**INCORPORATED TRUSTEES OF NIGERIA ASSOCIATION OF GENERAL PRACTICE PHARMACISTS EMPLOYERS**

**V.**

**PHARMACISTS COUNCIL OF NIGERIA**

IN THE COURT OF APPEAL OF NIGERIA

ON THURSDAY, THE 3RD DAY OF FEBRUARY, 2011

CA/A/322/09

**LEX (2011) - CA/A/322/09**

**OTHER CITATIONS**

3PLR/2011/48 (CA)

**BEFORE THEIR LORDSHIPS**

MOHAMMED LAWAL GARBA, JCA

PAUL ADAMU GALINJE, JCA

REGINA OBIAGELI NWODO, JCA

**BETWEEN**

INCORPORATED TRUSTEES OF NIGERIA ASSOCIATION OF GENERAL PRACTICE PHARMACISTS EMPLOYERS - Appellant(s)

AND

PHARMACISTS COUNCIL OF NIGERIA - Respondent(s)

**REPRESENTATION**

O. AKEREDOLU (SAN) appearing with: Ms. ANNE ETENAM, Miss TOYIN FAMESO and OLUFEMI ATETEOLAIYE. - For Appellant

AND

JOSIAH DANIEL EBUME - For Respondent

**ISSUES FROM THE CAUSE(S) OF ACTION**

ADMINISTRATIVE AND GOVERNMENT LAW:- Powers conferred on a body via statute – Application to restrain exercise of same via interlocutory injunction based on affidavit evidence – Burden applicant must discharge – How treated by court

ETHICS – LEGAL PRACTITIONER:- Appellate court practitioner – Duty to compile/transmit records of court – Need to observe the rules prescribed under the Evidence Act especially as to time – Duty to of counsel to client in deposing to affidavit – Sections 86–88 of the Evidence Act – Duty not to go beyond what is required by proceeding to support facts earlier deposed to with details of law – Attitude of court thereto – Legal Effect on client’s case

HEALTHCARE AND LAW:- Ill-health and justice administration - Legal practitioner – Duty to compile and transmit records of court and transmit same to appellate court where registrar fails to do so under Order 8 Rules 4 of the Court of Appeal Rule 2007 – Where not done within time due to ill-health of counsel – Nature of details required by court to exercise its discretion for the records to be filed out of time – Attitude of court to ill-health of counsel vis a vis inadvertence of counsel

**PRACTICE AND PROCEDURE ISSUES**

ACTION - FILING OF PROCESS:- Where a statute prescribes a specific time for filing a process – Default of – Need to furnish reasonable explanation for the delay – Attitude of court to ill-health of counsel as opposed to inadvertence of counsel as reason for the delay

APPEAL – COMPILATION AND TRANSMISSION OF RECORD:- Duty of Counsel under Order 8 Rules 4 of the Court of Appeal Rule 2007 - Where Court Registrar fails to compile and transmit records within 60 days after the filing of the notice of appeal – Duty placed on appellant/counsel

APPEAL – FILLING RECORD OUT OF TIME:- Attitude of the court towards allowing Records already compiled to come properly before the court in the interest of substantial justice – Justification – What an applicant must show

APPEAL – INTERIM APPLICATIONS – INJUNCTION:- Application for Order of Injunction under Rule 6 of the Court of Appeal Rules – Need for there to be an appeal entered and pending – Propriety of Applicant lumping the application for extension of time to compile and transmit record with the prayer seeking a Restraining Order, pending Appeal when Appeal is not pending

COURT - JUDICIAL DISCRETION AND SUBSTANTIAL JUSTICE: Principle of law that all judicial discretions must be exercised according to common sense and Justice – Essence of – Need that in the exercise of the discretion the issue of achieving substantial justice is paramount

EVIDENCE - AFFIDAVIT: Test to determine whether a matter is extraneous in an affidavit - Affidavit evidence which is in the form of conclusion, inference, legal argument, prayer, or objection – Whether treated as raising no fact which needs to be controverted and therefore extraneous to the determination of factual disputers

EVIDENCE - AFFIDAVIT:- Statements relating to legislative instrument – Whether only permissible for a paragraph in an affidavit to make reference to the existence of a law or an Act of legislature, but not discussion on the interpretation of the statute

EVIDENCE - AFFIDAVITS: Nature and essence of an affidavit as a statement of facts not law - Section 87 of the Evidence Act – Implication for including extraneous in any affidavit

JUDGMENT AND ORDERS - INJUNCTION - RESTRAINING ORDER: Essence of – When inappropriate

