YAKUB DAUDA, ESQ.

V.

ACCESS BANK PLC

COURT OF APPEAL

(ILORIN DIVISION)

CA/IL/54/2015

MOHAMMED LADAN TSAMIYA, J.C.A. (*presided*)

NDI NWAOMA UWA, J.C.A.

HECHUKWU ONYEMENAM, J.C.A. (*read the leading judgment*)

TUESDAY, 22ND MARCH 2016

ACTION – case of party- how considered- need to construe pleadings jointly and not severally- need to read statements on oath conjunctively.

APPEAL- finding of fact – error in finding of fact by court – when will be set aside by the appellant court – when appellate court will not interfere therewith.

RANKING – dishonor of cheque – when bank liable therefor.

RANKING – wrongful dishonor of cheque – damages therefor – nature of – how awarded.

COURT – decision of court – when perverse – where perverse – how treated.

COURT – evaluation of evidence – duty of trial court in respect of.

DAMAGES – damages – meaning of – general damages – what is.

DAMAGES – wrongful dishonor of cheque – damages therefor nature of – how awarded.

ESTOPPELS – doctrine of estoppels – operation of.

EVIDENCE – contradiction – contradiction in evidence – what constitutes.

EVIDENCE – documentary evidence – oral evidence – relationship between.

EVIDENCE – estoppels – doctrine of – operation of.

EVIDENCE – evaluation of evidence – duty of trial court in respect of.

EVIDENCE – proof – standard of proof in civil cases.

EVIDENCE – statement – where forms part of conversation, document, book or series of letters or papers – evidence which shall be given – section 33, evidence act, 2011.

JUDGMENT AND ORDER – decision of court – when perverse – where perverse – how treated.

PRACTICE AND PROCEDURE – appeal – finding of fact – error in finding of fact by court – when will be set aside by the appellate court – when appellate court will not interfere therewith.

PRACTICE AND PROCEDURE – case party – how considered – need to construe pleadings jointly not severally – need to read statements on oath conjunctively.

PRACTICE AND PROCEDURE – decision of court – when perverse – where perverse – how treated.

PRACTICE AND PROCEDURE – proof – standard of proof in cilvil cases.

WORDS AND PHRASES – Damages – meaning of.

Whether the trial court failed to properly evaluate and ascribe probative value to evidence led by the parties and whether the failure occasioned a miscarriage of justice on the appellant.

Issues

The appellant, a legal practitioner, operated an account on the respondent. The account was known as intercontinental premium saving account (IPSA). The respondent later took over defunct intercontinental bank and the account became known as access premium savings account (APSA).

On 15th march 2013, the appellant issue a cheque, exhibit with no. 00000380 to one Alhaji Abdulazeez oloriegbe for the amount of seven hundred and fifty thousand naira (N750,000.00). The cheque was presented on 18th march 2013 for encashment dishonoured. On 19th march 2013, the appellant and the said Alhaji Abdulazeez Oloriegbe went to bank and reoresented the cheque. The cheque was again dishonoured and they were asked represent the cheque next day, 20th march 2013. The cheque represented on 20th march 2013 and for third time and was still dishonoured.

The respondent advised the appellant, who contended that he is a balance of N1,250,341.27 in his account as at 18th march 2013 when the cheque was presented, to apply for his statement account for the period of 5th march 2012 to 20th march 2013 appreciate an incidence of double impactment of N782,500.00 his account as a result of computer error which affect 214 account of which appellant account was inclusive. The appellant applied for

his statement of account by a letter, exhibit "I", for the period from 1st November 2012 to 20th march 2013. When statement of account, exhibit "C", was issued appellant on 1st march 2013, it showed his credit balance as N1,250,341.27.

The appellant then wrote a letter to the respondent showing his pleasure for dishonouring his cheque without any justification and made claims. The respondent did not reply the letter.

Aggrieved, the appellant instituted an action against the respondent at the high Court of kwara state for wrongful dishonor of seeking declaratory reliefs, damages for denials of lawful use of his property, financial embarrassment and loss profitable financial opportunity and damages for the defamation of his character by the respondent.

At the conclusion of trial, the trial court in its judgment found that as at 18th march 2013 when the cheque was initially presented, the outstanding balance of the appellant was N467,841.27 consequentlythe trials court dismissed the appellant's claims.

Aggrieved by the judgment, the appellant appealed to the court of appeal.

In determining the appeal, the court of appeal considering the provision of section 33 of the evidence act, 2011 which reads thus.

> "33. When any statement of which evidence is given forms a longer part of a longer statement, or of a conversation or part of an isolated document, or is contained in a document which forms parts of a book. Or of a connected series of letters or papers,

evidence shall be given of so much and no more of the statement, conversation, document, books or series of letters or papers as the court considers necessary in that particular case to the statement, and of the circumstances in which it was made."

Held (unanimously allowing the appeal):

1. *On duty on trial court in respect of evaluation of evidence –*

   It is the primary duty of a trial court to evaluate and ascribe probative value to evidence adducted by witness called by parties before making pronouncement on the case presented before it is adjudication. A trial courts is duty-bound to put the evidence adducted by the plaintiff on one sides of the scale and that of the defendant on the other sides the scale and weigh them together. It is after doing this that it will then see which is heavier, not by the number of witness called by each party but by the quality of probative value of the testimonies of the witness called. This exercise is a binding duty a trial court before it can arrives at a just decision in a matter placed before it for adjudication. Where a trial court failed in its binding duty to evaluate and ascribe probative value to the evidence adduced before it, an appellant court will not hesitate in entering the shoes of a trial court by doing what the trial court ought to have done but failed to do.[*Adenuga v. Okelola* **(2008) All FWLR (Pt. 398) 292 referred to.]** (P.42, paras. B-E).

2. *On what is contradiction in evidence –*

Evidence is said to contradict one another when it assert or affirms the opposite of what the other asserts or affirms and not where there are some minor discrepancies or omission in details. It is usual and natural a clear evidence of honest testimony when two people or witness narrating an event especially an event of the past, do not relay the event recorded in human memory is spoken with some degree of memory. Witnesses who had been drilled to memorise the lines of evidence they have been coach to give. No two humans are at per with the narration of what had been assimilated and stored in their senses. Consequently, the court will not regard every discrepancy or inconsistency of witness as contradiction except where it is a fact that is central to the issue before the court and each of the witnesses asserts or affirms the opposite of the evidence of the other. In the instant case, a combined reading of the respondent's statements on oath revealed that there were no contradictions in the evidence of the respondent's witnesses as alleged by the appellant.

There were only minor discrepancies which were not central to the evidence before the trial court. *[Fatoba v. Ogundahunsi* **(2003) 14 NWLR (Pt. 840) 323 referred to.]** (*Pp. 42-43, paras.F-A*)

3. *On how case of party considered –*

In considering the case of a party, the pleadings must be construed jointly and not severally. The statements on oath of a party and his witness' must be read conjunctively to fully grasp the spirit and the facts of the case of the party. *A* **several reading of a party's statement on oath** will **lead to wrong appreciation of the facts put forth by the party. In the instant case, there was no contradiction that went to the central facts of the case as respondent's statements on oath**. (P.49, paras .B-C)

4. *On when decision of court perverse –*

A decision of a court will be perverse when the court ignores obvious facts or evidence, misconceives the main point of the case presented; or took into consideration irrelevant issues as the basis of its decision; or decides the matter based on issues not **canvassed at the peril of the merit of the case; or any other act or omission of the court that could lead to a miscarriage of justice. Once it is found that the judgment of a court is perverse, it must be set aside**. [*Udengwu v. Uzoegbu* **(2003) 13 NWLR (Pt. 836) 136**; *Atolagbe v. shorun* **(1985) 1 NWLR (Pt. 2) 360 referred to.]** (P.49, paras. D-E)

5. *On when error in finding of fact by court will be set aside by appellate court –*

Any error, mistake or wrong findings of a fact by a court which leads to a miscarriage of justice is perverse and same must be set aside by an appellate court. But where an error or mistake in the findings or decision of a court does not lead to a miscarriage of justice, the appellate court may not interfere with same. This is so because an error that leads to a miscarriage of justice is such without which the decision would have been otherwise. The appellate court cannot allow such mistake and decision to stand. But if despite the error or mistake, the decision of the court would remain the same, the error though generally not palatable in law will be ignored by the appellate curt and will not lead to the appeal being allowed. In the instant case, the trial court was wrong in its evaluation and ascription of probative value to evidence led by the parties which error occasioned a miscarriage of justice on the appellant. Accordingly, the judgment of the trial court was bound to be set aside. [*Udengwu v. Uzoegbu* (**2003) 13 NWLR (Pt.836) 136**; *Osuji v. Ekeocha* **(2009) 16 NWLR (Pt. 1166) 81 referred to**.] (p. 50, paras.A-C)

6. *On Extent o which evidence shall be given of a longer statement, conversations or part of an*

isolated document, or document forming part of a book, or of a connected series of letters or papers –

