IN THE SUPREME COURT OF NIGERIA
HOLDEN AT ABUJA

DELIVERED ON THE 30TH DAY OF JANUARY, 2026
BEFORE THEIR LORDSHIPS

JOHN INYANG OKORO	**JUSTICE, SUPREME COURT**
HELEN MORONKEJI OGUNWUMIJU	**JUSTICE, SUPREME COURT**
ADAMU JAURO	**JUSTICE, SUPREME COURT**
OBANDE FESTUS OGBUINYA	**JUSTICE, SUPREME COURT**
ABUBAKAR SADIQ UMAR	**JUSTICE, SUPREME COURT**

SC/CV/1631/2022

BETWEEN:

1. ALBABAMINU INTERNATIONAL LTD
2. ALHAJI MOHAMMED BABA DAN } **APPELLANTS**
3. BABA ABDALLAH
4. RALIAT BELLO

V.

ACCESS BANK PLC - - - RESPONDENT

JUDGEMENT

(DELIVERED BY OBANDE FESTUS OGBUINYA, JSC)

This appeal probes into the rightness of the decision of the Court of Appeal, Kaduna Division (hereunder addressed as "the lower court"), *coram judice:* I. S. Bdliya, H. A. O. Abiru and A. A. Wambai, JJCA, in Appeals No. CA/K/194/2011 and CA/K/248/2011, delivered

the 20th May, 2016. In its consolidated decision, the lower court dismissed the appeal and cross-appeal from the judgment of the High Court of Kano State (the trial court), in Suit No. K/323/2009, delivered on the 14th June, 2011, wherein Ibrahim Musa Karaye, J. dismissed the appellants' claim and struck out the respondent's counter claim.

A resumé of the material facts of the case, which transfigured into this appeal, are disobedient to verbosity and complexity. Sometime in 2009, the legacy banking institution, the Intercontinental Bank Plc, granted a series of overdraft facilities to the appellants to the cumulative sum of ₦40M. The facilities were secured by seven (7) plots of land lying at Road C Stephen Shekari Housing Estate, Kurmin Mashi, Kaduna State. In the year 2011, the respondent inherited, through purchase, the assets, liabilities, operational rights and licence of the Intercontinental Bank Plc after the confirmation of its collapse by the central Bank of Nigeria in 2010. The loan sum was drawn down by the appellants who refused to repay it despite repeated demands. The appellants claimed to have paid the sum of ₦35M in cash towards the discharge of the facilities. The appellants alleged that the respondent made unauthorised charges (usury) on their accounts upon which the overdraft facilities were granted. Sequel to that, the appellants beseeched the trial court, via a writ of summons, filed on the 24th July, 2009, and in an amended statement of claim, filed on the 5th May, 2010, they tabled against the respondent the following reliefs:

i. **A DECLARATION that the only collateral security provided for the overdraft facilities given to the Plaintiffs by the Defendant are the three plots which title documents are in the possession of the Defendat bank namely plots No. 66, 68 and 70 Road C, Stephen Shekari Housing Estate, Kurmin Mashi, Kaduna, South Local Government Area of Kaduna State.**

ii. **A DECLARATION that during the subsisting relationship that upon the credit or cash lodgments on 28th day of May, 2009, into the undermentioned accounts returning them into credit, the said account were deemed repaid and no debt arose from them, further withdrawals having not been made from the said accounts namely:-**

   i. **ALBABAMINU INTERNATIONAL LIMITED (2) Account No. 0223001000008691 …… ₦ 6,725,000.00**

   ii. **ALHAJI MOHAMMED BABA DAN Account No. 0223001000008471……₦ 5,900,000.00**

   iii. **BABA ABDALLAH Account No. 022300100-0008871 …….. ₦ 6,365,000.00**

   iv. **RALIAT BELLO AMINU Account No. 0223001000008861……..……₦6,400,000.00**

iii. **AN ORDER directing that the sum of ₦9,610,000.00 being balance outstanding out of ₦35 Million paid by the 2nd Plaintiff**

of which only the sum of ₦25,390,000.00 was paid out to the four (4) accounts of the Plaintiffs as averred in paragraph 19b above which the defendant without any lawful authority retained without any (sic) paying same into 1st Plaintiff's account No. (1) as instructed by the Plaintiffs and still refuses to account for.

iv. AN ORDER directing the plaintiffs be reimbursed the sums unlawfully debited from the accounts of the Plaintiffs as enumerated in paragraph 19d above and credit balances after repaying the debts as in paragraph 19 above, which the Defendant has refused the Plaintiffs access:-

a) ₦12,500.00 and ₦287,500.00 on 13/11/08 on 1st Plaintiff's account No.0223001000-002771

b) ₦37,500.00 and ₦862,500.00 on 2/12/08 on 1st Plaintiff's account No.0223001000-002771

c) ₦5,500.00, ₦66,000.00 and ₦88,000.00 on 27/2/09 on 1st Plaintiff's account No. 0223001000002771

d) ₦1,000,000.00 on 1st Plaintiff's account No. 0223001000002771

e) ₦133,127.80 being credit balance on 1st Plaintiff's account No. 2 on 28/5/09

f) **₦143,512.90k being credit balance on 2nd Plaintiff's account on 28/5/09**

g) **₦191,775.20k being credit balance on 2nd Plaintiff's account on 28/5/09**

h) **₦218,090.70k being credit balance on 4th Plaintiff's account on 28/5/09 all totaling ₦2,958,006.60k**

v. **AN ORDER directing the Defendant to restructure the facilities (if any) granted in the accounts mentioned in 2 above in such a manner that all the account will submerge into ALBABAMINU INTERNATIONAL LIMITED (1) Account No. 0223001000002771 and be operated as one account**

vi. **AN ORDER or (sic) injunction restraining the Defendant either by itself, through its officers, agents and or privies from doing any act inconsistent with the relationship that exist in respect of the accounts mentioned in 2 above by way of sale or otherwise tamper with the collateral named in prayer 1 above which are used to secure the facilities granted by the Defendant to the Plaintiffs.**

As expected, the respondent, upon service of the processes on it, joined issue with the appellants and denied liability. In its amended statement of defence, the respondent denied the repayment of ₦35M in cash which it described as "dummy postings" perpetrated by the officials of the respondent in collusion with the appellants.

