 162)348
Skenconsult v. Ukey (1981)1 SC.6
Ariori v. Elemo (1983)1 S.C. 13 at p. 16
Barclays Bank v. Central Bank (1976)6 S.C. 175
Egbe v. Adefarasin (1987)1 NWLR (Pt 47)
Akwuno v. Ifejika (1960)5 F.S.C. 156
Ashubiojo v. A.C.B. (1966) All NLR 482
Midland Bank v. Conway Corporation (1965)1 WLR 1165
Joachimson v. Swiss Bank Corporation (1921)3 All E.R. 110 at page 127
Dura v. The State (1989)4 NWLR (Pt. 113)24
Esso (West Africa) Incorporated v. Oyebola (1969)1 NWLR 194 at 198
Ezeoke v. Nwagbo (1988)3 S.C.N.J. (Pt. 1) 37 at 49 to 50
Olatunbosun v. Niser Council (1988)3 NWLR (Pt 80)25
Garba v. University of Maiduguri (1986)1 NWLR (Pt.1) 550
Olasehinde v. A.C.B. (1990)7 NWLR (Pt. 161)180 at 183
Ayoola v. Adebayo & Ors. (1969) N.S.C.C. 173
Dura v. Nwosu & Ors (1989) 3 N.S.C.C. 1

STATUTES & RULES REFERRED TO

High Court Civil Procedure Rules of Bendel State, 0.22 r. 2, 0.6 rr. 2- 4. 0.3
r.13
High Court Law s.45

Constitution of the Federal Republic of Nigeria 1979, s.17(2)
Sheriffs and Civil Process Act Cap 189 of 1958, ss. 97, 99, 101
Companies Act 1968 s. 36 Limitation Law Cap.89 Laws of Bendel State 1976 s.4

5 **LEAD.JUDGMENTBYBELLOCJN**

The Appellant was the plaintiff in the High Court, Benin City where he claimed from the Respondent/Bank as follows:-

10 “(a) A declaration that the plaintiff is not indebted to the Defen-
dant in respect of the plaintiff’s account with the Defendant, a banker, at Ibadan, Oyo State of the Federal Republic of Nigeria and at Benin City, Bendel State of Nigeria.

15 (b) A declaration that the plaintiff’s accounts with the defendant at Ibadan and Benin City are in a credit of N2,211 ,956.35k made up as follows:

(i) Ibadan Branch	N677,264.15
(ii) Benin Branch	N 1,534.692.20
Total	N2,211.956.35k

20 (c) An order for payment by the Defendant to the plaintiff of the sum of N2,211 ,956.35k due and payable from the Defendant to the plaintiff on the plaintiff’s accounts with the defendant at Ibadan and Benin City.”

25 The case for the appellant was that he was a customer of the respondent with which he had maintained two current accounts at Ibadan and its branch at Benin City from 1969 to 1971 and that the two accounts stood at credit balances as claimed.

The respondent admitted that the appellant had been its customer and it averred with respect to its Benin City account in paragraph 4 of the Statement Defence:

30 “The defendant shall establish that the plaintiff ceased to be a customer of the defendant when his account No.428 had to be closed in 1970 because the plaintiff failed to operate the account satisfactorily and there was no debt owing by the defendant to the plaintiff.”

35 However, the respondent denied that the appellant had operated an account with it at Ibadan.

In paragraph 7(2) of the Statement of Defence, the respondent also pleaded limitation of action as follows:

“At the trial of this action, the defendant shall in accordance with Order 22 rule 2 raise the following preliminary points of law-

(1) That the Plaintiff’s claim does not disclose any cause of action in so far as Banker and Customer relationship is concerned.

(2) That the alleged irregularity in the operation of plaintiff’s account in Benin Branch having been shown to have arisen since 1980, the plaintiff’s action is statute barred.

(3) That the transaction which gave rise to the alleged irregularity in the operation of plaintiff’s account in Ibadan Branch having been shown to have taken place in Ibadan Oyo State of Nigeria, this Honourable Court has no jurisdiction to hear the action by virtue of Order 6 Rules 2 to 4 of the High Court Civil Procedure Rules of Bendel State of Nigeria, 1976.”

