

SUPREME COURT OF NIGERIA
5TH JUNE, 1998. SC.127/1995
CORAM: - S. M. A. BELGORE, I. L. KUTIGI, M. E.
OGUNDARE, S. U. ONU, A. I. IGUH, JJSC.

CHIEF SAMUEL ADEBISI FALOMO APPELLANT
AND
1. OBA OMONIYI BANIGBE PLAINTIFF
2. THE ATTORNEY-GENERAL, KWARA STATE]
3. IFELODUN/IREPODUN/EKITI] RESPONDENTS
TRADITIONAL COUNCIL]
4. IREPODUN LOCAL GOVERNMENT]

APPEALS - Jurisdiction - To entertain a cause - Once an appeal is duly entered in an appellate court - The court has jurisdiction to entertain the cause.

APPEALS - Hearing - Briefs of argument - Oral amplification - Parties must not proffer oral submissions in amplification of their respective briefs.

APPEALS - Retrial before another Judge - Was rightly granted by the Court of Appeal - Though it was not prayed for by either party.

CHIEFTAINCY MATTERS - Interlocutory injunction - Balance of convenience - Is in favour of the plaintiff who has a letter of appointment - Unlike the appellant who was merely parading himself.

CHIEFTAINCY MATTERS - Interlocutory injunction - Preservation of the res - The res to be preserved - On the particular facts of the instant case - Is the appointment of the plaintiff to the chieftaincy stool in issue.

INTERLOCUTORY INJUNCTIONS - Primary object thereof - Is to keep matters in status quo ante bellum - Until the question in issue between the

parties can be finally determined by the court.

INTERLOCUTORY INJUNCTIONS - Order of interlocutory injunction-
What the courts usually consider- Before deciding whether or not to issue
the order.

INTERLOCUTORY INJUNCTIONS - Discretion - The grant or refusal
of the order - Is in the absolute discretion of the court.

INTERLOCUTORY INJUNCTIONS - Substantive case - Issues to be
tried in the substantive case - should not be delved into by the trial court
in deciding such applications.

INTERLOCUTORY INJUNCTIONS - Serious question to be tried - The
plaintiff having thus established this - The trial court ought next to pro-
ceed to consider the issue of balance of convenience.

INTERLOCUTORY INJUNCTIONS - Conditions for the grant - Where
the plaintiff met all the requirements - The Court of Appeal was right in
granting the order.

INTERLOCUTORY INJUNCTIONS - Continuing acts - Where the act
of the appellant complained of - Is that he is parading himself as the
appointee to the stool in issue - It is a continuing act and not a concluded
act.

INTERLOCUTORY INJUNCTIONS - Vagueness of the order - Conten-
tion that the order granted was vague- Since it is not disputed that the
terms of the order applied for are clear - The order granted was as prayed
for by the plaintiff.

INTERLOCUTORY INJUNCTIONS - Order restraining both parties -
When nobody asked for such an order - And after the application itself
had been refused on its merits - Was erroneous.

INTERLOCUTORY INJUNCTIONS - *Extending the order to all parties - Application to restrain one party from doing an act - Where extended against all the parties concerned - Circumstances warranting such order must be clearly stated.*

LEGAL PRACTITIONERS - *Appearance in court - Once this is announced - Whether the counsel is holding brief for another counsel or not - The court takes it that he is fully mandated to conduct the case.*

WORDS AND PHRASES - *"Status quo ante bellum " - How properly defined.*

FACTS

The plaintiff/respondent on the 27th day of July, 1993 instituted an action at the Ilorin High Court, Kwara State against the defendants jointly and severally claiming inter alia: That the plaintiff having been presented by his family, accepted by the Ihafa (the kingmakers) and properly approved by the Irepodun Local Government Area is the rightful Olusin of Ijara-Iji Isin; an injunction restraining the defendants from reviewing the appointment of the plaintiff and an injunction restraining the 1st defendant from parading or pretending to be Olusin of Ijara-Iji Isin. The plaintiff on the same date he instituted the action filed two applications against the defendants. The first was an ex parte application of interim injunction restraining, inter alia, the 1st defendant/appellant from parading himself as the Olusin of Ijara-Iji Isin, and the 2nd and 3rd defendants from reviewing the appointment of the plaintiff as the Olusin of Ijara-Iji Isin pending the determination of the motion on notice of interlocutory injunction filed in the cause. The second application was the substantive motion on notice for an order of interlocutory injunction. On the 28th day of July, 1993, the ex parte application for interim injunction was granted as prayed. The substantive motion on notice was thereafter adjourned to the 30th July, 1993 for hearing. It is the plaintiff's case that the stool of Olusin of Ijara-Iji Isin was rotated between Ijara and Iji families. Each of the two families had its kingmakers and did not inter-

fere with the other family when it was its turn to appoint an Oba. He deposed that it became the turn of Ijara Isin family to which he belonged to present a candidate for the vacant stool, following the demise of the late Olusin. His Ruling House in 1992 duly nominated him in accordance with their tradition and customary usages, which nomination was accepted and ratified by the kingmakers. The appointment was subsequently duly approved by the appropriate authorities. The plaintiff averred that the 1st defendant has been parading himself as the Olusin thus causing confusion and tension to the entire community and embarrassment to the plaintiff whose letter of appointment was neither revoked nor withdrawn.

The 1st defendant's case as deposed in his counter affidavit is that before the year 1911, the title of Olusin belonged exclusively to his family, until some meddlesome interlopers from Okegunsin and Odo Ijara snatched the throne from his family. He claimed that he was installed traditionally as the Olusin on the 19th July, 1993. He described the installation of the plaintiff as a desecration of the native law and custom governing the Olusin chieftaincy. At the conclusion of arguments, the learned trial judge in a considered ruling on the 11th day of January, 1994 dismissed the application for interlocutory injunction. He however restrained both plaintiff and the 1st defendant from parading themselves as the Olusin of Ijara Iji Isin pending the determination of the suit. Dissatisfied, the plaintiff appealed to the Court of Appeal, Kaduna Division. The Court of Appeal in a unanimous decision on the 6th day of April, 1995 allowed the appeal of the plaintiff and issued an Order of interlocutory injunction against the defendants as prayed. Aggrieved by this decision, the 1st defendant has now appealed to the Supreme Court raising four issues.

ISSUES FOR DETERMINATION

"1. *Whether from the affidavit evidence before the trial court which that court considered in detail, the court below was right to have held that the plaintiff made out a case deserving of an injunctive relief against the appellant and others in the circumstances of this case, moreover when the reliefs sought in the application for injunction were in respect of concluded acts and the order of the court below is not clear*

and equivocal.

2. Whether the court below did not act without jurisdiction in hearing the appeal on 23rd January, 1995 when the case was for a motion to file respondents' brief out of time and whether this did not lead to a miscarriage of Justice against the appellant.

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3. Whether the court below was right to have ordered a transfer of the case from the trial court when there was no legal basis for the order and none of the parties asked for it.

4. Whether the court below was not in serious error by tampering with the trial court's exercise of discretion to restrain the appellant and the plaintiff from further parading themselves as the Olusin of Ijara /Iji Isin moreover when the learned senior counsel representing the plaintiff at the trial asked for same."

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HELD (Unanimously dismissing the appeal per lead judgment of **IGUH JSC**)

Interlocutory injunction - Primary object thereof

1. An interlocutory injunction is granted before the trial of an action and its primary object is¹ to keep matters in statu quo ante bellum until the question at issue between the parties can be finally determined by the court, thus facilitating the administration of justice at the trial. Although it is well recognised that there are certain basic issues which the courts need to consider in deciding whether or not an interlocutory injunction should be granted, the remedy must be kept flexible and discretionary and each case must be considered as a whole on the basis of fairness, justice and common sense. See Hubbard v. Vosper (1972)² Q.B.84. (p. 1456 G)

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Order of interlocutory injunction - What the courts consider

2. The more important of the issues the courts usually consider before

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¹ For object of interlocutory injunction see also *Ogbonnaya v. Adapalm Ltd (1993)* 6 KLR 39

deciding whether or not to issue an order of interlocutory injunction² are as follows-

- (i) Applicant's real prospect of success in the right claimed.
- (ii) Balance of convenience.
- (iii) Status quo.
- (iv) Relative strength of the case of the parties.
- (v) Conduct of the parties.
- (vi) Inadequacy of payment of damages.

