IN THE HIGH COURT OF JUSTICE

IN THE BENIN JUDICIAL DIVISION

HOLDEN AT BENIN CITY

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

ON MONDAY THE

7TH DAY OF FEBRUARY, 2022.

BETWEEN: ***SUIT NO. B/425/2021***

GODWIN ASEMOTA …….. CLAIMANT/APPLICANT

AND

1. OSAGIE OBAKHAVBAYE
2. ISOWA OBAKHAVBAYE
3. NOSA OBAKHAVBAYE
4. OSAYANDE OBAKHAVBAYE ***DEFENDANTS/***
5. EDDY OBAKHAVBAYE ***RESPONDENTS***
6. DANIEL OBAKHAVBAYE
7. STELLA CHRISOPHER OLOGHOYO

RULING

This is a Ruling on a Motion on Notice dated and filed on the 18th of May, 2021, brought pursuant to Order 33 and 40 of the Edo State High Court (Civil Procedure) Rules 2018 and under the inherent jurisdiction of this Honourable Court.

By this application, the Claimant/Applicant is praying this Honourable court for the following orders:

An order of interlocutory injunction restraining the defendants, their agents, servants, privies and workmen from disturbing the claimant and or building on the claimant/applicant's land measuring 55feet by 115feet, situate at No. 1, Ologhoyo Street, Ogbe quarters, Benin City, within the jurisdiction of this Honourble court pending the hearing of the substance suit.

AND FOR SUCH FURTHER ORDER OR ORDERS as this Honourable Court shall deem fit to make in the circumstances of this case.

The motion is also supported by a 21 paragraphs affidavit and a Written Address of the learned counsel for the Applicant.

At the hearing of the application, the learned counsel for the Claimants/Applicants ***G.E.Oaikhena Esq.*** adopted his written address as his arguments in support of the motion.

In his written address, the learned counsel for the Applicant formulated two issues for determination, to wit:

1. Whether the claimant/applicant has established his right which need to be protected by this court; and

2. Whether the claimant/applicant has made out a case which entitles him to the grant of an order of interim injunction (sic) as per the prayers contained in the motion paper.

Opening his arguments on the issues for determination, the learned counsel submitted that it is settled law that an applicant seeking an order of interlocutory injunction must satisfy certain pre- conditions as laid down in the locus classicus case of ***7UP BOTTLING CO. & 2ORS. V. ABIOLA (1995) 29 LRCN (1-139) 23 AT 26 RATIO 4 AND 5*** where the Supreme Court held as follows:

"An order of interim injunction is one granted to preserve the status quo and to last until a named date or definite date or until further order …

It is for a situation of a real emergency to preserve and protect the rights of the parties before the court from destruction by either of the parties… it leaves the matter in status quo… and the court does not, at that stage, have to decide any contentious issues before granting it…"

He said that same was held in ***KOTOYE V. CBN (1989), NWLR (PT 98) 419 AT 422 RATIO 5(A-G).***

Learned counsel submitted that the applicant has established that he has a legal right to be protected. He referred to paragraphs 1, 2, 3, 4, 5, 6, 7, 8 and 9, of the affidavit in support of the motion where the claimant averred that he is the rightful owner of the land and the building on it, and that the defendants have no right to disturb his peaceful enjoyment of the property.

He posited that the Claimant has shown by his affidavit evidence that the conduct of the Defendant is not justified in law hence an order of interim injunction is necessary to protect the claimant from further harassment and he referred the Court to the case of ***COMMISSIONER FOR WORKS, BENUE***

STATE VS. DEV. COMPANY LTD (1988) NWLR (PT 83) 407 at 410 (Ratio 14).

He submitted that the essence of this application is to prevent the constant harassment of the claimant since the actions of the defendants would cause more harm and injuries to the Claimant. He relied on the cases of ***ACB V. AWOGBORO (1991), NWLR (PT 176) 711 at 719 – 720;*** and ***AKAKPO V. HAKEEM HABEEB (1992) NWLR (PT 24) at 303.***

He submitted that flowing from the various depositions in the affidavit, the Claimant has made out a case showing that there exist serious issues to be tried in the substantive suit hence the need for the restraining order. Furthermore, he posited that the Claimant/Applicant has established that it is in the interest of justice to grant this application and more so the Court has inherent powers to grant this application.

