

1. **COLITO (NIG.) LIMITED**
2. **ADEOLA OMOTUNDE, ESQ.**

V.

1. **HONOURABLE JUSTICE TITI DAIBU**
2. **LANRE DAIBU, ESQ.**
3. **ATTORNEY-GENERAL, KWARA STATE**
4. **COMMISSIONER FOR MINISTRY OF LANDS AND HOUSING, KWARA STATE**

COURT OF APPEAL  
(ILORIN DIVISION)

*CA/IL/11/2008*

SOTONYE DENTON-WEST. J.C.A. (Presided)  
IGNATIUS IGWE AGUBE. J.C.A. (Read the Leading Judgment)  
CENTUS CHIMA NWEZE. J.C.A.

WEDNESDAY. 8TH APRIL. 2009

APPEAL - Issues for determination - Proliferation of- Propriety of -Attitude of court thereto.

APPEAL - Notice of appeal - Fundamental nature of - Where defective - Effect.

APPEAL - Notice of appeal - Misstatement of date of judgment appealed against - Effect - How treated.

COURT - Court processes - Misstatement of date in a court process - Effect - Whether fatal.

COURT - Rules of court - Non-compliance therewith - Effect.

COURT- Technicalities -Attitude of court thereto - Need for court to do substantial justice.

DOCUMENT - Unsigned document - How treated.

EVIDENCE - Affidavit - Defective affidavit - When court may permit use of- Section 84, Evidence Act.

INJUNCTION - Injunctive order - Grant of- Principles governing - Whether will be made to restrain a completed act.

INJUNCTION - Interlocutory injunction - Application therefor -Duty on applicant.

INJUNCTION - Interlocutory injunction - Application therefor -Grant or refusal of - Principles governing - Balance of convenience - Duty on applicant to show that the balance of convenience is in his favour - Duty on court in respect of.

INJUNCTION - Interlocutory injunction - Application therefor -Grant or refusal of- Principles guiding - Discretionary power of court to grant.

JUSTICE- Technicalities -Attitude of court thereto - Need for court to do substantial justice.

MAXIM - Equity aids the vigilant - Delay defeats equity - Application

PRACTICE AND PROCEDURE, Appeal - Notice of appeal -Fundamental nature of - Where defective - Effect.

PRACTICE AND PROCEDURE - Appeal - Notice of appeal -Misstatement of date of judgment appealed against - Effect -How treated - Determination of- Principles guiding.

PRACTICE AND PROCEDURE - Appeal - Issues for determination - Proliferation of- Propriety of - Attitude of court thereto.

PRACTICE AND PROCEDURE- Injunction - Grant of- Whether will be granted to restrain a completed act.

PRACTICE AND PROCEDURE - Interlocutory injunction -Application therefor - Duty on applicant.

PRACTICE AND PROCEDURE - Interlocutor injunction -Application therefor - Grant or refusal of- Principles guiding - Discretionary power of court thereto.

PRACTICE AND PROCEDURE - Interlocutory injunction - Application therefor - Grant or refusal of - Principles governing - Balance of convenience - Duty on applicant to show that the balance of convenience is in his favour - Duty on court in respect of.

PRACTICE AND PROCEDURE - Rules of court - Non-compliance therewith - Effect.

PRACTICE AND PROCEDURE - Technicalities - Attitude of court thereto - Need for court to do substantial justice.

**Issues:**

1. Whether, from the facts and circumstances of the instant case, the appellants demonstrated their entitlement to the grant of interlocutory injunction by the trial court.
2. Having regard to the affidavit evidence, written addresses and the exhibits placed before the trial court, whether the trial court was not wrong when it held that the 1<sup>st</sup> to 4<sup>th</sup> respondents had competent counter-affidavits and processes before it.
3. Whether the trial court did not breach the appellants' right to fair hearing when it failed to make use of the processes filed and exhibits attached by the appellants, in its ruling.

**Facts:**

By a writ of summons and statement of claim dated 7th August, 2006 and filed simultaneously on the 22<sup>nd</sup> day of August, 2006 the appellants sought damages and two declaratory reliefs against the respondents.

Contemporaneously too, the appellants filed an affidavit of urgency and a motion for interlocutory injunction supported by an affidavit of 60 paragraphs.

The appellants deposed in the affidavit that the 1st appellant applied for and was allocated Plot 1 (B) Alimi Road. G.R.A., Ilorin while plot 1 (A) was allocated to the 1st respondent. Plots 1 (A) and 1(B) were excised from Plot 1. Alimi Road and that the 1st and 2nd respondents with the collaboration of the 3rd and 4th respondents made it difficult for them to develop the said Plot 1(B). They deposed further that the building materials placed in the premises by them were at the risk of being destroyed or stolen.

The 1st and 2nd respondents having entered appearance filed their counter-affidavit against the appellants' motion on the 1<sup>st</sup> of November, 2006 while the 3rd and 4th respondents also filed theirs on the 13th of November, 2006, with their memorandum of appearance.

The 1st and 2nd appellants in reaction to the counter-affidavits of the 1st and 2nd respondents filed a further-affidavit on the 14th of November, 2006 and a further-affidavit (No. 2) pursuant to the 3rd and 4th respondents' counter affidavit. The 1st and 2nd respondents deposed in their counter-affidavit that the 1st respondent would be at risk being a judicial officer if the fence of No. 1 Alimi Road. G.R.A., Ilorin is broken down and that they had been residing therein with the fence for upwards of twenty years.

Written addresses were submitted to articulate the respective positions of the parties in respect of the application. In a considered ruling, the trial High Court dismissed the application as lacking in merit and held that the status quo as at the time when the writ of summons was filed be maintained.

The appellants were dissatisfied with the ruling of the trial court and they appealed to the Court of Appeal and contended that maintaining the status quo at the time of filing of the writ of summons would enable the respondents to continue to perpetuate injustice and illegality on the appellants who were being deprived their constitutional right to their property and put them in great advantage.

**Held** (Unanimously dismissing the appeal):

1. On Principles guiding grant or refusal of application for interlocutory injunction - The general principles upon which a court would predicate the grant or refusal of an application for interlocutory injunction are as follows:-

- (a) That there must be a subsisting action which must donate a legal right capable of being protected by the order sought;
- (b) That the applicant must show that there is a serious question or substantial issue to be tried;
- (c) That the applicant must show that as a result of conditions 1 and 2 above, the status quo ante should be maintained pending the determination of the substantive suit;
- (d) That the applicant must show that the balance of convenience is in favour of the grant of the application;
- (e) That the applicant must show that his conduct is not reprehensible and that there was no delay on his part in bringing the application;
- (f) That damages cannot adequately compensate the applicant for the injury he would suffer if the application is not granted and the case is subsequently decided in his favour, and
- (g) That in deserving cases, the applicant has undertaken to pay damages in the event of wrongful exercise of the court's discretion to grant the injunction.

In the instant case, the parties were ad idem that there was a subsisting action by the appellants which threw up very serious and substantial issues for determination by the trial court. In addition, from the averments in both the affidavit in support of the motion and statement of claim and exhibits 1 to 5, it was clear that the appellants' claim had donated a legal right which ought to be protected *ceteris paribus* by an order of interlocutory injunction if there was a violation or threatened violation of the legal right as donated by the claim. [Obeya Memorial Specialist Hospital v. A.-G., Fed. (1987) 3 NWLR (Pt. 60) 325; Afro Continental v. Ayantuyi (1995) NWLR (Pt. 420) 411; Abdullah v. Gov, Lagos Stare (1989) 1 NWLR (Pt. 97) 356; Akupo v. Hakeem-Habeeb (1992) 6 NWLR (Pt. 247) 266; Falomo v. Banigbe (1998) 7 NWLR (Pt.559) 679; Kotoye v. C.B.N (1989) 1 NWLR (Pt. 98) 419 referred to.] (Pp. 266-267, paras. G-E; 269, paras. E-F)

2. On Principles guiding grant or refusal of application for interlocutory injunction - The grant or refusal of an application for interlocutory injunction is at the discretion of the court which discretion should be exercised judicially and judiciously taking into consideration the peculiar facts and circumstances of the case. These circumstances include the materials placed before the court by the applicants and the competing interests of the parties. Moreover, an order of interlocutory injunction is not granted at the whims and caprices of the court or just for the asking of an applicant. [Kotoye v. C.B.N. (1989) 1 NWLR (Pt. 98) 419; Buhari v. Obasanjo (2003) 17 NWLR (Pt. 850) 587; Obeya Memorial Special Hospital v. A.-G., Fed. (1987) 3 NWLR (Pt. 60) 325 referred to.] (P. 266, paras. B-D)

3. On Duty on applicant for interlocutory injunction –

The duty of an applicant seeking for an order of interlocutory injunction is filing an affidavit demonstrating from the case presented before the court that there are facts therein which would warrant the defendant/respondent to proffer an answer. In the instant case, the applicants/ appellants as at the time they filed the application did not need to prove their case as they would have done at the hearing of the substantive case but only to demonstrate simply that they had a substantial case which may or may not succeed. [Ladunni v. Kukoyi (1972) 3 S.C. 31 referred to.] (P.266. paras. D-F)

4. Duty on applicant for interlocutory injunction –

All that the applicant for interlocutory injunction need to do and which the instant applicants/ appellants had done was to show that they had a claim which was not frivolous or vexatious

and that there are serious questions or substantial issues to be tried by the trial court. In the instant case, since the trial court acknowledged that there was a serious issue to be tried and that the appellants' case was not frivolous or vexatious, the appellants had scaled the initial hurdle for the grant of interlocutory injunction and the court would proceed to consider the other conditions. [Falomo v. Banigbe (1998) 7 NWLR (Pt. 559) 629; Kufeji v. Kogbe (1961) 1 All NLR 113; Obeya Memorial Specialist Hospital v. A.-G., Fed. (1987) 3 NWLR (Pt. 60) 325; Akibu v. Oduntan (1991) 2 NWLR (Pt. 171) 1 referred to.] (Pp. 271-272, paras. G-C)

5. On Duty on applicant for interlocutory injunction to show that the balance of convenience is in his favour –

It is incumbent on the applicant who seeks an order of interlocutory injunction to show that the balance of convenience is in his favour. In other words, the applicants/appellants in the instant case ought to have shown that they would suffer more inconvenience and hardship than the 1st and 2nd respondents if the order of injunction was not granted. Furthermore, they ought to have satisfied the court that in the circumstances of the case, it was just and convenient to make the order sought. Where there is a clear breach of the appellants' right, the question of balance of convenience does not arise as injunction is granted to protect injury or a threat to the right of the applicants. Thus, in the circumstances of the instant case, the court is always called upon to scrutinize rival claims of the parties and juxtapose them in order to determine whether more justice will result in the grant of the application than in refusing it. In order therefore to discharge the bounden duty of the court to determine where the balance of convenience lies, it is necessary to have a look at the affidavits and counter-affidavits of the parties.

Taking into consideration, the totality of the facts of the instant case, the 1st and 2nd respondents would suffer more hardship if the order of injunction were made as sought by the appellants as the 1<sup>st</sup> respondent who is a judicial officer would be exposed to danger if the fence to her official residence is broken by the appellants by the grant of the application. Again, whatever inconvenience the appellants would suffer could be compensated in monetary terms as borne out from the monetary claims in both their writ of summons and statement of claim. [Alcatel Kabelmetal (Nig.) Pic v. Ojuegbele (2005) 2 NWLR (Pt. 805) 429; Odintan v. General Oil Co. Ltd. (1995) 4 NWLR (Pt. 387) 1; Koloye v. C.B.N. (1989) 1 NWLR (Pt. 98) 419 referred to.] (Pp. 277, paras. B-F; 278, paras. F-H)

6. On Whether injunction will be granted to restrain a completed act –

An injunction will normally not issue to restrain a completed act. In the instant case, the appellants inordinately delayed bringing up the application. In the circumstance, the equitable maxims that equity aids the vigilant and delay defeats equity were applicable. Thus, although there appeared to be the existence of legal right on the part of the appellants, the delay in bringing up their application, and the fact that the act sought to be restrained, that is the fencing of Plot 1(B), had been completed, there was nothing to restrain. [Akapo v. Hakeem-Habeeb (1992) 6 NWLR (Pt. 247) 266; Buhari v. Obasanjo (2003) 17 NWLR (Pt. 850) 587; John Holt (Nig.) Ltd. v. Holts African Workers Union of Nigeria & Cameroons (1963) 2 SCNLR 383 referred to.] (P, 280. paras. B-C; G-H)

7. On Treatment of unsigned document and when court may permit use of defective affidavit –

An unsigned document is a worthless document. However, section 84 of the Evidence Act which governs affidavit evidence provides in clear terms that the court may permit an affidavit to be used notwithstanding it is defective in form if the court is satisfied that it has been sworn before a person duly authorized. Accordingly, the trial court was right when it exercised its discretion to make use of the counter-affidavit since the appellants did not contest that the said affidavit was not sworn before a person duly authorized to administer the

oath for such an affidavit. [F.B.I.R. v. Babayo (1974) 1 NMLR 136 referred to.] (Pp. 282-283, paras. G-A)

8. On Effect of non-compliance with rules of court —

By virtue of the provisions of the High Court of Kwara State (Civil Procedure) Rules 2005, where in the beginning or purporting to begin any proceedings, or at any stage in the course of or in connection with any proceedings, there has, by reason of anything done or left undone, been a failure to comply with the requirements of these rules, whether in respect of time, place, manner, form or content or in any other respect, the failure may be treated as an irregularity and if so treated, will not nullify the proceedings or any document judgment or order therein. In the instant case, the filing of an affidavit out of time was an irregularity which neither nullified the proceedings nor the counter-affidavits in question. This is because the courts have departed from slavish adherence to technical rules of procedure. [Abubakar v. Yar'Adua (2008) 4 NWLR (Pt. 1078) 465 referred to.] (P. 283, paras. A-D)

9. On Fundamental nature of notice of appeal and attitude of court technicalities -

A notice of appeal is the foundation or substratum of every appeal and any defect therein will render the entire appeal incompetent and the Court of Appeal like any other appellate court will not be seized of the requisite jurisdictional competence to entertain such an appeal or any interlocutor application based on it. In other words, a notice of appeal is the cornerstone in the building blocks of the architecture of every appeal. As a result, any defect in this foundational process is bound to affect the entire edifice of the appeal. Like the prudent architect, an appeal court will not permit any other material (by means of court processes) to be imposed on the imminently fragile foundation. This is the rationale for the rule expressed in many cases that any defect in a notice of appeal renders the entire appeal incompetent. There can be no gainsaying the fact that an appeal court has no jurisdiction to entertain an incompetent appeal.

However, contemporary judicial attitude is geared towards the evolution of a foundational trial procedure or what may loosely be called functional procedural jurisprudence. This can only be achieved if the courts deliberately avoid technicalities. There is, indeed, clear evidence that nowadays there is a deliberate departure from procedural formalism or legalism. The trend these days is that courts as much as possible have tended to depart from strict adherence to technical and mechanical justice. Rather, the current jurisprudential posture emphasizes that at all times substantial justice should be seen to be done to parties and their rights determined on the merits. [Uwazurike v. A.-G., Fed. (2007) 8 NWLR (Pt 1035) 1; Jeric (Nig.) Ltd. U.B.N. Plc. (2000) 15 NWLR (Pt 691) 447; State v. Gwonto (1983) 1 SCNLR 142; Amako v. State (1995) 6 NWLR (Pt, 399) 11; Akpan v. State (1992) 6 NWLR (Pt. 248) 439; Olujimi v. Ekiti State House of Assembly (2009) 11 NWLR (Pt. 1153) 464 referred to.] (Pp. 261, paras. C-D; 262. paras. C, E: 284. paras. A-D)

10. Effect of misstatement of date in a process –

Where there is a misstatement of date in a process, misnomer or mis-description in a process like the notice of appeal in the instant case, Order 6 rule 15 of Court of Appeal Rules, 2007 which provides that a notice of appeal may be amended by or with leave of the court at any time, should be invoked to save the situation as in the instant appeal which otherwise would have been struck out on technical grounds. (P. 263, paras. A-C)

11. On Principles guiding determination of whether misstatement of date in a process is fatal

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The guiding principles for the determination by the court whether a misnomer or misstatement of date in a process like the notice of appeal in the instant case is fatal to the proceedings are:-

(a) Whether the misnomer or misstatement of the date has substantially misled the parties; and

- (b) Whether a miscarriage of justice has been occasioned on any of the parties and in Particular the respondents.

