

SUPREME COURT OF NIGERIA

8TH JUNE, 2007 SC.80/2002

**CORAM:- N. TOBI, G. A. OGUNTADE, A. M. MUKHTAR,
W.S.N. ONNOGHEN, C.M. CHUKWUMA-ENEH, JJSC**

1. UNIVERSAL TRUST BANK LIMITED

2. P.O. AKINBOHUN APPELLANTS

3. O.M. SAGAY

AND

DOLMETSCH PHARMACY

(NIGERIA) LIMITED RESPONDENT

APPEALS - Issues - Grounds of appeal - Respondent's issues for determination - Are not formulated from evidence - Or from applicable law - They must flow from the grounds of appeal - And decision of lower court (H1)

APPEALS - Leave - Fresh point of law or issue - Not being an issue of jurisdiction - Would be incompetent - Where leave of court was not secured (H2)

APPEALS - Issues - Competence - Ex parte injunction granted by trial court - Where two issues against it where not raised before Court of Appeal - And no leave was obtained - They will be struck out as incompetent (H3)

INJUNCTIONS - Ex parte order - Urgency of time - That justifies interim injunction - Without notice to the other party - Existed in this case (H4)

INJUNCTIONS - Ex parte order - Variation - Grounds on which a court will vary its interim order - Include suppression or misrepresentation of material facts - Which factor does not avail in this case (H5)

FACTS

Plaintiff/respondent was a customer of the 1st appellant, who granted it various credit facilities. Respondent executed a deed of legal mortgage over its estate along Nkpo - Obosi Road, Onitsha. It also executed an all assets debenture wherein it charged all its assets both present and future, including floating assets as security for the loan. When respondent failed to liquidate the indebtedness, 1st appellant under the powers conferred on it vide the debenture, appointed the 2nd and 3rd appellants as receivers/managers over the assets and management of the respondent's business who took over on the 20 -2 -1997. It seems this take over was not friendly as about 30 armed men invaded the respondent's premises.

Respondent filed a suit before the Federal High Court Enugu, on the 26-2-1997 claiming damages, injunction and 3 declaratory reliefs. Along with the writ of summons, it filed a motion ex parte praying inter alia, for an order of interim injunction restraining appellants from further trespass pending the determination of the Motion on Notice. The trial court granted the motion. Appellants' application to the trial court to discharge the order of interim injunction was refused. Their appeal to the Court of Appeal was also dismissed. Aggrieved, they have further appealed to the Supreme Court.

ISSUES FOR DETERMINATION

"1 Whether on the available facts, the Court of Appeal was right in dismissing the Appellants' Appeal therefore refusing to discharge the order of interim injunction granted ex parte against the Appellants.

2. Whether it was proper for the Court of Appeal to affirm the decision of the Learned Trial Judge exercising his discretion in favour of not discharging the order of interim injunction granted ex parte against the Appellants."

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

Issues - Grounds of appeal

1. Turning to the issues as formulated by learned Counsel for the respondent, I wish to mention the fact that the respondent has not cross appealed in this matter. Yet while the appellant submitted two issues for

determination, the respondent submitted four issues. It is settled law that issues for determination in an appeal must be distilled from the grounds of appeal filed in the appeal which grounds of appeal must be complaints against the ratio decidendi in the case. In other words, issues for determination in an appeal are not formulated from the evidence before the lower court and/or the applicable law thereto where there is or are no grounds of appeal attacking such evidence, findings or errors in law. In the instant case, I have gone through the grounds of appeal as filed in this matter and I agree with the submission of learned Counsel for the appellants that respondent's issues (a), (c) and (d) do not arise for determination having regard to the grounds of appeal vis-a-vis the decision of the Court of Appeal and are consequently discountenanced and it does not matter whether learned Counsel for the appellants argued them in his brief of argument. (p. 3144 F)

APPEALS - Leave - Fresh point of law or issue

2. No party is allowed to change his case per court. It is also settled law that where fresh point(s) of law or issue(s) is/are to be argued for the first time on appeal, the leave of either the lower court or the appellate court is required without which the issue(s) or point(s) of law would be incompetent particularly where the issue(s)/or point(s) of law do(es) not affect the jurisdiction of the lower court to entertain and determine the matter before it, as in the instant case. (p. 3145 C)

APPEALS - Issues - Competence

3. I have gone through the arguments of learned Counsel for the appellants in that brief of argument on the two issues, which were argued together, and it is very clear that the issues as to whether the ex parte order of injunction was granted after a completed act or to restrain a completed act, or lack of legal right in the respondent to be protected by the said ex parte order or locus standi of the respondent to apply for the said ex parte order or file the suit in the first instant were never raised and argued before the lower court neither did that court decide the said issues. The issues are therefore fresh issues or points of law being raised

for the first time by the appellants before this Court. It is settled law that fresh points of law or issues cannot be raised for the first time on appeal without the leave of either the lower court or the appellate court. In the instant case, there is no evidence on record that the appellants obtained
 B the leave of either the Court of Appeal or of this court before raising the issues in question thereby rendering the said issues or points of law incompetent and liable to be struck out. The issues are therefore discontenanced by me. (p. 3147 B)

C ***Ex parte order - Urgency of time***

4. It is now settled law that the time relevant in determining urgency justifying the grant of ex parte interim order of injunction is the time between the happening of the event which is sought to be restrained and
 D the date the application for an injunction could be heard if taken after due notice to the other side. From the facts relevant to the issue as contained in the affidavits which were accepted by the lower courts, it is clear that the take over of the respondents business premises was on 20/2/97 and it
 E was the event whose continuance the respondent sought to restrain by the ex parte order by an application filed on 26/2/97; there was a weekend between 20/2/97 and 26/2/97. From the record the action was filed in Enugu while the appellants were to be served in Lagos. In normal
 F circumstances the law requires thirty days between service and hearing of the motion on notice outside jurisdiction and that service out of jurisdiction has to be with leave of court first had and obtained. I therefore agree with the Court of Appeal that having regards to the facts of the
 G case it would have been impracticable to have put the appellants on notice without the risk that the respondent's business might be destroyed while the appellants remained in occupation of the premises and in control of its operations and assets. (p. 3148 A)

H ***INJUNCTIONS - Ex parte order - Variation***

5. It is settled law that the court that makes an ex parte order of interim, injunction has the inherent power or jurisdiction in an appropriate case to vary or discharge same. The grounds on which the court will set aside,

vary or discharge an order of interim injunction made ex parte include the following:-

(i) if the plaintiff has not used his administrative powers that might have resolved the difficulty;

(ii) if default has been made in giving security for costs; B

(iii) if the affidavit has not been filed when the injunction was moved for;

(iv) if it was granted on a suppression or misrepresentation of material facts; C

(v) if it was irregularly granted;

(vi) if the plaintiff failed to attend to be cross examined;

(vii) If there had been delay in complying with an undertaking to amend the writ by adding a party as plaintiff;

(viii) if there is non-disclosure of material facts. D

It is no excuse for the plaintiff or a party to say that he was not aware of the importance of the facts which have been suppressed or not brought to the attention of the court. The law is that the court will deal strictly, with a party applying ex parte and who had misrepresented or E suppressed material facts.

