

SUPREME COURT OF NIGERIA
8TH FEBRUARY, 2008. SC. 296/2000
CORAM:- A. I. KATSINA-ALU, A. M. MUKHTAR,
M. MOHAMMED, F. F. TABAI,
C. M. CHUKWUMA-ENEH, JJSC

DUWIN PHARMACEUTICAL
AND CHEMICAL COMPANY LTD APPELLANT
AND

1. BENEKS PHARMACEUTICAL
AND COSMETICS LTD

2. BENEKS PHARMACEUTICALS LTD RESPONDENTS

3. MR. BENEDICT AMUTA

(Sued on their behalf and
as representing others)

APPEALS - Issues - Proliferation - Bases and source of an issue - Must be from grounds of appeal - Issues should not out number grounds of appeal - Or Court may re-frame the issues (H1)

APPEALS - Issues - Re-framing by Court - Relationship with the grounds of appeal - Though appellant's issues could have been determined by Court of Appeal - Re-framing of the issues by that court - Will not be condemned - Since it can do so in law (H2)

ACTIONS - Self help - Reliefs sought vide motion ex parte - Having been granted by court orders - Reporting the matter to police is abuse of court's process - And self help which courts will not tolerate (H3)

COURTS - Abuse of process - Order of court - That petition to police be withdrawn was not obeyed - Appellant's step in this case - Is not one of maintenance of a civil suit - Based upon an offence that has not been disposed of - But an abuse of Court's process (H4)

INTERLOCUTORY APPLICATIONS - Injunctions - Merit of the matter - Should not be gone into - Lest there be nothing left to be deter-

COURTS - Interlocutory matters - Discretion of trial court - Where exercised judicially and judiciously - Appellate court will not interfere (H6)

FACTS

Before the Federal High Court Lagos, the plaintiff/appellant filed an action against the defendants/respondents. Appellant claimed inter alia, an injunction restraining respondents from infringing its registered trade marks, Movate gel, Movate, etc. It filed a motion ex parte, and a motion on notice seeking interim injunction pending the determination of the substantive suit. The trial court after hearing the motion ex parte made some orders restraining respondents from passing off, manufacturing or infringing appellant's registered trade marks afore mentioned.

Respondents filed a motion praying that the interim order be discharged. Meanwhile, trial court learned that appellant reported the same case to the police leading to arrest and release of 3rd respondent on bail. Trial court's order that the case be withdrawn from the police was not obeyed by the appellant. This report to the police was deprecated by the court as self help and abuse of court's process. The interim order against respondents was vacated after hearing both parties' motions on notice. Accelerated hearing of the main suit was ordered by the court. Appellant's appeal to the Court of Appeal was dismissed. Still dissatisfied, it has further appealed to the Supreme Court against lower court's affirmation of the vacation of the interim order against respondents.

ISSUES FOR DETERMINATION

"(1) Whether by not determining all the issues arising and submitted to it by the appellant as arising from its grounds of appeal for determination in the appeal, the Court of Appeal did not deny the appellant (its right to) a fair hearing of its appeal?

(2) Whether the Court of Appeal was right in holding that the appellant's resort to a police investigation of a crime in the circumstance was a resort to self-help and aimed at ridiculing the court and justified the vacation of the interim injunction by the learned trial

judge?

(3) Whether the Court of Appeal should not have interfered with the discretion exercised by the Federal High Court in respect of the appellant's Motion for interlocutory injunction and exercised its powers under Section 16 of the Court of Appeal Act to rehear and grant the said interlocutory injunction?"

HELD (Unanimously dismissing the appeal per **MUKHTAR JSC**)
APPEALS - Issues - Proliferation

1. It has been pronounced in many cases by appellate courts that issues formulated for determination must not out number the grounds of appeal, for each issue is supposed to have its base and source from a ground or grounds of appeal. Once issues exceed the grounds of appeal there is danger that some of the issues are outside the grounds of appeal, and therefore not related to each other. Grounds of appeal cannot be subsumed from main grounds to accommodate issues. That is why ideally an issue must be distilled from a ground or grounds of appeal. The position of the law is that an issue must derive its source from a ground of appeal, and an issue that does not so relate will not be tolerated. Whereas, the converse situation is allowed i.e. an issue can cover more than a ground of appeal, the present situation has no place in our legal system. Proliferations of issues are discouraged. This situation, I believe contributed to and informed the step taken by the learned Justice of the Court of Appeal to reframe his own issues, for he had in his judgment, before refraining the issues said:-

"Through a plethora of decisions this court and the Supreme Court have said that issues formulated by parties must flow from the grounds of appeal filed and such issues must not out number the grounds of appeal. The issues raised by the respondent would seem to out-number the grounds of appeal; they are however interwoven and repetitive. (p. 789 D)

APPEALS - Issues - Re-framing by Court

2. It is a relief that the learned counsel for the appellant has not contested the power of the court below to frame or reframe issues, for authorities abound that a court is empowered to frame issues

where it is of the opinion that the issues formulated by counsel are not succinct or suffer some inadequacies. I do not also loose sight of the argument of learned counsel for the appellant that the lower court could or should have considered the issues of the appellant. I suppose he has a point there, the issues being only five and in tandem with the grounds of appeal, but then the pertinent question here is, are the issues appropriate and do they flow from the grounds of appeal? In the first place, the grounds of appeal in the amended notice of appeal were five (as are reproduced above), and so the five issues raised in the appellant's brief of argument correlates with the five grounds of appeal, and at a careful study of both issues and grounds of appeal it could be said to be related to the grounds of appeal. There are however some overlapping in the issues, but then since the learned justice was at liberty to reframe the issues for determination, there is no reason to condemn the procedure adopted by him as long as the issues flow from the grounds of appeal. It is very clear that reframed issue (I) supra is distilled and flows from grounds (4) and (5) of appeal. Issue (2) is covered by grounds (1) and (2) of appeal, and the third issue is distilled from ground (3) of appeal. So in as far as the law is concerned the issues are competent and are issues that can be treated to determine the appeal, as they were in controversy. The situation in the authorities cited by the learned counsel for the appellant are distinguishable from the present case, so I fail to see that the lower court erred in reframing the issues upon which the determination of the appeal was based. (p. 790 F)

ACTIONS - Self help

3. It is disturbing that the appellant after obtaining the above orders should proceed to petition the police on the same matter. Order (b) supra as can be understood was restraining the respondents from inter-alia manufacturing the product in controversy, and so should cover whatever the appellant deemed to be the respondents interference with the product in controversy, albeit adulteration of the product. The argument of learned counsel for the appellant that the report lodged to the police was on adulteration of the product does not reduce the gravity and consequence of the action of seeking police intervention and self-help. The argument is not at all persuasive.

The appellant sought the court's intervention, and the court adequately intervened by giving the reliefs and orders sought, but then the appellant has proved that that was not enough for it was not satisfied, but resorted to self help. This action definitely was contrary to the principle that a litigant will not abuse a court's process that is already in existence by resorting to self-help, and the courts will not tolerate such action or abuse. The learned trial judge in his judgment after dealing with this issue of reporting the matter that was pending in court to the police, (rightly in my view) made this finding:-

"The fact that the complaint to the police was made simultaneously with the filing of the present suit in my view amount to an abuse of the judicial process of this court".

This finding having been made an issue of complaint was thrashed out by the lower in its judgment which reads:-

"A resort to police investigation as done by the appellant is some what a resort to self-help. Weighed against the background that no report was made to the court of any disobedience of its order, it seems to me that the action of the appellant is one aimed at bringing the court to ridicule. It is intolerable under rule of law".

I completely endorse the above finding affirming the trial court's decision. (p. 793 B)

COURTS - Abuse of process - Order of court

4. The fact that the appellant complied with the order of the court to withdraw its petition was negated by learned trial court in its judgment where it said:-

"Although the applicant has informed this court that he has on the order of this court taken steps to withdraw the complaint but as at today the matter is still with the police."

The rule in the case of *Smith v. Selwyn* (1914) 3 K.B. page 98, is not evocable within the context of this case. The reliance on Section 6 of the 1979 Constitution, and Section 230, 1979 Constitution, Amendment Decree 107, 1993, and the cases of *A. G. Federation v Dawodu* (1995) 2 NWLR part 380 page 712, and *Veritas Insurance Co. Limited v. Citi Trust Investment* (1993) 3 NWLR part 281 page 349 are not of assistance to the appellant as far as this issue and discussion is concerned, as the circumstances of these cases are

distinguishable from the present case. What is at stake here is the propriety of the appellant seeking police intervention after it has obtained an order of the court. The complaint here revolves around the abuse of court process, not the maintenance of a civil suit based upon an offence that has not been disposed of. (p. 794 B)

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Injunctions - Merit of the matter

5. A careful study of the record of proceedings reveals that facts that were in conflict have been disclosed, and to go into a detailed treatment of the affidavit evidence will be tantamount to dealing with the substantive issues at stake. The law is trite that at that stage of the proceedings i.e. interlocutory application the court should not attempt to go into the merit of the matter in controversy else it is tempted to determine the case at that stage and leave nothing for the just and proper determination of the suit after the hearing.

