

SUPREME COURT OF NIGERIA
FRIDAY 14TH FEBRUARY, 2014. SC. 79/2005
CORAM:- J. A. FABIYI, B. RHODES-VIVOUR,
N. S. NGWUTA, M. U. PETER-ODILI, J. I. OKORO, JJSC

1. SOCIETY BIC S. A.
2. COMPAGNIE DE MOULAGES APPELLANTS
3. NIGERIAN BALL POINT PEN IND. LTD.
AND
CHARZIN INDUSTRIES LIMITED RESPONDENT

APPEALS - Grounds of appeal - Issues - Proliferation - Number of grounds should not be less than issues - And framing two issues from one ground is wrong (H1)

APPEALS - Issues - Formulation - Outside grounds - Fate - Issue not related or based on grounds of appeal is incompetent and completely valueless - And must be ignored by appellate court (H2)

ACTIONS - Cause of action - Meaning of - It denotes every fact which it would be necessary for plaintiff to prove - If traversed - To support his right to judgment of the court (H3)

JURISDICTION - Definition of - It is the limits imposed upon the power of a validly constituted court - To hear and determine issues with reference to subject matter - Parties and the relief sought (H4)

JURISDICTION - Determination of - Basis - It is determined by claim endorsed on writ or stated in statement of claim - And not by facts averred in statement of claim or affidavit evidence to be relied on by plaintiff (H5)

JURISDICTION - Expounding of - While a Judge can expound his jurisdiction - He cannot expand same beyond the limit imposed by law - As he does not hunger after jurisdiction (H6)

APPEALS - Court - Judgment - Criticism - Where trial Judge makes a mistake in his judgment - It is enough for counsel to demonstrate

the error for appellate court to correct - Without putting to question the impartiality and integrity of the Judge (H7)

FACTS

Before the High Court of Lagos State plaintiff/respondent commenced this action against defendants/appellants, claiming N10 million damages for injury suffered as a result of libel published against it by appellants in a national daily. Respondent also claimed for perpetual injunction restraining appellants from further publication or circulating any other similar libel affecting respondent. Appellants entered a conditional appearance and thereafter brought application asking the court to strike out the suit on the ground that the court had no jurisdiction to entertain the action, the action being within the exclusive jurisdiction of the Federal High Court.

Appellants further contended that the suit is an abuse of court process in that the issues involved were sub judice in Suit No. FHC/L/CS/1182/95: Societe Bic S. A. & Compagnie de Moulages v. Charzin Ind. Ltd & Charles Ezeagwu already pending at the Federal High Court Lagos. Respondent responded by filing counter-affidavit. In its ruling, the court assumed jurisdiction and dismissed the objection of appellants. Appellants in reaction, appealed to the Court of Appeal Lagos Division. The appeal was dismissed. Appellants being aggrieved lodged appeal in Supreme Court.

ISSUES FOR DETERMINATION

“(1) Whether from the records the Court of Appeal was right in deeming as abandoned the 2nd prayer of the appellants in their motion on notice dated 23rd February, 1998 praying for an order striking out the Respondent’s suit as constituting an abuse of Court’s process

(2) Whether the Court of Appeal was right in holding that the Respondent’s cause of action in this Suit was founded in tort and not trademark and therefore the High Court of Lagos State has the jurisdiction to hear and determine the Suit

(3) Whether from the facts and circumstances of this case the Court of Appeal was right in holding that for purposes of determining jurisdiction, the plaintiffs’ cause of action is defined by reference to only the plaintiff’s statement of claim.”

HELD (Unanimously dismissing the appeal per NGWUTA JSC)

APPEALS - Grounds of appeal - Issues - Proliferation

1. It is an established principle of law that the number of grounds of appeal should on no account be less than the issues for determination and framing two issues from one ground of appeal is a violation of the said principle.

A ground of appeal should not be split to raise two issues.

(p. 680 F)

APPEALS - Issues - Formulation - Outside grounds - Fate

2. An issue for determination not related to or based on grounds of appeal is not only incompetent but completely valueless and must be ignored by the appellate Court.

(p. 681 B)

ACTIONS - Cause of action - Meaning of

3. Issue 3 is on the determination of the appellants' cause of action by reference to the Statement of Claim only. The term "cause of action" is judicially defined as denoting every fact (though not every piece of evidence) which it would be necessary for the plaintiff to prove, if traversed, to support his right to the judgment of the Court.

It is any act on the part of the defendant which gives the plaintiff a cause to complain.

It is different from the evidence or pieces of evidence necessary to sustain the claim. It is the entire set of circumstances giving right to enforceable claim. (p. 682 H)

JURISDICTION - Definition of

4. On the other hand, jurisdiction of a Court is defined as the dignity which the Court has to do justice in a cause or complaint brought before it. It is the limits imposed upon the power of a validly constituted Court to hear and determine issues with reference to subject matter, the parties and the relief sought. (p. 683 C)

JURISDICTION - Determination of - Basis

- 5. In determining the issue of jurisdiction, it is the claim endorsed on the Writ or stated in the Statement of Claim that will be considered, not the facts averred in the Statement of Claim or the affidavit evidence to be relied on by the plaintiff. It is a misconception for learned Counsel for the appellants, to refer to facts pleaded in the Statement of Claim or averments in affidavit as components of the cause of action to be relied on in ascertaining the jurisdiction of the Court. Issue 3 is resolved against the appellants. (p. 684 A)**

JURISDICTION - Expounding of

- 6. It is an established fundamental principle that while a Judge can expound his jurisdiction, he cannot expand same beyond the limit imposed by law. A Judge does not hunger after jurisdiction. (p. 684 E)**

Court - Judgment - Criticism

- 7. With due respect to learned Counsel, he portrayed His Lordship as having unlawfully assumed jurisdiction before he made effort to justify the illegal act of assuming jurisdiction denied him by the facts and law applicable to the claim before him. He also showed the Judge as having circumvented the bounds placed on his jurisdiction by law.**

- The above are unkind and unprofessional statements by a lawyer in reference to a Judge. It is more disturbing when the statements, as in this case, are entirely without substance. This judgment has vindicated the learned trial Judge and the statements reflected on learned Counsel who made them as being ignorant of the claim and the law applicable to same, or is bent on casting aspersion on the learned trial Judge by any means.**

- If a trial Judge makes a mistake in his judgment, it is enough for Counsel to demonstrate the error for the appellate Court to correct without putting to question the impartiality and ipso facto the integrity of the trial Judge without valid grounds for so doing. (p. 684 F)**

NOTABLE POINTS OF INTEREST

NGWUTA JSC

1. Competence of court

In *Madukolu v. Nkemdilim* (1962) 1 All NLR 587, this Court stated the ingredients of jurisdiction thus: B

(a) The Court or tribunal must be properly constituted with respect to the number and qualification of its members.

(b) The subject matter of the action must be within its jurisdiction. C

(c) The action is initiated by due process of law.

(d) Any condition precedent to the exercise of its jurisdiction has been fulfilled. (p. 683 E)

RHODES-VIVOUR JSC

2. Libel – Meaning of

Libel on the other hand is either written, (defamation) or spoken (slander). A libel is any publication in print, writing, pictures, or signs that is injurious to the reputation of someone else. Claims in libel succeed when found to be false. (p. 688 F) D

REPRESENTATION

Ekpe Asuquo Esq., for the Appellants

Andrew Igboekwe Esq., for the Respondent F

CASES REFERRED TO

Atanda v. Ajani (1989) 3 NWLR (pt. 111) 511

Rumain v. Rumain (1992) 4 NWLR (pt. 238) SC 650

Magnussun v. Koiki (1993) 9 NWLR (pt. 317) 287 G

Inah v. Ukoi (2002) 9 NWLR (pt. 773) 563

Saraki v. Kotoye (1992) 9 NWLR (pt. 264) 155

Briggs v. Bob-Manuel (1995) 7 NWLR (pt. 409) 559

Tukur v. Govt. of Gongola State (No.20) (1989) 4 NWLR (pt. 117) 517 H

Ejowhomu v. Edok Eter Ltd (1986) 5 NWLR (pt. 39) 1 SC 34

Yusuf v. Akindipe (2000) 8 NWLR (pt. 669) 376

Ogunyade v. Oshunkeye (2007) 15 NWLR (pt. 1057) 218

Oforkire v. Maduike (2003) 3 NWLR (pt. 812) 166

Umeh v. Iwu (2008) 8 NWLR (pt. 1089) 225

Plateau State v. A-G Federation (2006) 3 NWLR (pt. 967) 346

Oba Aremo II v. Adekeye (2000) 2 NWLR (pt. 644) 257

Fasuen Motors Ltd v. UBA Plc (2000) 1 NWLR (pt. 640) 190

B

STATUTES & RULES REFERRED TO

Constitution of the Federal Republic of Nigeria 1979, ss. 6(6)(a), 236(1)

C Constitution of the Federal Republic of Nigeria 1999, ss. 251 (1) (f)

Trademarks Act Cap 68 LFN 1990,

Lagos State High Court (Civil Procedure) Rules 1999, O. 23 & 42

BOOK REFERRED TO

D Black's Law Dictionary 7th Edn.

LEAD JUDGMENT BY NGWUTA JSC

E Before the High Court of Justice of Lagos State, Lagos Judicial Division, the plaintiff, now respondent, claimed against the defendants, now appellants, as follows:

F “(a) *The sum of N10,000,000.00 (Ten million naira) as damages for injury suffered by reason of the libel on the plaintiff’s “CHARZIN” Ball Point Pens contained in the advertisements the defendants published and caused to be published in the issues of the “Vanguard Newspaper, of August 18, 1995 on page 10 and the Daily Times Newspaper of November 13, 1995 in page 4.*

G “(b) *A perpetual injunction restraining the defendants and each of them whether by themselves or by their servants or agents from further printing, issuing, publishing or circulating or causing to be printed, issued, published or any other similar libel affecting the plaintiff.*”

H The plaintiff filed its Statement of Claim along with the writ of summons. Upon service on them of the Writ and Statement of Claim, the defendants (now appellants) filed a motion on notice on 23rd February, 1998 asking for the following reliefs:

“(1) *An order striking out this Suit in that this Honourable Court has no jurisdiction to entertain the same being an action within the exclusive jurisdiction of the Federal High Court.*

(2) An order striking out this Suit as constituting an abuse of Court process in view of the fact that the issues necessary for the determination of the same are subjudice in the case of Suit No. FHC/L/CS/1182/95: Societe Bic SA & Compagnie De Moulagues v. Charzin Industries Ltd & Charles Ezeagwu...

