

SUPREME COURT OF NIGERIA

4TH MAY, 2001. SC. 29/1996

**CORAM:- A. B. WALI, M. E. OGUNDARE, A. I. IGUH, A. I.
KATSINA-ALU, S. O. UWAIFO, JJSC.**

ITYKE MEDICAL MERCHANDISE DEFENDANT/APPELLANT
AND

PFIZER, INC.

..... PLAINTIFFS/RESPONDENTS

PFIZER PRODUCTS PLC

ACTIONS - Parties - Partnership - A plaintiff who sues such partners in their firm's name - Is taken to have sued than individually (H 2)

ACTIONS - Parties - Persons who conceal their names - Can be sued in the name in which they carry on business (H 6)

ACTIONS - Parties - Unincorporated business enterprise - Can be sued *eo nomine* - And there is no need to first ascertain the nature of ownership of an unincorporated business enterprise - Before determining whether it can be sued *eo nomine* (H 5)

BUSINESS NAMES - Actions - Seperate name for business - A person carrying on business in a name or style other than his own name - May be sued in such name or style - But cannot sue in his trade name (H 3)

PARTNERSHIP - Actions - Name of partnership proprietors - Ascertaining the name of the proprietors - For the purpose of suing them - Is not necessary (H 4)

PARTNERSHIP - Suit against partnership firm - A firm composed of two or more partners - May sue or be sued in the firm's name (H 1)

PRACTICE & PROCEDURE - Service of process - Business name - It is enough to effect service - On a partner - Or on a person having *defacto* control or management of a business using a business name - And at the

FACTS

In the Federal High Court, Enugu, the Plaintiffs/Respondents brought a suit against the Defendant/Appellant claiming for an injunction to restrain the Defendant whether acting by itself, its servants or agents or any of them or otherwise from doing the following acts, inter alia: infringing the 1st Plaintiff's Trade Mark COMBANTRIN PLUS registered under No. 31159; an order for delivery up for destruction upon oath of all copies of the infringing product and all packages, cartons, containers and label used in connection therewith in the possession custody and control of the Defendant, and damages of N5,000,000.00 or an account of profits. The plaintiffs also filed a motion for an interim injunction. The plaintiffs claim to be entitled to the trademark of a pharmaceutical product, a worm expeller for the treatment of worms in children and adults, known as COMBANTRIN PLUS duly registered under Trade Mark No. 31159. There is another pharmaceutical product branded COMBINTERIM put on public sale by the manufacturer/distributor going by the trade name IYKE MEDICAL MERCHANDISE sued as the Defendant. As the Plaintiff's COMBANTRIN, the Defendant's COMBINTERIM is offered for the treatment of worms in both children and adults.

Meanwhile, the Defendant brought a motion praying that the suit together with the motion for interim injunction be dismissed on a number of grounds inter alia: (i) that the defendant is a nonlegal entity and cannot sue or be sued; (ii) that the 1st plaintiff is a foreign company and cannot sue or be sued in Nigeria; (iii) that the 2nd Plaintiff has no reasonable cause of action or locus standi to institute the suit; and (iv) that the court lacks jurisdiction to try the matter as there are no proper parties before the court. The affidavit in support of the motion was sworn by one Ethel Okonkwo who described himself as a Nigerian businessman of No. 15 Sheba street, Fegge, Onitsha. He deposed among other things that he was served with the court processes in this suit by a bailiff and that he was not IYKE MEDICAL MERCHANDISE. Further, that from the in-

formation given to him by his counsel, the said IYKE MEDICAL MERCHANDISE was not a person known to law.

After hearing the motion, the learned trial judge in a considered ruling struck out the Defendant's name and dismissed the suit because the defendant is not a proper party. The Plaintiffs appealed to the Court of Appeal, Enugu Division. The court allowed the appeal holding that IYKE MEDICAL MERCHANDISE could be sued. Dissatisfied, the Defendant has appealed to the Supreme Court raising two issues.

ISSUES FOR DETERMINATION:

“1. Whether the Court of Appeal was right in holding that Ethel Okonkwo is the person carrying on business as IYKE MEDICAL MERCHANDISE and Order 13 Rule 42 of the High Court (Civil Procedure) Rules of Lagos State 1972 applied in the circumstances.

2. Whether the entry of appearance without more is a waiver by Ethel Okonkwo of his right to object to the service of Court processes on him and the constitution of the action as to proper parties to the suit.”

