

**IN THE SUPREME COURT OF NIGERIA
HOLDEN AT ABUJA
ON FRIDAY THE 13TH of JULY 2018
BEFORE THEIR LORDSHIPS**

**IBRAHIM TANKO MUHAMMAD
OLUKAYODE ARIWOOLA
AMINA ADAMU AUGIE
EJEMBI EKO
SIDI DAUDA BAGE**

**JUSTICE, SUPREME COURT
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SC.336/2008

BETWEEN:

1. ADEOKIN RECORDS
2. ALHAJI SAKA ALAGBADA

}

APPELLANTS

AND

MUSICAL COPYRIGHT SOCIETY OF NIGERIA
(LTD/GTE)

}

RESPONDENT

JUDGMENT

(Delivered by **EJEMBI EKO**, JSC)

ISSUE:

Whether the respondent, the undisputed owner, assignee and exclusive licensee of the copyright in the work "Ojumo Re" originally written, composed, arranged, performed, and/or recorded by one Alhaji Fatai Olowonyo and contained in the album "Don't Touch Me" can institute an action against the appellants for alleged infringement of the copyright.

FACTS:

On 29th February 1996, the respondent commenced an action for alleged infringement of copyright in a musical work against the appellants at the Federal High Court. The respondent averred that it is the owner, assignee and exclusive licensee of the copyright, including reproduction (mechanical) and public performance rights and also adaptation rights in the work "Ojumo Re" originally written, composed, arranged, performed and/or recorded by one Alhaji Fatai Olowonyo and contained in the album titled: "Don't Touch Me."

The respondent further averred that the appellants arranged with a band of music performers led by one Shefiu Alao Adekunle to adapt, record, and reproduce the musical work and put same on sale on tapes, record disc, and video film with the soundtrack containing the infringed work without the respondent's permission and/or license. The respondent also averred that the appellants agreed to pay a concessionary compensation of N25, 000 not later than 26th May 1995 for their infringement of the copyright and to obtain a formal license but reneged on the agreement.

Before filing its statement of defense, the appellants filed a demurrer, and sought an order striking out the suit on the ground that the respondent lacked locus standi to institute the action. However, in their supporting affidavit, the appellants restated the respondent's averment of the capacity in which it filed the suit.

The appellants argued that until the respondent, a corporate body, was licensed as a collecting society by the Copyright Council under section 32(B) of the Copyright Act 1988, as amended by the Copyright (Amendment) Act 1992, it

lacked locus standi to institute the action. In response, the respondent argued that it did not sue as a collecting society but as an owner, assignee and exclusive licensee of the work it alleged was infringed on.

In its ruling delivered on 9th July 1997, the trial court considered the certificate of incorporation of the respondent and the deed of assignment between the respondent (as the assignee) and the assignor. It upheld the appellants' argument, and held that it lacked jurisdiction to hear the suit. So it struck out the respondent's suit.

The respondent appealed to the Court of Appeal, which held that the respondent did not sue as a collecting society but as an owner, assignee and exclusive licensee. The Court of Appeal held that by virtue of sections 9, 10, 15 and 39 of the Copyright Act, 1988 (as amended), the respondent who sued as the owner, assignee or exclusive licensee of a copyright had locus standi under the Act to institute the action. Further, it held that the Copyright Act (Amendment) Act 1999 which amended section 15 of the Copyright Act 1988 did not expressly repeal any part of the original section 15 in respect of the right of action vested in owners, assignees, and exclusive licensees of copyright; or take away any right of action vested by the original section 15 of the Act.

Consequently, the Court of Appeal allowed the appeal, set aside the ruling of the trial court, and remitted the suit to the Federal High Court for trial by another Judge.

Dissatisfied in turn, the appellants appealed to the Supreme Court. They argued that the Court of Appeal, while construing the provision of section 15A of the Copyright Act 1988 as amended by the Copyright (Amendment) Act 1999, removed a clause therefrom, and thereby rendered its judgment defective and a nullity.

Held (Unanimously dismissing the appeal):

1. On who can sue for infringement of copyright -

Sections 9, 10, 15 and 39 of the Copyright Act 1988, which was in force on 29th February 1996, clearly vested litigable rights in the owners, assignees, and exclusive licensees of copyrights. In this case, the Court of Appeal rightly found that such litigable rights under the Act are not exclusively reserved for a collecting society. (P.567, Para. A)

2. On Whether fact admitted needs further proof -

An admitted fact needs no further proof. In this case, the appellants' restatement of the respondent's averred capacity is an express admission of the capacity the respondent claimed it stood in the action it commenced against the appellants at the trial court. It is the best evidence establishing the respondent's averred capacity as the owner/assignee and exclusive licensee of the copyright including reproduction and public performance rights and also adaptation rights in the work "Ojumo Re" originally written, composed, arranged, performed and/or recorded by Alhaji Fatai Olowonyo and contained in the album "Don't Touch Me". In the circumstance, the respondent was relieved of the burden of proving under sections 125 and 131 of the Evidence Act, 2011, that it commenced the action in that capacity. **OKPARAEKE V. EGBUONU (1941) 7 WACA 53; DIN V. AFRICAN NEWSPAPERS LTD (1990) 3 NWLR (PT.137) 392 AT 408; AGBANELO V. U.B.N. LTD. (2000) 7NWLR (PT.666) 534.**