The reliefs were predicated on the grounds that:

"1 By the provisions of section 230 (1) subsection (f) of the Constitution (Suspension and Modification) Decree No. 107 of 1993, jurisdiction is conferred on the Federal High Court to the exclusion of all other Courts, with respect to civil and criminal cases or matters relating to:-

'Any Federal enactment relating to Copyright, Patents, Designs, Trade Marks and Passing-off, Industrial Designs and Merchandise Marks, Business Names and Commercial Industrial Monopolies, Combines and Torts, Standards of goods and Commodities and Industrial Standards.'

2. The claim in this Suit arising from a publication made on protection of the defendants' Registered Trade Marks, Copyrights and Design falls within the exclusive jurisdiction of the Federal High Court as provided for under the Constitution (Suspension and Modification) Decree No. 107 of 1993.

3. There is pending before the Federal High Court Lagos presided over by His Lordship, Mr. Justice G. A. A. T. Jinnadu, Suit No. FHC/L/CS/1182/95 Societe Bic S. A. & Compagnie De Moulagues v. Charzin Industries Ltd & Charles Ezeagwu, over the same subject matter as the present suit wherein parties and the issues raised are substantially the same as this present Suit.

4. The issues necessary for the determination of this Suit are subjudice in the said Suit No. FHC/L/CS/1182/95: Societe Bic SA & Compagnie De Moulages v. Charzin Industries Ltd & Charles Ezeagwu.

5. The plaintiff in this Suit represented by the same solicitors herein has taken several steps in Suit No. FHC/L/C/S/1182/95: Societe Bic S. A. & Compagnie De Moulagues Industries Ltd & Charles Ezeagwu before Honourable Mr. Justice G.A.A.T. Jinnadu and are entitled to raise a counter-claim in the suit where they have already been sued."

The motion was supported by a 12-paragraph affidavit to

which were annexed Exhibits A-F1, further and better affidavit of six paragraphs of 20th March 1998 to which were annexed Exhibits AA-CC1 and 2nd further and better affidavit of five paragraphs deposed to on 21st April 1998 with one Exhibit - IJU1. Though there is a further counter-affidavit of six paragraphs, the records do not contain a counter-affidavit.

In its ruling delivered on 6/11/98, the trial Court stated, inter alia, that:

“The applicant has a 12 paragraphs (sic) affidavit with Exhibits attached marked ‘A-F1’ and a further and better affidavit of 6 paragraphs with Exhibits marked ‘AA-CC1’ and 2nd further and better affidavit of 5 paragraphs with another Exhibit marked ‘IJU1’. The trial Court concluded its ruling thus:

“Since the issue involved is the tort of libel and injunction I hold that this Court has the jurisdiction to adjudicate in respect of this suit. The objection by the learned Counsel to the Defendant is therefore misconceived and this application is accordingly struck out.”

In a challenge to the ruling on their Motion on Notice, the defendants/applicants, now appellants, filed before the Lagos Division of the Court of Appeal a Notice of Appeal containing five grounds of appeal on 15/11/98.

In its judgment, based on the lone issue presented for determination, the lower Court, on 17th January 2005, dismissed the appeal in the following terms:

“On the whole, the lone issue in this appeal is resolved against the Appellants. The appeal has no merit and is accordingly dismissed. The decision of the lower Court is hereby affirmed. Appellants are ordered to pay the Respondents the cost of this appeal put at N10,000 Ten thousand naira.”

Dissatisfied with the judgment once more, the appellants filed in this Court a Notice containing five grounds of appeal. The notice was dated 1st February, 2005. Though the notice was numbered as pages 156 to 160 of the transcripts, it was not stamped, it contains no evidence that payment for its filing fees was made nor does it have a date of filing. However, I will assume that the process was duly filed since it was numbered as part of the records for this appeal.

In compliance with the rules and practice of this Court, learned Counsel for the parties filed and exchanged briefs of argument.

From the five grounds of appeal, learned Counsel for the appellants distilled the following three issues for determination in the appellants' brief:

"(i) Whether the Court of Appeal was right in deeming as abandoned the 2nd prayer of the appellants' motion on notice, asking for an order striking out the Suit as constituting an abuse of Court process in that the issues necessary for determination of the Suit are subjudice, in Suit No. FHC/L/CS/1182/95 Societe Bic S. A. & Compagnie De Moulagues v. Charzin Industries Ltd & Charles Ezeagwu. (Ground (sic) 1 & 2)

(ii) Whether on the totality of the materials before the Court of Appeal the learned trial Judge was right in finding that the cause of action in the Suit was founded in the tort of trade libel and not in trademark and therefore the High Court of Lagos State has jurisdiction to hear and determine the Respondent's suit. (Ground 4)

(iii) Whether the Court of Appeal was right in treating the issue of jurisdiction raised in the appellants' motion on notice, dated 23rd January 1998 and filed with affidavits in support, as a matter in lieu of Demurer proceedings and whether the Court could rule on the issue of demurer without inviting parties and/or their Counsel to address the Court on such an issue." (Ground 3)

In his brief of argument, learned Counsel for the Respondent raised and argued a preliminary issue as to the competence of the appellants' third issue for determination. In his view, the issues that arose from the grounds of appeal are:

"(1) Whether from the records the Court of Appeal was right in deeming as abandoned the 2nd prayer of the appellants in their motion on notice dated 23rd February, 1998 praying for an order striking out the Respondent's suit as constituting an abuse of Court's process (Grounds 1 and 2).

(2) Whether the Court of Appeal was right in holding that the Respondent's cause of action in this Suit was founded in tort and not trademark and therefore the High Court of Lagos State has the jurisdiction to hear and determine the Suit (Ground 4).

(3) Whether from the facts and circumstances of this case the Court of Appeal was right in holding that for purposes of determining jurisdiction, the plaintiffs' cause of action is defined by reference to only the plaintiff's statement of claim." (Ground 3)

Arguing his issue one, learned Counsel for the Appellants referred to the motion for striking out from which this appeal arose and submitted that Counsel for both parties made submissions on the 2nd prayer in the motion. He referred to page 126 of the record which recorded learned Counsel who moved the application thus:

B *“She refers to the motion dated 23/2/98 and the ground stated. She refers to the affidavit in support and the further affidavit in support, of 6 paragraphs and further and better affidavit of 5 paragraphs.”*

C He said that though the trial Court restated the motion and the facts and grounds upon which it was founded, the Court failed to make a pronouncement on the 2nd prayer of the motion. He relied on *Atanda v. Ajani* (1989) 3 NWLR (Pt.111) 511 at 539 para. B; *Rumain v. Rumain* (1992) 4 NWLR (Pt.238) SC 650 in support of
D his argument that a Court has a duty to give full consideration to all issues raised or canvassed before it.

He relied on *Magnussun v. Koiki* (1993) 9 NWLR (pt.317) 287 at 296-297; *Harriman v. Harriman* (1989) 5 NWLR (Pt.119) C77 (?) paragraph A and argued further that a Court is bound to
E consider any prayer as well as the materiality and the relevance of the affidavit in relation to the prayer and rule accordingly even in cases where Counsel is silent in his submission on them. He contended that the Lower Court misdirected itself in law when it held that because the appellants allegedly did not canvass the issue of
F abuse of Court process during the argument in the trial Court, that Court was right when it declined to make a finding based on evidence before it.

He referred to *Magnussin v. Koiki* (supra) to the effect that
G *“the abandonment of prayers which are supported by affidavit evidence can only take place if the applicant expressly withdraws such prayer(s)”*.

Learned Counsel referred to page 42 of the record where the Court recorded learned Counsel for the Respondents thus:

H *“He then referred to the petition before the Federal High Court and stated that the cause of action there was different whereas what was before this Court is simply defamation”*

and argued that the learned Counsel for the respondent actually joined issues with the appellant on the 2nd prayer allegedly

abandoned.

He relied on *Inah v. Ukoi* (2002) 9 NWLR (Pt.773) 563 at 593 in which the Court of Appeal held that an order drawn up or proceedings which stated that the respondent's Counsel moved in terms of the motion paper was proper. He urged the Court to hold that the Lower Court erred in holding that the appellants abandoned their 2nd prayer in the motion. B

He argued that the Court of Appeal had a duty to do what the trial Court omitted to do, that is to pronounce on the 2nd prayer which alleged abuse of process of Court. He relied on *Saraki v. Kotoye* (1992) 9 NWLR (Pt.264) 155 at 188-189 for circumstances giving rise to abuse of judicial process. He argued that once a Court is satisfied that the proceedings before it is an abuse of its process, it has a duty to invoke its coercive powers under Section 6(6)(a) of the 1979 Constitution to dismiss the action. C D

He is of the view that the claim in Suit No.FHC/L/C/S/1182/95 is the same as in the Suit at hand and that the parties are the same. He argued that the learned trial Judge "*in his effort to justify his assumption of jurisdiction in the matter*" clearly overlooked the issue and thereby erred in his ruling. He urged the Court to consider the prayer on abuse of process of Court and set aside the judgment of the Court of Appeal and that of the trial Court. E

In issue two, learned Counsel for the appellants referred to the Vanguard Newspaper of Friday 18th August 1995 at page 10 and the Daily Times Newspaper of Monday, November 13, 1995 page 4 where it was alleged that the respondent: F

"falsely and maliciously published and caused to be published a photograph of ball point pens get-ups with the name CHARZIN inscribed on one of them under a large type caption 'AVOID IMITATION'". G

He argued that the above publication was not a tort of trade libel but was an infringement of the appellants' trademark which falls within the exclusive jurisdiction of the Federal High Court under Section 236(1) of the 1979 Constitution of the Federal Republic of Nigeria then in force. He referred to a cause of action as the factual situation which if substantiated entitles the plaintiff to a remedy against the defendant. He relied on *Briggs v. Bob-Manuel* (1995) 7 NWLR (Pt.409) 559; *Tukur v. Government of Gongola State* No.20 (1989) H

4 NWLR (Pt.117) 517 at 581.

He referred to paragraph 5-11 of the Statement of Claim at pages 3-5 of the record and said that the ingredients needed for the proof of the claim involved the issue of ownership of trademark. Learned Counsel argued that:

B *“The learned trial Judge shut his eyes to the facts as alleged in the Statement of Claim and in the various Affidavit Evidence of the parties which act prevented him from a dispassionate consideration of whether or not the matter before him concerned trademark issue and therefore outside his jurisdiction”:*

C and that the Court of Appeal fell into the same error when it affirmed the decision of the trial Court. He urged the Court to consider what he called *“the component of the cause of action”* of the plaintiff’s Suit and resolve the issue in favour of the appellants.

