

COURT OF APPEAL AKURE DIVISION
FRIDAY 5TH DECEMBER, 2013. CA/AK/17/2010
CORAM:- S. DENTON-WEST, M. A. OWOADE,
C. I. JOMBO-OFO, JJCA

FIRST BANK OF NIGERIA PLC APPELLANT
AND
S. M. P. AKIRI RESPONDENT

LEGAL PRACTITIONERS - Qualification - Basis - LPA s. 2(1) - To qualify for practice - Legal practitioner must have his name on the roll - Otherwise he cannot engage in any form of legal practice in Nigeria (H1)

COURTS - Competence of - *Madukolu v. Nkemdilim* - Before court assumes jurisdiction to adjudicate over a cause or matter - It must be competent (H2)

ACTIONS - Commencement - Incompetent process - The processes signed and filed by person whose name is not on the roll - Are not initiated by due process - And such feature limits jurisdiction of court (H3)

JURISDICTION - Issue of - When to raise - The issue can be raised at anytime by any party - Even for first time in Supreme Court - Without leave (H4)

APPEALS - Fresh issue - Leave - When party seeks to file and argue such issue - Leave to so do must be had and obtained first - Save when the issue pertains to jurisdiction (H5)

BANKING - Banker & customer relationship - Status of - It is contractual - As bank receives money on behalf of customer - And customer exercises reasonable care in executing his written order (H6)

BANKING - Cheque - Payment of - Banker has a duty to honour and pay customer's cheques - Provided that at the material time - There is sufficient and available funds for the purpose (H7)

DOCUMENTS - Reception of - Proof - Issue as to whether or not document is received - Is purely that of fact to be proved by evidence (H8)

ACTIONS - Proof - Burden of - Proving the existence of material issue in controversy - Is on a party who will lose - If no evidence is adduced (H9)

DOCUMENTS - Letter - Delivery of - Proof - Nlewedim v. Uduma - Can be proved by a dispatch book - Evidence of dispatch by registered post - And credible evidence that defendant was served (H10)

DOCUMENTS - Exhibit A - Delivery of - Proof - Only the signed dispatch book that could disclose - Whether exhibit A was delivered to appellant - And not the viva voce evidence of pw4 (H11)

BANKING - Customer - Meaning of - This is any person having account with bank - Or for whom bank has agreed to collect items - And it also includes a bank having account with another bank (H12)

BANKING - Customer - Mandate - Nature of - Failure to observe customer's mandate amounts to breach - As the mandate constitutes a contract between customer and banker (H13)

DAMAGES - Assessment of - Before court can assess damages - It must be sure of the nature of the claim - That is whether the claim is in contract or in tort (H14)

BANKING - Contract - Breach of - Damages - A party is entitled to damages flowing directly from the breach - Hence the award of general damages in addition to value of the cheque was wrong (H15)

EVIDENCE - Damages - Proof - Evidence did not exist to show tort of negligence - As to warrant award of compensation for economic loss - After value of the cheque had been awarded in full (H16)

FACTS

Before the High Court of Ondo State Akure, plaintiff/respondent commenced this action against defendant/appellant, claiming inter alia for the sum of N500,000.00 being the actual sum negligently paid to one Chief Abioye by appellant in complete disregard to respondent's mandate, the sum of N2 million naira as general damages and pre and post judgment interest on the said N500,000.00. Issues were joined and evidence led by the parties.

At the end of hearing, the court being of the opinion that there is tort of negligence on the part of appellant, awarded the sum of N2 million as general damages as well as the value of the cheque and pre judgment interest to respondent. Aggrieved, appellant appealed to the Court of Appeal Akure Division. Appellant's major contention in its issue one is that respondent's case is incompetent by virtue of the fact that the writ of summons as well reply to the statement of defence was signed by a person not entitled to practice as a barrister or as barrister and solicitor in Nigeria. Upon this issue and others, appellant urged that the appeal be allowed and judgment of the trial court set aside.

ISSUES FOR DETERMINATION

1) Whether the respondent's case is not incompetent, the respondent's writ of summons dated and filed on 17/3/2005 and the reply to statement of defence dated 16/6/2005 and filed on 17/6/2005 having been signed and filed by "pp; OLUSEGUN AKANMODE & Co.' a person not entitled in accordance with the law to practice as a barrister or as barrister and solicitor.

2) Whether the learned trial judge was not wrong to have awarded the sum of N500,000.00 to the respondent being the value of the cheque the respondent regularly issued to a third party in the course of business relationship with the said third party.

3) The learned trial judge having rightly rejected in evidence the dispatch book upon which the plaintiff allegedly delivered a fresh mandate to the appellant, whether the Lower Court was not wrong to have held that the respondent delivered/made a fresh mandate to the appellant.

4) Whether considering the nature of the respondent's case and the evidence led, the learned trial Judge was not wrong in awarding damages against the appellant.

HELD

(Unanimously allowing the appeal in part per

DENTON-WEST JCA)

LEGAL PRACTITIONERS - Qualification - Basis

- B 1. By section 2(1) of the Legal Practitioners Act, CAP 207 LFN, a person shall be entitled to practice as a barrister and solicitor if, and only if, his name is on the roll. Section 24 of the same Act defines a legal practitioner as a barrister or as a**
C barrister and solicitor either generally or for the purpose of any particular office.

D Therefore, by the combined effect of Sections 2(1) and 24 of the legal practitioners Act, for a person to be qualified to practice as a legal practitioner, he must have his name on the roll otherwise he cannot engage in any form of legal practice in Nigeria. Further, what is required to be on the roll is the name of the legal practitioner and not a firm's name.

