

RULING

INTRODUCTION

1. On 17 February 2022 the plaintiff filed an application for interlocutory injunction seeking inter alia orders against the defendants to restrain them from interfering in the plaintiff's construction of her dwelling house on land Portion No. 110 in Anetan District (Okoe, Irwerin) (Portion No. 110).

PRINCIPLES OF INTERLOCUTARY INJUNCTION

2. I stated in *Kam v Scotty*¹ at [4] as follows:

[4] The principle to be applied in application for interlocutory injunction have been authoritatively explained by Lord Diplock in *American Cyanamid Co. v Ethicon Ltd* [1975] UKHL 1; [1975] A.C. 396; [1975] 1 All E.R. 504 H.L. They may be summarised as follows:

1. The plaintiff must establish that he has a good arguable claim to the right he seeks to protect;
 2. The court must not attempt to decide this claim on affidavits; it is enough if the plaintiff shows that there is a serious question to be tried.
 3. If the plaintiff satisfies these tests, the grant or refusal of an injunction is a matter for the exercise of the Court's discretion on the balance of convenience.^[1]
3. In an article by Justice Dato'Gopal Sri Ram, Court of Appeal, Malaysia he stated at [2] as follows:

"Lord Diplock's re-formulation of the threshold test for an injunction in *American Cyanamid* is so well known that it is pointless reproducing it here. All that need be said is that the Malaysian courts have interpreted Lord Diplock's speech as involving three steps. In *Keet Gerald v Mohd Noor Abdullah* [1995] 1 MLJ 193, we attempted to crystallise *American Cyanamid* principles:

To summarize, a judge hearing an application for an interlocutory injunction should undertake an inquiry along the following lines:

- (1) he must ask himself whether the totality of the facts presented before him discloses a bona fide serious issue to be tried. He must, when considering this question, bear in mind that the pleadings and evidence are incomplete at that stage. Above all, he must refrain from making any determination on the merits of the claim or any defence to it. It is sufficient if he identifies with precision the issues raised on the joinder and decides whether these are serious enough to merit a trial. If he finds, upon a consideration of all the relevant material before him, including submissions of counsel, that no serious question is disclosed, that is an end of the matter and the

¹ [2021] NRSC 49; Civil Case No. 27 of 2021 (3 December 2021)

relief is refused. On the other hand if he does find that there are serious questions to be tried, he should move on to the next step of his inquiry;

- (2) having found that an issue has been disclosed that requires further investigation, he must consider where the justice of the case lies. In making his assessment, he must take into account all relevant matters, including the practical realities of the case before him. He must weigh the harm that the injunction would produce by its grant against the harm that would result from its refusal. He is entitled to take into account, inter alia, the relative financial standing of the litigants before him. If after weighing all matters, he comes to the conclusion that the plaintiff would suffer greater injustice if relief is withheld, then he would be entitled to grant the injunction especially if he is satisfied that the plaintiff is in a financial position to meet his undertaking in damages. Similarly, if he concludes that the defendant would suffer the greater injustice by the grant of an injunction, he would be entitled to refuse relief. Of course, cases may arise where the injustice to the plaintiff is so manifest that the judge would be entitled to dispense with the usual undertaking as to damages (see *Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd & Ors* [1988] 3 MLJ 90). Apart from such cases, the judge is entitled to take into account the plaintiff's ability to meet his undertaking in damages should the suit fail, and, in appropriate cases, may require the plaintiff to secure his undertaking, for example, by providing a bank guarantee; and
- (3) the judge must have in the forefront of his mind that the remedy that he is asked to administer is discretionary, intended to produce a just result for the period between the date of the application and the trial proper and intended to maintain the status quo, an expression explained by Lord Diplock in *Garden Cottage Foods Ltd v Milk Marketing Board* [1984] AC 130; [1983] 2 All ER 770; [1983] 3 WLR 143 and applied in *Cheng Hang Guan*. It is a judicial discretion capable of correction on appeal. Accordingly, the judge would be entitled to take into account all discretionary considerations, such as delay in the making of the application or any adequate alternative remedy that would satisfy the plaintiff's equity, such as an award of monetary compensation in the event that he succeeds in establishing his claim at the trial. Any question going to the public interest may, and in appropriate cases should, be taken into account. A judge should briefly set out in his judgement the several factors that weighed in his mind when arriving at his conclusion."

