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An Examination of Bankers'/Customers Relationship Under the Nigerian Law

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ABSTRACT: *This paper examines the evolving and complex legal relationship that exists between bankers and customers in view of the dynamic, intricate and knotty realities of banking in the 21st Century. Existing researches have portrayed the relationship that exists between bankers and customers as that of creditors and debtors. But unfolding of events in modern banking practices reveals that banking has gone beyond conventional practices of credit and debit; to embrace knotty foreign exchange dealings; discounting bills; financial advisory services; agency; administration of estates and acting as customers' bailee; to mention just a few. These modern services, coupled with emerging technological developments in banking services have opened new legal vistas with intricate legal issues which existing legislations and judicial authorities are grappling to cope with. The aim of this work is to critically examine the evolving relationship between bankers and customers beyond the conventionally known relationships of creditors and debtors using the doctrinal method of legal research to analyze existing literatures, case law and legislations. Findings revealed that modern technology and modern commerce have expanded the relationships between bankers and customers. Recommendations were made at the end of the work on the need to expand the frontier of legislations in Nigeria to embrace emerging realities of the relationship.*

KEYWORDS: Banks, Bankers, Customers, Relationships, Examination

INTRODUCTION

The banking industry is an indispensable part of every commercial transaction both locally and internationally. The relationship subsisting between bankers and customers is conventionally contractual and fundamentally that of debtor and creditor. It also consists of general and special contracts arising from the particular requirements of the banking business. The exigencies of modern banking services by banks to customers have traversed that of creditor and debtor to include discounting bills, dealing in foreign exchange, stock exchange transactions, financial advisory services, acting as trustees, acting as customers' trustees and as professional agents to customers.

Similarly, emerging technological developments in banking services with the advent of internet banking; use of Automated Tellers Machine (ATM), and Point of Sale (POS); to mention just a few have created new legal issues and open emerging legal frontier on the roles and duties of

bankers. As such, the relationship existing between banker and customer is no longer that of conventional credit and debit but one of agency; trustees, adviser and what have you.

Existing legislations and judicial authorities in Nigeria do not sufficiently capture the modern realities of the relationship. It is pertinent to point out that since the emergence of the first banking legislation in Nigeria in 1958; it is evident that issues as to the nature and character of banking institution and banking business is essentially a matter of law and fact. Also, modern banking has significantly expanded with the emergence of mortgage banking, merchant banks, development banks and several other financial houses too numerous to mention. The fact that a bank goes beyond conventional banking business to carry out other ancillary services does not detract from the fact that such an institution is still a bank or a banker. This development only increases the scope of banking business and create further legal realities.

Therefore, it is necessary to appraise the legal effects of the existing relationship between banks and customers vis-à-vis the labyrinth of conventional and unconventional nature of businesses and reciprocal roles performed by banks and customers to one another. The focal point of this paper is to elucidate legal and judicial scopes of the relationship existing between bankers and customers under the Nigerian law. This paper will discuss the nature of the banker-customer relationship by defining 'banker', 'customer' and analyzing the reciprocal rights and duties of bankers and customers respect.

Conceptual Framework

The Meaning of Bank (or Banker)

The word 'bank' and 'banker' are frequently used interchangeably in the banking system. There is no universal or completely satisfactory definition of who a 'banker' or 'bank' is as a result of the continuous expansion in the range of activities of the banking business . In general usage, people see anybody working in a bank as a banker. Although, this might be correct for the purpose of the profession, this paper deals with banking as an institution. In Akwule and Others v. Reginam[1], the Supreme Court held that:

> *The word 'banker' does not, in our view, include a person who is a mere employee of a bank. The relationship between a banker and a customer is that of debtor and creditor in respect of the money deposited with the banker by the customer. This position becomes clearer when a customer asks for his money. If the amount is not paid, the customer can sue the bank. The action will lie against the bank, not the bank manager...*

According to H.L.A Hart, "a banker is a company carrying on the business of receiving money and collecting drafts for customers subject to the obligation of honouring cheque drawn upon them from time to time by the customer to the extent of the amounts available in their account". This definition aligns with the position of the Supreme Court. Halsbury's Laws of England

[1] [1963] All NLR 193.

