

SUPREME COURT OF NIGERIA
15TH JULY, 2005. SC. 40/2001
CORAM:- I. L. KUTIGI, S. U. ONU, U. A. KALGO, I. C.
PATS-ACHOLONU, G.A. OGUNTADE, JJSC

CHIEF VICTOR NDOMA-EGBA APPELLANT
(Suing on behalf of Ndoma-Egba, Ebri & Co.)

AND

AFRICAN CONTINENTAL BANK PLC. RESPONDENT

EVIDENCE - Proof - Signature - Cheques - Burden of proof - Is on the defendant - Where it could not escape liability for plaintiff's claim - Or establish that it was the plaintiff who signed the cheques (H1)

EVIDENCE - Signature - Forgery of - Proof - Where plaintiff was not saying that a particular person - Forged his signature - He did not bear the burden - Of establishing the case - On a standard beyond reasonable doubt (H2)

PLEADINGS - Averments - Value - Where an averment does not in a juridical sense - Add any value to the plaintiff's case - Such averment is unnecessary (H3)

COURTS - Evidence - Inquiry - Examination of documents - It is not the duty of court to make inquiry into the case outside court (H4)

APPEALS - Reversal - Evidence - Where there are two versions of evidence - And the trial Court whose duty it is accepts plaintiff's version of evidence - Court below cannot reverse such findings of fact (H5)

PARTNERSHIP - Account - Bank - Duty of - The bank owes each partner the duty not to allow - Either of them to draw funds from the account - Without the concurrence of the other (H6)

EVIDENCE - Negligence - Proof of - Where defendant did not call evidence - To show plaintiff's negligence - It will be difficult to hold that the defendant - Exercised due amount of care (H7)

BANKING - Forged cheque - Negligence - By Bank in paying cheque with forged signature - Bank's liability is not absolute - Save reasonable care is not exercised - In processing the cheque (H8)

ESTOPPEL - Banking - Negligence - In honouring Cheque - Where defendant was negligent - In honouring plaintiff's unauthorized cheque - It ought not rely on estoppel (H9)

FACTS

Before the High Court of Cross River State, Calabar, the plaintiff/appellant filed this action against the defendant/respondent on behalf of Ndoma-Egba, Ebri and Co. The plaintiff's claim is as follows:- (a) the sum of N331,000.00 unlawfully withdrawn from the plaintiff's current account as a result of the defendant's negligence and collusion (b) Interest on the principal sum calculated at the rate of 52% from the date of withdrawal until judgment (c) N5 million being general damages for breach of contract, negligence for breach of contracts, negligence and loss of reputation. The plaintiff was a senior partner in a law firm registered as Ndoma-Egba, Ebri & Co., in Calabar. It maintained a current account with the defendant. A card, showing the specimen signatures of the two legal practitioners; Victor Ndoma-Egba and David Ebri was left with the defendant with a mandate that cheques and instruments of the law firm to be valid ought to be jointly signed by the two legal practitioners.

The law firm later paid a cheque of N500,000.00 into it's account with the defendant. The cheque was received for a Client of the law firm, Reynold Construction Company Ltd. (RCC), who later instructed the law firm to pay part of the N500,000.00 to its sister company called NWRD. The law firm therefore issued a cheque for N375,000.00, and was informed by the defendant that the firm had only N2,000.00 in it's

account. Upon further enquiry, the plaintiff discovered that three different cheques had been paid out of the account. The plaintiff pleaded that the defendant had been negligent. The trial court gave judgement in favour of the plaintiff for unlawful withdrawal from the firms account. Dissatisfied with the judgment, the defendant appealed to the Court of Appeal which allowed the appeal. Aggrieved by the decision of the Court of Appeal, the plaintiff has now appealed to the Supreme Court.

ISSUES FOR DETERMINATION

“ 1. Were their Lordships right in holding that the appellant did not prove that P.W. 1’s signature on Exhibits 2, 3 and 4 were forged?

2. Were their Lordships right in holding that the appellant as plaintiff were (sic) estopped from raising the issue of forgery?

3. Were the withdrawals from the appellant’s account lawful and was the award of damages by the trial court justified?

HELD (Unanimously allowing the appeal per **OGUNTADE JSC**)

EVIDENCE - Proof - Signature - Cheques

1. The case put before the trial court by the plaintiff deserves to be meticulously and reflectively analysed in order to determine whether he had set out to establish the commission of a crime by anybody such as would impose on him the necessity to establish a case of forgery beyond reasonable doubt. The case of the plaintiff was that when the law firm opened an account with the defendant, it was given a mandate form to fill so that those who could validly sign cheques for the law firm might be identified. Exhibit 1 was that mandate form. Exhibit 1 shows that the two partners, Victor Ndoma Egba and Richard David Ebri must jointly sign a cheque to be valid. The cheques which were issued to draw out a total sum of N331,000.00 were tendered as Exhibits 2, 3 and 4. P.W.2, Richard Ebri acknowledged that he signed each of Exhibits 2, 3 and 4. Plaintiff however said that he did not sign any of them. P.W.2 also stated that the signatures ascribed to plaintiff on Exhibits 2, 3 and 4 did not belong to him. The sum total of the forgery involved here, viewed from plaintiff’s angle was that plaintiff did not sign Exhibits 2, 3 and 4. It was never the case of the plaintiff that any named person had actually forged Exhibits 2, 3 and 4. The plank

of the plaintiff's case was that he did not sign the cheques. On the other hand, the defendant in paragraphs 11 and 17 reproduced above pleaded that it was the plaintiff who signed the signatures ascribed to him on Exhibits 2, 3 and 4. Indeed, the defendant could have escaped liability for plaintiff's claim only if it established that it was the plaintiff and not anyone else who signed Exhibits 2, 3 and 4. It is therefore apparent that it was the defendant and not the plaintiff who bore the burden of establishing that it was the plaintiff and not anyone else who signed Exhibits 2, 3 and 4. (p. 2485 G)

Signature - Forgery of

2. It is plainly the case that the plaintiff had not made the allegation that it was the defendant who forged the signature of the plaintiff on Exhibits 2, 3 and 4. The plaintiff's case as conceived and put across would succeed, as it did, if he succeeded in showing that he did not sign the signature ascribed to him in Exhibits 2, 3 and 4. The use of the word "forge" in the context of this case cannot be equated with the use of the same word as 'forgery' in a criminal offence. 'Forge' in this case has a secondary connotation and it means no more than that the plaintiff did not sign the cheques Exhibits 2, 3 and 4. Section 137(1) would apply only where the commission of a crime is imputed to a person in a civil trial. As the plaintiff was not saying that a particular person had forged his signature, he did not bear the burden of establishing the case on a standard beyond reasonable doubt. (p. 2487 E)

PLEADINGS - Averments - Value

3. Even if it is argued that the plaintiff had pleaded "forgery" in the sense postulated under Section 137(1) of the Evidence Act, it cannot escape notice that in paragraph 17(iii) and (iv) of the Amended Statement of Claim, the plaintiff had pleaded thus:

"(iii) *The defendant is in breach of her duty to the plaintiff in purporting to act on the alleged instructions of one signatory to the account when the plaintiff's mandate to the defendant was joint, that is, between Victor Ndoma-Egba and Richard D. Ebri acting together.*

(iv) *The defendant is in breach of her duty of care and negligence to the plaintiff.*”

The above two averments wherein the word “forge” was not employed fully captures the nature and essence of plaintiff’s case. Guided by this, one sees readily that the reference made in some paragraphs of the Amended Statement of Claim to fraud and forgery amounted to unnecessary and surplus averments, which did not in a juridical sense, add any value to the plaintiff’s case. The court below was of the view that the trial court ought to have held the plaintiff to the standard of proof prescribed under Section 137(1) of the Evidence Act I think, with respect to their Lordships of the court below that they were wrong to have imposed that extra burden on the plaintiff. It is my respectful view that in order to succeed, the plaintiff only needed to show that the defendant did not abide by the terms of the mandate given it vide Exhibit 1 as to who could validly sign cheques and bank instruments on behalf of the plaintiff. (p. 2488 F)

