

SUPREME COURT OF NIGERIA
17TH FEBRUARY, 2006. SC. 218/2001
CORAM:- S. U. ONU, A. I. KATSINA-ALU, N. TOBI, G. A.
OGUNTADE, M. MOHAMMED, JJSC

1. IHEANACHOEKPAHURUIDEOZU
2. CHIDI JEROME AGWO
3. CHIEF ROBERT WEYE PLAINTIFFS/APPELLANTS
4. ONYEMATARA EWOH
5. ELDER MATTHEW IMO
(For themselves and on behalf
of Umudele Family of Ahoada)

AND

1. CHIEF FRANK OKPO OCHOMA
2. MR. DAVID AZUBUIKE OCHOMA
(For themselves and on behalf of
Umu-Abubaogele Family of Ahoada)
3. ELDER FRED IDE
4. MR. WILSON EYI DEFENDANTS/RESPONDENTS
5. MR. NDUBUISI JOHNSON
(For themselves and on behalf of
Umu-Obusenye Family of Ahoada)
6. ELDER COUPLE AMAKIRI
7. ELDER IDOKE UDE
8. CHIEF FELIX IGWE
(For themselves and on behalf of
Umudigwe Family of Ahoada)

INJUNCTIONS - Interlocutory injunction - Object of - Where the acts had
been completed - Court of Appeal rightly set aside the order (H1)

INJUNCTIONS - Interlocutory injunction - Basis of the application - Was
not misconceived by lower court - As wrongfully alleged (H2)

FACTS

Before the Ahoada High Court of Rivers State, the plaintiffs/appellants filed an action against the defendants/respondents seeking inter alia, a declaration that conferment of the chieftaincy title in dispute upon the 1st defendant is null and void. About 7 years after filing the suit, plaintiffs filed an application for an interlocutory injunction restraining 1st defendant from parading himself as the Nye-Nwe-Ele of Ahoada Community until the determination of the suit. The parties filed affidavits and counter affidavits in support of their various contentions.

The trial court exercised its discretion in favour of the plaintiffs by granting the interlocutory injunction. Defendants' appeal to the Court of Appeal was upheld and the order was set aside, on the main ground that the act restrained had already been completed. Being aggrieved, plaintiffs have now appealed to the Supreme Court.

ISSUES FOR DETERMINATION

“(1) Whether the lower court was justified in law to have interfered with the discretion of the trial court by determining in favour of the Respondents at the interlocutory stage the substantive issue as to which of the parties to the suit produces the Nye-nwe-ele of Ahoada when the issue is still pending before the trial court for determination.

(2) Whether the lower court misconceived the basis of the appellants application before the lower court and also the order made by the trial judge and came to a wrong conclusion that the order has affected third parties and disrupted the traditional business of Ahoada community.”

HELD (Unanimously dismissing the appeal per **OGUNTADE JSC**)

Interlocutory injunction - Object of

1. In *John Holt Nig. Ltd. v. Holts African Workers in Nigeria and Cameroons* [1963] 1 All NLR 385 at 389-390, Ademola C. J. said:

“The second aspect is the insistence of the learned trial judge to continue the hearing of the application for interlocutory injunction when it was so obvious from the facts before him that the object for which the injunction was asked for, namely, the introduction of a Reconstruction

Plan to the defendants' Company, had already been effected, and the Plan had been introduced before the application for interim injunction was filed. In other words, an interlocutory injunction was no more a remedy for an act which had already been carried out." (underlining mine)

On the facts available it seems to me that the court below was right to have allowed the appeal by setting aside the order of interlocutory injunction granted by the trial court it being clear that the acts in respect of which the plaintiffs/appellants sought an interlocutory injunction had in fact been completed. It only remained for the trial court to declare the concluded acts null and void if the plaintiffs/appellants succeeded in their claims. The trial court was wrong to have granted an interlocutory injunction in the circumstances of this case. (pp. 528 E / 529 A)

Interlocutory injunction - Basis of the application

2. Under their second issue, the appellants have contended that the court below misconceived the basis of their application. It was argued that the court below erroneously formed the impression that the order made by the trial court would affect third parties. I have read the judgment of the court below wholly and the impression I have is that the major point made therein was that the acts which the trial court purported to restrain had in fact been concluded. It is therefore of no consequence if the court below in addition to the point majorly made thought that the order of the trial court might affect third parties.

In the final conclusion, I do not see any merit in this appeal.
(p. 529 C)

NOTABLE POINTS OF INTEREST

ONUJSC

1. Interlocutory injunction is granted in case of urgency

Thus, in *Ajewole v. Adotimo* (1996) 2 NWLR (Pt.431) 391 this Court said: *"Interlocutory or interim injunctions are granted in cases of urgency. Thus an applicant who is guilty of delay thereby demonstrates the absence of any urgency requiring prompt relief. In the instant case, no urgency was disclosed by the Appellant to enable the court exercise its discretion in its*

favour.”

The Supreme Court in principles laid down in several decided cases will not interfere in the exercise of the discretion of a lower court unless the exercise of such discretion is “*manifestly wrong, arbitrary, reckless or injudicious.*” (p. 533 G)

TOBIJSC

2. Whether court's discretion can be described as unfettered

C In my humble view, it is a misnomer or an aberration to invariably describe the exercise of the discretionary power by the court as unfettered. The moment a trial court is called upon to exercise discretionary power, in accordance with the enabling law or rule of court, it is not correct to say that he has an unfettered discretion in the matter. This is because the D moment the trial Judge wrongly exercises the discretionary power, an appellate court, in the exercise of its appellate power, can quash the wrong exercise of the discretion. Where then lies the unfettered power? If the discretion is really unfettered, then the trial Judge would only be guided by E his wisdom as given to him by the Almighty God in the light of the facts of the case before the court. In such a case the Judge is answerable to himself and to no other person. Perhaps in the real sense of the expression the only court which can exercise unfettered discretion is this Court. While F there be few areas of our adjectival law which may recognize the unfettered exercise of discretionary power by courts below the Supreme Court, such is not the regular position. The Nigerian and English decisions cited by my learned brother vindicate the fettered nature of exercise of G discretion. (p. 538 E)

3. Purpose of interlocutory injunction

Interlocutory injunction, second in the line of injunctive reliefs, is aimed at attacking or tackling a threatening, continuing or living adverse act or H conduct on the part of the owner of the act or conduct. Once the act or conduct is completed, the relief of interlocutory injunction is totally spent as it has no life to attack or tackle the completed act or conduct. The only remedy available in respect of a completed act or conduct is perpetual

injunction, which will last in perpetuity.