E The respondent's writ of summons dated and filed on 17/3/2010 and the Reply to statement of defence dated 16/6/2005 and filed on 17/6/2005 were both filed and signed by "pp: OLUSEGUN AKANMODE & CO." who is not a person entitled to practice law in Nigeria as a barrister and solicitor and whose name is on the roll. Accordingly, "PP: OLUSEGUN
F AKANMODE & CO." not being a legal practitioner cannot practice as such by signing, and filing processes in the courts in this country. (p. 2634 B)

COURTS - Competence of - Madukolu v. Nkemdilim

- G 2. In the notorious case of Madukolu v. Nkemdilim (1962) 1 ALL NLR 587, the Supreme Court established the principle that in any civil proceedings or matter, before any court of law assumes jurisdiction so as to determine or adjudicate on the cause or matter, the court must be competent and a court**
H shall be competent when:

"a ...

b. the subject matter of the case is within the court's jurisdiction and there is no feature in the case which prevents

the court from exercising its jurisdiction.

c. the case comes before the court initiated by due process of law upon fulfillment of a condition precedent to the exercise of jurisdiction. Any defect in competence is fatal for the proceedings are a nullity however well conducted”.

The above pre-conditions are confirmative and fulfillment or absence of any of them automatically robs the court of the jurisdiction to hear and determine the suit. (p. 2635 G) B

ACTIONS - Commencement - Incompetent process

3. The conditions B and C above cover the issue of incompetent originating court processes (inclusive of writ of summons and pleadings) signed and filed in court by a person whose name is not on the roll of legal practitioners, as such court processes are not initiated by due process of law and such feature prevents the court from exercising its jurisdiction. (p. 2636 C) C

JURISDICTION - Issue of - When to raise

4. An issue of competence or jurisdiction of the court can be raised at any time by any party even for the first time in the Supreme Court without leave of court. (p. 2636 E) E

APPEALS - Fresh issue - Leave

5. Thus it is correct to say that the general principle of law is that when a party seeks to file and argue in this court any fresh issue not canvassed in the Lower Court, whether that issue pertains to law or otherwise, leave to file and argue the issue must be had and obtained first. But where the point or, issue sought to be raised pertains to issue of jurisdiction, the point or issue can properly be filed and argued with or without the leave of the court even if it is being raised for the first time. F

This issue is hereby resolved in favour of the appellant, and so the appeal is subject to a strike out order for lack of jurisdiction. (p. 2636 G) H

BANKING - Banker & customer relationship - Status of

6. Generally, the relationship of a banker and a customer is contractual. The bank undertakes to receive money and to collect bills for its customers. The customer on his part undertakes to exercise reasonable care in executing his written order so as not to mislead the bank or to facilitate forgery and the bank is not liable to repay the full balance or any part thereof until he demands payment from the bank at the branch at which the current account is kept.

As a banker has a duty of fiduciary relationship so also the customer has a duty to exercise reasonable care in executing his written orders on the cheques so as not to mislead the bank or facilitate forgery.

I agree with the learned counsel's submission that awarding the value of the cheque to the respondent is equivalent to double compensation when indeed there is no shred of evidence before the court that the respondent did not benefit from the transaction between him and Chief Fola Abiloye, in respect of which the said cheque was issued. However it was also clear that the appellant had a duty to obey and observe the mandate the respondent issued as regards the payment of his cheques.

The appellant was not a privy to whatever transaction between the respondent and Chief Fola Abiloye, and so it would have been appropriate for the appellant to heed to the mandate issued to her by the respondent as regards the cheque issued to Chief Fola Abiloye. However it seems these days that banks in the country no longer live up to expectation of such high placed institution, for they have a right to direct the cheque back to the owner for a wrong or an impossible mandate. There is a duty of care imposed on the bank to their customer. I resolve this Issue 2 in favour of the respondent.

(pp. 2638 B/H/2639 C)

BANKING - Cheque - Payment of

7. It is the duty of a banker therefore to its customer to honour and pay cheques drawn on it by a customer as long as it has in its possession at the material time sufficient and available funds

for the purpose.

In law, a cheque being a negotiable instrument, once the cheque is regular on the face of it, the banker is bound to honour same upon presentation. (p. 2638 D/G)

DOCUMENTS - Reception of - Proof

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8. It is now settled in law that the issue as to whether a document is received or not is purely an issue of fact to be proved by evidence. (p. 2640 E)

ACTIONS - Proof - Burden of

C

9. In law, the burden of proving the existence of the material issue in controversy is on a party who will lose if no evidence is adduced. See Section 137 of the Evidence Act, 2011. (p. 2640 F)

D

DOCUMENTS - Letter - Delivery of - Proof

10. There are three ways of proving the delivery of a letter as established by the Supreme Court in Nlewedim v. Uduma (1995) 6 NWLR (Pt.402) 383 at 394 which are:

E

1. By a dispatch book

2. By evidence of dispatch by registered post

3. By evidence of witness(es) credible enough to testify that the defendant was served with it. (p. 2640 G)

F

DOCUMENTS - Exhibit A - Delivery of - Proof

11. What the evidence of pw4 at pages 48-49 of the record support and state is that the delivery of Exhibit "A" was evidenced by signature of the recipient in a document or a dispatch book. The justice of this case on the issue of receipt of Exhibit "A" could be but where the dispatch book allegedly signed by the recipient was in evidence. In the absence of the dispatch book, as it was rightly rejected in evidence, the findings of the learned trial judge that Exhibit "A" was actually delivered to the appellant meet the justice of this case and same is not perverse as it failed to take particular consideration of the evidence that the receipt of Exhibit "A" was acknowledged in writing which makes the evidence of pw4 on

G

H

that part unreliable and not credible.

