INDUCTION COURSE FOR NEWLY APPOINTED JUDGES OF THE LOWER COURT

PAPER PRESENTED

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TOPIC: INJUNCTIONS, DISCRETION AND THE RULE OF LAW

INTRODUCTION

The paper topic, Injunctions, Discretion and the Rule of Law, involves tripartite concepts which are intertwined. Each can be developed into a volume of legal literature. However, I will not attempt to do that here because of time constraints. I will rather, touch on them respectively and endeavour to produce a co-ordinated and coherent discourse.

The topic as constituted, comprises three (3) fundamental concepts in the administration of justice that are prone to abuse by courts. This fact underscores the great premium placed on the topic, which is in accord with the theme for the course, "ENHANCING JUDICIAL EFFICIENCY AND QUALITY OF DECISION MAKING". I commend the National Judicial Institute for the choice of the topic.

(A) INJUNCTION

Injunction, generally, is an order of equitable nature restraining the person to whom it is directed from performing a specific act or requiring him to perform a specified act. Injunctions are generally classified into prohibitory or mandatory injunctions according to whether they restrain or require the performance of the act which is in question.

JURISDICTION TO GRANT INJUNCTION.

The jurisdiction of court to grant injunction can be under inherent powers of courts, rules of court or statutory provisions.

INHERENT POWERS OF COURT

Inherent powers of the court are recognised by S.6 (6) (A) of the 1999 Constitution of Nigeria as amended. It reads thus:

"The judicial powers vested in accordance with the foregoing provisions of this section, shall extend notwithstanding anything to the contrary in this constitution, to all inherent powers and sanctions of a court of law"

Inherent power of court is that which is not expressly spelt out by the constitution or in any statute or rule but which can of necessity be invoked by any court to supplement its express jurisdiction and powers. It is a most valuable adjunct to the express jurisdiction or powers conferred on courts by the constitution, any law or rule of law. As nebulous as it appears, it usually does not extend the jurisdiction of a court. It practically lubricates its statutory jurisdiction and makes it work.

A.C. B. V NBISIKE (1)

AKILU V FAWEHNMI (2)

Furthermore, the inherent power of the court is the power which is itself essential to the very existence of the court as an institution charged with the dispensation of justice. Inherent powers of court are therefore those powers that are reasonably necessary for the administration of justice in the court. It is doubtful if justice can be effectively administered in our court, if the courts do not possess inherent powers to make consequential orders, orders that directly or indirectly, immediately or intermediately promote the process of litigation and ensure proper administration of justice.

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(1) 1995 L P E L R 14214 (CA)

(2) 1989 3 S.C.N.J.I

ERISI & ORS V IDIKA & ORS (3)

INEC V JIME & ORS (4)

What begs for an answer here is whether the said inherent powers of court as recognised in the constitution enures to the Magistrates court and other courts, lower in hierarchy to the high court, which are not created by the constitution.

S. 6(4)(a) of the 1999 constitution of Nigeria as amended provides thus:

"Nothing in the foregoing provisions of this section shall be construed as precluding

The National Assembly or any House of Assembly from establishing courts, other than those to which this section relates, with subordinate jurisdiction to that of a High Court."

It is thus a fact that the said lower courts are established by virtue of the powers donated to the National Assembly and the House of Assembly to establish them, however, with subordinate jurisdiction to the high court.

Furthermore, S.6 (6) (A) of the same constitution (a later provision), expressly provides thus:

"The Judicial powers vested in accordance with the "forgoing provisions" of this section

Shall extend, notwithstanding anything to the contrary in this constitution, to all inherent powers and sanctions of a court of law"

Much as the lower courts are not created by the constitution, they are courts of law to which inherent powers enures to them. See

NWAOGU V ATUMA (5), NGWUTA (JSC) as he then was held thus:

"Inherent power is inborn in the court. It enables the court to deal with diverse matters over which it has intrinsic authority such as procedural rule making, regulating the practise of law and general judicial housekeeping. Inherent powers of court of law are powers which enable it effectively and effectually to exercise the jurisdiction conferred upon it"

