IN THE FEDERAL HIGH COURT OF NIGERIA
IN THE CALABAR JUDICIAL DIVISION
HOLDEN AT CALABAR
ON WEDNESDAY, THE 25th DAY OF MAY, 2016
BEFORE HIS LORDSHIP, HONOURABLE JUSTICE PHOEBE M. AYUA
JUDGE

SUIT NO: FHC/CA/CS/55/2007

BETWEEN:

1. ARITA PHARMACEUTICALS LIMITED
2. DR. FRANCIS E. U. ISANGEDIGHI ...PLAINTIFFS/COUNTER DEFENDANTS
3. MRS. HENRIETTA N. ISANGEDIGHI

VS.

1. STERLING BANK PLC
(FORMERLY EQUITORIAL TRUST BANK PLC)....1ST DEFENDANT/ COUNTER CLAIMANT

2. ECONOMIC & FINANCIAL CRIMES COMMISSION (EFCC).....2ND DEFENDANT

JUDGEMENT

The 1st Plaintiff entered into a Contract with the 1st Defendant whereby pursuant to the application of the 1st Plaintiff, Exhibit P15, the 1st Defendant offered N20m (Twenty Million Naira) Overdraft facility, Exhibit P1, to the 1st Plaintiff upon the conditions contained in the letter of offer dated the 03/02/1998. The 1st Plaintiff accepted the offer upon the set conditions and the 2nd Plaintiff, the Vice Chairman, and the 3rd Plaintiff as the Managing Director of the 1st Plaintiff, respectively, did sign and stamp the Contract on behalf of the 1st Plaintiff on the 09/02/1998. The 2nd and 3rd Plaintiffs were also the authorised signatories to the 1st Plaintiff's account with the 1st Defendant.

The sum of ₦5m (Five Million Naira) only was disbursed to the 1st Plaintiff and by a letter dated the 10/07/1998, Exhibit P3, the 1st Defendant indicated their regret to inform the 1st Plaintiff that "Considering the present portfolio constraint, further disbursement of the ₦20m Petroleum Trust Fund Contract facility granted to your company in February, 1998 would no longer be accommodated." In the same letter, the 1st Defendant asked the 1st Plaintiff to make necessary arrangements to refund the ₦5m Naira already disbursed to it as soon as possible.

The 1st Plaintiff paid part of the loan overdraft facility of ₦5m, but did not complete the repayment, even after demands from the 1st Defendant. The 1st Defendant then wrote a petition, Exhibit P19 to the 2nd Defendant alleging fraudulent diversion of Bank's funds by the 2nd and 3rd Plaintiffs, describing them as promoters of the 1st Plaintiff. The 2nd Defendant invited the 2nd Plaintiff for questioning. The Defendants felt aggrieved and instituted this Suit against the 1st and 2nd Defendants seeking declaratory and injunctive reliefs and special and general damages, up to a total of ₦200,000,000.00 (Two Hundred Million Naira Only).

To be precise, the Plaintiffs, in their Amended Statement of Claim, claim against the Defendants as follows:

a. A Declaration that the Plaintiffs are not indebted to the 1st Defendant in that the debt is statute-barred.

b. An Order restraining the 1st and 2nd Defendants from attempting to recover the alleged debt.

c. A Declaration that the 2nd Defendant has no right or power to recover debts legitimately owed in a transaction between a banker/customer.

d. An Order of perpetual injunction restraining the 2nd Defendant, its agents, privies or assigns from recovering or attempting to recover any alleged debt owed the 1st Defendant and/or arresting, detaining, investigating, intimidating the Plaintiffs on any matter connected with Equitorial Trust Bank, Plc.

e. ₦200m (Two Hundred Million Naira), being special and general damages for frustration of contract and unlawful arrest and detention of the 2nd and 3rd Plaintiffs by the 2nd Defendant on the instruction of the 1st Defendant.

The 1st Defendant, on its part, filed a Statement of Defence / Counter Claim and counter claimed as follows:

a. A Declaration that the 1st Plaintiff with its guarantors – the 2nd and 3rd Plaintiffs - are indebted to the 1st Defendant jointly and severally in the sum of ₦19,199,680.52 as at 31/05/2006 and interest thereof at the rate of 25% per annum from the end of 31/05/2006 until the debt is repaid.

b. An Order for the payment by the Plaintiffs of the said debt of ₦19,199,680.52 as at 31/05/2006 and interest thereof at the rate of 25% per annum from 31/05/2006 until judgement and thereafter at the rate of 10% per annum until the judgement debt is satisfied.

The Plaintiffs called 2 witnesses, being the 2nd and 3rd Plaintiffs, while the 1st Defendant called one witness, Mr. Abimbade Olumide Dere as the DW1 and the 2nd Defendant also called a lone witness, Mohammed Musa, DW2.

This case has a chequered history. My Learned Brothers, three of them had sat on this case since 2007 to 2012. This case however, came before me for the first time on the 05/11/2012 for mention. On the 13/05/2013, this case came up before me, this time for trial *de novo*.

The Plaintiffs' Counsel called their first witness, the 2nd Plaintiff on record, Dr. Francis Effiong Uwe Isangedighi. The PW1 adopted his amended written statement on Oath filed before this Court on the 05/03/2013 as his evidence in this case. Twenty-six documents were tendered in evidence by PW1 and with no objection from the Defence, all the documents were admitted in evidence and marked as follows:

1. Letter of Offer of ₦20m overdraft facility by Equitorial Trust Bank Ltd. to the 1st Plaintiff, dated the 03/02/1998, marked as Exhibit P1.

2. Letter titled: DOMICILIATION OF PAYMENT: ARITA PHARMACEUTICALS LIMITED from Petroleum Trust Fund to the Manager, ETB, Aba, Abia State, dated the 04/02/1998, marked as Exhibit P2.

3. Letter of WITHDRAWAL FROM FURTHER DISBURSEMENT ON N20 MILLION PETROLEUM TRUST FUND CONTRACT FACILITY, dated 10/07/1998 from ETB to the MD, ARITA PHARMACEUTICALS LIMITED, CALABAR, CROSS RIVER STATE, marked as Exhibit P3.

4. Letter of RE: INDEBTEDNESS TO EQUITORIAL TRUST BANK LIMITED, dated the 20/05/1999 FROM ETB to the MD, ARITA PHARMACEUTICALS LIMITED, CALABAR, CROSS RIVER STATE, marked as Exhibit P4.

5. Letter of FINAL DEMAND NOTICE: INDEBTEDNESS TO EQUITORIAL TRUST BANK LIMITED to the MD, ARITA PHARMACEUTICALS LIMITED, dated the 06/01/2001, marked as Exhibit P5.

6. Co-operative Development Bank Plc. cheque, dated the 27/01/2000 in favour of Equitorial Trust Bank Limited, marked as Exhibit P6.

7. Undated letter from the 1st Plaintiff to the 1st Defendant (ETB) titled: STOPPAGE OF N20 MILLION PETROLEUM TRUST FUND CONTRACT LOAN: DEMAND FOR OFFICIAL COMMUNICATION signed by the 3rd Plaintiff, marked as Exhibit P7.

8. Letter from 1st Defendant to the 1st Plaintiff, titled: RE: REQUEST FOR 70% INTEREST WAIVER ON YOUR OUTSTANDING FACILITY, dated the 29/01/1999, marked as Exhibit P8.

9. Letter from the 1st Plaintiff, signed by the 3rd Plaintiff to the 1st Defendant, titled: RE: CREDIT FACILITY, dated the 09/06/1998, marked as Exhibit P9.

JUDGE
FEDERAL HIGH COURT
LOKOJA

10. Co-operative Development Bank Plc. cheque, in favour of the 1st Defendant from the 1st Plaintiff, dated the 27/06/2000, marked as Exhibit P10.

11. Co-operative Development Bank Plc. cheque in favour of the 1st Defendant from the 1st Plaintiff, dated the 10/04/2000, marked Exhibit P11.

12. Co-operative Development Bank Plc. cheque in favour of the 1st Defendant from the 1st Plaintiff, dated the 10/03/2000, marked as Exhibit P12.

13. CITIZENS BANK, Citizens International Bank Limited, cheque, in favour of the 1st Defendant, dated the 27/07/1999, marked as Exhibit P13.

14. MEMORANDUM OF UNDERSTANDING BETWEEN ARITA PHARMACEUTICALS LIMITED AND EQUITORIAL TRUST BANK LIMITED, Executed on the 21/07/1999, marked Exhibit P14.

15. APPLICATION FOR N20,000,000.00 (TWENTY MILLION NAIRA) OVERDRAFT/WORKING CAPITAL FACILITY, from 1st Plaintiff to the 1st Defendant, dated the 12/12/1997, marked Exhibit P15.

16. EQUITORIAL TRUST BANK LIMITED Guarantee – By an individual, Form No. 390, signed by the 3rd Plaintiff, marked as Exhibit P16.

CERTIFIED TRUE COPY
BANK
SIGN
DATE
FEDERAL HIGH COURT LOKOJA

17. Letter from the 1st Defendant to the 1st Plaintiff titled: YOUR N15,076,175.02 INDEBTEDNESS TO EQUITORIAL TRUST BANK LIMITED AS AT 5TH MAY, 2005, dated the 05/05/2005, marked as Exhibit P17.

18. Letter from the 1st Plaintiff to the 1st Defendant titled: RE: WITHDRAWAL FROM FURTHER DISBURSEMENT OF N20 MILLION PTF CONTRACT: REQUEST FOR 80% WAIVER OF INTEREST, dated the 27/08/1998, marked as Exhibit P18.

19. Letter from 1st Defendant to the 2nd Defendant (EFCC) titled: FRAUDULENT DIVERSION OF BANK FUNDS BY DR. & MRS. FRANCIS E. U. ISANGEDIGHI – PROMOTERS OF ARITA PHARMACEUTICALS LIMITED, dated the 15/03/2007, marked as Exhibit P19.

20. ALL ASSETS DEBENTURE OF 1ST DEFENDANT with reference No. ETB/CSLD/004B, with annexed schedule of property and Rent value, marked as Exhibit P20.

21. EQUITORIAL TRUST BANK LIMITED GUARANTEE – By an individual, Form No. 390, signed by the 2nd Plaintiff, marked as Exhibit P21.

22. ETB PROMISORY NOTE, signed by the 3rd Plaintiff and the Secretary of the 1st Plaintiff on behalf of the 1st Plaintiff, marked as Exhibit P22 (not dated).

23. INSPECTION SURVEY AND VALUATION REPORT FOR DR. E. U. ISANGEDIGHI ON ASSETS OF ARITA PHARMACEUTICALS LIMITED, PLOT 277, ETA AGBO LAYOUT, CALABAR, CROSS RIVER STATE BY GERSH HENSHAW & CO. ESTATE SURVEYORS & VALUERS DEVELOPMENT CONSULTANTS, date of inspection being Thursday, the 31st October, 1996, marked as Exhibit P23.

24. PETROLEUM (SPECIAL) TRUST FUND ESSENTIAL DRUG REVOLVING FUND (DRF), STORE RECEIPT VOUCHERS, Four in number and stapled together and collectively marked as Exhibit P24.

25. PETROLEUM (SPECIAL) TRUST FUND ESSENTIAL DRUG REVOLVING FUND (DRF) TWELVE (12) STORE RECEIPT VOUCHERS, stapled together and collectively marked as Exhibit P25.

26. Letter from Afri-Projects Consortium to the 1st Plaintiff, titled: PTF LOCAL GOVERNMENT DRUGS SUPPLY PROJECT. "Warrant of Authority to Commence Nationwide Delivery of PTF Essential Drugs to Local Government Areas" dated the 06/10/1997, marked Exhibit P26.

The PW1 (2nd Plaintiff) testified that they were putting a claim because the Plaintiffs have been wronged by the Bank (the 1st Defendant) and that the Plaintiffs contacted their lawyer to pursue their claims as contained in the Statement of Claim and Written Statement on Oath as adopted by him.

