**PROFESSOR A.B. FAFUNWA**

**V.**

**BELLVIEW TRAVELS LIMITED**

IN THE COURT OF APPEAL OF NIGERIA

THE 26TH DAY OF APRIL, 2013

CA/L/757/2008

**LEX (2013) - CA/L/757/2008**

OTHER CITATIONS

2PLR/2013/157 (CA)

(2013) LPELR-20800(CA)

**BEFORE THEIR LORDSHIPS**

AMINA ADAMU AUGIE, JCA

RITA NOSAKHARE PEMU, JCA

FATIMA OMORO AKINBAMI, JCA

**BETWEEN**

PROFESSOR A.B. FAFUNWA - Appellant(s)

AND

BELLVIEW TRAVELS LIMITED - Respondent(s)

**ORIGINATING STATE**

LAGOS STATE HIGH COURT (Pedro J., Presiding)

**REPRESENTATION**

B.E. MBAGWU, Esq. with ADELE FADEL - For Appellant

AND

MUIZ BANIRE Esq., with JOLOMI JAMES Esq. - For Respondent

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

TORT AND PERSONAL INJURY LAW:- Nuisance – Meaning– Elements of – How established - Difference between public and private nuisance

TORT AND PERSONAL INJURY LAW:- Nuisance – Basis of on enjoyment of rights and interest connected with land – Burden of proof to prove same – On whom lies – Effect of failure thereto

TORT AND PERSONAL INJURY LAW:- Wrongful telephone calls placed to a residence by clients of a business entity – Where based on wrongful entry in a public directory not authorised by the entity – Whether can be ground for proceeding against business on the basis of the tort of nuisance

TORT AND PERSONAL INJURY LAW:- Tort arising from alleged wrongs occasioned by telephony interaction – Necessary party – Whether includes the telephone company – Effect of failure to include them as a party

SCIENCE AND TECHNOLOGY LAW - TELECOMMUNICATIONS:- Issuance of same number to more than one client – Claims in nuisance arising from same – Where telephony company had corrected the error by issuing new number to the latter party – Where the number had been so widely published by that party so that its clients and open directory kept using it in reference to it- Whether can found a claim in tort – Proper parties to such a claim

ETHICS - LEGAL PRACTITIONER:- Court processes signed by legal practitioner in their partnership or firm’s name without indicating the name of the practitioner signing the process - Competence

**PRACTICE AND PROCEDURE ISSUES**

ACTION:- Determination of cause of action – Duty of court thereto - Need for the Statement of Claim and the writ of Summons to be considered

ACTION- JOINDER OF PARTIES:- Necessary parties to an action - Need to join "necessary parties"

JUDGMENT AND ORDER:- Declaratory Judgments and reliefs – Meaning and effect

PLEADINGS- COURT PROCESSES:-Effect of court processes signed by legal practitioner in their partnership or firms name without indicating the name of the practitioner signing the process – Competence – How treated by court

**MAIN JUDGMENT**

RITA NOSAKHARE PEMU J.C.A: (DELIVERING THE LEADING JUDGMENT):

This is an appeal against the Judgment of J.O. Pedro J. of the High Court of Lagos State in Suit No. ID/57/99, in which the Plaintiff's claim was dismissed.

At the Court below, the Plaintiff, Professor A. B. Fafunwa, now Appellant had on a Writ of Summon and Amended Statement of Claim filed on the 6th of May 2002 claimed the following against the Defendant/Respondent viz:

“1. A declaration that the Defendant is not entitled to the use of telephone numbers 2615028, or to publish the said number in such manner as would indicate or impress its customers and or the general public that it is entitled to the same.

2. A declaration that the publication of the said telephone number 2615028 by the Defendant on its brochure and ticket jackets, or any of its materials is improper and illegal.

3. An injunction restraining the Defendant by itself, its servants or agents or otherwise howsoever from continuing to publish the said telephone number on its brochure and ticket jackets or any of its materials, or in any manner whatsoever as to give the impression that it is entitled to the use thereof.

4. An order directing the Defendant to advertise to its customers and the general public that it is', not entitled to the use of the said telephone number 2515028 through on advert published in a Newspaper circulating throughout the Federation as well as a Notice to that effect posted to all its offices and places of business.

5. N517,282.00 as special damages and N5 million as general damages for nuisance occasioned by the Defendant's improper use of the said telephone number.”

At the lower Court, pleadings were filed and exchanged and the case proceeded to trial on the 13th of February 2003.

