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 TUEDAY THE
2ND DAY OF AUGUST, 2016.

BETWEEN

SUIT NO: B/58/0S/16

1. PA AUGUSTINE OGBOMO
(ODIONWERE OF UWUSAN)
2. PA. EMMANUEL IBIZUGBE
(2ND ELDER UWUSAN)
3. PA.OSAGIE IMASUEN
(3RD ELDER, UWUSAN)
4. PA ANDREW EGHAREVBA
(4TH ELDER, UWUSAN)
5. DR. RAPHAEL EDEMAKHIOTA OGBOMO
6. MR. JOHNBULL EFFIONNAYI
7. MR. JOHN ODIASE
8. PA IMAFIDON AIMIEWAENUWU
9. MR. MONDAY AIGUOKHIAN
10. PRINCE EDOBA OGBOMO

é é é é . CLAIMANTS/APPLICANTS

AND

MR. CHARLES UYIEKPEN é é é é é é é é é é é é é é é é DEFENDANT/RESPONDENT

RULING

This is a Ruling on a Motion on Notice, dated 20th of May, 2016, brought pursuant to Order 36 Rule 1(1) Of the Edo State High Court (Civil Procedure) Rules 2012 and under the inherent jurisdiction of this Court

The Claimant/Applicant is praying the Court for an Order of interlocutory injunction restraining the Defendant, his servants, agents and privies from engaging in any transaction involving the sale, transfer or lease of any parcel of

land constituting part of Uwusan Community in Ikpoba Okha Local Government Area of Edo State pending the determination of the substantive.

The application is supported by a 21 paragraphs affidavit. Attached to the affidavit, are Exhibits óAAô and óBBô which are the Constitution of Uwusan Community Development Association and the Notice of meeting issued by the Defendant as Chairman of the CDA respectively.The Applicantôs Counsel also filed a written Address which he adopted as his arguments in this application. This application is also supported by a Further Affidavit containing 21 paragraphs and a document captioned: Reply on Points of Law to the Defendantôs /Respondents Address in Opposition.

In his Written Address, the learned counsel for the Claimants/Applicants, Dr.Osagie Obayuwana, identified the issue for determination in this application as follows:

> *"Whether from the facts and circumstance, the Claimants/Applicants are entitled to the order of interlocutory injunction sought to preserve their communal land pending the hearing and determination of the substantive Suit."*

Arguing the motion, the learned counsel submitted that the purpose of an interlocutory injunction is to maintain the *status quo* and to preserve the *res* pending the hearing and determination of the substantive suit. He maintained that the Court has a duty to preserve the *res* and to maintain the *status quo.*For this proposition, he relied on the case of *Dekit Const. Co. Ltd v. Adebayo (2010) 15 NWLR (pt 1217) 590 at page 606 paragraph C Ratio 3.*

Arguing further, he submitted that the Court has the power to grant or refuse an application for interlocutory injunction and in exercise of such power, the Court must act judicially and judiciously taking into consideration some factors.

For the factors to be taken into consideration in order to grant an application for interlocutory injunction, he relied on the same case of *Dekit Const. Co. Ltd (supra) at page 606 paragraphs D-H Ratio 4*, and the decision of the Supreme Court in the case of *Adeleke v. Lawal (2014) 3 NWLR (pt 1393) 1 at page 31 paras A-D Ratio 10***.** Counsel enumerated the factors as follows:

1. SERIOUS QUESTION TO BE TRIED

He submitted that in this application, the Writ of Summons and Statement of claim show that the communal land of the Claimants/Applicants is being unjustly

exploited leading to devastation and waste of their farm lands. He referred the Court to paragraphs 1 ï 15 of the supporting affidavit and Exhibits óAAô and submitted that this is very serious and not frivolous.

2. BALANCE OF CONVENIENCE IN FAVOUR OF APPLICANTS

Counsel submitted that the balance of convenience is in favour of the applicants. According to him, the very existence of the Claimants/Applicants who are farmers is being threatened by the excesses and greed of the Defendant/Respondent. He argued that if the Defendant/Respondent is not restrained he would sell off or alienate a vast portion of their communal land to their detriment. He argued that the Defendant/ Respondent does not have anything to lose if the application is granted. He referred the Court to paragraphs 16-17 of the affidavit in support.

