

SUPREME COURT OF NIGERIA

24TH SEPTEMBER, 1999. SC. 158/1993

**CORAM:- A. G. KARIBI-WHYTE, I. L. KUTIGI, S. U. ONU,
U. A. KALGO, A. O. EJIWUNMI, JJSC**

CHIEF JOHN ATTAMAH & ORS PLAINTIFFS/
(For themselves and on behalf of the Amuke people) APPELLANTS

AND

THE ANGLICAN BISHOP OF THE NIGER, DEFENDANTS/
DR. JONATHAN A. ONYEMELUKWE RESPONDENTS
(TRUSTEE ANGLICAN CHURCH DIOCESE OF THE
NIGER) & ORS.

ACTIONS - Parties - Appeals - Contention that 4th defendant did not appeal in this matter - Is of no substance - Since all the defendants jointly appealed.

APPEALS - Injunction - Right of appeal where an injunction is granted or refused - Avails the defendants in this case.

CONSTITUTIONAL LAW - Appeal as of right - S. 220(1) of the 1979 Constitution - The present appeal is as of right under the section.

INJUNCTIONS - Ex parte injunctions - Are for cases of real emergency or urgency - Balance of convenience in this case - Was not on the plaintiffs' side.

INJUNCTIONS - Interim order of injunction - Having expired or lapsed - There was nothing to refuse or sustain after that date.

INJUNCTIONS - Interlocutory injunction - Application for it - Damages of N100.00 ordered by trial court - If plaintiffs' application proves to be frivolous - Cannot be called an undertaking to pay damages.

FACTS

Before the High Court Nsukka, the plaintiffs/appellants filed an action against the defendants/respondents claiming inter alia, declaration of ownership to the land in dispute. While the suit was filed on 22/6/92, the plaintiffs on the next day being 23/6/92 filed a motion ex parte seeking for an interim injunction. The order for interim injunction was granted on 25/6/92 pending the plaintiffs application for interlocutory injunction and the case was fixed for 13/7/92 for the hearing of the motion. Defendants on 7/7/92 filed a motion on notice praying the court to discharge the Orders. A ruling was delivered on 12/8/92 in which the trial court refused the application thereby refusing to discharge the ex parte orders made on 25/6/92.

Being dissatisfied, the defendants appealed to the Court of Appeal which allowed their appeal and vacated the order of interim injunction made on 25/6/92. Aggrieved by the Court of Appeal's decision, the plaintiffs have appealed to the Supreme Court raising 4 issues which were narrowed down to 2 issues.

ISSUES FOR DETERMINATION

1. *Whether the plaintiffs' Grounds of Appeal were grounds of law as to render Section 220(1)(b) of the 1979 Constitution applicable or whether they were adequately covered by the provision of Section 220 (1) (g) (ii) of the 1979 Constitution.*

2. *Was the Court of Appeal right in holding that an interlocutory injunction was granted by the Ruling of 12/8/92 and in discharging the ex-parte injunction against the 4th Defendant who did not appeal?*

HELD (Unanimously dismissing the appeal per lead judgment of **KUTIGI JSC**)

Appeals - Injunction

1. So that as in this case an appeal shall lie as of right where an injunction is granted or refused. The High Court made an interim order of injunction on 25/6/92 which it refused to discharge or vacate on 12/8/92. By refusing to vacate or discharge its order, it seems clear to me that the High Court had once again confirmed the order of interim injunction

made earlier on; the effect being that the order of injunction remained in force and binding on the Defendants until vacated or otherwise ordered. Considering the submissions of counsel for the plaintiffs/Defendants on the applicability of Section 220 (1) (g) (ii) above, the Court of Appeal in its lead judgment observed-

" I admire the ingenuity of the learned counsel for the respondent in his attempt to play with words in contending that refusal to discharge the order of injunction made on 25/6/92 is not the same with refusal to grant injunction just because the particular words "refusal to grant injunction" were used under S.220 (1) (g) (ii) of the 1979 Constitution. In my view the position here does not call for all linguistic refinery. The position simply put is that the trial court refused to discharge or vacate an interim order of injunction it made on 25/6/92 in its ruling of 12/8/92, which is the subject of this appeal. In my view the situation is adequately covered by S.220 (1) (g) (ii) of the 1979 Constitution."

