

IN THE SUPREME COURT OF NIGERIA

Suit No: SC176/2003

Petitioner: Omnia Nigeria Limited

And

Respondent: Dyktrade Limited

Date Delivered: 2007-07-13

Judge(s): Aloma Mariam Mukhtar, Ikechi Francis Ogbuagu, Francis Fedode Tabai, Ibrahim Tanko Muhammad, Christopher

Judgment Delivered

This is an appeal from the decision of the Court of Appeal Lagos division, which dismissed the appeal of the defendant/appellant who appealed to it, not being happy with the judgment of the Federal High Court, holden at Lagos. The parties are both limited liability companies. Sometime in 1989 the plaintiff initiated a trading venture with an Italian company to manufacture grinding stones for the washing of terrazzo floors. The plaintiff adopted the trade mark 'Super Rocket' for the grinding stones which it registered in Nigeria under No 51136 in class 19 with effect from 10th October, 1991 and the trade mark was inscribed on all the grinding stones ordered and supplied to the plaintiff. The plaintiff has in the course of the trading venture sold substantial quantities of 'super Rocket' grinding stones all over Nigeria and has acquired substantial reputation and good will in the trade mark. In December 1992 the defendant imported consignment of grinding stones branded 'Super Rocket' and distributed and sold them. It again imported another set of grinding stones branded Super Rocket, but plaintiff obtained an Anton Filler order against the defendant. The use of the trade mark 'Super Rocket' by the defendant has infringed the plaintiffs registered trade mark 'Super Rocket' No 51136, and was thereby passing off its grinding stones as and for the plaintiffs products. Consequently the plaintiff's sales have declined, and it has suffered loss and damage. The plaintiff thus claimed the following reliefs:-

"1. An injunction to restrain the Defendant whether by itself, its Directors, officers or any of them or otherwise howsoever from doing the following acts, or any of them, that is to say:-

- a. Infringing the plaintiffs trade mark 'Super Rocket', registered under No 51136 in class 19.
- b. Passing off or causing, enabling or assisting others to pass off grinding stones used for the purpose of washing terrazzo floors inscribed with the trade mark ' Super Rocket ' not being of the Plaintiffs manufacture or merchandise as and for the goods of the Plaintiff.
- c. Importing, selling or offering for sale or supplying grinding stones used for the purpose of washing terrazzo floors or any other product under the trade mark 'Super Rocket' as to be calculated to lead to the belief that grinding stones not of the Plaintiffs manufacture or merchandise are the products of the Plaintiff.

2. Delivery up for destruction of all grinding stones bearing the offending mark 'Super Rocket' in the possession, custody or control of the Defendant.

3. Damages of NI,000.000.00 or an account of profits.

4. Costs."

On being served with the plaintiff's statement of claim, rather than file the statement of defence, the defendant filed a motion on notice for the following orders:-

"1. An order striking out paragraphs 4, 5, 9, 11, 16, 21 (1) (a) of the Plaintiffs statement of claim dated 3rd of June 1997.

2. Striking out the statement of claim/entire claim of the Plaintiff.

3. Dismissing the entire suit with cost against the Plaintiff on the ground that:-

- a. The Plaintiff has no locus standi and
- b. Its claim discloses no reasonable possible cause of action."

The affidavit in support of the motion has the following salient facts:-

"2. That pursuant to an application by the Plaintiff dated the 25th of April 1997, this Honourable court on the 5th of May 1997 granted an order to set down the suit for mention and consequently ordered pleadings to be filed, i.e., the Plaintiff is to file and serve its statement of claim within 30 days and Defendant to file and serve its defence within 7 days after service of statement of claim.

3. That paragraph (sic) 4, 5, 9, 11, 16, and 21 (l)(a) of the statement of claim in so far as they lay claim to an alleged registration of a trade mark in favour of the Plaintiff are in direct material conflict with the particulars of claim dated the 2nd of March 1993.

4. Further to the conflict indicated in paragraph 3 above, the statement of claim directly contradicts all relevant material affidavit evidence in support of various motions filed by the Plaintiff in this suit, all of which are matters contained in the courts (sic) records, that nothing other than a mere application for registration of a trade mark is pending before the trade mark registry and not a registered trade mark as alleged in all the offending paragraphs aforementioned.

5. The rights if any in law of the Plaintiffs in the trade mark in dispute were considered by the court of Appeal in refusing the Plaintiffs appeal and claim for injunction, it was not and has never been the Plaintiff's case, in the said appeal No CA/L/202/93, or in the Federal High Court that it possessed a registered trade mark on the name \"Super Rocket\" or as alleged in all the above referred paragraphs.

6. That this bold attempt to introduce new issues into this suit by filing a statement of claim as in the said referred paragraphs is not only procedurally irregular but in bad faith and highly prejudicial to the interest of justice.

7. That the said offending paragraphs of the statement of claim ought to be stricken from (sic) the entire body of claim, as it is a gross abuse of the courts (sic) process.

8. That well apart from the offending stated paragraphs, the Plaintiff has no locus standi to bring or maintain the present action nor does its statement of claim contain or even disclose a reasonable cause of action or raise a triable issue upon which the honourable court can be called upon to adjudicate at all.

9. That consequently the entire statement of claim is incompetent, ought to be struck out in its entirety and the suit dismissed with cost against the Plaintiff.\"The application was moved and Jinadu J. of the Federal High Court dismissed the application, having found as follows:-\"It is by operation of law in Section 22 (2) of the Trade Marks Act that the subsequent registration of the Trade Mark was related back to the date of the application for registration which was 10/10/91. There is therefore no doubt in my mind that the plaintiff has the locus standi to institute this action and also that there is reasonable cause of action in this matter.\"The defendant was not happy with the dismissal of his application, so he appealed to the Court of Appeal on grounds of appeal. Briefs of argument were exchanged by learned counsel, pursuant to the Rules of this court. The briefs of argument which included an appellant's reply brief were adopted at the hearing of the appeal. Three issues for determination were distilled from the grounds of appeal in the appellant's brief of argument. These issues are:-

'1. Whether the Court of Appeal was right in holding that Federal High Court has jurisdiction to entertain a claim instituted upon an unregistered trade mark'

2. Whether the learned Justices of the Court of Appeal were justified in holding that \".....with the registration of the Respondent's trademark a new event has not intervened to make the present circumstances different from the issues considered in the earlier interlocutory matter.....\"

3. Whether the Court of Appeal was right in giving credence to the Respondent's certificate of Registration of Trade mark which was issued in contravention of Section 22 (4) of the Trade mark Act, Cap 436, Laws of the Federation\"

The respondent also formulated three issues for determination in its brief of argument as follows:-

\"Issue No 1

Whether the Federal High Court has jurisdiction to adjudicate over the claims brought before it by the plaintiff'

Issue No 2

Whether the decision of the Supreme Court in respect of the earlier interlocutory appeal in this suit ((Dyketrade v. Omnia (2000)12 NWLR (pt. 680) 1), operate as a bar against the entertainment by the Federal High Court, of the plaintiffs subsisting claim for infringement of trade mark'

Issue No 3

Whether the Federal High Court is precluded from recognizing the certificate of registration of the trade mark Super Rocket under No 51136 pleaded in the statement of claim\"I will adopt the appellant's issues for the treatment of this appeal, starting with issue (1) supra. The learned counsel for the appellant opened his argument on this issue by submitting that the Federal High Court lacks jurisdiction to entertain a claim upon an unregistered trade mark. Learned counsel for the appellant referred to the case of Madukolu v. Nkemdilim (1962) 2 NWLR page 341 on the competence of a court to adjudicate on an action. In that case the competence of a court to adjudicate upon an action is illustrated thus:-

\"1 (a) It is properly constituted as regards numbers and qualifications of the members of the bench and no member is disqualified for one reason or the other;

(b) The subject matter of the case is within its jurisdiction, and there is no feature in the case which prevent the court

from exercising its jurisdiction; and

(c) The case comes before the court initiated by due process of law, and upon fulfilment of any condition precedent to the exercise of jurisdiction. According to learned counsel, the third condition is the problem in this issue, and learned counsel's argument is whether the case before the Federal High Court was initiated by due process of law, and upon fulfilment of any condition precedent to the exercise of jurisdiction, and what determines jurisdiction of court is the cause of action of the plaintiff in the writ of summons as held in the case of NV Scheep v. MV "Arz" (2000) 15 NWLR part 691 page 668. This may be so, but where a statement of claim has been filed; its content and claim determine the jurisdiction of the court, as it is settled law that a statement of claim supersedes a writ of summons. See Ayorinde v. Oni (2000) 3 NWLR part 649 page 348, and Nnadi v. Okoro (1998) 1 NWLR part 535 page 573. I will now look at the statement of claim and reproduce the salient averments hereunder. They read:-

"4. The plaintiff further avers that for the purpose of distinguishing the grinding stones manufactured for the Plaintiff from other grinding stones available in the market, the plaintiff adopted the trade mark "Super Rocket" which it registered in Nigeria under No. 51136 in class 19 with effect from 10th October 1991 for the sale of grinding stones and which said trade mark is clearly inscribed on all grinding stones ordered by and supplied to the plaintiff.

