

(iii) AND FOR SUCH FURTHER ORDER(S) AS THIS HONOURABLE COURT MAY DEEM FIT TO MAKE IN THE CIRCUMSTANCES OF THIS CASE

BACKGROUND STATEMENT OF FACTS:

2.01 The facts are as contained in the Affidavit in support of the application. The Plaintiff/Applicant shall rely on the Affidavit in support of the Application, the Exhibits attached and the Originating Summons, Affidavit and Written Address dated 17th of September, 2023.

3.00 ISSUE FOR DETERMINATION:

The issue for determination is whether or not the Plaintiff/Applicant is entitled to the prayers sought in his application.

4.01 ARGUMENT ON THE ISSUE FOR DETERMINATION:

4.01 In arguing this application, the Plaintiff/Applicant relies on all the paragraphs of the Affidavit in support of application and the Exhibits attached to the Motion.
4.02 My Lord, we are mindful of the fact that the Plaintiff/Applicant has a duty in this instant case to establish certain conditions to entitle it to the reliefs sought to wit:

(i) Existence of legal rights the infringement of which they seek to protect.

(iii) Existence of triable issues.

(iii) Preservation of the Res or Status Quo

(iv) Real urgency

(v) Balance of convenience.

(vi) Inadequacy of damages.

(vii) No delay in presenting the application.

(viii) Undertaking to pay damages.

4.03 We shall now establish the above-mentioned conditions in the subsequent paragraphs as follows:

EXISTENCE OF A LEGAL RIGHT

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- 4.04 My Lord, a careful perusal of the Affidavit in support of this instant and the content of Exhibit Pacific1, would reveal that the Plaintiff/Applicant is the Warai pilotage District for Service Boat Operation of the Nigerian Ports Authority. This is a sequel to the success recorded in the procurement process that was initiated by the Nigerian Ports Authority.
- 4.05 It therefore follows by parity of reasoning that the Plaintiff/Applicant has a right to protect owing to the Certificate of No Objection issued by the Bureau of Public Procurement which inure in its favor. This position has been judicially favored by the Apex Court in **ABOSELEDEHYDE LABORATORIES PLC v. UNION MERCHANT BANK LTD & ANOR (2013) LPELR-20180(SC)** as follows:
- "In an application for interlocutory injunction, applicant's legal right over the subject matter is a precondition for the grant of the consideration of special circumstances for the grant of the application."
- 4.06 My Lord, we need not belabor this Honourable Court on this glaring point, and the reason is that we have succinctly stated the same in the substantive suit before this Honourable Court. However, at the risk of repetition, may we state that one of the triable issues in this instant case is the fact that the presidential directive on the subject matter is at variance with the provision of the enabling law.
- 4.07 More so, the attempt to bypass the procurement process that the Plaintiff/Applicant has actively participated in and emerged therefrom calls for a determination on the legality or otherwise by this Honourable Court.
- 4.08 My Lord, it is also pertinent to state that there have been deliberate attempts as we have demonstrated in the Affidavit in support of this instant Motion that there is the likelihood that the procurement process would be terminated by the approving authority. Once that happens, it will affect the right of the Plaintiff and the reliefs sought in the substantive Suit will be rendered futile as the contract under reference would have been awarded to another Company.
- 4.09 My Lord, it is therefore clear as crystal that the grant of this application would assist this Honourable Court in preserving the status quo and not affect the essence of the substantive suit. For this proposition, may we

comment the position of the Penultimate Court in ODLANA V. OLADEJO & ORS (2012) LPELR-9733(CA)? wherein it was stated thus:

"In the case of SUN INSURANCE (NIG) PLC V. LMBS LTD 2005 12 NWLR PT. 940 at 608, it was a situation that called for the Court ordering the maintenance of STATUS QUO pending the determination of the substantive action. In that case it was observed that "The status quo to be maintained is the position or situation of the parties as at the time of filing the action so that the res or subject matter thereof would not be altered during the pending of the suit."

REAL URGENCY

4.10 My Lords, at the risk of emphasis, conscious steps have been taken to actualize the directives of the President in whom the executive powers of the Federation reside, all in a bid to circumvent the procurement process that saw the emergence of the Plaintiff/Applicant as the preferred bidder.

4.11 More so, it is pertinent to state that the Plaintiff/Applicant has expended funds in the procurement process and if the directive of the President is carried out by the Nigerian Port Authority, the Plaintiff will suffer irreparable damage that cannot be quantified in monetary terms. We therefore urge this Honourable Court to intervene now as steps are been taken to circumvent the legitimate procurement process. In this regard, may we commend the recent position of the Penultimate Court in POLARIS BANK LTD V. BELLVIEW AIRLINES LTD & ANOR (2021) LPELR-56258(CA)? as follows:

"An interlocutory or interim relief by way of Injunction is generally granted only in matters of urgency, so that applicant who is guilty of delay thereby demonstrates the absence of any urgency requiring prompt relief."

BALANCE OF CONVENIENCE

4.12 My Lord, a robust perusal of the facts of the case would reveal that the balance of convenience is not in favor of the Plaintiff/Applicant. This is so as the refusal of the application would cause more harm to the Plaintiff/Applicant than it will to any other party. If Your Lordship refuses the application, the Defendants will benefit from a glaring illegality that this Honourable Court can stop from happening.