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defines a "bank" as an individual, partnership, or corporation whose sole or predominant business is banking, that is the receipt of money on current and deposit accounts and the payment of cheques drawn by and the collection of cheques paid in by a customer.[2] This definition with particular reference to the category of legal persons who by law can set up and operate a banking business has no application to Nigeria. This is because Section 2 of the Banks and Other Financial Institutions Act (BOFIA)[3] provides that no person shall carry on any banking business in Nigeria except it is a company duly incorporated in Nigeria and holds a valid banking license issued under the Act.

Statutory Definition of "Bank"

Unfortunately, none of the principal statutes governing banks in Nigeria has precisely defined what a bank is or who a banker is. Existing statutes merely describe or explain the term but for its limited purpose. Section 2 of The Bill of Exchange Act 1882 (as amended in 1990) defines a banker as including a body of persons whether incorporated or not, who carry on the business of banking. Section 2(1) of the Evidence Act[4] also defines the term as any person, partnership or company carrying on the business of a banker…" These definitions have been rendered archaic due to the use of the expressions "whether incorporated or not" , "any person, partnership" as successive banking legislative enactments such as BOFIA have consistently maintained that only an incorporated company with a banking license can legally carry on a banking business in Nigeria.

Section 43 of the Banking Act defines a 'bank' as any person who carries on the banking business. This definition is also defective and not encompassing. Section 131 of BOFIA 2020 defines a bank as a bank licensed under the act. It is pertinent to define banking business in other to have a satisfactory statutory definition of a bank. Section 131 of the BOFIA 2020 defines banking business as:

> *Means the business of receiving current deposits on current account, saving deposits account or other similar account, paying or collecting cheques, drawn by or paid in by customers; provision of finance consultancy and advisory services relating to corporate and investment matters, making or managing investments on behalf of any person whether such businesses are conducted digitally, virtually or electronically only or such other business as the governor may, by order publish in the Gazette designate as banking business*

This definition appears to contain the main financial functions which modern bank performs for its customers however this definition is not exhaustive as it allows the CBN Governor to designate other constituents of the banking business.

Judicial Definition of "Bank"

[2] Igweike, *Law of Banking and Negotiable Instruments* (Africana First Publishers Limited 2005).
[3] BOFIA 2020; No. 5, LFN 2004.
[4] Evidence Act 2011; No. 18, LFN 2004.

The onus for a working definition of the term "bank" has shifted to the courts and the judges. In this direction, the issue for determination is whether an institution need necessarily be engaged in all facets of banking business to be classified as a bank. Several judicial authorities have solved this legal quagmire; in the case of Banbury v. Bank of Montreal[5], the court pointed out that the limits of a bankers business cannot be laid down as a matter of law. The Supreme Court of Nigeria made an attempt to give an exhaustive definition on what constitutes banking business in the case of Societe Bancaire (Nig) Ltd v. De Lluch[6], where reference was made to a dictionary definition and the court held that:

> *The business of banking, as defined by law and custom, consists in the issue of notes payable on demand intended to circulate as money when the banks are banks of issue; in receiving deposits payable on demand; in discounting commercial paper; making loans of money on collateral security; buying and selling bills of exchange; negotiating loans, and dealing in negotiable securities issued by the government, state and national, and municipal and other corporations.*

However, the definition given in the case is not exhaustive. Therefore, it cannot be said to be all encompassing considering the array of businesses modern banks undertake.

The Meaning of Customer

The word 'customer' ordinarily refers to any person who enters into a contract of sale for the purchase of goods or services. A customer is defined as someone who buys goods or services from a shop/store or business, or who uses a bank.[7] No statutory attempt has been made to define who a customer of the bank is and the question has been left to judicial interpretation. In the *Great Western Railway Company v. London and County Banking*[8], it was held that a person who for about twenty years had been cashing a bank's cheque payable to him over the counter without opening an account with the bank is not a customer of the bank. Lord Davey pointed out that there must be some sort of account, either a deposit or current account to make a person a customer of a bank. This decision was followed in the Nigerian case of *Ekpeyong* **v** *The State*[9] where the court also noted that in order to be a customer; a person must have an account with the bank or less certainly agreed to open one.