Consequently, the respondent counter-claimed against the appellants, jointly and severally, for the following reliefs:

i. **The sum of N56,153,464.26 being the debit balance outstanding on the accounts of the Plaintiffs with the Defendant/Counter-claimant as at the 5th October 2009 arising from overdraft facilities granted the Plaintiffs by the Defendant/Counter-claimant.**
ii. **An order of foreclosure on the 7 plots of land being plots No: 60,62,62A, 64, 66, 68 and 70 at Road C, Stephen Shekari Housing Estate, Kurmin Mashi Local Government Area, Kaduna State.**
iii. **20% interest on the above mentioned outstanding sum still the delivery of judgment by this Honourable Court.**
iv. **10% interest from the date of delivery of judgment till the date of liquidation of the entire judgment sum.**
v. **Legal cost.**

Following the riotous claims, the trial court conducted a full dress determination of the case. In proof of the case, the appellants fielded a single witness, PW1. In defence of the suit, the respondent called two witnesses, DW1 and DW2. Tons of documentary evidence were tendered before the trial court. At the closure of evidence, the parties, through their respective counsel, addressed the trial court in a manner

allowed by law. In a considered judgment, delivered on the 14th June, 2011, documented between pages 594 – 639, volume 1, of the record, the trial court dismissed the appellants' claim and struck out the respondent's counter-claim.

The appellants and the respondent were dissatisfied with the judgment. Both cross-appealed and appealed against it respectively to the lower court. Both were consolidated and heard by the lower court. In a considered unanimous judgment, delivered on the 20th May, 2016, reflected between pages 865 – 899, volume 2, of the record, the lower court dismissed both appeals and in addition set aside the trial court's order striking out the respondent's counter-claim and entered an order of non-suit against it.

The appellants were peeved by the decision. Hence, with the leave of this court, the appellants, on the 6th February, 2024, lodged a 5 – ground notice of appeal, copied between pages 901 – 905, volume 2 of the record, wherein they prayed as follows:

1. **To allow the appeal and set aside the decision of the lower court non-suiting the Respondent/Cross appellant**
2. **An order of dismissal of the Respondent/ Cross Appellant's counter-claim.**

Thereafter, the parties, through their counsel, filed and exchanged their respective briefs of argument in line with the procedure regulating

the hearing of civil appeals before this court. The appeal was entertained on the 4th November, 2025.

During its hearing, learned counsel for the appellants, E. E. Ekhasemomhe, Esq., adopted the appellants' brief argument, filed on the 28th March, 2024, and appellants' reply brief, filed on the 27th May, 2024, as representing his arguments for the appeal. He urged the court to allow it. Similarly, learned counsel for the respondent, J. O. Okougbo, Esq., adopted the respondent/cross-appellant's brief of argument, filed on the 26th April, 2024, as constituting his submissions against the appeal. He urged the court to dismiss it.

Respondent's preliminary objection:

There is living proof that at the cradle of the respondent's brief of argument, precisely between pages 5 – 8 thereof, the respondent greeted the appeal with a preliminary objection which is erected on binary grounds. Its mission is to emasculate and weed out the appellants' ground 5 of the notice of appeal in its infancy on the ground that it is divorced from the decision of the lower court which birthed this appeal.

A preliminary objection, a pre-emptive strike that tends to pierce and perforate the heart of a matter, is a specie of objection which, if sustained and upheld by a court, has the potency to render further proceedings in a matter unnecessary, see ***Abe v. Unillorin*** (2013) 16

NWLR (Pt. 1379) 183; ***APC v. INEC*** (2015) 8 NWLR (Pt. 1462) 531; ***Jim-Jaja v. C.P, Rivers State*** (2013) 6 NWLR (Pt. 1350) 225; ***Petgas Resources Ltd. v. Mbanefo*** (2018) 1 NWLR (Pt. 1601) 442; ***Ekemezie v. Ifeanacho*** (2019) 6 NWLR (Pt. 1668) 356; ***Ebebi v. Ozobo*** (2022) 1 NWLR (Pt. 1810) 165; ***Jega v. Ekpenyong*** (2025) 11 NWLR (Pt.1998) 33.

It is now a settled law, beyond any peradventure of doubt, that a motion on notice is filed where a party intends to challenge the incompetence of one or two grounds of a notice of appeal in the presence of an existing valid ground(s) in an appeal. Where a party, in such a circumstance, files a preliminary objection, such a preliminary objection is rendered incompetent. Thus, a motion is filed when a party attacks the competence of one or two grounds of appeal in the midst of other valid grounds of appeal whilst a preliminary objection is filed if a party queries the competence of all the grounds of appeal with intent to nip an appeal in the bud *in solidum*, see ***Garba v. Mohammed*** (2012) NWLR (Pt. 1537) 114; ***Kente v. Ishaku*** (supra); ***PDP v. Sheriff*** (2017) 15 NWLR (t. 1588) 219; ***NNPC v. Famfa Oil Ltd***. (2012) 17 NWLR (Pt. 1328) 148; ***Cocacola (Nig) Ltd. v. Akinsanya*** (2017) 17 NWLR (Pt. 1593)74; ***Ezenwaji v. UNN*** (2017) 18 NWLR (Pt. 1598) 45; ***Petgas Resources Ltd. v. Mbanefor*** (2018) 1 NWLE (Pt. 1601) 442; ***KLM Royal Dueth Airlines v. Aloma*** (2018) 1 NWLR (Pt. 1601) 473; ***Isah v. INEC*** (2016) 18 NWLR (Pt.

