IN THE SUPREME COURT OF NIGERIA

Suit No: SC42/1975

Petitioner: Festus Sunmola Yesufu
And
Respondent: African Continental Bank Limited

Date Delivered: 1969-12-31

Judge(s): Atanda Fatayi-Williams, Charles Olusoji Madarikan, Mamman Nasir .

Judgment Delivered

The plaintiffs, now respondents, are commer'cial bankers. In proceedings commenced by them in the High Court at Benin City, they claim from the defendant, now appellant) the sum of '376,320.10.10d being debt due from and payable by the defendant to the plaintiffs plus interest at the rate of 9% per annum from the date of the issue of the writ of summons until judgment or payment. The said amount is shown in the defendant\'s account with the plaintiffs as debit balance.

The plaintiffs also sought an order of the court to foreclose for the purpose of sale, either by public auction or by private treaty, the two properties at Ward C, Lawani Street, Benin City, mortgaged by the defendant to the plaintiffs by way of deposit of title deeds. One deed was registered as No 41at page 4l in Volume 40 of the Lands Registry at Benin City and the other as No 22 at page 22 in Volume 40 of the Lands Registry in the same office at Benin City.

In a reserved judgment delivered after hearing evidence from both parties, the learned trial judge, rightly in our view, summarised the issues raised both by the pleadings and by the evidence given in support as follows:-

(i) Whether a case for foreclosure has been made in respect of the two properties referred to above;

(ii) whether the defendant operated Account No 2285 in the Ring Road Branch, Benin City, of the Plain'tiffs\' Bank, and if so, whether the account is overdrawn or in debit as claimed by the plaintiffs; and

(iii) if the account is overdrawn, the amount for which the defendant is liable.

He, however, struck out the claim for an order to foreclose on the two properties on the ground that the proper procedure had not been followed.

On the other matters in issue, the learned trial judge made certain crucial observations with respect to the testimony of Edward Oritseje, the only witness who testified for the plaintiffs and who produced the defendant\'s statement of account (Ex. B) showing the account number given to the defendant as 2285. These observations are, no doubt, based on part of the evidence given by Edward Oritseje in answer to questions put to him first in the examination-in-chief and later under cross-examination. The relevant portion of his evidence-in-chief reads -

\"We prepared the statement of account sent to the defendant from the Ledger Card in which the account is kept by the Bank for the defendant. Before the statements are sent out I see them.

The statements are prepared by the Machinist from the Ledger Card. I now say that the statement are prepared by the Machinist from the vouchers day by day. As the vouchers are typed to the statement by the Machinist, they are also typed in the Ledger Card. At the end of the month the statements with the Ledger Card are sent to the Supervisor who checks them. They are later again sent to the Accountant of the Bank who examines both the posting and the checking. They are then sent to me as the Manager to vet to ensure that all the officers have done their duty before the statement leaves the Bank. After checking by me they are sent to the customer.

This procedure I have described was adopted in every case before defendant\'s statements of account were dispatched to him. We do not send statements along with ledger cards to customers. We send only the statements "'.

I see the document shown to me. It is a true copy of the combined statement of account which we have been sending to the defendant.\"

(The underlining is ours).

After some arguments, the statement of account showing the amount claimed as the outstanding balance was admitted as Ex. \"B\".

In his judgment, the learned trial judge observed that Edward Oritseje (1st P1/W) admitted that the debit slip (Ex. T) is a duplication of another debit slip (Ex. Tl) and was repeated in the statement of account (Ex. B) and that he (the 1st Pl/W) explained that the error was clerical. He also pointed out that the 1st Pl/W further admit'ted -

(a) that he did not scrutinise state'ment of account (Ex. B) before it went out although he saw it;

(b) that up till 16th August, 1972 when he was still testifying in court he had still not had the opportunity of scrutinising the said statement of account; and

(c) that the commercial transactions of the defendant were in United States Dollars and that the con'version of the dollars to ster'ling (Nigerian pounds) which, incidentally, resulted in a short-fall for the defendant, was carried out at the head office of the plaintiffs' Bank in Lagos.

