In the Supreme Court of Nigeria

On Friday, the 23rd day of March 2012

Before their Lordships

Ibrahim Tanko Muhammad	.....	Justice Supreme Court
Olufunlola Oyelola Adekeye	.....	Justice Supreme Court
Bode Rhodes-Vivour	.....	Justice Supreme Court
Nwali Slyvester Ngwuta	.....	Justice Supreme Court
Mary Ukaego Perter-Odili	.....	Justice Supreme Court

SC.29/2006

Between

R-Benkay Nigeria Ltd ..... Appellant

And

Cadbury Nigerian Plc ..... Respondent

Judgment of the Court
Delivered by
Nwali Sylvester Ngwuta. JSC

In the Writ of Summons and Statement of Claim filed simultaneously in the Registry of the High Court of Lagos State, Ikeja Judicial Division on 18/4/2000, the Respondent as plaintiff claimed against the appellant as defendant as follows:

> "Wherefore the plaintiff claims from the defendant the sum of ₦5,108,210.30 being the value of goods and costs suffered by the plaintiff"

Hereunder is a summary of the facts of the case.

The Appellant and the Respondent are limited liability companies incorporated in Nigeria. The plaintiff carries on the business of manufacturing of food beverages and food items with head office and depot along Lateef Jakande Road Agidingbi, Ikeja, Lagos while the Respondent is engaged in carriage of goods for hire with head office at No 20 Oguta Road, Onitsha, Anambra State.

On the application of the Respondent dated 12/2/96 for appointment as a transporter, the appellant so appointed the Respondent on 10th June, 1996. Pursuant to the Respondent's acceptance of the appointment the parties executed a document titled: "Cadbury Nigeria Plc Terms and Conditions for Cadbury Nigeria Plc Transporters." It was agreed that the Respondent should safely and securely transport goods for the appellant; pursuant to which the Respondent registered six (6) of its vehicles with the appellant on retainership.

On 11th October, 1996 the appellant delivered to the Respondent at the appellant's depot at Lagos, and the Respondent accepted, goods for transportation on one of the vehicles registered with the appellant as ECN 147. The goods are itemised on "Direct Sales Invoice No 0865323" of 11th October 1996. The consignment was not delivered to the consignee, one Mr. M. O. Okoro but was wholly lost in transit.

Contrary to the condition for its appointment, the Respondent did not possess valid and current Goods-in-Transit Insurance Policy on its vehicle that carried the lost consignment of goods. In spite of that loss of its goods, the appellant reached a second agreement with the Respondent as contained in the letter dated 21st January, 1997.

The purpose of the second agreement was to enable the Respondent recover the goods and carry on the business of transporting the appellant's goods but the Respondent did not honour the terms of the second agreement. Pursuant to the agreement by the parties, the Respondent through its agents, drove its trailer registered BD 4053 A into the premises of the appellant. The appellant filed an action to recover the value of its lost goods from the Respondent and obtained an ex parte order on 24/3/97 to detain the Respondent's vehicle BD 4053 A on its premises in Suit No ID/749/97.

The Respondent filed a notice of preliminary objection to Suit No ID/749/97 and in a ruling delivered on 12th June, 1998 the trial High Court dismissed the preliminary objection. The Respondent appealed the ruling dismissing its preliminary objection

to the Court of Appeal, Lagos Division. The lower Court, in its ruling of 12th April 2010 allowed the appeal and struck out the appellant's suit in the High Court.

Be it noted that the Respondent in a counter-claim to Suit No HD/749/97 claimed a mandatory order and declarative reliefs against the appellant based on the detention of its trailer. In the alternative, it made monetary claims as arising from the detention of the vehicle. The counter-claim, with a life of its own outside Suit No ID/749/97 from which it originated was still pending when the appellant commenced Suit No ID/999/97 on 18/4/2000, a day following the striking out of its Suit No 10/749/97. The appellant had in its ex-parte application, obtained an order to detain the Respondent's vehicle No BD 4053 A at its premises and a *mareva* injunction pending the disposal of the suit.

By way of Motion on Notice filed on 14/7/2000, the Respondent as defendant/applicant prayed the Court for an order to dismiss or strike out Suit No ID/999/2000 as abuse of the process of Court or in the alternative an order to discharge the *mareva* injunction granted the appellant then plaintiff. It also asked for an order to stay proceedings in the suit pending final determination of Suit No ID/749/97 (by which it meant the counter-claim it instituted in the suit).

Multiple affidavits and counter-affidavits were filed and written addresses filed. In its ruling delivered on 29/10/2001, the trial Court, presided over by Philips, J concluded that

> "…. I find that the preliminary objection filed by the Defendant lacks merit and it is accordingly over-ruled in its entirety ....." See page 145 of the record.