In *Ajewole v. Adetimo* (1996) 2 NWLR (Pt. 431) 391, this Court held that when a court is asked to restrain a party from doing an act pending the decision in a matter before it, but the act has been done, no order to restrain will be made. This is so because, what is sought to be prevented had happened. In other words, an interlocutory injunction is not a remedy for an act which has already been carried out. (p. 539 A)

REPRESENTATION

J. T. O. Ugboduma Esq. for the appellants

A. Ekong Bassey, S.A.N., (V. N. Ikhua Madueyi with him) for the respondents.

CASES REFERRED TO

John Holt Nig. Ltd. v. Holts African Workers in Nigeria and Cameroons [1963] 1 All NLR 385 at 389-390

U.B.N. Plc. v. Adjarho [1997] 6 NWLR (Pt.507) 112 at 124

Ajewole v. Adetimo (1996) 2 NWLR (Pt. 431) 391

Ochudo v. Oseni 1 [1998] 13 NWLR (Pt.580) 103

Akapo v. Hakeem-Habeeb & Ors. [1992] 6 NWLR (Pt.247) 266 at 287

Onyesoh v. Nnebedun [1992] 3 NWLR (Pt.229) 319

Kotoye v. Central Bank (1989) 1 NWLR (Pt.98) 419

Missini v. Balogun (1968) All NLR 310

University of Lagos v. Olaniyan (1985) 7 NWLR 156 at 163

In Re Adewunmi (1988) 3 NWLR (Pt.83) 483

Lauwers import-Export v. Jozebson Ltd (1988) 13 NWLR (Pt.88) 430

Demuren v. Asuni (1967) All NLR 94 at 101

Solanke v. Ajibola (1968) 1 All NLR 46 at 52

University of Lagos v. Aigoro (1985) 1 NWLR 143 at 148

Niger Construction Co. Ltd v. Okugbeni (1987) 4 NWLR 787

Nwabueze v. Nwosu (1988) 4 NWLR (Pt.88) 257 at 262 and 266

LEAD JUDGMENT BY OGUNTADE JSC

This is an appeal from the judgment of the court below in which it

allowed an appeal from the ruling of the High Court in suit No. AHC/22/91 which is still pending before the said High Court of Ahoada Judicial Division of Rivers State. The appellants were the plaintiffs. By their amended writ of summons issued on 3rd June, 1997 against the respondents (as defendants) they claimed the following reliefs:

“1. A declaration that by Ekpeye native law and custom the Umudele Family of Ahoada is the head/founding family of NYE-NWE-ELE (Landlord) of Ahoada.

2. A declaration that the Umudele Family by virtue of its status as the Nye-Nwe-Ele Family of Ahoada has the exclusive and sacred custody of the Main OWOR-ELE-EHUDA.

3. A declaration that under Ekpeye native law and custom of inheritance, it is only members of the Umudele Family being the head/founding Family of Ahoada that can bear the title of NYE-NWE-ELE or Landlord/Traditional Ruler of Ahoada and who can possess the main OWOR-ELE EHUDA and conduct all communal sacrifices for Ahoada.

4. A declaration that by virtue of the Ekpeye customary law of inheritance, the following members of Umudele Family, namely Eyele Ele, Madu Ele, Ozogbe, Nwogwo, Usuma, Imo (Ideozu, Elder Michael Aliegbe, were recognized, lived, and died as the Nye-Nwe-Eles/Landlord/Traditional rulers of Ahoada.

5. A declaration the defendants not being the members of the Umudele Family cannot bear the title of NYE-NWE-ELE or hold the main OWOR-ELE EHUDA or conduct communal sacrifices for Ahoada.

6. A declaration that the purported certificate of conferment of the title of Nyemoji-Owhor-Ehuda dated 28/12/81 purportedly as a conferment of the title of Nye-nwe-ele of Ahoada on the 1st Defendant by HRH R.O. Robinson Eze Ekpeye Logbo is null and void.

7. A declaration that the purported judgment or verdict of the Eze Ekpeye Logbo in Council dated 8/3/90 adjudging the 1st and 2nd Defendants family of Abubogle as the Nye-Nwe-Ele of Ahoada and therefore entitled to hold the main Owor-Ele Ehuda is null and void.

8. An order of permanent injunction restraining the 1st defendant from holding himself out or howsoever parading himself as the Nye-nwe-

Ele of Ahoada Community.

9. *An Order of permanent injunction restraining all the defendants, by themselves, their servants, agents, privies or howsoever from interfering with the plaintiffs' Umudele Family rights as the Nye-Nwe-Ele Family of Ahoada, as the exclusive possessor of the Main Owbor-Ele Ehuda and in its conduct of communal sacrifices for Ahoada Community."* B

The parties filed and exchanged pleadings and ordinarily the suit should have proceeded to a hearing but on 10-1-98, the plaintiffs as applicants filed an application praying for the following: C

"(1) An order of interlocutory injunction restraining the 1st defendant by his agents, servants, privies or howsoever from acting, holding himself out or howsoever parading himself as the Nye-Nwe-Ele of Ahoada Community until the determination of this suit. D

(2) An order of interlocutory injunction restraining the defendants by themselves, their agents, servants privies or howsoever from entering into the premises where the Ele Ehuda Shrine is situated in Odiemelu Quarters of Ahoada for whatsoever purposes until the determination of this suit. E

(3) An for such further order or orders as this Honourable Court may deem fit to make in the circumstance."