See American Cyanamid Co. v. Ethicon Ltd (1975) A.C. 396 at 407-409. The court on the question of the applicant's real prospect of success in the right claimed must, at the outset, be satisfied that the plaintiff's claim is "not frivolous or vexatious" and that "there is a serious question to be tried at the hearing of the substantive suit." This first ingredient is a fundamental requirement to be established by an applicant for an order of interlocutory injunction. Where the plaintiff fails to satisfy this basic requirement, this in effect will automatically bring to an end, and defeat, his application. See Re Lord Cable (1977) 1 W.L.R. 7. Although there is no rule requiring the plaintiff to establish a prima facie case before he can obtain an interlocutory injunction, the court must be satisfied that the plaintiff's case is not frivolous or vexatious and that there is a serious question to be tried. Once this requirement is established, the governing consideration must be balance of convenience. See American Cyanamid Co. v. Ethicon Ltd. (supra) at 407. If the balance of convenience does not clearly favour either party, then the preservation of the Status quo ante bellum will be decisive. See Harman pictures N.V. v. Osborne (1967) 1 W.L.R.723 and American Cyanamid Co. v. Ethicon Ltd, supra. I think it ought to be mentioned that on an application for an interlocutory injunction in aid of a plaintiff's alleged right, the court , in appropriate cases may wish to consider the relative strength of the cases of the parties, the conduct of the parties, and whether the applicant's case is so clear and free from objection on equitable grounds that it ought to inter-

² For what applicant must show to be entitled to the order. See also ACB LTD V. Awogboro (1996) 2 KLR (Pt. 38) 372

fere to preserve the property or res in issue without waiting for the right to be fully established. See Eastern Trust Co. V. Mckenzie, Mann and Co. Ltd (1915) A.C. 750. (p. 1457 B)

Interlocutory injunctions - Discretion

3. The one thing that is well settled in law however, is that the grant or refusal of an order of interlocutory injunction is in the absolute discretion of the court,³ which discretion, however like all other judicial discretions, must be exercised judiciously, having regard to all the facts and circumstances of each and every case. And as Lord Denning put it in Hubbard v. Vosper (1972) 2 Q.B. 84 at 96, the remedy of interlocutory injunction is so useful that it should be kept flexible and discretionary and must not be made the subject of strict rules. (p. 1458 B)

Interlocutory injunctions - Substantive case

4. The vital point that needs be stressed at this stage is that the two courts below by their above observations could not be said to have made any pronouncements on anything that would tend to prejudice the main issues for determination in the substantive suit at the trial. In deciding applications of this nature, the trial court should, as much as possible, try not to delve into or predetermine the issues to be tried in the substantive case. See Orji v. Zaria Industries Ltd, (1992) 1 N.W.L.R.(part 216) 123, Obeya Memorial Hospital v. Attorney-General of the Federation (1987) 3 N.W.L.R. (part 60) 325. The courts in this type of situation do and must only confine themselves to those issues necessary for the disposal of the application without more. It is for this reason that I, too, am conscious not to make pronouncement on any issue that will be prejudicial to the main questions for determination at the trial of the substantive suit. See Ogbonnaya and others v. Adapalm (Nig) Ltd (1993) 5 N.W.L.R. (part 292) 147. All I need state from the above observations of the courts below is that it seems to me plain that the plaintiff's claim can by

³ Discretion of court to grant or refuse application for interlocutory injunction was also considered in Ayorinde v. A.G. Oyo State (1996) 2 KLR (Pt 38) 426

no stretch of the imagination be described as frivolous or vexatious or that there is no serious question to be tried in the substantive action. This is the first hurdle the plaintiff, as an applicant for order of interlocutory injunction, must clear. (p. 1461 A)

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Serious question to be tried

5. It is not necessary that for the plaintiff to succeed, the court in an application for interlocutory injunction should find a case which would entitle him to relief at all events. That is not the law. It is quite sufficient if the court finds a case which shows, as in the present case, that there is a substantial question to be investigated⁴ and that matters ought to be preserved in statu quo ante bellum until that question can be finally disposed of. See Preston V. Luck (1884) 27 Ch.D. 497 C.A., James V. Pacaya Rubber and Produce Co. Ltd (1911)1 K.B. 455 at 459. I agree with the finding of the court below that the res in issue in the substantive claim is the alleged appointment of the plaintiff as the Olusin and not the throne itself. The plaintiff, having thus established that his case in this direction was not frivolous or vexatious and that he had a serious question to be tried, the court below was right in holding that the trial court ought next to have proceeded to consider the issue of balance of convenience. (p. 1461 F)

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Balance of convenience

6. What is in issue in the present case is the appointment of the plaintiff as the Olusin of Ijara Iji Isin. This, in my view, is a substantial issue fit and deserving of legal protection. Both courts below are in agreement that the plaintiff's letter of appointment by the appropriate Local Government, Exhibit 3, remained valid until otherwise declared by the court see Governor of Imo State V. Anosike (1987) 4 N.W.L.R. (part 66) 663. I respectfully endorse this view. It seems to me that having regard to all the facts and circumstances of this case as disclosed in the affidavit

⁴ See Oduntan v. General Oil Ltd (1995) 4 KLR 796 where the Supreme Court dealt with presence of substantial issue to be tried.

evidence before the court, the balance of convenience in the present application would appear to favour the plaintiff. One clear thing that is certain, however, is that the balance of convenience in the case, no matter how remotely, did not favour the appellant. Even in a situation where the balance of convenience does not clearly favour either party, and this is not the position in the present case, then the preservation of the status quo ante bellum will be decisive. See American Cyanamid Co. V. Ethicon Ltd and Harman Pictures N.V. V. Osborne, (supra) (p. 1462 D)

"Status quo ante bellum"

7. It is trite law the court in an application for interlocutory injunction will consider the preservation of the status quo ante bellum. In Akapo v. Hakeem Habeeb (1992) 6 N.W.L.R. 266, Ogundare, J.S.C. defined the phrase, status quo ante bellum to mean -

".....the situation or position prevailing before the defendants' conduct complained of by the plaintiff." (p. 1463 C)

Preservation of the res

8. In my view, the prevailing position before the appellant's conduct complained of was the fact of the plaintiff's appointment as the Olusin of Ijara Iji Isin. It is this appointment that the appellant now seeks to challenge. As I have already pointed out earlier on in this judgment, the trial court in its ruling decided that the plaintiff's letter of appointment, Exhibit 3, is valid until otherwise pronounced by the court in the substantive suit. It is significant that the appellant herein did not appeal against this finding of the trial court which was affirmed by the Court of Appeal. In my view, it is this appointment of the plaintiff as the Olusin that is the res to be preserved on the particular facts of the instant case pending the final determination of the substantive suit and I so find. (p. 1464 B)

Interlocutory injunctions - Conditions for the grant

9. On the rest of the issues for consideration as to whether or not an order of interlocutory injunction may go, it is clear on the question of the relative strength of the case of the parties that the plaintiff's case, as

have already pointed out can by no means be regarded as frivolous or vexatious. He has, on the pleadings, clearly established that he has a Prima facie case and a serious question to be tried in the substantive suit. There is also no allegation of any conduct which in any way suggests that the plaintiff's case is not free from objection on equitable grounds that the court ought not to interfere to preserve the res in issue without waiting for the right to be fully established. See Eastern Trust Co. v. Mckenzie Mann and Co. Ltd. (supra). I cannot, myself, conceive the adequacy of any payment of damages or compensation to the plaintiff by the appellant, no matter how high the quantum thereof, in respect of the injury the plaintiff would sustain or suffer if the injunction was refused and he should ultimately turn out to be right. It seems to me that the Court of Appeal took pains to consider the entire arguments before the trial court before it came to the conclusion that the ruling of the learned trial judge could not be justified from the available facts of the case. I think the court below was perfectly right when it held that this is a proper case for the grant of interlocutory injunction as prayed. (p. 1464 E)

Continuing acts

10. Learned counsel for the appellant did submit that the relief claimed in the motion paper being in respect of concluded acts, there was nothing for the court to restrain by an order of interlocutory injunction. On this point, I need only state that what was sought by the plaintiff against the appellant before the trial court was to restrain the appellant from "parading and / or pretending to be the Olusin of Ijara Iji Isin and from advertising or sponsoring advertisement through his agents or servants that he is the Olusin of Ijara Isin or doing any other acts in negation of the appointment of the plaintiff as the Olusin " There is also paragraph 31 of the plaintiffs affidavit in support of the application which deposes as follows-

"31. That the 1st defendant is continuing in his parade as Oba of Ijara Iji Isin when no kingmakers appointed him as one and his activities are polluting our tradition and causing disharmony in the town."

It is thus clear that the acts of the appellant complained of were continuing

ing acts and not concluded acts as erroneously submitted by learned counsel for the appellant. (p. 1465 B)

Interlocutory injunctions - Vagueness of the order

11. There is next the submission of learned appellant's counsel to the effect that the order of the court of Appeal was vague. In this regard, It is not disputed that the terms of the interlocutory injunction applied for are clear. This application, the trial court dismissed. The Court of Appeal, upon a calm consideration of the decision of the trial court, found this to be erroneous and concluded thus-

"In effect, I hold that the requirements for the granting of injunction had been satisfied in the instant case."

