

SUPREME COURT OF NIGERIA
14TH JULY, 2000. SC. 57/1995
CORAM:- S. M. A. BELGORE, M. E. OGUNDARE,
U. MOHAMMED, A. I. KATSINA-ALU,
O. A. EJIWUNMI, JJSC

DYKTRADE LIMITED	APPELLANT
AND		
OMNIA NIGERIA LIMITED	RESPONDENT

COURTS - Trade Marks - Statutes - Where not ambiguous - Courts should not look beyond its provisions - There is nothing called "voidable registration" - Under the Trade Marks Act.

TRADE MARKS - Registration of - Creates right to sue for any infringement - And to sue for passing off.

TRADE MARKS - Registered trade mark - Mere application for registration is not enough - As the Registrar must take certain statutory steps - Before registering a trade mark.

TRADE MARKS - Registration - Acceptance of the application for registration - Is different from mere application and acknowledgment.

TRADE MARKS - Proprietor of a trade mark - How such status is acquired - Under the Act.

TRADE MARKS - Breach - Right to protect one's trade mark - Where not yet matured - The action was rightly struck out.

FACTS

Before the Federal High Court, the plaintiff/appellant filed an action against the defendant/respondent claiming inter alia, an injunction to restrain the defendant from infringing the plaintiff's trade mark "Super

Rocket" applied for and accepted in Nigeria under No. TP 11933/91/5. The plaintiff sought and obtained an ex parte order restraining the defendant from manufacturing or selling washing terrazzo floors bearing the trade mark "Super Rocket." In response to the ex parte order and pending motion on notice for injunction, the defendant filed an application to discharge the ex parte order and to oppose the motion on notice.

The trial Court heard the two applications together. And found that the plaintiff was not entitled to sue for infringement of a trade mark which had not been registered. The entire suit was struck out. An appeal to the Court of Appeal was not successful. Plaintiff has further appealed to the Supreme Court.

ISSUES FOR DETERMINATION

"1. Whether the plaintiff/Appellant did not establish that there was a serious question to be determined at the trial, as far as its claim for infringement of trade mark was concerned such as to support its prayer for an interlocutory injunction. Etc, see p. 2517

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

Trade Marks - Registration of

1. "Trade Mark" when registered will entitle the proprietor to sue or institute an action for any infringement of the Trade mark. Registration entitles the proprietor to the exclusive use of the trade mark and also right to sue for passing off the goods of the proprietor. (p. 2517 D)

Registered trade mark - Mere application for registration

2. The Registrar of Trade Marks will register a trade mark on an application by the proprietor and after making all the searches and investigations as provided for in Trade marks Act (Cap. 436 Laws of the Federation of Nigeria 1990) to satisfy the requirements of Section 9 (1), (2) & (3)' and Sections 10, 11 & 12 thereof . The Act sets out clearly in sections 17, 18, 19 and 20 the procedure whereby the application for registration of a trade mark will proceed. In the instant case on appeal the only matter before the Courts below is the allegation that the appellant applied for

registration of the trade mark. The contention that the application was made does not mean that it is "registered" (p. 2517 E)

Acceptance of the application for registration

3. Also when registered the trade mark shall be deemed as having been registered on the date the application was made. Therefore what was before the Courts below was mere application and acknowledgement of the application, not what the application calls acceptance. Acceptance of the application is when the conditions in S. 22 above have been fulfilled. Up to the moment there is no evidence that the application has been accepted and by virtue of S. 22 (4) the application has abated. (p.2518 B)

Proprietor of a trade mark

4. It is therefore clear that from the wording of the Act nobody acquires the status of the "proprietor" unless that person, in relation to the trade mark, is the owner, importer exporter, shipper or any other person for the time being possessed of or beneficially interested in the goods to which the trade mark is applied. The appellant has not acquired any right to protect for the time being as the applicant for the purpose of the Act because all the procedure leading to acceptance had not been followed. (p. 2518 D)