The nature and essence of inherent power of the court is further described in the

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(3) 1987 L P E L R 1160 (SC)
(4) 2019 L P E L R 48305 (CA)
(5) (2012) L P E L R 19647 (SC)

case of *OGWUEGBU V AGOMUO (6)* thus:

"The inherent power of the court is that power which is itself essential to the very existence of the court as an institution and to its ability to function as such an institution. An inherent power has to be inherent in the sense that it forms an essential and intrinsic element in the whole process of adjudication. It is innate in a court and is not a subject of specific grant by the constitution or legislation…… This explains Section 6(6) (a) of the 1979 constitution (now 1999) which merely recognised and stated the obvious – that the inherent powers of a court of law exist, notwithstanding anything to the contrary in this constitution……. As soon as the court is established, all its inherent powers adhere and attach to it."

It is thus clear that the inherent powers of court of law, including the lower courts and as recognised by the constitution, are innate and should not have selective application to only courts of law created by the constitution. It is imbued in every court of law inclusive of the lower courts.

STATUTORY JURISDICTION/RULES OF COURT

Statutory jurisdiction of court is the jurisdiction donated to the court by the law or statute. The said statute will define the limits within which such jurisdiction of the court is derived from its nature as a court of law.

The lower courts are established by virtue of powers donated to the National Assembly or State Assembly under the constitution. Thus, while the superior courts are created by the constitution, the lower courts are created under the constitution.

With respect to the statutory power of the lower courts to grant injunction, recourse should be had to the law establishing the court including its procedural rules guiding the procedure in the said court.

I will in this lecture have recourse to the law establishing the Magistrates court in Imo State which to a great extent is similar to the law establishing the magistrates courts in other states, on the subject. The principal law is the

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(6) 1999 7 N W L R PT 509 144

Magistrates Court law of Eastern Nigeria Cap 82, Laws of Eastern Nigeria, as amended, as applicable to Imo State.

S. 17 (1) (e) of the Magistrates Court Law amendment Edict No. 23 of 1971 which replaced S.17 of the principal law reads thus:

"Subject to the provisions of this law and to any other written law, the Chief Magistrate shall have and exercise jurisdiction, in civil causes or matters to grant in any suit instituted in the court, injunctions or orders to stay waste or alienation or for the detention or preservation of any property the subject of such suit or to restrain breaches of contracts or tort"

Further, S.29 of the said principal law provides that *"every Magistrate shall have power to make such decrees and orders and issue such processes and exercise such powers, judicial and administrative in relation to the administration of justice as shall from time to time be prescribed by rules of court or subject thereto by any order of the Chief justice."*

This provision relates to the general powers of the Magistrates, as donated by the principal law.

By Order V of the Magistrates court Rules made under the said principal law, the Magistrates exercise powers to make orders of injunction. It is expressly provided therein.

Further, in so far as law and equity are to be administered concurrently in the Magistrates court and to the extent that the remedy of injunction is equitable, the Magistrate can make orders for injunction. The Magistrates court thus have the statutory jurisdiction to make orders of injunction.

It is axiom from the foregoing that the magistrates and lower courts have both the inherent and statutory powers or jurisdiction to entertain and grant applications for injunction.

SCOPE OF INJUNCTION

Generally, injunction is a judicial process or mandate by which upon certain established principles of equity, a party is required to do or restrain from doing

a particular thing. It is framed according to the circumstances of the case, commanding an act which the court regards as essential to justice or restraining an act which it deems contrary to equity and good conscience. See

DR. KUBOR & ANOR V HON. DICKSON & 2 ORS (7)

They may be further classified as interlocutory or interim injunction on the one hand, where the order is expressed to have effect only until a further hearing or until a named date or time.

The terms interim and interlocutory injunction are often used interchangeably. But in practise, there is a substantial difference. An Interlocutory Injunction is normally expressed to last, till the conclusion of the substantive action while interim injunction is a much more temporary order of injunction which normally lasts till a named date, usually till the next motion day or pending the determination of the motion on notice. It is for a limited time.