3. On When finding of fact by court is perverse -

A finding of fact that is contrary to admitted, clear and unambiguous averment is perverse. In this case, the respondent pleaded and the appellants admitted that the respondent commenced its suit as the owner/assignee and exclusive licensee of the copyright of the alleged infringed work "Ojumo Re" contained in the album "Don't Touch Me". It was therefore perverse for the trial court to find, as it did, that the respondent commenced the suit as a "collecting society". (Pp.563-564, paras. G-B)

4. On Nature and determinant of locus standi -

Locus standi is a matter of law. It connotes the capacity the plaintiff has to commence an action or suit. It is the personal interest, legal or equitable, the

plaintiff has in the subject matter of the suit, which he alleges has been or is likely to be infringed. The main test or determinant of locus standi is whether the plaintiff, from the pleadings, has disclosed sufficient interest in the subject matter of his suit. Once he discloses, in the pleadings, his sufficient interest in the subject matter of the suit, he is by law, entitled to sue. **ATOYEBI V. GOV., OYO STATE (1994) 5 NWLR (PT.344) 290 AT 310; THOMAS V. OLUFOSOYE (1981) 3 NWLR (PT.13) 523 (SC); ADESANYA V. PRESIDENT (1981) 1 S.C.N.L.R 12; QUO V. VADIS HOTEL & RESTAURANT LTD. V. COMMISSIONER OF LANDS (1973) 6 SC 71 AT 82; AMADI V. ESSIEN (1994) 7 NWLR (PT.354) 94 (C.A).**

5. On Determination of issue of locus standi -

In order to ascertain whether a plaintiff has locus standi, a trial court has only to satisfy itself that the statement of claim discloses or does not disclose that a cause of action vested in the plaintiff. And in deciding the issue, the trial court looks only into the statement of claim. In this case, the trial court erred when it considered the certificate of incorporation of the respondent and the deed of assignment between the respondent (as the assignee) and the assignor in determining whether or not the respondent has locus standi or disclosed its locus standi to institute its suit. [Adefulu v. Oyesile (1989) 5NWLR (Pt.122) 377; Adesokan v. Adegorolu (1997) 3 NWLR (Pt.493) 261 referred to.] (Pp.565, paras. A-E; 566, paras. A-B)

6. On Determination of issue of locus standi -

When a court is deciding whether a plaintiff has locus standi or not, it is not necessary for the court to consider whether the plaintiff has a genuine case on the merits. In other words, the determination of the question whether a plaintiff has or has not disclosed his locus standi to institute his suit is quite distinct from the merits of the case. **Owodunni v. Regd. Trustees, C.C.C. (2000)10 NWLR (Pt.675) 315 referred to.] (P. 566, paras. B-C).**

7. On Duty on court interpreting court process -

When interpreting court processes, the duty of the court is simply to interpret the words used. [**KOTOYE V. SARAHI (1994) 7NWLR (PT.357) 414 REFERRED TO.] (P. 566, PARAS. C-D)**

8. On Duty on court interpreting statute -

When a court is called upon to interpret a statute, it is not permitted to do so by either putting a gloss on the provisions or by removing words therefrom. The court, not being a lawmaker, can neither add to nor deduct from the provisions of the statute. Put differently, a court acts ultra vires when in its interpretative function, it arrogates to itself the function of making a new statute, by adding to and/or deleting from the existing provisions of the statute, words not intended by the lawmaker. [**OLATUNJI V. F.R.N. (2003) 3 NWLR (PT.807)406; TANAREWA (NIG.) LTD. V. PLASTIFARM LTD. (2003) 14 NWLR (PT.840) 355 REFERRED TO.] (P. 564, PARAS. F-G)**

9. On whether court will interpret statute to give it retrospective effect or to deprive a party of accrued right -

Courts lean against interpreting a statute as to deprive a party of an accrued right. Further, retrospective operation is not given to a statute as to impair an existing right or obligation. In this case, the trial court's decision, which is the subject of the appellants' appeal, was delivered on 9th July 1997. The Copyright (Amendment) Act, 1999 which introduced section15A was promulgated as Decree No. 42 of 1999 with effect from 10th May 1999 - two years after the trial court's decision was delivered. There is no provision in Decree No. 42 of 1999 from where it could be deduced that the new provisions in section15A were intended to have retrospective effect. [**AFOLABI V. GOV. OYO STATE (1985) 2 NWLR (PT.9) 734; ADESANOYE V. ADEWOLE (2006) 14 NWLR (PT.1000) 242 REFERRED TO.] (P. 567, PARAS. A-E)**

10. On Effect of commencement date in statute -

Where a statute has a commencement date, the presumption that the statute has retrospective effect is displaced. In this case, the Copyright (Amendment) Act, 1999, which was promulgated as Decree No. 42 of 1999, had a commencement

date. **[OJOKOLOBO V. ALAMU (1987) 3 NWLR (PT.61) 377 REFERRED TO.] (P.567, PARAS. C-D)**

11. On Need for party to be consistent with case at trial and appellate courts -

A party must be consistent in the presentation of his case at the trial and appellate courts. His posture at trial must not be at variance with his posture at the appeal court on the same issue. In this case, the appellants did not base their objection at the trial court on section 15A of the Copyright Act, 1988(as amended), which as they argued on appeal, took away the respondent's right to maintain its action. Accordingly, section15A enacted into the Copyright Act by dint of the Copyright (Amendment) Act No. 42 of 1999 was not considered by the trial court, and it could not have been considered because it came two years after the decision of the trial court that gave rise to the appellants' appeal. **[SHEKA V. BASHARI (2013) LPELR2140; SUBREU V. STATE (2010) 8 NWLR (PT.1197) 586; EBLACONST. LTD. V. COSTAIN (W.A.) PLC (2011) 6 NWLR (PT.1242) 110REFERRED TO.] (P. 566, PARAS. E-G; 567, PARAS. E-F; 568, PARA. B)**

