

**SUPREME COURT OF NIGERIA**  
27TH FEBRUARY, 1996. SC. 329/1990  
**CORAM:- M. L. UWAI S C J N, M. E. OGUNDARE,**  
**E. O. OGWUEGBU, Y. O. ADIO, A. I. IGUH, JJSC**

1. AFRICAN CONTINENTAL BANK LTD.  
2. C. C. MOJEKWU ..... APPELLANTS  
AND  
PRINCE A. O. AWOGBORO & ANOTHER ..... RESPONDENTS

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***INTERLOCUTORY INJUNCTIONS*** - Discretion of Court - To grant the application - What court considers in exercising its discretion.

***INTERLOCUTORY INJUNCTIONS*** - Grant thereof - What applicant should show - To be entitled to the issue of an order.

***INTERLOCUTORY INJUNCTIONS*** - Status quo preservation - Is proper ground for court to intervene - And grant the injunction .

***INTERLOCUTORY INJUNCTIONS*** - Substantive suit - Duty of Judge - In granting application - Is not to determine issues in the substantial suit.

***INTERLOCUTORY INJUNCTIONS*** - Recourse to Writ of Summons - By the trial judge - Where only statement of claim was referred to - Effect

***INTERLOCUTORY INJUNCTIONS*** - Undertaking as to damages Failure to Extract same - Whether fatal.

***INTERLOCUTORY INJUNCTIONS*** - Proper case - Whether made out a case - For grant of the application.

**FACTS**

The plaintiffs/respondents are husband and wife and are directors of Awosco A - Z stores Ltd. The company is a customer of the 1st defendant/appellant Bank. The 1st plaintiff and the company obtained a loan facility, by a mortgage transaction from the 1st defendant. They defaulted in their obligations to the 1st defendant, whereupon the 1st defendant notice of sale to the 1st plaintiff and the Company and engaged the 2nd defendant to sell the said property.

The plaintiffs instituted the action leading to this appeal in the

High Court of Lagos State, Ikeja to resist the proposed sale by appellants, then defendant, by filing a writ of Summons and also a motion on Notice for interlocutory Injunction restraining them. The trial court granted the motion on Notice. Defendants' appeal to the Court of Appeal was dismissed that Court which affirmed the trial court's ruling. Being dissatisfied, the defendant have further appealed to the Supreme Court. The said defendant/appellants have formulated 4 issues for the determination of the appeal

***ISSUES FOR DETERMINATION:***

1. *Whether, as is held by the court below, evaluation of affidavit evidence before the learned trial judge in determining the application for interlocutory injunction would have in the circumstances meant premature trial of issues he would later on be called upon to try.*

2. *Whether, as held by the court below, the learned trial judge would properly determine the application for interlocutory injunction before him without being concerned with the claims in the writ of summons. Etc see p. 378*

***HELD*** (Unanimously granting the application per lead ruling of ***OGWUEGBU JSC***)

***Interlocutory injunction - Discretion of Court***

1. The jurisdiction of the court to grant interlocutory injunction is equitable. The main complaint of the appellants in this appeal is the exercise of discretionary power of the learned trial judge to grant the application for interlocutory injunction. It is a matter of discretion whether an injunction or will not be granted. The manner of the exercise of that discretion depends upon the precise nature of the particular rights which it is sought to protect and upon all the other material facts and circumstances, (p. 378 C)

***Interlocutory injunction - What applicant should show***

2. If a plaintiff is able to show that his remedies at law are inadequate and that there is sufficient probability that the acts which are complained of will place to render it unjust and unreasonable that the court should refuse to intervene, he is entitled *prima facie* to the issue of an injunction. It will however be refused as a matter of discretion if it should appear to be unjust in highly unreasonable to grant it having regard to the well known equitable consideration such as hardship or balance of convenience, or other such matters. (p. 378 D)