3. THE EXISTENCE OF A LEGAL RIGHT TO BE PROTECTED

Counsel submitted that Claimants have a legal right to protect. To wit: respect for the Constitution of the Community Development Association which the Defendant/Respondent has flouted as well as the preservation of their communal land which is in danger of being sold off by the Defendant/ Respondent who has become a law unto himself and uses thugs to enforce his will. He referred the Court to paragraphs 11 ï 17 of the affidavit in support.

4. DAMAGES CANNOT ADEQUATELY COMPENSATE FOR LOSS

Counsel maintained that the substantial loss of Claimants/Applicants communal farm land means a substantial loss of livelihood to the Claimants/Applicants in perpetuity which cannot be compensated by damages and referred the Court to paragraph 18 of the affidavit in support.

5. UNDERTAKING TO PAY DAMAGES

He asserted that the Claimants/Applicants have given an undertaking to pay damages to the Defendant/Respondent if it turns out at the conclusion of the case that the order of interlocutory injunction ought not to have been made in the first place. He referred the Court to paragraph 20 of their affidavit.

He urged the Court to grant the application.

Opposing the application, the learned Counsel for the Defendant/Respondent,P.E.Uwadiae Esq., relied on his 50 paragraphs Counter Affidavit and his written address.

He submitted that the grant an order of interlocutory injunction must be fortified by cogent and compelling reasons to convince the Court of the merit of the application. He posited that courts of records have distilled some factors to be considered before granting an application for interlocutory injunction. He identified the following factors:

(i) That the Applicant(s) must have the *locus standi* to institute the action in which the injunction relief is sought.

(ii) The Applicant(s) must show an existence of a legal right which needs to be protected in the interim.

(iii) The Applicant must show that the balance of convenience tilts towards his application.

(iv) He must also show that his damages cannot be assuaged in monetary terms.

(v) The Applicant must enter into an undertaking to pay damages in the event that the court finds that it ought not to have granted the injunction in the first place.

(vi) The Applicant must show a behavior of compliance with the legal circumstances for granting an injunction.

Arguing further, he submitted that the Plaintiff seeking an interlocutory injunction must adduce sufficiently, precise and factual affidavit evidence to satisfy the court that his claim for injunction at the trial is not frivolous.

On the requirement of *locus standi*, Counsel submitted that it is a requirement of law which must be established by convincing affidavit evidence that an Applicant seeking for an injunctive relief must establish that he has the *locus standi* to institute the action.

For this submission, he cited the following cases:

1) *Adenuga Vs. Odumeru (2003) 110 LRCN Pg. 1655 @ pages 1657 – 1658*
2) *Adefulu Vs Oyesile (1989) 5 NWLR Pat 122 @ 377*
3) *Odeneye Vs,. Efunuga (1990) 7 NWLR Pat 164 @ 618*
4) *Adesoka Vs. Adegorulu S.C. (1997) 48 LRCN 579*
5) *Owodunni Vs. Registered Trustees of C.C.C. (2000) 79 LRCN 2406.*

He submitted that the interest of the Claimants/Applicants must be real, not superficial or imaginary. He referred to the dictum of the Court in the case of *Amusa Momoh vs. Jimoh Olotu (1970) 1 ALL NLR 117,* thus:

> *'that it was not enough for a Plaintiff/Applicant to state that he was a member of a family laying claim for Chieftaincy title for him to seek injunctive relief by way of interlocutory injunction, he has to go further to aver in the statement of claim that he has interest in the Chieftaincy title. Not only that, the statement of claim must show how his interest in the chieftaincy title arose."*

Counsel maintained that in the instant case, the Counter Affidavit has established the fact that the deponent to the affidavit in support of the motion on notice is not from Uwusan Community. He asserted that the counter affidavit is supported by indisputable documentary evidence to show not only that the 6th Applicant/deponent is not from Uwusan Community, but that he is a man who has been engaged in unwholesome activities in his own community i.e. Evbuomoma Community. He argued that this is enough reason for the Court to refuse this application.

Counsel maintained that the 6th Claimant/Applicant is a meddlesome interloper in the affairs of Uwusan Community and, an ex-convict who was hired to disrupt the peace and harmony in Uwusan Community.