In his judgment, the trial judge held that he had jurisdiction to entertain the claim relating to Ibadan account and the action was not statute-barred. He considered the pleadings of the parties and the evidence adduced by them. He granted the declaration sought, to wit:

“(1) That the plaintiff is not indebted to the Defendant in respect of his accounts with the defendants, a Banker at Ibadan, Oyo State of Nigeria and in Benin City, Bendel State of Nigeria.

(2) That the plaintiff’s account with the Defendant at Ibadan Branch and Benin City branch are as follows:-

1. Ibadan Branch N677,264. 15

2. Benin Branch N 1,758, 288.00

He did not grant the 3rd and 4th reliefs.

The Respondent was not satisfied with the judgment and appealed to the Court of Appeal on seven grounds of appeal. The Appellant also cross-appealed on only one ground of appeal.

In its determination of the appeal and the cross-appeal, the Court of Appeal considered two issues only, namely, the power of the trial judge to appoint a Special Referee under section 45 of the High Court Law and whether the case for the Respondent was adequately considered at the trial.

The issue relating to the appointment of the Special Referee arose from the appointment by the trial court of Mr. Aguriase Osiriomo, a Chartered Accountant, in exercise of the power under section 45 of the Law. In the course of his testimony during the trial, the Appellant as P.W.1, tendered numerous banking documents and because of their banking and accounting technicalities, the trial judge sought the opinion of an expert and referred the matter to the Special Referee for examination and report. All the documents

tendered by the Appellant in evidence were given to the Special Referee and the parties were invited to make any submission or representation before him. The Appellant responded to the invitation but the Respondent failed to do so. In consequence, the Special Referee based his report, which was admitted in
5 evidence at the trial as exhibit AA 18, on the Appellant's case only. The Special Referee also testified at the trial and was cross examined by counsel for the parties.

In the Court of Appeal, learned counsel for the Respondent challenged the appointment of the Special Referee and calling him by the trial
10 judge to give evidence on the ground that by so doing the trial judge had provided a witness for the defence and had thereby descended into the arena contrary to section 17(2) of the 1979 Constitution. The Court of Appeal held that section 45 of the High Court Law empowered the trial judge to appoint a Special Referee and the appointment and his testimony under the circum-
15 stance of the case were not unconstitutional. The Court also considered the complaint against the trial court for calling its Senior Registrar, who merely produced the Special Referee's Report to have no merit.

I consider it necessary to quote in extenso the reasons stated by the Court of Appeal. The Court first referred to the Special Referee's Report which
20 stated:-

*"The Co-operative Bank did not respond to the letter by the Court Registrar. The information called for in our letter of March, 4, 1987 was not made available to us. In order to express an authoritative opinion on the accounts, the parties to the dispute, particularly the Bank ought to provide
25 all the information required.*

BANK LODGMENTS

*We have analysed the Bank tellers in order to arrive at the amounts paid into the Bank (See Appendix 1). The total amount paid to the Bank
30 during the period under consideration was 879, 144:8:6d (sic) or N1,758,288.85k. There were no Bank Statements. We could not therefore confirm whether or not these amounts were credited to Chief Yesufu's account. The Bank Statements produced by the Chief were incomplete and could not be worked upon. The Bank Statements for the period February,
35 25,1970 to March, 12, 1971 were not produced. The plaintiff stated that the Bank did not issue him with any during the period.*

BANK PAYMENTS

We did not have full details of all the payments by the plaintiff

through the Co-operative Bank Ltd. The paid Cheque book stubbs should have provided the information. The paid Cheque should be supplied by the Defendant or cheque book stubbs by the plaintiff."

Thereafter, the Court proceeded to state in the lead judgment of Edozie, J.C.A. "From the above excerpt, the Special Referee made it quite clear that his report cannot be said to be authoritative because relevant document's such as the relevant Statements of Account were not available. These Statements were subsequently tendered in evidence as Exhibits BB2 to BB10 and BB11 to BB17. They were tendered by the Appellant's (now the Respondent's) sole witness after the Special Referee had testified. In other words the Special Referee made no use of the Statement of Account. Worse still, the learned trial judge did not attempt to reconcile the Statement of Account with the Special Referee's report. He based his judgment on the Special Referee's report

Quite apart from the fact that the learned trial judge based his judgment on the Special Referee's report Exhibit AA18, he committed serious errors in his judgment. As an example whereas he declared that the amount standing to the credit of the Respondent at the Ibadan account was N677,264.15k, the Special Referee at page 2 of his report Exhibit AA 18 stated in respect of the Ibadan Branch account:-

There were no information about the dealings with the Cooperative Bank of Western Nigeria Limited, Ibadan. We could not therefore report on it. Furthermore, the learned trial judge gave the figure in the Benin Branch account as N1,758,288 as against the figure of N1,493,393.65 contained in the Special Referee's report.