The question of whether a person can hold an account on a third party's behalf was resolved in the case of *Ademiluyi and Lamuye* v. *African Continental Bank ltd,*[10] the court held that if a person's name appeared in the bank's book, even when the bank believes that the account is to be held in trust for another party, the person whose name appears in the bank's book will be

[5] [1918] A.C.647.
[6] [2005] All FWLR 419 [242] SC.
[7] A. S. Hornby, *Oxford Advanced Learner's Dictionary of Current English* (Oxford University Press, 2000) 288.
[8] [1901] A.C. 414.
[9] [1967] 1 All NLR 285.
[10] [1964] NCLR 10.

held as the customer of the bank and not the other party unless the title of the account clearly indicates "Agency" or "Trusteeship". The question of whether it is necessary that a minimum number of lodgments into or withdrawals from the account concerned should have been undertaken was resolved in the case of *Woods v. Martins Ltd*,[11] where the court held that a person becomes a customer of the bank as soon as arrangements for opening an account are completed and that whether a deposit has actually been made is immaterial.
It is however deducible from the provisions of BOFIA that a customer is a person who engages in the business of paying deposits on current account, savings account or other similar account, draws or pays in cheques, receives finance or such other business as the Governor may, by order published in the Federal Gazette, designate as banking business.

The Nature of Banker/Customer Relationship
The relationship subsisting between banker and customer is basically contractual and fundamentally that of debtor and creditor. It also consists of general and special contracts arising from the particular requirements of the banking business. In the case of *National Bank of Nigeria v. Maja*,[12] the court held that the relationship of banker and customer is peculiar, and that of necessity there must be superadded obligations. The mutuality of commerce and industry and their modern complexity are bound to give rise to superadded obligations in the relation between banker and customer.

The relationship may also be that of bailor and bailee as well as principal and agent. There may also be a lessor to landlord and lessee to tenant relationship. The relationship may also consist of trusteeship and executorship where banker acts as executor of will; and if the matter is prolonged, the banker becomes a trustee. In some instances, a banker may be asked to administer trust property. Hence, the banker is a trustee. A mortgagor and mortgagee relationship also exists where land is conveyed or chattels are assigned as security for the payment of loan advanced by a banker to customer

The relationship is said to be that of debtor and creditor where there is sufficient credit balance in the client's account. The banker in this case becomes a debtor to the customer since it has to pay the client on demand. It is however possible for these roles to be reversed such as where a customer is indebted to his banker – the customer here is the debtor while the banker becomes the creditor. In *Chief Festus Yusuf v. Cooperative Bank Nig Ltd*,[13] Bello CJN (as he then was) stated thus:

> *The relationship between a banker and its customer is that of a debtor and creditor and it is founded on a simple contract. This is because a banker is under an obligation to pay his customer on demand the amount standing to the customer's credit on his current account. However, it is when a customer has*

[11] [1958] 3 All ER 166
[12] [1978] 3 SC 155.
[13] [1994] 7 NWLR 676.

> *made a demand for payment and the banker has failed to meet the demand that a cause of action for recovery of the amount can be said to have arisen.*

A bailor bailee relationship arises where articles or valuables are deposited by a customer for safe keeping in a bank. Hence, possession of the deposited items rests with the banker while ownership in the item is still retained by the customer. The banker usually charges a fee for the safe-keeping of customer's valuables or for the rental of its safe deposit boxes by customers.
A principal agent relationship was expounded on in the case of Balogun v. National Bank of Nigeria[14] where Idigbe JSC (as he then was) stated thus:

> *Therefore, the receipt of money from or on account of his customer by a banker constitutes the latter the debtor of the former and the banker undertakes to pay any part of the money thus due from him to the customer against the written orders of the customer. Accordingly, the relationship so constituted is that of principal and agent and therefore a cheque drawn on the banker by the customer represents the order of the principal to his agent to pay, out of the principal's money in his hands, the amount stated on the cheque to the payee endorsed on the cheque.*

However, as with all general rules, there are exceptions. There are situations where a banker will not be liable to its customer and also situations where a banker will be liable to persons who are not its customer such as in the case *Hedley Byrne co. limited* v *Hellers and co* where it was held that a bank will be liable to persons to whom advice were given even if such persons had no account with the bank. Also in cases where an account is opened fraudulently, there will be no banker customer relationship. This was the position of the court in *Stoney Stanton supplies Coventry* v *Midland bank.*[15] Therefore, I opine that the relationship existing between banker and customer cannot be exhausted. This is so as new banking services and products are emerging continuously. The services rendered and products sold by banker to its customer would always determine what relationship subsists between the banker and its customer at any point in time.

