IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY

HOLDEN AT MAITAMA ABUJA

DATE: 26TH DAY OF NOVEMBER, 2020
BEFORE: HON. JUSTICE M. A. NASIR
COURT NO: 5
SUIT NO: CV/275/2016
MOTION NO: M/7584/2020

BETWEEN:

ISAAC TANKO --- PLAINTIFF/RESPONDENT
(suing through his lawful
attorney PATRICK J. ATAYI)

AND

1. ALHASSAN MAILAFIA ---- DEFENDANT/RESPONDENT
2. ALHAJI USMAN UMAR ---- DEFENDANT/RESPONDENT
3. MRS. MERCY I. JOSEPH ---- DEFENDANT/APPLICANT

RULING

Before this Court is a motion on notice filed by the 3rd defendant Mrs. Mercy I. Joseph on the 15/6/2020 praying this Court for the following reliefs:

"1. An order of interlocutory injunction restraining the plaintiff/respondent whether by himself or privies or agents howsoever described from trespassing on Plot 2060 at Jikwoyi Village Extension, Jikwoyi Abuja FCT,

which is the subject of this suit or from carrying out any construction or development on the plot pending the hearing and determination of this suit.

2. *An order for parties in this suit to exercise restrained and not to deal with the subject matter of this suit in any manner whatsoever pending the hearing and determination of this suit.*

3. *Any other order or further orders the Court may deem fit to make in the circumstances."*

The application is supported by a five paragraphs affidavit duly sworn to by one Hannah Hamo, a litigation clerk in the law firm of Refuge Chambers, counsel representing the applicant. Annexed to the application are 8 exhibits marked as Exhibits A – H respectively. **Friday Omakayi Abu Esq** for the applicant also filed a written address which he adopted and urged the Court to grant the application.

Upon receipt of the motion on notice, the plaintiff/respondent filed a counter affidavit of 30 paragraphs on the 25/6/2020. The counter affidavit was duly deposed to by Patrick J. Atayi, who is the lawful attorney of Isaac Tanko the plaintiff in this suit. Attached to the counter affidavit is a bundle of unmarked documents.

Cynthia Ovuarume Esq of counsel to the plaintiff/respondent filed a written address which was adopted by **Lawrence Erewele Esq** and urged the Court to refuse the application.

The applicant in the written address raised a sole issue for determination as follows:

> *"Whether the circumstances of this case warrants the grant of an order restraining parties in order to preserve the res pending the hearing and determination of the substantive suit."*

Learned counsel submitted that this Court has the power to grant the reliefs being sought by the applicant

provided certain conditions are met or the applicants are able to show certain things entitling them to the relief for an interlocutory injunction. Counsel submitted that the applicants herein have demonstrated through the affidavit in support of this motion and their statement of defence already filed before the Court that there is a serious issue to be tried which affect their title to the land and their enjoyment of same. That the balance of probability is on their side. The readiness to make an undertaking for damages is also in paragraph 4 of the said affidavit.

Learned counsel finally submitted that at this stage the applicants need not make out a case on the merit as all they need to do is to show that there is a triable issue and that they are likely to be entitled to a relief. Counsel urged this Court to grant their reliefs.

Counsel relied and referred this Court to the following cases:

1. Yusuf vs. Edun (2007) 21 WRN 163 at 172 – 173

2. Obeya Memorial Hospital & 1 or vs. A.G. Federation & 1 or (1987) SCNJ 42
3. Kwankwaso vs. Gov. of Kano State (2006) 29 WRN 35
4. Itex Ltd vs. First Inland Bank Plc (2007) 14 WRN 135

In reaction, the plaintiff/respondent formulated three issues for determination in their written address as follows:

"1. Whether this application is competent.

2. Whether the applicant has placed sufficient materials before this Court to entitle the applicant to the grant of the reliefs sought.