***Preservation of status quo***

3. The subject matter of the suit is a family house which is said to be jointly owned by the plaintiffs. It is the intention of the defendants to sell the house. The courts below took into account the probability that the apprehended breach of the rights of the 2nd applicant will take place. They also weighed the respective hardship and inconvenience to the parties which could be caused in granting or refusing the relief. I am therefore unable to see where the two courts went wrong to warrant the interference by this court. This is a proper case where the court will intervene and preserve the property in status quo during the pendency of the suit until the rights to it are decided. (p. 379 C)

***Interlocutory Injunction - Duty of Judge***

4. In an application for a grant of injunction pending the determination of the substantive claim, the judge has a duty to ensure that he does not in the determination of the application determine the same issues that would arise for determination in the substantial suit. An application for interlocutory injunction can be determined in the absence of pleading and oral evidenced (p. 379 F)

***Interlocutory injunction - Recourse to writ of summon***

5. From the affidavit evidence the plaintiffs made out a case for an injunction. There is need for the learned trial judge to have recourse to the writ summons or the statement of claim. He cannot shut his eyes from them this case however, only the statement of claim was filed. Since the defendants had not filed their statement of defence at that stage, issues had been joined and no oral evidence adduced. There cannot be a finding on merits. The failure of the learned trial judge to consider the writ of summons and the statement of claim in the circumstances of this case did occasion any miscarriage of justice. (p. 379 G)

***Undertaking as to damages***

6. I endorse the stand taken by the court below on the failure of the learned trial judge to extract an undertaking from the plaintiffs in that the property which is the subject-matter of the action is in the legal possession of defendant. (p. 380 A)

***Injunction - Plaintiffs made out a case***

7. I am clearly of the view that in this case the plaintiffs made out a case for the interlocutory injunction and I am also satisfied that the

courts below applied the right principles to the facts of the case. The learned trial judge exercised his discretion judicially and judiciously. (p. 380 B)

### **NOTABLE POINT OF INTEREST**

#### **IGUH JSC**

##### ***1. Interlocutory ruling of court - When appeal may be unnecessary***

It need not be each and every ruling of a trial court that a party necessarily needs to appeal against, particularly where such an interlocutory appeal shall have the effect of staying further hearing of the substantive suit. It may, in some cases, be more in the overall interest of justice and the grievied party if certain rulings of a trial court, considered erroneous, are ignored, all-be-it, temporarily, where this would cause no harm or lead to a miscarriage of justice if the continuation of hearing of the substantive case pursued with a view to its expeditious determination. Thereafter, which ever party that is aggrieved by such rulings may, if need be, incorporate his complaint in his notice and grounds of appeal filed against the final judgment of court in the substantive suit. (p. 381 C)

### **REPRESENTATION**

Theodore A. Ezeobi for the Appellants

Respondents are not represented

### **CASES REFERRED TO**

Akpo v. Hakeem-Habeeb & Ors. (1992)6 N.W.L.R. (Pt. 247)266

Mobil Oil (Nig) Ltd v. Chief Agadaigho (1988)2 N.W.L.R. (Pt. 77) 383

Kufeji v. Kogbe (1961) All N.L.R. 122 (Reprint)

### **RULES REFERRED TO**

Supreme Court Rules, 1985, Order 6, rule 9

### **LEAD JUDGMENT BY OGWUEGBU JSC**

The plaintiffs instituted a civil action in the Ikeja Division of the High Court of Lagos State against the defendants claiming that the mortgage between the 1st plaintiff and the 1st defendant which is secured by landed property known as 27, Onayade Street, Ikorodu Road, Lagos State is still valid and subsisting and that the 1st defendant's power of sale under the mortgage has not arisen.

The plaintiffs also prayed the court to declare that the proposed sale of the said property by the 2nd defendant at the instance of the 1st defendant is null and void as it is not in conformity with the terms and condi-

tions of the mortgage. They are also seeking an order of perpetual injunction restraining the defendants and their agents from selling or dealing in any way with the property, No. 27, Onayade Street, Ikorodu Road, Lagos.