JUDGMENT AND ORDERS - INJUNCTION - RESTRAINING ORDER PENDING APPEAL: Conditions for grant of a restraining order pending appeal – Need for Applicant to also show he is not guilty of delay in bringing the application – Justification

INTERPRETATION OF STATUTE:- Order 8 Rules 4 of the Court of Appeal Rule 2007 stipulates as follows:

INTERPRETATION OF STATUTE:- S.87 of the Evidence – Meaning and application

**MAIN JUDGMENT**

**REGINA OBIAGELI NWODO, J.C.A.** (Delivering the Lead Ruling):

The Appellant/Applicant by motion on Notice filed on 8/1/2010 seeks the following order:

"i. Extending the time within which the appellant/applicant may compile the records of appeal in this case and transmit same to this Honourable Court.

ii. An Order deeming the record of appeal already compiled and transmitted to this Honourable Court to be properly compiled and transmitted.

iii. Restraining the respondent by themselves, their agents, servants and/or privies or otherwise howsoever, from implementing regulation 2(2) of the Registration of pharmaceutical premises regulations, 2005 against the members of the appellant/applicant and from in any way interfering with the businesses of any such member pending the determination of the appeal against the decision of the lower court delivered on 26th, 2009.

iv. Take further notice that the appellant/applicant will at the hearing of this application rely on the record of Appeal which is already before this Honourable Court."

In support of the Application is a 23 paragraph affidavit deposed too by Prince Abubakar Kazeem, Managing Director of Kasco Pharmacy and a further Affidavit filed on 21/1/2010 deposed to by the same Prince Abubakar Kazeem.

The Respondent filed a33 paragraph counter affidavit on 13/1/2010 deposed to by Theobald Peter Dodo, a legal Practitioner.

The learner Senior Counsel O. Akeredolu arguing the Application on the 14th of December 2010 stated that the motion is brought under Order 7 Rule 10 and Order 4 Rule 6 of the Court of Appeal Rules, 2007, S.15 of the Court of Appeal Act and the inherent Jurisdiction of the Court.

The learned Senior Counsel relying on paragraphs 7 and 8 of the affidavit in support and paragraphs 6, 7 and 8 of the further affidavit submitted that since the reasons given for the delay is attributed to the fault of Counsel, such negligence of Counsel should not be visited on client. He cited the case of Lone John v Blakk (1998) 6 NWLR Pt 555 Pg 524. He urged the Court to grant the extension of time to compile and transmit Record.

In respect of prayer three, the learned Senior Counsel submitted that it is settled law that the Court for which an Appeal lies should preserve its Res. It is his contention that in an application of this nature where they are talking about protecting business interest vis a vis protecting the relief, the need to protect interest of party has always favourably been considered. He cited the cases of:- W.A.O.S. Ltd. v. PEL Farco Ltd. (1994) 1 NWLR Pt. 319 Pg 164 Voltic v. Doroupe (2003) 8 NWLR Pt. 821 pg 58 Josiem Holdines Ltd. v North Line Ltd. (1995) 1 NWLR Pt 371 Pg. 254

The learned Senior Counsel further urged the Court to strike out paragraphs 12, 13, 16, 17,18, 19 and 20 of the counter affidavit as they contain extraneous matters and thus offends the provisions of S.86, S.87 and S.88 of the Evidence Act.

The learned Counsel for the Respondent Mr. J.D Ebume opposing the application relied on the 33 paragraph counter affidavit. It is his contention that the nature of the Reliefs sought by the Appellant Applicant requires the exercise of the courts discretion and the Applicant must show substantial reason for the delay in not transmitting the record. He cited Chief Benson v. Nigeria Agip Co. Ltd. (1982) S.C pg 1.

It is his submission that applicant has failed to show any substantial reason and has not complied to Order 8 Rule 1 and 4 of the Rules of this Court in respect of prayer three. The learned Counsel submitted that the applicant has no legal right to be protected by an injunction. He referred to the exhibits in the counter Affidavit stating that they are Judgments in favour of the Respondent which has not been set aside. It is the further submission of Counsel that the Court does not grant an injunction to restrain a constitutional process and also which is against balance of convenience. He cited Peter v. Architect Okoye & another 2002 FWLR Pt 1110 Pg 1864 at 1882.

He urged the Court to refuse the application as Court of law does not grant an injunction for a completed Act. He cited AG of Abia State v. AG of Federation (2006) 16 NWLR Pt 1005 Pg 265. Buhari v. Obasanjo (2003) 17 NWLR Pt 860 Pg 587 part at Pg 638.