12. On Nature of appeal -

An appeal is a continuation of the original suit; it is not a new suit. Further, the parties are confined to their case as pleaded in the court of first instance. So parties to an appeal cannot make a new and different case from that argued at the trial court without express leave of court. **[ADEGOKE MOTORS LTD. V. ADESANYA (1989) 3 NWLR (PT.109) 250 REFERRED TO.] (P. 567, PARAS. G-H)**

13. On Application of principle of audi alteram partem -

The principle of audi alteram partem is an integral principle of fair hearing both at common law and in section 36(1) of the Constitution of the Federal Republic of Nigeria 1999. (Pp.567-568, paras. H-A)

14. On Aim of pleadings -

The aim of pleadings is to give notice of the case to be met so that the other party can adequately prepare for it and join issues. It prevents trial by ambush and saves either party the embarrassment of being taken by surprise. **[GEORGE V.**

FLOUR MILLS LTD. (1963) 1 SCNLR 117; EMEGOKWE V. OKADIGBO (1973)4 SC 113; BUNGE V. GOV., RIVERS STATE (2006) 12 NWLR (PT.995)573 REFERRED TO.] (P. 568, PARA. A)

15. On Duty of appellant seeking restoration of trial court's decision by Supreme Court -

The dual duty of an appellant at the Supreme Court who seeks the restoration of the trial court's decision is to defend that decision and to show in what respect the Court of Appeal erred in setting aside the decision. In that regard, the appellant must of necessity be confined to the ratio decidendi of the decision of the Court of Appeal that set aside the decision delivered in his favour at the trial court. (P.568, paras. B-C)

16. On Scope of duty on counsel to treat opposing counsel with respect -

A counsel's use of words that is demeaning and abusive of the opposing counsel offends Rule 26(1) of the Rules of Professional Conduct for Legal Practitioners, 2007. The Rule enjoins a counsel to treat the opposing counsel with respect, fairness, consideration and dignity. It also enjoins a counsel not to allow the ill-feeling between their respective clients to influence his conduct and demeanor towards the opposing counsel. In this case, the appellants' counsel breached Rule 26(1) of the Rules of Professional Conduct for Legal Practitioners, 2007 when he stated in particular of ground1 of the appellants' grounds of appeal that the respondent's counsel fraudulently or negligently misrepresented section15A of the Copyright Act 1988 (as amended in 1999) and thereby misled the Court of Appeal to arrive at its decision.

17. On Scope of counsel's right to criticize judgment appealed against -

As an officer in the temple of justice, an appellant's counsel can decently attack or criticize the decision of the court he is appealing, but he cannot abuse his office, as an officer of the court with some judicial immunity against the libel, to descend low to attack the opposing counsel with emotionally charged indecent and vituperative personal insults.

Nigerian Cases Referred to in the Judgment:

Adefulu v. Oyesile (1989) 5 NWLR (Pt. 122) 377

Adegoke Motors Ltd. v. Adesanya (1989) 3 NWLR (Pt. 109) 250

Adesanoye v. Adewole (2006) 14 NWLR (Pt. 1000) 242

Adesanya v. President, FRN (1981) 1 NCLR 236

Adesokan v. Adegorolu (1997) 3 NWLR (Pt. 493) 261

Afolabi v. Gov., Oyo State (1985) 2 NWLR (Pt. 9) 734

Agbanelo v. Union Bank of Nigeria Ltd. (2000) 7 NWLR (Pt. 666) 534

Amadi v. Essien (1994) 7 NWLR (Pt. 354) 91

Atoyebi v. Gov., Oyo State (1994) 5 NWLR (Pt.344) 290

Bunge v. Gov., Rivers State (2006) 12 NWLR (Pt. 995) 573

Din v. African Newspapers Ltd. (1990) 3 NWLR (Pt. 139) 392

Ebla Construction Ltd. v. Costain (W.A.) Plc (2011) 6 NWLR (Pt. 1242)110

Emegokwue v. Okadigbo (1973) 4 SC 113

George v. Dominion Flour Mills Ltd. (1963) 1 SCNLR 117

Kotoye v. Saraki (1994) 7 NWLR (Pt. 357) 414

Ojokolobo v. Alamu (1987) 3 NWLR (Pt. 61) 377

Okparaeke v. Egbuonu (1941).7 WACA 53

Olatunji v. F.R.N. (2003) 3 NWLR (Pt. 807) 406

Owodunni v. Registered Trustees of C.C.C. (2000) 10 NWLR (Pt. 675) 315

Quo v. Vadis Hotel & Restaurants Ltd. v. Commissioner of Lands, Mid-Western State (1973) 6 SC 71

Sheka v. Bashari (2013) LPELR – 2140 (CA)