Eventually, the learned trial judge gave judgement for the amount claimed as shown on the statement of account (Ex. B) less the sum of '10,123.19.3d after finding the following facts proved -

(a) that the defendant was at all material times a customer of the plaintiffs\' Bank and maintained at their Ring Road, Benin City Branch Account No 2285)

(b) that the defendant applied for and obtained overdraft facili'ties in the Bank and made use of the liberal overdraft faci'lities granted to him and that he obtained heavy overdraft from the Bank which he has been unable to repay; and

(c) that Ex. B the certified copy of the statement of account is a true copy of the statement of account kept by the plaintiffs for the defendant.

Thereafter, the learned trial judge observed as follows:-

'Three points of substance were made by learned counsel for the defence against the statement of account. These are the debit of 'l0.5.0d interest on 29th November, 1966, double debit of ' 10,099.4.3d made on 4th March, 1971 which was admitted by plaintiffs' witness, and the debit of '10,099.3d for loss re-devaluation of sterling debited to the defendant on 14th August, 1969.

There is no counter-claim before me in respect of Overseas Bills for collection deposited with the plaintiffs and not collected.

The evidence shows that the defendant was not credited with the value of these Bills and as the claim before me is based on the account of monies received and cre'dited to the defendant\'s account and monies paid out to him or at his order to others, the Bills not realised cannot be considered and cannot affect this claim.'

The defendant has now appealed against the judgment. Although, with the leave of this court, four grounds of appeal were filed in substitution for the original grounds of appeal, the only ground argued by learned counsel for the defendant,

appellant reads -

\"The learned trial judge erred in law in admitting Ex. B (the alleged copy of entries in the statement of the defendant\'s Bank Account) in evi'dence without any proof that -

(a) there was in existence a banker\'s book from which the entries about the said Account, were made;

(b) the book was, at the time of making the entries, one of the ordinary books of the bank;

(c) the entries were made in the usual and ordinary course of business;

(d) the book is in the custody and control of the bank; and

(e) the copy of the entries sought to be tendered has been examined with the original entries and found correct.\"

In the course of his argument in support of the appeal, learned counsel referred us to part of the testimony of the first and only witness called by the plaintiffs to which we have referred earlier. He also referred us to the answer given by the witness when he was asked whether he had prepared a certified true copy of the statement of account of the defendant for the purposes of the case in hand which reads -

\"I see the document shown to me. It is a true copy of the combined state'ment of account which we have been sending to the defendant.\"

He then pointed out that the statement was admit'ted in evidence as Exhibit \"B\" notwithstanding the strong objection of learned counsel for the defen'dant/appellant on the ground that the plaintiffs/ respondents had not complied with the procedure laid down in section 96 of the Evidence Act Cap. 62 (hereinafter referred to as the Act). Learned counsel then referred to the provisions of sections 96(1)(h) and 96(2)(e) of the Act which deal with the admissibility of a document which contains an entry in a \"banker\'s book\" and submitted as follows. The provisions of section 96 would not be of any avail to the plaintiffs/respondents because there was no question of any \"banker\'s book\" in the case in hand. To make a Ledger Card admissible, section 96(2) (e) of the Act would need to be amended, but until it is so amended, Ledger Cards which are not banker\'s books as defined in the Act, can only be admit'ted in evidence if they are brought to court and tendered in accordance with the provisions of section 90 subsections (1), (4) and (5) of the Evidence Act. As the statement (Ex.B) is not shown to be an entry from a banker\'s book but was compiled from a Ledger Card, it was wrongly admit'ted. Learned counsel further submitted, in the alternative that even if the \"Ledger Card\" is con'sidered to be a \"banker\'s book\", for the statement compiled from it to be admissible, the prelimina'ries prescribed in section 96(2) (e) must be com'plied with. As there is no evidence that this was done, the statement was admitted in error. More'over, to make confusion worse confounded, learned counsel also submitted, the 1st plaintiff witness said that the \"statements were prepared by the machinist from the vouchers\". As the \"vouchers\" cannot be regarded as \"banker\'s books\", the statements \"prepared\" from them are still not admissible under section 96(2)(e) of the Act. Finally, learned counsel submitted that, as the plaintiffs/respondents\' case was based on the statement (Ex.B), the wrongful admission of the statement has knocked the bottom out of the plaintiffs/respondents\' claim, and that the only order which the court could, and should have made in the circumstances is to dismiss the plain'tiffs/respondents' claim in its entirety.