I agree entirely. (p. 2650 D)

Constitutional law - Appeal as of right

2. It should be noted that whether the appeal was covered by section 220 (1) (b) or section 220 (1) (g) (ii), the end result was the same in that, the appeal was as of right under the two provisions. My conclusion in short is therefore that the appeal was covered by the provision of section 220 (1) (g) (ii) (supra) and there is no further need for me to consider the application of section 220 (1) (b) (supra). (p. 2651 F)

Interim order of injunction

3. The motion on notice for interlocutory injunction was to be heard on 13/7/92 when the Defendants should have been served. As observed above there is nothing on the record to show that the motion on Notice was heard on 13/7/92 or on any day at all. Therefore when the High Court was delivering the Ruling of 12/8/92, the interim order of injunction made on 25/6/92 was no longer in force. It had expired or lapsed on 13/7/92 probably unknown to the court as well as counsel. Consequently, there was nothing to refuse or sustain after that date. The Ruling to

discharge the order of interim injunction I believe ought to have been delivered on or before 13/7/92 when the motion on Notice could have been argued. (p. 2652 F)

B *Ex parte injunctions*

4. It is settled that ex-parte injunctions are for cases of real emergency or urgency where it is not possible to give Notice of Motion. The plaintiffs from their own affidavit in support of their motion ex-parte said they leased the land in dispute to the 1st & 2nd Defendants who granted a sub-lease of the land to the 3rd & 4th Defendants. The Defendants were thus already on the land. They had an existing petrol station also already on the land and spent a huge sum of money trying to modernize it. The plaintiffs said they wanted the land for farming. The facts thus clearly show that the balance of convenience was never on their side.(p.2653 A)

Interlocutory injunction - Application for it

5. The one hundred naira (N100.00) damages which the learned trial judge ordered to be paid by the plaintiffs to the Defendants "if their application for interlocutory injunction proves to be frivolous," can in no way be called an "undertaking to pay damages," which damages were yet to be suffered, ascertained and or even quantified by the court itself. (See for example KOTOYE V. C.B.N. (1989) 1 NWLR (PT.98) 419 WOLUCHEM V. WOKOMA (1974) 1 ALL NLR 605) . The court of Appeal must therefore be right when it said -

"Having given a dispassionate consideration to the priorities of both appellants and respondents, I am of the view that the learned trial judge with all due respect did not exercise his discretion judiciously in refusing to discharge his order made on 25/6/92. " (p. 2653 C)

Actions - Parties - Appeals

6. Learned Counsel for the plaintiffs also contended amongst others, that the 4th Defendant did not appeal against the Ruling of 12/8/92 and that the court of Appeal was therefore wrong to have vacated the order of interim injunction in his or its favour. I have carefully examined the

records in this appeal and have found that all the Defendants jointly applied by motion on Notice to discharge the ex-parte interim order of injunction in the High Court. The Notice of Appeal to the court of Appeal also shows that all the Defendants jointly appealed against the Ruling of 12/8/92. The brief of argument also filed in the court of Appeal shows clearly that it was filed jointly by all the Defendants in the case. I therefore find no substance in the complaint. (p. 2653 F)

REPRESENTATION

Appellants absent. Not represented

Chief O. Ugolo for the 1st, 2nd and 4th Respondents.

Chief Theodore A. Ezeobi for 3rd Respondent

CASES REFERRED TO

Kotoye v. C.B.N. (1989) 1 NWLR (PT.98) 419

Woluchem v. Wokoma (1974) 1 ALL NLR 605)

LEAD JUDGMENT BY KUTIGI JSC

The plaintiffs in the High Court holden at Nsukka instituted this action against the Defendants claiming as follows:-

"(a) A declaration that the plaintiffs are the owners of the land in dispute and are therefore entitled to the statutory right of occupancy over the land.

(b) A declaration that the 1st Defendant has breached the terms and conditions of the deed of lease and has therefore forfeited the lease.

(c) A declaration that the purported sub-lease or assignment of the land in dispute to the 3rd & 4th Defendants is null and void and of no effect.