In the instant case, the parties were aware that the ruling being appealed against was that contained in the record of proceedings and that the parties at all times material to the case were the same parties. Also, the respondents did not complain of being misled by the error in stating the date of delivering of the judgment. Above all, notwithstanding the preliminary objection, counsel for the 1st and 2nd respondents filed the respondents' brief and copiously proffered arguments on all the issues formulated from the purported incompetent notice and grounds of appeal. Thus, the court ordered that the date of delivery of the ruling being appealed against should read 1st August, 2007 instead of 2nd August 2007, as erroneously misstated by the appellants in their notice of appeal. [Bayo v. NJidda (2004) 8 NWLR (Pt. 876) 544; Ajadi v. Ajibola (2004) 16 NWLR (Pt. 898) 91; Nasco Mgt. Sen. Ltd. v. Amaku Transport (2003) 2 NWLR (Pt. 804) 290; Jeric (Nig.) Ltd. v. U.B.N. Plc (2000) 15 NWLR (Pt. 691) 447; Asafa Foods Factory v. Alraine (Nig.) Ltd. (2002) 12 NWLR (Pt. 781) 353; State v. Gwonto (1983) 1 SCNLR 142; MaerskLine v. Addide Invest. Ltd. (2002) 11 NWLR (Pt. 778) 383 referred to.] (Pp. 262, paras. G-H; ((262, paras. G-H; 263, paras. C-E; 264, paras. B-E)

12. On Attitude of court to proliferation of issues for determination -

The courts have deprecated the proliferation of issues for determination as demonstrated by the appellants when they formulated issues 1, 3, 4, 5 and 7 which ordinarily would have been subsumed within one issue. Notwithstanding the proliferation of the appellants' issues, the Court of Appeal still proceeded to hear the appeal on its merits. [Ehuwa v. O.S.I.E.C. (2006) 18 NWLR (Pt. 1012) 544; Agbeotu v. Brisibe (2005) 10 NWLR (Pt. 932) I; Eke v. Ogbonda (2006) 18 NWLR (Pt. 1012) 506; Amaeze v. Anyaso (1993) 5 NWLR (Pt. 291) 1; Buraimoh v. Bamgbose (1989) 3 NWLR (Pt. 459) 352; Yusuf v. Akindipe (2000) 8 NWLR (Pt. 669) 376 referred to.] (Pp. 264-265; paras. F-D)

#### **Nigerian Cases Referred to in the Judgment:**

A.C.B. v. Awogboro (1991) 2 NWLR (Pt. 176) 711  
A.P. Ltd. v. Owodunni (1991) 8 NWLR (Pt. 210) 391  
Abdullah v. Gov., Lagos State (1989) 1 NWLR (Pt. 97) 356  
Abubakar v. Yar 'Adita (2008) 4 NWLR (Pt. 1078) 465  
Adebayo v. Oja-lya C.B. (Nig.) Ltd. (2004) 11 NWLR (Pt.885)573  
Adesanya v. Otuewu (1993) 1 NWLR (Pt. 270) 414  
Afro-Continental (Nig.) Ltd. v. Ayantuyi (1995) 9 NWLR (Pt.420) 411  
Agbeotu v. Brisibe (2005) 10 NWLR (Pt. 932) 1  
Agundo v. Gberbo (1999) 9 NWLR (Pt. 617) 71  
Ajadi v. Ajibola (2004) 16 NWLR (Pt. 898) 91  
Akapo v. Hakeem-Habeeb (1992) 6 NWLR (Pt. 247) 266  
Akibu v. Odimtan (1991) 2 NWLR (Pt. 171)1  
Akinterinwa v. Oladunjoye (2000) 6 NWLR (Pt. 659) 92  
Akpan v. State (1992) 6 NWLR (Pt. 248) 439  
Alcatel Kabehuetal (Nig.) Pic v. Ojitegbele (2003) 2 NWLR (Pt. 805) 429  
Ames Electrical Co. Ltd v. F.A.A.N (2002) 1 NWLR (Pt. 748) 354  
Amako v. State (1995) 6 NWLR (Pt. 399) 11  
Anaeze v. Anyaso (1993) 5 NWLR (Pt. 291) 1  
Anason Farms Ltd. v. NAL Merchant Bank (1994) 3 NWLR (Pt. 331)241  
Asafa Foods Factory v. Alraine (Nig.) Ltd (2002) 12 NWLR (Pt. 781)353  
Atufe v. Oghoniemor (2004) 13 NWLR (Pt. 890) 327  
Avong v. K.R.P.C. Ltd. (2002) 14 NWLR (Pt. 788) 508

Bayo v. Njidda (2004) 8 NWLR (Pt. 876) 544  
Buhari v. Obasanjo (2005) 2 NWLR (Pt. 910) 241  
Buhari v. Obasanjo (2003) 17 NWLR (Pt. 850) 587  
Buraimoh v. Bamgbose (1989) 3 NWLR (Pt. 109) 352  
C.C.B. v. Onwuchekwa (1998) 8 NWLR (Pt. 562) 375  
C.S.S. Bookshops Ltd. v. R.T.M.C.R.S. (2006) 11 NWLR (Pt.992)530  
Dokubo v. Omoni (1999) 8 NWLR (Pt. 616) 647  
Echere v. Ezirike (2006) 12 NWLR (Pt. 994) 386  
Egbe v. Onogun (1972) 1 All NLR 95  
Ehuwa v. O.S.I.E.C. (2006) 18 NWLR (Pt. 1012) 544  
Eke v. Ogbonda (2006) 18 NWLR (Pt. 1012) 506  
Ekwulugo v. A.C.B. (Nig.) Ltd. (2006) 6 NWLR (Pt. 975) 30  
Ezebilo v. Chimvuba (1997) 7 NWLR (Pt. 511) 108  
F.B.I.R. v. Babaoye (1974) NMLR 136  
EB.N. Plc. v. A.C.B. Ltd. (2006) 1 NWLR (Pt. 962) 438  
Fagunwa v. Adibi (2004) 17 NWLR (Pt. 903) 544  
Falomo v. Banigbe (1998) 7 NWLR (Pt.559) 679  
Faro Bottling Co. Ltd. v. Osuji (2002) 1 NWLR (Pt. 748) 311  
Gever v. China (1993) 9 NWLR (Pt. 315) 97  
Globe Fishing bid. Ltd. v. Coker (1990) 7 NWLR (Pt. 162) 265  
Gov., Lagos State v. Ojukwu (1986) 1 NWLR (Pt. 18) 621  
Ikweki v. Ebele (2005) 11 NWLR (Pt. 936) 397  
Jeric (Nig.) Ltd. v. U.B.N. Plc (2000) 15 NWLR (Pt. 691) 447

John Holt (Nig.) Ltd. v. Holts African Workers Union of Nigeria & Cameroon (1963) 2 SCNLR 383  
Kotoye v. C.B.N. (1989) 1 NWLR (Pt. 98) 419  
Kufeji v. Kogbe (1961) 1 All NLR 113  
Ladunni v. Kitkoye (1972) 3 S.C. 33  
Madubuike v. Madubuike (2001) 9 NWLR (Pt. 719) 698  
Maersk Line v. Addide Invest Ltd. (2002) 11 NWLR (Pt. 778) 317  
Missini Gerino, PMIN Co. Ltd. v. Balogun (1968) All NLR 318  
Mobil Prod (Nig.) Unltd. v. LASEPA (2000) 18 NWLR (Pt. 798) 1  
Mosuro v. Akinyele (1950) 13 WACA 112  
N.I.W.A. v. S.P.D.C. (Nig.) Ltd. (2007) 1 NWLR (Pt. 1015) 305  
Nasco Mgt. Sen: Ltd. v. A.N. Amaku Transport (2003) 2 NWLR (Pt. 804) 290  
Ndukauba v. Kolomo (2005) 4 NWLR (Pt. 915) 411  
Nwanganga v. Mil. Gov. Imo State (1987) 3 NWLR (Pt. 59) 185  
Obeya Memorial Specialist Hospital v. A.-G., Fed. (1987) 3 NWLR (Pt. 60) 325  
Oduntan v. General Oil Co. Ltd. (1995) 4 NWLR (Pt. 387) 1  
Ogunleye v. Oni (1990) 2 NWLR (Pt. 135) 745  
Oilfield Supply Centre Ltd. v. Johnson (1987) 2 NWLR (Pt. 58)625  
Ojoh v. Kamalu (2005) 18 NWLR (Pt. 958) 523  
Olujimi v. Ekiti State House of Assembly (2009) 11 NWLR (Pt. 1153)464  
Omaliko v. Awachie (2002) 12 NWLR (Pt. 780) 1  
Oyeyemi v. irewole L.G. (1993) 1 NWLR (Pt. 270) 462  
Reckitt & Colman Ltd, v. Gongoni (2001) 8 NWLR (Pt. 716) 592  
State v. Gwonto (1983) 1 SCNLR 142  
Tsalibawa v. Habiba (1991) 2 NWLR (Pt. 174) 461  
Ude v. Nwara (1993) 2 NWLR (Pt. 278) 638

Udeze v. Ononuju (2001) 3 NWLR (Pt. 700) 216  
Uwazurike v. A.-G., Fed. (2007) 8 NWLR (Pt. 1035) 1  
Yusuf v. Akindipe (2000) 8 NWLR (Pt. 669) 376

**Foreign Cases Referred to in the Judgment:**

Eddowes v. Argentine Co. (1870) 38 W.R. 629  
Francome v. Mirro Group Newspaper Ltd. (1984) 1 WLR 892  
Hubbard v. Hosper (1972) Q.B. 84  
Macfow v. U.A.C. (1962) AC 152  
Re: Tierney (1855) 15 C.B. 761

**Nigerian Statutes Referred to in the Judgment:**

Constitution of the Federal Republic of Nigeria, 1999, S. 35  
Evidence Act, Cap. 112, Laws of the Federation of Nigeria, 1990, S.84  
Land Use Act, 1978, S. 50

**Nigerian Rules of Courts Referred to in the Judgment:**

Court of Appeal Rules, 2007, O. 6 r. 15  
High Court of Kwara State (Civil Procedure) Rules, 2005, O. 4 r. 1(1), O. 6 r. 8(2), O. 11 r. 2(3) and O. 41 rr. 1 and 6

**Appeal:**

This was an appeal against the ruling of the trial High Court which dismissed the appellants' application for interlocutory injunction. The Court of Appeal, in a unanimous decision, dismissed the appeal.

**History of the Case:**

Court of Appeal:

Division of the Court of Appeal to which the appeal was brought: Court of Appeal, Ilorin  
Names of Justices that sat on the appeal: Sotonye Denton-West. J.C.A. (Presided); Ignatius Igwe Agube. J.C.A. (Read the Leading Judgment); Centus Chima Nweze, J.C.A.  
Appeal No.: CA/IL/11/2008

Date of Judgment: Wednesday. 8th April. 2009

Names of Counsel: Wahab Ismail, Esq. (with him, Y. A. Dikko, Esq.) -for the Appellants  
Yakub Dauda, Esq. (with him, Tunji Adigun, Esq.) -for the 1st and 2nd Respondents  
Mrs. Funsho Lawal, DCL. M.O.J., Ilorin -for the 3<sup>rd</sup> and 4<sup>th</sup> Respondents

High Court:

Name of the High Court: High Court of Kwara State, Ilorin

Name of the Judge: M.D. Adeware J.

Date of Judgment: Wednesday, 1st August, 2007

Counsel:

Wahab Ismail, Esq. (with him, Y. A. Dikko, Esq.) -for the Appellants  
Yakub Dauda, Esq. (with him, Tunji Adigun, Esq.) -for the 1st and 2nd Respondents  
Mrs. Funsho Lawal, DCL, M.O.J., Ilorin -for the 3rd and 4th Respondents

**AGUBE, J.C.A. (Delivering the Leading Judgment):** By a writ of summons and statement of claim dated 7th August, 2006 and filed simultaneously on the 22nd day of August, 2006 the plaintiffs/appellants sought for amongst other relief: -

- (i) The sum of N200 million naira only on the footing of aggravated or exemplary damages;
- (ii) A sum of N13, 773,490.00 from the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants being special damages itemized in paragraph 53(ii) of the statement of claim;
- (iii) A declaration that the claimants having complied with all financial and administrative obligations or requirements for obtaining an allocation and having been allocated Plot 1(B) Alimi Road, G.R.A., Ilorin, have constitutional and legal rights to own the said plot and are entitled to unhindered, unrestricted and unrestrained access to and peaceful

occupation and enjoyment of the said plot without any molestation disturbance, or curtailment, let or hindrance from any of the defendants;

- (iv) A declaration that Plot 1(B) Alimi Road G.R.A., Ilorin exclusively belongs to the 1st claimant and the 2nd defendant has no right, interest, stake, or title whatsoever directly or remotely in Plot 1(B) Alimi Road, G.R.A, Ilorin, declaratory orders as contained in paragraphs (v) to (xi) of the endorsement on the writ and orders for perpetual injunction contained in paragraphs (xi) to (xv) of the said endorsement against the 1st, 2nd, 3rd and 4th defendants/respondents either by themselves, agents, servants, privies, subordinates, staff, guards, orderlies, officers or through any person or persons howsoever from trespassing or further trespassing, occupying or further occupying, encroaching or further encroaching on Plot 1 (B) which belongs to the claimants.

Contemporaneously too, the claimants/appellants filed an affidavit of urgency and a motion for interlocutory injunction supported by a whopping 60 paragraphed affidavit dated the same 7th day of August, 2006, in the following terms:- Affidavit in support #

- "1. I am the 2nd applicant, the Chairman/Chief Executive of the 1st applicant and a counsel in the chambers of Messrs Wole Olanipekun & Co., the law firm representing the claimants/applicants herein.
2. By virtue of my position aforesaid, I am very conversant with the facts of this case.
3. I have the instruction of the 1st applicant and my chambers to make this affidavit.
4. Except otherwise specifically stated, all facts deposed to herein are within my personal knowledge, information and belief.
5. 1st claimant/applicant is a limited liability company incorporated under the relevant laws of Nigeria to carry out the business of manufacturing, distribution and retail of diverse products, including but not limited to building materials and having its head office situate at No. 14, Wahab Folawiyo Road, (Unity Road), Ilorin Kwara State.
6. 1st respondent is a High Court Judge in Kwara State, while 2nd respondent is the husband of the 1st respondent and the commissioner for Education in Kwara State.
7. 3rd respondent is the Chief Law Officer and the privilege of being the officer delegated by the Governor of Kwara State to sign Certificates of Occupancy issued in Kwara State for lands and also carrying out allied or related matters.
8. 4th respondent is the commissioner in charge of the Ministry of Lands and Housing in Kwara State.
9. 1st applicant has also paid for the ground rent up to the year 2009 and was duly issued with receipts by the Ministry of Lands and Housing which are contained in exhibits 2 and 3.
10. Sometime in 1998, 1st respondent applied for allocation of a plot of land from the Ministry of Lands and Housing, Kwara State and she was allocated Plot 1 (A) Alimi Road, G.R.A. Ilorin, in her personal/private capacity in the name of "Safiya Daibu.
11. About the same time in 1998, 1st applicant also applied for allocation of a plot of land and it was allocated Plot 1(B), Alimi Road, G.R.A., Ilorin vide a letter of allocation dated 9th March, 1998. Now shown to me, attached hereto and marked as exhibit 1 is a copy of the said letter.
12. Plot 1(A) and (B) were excised from Plot 1, Alimi Road and are adjacent to each other. Both are contained in the survey plan attached to Certificate of Occupancy No. KW.12638, signed by the 3rd respondent on 23rd November, 2005.
13. Plot 1(A) and (B) contained a generator house and a boys quarters respectively which were to be replicated on the instruction of Ministry of Lands and Housing on the old plot, 1 Alimi Road, G.R.A., Ilorin by the 1st respondent and the 1st applicant respectively, 1st applicant has relocated or built a replacement boys quarters within Plot

- 1 Alimi Road, G.R.A., Ilorin while 1<sup>st</sup> respondent has not constructed replacement generator house on Plot 1, Alimi Road, G.R.A., Ilorin to date.
14. 1<sup>st</sup> applicant upon being allocated Plot 1 (B) Alimi Road, G.R.A., Ilorin made full payments for survey, premium, layout and other charges and was duly issued with receipts by the Ministry of Lands and Housing. All the said receipts are now shown to me, attached hereto and marked as exhibits 2 and 3 respectively.
  15. 1<sup>st</sup> applicant processed and was issued with a Right of Occupancy and a Certificate of Occupancy on 17<sup>th</sup> December, 2004 and 23<sup>rd</sup> November, 2005 respectively. Now shown to me, attached hereto and marked as exhibits 4 and 5 are copies of the said Right of Occupancy and Certificate of Occupancy respectively.
  16. 1<sup>st</sup> applicant constructed replacement boys quarters on Plot 1, Alimi Road, G.R.A., Ilorin based on the design, sketch or plan provided by and with full participation or active involvement of the officers from the Ministry of Lands and Housing.
  17. Applicants have earned out the following improvements or developments on Plot 1(B) Alimi Road, G.R.A., Ilorin in addition to the construction of the replacement boys quarters:
    - (i) Dug a well with concrete from top to bottom with appropriate metal cover,
    - (ii) Installed pipe home water, using large size pipes and other fittings, all imported.
    - (iii) Paid for necessary connection fees to the Kwara State Water Corporation.
    - (iv) Contracted out the electrification of the plot.
    - (v) Paid for and obtained a three (3) phase meter from National Electric Power Authority (NEPA) now Power Holding Company of Nigeria (PHCN).
    - (vi) Awarded contracts for the construction of the Managing Director's residence and two (2) senior staff quarters.
    - (vii) Embarked upon construction of two junior staff quarters by direct labour for which the following materials have been purchased;
      - (a) Two (2) heavy duty main gates and a pedestrian gate;
      - (b) Deposited large number of 9, 6 and 4 1/2 Blocks, 22 tipper loads of gravel, 8 tipper loads of granite, 5 tipper loads of sharp sand, 5 tipper loads of soft sand and two tipper loads of granite stone dust;
      - (c) Large number of woods of various sizes;
      - (d) Large quantity of cement;
      - (e) Aluminum doors and windows;
      - (f) Aluminum long span roofing sheets;
      - (g) Large quantity of metal and wooden doors and burglary proofs. Etc.
  18. 1<sup>st</sup> and 2<sup>nd</sup> respondents were found by me to have been manifesting hostilities to me and the 1<sup>st</sup> applicant and demonstrably frustrating and preventing their development efforts of Plot 1 (B) Alimi Road, G.R.A., Ilorin.
  19. Being uncomfortable with the attitude and actions of the 1<sup>st</sup> and 2<sup>nd</sup> respondents, I approached the 2<sup>nd</sup> respondent seeking to find out why they are disturbing applicants in the development of plot 1(B) Alimi Road, GRA, Ilorin and to let 1<sup>st</sup> and 2<sup>nd</sup> respondents, know that they have no right whatsoever to prevent the applicants from enjoying their peaceful possession of 1(B) Alimi Road, GRA, Ilorin.
  20. Applicants have committed enormous resources, capital and materials into the development of Plot 1(B) Alimi Road, G.R.A., Ilorin to the knowledge of the 1<sup>st</sup> and 2<sup>nd</sup> respondents.
  21. After Plot 1(B) Alimi Road, G.R.A., Ilorin had been well developed, 1<sup>st</sup> and 2<sup>nd</sup> respondents surprisingly requested for the purchase of the said plot from the applicants. They also sent emissaries to me to that effect. I made it abundantly clear that applicants were not interested in selling Plot 1(B) Alimi Road. G.R.A, Ilorin to 1<sup>st</sup>

