

NIGERIAN BOTTLING COMPANY PLC.**V.****MR. EDWIN EZEIFO***COURT OF APPEAL**(ABUJA DIVISION)*

CA/A/8/2000

DAHIRU MUSDAPHER, J.C.A. (*Presided*)

ZAINAB AD AMU BULKACHUWA, J.C.A.

ALBERT GBADEBO ODUYEMI, J.C.A. (*Read the Leading Judgment*)

MONDAY, 30TH APRIL, 2001

*ACTION - Locus standi - Connotation of.**ACTION - Locus standi - Determination of- Duty on plaintiff to establish the capacity in which he sues - Failure to do so - Effect.**ACTION - Cause of action - Where action discloses no cause of action - Duty on court in respect thereof.**ACTION - Reasonable cause of action - What constitutes.**APPEAL - Exercise of discretion by trial court - Attitude of appellate court thereof- When it will interfere therewith.**COURT - Mention - Court treating a date fixed for mention of a case as one for hearing - Propriety of- Treatment of proceedings conducted thereby.**DAMAGES - General damages - Award of by trial court - Discretionary nature of.**LOCUS STANDI - Issue of locus standi - Duty on plaintiff to establish capacity in which he sues - Failure to do so - Effect.**PRACTICE AND PROCEDURE - Cause of action - Statement of claim - Where it discloses no cause of action - Duty on court in respect thereof.**PRACTICE AND PROCEDURE - Exercise of discretion by trial court - Attitude of appellate court thereto - When it will interfere therewith.**PRACTICE AND PROCEDURE - General damages - Award of by trial court - Discretionary nature of.**PRACTICE AND PROCEDURE - Locus standi - Determination of-Duty on plaintiff to establish the capacity in which he sues -Failure to do so - Effect.**PRACTICE AND PROCEDURE - Mention - Court treating a date fixed for mention of a case as one for hearing - Propriety of-Proceedings conducted thereon - How treated.**PRACTICE AND PROCEDURE - Service of court process - Failure to serve where service is necessary - Effect of.**WORDS AND PHRASES - Locus standi - Connotation of.**WORDS AND PHRASES - Reasonable cause of action - Meaning of-*

Issues:

1. Whether the failure to serve hearing notices of the proceedings on the appellant on the various dates the case came up before the trial court was not a breach of its right to fair hearing.
2. Whether, in the circumstances of this case, the respondent did not lack *locus standi* to maintain the action and whether the case disclosed any reasonable cause of action.
3. Whether the respondent proved his case on all the grounds canvassed before the trial court and whether the general damages awarded is justifiable in law.

Facts:

The respondent sued the appellant for negligence claiming declarations and damages. The respondent's case was that he bought crates of the appellant's products for sale in the ordinary course of business as a trader. The respondent sold the products to customers who consumed same and discovered the products to be highly contaminated.

The respondent averred that the appellant manufactured the contaminated products knowingly and deceitfully and sold same to him thereby breaching the legal duty of care owed him and other consumers of the products. The respondent stated that sequel to these events he incurred huge expenses and terrible financial losses resulting from sharp business decline and low patronage by customers who believed that the respondent was selling fake and adulterated goods and drinks.

The appellant filed a defence and a counter-claim contending that the respondent's case constituted a gross abuse of judicial process and claimed damages for the expenses the respondent put it to. The matter was tried in the absence of both the appellant and its counsel and the court did not issue any hearing notice to the appellant. The trial court in a considered judgment found for the respondent and awarded in his favour general damages in the sum of N50,000.

Dissatisfied with the judgment, the appellant appealed to the Court of Appeal contending that the failure of the trial court to notify the appellant of the proceedings when they were pending was a contravention of the appellant's constitutional right to a fair hearing and renders the proceedings a nullity and fruitless exercise. The respondent also cross-appealed against the quantum of general damages awarded by the trial court.

In resolving the appeal, the Court of Appeal considered the provision of section 36(1) of Constitution of the Federal Republic of Nigeria, 1999 which provides:

"36-(1) In the determination of his civil rights and obligations, including any question or determination by or against any government or authority, a person shall be entitled to a fair hearing within a reasonable time by a court or other tribunal established by law and constituted in such manner as to secure its independence and impartiality"

Held (*Unanimously allowing the appeal and dismissing the cross-appeal*):

1. *On Effect of failure to serve process of court where service is required -*
Where service of process is required, failure to serve is a fundamental vice, and the person affected by the order but not served with the process is entitled *ex-debito justitiate* to have the order set aside as a nullity. Such an order of nullity becomes a necessity because due service of process is a condition precedent to the hearing of any suit if the principle of *audi alteram partem* is to have any value. [*Skenconsult (Nig.) Ltd. v. Ukey* (1981) 1 SC 6; *Odutola v. Kayode* (1994) 2 NWLR (Pt.324) 1; *Mbadinuju v. Ezuka* (1994) 8 NWLR (Pt.364) 535 referred to.] (*Pp. 25-26, paras. H-B*)
2. *On Propriety of court treating a date fixed for mention of a case as one of hearing -*
It is wrong for a court to treat a date fixed for mention of a case as one of hearing when all the parties or their counsel are not in court. Any judgment consequently entered contrary, to this principle of law amounts to a nullity. In the instant case, the hearing of the suit could not have properly commenced on 13th October, 1999 since the trial court did not order the issuance and service of fresh hearing notice on the appellant. In the circumstance, the proceedings of the trial court from 13th October, 1999 in the trial of the suit up to judgment was in breach of the appellant's right to fair hearing and therefore a nullity. [*Agena v. Katseen* (1998) 3 NWLR (Pt.543) 560; *Aladegbemi v. Fasanmade* (1988) 3 NWLR (Pt.81) 129 referred to.] (*P. 26, paras. B-E*)
3. *On Meaning of locus standi and effect of absence of locus standi -*