I will first look at the submission of the learned Senior Counsel in respect of the Counter-Affidavit. The learned Senior Counsel urged the Court to strike out paragraphs 12, 13, 16, 17, 18, 19 and 20 of the counter-affidavit of the Respondent for offending the provision of S.86, S.87 and S.88 of the Evidence Act. I will first reproduce the provisions in the sections of the Evidence Act relevant to the submission.

S.86 "Every affidavit used in the court shall contain only statement of facts and circumstances to which the witness deposes, either of his own personal knowledge or from information which he believes to be true."

S.87 "An affidavit shall not contain extraneous matter, by way of objection, or prayer, or legal argument or conclusion."

S.88 "When a person deposes to his Belief in any matter of fact, and his belief is derived from any source other than his own personal knowledge, he shall set forth explicitly the facts and circumstances forming the grounds of his belief."

Looking at the aforesaid provisions, it is obvious that the only relevant section to the submission of learned Senior Counsel is S.87 of the Evidence Act. The learned Senior Counsel urged the Court to hold that the paragraphs cited are offending on the grounds that they contain extraneous matters. S.86 covers circumstances relating to personal knowledge or information, whilst S.88 provides for deponent to state source other than his own personal knowledge.

An affidavit essentially is a statement of facts not law, obviously this is the rationale for the provision under Section 87 of the Evidence Act, stipulating that extraneous matters be excluded from contents of every affidavit.

Therefore, every affidavit is required to contain only a statement of fact and circumstances derived from the personal knowledge of the deponent or from information which he believes to be true. The test on when an affidavit is said to be offensive is to examine each of the paragraphs deposed to in the affidavit. Once the content is such that a witness may be entitled to adduce same in testimony on oath and same are legally admissible as evidence to prove or disprove a fact in issue, then that paragraph qualifies as a statement of facts or circumstance.

On when is a matter extraneous in an affidavit, the Supreme Court in General Aviation Services Limited v Thatial (2004) All FWLR (Pt 211) 1368 SC per Uwaifo JSC Said

"If therefore, affidavit evidence is in the form of conclusion, inference, legal argument, prayer, or objection, it raises no fact which needs to be controverted but is simply regarded as extraneous to the determination of factual disputers."

The test therefore for determining whether a matter is extraneous is to ascertain whether that particular deposition is fit only as an argument which counsel ought to urge upon the court. Once it falls within that category then the deposition is offensive to S87 of the Evidence Act. I have looked at each of the paragraphs in the counter affidavit argued by Senior Counsel as offensive; the following paragraph 12, 13, 16, 17, and 18 contains statements on gazette No. 81, the pharmacy Act and the Respondents duty under the Act. It is permissible for a paragraph in an affidavit to make reference to the existence of a law or an Act of legislature, however it is not permissible to discuss the position of the law and on whom the law vest responsibility. The issue of responsibility calls for the interpretation of the Act. It is just enough to cite the law.

The deponent in the counter affidavit went above what is allowed when he proceeded to discuss the nature of regulation and the nature of responsibility. The Deponent is a legal practitioner and certainly got carried away by proceeding to support facts earlier deposed to with details of law. Therefore, I agree with the submission of Senior Counsel that paragraphs 12, 13, 16, 17 and 18 of the counter affidavit are offensive to provisions of S.87 of the Evidence Act.

Paragraph 19 of the counter Affidavit is a response to paragraphs 13 - 18 of the affidavit in support, likewise paragraph 20. I find no reason to hold that paragraphs 19 and 20 offend the provisions under S87 of the Evidence Act.  
Consequently, paragraphs 12, 13, 16, 17 and 18 of the counter affidavit are hereby struck out.

I have carefully considered the averments in the affidavit, further affidavit and the remaining paragraphs of the counter-affidavit. The Application before the Court from the reliefs sought falls into two segments. First is whether the Applicant should be granted Extension of time to compile and transmit the record of Appeal and the second segment is whether the court should make a Restraining Order against the Respondent. Order 10 (1) of the Court of Appeal Rules 2007 provides that the court may enlarge the time provided by the Rules of Court for the doing of anything to which the Rules apply. Order 8 Rules 4 of the Court of Appeal Rule 2007 stipulates as follows:

"When at the expiration of 60 days after the filing of the notice of appeal the registrar has failed and or neglected to compile and transmit the records of appeal in accordance with the preceding provisions of this Rule, it shall become mandatory for the Appellant to compile the records of all documents and exhibits necessary for his appeal and transmit to the Court within 30days after the registrar's failure or neglect."