- and 2nd defendants having committed so much funds and resources, to development same.
22. When all efforts made at persuading applicants to sell Plot 1 (B) failed, 2nd respondent approached me on behalf of 1st respondent requesting that Plot 1 (A) be swapped with Plot 1(B) as they would prefer Plot 1(B) to Plot 1(A) because of certain undisclosed advantages the former allegedly has over the latter. Their request was humbly turned down by the applicants.
  23. Sometime in the year 2003, 2nd respondent was appointed as a Special Adviser (Political) and later became a Commissioner in the Government of Dr. Bukola Saraki and ever since, both respondents have been employing that position to victimize and frustrate the applicants on account of the latter's resolve to continue to develop their own Plot 1 (B).
  24. Pursuant to the foregoing paragraph, labourers hired by the applicants to do clearing of part of Plot 1(B) were prevented from carrying out their job by the 1st and 2nd respondents on 27th January, 2004 even when the labourers had been paid for the job.
  25. Similarly, workers and labourers sent by the applicants on 31st January, 2004 to Plot 1 (B) to carry out construction works were equally not allowed to do so by the 1st and 2nd respondents. Both 1st and 2nd respondents have been boasting that they have secured the consent of the Governor of Kwara State and the support of the 3rd and 4th respondent to ensure that 1st applicant's title to Plot 1 (B) is revoked.
  26. Also on 31st January, 2004, I was denied entry into Plot 1(B) by the 1st and 2nd respondents
  27. Being greatly embarrassed by the unfriendly or antagonistic attitude of the 1st and 2nd respondents, I spoke to 2nd respondent on his G.S.M. phone on 31st January, 2004 asking him to confirm whether the instruction to declare the applicants, their workers, staff and contractors persona non grata on their plot was actually from them. He confirmed that it was their joint decision because the judiciary has interest in Plot 1(B) and it was/is planning to revoke same through the 3rd and 4th respondents and reallocate it to them in their personal or private capacity.
  28. By the letter dated 1st February, 2004, addressed to the 1st respondent, I asked the 1st respondent to confirm which judiciary had interest in Plot 1(B) and not in her own personal or private plot, that is, Plot 1 (A) and requested that the 1st and 2nd respondents should stop their trespass on Plot 1(B). To date, the 1st respondent has neither replied that letter nor complied with demands contained therein. The said letter is shown to me and marked as exhibit 6.
  29. While 1st and 2nd respondents stalled the development of Plot 1 (B), they have built an ultra modern, multi-storey mansion on Plot 1(A) and in the process, used the applicant's building materials including but not limited to 200 (6 inches) and 100 (9 inches) blocks 8 tipper loads of granite, 10 tipper loads of gravel, 2 tipper loads of granite stone dust and 2 tipper loads of sharp sand etc.
  30. I was informed by the 4th respondent and I verily believed that 1st respondent wrote a letter in April, 2004 requesting for the extension of Plot 1 (A) which by necessary implication would mean an encroachment on Plot 1(B). Ironically, the Ministry of Lands and Housing was processing the illegal application with the speed of lightning and unparalleled urgency and in the process, the 4th respondent instructed the officers of the ministry to stop processing the Right of Occupancy of Plot 1(B).
  31. Further to paragraph 30 supra, the Ministry of Lands and Housing stopped the processing of the 1st applicant's Right of Occupancy and subsequently invited me to a meeting aimed at persuading me to accede to the request of the 1st and 2nd respondents in getting an alternative plot for the 1st applicant to satisfy the ambition

of the 1st and 2nd respondents at taking over Plot 1(B) at all cost. (The letter of invitation is marked as exhibit 7.

32. Realizing the desperation of the 4th respondent in carrying out the exercise of extending Plot 1 (A) in favour of the 1st and 2nd respondents. I was compelled to write a letter dated 29th April, 2004. Indicating my displeasure at the actions of the said Ministry in interfering with the possessory rights of the applicants before the applicants could have a respite. The said letter is marked as exhibit 8.
33. When the 1st and 2nd respondents continued to manifest, hostilities towards the applicants and refused them; access to Plot 1, Alimi Road, I decided to erect a gate on the portion of Plot 1 (B) facing Alimi Road.
34. Sequel to paragraph 33, applicants contracted one Mr, Daji Imman to supply Twenty (20) tipper loads of granite at Twelve Thousand Naira (N12, 000) per load and 5 tipper loads of sharp sand at six thousand Naira. (N6, 000) per load. The supply was to cover a period of 5 days beginning from 15th May. 2006.
35. I was informed by Mr. Daji Imman and I verily believed that immediately, he got to the site of Plot 1 (B), he sought audience with 1st and 2nd respondents to inform them of his intention to deposit building materials in front of Plot 1(B). 1st respondent on being informed of his arrival with his drivers came out and threatened not only to cause their arrest but to personally jail them and confiscate their vehicles.
36. Consequent upon the threat of the 1st respondent, Mr. Daji Imman informed me and I verily believed that he was forced to abandon the supply and thereby making the applicants to incur heavy losses as only 5 tipper loads of granite and 2 tipper loads of sharp sand were delivered within the contract period.
37. As a matter of fact, the contractor was able to deliver up to 5 tipper loads of granite and 2 tipper loads of sharp sand due to my presence at Plot 1(B) Alimi Road, G.R.A., Ilorin on 19th May, 2006 which emboldened him to ignore the threat of the 1st and 2nd respondents, their gate man and police orderlies who were acting to the 1st respondent on the shoddy treatment meted out to Mr. Deji Imman and same is now shown to me and marked as exhibit 9.
38. Realizing the determination of the applicants to erect a gate at Plot 1 (B), 1st and 2nd applicants between 20th May and 2nd June, 2006, deliberately and intentionally, fenced Plot 1(B) with their own Plot 1(A) to prevent the applicants from gaining access to their land, building, installations and infrastructure or facilities located on Plot 1 (B) and thereby, literally over the said plot which does not belong to them.
39. Pursuant to paragraph (33) supra, and undeterred by the activities of the 1st and 2nd respondents, I in the company of Shina Ibiyemi, Esq., Engr. Simon Ojo, a building contractor and his workers went Plot 1(B) Alimi Road, G.R.A., Ilorin on 3rd June, 2006 at about 8:30 am with the intention of erecting or installing a gate at the said plot.

On my arrival at Plot 1 (B) Alimi Road, G.R.A., Ilorin on the said 3rd June, 2006. as a mark of respect for the positions and high offices being occupied by the 1<sup>st</sup> and 2<sup>nd</sup> respondents and as a matter of courtesy. I sent the gate man to inform the 1<sup>st</sup> and 2<sup>nd</sup> respondents of my arrival and mission.

To my utter dismay, 1st and 2nd respondents came out off their residence pouring venom of insults and using abusive language on my person and even threatened to get me arrested to the chagrin of Shina Ibiyemi, Esq. Engr. Simon Ojo his workers and others, who were; present at the scene and highly disappointed at the conduct of the 1st and 2nd respondents. 1st and 2nd defendants threw all caution into the wind; and jointly molested, manhandled, rough-handled and assaulted me, Engr. Simon Ojo and his worker for daring to install a gate on Plot 1 (B) Alimi road which does not belong to them.

In further actualization of their threat, I5' and 2nd respondents in my presence sent simulated or concocted distress calls to the police, alleging that their lives were-being endangered and then residence stormed or; bombarded by person they suspected to be armed robbers, although they were aware of the presence of and had seen me and others that miming. In view of the seriousness of the allegations, two (2)' teams of policemen arrived simultaneously, that is, from 'A' Division and the Police Headquarters. Inspector Ologun Christopher led the team from "A" Division while Abel Ademola led the other team from the Police!, Headquarters. The Police were armed to the teeth and came in two (2) vehicles, viz: Pic-Up van with registration No. PF 4736KW and a Nissan Urvan busf bearing registration No. FE 724 AAA. The Police arrested me. Engr. Simon Ojo and his workers and bundled us into the waiting Urvan bus like common criminals al the instance, report and instruction of the 1st and 2nd respondents.

I have written letters of protest on the illegal arrest by the Police pursuant 10 the deliberate false information ran I 2 NWLR Colito (Nig.) Ltd, v. Daibu (Agube. J.C.A.)237 furnished to them by the 1<sup>st</sup> and 2<sup>nd</sup> respondents to the Commissioner of Police. Kwara State, I51, 3<sup>rd</sup> & 4<sup>th</sup> respondents, and the Governor of Kwara State copies of these letters are now shown to me, attached hereto and marked as exhibits 10, 11 and 12 respectively. 1<sup>st</sup> and 2<sup>nd</sup> respondents have been using also without permission, authority or approval of the applicants the facilities and infrastructure installed and provided by the applicants on Plot 1 (B). These include but not limited to the well, pipe borne water, economic trees and building materials etc.

On the 3rd June, 2006, JM and 2nd respondents summoned in my presence 3rd respondent, the Secretary of the Land use and Allocation Committee of the Ministry of Lands and Housing to Plot 1(B) Alimi Road, G.R.A., Ilorin and others. After holding a meeting at the residence of the 1s' and 2nd respondents, the Secretary to the Land use and Allocation Committee was mandated to brief me of one of their resolutions, to wit, the applicants were ordered to suspend/stop the erection or installation of the gate and further development of Plot 1 (B) without any justification.

Upon enquiry into the reasons for the strange stoppage order, the said secretary to the Land Use and Allocation Committee informed me and I verily believed that I51 respondent had written a letter to the Ministry of Lands and Housing indicating her interest in the said plot and requesting for the revocation of Plot 1 (B) Alimi .Road, G.R.A., Ilorin and invited me to a meeting slated for 5<sup>th</sup> June, 2006 to discuss the issue(s) relating to the said letter.

I indicated via my letter of 5<sup>th</sup> June, 2006 a copy of which is now shown to me and marked as exhibit 13 that I would not be available on Monday June. 5. 2006 suggested by the secretary to Land Use and Allocation Committee and suggested 7<sup>th</sup> of June. 2006 as a day that may be convenient for me I also requested for a copy of the letter written to the Ministry by the 1<sup>st</sup> respondent which is the subject of the proposed meeting so as to enable me prepare adequately for the meeting.

40. On my arrival at Plot 1 (B) Alimi Road, G.R.A., Ilorin on the said 3rd June, 2006. as a mark of respect for the positions and high offices being occupied by the 1st and 2nd respondents and as a matter of courtesy. I sent the gate man to inform the 1st and 2nd respondents of my arrival and mission.
42. To my utter dismay, 1st and 2nd respondents came out off their residence pouring venom of insults and using abusive language on my person and even threatened to get me arrested to the chagrin of Shina Ibiyemi, Esq Engr. Simon Ojo. his workers and others, who were present at the scene and highly disappointed al the conduct of the 1st and 2nd respondents.

43. 1st and 2nd defendants threw all caution into the wind and jointly molested, manhandled, rough-handled and assaulted me, Engr. Simon Ojo and his worker for daring to install a gate on Plot 1 (B) Alimi road which does not belong to them.
44. In further actualization of their threat, 1st and 2nd respondents in my presence sent simulated or concocted distress calls to the police, alleging that their lives were being endangered and then residence stormed or bombarded by person they suspected to be armed robbers, although they were aware of the presence of and had seen me and others that morning.
45. In view of the seriousness of the allegations, two (2) teams of policemen arrived simultaneously, that is, from 'A' Division and the Police Headquarters. Inspector Ologun Christopher led the team from "A" Division while Abel Ademola led the other team from the Police Headquarters. The Police were armed to the teeth and came in two (2) vehicles, viz: Pic-Up van with registration No. PF 4736KW and a Nissan Urvan bus bearing registration No. FE 724 AAA. The Police arrested me. Engr. Simon Ojo and his workers and bundled us into the waiting Urvan bus like common criminals at the instance, report and instruction of the 1st and 2nd respondents.
46. I have written letters of protest on the illegal arrest by the Police pursuant to the deliberate false information furnished to them by the 1st and 2nd respondents to the Commissioner of Police. Kwara State, 1st, 3rd & 4th respondents, and the Governor of Kwara State copies of these letters are now shown to me, attached hereto and marked as exhibits 10, 11 and 12 respectively.
47. 1st and 2nd respondents have been using also without permission, authority or approval of the applicants the facilities and infrastructure installed and provided by the applicants on Plot 1 (B). These include but not limited to the well, pipe borne water, economic trees and building materials etc.
48. On the 3rd June, 2006, 1st and 2nd respondents summoned in my presence 3rd respondent, the Secretary of the Land use and Allocation Committee of the Ministry of Lands and Housing to Plot 1(B) Alimi Road, G.R.A., Ilorin and others. After holding a meeting at the residence of the 1st and 2nd respondents, the Secretary to the Land Use and Allocation committee was mandated to brief me of one of their resolutions, to wit, the applicants were ordered to suspend/stop the erection or installation of the gate and further development of Plot 1 (B) without any justification.
49. Upon enquiry into the reasons for the strange stoppage order, the said secretary to the Land Use and Allocation Committee informed me and I verily believed that 1st respondent had written a letter to the Ministry of Lands and Housing indicating her interest in the said plot and requesting for the revocation of Plot 1 (B) Alimi .Road, G.R.A., Ilorin and invited me to a meeting slated for 5th June, 2006 to discuss the issue(s) relating to the said letter.
50. I indicated via my letter of 5th June, 2006, a copy of which is now shown to me and marked as exhibit 13 that I would not be available on Monday June. 5. 2006 suggested by the secretary to Land Use and Allocation Committee and suggested 7th of June. 2006 as a day

That may be convenient for me I also requested for a copy of the letter written to the Ministry by the 1st respondent which is the subject of the proposed meeting so as to enable me prepare adequately for the meeting.

51. On the 7th June, 2006, I was at the Ministry of Lands and Housing for the meeting scheduled for that day. I requested for a copy of the letter written by the 1st respondent for my response, but same was not made available to me. Strangely enough, I was told by the Secretary to the Land Use and Allocation Committee that

the meeting scheduled for that day had been cancelled for an undisclosed reason and I was advised to see the 4th respondent for further briefing. All efforts to see the 4th respondent on 7th, 8th, 9th and 13th of June, 2006 etc. proved abortive as he has deliberately been avoiding me.

52. The stoppage order issued by the Ministry of Lands and Housing on the instruction, influence and at the instigation of the 1st and 2nd respondents and active support of the 3rd respondent is prejudicial to the interest and title on the land of the applicants based on the Certificate of Occupancy No. KW 12638 and has led to our incurring of great losses financially and materially and has stalled our development on Plot 1(B).
53. By letter dated 14th June 2006, a copy of which is now shown to me and marked as exhibit 14, applicants appealed to the 4th respondent to do whatever is necessary and lift the embargo/stoppage order on the development of Plot 1(B) on or before 16th June, 2006 because the building materials including 5 tipper loads of sharp sand, assorted/different types of iron rods, one main and one pedestrian gate, planks of different sizes as well as 30 bags of cements and others are being exposed to danger of destruction or theft as they (except cement) are deposited outside the fence of Plot 1(B)
54. To date 4th respondent has not responded to that letter 4th respondent is colluding with the 1st and 2nd respondents in frustrating the 1st and 2nd respondents to the detriment or disadvantage of the applicants.
55. Applicants have been in peaceful possession and exercising full right of ownership and control over the Plot 1(B) since 1998 until the interference a disturbance of same by the 1st, 2nd, 3rd and 4th respondent on June, 2006.
56. 1st and 2nd respondents have been developing plot 1 (A) without any let or hindrance but they are frustrating the efforts of the applicants in developing Plot 1(B) and they are receiving active support and encouragement from the other respondents.
57. Defendants/respondents should be restrained so that the:
  - (i) Building materials deposited outside the fence of Plot 1(B) Alimi Road, G.R.A., Ilorin including but not limited to iron rods of various sizes, planks of different sizes, 30 bags of cement, 5 tipper loads of granite, 2 tipper loads of sharp sand, heavy duty main gate and a pedestrian gate are not destroyed or stolen;
  - (ii) A fait accompli is not foisted upon this honourable court by the 1st and 2nd respondents who have already constructed a fence on Plot 1(B) which does not belong to them and are determined to continue further development on Plot 1(B).
  - (iii) Irreparable/incalculable damages are not caused the claimants/applicants.
58. I am ready to enter into an undertaking to indemnify the respondents for any loss they may suffer if this application is granted.
59. The applicants are ready to expeditiously prosecute this case.
60. The respondents have nothing to lose if this application is granted.
61. It is in the interest of justice to grant this application.
62. I make this affidavit in good faith believing same to be true and correct in accordance with the provisions of the Oaths Law".

The 1st and 2nd respondents having entered appearance filed their counter-affidavit against the claimants/appellants, motion on the 1st of November, 2006, while the 3rd and 4th respondents also filed theirs subsequently on the 13th of November, 2006 with their memorandum of appearance. 1<sup>st</sup> and 2nd claimants/appellants in reaction to the counter-affidavit of the 1st and 2nd defendants/respondents filed a further-affidavit on the 14th of November, 2006 and a further affidavit (No. 2) pursuant to the counter-affidavit of the 3rd and 4th respondents.

Written addresses were submitted to articulate the respective positions of the parties in respect of the application and in a considered ruling delivered on the 1st August, 2006 by Honourable Justice M.O. Adewara of Ilorin Division of Kwara State High Court, the application was dismissed in the following terms:- "On the whole, hold that this application lacks merit and I hereby dismiss it in its entirety."

Dissatisfied with the ruling of the learned trial Judge, the claimants/appellants filed their notice of appeal with a whooping eleven grounds of appeal which grounds I shall reproduce hereunder without their prolix particulars as follows: -

"1. The learned trial Judge erred in law by holding that the status quo lobe maintained is the position of the parties as at the time when the writ of summons was filed on 7th August, 2006.

2. Having rightly and clearly held that:

"I therefore hold that it is the title to Plot I (B) Alimi Road, G.R.A., Ilorin that is the 'res' to be preserved on the particular facts of the instant case pending the final determination of the substantive suit and I so find."

The learned trial Judge erred in law when he went further to dismiss the motion for injunction.