R. Benkay Nigeria Limited appealed the dismissal of its preliminary objection to the Lagos Division of the Court of Appeal on 11 grounds from which six issues were framed for determination. In its judgment dated 7th March, 2005 the lower Court having resolved all the six issues against the appellant, dismissed the appeal with ₦10,000 costs against the appellant in favour of the Respondent. By leave of this Court granting its application for the trinity reliefs on 8th February, 2007 the appellant appealed to this Court on eight grounds from which the following three issues were distilled by the appellant in its brief for determination:

> "3.0 Issues for Determination
>
> 1. Whether from the facts and circumstances of this case the obtaining of an order of *mareva* injunction by the Respondent on 20th April, 2000 permitting it to detain the Appellant's 30 tonnes trailer with registration No BD 4053 A which was the *re*s in the appellant's pending counter-claim in Suit No10/749/97 constitutes an abuse of Court process.
>
> 2. Whether from the facts and circumstances of this case, the institution and continued prosecution of this Suit (i.e. Suit No ID/999/2000) by the Respondent while the Appellant's counter-claim in Suit No ID/749/97 was still pending constitutes an abuse of Court process.
>
> 3. Whether from the facts and circumstances of this case the order of *mareva* injunction dated 20th April 2000 ought to be discharged."

In its brief of argument, the Respondent, through its learned Counsel, formulated the Following two issues for determination:

> (a) Whether the institution of Suit No 10/999/2000 by the Respondent constituted an abuse of Court process.
>
> (b) Whether the lower Court was right in refusing to discharge the order of *mareva* injunction granted by the High Court."

Arguing issue one in his brief, learned Counsel for the appellant, referred to three reliefs sought by the appellant in its counter-claim in Suit No ID/749/97 instituted by the Respondent. He said that the *res*, the appellant's 30 tonne Mercedes Benz trailer with registration number BD 4053 A in the counter-claim in Suit No ID/749/97 is also the *res* in this suit. He referred to paragraph 3(a) and (r) of the Respondent's affidavit in support of its application for *mareva* injunction and submitted that not only did the respondent conceal the pendency of Suit No ID/749/97 but deliberately informed the trial Court that the suit had abated and was no longer pending between the parties.

Learned Counsel argued that the respondent had, by filing the suit and obtaining an ex parte order of *mareva* injunction and an order to detain the appellant's trailer, unlawfully interfered with the *res* in the appellant's counter-claim in Suit No ID/749/97. He said the respondent cannot be said to have used the process of Court *bona fide* or properly. He relied on *Arubo v Aiyeleru (1993) 3 NWLR (Part 280) page 126* in his contention that the Respondent abused the process of Court. He referred to the trial High Court and argued that that Court, having determined that the detention of the appellant's trailer by the respondent was wrong, would have granted the appellant's reliefs in the counter-claim but for the fact that the respondent abused the process of Court by filing this suit.

Relying on *Saraki v Kotoye (1992) 9 NWLR (Part 264) 156; Okorodudu v Okoromadu (1977) 3 SC 71; Oyegbola v Esso West Africa Inc (1966) 1 All NLR 170,* he submitted that it is an abuse of Court process for a party to improperly use the issue of judicial process to the irritation and annoyance of his opponent and the efficient and effective administration of justice as the respondent has done. He relied on *Jumbo v Petroleum Equalisation Fund Management Board (2005) 14 NWLR (Part 945) 442* for the Supreme Court's decision that it is an act of disrespect and an act of bad faith for a litigant to manipulate the adjudicative process by taking steps which interfere with the proceeding in a pending case in which he is a party. He urged the Court to resolve the issue in favour of the appellant as, according to him, anything to the contrary will occasion a miscarriage of justice.

In issue two, Counsel referred to the counter-claim in Suit No ID/749/97 and said that the counter-claim was still pending after the main Suit was struck out on 17th April, 2000. He said the parties and the subject matter in the counter-claim and Suit No ID/749/97 are the same as in this case and that the statement 0f claim of the respondent herein is the same or substantially the same as its statement of defence in Suit No ID/749/97 and that the statement of defence of the appellant herein is the same or substantially the same as its counter-claim in Suit No ID/749/97.

He referred to the affidavit evidence and urged the Court to accept that the two suits are the same since the respondent did not controvert the appellant's averment to that effect. Relying on *Long John v Blakk (1998) 6 NWLR (Part 555) 524; Ayoola v Baruwa (1999) 11 NWLR (Part 628) 595* and *Alagbe v Abimbola (1978) 2 SC 39,* Counsel urged the Court to deem the facts admitted in law. He said that the facts of this case show that the respondent exercised its right of action in a manner to harass, irritate and annoy the appellant as well as interfere with the due administration of justice.

Learned Counsel referred to Order 19 Rules 9 and 16 of the High Court of Lagos State (Civil Procedure) Rules 1994 and argued that the respondent should have filed a counter-claim or set off in its statement of defence and the entire suit would have been disposed of in one Court. He relied on *Ogbonna v A-G Imo State (1992) 1 NWLR (Part 220) 647 at 675* and submitted that the respondent could have filed a counter-claim to the appellant's counter-claim.

Learned Counsel argued that the Court has a duty to allow his appeal in order to protect the integrity of the judiciary adding that a dismissal of his appeal will ridicule the judicial system with conflicting judicial decisions on the same matter. He relied on *Yale v AG Leventis & Co. Ltd (1965) Vol. 4 NSCC 132 at 134* in his contention that the respondent ought to have brought a counter-claim and a set off in Suit No ID/749/97 for the conflicting claims to be determined in one Suit.

