IN THE HIGH COURT OF JUSTICE

IN THE BENIN JUDICIAL DIVISION

HOLDEN AT BENIN CITY

BEFORE HIS LORDSHIP, HON.JUSTICE P.A.AKHIHIERO,

ON THURSDAY THE

17TH DAY OF FEBRUARY, 2022.

BETWEEN: ***SUIT NO: B/1084/2021***

MR. ADE OSCAR ERHABOR---------- CLAIMANT/APPLICANT

SUING BY HIS LAWFUL ATTORNEY,

MR. Erhabor Henry Eso.

AND

PERSON(S) UNKNOWN----------DEFENDANT/RESPONDENT

RULING

This is a Ruling on a Motion on Notice, dated 17th and filed on the 23rd of November, 2021, brought pursuant to Order 40 Rule 5 of the Edo State High Court (Civil Procedure) Rules 2018 and under the Inherent Jurisdiction of the Court praying for the following orders:

AN ORDER OF INTERLOCUTORY INJUNCTION restraining the defendants by himself, his agents/ privies (howsoever described) from further trespassing on claimant land measuring 100feet by 200feet lying, being and situate at Amagba Community, more particularly described in survey plan No. GEO: 1724:2021 ENG-EDO of the 31st of May, 2021, an area within the jurisdiction of this Honourable Court pending the determination of the substantive suit.

And for such further order(s) as this Honourable Court may deem fit to make in the circumstance.

The application is supported by a 25 paragraph affidavit and the Written Address of the learned counsel for the Claimant/Applicant.

Arguing the motion, the learned counsel for the Applicant, ***Uyi Precious Aiwaguore, Esq.*** adopted his Written Address as his arguments in support of the application and urged the Court to grant the application.

In his Written Address, the learned counsel for the Applicant formulated a single issue for determination, to wit:

"Whether considering the circumstance of this case, this Honourable Court should exercise it discretion in favour of the applicant."

Arguing the sole issue for determination, learned counsel submitted that the principles on which an application of this nature can be granted are well established in the case of ***KOTOYE V CBN 1981 5 NWLR (PT 89).*** He posited that for the court to exercise its discretion in favour of an applicant for injunction, the following conditions must be satisfied:

(1) Existence of legal right;

(2) Substantial issue to be tried;

(3) Balance of convenience;

(4) Irreparable damage or injury;

(5) Conduct of the parties; and

(6) Undertaking as to damages.

Learned counsel addressed the Court on each of the conditions seriatim.

1. **LEGAL RIGHT**

He referred the Court to the case of ***Akapo v. Hakeem-Habeeb [1992] 6 NWLR (Pt. 247) 266 @ 289*** where the Supreme Court reiterated that the first hurdle an applicant for an injunction must surmount is to show the existence of a legal right which is being threatened and deserves to be protected.

2. **SUBSTANTIAL ISSUE TO BE TRIED**

He submitted that this condition is important because it raises a fundamental issue which judicial officers must pay particular attention to. He said that in considering an application for interlocutory injunction the court should not try to resolve conflicts of evidence on affidavit as to facts on which the claims of either side may ultimately depend or decide difficult questions of law which call for detailed arguments and serious consideration.

He emphasised that the court must be careful not to delve into facts the resolution of which might lead to a determination of the substantive suit. That what is required of the applicant is to show that there is a substantial issue to be

tried at the hearing and there is no longer any need to show a strong prima facie case as a condition for grant of an injunction. See ***U.T.B. Ltd v. Dolmetsch Pharm. (Nig.) Ltd (2007) 16 NWLR (Pt. 1061) 420***.

Furthermore, he maintained that at this stage, the applicant does not need to make out a case on the merits as he would in the substantive case. That all that he needs is to show is that there is a substantial issue to be tried. See: ***Obeya Memorial Hospital v. A-G Federation (Supra).***

3. **BALANCE OF CONVENIENCE:**

On balance of convenience he submitted an injunction will be granted if the balance of convenience favours the applicant and he relied on the case of ***Egbe v Onogun (1972) LPELR-1034 (SC)***.

He submitted that the burden of proof that the inconvenience which the plaintiff will suffer by the refusal of the injunction is greater than that, which the defendant will suffer, if it is granted, lies on the plaintiff.

4. **IRREPARABLE DAMAGE OR INJURY:**

Counsel submitted that the applicant in his affidavit evidence must depose to facts which show that if the injunction is not granted he will suffer serious and substantial damage which cannot be remedied by monetary compensation or damages. See: ***Kotoye vs. CBN supra***.

5. **CONDUCT OF THE PARTIES**:

Counsel referred to the case of ***Peter v Okoye [2002] 3 NWLR (PT. 755) 529 @ 552 AC***, where the Court of Appeal Enugu Division observed that in determining an application for interlocutory injunction the conduct of the parties is one of the relevant factors to be taken into consideration.

He said that on the part of an applicant, a reprehensible conduct is enough to deny him a grant of his application. That an applicant for an order of interlocutory injunction would fail if he is guilty of delay because an order of interlocutory injunction is an equitable remedy and delay defeats equity. See: ***Kotoye v. CBN (Supra); Nigerian Civil Service Union v. Essien (supra); Ezebilo v. Chinwuba (supra) at page 128; and Akapo v. Hakeem Habeeb (1992) 6 NWLR (Pt. 247) 266***.