He therefore urged the Court to answer the issues for determination in the affirmative.

Finally, he urged the Court to grant this application.

In opposition to this application, the 1st – 6th Defendants/Respondents filed a thirty (30) paragraph counter affidavit together with the written address of their counsel. In his written address, the learned counsel for the 1st – 6th Defendants/Respondents, ***E.F.Osifo Esq***., formulated a sole issue for determination as follows:

> ***"Whether having regard to the facts and circumstances of this case, it would be judicial and judicious for this Honourable Court to exercise its discretion in favour of granting the claimant/applicant's application."***

Opening his arguments on the sole issue for determination, the learned counsel submitted that the trite principle of law is that the remedy of interlocutory injunction is an equitable relief which is not granted as a matter of course but according to the discretion of the Court which must be exercised judicially and judiciously having regard to the peculiar facts and circumstances of the case. See ***John Holt Nig Ltd v Holts African Works Union of Nigeria and Cameroon (1963) 2SC NLR 383.***

He posited that in exercising its discretion, the court is enjoined to take into consideration some fundamental factors which the higher courts have numerously outlined as follows:

> ***(i) Whether the applicant has a protectable legal rght in the subject matter of the suit.***

(ii) Whether there is threat of irreparable damage to the legal right of the applicant.

(iii) Whether there are serious issues to be determined in the substantive suit.

(iv) Whether the balance of convenience is in favour of granting the application.

(v) Whether monetary award of damages can adequately assuage the loss of the applicant if his application is refused pending the determination of the substantive suit.

(vi) Whether there is a satisfactory undertaking to pay damages by the applicant and

(vii) Whether the applicant is guilty of any reprehensible conduct capable of robbing him of his entitlement to the equitable relief.

See ***Obeya Memorial Specialist Hospital v A.G. Federation (1987) 3 NWLR (Pt 60) 325***

Kotoye v C.B.N (1989) NWLR (Pt 98) 419 at 422.

Learned counsel submitted that it is imperative that an applicant for interlocutory injunction must evidentially demonstrate prima facie legal right in the subject matter of the suit because it is the legal right that the order is designed to protect. See: ***Akapo v Hakeem-Habeeb (1992) 6 NWLR (Pt 247) 266 at 289 Para F and 291 para D-E.***

He posited that the subject matter of this suit is a small parcel of land and not the whole land purportedly measuring 55 feet by 115 feet situate at No 1, Ologhoye Street, Ogbe Quarters, Benin City. He said that the applicant, by paragraphs 4, 5, 6, 7, 8, 9 and 10 stated that the said land was originally owned by the father of the 1st – 6th defendants who purportedly sold it to the late Ologhoyo Okungbowa. That on his death, Christopher Ologhoyo purportedly inherited the said land and transferred same to Frank Adun who thereafter transferred the land to the applicant.

He submitted that the 1st – 6th respondents are disputing depositions of the Applicant. He said that by paragraphs 7(1) –(vii), 8, 9, 10 of their affidavit in support of the motion, the applicant assert that although their late father sold a portion of the land to the late Mr. Ologhoyo Okungbowa in the 1960s, the portion sold did not include the undeveloped space at the back and that Mr. Ologhoyo Okungbowa utilized the whole land sold to him while developing same without respect for space and that what was sold to him was not 55 feet by 115 feet as the space at the back was not included in the sale to him.

He said that Mr. Ologhoyo thereafter started encroaching on the 1st – 6th respondents' father's space behind the portion he sold and this resulted in Suit No 32/1965 which their late father won in the Midwestern Region Customary Court on 25/3/1965. So he said that the matter has been litigated as far back as 1965.