I had earlier in this judgment reproduced the reliefs claimed in the writ of summons which clearly vindicates the views held by the lower courts as to the substantive claim before the court and the materiality of F the alleged suppressed or misrepresented facts to the said claim rather than to the grant of the ex parte application for an order of interim injunction. I have no hesitation whatsoever in coming to the conclusion that the Court of Appeal was right in holding as it did. I therefore have no G reason to disturb that holding which in effect affirmed the finding of the trial court on the matter. (p. 3149 H/ 3151 H)

NOTABLE POINTS OF INTEREST

ONNOGHEN JSC

1. Need for lawyers to adopt litigation approach that saves time and finance

Once again we are faced with a very unfortunate situation in which an

action commenced in February 1997 is yet to go beyond the stage of pleadings ten years after, due to interlocutory appeals on interim order of injunction. In the instant case, appellant kept on changing his case as to why the ex parte order of injunction ought to be discharged from one court to the other. Meanwhile the substantive action still pends at the Federal High Court, Enugu when it would have benefited both parties if all the money and energy expended in pursuing the worthless appeals had been directed at the hearing and determination of the substantive action. Legal practitioners need to review their approach to legal practice particularly in company matters since the economy of Nigeria currently is private sector driven and needs our support and encouragement to create and sustain an enabling environment for it to grow properly. (p. 3152 C)

TOBIJSC

2. Purpose of granting interim order of injunction

The purpose or object of granting an order of interim injunction is to make sure that the subject matter of the litigation is kept in status quo pending or until the litigation. It is to maintain the *status quo* between the parties. Accordingly, the order must be restricted or limited to the preservation of the *res* pending the determination of the motion on notice. It is to protect the existing legal right of the applicant from being destroyed or annihilated. It is aimed at meeting a situation of real urgency or emergency before the respondent can be put on notice. (p. 3153 E)

3. Factors court must consider in an application for interm injunction

In an application for granting an order of interim injunction, the court must take into consideration the following: (1) An applicant for interim injunction must have a legal right in the subject matter, which he seeks to prevent by the conduct of the defendant to violate. (2) There must exist a serious question or substantial issue or case to be tried. The courts should note that in the determination of the strength of the applicant's case, the case law has moved from the earlier position that the plaintiff must show a strong *prima facie* case or a case of probability of success (see *Harman Pictures N.V. v. Osborne* (1967) 1 WLR 723; *Nigeria Civil*

Service Union v. Essien (1985) 3 NWLR (Pt. 12) 306) to whether there is a serious question or substantial issue or case to be tried: See *Cynamid v. Ethican Ltd.* (1975) AC 396; *Obeya Memorial Specialist Hospital Ayi-Onyama Family Limited v. Attorney-General of the Federation* (1987) 3 NWLR (Pt. 60) 325 (3) One of the most important principles is the preservation of the res which is the subject matter of the suit. (4) In the application, the court must consider the balance of convenience, the opposite of the balance of inconvenience. (5) For an interim injunction to be granted, the applicant must show the existence of a real urgency and not a caricature of it. (6) Interim injunction can only be granted in cases of emergency. It should be noted that the word “emergency” is not synonymous with “urgency”. While emergency means an unforeseen event or condition requiring a prompt action, urgency, in its adjectival variant, means calling for immediate attention. (p. 3153 G) ... *etc. see p. 3154 D*

CASES REFERRED TO

Kotoye vs CBN (1989) 1 NWLR (pt. 98) 419

Akibu vs Oduntan (1991) 2 NWLR (pt.171) 1 at 3

Akapo vs Hakeem -Habeeb (1992) 6 NWLR (pt. 247) 266 - 289

Ojukwu vs Governor of Lagos State (1986) 3 NWLR (pt 26) 39

Ajewole vs Adetimo (1996) 2 NWLR (pt. 431) 391 at 400 - 401

Jadesinmi vs Okotie - Eboh, (1996) 2 NWLR (pt. 429) 128 at 144

Sheneka vs Smith (1964) 1 All NLR 168

Okechukwu vs Okechukwu (1989) 3 NWLR (pt. 108) 234 at 246

Harman Pictures N.V. v. Osborne (1967) 1 WLR 723

Nigeria Civil Service Union v. Essien (1985) 3 NWLR (Pt. 12) 306)

Cynamid v. Ethican Ltd. (1975) AC 396

Obeya Memorial Specialist Hospital Ayi-Onyama Family Limited v. Attorney-General of the Federation (1987) 3 NWLR (Pt. 60) 325

Magdalen College Oxford v. Ward 1839 47 E.R. 849

LEAD JUDGMENT BY ONNOGHEN JSC

This is an appeal against the judgment of the Court of Appeal holden at Enugu in appeal No. CA/E/58/99 delivered on the 6th day of May, 2001

in which the court dismissed the appeal of the appellants and affirmed the decision of the trial court refusing to set aside or discharge the ex parte order made on the 27th day of February, 1997.

It is not disputed that the respondent is a customer of the 1st appellant by virtue of which it was granted various credit facilities by the 1st appellant on request. As security for the various facilities, the respondent executed a deed of legal mortgage, exhibit D2, over its' estate at NKPOR - OBOSI Road, Onitsha. The respondent also executed an all assets debenture wherein it charged all its assets both present and future, including but not limiting to floating assets as security for the loan. Exhibits D11 and D12 are the all assets Debenture and the certificate of registration of the said debenture at the Corporate Affairs Commission respectively.