Locus standi denotes legal capacity to institute proceedings in a court of law. It is used interchangeably with terms like "standing" or "title to sue". Failure to disclose any *locus standi* is as fatal to an action as is failure to disclose any reasonable cause of action. [*Adesanya v. The President of the Federation Republic of Nigeria* (1981) 2 NCLR 358 referred to.] (P. 28, paras. A-B)

4. *On Effect of failure by plaintiff to establish locus standi -*

In determining the issue of locus standi, the court must constantly bear in mind that its judicial powers are being invoked and the matters in which the judicial powers can be exercised are by the provisions of section 6(6)(b) of the Constitution of the Federal Republic of Nigeria, 1999 expressly stated to extend to all matters between persons, or between government or authority and to any person in Nigeria, and to all actions and proceedings relating thereto, for the determination of any question as to the civil rights and obligations of that person. Therefore, if a plaintiff has no locus standi his claim must fail. [Gamioba v. Esezii II (1961) 2 SCNLR 237 referred to.] (P. 28, paras. B-D)

5. *On What constitutes reasonable cause of action -*

A reasonable cause of action is a cause of action with some chance of success when only the allegations in the pleadings are considered. So long as the statement of claim or the particulars disclose some cause of action or raise some question fit to be decided by a Judge or jury, the mere fact that the case is weak and not likely to succeed is no ground for striking it out. (P. 28, paras. F-G)

6. *On Duty on court where statement of claim, no reasonable cause of action-*

Where a statement of claim disclose no cause of action and the court is satisfied that no amendment however ingenious, will cure the defect, the statement of claim will be struck out and the action dis-missed and also where no question as to the civil rights and obligations of the plaintiff is raised in the statement of claim for determination, the statement of claim will be struck out and the action dismissed, [Thomas v. Olufosoye (1986) 1 NWLR (Pt.18) 669 referred to.] (Pp. 28-29, paras. G-A)

7. *On Discretionary nature of award of general damages –*

The award of general damages is in the discretion of the trial court. (P. 34, para. A)
On Attitude of appellate court to exercise of discretion by trial court and when it will interfere therewith -

It is normally not the business of an appellate court to interfere with the exercise of discretion by a trial court even if it would have decided the matter hi some other way if it was to exercise the discretion. An appellate court will however interfere with the exercise of discretion by the trial court where the trial court proceeded on a wrong principle of law in making the award and/or where the award is an entirely wrong estimate of the damage. [Ibekendu v. Ike (1993) 6 NWLR (Pt.299) 287 referred to.] (P. 34, paras. A-C)

Nigerian Cases Referred to in the Judgment:

A.-G., *Kwara State v. Olawale* (1993) 1 NWLR (Pt.272) 645

Adefulu v. Oyesile (1989) 5 NWLR (Pt.122) 377
Adesanya v. The President of the Federal Republic of Nigeria,
 (1981)2NCLR358
Adeyemi v. Olakunri (1994) 2 NWLR (Pt.327) 500
Agena v. Katseen (1998) 3 NWLR (Pt.543) 560
Aladegbemi v. Fasanmade (1988) 3 NWLR (Pt.81) 129
C.S.T.W.U. v.A. &A.W.U.N. (1993) (Pt.273) 63
Gamioba v. Ezezi II (1961) 2 SCNLR 237
Ibekendu v. Ike (1993) 6 NWLR (Pt.299) 287
Julius Berger (Nigeria) Ltd. v. Femi (1993) 5 NWLR (Pt.295) 612

Mbadinuju v. Ezuka (1994) 8 NWLR (Pt.364) 535

Obere v. Eku Baptist Hospital (1978) 6-7 SC 15 *Odutola v. Kayode* (1994) 2 NWLR
 (Pt.324) 1 *Ogbimi v. Ohio* (1993) 7 NWLR (Pt.304) 128 *Skenconsult (Nig.) Ltd. v. Ukey*
 (1981) 1 SC 6 *Thomas v. Olufosoye* (1986) 1 NWLR (Pt.18) 669

Foreign Cases Referred to in the Judgment:

Drummond- Jackson v. Britain Medical Association (1970) 1 NWLR 688
Moore v. Lawson 31 TLR 418

Nigerian Statute Referred to in the Judgment:

Constitution of the Federal Republic of Nigeria, 1999,8.36(1)

Book Referred to in the Judgment:

Clerk and Lindsell on Torts, 14th Edn., p.402

Appeal and Cross-appeal:

These were an appeal and a cross-appeal against the decision of the High Court awarding damages in favour of the respondent. The Court of Appeal, in a unanimous decision, allowed the appeal and dismissed the cross-appeal.