It then proceeded to allow the appeal, set aside the decision of the learned trial judge and granted the plaintiff's application. It is clear to me that upon a consideration of the decision of the court below in its totality, the order of injunction granted was as prayed for by the plaintiff. Issue 1 must therefore be resolved against the appellant. (p. 1465 G)

Appeals - Jurisdiction

12. On issue 2, learned counsel for the appellant contended that the court below lacked the jurisdiction to hear the appeal on the 23rd January, 1995 on which date the matter, according to him, was only fixed for the hearing of a motion for extension of time within which to file the respondent's brief of argument. With respect to learned counsel, I am unable to accept that this submission is either sound or well founded. The record of proceedings shows that the appellant on the 12th April, 1994 moved a motion for stay of proceedings after which the ruling was reserved. The said ruling was delivered on the 7th July, 1994. It is on record that immediately after the ruling was delivered, the main appeal was adjourned to the 23rd January, 1995 for hearing. Learned appellant's counsel was therefore in error to suggest that the appeal was not fixed for hearing on the 23rd January, 1995 on which date the appeal was duly heard and all the parties concerned were duly represented by counsel. The appellant, in particular, was represented at the hearing of the appeal on that date by

one M.I. Komolafe Esq. who announced himself as holding brief for Mr. Yusuf Alli, the appellant's present counsel before this court. It is not in dispute that the appeal had been entered in the Court of Appeal before it was heard by that court on the 23rd January, 1995. Once on appeal is
B duly entered in an appellate court, it cannot be rightly suggested that such an appellate court is not seised of the appeal or that such an appellate court would have no jurisdiction to entertain the cause or matter. In my view, no question of jurisdiction arises in this appeal and issue 2 must be
C resolved against the appellant. (pp. 1466 B & 1467 F)

Legal practitioners - Appearance in court

13. It seems to me necessary at this stage to stress that once counsel announces his appearance in court, whether he is holding brief for an-
D other counsel or not, the court takes it that he is fully mandated and /or authorised to conduct the case on behalf of his principal or his client. If however, he is not in a position for any reason to do so, it is his duty to apply for an adjournment, stating his reasons to the court for the applica-
E tion whereupon the court, upon a consideration of such reasons, shall decide whether or not the case should, in the interest of justice, be ad-
F journed, otherwise the court would proceed with the hearing of the cause or matter. In the absence of such an application, the court is entitled to assume that counsel is fully instructed and / or mandated to get on with the case. See Shyllon V. Asein (1994) 6 S.C.N.J. 287. In the present case, learned counsel for the appellant sought for no adjournment of the appeal but took full part in the hearing thereof. (p. 1466 G)

Appeals - Hearing

14. Briefs of argument were duly filed by learned counsel on behalf of the parties. The appellant's brief of argument, in particular, was settled and signed by Yusuf O. Alli Esq, the learned Senior Advocate who ap-
H peared before us on behalf of the appellant. At the hearing of the appeal on the 23rd January, 1995 learned counsel for the appellant, Mr. Komolafe duly adopted the brief filed on behalf of his client. He urged the court to dismiss the appeal. In this regard, it has to be pointed out that at the

hearing of appeals where briefs of argument have been filed, it is not a sine qua non that parties need proffer oral arguments or submissions in amplification of their respective briefs of argument. Any party, where he so desires, has the right of choice whether or not to offer oral submissions in amplification of his brief. (p. 1467 B)

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Appeals - Retrial before another judge

15. Issue 3 complains of transfer of the substantive cases by the Court of Appeal to another judge of the Kwara State High Court for hearing and determination when no party applied for it. In the first place, there is section 16 of the Court of Appeal Act, 1976 which empowers the Court of Appeal to exercise full jurisdiction over all matters before it and may, inter alia remit a case to the court below for the purpose of rehearing or may give such other directions as to the manner in which the court below shall deal with the case, or, in case of an appeal from the court below in that court's appellate jurisdiction, order the case to be reheard by a court of competent jurisdiction. See Iyaji v. Eyigbe (1987) 3 N.W.L.R. (part 61) 523 at 530 E.G. Igboho, Irepo L.G.A. and Another V. The Boundary Settlement Commissioner (1988) 2 S.C.N.J. 28 etc. There is also the provision of Order 3 Rule 23 of the Court of Appeal Rules, 1981 which, inter alia empowers the Court of Appeal to give any judgment or make such further or other as a case may require. These powers are exercisable by the court in favour of all or any of the parties although such parties may not have appealed from or complained of the decision.

It is apparent from decision of the court of Appeal that the trial court on the issue on appeal did not exercise its discretion judicially and judiciously. The trial court having exercised its discretion wrongly, the Court of Appeal rightly allowed the appeal and, as it was entitled to do, remitted the case to another judge of the Kwara State High Court for hearing and determination. This, it did, in accordance with the maxim that justice must not only be done but must manifestly be seen to be done. It is clear to me that it is not the constitutional right of any party to be heard by a particular judge. See Aliyu V. Ibrahim (1992) 7 N.W.L.R. (part 253) at 373 B.C. In my view, there is nothing wrong with this

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order of the court below and issue 3 is hereby resolved against the appellant. (p. 1467 H)

Interlocutory injunctions - Order restraining both parties

B 16. The learned counsel for the plaintiff has described the order in question as "strange " and I think, with the greatest respect, that I am inclined to agree with him. The "circumstances of this case" alluded to by the learned trial judge as a result of which the unsolicited order under attack was made were in no way stated. Learned counsel for the appellant had submitted that the order is justifiable as he claimed it was incidental to and flowed from the prayers sought by the plaintiff. With respect, I find it difficult to accept this submission as well founded, particularly in view of the fact that the application itself had been found to be without substance and accordingly dismissed by the trial court. I fully endorse the decision of the Court of Appeal that the learned trial judge was in definite error by restraining the plaintiff and the appellant as he did when nobody applied or asked for such an order and after the application itself had been refused on its merits. (p. 1469 C)

Interlocutory injunctions - Extending the order to all parties

F 17. Without doubt, where in an application for interlocutory injunction to restrain one party from doing an act, the parties agree that the injunction may issue against all the parties concerned or a definite case is made out that it is in the overall interest of justice that both parties ought to be restrained, the court would be entitled to issue such an order. In the later case, however, the court must clearly state the facts and circumstances which make it compelling and imperative to extend the order of injunction to both parties. This is because it is trite that a court must not grant to a party, a relief which he has not sought or which is more than he has sought. See Ekpenyong v. Nyong (1975) 2 S.C.71 at 81-82, Union Beverages v.Owolabi (1988) 2 N.W.L.R. (part 68)128 at 133. (p.1469 F)

REPRESENTATION

Y. O. Alli Esq. SAN with Messrs A. S. Oyinloye, M. O. Aminu, S. U.

Solagberu, M. Alabelewe and K. Orisankoko for the appellant
Chief P. A. O. Olorunnisola SAN with Messrs A. Aiyedun and S. O.
Jimoh for the 1st respondent
M. A. Sanni Esq., Attorney-General, Kwara State, with S. A. Moham-
med, Esq. Ag. Director of Civil Litigation, Kwara State for the 2nd and B
3rd respondents

CASES REFERRED TO

Hubbard v. Vosper (1972)2 Q.B.84. C
American Cyanamid Co. v. Ethicon Ltd (1975) A.C. 396 at 407-409
Re Lord Cable (1977) 1 W.L.R. 7.
Eastern Trust Co. V. Mckenzie, Mann and Co. Ltd (1915) A.C. 750
Ogbonnaya v. Adapalm (Nig) Ltd (1993) 5 N.W.L.R. (part 292) 147 D
Preston v. Luck (1884) 27 Ch.D. 497 C.A.
James v. Pacaya Rubber and produce Co. Ltd (1911)1 K.B. 455 at 459
Imo State v. Anosike (1987) 4 N.W.L.R. (part 66) 663
Donmar v. Bart (1967)1 WLR 740 at page 742 E
Ladunni v. Kukoyi (1972) 1 All NLR 133 at page 137

STATUTES AND RULES REFERRED TO

Chiefs Appointment and Deposition Law Cap 20. Laws of Kwara State F
(1963)
Court Appeal Act, 1976; S. 16
Court of Appeal rules 1981; Order 3 Rule 23.

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LEAD JUDGMENT BY IGUH JSC

This is an appeal against the judgment of the Court of Appeal, Kaduna Division, which had on the 6th day of April, 1995 allowed the appeal by the defendants from the decision of Ojo, J. sitting at Ilorin in H the High Court of Kwara State of the Federal Republic of Nigeria.

The plaintiff had on the 27th day of July, 1993 instituted an action against the defendants jointly and severally claiming as follows-

"(1) That the Olusin of Ijara-Iji Isin is not a recognized Chief under the Chiefs Appointment and Deposition Law Cap 20, Laws of Kwara State (1963), Northern Nigeria Laws applicable to Kwara State and the appointment to that office does not require the approval of Kwara State Governor or Government.

(2) That under Ijara-Iji Isin native Law and custom, a person cannot be appointed to the post of Olusin of Ijara-Iji Isin until he is presented by the majority of the members of his royal house to the kingmakers (Ihafa) and the majority of the kingmakers have accepted the candidature after certifying the propriety of the candidate.

(3) That the plaintiff having been presented by his royal family, accepted by the Ihafa (the kingmakers) and has been properly approved by the Irepodun Local Government Area is the rightful Olusin of Ijara-Iji Isin.

(4) An injunction restraining the Defendants from reviewing the appointment of the plaintiff as the Olusin of Ijara-Iji Isin.

(5) An injunction restraining the 1st Defendant from parading and or pretending to be the Olusin of Ijara-Iji Isin and from advertising or sponsoring advertisements through his agents or servants that he is Olusin Ijara-Iji Isin or doing any other acts in negation of the appointment of the plaintiff as the Olusin of Ijara -Isin."

The plaintiff on the same 27th day of July, 1993 filled two applications against the defendants. The first was an ex parte application of interim injunction restraining, inter alia, the 1st defendant from parading himself as the Olusin of Ijara Iji Isin, and the 2nd and 3rd defendants from reviewing the appointment of the plaintiff as the Olusin Ijara Iji Isin pending the determination of the motion on notice for interlocutory injunction filed in the cause. The second application was the substantive motion on notice for an order of interlocutory injunction praying the court for the following orders, namely-

'1. AN INTERLOCUTORY INJUNCTION restraining the 1st defendant from parading and or pretending to be the Olusin of Ijara/Iji Isin and from advertising or sponsoring advertisement, through his agents or servants that he is the Olusin of Ijara Iji Isin or doing any other acts

in negation of the appointment of the plaintiff as the Olusin of Ijara Iji Isin pending the determination of the substantive suit.