Subreu v. State (2010) 8 NWLR (Pt. 1197) 586

Tanarewa (Nig.) Ltd. v. Plastifarm Ltd. (2003) 14 NWLR (Pt. 840) 355

Thomas v. Olufosoye (1985) 3 NWLR (Pt. 13) 523

Nigerian Statutes Referred to in the Judgment:

Constitution of the Federal Republic of Nigeria, Ss. 33(1), 36(1)

Copyright (Amendment) Act, 1992, Ss. 9, 10, 15(A), 32(B) (2)(d), 115A

Copyright Act, 1999, S. 15A

Court of Appeal Act, S. 15(a)

Evidence Act, 2011, Ss. 125, 131

Rules of Professional Conduct for Legal Practitioners Rules, S. 26(1)

EKO, J.S.C. (Delivering the Leading Judgment): The respondent was the plaintiff at the trial Federal High Court, holden at Lagos (Coram: Ukeje, J. as he then was). As plaintiff, the respondent averred in paragraphs 2, 3, 4, 5, 6, 7, 8, 9, 11, 12 & 14 of the statement of the claim the capacity it took out the suit against the appellant, as the defendant, thus:

2.The plaintiff is the owner, assignee and exclusive licensee of the performing, reproduction, and other rights in (the) musical works contained in repertoire within the territory of Nigeria.

4.The plaintiff is the owner, assignee, and exclusive licensee of the copyright, including reproduction (mechanical) and public performance rights and also adaptation rights in the work “OJUMO RE” originally written, composed,

arranged, performed and/or recorded by Alhaji Fatai Olowonyo and contained in the album "DON'T TOUCH ME."

Particulars of Subsistence

5. The said work is an original musical work and contained in the album "DON'T TOUCH ME."

6. The said work was composed and written by Fatai Olowonyo who is a member, assignor, and exclusive licensor, of (the) plaintiff in this work and a Nigerian Citizen/domicile when the work was made and/or first published in Nigeria.

Particulars of Ownership

7. The said work was created by the said Olowonyo.

8. By assignment in writing dated the 9th day of November 1994 the copyright in the said work was assigned to the plaintiff together with all accrued (right) of action in respect thereof.

The respondent, as the plaintiff, continued in paragraphs 19 and 20 of the statement of claim -

9. The plaintiff further avers that the defendant, without the permission and/or license of the plaintiff, arranged with a band of music performers led by one Shefiu Alao Adekunle and recorded, adapted, and reproduced the plaintiff's musical works and put same on sale on tapes, record disc and video film with the soundtrack containing the infringed work.

11. The plaintiff avers that the musical work in the said "OJUMORE" adapted, reproduced, and infringed by the defendant is contained in "OJUMO REE NI" in the opening track of A-Side of the album.

12. The plaintiff avers that the defendant further caused the infringing copies of the works to be offer (sic) for sale through agents, marketers and distributors to

the public as well as facilitate the public performance and broadcast of the aforesaid infringed works via advertisements and promotions of the album.

14.The plaintiff avers that it has not granted any license or permission to the defendant to record, reproduce, distribute, and sell the plaintiff's musical work in the said album under its (defendant's) label/name or the payment of royalties or any other fee or negotiation on the recording and sales of copies of same.

In paragraphs 18, 19 and 20 of the statement of claim, it is further averred that on the same footing the respondent and the appellant (through its General Manager) entered into a negotiation for compensation payable to the" respondent; that upon the appellant's "pleas and admission of liability, was compelled - to pay a concessionary compensation of N25,000.00 not later than 26th May, 1995 and to obtain a formal license thereat," and that the appellant reneged on the agreed concessionary compensation even after extension of the 14-day ultimatum.

Before filing its statement of defense to join issues on the respondent's averment, the appellant by way of demurrer, filed on 21st November, 1996, a motion on notice seeking:-

"An order striking out this suit on the ground that the plaintiff lacks the requisite locus standi to institute this action".

In the supporting affidavit the appellant reiterated, in paragraph 2 thereof, the point:

2.That the plaintiff commenced this action against the defendant as the owner/assignee and exclusive licensee of the copyright including reproduction and public performance rights and also adaptation rights in the work "OJUMORE" originally written, composed, arranged, performed and/or recorded by Alhaji Fatai Olowonyo and contained in the album "DON'T TOUCH ME."

This, no doubt, is an admission expressly of the capacity the respondent, as the plaintiff, claimed it stood on in the action it commenced against the appellant at the trial court. It is trite that facts admitted, needing no further proof, are taken

as established. This admitted fact therefore stands as the best evidence establishing the fact that the respondent, as the plaintiff, “commenced this action against defendant as the owner/assignee and exclusive licensee of the copyright including reproduction and public performance rights and also adaptation rights in the work **“OJUMO RE”** originally written, composed, arranged, performed and/or recorded by Alhaji Fatai Olowonyo and contained in the album **“DON’T TOUCH ME”**. **OKPARAEKE V. EGBUONU (1941).7 W.A.C.A. 53; DIN V. AFRICAN NEWSPAPERS LTD (1990) 3 NWLR (PT. 137) 392 AT 408.** The respondent, as the plaintiff, had thus been relieved of the burden of proving, by virtue of sections 125 and 131 of the Evidence Act, 2011, that it commenced the suit against the appellant, as the defendant, as a party vested with the right “as owner; assignee and exclusive licensee of Alhaji Fatai Olowonyo’s copyright in the musical work under the title **“OJUMO RE”** : **AGBANELO V. UNION BANK OF NIGERIA LTD(2000) 7 NWLR (PT. 666) 534.**

