IN THE HIGH COURT OF JUSTICE
IN THE BENIN JUDICIAL DIVISION
HOLDEN IN BENIN CITY
BEFORE HIS LORDSHIP, HON.JUSTICE P.A.AKHIHIERO,
JUDGE, ON THURSDAY THE
2ND DAY OF JUNE, 2016.

BETWEEN: SUIT NO: B/216/16

MRS. EHIMWENMA EHANAH é é é é CLAIMANT/APPLICANT

AND

1. MISS. ROSEMARY OSAYANDE) é DEFENDANTS/RESPONDENTS
2. MR. FRANK OSAYANDE)

RULING

This is a Ruling on a Motion on Notice, dated 31st March, 2016, brought pursuant to Order 36 Rule (1) & (2) of the Edo State High Court (Civil Procedures Rules) 2012 and under the inherent jurisdiction of this Honourable Court. By this Motion, the Claimant/Applicant is praying this Court for an Order of interlocutory injunction restraining the Defendants/Respondents by themselves, their agents, privies or assigns from building on the applicants piece of land measuring 100ft by 300ft situate and lying at Ward 37B, Oriokpa Village, Benin City, Edo State pending the determination of the substantive suit.

The Motion is supported by a 26 paragraphs affidavit deposed to by the one of the Claimantôs Counsel, Mrs. P.S. Aigbonoga. The Applicantôs Counsel also filed a written Address which he adopted as his arguments in this application.

He submitted that it is trite law that for an Applicant for injunction to succeed, he must fulfill certain conditions which include the following:

a. That there is a serious question to be tried in the substantive action;
b. That there is extreme urgency for the grant of the application;
c. That the balance of convenience is on his side i.e. that more justice will result in granting the application than in refusing it;
d. That damages will not be adequate compensation for his damage or injury if he succeeds at the end of the day;

e. That his conduct is not reprehensible (e.g. that he is not guilty of delay);
f. That the injunction is necessary to preserve the res which are in imminent danger of being destroyed;
g. That the Applicant is willing and ready to enter into an undertaking to pay damages.

For this submission, Counsel relied on the following authorities*: KOTOYE V CBN (1989) 1 NWLR 9PT.98) P.419 at p. 422 Ratio 5;and LEASING COMPANY OF NIGERIA LTD. V TIGER INDUSTRIES LIMITED (2007) 14 NWLR (Pt. 1054) P.346 at pp.346 – 350 Ratios 2.3 & 5*

He submitted that from the affidavit in support of the application, the Applicant has a serious triable issue before the Court. He referred the Court to paragraphs 4, 5, 7, 11 and 16 of the affidavit in support of the application and posited that the paragraphs contain facts which succinctly state the Claimantôs legal rights that are being threatened by the Defendant/Respondent. He also referred to the case of *KOTOYE V CBN (Supra) and LEASING COMPANY OF NIGERIA LTD V TIGER INDUSTRIES LIMITED (supra).*

Counsel submitted that the Claimant/Applicant has also shown that the matter is one in which the Defendant/Respondent ought to and can be restrained by an interlocutory injunction pending the determination of this suit. He argued that except the Defendant/Respondent is restrained as aforesaid, he would foist upon the Court a *fait accompli*. He referred the Court to the case of*: AKAPO V HAKEEM HABEEB (1992) 6 NWLR (PT. 247)p.266 at Pp. 270 – 272, Ratios 1,2,7 and 8 or page 289, para F – G, page 289, para E and page 288, paras A – B.*

He further submitted that a óprima facieô case has been made out by the Claimant/Applicant to warrant his legal rights to be protected by this Court and urged the Court to hold that there are ñserious issues for trialò in this suit. According to him, the Claimant has a real likelihood/possibility of success at the trial of the suit.