In reply, learned counsel for the plaintiff/respondent submitted that where a document is expressly pleaded in the circumstances set out in Paragraph 9 of their statement of claim, there is no necessity to serve notice to produce the origi'nal in view of the provisions of the proviso to section 97 of the Act. When it vas pointed out to learned counsel that section 97 is irrelevant, firstly, because it deals only with notice -to pro'duce an original document where a party wishes to prove a copy of the document by virtue of the pro'visions of section 96(1) (a) of the Act, and secondly, because the original document (the voucher) in the case in hand is with the Bank, he did not pursue this argument. Learned counsel, however, referred us to \'the letter (Ex. B) written by the defendant/appellant to the plaintiffs/ respondents and submitted that the defendant/ appellant never denied owing the bank some money. That being the case, learned counsel observed, it would be in the interest of justice, assuming there is merit in the submissions of learned counsel for the defendant/appellant, to allow the appeal and non-suit the plaintiffs/respondents

In our view, there can be no doubt, both from the pleadings and from the evidence adduced by both parties, that the plaintiffs/respondents\' claim was baaed on the statement of account (Ex. B). This view is supported by the averments in paragraphs 10 and 11 of the statement of claim which read -

\"10. At the close of business on 15th January, 1972, the defendant\'s said account according to the books kept by the plaintiffs showed a total sum of '376,320.l0.l0d debit which sun includes interests, bank charges, commissions and other charges as afore'said.

11. The plaintiffs will at the hearing of this suit tender the said statement of account of the defendant numbered as 2285 on which the suit shall be founded.\"

The learned trial judge also had the statement of account (Ex. B) very much in mind when he was delivering his reserved judgment. In this con'nection, we think it is pertinent to refer to that part of his Judgment which reads -

\"Counsel submitted that Ex. B is admissible, being certified true copy of entries in the books of the plaintiffs' Bank. I hold it is admissible "

I find as a fact that Ex. B the certi'fied copy of statement of account is a true copy of the statement of account kept by the plaintiff s for the defendant.\"

The next question is, was the statement of account properly admitted in evidence and if it was hot, to what extent would it affect the plaintiffs/respondents' claim'

It must be recalled that the claim is for '376,320.10.104, the sane amount referred to in paragraph 10 of the statement of claim as the debit balance of the defendant\'s \"account accord'ing to the books kept by the plaintiff\". Since the evidence adduced by the plaintiffs\' first and only witness showed that the statement of account (Ex. B) was prepared or compiled from a \"voucher\", can it be regarded as \"an entry in a banker\'s book\" thereby making its contents admissible in evidence by virtue of the provi'sions of section 96(2)(e) of the Evidence Act' We think not for the following reasons.

Although section 96(l)(h) of the Act pro'vides that secondary evidence may be given of the existence, condition or contents of a docu'ment where the document is an entry in a banker\'s book, a \"banker\'s book\" is defined in. section 2 of the Act as including \"ledgers, days books, cash books, account books and all other books used in the ordinary business of a bank\". Admittedly, this definition is not restrictive and could there- fore be extended to mean something else which it does not ordinarily mean. Therefore, while the phrase may include \"a ledger card\", although even this is far from clear, we do not think it could ;be extended to mean a \"voucher\" from which, according to the evidence, the entries in the statement of account (Ex. B) were obtained.

That being the case, the statement could not be admitted as secondary evidence of the entries in banker\'s book by virtue of the provisions of section 96(l)(h) of the Act and the learned trial judge was in error in admitting it as such.