In order to sustain its preliminary objection, on the grounds that the respondent as the plaintiff lacked the requisite locus standi to institute the action, the appellant, as the defendant, argued, and the learned trial Judge agreed with him, that until the respondent (the plaintiff) a corporate body, was licensed as a collecting society by the Copyright Council pursuant to section 32 B of the Copyright Act, as amended by Copyright (Amendment) Act 1992, it lacked the locus standi to institute this suit. Holding further that when the plaintiff lacks the locus standi to institute and maintain an action, the court lacks jurisdiction to entertain the action, the learned trial Judge then struck out the suit of the respondent. The respondent, positing that it did not sue as a collecting society, but as owner, assignee and exclusive licensee, appealed to the Court of Appeal, Lagos Division (hereafter called the lower court). The lower court (Coram: Galadima, Aderemi & Jega, JCA, as they were then) allowed the appeal and set aside the decision of Ukeje, J (as he then was) that the respondent not being a collecting society lacked locus standi to institute the action. The lower court, per Galadima, JCA (as he then was), found that the respondent, the plaintiff, did not sue as a collecting society and held inter alia that by virtue of section 9, 10 and 39 of the Copyright Act, as amended, together with section 15 of the same Act, the

plaintiff suing as the owner, assignee or exclusive licensee of a copyright has locus standi under the Act to institute an action, as the respondent in the instant action did. His Lordship further added that the instant respondent, as the plaintiff -

“As the owner, assignee, and exclusive licensee of the copyright in the allegedly infringed work has legal right and indeed locus standi statutorily recognized which ought to be protected and adjudicated upon by the lower court. Where a statute confers on the plaintiff the right to sue, a court of law has not the jurisdiction to deny him the standing to sue”.

This further appeal is against the judgment of the lower court delivered on 27th September, 2004. The appeal was brought on three grounds of appeal. The appellant formulated two issues from grounds 1 and 2 in the notice of appeal. It thus has abandoned ground 3, which is hereby struck out.

Grounds 1 & 2 from which the appellant formulated the two issues for the determination of this appeal are couched as, follows

1. The learned Justices of the Court of Appeal, Lagos erred in law when (they) held that the 1999 Copyright Amendment does not apply to the appeal.

Particulars

- a. **The Court of Appeal in arriving at its decision omitted a very important part of section 15A of the Copyright Act, 1998 as amended.**
- b. **The section provides: notwithstanding the provisions of this Act or any other law, no action for the infringement of copyright under this Act shall be commenced or maintained by any person.**
- c. **The words ‘or maintained’ was (sic) not taking (sic) into account by the learned Justices of the Court of Appeal in arriving at its decision.**
- d. **The learned respondent/appellant’s counsel either fraudulently or negligently misrepresented section 15A to the Court of Appeal thereby making the learned Justicesd.to arrive at the decision.**

2. The learned Justices of the Court of Appeal, Lagos erred in law in allowing the appeal and stating that the appellant has locus standi to institute and maintain the action against the respondent.

I pause a while to comment on the foul language of the learned appellant's counsel, Prof. Bankole Sodipo, in the manner he framed or caused to be framed particular of the error of law complained of in ground 1 of the grounds of appeal. Such language, demeaning and abusive of the opposing counsel is certainly abhorred by and offensive of Rule 26(1) of the Rules of Professional Conduct for Legal Practitioners, 2007. The said Rule 26(1) enjoins the learned appellant's counsel to treat the respondent's counsel with respect, fairness, consideration and dignity. It also enjoins him not to allow the ill-feeling between their respective, clients to influence his conduct and demeanor towards the opposing counsel. Having thus observed, I hereby discountenance the rather unwarranted outburst, suggesting that the learned respondent's counsel had "fraudulently or negligently misrepresented section 15A" (of the Copyright Act, as amended) and thereby misled the learned Justices of the lower court to arrive at the decision appealed. As an officer in the hallowed temple of justice it behoves the learned appellant's counsel to decently attack or criticize the decision of the court he is appealing, but not to abuse his office, as an officer of the court with some judicial immunity against the libel, to descend low on the opposing counsel with emotionally charged, indecent and vituperative personal insults.

The simple question is: whether the respondent/plaintiff, an undisputed "owner, assignee and exclusive licensee of the copyright in the work "OJUMORE" originally written, composed, arranged, performed and/or recorded by Alhaji Fatai Olowonyo and contained in the album "DON'T TOUCH ME" can constitute and institute action against the appellant for alleged infringement of the said copyright? It is also alleged in the statement of claim, particularly paragraphs 19 and 20 thereof, that the appellant had admitted its liability and agreed with the respondent "to pay a concessionary compensation" for the infringement of the copyright in the work "OJUMO RE", which undertaking he reneged on. At least on this admission of liability and the reneging on the undertaking to pay concessionary compensation, the respondent had vested in it a cause of action for

breach of contract. Clearly, on this admission the respondent, as the plaintiff, had the locus standi to institute an action.