D In issue three, learned Counsel for the appellants reproduced paragraphs 5, 6, 7, 9, 10 and 11 of the Statement of Claim at pages 3-5 of the record and contended that the claim showed clearly that the issues raised border on an alleged injury to a trademark “CHARZIN” and the right enjoyed by the said trademark. He referred to Trademarks Act, Cap 68 Laws of the Federation of Nigeria, 1990 and Section 230 (1) (f) of the Constitution (as amended) now Section 251 (1) (f) of the Constitution of the Federal Republic of Nigeria 1999 (as amended) and argued that the issues in the case fall under the exclusive jurisdiction of the Federal High Court.

F Learned Counsel for the appellant once more called the integrity and impartiality of the learned trial Judge in issue when he argued that:

G *“The learned trial Judge, in order to avoid the ouster of his jurisdiction in this matter, erroneously held that the Statement of Claim did not raise the issue of Trademark and that as a result the Lagos State High Court had jurisdiction to adjudicate on the claim of the plaintiff.”*

H He referred to page 47 of the record wherein the trial Court said, inter alia:

“It is clear that the plaintiff had a mark Charzin in their ball pens, the publication in the National Dailies did not involve the mark but the false and malicious publication...”

Learned Counsel inferred from the above that the trial Court

decided the issues of trademark. He referred to page 47 of the record wherein the Lower Court agreed with the ruling of the trial Court and reproduced and considered Orders 23 and 42 of the Lagos State High Court (Civil Procedure) Rules 1999 and submitted that the allegation of trade libel, raised is ancillary to the issues of Trade Mark Law as the question whether or not the plaintiff is entitled to the reliefs claimed will depend on Trade Mark Law. B

He reproduced and relied on the finding of the Court below that, inter alia: *“The defendant/objector having conceded and relied upon the averments in the plaintiff’s claim is deemed to have admitted the facts as averred to there.”* C

In practical terms, the demurer procedure has continued to be in spite of its abandonment by the rules of Court.” and argued that the issue raised by the appellants is not a matter for the demurer proceedings but is more fundamental than that, adding that the objection to jurisdiction can be taken even on a motion without affidavit. He argued that the issue of demurer was not raised by either party in the trial Court, and that since the issue was raised by the Lower Court suo motu the parties should have been called upon to address same before a decision on it is taken. He relied on *Ejowhomu v. Edok Eter Ltd* (1986) 5 NWLR (Pt.39) 1 SC pages 34-35 H-A. He urged the Court to declare the decision on the issue of demurer as *“nullity and proceed to set it aside”*. E

He urged the Court to pronounce on the prayers contained in the applicants’ motion on notice of 23/2/98 and to overturn the judgment of the Court below. He urged the Court to set aside the ruling of the trial Court. F

Arguing the preliminary issue he raised in his brief, learned Counsel for the respondent said that the appellants’ 3rd issue consists of two issues co-joined as one. He said the two issues are; G

(1) whether the Court of Appeal was right in treating the issue of jurisdiction... as a matter in lieu of demurer proceedings and the second issue is *“whether the Court could rule on the issue of demurer without inviting parties and/or their Counsel to address the Court on such an issue.”* He argued that contrary to the appellate practice that two issues cannot be formulated from one ground of appeal, the appellants framed the two issues from one ground, ground 3. H

He referred to Yusuf v. Akindipe (2000) 8 NWLR (Pt.669) 376 at 384 para C-D; Ogunyade v. Oshunkeye (2007) 15 NWLR (Pt.1057) 218 at 240 paras A-B and urged the Court to strike out appellants' issue three as incompetent. He urged the Court to strike out the issue on the further ground that it was framed from the particulars of ground B 3, that is, particulars of misdirection, number (iv) of ground 3.

In his issue one on the alleged abandonment of prayer 2 in the appellants' motion, he referred to pages 126-127 of the record to the effect that Counsel for the appellants argued only the first prayer C in the motion and made no reference to the second relief of abuse of process of Court. He relied on Oforkire v. Maduikie (2003) 3 NWLR (Pt.812) 166 at 187 paras C-F in his contention that Court will not grant a relief in respect of which it was not moved.

He argued that the Court below was right in its finding that D the second prayer upon which the Court was not moved was abandoned and that the trial Court rightly did not pronounce on it. He referred to Inah v. Ukoi (supra) relied on by learned Counsel for the appellant and contended that the facts are not the same as Counsel in the present case did not move the Court in terms of the motion E paper.

With reference to the concession of the appellants in their argument that *"a claim on such a publication we respectfully submit is an off-shoot of the said already pending suit... and should more appropriately be raised as a counter-claim in the suit..."*, he argued that F once it is accepted that the respondent has a cause of action, it is not for the opponent to dictate how that cause can be agitated and that the filing of a fresh suit in the circumstance will not constitute abuse of process of Court. He relied on R. Benkay Nigeria Limited v. Cadbury G Nigeria Plc, unreported decision of this Court in SC.29/2006 of 23/3/2012.

On the alleged abuse of process of Court, he referred to Umeh v. Iwu (2008) 8 NWLR (Pt.1089) 225 at 243 paras G-H where this Court stated that to sustain a charge of abuse of process of Court H the following, inter alia, must co-exist:

- (1) a multiplicity of Suits;
- (2) between the same opponents;
- (3) on the same subject matter;
- (4) on the same issues.

He said that the claims and parties in Suit No. FHC/L/C/S/1182 are completely different from the claims and parties in the present Suit, that being the case, the issue of abuse of process of Court does not arise. He referred to *Plateau State v. A-G Federation* (2006) 3 NWLR (Pt. 967) page 346 at 393 paras F-G and contended that the present Suit does not constitute abuse of process of Court in relation to Suit No. FHC/L/C/S/1182/95. He added that the two Suits were not instituted by the same party. He urged the Court to resolve the issue in favour of the respondent. B

He argued issues 2 and 3 together. Issue two is whether the claim is founded in tort and not trademark and the Lagos State High Court has jurisdiction to hear same and issue 3 is whether or not a cause of action is determined exclusively by reference to the Statement of Claim. He referred to the argument of the appellants that the trial Court and the Court below were wrong in law to have considered only the Writ of Summons and the Statement of Claim in determining the cause of action and ipso facto the jurisdiction of the trial Court to hear the case. C D

He said that the argument is misconceived as the Court, on determining the cause of action, is limited to a consideration of the Writ of Summons and the Statement of Claim and is not expected to consider components of the cause of action. He relied on *Oba Aremo II v. Adekeye* (2000) 2 NWLR (Pt.644) 257 at 271; *Fasuen Motors Ltd v. UBA Plc* (2000) 1 NWLR (Pt.640) p.190 at p.200; *Alhaji Sule Anka & 9 Ors v. Alhaji Abdullahi Lokoja* (2001) 4 NWLR (Pt.702) p.178. He referred to page 46 of the record where the trial Court held that: E F

“To determine the jurisdiction of this Court vis-a-vis the claim of the plaintiff, one must of necessity look at the Statement of Claim. Paragraphs 1, 5, 6, 7, 9, 10, 11 and 12 are very germane;” G and argued that the trial Court followed a laid down principle of law.

Learned Counsel referred to the claim endorsed on the Writ of Summons and the Statement of Claim, particularly paragraph 7 thereof and said that the claim is based on alleged false and malicious publication by the appellants of the respondent's Charzin Ball Points, adding that the trade mark of Charzin was not in issue. He referred to *Gatley on Libel and Slander*, 17th Edition, page 38 paras 71-72 in support of his contention that the respondent's claim relates to trade H

libel.

He referred to the definitions of “Trademark” and “Mark” in Black’s Law Dictionary 7th Edn and said that the trial Judge did not contradict himself and was right in the determination that trademark was not an issue in the case. Learned Counsel referred to the concurrent findings of the two Courts below that the respondent’s cause of action is the tort of trade libel in which the Lagos State High Court has jurisdiction to entertain and urged the Court not to disturb same. He relied on *R. Benkay Nigeria Limited v. Cadbury Nigeria Plc* (supra). He urged the Court to dismiss the appeal and affirm the decision of the Court below.

Learned Counsel for the respondent challenged the competence of appellants’ issue 3. The issue is hereby reproduced once more for ease of reference:

“Whether the Court of Appeal was right in treating the issue of jurisdiction raised in the Appellants’ Motion on Notice dated 23rd February 1998 as a matter in lieu of demurer proceedings and whether the Court could rule on the issue of demurer without inviting parties and/or their Counsel to address the Court on such an issue (Grd 3).”

As argued by learned Counsel for the respondent, issue 3 consists of two separate issues rolled into one. The first issue questions the right of the Court below to treat the issue of jurisdiction raised in the motion as a matter in lieu of demurrer and the second issue challenges the competence of the Court below to rule on the issue it raised without giving the parties or their Counsel the opportunity to address same.

It is an established principle of law that the number of grounds of appeal should on no account be less than the issues for determination and framing two issues from one ground of appeal is a violation of the said principle. See *Agu v. Ikewibe* (1991) 3 NWLR (Pt. 180) 385. ***A ground of appeal should not be split to raise two issues.*** See also *A-G Bendel State v. Aideyan* (1989) 4 NWLR (Pt.118) 646; *Ugo v. Obiekwe & Anor* (1989) 1 NWLR (Pt.99) 566; *Adelaja v. Funoiki* (1990) 2 NWLR (Pt.131) 137.