On the other hand, Perpetual Injunction is not limited. It is usually granted as a final order after the establishment of a right. See *ADENIRAN V ALAO (8)*

There are other types of injunction which include:

(1) QUIA TIMET INJUNCTION: This is a type of Injunction granted when ones legal rights have not been infringed but is granted to prevent a potential harm or injury from occurring rather than to redress a harm that has occurred. It is a preventive measure aimed at preventing harm or injury from occurring.

(2) MAREVA INJUNCTION: It is a form of injunction whereby the Defendant could be restrained from disposing of his or alienating his property so as not to frustrate or render nugatory the Judgment that the Plaintiff may obtain in the case before the court. Thus, the Defendants assets are frozen to prevent them from being removed or dissipated which

(7) 2012 10-11 (SC)
(8) 1992 2 N W L R PT 223 at 350

assets could be used to satisfy a potential Judgment.

(3) ANTON PILLER ORDER: This is a form of order of court that allows a Plaintiff to enter the Defendant's premises to conduct a search and remove documents or other items which form evidence in his action. The aim of this order is to prevent a defendant from destroying or hiding evidence that is relevant to the claim. By order V of the Magistrates court rules of Imo Sate, the court may authorise any person to enter upon or into any land or building in the possession of any party for purposes of any appointment or order made.

MODES OF APPLICATION FOR INJUNCTION

(1) EXPARTE

An exparte application is one made without notice to the opposing party. It is typically resorted to in situations of real urgency and in special circumstances where irreparable harm may occur before the service of processes on the opposing party. See *KOTOYE V CBN & ORS (9)*

JONATHAN V FRN (10)

The said urgency must not be self-induced or self-imposed urgency. The order issued by an exparte application, is usually made in the interim and operates until the other party is put on notice of the said motion. The order can however be discharged or varied by the court.

Where the application is made exparte, the court will balance the need of the applicant to an immediate relief together with any difficulties which may be encountered in proceeding inter parties, against the undesirability of making an order in the absence of the Defendant. Ordinarily, this may seem to offend the constitutional provision of the principle of fair hearing. However, in *THOMAS A. EDDISON V BULLOCK (11)*, it was held thus:

(9) 1989 2 SC I
(10) 2019 10 N W L R PT 1681 at 568
(11) 1912 15 C. L R 678 at 681

"There is a primary precept governing the administration of Justice, that no man is to be condemned unheard and therefore, as a general rule, no order should be made to the prejudice of a party unless he has the opportunity of being heard in defence. But instances occur where Justice could not be done, unless the subject matter of the suit were preserved and if that is in danger of destruction by one party, or if irreparable or serious damage be imminent, the other may come to the court and ask for its interposition even in the absence of his opponent on the ground that delay would involve greater injustice than instant action." See

ARIORI V ELEMO (12)

In the grant of the exparte application of injunction, the court should take into consideration the extent and nature of the risk which will be undergone by the Plaintiff if there is adjournment, the degree of probability with which he has established his right, the extent of hardship and inconvenience to the Defendant that the grant of the injunction will involve, any difficulties which might be encountered in effecting service on or giving notice of the material application to him and the manner in which the grant or refusal of the relief will probably affect third parties.

It is in recognition of the foregoing that exparte applications of injunction should not be granted as a matter of course.

The law with respect to exparte application for injunction, constitute one of the most difficult sections of our law and the difficulty exist not because the law is recondite but because the ascertained principles of law must be subjected at all times to a rather amorphous combination of facts which are perpetually different in every case. See

LADUNMI V KUKOYI & ORS (13)

There are occasions where the opposite party is present in court at the hearing of exparte application for injunction. Where the opposite party agrees to take the

(12)1983 1 SC 13 at 76
(13) 1972 (SC) 30

motion exparte, he may be served with the exparte motion as well as the motion on notice and he thus becomes aware of both applications.

He may elect to convert the exparte application into that on notice or may appear in opposition to the exparte application. If inspite of his presence and opposition, an interim order be made, he can still oppose it when the motion on notice is heard. He can also apply to have it set aside or varied when:

(1) where there is non-disclosure of material facts.