By virtue of section *33* **of the Evidence Act** *2011,* **when any statement of which evidence is given forms a longer part of a longer statement or of a conversation or part of an isolated document or is contained in a document which forms part of a book, or of a connected series of letters or papers, evidence shall be given of so much and no more of the statement, conversation, document, books or series of letter or papers as the court considers necessary IN that particular case to the full, understanding of the nature and effect of the statement, and of the circumstances in which it was made. It is the pleadings of the parties and not sentiments that will determine the evidence a trial court will accommodate under section** 33 **of the Evidence Act 2011 to assist it fully appreciate and appraise the essence of the documentary evidence placed before it and to ensure both parties have been given fair opportunity to lay the totality of their evidence on the imaginary scale for the court to determine each side's quantum.** (Pp.51-52, paras. G-A; 52-53, paras. H-A)

Per ONYEMENAM,J.C.A. at pages 52-53, paras. F-B:

"Exhibit C is no doubt a part of the appellant's statement of account with the respondent entire or whole statement of account of the appellant starts from the day

he opened the account to the last day he maintains the account. Exhibit C was made from 1st November, 2012 to 20th March, 2013. By the provisions of section 33 of the Evidence Act the trial court was empowered to admit evidence of so much of the appellant's statement of account as it thought out and calculated necessary in the case to the full understanding of the nature and result of exhibit C, and the circumstances in which it was made. It is the pleadings of the parties and not sentiments that will determine the evidence a trial court will accommodate under section 33 of the Evidence Act. 2011 to assist it fully appreciate and appraise the essence of the documentary evidence placed before it and to ensure both parties have been given fair opportunity to lay the totality of their evidence on the imaginary scale for the court to determine each side's quantum. The argument of the appellant that the lower court could not revert to relevant period preceding 18th March, 2013 when exhibit A was presented In the instant case the argument of the appellant that the lower court could not revert to relevant period preceding 18th March, 2013 when exhibit A was presented to determine the nature of appellants account which is whether the appellant had sufficient credit balance in his

account to accommodate the N750,000.00 written in exhibit A is not tenable in law."

7. *On standard of proof in civil cases –*

Generally, cases are decided on the basis of pleadings and evidence of parties. In particular, civil suits are decided on the balance of probabilities, that is, on the preponderance of evidence. Therefore, the totality of the evidence of both sides is taken into account and evaluated to determine each side's measure. **[***Uwah v. Akpabio* ***(2014) 7 NWLR (Pt. 1407) 472;*** *Odutola v. Aileru* (**1985) 1 NWLR (Pt. 1) 92 referred to.**] (P.52. paras. B-C)

8. *On Operation of* doctrine *of estoppel* -

Estoppel interdicts a party from proving any thing which contradicts or challenges his previous acts or declarations, or omissions to the prejudice of a party who relying upon them has altered his position. Estoppel is viewed in law as an admission and by its nature it is absolutely important and conclusive. Accordingly, any party it affects is outlawed to either plead against it or adduce evidence to contradict it. ***[****Ehidimhen* v. *Musa* **(2000) 8 NWLR (Pt. 669) 540;** Ukaegbu v. *Ugoji* **(1991) 6 NWLR (Pt.**

196) 127*; Bank* of the North Ltd. v. Yau **(2001) 10 NWLR (Pt. 721) 408 referred to.]** (P. ***55.*** Paras. E-G.)

9. *On Operation of doctrine of estoppels* -

Where a person by words or conduct made to another, a clear and unequivocal representation of a fact or facts either with knowledge of its falsehood, with intention that it should be acted upon, or has so conducted himself that another would as a reasonable man in his full faculties, understand that a certain representation of fact was intended to be acted upon, and that other person in fact acted upon that representation whereby his position was thereby altered, to his detriment, an estoppels arises against the person who made the representation and he will not be allowed to aver the contrary of what he presented it to be. In the instant case, the respondent by exhibit "C" made clear and unequivocal representation of the credit balance of the appellant with the knowledge that there was wrong impactment on his account on 5th march 2012 which created a false credit balance in appellant's statement of account until 28th march 2013 when his account was duly reconciled. By its omission, the respondent failed to notify the appellant of the wrong impactment which him to issues N750,000.00 cheque to CW1 which cheque was dishonoured to his

embarrassment, loss of use of property and the risk of facing criminal charge for issue a dud cheque. Accordingly, estoppels arose against the respondent who could not be allowed to adduce evidence whether or documentary to contradict exhibit "C". In the circumstance, the respondent was estoppels from relying on exhibit "F", "G" and "H" or any other evidence to prove anything that contradicted exhibit "C". [Bank of the *North Ltd. V. Yau* **(2001) 10 NWLR (Pt. 721) 408 referred to**.] (Pp. 56-57, paras. F-D)

10. *On when bank liable for dishonor of cheque –*

A bank will be liable if at the time of request by a customer that a third party be paid a sum stated on a bank's cheque, the bank wrongfully dishonours the request where the customer has at the time of making the request sufficient fund to accommodate the sun. stated on the order. What the court is enjoined to do w here there is dispute relating to dishonour of cheque is to inquire whether or not the customer who alleged that his cheque was wrongfully dishonoured had sufficient credit *balanc*e in his account as at the date the cheque was allegedly dishonoured. *[Mai v. Standard Trust Bank Ltd. (2007)* LPELR-8447 (CA); *Ide Chemist Ltd. V. N.B.N. Ltd*. (**1976-84) 3 NWLR 111 referred to.**] (Pp. 53-54, paras. H-B)

11. On relationship between documentary evidence and oral evidence –

Where there is oral as well as documentary evident, the documentary evidence would naturally be preferred. It would W the oasis for tits assessment of the veracity and credibility of the oral evidence. The simple reason is that documentary evidence is for all intent and purpose more calculable, tried and true and reliable than oral evidence, in the instant case, exhibit "C" the appellant's statement of account from 1st November 2012 to 20th March 2(113 and exhibit "I", the application for the issuance of exhibit C, stood against the oral evidence that DW2's boss, who never testified, advised the appellant to apply for his statement from 5th March 2012 to 20th March 2013 and also informed the appellant that his account was wrongly impacted. Since exhibits "C" and "I" spoke differently from whatever oral evidence, the documentary evidence confuted and chaffed the respondent's oral evidence, thus making same unreliable [*Egharevba v. Osagie* (2009) 18 NWLR (Pt. 1173) 299; *Fashanu v. Adekoya* (1974) 1 All NLR (Pt. 1) 35; *kimdey v. Mil. Gov., Gongola State* (**1988) 2 NWLR (PT. 77) 445 referred to.**] (P. 56, paras. B-E)

12. On meaning of damages –

Damages is the term used for the money that is awarded by a court in reflection of the effect of injury or loss that is caused *by* **another. When it is general damages, it relates to the monetary award for injuries or loss which is incalculable in exact monetary value such as pain and suffering, shortened *life* expectancy, *harmful* effect on the plaintiff's reputation. This relates to the injury to the proper feelings of damages is such that the court awards in the circumstance of a case in the absence of any yard stick with which to assess the award except by presuming the ordinary expectation and reasonable man.** [*Oshinjirin v. Elias* **(1970) All NWLR 158**; *Lar v. Stirling Astaldi Ltd*. **(1977) 11 – 12 SCLR** *Yalaju-Amaye v. A.R.E.C. Ltd*. (**1990) 4 NWLR (145) 422 referred to.]** (P.58, paras. A-D)

13. On nature of damages for wrongful dishonor cheques and how awarded –

Damages for dishonour of cheques are at large. A successful plaintiff is entitled to recover several heads of damages. The refusal by a banker to a customer's cheque when he holds in hand a amount equivalent to that endorsed on the cheque belonging to the customer amounts to a breach contract for which the banker is liable in damages. Damages awarded for wrongful dishonour cheques by a banker are generally nominal, saves in the instances which the law has come to regard as exceptional and these constitute exceptions, is always extremely

difficult to have an accurate estimate of damages under this head. Thereto a court may within reason make an award of a such sum as it considers the circumstances of the breach of contract or dishonour of cheque warrant although there has been no proof of any actual los that is, special damages, to the customer. [U.B.N. Plc. V. Chimaze **(2014) 9 NWLR (Pt. 1411) 166 referred to**.] (pp. 58-59, paras. D-C)

Nigerian Cases Referred to in Judgment:

Access Bank Plc. V. M.F.C.C.S. (2005) 3 NWLR (Pt. 913) 460

Adenuga v. okelola (2008) All FWLR (PT. 398) 292

Akinfosile v. Ijose (1960) SCNLR 447

Allied bank (Nig.) Ltd. V. Akubueze (1997) 6 NWLR (Pt. 509) 374

Atolagbe v. Shorun (1985) 1 NWLR (Pt.2) 360

Balogun v. Akanji (1988) 1 NWLR (Pt. 70) 301

Balogun v. N.B.N. Plc. (1978) 3 SC 155

Bank of the North ltd. V. Yau (2001) 10 NWLR (Pt. 721) 408

Diamond Bank Ltd v. Ugochukwu (2008) 1 NWLR (Pt. 267) 1

Agharevba v. Osagie (2009) 18 NWLR (Pt. 1173) 299

Chidimhen v. Musa (2000) 8 NWLR (Pt. 669) 540

Fashanu v. Adekoya (1974) 1 All NLR 35

Fatoba v. Ogundahunsi (2003) 14 NWLR (Pt. 840) 323

Ibrahim v. Ojomo (2004) 4 NWLR (Pt. 862) 89

Ide *Chemist Ltd. V. N.B.N. Ltd*. (1976-84) 3 NBLR 111

kimdey v. Mil. Gov., Gongola State (1988) 2 NWLR (PT.77) 445

Lar v. Stirling Astaldi Ltd. (1977) 11 – 12 SC 53

Mai v. Standard Trust Bank Ltd. (2007) LPELR-8447(CA)

