

**IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY
IN THE ABUJA JUDICIAL DIVISION
HOLDEN AT APO**

SUIT NO: FCT/HC/CV/3153/19

DATE: 9-2-2021

BETWEEN:

**REGISTERED TRUSTEES OF SOCIETY
AGAINST FAKE AND SUBSTANDARD
GOODS AND PRODUCTS IN NIGERIA
(SAFE GP NIGERIA).....APPLICANT**

AND

- | | | |
|---|---|--------------------|
| 1. JOHNSONS WAX NIGERIA LTD | } | RESPONDENTS |
| 2. SC JOHNSONS AND SON NIGERIA LTD | | |
| 3. ALIU BALOGUN (THE HEAD QUALITY AND
CONTROL 1ST AND 2ND RESPONDENTS) | | |

JUDGMENT

(DELIVERED BY HON. JUSTICE SULEIMAN B. BELGORE)

By an application for orders enforcing the Fundamental Rights and brought pursuant to Order 1 Rule 2, Order 2 Rule 1 of the Fundamental Right (Enforcement Procedure) Rules 2009, Sections 33 and 46 of the Constitution of the Federal Republic of Nigeria, 1999 as amended, Articles 3 (1), Article 27 (1) Article 28 (1) of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act (CAP A9) laws of the Federation of Nigeria 2004 and under the inherent jurisdiction of this honourable Court.

The applicant, Registered Trustees of Society Against Fake and Substandard Goods and Products in Nigeria (SAFE GP NIGERIA) – prayed for the following five reliefs:

- (1) **AN ORDER OF THIS HONOURABLE COURT** stating that the Respondents in ability to take any reasonable action against the sales and distribution of their product Baygon insecticide in Nigeria which was reported to them by the Applicants since 24/07/19 to the time of filing this action amounts to total disregard to the life of innocent Nigerians who will definitely use the fake products in their various homes. Thereby endangering the life of innocent purchaser for value and contrary to section 33(1) of 1999 Constitution of Federal Republic of Nigeria as amended.
- (2) **AN ORDER OF THIS HONOURABLE COURT** directing that the attitude of the Respondents towards protecting the lives of innocent Nigerian from the hands of merchants of death who produces the fake Baygon insecticide which was brought to the attention of the Respondents was unlawful and unbecoming of a body in the position of the Respondents. Contrary to **Article 27 (1)** of African Charter on Human and People’s Rights (Ratification and Enforcement) Act. (Cap 10) Laws of the Federation of Nigeria 1990
- (3) **AN ORDER OF THIS HONOURABLE COURT** directing the Respondents to pay the Applicant the sum of N50million as punitive damage, having failed in their duty to take action with the Applicants towards protecting the lives of innocent Nigerians from the use of their fake products in circulation in Nigeria. Contrary to **Article 28 (1)** of African Charter on Human and People’s

Rights (Ratification and Enforcement) Act. (Cap 10) Laws of the Federation of Nigeria, 1990.

- (4) **AN ORDER OF THIS HONOURABLE COURT** stopping the Respondents by themselves, privies allies or anybody(s) howsoever, whomsoever from importing, sale or distribution of Baygon insecticides in Nigeria until they live up to their inherent duty of care and corporate social responsibility by acting on the information subject matter of this action under reference.
- (5) **AN ORDER** of N1.5 million as cost of action.

The Respondents are:

1. JOHNSONS WAX NIGERIA LTD
2. SC JOHNSONS AND SON NIGERIA LTD
3. ALIU BALOGUN (The Head Quality and Control 1st and 2nd Respondents)

And the grounds upon which the application is premised are:

- (1) The action of the Respondents is contrary to **Article 27 (1)** of African Charter on Human and People's Rights (Ratification and Enforcement) Act. (Cap 10) Laws of the Federation of Nigeria, 1990 which provides that every individual shall have duties towards his family and society, the state and other legally recognized communities and the international community.
- (2) The action of the Respondents is contrary to **Article 28** of African Charter on Human and People's Rights (Ratification and Enforcement) Act. (Cap 10) Laws of the Federation of Nigeria, 1990 which provides that every individual shall have the duty to respect and consider his

fellow beings without discrimination and to maintain relations aimed at promoting, safe guarding and reinforcing mutual respect and tolerance.