The plaintiffs as applicants filed an affidavit in support of the application. The defendants filed a counter-affidavit to which was annexed F a certificate of conferment. This elicited from the plaintiffs a further affidavit. In reaction the defendants filed a further counter- affidavit. The application was before Charles-Graville J. Parties having extensively argued the application, ruling was on 13-3/2000 delivered thereon. In the ruling, the trial judge concluded as follows at page 90 of the record: G

"I shall therefore exercise my discretion in favour of the Plaintiff/Applicants by granting the orders sought. Accordingly, I hereby make

(1) An order of interlocutory injunction restraining the 1st Defendant by himself, his servants, agents, privies or howsoever from acting, holding himself out or howsoever parading himself as the Nye-nwe-ele of Ahoada Community until the determination of this suit. H

(2) An order of interlocutory injunction restraining the Defendants

by themselves, their Agents, servants, privies or howsoever from entering into the premises where the Ele-Ehuda Shrine is situate for whatever purposes until the determination of this suit.

B (3) *The Plaintiffs/Applicants are hereby ordered to enter into an undertaking before the Assistant Chief Registrar II of this court, to pay to the Defendant/Respondents, whatever damages the court may deem fit to make, if at the end, it is found that the order of interlocutory injunction was obtained frivolously, and ought not to have made.”*

C The defendants/respondents who were restrained by the trial judge brought an appeal against the ruling. The appeal was heard at the Court of Appeal, Port-Harcourt Division (hereinafter referred to as the ‘court below’). On 22-02-01 the court below in its judgment allowed the appeal and set aside the ruling of the trial court. The plaintiffs were dissatisfied D with the judgment of the court below and have come on a final appeal before this Court. In their appellants’ brief filed, the issues for determination in the appeal were stated to be these:

E “(1) *Whether the lower court was justified in law to have interfered with the discretion of the trial court by determining in favour of the Respondents at the interlocutory stage the substantive issue as to which of the parties to the suit produces the Nye-nwe-ele of Ahoada when the issue is still pending before the trial court for determination.*

F (2) *Whether the lower court misconceived the basis of the appellants application before the lower court and also the order made by the trial judge and came to a wrong conclusion that the order has affected third parties and disrupted the traditional business of Ahoada community.”*

G The respondents’ counsel in his brief elected to adopt the issues for determination as formulated by the appellants.

The basis upon which the court below reversed the ruling of the trial court was that a court of law could not restrain a party from doing an act H which has been done or completed. At pages 178-179 of the record of proceedings the court below in its judgment said -

“At this stage, I would like to reproduce paragraphs 6 and 7 of the amended writ of summons of the respondents filed on 3/6/97. They read

as follows:-

“6. A declaration that the purported certificate of conferment of the title of Nyemoji-Owhor-Ehuda dated 18/12/81 purported as a conferment of the title of the Nye-nwe-ele of Ahoada on the 1st defendant by HRH R.O. Robinson, Eze Ekpeye Logbo is null and void. B

7. A declaration that the purported judgment or verdict of the Eze Ekpeye Logbo in council dated 8/3/90 adjudging the 1st and 2nd defendant’s family of Abubaogele as the Nye-nwe-ele of Ahoada and therefore entitled to hold the Owor, Ele-Ehuda null and void.” C

The action was filed on 7/11/91. It is therefore clear from the above paragraphs of the respondents’ amended writ of summons that ten years prior to the filing of this suit in 1991 and specifically since 1981 the 1st defendant had continued to act pursuant to Ekpeye native law and custom as the Nye-nwe-ele of Ahoada. D

It is also disclosed in the writ of summons and repeated in the statement of claim that there had been a native arbitration by a panel headed by the Supreme Head of Ekpeye Kingdom where it was adjudged that the 1st and 2nd defendants’ family of Abubogele was the Nye-nwe-ele of Ahoada and therefore entitled to hold the main Owor-ele-Ehuda as against the plaintiffs’ family. It follows therefore restraining the 1st defendant from parading himself as the Nye-nwe-ele which he had so held out and so paraded himself for upwards of twenty years will not only be unjust but amounts to entering judgment for the respondents before leading evidence in the case, because the issue to be decided by the court is whether the recognition given to the 1st defendant as the Nye-nwe-ele of Ahoada was null and void. I think the better approach should have been to maintain the status quo and hold the recognition valid until it is set aside or nullified after hearing evidence from the parties.” E F G

And finally on the point the court below said in the same vein at page 181:

“This submission is misplaced because the 1st defendant having H been duly recognized as the Nye-nwe-ele and had been acting as such since 1981 what the learned trial Judge restrained was clearly a completed act. In *Ajewole v. Adetimo* (supra) the Supreme Court held that when a court

is asked to restrain a party from doing an act pending a decision in a matter before it, but the act has been done, no order to restrain will be made because what is sought to be restrained had been completed. See also the case of John Holt Nig. Ltd. v. Holts African Workers Union (supra) and Ayorinde v. Attorney-Genral of Oyo State (supra).“

The appellant in his written brief before this Court has argued that it was wrong for the court below to have interfered with the exercise of discretion by the trial court. Counsel relied on Ngwu v. Onuigbo [1990] 13 NWLR (Pt.636) 512, 523-524. It was further submitted that the court below erred by making in its judgment certain pronouncements, which affected the issues to be decided in the substantive matter. Counsel relied on Biocon Agrochemicals (Nig.) Ltd. & Ors. v. Kudu Holdings (Pty) Ltd. [2000] 15 NWLR (Pt. 611) 493 at 505 and 509; Olunloyo v. Adeniran D [2001] 4 NWLR (Pt. 734) 699 at 708.

In granting the application the trial court in its ruling at pp.88-89 of the record had reasoned thus:

“The applicants in this case have shown that there is a serious issue for trial to which learned counsel for the Respondents conceded. That issue which is the Res, is the claim of both parties to be entitled to bear the title of Nye-nwe-ele, and to posses the main Owbor and to sacrifice to Ele-Ehuda shrine. It is my view that this state of affairs calls for the courts intervention at this stage to prevent the doing of anything that will affect the smooth trial of the substantive suit.