Counsel maintained that the Claimant has also shown copiously by her affidavit evidence as well as the exhibits attached thereto that she has been in unchallenged possession of the said land since 1977.He said that, she has expended huge sums of money, time and energy on same and has become sentimentally attached to the land. He submitted therefore, that the balance of convenience is in favour of the grant of this application as the Claimant/Applicant is the one who stands to lose greatly should the Defendant/Respondent not be restrained by an injunctive order of this Court pending the hearing and determination of this suit. He referred the Court to the case of: *UDO V ITCMC (2010) ALL FWLR (pt.507) P.93 Ratio 8.*

Counsel submitted that the Applicant has shown that she is sentimentally attached to this very parcel of land which is why she has expended so much to make it suitable for development. Consequently, she submitted that no amount of damages will adequately compensate the Claimant/Applicant should the Defendant/Respondent be allowed to complete the annexation of Claimantôs land. He said that monetary compensation cannot take care of the losses, agony and emotional torment the Claimant/Applicant has incurred and will incur if the application is not granted now. He cited the following decisions in support: *AKAPO V HAKEEM-HABEEB (SUPRA) Ratio 9 at page 272, or page 302 PARA D*

See, INTEGRITY BANK PLC VS ALI (2012) 7NWLR part 766 p. 420 at 427, PT. 748, P. 338 Ratio 4 (Para F – H at p. 349 (Body of Report)

He further submitted that the Claimant/Applicantôs conduct is not reprehensible in that he acted timeously by approaching the Court whose orders the Defendant/Respondent is more likely to obey since several appeals from well-meaning people to the Defendant have fallen on deaf ears. He referred the court to paragraph 10 of the affidavit in support and also the case of *UDO V ITCMEC (supra) Ratio 7.* He argued that an order of this Court restraining the Defendant pending the hearing and determination of the substantive suit will preserve the *res* and avert irreparable losses to the Claimant.

Learned Counsel for the Applicant submitted that the grant of an application such as this is at the discretion of the Court and subject to whatever terms the Court may impose. He stated that the Claimants/Applicant has given an undertaking to pay damages to the Defendants/Respondents in the unlikely event that the Court holds that this application ought not to have been granted.

Counsel posited that one of the situations that the law of injunction is designed to combat is to arrest a *fait accompli* which a Defendants/Respondent might attempt to foist on the Court in the circumstances of the case. He submitted that the Defendant/respondentôs avowed intention is to alter the character of the Claimantôs land and annex part of it if not stopped by an injunctive order. He said that this will completely destroy part of the *res* and foist a *fait accompli* on the Court. He argued that at the end of the day, the judgment may become merely an academic exercise.

Learned Counsel further submitted that the Court in considering an application for injunction is enjoined not to deprive an Applicant who has a likelihood of success of the fruit of her anticipated judgment. He maintained that the Claimant/Applicant has shown that she has a real possibility of success at the trial of this suit. He argued that the refusal of this application will therefore deny the Applicant of the fruits of the anticipated judgment. He submitted that the Defendants/Respondents do not stand to lose anything from being restrained.

He therefore urged the Court to grant this application to protect the Applicantôs legal right. He relied on the case of: *DEKIT CONSTRUCTION COMPANY VS ADEBAYO (2010) 16 NWLR (Pt.1217) @ page 590 RATIOS 1, 2 AND 4.*

On the issue of Balance of Convenience he submitted that from the foregoing, it is in favour of the Claimants/Applicant whose legal right is being threatened .He therefore urged the court to grant the application in the interest of justice. He relied on the case of: *OBEYA VS A.G. (2004) ALL FWLR PART 232 AT 15, 58 PARTICULARLY AT PAGE 1583 RATIOS 1 & 2*

He also relied on: MADUBUIKE V MADUBUIKE (2000) VOL. 24 WRN PAGES 1-188 PARTICULARLY AT PAGE 141 RATIO 4**.**

On the issue of irreparable damage or injury, Counsel submitted that it is the Applicant whose interest in the suit is at stake who will suffer the irreparable loss or damage or injury by the refusal of this application. He therefore urged the Court to grant the application. He relied on the case *A.C.B. VS AWOBORO (1991) 2 NWLR PART 176 AT PAGE 711 AND KOTOYE VS C.B.N. (2000) 16 WRN AT PAGE 71, OBEYA VS. A.G. FEDERAL SUPRA***.**