5. The plaintiff avers that the said trade mark 'Super Rocket' is valid and subsisting on the register of trade marks and remains in force up to 10th October, 1998.

8B. By reason of the foregoing the Plaintiff has acquired substantial reputation in the trade mark 'Super Rocket' in connection with grinding stones as its products have become extremely well known in the building industry and to the purchasing public in Nigeria.

9. As a consequence of the above reputation, the Plaintiff has acquired substantial goodwill in the trade mark "Super Rocket" in Nigeria and which trade mark has by wide spread usage over the past 7 years become distinctive of the Plaintiffs goods on the part of the members of the public.

10. In December 1992 it came to the Plaintiffs attention that a consignment of grinding stones branded "Super Rocket" not being the Plaintiffs product had been imported into the country by the Defendant from Italy, without the consent or permission of the Plaintiff.

11. The Plaintiff being seriously concerned about the aforesaid importation, as it constituted an infringement of the Plaintiffs trade mark "Super Rocket" No. 51136 proceeded to investigate same, but by the time the Plaintiff traced the importation of the aforesaid grinding stones to the Defendant, the whole consignment had already been distributed and sold off by the Defendant.

12. The Plaintiff avers that subsequently it received information that the Defendant had again imported into the country another consignment of grinding stones, not of the Plaintiffs merchandise and branded Super Rocket and that the consignment was at the time being cleared at the Port preparatory to delivery and distribution.

13. Consequently, the Plaintiff applied ex-parte for an Anton Filler Order against the Defendant which was granted by the Honourable court on the 12th of March, 1993.

14. The Plaintiff further avers that upon the execution of this order on the Defendant at its address at Adeyanju Daniel Street (Vanguard Avenue) Oshodi - Apapa expressway Lagos 8 photocopies of the way bills showing sales of polishing stones to certain customers, were delivered to the Plaintiffs solicitor and the bailiffs of this Honourable court.

Particulars

Way Bill Receipt Quantity of Polishing Stones Supplied

a. No. 10593 dated 5th March 1993 785 Cartons

b. No. 9841 dated 12th May 1992 392 Cartons

c. No. 9840 dated 12th May 1992 393 Cartons

d. No. 9835 dated 9th May 1992 392 Cartons

e. No. 9834 dated 9th May 1992 393 Cartons

f. No. 9736 dated 31st March 1992 413 Cartons

g. No. 9754 dated 1st April 1992 72 Cartons

h. No. 9753 dated 1st April 1992 300 Cartons

15. The Plaintiff also avers that each carton contains about 56 grinding stones and the Defendant sells 3 grinding stones for N45.00 as against the Plaintiffs product which sells for N55.00 for 3 pieces.

16. By using the trade mark "Super Rocket" in the course of trade in relation to grinding stones which are not of the Plaintiffs manufacture or merchandise, the Defendant has infringed the Plaintiffs registered trade mark "Super Rocket" No 51136. Further the Defendant is also thereby passing off its grinding stones as and for the Plaintiffs products.

17. The Plaintiff avers that the defendant has deliberately branded its products as "Super Rocket" in order to benefit undeservedly from the good reputation which the Plaintiff has earned over the past 7 years from the high quality of the Plaintiffs grinding stones. The statement of claim was filed well before the motion for dismissal of the suit was filed, so the above averments were very much active to determine the cause of action. The particulars of claim reproduced in the appellant's brief of argument cannot be read in isolation, they must be read together with the above averments to determine whether or not a cause of action has been disclosed by the plaintiff. I have no doubt in my mind that the cause of action is the infringement of the plaintiffs registered trade mark and passing off. By virtue of Section 251 (1) (f) of the 1999 Constitution of the Federal Republic of Nigeria, the Federal High Court was conferred with exclusive jurisdiction in matters relating to any Federal enactment on copyright patent designs etc. The relevant Federal enactment to the subject matter of this suit is the Trade Marks Act Cap 436, Laws of the Federation of Nigeria 1990; Sections 3 of which stipulates the following:-

"3. No person shall be entitled to institute any proceeding to prevent or to recover damages for the infringement of an unregistered trade mark; but nothing in this Act shall be taken to affect rights of action against any person for passing off goods as the goods of another person or the remedies in respect thereof." The learned Counsel relied upon the cases of *Ayman Enterprises v. Akuma Industries Ltd and 3 ors* (2003) 13 NWLR part 836 page 22 and *Dyketrade v. Omnia* (2000) 755 part 1 page 1. The learned Counsel for the respondent has in response submitted that it is only where the statement of claim has not been filed that the court will look only at the writ of summons and the particulars of claim endorsed thereon to determine whether or not the court has jurisdiction in the matter before it. Therefore, the claim of the plaintiff as formulated in the statement of claim is final. He argued that in the *NV Scheep* case only the writ of summons and particulars of claim had been filed at the time the issue of jurisdiction was raised, hence the court in that case stated that the cause of action is as endorsed on the writ of summons, but where a statement of claim has been filed, it is the averments therein that need to be looked at. He referred to the case of *Ikine v. Edjerode* (2001) 18 NWLR part page 446. Indeed, having filed the statement of claim, the position of the law is that the writ of summons and particulars of claim are superseded, and it is the content of the said statement of claim that becomes final, and on which the case is predicated. The learned counsel for the appellant has submitted that the Federal High Court has no jurisdiction to entertain the respondent's claim owing to the failure of the respondent to fulfil the condition precedent to bringing the claim, which is obtaining a certificate of registration of the said trade mark before suing for its alleged infringement. The learned counsel for the appellant argued that unless this action was initiated by an invalid process, this court should not be concerned with the jurisdiction of the Federal High Court at the date the writ of summons was filed, but with the current jurisdiction of the Federal High Court. According to him even if the Federal High Court did not have jurisdiction over the cause or causes of action sought to be litigated before it at the time the action was initiated, but later acquired jurisdiction, then its continued adjudication over the matter will be lawful and valid. He placed reliance on the case of *Adani & Anor v. Igwe* 1957 1 NSCC 84. Learned counsel further contended that jurisdiction conferred on the Federal High Court by Section 251 of the 1999 Constitution is in addition to any other jurisdiction which might be conferred on the court by any Act of the National Assembly. Therefore, the jurisdiction of the Federal High Court is not limited to that prescribed in the Constitution. He continued by submitting that Section 315 of the 1999 Constitution deems existing laws in respect of matters within the legislative authority of the National Assembly to be Acts of the National Assembly. That the law relating to the establishment power and administration of the Federal High Court is a law within the legislative competence of the National Assembly, therefore the Federal High Court Act is an Act of the National Assembly. Consequently any jurisdiction conferred upon the Federal High Court by that Act, which is wider than the jurisdiction conferred upon the court by the Constitution shall be jurisdiction, validly conferred on the court. Hence in *Ayman Enterprises v. Akuma Industries & 3 ors* 2003 13 NWLR part 836 page 22, the court took into consideration the jurisdiction conferred by the Federal High Court in reaching its decision. Now, let me examine the provision of Section 251 (1) (f), vis-à-vis Section 315 of the constitution, which states thus:-

\251 (1) Notwithstanding anything to the contrary contained in this Constitution and in addition to such other jurisdiction as may be conferred upon it by an Act of the National Assembly, the Federal High Court shall have and exercise jurisdiction to the exclusion of any other court in civil causes and matters:-

.....
(f) Any Federal enactment relating to copyright patent, designs, trade marks and passing-off, industrial designs and merchandise marks, business names. Commercial and industrial monopolies combines and trusts; standards of goods and commodities and industrial standards.\

\315 (1) Subject to the provisions of this Constitution, an existing law shall have effect with such modifications as may be necessary to bring into conformity with the provisions of this Constitution and shall be deemed to be-(a) An act of the National Assembly to the extent that it is a law with respect to any matter on which the National Assembly is empowered by this Constitution to make laws; and(b) a law made by a House of Assembly to the extent that it is a law with respect to any matter on which a House of Assembly is empowered by this Constitution to make laws.\