2. *AN INTERLOCUTORY INJUNCTION* restraining the 2nd and 3rd defendants their agents or privies from reviewing the appointment of the plaintiff as the Olusin of Ijara Iji Isin pending the hearing of the substantive suit.

3. *AND for such further or other orders as the Honourable court may deem fit to make in the circumstances of this case."*

On the 28th day of July, 1993, the ex parte application for interim injunction restraining the 1st defendant from parading himself as the Olusin of Ijara Iji Isin, and the 2nd and 3rd defendants from reviewing the appointment of the plaintiff as the Olusin of Ijara Iji Isin pending the determination of the said substantive motion on notice was granted as prayed. The substantive motion on notice was thereafter adjourned to the 30th July, 1993 for hearing.

From the affidavit evidence before the court, it is the case of the plaintiff that the stool of Ijara Iji Isin became vacant on the demise of the late Olusin, Oba Jacob Olafioye Omiyale on the 14th day of July, 1992. The claim was that the stool of Olusin of Ijara Iji Isin was rotated between Ijara and Iji families. Each of the two families had its kingmakers and did not interfere with the other family when it was its turn to appoint an Oba. The plaintiff deposed that as it became the turn of Ijara Isin family, to which he belonged, to present a candidate for the vacant stool, his Ruling House in 1992 duly nominated him in accordance with their tradition and customary usages and forwarded his name to the kingmakers for approval. The kingmakers after due consultations ratified and accepted his nomination as the Olusin of Ijara Iji Isin. The Ijara Chiefs which included the Kingmakers headed by the Baale, the Ijara Isin Development Council and the Irepodun Local Government duly approved the appointment of the plaintiff as the Olusin of Ijara Iji Isin. Exhibits A and 2 were annexed to the plaintiff's affidavit in proof of the various procedural stages and consultations the nomination of the plaintiff as the Olusin went through. Exhibit 3 was said to be approval of the plaintiff's nomination and his appointment as the Olusin of Ijara Iji Isin by the Irepodun

Local Government Council with effect from the 9th July, 1993.

The plaintiff added that on the 20th July, 1993, the 1st defendant and/or his supporters carried radio and other advertisements to the effect that the plaintiff's appointment as Olusin Ijara Iji Isin was null and void
 B congratulating the 1st defendant for his purported appointment as the Oba Ijara Iji Isin. On the 22nd July, 1993 the 1st defendant and members of his family sang and danced round the town with the 1st defendant parading himself as the Olusin and addressed as "Kabiyesi". It was then
 C alleged that the said actions of the 1st defendant were causing untold confusion and tension to the entire community and embarrassment to the plaintiff whose letter of appointment, Exhibit 3, was neither revoked nor withdrawn.

The 1st defendant in his own counter-affidavit deposed that be-
 D fore the year 1911, the title of Olusin of Ijara Isin belonged exclusively to his family. He stated that it was not until the year 1911 that some "meddlesome interlopers" from Okegunsin and Odo Ijara "snatched" the throne from his family. The 1st defendant claimed that he was installed tradi-
 E tionally as the Olusin of Ijara Iji Isin on the 19th July, 1993. He described the installation of the plaintiff as a desecration of the native law and custom governing the Olusin Chieftaincy.

At the conclusion of arguments, the learned trial judge in a con-
 F sidered ruling on the 11th day of January, 1994 dismissed the application for interlocutory injunction. He however restrained both the plaintiff and the 1st defendant from parading themselves as the Olusin of Ijara Iji Isin pending the determination of the suit.

Dissatisfied with this ruling of the learned trial judge, the plaintiff
 G lodge an appeal against the same to the Court of Appeal, Kaduna Division. The Court of Appeal in a unanimous judgment on the 6th day of April, 1995 allowed the appeal of the plaintiff and issued an order of interlocutory injunction against the defendants as prayed.

H Aggrieved by this decision of the Court of Appeal, the 1st defendant has now appealed to this court. I shall hereinafter refer to the 1st defendant in this judgment as the appellant, the plaintiff simply as the plaintiff and the 2nd, 3rd and 4th defendants as the respondents respec-

tively.

Fourteen grounds of appeal were filed by the appellant against this decision of the Court of Appeal. It is unnecessary to reproduce them in this judgment. It suffices to state that the parties pursuant to the Rules of this court filed and exchanged their written briefs of argument. B

The four issues distilled from the appellant's grounds of appeal set out on his behalf for the determination of this appeal are as follows-

"1. Whether from the affidavit evidence before the trial court which that court considered in detail, the court below was right to have held that the plaintiff made out a case deserving of an injunctive relief against the appellant and others in the circumstances of this case, more-over when the reliefs sought in the application for injunction were in respect of concluded acts and the order of the court below is not clear and equivocal. D

2. Whether the court below did not act without jurisdiction in hearing the appeal on 23rd January, 1995 when the case was for a motion to file respondents' brief out of time and whether this did not lead to a miscarriage of Justice against the appellant. E

3. Whether the court below was right to have ordered a transfer of the case from the trial court when there was no legal basis for the order and none of the parties asked for it.

4. Whether the court below was not in serious error by tampering with the trial court's exercise of discretion to restrain the appellant and the plaintiff from further parading themselves as the Olusin of Ijara /Iji Isin moreover when the learned senior counsel representing the plaintiff at the trial asked for same." F

The plaintiff and the respondents, for their parts, severally adopted the four issues as formulated by the appellant for the determination of this appeal. G

At the oral hearing of the appeal before us, all three leading learned counsel for the parties adopted their respective briefs of argument and proffered additional submissions in amplification thereof. H

The main argument of learned leading counsel for the appellant, Y.O. Alli Esq, S.A.N. on issue I was that having regard to the affidavit

evidence in support of the plaintiff's application, the order of interlocutory injunction granted by the court below was unjustifiable. In this regard, he called in aid the decision in Ajewole v. Adetimo (1996) 2 N.W.L.R. (part 431) 391 at 400-401 and 404. Learned counsel submitted that the existence of a legal right, maintenance of the status quo, balance of convenience, conduct of the parties, inadequacy of damages and the relative strength of the case of the parties crystalised ingredients that an applicant for interlocutory injunction must satisfy the court upon. He argued that the foregoing six ingredients must co-exist and established by an applicant and that where a single one of them is not proved, the court must dismiss such application for interlocutory injunction. He contended that the applicant, from his affidavit evidence, failed woefully to establish any of the said ingredients. Relying on the decisions in Governor of Imo State v. Anosike (1987) 4 N.W.L.R. (part 68) 663 and Ogbonnaya v. Adapalm (Nig).Ltd (1993) 5 N.W.L.R. (part 292) 147 at 158, he submitted that the reliefs claimed in the motion paper being in respect of concluded acts, there was nothing for the court to restrain by an order of interlocutory injunction. Learned counsel further submitted that the plaintiff was unable to show that the balance of convenience was on his side. He attacked the order of interlocutory injunction issued by the court below which, he claimed, merely restrained the defendants as vague, equivocal and general in terms and therefore unenforceable.

On issue 2 it was learned Senior Advocate's contention that the court below lacked the jurisdiction to hear the appeal on the 23rd January, 1995 on which date the matter was only fixed for the hearing of an application for extension of time within which to file the respondent's brief of argument. He submitted, with regard to issue 3, that the court below was in error when it ordered the transfer of the case to another judge in the absence of any application to that effect. On issue 4, learned counsel contended that it is not in all cases where an application for interlocutory injunction is dismissed that the court becomes unable to restrain both sides from committing the act complained of. He argued that the court below was in error by interfering with the trial courts' exercise of discretion to restrain the plaintiff and the appellant from fur-

ther parading themselves as the Olusin of Ijara Iji Isin , particularly when the plaintiff's learned counsel at the trial applied for the same relief . He urged the court to allow the appeal.

Learned leading counsel for the plaintiff, Chief P.A.O. Olorunnisola S.A.N. in his reply maintained that the trial court laboured under a mistake of law and failed to consider relevant affidavit evidence before it. It was his view, therefore, that the court below rightly reversed the exercise of discretion by the trial court which dismissed the plaintiff's application but issued interlocutory injunction against both the plaintiff and the appellant. He pointed out that both the trial court and the Court of Appeal were in agreement that the plaintiff had a legal right to protect as per his letter of appointment as the Olusin of Ijara Iji Isin by the Irepodun Local Government . He also stressed that the appellant's acts of parading and advertising himself as the Olusin was a continuing conduct, capable of being arrested at any point in time by an interlocutory injunction. He submitted that the 1st respondent established a clear case for the issue of an interlocutory injunction, having regard to the essential ingredients that needed be proved.

On issue 2, learned counsel's submission was that the substantive appeal was on the 17th day of July 1994 adjourned to the 23rd January, 1995 for hearing. He argued that no question of want of jurisdiction on the part of the court below to hear the appeal arose as the cause was duly entered in that court before the appeal was heard. It was finally pointed out that all the parties were represented by counsel at the hearing of the appeal and, again, that no question of a miscarriage of Justice against the appellant arose at the hearing. On issue 3 learned counsel referred to section 16 of the Court of Appeal Act, 1976 and to the provisions of Order 3 Rule 23 of the Court of Appeal Rules, 1981 and submitted that the Court of Appeal had the power to order the transfer of the suit to another judge for hearing in the particular circumstances of the case to ensure that justice was not only done but was seen to be done to all the parties. On issue 4, finally, it was the contention of learned counsel that the Court of Appeal acted lawfully when it held that the order of the trial court restraining the plaintiff and the appellant by an order of

interlocutory injunction was invalid as no one asked for it. It was further submitted that the said order could not be described as a consequential order since the main or principal relief claimed by the plaintiff had been dismissed by the trial court. He urged this court to resolve all four issues in favour of the respondents and dismiss the appeal as unmeritorious.

