IN THE HIGH COURT OF JUSTICE
IN THE BENIN JUDICIAL DIVISION
HOLDEN AT BENIN CITY
BEFORE HIS LORDSHIP, HON.JUSTICE P.A.AKHIHIERO,
ON TUESDAY THE
1ST DAY OF JUNE, 2021.

BETWEEN: SUIT NO: B/38/2021

JOHN IDIAGBONYA ---------- CLAIMANT/APPLICANT

AND

1. HENRY OSAIGBOVO IDIAGBONYA
2. KINGSLEY NOSAKHARE IDAGBONYA
3. FESTUS IDIAGBONYA ---------- DEFENDANTS

(FOR THEMSELVES AND OTHER CHILDREN
OF LATE MADAM GLADYS IDIAGBONYA)

RULING

This is a Ruling on a Motion Ex-Parte wherein the Claimant/Applicant is praying this Honourable Court for:

1. AN ORDER of INTERIM INJUNCTION restraining the Defendants, their servants, agents, or privies from arranging or conducting the burial rites of their mother, MADAM GLADYS IDIAGBONYA without the Claimant as the eldest surviving son playing the leading roles in the performance of the burial in accordance with the Benin Native Law and Custom pending the determination of the Motion on Notice;
2. AN ORDER of INTERIM INJUNCTION restraining the Defendants from fixing dates, inviting people, holding meetings or performing the burial rites of their late mother, MADAM GLADYS IDIAGBONYA in Claimant's properties known as No. 52, Medical Stores Road, Benin City and at Oke Irhue Village in Uhunmwode Local Government Area, Edo State without the consent/authority of the Claimant pending the determination of the Motion on Notice;

AND for such further or other orders this court may deem fit to make in the circumstance of this case.

The Claimant/Applicant in support of the application filed a 21 paragraphs affidavit and 6 paragraphs affidavit of urgency. He relied on all the paragraphs of the affidavits. The learned counsel for the Claimant/Applicant, ***Raphael Ihensekhien Esq.*** also filed a Written Address of counsel which he adopted at the hearing as his arguments in support of the application.

In his Written Address, the learned counsel formulated a sole issue for determination as follows:

"Whether the Claimant/Applicant has sufficiently placed before my Lord, facts upon which an order of interim injunction may be exercised in his favour."

Opening his arguments, the learned counsel submitted that the sole issue should be answered in the affirmative. He referred the Court to the case of ***EJIOFOR VS EMEJULU (2006) 4JNSC PAGE 44 AT PAGE 52, PARAS. A-C*** where the Court of Appeal held thus:

> ***"The principle governing interim injunction is that once the Applicant shows that he has a prima facie case on a claim of right, or that prima facie, the case made out is one which the opposing party would be called upon to answer and that it is just and correct for the Court to intervene at that stage, the other party's action or conduct would irreparably alter the status quo or render ineffective any subsequent decree of the Court, the Applicant is entitled to an interim injunction."***

He further submitted that in considering the grant or otherwise of an application of this nature, the Court will be guided by the well laid down principles. He referred to the following authorities on the point: ***OBEYA MEMORIAL SPECIALIST HOSPITAL V. AG, FEDERATION & ANOR (1987) LPELR 2163 (SC) PAGE 37 PARAS A – D***; ***THE REGISTERED TRUSTEE OF UGBORODO COMMUNITY TRUST & ORS V. OJOGOR & ORS (2014) LPELR 22333 (CA) PAGES 22 -24 PARAS E – A; AGBAJE V. IBRU SEA FOOD LTD (1872) LPELR 230 (SC) PAGE 7 PARAS B – E AND OLUWANIYI V. ADEWUMI & ORS (2010) LPELR 4885 (CA) PAGE 16 PARAS A – E.***

He submitted that an applicant who seeks the equitable power of the court for an order of Interim Injunction must have a legal right or claim a legal right in the substantive action for which he seeks the injunction. He said that the Applicant in his depositions in the affidavit in support of his application, particularly paragraphs 3, 4, 6, 7, 9, 10 and 11 has shown that he has not just an interest, but a legal right which the Court is called upon to protect.