When the respondent failed to liquidate the indebtedness, the 1st appellant, in exercise of the powers conferred on it by clause 5 of Exhibit D11, appointed the 2nd and 3rd appellants as receivers/managers over all the assets and management of the respondent's business, vide exhibit D19 which appointment was duly registered with the Corporate Affairs Commission vide exhibit 20. The 2nd and 3rd appellants took over the management of the assets and business of the respondent, according to the appellants, on the 20th day of February, 1997.

On the 26th day of February, 1997, the respondent instituted an action at the Federal High Court holden at Enugu in suit No. FHC/AN/11/97 against the appellants in which it claimed the following reliefs:-

“(1) A DECLARATION that the Deed of Debenture dated the 11th of December 1995 is invalid, null and void AND THAT the consequent appointment of the 2nd and 3rd defendants as Receiver/Manager of the plaintiff company is invalid, null and void and of no effect whatsoever.

(2) A DECLARATION that the said Deed of Debenture, even if valid, does not incorporate a legal mortgage over plaintiff's landed properties, if any.

(3) A DECLARATION that the said Deed of Debenture, even if valid, does not cover the landed properties situate at Agulu in Anaocha Local Government Area and No. 5 Udodi Crescent Omoba Phase II,

Onitsha both in Anambra State, in that neither is the property of the plaintiff company.

(4) *DAMAGES against the Defendants jointly and severally.*

AN ORDER of perpetual injunction restraining the Defendants, their officers, servants, agents/privies or any of them or otherwise howsoever from interfering or inter-meddling with and/or disrupting howsoever the management the plaintiff company of its affairs."

Along with the writ of summons the respondent filed a motion ex parte praying the court for, inter alia, the following orders:-

"1. AN ORDER of interim injunction restraining the Defendants, their agents and/or privies jointly and severally from further trespassing and/or interfering with assets, business and operations of the plaintiff/applicant pending the determination of the Motion on Notice filed in the suit.

2. AN ORDER of interim injunction restraining the Respondents, their agents/privies jointly and severally from further trespassing on the premises at Agulu in Anaocha Local Government Area and No. 5 Udodi Crescent, Omoba, Phase II, Onitsha, both in Anambra State, which properties do not belong to the Plaintiff/Applicant, and in any case are not covered by the Deed of Debenture on the strength of which the Defendants/Respondent purported to have acted pending the determination of the Motion of Notice filed therein.

3. AN ORDER of interim injunction restraining the Defendants/Respondents, their agents and/or privies jointly and severally howsoever from continuing to threaten the operations of the plaintiff's business and assets pending the determination of the motion on Notice."

The ex parte motion was supported by an affidavit of 32 paragraphs and many exhibits. The trial court, after due consideration, granted the orders, on 27/2/97.

On the 20th day of March, 1997, the appellants, as defendants, filed a motion on Notice before the trial court for the following orders:-

"1. An order extending the time within which the Defendants/Applicants may apply for a discharge of the order of interim injunction granted by this Honourable Court on 29 (sic) February, 1997 in favour

of the Plaintiff/Respondent.

2. *An order discharging the order of interim order granted on the 27th February, 1997 by the Honourable Court.*”

The grounds on which the application to discharge the order are based are stated to be:

“(a) *The plaintiff suppressed material facts in obtaining the order.*

(b) *There is no matter of urgency for which the order was obtained.*

(c) *The plaintiff did not give undertaking as to damages.*

(d) *The order was obtained mala fide.*”

The application was supported by a 50 paragraphed affidavit. In a considered ruling delivered by the trial court on the 27th day of January 1998, the court refused the application by dismissing same, thereby giving rise, to the appeal to the Court of Appeal holden at Enugu which was dismissed resulting in the instant further appeal to The Supreme Court.

In the appellants’ brief of argument filed on 22/4/02 and adopted in argument of the appeal by learned Counsel for the appellants MOGBEYI SAGAY, Esq, the following issues have been identified for determination:-

“1 *Whether on the available facts, the Court of Appeal was right in dismissing the Appellants’ Appeal therefore refusing to discharge the order of interim injunction granted ex parte against the Appellants.*

2. *Whether it was proper for the Court of Appeal to affirm the decision of the Learned Trial Judge exercising his discretion in favour of not discharging the order of interim injunction granted ex parte against the Appellants.*”

On the other hand, learned Senior Leading Counsel for the respondent, Prof. B.O. NWABUEZE SAN, has, in the respondent’s brief of argument filed on 19/11/02, identified the following four issues for determination:

“(A) *Whether the execution of the legal Mortgage over the Plaintiff/Respondent’s land in NKPOR/OBOSI Road; the execution of the Deed of Debenture over the Plaintiff’s/Respondent’s business-and assets at No. 5 Udodi Crescent, Onitsha and the appointment of the 2nd and 3rd*

appellant's as Receivers/Managers under the said Deed of Debenture deprived the plaintiff/respondent of all "recognizable legal right" in the property, business and assets aforementioned and consequently of locus standi to institute the present suit.

(B) Whether there was real urgency to justify the ex parte interim injunction granted to the plaintiff/respondent by the trial court and that court's refusal of the appellants' application for the discharge of the ex parte interim injunction as well as the affirmation by the Court of Appeal of the trial Court's Ruling on the application.

(C) Whether the appellants' invasion of the plaintiff/respondent's business premises with 30 armed men on 20/2/97 and their continued interferences with the said premises, business and assets after a suit of an injunction was filed on 26/2/97 and an interim restraining order was made on 27/2/97, even assuming the order to have been wrongly made, do not disentitle the appellants to pray the court for a discharge of the order.

(D) Whether the appeal is not fatally flawed by manifold inaccuracies and confusion in ideas in the appellants brief as well as by its unintelligible and unseeing language."

Learned Senior Counsel for the respondent then called on the court to discountenance arguments of learned Counsel for the appellants on, what counsel referred to as non-issues because -

"(i) there was no averment in support of them in the appellants' affidavit (which was the only evidence produced by them in support of their application for the discharge of the interim injunctive order) and

(ii) the questions were not raised by the appellants nor canvassed by the parties during the hearing of the application for the discharge of the order, and were not considered in the trial Court's Ruling"

Learned Counsel then identified the alleged non - issues to be the following:-

"(E) Whether the acts restrained by the ex parte interim injunction had been completed or not completed at the time the restraining order was granted;

(F) Whether there had been suppression or nondisclosure of cer-

tain facts mentioned in the appellants' Brief of Argument filed in the Supreme Court."