N.B.N. v. Opeola (1994) 1 NWLR (Pt.319) 126

Odutola v. Aileru (1985) 1 NWLR (Pt. 1) 92

Oje v. babalola (1991) 4 NWLR (Pt. 185) 267

Okechukwu v. ndah (1967) NMLR 368

Onajobi v. Olanipekun (1985) 4 SC (Pt. 11) 156

Oshinjirin v. Elias (1970) 1 All NLR 153

Osuji v. Ekeocha (2009) 16 NWLR (Pt. 1166) 81

Owie v. Ighiwi (2005) 5 NWLR (Pt. 917) 184

U.B.N. V. Nwoye (1996) 3 NWLR (Pt. 435) 135

U.B.N. Plc v Chimaze (2007) All FWLR (PT. 364) 303

U.B.N. Plc. V. Chimaze (2014) 9 NWLR (Pt. 1411) 166

U.B.N. Plc v Chimaze (2014) 9 NWLR (PT. 1411) 166

Udengwu v. Uzoegbu (2003) 13 NWLR (Pt. 836) 136

Ukaegbu v. Ugoji (1991) 6 NWLR (Pt. 196) 127

Uwah v. Akpabio (2014) 7 NWLR (Pt. 1407) 472

W.D.N. Ltd v. Oyibo (1992) 2 NWLR (Pt. 239) 77

Yalaju-Amaye v. A.R.E.C. Ltd. (1990) 4 NWLR (145) 422

Yoye v. Olubode (1974) 10 SC 209

Foreign case referred to in the judgment:

Rookes v. Barnard (1964) 2 WLR 269

Nigerian Statute Referred to in the judgment:

Evidence Act, 2011, Ss. 33 169

Appeal:

This was an appeal against the judgment of high court which refused the appellant's claims. The court of appeal, in a unanimous decision, allowed the appeal.

History of the case:

Court of Appeal:

Division of the court of Appeal to which the appeal was brought: Court of Appeal, Ilorin

Names of justice that sat on the appeal: Mohammed Ladan Tsamiya,J.C.A. (Presided); Chidi Nwaoma Uwa, J.C.A.; Uchechukwu Oyemenam, J.C.A. (Read the Leading Judgment)

Appeal No.: CA/IL/54/2015

Date of judgment: Tuesday, 22nd March 2016

Names of Counsel: N.N Adegboye (with him, Rilwan Mahmoud; A.A. Mustapha; S.A. Salman and Taofiq Olateju) – for the Appellant

Abdulwahab Bamidele (with him, Y.S. Amule; H.G. Ibn Mahmud and M.O. Osondu [Miss.] – for the Respondent

High court:

Names of the high court: High court of kwara State, Ilorin

Name of the judge: ….

Suit No.: KWS/142/2013

Date of judgment: …, 24th February 2015

Counsel:

N.N. Adegboye (with him,Rilwan mahmoud; A.A. Mustapha; S.A. Salman and Taofiq Olateju) – for the Appellant

Abdulwahab Bamidele (with him, Y.S. Amule; H.G. Ibn Mahmud and M.O. Osondu [Miss.]) – for the Respondent

ONYEMENAM, J.C.A. (Delivering the Leading judgment):

This is an appeal filed by the appellant herein who was the claimant at the trial court against the decision of the High Court of Kwara State. The said judgment which could be found at pages 241-276 of the record was delivered on 24th February, 2015.

In the said judgment, the trial court refused all the reliefs sought by the appellant. Dissatisfied with the judgment, the appellant filed case of appeal containing nine grounds of appeal against same. Said notice of appeal is at pages 277-288 of the record.

The appellant who is a legal practitioner operates an account with the respondent. The account was known intercontinental premium Saving Account (IPSA) before the respondent took over defunct intercontinental bank and the account became known Access premium Saving Account (APSA).

The appellant on 15th day of March, 2003 issued a cheque No. 00000380 to Alhaji Abdulazeez Oloriegbe who testified here the trial court as CW1. The amount covered by the cheque is seven hundred and fifty thousand naira (n750,000.00). the cheque is tendered and admitted at the trial as exhibit A.

The cheque was presented by CW1 on the 18th March, 2013 for encashment but dishonoured. On 19th March 2013 the appellant

and CW1went to the bank and represented the cheque, and the cheque was dishonoured and the appellant and CW1 were faked to represent the cheque next day, 20th march, 2013.

As directed by the respondent official, the cheque was presented on the 20th March, 2013 by CW1 and for the third time the cheque was dishonoured. The bone of contention in appellant's is that he had a balance of N1,250,341.27 in his account as at 30th March, 2013 when CW1 presented exhibit A (i.e. appellant's cheque) issued for N750,000,00 which cheque, according to the appellant was wrongfully dishonoured by the respondent's contention is that the appellant did not have the credit balance to accommodate the cheque. He was advised to apply for his statement for the period of 5th March, 2012 to 20th March, 2013 to appreciate double impactment of ₦782,500.00 in his account as a result of computer error which affected 214 accounts of which appellant account was inclusive.

The appellant applied for his statement of account but starting from 1st November, 2012 to 20th March, 2013. Upon receipt of the statement of account the appellant affirmed he had sufficient fund to accommodate the cheque he issued to CW1. He wrote a letter to the repondant showing his displeasure for dishonouring his cheque without any justification and claims.

When the respondent did not reply the letter, the appellant now took out an action at the trial court claiming *inter alia:*

> "i. *A declaration that the* claimant is entitled to lawful use of his money kept in the defendant custody and the act of defendant in dishonouring the claimant's cheque without justification is wrongful, Oppressive and constitute a denial of lawful use of the claimant's property.

ii. A *declaration* that the decision of the defendant in dishonouring the claimant's cheque issued in favour of and presented by abdulazeez oloriegbe for encashment is malicious, spiteful and constitutes a defamation of character of the claimant.

iii. *An order* of the honourable court directing the defendant to pay unto the claimants the amount reflected in dishonoured cheque together with interest at the rate of 21% per annum or any sum prevailing on the date of the dishonouring until the date of judgment.

iv. 10% interest on the judgment sum from the date of judgment until liquidation of the judgment sum by tip defendant.

v. General damages in the sum of twenty five million naira (M25,000,000.00) for the denial of lawful use of his property, financial embarrassment, loss of profitable financial opportunity by the claimant owing to the act of the defendant.

vi. Damage in the sum of twenty five million naira (₦25,000,000.00) for the defamation of the claimant's character by the defendant.

vii. Cost of this suit."

In this court, parties exchanged their briefs of argument pursuant to the rules of the court. Appeal was heard on 24th February, 2016. Mr. N. N. Adegboye who appeared with Rilwan Mohammed Esq. Adopted and relied on the appellant's brief settled By vakud dauda esq. And died on 15th June, 2015. Mr. Adegboye indicated that appellant upon service of the respondent's brief filed a reply brief on 17th August.

2015. They equally adopted and relied on the brief in urging the court to allow the appeal.

For the respondent, Abdulwahab Bamidele Esq. Appeared with Y.S.Amule Esq., H.G. Ibn Mahmud Esq., and Miss M.O. Osondu. He referred to the respondent's brief settled by him and file on 13th July, 2015. He adopted and relied on the said brief as the respondent's argument in the appeal and urged the court to dismissed the appeal and affirm the judgment of the trial court. Mr. Bamidele referred to the list of additional cases submitted on 24th February, 2016. He urged the court to discountenance the appellant's reply as the same being are argument.

In the appellant's brief. Mr. Yakub Dauda distilled 3 issues for determination of this appeal. Mr. Bamidele adopted the 3 issues, the respondent issues. I shall therefore adopt the 3 issues for determination of the appeal. The 3 issues are as follows:

"1. Whether the trial court has not failed in its primary duty of evaluation of and ascription of probative value to evidence led by parties and whether its failure has no: occasioned a miscarriage or justice on the appellant.

2. Whether considering the facts of this case and the evidence both oral and documentary led, The trial court was not wrong when it held that the appellant had no legitimate funds in his account to accommodate the sum of ₦750,000.00 covered by exhibit a when it is glaring that the appellant had sufficient fund in his account on the days exhibit a was presented and represented by CW1.

3. Whether considering the facts and circumstances of this case the appellant is not entitled to the reliefs Sought before the trial court."