On the authority of *Akilu v Fawehinmi (No 2) (1989) 2 NWLR (Part 102) 122 ratio 29,* he submitted that the conduct of the respondent is not only vexatious and oppressive but also malicious and in bad faith and therefore constitutes abuse of Court process. Concluding his lengthy argument and plethora of authorities, learned Counsel urged the Court to resolve issue two in favour of the appellant.

In issue three, learned Counsel argued that the order of *mareva* injunction should not have been made in the first place and that the injunction ought to be discharged, for the reason that Suit No ID/749/97 in which the order was made was struck out on 17th April 2000. He referred to paragraph 3 (r) of the affidavit in support of the respondent's motion ex parte for *mareva* injunction in the suit and charged that the respondent misled the trial Court by withholding the fact that though the Suit No ID/749/97 was struck out, the appellant's counter-claim therein was still pending. He referred to *Okeke v Okoli (2000) 1 NWLR (Part 642) page 641* in his submission that where an *ex parte* order is based on an important misstatement, the Court should not hesitate to discharge the order.

Learned Counsel impugned the judgments of the two Courts below for holding that the facts allegedly suppressed in the application for *mareva* injunction in the suit was not relevant or material to the application. He argued that the fact that the trailer registered as BD 4053 A was the *res* in the counter-claim in Suit No ID/749/97 would have led to a denial of the *ex parte* application for *mareva* injunction in relation to the same trailer in this suit. He relied on *Ojukwu v Governor Lagos State (1996) 3 NWLR (Part 76) 39* in urging the Court to discharge the order for non-disclosure of relevant facts in the application for same.

He relied on *Lawal-Osula v Lawal-Osula (1995) 3 NWLR (Part 382) 128*; *Aruruba v Ebenator Community Bank Ltd. (2005) 10 NWLR (Part 933) 321* in urging the Court to discharge the order as the respondent violated good conscience in the application for the equitable relief. He contended that on the facts of the case, there is no moral or legal basis for the *mareva* injunction and urged the Court to discharge same. He urged the Court to resolve all the three issues in the appeal in favour of the appellant and to allow the appeal.

Issue one in the respondent's brief queried whether or not the institution of Suit No ID/999/2000 constitutes abuse of process of Court. Arguing the issue in his brief, learned Counsel for the Respondent conceded that the parties in Suit No ID/740/97 and Suit No ID/999/2000 are the same but argued that this alone did not establish the allegation of abuse of process of Court. He argued that there is nothing in the appellant's affidavit evidence of 12th July 2000 to show that the respondent used Suit No ID/999/2000 to irritate or annoy the appellant or hinder the efficient and effective administration of justice. In the reaction to paragraph 5.06 in the Appellant's brief, Learned Counsel urged the Court to decline the invitation to make use of documents other than those contained in the record of appeal. He relied in *Ogolo v Fubura (2003) 5 SC 141, 162.*

He argued that all that the appellant's affidavit evidence tended to show is that the *mareva* injunction and custodial orders are improperly obtained and argued that any impropriety associated with the ex-parte orders cannot taint or render an otherwise valid suit invalid; adding that the affidavit evidence in support of the appellants motion did not demonstrate bad faith on the part of the respondent. He relied on *NDIC v CBN (2002) 7 NWLR (Part 766) 272 at 284-285* and argued that the appellant did not adduce evidence of bad faith on the part of the respondent. He urged the Court to affirm the decision of the lower Court that once Suit No ID/749/97 was struck out, the respondent was free to file a fresh action.

For the unchallenged averments in the appellant's affidavit, learned Counsel contended that though the averment is not challenged, the Court is bound to evaluate and ensure its credibility and determine if it can sustain the claim. He relied on *Gonzee Nig. Ltd v NERDC (2005) 13 NWLR (Part 943) 634 at 638.* He said that the lower Court found that the deposition on the subject matter by the appellant was not only incredible but also an affront to common sense.

He referred to the authorities cited by the appellant and said none of them decided that a counter-claim was mandatory. He argued that where a party has discretion in the exercise of his rights the other party cannot be heard to complain that the party exercised his discretion one way or the other. He relied on *Hondy v Elpwich (1973) 2 All ER 914*, which was relied on in *Fasakin Foods (Nig.) Co. Ltd. v Shosanya (2003) 17 NWLR (Part 849) 237 at 248*. He argued that the lawful exercise of the right of the Respondent to file the suit cannot be subjected to the whims of the appellant. He relied on *Saraki v Kotoye (1992) 9 NWLR (Part 264) 156 at 170.*

He contended that Suit No ID/999/2000 was not filed to harass, annoy or oppress the appellant, adding that the suit was filed in *bona fide* exercise of the Respondent's right of action. Learned Counsel argued that the case of *Nigeria Intercontinental Merchant Bank Ltd. v Union Bank of Nigeria Ltd. (2004) 12 NWLR (Part 888) page 599* relied on by the appellant is of no avail as there is no duality of Courts involved in this case but only the High Court of Lagos State.

Learned Counsel urged the Court to endorse the decision of the lower Court that Suit No ID/999/2000 does not constitute abuse of process. He urged us to resolve the issue in favour of the respondent.