Learned leading counsel for the 2nd and 3rd respondents, M.A. Sanni esq, Attorney-General and Commissioner for Justice, Kwara State, in his own reply to issue I submitted that the grant or refusal of interlocutory injunction depended entirely on the discretion of the court which must be exercised judiciously and upon the facts and circumstances of each case. The arguments proffered on behalf of the 2nd and 3rd respondents synchronized with those advanced on behalf of the plaintiff and it is unnecessary to recount them all over again. It suffices to state that the learned Attorney-General with regard to issue I rounded up by submitting that from all the available facts, the Court of Appeal rightly found that the trial court failed to consider relevant matters deposed to by the plaintiff in his affidavit in support of the application and thereby erroneously misapplied the law. On Issue 2, learned counsel submitted that the appeal was properly adjourned on the 7th July, 1994 to the 23rd January, 1995 for hearing. He argued that no question of jurisdiction arises in the case as the appeal was duly entered in the court below and fully argued by counsel for all the parties on the said 23rd January, 1995. He was in agreement with the submissions on behalf of the plaintiff with regard to issues 3 and 4 and he urged the court to dismiss this appeal.

I think it will be necessary before I proceed to consider the issues that arise for determination in this appeal to examine, briefly, the more important general principles of law that govern the grant or refusal of an interlocutory injunction. In the first place, **an interlocutory injunction is granted before the trial of an action and its primary object is to keep matters in statu quo ante bellum until the question at issue between the parties can be finally determined by the court, thus facilitating the administration of justice at the trial. Although it is well recognised that there are certain basic issues which the courts need to consider in deciding whether or not an**

interlocutory injunction should be granted, the remedy must be kept flexible and discretionary and each case must be considered as a whole on the basis of fairness, justice and common sense. See Hubbard v. Vosper (1972) 2 Q.B.84.

The more important of the issues the courts usually consider before deciding whether or not to issue an order of interlocutory injunction are as follows-

- (i) Applicant's real prospect of success in the right claimed.
- (ii) Balance of convenience.
- (iii) Status quo.
- (iv) Relative strength of the case of the parties.
- (v) Conduct of the parties.
- (vi) Inadequacy of payment of damages.

See American Cyanamid Co. v. Ethicon Ltd (1975) A.C. 396 at 407-409.

The court on the question of the applicant's real prospect of success in the right claimed must, at the outset, be satisfied that the plaintiff's claim is "not frivolous or vexatious" and that "there is a serious question to be tried at the hearing of the substantive suit." This first ingredient is a fundamental requirement to be established by an applicant for an order of interlocutory injunction. Where the plaintiff fails to satisfy this basic requirement, this in effect will automatically bring to an end, and defeat, his application. See Re Lord Cable (1977) 1 W.L.R. 7. Although there is no rule requiring the plaintiff to establish a prima facie case before he can obtain an interlocutory injunction, the court must be satisfied that the plaintiff's case is not frivolous or vexatious and that there is a serious question to be tried. Once this requirement is established, the governing consideration must be balance of convenience. See American Cyanamid Co. V. Ethicon Ltd. (supra) at 407. If the balance of convenience does not clearly favour either party, then the preservation of the Status quo ante bellum will be decisive. See Harman pictures N.V. V. Osborne (1967) 1 W.L.R.723 and American Cyanamid Co. V. Ethicon Ltd, supra.

I think it ought to be mentioned that on an application for an interlocutory injunction in aid of a plaintiff's alleged right, the court, in appropriate cases may wish to consider the relative strength of the cases of the parties, the conduct of the parties, and whether the applicant's case is so clear and free from objection on equitable grounds that it ought to interfere to preserve the property or res in issue without waiting for the right to be fully established. See Eastern Trust Co. V. McKenzie, Mann and Co. Ltd (1915) A.C. 750. The one thing that is well settled in law however, is that the grant or refusal of an order of interlocutory injunction is in the absolute discretion of the court, which discretion, however like all other judicial discretions, must be exercised judiciously, having regard to all the facts and circumstances of each and every case. And as Lord Denning put it in Hubbard v. Vosper (1972) 2 Q.B. 84 at 96, the remedy of interlocutory injunction is so useful that it should be kept flexible and discretionary and must not be made the subject of strict rules, said the learned Lord-

"In considering whether to grant an interlocutory injunction, the right course for a judge is to look at the whole case. He must have regard not only to the strength of the claim but also to the strength of the defence and then decide what is best to do done. Sometimes it is best to grant an injunction so as to maintain the status quo until trial. At other times, it is best not to impose a restraint upon the defendant but leave him free to go ahead. For instance in Fraser v. Evans (1969) 1 Q.B. 349, although the plaintiff owned the copy right, we did not grant an injunction because the defendant might have a defence of fair dealing. The remedy of interlocutory injunction is so useful that it should be kept flexible and discretionary. It must not be made the subject of strict rules."

Having briefly disposed of the general principles of law that govern the grant or refusal of an order of interlocutory injunction, I will now consider the issues formulated by the parties for determination in this appeal against the background of the said general principles of law and the facts of this case.

Issue I poses the question whether the Court of Appeal was

right to have held that the plaintiff made out a case deserving of an injunctive relief against the appellant when the relief sought in the application was in respect of concluded acts and the order of the court below was not clear and unequivocal. The totality of the affidavit evidence of the plaintiff before the trial court was that the said plaintiff was by Exhibit 3 appointed the Olusin of Ijara Iji Isin on the 9th July, 1993. This letter of appointment was issued to the plaintiff after he had been nominated and duly recommended by his ruling house, It was after the plaintiff had received his said letter of appointment that the appellant allegedly started to sponsor advertisements to the effect that the plaintiff's appointment was null and void and that it was the said appellant that was the Olusin of Ijara Iji Isin. The appellant had claimed in his own counter-affidavit that he had been duly nominated by his family and that he had been installed by the Eesa of Pamo in accordance with their tradition.

In this regard it must be pointed out that both the trial court and the court below were in agreement that the plaintiff had a legal right to protect by dint of Exhibit 3, his letter of appointment as the Olusin of Ijara Iji Isin with effect from the 9th day of July, 1993. This letter which is reference No. IRLG/CA/S/13/S/32/1/95 is dated the 9th July, 1993 and reads thus-

*"In Reply please Quote Ref No. IRLG/CA/S/13/S/32/1/95
Number and Date IREPODUN LOCAL GOVERNMENT
Telegram Loradmin Omu-Aran Personal Department P.M.B*

105

OMU -ARAN Via Ilorin

Your Ref No.....

*Kwara State, Nigeria.
Date 9th July 1993.*

*His Royal Highness,
Oba Ominiye Banigbe,
(The Olusin of Ijara/Iji-Isin,
Your Highness,*

APPOINTMENT AS OLUSIN OF IJARA/IJI-ISIN

I wish to inform your Royal Highness that after due consultation with the Irepodun/Ifelodun/Ekiti traditional council and on further in-

vestigation by the Irepodun Local Government Council, I hereby approved your appointment as the Olusin of Ijara/Iji-Isin. The appointment takes effect from 9th July , 1993.

2. Your Highness, it is my sincere hope that this appointment would spur you to great heights in the service of the Government and people of Irepodun Local Government in general and your own people in particular.

Please accept my heartfelt congratulations.
(SGD).

Chairman Irepodun Local Government.

There were also Exhibits A and 2 which respectively in indicated various stages of nominations, consultations and alleged traditional and /or customary moves which culminated in the letter of appointment, Exhibit 3.

Of Exhibit 3, the learned trial judge observed as follows-

"In the instant case, the subject matter of the application is the Olusin throneThe plaintiff/applicant's claim is that he has been appointed by the Irepodun Local Government. His letter of appointment dated 9th July, 1993 and signed by the Chairman of the said Local Government is exhibited in this application. The 1st defendant / respondent has no such letter of appointment.....

The letter of appointment of the plaintiff / applicant remains valid until otherwise declared by this court ," (Underlining supplied for emphasis).

The Court of Appeal for its own part endorsed the above finding of the trial court, holding as follows-

"The pertinent question to ask here in the light of the prevailing circumstances in this instant case is whether there is a legal right to protect via injunction. I would answer that since the lower court had held that Exhibit 3 is valid and in the light of the uncontroverted affidavit evidence of tension in the community, there is a legal right to be protected in Exhibit 3 via injunction. See Akpa v. Habeed (supra) Pages 288 -290. It is my view that there are triable issues at the trial of the main suit. In effect I hold that requirements for the granting of injunction had been satisfied in the instant case. See also Anosike Building

The vital point that needs be stressed at this stage is that the two courts below by their above observations could not be said to have made any pronouncements on anything that would tend to prejudice the main issues for determination in the substantive suit at the trial. In deciding applications of this nature, the trial court should, as much as possible, try not to delve into or predetermine the issues to be tried in the substantive case. See Orji v. Zaria Industries Ltd, (1992) 1 N.W.L.R.(part 216) 123, Obeya Memorial Hospital V. Attorney-General of the Federation (1987) 3 N.W.L.R. (part 60) 325. The courts in this type of situation do and must only confine themselves to those issues necessary for the disposal of the application without more. It is for this reason that I, too, am conscious not to make pronouncement on any issue that will be prejudicial to the main questions for determination at the trial of the substantive suit. See Ogbonnaya and others v. Adapalm (Nig) Ltd (1993) 5 N.W.L.R. (part 292) 147. All I need state from the above observations of the courts below is that it seems to me plain that the plaintiff's claim can by no stretch of the imagination be described as frivolous or vexatious or that there is no serious question to be tried in the substantive action. This is the first hurdle the plaintiff,as an applicant for order of interlocutory injunction, must clear.