He submitted that the claimant/applicant cannot be said to possess a legal right in respect of a portion of land the ownership of which the court has resolved as far back as 1965 against his predecessor in-title. He posited that since the equitable remedy of interlocutory injunction is granted or refused on the basis of competing legal right, the instant application cannot enjoy the benefit of the court's favourable consideration because the legal right of the 1st – 6th respondents preponderates over the applicant's purported legal right. He referred the Court to the case of ***Akapo v Hakeem-Habeeb (1992) 6 NWLR (Pt 247) 266 at 289 para F and 291 paras D-E*** where *Karibi-Whyte JSC said*

> ***"The claim for an injunction is won and lost on the basis of the existence of competing legal rights. As I have already said above, where an applicant for an injunction has no legal right recognizable by the courts, there is no power to grant him an injunction".***

Counsel submitted that this is the kind of application in which the court is enjoyed to look into the relative strength of both parties' cases to see where the balance of justice tilts. See ***Orhue v Edo (1996) 9 NWLR (Pt 473) 475 at 487 para B.***

Furthermore, he posited that Exhibits D and E attached to the applicant's motion strongly derogates from the applicant's case in favour of the 1st-6th respondent's contention that their late father, Chief Solomon Aiguekunrhueghian Obakhavbaye never sold the space behind to the applicant's predecessors-in-title.

Thereafter, learned counsel referred to several portions of the exhibits to support his contention that the Applicant has no legal right to protect in relation to the land in dispute.

He submitted that the remedy of interlocutory injunction is designed to protect invasion or threat to a legal right and not to stop the respondent's enjoyment of a legal right. See ***Akibu v Odutan (1991) 2 NWLR (Pt 171) 1 at 10 Para C***

> ***"An interlocutory injunction can only be issued to restrain a threatened wrong to a right and not to restrain the lawful enjoyment of a legal right".***

He said that an applicant for interlocutory injunction must show convincingly that he is in lawful possession which is being disturbed by the respondent. He said that throughout the gamut of the applicant's affidavit in support of the motion, there is nothing to show that he has been in possession of the disputed portion of land. He said that his bare assertion in paragraph 11 of the affidavit in support of the motion that he has been in possession of the said space of land behind the uncompleted structure at the front cannot be believed in the face of the averments in paragraphs 12 and 13 of his affidavit in support of the motion, and the solid facts of possession of same by the respondents since the 1960s as shown in paragraphs 8, 9, 10, 11,12, 13,14 and 15 of the counter affidavit of the 1st – 6th respondents.

He maintained that the applicant has never been in possession of the land and what he is now trying to do is to use his recent transaction of payment for the land to the 7th respondent to take possession of same for which the respondents' younger brothers and siblings resisted him. He emphasized that where an applicant in an application for interlocutory injunction is found not be in possession of the property over which he seeks an injunctive relief, his application will be refused. See ***Orhue v Edo (Supra) at page 484 para F***.

Furthermore, counsel submitted that there is no serious issue to be determined in the substantive suit and the applicant has a duty to show that there is a serious question to be determined in the substantive Suit. See ***Onyesoh v Nnebedum (1992) 3 NWLR (Pt 229) 315 at 339-337 para A.***

On balance of convenience, he submitted that the applicant has not shown that the balance of convenience is in his favour in this case. He said that the applicant has not shown any hardship he is likely to suffer if the order sought is refused. He reiterated that since the applicant is not in possession of the subject matter and has no activity thereon, the balance of convenience is not in his favour so the court should not exercise its discretion in his favour. See ***Edosomwon v Erebor (2001) 13 NWLR (Pt 730) 265 paras at 286B-G Orhue v Edo (supra) at 484 paras F-H.***

He said that by paragraph 13 of the applicant's affidavit in support of the motion, all the applicant is seeking to do on the subject matter now is to erect a concrete wall fence around same. He said that he wants the court to restrain the respondents so that he could fence and possibly build on the land to alter its character before the determination of the substantive suit.

He said that he has not alleged that the respondents intend to do anything on the land to damage its character so there is no reason for restraining a respondent who does not intend to build on the land.

He said that what the law prescribes in this kind of situation is to restrain both parties from the land and/or refuse the application and order accelerated hearing of the substantive suit so that the status quo ante bellum can be preserved. See ***Ushie v Edet (2010) 6 NWLR (Pt 1190) 386 at 404 Paras D-G. Onyesoh v Nnebedium (Supra) at page 344-342 paras B-E***

He urged the court to hold that the balance of convenience does not lie in favour of the applicant in this case and to refuse the application.