In issue two, learned Counsel for the Respondent submitted that the question of whether the *mareva* injunction ought to have been granted does not emanate from the judgment of the lower Court. Accordingly, he urged Court to ignore the arguments in paragraphs 5.54 to 5.59 of the appellant's brief as untenable. As for the prayer that the *mareva* injunction be lifted, learned Counsel argued that the order sought to be discharged does not exist.

He referred to page 31 of the record and submitted that the order restricting the appellant from disposing of its vehicle with registration number BD 4053 A which was made to last for 15 days from 20th day of April, 2000 has expired by effluxion of time. He argued that what subsists today is the order on the Deputy Sheriff of the High Court to take possession of the Respondent's trailer and keep same at the premises of the State High Court; that the issue is academic since it is not the focus of the appellant's issue three.

On the allegation of non-disclosure of material facts, learned Counsel referred to pages 143 and 311-312 of the record where the trial Court and the lower Court respectively found that the non-disclosure of the existence of the counter-claim was not material to the grant or refusal of the application for injunction in suit No ID/999/2000. He argued that the bare assertion that the two lower Courts are wrong without more does not demonstrate how the fact allegedly withheld would have affected the consideration of the appeal if it had been disclosed. He described the greater part of the appellant's brief as an exposition of judicial authorities rather than submissions based on evidence adduced in Court.

Relying on *Amadi v NNPC (2000) 10 NWLR (Part 674); Globe Fishing Industries Ltd. v Coker (1990) 7 NWLR (Part 162) 265 at 297* and *Oguejiofo v Oguejiofor (2006) 1 SC (Part 1) 157*, learned Counsel urged the Court not to disturb the concurrent findings of the two lower Courts which were supported by evidence and which are neither perverse nor resulted in a miscarriage of justice. He argued that even if there was non-disclosure of material facts, the non-disclosure was not intentional. He relied on *Behbeham v Salem (1989) 1 WLR 723,728; Ali and Fahd Shobokshi Group v. Moneim (1989) 1 WLR 210, 719-720.*

He argued that not every non-disclosure will result in the discharge of *mareva* injunction as the court may continue the order or make a new order on new terms. He relied on *Brimark's Mart Ltd. v Elcombe (1988) 3 All ER 188 at 193* and placing reliance on Order 8 Rule 2 (3) of the Supreme Court Rules 1999 (as amended), he urged the Court to strike out ground 1 particulars (iii), (iv), (v), (vi), (vii); 2 particulars (i), (ii), (iii); 3 particulars (iii), (iv); 4 particulars (ii), (iii), (iv), (vi); 5, 6 particulars (iii) and (iv) as argumentative and narrative. He relied on *Gada v Kito (1999) 12 NWLR (Part 629) 21 at 39; Skenconsult v Ukey (1981) 1 SC 6 and 39.* He urged the Court to dismiss the appeal.

Having considered the record of the Court below and the briefs filed on behalf of the parties, I am of the view that the two issues raised by the Respondent are subsumed in the appellant's three issues and I intend to determine the appeal on the said three issues.

Issue one in the appellant's brief is hereunder reproduced once more:

> "whether from the facts and circumstances of this case, the obtaining of an order of *mareva* injunction by the Respondent on 20th April 2000 permitting it to detain the Appellant's 30 tonnes trailer with registration No BD 4053 A which trailer was the *res* in the Appellant's pending counter-claim in Suit No ID/749/97 constitutes an abuse of Court process."

Abuse of Court process means that the process of the Court has not been used *bona fide* and properly. See *Central Bank of Nigeria v Saidu H. Ahmed & Ors (2001) 5 SC (Part 11) 146; Edjerode v Ikine (2001) 12 SC (Part 11) 125.*

The concept of abuse of Court process is imprecise. It involves circumstances and situations of infinite variety and conditions but it has a common feature in improper use of the judicial process by a party in litigation to interfere with the due administration of justice. See *Agwasim v Ojichie (2004) 10 NWLR (Part 882) 613 at 624-625 (SC).*

In *Saraki v Kotoye (1992) 9 NWLR (Part 264) 156 at 188,* this Court on abuse of Court process held:

> "….. the employment of judicial process is only regarded generally as an abuse when a party improperly uses the issue of the judicial process to the irritation and annoyance of his opponent and the efficient and effective administration of justice. This will arise in instituting a multiplicity of action on the same subject matter against the same opponent on the same issue." See also *Okorodudu v Okoromadu (1977) 3 SC 21*.

From the pronouncement of this Court reproduced above, to constitute abuse of Court process, the multiplicity of suit must have been instituted by one person against his opponent on the same set of facts. The Respondent filed Suit No ID/999/2000 in which the order of *mareva* injunction was made in his favour on his motion on 20th April 2000. This was during the pendency of the appellant's counter-claim in Suit No ID/749/97. Suit No ID/749/97 was struck out leaving the counter-claim which has a life of its own and independent of its source, the main suit. See *Oabup v Kola (1993) 9 NWLR (Part 317) 254 at 281; Ige v Farinde (1984) 7-8 SCNJ 284.*

The issue of multiplicity of suits by the same person against another on the same subject matter does not arise. As a matter of fact, whether a case constitutes abuse of Court process will depend on the facts and circumstances of that case. Appellant appreciated that point when he framed issue one in which he urged the Court to determine the issue on the available facts and circumstances. Whether a suit constitutes abuse of Court process is a matter of the facts of each case.