It is worthy of note that none of the plaintiffs' witnesses (particularly pw4) stated the name of the man that Exhibit "A" was purportedly delivered to. It is only the signed document (dispatch book) that could disclose whether in fact Exhibit "A" was delivered to the appellant or anybody else. The viva voce evidence of the pw4 (which evidence emphasises signing) was not credible enough as evidence of receipt of Exhibit "A" by the appellant in the absence of the dispatch book which the pw4 testified "He signed my dispatch book". (p. 2641 G)

BANKING - Customer - Meaning of

12. I am in total agreement to the submission of both counsel that the relationship between a banker and its customer is contractual. In other words, a customer to a bank in the business of banking is "any person having an amount (account) with a bank or for whom a bank has agreed to collect items and includes a bank carrying an account with another bank. (p. 2643 H)

BANKING - Customer - Mandate - Nature of

13. Assuming there had been failure to observe the mandate of the respondent this would amount to negligent breach of the mandate as mandate of a customer constitutes a contract between the customer and the banker. If for instance, Exhibit "A" was ever delivered to the appellant and the appellant failed to strictly abide by the terms of the mandate of the respondent in Exhibit "A", then it amounts to a breach of contract as the mandate between the customer (respondent) and the bank (appellant) constitutes a contract. (p. 2644B/G)

DAMAGES - Assessment of

14. Also before a court can commence a meaningful assessment of damages it must be sure of the nature of the claim, that is to say, whether the claim is in contract or in tort, and if in tort, the nature of the wrong alleged. (p. 2644 C)

Contract - Breach of - Damages

15. It was wrong for the trial judge to have awarded general damages of N2 million against the appellant in addition to the value of the cheque (i.e. N500,000.00) as well as both pre-judgment. With due respect to the trial judge the point was missed in the award of damages for breach of contract or negligent breach of contract when he stated: B

“In a case like this, a court may award such amount as it seems reasonable in the circumstances of the breach of contract even though there is no proof of actual loss”. See page 78 of the record. C

The rule is that a party is entitled to damages that flow directly and naturally from the breach. The Lower Court stated the law at page 78 -79 of the record but he failed to apply same. (p. 2644 H) D

Damages - Proof

16. Moreso, if the trial judge had found that the claim of the respondent is in the tort of negligence simpliciter, it was not established by any shred of evidence that the respondent suffered any economic loss and the Lower Court did not show that the tortuous conduct was such that the court will award compensation for economic loss after the value of the cheque had been awarded in full together with pre-judgment and post-judgment interest to the respondent. It is on this note that I only grant the value of the cheque to the respondent in the sum of N500,000.00 as flowing from the contractual relationship. In view of the foregoing, I resolve this issue in favour of the appellant. E F G

In all, this appeal largely succeeds in part and the judgment of the Lower Court is hereby set aside with the orders made therein, except for the order to refund the sum of N500,000.00 to the respondent without the attendant unusually inflated interest awarded by the trial court. I make no order as to cost. (p. 2646 A) H

NOTABLE POINTS OF INTEREST

DENTON-WEST JCA

1. CA to express its views even where it lacks jurisdiction

However, it must be stated unequivocally that the resolution of this issue one puts paid to this appeal since lack of jurisdiction by Lower Court means that even the appellate court does not also have jurisdiction to sit on appeal in this matter as instituted. That is to say that this court lacks the requisite jurisdiction to hear this appeal. However, it is all the same necessary for this court to express its views on the remaining three issues to assist the apex court should the parties be inclined to go upstairs. From the foregoing, since the court of appeal is a penultimate court, it behooves this court to give its views in respect of the issues as sometimes the Apex Court so directs in circumstances such as this. For that reason only, I shall proceed with the views of this court on the remaining issue to their logical conclusion on merit. (p. 2637 A)

2. Bank Cheque - Definition of

Black's Law Dictionary 8th Edition at page 252 defines a Cheque (Check) thus:

"As draft signed by the maker or drawer drawn on a bank, payable on demand and unlimited in negotiability." (p. 2638 E)

REPRESENTATION

E. Udofot, for the Appellant

P. P. Monde, for the Respondent

CASES REFERRED TO

- G Okafor v. Nweke (2007) All FWLR (pt. 368) 1016
- Madukolu v. Nkemdilim (1962) 1 All NLR 587
- Osakwe v. Gov. of Imo State (1999) 5 NWLR (pt. 191) 318
- Arabambi v. A.B.T. Ltd (2006) 3 MJSC 61
- SCC Nig. Ltd v. Ekenna (2009) All FWLR (pt. 497) 53
- H DENR Ltd. v. Trans Int'l. Bank Ltd (2009) All FWLR (pt. 456) 1832
- Basinco Motors Ltd v. Woermann-Line (2009) All FWLR (pt. 485) 1634
- Elugbe v. Omokbiafe (2005) All FWLR (pt. 243) 629

Military Gov. Ondo State v. Kolawole (2008) All FWLR (pt. 466) 1805

Adebuji v. Kolawole (2008) All FWLR (pt. 428) 234

Obiakor v. State (2002) FWLR (pt. 113) 299

Mai v. STB Ltd (2008) All FWLR (pt. 299) 552

Nigerian Air Force v. Obiosa (2003) 4 NWLR (pt. 810) 233

Obiazikwor v. Obiazikwor (2007) All FWLR (pt. 2010) 1602

Ezemba v. Ibeneme (2004) 1 All FWLR (pt. 223) 1786

STATUTE REFERRED TO

Legal Practitioners Act, ss. 2(1), 24

LEAD JUDGMENT BY DENTON-WEST JCA

This is an appeal from the judgment of the Ondo State High Court sitting in Akure in Suit No:AK/70/2005 delivered on the 10th day of June, 2009 by Honourable Justice T. O. Osoba.