One of the primary functions of the court is to see that law and order reigns supreme in the society and every decision of any court must be geared towards the maintenance of law and order, and not to cause blood shed or a state of anarchy in the society. In this case, the refusal to grant an order of interlocutory injunction and allowing the Respondents to continue parading the 1st Defendant as the Nye-nwe-ele sand to perform sacrifices at the Ele Ehuda shrine which is the issue for determination by this court during the pendency of the suit will create a situation where there might be disturbances, as deposed to in Paragraph 20 of the Supporting Affidavit that such acts would inevitably lead to the break down of law and order in Ahoada, since the patience of members of the Applicant’s

family are gradually wearing of.”

Was the trial court right? And was the court below in error to have reasoned that an act, which had been completed, ought not be restrained? Before I answer these questions, I must express that the submission of appellants’ counsel that an appellate court does not make a practice of reversing the exercise of discretion by a court of trial is only partially true. It does not represent an absolute principle of law. In *Enekebe v. Enekebe* [1964] 1 All N.L.R. 102, this Court per Bairamian J.S.C. quoted with approval a portion of the statement of Lord Simon in *Blunt v. Blunt* [1943] A. C. 517 at 526 where he said:

“If it can be shown that the court acted under a misapprehension of fact in that it either gave weight to irrelevant or unproved matters or omitted to take into account matters that are relevant, there would in my opinion be ground for an appeal. In such a case the exercise of discretion will have been exercised on wrong or inadequate materials but, as was recently pointed in this House in another connection in Charles Osenbon v. Johnston [1940] A.C. 130, 138:

‘The appellate tribunal is not at liberty to substitute its own exercise of discretion for the discretion already exercised by the judge. In other words, appellate authorities ought not to reverse the order merely because they would themselves have exercised the original discretion, had it attached to them in a different way. But if the appellate tribunal reaches the clear conclusion that there has been a wrongful exercise of discretion in that no weight or no sufficient weight has been given to relevant considerations..... then the reversal of the order may be justified.’”

See also *Solanke v. Ajibola* [1968] 1 All NLR 46 AT 51 and *Saffieddine v. COP* (1965) 1 All NLR 54.

Earlier in this judgment, I set out the reliefs, which the plaintiffs/appellants sought by their claims against the defendants/respondents. The 6th and 7th claims made by the plaintiffs/appellants postulated that His Royal Highness R.O. Robinson Eze Ekpeye Logbo had conferred the title Nyemoji-Owhor-Ehuda on the 1st defendant and that a certificate of such conferment dated 8/12/81 was issued to the 1st defendant. It was also made manifest that a judgment or verdict of Eze Ekpeye Logbo in Council

had been given in favour of 1st and 2nd defendants family on 8/3/90. The plaintiffs/appellants wished by their suit to set aside these acts. The Plaintiffs/appellants' original writ of summons as distinguished from the amended writ of summons was issued on 7/11/91. The undisputed factual
 B situation as at 7/11/91 when the plaintiffs/appellants commenced their suit was that a conferment rightly or wrongfully done had been made on the 1st defendant about 10 years before the plaintiffs/appellants commenced their suit. A customary body, Eze Ekpeye Logbo in Council had also as at 8/3/90 decided the dispute in favour of the 1st and 2nd defendants.

C The plaintiffs/appellants had been aware of these occurrences and it was apparent that because they felt that these acts were improperly done that the plaintiffs by their suit asked that these acts be set aside as null and void.

D Strangely however, after pleadings had been fully filed, the plaintiffs/appellants brought their application on 10-1-98, some seven years after they filed their suit. They asked that the 1st defendant be restrained from holding himself out as the Nze-nwe-Ele of Ahoada community, a
 E privilege which the 1st defendant had enjoyed since 8/12/81 and before the commencement of the plaintiffs' suit. In other words, the plaintiffs were asking by their application that the situation as it stood before the commencement of the suit be reversed even before the case was heard.

F **In John Holt Nig. Ltd. v. Holts African Workers in Nigeria and Cameroons [1963] 1 All NLR 385 at 389-390, Ademola C.J. said:**

*"The second aspect is the insistence of the learned trial judge to continue the hearing of the application for interlocutory injunction when it was so obvious from the facts before him that the object for
 G which the injunction was asked for, namely, the introduction of a Reconstruction Plan to the defendants' Company, had already been effected, and the Plan had been introduced before the application for interim injunction was filed. In other words, an interlocutory injunction
 H was no more a remedy for an act which had already been carried out."*
 (underlining mine)

See also U.B.N. Plc. v. Adjarho [1997] 6 NWLR (Pt.507) 112 at 124 and Ochudo v. Oseni 1 [1998] 13 NWLR (Pt.580) 103.

On the facts available it seems to me that the court below was right to have allowed the appeal by setting aside the order of interlocutory injunction granted by the trial court it being clear that the acts in respect of which the plaintiffs/appellants sought an interlocutory injunction had in fact been completed. It only remained for the trial court to declare the concluded acts null and void if the plaintiffs/appellants succeeded in their claims. The trial court was wrong to have granted an interlocutory injunction in the circumstances of this case.

Under their second issue, the appellants have contended that the court below misconceived the basis of their application. It was argued that the court below erroneously formed the impression that the order made by the trial court would affect third parties. Counsel relied on Akapo v. Hakeem-Habeeb & Ors. [1992] 6 NWLR (Pt.247) 266 at 287 and Onyesoh v. Nnebedun [1992] 3 NWLR (Pt.229) 319. I have read the judgment of the court below wholly and the impression I have is that the major point made therein was that the acts which the trial court purported to restrain had in fact been concluded. It is therefore of no consequence if the court below in addition to the point majorly made thought that the order of the trial court might affect third parties.

In the final conclusion, I do not see any merit in this appeal. It is accordingly dismissed with N10,000.00 costs in favour of the respondents.

ONU JSC

Having been privileged to read in advance the lead judgment just delivered by my learned brother, Oguntade JSC, I am in entire agreement with him that this appeal be dismissed.