By relying on the Special Referee's report and without due consideration of the Statement of Account, it seems to me that the Appellant's case had not been considered or adequately considered. The Statements of Account Exhibits BB2 to BB10, BB11 to BB17 show that the Respondent had only a credit balance of 534:5:1pounds or approximately N1,069.10k. The Respondent's case, it must be remembered, was that certain lodgments into his account were wrongly debited against the account. In my view, the best evidence of that fact is the relevant lodger cards or Statements of Account. I also take the view that a report on the Respondent's account with the appellant at Benin Branch which fails to take into consideration the entries in the relevant ledger cards or Statements of Account cannot be a realistic account. I have scanned through the judgment of the learned trial judge and I was unable to find where any attempt was made to reconcile the Statement of Account which he received in evidence with the report of the Special Referee. Since he failed to give any consideration to the Statement of Ac

count Exhibits BB2 to BB10 and BB11 to BB17 and since it cannot be said that had he done so, his decision would have been the same, his judgment cannot be allowed to stand. An Appeal Court will order a retrial where there has been such an error in law or an irregularity in procedure which
 5 neither renders the trial a nullity nor makes it possible for the Appeal Court to say there has been no mis-carriage of justice. *Duru v. Nwosu* (1989) 7 S.C.N.1. 154 at p. 159, (1989) 4 NWLR (Pt 113) 24 *Okoduwa v. The State* (1988) 2 NWLR (pt.76), p.333.”

The Court of Appeal allowed the appeal and ordered a trial de novo. It
 10 struck out the cross-appeal.

On 15th April 1992, the Appellant obtained the leave of this court to appeal and to argue grounds of mixed law and facts. Four grounds of appeal were filed and the following issues for determination were formulated therefrom:

15 “(i) Are the reasons for which the Court of Appeal set aside the judgment of the trial Court well-founded? In other words, was the Court of Appeal right to have set aside the judgment of the learned trial judge on the basis that the Respondent’s case (Appellant in the Court below) was not considered; or adequately considered?

20 (ii) Was the reason for ordering a retrial in this case well founded in law and in fact? In other words, was the order for retrial proper and justified?

(iii) Was the Cross-Appeal of the Plaintiff/Appellant rightly struck out or refused by the Court of Appeal?”

25 The respondent was not also satisfied with the decisions of the Court of Appeal and has cross-appealed on three grounds of appeal from which the following issues were raised:

30 “1. Whether the justices of the Appeal Court were right in failing to pronounce on the issues of jurisdiction and statute of limitation canvassed before them.

2. Whether or not the writ of summons that originated the present action leading up to this appeal was void for non-compliance with sections 97 and 99 of the Sheriffs and Civil Process Act, Cap 189 of 1958.

35 3. Whether the learned justices of the Court of Appeal were right in not dismissing the Respondent’s case when Appellant was not given fair hearing.”

I think it is appropriate to deal with the cross-appeal first except issue No.3 thereof which may be considered together with issue No. (ii) of the appeal because both are inter-related.

The issue of jurisdiction in respect of the claim relating to Ibadan was raised both in the trial Court and in the Court of Appeal. As shown earlier in this judgment, the trial Court had held it had jurisdiction. However, the Court below failed to determine the issue. The failure of the Court of Appeal will not be an impediment to this Court for the determination of the issue. The issue of jurisdiction is very fundamental and it can be taken at any stage of the proceedings in any court including this Court: *Ezomo v. Oyakhire* (1985) 2 S.C. 260 (1985) 1 NWLR (Pt 2) 195; *Mustapha v. Governor of Lagos State* (1987) 5 S.C.J.N. 143 (1987) 2 NWLR (Pt.58) 539 and *Saude v. Abdulahi* (1989) 4 NWLR (Part 116) 387. 5 10