Inquiry - Examination of documents

4. The court below was in error to have concluded that the trial court could not on its own compare plaintiff’s specimen signature on Exhibit 1 with the disputed signatures on Exhibits 2, 3 and 4. There is no doubt however that the procedure adopted by the trial Judge is wrong. Having identified the dissimilarities between the signature of the plaintiff on Exhibit 1 and the signatures on Exhibits 2, 3 and 4, the trial Judge should have read to the parties in court his observations as to the dissimilarities and called for the reactions of parties on such observations. In *Muhammadu Duriminiya v. Commissioner of Police* (1961) NRNLR 70, the court said:

“A trial is not an investigation, and investigation is not the function of a court. A trial is the public demonstration and testing before a court of the cases of the contending parties. The demonstration is by assertion and evidence and the testing is by cross-examination and argument. The function of a court is to decide between the parties on the basis of what has been so demonstrated and tested. What was demonstrated in court at the trial failed to support the prosecution case and the magistrate should have dismissed the case. It was not part of his duty to do cloistered justice

by making an inquiry into the case outside court -not even by the examination of documents which were in evidence when the documents had not been examined in court and the magistrate's examination disclosed things that had not been brought out and exposed to test in court, or were not things that at least must have been noticed in court."

(Underlining mine)

The finding made by the trial court upon a comparison of the plaintiff's signatures on Exhibit 1 and Exhibits 2, 3 and 4 must therefore be discountenanced. (p. 2490 B)

APPEALS - Reversal - Evidence

5. There were thus two versions of the evidence before the trial Judge. The version given by plaintiff and P.W.2 needed to be compared with that given by D.W.1. This was a civil case and the trial Judge had the duty to decide which of the two versions of the evidence to accept. He accepted the version of the plaintiff. It was not open to the court below to reverse such findings of fact. See Akinola v. Oluwo (1962) 1AII NLR 224; and Akinloye v. Eyiola (1968) NMLR 92. I am satisfied therefore that the trial court was right to have found that plaintiff did not sign the signatures on Exhibits 2, 3 and 4 which were ascribed to him. (p. 2491 D)

PARTNERSHIP - Account - Bank - Duty of

6. It is undisputed, on the facts presented in this case, that the plaintiff in its mandate Exhibit 1 left written instructions and notice with the defendant that its cheques must only be signed by the two partners jointly. Clearly therefore, the defendant had notice of the limit on the authority of P.W.2 to sign cheques on behalf of the partnership. Sections 5, 10 and 15 of the Partnership Act, 1890, only offer protection to an outsider dealing with a member of partnership only to the extent that the outsider is unaware of the limit of the authority of the partners with whom he is dealing.

When the plaintiff and P.W.2 jointly executed the mandate form Exhibit 1, it must have dawned on the defendant that each wanted to protect himself from a situation where the other could unilaterally withdraw the partnership funds. The defendant therefore owed each of

the two partners the duty not to allow either of them to draw funds from the partnership account without the concurrence of the other, which concurrence must be signified by the signature of that other as stated in Exhibit 1. It amounts to making a nonsense of the purpose of giving the mandate Exhibit 1 for the court below to rely on the Partnership Act, 1890, to create an escape route for the defendant in its obligations to the partners. I am satisfied that the court below clearly misunderstood the import of Sections 5, 10 and 15 of the Partnership Act, 1890. (pp. 2494 C / 2496 D)

Negligence - Proof of

7. At the trial however, no evidence was called by the defendant in proof of the facts pleaded on the negligence of the plaintiff. The plaintiff did not lead evidence to show how Exhibit 2, 3 and 4 came to be signed by P.W.2 alone and not by himself .

D.W.1 testified that the signatures on Exhibits 2, 3 and 4 were consistent with those on Exhibit 1 and that the signatures bear similar features and characteristics. However, D.W.1 did not testify that he had been the defendant's official who caused Exhibits 2, 3 and 4 to be honoured in the first place. There was therefore no evidence that the defendant's official or clerk who honoured Exhibits 2, 3 and 4 had first compared the signatures on them with those on the mandate card Exhibit 1. The evidence of D.W.1 on the point was his opinion. It is difficult to hold in the circumstances that the defendant had exercised a due amount of care to ascertain if the signature ascribed to the plaintiff in Exhibits 2,3 and 4 was in fact his signature as in Exhibit 1. (p. 2497 E / 2498 A)

BANKING - Forged cheque - Negligence

8. It needs be said however that the basis of the liability ascribed to the defendant is in the tort of negligence. It is not a case of absolute liability. The question is - had the defendant exercised due care and diligence in the procedure it adopted in making payments on Exhibits 2, 3 and 4? The degree of perfection achieved in the simulation of the genuine signature of a customer may be so high that even the banker may not be able to discover it is a forgery. It is not therefore the law that when a banker pays money

out from a customer's account on a cheque, which he believes to be genuine but which turns out to be a forgery, the banker is willy nilly liable. The basis of liability in such a case is the failure to exercise reasonable care and diligence to process this cheque before payment. If there is cogent evidence, which the court accepts that the banking official before paying out money from a customer's account on a forged cheque did all that is necessary to compare the signature on the cheque, which turns out to be forged with the specimen signature of the customer in its possession, the basis of liability in negligence is displaced. In the instant case however, there was not a shred of evidence on the prepayment formalities done by the defendant by the clerk or official who paid, as to whether the signature of plaintiff on Exhibits 2, 3 and 4 was at any stage compared with the plaintiff's specimen signature on Exhibit 1. In coming to the conclusion as to banker's negligence, it is always important to look at the disputed signature and compare same with the authentic signature to discover if the dissimilarities are so obvious as to be easily discernible. (p. 2498 C)

ESTOPPEL - Banking - Negligence

9. Even if one of plaintiff's partners had written Exhibit 16 to the defendant to pay N225,000.00, that did not confer on the defendant an authority to ignore the terms contained in the mandate Exhibit 1. The same may be said in relation to the two payments made to plaintiff's accountant vide Exhibits 3 and 4. There was also no evidence of the negligence of the plaintiff as pleaded. The attempt by the defendant to rely on estoppel ought not to have succeeded before the court below. Under Section 24 of Bills of Exchange Act, 1882, a forged or an unauthorised cheque is inoperative. It may well be that the defendant may have its remedies against P.W.2 who was shown to have signed Exhibits 2, 3, 4 and 16, but that will not alter the fact that the defendant was negligent in honouring Exhibits 2, 3 and 4 which did not carry a valid signature of the plaintiff as per Exhibit 1. (p. 2499 F)

REPRESENTATION

Mr. Obi Okwusogu, for the Appellant.
Respondent not represented.

CASES REFERRED TO

- Muhammadu Duriminiya v. Commissioner of Police (1961) NRNL 70
Akinola v. Oluwo (1962) 1 AIINLR 224
Akin love v. Evivola (1968) NMLR 92 B
Nwobodo v. Onoh (1984) All NLR 1 at 77
Omoboriowo v. Ajasin (1984) All NLR 105 at 110
Nwankwere v. Adewunmi (1967) NMLR 45 at 48
Arab Bank v. Ross (1952) QBD 216 at 229
Wilcox v. Queen (1961) 2 SCNL 296 C

STATUTES REFERRED TO

- Criminal Code s. 465
Evidence Act ss. 108, 137(1) D
Partnership Act, 1890 ss. 5, 10 & 15

LEAD JUDGMENT BY OGUNTADE JSC

The appellant was the plaintiff at the Calabar High Court of Cross-River State. He brought the suit for and on behalf of Ndoma-Egba, Ebri & Co. (hereinafter referred to as 'the Law Firm'). He claimed against the respondent, as the defendant for the following: E

“(i) *The sum of N331,000.00 unlawfully withdrawn from the plaintiff's current account No.05756 as a result of the defendant's negligence and collusion.* F

(ii) *Interest on the principal sum calculated at the rate of 52% from the date of withdrawal until judgment.* G

(iii) *N5 million (Five Million Naira) being general damages for breach of contract, negligence for breach of contract, negligence and loss of reputation”.*

The parties filed and exchanged pleadings after which the suit was heard by Itam, J. In a reserved judgment on 22-9-98, the trial Judge awarded to the plaintiff the sum of N331,000.00 being the amount alleged to have been unlawfully withdrawn from the account of the law firm and H

a further sum of N500,000.00 as general damages. Dissatisfied with the said judgment, the defendant brought an appeal against it before the Court of Appeal, Calabar Division (hereinafter referred to as the ‘court below’). The court below in its judgment on 11-4-2000, allowed the appeal. It set aside the award made by the trial court and dismissed the plaintiff’s suit. The plaintiff has brought before us an appeal against the judgment of the court below. In the appellant’s brief filed by plaintiff’s counsel, the issues for determination in the appeal were identified as the following:

“ 1. Were their Lordships right in holding that the appellant did not prove that P.W. 1’s signature on Exhibits 2, 3 and 4 were forged?