On 4:2:85 which was the same day the writ of summons was issued, the plaintiffs filed a motion on notice praying the court in the following terms:

*“Restraining the defendants/respondents by themselves and/or their agents, servants or privies from selling or otherwise dealing any way (sic) whatsoever with the property of the applicants lying being and situate at No. 27, Onayade Street, Ikorodu Road, Lagos, Lagos State pending the hearing and determination of this action.”*

The application was supported by an affidavit of twelve paragraphs deposed to by the 2nd plaintiff and a further affidavit of one Idowu Asero, a clerk in the Chambers of the plaintiffs counsel. The defendants filed a counter-affidavit. The application was opposed.

The facts of the case are that both plaintiffs/respondents are husband and wife. Both are directors of a company called Awosco A-Z Stores Ltd. This company is a customer of the 1st defendant. Awosco A-Z Ltd. enjoyed banking facilities from the 1st defendant bank. The 1st plaintiff secured the facilities with a deed of legal mortgage over property known as No. 27, Onayade Street, Ikorodu Road, Lagos. The company and the 1st plaintiff defaulted in their obligations to the 1st defendant. The 1st defendant gave the 1st plaintiff and Awosco A-Z Stores Ltd. notice of sale of the mortgage property. The 2nd defendant is the auctioneer engaged by the 1st defendant to carry out the sale.

The plaintiffs resisted the proposed sale by filing a writ of summons and the application for an order of interlocutory injunction which gave rise to this appeal.

The relevant paragraphs of the affidavit in support of the application are:

*“2(c) That 27, Onayade Street, Ikorodu Road, Lagos is the joint property of the plaintiffs and the 2nd plaintiff’s share of the said property is not subject to the mortgage recited in I above.*

*3. That this action was instituted as a result of the publication inserted at page 6 of the Friday Edition of the Daily Times published on 1/2/85 a photocopy of which publication is attached hereto and marked Exhibit “AA”*

*4. That before the publication of Exhibit “AA” the defendants/respondents failed and neglected to issue and serve on the 1st plaintiff/applicant the requisite notice under the Mortgage Instrument pointing out the default that made any power of sale exercisable.*

5. *That 27. Onayade Street, Ikorodu Road, Lagos is the only family house jointly owned by my husband, 1st plaintiff/applicant and myself and untold hardship will be involved should the house be sold as there is no alternative place of accommodation for us and 1st plaintiff/applicant is presently out of the country.*

6. *That the intended sale of 27 Onayade Street, Ikorodu Road, Lagos will paralyse my entire family as some of my children do attend educational institutions within the neighbourhood of Fadeyi where the property is sited.*

10. *That I will suffer irreparable damages and loss and I will have no alternative place to live with my family if the respondents are not restrained forthwith from disposing of my property."*

The affidavit was deposed to by the 2nd plaintiff/applicant who is the wife of the 1st plaintiff. The counter-affidavit gave account of the loan and mortgage transactions and the failure of the 1st plaintiff and Awosco A-Z Stores Ltd. to honour their obligations under the mortgage. In paragraphs 13, 14 and 15 of the counter-affidavit, the 1st defendant deposed as follows:-

"13. *By a letter of 15/12/83 the 1st defendant issued a further demand notice to the 1st plaintiff demanding compliance with certain repayment terms or have 27, Onayade Street, Ikorodu Road sold. A copy of this letter is herewith attached marked Exhibit "G".*

14. *By its letter of 28/9/84 with respect to the 1st defendant's posture to sell the said property. The company pleaded with the 1st defendant to stay action "on the sale of the property of Prince A.O. Awogboro." A copy of this letter is herewith attached and marked Exhibit "H".*

15. *That the company again wrote to the 1st defendant only on 13/1/85 signed by the 2nd plaintiff pleading for further delay in the sale 27, Onayade Street and no mention was made of any interest of the 2nd plaintiff as a joint owner of the property."*

The learned trial Judge granted the application. The defendants not satisfied with the decision of the learned trial Judge appealed to the Court of Appeal, Lagos Division. They lost in that court and have further appealed to this court. The plaintiffs who are the respondents in this court did not file the respondents brief. They did not appear and were not represented at the hearing of this appeal. Order 6 rule 9 of the rules of this court is clear on the failure of a respondent to file his brief of argument.

