

IN THE HIGH COURT OF JUSTICE
IN THE BENIN JUDICIAL DIVISION
HOLDEN AT BENIN CITY
BEFORE HIS LORDSHIP, HON.JUSTICE P.A.AKHIHIRO,
ON MONDAY THE
21ST DAY OF JUNE, 2021.

BETWEEN:

SUIT NO: B/236/2021

MR. SHEGUN OGBEIDE -----CLAIMANT/APPLICANT

AND

1. MR. IKPONMWOSA OGBEIDE	}	DEFENDANTS/
2. MR. MONDAY AMOWIE	}	RESPONDENTS

RULING

This is a Ruling on a Motion on Notice, dated and filed on the 26th of March 2021, brought pursuant to Order 40 Rules 2(1) 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 restraining the 1st Defendant/Respondent, from retrieving the corpse of late Patrick Emovon Ogbeide Edosomwan from God's Care Hospital and from interring it during the pendency 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 37 paragraph affidavit and the Written Address of the learned counsel for the Claimant/Applicant.

Arguing the motion, the learned counsel for the Applicant, ***S.I. Okoror 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 this honourable court can make an order to restrain the 1st Defendant/Respondent from retrieving and interring the corpse of late Patrick Emovon Ogbeide Edosomwan.”

Opening his arguments on the sole issue, the learned counsel referred the Court to the provisions of **Order 39 Rule 4 (1)** of our rules which provides thus:

“Detention, preservation or inspection of property

- (1) The court may upon application of any party to an action or matter and upon terms as may be just, make any order for the detention, preservation or inspection of any property or thing, being the subject of such action or matter or as to which any question may arise therein and for all or any of the purpose authorize any person to enter upon or into any land or building in the possession of any party to such action or matter, and for all or any of the purposes aforesaid authorize any samples to be taken or any observation to be made or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence.”***

Learned counsel submitted that it is clear and unambiguous what the above stated rule provides. He said that the corpse of late Patrick Emovon Ogbeide Edosomwan is the subject matter in the substantive suit and if the 1st Defendant/Respondent is not restrained from retrieving and interring the corpse, the subject matter would be destroyed and the case shall become spent.

He submitted that the basis for the grant of an interlocutory injunction is the need to protect the applicant by preserving the circumstances which are found to exist at the time of his application until the rights of the parties are finally determined. He said that the Claimant’s application is simply to ensure that a burial is not conducted by the 1st Defendant/Respondent before this suit is determined. He said that the 1st Defendant/Respondent has made an assertion and he is being put to the strictest proof before he can be accepted as a member of the Ogbeide family. That it will become impossible to prove or even conclude this matter if the Court does not grant this application.

He referred to the case of ***Itex Limited & anor V. First Inland Bank Plc.*** [2007] WRN 14 page 135 at 150 where **Odili JCA** held thus:

“The grant of an interlocutory relief is always discretionary and depends on the varied circumstances of each case...In an application for interlocutory injunction, the applicant does not have to show that he would be entitled to relief at all events. It is not necessary that the applicant should make out a case, as he would on the merits. It is enough if he can show that he has a fair question to raise as to the existence of the right which he alleges or that there is a substantial issue to be tried at the hearing consequently, where he can satisfy

the Court that the property should be preserved in its actual condition until such question can be disposed of, it is sufficient.”

Counsel submitted that it is important that the res should be preserved in its present condition until the substantive suit is determined.

He further submitted that this application is not frivolous and that it is in the interest of justice that the res be preserved by restraining the 1st Defendant/Respondent from retrieving or interring the corpse of late Patrick Emovon Ogbeide Edosomwan.

He submitted that granting this application will not in any way prejudice the defendants. That a grant of this application is within the discretionary powers of the Court and he urged the Court to exercise same favourably.

The Respondents were served with the motion papers but they failed to respond 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 Respondents are 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 paragraphs 25 to 27 of the supporting affidavit, the Applicant stated thus:

“25.That I, being the immediate younger brother of the deceased, I am the one who will by Bini Custom act as the Edionegbe during the burial ceremony.

26.That the 1st Defendant, he not being a son of the deceased Patrick Emovon Ogbeide Edosomwan cannot assume the position of the son of the deceased during the burial rites and ceremony.

27. That the 1st Defendant has threatened that unless he is allowed to act as the first son in the burial rites of Patrick Emovon Ogbeide Edosomwan, no one else would be allowed to conduct the burial ceremony.”

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”***.

From the facts contained in the aforementioned paragraphs of the supporting affidavit, 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 1st Respondent is allowed to retrieve the corpse of the deceased and carry on with the burial. In **paragraph 22** of the supporting affidavit he stated thus:

“22. That it would be a taboo for the 1st Defendant/Respondent to retrieve the corpse and conduct the burial ceremony, he not being a son or even a family member of my late brother.”

Meanwhile, the 1st Respondent has not shown what he stands to lose if this Court makes an order restraining him from participating in the burial.

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) 1 ALL E.R. at 504 pp. 510***, 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 23 of the supporting affidavit the applicant deposed to the fact that no amount of damages will be sufficient to assuage him if this application is refused and the 1st Defendant/Respondent makes good his threats and the suit is eventually decided in his favour.

In the light of the circumstances of this case, I do not think damages can adequately compensate the Applicant if the 1st Respondent is permitted to perform the burial.

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 35 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 1st Defendant/Respondent, from***

*retrieving the corpse of late Patrick Emovon Ogbeide Edosomwan from God's Care Hospital and from interring it during the pendency of the substantive suit.
I make no order as to costs.*

P.A.AKHIHIERO
JUDGE
21/06/2021

COUNSEL:

STEPHEN OKOROR ESQ.....CLAIMANT/APPLICANT

UNREPRESENTED.....DEFENDANTS/RESPONDENTS