

**IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY  
HOLDEN AT ABUJA**

**THIS THURSDAY, THE 22ND DAY OF JULY, 2021.**

**BEFORE: HON. JUSTICE ABUBAKAR IDRIS KUTIGI – JUDGE**

**SUIT NO: CV/0143/17  
MOTION NO:M4745/21**

**BETWEEN:**

**FRAJEND INVESTMENTS LIMITED.....PLAINTIFF**

**AND**

- 1. MR SIMON OLAYINKA OGUNBIYI**
- 2. FEDERAL CAPITAL TERRITORY  
ADMINISTRATION**
- 3. ABUJA GEOGRAPHIC INFORMATION  
SYSTEM (AGIS)**

}.....**DEFENDANTS**

**RULING**

By a motion on notice dated 8<sup>th</sup> July, 2021 and filed same date at the Court's Registry, the Plaintiff/Applicant seeks for the following reliefs:

- 1. An order of Interlocutory Injunction restraining the Defendants/Respondents, particularly the 1st Defendant/Respondent, their agents, privies, proxies, personal representatives and family members, from erecting any form of structure or building, selling, farming, or cutting of any economic trees/crops on the subject matter of this suit situate at Plot 1080, Cadastral Zone B19, Katampe, Abuja, covered by the Certificate of Occupancy No. KW21548 dated 15th May, 2007, pending the determination of the substantive suit.**
- 2. And for such order or further orders as the Honourable Court may deem fit in the circumstance.**

The grounds upon which this application is brought are as follows:

- 1. Order 42 of the High Court (Civil Procedure) Rules of the Federal Capital Territory, Abuja 2018 empowers the Claimant/Applicant to bring application for the preservation of the subject matter pending the determination of the substantive suit.**
- 2. Parties are expected to maintain status quo once a suit is filed before the Court, pending the determination of the case.**
- 3. There is a compelling need to preserve the “res” and to maintain the “status quo” pending the determination of the substantive suit.**
- 4. The “res” will be completely destroyed and the Judgment of this court will be rendered nugatory in the event the Claimant/Applicant succeeds.**
- 5. The applicant has raised serious issues for trial and determination in this suit.**
- 6. Damages against the Respondent will not provide adequate compensation to the Applicant.**
- 7. The balance of convenience is in favour of the Applicant and the Claimant/Applicant.**
- 8. The Claimant/Applicant has made undertaking as to damages.**
- 9. Despite the pendency of this suit, the 1st Defendant/Respondent has continued to trespass on said land by destroying the fence and structure put up by the Claimant/Applicant and is erecting illegal fence and structure on the property.**
- 10. The determination of the rightful owner of the land forms part of the fundamental issues and questions to be resolved by this Honourable Court.**
- 11. The 1st Defendant/Respondent and his cohorts have continued in their acts of trespass on the land and cannot stop, if not restrained by this Honourable Court.**

**12. The Honourable Court possesses the inherent powers to restrain the Defendants/Respondents, their privies, agents and proxies in the circumstance of this case pending the determination of the substantive suit.**

The application is supported by a 28 paragraphs affidavit with six annexures marked as **Exhibits A-F**. Pursuant to the provisions of the **Rules of Court**, a written address was filed in support of the application in which the well known principles governing the grant of an order of injunction were articulated and it was submitted that the Applicant has in this case met the requirements to enable the court make the orders sought.

At the hearing, Barbara T Onwubiko of counsel for the Applicant relied on the paragraphs of the supporting affidavit. She adopted the submissions contained in the written address and urged the court to grant the application.

From the records of court, the Defendants were duly served with all court processes including hearing notices as the various proof of service filed by bailiff of court clearly indicates or shows. Indeed from the record, hearing notice was also served for today's hearing vide proof of service filed by bailiff of court dated 13<sup>th</sup> July, 2021. It is relevant to state that these aforementioned processes were all served on 1st Defendant by substituted means pursuant to an order of court granted on 3rd May, 2018.

Despite the service of these processes, the 1st Defendant, neither filed any process in reaction and was never at any time represented during the hearing of the extant application. On the part of the 2nd and 3rd Defendants, Esther Okeke of Counsel indicated that they are not opposing the application.