The appellants have identified the following issues for determination:

1. Whether as is held by the court below evaluation of affidavit evidence before the learned trial Judge in determining the application for interlocutory

injunction would have in the circumstances meant premature trial of issues he would later on be called upon to try.

2. Whether as held by the court below, the learned trial Judge would properly determine the application for interlocutory injunction before him without being concerned with the claims in the writ of summons.

3. Whether on the facts as found by the court below and which were in any event common ground it was competent for it to hold that this was proper case for grant of interlocutory injunction.

4. Whether the court below was right in affirming the failure of the learned trial Judge to extract an undertaking as to damages from the plaintiffs/applicants as a precondition for grant of interlocutory injunction in this case.

The jurisdiction of the court to grant interlocutory injunction is equitable. The main complaint of the appellants in this appeal is the exercise of the discretionary power of the learned trial Judge to grant the application for interlocutory injunction. It is a matter of discretion whether an injunction will or will not be granted. The manner of the exercise of that discretion depends upon the precise nature of the particular rights which it is sought to protect and upon all the other material facts and circumstances. If a plaintiff is able to show that his remedies at law are inadequate and that there is sufficient probability that the acts which are complained of will take place to render it unjust and unreasonable that the court should refuse to intervene. He is entitled prima facie to the issue of an injunction. It will however be refused as a matter of discretion if it should appear to be unjust or highly unreasonable to grant it having regard to the well known equitable considerations such as hardship or balance of convenience, or other such matters. In the particular case in hand there was affidavit evidence before the learned trial Judge that 27, Onayade Street, Ikorodu Road, Lagos, is the joint property of the plaintiffs/applicants and the 2nd plaintiff's share of the said property is not subject to the mortgage; that the sale will paralyse the family as it is their family house where they live and some of their children who attend educational institutions in the neighbourhood also live in the house. In granting the application, the learned trial Judge said-

*"Applying these principles to the instant application, I am satisfied that there is a triable issue in this matter. For instance, it is beyond controversy that there is a mortgage transaction between 1st plaintiff, Awosco AZ Ltd on the one hand and the 1st defendant on the other. It is also evident that the 1st defendant is now poised to exercise its right of sale under the mortgage agreement. The counter-affidavit of Mr. Njoku raised so many issues that ought to be looked into.*

*Again it is my view that if No. 27 Onayade Street is sold and ultimately the applicants succeed, there could be no return to status quo. They will suffer irreparable injury."*

The learned trial Judge considered two material questions before granting the application namely, whether the plaintiffs made out a prima facie case and the balance of convenience and inconvenience in granting or refusing the injunction. B

The court below in affirming the decision of the learned trial Judge said:

*"The Judge was also right in saying that he is satisfied that there are triable issues in this matter; and for saying that if No. 27, Onayade Street is sold and ultimately the applicant succeeds there can be no return to status quo and that respondent would have suffered irreparable damage."* C

The subject matter of the suit is a family house which is said to be jointly owned by the plaintiffs. It is the intention of the defendants to sell the house. The courts below took into account the probability that the apprehended breach of the rights of the 2nd applicant will take place. They also weighed the respective hardship and inconvenience to the parties which could be caused in granting or refusing the relief. I am therefore unable to see where the two courts went wrong to warrant the interference by this court. This is a proper case where the court will intervene and preserve the property in status quo during the pendency of the suit until the rights to it are decided. It is not proper for the court at that stage to express any opinion as to such rights. Such an opinion might give the impression that the court has made up its mind on the substantive issue on trial before it. See Orji v. Zaria Ind. Ltd. & Or. (1992) 1 NWLR (Pt. 216) 124 and Akapo v. Hakeem-Habeeb & Ors. (1992) 6 NWLR (Pt. 247) 266. D E F