3. We humbly adopt the applicant's sole issue for determination."

On the first issue learned counsel submitted that the instant application is incompetent because the motion seeks to restrain an already completed act. That the two boys quarters was long completed before the 15/6/2020 when this motion was filed. Counsel went on to submit that

interlocutory injunction such as the instant application should not be granted as a remedy for the trespass or construction which the plaintiff started and completed before this motion was filed. He referred to the case of John Holt Nig. Ltd & anor vs. Hotels African Workers Union Nigeria and Cameroons (1963) LPELR – 25399 (SC), Obidozo &U ors vs. State (1987) LPELR – 2170 (SC).

On the second issue, learned counsel cited the Supreme Court decision in the case of Obeya Memorial Hospital vs. A.G. Federation (1987) SCNJ 42 and outlined the conditions that a party seeking for an order of interlocutory injunction must satisfy to be entitled to the grant of such interlocutory injunction. Counsel submitted that the applicant has not satisfied any of the conditions for the grant of the relief sought. That the applicant has not shown that he has a legal right over the land which is threatened for which he seeks restraining order.

Finally counsel submitted that the duty on the Court is to protect the res in a subject matter. That the res in this suit is Plot 2060 at Jikwoyi Village extension, Abuja, the fence on the land and the two rooms boys quarters. That the fence and the two rooms boys quarters were built by the plaintiff in 2001 and 2010 respectively before this suit was instituted in 2016. Counsel urged the Court to refuse the application.

On his part, learned counsel to the 2nd defendant/respondent **Idris Abubakar Esq** submitted that he had no objection to the grant of the reliefs sought.

This Court has considered the submissions of both counsel on the issues addressed, and carefully studied the case law cited, I have also carefully perused the affidavit in support of the application and the counter affidavit in opposition, in my view the only issue germane for determination is as follows:

"Whether from the circumstances of this case, the applicant has satisfied the requirements for the grant of this application."

In Alhaji Akibu & ors vs. Alhaji Oduntan & ors (1991) 2 NWLR (Part 171) 1, the Supreme Court held that an interlocutory injunction is usually granted with the object of keeping matters in status quo until the question at issue between the parties is resolved. The reason behind an interlocutory injunction to maintain status quo, is to preserve the res of the litigation from being wasted, damaged, or frittered away with the result that if the action succeeds, the successful party will reap an empty judgment. See Oyeyemi & Ors vs. Irewole Local Government, Ikire & Ors (1993) 1 NWLR (part 270) 462, Allon vs. Dandrill Nigeria Ltd (1997) 8 NWLR (part 517) 495, Omaliko vs. Awachie (2002) 12 NWLR (Part 780) 1, Ideozu vs. Ochoma (2006) 4 NWLR (Part 970) 364, Nwannewuihe vs. Nwannewuihe (2007) 16 NWLR (Part 1059) 1, Stallion

(Nig) Ltd vs. Economic & Financial Crimes Commission (2008) 7 NWLR (Part 1087) 461.

Now the ingredients which the Court must consider in granting an interlocutory injunction premised on the principles enunciated in the *locus classicus* of Kotoye vs. CBN (1989) 1 NWLR (part 98) 419, followed in Akinpelu vs. Adegbore (2008) 10 NWLR (part 1096) 531 are that the application for interlocutory injunction must show that:

"a) There is a serious question to be tried, i.e. that the applicant has a real possibility, not a probability of success at the trial,

b) The balance of convenience is on the side of the applicant,

c) Damages cannot be an adequate compensation for his injury,

d) The applicant's conduct is not reprehensible or guilty of any delay; and

e) There must be an undertaking as to damages."

In **Adenuga vs. Odumeru (2003) FWLR (Part 158) 1288 at page 1304** the Court held thus:

> *"In an application for an interlocutory injunction, the plaintiff must show an existence of his right which needs to be protected in the interim. He must at the same time satisfy the Court that there is a real question to be tried in the substantive suit."*

See also **Egbe vs. Onogun (1972) 1 All NLR 95 at 98.**

The plaintiff/respondent in the counter affidavit stated that the boys quarters was built in 2010 long before the commencement of this suit. That the Respondent is only trying to rebuild the aspect of the building demolished by the 1st and 3rd defendants/applicants in April, 2020 so that his security man will have a place to stay and watch over the fence and the land. The above informed the submission

of counsel for the respondent that the act for which this application is sought is a completed act.