The Respondent (plaintiff at the Lower Court's) claim in its entirety was granted. The Respondent maintained the action against the Appellant (Defendant at the Lower Court) at the trial court claiming the following reliefs:

i) A sum of N500,000.00 being the actual sum negligently and/or recklessly paid to Chief Fola Abiloye by the defendant in complete disregard to his mandate.

ii) A sum of N2 million as general damages for the defendant's negligence and/or recklessness.

iii) Interest on the said sum of N500, 000 at the rate of 21% per annum from 25th May, 2000 cashment date to the date of the judgment herein and at the rate of 10% per annum from the date of judgment to the date of final liquidation. The parties joined issues and led evidence respectively, at the end of which the court found for the Respondent and granted all his claims.

The Appellant in a Notice of Appeal dated 29th day of June, 2009 but filed on 30th June, 2009 dug out 6 grounds of appeal. In their brief of argument dated 21st day of January, 2011 but deemed filed on 13/10/2011 formulated four (4) issues for determination as follows:

1) Whether the respondent's case is not incompetent, the respondent's writ of summons dated and filed on 17/3/2005 and the

reply to statement of defence dated 16/6/2005 and having being signed and filed by “pp; OLUSEGUN AKANIMODE & Co.”, a person not entitled in accordance with the law to practice as a barrister or as barrister and solicitor (GROUND 1).

B 2) Whether the learned trial judge was not wrong to have awarded the sum of N500,000.00 to the respondent being the value of the cheque the respondent regularly issued to a third party (GROUND II).

C 3) The learned trial judge having rightly rejected in evidence the dispatch book upon which the plaintiff allegedly delivered a fresh mandate to the appellant, whether the Lower Court was not wrong to have held that the respondent delivered/made a fresh mandate to the appellant (GROUND III & IV).

D 4) Whether considering the nature of the respondent’s case and the evidence led, the learned trial Judge was not wrong in awarding damages against the appellant.

E The Appellant also filed a reply brief dated 6th day of April, 2012 but filed on 10/4/2012. The respondent in his brief of argument dated and filed on 12th day of March, 2012 adopted the issues as raised by the appellant.

Therefore, in the resolution of this appeal, the issues as formulated by the appellant will be centered on. The issues for determination in this appeal are:

F 1) Whether the respondent’s case is not incompetent, the respondent’s writ of summons dated and filed on 17/3/2005 and the reply to statement of defence dated 16/6/2005 and filed on 17/6/2005 having been signed and filed by “pp; OLUSEGUN AKANIMODE & Co.’ a person not entitled in accordance with the law to practice as a barrister or as barrister and solicitor.

2) Whether the learned trial judge was not wrong to have awarded the sum of N500,000.00 to the respondent being the value of the cheque the respondent regularly issued to a third party in the course of business relationship with the said third party.

H 3) The learned trial judge having rightly rejected in evidence the dispatch book upon which the plaintiff allegedly delivered a fresh mandate to the appellant, whether the Lower Court was not wrong to have held that the respondent delivered/made a fresh mandate to the appellant.

4) Whether considering the nature of the respondent's case and the evidence led, the learned trial Judge was not wrong in awarding damages against the appellant.

ISSUE 1 (ARGUMENT)

"Whether the respondent's case is not incompetent the respondent's writ of summons dated 16/6/2005 and filed on 17/6/2005 having been signed and filed by "pp; OLUSEGUN AKANMODE & Co." a person not entitled in accordance with the law to practice as a barrister or as barrister and solicitor."

The main argument of the counsel to the appellant on this issue was that "pp; OLUSEGUN AKANMODE & CO." is not a legal practitioner under the Section 2(1) and Sections 24 of the Legal Practitioners Act and cannot therefore endorse any document which ought to be signed by a legal practitioner, otherwise, such document becomes defective and cannot be used for any legal purposes.

It was the argument of the Counsel that the writ of summons dated and filed on 17/3/2005 and the reply to statement of defence dated 16/6/2005 and filed on 17/6/2005 having been signed and filed by pp: OLUSEGUN AKANMODE & CO. is a nullity and cannot be a valid originating process of the suit commenced by the respondent at the trial court. Among the authorities relied on to buttress this point was the locus classicus of Okafor v. Nweke (2007) ALL FWLR (Pt.368) 1016 at pp 1025 - 1027.

Furthermore, it was submitted that due to the fundamentally defective originating process of the suit at the Lower Court, the court was robbed of jurisdiction to entertain the suit since the court cannot sit over a matter incompetently and wrongly placed before it. The notorious case of Madukolu v. Nkemdilim (1962) 1 ALL NLR 587. This court was urged to resolve this issue in favour of the appellant.

On his own part, the Counsel to the respondent reacted that the appellant did not plead this at the trial court and did not seek the leave of this court before raising the issue of the writ of summons not being signed by a legal practitioner. That since no leave was obtained before filing the grounds; this court was urged to strike out the grounds from which this issue one was distilled from. The Counsel relied on the case of Osakwe vs. Gov. of Imo State (1999) 5 NWLR (PT. 191) 318 @ 342. It was also argued that even if this court affirms the appellant's argument on this issue, that this court should hold that

the respondent's statement of claim signed by Segun Akanmode Esq. ditto to the amended statement of claim dated 2nd day of August, 2007 and filed on the 3rd day of August, 2007 as found on page 22 of the records of appeal was valid and supersedes the writ of summons. The case of Arabambi vs. A.B.T. Ltd (2006) 3 MJSC 61 @ 94 was relied on and this court was urged to dismiss this appeal on this issue.

RESOLUTION OF ISSUE 1

By section 2(1) of the Legal Practitioners Act, CAP 207 LFN, a person shall be entitled to practice as a barrister and solicitor if, and only if, his name is on the roll. Section 24 of the same Act defines a legal practitioner as a barrister or as a barrister and solicitor either generally or for the purpose of any particular office.

Therefore, by the combined effect of Sections 2(1) and 24 of the legal practitioners Act, for a person to be qualified to practice as a legal practitioner, he must have his name on the roll otherwise he cannot engage in any form of legal practice in Nigeria. Further, what is required to be on the roll is the name of the legal practitioner and not a firm's name.