History of the Case:

Court of Appeal:

Division of the Court of Appeal to which the appeal was brought: Court of Appeal, Abuja
Names of Justices that sat on the appeal: Dahiru Musdapher, J.C.A. (*Presided*);
 Zainab Adamu Bulkachuwa, J.C.A.; Albert Gbadebo Oduyemi, J.C.A. (*Read the Leading Judgment*)

Appeal No..-CA/A/8/2000

Date of Judgment: Monday, 30th April, 2001

Names of Counsel: Yusuf O. Ali, SAN (*with him*, S. U. Solagberu, Esq. and S. A. Oke, Esq.) -*for the Appellant*
 Eric A. Nwabuzor, Esq. -*for the Respondent*

High Court:

Name of the High Court: High Court, Minna

Counsel:

Yusuf O. Ali, SAN (*with him*, S. U. Solagberu, Esq. and S. A.' Oke, Esq.) - *for the Appellant*
 Eric A. Nwabuzor, Esq. -*for the Respondent*

ODUYEMI, J.C.A. (Delivering the Leading Judgment): On 2nd

November, 1998, the respondent, as plaintiff caused a writ of summons to be issued on the appellant, as defendant by the High Court of Justice of Niger State in the Minna Judicial Division. The writ was specially endorsed as follows:-"Particulars of claim

1. The plaintiff who, in the ordinary cause of business as a trader and shop keeper, bought

crates of the defendants' products for sale and actually sold same to customers who consumed same and discovered the products to be highly contaminated.

2. The defendants who are the manufactures of the coca-cola brand of soft drinks manufactured the contaminated products knowingly and deceitfully sold same to the plaintiff who bought the contaminated products thereby breaching the legal duty of care owed the plaintiff and other consumers of the product.
3. The plaintiff has incurred enormous financial and material losses arising from the defendants' negligence and have in fact continued to suffer decline in patronage of his business by reason thereof."The writ also had endorsed thereon, a claim for the following q reliefs:-

- "1. A declaration that the presence of solid contaminants and or substances in corked bottles of the defendants' product (i.e. coca-cola brand of drinks) is tantamount to a breach of duty of care owed the plaintiff by the defendant.
2. A declaration that the defendant is negligently liable to the plaintiff and indeed all consumers of the defendants' products in the circumstances.
3. The sum of one million naira (N1m) as special, exemplary and general damages for negligence.
4. An order compelling the defendants lo issue a public apology for its negligence and immediate withdrawal from circulation in Niger State of its products having the same batch number as the one in question and or an injunction restraining the defendants from further manufacturing and circulating its products in Niger State.

In addition, plaintiff attached to the writ a 17 paragraph statement of claim in which he claimed the same with minor modification. The defendant filed a memorandum of appearance as well as Statement of defence and counter-claim for N1 million on 1st December, 1998.

The defendant, in its 6 paragraph statement of defence and counter-claim sought the following relief s:-

" Statement of Defence

5. Whereupon, the defendants plead that the case of the plaintiff shall be dismissed, because it is unnecessary and unwarranted, and constitutes a gross abuse of the judicial process, and that its counter-claim herewith annexed, shall be upheld by the court.

Counter-claim

3. Whereupon, the defendant claims the following special and general damages from the plaintiff as a result of above.

Particulars of Special Damages

1. Transport costs	N2,000.00
2. Administrative expenses	N8,000.00
3. Solicitors fees for intellectual labour, research, and other incidental expenses	<u>N80,000.00</u>
TOTAL	N90,000.00
General Damages	N1,000,000.00"

The matter was tried in the absence of both the defendant and

its counsel. The learned trial Judge in a considered judgment found for the plaintiff and awarded in favour of the plaintiff general damages in the sum of N50,000.00.

It is against that judgment that the defendant has appealed. The plaintiff has also cross-appealed against the quantum of general damages awarded by the lower court.

The notice of appeal of the defendant (hereinafter called "The appellant") contained six grounds of appeal, which shorn of the respective particulars read as follows:-

"Grounds of Appeal

1. The learned trial Judge erred in law in granting a declaratory relief in favour of the respondent when he did not make out a case entitling him to the grant of such relief either in his pleadings nor evidence.
2. The learned trial Judge erred in law when he held that since the plaintiff has proved his case on general damages only on the preponderance of evidence before the court his claim hereby succeeds. And the court hereby orders that
3. The learned trial Judge erred in law in finding the appellant liable in the tort of negligence when all the ingredients of negligence were not established by the respondent, nor properly pleaded by him.
4. The learned trial Judge erred in law when he held that

1. The presence of the solid contaminated substance in the corked bottles of the defendant's product i.e. coca cola brand of drinks is a breach of duty of care owed by the plaintiff to the defendant.
2. Defendant is therefore liable to the plaintiff and all consumers of the product in the circumstances.
3. The court is as such awarding the plaintiff N50,000.00 in general damages only since that was proved on the preponderance of evidence before the court. This is done in consideration of the many lives at stake as coca-cola is a very popular drink nationwide and the continued consumption of such contaminated drinks in future would definitely be a health risk of not just a single individual but many Nigerians in general.'

The learned trial Judge erred in law in entering judgment for the respondent and against the appellant when the respondent lacked *locus standi* to maintain the action and when the action disclosed no reasonable cause of action and was totally unmaintainable.

5. The learned trial Judge erred in law in proceeding to enter judgment against the appellant when there was no evidence that the appellant had notice of the proceedings culminating into judgment and thereby denied the appellant its right to a fair hearing." The cross-appeal of the plaintiff (hereinafter called "cross-appellant") was filed in this court on 7th April, 2000. It contains only one ground of appeal which shorn of its particulars read thus:-

"3. *Grounds of Appeal*

1. The learned trial Judge erred in law and fact by proceeding to award the sum of N50,000.00 only as general damages for a proven case of negligence in view of the enormity of the damages sought, preponderance of evidence and the undefended nature of the appellant's claims."

Appellant filed a brief of argument as well as a reply brief which incorporated its cross-respondent's brief of argument.

Respondent filed a respondent's brief, which also incorporated his cross-appellant's brief of argument.

Learned senior counsel for appellant made a short expatiation of the appellant's brief at the oral hearing in this court while learned counsel for respondent merely adopted the respondent's brief of argument.