The Plaintiff (now Appellant) was a Federal Minister of Education of the Federal Republic of Nigeria. The number 615028 was given to him by NITEL. Same was digitalized by prefixing the number "2" making it 2615028. He had been paying bills to NITEL on this number.

When he had the analog number, he did not have any problem with it, until when the number became digitalized in 1993. From that time he started receiving calls from the Respondent's clients and the Respondent incessantly.

This affected his blood pressure.

They wrote to NITEL complaining about the incessant calls from the Respondent's clients. NITEL then gave the Respondent new number which is 615098. The Respondent refused to advertise the new number. Instead they continued to advertise the Plaintiff's number.

Upon investigation, they discovered that the Respondent continued to use their number in their handbills. The handbills are not dated so that they cannot say whether it was printed when the phone number was given to Bellview, or when a new number was given to them. The Appellants ordeal lasted nine years and has affected his health and that of his family.

The Appellant through a medical doctor had testified how his health was affected by this whole saga.

The Respondent on record, Bellview Travels Limited denied the claim and in its Amended Statement of Defence had stated in paragraphs 4-7 that he had applied to NITEL for a telephone line, who acknowledged receipt of the application letter for the provision of telephone line. This was in June 1993.

It filled a Form TC1 as directed by NITEL and signed same. Where upon he was allocated telephone line number 615028 by NITEL. Even since, he had been receiving bills from NITEL and making payment on this number.

The Respondent had said that the claim at the lower Court is in respect of telephone line No. 2615028 and that is not their number but 615028. It denied advertising or giving their customers the Appellant's phone number. It received calls and made calls without interference. It did not advertise or give its customers the Appellant's phone number.

After the Appellant's complain, it applied to NITEL for a new line who changed their line from 615028 to 615098. It published handbills and distributed to their clients that 2615028 is not their number.

It did not know who published in Exhibit P7, as it did not give the Company which published the Directory its telephone number. It denied using the number 2615028.

The learned trial Judge after appraising the evidence before it, both oral and documentary, found for the Defendant/Respondent by striking out the claim of the Plaintiff/Appellant including that for injunction and damages - pages 153 to 169 of the Record of Appeal.

The Appellant, being dissatisfied with the lower Courts' decision has appealed it.

The Appellant has pursuant to the Practice Direction of this Honourable Court filed a Notice of Appeal on the 18th of January 2008 with four (4) grounds of appeal - pages 170 - 174 of the Record of Appeal.

The Appellant filed Amended Brief of Argument on the 13th of November 2012 having earlier filed one on the 30th of October 2008.

The Respondent filed its Amended Brief of Argument on the 10th of December 2012, while the Appellant filed his reply 19th of February 2010.

The Appellant had, in his brief of argument proffered and distilled three issues for determination viz:

“(1) Whether the learned trial Judge was right to have struck out the Appellant's Claims 1, 2, 3 and 4 in this suit for non-joinder of NITEL to the suit. (Grounds 1 and 2)

(2) Whether the Appellant established a case of nuisance against the Respondent in the suit herein. (Ground 3)

(3) Whether the learned trial Judge was right to dismiss the Appellant's claim in this suit, particularly those on injunction and damages. (Grounds 4 and 5)”

The Respondent on its own had proffered and distilled two (2) issued for determination which are:

“(1) Whether the trial Court was right to have dismissed the claim in its entirety on the ground that proper parties were not before the Court. - Grounds 1, 2, 3 and 4.

(2) Whether the lower Court had jurisdiction, or action or present appeal competent, on the ground that the originating processes and other processes at the trial court were neither issued by the litigant personally or a legal practitioner." (Jurisdictional Issue)

It seems to me that the Appellant's issue No 1 of the Appellant's issues for determination coalesce with that of the Respondent's issue No 1, and I shall take them together.

But a cursory look at Issue No 2 of the Respondent's issue do not seem to me to flow from the Grounds of Appeal (although termed a Jurisdictional Issue). However, having been raised, I shall have to consider it, because being a Jurisdictional Issue, it behoves on this Court to look at it for what it is worth.

I must first and foremost note that the reliefs sought by the Appellant are declaratory in the main.

Declaratory Judgments and reliefs therefore proclaim or seek the existence of a legal relationship and do not contain any order which may be enforced against the Defendant. OKOYA VS. SANTILLI (1990) 2 NWLR Pt.131 at 192 at 196; CARRENA VS. AKINLASE (2008) 14 NWLR Pt.1107 Pg. 262 at 291 paragraphs b-g.