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In Halsbury's Laws of England, fourth Edition, Re issue, vol. 24, page 853, the principles upon which the court acts are stated thus:-

"On application for an injunction in aid of a plaintiffs alleged right, the court will usually wish to consider whether the case is so clear and free from objection on equitable grounds that it ought to interfere to preserve property without waiting for the right to be established. This depends upon a variety of circumstances, and it is impossible to lay down any general rule on the subject by which the court ought in all cases to be regulated, but in no case will the court grant an interlocutory injunction as of course. The tendency is to avoid trying the same question twice and to grant injunctions only in clear cases." (pp. 795 F/796 A)

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COURTS - Interlocutory matters - Discretion of trial court

6. The issuance of orders of interlocutory matters being one purely at the discretion of a court is a matter that should be exercised judicially and judiciously, and once an appellate court is satisfied that this principle of law has been met, it will hesitate to interfere with the decision of the trial court. In this vein, the lower court was therefore right when it said:-

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"Giving the facts of this case, it is my considered view that the

trial judge has exercised his judicial discretion bona fide. To interfere with the orders contained in the ruling of 22nd July, 1997 is to fetter that discretionary power of the learned trial judge." (p. 797 C)

NOTABLE POINTS OF INTEREST

MOHAMMED JSC

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1. Appellant's abandonment of accelerated hearing is not wise

It is quite clear that the option taken by the plaintiff/appellant in abandoning the chance to have his case given an accelerated hearing to pursue an appeal to the Court of Appeal and further appeal to this court for the restoration of its interim ex-parte order of injunction or the grant of an interlocutory injunction, is not at all a wise decision. This is because taking into consideration that the main relief in the substantive action is an order of perpetual injunction against the defendants/respondents restraining them from committing various acts in breach of the rights of the appellant in connection with its registered trade marks and design, accelerated hearing of the matter given on 22nd July, 1997 could have settled once and for all, the respective rights of the parties at the trial court. It is really unfortunate that the appellant having thrown away the opportunity given by the trial court to the accelerated hearing of the case, had to spend more than ten years chasing an interlocutory injunction up to the Supreme Court, particularly after being fully aware that the earlier interim order of injunction obtained ex-parte, was no longer in force. (p. 801 G)

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TABAI JSC

2. Interlocutory injunction - Attitude of trial Court

Let me first refer to the two main reasons on which the learned trial judge premised his decision. His first reason is that in the determination of an application for interlocutory injunction care must be taken to avoid making pronouncements that may prejudice the fair trial of the substantive suit. I entirely agree with the learned trial judge. At the stage of an application for Interlocutory Injunction pending the determination of the substantive suit, the only evidence is the incomplete untested affidavit evidence and a court should, at that stage, refrain from making pronouncements on issues to be decided in the substantive suit. Otherwise, it will fall into the unhealthy situation of

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deciding the issue twice, first at the interlocutory application and then in the ultimate decision at the end of trial. Such a procedure will be prejudicial to the fair trial of the substantive case. It has also been settled that at the stage of an application for an interlocutory injunction, the court should avoid the resolution of complex and intricate issues of facts since at that stage the veracity of the affidavit evidence would not have been tested in cross-examination. In *Onyesoh v. Nnebedun* (1992) 3 NWLR (Part 229) 315 at 248, this court per Akpata, JSC., spoke of this principle in the following terms:

"Besides a trial Judge in considering whether to order an interlocutory injunction has to be circumspect in respect of his finding and should not be seen to be deciding the issue in the substantive case by his pronouncements in the interlocutory application. He only has to be satisfied that the substantive case is not frivolous and he does not do this by making findings of fact on vital issues in the substantive case." (p. 806 D)

3. Interlocutory injunction - Recourse to accelerated hearing preferred

In addition to all I have discussed above, it has often been advised that in appropriate cases recourse to an order of accelerated hearing should be preferred to an interlocutory injunction so that the matters in controversy can be settled once and for all. This principle was restated in *Onyesoh v. Nnebedun* (supra) at 341-342 where this court, per Nnaemeka-Agu, JSC., said:

"The better view is, therefore, that whenever it is possible to accelerate the hearing instead of wading through massive affidavits and hearing lengthy arguments on interlocutory injunction, the court should accelerate the hearing and decide finally on the rights of the parties."

In this case the appellant who was eager, as it was, to obtain the interim order would probably have obtained the reliefs it claimed in the substantive claim if it had taken advantage of the order of accelerated hearing over ten years ago. No doubt a lot of litigation time and resources would have been saved. (p. 808 D)

CHUKWUMA-ENEH JSC

4. Conflict in affidavit evidence - How resolved

However, I do not see how upon the foregoing scenario coupled with the apparent case of conflicting affidavits of the parties in the substantive application as found by the trial court, the plaintiff had expected the trial court to grant to it an order of interlocutory injunction without more. It is settled law that where there is a conflict in the affidavit evidence of the parties before a court, the court should resolve such conflict by oral evidence from the deponents. There is no way the matter could have moved forward without first resolving the conflicting affidavits. B

It is against this background that the trial court rightly in my view has chosen to grant to the parties an accelerated hearing of the main action and avoid commenting at interlocutory stage on the serious questions in controversy between the parties in the substantive action. (p. 814 A) C

REPRESENTATION

C. F. Agbu, (with him A. S. Oyinloye, and P. Guobadia), for the Appellant

Dr. Bankole Sodipo For the Respondents

CASES REFERRED TO

Olowosago v Adebajo (1988) 4 NWLR part 86 page 275

Sapara v U.C.H. Board (1988) 4 NWLR (pt. 86) page 58

Ukwunneyi v State (1989) 4 NWLR part 114 page 131

Oro v Falode (1995) 5 NWLR (pt. 396) page 385

Titiloye v Olupo (1991) 7 NWLR part 205 page 519

Nzekwu v Nzekwu (1989) 2 NWLR part 104 page 373

Ogbuanyinya and Ors v Okudo and Ors No 2 (1990) 8 NWLR part 146 page 55

Oladele v The State (1991) 1 NWLR part 170 page 708

Busari and Ors v Oseni and Ors (1992) 4 NWLR part 237 page 557

Chief Coker v Chief Olukoga and Ors (1994) 2 NWLR part 329 page 648

Oyekan v Akinrinwa (1996) 1 NWLR part 459 page 128

Angara v Christmatel Shipping Co. Ltd (2001) 8 NWLR part 716 page 685

Apostolic Church v Olowoleni (1990) 6 NWLR part 158 page 514

Governor of Lagos State v Ojukwu (1985) 2 NWLR part 10 page 806

Ojukwu v Government of Lagos State (1986) 3 NWLR (Part 26) 39

BOOKS REFERRED TO

B Halsbury's Laws of England Volume 45, 4th Edition paragraph 1248 at page 577

Halsbury's Laws of England Fourth Edition Re issue, Vol. 24 page 853

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LEAD JUDGMENT BY MUKHTAR JSC

On a motion ex parte brought by the appellant against the defendants who is now the respondents, the learned trial judge of the Federal High Court holden in Lagos made amongst others the following interim orders:-

D *"(1) That leave is hereby granted to the Plaintiff/Applicant to sue the Defendants/Respondents on their own behalf and as representing all members of the class defined as engaged in the trade or business of selling or offering for sale and/or manufacture of a dermatological preparation called "Hot Movate Gel" purporting to be a product of the plaintiff by adopting a trade mark, get up or/and package design similar to and capable of being offered for sale as the Applicant "Movate" Cream.*

F *(2) That the Defendants/Respondents and each of those on whose behalf the Defendants/Respondents are sued whether acting by themselves or by their servants or agents or otherwise howsoever are hereby restrained pending the determination of the Motion on Notice for interlocutory injunction filed on the 25th day of February,*
G *1997 or further order, from doing or authorising the doing of the following acts or any of them namely:-*

(a) passing off or attempting to pass off or causing, enabling or assisting others to pass off a pharmaceutical preparation known as "Hot Movate Gel" not manufactured at the Applicant's instance or of
H *its merchandise as and for the "Movate cream" or goods of the applicant by the use or goods of the Applicant by the use or in connection therewith in the course of trade of the Applicant's trade mark or adopting the distinctive get-up, package design or label identical or similar*

in all essential details to that of the applicant's "Movate cream" or any colourable or deceptive imitation thereof without duly distinguishing such trade mark, get-up, or label from those of the applicant or by any other means,

(b) manufacturing, or causing to be manufactured for them, importing, selling or exposing or offering for sale or supplying or inviting offers to acquire or distribute for the purpose of sale any pharmaceutical dermatological preparation in particular "Hot movate gel" with any package, get-up, label or tube, bearing the words "Hot movate gel" or "movate" or any other words so closely resembling the applicant's trade marks in particular "Movate gel" registered as No 52632 or "Top movate" registered as No 52623 as to be calculated to lead to the belief that the preparation ("Hot movate gel") not of the applicant's manufacture or merchandise are products of the applicant,

(c) infringing the Applicant's copyright in the registered design No 5456 in respect of the applicant's registered trade marks known as "Movate gel" and "Top movate", "Top sovate", "Top vate" their get-up, label and package design."