The appellant's brief of argument distilled for determination by this court arising from the six grounds of appeal three issues thus:-

"Issues for Determination

It is our humble submission that from the six grounds of appeal the following three issues call for the decision of your Lordships -

1. Whether the failure to serve hearing notices of the proceedings on the appellant on the various dates the case came up before the trial court was not a violent breach of its right to a fair hearing?
2. Whether in the circumstances of this case the respondent did not lack *locus standi* to maintain the action and whether the case disclosed any reasonable cause of action?
3. Whether the respondent proved his case on all the grounds canvassed before the trial court and whether the general damages awarded is justifiable in law?

Issue No. 1 covers ground 6, Issue No. 2 deals with ground 5 while grounds 1, 2, 3, and 4 are covered by Issue No. 3."

The respondent, for its part adopted the three issues formulated by the appellant on the main appeal while respondent formulated only one issue for determination in the cross-appeal thus:-

"Issue for Determination

Whether or not, having regard to the facts and circumstances of this case, the award of the sum of N50,000.00 as general damages by the trial court for a proven case of negligence is reasonable sufficient (*sic*) reasonable and represent a fair estimate of damages naturally flowing therefrom?"

For its part, the appellant/cross-respondent formulated only one issue also for determination in the cross-appeal but as follows: -

"Issue for Determination

It is our humble submission that the single issue that arises from the lone ground of cross-appeal is as follows:-

Whether the award of fifty thousand naira (N50,000.00) damages awarded by the trial court is justifiable in the circumstances of this case?"

On Issue 1 of the appellant's brief - i.e. on the complaint of failure of service of hearing notices of the proceedings on the appellant on the various dates on which the case came up before the trial court, appellant submitted as follows:-

It is apparent from the fact of the record of the lower court that the appellant and its counsel had no notice of the sitting of the court on 13/10/99 when hearing commenced in the action; also they had no notice of the sitting on 28/10/99 when the case was for cross-examination and continuation and on 2/11/99 when the respondent closed his case and the matter was adjourned for judgment to 1/12/99. It is also contended that the records also show that the appellant and his counsel were not aware of the sitting of court on 1/12/99 when the court delivered judgment. It is submitted that appellant only became aware of the judgment about 14/12/99 when the Bailiff of the lower court went to levy execution of the judgment. Appellant has timeously filed a memorandum of appearance, and a statement of defence incorporating a counter-claim cannot be said to be tardy

and unserious to prosecute its defence.

Appellant relies on the absence of any affidavit of service in the whole record of proceedings to controvert the sequence of events enumerated above.

It is the contention of appellant that the failure of the court of trial to notify defendant/appellant of the proceedings when they were pending was a contravention of appellant's constitutional right to a fair hearing and renders the proceedings a nullity and fruitless exercise.

He relies on *inter alia* - (i) *Agena v. Katseen* (1998) 3 NWLR (Pt.543) 560; (11) *Julius Berger (Nigeria) Ltd. v. Femi* (1993) 5 NWLR (Pt.295) 612.

For the respondent, it is submitted as follows -There is proof of service at pages 15 and 16 of the record of service on the defendant of notice of the hearing fixed for 27th September, 1999.

The matter was mentioned on that day even though both parties had filed pleadings. Appellant and its counsel were absent and no reason was sent. The matter was then adjourned to 13/10/99 for hearing.

On 13/10/99, plaintiff gave evidence as PW1. The court adjourned the matter to 28/10/99 for cross-examination. Respondent concedes that no order for service of hearing notice appears on the record of the lower court but maintains that the lower court indeed issued another hearing notice for 28/10/99.

Respondent concedes that no proceedings in fact took place on 28/10/99 but the court conducted proceedings on 2/11/99 in the absence of the appellant or his counsel and adjourned for judgment on 1/12/99. A copy of the judgment of 1/12/99, it is submitted, was served on the appellant about 14/12/99.

It is the contention of respondent that appellant had adequate notice of the hearing of respondent's case at the lower court and that appellant's right to fair hearing was not breached.

The provision as regards a person's right to fair hearing is now entrenched in the Constitution of the Federal Republic of Nigeria, 1999 in the following terms -

"S.36-(1) In the determination of his civil rights and obligations, including any question or determination by or against any government or authority, a person shall be entitled to a fair hearing within a reasonable time by a court or other tribunal established by law and constituted in such manner as to secure its independence and impartiality."

In so far as the service of Hearing Notice concerning the proceedings in this case in the lower court is concerned, the printed record of the court must be relied upon in the absence of a satisfactory challenge to its correctness.

It is apparent from the record of proceedings that both parties were served with hearing notice for the proceedings of court on 27th September, 1999.

While plaintiff and his counsel were in court on that day, defendant and his counsel were reported absent. The suit was merely mentioned while hearing was adjourned to 13.10.99 by the court. There was no order of court for issue and service of fresh hearing notice on defendant or his counsel and none was issued or served. In the event, the court commenced hearing of the matter on 13.10.99 when the plaintiff testified on his own behalf as PW1. At the end of the testimony, the record of the court reads as follows:-"Court -1 will adjourn the case to 28.10.99 for cross-examination and continuation, if the defence so wish." There is no directive for fresh hearing notice to be issued and served on the defendant contrary to the assertion in the brief of respondent; also there is no affidavit in proof of service of any hearing notice of appellant as alleged by the respondent. In any event, there is no indication in the printed record that the court sat for the case on 28.10.99 as ordered.

Instead, the next sitting of the court for the suit was on 2nd November, 1999.

