IN THE HIGH COURT OF JUSTICE

IN THE BENIN JUDICIAL DIVISION

HOLDEN AT BENIN CITY

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

ON WEDNESDAY THE

31ST DAY OF JANUARY, 2024.

BETWEEN: ***SUIT NO. B/1139/2022***

AIGBOKHAI OAIKHENA OSAGIE ESQ----------CLAIMANT/RESPONDENT

AND

MR. SAMUEL OMOROGIEVA----------DEFENDANT/APPLICANT

RULING

This is a Ruling on a Motion on Notice dated and filed on the 17th of July, 2022 brought pursuant to ***Order 40 Rules 1 & 2 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 Claimant/Respondent either by themselves or their agents, servant, privies and assigns from trespassing, or further trespassing into the Defendant/Applicant's parcel of land or carrying out activities inconsistent with the rights of the Defendant capable of affecting the Res of this case, the land measuring 50ft by 100ft located at Ward 36/A Amagba, Oredo Local Government Area, Edo State.

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

This application is supported by a 29 paragraphs affidavit and a written address of the learned counsel for the Defendant/Applicant.

In his written address, the learned counsel for the Defendant/Applicant, ***M.E. Esekhile Esq.*** submitted that for an order of interlocutory injunction to be granted, the court must be guided by the principles as stated in the cases of ***SARAKI V KOTOYE; (1990) 4NWLR PT 143) 187; FALOMO V. BANIBE (1988) 7NWLR (Pt557) 679; See also ZENITH INTERNATIONAL BANK LIMITED v. ODULAMI (2001) ALL FWLR (Pt 59)1320 WHETHER THE APPLICANT HAS A LEGAL RIGHT.***

He further submitted that before an applicant for injunction would succeed, he must show the court that he has a legal right the violation of which he seeks to protect and that he has sufficient interest in the relief sought. See: ***KADIYA VS KADIYA (2001) FWLR (PT. 70) 1586 R1 5 & 6.*** He said that the Applicants have shown through his statement of defence and the paragraphs of his supporting affidavit about his interest in the reliefs.

He submitted that the Defendant/Applicant has shown a right and interest over the land in dispute to be protected by this Honourable Court pending the determination of this suit and he cited the cases of ***KOTOYE V. CBN (1989) 1NWLR (Pt89) 419, OBEYA MEMORIAL SPECIALIST HOSPITAL V. AG FEDERATION (1987) 3 NWLR (Pt.6o) 3225, KAS UMU y. SHITA BAY (2006)17NWLR (Ptloo8) 372.***

On the requirement of having a serious issue or question between the parties he submitted that the Applicant has shown that his claim is not frivolous or vexations and that there is a serious question to be tried from the statement of Defence and affidavit evidence as to the issue of ownership or declaration of title to land/trespass. He referred the Court to the case of ***OLOKAKASUN & ANOR V. GOV. KWARA STATE & ORS (1996) 1NWLR (Pt425) 453@ 465***

On the balance of convenience, he referred to paragraph 27(b) of the affidavit in support of the application and submitted that the Applicant would suffer greatly if the application is not granted. He said that the Claimant/Respondent has already trespassed into the Defendant's piece of land measuring 50ft by 100ft which is a factor for the court to grant an injunction in order to preserve the Res pending the determination of this case. See the case of ***I.T.N.A.GP.P.E. vs. P.C.N (2012) 2 NWLR (PT 1284) 267 @ 272***. He submitted that the balance of convenience is in favour of the Defendant/Applicant being the party that will suffer more and lose more if the subject matter is not preserved as the land in question and the act of trespass on his land by the Claimants/Respondents which is still ongoing will deprive the Defendant of the peaceable use of same.