I shall resolve these issues seriatim.

Issue 1

"whether the trial -court has not faded in its primary duty of evaluation of and ascription of probative value to evidence led by parties and whether its failure has not Occasioned a miscarriage of justice on the appellant"

Mr. Dauda submitted that the learned trial judge failed to properly evaluate and ascribe probative value to the evidence adduced before it. He referred to the written statements on oath of both the appellants and respondents witnesses, particularly paragraphs 12, 13, 14, 15, 16, 17, 18, 19, and 22 of the written statement on oath of DW2 at pages 111-113 and paragraphs 9, 10 and 11 of the DW1's statement on oath at page 106 of the record; their cross- examinations; exhibit C which is appellant's statement of account covering the period of 1st November 2012 to 20th March, 2013 issued to him by the respondent upon his application (exhibit 1).

He contended that a critical study of the itemized paragraphs of the statements on oath of DW1 and DW2 aforementioned will reveal both inter and intra contradictions in their testimonies which if the learned trial judge reviewed carefully would have found that the respondent two witnesses were unreliable and some paragraphs of their statements on oath supported exhibit C to the effect that the appellant had sufficient fund in his account as at the days exhibit A (the cheque) was presented and represented by CW1.

The learned counsel from paragraphs 5.13 – 5.29 at pages 6 – 9 of the appellant's brief analysis the alleged contradiction in the evidence of the respondent. At paragraph 5.30 of the brief he submitted that had the learned trial judge adverted his mind to the alleged contradictions he highlighted by properly reviewing and evaluating evidence led before him, he would have come to a sound conclusion that the appellant had sufficient fund in his account with the respondent as at 18th, 19 and 20th March, 2013 when his cheque, exhibit A was presented and represented by CW1.

Mr. Dauda submitted that the learned trial judge was wrong when he placed reliance on exhibits F,G and H which according to the learned trial judge "showed a different statement of account of the claimant" as against exhibit C which was equally produced by the respondent earlier and before the institution of the suit. The learned counsel submitted that for the fact that exhibits F,G, and H were made during the pendency of the suit and were made purposely for the suit, the trial court ought to have preferred exhibit C. He cited: W.D.N Ltd. v. Oyibo (1992) 5 NWLR (Pt. 239) 77 at 95-96, Owie v. Ighiwi (2005) 5 NWLR (Pt. 917) 184.

On what was expected of the court to consider before arriving at a decision as to whether exhibit A was wrongly dishonoured, the learned counsel relied on: Mai v. standard Trust Bank Ltd. (2007) LPELR-8447 (CA);Ide Chemist Ltd. v. National Bank of Nig. Ltd. (1976-1984) 111; Diamond Bank Ltd v. Ugochukwu (2008) 1 NWLR (Pt. 1067) 1; Balogun v. National Bank Of Nigeria Plc (1978) 3 SC 155; UBN Plc v. Chiamaeze (2007) All FWLR (Pt. 364) 303; Ashubiojo v. African Continental Bank (Pt. 66) All NLR 203. He urged the court to hold that the trial court ought to have relied on exhibit C and not exhibits F, G and H in arriving at its decision. Mr. Dauda submitted that failure of the

learned trial judge to give probative value to exhibit C and consider paragraph 22 of DW2'S written statement on oath made his judgment perverse.

He learned counsel further submitted that in the face of exhibit oral evidence of DW2 that his boss asked the appellant to last for his statement of account from 5th march, 2012 to 20 March, 2013 ought not to be given probative value in the sense that request should have been put in writing, and made official. Referred to paragraphs 9 and 11 or the written statement on DW1 to raise the question as to how DW2's boss obtained the information that prompted him to advice the appellant to request statement of account from 5th March, 2012 when from statement of DW1 referred to above the appellant's account once reverted on 28th March, 2013 after the conclusion of their reconciliation. Mr. Dauda further submitted that it is preposterous the respondent to contend the contention that the account of the appellant was credited with the sum ₦782,500.00 on 5th March, 2012 when the cheque exhibits J for that amount was only issued 26th April, 2012 and lodged in appellant's account with the respondent on 27th April, 2012.

Furthermore, the learned counsel for the appellant referred to holding of the learned trial judge at pages 264-265 and faulted fact that the trial court took an unprecedent excursion back on 26th March, 2012 in order to determine whether exhibit A was wrongly dishonoured. This the learned counsel contended has no foundation in law as all that was required of the trial court was no determined whether or not the appellant had sufficient balance in his

account to accommodate the amount written on exhibit A as at 18th March, 2013 when it was presented. He referred to Mai v. Standard Trust Bank Ltd. (supra); Allied Bank (Nig.) Ltd v. Akubueze (1997) NWLR (Pt. 509) 374; Union Bank Nigeria ltd. V. Nwoye (1996) NWLR (Pt. 435) 135; Access bank Plc v. M.F.C.C.S. (2005) 3 NWLR (Pt. 913) 460.

At paragraphs 5.57 – 5.61, Mr. Dauda further faulted the dealing of the trial court referred to above in the eye of paragraphs 17 and 19 of DW2'S statement on oath; and exhibit C to urge court to hold that the said trial court's finding which greatly influenced its decision was perverse and led to a miscarriage of notice.

The appellant at pages 21 – 24 of his brief particularly at paragraphs 5.62 – 5.76 analysed exhibits F,G and H; faulted the appeal court for according weight and probative value on the exhibits which described as worthless, weightless and suspect documents and stated reasons why the learned trial judge ought to have placed premium on exhibit covers Exhibit F,G and H.

He finally urged the court to resolve issues 1 in favour of the Appellant.

In response, Mr. Abdulwahab bamidele learned counsel for the respondent with regard to paragraph 5.09 of the appellant's brief contended that, having regards to pleading, issues and evidence presented before the lower court, the pertinent period for determining appellant's case is not 18th, 19th,and 20th March, 2013 rather it is between the period of 15th

March, 2012 when appellant's account was shown to have been erroneously credited or impacted with ₦782,500.00 which consequently rendered the amount reflect in exhibit C inconclusive; and 18th March, 2013 when appellant's cheque, (exhibit A) issued for ₦750,000 was presented by CW1 for payment.

The learned counsel also submitted that the pertinent paragraph of DW1 and DW2 written statement on oath are no way contradictory as canvassed at paragraph 5.12 of the appellant's was sufficiently funded as shown in exhibit C as at when exhibit A was presented. The respondent contended that the complaints of contradictions in the evidence of DW1 and DW2 and instances of contradictions canvassed at paragraphs 5.12 – 5.30 of the appellant's brief is grossly misconceived having regard to the evidence before the trial court. From pages 4-7 paragraphs 4.08 to 4.05 the learned counsel highlighted the relevant evidence of DW1 and DW2 from the paragraphs of their written statement on oath and their evidence under cross-examination; and argued that the pieces of evidence of the respondent's witnesses referred to in paragraphs 5.14 – 5.29 of the appellant's brief are wrongly twisted and incorrectly analysed by the appellant to justify purported or perceived intra and inter contradictions alleged against the evidence of the respondent's witnesses.

Mr. Bamidele noted the fact that the appellant neither challenged exhibit G nor exhibit F which exhibits brought out the correct closing balance of the appellant to be ₦467,841.27 as at 18th March, 2013. He

argued that the burden of proof was on the appellant to show evidence of lodgement of ₦782,500.00 into his account against 5th March, 2012 in the absence of which a case of erroneous impactment of ₦782,500.00 into appellant account against 5th March, 2012 has been made and shown in exhibit G. which case the dishonor of the appellant's cheque cannot be judge libelous since same would not be wrongful. See Access Bank Plc v. Maryland Finance Company and Consultancy Service (2015) 3 NWLR (Pt. 913) 460.

In response to the appellant's argument at paragraphs 5.32-5.37 that the trial court was wrong to place much reliance on exhibits F, G and H being made during the pendency of the suit and purposely for it. The respondent submitted that exhibits F, G and H are higher premium and probative value than exhibit C in determining the true credit status of appellant's account as at 18th March, 2013 having regards to evidence on record. It was argued that exhibit F, G and H when considered together show that exhibit is subsumed in exhibit G in all material contents. He referred to the case of Adenuga v. Okelola (2008) All FWLR (Pt. 398) 292; issued by the appellant to submit that the principle of evaluation of evidence extend to a consideration of the totality of the evidence of any issue or facts in the circumstances of each case in order to determine whether the totality of the evidence support a finding of fact which the party adducing evidence seeks the trial court to make.

The respondent submitted that the appellant's argument on paragraph 5.49 of his brief that exhibit C

constitutes estoppels and misconceived. He referred to the evidence of DW2 on the circumstances under which exhibit C was issued. He argued that the appellant applied for a statement of account to run from 1st of November, 2012 his closing balance would have been correct. Further he added that exhibit C could have constituted estoppels and it was issued before exhibit A; but exhibit A having been first issued before appellant obtained his statement of account, exhibit cannot constitute estoppels. He relied on*: Bank of the North Ltd v. Yau* (2001) 5 SC (Pt. 1) 121;(2001) 10 NWLR (pt. 721) 408; *Yoye v. Olubode* & Ors (1974) 9 NSCC 409; Section 169 Evidence Act, 2011.