The two issues ought to have been ignored or struck out as incompetent as it is not the duty of the Court to make a choice for the appellant between the two issues allegedly framed from one ground of appeal. However, the respondent’s Counsel provided a life-line to

the appellant when he argued that second of the two issues was framed not from ground 3 but from one of its particulars. In other words, only the first of the two issues was raised from ground 3 but the second issue was distilled from one of the particulars therein.

An issue for determination not related to or based on grounds of appeal is not only incompetent but completely valueless and must be ignored by the appellate Court. See Omo v. JSC Delta State (2000) 7 SC (Pt.11) p.1. While the first arm of issue 3 is distilled from issue 3 and is competent, the second arm distilled from the particulars under ground 3 is incompetent and is hereby struck out.

I have carefully examined the two sets of issues in this appeal. The difference between the two is the issue of demurrer. The Lower Court held, inter alia:

“The defendant/objector having conceded and relied upon the averments in the plaintiff’s claim is deemed to have admitted the facts as averred to there. In practical terms, the demurrer procedure has confirmed to be in spite of its abandonment by the rules of Court.”

With respect, the Court below erred. There is no implication that a defendant challenging the jurisdiction of the Court to hear a case has, by doing so, admitted the facts averred by the plaintiff. However, the appeal was not determined on the issue of proceeding in lieu of demurrer inadvertently raised by the Court below.

Having disposed of this side issue, I intend to determine the appeal on the issues raised by the respondent which are substantially the same as those of the appellant.

Issue 1 is whether the Court below was right in deeming as abandoned prayer 2 in the appellants’ motion. Prayer 2 in the motion filed by appellants as defendants/applicants in the trial Court reads:

“2. An order striking out this Suit as constituting an abuse of Court process in view of the fact that the issues necessary for the determination of the same are subjudice in the case of Suit No. FHC/L/C/S/1182/95, Societe Bic S.A.A & Compagnie De Moulages v. Charzin Industries Ltd & Charles Ezeagwu.”

From the record and as argued by learned Counsel for the respondent, learned Counsel for the appellant dealt with issue 1 in his motions without any reference to the second issue, though refer-

ence was made to affidavit evidence. Appellants' Counsel relied on the case of *Magnusson v. Koiki* (supra) in his argument that an abandonment of a prayer can only take place if the applicant expressly withdraws such prayer. The facts of this case appear different from the facts of the case relied on by the appellants.

B In his ruling in the case, Kutigi, JSC (as His Lordship was then) said in part:

"In this case the ruling of the Court of Appeal clearly showed that the appellants' Counsel moved the motion or application and finally urged the Court to grant the application..."

C At page 41 of the record, the trial Court referring to learned Counsel for the appellants (applicants in the motion), said:

"She urged the Court to ask the question - what was trade libel?" She referred to Gatley on Libel and Slander, 8th Edition Chp D 9 at pages 132-134. She concluded that this Court had no jurisdiction in the subject matter of this suit."

From the record, not only did the learned Counsel fail to mention the second relief but she actually failed to move the Court. It would have been different if the learned Counsel had asked the E Court to grant the reliefs in the motion paper or had moved in terms of the motion paper.

With respect to the learned Counsel for the appellants, the motion was treated with levity as if such applications are granted as a matter of grace. The Court below was right to have held that the F second relief was abandoned and only the part of reliefs proved could have been granted. See *Orie & Anor v. UBA & Anor* (1976) 9 & 10 SC.123. I resolve issue one against the appellants.

Issue 2 is on the respondent's cause of action as found by the G Court below. I have already reproduced the respondent's claim. The claim is that the appellants', by their publications in the *National Dailies* portrayed the respondent's product as fake or imitation. It is the claim of the respondent that the publications were made of its product called *Charzin*, which was to be avoided by the public as fake or H imitation. I agree with the Court below that the claim was based on a trade libel and does not involve trademark. The issue is resolved against the appellants.

Issue 3 is on the determination of the appellants' cause of action by reference to the Statement of Claim only. The

term “cause of action” is judicially defined as denoting every fact (though not every piece of evidence) which it would be necessary for the plaintiff to prove, if traversed, to support his right to the judgment of the Court.

It is any act on the part of the defendant which gives the plaintiff a cause to complain. See *Lasisi Fadare & Ors v. A-G Oyo State* (1982) 4 SC 1 at 7; *Read v. Brown* (1888) 22 QBD 128 at 131; *Adimora v. Ajufo* (1988) 3 NWLR (Pt.80) 1. **It is different from the evidence or pieces of evidence necessary to sustain the claim. It is the entire set of circumstances giving right to enforceable claim.** See *Odutan v. Akibu* (2000) 7 SC (Pt.11) 106. **On the other hand, jurisdiction of a Court is defined as the dignity which the Court has to do justice in a cause or complaint brought before it. It is the limits imposed upon the power of a validly constituted Court to hear and determine issues with reference to subject matter, the parties and the relief sought.** See *Ikine v. Edjerode* (2001) 92 LRCN 3288 at 3316; *Adeyemi v. Opeyori* (1976) 9-10 SC 31.

There is a close relationship between cause of action and jurisdiction of a Court to entertain an action. In *Madukolu v. Nkemdilim* (1962) 1 All NLR 587, this Court stated the ingredients of jurisdiction thus:

- (a) The Court or tribunal must be properly constituted with respect to the number and qualification of its members.
- (b) The subject matter of action must be within its jurisdiction.
- (c) The action is initiated by due process of law.
- (d) Any condition precedent to the exercise of its jurisdiction has been fulfilled. See also *Ogbuinyiya v. Okudo* (1979) 6-9 SC 32.

In the case at hand, there is no issue on the number and qualification of the members of the Court, and the issue whether or not the action was initiated by due process of law was not raised nor is there any issue as to the condition precedent to the exercise of the Court’s jurisdiction. The question here is whether or not the subject matter of the action is within the limits imposed on the power of the Court to hear and determine the case before it.

All other conditions are fulfilled and it is the claim itself that will be considered, in the light of the applicable law to determine if the Court has power to hear the case. The claim is as stated in the

Statement of Claim if the claim therein is different from the one endorsed on the Writ of Summons.

In determining the issue of jurisdiction, it is the claim endorsed on the Writ or stated in the Statement of Claim that will be considered, not the facts averred in the Statement of Claim or the affidavit evidence to be relied on by the plaintiff. It is a misconception for learned Counsel for the appellants, to refer to facts pleaded in the Statement of Claim or averments in affidavit as components of the cause of action to be relied on in ascertaining the jurisdiction of the Court. Issue 3 is resolved against the appellants.

I find the language employed by learned Counsel for the appellants in his reference to the learned trial Judge disturbing.

At page 10 paragraph 4.1.21 of his brief, learned Counsel D for the appellants claimed:

“Rather the learned trial Judge, in his effort to justify his assumption of jurisdiction in the matter overlooked the issue...”

Again at page 18, paragraph 4.3.5 of the said brief, learned Counsel for the appellants said:

“The learned trial Judge, in order to avoid the ouster of his jurisdiction in the matter erroneously held...”

It is an established fundamental principle that while a Judge can expound his jurisdiction, he cannot expand same beyond the limit imposed by law. A Judge does not hunger after jurisdiction. With due respect to learned Counsel, he portrayed His Lordship as having unlawfully assumed jurisdiction before he made effort to justify the illegal act of assuming jurisdiction denied him by the facts and law applicable to the claim before him. He also showed the Judge as having circumvented the bounds placed on his jurisdiction by law.

The above are unkind and unprofessional statements by a lawyer in reference to a Judge. It is more disturbing when the statements, as in this case, are entirely without substance. This judgment has vindicated the learned trial Judge and the statements reflected on learned Counsel who made them as being ignorant of the claim and the law applicable to same, or is bent on casting aspersion on the learned trial Judge by any means.

If a trial Judge makes a mistake in his judgment, it is enough for Counsel to demonstrate the error for the appellate Court to correct without putting to question the impartiality and ipso facto the integrity of the trial Judge without valid grounds for so doing.

Having resolved the three issues against the appellants, I hold that the appeal is devoid of merit and I accordingly dismiss same with N100, 000.00 costs to the respondent. B

FABIYI JSC

I have had a preview of the judgment just delivered by my learned brother - Ngwuta, JSC. I agree with the reasons therein advanced to arrive at the conclusion that the appeal lacks merit and should be dismissed. C

It is basic that it is the claim of the plaintiff as can be gleaned from the Writ of Summons and Statement of Claim that determines the jurisdiction of a court to entertain a matter. See: Savannah Bank of Nigeria Ltd. v. Pan Atlantic Shipping & Transport Agencies Ltd. (1987) 1 NWLR (Pt.49) 212. D

As found by the two lower courts, nothing in the Writ of Summons and the Statement of Claim relates to trade mark or copy right to imbue the Federal High Court with jurisdiction as dictated by the provision of Section 230(1) (f) of the 1999 Constitution of the Federal Republic of Nigeria as amended by Decree 107 of 1993. The action, in its real essence, relates to trade libel which imbues Lagos State High Court with jurisdiction. This court will not interfere with the concurrent sound finding of the Lower Courts. See: Anaeze v. Anyaso (1993) 5 NWLR (Pt.291) 1. E

For the above reason and the detailed ones contained in the lead judgment which I hereby adopt, I too feel that the appeal to this court clearly lacks merit. It is hereby dismissed. I endorse the other consequential orders contained in the said judgment. F

RHODES-VIVOUR JSC

The respondent is a private limited liability. It manufactures and distributes high quality ball point pens under the name H

“CHARZIN”. It claims the 1st and 2nd appellants, who are agents/representatives of the 3rd defendant caused to be published in the Vanguard Newspapers of Friday 18th August, 1995 and Daily Times Newspaper of 13th of August, 1995 false offensive advertisement which disparaged the respondents product. Alarmed, the respondent as plaintiff filed an action in a Lagos High Court claiming as follows:

(a) The sum of N10m as damages for injury suffered by reason of the libel on the plaintiffs “CHARZIN” Ball point pens contained in the advertisement the defendants published and caused to be published in the issues of the Vanguard Newspaper of August 18th 1995 on page 10 and the Daily Times Newspaper of November 13th 1995 at page 4.