6. **UNDERTAKING AS TO DAMAGES**:

He submitted that one of the conditions for a grant of interlocutory injunction is that the applicant must give an undertaking to pay damages in the event it turns out that the injunction ought not to have been granted. He said that

the usual practice is for the applicant to depose in his affidavit in support of the application his willingness to pay damages.

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

The Respondent was served with the motion papers by means of substituted service but he failed to appear in Court, neither did he file any response to the application. In effect, the application was unopposed.

It is settled law that where facts contained in an affidavit are not countered, they are deemed to have been admitted. See the cases of: ***NWOSU V IMO STATE ENVIRONMENTAL PROTECTION AGENCY 1990 2 NWLR Pt. 135, 688; and EGBUNA V EGBUNA 1989 2 NWLR Pt. 106 773, 777.***

Thus, the Respondent is deemed to have admitted all the facts contained in the Applicant's affidavit in support of this application.

However, the mere fact that the application is not opposed does not guarantee the success of same. The Applicant still has the burden to convince the Court to exercise its discretion in his favour.

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

Going through the written address of the Applicant's counsel, I must observe that while the counsel correctly stated the principles governing the grant of an application for interlocutory injunction, he made no attempt whatsoever to apply the principles to his affidavit evidence in support of the motion. In the event, his written address amounted to a mere academic exercise without any practical relevance to this application. While such an address might be useful to Law Students at the Law School, such address is completely useless to a Court adjudicating over a practical dispute.

In the case of ***MR. RICHARD ORERE v. MRS. JULIET ORERE (2017) LPELR-42160(CA),*** the Court observed that it is trite that the address of counsel should be based on facts canvassed by both parties before the Court. Furthermore in the case of ***DR. G.O.C ONUEGBU v. MRS. VERONICA N. OKAFOR (2016) LPELR-41513(CA),*** the Court emphasised that it must be borne in mind that addresses by counsel are meant to assist the Court.

Written Address filed by counsel should contain a summation of facts admitted, proved or deemed conceded at the trial and the relevant laws applicable to the facts. It is the means by which a counsel seeks to persuade the Court to lean in favour of his client. See ***OMISORE & ANOR VS. AREGBESOLA & ORS (2015) 15 NWLR (PT. 1482)205.***

Unfortunately, the Counsel's written address fell short of all these. By the default of the counsel, the Court will be saddled with the burden of going through the affidavit evidence to see whether they are sufficient to establish the principles for granting such an application.

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 order is meant to forestall irreparable injury to the applicant's legal or equitable right. See the following decisions on the point: ***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 Court's discretion in granting the injunction.***

See also, 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.***

Therefore, 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 a legal right which is 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.***

From the available evidence, the Applicant stated that he is the rightful owner of the parcel of land, measuring 100ft by 200ft, lying, being and situate at

Amagba Community, in Oredo Local Government Local Government Area. He alleged that he followed the necessary procedures for the allocation of land in Amagba Community and the land was duly allotted to him after he made payment. He annexed the approved application as Exhibit B to his supporting affidavit.

He said that since his acquisition of the land, he has farmed on it either by himself or by letting it out to some of his neighbours in Amagba for the purpose of farming thereon.

According to the Applicant, subsequently, he erected a building on the land up to DPC level and also surveyed the land. He annexed the Survey Plan as Exhibit C.

I am of the view that at this stage, 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.

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."

Also, in the case of: ***Ladunni vs. Kukoyi (1972) 1 All NLR(Pt.1) 133*****,** the Court opined that: **"*…when a Court considers an application for interlocutory injunction, it is entitled to look at the whole case before it, all the circumstances which may include affidavit evidence, judgments or pleadings if these have been filed. All these show what is in the dispute between the parties".***

In his affidavit in support of this application, the deponent stated 13 that when he visited the land in the month of May, 2021, he discovered that someone had trespassed on the land and carved out part of the land measuring 50ft by 100ft with a perimeter fence. Furthermore, he alleged that the 3 bedroom flat apartment which he erected on the land had been demolished by the Defendant/Respondent.

From the foregoing facts, 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.

Presently, the Applicant is apprehensive that he will suffer more if this application is not granted and the Respondent is allowed to continue to alter the *res*, the subject matter of this suit. The Respondent has not shown what he stands to lose if this Court makes an order restraining him from continuing the alleged acts of trespass.

From the available evidence, the balance of convenience tilts 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) (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 paragraph 20 of the supporting affidavit the applicant deposed to the fact that damages would not be adequate compensation for him if the injunction is refused and he eventually wins the substantive suit. The Defendant/Respondent has not denied this assertion. In the light of the circumstances of this case, I do not think damages can adequately compensate the Applicant if the Respondent is allowed to continue his activities on the land.

On the condition of whether the Applicant was prompt in bringing the application, there is no evidence of undue delay on the part of the Applicant.

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, I observed that in paragraph 23 of the supporting affidavit, the Applicant entered into an undertaking to pay damages if it is found that the injunction ought not to have been granted.

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 an order of interlocutory injunction restraining the defendant by himself, his agents/ privies (howsoever described) from further trespassing on the claimant's land measuring 100feet by 200feet lying, being and situate at Amagba Community, more particularly described in survey plan No. GEO: 1724:2021 ENG-EDO of***

the 31st of May, 2021, an area within the jurisdiction of this Honourable Court pending the determination of the substantive suit.

I make no order as to costs.

P.A.AKHIHIERO

JUDGE

17/02/2022

<u>COUNSEL:</u>

UYI PRECIOUS AIWAGUORE, ESQ ……....CLAIMANT/APPLICANT

UNREPRESENTED……..……DEFENDANT/RESPONDENT