The above provisions speak for themselves. Section 251 confers on the Federal High Court jurisdiction to hear and determine not only on matters stipulated in subsection (f) supra, but other jurisdiction as may be conferred upon it by an Act of National Assembly. Consequently the Federal High Court's jurisdiction is not limited to only matters contained in the said subsection (f) supra. Section 315 of the Constitution similarly widens the scope of the jurisdiction of the Federal High Court, as the Federal High Court is within the purview of the legislative power of the National Assembly. It is a fact that the case of Ayman v. Akuma supra was decided with reference to the provision of Section 230 (1) (f) of the 1979 Constitution as amended by Decree 107 of 1993 and Section 7 of the Federal High Court Act 1973. According to learned counsel for the respondent, the provisions of Section 230 (1) of the 1979 Constitution as amended by Decree 107 of 1993 and Section 251 (1) of the 1999 Constitution being virtually identical, the decisions in Ayman v. Akuma regarding the interpretation of Section 230 (1) of the 1979 Constitution is applicable in the interpretation of Section 251 (1) (f) of the 1999 Constitution. He continued that this court has adopted as prescribed by the Federal High Court Act, the 1973 text of Section 7 of the Act, whereas that text had already been amended and therefore no longer valid at the time the decision in Ayman v. Akuma was reached, so the decision was in error, hence this court is being urged to depart from the conclusion reached in that case; that the jurisdiction of the Federal High Court in respect of passing-off is limited to claims arising from the infringement of a registered trade mark and does not extend to claims founded on principles of common law. According to learned counsel section 7 of the Federal High Court Act 1973 was amended by the Federal High Court (Amendment) Decree 1991 (Decree No 60). Though the decree was promulgated on 30th December 1991, it was suspended two days later by the Federal High Court (Amendment Decree 1992 (Decree No 16), promulgated on 1st January 1992. Subsequently, on 25th August 1993, by Statutory Instrument No 9 of 1993, 26th August 1993 was appointed as the date on which the Federal High Court (Amendment) Decree 1991 shall come into force. It is a fact that in the Ayman's case Section 7 of the 1973 text of the Federal High Court Act was reproduced and dealt with thus :-\Section 7 (1) (c) (ii) of the Federal High Court also provides:-

The Federal Revenue Court shall have and exercise jurisdiction in civil causes and matters arising from-

(i)

(ii) any enactment relating to copyright, patents, designs, trademarks and merchandise marks;\

Section 7(1) above re-affirms the jurisdiction conferred on the Federal High Court in respect of \any civil causes and matters, arising from any enactment relating to trade marks. \It is to be noted that it did not include \passing-off" and it did not say \arising from any Federal enactment relating to\". In respect of the general jurisdiction in passing-off; the provision in Section 230 (1) of the 1979 Constitution prevailed so that after 1993, the Federal High Court had jurisdiction to entertain passing-off, actions arising from any Federal enactment\It is also a fact that Section (7) of the Federal High Court Act was amended by the Federal High Court (Amendment) Decree No 60 of 1991 in the following provision, in as far as it concerns the subject matter in the present suit:-

\2. For section 7 of the Principal Act, there shall be substituted the following new section, that is '

7(1) The court shall to the exclusion of any other court have original jurisdiction to try civil causes and matters connected with or pertaining to '

(f) Any Federal enactment of common law relating to copyright, patents, designs, trademarks and passing-off, industrial designs\" With this amendment the issue of common law, and passing-off was specifically introduced to the provision of Section 7 of the Federal High Court Act reproduced in the Ayman's case supra, and reproduced herein. The Federal enactment in the context of the issue under discussion is the Trade Marks Act 1965, Cap. 436, Laws of the Federation of Nigeria 1990, Section 3 of which I have already reproduced supra. In spite of the amendment, Section 7 of the Federal High Court Act by the introduction and or additions mentioned above, the Federal enactments still remain

the said section 3 of the Trade Marks Act reproduced supra, and which has not been amended. The fact that the old text of Section 7 i.e. the Federal Revenue Court was invoked for the purpose of looking for the jurisdiction of the High Court does not derogate from the fact that the enactment referred to and relied upon was the Trade Marks Act. The second part of the provision of section 3, which is another aspect of the provision is very clear on the passing off as it includes the right of any person to maintain an action against any passing off of goods as goods of another person, one of the grouse upon which the respondent's claim was predicated; (see paragraph 21 (b) of the statement of claim reproduced above. The Federal High Court therefore has jurisdiction to hear and determine the claim for passing-off, and I subscribe to the learned counsel for the respondent's argument that the said court has jurisdiction whether or not that claim arises from the infringement of a registered or unregistered trade mark. At any rate, even if the claim was based on the infringement of an unregistered trade mark, as at the time the statement of claim was filed, the trade mark had already been registered. Towards this, I will re-echo the words of Nageon de Lestang F.J., in *Adani & Anor v. Igwe's ease* supra, cited by learned counsel for the respondent when he said:- "Assuming that when pleadings were closed, the then Supreme Court had jurisdiction to try the action, it is clear that when the case came up for trial before the High Court in September, 1956, that court was invested with jurisdiction to try it. What is the court to do in such case? Is it to decline jurisdiction merely because it had no jurisdiction when the case started and thus put the parties to the expenses of beginning all over again? In my view, this would not be only unreasonable, but wrong in law. I have always understood the position to be that so long as a court acquires jurisdiction before delivering judgment, its decision cannot be attacked on the ground of want of jurisdiction. Consequently, the time to decide whether the court has jurisdiction or not is when the point is taken". Indeed, the above clarifies the position as in the instant case, on the jurisdiction of the court. In the light of the above discussion I resolve issue (1) supra in favour of the respondent, and dismiss ground (1) of appeal to which it is married. I will now deal with issue (2) in the appellant's brief of argument, where the learned counsel for the appellant posited that it is trite law that where an issue has been decided in an earlier action it is incompetent for a court to decide on such issue in a subsequent action. He argued that issue estoppel arises where a court of competent jurisdiction had earlier adjudicated upon an issue between the same parties or the privies and the same issue comes incidentally in question in any subsequent proceeding between the same parties or their privies, and that issue estoppel applies whether the point involved in the earlier decision is one of fact or law or mixed law and fact. He placed reliance on the cases of *Fadiora v. Gbadebo* (1978) S.C. 219 and *Iyowuawi v. Iyowuawi* (1987) NWLR part 630 page 61. In the earlier action, the respondents reliefs sought were as follows:-

"1. An injunction to restrain the Defendants, whether by themselves, their Directors officers, servants or agents or any of them, or otherwise howsoever, from doing the following acts or any of them, that is to say:-

- a. Infringing the plaintiffs Trade mark 'Super Rocket' applied for and accepted in Nigeria under No. TP 11 933/91/5.
- b. Passing-off, or causing, enabling or assisting others to pass-off grinding stones used for the purpose of washing terrazzo floors inscribed with the trade mark "Super Rocket" not being of the plaintiffs manufacture or merchandise as and for the goods of the plaintiff.
- c. Importing, selling or offering for sale, or supplying grinding stones used for the purpose of washing terrazzo floors or any other product under the trade mark 'Super Rocket' as to be calculated to lead to the belief that grinding stones not of the plaintiff's manufacture or merchandise are the product of the plaintiff.

2. Delivery up for destruction of all grinding stones bearing the offending mark "Super Rocket" in the possession, custody or control of the Defendant.