APPLICATION FOR INJUNCTION

4. The application was set down for hearing on 24 February 2022 and the plaintiff's counsel, Miss Lekenaua, informed the Court that the defendants had commenced building on Portion 110 having laid the foundation on 19 and 20 February 2022. Miss Akubor wanted the plaintiff to continue building whilst Miss Lekenaua sought an order for interim injunction. The matter was adjourned to 25 February 2022 to allow the parties to have discussions to resolve the matter as the dispute was about the boundary and orders were made for the defendants to file and serve a statement of defense and affidavit in reply.
5. In the affidavit filed by the first defendant on 25 February 2022 she stated that she obtained 75% consent of the landowners by 7 October 2021; that she then had the land surveyed by the Director of Land and Survey on 7 October 2021 and pegs were installed to identify the area where she could build their house; that she and her husband were granted assistance under the Housing Scheme Project; and the building was to be

constructed between them and MR Constructions in different stages; and that if they were stopped from continuing with the building then they would miss out on the Housing Scheme Project. Both the first and second defendants stated that they had no objection to the interim injunction being granted against them provided it did not prevent them from accessing the building material already on the site to continue with the building of their house. The second defendant denied that he ever interfered with the plaintiff's use of the land and that the issues will be further clarified in the statement of defence when filed.

6. On 25 February 2022 the matter was adjourned to allow Miss Lekenaua to file an affidavit in reply and it was adjourned to 11 March 2022. In the meantime, parties were to explore settlement and the matter was adjourned to 25 March 2022.
7. On 25 March 2022 the parties were allowed further time to resolve the matter and it was adjourned to 28 March 2022 and an order was made that all construction work shall cease. Before this matter was adjourned Mr Lee appearing on behalf of the defendants raised the issue that the plaintiff was given consent in 2001 by the landowners to build a house and she instead built a garage.
8. In an affidavit filed by the first defendant she raised that the plaintiff's consent was not registered with the Department of Land Management; and that she that she had no authority to build her house.
9. On 6 April 2022 Yvette Dubriya, Assistant Secretary for Land Management filed an affidavit on behalf of the defendants in which she deposed that she was a neutral party; and only wanted to clarify some issues. In her affidavit she stated that the first defendant's mother, Mrs Brechtefeld, obtained a consent from her office to seek consent for the first defendant to build a house on Portion No. 110; that she certified the consent form on 7 October 2021; that a week later the plaintiff came to her office and produced a consent form from the year 2001 which was not registered; that the plaintiff undertook to build on another site and on that basis she signed the consent form and registered it; and that she believed that the consent form was for her build a garage and not a dwelling house; and that she was informed that the plaintiff wanted to share half of the land where the defendants are building and she stated that she cannot do that.

ISSUES FOR DETERMINATION

10. The plaintiff admits to obtaining of the landowners to build in the year 2001 and has not started building the dwelling, however, she had reserved her house site area by placing three containers with the building materials in them on the area that she had earmarked to build her dwelling house.
11. I note that the consent that the plaintiff obtained in 2001 is different to the consent form currently in use. (I might add that neither the defendants' counsel or Miss Dubriya attached a copy of the relevant consent form.) The plaintiff's consent form states:

“We, the undersigned as part owners of land named: Okoe, Ibwerin Portion No. 110C District of: Anetan have no objection whatsoever to Mrs Sharon Buramen live upon this piece of land.

<u>Owners:</u>	<u>Share:</u>	<u>Signatures:</u>
Bernicke Betty	1/9 th	.....
Bam Sarah	1/9 th	.....
Tamakin Alek	1/36 th	.....
Detenamo Sara	1/36 th	.....
Keke Eibireirok	1/36 th	.....
Manke April	1/36 th	.....
Capelle Arabella	1/9 th	.....
Kakiouea Elchen	1/9 th	.....
Brectefeld Elva	1/9 th	.....
Tamakin Kelson	1/9 th	.....
Tamakin Nelson	1/9 th	.....
Tamakin Robyn	1/9 th	.....

NB: Kindly return this form after all signatures have been obtained for official record use by our department.”

12. As can be seen from the above 100% of the landowners were required to sign the form; whilst the current form only requires 75% consent of the landowners. The other difference is (and this is based on the current forms placed before me in other cases) is the form does not require it to be registered with the Department of Land Management. All that is required to be done is to return the form to the department after 100% consent is obtained. It is not known whether it was returned to the department and the Acting Director of Land Management, Miss Dubriya, did not suggest that it was not returned; all she said was that it was not registered.
13. Further the first defendant prior to the commencement of the construction on 1 December 2021 wrote to the plaintiff for the removal of the three containers. Her letter stated as follows:

Sharon Buramen
Anetan District
Republic of Nauru
15 December 2021

Dear Mrs Buramen

Re: Portion 110 (Okoe, Ibwerin) at Anetan District

I make reference to the above-mentioned subject.