² Per RITA NOSAKHARE PEMU, JCA (Pp 22 - 22 Paras E - G)
³ Per ONYEKACHI AJA OTISI, JCA (Pp 36 - 37 Paras C - D)

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4.13 It is on this basis that we commend the case of **MABON LTD & ORS V. ACCESS BANK (2021) 1 PEER-53261(CA)** wherein the Penultimate Court stated what a Court must consider in weighing the balance of convenience as follows:

"Issue (3) is on balance of convenience. This is not an abstract term but it can be quite subjective because what constitutes balance of convenience in one situation may not be so in another. In other words, the determination by a Court of where the balance of convenience rests in a case is a question of fact, not law. This exercise of discretion implies weighing from the evidence before the Court, the degree of hardship or inconvenience which each party is likely to suffer according to whether the order is granted or refused."

4.14 My Lord, it is clear from the above ratio of the Court of Appeal that the balance of convenience is not in favor of the Plaintiff/Applicant based on the facts of this case, and we urge Your Lordship to hold.

INADEQUACY OF DAMAGES

4.15 My Lord, as stated earlier in the Affidavit in support of this instant Application, the issue for contention is the determination of the legality or otherwise of the directive of the President to circumvent a legitimate procurement process that saw the emergence of the Plaintiff/Applicant as the preferred bidder which is evidenced by the Certificate of No Objection annexed to the Affidavit in support of this application.

4.16 My Lord, the nature of the reliefs sought in the substantive suit cannot be achieved by the award of damages if the directive of the Commander in Chief is brought to life. Whether or not there will be res to litigate upon in the substantive suit is mainly dependent on the grant or refusal of this application.

4.17 It is therefore our contention that if the contract under reference is awarded to another company based on the directives of the President, the Plaintiff/Applicant cannot be compensated in the form of damages. On this note, we commend the case of **BOBAI V. ACHI & ANOR (2015) 1 PEER-25901(CA)** wherein it was stated as follows:

"Now, specific performance is the rendering, as nearly as practicable, of a promised performance through a judgment or decree. It is a decree issued by the Court which constrains a contracting party to do that which he has promised to do. Specific performance is a Court-ordered remedy that requires

- fulfilment of a legal or contractual obligation when monetary damages are inappropriate or inadequate. It is a remedy provided by equity to meet those cases where the common law remedy of damages is inadequate.
- 4.18 In light of the above decision, we submit on this heading that the only remedy available to the Plaintiff/Applicant is that of specific performance and not damages, and we urge Your Lordship to so hold.
- NO DELAY IN PRESENTING THE APPLICATION**
- 4.19 My Lord, we contend that the Plaintiff/Applicant has approached this hallowed temple of justice timeously to seek remedy for the wrong done to her as a result of the steps taken by the Defendants to circumvent the procurement process. In that pursuit, we state that the Plaintiff/Applicant did not sleep on her right, and we urge Your Lordship to so hold.
- 4.20 My Lord, in light of the above, we submit that Plaintiff/Applicant has established why he is entitled to the reliefs sought on the strength of the immortal position of the Apex Court in **AKINFELU v. ADEGBORE & ORS (2008) LPELR-354(SC)** as follows:
- "Interlocutory Injunction is procedurally between interim Injunction and perpetual Injunction. It is an Injunction granted by the Court pending the determination of the case. The locus classicus is *Kotye v. Central Bank of Nigeria* (1989) 1 NWLR (Pt. 98) 419, a decision of this Court. In that case, this Court held as follows: (a) That the applicant must show that there is a serious question to be tried, i.e. that the applicant has a real possibility, not a probability of success at the trial, notwithstanding the defendant's technical defence (if any), (Obeya Memorial Specialist Hospital v. A-G Federation (1987) 3 NWLR (Pt. 60) 325 followed.) (b) That the applicant must show that the balance of convenience is on his side; that is, that more justice will result in granting the application than in refusing it. [*Missini v. Bologun* (1968) 1 All NLR 318 referred to]; (c) That the applicant must show that damages cannot be an adequate compensation for his damage or injury, if he succeeds at the end of the day. (d) That the applicant must show that his conduct is not reprehensible for example that he is not guilty of any delay. (e) No order for an interlocutory Injunction should be made on notice unless the applicant gives a satisfactory undertaking as to damages save in recognized exceptions. (f) Where a Court of first instance fails to extract an undertaking as to damages, an appellate Court ought normally to discharge the order of Injunction on appeal."

4.21 My Lord, to conclude our contention, we state that this Honourable Court has the power to mandate a government body to carry out its duty that it has undertaken to carry out under a contract based on the doctrine of legitimate expectation.

5 CONCLUSION

5.1 Relying on the totality of arguments canvassed with the aid of judicial and statutory authorities in support of our position, we humbly urge Your Lordship to resolve the issue canvassed in favor of the Plaintiff/Applicant and accordingly grant the reliefs sought herein without much ado.
WE ARE MOST OBLIGED.
DATED THIS 17TH DAY OF SEPTEMBER, 2023.

DATED THIS 17TH DAY OF SEPTEMBER, 2023

Settled By:



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