(d) An order granting the plaintiffs recovery and possession of the disputed land.

(e) An order of perpetual injunction restraining the Defendants their servants, agents, privies and successors from further entering into the disputed land and from carrying on any activity on the said

2648 Attamah v. Bishop of the Niger (1999) 9 KLR Kutigi JSC
land."

The suit was filed on 22/6/92. On the following day 23/6/92, the plaintiffs filed a Motion Ex-parte before the court seeking for an order of interim injunction against the Defendants pending the hearing and determination of the plaintiffs' application for an interlocutory injunction as a result of which the court on 25/6/92 made the following orders:-

"1. That the Defendants/Respondents, their servants and Agents be and are hereby restrained from entering or carrying on any activity on the plaintiffs /Applicants' parcel of land situating opposite Bishop Shanahan Hospital along Enugu Road, Nsukka pending the hearing and determination of the plaintiffs/Applicants' Application for interlocutory injunction pending in this court.

2. That the plaintiffs/Applicants shall pay to the Defendants/Respondents the sum of N100.00 as damages if their application for interlocutory injunction proves to be frivolous.

3. That the case is fixed for 13th July, 1992 FOR THE HEARING OF THE Motion On Notice

On being served with the above orders, the Defendants on 7/7/92 filed a Motion on Notice praying the court to discharge the orders.

There is no indication on the records when the motion was argued, but a Ruling was delivered on 12/8/92. In the Ruling the learned trial judge refused the application. In other words the court refused to discharge the ex-parte orders made on 25/6/92 set out above.

Dissatisfied with the Ruling of the trial court, the Defendants appealed to the Court of Appeal holden at Enugu. Having regard to the nature of the application and the order made by the trial court, the Court of Appeal was of the view and rightly so to my mind, that the only issue for its determination was:-

"Whether in the circumstances of this case, the trial court had exercised its discretion judicially and judiciously when it refused to discharge the order made on 25/6/92 in its Ruling dated 12/8/92."

The issue was carefully examined and in a unanimous judgment, the court of Appeal held that the appeal had merit. The appeal was

allowed. The order of interim injunction made by the trial court on 25/6/92 was vacated with costs in favour of the Defendants.

Aggrieved by the decision of the Court of Appeal, the plaintiff have appealed to this court. The parties filed and exchanged briefs of argument as provided under the Rules of Court. In addition oral submissions were made at the hearing of the appeal during which the respective briefs were adopted and relied upon by the parties.

Mr. Ezugwu learned counsel for the plaintiffs in his brief submitted four (4) issues for determination. These can conveniently in my view be reduced to two thus:-

1. *Whether the plaintiffs' Grounds of Appeal were grounds of law as to render Section 220(1)(b) of the 1979 Constitution applicable or whether they were adequately covered by the provision of Section 220 (1) (g) (ii) of the 1979 Constitution.*

2. *Was the Court of Appeal right in holding that an interlocutory injunction was granted by the Ruling of 12/8/92 and in discharging the ex-parte injunction against the 4th Defendant who did not appeal?*

ISSUE (1)

Learned counsel for the plaintiffs contended that all the Grounds of Appeal filed by the Defendants to the Court of Appeal raised questions of mixed law and fact and that the Defendants ought to have obtained leave of the court before filling their Notice of Appeal as stipulated under Section 221(1) of the 1979 Constitution. That not being grounds of law, the Defendants did not come under the provisions of Section 220(1)(b) of the 1979 Constitution. It was also contended that Section 220 (1) (g) (ii) of the same Constitution did not also apply because the High Court did not in its Ruling of 12/8/92 grant any injunction nor did it refuse to grant an injunction. That the High Court on that day only refused discharged the interim order of injunction dated 25/6/92 and ordered an accelerated hearing of the case. That "refusal to discharge an injunction" did not mean the same thing as "refusal to grant an injunction."

Now, Section 220(1)(b) of the 1979 Constitution provides as follows-

S.220 (1) An appeal shall lie from the decisions of a High

Court to the Court of Appeal as of right in the following cases-

(b) Where the ground of appeal involves question of law alone, decision in any civil or criminal proceedings.