Right to protect one's trade mark

5. It is therefore clear that the right sought to be protected with injunction by the appellant has not matured and the trial Court on scanty materials before it rightly refused to continue with the matter and the action was rightly struck out. Court of Appeal did the right thing. The appellant has not indicated clearly the right he wanted protected either in the interim or substantive claim. What was before the trial Court was not a matter of passing off but that of breach of appellant's trade mark. The appellant has got no trade mark to protect. (p. 2518 F)

Courts - Trade marks - Statutes

6. The courts in this country must not look beyond our statute when

there is no ambiguity. Trade Mark Act is very clear and the appellant has not acquired anything called "voidable registration" as held in Wellcome Foundation v. Ranboxy Mantori Nigeria Ltd (unreported FHC/L/35/90 of 31/10/90) because nothing in the Act justifies such status for trade marks.

B The grant or refusal of an injunction is a discretionary power of the Court and enough facts must be available in Court to grant it. American Cyanud Co. v Ethicon Ltd. (1975 1 All E.R. 504. (p. 2518 H)

C NOTABLE POINTS OF INTEREST OGUNDARE JSC

1. Interlocutory injunction - Its purpose

The purpose of an interlocutory injunction is to protect a plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the case were resolved in his favour at the trial- see Obeya Memorial Specialist Hospital & Anor v. Attorney General of the Federation & Anor. (1987) 2 NSCC 961. Here, the appellant acquired no right to the trade mark SUPER ROCKET in respect of which he had not been registered as a proprietor at all times relevant to these proceedings. As he acquired no right, there was nothing to protect by an interlocutory injunction - see: Alowonle v. Bello & Anor. (1972) ANLR 45 (p. 2523 E)

F 2. Passing off - Is not the claim in this matter

On Issue 3, the prayer sought by the appellant in his motion on notice dated 12/3/93 and filed along with the motion ex- parte is clear. I have already set it out earlier in this judgment. It does not cover passing off. G The argument that -

"the selling by one manufacturer or trader of his own products or merchandise in a manner or by the adoption of a presentation calculated to deceive purchasing members of the public into believing that they were products or merchandise of another manufacturer or trader, qualifies as the tort of passing off."

H ingenious as it is, does not persuade me to disagree with the Court below. There was no specific prayer for an interlocutory injunction restraining

the respondent from passing off and it would have been wrong to grant such a prayer which was not asked for - Olurotimi v. Ige (1993) 8 NWLR 259. (p. 2524 B)

REPRESENTATION

O. OGUNKEYE ESQR. FOR THE APPELLANT
A. AJIBOLA, ESQR. FOR RESPONDENT.

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CASES REFERRED TO

American Cyanud Co. v Ethicon Ltd. (1975 1 All E.R. 504

Kotoye v. C.B.N (1989) 1 NWLR (Pt.98) 419

Oduntan v. General Oil Ltd. (1995) 4 NWLR (pp 38) 1, 18

Alowonle v. Bello (1972) ANLR 45

Olurotimi v. Ige (1993) 8 NWLR 259

Obeya Memorial Hospital v. A.G. Fed.

Alowonle v. Bello (1972) A N. L. R 45

Ekpenyong v. Nyong (1975) 2 SC 71

Kalio v. Kalio (1975) 2 SC. 15

Union Beverages v Owolabi (1988) 1 NWLR (Pt.68) 128

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STATUTE REFERRED TO

Trade Marks Act (Cap. 434 Laws of the Federation of Nigeria 1990) ss. 9 - 12, 17 - 20, 22, 3 - 6

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LEAD JUDGMENT BY BELGORE JSC

The appellant was the plaintiff in the Federal High Court and the appellant at the Court of Appeal. The claim in the Federal High Court was against the defendant (now respondent as it was in Court of Appeal) as follows:-

An injunction to restrain the defendant from

"a) Infringing the plaintiff's Trade Mark "SUPER ROCKET" applied for and accepted in Nigeria under No. TP 11933/91/5.

(b) passing off or causing enabling or assisting others to pass off grinding stones used for the purpose of washing terrazzo floors in-

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scribed with the trade mark "SUPER ROCKET" not being of the plaintiff's manufacture or merchandise as and for the goods of the plaintiff.

