

IN THE COURT OF APPEAL
HOLDEN AT LAGOS
ON MONDAY THE 15TH DAY OF MAY, 2006

BEFORE THEIR LORDSHIPS:

<u>DALHATU ADAMU</u>	<u>JUSTICE, COURT OF APPEAL</u>
<u>MOHAMMED LAWAL GARBA</u>	<u>JUSTICE, COURT OF APPEAL</u>
<u>SOTONYE DENTON WEST</u>	<u>JUSTICE, COURT OF APPEAL</u>

CA/L/282/2001

BETWEEN:

PFIZER SPECIALTIES LIMITED	PLAINTIFF/APPELLANT
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| 1. CHYZOB PHARMACY LIMITED) | |
| 2. WEMOL PHARMACY LIMITED) | DEFENDANTS/RESPONDENTS |
| 3. MEDICINES PLUS) | |

JUDGMENT
(DELIVERED BY M. L. GARBA, JCA)

This appeal relates to the ruling of the Federal High Court, Lagos in Suit No. FHC/L/CS/1318/99 which was delivered on the 13/2/2001. The ruling struck out the Appellants' claims as Plaintiff's on the grounds that:- (i) the Plaintiff lacked the locus standi to institute the action, (ii) that the Statement of Claim did not disclose a reasonable cause of action and (iii) that court lacked jurisdiction to entertain the claims of the Plaintiff.

Being dissatisfied and aggrieved by that decision, the Appellant made for this court to register and ventilate his complaints against it. A notice of

appeal was dated and filed on the 12/3/2001 in accordance with the law and Rules of this court containing seven (7) grounds of appeal by learned Counsel for the Appellant. Devoid of the particulars, (which I would set out later on in respect of ground No. VII to which objection was made), the grounds are as follows:-

- “(i). The learned trial judgment misdirected himself in referring to “parallel importation” as a cause of action and relying on judicial authorities concerned with the viability of actions for trade marks infringement as means of stopping the act of parallel importation.
- (ii) The learned trial judge erred in law in failing to reach a decision on the first issue for determination which his Lordship himself formulated in his ruling.
- (iii) The learned trial judge erred in law in holding that the Federal High Court is not vested with jurisdiction to adjudicate on the claim of the Plaintiff/Appellant.
- (iv) The learned trial judge erred in law in limiting his consideration of the Plaintiff/Appellant’s claim only to the question whether it is entitled sue the Defendant/ Respondent for the tort of unlawful interference in business
- (v) The learned trial judge erred in law in failing to hold that the statement of claim disclosed a reasonable cause of action.
- (vi) The learned trial judge erred in law in hold that, on the face of the statement of claim, the Plaintiff/Appellant had no locus standi to sue the Defendants/Respondents for the tort of unlawful interference in business interest, for the reason that it is only the Attorney-General that can enforce the provisions of the Drugs and Related Products (Registration etc) Act of 1993.
- (vi) The learned trial judge erred in law in refusing to grant an

interlocutory injunction against the Defendants/
Respondents as prayed by the Plaintiff/Appellant.

Eventually, briefs were settled by counsel as follows; Appellants' counsel filed Appellants' brief of argument on 26/6/2001, Appellants' Reply brief to 1st Respondent's brief on 22/11/2005 and Appellants' Reply brief to the 3rd Respondent's brief was filed on the 9/2/2005. The 1st Respondent's brief was filed on 11/11/2005 and deemed filed on 14/11/2005 while the 3rd Respondent's amended brief of argument was filed on the 1/2/2005 and deemed properly filed on the 17/3/2005.

The 3rd Respondent had also filed a motion of preliminary objection to ground of appeal No (VII) on 25/2/2004 which he argued in the 3rd Respondents amended brief. There is no record that any brief of arguments was filed for the 2nd Respondent to the appeal.

At the hearing of the appeal, learned Counsel adopted and relied on their respective briefs of arguments and urged us to find for their clients; allowing or dismissing the appeal as the case may be.

The appropriate way to start a consideration of the submissions of Counsel on their respective positions is by taking the preliminary objection to ground of appeal No. (VII) by the learned Counsel for the 3rd Respondent in his motion referred to above.

The objection is that ground No. (VII) did not arise from the decision of the court below, it contravenes Order 3 Rule 2 (4) of the Rules of this court and so is incompetent.

The ground along with its particulars is as follows:-

- “(vii) The learned trial judge erred in law in refusing to grant an interlocutory injunction against the Defendants/ Respondents as prayed by the Plaintiff/Appellant.

PARTICULARS OF ERROR

- (a) The statement of claim and affidavit in support of the motion for interlocutory injunction disclose a serious issue to be tried and that the Plaintiff/Appellant has a right the violation of which is threatened by the act sought to be restrained.
- (b) The injury threatened to the Plaintiff/Appellant's interest is such as cannot be adequately compensated by an award of damages.
- (c) The balance of convenience is in favour of the Plaintiff/Appellant.”

The submission of learned counsel for the 3rd Respondent in support of the objection is that the learned trial judge did not decide the issue of interlocutory injunction which he considered unnecessary after his findings that there was no reasonable cause of action, lack of locus standi on the part of the Appellant to institute the action and lack of jurisdiction for the court to entertain the Appellants' suit. According to learned Counsel, there was therefore no decision refusing the injunction from which the ground No.(VII) arose. It was argued that the ground did not arise from a decision or pronouncement of the court below and so this court cannot be called upon to consider any issue arising from such a ground of appeal. Replying on the cases of **SARAKI V KOTOYE** (1992) 9 NWLR (Pt.264) 156 at 199, **OJIMBA V OJIMBA** (1996) 4 NWLR (Part. 440) 32 at 39, **DANGTOE V C. S. C. PLATEAU STATE** (2001) 9 NWLR (Part. 717) 132 at 162 and **BUHARI V YUSUF** (2003) 14 NWLR (Part.841) 446 at 533, he urged us to strike out the ground pursuant to Order 3, Rule 2(4) of the Rules of this court which he set out in the brief.

