IN THE SUPERIOR COURT OF JUDICATURE
IN THE SUPREME COURT OF GHANA
ACCRA – GHANA A.D. 2014

CORAM: ATUGUBA, JSC (PRESIDING)
ADINYIRA (MRS), JSC
YEBOAH, JSC
GBADEGBE, JSC
AKOTO-BAMFO,(MRS) JSC

CIVIL APPEAL
No. J4/3/2013

19TH MARCH, 2014

KOJACH LIMITED .... **PLAINTIFF/RESPONDENT/**
H/No. OTB 503 **APPELLANT**
FULLER ROAD, KUMASI

VRS

MULTICHOICE GHANA LTD .... **DEFENDANT/APPELLANT/**
ASOKWA-KUMASI **RESPONDENT**

J U D G M E N T

ANIN-YEBOAH JSC:

The facts of this interlocutory appeal fall within a narrow compass and appear to be uncontroverted.

The plaintiff/respondent/appellant herein (who shall be referred to in this appeal simply as the plaintiff) commenced an action at the High Court (Commercial Division), Kumasi against the defendant/appellant/respondent herein who (shall be referred to simply as the defendant).

The plaintiff a pharmaceutical company incorporated under the laws of Ghana alleged that it had exclusive right to manufacture, distribute and deal in the product called “Pro Cold” for cure of cold and sinuses. The plaintiff alleges that it had registered the product at the Food and Drugs Board to entitle it as the exclusive manufacturer and distributor. According to the plaintiff, a Nigeria firm known as Orange Drugs Limited attempted to invade the Ghanaian market with its brand of “Pro Cold” which was successfully resisted by the plaintiff. The Nigeria firm thereafter resorted to using the defendant’s electronic broadcasting on a gigantic scale by collusively airing and broadcasting advertisement on “Pro Cold” at prime times before, during and after English Premiership Leagues games which enjoy a truly wide coverage and audience.

According to the plaintiff the “Pro Cold” which is not made or manufactured by the plaintiff has found its way illegally into the Ghanaian market. This conduct of the defendant has resulted in huge financial loss to the plaintiff which runs into millions of United States Dollars. All efforts to stop the alleged illegal conduct of the defendant prove futile.

The plaintiff on 7/12/2010 issued a writ of summons together with a statement of claim and had the two processes served on the defendant. On the writ, the plaintiff claimed several declaratory reliefs inviting the High Court to declare that the broadcasting of the advertisement of Pro Cold on the airwaves of the respondent was illegal leading to consequential loss of income, and an Order of injunction to restrain the defendant and its agents, assigns and privies from further broadcasting the advert.

On 14/12/2010 the plaintiff filed a motion for interlocutory injunction against the defendant praying the trial court for an order “compelling the defendant, its agents, assigns, representatives, workmen and technicians as well as technical officers howsoever described to stop the broadcasting of the advertisement on “Pro Cold” pending the final determination of the case.

The plaintiff annexed several exhibits to bolster its case to convince the trial court that several demands made to the defendants to desist from broadcasting the advert had proved futile.

On the very day that the application for interlocutory injunction was filed, the defendant entered conditional appearance. It appears from the record that no application was subsequently filed to either set-aside the writ or the service thereof. However, the defendant filed an affidavit in answer to oppose the application for the interlocutory injunction, stoutly contending that it merely provides subscriber management services for MultiChoice Africa's DStv subscribers. For a more detailed record the pertinent depositions in the affidavit of the defendant is reproduced ad longum:

> 6. The defendant says that all that MultiChoice (Gh) Ltd. does is to provide subscriber management services for MultiChoice Africa's DStv subscribers, which entails subscription fee collection services, marketing and sales, technical and installation support and the operation of a national call centre – so it has no relationship whatsoever with either the Nigerian Company which manufactures the offending product neither is it in collusion with it to destroy plaintiff's business.
>
> 7. The defendant further maintain that it has no relationship with Supersport where the advert appears and thus cannot be held liable even if the said advert were offensive to the plaintiff.
>
> 8. The defendant further says in answer to the allegations raised by the plaintiff that it has no interest, commercial or otherwise, in any pharmaceutical product nor in its distribution and thus the prayer to this honourable court for an order "directing the defendant to take all necessary steps to withdraw the illicit product unleashed on the

Ghanaian market pending the hearing and final determination of the suit…" is not only misguided but also ill-advised."