1544) 175; ***FRN v. Atuche*** (2019) 8 NWLR (Pt. 1674) 338; ***Lolapo v. COP*** (2019) 16 NWLR (1699) 476***. Opeyemi v. State*** (2019) 17 NWLR (Pt. 1702) 403.

I have situated the hub of the respondent's objection with the inelastic position of the law displayed above. The *raison d'etre* behind the juxtaposition is not difficult to find. It is to ascertain if the preliminary objection is obedient to the law. An intimate reading of the objector's preliminary objection, deducible from the arguments thereon, reveals clearly that it mainly censured the competence of the appellants' ground 5 of the notice of appeal. It is axiomatic that the preliminary objection spared grounds 1 - 4 of the notice of appeal from any attach. In other words, in the absence of any condemnation of grounds 1 - 4 in the preliminary objection, they are apparently valid and viable with the potency to sustain the appellant's appeal. As a matter of law, one ground of appeal is sufficient to oxygenate an appeal and impregnate it with success. In the face of the existential validity of grounds 1 - 4, the objector ought not to have raised a preliminary objection with the intent to terminate the life of the appeal *in limine.* The appropriate process or mode is by dint of an application (motion on notice) challenging the validity of the appellants' ground 5 of the notice of appeal. In so far as the principal mission of the preliminary objection is against the competence of ground 5, it is impotent to determine, one way or the other, the fortune of the entire appeal. In this wise, the

objector's approach, a costly *faux pas* to behold, is an affront to the law as it ought to have besieged this court by way of an application to abrogate the appellants' ground 5. The improper method constitutes a serious *coup de grace* to the competency of the preliminary objection. In a word, the preliminary is plagued by an indelible incompetence. In consequence, it does not deserve the investure of the scarce juridical time and space, which are in short supply in adjudication, for its consideration.

Having regard to this brief legal dissection of preliminary objection against grounds of appeal, the respondent's preliminary objection, with due reverence, is disabled from its birth. Consequently, the respondent/objector's preliminary objection, which was invented to abort the appeal in its embryo, is irremediably incompetent and is, hereby, struck out. I will proceed to handle the appeal on its merited merit.

Determination of the appeal:

In the appellants' brief of argument, learned counsel distilled three issues for determination, to wit:

1. **Whether or not the court below, having held that the appeal as constituted in Appeal No. CA/K/248/2011 has no merit and in consequence dismissed it, has not thereby become funtus officio and**

lacks the jurisdiction to make the subsequent order of non-suit in favour of the Respondent?

2. **Whether the court below has the jurisdiction after dismissing the Respondent's appeal to subsequently make an order of non-sui in favour of the Respondent without inviting the parties in the appeal to address the court on the propriety in making an order of non-suit before making it?**
3. **Whether or not the court of Appeal was right in non-suiting the respondent in respect of the counter-claim instead of dismissing it in the light of the evidence adduced at the trial and the affirmation of the trial court's decision by the court below?**

In the respondent's brief of argument, learned counsel adopted the first and second issues for determination as crafted by the learned appellant's counsel. Learned counsel added a third issue, namely

3. **Whether there is any proof from the Records of appeal that the counter-claim before the trial court was wholly approved?**

A comparative scrutiny of the two sets of issues shows that the issues for determination are two, namely:

> **(1) Was the lower court right in entering an order of non-suit against the respondent counter-claim?**
> **(2) Was the lower court right in entering an order of dismissal of the respondent's counter-claim on account of total non-proof of it?**

Arguments on the issues:

Appellants' submissions:

Learned appellants' counsel submitted that the lower court having dismissed the respondent's counter-claim became *functus officio* and lacked the power to non-suit the respondent on it except to correct clerical mistakes or accidental errors. He relied on ***Uloma Investments (Nig.) Ltd v. Suleiman*** (2003) FWLR (Pt. 169) 1186; ***Onyemobi v. President Onitsha Customary Court*** (1995) 3 NWLR (Pt. 381) 50; ***Mohammed v. Husseini*** (1998) 14 NWLR (Pt. 584) 108; ***M. T. Delma v. M. T. Ane (Ex M. T. Leste)*** (2016) 13 NWLR (Pt. 1530) 482; ***Nigerian Army v. Iyela*** (2008) 16 NWLR (Pt. 1118) 115; ***FRN v. Ogbulafor*** (2012) LPELR – 7947. He noted that the lower court had no power to sit on an appeal over its decision. He cited ***Sun Insurance v. IMB Ltd*** (2005) 12 NWLR (Pt. 940) 608; ***Ukachukwu v. UBA*** (2005) 18 NWLR (Pt. 956) 1.