Then on 2/4/97 the defendant filed a motion on notice for the following orders:-

"1. An Order discharging the order of this honourable court made on the 3rd day of March 1997 on the grounds of material misrepresentation and failure to make full and frank disclosure.

2. An Order striking out the name of the 3rd defendant in this case on the grounds that he is merely an agent of a disclosed principal, that is, the 1st defendant in this case.

3. An Order of leave of court to join the Registrar of Trade Marks and Designs as a defendant to this suit to enable the defendant counter-claim for a rectification of the Register of Trade Marks and Designs on the ground that the plaintiffs' registrations were obtained fraudulently, the plaintiffs being merely agents and distributors of Esapilarma of today's Movate cream and not the manufacturers thereof."

The motion on notice was supported by an affidavit. It was moved and at the end of the day, the trial judge after considering the addresses of learned counsel vacated the interim injunction thus:-

"In the exercise of my discretion and having regard to the circumstances of this case, I hereby order that the interim order of this court of 3/3/96 be and is hereby vacated."

Unhappy with the above order, the plaintiff appealed to the Court of Appeal, Lagos, originally on four grounds of appeal, which notice of appeal was amended, and the grounds were increased to five. The appeal court after treating the issues raised by parties alongside the submission, found no merit whatsoever in the appeal and dismissed it. Again the plaintiff was not satisfied, so he has appealed to this court on five grounds of appeal, from which three issues for determination were raised. The issues are:-

"(1) Whether by not determining all the issues arising and submitted to it by the appellant as arising from its grounds of appeal for determination in the appeal, the Court of Appeal did not deny the appellant (its right to) a fair hearing of its appeal?"

(2) Whether the Court of Appeal was right in holding that the appellant's resort to a police investigation of a crime in the circumstance was a resort to self-help and aimed at ridiculing the court and justified the vacation of the interim injunction by the learned trial judge?"

(3) Whether the Court of Appeal should not have interfered with the discretion exercised by the Federal High Court in respect of the appellant's Motion for interlocutory injunction and exercised its powers under Section 16 of the Court of Appeal Act to rehear and grant the said interlocutory injunction?"

The issues raised in the respondents' brief of argument are:-

"1. Whether the Court of Appeal by determining only the issues arising from the grounds of appeal submitted to it by the parties amounted to a denial of fair hearing."

2. Whether the Court of Appeal was right in law in affirming the learned trial judge holding, that an Appellant who obtained an ex-parte order of injunction restraining the respondents from selling products subject matter of dispute to subsequently or simultaneously and without informing the court to initiate police investigation against the same infringement and without informing the police of a pending civil action has resorted to self-help."

3. Whether the Court of Appeal was right in law in affirming

the learned trial judge holding, discharging the interim injunction and ordering an accelerated hearing of the suit instead of granting an interlocutory injunction after taking arguments from both counsel on the Motion to discharge the interim Order given that there were conflicts in the parties affidavit evidence which raised issues that went to the root of the case."

At the hearing of the appeal exchanged briefs of argument were adopted by the learned counsel. I will now commence the judgment on this appeal with the treatment of issue (1) in the appellant and respondents' briefs of argument. The gravamen of the appellant's complain under this issue is that the court below jettisoned some of the issues raised by it, as rather than treating all the five issues raised by it, the court reframed three issues. In his argument learned counsel for the appellant has submitted that their five issues were related to their grounds of appeal and that the law is that issues are like pleadings intended to accentuate the real issues for determination. See *Olowosago v Adebajo* (1988) 4 NWLR part 86 page 275. According to learned counsel their entire brief and the issues raised were not examined or considered. Learned counsel further submitted that the three issues framed by the court below did not correctly flow from the grounds of appeal, and the arguments were overlooked in the judgment, and this occasioned a miscarriage of justice to the appellant. Reliance was placed on the cases of *Sapara v U.C.H. Board* (1988) 4 NWLR (pt. 86) page 58, *Ukwunneyi v State* (1989) 4 NWLR part 114 page 131, *Oro v Falode* (1995) 5 NWLR (pt. 396) page 385, *Titiloye v Olupo* (1991) 7 NWLR part 205 page 519. and *Nzekwu v Nzekwu* (1989) 2 NWLR part 104 page 373.

The learned counsel for the respondents reiterated the essence of issues as adumbrated in the appellant's brief of argument, referring to the cases of *Ogbuanyinya and Ors v Okudo and Ors* No 2 (1990) 8 NWLR part 146 page 55, *Oladele v The State* (1991) 1 NWLR part 170 page 708, *Busari and Ors v Oseni and Ors* (1992) 4 NWLR part 237 page 557, and *Chief Coker v Chief Olukoga and Ors* (1994) 2 NWLR part 329 page 648. He contended that in the cases of *Nzekwu v Nzekwu* etc relied upon by the appellant, the issues formulated therein were not derived from any of the grounds of appeal. Learned counsel submitted that since the issues reframed by

the court in this case arose from the grounds of appeal there is no miscarriage of justice occasioned.

It is imperative to look at the record of proceedings to analyse the issues refrained by the lower court vis a vis the grounds of appeal.

B The grounds of appeal as contained in the amended notice of appeal on page 392 of the printed record of appeal read the following (without their particular);

C *"1. The learned trial judge erred in law when after having fully heard and entertained on the merits, the pending applications including the plaintiff's Motion on Notice dated 24/2/97 for interlocutory injunction, he directed an accelerated trial of the substantive suit without granting or determining the interlocutory injunction the requirements for granting or determining which the plaintiff met.*

D *2. The learned trial Judge erred in law and occasioned miscarriage of justice when without giving the appellant (or the parties) an opportunity to comment or address him on the following issues not raised or canvassed or relied on by the parties based his decision on them namely:-*

E *3. The learned trial Judge erred in law in denying the plaintiff of its constitutional right to fair hearing when after the plaintiff had taken the trouble and incurred expenses on filing and serving the said Motion on Notice for interlocutory injunction dated 24/2/97 and fully argued same on the merits, he failed or neglected to determine*
F *the Plaintiffs civil or legal right or otherwise to it and vacated the interim injunction then subsisting in favour of the plaintiff, thereby exposing the Plaintiff's legal rights, trade marks and designs to violation by the defendants.*

G *4. The learned trial Judge misdirected himself in holding as follows namely:-*

H *"Again, I am of the view that it is no longer justifiable for this court to retain its interim order granted on 3/3/97 in that this court must in the circumstances of the present application for an injunction, take account of the conduct of an applicant in the instant case. In the present case what transpired in the course of the proceeding is that the present applicant for interlocutory injunction has resorted to self-help by reporting the same matter to the police who are now investigating a complaint of adulteration of the product Movate cream*

against the Respondents. Following this complaint the respondent was detained by the Police and was subsequently released on Bail. Although the applicant has informed this court that he has taken steps to withdraw the complaint but as at today the matter is still with the police

5. The learned trial Judge erred in law in treating the plaintiff's tarn s complaint to the Police of the adulteration of its Movate cream and the police investigation of same as a resort to self-help and abuse of his court's process and in using same as a basis for vacating the interim injunction dated 3/3/97 subsisting in favour of the plaintiff when"

As has been said above the appellant raised five issues for determination in its brief of argument, and the respondents raised seven issues in its brief of argument, a position which many legal authorities frown on, (the grounds of appeal being only five). **It has been pronounced in many cases by appellate courts that issues formulated for determination must not out number the grounds of appeal, for each issue is supposed to have its base and source from a ground or grounds of appeal.** See *Oyekan v Akinrinwa* (1996) 1 NWLR part 459 page 128, and *Angara v Christmatel Shipping Co. Ltd* (2001) 8 NWLR part 716 page 685. **Once issues exceed the grounds of appeal there is danger that some of the issues are outside the grounds of appeal, and therefore not related to each other. Grounds of appeal cannot be subsumed from main grounds to accommodate issues. That is why ideally an issue must be distilled from a ground or grounds of appeal. The position of the law is that an issue must derive its source from a ground of appeal, and an issue that does not so relate will not be tolerated.** See *Chime v Chime* (2001) 3 NWLR G part 701 page 527, *Western Steel Works v Iron and Steel Workers* (1987) 1 NWLR part 49 page 284, and *Salami v Mohammed* (2000) 9 NWLR part 673 page 469. **Whereas, the converse situation is allowed i.e. an issue can cover more than a ground of appeal, the present situation has no place in our legal system. Proliferations of issues are discouraged.** See *Oyekan v Akinrinwa* supra. **This situation, I believe contributed to and informed the step taken by the learned Justice of the Court of Appeal to**

reframe his own issues, for he had in his judgment, before refraining the issues said:-

"Through a plethora of decisions this court and the Supreme Court have said that issues formulated by parties must flow from the grounds of appeal filed and such issues must not out number the grounds of appeal. The issues raised by the respondent would seem to out-number the grounds of appeal; they are however interwoven and repetitive"

In considering this appeal, I shall like to be guided by the following issues:

"(1) Is it an abuse of the court process for an appellant who has obtained an ex-parte order of injunction restraining the respondent from selling products subject matter of dispute to subsequently and without informing the court to initiate police investigation against the same respondents on an allegation of the same infringement and without informing the police of a pending civil action.