B (c) *Importing, selling or offering for sale or supplying grinding stones used for the purpose of washing terrazzo floors or any other product under the trade mark "SUPER ROCKET" as to be calculated to lead to the belief that grinding stones not of the plaintiff's manufacture or merchandise are the products of the plaintiff".*

C Then an ex parte order was prayed for which included an injunction restraining the defendant from manufacturing, selling, offering for sale, inviting offers to acquire or distribution for the purposes of sale grinding stones used for the purpose of washing terrazzo floors inscribed with the Trade mark "SUPER ROCKET" but not being of the plaintiff's
D manufacture or merchandise" This ex parte application was granted. Concurrently filed with the ex parte application was an application on Notice praying for an interlocutory injunction to restrain the defendant from selling grinding stones branded as SUPER ROCKET which were
E imported or about to be imported by the defendant. Reacting to both the ex parte order of injunction and pending motion on notice for injunction the defendant filed an application to discharge the ex parte order and to oppose the motion on notice. Trial judge decided to hear the two appli-
F cations together and in his ruling decided:-

1. that the plaintiff was not entitled to sue for infringement of a trade mark which had not been registered and mere acceptance by Registrar of Trade Marks of the applicant has not amounted to registration.

G 2. the defendant cannot be held liable for passing off because it ordered and imported goods as an agent for disclosed principals and therefore the Court would not grant an application for injunction and a suit for passing off could not be sustained.

3. As the claim for infringement was struck out the entire suit
H stood struck out.

Against this ruling an appeal was unsuccessfully lodged to Court of Appeal. There is a further appeal to this Court. The appellant raised the following issues for determination:-

"1. Whether the plaintiff/Appellant did not establish that there was a serious question to be determined at the trial, as far as its claim for infringement of trade mark was concerned such as to support its prayer for an interlocutory injunction.

2. Whether the court is obliged to consider the question of balance of convenience between the parties as the Respondent did not assert in its counter affidavit to the prayer for interlocutory injunction, whether directly or impliedly, that if the injunction sought was granted, it would suffer an injury which cannot be adequately recompensed by an award of damages under an undertaking as to damages?

3. Whether the prayer in the plaintiff's/Appellant's motion for interlocutory injunction does not amount to a prayer to restrain the Respondent from passing off as well as to restrain it from trade mark infringement, and whether the plaintiff/Appellant is not entitled to an interlocutory injunction as far as its claim for passing off was concerned."

"Trade Mark" when registered will entitle the proprietor to sue or institute an action for any infringement of the Trade mark. Registration entitles the proprietor to the exclusive use of the trade mark and also right to sue for passing off the goods of the proprietor. The Registrar of Trade Marks will register a trade mark on an application by the proprietor and after making all the searches and investigations as provided for in Trade marks Act (Cap. 436 Laws of the Federation of Nigeria 1990) to satisfy the requirements of Section 9 (1), (2) & (3)' and Sections 10, 11 & 12 thereof . The Act sets out clearly in sections 17, 18, 19 and 20 the procedure whereby the application for registration of a trade mark will proceed. In the instant case on appeal the only matter before the Courts below is the allegation that the appellant applied for registration of the trade mark. The contention that the application was made does not mean that it is "registered" The Act in Section 22 states clearly:-

"(1) When an application for registration of a trade mark in part A or in part B of the register has been accepted, and either-

(a) the application has not been opposed and the time for notice

of opposition has expired; or

(b) the application has been opposed and the opposition has been decided in favour of the applicant. The registrar shall, unless the application has been accepted in error, register the trade mark in part A

B or part B, as the case may be"

Also when registered the trade mark shall be deemed as having been registered on the date the application was made. Therefore what was before the Courts below was mere application and acknowledgement of the application, not what the application calls acceptance. Acceptance of the application is when the conditions in S. 22 above have been fulfilled. Up to the moment there is no evidence that the application has been accepted and by virtue of S. 22 (4) the application has abated.