In the modern-day banking business, a banker can carry out arrays of financial advisory services for customers; act as bailee for customers and provide complex services on mortgage, development, stocks and bill of exchange.

The Duties of the Banker

The obligations of a banker arise not only from the relationship between the banker and customer but also arises from the banker's customs. In other words, a banker and customer need not have express contract on the correlating duties between parties; there are certain duties that are presumed by custom in view of the existing relationship. The duties are:

1. **To Honor Customer's Cheques**

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[14] [1978] All NLR 63.

[15] [1966] 2 Lloyd's Rep. 373.

The obligation of the banker to honor the customer's cheque up to the credit balance standing in the customer's account is not limited to the amount the customer has in the account; but extends to any agreed or permitted overdraft.[16] It has been held in a long line of cases that a wrongful dishonor of a customer's cheque is a breach of the contractual relationship between the customer and the bank. The customer's business or credit worthiness may have been jeopardized and therefore he is entitled to damages for the breach.[17] It is pertinent to know that a customer cannot bring an action for recovery of money if he did not make a demand. This was the position of the court in *Chief Festus Yusuf v Co-operative bank Nig. Ltd.*[18] The delay in payment of customer's cheque cannot amount to a wrongful dishonor. This was held in *Ejimofor* v *Union Bank of Nigeria*[19] where the payee of a cheque went to the bank and his cheque was marked for payment but after waiting for several hours, the payee got impatient and left. Delay does not amount to dishonor.

The duty to honor a customer's cheque is not absolute and is determined generally by an event that puts an end to the contractual relationship between the banker and customer. The duty may be determined by one of the following events: by notice of customer's death: The customer's death effectively terminates the continuity of the banker-customer relationship and hence the mandate to dishonour cheques drawn by the deceased; by countermand of payment: the order to "pay on demand" on a cheque may be retracted any time before the encashment of the cheque. In order to for the countermand to be effective in law, it must be in writing and must have been received by the bank or its authorized agent. Notice of countermand is ineffective if the cheque to which it relates has been paid or cancelled. This was the decision of the court in *Woodland* v *Fear.*[20] The countermand must be unambiguous and clear, this was held in *Westminster Bank ltd. v Hilton.*[21]; by notice of winding Up or receivership proceeding or declaration of bankruptcy petition: a declaration of bankruptcy automatically divests the customer of contractual capacity to operate an account, as his estate becomes vested without more, on his trustee in bankruptcy. Notice of winding up is applicable where the customer is a limited liability company.

a. Stale Cheque: In normal banking practice, a cheque will be considered stale six months after the due date. Thereafter, the bank is not obliged to honour it.
b. By Notice of Customer's Mental Disorder: This applies where the disorder or incapacity is of a degree that prevents the customer from understanding the true nature or effects of transactions.
c. Mareva Injuction : A mareva order also known as a freezing order is usually issued by courts pending investigations over an account within its jurisdiction. When a

[16] Rouse v. Bradford Banking Corporation; Woodland v Fear (1857) 7 E&B 519; Gray v. Johnson; Osawaye v. National Bank of Nigeria Ltd.
[17] Enyi v African Continental bank [1981] IMSLR 352.
[18] (1994) 7 NWLR (PT 359) 676.
[19] (1981) 1 FNR 5.
[20] (1857) 7 E & B 519.
[21] (1926) TLR 124.

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mareva order has been granted, the bank is bound to dishonor cheques on the specific account.