2. Were their Lordships right in holding that the appellant as plaintiff were (sic) estopped from raising the issue of forgery?

3. Were the withdrawals from the appellant’s account lawful and was the award of damages by the trial court justified?

The respondent formulated its own set of issues for determination. A comparison of respondent’s issues with the appellant’s shows that in substance both sets are similar. I shall be guided in this judgment by the appellant’s issues. I intend to consider each of the issues serially. It is necessary that I expose briefly the facts giving rise to the dispute out of which this appeal arose as pleaded by the parties.

The plaintiff was the senior partner in a law firm registered as Ndoma-Egba, Ebri and Company The law firm had a registered office at Calabar. It maintained a current account No.0576 with the defendant, bankers, at the defendant’s branch situate at Calabar Road, Calabar. It was a “clients account’. In order to operate the account, the law firm filed with the defendant a mandate, which indicated that the cheques and instruments of the law firm, to be valid, ought to be jointly signed by the two legal practitioners in the law firm, that is, the plaintiff, Victor Ndoma-Egba and Richard David Ebri. A card showing the specimen signatures of the two legal practitioners was filed and left with the defendant.

The law firm later paid a cheque for N500,000.00 into its account with the defendant. The cheque had been received for a client of the law firm - Messrs. Reynold Construction Company Ltd., (hereinafter referred to as RCC). R.C.C. later instructed the law firm to pay a part of the

N500,000.00 to its sister company called NWRD. The law firm issued the cheque on 12-3-93. On 30-3-93, plaintiff called at the defendant's branch to ascertain if the cheque issued had been paid. He was however informed that although the said cheque for N375,000.00 had not yet been presented, the law firm had only 2,000.00 in its account. Upon further enquiry, the plaintiff discovered that three different cheques for N225,000.00, N31,000.00 and N75,000.00 had been paid out of the account on 1/3/93 and 12/3/93 respectively. These came to a total sum of N331,000.00. The cheques for N31,000.00 and N75,000.00 had been paid to one Oluwaseyi Fabelurin and the one for N225,000.00 to the defendant.

The plaintiff pleaded that the defendant had been negligent by not observing the instructions left with it on the mandate card as to who could validly sign cheques and instruments on behalf of the law firm. The cheque issued by the law firm to NWRD was dishonoured by the defendant on its presentment. Embarrassed, the plaintiff by its letters wrote to the defendant to demand a refund or restitution. The defendant denied liability. The plaintiff therefore sued as earlier stated above.

The defendant denied plaintiff's claim. It pleaded that on 1/3/93, Mr. Richard D. Ebri wrote to the defendant requesting for a bank draft for N225,000.00 in favour of a stated company. The law firm's cheque for N225,000.00 was annexed to the letter. The other withdrawals of N31,000.00 and N75,000.00 were made by the law firm's accountant Oluwaseyi A. Fabelurin who had hitherto made huge withdrawals on the law firm's behalf. The plaintiff had introduced the accountant to the defendant and the defendant had in good faith dealt with him. The cheques against which the three payments were made had carried signatures, which were regular on their face. The signatures on the cheques were those of the plaintiff and Mr. Richard Ebri. Mr. Richard Ebri had not complained that his signature was forged. The defendant pleaded that the plaintiff had been negligent or contributorily negligent.

The trial Judge heard the case on this state of pleadings. The plaintiff testified as P. W. 1 and his partner Richard David Eri as P.W.2. The plaintiff maintained as he pleaded that the signature ascribed to him in the cheques with which the sum of N331,000.00 was withdrawn from the

account of the law firm was not his own; and not in accordance with the mandate given to the defendant vide Exhibit 1. The photocopies of the cheque with which the total sum of N331,000.00 was withdrawn were tendered as Exhibits 2, 3 and 4. Plaintiff however agreed that the signature
B of his partner Mr. Richard Ebri was on Exhibits 2, 3 and 4.

In his evidence the plaintiff who testified as P.W. 1 said:

*“Mr. Ebri was not in charge of the general management of the partnership. I am the head of the Firm and senior partner. Mr. Ebri is a partner. It is not true that we do not work in concert with my partner. It
C is the oldest surviving partnership in Calabar and has grown from strength to strength, in spite of A.C.B. Ltd. Our mandate to the defendant is that all cheques must be signed by both of us, not either of us. All instructions to the bank also must be signed by both of us. My partner’s signatures in
D Exhibits 3 and 4 were not forged. The documents shown to me appear to be the original copies of Exhibits 3 and 4.*

*I had a partnership accountant by name Oluwaseyi Fabelurin. His duty was to keep the books whether or not we were around. It will include
E handling banking transactions but will exclude signing my signature. The cheque book and stubs are kept in the Accounts Department under the care of the Accountant. He takes care of everything in the Accounts Department.*

*No, it is not true that as at date of commencement of this suit, all
F bank statements had been duly delivered to the partnership. Exhibits 2, 3 and 4 were obviously and patently forged. My signatures there bore no resemblance whatsoever to mine. It should have been obvious to every person. The signatures on Exhibits 2, 3 and 4 are definitely not mine.*

G They are not in the least similar to my signature on Exhibit

1. It is like comparing a car and a bicycle. There is no resemblance at all. I am entitled to my claims in the suit.”

(Underlining mine)

H P.W.2’s evidence in pages 128-129 of the record is brief. I produce it in full:

“I know P.W. 1 and that he brings this action by authority of the law firm of Ndoma-Egba, Ebri & Co., in his capacity as senior partner.

I know the defendant as a company that has been bankers to our law firm. The law firm has an account with the defendant opened by way of dual mandate signatures to have been effected always by Victor Ndoma-Egba and myself, I have seen Exhibits 1, 2, 3 and 4. The signatures on the mandate card (Exhibit D and those on Exhibits 2, 3 and 4) are mine. Yes, B I am familiar with the signature of P.W.I The signature of P.W.I is on Exhibit 1. Those on Exhibits 2,3 and 4 are definitely not his signature Yes I made Exhibit 16.

Cross-Examination By Mrs. Akobune:

Yes I said I signed Exhibit 16. I am aware that the defendant C complied with Exhibit 16. I am not aware whether the obligation to the Federal Superphosphate Fertilizer Company was met.

I am convinced that P.W. 1 's signature in Exhibit 1 is not the same as that in Exhibits 2,3 and 4. We had an Accountant by name O. Fabelurin. D In the absence of P.W.1, I run the firm on my own not in conjunction with the Accountant. I and P.W.1 jointly run the firm's banking transactions. The accountant only carries out accounting transactions. I and P.W.1 alone carry out banking transactions. Yes all cheques issued by the firm E may be signed by me and P.W.1."

The remarkable thing about the evidence of P.W. 1 and P.W. 2 is that neither of them explained the procedure followed in drawing out money from the bank and how the cheques Exhibits 2, 3 and 4 came to F be signed by P.W. 2 and not signed by the plaintiff. Strangely too, the defence counsel under his cross-examination did not attempt to elicit from P.W.1 and P.W.2 evidence on these points.