The trite position of the law as rightly submitted by learned counsel for the respondent is the fact that an injunction cannot be granted to restrain an action that has been completed. To ask for an order restraining an already executed act is like offering a dead man medicine intended to cure his ailment. Thus, an order of injunction either interim, interlocutory or perpetual cannot be granted to restrain the carrying out of an already completed act. See Zenith Bank Plc vs. John & ors (2015) LPELR – 24315 (SC), Ukwuoma vs. Okafor (2017) LPELR – 42880 (CA).

The applicant relied on Exhibits B – H which are photographs of the alleged two bedroom boys quarters, while the respondent relied on Exhibits P6 and P7. None of these exhibits show a completed boys quarters which the respondent alleged was built in 2010 before or after the

suit was filed. I hold that the applicant is not seeking to restrain a completed act.

Now the question is whether there is a question to be tried at the hearing of the substantive suit. This issue shall be considered in the light of the affidavit evidence before the Court. This Court has gone through the 5 paragraphs affidavit in support the application and the 30 paragraphs counter affidavit filed by the plaintiff.

A preliminary consideration of the depositions of parties without necessarily venturing beyond this point will reveal that there are serious issues to be tried at the stage of trial of the substantive suit.

This Court has noted that the burden placed on the applicant at this stage is not necessarily one requiring him to make out a case as he would do on the merits. It is further noted that the applicant despite the averments in the respondent's counter affidavit, never bothered to file a reply to the said counter affidavit. It is elementary point of

law that a party who fails to file a counter affidavit, reply or further and better affidavit in order to challenge or controvert depositions in the adverse party's affidavit is deemed to have accepted the facts deposed in the affidavit in question. It is thus established that unchallenged facts in an affidavit are treated as established before the Court. See Rekol Clinic & Maternity Hospital vs. Supreme Finance & Investment Co. Ltd (1997) 7 NWLR (part 612) 613; Comptroller Nigeria Prison Service vs. Adekanye (1990) 10 NWLR (part 623) 400.

But that is not the end of the story. To succeed the applicant has to show in his affidavit in support of the application that the balance of convenience is in his favour; that is, he would suffer more damages than the respondent if his application were refused.

The governing principle in considering the question of balance of convenience is whether, if the applicant succeeds, he could not be adequately compensated by an

award of damages against the respondent and that the respondent is financially in a position to pay damages. See Orji vs. Zaria Industries Ltd (1991) 1 NWLR (part 216) 124. Usually, the balance of convenience will be in favour of party in possession, and it is also a matter of competing legal rights of the parties.

In this circumstance, the averments of the applicant in all the 5 paragraphs of the supporting affidavit failed to make depositions in this regard; all they said in all the averments is how the respondent is trying to complete the already existing boys quarters built by the respondent on the plot and how they reported to the Police and all that transpired at the Police station. The applicant in all the depositions did not aver that they are in possession of the plot. The balance of convenience in the circumstance is not in favour of the applicant. On the other hand, the respondent averred to the fact of being in possession of the

plot of land in issue. I hold therefore that the application as sought is not meritorious.

However upon perusal of the Rules of this Court Order 4 Rule 9 thereof, it provides:

> *"Every originating process shall contain an endorsement by the Registrar that parties maintain status quo until otherwise ordered by the Court."*

Relying on the above provision of the Rules of Court, parties are directed to be guided by the doctrine of *lis pendens* and maintain status quo pending the hearing and final determination of the substantive suit.

Hon. Justice. M.A. Nasir

Appearances:

Lawrence Erewele Esq – for the Claimant/Respondent, with him Majesty Echika Anim Esq and Cynthia Ovuarume (Mrs.)

Friday O. Abu Esq – for the 1st and 3rd Defendants/Applicants

Idris Abubakar Esq with him Maryam Safiyanu Esq and Hamisu Umar Esq – for the 2nd Defendant/Respondent