The 2nd Plaintiff was cross-examined by the 1st Defendant's Counsel, C. M. Nwaka, Esq., immediately. Under cross-examination, the PW1 stated that the 1st Plaintiff applied for a loan from the Defendant vide Exhibit P15, before the 1st Defendant issued the letter of offer to the 1st Plaintiff (that is, Exhibit P1). That the Plaintiffs accepted the terms and conditions in the offer letter. That the 2nd and 3rd Plaintiffs accepted the offer letter on behalf of the 1st Plaintiff and that the Plaintiffs did satisfy the terms and conditions in the 1st Defendant's offer letter and that there was disbursement of funds. That one of the conditions was personal guarantee by the 2nd and 3rd Plaintiffs but that the 2nd and 3rd Plaintiffs did not execute any personal guarantee on behalf of the 1st Plaintiff. The PW1 said he was not aware of any personal guarantee executed by the 2nd and 3rd Plaintiffs to guarantee the loan facility on behalf of the 1st Plaintiff in favour of the 1st Defendant before this Court. PW1 stated that the only loan transaction was between the 1st Plaintiff and the 1st Defendant which the 1st Defendant did not see through. PW1 admitted that he complained that the 1st Defendant disbursed only ₦5million to the 1st Plaintiff instead of ₦20million stated in the offer letter. PW1 said he did not know that the 1st Defendant and the Plaintiffs agreed that the 1st Defendant could disburse less than the ₦20million or had a discretion to disburse less than that amount. That the Bank had agreed to give ₦20million to the 1st Plaintiff to complete the contract to deliver drugs to the Petroleum (Special) Trust Fund (PTF).

The learned Counsel for the 1st Defendant drew the attention of the Court to paragraph 3 of the offer letter and asked the PW1 to read the portion

but did not ask questions on it and said he would save the issue for address.

PW1 further testified under cross-examination that the Plaintiffs requested the 1st Defendant to surrender their security documents to them to enable the Plaintiffs to go and ask for a loan from another bank. That the 1st Defendant had disbursed only N5m out of the N20m agreed upon and then the 1st Defendant wrote to the 1st Plaintiff stating in the letter that the 1st Defendant could not disburse further funds to the 1st Plaintiff because of the 1st Defendant's portfolio constraints. PW1 stated that on the strength of that letter, the Plaintiffs approached Peak Merchant Bank which demanded domiciliation letter from the PTF and that the bank (1st Defendant) refused to surrender the documents to the Plaintiffs to enable them give the same to the other bank. PW1 admitted that the 1st Plaintiff did not repay the N5m already disbursed by the 1st Defendant when requested to do so but explained that it was because the contract was still hanging. PW1 stated that the 1st Plaintiff had paid the sum of N3.6million to the 1st Defendant. The PW1 said they had evidence that they paid N3.6million to the 1st Defendant but that the evidence was not with him in the Court. PW1 stated that he could not say whether at the point they requested for the security documents from the 1st Defendant, the Plaintiffs had paid part of the loan granted to them by the 1st Defendant. PW1, however, responded that long after the request for the return of the security documents, the parties executed a Memorandum of Understanding (MOU) dated the 21/07/1999 (Exhibit P14). That based on the MOU, the 1st Plaintiff issued to the 1st Defendant some post-dated cheques but that the cheques were not cleared. PW1 explained that before the MOU, the Plaintiffs felt disappointed that the 1st Defendant had let them down

the Plaintiffs engaged the services of Counsel who sued the 1st Defendant. That the 1st Defendant then ran to their lawyer who drafted the Memorandum of Understanding and that before the MOU, the 1st Plaintiff issued a cheque of N1m to the 1st Defendant and it went through but that after the signing of the MOU, the 1st Defendant requested and the Plaintiffs issued to the 1st Defendant post-dated cheques but that the cheques could not be honoured because as at then the 1st Plaintiff went under owing to the fact that the 1st Plaintiff's factory was no longer running due to lack of funds. That the 1st Plaintiff did not repay the loan as agreed by the MOU because the factory stopped running. PW1 admitted that it is not correct to say that the 1st Defendant forced the Plaintiffs to issue the post-dated cheques because issuing of post-dated cheques is a normal banking situation even at the World Bank. That the loan was supposed to be paid by the PTF from the contract proceeds and that there was a letter of domiciliation from the PTF to the 1stDefendant, dated the 04/02/1998 (Exhibit P2), stating that payments of proceeds from the contract between the 1st Plaintiff and PTF were to be made to the 1st Defendant (ETB). PW1 stated that he was not aware of any payment made straight to the 1st Defendant by PTF. PW1 stated that the total amount of the contract between PTF and the 1st Plaintiff was N51million. That at the end, the PTF paid all the contract proceeds to the 1st Plaintiff through the United Bank for Africa, Plc., Calabar. That the 1st Plaintiff was paid half of the proceeds and that when the 1st Plaintiff could not get funding, they borrowed money at very high interest rate to complete the contract failing the 1st Defendant's further disbursement of funds to the 1st Plaintiff due to portfolio constraints. That the 1st Defendant petitioned the Economic and Financial Crimes Commission (EFCC), 2ndDefendant, alleging that the

Plaintiffs diverted funds that would have come to the 1st Defendant. PW1 maintained that the 1st Defendant stopped funding the project and that the Plaintiffs had no choice but to look for funding elsewhere but at very high interest rate. PW1 admitted that before the 1st Defendant petitioned the 2nd Defendant (EFCC), the 1st Defendant wrote to the 1st Plaintiff requesting the 1st Plaintiff to pay back the loan else the 1st Defendant would report the Plaintiffs to the EFCC (2nd Defendant) for investigation. PW1 stated that he would not know why the 2nd Defendant (EFCC) wrote to the Plaintiffs because the 2nd Defendant (EFCC) is not there to collect debt. That the post-dated cheques issued by the 1st Plaintiff to the 1st Defendant are Exhibits before the Court and that the 1st Defendant frustrated the project. PW1 testified under cross-examination that the 2nd Defendant (EFCC) detained him at the Akim Police Station for hours after inviting him. PW1 stated that he knows that the 2nd Defendant does not have an office in Calabar.

The 1st Defendant's Counsel then closed his cross-examination of PW1. The Plaintiffs' Counsel did not re-examine the PW1. The matter was adjourned. The 2nd Defendant's Counsel, C. A. Okoli, Esq., then conducted cross-examination of the PW1 on the 14/05/2013. Under cross-examination, the PW1 admitted that he had told this Court that he is a Surgeon and that he trained in Nigeria for his first degree at the University College, Ibadan (affiliate of the College of the University of London) in 1961. PW1 also stated that he is the Principal Director of the 1st Plaintiff. That for the purposes of his training as a Surgeon, he was resident in London from 1974 – 1975 in the Urology Unit at the Post-Graduate Medical College, Hammersmith Hospital, Duncane Road, London. That he was sent there

the Federal Government of Nigeria and that his salary was being paid by the University of Lagos Teaching Hospital (LUTH) and that after graduation, he returned to LUTH. That LUTH took care of his accommodation in London and also took care of his tax and maintenance of the building and water rates. That he did not earn a salary in London while doing his Post-Graduate course there. That during the time of training he was not exposed to paying taxes. PW1 admitted that he told the Court the previous day that the 1st – 3rd Plaintiffs received money from PTF up to the tune of N51m as contract sum which is the total money they were eventually given. PW1 stated that in paragraph 2 of his written statement on Oath he mentioned that the 1st Plaintiff is an incorporated company under the Corporate Affairs Commission of the Federal Government of Nigeria. PW1 admitted that the 1st Plaintiff, therefore, owes the Federal Government of Nigeria certain responsibilities, including the payment of taxes. PW1 said that he knows that the 2nd Defendant (EFCC) goes after people. That he is also aware that the EFCC is an agency of the Federal Government of Nigeria, established for the enforcement of Economic and Financial Crimes. PW1 agreed that it is true that tax evasion is also part of economic crime. PW1 admitted that the Plaintiffs received N51m from PTF but that he did not tender any document before this Court to show that the 1st, 2nd and 3rd Plaintiffs made any Tax payments to the Federal Government of Nigeria either by way of Income Tax or Value Added Tax. PW1 admitted that in his relationship with the 1st Defendant, he had signed a number of documents, some of which had been admitted in evidence and marked accordingly. PW1 stated that in some of these documents the obligations of the Plaintiffs and those of the 1st Defendant were stated. He identified the cheques shown to him and admitted that h

issued the cheques. PW1, however, stated that he was not aware that the 2nd Defendant (EFCC) has some offices in Nigeria and that the nearest to Calabar, the jurisdiction of this Court, is in Port-Harcourt. PW1 said he was aware that one of the offices of the 2nd Defendant is in Abuja, but that he is not aware of the 2nd Defendant's offices at Enugu, Lagos, Kano and Gombe and that the 2nd Defendant has detention facilities in all of the 6 offices. PW1 said he was aware that the 2nd Defendant has no office or detention facilities in Calabar. PW1 said he would disagree that the 2nd Defendant did not detain him in Calabar. The PW1 was shown Exhibit P19 titled: FRAUDULENT DIVERSION OF BANK FUNDS BY DR. & MRS. FRANCIS E. U. ISANGEDIGHI – PROMOTERS OF ARITA PHARMACEUTICALS LTD. PW1 also agreed that in paragraphs 16, 17, 19, 21 and 22 of his Statement on Oath, he PW1, said he was arrested by the 2nd Defendant at the behest of the 1st Defendant who wants to recover money from the Plaintiffs. That the 2nd Defendant was procured to come and extract money from the Plaintiffs. PW1, however, also stated that no personnel of the 2nd Defendant took money from him. PW1 also said he agreed that in a serious matter such as the allegation of fraud against the Plaintiffs, it was proper for the two sides to be heard but did not agree that it was to be able to hear his own side of the story that, he PW1, was invited by the 2nd Defendant because, according to him, the 2nd Defendant had no business in the matter. PW1 stated that he did not know whether diversion of funds is within the scope of economic crimes. PW1 agreed that issuing of dud cheques is within the scope of economic crimes, but not post-dated cheques. PW1 denied evading the payment of tax to the Government after receiving the sum of N51m from PTF.

On the same 14/05/2013, the PW2 was called to the witness box. She affirmed to speak the truth while testifying.

During examination-in-chief, the PW2, (3rd Plaintiff), Mrs. Henrietta Nene Isangedighi, said she is an Industrial Pharmacist, residing in Calabar. She adopted her written statement on Oath, filed before this court on the 05/03/2013, as her evidence in this case. The Plaintiffs' Counsel then surrendered her for cross-examination. The Counsel for the 1st Defendant cross-examined the PW2.

Under cross-examination, the PW2 stated that she, PW2 and the 2nd Plaintiff (PW1) applied for an overdraft facility on behalf of the 1st Plaintiff from the 1st Defendant. That the Plaintiffs issued several cheques to the 1st Defendant intending to pay the loan and it would not be correct to say that the Plaintiffs issued the cheques to repay the loan, but actually not intending to pay the said loan. PW2 said she had seen the Citizen Bank Cheque shown to her. That the cheque appears to have been signed by the 2nd Plaintiff (PW1) and bearing the stamp of the 1st Plaintiff (Arita Pharmaceuticals Limited). The Plaintiffs' Counsel objected to the cross-examination of the PW2 based on that Citizen Bank cheque dated the 25/09/2000 because though pleaded, it was not frontloaded. The 1st Defendant's Counsel withdrew the cheque and applied orally to the Court for an Order to file and serve the said cheque on the Plaintiffs and for an Order deeming the said cheque as properly filed and served. The Plaintiffs' Counsel did not object to the oral application. The same was granted and the 1st Defendant's Counsel served the Citizen Bank cheque dated the 25/09/2000 on the Plaintiffs' Counsel who also accepted it. PW2 further testified under cross-examination that she could not remember how much

the Plaintiffs were owing the 1st Defendant but that the Plaintiffs' had paid to the 1st Defendant, the sum of N3.6m. That the Plaintiffs supplied all the security demanded for the overdraft facility as stated in paragraph 2 of, the letter of offer (Exhibit P1) including the letter of domiciliation from the PTF (Exhibit P2). PW2 stated that the payment for the contract was done in instalments. That the Plaintiffs wrote a letter to the 1st Defendant dated the 09/06/1998, Exhibit P9, and complained that only N5m had been disbursed by the 1st Defendant. That after that letter, the Plaintiffs and the 1st Defendant entered into a Memorandum of Understanding (MOU) dated the 21/07/1999 (Exhibit P14). That the 1st Defendant wrote a letter to the 2nd Defendant (EFCC) that the Plaintiffs diverted the funds in question but that she never saw the letter before the time she was shown the letter in Court. PW2 maintained that the Plaintiffs were not owing the 1st Defendant because the overdraft facility had lasted for up to 6 years as stated in the statement on Oath of PW2. PW2 stated that she is not a lawyer to know whether the 1st Defendant can still collect that debt from the 1st Plaintiff. The 1st Defendant's Counsel closed his cross-examination of PW2. The Plaintiffs' Counsel said he was not re-examining PW2. The 2nd Defendant's Counsel cross-examined PW2 on the 03/07/2013.