In an application for a grant of injunction pending the determination of the substantive claim, the Judge has a duty to ensure that he does not in the determination of the application determine the same issues that would arise for determination in the substantive suit. An application for interlocutory injunction can be determined in the absence of pleadings and oral evidence. See Mobil Oil (Nig.) Ltd. v. Chief Agadaigho (1988) 2 NWLR (Pt. 77) 383 and Kufeji v. Kogbe (1961) All NLR 122 (Reprint). From the affidavit evidence the plaintiffs made out a case for an injunction. There is need for the learned trial Judge to have recourse to the writ of summons or the statement of claim. He cannot shut his eyes from them. In this case however, only the statement of claim was filed. Since the defendants had not filed their statement of defence at that stage, issues had not been joined G H



and no oral evidence adduced. There cannot be a finding on the merits. The failure of the learned trial Judge to consider the writ of summons and the statement of claim in the circumstances of this case did not occasion any miscarriage of justice. I endorse the stand taken by the court below on the failure of the learned trial Judge to extract an undertaking from the plaintiffs in that the property which is the subject-matter of the action is in the legal possession of the 1st defendant.

I am clearly of the view that in this case the plaintiffs made out a case for the grant of an interlocutory injunction and I am also satisfied that the courts below applied the right principles to the facts of the case. The learned trial Judge exercised his discretion judicially and judiciously

There is one aspect of this case which I think it is my duty to comment upon. The appeals to the Court of Appeal and this court which followed the grant of the application on 13:6:86 lasted nine years. The action was instituted ten years ago. It should have been obvious to the learned counsel for the defendants that this is a matter in which time, inconvenience and costs would have been saved by an accelerated hearing of the substantive action from the time the ruling was delivered instead of pursuing the appeal up to this court. The learned trial Judge realized the need for accelerated hearing. He gave each party leave to apply for same at the close of pleadings but his advice was not heeded. The defendants as it were fell into a trap set for them by the plaintiffs.

The appeal fails and it is dismissed. The decision of the court below is hereby affirmed.

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**UWAIS CJN**

I have had the privilege of reading in draft the judgment read by my learned brother Ogwuegbu, J.S.C. I agree with it and have nothing to add.

The appeal fails and it is hereby dismissed with N1,000.00 costs to the respondents.

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**OGUNDARE JSC**

I have had the privilege of a preview of the judgment of my learned brother Ogwuegbu, J.S.C. just delivered and I have nothing more to add.

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**ADIO JSC**

I have had the advantage of reading, in draft, the judgment just read by my learned brother, Ogwuegbu, J.S.C., and I agree that the appeal fails. I dismiss it and abide by the order for costs.

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**IGUH JSC**

I read, in draft, the lead judgment just delivered by my learned brother, Ogwuegbu, J.S.C. and I agree entirely with his reasoning and conclusion.

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There is however one single admonition I desire to give. It need not be each and every ruling of a trial court that a party necessarily needs to appeal against, particularly where such an interlocutory appeal shall have the effect of staying further hearing of the substantive suit. It may, in some cases, be more in the overall interest of justice and the aggrieved party if certain rulings of a trial court, considered erroneous, are ignored, all be it, temporarily, where this would cause no harm or lead to a miscarriage of justice if the continuation of hearing of the substantive case is pursued with a view to its expeditious determination. Thereafter, which ever party that is aggrieved by such rulings may, if need be, incorporate his complaint in his notice and grounds of appeal filed against the final judgment .of court in the substantive suit.

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I find it necessary to make this observation as the hearing of the present suit which, in my view, could not have taken more than one, or at the very most, two days to complete, was stayed for an incredible period of 10 years in pursuit of an appeal against the trial court's ruling on a mere application for an interlocutory injunction. Justice delayed, they say, is justice denied and it is my advice that parties ought in future to give a more serious consideration to whether or not to ignore their grievance against a mere interlocutory ruling temporarily and proceed with the continuation of hearing of the substantive suit and canvass the correctness of the alleged offending ruling at the end of trial if need be.

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This appeal however, fails and I too, dismiss it for all the reasons elucidated in the lead judgment which I adopt as mine. I affirm the judgment of the court below and abide by the order for costs contained in the lead judgment.

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