Learned counsel contended that the lower court failed to invite the parties to address it before making the order of non-suit as required by law. He referred to ***Olayoye v. Oso*** (1969) All NLR 271; ***Osayi v. Izozo*** (1969) All NLR 150; ***Craig v. Craig*** (1967) NMLR 52. He reasoned that the issue of non-suit was raised *suo motu* by the lower court without inviting parties to address it on the point. He relied on ***Araka v. Ejeagwu*** (2001) 1 SCN 50; ***Kuti v. Balogun*** (1978) 1 SC 53; ***Ogiamien v. Ogiamien*** (1967) NMLR 2L5; ***Egbuchu v. CMB Plc*** (2006) 8 NWLR (Pt. 1513) 192; ***Omoregbe v. Lawani*** (1980) 3-4 SC 108; ***Mandilars & Karaberis Ltd. v. Oridota*** (197) SC 47. He described the act as a breach of the appellants' right to fair hearing. He cited ***Otopo v. Sunmonu*** (1987) 2 NWLR (Pt. 58) 587; ***Ugo v. Obiekwe*** (1989) 1 NWLR (Pt. 99) 566; ***Akingbola v. FRN.*** (2019) All FWLR (Pt, 992) 274; ***Adigun v. Oyo State (No.)*** (1987) 1 NWLR (Pt. 53) 678; ***Kotoye v. CBN*** (1989) 1 NWLR (Pt. 98) 419. He reasoned that the act rendered the entire decision of the lower court a nullity. He referred to ***Olayioye v. Abdulrafiu*** (2020) Alla FWLR (Pt. 1034) 992.

Learned counsel argued that the respondent had the burden to prove that the counter-claim, especially relief one thereof, wherein it claimed the sum of ₦56.1M, or have it dismissed, not non-suited. He relied on ***Nigeria Maritime Services Ltd. v. Afolabi*** (1978) 2 SC 79; ***Akpapuna v. Nzeka*** (1983) All NLR 350; ***Olayioye v. Oso*** (supra). He observed that the case was fought on its merit and the respondent

failed to prove the counter-claim. He stated that exhibit F (the statement of account) was beclouded with issues of unjustified, illegal and unauthorised deductions and it could not represent a reliable account of the transaction between the parties. He cited ***Anyawo v. ACB Ltd.*** (1976) 2 SC 41. He opined that there was no other document, or evidence, tendered in proof of the counter-claim by the respondent. He insisted that the issue of non-suit was not raised by the parties and the lower court should have maintained a studied silence therein. He referred to ***Ejowhomu v. Edok-Eter Mandilas Ltd.*** (1986) 5 NWLR (Pt. 39)1.

Respondent's contentions:

Learned respondent's counsel submitted that the appellants admitted taking the loans in their defence to the counter-claim and had a duty to repay the loan. He relied on ***Pacers Multi Dynamics Ltd. v. Access Bank*** (2022) LPELR – 59572 (SC). He enumerated the defences open to a defendant (the appellants) on an allegation of indebtedness. He cited ***Airvia Ltd v. Oriental Airlines Ltd.*** (2004) LPELR – 272 (SC); ***Okoli v. Morecab*** (2007) LPELR – 2463 (SC).

Learned counsel contended that a non-suit is not a favour to either side, but based on justice. He cited ***Ugbodume v. Abiegbe*** (1991) 8 NWLR (Pt. 209) 261. He Claimed that the lower court had the discretion to make the order of non-suit without hearing the parties. He

cited ***Adeosun v. Babalola*** (1972) LPELR – 24935 (SC); ***Ogbechie v. Onochie*** (1988) LPELR – 2277; ***Ugbodume v. Abiegbe*** (1991) LPELR – 3316 (SC); ***Anyaduba v. NRTC Ltd.*** (1992) LPELR – 505 (SC); ***Balogun v. UBA*** (1992) LPELR – 728 (SC); section 15 of the Court of Appeal Act, order 34 rule 1 of the Kano State High Court Rules, 2014.

Learned counsel argued further that the counter-claim was proved. He said that the exhibit X was the letter of demand for payment. He added that the appellants admitted drawing down on the loans. He noted that the trial court's finding on the admission was not upturned by the lower court and so binding on the parties. He referred to ***MTN v. Corporate Communications Investment Ltd.*** (2019) LPELR – 47042 (SC). He described the indebtedness of the appellants to the respondent was affirmed by concurrent findings by the lower courts. He explained that when the sum of ₦2.9M found by the lower courts is subtracted from the claimed total debt of ₦56.1M, the appellants are sitting indebted to the respondent for the sum of ₦53.1M.

Resolution of the issues:

In order to harness the gains of uniformity, I will attend to the binary issues seriatim. To this end, I will, without much ado, kick off with the treatment of issue one. The marrow of the issue, though a

seemingly stubborn one, is circumscribed within a narrow compass. It chastises the propriety *vel non* of the lower court's entry of non-suit order against the respondent's counter-claim after an order of its dismissal without giving the parties the opportunity of addressing it before making it.

In the first place, the respondent's case, which ultimately midwifed this appeal, traces its judicial paternity to Kano State. It was determined by the High Court of Kano State. Given its ancestry and determination, the provision of order 34 rule I of the Kano State High Court Rules, 2014 comes in handy and cries for utilisation in the determination of the thorny issue. Since its judicial interpretation is the cynosure and determinative of the vexed issue, it is important to pluck it out, *verbatim ac literattim,* whence it is ingrained quietly in the auxiliary enactment thusly:

> **Where satisfactory evidence is not given entitling the plaintiff or defendant to the judgement of the court, the judge may, *suo motu* or on application, non-suit the plaintiff, but the parties' legal practitioners retain to make submissions about the propriety or otherwise of making such an order**

At this juncture, it is apropos, perforce, to invite the reasoning/order of the lower court which is in the heat of extermination

and expunction. It is warehoused in the lower court's decision which monopolises pages 865 – 900, volume 2, of the mountainous record. At the *terminus ad quem* of the leading judgment, precisely at page 897 of the record, the lower declared:

> **The contention of the Respondents that the order of striking out made by the lower Court was faulty in the circumstances of the case is correct, but the order to be substituted there for is an order of non-suit, and not an order of dismissal as prayed for by the Respondents.**
>
> **Conclusion**
>
> **In conclusion, this Court finds no merit in the appeal of the Appellant constituted in Appeal No. CA/K/248/2011 and same be and is hereby dismissed. This Court also finds not merit in the cross appeal of the Respondents constituted in Appeal No. CA/K/194/11 and it is hereby also dismissed, save for the complaint against the order striking out of the counterclaim of the Appellant made by the lower Court. The Judgment of the High Court of Kano State in Suit No. K/232/2009 delivered by Honourable Justice**

> **Ibrahim Musa Karaye on the 14th of June, 2011 is hereby affirmed, save for the order striking out the counterclaim of the Appellant. The order of the lower court striking out the counterclaim is set aside in its stead is entered as order of non-suit of the counterclaim.**

It is gleanable from the phraseology and tenor of the comprehension-friendly excerpt, catalogued supra, that the lower court made the order of non-suit in relation to the respondent's counter-claim *proprio motu* – on its own volition – and devoid of any atom of input from the legal practitioners of the feuding parties. In other words, the order of non-suit was issued without parties, *qua* counsel, making submissions on its legality or otherwise. This court, since its propagation, has been consistent and unanimous on the toxic consequence of issuing an order of non-suit over a matter without an address from the counsel to contending parties therein. In ***Craig v. Craig*** (1967) All NLR 52/ (1966) NSCC, vol. 4, 205, at page 208, this court, per Coker, JSC, proclaimed insightfully:

> **It seems to us, when considering our judgment, that this might be a proper case for a non-suit; but we though we ought first to hear learned counsel. And we pause to observe that when the properity (sic) of a non-suit has not**

been argued, if a trial Judge should think of entering a non-suit it is desirable that he should first ask counsel for the parties for their submissions. We invited the learned counsel to state their arguments for and against a non-suit.

In ***Anyaduba v. N.R.T.C. Ltd.*** (1992) 5 NWLR (Pt. 243) 535 at 566, Nnaemeka-Agu, JSC, of the blessed memory, re-echoed the stand:

> **…there can no longer arise in Nigeria the question whether parties to suit are entitled to be heard on the propriety or otherwise of a non-suit before the order is made. It is true that parties no longer by themselves elect or ask that they be non-suited. They normally come to court to urge the court to enter judgment in their favour. As it is so, ordering a non-suit is in effect making an order which none of the parties has asked for. In a country like Nigeria where right to fair hearing is a constitutional right under section 33 of the Constitution, it would be unconstitutional as being contrary to the principles of fair hearing to make any substantive order which none of the parties in litigation has**

asked for, no matter how benevolent it might seem. I, therefore agree that the failure to invite the parties to address the court on the propriety of a non-suit before ordering it, the appeal was rightly allowed.

See, also, ***Ehifisoye v. Alabetutu*** (1968) NMLR 298 at 303; ***Anyakwo c. ACB Ltd.*** (1976) 2 SC 41; ***Aigbe v. Edokpolor*** (1977) 2 SC 1; ***Omoregbe v. Lawani*** (1980) 3 – 4 SC 180; ***Akpapuna v. Nzeka*** (1983) 2 SCNLR 1; ***Afolabi v. Adekunle*** (1983) 2 SCNLR 141 at 148; ***Olusanya v. Olusanya*** (1983) 2 SCNLR 134 at 139; ***Adeleke v. Raji*** (2002) 13 NWLR (Pt.783) 142; ***A.G. Leventis Nig. Plc v. Akpu*** (2007) 17 NWLR (Pt. 1063) 416; ***Olufosoye v. Olorunfemi*** (1989) 1 NWLR (Pt. 95) 26; ***Kachalla v. Banki*** (2006) 8 NWLR (Pt. 982) 364; ***Egbuchi v. Continental Merchant Bank Plc.*** (2016) 8 NWLR (Pt. 1513) 192.

The inflexible posture of the law, discernible from the magisterial pronouncement in the army of these *ex cathedra* authorities, displayed above, is obvious. The requirement of counsel for the parties to address a court prior to any order of non-suit, as ordained by the provision chronicled above, is mandatory. It is not directory, perhaps due to the employment of the word "shall" by the draftsman. A violation of the compulsory requirement constitutes a serious erosion of the parties' inviolable right to fair hearing as entrenched and guaranteed by the sacrosanct provision of section 36 (1) of the Constitution, as

amended. Indisputably, the beauty of an order of non-suit in adjudication cannot be overemphasised. It affords the non-suited party, usually a plaintiff, the rare opportunity to have a second bite at the cherry *vis-à-vis* his cause of action. In that wise, he owns a chance to repair his case and coast to victory on it. However, it has its price and demerits. The order may occasion injustice to a plaintiff who may claim to have proved his case and is being subjected to another judicial journey over the case at the measured millipede speed of court processes. It inflicts a serious ordeal on a defendant who will be compelled to engage in a second round of litigation with the plaintiff over the same matter. Methinks, it is as a result of all these major inconveniences/hardships against litigating parties that necessitate the crying need for addresses of counsel for the parties on the propriety or otherwise of order of non-suit. Perhaps, the address will neutralise the dismal effect of the prejudices that may germinate from an order of non-suit. In effect, the lower court's order of non-suit, which was destitute of the required submissions of legal practitioners of the warring parties, was, with profound respect, a flagrant defilement of the established law on non-suit.