It is therefore clear that from the wording of the Act nobody acquires the status of the "proprietor" unless that person, in relation to the trade mark, is the owner, importer exporter, shipper or any other person for the time being possessed of or beneficially interested in the goods to which the trade mark is applied. The appellant has not acquired any right to protect for the time being as the applicant for the purpose of the Act because all the procedure leading to acceptance had not been followed.

The word "proprietor" may be misleading, if taken literally because what is being protected is the goodwill of a business, not a properting right as such. It is therefore clear that the right sought to be protected with injunction by the appellant has not matured and the trial Court on scanty materials before it rightly refused to continue with the matter and the action was rightly struck out. Court of Appeal did the right thing. The appellant has not indicated clearly the right he wanted protected either in the interim or substantive claim. What was before the trial Court was not a matter of passing off but that of breach of appellant's trade mark. The appellant has got no trade mark to protect.

The courts in this country must not look beyond our statute when there is no ambiguity. Trade Mark Act is very clear and

the appellant has not acquired anything called "voidable registration" as held in Wellcome Foundation v. Ranboxy Mantori Nigeria Ltd (unreported FHC/L/35/90 of 31/10/90) because nothing in the Act justifies such status for trade marks. The grant or refusal of an injunction is a discretionary power of the Court and enough facts must be available in Court to grant it. American Cyanud Co. v Ethicon Ltd. (1975 1 All E.R. 504; Kotoye v. C.B.N (1989) 1 NWLR (Pt.98) 419 and Oduntan v. General Oil Ltd. (1995) 4 NWLR (pp 38) 1, 18 are decision on conditions necessary to grant discretionary order of injunction. The appellant has not shown any other reasons or that he has applied and got any trade mark registered.

I therefore find no merit in this appeal and I dismiss it with N10,000.00 costs to the respondent.

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OGUNDARE JSC

I agree with my learned brother Belgore JSC whose judgment I had a preview of ere now, that this appeal is totally lacking in substance and ought to be dismissed. I may, however, add a few words to the reason to the reasons given by him for reaching this conclusion.

The appellant now before us was plaintiff in the Federal High Court sitting in Lagos. It had sued the present respondent claiming an injunction to restrain the defendant, et cetera for infringing the plaintiff's Trade Mark 'SUPER ROCKET' applied for and accepted in Nigeria under No. TP 11933/91/5. passing off grinding stones used for the purpose of washing terazzo floors inscribed with the trade mark "SUPER ROCKET" not being of the plaintiff's manufacture as and for the good of the plaintiff and importing, et cetera such product; delivery up for destruction of all grinding stones bearing the offending mark "SUPER ROCKET" in the possession, custody or the control of the defendant; I million Naria (N1,000,000.00) profits or an account of profits; costs, and further or other reliefs. Simultaneously with the filing of the writ, the appellant filed a motion ex-parte praying for some injunctive orders pending the hearing and determination of another motion on notice, filed at the same time,

praying for an order of injunction "restraining the Defendant whether acting by itself, its Directors, Officers, servants, employees or agents or any of them or otherwise howsoever, until judgment in this suit or further order, from doing or authorising the doing of the following acts or any of them, that is to say: selling, offering for sale, inviting offers to acquire or distributing for the purposes of sale grinding stones branded as "SUPER ROCKET" and imported or about to be imported by the Defendant/Respondent." The ex-parte application was granted on 12/3/93 and injunctive orders were made. On being served with the orders the respondent moved the trial Court by way of motion filed on 5/4/93 for an order "to set aside/discharge the ex-parte order made by this Honourable court and dated 16th March 1993 on the ground that this Honourable court was misled into making the order". Both the appellant's motion on notice and the respondent's motion to set aside were taken together and arguments were advanced by learned counsel appearing for the parties.