Again, counsel submitted that if the Claimant/Respondent is not restrained from further trespassing into the Defendants/Applicant's land before the determination of this case and the Respondent succeeds in building on the Defendant/Applicant's land, this will result in irreparable damage, psychological and mental damage to the Defendant/Applicant which cannot

Be adequately compensated in terms of monetary damages. See the case of ***MADUBUKE u. MADUBUIKE (2001) 9 NWLR (Pt719) 698 @ 700 R 2, see CHRJSTLIEB PLC u. MAJEKODUNMI (2008) i6 NWLR (Pt 1113)297 @ 334 R 2.***

Furthermore, counsel submitted that an injunctive relief is available to restrain the Respondent from trespassing on the Defendant/Applicant's land knowing fully well that the matter is under adjudication and there is need to preserve the Applicant's land in order to keep matters in status quo until the issues between the parties are determined. See ***BABATUNDE ADENUGA u. J.K ODUMENI (2001)10 NTWLR (PT 696)184.***

On the conduct of the Applicant, counsel submitted that from paragraph 23 of the supporting affidavit, it is clear that the Claimant acted timeously before the act complained of and he referred to the case of ***I.T.N.A.GP.P.E. vs. P.C.N (2012) 2 NWLR (PT 1284) 267 @ 272.***

Finally, he submitted that in paragraph 27(f) of the affidavit in support, the Applicant fulfilled the requirement of giving an undertaking to pay damages to the Respondent in case the grant of this application turns out to be unmeritorious. He therefore urged the Court to grant this application in the interest of justice.

In opposition to the application, the Claimant/Respondent filed a Counter-Affidavit of 55 paragraphs and a written address of their counsel. At the hearing, the learned counsel for the Claimant/Respondent, ***Oaikhena Osagie Esq.*** adopted his written address as his arguments in opposition to the application.

In his written address, the learned counsel formulated two issues for determination as follows:

1. Whether the Defendant/Applicant has placed before the court, sufficient materials upon which this Honourable Court will grant their application; and

2. Whether the Entire Paragraph 27 of the Defendant/Applicant Affidavit does not offend the Evidence Act?

Thereafter, the learned counsel argued the two issues seriatim.

ISSUE NO 1:

Arguing issue one, learned counsel submitted that it is trite law that a party who brings an application for the court to exercise its discretion in his favour, must place before court, sufficient materials upon which the court will exercise its discretion in his favour and he relied on the case of ***WILLIAMS v. HOPE RISING VOLUNTARY FUNDS SOCIETY (19820 1-2 SC.*** He posited that the Defendant/Applicant has not placed sufficient materials before the Court to enable the Court exercise its discretion in his favour.

He enumerated the factors that guides the Court in considering an application for interlocutory injunction and relied on the case of ***OBEYA MEMORIAL HOSPITAL V A.G FEDERATION (1987) 3 NWLR (PT.60)325***. He submitted that the Defendant/Applicant has not met with any of the enumerated requirements.

First on the existence of a legal right, learned counsel submitted that for there to be an interlocutory injunction there ought to be a substantive suit. He posited that in this case, there should be a substantive Statement of Defence and Counter-Claim. That legally speaking, an application to file a Statement of Defence and Counter Claim out of time cannot amount to a substantive Counter Claim. He referred the Court to the case of ***Nigeria Cement Co Ltd v. N.R.C (1992) 1 NWLR (PT 220) 747*** where the court dismissed an ex parte application on the ground that there was no suit filed upon which the application can be based.

He emphasized that the Defendant/Applicant cannot seek an injunction where there is no prima facie legal right. That the fulcrum of the Defendant's/Applicant's application is that he was gifted the land in dispute but that there is no paragraph in his affidavit where he stated that he is in possession of the land. He submitted that the Application for building plot which the Defendant's root of title originates from is defective and a nullity, been unsigned by the purported Applicant. He said that it is law trite that an unsigned document is worthless and he maintained that the Defendant/Applicant cannot base his legal rights on inconsistencies and forgeries.

Furthermore, counsel submitted that the Defendant/ Applicant cannot build legal right on material inconsistencies, as can be gleaned from the document which he referred to as Exhibit J, in his affidavit in support. He posited that from the said Exhibit J which was made on the 22nd day of February 2022, it was categorically stated that the land in dispute does not belong to the Defendant but his Sister, Adesuwa Odigie. He said that surprisingly the Defendant by his Exhibit E is alluding to the fact that he has been the owner of the Land since 20th of September 2017.

He submitted that an application for injunction seeks the equitable discretion of the Court, and the law is that he who comes to Equity must come with clean hands and he relied on the case of ***Adigwe V. F.R.N (2015) 18 NWLR PART 1490, PAGE 105 AT 133***.

