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

28TH DAY OF JUNE, 2021.

BETWEEN: **SUIT NO: B/347/2021**

MR. CHRISTOPHER AKIM
BASKY OLUMESE } **CLAIMANT/APPLICANT**
(Suing by his Lawful Attorney
MADAM GRACE UGBOGBO)

AND

PERSON NAME UNKNOWN----------DEFENDANT/RESPONDENT

RULING

This is a Ruling on a Motion on Notice, dated and filed on the 26th of April, 2021, brought pursuant to Order 36 rules 1 & 2 of the High Court (Civil Procedure) Rules of Edo State 2018 and under the inherent jurisdiction of the Court praying for the following orders:

AN ORDER OF INTERLOCUTORY INJUNCTION restraining the Defendant, his/her agents, servants or privies from carrying out any building construction or doing anything whatsoever on the land measuring 100ft by 200ft lying and situate on a corner piece at Monday Iduoryekemwen Street and an existing road linking Osarobo Ologbosere Road at Amagba Community Ward 36A, Oredo Local Government Area which location is particularly now described in the Certificate of Occupancy number No. 7f7a1 contained in file No. EDL.55717 as well shown in the litigation Survey Plan No. SEA/ED/D.236/2021 pending the determination of the Substantive Suit.

AND for such further Order or other Orders as this Honourable Court may deem fit to make in the circumstances of this case.

The application is supported by a 26 paragraph affidavit and the Written Address of the learned counsel for the Claimant/Applicant.

Arguing the motion, the learned counsel for the Applicant, ***O.M.Obayuwana 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 the Claimant/Applicant has placed sufficient materials before the court to warrant the court granting this application."

Arguing the sole issue, the learned counsel submitted that sufficient materials have been placed before this honourable court to warrant the grant of this application as can be gleaned from the affidavit evidence herein and the exhibits attached.

He submitted that from the supporting affidavit, the Claimant/Applicant has disclosed his legal rights that are being threatened by the Defendant/Respondent who want to partition the Claimant's land and that these rights are worthy of protection.

He also submitted that there exists serious issues to be tried before this honourable court. He posited that the Applicant has shown that he will be greatly prejudiced if this application is refused because he will suffer irreparable harm of interference with the topography of the land in dispute and the proposed plan he has for the land, as a result of the manner of concrete wall fence being erected on the land.

He submitted that the Applicant is not guilty of delay or self-induced urgency and that the conduct of the Respondent leaves much to be desired as the Respondent seeks to present a fait accompli.

Furthermore, he submitted that the balance of convenience is on the side of the Applicant, who will suffer more if this application is refused.

He submitted that a Claimant is entitled to an interlocutory application at any stage of the proceedings in the interest of justice and to enable the effective determination of the issues in controversy and the maintenance of the *status quo ante bellum* pending the determination of the substantive suit. He referred to the case of ***ADEFARATI v. GOVERNOR, ONDO STATE [2006] ALL FWLR [pt302] Pg. 55, Ratio 1 and 2***, where the court stated *inter alia* thus:

"An interlocutory injunction by its very nature is a preservatory measure that requires the equitable discretion of the court, taken at an early stage of the proceedings before the court has had the opportunity to hear and weigh fully the evidence on both sides. It is an injunction which is directed to ensure that particular acts do not take place, pending the final determination of the rights of the parties by the courts."

Learned counsel also relied on the cases of ***DEKIT CONSTRUCTION CO.LTD v. ADEBAYO (2011) 2 AFWLR (Pt. 596), Ratio 3 and 4; and AKINPELU v. ADGBORE(2008)AFWLR (Pt429) at pg. 416,Ratio 6 & 7*** and submitted that from the facts deposed to in the affidavit in support of the interlocutory application, and the Exhibit attached thereto, it is evident that if the Defendant is not restrained, he will continue his acts of further trespass on the Claimant's land and probably move in to permanently deny the Applicant access to his property. He said that the Defendant must not be allowed to bring about a *fait accompli*.

He submitted that the applicant would suffer an irreparable damage and the risk of violation of his legal rights if this application is not granted.

He submitted that from the materials placed before the court, a case of real urgency has been made out and that if the application is not granted, a great mischief or damage would be done to the applicant's legal right. Hence, he urged the court to grant this application.

He submitted that there exists, serious issues to be tried in this suit and that the balance of convenience is on the side of the Applicant; that the Defendants will not lose anything or be prejudiced in any way if this application is granted, pending the determination of the substantive suit.

Finally, he submitted that the Applicant has a threatened legal right which is worthy of protection and he has undertaken to pay damages if it turns out that this application ought not to have been granted. He therefore urged the court to grant this application in the terms of the motion papers and in accordance with the demands of justice pending the determination of the substantive suit.

The Respondent was served with the motion papers by means of substituted service to wit: by pasting same on the concrete wall erected on the land in dispute. However, 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 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.***

From the available evidence, I think the Applicant has identified a legal right which he seeks to protect. In the supporting affidavit, the Applicant stated that sometime in 2017, one Mr. Ernest Akpomedaye acting through his lawful attorneys, executed a Deed of Conveyance dated 28th April, 2017 wherein he transferred his entire interest in the parcel of land in dispute to the Applicant who therefore became the owner and has been in effective possession of the said land without any challenge, encumbrances or disturbances whatsoever from any other person ever since, until the Respondent allegedly trespassed into the land.

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 paragraphs 9, 10 and 11 of the affidavit in support of this application, the deponent stated as follows:

"9.That recently on a routine visit to the land it was observed that an unknown person has trespassed on a portion of his land, the trespasser cut his concrete wall fence and started to demarcate his land into two, without the Claimant's consent or authority and all efforts made at knowing the identity of the trespasser has proved abortive. The Community elders and youth feigned ignorance of the trespasser. Attached is exhibit F the litigation survey plan showing the acts of trespass by the Defendant on the said land.

10.That the Claimant's legal and equitable interest are at stake and at further risk of being violated by the acts of the defendant, who is bent on carrying out to continue (sic) the act of trespass on the Claimant's land without showing his/her identity, but working through hired hands.

11. That an irreparable harm will be done, if he/she is allowed to continue erecting the concrete wall fence to partition the Claimant's land."

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 16 of the supporting affidavit the applicant deposed to the fact that no amount of damages will be sufficient to assuage him if this order is refused and the threat to be curtailed is allowed to happen.

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, I observed that this application was filed along with the originating processes in this suit so there was no delay whatsoever 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 20 of the supporting affidavit, the Claimant/Applicant gave an undertaking to pay damages in the event that it turned out that this application 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, his/her agents, servants or privies from carrying out any building construction or doing anything whatsoever on the land measuring 100ft by 200ft lying and situate on a corner piece at Monday Iduoryekemwen Street and an existing road linking Osarobo Ologbosere Road at Amagba Community Ward 36A, Oredo Local Government Area which location is particularly now described in the Certificate of Occupancy number No. 7f7a1 contained in file No. EDL.55717 as well shown in the litigation Survey Plan No. SEA/ED/D.236/2021, pending the determination of the substantive suit.***

I make no order as to costs.

P.A.AKHIHIERO
JUDGE
28/06/2021

<u>COUNSEL:</u>
O.M.OBAYUWANA ESQ……..……..CLAIMANT/APPLICANT

UNREPRESENTED……..……DEFENDANT/RESPONDENT