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: GWD/CV/146/20
MOTION NO: GWD/M/279/20

BETWEEN:

MRS R.O. OTUKOYA……...…….PLAINTIFF/APPLICANT

AND

YERIMA KUTUNKU……DEFENDANT/RESPONDENT

RULING

By a Motion on Notice dated 1st December, 2020 and filed on 15th December, 2020, the Plaintiff/Applicant prays for the following orders:

1. **An order of interlocutory/interim injunction restraining the Defendant/Respondent either by himself, his agent(s), servant(s), privies, workmen and/or assigns from continuing with his any further acts of trespass on the Plaintiff/Applicant's two adjoining Plots of land lying, situate and/or being Plots Nos. 474 and 475, Old Kutunku Compensation Layout, Gwagwalada-Abuja, FCT, being the lawful properties of the Plaintiff/Claimant and the subject matters of this suit pending the determination of the substantive suit by this Honourable Court.**

2. **An order in interlocutory/interim injunction restraining the Defendant/Respondent either by himself, his agent(s), servant(s), privies, workmen and/or assigns from continuing with his further acts of interrupting, decimating, encroaching upon and/or interfering with the res of this case and/or with the Plaintiff/Claimant's peaceful enjoyment, occupation and/or with her possessory rights over the said two adjoining Plots of land being the lawful properties of the Plaintiff/Claimant which is**

all that parcel and/or Plots of land being Plots Nos. 474 and 475, Old Kutunku Compensation Layout, Gwagwalada-Abuja, FCT.

3. **An order of interlocutory/interim injunction restraining the Defendant/Respondent either by himself, his agent(s), servant(s), privies, workmen and/or assigns from continuing further with his acts of trespass, interrupting and/or interfering with the res either by continuing with any further construction and/or erection or building any structure of any description whatsoever on the said two adjoining plots of land being the lawful properties of the Plaintiff/Claimant which is the subject matters of this case pending the final determination of the substantive suit by this Honourable Court.**

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

The application is supported by a 10 paragraphs affidavit and 6 annexures marked as **Exhibits A-F.** Pursuant to 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, S.O. Ojo of counsel for the Applicant relied on the paragraphs of the supporting affidavit. He adopted the arguments contained in his written address and urged the court to grant the application.

From the records, the Defendant was served with the originating court process and the extant application on 21st December, 2020 and he appeared personally in court on 3rd February, 2021 when he sought for time to get a lawyer. Again, from the record, one I.A Adejembi, Esq entered appearance for the Defendant and by proof of service filed by bailiff of court dated 9th July, 2021, the defence counsel was served hearing notice for today. Neither Defendant or counsel however appeared in court and nothing has so for been filed by Defendant in opposition to the extant application and indeed the substantive action.

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 10 paragraphs affidavit in support of the application. The defendant/respondent having failed and/ or neglected to file a counter-affidavit in reaction or opposition to the said applicant's affidavit, the said affidavit stand 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 his 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 5(i)-(ix) of the supporting affidavit and the annexures attached in particular the exhibits attached. The first two documents both marked **Exhibit "A"** shows the conveyance of approval over plots 474 and 475 at Old Kutunku Comprehensive Layout at Gwagwalada to the Plaintiff/Applicant. The next attached two documents, both marked **Exhibit "B"** shows the certificate of occupancy (customary) over plots 474 and 475 issued to the Plaintiff by Gwagwalada Area Council for a term of 55 years.

These exhibits cumulatively show, prima facie, the apparent legal interest of the Applicant in the two plots subject of dispute. The Applicant avers in paragraphs 5 (xii), (xv) – (xxii) that she has been exercising undisturbed ownership and possession of the two plots until sometimes in 2020 when she was alerted to the fact that the defendant has together with his workmen encroached on the two plots of land, claimed ownership and proceeded to damage the property beacons and constructed a perimeter fence without the knowledge or authorization by plaintiff.

The plaintiff avers that all peaceful overturns to defendant to stop his actions including a letter of complaint written to the Director, Abuja Metropolitan Management Agency, Department of Development Control FCT vide **Exhibit F** did not yield any positive result and that the defendant has continued with the actions complained of in relation to the disputed plots.

The actions of defendant complained of shows the apparent threat to the interest of Applicant particularly in the light of Exhibits A and B situating the prima facie legal right of Applicant to the disputed plots and the complaint made vide Exhibit F.

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 paragraph 5 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 and B**. Without the temporary intervention of court, it is clear that the res in dispute which is the applicants right or otherwise to the two plots in dispute will be adversely affected by the actions of the defendant/respondent. 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 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 AII ER 504 at 510.**

Applying this principle, the Plaintiff/Applicant has deposed to facts showing she is the allottee of the disputed plots vide **Exhibits A and B** for a duration of 55 years. She has also deposed to the fact she never assigned the said plot to anybody. Here too, there is nothing by the 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 on 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 allocation of the disputed plots.

It is to be noted that the Applicant has in paragraph 7 given an undertaking as to damages. The requirement for an undertaking as to damage is the *quid pro quo* for the grant of an application for injunction. See **Kotoye V CBN (1989) 1 NWLR (pt.98) 419 at 450 H.** An undertaking as to damages is the price, which an applicant for an injunction has to pay for its grant. The object of the undertaking is to protect the court as well as the Defendant from improper applications for injunction. See **Victory Merchant Bank V Pelfaco Ltd (1993) 9 NWLR (pt.317) 340 at 356.**

The Plaintiff/Applicant as I understand undertakes to indemnify the Defendant to the full value of any loss arising from the grant of the application. The loss or damage to be suffered may not be known before hand, it is fixed afterwards at the dissolution of the injunction or after trial and after due inquiry. See **Onyemelukwe V Attamah (1993) 5 NWLR (pt.293) 350 at 366.** Since the Plaintiff/Applicant has voluntarily deposed in the supporting affidavit that she undertakes to pay damages, the necessity for the court to extract an undertaking would not arise. See **Onyesoh V Nnebedum (1992) 3 NWLR (pt.229) 315 at 340**. The Plaintiff/Applicant has on her own supplied the *quid pro quo* for the grant of the injunction and this for me is sufficient. Where at the end of the injunction, it is found to lack bonafide, nothing stops the Respondent from processing with the inquiry to assess the quantum of damages.

It seems to me therefore that though the defendant may have not filed any response or challenged this application, that whether damages he or they may suffer if they are restrained, albeit temporarily, at this stage, and they later succeed 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 sence, 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 been aware of the encroachment on the parcels of land by defendant took immediate steps to file this case to challenge the said actions. The respondent 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 relief(s) as it forms part of the crux of the substantive issues that will be resolved in the determination of the substantive suit.

Since as stated at the outset that 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 defendant/respondent either by himself, agents, servants, privies, workmen and/or assigns are hereby restrained from carrying out any further development(s) or continuing construction works on plots Nos. 474 and 475, old Kutunku Comp. Layout Gwagwalada, Abuja, FCT pending the hearing and determination of the substantive action.**

2. **An accelerated hearing of this action is hereby ordered.**

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Hon. Justice A.I. Kutigi

Appearances:

1. S.O Ojo, Esq., with John Omeiza Obansa, Esq., for the Plaintiff/Applicant.