2. **Duty to Exercise Care and Skill**

A bank has a duty under its contract with the customer to exercise reasonable care and skill in carrying out its part with regards to operations within its contracts with its customer. The duty extends over the whole range of banking business within the contract with the customer. In the performance of these services, the law sets and expects from a banker a minimum standard of conduct, care and skill. A banker owes his customer a further duty to execute its services with a reasonable standard of professionalism. Where the banker is found wanting or careless in dealing with the affairs of the customer, he is liable to the customer for breach of contractual duty. The duty of care and skill has been established on the giving of information as to customer's credit. A bank may be liable in damages for negligence if he has made a false or fraudulent misrepresentation of the customer's financial or other standing. This principle was upheld in the case of Imersel Chemical Co. Ltd v. National Bank of Nigeria Ltd.[22] Also in the case of Hedley Byrnes and Co. Ltd v. Heller Partners,[23] the appellant bank was held liable for breach of duty of care and skill due to negligent advice given to the respondent regarding the credit worthiness of an advertising company.

3. **Duty to Treat Customer's Affairs as Confidential**

This aspect of the relationship is underlined in the case of Tournier v National Provincial bank[24] where the court held that it is a further term of the implied contract that the bank enters into a qualified obligation not to disclose information concerning the customer's affairs without his consent. It was further held that the obligation extends to information from other sources than the customer's actual account, if the occasion upon which the information was obtained arose out of banking relation of the bank in conducting the customer's business or in coming to decisions as to its treatment of its customers.

However, there are instances where a bank will not be required to treat the customer's affairs as confidential. These exceptions were laid down in Tournier's case by Banks, L.J. and they include:

a. Compulsion of law e.g. where the bank has to give evidence in legal proceeding
b. Public duty to disclose e.g. when a customer is transacting business with the enemy during a war in the country.
c. Where it is in the interest of the bank to disclose.
d. Express or Implied consent of the customer.

Section 37 of the 1999 Constitution as amended guarantees the right to privacy of citizens, their homes, correspondence, telephone conversations and telegraphic communications. A breach of this by a banker may therefore also give rise to an action

[22] (1974) 4 ECSLR. 355; Agbonmagbe Bank Ltd. V. C.F.A.O (1997) NMLR 173.
[23] (1964) AC 465.
[24] (1924) 1 KB 461.

for enforcement of fundamental human rights. Section 45 of the 1999 Constitution of the Federal Republic of Nigeria as amended however provides for derogations from the fundamental human right. Section 45(1) provides that "nothing in sections 37, 38, 39, 40 and 41 of the constitution shall invalidate any law that is reasonably justifiable in a democratic society." Section 177 Evidence Act provides that a banker or an officer of the bank shall not, in any legal proceeding to which the bank or financial institution is not a party, be compellable to produce any banker's book or financial book, the contents of which can be proved in the manner provided in sections 89 and 90 of the Act, or to appear as a witness to prove the matters transaction and accounts in such book, unless by order of the court made by special cause. This goes further to reiterate that the court can order a banker to disclose confidential information and in this instance, such banker is not liable for breach of duty.

4. To Act as Collecting Banker

A banker is under obligation to collect and receive all amounts payable to his customer under banking instruments delivered to him by the customer for collection. The obligation of the collecting banker extends to taking proper steps to credit the account of the customer with the proceeds when they are received. In performing this obligation, the collecting banker is bound to exercise diligence in presenting the instrument for payment. Thus in *Forman v. Bank of England*,[25] where the collecting banker caused a delay in receipts of proceeds and this delay caused another cheque issued by the customer to be dishonoured, the court held the collecting banker was liable to the customer in damages. In the absence of any agreement to the contrary, a collecting banker is under a duty to collect the face value of the instrument lodged with it. If it collects any amount less than such face value, he may be liable for a breach of contract to the customer who lodged the instrument for collection. This principle was upheld in *A.C.B. v. Yesufu*.[26]

Duties of the Customer

The customer owes some onerous but very few duties to his banker, the most important being that he must take proper care of the cheque book issued to him by his banker. He is not liable to the banker for mere carelessness in keeping his cheque book if this enables a third party to obtain a cheque leaf and forge his signature.[27] Other obligations include: to give adequate written instructions to the bank if he seeks to withdraw his money. Such instruction usually includes cheques, standing orders, direct debit instruction, request for payment instrument like bank draft or bank cheques, foreign payments etc.[28]; to inform the bank without delay of any suspicious dealings on his account as may come to his knowledge. Failure to do this in *Brown v National Westminster bank ltd*.[29] was held as an estoppel against the customer; to draw his