(2) where the order was fraudulently obtained.

(3) where the Plaintiff deliberately delays the hearing of the motion on notice. See

OGBONNA V NURTW (14)

Generally, the opposite party is not a party to the exparte motion and to that extent may not be heard. However, where he is present in court on the day, it is in the interest of justice and fair hearing that his attention be drawn and heard on the application which if granted will affect him. See *ADEBISI V ODUNKOYA (15).*

Furthermore, where the opposite party prays for time to be heard on the application, the court may grant him the time depending on the circumstances. In urgent and deserving cases the court can make an order for the maintenance of the status quo or extract an undertaking on record from the opposite party that pending the hearing on the said application, he will not do the act, the subject of the application.

I will further add here that where an exparte application for injunction is filed before your court, insist that the motion on notice be filed alongside the motion exparte and the order, if granted must not be made to last too long and usually is pending the hearing of the motion on notice filed alongside.

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(14) 1990 3 N W L R PT 14`at 696
(15) 1997 11 N W L R PT 527 at 83 CA

(2) INTERLOCUTORY

Where an injunction is sought pending the determination of the substantive suit, such an injunction can only be interlocutory. It is for the preservation of the subject matter in dispute which should not be destroyed or annihilated before the Judgment of the court. See

AKIBU & 4 ORS V ODUNTAN (16)

The application for interlocutory injunction is made on notice to the other side and it is granted to support a legal right.

An Interlocutory application for Injunction is granted pending the trial of the action in order to keep the matter in status quo until the issues in controversy between the parties can be tried and determined. Thus, an applicant can properly obtain an order of interlocutory injunction even though he has not made out a case that may entitle him to win a perpetual injunction. See *GLOBE FISHING INDUSTRIES LTD V COKER (17)*

The applicant for interlocutory injunction is no longer required to show prima facie case or strong Prima facie case for a success of the application. What is required, which is the new trend, is that the applicant must show that the claim is not frivolous or vexatious in other words there is a serious question to be tried. See *AMERICAN CYNAMID CO V ETHICON LTD (18)*, where Diplock L. J observed as follows:

"The use of the expressions as "a probability", "a prima facie case" or a strong prima facie case in the context of the exercise of discretionary power to grant an interlocutory injunction leads to confusion as to the object sought to be adhered by this temporary relief. The court no doubt must be satisfied that there is a serious question to be tried. It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavits as facts on

(16) 1991 2 S C N J 30
(17) 1990 7 N W L R PT 162 at 265
(18) 1975 A. C. 396 at 407

which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed cogent and mature considerations. These are matters to be dealt with at the final"

See *ONYESOH V NNEBEDUM & ORS (19)*

PERPETUAL INJUNCTION

Perpetual injunction can only be applied for and subjoined in the reliefs in the substantive action. It can only be granted after a trial in the Judgment, after the applicant has established his right or entitlement to the substantive relief especially declaratory reliefs. It is usually an ancillary relief to a declaratory order.

The essence of a perpetual injunction in a final determination of the rights of the parties is to prevent the infringement of those rights and to obviate the necessity of bringing multiplicity of suits in respect of every repeated infringement between the parties. See

GOLDMARK NIGERIA LTD & 3 ORS V IBAFON COMPANY LTD & 4 ORS (20)

ORAL APPLICATION FOR INJUNCTION

The lower courts are generally speaking courts of summary jurisdiction. Thus, they are courts that have limited jurisdiction to hear and determine certain type of cases. The procedures in these courts are often simplified and less formal than in the higher courts. These courts provide a quick and efficient way of resolving dispute. Applications for injunctions generally can be countenanced orally in keeping with its summary jurisdiction.

Indeed, Order IV of the Magistrates Court Rules of Imo State provides that Interlocutory applications may be made orally to the Magistrate in whose court a cause or matter is pending provided that the Magistrate shall have power.

(a) to direct the application to be reduced to writing

(19) 1992 3 S C N J 129
(20) 2012 3 SC PT 111 at 72

(b) to direct notice thereof to be given to any person affected thereby.

(c) to direct in what manner evidence relating to the application shall be given by the applicant or any person affected thereby.