Furthermore, counsel submitted that it is trite law that the court should not grant an interlocutory injunction in land matters unless there exists a threat to the radical alteration of the character of the land and he relied on the case of ***AKPUGHUNUM V AKPUGHUNM (2007) ALL FLWR (Pt 376) 746 at 748.*** He submitted that the affidavit of the Defendant/ Applicant does not show that any irreparable damage will be caused if the application is not granted or that the activities of the Defendant/Respondent would cause a radical alteration of the land in dispute. Rather, he maintained that the Claimant /Respondent in his counter

affidavit has sufficiently shown that he has vast investments on the land in dispute and that he will suffer more if the injunction is allowed and he referred to paragraphs 41,42,43,52,and 53 of the Claimant/Respondent's Counter-Affidavit.

Again, learned counsel referred to paragraphs 24, 25, and 26 and documents Exhibits 7, 8, 9 and 51 of the Claimants/Respondent Counter affidavit and pointed out that the Defendant has not acted bona fide because he destroyed the wall fence of the Claimant on the land in dispute. He urged the Court to discountenance the denials of the Defendant/Applicant and hold that his actions were reprehensible thus disentitling him from the injunctive relief which he seeks.

On the balance of convenience, he submitted that the Defendant/Applicant has not shown that it is in his favour. He submitted that the Defendant/ Applicant has nothing to suffer if this application is refused apart from what he perceives to be emotional as stated in his paragraph 27 of the affidavit in support. However he maintained that the Claimant/Respondent will suffer more and he referred to paragraphs 21, 22, 41,42,43,52 and 53 of their counter-affidavit.

Learned counsel submitted that paragraph 27 of the affidavit in support of the interlocutory application offends section 115(3) of the Evidence Act, 2011 because Nicolas Otaigbe is not a party to this suit and his address of was not disclosed. He maintained that the Defendant/ Applicant thus failed to supply the necessary particulars envisaged by section 115 (3) of the Evidence Act LFN 2011. He relied on the case of ***ALHAJI GIDADO BAA V ADAMAWA EMIRATE COUNCIL & ORS (2013).***

Finally, he urged the Court to dismiss this application as it lacking in merit.

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 his paragraphs 4 to 15 of his supporting affidavit, the Defendant/Applicant deposed to the fact that sometime in December 2011 one Prince Nosakhare Erese, Jolly Erese and Osayande took himself and his sister (Mrs. Adesuwa Odigie) to view the land in dispute

That subsequently, his sister and her husband Mr. Lucky Odigie purchased the land measuring 100 feet by 100 feet, vide a Deed of Transfer between Prince Nosakhare Erese and Mr. Lucky Odigie & Mrs. Adesuwa Odigie, attached as Exhibit "A" to the Applicant's supporting affidavit.

The Applicant alleged that sometime in 2017 as a result of natural love and affection between him and his sister, his sister and her husband transferred a part of the land measuring 100 feet by 50 feet to the Defendant/Applicant vide Deeds of Gift attached as Exhibits D and E to the supporting affidavit.

Prima facie, by the said Exhibits D and E, the Defendant/Applicant has shown that he has a right to counter-claim against the Claimant/Respondent for the land in dispute.

In his counter affidavit and written address of his counsel, the Claimant/Respondent denied the Applicant's title to the land put forward some arguments to disprove the Applicant's title to the land.

With respect to the issues canvassed by the Respondent on the title of the Applicant, I am of the view that it is premature to make any findings on title 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 pronouncement 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 am of the view that at this stage, the Claimant/Applicant has adduced sufficient evidence to establish the fact that he has some legal rights to protect in relation to the land in dispute.

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 rights of the Claimant and the Defendant over the land in dispute.

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.

The relevant part of the Applicant's affidavit in support of the balance of convenience being in the Applicant's favour appears to be paragraph 27 where the Defendant/Applicant stated as follows:

"27. That Mr. Nicholas Otaigbe informed me in Chambers on the 21st of March, 2023 exactly by 12:00pm when he was preparing this process and I verily believe him to be true as follows:

a. ***That this Honourable Court has the power to grant an application of this nature;***
b. ***That if the Claimant are not urgently restrained, the Defendant/Applicant has a lot to lose, both emotionally and financially;***
c. ***That the balance of convenience is on the side of the Defendant/Applicant who will suffer more if this application is refused;***
d. ***That unless the Claimants are restrained from further trespassing into portions of the Defendant"s parcel of land measuring 50ft by 100ft located at Ward 36/A Amagba Oredo Local Government Area, Edo State they will continue in their illegality and the Applicant can never be assuaged by damages;***
e. ***That the Claimants will not be prejudiced however if this application is granted, as it is brought to protect and preserve the Res of this case;***
f. ***That the Defendant/Applicant undertakes to pay damages if at the end it turns out that this application is frivolous and ought not to have been granted."***