(2) Whether the learned trial judge was right in discharging the interim injunction and ordering an accelerated hearing of the suit instead of granting an accelerated injunction after taking arguments from both counsel on the motion to discharge the interim order; giving the facts of this case.

(3) Whether by the ruling of 22nd July 1997 the constitutional right to fair hearing of the appellant has been infringed."

It is a relief that the learned counsel for the appellant has not contested the power of the court below to frame or reframe issues, for authorities abound that a court is empowered to frame issues where it is of the opinion that the issues formulated by counsel are not succinct or suffer some inadequacies. See *Oloriode v Oyebi* (1984) 1 SCWLR page 390, *N.P.A.v Panalpina World Transport (Nig) Ltd* (1974) 1 NMLR 82, and *Oba Lawal Ifabiyi v Chief Solomon Adeniyi & 2 ors* (2000) 6 NWLR part 662 page 532. **I do not also loose sight of the argument of learned counsel for the appellant that the lower court could or should have considered the issues of the appellant. I suppose he has a point there, the issues being only five and in tandem with the grounds of appeal, but then the pertinent question here is, are the issues appropriate and do they flow from the grounds of**

appeal? In the first place, the grounds of appeal in the amended notice of appeal were five (as are reproduced above), and so the five issues raised in the appellant's brief of argument correlates with the five grounds of appeal, and at a careful study of both issues and grounds of appeal it could be said to be related to the grounds of appeal. There are however some overlapping in the issues, but then since the learned justice was at liberty to reframe the issues for determination, there is no reason to condemn the procedure adopted by him as long as the issues flow from the grounds of appeal. It is very clear that reframed issue (1) supra is distilled and flows from grounds (4) and (5) of appeal. Issue (2) is covered by grounds (1) and (2) of appeal, and the third issue is distilled from ground (3) of appeal. So in as far as the law is concerned the issues are competent and are issues that can be treated to determine the appeal, as they were in controversy. The situation in the authorities cited by the learned counsel for the appellant are distinguishable from the present case, so I fail to see that the lower court erred in reframing the issues upon which the determination of the appeal was based, and so grounds (1) and (2) of appeal to which issue (1) is married fails, as I am answering the said issue in the negative.

In proffering argument to cover issue (2) supra, learned counsel for the appellant submitted that its lodging of complaint of adulteration of its product to the Police against the respondents was not because the trial court's order was being disobeyed by the respondents and was being enforced through the police, as the lower court seems to have understood the situation and concluded that the report and investigation were aimed at ridiculing the trial court. What the learned trial judge described as resort to self help was the appellant's reporting of the same matter pending before him to the police authorities who were then investigating a complaint of adulteration of the product Movate cream against the respondents. Learned counsel further submitted that the matter reported to the police was the crime of product adulteration which was different from claim of injunction from infringement and passing off of registered trade mark before the court. Learned counsel placed reliance on the cases of *Odogwu v*

Odogwu (1994) 1 NWLR part 323 page 708, Registered Trustee Apostolic Church v Olowoleni (1990) 6 NWLR part 158 page 514, Governor of Lagos State v Ojukwu (1985) 2 NWLR part 10 page 806, and Halsbury's Laws of England, volume 45, 4th Edition paragraph 1248 at page 577.

B The learned counsel for the respondents after stating the position of things and the action taken by the appellant, in his brief of argument proceeded to submit that the appellant's report to the police by way of petition initiated police investigation against the same respondents on an allegation of the same infringement and without
C informing the police of the pending civil action in which an anton pilla order has been granted and without informing the trial court who should be seized of all the facts of the case, is not just an abuse but also self help as it is aimed at totally frustrating the legitimate
D healthy competition.

It is on record (see page 19 of the printed record of proceedings) that the appellant did report the matter in controversy to the police, as is evidenced by the proceedings I will reproduce here below. It reads:-

E *"Court:- At the last hearing there was a complaint before this court by the Respondents that the same subject matter is before the A. I. G. Force C.I.D. Alagbon, who ordered that the 3rd respondent be detained. He was later released on bail. This court then took into
F consideration the fact that the plaintiff had resorted to self help and therefore ordered learned counsel for the plaintiffs/applicants to advise his client to withdraw the complaint pending before the police before the adjourned date.*

Nakpodia:- We have withdrawn the petition.

G *Dr. Sodipo:- This is not strictly correct because the defendants/respondents have been visiting the police on their invitation and have even made additional statement yesterday 21/7/97. The police have collected samples of the defendant's product on 21/7/97 and have sent same for analysis. The police have refused to release
H the defendant's product which they bought from the plaintiffs. The police still came to the defendant's premises to conduct searches. The police refuted the plaintiffs' claim that they have withdrawn the petition. I submit that the plaintiff has not done enough to ensure that*

the harassment which they initiated by their petition will stop despite the interim order against us"

It is also on record that the trial court upon hearing the exparte motion of the plaintiff/appellant for injunction inter alia made the orders already reproduced above.

It is disturbing that the appellant after obtaining the above orders should proceed to petition the police on the same matter. Order (b) supra as can be understood was restraining the respondents from inter-alia manufacturing the product in controversy, and so should cover whatever the appellant deemed to be the respondents interference with the product in controversy, albeit adulteration of the product. The argument of learned counsel for the appellant that the report lodged to the police was on adulteration of the product does not reduce the gravity and consequence of the action of seeking police intervention and self-help. The argument is not at all persuasive. The appellant sought the court's intervention, and the court adequately intervened by giving the reliefs and orders sought, but then the appellant has proved that that was not enough for it was not satisfied, but resorted to self help. This action definitely was contrary to the principle that a litigant will not abuse a court's process that is already in existence by resorting to self-help, and the courts will not tolerate such action or abuse. The learned trial judge in his judgment after dealing with this issue of reporting the matter that was pending in court to the police, (rightly in my view) made this finding:-

"The fact that the complaint to the police was made simultaneously with the filing of the present suit in my view amount to an abuse of the judicial process of this court". This finding having been made an issue of complaint was thrashed out by the lower in its judgment which reads:-

"A resort to police investigation as done by the appellant is some what a resort to self-help. Weighed against the background that no report was made to the court of any disobedience of its order, it seems to me that the action of the appellant is one aimed at bringing the court to ridicule. It is

intolerable under rule of law".

I completely endorse the above finding affirming the trial court's decision.

B The submission of learned counsel for the appellant that the facts and circumstances of this case are different from the situations of self-help and thus justifying their action as contained on page 9 of their brief of argument does not hold water. ***The fact that the appellant complied with the order of the court to withdraw its petition was negated by learned trial court in its judgment where it said:-***

C ***"Although the applicant has informed this court that he has on the order of this court taken steps to withdraw the complaint but as at today the matter is still with the police."***

D ***The rule in the case of Smith v. Selwyn (1914) 3 K.B. page 98, is not evocable within the context of this case. The reliance on Section 6 of the 1979, Constitution, and Section 230, 1979 Constitution Amendment Decree 107, 1993, and the cases of A. G. Federation v. Dawodu (1995) 2 NWLR part 380 page 712, and Veritas Insurance Co. Limited v. Citi Trust Investment (1993) 3 NWLR part 281 page 349 are not of assistance to the appellant as far as this issue and discussion is concerned, as the circumstances of these cases are distinguishable from the present case. What is at stake here is the propriety of the appellant seeking police intervention after it has obtained an order of the court. The complaint here revolves around the abuse of court process, not the maintenance of a civil suit based upon an offence that has not been disposed of.***

G In the light of the above discussion I answer the above issue in the affirmative, and so dismiss ground (3) of appeal to which it is married.

H Now to issue (3). The submission of learned counsel for the appellant under this issue is that the interest of fairness and justice would have been met if the appellant's civil right to the interlocutory injunction sought had been determined especially since a lot of time, energy, costs and efforts had gone into the filing and hearing of the motion for interlocutory injunction. According to learned counsel, as

the requirements to be fulfilled by the appellant for the granting of interlocutory injunction has been fulfilled the balance of convenience is on the appellant's side and that damages will not be enough to compensate the loss the appellant will suffer. The appellant was prepared to give an undertaking as to damages should the interlocutory order later be found to have been wrongly made, and the appellant's legal intellectual property rights to the trade marks 'Movate gel', 'Topmovate' as evidenced by its certificates of registrations of the trade marks and usage of same in Nigeria, which the appellant sought to protect from the respondents' continuous violation pending trial. Learned counsel placed reliance on the cases of *Adene v Dantubu* (1988) 4 NWLR part 86 page 309, *Obeya Memorial Specialist Hospital v Attorney General of the Federation* (1987) Vol. 18 NSVV part II page 961, *Kotoye v CBN* (1989) 1 NWLR part 99 page 419, *Ladoke v Olatayo* (1992) 8 NWLR part 281 page 605, and *University of Lagos v M. I. Aigoro* (1985) 1 NWLR part 1 page 143.