Learned counsel for the Respondent did not appear at the hearing of the appeal but had filed Briefs for the prosecution of the cross-appeal and in response to the appeal. In his Brief on jurisdiction, learned counsel contended that the Headquarters of the Respondent was Situated at Ibadan in Oyo State while the suit was instituted at Benin City in Bendel State; that the appellant had not complied with Order 3 rule 13 of the High Court of Bendel State Civil Procedure Rules 1976 and section 36 of the Companies Act 1968 regarding service and that the noncompliance constituted breaches of section 98,99 and 101 of the Sheriffs and Civil Procedure Act. Relying on *Union Beverages Ltd. v. Adamite Co. Ltd.* (1990) 7 NWLR (part 162) 348 and *Skenconsult v. Ukey* (1981) 1 S.C.6, he submitted that the breach of the mandatory requirements of sections 97 and 99 of the said Act was a fundamental defect which rendered the writ a nullity. This submission is the backbone of issue No.2. 15 20

Responding in his Brief, learned counsel for the Appellant submitted that the jurisdiction issue was ill-founded and was not properly raised in this Court because the point had not been taken in the lower Courts for the reasons now relied upon by the Respondent. Whether the writ of summons, contended counsel, was properly served or not depended upon proof or evidence of such service whether at Ibadan or Benin City and in the absence of such evidence, the mere endorsement of the writ did not prove or pre-suppose irregularity. There was no proven breach of section 99 of the Act. Further, the respondent having appeared in answer to the writ, filed pleadings and participated at the trial without any objection, the doctrine of waiver would therefore apply. 25 30 35

Learned counsel submitted that *Skenconsult (Nig) Ltd. v. Ukey* (supra) is distinguishable from the case in hand and he referred the Court to *Ariori v. Elemo* (1983) 1 S.C. 13 at p. 16 and *Elemo v Oyakhire* Supra at 261, but did not show any reason or purpose for the reference.

I agree with learned counsel for the appellant that the jurisdiction issue pleaded in the Statement of Defence was entirely based on different ground from the ground now advocated in this Court. Paragraph 7(3) of the Defence averred:-

5 “(3) *That the transaction which gave rise to the alleged irregularity in the operation of plaintiff’s account in Ibadan Branch having been shown to have taken place in Ibadan, Oyo State of Nigeria, this Honourable Court has no jurisdiction to hear the action by virtue of Order 6 rules 2 to 4 of the High Court Civil Procedure Rules of Bendel State of Nigeria, 1976.*”

10 Order 6 rules 2 and 4 relate to the territorial jurisdiction of the High Court of Bendel State. The rules provide:

 “(2) *All suits relating to land, or any mortgage or charge thereon, or any other interest therein or for any injuries thereto, and also all actions relating to personal property distrained or seized for any cause, shall be*
15 *commenced and determined in the Judicial Divisions in which the land is situated or the distress or seizure took place.*

XXXX

 “(4) *All suits for the specific performance, or upon the breach of any contract, may be commenced and determined in the Judicial Division in*
20 *which such contract ought to have been performed or in which the defendant resides.*”

Learned counsel for the Respondent did not adduce any evidence on the pleading and did not address the trial court on it. It appeared the trial Judge regarded the matter, quite rightly in my view, as abandoned and he did
25 not decide it in his judgment.

In the Court of Appeal the Respondent shifted its ground on the issue in its counsel’s Brief wherein non-compliance with order 3 rule 13 and section 36 of the Company Act and the Breach of sections 97 and 99 of the Sheriffs and Civil Process Act were introduced. The Court of Appeal did not
30 determine the issue which the Respondent has brought forward to this Court as reiterated in its Brief.

I consider it pertinent to state the relevant provisions of the rule and the Acts upon which the jurisdiction issue and the validity of the writ were predicated. Order 3 rule 13 reads:

35 “13. *Subject to the provisions of any law regulating service on a company carrying on business in Nigeria or on any society or fellowship in Nigeria whether corporate or unincorporate, service may be effected by sending the writ, or other document to be served, by prepaid registered post to the secretary or other corresponding officer at the Head Office in Nigeria*

of such company, society or fellowship, as the case may be, or by serving the writ or document on such secretary or corresponding officer personally at such Head Office as aforesaid."