The respondent's writ of summons dated and filed on 17/3/2010 and the Reply to statement of defence dated 16/6/2005 and filed on 17/6/2005 were both filed and signed by "pp: OLUSEGUN AKANMODE & CO." who is not a person entitled to practice law in Nigeria as a barrister and solicitor and whose name is on the roll. Accordingly, "PP: OLUSEGUN AKANMODE & CO." not being a legal practitioner cannot practice as such by signing, and filing processes in the courts in this country.

In echoing the principle enunciated in the locus classicus of Okafor vs. Nweke (2007) ALL FWLR (pt. 368) 1016 at PP 1025 - 1027, the Supreme Court in SCC Nig. Ltd v. Ekenna (2009) ALL FWLR (Pt. 497) 53 @ 77-78 (paras E-C). The court held:

"From the decision of the Supreme Courts in the case of Emmanuel Okafor & ors v. Augustine Nweke & ors, it is clear as crystal that a firm of legal practitioners is not a legal practitioner given the provisions of sections 2 and 24 of Cap. 207, Laws of the Federation of Nigeria, 1990 and therefore, cannot legally sign and/or file

any process in the courts.

I do not think it can be successfully argued that a notice of appeal is not a process of court. The decision of this court in the case of Miss Esther Thomas v. MF. Daniel Maude on the question of the Firm of legal practitioners to sign a notice of appeal in civil matters although earlier in time is therefore, not in conflict with that in Emmanuel Okafor & Ors. v. Augustine Nweke & Ors.

Furthermore, I simply do not see how I can now properly leave recourse to the doctrine of substantial justice and thereby treat the signing of the notice of appeal upon which the instant appeal is founded by the firm of Mela Audu Nunghe & Co. as “mere technicality” as was done in the case of Unity Bank Plc v. Mr. Akinlabi S. Oluwafemi which though decided later in time to the case of Miss Esther Thomas v. Mr. Avid Mande was however denied earlier in time to the case of Emmanuel Okafor & Ors. v. Augustine Nweke & Ors.

This is in view of the pronouncement of the Supreme Court in the said case of Emmanuel Okafor & Ors, V. Augustine Nweke & Ors. To the effect that the matter of the incompetence of a firm of legal practitioners signing a process of court in its own name transcends one of technicality and that court will do well to ensure that laws are strictly enforced and observed. In conclusion, and from all that has been said before in relation to ground (a) of the grounds of the preliminary objection, I hereby uphold the preliminary objection of the respondent challenging the competence of the notice of appeal dated 1st July 2005 issued and filed by the Firm of Mela Audu Nunghe & Co, upon which this appeal is founded in as much as the said firm of Mela Audu Nanghe & Co. which signed and “filed the said notice of appeal is not a legal practitioner recognized by law (Sections 2(i) and 24 of the Legal Practitioners Act, Cap. 207 Laws of the Federation of Nigeria 1990 and therefore cannot legally sign and file the said process in the courts”.

In the notorious case of Madukolu v. Nkemdilim (1962) 1 ALL NLR 587, the Supreme Court established the principle that in any civil proceedings or matter, before any court of law assumes jurisdiction so as to determine or adjudicate on the cause or matter, the court must be competent and a court shall be competent when:

“a ...

b. the subject matter of the case is within the court’s jurisdiction and there is no feature in the case which prevents the court from exercising its jurisdiction.

c. the case comes before the court initiated by due process of law upon fulfillment of a condition precedent to the exercise of jurisdiction. Any defect in competence is fatal for the proceedings are a nullity however well conducted”.

The above pre-conditions are confirmative and fulfillment or absence of any of them automatically robs the court of the jurisdiction to hear and determine the suit. See also DENR Ltd. V. Trans International Bank Ltd (2009) ALL FWLR (pt. 456) 1832 at 1841 para B.

The conditions B and C above cover the issue of incompetent originating court processes (inclusive of writ of summons and pleadings) signed and filed in court by a person whose name is not on the roll of legal practitioners, as such court processes are not initiated by due process of law and such feature prevents the court from exercising its jurisdiction. See also Basinco Motors Ltd V. Woermann-Line (2009) ALL FWLR (pt. 485) 1634 at 1655 (paras. C - F).

An issue of competence or jurisdiction of the court can be raised at any time by any party even for the first time in the Supreme Court without leave of court. See Elugbe v. Omokbiafe (2005) ALL FWLR (pt.243) 629 at 646 paras A - C; Military Governor Ondo State V. Kolawole (2008) ALL FWLR (pt.466) 1805 @ 1815 paras B - D; Adebuji V. Kolawole (2008) ALL FWLR (Pt.428) 234 at 244 paras. D-F; Obiakor v. State (2002) FWLR (pt. 113) 299 G at paras A - B.

Thus it is correct to say that the general principle of law is that when a party seeks to file and argue in this court any fresh issue not canvassed in the Lower Court, whether that issue pertains to law or otherwise, leave to file and argue the issue must be had and obtained first. But where the point or, issue sought to be raised pertains to issue of jurisdiction, the point or issue can properly be filed and argued with or without the leave of the court even if it is being raised for the first time. See Obiako V. State (supra) at 309 paras. A - B. *This issue is*

hereby resolved in favour of the appellant, and so the appeal is subject to a strike out order for lack of jurisdiction.

However, it must be stated unequivocally that the resolution of this issue one puts paid to this appeal since lack of jurisdiction by Lower Court means that even the appellate court does not also have jurisdiction to sit on appeal in this matter as instituted. That is to say that this court lacks the requisite jurisdiction to hear this appeal. However, it is all the same necessary for this court to express its views on the remaining three issues to assist the apex court should the parties be inclined to go upstairs. From the foregoing, since the court of appeal is a penultimate court, it behooves this court to give its views in respect of the issues as sometimes the Apex Court so directs in circumstances such as this. For that reason only, I shall proceed with the views of this court on the remaining issue to their logical conclusion on merit.