In a reserved ruling, the learned trial Judge (Jinadu J.) on 16/7/93 dismissed the appellant's motion on notice and set aside the interim injunction granted on 12/3/93. In addition, he struck out the entire suit with costs to the respondent on the ground that the appellant had no cause of action against the respondent but against its principals. The learned Judge had said:

"I have read thoroughly all the avalanche of Court papers filed in this matter. I have also patiently read and digested all the submission of both learned counsel including all the legal authorities cited before me. I have, however, found that there are so much conflicting affidavits and counter- affidavits that the facts cannot be resolved unless I take oral evidence from the deponents. However, this I will not do in view of the very formidable arguments put up by both learned counsel for the plaintiff and the defendant. If I resolve the legal propositions of the defendant's counsel in favour of the defendant then this case must be struck out otherwise I may decide to give the case an accelerated hearing instead of proceeding to hear oral evidence from the deponents to the affidavits and counter-affidavits".

After considering the submissions made by learned counsel, the learned

Judge found-

1. *that once an application is accepted for registration the applicant can be said to have a voidable registration this does not confer the right to sue conferred by Section 22(2) of the Trade Marks Act on such an applicant. What Section 22(2) did was to relate the date of registration of the trade mark back to the date of the application. It is my humble view that the exclusive right (to) a trade mark is based on its registration and it belongs to the person who first filed an application."* B

2. *"the plaintiff cannot have a cause of action for infringement of trade mark until the trade mark is registered and a certificate of registration is issued to it by the Registrar of Trade Marks I therefore hold that the plaintiff has not yet vested in it the legal interest in the trade mark Super Rocket to protect."* C

3 *"It is therefore not entitle to the grant of any injunction in D respect to the substantive claim for an infringement of the trade mark Super Rocket and the claim in respect thereof is hereby struck out because it is premature."*

4. *"One the defendant has stated that it is an agent of a disclosed and known principal and Exhibit D attached to the affidavit in reply to the counter-affidavit of the plaintiff clearly showed that the plaintiff knew one of the principals of the defendant and that the plaintiff in fact purchased exhibit C attached to the affidavit in support of the motion for injunction from the agent (sic principal?) and not from the defendant then on the strength of this it is clear that the defendant incurred no liability and its principals ought to have been sued....."* E F

Being dissatisfied with this decision, the appellant appealed to the Court of Appeal (Lagos Division) which Court dismissed the appeal G but held that "the suit ought not to have been struck out and as such it is hereby sent back for trial." The order of the trial court striking out the suit was set aside. The Court of Appeal had found-

1. *that the learned trial Judge was wrong to have struck out the H suit as there was no prayer to that effect by any of the parties*

2. *that the learned Judge was wrong inferring that contract of agency existed between the defendant and its customers*

3. *that the trade mark was not yet registered in the appellant's name*

4. *that "with the nature of the case presented by the appellant in respect of his prayer for interlocutory application (sic injunction), I find it difficult to say that the balance of convenience really tilts to its side. Restraining the respondents when the appellant is yet to have his trade mark registered is yet to have his trade mark registered offends my sense of justice."*

There is no appeal to this Court against the order restoring the action to the list. The appellant, however, appealed further to this Court against the order of the Court of Appeal refusing its application for interlocutory injunction. Four grounds of appeal are raised in the notice of appeal upon which three issues are distilled, to wit:

"1. *Whether the plaintiff/Appellant did not establish that there was a serious question to be determined at the trial, as far as its claim for infringement of trade mark was concerned such as to support its prayer for an interlocutory injunction.*

2. *Whether the court is obliged to consider the question of balance of convenience between the parties as the Respondent did not assert in its counter affidavit to the prayer for interlocutory injunction, whether directly or impliedly, that the injunction sought was granted, it would suffer an injury which cannot be adequately recompensed by an award of damages under an undertaking as to damages?*

3. *Whether the prayer in the plaintiff's/Appellant's motion for interlocutory injunction does not amount to a prayer to restrain the Respondent from passing off as well as to restrain it from trade mark infringement, and whether the plaintiff/Appellant is not entitled to an interlocutory injunction as far as its claim for passing off was concerned."*