Section 36 of the Company Act also made provision for service of documents on companies as follows:

"36. A document may be served on a company by leaving it at, or 5 sending it by post to, the registered office of the company."

Sections 97 to 99 of the Sheriffs and Civil process Act are in these terms:

"97. Every writ of summons for service under this part out of the Region or part of the Federation in which it was issued shall, in addition to any other endorsement or notice required by the law of such Region or part 10 of the Federation, have endorsed thereon a notice to the following effect (that is to say)

"This summons (or as the case may be) is to be served out of the.....Region (or as the case may be) and in the..... 15 Region (or as the case may be)."

98 A writ of summons for service out of the Region or part of the Federation in which it was issued may be issued as a concurrent writ with one for service within such Region or part of the Federation and shall in that case be marked as concurrent.

99. The period specified in a writ of summons for service under this 20 part as the period within which a defendant is required to answer before the court to the writ of summons shall be not less than thirty days after service of the writ has been effected, or if a longer period is prescribed by the rules of the court within which the writ of summons is issued, not less than that longer period." **25**

In *Skenconsult v. Ukey* supra this Court held that non-compliance with the provision of section 99 was a fundamental defect which went to the question of competence and the jurisdiction of the court and consequently an interlocutory proceeding taken less than 30 days after the service of the writ of summons was null and void. As that case clearly disclosed and *Barclays Bank v. Central Bank* (1976) 6 S.C 175 also stated at page 192, there must be evidence of the requirements of Order 3 rule 13 and sections 97 to 99 of the Act that were not complied with before the court can act. In the case on appeal, the Respondent did not furnish such evidence and has not even asserted in its Brief to this Court the defect in the service of the writ upon which the issues 35 on jurisdiction and the validity of the writ were invoked.

It follows from the foregoing that the Respondent has not provided the materials upon which the jurisdiction and the validity of the writ issues

may be determined.

The second limb of issue No. 1 deals with the failure of the Court of Appeal to decide the issue of limitation of action canvassed before it. The issue had been raised in the trial Court and the Judge had held that the action
5 was not barred by section 4 of the Limitation Law, Cap 89 of the Laws of Bendel State 1976. The Respondent appealed against that decision and canvassed it in the Court of Appeal but that Court omitted to pronounce on the issue.

In his Brief, learned counsel for the Respondent urged this court to
10 decide the issue of limitation of action and to hold that since the cause of action arose in 1970, the action was barred by sections 4(1) (a) and 4(2) of the said Law. He referred to *Egbe v. Adefarasin* (1987) 1 NWLR (Part 47) I at page 3. He stated that the failure of the Court of Appeal should not bar this Court from determining the issue.

In response, the Appellant's counsel contended that the assertion
15 that the cause of action had arisen in 1970 was a mere assumption not supported by the findings of the trial Judge who considered the Limitation Law inapplicable to the circumstances of the case. Since the trial judge found the Appellant had a dormant current account and the claim was for declaration of
20 the balance of the account, counsel submitted that the Limitation Law was not a bar to such claim. He referred to *Ekwuno v. Ifejika* (1960) 5 F.S.C. 156 (1960) SCNLR 320 which appears to be irrelevant.

I think, the Court of Appeal made a very serious error of law by its failure to determine the limitation issue. If the cause of action was statute-
25 barred, no proceedings could be brought to prosecute the action and the order for a retrial made by the Court of Appeal would be abortive. It is therefore essential to decide the issue before the order for a retrial can be upheld. Since the Court of Appeal did not decide it, ordinarily we would remit the case to that Court for that purpose.

However, since the issue touches on the competence and jurisdiction
30 of the court to entertain the claim, this Court, for the reasons I have earlier stated in this judgment while considering the jurisdiction issue, may as well determine the issue.