A few comments of mine, I think, will do in expatiation of the two issues for determination discussed in this appeal as follows: -

In issue No.1, the Appellants have taken the view firstly, that the Court of Appeal interfered with the discretion of the trial court and

secondly, that the Court of Appeal in coming to the decision that the interlocutory injunction was wrongly granted did in fact in that process, decide the “*substantive issue of which of the parties to the suit produces the Nye - nwe - Ele of Ahoada when the issue is still pending before the trial court.*”

The main plank of the claim in the High Court as disclosed in the pleadings was not that the title or stool of the Nye - Nwe - Ele of Ahoada was vacant and so the High Court should decide between the plaintiffs and defendants who should ascend to the vacant stool. On the contrary their claim was that the 1st defendant has since December 1981 been issued with a certificate of conferment of the title of Nye - Nwe - Ele and that the High Court should declare the said conferment or recognition and that the High Court should declare the said conferment or recognition as null and void. If one may ask the Appellants, if the 1st defendant had not been so recognized what then do the Appellants want the court to declare null and void? And if the 1st defendant had not been going about performing the functions of the office of the Nye - Nwe - Ele, why do the Appellants want him to be restrained from holding out himself to be the Nye - Nwe - Ele?

The true position in the case in hand is that the Appellants are in court to protest the recognition or conferment of the title of Nye - Nwe - Ele on the 1st defendant. Except the court decides that the 1st defendant and his family are not the proper title holders and accedes to the appellants’ claim to nullify the recognition or conferment, the question whether the Appellants should produce the Nye - Nwe - Ele, being the person to hold the main Owbor -ele - Ehuda does not ever arise.

Notice the difficulty encountered by the Appellants in the court below (Court of Appeal) which drove them to a rather confused engagement in an exercise in semantics, an exercise which the court below rightly deprecated. The Appellants in the court below admitted that what the 1st defendant had before they filed the suit was a conferment and not a recognition. The court below not impressed by the 1st Appellant’s contention commented thus:

“The contention of the learned counsel to the respondents that the certificate given to the 1st Appellant was not a certificate of recognition

but rather a conferment is totally misplaced because whether by recognition or conferment, the 1st Appellant had acted before and since 1981 as the Nye-Nwe-Ele of Ahoada. When therefore the Appellants complain about the court below interfering with the discretion of the trial court the allegation appears to be specious. This is because they have not
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pin - pointed any particular finding of fact of the trial court which was within the province of the trial court but which the Court of Appeal interfered with. It is the law that except under some stated conditions a Court of Appeal will not interfere with a discretion or finding of fact by a
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trial court. But where the discretion of the trial court was not judicially exercised or where the finding of fact was perverse, a court of appeal will definitely interfere. Vide Makinde v. Akinwale (2000) 2 NWLR (Pt.645) 435; Chikere v. Okegba (2000) 12 NWLR (Pt.681) 274; Acme Builders Ltd v. K.S.W.B (1999) 2 NWLR (Pt.590) 288 and Uzochi v. Onyemwe
D
(1999) 1 NWLR (Pt.587) 339.

Having taken a careful look at this case I take the firm view that the trial court's discretion was wrongly exercised and the court below quite rightly exercised its discretion to set it aside in the interest of justice. The
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court below is empowered under section 16 of the Court of Appeal Act to "*.....generally have full jurisdiction over the whole proceedings as if the proceedings have been instituted in the Court of Appeal as a court of first instance and may rehear the case in whole or part.....*"

The Appellants' insistence that the court below by setting aside the order of injunction thereby decided the substantive action in favour of the respondents is unfortunate. It shows a total lack of understanding of the judgment of the court. The principle is that the court will not make an order
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of restraint of an act which has been completed and that the court will not make an order of injunction if that will have the effect of altering the status
G
quo. See John Holt Nig. Ltd v. Holts African Workers Union (1963) 1 All NLR 379, U.B.N v. Adjarho (1997) 6 NWLR (Pt.507) 112 and Ochido v. Useni (1998) 13 NWLR (Pt.580) 103.
H

In its judgment in the case herein on appeal, the court below set out in extenso the relevant claims of the Appellants vide paragraphs 6 and 7 whose ipse dixit was to the effect that 1st Respondent as at 1981 had been

recognized as the Nye-Nwe-Ele of Ahoada and that such could not justify the order of injunction granted by the High Court except it was wrongly intended to upset the well established principle that an injunction will not be issued to alter the status quo.

B For these reasons, I agree with the Respondents' submission that the Court below was perfectly right when it concluded thus: ".....*It follows therefore that restraining the 1st defendant from parading himself for upwards of 20 years will not only be unjust but amount to entering judgment for the respondents before leading evidence in the case, because*
C *the issue to be decided by the court is whether the recognition given to the 1st defendant as the Nye-Nwe-Ele of Ahoada was null and void. I think the better approach should have been to maintain the status quo and hold the recognition valid until it is set aside or nullified after hearing evidence*
D *from the parties.*"

The Appellants in their brief have insisted that the res in the substantive suit was the claim of both parties to be entitled to bear the title of Nye-Nwe-Ele of Ahoada Town. With due respect, I disagree with this
E submission and state that the res was rather the entitlement of the defendants' family to continue to keep the main Owbor and to sacrifice at the Ele-Ehuda shrine, a fact which the Plaintiffs/Appellants have sought to nullify in the substantive suit. The Appellants ought to appreciate that there
F must be something on the ground before the question of nullification can arise. One cannot ask a court to nullify a vacuum or nothing.