I will consider Issues 1 and 2 together. The main thrust of the submissions of learned counsel for the appellant, Mr. Ogunkeye is that all that is required of an applicant for interlocutory injunction to show is that there is a serious question to be tried at the trial and that the appellant has shown. But what serious question is there to be tried in this case? The appellant, truly, applied for registration of the trade mark of grinding

stones described as SUPER ROCKET. At the time it instituted its action against the respondent and prayed for interlocutory injunction its application had not been approved and the trade mark registered. Now section 3 of the Trade Marks Act Cap 436, Law of the Federation of Nigeria 1990 provides:

"3. No person shall be entitled to institute any proceeding to prevent, or to recover damages for, the infringement of an unregistered trade mark; but nothing in this Act shall be taken to affect rights of action against any person for passing off goods as the goods of another person or the remedies in respect thereof."

This seems to be the simple answer to learned counsel's submission. If there was no right to sue, how could there be a serious question to be tried? I think the following statement in Kerly's Law of Trade marks and Trade Names, 12th edition at paragraph 15-66 at page 321 correctly states what is required to be shown by an applicant for interlocutory injunction.

"He need not in general show a strong prima-facie case - say, a 20 per cent chance of success at the trial will do - but something more is needed than a case that will avoid being struck out as frivolous or vexatious."

The latter appears to be the case shown here by the appellant. The purpose of an interlocutory injunction is to protect a plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the case were resolved in his favour at the trial- see Obeya Memorial Specialist Hospital & Anor v. Attorney General of the Federation & Anor. (1987) 2 NSCC 961. Here, the appellant acquired no right to the trade mark SUPER ROCKET in respect of which he had not been registered as a proprietor at all times relevant to these proceedings. As he acquired no right, there was nothing to protect by an interlocutory injunction - see: Alowonle v. Bello & Anor. (1972) ANLR 45.

A lot of fuss was made by learned counsel for the appellant about the acceptance of appellant's application. Learned counsel talked of "voidable " registration", etc. and relies heavily on the decision of

Odunowo J. in Wellcome Foundation v. Ranboxy Mantori Nig. Ltd. - FHC/L/35/90 ruling delivered on 31/10/90. I do not see how that decision can help the appellant in the light of the clear provisions of sections 3, 4, 5 and 6 of the Trade Marks Act. I think the two Courts below are right in the conclusion they reached that the appellant failed to make a case for the grant of an interlocutory injunction.

On Issue 3, the prayer sought by the appellant in his motion on notice dated 12/3/93 and filed along with the motion ex- parte is clear. I have already set it out earlier in this judgment. It does not cover passing off. The argument that -

"the selling by one manufacturer or trader of his own products or merchandise in a manner or by the adoption of a presentation calculated to deceive purchasing members of the public into believing that they were products or merchandise of another manufacturer or trader, qualifies as the tort of passing off."

ingenious as it is, does not persuade me to disagree with the Court below. There was no specific prayer for an interlocutory injunction restraining the respondent from passing off and it would have been wrong to grant such a prayer which was not asked for - Olurotimi v. Ige (1993) 8 NWLR 259.

For the reason given above and the other reasons in the judgment of my learned brother Belgore JSC, I, too dismiss this appeal and affirm the judgment of the Court below with cost to the respondent assessed at N10,000.00.

MOHAMMED JSC

I entirely agree that this appeal has failed and for reasons given by my learned brother, Belgore, J.S.C. in his judgment which I have had the privilege to read before now I will also dismiss the appeal. Accordingly, the appeal is dismissed. I abide by all the consequential orders made in the lead judgment including the assessment and award of costs.

KATSINA-ALU JSC

I agree entirely with the judgment of my learned brother Belgore JSC just delivered in this appeal.