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

Suit against partnership firm

1. I think the provision in Order 4, rule 6 of the Federal High Court (Civil Procedure) Rules 1976 is clear that a firm composed of two or more partners may sue or be sued in the firm's name i.e. *eo nomine* (p.1387 D)

Actions - Parties - Partnership

2. A plaintiff who sues such partners in their firm's name is taken to have sued them individually just as much as if he had set out their names: see *Western National Bank v. Perez, Triana & Co.* (1891) 1 Q.B.D. 304 at 314 per Lindley L.J (p. 1388 F)

Seperate name for business

3. Partnership firm, of course, presupposes two or more persons who make it up. In the present case, there is some assumption, I suppose, that the appellants are mere business names; or at any rate, the case has not

proceeded on the basis that a partnership is involved. In that circumstance, the Federal High Court (Civil Procedure) Rules have not directly provided whether such a business name can be sued *eo nomine*. But section 9 of the Federal High Court Act creates a window for looking to
B other sources.

There is the provision in Order 13, r. 42 of the High Court of Lagos (Civil Procedure) Rules 1972, then applicable when this suit was filed and the trial court gave its ruling [but now Order 14, r. 42 of the
C High Court of Lagos (Civil Procedure) Rules, 1994 and *in pari materia*] which states:

*“Any person carrying on business within the jurisdiction in a name or style other than his own name may be sued in such name or style as if it were a firm’s name; and so far as the nature of the case will
D permit, all rules relating to proceedings against firms shall apply.”*

The first point to note is that such a person coming within the said r. 42 may be *sued*, but cannot *sue* in his trade name: see *Mason v. Mogridge* (1892) 8 T.L.R. 805 (pp. 1388 G & 1389 C)

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Actions - Name of partnership proprietors

4. In the case of partnership, that there is no necessity of ascertaining the names of the individual partners for the purpose of suing the firm.
F The same applies to business name (p. 1389 G)

Parties - Unincorporated business enterprise

5. I therefore agree with Mr. Ogunkeye, learned counsel for the respondents, when, in the respondents’ brief of argument, he submits:

G *“If Order 4 rule 6 (FHC) enables a firm which is a partnership to be sued eo nomine and Order 13 rule 42 (LHC) enables an individual doing business in a name other than his own to be sued in that name, then the general proposition can be asserted that an unincorporated business
H enterprise, regardless of the nature of its ownership can be sued eo nomine, because the ownership can only be either sole or plural, which is covered by both rules. If that proposition is valid, then it means that there is no need to first ascertain the nature of ownership of an unincorporated busi-*

ness enterprise before determining whether it can be sued eo nomine. The reality is that whether it is a partnership or solely owned it can be so sued.” (p. 1389 H)

Parties - Persons who conceal their names

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6. It could happen that a person may carry on business in a name other than his name but may fail to register it as required under Part B - Business Names - of the Companies and Allied Matters Act, 1990. Such persons undoubtedly come within those who conceal their names. The solution to such device by that type of persons can be found in the rule that allows suing them in the name in which they carry on business. And this is intended to obviate obstacles against actions against them if their real name had first to be ascertained. So the question of the production of the Certificate of Registration of the business name as submitted by learned counsel for the appellant would not arise and becomes a non-issue. If it happens that the business name had not in fact been registered, that would be a contravention of s.667 of the Act and there are penalties provided. That does not provide immunity against being sued in that name, whatever its status, in accordance with the said Order 14, r.42 applicable in the Federal High Court (p. 1391 D)

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Service of process - Business name

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7. It is enough to effect service on a partner (in the case of partnership firm) or, which is quite appropriate, service on a person having *de facto* control or management of a business using a business name and at the principal place of business (p. 1392 C)

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NOTABLE POINTS OF INTEREST

UWAIFO.JSC

1. Purpose of discovering the names of members of a defendant firm

When action has thus been taken against that firm, the plaintiff or any other party to the action may apply to the court for a statement of the names and addresses of the persons who were partners in the firm at the time the cause of action arose. This is an information a plaintiff may

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1382 Iyke Medical Merchandise v. Pfizer, Inc. (2001) 5 KLR

wish to avail himself of after the action has been filed. One of the purposes this serves the plaintiff is the legal consequence that a judgment against the firm has the same effect that a judgment against all the partners had formerly: see *Clark v. Cullen* (1882) 9 Q.B.D. 355. Actually it serves to ensure the execution of such judgment. (p. 1387 G)

IGUHJSC

2. Juristic persons who may sue or be sued eo nomine

Juristic persons who may sue or be sued eo nomine have been recognised to include:-

- (i) Natural persons, that is to say, human beings;
- (ii) Companies incorporated under the Companies Act;
- (iii) Corporations aggregate and Corporations sole with perpetual succession;

(iv) Certain unincorporated Associations granted the status of legal personae by law such as:-

- (a) Registered Trade Unions;
- (b) Partnerships and
- (c) Friendly Societies or Sole proprietorships.