3. The learned trial Judge erred in law when he held thus:

"The prevailing position when the claimants' writ of summons was filed was the fact of the 1st and 2nd defendants/respondents (sic) in possession of No. 1, Alimi Road, G.R.A., Ilorin encompassing both Plot 1 (A), 1(B) Alimi road G.R.A., Ilorin. "

4. The learned trial Judge erred in law by dismissing the claimants' motion for injunction without making use of or referring to the further-affidavits, written addresses and exhibits attached thereto despite the holding thus:

"I hold therefore that the written addresses filed in support of the claimants' further-affidavits No. 1 & 2 are in order and I so hold."

5. The learned trial Judge erred in law by refusing the application for injunction and dismissing same after holding thus:

So, is not therefore a serious issue to be tried in this case as to the true owner of Plot 1 (B) Alimi Road, G.R.A. Ilorin. On the basis of the foregoing, I cannot but agree that there is a serious question for determination in the substantive suit."

6. The lower court erred in law and came to a perverse decision when it held that the balance of convenience tilts in favour of the 1st and 2nd defendants/respondents.

7. The lower court erred in law and came to a perverse decision when it held that the counter-affidavits filed by 1st-4th defendants/respondents are competent and consequently dismissed the application of the claimants/appellants for injunction.

8. The lower court erred in law and came to a wrong decision when it held that the loss to be suffered by the claimants/appellants would be compensated in monetary terms.

9. The learned trial Judge erred in law and came to a perverse decision when he held that the injury to be suffered by the claimants/appellants is far less than that of the 1st and 2nd defendants/respondents if the application is granted.

10. The learned Judge erred in law in holding that the 1st and 2nd defendants/respondents have been in possession of the land in dispute for 20 years thereby deciding a core/critical issue in the substantive matter.

11. The ruling of the lower court is against the weight of evidence."

Upon the records of appeal being transmitted to this Court, parties exchanged their respective briefs in accordance with the rules of this honourable court. When the appeal came up for hearing on the 29th January, 2009, Wahab Ismail Esq. with him Y.A. Dikko Esq. adopted the appellants' brief dated 28th October, 2008 and filed same day and the

reply brief dated 15/12/2008 and filed on the 16th December, 2008 to pray the court to allow the appeal.

He also drew the court's attention to pages 1 - 2 of their reply brief where they answered to the 1st and 2nd respondents' preliminary objection to the appeal and urge on us to allow the appeal. Yakubu Dauda Esq. for the 1st and 2nd respondents also adopted the 1st and 2nd respondents' brief dated 26th November, 2008 and filed on the 27th November, 2008 wherein they incorporated their notice of preliminary objection and the argument buttressing same to urge on us to dismiss the appeal.

Mrs. Funso Lawal (Director Civil Litigation) Ministry of Justice, Kwara State on her part for the 3rd and 4th respondents, adopted their brief dated 27th day of January, 2009 but deemed filed the 29th January, 2009 to also urge the court to dismiss the appeal; and affirm the ruling of the lower court. Ismail, Esq. subsequently adopted the appellants' reply brief to cover the arguments of the 3rd and 4th respondents in their brief.

In the brief settled by Wahab Ismail Esq., seven issues were distilled for determination which I hereunder set down inter alia:

1. Whether the lower court was not wrong by holding that the status quo to be maintained is the position of the parties as at the time when the writ of summons was filed on 7th August, 2006 - Ground 1.
2. Whether the lower court was not wrong by holding that the 1st and 2nd respondents are in possession of (Plot 1(B) Alimi Road, G.R.A., Ilorin - Grounds 3 and 10. -
3. Having regard to the affidavit evidence, written addresses and exhibits placed before the lower court, whether the lower court was not wrong when it held that the 1st and 2nd respondents had competent counter-affidavits and processes before it - Ground 7.
4. Whether the lower court has not breached the appellants' right to fair hearing when it failed to make use of the process filed and exhibits attached by the appellants in its ruling - Ground 4.
5. Having acknowledged that there was a serious issue question to be determined in the substantive suit whether the lower court was not patently wrong in dismissing the application for injunction - Ground 5.
6. Having held that Plot 1 (B), Alimi Road is the n? Stop be preserved on the particular facts of this case, whether the lower court was not wrong in dismissing the application sought to preserve that 'res'- Ground 2. 1
7. Whether the lower court was not wrong when it held that the balance of convenience tilts in favour of 1st and 2nd respondents and the injury to be suffered by them is far more than that of the appellants and the loss to be suffered by the appellants can be compensated by costs - Grounds 6, 8 and 9."

In the brief of the 1st and 2nd respondents, a sole issue was formulated by Yakubu Dauda, Esq. Who settled the brief in the following terms:-

"Whether from the facts and circumstances of this case, the appellants have demonstrated their entitlement to the grant of interlocutory injunction by this honourable court." As for the 3rd and 4th respondents' three issues were formulated as follows:-

1. Whether based on the materials before the trial court that court was not right to have held that 3rd and 4th respondents had competent counter-affidavit before it.
2. Whether the lower court was right by dismissing the appellants' motion in its entirety for lacking in merit."
3. Whether the lower court was right when it held that there is a serious issue to be tried in the substantive suit and at the same time dismissed the appellants' injunction."

Arguing issue number one, learned counsel drew our attention to paragraphs 10, 11, 12, 13, 14, 15, 16, 17, 23 and 54 of the affidavit in support pages 85 - 95 of the records as

well as paragraphs 16, 19, 20 and 52 at pages 159 - 166 of the records as well as exhibits 1-18 all showing that appellants were/are in possession of Plot 1(B) allocated to the 1s' appellant since 1998 and on which he has carried out several developments and also has a Certificate of Occupancy therefor. He further referred to paragraphs 23 - 61 of the affidavit in support which is to the effect that the position changed in 2003 when the 2"d respondent secured government appointment as Special Adviser and later Commissioner and then used his position to forcibly eject the appellants from the plot in question with the active connivance of the 3rd and 4th respondents, locked out the appellants and illegally and unconstitutionally took over the plot.

The learned counsel also alluded to the events of 3rd June, 2006 when the appellant attempted to install their gate on the land, and 1st and 2nd respondents raised a false alarm that the appellants were armed robbers who had come to invade their residence and police invited who arrested the 2nd appellant and his workers and quently using the instrumentality of State power to cause the id 2nd respondents to issue a ban on the appellants on the ground that 1st respondent had applied to be allocated the same plot. He referred to the ruling of lower court at page 215 lines 11-14 regarding the status quo to be maintained submitting that the position taken by the learned trial Judge is erroneous as the status quo to be maintained is the state of thing as existed before the beginning of hostilities and the wrongful act of the defendants/respondents complained of by the claimants/appellants. For this submission, he cited the dicta of Nnaemeka-Agu and Ogundare, J.J.S.C. in the case *Akapo v. Hakeem-Habeeb* (1992) 6 NWLR (Pt. 247) 266 at 303

paras. F - G and 311 para. C; *Oputa, J.S.C. in Governor of Lagos state v. Ojukwu* (1986) 1 NWLR (Pt. 18) 621; to farther contend at from the above decision, the lower court was patently wrong in

holding that the status quo, to be maintained is that of 7th August, 006 when the writ of summons was issued.

Still on the issue of status quo, learned counsel for the appellants insisted that maintaining the status quo at the time of filing of the writ of summons on 7"1 August, 2006 will enable the respondents to continue to perpetuate injustice and illegality on the appellants who are being denied their constitutional right to their property and put them in great disadvantage. *Akapo v. Hakeem-Habeeb* (supra) at page 291 - 292 paras. E - A per Karibi-Whyte and Nnaemeka-Agu, J.J.S.C. was further cited to submit that the ruling of the lower court was perverse as it is a licence for the condonation of illegality and capable of foisting a situation of *fait accompli* on the court which an application for injunction is designed to forestall particularly, as the 1s' and 2"d respondents who are trespassers with the support of 3rd and 4"" respondents have constructed additional layers of blocks on the plot in dispute and started constructing a structure thereon.

The learned counsel maintained that the refusal to grant injunction in the circumstances of the case is tantamount to surrendering the machinery of the law to lawlessness and quoting the dictum of Nnaemeka-Agu, J.S.C in *Akapo v. Hakeem-Habeeb* (supra) at page 304 para. A, he urged the court to resolve issue number one in favour of the appellants.

Arguing issue number II, the teamed counsel referred us to paragraphs 10 - 17 and 54 of the affidavit in support, paragraphs 9, in ?0 and 52 of the further-affidavit to submit that the appellants have been in constructive possession of Plot 1(B) Aliini Road, G'R A., Ilorin, since March, 1998 and that the appellants have denied the fact that the 1st and 2nd respondents have been occupying and have been possession of the plot for about 20 years which is incorrect because from 9th1 March, 1998 when Plot 1(A) and 1(B) were earned out of the original Plot 1, there was no more Plot 1 of the size and form it used to be previously.

According to counsel, the respondents proceeded wrongly to assume possession and occupation of the said plot without single documentary evidence whereas the appellants tendered 18 exhibits in support of their case that respondents were/are trespassers on Plot 1(8) Alimi Road, G.R.A., and Ilorin. He relied on *Ojoh v. Kawaht* (2005) 18 NWLR (Pt. 958) 523 at 580 and *Akinterinwa v. Oladnnjoye* (2000) FWLR (Pt. 10) 1595 at 1700 para. G -H; (2000) 6 NWLR (Pt. 659) 92. He maintained that even if the 1st and 2nd respondents have been in possession for 20 years, on the authorities' of *Atufe v. Oghonienor* (2004) 11 NWLR (Pt. 890) 327 at 349 paras. F - A and *Dokitbo v. Omoni* (1999) 8 NWLR (Pt. 616) 647; a claim for possession no matter how long cannot found a claim of title against the true owner (1st appellant) as prove of ownership is prima facie evidence of possession and once the 1st and 2nd respondents fail to prove ownership of Plot 1 (B) their bogus claim to possession must fail.

Citing again, *Echere v. Ezirike* (2006) 12 NWLR (Pt. 994) 286 at 408, *Ude Nwara* (1993) 2 NWLR (Pt. 278) 638 at 661 para. G. Learned counsel for the appellants submitted that entry into Plot 1 (B) by forcibly effecting workers illegally, raising the fence of same and taking over control of buildings, amenities infrastructure and facilities does not put the 1st and 2nd respondents in possession but at best a disturbance of the appellants' possession.

He then urged the court to protect the possessory/proprietary rights of the 1st appellant from invasion and continuing invasion by the 1st respondent with the connivance of the 2nd respondent who intends to use his position to take over Plot 1(B) from 1st appellant became the said respondent got political power in 2003. Citing again *Mobil Prod. (Nig.) Unltd. v LAS EPA* (2000) 18 NWLR (Pt.798) 1 & 3\$: *Akapo v. Hakeem-Habeeb* (supra) at 291; *Odunlan v. General Oil Co.* (1995) 4 NWLR (Pt. 387) 1 at 13; *C.C.B. v. Omichekwa* (1998) 8 NWLR (Pt. 562) 375 at 395 and *A.P. Ltd. v. Owodimni* (1991) 8 NWLR (Pt. 210) 331 at 241 para. A; the learned counsel further argued that:

1. Paragraphs 6, 7, 16, 54 and 55 of the further affidavit, exhibit 5 the Certificate of Occupancy No. 12638 at page 4 thereof as well as the survey plan attached thereto and paragraphs 11, 12 and 13 of the counter-affidavit of the 1st and 2nd respondents show that Plot 1(B) is not an integral part of Plot 1 as falsely contended by the respondents but that it is demarcated from plots 1 and HA);
2. That paragraph 1(12) of exhibit 5 shows contrary to the allegation of the 1st and 2nd respondents that the plot in dispute 1(B) was allocated for residential purpose and it is not even the business of the respondent to complain about the purpose for which the land was acquired or allocated the 1st respondent also being a mere allottee;
3. The inability of the 1st appellant to complete her building or reside therein as alleged by the 1st and 2nd respondents is due to the malicious and forceful prevention of the appellants' workers from working on the site while the respondents earned out construction works on Plot 1 (b) Alimi Road, G.R.A., Ilorin without let and hindrance. The acts of the 1st and 2nd respondents is a breach of the appellants' right to ownership and development of Plot 1(B) Alimi Road, G.R.A., Ilorin and such circumstance an application for injunction ought to be granted;
4. The 1st and 2nd respondents cannot be allowed to benefit from their illegal acts as the respondents are arguing on the court to allow such wrongful and unjust acts to be used to portray law as an instrument of injustice.

It was finally submitted that the learned trial Judge erred in holding that the 1st and 2nd respondents had been in possession for over 20 years and had indeed decided a core or critical issue in the substantive matter. This decision of the learned trial Judge at the interlocutory stage had seriously prejudiced the case of the appellants when no evidence was called on the very crucial issues, learned counsel insisted to urge the court to rely on the decision in *Akapo v. Hakeem-Habeeb* (supra) at 287 paras. G-H and resolved the issue in favour of the appellants.

As for issue number III, learned counsel argued making references to page 152 of the records which shows that the counter-affidavit of the 1st and 2nd respondents was not signed, and the authorities of *Faro Bottling Co. Ltd v. Ositji* (2002) 1 NWLR (Pt. 748) 311 at 330 - 331 and *Tsalibawa v. Habiba* (1991) 2 NWLR (Pt. 174) 461 at 475 - 477 which are to the effect that an unsigned document is a worthless document for all intents and purposes.

He pointed out that above argument was canvassed in the lower court but the respondents had no reply whatsoever. Placing reliance on the case of *Adesanya v. Otuewit* (1993) 1 NWLR (Pt. 270) 414 at 456 paras. D - E; he contended that the respondent had conceded to the point but surprisingly, the lower court relied heavily on the said counter-affidavit and went on to hold as it did at page 218 lines 22 -25 of the records and page 219 lines 1-4 which ruling was therefore incompetent as the P1 and 2nd respondents did not seek leave of the court to file the counter-affidavit out of time, assuming without conceding that the 2nd respondent was served on 24/1/07 while the case was filed on 7/1/06. According to learned counsel for the appellants where there was a joint-counter-affidavit filed by the respondents the fact that one of the parties was out of time, there must be an application for extension of time notwithstanding that one of the parties was within time. It was therefore submitted that the lower court was wrong in holding that the 1st and 2nd respondents' counter-affidavit was filed within time and therefore required no payment of penalty.

In the case of the 3rd and 4th respondents, the learned counsel also took the view that the motion for injunction was filed on 7/8/06 and served immediately but that respondents filed their joint counter-affidavit on 13/11/06 and served same on the appellants on 14/11/06 outside the period prescribed by the rules of the lower court.

Particular references were made to Order 11 rule 2(3) of the Kwara State High Court (Civil Procedure) Rules, 2005 and Order 41 rules 1 and 6 to assert that the lower court lacked the jurisdiction to entertain the counter-affidavits of the respondents on the authorities of *Ukweki v. Ebele* (2005) 11 NWLR (Pt. 936) 397 .at 423 paras. E -H; *Avong v. K.R.P.C. Lid.* (2002) 14 NWLR (Pt. 788) 508 at 528 paras. A - D.

On the other hand, without conceding that their above-submissions were overruled, the 1st and 2nd respondents unequivocally admitted paragraphs 1.2,5.6.7.8,9, 10, 11, 13, 14, 15, 16.30.31, 32, 34, 39,48, 50, 52 and 58 of the appellants' affidavit to the effect that 1st and 2nd respondents only have title to Plot 1(B) Alimi Road) G.R.A., Ilorin, no more no less. Relying on *Buluiriri v. Obasanjo* (2005) 2 NWLR (Pt. 910) 241 at 483 - 484 at 532, *Fagunwa v. Adib*, (2002) 17 NWLR (Pt. 903).544 at 566 and *Anason Farms Ltd. NAL Merchant Bank* (1994) 3 NWLR (Pt. 331) 241 at 251 to buttress; the above submissions he also urged us to decide the issue in favour of the appellants.

On issue number IV which is whether the lower court had breached the appellants' right to fair hearing by refusing to make-use of the appellants' further affidavits, written addresses and exhibits references were made to paragraphs 10-17 and exhibits 1 - 5, page 210 lines 20 - 22, page 215 lines 19-21 of the records as regards the *res* of the claim of the appellants which is Plot 1 (B) as found by the court below but surprisingly, and contrary to the above findings, the court below not only failed to preserve the "*res*" but went on to dismiss the entire case and changed his position on the *res* to Plot 1(B) Alimi Road, G.R.A., Ilorin, enclosing and encompassing Plots] 1(A) and 1(B) Alimi Road, learned counsel argued.

Learned counsel further emphasized that appellants' case is strictly in respect of Plot 1(B) and that Plot 1 is the official quarters of the 1st respondent while Plot 1(A) was allocated to the 1st respondent in her personal capacity in the name of "Safiya Daibu and that it was unfathomable how the lower court enlarged the "*res*" of the litigation to cover 3 different plots namely Plots 1, 1 (A) and 1(B) Alimi Road, G.R.A., Ilorin.

Learned counsel then relied on *F.B.N. Plc. v. A. C. B. Lid* (2006) NWLR (Pt. 962) 438 at 481 paras. D - E, *Buhari v. Obasanjo* (2004) FWLR (Pt. 191) 1487 at 1519 para. A; to submit that where the *res* is ascertained as in the instant case, the court was duty bound and it was unfair for the court to have extended same beyond Plot 1 (B) as was done by the lower court. He therefore urged the court to resolve the issue in favour of the appellants.

On issue number 5 which is whether having acknowledged that there was a serious issue/Question to be determined in the substantive: H suit, the court was not wrong in dismissing the application for: injunction, the learned counsel agreed that the learned trial Judge was right by his holding at page 212 lines 17 - 20 of the records as the position is buttressed by the Supreme Court case of *Obeya Memorial Hospital v. Attorney-General of the Federation per C.* (2004) All FWLR (Pt. 232) 1580 at 1605 paras. B -D- (1987) 3 NWLR (Pt. 60) 325 and *Egbe v. Onogim* (1972) 1 All NLR95- submitting that having acknowledged that there is a serious question to be tried and that the case of the appellants is not frivolous, the court ought to have made an order of injunction.