In his response, learned Counsel to the Appellant in the Reply brief to the 3rd Respondent's brief contended that since the injunction sought and argued was not granted by the court below, the implication was that because of his earlier findings on reasonable cause of action, lack of locus standi and jurisdiction, the learned trial judge had held that Appellant had not shown a serious issue to be tried or that it had a right that needed to be protected by an injunction. It was therefore submitted that a ground of appeal like ground (VII), complaining about the refusal to grant the injunction cannot be said not arise from the decision of the court.

It is now common knowledge from the Rules and practice of this court for many years that its function is to receive, hear and determine appeals from the decisions of lower courts and tribunals as provided in Section 240 of the 1999 Constitution of Nigeria. In the discharge of that function, the court considers or treat only issues arising or formulated from competent grounds of appeal as contained on the notice of appeal which must have arisen from or be related to the decision or judgment appealed against.

Because a ground of appeal, which is the complaint and basis of dissatisfaction with the decision appeal against, cannot be at large, it must enure from the decision of the lower court/tribunal on issue/s canvassed and determined or pronouncement made by that court or tribunal. Any ground of appeal that is outside or did arise from a decision of the lower court or tribunal would not be relevant and in legal parlance, is incompetent in the determination of an appeal against that decision. In addition to the cases cited on the point by learned Court for the 3rd Respondent. See also **OKPALA V OKAFOR** (1991) 7 NWLR (Part. 204) 510, **AKANBI V RAJI** (1998) 12 NWLR (Part. 578) 360, **ALUBANKUDI V ATTORNEY GENERAL OF FEDERATION** (2002) 17 NWLR (Part. 796) 338,

IKWEKI V EBELE (2005) 2 S C (II) 96 **MERCHANTILE BANK PLC V NWOBODO** (2005) 7 S C (III) 1 and **LARMIE V D.P. M and SERVICES** (2006 ALL FWLR (Part 296) 775. Such a ground is liable to be strike out under Order 3 Rule 2 (4) of the Rules of court.

Ground No. (VII) even on a mere glance shows that it is complaining about the refusal of the court below to grant the order of interlocutory injunction sought by the Appellant. However it is common ground that the trial judge did not consider, deal with or make any decision or pronouncement on the relief except to say that it was unnecessary to make any pronouncement thereon. In other words. The learned trial judge, chose not to, declined, refused or failed to decide or take any decision on the issue of interlocutory injunction on the merits as canvassed by the learned Counsel for the parties. In effect the decision of the learned trial judge was not to make any pronouncement or take any decision on the issue of interlocutory injunction. If any complaint by way of a ground of appeal against that decision is to arise there from, it must be against the failure or refusal by the learned trial judge to consider and determine the issue of interlocutory injunction as canvassed, on the merits.

A ground of appeal which complains about refusal to grant the interlocutory injunction as in the Appellant's ground of appeal No. (VII), would clearly not have arisen from the decision not to consider at all and determine the issue of injunction. **WITTS & BUSH LTD. V GOODWILL & TRUST INVESTMENT LTD.** (2004) 8 NWLR (Pt.87) 179. I therefore find myself in agreement with the submissions of the learned Counsel for the 3rd Respondent that the said ground did not arise from the decision of the court below, is incompetent as a result and liable be struck out.

The objection to the ground is upheld and accordingly, the ground as well as the issue No. (IV) formulated there from as contained in the Appellants' brief of arguments, are both struck out for being incompetent.

From the remaining six (6) grounds of appeal now left on the Notice of Appeal, learned counsel formulated the following balance of issues for determination in the appeal: -

- “(i) Whether the Plaintiff’s statement of claim discloses a reasonable cause of action.
- (ii) Whether the Plaintiff has any locus standi to institute the action.
- (iii) Whether the claim of the Plaintiff fall within the jurisdiction of the Federal High Court. According to Learned Counsel, issue (i) arises from grounds of appeal No. (i), (ii), (iv) and (v), issue (ii) arises from ground No. (vi) and issue (iii) arises from ground No. (iii).”

Learned counsel for the 1st Respondent adopted the above issues in his brief of arguments while the learned counsel for the 3rd Respondent raised the following issues: -

- (i) Whether the Plaintiff’s Statement of Claim discloses a reasonable cause of action.
- (ii) Whether the Plaintiff has any locus standi to institute this action.
- (iii) Whether the claim of the Plaintiff falls within the jurisdiction of the Federal High Court.
- (iv) Whether the Court of Appeal should entertain the Appellant’s application for Interlocutory Injunction.
- (v) Whether an Interlocutory Injunction ought to be granted

as prayed by the Plaintiff.”

Learned Counsel had at the hearing of the appeal related the issues thus; Issues (i) arises from grounds of appeal No. (i) and (v), issue (ii) arises from ground No. (vi), issue (iii) arises from ground No. (iii) while issues (iv) and (v) arise from ground No. (vii).

What is apparent from the formulation of the learned counsel for the 3rd Respondent is that in the first instance, he formulated two issues from a single ground of appeal a practice not permitted or allowed by established principle of law. See **IGWEGBE V EZUMA** (1999) 6 NWLR (Part 606) 205 **PURIFICATION TECHNICAL LTD. V.L. S.B.D. CORPORATION** (2001) 10 N.W.L.R. (Part. 720) 86, **U.B.A. V ABDULLAHI** (2003) 3 NWLR (Part 807) 359 and **AFRIBANK V ONYIMA** (2004) 2 NWLR (Part 858) 654. Secondly, the two (2) issues were formulated from ground of No. (vii) which was struck out for being incompetent earlier in his judgment. For these reasons, issues (iv) and (v) formulated by the learned counsel for the 3rd Respondent are patently incompetent and strike out accordingly.