See Fawehinmi v. Nigeria Bar Association (No.2) (1989) 2 N.W.L.R. (Part 105) 558.(p. 1393 C)

3. A partnership may sue or be sued eo nomine but a sole proprietorship may only be sued eo nomine

A point of distinction is, however, worthy of note from the above Rules. This is the fact that whereas a partnership may sue or be sued in the name of the firm under Order 4 Rule 6 as aforementioned, Order 13 Rule 42 vests the sole proprietor of the business only with the right to be sued eo nomine.(p. 1395 H)

H CASES REFERRED TO

Fawehinmi v. Nigerian Bar Association (No.2) (1989) 2 NWLR (pt.105) 558

Maclver v. G & J Burns (1895) 2 Ch. D.630

Clark v. Cullen (1882) 9 Q.B.D. 335

Seal & Edgelow v. Kingston (1908) 2 K.B. 579

Sadler v. Whiteman (1910) 1 K.B. 868 at 889

Western National Bank v. Perez, Triana & Co. (1891) 1 Q.B.D. 304

Laibru Ltd v. Building and Civil Engineering Contractors (1962) 2 SCNLR B 118

Apostolic Church Ilesha v. Attorney-General Mid-West State (1972) 4 S.C. 150 at 159

Abakaliki L.G.C. v. Abakaliki R. M. O. (1990) 6 N.W.L.R. (Part 155) C 182 at 192

Knight and Searle v. Dove (1964) 2 ALL E.R. 307 at 309

STATUTES & RULES REFERRED TO

Federal High Court (Civil Procedure) Rules 1976; ord 4 r6

Federal High Court Act, s.9

High Court of Lagos (Civil Procedure) Rules 1972; ord 13 r.42 (now ord 14 v. 42 of the High Court of Lagos (Civil Procedure) Rules, 1994).

Rules of the Supreme Court 1965 of England (as amended) ord 81 r.9 E Companies and Allied Matters Act, 1990; s.667

BOOK REFERRED TO

The Supreme Court Practice (of England) 1999 Vol. 1, r. 81/1/5, p. 1530 F

LEAD JUDGMENT BY UWAIFO JSC

This action has its cause in the tort of passing-off. The plaintiffs (now respondents) claim to be entitled to the trademark of a pharmaceutical product, a worm expeller for the treatment of worms in children and adults, known as COMBANTRIN PLUS duly registered under Trade Mark No.31159. There is another pharmaceutical product branded COMBINTERIM put on public sale by the manufacturer/distributor going by the trade name IYKE MEDICAL MERCHANDISE, sued as the defendant (now appellant). The said COMBINTERIM is offered for the treatment of worms in both children and adults as though the plaintiffs' COMBANTRIN. G H

The respondents then brought a suit against the appellant on 18 October, 1993 at the Federal High Court, Enugu claiming for -

“1. An injunction to restrain the Defendant whether acting by itself, its servants or agents or any of them or otherwise howsoever from
B doing the following acts or any of them that is to say:

(i) infringing the 1st Plaintiff’s Trade Mark COMBANTRIN PLUS registered under No. 31159.

(ii) Passing-off, or causing, enabling or assisting others to
C pass-off the Defendant’s product purported to be a worm expeller branded as ‘COMBINTERIN’ (hereinafter referred to as the infringing product), not being of either of the Plaintiffs’ manufacture or merchandise as and for the plaintiffs ‘COMBANTRIN’ worm expeller.

(iii) Importing, causing to be manufactured, selling, offering
D for sale or supplying the infringing product or any other product in packages on which has been printed a mark or which has a get-up which so nearly resembles the mark or get-up used by the Plaintiffs in connection with their COMBANTRIN worm expeller as to be calculated to lead to
E the belief that worm expeller products not of the Plaintiffs manufacture or merchandise are products of the Plaintiffs or are otherwise connected to the Plaintiffs or the Plaintiff’s products.