(b) A perpetual injunction restraining the defendants and each of them whether themselves or by their servants or agents from further printing, issuing, publishing or circulating or causing to be printed, issued, published or circulated the said libel or any other similar libel affecting the plaintiff.

After service of the originating processes the appellants, then defendants filed a Notice of Motion asking for the following reliefs:

(1) An Order striking out this suit in that this Honourable Court has no jurisdiction to entertain the same being an action within the exclusive jurisdiction of the Federal High Court.

(2) An Order striking out this suit as constituting an abuse of court process in view of the fact that the issues necessary for the determination of the same are subjudice in the case of suit No: FHC/L/CS/1182/95: Societe Bic S.A. & Compagine De Moulages v. Charzin Industries Ltd & Charles Ezeagwu.

In a considered Ruling delivered on 6/11/98, the learned trial judge ruled that the Lagos High Court had jurisdiction to hear the plaintiffs suit. He struck out the application.

His lordships reasoning can be found in the penultimate paragraph of his Ruling. It reads:

“It is clear that the plaintiffs had a mark Charzin in their ball point pens, the publication in the National Dailies did not involve the mark but the false and malicious publication which is in the realm of the tort of libel and not copyright and trade mark as envisaged by the provision of Section 230(i)(f) of Decree No 107 of 1993.

On the 17th of January, 2005 the Court of Appeal agreed with the learned trial judge. It proceeded to affirm the Ruling when it said:

“...An examination of the averments in the statement of claim leaves one with exactly the same conclusion as the one the lower Court had. The averments have not made the proprietorship of respondents trade mark an issue at all. Rather the main plinth of the averments is one on the false and malicious publications in some National Dailies ascribed to the appellants and injunction against the appellants on further publication of the alleged libelous materials...”

A few questions would resolve this interlocutory appeal.

1. How is jurisdiction determined?

It is long settled that jurisdiction is determined by the plaintiffs claim and not the defence or any other process. It is the Writ of Summons and statement of claim which contain the claims before the court that has to be examined in detail to ascertain whether it comes within the jurisdiction conferred on the court by the Constitution, or/and statute. See *Adeyemi v. Opeyori* 1976 9 - 10 SC p.31; *PDP v. T. Sylva & 2 Ors.* 2012 ALL FWLR Pt.637 p.606.

2. What is the plaintiffs claim?

Now, what do those documents say. The indorsement on the Writ of Summons reads:

(a) The sum of N10,000,000.00 (Ten Million) as damages for injury suffered by reason of the Libel on the plaintiffs ‘CHARZIN’ ball point pens contained in the advertisements the defendants published and caused to be published in the issues of the vanguard Newspaper of August 18th 1995 on page 10 and the Daily Times Newspaper of November 13th 1995 on page 4;

(b) A perpetual injunction restraining the defendants and each of them whether themselves or by their servants or agents from further printing, issuing publishing or circulating or causing to be printed, issued, published or circulated the said libel or any other similar libel affecting the plaintiff.

Relevant extracts from the statement of claim runs as follows.

(4) The 3rd defendant is a limited liability company... carrying on business as Agent/Representative of the 1st and 2nd defendants particularly in the manufacture and sale of “BIC” ball point pens in Nigeria.

(5) The plaintiff avers that it is and was at all material times the manufacturers and distributors of high quality ball pens under the name "CHARZIN". The plaintiff further avers that "CHARZIN" ball point pens have enjoyed considerable patronage from members of the public since their introduction to the market essentially because
 B of their proven high quality and efficiency.

(6) The plaintiff avers that the 1st and 2nd defendants by their Agent/Representative, the 3rd defendant, published and caused to be published advertisements in the issues of the Vanguard Newspaper of Friday August 18th 1995 on page 10 and the Daily Times
 C Newspaper of Monday, November 13th 1995 on page 4 wherein they falsely and maliciously published and caused to be published a photograph of ball point pens get-ups with the name "CHARZIN" inscribed on one of them under a large type caption "*AVOID IMITA-*
 D *TIONS*"

Trade Mark is a distinctive mark of authenticity through which the product of a particular manufacturer may be distinguished from those of others by word, name, symbol or device.

A car manufacturer who fixes or inscribes on his cars the
 E three pointed star may be infringing the Mercedes Benz trade mark. Also affixing the flying lady on a car may be infringing the Rolls Royce Trade Mark. Both examples are the distinctive mark of authenticity by which both motorcars are distinguished from those of other manu-
 F factures.

Trade Marks are registered and remain personal to the manufacturers.

Libel on the other hand is either written, (defamation) or spoken (slander). A libel is any publication in print, writing, pictures,
 G or signs that is injurious to the reputation of someone else. Claims in libel succeed when found to be false. The statement of claim reveals that the appellants' and the respondent are in the business of manufacturing Ball point pens. The appellants brand is BIC ball point pen, while the respondent's is CHARZIN ball point pen.

H The publication in the Newspapers warns the reading public to avoid the respondent's brand of ball point pens as the said products are imitations. The respondent says this is a false and malicious publication by the appellants. This is clearly the Tort of Libel. No-where in the pleadings is an infringing of the respondents trade mark

remotely alleged. The provisions of Section 230(i) (f) of Decree No.107 of 1993 of Section 251 (i) (f) of the 1999 Constitution are in the circumstances not applicable. The respondents claim is founded in the Tort of Libel. To be precise, defamation, and injunction to stop further publishing of defamatory material.

3. Which Court has jurisdiction to hear the Plaintiffs claim? B
Put briefly a court is competent when-

1. It is properly constituted as regards members and qualification of the members of the bench, and no member is disqualified for one reason or another; and

2. The subject matter of the case is within its jurisdiction, and there is no feature in the case which prevents the court from exercising its jurisdiction; and C

3. The case comes before the court initiated by due process of law, and upon fulfillment of any condition precedent to the exercise of jurisdiction. D

See: Madukolu & ors v. Nkemdilim 1962 2 NSCC p.374

Before a court can properly assume jurisdiction to hear a case, the subject matter of the case must be within the jurisdiction of the court. This suit is all about (2) above. The subject matter is the main complaint, and the main complaint is the publication of offensive material by the appellants, about the respondent product, Charzin ball point pens. This is Libel. Injunction is incidental to the main claim, which is to stop further publication of defamatory material about the respondents product, CHARZIN Ball Point Pen. F

The jurisdiction of the Federal High Court is spelt out in Section 7 of the Federal High Court Act Cap F.12 Vol.6 Laws of the Federation of Nigeria and Sections 251 and 272 (3) of the Constitution. Libel does not fall within the jurisdiction of the Federal High Court. G

The jurisdiction of a State High Court is enormous but not unlimited. Section 272 of the Constitution states that:

272(1) Subject to the provisions of section 251 and other provisions of this constitution; the High Court of a State shall have jurisdiction to hear and determine any civil proceedings in which the existence or extent of a legal right, power, duty, liability, privilege, interest, obligation or claim is in issue or to hear and determine any criminal proceedings involving or relating to any penalty, forfeiture, H

punishment or other liability in respect of an offence committed by any person.

(2) The reference to civil or criminal proceedings in this section includes a reference to the proceedings which originate in the High Court of a State and those which are brought before the High Court to be dealt with by the court in the existence of its appellate or supervisory jurisdiction.

My lords, Section 230 (i) (f) of Decree No.107 of 1993 or Section 251(i)(f) of the 1999 Constitution confers jurisdiction on the Federal High Court to hear civil causes and matters relating to copy right, patent, designs, trademarks and passing of industrial designs and merchandise marks etc. Section 272 (3) of the Constitution confers jurisdiction on the Federal High Court to hear questions as to whether the term of office of a member of the House of Assembly of a State, a Governor or Deputy Governor has ceased or become vacant. None of the above is applicable as the trademark “CHARZIN” was not in issue. What was in issue was the false publication to the reading public to avoid imitation. The publication refers to “CHARZIN” ball point pens as an imitation. The averments in the statement of claim do not complain about trade mark infringement of the mark “CHARZIN” rather it complains of the false and malicious publication warning the reading public to avoid “charzin” which is an imitation. That is the effect of “avoid imitation”. This is clearly a cause of action that falls into the tort of libel and not copyright or trade mark as spelt out by the provisions of section 230(i) (f) of Decree No.107 of 1993 or Section 251 (i)(f) of the Constitution. Since the claims are for libel and injunction, the State High Court and not the Federal High Court has jurisdiction to hear the plaintiff/respondents claims. Both courts below were correct.

This is an interlocutory appeal from the decision of Hunponu-Wusu J of a Lagos High Court where his lordship ruled that the State High Court has jurisdiction to hear the plaintiff/respondents claims. This suit was filed in 1995. Nineteen years ago. It took nineteen years to resolve the simple issue of jurisdiction. The case would now be sent back to the High Court for hearing of the main suit. That would possibly be settled after fifteen years or more. This is unfortunate and a sad state of affairs for the Rule of Law. Cases must be heard with dispatch and resolved quickly. The better course would have been

for the trial judge to proceed with the hearing of the case after the Ruling on jurisdiction, since the Ruling on jurisdiction could easily be a subject of appeal after judgment. This is clearly an unnecessary interlocutory appeal, a waste of client's resources and judicial time. Such unnecessary interlocutory appeals have been frowned upon by this court in a plethora of cases. See: *Obiweubi v. CBN* 2011 ALL FWLR (Pt.575) p.208; *Tukur v. Govt. of Gongola State* 1988 1 NWLR (Pt.68) p.39

For these brief reasons as well as those more fully given by my learned brother Ngwuta, JSC I would dismiss this appeal with costs of N100,000 to the respondent.

PETER-ODILI JSC

I am in agreement with the judgment just delivered by my learned brother, Nwali Sylvester Ngwuta JSC. I shall make some comments to underscore my support of the reasoning.

This is an appeal by the defendants/appellants in the Lower Court against the judgment of the Court of Appeal, Lagos delivered on the 18th day of January, 2005 in which the court below dismissed the defendant/appellants appeal which challenged the competence of the Lagos State High Court to adjudicate on the subject matter of the suit.