The Appellants after setting out the findings of the lower court to the effect that "*it is clear from the amended writ of summons that ten years prior to filing of this suit and specifically since 1981 the 1st defendant had*
G *continued to act pursuant to Ekpeye native law and custom as the Nye-Nwe-Ele of Ahoada*" to have rather sentimentally and unguardedly condemned the court below for making a finding of fact without evidence and therefore entering judgment for the respondent without evidence at the
H stage of interlocutory injunction. This may have to do with the veracity of the case put up by the appellants who have contended that that finding was not borne out by the evidence. The position of the Appellants is quite curious for the sheer reason that it was the Appellants who had voluntarily

claimed that a certificate dated 18/12/81 certifying the 1st Respondent as the Nyemoja-Owhor-Ehuda being conferred with the title Nye-Nwe-Ele of Ahoada, a claim which the Appellants urged the court below to examine and act upon accordingly when and as necessary. Besides, it is not clear what they (Appellants) mean by evidence when apart from the claim on the writ there was abundance of evidence from the Respondents' counter-affidavit reproduced in the Defendants/Respondents' counter-affidavit reproduced in their brief of argument in the court below. B

Furthermore, the 1st Respondent has been accepted as the Nye-Nwe-Ele by the Ahoada community and even by a section of the Appellants' family. It cannot be said therefore that the Appellants were not aware of the existence of such evidence; accordingly their contention that the judgment of the Court of Appeal in this respect had no evidential support can only be described as unfortunate. C D

The Appellants have further contended that "*there is no evidence before the lower court that the Respondents (i.e now Appellants) did not apply for injunction until almost one year after the installation of the 1st defendant. Clearly, the quotation is incomplete and misleading since the Appellants have left out the other portion of the judgment. The concluding part of the judgment should read....." and waited for almost ten years to sue him and another seven years to apply for interlocutory injunction to restrain him from performing the functions of his office to which he was appointed in 1981.*" E F

When the totality of that portion of the judgment is quoted as above, it is clear that the Court of Appeal was at pains to appreciate why the plaintiffs seeking the equitable remedy of injunctions are granted in cases of urgency. Thus, in Ajewole v. Adotimo (1996) 2 NWLR (Pt.431) 391 this Court said: G

"Interlocutory or interim injunctions are granted in cases of urgency. Thus an applicant who is guilty of delay thereby demonstrates the absence of any urgency requiring prompt relief. In the instant case, no urgency was disclosed by the Appellant to enable the court exercise its discretion in its favour." See also Kotoye v. Central Bank (1989) 1 NWLR (Pt.98) 419 and Missini v. Balogun (1968) All NLR 310. H

The Supreme Court in principles laid down in several decided cases will not interfere in the exercise of the discretion of a lower court unless the exercise of such discretion is “*manifestly wrong, arbitrary, reckless or injudicious.*” See per Nnamani, JSC in *University of Lagos v. Olaniyan* B (1985) 7 NWLR 156 at 163. See also *In Re Adewunmi* (1988) 3 NWLR (Pt.83) 483; *Lauwers import-Export v. Jozebson Ltd* (1988) 13 NWLR (Pt.88) 430. Other cases decided on the same principle are *Demuren v. Asuni* (1967) All NLR 94 at 101, *Solanke v. Ajibola* (1968) 1 All NLR 46 at 52, *University of Lagos v. Aigoro* (1985) 1 NWLR 143 at 148, *Niger Construction Co. Ltd v. Okugbeni* (1987) 4 NWLR 787 and *Nwabueze v. Nwosu* (1988) 4 NWLR (Pt.88) 257 at pages 262 and 266. C

As has been decided in a majority of cases on the exercise of discretion, it has been held that discretion is not to be reversed merely D because courts might think it quite plain that they would have adopted a different course.

In further answer to the point that there was no evidence to support the quoted portion of the judgment of the court below at page 14 of the E Appellants’ brief, I am of the view that the exception taken by the Appellants is misplaced since in none of the four grounds of appeal has that portion of the judgment been questioned either as a misdirection or error in law and particularly, as there is no general ground of appeal complaining F that the judgment of the Court of Appeal is against the weight of evidence. Accordingly, the Appellants’ submission on that point, relates to no issue arising from a valid ground of appeal and this Court therefore lacks the jurisdiction to entertain the argument which I hereby accordingly discountenance. G

ISSUE NO.2

Appellants’ issue No.2 questions “whether the lower court misconceived the basis of the Appellants’ application before the lower court and also the order made by the trial Judge and came to a wrong conclusion that H the order has affected third parties and disrupted the traditional business of Ahoada Community.

The short answer to this issue as succinctly put by the Respondents is, in my view: (1) that the court below had in no way misconceived the

basis of the Appellants' application. The court below indeed truly appreciated the basis of that application which is why it held that the order of injunction ought not to have been granted because the Appellants delayed for several years and established no urgency that the application was made to restrain an act that had already been done and that third parties' interest had been adversely affected by the order of injunction. B

I adopt in its entirety Respondents' answer on this issue and have nothing further to add thereto.

For the reasons I have given and the more compelling ones contained in the leading judgment of my learned brother Oguntade, JSC with which I entirely agree, I too dismiss the appeal. I make similar consequential orders inclusive of those as to costs contained in the leading judgment of my learned brother Oguntade, JSC. C

D

KATSINA-ALU JSC

I have had the advantage of reading in draft the judgment delivered by my learned brother Oguntade JSC. I agree with it. E

Paragraphs 6 and 7 of the Amended Writ of Summons of the Plaintiffs filed on 3/6/97 read as follows:

"6. A declaration that the purported certificate of conferment of the title of Nyemoji - Ow hor-Ehuda dated 18/12/81 purported as a conferment of the title of the Nye-nwe-ele of Ahoada on the 1st defendant by HRH R.O. Robinson, Eze Ekpeye Logbo is null and void. F

7. A declaration that the purported judgment or verdict of the Eze Ekpeye Logbo in council dated 8/3/90 adjudging the 1st and 2nd defendants' family of Abubaogele as the Nye-nwe-ele of Ahoada and therefore entitled to hold the Owor, Ele-Ehuda null and void." G

This action was commenced on 7/11/91. By the Plaintiffs' own showing the 1st defendant was conferred with the title of Nye-nwe-ele of Ahoada since 1981 and had continued to act in that capacity pursuant to Ekpeye native law and custom. It is not therefore in dispute that the act sought to be stayed had already been Carried out It is now settled law that an interlocutory injunction is no more a remedy for an act which had H

already been carried out - See John Holt Nig, Ltd. v. Holts African Workers in Nigeria and Cameroons (1963)1 ALL NLR 385 at 389-390.

One more thing. A chieftaincy throne is not a perishable commodity. It is always there for the winner.

B All things considered, the trial court was wrong to have granted an interlocutory injunction in favour of the Plaintiffs.