My name is Daniella Dageago and I am the daughter of Jim Brectefeld and Elva Brectefeld. My mother is a landowner at Portion 110 (Okoe, Ibwerin) at Anetan District. She owns a large share in Portion 110, which is 1/9. You are a landowner as well, with a share 1/72. Earlier this year in 2021, my mother sought to obtain permission from fellow landowners on my behalf, in order to build a house on Portion 110. She obtained consent from fellow landowners, a total of 75% signed. You had signed the consent form as well. This document was verified and approved by the Director of Land Management on 7th October 2021. There are three (3) containers on Portion 110, all of which belong to you. You are requested to remove your containers in order for me to

start building on Portion 110 and your response was that you would remove the containers. It has been more than two (2) months now and you have still not removed your containers. I am ready to build and the contractors are wondering why it is taking so long. I have advised them of the three containers that are blocking Portion 110. You have signed the consent form and said that you will remove the containers yet it is still not done after two months. Failing to keep your word is a bad reflection on you.

LEGAL ADVICE

I have sought legal advice on this matter and have been advised to take legal action in Court against you. I am strongly considering the same, in light of your inaction. Before I take legal action against you, I will give one final opportunity to allow you to remove the 3 containers from Portion 110.

NOTICE

You are hereby put on notice and given seven (7) days to remove the 3 containers from Portion 110. Failure to do so will result in a civil action against you. The filing of a civil action against you will incur far more consequences, including being ordered to meet the cost of removal of containers, court fees, legal costs, damages and other costs that the Court deems fit. I look forward to hearing from you within seven days. I can be contacted on 5582929.

Yours faithfully
Daniella Dageago

14. The plaintiff responded to the first defendant's letter on 24 January 2022 in which she refuted the allegation and stated as follows:

24th January 2022
Daniella Dageago
Menen District
Republic of Nauru

Without prejudice

Dear Mrs Daniella Dageago,

Re: Portion 110 (Okoe, Ibwerin) at Anetan District

I make reference to your letter dated 15 December 2021.

I do NOT accept your letter and I DENY your allegations made against me for the use of Portion 110 Anetan.

Firstly, you should be aware that I have an authority form signed by landowners of Portion 110 to utilize Portion 110. When you circulated your own authority form, I also agreed, as you stated that you would utilize part of Portion 110 behind Robert Atsime's place. After gaining signatures for your authority form, you then changed your mind and wanted to build in front of Congo Scotty's residence, where I had already earmarked to


build. Since you were adamant in wanting to build on the same part of Portion 110 as myself, I agreed, as there was enough space for both of us. When we initially met to discuss where you could build, we finally agreed that you could build at the front part of Portion 110 (the side nearest the oval). We also agreed that you would not use any portion of Portion 110 that infringes on the oval. I would use the side nearest to the Congo Scotty's residence. You asked me to remove my containers and I was trying to make this possible when your husband got Utilities to dig up a trench for the installation of his power connection on my side of Portion 110. Your husband also destroyed coconut trees on my side of Portion 110 and said he's going to build on that side of the land. I now assume that you have yet again changed your mind again and now want to build on the site nearest to Congo Scotty's residence. I am still in agreement for you to do that, but so long as you build on that part of Portion 110 (nearest to Congo Scotty's residence as claimed by your husband). The Portion of 110 where I have already laid down containers (side nearest to the oval) is the part that had earmarked and intend to build on.

Your threats are not appreciated and I must ask you to cease this behaviour immediately. You must understand and I repeat again that I have already obtained the landowners authority to build on Portion 110 Anetan. My construction site is where the containers are placed and thus we are not going to move the containers as we will be starting with our construction. You have enough space on the half nearest Congo's residence (part of Portion 110) to build your home. I also have my legal rights. I am willing to sit with you and discuss this peacefully.

Yours faithfully
Mrs Sharon Buramen
Anetan District

15. The defendants agreed to an interim injunction being issued against them in their affidavits filed on 25 February 2022, and implicit in their admissions is that the plaintiff was entitled to build her house next to their house; but their position has changed as this matter progressed which is that only the defendants are entitled to that portion alone.
16. The issues to be determined is the status of the plaintiff's consent form obtained in 2001, its legality, as to whether the plaintiff had earmarked the land area after she obtained the landowners consent in 2001, whether the plaintiff has used the consent form to build a garage instead of a dwelling house and if not then as to whether the plaintiff is entitled to build her dwelling house in or around the area where she had placed the three containers.
17. I cannot determine these matters on affidavit evidence alone, and I therefore adjourn the application for injunction for trial proper, and in the meantime, I order that the status quo is to be maintained, that is, all construction and building works both by the plaintiff and the defendants is to cease.

DATED this 2 day of May 2022


Mohammed Shafiullah Khan
Acting Chief Justice