The other submissions for the respondent are still on the propriety and otherwise of exhibit F, G and H. I shall refer to them where necessary in the course of resolving this issue.

The respondent submitted a list of additional authorities on 24th February, 2016. I have read the authorities and will apply them where necessary.

On points of law, the learned counsel for appellant basically reargued his brief except for two glaring points of law at pages 5 and 6 of the reply brief. On the two points of law, the learned counsel relied on: *Fatoba v. Ogundahunsi* (2003) 14 NWLR (Pt. 840) 323; *Ibrahim v. Ojomo* (2004) 4 NWLR (pt. 862) 89; *N.B.N Ltd v. Opeola* (1994) 1 NWLR (Pt. 319) 126; *Okechukwu & Sons v. Ndah* (1967) NMLR 368; *Akinfosile v. Ijose* (1960) SCNLR 447. I shall refer to the points where relevant in the course of the resolution of the issue.

Resolution of issue 1

it is the primary duty of a trial judge to evaluate and ascribe probative value to evidence adduced by witnesses called by parties before making a pronouncement on the case presented before him for adjudication. A trial court is duty-bound to put the evidence adduced by the plaintiff on one side of the scale and weigh them together. It is after doing this that it will then see which is heavier not by number of witnesses called by each party but by the quality of probative value of the testimony of the witnesses called. This exercise is a binding duty on trial court before it can arrive at a just decision in a matter placed before it for adjudication. Where a trial court failed in its binding duty to evaluate and ascribe probative value to the evidence adduced before it, an appellate court will not hesitate in entering the shoes of a trial court by doing what the trial court ought to have done but failed to do so. See: *Adenuga v. Okelola* (2008) All FWLR (Pt. 398) 292.

Evidence is said to contradict one another when it asserts or affirms the opposite of what the other asserts or affirms and not where there are some minor discrepancies or omissions in details. It is quite usual and natural and in fact a clear evidence of honest testimony when two people or witnesses narrating an event especially an event of the past, do not relay the event with the same exact accuracy. Event recorded in human memory is spoken with some degree of inconsistencies depending on how individuals perceive and analyze what they see, hear; their accuracy in

narration coupled with retentiveness of memory. More commonly, witnesses who narrate events with high degree of precise consistency are witnesses who had been drilled to memorize the lines of evidence they have been coached to give. No two humans are at par with the narration of what had been assimilated and stored in their senses. It is for this that the courts will not regard every discrepancy or inconsistency of the witnesses as contradiction except where it is a fact that is central to issue before the court; and each of the witnesses asserts or affirms the opposite of the evidence of the other. See: *Fatoba v. Ogundahunsi* (2003) FWLR (Pt. 154) 565, 2013 14 NWLR (Pt. 840) 323.

From the record the appellant testified as CW2 while his two witnesses, the bearer of exhibit A (the dishonored cheque) testified CW2 and CW3 respectively. The respondent also called two witnesses DW1 and DW2, staff of the respondent at her head office Lagos and wahab folawiyo Road, Ilorin branch office respectively. Appellant had on 20th March 2013 applied via exhibit I to be issued with his statement of account covering the period of 1st November, 2012 to 20th March, 2013. The respondent bank obliged him and issued exhibit C to him. Exhibit I and subsequent exhibit C were necessitated because the appellant's cheque, exhibit A issued to CW1 had been presented and represented to the respondent on March 19th and 20th March, 2013 but on these three occasions the respondent did not honour same.

The appellant's contention is that had the trial court evaluated relevant paragraphs of the written statement on oath of DW1 and DW2 *viz-a-vis* exhibit C, its mind would have been swayed to enter judgment for him. He referred to paragraphs 12, 13, 15, 16, 17, 18, 19, 20 and 22 and 9, 10, 11 of the written statements on oath of DW2 and DW1 respectively. The appellant's contention is that a careful study of the above referred paragraphs will refill intra and inter contradictions in their evidence in support of exhibit C to the effect that the appellant had sufficient fund in his account as at the days exhibit A was presented and represented by DW1.

For ease of reading and understanding I shall reproduce the above referred paragraphs of the statement on oath of DW2 and DW1 along with other paragraphs I deem relevant.

DW2, paragraphs:

12. "That on 18th March, 2013 I was at work at our branch office when the claimant's cheque issued to one Oloriegbe for ₦750,000.00 was referred to me by one of our cashiers/tellers for confirmation and necessary processing.
13. That when the claiment's cheque was referred to me on 18th March, 2013 for my necessary action, I called the claimant on phone for his confirmation as to whether he issued the cheque in question and the claimant confirmed issuing same and I

endorsed “confirm” on the cheque as a matter of procedure.

15. that as I proceeded to process the claimant’s cheque for payment I discovered that the claimants account was once erroneously credited with ₦782,500.00 which gave the claimant a false balance of ₦1,250,341.27 as at 18th, march, 2013 whereas the true correct balance in the claimant’s account was not sufficient to pay the cheque.
16. That I politely advised the bearer of the cheque to hold on to enabled the bank contact the claimant and immediately referred the matter to Mr. Olufemi Ayodele who was then the branch service head in charge of supervision of tellers, management of the branch getting report from tellers and giving necessary instructions to tellers as the need arises.
17. That I was with Mr. Olufemi when he called the claimant on phone and explained the wrong impactment of his account with a surplus of ₦782,500 as result of system error and the fact that the remaining balance in his account was not sufficient to pay a cheque of ₦750,000.00.
18. That I was also at work on 20th March, 2013 when the claimant visited our branch office to see Mr. olufemi Ayodele who again explained to the claimant the

erroneous impactment of his account with a surplus credit of ₦782,500.00 against 5th March, 2012 at the point of giving a value to a UBA cheque dated 26th April, 2013 issued by yusuf Ali & Co. and lodged to his account on 27th April, 2012 as a result of our bank's system error.

19. That I also heard Mr. Olufemi Ayodele explaining to the claimant about the ongoing reconciliation of all accounts affected by system error of which his account was involved and when he advised the claimant to obtain his statement of account from the period of 5th march, 2012 for his personal appreciation of the error and reconcilization.

20. That from record available to our branch office I know that the claimant wrote a letter of application for statement of account from November, 2012 to 20th March, 2013 and I know from the records that same was accordingly issued to him in line with his instruction. I shall rely on the claimant's letter of application dated 20th March, 2013 and the claimant's statement of account for the period of 1st November, 2012 to 20th March, 2013.

22. That the Information and Technology (I.T.) department at the head office of our bank in lagos handles the computer system management of the entires branch network

of our bank in Nigeria and as at 18th March, 2013 when the claimant's cheque for ₦750,000.00 was presented at our branch office, the erroneous double impacting of the claimant's account with ₦782,500.00 had occurred despite which the claimant's closing balance as at 18th March, 2013 was still showing ₦1,250,341.27 by which time the reconciliation of the accounts affected by system error at the head office of our bank was ongoing without our knowledge at the branch office.

23. that I know from the record that our branch office contacted our head office in Lagos on the outcome of our branch's internal investigation/reconciliation on the claimant's account and our head office confirm the ongoing reconciliation of 214 accounted affected by system error which erroneously impacted various sums of money to the affected accounts of which the claimants account was involved.

24. I know from the record that from our branch's internal investigation/reconciliation the true and actual lawful balance in the claimant's account as at 18/03/2013 when the claimant's cheque was presented for payment by one Azeez Oloriegbe was N467,841.27 and not n1,250,341.27 as proper and true calculation/ for the material period of 5/3/2012 to 20/03/2013 upon deduction of erroneously

impacted N782,500.00 would reveal a credit balance of N467,841.27 and not N1,250,341.27 as at 18th March or 20th March, 2013 know that this fact is evidence in the claimant's cheque presented on 18/03/2013.

25. That records in our branch shows that the internal investigation/reconciliation conducted on the claimant's account by the branch office base on the entries in the claimant's statement of account printed on 18th March, 2013 revealed that the sum of ₦782,500.00 was wrongly impacted or credited to the claimant's account against 5th March, 2012 which falsely gave the claimant an excess credit of ₦782,500.00 wrongly which when deducted left the claimant with a credit balance lower than ₦750,000.00 stated in the claimant's cheque presented on 18th March, 2013.

DW1 PARAGRAPHS:

9. That the reconciliation of the accounts affected by system error occasioning wrong crediting to the affected account's including the claimant's account was a rigorous and time consuming exercise which involved thorough and painstaking investigation and strenuous auditing of voluminous documents and record which exercise was ongoing as at 18th March, 2013 when the claimant's cheque issued for ₦750,000.00 was presented for

payment at our Wahab Folawiyo Branch Office, Ilorin.