ISSUE NO.1

A painstaking perusal of the claim against the Respondent at the lower Court as well as the facts averred in the Statement of Claim, asks the very vexed question, why NITEL was not made a party to the suit. This is simply because NITEL it is, that allocates lines to subscribers who had applied for lines. The law is trite that "necessary parties" should be joined to a suit. Parties, who without them, matters in Court cannot be determined effectually. To me, NITEL seems to be the pivot in this case. Indeed in paragraphs 3, 5 and 7 of the Statement of Claim, NITEL is indicated. The question then is, why were they not joined? The failure to join NITEL divests the suit at the lower Court of a reasonable cause of action. It is no gainsaying that for there to exist a cause of action, the Statement of Claim and the writ of Summons comes readily to focus and same must be considered - OLAGUNJU VS. YAHAYA (1998) 3 NWLR Pt. 543 at 501; ADEYEMI VS. OPEYORI (1976) 9-10 SC. 31 at 43; SHELL PETROLEUM DEV. VS. ONASANYA (1976) 6 S.C. 89 @ 94.It is apparent that the Appellant was asking the lower Court to declare inter alia that Respondent is not legally entitled to the issue of the telephone No. 2615028.

The onus is on the Appellant, seeking a declaratory relief to pursue his case, but the issue of proper parties must first be settled, at it comes to the fore. Indeed it is a Jurisdictional Issue.

At page 13 of the Judgment (page 165 of the Record of Appeal), the learned trial Judge had this to say.

"The Government Agent, NITEL the party who conferred the legal right for the sole use of this telephone line as claimed by the Plaintiff in this suit and as pleaded in paragraph 3 was not in Court as a party. Yet, the Plaintiff has urged the Court to grant two declaratory reliefs which effect can only be directed on the party who has the right to allocate or withdraw the telephone line in question but who was not made a party to this suit,"

Indeed, NITEL, possessing the sole right to allocate the line in question, he should have been joined.

The lower Court continued

"I am of the humble view and I so hold that for the purpose of effectual and complete adjudication of the claim before the Court, NITEL is a necessary party since she will be directly affected by any order that the Court may make in the circumstance..."

I agree entirely with this view of the lower Court, who did hold that in the circumstances, "the 1st claim of the Plaintiff in this suit cannot succeed in view of the fact that there are no proper parties before the lower Court."

Indeed the lower Court went on to observe that having held that claim I must fail on the ground that the necessary party was not before the Court, claims 2, 3 and 4 must also fail for eth same reason. Same were struck out.

The failure to join NITEL to this suit makes mincement of the suit and same has, as earlier observed divested the lower Court of the relevant cause of action.

The lower Court was right to have dismissed the declaratory claims as he did. This issue is resolved in favour of the Respondent and against the Appellant and same is answered in the affirmative.

ISSUE NO 2

Nuisance as any other tort, has elements to it. In other words, to established nuisance, you must prove some essential, elements, in order to succeed.

The tort of Nuisance is an interference with rights over land arising from a non reasonable use of land. HUNTER VS. CANARY WHARF LTD. (1997) A.C. 655-695 A-B. GOLDMAN VS. HARGRAVE (1967) 1. A.C. 645 @ 657.

In parlance, nuisance is that branch of the law of tort most closely concerned with "protection of the environment". Invariably nuisance actions have concerned pollution by oil, or noxious fumes, interference with leisure activities, offensive smells from premises used for keeping animals; noise from industrial installations. It is quite broad. However there are areas of nuisance such as obstruction of the highway or of access thereto which have no environmental flavor.

The prevailing stance of nuisance liability is that of protection of private rights in the enjoyment of land, so that control of injurious activity for the benefit of the whole community is incidental.

Nuisances are categorized into "private" and "public" nuisance. The same conduct may amount to both. Suffice to say that public nuisance is a crime, while a private nuisance is a tort.

The definition of Nuisance is vague and has been rightly said to "cover a multitude of sins, great and small" SOUTHPORT CORP V. ESSO PETROLEUM CO. LTD. (1954) 2 Q.B. 18 at 196 per Denning L.J.

At Common Law, public nuisance includes such diverse activities as carrying on an offensive trade, selling food unfit for human consumption etc.

Perhaps in this particular matter at hand, "Private Nuisance" is what should be focused on, that is if it is applicable. It may be described as unlawful interference with a person's use or enjoyment of land, or some right over, or in connection with it.