As already observed, it is not necessary that for the plaintiff to succeed, the court in an application for interlocutory injunction should find a case which would entitle him to relief at all events. That is not the law. It is quite sufficient if the court finds a case which shows, as in the present case, that there is a substantial question to be investigated and that matters ought to be preserved in statu quo ante bellum until that question can be finally disposed of. See Preston V. Luck (1884) 27 Ch.D. 497 C.A., James V. Pacaya Rubber and produce Co. Ltd (1911)1 K.B. 455 at 459. I agree with the finding of the court below that the res in issue in the substantive claim is the alleged appointment of the plaintiff as the Olusin

and not the throne itself. The plaintiff, having thus established that his case in this direction was not frivolous or vexatious and that he had a serious question to be tried, the court below was right in holding that the trial court ought next to have proceeded to consider the issue of balance of convenience.

The issue of balance of convenience did not appear to have engaged the attention of the court below. The view of the trial court was that the balance of convenience was not in favour of the plaintiff by the mere fact that his appointment in issue as the Olusin was evidence in writing per Exhibit 3, his letter of appointment from the Irepodun Local Government. It is clear that the balance of convenience that will be protected, as submitted by learned counsel for the appellant, can not be any fancied ego or personal pride of an applicant but a substantial right that is fit for legal protection. See Vee Gee (Nig) Ltd v. Contact (Overseas) Ltd (1992) 9 N.W.L.R. (part 266) 503 at 515. **What is in issue in the present case is the appointment of the plaintiff as the Olusin of Ijara Iji Isin. This, in my view, is a substantial issue fit and deserving of legal protection. Both courts below are in agreement that the plaintiff's letter of appointment by the appropriate Local Government, Exhibit 3, remained valid until otherwise declared by the court see Governor of Imo State V. Anosike (1987) 4 N.W.L.R. (part 66) 663 I respectfully endorse this view.** In the face of this finding, it is difficult to appreciate how the learned trial judge was able to hold that the fact that the plaintiff had his letter of appointment was not enough to hold that the balance of convenience in the present case was in his favour. In my view, the nature of the injury which the appellant, on the one hand, might suffer if the injunction was granted and he should ultimately turn out to be right would be far less than that which the plaintiff, on the other hand, whose evidence of appointment, Exhibit 3, was before the court would sustain if the injunction was refused and he should ultimately turn out to be right. After all, the plaintiff's purported appointment was not only duly recognised by his appropriate Local Government and evidenced in writing, unlike the appellant's claim by which all he had been doing, in the words of the

learned trial judge, was merely "Parading himself as the Olusin," **It seems to me that having regard to all the facts and circumstances of this case as disclosed in the affidavit evidence before the court, the balance of convenience in the present application would appear to favour the plaintiff.** One clear thing that is certain, however, is that the balance of convenience in the case, no matter how remotely, did not favour the appellant. Even in a situation where the balance of convenience does not clearly favour either party, and this is not the position in the present case, then the preservation of the status quo ante bellum will be decisive. See American cyanamid Co. V. Ethicon Ltd and Harman pictures N.V. V. Osborne, (supra) I will now dispose of the issue of status quo bel lum.

It is trite law the court in an application for interlocutory injunction will consider the preservation of the status quo ante bellum. In Akapo v. Hakeem Habeeb (1992) 6 N.W.L.R. 266, Ogunbare, J.S.C. defined the phrase, status quo ante bellum to mean-

" *the situation or position prevailing before the defendants' conduct complained of by the plaintiff.*"

The next question, naturally, must be what the prevailing situation or position was before the appellant's conduct complained of by the plaintiff. The answer seems to me clear. As the court below put it-

"It is my considered view that in the instant case, the res is the appointment and not the throne. The application for injunction here is being made by a person who believes he has been appointed and wants to restrain the other from causing a break down of law and order and I so hold. See Governor of Lagos State v. Ojukwu (1986) 1 NWLR (part 18) 621 page 624-626 (Holding 26) page 645 to 647. See also Akapo V. Habeeb (supra) pages 311 -312. I need to emphasize here that I have used the phrase 'a person who believes that he has been appointed' and not a person who has been appointed since this is the issue for determination in the substantive suit. I have taken this precaution since this is an appeal against an interlocutory injunction and taking into consideration also the fact that one of the reliefs claimed in the writ of summons

in the substantive suit pending at the lower court by the appellant is a relief for perpetual injunction restraining the respondents, their servants, privies and agents from further acts related to the chieftaincy stool. I am fully aware in consequence that I have to confine myself to those issues only necessary for disposing of the appeal. It is for this reason that I am conscious not to make any pronouncement on anything that will tend to prejudice the main issues of the case pending at the trial court."

I think the Court of Appeal was right in the above observation.

In my view, the prevailing position before the appellant's conduct complained of was the fact of the plaintiff's appointment as the Olusin of Ijara Iji Isin. It is this appointment that the appellant now seeks to challenge. As I have already pointed out earlier on in this judgment, the trial court in its ruling decided that the plaintiff's letter of appointment, Exhibit 3, is valid until otherwise pronounced by the court in the substantive suit. It is significant that the appellant herein did not appeal against this finding of the trial court which was affirmed by the Court of Appeal. In my view, it is this appointment of the plaintiff as the Olusin that is the res to be preserved on the particular facts of the instant case pending the final determination of the substantive suit and I so find.

On the rest of the issues for consideration as to whether or not an order of interlocutory injunction may go, it is clear on the question of the relative strength of the case of the parties that the plaintiff's case, as I have already pointed out can by no means be regarded as frivolous or vexatious. He has, on the pleadings, clearly established that he has a Prima facie case and a serious question to be tried in the substantive suit. There is also no allegation of any conduct which in any way suggests that the plaintiff's case is not free from objection on equitable grounds that the court ought not to interfere to preserve the res in issue without waiting for the right to be fully established. See Eastern Trust Co.. v. McKenzie Mann and Co. Ltd. (supra). I cannot, myself, conceive the adequacy of any payment of damages or compensation to the plaintiff by the appellant, no matter how high the quantum thereof, in re-

spect of the injury the plaintiff would sustain or suffer if the injunction was refused and he should ultimately turn out to be right. It seems to me that the Court of Appeal took pains to consider the entire arguments before the trial court before it came to the conclusion that the ruling of the learned trial judge could not be justified from the available facts of the case. I think the court below was perfectly right when it held that this is a proper case for the grant of interlocutory injunction as prayed.

Learned counsel for the appellant did submit that the relief claimed in the motion paper being in respect of concluded acts, there was nothing for the court to restrain by an order of interlocutory injunction. On this point, I need only state that what was sought by the plaintiff against the appellant before the trial court was to restrain the appellant from "parading and / or pretending to be the Olusin of Ijara Iji Isin and from advertising or sponsoring advertisement through his agents or servants that he is the Olusin of Ijara Isin or doing any other acts in negation of the appointment of the plaintiff as the Olusin..... " There is also paragraph 31 of the plaintiffs affidavit in support of the application which deposes as follows-

"31. That the 1st defendant is continuing in his parade as Oba of Ijara Iji Isin when no kingmakers appointed him as one and his activities are polluting our tradition and causing disharmony in the town."

It is thus clear that the acts of the appellant complained of were continuing acts and not concluded acts as erroneously submitted by learned counsel for the appellant.

There is next the submission of learned appellant's counsel to the effect that the order of the court of Appeal was vague. In this regard, It is not disputed that the terms of the interlocutory injunction applied for are clear. This application, the trial court dismissed. The Court of Appeal, upon a calm consideration of the decision of the trial court, found this to be erroneous and concluded thus-

"In effect, I hold that the requirements for the granting of injunction had been satisfied in the instant case."

It then proceeded to allow the appeal, set aside the decision of the learned trial judge and granted the plaintiff's application. It is clear to me that upon a consideration of the decision of the court below in its totality, the order of injunction granted was as prayed for by the plaintiff. Issue I must therefore be resolved against the appellant.

On issue 2, learned counsel for the appellant contended that the court below lacked the jurisdiction to hear the appeal on the 23rd January, 1995 on which date the matter, according to him, was only fixed for the hearing of a motion for extension of time within which to file the respondent's brief of argument. With respect to learned counsel, I am unable to accept that this submission is either sound or well founded. The record of proceedings shows that the appellant on the 12th April, 1994 moved a motion for stay of proceedings after which the ruling was reserved. The said ruling was delivered on the 7th July, 1994. It is on record that immediately after the ruling was delivered, the main appeal was adjourned to the 23rd January, 1995 for hearing. Learned appellant's counsel was therefore in error to suggest that the appeal was not fixed for hearing on the 23rd January, 1995 on which date the appeal was duly heard and all the parties concerned were duly represented by counsel. The appellant, in particular, was represented at the hearing of the appeal on that date by one M.I. Komolafe Esq. who announced himself as holding brief for Mr. Yusuf Alli, the appellant's present counsel before this court.