FACTS BRIEFLY STATED

At the trial High Court the respondent herein as plaintiff commenced this action in the Lagos State High Court, Lagos on the 20th day of December 1995, seeking the following reliefs:

(a) The sum of N10,000,000.00 (Ten Million Naira) as damages for injury suffered by reason of the libel on the plaintiffs "CHARZIN" ball point pens contained in the advertisements the defendants published and caused to be published in the issues of the "vanguard Newspaper" of August 18, 1995, on page 10 and the "Daily Times Newspaper" of November 13, 1995 on page 4.

(b) A perpetual injunction restraining the defendants and each of them whether by themselves or by their servants or agents from further printing, issuing, publishing or circulating or causing to be printed, issued, published or circulated the said libel or any other similar libel affecting the plaintiff.

The appellants, as defendants entered a conditional appearance and thereafter filed a motion on notice praying the court to strike out the suit on the ground that the court had no jurisdiction to entertain the action, the action being within the exclusive jurisdiction of the Federal High Court. Also because the suit constituted an abuse of court process in that the issues necessary for determination of the suit were sub judice in Suit No. FHC/L/CS/1182/95: Societe Bic S. A. & Compagnie de Moulages v Charzin Industries Limited & Charles Ezeagwu already pending at the Federal High Court, Lagos.

The plaintiff filed a Further Counter-Affidavit and the defendants filed a Further and Better Affidavit. The motion on notice was argued and in a considered Ruling the trial judge decided he had jurisdiction and dismissed the objection of the defendant. Appellants dissatisfied appealed to the Court of Appeal which dismissed the appeal hence the current one to the Supreme Court.

On the 19th November, 2013 date of hearing, learned counsel for the appellants Mr. Ekpe Asuquo adopted their Brief of Argument settled by Mrs. Sylvia Shinaba of blessed memory, filed, on 15/6/09 and deemed properly filed on 7/10/09.

In the brief of argument were distilled three issues for determination stated as follows:

(1) Whether the Court of Appeal was right in deeming as abandoned the 2nd prayer of the appellant's motion on notice, asking for an order striking out the suit as constituting an abuse of court process in that the issues necessary for determinations of the suit are subjudice, in suit No. FHC/L/CS/1182/95: Societe Bic S. A. & Compagnie de Moulages v Charzin Industries Limited & Charles Ezeagwu. (Ground 1 & 2).

(2) Whether on the totality of the materials before the Court of Appeal the learned trial judge was right in finding that the cause of action in the suit was founded in the tort of trade libel and not in trade mark and therefore the High Court of Lagos State has jurisdiction to hear and determine the respondent's suit. (Ground 4.)

(3) Whether the Court of Appeal was right in treating the issue of jurisdiction raised in the appellant's motion on notice, dated 23rd February 1998, and filed with affidavits in support, as a matter in lieu of demurrer proceedings and whether the court could rule on the issue of demurer without inviting parties and/or their counsel to

address the court on such an issue (Ground 3)

For the respondent, Mr. Andrew C. Igboekwe adopted their Brief of Argument he had settled and filed on 27/6/12 and deemed properly filed on 3/10/12. Three issues were raised in the brief of argument which are thus:

1. Whether from the record, the Court of Appeal was right in deeming as abandoned the 2nd prayer of the appellants in their motion on notice dated 23rd February, 1998 praying for an order striking out the respondent's suit as constituting an abuse of court process (Grounds 1 & 2). B

2. Whether the Court of Appeal was right in holding that the respondent's cause of action in this suit was founded in tort and not trademark and therefore the High Court of Lagos State has the jurisdiction to hear and determine the suit. (Ground 4). C

The more simply crafted questions as put forward by the respondents seem easier to follow and utilise and so I shall use them in the determination of this appeal. D

ISSUE I

Whether from the record, the Court of Appeal was right in deeming as abandoned the 2nd prayer of the appellants in their motion on notice dated 23rd February, 1998 praying for an order striking out the respondent's suit as constituting an abuse of court process. E

For the appellants was submitted that a court is duty bound to give a full and dispassionate consideration to all issues raised or canvassed before it. That a court is bound to consider any prayer as well as the materiality and relevance of the affidavit in relation to the prayer and rule accordingly even where counsel was silent on those areas. He cited *Atanda v Ajani* (1989) 3 NWLR (pt.111) 511 at 539; *Romaine v. Romaine* (1992) 4 NWLR (Pt.238) SC 650; *Magnusen v Koiki* (1993) 9 NWLR (Pt.317) 287 at 296 - 297; *Harriman v Harriman* (1989) 5 NWLR (Pt.119) 77. F

Mr. Asuquo of counsel stated on that where the jurisdiction of a court is challenged as to its competence to entertain the subject of dispute as in this case the proper procedure for the trial judge to consider are the facts alleged in the statement of claim and the affidavit evidence of the parties in jurisdiction. He referred to *I. K. Martins Nig. Ltd v. University Press Ltd* (1992) NWLR (pt. 217) 322; *Western* H

Steel Work Ltd v. Iron and Steel Workers Union of Nigeria (1987) 1 NWLR (Pt.49) 284.

B Further argued by learned counsel for the appellants is that the appellants suffered an injustice when the lower court ruled that prayer 2 of the motion on notice had been abandoned when in fact it was the non pronouncement on that said prayer 2 that was the subject of appeal before the Court of Appeal. He cited *Geco-Prakla (Nig.) Ltd v Ukiri* (2004) 1 NWLR (Pt.855) 519 at 539 - 540; *Ogunleye v Oni* (1990) 2 NWLR (Pt.135) 745; *Saraki v Kotoye* (1992) C 9 NWLR (Pt.264) 156 at 188 - 189 etc.

In response, learned counsel for the respondent, Mr. Igboekwe contended that it is settled law that where a party in an application has multiple prayers or reliefs he must move the court in respect of each and every such relief and any relief ignored or not D moved by the applicant is deemed not for the consideration of the court and cannot be granted and so the Court of Appeal was right to have held so. He cited *Oforkire v Maduiké* (2003) 5 NWLR (Pt.812) 166 at 187; *Osuji v Ekeocha* (2009) 16 NWLR (pt.1166) 81 at 142; *A. G. Anambra State v Okafor* (1992) 2 NWLR (Pt.224) 396 at 427; E *Olalomi Ind. Ltd v N.I.D.B Ltd.* (2009) 16 NWLR (Pt.1167) 266 at 303 - 304. Also that the claims in the two suits are different in that the claims in Suit No FHC/L/CS/1182/95 are for infringement of trade-mark and copyright as well as passing off. In the present suit, the F claims are for damages and injunction based on the tort of trade libel. Learned counsel went on to say that the conditions for the existence of abuse are absent. He placed reliance on *Plateau State v. A.G. Federation* (2006) 3 NWLR (Pt.967) 346; *Oguejiofo v Oguejiofo* (2006) 3 NWLR (Pt.966) 205 at 221; *Saraki v. Kotoye* (1992) G NWLR (Pt.264) 156.

H It is not difficult to appreciate the stand of the respondent that the appellant is seeking to get reliefs outside the case he presented at inception. That no court is allowed to create a new case for the parties or to go beyond the scope of what the parties came to court for in granting a relief unrelated to the dispute as initiated by a plaintiff and upon which the defendants has set up a defence.

To refresh one's memory, the reliefs prayed for at the trial court when the appellants as defendants filed a preliminary objection by way of a motion dated 23rd February, 1998 are stated hereun-

der:

(i) *“An order striking out this suit in that this honourable court has no jurisdiction to entertain the same being an action within the exclusive jurisdiction of the Federal High Court.*

(ii) *An order striking out this suit as constituting an abuse of court process in view of the fact that the issues necessary for the determination of the same are subjudice in the case of suit No. FHC/L/CS/1182/95: Societe Bic S. A. & Compagnie de Moulages v. Charzin Industries Limited & Charles Ezeagwu.*

(iii) *Such further or other order(s) as the honourable court may wish to”.*

It can easily be seen from all the materials before court that the appellant’s counsel focused on the issue of the cause of action and jurisdiction being the substance of the first prayer in the Notice of Preliminary Objection. The second prayer was left unattended in regard to the issue of the abuse of court process and so no blame can be visited on the trial judge in confining himself to the issues on cause of action and jurisdiction.

A need to reiterate a rather trite point is that a party or counsel on his behalf has to be up and doing in canvassing what relief they seek. Therefore a party must move the court on each prayer or relief and any of such prayer or prayers that are left unattended would be taken by the court as abandoned. The court cannot on its own get into such an abandoned relief to grant or even make comments thereon. This is because the duty of court is streamlined and must be carried out with the jurisdiction to entertain whatever has been presented before him or assumed to have been so presented. Therefore what the appellants hoped for from the court steamed from their attempt to clothe the court with the garb of the famed or fabled “father Christmas” or philanthropic organization which attends to the needs of whoever even if not requested for. I place reliance on *Oforkire v. Maduiké* (2003) 5 NWLR (Pt.812) 166 at 187; *Osuji v. Ekeocha* (2009) 16 NWLR (Pt.1166) 81 at 142; *A.G. Anambra State v Okafor* (1992) 2 NWLR (Pt.224) 396 at 427; *Olalomi Ind. Ltd v N.I.D.B. Ltd.* (2009) 16 NWLR (Pt.1167) 266 at 303 - 304.

The Court of Appeal was clearly on a solid firm ground in agreeing with what the trial court did in that the relief on abuse of court process was not canvassed at the trial court and which court

was correct in discountenancing the matter. Again to be said is that since the matter of the abuse of court process was neither moved nor canvassed and not decided upon by the trial court, the Court of Appeal was correct in holding that it translates to the raising of a fresh issue which could only come up after leave of the appellate court had been sought for and obtained. In this instance no such leave was asked for and none granted and so the matter could not be considered by the court below. See *Niger Progress Ltd v N.E.L. Corp.* (1989) 3 NWLR (pt. 107) 68; *Onyemaizu v Ojiako* (2010) 4 NWLR (Pt.1185) 504.