Learned counsel again noted that the 1st and 2nd respondents acknowledged the fact that there were serious issues to be tried but nevertheless questioned the legality and propriety of allocation of plot 1 (B) Alimi Road yet was ironically silent on the allocation of Plot 1 (A) to the 1st respondent in her personal capacity and name to build her personal house. Placing reliance on the case of *Oil Field Supply Centre Ltd. v. Johnson* (1987) 2 NWLR (Pt. 58) 625; *Kitfeji v. Kogbe*(1961) 1 All NLR (Pt. 1)113; *Reckitt Col man v. Gongoni* (2001) 8 NWLR (Pt. 716) 592 at 621 and *Udeze v. Ononuju* (2001) 3 NWLR (Pi. 700) 2 1 6 at 229. Learned counsel asserted as follows:

1. That the respondents are approaching equity with dirty hands by calling on the court to adopt double standards in the determination of the application;
2. That it is a misconception to contend as the respondents have done that the serious issues to be tried should only be determined from the substantive case as the question to be determined at this interlocutory stage is not whether the applicants' case would succeed but that there is a right threatened which needs protection pending the hearing and determination of the case;
3. That it is not necessary for the plaintiff at the interlocutory stage to show that he would succeed on the reliefs sought at all events nor should the plaintiffs/

applicants make out *prima facie* case as they would do on the merits but that what is necessary is that there is in existence a right which he alleges has been breached or a substantial issue to be tried at the hearing. In the case of *Victory Merchant Bank v. Pelfaco Ltd.* (1993) 9 NWLR (Pt. 317) 340 at 354 C-E was cited to submit that the respondents having admitted that there are serious questions to be tried which the lower court agreed, the order of interlocutory injunction ought to be granted. The court was then urged to again resolve issue number in their favour.

On issue number VI, the learned counsel for the appellants drew the court's attention to pages 82 - 145; 147 - 158 and 183 - 186 the records where the application for interlocutory injunction and joint counter-affidavits of the 1st - 4<sup>th</sup> respondents appear respective and pages 159-181 and 187- 194 where the further affidavits of appellants also appear. He further drew the attention of the court page 198 lines 26 - 27 and page 197 lines 1 - 6 of the records; page 200 lines 11-14 and 201 lines 7 -10 of the records where the attention of the lower court was drawn to the processes filed by the appellant and counsel to the 1st and 2nd respondents contended that the rules the lower court did not provide for written addresses to be filed along side with affidavits of which the lower court ruled that this written addresses filed by the appellants was proper.

The learned counsel for the appellants then contended that the court below did not consider or make reference to any of the forth affidavits, the written addresses and exhibit attached to them but only quoted copiously from the counter-affidavit of the 1st and 2nd respondents which failure according to him occasioned a miscarriage of justice against the appellants. It was further contended that the appellants were deprived of their right to fair hearing as guarantee by Section 35 of the 1999 Constitution and in accordance with the decision of *Otapo Sunmomt & Ors.* (1987) 2 NWLR (Pt. 58) 587J at 605 and *Odessa v. F.R.N (No. 2)* (2005) 10 NWLR (Pt. 934) 52: at 562 paras. F- H, any judgment or ruling in breach of the] Constitution provisions on fair hearing is null and void and will not be allowed to stand.

Learned counsel also went on to enumerate the essence and, characteristic features of fair hearing and citing *Ndukauba v. Kolomdi* (2005) 4 NWLR (Pt. 915) 411 at "437 - 438 paras. H - B and D, submitted on the authority of *Akapo v, Hakeem-Habeeb* (supra) a)j 289 paras F - G that as long as the acts which the appellant complained of will result in the infringement of their rights, injunction! ought to issue irrespective of whether or not pecuniary damages proved, in that the rights of the appellants to own property are being flagrantly violated by the 1st and 2nd respondents but that the court below curiously held that the loss to be suffered by the violators is more than that to be suffered by the appellants.

Finally, On issue number VII learned counsel for the appellants reiterated that 1st and 2nd respondents have no title to Plot 1 (B) and will lose nothing if the application for injunction is granted as title to said plot belong to the appellants as can be shown from exhibit 1- paras. 56 of the affidavit in support and 9 and 10 of the affidavit 1st and 2nd respondents he submitted, can only resist and injunction by proving or showing better title which they have failed to do and where as in this case, there is a clear breach of the Sights of the applicants/appellants by the acts of 1st and 2nd U«»in0ndents who are trespassing on the land in dispute and frustrating Development of the same, injunction will be granted to protect the annellants/applicants against injury real or threaten and the question: appellant/applicants convenience will not arise. *Omaliko v. Awaclic* (2002) 12 NWLR (Pt. 780) 1 at 27 referred.

Still on balance of convenience, the learned counsel referred to *Francome v. Mirror Group Newspaper Ltd.* (1984) 1 WLR 892 where the term "balance of convenience" was defined by Sir John Donald MR- and submitted that more justice will be done or result in protecting the appellants/applicants who have building installation on Plot I (B) as against the 1st and 2nd respondents who have nothing on the said Plot. It was therefore contended that by the refusing the application for injunction, the lower court has denied the appellants 'their rights to peaceful enjoyment and possession of their property in a situation where the 1st and 2nd respondents are trespassers and they have not adduced any loss they will suffer if injunction is granted.

On the contention by the 1st and 2nd respondents that the damages they would suffer cannot be quantified in monetary terms and that they cannot be adequately compensated, it was submitted by learned counsel for the appellants on the authority *Adebayo v. Oja-Iya C.B. (Nig.) Ltd.* (2004) 11 NWLR (Pt. 885) 573 at 583 paras. A - B; that the respondents and indeed their counsel did not state the loss that cannot be compensated for and/or quantified in monetary terms.

On the issue of undertaking as to damages, the learned counsel -argued that it is now settled that the giving of undertaking is mere surplussage and that appellants gave such undertaking out of the

abundance of caution, as failure to do so, does not render void or [vitiate the order of injunction. *Afro-Coniiental (Nig.) Ltd r. Avantuvi* (1995) 9 NWLR (Pt. 420) 411 at 427, 437 refers.

On their allegation, the appellants do not have a complete building nor carry out business in Plot 1(B), appellants" counsel argued that the allegation is speculative and based on mere *ipsi-dixit* of counsel and not borne out of the affidavit evidence before the court adding that the submission of counsel no matter how brilliant cannot take the place of the evidence before the court. For this' submission, he placed reliance on the case *Ames Electrical Co. Ltd, v. F.A.A.N* (2002) 1 NWLR (Pt. 748) 354 at 369 *paras.* D - E. In the alternative, he referred to section 50 of the Land Use Act where "developed land" is defined and the authority of *C.S.S. Bookshop Ltd. v. R.T.M.C.R.S.* (2006) 11 NWLR (Pt. 992) 530 at 564, 577BJ and 582D to urge the court to resolve the issue in favour of the1 appellants.

It would be recalled that T1 and 2"d respondents, in their brief raised a preliminary objection on three grounds namely:

1. That the notice of appeal as appearing on the record does not reflect the date the ruling appealed against was delivered;
2. The appeal is fundamentally defective;
3. The honourable court lacks jurisdiction to entertain same.

Arguing the preliminary objection, the learned counsel for the 1st and 2nd respondents submitted that a notice of appeal is the foundation and substratum of every appeal and any defect therein will render the whole appeal incompetent and the appellate court will lack the requisite jurisdiction to entertain it or any interlocutory application based on the said appeal. Citing the case of *Uwazitrike v. Attorney-General, Federation* (2007) All FWLR (Pt. 387) 834 at 846 paras. E-F; (2007) 8 NWLR (Pt. 1035) 1. Learned counsel maintained that going by the record compiled from the lower court especially pages 202 and

219 thereof, it is not in doubt that the ruling t of the lower court purportedly appealed against was delivered on Wednesday the 1st day of August, 2007. However, he noted, at page 1 220 of the same record which accommodate the appellants purported; notice of appeal is also legible enough and a careful look at the document tagged notice of appeal will no doubt reveal that the; appellants categorically referred to a ruling delivered on the 2nd day of August, 2007 the ruling which is not before this honourable court. Thus while the appellants compiled their record in respect of the ruling delivered on the 1st day of August, 2007, the notice of appeal filed by the said appellants refer to a ruling delivered on 2nd of August, 2007.

For the above reasons, it was contended that the appellants do not have competent notice of appeal before this honourable court Because of the discrepancy between the date of the ruling on the record and the ruling against which the notice of appeal was filed. He therefore submitted and urged this honourable court to hold that the appellants do not have a competent notice of appeal before this honourable court and that if this honourable court agrees with their submission on the incompetence of the appellants' notice of appeal, the effect will be that their appellants' brief of argument in support of same will also be affected by the incompetence of the said notice of appeal. Reference was made to the case of *N.I. W.A. v. S.P.D.C. (Nig.) Ltd.* (2007) All FWLR (Pt. 361) 1727 at 1747 paras. A-B; (2007) 1 NWLR (Pt. 1015) 305, where it was held that:

*"We must submit to the binding authorities of the decisions in Ekwuhtgo v. A.C.B. (2006) 6 NWLR (Pt. 975) 30 at 40, Musuw & Anor. v. Akinyele (1950]3 WACA 112 to the effect that and process attendant to an incompetent notice of appeal, including brief of argument is equally incompetent. As held in Macfoy v. VAC (supra), because applicant's notice of appeal is ab initio void and cannot be regularized retrospectively every process or proceedings founded on such a nullity is incurable bad."*

He therefore urged us to hold that the appellants' notice of appeal and the brief of argument filed based on the said notice of appeal is also incompetent and prayed this honourable court to strike out both the notice of appeal and the appellants' brief of argument.

On the sole issue which was formulated for determination in their brief of argument which is whether from the facts and circumstances of this case, the appellants have demonstrated their entitlement to the grant of interlocutory injunction by this honourable court; the learned counsel submitted firstly that the grant or refusal of application for injunction is entirely at the discretion of the court which discretion must be exercised, judiciously and judicially based on the materials placed before the court.

As for the factors which a court should consider before granting an order for interlocutory injunction the learned counsel for 1st and 2nd respondents cited *Obeya Memorial Specialist Hospital v. A.-G., Federation* (1987) 3 NWLR (Pt. 60) 325; *Afro Continental v. Ayantuyi* (1995) 12 SCNJ 12, (1995) NWLR (Pt. 420) 411 and *Abdullah v. Governor of Lagos State* (1989) 1 NWLR (Pt. 97) 356. Wherein they were enumerated as follows:

1. There must be a serious question to be tried:
2. The applicant must show that balance of convenient is on his side;
3. The applicant must show that damages cannot adequate compensation for

his injury;

4. The applicant must show that his conduct is not reprehensible and
5. In deserving cases, there must be undertaking as damages; submitting further that these factors especially the first four must exist conjunctively before an applicant can be granted an order of interlocutory injunction.

As far as this appeal is concerned, the 1st and 2nd respondents' counsel conceded that the first condition as to whether there is serious question to be tried has been fulfilled in that the propriety legality of the allocation of Plot 1(B) to the 1st appellant is a lift issue for determination in the substantive suit before the court below.

On the second factor which is the balance of convenience, was submitted that a look at the processes filed will reveal that the 1st and 2nd respondents will suffer more inconvenience if the application was granted than the refusal will cause the appellant because the appellants are not living on the Plot in question and not carrying out any business thereat at present. On the other hand, the 1st and 2nd respondents are presently living at Plot 1(B) and is covered by the same fence and that there is no doubt if the order for interlocutory injunction is refused, the worst that can happen to the appellants would be the destruction of the building materials allegedly kept outside the fence for which the appellants can be compensated in monetary damages if they succeed in the substantive case at the trial court.

Referring to paragraphs 7 - 29, 32, 34, 36, 37, 38, 39 and 40 of the 1st and 2nd respondents' counter-affidavits on pages 147 - 152 of the records, it was posited that the grant of the application will give the appellants liberty to break the fence of 1st and 2nd respondent thereby exposing them to danger, whereas, the refusal of the appellants' prayers will not inflict any further hardship on the appellants than the risk of tampering with the building material kept outside the premises of the plot in dispute. For this submission he referred us to *Missini Gerino, PMIN Co. Ltd. v. Balogun* (1968) All NLR (Reprint) 310 at 316 and *A.C.B. v. Awogbom* (1991) 2 NWLR(Pt- 176) 711 at 719 to submit that from the argument of the appellants' issue number one (1) there is no doubt that as at the date the appellants filed their suit, they were no longer in possession of the plot in dispute as the appellants themselves acknowledged in paragraph 5.1 of page 11 of the appellants' brief.

Also, from the processes filed by the appellants, there is no doubt that the suit was commenced in the year 2006, three years after which the appellants admitted that the position changed which amounted to admission that as at 2006 they were not in possession of the said Plot 1(B) counsel further submitted. He further canvassed the point that before an applicant for interlocutory injunction can be obliged the grant of such an application, the applicant is duly bound to show that he/or she is in possession of the plot in question which in this case, the appellants have failed to do.

It was therefore submitted that the lower court was right to hold that the prevailing position when the appellants' writ of summons was filed, was the fact of the 1st and 2nd defendants/respondents in possession of No. 1 Alimi Road, G.R.A., Ilorin and this court should not disturb the finding of the lower court in this respect. Relying again on the case of *Agundo v. Gberbo* (1999) 9 NWLR (Pt. 617) 71 at 97 - 98 paras. H - A where the case of *Ogitiye v. Oni* (1990) 2 NWLR (Pt. 135) 745 was referred to and the fact that the 1st and 2nd respondents have even protested to the Kwara State Government on the legality of Certificate of Occupancy issued to the

appellants, it was submitted that where the appellants failed to establish possession, they could not be said to have any legal right on Plot 1 (B) notwithstanding the issuance of the Certificate of Occupancy which is not conclusive proof of the ownership of the land.

He then prayed this court to hold that the failure of the appellants to establish that they have a cognizable legal right on the land is very fatal to the grant of interlocutory injunction in their favour and that this court should not accede to the appellants' prayers particularly, when it has been established by the 1st and 2nd respondents that the said Plot 1(B) is part of Plot 1 on which the 1st and 2nd respondents have been in possession for more 20 years.

On the third condition which is that the applicants must establish that if the injunction is refused an irreparable injury will be caused to them and such injury cannot be adequately compensated for if at the end of the day, the case is decided in their favour by the trial court reference was made to the endorsement on the writ of summons of the appellants which encompasses the reliefs being claimed on page 2, paragraphs 53 and 54 of the statement of claim at pages 16 and 171 of the records which paragraphs show that the appellants' loss or injury at the end of the day in the event of the substantive case being determined in their favour, can be assuaged by payment of the monetary damages claimed by them. The case of *Nwanganga v. Military Governor of Imo* (1987) 3 NWLR (Pt. 59) 185 at 195 per.-.] Olatawura, J.C.A. (as he then was) was finally relied upon to urge the court to determine the sole issue in favour of the 1st and 2nd respondents.

In conclusion, learned counsel urged us to dismiss the appeal as it is unmeritorious. In respect of the three issues formulated by the learned' Attorney-General of Kwara State. Alhaji Saka Isau, SAN, in the; brief settled on behalf of the 3rd and 4th respondents, the learned Attorney submitted on issue number one (1) which is on the competence of the joint counter-affidavit of the 3rd and 4th respondents and noted that the appellants' motion for injunction was filed on 7/8/06 while the 3rd and 4th respondents filed their joint counter affidavit on 13/11/06 and that there is no evidence of the date of service of, the appellants' motion on the 3rd and 4th respondents. Furthermore, he submitted that the date of service of the motion is vital for the determination of the fact as to whether the 3rd and 4th respondents' counter affidavits were filed out of time, adding that the 3rd and 4th respondents' counter affidavits are competent as held by the lower court.

In the alternative, it was submitted that assuming without conceding that the 3rd and 4th respondents' counter-affidavits were filed outside the time stipulated by the rules of the lower court, the failure to obtain the leave of the lower court does not automatically make the 3rd and 4th respondents' counter-affidavit and written addresses incompetent, in view of the provisions of Order 4 rule 1(1) of the Kwara State High Court (Civil Procedure) Rules, 2005 which he further submitted renders the 3rd and 4th respondents' counter-affidavits competent.

The learned Senior Advocate contended still on this issue that the 3rd and 4th respondents are also exempted from the payment of any fee by the rules of the lower court by virtue of Order 56 rule Kwara State High Court (Civil Procedure) Rules, 2005 and that the honourable lower court had the jurisdictional competence entertain the 3rd and 4th respondents' counter-affidavit. Arguing further on this issue, it was the learned Attorney's further contention A at non-compliance with the rule of court must be in the interest of justice. The case of *Abubakar v. Yar'Adua*(2008)4NWLR (Pt. 1078) 465at510- 512; was cited to submit that the lower court adequately considered all the appellants' processes and exhibits

before arriving at its decision as shown in the ruling and to urge the court to answer this issue in the negative by holding that the 3rd and 4th respondents had competent counter-affidavit before the lower court.

On issue number two (2), which is whether the lower court was right by dismissing the appellants' motion, he answered the question raised by the issue in the affirmative and submitted that the grant or refusal of an order of interlocutory injunction is the absolute discretion of the court which must be exercised judicially and judiciously having regard to the facts and circumstance of each case.

He further submitted that for an applicant to succeed in an application for injunction, he must satisfy the court of the following conditions which must necessarily co-exist as considered by the lower court before dismissing the appellants' motion, thus:

1. That he has a legal right in the subject matter of the suit;
2. That there is serious issue to be tried;
3. That the balance of convenience is in the applicants' favour;
4. That damages will not be enough compensation.

On the issue of legal right of the appellant in the subject matter, it was submitted that the appellant cannot be considered to have acquired legal right over Plot 1(B) Alimi Road G.R. A., Ilorin, having been instructed by the 4th respondent to stop all action on Plot 1(B) Alimi Road, Ilorin. The learned Attorney pointed out that the 4th respondent granted the 1st appellant the right of occupancy over Plot 1(B) Alimi Road and having instructed the grantee to stop all action on the Plot, the appellant could not be said to have acquired legal right on the property. It was further submitted that interlocutory-injunction is issued to restrain a wrong to a right and not the lawful enjoyment of a legal right. The 4th respondent, he continued, cannot be restrained from the performance of his legal right. *Ahaji A. W. Akibu & 4 Ors. v. AUmja Munirat Oduntan & 4 Ors.* (1991) 2 S.C.R 30 119 at 137; (1991) 2 NWLR (Pi. 171)1 was cited as the authority] for his above submissions.