Under cross-examination, the PW2 agreed that she is a Director of the 1st Plaintiff. PW2 stated that the central subject in this Suit is that the Plaintiffs took an overdraft facility from the 1st Defendant but that Plaintiffs did not pay back the overdraft facility as at when due or expected. That in an effort to pay the loan, the Plaintiffs issued cheques to the 1st Defendant and that the cheques were not dud cheques, but that on presentation the cheques were not honoured because there was no money in the account

of the 1st Plaintiff as at the time the cheques were presented. The PW2 said she was not aware that the 1st Defendant wrote an application to the 2nd Defendant and that the petition of the 1st Defendant to the 2nd Defendant (Exhibit P19) was shown her in the Court for the first time but that she, PW2, did not divert the funds or loan received from the 1st Defendant for personal use. That the overdraft facility the 1st Plaintiff took from the 1st Defendant was meant for purchase of drugs for the 1st Plaintiff and that the said loan was applied for buying of raw materials for running the Pharmaceutical Company of the 1st Plaintiff. PW2 stated that the 2nd Defendant detained her at Otop Abasi Police Station, Calabar and also detained the Chairman of the 1st Plaintiff for interview for some hours. PW2 said she did not make any payment to the EFCC (2nd Defendant), PW2 said she was not suing EFCC (2nd Defendant) for the fun of it but that the EFCC (2nd Defendant) has no business in the transaction between her and the 1st Defendant, Equitorial Trust Bank (now Sterling Bank Plc). PW2 admitted that she knows that the 2nd Defendant has statutory duties but that she was not aware that the 2nd Defendant has statutory duties to investigate petitions involving stealing of funds, issuing of dud cheques, etc. The PW2 was shown Exhibits P6, P10, P11 and P12 at the request of the 2nd Defendant's Counsel and PW2 identified the Exhibits as photocopies of cheques which were issued by the 1st Plaintiff but that she did not agree that no payment was made on those cheques because the Plaintiffs made payments of over N3m. That if the 2nd Defendant's Counsel was saying that no payment was made in respect of those cheques, she PW2, was hearing about it for the first time that the cheques were not honoured. The 2nd Defendant's Counsel closed his cross-examination of PW2. The

Plaintiffs' Counsel did not re-examine PW2. He submitted that that was the conclusion of the case for the Plaintiffs.

The 1st Defendant's Counsel applied to open their Defence and leave was granted him to conduct the examination-in-chief of DW1. The DW1 was in the witness box. He swore on the Holy Bible to speak the truth in testifying in the matter. DW1 stated his name as Abimbade Olumide Dere, living at Port-Harcourt, Rivers State. He stated that he had worked for the 1st Defendant as the Regional Credit Recovery Manager until the 1st day of May, 2012 when he retired. That as at the time of giving evidence in Court, he was a student of the Nigerian Law School. DW1 testified that he knows the Plaintiffs in this Suit. That they were his customers. DW1 stated that he made a Written Statement on Oath on the 02/03/2010 and that he would adopt it as his evidence-in-chief on behalf of the 1st Defendant in this case. That in the said statement on Oath, he did mention a Citizen Bank Cheque dated the 25/09/2000 and the Statement of Account of the 1st Plaintiff. DW1 identified the documents shown to him as the cheque and Statement of Account of the 1st Plaintiff. The 1st Defendant's Counsel applied to tender the documents through DW1. The Plaintiff's Counsel objected to the Statement of Account of the 1st Plaintiff only. The 1st Defendant's Counsel withdrew the Statement of Account of the 1st Plaintiff. The Court then admitted the Citizen Bank Cheque dated the 25/09/2000 drawn in favour of the 1st Defendant in the sum of ₦600,000.00 in evidence and marked it as Exhibit D1. The DW1 was shown Exhibit P1 and Exhibit P15 and he identified them as the letter of offer of the overdraft facility of ₦20m by the 1st Defendant and the letter of Application for the said overdraft facility by the 1st Plaintiff, respectively.

At this juncture, there was power outage and the 1st Defendant's Counsel applied for an adjournment owing to the inclement weather. The Plaintiff's Counsel did not object. The case was adjourned to the 28/10/2013.

On the said 28/10/2013, the DW1 continued with his evidence-in-chief. The DW1 sought to tender the Statement of Account of the 1st Plaintiff with the 1st Defendant. The DW1 stated that the Statement of Account consist of entries taken from one of the ordinary books of the bank and that the entry was made during the usual and ordinary course of the bank's business. That the book was in the control and custody of the bank, ETB, now Sterling Bank Plc, the 1st Defendant. DW1 said he compared the Statement of Account in question with the original entry in the book and found it to be correct. The Plaintiffs' Counsel objected to the admissibility of the said Statement of Account of the 1st Plaintiff and argued that it was a computer printout yet the DW1 did not lay a proper foundation before seeking to tender it as required by section 84(2) of the Evidence Act, 2011 and also that the document was not accompanied by a certificate being a computer generated document as required by section 84(4) of the Evidence Act, 2011. He relied on the case of ***Arak v. Ogbuino (no citation).*** The 1st Defendant's Counsel said that the document was pleaded in the Statement of Deference and Counter Claim of the 1st Defendant and that the Plaintiffs' did not deny it in their pleading. Learned 1st Defendant's Counsel also submitted that the Statement of Account of the 1st Plaintiff was being tendered as an entry taken from one of the ordinary books of the banks and that the DW1 had laid a proper foundation for tendering it as required by sections 87, 89(h) and 90(e) of the Evidence Act, 2011. He also relied on the case of ***Narindex Ltd v. NIMB (2001) 4 SCNJ, page 208*** and said the case was cited and relied

on by the learned Author, Sabastine T. Hon, (2006), The Law of Evidence in Nigeria, at page 279. In a Ruling delivered on the 02/12/2013, this Court overruled the objection of the Plaintiffs' Counsel and admitted the Statement of Account of the 1st Plaintiff in evidence and marked it as Exhibit D2.

DW1 continued with his evidence-in-chief thereafter. He testified further that the 1st Defendant pleaded a letter dated 30/11/1998 from the 1st Plaintiff to the 1st Defendant and DW1 tendered it in evidence. The Plaintiffs' Counsel did not object. The letter titled: "REQUEST FOR 70% WAIVER OF INTEREST" dated the 30/11/1998 mentioned in paragraph 9 of the Plaintiffs' amended Statement of Claim was admitted in evidence and marked as Exhibit D3.

The 1st Defendant's Counsel closed his Examination-in-chief of DW1. The Plaintiffs' Counsel cross-examined DW1 on the 17/03/2014.

DW1 under cross-examination explained that "portfolio" in banking terms means the granted facility and the security used for securing the facility, that is, the collateral. He explained further that the grant of a loan to a customer is an investment on the part of the person who granted the loan because profit is made on it by the lender – the bank, in this case, the 1st Defendant. DW1 further testified that the 1st Defendant wrote a letter, Exhibit P3 informing the 1st Plaintiff that the bank, the 1st Defendant, was withdrawing from further disbursement of the loan because of portfolio constraints. That the 1st Defendant did not send any other letter to the 1st Plaintiff stating that the withdrawal of further disbursement of the loan

was due to the neglect of the Plaintiffs to give evidence of supply and completion of the job order because it was expressly stated in Exhibit P1, the offer letter, the conditions for disbursement of the overdraft facility, which were breached by the Plaintiffs. That the 1st Plaintiff did not supply any evidence of supply of chemicals to make drugs or evidence of payment for the already supplied drugs, irrespective of the fact that there was irrevocable domiciliation of payment from PTF.

DW1 explained that a draw down means drawing from a loan (granted facility) given by the bank. That a draw down is usually conditional and that when the conditions are met, the grantee would apply for him to withdraw some of the funds. That Exhibit P1, the offer letter, has conditions for draw down and that one of such conditions is found in item 7 of the Exhibit P1, that is "Receipts of Evidence of Supply and payment Received from Completed Job Orders." That the Plaintiffs in the present case gave the 1st Defendant evidence of supply they made to the PTF and the evidence was in the form of receipts which the 1st Defendant pleaded. DW1 said he did not agree that it was not necessary to give evidence before disbursement of the funds. That the 1st Defendant was aware that the Plaintiffs completed the job by getting money elsewhere. DW1 agreed that looking at Exhibit P1, there are two methods stated therein for repayment of the loan, namely:

1. From contract proceeds directly from PTF and,
2. Cash generated from company's internal operations.

DW1 also agreed that the 1st Plaintiff's Company approached the Bank, 1st Defendant, to give them funds to do the job because they had no sufficient funds for the job. That concerning repayment of the overdraft facility from contract proceeds directly from PTF, it was the PTF that was supposed to pay the 1st Defendant through the irrevocable domiciliation of payment into the account of the 1st Plaintiff maintained by the 1st Defendant. That it was not in dispute that the 1st Defendant has a domiciliation from PTF but that no money came from PTF. DW1 admitted that the 1st Defendant did not write a letter of complaint to the PTF on that and that the 1st Defendant did not sue the PTF for the guarantee that was not met. DW1, however, did not agree that the 1st Defendant frustrated the 1st Plaintiff in the performance of the contract. DW1 admitted that Exhibit P16 is the Personal Guarantee Form executed by the 3rd Plaintiff and Exhibit P21 is the Personal Guarantee Executed by the 2nd Claimant which show that the total amount recoverable from the 2nd and 3rd Plaintiffs is limited to the principal sum of N20million, and that the 1st Defendant gave the 1st Plaintiff N5million and not N20million. That the 1st Defendant reserved the right to change the nature and amount of the facility and its underlying terms and conditions and security. DW1 admitted that the 1st Plaintiff had paid back N3,370,479.00. That the Plaintiffs wrote to the 1st Defendant to release the domiciliation documents, the 1st Defendant refused to give them because the Plaintiffs were owing the 1st Defendant. DW1 also admitted that via Exhibits P4, P5 and P17, the 1st Defendant wrote to the 1st Plaintiff demanding payment of the loan. That the 1st Defendant also wrote Exhibit P19, a letter, a petition to the (EFCC) 2nd Defendant stating in it, Fraudulent Diversion of Bank Funds by Dr. & Mrs. Francis E. U. Isangedighi, dated the 15/03/2007. That in the course of investigation, the

2nd Defendant checked the Statement of Account of the 1st Defendant and noticed that the 1st Plaintiff issued a dud cheque to the 1st Defendant on the 25/09/2000, Exhibit D1, and then 2nd Defendant demanded for a copy of the dud cheque and that the 1st Defendant gave it to the 2nd Defendant. That when the 1st Plaintiff's Citizen Bank cheque dated the 25/09/2000 was not honoured, the 1st Defendant sent to the 1st Plaintiff a slip called "Returned Cheque Slip" whereby the particulars of the cheque were written. DW1 said that he did not, however, have any evidence in Court that the slip was sent to the Plaintiffs. DW1 stated that by the estimation of the 1st Defendant, as at the time of his evidence in Court, the 1st Plaintiff was owing the 1st Defendant over ₦19million as stated in their Statement of Defence already before the Court. DW1 admitted that the loan of ₦5million was given to the 1st Plaintiff in 1998 but that he did not know the 1st Defendant's turn over for 1998 or 1999 and that he did not also know the 1st Defendant's turn over from 1998 – 2011 or the 1st Defendant's market conditions from 1998 to 2011 when the 1st Defendant changed to Sterling Bank Plc. DW1 read the portion of Exhibit P1 on pricing interest and explained that the 1st Defendant gave a detailed analysis of how the overdraft facility went to the amount stated, which is over N19million.

The Plaintiffs' Counsel stated that he was done with the cross-examination of DW1. The 1st Defendant's Counsel said he was not re-examining DW1. He then applied to close the case of the 1st Defendant. The Plaintiffs' Counsel did not object. The application was granted. The DW1 was discharged from the witness box.

On the 07/04/2014, the 2nd Defendant called its lone witness, DW2, Bashir Maikano, a personnel of the 2nd Defendant (EFCC) but now of blessed memory. He adopted his statement on oath which was before the court as his evidence in this case. He did not complete his evidence-in-chief that date. On the next adjourned date, when he was to continue, the 2nd Defendant's Counsel informed the Court of the unfortunate demise of DW2 in a car accident.