It has to be said, assuming there was the necessary authority for the court to enter into the discourse of abuse of court process due to multiplicity of suits, what would amount to multiplicity of suits must be shown to exist and that is that the two suits or more are on the same subject matter and issues and the parties the same. All these components must co-exist for the ingredients that would qualify the particular suit as an abuse of court process based on multiplicity of suits. In the present suits the parties are as follows:

CHARZIN INDUSTRIES LTD. -
 PLAINTIFFS
 AND
 1. SOCIETE BIC S. A.
 2. COMPAGNIE DE MOULAGES
 3. NIGERIAN BALL POINT PEN INDUSTRIES (NIPEN) LTD.
 DEFENDANTS

In the other suit are thus:
 CHARZIN INDUSTRIES LTD.
 AND
 1. CHARZIN INDUSTRIES LTD
 2. CHARLES EZEAGWU

The claims in *Societe Bic v. Charzin Industries Ltd & Charles Ezeagwu* are over the sale of “Charzin Ball Point Pens because they are very similar in packaging, designs and colouring to the plaintiff’s “Bic” ball point pens. The subject matter based on the infringement of Trade Mark and copyright as well as passing off of the “Bic Cristal” ball point pens by the plaintiff/respondents crystal Charzin ball point pens.

In the current suit of *Charzin Industries Ltd v. Societe Bic S. A.*

Compagnie De Moulages and Nigerian Ball Point Pen Industries Limited which had to do with a publication made by the defendants/appellants in protection of their registered Trade Marks, against the infringement and/or passing off by the plaintiff/respondent's product "Charzin", ball point pen and the packaging adopted for the sale thereof. B

Evidently the two suits are different, each commenced by different parties. In one 1st appellant alone initiated the suit and in the other the respondent against the appellants. In the circumstance proliferation of suits or as normally referred to multiplicity of suits to occasion an abuse of court process do not arise. The parties as well cause of action different in one as in the other. I place reliance on *Oguejiofo v. Oguejiofo* (2006) 3 NWLR (pt.966) 205 at 221; *Saraki v. Kotoye* (1992) 9 NWLR (Pt.264) 156, *Plateau State v. A.G. Federation* (2006) 3 NWLR (Pt. 967) 346. For a fact this issue is resolved D against the appellant.

ISSUE 2

Whether the Court of Appeal was right in holding that the respondent's cause of action in this suit was founded in tort and not trademark and therefore the High Court of Lagos State has the jurisdiction to hear and determine the suit. E

Learned counsel for the appellants said the averment of the plaintiffs is that the and 2nd defendants had published through the 3rd defendant an advertisement in the Vanguard Newspaper a photograph of ball point pens get-ups with the name "CHARZIN" inscribed on them under a large caption "AVOID IMITATION". That the dispute was within the exclusive jurisdiction of the Federal High Court and not that of a State such as the Lagos State High Court. F

That the appellants having challenged the jurisdiction of the Lagos High Court to entertain the subject of the dispute before it, the proper procedure for the trial judge would have been to consider the facts alleged in the Statement of claim and the affidavit evidence of the parties to resolve the jurisdictional issue. He cited *Western Steel Works Ltd v Iron and Steel Workers Union of Nigeria* (1987) 1 NWLR H (Pt.49) 284; *Izenkwe v. Nnadozie* 14 WACA 361 at 363; *Iyabi-Ayah v. Ayah* (1997) 10 NWLR (Pt.523) 143 etc.

That where a statute ousts the jurisdiction of a court in respect of a matter that court lacks the legal competence to adjudicate on the

matter the trial judge ought to have dispassionately considered the substance of the claim before him which was not done either by the court of trial or the appellate court. He cited Section 230 (i) (f) of the Constitution of the Federal Republic of Nigeria 1979 (as amended by the Constitution suspension and modification Decree No.107 of 1993) now Section 251 (1) (f) of the Constitution of the Federal Republic of Nigeria 1999.

Mr. Igboekwe for the respondent contended that contrary to the arguments of the appellants, the subject matter of this suit is not the trademark of Charzin under which the ball pens were sold. That rather it is the false, injurious and malicious publication of the respondent's product and business by the appellants. That the statement of claim did not deal with issues of copyright or registration or non-registration of trademark or any aspect of the law on trademark and patents. That the concurrent findings of the two courts below should be upheld. He cited *R. Benkay Nigeria Limited v. Cadbury Nigeria* (2006) 6 NWLR (Pt.976) 338.

The foundation of the matter in hand is based on the publication made by the defendants/appellants which plaintiff/respondent considered as false and malicious publication of the plaintiffs Charzin Ball Points. This publication was by way an advertisement words referring to the respondent's ball Point pens in a large type caption AVOID IMITATIONS". While the respondent sees the perceived infraction as tort of libel, the appellants see it as passing-off a trademark.

A description of what amounts to a libel in trades or matters concerning goods would be of assistance. This the learned author of the book *GATLEY ON LIBEL AND SLANDER*, 17th Edition at page 38 stated as follows:

"It is thus clear that language in disparagement of goods or their quality is defamatory where it reflects on the owner or manufacturer of the goods in his character as a man or as a tradesman"

Black's Law Dictionary, 7th Edition sees trade libel thus:

"A false and injurious statement that discredit or detracts from the reputation of another's property, product or business. To recover in Tort for disparagement, the plaintiff must prove that the statement caused a third party to take some action resulting in specific pecuniary loss to the plaintiff-more narrowly termed slander to title, trade

libel, slander of goods.” It is to be said therefore that the two definitions above recast have situated the publication with the loud caption “AVOID IMITATION” in relation to the product of the plaintiff/respondent squarely to where it belongs, an action in Tort and specifically a trade libel. The follow up is that the trial court and the Court of Appeal were correct in their findings in that regard and there is nothing upon which what the appellants posit on issues of copyright or the registration or non-registration of trademark or any aspect of the law on trademark and patents would be taken as the real thing. B

The issue herein is of course resolved against the appellants. C
ISSUE 3

Whether from the facts and circumstances of this case, the Court of Appeal was right in holding that for purposes of determining jurisdiction, the plaintiff’s cause of action is defined by reference to only the plaintiffs. D

For the appellants was contended that an examination of the claims of the plaintiff/respondent show that clearly the issues raised therein border on an alleged injury to a Trade Mark “Charzin” and the rights allegedly enjoyed by the said Trade Mark. That is to say that the plaintiff/respondent is the manufacturer and distributor of high quality ball point pens under the name “Charzin”. That the learned trial judge was wrong to hold that the Statement of Claim did not raise the issue of Trademark and the implication is that the Lagos State High Court had jurisdiction to adjudicate on the claims of the plaintiff. That the High Court and the Court of Appeal acted wrongly in not examining the affidavits of the parties with the Exhibits including the certificate of registration of Trade Marks and so lost sight of the features of the case which prevented it from exercising jurisdiction thereon. He said that failure caused a denial of the appellants the right of fair hearing. He cited *Imah v Okogbe* (1993) 9 NWLR (Pt.316) 159; *Stirling Civil Eng. Nig. Ltd v. Yahaya* (2005) 11 NWLR (Pt.936) 181 at 203. E F G

Countering the above submissions of the appellant’s learned for respondent said the two courts below were right in determining the cause of action in the suit by looking at the statement of claim only. That it is settled law that the jurisdiction of a court is determined by the claim of the plaintiff. He relied on *FBN Plc v Abraham* (2008) 18 NWLR (Pt.1118) 172 at 199; *Adetayo v Ademola* (2010) 15 H

NWLR (Pt.1215) 169 at 199.

Going further, Mr. Igboekwe of counsel said the statement of claim would show that the issues therein raised were not of copyright or the registration or non-registration of trademark or any aspect of law on trademark and patents and so the two courts below were right to find that the issues raised in the statement of claim relate to the false publication by the appellant concerning the respondent's goods. That these concurrent findings ought not be interfered with. That the reliefs were for damages in libel and injunction from further publication.

The point of departure in this issue between the parties is what the court of trial should utilise in determining if it had jurisdiction or not. While the appellants' counsel is of the determined view that the court should consider the statement of claim he was also of the opinion that it should equally consider the affidavit and exhibits as materials that should taken into account. This stance the learned counsel for respondent vehemently rejects insisting that if the cause of action should be discerned to ascertain the jurisdiction of the court, the Writ of Summons and Statement of Claim are the materials to be considered.

Taking these two divergent views in hand, I would refer to the policy statement of this court and in that light, this court had held in *FBN Plc v Abraham* (2008) 18 NWLR (Pt.1118) 172 at 199; *Adetayo v Ademola* (2010) 15 NWLR (Pt.1215) 169. In fact *Ogbuagu JSC* had held at 198 - 199 of the *Adetayo v. Ademola* (supra) stated. *"As to what determines the jurisdiction of a court, it is now firmly settled that the jurisdiction of a court, is determined by the plaintiffs claim i.e. by the subject matter and claim before the court."*

To expatiate, it can safely be said that jurisdiction is determined by what the plaintiff is demanding and cannot be a situation where the response that is anticipated if I may so would be the decider. Going contrary to using the claim as a determinant is like begging the question, allowing the cart before the horse or a possible journey into speculation in getting into materials outside what the initiator of the court process has put forward. If I may venture to posit, I would say the safe arena in the matter of jurisdiction is the statement of claim within which boundary the trial court would not

take the risk of a possible entering into the merits of a matter in limine without a full hearing as it is known. See Chief Adeyemi & Ors v Opeyemi (1976) 9 - 10 SC 31; Akin Folarin & Ors v Akinola (1994) 3 NWLR (pt.335) 659 at 674; Izenkwe & Ors v Nnadozie (1953) 14 WACA 361.

This issue also I resolve in favour of the respondent. The issues found successfully for the respondent and from the fuller and better reasoning in the lead judgment, I have no hesitation in dismissing the appeal holding that the State High Court is the court with the vires and not Federal High Court.

I abide by the consequential orders made.

OKORO JSC

I had a preview of the judgment of my learned brother NWALI SYLVESTER NGWUTA, JSC just delivered with which I agree with the reasoning and conclusion that there is no merit in this appeal which ought to be dismissed and I join to dismiss same. I shall however make a few comments in support of the judgment.

By a writ of summons and statement of claim both dated 20th December, 1995, the Respondent as Plaintiff commenced this suit against the Appellants as Defendants at the High Court of Lagos State claiming the following:-

“(a) The sum of N10,000,000.00 (Ten Million Naira) as damages for injury suffered by reason of the libel on the Plaintiff’s CHARZIN Ball Point Pens contained in the advertisement the Defendants published and caused to be published in the issues of the Vanguard Newspaper of August 18, 1995 on page 10 and the Daily Times Newspaper of November 13, 1995 on page 4.