It is trite law that under the above section, a decision of the High Court whether final or interlocutory is appealable as of right and without leave on questions of law alone.

Apart from this, and particularly relevant to this case, there is also the provision of Section 220 (1) (g) (ii) of the 1979 Constitution which reads:-

S.220(1) *An appeal shall lie from the decisions of a High Court to the Court of Appeal as of right in the following cases-*

(g) decisions made or given by the High Court-

(ii) Where an injunction or the appointment or a receiver is granted or refused.

So that as in this case an appeal shall lie as of right where an injunction is granted or refused. The High Court made an interim order of injunction on 25/6/92 which it refused to discharge or vacate on 12/8/92. By refusing to vacate or discharge its order, it seems clear to me that the High Court had once again confirmed the order of interim injunction made earlier on; the effect being that the order of injunction remained in force and binding on the Defendants until vacated or otherwise ordered.

Considering the submissions of counsel for the plaintiffs/ Defendants on the applicability of Section 220 (1) (g) (ii) above, the Court of Appeal in its lead judgment observed-

"I admire the ingenuity of the learned counsel for the respondent in his attempt to play with words in contending that refusal to discharge the order of injunction made on 25/6/92 is not the same with refusal to grant injunction just because the particular words "refusal to grant injunction" were used under S.220 (1) (g) (ii) of the 1979 Constitution. In my view the position here does not call for all linguistic refinery.

The position simply put is that the trial court refused to discharge or vacate an interim order of injunction it made on 25/6/92

in its ruling of 12/8/92, which is the subject of this appeal. In my view the situation is adequately covered by S.220 (1) (g) (ii) of the 1979 Constitution."

I agree entirely.

It was after reaching the conclusion above that the court of Appeal proceeded to consider whether the Grounds of Appeal were actually grounds of law alone and therefore covered by section 220 (1) (b) above. Five grounds of Appeal were originally filed. The court of Appeal in its lead judgment considered only ground (1) which was reproduced therein. The remaining four grounds were left out. That court came to the conclusion that ground (1) being a ground of law, no leave was required and as such section 221 (1) of the 1979 constitution did not apply. The other four (4) grounds of appeal were not considered by the court. That I believe must have been an oversight. But having earlier come to the conclusion that the appeal was covered by the provisions of section 220 (1) (g) (ii) there was probably no need for the court to have considered the applicability of section 221 (1) any more. It was perhaps to make sure that if one failed, the other succeeded. But even then the exercise was never completed.

Be that as it may, this being the apex court, there is no further need for me to consider the applicability of section 220 (1) (b), having earlier agreed with the court of Appeal that the appeal was covered by section 220 (1) (g) (ii) above. **It should be noted that whether the appeal was covered by section 220 (1) (b) or section 220 (1) (g) (ii), the end result was the same in that, the appeal was as of right under the two provisions. My conclusion in short is therefore that the appeal was covered by the provision of section 220 (1) (g) (ii) (supra) and there is no further need for me to consider the application of section 220 (1) (b) (supra).**

ISSUE (2)

In my treatment of issue (1) above, the first arm of issue (2) clearly also seemed to have been answered already. By refusing to discharge its earlier order of interim injunction in the Ruling of 12/8/92, the High Court did not merely confirm the said earlier order, but that the said

order of injunction remained binding on the Defendants until vacated or otherwise ordered. The subject matter of the appeal therefore was simply the interim injunction granted by the trial court against the Defendants.

B I must observe that the Ruling of 12/8/. 92 did not indicate or show that any other motion on Notice apart from the Defendants' motion to discharge the order of injunction was taken or heard together with the Defendants' motion. Also although the court of Appeal in the lead judgment clearly stated that the plaintiffs' motion on Notice earlier fixed for C hearing on 13/7/92 and the Defendants' motion on Notice filed on 7/7/92, were heard together on the same day (even though it did not give the date) , that court never said any where in its judgment that the trial High Court granted an order of interlocutory injunction against the Defendants D as plaintiffs' counsel would want us to believe. The High Court in its Ruling of 12/8/92 only refused the application to discharge the order of interim injunction. It did not make any order of interlocutory injunction on that day as no application of that nature was moved before it. In my E view I think the plaintiffs should therefore feel free to pursue their said motion on Notice to its logical conclusion if and when necessary. This must be so because the ex-parte interim order of injunction as shown above was supposed to last until 13/7/92. That is as it should have been, it being interim only.