Generally, the essence of a nuisance is a state of affairs that is either continuous, or recurrent, a condition or activity which unduly interferes with the use or enjoyment of land.

The issue of when the interference becomes unlawful has always been a sticky one.

Private nuisance connotes interference with ownership or occupation of land or of some easement, profit, or other right used or enjoyed in connection with land. - Clark & hindsell on Torts 15th Edition paragraphs 25- 110 page 1140.

I had earlier observed that the non joinder of NITEL to the suit at the lower Court occasioned a lacuna in the case of the Appellant.

Now, how can nuisance be determined or inferred in the circumstances of this case? What complaint of the Appellant relates to the annoyance and disturbance of his peaceful occupation of land arising from the conduct of the Respondent? If anything, it is NITEL that should be made culpable and not the Respondent. After all, the source of the said disturbance was the incessant and harassing calls that were made to the Appellant's premises at 9A Bendel Close, Victoria Island, Lagos. These so called calls were not proved to have emanated from the Respondent. The line in issue was a land line. This made no difference.

The Appellant had argued that by wrongfully advertising the telephone number 2615028 as its own, the Respondent caused the Appellant to be harassed, annoyed and disturbed at his residence by unwanted and incessant calls from the Respondent's customers and callers. The Respondent had argued and postulated (rightly in my view) that the lower Court had no jurisdiction to entertain the matter in the first place because of the non joinder of NITEL.

Although he also argued that although an issue was framed for the first time on appeal, if such issue goes to the competence or jurisdiction of the Court, then the Court can entertain that issue. This is because in this case the originating processes in the lower Court were incompetent because all the various Court processes contained in pages 46, 48, 51, 54, 56, 57, 59, 72, 75, 83 of the records were originally signed in the name of the law firm representing the Claimant.

I shall consider this, as I go on with this Judgment. But, suffice to say that declaratory reliefs, by their very nature in order to succeed, all the Claimant's cards must be placed on the table. He must establish his case by facts cogent and credible enough. When a litigant claims declaratory reliefs, he does no more than to invite the Court to declare what the law is on the issue. Whatever the Court of law may say in acceding to that invitation is not exemtory, indeed the grant of such a relief is discretionary. Therefore a Claimant who intends to have an enforceable legal right for a declaratory Judgment or order in is favour must in addition seek injunctive order or damages.

The Plaintiff/Appellant in the present case had claimed, aside of the declaratory reliefs in claims 1 and 2, injunction in relief 3 and damages in relief 5 (page 2 of the Record of Appeal).

But these ancillary reliefs are predicated on whether the Claimant had been able to establish that he is entitled to the declarations sought.

I had observed, and indeed hold that the Appellant had been unable to establish a case against the Respondent, and that failure to join NITEL as a necessary party to the suit was fatal to his case.

The trial Court was right to have dismissed the claim of the Appellant in its entirety on the ground that proper parties were not before the Court.

Issue No 2 is resolved in favour of the Respondent and against the Appellant.

A cursory look at the processes at pages 46-48 show that it is one Mbagwu who signed for Mbagwu Mbagwu & Co. Same applies to process at pages 51, 54-56.

But the process at pages 57-58 which is the Amended Statement of Claim filed on the 6th of May 2002 was signed for Mbagwu Mbagwu & Co by an unidentified person.

It is trite that Statement of Claim precedes the Writ of Summons.

The process at page 72 of the Record of Appeal is regular as it is signed by one Mbagwu.

The process at pages 75 - 83 was not even signed by anyone. It is the amended final Written Address of the Plaintiff.

The Amended Statement of Claim filed on the 6th of May, 2002, being the originating process in the suit is ex-facie defective.

I agree with learned counsel for the Respondent that the issue of defective originating process is a jurisdictional issue and a fortiori, where the originating process is defective, it goes to the jurisdiction of the Court. Indeed, it renders the entire proceedings null and void.

In his reply brief, the Appellant had argued that issue No. 2 as formulated is not predicated on any of the grounds of appeal filed or raised by the Appellant in this appeal nor is it in any way related to any of the said grounds.

Now Issue No 2 in the Respondent's Amended Brief of Argument has this to say-

"Whether the lower Court had jurisdiction, or action or present appeal competent, on the ground that the originating processes and other processes at the trial court were neither issued by the litigant personally or a legal practitioner."