On that day, learned counsel for plaintiff applied to the court to "close" its order for cross-examination of plaintiff by the defence. The application was granted.

Thereafter plaintiff's counsel announced that that was the case for the plaintiff and urged the court to enter judgment in favour of plaintiff.

The court then adjourned the matter for judgment to 1st December, 1999.

There was no new directive given for issue and service of notice of judgment on the defendant or his counsel. In the event, neither the defendant nor his counsel was present in court on 1st December, 1999 when the court gave judgment.

The pertinent question now to ask is - Were the proceedings of the lower court on 13th October, 1999 and on 2nd November, 1999 in the absence of the defendant and of his counsel in breach of the constitutional right to fair hearing of the appellant for the non-issue or service of hearing notices regarding the proceedings on the defendant on each of the two days?

As I indicated earlier, there is evidence in the record that the court duly issued on the parties notice of process for the proceedings of 27th September, 1999 and it was served on them. The court could have safely commenced hearing of the case on that day even though the defendant and his counsel were absent. As it turned out the court merely mentioned the matter and adjourned the hearing thereof to 13th October, 1999. The learned trial Judge wrote in the record thus -

"Case is adjourned to 13-10-99 for hearing since the defendants have been served and they have filed the necessary papers but are not here and with no reason."

It is apparent that the learned trial Judge felt there was no need on the court to order that fresh hearing notice be issued and served on the defendant. I think the court was wrong. It was obligatory on the court, since no hearing of the suit took place on that day as fixed to order that fresh hearing notice be issued and served on the defendant to notify it of the adjournment to 13th October, 1999.

The defendants were entitled to be served with notice of the proceedings fixed for 13-10-99 since the matter was merely mentioned in their absence on 27th September, 1999.

Similarly, it was obligatory on the court to have ordered that service be effected on defendant of notice of the adjournment for cross-examination and continuation fixed for 28-10-99. Since no proceedings took place on 28-10-99 the next date of sitting, the court ought to have merely mentioned the matter and ordered that service of fresh hearing notice be effected on defendant in respect of such other date to which the court might adjourn the matter.

It is a cardinal principle of law that where service of process is required, failure to serve is a fundamental vice, and the person affected by the order but not served with the process is entitled *ex debito justitiae* to have the order set aside as a nullity. Such an order of nullity becomes a necessity because due service of process is a condition *sine qua non* to the hearing of any suit if the principle of *audi aliam partem* is to have any value - (i) *Skenconsult (Nig) Ltd. v. Ukey* (1981) 1 SC 6; (ii) *Odotola v. Kayode* (1994) 2 NWLR (Pt.324) p.1; (iii) *Mbadinuju v. Ezuka* (1994) 8 NWLR (Pt.364) p.535, 541.

It is wrong for a Judge to treat a date fixed for mention of a case as one of hearing when all the parties or their counsel are not in court. Any judgment consequently entered contrary to this principle of law amounts to a nullity. *Agena v. Katseen* (1998) 3 NWLR (Pt.543) p.560.

In the instant case, the hearing of the suit could not have properly commenced on 13th October, 1999 since the learned trial Judge could not be bothered to order the issuance and service of fresh hearing notice on the defendant -

In the circumstance, I hold that the proceedings of the lower court from 13th October, 1999 in the trial of this suit up to judgment was in breach of the right of the defendant to a fair hearing. In the circumstance the said proceedings were a nullity. The decision of the lower court was given without jurisdiction. Similarly the levy of execution of the judgment will suffer the same fate. *Aladegbemi v. Fasanmade* (1988) 3 NWLR (Pt.81) p. 129.

In the event, I resolve issue 1 in favour of the appellant. This decision should have been enough to dispose of the appeal. However, I shall consider the remaining two issues set down for resolution in the appeal.

The second issue for determination is whether the respondent in this appeal did not lack *locus standi* to maintain the action and whether the case disclosed any reasonable cause of action.

For the appellant, it is contended that the gist of the complaint of the respondent is that he bought some products from the appellant in July, 1998 but a third party who bought a bottle of the products from the respondent, and who was not a party to the case was alleged to have discovered some particles in the drink. It is therefore the submission of appellant that respondent was purporting to sue on the alleged wrong said to have been committed against a non-party to the suit.

It is also contended that there is no nexus between the allegation of the respondent against the appellant and the sealing off of the premises of the respondent by officials of the Bosso Local Government Council nor with the alleged arrest of the respondent by the Police.

It is also contended that reliefs (a), (b) and (d) claimed in paragraph 17 of the statement of claim (almost identical with reliefs (1), (2) and (4) of the endorsed particulars in the writ of summons quoted (*supra*) are in the nature of public nuisance for which the respondent has no right of action except if he was able to show that he suffered more over and above members of the society.

It is also contended that there was nothing in the case of the respondent as formulated in the trial court that disclosed a reasonable cause of action against the appellant.

Appellant rely on *inter alia*, (i) *Adeyemi v. Olakunri* (1994)2 NWLR (Pt.327) p. 500; (ii) *C.S.T.W.U. v. A. & A. W. U. N.* (1993) 2NWLR(Pt.273)p.63.

the respondent, it is contended that a consideration of paragraphs 3,5,10,11 and 15 of the statement of claim collectively form the bedrock of the respondent's action in the lower court and that it is to these paragraphs that one should look for the legal capacity of the plaintiff in the lower court to institute the proceedings.

Respondent contended that it was the "corked bottles" of appellant's products which were admitted by appellant to have been sold to respondent that form the subject matter of the complaint of the respondent in the action.