- (3) The action of the Respondents is contrary to **Article 28(1)** of African Charter on Human and People's Rights (Ratification and Enforcement) Act. (Cap 10) Laws of the Federation of Nigeria, 1990 which provides that every individual shall have the duty to serve his national community by placing his physical and intellectual abilities at its service.
- (4) This action is brought pursuant to Section 46 of 1999 Constitution of Federal Republic of Nigeria as amended which provides that Any person who alleges that any of the provisions of this chapter has been, is being or likely to be contravened in any state in relation to him may apply to a High Court in that State for redress.
- (5) This action is brought pursuant to Section 33 of 1999 Constitution of Federal Republic of Nigeria as amended which
- (6) That article 3 (1) of the African Charter on Human and Peoples Right (Ratification and Enforcement) Act (Cap 10) Laws of the Federation of Nigeria 1990 provides that every individual shall be entitled to equal protection of the law and the innocent citizens who uses the said building is also entitled to the protection accorded them by the law.

In support are:

- (1) Statement of facts

- (2) 26-paragraph affidavits to which is attached 4 - documents i.e.
 - (a) Certificate of Incorporation of the applicant
 - (b) A letter of the applicant to the Respondents
 - (c) Subtle reminder letter from the applicant to the Respondents
 - (d) Receipt of payment to the applicant Solicitor
 - (e) A written address filed by the applicant's Counsel.

Upon service of the Respondents counter affidavits on the applicant, they filed a further affidavits of 36-paragraphs dated 6/7/20. Attached to the said further affidavits are Exhibits FCJ1 - FCJ4. They are:

- FCJ1 - The aims and objectives of the applicant
- FCJ2 - Already an Exhibit in Court
- FCJ3 - A product of the Respondents
- FCJ4 - Another product of the Respondent

There is also another written address in support of the further affidavits. I must quickly point it out here that the applicant is a Non-Governmental Organization that is meant to assist the government to ensure proper consumables or product services. It has, as part of its aims and objectives, the following:

- (1) To educate and enlighten the citizens on the dangers of use and patronage of fake goods and products.
- (2) To educate and enlighten citizens on how to avoid fake goods and products
- (3) To use the instrument of law to sue and demand for legal punishment and **retribution?** for victims and promoters alike
- (4) To promote clean, safe and healthy goods and products in Nigeria through the help of all the relevant

government agencies and genuine producers of such goods and products.

In response, the Respondents filed a 20-paragraphs counter-affidavit to which is attached two exhibits – SJ1 and SJ2.

Exhibit SCJ1 – is a certificate of incorporation from CAC of SC JOHNSON & SONS NIGERIA LIMITED.

Exhibit SCJ2 – is a letter headed Change of Company's Name addressed to Director General of NAFDAC dated 1st June, 2015.

There is also a written address filed along with the counter-affidavits.

On the 10/11/2020 when the matter came up in Court, learned Counsel to the applicant, O. N. Kelvin Esq moved the application *brevi manu*. He adopted the two written addresses filed as his arguments and urged me to grant the applications.

For all his argument, Mr. Kelvin cited the cases TONY ANOZIA VS. ATTORNEY-GENERAL LAGOS STATE (2010) LPELR-3778(CA); CHIEF KARMA TUNYAN & ORS VS. HIS EXCELLENCY DR. OLUSEGUN AGAGU (2015) LPELR-25801(CA); OKWUDILI OKONTA & ANOR VS. CHIEF BARRISTER IKENNA EGBUNA (2013) LPELR-21253(CA); AFOLAYAN VS. OGUNRINDE (1990) 2SC70; AND NOKIA WEST AFRICA (NIGERIA) LTD VS. MR. WILLIAMS ONUOHA (2016) LPELR 40189 (CA).

In the same vein, learned Counsel to the Respondents, Mr. Davidson Oturu adopted the written address attach to their counter-affidavit as his full argument. He referred specifically to exhibits SJ1 and SJ2 attached to the counter-affidavits and urged me to hold that the applicant has no reasonable cause of

action and that the 1st Respondent is not a juristic personality. Finally, he urged me to reject this application.

For all his submission, learned counsel cited and relied *inter alia* on the cases of; FEDERAL COLLEGE OF EDUCATION (TECHNICAL) GUSAU & ANOR VS. ABUBAKAR (2013) LPELR-22203 (CA), THE ADMIN. & EXECUTIVE OF THE ESTATE OF ABACHA VS EKE-SPIFF & ORS (2009) LPELR-3152 (SC), NBA VS FAWEHINMI (1989) 2 NWLR (PT. 105); RINCO CONSTRUCTION CO. LTD VS. VEEPEE INDUSTRIES LTD (2085) 9 NWLR (PT. 929) 85; CHIEF AFOLAYAN VS OBA OGURINDE & 3 ORS (1990) 1 NWLR (PT. 127) 369; HASSAN VS EFCC (2014) 1 NWLR (PT. 1389) 604 etc.