The law is trite that where Court processes are signed by legal practitioner in their partnership or firms name without indicating the name of the practitioner signing the process, such are incompetent and liable to be struck out.  
In OKAFOR VS. NWEKE (2007) 10 NWLR Pt. 1043 521 @ 523, the facts of the case indicate that the motion was signed by J.H.C. Okolo SAN & Co. applicant's counsel as applicants' counsel.

The name of the legal practitioner which he enrolled with at the bar must be stated on the processes.

Let me quickly say here that there is a big legal difference between the name of a firm of Legal Practitioner and the name of a Legal Practitioner simpliciter. The name of a Company is a firm with some corporate existence, while the name of a Legal Practitioner is a name qua Solicitor and Advocate of the Supreme Court of Nigeria which has no corporate connotation. They are not synonymous because they both carry different legal entities. One cannot be a substitute for the other.

Pages 57 to 59 of the Record of Appeal is worthy of note. That is the Amended Statement of Claim of the Appellant. It is an originating processes. It was sign by an unknown person for Mbagwu, Mbagwu & Co.

This defect is caught by the principle of Okafor Vs. Nweke supra, and this lacuna alone suffices to render the entire suit in the lower Court incompetent and I so hold

I had dealt with this issue, because it is a jurisdictional one.

This is enough to knock the bottom of this appeal and it does.

The 3rd issue proffered by the Appellant, which is whether the learned trial Judge was right to dismiss the Appellant's claims in this suit particularly those on injunction and damages, I can readily say here that where a suit is denied of its reliefs in the main, then any incidental reliefs are ipso facto denied. It naturally flows, as you cannot put something on nothing. The claim for injunction, damages must necessarily fail as it has nothing to stand upon.

The consequence is that Issue No 3 must be answered in the affirmative and same is resolved in favour of the Respondent had against the Appellant.

The Court below had no jurisdiction to entertain the suit No LD/51/99 in the first place and I so hold. Moreso the originating process is defective.

The appeal is devoid of merit and same is hereby dismissed in its entirety.

N30,000 costs in favour of the Respondent.

**AMINA A. AUGIE, J.C.A.:**

I have read in draft the lead Judgment just delivered by my learned brother, Pemu, JCA, and I agree with him that the appeal lacks merit. The situation is not any different from that in Okafor v. Nweke (2007) 10 NWLR (Pt. 1043) 521 SC where the Supreme Court hammered the nail down hard with its decision that a law firm "cannot legally sign and/or file any process in the Courts"; and that any such process signed by a law firm is "incompetent in law", which means that the process is not only defective but also incurably bad, and in a case like this one, robs the Court of the jurisdiction to entertain the suit.

Consequently, I also dismiss the appeal, and I abide by the consequential orders in the lead Judgment including the order as to costs.

**FATIMA OMORO AKINBAMI, J.C.A.:**

This appeal is premised on the claims of the Appellant that was dismissed by the Lower Court.

The Appellant in his Amended Statement of claimed against the Respondent:

1. A declaration that the Defendant is not entitled to the use of telephone number 2615028, or to publish the said number in such manner as would indicate or impress its customers and or the general public that it is entitled to the same.

2. A declaration that the publication of the said telephone number 2615028 by the Defendant on its brochure and ticket jackets, or any of its materials is improper and illegal.

3. An injunction restraining the Defendant by itself, its servants or agents or otherwise howsoever from continuing to publish the said telephone number on its brochure and ticket jackets on any of its materials, or in any manner whatsoever as to give the impression that is entitled to the use thereof.

4. An order directing the Defendant to advertise to its customers and the general public that it is not entitled to the use of the said telephone number 2615028 through an advert published in a Newspaper circulating throughout the Federation as a Notice to that effect posted to all its offices and places of business.

5. N517,282.00 as special damages and N5 million as general damages for nuisance occasioned by the Defendant's improper use of the said telephone number".

The Appellants health was impaired as a result of the incessant calls he and his family received from their NITEL telephone number 2615028. This nuisance lasted for nine years before Appellant instituted his suit.

The Respondent contended that the claim at the lower Court is in respect of telephone line No. 2615028, and that it is not their number.

Respondent denied using the number 2615028.

NITEL the service provider for the telephone, number in dispute was not made a party to this suit, when they ought to have been made a party.

I have had the privilege of reading in advance the lead judgment delivered by my learned brother FEMU, JCA.

I am in total agreement with the reasoning and conclusion reached in the Judgment. I have nothing more to add.

This appeal is unmeritorious same is hereby dismissed.