From the above provision once the Registrar of the High Court fails to compile Record it becomes mandatory for the Appellant to compile the record of all documents and exhibits and transmit same to the court within 30 day after the Registrar's neglect.  Where the statute provides a specific time for filing of a process and it is not filed within the period specified, the reason for the delay in not complying must be reasonable. The Party in default must seek for extension of time. The Deponent in the affidavit in support averred in the affidavit and paragraphs 6 & 7 of further affidavit that the records were compiled out of time hence they seek to regularize the late compilation. He further averred they were not invited by the Court Registrar to settle the records. This assertion by the Applicant in the further affidavit was not contradicted. The main reason adduced by the Applicant for the delay is that the lawyer instructed to compile and transmit the record was sick. The Deponent did not aver to the date the counsel Mr. Atetedaiye was briefed to compile Record and when they realized that the Registrar had not compiled the Record. In certain circumstances the Court is to consider the date proferred in order to exercise its discretion. The date is of essence in view of the provision of Order 8 of the Rules of Court, which provides for specific period within which the Registrar should compile record and what Appellant must do if the Registrar fails is to transmit the record. Mr. Atetedaiye, should have deposed to the affidavit giving the reason why he did not transmit record within 30 days and when he took ill.

Nevertheless, the attitude of the court is to allow Records already compiled to come properly before the court in the interest of substantial justice so that the appeal will be considered on its merit and determined. This augurs with the spirit of avoiding adherence to undue technicality that will cause injustice. Therefore whilst an applicant seeking for extension of time to transmit record of Appeal may be indulged if the reason given is reasonable that may not work out in other situations where extension of time is sought and the rules specifically prescribed what must be proved. The reason is obvious, the question whether or not an extension of time may be granted to regularize a particular act or default being a matter of discretion requires Court to exercise same judiciously. An Applicant to earn the extension of time must show good reason. It also depends on facts and circumstances of each case. The Deponent averred the Applicants Counsel that was briefed to transmit the record of appeal could not do so timeuosly because he was sick. The burden is on the Applicant seeking extension of time to establish good or exceptional reasons to succeed. Issue of a counsel being sick is not frivolous and is acceptable. I will accept the reason as good in view of the nature of the relief sought in order to facilitate the Appeal being heard. The counter affidavit did not contain facts truly challenging the averment that the counsel was sick, the averment remains uncontradicted in the absence of any contrary evidence contradicting the material particular. The reason given is on ill-health of counsel and not inadvertence of Counsel.

In the exercise of Judicial discretion to extend time within which to take certain procedural steps as prescribed by the rules of court substantial justice to the parties must always be the cardinal determinant. It is well settled principle of law that all judicial discretions must be exercised according to common sense and Justice, what is pertinent is that in the exercise of the discretion the issue of achieving substantial justice is paramount.

In Lone-John v. Blakk (1998) Supra. The Supreme Court per Iguh J.S.C

"In the exercise of its discretion, therefore, in applications for extension of time, the court must be guided by consideration of doing substantial justice between the parties on the shape of his appeal being granted a hearing on its merits provided always that no injustice is thereby caused to the other side."  
See: NALSA and Team Associates v. NNPC (1991) 8 NWLR Pt 212 Pg 652.

I therefore hold that, there is merit in prayers One and Two.

Looking at this prayer three as framed, the import therein is that there is an Appeal pending. At the time the present motion was filed on 8/1/10 there was no appeal pending. The prayer pending an appeal presumes that an Appeal has been entered. The fact that prayers one and two is on transmission of Record of Appeal does not make a relief on injunction pending appeal ripe for hearing when appeal has not been entered by the transmission of the Record of appeal to this Court. That prayer three by its phrase and nature at the time of filing was not appropriate.

The learned Senior Counsel referred to Order 4 Rule 6 of the Court of Appeal Rules. This Rule 6 stipulates as follows.

"The Court shall have power to make orders by way of injunctions or the appointment of a receiver of manager, and such other necessary orders for the protecting of property or person, pending the determination of an appeal to it even though no application for such an order was made in the court below."

From the aforesaid provision the Court will exercise the power to make an Order of injunction when there is an appeal already pending. In effect when an appeal has been entered. Therefore it was inappropriate for the Applicant to lump the application for extension of time to compile and transmit record with the prayer seeking a Restraining Order, pending Appeal when Appeal is not pending.

Nevertheless, I will proceed to look at prayer three having found merit in respect of prayer one and two on the motion paper. An Applicant seeking a restraining Order pending Appeal must satisfy the Court on the following points namely:

(a) That there is a competent genuine ground of appeal;

(b) That the ground of appeal raises substantial issues in an area of law that is quite novel or recondite;

(c) That there are special circumstances in the appeal which favour the grant of the application;

(d) That it is right to pat the matters in status quo and preserve the res so that the appeal is not rendered nugatory;

(e) That the application relates to the prayers in the substantive appeal, that is, have some nexus with the appeal;

(f) That justice would thereby be done to the interests of the parties.