The defendant called one witness. He testified as D.W.1. In his evidence under cross-examination at pp. 138-139 of the record, D.W.1 G said:

"I have seen Exhibit 1 (plaintiffs asked to read it out in full by counsel). The name of the account in our books is Ndoma Egba, Ebri & Co. I seen (sic) on Exhibit 1 that 'both must sign' but it is not their H instruction to the defendant, it is for our office use. The signatures were not put on the mandate card by the defendant. They were put by the signatories, Victor Ndoma-Egba and Richard Ebri. In further answer,

mandates are given through resolution of a Registered Company. Where a respondent is absent, the bank will now insist on all the signatures in the signatory card signing. So, signature does not bear the mandate. Rather, I now say that the account holders do not give mandate in the signature care. Yes, I told the court that in Exhibit 1, the resolution column was nil. In order words therefore, all the signatures of Exhibit 1 must sign. In order words, the mandate on Exhibit 1 is that Richard Ebri & Victor Ndoma-Egba must sign together. I still maintain my previous statement that the defendant is not a banker to Ndoma-Egba, Ebri & Co., as a registered company, but a joint account. Yes, I brought Exhibit 16. The heading is Ndoma-Egba, Ebri & Co. No, I did not take instructions from a partnership that does not exist in Exhibit 16. Exhibit 16 was signed by Richard Ebri alone, even though I told the court that both signatures (sic) must sign.”

The trial Judge in his judgment at pages 163-166 of the record made findings of fact thus:

“1. Both parties agree that the specimen signature of P. W. 1 is the true, genuine, regular and acceptable one. I take it as agreed that it is therefore the basis or reference point for comparing and determining any other signature in dispute between the parties.

2. I have perused the signatures on Exhibit 1 and that attached to Exhibit 14 and I find them similar in all material particulars and characteristics.

3. I have also compared by way of examination the signature on Exhibit 1 on one hand and those on Exhibits 2, 3 and 4 on the other hand and I clearly find the following obvious and material differences, namely:-

(a) The general impression of that on Exhibit 1 is that of a normal, free signature whilst that on Exhibits 2, 3 and 4 are those of copied or printed effort.

(b) The writing in one gives the impression of a fast, smooth and minute one whilst the others are that of a laborious painstaking, calculated, premeditated one and are obviously larger.

(c) In the 1st the stroke connecting ‘N’ and ‘D’ is slanting and obvious. In the others it is horizontal or absent entirely.

(d) In the 1st the long line or stroke under the signature is straight and clearly extends beyond the last alphabet (a). In the others it ends abruptly with the 'a'.

(e) In the 1st the last word 'a' is itself long and extensive. In the others it has no lone to it and ends sharply and abruptly with the 'a' B

(f) In the 1st the 'E' of Egba appears like a big 'Q' and the proceeding 'a' connects it with 4 line at the upper side. In the others the connection is at the bottom side and it looks like an 'E' instead of 'O'.

(g) In the 1st the 'g' of Egba below the long line is preceded by 2 dots. In the others it is between the 2 dots. C

(h) In the 1st the character of the alphabets are smallest, sedate, smooth and uniform. In the others they are abrupt, noisy, obvious, loud and clear.

4. The plaintiff in paragraph 9 of the Amended Statement of Claim D pleaded and sought to rely at the trial on the report of an handwriting expert, Ref. No.DXX/21/93 dated 4/5/93 and the Police Report on the fraud.

But the defendant in paragraph 15 of the Amended Statement of Defence E stated that it would object to the tendering of the two reports at the trial. I take it that the defendant did not want the said reports to be tendered at all. I further take it that it is not open to them to approbate and reprobate.

5. The signatures on Exhibits 2, 3 and 4 were not made or authorized F by P.W. 1, and he never ratified or adopted or condoned them at all throughout and till date.

6. The said signatures were clearly made without his consent or knowledge, and to the material detriment and loss of the plaintiff's firm. G

(C) On The Question Of Negligence etc.

1. That the defendant returned the cheque for N375,000.00 attached to Exhibit 14 unpaid, because the account was no more in funds as stated by Mr. Omenye, their Manager. H

2. That the defendant declined or refused to call any of its officers who has direct and personal knowledge relating to the unauthorized withdrawals in Exhibits 2, 3 and 4 because it would be adverse to their

interest to do so.

3. *That the defendants ought to have been put on notice that payment of Exhibits 2,3 and 4 is irregular because of the irregular signatures of P.W. 1 thereon, the huge amounts withdrawn within a short period of time, and all the surrounding circumstances of this particular case.*

4. *That neither the Branch Manager, the verifying officer nor the pay officer was called to establish good faith, due care or lack of negligence or collusion in the payment complained of - especially as the purported signatures of P.W.1 on Exhibits 2, 3 and 4 were so self-evidently dissimilar or irregular as compared to that in Exhibit 1 in their custody, and intended for the very purposes of comparison. That the unauthorized withdrawals could have been aborted had the defendant's officers taken or made even minimal due care and enquiry. That the wrongful dishonour of the cheque attached to Exhibit 14 by the defendant is a direct and foreseeable consequence of the defendant's negligence in wrongfully paying out in Exhibits 2, 3 and 4, in clear breach of their contractual obligation in Exhibit 1, not to honour cheques that are not duly signed or issued by both partners i.e. P.W. 1 and P.W.2"*

The court below reversed the judgment of the trial court on three grounds. The first was that, as the plaintiff had pleaded that his signature was forged, he bore the burden of proving that allegation beyond reasonable doubt. It held that as the plaintiff did not call handwriting experts to show that his signature was forged on Exhibits 2, 3 and 4, he ought not to have succeeded. Secondly, the court below held that since P.W.2, a partner in the law firm, was shown to have written a letter Exhibit 16 authorising that the cheque Exhibit 2 be paid, the plaintiff was estopped from contending that any of Exhibits 2, 3 and 4 was forged. Reliance was placed on Sections 5, 10 and 15 of the Partnership Act, 1890 of England. Thirdly, that as it was shown that the fraudulent withdrawals were indeed authorised, the plaintiff had failed to establish that the cheque for N375,000.00 it issued to its client was wrongfully dishonoured.

Was the court below right in its views that the plaintiff/appellant did not show that Exhibits 2, 3 and 4 were forged? At page 258 of its judgment,

the court below said:

“Where a party denies making a document which he is alleged to have executed or thumb-printed, such denial is tantamount to saying that the document is a forgery or fake. In such a situation, the burden of proof of the forgery rests on the party who alleges since forgery is a crime, the onus of proof on him who alleges is proof beyond reasonable doubt; Ikoku v. Oli 1962) 1 SCNLR 307. Adelaja v. Alade (1999) 6 NWLR (Pt.608) 544 at 557 to 558.”

In coming to the conclusion that the trial Judge erroneously took it upon himself to compare the signature on Exhibits 2, 3 and 4, (the cheques with which withdrawals were made) with that on Exhibit 1 (specimen signatures of P.W.I and P.W.2), the court below said:

“It cannot be disputed that a Judge has the power to make comparison of signatures or writings independent of an expert evidence. But he has some limitations on the matter beyond which he cannot go. Where the comparison is not very obvious but involves matters which are in the competence of an expert, it will not be proper for the Judge to constitute himself an expert and proceed to form his own opinion in a handwriting in the issue: Udekeson Ent. Ltd, v. Okafor FCA/B/103/78 of 13/8/93..... From the above extract, it cannot be gainsaid that the trial Judge had not assumed the role of an expert in determining whether the disputed signature in question was forged. This, he is not permitted to do. he not being a witness nor a handwriting expert.”

In his appellant’s brief, counsel submitted that on the undisputed evidence before the trial court, there was no doubt that only the two partners in the law firm could validly sign cheques and instruments on behalf of the firm. Further, that there was evidence from both the plaintiff and P.W.2 that the signature of the plaintiff on Exhibits 2, 3 and 4 was forged. As against this evidence, the only defence witness offered a mere denial. It was submitted that the trial Judge who saw the witnesses testify was entitled to make his findings on the matter in view of Section 108(1) of the Evidence Act. Counsel relied on *The Queen v. Wilcox* (1961) NSCC Vol. 2 at 274, *Jobi v. Oshilaia* (1963) NSCC Vol. 3 and 5. Counsel said that it was obvious that the court below had not itself examined the handwriting

ings before it rejected the findings of the trial Judge. He submitted that this court could itself make the comparison.