It is pertinent at this juncture to state the case of the parties in summary form. Briefly stated the Applicant is of the position that the Respondents failure to respond to the information supplied to the Respondent with respect to the Respondents product (Baygon insecticides) which the applicant reliably informed the Respondent that some persons are selling fake Baygon insecticides to innocent Nigerians, thereby cause on told hardship to unsuspecting, innocent Nigerian citizens.

The Applicant stated that they made all efforts towards persuading the Respondents to take action and save the lives of innocent Nigerians but the Respondents failed, neglected to take any action whatsoever till date hence this action. This is the position of the applicant.

The Respondents did not deny receiving the complaint or information or correspondence from the applicant. They agreed, the applicant informed them that it received complaints in relation to the manufacturing of fake Baygon, one of the 2nd Respondent's aerosol insecticides; and that it discovered a

warehouse where the counterfeit products were being manufactured. In accordance with the 2nd Respondent's standard procedure, the Applicant's correspondence was received and forwarded to the 2nd Respondent's department in charge of regulatory compliance for necessary action. This fact was duly communicated to the Applicant. However, without allowing the 2nd Respondent time to consider the Applicant's complaint in line with internal protocols, the Applicant in a letter dated 24 July 2019 demanded a meeting with 2nd Respondent within 7 days to discuss collaboration in tackling the activities of fake manufacturers. When the Applicant did not get a response from the Respondents, it instituted this action seeking the reliefs earlier stated in this Judgment.

I have considered this application with all the seriousness it deserves. The question may be asked now, what are the issues involved?

Learned Counsel to the applicant, Mr. Kelvin submitted one lone issue for determination; to wit:

"Whether from the facts and circumstances of this case, the Applicant has made out a case against the Respondents that will warrant the granting of the reliefs sought by the Applicant".

Similarly, Mr. Oturu of Counsel to the Respondent raised the same lone issue, *albeit* in different style and wordings. He also, as a rider, raised a preliminary issue. The lone issue raised by Respondent Counsel goes thus:

"Whether the Applicant's suit discloses a reasonable cause of action".

The preliminary issue he raised is that the 1st Respondent is not a juristic person who cannot sue or be sued. Learned Counsel submitted that the name of the 1st Respondent out to be struck out from this suit. For all his argument see paragraphs 3.2, 3.3, 3.4, 3.5 and 3.6 of the learned Counsel's written address.

It is very interesting that the learned Counsel to the applicant made a tacit admission of the argument of the learned Counsel to the Respondent on this issue. He was very clever and to my mind professional in doing so. What he (Mr. Kelvin) wrote at the last paragraph and page of his unpaginated 2nd written address (attached to the Further Affidavit in support of the application, and dated & filed on 6th July, 2020 is very illustrative and revealing of his admission. He said as follows:

“My lord from the argument and documents tendered by the respondents striking out the name of the 1st respondent does no harm, to this action. However, my lord a closer look at SCJ3 and SCJ4 exhibits they both stated that the 1st and 2nd respondents manufacture both products respectively. The applicants sued the name of manufacturer on the rest subject of litigation. However whether the action is maintained against the 1st or 2nd Respondent it makes no difference, since both of them are one and same people. Therefore the argument of the Respondent is mis joinder of parties in this action amount to a guess chase and we urge my lord to so hold”.

I agree fully with both Counsel that this is not a contentious issue. The 1st Respondent – Johnsons Wax Nigeria Limited has since changed its name as far back as 12th December, 2012 to SC Johnson and Son Ltd. This is evidenced from Exhibit SCJ2 – Change of Name letter addressed to the Director-General of NAFDAC and SCJ1 – which is the Certificate of Incorporation certifying the change of name by Corporate Affairs Commission (CAC). In essence, the 1st Respondent is in law and fact no longer a juristic person who can be sued. See **FEDERAL COLLEGE OF EDUCATION (TECHNICAL) GUSAU & ANOR VS. ABUBAKAR (SUPRA)**.

In effect therefore, the name of the 1st Respondent is hereby struck out of this suit.