It should be noted, as a preliminary matter, that learned Counsel for the appellants has submitted in the Reply brief filed on 12/12/06 that respondent's issues (a), (c) and (d) are incompetent as they do not arise from the decision of the Court of Appeal and that the respondent cannot raise them without the leave of court; that a ground of appeal or a point of law not raised in the court below may, with the leave of the appeal court, be raised for the first time on appeal where:

(a) the new ground involves a substantial point of law and it is plain that no further evidence is needed for a decision on it, relying on *Sheneka vs Smith* (1964) 1 All NLR 168;

(b) a point of law not taken in the court below, but raised for the first time in appellate court can be entertained by the appellate court if it is satisfied that the evidence upon which it is required to decide the point is on record and that such evidence on record is sufficient to sustain the new point, and that the respondent could not have called evidence in rebuttal;

(c) where the new point goes to the existence of the suit, and,

(d) the appellant is also required to change his argument if the evidence of the new point is on record; relying on *Jadesinmi vs Okotie - Eboh*, (1996) 2 NWLR (pt. 429) 128 at 144.

However, **turning to the issues as formulated by learned Counsel for the respondent, I wish to mention the fact that the respondent has not cross appealed in this matter. Yet while the appellant submitted two issues for determination, the respondent submitted four issues. It is settled law that issues for determination in an appeal must be distilled from the grounds of appeal filed in the appeal which grounds of appeal must be complaints against the ratio decidendi in the case. In other words, issues for determination in an appeal are not formulated from the evidence before the lower court and/or the applicable law thereto where there is or are no grounds of appeal attacking such evidence, findings or errors in law. In the instant case, I have gone through the grounds of appeal,**

as filed in this matter and I agree with the submission of learned Counsel for the appellants that respondent's issues (a), (c) and (d) do not arise for determination having regard to the grounds of appeal vis-a-vis the decision of the Court of Appeal and are consequently discountenanced and it does not matter whether learned Counsel for the appellants argued them in his brief of argument. It must be remembered always that the grounds on which learned Counsel urged, the trial court to discharge the ex parte interim order of injunction are as earlier reproduced in the judgment and that it was on the basis of those grounds and the facts in support thereof that the trial judge exercised his discretion not to discharge the order. The appeal to the Court of Appeal is based on the refusal of the trial court to discharge the order having regards to the facts in support and applicable law thereto. No party is allowed to change his case per court. It is also settled law that where fresh point(s) of law or issue(s) is/are to be argued for the first time on appeal, the leave of either the lower court or the appellate court is required without which the issue(s) or point(s) of law would be incompetent particularly where the issue(s)/or point(s) of law do(es) not affect the jurisdiction of the lower court to entertain and determine the matter before it, as in the instant case.

In this judgment, I will limit myself to the two main issues as formulated by learned Counsel for the appellants and any such subsidiary issue(s) as may arise having regards to the grounds of appeal. I need to comment on the fact that this is really a simple matter which had been blown out of proportion by both counsel who have filed copious briefs on multiple issues and/or subsidiary issues on the simple question as to whether or not the trial court exercised its discretion judiciously and judicially when it refused to discharge the ex parte order of interim injunction which was the main issue before the Court of Appeal, and whether the Court of Appeal was right in affirming the decision of the trial court refusing to discharge the said ex parte order of interim injunction, which should be the primary issue for determination by this Court. When one bears the above observations in mind, it becomes very clear that appellants' two issues are really not two but one issue which is also in line with

what I had earlier stated as expected of an appeal of this nature.

However, in arguing issue No. 1, learned Counsel for the appellants submitted that it is settled law that injunction is granted to protect existing legal rights or recognizable right of a person from unlawful invasion by another and that where there is no such right, the order ought not to be granted, for which counsel cited and relied on the case of *Akibu vs Oduntan* (1991) 2 NWLR (pt.171) 1 at 3; that the Court of Appeal ought to have discharged the interim order as there was no recognizable right of the respondent to be protected at the time of making the order on 27/2/97 relying on *Akapo vs Hakeem -Habeeb* (1992) 6 NWLR (pt. 247) 266 - 289; *Ojukwu vs Governor of Lagos State* (1986) 3 NWLR (pt 26) 39; *Obeya Memorial Hospital vs A-G of the Federation* (1987) 3 NWLR (pt. 60) 325; that the absence of any legal right in the respondent worthy of any protection is the result of the appointment of the 2nd and 3rd appellants as Receivers/Managers of the respondent thereby vesting the legal rights of the respondent in the properties in the 2nd and 3rd appellants leaving the respondent with no locus standi to institute the action; that the respondent did not establish, by affidavit evidence the urgency needed for a grant of an ex parte order of injunction; that injunction is not a remedy for any act that has been completed, relying on *Ajewole vs Adetimo* (1996) 2 NWLR (pt. 431) 391 at 400 - 401 and urged the court to resolve -the issue in favour of the appellants.

It has to be pointed out once more that the grounds upon which learned Counsel for the appellants called upon the trial court to discharge its ex parte order of interim injunction are four; namely,

- (a) that the plaintiff/respondent suppressed material facts in obtaining the order;
- (b) there is no matter of urgency for which the order was obtained,
- (c) the plaintiff/respondent did not give undertaking as to damages, and
- (d) the order was obtained mala fide.