Respondent's counsel submitted that the plaintiff had pleaded in its Statement of Claim that it would rely on the evidence of a handwriting expert in proof of the fact that the signatures on Exhibits 2, 3 and 4 were forged. As it had so pleaded, the plaintiff could not rely on oral testimony to prove facts contained in a written record - *Elias v. Omo-Bare* (1982) 5 S.C. (Reprint) 13;(1982) 1 All NLR 70. *A.C. B. Plc. v. Haslon (Nig.) Ltd.* (1997) 8 NWLR (Pt.515) 110 at 131. Counsel argued that since an expert was not called to testify. Section 149(d) of the Evidence Act should have been invoked. Counsel relied on *Ezeonwu v. Onyechi* (1996) 3 NWLR (Pt.43) 499 at 528; *Ekenye v. Ofunne*(1985) 4 S.C. (Pt.I) 8 at 22. Now in paragraph 9 of its Amended Statement of Claim, the plaintiff pleaded:

"9. The plaintiff then demanded for all the cheques upon which these withdrawals were made. An inspection of the cheques produced by the defendant revealed that all the withdrawals were made with cheques bearing forged signatures. All the cheques (except the cheque of 1/3/93 for N225,000.00) were made payable to one Oluwaseyi Fabelurin - an accountant employed by the plaintiff, while the cheque for N225,000.00 was made payable to the defendant. The defendant is hereby put on notice to produce all the cheques pleaded in paragraph 8 above or their copies at the trial. At the trial of this case, the plaintiff shall also rely on the report of an handwriting expert Reference No.DXX/21/93 dated 4th day of May, 1993 and the Police report on the fraud."

The defendant in paragraphs 11 and 17 of its Amended Statement of Defence pleaded:

"11. Still in further denial of the said paragraph 8 of the plaintiff's Amended Statement of Claim, the defendant says that the sums of N31,000.00 and N75,000.00 were authorized withdrawals made by the plaintiff to his Accountant, Fabelurin A. Oluwaseyi who has been making huge withdrawals for the plaintiff for many years. Besides, the plaintiff is silent on the signature of his partner who also signs the partnership account cheques with him. The defendants say that the total sum of

N331,000.00 (Three Hundred and Thirty-one Thousand Naira) allegedly withdrawn from the plaintiff's law firm Account No.05756 was duly authorized by the plaintiff by his conduct.

17. In further answer to the said paragraph 10, the defendant avers that:

(i) the signatures on the cheques alleged by the plaintiff to be fraudulent, which is denied, were those of the plaintiff and resembled the approved signatures supplied by the plaintiff and his partner on the specimen signature card;

(ii) at the trial the defendant will contend that the plaintiff's signature on the cheques were those of the plaintiff's and his partner who has not complained of his signature being forged and he is not a party to this action;

(iii) the defendant denies that the signatures were not those of the plaintiff and his partner and the withdrawals complained of were made by the plaintiff and his partner on cheques regularly signed by them and issued to Mr. Oluwaseyi Fabelurin, an Accountant, employed by the plaintiff, who was entrusted to handle the accounts and finances of the plaintiff (s).

(iv) paragraph 10(iii) is specifically denied. The plaintiff is being mischievous in his allegation. The withdrawal of the sum of N225. 000.00 (Two Hundred and Twenty-five Thousand Naira) was authorized by the plaintiff's partner in his letter to the defendant dated 1st March. 1993, requesting for a Bank draft to be issued in favour of Federal Super Phosphate Fertilizer Company Limited, Kaduna, which request was duly complied with. The letter of 1st March. 1993, which was accompanied by a cheque No.388684 duly authorized by both partners is hereby pleaded. The said amount was paid by bank draft and not across the counter as alleged."

The case put before the trial court by the plaintiff deserves to be meticulously and reflectively analysed in order to determine whether he had set out to establish the commission of a crime by anybody such as would impose on him the necessity to establish a case of forgery beyond reasonable doubt. The case of the plaintiff was

that when the law firm opened an account with the defendant, it was given a mandate form to fill so that those who could validly sign cheques for the law firm might be identified. Exhibit 1 was that mandate form. Exhibit 1 shows that the two partners, Victor Ndoma
 B Egba and Richard David Ebri must jointly sign a cheque to be valid. The cheques which were issued to draw out a total sum of N331,000.00 were tendered as Exhibits 2, 3 and 4. P.W.2, Richard Ebri acknowledged that he signed each of Exhibits 2, 3 and 4. Plaintiff
 C however said that he did not sign any of them. P.W.2 also stated that the signatures ascribed to plaintiff on Exhibits 2, 3 and 4 did not belong to him. The sum total of the forgery involved here, viewed from plaintiff's angle was that plaintiff did not sign Exhibits 2, 3 and 4. It was never the case of the plaintiff that any named person had
 D actually forged Exhibits 2, 3 and 4. The plank of the plaintiff's case was that he did not sign the cheques. On the other hand, the defendant in paragraphs 11 and 17 reproduced above pleaded that it was the plaintiff who signed the signatures ascribed to him on
 E Exhibits 2, 3 and 4. Indeed, the defendant could have escaped liability for plaintiff's claim only if it established that it was the plaintiff and not anyone else who signed Exhibits 2, 3 and 4. It is therefore apparent that it was the defendant and not the plaintiff who bore the
 F burden of establishing that it was the plaintiff and not anyone else who signed Exhibits 2, 3 and 4.

In *Nwobodo v. Onoh* (1984) All NLR 1 at 77, Obaseki, JSC., discussed the nature of the offence of forgery and the proof of it in relation to Section 137(1) of the Evidence Act thus:

G *"Forgery as defined under the Criminal Code reads-*

465. *A person who makes a false document or writing knowing it to be false, and with intent that it may in any way be used or acted upon as genuine, whether in Nigeria or elsewhere to the prejudice of any person,*
 H *or with intent that any person may be in the belief that it is genuine be induced to do, or refrain from doing any act whether in Nigeria or elsewhere is said to forge the document or writing.*

To bring an indictment for the offence of forgery under Section 465

of the Criminal Code, it must contain the important ingredient of knowledge except the word 'forgery' is used in the indictment.

The whole essence of an examination of the pleading for the purpose of determining whether it alleges a criminal offence or not is brought about by Section 137(1) of the Evidence Act. The sub-section provides -

'If the commission of a crime by a party to any proceeding is directly in issue in any proceeding civil or criminal, it must be proved beyond reasonable doubt.'

It amounts to this therefore -

*(1) that the allegation must be made to a party to the case; and
(2) that the commission of the crime shall be directly in issue, or in other words, that it is the commission of the crime that must be proved before the plaintiff or the petitioner (as in this case) could succeed in his action.*

If this were the case, then the allegation which constitutes the crime must be proved beyond reasonable doubt as if it were a criminal case that was on and not on the balance of probabilities."

It is plainly the case that the plaintiff had not made the allegation that it was the defendant who forged the signature of the plaintiff on Exhibits 2, 3 and 4. The plaintiff's case as conceived and put across would succeed, as it did, if he succeeded in showing that he did not sign the signature ascribed to him in Exhibits 2, 3 and 4. The use of the word "forge" in the context of this case cannot be equated with the use of the same word as 'forgery' in a criminal offence. 'Forge' in this case has a secondary connotation and it means no more than that the plaintiff did not sign the cheques Exhibits 2, 3 and 4. Section 137(1) would apply only where the commission of a crime is imputed to a person in a civil trial. As the plaintiff was not saying that a particular person had forged his signature, he did not bear the burden of establishing the case on a standard beyond reasonable doubt.