(iv) Causing to be manufactured, importing, selling, offering
F for sale or supplying worm expellers or any other product under the trade mark ‘COMBINTERIM’ as to be calculated to lead to the belief that worm expellers not of the Plaintiffs manufacture or merchandise are the products of the Plaintiff.

2. An order for delivery up for destruction upon oath of all
G copies of the infringing product and all packages, cartons, containers and label used in connection therewith in the possession, custody or control of the Defendant.

3. Damages of N5,000,000.00 or an account of profits.”

H The respondents also filed a motion for an interim injunction. In the meantime the appellant brought a motion praying that the suit together with the motion for interim injunction be dismissed on a number of grounds. It is enough for me to mention four, namely (i) that the

defendant is a non-legal entity and cannot sue or be sued; (ii) that the 1st plaintiff is a foreign company and cannot sue or be sued in Nigeria; (iii) that the 2nd plaintiff has no reasonable cause of action or locus standi to institute the suit; and (iv) that the court lacks jurisdiction to try the matter as there are no proper parties before the court.

The affidavit in support of the motion was sworn by Ethel Okonkwo. He styled himself a Nigerian businessman of No.15 Sheaba Street Fegge, Onitsha running his business at the Niger Bridge Head Market, Onitsha. He deposed among other things that he was served with the court processes in this suit by a bailiff on or about 20 October, 1993. Further, that he was not IYKE MEDICAL MERCHANDISE and that from the information given to him by his counsel, O.J. Nnadi Esq., the said IYKE MEDICAL MERCHANDISE was not a person known to law.

The motion was heard by Abutu, J. In a considered ruling given on 4 February, 1994, the learned trial judge struck out the defendant's name and dismissed the suit. Before doing so, he made the following observation:

"The crucial question in my view is whether or not the party sued is a partnership or an individual sued by his business name. For a party relying on order 4 Rule 6 of the Rules of this Court and order 13 Rule 42 of the Lagos High Court (Civil Procedure) Rules 1972 must show conclusively that the party suing or being sued is a partnership or an individual sued by his business name. The averment in paragraph 1 of the counter-affidavit above set out shows that the plaintiffs themselves are not certain about the status of the defendant. They appear not to have made any investigation regarding the status of the Defendant before the commencement of this action. Under s.657 (3) of the Companies and Allied Matters Act, 1990 the person or persons on whose behalf the business is carried on are required to furnish to the Registrar their present forenames and surname at the time of registration. If the plaintiffs in this case carried out any investigation they would, no doubt, know the names of those on whose behalf the business is being carried on.

What is more, in the case of a registered business name, the identi-

fication letters of the state of registration is required to be added to the business name in brackets at the end of the name. See ss.658 and 659 of the Companies and Allied Matters Act, 1990. There is no such State identification letters added to the name of the defendant in this case.
B *The end result of what I have said so far is that there is no evidence before me that the defendant is a partnership or an individual sued by his business name. Order 4 Rule 6 of the Rules of this Court and order 13 rule 42 of the Lagos High Court (Civil Procedure) rules, 1972 above set out apply only to partnerships or individual business names known to*
C *law. Undoubtedly the defendant is not, a juristic person and there is no evidence before me that it is a registered partnership or the registered business name of an individual. The defendant is therefore not a proper party."*

D The appeal to the Court of Appeal Enugu Division, against that judgment was allowed on 8 December, 1994. The Court held that IYKE MEDICAL MERCHANDISE could be sued. The appellant has filed four grounds of appeal against that decision. From those grounds of appeal,
E two issues for determination were set down in the appellant's brief of argument as follows:

"1. Whether the Court of Appeal was right in holding that Ethel Okonkwo is the person carrying on business as IYKE MEDICAL MER-
F *CHANDISE and Order 13 Rule 42 of the High Court (Civil Procedure) Rules of Lagos State 1972 applied in the circumstances.*

2. Whether the entry of appearance without more is a waiver by Ethel Okonkwo of his right to object to the service of Court processes on him and the constitution of the action as to proper parties to the suit."

G Issue No. 1

The appellant's counsel's argument under this issue is that the lower court having held that there was insufficient material disclosing that Iyke Medical Merchandise was a firm or partnership ought to have
H dismissed the appeal. He submits that the affidavit of service by the bailiff does not determine who is the owner of the business in question and unless there is clear evidence the court cannot hold that Ethel Okonkwo is the person carrying on business as Iyke Medical Merchandise. He has

criticised the lower court as having (to use his words) “embarked on a self-imposed voyage of discovery of the person behind Iyke Medical Merchandise.”