In this appeal, the record shows that both the trial Court and the Court below found as a fact that Suit No ID/999/2000 in which the order was made did not constitute abuse of process of Court. The order made in the said case cannot be said to be abuse of Court process, as found by the two Courts below. This is a concurrent finding of fact by the two lower Courts and the appellant has not provided any material for this Court to disturb the said findings. See *Lucy Onowon & Anor v. JJJ Iseribien (1976) 9 & 10 SC 25; Nnajiofor & Ors v Ukonu & Ors (1986) NSCC 1067; Ige & Anor v Akogu & Ors (1994) NWLR (Part 340) 535 at 540.*

The case law relied on by appellant give the respondent the choice of instituting a separate action or filing a counter-claim to the counter-claim filed by the appellant. The Respondent can adopt one or the other option and it does not lie in the mouth of the appellant to complain about the choice made by the Respondent. I resolve issue one against the appellant.

In resolving issue one, I have determined that Suit No ID/999/2000 in which the *mareva* injunction was made does not constitute abuse of Court process thus resolving issue two. The issue is resolved against the appellant

In issue three, the appellant questioned the propriety of the *mareva* injunction made on 20th April 2000. The order was made to last for 15 days from 20th April, 2000. The order had been discharged by passage of time on 2nd August, 2007 when the appellant filed his brief in this appeal. The question of the propriety *vel non* of the order has become academic. The issue is resolved against the appellant. All the issues have been resolved against the appellant. This appeal is bereft of merit and it is hereby dismissed. Appellant to pay ₦50,000.00 costs to the Respondent.

Judgment delivered by
Ibrahim Tanko Muhammad. JSC

I have read before now the judgment of my learned brother, Ngwuta. JSC.

I am in complete agreement with my learned brother that the appeal lacks merit and the judgment of the lower court is concurrent. I dismiss the appeal with ₦50,000.00 costs in favour of the respondent.

Judgment delivered by
Olufunlola Oyelola Adekeye. JSC

I have had the privilege of a preview of the judgment just delivered by my learned brother N. S. Ngwuta JSC. I agree with my learned brother's reasoning and conclusion in respect of the issues distilled for determination in this appeal. The facts of the case and the three issues raised by the appellant are as aptly narrated in the lead judgment.

The appellant in the first issue for determination raised the question:

> "Whether from the facts and circumstances of this case, the obtaining of an order of *mareva* injunction by the respondent on 20th April, 2000 permitting it to detain the appellants 30 tones trailer with registration No BD 4053 A which trailer was the res in the appellants pending counter claim in suit No ID/749/07 contributes an abuse of court process."

The concept of abuse of court process relying on numerous decided authorities is imprecise. It involves circumstances and situation of infinite variety and conditions. But a common feature of it is the improper use of judicial process by a party in litigation to interfere with the due administration of justice. The circumstances which will give rise to abuse of court process include:-

a) Instituting a multiplicity of actions on the same subject matter against the same opponent on the same issues on multiplicity of actions on the same matter between the same parties even where there exists a right to begin the action.

b) Instituting different actions between the same parties simultaneously in different courts, even though on different grounds.

c) Where two similar processes are used in respect of the exercise of the same right for example a cross-appeal and a respondent's notice.

d) Where an application for adjournment is sought by a party to an action to bring an application to court for leave to raise issues of fact already decided by the lower court.

e) Where there is no law supporting a court process or where it is premised on frivolity or recklessness.

f) Where a party has adopted the system of forum-shopping in the enforcement of a conceived right.

g) It is an abuse of court process for an appellant to file an application at the trial court in respect of a matter which is already subject of an earlier application by the respondent at the Court of Appeal. When the appellants application has the effect of over reaching the respondents application.

h) Where two actions are commenced, the second asking for a relief which may have been obtained in the first, the second action is prima facie vexatious and an abuse of court process.

See *Saraki v Kotoye (1992) 9 NWLR (Part 264) page 156; Oguejiofor v Oguejiofor (2006) 3 NWLR (Part) 966 page 205; Abubakar v Unipetrol (2002) 8 NWLR (part 769) page 242; Plateau State v Attorney-General of Federation (2006) 3 NWLR (Part 967) page 346; Dingyadi v I.N.E.C (No 2) (2010) 18 NWLR (Part 1224) page 154; Arubo v Aiyeleru (1993) 3 NWLR (Part 280) page 126; Adesanoye v Adewole (2000) 9 NWLR (Part 671) page 127; Vaswani Trading Co. v Savalakh & Co. (1972) All NLR, (Part 2) page 483; Okorodudu v Okoromadu (1977) 3 SC 21*

The common feature of an abuse is in the improper use of the judicial process by a party in litigation. An abuse of court process does not envisage a scenario like the instant appeal where the appellant and the respondent were exercising respective feasible right of action. In ID/749/97 the appellant maintained its counter-claim while the respondent filed suit No ID/999/2000 to seek a remedy for his grievance. The concurrent findings of the two lower courts that the order made in the case cannot be said to be an abuse of court process is right and correct in the circumstance of the case. This court has no cause whatsoever to disturb such findings.