In *Omoboriowo v. Ajasin* (1984) All KLR 105 at 110, this court per Bello, JSC, (as he then was) drew a distinction between a case where it

is necessary to prove the allegation of crime beyond reasonable doubt and another where such allegation even if made does not form the bedrock of the case as to entail the necessity to prove it beyond reasonable doubt. The learned JSC, said:

B “Again, in my reasons for judgment in *Nwobodo v. Onoh* (*supra*), I considered fully the scope of Section 137(1) of the Evidence Act and its application to the pleadings of a particular case as qualified by the principle of severance of pleadings as demonstrated in *Nwankwere v. Adewunmi* (1967) NMLR 45 at 48 and *Arab Bank v. Ross* (1952) QBD C 216 at 229.

In the case on hand, at the close of his case during the hearing of the petition, the petitioner abandoned the allegations of crimes. It follows therefore that in so far as the petition was founded on those allegations, D it must be dismissed. However if the averments alleging crimes against the 2nd respondent were excised from the petition, there still remained in the body of the petition sufficient averments without putting directly in issue the commission of a crime by a party to sustain the petition.”

E (Underlining mine)

In *Arab Bank Ltd. v. Ross* (*supra*) at page 229, Lord Denning, MR., said:

“Under the rules of pleading as I have always understood them, a F pleader who has pleaded more than he strictly need have done can always disregard the unnecessary or surplus averments and rely simply on the more limited ones.”

Even if it is argued that the plaintiff had pleaded “forgery” in the sense postulated under Section 137(1) of the Evidence Act, it G cannot escape notice that in paragraph 17(iii) and (iv) of the Amended Statement of Claim, the plaintiff had pleaded thus:

“(iii) The defendant is in breach of her duty to the plaintiff in purporting to act on the alleged instructions of one signatory to the H account when the plaintiff’s mandate to the defendant was joint, that is, between Victor Ndoma-Egba and Richard D. Ebri acting together.

(iv) The defendant is in breach of her duty of care and negligence to the plaintiff.”

The above two averments wherein the word “forge” was not employed fully captures the nature and essence of plaintiff’s case. Guided by this, one sees readily that the reference made in some paragraphs of the Amended Statement of Claim to fraud and forgery amounted to unnecessary and surplus averments, which did not in a juridical sense, add any value to the plaintiff’s case. The court below was of the view that the trial court ought to have held the plaintiff to the standard of proof prescribed under Section 137(1) of the Evidence Act I think, with respect to their Lordships of the court below that they were wrong to have imposed that extra burden on the plaintiff. It is my respectful view that in order to succeed, the plaintiff only needed to show that the defendant did not abide by the terms of the mandate given it vide Exhibit 1 as to who could validly sign cheques and bank instruments on behalf of the plaintiff.

In coming to the conclusion that the plaintiff’s signatures on Exhibits 2,3 and 4 were different from the specimen signature on Exhibit 1, the trial Judge compared the disputed signatures on Exhibits 2, 3 and 4 with that on Exhibit 1. He then made extensive findings of fact to the effect that the signatures of the plaintiff on Exhibits 2, 3 and 4 differed from the specimen signature of the plaintiff in Exhibit 1. However, the court below took the view that the trial Judge had by doing so turned himself into an expert. Section 108(1) of the Evidence Act, Cap.112 Laws of the Federation, 1990 provides:

“108(1) *In order to ascertain whether a signature, writing, seal or finger impression is that of the person by whom it purports to have been written or made, any signature, writing, seal or finger impression admitted or proved to the satisfaction of the court to have been written or made by that person may be compared with the one which is to be proved although that signature, writing, seal or finger impression has not been produced or proved for any other purpose.*”

In Wilcox v. Queen (1961) 2 SCNLR 296, De Lestang, CJ., Federal Supreme Court of Nigeria observed:

“*It is not unusual for the courts in a clear case to form their own opinion as to handwriting and in R. v. Smith, 3 Cr. App. R. 87 as well as*

in Rex v. Richard, upon which Mr. David relies, the Court of Criminal Appeal in England formed its own opinion by comparing the handwriting alleged to be that of the appellant with a genuine specimen of his handwriting. So also did the West African Court of Appeal in R. v. Apena,
 B 13 WACA 173. In the present case, the dissimilarities between the signatures on the cheque and the genuine signatures of Nwobu are apparent to the naked eye and in our view the course pursued by the learned Judge was not improper in the circumstances.”

The court below was in error to have concluded that the trial court could not on its own compare plaintiff’s specimen signature on Exhibit 1 with the disputed signatures on Exhibits 2, 3 and 4. There is no doubt however that the procedure adopted by the trial Judge is wrong. Having identified the dissimilarities between the signature of the plaintiff on Exhibit 1 and the signatures on Exhibits 2, 3 and 4, the trial Judge should have read to the parties in court his observations as to the dissimilarities and called for the reactions of parties on such observations. In Muhammadu Duriminiya v. Commissioner of Police (1961) NRNLR 70, the court said:
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“A trial is not an investigation, and investigation is not the function of a court. A trial is the public demonstration and testing before a court of the cases of the contending parties. The demonstration is by assertion and evidence and the testing is by cross-examination and argument. The function of a court is to decide between the parties on the basis of what has been so demonstrated and tested. What was demonstrated in court at the trial failed to support the prosecution case and the magistrate should have dismissed the case. It was not part of his duty to do cloistered justice by making an inquiry into the case outside court - not even by the examination of documents which were in evidence when the documents had not been examined in court and the magistrate’s examination disclosed things that had not been brought out and exposed to test in court, or were not things that at least must have been noticed in court.” (Underlining mine)
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The finding made by the trial court upon a comparison of the plaintiff’s signatures on Exhibit 1 and Exhibits 2, 3 and 4 must

therefore be discountenanced. ‘But that is not the end of the matter. As I observed earlier, plaintiff denied that he signed Exhibits 2, 3 and 4. P.W.2, the partner of the plaintiff who was familiar with the signature of the plaintiff confirmed that the signatures of Exhibits 2, 3 and 4 ascribed to plaintiff were not his. The only defence witness gave the evidence on the point.

He said:

“I have also seen Exhibits 3 and 4. The plaintiff’s signature on them are not forged. They bear the same features and characteristics as the signature card which is Exhibit I. Also since P.W.2 (Mr. Ebri) admitted his own signature on Exhibits 3 and 4, we are entitled to pay to the payee (Oluwaseyi Fabelurin) who is the accountant to the partnership.

I have seen Exhibit 2 and I maintain that the signatures of the plaintiff bear the same features and characteristics. By the plaintiff I mean P.W. I on record.”

There were thus two versions of the evidence before the trial Judge. The version given by plaintiff and P.W.2 needed to be compared with that given by D.W.1. This was a civil case and the trial Judge had the duty to decide which of the two versions of the evidence to accept. He accepted the version of the plaintiff. It was not open to the court below to reverse such findings of fact. See Akinola v. Oluwo (1962) 1AII NLR 224; and Akinloye v. Eyiola (1968) NMLR 92. I am satisfied therefore that the trial court was right to have found that plaintiff did not sign the signatures on Exhibits 2, 3 and 4 which were ascribed to him.

Was the court below right in holding that the appellant was estopped from raising the issue of forgery?

At pages 265-266 of the record, the court below in coming to the conclusion that the plaintiff/appellant was estopped from denying that the acts of P.W.2 as an agent of the law firm were in the course of the business of the partnership. The court below said:

“In the face of the above two extracts it cannot be seriously contended that the account in question is not a partnership account It is immaterial that it was opened as a client’s account I am clearly of the view

that Sections 5, 10 and 15 of the Partnership Act, 1890, are applicable to the circumstances of the case. The sections provide:-

B 5. Every partner is an agent of the firm and his other partners for the purpose of the business of the partnership, and the acts of every partner who does any act for carrying on in the usual way of business of the kind by the firm of which he is a member bind the firm and his partners, unless the partner so acting, has in fact no authority, to act for the firm in the partnership matter, and the person with whom he is dealing either knows that he has no authority or does not know or believe him to be a partner.

C 10. Whereby any wrongful act or omission of any partner acting in the ordinary course of the business of the firm, or with the authority of his co-partners, loss or injury is caused to any person not being a partner in the firm or any penalty is incurred, the firm is liable therefore to the same D extent as the partner so acting or omitting to act.