Even if the statement of account (Ex. B) could have been admitted as secondary evidence under section 96(l)(h) of the Act, it could have been so admitted only in accordance with the procedure laid down in section 96(2)(e) thereof which reads :-

\"96 (2) The secondary evidence admis'sible in respect of the original documents referred to in the several paragraphs of subsection (l) is as follows:-

(e) In paragraph (h) the copies cannot be received as evidence unless it be first proved that the book in which the entries copied were made was at the time of making one of the ordinary books of the bank, and that the entry was made in the usual and ordinary course of business, and that the book is in the custody and control of the bank, which proof may be given orally or by affidavit by a partner or officer of the bank, and that the copy has been examined with the

original entry and is correct, which proof must be given by some person who has examined the copy with the original entry and may be given orally or by affidavit.\"

We have considered the scope of this section in The State v Olomo (unreported but see SC.1/1970 delivered on 29th October, 1970). We observed in our decision in that case as follows:-

\"It is not the length of evidence given in tendering a bank state'ment of account that matters but the substance of the evidence given; nor is it compulsory that the pre'cise words set out in section 96(2)(e) should be used by the wit'ness or the judge taking down his evidence. It is enough that substantially the requirements of the section are observed: \'e.g.

(i) where it is not possible to produce the book of the bank, a certified copy of the account is enough to satisfy the court that there is a book in exis'tence from where copies were made,

(ii) if certified by an official of the bank giving evidence, this presupposes that he has compared the copy with the original before he certified it, and

(iii) if the books of the bank were produced by the manager or the accountant, this, must have been in the custody and control of the bank.'

It is sufficient to point out that, in the case in hand, none of the requirements of section 96(2) (e) as explained in The State v Olomo (supra) was complied with by the plaintiffs. All that the 1st Pl/W did with the statement of account was \"to vet to ensure that all the officers have done their duty before the statement leaves the Bank\". He did not say that he examined it with the original entries and found it correct or that the \"voucher\" was one of the books kept by the Bank. On the contrary, the witness testified under cross-examination as follows:-

'I did not scrutinise Ex. B and Ex. Bl before they went out although I saw them. Up till this morning I have never had the opportunity of scruti'nising Ex. B.\"

For all these reasons, we think that the statement of account should not have been admitted in evi'dence under that section and the learned trial judge was again in error in admitting it as he did.

There is one other point. Could the statement of account have been admitted under section 37 of the Act' The section reads -

\"37. Entries in books of account, regularly kept in the course of business, are relevant whenever they refer to a matter into which the court has to inquire, but such state'ments shall not alone be sufficient evidence to charge any person with liability.\"

The section was considered by this court in Esso West Africa Inc. v. T. Oyegbola (1969) 1 N.M.L.R. where we observed at page 198 as follows:-

\"Besides, section 37 of the Evidence Act does not require the production of 'books' of account but makes entries in such books relevant for purposes of admissibility. The evi'dence describes the cards sought to be tendered as ledger cards, meaning that they are cards from a ledger or constitute a ledger. The law cannot be and is not ignorant of modern business methods and must not shut its eyes to the mysteries of the computer. In modern times, \"reproduction or inscriptions on ledgers or other docu'ments by mechanical process are common place and section 37 cannot therefore only apply to 'books of account \' ..... so bound and the pages ..... not easily replaced.\"

Again the entries in the statement of account (Ex. B) cannot be regarded as entries in 'books of account' for the purpose of this section because there is positive evidence that they are \"prepared by the machinist from the voucher'. Moreover, the record of proceedings shows that the statement was not tendered under section 37 but under section 96(l) (h) of the Evidence Act. For these reasons, we do not think that the statement of account (Ex. B) could have been admitted under section 37 of the Act.