It is trite law that an order of injunction made by a court for limited application and specific duration becomes automatically discharged at the expiration of the period.

With fuller reasons given by the learned brother in his lead judgment, I also agree that this appeal is devoid of merit and it is hereby dismissed. I adopt the consequential orders made including the order of costs.

Judgment delivered by
Bode Rhodes-Vivour. JSC

I read in draft the judgment delivered by my learned brother, Ngwuto, JSC, am in complete agreement with his Lordships reasoning and conclusions.

The respondent instituted suit No ID/999/2000 and obtained a *mareva* injunction (*ex-parte*). Both courts below found that the order does not amount to an abuse of court process. This court rarely disturbs concurrent findings of fact but would be compelled to do so if found to be perverse. See *Cameroon Airline v Otutuizu (2011) 1-2 SC (Part 111) page 200; Ogbu v State (1992) 8 NWLR (Part 259) page 255; Ebba v Ogodo (1984) 4 SC page 84*

Concurrent findings of fact by the two courts below are that the order of the trial judge in suit No ID/999/2000 granting a *mareva* injunction is not an abuse of process. That finding can only be disturbed by this court if and only if the adverse party was able to satisfy this court that the finding was unsound. In the absence of such a finding, concurrent findings of fact by the courts below are correct.

For, this and the elaborate reasoning in the leading judgment the appeal is dismissed with costs of ₦50,000.00 to the respondent.

Judgment delivered by
Mary Ukaego Peter-Odili. JSC

The respondent as the plaintiff instituted Suit No ID/749/97 against the appellant as the defendant on 11/3/97 in the High Court of Lagos State, Ikeja Judicial Division claiming the sum of ₦5,108,010.30 (Five Million One Hundred and Eight Thousand, Ten Naira, and thirty Kobo), "being the value of the goods and loss suffered by the plaintiff."

The defendant filed its Statement of Defence and counter claimed alleging wrongful detention of its trailer by the plaintiff since 13th November 1996 and claimed award of damages in consequence thereof. The defendant also filed a preliminary objection to the plaintiff's suit for being premature. This application was refused by the trial court and the defendant appealed to the Court of Appeal. That appellate court struck out the plaintiff/respondent's action for being prematurely commenced.

The plaintiff/respondent instituted this suit now on appeal claiming the reliefs in Suit No ID/749/97 and also filed an ex-parte application and obtained on 20th April 2000 an order of *mareva* injunction against the defendant/respondent for a period of 15 days and an order directing the Deputy Sheriff to take possession of the appellant's trailer for keep within the High Court premises pending the determination of the motion on Notice dated 18/4/2000.

On 14th July 2000, about three months after the *ex-parte* order was made, the defendant filed a Statement of Defence dated 12th July, 2000 and a Motion on Notice in which it prayed that the suit be dismissed or struck out on ground of abuse of court process or alternatively that the *mareva* and attachment orders be discharged and the suit be stayed pending the outcome of the matter in the suit at the trial court.

In a considered ruling delivered on 12th October, 2001, the High Court refused the defendant's application and the appeal against the ruling was also dismissed by the Court of Appeal.

At the time when the High Court delivered its ruling from which the present appeal arose, the defendant's counter claim had not been heard and of course no judgment delivered. Furthermore, the defendant had not taken steps to enforce the undertaking as to damages.

On the 15th November, 2005 the Lagos High Court delivered its final judgment in the appellant's counter claim in Suit No ID/749/97 wherein the trial court held per Adesanya J. that the respondent herein unlawfully seized and detained the appellant's aforesaid 30 tonnes trailer but the court held that it was incapacitated in ordering a return of appellant's trailer to it as sought by the appellant because the respondent had after over three years of the commencement of Suit No ID/749/97 obtained a fresh order of *mareva* injunction in this suit permitting it to detain the said 30 tonnes trailer.

As stated earlier the appeal to the Court of Appeal was dismissed hence the present appeal to this court with the appellant filing eight grounds of appeal.

On the 24/1/12 date of hearing, Mr. A. C. Igbokwe, learned counsel for the appellant adopted the brief of appellant filed on 2/8/07 in which were framed three issues for determination viz:

1. Whether from the facts and circumstances of this case, the obtaining of an order of *mareva* injunction by the respondent on 20th April, 2000 permitting it to detain the appellant's 30 tonnes trailer with registration No BD

4053 A which trailer was the *res* in the appellant's pending counter claim in Suit No ID/749/97 constitutes an abuse of court process.

2. Whether from the facts and circumstances of this case, the institution and continued prosecution of this suit (i.e Suit No ID/999/2000) by the respondent while the appellant's counter-claim in Suit No ID/749/97 was still pending constitutes an abuse of court process.

3. Whether from the facts and circumstance of this case the order of *mareva* injunction dated 20th April, 2000 ought to be discharged.