Counsel reiterated that a man without *locus standi* cannot maintain an action in law. He said that the 6th Claimant/Applicant does not have the *locus standi* because he has no interest threatened, no right violated or threatened to be violated and no obligation placed on him to institute an action as had been done. He maintained that the application for injunction is unmeritorious, vexatious, bereft of legal substance and brought *mala fide.*

Submitting on the requirement that the applicant must establish the existence of a legal right, learned counsel posited that from the affidavit evidence adduced by the Applicants, including the attached exhibit ñAò, the Constitution of Uwusan Community, there is nothing to show that the applicants are vested with authority on transactions relating to the transfer of community land. He maintained that the fulcrum of their challenge is that of transfer of communal land for which they are seeking an injunction. According to him, by virtue of section 1(1V) of the Uwusan Constitution, the transfer of community land is vested in the Plot Allotment Committee. He added that the power to deal with land is only subject to the final approval of the Enogie of Uwusan. Counsel submitted that going through the entire gamut of the Applicantsô supporting affidavit; the Applicants are not members of the Plot Allotment Committee to suggest that their rights are being violated or about to be violated by the Defendant/Respondent. He submitted that the alleged rights of the applicants are imaginary rights. He stated that the courts have been admonished not to grant injunctive reliefs on imaginary rights. For this submission, he relied on the authority of *Aboseldehyde Laboratories Plc Vs. Union Merchant Bank Ltd. & Anor (2013) 2 – 3 NJSC, pt. ix ppt 158 – 159,* where the Supreme Court held thus:

> *"an Applicant seeking injunction is duty bound to establish by affidavit evidence, the legal right he seeks to protect. For the aim of an order of injunction is to protect an* ***established right*** *of the applicant. The onus is on the applicant to establish factually his rights that are being violated or threatened to be violated and not to send the court on a wild goose chase. The right must be positive and unequivocal" (underlining his).*

Counsel furthered argued that the Claimants/Applicants have an onerous obligation not only to establish that they are from the community but that their rights extend to land transactions in that community. He submitted that the Supreme Court has held that it is not sufficient to establish membership of a community, but you must go further to establish your right in the transaction so threatened.

He further submitted that the traditional ruler who is the administrative head of the community, vested with the capacity to complain of the land transactions in the community is not a party to this action as demonstrated by his affidavit of disclaimer to this action.

He therefore urged the court to discountenance this application and dismiss same as the Claimants/Applicants have failed woefully to prove their rights that are being threatened.

On the balance of convenience, counsel submitted that the balance of convenience can only be considered after the applicant has successfully established through factual evidence his rights which outweigh that of the Defendant/Respondent. He argued that if the court finds that the right of the Defendant/Respondent outweighs that of the Claimants/Applicants, the application for injunction must be refused. He referred the court to the views of Lord Diplock in the case of *American Cyanamid Company vs. Ethicon Ltd. (1975) 1 ALL E.R. at 504 pp 5l0* cited with authority in the case of *Adenuga Vs. Odumeru (Supra).*

Counsel maintained that the applicants have failed to establish their rights which are being threatened and that the rights of the Defendant/Respondent out weights that of the Applicants. According to him, the Defendant/Respondent is a member of the Plot Allotment Committee whose responsibility it is to supervise the sales of community land and the chairman of the Plot Allotment Committee and the Enogie are the persons that have the authority to approve the sale of land. He submitted that the supporting affidavit of the Claimants/Applicant is only *hypothetical in content and speculative in design*. He further explained that the affidavit did not state the person transacting the business of land with the Defendant/Respondent, the size of the land and where it is situate in the community. According to him, all these amounts to imaginary thoughts which the courts have been admonished to frown at when considering an application for injunction. He said that the entire motion was designed to create a state of crisis in the community as their intention is to use the injunction to perpetrate crime in the community which he said is the stock in trade of the 6th applicant cum deponent in the supporting affidavit. He therefore urged the court to refuse the application.

Next, learned counsel submitted that on the authority of *Kotoye vs. C.B.N. (1989) 1 NWLR Pt 98 @ 419*, an applicant for an interlocutory injunction must show that damages cannot be adequate compensation for the injury he wants the

court to protect. He posited that in the sales of land there must be valuable consideration in monetary terms. He argued that once the value of an item is known and it is replaceable i.e. in monetary terms, an injunction cannot be granted in such circumstance. .