Where the court entertains an oral application for injunction, ensure to interrogate the facts presented and be satisfied that the said facts are true especially for exparte injunction. You must not grant same for the asking. Further, save in very urgent and deserving cases, ensure that the other party is heard on the oral application. You must also record the application and the reply on the record book clearly and explicitly.

(B) DISCRETION

The grant or refusal of an Order of Injunction is at the discretion of the court, which discretion like all other judicial discretion must be exercised judicially and judiciously having regard to all the facts and circumstances of each case and every case.

Judicial discretion is a term applied to the discretionary action of a court or judge bounded by the rules and principles of law, not giving effect to his will or private opinion and not to humor. It is based or exercised upon facts and circumstances presented to the court from which it must draw a conclusion governed by law, justice and common sense.

See *ERONINI V IHEUKO (21)*

The exercise of the court's discretion is said to be judicial if the Judge involves the power in his capacity as Judge qua law. In other words, an exercise of a discretionary power will be said to be judicial, if the power is exercised in accordance with the enabling statutes. On the other hand, an exercise of a discretionary power is said to be judicious if it carries or conveys the intellectual wisdom or prudent intellectual capacity of the Judge as judex. In

(21) 1989 2 N W L R PT 101 46 at 60-61

this second situation, the exercise of the discretion must be replete with such wisdom and tenacity of mind and purpose. The exercise must be based on a sound and sensible Judgment with a view to doing justice to the parties.

Discretion is discretion, whether it wears any of the two qualifying expressions mentioned above, only when it is exercised by the court according to law and good Judgment. However, discretion is not discretion if its exercise is based on sentiments or ideas on the matter completely outside the dictates of either the enabling law or good Judgment as the case may be. See *WAZIRI V GUMEL (22)*

INC TRUSTEES OF NGF V AG & ORS (23)

The exercise of the discretion to grant injunction is not done malafide, arbitrarily or in vacuo. Firstly, the court must be satisfied that it is just and convenient to grant the injunction sought. Since it is not granted as a matter of course, the applicant has a duty to satisfy the court that special circumstance exist to warrant the said grant. See

T. A. A AYOKINDE V ATTORNEY GENERAL OF OYO STATE (24)

It is trite that courts, including the lower courts are not bound by decisions of the higher courts based on discretion, save where the circumstances are the same, which is unusual.

All courts have the flexibility to make decisions based on the specific circumstances of a case rather than being strictly bound by precedent. Thus, discretionary decisions are not considered binding precedent for future cases. Discretionary decisions are fact-specific and may not be applicable to other cases with different facts. Discretionary decisions allow courts to exercise flexibility and consider the peculiar circumstances of each case. See

FOLORUNSHO V FOLORUNSHO (25), where it was held that a court in exercising its discretion is not bound by precedence because no two cases are exactly the

(22) 2012 L P E R 78161 – 29 -30
(23) 2023 L P E L R 60655 CA
(24) 1996 2 S C N J 198
(25) 1996 5 N W L R PT 450 at 612

same. Where a court is bound by precedence in discretion, it will in effect be a fetter to and put an end to discretion of court. See also *OKWOR & ORS V UGWU & ORS (26)*

However, as a guide, there are varied factors which the courts should take into account in the exercise of its discretion in the grant of injunction. These include:

(1) The applicant must show that there is a serious issue to be tried including the strength of his substantive case. That the action is neither frivolous nor vexatious.

(2) The Applicant must show that the balance of convenience is in favour of granting the application than in refusing it. Thus, more justice will result in granting the application than in refusing it.

(3) The applicant must show that damages cannot be an adequate compensation for injury, if the application is not granted. Being an equitable remedy, the applicant must show that his conduct is not reprehensible and must not be guilty of delay.

(4) An undertaking made by the Defendant not to perform the acts which if performed will rise to irreparable injury achieves the same result.

(5) The court can also order for speedy trial in lieu of hearing of the application for injunction. Thus, the court can make preservative orders against all parties and order for accelerated hearing.