He further submitted that the Applicant has also shown that the balance of convenience is on his side in the sense that more justice will result in granting the injunction than in refusing it. According to him, by the Applicant's depositions in support of this application, he has clearly shown that justice will result in granting the injunction rather than refusing it. He contended that if the application is refused, the Applicant will suffer deprivation of his right of ownership of the land, deprivation of his inheritance and birth right under the Benin Native Law and Custom with the attendant psychological burden the acts of the Defendant will put on him. Learned counsel referred the Court to paragraphs 3, 4, 5, 6, 7, 9, 10, 11, 12, 13, 15, 16,

17, 18, 19 and 20 of the supporting affidavit where the Applicant has clearly shown that he has a Res (his birth right and properties) that are being threatened and is indeed facing imminent alteration of the use of the buildings, an act that is capable of both physical and spiritual consequences.

He posited that the Applicant being the first son of LATE MADAM GLADYS IDIAGBONYA, it is his customary right to lead the other children in performing the burial rites of their mother. He said that the two buildings also belong to the Applicant and the Defendants cannot bury their mother in either of the buildings without the consent of the Applicant. He said that the Applicant deposed to the fact that he did not at any time authorise the Defendants to carry out the burial ceremony of their mother or bury her in either of his properties. That unless an interim order of this court is made to keep the parties in status quo pending the determination of the Motion on Notice, there will be nothing to protect.

Counsel submitted that by the Applicant's depositions in support of this application, he has clearly shown that justice will result in granting the injunction rather than refusing it. That the Applicant will suffer a deprivation of his right of ownership of the buildings, deprivation of his inheritance and birth right under the Benin Native Law and Custom with the attendant customary burden the acts of the Defendants will put on him.

He submitted that on the other hand, the Defendants will not suffer such unquantifiable damages, that if the case is determined in their favour, they will still be there to bury their mother and the Defendants will lose nothing. He said that the Applicant deposed to the fact that the balance of convenient tilts in his favour in paragraph 20 of the supporting affidavit and he relied on the cases of ***ADEYEMI VS OLADAPO (Supra) AT PAGE 150 RT 4 AND FALOMO VS BANIGBE (SUPRA) AT PAGE 1442 -1443 PARAS F – B***. He urged the Court to hold that the balance of convenience tilts in favour of the Applicant.

He further submitted that at the stage of Interim Injunction, the applicant is not required to establish the relief claimed and it is enough if the applicant can show that there is a substantial question for trial with the probability of success. He referred to paragraphs 2, 3, 4, 5, 13, 15, 16, 17, 18, 19 and 20 of the supporting affidavit together with the Statement of Claim and Writ of Summons to show that there are substantial questions for trial with the probability of success. He also cited the case of ***ADEYEMI VS OLADAPO (SUPRA) AT PAGE 281 – 282*** in support.

Learned counsel submitted that for an applicant to be entitled to an Interim Injunction, he must show that the injuries sought to be prevented by the injunction, are such that he cannot adequately be compensated in damages recoverable from the action. He said that in the instant case, the Applicant has shown in paragraphs 20 (v) of his supporting affidavit that he cannot be adequately compensated for the actions of the Defendants upon his land. That in paragraphs 20 (ii), (iii) and (vi), of his supporting affidavit, the Claimant/Applicant categorically stated that monetary award of damages cannot adequately assuage his loss if this application is refused and he eventually wins the substantive suit.

He submitted further that the case of the Applicant has relative strength and therefore cannot be said to be frivolous or vexatious as can be seen from the supporting affidavit to this motion, the statement of claim and the writ of summons. He submitted that the application is not reprehensible or brought in bad faith; that it is timeous and meant to curb the activities of

the Defendants in recent times and to maintain the status quo pending the determination of the Motion on Notice.

He posited that the Applicant has undertaken to pay damages in the unlikely event that this application is granted when it ought not to be granted. That the Applicant did not also waste time in bringing this application and he therefore urged the Court to grant the application.

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

An application for interim injunction seeks a discretionary remedy. It is settled law that all judicial discretions must be exercised judicially and judiciously. An application for interim or ex-parte injunction may be properly made in a case of extreme urgency. It should only be used when the case is one of real urgency requiring immediate relief. See: ***Kotoye vs.C.B.N.and others (1989) 1 NWLR (Pt.98) 419 at 442; and Unibiz (Nig.) Ltd. vs.C.B.C.L Ltd. (2003) 6 NWLR (Pt.816) 402.***

The order is meant 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 interim 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. That the applicant must give an undertaking to pay damages in the event of a wrongful exercise of the Court's 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 his favour.