On the other hand, the main thrust of the respondents’ counsel’s submission can be summarised thus: As a general rule, only natural persons or legal personalities have the right (inherent, in the case of natural persons and statutory, in the case of created personalities) to sue and be sued in their names, citing *Knight & Searle v. Dove* (1964) 2 All ER 307 and *Fawehinmi v. Nigerian Bar Association (No.2)* (1989) 2 NWLR (pt.105) 558. Furthermore, the right to sue and be sued *eo nomine* can also be vested by Rules of Court. There could be a particular Rule of Court which vests only the right to be sued *eo nomine* on an individual doing business in a name other than his own within the jurisdiction of the Court, citing *MacIver v. G & J Burns* (1895) 2 Ch. D.630.

I think the provision in Order 4, rule 6 of the Federal High Court (Civil Procedure) Rules 1976 is clear that a firm composed of two or more partners may sue or be sued in the firm’s name i.e. *eo nomine*. The said rule reads:

“6. Any two or more persons claiming or alleged to be liable as partners may sue or be sued in the name of the firm in which they were partners when the cause of action arose; and any party to an action may in such case apply to the Court for a statement of the names and addresses of the persons who were, when the cause of action arose, partners in any such firm, to be furnished in such manner, and verified on oath or otherwise, as the Court may direct.”

As has been said, the law, by this provision, allows partners *to sue*, when they claim any relief to which they may be entitled as partners, or *be sued*, when they are alleged to be liable as partners, and in either case such action may be in the name of the firm in which they were partners at the time the cause of action arose. When action has thus been taken against that firm, the plaintiff or any other party to the action may apply to the court for a statement of the names and addresses of the persons who were partners in the firm at the time the cause of action arose. This is an information a plaintiff may wish to avail himself of after the action

has been filed. One of the purposes this serves the plaintiff is the legal consequence that a judgment against the firm has the same effect that a judgment against all the partners had formerly: see *Clark v. Cullen* (1882) 9 Q.B.D. 355. Actually it serves to ensure the execution of such judgment. In *Jackson v. Litchfield* (1882) 8 Q.B.D. 474, the plaintiff having issued his writ against a partnership firm in the name of the firm, moved to enter judgment against a person whom he had discovered to be a member of the firm, and who had not appeared to the writ. Similarly an order for discovery against a firm is an order against the partners: see *Seal & Edgelow v. Kingston* (1908) 2 K.B. 579.

Although actions against partners may be in the name of the firm in which they are partners, the law is that there is no necessity of finding out the names of the individual partners. This is important as will be apparent shortly. The firm has no existence and the name is a mere expression, not a legal entity. It is used as an expedience under the rule. It is a method of expressing the persons (as partners) who made up the firm at the time the cause of action arose. It may therefore be used for the sake of suing and being sued: see *Sadler v. Whiteman* (1910) 1 K.B. 868 at 889 per Farwell L.J., where he said *inter alia*:

“In English law a firm as such has no existence The firm name is a mere expression, not a legal entity, although for convenience under Order XLIII.A it may be used for the sake of suing or being sued.”

See also *The Supreme Court Practice* (of England) 1999, Vol.1, r.81/1/5, page 1530. But it must be noted that **a plaintiff who sues such partners in their firm’s name is taken to have sued them individually just as much as if he had set out their names**: see *Western National Bank v. Perez, Triana & Co.* (1891) 1 Q.B.D. 304 at 314 per Lindley L.J.

Partnership firm, of course, presupposes two or more persons who make it up. In the present case, there is some assumption, I suppose, that the appellant is a mere business name; or at any rate, the case has not proceeded on the basis that a partnership is involved. In that circumstance, the Federal High Court (Civil Procedure) Rules have not directly provided whether such a busi-

ness name can be sued *eo nomine*. But section 9 of the Federal High Court Act creates a window for looking to other sources by providing that:

“9. The jurisdiction vested in the Court shall, so far as practice and procedure are concerned, be exercised in the manner provided by this Act or any other enactment or by such rules and orders of court as may be made pursuant to this Act or, in the absence of any such provisions, in substantial conformity with the practice and procedure for the time being in force in the High Court of Lagos State.”

See *Laibru Ltd v. Building and Civil Engineering Contractors* (1962) 2 SCNLR 118 in which a similar provision made it possible to resort to the English Rules of Court.