On conduct of the parties, Counsel urged the Court to consider the conduct of the parties in granting this application. He referred to the materials placed before the Court, the seriousness in moving the application and all reasonable steps taken in Court. He cited the cases of: *AGBOGU VS OKOYE (2008) ALL FWLR (PART 414) AT 1494; and D.P.C.E. VS B.P.C LTD (2008) ALL FWLR (PART 414) PAGE 1420.*

He maintained that the Claimant/Applicant has shown every seriousness in moving the application .He therefore urged the court to exercise its discretion in favour of the Claimant/Applicant in the interest of justice. He relied on a text titled: CIVIL PROCEDURE by, Professor Nwandialor 2nd edition at pages 588 to page 59.

He referred the Court to the Statement of Claim, where the Applicant averred that if the Defendants continuously build on the land, no adequate compensation will be sufficient. He urged the Court to grant the Applicantôs application. He submitted that perpetual injunction is an ancillary relief which is granted to protect an established legal right in law or in equity.

Finally, he submitted that the Defendants/Respondents claim do not contain any substance in the eye of the law that will make the Court not to exercise its discretion in favour of the Claimant/Applicant. He urged the court to grant the application in the interest of justice.

Responding to the application, the learned Counsel for the Defendants/Respondents raised a sole issue for determination as follows:

Whether the claimant/Applicant is entitled to the grant of the reliefs sought in her motion.

In opposition to the Applicantôs motion, the Defendants/Respondents filed a 30 paragraph affidavit deposed to by 2nd Defendant/Respondent and the defendants relied on all the paragraphs together with the Exhibits. He also relied on sections 86, 87, 88 and 89 of the evidence Act 2011 as amended.

He submitted that the claimant/applicant is not entitled to the grant of the reliefs sought in her motion paper for the following reasons:

1) The applicant is not definite, concise and clear about the reliefs she is seeking before this court, because the subject matter in dispute before this court is a parcel of land measuring 100 feet by 100 feet already built on, by the Defendants/Respondents. But by the applicantôs prayer 1 on the face of the motion paper, the applicant is seeking injunction against the defendants on a piece of land measuring 100 feet by 300 feet. The applicantôs endorsement on the writ is 100 feet by 100 feet. The same dimension is claimed in paragraph 7 of the applicantôs statement of claim.

   He submitted that it is a settled law that where an application for injunction is not certain about the area of land upon which an order of injunction is to be granted such an application should be refused .For this; he relied on the case of *Ideozu vs. Ochoma. (2006) vol. 4 M.J.SC. at P.91 particularly at page 96-97 ratio 5;*

2) The affidavit in support of the applicantôs motion is legally inadmissible because it offends sections 86, 87, 88 and 89 of the evidence Act 2011 as amended.

3) Counsel further submitted that paragraphs 2 to 26 of the applicantôs affidavit are unreliable for the following reasons:

(a) For failure of the deponent to disclose her grounds of belief and the name of her informant;

(b) Their paragraphs contain legal argument/conclusion;

(c) For failure of the deponent to mention the time and place of the information forming her belief specifically in paragraphs 6, 8, 9, 10, 11, 12, 13 14, 15, 16, 17 and 18, where the deponent failed to mention the time and year of all the events mentioned in the aforesaid paragraphs.

He therefore urged the Court to strike out the offending paragraphs or not to rely on them. For this submission, he relied on the authorities of: *AG Adamawa State & ors vs. AGF & ors (2006) Vol. 1 M.J.S.C. Pg. 1 at Ratio 7; Bamaiyi vs State & ors (2001) 8 NWLR (PT. 715 at P.270 at PP. 28; and Nigeria LNG LTD VS African Development Insurance Co. Ltd (1995) 8 NWLR (PT. 416) at P.701.*

While still attacking the affidavit, Counsel referred to paragraph 1thereof where the deponent stated thus: ñ*that I am the lawful Attorney to the claimant in this suit, by virtue of which I am quite conversant with the facts of this case".*

He submitted that the affidavit is defective in substance because it is not a suit brought in a representative capacity or in proxy, but in the name of the applicant, therefore the deponent is a stranger without any authority to do what she did. He urged the court to treat the said affidavit as facts imagined and manufactured by the deponent alone and hearsay. He referred the Court to paragraph 5 of the counter affidavit of the Respondents.