The application was moved before the trial court on 21/01/2011 and same was granted in a detailed ruling delivered on 27/01/2011. The court granted the interlocutory injunction as prayed and made an order as follows:-

> "The defendant shall not re-transmit Supersport channel 203 via Multichocie Africa DStv service until the infringing advertisement on Pro Cold 4 Flu Tablet is blocked pending the final determination of this suit. The defendant shall file its statement of defence within 14 days from today".
>
> The defendant filed a statement of defence within its time ordered and proceeded to lodge an interlocutory appeal on 11/2/2011 at the Court of Appeal, Kumasi on several grounds to set aside the order granting the interlocutory injunction against it.
>
> The Court of Appeal allowed the appeal on 30/03/2012 and vacated the order of interlocutory injunction granted by the trial court. On the same day, the plaintiff lodged this appeal to this court praying this court to set aside the ruling of the Court of Appeal and restore the injunction granted by the trial Court."

The plaintiff has canvassed before us several grounds of appeal as follows:

a. The Honourable Court erred by interfering with the proper exercise of the trial court's discretion.
b. The Honourable court erred by making findings of fact on affidavit evidence.
c. The Honourable court erred by determining the issues for trial which is the province of the trial court in interlocutory appeal.
d. The judgment is against the weight of evidence.

The first ground of appeal which perhaps took the greater part of the appellant's statement of case, attacked the interference by the Court of Appeal in the exercise of discretion by the trial court. Learned counsel contended that since the grant or refusal of interlocutory injunction is discretionary the exercise of the discretion vested in the trial court ought not to be interfered with by the appellate court in the circumstances as it occurred in this case before us. He argued that since the learned trial judge fairly exercised her discretion it was not within the powers of the Court of Appeal in the exercise of its appellate jurisdiction to set aside the injunction granted by the trial judge. He therefore submitted that the Court of Appeal was in error in setting aside the interlocutory injunction granted by the learned trial judge. In support of the above proposition of law, learned counsel for the plaintiff indeed went to town as he cited virtually all the reported authorities on the exercise of judicial discretion by trial courts notably: AJETEY AGBOSU v E. N. KOTEY [2006] 2 MLRG III, OWUSU v OWUSU-ANSAH [2007-08] SCGLR 870 BLUNT v BLUNT [1943] AC 517, BALLMOOS v MENSAH [1984-86] 1 GLR 724 and others not worth repeating.

The Court of Appeal was indeed mindful of the interference of the discretion of the trial judge. The court was of the considered opinion that crucial issues which ought to have been resolved by the learned trial judge were on record ignored. This was how the Court of Appeal delivered itself per Korbieh JA as follows:

> "Part of the appellant's case in opposing the motion for the interim injunction was that it was not a proper party to the suit. There were two main reasons advanced by the appellant to support its stance that it was not a proper party to the suit. The first was that it has no commercial or any other interest in the drugs that was at the centre of the respondent's complaint and has never had anything to do with its importation into this country. The second was that it neither broadcasts nor retransmits and was therefore not the entity responsible for broadcasting the offending advertisement".

The Court of Appeal was of the opinion that the learned trial court in her judgment held that the defendant was a proper party to be sued but did so in error without giving adequate consideration to the defendant's case.

It must be pointed out that in virtually all interlocutory applications that come before our courts, evidence in support would be in the nature of affidavit evidence as required under Order 19 Rule 4 of the High Court (Civil Procedure) Rules 2004 CI 47. In the normal course of determining interlocutory applications the courts would rely on the affidavits filed together with exhibits, if any. However, if any of the parties to the application is of the opinion that certain vital issues appear unresolved, a party may with the leave of the court, orally apply to the court to cross-examine a deponent to the affidavit to assist the court in resolving the crucial issue, the determination of which may have a decisive effect on the determination of the application. This practice is supported by a passage from Atkin's Encyclopedia of Court Forms in Civil Proceedings page 37 of the second edition which states the practice succinctly as follows:

> "In the Queen's Bench Division an application for leave to cross-examine a deponent in interlocutory proceedings is made at the hearing of those proceedings. **For example, if on the hearing of an application for an interlocutory injunction, a party wished to cross-examine a deponent on his affidavit the application (in the absence of consent) would be made there and there to the judge.** If the judge make the order sought and the deponent was not present, the judge would adjourn the matter for him to attend; if the deponent was present the cross-examination would proceed at once".

A similar passage from Civil Procedure in Nigeria by Fedilis Nwadialo (second edition) at page 558 supports the above quotation from Atkin's book as follows:

> "The need for oral evidence does not arise frequently and when it does it is for cross-examination of a deponent to an affidavit. **Oral evidence is, however, imperative, when there is conflict on material facts as deposed to in an affidavit on the other hand, and in the counter affidavit, on the other hand.**

Without resolving such a conflict the court cannot make a finding on that material issue of fact. The only way to resolve the conflict is by the court taking oral evidence of the deponents and witnesses on the material issues of fact. The deponent to the affidavit and the deponent to the counter affidavit are each cross-examined by the respective opposite party. The court has a duty to receive oral evidence in the case of such conflict and no party need make any application for that purpose"

From the ruling of the learned Judge, it does appear that this crucial issue of total disclaimer on the part of the defendant was not adequately considered. The depositions in the affidavit in answer to the application stated supra, in this delivery was of vital importance to the defendant's case. As that stage of the proceedings the defendant had not filed its statement of defence, and the only process on record which the learned trial Judge was bound to consider on the part of the defendant was the affidavit filed by the defendant. The court was thus faced with a lack of certainty on a very crucial issue.