I have carefully read the written address on behalf of the Plaintiff which essentially dealt with the trite principles governing the grant of an order of injunction. I need not repeat them. Now as earlier stated, the plaintiff/applicant filed a 28 paragraphs affidavit in support of the application. The defendants/respondents having failed and/ or neglected to file a counter-affidavit in reaction or opposition to the said applicant's affidavit, the said affidavit stands uncontroverted and unchallenged. It is now trite principle of general application that where averments in an affidavit are neither challenged nor controverted, the court is under a duty to take the facts deposed therein, where cogent and credible, as established. See **B.O.N. Ltd Vs Aliyu (1999) 3 NWLR (pt612) 622 and Okonkwo V. Onovo (1999) 4 NWLR (pt597) 110**

While in law, the above position on failure to file a counter-affidavit cannot be faulted, it is equally important to state that the fact that an affidavit is unchallenged does not mean that the court will simply accept the contents of the affidavit; the court has a duty to look at the unchallenged affidavit to see if it is sufficient to determine the claim made by applicant. See **Martchem Industries Nig Ltd V. MF Kent West Africa Ltd (2005) 129 LRCN 1896 at 1899**

Flowing from the above, the duty of the court now is to examine the established facts against the factors guiding the grant of an injunction to see whether the applicant has made out a good case for the exercise of the court's discretion in its favour.

Now the grant or otherwise of an Interlocutory Injunction involves the exercise of the court's undoubted discretion which discretion must be exercised judiciously and judicially. The basis for the grant of an injunction is the need to protect the applicant by preserving the circumstances that are found to exist at the time of the application until the rights of the parties can be finally established. This need is weighed against the corresponding need of the respondent to be protected against any injury resulting from having been prevented from exercising his legal rights for which he could not be adequately compensated in damages if in the end the substantive case is decided in his favour. See **Oduntan V General Oil Ltd (1995) 4 N.W.L.R (pt 387) 1 at 12 H – 13 A**. The essence of the injunctive relief is the preservation of the status-quo. The order is given in the light of the threat, actual or perceived, to the applicant's rights. The order is put in place to forestall irreparable injury of the applicant's legal or equitable rights. See **Madubuike V. Madubuike (2001) 9 NWLR (pt 719)698 at 708 A-C**

The principles that inures in favour of granting an order of Interlocutory Injunction are now fairly well settled. In exercising its discretion, the court considers the existence or otherwise of the following factors amongst others to wit:

- I. Existence of legal right or interest in the subject of litigation.
- II. Threat to or violation of the right or interest.
- III. Balance of convenience.
- IV. Adequacy of damages.
- V. Conduct of the parties.

## VI. Undertaking as to damages

See **Akapo V Hakeem Habeeb (1992) 6 NWLR (pt 277) 289; Kotoye V Central Bank of Nigeria (1989) 1 NWLR (pt 98) 419; Oduntan V General Oil (Supra).**

On the issue of existence or otherwise of a legal right or interest in the subject of litigation, the court's attention has been drawn to the averments in paragraphs 4-9 of the supporting affidavit and the annexures attached in particular the Exhibits attached. **Exhibit A** shows the offer of statutory right of occupancy in the name of 1st Defendant in respect of Plot 1080 in Cadastral Zone B19 Katampe while **Exhibit B and B1** shows the Power of Attorney and Deed of Assignment disclosing a transaction over the same Plot between Plaintiff and 1st Defendant. **Exhibit E** is a letter written by 1st Defendant authorizing the registration of the Power of Attorney in favour of Plaintiff/Applicant.

These exhibits cumulatively show, *prima facie*, the apparent legal interest of the Applicant in the said plot subject of dispute. The Applicant avers in paragraph 9-11 that it took possession and built a fence around the plot and he has been exercising undisturbed ownership and possession of the plot until recently when it discovered that the 1st Defendant who it transacted with in relation to the plot has trespassed on the it and built a new fence and structure on the land without the knowledge and or authorization by Plaintiff. The Plaintiff further avers that despite the present court action, the 1st Defendant has continued with actions complained of in relation to the disputed plot.

These actions of 1st Defendant complained of shows the apparent threat to the interest of Applicant particularly in the light of Exhibits A, B and B1 situating the *prima facie* legal right of Applicant to the disputed plot.

On the existence of triable issues, it suffices to say that given the totality of the facts in the affidavit evidence, it seems to me that the plaintiff/applicants' claim is not frivolous or vexatious, in fact there seems to be serious questions to be adjudicated upon in the substantive suit relating to this disputed plot. It is important to emphasise the point that an applicant for an order of injunction is no longer expected to show a strong *prima-facie* case or an indefeasible right to the relief sought. Once there is a substantial issue to be tried at the hearing, the burden of the applicant is discharged. See **Oduntan V. General Oil Ltd (supra) at 13 B-D**. I am therefore satisfied that on the materials, serious issues have been raised for determination in the substantive suit.