3. Damages of N1,000,000.00 or an account of profits.

4. Costs.

5. Further or other reliefs."

According to learned counsel for the appellant, the respondent sought exactly the same reliefs in the present statement of claim, as were sought in the particulars of claim upon which judgments were pronounced by the Court of Appeal and Supreme Court in *Dyketrade v. Omnia* 2000 12 NWLR part 680 page 1. Learned Counsel further argued that the respondent's claim did not arise until 1993 at which material time it had not registered its trade mark, but only had a pending application, the effect of which is that the claim was without legal basis, incompetent and bad. It was submitted that the Supreme Court having come to the conclusion in *Dyketrade v. Omnia* supra the respondent cannot re-litigate the issue of trade mark infringement as long as the Supreme Court judgment on same subsists. He referred to the case of *Adigun and Ors. v. The Secretary of Iwo Local Government and Anor* 1999 8 NWLR part 613 page 30. It was further contended that the action was originally filed upon a pending application to register the trade mark and the Supreme Court had given judgment on the issue of the subsequent registration of the trade mark after which the suit was remitted back to the Federal High Court for trial of the issue of passing-off. According to learned counsel, the issue of passing-off

is the only issue upon which the lower court had jurisdiction to adjudicate. He further submitted that at the time the respondent instituted the action, its application for registration of trade mark had abated, same not having been completed within one year as required by Section 22 (4) of the Trade Mark Act supra. In reply learned counsel for the respondent has submitted that the Supreme Court in *Dyketrade v. Omnia* supra did not dismiss the plaintiffs claim for infringement of trade marks, the decision of the court was limited to the merit of the application for an interlocutory injunction. According to the learned counsel, the claims in the decision in the *Dyketrade* case supra are different from the claims in the current case. Learned counsel placed reliance on the case of *Mohammed v. Olawunmi* 1993 4 NWLR part 287 page 254, and Halsbury's laws of England, 3rd Edition Vol. 15, paragraph 359, which states the following in respect of the plea of *res judicata*. "In all cases where the cause of action is really the same, and has been determined on the merits, and not on some ground (as the non-expiration of the term of credit) which has ceased to operate when the second action is brought, the plea of *res judicata* would succeed. The doctrine applies to all matters which existed at the time of the giving of the judgment, and which the party had an opportunity of bringing before the court. If, however there is a matter subsequent which could not be brought before the court at the time, the party is not estopped from raising it." The above is quite fortifying. Indeed, there is no way one can classify the claims in the earlier *Dyketrade Limited* case supra in the same category as those in the present case. In the earlier case, the claims were as stated in the particulars of claim and based on a complaint of the use of an unregistered trade mark. In the instant case the trade mark complained of had been registered and the registration number stated in the statement of claim. We must not lose sight of the fact that in the present case a statement of claim had already been filed and all the materials set out therein, and it was based on the pleadings that the application for striking out the claim of the respondent/plaintiff was filed and moved. This appeal emanated and had its root from the ruling of the trial Federal High Court refusing the application. Again, we must not lose sight of the cardinal principle of law that a statement of claim supercedes the writ or whatever material of claim that might have been filed earlier on. See *Lahan v. Lajoyetan* (1972) 6 SC 190, and *Dr. Mathias Oko Offoboche v. Ogoja Local Government and Anor* (2001) 16 NWLR part 739 page 458. Again, the thrust of the argument in the earlier case was the non registration of the trade mark sought to be protected, and that omission led to the failure of the case, whereas the omission or anomaly had been rectified, and the situation we have at hand now is different. I am not satisfied that the questions for determination are the same, as the difference is clear, so to speak. The cardinal principle of the law is that for issue estoppel *per rem judicatum* to operate and succeed the party relying on it must establish the following pre conditions :-

- (1) That the parties or their privies in both earlier and instant case are the same.
- (2) That the judgment relied upon is valid, subsisting and final.
- (3) That the claim or issue in dispute in the proceedings are the same.
- (4) That the subject matter of the litigation in both cases is the same.
- (5) That the court that decided the previous suit is a court of competent jurisdiction.

It is my view that the pre condition number (3) above has not been met, so the case cannot operate as an estoppel *per rem judicatum*. See *Okukuje v. Akwido* (2001) 3 NWLR part 700 page 261, *Chiekwe v. Obiora* (1960) F.S.C page 258, and *Abiodun v. Fasanya* (1974) 11 S.C. 61. I endorse the finding of the lower court which reads thus:- "I agree with the submission of the learned counsel for the respondent that with the registration of the Respondent's trade mark which was pleaded in paragraph 4 of its statement of claim a new event has intervened to make the present circumstances different from the issues considered in the earlier interlocutory matters which went to the Court of Appeal and the Supreme Court." In this wise, I resolve this issue No. (2) in favour of the respondent, and ground of appeal No. (2) to which it is married fails, and it is dismissed. On the last issue raised for determination, which is to do with the application of Section 22(4) of the Trade Marks Act supra, I am of the view that it is not necessary to go through, the arguments canvassed by both counsel to the parties, in view of my findings and earlier pronouncements in this judgment. I have already found that the trade mark alleged to be infringed in this case has already been registered, and the suit was based on the registered trade mark, hence the period of completion of registration is not an issue and does not arise at this stage of the proceedings. To go into the detail of any abatement or non compliance will be an exercise in futility, having held that the suit was properly before the Federal High Court that indeed has jurisdiction conferred upon it to hear the suit by the Constitution of the Federal Republic of Nigeria supra and the Federal High Court Act. In the circumstances, the need to deal with the issue is obviated. The issue even if discussed will be resolved in favour of the respondent. Ground (3) of appeal to which it is married fails and it is dismissed. Before I conclude this judgment, I will like to comment on the appellant's reply brief of argument, which is a far cry from what an appellant's reply brief of argument should contain. The reply brief filed by the appellant in this case virtually opened another vista for argument of

the appeal the second time, when it had already thoroughly canvassed arguments in its brief of argument. The purport of an appellant reply brief is to address new issues that may have arisen from the respondent's brief of argument, and provide answers to clarify whatever such new issues may have exposed. See *Humbe v. A. G. Benue State* (2000) 3 NWLR part 648, page 419, *Ojo v. Okitipupa Oil Palm PLC* (2001) 9 NWLR part 716 page 679, and *V.S. Steel (Nig.) Ltd. V. Government of Anambra State* (2001) 8 NWLR part 715 page 454. In the light of the reasonings in this judgment, I dismiss the appeal as it has no merit whatsoever. I affirm the judgment of the Court of Appeal Lagos Division. I hereby order that the case be heard by the Federal High Court Lagos. I assess costs at N10,000.00 in favour of the respondent, against the appellant.

Judgment delivered by

Ikechi Francis Ogbuagu. J.S.C.

This is an appeal against the decision of the Court of Appeal, Lagos Division (hereinafter called "the court below") delivered on 20th May, 2003, affirming the Ruling of Jinadu, J. of the Federal High Court, Lagos, delivered on 20th March, 1998 dismissing the motion/application of the Appellant. Dissatisfied with the said decision, the Defendant/Appellant has appealed to this Court on three (3) Grounds of Appeal contained in the Amended Notice of Appeal filed on 6th December, 2006. Without their particulars, they read as follows:

"Ground 1

The Court of Appeal erred in law when it affirmed the ruling of the Federal High Court regarding the issue of registration of Respondent's trademark and its competence to adjudicate upon it.

(the underlining is mine)

Ground 2

The Court of Appeal erred in law when it held that "..... With the registration of the Respondent's trademark to make the present circumstances different from the issues considered in the earlier interlocutory matter"

Ground 3

The Court of Appeal erred in law when it gave credence to the Respondent's Certificate of Registration of Trade Mark which was issued in contravention of S.22 (4) of the Trade Mark Act Cap 436, Laws of the Federation". The facts of the case briefly stated are that in instituting the suit in 1993, the Plaintiff/Respondent filed a Writ of Summons where only the particulars of claim were stated. That said particulars of claim, were not the same as the averments in a Statement of Claim. What is more, in praying for Injunctions, the first prayer which is pertinent in this matter/appeal reads as follows:

"(a) Infringing the Plaintiffs trade mark "Super Rocket" applied for and accepted in Nigeria under TP11933/91/5".

(the underlining mine)

In other words, the Respondent had made an application for registration of its trade mark. I note that at the time of filing the said suit, the Plaintiff/Respondent, also filed both a motion ex parte and a substantive motion on Notice for an Injunction to restrain the Defendant/Appellant, from importing or selling the goods complained of, firstly, pending the hearing of the ex parte motion and subsequently, pending the hearing and determination of the said suit. The ex parte motion was heard and granted. On being served with the motion on notice and the order granted in respect of the motion ex parte, the Defendant/Appellant filed a motion, to discharge the order of interim injunction. The trial court, heard together the motion on notice and the motion to discharge the said interim order of injunction. In his Ruling, the learned trial Judge, discharged the interim order of injunction, refused the motion for interlocutory injunction and proceeded to strike out the entire suit. The Plaintiff/Respondent, appealed to the Court of Appeal that allowed the appeal in respect of the striking out of the suit on the ground that no such prayer was before the trial court; but it dismissed the appeal in respect of the refusal of the trial court, to grant the prayer for an interlocutory injunction on the ground, firstly, that an injunction to restrain the infringement of a trade mark, could not be granted when the trade mark claimed or applied for, had not yet been registered. Secondly, that an injunction to restrain the Defendant/Appellant, from continuing to sell the goods complained of on the basis of the claim for passing-off, could not be granted when the Plaintiff/Respondent, did not specifically pray for an interlocutory injunction to restrain the Defendant/Appellant, from passing-off its goods as those of the Plaintiff/Respondent. The Court of Appeal, therefore, ordered that the suit be re-listed at the trial Federal High Court which was eventually done. The Plaintiff/Respondent, appealed to this Court against the refusal of the Court of Appeal to grant the interlocutory injunction prayed for. The appeal was dismissed virtually on the same grounds as did the Court of Appeal. That appeal and the decision is reported in (2000) 12 NWLR (Pt.680) 1; (2000) 7 SCNJ. 90. I also note that in the meantime, as a result of the re-listing of the suit in the Federal High Court, pleadings were ordered and the Plaintiff/Respondent in its Statement of Claim filed on 3rd June, 1997, in paragraph 4 thereof, averred inter alia, that its "trade mark Super Rocket, which it registered in Nigeria, under No.