There were several adjournments before application to substitute the DW2 with Mohammed Umar Musa, an Operative of the 2nd Defendant (EFCC), Port-Harcourt Zonal Office, because of the transfer of the Judge (me) from the Calabar Division of the Federal High Court. The parties' application for a fiat to enable me, the Judge, to travel to Calabar to continue with hearing of the case was granted by the Honourable Chief Judge of the Federal High Court, Hon. Justice I. N. Auta, OFR, months after the Court's last hearing in April, 2014.

So, on the 08/12/2014, the 2nd Defendant's Counsel moved the application to substitute the late DW2 with another witness who he said was part of their investigating team in this case. The application was not opposed. The same was granted by this Court. The DW2, now by name Mohammed Umar Musa, was called and he affirmed to speak the truth only in giving evidence. DW2 said in his evidence-in-chief that he knew Bashir Maikano who was formerly his boss in the office and he DW2 worked under the now late Bashir Maikano. DW2 then adopted his written deposition on Oath which he said was deposed to on the 04/12/2014 and was before this Court, as his evidence in the instant case. DW2 admitted that in

paragraphs 7 and 9 of his written Statement on Oath, he referred to facts touching on a petition that was made to the 2nd Defendant (EFCC) by the 1st Defendant (then Equitorial Trust Bank but now known as Sterling Bank Plc). DW2 stated that pursuant to the petition dated the 15/03/2007, the 2nd Plaintiff was invited to the State CID, Calabar on the 22/05/2007 to answer to the criminal allegation contained in the petition of the 1st Defendant against the Plaintiffs. That the 2nd Plaintiff honoured the invitation and was afterward released on administrative bail bond. DW2 said he would be able to recognise the petition, the statement of the 1st Plaintiff to the 2nd Defendant, the bail application of the 2nd Plaintiff and the bail bond. He stated that the certified true copy of each of the documents mentioned by him above were in Court. He stated that the statement of the 2nd Plaintiff, his bail application and the bail bond were all made on the 22/05/2007 and that the three documents as well as the petition were pleaded. The DW2 was shown the documents and he identified them as the documents he was referring to while testifying. The documents were tendered in evidence. The Plaintiffs' Counsel did not object to the admissibility of the petition, the bail application and the bail bond. The said documents were admitted in evidence and the petition was marked as Exhibit D4, the bail application was marked as Exhibit D5 and the bail bond was marked as Exhibit D6.

The learned Plaintiffs' Counsel, however, objected to the admissibility of the statement of the 2nd Plaintiff on the grounds that it was a public document which ought to have been properly certified but which was not, in that it was not shown on the face of the document how much fee was paid for the certification as required by the provisions of section 104 of the

Evidence Act, 2011. Learned Counsel said he would supply a judicial authority to support his objection but on the next adjourned date, being 11/03/2015, he stated that he could not place his hand on the said authority. He then withdrew his objection. The Court, therefore, admitted the Certified True Copy of the statement of the 2nd Plaintiff to the 2nd Defendant made on the 22/05/2007 and marked it as Exhibit D7. The 1st and 2nd Defendants' Counsel were absent from Court. The matter was adjourned.

At the next adjourned date, being the 09/06/2015, the matter came up for continuation of hearing, the DW2 was called to the witness box and reminded of his Oath. The learned Counsel for the 2nd Defendant asked DW2 whether apart from his written depositions in his Statement on Oath and the documents tendered through him, he had any other thing to tell the Court about this case. The DW2 answered in the negative.

The 2nd Defendant's Counsel then submitted the DW2 for cross-examination. The DW2 stated under cross-examination that he found out in the course of investigation that there was an overdraft facility transaction between the Plaintiffs and the 1st Defendant and that the Plaintiffs diverted the funds that they ought to have paid for the transaction they entered into with the 1st Defendant. DW2 also stated that the matter was still under investigation when the Plaintiffs rushed to Court. DW2 also said he was an investigator and that when a petition comes to the 2nd Defendant, the 2nd Defendant investigates it and that the report of the investigation is sent to the Legal Department which looks at the report and gives advice as to whether the matter should be taken to Court or sign

otherwise, so he could not tell whether the matter between the Plaintiffs and the 1st Defendant was purely civil and a contractual matter in which the 2nd Defendant has no business as was suggested by the Plaintiffs' Counsel. The Plaintiffs' Counsel put it to the DW2 that funds were not diverted because there was a guarantor, the PTF, in this matter. DW2 answered that the matter was still under investigation and that he does not also know the meaning of "domiciliation" as he is not a banker. DW2 also said as at the time of the diversion he did not know how much was diverted because the matter was still under investigation when the Plaintiffs rushed to Court.

The Plaintiffs' Counsel submitted that he was done with cross-examination of DW2. The 1st Defendant's Counsel when asked by the Court, said he had no questions for DW2. The 2nd Defendant's Counsel also stated that he was not re-examining DW2 and applied for DW2 to be discharged from the witness box. The Plaintiffs' Counsel had no objection to that application. The Court granted the application and discharged the DW2. The case was adjourned for adoption of the final written addresses of Counsel for the parties. This was to be done on the 03/12/2015 but the Plaintiffs filed their written address only that same date even though the 1st Defendant had filed their final written address on the 30/06/2015 and served the same on the Plaintiffs on the 01/07/2015 and the 2nd Defendant served their written address on the Plaintiffs in July, 2015. The Plaintiffs' Counsel apologised to the Court and to parties on the other side for the delay in filing his written address. He explained that he was busy at the Election Petition Tribunal at Abuja, that hearings before the Election Petition Tribunal are time-bound, hence his delay. He submitted that he had paid his penalty fees for default

in filing. David Kip, Esq., (holding the brief of C. M. Nwaka, Esq.), for the 1st Defendant and also holding the brief of C. A. Okoli, Esq., for the 2nd Defendant applied that since they were served with the final Reply address of the Plaintiffs only in Court on that same 09/06/2015, he would need another date to enable them study the Plaintiffs' Reply address and file a Reply on points of law, if it was necessary. The learned Defence Counsel also stated that the Plaintiffs' Counsel had explained the reason for the delay in filing their Reply address, so they would not ask for costs.

The Court expressed its displeasure that after such a long adjournment which also included the Court's long vacation, the Plaintiffs were unable to file the Reply address, but granted the adjournment, more so that the 1st and 2nd Defendants were not opposed to the application for adjournment.

On the 10/03/2016, the 1st Defendant's Counsel, C. M. Nwaka, Esq., submitted that they had filed the 1st Defendant's final written address, dated the 30/06/2015 on the same date, that the 1st Defendant also filed a Reply on Points of law. He adopted the written address as their argument on the three issues raised in the 1st Defendant's written address. He also cited one additional judicial authority which is not in their written address, to support his argument on the issue of the loan in question not being statute-barred after six (6) years, but only after twelve (12) years because it is a specialty debt, being a secured debt. He cited in support the case of ***Samuel Tele Onadeko v. Union Bank of Nigeria Plc. (2006) All FWLR (Pt. 301) p. 1872 at 1890-1891 H-A, Ratio 7.*** He urged this Court to dismiss the Plaintiffs claim and to grant the 1st Defendant's counter claim.

The 2nd Defendant's Counsel, C. A. Okoli, Esq., submitted that the 2nd Defendant's final written address is dated the 07/07/2015 and filed on the 10/07/2015. He submitted that they were relying on all their arguments in the said final written address. He also stated that there was a Reply address to the 2nd Defendant's written address which he would comment on after the Plaintiffs' Counsel had adopted their Reply Address.

Learned Counsel for the Plaintiffs, Patrick Ekuri, Esq., submitted that upon being served with the 1st Defendant's Final Written Address, the Plaintiffs filed a written address on the 03/12/2015, in reply and that the Plaintiffs also filed a Final written address in response to the 2nd Defendant's Final written address. He adopted both written addresses as the Plaintiffs' arguments in reply to the Defendants' submissions. He urged this Court to resolve the issues in favour of the Plaintiffs and uphold the Plaintiffs' claim, therein.

The 1st Defendant's Counsel submitted that the 1st Defendant filed a Reply on points of law, dated the 10/03/2016 and filed on the same date. He adopted it as their reply on points of law and urged this Court to resolve all the issues in favour of the 1st Defendant and to dismiss the Plaintiffs' claim and grant the 1st Defendant's counter claim.

The 2nd Defendant's Counsel also said he was replying to the Reply address of the Plaintiffs wherein the Plaintiffs objected to the admissibility of the documents tendered in evidence by the 2nd Defendant on the grounds that the documents are public documents which ought to be certified true

copies but were not validly certified, so the Court cannot rely on them. The learned Plaintiffs' Counsel argued that the 2nd Defendant did not show evidence on the face of the documents that any fee was paid for the certification and that without evidence of payment of fees, the purported certification on the documents is not valid. He relied on the case of ***Tabik Investment Limited v. G.T.B. Plc. (2011) ALL FWLR (Pt. 602) 1592.*** The 2nd Defendant's Counsel argued that the Supreme Court has held that it is fatal to the case of a Defendant or a Plaintiff who fails to put-across the case of his client by examining a witness on an issue or to put his defence across to a witness by way of cross-examination. He relied on the case of ***Oforlete v. The State (2004) 14 NWLR (Pt. 681).*** He argued that assuming the 2nd Defendant's documents were not to be looked at, there was evidence before the Court which the 2nd Defendant could rely upon. That the 1st Defendant's petition to the 2nd Defendant against the Plaintiffs borders on facts which have been set before this Court, which the Plaintiffs failed to cross-examine the 2nd Defendant's witness to put across their case against the 2nd Defendant about the alleged detention of the Plaintiffs.

Learned Counsel said they were relying on section 104 of the Evidence Act, 2011 to submit that the Exhibits tendered through DW2 and admitted and marked as Exhibits D4, D5, D6 and D7 are properly certified true copies for which a fee was paid for the certification. He submitted further that there is a presumption raised by the appearance of a certified true copy of a document that the conditions for making a certified true copy were properly met before certification of the said document, especially as regards the issue of payment of fees. That a party who wanted to make an

issue out of whether payment was made for certification of the documents ought to have raised such objection at the point the documents were being tendered and that the Plaintiffs failed to do that. The learned 2nd Defendant's Counsel urged the Court to discountenance the objection of the Plaintiffs' Counsel at this stage and regard it as a mere tantrum which goes to no issue, following the authority in ***Oforlete's case (supra).***

Well, the learned Counsel for the 1st Defendant has submitted that fees was paid for certification of the documents sought to be tendered by them. But there is no evidence of such payment and it appears that going by the authority of the Supreme Court in the case of ***Tabik Investment Limited v. GTB Plc.,*** such evidence of payment of fees for certification is required.

I, therefore, rely on the authority of that case to hold that the documents tendered by the 2nd Defendant and earlier admitted and marked as Exhibit D4, Exhibit D5, Exhibit D6 and Exhibit D7 are not in admissible form. The said documents will not be relied on by the Court in this Judgement.

I, however, find that the case of ***Oforlete (supra),*** cited by the learned Counsel for the 2nd Defendant is good law. It supports the submission of the Counsel that evidence led by the 2nd Defence Witness, DW2 as regards the invitation of the PW2 by the 2nd Defendant for questioning only, after the 2nd Defendant received the petition of the 1st Defendant against the Plaintiffs, Exhibit P19, was not challenged under cross-examination and the Court can rely on it, and I so hold.

1ST DEFENDANT'S ARGUMENT AGAINST THE PLAINTIFFS' SUIT AND ARGUMENT IN FAVOUR OF ITS COUNTER CLAIM

A summary of the facts of the Plaintiffs' complaint against the 1st Defendant is that the 1st Plaintiff applied for an overdraft facility from the 1st Defendant via Exhibit P15. The 1st Defendant offered the 1st Plaintiff an overdraft facility in the sum of ₦20million. The 2nd and 3rd Plaintiffs accepted the overdraft facility on behalf of the 1stPlaintiff, a Pharmaceutical Company, to enable the 1st Plaintiff execute their contract with the P.T.F. to supply drugs. The 2nd and 3rd Plaintiffs executed personal or individual Guarantee Forms, being Exhibit P16 and Exhibit P21.