We are now left with the three (3) issues formulated by the learned Appellant’s counsel, adopted by the learned counsel for the 1st Respondent and the three (3) issues for the learned counsel for the 3rd Respondent.

The two sets of issues formulated by learned counsel are word for word, the same as can be seen in the formulation. In effect what the Learned Counsel for the 3rd Respondent did in his brief of arguments was to merely repeat or copy the issues formulated by the learned Appellant’s Counsel in the Appellants’ brief of argument. He is thereby deemed to have adopted the issues formulated by the Appellants’ Counsel as the issues he submitted

to the court for determination in the appeal. See: **GARBA V KUR** (2003) 11 NWLR (Part. 831) 280 and **BAKOSHI V CHIEF OF NAVAL STAFF** (2004) 15 NWLR (Part .896) 268. So at the end of it all, the issues formulated for the Appellant are the ones distilled by all Counsel for determination in the appeal. I would consider them along with the submissions of Counsel thereon in the manner they are presented.

The Learned Appellant's counsel argued issues (i) and (ii) as 1 and 2 together in his brief.

It was submitted by him that the learned trial judge in his discourse on whether a reasonable cause of action was disclosed in the suit before him regarded the expression "parallel importation" as the name of the cause of action instead of a defined term used in pleadings and the affidavit. He then said trial judge was wrong to have relied on the decision in the Canadian case of **Coca – Cola V Pardhan** to hold that Appellants' action was on parallel importation; a common law concept not known to the laws of this country, when the Appellant never claimed for trade mark infringement or based its claim on the intellectual property embodied in the product in dispute. It was contended that the learned trial judge used or considered irrelevant points or issues in his determination of whether a reasonable cause of action was disclosed. That in determination of the issue, the Appellant was not limited to asserting an entitlement to the remedy he claims under the principle of common law, equity or the statute which he specifically pleaded. Where the Court finds that a Plaintiff is entitled to the remedy he claims under any other principle of common law, equity or the statute other than the one pleaded, the court is obliged to grant the remedy claimed. The case of **FALOBI V FALOBI** (1976) 10 N.S.C.C. 576 at 581 was relied on for the submission and **THOMAS V OLUPSOYE** (1986) 1 NWLR (Part 18) 669

at 682 that the court is limited to the consideration of the facts contained in the statement of claim only.

Turning to the issue of locus standi, learned counsel submitted that the court below had held that an individual can only bring a common law action in respect of a breach of duty imposed by statute if the intention of the statute is to vest such right in the aggrieved individual. That the provisions of the Drugs and Related Products (Registration etc) Decree 1993 (herein after to be called 1993 Decree) do not vest the individual with any right to enforce the provisions but vested such right in the Attorney General of the Federation and so Appellant lacked the locus to institute the action. It was argued by counsel that the claim before the court below was not prayer for the enforcement of the breach of any statutory duty but that in doing an act prohibited by the 1993 Decree, the Respondents have injured and are continuing to injure the Appellants' private economic interest. The Appellant prayed the court to stop a continuation of the injury and compensate it for the loss it had suffered thereby. Learned counsel then cited and set out in details, the facts and the principles set out in the Supreme case of **IPADEOLA V OSHOWOLE** (19987) 2 NWLR 755 and said that the decision of the learned trial judge that Appellant lacked the locus to institute an action to restrain the sale by the Respondents of drugs not registered under the 1993 Decree was wrong on the authority of the case. That the Appellant had pleaded that it is the sole registrant with National Agency for Food and Drugs Administration and Control (NAFDAC) of the drug branded as "Viagra" and so was given the advantage to exclusively sell the drug in Nigeria, which advantage is a right which it is entitled to protect by an action in court. Further that the importation and sale of the drug "Viagra" not registered with NAFDAC, by the Respondents contravenes

Section 1 (1) of the 1993 Decree, reduces the sale Appellant can make of its own version of the drug and therefore it interferes with its enjoyment of the advantage of being the only registered version. That the Appellant was entitled under the principle in *IPADEOLA V OSHOWOLE* to sue to protect its right. The South African case of *PATZ V GREENE* (1907) T.S. 427 was cited by counsel. Finally we are urged on the two issues by the learned counsel for the Appellant, to hold that the Appellant has a right of action and therefore the locus standi to institute the suit.

Learned counsel for the 1st Respondent also argued issues (i) and (ii) as 1 and 2 together in his brief. He started by reference to the judicial definition of a cause of action and what the court has to look at in the determination of the existence of a cause of action as set out in the cases of **SAVAGE V UWECHIA** (1972) 1 ALL NLR (1) 25 at 257, **OWODUNNI V REG. TRUSTEE OF C.C.** (2000) FWLR (Part 9) 1455 at 1506 and **DADA V OGUNSANYA** (1992) 3 N.W.L.R. (Part. 232) 754 at 766.

On the issue of locus standi, learned counsel said in the determination of the question of locus standi, the court would look at the statement of claim, any affidavit evidence and material brought by the parties in an application challenging locus standi. He cited the cases of **O.P.I. C. V OTUNRASE PETROLEUM PRODUCTS** (2003) FWLR. (Part. 140) 1800 at 1815 and **OWODUNNI V REG. TRUSTEES** (supra) in support of the submission.