He submitted that since the applicant has no activities on the land which is an imperishable res, monetary award of damages can adequately assuage his loss (if any) at the end of the case if he wins in the substantive suit. He submitted that it is only where monetary damages cannot adequately assuage his loss that injunction would be an appropriate remedy: See ***Union Beverages Ltd v Pepsi cola Int. Ltd (1994) 3 NWLR (Pt330) 1 at 17 paras A-C***.

Furthermore, he referred the Court to the claimant's relief 3 on the writ of summons and 17(c) of the statements of claim where he is claiming Two Million Naira (N2, 000,000:00) as general damages. He referred to the case of ***Anosike Building and Commercial Co V.F.C.D.A (1994) 8 NWLR (Pt 363) 421 at 435 paras A-B*** where the court held that where an applicant for interlocutory injunction claims for special or general damages, it is an indication that he can adequately be compensated by monetary damages at the end of the day.

He submitted that it is a fundamental requirement that in an application for interlocutory injunction, the applicant must give a satisfactory undertaking to pay damages to the respondents if the application is granted and he eventually losses at the end of the day. He said that such an undertaking must not just be a bare assertion or covenant to pay damages in one of the paragraphs of the affidavit in support of the motion, but he must disclose his capacity and means to pay the undertaking for the court to take him seriously. He said that if he fails to do so, the undertaking is inadequate and the court should not take him seriously on that.

He said that in the instant application, the applicant only made a bare undertaking in paragraph 19 of the affidavit in support of the motion to pay damages without disclosing the means to effectuate such undertaking so the application ought to be refused on that ground.

Finally, he urged the Court to dismiss the application.

Upon receipt of the Counter-Affidavit, the Claimant/Applicant filed a Further Affidavit of 14 paragraphs and a reply on points of law to the counter-affidavit of the Defendant/respondent.

In his reply on points of law, the learned counsel submitted that the argument of the 1st – 6th Defendants/Respondents are all facts forming part of a public record for which no documents were exhibited in their Counter – Affidavit. He therefore submitted that the alleged facts are only within the personal knowledge of the defendants/respondents. He said that it is not in dispute that the claimant's predecessor in title: Christopher Okungbowa, bought from the late father of the 1st – 6th defendants. He said that the 1st – 6th defendants made such allegations in paragraphs 7 (i) & (ii) of the Counter – Affidavit.

He said that what is in issue is with regards to the portion of land sold, which the defendants contend has been determined by a judgment which they never exhibited. He submitted that he who alleges must prove and he relied on Section 136 (I) of the Evidence Act, 2011. He maintained that the judgment relied upon by the 1st – 5th defendants is a public document within the contexts of Section 102 (a) of the Evidence Act, 2011and same must be proved by a certified true copy. He therefore urged the Court to discountenance the counter affidavit of the 1st – 5th defendants/respondent and grant this application.

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

In paragraphs 4 to 14 of his affidavit in support of the application, the Claimant/Applicant deposed to some salient facts in his bid to establish his title to the disputed property. He alleged that he purchased the land in dispute together with the building on it measuring 55feet by 115feet, situate at No. 1, Ologhoyo Street, Ogbe quarters, Benin City from one Mr Frank Adun and he attached his receipt of purchase to the supporting affidavit. He traced his root of title to the time when one Obakhavbaye, the father of the 1st to the 6th defendants, sold the empty parcel of land to one Ologhoyo Okungbowa. He said that Mr. Ologhoyo Okungbowa having purchased the land, erected a building on it leaving a space behind it.

That upon the demise of Ologhoyo Okungbowa, his son, Mr. Christopher Ologhoyo inherited the property and later sold it his vendor, Mr. Frank Adun. He alleged that he has been in peaceful possession of the land ever since without any disturbance from anybody. He said that when he started the fencing of the land, the wife of his predecessor in title, Christopher Ologhoyo, came to demand some money from him for the land at the back of the building and in the interest of peace he paid her the sum of #250,000.00 (Two Hundred and Fifty Thousand Naira), and she issued a receipt to him which he attached as Exhibit D to his supporting affidavit.