I also see no merit in this appeal. Accordingly I dismiss it with N10,000.00 costs in favour of the defendants/respondents.

C

TOBI JSC

I have read in draft the judgment of my learned brother, Oguntade, JSC, and I agree with him. This is another chieftaincy matter. It emanates D from Ahoada in Rivers State. On 3rd June 1997, the appellants as plaintiffs claimed nine reliefs from the respondents as defendants. The parties duly filed and exchanged pleadings.

While the matter is pending, the appellants filed an application for E interlocutory injunction against the respondents by themselves, their agents, servants, privies, pending the determination of the suit. The application was contested. The learned trial Judge exercised his discretion in favour of the appellants and granted the order as prayed.

F Dissatisfied, the respondents filed an appeal against the order of interlocutory injunction. The Court of Appeal allowed the appeal.

In his judgment, Akpiroroh, JCA said:

“The contention of learned counsel for the respondents that it was because of the acts of the applicants in parading the 1st Appellant as Nye- G nwe-ele and in desecrating the Ele-Ehuda shrine during the pendency of the suit particularly the events of 6/7/77 - 31/12/97, that led to the filing of the application to restrain the defendants from such acts is totally misplaced because in the amended writ of summons at pages 4-5 of the H records none of the heads of the claim is the appellant’s wrongful acts of 6/7/97 and 31/12/97 an issue on any of the reliefs. The interlocutory injunction was therefore sought and granted in respect of a relief or reliefs not prayed for in the substantive action. Accordingly, the Court lacked the

jurisdiction to grant the interlocutory relief and prayed for based on the writ of summons and the pleadings... On the question of balance of convenience, it tilts heavily in favour of the appellants because the respondents did not apply for injunction until almost one year of the installation of the 1st appellant and waited for 'about 10 years to sue him and another seven years to apply for interlocutory injunction to restrain him from performing the functions of his office to which he was appointed in 1981... It ought to have occurred to the learned trial Judge that the interest of the entire community of Ahoada is greater than that of the respondents. There is no doubt that apart from affecting the interest of third parties, the order of injunction has disrupted the traditional business of the community and he could have taken this into consideration in weighing the balance of convenience... From all what I have said in this judgment, there is merit in this appeal and it is hereby allowed.'

Questioning the exercise of discretion by the Court of Appeal, learned counsel for the appellants did not like the way the Court interfered with the findings/discretion of the trial court, which according to him, was contrary to the principle of law relating to the duty of an appellate court recently restated by this Court in Ngwu v. Onuigbo (1990) 13 NWLR (Pt.636) 512 at 523 to 524. This Court held in that case that a discretion of a trial court ought not to be reversed merely because an appellate court might think it quite plain that it would have exercised the discretion differently. The Court relied on four earlier decisions.

My learned brother has referred to two English decisions which were relied upon by this Court in the case of Enekebe v. Enekebe (1964) 1 All NLR 102. The decisions are to the effect that an appellate court will interfere with the exercise of discretion by a trial court if the discretion was exercised on wrong or inadequate materials in that no weight or no sufficient weight has been given to relevant considerations. In either of the situations, that is the decision of Ngwu v. Onuigbo or the decisions of the English Courts as followed in Enekebe v. Enekebe, one is dealing with the undisclosed mind of the Judge in the exercise of the discretion. In other words, because the mind of the Judge is only known to him and no other person other than God, the dichotomy or cleavage drawn by the cases is

another pretence of the law.

It is perhaps because of the artificiality created by the forced distinction or dichotomy that has given rise to one fairly worrying qualifying epithet “*unfettered*”, coming immediately before the word discretion. It is now almost an aphorism or cliché for the courts and counsel when they say that a court of law has unfettered discretion to exercise in certain procedural or adjectival matters of the nature of non-compliance with rules of court.

I have always wondered why the position of the law should be so. Is it correct to say that a court of law has unfettered discretion in respect of non-compliance with rules of court? Is that true? Is it the correct position of the law? Or should that be the correct position of the law?

The word “*fetter*” ordinarily means chain up, check, restrain and what have you. It also carries in its aggregate content, the combination of ‘*capacity*’ and here it has a figurative content. This is not my concern. My concern is not even the word ‘*fetter*’. I am dealing with the opposite of the word, prefixed by ‘*un*’ thus giving the complete word ‘*unfettered*’. The expression in our context means “unchained, unchecked, unrestrained, unhampered” and what have you.

In my humble view, it is a misnomer or an aberration to invariably describe the exercise of the discretionary power by the court as unfettered. The moment a trial court is called upon to exercise discretionary power, in accordance with the enabling law or rule of court, it is not correct to say that he has an unfettered discretion in the matter. This is because the moment the trial Judge wrongly exercises the discretionary power, an appellate court, in the exercise of its appellate power, can quash the wrong exercise of the discretion. Where then lies the unfettered power? If the discretion is really unfettered, then the trial Judge would only be guided by his wisdom as given to him by the Almighty God in the light of the facts of the case before the court. In such a case the Judge is answerable to himself and to no other person. Perhaps in the real sense of the expression the only court which can exercise unfettered discretion is this Court. While there be few areas of our adjectival law which may recognize the unfettered exercise of discretionary power by courts below the Supreme

Court, such is not the regular position. The Nigerian and English decisions cited by my learned brother vindicate the fettered nature of exercise of discretion.