That is not all. The order of non-suit, which is housed in the extract chronicled above, is posterior to an order of dismissal of the respondent's appeal, registered as Appeal No. CA/K/248/2011, over the striking of its counter claim. The order of dismissal and order non-

suit are concurrent and run pari passu in the lower court's decision and in a cutthroat competition on which to arrest the blessing of the law. The nagging question, which begs for an answer, is: can they legitimately co-exist? I have my doubts. In the legal hemisphere, the two orders are mutually exclusive and incompatible in the province of one matter. They portray divergent effects on the fortune of a matter under adjudication. Incontestably, as already noted supra, an order of non-suit is a palliative order. It bequeaths to a party, armed with it, a second chance to revisit a lower court (usually a trial court) and reventilate his perceived and nursed grievances against an adversary in the hope of fetching a magnificent triumph over his opponent. An order of dismissal, in the eyes of the law, is the most punitive penalty that could be slammed on a matter that has been accorded a full dress determination on the merit. It is like a judicial death and burial of a case which has passed through the legal lens of full-scale determination on the merit. It is *cul-de-sac* of a matter conducted on its merit. In this wise, to issue an order of non-suit over a matter that has been penalised with order of dismissal, after its consideration on the merit, is akin to resurrecting it after its funeral in the temple of justice. An order of dismissal cannot tolerate any posterior marriage with an order of non-suit. Indubitably, a latter-order of non-suit is liable to banishment and vacation from the temple of justice.

It stems from the foregoing legal anatomy of order of non-suit, done in due consultation with the law, that the lower court's order of non-suit, with due reverence, was totally offensive to basic tenets of the law. This court, on the footing of the doctrine of has *ex debito justitae,* is showered with the *vires* to mow it down with its unbiased judicial sword. In the end, I have no choice than to resolve the issue one in favour of the appellants and against the respondent.

That takes me to settlement of issue two. The mainstay of the issue is plain. It queries the legitimacy of the lower court's order of dismissal made against the respondent's appeal, *vis-à-vis* its counter-claim, in the face of the evidence on record in proof of it. In due fidelity to the desire of the law, I have consulted the record, the soul of the appeal. My port of call is at the residence of the consideration of the respondent's appeal in the lower court's decision sought to be impugned and ostracised from the legal firmament. The reasoning of the lower court is domiciled between pages 892 – 896, volume 2, of the mountainous record. At the expense of prolixity, but borne out of necessity for easy appreciation, I will invite the reasoning and finding *in extenso.* At page 892, lines 10 – 24, volume 2, of the record, the lower court declared:

> **The core issue for resolution in this appeal, therefore, is whether the Counsel to Appellant was correct that**

the Appellant made out a case of entitlement to the sum of ₦40 Million, out the sum of ₦56,153,464,24 counterclaimed for, and to have had judgment being entered for it in that sum. It is correct as stated by Counsel to the Appellant that the lower Court found that the Appellant pleaded the fact that it granted the Respondents facilities worth ₦40 Million and that this fact was admitted by the Respondents and the fact needed no further proof and it was deemed established. It is also correct that the lower court found as a fact, and as confirmed by this court in the earlier part of this judgment, that the assertion of the Respondents that it made a cash payment of ₦35 Million towards liquidating their indebtedness to the Appellant was a farce. Counsel has urged that it should be concluded from these findings that the Respondents owed the Appellant, at least, the sum of N40 Million being the total facilities that the Respondents admitted they were granted by the Appellant.

Again, at page 896, lines 17 – 23, volume 2, of the record, the lower court concluded:

> **The cumulative effect of the findings of the lower Court on the counterclaim of the appellant was that respondents obtained overdraft facilities totaling ₦40 Million from the appellant and that they drew down on the facilities and did not repay the amount drawn down on the facilities at the expiration of the period of the facilities and were indebted to the appellant. The claims of the appellant on the counterclaim failed because the appellant did not prove the actual amount of the indebtedness. The appropriate order to make in the circumstances was not an order of striking out or for dismissal, but an order of non-suit.**

In hunting for a balanced resolution of the issue, I have paid another excursion to the record, the bedrock of the appeal. This time around at the province of the appellants' statement of defence to the respondent's counter-claim which colonises pages 396 – 398, volume 1, of the wordy record. The rationale behind the visit is simple. It is the legally accepted barometer with which to gauge the stand of the appellants in respect of the counter-claim. In due pacification of the law, I have given a clinical audit to it. Admirably, it is rebellious to

woolliness. In paragraph 2 thereof, the appellants made a categorical admission of the respondent's averments in paragraphs 8 – 13 of the counter-claim which orbit around the grant of the overdraft facilities of ₦40M to the appellants. In the same vein, the appellants' only and star witness, PWI, the second appellant, the *alter ego* of the first appellant, in his deposition, found at pages 210 and 211, volume 1, of the record, testified eloquently that he drew down on the facilities.