I now move to issue for determination.

Issue for Determination

I feel free to adopt the issue as framed for determination by the learned Counsel to the Applicant – Mr. Kelvin – as the issue for consideration in this application. That is:

“Whether from the facts and circumstances of this case, the Applicant has made out a case against the Respondents that will warrant the granting of the reliefs sought by the Applicant”?

This application is predicated on a perceived breach or threat of breach of the Fundamental Rights as codified or specified in S.33 of the 1999 Constitution of the Federal Republic of Nigeria (as amended) and the provision of the provision of the Africa Charter. Is there any evidence in support of this claim of breach or threat of breach. **S.33 of the 1999 Constitution** (as amended) reads:

“(1) Every person has a right to life, and no one shall be deprived intentionally of his life, save in execution of the sentence of a Court in respect of a criminal offence of which he has been found guilty in Nigeria.

(2) A person shall not be regarded as having been deprived of his life in contravention of this Section, if he dies as a result of the use, to such extent and in such circumstance as are permitted by law, of such force as is reasonably necessary.

(a) For the defence of any person from unlawful violence or for the defence of property; (b) In order to effect a lawful arrest or to prevent the escape of a person lawfully detained-or (c) For the purpose of suppressing a riot, insurrection or mutiny”.

Article 2 of the African Charter provides:

“Every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or any status.

Article 16 of the African Charter says:

“(i) Every individual shall have the right to enjoy the best attainable state of physical and mental health.

(ii) State Parties to the present Charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick”.

The big question and in fact the most germane and relevant question that readily comes to mind is: Is failure to accede to the Applicant’s request for collaboration a breach of Fundamental Human Right? OR is request by a non-government agency to collaborate with a government agency a specie of Fundamental Human Right under our Constitution? The answer is in the negative.

In my view, I cannot see where it is provided in the above quoted provisions that failure to allow an NGO such as the applicant collaborate with a government agency would in effect mean threat to loss of life or in itself is a loss of life.

Since, only Rights recognised by law are enforceable by Courts, the applicant’s position is so slippery and **doomly** weak in law that no **judex** worth his salt would give them any serious consideration. In **HASSAN VS. EFCC (SUPRA)**, cited by Counsel to the Respondent, the Court of Appeal put the law beautifully thus:

“The rights that can be enforced under the Fundamental Rights (Enforcement Procedure) Rules must be those one that have been specifically mentioned in Chapter 4 of the 1999 Constitution. Hence the Fundamental Human Rights (Enforcement Procedure) Rules cannot be used to institute an action for the enforcement of a right that has not been specifically listed in Chapter 4 of the

*Constitution of the Federal Republic of
Nigeria 1999...[Emphasis supplied]"*

Aside from the above, the contention of the applicant is full of many weaknesses arising from many questions that were left unanswered. The questions are:

- (1) Who are the Nigerians that complained to the applicants?
Why are they faceless? What are their identities?
- (2) Where the fake Baygon (the product) samples that were put on for sale to the public?
- (3) Who and who has used and died or suffered some health hazard for the usage of the fake product?
- (4) In which warehouse are the fake samples or products stored?
- (5) Why has the Applicant refused to make a report to the Regulatory Agencies (NAFDAC and SON) or to Law Enforcement Agencies like the Police?

The above questions begged and begged for answers but none were supplied. It is not enough to just exhibit photographs of Baygon products in an affidavit as done in paragraphs 29 of the applicant's further affidavit.

Perhaps, a proper request for collaboration or complaints of existence of fake product in the market with full disclosure as to where and buy who appropriately channelled and laid before NAFDAC and SON would have given more purity to the case of the Applicant. After all, those Agencies are the Right Regulator in this instance.

“Section 5 of the National Agency for Food and Drug Administration and Control Act Chapter N1 LFN 2004 (the “NAFDAC Act”) empowers the National Agency for Food and Drug Administration and Control (NAFDAC) inter alia to:

4.18 (a) Regulate and control the importation, exportation, manufacture, advertisement, distribution, sale and use of food, drugs, cosmetics, medical devices, bottled water and chemicals;

(b) Conduct appropriate tests and ensure compliance with standard specifications designated and approved by the Council for the effective control of the quality of food, drugs, cosmetics, medical devices, bottled water and chemicals and their raw materials as well as their production processes in factories and other establishments;

(c) Undertake appropriate investigations into the production premises and raw materials for food, drugs, cosmetics, medical devices, bottled water and chemicals and establish relevant quality assurance systems, including certificates of the production sites and of the regulated products;

(d) Undertake inspection of imported food, drugs, cosmetics, medical devices, bottled water and chemicals and establish relevant quality assurance systems, including certification of the production sites and of the regulated products.....”