It is also contended that the mere fact that the bottles in Exhibits I(a) - (c) bought from the appellant by the respondent contained unusual substances (contaminants) thereby making them unfit for sale or consumption provides for the respondent the *locus standi* to institute the action; that the mere presence of the contaminants in Exhibits I(a)-(c) without more, is a *prima facie* evidence of negligence (*res ipsa loquitur*).

As for the issue of cause of action, it is the contention of respondent that paragraphs 2, 3, 5 and 10 of his statement of claim disclose his cause of action against the appellant. Respondent maintains that his cause of action in the suit arose at the time when he purchased the alleged defective products i.e. July, 1998 and not when the customer made the discovery with regard to the already defective product; that his cause of action is negligence and once the act complained of discloses *prima facie* evidence of negligence, a cause of action arises.

The term "*locus standi*" denotes legal capacity to institute proceedings in a court of law. It

is used interchangeably with terms like "standing" or "title to sue" - Per Hon. Justice Fatayi Williams, CJN as he then was, in *Adesanya v. The President of the Federation Republic of Nigeria & Anor.* (1981) 2 NCLR 358, (1981) 1 All NLR(Pt.1)1, (1985) 5SC112.

The failure to disclose any *locus standi* is as fatal to an action as is failure to disclose any reasonable cause of action.

In determining the issue of *locus standi*, the court, must constantly bear in mind that its judicial powers are being invoked and the matters in which the judicial powers can be exercised are, by the provisions of section 6(6)(b) of the Constitution of the Federal Republic of Nigeria, 1999 expressly stated to extend to all matters between persons, or between government or authority and to any person in Nigeria and to all actions and proceedings relating thereto, for the determination of any question as to the civil rights and obligation of that person.

Therefore, if a plaintiff has no *locus standi*, his claim must fail - (i) *Gamioba & Ors. v. Ezezi II & Ors.* (1961) 2 SCNLR 237, (1961) 4 All NLR 584; (ii) *Irene Thomas & Ors. v. Most Rev. Olufosoye* (1986) 1 NWLR (Pt.18) p. 669.

Similarly reasonable cause of action was defined by Lord Pearson in *Drummond-Jackson v. Britain Medical Association* (1970) 1 WLR 688; (1970) 1 All ER 1094 CA and adopted by Hon. Justice Obaseki, JSC (as he then was) in *Thomas v. Olufosoye (supra)* at p. 671, thus:-

"a cause of action with some chance of success when only the allegations in the pleading are considered. The practice is clear. So long as the statement of claim or the particulars disclose some cause of action or raise some question fit to be decided by a Judge or jury, the mere fact that the case is weak and not likely to succeed is no ground for striking it out. (*Moore v. Lawson* 31 TLR 418 CA); where the statement of claim discloses no cause of action and if the court is satisfied that no amendment, however ingenious will cure the defect, the statement of claim will be struck out and the action dismissed. Where no question as to the civil rights and obligations of the plaintiff is raised in the statement of claim for determination, the statement of claim will be struck out and the action dismissed." The respondent in his brief has urged this court to look into paragraphs: 2, 3, 5, 10, 11 and 15 of the statement of claim for answers to the question as to his "*locus standi*" and cause of action. We shall.

Paragraph 2. The defendant is public limited liability company carrying on the business of soft drink manufacturers and bottlers throughout Nigeria including Minna and is the manufacturer, bottler and distributor of Coca-cola brand of soft drinks.

Paragraph 3. The plaintiff has been in the business of buying and selling for over ten years and is a regular customer of the defendant from whom the plaintiff buys coca-cola brand of soft drinks by means of the defendant's stock card. The plaintiff pleads and shall rely on his stock cards at the hearing of this suit.

Paragraph 5. The plaintiff avers that sometimes in the month of July, 1998, he purchased stock of the defendant's coca-cola brand of soft drinks with the usual intention of reselling them to the general public in retail quantities.

Paragraph 10. The plaintiff states that as the foregoing events unfolded, it became imperative to him to actually scrutinise the stock of the defendant's product in his shop and was shocked to discover so many bottles of the defendant's products with varieties of contaminants.

Paragraph 11. The plaintiff states that sequel to these events he incurred huge expenses and terrible financial losses resulting from sharp business decline and low patronage by

customers who now believes that the plaintiff sells fake, adulterated and contaminated goods and drinks.

Paragraph 15. The plaintiff shall contend at the trial that:

- a. the defendant was and is grossly negligent in the manufacture and distribution of its soft drinks products.
- b. that the defendant is liable in exemplary and aggravated damages to the plaintiff in the circumstances
- c. that the defendant's soft drinks now pose a he hazard to the public.
- d. that the defendant must be restrained from jeopardizing the health of the public any further "

It is obvious that the respondent is alleging that there was contract between himself and the appellant with regard to products manufactured by the appellant, that as regards a particular consignment of the products, he suffered loss by "incurring huge expenses and terrible financial losses resulting from sharp business decline and low patronage by customers" owing to the negligence of the appellant in the manufacture of its products, the subject of the contractual relationship between him and the appellant.

I am convinced that the respondent has disclosed in his statement of claim not only that he had *locus standi* in the case but also a reasonable cause of action - (i) *Adefulu & Ors. v. Oyesile and Ors.* (1989) 5 NWLR (Pt.122) p.377; (ii) *A.-G., Kwara State & 2 Ors. v. Olawale* (1993) 1 NWLR (Pt.272) p.645; (iii) *Ogbimi v. Ohio* (1993) 7 NWLR (Pt.304) p. 128.