The learned trial Judge, correctly in my view, had stated locus standi is a matter of law. This court stated so in **ATOYEBI V. GOVERNOR OF OYO STATE (1994) 5 NWLR (PT.344) 290 AT 310**. I also agree with the learned trial Judge, on the authority of **THOMAS V. OLUFOSOYE (1985) 3 NWLR (PT. 13) 523 (S.C.); ADESANYA V. THE PRESIDENT (1981) 1 NCLR 236; QUO V. VADIS HOTEL & RESTAURANT LTD V. COMMISSIONER OF LANDS, MID-WESTERN STATE (1973) 6 SC 71 AT 82; AMADI V. ESSIEN (1994) 7 NWLR (Pt. 354) 91 (C.A.)** that locus standi connoting the capacity the plaintiff has to commence an action or suit, is the personal interest, legal or equitable, the plaintiff has in the subject matter of the suit which he alleges has been or is likely to be infringed. The main test or determinant of locus standi is whether the plaintiff, from the pleadings, has disclosed sufficient interest in the subject matter of his suit? Once he disclosed, in the pleadings, his sufficient interest in the subject matter of the suit then he is, by law, entitled to sue. The turning point in the decision of the trial court is where the learned trial Judge stated that she had “found that the plaintiff has not been approved as a collecting society (by the) Copyright Council as required by section 32B (2) (d) of the Copyright Act, as amended.” She had earlier stated that “for all intents and purposes” the plaintiff (the respondent herein) was suing “in the capacity of a” collecting society “in respect of divers copyrights conferred upon it in the works of one of its members”. This finding of fact, from the clear and unambiguous averments contained in paragraphs 2, 4 - 14 of the statement of claim is perverse and unwarranted. I had earlier reproduced paragraph 2 of the appellant’s own affidavit in support of the motion filed on 21st November, 1996, the ruling in respect of which is the subject of this appeal. The appellant clearly in no ambiguous terms, admitted therein that the respondent commenced this action against the defendant as the owner/assignee and exclusive licensee of the copyright” of the allegedly infringed work OJUMO RE contained in the album “DON’T TOUCH ME.” It is therefore perverse for the learned trial Judge to find, as she did, as a fact that the plaintiff (the respondent herein) had commenced this suit, for all intents and purposes, as a “collecting society.”

The lower court upon its community reading of sections 9, 10, 15, 32B and 39 of the Copyright Act, as amended, came to the conclusion that section 32B of the act is inapplicable to the present case, the cause of action in the suit having arisen before the 1999 amendment and that the amending statute of 1999 did not expressly provide that it would have retrospective effect. And further that the 1999 amendment did not expressly repeal “any parts of section 15 or in its entirety with regards to the right of action vested on owners, assignees and exclusive licensees of copyright by section 15A or the Amendment Act of 1999,” and that “the right of action vested under section 15A (by date of the 1999 amendment) does not take away the right of action vested, under section 15 of the Act”.

The appellant’s complaint under its issue 1, distilled from ground 1 of the grounds of appeal is that the lower court, while construing section 15A of the Act had removed “a clause from the statute” and therefore the judgment is defective and a nullity. The learned counsel, in formulating the said ground 1, had insisted that section 15A of the Copyright Act, 1988, as amended, provides:

“Notwithstanding the provisions of this Act or any other law, no action for infringement of copyright or any right under this Act shall be commenced or maintained by any person -

- a. Carrying on the business of negotiating and granting license.**
- b. collecting and distributing royalties in respect of copyright works or representing more than 50 owners of copyright in any category of works protected by this (Act), unless it is approved under section 32B of this (Act) to operate as a collecting society or is otherwise issued with a certificate of exemption by the commission.**

I agree with the learned appellant’s counsel, on the authority of **OLATUNJIV. F.R.N. (2003) 3 NWLR (PT. 807) 406; TANAREWA (NIG) LTD V. PLASTIFARM LTD (2003) 14 NWLR (Pt. 840) 355**, that the court, when called upon to interpret a statute is not permitted to do so by either putting a gloss on the provisions or removing words there from. The court, not being a lawmaker, can neither add to nor deduct from the provisions of the statute. The court will be acting ultra vires

when in its interpretative function, it arrogates to itself the function of making a new statute, by the addition of and/or deleting from the existing provisions of the statute, words not intended by the lawmaker.

Having thus agreed with the appellant, I ask: has the instant respondent, as the plaintiff, brought this action or suit in any capacity that it seeks to enforce or exercise its right either as a person carrying on business of negotiating or granting license; or collecting and distributing royalties in respect of copyright works or representing more than 50 owners of copyright etc. The learned appellant's counsel, apparently confused about the purport of section 15A (now S. 17) of the Copyright Act, as amended, has no doubt misconceived the true intent of the legislator for the provision of section 15A. The appellant, having admitted that the respondent had brought the suit against it in its capacity or standing as a person vested with right "as owner, assignee and exclusive licensee" of the musical work of Alhaji Fatai Olowonyo under the title "OJUMO RE" contained in the album "DON'T TOUCH ME," I hold firmly in my view, that the locus standi of the respondent as the plaintiff shall be adjudged in that undisputed capacity or standing. This much is affirmed by the learned trial Judge at page 85 of the record, in the ruling the subject of this appeal; that is: that the plaintiff (respondent herein) commenced this suit in its capacity as the "owner/assignee and exclusive licensee of the copyright in the musical work "OJUMO RE".