Interlocutory injunction, second in the line of injunctive reliefs, is aimed at attacking or tackling a threatening, continuing or living adverse act or conduct on the part of the owner of the act or conduct. Once the act or conduct is completed, the relief of interlocutory injunction is totally spent as it has no life to attack or tackle the completed act or conduct. The only remedy available in respect of a completed act or conduct is perpetual injunction, which will last in perpetuity. C

In *Ajewole v. Adetimo* (1996) 2 NWLR (Pt. 431) 391, this Court held that when a court is asked to restrain a party from doing an act pending the decision in a matter before it, but the act has been done, no order to restrain will be made. This is so because, what is sought to be prevented had happened. In other words, an interlocutory injunction is not a remedy for an act which has already been carried out. D

In *Alon v. Dandrill Nigeria Ltd.* (1997) 8 NWLR (Pt. 517) 495, it was held that the main purpose of an interlocutory injunction is to preserve the res or subject matter of the litigation from destruction pending the determination of the matter. It is to maintain the status quo pending the determination of the matter. Where an action sought to be restrained has already been completed, the equitable remedy of interlocutory injunction will no longer be available to an applicant. E F

Learned counsel for the appellants submitted that the Court of Appeal did not in its judgment set aside any of the findings of fact made by the trial court before the court made the order of interlocutory injunction against them. With the greatest respect, this is a very lousy and lazy submission. Setting aside findings of fact of a trial court is a very serious appellate function which an appellate court cannot exercise for the fun of it, but rather for valid legal reason or reasons. An appellate court cannot fault the findings of fact of a trial court when the appellate court does not find or see any fault. This is what happened in that Court and I cannot fault the Court of Appeal. G H

Learned counsel for the appellants also made efforts in paragraphs

3.5 to 3.8 to fault some findings of the Court of Appeal. With respect, I do not agree with him. A court of law by the exercise of its interpretative jurisdiction interpret paragraphs of writ of summons or court processes and come to conclusion one way or the other. This the court does to come out with-the intention of the court processes if the intention is not clear on the fact of it.

In attacking the findings of the Court of Appeal, counsel submitted that there is nothing in paragraph 6 or paragraph 7 of the reliefs in the Amended Writ of Summons which proved that:

“... since 1981 the 1st defendant had continued to act pursuant to Ekpeye native law and custom as Nye-nwe-ele of Ahoada.”

As it is, learned counsel picked the above from the middle of the sentence instead of reproducing the sentence as a whole. I will do just that, to bring out the meaning behind the finding. At page 178 of the Record, the Court of Appeal, referring to paragraphs 6 and 7, said:

“It is therefore clear from the above paragraphs of the respondent’s amended writ of summons that ten years prior to the filing of this suit in 1991 and specifically since 1981 the 1st defendant had continued to act pursuant to Ekpeye native law and custom as the Nye-nwe-ele of Ahoada.”

The above, in my humble view, is a valid interpretation or construction of paragraphs 6 and 7 of the Amended Writ of Summons. Let me involve myself in some arithmetical calculation to make myself clearer. The first sentence above is clear. The Court of Appeal got the date the action was filed from the case file and it is 7/11/91. The law allows the court to do that, as there is no need for any proof of that date. Possibly using the content of paragraph 6, particularly the date, 18/12/81, as the year the title of Nyemoji-Owhor-Ehuda was conferred on the defendant by HRH R.O. Robinson, the year of 1991 when the action was filed is subtracted from 1981 the conferment year and that would appear to have given the Court of Appeal the “ten years”. Of course, the year 1981 was directly lifted from paragraph 6 of the amended writ of summons. The above is just one example of the faults counsel tried to find and failed. I think I can stop here.

Contrary to the contention of learned counsel, the Court of Appeal

was correct in evaluating the evidence before the trial Court and came to correct conclusion.

In sum, this appeal has no merit and I too dismiss it. I award N10,000.00 costs in favour of the respondents.

B

MOHAMMED JSC

On 22-2-2001, the Court of Appeal Port Harcourt Division in its judgment delivered the same day, set aside the ruling of the High Court of Justice of Rivers State sitting at Ahoada delivered on 13-3-2000 granting the plaintiffs' application for interlocutory injunction restraining the defendants from interfering with the matters in dispute between the parties pending the determination of the substantive suit. The reasons given by the trial High Court for granting the reliefs sought by the plaintiffs in their application at pages 88-89 of the record of this appeal are-

"The applicants in this case have shown that there is a serious issue for trial to which learned counsel for the respondents conceded. That issue which is the Res, is the claim of both parties to be entitled to bear the title of Nye-nwe-ele, and to sacrifice to Ele-Ahuda shrine. It is my view that the state of affairs calls for the courts intervention at this stage to prevent the doing of anything that will affect the smooth trial of the substantive suit."

F

After setting aside this ruling of the trial High Court, the Court of Appeal proceeded and dismissed the plaintiffs' application for interlocutory injunction. Not satisfied with the decision of the Court below, the plaintiffs now appellants have appealed to this court submitting two issues for the determination of the appeal.

G

The record of this appeal shows that the appellants as plaintiffs commenced their action against the respondents as defendants by a writ of summons dated 7-11-1991. Although part of the reliefs claimed by the appellants in their action include orders of injunction, the appellants' application for interlocutory injunction pending the determination of the substantive suit was not filed before the trial court until sometime in January 1998, when the motion dated 10-1-1998 was filed. The applica-

H

tion asked for an order of interlocutory injunction restraining the 1st defendant by himself, his agents, servants, privies or howsoever from acting, holding himself out or howsoever parading himself as the Nye-nwe-ele of Ahoada community, until the determination of the suit.

B However, as the 1st defendant had been recognized as the Nye-Nwe-Ele of Ahoada Community as far back as 18-12-1981, about seventeen years before filing the appellants' application for interlocutory injunction, there is no doubt whatsoever that the action the appellants were seeking to
C restrain by the order of interlocutory injunction, had already been completed. The law is trite from several decisions of this court and the Court of Appeal that relief of an interlocutory injunction is not perceived as a proper remedy for an act which has already been carried out, and will not
D be granted where even the act complained of is irregular. See *John Holt Nigeria Ltd v. H.A.W.U.N.C.* (1963) 2 SCNLR 383; *Uwegba v. Attorney-General of Bendel State* (1986) 1 NWLR (pt.16) 303 at 309; *Governor of Imo State v. Anosike* (1987) 4 NWLR (pt.66) 663 and *Attorney-General of Anambra State v. Okafor* (1992) 2 NWLR (pt.224) 396 at 419 - 420.

E For the foregoing reasons and the reasons given in detail in the lead judgment of my learned brother Oguntade JSC with which I entirely agree, I shall also dismiss this appeal which is hereby dismissed with N10,000.00 costs to the respondents.

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