He then contended that the registration of the drug in dispute by the Appellant with NAFDAC does not confer any status of the sole marketer or distributor of the product in Nigeria since Appellant is not the manufacturer or registered or prospective owner of the trade mark “Viagra” on the drug. According to counsel, the Appellants’ complaint is that the Respondents are

competing with it in marketing the drug in Nigeria and not that the drug sold by Respondents was a fake of the one registered with NAFDAC. That it is the duty of the manufacturer and the importer to register the drug with NAFDAC and that there is no law against competition in business among companies but infringement of a registered trade mark, patent or copy right would ground an action in court. Counsel submitted that in the pleadings, the Appellants' case was for parallel importation but no facts were pleaded to show that the 1st Respondent imported the drug in dispute. That parallel importation is not unlawful and cannot give rise to a reasonable cause of action. It was argued that the Appellants' counsel in his submission in the court below made a case different from the pleadings by purporting to found a cause of action on alleged interference with Appellant's business interests which arises where a statute restrict participation in a particular trade an unauthorized person carries or participate in the said trade. The unauthorized participation would amount to unlawful interference in the business of the authorized person and therefore actionable. Furthermore that Appellants' claim was anchored its claim of interference with business on exclusivity of its rights to market the drug by virtue of the registration with NAFDAC yet no pleadings were made of a contract conferring the sole agency to market the drug in Nigeria, in the statement claim. That Appellant's parent company in the absence of such contract can sell or market the drug directly in Nigeria on the authority of **DENTAL HORSLEY** and **BALDARY V VICARY** (1931) I.K.B. 255. It was submitted that 1st Respondent was authorized to trade in the drug under Section 10 of the Pharcist Council of Nigeria Decree No. 91 of 1992 (to be referred henceforth as Decree No. 91) and the right to do so was not circumscribed by the registration with NAFDAC by the Appellant of its own

version of the drug. In addition, learned Counsel said the drug sold by the 1st Respondent was sourced from the Appellant relying on page 118 – 119 of the record of appeal and urged the court to find that Appellant’s claim discloses no reasonable cause of action against the 1st Respondent. Also that the alleged non-compliance with the 1993 Decree does not involve the violation of the private right of the Appellant so as to give rise to a right of action.

That the case of **IPADEOLA V OSHOWOLE** (supra) relied on by Appellant considered a statute which imposed a public duty in addition to the duty enforceable by an individual unlike, the Appellants’ case where only a public duty was imposed and no individual right conferred. It was concluded that the Appellant lacks the locus to institute the action and we are urged to dismiss same.

The learned counsel for the 3rd Respondent argued all the issues separately as they were set out in the briefs.

Substantially, the submissions of the Learned counsel for the 3rd Respondent on issues of reasonable cause of action, that the Appellants’ claim in the pleadings is for parallel importation which is unknown to the Nigerian law, that Appellant cannot widen or change the claims in the pleading, are the same with those of the 1st Respondent’s Counsel and do not require repetition here. Learned Counsel cited inter alia, the cases of **ECON BANK V GATEWAY HOTELS** (1999) 11 N.W.L.R. (Part. 627) 397, **IAL 461 INC. V MOBIL OIL** (1995) 5 NWLR (Part. 601) 9 at 20 and argued that the principle of law established in **FALOBI V FALOBI** (supra) is not applicable in Appellants’ case relying on the case of **ALUBANKUDI V ATTORNEY GENERAL FEDERATION** (also supra). In the alternative, learned counsel argued that 3rd Respondent was not liable for

unlawful interference because it sells the genuine drug manufactured by the Appellants' parent company and has not breached any provisions of the 1993 Decree since as a retailer it is not under any obligation to register the drug with NAFDAC. He said the 1993 Decree does not confer a civil right of action on Appellant or create a public right as envisaged in the cases cited especially **IPADEOLA V OSHOWOLE** (supra).

On the issue of locus standi, the cases of **K. LINE INC. V. K.R. INTERNATIONAL** (1993) 5 NWLR (Part. 292) 159 at 176 and **ALBIO V CONSTRUCTION V RAO INVEST AND PROPERTY** (1992) 1 N.W.L.R. (Part. 583) 594 were referred to on the judicial definitions and it was submitted that the decision of the court below was based on the clear and unambiguous provisions of the 1993 Decree that confer exclusive power on the FEDERAL ATTORNEY GENERAL to prosecute a breach thereof.

Finally it was contended that the Appellant does not have special interest or at least, its interest is vague and speculative and we are urged to uphold the decision of the court below that the Appellant lacks the locus standi to institute the action.

In his Reply brief to the 1st Respondent's brief, learned counsel cited cases on the law that only statement of claim must be looked at in considering whether a Plaintiff has locus standi to institute an action. They are **OWODUNNI V REG. TRUSTEES OF C.C.C.** (supra), **ADENUGA V ODUMERU** (2003) 8 N.W.L.R. (Part. 821) 163 at 184 and **LADJOBI V OGUNTAYO** (2004) 18 v (part 904) 149 at 173. It was insisted that Appellants' claim is not for parallel importation and that the registration with NAFDAC was intended to mean that the holder of the certificate shall be the sole manufacturer and importer of the registered product in Nigeria. That Section 10 of the Decree No. 91 vests a right to sell products that are

lawful, not fake, or smuggled products which are not duly registered under the 1993 Decree. Finally, that Appellant had been consistent in its claim in the court below and this court.

In the Reply brief to the 3rd Respondent's brief, learned counsel for the Appellant largely reargued the appeal on the nature of his client's claim and applicability of the cases he relied on. That sums up the submissions of counsel on issues (i) and (ii).

The determination of these issues goes to the jurisdiction of the court below to entertain the Appellants' suit. This is because where there was no reasonable cause of action in a Plaintiffs' suit or claim and a Plaintiff was found not to have the locus standi to initiate the action or approach the court for the invocation of its adjudicatory powers, then the jurisdiction and powers of the court to receive, look at and embark on the determination of the matter or suit is called into question.

As has been demonstrated in the cases cited by the learned counsel above, the two expressions or terms and the situations which they arise i.e., a reasonable cause of action and locus standi have received several judicial pronouncement.

A reasonable cause of action in general terms means a fact or a combination of fact which if proved would entitle a Plaintiff to a remedy against a defendant. See: **EGBE V ADEFARASIN** (1987) 1 N.W.L.R. (Part. 47) 20, **AKILU V FAWEHINMI** (No. 2) (1989) 2 NWLR (Part. 102) 122 and **OSH0-BOJA V AMUDA** (1992) 6 N.W.L.R. (Part. 250) 690.