The respondent's brief settled by learned counsel on their behalf, Oluseye Opasanya was adopted by counsel. In the brief were couched two issues for determination as follows:

(a) Whether the institution of suit No. ID/999/2000 by the respondent constitutes an abuse of court process, and

(b) Whether the lower court was right in refusing to discharge the order of *mareva* injunction granted by the High Court

The issues as framed by the respondent are simpler and convenient to use.

In answering the questions raised in the two issues of the respondent, that is if there had been an abuse of court process when the respondent obtained the *mareva* injunction during the pendency of the appellant's counter claim, the learned counsel for the appellant stated that by the filing of this suit and obtaining an ex-parte order of *mareva* injunction permitting it to detain the appellant's 30 tonnes trailer the respondent overreached the appellant and unlawfully interfered with the *res* in the Suit No ID/749/97. That it is now trite law that abuse of court process means that the process of court has not been used *bona fide* and properly which is what has taken place herein. That a look at page 27 of the final judgment of the Lagos High Court, Exhibit G to the appellant's application for leave to appeal filed on 15th February, 2006 in this court which judgment this court is entitled to take judicial notice of. He referred to the cases: *Aruba v Aiyeleru (1993) 3 NWLR (Part 280) 126; Nigerite Ltd. v Dalami (Nig) Ltd (1992) 7 NWLR (Part 253) 288; I.F. A. International Limited v Liberty Merchant Bank Plc. (2005) 9 NWLR (Part 930) 270; USI Enterprises Limited v Kogi State Government (2005) 1 NWLR (Part 908) 494.*

He stated that the commencement of this suit particularly the obtaining of the order of *mareva* injunction by the respondent had occasioned great injustice on the appellant in that the said *mareva* injunction has made it impossible for the appellant to reap the fruits of its over eight year litigation in Suit No ID/749/97. That this amounted to an abuse of court process being the respondent's improper use of the judicial process to the irritation and annoyance of his opponent and efficient and effective administration of justice like the respondent has done in this case. He cited *Saraki v Kotoye (1992) 9 NWLR (Part 264) 156; Okorodudu v Okoromadu (1997) 3 SC 21; Oyegbola v Esso West African Inc.(1966) 1 All N LR 170; Jumbo v Petroleum Equalisation Fund Management Board (2005) 14 NWLR (Part 945) 442.*

Learned counsel for the appellant went on to contend that after the Court of Appeal on 17th April, 2000 struck out the respondent's claim in the said suit, the appellant's counter claim is between the same parties and on the same subject matter and arose from the same transaction. He stated that prior to commencing this suit, the respondent knew full well that Suit No ID/749/97 was still subsisting as the appellant's counter claim survived the striking out of the respondent's claim by the Court of Appeal. That from the records, it can be seen that the respondent had filed a Statement of Defence to the appellant's counter claim. That in the present suit, the respondent had filed a statement of claim to which the appellant had filed a statement of defence. That the practical implication of the respondent's action in commencing this suit while Suit No ID/749/97 was pending is that the appellant must wait till the present suit is finally determined before its own claims in suit No ID/749/97 can be determined even though its claims in suit No ID/749/97 were in existence for about three years before the respondent commenced the present suit.

Mr. Igbokwe of counsel further stated that this new suit instituted by the respondent could have been conveniently determined in Suit No ID/749/97 as the subject matter, the parties and the claims are exactly the same. That the only reason why the respondent instituted this new action is to prevent the appellant from enjoying the fruits of its litigation in its counter claim in Suit No ID/749/97. He said that it is now trite that a counter claim is an independent action whereby the defendant in the main suit is the plaintiff and in the counter claim is the defendant. That Order 19 Rule 16 of the High Court of Lagos State Civil Procedure Rules 1994 provides that the two claims can be taken together and the party in whose favour is the balance would have judgment. He cited *NAL Merchant Bank Plc v Onu (2001) 5 NWLR (Part 705) 11; Ogbonna v A. G. Imo State (1992) 1 NWLR (Part 220) 647 at 675; Ijale v A. G. leventis & Co. ltd (1965) 4 NSCC 132 at 134.*

For the appellant was canvassed that there is concealment and or misrepresentation as the respondent is averring that the Suit No ID/749/97 had abated. That if the trial court had been aware of the true state of affairs it would not have granted the *mareva* injunction against the same *res* as that in the pending counter claim. He cited *Okeke v Okoli (2000) 1 NWLR (Part 642) 641* on

the basis that where an *ex-parte* order is based on an important misstatement, the court should not hesitate in discharging it. He cited *Akuma Industrial Ltd v Ayman Enterprises ltd (1999) 13 NWLR (Part 633) 68.*

Mr. Opasanya, learned counsel for the respondent stated that they were conceding that the parties in Suit No ID/749/97 and Suit No ID/999/2000 are the same but that alone is not enough to ground an allegation of abuse of court process. That this appeal should fail because the affidavit in support of the appellant's motion set out on pages 43 to 46 of the Record did not support the contention of abuse of process as postulated by the appellant in their brief. That it is important to note that the appellant's trailer on which the respondent's goods were lost in this suit was not the same trailer in Suit No ID/749/97.