There is the provision in Order 13, r.42 of the High Court of Lagos (Civil Procedure) Rules 1972, then applicable when this suit was filed and the trial court gave its ruling [but now Order 14, r.42 of the High Court of Lagos (Civil Procedure) Rules, 1994 and *in pari materia*] which states:

“Any person carrying on business within the jurisdiction in a name or style other than his own name may be sued in such name or style as if it were a firm’s name; and so far as the nature of the case will permit, all rules relating to proceedings against firms shall apply.”

The first point to note is that such a person coming within the said r. 42 may be sued, but cannot sue in his trade name: see *Mason v. Mogridge* (1892) 8 T.L.R. 805. The rule is similar to the Rules of the Supreme Court, 1965 of England (as amended), Order 81, r.9. That rule was taken from RSC (Rev.) 1962, Ord.81, r.9, formerly Ord. 48A, r.11 which itself is in fact *in pari materia* with our rule 42, Order 14. As far as applicable, says Ord. 81, r.9, the rules relating to partnership shall apply to business name as if it were a firm. That is why I said it was important to note, **in the case of partnership, that there is no necessity of ascertaining the names of the individual partners for the purpose of suing the firm. The same applies to business name. I therefore agree with Mr. Ogunkeye, learned counsel for the respondents, when, in the respondents’ brief of argument, he sub-**

mits:

“If Order 4 rule 6 (FHC) enables a firm which is a partnership to be sued *eo nomine* and Order 13 rule 42 (LHC) enables an individual doing business in a name other than his own to be sued in that name, then the general proposition can be asserted that an unincorporated business enterprise, regardless of the nature of its ownership can be sued *eo nomine*, because the ownership can only be either sole or plural, which is covered by both rules. If that proposition is valid, then it means that there is no need to first ascertain the nature of ownership of an unincorporated business enterprise before determining whether it can be sued *eo nomine*. The reality is that whether it is a partnership or solely owned it can be so sued.”

I think learned counsel for the appellant, with due respect to him, misconceived the decision of this court in *Fawehinmi v. Nigerian Bar Association* (supra) in relation to the present case when, after citing that authority, he said in the appellant’s brief of argument:

“In the case of partnership, companies, trade union, sole proprietorship, the best evidence in the event of challenge of its juristic personality or entitlement to being sued is the production of the Certificate of Registration or incorporation under the relevant laws.”

In *Fawehinmi v. Nigerian Bar Association* (supra) the reason why that Association was regarded as an entity which did not have the capability of being sued *eo nomine* was that it was not a creation of statute nor was there any law or rule of court recognising it as a suable entity. In the present case, there is a rule of court which makes it possible for the appellant to be sued *eo nomine*. That should not be overlooked. Learned counsel for the appellant seems unwilling or unable to recognise this when in fact the language of the rule is very plain and unambiguous.

The rule was examined in *MacIver v. G. & J. Burns* (1895) 2 Ch.630 where at pages 634-635, Lindley L.J. observed *inter alia*:

“Order XLVIII.A [i.e. Order 48A] refers to actions by and against partnerships. The first ten rules of it relate to actions by and against partnerships only. Partnerships can now be sued in the name of the firm, whereas formerly they could only be sued in the names of the persons who

composed the firm. It was necessary to frame some rules to carry out the new procedure, and rules 1 to 10 of Order XLVIII.A are addressed solely to suits against partnerships. Then comes rule 11, which has really nothing to do with the partnership rules, but which is tacked on to apply to the case of a single individual who carries on business, either in the name of a firm, or, as it is expressed in the rule, under some name other than his own

Now, consider what is the object of rule 11. It is to authorise the suing (of) persons in the name in which they carry on business - to facilitate the carrying on of actions against persons who conceal their names, and for that purpose the rules relating to actions against firms are to be applied as far as possible” [Italics mine for emphasis]

It could happen that a person may carry on business in a name other than his name but may fail to register it as required under Part B - Business Names - of the Companies and Allied Matters Act, 1990. Such persons undoubtedly come within those who conceal their names. The solution to such device by that type of persons can be found in the rule that allows suing them in the name in which they carry on business. And this is intended to obviate obstacles against actions against them if their real name had first to be ascertained. So the question of the production of the Certificate of Registration of the business name as submitted by learned counsel for the appellant would not arise and becomes a non-issue. If it happens that the business name had not in fact been registered, that would be a contravention of s.667 of the Act and there are penalties provided. That does not provide immunity against being sued in that name, whatever its status, in accordance with the said Order 14, r.42 applicable in the Federal High Court.