Upon the trial court's refusal to disengage the ex parte order and the consequent appeal to the Court of Appeal, the issues for determina-

tion before the Court of Appeal, as can be seen in the appellants' brief filed in that court at page 222 of the record are as follows:-

“(i) *Whether the learned trial judge was right in refusing to discharge the interim order of injunction dated 27/2/97?*

(ii) *Whether the court (sic) discretion to discharge the order was judiciously and judicially exercised?*” B

I have gone through the arguments of learned Counsel for the appellants in that brief of argument on the two issues, which were argued together, and it is very clear that the issues as to whether the ex parte order of injunction was granted after a completed act or to restrain a completed act, or lack of legal right in the respondent to be protected by the said ex parte order or locus standi of the respondent to apply for the said ex parte order or file the suit in the first instant were never raised and argued before the lower court neither did that court decide the said issues. The issues are therefore fresh issues or points of law being raised for the first time by the appellants before this Court. It is settled law that fresh points of law or issues cannot be raised for the first time on appeal without the leave of either the lower court or the appellate court. In the instant case, there is no evidence on record that the appellants obtained the leave of either the Court of Appeal or of this court before raising the issues in question thereby rendering the said issues or points of law incompetent and liable to be struck out. The issues are therefore discountenanced by me. C D E F

On the issue of lack of urgency for the ex parte order learned Counsel for the respondent submitted that there was real urgency and that the reasons given by the Court of Appeal for its decision on the issue cannot be faulted particularly as the take over of the respondent's premises was anything but peaceful; that the assets of the respondent were being sold or carted away by the 2nd and 3rd appellants; that the question as to whether there was sufficient time for an applicant to have put the respondent on notice has to be judged in relation to the facts of each case and that the facts and circumstances of this case justified the grant of the G H

order.

It is now settled law that the time relevant in determining urgency justifying the grant of ex parte interim order of injunction is the time between the happening of the event which is sought to be restrained and the date the application for an injunction could be heard if taken after due notice to the other side - see Kotoye vs CBN (1989) 1 NWLR (pt. 98) 419 per NNAEMEKA AGU, JSC. From the facts relevant to the issue as contained in the affidavits which were accepted by the lower courts, it is clear that the take over of the respondents business premises was on 20/2/97 and it was the event whose continuance the respondent sought to restrain by the ex parte order by an application filed on 26/2/97; there was a week-end between 20/2/97 and 26/2/97. From the record the action was filed in Enugu while the appellants were to be served in Lagos. In normal circumstances the law requires thirty days between service and hearing of the motion on notice outside jurisdiction and that service out of jurisdiction has to be with leave of court first had and obtained. I therefore agree with the Court of Appeal that having regards to the facts of the case it would have been impracticable to have put the appellants on notice without the risk that the respondent's business might be destroyed while the appellants remained in occupation of the premises and in control of its operations and assets. I therefore resolve the issue against the appellants.

On issue 2, learned Counsel for the appellants submitted that 'the Court of Appeal was wrong to have affirmed the decision of the trial court refusing to discharge the order of injunction when it was overwhelmingly posited that the respondent massively suppressed material facts and indeed misdirected the mind of the court into granting the ex parte injunction; that the respondent suppressed the fact that the Deed of Debenture was signed by the Chief Executive of the respondent; that the Deed of Debenture is very material to the case of the respondent; that though the respondent acknowledged the appointment of the 2nd & 3rd appellants as receivers/managers but suppressed the fact of what date the appointment took effect and when it became aware of such appoint-

ment when it exhibited the copy of the Deed of Appointment; that where an ex parte order of injunction is based on an important misstatement, the court should not hesitate to discharge the order at once, relying on Okechukwu vs Okechukwu (1989) 3 NWLR (pt. 108) 234 at 246, and urged the court to resolve the issue in favour of the appellants. B

On his part, learned Senior Counsel for the respondent submitted that the facts relied upon by counsel for the appellants in making the submission of suppression of facts are contrary to the facts deposed to in paragraphs 7, 9, 10; 11, 12 and 15 at pages 84, 85 and 86 of the record, of their affidavit; that the said depositions relate to the amount C which the appellants claimed the respondent was indebted to it, the nature of the facility from which the debt arose (whether loan, overdraft, letter of credit, etc), the security for the facility, how or by whom the facility was granted; that the trial court was right in holding that the D alleged suppressed facts were irrelevant to the application; that there was no evidence to the fact that the respondent did not disclose the existence, of a Deed of Debenture neither was the issue raised before the trial court which therefore had no opportunity of deciding it; that the issue cannot E now be raised before the Supreme Court.

In any event learned counsel submitted that a party cannot be said to have suppressed a fact of the existence of a document which he has exhibited before the court (exhibit BON 8); that the pleas of non est F factum raised in paragraph 19 of the respondent's affidavit is a well known defence at common law, which allows a person to say that a deed bearing his signature is not, in fact, executed by him because his signature on it was obtained by duress, undue influence, intimidation, etc; that all the G instances listed as constituting suppression of material facts were not covered by the affidavit evidence before the court neither were they raised before the trial court which consequently never preferred any opinion thereon and that this Court should discountenance them; that the determination of what facts are material in an application for an interim injunction must have regard to the claims in the substantive suit and urged the H court to resolve the issue against the appellants.

It is settled law that the court that makes an ex parte order

of interim, injunction has the inherent power or jurisdiction in an appropriate case to vary or discharge same. The grounds on which the court will set aside, vary or discharge an order of interim injunction made ex parte include the following:-

- B (i) if the plaintiff has not used his administrative powers that might have resolved the difficulty;**
- (ii) if default has been made in giving security for costs;**
- (iii) if the affidavit has not been filed when the injunction was moved for;**
- C (iv) if it was granted on a suppression or misrepresentation of material facts;**
- (v) if it was irregularly granted;**
- (vi) if the plaintiff failed to attend to be cross examined;**
- D (vii) If there had been delay in complying with an undertaking to amend the writ by adding a party as plaintiff;**
- (viii) if there is non-disclosure of material facts.**

It is no excuse for the plaintiff or a party to say that he was not aware of the importance of the facts which have been suppressed or not brought to the attention of the court. The law is that the court will deal strictly, with a party applying ex parte and who had misrepresented or suppressed material facts.

F Applying the above principles to the facts of the case, the learned trial judge at pages 203 to 204 held thus:

“In as much as the plaintiff’s claim is as regards the validity of the said Deed of Debenture dated 11-12-95, the plaintiff must confine itself to that claim and no v more. The defendants and the court cannot go beyond the plaintiff’s claim. The plaintiff does not have to plead or exhibit all the documents required to prove his case, it is sufficient if he exhibits the main document on which his claim revolves, at this interlocutory stage. Therefore, all the documents which the plaintiff was alleged to have suppressed from the court, are not relevant or material to the claim of the plaintiff, hence no case of suppression of material facts, has been established…….”