In the determination of whether a case discloses a reasonable cause of action, the court examines the statement of claim and see whether on the face of it, it discloses facts which if proved would entitle the Plaintiff to a remedy. It is only the statement of claim that would clearly reveal or show

whether or not a Plaintiff has a reasonable cause of action which may entitle him to a remedy and once it is disclosed, the reason exists to approach the court to seek the remedy and for the court to intervene **EGBUE V ARAKA** (1988) 3 NWLR Part. 84) 598, **YUSUFU V CO-OPERATIVE BOARD** (1994) 7 N.W.L.R. (Part. 359) 676, **OGNEMI V OLOLO** (1993) 7 SCNJ and **BRIGHT MOTORS V HONDA MOTORS** (1998) 12 N.W.L.R. (Part. 577) 230.

The term *locus standi*, in all the cases cited was defined to simply mean, the legal capacity or standing to institute, undertake or initiate a suit or action in a court of law. In order to acquire that capacity or standing, a person must show interest that is sufficient in the subject matter of the intended suit to enable him sue. The facts contained in the pleadings of a person must therefore disclose a legal interest which has been, is being or threatened to be adversely affected by the act of another, i.e. the defendant, in respect of which he calls on the court to intervene. However such legal interest has to be a peculiar one to the Plaintiff and not one shared with the generality of the public (if it is an interest affected by the performance of a duty impose by law or statute then the Plaintiff to have locus). **DAMISUA V SPEAKER, BENUE STATE HOUSE OF ASSEMBLY** (1983) 4 NCLR 625, **NSOSU V OFOR** (1991) 2 NWLR (Part. 173) 275, **In RE; OGUNMOWOLA** (1996) 2 NWLR (Part. 428) 90, **ADEWUNMI V ATTORNEY GENERAL OF EKITI STATE** (20002) 2 NWLR (Part. 751) 474 and **ADAMAWA STATE V. ATTORNEY GENERAL OF THE FEDERATION** (2005) 12 SC (II) 132. In addition, where the interest of a person is in respect of the performance of a statutory duty, to have *locus standi* to institute an action, the Plaintiff must show on the pleadings that he has the individual legal right or interest in the performance of the duty which

was adversely affected thereby. See **OVIE-WHISKEY V OLAWOYIN** (1985) 6 NCLR 156, **ELECTORAL COMMISSIONER, ANAMBRA STATE V NWOCHA** (1991) 2 NWLR (Pt.176) 732 **OKAFOR V ASOH** (1999) 3 NWLR (Pt.593) 35 and **ATTORNEY GENERAL OF AKWA IBOM STATE V ESSIEN** (2004) 7 NWLR (Pt.872) 288. What appears apparent in the definitions of these terms is that the effect of the absence of either of them is to take away from the Court the power or authority to intervene by way of entertaining an action filed by a plaintiff. The absence of a reasonable cause of action would necessary result in the absence or want of the sufficient legal interest in a plaintiff to institute an action. In other words, the absence of a reasonable cause of action would inevitably mean that there would be no legal capacity or standing for a plaintiff to initiate or institute an action before the court.

Furthermore, it appears that once a plaintiff has been held to have disclosed a reasonable cause of action in his pleadings, the implication would be that he has shown sufficient legal interest to clothe him with the legal capacity or standing to approach or call on the Court to intervene and determine whether or not he was entitled to any remedy. The difference between the two terms or concepts of law in relation to the jurisdiction of the court only appears when each is considered in the peculiar facts and circumstance of the situation or case it arises. The established and generally known position of the law however, is that once the legal capacity or standing to sue or locus standi on the part of a plaintiff is absent, a court would automatically lack the power and jurisdiction to entertain the action. See **OLORIODE V OYEBI** (1984) 1 SCNLR 390, **OLAWOSOGO V ADEBANJO** (1988) 4 NWLR (Pt.88) 275, **NWONU V ADMINISTRATOR GENERAL, BENDEL STATE** (1991) 2 NWLR

(Pt.173) 343, **EREBOR V MAJOR & CO.** (2001) 5 NWLR (Pt.706) 300 and **ATTORNEY GENERAL AKWA IBOM STATE V ESSIEN** (2004) 7 NWLR (Pt.872) 288 and **ADENUGA V ODUMERA** (2003) 8 NWLR (Pt.821) 163.

In determining the twin issues raised in this appeal within the above parameters set out in all the cases cited, the claims of the Appellant as put forward in the pleadings; that is the statement of claim filed by the Appellant, would be the primary concern and relevant materials. It is therefore good law which I accept that the statement of claim of the Appellant would be the determinant of the issues and the legal duty is on the Appellant to show and satisfy the Court that the pleadings in the statement of claim disclose a reasonable cause of action and that the Appellant has the requisite capacity or standing to institute the action in this appeal. For this purpose, it is expedient to set out in details the relevant part or paragraphs of the statement of claim relied on by the Appellant in the discharge of that legal burden. They are: -

- “7. Sometimes before the month of April 1999, the Plaintiff formed the intention of importing into and selling in Nigeria a new drug which had recently been put on the market worldwide by its parent company, Pfizer Inc. The drug, the generic name of which is “Sildenafil” was being marketed worldwide under the trade mark or brand name VIAGRA.
8. In order to comply with the requirements of Nigerian Law as to the importation and sale of Drugs in Nigeria, the Plaintiff applied to the National Agency For Food, Drug, Administration and Control (NAFDAC) for the Registration of the drug VIAGRA to be sold in tablet form. In consequence of the application, NAFDAC granted the

Plaintiff registration of VIAGRA tablets under registration No.04-1501 dated 19th April, 1999. The registration is to remain valid for one year, the Plaintiff shall rely on a letter dated 3rd November, 1999 from NAFDAC confirming that registration approval has been granted to the Plaintiff in respect of the drug VIAGRA amongst others. The Plaintiff thus started importing into and selling in Nigeria the drug VIAGRA as from the month of May 1999.