On the part of the Claimant/Respondent, at paragraphs 41 to 45 of his counter-affidavit he stated as follows:

"41.That I am in full, exclusive possession of the land in dispute and I never entered or constructed my building on the land in dispute secretly as alluded by the Defendant. Photographs of My Building on the Land in dispute is attached as Exhibit 12;

42. That I have granites worth more than Three Hundred Thousand Naira, and Wood Planks worth more than Three Million Naira, to be used for further construction of the Building on the Land in dispute: the planks are perishable and the granites can be easily stolen, as in the past unknown person stole blocks and granites I put on the land;
43. That the investigation on whether it is the Defendant that destroyed my wall fence in the land is still ongoing at the office of the A.I.G Zone 5, and if I am restrained from carrying out further development on the land in dispute I will be put in financial risk if the items lying on the land are stolen or the building destroyed as the Defendant have boasted severally to do;
44. That the Defendant does not have a means of livelihood adequate enough to pay me damages if my building on the land in dispute is put in harm's way."

As I earlier pointed out in this ruling, in his opposition to this application, the learned counsel for the Claimant/Respondent Learned counsel contended that paragraph 27 of the affidavit in support of the interlocutory application offends ***section 115(3) of the Evidence Act, 2011*** because the said Nicolas Otaigbe mentioned therein is not a party to this suit and

the Applicant did not disclose his address or supply the necessary particulars envisaged by ***section 115 (3) of the Evidence Act LFN 2011***. As the learned counsel rightly posited, where the facts deposed to in an affidavit by another person is derived from information received from another person, the name of the informant must be stated and reasonable particulars given in respect of his information and the time, place and circumstances must be disclosed.

From the contents of the said paragraph 27 of the supporting affidavit, it is apparent that the Defendant/Applicant derived the salient facts on the balance of convenience from one Nicholas Otaigbe who appears to be one of the Applicant's counsel in this suit. It beats my imagination how the Applicant's counsel would be the person giving the Applicant the salient facts of how the balance of convenience is in favour of the Applicant. I would have thought that it is the Applicant who alleges that he would suffer more, to supply the facts of what he would suffer if the application is not granted. Furthermore, the deponent did not give reasonable particulars of the information allegedly derived from the said Nicholas Otaigbe in relation to the time, place and circumstances of the said information.

Moreover, upon a careful examination of the facts disclosed in paragraph on the balance of convenience, it is apparent that the deponent merely stated that if the Claimant is not urgently restrained, the Defendant/Applicant has a lot to lose, both emotionally and financially and that the balance of convenience is on the side of the Defendant/Applicant who will suffer more if this application is refused. The reference to emotional and financial losses appears too vague.

In view of the foregoing, I agree that the said paragraph 27 offends ***section 115 (3) of the Evidence Act*** and it is accordingly struck out.

On the part of the Claimant/Respondent, he deposed to cogent facts that he has granites worth more than Three Hundred Thousand Naira, and wood planks worth more than Three Million Naira on the land in dispute and the planks are perishable item and that the granites can easily be stolen from the site if he is restrained from going there.

Juxtaposed with the evidence of the Defendant/Applicant, it is apparent that the Claimant/Respondent will lose more if the application is granted. Thus, at this stage I hold that the balance of convenience is on the side of the Claimant/Respondent.

Having found that the balance of convenience is not on the side of the Applicant, I do not think it is necessary for me to go further to consider the other requirements which the Applicant must fulfill before I can grant this application. The failure to meet the requirement of balance of convenience being I favour of the Applicant is fatal to this application.

On the whole, I hold that the Applicant has not fulfilled the requirements to enable this Court exercise its discretion to grant this application. The application is accordingly dismissed with N50, 000.00 (Fifty Thousand Naira) costs in favour of the Claimant/Respondent.

P.A.AKHIHIERO
JUDGE
31/01/2024

<u>COUNSEL:</u>
OSAGIE OAIKHENA ESQ----------CLAIMANT/RESPONDENT
M.E. ESEKHILE ESQ----------DEFENDANT/APPLICANT