On the question of serious issue to be tried, he posited that there is a serious issue to be tried as held by the lower court, the fulfillment of that condition alone cannot avail the appellants the] grant of the injunction sought as the conditions for the grant music co-exist. *Falowo v. Omonivi Banigbe* (1998) 6 SCNJ 42; (1998) NWLR (Pt.559) 679 was again referred to submit that the balance: of convenience in this case tilted in favour of the 3rd and 4' respondents the grantor of Plot KB) Alimi Road to the appellants.1] Still on the balance of convenience, he maintained that the 3rd and, 4th respondents will suffer greater hardship above that of the appellant; if restrained from the performance of his legal duty which will also put a clog in the wheel of government machinery: *Obeya Memorial Specialist Hospital v. A.-G., Federation & An or.* (1987) 7 SCNJ 42 at 45, (1987) 3 NWLR (Pt. 60) 325 was cited to buttress the above submissions.

On adequacy of damages, the learned SAN argued that whatever, the quantum of damage the appellant may suffer in respect of Plot 1(B) can be atoned in monetary terms and the appellants can adequately be compensated. This condition also tilts in favour of the 3rd and 4th respondents as can be gleaned from the decision in *C.B.N. v. Kotoye* (1989) 2 SCNJ 31; (1989) 1 NWLR (Pt. 17) 396 and could not have" availed an applicant for the grant of injunctive relief as in the instant case. It was finally submitted that the appellants having failed to satisfy the

conditions for the grant of interlocutory injunction, the lower court was right to have dismissed their motion for interlocutory injunction.

Finally, on issue number Three (3) which poses the question as to whether the lower court was right when it held that there is a serious issue to be tried in the substantive case and at the same time dismissed the appellants' motion for injunction, the learned senior counsel answered the question in the affirmative. He adopted the arguments under issue No. 2 and further submitted that the appellants could not fulfill all the conditions for the grant of an interlocutory injunction and that for an interlocutory injunction to be granted, all the conditions precedent must be fulfilled and co-exist. *Falowo v. Omoniyi Bamigbe* (supra) was cited to finally urge this court to hold that the lower court properly considered the facts of this case with the law before dismissing the appellants' motion for injunction.

He therefore prayed the honourable court to dismiss the appeal in its entirety because:

1. The trial Court considered dispassionately the appellants' motion for injunction before dismissing same;
2. The trial court rightly and correctly dismissed the appellants' motion in its entirety;
3. The decision of the trial court is not perverse but sound;
4. It is in the interest of justice to dismiss the appeal for want of merit.

The appellants in their reply brief responded to the preliminary objection of the 1st and 2nd respondents and conceded to the fact that the ruling of the court appearing on pages 202 - 219 of the record of appeal is dated 1st day of August, 2007 and the notice and grounds of appeal is dated 2nd day of August, 2007 at page 210 of the records. The appellants' counsel noted the complaint of the 1st and 2nd respondents which is that the notice of appeal ought to have referred to the 1st and not 2nd August, 2007 as the date of delivery of the ruling of the lower court which is the subject of this appeal. He explained that the discrepancy in date arose from the fact that although the ruling was dated and stated for delivery on 1st August, 2007, it was however delivered on 2nd August, 2007 because same was not ready for delivery on 1st day of August, 2007, the original date it was slated for delivery by the lower court. To the knowledge of all the counsel to the respondent who were present in court, the ruling was delivered on 2nd August, 2007. However, when the said ruling was delivered, the lower court inadvertently retained and maintained the original date of 1st August, 2007 instead of 2nd August, 2007, it was submitted.

Against the foregoing backdrop, learned counsel for the appellants argued that they were perfectly in order by stating that the ruling was delivered on 2nd August, 2007 as the default in correcting the date of the delivery of the ruling is that of the lower court for which the appellants could not be held responsible. He referred to a similar scenario which played itself out in the case of *NASCO Mgt. Sen: Ltd. v. A.N. Amaku Transport* (2002) FWLR (Pt. 135) 652 at 681 paras. A- E: (2003) 2 NWLR (Pt. 804) 290 per Mangaji, J.C.A. where the objectors were raising their objection on the basis of discrepancy on the date of the delivery of the judgment and submitted that by the above authority, the mistake in stating the date of judgment is neither fatal nor does it affect the competence of the notice of appeal.

He further contended that the case of *N.I.W.A. v. S.P.D.C.* (supra cited by the 1s' and 2nd respondents' counsel is not applicable to this' case and that even if they are wrong on the above position which is not conceded, it is clear and without any doubt whatsoever that:

1. All the parties are aware that a ruling on interlocutor injunction was delivered by the lower court;
2. There was only one ruling on the said subject by the lower court;
3. The error if any at all is human as no man is perfect or infallible but only the Almighty God is;
4. 1st and 2nd respondents are aware that the notice and grounds of appeal are in respect of the ruling on the application for interlocutory injunction delivered by the lower court;
5. 1st and 2nd respondents were not in any way misled as they fully responded to the same notice and grounds of appeal by filing their brief of argument and a written address to an earlier application brought by the appellants in respect of the same appeal;
6. If there is any mistake at all, it is merely an irregularity which does not vitiate or render the appeal incompetent or cause a miscarriage of justice.

According to the learned counsel for the appellants, the correct position is as presented by the Supreme Court in the case of *Jeric (Nig.) Ltd. U.B.N. Plc.* (2001) FWLR (Pt. 31) 2913 at 2923 paras. B

- G; (2000) 15 NWLR (Pt. 691) 447, which situation was worse than the instant case in the sense that the error in that case spanned a whole year "1996" - 1997 while in the instant case; it was an error which ought not to hurt. This position he stated, is embodied in the Latin maxim, "*vitiwn clerici nocere non debet*" *Asqfa Foods Factory v. Alraine (Nig.) Ltd* (2002) 12 NWLR (Pt. 781) 353 at 372 paras. B referred.

Finally, it was contended that the objection of the learned counsel to the 1st and 2nd respondents is a mere resort to the realm of technicalities and that the courts on the authorities of *State v. Gwontd* (1983) 1 SCNLR 142 at 160 and *Maersk Line v. Addide Invest. Ltd!* (2002) 11 NWLR (Pt. 778) 383 paras. A - C per Ayoola, J.S.C., generally have moved far away from technicalities to considering the substance of matters.

Against the foregoing submissions, he urged this honourable court to hold that the notice and grounds of appeal and appellants' brief of argument are competent and that the preliminary objection should be overruled. The learned counsel also replied copiously to the submissions of counsel for the appellants on their respective issues and we shall reflect on them in the course of the resolution of the issues as formulated. However, before delving into the resolution of issues, we shall briefly deal with the preliminary objection raised by the 1st and 2nd respondents in their brief.

There no doubt as was rightly argued by the learned counsel for the 1st and 2nd respondents that the notice of appeal is the foundation or substratum of every appeal and any defect therein will render the entire appeal incompetent and this court like any other appellate court will not be seized of the requisite jurisdictional competence to entertain such an appeal or any interlocutory application based on it. The case of

*Uwazurike v. A.-G., Federation* (2007) All FWLR (Pt. 387) 834 at 846 paras. E - F is very instructive in this respect.

The complaint of the 1st and 2nd respondents is that the notice of appeal filed by the appellants bears the 1st day of August, 2007 instead of 2nd day of August, 2007 which was the actual date of the ruling upon which this appeal is predicated, in which case, the notice of appeal of the appellants is incompetent, thus robbing this court of the jurisdiction to hear the appeal. In *N.I.W.A. v. S.P.D.C* (supra), the point was stressed on the authorities of *Ekwuhtgo v. A.C.B. ((Nig.) Ltd.* (2006) 6 NWLR (Pt. 975) 30 at 40; *Mosuro & An or. v. Akinyele* (1950) 13 WACA 112 and *Macoy v. U.A.C.* (1962) AC 152 that any process attendant to an incompetent notice of appeal including the brief of argument is equally incompetent because if the notice of appeal is *abinitio* void, it cannot be regularized retrospectively for - that every process founded on a void notice is a nullity and incurably bad.

The learned counsel for the appellants on the other hand has argued *per contra* that the error in stating the date of delivery of judgment is that of the court and even where the mistake is theirs (which they have not conceded), such error is a mere irregularity which does not render the notice and grounds of appeal and the briefs attendant thereto incompetent.

He has explained away the discrepancy in the dates as reflected] in pages 202 - 219. A look at the record of proceedings, at pages 202 and 219 will reveal that the date of the delivery of the ruling against which the appellants are appealing was the 1st day of August, 2007. The ruling of Honourable Justice M.O. Adewara which is the subject of this appeal also dated same as 1/8/2007. There is no indication that the court sat on the 2nd day of August, 2007 when the ruling was delivered as explained by the appellants. Ordinarily, the contention of the 1st and 2nd respondents would have been well founded particularly in the days of strict adherence to technicalities in the administration of justice.

The trend these days is that courts as much as possible have tended to depart from strict adherence to technical and mechanical justice. The dictum of Kalgo, J.S.C. in *Jeric (Nig.) Ltd. v. U.B.N. Pic* (2000) 15 NWLR (Pt. 691) 447 at 458 paras. A - D, where he posited that:

*"The misstating in the notice of appeal of the actual year of the judgment appealed against is a mere irregularity which will not vitiate the appeal or cause any miscarriage of justice. The error is not fatal as to render the appeal incompetent,"* accords with our current jurisprudential posture which de-emphasizes strict adherence to technicalities but emphasizes that at all times substantial justice should be seen to be done to parties and their rights determined on the merits. See *The State v. Gwonto* (1983) 1 SCNLR 142; *Amako v. The State* (1995) 6 NWLR (Pt. 399) 11 at 26; *Akpan v. The State*, (1992) 6 NWLR (Pt. 248) 439.

In the case at hand, the appellants have explained that the error in stating the date of delivery of the judgment stemmed from the inability of the court below to complete the writing of the ruling for delivery on the 1st of August, 2007 but same was eventually completed and delivered on the 2nd of August, 2007 but that the learned trial Judge and the registry mistakenly failed to amend the date to read 2nd instead of 1st as appears on the record of proceedings or ruling. Again, as was rightly stated by the appellants, parties are aware that the ruling being appealed against is that contained in pages 202 to 219 of the record of

proceedings and that the parties at all times material to this case are *Colito (Nig.) Lid. & Anor. v. Honourable Justice Tit: Daibu & 3 Ors.*

Also, the respondents in this case have not complained of being misled by the error in stating the date of delivery of the judgement as the appellants have even owned up that the misstatement of the date due to human error. As I said elsewhere, human memory can be sometimes volatile, fickle, and fleeting particularly in a country like ours where prevailing human circumstances are extremely hostile and unpredictable. Where there is a misstatement of date in a process, misnomer or mis-description in a process like the notice of appeal in question, Order 6 rule 15 of Court Appeal Rules, 2007, which provides that:

"15 A notice of appeal may be amended by or with leave of the Court at any time;" should be and is hereby invoked to save this appeal which otherwise would have been struck out on technical grounds as urged on us by the respondents in this appeal.

On the whole, the guiding principles for the determination by court as to whether a misnomer or misstatement of date in a process like the notice of appeal in our instant case is fatal to the proceedings are:

1. Whether the misnomer or misstatement of the date has substantially misled the parties (in this case the respondents); and
2. Whether a miscarriage of justice has been occasioned on any of the parties and in particular the respondents.

See the case of *Bayo v. Njidda* (2004) 8 NWLR (Pt. 876) 544 and *Ajadi v. Ajibola* (2004) 16 NWLR (Pt. 898) 91

In *Nasco Mgt. Sen: Ltd. v. Amaku Transport* (2002) FWLR (Pt. 135) 652 at 681 paras. A-E; (2003) 2 NWLR (Pt. 804) 290; Mangaji, J.C.A, appropriately captured the scenario in which we have found ourselves where in the course of preparation of the record ; of proceedings the registrar failed to amend the date as ordered by the court and the appellant's counsel reflected the date erroneously indicated in the record on the notice of appeal. When counsel for respondents raised a similar objection that the date of delivery of the judgment was 21/7/95 instead of 21/7/93 as erroneously stated in the record of proceedings and subsequently as reflected in the notice of appeal, the learned justice appropriately held *inter alia*: "*Whatever it is, the dispute was created by the record of appeal itself and none of the parties can be blamed for it. What is obvious, however is that parties are agreed, that the judgment on appeal is the very judgment they are hotly contesting upon. There is thus no' conceivable dispute about the judgment being complained about apart from the dating of it caused by the producer of the record of proceedings which is basically an irregularity which will not, by any shred of imagination render the notice and grounds of appeal void. Accordingly I overrule it.*"

I adopt the position taken by my teamed brother as the facts of this case and the one above cited are on all fours.

Above all, notwithstanding the preliminary objection, the learned counsel for the 1st and 2nd respondents has filed the respondents' brief and copiously proffered arguments on all the issues formulated from the purported incompetent notice and grounds of appeal. In line with the authorities of *Jeric (Nig.) Ltd. v. U.B.N Plc. (supra)*; *Asafa Foods Factory v Alraine (Nig.) Ltd.*, (2001) FWLR (Pt. 31) 2913; (2002) 12 NWLR (Pt. 781) 353; *The State v. Gwonto'* (1983) 1 SCNLR 142 at 160 and *Maersk Line v. Addide Invest. Ltd.* (2002) 11 NWLR (Pt. 778) 383, this court shall order and has hereby ordered that the date of delivery of the ruling being appealed against shall read 1st August, 2007 instead of 2nd August, 2007, as erroneously misstated by the appellants in their notice of appeal.

Finally, I agree with the submission of the appellants that the preliminary objection is mainly technical and this court can no longer be bogged down by technicalities but will rather do justice and hear this appeal on the merit. The preliminary objection is therefore over ruled.

Turning to the main issues for determination in this appeal, the courts have deprecated the proliferation of issues as demonstrated by the appellants when they formulated issues number 1, 3, 4, 5, 6 and 7 which ordinarily would have been subsumed within one issue as to whether the learned trial judge was right in dismissing the application for interlocutory injunction having regard to the materials placed before him and the principles guiding the grant or refusal of such an application. See *Eluwa v. O.S.I.E.C.* (2006) 18 NWLR (Pt. 1012) 544 S.C; *Agbeotu v. Brisibe* (2005) 10 NWLR (Pt. 932) 1 at 16; where Amaizu, JCA in the Benin Division of this court held *inter alia*:-

*"The apex court has warned without number that it is not permissible to formulate more than one issue from a ground of appeal even through several grounds of appeal may be covered by one issue. It is obvious that the two issues do not comply with the principles guiding formulation of issues. Such being the case, they are considered incompetent and consequently ignored. Alhaji Raimi Akanji Yusuf & Ors. v. Alh. Akindipe & Ors (2000) 8 NWLR (Pt. 669) 376 "*

See however the recent case of *Eke v. Ogbonda* (2006) 18 (Pt. 1012) 506 at 524, where the Supreme Court per -Muhammed, J.S.C. who, while commenting on the propriety of formulating more than one issue from a ground of appeal posited that although the distillation of more than one issue from a ground of appeal tantamount to proliferation of issues the practice which has been highly deprecated in several cases by the apex court such as *Amaeze v. Anyaso*(1993) 5 NWLR (Pt. 291) 1 at 30; *Buraimoh v. Bamgbose* (1989) 3 NWLR (Pt. 109) 352; *Utih v. Onoyivwe* (1991) 1NWLR (Pt. 166) 166 at 214; *Oyekan v. Akinrinwa* (1996) 7 NWLR (Pt.459) 128 at 136 and *Yitsufv. Akindipe* (2000) 8 NWLR (Pt. 669) 376 at 384, since the ground and issues formulated are competent, he would proceed to determine the appeal and the issues together. Following the above authority, am of the candid view that a combination of the sole issue formulated by the 1st and 2nd respondents and issues number III and IV of the appellants which are the same with the three issues formulated by the learned Attorney General of Kwara State on behalf of the 3rd and 4th respondents are enough to determine this appeal on its merit. Accordingly, the issues for determination are hereunder reproduced as follows:

#### **ISSUES:**

1. "Whether from the facts and circumstances of this case the appellants have demonstrated their entitlement to the grant of Interlocutory Injunction by this honourable court?"

2. "Having regard to the affidavit evidence, written addresses, and exhibits placed before the lower court, whether the lower court was not wrong when it held that the 1M to 4"1 respondents had competent counter-affidavit and processes before it?"
3. "Whether the lower court has not breached the appellants' right to fair hearing when it failed to make use of the processes filed and exhibits attached by the appellants in its ruling?"

#### RESOLUTION OF ISSUES:

Issue Number 1 poses the question as to whether the appellants have demonstrated their entitlement to the grant of their applicator for interlocutory injunction having regards to the facts and circumstances of this case. It is settled law from a plethora of deck authorities by the Supreme Court and this court and as rig hill submitted by the learned counsel for the respondents that the grant or refusal of an application for interlocutory injunction is at the discretion of the court which discretion should be exercised judicially and judiciously taking into consideration the peculiar facts and circumstances of the case. These circumstances include the materials placed before the court by the applicants and the competing interests of the parties. Moreover, the order for interlocutory injunction has been rightly argued by the learned Attorney-General, is no granted at the whims and caprices of the court or just for the asking of an applicant. See *Kotoye v. C.B.N.* (1989) 1 NWLR (Pt. 98) 419 | *Buhari v. Obasanjo* (2003) 17 NWLR (Pt. 850) 587 at 648 - 649; and *Obeya Memorial Hospital v. Attorney-General of the Federation* (1987) 3 NWLR (Pt. 60)325.

In *Ladimni v. Kukoye & Ors.* (1972) 3 S.C. 33-35; Coker, J.S.C succinctly spelt out the duty of an applicant seeking for an order interlocutory injunction which is that, at that juncture all that is required of him is an affidavit demonstrating from the case presented before the court that there are facts therein which would warrant the defendant respondent to proffer an answer. The appellants as at the time they file the application did not need to prove their case as they would have done at the hearing of the substantive case but to demonstrate simply that they had a substantial case which may or may not succeed.