Issue 2

“Whether the learned trial judge was not wrong to have awarded the sum of N500, 000.00 to the respondent being the value of the cheque the respondent regularly issue to a third party in the course of business relationship with the said third party.”

ARGUMENT

The basis of the counsel’s argument to the Appellant’s submission was that it behooves on banks to treat with utmost honour and diligence customers’ lodgments and withdrawals, but it is incumbent on customers to draw regular orders without turning banks into a gambling centre clothed with technicalities rather than regularity. It was argued that it was unconscionable for the respondent to take benefit of the contract upon which he issues a cheque to the said Chief Fola Abiloye and turned around to recover the said sum from the appellant when there was evidence that the said cheque and the signature on this cheque was not forged.

This court was urged to resolve this in favour of the appellant. On his own part, the respondent’s counsel argued that it was not the regular issuance of the cheque that was in issue but the obligation the defendant/appellant owed to the plaintiff respondent as a customer that mattered, which duty the defendant/appellant breached that entitled the plaintiff/respondent to the value of the cheque which was the cause of action.

Furthermore, it was submitted that the plaintiff/respondent never denied issuing the cheque but that the defendant/appellant breached its duty of reasonable care and skill when it paid the cheque in breach of the mandate the plaintiff/respondent gave the defendant/appellant. This court was urged to uphold the award of
 B N500,000.00 damages.

RESOLUTION OF ISSUE 2

***Generally, the relationship of a banker and a customer is contractual. The bank undertakes to receive money and to collect bills for its customers. The customer on his part undertakes to exercise reasonable care in executing his written order so as not to mislead the bank or to facilitate forgery and the bank is not liable to repay the full balance or any part thereof until he demands payment from the bank at the branch
 C at which the current account is kept.***
 D

It is the duty of a banker therefore to its customer to honour and pay cheques drawn on it by a customer as long as it has in its possession at the material time sufficient and available funds for the purpose. See *Mai v. STB Ltd* (2008) ALL FWLR
 E (Pt 299) 552 at 565 - 566 paras. F-B)

Black's Law Dictionary 8th Edition at page 252 defines a Cheque (Check) thus:

"As draft signed by the maker or drawer drawn on a bank, payable on demand and unlimited in negotiability."
 F

There is evidence on record that the respondent regularly and personally issued the cheque of N500,000.00 to Chief Fola Abiloye. This issuance of the cheque to Chief Fola Abiloye, according to the PW1, was pursuant to the business relationship between the respondent and the said Chief Fola Abiloye. See page 24-35 of the records of appeal.
 G

In law, a cheque being a negotiable instrument, once the cheque is regular on the face of it, the banker is bound to honour same upon presentation. See *Nigerian Air Force v. J. Obiosa* (2003) 4 NWLR (pt. 810) 233.
 H

As a banker has a duty of fiduciary relationship so also the customer has a duty to exercise reasonable care in executing his written orders on the cheques so as not to mislead the bank or facilitate forgery. See *Mai V. STB Ltd* (Supra) at 565-

566 paras F-8.

The respondent willfully, regularly and personally issued his cheque to the appellant for payment to the drawee but having intention that it would not be given value is to my mind fairly mischievous pursuant to his written orders without due regards to the principles of fairness. The saying goes that all is fair business deals. It would be recalled that PWI testified that he issued the said cheque of N500,000.00 to Chief Fola Abiloye, to “acquire forest reserve by purchase” the said witness failed or neglected to state what steps he had taken against the said Chief Fola Abiloye, to recover the said sum if indeed he did not eventually acquire the said forest reserve from Chief Fola Abiloye.

I agree with the learned counsel’s submission that awarding the value of the cheque to the respondent is equivalent to double compensation when indeed there is no shred of evidence before the court that the respondent did not benefit from the transaction between him and Chief Fola Abiloye, in respect of which the said cheque was issued. However it was also clear that the appellant had a duty to obey and observe the mandate the respondent issued as regards the payment of his cheques.

The appellant was not a privy to whatever transaction between the respondent and Chief Fola Abiloye, and so it would have been appropriate for the appellant to heed to the mandate issued to her by the respondent as regards the cheque issued to Chief Fola Abiloye. However it seems these days that banks in the country no longer live up to expectation of such high placed institution, for they have a right to direct the cheque back to the owner for a wrong or an impossible mandate. There is a duty of care imposed on the bank to their customer. I resolve this Issue 2 in favour of the respondent.

ISSUE NO 3

“Whether the learned trial judge having rightly rejected in evidence the dispatch book upon which the plaintiff allegedly delivered a fresh mandate to the appellant, whether the Lower Court was not wrong to have held that the respondent delivered/made a fresh mandate to the appellant.”

ARGUMENT

The main point on the appellant's submission on the above issue was that 'the dispatch book upon which Exhibit A (fresh mandate) was delivered to the appellant was rejected by the trial court and there was no basis for the trial judge to have relied on Exhibit A since its roots of existence had been caught off by the objection, the appellant raised and which objection, the trial Lower Court upheld.

In a swift reaction, the respondent's counsel submitted that the totality of the evidence before the court was on the fact that Exhibit A was actually received by the defendant/appellant and that the defendant acted in breach of Exhibit A which is the duty of reasonable care and skill the defendant/appellant owes the plaintiff respondent in this case. It was further submitted that the trial court was therefore right when he held in page 13 of the judgment of the court (which is at page 77) of the record of appeal as follows:

"Moreover pw3 appears to me as a witness of truth and I accept his evidence that Exhibit A was written by the plaintiff to the defendant and that the defendant was in receipt of Exhibit A.