9. Starting from the month of August 1999, the Plaintiff started noticing a declining in its sale of VIAGRA tablets, following investigation conducted into the cause of the declining sales, the Plaintiff found out that there has been an influx into the Nigerian market of VIAGRA tablets not manufactured for the Plaintiff nor imported into Nigeria by it (hereinafter referred to as “Parallel import Viagra tablets”)
10. The aforesaid Parallel Import Viagra tablets, which were Manufactured for markets outside Nigeria, were being Imported without the authorization or license of the Plaintiff, which is the sole registrant of Viagra tablets with NAFDAC and, by implication, the only company entitled by law to import into and sell same in Nigeria. The Plaintiff neither authorized nor licenced any person, corporate or otherwise, to bring the Parallel Import Viagra tablets into Nigeria.
11. The plaintiff was unable to ascertain the identity of the person or any of the persons responsible for the importation into Nigeria of the Parallel Import Viagra tablets, but believes from information gathered in the market, that the drug is being independently imported by many persons who purchase them wholesalers or retailers in different foreign countries.
12. The Plaintiff is able to identify in the market Viagra tablets not imported by it into Nigeria because the Viagra tablets being imported by it into Nigeria is specifically manufactured for the Plaintiff under the licence of its

parent company, Pfizer Inc.

The packets of such Viagra tablets all bear the inscription that it had been made for the Plaintiff. The name and address of the Plaintiff and of Pfizer West Africa is therefore printed on the packet.

13. In surveying chemist shops in Lagos to ascertain those selling Parallel Import Viagra tablets, the Plaintiff identified the Defendants amongst several others as sellers of Parallel Import Viagra tablets.
14. The Plaintiff avers that its staff visited the premises of the 1st Defendant at 168 Awolowo Road, Ikoyi, Lagos, the premises of the 2nd Defendant at 78 Ogunlana Drive, Surulere, Lagos and the premises of the 3rd Defendant at payless 3 Shopping Mall, Plot 307 Adeola Odeku Street, Lagos and thereat on Different dates purchased Parallel Import Viagra tablets and were issued receipts therefore.
15. By importing, selling, distributing or otherwise dealing with The Parallel Import Viagra tablets without the approval of NAFDAC, the Defendants are acting unlawfully and in contravention of Section 1(i) of the Drug and Related Products (Registration etc) Decree 1993 which forbids anybody from importing, selling or distributing any drug in Nigeria without first registering same with NAFDAC.
16. The aforesaid registration for Viagra tablets secured by the Plaintiff with NAFDAC entitles the Plaintiff only, to the exclusion of any other company or person except it authorized agents/lincees to import, sell and otherwise deal with this product in Nigeria, with the attendant obligation on the Plaintiff to ensure that the standard, quality, safety or efficacy of the products as approved by NAFDAC is maintained, and also that the condition under which it is stored or manufactured meets with NAFDAC's stipulation. The aforesaid Decree empowers NAFDAC to cancel or suspend registration of a drug where any of the conditions under which registration was granted has been contravened.

17. The Plaintiff always ensures that all the drugs sold by it in Nigeria meets with the specifications of NAFDAC at all times. However, by reason of the fact that the Parallel Import Viagra tablets are being brought into the country By persons unknown through various sources, the specification and composition of the different batches imported by the Defendants may vary and may not meet with the standard prescribed by NAFDAC for such drugs.
18. By importing, selling and distributing the Parallel Import Viagra tables aforesaid, without the necessary approval from NAFDAC, and the Plaintiff's consent, the Defendants and all those on whose behalf the Defendants are sued have unlawfully and deliberately interfered with the business interest of the Plaintiff in the sales of these products, with the intention of causing damage to the Plaintiff.
19. By reason of the acts complained of, the Plaintiff has suffered Financial loss and damage in connection with the sales of its product, VIAGRA tablets, which sales has declined drastically since the commencement of the unlawful activities of the Defendants.
20. The Defendants and all those on whose behalf the defendants are sued threaten and intend to continue their unlawful acts and in the premises hereinbefore mentioned the Plaintiff will suffer further loss and damage.
21. AND the Plaintiff claims:
 - i) And injunction to restrain the Defendants jointly and severally and each of those upon whose behalf the Defendants are sued whether acting 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: Importing, selling, offering for sale, inviting offers to acquire or distributing for the purposes of sale the

Pharmaceutical product, branded as VIGRA contained in packages or bearing labels not marked with the name of Pfizer Specialties Limited of Churchgate Towers, Plot PC30, Afribank Street, Victoria island, Lagos.

- ii) An order for delivery up upon oath of all stock of the pharmaceutical product, branded as VIAGRA, contained in packages or bearing labels not marked with the name of Pfizer Specialties Limited of Churchgate Towers Plot PC30, Afribank Street, Victoria Island, Lagos.
- iii) Damages of N3,000,000.00 (Three million Naira) against the Defendants jointly and severally for Unlawful interference with the Plaintiff's business interest by importing, distributing and or selling without the approval of NAFDAC or the Plaintiff's consent the pharmaceutical product branded as VIAGRA, in respect of which product the Plaintiff is the sole Registrant with NAFDAC, thereby causing financial losses to the Plaintiff in respect of its sales of the said product and damaging the Plaintiff's business.
- iv) Alternative, an account of profits.
- v) Further or other reliefs."

In order to find and bring out the real and factual claims of the Appellant, these pleadings have to be read together; - i.e. one in relation to the other. Now, does a community reading of these averments support the finding by learned trial judge that the Appellant's claims, were for or based on parallel importation of the drug in dispute? The use by learned Appellant's counsel of the phrase "Parallel Import" in paragraphs 10, 11, 13, 15 and 17 may tend to suggest and support that finding. However a calm and dispassionate reading of the paragraphs as a whole would reveal that the complaint and claim of the Appellant were based on the following:

- “(a) that Appellant had registered the drug with the brand name of “Viagra” with NAFDAC for sale in Nigeria in accordance with the 1993 Decree,
- (b) that the Respondents are selling the drug “Viagra” not imported by the Appellant and not registered with NAFDAC contrary to the provisions of the 1993 Decree,
- (c) that the Appellant’s sale of its registered drug had declined, causing it financial loss and damage due to the the unlawful interference by the Respondents of selling in Nigeria, the unregistered drug.”