He maintained that in the instant case, the sales of community land is for a consideration known to law, so that the degree of injury of any of the land is certain in monetary terms i.e. the consideration and at such, it can be adequately compensated for and such a situation does not merit the grant of an injunction. He cited the case of *Buhari vs. Obasanjo (2004) 114 LRCN page 2723 pp 2727 – 2728.*

On the conduct of the parties, counsel submitted that an applicant who has applied for an injunctive relief must behave in a manner that is suggestive of clean hands and must not resort to self-help because injunction being an equitable remedy is only granted to those who have come with clean hands.

He stated that from the counter-affidavit, it has been shown that after the Claimants/Applicants applied for this injunctive reliefs, the 6th Claimant/Applicant led the other Claimants/Applicants to indulge in the act of conducting an election into the office that he is presently challenging in court *vide* this suit. According to him, that singular act undermines the integrity, aura and majesty of this court thereby divesting the claimants of the courtôs positive exercise of its discretionary powers in their favour. He said that a party cannot over reach a court in respect of reliefs he is seeking from the same court. He alleged that the Claimants/Applicants are seeking these injunctive reliefs to legitimize their illegality. He argued that the act of going to conduct an illegal election having filed a suit pending before court shows that the Claimants/Applicants have no respect for this court and as such cannot seek a remedy in this regard.

Counsel submitted that an equitable remedy cannot assist a self-styled emergency. According to him, the situation created by the applicant in this application is a self-styled emergency which only exist in the imaginations of the applicants.

He argued that the court can only grant an injunction where a real emergency exists. He said that this application lacks all the requisite conditions and at such, same should be dismissed.

Lastly, learned counsel argued the point: Whether a Court can act on a process that is statutorily dead by reason of non-compliance with the rules of Court.

He submitted that non-compliance with the rules of court is classified in two folds. He said that the first has to do with irregularity that can be ratified such as where time is prescribed for filing processes i.e. where the rules of court make provisions for an extension of time to file a process.
He said the second is where there are rules that confer jurisdiction such as service of process; its breach is not a mere technicality but substantive as to make any proceeding thereafter a nullity. For this submission, he relied on the case of *Household Utensil Dealers V. Ifeanyichukwu Ventures Ltd. (2003) F.W.L.R. pt 257 page 1573 ppr 1581 – 2.*

The learned counsel submitted that under our rules, a motion seeking a restraining or injunctive relief must be served within five day after the filing of same. He referred the court to *Order 37 Rule 2(1) of the Edo State High Court (Civil Procedure) Rules 2012***.** According to him, this particular rule that deals with service of process cannot be treated as a mere irregularity on the authority of *Household Utensil Dealers V. Ifenyichukwu (Supra)***.**He maintained that where the motion is not served within the five (5) days of filing it ceases to have life because the operative word of the statute is ñshallò which makes compliance mandatory. He submitted that non-compliance will divest the court of jurisdiction to entertain the motion itself.
Counsel also relied on dictum of the Court of Appeal in *Nico Oliver V. Dangote Industries Ltd. (2010 PWLR (Pt. 506) 1858 ppt at 1882,* thus:

"Rules of court should be obeyed and not flouted with impunity'.

Counsel re-emphasized that non-compliance with the rules relating to service divests the court of jurisdiction as service is one of the components that inject a court with jurisdiction. He stated that in the instant case, the motion on notice was filed on 20th May, 2016 and same was not served until 13th June, 2016.He added that most striking is that the *ex-parte* motion for substituted service was filed after the expiration of the five (5) days which is the period required for the life of that process. He posited that the contemplation of the law is that the *ex-parte* application for substituted service is to be filed within the life span of the motion itself and not after the death of the motion.

He maintained that substituted service cannot revive a dead motion. According to him, anything done upon a dead process, no matter how beautifully

conducted amounts to a nullity as it goes to the root of the jurisdiction of the court to entertain the motion itself. He therefore urged the court to dismiss the motion with punitive costs.

The learned counsel for the Applicants filed a copious document which he captioned: Reply on Points of Law to Defendantôs Written Address in Opposition. He adopted this document in his reply to the arguments of learned counsel for the Defendant/Respondent.