On its part the Court of Appeal, in its judgment at pages 280 to 281

of the record, held as follows; with regards to the issue of suppression of material facts:-

“The question of whether the respondent suppressed or misrepresented material facts that influenced the granting to it of the injunctive orders treads on the borderline of the substantive and interlocutory stage of the action. To which side of the divide the question swings will depend on the nature of the facts suppressed or misrepresented and the materiality of the facts in the sequence of occurrence that triggered off the supplication. What is advanced by the appellants as suppression or misrepresentation of facts is the validity of the Debenture Deed which is a springboard for the take over of the respondent’s business. That is a question that must be settled at the trial of the substantive action. The fall out of the take over is what led to the temporary relief of an interim injunction to contain injury or damage that was engendered by the take over. Therefore whether the respondent suppressed or misrepresented facts about the validity of the Debenture Deed belongs to the sphere of the substantive action. It is not necessary to consider it in examining the merit of the interlocutory relief. What fell to be considered in the respondent’s application was whether there had been established an injury of the magnitude justifying the relief sought and how to contain the damage or injury done to respondent’s business as a result of the take over.”

The validity of the Debenture Deed would decide the key issue of whether the take over of the respondent’s assets and management of its business is justified and the forum for that deliberation is the trial of the substantive action. That being the case to consider at the stage, of an interlocutory application in the proceedings any question about the validity of the Debenture Deed is to anticipate the very issue that is the core of the dispute in the action. What called for consideration in the interlocutory application before the trial court was how best to salvage the respondent’s business which from the evidence believed by the court had gone into a sudden nose dive leaving the more fundamental question of whether the take over was justified which is bound up with the validity of the Debenture Deed to be determined in the substantive action.”

I had earlier in this judgment reproduced the reliefs claimed

in the writ of summons which clearly vindicates the views held by the lower courts as to the substantive claim before the court and the materiality of the alleged suppressed or misrepresented facts to the said claim rather than to the grant of the ex parte application for an order of interim injunction. I have no hesitation whatsoever in coming to the conclusion that the Court of Appeal was right in holding as it did. I therefore have no reason to disturb that holding which in effect affirmed the finding of the trial court on the matter.

Once again we are faced with a very unfortunate situation in which an action commenced in February 1997 is yet to go beyond the stage of pleadings ten years after, due to interlocutory appeals on interim order of injunction. In the instant case, appellant kept on changing his case as to why the ex parte order of injunction ought to be discharged from one court to the other. Meanwhile the substantive action still pends at the Federal High Court, Enugu when it would have benefited both parties if all the money and energy expended in pursuing the worthless appeals had been directed at the hearing and determination of the substantive action. Legal practitioners need to review their approach to legal practice particularly in company matters since the economy of Nigeria currently is private sector driven and needs our support and encouragement to create and sustain an enabling environment for it to grow properly.

In conclusion, I find no merit whatsoever in this appeal which is accordingly dismissed with N10,000. 00 costs in favour of the respondent.

Appeal dismissed

TOBI JSC

This appeal arises because of the refusal of the two lower courts to discharge an order of interim injunction made or granted *ex parte* by the High Court. The respondent was indebted to the 1st appellant. The respondent was unable to liquidate its indebtedness. This resulted in the 1st appellant appointing the 2nd and 3rd appellants as Receivers/Managers

over all the assets and management of the respondent's business. The respondent filed an action at the Federal High Court Enugu against the appellants. The action was accompanied by a motion *ex parte* for interim injunction. The learned trial Judge granted the order of interim injunction. That was on 27th February, 1997. Appellants filed a motion B for the discharge of the order of interim injunction. The learned trial Judge refused to do so. An appeal to the Court of Appeal was dismissed. This is a further appeal to this court.

Learned counsel for the appellants submitted that the order of interim injunction ought to have been discharged because there was no cognizable legal right of the respondent at the time the injunction was issued on 27th February, 1997. He argued that the respondent had no *locus standi* to seek an injunctive redress. Counsel submitted that in the circumstances of the case, the Court of Appeal was wrong in affirming D the decision of the High Court. On the contrary, learned counsel for the respondent submitted that the High Court was right in refusing the application to discharge its interim order and that the Court of Appeal rightly dismissed the appeal. E

The purpose or object of granting an order of interim injunction is to make sure that the subject matter of the litigation is kept in status quo pending or until the litigation. It is to maintain the *status quo* between the parties. Accordingly, the order must be restricted or limited to the preservation of the *res* pending the determination of the motion on notice. It is F to protect the existing legal right of the applicant from being destroyed or annihilated. It is aimed at meeting a situation of real urgency or emergency before the respondent can be put on notice.

In an application for granting an order of interim injunction, the G court must take into consideration the following: (1) An applicant for interim injunction must have a legal right in the subject matter, which he seeks to prevent by the conduct of the defendant to violate. (2) There must exist a serious question or substantial issue or case to be tried. The H courts should note that in the determination of the strength of the applicant's case, the case law has moved from the earlier position that the plaintiff must show a strong *prima facie* case or a case of probability of

success (see *Harman Pictures N.V. v. Osborne* (1967) 1 WLR 723; *Nigeria Civil Service Union v. Essien* (1985) 3 NWLR (Pt. 12) 306) to whether there is a serious question or substantial issue or case to be tried: See *Cynamid v. Ethican Ltd.* (1975) AC 396; *Obeya Memorial Specialist Hospital Ayi-Onyama Family Limited v. Attorney-General of the Federation* (1987) 3 NWLR (Pt. 60) 325 (3) One of the most important principles is the preservation of the res which is the subject matter of the suit. (4) In the application, the court must consider the balance of convenience, the opposite of the balance of inconvenience. (5) For an interim injunction to be granted, the applicant must show the existence of a real urgency and not a caricature of it. (6) Interim injunction can only be granted in cases of emergency. It should be noted that the word “emergency” is not synonymous with “urgency”. While emergency means an unforeseen event or condition requiring a prompt action, urgency, in its adjectival variant, means calling for immediate attention. (7) The applicant must not delay in bringing, the application: It is a loud doctrine of equity that delay defeats equity. Since interim injunction is by and large an equitable remedy or relief, delay in making the application will certainly defeat it, because the element of urgency, the very essence and basis of the application, is gone. (8) There must be a subsisting action and relief to found an application for interim injunction. Evidently, an application for interim injunction postulates that the applicant has a right the violation of which he seeks to prevent and in order to do so effectively, to ensure at that stage of the proceedings that the subject matter of the right be maintained in status quo. (9) The court must consider the gravity of injury and the fact that the loss is irreparable. (10) The applicant must establish or show that it is virtually or practically impossible to bring a motion on notice, considering the compelling sudden events: (11) The applicant must show that the award of damages will not be adequate or enough to compensate him. (12) A mere allegation of threat to peace is not enough to grant an application for interim injunction. An applicant should go beyond mere allegation of threat to peace to substantial overt acts of such threat. (13) The omnibus principle is the existence of special circumstances. This includes quite a number of the principles examined,

above, and more particularly, those mentioned in Kotoye v. CBN (1989) 1 NWLR (Pt. 98) 419. (14) The granting of an interim injunction is not a matter of course or routine, slavishly following an application. The court must take into consideration the above principles .in their relevance to the facts of the case.