The overdraft facility was guaranteed with collateral. That the 1st Defendant disbursed only ₦5million out of the ₦20million agreed upon. That the 1st Defendant then refused to allow the Plaintiff to make further draw down on the overdraft facility and that the debt is more than 6 years. See paragraph 20 of the Amended Statement of Claim and paragraph 20 of the Written Statement on Oath of the 2nd Plaintiff as well as paragraph 16 of the 3rd Plaintiff's Written Statement on Oath.

The 1st Defendant on its part, argues that the 1st Defendant was entitled under the terms of the overdraft facility, Exhibit P1, particularly, paragraph 1 at page 3, to change at any time without notice and at its discretion the nature and amount of the overdraft facility as well as the underlying terms and conditions and security arrangement. That by that clause in the offer letter, which was duly accepted by the Plaintiffs, the Plaintiffs' complaint that the 1st Defendant disbursed only ₦5m instead of ₦20m goes to

The 1st Defendant also argued that the debt owed the 1st Defendant by the 1st Plaintiff is a specialty debt which does not lapse until after 12 years upon accrual of the cause of action and is different from a simple debt which usually has a life span of 6 years from the date the cause of action accrued. That the 1st Plaintiff's indebtedness to the 1st Defendant is still valid and subsisting, hence the 1st Defendant's counter claim, herein.

The 2nd Defendant denied harassing the 2nd and 3rd Plaintiffs and forcing them to pay money to the 1st Defendant or anyone else. The 2nd Defendant argued that they received a petition from the 1st Defendant and they were duty bound to investigate it by hearing from the Plaintiffs, hence the invitation of the 2nd Plaintiff for questioning.

ISSUES FOR DETERMINATION

I have carefully perused the final written address of the learned Counsel for the 1st Defendant and the final written address of the learned Counsel for the 2nd Defendant. I have also very well looked at the written address of learned Counsel for the Plaintiffs in reply to the written addresses of the 1st and 2nd Defendants, respectively. Furthermore, I also looked at the Reply address on points of law filed by the 1st Defendant in response to the Plaintiffs' written address.

In the final written address of the 1st Defendant, three issues are raised for determination and the 2nd Defendant in the final written address raised two issues for determination. On their part, the Plaintiffs in their Reply address raised two issues for determination in response to the 1st Defendant's final

written address and also two issues for determination in response to the 2nd Defendant's final written address.

In my humble view, from the synthesis of the issues put forth for determination by the three Counsel in this case, there are four issues which call for the determination of the Court, herein. They are as follows:

1. Whether the 1st Defendant breached the overdraft facility contract between the 1st Defendant and the 1st Plaintiff and that the Plaintiffs are thereby exonerated from repayment of the amount of N5million advanced to the 1st Plaintiff by the 1st Defendant.

2. Whether the 1st Plaintiff is no longer indebted to the 1st Defendant because the debt has lasted for more than 6 years.

3. Whether the 1st and 2nd Defendants are liable in Damages to the Plaintiffs.

4. Whether the 1st Defendant is entitled to the Reliefs sought in its counter claim.

ISSUE ONE: Whether the 1st Defendant breached the overdraft facility contract.

There is no dispute that the 1st Plaintiff applied for an overdraft facility from the 1st Defendant, Equitorial Trust Bank (now known as Sterling Bank Plc). See Exhibit P15. The 1st Defendant offered the 1st Plaintiff an overdraft facility in the sum of N20m (Twenty Million Naira only). See

Exhibit P1. See paragraph 5 of the Amended Statement of Claim and paragraph 4 of the 2nd Plaintiff's Witness Statement on Oath as well as paragraph 5 of the 3rd Plaintiff's Witness Statement on Oath, all filed on the 05/03/2013 and paragraphs 2 and 3 of the 1st Defendant's Amended Statement of Defence filed on the 02/03/2010. The Plaintiffs accepted the overdraft facility and signed the documents and there was therefore a contract between the 1st Defendant and the 1st Plaintiff.

The parties are all agreed that the 1st Defendant disbursed only N5million out of the N20million offered and refused to disburse any further funds from the remaining N15million of the overdraft facility.

The Plaintiffs felt disappointed and aggrieved. They wrote a letter of complaint about the non-disbursement of further funds from the overdraft facility vide Exhibit P9 dated the 10/07/1998. The 1st Defendant did not give any positive response. Rather the 1st Defendant wrote a letter to the 1st Plaintiff, Exhibit P3 dated the 10/07/1998, stating that the 1st Defendant has withdrawn from further disbursement of the remaining funds as earlier agreed, on grounds of portfolio constraints.

The 1st Defendant justified their action of withdrawal of further disbursement of the overdraft facility based on paragraph 1 at page 3 of Exhibit P1 which states that:

It is the bank's policy to review facilities from time to time in the light of changing market conditions. The bank reserves the right to change at any time without notice and at its discretion the agreed

and amount of facility as well as the underlying terms and conditions and security arrangement.

The 1st Defendant argued that by the above quoted clause, the parties had agreed, vide the Exhibit P1 (the overdraft facility contract), that the 1st Defendant is at liberty, at its discretion to disburse less than the agreed ₦20million overdraft facility. That by disbursing ₦5m, only, out of the ₦20m, the 1st Defendant did not breach the said contract.

On their part, the Plaintiffs argued that that clause at page 3 of Exhibit P1 never permitted the 1st Defendant to withdraw from the contract agreement. That it only permitted the 1st Defendant to change the "nature" and "amount" of ₦20m to another amount and not to include the change in nature and amount of an already drawn down ₦5m. That the letter of withdrawal, Exhibit P3, from the 1st Defendant to the Plaintiffs was never contemplated by the parties. That by the definition of 'change' in Websters' Collegiate Dictionary, 1999, "change" means "modification" and that at page 1025 of the Black's Law Dictionary, 8th Edition, "modification" is defined as a change to something, an alteration. That change or modification to something does not mean withdrawal from the contract which had 180 days tenor and was breached before the expiration of the 180 days. That the 1st Defendant withdrew from the contract even when Exhibit P1 never gave any of the parties the right to withdraw from the contract. That there is no clause permitting any of the parties to determine the contract within the tenor as the Defendant did. That parties are bound by the terms and conditions of the contract and a Court has no power to import extraneous terms into it. He relied on the case of ***Kayode***

Ventures v. Hon. Minister of FCT (2010) ALL FWLR (Pt. 519) 1072 at 1092.

In his reply on points of law filed in response to the Plaintiffs' written address, the 1st Defendant's Counsel maintained that Exhibit P1 authorises the 1st Defendant to disburse any amount at all different from the facility amount of ₦20million, hence the 1st Defendant was not in breach of the contract.

In my opinion, by the wording of the clause at page 3 of the Exhibit P1 already copied, herein, above, the 1st Defendant did have the discretion to change the amount of the loan facility of ₦20million, and not exclusive of the ₦5m already drawn by the 1st Plaintiff. I say so because, by the definitions of "change" as "modification" and "modification" as "change" or alteration, it means that the clause at page 3 of Exhibit P1 is very broad and it gives the 1st Defendant the power to modify or alter the nature and amount of the facility (note, not the amount of the facility not yet drawn) as well as the underlying terms and conditions and security arrangement. This clause is wide ranging and I dare say, it includes a change or alteration in the tenor of the contract from 180 days to some shorter period, even by the 1st Defendant, and without notice to the Plaintiffs at that. See item 6 "Tenor" listed at page one of the overdraft facility agreement falling under the "terms and conditions".

In the result, I find that the 1st Defendant acted within the overdraft facility agreement binding the 1st Defendant and the Plaintiffs when it altered the nature, amount and tenor of the agreement vide Exhibit P1 and withdrew

from further disbursement of the overdraft facility of ₦20m after the initial draw dawn of ₦5m and I so hold. The 1st Defendant did not breach the overdraft facility contract between itself and the 1st Plaintiff. The parties are bound by the terms and conditions of the contract between them. See the case of ***Kayode Ventures v. Hon. Minister of FCT (supra).***

Furthermore, it appears that throughout the period of the transaction between the 1st Defendant and the Plaintiffs, the Plaintiffs acknowledged that they owed the 1st Defendant the sum of N5million which they had withdrawn from the overdraft facility. The Plaintiffs expressed eagerness to repay the said ₦5m to the 1st Defendant. See paragraph 6 of the Statement of Claim, paragraph 6 of the Witness Statement on Oath of the 2nd Plaintiff and paragraph 5 of the Written Witness Statement on Oath of the 3rd Plaintiff. See also Exhibit P8 dated 29/01/1999 which shows evidence that the 1st Plaintiff requested for a 70% interest waiver on their outstanding facility and the 1st Defendant was willing to discuss the matter with the Plaintiffs on the condition that the 1st Plaintiff would first pay off the principal sum of ₦4,574,290.38 (Four Million, Five Hundred and Seventy-Four Thousand, Two Hundred and Ninety Naira, Thirty-Eight kobo) as promised by the Plaintiffs. See also Exhibit P18 where the 1st Plaintiff wrote to the 1st Defendant on the 27/8/1998 asking for 80% waiver of interest.

After repeated demands by the 1st Defendant for the 1st Plaintiff to pay up the loan of ₦5m and accrued interest, including the letter of demand dated the 20/5/1998, Exhibit P4 and failure of the Plaintiffs to pay up the debt, the parties executed a Memorandum of Understanding on the 21/07/1999

Exhibit P14, wherein the loan repayment agreement was made. It was agreed vide Exhibit P14 that the 1st Plaintiff was indebted to the 1st Defendant and had applied for interest waiver which the 1st Defendant approved on the condition that the 1st Plaintiff would pay ₦5m as concessionary out of which N1m had been paid. That the 1st Defendant would pay ₦1m upon execution of the Memorandum of Understanding (MOU) and the balance of ₦3m to be repaid in 12 months as per the schedule to the Memorandum. That the 1st Defendant shall from the 01/07/1999 until liquidation pay interest of 21% per annum and the outstanding sum then due shall become payable en-bloc with interest chargeable from the date of default at the market interest rate.

The Plaintiffs, however, did not comply with the payment terms as they did not pay down between January, 2000 and December 31st, 2000. Now, the Exhibit D2, the Statement of Account of the 1st Plaintiff shows that as at 31/05/2006 the 1st Plaintiff owed the 1st Defendant, ₦19,199, 680.52.

The Plaintiffs issued some cheques in honour of the 1st Defendant in attempt to repay the debt between 1999 and 2000 but that came to no avail.

In essence, therefore, the 1st Defendant never breached the overdraft facility agreement with the 1st Plaintiff.

Issue One (1) is resolved in favour of the 1st Defendant and I so hold.

ISSUE 2: Whether the 1st Plaintiff is no longer indebted to the 1st Defendant because the debt has lasted for more than 6 years

At paragraph 20 of the Statement of Claim, the Plaintiffs aver that the 1st Plaintiff is not indebted to the 1st Defendant as the alleged debt has lasted for more than 6 years.

At paragraph 22(a) of the Statement of Claim, the Plaintiffs claim a declaratory relief as follows:

> A Declaration that the Plaintiffs are not indebted to the 1st Defendant in that the debt is statute-barred.

Similarly, at paragraph 20 of the Witness Statement on Oath of the 2nd Plaintiff, he leads evidence to the effect that the 1st Plaintiff is not indebted to the 1st Defendant as the "purported" debt has lasted for more than 6 years. The same deposition is repeated at paragraph 16 of the 3rd Plaintiff's Written Statement on Oath.

During cross-examination of PW2 on the 03/07/2013, the PW2 stated that the Plaintiffs have reason for saying that the 1st Plaintiff does not owe the 1st Defendant because the loan had lasted for up to 6 years as stated in the Statement on Oath of the PW2. When asked whether she was aware that the 1st Defendant can still collect the debt from the 1st Plaintiff, the 3rd Plaintiff (PW2) answered that she was not a lawyer as to know that and that she was not in a position to tell the Court whether the 1st Defendant can still collect that debt from the 1st Plaintiff.

The Plaintiffs' Counsel who ought to know whether the 1st Defendant can still collect the debt from the 1st Plaintiff or whether the debt is statute-barred did not pursue that line of argument at all.