“(b) A perpetual injunction restraining the Defendants and each of them whether themselves or by their servants or agents from further printing, issuing, publishing or circulating or causing to be printed, issued, published or circulated the said libel or any other similar libel affecting the Plaintiff.”

Upon the service of the Writ of Summons, the Appellants filed a preliminary objection challenging the jurisdiction of the trial court to hear and/or determine the suit. On 6th November, 1998, the trial court dismissed the objection and held that it has jurisdiction

to entertain the suit.

Dissatisfied, the Appellants filed an appeal to the Court of Appeal. Their appeal was dismissed by the Lower Court and the Appellants have now appealed to this court. The notice of appeal has five grounds out of which the Appellants have decoded three issues
B for determination. They are:-

C *“(I) Whether, the Court of Appeal was right in deeming as abandoned the 2nd prayer of the Appellant’s motion on notice, asking for an order striking out the suit as constituting an abuse of court process in that the issues necessary for determination of the suit are subjudice, in suit No. FHC/L/CS/1182/95: SOCIETY BIC S.A. & COMPAGNIE DE MOULAGES V CHARZIN INDUSTRIES LTD & CHARLES EZEAGWU. (Ground 1 & 2)*

D *(II) Whether on the totality of the materials before the Court of Appeal the learned trial judge was right in finding that the cause of action in the suit was founded in the tort of trade libel and not in trade mark and therefore the High Court of Lagos State has jurisdiction to hear and determine the Respondent’s Suit. (Ground 4).*

E *(III) Whether the Court of Appeal was right in treating the issue of jurisdiction raised in the Appellant’s Motion on Notice, dated 23rd February, 1998, and filed with affidavits in support, as a matter in lieu of Demurrer Proceedings and whether the court could rule on the issue of Demurer without inviting parties and/or their Counsel to address the court on such an issue. (Ground 3)”*

F The Respondents also distilled three issues which are as follows:-

G *“1. Whether from the record, the Court of Appeal was right in deeming abandoned the 2nd prayer of the Appellants in their motion on notice dated 23rd February, 1998 praying for an order striking out the Respondent’s suit as constituting an abuse of court process. (Grounds 1 and 2)*

H *2. Whether the Court of Appeal was right in holding that the Respondent’s cause of action in this suit was founded in tort and not trademark and therefore, the High Court of Lagos State has the jurisdiction to hear and determine the suit. (Ground 4).*

3. Whether from the facts and circumstances of this case, the Court of Appeal was right in holding that for purposes of determin-

ing jurisdiction, the Plaintiffs cause of action is defined by reference to only the Plaintiffs statement of claim. (Ground 3)”

The issue raised in the preliminary objection has been ably resolved in the lead judgment and I do not intend to go over it again. I shall say a few words as regards issue No.2 in both the Appellants’ and Respondent’s brief which I consider to be the core issue in this appeal. B

Learned Counsel for the Appellants submitted in the main that although the State High Courts had unlimited jurisdiction by virtue of Section 236 (i) of the 1979 Constitution of the Federal Republic of Nigeria (as amended by the Constitution (Suspension and Modification) Decree No. 107 of 1993, Section 230 (i) (f) of the same 1979 Constitution of the Federal Republic of Nigeria (as amended by the Constitution (Suspension and Modification) Decree No. 107 of 1993, the law in force at all times relevant to this suit, C which is now embodied in Section 251 (i) (f) of the Constitution of the Federal Republic of Nigeria 1999 (as amended), it is clear that the Federal High Court has jurisdiction over matters pertaining to trade marks, amongst other things, to the exclusion of all other courts, notwithstanding the apparent “unlimited jurisdiction” conferred on the State High Court by Section 236 (i) thereof. He further submitted that the Federal High Court Act, Cap. 134 of the Laws of the Federation of Nigeria 1990 (as amended by Decree 60 of 1991) provides that where jurisdiction is conferred on the Federal High Court D by Sub-Sections 1 and 2 of Section 7, such jurisdiction shall be considered to include jurisdiction to hear and determine all issues relating to/arising from or ancillary to such subject matter. He concluded thus at page 14 paragraph 4.2.7 of their brief. E

“If the Lower Court had taken care to go through the evidence on jurisdiction before it, it would have found that the matter concerned trade mark issue and, that the jurisdiction of the Lagos State High Court had been ousted by the statutory provisions of Section 230 (i) (f) of the Constitution of the Federal Republic of Nigeria 1979 as amended by the Constitution (Suspension and Modification) Decree No.107 of 1993), now Section 251 (i) (f) of the Constitution of the Federal Republic of Nigeria, 1999.” F

In response, the Learned Counsel for the Respondent submitted that the court below was right in looking at the Statement of

Claim to determine the cause of action and that the jurisdiction of the Court is determined by the claim of the plaintiff, citing the cases of FBN PLC V. ABRAHAM (2008) 18 NWLR (pt. 1118) page 172 and ADETAYO V. ADEMOLA (2010) 15 NWLR (Pt.1215) 169. It is his submission that it is manifestly clear that from the facts of this case, the Respondents' cause of action is the tort of trade libel and not trademark as argued by Appellants. He argued further that a scrutiny of the claim as endorsed on the Writ of Summons and Statement of Claim discloses a complaint of a false and malicious publication by the Appellants of the Respondent's Charzin Ball Points Pen and nothing more.

My Lords, it is now well settled that in determining the cause of action in a suit the only document which the court will look at are the writ of summons and the statement of claim. See ABUBAKAR V. BEBEJI OIL AND ALLIED PRODUCTS LTD & ORS (2007) 2 SC, 48, ALHAJI USMAN DANTATA V. MUKHTAR MOHAMNIED (2000) 7 NWLR (pt.664) 176, ADIMORA A. v. AJUFO (1988) 3 NWLR (pt.80) 1, AKIBU v. ODUNTAN (2000) 13 NWLR (Pt.685). Cause of action itself means the aggregate of facts which when proved will entitle a plaintiff to a remedy against a defendant. See OSHOBOJA v. AMUDA (1992) NWLR (Pt.250) 690, EGBE V. ADEFARASIN (1987) 7 NWLR (Pt.47) 1.

It follows that in determining whether the plaintiff's cause of action is within its jurisdictional competence, the court limits itself to the plaintiff's statement of claim and writ of summons. The enquiry does not extend to the Defendants' pleadings even though same had been filed in compliance with the Rules of Court. I think both the trial court and the Court of Appeal were right in determining the cause of action in this suit by looking at the statement of claim only.

In this case, the Respondent as Plaintiff at the trial court, had averred that the 1st and 2nd Appellants by their Agent/Representative, the 3rd Appellant, published and caused to be published advertisements in the issues of the "Vanguard Newspaper" of Friday, August 18, 1995 at page 10 thereof and the "Daily Times Newspaper" of Monday, November 13, 1995 at page 4, wherein they "falsely and maliciously" published and caused to be published a photograph of ball point pens get-ups with the name "CHARZIN" inscribed on one of them under a large type caption "AVOID IMITATION." In-

deed that was their complaint. It is crystal clear from the statement of claim of the Respondent that its cause of action is the tort of trade libel and not trade mark as argued by the Appellants. The claim as endorsed on the Writ of Summons and Statement of Claim disclose a complaint of a false and malicious publication by the Appellants of the Respondent's Charzin Ball points pen. As I see it, the trade mark of Charzin was not in issue. What was in issue was the false publication i.e. "AVOID IMITATION". There is no dispute as to who is the owner of the trade mark "Charzin." No there is none.

Black's Law Dictionary, 7th Edition defines trade libel to mean:

"A false statement that disparage the quality or reputation of another's product or business."

It is my view that although Section 236(i) of the 1979 Constitution of the Federal Republic of Nigeria (as amended) had given exclusive jurisdiction to the Federal High Court in trade mark issues, an action based on a complaint of a false statement made in reference to another person's goods or business, as in this case, will not fall under trademark but under libel simpliciter.

Quite apart from what I have said above, the concurrent findings of both the trial court and the Court of Appeal is that this is not a trade mark issue but tort of libel. This court will not disturb the findings of two courts below unless there is manifest error which leads to some miscarriage of justice, or a violation of same principle of law or procedure. See *ADAKU AMADI V. EDWARD N. NWOSU* (1992) NWLR (Pt.241) 273, (1992) 6 SCNJ 59; *AKPAGBUE V. OGU* (1976) 6 SC 63 *ODOFIN V. AYOOLA* (1984) 11 SC 72.

In conclusion, I wish to state clearly that from the Respondent's Writ of Summons and paragraphs of the Statement of Claim, the cause of action of the Respondent was the alleged tort of libel as a result of the alleged defamatory publication of its product by the Appellants in a manner that was calculated to disparage the Respondent's product CHARZIN Ball Point Pens. The claim was never against trade mark as there was no controversy whatsoever about the trade mark of the Respondent. Based on the above, the decision by the Court below, affirming the judgment of the trial court that the Lagos State High Court has jurisdiction on the matter is unassailable.

Before I end this judgment, I wish to observe that this matter was filed at the Lagos State High Court Registry in 1995. Today is the

14th day of February, 2014, about 19 years thereafter. The sad commentary is that hearing in the main suit is yet to commence. With the outcome of this appeal, hearing in the suit will now commence at the Lagos State High Court. Only God knows how long the matter will last in that court, not to mention subsequent appeals that may follow.

- B In the interim, the parties would, with patience and long suffering, be waiting for justice. What manner of justice, I may ask. Would it not have been more reasonable to allow the matter to be heard to conclusion and whatever is the outcome of the case, an appeal thereof
- C would be combined with the interlocutory appeal as issue of jurisdiction can be raised at any time even for the first time on appeal in this court. I urge counsel to heed the various admonitions of this court in this regard. Time and resources would be saved in the process. I hope parties would know on whose door step to heap the blame.
- D Definitely, not the court.

Based on the above and the fuller reasons in the lead judgment, I hereby agree and hold that this appeal lacks merit. It is also dismissed by me. The Respondent is entitled to costs which I also assess at N100,000.00.

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