In his written address, the learned counsel for the 1st to 6th Defendants/Respondents while seriously contending that the Applicant has no legal right to protect, seriously contended that the Claimant/Applicant's predecessor in title, Mr. Ologhoyo was the person who started encroaching on the

space behind building which the 1st to 6th Defendants' father never sold. He said that this resulted in Suit No 32/1965 which their late father won in the Midwestern Region Customary Court on 25/3/1965. That based on that judgment, the Claimant/Applicant has no legal right over the disputed portion of land.

With respect to the alleged judgment which the Respondents' father obtained in Suit No 32/1965 in the Midwestern Region Customary Court, I am of the view that it is too premature for me to make any pronouncement on the alleged judgment at this stage. The Law is settled that in dealing with any interlocutory application the Court should not delve into the substantive issues. A Court must avoid the determination of a substantive issue at an interlocutory stage. It is never proper for a court to make pronouncements in the course of interlocutory proceedings on issues capable of prejudging the substantive issues before the Court. See the following decisions on the point: ***Consortium MC v NEPA (1992) NWLR (Pt.246) 132, Barigha v PDP & 2 Ors (2012) 12 SC (Pt.v) 1, Mortune v Gimba (1983) 4 NCLR 237 at 242.***

From the available evidence, I think the Applicant has identified that he has some legal rights which he seeks to protect in relation to the disputed property. I am of the view that at this stage, he has adduced sufficient evidence of his legal rights 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-emphasized 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".***

From the facts disclosed in the affidavit and counter-affidavit it is evident that there are substantial issues to be tried in the substantive suit in relation to the determination of the legal rights of the Claimant/Applicant.

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 the Defendants and their agents may continue to disturb his alleged peaceful possession and to prevent him from fencing the land if this application is not granted.

On the part of the 1st to 6th Defendants/Respondents, they are also apprehensive that if this application is granted, the Claimant/Applicant will go ahead to desecrate their late grandfather and aunt's graves on the land and dispossess their family of same before the determination of the substantive suit. They maintain that the balance of convenience is in their favour because the Applicant is ready to build on the land and alter its topography.

From the available evidence, the only thing which the Applicant is apprehensive about is that the Respondents may prevent him from fencing the land. There is no visible threat to any property on the land. On the other hand, there appears to be a real threat that the alleged graves of the 1st to 6th Respondents' grandfather and aunty may be desecrated by the Applicant if this application is granted. Juxtaposing the evidence of the Applicant with that of the 1st to 6th Respondents on the balance of convenience, I am of the view that the scale tilts in favour of the Respondents. The balance of convenience is in favour of the 1st to 6th Respondents.

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 English court stated the position thus:

"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"

Going through the Applicant's affidavit, there is nothing to show that the award of damages would be inadequate to compensate him if the application is refused and he eventually wins the case. Incidentally in paragraph 28 of their counter-affidavit, the 1st to 6th Respondents gave an undertaking not do anything on the land to change or alter its character or defeat the status quo before the determination of the substantive suit.

Furthermore, the 5th and 6th Defendants/Applicants who are resident abroad appear buoyant enough to pay any damages that may be awarded. In their deposition, they alleged that they offered the Claimant the sum of N5 million

(five million naira) to purchase his uncompleted building which is in front of the disputed land. On the authority of the case of ***American Cyanamid Co. vs Ethicon Ltd. (1975) supra***, if damages would be an adequate remedy and the defendant would be in a financial position to pay, no interlocutory injunction should be granted.

Since the Claimant/Applicant has failed to satisfy two of the salient requirements for the grant of an interlocutory injunction, the Court cannot exercise its discretion in his favour. In the event, the application is dismissed with N50, 000.00 (fifty thousand naira) costs in favour of the 1st to 6th Respondents.

P.A.AKHIHIERO
JUDGE
07/02/2022

COUNSEL:
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E.F. OSIFO, ESQ. ---1ST -6TH DEFENDANTS/RESPONDENTS
PATRICK WILSON ESQ-------7TH DEFENDANT/RESPONDENT