On the other hand, the 1st Defendant's Counsel went a long way to show that the debt owed the 1st Defendant by the 1st Plaintiff has not lapsed and is not statute-barred after 6 years as if it were a simple debt. The learned Counsel in the 1st Defendant's Final Written Address, submitted that the debt owed by the 1st Plaintiff is a secured specialty debt with a validity period of 12 years from the date when the cause of action accrued. He argued that an ordinary simple debt would be caught up by the limitation law if it was not commenced within 6 years of accrual of cause of action but a specialty debt will be statute-barred if action for its recovery is not commenced within 12 years of accrual of cause of action. He relied on the definition of a simple contract debt given in the Black's Law Dictionary, 6th Edition, page 404, as a ***Contract upon Common Law, upon which the obligation arises neither ascertained by matter of record nor by deed or instrument but by mere oral evidence or by notes unsealed.***

At the same page 404 of the said Black's Law Dictionary, a secured debt is defined as a ***"Debt secured by collateral; example by mortgage, securities, deed, etc."***

Learned Counsel submitted further that at page 1398 of the Black's Law Dictionary, specialty debt is defined as:

> *A debt due or acknowledged to be due by deed or instrument under seal. A contract under seal.*

In the present case the parties agree from their pleadings and testimonies that the overdraft facility in question was granted to the 1st Plaintiff by the 1st Defendant as per Exhibit P1, the offer letter which was duly accepted by the Plaintiffs. At page 2 of Exhibit P1, the parties agreed that the debt would be secured as follows:

1. All Assets Debenture on Company's assets valued at ₦52m, Exhibit P20.

2. Personal Guarantee of the Company's Managing Director and Vice Chairman supported by Statement of Personal Networth – Exhibit P16, P21, respectively.

3. Receipt of duly confirmed domiciliation of payment agreement from Petroleum (Special) Trust Fund, Exhibit P2.

Learned Counsel submitted that Exhibit P20 – Deed of All Assets Debenture acknowledged that a debt is due from the 1st Plaintiff to the 1st Defendant. That this confirmed that the debt is a specialty debt, particularly as the Exhibit P20 was given as Security for the payment of the debt. He referred to pages 730 -731 of CHITTY ON CONTRACTS, GENERAL PRINCIPLES, 23rd Edition, where the period of limitation for specialty contract is stated to be 12 years. That no action upon a specialty can be brought after the expiration of twelve (12) years from the date on which the cause of action accrued.

Learned Counsel submitted that cause of action accrues upon demand for payment of the debt. That in the case where negotiation commenced after the cause of action had accrued, time will not stop running with the exception that if the Defendant makes an admission during the negotiation and fails to fulfil the admission, the admission made during that negotiation will be recognised as revalidating the cause of action. He relied on the cases of ***Kolo v. FBN Plc (2003) 3 NWLR (Pt. 806) 216 at 220, Paragraphs H-G and pages 232-233, Ratio 3; and Ibeto Cement Company Limited v. AG. Federation (2008) 1 NWLR (Pt. 1069) 470 at 501 paragraphs D-F, Ratio 8 at page 479.***

It was the submission of Counsel that the unchallenged averment of the 1st Defendant at paragraph 13 of the Amended Statement of Defence shows that after the Plaintiffs received the 1st Defendant's demand letter, Exhibit P5, dated the 06/01/2001, the Plaintiffs again admitted the debt severally and made unfulfilled promises to pay until 2005.

That by the law of pleadings, paragraph 13 having not been denied by the Plaintiffs is deemed admitted and the facts therein also remain established. Learned Counsel relied on the case of ***Olowoofoyeku v. Olowoofoyeku (2011) 1 NWLR (Pt. 1227) 177 at 202 Paragraphs D-F, Ratio 11.***

That given the circumstances of this case whereby the Citizen's Bank cheque, Exhibit D1 dated 25/9/2000 which the 1st Plaintiff issued the 1st Defendant was not paid until it expired after 6 months on 24/03/2001, it is established that the cause of action, herein arose on the 05/05/2005 and not earlier.

Learned Counsel submitted that it would have been unreasonable to file a recovery action earlier with the acknowledgment and promise to pay by the Plaintiffs before a demand letter, hence Exhibit P17. He cited in aid the case of ***UBA Plc v. BTC Industries (2007) ALL FWLR (Pt. 352) 1615 at 1665 A-E.*** That the cause of action was activated after Exhibit P17 – a final demand for payment, dated the 05/05/2005 and that it was on the basis of that letter that the cause of action arose whereas the Plaintiffs filed this Suit on the 06/06/2007.

At paragraph 16 of the Amended Statement of Claim, the Plaintiffs stated that the 1st Defendant again demanded the sum of ₦15,175,020.02. The Plaintiffs did not give particulars of their allegation that the overdraft facility had lasted for over six years and so the Plaintiffs were no longer obligated to pay the loan. Learned Counsel for the Plaintiffs also appeared not to be interested in establishing that the overdraft facility contract between the 1st Plaintiff and the 1st Defendant had become statute-barred. The 1st Defendant has denied that the loan is statute-barred in paragraphs 15j and 17 of the Amended Statement of Defence. The 1st Defendant's Counsel in his written address cited copious authorities and showed that the overdraft facility contract, Exhibit P1, between the 1st Plaintiff and the 1st Defendant is a specialty debt contract which has a life span of twelve years from the date the cause of action accrued, which he gave as the 05/05/2005, in the instant case.

This Court is satisfied that the overdraft facility contract is a specialty debt contract which has a life span of twelve (12) years from the date the cause of action accrued, which in this case was on the 05/05/2005.

I, therefore, find and hold that the debt owed the 1st Defendant by the Plaintiffs is current, valid and enforceable.

Issue Two is resolved in favour of the 1st Defendant.

ISSUE 3: Whether the 1st and 2nd Defendants are liable to pay damages to the Plaintiffs.

The Plaintiffs alleged that the 1st Defendant breached the overdraft facility contract and the 1st Defendant is therefore liable for breach of the agreement and liable to damages. He relied on the case of ***Intercontinental Bank Plc v. Zumator Engineering Company Limited (2010) ALL FWLR (Pt. 519) 1121 at 1137,*** where it was held that damages are awarded in an action for breach of contract only if there is a wrong committed.

In paragraph 22 of the Amended Statement of Claim, the Plaintiffs stated what it lost as regards three lines of pharmaceutical business from December, 1999 to February, 2000 amounting to ₦96,666,666.00. The Plaintiffs also asked for general damages in the sum of ₦100million.

This Court has, however, determined issue No. 1 in favour of the 1st Defendant to the effect that the 1st Defendant is not in breach of the overdraft facility contract between the 1st Defendant and the 1st Plaintiff. It implies that the 1st Defendant is not, therefore, liable to pay damages to the Plaintiffs for breach of contract as there was no such situation.

As regards the question whether the 2nd Defendant is liable to pay damages to the 2nd and 3rd Plaintiffs, it is the claim of the Plaintiffs that the 2nd Defendant at the behest of the 1st Defendant arrested and detained the 2nd and 3rd Plaintiffs for a matter that is purely contractual between a bank and its customer. That the 2nd Defendant has no right or power to enforce debt repayment in a contractual matter involving a Bank and its Customer. See paragraphs 17 and 22(a), (c) and (d) of the Amended Statement of Claim.

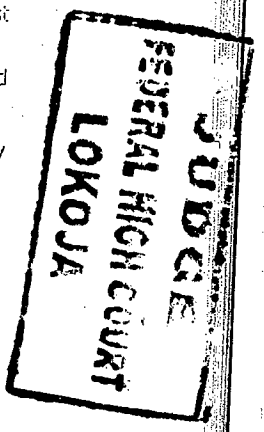
In the Written Address of the Plaintiffs in reply to the 2nd Defendant's Final Written Address, learned Counsel for the Plaintiffs argued that though the 2nd and 3rd Plaintiffs are not the Guarantors of the overdraft facility offered to the 1st Plaintiff by the 1st Defendant, the 2nd Defendant arrested and detained the 2nd and 3rd Plaintiffs on the 22/05/2007 for hours before releasing them. At paragraph 17 of the Written Statement on Oath of the 2nd Plaintiff, it is averred that the 2nd Defendant at the behest of the 1st Defendant arrested and detained the 2nd and 3rd Plaintiffs for a matter that is purely contractual between a bank and its customer. At paragraph 21 of the said Written Statement on Oath of the 2nd Plaintiff, it is stated that the 2nd Defendant has no right or power to enforce debt repayment in a contractual matter involving a Bank and its Customer. See also paragraphs 13 and 17 of the 3rd Plaintiff's Written Statement on Oath.

The Plaintiffs, therefore, at paragraph 22 of the Amended Statement of Claim seek declaratory and injunctive reliefs against the Defendants as well as damages.

At paragraph 2 of the Statement of Defence of the 2nd Defendant filed on the 19/06/2008, the 2nd Defendant admitted paragraphs 1, 2, 3, and 4 of the Statement of Claim but did not admit averments in the paragraphs of the respective Statements on Oath of the 2nd and 3rd Plaintiffs, and put the Plaintiffs to the strictest proof of those facts as they were events that took place between the Plaintiffs and the 1st Defendant which are not within the knowledge of the 2nd Defendant.

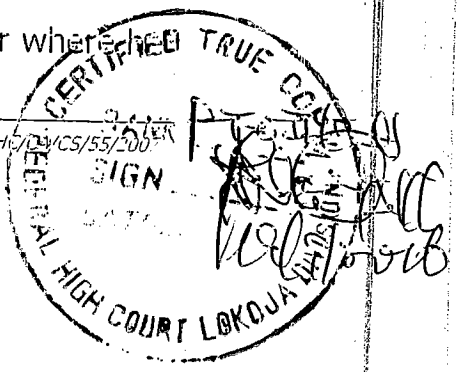
At paragraph 3 of the 2nd Defendant's Statement of Defence, the 2nd Defendant denies paragraph 15 of the Statement of Claim, which is now paragraph 17 in the Amended Statement of Claim. In further answer to the said paragraph, the 2nd Defendant averred that the 2nd Defendant is a law enforcement agency of the Federal Republic of Nigeria established by an Act of the National Assembly, being the Economic and Financial Crimes Commission (Establishment) Act, 2004. That the 2nd Defendant is empowered with all statutory powers to conduct investigation and examination into all reported cases of economic and financial crimes with a view to identifying individuals, corporate bodies and groups involved therein. That the 2nd Defendant is also saddled with the statutory responsibility of being the coordinating agency for the enforcement of the provisions of the Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Act, as amended. That the 2nd Defendant, pursuant to its statutory duty, received a petition dated the 15/03/2007 from the 1st Defendant wherein a case of fraudulent diversion of Bank funds was reported against the Plaintiffs. That the 2nd Defendant through its agents in Calabar, following the procedure of investigation, invited the 2nd Plaintiff to the State Criminal Investigation Department, Calabar, on the 22/05/2007,

to answer to the criminal allegation contained in the petition of the 1st Defendant. That the 2nd Plaintiff came to meet the agents of the 2nd Defendant whereupon he volunteered his statement and was subsequently released on bail within a few hours.



The 2nd Defendant denied the allegation that the matter under investigation was just contractual between a Banker and its Customer and maintained that it was a matter within the contemplation of the Economic and Financial Crimes Commission Act, which is the mandate of the 2nd Defendant. The 2nd Defendant averred that the 2nd Plaintiff was not unlawfully arrested and was not detained even though he was suspected of having committed an offence. The 2nd Defendant stated as false the allegation that the 2nd Defendant was being used as a debt collector and also denied the paragraphs of the Plaintiffs' Amended Statement of Claim where it is stated that the Plaintiffs are entitled to the declaratory and injunctive reliefs as well as the damages sought by them from the Defendants.

In the Final Written Address of Counsel for the 2nd Defendant, it was submitted by learned Counsel for the 2nd Defendant that there is nothing in the evidence of the Plaintiffs to show that the 1st, 2nd and 3rd Plaintiffs were detained or arrested or violated in any form by the 2nd Defendant. That the Plaintiffs only made unsubstantiated claims of unlawful detention and arrest and that the 2ndDefendant was being used as an agent for the recovery of the debt owed the 1st Defendant by the 1st Plaintiff. That during cross-examination by the 2nd Defendant's Counsel, the 2nd Plaintiff (PW1) admitted that he was invited to a Police Station in Calabar where he



made his statement in response to the petition of the 1st Defendant and that he was released on bail to go home on the same date. The learned Counsel relied on Exhibits D4, D5, D6, and D7. The learned Counsel submitted that the claim of the 3rd Plaintiff that she was detained by officers of the 2nd Defendant is complete falsehood as the 3rd Plaintiff had no interaction with the 2nd Defendant whatsoever and that the 3rd Plaintiff's allegation was motivated by gold-digging concerns.