In the circumstances, I resolve issue 2 in favour of the respondent. Issue 3 in the appellant's brief asks the question whether the respondent proved his case on all the grounds canvassed before the trial court and whether the general damages awarded is justifiable in law –

This issue as framed would appear to be wider than is justified by the judgment appealed against. To give a proper focus on the issue -1 shall quote the pertinent portion of the judgment of the lower court, the subject of the appeal. It reads:-

"It is trite law that special damages must be specially pleaded and proved, see case of *Imana v. Robinson* (1979) 3-4 SC 1 which says, on special damages that evidence must show the same particularity as it is necessary in pleading it consist (*sic*) of the evidence of particular losses which are exactly known or accurately measured at trial. This was not the case here as the plaintiff himself could not quantify before the court how much he spent on losses in this case; his claim on special damages therefore fails. He has not established it on the preponderance of evidence before the court. On general damages however since he has estab- before the court his case but only failed on special damages as that was not strictly proved his claim
for general damages succeeds

Since the plaintiff has proved his case on general damages only on the preponderance of evidence before the court his claim hereby succeeds. And the court hereby orders that:-

- 1. The presence of the solid contaminate substance in the corked bottles of the defendant's product i.e. coca-cola brand of drinks is a breach of duty of care owed by plaintiff to the defendant.
- 2. Defendant is therefore liable to the plaintiff and all consumers of the product in the circumstance.
- 3. The court is as such awarding the plaintiff N50,000.00k in general damages only since that

was proved on the preponderance of evidence before the court.

This is done in consideration of the lives at stake as coca-cola is a very popular drink nationwide and the continued consumption of such contaminated drinks in future would definitely be a health risk of not just a single individual but many Nigerians in general." In the event, attention in this appeal must be directed principally to the aspect of general damages said to have been successfully proved by the learned trial Judge and for which the award of N50,000 was made.

For the appellant it is contended that - though uncontested, the evidence of plaintiff on his own *ipse dixit* should not have been believed because: it is not cogent and parts are not pleaded or contradictory, in that -whereas paragraph 6 of the statement of claim would imply that the aggressive customer was a male, the evidence of plaintiff was that the aggressive customer was female - a contradiction.

Plaintiff gave evidence which was not pleaded to the effect that he bribed the officials of Bosso Local Government Council and Police Officers - appellants contend that the principle of *ex turpi causa non Oritur actio* should have been applied by the trial Judge against the respondent.

It is contended that the judgment of the trial court was not a fair demonstration of the respondent's case and was perverse in that the learned trial Judge misrepresented the evidence of the respondent.

Appellant therefore urges this court on the above premises to interfere with the quantum of damages awarded by the lower court.

For the respondent, it is contended that the respondent's claims in the lower court are based on negligence; that negligence is a tort and actionable *per se*; consequently the admission of the act complained of in evidence as shown in Exhibits 1(a)-(c) without more, is sufficient to warrant judgment in favour of the respondent; furthermore it is contended that the plea of appellant in paragraph 2 of the statement of defence is a general denial which does not in law amount to a valid traverse of the averments of negligence in the statement of claim - as such only minimal evidence was required to ground respondent's case at the lower court, that failure of appellant to produce evidence in rebuttal of the presumption of negligence when Exhibits 1(a)-(c) the "corked bottles" were admitted in evidence was fatal to the appellant. It is therefore submitted that having proved the appellant negligent, the law confers automatically on the respondent a cognisable right which cannot be breached without a remedy, on the principle of "*ubijus, ibi remedium*".

Furthermore, it is contended that in spite of the gender of the complaint being stressed by the appellant there was no material contradiction in the evidence of plaintiff in the lower court and it has remained cogent and convincing.

On the issue of the bribes to which appellant would want the maxim *ex turpi causa* to apply, respondent contends that these could only have featured if the court had granted the claim of plaintiff in special damages but that since plaintiff was successful only in respect of his claim for general damages, the issue of moneys given in bribe do not feature in the appeal.

Finally, it is contended that the award of general damages being one in the discretion of the lower court this court should not interfere because there was nothing perverse in the judgment of the lower court. I have already quoted in this judgment, extracts of the portion of the judgment from which it is clear that the learned trial Judge considered that plaintiff failed in that court to establish his claim for special damages. I think her Lordship was right when one looks at the evidence preferred.

When contesting issue 2 in this appeal, respondent emphasised that his claim in negligence was rooted in contract between him and the appellant he being a retailer of appellant's products.

It is clear therefore from the evidence that the only claim which he made any attempt to establish was in the three bottles containing contaminants - Exhibits 1(a),(b) and (c). The only special damages he could have suffered was in the cost of the products of the three bottles together with the profit which he could have made from them. He did not establish it. Neither did he give any evidence of any other pecuniary loss which he may have suffered by diminished sales and the alleged loss of patronage.

We are therefore left with the issue of general damages awarded by the court.

Plaintiff was not the one who drank the contents of the contaminated bottle; therefore this should not properly have featured in the award of general damages by the lower court in favour of plaintiff.

Learned trial Judge used her finding that (1) the presence of solid contaminants in the "corked bottles" of the defendant's products is a breach of duty of care owed by the "plaintiff to the defendant". I think she meant it the other way.

Nevertheless, as I stated earlier, since the claim of plaintiff against the defendant was only established by evidence with regard to the three bottles in evidence in respect of which he has failed to establish his claim to special damages, any award of general damages on this account can only properly be nominal damages.