In his brief of argument learned counsel for the respondent has contended that in granting or refusing an application for interlocutory injunction, a court must exercise its discretion judicially and judiciously, and an appellate court will not normally set aside or interfere with the exercise of discretion of the lower court once it is clear that it was exercised on just and legal reasons i.e. judicially and judiciously. He placed reliance on the cases of *Idoko v Ogbeikwu* (2003) 7 NWLR part 819 page 275, *Royal Exchange Assurance (Nig) Ltd. v Aswani Textile Industries Ltd.* 3 NWLR part 227 page 1, and *Saraki v Kotoye* (1992) 9 NWLR part 264 page 156.

A careful study of the record of proceedings reveals that facts that were in conflict have been disclosed, and to go into a detailed treatment of the affidavit evidence will be tantamount to dealing with the substantive issues at stake. The law is trite that at that stage of the proceedings i.e. interlocutory application the court should not attempt to go into the merit of the matter in controversy else it is tempted to determine the case at that stage and leave nothing for the just and proper determination of the suit after the hearing. See *Registered Trustees of P.C.N v Registered Trustees of Ansar-ud-deen Society of Nigeria* (2000) 5 NWLR part 657 page 368 and *John Holt Nigeria Ltd &*

ors v Holts African Workers Union of Nigeria and Cameroons (1963) 1 AWLR page 379.

In Halsbury's Laws of England, fourth Edition, Re issue, vol. 24, page 853, the principles upon which the court acts are stated thus:-

B ***"On application for an injunction in aid of a plaintiffs alleged right, the court will usually wish to consider whether the case is so clear and free from objection on equitable grounds that it ought to interfere to preserve property without waiting for the right to be established. This depends upon***
 C ***a variety of circumstances, and it is impossible to lay down any general rule on the subject by which the court ought in all cases to be regulated, but in no case will the court grant an interlocutory injunction as of course. The tendency is to avoid***
 D ***trying the same question twice and to grant injunctions only in clear cases."***

(Underlining is mine)

It was in this wise that the learned trial judge was cautious to make the following observations and findings:-

E ***"Court :- Ruling***

I have carefully gone through the arguments of counsel for and against the two applications which have been canvassed before me. First and foremost, I hold the view that both applications call for the exercise of my discretion which must be exercised both judicially
 F ***and judiciously.***

Again, it seems to me on a careful analysis of the averments contained in the affidavits and counter affidavits as well as the submissions of learned counsel for the applicant and respondent in the
 G ***two applications that the issue of two competing rights have been raised which to me cannot be conveniently disposed of at this stage of the proceedings by affidavit evidence but are issues to be determined by oral evidence at the trial of the substantive suit. The duty placed therefore on this court in the determination of any interlocu-***
 H ***tory application pending the trial of the substantive suit is that care should be taken not to make pronouncements which may prejudice the trial of the claim filed and still pending before the court - See Ojukwu v Govt of Lagos State (1986) 3 N.W.L.R. (part 26) at page***

39. A corollary to the above is that a court is not to try the issue in contention in a case twice, first while considering the application for interlocutory injunction and secondly during the trial. The correct thing to do is to stop hearing the application and accelerate the trial of the substantive Suit. See *The John Holt case (1963)* 1 ANLR page 379 as applied in *Nigerian Civil Service Commission v Essien (1985)* 3 N.W.L.R. Part 12 page 312. B

I have come to the conclusion that the two principles of law enunciated above are applicable to the instant case. I believe the better approach in a situation as this, is to fix the case for hearing and decide the issue once and for all. This suit is therefore to be given accelerated hearing and I hereby order pleadings accordingly." C

The issuance of orders of interlocutory matters being one purely at the discretion of a court is a matter that should be exercised judicially and judiciously, and once an appellate court is satisfied that this principle of law has been met, it will hesitate to interfere with the decision of the trial court. In this vein, the lower court was therefore right when it said:- D

"Giving the facts of this case, it is my considered view that the trial judge has exercised his judicial discretion bona fide. To interfere with the orders contained in the ruling of 22nd July, 1997 is to fetter that discretionary power of the learned trial judge." E

In the light of the above discussion, I resolve the last issue in the appellant's brief of argument in favour of the respondents, and so dismiss the ground of appeal to which the said issue is married. F

In the final analysis the appeal has no merit whatsoever, and I so dismiss it. The judgment of the Court of Appeal is hereby affirmed. I order the costs of N10,000.00 in favour of the respondent against G the appellant.

KATSINA-ALU JSC

I have read before now in draft the judgment delivered by my learned brother Mukhtar J.S.C in this appeal. I entirely agree with it and, for the reasons given therein, I also dismiss this appeal with N10, 000.00 costs to the respondents. H

MOHAMMED JSC

The dispute between the parties in this appeal which are registered Pharmaceutical Chemical and Cosmetics Companies, started at the trial Federal High Court Lagos where the Plaintiff which is now the Appellant commenced its action against the Defendants which are now the respondents claiming against them jointly and severally -

"1. An injunction restraining the respondents by themselves, their servants, agents or privies or otherwise howsoever from:-

(a.) Manufacturing or causing to be manufactured for them, importing, selling or exposing or causing to be exposed for sale, supplying or inviting offers to acquire or distribute for the purpose of sale any pharmaceutical or cosmetic product bearing the trade mark 'Hot Movate Gel' or 'Movate' or bearing a name similar to the Plaintiff's registered trade marks 'Topvate,' 'Topsovate,' or any other words or products not of the plaintiff's origin or made at the plaintiff's instance so closely resembling or similar to the plaintiff's aforesaid registered trade marks or bearing the plaintiff's registered design No 5456 in respect of 'Movate' cream or an obvious or deceptive colourable imitation thereof as to mislead or deceive the plaintiff's customers or the public further and/or alternatively;

(b) Infringing the plaintiff's registered trade marks numbers 52632 (Movate Gel), 52621 (Topvate cream), 52633 (Topsovate) and 52623 (Topmovate) and/or the plaintiff's copyright in its Registered Design No 5456 in respect of its registered design 'Movate' cream pack.

2. Delivery up for public destruction or destruction up on oath of all articles in the defendants' possession custody or control and which infringe the plaintiff's interest and copyright respectively in the aforesaid registered trade marks and/or design or sale of which by the defendants will be a breach of the said injunction from passing off or the infringement of the plaintiff's aforesaid trade marks and design.

3. The sum of N20 million as damages for passing off or the infringement of the plaintiff's aforesaid trade marks and design or an inquiry as to the damages the plaintiff has suffered or at the option of

the plaintiff, an account of the profits made by the defendants by the passing off or the Infringement of plaintiff's copy right in the said registered design and the said registered trade marks by an account of the sales by the defendants of all goods known as Hot Movate Gel to which the said design or obvious or colourable imitation thereof shall have been applied and of the profit made there from. B

4. Costs.

5. Such further or other reliefs as this Honourable Court may deem fit."

These particulars of claim of the appellant were accompanied by a motion ex-parte for an interim injunction in terms sought in the action together with an interlocutory motion on notice for the same injunctive relief pending the hearing and determination of the substantive action. The ex-parte motion for interim order of injunction was duly heard and granted by the trial Court while the motion on notice for similar interlocutory relief was adjourned for hearing, when the respondents must have been served. On being served with the processes of the court in the matter, the respondents reacted by filing a motion on notice for an order setting aside the interim order of injunction granted ex-parte. This motion and the appellant's motion for interlocutory injunction were taken together by the trial court which in its ruling on 22nd July, 1997, set aside the interim order of injunction and in place of the appellant's application for interlocutory injunction against the respondents pending the hearing and determination of the substantive action, granted accelerated hearing of the case and ordered the parties to file their pleadings. C D E F

The appellant who was not happy with this approach of the trial court to the case, promptly appealed against the order to the Court of Appeal which after hearing the parties, dismissed the appeal in its judgment delivered on 22nd March, 2000. It is against this judgment that the appellant is now on a further and final appeal to this Court raising the following three issues for determination - G

"(1) Whether by not determining all the issues arising and submitted to it by the appellant as arising from its grounds of appeal for determination in the appeal, the Court of Appeal did not deny the appellant (its right to) a fair hearing of its appeal? H

(2) Whether the Court of Appeal was right in holding that the appellant's resort to a police investigation of a crime in the circum-

stance was a resort to self help and aimed at ridiculing the court and justified the vacation of the interim injunction by the learned trial judge?

(3) Whether the Court of Appeal should not have interfered with the discretion exercised by the Federal High Court in respect of the appellant's motion for interlocutory injunction and exercised its powers under Section 16 of the Court of Appeal Act to rehear and grant the said interlocutory injunction?"

Similar issues although differently worded were also raised in the respondent's brief of argument for the determination of the appeal.