The learned counsel for the respondents have in my view right spelt out the general principles upon which a court like the court below would predicate the grant or refusal of an application for interlocutory injunction as was laid down in the cases of *Obeya Memorial Hospital A.- G., Federation* (supra), *Afro Continental (Nig.) Ltd. v. Ayantuyi* (1 12 S.C.N.J 12; (1995) 9 NWLR (Pt. 420) 411; *Abdulah v. Governor Lagos State* (1989) 1 NWLR (Pt. 97) 356 and *Akapo v. Hakeem-Habeeb* (supra). These principles are as follows:

1. That there must be a subsisting action which must donate a legal right capable of being protected by the order sought.
2. That the applicants must show that there is a serious question or substantial issue to be tried:
3. That the applicants must show that as a result of conditions 1 and 2 above, the *status quo* ante should be maintained pending the determination of the substantive suit;
4. That the applicants must show that the balance of convenience is in favour of the grant of their application;
5. That the applicants must show that their conduct is not reprehensible and that there was no delay on their part in bringing the application;

6. That damages cannot adequately compensate them for the injury they would suffer if the application is not granted and the case is subsequently decided in their favour.
7. That in deserving cases, the applicants have undertaken to pay damages in the event of wrongful exercise of the court's discretion to grant the injunction.

See further *Falowo v. Bamigbe (supra)*; *Kotoye v. C.B.N (Supra)* and *O.B.M.H. v. A.-G., Federation (supra)* cited by the parties.

On the first condition, there is no doubt, and parties are *ad idem* that there is a subsisting action initiated by the applicants/ appellants which has thrown up very serious and substantial issues or questions to be determined by the trial court as can be gleaned from the endorsement on the writ of summons and the 54 paragraphs 10 to 17, 23 and 54 of the affidavit in support as well as paragraphs 16,19, 20 and 52 of the further affidavit and exhibits 1 to 18 annexed to the said affidavits. Furthermore, from the averments in paragraphs 6 to 39 of the joint counter-affidavit of the 1st and 2nd respondents, it is clear that the respondents are contesting the legality of the claim of the appellants that Plot 1(B) was allocated to them by the Government of Kwara State and that the 1st and 2nd respondents were using their political and financial muscles to forcibly eject the appellants from Plot 1(B) Alimi Road, Ilorin.

However, the crucial question to be answered now which is closely connected with the suit/claim of the appellants is whether the action aforesaid donates a legal right which is capable of being protected by an order of interlocutory injunction as sought by the appellants in the lower court. In order to answer this question, it is necessary to resort to the statement of claim, the averments therein which are replicated in the affidavit in support of the application and the exhibits annexed thereto. For instance, paragraphs 6 to 14 of the statement of claim disclose that by a letter of allocation dated 9<sup>th</sup> March, 1998 (Exhibit 1), the 1st appellant was allocated Plot 1(B), the said plot having been excised from Plot 1 Alimi Road, G.R.A., Ilorin. The 1st appellant was subsequently granted a Right of Occupancy as well as Certificate of Occupancy No. 12638 (Exhibits 4 & 5) on the 17<sup>th</sup> December, 2004 and 23<sup>rd</sup> November, 2005 respectively. The Plot is contained in a survey plan attached to the said Certificate of Occupancy, signed by the 3<sup>rd</sup> defendant. Upon the grant of the Certificate of Occupancy, the 1st appellant made full payments for survey, premium, layout and other charges including the ground rents up to 2009 which were duly receipted by the Ministry of Lands and Housing. See Exhibits 2 and 3 respectively.

According to the terms of the grant, the appellants constructed replacement boys' quarters on Plot 1 Alimi Road, Ilorin based on the designed sketch or plan provided by officers from the Ministry headed by the 4<sup>th</sup> defendant which officers participated fully in the supervision and construction of the boys' quarters. The appellants also aver that they have carried out improvement or development of the said Plot 1(B). See also paragraphs 9-14 where these facts are replicated in the affidavit in support of the motion as reproduced hereunder *inter alia*: -

- "9. Sometime in 1998, 1st respondent applied for allocation of a plot of land from the Ministry of Lands and Housing, Kwara State and she was allocated Plot 1(A) Alimi Road, G.R.A. Ilorin, in her personal/private capacity in the name of "Safiya Daibu."
10. About the same time in 1998, 1st applicant also applied for allocation of a plot of land and it was allocated Plot 1(B), Alimi Road, G.R.A., Ilorin vide a letter of

allocation dated 9th March, 1998. Now shown to me attached hereto and marked as Exhibit 1 is a copy of the said letter.

11. Plots 1 (A) and 1(B) were excised from Plot 1, Alimi Road and are adjacent to each other. Both are contained in the survey plan attached to Certificate of Occupancy No. KW 12638, signed by the 3rd respondent on 231 November, 2005.
12. Plots 1(A) and 1(B) contained a generator house and boys quarters respectively which were to be replicated on the instruction of Ministry of Lands and Housing on the old plot, 1 Alimi Road, G.R.A. Ilorin by the P' respondent and the 1s' applicant respectively. 1s' applicant has relocated or built a replacement boys quarters within Plot 1 Alimi Road, G.R.A. Ilorin while 1s' respondent has not constructed replacement generator house on Plot 1, Alimi Road, G.R.A. Ilorin to date.
13. 1s' applicant upon being allocated Plot 1 (B) Alimi Road, G.R.A. Ilorin made full payments for survey, premium, layout and other charges and was duly issued with receipts by the Ministry of Lands and Housing. All the said receipts are now shown to me. attached hereto and marked as exhibits 2 and 3 respectively.
14. 1st applicant processed and was issued with a Right of Occupancy and a Certificate of Occupancy on 17th December, 2004 and 23rd November, 2005 respectively. Now shown to me, attached hereto and marked as exhibits 4 and 5 are copies of the said Right of Occupancy and Certificate of Occupancy respectively".

From the averments in both the affidavit in support of the motion and statement of claim and exhibits 1 to 5, it is clear that the claimants/applicants/appellants' claim had demonstrated the donation of legal right which ought to be protected *ceteris paribus* by an order of interlocutory injunction if there were a violation or threatened violation of the legal right as donated by the claim.

However, the 1st and 2nd respondents in their counter-affidavit have tended to challenge the assertion of the appellants that they have such legal right to Plot 1 (B) which is the *res* in the substantive suit when the respondents averred as follows: -

6. That I know as a fact that there was never a time that I was instructed by the Ministry of Lands and Housing to relocate any generator house.
7. That I was allocated No. 1 Alimi Road G.R.A. Ilorin, Kwara State as my official quarters since 20 years ago and I have been enjoying peaceful and quiet possession of same until the applicants started disturbing my peaceful enjoyment of same.
8. That I know as a fact that sometimes in the year 1998, myself and my other brother Judges and Magistrates had the parcel of land behind our official quarters] excised and allocated to us by the Kwara State, Government.
9. That sometimes in the year 2003, I traveled with my spouse (the 2nd respondent) on Holy Pilgrimage to Mecca and I left my aged mother at home to take care of the children and the house.
10. That on my return from Saudi Arabia, I discovered of my surprise that construction had gone far on a boys' [quarters which was being built right inside

my official] quarters and upon enquiry from my mother whom I left at home, she told me and I verily believed same to be true that same was being constructed by a man and his labourers who informed her that they were officers from the Kwara State Ministry of Lands and Housing. The said boys' quarter is yet to be completed.

11. That the 2nd applicant and his workers always gain entrance to Plot I(B) Alimi Road, G.R.A., Ilorin through the main and only gate of my official quarters as the whole land (1, 1A and 1B) have just a common fence' enclosing all. The use of the gate has opened my quarters to unwanted visitors who infringed my privacy to my discomfiture and displeasure.
12. That upon the incidence in paragraphs 10 and 11 above; I protested to the Ministry of Lands and Housing on the allocation of Plot 1(B) to the 1st claimant, a Limited Liability Company that same was not proper because Plot (B) Alimi Road falls within and right inside my quarters and there is no other way or road to Plot 1(B) apart from the main gate of my official quarters which is Plot 1 Alimi Road G.R.A., Ilorin and which is fence round even before I started occupying No. 1 Alimi Road G.R.A., Ilorin.
13. That my main ground of protesting the allocation Plot 1(B) is for security reasons.
14. That I know as a fact that to the left hand side of my official quarters which is No. 1 Alimi Road G.R.A.; Ilorin is the house of the former Grand Khadi of Kwara State (Alhaji Abdulkadir Onre), to the right hand side of the said No. 1 Alimi Road is the house of the Director of the State Security Service, and at the back of the same No. 1 Alimi Road is the house of Deacon Onigbinde.
15. That I know as a fact that the entire Alimi Road is a residential area.
16. That I know as a fact that allocating Plot 1(B) Alimi Road, which is within my official quarters to a company when it is not a Commercial Area will expose me and my family members to danger; I being a Judicial Officer.
20. That Plot 1 Alimi Road, G.R.A., Ilorin is my official quarters and it would have been impossible for the 2nd applicant/claimant to enter Plot 1 (B) through Plot 1."

From the foregoing depositions in the affidavit, it is clear that whereas, the appellants' claim to have been allocated Plot 1 (B) as carved out from Plot 1, the 1st and 2nd respondents resist such claim asserting that No. 1 Alimi Road has been the 1st respondent's official quarters since 20 years and she has since then been enjoying peaceful *and* undisturbed possession of the said Plot until the appellants (encroached into same and disturbed her peace. The court below upon the consideration of the disparate claims of the parties rightly held, in my view, while relying on the case of *Falomo v. Banigbe* (1998) 6S.C.N.J 42, (1998) 7 NWLR (Pt. 559) 629; that at that stage of the proceedings, he was not supposed to delve into or predetermine the issue as to who actually is entitled to the land in dispute or whether the allocation of Plot 1 (B) to the appellants was illegal or not, as these are the issues to be tried by the lower court in the substantive suit.

Although, the legal right upon which the appellants/applicants predicated their application for interlocutory injunction is still subject to determination as same is being challenged by the 1st and 2nd respondents, it is settled by a plethora of Supreme Court authorities that all that the appellants/applicants needed to do and which they had done was to show that they had a claim which was not frivolous or vexatious and that there were serious questions or substantial issues to be tried by the lower court. In *Kufeji v. Kogbe* (1961) All NLR113 at 114 which was followed by the Supreme Court in the *Obeya Memorial Hospital* case, the point was stressed that:

*"In an application for interim relief by way of injunction, it is not necessan' that a plaintiff or applicant should make out a case as he should on the merits, it being sufficient that he should establish that there substantial issue to be tried at the hearing. "See age, Egbe r. Onogun (1972) 1 All NLR 95 at 98".*

As was rightly submitted by the appellants, since the trial court acknowledged that there was a serious issue to be tried, the appellant case not being frivolous or vexatious the order for interlocutory injunction ought to be granted to restrain the respondents from trespassing into the plot in dispute pending the determination of the case. See *Akibu v. Oduntan* (1991) 2 NWLR (Pt. 171) at paragraphs C - D and *Hubbard v. Hosper* (1972) Q.B. 84 at 96 which was adopted by the Supreme Court in *Falamo v. Banigbe* (1998)j NWLR (Pt. 559) 676 at 695.

Having held that the appellants had shown that their claim donated a legal right which ought to be protected and consider the fact that conditions for the grant of an order for interlocutory injunction must exist conjunctively, we shall now consider the other conditions.

On the third condition which is whether the applicants shown that the *res* in the case is worth preserving so as to maintain the *status quo ante*, the appellants have vehemently contended holding by the court at page 215 lines 11-18 concerning the *status quo* to be maintained as follows: "The prevailing position when I claimants' writ of summons was filed was the fact of the 1st defendants/respondents (read 'being') in possession of No. 1 Alimi Road, G.R.A., Ilorin encompassing both Plots 1(A) and 1(B), Alimi Road. G.R.A., Ilorin.", submitting that the *status quo* to be maintained on the authority of *Akapo v. Hakeem-Habeeb* (1992) 6 NWLR (E 247) 266 per Nnaemeka-Agu and Ogundare, J.J.S.C. at 30 paragraphs F - G and 311 paragraph C respectively where the learned Law Lords posited:

"So, the status quo that ought to be maintained in case is the state of affairs that existed before the defendants' forcible takeover of the management control of the family properties which constitutes ' wrongful act complained of in the application;"  
And

"I have given careful consideration to the submission made by learned counsel in respect of the question maintaining the status quo bellum. What is the meaning of this phrase? It can only mean the situation or position prevailing before the defendants' conduct complained of by the plaintiff;" is the status quo ante bellum, that is, the state of affairs that existed before hostilities began and wrongful act of the defendants/respondents complained of by the appellants.

It is pertinent to note that the learned trial judge had held at the 215 of the records lines 19 - 21 "I therefore hold that it is Plot 1 (B) Alimi Road G.R.A., Ilorin that is the '*res*' lobe preserved on the particular facts of the instant case pending the determination of the

substantive suit and I so find." In *Governor of Lagos State v. Ojukwu* (1986) 1 NWLR (Pt.18) 621 at 624; Opola, JSC. distinguished between *status quo ante bellum* and *status quo ante item* (the state before the lis) explaining that preserving any property in *status quo*, presupposes the existence of an actual, peaceable uncontested *status quo* preceding the pending controversy, as distinguished from a *status quo*, effected by a wrong doer before institution of the suit. In other words, a trespasser cannot by the very act of trespass create a *status quo*, in respect of the property in dispute and then ask the court to restore that as a *status quo*. Going by the dictum of Oputa, J.S.C., the question is what was the *status quo ante bellum* and *status quo ante litem*.

The answers can be found from the averments of the parties in their respective affidavits. The relevant paragraphs of the appellants' affidavit in support which indicate the *status quo ante bellum* and *ante litem* are hereunder reproduced as follows:

- 21 After Plot 1(B) Alimi Road. G.R.A., Ilorin had been well developed, 1st and 2nd respondents surprisingly requested for the purchase of the said plot from the applicants. They also sent emissaries to me to that effect.  
  
I made it abundantly clear that applicants were not interested in selling Plot 1(B) Alimi Road, GRA, Ilorin to 1st and 2nd defendants having committed so much funds and resources to development of same.
22. When all efforts made at persuading applicants to sell Plot 1 (B) failed, 2nd respondent approached me on behalf of 1s' respondent requesting that Plot 1(A) be swapped with Plot 1(B) as they would prefer Plot 1(B) to Plot 1(A) because of certain undisclosed advantages the former allegedly has over the latter. These request was humbly turned down by the applicants
23. Sometime in the year 2003, 2nd respondent was appointed as a Special Adviser (Political) and later became a Commissioner in the Government of Dr. Bukola Saraki and ever since, both respondents have been employing that position to victimize and frustrate the applicants on account of the latter's resolve to continue to develop their own Plot 1 (B).
24. Pursuant to the foregoing paragraph, labourers hired by the applicants to do clearing of part of Plot 1(B) were prevented from carrying out their job by the 1st and 2nd respondents on 27<sup>th</sup> 1 January, 2004 even when the labourers had been paid for the job.
25. Similarly, workers and labourers sent by the applicants on 31<sup>st</sup> January, 2004 to Plot 1(B) to carry out construction works were equally not allowed to do so by the 1st and 2nd respondents. Both 1st and 2nd respondents have been boasting that they have secured the consent of the Governor of Kwara State and the support of the 3rd and 4th respondents to ensure that 1st applicant's title to Plot 1 (B) is revoked.
26. Also on 31<sup>st</sup> January, 2004, 1 was denied entry into Plot 1(B) by the 1st and 2nd respondents.

Realizing the determination of the applicants to erect a gate at Plot 1(B), 1st and 2nd applicants between 20<sup>th</sup> May and 2<sup>nd</sup> June, 2006, deliberately and intentionally, fenced

Plot 1(B) with their own Plot 1(A) to prevent the applicants from gaining access to their land, building, installations and infrastructure or facilities located on Plot 1(B) and thereby, literally taking over the said plot which does not belong to them".

From the above averments, the case of the appellants is that they have been in peaceable possession and enjoyment of said plot in dispute between 1998 and 2003 when the 1st and 2nd respondents by virtue of their political and financial muscles trespassed on the plot in dispute. In other words, the *status quo ante bellum* was as it existed between the period 1998 and 2003 whereas, the *status quo ante lit em* was as it existed the between 2003 and the 3rd of June, 2006 before the appellants instituted their action in August, 2006. On the other hand, by paragraphs 7, 8, 9, 10, 11, 12, 13, 14, 16, 20 and 22. the 1st and 2nd respondents claim that they have been enjoying the peaceful and quiet possession of No. 1 Alimi Road, G.R. A., Ilorin which plot incorporates Plot 1 (B) Alimi Road for over 70 years and which presupposes that the *status quo ante bellum* dates back to 20 years before hostilities commenced between the parties in 2003, whereas the *status quo ante litem* was the situation as at 2003 and 2006.

If the averments in paragraphs 38 of the appellants' affidavit in support and 20, 21 and 22 of the 1st and 2nd respondents' counter-affidavit are taken into consideration, the learned trial Judge was right to have held as he did at page 215 of the records that the prevailing position when the claimants writ of summons was filed was the fact that the 1st and 2nd defendants were in possession of No. 1 Alimi Road, G.R.A., Ilorin encompassing both Plot 1(A) and KB) Alimi Road. In other words, the *status quo ante* either before hostilities or before the commencement of the action was that the respondents had been in actual possession of the plot in dispute. He was also right to have held that the *res* to be preserved is Plot 1(B) Alimi Road G.R.A., Ilorin. In *Oyeyemi v. Irewole Local Government* (1993) 1 NWLR (Pt. 270) 462 at 476 paragraphs F-G the Supreme Court, per Nnaemeka-Agu said:

"Also it must be noted that the whole purpose of an order to maintain the *status quo* is to preserve the *res*, the subject matter of the litigation, from being wasted, damaged, or frittered away, with the result that if the appeal succeeds, the result would be rendered nugatory in that the successful appellant could only reap an empty judgment. When as in this case, a court of law finds that completion of a step sought to be restrained will not render the appeal, if successful, nugatory, then there is absolutely no basis for making the order to maintain the *status quo*"

See *Gever v. China* (1993) 9 NWLR (Pt. 315) 97 where the Court of Appeal adopted the above dictum of the Supreme Court; *Globe Fishing v. Coter* (1990) 7 NWLR (Pt. 162) 265, where the Supreme Court case of *Ladunui v. Kukoyi* (1972) 3 S.C. 31 was also adopted and *Madubuike v. Madubuike* (2001) 9 NWLR (Pt. 719) 698 at 707.