4.19 Furthermore, Section 24 of the NAFDAC Act empowers officers of the Agency to enter

and search any premises suspected to be used to carry out acts which are in contravention of the Act. Specifically, such officers may:

“...seize and detain for such time as may be necessary...any article by means of or in relation to which he reasonably believes any provision of this Act or regulations has been contravened.”

4.20 Similarly, Section 5 of the Standards Organisation of Nigeria Act 2015 confers very broad powers on the Standards Organisation of Nigeria (SON), including to carry out tests to ascertain compliance with standards, and to investigate the quality of facilities, systems and products. Section 30 of the SON Act also empowers the SON to search any premises and, even without a Court order, to seize/detain products suspected to be counterfeited for a certain period of time.

4.21 By the foregoing statutory provisions, the Respondents do not have any duty, statutory or otherwise to investigate or collaborate with unauthorised non-governmental agencies to carry out acts which the law has already empowered several government agencies to execute.”

I agree entirely with the learned Counsel to the Respondent when he wrote at paragraph 4.22 of his address thus:

“It is indeed very surprising that the Applicant, despite stating in paragraph 4 of its Affidavit that its “...sole mandate is complementing the efforts of other governmental agencies”, would

prefer to demand collaboration from the 2nd Respondent, a private company, rather than seeking to partner with the agencies whose efforts it claims to compliment. This raises a question on the integrity and motives of the Applicant which ultimately appears to be aimed at deriving some financial benefit from unsuspecting business owners under the guise of seeking collaboration to tackle fake products. It is also important to note that the Applicant have not disclosed the details of the alleged location and manufacturers of the counterfeit products. This therefore makes the basis of the Applicant's claim suspicious and lacking merit."

On the contrary, the position of the Respondent has considerable strength that cannot be ignored. The parameters of their opposition to this application that give them unassailable edge and strength are:

- (1) Applicant is not a Regulatory Agency nor a Law Enforcement Agency. The proper Agency is NAFDAC and SON. See paragraph 14 (f) of the counter-affidavit.
- (2) The Respondents took steps in respect of the Applicant's complaints when it was received. See paragraph 13 of the counter-affidavit.
- (3) Applicant did not supply any of the fake products alleged to the 2nd Respondent despite promising to do so. See paragraph 33 of the applicant's Further Affidavits which reads:

"That we shall during hearing of this action produce the two products herein referred and

marked as SCJ3 and SCJ4 respectively for the Court's inspection.

See also paragraph 14(e) of the Respondent's Counter-Affidavit which reads:

"Furthermore, the applicant did not make available the sample of the counterfeit products or detail of its alleged investigation to the 2nd Defendant so as to enable them contact the regulatory and law enforcement agencies. Rather the Applicant has chosen to bring the present action".

In essence, I am in complete agreement with the learned Counsel to the Respondent that there is no cause of Action that can **ensure??** in favour of the applicant in this case. See paragraph 4.24 of the learned Counsel's Address.

Cause of action is defined as the entire set of facts or circumstances giving rise to an enforceable claim.

The interpretation or definition of a cause of action appears to be amphibious. The boundary is wide and unrestrictive. But it certainly encompasses all those things necessary to give a right of action and every fact which is material to be proved to entitle the plaintiff to succeed. See **FIRST BANK OF NIGERIA PLC VS. M. O. KANU & SONS CO. LTD (1999) 9 NWLR (PT 619) 82; AFRIBANK NIGERIA PLC VS AMINU ISHOLA INVESTMENT LTD (2002) 7 NWLR (PT. 765) 40.**

It is for the above foregone established fact and law, that I find, with due respect, the written submission of the learned Counsel to the applicant - Mr. Kelvin at the 2nd paragraph of

his first written address to be laughable, unsubstantiated and far from the established truth. The learned Counsel wrote thus:

“.....We submit that the Respondents has not take adequate steps toward safe guarding the lives of innocent and unsuspecting Nigerians who uses their product for the purpose upon which it was intended, without knowing that what they are using are fake Baygon Insecticides”.

In short, this application is lacking in all merit and it is therefore dismissed.

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S. B. Belgore
(Judge) 09/02/2021