Arguing on the merits of the application, Counsel submitted that for the applicant to succeed in this application, he has to satisfy the following conditions:

a. That there is a triable issue;

b. That there exists extreme urgency;

c. That his conduct is not reprehensible e.g. not guilty of delay;

d. That the balance of convenience is on his side;

e. That damages will not be adequate compensation if he succeeds at the trial; and

f. That he has entered into or is willing to enter an undertaking to pay damages etc.

He cited the authority *of Kotoye vs. CBN (1989) 1 NWRL (Pt.98) P.419 PP. 422 Ratio 5*. Furthermore, he submitted that the applicant was not timeous in her application and the applicantôs conduct is reprehensible and guilty of delay if we are to go by the applicantôs Exhibit ñBò which dates the applicantôs complaint back to the year 2008.He referred the Court to paragraph 3 of the said Exhibit ñBò and submitted that the applicant has not shown real and extreme urgency. He also referred the Court to paragraphs 11, 17, 18 and 20 of the respondents counter affidavit as well as Exhibits B, C and E attached to the counter affidavit, which showed that the respondents have been on the land for a long time.

Counsel referred to the respondents Exhibit A1-A5 as well as paragraphs 6, 15, 16 and 17, to show that the respondents had since built on the land and stopped working there since November, 2012, due to financial constraint. He argued that there is no urgency to warrant the grant of the applicantôs relief. He asked the question: *what is the res to be preserved?* He answered that: *It is the said parcel of land which has been developed since 2007, therefore the act to be restrained by the applicant has been completed*. For this view, he relied on the case of: *Buhari vs Obasanjo (2004) FWLR (PT. 191) 1487 AT 1491 Ratio 3*. He also quoted from prayer 1 of the motion paper thus: ñé .restraining the defendants by themselves, agents, privies or assigns from building on the applicantôs piece of land é .ò.He submitted that if the Court grants the applicantôs prayer aforesaid, it means that the Court has determined the substantive matter at interlocutory stage because of the phrase: ñé the applicantôs piece of landé ò contained in the said prayer.

On the Balance of Convenience, he submitted that the balance of convenience is not on the applicantôs side because she wants 50 feet x 100 feet out of the land in dispute to satisfy her pecuniary interest only as shown by her paragraph 13 of the affidavit in support of motion and she will not suffer anything if the application is refused.

On whether the claimant/applicant has given a satisfactory undertaking as to damages to be entitled to this application, Counsel submitted that the claimant/applicant has not satisfied this requirement because it is another person who deposed to the affidavit and not the applicant herself.

In conclusion, he urged the Court to refuse the application.

I have carefully examined all the processes filed in this application together with the arguments of both counsel on the matter.

An application for interlocutory injunction seeks a discretionary remedy. It is settled law that all judicial discretions must be exercised judicially and judiciously.

The essence of an interlocutory injunction is the preservation of the *status quo ante bellum (the way things were before the fracas)*.The order is put in place to forestall irreparable injury to the applicant's legal or equitable right. See: *Madubuike vs Madubuike (2001) 9NWLR (PT.719) 689 at 709; and Okomu Oil Palm Co. vs Tajudeen (2016) 3NWLR (Pt.1499)284 at 296.*

The principal factors to consider in an application for interlocutory injunction are as follows:

I. The applicant must establish the existence of a legal right;
II. That there is a serious question or substantial issue to be tried;
III. That the balance of convenience is in favour of the applicant;

IV. That damages cannot be adequate compensation for the injury he wants to prevent;

V. That there was no delay on the part of the applicant in bringing the application; and

VI. The applicant must give an undertaking to pay damages in the event of a wrongful exercise of the Courtôs discretion in granting the injunction.