10. That the kind of system error that erroneouslt impacted the affected customer's account including the claimants account on various detes was beyond the control of our bank and it is only regular and periodic snap checks/ aidits of customer's account that may reveal the system error and in the peculiar circumstances of the instant case our bank took immediate steps to rectify the error which our unit's snap check/audit of customer's account revealed by normalizing/reconciling the affected account in the process of which the claimants cheque was presented on 18th March, 2013 before conclusion of reconciliation on the claimant's account when the claimant's correct balance would have been reflected in his account.

11. That upon conclusion of reconciliation of the claimant's account by our unit at the bank's head office in lagos on 28th March, 2013. The correct outstanding credit balance in the claimants account reverted to ₦467,841.27.

17. That from the way our bank's computer system was structured of configured, cheque issued in excess of the actual balance in an account when being

> processed of posted into the bank computer system, the computer system will not recognize or accept the amount stated in the cheque even when the closing balance in the account is sufficient enough to pay the cheque.

On the intra contradictions in DW2 testimonies, the appellant's submitted that paragraph 22 contradict paragraphs 15 and 17 respectively. On inter contradictions, he contended that paragraph 18 of DW2 contradicts DW1's paragraphs 9,10 and 11.

He then concluded that the judgment of the trial court was reverse.

It is correct as canvassed at paragraph 5.21 of the appellant's brief that the import of paragraph 22 of DW2's statement on oath as that as at 18th March, 2013 when exhibit A was presented, the appellant's balance stood at ₦1,250,341.27 at which time the reconciliation of the account was ongoing at the respondent's head office without their knowledge at the Ilorin branch. It is also correct that DW2 said at paragraph 15 that he discovered the previous wrong impactment of appellant's credit with ₦782,500.00 as at 18th March,2013 when exhibit A was presented to him. The exposer which made the appellant conclude their was a contradiction is that, how did DW2 discover the purported impactment when according to paragraph 22 he said the appellant account balance was still reading N1,250,341.27 as at 18th March, 2013 while the reconciliation was going on without the branch office's knowledge.

I have considered the above and other alleged contradictions the appellant's raised in paragraphs 5.23 – 5.28 at pages 7 – 8 of the appellant brief. On the face of those paragraphs, the appellant's contention sounds compelling but the fact is that the appellant has considered and analysed the paragraphs of the statement on oath, a combined reading of the statements will reveal no intra or inter contradictions but minor discrepancies which are not central to the evidence before the court. On the poser raised by the appellant in the last paragraph relating to alleged contradiction arising from paragraphs 22 and 15 of DW2's statement on oath, when paragraphs 15, 16, 17, 18, 19, 22, 23, 24 and 25 are read together along with paragraphs 17 and 18 of DW1's statement on oath, the seeming contradiction will disappear. The missing link or details which the appellant deemed contradictions are found at paragraphs 16, 17, 18, 19, 23 and 17 and 18 of the DW2's and DW1's statements on oath.

The respondent at pages 4 – 5 of his brief set out all the paragraphs I have referred to above and demonstrated how the seeming contradictions in the evidence of the respondent's witnesses are mere discrepancies. Upon examination of the entire statements on oath of the respondent's witnesses, DW1 and DW2's testimonies are simples and straight forward and which are: that the respondent's computer is structured in such a way not to recognize cheques issued in excess of actual balance in an account even when the closing balance states otherwise in order to curb fraud (para. 17 of DW1's statement on oath). So

on 18th March, 2013 the DW2's computer could not accept payment of exhibit A because the money in the account could not accommodate same although the account balance showed otherwise owing to wrong crediting of appellant's account. Also the Ilorin branch of the respondent carried out an internal investigation and reconciliation based on the entries in the appellant's statement of account on 18th March, 2013 and printed same out. The said statement of account printed based on the internal investigation showed that the appellant's credit balance could not accommodate the cheque of N750,000.00 (paras. 24 and of DW2's statement on oath). DW2 notified his boss who he alleged called the appellant to tell him the position of things. DW2 politely dismissed CW1 and asked him to represent the cheque. DW2 stated at paragraph 22 that unknown to them at the branch the IT department of the respondent at the head office was already working on the reconciliation of the account which was still showing closing balance of N1,250,341.27 as at 18th March, 2013. Paragraphs 24 and 25 of DW2's statement on oath made it clear therefore that the branch conducted its internal investigation and made a print out based on entries of the appellant's account on 18th March, 2013 which revealed the N782,500.00 wrong impactment. Therefore, the question as to how DW2's boss knew about the impactment before the head office concluded its reconciliation does arise by reason of the evidence of DW2 and as such the seeming contradictions both intra and inter do not arise. It is however correct in some paragraphs of the respondent's

witnesses' statements on oath particularly paragraphs 22 and 24 of DW2 and 12 of DW1 in support of exhibit C that as at 18th March, 2013 the credit closing balance of the appellant was N1,250,341.27.

In considering the case of a party, the pleadings must be construed jointly and not severally. The statements on oath of a party and his witness must be read conjunctively to fully grasp in spirit and the facts of the case of the party. A several reading of a party's statement on oath will lead to wrong appreciation of the facts put forth by the party. This explains the contention of the appellant in this case. I firmly agree with the respondent that there is no contradiction that goes to the central facts of the case as per the statements on oath.

A decision of a court will be perverse when the court ignores previous facts or evidence; misconceives the main point of the case presented; or took into consideration irrelevant issues as the basis of its decision; or decides the matters base on issues not canvassed in the peril of the merit of the case; or any other act or omission with the court that could lead to a miscarriage of justice. See: Edwin *chukwedulue udengwu v. Simon Uzoegbu & 4 Ors*. (2003) 13 NWLR (pt. 836) 136, (2003) 7 SC 64; *Atolagbe v. Sharun* (1985) 1 NWLR (Pt. 2) 360. In any case, once it is found that the judgment of a court is perverse, same must be set aside.

The appellant referred to the decision of the trial court at page 267 and submitted that because the trial court failed to consider paragraphs 15 and 22 of the

DW2's statement on path, the learned trial judge turned himself to the respondent's advocate thereby rendering a perverse finding at pages 267 of the record.

The learned trial judge held thus at page 267:

> "The effect of the above is that if indeed the error had hitherto been discovered before exhibit C was requested for and given to the claimant, the opening balance as at 1st November, 2012 would have revealed an overdrawn account balance"

The respondent reacted at page 16 paragraphs 4.43 to 4.47 and submitted that assuming without conceding the trial court was in error in its findings complained of, that it is not every mistake of a trial court that will lead to reversal of the judgment or result in appeal being allowed. He relied on: *Onajobi v. Olanipekun* (1985) 4 S.C (pt. 11) 156: *Oje v. Babalola* (1991) 5 S.C 128; (1991) 4 NWLR (pt. 185) 267

Any error, mistake or wrong finding of a fact by a court which leads to a miscarriage of justice is perverse and same must be set aside by an appellant court. But where an error or mistake in the finding or decision of a court does not lead to miscarriage of justice in the court may not interfere with the same Udengwu v. Uzuegbu (2003) 13 NWLR (PT.836) 136; osuji v. Ekeocha (2009) 16 NWLR (Pt. 1166) 81. This is because an error that leads to a miscarriage of justice is such without which the decision would have been otherwise. The appellate court cannot allow such mistake and decision to stand. But if despite the error or mistake the decision of the court would remain the

same, the error though generally not palatable in law will be winked at by the appellate court and will not lead to the appeal being allowed.

I had earlier reproduced paragraph 15, 17, 19, 22, 24 and 25 of DW2's statement on oath. A casual reading of these paragraphs reveal that as at 18th March, 2013 the respondent had known about the alleged wrong impactment of N782,500.00 into appellant's account. The Ilorin branch in particular had not only known about the wrong impactment but had also reconcile the entries in the appellant's account on 18th March, 2013; and found that his actual credit balance could not pay the N750,000.00 cheque (exhibit 1) issue by the appellant but still allowed the appellant's credit account balance to stand at N1,250,341.27. On its own the head office had commenced probe and reconciliation of the appellant's account. It was this knowledge that made the DW2's boss to advice the appellant to apply for his statement of account starting from 5th March, 2012 so he can appreciate the wrong impactment. It was after this alleged advice that the appellant applied and obtain exhibit C. the above finding of the trial court is therefore not borne out of the evidence on record.

The improper evaluation of the evidence before the court led the trial court to make a wrong finding that had the respondent known of the wrong impactment as at 20th March, 201 the opening balance of the appellant's account on 1st November, 2012 would have revealed an overdrawn account balance. This error imperatively gave the trial court the

mistaken believe that exhibit C was issued by the respondent to the appellant because it did not know of the wrong impactment. So the trial court came to the conclusion that Exhibit C unknown to the respondent had a mistaken credit balance which no doubt affect his judgment. The proper evidence before the court is that as at 18th March, 2013, the respondent both at the Ilorin and Lagos head office knew about the alleged wrong impactment of N782,500.00 in appellant's account. The Ilorin branch had on 18th march, 2013 gone as far as printing appellant's credit balance that revealed the alleged wrong impactment. Despite his obvious knowledge the respondent went ahead on 20th march, 2013 to issue the appellant with statement account with the credit balance of N1,250,341.27 without caveat. To this extend I told that the findings of the fact challenged by the appellant herein is reverse and same ought to be set aside and is hereby set aside.