Learned Counsel maintained that statutorily, the 2nd Defendant is empowered to enforce the provisions of the EFCC (Establishment) Act, 2004, the Miscellaneous Offences Act, the Advance Fee Fraud Act, the Banks and Other Financial Institutions Act, and all other laws as specified. He referred to sections 6, 7, and 14 of the EFCC (Establishment) Act, 2004. He submitted that section 46 of the EFCC Act covers offences alleged against the Plaintiffs in the 1st Defendant's petition and that by virtue of section 6(h) of the EFCC Act, the 2nd Defendant was bound to investigate such reported case and by inviting the 2nd Plaintiff for interview in respect of the petition did not amount to a violation of the rights of the Plaintiffs by the 2nd Defendant. He argued that in any case, just like the Police and all other law enforcement organizations, the 2nd Defendant is empowered by the Constitution to tamper with the rights of persons in the course of enforcement of the law, but that in the present case, the rights of the Plaintiffs were not violated in any form. He relied on Chapter IV and section 35 of the Constitution of the Federal Republic of Nigeria, 1999, as amended and the case of ***Ekwenugo v. FRN (2001) 6 NWLR (Pt. 708) 171 at 185.***

The 2nd Defendant's Counsel canvassed that the Plaintiffs had no justification for instituting this action against the 2nd Defendant and that it was a mere ploy to use the powers of this Court for their own amusement. He described the action as vexatious, frivolous and abuse of Court process. He relied on the case of ***Dingyadi v. INEC (2010) 11 – 12 MJSC 131 C-D.***

In the Plaintiffs final written address in reply to the 2nd Defendant's written address, learned Counsel for the Plaintiffs dwelt extensively on the inadmissibility of the 2nd Defendant's Exhibits D4 – D7 and urged the Court to disregard the said Exhibits and refuse to rely on them. Earlier in this Judgement, I upheld the learned Counsel's argument on this issue and I maintain that Exhibits D4, D5, D6, and D7 are inadmissible at law and will not be used by this Court. See the case of ***Tabik Investment Limited v. GTB Plc. (2011), supra,*** and sections 102 and 104 of the evidence Act, 2011 as well as section 318(h) of the Constitution of the Federal Republic of Nigeria, 1999,as amended and section 18 of the Interpretation Act, CAP. I21, Laws of the Federation of Nigeria,2004.

Furthermore, on the issue of this Suit being an abuse of Court process raised by the 2nd Defendant in their Defence, learned Counsel for the Plaintiffs submitted that bringing in the 2nd Defendant in this Suit does not amount to abuse of Court process because the 2nd Defendant had no business investigating the 2nd and 3rd Plaintiffs on allegations which deal with civil matters.

RESOLUTION OF ISSUE 3

Well, I have reviewed the Statements on Oath of the 2nd and 3rd Plaintiffs and the answers given by them under cross-examination and I am of the view that the Plaintiffs have failed to place any material before the Court to show that the 2nd Defendant was being used as debt repayment agent by the 1st Defendant to force the Plaintiffs to repay the debt owed the 1st Defendant. For example, apart from merely stating so, the Plaintiffs did not give the particulars of their harassment by the officers of the 2nd Defendant. As a matter of fact, during cross-examination, the 2nd Plaintiff stated that he was invited to a Police Station and interviewed by an officer of the 2nd Defendant for hours and was later released. The 2nd Plaintiff also admitted that the 2nd Defendant did not extort money from him. The 2nd Defendant said they never had any encounter with the 3rd Plaintiff. The 3rd Plaintiff, however, led evidence to the effect that she was invited by the 2nd Defendant and detained and questioned at a Police Station for hours before she was allowed to go home. She, however, under cross-examination, admitted that the 2nd Defendant did not extort money from her or forced her to give money to the 1st Plaintiff or anybody else.

On the other hand, it is not in doubt that the 2nd Defendant as a law enforcement agency is constitutionally and statutorily empowered to investigate economic and financial crimes reported to it. See sections 6, 7, 14 and 46 of the EFCC Act. In the course of investigating reported cases of economic and financial crimes, the 2nd Defendant is empowered under section 35(1), (c), (4) and (5) of the 1999 Constitution to invite persons suspected of having committed the offence(s) for questioning and this may even involve arrest and detention for up to one or two days depending on

the location the suspect is held and proximity to a Court of competent jurisdiction. See the case of ***Fawehinmi v. IGP (2002) 8 NWLR (Pt. 767) 606 at 679 F-G,*** the Supreme Court held, per Kalgo, JSC, thus:

> *In civil proceedings, investigation is hardly necessary but in criminal proceedings where allegations of crime are made, there is the need to show that there is sufficient evidence to prosecute and this may involve questioning, arrest and even detention, where necessary, of the person(s) involved.*

Similarly, in the case of ***Ekwenugo v. FRN (2001) 6 NWLR (Pt. 708) 171 at 185,*** the Court held that:

> *No citizen's freedom or liberty is absolute. A citizen's right or liberty may be impaired temporally in order to prevent him from committing an offence or if there is reasonable suspicion that he has committed an offence.*

In the case in hand, the 2nd Defendant said they invited the 2nd Plaintiff only for questioning in relation to the 1st Defendant's petition for a few hours after which he was released. I looked at the 1st Defendant's petition to the 2nd Defendant and the title reads:

> FRAUDULENT DIVERSION OF BANK FUNDS BY DR. & MRS. FRANCIS E. U. ISANGEDIGHI – PROMOTERS OF ARITA PHARMACEUTICALS LIMITED.

On the face of the petition, the allegations against the Plaintiffs border on allegations of fraud and economic sabotage. The 2nd Defendant was therefore bound to investigate the matter to know the actual state of

things. Under cross-examination, the 2nd Plaintiff admitted that where there are serious allegations of fraud reported to the 2nd Defendant such as the 1st Defendant's petition against the Plaintiffs in this case, it would be necessary to hear the story of those alleged or suspected to have committed the offence.

In the result, the 2nd Defendant was right and was acting within the ambit of the law to have invited the 2nd Plaintiff (and perhaps the 3rd Plaintiff) for questioning and I so hold. See the case of ***Fawehinmi v. IGP (supra)***

Similarly, the 1st Defendant was right to have reported the case to the 2nd Defendant when the 1st Defendant suspected that the Plaintiffs diverted the funds which they could have used to pay back the debt they owed the 1st Defendant. See the case of ***Ezeadukwa v. Maduka (1997) 8 NWLR (Pt. 518) 635 at 677 B-C,*** the Court of Appeal held that: ***'liability does not attach to a private citizen who merely names a suspect.'***

Accordingly, considering the totality of the evidence placed before this Court by the parties, I find that the 1st and 2nd Defendants are not liable to pay any damages to the Plaintiffs and I so hold.
Issue No. 3 is also determined in favour of the Defendants.

ISSUE 4: Whether the 1st Defendant is entitled to the reliefs sought as stated in the Amended Statement of Defence and Counter Claim.

The parties have agreed that there is an overdraft facility contract between the 1st Plaintiff and the 1st Defendant. See Exhibit P1 and paragraph 4 of the Amended Statement of Claim and paragraph 4 of the 2nd Plaintiff's Written Statement on Oath and paragraph 4 of the Written Statement on Oath of the 3rd Plaintiff. See also paragraph 3 of the Amended Statement of Defence and Counter Claim of the 1st Defendant.

By the same Exhibit P1, the 1st Defendant offered an overdraft facility to the 1st Plaintiff in the sum of N20m. The 1st Defendant, however, disbursed the sum of N5m only and did not disburse further funds in respect of the overdraft facility, stating the reasons for that to be portfolio constraints.

At page 3 of the Exhibit P1, the offer letter, it is stated at paragraph 1 of page 3 thereof, as a condition, that: ***It is the bank's policy to review facilities from time to time in the light of changing market conditions. The bank reserves the right to change at any time without notice and at its discretion the nature and amount of the facility as well as the underlying terms and conditions and security arrangement.***

This Court has already held under Issue 1 that:

1. The overdraft facility contract was not breached by the 1st Defendant when it disbursed only N5million out of the N20million agreed upon based on the above quoted condition in the contract document, Exhibit P1.

2. This Court has also held under Issue 2 of this Judgement that the overdraft facility contract between the 1st Plaintiff and the 1st Defendant as regards the amount of N5million already disbursed to the 1st Plaintiff by the 1st Defendant is still current and enforceable because it is a specialty contract, which has a life span of 12 years from the date the cause of action accrued.

The overdraft facility contract was secured as follows:

1. All Assets Debenture on Company's assets valued at N52million – Exhibit P20.

2. Personal Guarantee of the Company's Managing Director and Vice Chairman supported by a statement of Personal Net Worth – Exhibits P16 and P21, respectively.

3. Receipt of duly confirmed domiciliation of payment agreement from Petroleum Special Trust Fund – Exhibit P2.

It has been established by the 1st Defendant in his written address that the Plaintiffs have admitted paragraph 13 of the 1st Defendant's Amended Statement of Defence/Counter Claim wherein it is stated that:

> ....In further answer thereof, the 1st Defendant avers that upon receipt of the said letter, the Plaintiffs opened up fresh negotiations with the 1st Defendant on when to pay the money which promises they failed to fulfil until 2005 when the 1st Defendant wrote final letter of demand.

Learned Counsel for the 1st Defendant submitted that facts admitted need no further proof and facts not denied by the opponent in the pleadings are deemed admitted. He relied on the case of ***Olowoofoyeku v. Olowoofoyeku (2011) 1 NWLR (Pt. 202) Paragraphs D-F ratio 11.***

It is clear from the facts of the case that the 1st Plaintiff acknowledged its indebtedness to the 1st Defendant to the tune of ₦5million with the interest that was accruing over the period. The 1st Plaintiff also desired to pay back the debt and issued cheques including post-dated cheques some of which were not honoured. The 1st Defendant made several demands for repayment of the debt including via Exhibit P4, P5 and P17.

Even when the overdraft facility expired and the Plaintiffs failed to pay, by Exhibit P14, titled "Memorandum of Understanding" executed on the 21/7/1999, the parties agreed that the debt will be paid by instalments by spreading payments up to the 31/12/2000. The Plaintiffs failed to meet up with that payment schedule. The 1st Defendant wrote reminders by way of letters dated the 06/01/2001, (Exhibit P5) and 05/05/2005, (Exhibit P17). This Court has already held that the debt owed the 1st Defendant by the 1st Plaintiff is current and enforceable.

Moreover, the 2nd and 3rd Plaintiffs guaranteed the overdraft facility and stated that they are liable for as long as the debt is owed. See paragraph 3 page 1 of Exhibits P16 and P21, the Personal Guarantee Form executed by the 3rd and 2nd Plaintiffs, respectively. The wording of paragraph 3, page 1 of Exhibit P16 and P21, respectively is clear. The said paragraphs state:

This Guarantee shall not be considered as satisfied by any intermediate payment or satisfaction of the whole or any part of the

sum or sums owing as aforesaid but shall be a continuing security binding on me and my personal representatives until the expiration of three months after the receipt by you from me or them of Notice in writing to discontinue it, notwithstanding any change in name or style or constitution of customers.

I agree with the submission of the learned Counsel for the 1st Defendant that in view of the continuing Guarantee (Exhibit P16 and Exhibit P21) executed by the 3rd and 2nd Plaintiffs, respectively, their liability is current and valid as the debt owed by the 1st Plaintiff remains unpaid.

The 1st Defendant maintains that up until today the debt is still due and has not been repaid by the Plaintiffs and that neither the 1st Plaintiff nor the 2nd Plaintiff and 3rd Plaintiff ever notified the 1st Defendant in writing to discontinue the Guarantee.

It is noteworthy that apart from the issue raised by the Plaintiffs that the debt is stature-barred, the Plaintiffs never entered any other defence to the counter claim of the 1st Defendant.

The 1st Defendant's counter claim is that the 1st Plaintiff and its guarantors, the 2nd and 3rd Plaintiffs are jointly and severally indebted to the 1st Defendant in the sum of ₦19,199,680.52 as at 31/05/2006 and interest thereof at 25% per annum until payment. Exhibit D2, the statement of Account of the 1st Plaintiff shows that as at 31/5/2006, the 1st Plaintiff owed the 1st Defendant ₦18,199,680.52.

In apparent reply to the counter claim of the 1st Defendant, the Plaintiffs' Counsel, in his Final written address to the 1st defendant's Final written address submitted that the Plaintiffs were never in breach of the overdraft facility agreement. That the Plaintiffs were required to make repayments of the debt from two sub-heads:

a. From contract proceeds directly from the P.T.F.

b. Cash generation from the company's internal operations.