See the following decisions on the point: *Kotoye v C.B.N.(1989) 1 NWLR (Pt.98) 419; Buhari v Obasanjo (2003) 17 NWLR (Pt.850) 587; and Adeleke v Lawal (2014) 3 NWLR (Pt.1393) 1at 5.*

The issue for determination in this application is whether the applicant has satisfied the above enumerated conditions to warrant the exercise of the discretion of this Court in her favour. However, before I consider these factors, I think it would be expedient for me to address some salient objections raised by the learned counsel for the respondents in his written address.

The first objection was on the identity of the land in dispute. Counsel submitted that the applicant was not definite, concise and clear about the reliefs she is seeking from this court. He maintained that the subject matter in dispute as identified in the Writ of Summons and the Statement of Claim is a parcel of land measuring 100 feet by 100 feet. But by the applicantôs prayer 1 on the face of the motion paper, the applicant is seeking injunction against the defendants on a piece of land measuring 100 feet by 300 feet. He submitted that where an application for injunction is not certain about the area of land upon which an order of injunction is to be granted such an application should be refused .For this view, he relied on the case of *Ideozu vs. Ochoma. (2006) supra.*

Going through the entire gamut of the address of the learned counsel for the applicant, I observed that he did not respond to this ground of objection.

In a land matter, the identity of the piece of land must be certain to both parties and to the Court. It should be clearly ascertained for an order of injunction to be tied to it. See the cases of: *Oladejo v Adeyemi (2000) 3NWLR (Pt.647) 25; Assam v Okposin (2000) 10 NWLR (Pt.676) 659; and Adeleke v Lawal (2014) 3 NWLR (Pt.1393) 1at 6.*

Furthermore, a motion for interlocutory injunction should normally be based on the substantive suit in Court. In other words, the injunctive relief should be based on the specific relief sought in the substantive suit. An applicant cannot at the interlocutory stage, make a fresh case which is different from the one claimed in the main suit. In the case of: *Okoya v Santili (1991) 7 NWLR (Pt.206) 753 at 765S, Niki Tobi J.C.A.* explained thus: ñé He has no such right without first applying for the amendment of the reliefs. After all, an applicant cannot unilaterally make a ñUò turn to take a summersault in an interlocutory applicationé ..Talking mildly, that will be tantamount to overreaching the respondent. Talking seriously, that will be tantamount to an abuse of the judicial processò. Also in the case of: *Ladoke & Ors. v Olubayo & Anor. (1992) 8 NWLR (Pt.261) 605 at 624, Kolawole J.C.A.* reiterated that: ñAn applicant cannot, at the interlocutory level, make a fresh case, different from the cause of actionò

In the instant case it is evident that there is a material discrepancy between the description of the land in the originating processes (the Writ of Summons and the Statement of Claim) and the one described in the present application. The applicant is applying for an interlocutory injunction over a portion of land which is in excess of what she is claiming in the substantive suit. This is clearly not possible. This is a fundamental error. The applicantôs Counsel has not proffered any explanation for this obvious contradiction. The Court cannot grant an interlocutory injunction over a parcel of land which is larger than the

portion claimed in the main action. As it is presently, the exact dimension of the disputed land is quite uncertain. The application cannot be granted under such circumstances. In a similar case of: *Adeleke v Lawal (2014) supra, Mary Peter-Odili J.S.C*. stated that: ñé the order of interlocutory injunction cannot be granted in the circumstance where the land in dispute is uncertain and unidentifiable. A situation that can only be resolved by oral evidence which cannot be done in an interlocutory applicationò.

In the event this application cannot be granted. There is no need to consider the other requirements .That will be a mere academic exercise. The application is dismissed with costs assessed at N10, 000.00 (ten thousand naira) in favour of the respondents.

P.A.AKHIHIERO
JUDGE

02/06/16

COUNSEL:

1. PAT UGBOGBO ESQ. ……...CLAIMANT/APPLICANT

2. KEHINDE P. OMOIKE ESQ……DEFENDANTS/RESPONDENTS