In the instant case before coming to the decision that the respondent, as the plaintiff, had no locus standi to institute the instant suit, the learned trial Judge went on an unnecessary and in fact undesirable excursion to exhibits A and B, respectively the certificate of incorporation of the respondent and the deed of assignment between the respondent (as the assignee) and the assignor. It is this exercise of resorting to extraneous matters in order to resolve the question whether the respondent had disclosed its locus standi that resulted in the learned trial Judge holding that she had "no doubt that the plaintiff is a collecting society" and that from exhibits A and B there is a manifest intent on the part of the plaintiff to operate as a collecting society. It is only from this excursion to matters, quite extraneous to the preliminary objection of the appellant, that the learned Judge came ultimately to the conclusion, at page 92 of the record:

“That the plaintiff herein, having not complied with the entire provisions of section 32B (2), particularly S. 32B (d), and consequently, not having been approved as a collecting society by the Copyright Council in terms of S. 32B notwithstanding the plaintiff’s partial compliance with S. 32B and S. 32B (a), and of the Copyright Act, as amended, the plaintiff lacks the locus standi to institute this suit.”

(Underlining supplied for emphasis)

This view contradicts and completely undermines the earlier finding by the learned trial Judge, at page 85 of the record that -

“There is no dispute between the parties - that the plaintiff commenced this suit in its capacity as the “owner/assignee and exclusive licensee of the copyright in the musical work “OJUMORE.”

This finding prompted her correct statement; to wit:

“Now, by section 15(1) of the Copyright Act, it is provided that “infringement of copyright shall be actionable at the suit of the owner, assignee or an exclusive licensee of the copyright, as the case may be.”

The learned trial Judge, no doubt, erred in resorting to exhibits A and B in order to decide whether or not the respondent, as the plaintiff, had locus standi, or disclosed its locus standi, to institute the instant suit. A trial Judge, in order to ascertain whether the plaintiff in the action has locus standi, has only to satisfy himself that the statement of claim does or does not disclose that a cause of action vests in him. In deciding the issue, the trial Judge looks only into the statement of claim: **ADEFULU V. OYESILE (1989) 5 NWLR (Pt. 122) 377 at 418; ADESOKAN V. ADEGOROLU (1997) 3 S.C.N.J 1 AT 15.** Let me add, as it decided in **OWODUNNI V. REGISTERED TRUSTEES OF C.C.C. (2000)10 NWLR (Pt. 675) 315 at 338 and 357,** that at this stage it is not necessary for the trial Judge to consider whether there is a genuine case on the merits. The determination of the question whether the plaintiff has, or has not disclosed his locus standi to institute his suit is quite distinct from the merits of the case.

The issue in this case turns squarely on how the trial court construed the plaintiff's statement of claim in deciding whether or not the plaintiff has, or has not, disclosed its locus standi to institute the suit. The same cannon or principle of interpretation the learned appellant's counsel has invoked for interpretation of provisions also applies mutatis mutandis to interpretation of court processes. It is simply, as Kutigi JSC (as he then was) stated in **KUTOYE V. SARAKI (1994) 7 N.W.L.R (PT. 357) 414** the duty of the court is simply to interpret the words used. The court's duty to travel on a voyage of discovery, even if the words in the provisions of a statute or court's process are ambiguous is strictly limited.

This takes one to the counsel's duty to be consistent in his advocacy. It is not permitted for counsel "to chop and change his case from stage to another in the litigation progress" as Abiru, JCA puts it in **ALHAJI IBRAHIM SHEKA V. ALHAJI UMARU BASHARI (2013) L.P.E.L.R.- 2140 (C.A)**. At the trial court this same appellant, represented by the same counsel, admitted in the affidavit in support of the motion, the ruling, which is the subject of this appeal, that the plaintiff commenced this action against the defendant as the owner/assignee and exclusive licensee of the copyright in the work "OJUMO RE" allegedly infringed. Through Prof. Sodipo of counsel, the appellant now shifts the goal posts on the issue to the plaintiff lacking locus standi because it is not a collecting society, by dint of section 32B of the Copyright Act, as amended. Counsel, must state the same thing and speak on the same thing from the trial court to the appellate courts. His posture at trial must not be at variance with the posture at the appeal court on the same issue. He must be consistent on the presentation of a case: **SUBREU V. THE STATE (2010) 8 NWLR (PT. 1197) 586; EBIA CONSTRUCTION LTD V. COSTAIN (W.A) PLC. (2011) 6 NWLR (PT. 1242) 110.**

The findings of the lower court that nowhere in the plaintiff's (now respondent's) pleading did it ever refer "to itself as a collecting society," and that from the provisions of the Copyright Act, as amended, "a collecting society is not the same as owner, assignee or exclusive licensee of copyright" are unassailable, particularly in view of the meanings of definitions assigned to the words "ownership" under section 9, "assignment" under section 10 and "exclusive licensee" under section 39 of the Act.

I have looked at the Act, as it was at the commencement of this suit on 29th February 1996. Sections 9, 10, 15 and 39 therein clearly vested litigable rights in the owners, assignees and exclusive licensees of copyrights. Thus as found by the lower court those rights are nowhere stated in the Act to be “exclusive preserve of collecting society”.