It admits of no argument that these critical and unequivocal averments and tangible testimony, mined out from the quiet premises of the pleading and evidence, to all intents and purposes, constitute a classic exemplication of an admission. Indeed, it is a quintessence of an admission of the principal loan sum of ₦40M which formed part and parcel of the respondent's counter-claim against the appellants. A loan signifies a sum of money lent to a borrower with interest, see ***Olowu v. Building Stock Ltd***. (2018) 1 NWLR (Pt. 1601) 343. In the face of an undiluted admission of the grant of the loan facilities, the appellants were mired in debt or indebtedness to the appellant. Debt or indebtedness implies a state of owing money or something owed, or debt to another person, see ***Bebedos and Ventures Ltd. v. FBN Plc*** (2016) 4 NWLR (Pt. 1609) 241 The law recognises and sanctions four ways of answering/defending an allegation of indebtedness, *videlicet*: (a) To admit the debt. (b) To deny the debt. (c) To counter-claim against the debt. (d) To set off against the debt, see ***Okoli v.***

Morecab Finance (Nig.) Ltd. (2007) 14 NWLR (Pt. 1053) 37; ***Unity Bank Plc. v. Rhour & Lue (Nig.) Ltd.*** (2025) 9 NWLR (Pt. 1994) 1. Unarguably, the appellants' response comes squarely within the territory of the first answer, *id est*, admission.

In the expansive legal hemisphere, admission has received connotations from statutes and case law. According to section 20 of the Evidence Act, 2011:

> **An admission is a statement, oral or documentary, or conduct which suggests any inference as to any fact in issue or relevant fact, and which is made by any of the persons, and in the circumstances, mentioned in this Act**.

This was noted in ***UBA Plc. v. Jargaba*** (2007) 11 NWLR (Pt. 1045) 237; ***Oguanuhu v. Chiegboka*** (2013) 6 NWLR (Pt. 1351) 588. In ***Adusei v. Adebayo*** (2012) 3 NWLR (Pt. 1288) 534 at 558, this court described admission as:

> **a concession or voluntary acknowledgement made by a party of the existence of certain facts; a statement made by a party of the existence of a fact which is relevant to the cause of his adversary; a voluntary acknowledgement made by a party of the existence of the truth of certain facts which are inconsistent with his claims in an action"**,

See, also, ***UBA v. Jaraaba*** (2007) 31 NSCQR 144; ***N.B.C.I. v. Integrated Gas (Nig.) Ltd.*** (2005) 4 NWLR (Pt. 916) 617; ***Omisore v. Aregbesola*** (2015) 15 NWLR (Pt. 1482) 205; ***N.A.S. Ltd. v. UBA Plc.*** (2005) 14 NWLR (Pt. 945) 421.

In the evidential pyramid, admission has been crowned with the deserved toga of the best evidence against the party making it, see ***Daniel v. INEC*** (2015) 9 NWLR (Pt. 1463) 133. It constitutes a concession against the interest of a party making it, see ***Onovo v. Mba*** (2014) 14 NWLR (Pt. 1427) 391. Hence, in the view of the law, an admitted fact does not need any proof, see ***Our Line v. S.C.C. Nig. Ltd.*** (2009) 7 SCNJ 358; ***Jolasun v. Bamgboye*** (2010) 18 NWLR (Pt. 1225) 285; ***Offor v. State*** (2012) 18 NWLR (Pt. 1333) 421; ***Jitte v. Okpulor*** (2016) 2 NWLR (Pt. 1497 542; ***Cole v. Jibunoh*** (2016) 4 NWLR (Pt. 1503) 499; ***Orlanezi v. A.-G., Rivers State*** (2017) 6 NWLR (Pt. 1561) 224; ***Mba v. Mba*** (2018) 15 NWLR (Pt. 1641) 177; ***Adeokin Records v. M.C.S.N (Ltd/GTE)*** (2018) 15 NWLR (Pt. 1643) 550; ***N.R.M.A & FC v. Johnson*** (2019) 2 NWLR (1656) 247.

Let me placed on record, pronto and perforce, that my microscopic examination of the appellants' pleading supra, which does not harbour any ambiguity, discloses clearly and amply that the appellants' admission of the grant of the principal sum of the loan facilities, ₦40M, is total, crystal clear, unequivocal and devoid of misapprehension of the facts and, *ipso facto,* makes it binding on

them, see ***Al-Hassan v. Ishaku*** (2016) 10NWLR) Pt. 1520) 230. The admission is a holistic concession and not susceptible to any iota of conjecture. It is not shrouded in the fog of uncertainty. The unfiltered admission falls within the perimeter of formal admission. In ***Nwankwo v. Nwankwo*** (1995) 5 NWLR (Pt. 394) 153, at page 171, Igu, JSC, incisively proclaimed:

> **Admissions are either *formal* or *informal*. Formal admissions are admissions made by a party to a civil proceeding so as to relieve the other party of the necessity of proving the matters admitted. They are usually contained in a pleading as facts admitted in a pleading need not be proved any longer but are taken as established. Formal admissions may also take the form of clear admissions filed or made by party to a civil proceeding or by his counsel in the course of the trial of civil suit. See *Chief Aaron Nwizuk and others v. Chief waribo Eneyok and others* (1953) 14 W. A. C. A. 354 and ReBeeny (1894)1 ch.499**

Indisputably, in the sight of the law, a party who makes an admission surrenders himself to the fact and law and makes himself an easy prey in the waiting hands of his adversary. The appellants' admission is a *pessimi exempli* of an admission against interest – a party's acknowledgment of a fact that is inimical to his position. The

net effect comes to this. The respondent, the lender banker is entitled, *de jure,* to a refund of the admitted sum of ₦40M. Indubitably, the loan sum belongs to a galaxy of unknown depositors who reposed mountainous confidence in the respondent bank due to the fiduciary relationship between them. It smells of injustice to deny the depositors of their hard earned resources stashed in the respondent's vault for their use *in futuro,* perhaps for a "rainy day" in their lives. By the same token, it will constitute a serious *coup de grace* to the cherished legal duty of a bank to a customer under which it has a binding obligation to husband the funds they emptied and funnelled into its custody.