51136 in Class 19 with effect from 10th October, 1991". (See page 28 of the Records). Then in paragraph 21(1) (a) thereof, it claimed against the Defendant/Appellant, an injunction, to restrain the Defendant/Appellant, from infringing its trade mark Super Rocket registered under No 51136 in Class 19". (See page 30 of the Records).The Defendant/Appellant did not like this pleading of the registration of its trade mark in the Statement of Claim and therefore, filed a motion on 30th October, 1997, praying the court to strike out the paragraph in which the said registration of the trade mark was pleaded and also to dismiss the suit in its entirety, on the ground that the Plaintiff, lacks locus standi and that the -Statement of Claim, discloses no reasonable cause of action. After hearing arguments, the learned trial Judge, in his Ruling, dismissed the motion/application and held that the Plaintiff/Respondent was entitled to alter, modify or extend the cause of claim in its particulars of claim so long as it did not create a new cause of action. That the Plaintiff/Respondent had not created a new cause of action in its Statement of Claim because,

"the fact of registration of the trade mark arose from the fact of application for the registration of the trade mark and the acceptance thereof for registration "

(the underlining is mine)

The Defendant/Appellant, - appealed to the court below against the decision of the said Federal High Court. As earlier stated by me at the beginning of this Judgment, the court below dismissed the appeal, hence the instant appeal. I have taken pains to highlight the above, in order to show that this appeal poses no difficulty to me as the facts, are straight forward. For completeness, I am obliged to reproduce the parties' issues for determination.The Appellant's three (3) issues for determination, read as follows:

1. Whether the Court of Appeal was right in holding that the Federal High Court has jurisdiction to entertain a claim instituted upon an unregistered trade mark'

2. Whether the learned justices of the Court of Appeal were justified in holding that "..... with the registration of the Respondent's trade mark a new event has intervened to make the present circumstances different from the issues considered in the earlier interlocutory matter.....'

3. Whether the Court of Appeal was right in giving credence to Respondent's Certificate of Registration of Trademark which was issued in contravention of S.22(4) of the Trademark Act, Cap 436, Laws of the Federation"

The Respondent, also formulated three (3) issues for determination, namely,

"Issue No 1

Whether the Federal High Court has jurisdiction to adjudicate over the claims brought before it by the Plaintiff.

Issue No 2

Whether the decision of the Supreme Court in respect of the earlier interlocutory appeal in this suit (Dyketrade v. Omnia (2000) 12 NWLR (Pt.680) 1), operates as a bar against the entertainment by the Federal High Court, of the Plaintiff's subsisting claim for infringement of trade mark'

Issue No 3

Whether the Federal High Court is precluded from recognizing the certificate of registration of the trade mark Super Rocket under No. 51136 pleaded in the Statement of Claim "

(the underlining mine)

It is pertinent to be borne in mind and to be stressed that at the time the suit was re-listed in the Federal High Court and pleadings were ordered without any objection by the Appellant or his learned counsel, the parties, were to file and exchange their respective pleadings - i.e. by filing a Statement of Claim and a Statement of Defence respectively. The said order was a manifestation of the fact that particulars of claim endorsed on a Writ of Summons, were/are not the same thing as averments in a Statement of Claim, where a Plaintiff can/could give particulars where or if necessary .The learned counsel for the Appellant ought to have appreciated and realized and this is settled, that a Statement of Claim supercedes a Writ of Summons. Speaking for myself, by not objecting to the said order of ordering pleadings to be filed and/or exchanged, the Appellant and his learned counsel, conceded or admitted, that a Writ of Summons, is not the same thing as a Statement of Claim even if "particulars of Claim" are endorsed on the said Writ of Summons. A Writ of Summons is used to commence every action except if a particular rule or law provides otherwise. This is why, its contents, are different from a Statement of Claim. The contents are substantially as follows:

"(a) the court in which the action is brought and the Judicial Division,

(b) the heading of the matter;

(c) Names of the parties and where appropriate, the capacities in which they sue or are being sued.

(d) Name and address of the Defendant/Defendants

(e) Time within which the Defendant is commanded to enter appearance and consequences of default of appearances;

- (f) Life span of the writ
- (g) How the Defendant may enter appearances, - i.e. personally or through a Solicitor/Counsel;
- (h) Particulars of claim;
- (i) Name and address of Solicitor
- (j) Address of Plaintiff.

In Black's Law Dictionary 7th Edition page 1065, a Writ of Summons, is stated to be a Writ by which, under the Judicature Acts of 1873 - 1875 all actions, were commenced. In Nigeria, an action certainly is not commenced by a Statement of Claim. I suppose this is elementary. It is because, a Statement of Claim supercedes a/the Writ of Summons, that in determining either the jurisdiction of the court to entertain and determine the suit, or whether a reasonable cause of action is disclosed or whether the plaintiff has a locus standi, that the court, looks at the Statement of Claim and perhaps the Writ. For the settled authority that a Statement of Claim supercedes the Writ of Summons, See the cases of Lahan & Ors. v. Lajoyetan & Ors. (1972) 6 S.C. 190 @ 792; (1972) NSCC 460 @ 461; Otanioku v Alli (1977) 11 - 12 S.C. 9; Elf. Nig. Ltd, v. Siko & Anor. (1994) 7-8 SCNJ. (PU) 119; and recently, Alhaji Ndayako (Etsu Nupe) & Anor. v. Alhaji Dantoro & 6 Ors. (2004) 13 NWLR (Pt.889) 189; (2004) 5 SCNJ. 152 (a), 175 - 176 citing several cases therein. Indeed, in the case of Enigbokan v. American International Ins. Co. Ltd. (1994) 4 NWLR (Pt.348) 1 (a), 19, it was held that in many cases, the Statement of Claim, more than a writ, amplifies through facts averred, the real action a party pursues. As to the fact of looking at the Statement of Claim by the court and not the writ in order to determine say, whether it has jurisdiction or there is a cause of action, etc, there are also too many decided authorities in this regard. See the cases of Chief Adeyemi & Ors. v. Opeyori (1976) 9-10 S.C. 31 (g), 51; Western Steel Workers Ltd. & Anor. v. Iron & Steel Workers Union of Nigeria & Anor. (1987) 1 NWLR (Pt. 49) (a) 301 - 302; (1987) 2 SCNJ. 1; Akinfolarin & 2 Ors. v. Akinola (1994) 3 NWLR (Pt.335) 659 (a), 674; (1994) 4 SCNJ. 30 and recently, C.G.G. (Nig.) Ltd, v. Chief Lawrence Osu (2005) 2 SCNJ. 227 @ 257 and (2005) 2 S.C. (Pt. II) 50 citing several other cases therein. Learned counsel for the Appellant, can now see that from the welter or plethora of decided authorities by this Court, he was not standing on a firm ground in respect of the complaint and arguments in the Appellant's Brief which with respect, lack substance and fail. From what I have adumbrated above in this Judgment, the learned counsel for the Appellant can also see, with respect, that by no stretch of imagination, can/could the plea of estoppel rem judicata or issue estoppel, apply in the said suit leading to this appeal. In the first place, the matter that came to this Court in the case of Dyktrade Ltd, (also sometimes spelt Dyketrade) v. Omnia Nig. Ltd, (supra), was interlocutory and not a final decision or disposal of the suit. In the second place, at the time the appeal was filed and the suit, or whether a reasonable cause of action is disclosed or whether the plaintiff has a locus standi, that the court, looks at the Statement of Claim and perhaps the Writ. For the settled authority that a Statement of Claim supercedes the Writ of Summons, See the cases of Lahan & Ors. v. Lajoyetan & Ors. (1972) 6 S.C. 190 @ 792; (1972) NSCC 460 @ 461; Otanioku v Alli (1977) 11 - 12 S.C. 9; Elf. Nig. Ltd, v. Siko & Anor. (1994) 7-8 SCNJ. (Pt. 1) 119; and recently, Alhaji Ndayako (Etsu Nupe) & Anor. v. Alhaji Dantoro & 6 Ors. (2004) 13 NWLR (Pt.889) 189; (2004) 5 SCNJ. 152 (a), 175 - 176 citing several cases therein. Indeed, in the case of Enigbokan v. American International Ins. Co. Ltd. (1994) 4 NWLR (Pt.348) 1 (a), 19, it was held that in many cases, the Statement of Claim, more than a writ, amplifies through facts averred, the real action a party pursues.