The trial court’s decision, the subject of this appeal was handed down on 9th July, 1997. The Copyright (Amendment) Act, 1999 which introduced section 15A was promulgated as Decree No. 42 of 1999 with effect from 10May 1999 - two years after the decision on appeal was rendered. There is no provision in the Act No. 42 of 1999 from where it could be deduced that the new provisions in section 15A were intended to have retrospective effect. The consistent position of this court is that courts lean against interpreting a statute as to deprive a party of an accrued right and that no retrospective operation is to be given to a statute as to impair an existing right or obligation: **AFOLABI V. GOVERNOR OF OYO STATE (1985) 2 NWLR (PT. 9) 734; ADESANOYE V. ADEWOLE (2006) 14 NWLR (PT. 1000) 242.**

The Act No. 42 of 1999 had a commencement date. The learned counsel for the respondent submits, on authority of **OJOKOLOBO V. ALAMU (1987) 2 N.S.C.C. 991**; and I agree, that where in a statute a commencement date is provided, the presumption that the statute has retrospective effect is displaced.

The objection culminating in the trial court’s decision, the subject of this appeal had no benefit of clairvoyance that section 15A would be promulgated to take away the right of the respondent to maintain his suit on the cause list. The ruling of the trial court delivered on 9th July, 1997 also did not contemplate the toxic nuisance that section 15A has been made to be in this appeal by Prof. Sodipo of counsel.

The indubitable fact is that the appellant, through its counsel, did not premise or predicate his preliminary objection at the trial court on section 15A of the Copyright Act, as amended which, allegedly, removed from the plaintiff the right to maintain this action. Section of 15A enacted into the Copyright Act by dint of the 1999 Copyright (Amendment) Act No. 4.2 was not considered by the trial

court, and it could not have because it came two years after the decision of that court that is now the subject of this appeal.

The appellants excuse for bringing under section 15A of Copyright Act as amended, is that at pages 360 - 362 of the record the lower court in passing or obiter dictum, commented that the 1999 Act did not apply to this appeal.

The learned appellant's counsel has not been able to surmount two basic principles which indeed are fundamental in our jurisprudence. They are that an appeal is generally regarded as a continuation of the original suit, rather than the inception of a new one, and that in an appeal, parties are confined to their case as pleaded in the court of first instance: **ADEGOKE MOTORS LTD. V. ADESANYA & ANOR. (1989) L.P.E.L.R. - 94 (S.C)**. This principle prevents the parties from making a new and different case from that argued at the trial court without express leave of court. The second is audi alteram partem which is an integral principle of fair hearing both at common law and in section 36(1) (formerly S.33 (1) of the Constitution. The aim of pleadings is to give notice of the case to be met so that the other party can adequately prepare for it and join issues. It prevents trial by ambush and saves either party the embarrassment of being taken by surprise: **GEORGE V. FLOUR MILLS LTD. (1965) 1 ALL N.L.R. 71; EMEGOKWE V. OKADIGBO (1973) 4 S.C. 113; BUNGE V. GOVERNOR, RIVERS STATE (2006) 12 NWLR (PT. 995) 573 AT 595.**

I have said enough to warrant the conclusion that the administration of justice cannot afford the luxury of a litigant or his counsel resorting to "chopping and changing his case from one stage to another" depending on the direction of the weather-cock. The dual duty of the instant appellant is not only to defend the decision he obtained at the trial court but also to show in what respect the lower court erred in setting aside that decision. In that regard the appellant's counsel must of necessity be confined to the ratio decidendi of the decision that set aside the decision he earned at the trial court.

This appeal, in my firm view does not deserve, on the merits, to be allowed. It is accordingly dismissed in its entirety. Consequently, I affirm the judgment of the lower court delivered on 27th September, 2004 which judgment set aside the

decision of the trial court contained in its ruling delivered on 9th July, 1997. I also affirm and adopt the order made by the lower court that the suit is remitted to Hon. Chief Judge of the Federal High Court for reassignment to another Judge for rehearing de novo. In addition, it is hereby ordered that the trial court give the case accelerated hearing, considering the age of the case.

The respondent is entitled to costs and hereby orders the appellant to pay, as costs, the sum of N500, 000.00 to the respondent. Appeal dismissed.

I. T. MUHAMMAD, J.S.C.: I have had the advantage of reading before now, the judgment of my learned brother, Eko, JSC, I entirely agree with his reasoning and conclusion that, the appeal is lacking in merit. I, too, hereby dismiss the appeal. I abide by orders made in the lead judgment.

ARIWOOLA, J.S.C.: I had the privilege of reading in draft the lead judgment of my learned brother Eko, JSC just delivered. I agree entirely with the reasoning and conclusion of the leading judgment. I also consider the appeal unmeritorious and deserve to be dismissed. Accordingly, it is dismissed by me. Appeal dismissed. I abide by the consequential orders in the said lead judgment inclusive of the order on costs.

AUGIE, J.S.C.: I have had a preview of the judgment just delivered by my learned brother - Ejembi Eko, JSC, and I agree with his reasoning and conclusion that this appeal is devoid of merit. I accordingly dismiss it and affirm the judgment of the lower court delivered on 27th September 2004 and also affirm and adopt the order made by the lower court that the suit be remitted back to Hon. Chief Judge of the Federal High Court for reassignment. In addition, it is hereby ordered that the trial court should give the case accelerated hearing, considering the age of the case. I abide by the consequential orders made in the lead judgment.

BAGE, J.S.C.: I have had the benefit of reading in draft the lead judgment of my learned, Brother Ejembi Eko, JSC, just delivered. I agree entirely with the reasoning and conclusion reached. I do not have anything to add. The appeal lacks merit, and it is accordingly dismissed by me. I abide by all the orders contained in the lead judgment.

Appeal dismissed.

Names of Counsel:

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