There is no gainsaying the fact that Nigeria is a legatee of the common law principles and operates an accusatorial system of administration which it imported from the Anglo-American legal system. In this adversarial system of adjudication, the duty of a court in relation to claimed reliefs has been settled by this court. In ***Agu v. Odofin*** (1992) 2 SCNJ 161, at 173, Karibi-Whyte, JSC, intoned:

> **Our adjudicatory system has severely circumscribed and restricted the award to be made by the court within the scope of the claims made and reliefs sought by the parties before the court. The view of this court is that it is without power to award to a claimant or grant a relief that which he did not claim…. A court of law may award less,**

and not more than what the parties have claimed…. A fortiori the court should never award that which was not claimed or pleaded by either party.

Flowing from this expansive *tour d'horizon* on the proof of claim under the canopy of admission, the lower court's decision/finding which visited an order of dismissal on the respondent's counter-claim, with due respect, orbits outside the alignment of the law as anatomised above. It flies in the face of the established law and concrete evidence on record as it will smack of idolising judicial sacrilege for this court to endorse a finding that has disclosed serious hostility to the letters and spirit of the law. I am, therefore, not armed strong in law to honour the appellants' salivating invitation to coronate the injudicious finding/dismissal with an un1derserved toga of validity. In the result, I have no option than to resolve the issue two against the appellants and in favour of the respondent.

On the whole, having resolved the two issues for and against the appellants, the destiny of the appeal is obvious. It succeeds in part. Consequently, I allow the appeal partly. Accordingly, the order of non-suit made by the lower court, in the Appeal No. CA/K/248/2011, delivered on the 20th May, 2016, is, hereby, set aside for the appellants. Also, the order of dismissal made thereon is, hereby, set aside for the respondent. The parties shall bear the respective costs

they incurred in the prosecution and defence of the partially successful appeal.

Determination of the cross-appeal:

The cross-appeal was heard alongside the appeal. During the hearing, learned counsel for the cross-appellant, J. O. Okougbo, Esq., adopted the respondent/cross-appellant's brief of argument, filed on the 24th April, 2024, and cross-appellant's reply brief, filed on the 15th July, 2024, as representing his arguments for the cross-appeal. He urged the court to allow it. In the same vein, learned counsel for the cross-respondents, E. E. Ekhasemomhe, Esq., adopted the appellants/cross-respondents' brief of argument, filed on the 25th June, 2024, as constituting his submissions against the appeal.

In the cross-appellant's brief of argument, learned counsel nominated two issues for determination:

1. **Whether on the state of evidence established at the trial, the court below was not misdirected to hold that there was no proof of the overdrafts having been drawn down?**
2. **Whether in claim of money, a party must expressly make a case for a lesser sum to be entitled to judgment in that lesser sum?**

Interestingly, learned cross-respondents' counsel adopted hook, line and sinker the duo issues framed by the learned counsel for the cross-appellant.

A panoramic view of the bipartite issues, as espoused in the dazzling submissions of the counsel for the contending parties, in their respective briefs of arguments for and against the cross-appeal, amply demonstrate that they quarrel with the lower court's confirmatory proclamation that the cross-appellant did not prove the overdraft facilities. In other words, the casus belli *inter parties* in the cross-appeal is the proof or otherwise of the overdraft facilities of ₦40M being part of the sum claimed in the cross-appellant's counter-claim.

It will be recalled vividly that I had found during the consideration of the main appeal, in due obeisance to the dictate of the law, that the cross-appellant established the grant, drawn down/disbursement and non-repayment of the overdraft facilities of ₦40M by dint of a wholesale admission by the cross-respondents. The cross-respondents, under the umbrella of this cross-appeal, have not furnished this court with any extenuating circumstances that will stimulate and compel me to disturb the immaculate finding which is in total allegiance to the law. Indubitably, due to the fact that the bone of contention in this cross-appeal is a mirror of that considered under the banner of issue two in the main appeal, the law grants me the unbridled licence to adopt my finding in the main appeal here. The

wisdom behind the legal permission are not far-fetched. First, the purpose is to conserve the scarce judicial time and space which are in constant drought in judicial adjudication. Second, it helps to banish unnecessary duplication of effort, which usually serve the undesirable purpose of swelling the verbosity of judgments, from its underserved throne in the temple of justice. In an abiding loyalty to the desire of law, I hereby import my reasoning and determination under issue two in the main appeal. The import of my finding therein is that the respondent proved, based on concrete evidence of admission, that the cross-respondents were granted ₦40M facilities which they drew down and refused to repay it. Following the legitimate transportation of that finding to the landscape of this cross-appeal, I, *mutatis mutandis,* adopt it as my finding herein. The domino effect comes to this. The lower court, with due deference, fractured the law in its finding against the proof of the ₦40M overdraft facilities in the cross-appellant's counter-claim. In the circumstance, I resolve the conflated issues one and two in the cross-appeal in favour of the cross-appellant and against the cross-respondents.

Having resolved the two issues in favour of the cross-appellant, the fate of the cross-appeal, which was weaved on the proof of the sum of ₦40M overdraft facilities, is plain. It is imbued with merit. Consequently, I allow the cross-appeal. Accordingly, I hereby order that the cross-respondents shall forthwith refund the loan sum of

₦40M to the cross-appellant being the overdraft facilities granted to them by the cross-appellant in 2009. No order as to costs.

OBANDE FESTUS OGBUINYA,
JUSTICE, SUPREME COURT.

COUNSEL:

E. E. Ekhasemomhe, Esq. (with him, K. K. Omwirhiren, Esq.) for the appellant/cross-respondents.

J. O. Okougbo, Esq. for the respondent/cross-appellant.