Now, section 4 of the Limitation Law provides:
35 *"4(1) The following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued, this is to say-*

(a) actions founded on simple contract or on tort;

"Cause of action" was defined by Oputa, J.S.C. in *Egbe v. Adefarasin* (1987) 1 NWLR (Part 47) 1 *"as the fact or facts which establish or give rise to*

a right of action-it is the factual situation which gives a person a right to judicial relief". The relation between a banker and its customer is that of a debtor and creditor and it is founded on a simple contract. A banker is under an obligation to pay his customer the amount standing to the customer credit on his current account. It is when a customer has made a demand for payment and the banker has failed to meet the demand that a cause of action for the recovery of the amount can be said to have arisen from the date of the failure to effect payment: Ashubiojo v. A.C.B. (1966) 2 All NLR 203, Midland Bank v. Conway Corporation (1965) 1 WLR 1165 and Joachimson v. Swiss Bank Corporation (1921) 3 K.B. 110 at page 127.

The evidence in this case on appeal shows that the Appellant's current account stood at credit of 534-5-1pounds at the time of the trial. Though the account had been dormant since 1971, there was no evidence whatsoever that the Appellant had made any demand in relation to the account which the Respondent had failed to meet. Accordingly no foundation was established for the issue relating to the cause of action. I am satisfied the trial judge was right in his finding that the cause of action was not statute barred.

In conclusion, the cross-appeal on issues Nos. 1 and 2 have no merit.

The appeal and issue No.3 of the cross-appeal may now be considered. In dealing with the conclusion of the Court of Appeal that the trial court had not adequately considered the case for the Respondent and upon which that Court set aside the judgment of the trial court, learned counsel for the Appellant reviewed the evidence adduced by the parties and submitted that the trial judge meticulously examined and assessed the evidence before arriving at his verdict and the Court of Appeal was in error not only in stating that the case of the respondent had not been adequately considered but also in suggesting that the trial judge had based his decision on the report of the Special Referee.

With regard to the order of a retrial, appellant's counsel stated that the Court of Appeal misdirected itself as to the correct guideline for ordering a retrial when it relied on Duru v. Nwosu (1989) 4 NWLR (Part 113) 24 and Okoduwa v. The State (1988) 2 NWLR (Part 76)333. In the DURU'S case, learned counsel submitted, there was a misdirection on the onus of proof and a failure to evaluate the evidence while in Okoduwas's case there was a flaw by the trial judge in the consideration of the real issue in the case and a failure to advert to the conflicting-evidence. No such misdirection or flaw or failure in the present case.

Learned counsel further contended that a retrial would serve no useful purpose because according to the testimony of D.W.1, all the vouchers on

the appellant's account had been destroyed and would be futile and wasteful exercise, except perhaps as affording the respondent another opportunity to make up for the deficiencies in their pleadings and evidence, a course which was objectionable in law. Showing due respect, he submitted that the order for
 5 a retrial in the face of the overwhelming evidence in support of the declarations granted by the trial court was a wrongful exercise of judicial discretion. He relied on *Esso West Africa Incorporated v. Oyegbola* (1969) 1 NMLR 194 at 198. *Ezeoke v. Nwagbo* (1988) 3 S.C.N.J (Pt.1) 37 at 49 to 50 (1988) 1 NWLR (Pt. 72) 616.

10 On issue No. (iii), the appellant's counsel stated that the Court of Appeal had erred in law by its failure to decide the appellant's cross-appeal which was argued before it. He said the appellant's claim for the payment by the Respondent of the money standing to his credit was dismissed by the trial judge because, according to the judge, there was no evidence that a demand
 15 had been made on the respondent and the respondent had refused payment. Learned counsel contended that if the Court of Appeal had examined the issue, it would have found that the trial judge had failed to advert to his own finding in the case that the writ of summon was a sufficient demand in law and the appellant was entitled to judgment in whatever amount that was standing
 20 to his credit: *Joachimson v. Swiss Bank Corporation* (1921) All E.R. (Reprint) 93. He concluded that the dismissal of that item of claim was wrong.

Responding, learned counsel for the respondent referred to the judgment of Salami, J.C.A wherein the learned Justice stated that the respondent had not been given a fair hearing and submitted that it is trite law that where an
 25 appellant was not given a right of fair hearing, the proper order was the dismissal of the claim. To order a retrial was a miscarriage of justice for it amounted to giving the plaintiff another opportunity to relitigate the same matter. A retrial would only be ordered if the court was satisfied that the other party would not thereby be wronged. Being a declaratory action, learned counsel
 30 urged the court to dismiss the claim since the appellant did not prove his case: *Olatunbosun v. NICER council* (1988) 3 NWLR (Pt.80) 25, *Garba v. University of Maiduguri* (1986) 1 NWLR (Pt.18) 550 and *Olasehinde v. A.C.B.* (1990) 7 NWLR (Pt.161) 180 at 183.