(g) That the grant of the application will not thereby put an end to the conduct of the substantive appeal.

See: Aminashaun v. Gov. Lagos State (200) 16 NWLR (Pt 793) 282 C.A.

The Applicant must also show he is not guilty of delay in bringing the application, in view of the principle that inordinate delay defeats equity.

One of the principles to be considered in an application seeking a restraining order pending appeal is whether the grant of the application will put an end to the conduct of the Appeal. Once the grant of such order will take care of the main issue on appeal then the restraining order should be refused and the Appeal should be heard to determine its merit. This Court in Estisione H. Nig. Ltd. v. Osun State Government (2006) All FWLR (30) 1131 at 1146 cautioned against making pronouncements on issues or facts at the interlocutory stage when same issues will arise for determination on appeal.

I have looked at the Notice of Appeal on page 172 - 174 of the Record of Appeal filed on 9/11/09. One of the Reliefs sought from this Court is to enter Judgment to the Plaintiff in accordance with their claims in the Amended Originating Summons. In the Amended Originating Summons at pages 74 to 75, relief 4 therein seeks a restraining Order on the Defendant from implementing Regulation 2 (2) of the Registration of Pharmaceutical Premises Regulations 2005 against members of the plaintiff. This restraining Order sought in the Amended Originating summons is the same order sought by the Applicant in the present motion before this Court under prayer three. The Respondent in his copious affidavit averred to facts on why a restraining Order should not be made. These facts dwelt on the substantive case relating to Regulation 2005. Clearly this Court will consider the averments in the affidavit and counter affidavit to determine whether a restraining Order should be made at this stage. The nature of the facts averred too certainly will require the court making pronouncement on the main points stated in the Notice of appeal. The question of Balance of convenience requires a consideration of the competing rights of the parties.

This Court cannot decide intricate issues of facts at this stage when the relief sought in the Appeal is founded on similar facts in the affidavit evidence and counter in respect of the motion. See D.P.C.C. Ltd. v. B.P.C. Ltd. (2008) 4 NWLR (Pt 1077) 376 S.C.

It is indisputable that any pronouncement made based on the facts in support and against the Restraining Order will affect the Relief sought in the Notice of Appeal. The essence of a Restraining Order is to keep matters in status Quo for the preservation of the res until the question in issue between the parties is determined. In the instance application, an issue in the substantive appeal will be determined if prayer three is granted consequently the prayer to restrain the Respondent cannot be considered at this stage.

In the light of the forgoing I hold that a prayer 1 & 2 on the motion has merit and is granted. I order as follows: The Appellant Applicant is granted extension of time till today to compile and transmit the record of Appeal to this court. The Record of Appeal already compiled and transmitted filed 9/11/09 is deemed as properly filed and transmitted today. The Record of Appeal shall be the Record in this Appeal.

Prayer three is premature and is struck out.

**MOHAMMED LAWAL GARBA, J.C.A.:**

After reading the draft of the ruling delivered by my learned brother NWODO, JCA, I am in agreement that from the averments in Applicant's paragraph 10 of the initial affidavit and the need to hear the appeal on the merit as disclosed by the peculiar circumstances that arise from all the affidavit evidence of the parties to the application, prayers 1 and 2 be granted. I do not find facts in the Applicant's 2 affidavits which would warrant the grant of prayer 3 on the face of the motion. In the result, I grant prayers 1 and 2 and refuse and strike out prayer 3 for injunction in terms of the lead ruling.

**PAUL ADAMU GALINJE, J.C.A.:**

I have read in advance the ruling just delivered by my learned brother, Nwodo JCA, and I entirely agree with the reasoning contained therein and the conclusion arrived thereat. Extension of time for doing of anything to which the rules of this Court apply is within the discretionary powers of this Court. A judicious and judicial exercise of such powers in the instant application can only be achieved if the extension of time that is sought is to get the appeal heard. This is the effort the Applicant is exerting in order to have the appeal heard. There is therefore no reason to foreclose the hearing of the appeal, by refusing to extend time to compile record. Accordingly, prayers 1, 2 and 4 are granted as prayed.

On prayer 3, I agree that any restraining order at this stage will have the effect of determining certain issues in the substantive appeal. This is not permissible in law.

For this short comment and the more detailed reasons in the lead ruling, I too grant prayers 1, 2 and 4, and refuse prayer 3, which I dismiss accordingly. I abide by all the consequential orders made therein including order on cost.