The evidence available connects Ethel Okonkwo strongly with the appellant as the person carrying on business in that name, viz, Iyke Medical Merchandise. I am satisfied that the lower court was justified in its conclusion in that regard and also that Iyke Medical Merchandise is a proper defendant in this action. I therefore, answer *Issue No.1* in the

1392 Iyke Medical Merchandise v. Pfizer, Inc. (2001) 5 KLR Uwaifo JSC
affirmative.

Issue No.2

B In view of the conclusion I have reached on *Issue No.1*, Issue
No.2 has really lost its base. It cannot be argued that the service of the
writ of summons and other processes meant for Iyke Medical Merchandise
on Ethel Okonkwo is bad in the circumstances. Nothing has been
shown as to what makes such a service bad other than the ridiculous
C deposition “*That I am not Iyke Medical Merchandise.*” Nothing was
explained further particularly as it is obvious that he could not, naturally,
be called Iyke Medical Merchandise. In a matter like this, **it is enough
to effect service on a partner (in the case of partnership firm) or,
D which is quite appropriate, service on a person having *de facto* control or management of a business using a business name and at the
principal place of business.** Obviously, Ethel Okonkwo was such a
person. I find no merit in this appeal and accordingly I dismiss it with
E N10,000.00 costs to the respondents. It is ordered that the action should
proceed to trial before another judge with a minimum of delay since it
was filed in 1993 and the issue involved is of utmost public importance.

WALI JSC

F I have had the privilege of reading before now, the lead judgment
of my learned brother Uwaifo, JSC and for the reasons contained therein,
I also agree that this appeal has no merit and it is hereby dismissed.

I adopt the consequential orders made in the lead judgment, in-
G cluding that of costs.

OGUNDARE JSC

I agree entirely with the judgment of my learned brother, Uwaifo,
H JSC just delivered. I have nothing more to add, I too dismiss the appeal
with N10,000.00 costs to the Respondents.

IGUHJSC

I have the privilege of reading in draft the judgment just delivered by my learned brother, Uwaifo, J.S.C. and I agree entirely that this appeal lacks merit and ought to be dismissed.

There is no doubt that as a general rule, only juristic persons B have the inherent right and/or power to sue and be sued in their names. Non legal persons or entities, again as a general proposition of law, may neither sue nor be sued except, of course, where such right to sue or be sued is created and/or vested by or under a statute.

Juristic persons who may sue or be sued eo nomine have been C recognised to include:-

- (i) Natural persons, that is to say, human beings;
- (ii) Companies incorporated under the Companies Act;
- (iii) Corporations aggregate and Corporations sole with perpetual D succession;

(iv) Certain unincorporated Associations granted the status of legal personae by law such as:-

- (a) Registered Trade Unions; E
- (b) Partnerships and
- (c) Friendly Societies or Sole proprietorships.

See Fawehinmi v. Nigeria Bar Association (No.2) (1989) 2 N.W.L.R. (Part 105) 558. In the case of partnerships, companies, trade unions, F sole proprietorships or corporations sole or aggregate, the best evidence in the event of a dispute as to their juristic personalities or their right to sue or be sued eo nomine is the production of their certificate of registration or incorporation under the relevant Laws. See Apostolic Church Ilesha v. Attorney-General Mid-West State (1972) 4 S.C. 150 at 159, G Abakaliki L.G.C. v. Abakaliki R. M. O. (1990) 6 N.W.L.R. (Part 155) 182 at 192.

The right to sue or be sued eo nomine apart from the fact that it can be created by or under a Statute may also be established pursuant to H some enabling statutory provisions. Such a right may therefore be vested by the Rules of Court appropriately made pursuant to and under powers conferred by the relevant Law or Statute establishing the court. See

Knight and Searle v. Dove (1964) 2 All E.R. 307 at 309 and Fawehinmi v. N.B.A. (No.2), (supra). Accordingly, where the Rules of Court vest the right to be sued eo nomine on an individual doing business within jurisdiction in a name other than his own, such right, to all intents and purposes, must be recognised as validly vested. See MacIver v. G. and J Burns (1895) 2 Ch. D. 630 at 635.