I should now apply the above in their relevance to the facts of this case. I should say right away that the relevant principles are those of urgency, delay and why the appellant was not put on notice. I will take them *seriatim*. On the principle of urgency, the Court of Appeal said at pages 276 and 277 of the Record:

“Paragraphs 3b, 3c, 3d, 4 and 5 of Affidavit of Urgency are an abridgment of paragraphs 17-18 and 21-27 of the affidavit supporting the ex parte motion for injunction at pages 7-8 of the record of this appeal. They give a description of some bizarre happenings on the respondent’s premises at No. 3 Udodi Crescent, Onitsha, on 20/2/97. There is no coherent denial of the allegations by the appellants in the 50-paragraph affidavit supporting their motion to discharge the injunction orders... The above portrayal of the situation in the respondent’s business establishment following the take over of the business by the appellants is the very antithesis of calm and serenity. It is a short step from anarchy which is a forerunner of a state of emergency and it will betaking a perverse view of such an explosive turn of events to describe the situation as anything but grave. Therefore, the submission by learned counsel for the appellants that there was no urgent situation on 27/2/97 when the orders of injunction were made by the court below is a wild flight of fancy that ignores the reality of the situation. It is an affront to rationality; indeed, an escape into the cocoon of make-believe.”

On the principle of delay, the Court gave credence to the following submission by the Senior Advocate for the respondent:

“The intervals between the take over on 20/2/97 and 26/2/97 when the respondent took out the writ are inconsequential to amount to a delay considering the fact that the take over took place on Thursday with an intervening weekend leaving only 2 days of ensuing week for the respondent to contemplate the recourse that would be efficacious and ef-

fectuate it.”

Drawing from the above, the Court of Appeal concluded at page 278:

B *“To my judgment, the excuse is tenable and I do not find the time-lag of 6 days punctuated by a week-end to be an inexcusable delay even where it is considered to be a delay by aggregating the number of days.”*

On why a motion on notice was not served on the respondent, the Court of Appeal said at page 278 of the Record and I will quote the Court *in extenso*:

C *“With regard to the third question, the contention of learned counsel for the applicants that failure of the respondent to put the appellants on notice of its motion is inexcusable because there, was enough time for the respondent to do so was met by the respondent’s rejoinder that as the*
D *appellants were shown to be living on various addresses, and at different locations in Lagos outside Anambra State it was not practicable to put them on notice within the time required to ward off the threat faced by the respondent.*

E *The appellants did not rebut the respondent’s claim on page 9 of the Respondent’s Brief of Argument that the appellants lived in Lagos at the time material to the service. From the finding on question, one the*
F *situation of near anarchy foisted on the respondent by the take over of its business calling for an urgent measure to combat the threat which, as learned Senior Advocate for the respondent submitted could only be effectively checked by an interim injunction. Therefore, time being of essence in warding off a deadly threat to the respondent’s business a situation arose which was created by the appellants themselves that the law*
G *excuses putting them on notice of the relief that could stave off the threat. Consequently, failure by the respondent to put the appellants on notice of its motion is dictated by the intrinsic nature of the remedial measure appropriate to the occasion and is therefore, excusable.”*

H *I think the Court of Appeal did a good job in this case. The arrest, seizure of the property and the presence of armed policemen and soldiers in the premises executing the arrest and seizure were signs, not only of breakdown of law and order, but also of instability and chaos. The social*

equilibrium was in disarray and ominous “war bells” were figuratively ringing in the air. There could not have been a better situation of urgency to invite and receive an order of interim injunction. The learned trial Judge, Kasim, J was therefore right in clamping the order on the appellant. From the state of things, every passing minute was important and urgent.

Dealing with delay in *Kotoye v. Central Bank of Nigeria*, supra, the Supreme Court said at page 440:

“So, if an incident which forms the basis of an application occurred long enough for the applicant to have given due notice of the application to the other side if he had acted promptly but he delays so much in bringing the application until there is not enough time to put the other side on notice, then there is a case of self-induced urgency, and not one of real urgency within the meaning of the law. This self-induced urgency will not warrant the granting of the application ex parte”

The operative expressions in *Kotoye* are “long enough” and “delays so much”. These expressions can only be given their proper meaning in the context of the facts of the case and not *in vacuo*. The length or period of delay can only be donated by the facts of the case. On the face value of the grammar or syntax of the two expressions, they may connote a longish period in the context of quite long, or lasting more than usual or more than is wished. The expressions must be given their relevant meaning in the law of interim injunction granted in an *ex parte* motion, vis-a-vis motion on notice. In that context, the expressions in *Kotoye* should not take or cover a longish period with the urgency characteristic of *ex parte* motion of interim injunction.

“The quarrel in this appeal is the period of six days. The appellants say that was too long a period. The respondent says that was not too long a period, considering the circumstances of the case, particularly the intervening weekend. I think I am with the respondent. There is an adequate explanation of the period of six days. I therefore agree with the Court of Appeal that there was no delay in bringing the application. And that takes me to the last one. An application *ex parte* for an interim injunction can only be brought in cases of extreme urgency where it is not

possible in reality to bring an application on notice. I think the respondent's explanation that the appellant lived in various addresses and at different locations in Lagos, outside Anambra State, is cogent and acceptable. The Court, of Appeal accepted that. I have no valid reason to reject
B it.

In sum, this appeal fails. I entirely agree with my learned brother, Onnoghen, JSC, that the appeal should be dismissed. I abide by the orders as to costs made by my learned brother.