It seems to me necessary at this stage to stress that once counsel announces his appearance in court, whether he is holding brief for another counsel or not, the court takes it that he is fully mandated and /or authorised to conduct the case on behalf of his principal or his client. If however, he is not in a position for any reason to do so, it is his duty to apply for an adjournment, stating his reasons to the court for the application whereupon the court,

upon a consideration of such reasons, shall decide whether or not the case should, in the interest of justice, be adjourned, otherwise the court would proceed with the hearing of the cause or matter. In the absence of such an application, the court is entitled to assume that counsel is fully instructed and/or mandated to get on with the case. See Shyllon V. Asein (1994) 6 S.C.N.J. 287. B

In the present case, learned counsel for the appellant sought for no adjournment of the appeal but took full part in the hearing thereof. Briefs of argument were duly filed by learned counsel on behalf of the parties. The appellant's brief of argument, in particular, was settled and signed by Yusuf O. Alli Esq, the learned Senior Advocate who appeared before us on behalf of the appellant. At the hearing of the appeal on the 23rd January, 1995 learned counsel for the appellant, Mr. Komolafe duly adopted the brief filed on behalf of his client. He urged the court to dismiss the appeal. D

In this regard, it has to be pointed out that at the hearing of appeals where briefs of argument have been filed, it is not a sine qua non that parties need proffer oral arguments or submissions in amplification of their respective briefs of argument. Any party, where he so desires, has the right of choice whether or not to offer oral submissions in amplification of his brief. I therefore think that the complaint of the appellant under this issue is without any legal justification. F

Finally in issue 2, it is not in dispute that the appeal had been entered in the Court of Appeal before it was heard by that court on the 23rd January, 1995. Once on appeal is duly entered in an appellate court, it cannot be rightly suggested that such an appellate court is not seised of the appeal or that such an appellate court would have no jurisdiction to entertain the cause or matter. In my view, no question of jurisdiction arises in this appeal and issue 2 must be resolved against the appellant. H

Issue 3 complains of transfer of the substantive cases by the Court of Appeal to another judge of the Kwara State High Court for hearing and determination when no party applied for it. In the

first place, there is section 16 of the Court of Appeal Act, 1976 which empowers the Court of Appeal to exercise full jurisdiction over all matters before it and may, inter alia remit a case to the court below for the purpose of rehearing or may give such other
 B directions as to the manner in which the court below shall deal with the case, or, in case of an appeal from the court below in that court's appellate jurisdiction, order the case to be reheard by a court of competent jurisdiction. See Iyaji v. Eyigbe (1987) 3 N.W.L.R. (part 61) 523 at 530 E.G. Igboho, Irepo L.G.A. and Another V. The Boundary Settlement Commissioner (1988) 2 S.C.N.J. 28 etc.
 C There is also the provision of Order 3 Rule 23 of the Court of Appeal Rules, 1981 which, inter alia empowers the Court of Appeal to give any judgment or make such further or other as a case may
 D require. These powers are exercisable by the court in favour of all or any of the parties although such parties may not have appealed from or complained of the decision.

It is apparent from decision of the court of Appeal that the
 E trial court on the issue on appeal did not exercise its discretion judicially and judiciously. The trial court having exercised its discretion wrongly, the Court of Appeal rightly allowed the appeal and, as it was entitled to do, remitted the case to another judge of the
 F Kwara State High Court for hearing and determination. This, it did, in accordance with the maxim that justice must not only be done but must manifestly be seen to be done. It is clear to me that it is not the constitutional right of any party to be heard by a particular judge. See Aliyu V. Ibrahim (1992) 7 N.W.L.R. (part 253) at 373 B.C.
 G In my view, there is nothing wrong with this order of the court below and issue 3 is hereby resolved against the appellant.

Issue 4 deals with the restraint of both the plaintiff and the appellant by the trial court in the application for interlocutory injunction in
 H issue. In this regard it has to be recalled that the trial court dismissed the plaintiff's application for interim injunction against the appellant. The court however proceeded to restrain both the plaintiff and the appellant from parading themselves as the Olusin of Ijara Iji Isin pending the deter-

mination of the substantive suit. In spite of the fact that the trial court had held that-

"there is also no evidence before me that there has been any break down of law and order in the area since the chieftaincy dispute started,"

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It never -the - less went on to state-

"In view of the circumstances of this case and in the interest of justice and peace, I hereby restrain both the plaintiff and the 1st defendant from parading themselves as the Olusin of Ijara Iji Isin pending the determination of this suit."

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The learned counsel for the plaintiff has described the order in question as "strange " and I think, with the greatest respect, that I am inclined to agree with him. The "circumstances of this case" alluded to by the learned trial judge as a result of which the unsolicited order under attack was made were in no way stated. Learned counsel for the appellant had submitted that the order is justifiable as he claimed it was incidental to and flowed from the prayers sought by the plaintiff. With respect, I find it difficult to accept this submission as well founded, particularly in view of the fact that the application itself had been found to be without substance and accordingly dismissed by the trial court. I fully endorse the decision of the Court of Appeal that the learned trial judge was in definite error by restraining the plaintiff and the appellant as he did when nobody applied or asked for such an order and after the application itself had been refused on its merits.

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Without doubt, where in an application for interlocutory injunction to restrain one party from doing an act, the parties agree that the injunction may issue against all the parties concerned or a definite case is made out that it is in the overall interest of justice that both parties ought to be restrained, the court would be entitled to issue such an order. In the later case, however, the court must clearly state the facts and circumstances which make it compelling and imperative to extend the order of injunction to both parties. This is because it is trite that a court must not grant to a party, a

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relief which he has not sought or which is more than he has sought. See Ekpenyong .v. Nyong (1975)2 S.C.71 at 81 -82, Union Bever-ages .v.Owolabi (1988) 2 N.W.L.R. (part 68)128 at 133, Makanjuola V. Balogun (1989) 3 N.W.L.R. (part 108) 192 at 206, Olurotimi V. Ige B (1993) 8 N.W.L.R. (part 311) 257 at 271 etc.

In the present case, the order under attack was neither sought by the plaintiff nor made by the consent of the parties. The alleged circumstances which compelled the trial court to issue the order was no where stated in its ruling. The order complained of could in no way be described as a consequential order in view of the outright dismissal of the plaintiff's application in its entirety. I agree with the Court of Appeal that the learned trial Judge exceeded his powers in the circumstances of this case by restraining the plaintiff as he purported to do in his ruling of the D 11th January, 1994. Issue 4 is accordingly resolved against the appel- lant.

On the whole, this appeal lacks merit and it is hereby dismissed with costs to the plaintiff / 1st respondent against the appellant which I E assess and fix at N10,000.00.

BELGORE JSC

In chieftaincy matters, it is in the interest of public good to avoid F confusion in the community as confusion can lead to breakdown of law and order. In the instant case the plaintiff after going through some formalities - traditional and statutory -was appointed the Olusin of Ijara Isin by Ifelodun/Irepodun /Ekiti Traditional council and was given a letter G to that effect which is Exhibit 3. From that day he received Exhibit 3- we shall not for the moment know whether rightly or wrongly- he has had a vested interest to protect and the balance of convenience is on his side to maintain status quo ante bellum. Until Exhibit 3 is declared null and void H the presumption is that it is in order because it emanated from rightful source. Pending the determination of the substantive suit, the plaintiff's right under Exhibit 3 must be protected.

The plaintiff has got a serious issue of law to be decided, to wit,

whether Exhibit 3 is valid or not; if it is valid he is the Olusin, if not his appointment is null and void. But these are matters to be decided in the substantive action which is still begging to be heard at the trial court.

I see no merit in this appeal and I dismiss it in agreeing with the judgment of my learned brother, Iguh J.S.C., I award N10,000.00 as costs to the respondents against the appellant.

KUTIGI JSC

I read in advance the judgment just delivered by my learned brother, Iguh, JSC . I agree with his conclusion that the appeal is without substance and ought to be dismissed. It is accordingly dismissed with N10,000.00 (Ten Thousand Naira Only) costs against the 1st defendant/appellant and in favour of the plaintiff/respondent only.

OGUNDARE JSC

I agree entirely with the judgment of my learned brother Iguh, JSC just delivered. He has, in his usual characteristic clarity, dealt with all the issues canvassed in this appeal. I adopt his reasonings and conclusions as mine and, like him too, I dismiss the appeal with costs as assessed by Iguh.

ONU JSC

Having been privileged to read before now the judgment just delivered by my learned brother Iguh, J.S.C., I am in entire agreement with him that the appeal lacks substance and it is accordingly dismissed by me.

My learned brother has so meticulously dealt with the facts and the law (principles) applicable to the grant or refusal of interlocutory injunctions such as the one in hand, that my task here is made all the more lighter by my venturing the following brief comments:-

The four issues submitted by appellant from his fourteen grounds

of appeal as arising for our determination are as follows:-

"1. Whether from the affidavit evidence before the trial court which that court considered in detail, the court below was right to have held that the plaintiff made out a case deserving of an injunctive relief against the appellant and others in the circumstances of this case, more-over when the reliefs were in respect of concluded acts and the order of the court below is not clear and equivocal.

2. Whether the court below did not act without jurisdiction in hearing the appeal on 23rd January, 1995, when the case was for a motion to file respondent's brief out of time and whether this did not lead to a miscarriage of justice against the appellant.

3. Whether the court below was right to have ordered a transfer of the case from the trial court when there was no legal basis for the order and none of the parties asked for it.