The appellant also faulted what he tagged the learned trial judge's principles of "taking excursion" and "a whole can not be a whole without a part". He argued that the propounded principles by the learned trial judge had no foundation in law when the issue of dishonor of cheque is in contention. He relied on: *Mai v. standard Trust Bank Ltd.* (2007) LPELR-8447 (CA); *Allied Bank (Nig.) Ltd. V. Akubueze* (1997) 6 NWLR (Pt. 509) 374; etc.

The respondent at paragraph 4.42 page 16 of their brief referred to the statements of claim, defense and reply to the statement of defense at paragraphs 14 – 17; 36 – 48 and 74 -81 of the record respectively. He

submitted that the trial court was right to revert back to the period of 5th March, 2012 when the appellant's account was shown to have been wrongly impacted with ₦782,500.00 having regards to the issues joined between parties and evidence led. He referred to: *Odutola v. Aleru* (1985) 1 NWLR (Pt.1) 92;Balogun v. Akanji (1988) 2 S.C (Pt.1) (Reprint) 144 (1988) 1 NWLR (Pt. 70)301; *Osuji v. Ekeocha* (2009) 6-7 SC (Pt.11) 91; (2009) 16 NWLR (Pt. 1166) 81; *Uwah & Anor v. Akpabio & Anor* (2014) 2 – 3 S.C 1 (2014) 7 NWLR (Pt. 1407) 472. He said the case cited by the appellant at paragraph 5.55 of his brief are not apposite.

Section 33 of the Evidence Act, 2011 provides:

> "When any statement of which evidence is given forms part of a longer statement, or of a conversation or part of an isolated document which forms part of a book. Or of a connected series of letters or papers, evidence shall be given of so much and no more of the statement, conversation, document, book or series of letters or papers as the court considers necessary in that particular case to the full understanding of the nature and effect of the statement, and of the circumstances in which it was made".

Generally, cases are decided on the basis of pleadings and evidence of parties. In particular, civil suits are decided on the balance of probabilities; that is on the preponderance of evidence. Therefore, the

totality of the evidence of both sides measure. See: *Dr. Useni Uwah & Anor v. Dr. Edmunds on T. Akpabio & Anor (*2014) 2- 3 S.C. 1 at 21;(2014) 7 NWLR (Pt. 1407) 472; *Odutola v. Aileru* (1985) 1 NWLR (Pt. 1) 92.

What the trial court did is captured at pages 264-265 of the record where he held:

> "Since a whole cannot be a whole without a part, it is important that for the purpose of establishing and or determining the true state of affairs or position of the claimant's account covering 1st November, 2012 to 20th March, 2013 as contained in exhibit C, which was requested for and given to the claimant on 20th March, 2013. We have to take excursion to period preceding November, 2012 which covered other several business transactions such as lodgment and withdrawals made by the claimant to determine the liability or otherwise of the defendant".

Exhibit C is no doubt a part of the appellant's statement of account with the respondent. The entire or whole statement of account of the appellant starts from the day he opened the account to the last day he maintains the account. Exhibit C was made from 1st November, 2012 to 20th March, 2013. By the provisions of section 33 of the Evidence Act the trial court was empowered to admit evidence of so much of the appellant's statement of account as it thought out and calculated necessary in the case to the full understanding of the nature and result of exhibit C, and the circumstances in which it was made. It is the pleadings of the parties and not sentiments that will determine the evidence a trial court will accommodate under section 33 of the Evidence Act,

2011 to assist it fully appreciate and appraise the essence of the documentary evidence placed before it and to ensure both parties have been on fair opportunity to lay the totality of their evidence on the imaginary scale for the court to determine each side's quantum. The argument of the appellant that the lower court could not revert relevant period preceding 18th March, 2013 when exhibit A was presented to determine the nature of the appellant's account which whether the appellant has sufficient balance in his account to accommodate the ₦750,000.00 written in exhibit A is not tenable in Law.

I am therefore of the view that the trial court was right and his words to have taken excursion to the period preceding November 2012 to determine the real credit balance of the appellant's account as at 20th March, 2013.

Then again on the issue, the appellant submitted that given the circumstances of the suit having the statements on oath and facts in mind, that exhibit C constituted admission against interest on the part of the respondent. He contended that the respondent who had by exhibit C made him to alter his position cannot seek to contradict same with exhibit F, G and H. In response, the respondent contended that the argument of the appellant is misconceived. He equally leaned on the circumstances under which exhibit C was issued to the appellant. He referred to: *Bank of the North Ltd. V. Yau* (2001) 5 S.C (Pt. 1) 121; (2001) 10 NWLR (Pt. 721) 408; *Yoye v. Olubode & Ors*. (1974) 9 NSCC 409.

In simple terms estoppels interdicts a party from proving anything which contradicts or challenges his previous acts or declarations, or omissions to the prejudice of a party who, relying upon them has altered his position. See: *Ehidimhen v. Musa* (2000) NWLR (Pt. 18-22) 930; (2000) 8 NWLR (Pt.

669) 540; *Ukaegbu v. Ugoji* (1991) 6 NWLR (Pt. 196) 127; Bank of the North Ltd. V. *Alhaji Bala Yau* (supra); Section 169 of the Evidence Act 2011. Estoppel is viewed in law as an admission and by its nature it is absolutely important and conclusive; accordingly, any party it affects is outlawed to either plead against it or adduce evidence to contradict it. See: Bank of the North Ltd. v. Alhaji Bala Yau (supra).

The law relating the issue of dishonor of cheque is that a bank will be liable if at the time of request by a customer that a third party be paid a sum stated on a bank's cheque, the bank wrongfully dishonours the request where the customer has at the time of making the request, sufficient fund to accommodate the sum stated on the order. So what the court is enjoined to do where there is dispute as in this case is to inquire whether or not the customer who alleged that his cheque was wrongfully dishonored had sufficient credit balance in his account as at the date the said cheque was allegedly dishonoured. See : *Mai v. Standard Trust Bank Ltd. (2007) LPELR – 8447 (CA); Ide Chemist Ltd. v. National Bank of Nigeria Ltd (1976) NCLR 143 at 145.*

The respondent did not categorically state the date it discovered that on 5th March, 2012 the appellant's account was wrongly impacted with ₦782,500.00. However, from evidence on record by 18th March, 2013 both the respondent's Ilorin branch and headquarter office in Lagos were aware of the wrong impactment. While the Lagos office did not conclude its reconciliation of appellant's account till 28th March, 2013 whereupon the appellant's credit balance was reverted to ₦467,841.27 (paragraph 32 of DW2's statement on oath at page 114 of the record). The Ilorin branch of the respondent where the appellant's account is domiciled and where his cheque (exhibit A) was presented and

represented on 18th, 19th and 20th March, 2013 knew on 18th March 2013 that the appellant did not have sufficient fund to pay exhibit A as a result of the alleged wrong crediting of his account. See paragraph 15 of DW2's statement on oath. Accordingly, the DW2 refused to honor the appellant's chque and at the same time did not inscribe or endorse 'DAR' (Drawer Attention Required) on it to drive home the point to the appellant that he did not have sufficient money in his account.

The respondent upon coming to the knowledge of the wrong impactment did nothing to notify the appellant. The appellant was equally not informed that his account was undergoing reconciliation. Without knowledge of the above, the appellant who had his account credit balance as per exhibit C reading thus:

₦830,341.27	as at 13th March, 2013
₦1,080,341.27	as at 14th March, 2013
₦1,250,341.27	as at 15th March, 2014
₦1,250,341.27	as at 20th March, 2014

Issued a cheque of ₦750,000.00 to CW1 which he presented on 18th March, 2013 for the first time but it was not honored.

The DW2 in his statement on oath said his boss whom he reported the insufficiency of fund placed a call to the appellant and notified him that there was wrong impactment on his account for some reason his attention was required as the actual money in his account could not pay the cheque. The cheque was again represented on 19th March, 2013 but was still dishonored for same reason. Again upon this representation, the respondent did not write to inform the appellant of the state of his credit balance neither did the respondent endorse "DAR" on the cheque. On 20th

March, 2013 the appellant came to know why his cheque was dishonored, DW2 claimed his boss again informed him that his account was wrongly credited with the sum of ₦782,500.00 on 5th March, 2012 advised him to apply for his statement of account from 5th March, 2012 to 20th March, 2013. But rather than heed the alleged written, unofficial advice in an official transaction which had led to the dishonor of appellant's cheque, the appellant took an initial step to apply in writing for his statement of account from 1st November, 2012 to 20th March, 2013 via exhibit 1 whereupon the respondent issued him with a statement of account exhibit C on 20th March, 2013.