F **The motion on notice for interlocutory injunction was to be heard on 13/7/92 when the Defendants should have been served. As observed above there is nothing on the record to show that the motion on Notice was heard on 13/7/92 or on any day at all. There-**
G **fore when the High Court was delivering the Ruling of 12/8/92, the interim order of injunction made on 25/6/92 was no longer in force. It had expired or lapsed on 13/7/92 probably unknown to the court as well as counsel. Consequently, there was nothing to refuse or**
H **sustain after that date. The Ruling to discharge the order of interim injunction I believe ought to have been delivered on or before 13/7/92 when the motion on Notice could have been argued. Enough of that.**

Now, turning to the facts of the case, it is settled that ex-parte injunctions are for cases of real emergency or urgency where it is not possible to give Notice of Motion. The plaintiffs from their own affidavit in support of their motion ex-parte said they leased the land in dispute to the 1st & 2nd Defendants who granted a sub-lease of the land to the 3rd & 4th Defendants. The Defendants were thus already on the land. They had an existing petrol station also already on the land and spent a huge sum of money trying to modernize it. The plaintiffs said they wanted the land for farming. The facts thus clearly show that the balance of convenience was never on their side. Secondly the one hundred naira (N100.00) damages which the learned trial judge ordered to be paid by the plaintiffs to the Defendants "if their application for interlocutory injunction proves to be frivolous," can in no way be called an "undertaking to pay damages," which damages were yet to be suffered, ascertained and or even quantified by the court itself. (See for example KOTOYE V. C.B.N. (1989) 1 NWLR (PT.98) 419 WOLUCHEM V. WOKOMA (1974) 1 ALL NLR 605) . The court of Appeal must therefore be right when it said -

"Having given a dispassionate consideration to the priorities of both appellants and respondents, I am of the view that the learned trial judge with all due respect did not exercise his discretion judiciously in refusing to discharge his order made on 25/6/92."

Learned Counsel for the plaintiffs also contended amongst others, that the 4th Defendant did not appeal against the Ruling of 12/8/92 and that the court of Appeal was therefore wrong to have vacated the order of interim injunction in his or its favour. I have carefully examined the records in this appeal and have found that all the Defendants jointly applied by motion on Notice to discharge the ex-parte interim order of injunction in the High Court. The Notice of Appeal to the court of Appeal also shows that all the Defendants jointly appealed against the Ruling of 12/8/92. The brief of argument also filed in the court of Appeal shows clearly that it was filed jointly by all the Defendants in the case. I therefore find

no substance in the complaint.

In conclusion, this appeal must fail. It is accordingly dismissed with N10,000 casts for each set of Defendants / Respondents.

B

KARIBI-WHYTE JSC

I have read in its draft form, the judgment of my learned brother I. L. Kutigi, JSC in this appeal. I agree entirely with his reasoning and conclusion that this appeal lacks merit and ought to be dismissed. I also will, and hereby dismiss the appeal of the Appellants in this case. Appel-
C lants shall pay N10,000 as costs to Respondents.

ONU JSC

D Having been privileged to read in draft before now the leading judgment of my learned brother Kutigi, JSC just delivered, I am of the same view that the appeal lacks substance and ought to fail.

I therefore dismiss this appeal and make similar consequential orders inclusive of costs as therein contained.

E

KALGO JSC

F I have had the advantage of reading in advance the draft of the judgement just delivered by my learned brother Kutigi JSC, and I entirely agree with him that there is no merit in this appeal. It is my respectful view as indeed clearly expressed in the leading judgement, that the respondents' appeal in the court of Appeal was valid and competent within the provisions of section 220 (1) (g) (ii) of the 1979 constitution, and that the interim order of injunction made by the learned trial judge on the
G 25 of June, 1992 was properly vacated in favour of the respondents. In the result, I dismiss the appeal affirm the decision of the court of Appeal and abide by the order of costs made in the lead judgement

H

EJWUNMI JSC

Also agreed with the lead judgment.