Replying on the issue of *locus standi*, counsel submitted that the said argument is misplaced and lacks any basis in law, as the Courts have made it very clear that the issue of *locus standi* is one that courts are to ascertain only from the pleadings of the Claimants. He maintained that the Defendant/Respondentôs argument on *locus standi* in his Counter Affidavit and the exhibits attached thereto cannot be considered by this Court as the Court is not empowered to look at the Defendantôs pleadings and documents in determining the existence of the *locus standi* of the Plaintiff. He relied on the case of: *Bakare v. Ajose – Adeogun (2014) 6 NWLR part 1403, page 320 at page 351, Para E-H Ratio 5 as well as Page 365, Para. C-F, Ratio 6; pages 365, 366, paras F, A, Ratio 7***.**

Counsel argued that in the instant case which is an Originating Summons, the Affidavit in Support of the Originating Summons constitutes the |Statement of Claim, which is the only process which the court is enjoined by law to consider. He posited that the 6th Claimant/Applicants has stated that he is a notable elder in Uwusan Community, and that he has the authority of all the Claimants to depose to the said Affidavit on their behalf. He urged Court to hold that the said depositions have vested all the other Applicants with *locus standi*.

He submitted that in their Counter Affidavit, the Defendant admitted that the 1st Claimant, 7th Claimant, 8th Claimant and the 9th Claimant herein, are all from Uwusan Community. He maintained that facts admitted need no proof. He referred the court to the case of*: Reptico S.A. Geneva v Afribank (Nig) Plc, (3013) 14 NWLR Part 1373, page 172 at 209, paras B-C.Ratio 10.*

He therefore urged the Court to discountenance the arguments of the Defendant on *locus standi.*

On the issue of whether the applicants have any legal rights to protect, he submitted that the case of *Aboseldehyde Laboratories Plc v Union Merchant Bank Ltd & Anor***,** cited by the Defendant/Respondent merely states the general principle of law relating to interlocutory injunctions and does not in any way address the issues based on the peculiar facts of this case. He submitted that the land which is the subject matter of this application is Community or communal land, and the Applicants who have been shown to be Odionwere and elders of Uwusan Community have the right to protect Uwusan communal land from being frittered or dissipated for personal and inordinate gains by any person; including the Respondent herein. He relied on the cases of: *Olagbegi v Ogunlo (1996)5 NWLR, Part 448, page 332 at 352, paras D.E. Ratio1; and Nwokafor v Agumadu (2009) 3 NWLR, Part 1129, page 628 at 655 – 656, Paras H.A. Ratio 6.*

On balance of convenience, he submitted that in an application for interlocutory injunction, the court is concerned with the preservation of the subject matter of the suit pending the hearing and determination of the suit. He pointed out that the Defendant admitted in paragraph 38 of his Counter Affidavit that he has no right to sell the land. He referred the court to the case of*: Buhari v Obasanjo (2003) 17 NWLR Part 850, page 587 at 651-652, paras E*.

Replying on the cases *of Kotoye vs C.B.N supra and Buhari vs Obasanjo supra*, cited by Defendantôs counsel on the principle of compensation by damages, counsel submitted that those two decisions are not on that point.

Replying on the point raised that the motion was fundamentally defective for failure to serve within 5 days; counsel submitted that the records of this court are before it, and the court is empowered by the law to look into its records. For this he relied on the case of: *Agbareh v Mimrah (2008) 2 NWLR (Part 1071) 378 at 410 – 411paras H-B.*

He explained that from the records of the court, the Bailiff had difficulty serving the Defendant because he was evading service which necessitated substituted service. He argued that the law does not allow a party to benefit from his own wrong. For this view, he relied on the case of: *Ohiwerei v Okosun (2003) 11 NWLR Part 832 Page 463 at 494, paras A-D, Ratio 11.*

He submitted that by virtue of: Order 5 Rule 2 of the Edo State High Court (Civil Procedure) Rules 2012,the non service within 5 days is a mere irregularity occasioned by clearly understandable circumstances, which cannot nullify the court proceedings. He said more so, the motion was served within 5 days of the granting of the application for substituted service.

He therefore urged the Court to discountenance the Counter Affidavit and submissions of the Defendant in opposition to the Applicantsô motion.