4. Whether the court below was not in serious error by tampering with the trial court's exercise of discretion to restrain the appellant and the plaintiff from further parading themselves as the Olusin of Ijara - Isin moreover when the learned Senior counsel represented the plaintiff at the trial asked for same."

It is trite law from numerous and consistent judicial pronouncements in this country, that an applicant for an interlocutory injunction has the onus of proof; "the burden whereof lies on him throughout." (per Ungood-Thomas, J.) in Donmar v. Bart (1967) 1 WLR 740 at page 742, cited with approval by Coker, JSC in Ladunni v. Kukoyi (1972) 1 All NLR 133 at page 137.

In the instant case where Exhibit 3 - the letter of appointment of the plaintiff by the Irepodun Local Government as Olusin of Ijara-Iji Isin- forms the cornerstone of the plaintiff's rights, such rights shown to be frivolous or vexatious, ought to be protected by way of interlocutory injunction. An interlocutory injunction being a discretionary. relief will only be granted by the trial judge acting judiciously or will be granted upon triable issues on substantial question to be investigated at the trial of the main suit or of matters which ought to be preserved in statu quo ante bellum until the main suit is finally disposed of at the trial thereof.

In this regard, what is the res in the case in hand is not the throne of Olusin which is tangible but the appointment of the plaintiff as Olusin of Ijara-Iji Isin by the Irepodun Local Government.

Thus, in Mrs. Monica Ego Kanno v. Mr. Banigo Igbani Kanno & 2 Ors. (1986) 5 NWLR (part 40) 138, it was held inter alia that:- B

"It is for the applicant to show or satisfy the court that the action is neither frivolous nor vexatious." see also Coker, J. (as he then was) in Simplicio Kufeji v. Kogbe (1961)1 All NLR 113.

At page 114 of Kufeji's case (supra) Coker, J. went on to enunciate C thus:

"In an application for interim relief by way of injunction it is not necessary that a plaintiff or applicant should make out a case as he would do on the merits, it being sufficient that he should establish that there is substantial Issue to be tried at the hearing." D

As Akpata, JCA (as he then was) further put it in Kanno v. Kanno (supra)

"In an application for an interlocutory injunction the applicant must establish a probability or strong prima facie case that he is entitled E to the right of whose violation he complains and subject to this being established, the governing consideration is maintenance of the status quo pending the trial."

On balance of convenience, upon weighing the materials placed F before the trial court as well as the court below, most especially Exhibit 3 and the affidavit evidence, the balance of convenience seems to favour or weigh more on the side of the plaintiff than on the side of appellant for, it is the plaintiff's appointment as Olusin and not the throne per se, that constitutes the res to be preserved on the facts disclosed herein pending G the final determination of the substantive suit. The plaintiff would therefore appear clear to me to have established a prima facie case. For, as held by this court in Ladunni V. Kukoyi (1972)3 SC. 31 at page 34 or (1976)1 All NLR 133 at page 137: H

"What is required to be made out is a prima facie case and not a prima facie title to the land and depending on the circumstances of each case and in particular the circumstances necessitating or compelling the

application for an interim injunction, the court must bring to bear on the whole matter its own discretion maintaining an equilibrium as between two warring parties. It must however be borne in mind that at all times the burden of establishing such a case, as indeed that of balance of convenience, rests always on the applicant for the order."

I am in agreement with learned counsel for the 1st plaintiff / respondent when he submitted that the plaintiff made out a prima facie case for the interlocutory injunction. See Obeya Memorial Hospital etc Ltd v. A.G. of the Federation (1987) 3 NWLR (part 60) 325 in which the motion of establishing a triable issue in the context of interim injunction was analysed in considerable detail. Similarly, I agree with the court below when it held inter alia that-

"I have examined the records of the trial court paragraph 18 at page 18 of same which shows that the appellant having been appointed as the Olusin became the agent of the Local Government for tax collection and maintenance of peace in the appellant's community where he is living at the expense of his legal practice vide paragraph 30 page 20 of the records. At paragraph 29 of the same page 20 there is also uncontroverted affidavit evidence that the appellant was being paid by the Irepodun Local Government for his duties as appointee of the said Local Government....."

This is evidence of payment of salary to the appellant. In my view, the learned trial judge was in error when he stated at page 191, lines 5-8 of the records that the appellant did not depose to the fact that he has been performing any duties as the Olusin of Ijara/ Iji Isin."

Later down in the judgment, the learned Justices observed thus:-

"it was also observed that 1st respondent advertised and sponsored advertisements on Radio Kwara and Radio Oyo that he is the Olusin even when he had no letter of approval.It is my considered view, that in the instant case the res is the appointment and not the throne. The application for injunction here is being made by a person who believes he has been appointed and wants to restrain the other from causing a break down of law and order and I so hold. See Governor of Lagos State v. Ojukwu (1986) 1 NWLR (part 18) 621 at 624-626 (Holding 26) page

645-647. See also *Akapo v. Hebeeb (supra)* pages 311-312. I need to emphasise here that I have used the phrase 'a person who believes that he has been appointed' and not a person who has been appointed since this is the issue for determination in the substantive suit.

I have taken this precaution since this is an appeal against an interlocutory injunction and taking into consideration also the fact that one of the reliefs claimed in the writ of summons in the substantive suit pending at the lower court by the appellant is a relief for perpetual injunction restraining the respondents, their servants, privies and agents from further acts related to the chieftaincy stool. I am fully aware in consequence that I have to confine myself to those issues only necessary for disposing of the appeal."

It is in the light of the foregoing that the conclusion arrived at the trial court that both parties be restrained by injunction could not be justified in the face of the available facts and circumstances. A fortiori, I hold the firm view that the court below was perfectly right when it held that this is an appropriate fact for the grant in the plaintiff's favour the interlocutory injunction prayed.

As per paragraph 31 of the plaintiff's affidavit, since the appellant was shown "as continuing in his parade as Oba of Ijara-Iji Isin when no Kingsmakers appointed him as one," the question of the reliefs claimed being for concluded acts for which there was nothing for the court to restrain by an order of interlocutory injunction, it will suffice for me to say shortly that the submission is totally misconceived. I Therefore have no hesitation in jettisoning it. Indeed, as the order made by the trial court granting the interlocutory injunction in the plaintiff's favour is peremptory (not minding the grant of the same order in appellant's favour which in my view was gratuitous and not a relief supplicated by him vide the cases of *Ekpeyong v. Nyong*(1975)2 SC. 71, *Olatunji v. Adisa* (1975)2 NWLR (part 376)167; *Ogoyi v Umagba* (1995)9 NWLR (part 419) 283 and *U.B.N. Ltd V. Ogboh* (1995)2 NWLR (part 380) 647), there can be no vagueness in its purport. Issue 1 is thus resolved against the appellant.

On appellant's complaint under issue No.2 to the effect that the court

below lacked jurisdiction to hear the appeal on 23rd January, 1995, that is to say, on a date the matter was only fixed for the hearing of a motion for extension of time within which to file the respondent's brief, this argument having proceeded from a faulty premise and a misconception, is B outrightly discountenanced by me for its unsoundness and untruth. I have myself perused the records of proceedings and I find that the case was fixed to 23rd January, 1995 for hearing - direct and to the point but not otherwise. The appellant was represented by counsel who partook in the proceedings of the court. He cannot now, late in the day, turn round C to argue something different. Besides, the appeal having been entered in the court below at the time of the hearing, there was nothing to bar the hearing of the appeal as at 23rd January, 1995 since not only was it already duly entered, the appellate court was effectively seized of the D matter. This issue is also resolved against the appellant.

The grouse in issue 3 is that the order of transfer of the substantive case by the court below to another High Court Judge of the Kwara state High Court for hearing and determination was wrong when no party applied E for it. By the combined effect of the provisions of section 16 of the Court of Appeal Act, 1976. Cap.75. Laws of the Federation of Nigeria, 1990 and Order 3 Rule 23 of the Court of Appeal Rules 1981, as amended, while in the former section the Court of Appeal exercises wide and vary- F ing powers which include "full jurisdiction over the whole proceedings as if the proceedings had been instituted in the Court of Appeal as a court of first instance and may re-hear the case as a whole or in part or may remit it to the court below for purpose of such rehearing or may give such other directions as to the manner in which the court below shall G deal with the case....." The latter Rule makes provisions as to how "These powers may be exercised by the court, notwithstanding that the appellant may have asked that part only of a decision may be reversed or varied, and may also be exercised in favour of all or any of the respon- H dents or parties, although such respondents or parties may not have appealed from or complained of the decision." See Ugwu v. Aba (1961) 2 All NLR (part 1) 436; Ayoola v. Adebayo (1969) 1 All NLR 159 and Awote v. Owodunni (No.2) (1987) NWLR (part 57) 366 at 378. I

have no hesitation also in resolving this issue against the appellant.

On issue 4 which deals with the restriction of both the plaintiff and the appellant, I think that my treatment of issue No1 more than adequately covers same. Suffice it to add, however, that the remark of the court below that that order was "strange" was fully justified and I so hold. The court below was therefore right, in my view, to set aside the restraining order wrongly imposed on the plaintiff when nobody applied or asked for such an order and after the application itself had been refused on its merits. I therefore adopt all I have said under issue 1 in my consideration of this issue.

It is for these reasons and the fuller ones set out in the leading judgment of my learned brother Iguh, JSC that I too dismiss the appeal. I abide by the consequential orders made in the leading judgment inclusive of costs.

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