As to the fact of looking at the Statement of Claim by the court and not the writ in order to determine say, whether it has jurisdiction or there is a cause of action, etc, there are also too many decided authorities in this regard. See the cases of Chief Adeyemi & Ors. v. Opeyori (1976) 9-10 S.C. 31 @ 51; Western Steel Workers Ltd. & Anor. v. Iron & Steel Workers Union of Nigeria & Anor. (1987) 1 NWLR (Pt. 49) @, 301 - 302; (1987) 2 SCNJ. 1; Akinfolarin & 2 Ors. v. Akinola (1994) 3 NWLR (Pt.335) 659 @, 674; (1994) 4 SCNJ. 30 and recently, C.G.G. (Nig.) Ltd, v. Chief Lawrence Osu (2005) 2 SCNJ. 227 @ 257 and (2005) 2 S.C. (Pt. II) 50 citing several other cases therein. Learned counsel for the Appellant, can now see that from the welter or plethora of decided authorities by this Court, he was not standing on a firm ground in respect of the complaint and arguments in the Appellant's Brief which with respect, lack substance and fail. From what I have adumbrated above in this Judgment, the learned counsel for the Appellant can also see, with respect, that by no stretch of imagination, can/could the plea of estoppel resjudicata or issue estoppel, apply in the said suit leading to this appeal. In the first place, the matter that came to this Court in the case of Dyketrade Ltd, (also sometimes spelt Dyktrade) v. Omnia Nig. Ltd, (supra), was interlocutory and not a final decision or disposal of the suit. In the second place, at the time the appeal was filed and heard by this Court, the said trademark had not been registered. There was then, a mere application for it to be registered. At the time the trial court heard by this Court, the said trade mark had not been registered. There was then, a mere application for it to be registered. At the time the trial court heard arguments

and made its ruling, the trade mark had been registered. So, now that the instant appeal has come to this Court, the trade mark had been fully and completely registered and numbered 51136 in Class 19. With the greatest humility and respect to the learned counsel for the Appellant, this appeal, is an exercise in futility. Indeed and in fact, the decision of the two lower courts, are based on findings of fact that are not perverse and are therefore, concurrent findings. For completeness, the cause of action and the remedy sought when the suit was before the trial court, were the factual situation the existence of which, entitled the Plaintiff/Respondent, to obtain a remedy against the Appellant. It was the factual situation on which the Plaintiff/Respondent relied to support its claim which must be recognized by the law as giving rise to a substantive right capable of being claimed or enforced against the Appellant. See the cases of Ogbini & Mrs. Oloto 19 & 3 Ors. (1993) 7 NWLR (Pt.304) 128; (1993) 7 SCNJ. (Pt.II) 447@, 454 and Attorney-General of the Federation v. Attorney-General of all the 36 States (2001) 7 SCNJ. 1 @ 32 and many others. The said decision of this Court in the Dyktrade Ltd, v. Ominia Nig. Ltd, (supra), was not only limited to the merit of the application for interlocutory injunction, but it was based, on the claims contained in the particulars of claim and facts deposed to in the affidavit in support of the application for a grant of interlocutory injunction. The claims and the facts averred in the Statement of Claim are diametrically or significantly different as I have demonstrated above in this Judgment. I think I have "flogged" this point or issue. But before I am done, I note and most importantly, that the Appellant, never, appealed against the decision of the trial court that the Plaintiff/Respondent, is entitled to plead the registration of its trade mark in the Statement of Claim and that the Statement of Claim, supercedes the particulars of Claim. This knocks out the bottom so to speak, of this appeal, because, on the decided authorities and this is settled, that where there is no appeal against a finding of fact, an Appellate Court, cannot deal with the matter and cannot, disturb such finding or findings of fact or facts not properly brought as well as those not brought before it. See the cases of Ejiwhomu v. Edok-Eter Mandilas Ltd. (1986) 9 S.C. 41 (a), 47; Iseru v. Catholic Bishop (1997) 4 SCNJ. 10 @ 115; Dr. Alakija & Ors. v. Alhaji Abdulai (1998) 6 NWLR (Pt.552) 1, 24; (1998) 5 SCNJ. 1; Udo v. Cross River State Newspaper Corporation (2001) 14 NWLR (Pt.732) 116 @ 167 and recently, Dabo v. Alhaji Abdullahi (2005) 7 NWLR (Pt.923) 181 @ 206; (2005) 2 SCNJ. 76 (a), 95; (2005) 2 S.C. (Pt.1) 75 @ 91 just to mention but a few. On this ground again, the appeal fails woefully. My answers to Issues 2 and 3 of the Appellant and Issue 1 of the Respondent are in the affirmative. Issue 1 of the Appellant, with respect, is a non-issue as there is pleading in the Statement of Claim of the fact of registration of the trade mark. My answers to Issues 2 and 3 of the Respondent are in the negative. I have had the privilege of reading before now, the lead judgment of my learned brother, Mukhtar, J.S.C and I agree completely with his reasoning and conclusion. From the foregoing and the fuller reasons contained in the said lead Judgment, I find no substance in this appeal and I too, dismiss the same. I hereby affirm the decision of the court below and I abide by the consequential order in respect of costs.

Judgment delivered by

Francis Fedode Tabai. J.S.C.

I had, before now, read the leading judgment of my learned brother Mukhtar J.S.C and I agree with the reasoning and conclusions reached. I also agree with the consequential orders including the order on costs.

Judgment delivered by

Ibrahim Tanko Muhammad. J.S.C.

My learned brother Mukhtar, JSC, afforded me a copy of the judgment just delivered, in its draft form. The facts giving rise to the case require no repetition as they were fully set out in the leading judgment. My comments are limited to the 2nd issue as formulated by both the appellant and the respondent in their respective briefs of argument. This issue is on Issue Estoppel. The learned counsel for the appellant couched the issue as follows: "Whether the learned justices of the Court of Appeal were justified in holding that "... with the registration of the Respondent's trademark a new event has intervened to make the present circumstances different from the issues considered in the earlier interlocutory matter..." Learned Counsel for the respondent framed the issue in the following words: "Whether the decision of the Supreme Court in respect of the earlier interlocutory appeal in this suit (Dyketrade v. Omnia (2000) 12 NWLR (Pt.680) 1), operate as a bar against the entertainment by the Federal High Court, of the plaintiff's subsisting claim for infringement of trade mark" The arguments put forward by learned counsel for the appellant are that where an issue has been decided in an earlier action, it is incompetent for a court to decide on such issue in a subsequent action. Issue estoppel, he submitted, arises where a court of competent jurisdiction had earlier adjudicated upon an issue between the same parties or their privies and the same issue comes incidental in question in any subsequent proceeding between the same parties or their privies. It applies whether the point involved in the earlier decision in one of fact or law

or mixed law and fact. He cited the case of *Fadiora v. Gbadebo* (1978) SC 219 P.295 9 -11; *Iyowuawi v. Iyowuawi* (1987) 4 NWLR (Pt.63) 61. The point in contention, according to the learned counsel for the appellant is that in the statement of claim filed by the respondent on 3rd June, 1997, the respondent sought exactly the same reliefs as contained in its particulars of claim upon which judgments were pronounced by both the Court of Appeal and the Supreme Court. He cited the case of *Dyketrade v. Omnia* (2000) 12 NWLR (pt. 680) page 1. Learned counsel for the appellant did not see any need to amend its subsequent particulars of claim thus inviting the trial court to also adjudicate on issues raised therein which had been decided by the appellate courts. The respondent had no triable issue as its claim did not arise until 1993 when it had not by then registered its trade mark but only had a pending application. He submitted further that the Supreme Court having come to this conclusion in *Dyketrade v. Omnia* (supra) the respondent cannot again re-litigate the issue of trademark infringement as long as the judgment of the Supreme Court on same subsists. He cited the case of *Adigun v. The Secretary of Iwo Local Government* (1999) 8 NWLR (Pt.613) at 30; *Okwugu v. Nwokedie* (1999) 8 NWLR (Pt.517) at 407. Learned counsel for the respondent, on his part, submitted that the Supreme Court in *Dyketrade v. Omnia* (supra) did not dismiss the plaintiffs claim for infringement of trademarks. The decision was based on the claims as formulated in the particulars of claim and facts deposed to in the affidavit filed in support of the motion for the grant of the interlocutory injunction. Compared to the claims formulated in the statement of claim and the facts pleaded therein, there is a significant difference which is that, the trademark alleged to be infringed, is alleged in the statement of claim, to be registered, whereas it was alleged in the particulars of claim to be simply an accepted application. Learned counsel for the respondent argued that the decision of the Supreme Court in *Dyketrade v. Omnia* will not support a plea of issue estoppel or *res judicata* to prevent the Federal High Court from entertaining the plaintiffs claim for infringement of trademark based on an allegation of ownership of a registered trademark as contained in the statement of claim. Estoppel, has generally, been defined as a disability whereby a party is precluded from alleging or proving in legal proceedings that a fact is otherwise than it has been made to appear by the matter giving rise to that disability. See: *Halbury's Laws of England* (4th Edition) vol. 16, page 840, paragraph 951. It is of many types. The Common Law recognizes three kinds:

- (a) estoppel by record or quasi by record
- (b) estoppel by deed and
- (c) estoppel in pais.