I have also said that this is a banker customer relationship between the plaintiff and the defendant which relationship is contractual in nature and the banker owes its customer a duty of care"

This court was urged to resolve this issue in favour of the respondent.

RESOLUTION OF ISSUE NO 3

It is now settled in law that the issue as to whether a document is received or not is purely an issue of fact to be proved by evidence. In law, the burden of proving the existence of the material issue in controversy is on a party who will lose if no evidence is adduced. See Section 137 of the Evidence Act, 2011. Yadis Nig. Ltd V. G.N.I.C Ltd (2007) ALL FWR (pt.370) 1348 at 1370 (para. A).

There are three ways of proving the delivery of a letter as established by the Supreme Court in Nlewedim v. Uduma (1995) 6 NWLR (Pt.402) 383 at 394 which are:

- 1. By a dispatch book***
- 2. By evidence of dispatch by registered post***
- 3. By evidence of witness(es) credible enough to testify that the defendant was served with it.***

The appellant by its paragraphs 3, 4 (a), 5 and 6 of the

Amended statement of defence strongly denied the delivery and receipt of Exhibit (A) and accordingly parties at the Lower Court joined issue extensively on receipt of Exhibit "A". See page 27-28 of the records.

From the pleadings, it is quite certain that the respondent hinged the receipt of Exhibit "A" on the dispatch book allegedly signed by the appellant as evidence of delivery of the said Exhibit "A". By paragraph 1 of the reply to the statement of defence, the respondent clearly and positively stated that *"paragraph 3 of the statement of defence is false in that the defendant signed a document in acknowledgment of the receipt of the mandate on 27th May, 1997. Reliance will at the trial of this suit be placed on the said document"*. See page 9 of the records of appeal.

An objection was raised as to the admissibility of the dispatch book and the learned trial judge in rejecting the dispatch book held thus:

"I agree with counsel to the defendant that nothing on the booklet connects it with the law firm of Wale Omotosho & Co., and that though the date written in the booklet is the same as the date the letter was alleged to have been delivered, there is nothing to indicate what letter was delivered to the defendant bank In the circumstance cannot admit the dispatch book which I now mark "R".

It can be gleaned from page 48-50 of the records of appeal that the kernel of the respondent's case at the trial court was that as evidence of delivery of Exhibit "A" the appellant signed the document and/or signed the dispatch book. The dispatch book being the yardstick upon which the veracity of the oral evidence of delivery by PW4 will be tested. See *Obiazikwor v. Obiazikwor* (2007) ALL FWLR (Pt.2010) 1602 at 1623 Paras G-11, *Ezemba v. Ibeneme* (2004) 1 ALL FWLR (Pt.223) 1786.

What the evidence of pw4 at pages 48-49 of the record support and state is that the delivery of Exhibit "A" was evidenced by signature of the recipient in a document or a dispatch book. The justice of this case on the issue of receipt of Exhibit "A" could be but where the dispatch book allegedly signed by the recipient was in evidence. In the absence of the dispatch book, as it was rightly rejected in evidence, the findings of the learned trial judge that Exhibit "A" was actually

delivered to the appellant meet the justice of this case and same is not perverse as it failed to take particular consideration of the evidence that the receipt of Exhibit “A” was acknowledged in writing which makes the evidence of pw4 on that part unreliable and not credible.

It is worthy of note that none of the plaintiffs’ witnesses (particularly pw4) stated the name of the man that Exhibit “A” was purportedly delivered to. It is only the signed document (dispatch book) that could disclose whether in fact Exhibit “A” was delivered to the appellant or anybody else. The viva voce evidence of the pw4 (which evidence emphasizes signing) was not credible enough as evidence of receipt of Exhibit “A” by the appellant in the absence of the dispatch book which the pw4 testified “He signed my dispatch book”.

The case of Nlewedim v. Uduma (1995) 6 NWLR (Pt.402) 383 relied on by the learned trial judge is distinguishable from the present case in that:

a) This case involves the delivery of a document to a corporate entity case of Nlewedim v. Uduma (supra) while it is easy in the case of individual to prove receipt by viva voce evidence, in the case of a corporate entity, prove of delivery or acknowledgment of receipt of a document is shown by signing a document by the officer served together with his initials.

b) In the instant case, unlike Nlewedim’s case, there is evidence from the person who purportedly served the document (pw4) that the person he allegedly served signed *“HE signed my dispatch book”* the pw4 testified. This makes the dispatch book allegedly more compelling to be placed before the Lower Court.

c) Unlike in Nlewedim’s case, the learned trial judge in this case rejected the dispatch book (which is the foundation of delivery of Exhibit “A” as testified by pw4) as *“there is nothing to indicate what letter was delivered to the defendant bank”*.

This issue is hereby resolved in favour of the appellant.

ISSUE NO 4

“Whether considering the nature of the respondent’s case and the evidence led, the learned trial judge was not wrong in awarding damages against the appellant.”

ARGUMENT

It was submitted on this issue that the appellant having rightly honoured a cheque regularly issued by the respondent in favour of a third party, did not breach any of its duties to the respondent to warrant an award of damages of N2 million as well as the value of the cheque regularly issued by the respondent and duly honoured by the appellant in line with its duties to honour cheques regularly issued by its customers. B

It was also argued that the trial judge having rightly found that the plaintiff's claim is in contract and/or breach of contract, was palpably wrong to have awarded N2 million general damages against the appellant after the award of N500,000.00 as well as pre and post judgment interest. C

Further that even if the respondent's case is in tort of negligence simpliciter, it amounts to double compensation for the same misdeed for the learned trial judge to have awarded N2 million damages in addition to the sum of 500,000.000 as well as pre and post judgment interest. That the award of pre-judgment interest and damages of N2m is certainly erroneous and wrong in law. This court was urged to allow this appeal on this issue. D