15. An admission or representation made by any partner concerning the partnership affairs and in the ordinary course of business is evidence against the firm.'

E Applying the above provisions to the instant case, it seems clear to me that Exhibit 16 and Exhibit 2 being the acts of P.W.2 as agent of the partnership and the acts having been done in the ordinary course of business are binding on P.W. 1 as well as on the partnership firm.

F Since P.W.2 had signed Exhibits 2, 3 and 4 and wrote Exhibit 16, he had by his act induced the appellant bank to act on Exhibits 2, 3, 4 and 16 and neither he nor P.W.1 nor the firm is permitted to set up P.W.2's own act to the prejudice of the appellant whom P.W.2 had misled. I resolve this issue in favour of the appellant"

G I think that the court below completely misunderstood the purport of Sections 5, 10 and 15 of the Partnership Act, 1890, England in relation to the ascertained facts of this case. The learned authors of Lindley on Partnership 14th Edition at page 254 discussing the general rules guiding H the applicability of Section 5 of the Partnership Act, 1890 write;

"The consequences of the general rule contained in Section 5 of the Partnership Act 1890 are:

(1) That if an act is done by one partner on behalf of the firm, and

it was done for carrying on the partnership business in the ordinary way, the firm will prima facie be liable although in point of fact the act was not authorised by the other partners.

(2) *That if an act is done by one partner on behalf of the firm, and it was not done for carrying on the partnership in the ordinary way, the firm will prima facie not be liable.* B

In the first case the firm will be liable unless the one partner had in fact no authority to bind the firm, and the person dealing with him either was aware of that want of authority or did not know or believe him to be a partner whilst in the second case the firm will not be liable unless an authority to do the act in question, or some ratification of it, can be shown to have been conferred or made by the other partners.” C

And at pages 302-303 of the same work, the authors write:

“By Section 5 of the Partnership Act, 1890, every member of a partnership is declared to be the agent of the firm, so far as is necessary for the transaction of its business in the ordinary way, and to this extent his authority to act for the firm may be assumed by those who, knowing him to be a partner, have no knowledge of the real limits of his authority. If his authority has been restricted to narrower limits, still the firm will be bound to all persons who, knowing or believing him to be a partner, deal with him bona fide without notice of the restriction, so long as he acts within the wider limits set by that section. On the other hand, if a person seeks to fasten upon the firm liability in respect of some act of one of the members which does not fall within the limits of his authority as set by that section, a more extensive authority must be shown to have been actually conferred upon him by the other partners; and if no sufficient authority can be shown, the firm will not be liable, even though the person seeking to charge it had no notice of the real authority possessed by the partner with whom he dealt. D E F G

Notice of Want of Authority

The. immateriality of notice of want of authority in the last case, and its materiality in the former, is a necessary consequence of the law of agency. A firm can only be made liable for what is done by one of its members on the supposition that the act in question was authorized by the H

other members. Now, as by law they are held prima facie to authorise all acts done in carrying on the business of the firm in the usual way, they cannot escape liability for any act of this character unless they can show that the apparent authority to do it did not exist, and was known not to exist. But when it is sought to make the firm liable for some act not prima facie authorized by it, an actual authority by it must be shown; ignorance of the person seeking to charge it may have been of what was authorised and what was not. In the case now supposed the firm did not mislead him; and if he was misled by the representations of the partner with whom he dealt, his remedy is against that partner; just as when an agent untruly represents his authority, a person dealing with him acquires no right against the principal, but must look to the agent for indemnity.”

It is undisputed, on the facts presented in this case, that the plaintiff in its mandate Exhibit 1 left written instructions and notice with the defendant that its cheques must only be signed by the two partners jointly. Clearly therefore, the defendant had notice of the limit on the authority of P.W.2 to sign cheques on behalf of the partnership. Sections 5, 10 and 15 of the Partnership Act, 1890, only offer protection to an outsider dealing with a member of partnership only to the extent that the outsider is unaware of the limit of the authority of the partners with whom he is dealing. In the instant case, the defendant in the evidence of D.W.I said at page 138:

“I have seen Exhibit I (Plaintiff asked to read out in full by counsel) the name of the account in our books is Ndoma Egba, Ebri & Co. I see on Exhibit I that ‘both must sign’ but it is not their instruction to the defendant, it is for our office use.”

In coming to the conclusion that Sections 5, 10 and 15 of the Partnership Act, 1890, estopped the plaintiff from claiming damages, the court below dwelt at length on the implications of Exhibit 16, a letter written by P.W.2 to which was annexed the cheque Exhibit 2. The letter Exhibit 16 reads:

*“Ndoma-Egba, Ebri & Co.,
Barristers-at-Law & Solicitors
31st March, 1993.*

*The Manager,
African Continental Bank Pic.,
Calabar Road,
Calabar.*

Dear Sir,

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Re: Bank Draft:

Kindly issue a Bank draft of N225,000.00 (Two Hundred and Twenty-Five Thousand Naira only) in favour of Federal Super Phosphate Fertilizer Company Limited, Kaduna.

Enclosed herewith is our Bank cheque No.388684 in your favour.

C

Treat as urgent.

Yours faithfully,

For Ndoma-Egba, Ebri & Co.

Sgd: Richard D. Ebri,

D

Partner.”

P.W.2 agreed writing the above letter. But the defendant should not have honoured the letter and the cheque Exhibit 2 for N225,000.00 annexed to it since both did not bear the signature of the plaintiff as given in Exhibit 1. It is difficult to understand why the court below placed reliance on Exhibit 16 and Sections 5, 10 and 15 of the Partnership Act, 1890, to conclude that the defendant, a banker could honour Exhibit 2 without complying with the mandate given it in Exhibit 1.

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An instructive case in this connection is *Catlin v. Cyprus finance Corporation (London) Ltd.* (1983) 1 All ER 809 at 816 where the court said:

“The defendants agreed to honour instructions signed by both account holders. This no doubt imported a negative duty not to honour instructions not signed by both account holders. This duty also could, in theory, have been owed jointly, but it must (to make sense) have been owed to the account holders severally, because the only purpose of requiring two signatures was to obviate the possibility of independent action by one account holder to the detriment of the other. A duty on the defendants, which could only be enforced jointly with the party against the possibility of whose misconduct a safeguard, was sought, and where the occurrence

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of such misconduct through the negligent breach of mandate by the defendants would deprive the innocent party of any remedy, would in practical terms be worthless. Indeed, it would be worse than worthless, because a customer would reasonably rely on the account, only to find
B when loss (allegedly irreparable) has resulted that the reliance was misplaced. The reality of this transaction was otherwise. Mrs. Catlin wanted, and thought she had obtained, an undertaking from the bank that orders for payment would not be honoured without her signature. I cannot
C conceive that the bank for its part did not intend to incur such an obligation to her (and also, *mutatis mutandis*, to Mr. Catlin). Had she raised the question at the outset I feel sure that they would have assured her of the personal protection which she obtained from the mandate. The
D duty of complying with a simple mandate or pain of indemnifying the customer is not, after all, something which is to a banker either unfamiliar or onerous.”

When the plaintiff and P.W.2 jointly executed the mandate form Exhibit 1, it must have dawned on the defendant that each
E wanted to protect himself from a situation where the other could unilaterally withdraw the partnership funds. The defendant therefore owed each of the two partners the duty not to allow either of them to draw funds from the partnership account without the
F concurrence of the other, which concurrence must be signified by the signature of that other as stated in Exhibit 1. It amounts to making a nonsense of the purpose of giving the mandate Exhibit 1 for the court below to rely on the Partnership Act, 1890, to create an
G escape route for the defendant in its obligations to the partners. I am satisfied that the court below clearly misunderstood the import of Sections 5, 10 and 15 of the Partnership Act, 1890.

The defendant in paragraph 19 of its Amended Statement of Defence pleaded that the plaintiff had been himself negligent thus:
H “19. Paragraph 11 of the plaintiff’s Amended Statement of Claim is denied. The said matters complained of were wholly caused or contributed to by the negligence and recklessness of the plaintiff.