Even at that, the respondent never took any formal step to inform the appellant of the alleged wrong impactment as disclosed to the oral information which the appellant vehemently denied and DW2's boss was not called to testify to the advice information he allegedly gave to the appellant. When exhibit 1 was issued to the appellant, his credit balance was still reading ₦250,341.27 without any indication on exhibit that the closing balance is inconclusive as a result of wrong impactment which warranted the reconciliation of the appellant's account. With exhibit C telling the appellant that he had enough cash to pay his dishonoured cheque on the same 20th March, 2013 exhibit C was issued, the appellant through his counsel Yusuf Ali & Co, wrote to the respondent expressing his displeasure and asking for damages failure of which he will approach the court for wrongful dishonor of his cheque. Again, the respondent did not reply nor in any way to formerly communicate to the appellant the state of his account but rather waited for appellant to go to court.

The respondent's chief defence is that DW2's boss on 18th March, 2013 told the appellant that his account was wrongly impacted on

5th March, 2012. That on 20th March, 2013, DW2's boss told the appellant again of the wrong impactment and advised them to apply for his statement of account from 5th March, 2012 to 20th March, 2013. There is no credible evidence of all these as DW2's boss was not called to testify. But even when it is found that the DW2's boss passed on the information as stated above and gave the necessary advice what will be the stance of such oral information and advice in the face of documentary information as exhibits C and I which stand in opposition to the oral evidence.

Where there is oral as well as documentary evidence, the documentary evidence would naturally be preferred. It would be the basis for assessment of the veracity and credibility of the oral evidence. See: *Vincent Egharevba v. Dr. Orobor Osagie (2009) LPELR- 1044 (SC); (2009) 18 NWLR (pt. 1173) 299 Fashanu v. Adekoya (1974) 1 All NLR (pt. 1) 35; Kimdey & 11 Ors. V. The Military Governor of Gongola State & Ors. (1988) 2 NWLR (pt. 77) 445.* The reason is simple, documentary evidence is for all intent and purpose more calculable, tried-and-true and reliable than oral evidence. Exhibit C (The appellant's statement of account from 1st November 2012 to 20th March, 2013) and exhibit I (The application for the issuance of exhibit C) stand against the oral evidence that DW2's boss who never testified that he had advised the appellant to apply for his statement from 5th March, 2012 to 20th March, 2013 and had also informed the appellant that his account was wrongly impacted.

Since exhibit C and I speak differently from whatever oral evidence, the documentary evidence herein has confuted and chaffed the oral evidence of the respondent on this, making same unreliable.

Accordingly, the doctrine of estoppels comes to play. The, principle as succinctly spelt out by the apex court, per Kabiri Whyte, JSC stated thus:

> "it is well accepted in our jurisprudence that where a person by words or conduct made to another a clear and unequivocal representation of a fact or facts either with knowledge of its falsehood, with intention that it should be acted upon, or has so conducted himself that another would as a reasonable man in his full faculties, understand that a certain representation of fact was intended to be acted upon, and that other person in fact acted upon that representation whereby his position was thereby altered, to his detriment, as estoppels rises against the person who made the representation and he will not be allowed tp aver the contrary of what he presented it to be."

Bank of the North Ltd v. Yau (2001) LPELR – 746 (SC) at 37 paras (2001) 10 NWLR (pt. 721) 408 at page 434, paras. G-H.

From the foregoing analysis it is my view that the respondent exhibit C made a clear and unequivocal representation of the balance of the appellant with the knowledge that there was wrong impactment on his account on 5th March, 2012 which created a false credit balance in appellant's statement of account on 28th March, 2013 when his account was duly reconciled; and the omission tailed to duly notify the appellant or the wrong impartment which made him issue ₦750,000.00 cheque to CW1 which cheque was dishonored to his embarrassment, loss of use of property and the risk, of facing criminal charge for issuing a cheque. Accordingly, estoppels arise against the respondent and cannot in law be allowed to adduce evidence whether oral or documentary to contradict exhibit C.

In the circumstance therefore the respondent is estopped to rely exhibits F,G and H or any other evidence for that matter to prove anything that contradicts exhibit C. in other words exhibit C, estoppels against the respondent is the conclusive credit balance statement of account of the appellant as at 20th March, 2013. The learned trial Judge therefore was in error when he ascribed high probative value to exhibits F, G and H as against exhibit C which led him to arrive at a wrong conclusion that as 18th March, 2013 when CW1 first presented the cheque, the outstanding balance of appellant's credit account was ₦467,841.27. In sum, it is my strong view that the respondent by reason of exhibit C wrongfully dishonored exhibit A presented by CW1 on 18th, 19th and 20th March, 2013.

I therefore hold that the trial court was wrong in its evaluation ascription of probative value to evidence led by parties which error occasioned a miscarriage of justice on the appellant. Accordingly, the judgment is bound to be set aside.

Issue 1 is resolve in favor of the appellant.

Issue 2 is subsumed in issue 1 and having resolved issue 1 the way I did; there is nothing more to resolve or answer in issue 2 but to say. It is resolved in favor of the appellant.

Having resolved issues 1 and 2 in favor of the appellant, by nature of issue 3 there is nothing more to resolve. But before I proceed to make declarations and order, I shall briefly examine basic principles in award of damages of this nature.

Damages is the term used for the money that is awarded by a Judge in reflection of the effect of injury or loss that is caused by another. When it is general damages, it relates to the monetary award for injuries or loss which is incalculable in exact monetary value such

as pain and suffering, shortened life expectancy, harmful effect on the plaintiff's reputation. This relates to the injury to the proper feelings of dignity and pride of the plaintiff. See: *Lord Delvin in Rookes v. Barnard* (1964) 2 W.L.R. 269; *Oshinjirin & Ors.v. Alhaji Elias & Ors.* (1970) 1 All NLR 153. General damages therefore is such that the court awards in the circumstance of a case in the absence of any yardstick with which to access the award except of course by presuming the ordinary expectations of a reasonable man. See: *Lar v. Stirling Astafdi* (Nig.) Ltd. (1977) 11/12 SC 53; *Yalaju- Amaye v. Associated Registered Engineering Contractors Ltd. & Ors. (A.R.E.C)* (1990) 4 NWLR (pt. 145) 422 (1990) 6 SC 157.

Specifically on damages that can be awarded for wrongful dishonor of cheques, the apex court per Kekere-Ekun, J.S.C. held:

"… It is settled law that in cases of breach of contract for wrongful dishonor of cheques (which are *sui generis*) damages are as to be "at large". A successful plaintiff is entitled to recover under several heads of damages. See: *Balogun v. N.B.N. Ltd.* (1978) 3 SC (Reprint) 111 @ 117 fines 19 – 24, 35 – 38 & 118 fines 4 – 11 where this court held:

"…it has long been established that refusal by a banker to pay a customer's cheque when he holds in hand an amount equivalent to that endorsed on the cheque, belonging to the customer amounts to a breach of contract for which the banker is liable in damages. The only question which arose in these circumstances, has been that relating to question or amount of damages…it is on this account that damages awarded for wrongful dishonor of cheques by a banker are generally nominal, save in the instances which the law has come to regard as exceptional; and these constitute exceptions with which we shall deal anon…"

"As it is always extremely difficult to have an accurate estimate of damages under this "head" it has therefore been laid down by a long line of cases beginning with that of *Marzetti v. Williams* (1830) 1 B & Ad 415 that damages in such cases a jury may within reason make an award of any such sum as they consider the circumstances of the breach of contract or dishonor of cheque warrant although there has been no proof of any actual loss (i.e. special damages) to the customer" See*: Union Bank of Nigeria Plc v. Mr. N.M. Okpora Chimaeze* (2014) LPELR – 22699 (SC) (Pp.46 – 47 paras E- E) (2014) 9 NWLR (pt. 1411) 166 at page 195-196, paras D-B.

In conclusion, owing to the earlier resolutions made, appeal ** and is allowed. I set aside the judgment of the High Court of Kwara State sitting in Ilorin in Suit No. Kws/142/2013 delivered on 24th February, 2015.

Make the following declarations:

1. That the appellant is entitled to lawful use of his money kept in the respondent's custody and by exhibit C, the act of the respondent in dishonoring the appellant's cheque is wrongful.
2. That the decision of the respondent in dishonoring the appellant's cheque issued in favor of and presented by Abdulazeez Oloriegbe for encashment constitutes a defamation of character of the appellant;

   And I make order for:
3. General damages in the sum of ₦200,000.00 (Two hundred thousand naira) only for financial embarrassment in favor of the appellant;

4. Damages in the sum of ₦300,000.00 (Three hundred thousand naira) only for the defamation of the appellant's character by the respondent.
5. I award cost of ₦50,000.00 (Fifty thousand naira) only in favor of the appellant.

TSAMIYA, J.C.A: I have had the priviledge of reading in advance the lead Judgment of my learned brother Uchechukwu Onyemenam, JCA. I am in complete agreement with the reasoning and conclusions in the said judgment, I have nothing to add. I also abide by the orders made including the order as to costs.

UWA, J.C.A: I read before now the judgment of my learned brother, Uchechukwu Onyemenam, JCA

His Lordship has dealt with the issues and resolved same in detail; I adopt the reasoning and conclusion therein as mine and also allow the appeal. I am at one with the orders made in leading judgment including costs awarded in favour of the appellant.

Appeal allowed