The most important pre-condition is for the Applicant to establish that he has legal rights which are threatened and ought to be urgently 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.***

Going through the supporting affidavit, I am of the view that the Applicant has identified a legal right which he seeks to protect. In paragraphs 3, 4, 6, 7, 9, 10 and 11, the Applicant has shown that he has a legal right to the properties where he alleged the Defendants

are trying to inter their deceased mother without his consent. He seeks to protect this his alleged legal right.

I am of the view that the Applicant has adduced sufficient evidence to establish the fact that he has a legal right to protect in relation to the issues to be determined in the substantive suit.

Furthermore, there is a sense of urgency surrounding this application. In paragraphs 4 and 5 of the Affidavit of Urgency, the Applicant stated thus:

"4.That I reliably gathered that they have gone far in the preparation to bury our mother without me and in my building without my consent.

5.That I also reliably gathered from members of my extended family that they have resolved to secretly bury our mother in no distant time in a date to be agreed on in their next meeting."

The urgent nature of the application justifies the resort to the ex-parte procedure.

On the second condition of having a serious question or substantial issue to be tried, I am guided by the dictum of the Court in the case of: ***Onyesoh vs Nze Christopher Nnebedun & Others (1992) 1 NWLR (Pt.270) 461 at 462***, where it was re-emphasised that:

"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."

Applying the foregoing principle, I am of the view that there are substantial issues to be tried in the substantive suit.

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.

In the present application, the Applicant has adduced facts to show that justice will result in granting the injunction rather than refusing it. According to him, if the application is refused, he will suffer deprivation of his right of ownership of the land, deprivation of his inheritance and birth right under the Benin Native Law and Custom with some attendant psychological burdens. In paragraphs 3, 4, 5, 6, 7, 9, 10, 11, 12, 13, 15, 16, 17, 18, 19 and 20 of the supporting affidavit, the Applicant has clearly shown that his birth right and properties are being threatened and he is faced with the imminent alteration of the use of the buildings which is capable of both physical and spiritual consequences. For now, there is nothing to show that the Defendants have anything to lose if the Court grants an interim order of injunction. From the available evidence, I hold that the balance of convenience is in favour of the Applicant.

Next is on the requirement of inadequacy of damages. In the case of: ***American Cyanamid Co. vs Ethicon Ltd. (1975) 1 ALL E.R. at 504 pp 5l0***, 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."

In the paragraph 20(g) of the supporting affidavit, the Claimant maintained that monetary award of damages cannot adequately assuage his loss if this application is refused and he eventually wins the substantive suit. On the available facts, I do not think damages can compensate the Claimant in the event of injury arising from the Defendants' action.

On the conduct of the Applicant, I do not think he is guilty of any delay in bringing this application. He filed the motion for interim injunction contemporaneously with the originating processes in this suit.

Finally, on the requirement of an undertaking to pay damages in the event of a wrongful exercise of the Court's discretion in granting the injunction, in paragraph 20 (g) of the affidavit in support of this application, the Applicant gave an undertaking to pay damages.

On the whole, I am satisfied that the Applicant has fulfilled the requirements to enable this court exercise its discretion to grant this application.

Consequently, this application succeeds and I hereby make the following orders:

1. ***AN ORDER of INTERIM INJUNCTION restraining the Defendants, their servants, agents, or privies from arranging or conducting the burial rites of their mother, MADAM GLADYS IDIAGBONYA without the Claimant as the eldest surviving son playing the leading roles in the performance of the burial in accordance with the Benin Native Law and Custom pending the determination of the Motion on Notice; and***
2. ***AN ORDER of INTERIM INJUNCTION restraining the Defendants from fixing dates, inviting people, holding meetings or performing the burial rites of their late mother, MADAM GLADYS IDIAGBONYA in Claimant's properties known as No. 52, Medical Stores Road, Benin City and at Oke Irhue Village in Uhunmwode Local Government Area, Edo State without the consent/authority of the Claimant pending the determination of the Motion on Notice.***

P.A.AKHIHIERO
JUDGE
01/06/21

COUNSEL:

RAPHAEL IHENSEKHIEN ESQ……..……..……..CLAIMANT/APPLICANT