PARTICULARS OF NEGLIGENCE:

- (i) *Failure to keep his cheque books securely safe.*
- (ii) *Failure to exercise due care and supervision over his accountant - Mr. Fabelurin A. Oluwaseyi.*
- (iii) *Failure to exercise due care, sufficient or any checks and balances and/or supervision over his Accountant - Mr. Fabelurin A. B Oluwaseyi.*
- (iv) *Failure to adhere to the precautionary measures given to defendant's customers including the plaintiff as contained in every cheque book issued to its customers. This precautionary measures as contained in the defendant's cheque books are hereby pleaded.*
- (v) *Signing blank cheques for his 'Accountant' and leaving him to fill in the amounts.*
- (vi) *Failure to have regular consultations with his partner especially on matters touching the partnership account and money.*
- (vii) *Lack of diligence in the conduct of the partnership business.*
- (viii) *Insufficient knowledge of accounts and business management."*

At the trial however, no evidence was called by the defendant in proof of the facts pleaded on the negligence of the plaintiff. The plaintiff did not lead evidence to show how Exhibit 2, 3 and 4 came to be signed by P.W. 2 alone and not by himself . The learned authors of Pagets Law of Banking 8th Edition at page 474 write:

"No doubt many of the earlier cases speak of a banker being bound to know his customer's signature, and of its being ipso facto negligent if he is misled by forgery but there can be no legal obligation of the sort, the law does not compel or exact the impossible and as pointed out by Mathew, L, in London & River Plade Bank v. Bank of Liverpool (1896) 1QB7, the forgery is cleverly executed the banker may not be able by any amount of care to ascertain whether or not his customer's signature is a forgery.

As counterbalancing estoppel, it would seem therefore to be a question of fact whether the banker by exercising a due amount of care should have detected his customer's supposed signature to be a forgery."
(Underlining mine)

D.W.1 testified that the signatures on Exhibits 2, 3 and 4 were consistent with those on Exhibit 1 and that the signatures bear similar features and characteristics. However, D.W.1 did not testify that he had been the defendant's official who caused Exhibits 2, 3 and 4 to be honoured in the first place. There was therefore no evidence that the defendant's official or clerk who honoured Exhibits 2, 3 and 4 had first compared the signatures on them with those on the mandate card Exhibit 1. The evidence of D.W.1 on the point was his opinion. It is difficult to hold in the circumstances that the defendant had exercised a due amount of care to ascertain if the signature ascribed to the plaintiff in Exhibits 2,3 and 4 was in fact his signature as in Exhibit 1.

It needs be said however that the basis of the liability ascribed to the defendant is in the tort of negligence. It is not a case of absolute liability. The question is - had the defendant exercised due care and diligence in the procedure it adopted in making payments on Exhibits 2, 3 and 4? The degree of perfection achieved in the simulation of the genuine signature of a customer may be so high that even the banker may not be able to discover it is a forgery. It is not therefore the law that when a banker pays money out from a customer's account on a cheque, which he believes to be genuine but which turns out to be a forgery, the banker is willy nilly liable. The basis of liability in such a case is the failure to exercise reasonable care and diligence to process this cheque before payment. If there is cogent evidence, which the court accepts that the banking official before paying out money from a customer's account on a forged cheque did all that is necessary to compare the signature on the cheque, which turns out to be forged with the specimen signature of the customer in its possession, the basis of liability in negligence is displaced. In the instant case however, there was not a shred of evidence on the prepayment formalities done by the defendant by the clerk or official who paid, as to whether the signature of plaintiff on Exhibits 2, 3 and 4 was at any stage compared with the plaintiff's specimen signature on Exhibit 1. In coming to the conclusion as to

banker's negligence, it is always important to look at the disputed signature and compare same with the authentic signature to discover if the dissimilarities are so obvious as to be easily discernible.

And finally is the third issue which queries whether the withdrawals from the plaintiff's account were lawful. I have discussed above the case of the plaintiff as to Exhibit 1. It was the case of the plaintiff that unless its cheques were jointly signed by the two partners - the plaintiff and P.W.2, no payment should be made by the defendant from the plaintiff's account. The evidence which the trial court accepted was that Exhibits 2, 3 and 4 against which the defendant made payments were not signed by plaintiff in accordance with the mandate Exhibit 1. The points of defence which the defendant canvassed in their Amended Statement of Defence were:

(1) That one of plaintiff's parties wrote to the defendant to pay on Exhibit 2.

(2) That the plaintiff authorised the payment on Exhibits 3 and 2 to its accountant, Mr. Fabelurin A. Oluwaseyi.

(3) That the plaintiff had introduced his accountant Mr. Fabelurin A. Oluwaseyi to the defendant.

(4) That the signatures on Exhibits 2, 3 and 4 were those of the plaintiff's partners.

(5) That the plaintiff had been itself negligent in the manner it handled its cheque book.

At the conclusion of a trial however, most of these points of defence had no evidence in support of them.

Even if one of plaintiff's partners had written Exhibit 16 to the defendant to pay N225,000.00, that did not confer on the defendant an authority to ignore the terms contained in the mandate Exhibit 1. The same may be said in relation to the two payments made to plaintiff's accountant vide Exhibits 3 and 4. There was also no evidence of the negligence of the plaintiff as pleaded. The attempt by the defendant to rely on estoppel ought not to have succeeded before the court below. Under Section 24 of Bills of Exchange Act, 1882, a forged or an unauthorised cheque is inoperative. It may well

be that the defendant may have its remedies against P.W.2 who was shown to have signed Exhibits 2, 3 4 and 16, but that will not alter the fact that the defendant was negligent in honouring Exhibits 2, 3 and 4 which did not carry a valid signature of the plaintiff as per Exhibit 1.

In the final conclusion, this appeal succeeds. It is allowed. The judgment of the court below is set aside and the judgment of the trial court is restored. The plaintiff/appellant is entitled to costs in the court below and in this court which I fix at N5,000.00 and N 10,000.00 respectively.

KUTIGI JSC

I read in advance the judgment just delivered by my learned brother, Oguntade, JSC. I agree with his reasoning and conclusion to allow the appeal. It is really difficult to see how the defendant could have escaped liability in this case after the plaintiff has clearly established that the defendant had failed to abide by the terms of the mandate (Exhibit 1 in the proceedings) filed by the plaintiff with the defendant to the effect that the cheques and instruments of the plaintiff to be valid, ought to be jointly signed by the two legal practitioners in the firm, that is the plaintiff Victor Ndoma-Egba and Richard David Ebri. The breach was no doubt responsible for the loss of funds claimed herein.

I accordingly allow the appeal, set aside the judgment of the Court of Appeal and restore that of the trial High Court. I endorse the order for costs made in the said judgment.

ONU JSC

Having read before now the draft judgment of my learned brother, Oguntade, JSC., I agree with him that there is merit in this appeal which I accordingly allow for the reasons assigned therein. The plaintiff/appellant is entitled to costs in the court below and in this court which I fix at N5,000.00 and N 10,000.00 respectively.

KALGO JSC

I have had the opportunity of reading in draft the judgment just delivered by my learned brother, Oguntade, JSC., and I am in full agreement with his reasoning and conclusions reached therein. He has fully and clearly in my view, dealt with the main issues in controversy between the parties and I entirely agree with him that there is merit in the appeal. I accordingly allow it and set aside the decision of the Court of Appeal delivered on 11th April, 2000., and restore that of the trial court. I award N10,000.00 costs to the appellant against the respondent.

PATS-ACHOLONU JSC

I have read in advance the judgment of my learned brother, Oguntade, JSC., and I broadly and generally agree with him. On the face of the appeal to unravel what really happened in order to determine on whom the onus of proof rests, it would at first appear to be the appellant. On a closer examination of the proceedings, it becomes inevitable that the onus of proof to show that the signature is that of the appellant lies on the respondent and not the appellant who had emphatically denied it. The respondent did not succeed in discharging the onus.

In the circumstances, the appeal succeeds and I abide by the orders in the leading judgment.

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