C —————

OGUNTADE JSC

I have had the advantage of reading in draft a copy of the lead judgment by my learned brother Onnoghen JSC. He has exhaustively
D dealt with the issues in this appeal and I entirely agree with him. I adopt his reasoning and conclusion as mine. I would also dismiss this appeal as unmeritorious. I subscribe to the order on costs.

E —————

MUKHTAR JSC

After filing its writ of summons, the plaintiff, who is the respondent in appeal filed and moved a motion ex parte for:-

F *"1. AN ORDER of interim injunction restraining the Defendants, their agents and/or privies jointly and severally from further trespassing on or interfering with the assets, business and operations of the Plaintiff/Applicant pending the determination of the motion on Notice filed in this suit.*

G *2. AN ORDER of interim injunction restraining the Respondents, their agents/privies jointly and severally from further trespassing on the premises at Agulu in Aniocha Local Government Area and No 5 Udoji Crescent, Omaba , Onitsha, both in Anambra State, which properties do*
H *not belong to the Plaintiff/Applicant , and in any case are not covered by the Deed of Debenture on the strength of which the Defendants/Respondents purported to have acted pending the determination of the Motion on Notice filed therein.*

3. *AN ORDER of interim, injunction restraining the Defendants/ Respondents, their agents and/or privies jointly and severally however from continuing to threaten the operations of the plaintiffs business and assets pending the determination of the Motion on Notice.*”

The Chairman/Chief Executive of the plaintiff applicant company, B Chief Oliver Afamefuna swore to an affidavit in support of the motion. The interim order of injunction was, granted. A few days after the defendants filed an application to discharge the interim orders, supported by an affidavit. The application was refused, and the defendant appealed C to the Court of Appeal, Enugu division, but the appeal was dismissed. Again the defendant appealed to this court.

It has been argued in the appellants’ brief of argument that the plaintiff/respondent did not show or disclose urgency in the matter to warrant or justify the granting of an interim injunction. I disagree. If one D looks carefully at the supporting affidavit to the application for interim injunction, it will be discovered that some depositions have established that some element of urgency did exist. The salient depositions are:

“13. *That in spite of the above-mentioned mortgage executed in E favour of the 1st Defendant/Respondent, the Defendant/Respondent sometime in March 1996 seized and took possession of the drugs belonging to the Plaintiff/Applicant Company valued at N104,441,080.00 still in possession of same.....*” F

23. *That these drugs are still left unattended and will result in (sic) G the enormous losses if not attended to as soon as possible.*

25. *That several properties and assets found in the premises were carted away by the 2nd and 3rd Defendants who have since engaged in the sale and disposal of the said properties and the premises sealed by the Defendants.* G

26. *That the 2nd and 3rd Defendants/Respondent thereafter proceeded to Agulu factory located at Aniocha Local Government Area of Anambra State and removed all machineries found in the factory to an H unknown destination for sale and disposal of same.*

28. *That it is the fear of the plaintiff/applicant that if this order is not granted that the properties carted away by the Defendants would all*

be sold without any possibilities of getting them back.”

The above facts clearly set out the position of the defendants/ appellants’ properties in the possession of the respondent, their fate and the fear of the plaintiffs on the ultimate fate of the properties and the irreparable loss he is likely to suffer. Interim or ex parte injunction will usually be granted where delay caused by proceeding might involve irreparable loss, and where such situation exists the court might exercise its discretion in favour of the plaintiff. In the case of *Magdalen College Oxford v. Ward* 1839.47 E.R. 849, Lord Langdale M.R. in granting an injunction ex parte made the following observation:-

“When application is made to me for such an injunction I am always disposed to accede to the application where little mischief can arise by the granting of the injunction ex parte and on the other hand irreparable injury may ensue were the injunction is refused.”

In the instant case if the learned trial judge had not granted the interim injunction the machines etc of the plaintiff/respondent would have been sold and the status quo would not have been preserved. The result would have been that the respondent would have suffered serious injury.

The learned judge of the Federal High Court could not have been faulted for granting the interim injunction and for refusing to grant the application to discharge the said injunction. Consequently, the Enugu division of the Court of Appeal was right to affirm the ruling of the trial judge refusing to discharge the order of the interim injunction. The law is settled that a party who seeks to discharge an order of injunction must show the grounds on which it hinges its request. Grounds set out in *Halsbury’s laws of England* 4th Edition Reissue in paragraph 1021 at page 1021 are :-

- (1) If the plaintiffs have not used their administrative powers that might have resolved the difficulty.*
- (2) If default has been made in giving security for costs.*
- (3) If the affidavit had not been filed and an office copy obtained when the injunction was moved for;*
- (4) If it was granted on a suppression or misrepresentation of material facts, even if the injunction is about to expire. Failure to attend to*

be cross-examined, and delay in complying with an undertaking to amend the writ by adding a party as plaintiff, are also grounds for dissolution.”

These grounds have not been shown by the appellant. On a whole, the Court of Appeal was not wrong for dismissing the appeal before it. The court affirmed the ruling of the Federal High Court and correctly B found as follows:-

“Although not distinctly articulated in the Appellants’ Brief of Argument yet as an impact and factor to be considered in an application for an interim injunction I am satisfied that the convenience for granting the application weighed heavily in favour of the respondent as one, that C would suffer more hardship if the interim injunction was refused. That is because on the facts examined under question one of issue one the state of the respondent’s business that was shown to have gone into a sudden nosedive between 20/2/96 and 26/2/96 at the onset of its being taken D over by the appellants is a clear indication of the swing of the pendulum of convenience in favour of the respondent. See African Continental Bank Ltd. V. Awogboro, (1991) 2 NWLR (part 176) 711, 719 - 720.”

In the light of the above and the fuller reasoning in the lead judgment of my learned brother Onnoghen JSC, I also dismiss the appeal. It is unmeritorious and it lacks substance. I abide by the consequential orders made in the lead judgment.

F

CHUKWUMA-ENEH JSC

I have read in advance the judgment prepared by my learned brother Onnoghen JSC in this matter and I agree with him that the ex parte interim order granted in this matter by the Federal High Court Enugu and as affirmed by the Court below should not for good reasons be discharged. I therefore dismiss the appeal, and abide by the orders made in the lead judgment.

H