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.T*he order is put in place to forestall irreparable injury to the applicantôs 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;
VI. That 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 applicants have satisfied the above enumerated conditions to warrant the exercise of the discretion of this Court in their favour. However before I consider these factors, I think it would be expedient for me to consider the challenge against this

application for non-compliance with *Order 37 Rule 2(1) of the Edo State High Court (Civil Procedure) Rules 2012***.**According to the learned counsel for the respondent, this non-compliance has divested the court of jurisdiction to entertain the motion itself. He relied heavily on the Court of Appeal decision in the case of: of *Household Utensils Dealers & Anor. V Ifeanyichukwu Ventures Nig.Ltd. (2005) All FWLR Pt.257, p.1573.*

For the avoidance of doubt, the said Order 37 Rule 2(1) provides as follows:

> *"(1) Where by these Rules, any application is authorized to be made to the Court or a Judge in chambers or a Registrar, such application may be made by motion which may be supported by affidavit and shall state under what Rule of Court or Law the application is brought. Every motion shall be served within 5 days of filing" (underlining, mine).*

It is an indisputable fact that the motion was served after five days. The issue therefore is what is the effect of such service out of time in the circumstances of this case.

Commenting on the classification of rules of procedure, Umoren JCA, in the much orchestrated case of: *Household Utensils Dealers & Anor. vs Ifeanyichukwu Ventures Nig.Ltd. (2005) All FWLR Pt.257, p.1573 at 1582 to 1583* explained thus:

> *"…all our rules of procedure can be classified into two. Some are purely technical in that they prescribe certain procedural steps to be taken mainly for the convenience of the parties in litigation and the court. But others go to ensure that justice is done to the parties. If a rule prescribes that a defendant shall file his statement of defence within, say, fourteen days of the service of the statement of claim on him, that rule as to time is for the convenience of the parties. The time fixed can be extended on application or waived by the other party. Failure to file a pleading in time is an irregularity. See: Dike Nwosa vs U.B.A.Ltd.(1978) 2 LRN 149.The rule is purely technical and belongs to the first category. It can be waived. But a rule which states that the defendant shall be served with a writ of summons or other processes is more than a mere technicality. If it is breached, the proceedings are a nullity."*

In essence, there is a distinction between the fact of service and the time of service. Failure to effect service of a process is a fundamental irregularity which will nullify the proceedings. But service of a process out of time is an irregularity which can be waived by the other party. This appears to be the situation at hand. Although the applicants served the motion on the respondent after the stipulated five days, the respondent accepted service of same and filed a marathon counter affidavit of 50 paragraphs together with the Written Address of his counsel. By his conduct, the respondent is deemed to have waived the irregularity of service out of time.

It is settled law that non compliance with the rules of court will not in all cases result in the judgment being set aside. Once a step has been taken by the other party, he is deemed to have waived his right to complain of non compliance with the rules. See: *R.LAUWERS IMPORT-EXPORT v JOZEBSON IND.CO.LTD. (1988) 3 NWLR (Pt.83) 429; SHUAIBU v MUAZU (2014) 8 NWLR (Pt.1409) 207 at 219.* Furthermore, non compliance with the rules of court can only vitiate the proceedings if it resulted in a denial of justice. See*: OKOYE v N.C. & F.Co.Ltd.(1991) 6 NWLR (Pt.199)501; SHUAIBU v MUAZU(2014) supra at 220.*

Furthermore, I am in agreement with the learned counsel for the Applicants that that by virtue of: Order 5 Rule 2 of the Edo State High Court (Civil Procedure) Rules 2012,the non service within 5 days is a mere irregularity which cannot nullify the proceedings. The said Order 5, Rule 2 states that:

> *" Where at any stage in the course of or in connection with any proceedings, there has by reason of anything done or left undone, been a failure to comply with the requirements as to time, place, manner or form , the failure shall be treated as an irregularity and may not nullify such step taken in the proceedings. The Judge may give any direction as he thinks fit to regularize such steps"*

In view of the foregoing, I hold that the irregularity cannot nullify the motion and the proceedings thereon.

I will now consider the merits of this application in relation to the set down conditions governing interlocutory injunctions.

The most important pre-condition is for the applicants to establish that they have legal rights which are threatened and ought to be protected. See: *Ojukwu vs*

Governor of Lagos State (1986) 3 NWLR (Pt.26) 39; Akapo vs Hakeem Habeeb (1992) 6 NWLR (Pt.247) 266-289.