Finally, while we agree that, for the pur'pose of sections 96(l) (h) and 37 of the Act, \"banker\'s books\" and \"books of account\" could in'clude \"ledger cards\", it would have been much better, particularly with respect to a statement of account contained in a document produced by a computer, if the position is clarified beyond doubt by legislation as had been done in England in the Civil Evidence Act 1968. Section 5 subsec'tions (1) and. (2) of that Act provide that in any civil proceedings a statement contained in a document produced by a computer would, subject to rules of court, be admissible as evidence of any fact stated therein of which direct oral evidence would be admissible, if it is shown that certain conditions are satisfied in relation to the statement and computer in question. These con'ditions are -

(a) that the document containing the statement was produced by the computer during a period over which the computer was used regu'larly to store or process infor'mation for the purposes of any activities regularly carried on over that period, whether for pro'fit or not, by any body, whether corporate or not, or by any indi'vidual;

(b) that over that period there was regularly supplied to the compu'ter in the ordinary course of those activities information of the kind contained in the state'ment or of the kind from which the information so contained is derived;

(c) that throughout the material part of that period, the computer was operating properly or, if not, that any respect in which it was not operating properly or was out of operation during that part of that period was not such as to affect the production of the documents or the accuracy of its con'tents; and

(d) that the information contained in the statement reproduces or is derived from information supplied to the computer in the ordinary course of those activities.

Be that as it may, it is manifest that, in the case in hand, the document (Ex.B) on which the plaintiffs/respondents\' claim is predicated was admitted in error. The next question is this. Should the plaintiffs/respondents' claim, for this reason only, be dismissed in toto' In considering what order to make, we cannot ignore the contents of the letter (Ex. 0) written by the defendant/ appellant in reply to the plaintiffs/respondents\' letter (Ex. N). The letter (Ex. N) dated 8th July, 1971, reads '

\"F. S. Yesufu, Esq.,
P.O. Box 151,
Benin City.
Dear Sir,

Your outstanding debt of '274, 790.l8.6d

We writes you as solicitors of the African Continental Bank Limited and have instructions to demand your immediate pay'ment to the Bank of the sum of '274, 790.l8.6d (Two hundred and seventy four thousand, seven hundred and ninety pounds eighteen shillings six pence) being the balance of your debt at Ring Road, Benin City Branch of the Bank originating from transactions between you and the said Bank in May, 1967.

It is our instruction that several demand notices have been sent to you by the said bank to settle this debt but you have proved adamant. We are instructed therefore to demand your immediate settlement of this out'standing debt to the bank within 14 (fourteen) days from the date of this letter failing which we shall have to carry out our further instruction of taking you to court for the recovery of the said debt with costs thereto. We shall do this without further notice to you.

Yours faithfully,

(Sgd.) C, I. Okoye
Solicitor.\"

The reply (Ex. 0) dated 21st July, 1971, reads:-

\"The Senior Solicitor,
African Continental Bank Ltd.
Head Office.
P.M.B. 2466, Lagos.

Dear Sir,
Re: My overall indebtedness

I intend to liquidate my total indebtedness with the Bank on or before the end of September 1971, or substantially reduce the amount. The two months should be regarded as months of grace to enable me double my efforts towards the clearance of this adverse balance.

Considering my past relationship with the bank, I hope you will use your good offices to make this considera'tion; I will also like the senior soli'citor to give me some time to reconcile some of the outstandings which are ex'pected to be credited to my account to reduce my indebtedness and have not been done.

Litigation as you know is pro'tracted and might not be in the inte'rest of the cordial relationship that has always existed between the bank and myself.

Kindly give this my unflinching proposal your consideration. If I fail you can go on with your court auction for recovery. I give my honour on this transaction and I won\'t fail.

I have outstanding bills and as soon as they mature or the proceeds are received, I will pay same to reduce the balance and I am also ex'pecting some money from Finance Houses for the expansion of my business.

Be rest assured that I will not fail.

Yours faithfully,

for: Sarah & Yesufu Trading Company.

(Sgd.) F. S. Yesufu,
Managing Director.\"

(The underlining is ours).

In view of the admission made in Ex. O, we do not think that it will be fair or just to dis'miss the plaintiffs/respondents\' claim in its entirety. We must, nevertheless, allow this appeal for the reasons we have stated earlier. The appeal is allowed and the judgment of the learned trial judge in Suit No. B/10/72, deli'vered in the High Court sitting in Benin City on 16th August, 1974, including the order made by him as to costs, is set aside. Instead we non'suit the plaintiffs/respondents and this shall be the judgment of the court. Costs in favour of the defendant/appellant are assessed in the court below at N500 and in this court at N364