So the purport of the claim of the Appellant is that it had suffered financial loss and damage which it says was caused by the acts of the Respondents’ selling the unregistered drug in Nigeria contrary to the 1993 Decree.

It is not the case put forward by the Appellant in these averments that the action was instituted because the Respondents made parallel importation of the drug. This was made clear by the emphatic averment of the Appellant in paragraph 11 (set out above) that the Appellant was unable to ascertain the identity of the person or any of the persons responsible for the importation into Nigeria of the Parallel Import Viagra tablets. In view of that fact, the Appellants’ claim cannot properly and correctly be said to be based on or for parallel importation of the drug in question by the Respondents. I therefore agree with the learned counsel for the Appellant that the use by him of the expression “parallel import” in the pleadings was purely to refer to or describe the Viagra drug not imported by the Appellant. It was an error on the part of the learned trial judge to have considered and relied on the principle of parallel importation to come to the conclusion that no reasonable cause of action was disclosed by the Appellants’ pleadings.

Having misconceived the purport of the Appellant's claim, the conclusion reached thereon by the learned trial judge on the issue cannot be right. See: **UDENGWU V UZUEGBUE** (2003) 13 N.W.L.R. (Part. 836) 136 at 152 and **LADEJOBI V OGUNTAYO** (2004) 4 SC (1) 159 at 169 paragraphs 25-31.

The question that now arises is whether a reasonable cause of action was disclosed by the Appellant's on the basis of the claims as found earlier. Due to the nature of the facts pleaded by the Appellant in the statement of claim, a determination of this question would inevitably involve the twin issue of its locus standi to institute the action. Both issues require a consideration of the Appellant's genuine legal interests that would entitle it to institute and maintain the action against the Respondents as disclosed by the pleadings.

As seen earlier, the plank of the submissions by learned counsel for the Appellant is that by the principle in **FALOBI V FALOBI** (supra) a Plaintiff is entitled to the remedy he claims under the principle of common law, equity or statute even if different from the ones he made a claim under. That the decision in **IPADEOLA V SHOWOLE** (supra) was authority for the Appellants' sufficient interest in the action because it has suffered injury as a result of the violation of the 1993 Decree by the Respondents. It would be recalled that Appellant had registered its drug called "Viagra" with NAFDAC pursuant to the provisions of Section 1 (1) of the 1993 which are thus: -

"1. (1) No drug, drug product, cosmetic or medical device shall be manufactured, imported, advertised, sold or distributed in Nigeria unless it has been registered in accordance with this Decree or application made under it."

Contravention of the above provisions was made an offence and punishable on conviction by the provisions of Section 6 (1) of the Decree.

These provisions of the Decree are very clear, straight forward and unambiguous. Given their ordinary meaning, they are meant to prohibit, outlaw, make illegal, unlawful, and an offence; the importation, manufacture, advertisement, sale or distribution of any drug, etc not registered under the Decree in Nigeria. It cannot be disputed that compliance with the provisions of the Decree by the registration of such drug etc as stipulated, draws and confers on the Registrant, the benefit and right to sell, manufacture import, etc, the registered drug in Nigeria. While being the only holder of the registration in respect of the particular named, branded or specified drug, the Registrant would or better out, shall be entitled to the sole or exclusive benefit and right to sell, distribute, etc, the said drug in Nigeria. I should not be misunderstood here to be talking about entitlement and right to a trade mark in respect of the drug which is not what is involved in the Appellant's action.

The essence of the provisions of Section 1(1) above is to limit, restrict, confine and control the sale, distribution etc of drugs in Nigeria strictly to the ones registered in accordance with the provisions of the 1993 Decree. Put in other words, the sale, distribution etc of drugs in Nigeria is made strictly subject to the registration of such drug as provided by the 1993 Decree. That is why the Decree in Section 6 (1) makes it illegal, unlawful and therefore an offence for any drugs not registered to be sold, distributed etc in Nigeria. Accordingly, the provisions of Section 10 of the 1991 Decree are therefore circumscribed by the provisions of the 1993 Decree which are later in time. No person natural or artificial including the Respondents has a

right to sell, distribute etc, any drug in Nigeria not registered as required by the 1993 Decree.

The pleadings are that the Respondents sell or distribute in Nigeria, the drug in dispute which was not registered in accordance with the mandatory provisions and requirement of the 1993 Decree. The Decree in my firm view did create a duty and vests or confers a benefit and right in the registration of drugs to be sold, distributed etc, in Nigeria.

This must be so because it would undoubtedly be absurd and bizarre suggest otherwise as the registration would be rendered and made to look meaningless and useless by such a position. Let me emphasis that the benefit and right conferred by the provisions on registration are not and do not include the enforcement or prosecution for the contravention of the provisions. The Appellant did not claim any right to enforce the 1993 Decree. However when contravention of the provisions was made which resulted in the private injury or damages to a Registrant thereunder, the rights and benefit conferred by the registration should entitle it to put into motion, the machinery of the courts in the process of protecting such rights and benefit. That is my understanding of the laudable principle of law established in the **IPADEOLA V OSHOWOLE** case by Supreme Court. The facts of that case must be different from the Appellant's case because the facts and circumstances of a particular case are hardly if ever, the same as those of another case. However, the principle of law established therein is as constant and regular like the sun rising from the east, and its application would only vary from one case to the other depending on the facts. The Appellant here has pleaded that it has suffered an injury or damage as a result of the Respondent's acts of interfering with its right and benefit conferred by the registration of its drug, by contravening the provisions of

the 1993 Decree. These facts disclose an interest that cannot be said to be vague, intangible, imaginary or frivolous. Rather the facts disclose in the circumstances of this case and I find that sufficient, peculiar interest on the part of the Appellant to entitle it, to institute the action against the Respondent both a common law and in equity. **WAKAMA V KALLO** (1991) 8 N.W.L.R. (Part. 207) 123 **LIMAN V MOHAMMED** (1999) 9 N.W.L.R. (Part. 617) 116 and **ECOBANK V GATEWAY HOTELS** (supra). In the result, I find that the pleadings of the Appellant have disclosed a reasonable cause of action.