(6) The applicant must make an undertaking to pay damages in the event of a wrongful exercise of the courts discretion in granting the injunction.

See FALOMO V BANIGBE & ORS (27)

(7) Injunction is not to be granted to restrain completed acts. It is not a remedy for an act that had been completed. See *AYORINDE V A.G. OYO STATE (28)*

(26) 2016 L P E L R 42094 (CA)
(27) 1998 L P E L R
(28) 1996 3 N W L R 434 at 20

I will commend the admonition of the Chief Justice of Nigeria on the wrong use of discretionary powers at the ALL NIGERIA JUDGES CONFERENCE held in Abuja in September 1988. His Lordship said:

"The decision of some of our courts on exparte injunction seem to put individual interest over and above the collective national interest in Nigeria……..

A court of law denied electricity to a town simply because of dispute between two contractors. Indeed there is urgent need among some of us, the Judges, to appreciate that exparte injunction which was devised as a vehicle for the carriage of instant justice in proper cases should not be converted into a bulldozer for the demolition of substantial justice…… "

(C) RULE OF LAW

The rule of law as we know is a fundamental principle that governs individuals, organizations and governments and society. It ensures that all members of the society are subject to a fair and just system of laws. The law is supreme and all individuals, institutions and government are subject to the rule of law. The law should be fair, just and applied impartially.

However, with respect to injunction, the rule of law refers to the principles and guidelines that should guide issuance and enforcement of injunction. The said principles and guidelines include:

(1) JURISDICTION OF THE COURT

Where a court lacks jurisdiction to entertain a matter, it will have no jurisdiction to make an order of injunction in the suit. *UZONDU V UZONDU (29)*

(2) FAIR HEARING

(a) You should not make any order of injunction to affect persons who are not parties in the action. The grant of the order of injunction should be confined to the parties in the action.

(29) 1997 9 N W L R PT 521 at 466 CA

(b) You have a duty to ensure that you do not in the determination of the application for injunction determine the same issues or rights that could arise for determination in the substantive suit.

See *AKAPO V HAKEEM HABEEB (30)*

(c) Facts relied upon in opposition to an application for injunction should not (whether denied or not) be considered by the court in the determination of the application, if those facts constitute the entirety of the substantive claim before the court because at that stage of the proceedings, the court is not concerned with the proof of those facts or denials of them.

(3) ENFORCEMENT OF INJUNCTION

The rule of law ensures that a party to whom an order of injunction is directed to and has been served or aware of the order has a duty to obey the said order. He breaches the said order when he fails to comply with the terms of the injunction. He is in direct breach when he intentionally disobeys the terms of the injunction and indirect breach when his actions or inactions indirectly contravene the terms of the injunction.

Where such a party breaches the terms of injunction, he risks being cited for contempt which can result in fines, imprisonment or other penalties. The court can also set aside the very act done by the party in breach of the said terms of injunction.

See, *EZEGBU V F.A. T. B (31)*

CONCLUSION

Parties in litigation sue to court for the determination of their rights in relation to the subject matter of the suit. It is a fact that it takes a long period of time before the determination of the case. It therefore stands to reason that the

(30) 1992 6 N W L R PT 247 at 287
(31) 1992 9 N W L R PT 264 at 132 SC PT 264

subject matter of the suit should be preserved from waste, destruction or dissipation by any of the parties or that the position of the parties at all times preceding the commencement of hostilities is maintained pending the determination of the case. It is the preservation of the subject matter in dispute or the maintenance of the status quo that is achieved through the judicial process of equitable order of injunction. Without this remedy, Judgment of the courts will be rendered nugatory and the victorious party will be left with phyrrhic victory. This clearly underscores the significance of the said equitable remedy of injunction in the administration of justice.

The relationship between injunction, discretion and rule of law is that of balance and interdependence. Injunctions are issued based on the discretion of the court while discretion is guided by the rule of law. This ensures that injunction comply with the rule of law.

Finally, these three concepts work together to ensure that justice is administered efficiently, fairly and lawfully, in our courts. We, as officers in the temple of justice, have a bounden duty to ensure compliance with the principles of these concepts.

Thank you.