The principal complaint of the appellant in this appeal is the action of the trial court in vacating the ex-parte order of interim injunction earlier granted to it and the replacement of the relief sought by it in its motion on notice for an order of interlocutory injunction against the respondents pending the hearing and determination of the substantive case, with an order of accelerated hearing of the action, which was to the disappointment of the appellant, affirmed by the court below. The reasons given by the trial court for the stand it took in the matter are contained at pages 355 - 356 of the record in a short ruling of the court given on 22nd July, 1997.

"The duty placed therefore on this Court in the determination of any interlocutory application pending the trial of the substantive suit is that care should be taken not to make pronouncements which may prejudice the trial of the claim filed and still pending before the Court. See Ojukwu v Government of Lagos State (1986) 3 N.W.L.R. (Pt. 26) at page 39. A corollary to the above is that a court is not to try in contention in a case twice, first while considering the application for interlocutory injunction and secondly during the trial. The correct thing to do is stop hearing the application and accelerate the trial of the substantive suit. See The John Holt case (1963) 1 A.N.L.R. page 379 as applied in Nigerian Civil Service Commission v Essien (1985) 3 N.W.L.R. Part 12 page 312.

I have come to the conclusion that the two principles of law enunciated above are applicable to the instant case. I believe the better approach in a situation as this, is to fix the case for hearing and decide the issues once and for all. This suit is therefore to be given

accelerated hearing and I hereby order pleadings accordingly."

On this lucid stand of the trial court, the court below was strongly behind it and rightly in my view refused to interfere with the discretion exercised in the matter by the trial court. For the same reasons, I have no ground whatsoever to disagree with the court below. The two courts below were indeed properly guided by many decisions of this court notable among which are John Holt (Nig.) Ltd. v Holts African Workers Union of Nigeria and Cameroons (1963) 2 S.C.N.L.R. 383; Nigerian Civil Service Union v Essien (1985) 3 N.W.L.R. (Pt. 12) 185 and Obidiegwu Onyesoh v Nze Christopher Nnebedun & Ors. (1992) 3 N.W.L.R. (Pt. 229) 315 at 341 - 342 where Nnaemeka-Agu, J.S.C stated the position of the law -

"It does appear that the defendant instead of taking advantage of or pursuing the order for accelerated hearing decided to appeal against the order for interlocutory injunction. This is quite a surprising course to take. For quite apart from the fact that this has apparently led to further delay in the hearing of the substantive suit, which is said to be still pending since March, 1988, it should now be obvious to parties and their counsel from a gamut of decided cases that in practically most applications for interlocutory injunction the justice of the case can quite often be met by accelerating the hearing instead of granting an order of interlocutory injunction. A successful application for interlocutory injunction simply keeps matters in status quo until completion of hearing. But a successful hearing disposes of the matter for good. The better view is, therefore, that whenever it is possible to accelerate the hearing instead of wading through massive affidavits and hearing lengthy arguments on interlocutory injunction, the Court should accelerate the hearing and decide finally on the rights of the parties."

From the principle of the law expounded above, it is quite clear that the option taken by the plaintiff/appellant in abandoning the chance to have his case given an accelerated hearing to pursue an appeal to the Court of Appeal and further appeal to this court for the restoration of its interim ex-parte order of injunction or the grant of an interlocutory injunction, is not at all a wise decision. This is because taking into consideration that the main relief in the substantive action is an order of perpetual injunction against the defendants/

respondents restraining them from committing various acts in breach of the rights of the appellant in connection with its registered trade marks and design, accelerated hearing of the matter given on 22nd July, 1997 could have settled once and for all, the respective rights of the parties at the trial court. It is really unfortunate that the appellant having thrown away the opportunity given by the trial court to the accelerated hearing of the case, had to spend more than ten years chasing an interlocutory injunction up to the Supreme Court, particularly after being fully aware that the earlier interim order of injunction obtained ex-parte, was no longer in force.

It is for the above reasons and fuller or more comprehensive reasons contained in the lead judgment of Mukhtar, J.S.C, just delivered and which I have had the opportunity to read before today that I also dismiss this appeal with N10,000.00 costs to the respondents.

TABAI JSC

I have had the benefit of reading, in advance, the draft of the leading judgment of my learned brother Mukhtar J.S.C and I am also of the firm view that the appeal be dismissed for lack of merit.

The facts of the case are very ably articulated in the leading judgment and I do not consider it necessary to reproduce them. In their briefs each of the parties submitted three issues for determination. These are comprehensively dealt with in the leading judgment. I have nothing to add with respect to the first and second issues.

By way of emphasis however I shall make some comments on the third issue. In the exercise I shall make references to only such facts and materials as would make my contribution intelligible. In the appellant's brief the said third issue was formulated as follows:-

"Whether the court of Appeal should not have interfered with the discretion exercised by the Federal High Court in respect of the applicant's motion for interlocutory injunction and exercised its powers under Section 16 of the Court of Appeal Act to rehear and grant the said interlocutory injunction?"

In the respondent's brief the issue is framed as follows:

"Whether the Court of Appeal was right in affirming the learned trial judge's holding discharging the interim injunction and ordering

an accelerated hearing of the suit instead of granting an interlocutory injunction after taking arguments from both counsel on the motion to discharge the interim order given that there were conflicts in the parties affidavit evidence which raised issues that went to the root of the case."

Before considering the address of counsel on this issue let me state, B
albeit briefly, the relevant facts. This action was filed on or about the
25/2/97. On that same day, 25/2/97, the plaintiff/appellant also filed
a Motion Exparte for an Interim Injunction restraining the defend-
ant/respondent from doing a number of acts pending the hearing C
and determination of a motion on Notice also filed on the 25/2/97.
The Motion Exparte was heard and granted on the 3/3/97. The drawn
up order of the trial court detailing the orders sought and granted is
copied at pages 11-18 of the record of appeal. Altogether five reliefs D
were granted. Needless to say that they were extensive and far reach-
ing. Their due execution meant a total paralysis of the trade and
business of the respondent. For the constraints of time and space, I
would not reproduce all of them. By relief 3 thereof the trial court
granted the plaintiff/applicant/appellant leave to serve the orders E
therein on all the person on whose behalf the defendants/respon-
dents were sued advertising same in the Daily Times Newspaper or
any other Newspaper known to circulate throughout Nigeria.
(Underling mine)

The underlining also shows the rather devastating and far reaching F
effect of the order.

Upon the execution of the above order on the respondents
they, expectedly, filed a motion on notice which sought amongst other
reliefs a discharge of the Interim Order. The motion was dated the
27/3/97. There were thus two motions namely; the motion for Inter- G
locutory Injunction which reliefs were identical with those in the pending
Interim order by the appellant and the motion for the discharge of
the interim order filed by the respondents. Arguments for and against
the applications were canvassed by learned counsel for the parties.
By his ruling on the 22/7/97 the learned trial judge vacated the In- H
terim order and rather than either grant or refuse the application for
the interlocutory injunction, ordered an accelerated hearing of the
substantive suit. He gave reasons for his discretion so to do. For the

purpose of appreciating the reasons for the exercise of his discretion, I reproduce hereunder portions of the ruling of the learned trial judge. At pages 20-21 of the record he reasoned and concluded as follows:

B *"I have carefully gone through the arguments of counsel for and against the two applications which have been canvassed before me. First and foremost, I hold the view that both applications call for the exercise of my discretion which must be exercised both judicially and judiciously.*

C *Again it seems to me on a careful analysis of the averments contained in the affidavits and counter affidavits as well as the submissions of learned counsel for the applicant and respondent in the two applications that the issue of two competing rights has been raised which to me cannot be conveniently disposed of at this stage of the proceedings by affidavit evidence but are issues to be determined by*
D *oral evidence at the trial of the substantive suit. The duty placed before this court in the determination of any interlocutory application pending the trial of the substantive suit is that care should be taken not to make pronouncements which may prejudice the trial of the claim filed and still pending before the court. See Ojukwu v Government of Lagos State (1986) 3 NWLR (Part 26) 39.*
E

A corollary to the above is that a court is not to try in contention in a case twice first while considering the application for interlocutory injunction and secondly during the trial. The correct thing to
F *do is to stop hearing the application and accelerate the trial of the substantive suit. See The John Holt case (1963) 1 A.N.L.R. page 397 as applied in the Nigerian Civil Service Commission v Essien (1985) 3 NWLR (Part 12) page 312.*

G *I have come to the conclusion that the two principles of law enunciated above are applicable to the instant case. I believe the better approach in a situation as this is to fix the case for hearing and decide the issue once and for all. The suit is therefore to be given accelerated hearing and I hereby order pleadings accordingly."*

H The appellant was not satisfied with the above decision and went on appeal to the Court below. By its judgment on the 22/3/2000 the appeal was dismissed. The respondent was still not satisfied and has come on appeal to this court. I have earlier reproduced the third issue as formulated by the parties in their respective briefs of

argument.