Learned Counsel submitted that proceeds were to flow directly from the P.T.F. and that this was the only guarantee of payment in the entire transaction. That the P.T.F. and the 1st Plaintiff made a guarantee to the 1st Defendant as regards the repayment and that having made that guarantee, Exhibit P2, which is the letter of domiciliation of payment, dated the 04/02/1998, the 1st Plaintiff was no longer to be held to repay any fund which the P.T.F. had undertaken to pay. That the 1st Defendant's witness, Mr. Abimbade Olumide Dere, DW1, in cross-examination when asked who ought to have paid back the money, answered that the proceeds were supposed to come directly from the P.T.F. That the DW1 was shown the Exhibit P2 and identified it.

Learned Counsel argued that it was surprising that the 1st Defendant filed its defence to the Plaintiffs' claim and added a counter claim and yet never deemed it necessary to join the P.T.F. as a party. That the DW1, when asked whether the P.T.F. had written a letter to the 1st Defendant showing that the 1st Plaintiff had completed the jobs, he answered no. That the DW1 also answered in the negative when asked if the 1st Defendant has

sued P.T.F. for the guarantee it undertook to pay the 1st Defendant directly.

Learned Counsel further argued that a contract of guarantee must be made in writing, hence Exhibit P2 was put in writing. He relied on the case of ***Okeaya-Inneh v. Quality Finance Limited (2006) ALL FWLR (Pt. 300) 1632.***

Learned Counsel also relied on the case of ***Nwankwo v. E.D.C.S. (2007) ALL FWLR (Pt. 360) 1448 at 1453,*** where it was held that the Creditor is now entitled to proceed against the guarantor without or independent of the incident of the default of the principal debtor, immediately the debtor becomes unable to repay the outstanding debt.
The Court further held that a guarantor is bound by the written agreement he entered into.

It was the submission of Counsel, therefore, that not having joined or sued the P.T.F., who had undertaken to indemnify and pay directly to the 1st Defendant, the Plaintiffs cannot be said to be indebted to the 1st Defendant as regards the overdraft facility.

Furthermore, learned Counsel submitted that it was also provided in the repayment clause in Exhibit P1 that cash generation from the Company's internal operations was to constitute a mode of payment. That the 1st Defendant's only witness under cross-examination, agreed that the Plaintiffs have paid the sum of ₦1.5million. It was the submission of Counsel that the other sums allegedly owed the 1st Defendant ought to

have been sourced from the P.T.F., but that the 1st Defendant never joined the P.T.F. in the counter claim or sued the P.T.F. independently. That the 1st Defendant had abandoned the counter claim as no issue has arisen from the said counter claim.

The 1st Defendant's Counsel, in response to the submission by the Plaintiffs that the P.T.F was the guarantor of the debt by virtue of Exhibit P2 and that the 1st Defendant should go to the P.T.F. to look for repayment, stated that the Plaintiffs' Counsel's submission is based on a misconception. The 1st Defendant's Counsel submitted that Exhibit P2 is not a guarantee but as the title shows, "domiciliation of payment." He submitted further that the cases of ***Okeaya-Inneh v. Quality Finance Limited (supra)*** and ***Nwankwo v. E.D.C.S. (supra)*** cited by the Plaintiffs' Counsel deal with contract of Guarantee whereas the Exhibit P2 in the case in hand has to do with domiciliation of payment, which the Plaintiff himself has breached. That the above cited two cases do not apply to the circumstances of the present case as regards Exhibit P2.

Learned Counsel further distinguished the concept of domiciliation of payment from Guarantee when he cited in aid the Court of Appeal decision in the case of ***Umegu v. Oko (2001) 17 NWLR (Pt. 741) 142 at pp. 157 D-F, 158 A-C, Ratio 2 and page 156 A-D, Ratio 3,*** where the Court explained the meaning and effect of a guarantee. The Court of Appeal stated as follows:

> *"Collateral agreement for performance of another's undertaking or an agreement in which the guarantor agrees to satisfy the debt of another (the debtor) only if and when the debtor fails to pay...*

In that same case, the Court stipulated the ingredients of a legally binding guarantee as follows:

a. There must be three parties involved in the contract, viz:
b. (i) a Creditor
   (ii) a Principal debtor
   (iii) a Promissory who undertakes to discharge the principal debtor's liability should the latter fail to discharge it himself
c. There must be an agreement between the parties.
d. The agreement must be in writing and if not under seal, there must be valuable consideration.
e. The Contract or agreement must not be illegal as illegality generally renders any contract null and void *ab initio* and the party seeking to enforce it will have no remedy in a Court of law.

Learned Counsel submitted that Exhibit P2 in this case is not an agreement between the Plaintiffs and the 1st Defendant and the P.T.F. evidencing any guarantee or promise or undertaking by P.T.F. to satisfy any debt owed by the Plaintiffs to the Defendant if the Plaintiffs refused to pay and so it is not a guarantee. It was further submitted that there is no agreement under seal or at all between the 1st Defendant and the P.T.F. and that there is no consideration flowing either way. That the P.T.F. is not privy to the contract between the Plaintiffs and the 1st Defendant. That as a general rule, a contract affects only persons thereto and cannot be enforced by or against a person who is not a party to it. That the contract in this case is between the Plaintiffs and the 1st Defendant and the P.T.F. is not privy to it so the P.T.F. cannot sue or be sued on the contract. Learned

Counsel relied on the case of ***Makwe v. Nwukor (2001) 14 NWLR (Pt. 733) 356, Ratio 1 at p. 372 B-F, 378 E-F and 381 D.***

Furthermore, learned Counsel submitted that the guarantors of the overdraft facility in this case are the 3rd and 2nd Plaintiffs via Exhibits P16 and P21 and not P.T.F. That Exhibit P2 which the P.T.F. wrote to the 1st Defendant is not a guarantee and cannot be construed as a guarantee to repay the debt for which the P.T.F. can be sued by the 1st Defendant. He submitted that the pronouncement of the Supreme Court in ***Nwankwo v. E.D.C.S. (supra)*** does not apply to the special circumstances of the present case.

Learned Counsel submitted that in view of the admission of the Plaintiffs that they eventually collected the entire contract proceeds via another bank that is not the 1st Defendant, the issue of P.T.F's involvement by way of being joined as a party pursuant to the 1st Defendant's counter claim has become an academic exercise that is of no moment in this case.

The 1st Defendant's Counsel also denied that the 1st Defendant has abandoned the counter claim as alleged by the Plaintiffs. Learned Counsel for the 1st Defendant argued that the 1st Defendant pleaded facts in support of the counter claim and also gave evidence through DW1 in support of the counter claim. That the 1st Defendant also relied on several Exhibits including Exhibit P1, the Overdraft Facility Offer Letter, Exhibit P15, the Application for Facility, Exhibits P16 and P21, being the Guarantee signed by the 3rd and 2nd Plaintiffs, respectively, Exhibit P22, being the

Promissory note, Exhibit D2, being the Statement of Account of the 1st Plaintiff showing that the 1st Plaintiff is indebted to the 1st Defendant.

Learned Counsel also referred to the admission of PW1 and PW2 during cross-examination that the Plaintiffs have only paid the sum of ₦3.6million. That with these pieces of evidence, it cannot be said at law that the 1st Defendant has abandoned the counter claim. He urged the Court to discountenance the reply filed by the Plaintiffs and dismiss the claim as baseless and grant the counter claim.

RESOLUTION OF ISSUE 4

The fact about the loan of ₦5million given to the 1st Plaintiff by the 1st Defendant is not in dispute. The Plaintiffs agreed that ₦5million was given to the 1st Plaintiff out of the ₦20million agreed upon by the parties. The Plaintiffs have also admitted that they have only paid ₦3.6million out of the debt. Despite several demands, the Plaintiffs did not pay up the entire debt. The Memorandum of Understanding executed by the parties and the repayment schedule was not followed by the Plaintiffs. Part of the debt remains unpaid.

The Overdraft Facility contract was executed on the 09/02/1998. By the time the Plaintiffs instituted this Suit in 2007, the Plaintiffs pleaded in their Amended Statement of Claim that the Plaintiffs are no longer indebted to the 1st Defendant because the debt has lasted for more than 6 years. The Plaintiffs also led evidence to show that even if the debt was still current and enforceable, it is the P.T.F., the supposed Guarantor of the Overdraft facility that should be held responsible to repay the debt and not the Plaintiffs. That since the 1st Defendant did not join the P.T.F., the supposed

Guarantor, as a party to the counter claim, the 1st Defendant seemed to have abandoned the counter claim.

I have reviewed the submissions of Counsel on both sides and this Court aligns itself with the submissions of the learned Counsel for the 1st Defendant that the 1st Defendant did not abandon the counter claim. That the 1st Defendant had no right to sue the P.T.F. for the debt or join the P.T.F. as a party for recovery of the debt because the 1st Defendant has no privity of contract with the P.T.F. The overdraft facility contract is between the 1st Defendant and the 1st Plaintiff, and the Guarantors are the 2nd and 3rd Plaintiffs who executed the guarantee, being Exhibits P21 and P16, respectively.

Furthermore, I find that Exhibit P2 is not a guarantee but a mere letter of domiciliation of payment written by the P.T.F. to the 1st Defendant as a security for the debt owed the 1st Defendant by the 1st Plaintiff. It does not amount to a guarantee. See the case of ***Umegu v. Oko (2001) 17 NWLR (Pt. 741) 142 at pp. 157 D-F.*** See also the case of ***Makwe v. Nwukor (2001) 14 NWLR (Pt. 733) 356, Ratio 1 at p. 372 B-F,*** which explains the concept of privity of contract.

I agree that the 1st Defendant is not entitled to proceed against the P.T.F. to recover the debt owed by the 1st Plaintiff because P.T.F. never acted as guarantor of the overdraft facility in question and I so hold.

The 2nd and 3rd Plaintiffs admitted in their respective testimonies before the Court, under cross-examination, that the 1st Plaintiff was eventually paid by P.T.F, the entire contract proceeds through another bank, UBA, Plc., and

not the 1st Defendant. During the examination-in-chief of DW1, the 1st Defendant led evidence to show that the 1st Plaintiff owes the 1st Defendant a debt of over ₦19million and tendered in evidence, Exhibit D2, being the Statement of Account of the 1st Plaintiff.

With all this evidence placed before the Court, this Court is satisfied that the 1st Defendant never abandoned the Counter Claim but has sufficiently adduced material evidence before this Court to support the Counter Claim. See Exhibits P1, P4, P9, P15, P16, P21, P22 and D2, respectively.

The 1st Defendant to my mind has proved its Counter Claim.
On the other hand, I find that the Plaintiffs who dragged the Defendants to Court in this Suit have not placed sufficient material, as evidence, before this Court to substantiate their claim. The burden of proof is on the Plaintiffs to prove their case on the preponderance of evidence and balance of probability. See sections 133, 134 and 136 of the Evidence Act, 2011. See also the case of ***Agala v. Egwere (2010) ALL FWLR (Pt. 532) 1609, S.C.***

In the present case, the Plaintiffs have failed to discharge the burden placed on them by law, whereas, the 1st Defendant/Counter Claimant has discharged that burden as regards its counter claim.

In the result, the Suit of the Plaintiffs fails, while the Counter Claim of the 1st Defendant/Counter Claimant succeeds.
On the whole, Issue 1, Issue 2, Issue 3 and Issue 4 have all been resolved in favour of the 1st and 2nd Defendants.

Accordingly, I make an Order dismissing the Suit of the Plaintiffs. The Counter Claim is upheld by this Court and the same is granted as prayed.

I make no Order as to costs.

This shall be the Judgement of this Court in this Suit.

JUDGE
FEDERAL HIGH COURT
LOKOJA

Hon. Justice Phoebe Msuean Ayua
Judge
Wednesday, the 25th day of May, 2016

Parties: The 3rd Plaintiff is present in Court and all the other parties are absent from Court.

Appearances: Patrick Ekuri, Esq., for the Plaintiffs; C. M. Nwaka, Esq. for the 1st Defendant, and C.A. Okoli, Esq., for the 2nd Defendant.

JUDGE
FEDERAL HIGH COURT
LOKOJA

Hon. Justice Phoebe Msuean Ayua
Judge
Wednesday, the 25th day of May, 2016

CERTIFIED TRUE COPY
BANK
SIGN.
DATE