There are two further kinds in equity. They are:

- (i) promissory estoppel and
- (ii) Proprietary estoppel.

The defence or kind of estoppel being raised by the appellant in this issue falls under category (a) of the Common law types. It is more popularly known as *estoppel per rem judicatum*. It arises in the following situations:

i. Where an issue of fact has been judicially determined in a final manner between the parties by a court/tribunal having jurisdiction, concurrent or exclusive, in the matter, and the same issue comes directly in question in subsequent proceedings between the same parties. It is sometimes known as "*cause of action estoppel*."

ii. Where the first determination was by a court having exclusive jurisdiction and the same issue comes incidentally in question in subsequent proceedings between the same parties. This is known as "*issue estoppel*."

iii. In some cases where an issue of fact affecting the status of a person or thing has been necessarily determined in a final manner as a substantive part of a judgment in rem of a tribunal having jurisdiction to determine that status and the same issue comes directly in question in subsequent civil or criminal proceedings between any party whatever. In order to establish his claim of issue estoppel, the appellant through his learned counsel while making his submission quoted the reliefs claimed by the respondent in his particulars of claim which he said were exactly the same as contained in the statement of claim filed by the respondent in 1997 and upon which the Court of Appeal and the Supreme Court had made pronouncements in the *Dyketrade v. Omnia's* case. I took time to compare the two claims. In *Omnia's* case (supra) the Supreme Court set out the claim of the appellant before it, who was the plaintiff before the Federal High Court as follows: "*An injunction to restrain the defendant from* "

- (a) Infringing the plaintiff's Trade mark "*Super Rockets*" applied for and accepted in Nigerian under No TP 11933/91/5.
- (b) Passing - off or causing, enabling or assisting others to pass - off grinding stones used for the purpose of washing terrazzo floors inscribed with the trade make "*Super Rockets*" not being of the plaintiff's manufacture or merchandise as and for the goods of the plaintiff.
- (c) Importing, selling or offering for sale or supplying grinding stones used for the purpose of washing terrazzo floors or

any other product under the trade mark "Super Rockets" as to be calculated to lead to the belief that grinding stones not of the plaintiff's manufacture or merchandise are the products of the plaintiff."

The reliefs claimed in the present action by the plaintiff at the Federal High Court Lagos, and now respondent before this court, read as follows:

"1. An injunction to restrain the Defendant, whether by itself, its Directors, officers or any of them or otherwise howsoever from doing the following acts or any of them, that it to say:-

- a. Infringing the Plaintiffs trade mark "Super Rockets" registered under No 51136 in class 19.
- b. Passing off or causing, enabling or assisting others to pass off grinding stones used for the purpose of washing terrazzo floors inscribed with the trade mark "Super Rockets" not being of the Plaintiff's manufacture or merchandise as and for the goods of the Plaintiff.
- c. Importing, selling or offering for sale or supplying grinding stones used for the purpose of washing terrazzo floors or any other product under the trade mark "Super Rockets" as to be calculated to lead to the belief that grinding stones not of the Plaintiff's manufacture or merchandise are the products of the Plaintiff.

2. Delivery up for destruction of all grinding stones bearing the offending mark "Super Rockets" in the possession, custody or control of the Defendant.

3. Damages of N1,000,000.00 or an account of profits

4. Costs.

5. Further or other Reliefs."

(Underlining supplied for emphasis)

In the first set of reliefs set out above, the Court of Appeal and the Supreme Court affirmed the ruling of the trial Federal High Court. The ruling decided:

1. that the plaintiff was not entitled to sue for infringement of a trade mark which had not been registered and mere acceptance by Registrar of Trade Marks of the application has not amounted to registration.

2. the defendant cannot be held liable for passing - off because it ordered and imported goods as an agent for disclosed principals and therefore the Court would not grant an application for injunction and a suit for passing - off could not be sustained.

3. as the claim of infringement was struck out the entire suit stood struck out.

Some excerpts from the Supreme Court judgment, in Omnia's case (Supra), per Belgore, J.S.C (as he then was) are instructive. I quote them herein below:- " 'Trade Mark' when registered will entitle the proprietor to sue or institute an action for any infringement of the Trade Mark. Registration entitles the proprietor to the exclusive use of the Trade Mark and also right to sue for passing - off the goods of the proprietor in the instant case on appeal the only matter before the courts below is the allegation that the appellant applied for registration of the trade mark. The Contention that the application was made does not mean that it is "registered"..... Therefore what was before the courts below was mere application and acknowledgement of the application, not what the applicant calls acceptance. Acceptance of the application occurs when the conditions in Section 22 above have been fulfilled. Up to that moment there is no evidence that the application has been accepted and by virtue of Section 22(4) the application has abated. ----- The appellant has not acquired any right to protect for the time being as the applicant for the purpose of the Act because all the procedure leading to acceptance had not been followed.-----It is therefore clear that the right sought to be protected with injunction by the appellant has not matured and the trial court on scanty materials before it rightly refused to continue with the matter and the action was rightly struck out. Court of Appeal did the right thing. The appellant has not indicated clearly the right he wanted protected either in the interim or substantive claim. What was before the trial court was not a matter of passing - off but that of breach of appellant's trade mark. The appellant has got no trade mark to protect ---- The appellant has not shown any other reasons or that he has applied and got any trade mark registered."

(underlining supplied for emphasis)

From the above, therefore, it stands clear to me that it is not correct to say, as posited by learned counsel for the appellant (page 11 of his brief) that the respondent did not see any need to amend its subsequent particulars of claim. It is apparent that in the particulars of claim set out first above, no identification/Registration Number of the trade mark was furnished. It was only alluded that an application for that purpose was filed. In the particulars of claim of the suit on appeal, paragraph 1(a) of the claims furnished Registration No 51136 in class 19 this marks a fundamental difference between the two claims. It confers legal right now on the respondent to sue on any infringement of the trade mark, a right which by the operation of law, he could not hitherto exercise, as held by the Supreme Court in Omnia's case (supra).Secondly, from the pronouncements of the Supreme Court, the doors were not closed for the respondent to exercise the right not to allow infringement of its trade mark once such was properly registered, (see the underlined

phrases/sentences in the judgment quoted above). I do not agree with the learned counsel for the appellant in his submission that the Supreme Court having come to this conclusion in *Dyketrade v. Omnia* (supra) that the respondent cannot again re-litigate the issue of trade mark infringement as long as the judgment of the Supreme Court on same subsists. I would like to pause here and draw attention of learned counsel for the appellant that it is not proper to try to give a diametrically opposed meaning to a decision of any court, particularly the apex court *moreso*, when the pronouncement of that court is very clear, cogent and straight forward. Selfish interest in prosecution of cases always compounds the problems more. Learned counsel by the nature of their calling must desist from such unhealthy practice. It is elementary for any counsel to know that on matters of issue estoppel, a plea raised thereon can hardly succeed where the circumstances of the decision in an earlier proceeding is different from the circumstances in the subsequent one. It is the law that in an issue estoppel, a party may be precluded from contending the contrary of any precise point which, having once been distinctly put in issue has been solemnly and with certainty determined against him. This is even where the objects of the first and second actions are different, the finding on a matter which came directly in issue in the first action provided it is embodied in a judicial decision that is final, is conclusive in a second action between the same parties and their privies. This principle applies whether the point invoked in the earlier decision is one of fact or one of law or of mixed law and fact. Under all circumstances, the following conditions have to be satisfied before the doctrine can be applied:

- i. the same question or subject matter was decided in both proceedings;
- ii. parties or their privies were the same in both proceedings and
- iii. the judicial decision said to create the estoppel was final.