We now come to the issue of balance of convenience. By balance of convenience is meant who would lose more if the status-quo is not preserved and maintained until the determination of the suit. In consideration of the balance of convenience, the principle appears now well settled that the law does not require mathematical exactness; it suffices if from the measurement of the scales of justice, the pendulum tilts in favour of the applicant. See **ACB Ltd. V. Awogboro (1991)2 N.W.L.R (pt176) 711 at 719.**

To answer this question, my attention has been drawn to the averments in paragraphs 7-22 of the affidavit in support of the application. As earlier stated, these averments were neither challenged nor controverted. The court is in the circumstances under a duty to accept them as established evidence of the hardship the applicant will suffer. As there is no counter evidence on the respondents' side of the scale of balance, I have no difficulty in holding that the applicant will suffer more in the event of the refusal of this application. It is doubtless that from the materials before court that the applicant has *prima facie* shown his entitlement to the subject of dispute by virtue of **Exhibits A, B, B1 and E.** Without the temporary intervention of court, it is clear that the res in dispute which is the applicants right or otherwise to the property in dispute will be adversely affected by the actions of the 1st defendant/respondent complained of as exemplified in **Exhibit F.** The aim of a grant of interlocutory injunction is to preserve the *res* from destruction. I therefore find that the balance of convenience lies in Applicants favour and that this is a proper case for intervention by the grant of an injunction.

On the issue of whether damages would be adequate compensation, the plaintiff/applicant has submitted that damages would not be adequate compensation if the 1st defendant/respondent is not restrained and he proceeds to deal with the land in a manner prejudicial to the interest of plaintiff/applicant.

The governing principle is that the court should first consider whether if the plaintiff were to succeed at the trial in establishing his right to a permanent injunction, he would be adequately compensated by an award of damages for the loss he would have sustained as a result of the defendant's continuing to do what was sought to be restrained between the time of the application and the time of the trial. If damages would be an adequate remedy, no interlocutory injunction should be granted, however strong the plaintiff's case may appear to be at the stage. If on the other hand, damages would not provide an adequate remedy for the plaintiff in the event of his succeeding at the trial, the court should then consider on the

contrary hypothesis, that if the defendant were to succeed at the trial in establishing his right to that which was sought to be restrained; whether the defendant would be adequately compensated by the plaintiffs undertaking for damages for the loss he would have sustained. If damages under the undertaking would be adequate remedy, then the injunction should not be granted. See **American Cyanamid Co V. Ethicon Ltd. (1975)1 All ER 504 at 510.**

Applying this principle, the Plaintiff/Applicant has deposed to facts showing the interest it has on the disputed plot as already demonstrated. It has also deposed to the facts that it never authorized the action(s) of 1st Defendant on the Plot. Here to, there is nothing by the 1st Defendant to counter or challenge these averments. In law they are deemed as established.

In law, it is trite principle that the power of the court to grant an order of injunction is essentially discretionary based on the peculiar facts of each case. The Plaintiff here must obviously have expended time and resources in getting the disputed plot from 1st Defendant. I also note that the Applicant gave an undertaking as to damages in paragraph 24 of its affidavit.

It seems to me therefore that though the 1st Defendant may have not filed any response or challenged this application, that whatever damages he may suffer if he is restrained, albeit temporarily, at this stage, and he later succeeds at the main trial in respect of the plot of land subject of dispute can be adequately compensated by the Applicants undertaking for damages. It seems to me fair that guided by the peculiar facts of this matter, good sense, wisdom and sound judgment compels me to hold that damages would not be adequate compensation for the plaintiff/applicant.

I find nothing reprehensible on the part of the applicant who upon being aware of the encroachment on the parcel of land by 1st defendant took immediate steps to file this case to challenge the said action(s). The 1st Defendant on his part, despite service of the court processes and hearing notice found no interest whatsoever in responding or reacting to the suit and application by way of a counter-affidavit.

A court considering an application of this nature should as much as possible try not to delve into or predetermine the issues to be determined in the substantive suit. See **U.B.A V Tsokwa Motors (2000)2 N.W.L.R (pt643)36 at 43-44; Ogbonnaya V. Adapalm (1993)5 N.W.L.R (pt292)147 at 152 D-F.**

Bearing this principle in mind, it is clear that I cannot at this stage be making any pronouncement on the allegation of trespass which is part of the extant interlocutory application as it forms part of the crux of the substantive issues that will be resolved in the determination of the substantive suit.

On the whole, the extant applicant has considerable merit. The temporary intervention of the Court appears imperative since as stated at the outset, the basis for the grant of an order of injunction is the need to protect the applicant by preserving the circumstances that are found to exist at the time of the application until the rights of the parties can be finally established. I accordingly having found that the applicant has made out a case for a favourable exercise of the courts discretion order as follows:

- 1. The 1st Defendant/Respondent either by himself, agents, servants, privies, workmen and or assigns are hereby restrained from carrying out any further development or continuing of construction works on plot 1080, Cadastral Zone B19, Katampe, Abuja pending the hearing and determination of the substantive action.**
- 2. An order for accelerated hearing is hereby granted.**

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*Hon. Justice A.I. Kutigi*

**Appearances:**

- 1. Barbara, T. Onwubiko, Esq., for the Plaintiff/Applicant*