Having found that Appellants' pleadings disclose a reasonable cause of action by showing sufficient interest to institute the action, I hold that it has thereby shown that its right derived from the registration of its drug have been infringed upon by the acts of selling and or distributing the unregistered drug by the Respondents. The Appellant therefore has a justiciable dispute with the Respondents and accordingly has the capacity, standing or locus standi to institute the action against them. I am encouraged in the liberal approach adopted in the determination of these twin issues of reasonable cause of action and locus standi by the progressive and very sound observations of Pats-Acholonu, JSC in the case of **LADESO V OGUNTAYO** (supra) at page 175, paragraphs 8-18,26-9 and page 176, paragraphs 10-28.

“It is important to bear in mind that ready access to the court is one of the attributes of a civilized legal system, and it will amount to setting the clock back at this stage for any court to dismiss or strike out an action based on the pleading without carefully analyzing the averments and ensuring that there is no nexus. Besides, I make bold to say that it is dangerous to limit the opportunity for one to canvass his case by rigid adherence to the ubiquitous principle inherent in locus standi which is

whether a person has the stand in a case. The society is becoming highly dynamic and certain stands of yester years may no longer stand in the present state of our social and political development. Consider, for examples, the locus standi of a trader who sells his wares in the market. The law of the land vests in the local governments the duty to establish and regulate markets within their domain, if a trader finds out that due to the negligence of the local government concerned, the market is in a state of disrepair, and the condition of the market being affected by the rot, can it be stated that he cannot complain and at the same time take an action against the local government if his inability to sell has been adversely affected by the condition of the market? The court should exercise utmost caution in throwing out a case because of the issue of locus standi.”

There may be a few better ways of emphasizing the need for dynamism in our approach to the interpretation and application of rather static principles of law to meet the realities of the facts disclosed in individual cases. The preference for realistic rather than strict technical justice is the general attitude of the courts. On the whole I resolved the twin issues, i.e. (i) and (ii) set out as the for determination in the appeal, in favour of the Appellant.

The next and only other pending issue is, issue (iii) which is whether the Appellants’ claim fall within the jurisdiction of the court below, the Federal High Court. Learned Appellant’s Counsel submissions are that by virtue of the use of the words “civil causes and matters connected with or pertaining to ...drugs and poisons” and “civil causes and mattersdrugs and poison in Section 7(1) (n) of the Federal High Court Act, 1973 as amended and Section 251 (1) (m) of the 1999 Constitution respectively, the court below is vested with jurisdiction to entertain the Appellant’s claim because it pertains to drugs.

For the 1st Respondent it was argued that the action was not to determine whether the Respondents had infringed the 1993 Decree or if the tablets Viagra constitutes a drug. That the Appellant's action is based on tort and so does not fall, within the constitutional provisions. We are urged to so find.

For the 3rd Respondent, it was also argued that the Appellant's claim being on common law of tort, cannot be said to come within the jurisdiction of the Federal High Court as provided in the Constitution. We are invited to hold that the Court below has no jurisdiction to entertain the Appellant's claim and to strike out same.

In his reply to the 3rd Respondent's brief, learned counsel for the Appellant maintained that the court below has the jurisdiction to entertain Appellants' claim regardless of the fact that it is tortuous.

There is no doubt that the reasonable cause of action found by me earlier to have been disclosed by the pleadings of the Appellant is one grounded on tort of injury arising out of the Respondent's acts of contravening the provisions of the 1993 Decree which conferred rights and benefits to the Appellant.

The mere fact of the use of the words "drugs" in the Decree and the phrases used in both the Federal High Court Act as well as the Constitution cannot seriously be contended to mean that the court below has a blanket jurisdiction to entertain all sort of actions in which drugs were involved. That would mean that for instance claims for destruction of drugs between individuals and/or companies or a claim for damages in respect of the wrong or negligent administration or dispensation of drugs by individuals against private Doctors, Clinics or Hospitals simply because drugs are involved

would come within the provisions of Section 57 (1) (n) of the Federal High Court Act and the Constitution.

I am not prepared to accept such a wild and unreasonable contention. The act of the Respondents which resulted in the complaint of the Appellant is that of selling or distributing the Viagra drug in Nigeria. The vital and relevant point in the claim is “the sale” of the product that happens to be the drug Viagra.

The claim being one based on tort, I agree with the learned counsel for the two Respondents that it does not fall within the jurisdiction of the court below. I for that reason find that that court lacks the jurisdiction to entertain the claim. In the result, I resolve this issue against the Appellant.

In the final result, though I have found that Appellant’s pleadings have disclosed a reasonable cause of action and that the Appellant has the locus to institute the action, the action of the Appellant does not fall within the jurisdiction of the court below. The action is accordingly struck out for want of jurisdiction on the part of that Court to entertain same.

Each party to bear costs of the appeal.

**M. L. GARBA,
JUSTICE, COURT OF APPEAL.**

Appearance:

O. Ogunkeye with E. C. Njoku for the Appellant.

Rasaq Okesiji and A. Laditan for the 1st Respondent.

P. O. O. Alabi (Mrs.) for the 3rd Respondent with K. P. Okelade.

2nd Respondent served on 28/2/06. Absent and not represented.

No brief was filed.