[25] (1902) 18 TLR 339.
[26] (1979) 2 SC 93.
[27] Bank of Ireland v. Evans Charities Trustees (1855) 2 H.L.C. 389; Kepitigalla Rubber Estate Ltd v. National Bank of India (1909) 2 KB 1010.
[28] London Joint Stock Bank v. Macmillan (1919) All E.R. 30.
[29] (1964) 2 Lloyd rep. 187; The decision in this case was upeld also in Nigerian Advertising Services Ltd. v. U.B.A. Ltd. (1965) NCLR 6.

cheque with care and diligence and in a manner that will not facilitate fraud, forgery or unauthorized alteration. It was held in *London Joint Stock bank ltd. v Macmillan & Arthur*[30] that in drawing a cheque, the customer owes a duty to the bank to take reasonable precautions against possible alteration of the cheque.[31] The scope of the customer's duty to his bank in drawing cheques received further consideration in *Tai Hing Cotton Mill Ltd v. Lie Chong Hing Bank Ltd. & Ors*,[32] the privy council held that in the absence of express agreement to the contrary, the duty of care owed by a customer to his bank in the operation of his current account is limited to a duty to refrain from drawing cheque in such a manner as to facilitate fraud or forgery and a duty to inform the bank of any unauthorized cheque purportedly drawn on the account as soon as he, the customer becomes aware of it and to pay reasonable commission and interest on borrowed funds as agreed.
However, in carrying out this obligation, it has been held in *Union Bank Plc* v .*Ozigi*[33] that the bank cannot after an agreed amount of interest increase it beyond the agreed interest.
Conclusively, a breach of any of these duties either by the bank or by the customer can give rise to an action for damages in court.

Recommendations

There is a pressing need for a degree of certainty in the legal framework concerning the banker-customer relationship in Nigeria. It is imperative to expand banking regulations to encompass emerging aspects of the industry, such as the use of automated cash withdrawal machines, rather than focusing solely on cheques. Banking legislations in Nigeria should be such that give avenues to tap into the abundant opportunities available both locally and globally.

Moreover, there should be legislations that will prioritize the security of electronic banking transactions, thus safeguarding the interests of customers. The current legal framework governing the banker-customer relationship requires a comprehensive revision to reflect the changing times, as the existing regulations are antiquated and are bound to create more difficulties for both bankers and customers in the 21st century. Not only are the existing laws outdated, they also fall short in addressing numerous aspects of the banking profession that demand legislative intervention. It is disconcerting that such a pivotal facet of everyday life, like the banking sector, lacks the necessary legal provisions to govern the intricacies of the banker-customer relationship.

There should be specialized courts for banking cases with judicial officers who are specially trained in banking law as well as contemporary trends in banking practices. Technological innovations have significantly expanded the frontier of banking businesses. Thus, it takes judicial officers who understand the underpinnings of these technological innovations to successfully adjudicate on such cases.

[30] (1918) AC 777.
[31] Greenwood v. Martins Bank Ltd. (1933) AC 51.
[32] (1985) 2 All ER 947.
[33] (1994) 3 SCNJ 42.

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There are many business owners in Nigeria who abuse credit services provided by banks in such a way that they borrow from several banks and they refuse to pay thereby breaching their duties to their banks. Adequate legislations must be put in place to curb this menace. Such wicked gestures should be criminalized under the law and perpetrators of such acts should be adequately punished.

In the face of paucity of available legislations on complex areas of banking; persuasive judicial authorities should be drawn from the United Kingdom by Nigerian courts.

CONCLUSION

As of today, there remains a huge deficiency in the existing legislations governing the banking industry in Nigeria, not to mention the intricate dynamics of the relationship between bankers and customers. Most of the existing laws in Nigeria are shallow, inadequate and unable to embrace emerging realities of modern banking businesses beyond the conventional banking practices. There are no legislations on internet banking and several products of banks brought about by the advent of technology. The attendant implications of this are that conflicts between banks and customers cannot be predictably determined by legislations and case law; courts in Nigeria are now left with no other options than to determine banking cases with the general principles of law drawn from the law of contracts, commercial law, company law and torts. And this deficiency will affect commerce and direct foreign investments in Nigeria.