In item 2, learned trial Judge also found defendant to be liable to the plaintiff and all consumers of the product in the circumstance. Again, I think, with respect, she was wrong to have extended liability of defendant beyond the plaintiff to 'all consumers of the product' in the circumstance. Plaintiff has only established his *locus standi* to sue in his own behalf. He has not established in the case, any authority to sue on behalf of the consumers of the product. In item 3 the court also stated as follows in justification of her award of N50 ,000 general damages to the plaintiff –

"This is done in consideration of the lives at stake as coca-cola is a very popular drink nationwide and the continued consumption of such contaminated drink in future would definitely be a health risk of not just a single individual but many Nigerians in general." With respect, the plaintiff did not exhibit any authority to sue in a representative capacity. He is therefore not entitled to an award on behalf of the "many other Nigerians" covered by the judgment.

The law is that the award of general damages is in the discretion of the court of trial. It is normally not the business of an appellate court to interfere with the exercise of that discretion even if it would have decided the matter in some other way if it was to exercise the discretion.

This rule of non-interference however applies only where the appellant is not able to show that the trial court proceeded on a wrong principle of law in making the award; and/or the award is an entirely wrong estimate of the damage. See *Ibekendu v. Ike* (1993) 6 NWLR (Pt.299) p.287 See also Clerk and Lindsell on Torts 14th Edition - 402. In this instance the award of the trial court has been faulted in both respects and I feel justified in interfering.

The plaintiff, even if the trial court had not had its exercise of jurisdiction faulted in the case because of failure to accord the appellant fair hearing at the trial would only have been entitled to nominal damages which I assess at Five Hundred Naira (500) with no costs to either side.

This would however have to await a successful appeal against this judgment. In the event, having resolved Issues 1 and 3 in favour of the appellant, this appeal succeeds.

I hereby set aside the judgment of the lower court.

I award costs of N1,000 in favour of the appellant.

I now come to consider the cross-appeal of the plaintiff in the lower court - now cross-appellant.

I have already indicated in the main appeal the only ground of the cross-appeal as well as the only issue raised thereon.

However, I shall in the consideration of this cross-appeal repeat the issue set out for resolution for ease of reference - It is -whether or not, having regard to the facts and circumstances of this case, the award of the sum of N50,000 as general damages by the trial court for a proven case of negligence is reasonable or sufficiently reasonable and representing a fair estimate of damages naturally flowing therefrom.

For the cross-appeal, it is contended that having refused plaintiff's claim for special damages, the award of N50,000 as general damages is much too small in the circumstance that plaintiff claimed N1 million. This is because in law a claimant for general damages is not required to strictly prove it as such because such a claim is presumed to be the direct and probable consequences of the act complained of once the claim for general damages succeeds on a preponderance of evidence. It is contended that having regard to the facts the defendant in the lower court did not make any worthy defence to plaintiff's claim nor appeared in court to establish its own counter-claim, the averments in the statement of defence went to no issue and must be deemed abandoned. This leaves only the evidence of plaintiff as unchallenged and uncontradicted. Cross-appellant relying on the authority of *Ibekendu v. Ike (supra)* urges this court to interfere with the assessment of general damages by the lower court.

For the cross-respondent, the issue formulated on the sole ground of cross-appeal is whether the award of N50,000 damages by the trial court is justifiable in the circumstances of this case.

Cross-respondent contends that the award of N50,000 damages by the learned trial Judge was based on wrong principles and irrelevant parameters when she said that:

- a) there are many lives at stake since coca-cola is a popular drink nationwide;
- b) the continued consumption of such coca-cola in future, would be a health hazard of not just a single individual but many Nigerians."

Cross-respondent therefore considers that this court in the circumstance would be justified in setting aside the award made by the trial Judge - relying on the decision of the Supreme Court in *Obere v. Eku Baptist Hospital (1978) 6-7 SC p. 15 at p. 24.*

I have already set out in the main appeal in considering issue 3 therein certain extracts of the judgment, the subject of the cross-appeal. I have also stated therein my reasons for concluding that the learned trial Judge made the award on wrong principles of law and also upon a wrong estimate of the damages.

I should be taken as repeating the same arguments herein and in respect of this issue in this cross-appeal.

In the event, I hold that this appellate court would be justified in interfering with the award of general damages by the lower court as the lower court took into consideration wrong principles of law in making the award.

Accordingly, in the event that my decision on Issue 1 in main appeal regarding failure of the lower court is overruled, my award in respect of general damages in favour of the plaintiff is five hundred naira (N500) with no order as to costs.

However, having ruled on Issue 1 that the proceedings from " 13th October, 1999 in the

trial of the suit the subject of this appeal was in breach of the right of the appellant to a fair hearing and that the said proceedings of the lower court were in consequence a nullity, this appeal has merit and I allow it.

The cross-appeal lacks merit and I dismiss it.

I set aside the judgment of the lower court in favour of the plaintiff for want of jurisdiction.

I award costs of N 1,000 in favour of the appellant.

MUSDAPHER, J.C.A.: I have had the preview of the judgment of my Lord Oduyemi, JCA just delivered and I entirely agree with the consideration arrived at. I abide by the order for costs contained in the aforesaid judgment.

BULKACHUWA, J.C.A.: I read in advance the judgment of my learned brother, Oduyemi, JCA just delivered, I agree with him that the appeal be allowed as the appellant was not granted fair hearing at the trial court rendering the whole trial a nullity. Similarly, I agree that there is no merit in the cross-appeal and should be dismissed. The judgment of the trial court is accordingly set aside for being incompetent, the cross-appeal is dismissed and I award cost of N1,000.00 to the appellant.

*Appeal allowed.
Cross-appeal dismissed.*