The plaintiff has contended that "the claim of the plaintiff for infringement of trade mark in respect of a trade mark which is merely accepted, but not fully registered is a claim that raises a serious issue to be tried at the trial. Therefore should sustain an application for an interlocutory injunction." This I believe, is in support of para. 4 of the Affidavit in support of the motion for interlocutory injunction which reads:

"4. Further, in order to safe-guard the interest of my company in the trade 'SUPER ROCKET' in relation to grinding stones, my company applied in October, 1991 to the trade marks registry at Abuja for registration of the trade mark 'SUPER ROCKET' in Class 19. The application was accepted and numbered TP 11933. Now shown to me and marked exhibit 'A' is a copy of the letter of acceptance issued by the trade marks registry."

The material portion of the Acceptance Form i.e. exhibit 'A' referred to in para. 4 set out above, reads:

"I have to inform you that the application in respect of the above-mentioned Trade Mark in class 19 in the name of DYKTRADE LIMITED has been accepted and numbered TP11933 and will in due course be advertised in the Trade Marks journal."

It is crystal clear that the only evidence provided by the plaintiff in relation to the issue of his right was its application for the registration of the trade mark it submitted to the Trade Marks Registry. The trade mark is yet to be registered. Yet the plaintiff contends that this is sufficient to entitle it to order of injunction. The reason is section 3 of the Trade Marks Act Cap 436 Laws of the Federation of Nigeria. It provides as follows:

"3. No person shall be entitled to institute any proceedings to prevent, or to recover damages for, the infringement of an unregistered H trade mark; but nothing in this Act shall be taken to affect rights of action against any person for passing off goods of another person or the remedies in respect thereof."

The plaintiff here clearly possesses no registered trade mark. Its application does not confer a right in law. The purpose of an interlocutory injunction is to protect a plaintiff against injury by violation of his right - see Obeya Memorial Hospital & Anor. v. A.G. Fed. & Anor. Finally, on this issue, this Court had the occasion to consider the effect of an unregistered trade mark in Alowonle v. Bello & Anor. (1972) A N. L. R 45. In that case the Court per Coker. JSC said:

".....the plaintiffs possess no registered trade mark the use of which by other persons they could prevent by an order of injunction."

I now turn to the issue regarding passing off. The answer is simple. The record shows that the plaintiff did not specifically ask in its prayer for an injunction against passing off. And it is trite law that our courts cannot grant to a plaintiff a remedy which he has claimed - see Ekpenyong & Ors. v. Nyong & Ors. (1975) 2 SC 71; Kalio v. Kalio (1975) 2 SC. 15; Union Breverages v Owolabi (1988) 1 NWLR (Pt.68) 128.

In the result, I also would, for this reason and the fuller reasons given by my Lord Belgore JSC, dismiss this appeal with N10,000.00 costs to the Respondent.

EJIWUNMI JSC

I have had the privilege of reading before now the judgment just delivered by my learned brother Belgore JSC, I agree for the reasons given in the said judgment that this appeal lacks merit.

It is manifest from the facts and the issues raised thereon that before the appellant can be entitled to an order of injunction against the respondent, it must be established that he has a legal right capable of being protected by such an order. See Obeya Memorial Specialist Hospital and Anor v Attorney General of the Federation and Anor. (1987) 2 H NSCC 961.

The appellant must therefore establish such right before an order of interlocutory injunction may be made in its favour. It seems clear that in this case the appellant as found by the court below and by virtue

of the provisions of Section 3 of the Trade Marks Act Cap 436, Laws of the Federation of Nigeria 1990, which provides:

"3. No person shall be entitle to intitue any proceeding to prevent, or to recover damages for, the infringement of an unregistered trade mark; but nothing in this Act shall be taken to affect rights of action against any person for passing off goods as the goods of another person or the remedies in respect thereof."

that the appellant had no right to sue as he had no legal right to protect. See Alowonle v. Bello & Anor. (1972) ANLR 45.

It is also my view, having regard to the claim before the Court, that an interlocutory order preventing the respondent from passing off cannot also be issue against the respondent. For such an order to be made there should be a specific prayer to that effect. See Olurotimi v. Ige (1993) 8 NWLR 259.

I therefore also dismiss this appeal for the reason given above and the fuller reasons contained in the judgement of my learned brother Belgore JSC. I award costs in the sum of N10,000.00 to the respondent

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