We are of the considered opinion that if Counsel for the plaintiff was doubting the crucial depositions in paragraphs 6, 7 and 8 of the defendants' affidavit he could have sought leave of the trial court to cross-examine the deponent. Even though this procedure is sparingly used, this case offered a classic example whereby Counsel ought to have sought the leave of the learned trial Judge to resolve the issue raised by the defendant in the affidavit filed by cross-examining the deponent.

This our position does not mean that the Plaintiff who sought the interlocutory injunction was to establish a prima facie case on the merits. In his invaluable book: A Practical Approach to Civil Procedure (16th edition), Professor Stuart Sime at page 455 in discussing the oft-quoted case of AMERICAN CYANMID CO. v ETHICON Ltd. [1975] AC 396 said as follows:-

"The court needs to be satisfied only that there is a serious question to be tried on the merits. The result is that the court is required to investigate the merits to a limited extent only. All that needs to be shown is that the claimants' cause of action has substance and reality."

Our esteemed sister, Adinyirah JSC in OWUSU v OWUSU-ANSAH supra offered enough guidance to trial courts in determining interlocutory applications at page 875 as follows:

"While agreeing that in an interlocutory application for an interim relief, the court ought to refrain from expressing an opinion on the merits of the case before the hearing, we are of the view that this does not absolve the trial court from considering the material before it in order to guide it to either grant or refuse the request before the court. The guiding principle in such applications is, whether an applicant has, by his pleadings and affidavit established a legal or equitable right, which has to be protected by maintaining the status quo until the final determination of the action on its merits."

If from the record there is no serious question to be tried on the substantive claim, the reliefs may be refused. See NATIONAL COMMERCIAL BANK JAMAICA LTD. v OLINT CORPORATION LTD [2009] 1 WLR 1405 and opinion expressed by Lord Hoffmann.

The learned justices of the Court of Appeal were of the opinion that the defence in the affidavit raised by the defendant was very formidable but was not adequately considered by the learned trial judge. The Court of Appeal in the exercise of its appellate jurisdiction proceeded to set aside the order of interlocutory injunction. This, has attracted severe criticisms from learned counsel for the appellant who has urged that what the Court Appeal did was erroneous exercise of appellate jurisdiction in matters dealing with discretionary powers of a trial court. It has never been the proposition of law that a discretion exercised by a trial court cannot be set

aside on appeal. We think that the proposition of law which this court has kept faith is the recent one expressed in OWUSU v OWUSU-ANSAH [2007-2008] SCGLR 870 where it was held as follows:

> "an appeal against the exercise of the court's discretion may succeed on the ground that the discretion was exercised on wrong or inadequate materials if it can be shown that the court cited under a misapprehension of fact in that it either gave weight to irrelevant or unproved matters or omitted to take relevant matters into account. In the instance case, the trial High Court acted on a misapprehension of the pleadings and affidavit evidence before it and thereby exercised its discretion wrongly in favour of the co-defendant-appellant"

This court has demonstrated remarkable consistency in applying the above principle of law which has its genesis from CRENSTIL v CRENSTIL [1962] IGLR 171 SC which relied on BLUNT v BLUNT [1948] AC 517, HL.

We are of the considered opinion that the Court of Appeal rightly interfered with the discretion exercised by the trial High Court as there is clear misapprehension of the facts on the part of the trial judge.

Another ground which was argued related to the Court of Appeal's delivery on the giving of undertakings by trial court's in interlocutory injunction applications. We think that the refusal of the trial court to make an order for undertaking should not have been a ground for setting aside the interlocutory injunction granted by the trial judge. The order for undertaking is usually a consequential order granted by trial courts upon grant of interlocutory injunctions. We do not consider this error on the part of the Court of Appeal to be a ground to set aside a well written ruling which took all the circumstances of the case into consideration. The other grounds of appeal argued are indeed of minor consequences.

On the whole we find that the appeal has no merits and we accordingly proceed to dismiss same.

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(SGD) ANIN YEBOAH
JUSTICE OF THE SUPREME COURT

(SGD) W. A. ATUGUBA
JUSTICE OF THE SUPREME COURT

(SGD) S. O. A. ADINYIRA (MRS)
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