The Applicants have identified a legal right which they seek to protect. To wit: respect for the Constitution of the Community Development Association which they allege the Defendant/Respondent has flouted as well as the preservation of their communal land which they claim is in danger of being sold off by the Respondent. The Respondent has denied such a right and seriously challenged the *locus standi* of the Applicants. In the process they maintained that the 6th Applicant who deposed to the affidavit is not a member of Uwusan Community but from Evbuomoma Community. These are issues touching the substantive suit. It is settled law that in dealing with an interlocutory injunction, the Court must restrain itself from deciding issues in the substantive suit. See: *Nigerian Civil Service Union vs Essien (1985) 3NWLR (Pt.12) 306 at 316*; *American Cyanamid Co.vs Ethicon Ltd. (1975) 1 A.E.R. 504 at 510.*

I am of the view that at this stage, the Applicants have adduced sufficient evidence to establish the fact that they have some legal rights to protect in the community in relation to the issues to be determined in the substantive suit.

On the second condition of having a serious question or substantial issue to be tried, I think this is a necessary corollary from the foregoing that there are serious and substantial issues to be determined in the main suit. In the case of: *Onyesoh vs Nze Christopher Nnebedun & Others (1992) 1 NWLR (Pt.270) 461* at 462, the Court re-emphasised that:

> ñ*It is not the law that the applicant must show a prospect of obtaining a permanent injunction at the end of the trial. It is sufficient for the applicant to show that there is a serious question between the parties to be tried at the hearing."*

On the balance of convenience, the applicant must show that the balance of convenience is on his side. In the classical case of *Kotoye v C.B.N. (1989) 1 NWLR (Pt.98) 419*, the Supreme Court explained that the applicant must establish that more justice will result in granting the application than in refusing it. Presently, the applicants are apprehensive that if the respondent is not restrained he would sell off or alienate a vast portion of their communal land to their detriment.Meanwhile,the respondent admitted in paragraph 38 of his Counter Affidavit that he has no right to sell the land. Furthermore, the respondent has not shown what he stands to lose if the application is granted. From the available evidence, the balance of convenience tilts in favour of the applicants.

Next is on the requirement of inadequacy of damages. In the case of : *American Cyanamid Co.vs Ethicon Ltd. (1975)supra,the court stated that:*

> *"If damages …would be an adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff's claim appeared to be at that stage"*

The applicants are contending that the substantial loss of their communal farm land means a substantial loss of their livelihood in perpetuity which cannot be compensated by damages. The respondent countered this by explaining that since the land is being sold for money, damages will be adequate compensation for any loss. Weighing the two arguments, I do not think damages can adequately compensate the applicants if the respondent disposes of the communal farm lands. This may put their source of living in jeopardy for a long time.

On the condition of whether the Applicants were prompt in bringing the application, there is no allegation of delay on their part. The only grouse of the Respondent about the conduct of the applicants is that the Claimants/Applicants are seeking these injunctive reliefs to legitimize their illegality. According to him, after the Claimants/Applicants applied for this injunctive reliefs, the 6th Claimant/Applicant led the other Claimants/Applicants to conduct an election into the office that he is presently challenging in court *vide* this suit.

At this stage of the proceedings the Court must be careful not to delve into the substantive suit. In the *American Cyanamid Co.vs Ethicon Ltd. (1975)* case *supra at p.408A,* Lord Diplock cautioned that:

> *"It is not part of the court's function to try to resolve conflicts of evidence on affidavits as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature consideration. These are matters to be dealt with at the trial."*

Following the above caution, I will decline to make any finding on the allegation that the applicants conducted an election while this application was pending.

Finally, on the requirement of an undertaking to pay damages in the event of a wrongful exercise of the Courtôs discretion in granting the injunction, at paragraph 20 of their affidavit in support of this application, the applicants made the said undertaking to pay damages.

On the whole, I am satisfied that the Applicants have fulfilled the requirements to enable this court exercise its discretion to grant this application. Consequently, this application succeeds and ***I hereby make an order of interlocutory injunction, restraining the Defendant, his servants, agents and privies from engaging in any transaction involving the sale, transfer or lease of any parcel of land constituting part of Uwusan Community in Ikpoba Okha Local Government Area of Edo State, pending the determination of the substantive suit.***

I award the sum of N5, 000.00 (five thousand naira) as costs in favour of the Applicants.

P.A.AKHIHIERO
JUDGE
02/08/16

COUNSEL:

DR. OSAGIE OBAYUWANAé é é é é é é é ..CLAIMANTS/APPLICANTS

P.E.UWADIAE ESQé é é é é é é é é ..é é DEFENDANT/RESPONDENT