I do not think the appellant in this appeal has complied with all the above conditions. I will conclude by quoting the dictum of Uwais, J.S.C (as he then was) in the case of *Mohammed v. Olawunmi* (1993) 4 NWLR (Pt.287) 254, where he said:

"Now for an estoppel to be established whatever determination is made in the first proceedings must be the same question arising in the latter proceedings. Where the question in the second proceeding is not the same (i.e. not *eadem quaestio*) as that decided in the first then there can be no estoppel."

This issue must fail. I dismiss it.

For the fuller reasons given by My Lord, Mukhtar, J.S.C; which I adopt as mine, I find no merit in this appeal and same is dismissed by me. I abide by orders made in the leading judgment including order as to costs.

Judgment delivered by

Christopher Mitchel Chukwuma-Eneh. J.S.C.

This matter commenced at the Federal High Court, Lagos. By an interlocutory application at the defendant's instance it queried the plaintiffs standing to institute this suit and whether the claim discloses a reasonable cause of action. The trial court answered both questions in the affirmative and dismissed the application. The defendant has appealed the decision. Meanwhile, let me state that the plaintiff claimed against the defendant the following reliefs.

(1) An injunction to restrain the defendant whether by itself, its Director, officers and any of them, or otherwise howsoever from doing the following acts, or any of them, that is to say:-

- (a) Infringing the plaintiffs trade mark 'Super Rocket,' Registered under No 51136 in class 19.
- (b) Passing off or causing, enabling or assisting others to pass off grinding stones used for the purpose of washing terrazzo floors inscribed with the trade mark 'Super Rocket' not being of the plaintiffs manufacturer or merchandise as and for the goods of the plaintiff.
- (c) Importing, selling or offering for sale or supplying grinding stones used for the purpose of washing terrazzo floor or any other product under trade mark 'Super Rocket' as to be calculated to lead to the belief that grinding stones not of the plaintiffs manufacture or merchandise are the products of the plaintiff.

(2) Delivery up for destruction of all grinding stones bearing the offending mark 'Super Rocket' in the possession, custody or control of the defendant.

(3) Damages of N 1,000,000.00 or an account of profits.

(4) Costs."

Upon being served the statement of claim the defendant filed an application for the following.

"(1) An order striking out paragraphs 4, 5, 9, 11, 16, 21(1) (a) of the plaintiffs statement dated 3rd of June, 1997.

(2) Striking out the statement of claims/entire claim of the plaintiff.

(3) Dismissing the entire suit with costs against the plaintiff on the ground that:-

- (a) The plaintiff has no locus standi and
- (b) Its claim discloses no reasonable possible cause of action."

In support of the application the defendant filed an affidavit of 10 (ten) paragraphs. The plaintiff did not file a counter affidavit. The trial court after having heard argument of learned counsel on both sides of the application in a considered Ruling held that by the operation of law as per Section 22(2) of the Trade Mark Act that the subsequent Registration of the Trade Mark relates back to 10/10/91 being the date the application for registration was made and so, the plaintiff not only has locus standi in instituting the suit, but also has a reasonable cause of action. The application having been dismissed the defendant appealed to the Court of Appeal which affirmed the decision of the trial court. The defendant still feeling aggrieved has appealed to this court on an Amended Notice of Appeal dated 6/12/2004 containing 3 grounds of appeal. Parties have in compliance with Rules of this court filed and exchanged their briefs of argument. The appellant in its brief of argument has distilled 3 issues for determination as follows:-

"(1) Whether the Court of Appeal was right in holding that the Federal High Court has jurisdiction to entertain a claim instituted upon an unregistered trade mark'

(2) Whether the learned Justices of the Court of Appeal were justified in holding that,

1. "\'..... with the registration of the Respondent\'s trade mark a new event has intervened to make the present circumstances different from the issues considered in the earlier interlocutory matter ... ' "

2. Whether the Court of Appeal was right in giving credence to the Respondent\'s Certificate of Registration of Trade Mark which was issued in contravention of S.22(4) of the Trade Mark Act, Cap 436 Laws of the Federations\'"

The respondent in its brief of argument has also distilled three issues for determination as follows:-

"Issue No 1

Whether the Federal High Court has jurisdiction to adjudicate over the claims brought before it by the plaintiff'

Issue No 2

Whether the decision of the Supreme Court in respect of the earlier interlocutory appeal in the suit Dyketrade v. Omnia (2000) 2 NWLR (pt .680) 1, operate as a bar against the entertainment by the Federal High Court, of the plaintiffs subsisting claim for infringement of trade mark'

Issue No 3

Whether the Federal High Court is precluded from recognising the certificate of registration of the trade mark Super Rocket under No 51136 pleaded in the statement of claim." I have set out the foregoing in order to position my contribution to this matter within its narrow perspective on issue 3 as raised in both briefs of the appellant and the respondent. The two issues have been reproduced above. The respondent has rightly in my view taken an exception to the question of the propriety or otherwise of giving credence to the respondent\'s certificate of registration of Trade Mark Super Rocket No 51136 pleaded in the Statement of Claim as per paragraphs 4 and 5 in this proceeding and as raised under the appellants issue 3 in its brief of argument. And I think the respondent has taken a very important point. In this regard, therefore, I deal only with Issue 3 in both briefs as the other issues for determination in both briefs have been dealt with exhaustively in the lead judgment. Under issue 3 in the appellant\'s brief of argument it has been contended by the appellant that the Federal High Court has acted in error in giving credence to the Certificate of Registration of Trade Mark Super Rocket under No 51136 as it has all the same, been issued after the damaging remarks over it by this court in the case of Dyketrade v. Omnia (supra) to the effect that the application for registration of the same has lapsed by operation of Section 22(4) of the Trade Mark Act and more, as the application in the absence of any evidence that it has been accepted, has by virtue of Section 22(4) of the Trademark Act abated and so, the two lower courts should not have given the certificate any credence. The respondent as I said above has in furtherance of its objection to this question as raised in the said issue 3 in the appellant\'s brief of argument observed that this issue could not be properly raised on appeal for the first time without leave of either court and that no leave has been granted by the court below or this court to raise the issue. In other words, the question is incompetent for lacking in due process. Again, I think that this point is well taken. See: Section 233(3) of the 1999 Constitution. Sequel to this objection, I have waded into the Record of Appeal and I agree with the respondent that this question is a fresh matter by any standards as it was not taken in the court below and so requires leave of the court below or this court. The more fundamental objection to raising this issue is that the defendant once it has decided to challenge the action by way of preliminary objection before filing its defence is taken as having conceded all questions of facts as contained in the Statement of Claim as correct and so, it cannot be heard to challenge the said certificate on this point. Its challenge should therefore, converge on questions of law only, it should concentrate on the legal consequences of the registration. The other aspect of this matter deserving of comment is that this court should show great concern that in an interlocutory appeal as here, it does not by its pronouncement as it is being urged under Issue 3 to prejudice the trial of the substantive issues to be pronounced upon by the trial court. In other words, this court should not decide the very questions which are pending to be determined in the substantive case before the trial court. See Egbe v. Onaogun (1972) 1 ANLR 95, Orji v. Zaria Industries Ltd (1991) 1 NWLR (pt.216) 124

Ndoma-Egba v. Government of Cross River State (1991) 4 NWLR (pt.188) 733, Mobil Oil Nig. Plc v. Kena Energy International Ltd. (2000) 1 NWLR (pt.695) 555. It is irrefutable that this question is one critical fact the appellant has to deny or admit in its defence as per paragraphs 4 & 5 of the Statement of Claim. After all, it is the question of giving credence to the certificate of Registration of Trademark No 51136 that is at the root of this matter. I conclude this resume by deferring to the decision of Attorney General Anambra State v. Okafor (1992) 2 NWLR (pt.224) 398 in which it held; "In any interlocutory application or interlocutory appeal, there must be cautious approach to the order being sought or already granted so that when the substantive case or appeal is heard the court is not placed in an invidious position" Any decision one way or the other on the credence of the certificate of registration of Trademark No 51136 presents the trial court with a fait accompli. It is wise to discountenance it and let sleeping dogs lie. With these comments, I agree with the reasoning and conclusions in the lead judgment of my learned brother Mukhtar J.S.C that there is no merit in this appeal. I also dismiss it. I abide by the orders in the lead judgment.

Counsel

Mr. Adesegun Ajibola " For the Appellant

Mr. Obatosin Ogunkeye " For the Respondent