Also that the respondent's claims in Suit No ID/999/2000 is a claim for value of lost goods consigned by the respondent to the appellant sometime in 1996 whilst, the appellant's counter claim in Suit No ID/749/97 is compensation for detinue arising from an alleged unlawful detention of its trailer by the respondent between 13th November 1996 and March 1997 when Hon. Justice A.O. Holloway made the *ex-parte* order. That it is an established principle of law, that where a party is by law given the discretion to exercise his rights in different forms, it is not for the other party to insist on the adoption of a particular form. He said suit No ID/999/2000 was not filed to harass and annoy or oppress the appellant but was filed in bona fide exercise of the respondent's right of action.

Mr. Opasanya of counsel submitted that even if there had been non-disclosure of a material fact, it was neither deliberate nor intended to overreach the appellant but done in the honest belief that the undisclosed fact was immaterial and hence had no bearing on the application for *mareva* injunction and the custodial orders. He cited *Ali & Fald Shobokshi Group v Moneim (1989) 1 WLR 710; Behbehani v Salem (1989) 1 WLR 723 at 728.*

In reply on points of law based on the appellant's reply brief filed on 31/3/08, learned counsel on his behalf submitted that, the respondent having not appealed against the said judgment of the Court of Appeal cannot be heard to argue as it has attempted to do. That the respondent having not cross-appealed in this appeal is bound by the decision of the Court of Appeal that the mareva injunction in this suit relates to the ex-parte order for the detention of the appellant's 30 tonnes trailer at the High Court premises Ikeja Lagos by the trial court on 20th April. He referred to *Oshodi v Eyifunmi (2000) 13 NWLR (Part 684) 298; Sotuminu v Ocean Steamship Nigeria Limited (1992) 5 NWLR (Part 239) 1.*

The different positions taken by the parties crystallise into whether or not in the channel of seeking the enforcement of his perceived right, the respondent had not entered the arena of abuse of court process. In resolving, the question therefore, it must be stated that whether or not the subject matter in a suit is the same as that of the counter claim in Suit No ID/749/97 is not automatically arrived at based on the deposition of any of the parties or both of them and no more. The correct position is that it is to be resolved in the judicial exercise of the courts based on the analysis and evaluation of the evidence before them. In that regard even if the respondent had not countered or contradicted the averments by way of a counter affidavit it would not change the fact and remove from the court the power of evaluation of evidence available. This in effect means that it is not a *fait accompli* that once there are averments in affidavit which are not contravened, the result would be a favourable disposition to the position of the party who had proffered the disposition. This is so because all averments must go under the surgical knife of evaluation which is done by the court as a matter of duty to see to its acceptability as happened in this case. I refer to *Gonzee (Nig.) Ltd v NERDC (2005) 13 NWLR (Part 943) 634 at 638.*

In this case the main grouse of the appellant is that the respondent ought not to have filed a fresh suit instead of filing a counter claim to appellant's counter claim. In that view point is anchored the abuse of process which appellant touts. It is now trite law that where a party is by law given the option or discretion to exercise his right in different ways it is not for an opponent to prescribe the particular form the other party should utilize and where the form adopted by the other party is not what the opponent feels is the right course, then automatically an abuse of court process would be said to have taken place. There were options open to the respondent to tackle the scenario before him and he cannot be confined to the only choice of a counter claim to the appellant's counter claim to ventilate his own grouse or grievance even though at the base is the same contract or facts since he had the alternative of bringing a fresh action so that all that he needs say would be brought to the fore. He had that right and he was at liberty to take it and did so. I have therefore no difficulty in flowing along with what the Court of Appeal did as I see no error in their decision in upholding that the fresh action filed by the respondent was in order and the integrity of the court was not jeopardized. I refer to the case of *Saraki v Kotoye (1992) 9 NWLR (Part 264) 156 at 170.*

On the allegation by the appellant that there was material non-disclosure which precipitated the High Court affirmed by the Court of Appeal on the grant of the injunction, the point has to be made that where a party seeking and obtaining an injunction including a *mareva* one as in this instance fails to disclose some facts or had made some misrepresentation in the course of the grant of the injunction, such an injunction on the realization of the non-disclosure or misrepresentation has to be discharged. That is the general principle while the rider is that the non-disclosure or misrepresentation must be material and of a nature which had propelled the hand of the court in the grant of the injunction. If that is not the case then such non-disclosure or misrepresentation or error would not change the situation nor force the discharge of the injunctive order. In this case the appellant had put forward that there were non-disclosures which produced a disadvantage on their part. This is not shown by the concurrent findings of the two courts below and there being no miscarriage of justice or any error in those findings, this court has no business in forcing its way by interfering with those findings which those courts had said the alleged undisclosed

facts were not material. I place reliance on the following cases: *Amadi v NNPC (2000) 10 NWLR (Part 674) 76; Globe Fishing Industries Ltd v Coker (1990) 7 NWLR (Part 162) 265 at 297; Ogoejeofo v Ogoejeofo (2006) 1 SC (Part 1) 157.*

From the foregoing and the fuller reasons in the leading judgment of my learned brother, Nwali Sylvester Ngwuta JSC, I too dismiss this appeal.

Counsel

A. C. Igbokwe	.....	For the Appellant
O. Opasanya *with him* Dr. Ehiwere T. Raji	.....	For the Respondent