The respondent's counsel in his own reaction on this issue pointed out mainly that the damages of N2 million awarded to the respondent by the trial court was in order as it was the exercise of the court's discretion having found the appellant liable in negligence. E

Further that the award of interest on the sum of N500,000.00 that is 10% per annum from 25th May, 2000, cashment date to the date of judgment herein and at 5% per annum from the 10th day of June 2009 to the date of final liquidation was right as it is in accordance with Order 40 rule 7 of the Ondo State High Court (Civil Procedure) Rules 1987. F

This court was urged to dismiss this appeal on this issue. G

RESOLUTION OF ISSUE NO 4

"Whether considering the nature of the respondent's case and the evidence led, the learned trial judge was not wrong in awarding damages against the appellant." H

I am in total agreement to the submission of both counsel that the relationship between a banker and its customer is contractual. In other words, a customer to a bank in the business of banking is "any person having an amount (account)

with a bank or for whom a bank has agreed to collect items and includes a bank carrying an account with another bank.

See: Mai V. STB Ltd (2008) ALL FWLR (Pt. 399) 552 at 563- 564 (paras F-A); NDIC V. Okem Ent. (2004) ALL FWLR (Pt. 210) 1176 (a) 1221 (paras B-C).

B The respondent's grouse in paragraph 22 (i - iii) of the amended statement of claim is mainly that the appellant paid out a cheque to one Chief Abiloye in complete disregard to his mandate. See page 22 of the record.

C ***Assuming there had been failure to observe the mandate of the respondent this would amount to negligent breach of the mandate as mandate of a customer constitutes a contract between the customer and the banker. Also before a court can commence a meaningful assessment of damages it must***
 D ***be sure of the nature of the claim, that is to say, whether the claim is in contract or in tort, and if in tort, the nature of the wrong alleged.*** See Agbenelo V. Union Bank Plc (2000) FWLR (pt.13) 2197 at 2214 (para. 4).

E In determining the nature of the relationship between the respondent and the appellant, the learned trial judge held:

"I have also said that there is a banker customer relationship between the plaintiff and the defendant which relationship is contractual in nature and the banks owes its customer a duty of care"

F The learned trial judge further stated at page 78 of the records as follows:

"In the well established case of Afribank V. UBA Ltd (1968) 1 ALR 56 and Lloyds Bank Ltd. (supra) it was decided that where a banker fails to carry out the instructions of his customer or was negligent in the performance of its duty he is liable for an action for breach of contract".

If for instance, Exhibit "A" was ever delivered to the appellant and the appellant failed to strictly abide by the terms of the mandate of the respondent in Exhibit "A", then it amounts
 H ***to a breach of contract as the mandate between the customer (respondent) and the bank (appellant) constitutes a contract.***

It was wrong for the trial judge to have awarded general damages of N2 million against the appellant in addition to the value of the cheque (i.e. N500,000.00) as well as both pre-

judgment. With due respect to the trial judge the point was missed in the award of damages for breach of contract or negligent breach of contract when he stated:

“In a case like this, a court may award such amount as it seems reasonable in the circumstances of the breach of contract even though there is no proof of actual loss”. See page 78 of the record. B

The rule is that a party is entitled to damages that flow directly and naturally from the breach. The Lower Court stated the law at page 78 -79 of the record but he failed to apply same. C

The Supreme Court considered a case not too dissimilar to the instant case in *Haston (Nig.) Ltd v. ACB Plc* (2002) FWLR (Pt.119) 1476 at 1496 (paras. E - F) the court per Ogundare JSC (As he then was) held:

“The plaintiff had claimed one sum (N5 million) for all the alleged wrongs And the trial judge awarded a lump sum (N3.5 million) too it is not discernible from the judgment what he awarded in respect of each wrong. For breach of contract it would amount to double compensation for the learned judge to award relief’s (1) and (2) for N212,700.00 and interest of 54% and at the same time award general damages - P.Z. & Co. Ltd Vs. Ogedengbe (1972) 1 ALL WLR 206 for those are the damages that naturally flowed from the defendant’s breach of contract” D

The Supreme Court had over the years restated the object and award of damages in contract and in tort. In *Agbado v. Union Bank Plc* (supra) at 2215 (paras B.C), the court stated:

“In an action for breach of contract the measure of damages is the loss flowing naturally from the breach and is incurred in direct consequence of the violation (see Swiss-Nigeria wood Industries Ltd Vs. Bogo (1970) 6 NSCC 235). The principles guiding the award of damages in tort are different from the guiding principles guiding award of damages in contract. See James vs. Mid-motors Nigeria Co. Ltd (1978) 11 & 12 SC 31, (1978) 1 NSCC 536 the Object of tort damages is to put, the plaintiff in the position he would have been in (sic) if the tort had not been committed, whereas, the object of contract damages is to put the plaintiff in the position he would have been in (sic) if the contract had been satisfactorily performed”. F G H

Moreso, if the trial judge had found that the claim of the respondent is in the tort of negligence simpliciter, it was not established by any shred of evidence that the respondent suffered any economic loss and the Lower Court did not show that the tortuous conduct was such that the court will award compensation for economic loss after the value of the cheque had been awarded in full together with pre-judgment and post-judgment interest to the respondent. It is on this note that I only grant the value of the cheque to the respondent in the sum of N500,000.00 as flowing from the contractual relationship. In view of the foregoing, I resolve this issue in favour of the appellant.

In all, this appeal largely succeeds in part and the judgment of the Lower Court is hereby set aside with the orders made therein, except for the order to refund the sum of N500,000.00 to the respondent without the attendant unusually inflated interest awarded by the trial court. I make no order as to cost.

E

OWOADE JCA

I read in draft the judgment delivered by my learned brother Sotonye Denton West, JCA. I agree with the conclusion and I also abide with the consequential orders.

F

JOMBO-OFO JCA

I agree.

G

H