35 In parenthesis I may point out that the submission of learned counsel for the respondent on the striking out of the appellant's cross-appeal by the Court of Appeal was misconceived. He stated that the dismissal of the claim relating to the cross-appeal on the ground that there was no demand and failure to meet the demand were concurrent findings of facts. It is correct that

the trial court had made such finding but the Court of Appeal did not consider the matter and did not make any finding.

In my view, the Court of Appeal was right to set aside the declarations granted by the trial court. In respect of the Ibadan account, there was no evidence whatsoever to support the declaration that it had a credit of 5 N677,264.15 in Ibadan Branch which was the amount claimed in the amended Statement of Claim.

It is pertinent to state the evidence adduced by the appellant in respect of the Ibadan Branch. Firstly, the appellant as P.W.1 produced the letter of credit, Exhibit C. which he stated was sent to him from London through 10 the Ibadan Branch. He then proceeded in his evidence and said:

"I received Statement of Account from the defendant last in April, 1970. It is from these Statement of account sic I received that I discovered that all the payments I made with these exhibits were debited to my account I maintained at the defendant branch at Ibadan. All the payments so far I 15 made was not treated in my account in the defendant bank in Benin but sent to the one I maintained with them at Ibadan branch. In spite of the slips with which I paid into the Benin account, the defendant was using the payment for the Ibadan branch account. I then caused auditors to go into my account which I maintained both in Benin and Ibadan branch of the defendant Com- 20 pany. These auditors are Obiorah Monu and Co. I instructed also the firm of Anjous, Uku and Eweka and Co. who are Chattered Accountants to investigate my financial dealing with the defendant both in Benin and in Ibadan. The two companies submitted their reports to me. These are the Reports.Counsel seeks to tender Reports. Mr Edema-Sillo: This document 25 cannot go in through this witness, because the witness is not the maker.

Court: - Mr. Edema-Sillo is perfectly right. In the interest of justice document cannot go in as exhibit it is accordingly admitted and marked Id1 30 to Id 3."

It may be noted that none of the auditors nor the accountants were called as witnesses and their reports were not admitted in evidence.

Again the appellant as P.W.1 testified:

"Exhibit "AA8" was collected on my behalf by the defendant but debited my account with it. Exhibit "AA10" was paid by exhibit "AA9" and was debited to my account instead of being credited. The value in Exhibit "AA 14" was collected on my behalf by the defendant but debited instead of crediting my account. Exhibit "AA 15"'s proceeds were collected on my behalf by defendant but not credited to my account. Exhibit "AA 16" is a bank 35 of America Draft paid into my account with the defendant and not credited

to the account. These documents are statements of account from Ibadan branch of the defendant where I also have an account sent to me. Counsel seeks to tender statements of account. Mr Agbettor: I withdraw documents.” The statement of account were not thereafter produced at the trial.

Under cross-examination, the appellant stated that the respondent
5 had transferred his account in Benin Branch to Ibadan Branch and all the credit entries that should have gone into his Benin account were debited to his Ibadan account. The credit and debit entries were not produced.

In his report, the Special Referee stated that he had not been given Information on Ibadan Branch and he could not report on it. The Manager of
10 the Benin Branch, P.W.1, stated that he was not aware the appellant had an account in the Ibadan Branch.

It appears the trial judge did not base his decision relating to the Ibadan Branch on any evidence but on the pleadings. In his judgment after having referred to several paragraphs of the amended Statement of Claim and
15 their denials in the Statement of Defence, he continued:

“In so denying the material facts averred in those paragraphs of the Amended Statement of Claim, the Defendant had been evasive and consequently a defective denial. The legal effect of paragraphs 7 and 8 of the Statement of Defence is therefore non-denial of the facts contained in those
20 paragraphs of the amended Statement of Claim; and so by order 13 rule 12 High Court (Civil Procedure) Rules 1976 those paragraphs of the Amended Statement of Claim are taken as admitted.”

He therefore entered judgment in the sum of N677,264.15 for the Branch on the purported admission of the respondent.