The appellant's brief was prepared by Mike I. Igbokwe. The substance of his argument on this issue is that the facts and circumstances before and on the 22/7/97 were such that the only proper exercise of the learned trial judge's discretion ought to have been either a refusal to vacate the Interim order or grant of the Interlocutory Injunction. In particular, it was argued that there existed circumstances that warranted the grant of the Interlocutory Injunction. According to counsel these circumstances include:

(a) That there were serious issues and questions to be tried and they include:

(1) Whether the appellant or Esapharma S.r.l. is the owner of the trade mark and design pack of "Movate".

(2) Whether it is only a manufacturer of a product under a trade mark that can be registered as the proprietor of that trade mark and a merchant or distributor of entrepreneur cannot be registered as a proprietor of a trade mark.

(3) Whether "Movate" has become generic.

(4) Whether the appellant can maintain an action for injunction and damages against the respondent for infringement or passing off of trade mark "Movate" and design pack.

(5) Whether the appellant's registration of the trade mark "Movate" Gel was obtained fraudulently.

(6) Whether the respondent are regular customers of the appellant.

(7) Whether the respondent's trade mark "Hot Movate Gel" is a gel or a cream.

Other circumstances which, he argued, warranted the grant of the Interlocutory Injunction were:

(b) that the balance of convenience was on the appellant's side since more justice would be done by granting the injunction than refusing it.

(c) that damages would not be enough to compensate the appellant by the respondent's unrestricted exploitation of the appellant's reputation and goodwill.

(d) that the appellant was prepared to give an undertaking as to damages.

The respondent's brief was settled by Dr. Bankole Sodipo. On this issue it was his submission that although a trial judge need not give reasons for the exercise of his discretion, it nevertheless has to be exercised judiciously and judicially and an appellate court will not normally interfere with the exercise of discretion since it is clear that it was exercised judicially and judiciously. He relied on *Idoko v Ogebeikwu* (2003) 7 NWLR (Part 819) 275 at 282; *Royal Exchange Assurance (Nig) Ltd v Aswani Textile Industries Ltd* (1992) 3 NWLR (Part 227) 1 at 5, *Saraki v Kotoye* (1992) 9 NWLR (Part 264) 156. It was his further submission that there were conflicts in the affidavit evidence which raised issues that went to the root of the substantive case and which can only be resolved by oral testimony at the trial. He advanced various reasons why the discretion exercised by the trial court and endorsed by the Court of Appeal should not be interfered with.

Let me first refer to the two main reasons on which the learned trial judge premised his decision. His first reason is that in the determination of an application for interlocutory injunction care must be taken to avoid making pronouncements that may prejudice the fair trial of the substantive suit. I entirely agree with the learned trial judge. At the stage of an application for Interlocutory Injunction pending the determination of the substantive suit, the only evidence is the incomplete untested affidavit evidence and a court should, at that stage, refrain from making pronouncements on issues to be decided in the substantive suit. Otherwise, it will fall into the unhealthy situation of deciding the issue twice, first at the interlocutory application and then in the ultimate decision at the end of trial. Such a procedure will be prejudicial to the fair trial of the substantive case. It has also been settled that at the stage of an application for an interlocutory injunction, the court should avoid the resolution of complex and intricate issues of facts since at that stage the veracity of the affidavit evidence would not have been tested in cross-examination. See *Egbe v Onogen* (1972) 1 All NLR 95; *Amachree v I.C.C. Ltd* (1989) 4 NWLR (Part 18) 686; *Williams v Dawodu* (1988) 4 NWLR (Part 88) 210; *Onyesoh v. Nnebedun* (1992) 3 NWLR (Part 229) 315. In *Onyesoh v. Nnebedun* (1992) 3 NWLR (Part 229) 315 at 248, this court per Akpata, JSC., spoke of this principle in the following terms:

"Besides a trial Judge in considering whether to order an inter-

locutory injunction has to be circumspect in respect of his finding and should not be seen to be deciding the issue in the substantive case by his pronouncements in the interlocutory application. He only has to be satisfied that the substantive case is not frivolous and he does not do this by making findings of fact on vital issues in the substantive case." B

In paragraph 3.13 of the appellant's brief of argument, Mr. Igboke pointed out the serious issues for trial, the summary of some of which I have highlighted above. The reasoning of the learned trial judge is that they are not such issues that can be adequately determined on the untested affidavit evidence. This reasoning was endorsed by the court below. I have no reason to think otherwise. I also endorse it. C

Besides, this whole appeal is against the trial court's exercise of its discretion. It is a settled principle of law that an appellate court should not interfere with a trial court's exercise of its discretion unless it is shown that the discretion was not exercised judicially and judiciously. There are numerous case law authorities on this point and I need not cite them. Has the appellant established in this appeal that the learned trial judge failed to his exercise his discretion judicially and judiciously. Learned counsel for the respondent answered this question in the negative. On this issue the court below at page 457 of the record had this to say. D E

"The grant or refusal of an application by a court of law of an application for interlocutory injunction is always a product of the exercise of the discretionary power of the court. However, a judicial discretion properly so exercised ought to be founded upon the facts and circumstances presented to the court, from which a conclusion governed by law will have to be drawn. If judicial discretion has been exercised bona fide not arbitrarily or illegally by a court of law, an appeal court will not ordinarily interfere with that exercise. See University Of Lagos & Ors v Olaniyan & Ors (1985) 1 SC 295. Giving the facts of this case, it is my considered view that the trial judge has exercised his judicial discretion bonafide. To interfere with the orders contained in the ruling of 22nd July 1997 is to fetter that discretionary power of the learned trial judge..." F G H

I agree entirely with the above reasoning and conclusion of the court

below. There is no basis whatsoever for any interference with the learned trial judge's exercise of his discretion particularly having regard to the peculiar facts and circumstances of the case.

Further more, it is curious to see the appellant even contesting the order for accelerated hearing. It is my considered view that the order for accelerated hearing best met the ends of the justice of this case, The appellant filed the action on or about the 25/2/97 and obtained the interim order on the 3/3/97, less than one week after the filing of the action. The appellant was, evidently in a hurry to get the interim order. After that its main preoccupation was to secure the interlocutory injunction. It is clear

from the record that up till the 22nd July 1997 when the learned trial judge gave his ruling, the appellant had not filed its statement of claim. Yet he wanted either the interlocutory injunction or the retention of the interim order which had then lasted for nearly five months.

In addition to all I have discussed above, it has often been advised that in appropriate cases recourse to an order of accelerated hearing should be preferred to an interlocutory injunction so that the matters in controversy can be settled once and for all. This principle was restated in *Onyesoh v. Nnebedun* (supra) at 341-342 where this court, per Nnaemeka-Agu, JSC., said:

"The better view is, therefore, that whenever it is possible to accelerate the hearing instead of wading through massive affidavits and hearing lengthy arguments on interlocutory injunction, the court should accelerate the hearing and decide finally on the rights of the parties."

In this case the appellant who was eager, as it was, to obtain the interim order would probably have obtained the reliefs it claimed in the substantive claim if it had taken advantage of the order of accelerated hearing over ten years ago. No doubt a lot of litigation time and resources would have been saved.

On the whole, in view of the considerations above and the better reasons contained in the leading judgment of my learned brother, Mukhtar J.S.C, I also dismiss this appeal for lack of substance. I abide by the order on costs contained in the leading judgment.

CHUKWUMA-ENEH JSC

The appellant as the plaintiff in the Federal High Court sitting in Lagos claimed against the respondent (i.e. the defendant) the following reliefs to wit:

" 1. An injunction restraining the respondents by themselves, their servants, agents or privies or otherwise however from:-

(a) manufacturing or causing to be manufactured for them, importing, selling or exposing or causing to be exposed for sale, manufactured, supplying or inviting offers to acquire or distribute for the purpose of sale any pharmaceutical dermatological or cosmetic product bearing the trade mark 'Hot Movate Gel' or 'Movate' or bearing a name similar to the plaintiffs registered trade marks 'Topvate', 'Topsovate', 'Topmovate' or any other words or products not of the plaintiffs origin or made at the plaintiffs instance so closely resembling or similar to the plaintiffs aforesaid registered trade marks or bearing the plaintiffs registered design No 5456 in respect of 'Movate' Cream or an., obvious or deceptive colourable imitation thereof as to mislead or deceive the plaintiffs customers or the public.

Further and/or alternatively:

(b) infringing the plaintiffs registered trade marks numbers 52632 (Movate Gel), 52621 (Topvate Cream), 52633 (Topsovate) and 52623 (Topmovate) and/or the plaintiffs copyright in its Registered Design No 5456 in respect of its registered design 'Movate' Cream Pack.

2. Delivery up for public destruction or destruction upon oath of all articles in the defendants' possession custody or control and which infringe the plaintiffs interest and copyright respectively in the aforesaid registered trade marks and/or design or the sale of which by the defendants will be a breach of the said injunction from passing off or the infringement of the plaintiffs aforesaid trade marks and design.