Whereas the *res* in this case is land which is incapable of being destroyed, damaged, wasted or frittered away the court was right to have held that the *status quo* should be maintained even though the order for interlocutory injunction was not made. Accordingly, I see nothing perverse in the ruling of the learned trial Judge since the appellants themselves have admitted that as between 20th May, and] 2nd June, 2006, the respondents deliberately and intentionally fenced? Plot 1(B) with their own Plot 1(A) to prevent the applicants from gaining entrance which in essence means that the *status quo*, assuming the appellants were in actual possession as they claimed, had changed before the appellants instituted their action on the 7th of August, 2006. All the authorities cited in the respect of title to the plot the

illegality or otherwise of the conduct of the respondents should be reserved for determination during the hearing of the substantive suit.

Closely, connected with status quo ante and preservation of the res is the question as to whether the appellants have shown that the balance of convenience is in their favour. The appellants have copiously argued that the 1st and 2nd respondents have no title to Plot 1(B) and will have nothing to lose if the application is granted and that they have shown by exhibits 1 - 5 that they have title, whereas the 1st and 2nd respondents have failed to show that they have a better title to the land in dispute so as to resist the order of injunction. According to the appellants, they have suffered injury and are still suffering the injury inflicted on them by the 1st and 2nd respondents with the tacit connivance of the 3rd and 4th respondents and that injunction ought to protect the appellants against injury real or threatened to their rights. They have maintained that more justice will result in protecting the applicants who have buildings and installations on Plot 1(B) than the refusal of the application thereby warranting the 1st and 2nd respondents who are mere trespassers to continue to prevent and frustrate the appellants' development of their plot.

The respondents on the other hand have contended that the appellants are not living on Plot 1(B) in question neither are they carrying out any business on the plot whereas the 1st and 2nd respondents who are presently living in Plot 1 which encompasses Plot 1(B) and is covered by the same fence would suffer more inconvenience if the interlocutory injunction is granted. They have also contended that the grant of the application will expose the 1st respondent in particular to danger as it would afford the appellants the liberty to break the fence of the 1st and 2nd respondents as reflected paragraphs 7, 8, 10, 11, 12, 13, 15, 16, 20, 22, 23, 24, 25, 26, 28, 29, 32, 34, 36, 37, 38, 39 and 40 of the 1st and 2nd respondents' counter-affidavit. It is their further contention that the appellants will not suffer any hardship than the risk of tampering with the building materials which they kept outside the premises in issue.

There is no doubt that it is incumbent on the appellants/ applicants who sought for an order for interlocutory injunction to show that the balance of convenience was in their favour. In other words, they ought to show that they would suffer more inconvenience and hardship than the 1st and 2nd respondents if the order of injunction was not granted. Furthermore, they ought to satisfy the court that in the circumstances of the case, it was as just and convenient to make the order sought for. See *Francome v. Mirro Group Newspaper Ltd.* (1984) 1 WLR 892 and *Alcatel Kabehnetal (Nig.) Plc v. Ojuegbele* (2005) 2 NWLR (Pt. 805) 429 at 455. As was rightly submitted, where there is a clear breach of the appellants' right, the question of balance of convenience does not arise *Oduntan v. General Oil Co.* (1995) 4 NWLR (Pt. 387) 1 at 13; as injunction is granted to protect injury or a threat to the right of the applicants. Thus in circumstances as we have found ourselves, the court is always called upon to scrutinize rival claims of the parties and juxtapose them in order to determine whether more justice will result in the grant of the application than in refusing it. See *Kotoye v. C.B.N* (1989) 1 N.S.C.C 238 at 251; (1989) 1 NWLR (Pt. 98) 419.

In order therefore, to discharge the bounding duty of this court to determine where the balance of convenience lies, it is necessary to have a look once more at the affidavits and counter-affidavit of the parties. The appellants have relied on their averments in paragraphs 9, 10, 11, 12, 13, 14, 15, 16, and in particular paragraphs 17(i) - (vii) where they allege that they have earned out substantial improvements or developments on the plot in question, paragraphs 18, 20, 23, 24, 25, 26, 29, 30, 34, 35, 36, 37, 38, 47, 48, 51, 53, 54, 55,

56, where they stated the acts of the 1st and 2nd respondents which amounted to trespass on their said plot. The 1st and 2nd respondents have also relied on paragraphs 7, 8, 10, 11, 12, 13, 15, 16, 20, 22, 23, 24, 25, 26, 28, 29, 32, 34, 36, 37, 38, 39 and 40 of their counter-affidavit to submit that more justice would be done if the application is refused as the lower court had done because the 1st and 2nd respondents particularly the 2nd respondent's life as a judicial officer would be exposed to danger if the application is granted.

When confronted with the respective affidavit evidence of the parties, the lower court in my view rightly held:

"As it could be seen, there is no doubt in my mind that the nature of the injury which the claimants/applicants, -on the one hand, might suffer if this application is refused and it should turn out to be right at the end of the day will be far less than that which the defendants/ respondents particularly 1st and 2nd respondents on the, other hand would sustain if the application is granted and they should turn out to be right at the end of the day. The reason is obvious.

While no amount of damages could compensate for the lives of the 1st and 2nd respondents which will be exposed to danger if the order of injunction is granted, the loss of the applicants (if any) could be adequately compensated in monetary terms as this is borne out by the monetary claims sought by the applicants via their writ of summons and paragraphs 53 and 54(i) & (ii) of their statement of claim.

In view of the foregoing therefore, I am of the view that the balance of convenience in the present application tilts in favour of the defendants/respondents particularly 1st and 2nd respondents. See *Ayorinde v. Attorney-General of Oyo State* (1996) 2 SCNJ 198 & 208; (1996) 3 NWLR (Pt. 434) 2 and *Falowo v. Banigbe* (supra).

I am also of the view that taking into consideration, the totality of the facts of this case, the 1st and 2nd respondents would suffer more hardship if the order of injunction were made as sought by the appellants as the respondent who is a judicial officer would be exposed to danger if the fence to her official residence is broken by the appellants by the grant of the application. Again, the lower court rightly held that whatever inconvenience the appellants would suffer, can be compensated in monetary terms as is borne out from the monetary claims in both their writ of summons and statement of claim.

On the fifth condition that the appellants/applicants must show that their conduct is not reprehensible or that there was no delay in bringing the application. I must state without any equivocation that by virtue of paragraphs 23, 24, 25, 26, 29, 33 and in particular 38 of the appellants'/applicants' affidavit in support, wherein they deposed the fact that:

"38. Realizing the determination of the applicants to erect a gate at Plot 1(B), 1st and 2nd applicants between 20th May and 2nd June, 2006, deliberately and intentionally, fenced Plot 1(B) with their own Plot 1 (A) to prevent the applicants from gaining access to their land, building, installations and infrastructure or facilities located on Plot 1(B) and thereby, literally taking over the said plot which does not belong to them"; it is glaring that the appellants had vacillated from 2003 when they started noticing hostilities on the part of the 1st and 2nd respondents against them until 2006 when the, 1st and 2nd respondents purportedly fenced in Plot 1(B) to prevent appellants from gaining access to their land and virtually taking over their land. It is pertinent to note that 1st and 2nd

respondents vehemently denied the allegation that they fenced Plot 1(B) in 2006 as contended by the appellants. For the avoidance of doubt, paragraphs 16, 20 and 22 of the counter - affidavit are hereunder reproduced:

"16. That I know as a fact that allocating Plot 1(B) Alimi Road, which is within in official quarters to a company when it is not a Commercial Area will expose me and inv family members to danger; I being a judicial officer.

"20. That Plot Alimi Road, G.R.A., Ilorin is my official quarters and it would have been impossible for the 2nd applicant/claimant to enter Plot I (D) through Plot 1.

"22. That neither myself nor the applicants fenced an Plot 1(B) as the fence of my official quarters has been erected for more than 20years."

See also paragraph 12 of the counter affidavit where the respondents averred thus:

"12. That upon the incidence in paragraphs 10 and 77 above, I protested to the Ministry of Land and Housing on the allocation of Plot 1(B) to the 7 claimant, a Limited Liability Company that same was not proper because Plot 1 (B) Alimi Road, falls within and right inside my quarters and there is no other way or road to Plot 1(B) apart from the main gate of my official quarters which is Plot 7 Alimi Road, G.R.A., Ilorin and which is fenced round even before 1 started occupying No. 1 Alimi Road, G.R.A., Ilorin"

From the above averments and assuming that the 1st and 2nd respondents actually fenced round Plot I(B) as at the 3rd of June, 2006, the appellants neither instituted the action culminating in the application for interlocutory in 2003 when they started noticing the hostilities of the respondents and the ploy to take over Plot 1(B) and even in 2006, when the suit was eventually initiated, it was not until the 7'h of August, 2006, that the appellants thought it expedient to file the application for interlocutory injunction. Definitely, the appellants inordinately delayed bringing up the application as injunction would normally not issue to restrain a completed act. In the circumstances we have found ourselves, the equitable maxims that equity aids the vigilant and that delay defeats equity are aptly applicable. The Supreme Court, per Kanbi-Whyte, J.S.C, in *Akapo v. Hakeem-Habeeb* (1992) 7 S.C.N.J 143-145 succinctly captured the mood of the courts there is a delay in bringing an application of this nature, when he posited *inter alia*:

"The effect of delay was also pronounced upon by this court in *Kotoye v. C.B.N & Ors* (1989) 1 NWLR (Pt. 98) 419 where Nnaemeka Agu, J.S.C said: - Conduct of parties has also quite often been relevant factor in the consideration of whether or not to grant an application for interlocutory injunction as with permanent injunction ... Also delay in bringing the application will defeat it because such a delay postulates that there is no urgency in the matter and destroys the very basis for a prompt relief by way of interlocutory injunction. I have consistently pointed out in this judgment that respondents have not disclosed any of their legal rights which would be affected by the conduct of the appellant. The period of nine months before the institution of the claim for injunction was not a period when the respondents could have altered their position to their detriment. The delay did not affect non - existent legal rights of the respondents."

Although, in this case there appears to be the existence of legal right on the part of appellants, the delay in bringing up this application and the fact that the act sought to be restrained, that is the fencing in of Plot 1(B), has been completed, there is nothing to restrain.

See *Buhari v. Obasanjo* (2003) 17 NWLR (Pt. 850) 587 at 639 - 640 and *John Holt (Nig.) Ltd. & Anor. v. Holts African Workers Union of Algeria & Cameroons* (1963) 1 All N.L.R 379; (1963) 2 SCNLR 383. Accordingly, no matter how meritorious the case of the appellants may seem and, notwithstanding the copious submissions and avalanche of cases cited, the lower court was right in exercising its discretion against the grant of the application.

On the sixth condition, it is needless to repeat that the court below having considered the totality of the case presented by the parties and the claim of the plaintiffs/appellants which was more in damages, rightly held that no amount of damages can compensate for the lives of the 1st and 2nd respondents who would be exposed to jeopardy whereas the appellants can be adequately compensated in monetary terms should they succeed in their substantive claim at the High Court or at the Court of Appeal if need be.

On the last issue, which is that the applicants in some cases must undertake to pay damages should the court exercise its discretion wrongly, in this case the appellants/applicants had in paragraph 57 undertaken to indemnify the respondents for any loss they may suffer if the application is granted such that, all things being equal the application ought to be granted. However, notwithstanding this, the court held at page 216 on the authority of *Ezebilo v. Chinwuba* (1997) 7 NWLR (Pt. 511) 108 & 114 that:

*"I cannot myself conceive the adequacy of any payment of damages, no matter how high the quantum thereof, in respect of the injury the defendants, particularly the 1st and 2nd defendants will suffer if this application is granted and the\ turn out to the right at the end of the day."*

*On the whole, I agree with the holding of the trial court that the application lacked merit and was properly dismissed by the court below. Issue number 1 is hereby resolved in favour of the respondents as all the conditionalities for the grant of the order of interlocutory injunction were not concurrently in existence.*

*With the resolution of issue Number 1 which is the crux of this appeal, the other issues become merely academic but as a penultimate court, it is necessary to comment briefly on issues numbers II and III. On issue number II, the grouse of the appellants is that the counter-affidavit of the 1st and 2nd respondents was not signed and that an unsigned document on the authorities of *Faro Boning Co. Ltd. v. Osuji* (supra) and *Tsalibawa v. Habiba* (supra) is a worthless document to all intent and purposes. It was further contended on the authority of *Adesanya v. Otuewu* (1993), that the respondents who did not reply to that question when it was raised by the appellants in the lower court were deemed to have conceded and admitted that point to the opponent.*

*Again, the appellants quarreled with the reliance placed on the said incompetent counter-affidavit and the holding of the court that the 1st and 2nd respondents' counter-affidavit was not served outside the prescribed period as provided for under Order 11 rule 2(3) of the Kwara State High Court (Civil Procedure) Rules, 2005 which provides for 7 days within which to file a counter-affidavit and written address. Furthermore, the learned counsel, contended that the respondents failed to comply with Order 41 rules 1 and 6 which provide for extension of time and payment of N100 per day of default in the event of failure to file the counter-affidavit within time, relying on *Ikweki v. Ebele* (supra) and *Avong v. K.R.P.C. Ltd.* (2002) 14 NWLR (Pt. 788) 508 at 528 paras, A - D to urge the court to hold that the lower court was wrong to make use of the counter-affidavit. The learned Attorney-General and learned counsel for the 1st and 2nd respondents did not react to the first aim of the appellants' submission*

*regarding the unsigned counter- affidavit. In respect of the submission that the counter- affidavit was served out of time, the learned Attorney-General submitted that the application for injunction was filed on the 7th of August, 2006 while the counter-affidavit was filed on 13/11/2006 but that there is no evidence of the date of service of the appellants' motion on the 3rd and 4th respondents. The learned Attorney has referred to Order 4 rule 1(1), Order 56 rule 8(2) of the Kwara State High Court (Civil Procedure) Rules, 2005 and the case of Abubakar v. Yar'Adua (2008) 4 NWLR (Pt. 1078)465 at 510 - 512 to urge us to discountenance the submissions of the appellants.*

*There is no doubt that the courts have held on the authorities above cited that an unsigned document is a worthless document. However, section 84 of the Evident Act. which governs affidavit evidence provides in clear terms that the court may permit an affidavit to be used notwithstanding it is defective in form to the Act, if the court is satisfied that it has been sworn before a person duly authorized. See, Eddowes v. Argentine Co. (1870) 38 W.R. 629; Re: Tierney (1855) 15 C.B. 761 and F.B.I.R. r. Babayo (1974) NMLR 136. Order 4 rule 1(1). Accordingly, the court was therefore right when it exercised its discretion to make use of the counter-affidavit since the appellants did not contest that the said affidavit was not sworn before a person duly authorized to administer the oath for such an affidavit. On the question of non-compliance with the Kwara State High Court (Civil Procedure) Rules, 2005, Order 4 r. 1 provides thus:*

*"Where in beginning or purporting to begin any proceedings, or at any stage in the course of or in connection with any proceedings, there has, by reason of anything done or left undone, been a failure to comply with the requirements of these rules, whether in respect of time, place, manner, form or content or in any other respect, the failure may be treated as an irregularity and if so treated, will not nullify the proceedings or any document, judgment or order therein." takes care of the submissions of the appellants.*

As was decided in *Abubakar v. Yar'Adua*, the courts have departed from slavish adherence to technical rules of procedure. The court was therefore right to have treated the filing of the counter-affidavits out of time (if at all) as an irregularity which will neither nullify the proceedings nor the counter-affidavits. This issue will again be resolved in favour of the respondents.

Finally, on issue number III which is whether the court had not breached the appellants' right to fair hearing, I have looked at the entire ruling and am satisfied that the court considered the totality of the documentary evidence before arriving at the decision dismissing the application, the appellants were therefore not denied their right to fair hearing.

On the whole, I hold this appeal lacks merit and it is accordingly dismissed however, order that in view of the complicated nature of the case, and the fact that the substantive case has been pending in the lower court since 2006, the case should be given accelerated hearing. Parties shall bear their respective costs.

**DENTON WEST, J.C.A.: I agree.**

NWEZE, J.C.A.: I had the privilege of reading the draft of the leading judgement which my Lord Agube. J.C.A. just delivered no\ v. I am in agreement with his reasoning and conclusion.

Learned counsel dissipated so much energy in his agitation: a favourable response to his preliminary objection. It is indubitable that the notice of appeal is the cornerstone in the building blocks of the architecture of every appeal. As a result, any defect in this foundational process is bound to affect the entire edifice of the appeal.

Like the prudent architect, an appeal court will not permit, other material (by means of court processes) to be imposed on that imminently fragile foundation. This is the rationale for the rule expressed in many cases that any defect in a notice of appeal renders the entire appeal incompetent. There can be no gainsaying the fact that an appeal court has no jurisdiction to entertain an incompetent appeal.

However, as I noted in my leading judgment in: *Olujimi v. Ekiti State House of Assembly and Anor* [Appeal No. CA/IL/29/2008; delivered on November 21, 2008], contemporary judicial attitude is; geared towards the evolution of a functional trial procedure or what: may loosely be called functional procedural jurisprudence. This can only be achieved if the courts deliberately avoid technicalities. There is, indeed, clear evidence that nowadays there is a deliberate departure; from procedural formalism or legalism.

As my Lord Agube, J.C.A. observed in the leading judgment, the preliminary objection is mainly technical. I am, therefore, entirely: in agreement with my noble and erudite Lord that this court, and indeed every other court in Nigeria, can no longer be bogged down; by technicalities. It is for these reasons and the more elaborate reasons contained in the leading judgment that I, too, shall enter an order dismissing it. I abide by the consequential orders in the leading, judgment.

Appeal dismissed