25 The Benin account may now be considered. In his testimony relating to the account, the appellant produced plethora of documents which caused the trial judge to appoint the Special Referee. The Appellant did not give evidence of the balance of the account. In his Report, Exhibit AA 18, the Special Referee found the balance to be N1,493,393.85 credit based on the
30 documents and information supplied to him by the appellant. The Report showed the credit balance was the total of the amount paid into the account less dishonoured cheques and it did not include withdrawals by appellant from the account. The Special Referee stated that the respondent or the appellant should have provided him with the paid cheques or the cheque book
35 stubbs respectively to determine the withdrawals. Neither did so.

He pointed out that in order to express an authoritative opinion on the accounts, the parties, particularly the respondent ought to provide all the information he had required. The report was therefore not conclusive.

First defence witness (D.W.1) testified after the Special Referee had

given evidence. He produced the statements of the Benin account, Exhibits BB2 to BB 10, which showed all the withdrawals during the material time leaving a credit of 534.5.1pounds, now N 1065.02, only.

It is also apparent that the trial judge did not base his judgment for the Benin account on the evidence or on the Amended Statement of Claim wherein the claim was N 1,534,692.20. The Special Referee found the balance to be N1,493,393.35 but the total withdrawals must be deducted from that amount to realise the correct balance. The evidence of D.W.1 showed the balance of the account to be 534.5.1pounds, now N1,065.02, credit after the withdrawals had been deducted. The trial judge did not consider and assess the evidence properly when he gave judgment for the appellant in the sum of N1,758,288.00 for the Benin Branch. He did not show in the judgment how he arrived at that amount. He did not give full consideration to the evidence for the defence and Exhibit BB2 to 10 which showed the balance of the account to be N 1,065.02 credit only. It is obvious that the judgment cannot be supported having regard to the evidence.

Having set aside the judgment, the question that remains to be considered is whether the Court of Appeal was right to have ordered a retrial or the claim should have been dismissed. It is elementary principle of law that where a plaintiff fails to adduce an iota of evidence to prove his case, his claim should be dismissed. Ex facie, the appellant did not establish his case in respect of the Ibadan account, one may therefore be tempted to dismiss that item of claim. However, the evidence showed the Ibadan and Benin accounts were inter-mingled and therefore in the interest of justice both should be treated together.

The principles for making an order for retrial were stated by this Court in Ayoola v. Adebayo and Ors. (1969) N.S.C.C. 173 and Duru v. Nwosu and Ors. (1989) N.S.C.C. 1 (1989)4 NWLR (Pt. 113) 24 and I am satisfied the Court of Appeal took these principles into consideration in making the order for retrial. The appellant's claim has not failed in toto as the respondent admitted being indebted to him. Since neither party is entitled to judgment under the circumstances of the case, it is proper and just to order a retrial.

I think the Court of Appeal was also right in striking out the cross-appeal in that Court. The claim in the cross-appeal was for judgment to be entered for the appellant in whatever amount the trial court found to be due to him in the Ibadan and Benin accounts. The claim was therefore dependent and flowed from the declarations sought. Since the judgment on the declarations has been set aside, the cross-appeal cannot succeed.

In conclusion, the appeal and the cross-appeal fail and both are hereby dismissed. The decision of the Court of Appeal is affirmed. There is no order as to costs.

UWAIS JSC

I have had the advantage of reading in advance the judgment read by my learned brother Bello, C.J.N I adopt the judgment as mine and I have nothing to add.

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OGWUEGBU JSC

I have had the privilege of reading in advance the draft judgment just delivered by my Lord, the Chief Justice of Nigeria, I entirely agree with him. I have nothing useful more to add. I abide by the consequential orders including the order as to costs contained therein.

ONU JSC

15 I have been privileged to read in advance the judgment of the Honourable Chief Justice of Nigeria just delivered and I agree with his reasoning and conclusion and have nothing more to add thereto. I make the same consequential orders inclusive of those relating to costs.

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IGUH JSC

I have had the privilege of reading in draft the lead judgment just delivered by my learned brother, the Honourable Chief Justice of Nigeria.

25 I entirely agree with the reasoning and conclusion therein and I have nothing to add.

I abide by the consequential orders including those as to costs made in the lead judgment.

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