3. The sum of N20 million as damages for passing off or the infringement of the plaintiffs aforesaid trade marks and design or an inquiry as to the damages the plaintiff has suffered or at the option of the plaintiff, an account of the profits made by the defendants by the

passing off or the infringement of the plaintiffs copyright in the said registered design and the said registered trade marks by an account of the sales by the defendants of all goods known as Hot Movate Gel to which the said design or obvious or colorable imitation thereof shall have been applied and of the profit made there from.

B 4. Costs

5. Such further or other reliefs as this Honourable Court may seem fit."

C The plaintiff at the same time as filing the action also filed an ex parte application and a substantive application to restrain the defendant from interfering with its rights as per its particulars of claim. The trial court heard the ex parte application and granted an order to that effect which inter alia has restrained the defendant in these words:

D 1. An order granting leave to the applicant to sue the defendants on their own behalf and as representing all members of the class defined as engaged in the trade or business of selling or offering for sale and/or business of selling or offering for sale and/or manufacture of a dermatological preparation called 'Hot Movate Gel' purporting to be a product of the plaintiff by adopting a trade mark, get up or/and package design similar to and capable of being offered for sale as the applicant 'Movate' Cream.

F 2. An order of interim injunction restraining the defendants, and each of these on whose behalf the defendants are sued whether acting by themselves or by their servants or agents or otherwise howsoever pending the determination of the motion on notice for interlocutory injunction filed herein or further order, from doing or authorizing the doing of the following acts or any of them namely:

G (a) passing off or attempting to pass off or causing, enabling or assisting others to pass off a pharmaceutical preparation known as 'Hot Movate Gel' not manufactured at the applicant's instance or of its merchandise as and for the 'Movate Cream' or goods of the applicant by the use or in connection therewith in the course of trade of the applicant's trade mark or adopting the distinctive get-up, package design or label identical or similar in all essential details to that of the applicant's 'Movate Cream' or any colourable or deceptive imitation thereof without duly distinguishing such trade mark, set-up, or label from those of the applicant or by any other means,

(b) manufacturing, or causing to be manufactured for them, importing, selling or exposing or offering for sale or supplying or inviting offers to acquire or distribute for the purpose of sale any pharmaceutical dermatological preparation in particular 'Hot Movate Gel' with any package, get-up, label or tube, bearing the words 'Hot Movate Gei' or 'Movate' or any other words so closely resembling the applicant's trade marks in particular 'Movate Gel' registered as No 52632 or 'TopMovate' registered as No 52623 as to be calculated to lead to the belief that the preparation ('Hot Movate Gel') not of the applicant's manufacture or merchandise are products of the applicant,

(c) infringing the applicant's copyright in the registered design No 5456 in respect of the applicant's registered trade marks known as 'Movate Gel' and 'Top Movate', 'Topsovate', 'Topvate' their get-up, label and package design."

Meanwhile, the defendant on being acquainted with the foregoing interim order filed an application dated 27/3/79 seeking inter alia to discharge the said order of interim injunction granted on 3/3/96. Thereupon, the trial court vacated the said interim order among other orders.

The plaintiff feeling aggrieved by the decision appealed to the Court of Appeal, Lagos by an amended notice of appeal containing 5 grounds. Parties thereafter filed and exchanged their respective briefs of argument. The Court of Appeal at the end of the day dismissed the plaintiffs appeal hence the appeal to this court. Parties here have filed and exchanged their briefs of argument. The plaintiff is the appellant so far in this court.

I think, I have brought the background to this matter up to the stage I may comment on one or two major questions that directly have arisen from the decision in this matter particularly as regards the court below reframing the issues for determination in the appeal. The appellant has complained bitterly against this act as being highly prejudicial to the appellant in the circumstances, and even has gone as far as contending that the reframed issues do not stem from the grounds of appeal the appellant filed. It is trite law that an appeal court should deal with the issues for determination as identified by an appellant, that is to say, in deciding the appeal presented before the

court; this is not to say that the court may not in the interest of justice
 frame or reframe the issues for determination in a matter under cer-
 tain circumstances. On this occasion the refraining of the issues by
 the court below is most appropriate to bring out the issues in dispute
 in the appeal. This court has decided in *Ifabiye v Adeniyi* (2000) SC
 B 31 at 42 that where the issues raised by the parties on appeal are
 inappropriate or inadequate vis-a-vis the grounds of appeal filed, the
 court should without any hesitation attempt to identify the appropri-
 ate issues in the circumstances in the case. This power is not at large
 C as the court in such instances has to ensure that the issues so formu-
 lated do not raise new ones not covered by the grounds of appeal as
 canvassed by the parties except it is an issue on jurisdiction see again
Ifabiye v Adeniyi (2000) 5 SCL 31 at 41.

Speaking for myself, in expatiation, I hold the view that in so
 D far as issues for determination relate to questions of law or facts or
 both a decision on them in favour of either of the parties entitles him
 to judgment in the matter, therefore the courts have to show great
 restraint for intervening to frame or reframe of issues for determina-
 tion in a matter. It is settled that Issues for determination have to be
 E rooted in the grounds of appeal otherwise they are incompetent.
 They serve to crystallize a party's dispute with the judgment as accen-
 tuated in the grounds of appeal. After all, it is what the appellant
 considers is in dispute between the parties in regard to the law or fact
 F in an appeal that is placed before the appeal court for determination.
 In this regard, it requires special skill if I may say so to be able to
 frame or reframe issues for determination so as to fall in sync with the
 arguments already proffered in the briefs of argument on the issues
 as identified by the parties. In all, the power of the court to frame or
 G reframe issues for determination cannot be questioned nor challenged
 although it should exercise this power with the greatest circumspect
 as in this case.

The other important question in this matter relates to the ques-
 tion of the plaintiff resorting to self-help coupled with its failure to
 H disclose the same to the trial court earliest. I think the plaintiff on
 these facts/grounds is not entitled to the exercise of judicial discretion
 in its favour. The relief being an equitable relief, equity expects the
 plaintiff to come to its sanctuary with clean hands and in this regard

to make a clean disclosure of facts to enable the court do equity between the parties in the application. The circumstances of this case is governed by the principle of law in Ojukwu's case in Governor of Lagos State v Ojukwu (1986) 1 NWLR (pt. 18) 621 that is to say - once the court is seised of a matter no party has a right to take the matter into his own hands as by taking possession of the premises in question in the cited case by strong hand (a case of stay of execution). The Governor of Lagos State had in the cited case resorted to extra judicial method by ejecting Ojukwu out of the premises the subject matter of an application before the court. This court was vehement in condemning this act as an executive lawlessness. The appellant here reported to the police of the matter of drug adulteration in this matter when even then the trial court is already duly seised of the subject matter, having granted an interim order of injunction to keep the Res as per the particulars of claim in status quo ante. The situation in this case appears to have been aggravated by the plaintiff non-disclosure of this act to the trial court at the earliest opportunity. The trial court has deprecated the act in these strong words:

"At the last hearing there was a complaint before this court by the respondent that the same subject matter is before the A.I.G Force C.I.D. Alagbon, who ordered that the 3rd respondent be detained. He was later released on bail. This court then took into consideration the fact that the plaintiff had resorted to self help and therefore ordered learned counsel for the plaintiff/applicants to advise his clients to withdraw the complaint pending before the police before the adjourned date."

Furthermore, in Odogwu v Odogwu (1992) 2 NWLR (pt. 225) 539 at 557, the applicant by strong hand took custody of his 3 children, notwithstanding the initial order of the court giving him custody of the 3 children, all the same, Karibi-Whyte J.S.C castigated such act saying that

"The court should neither expressly nor by implication endorse self-help as a remedy"

The circumstances in the instant case are poles apart from the situations in the two cited cases above. I must confess that I still find it difficult to hold on the peculiar facts of this case on the question whether the appellant by reporting of the matter of drug adultera-

tion to the police thereby resorted to self-help. However, I do not see how upon the foregoing scenario coupled with the apparent case of conflicting affidavits of the parties in the substantive application as found by the trial court, the plaintiff had expected the trial court to grant to it an order of interlocutory injunction without more. It is settled law that where there is a conflict in the affidavit evidence of the parties before a court, the court should resolve such conflict by oral evidence from the deponents. See: *Falobi v Falobi* (1946) NWLR 169 SC and *F.S.B. International Bank Ltd v Imano Nig. Ltd* (2000) 7 SC (pt. 1) 1. There is no way the matter could have moved forward without first resolving the conflicting affidavits.

It is against this background that the trial court rightly in my view has chosen to grant to the parties an accelerated hearing of the main action and avoid commenting at interlocutory stage on the serious questions in controversy between the parties in the substantive action. See *Akapo v Hakeem-Habeeb* (1992) 6 NWLR (pt. 247) 266 and *ACE Ltd v Awogboro* (1996) 5 NWLR (pt 437) 383.

There can be no doubt that this interlocutory matter has no reason getting this far. The delay in determining this matter cannot be in the interest of the plaintiff particularly in a passing-off matter.

As I posited above, I have read the lead judgment of my learned brother Mukhtar. J.S.C and I agree with him that this appeal should be dismissed. I dismiss it and award N10,000.00 costs to the respondent.

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