In the present case, the proceedings in issue were instituted at the Federal High Court of the Enugu Judicial Division. Order 4 Rule 6 of the Federal High Court (Civil Procedure) Rules, 1976 provides as follows:-

“Any two or more persons claiming or alleged to be liable as partners may sue or be sued in the name of the firm in which they were partners when the cause of action arose; and any party to an action may in such case apply to the court for a statement of the names and addresses of the persons who were, when the cause of action arose, partners in any such firm, to be furnished in such manner and verified on oath, or otherwise, as the court may direct.”

It is evident that the above Rule of Court concerns firms comprising of two or more partners and that these may sue or be sued eo nomine. The provision does not relate to a firm which is owned and/or run by one person only and must to this extent be regarded as inapplicable to the present proceeding which, as found by the Court of Appeal, concerns a business owned and/or being run by one person.

There are, however, the provisions of Section 9 of the Federal High Court Act, 1973 which stipulate that in the absence of relevant provision in the Rules of the Federal High Court, practice and procedure shall be exercised in substantial conformity with the practice and procedure in force in the Lagos State High Court. These provisions of Section 9 of the Federal High Court Act, 1973 are, to a large extent, in pari materia with those of Section 12 of the Lagos High Court Law, 1935 which enabled the Lagos High Court, where its rules are silent or deficient on a point, to rely on the rules of the High Court of Justice in England. The said Section 9 of the Act provides thus:-

“The jurisdiction vested in the Court shall, so far as practice

and procedure are concerned, be exercised in the manner provided by this Act or any other enactment or by such rules and orders of court as may be made pursuant to this Act or, in the absence of any such provisions in substantial conformity with the practice and procedure for the time being in force in the High Court of Lagos State.”

B

It is plain to me that by virtue of Section 9 of the Federal High Court Act, 1973, the provisions of Order 13, Rule 42 of the High Court of Lagos (Civil Procedure) Rules 1972 become applicable in appropriate cases in the Federal High Court. See Laibru Ltd. v. Building and Civil Engineering Contractors (1962) 1 All N.L.R. 387.

C

Now, Order 13 Rule 42 of the High Court of Lagos (Civil Procedure) Rules, 1972 provides as follows:-

“Any person carrying on business within the jurisdiction in a name or style other than his own name may be sued in such name or style as if it were a firm name; and, so far as the nature of the case will permit, all Rules relating to the proceedings against firms shall apply.”

D

Where, therefore, it is established that a person is carrying on business within jurisdiction in a name or style other than his own name, such a person may pursuant to the provisions of the said Order 13 Rule 42 of the High Court of Lagos (Civil Procedure) Rules, 1972 be sued in such a name or style as if it were a firm.

E

It is thus evident from the combined effect of the provisions of Order 13 Rule 42 of the High Court of Lagos (Civil Procedure) Rules, 1972 and Order 4 Rule 6 of the Federal High Court (Civil Procedure) Rules, 1976 that a person carrying on business within jurisdiction in a name or style other than his own name or any two or more persons liable as partners may be sued in such name or style, in the case of a person carrying on the business alone, or in the name of the partnership or firm, in a case of where two or more persons are liable as partners. Such business name, style or firm although an unincorporated business enterprise may rightly be sued eo nomine.

F

G

H

A point of distinction is, however, worthy of note from the above Rules. This is the fact that whereas a partnership may sue or be sued in the name of the firm under Order 4 Rule 6 as aforementioned, Order 13

Rule 42 vests the sole proprietor of the business only with the right to be sued eo nomine.

In the present case, the court below after a painstaking review of the evidence before the court posed the question:-

B *“Bearing the above analysis in mind, the question then is whether Iyke Medical Merchandise is the name or style under which a person is carrying on business within the jurisdiction.”*

C This it resolved, holding that it was one Ethel Okonkwo who, on the evidence, was carrying on business within jurisdiction in the name or style of Iyke Medical Merchandise, the defendant/appellant in the present case. I have myself examined the evidence and have no reason to disagree with this decision of the Court of Appeal which in my view, is based on a sound and flawless analysis of the evidence before the court.

D I am therefore in total agreement with the court below that the defendant/appellant being an unincorporated business enterprise of the said Ethel Okonkwo was rightly sued eo nomine in the present proceedings.

E It is for the above and the more detailed reasons contained in the judgment of my learned brother, Uwaifo, J.S.C. that I, too, dismiss this appeal. I abide by the order as to costs therein made.

KASTINA-ALU

F I have had the advantage of reading in advance the judgment of my learned brother, Uwaifo JSC in this appeal. I entirely agree with it. For the reasons he has given I would also dismiss the appeal. I abide by the order for costs.

G

H