PROCEEDINGS IN INTERLOCUTORY APPLICATIONS: INJUNCTIONS, STAY OF PROCEEDINGS AND EXECUTION

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INTRODUCTION

I am honoured and thankful to the Board of Governors of the National Judicial Institute (NJI), the Administrator of the Institute, Hon. Justice R. P. I. Bozimo OFR and the staff of the Institute for this invitation to present a paper, this time at the induction course for newly appointed Judges and Kadis. I remember quite vividly nineteen years ago when I attended a similar course on my appointment as a Judge of Anambra State Judiciary. I and my fellow newly appointed Judges and Kadis were full of excitement and trepidation at our new status and very eager to learn as much as we could for a smooth change over to the new status. For some, especially those who prepared well by reading up on literature especially rules of procedure of the relevant state, judgments of a jurist whose style of writing is preferred and full judgments of other jurists generally, the change was easy and smooth. For some not so studious ones, it was a daunting task as they continued to dwell in uncertainties as to how to handle certain situations. This induction course (which is compulsory for all newly appointed Judges and Kadis) is intended to assist in quickly equipping the new appointees with the needed tools

for their new status. I thank the Chief Justice of Nigeria, the Chairman of the Board of NJI for continuing the now well established tradition of giving all the required support to enable the Institute function optimally in its primary duty of providing continuing legal education for all Judicial Officers of this our great Nation. The courses usually cover a wide range of topics and are very useful for those who participate attentively. The theme of this year's Course "Inculcating Judicial Excellence in Newly Appointed Judicial Officers" is apt and depicts what the Course is all about. I am to speak on "Proceedings in Interlocutory Applications: Injunctions, Stay of Proceedings and Execution" It is a very wide topic and it is not possible to deal with all aspects of it in a paper such as this. As all your lordships here were graduates of various law institutions, legal practitioners or members of the lower bench before your appointment, the issues cannot be new to you. I intend therefore to dwell mainly on the practical aspects of the application of the concepts.

INTERLOCUTORY APPLICATIONS:

Interlocutory applications are made to courts during the pendency of proceedings. They include all steps taken for the purpose of assisting either party in the prosecution of his case, whether before or after final judgment; or of protecting or otherwise dealing with the subject matter of the action before the rights of the parties are finally determined.[1] For example, after counsel has filed the writ of summons and pleadings exchanged; the issue may arise whether the court has jurisdiction to hear the matter, it may turn out that a wrong party was sued or that one of the parties died and needed to be substituted, or that there is need to apply for interlocutory injunction to restrain one of the parties from continuing with a certain course of action. There are countless situations that may require counsel to make one application or the other to the court in the course of the proceedings. These are referred to as interlocutory applications. An interlocutory application may be made in open court or in chambers. The Rules of the various High Courts make provisions for the kind of applications that can be taken in chambers. [2] Interlocutory applications are usually by motion which may be exparte

or on notice. The motion is supported by an affidavit deposing to facts to be relied on by the applicant. The motion does not need to be supported by an affidavit where the applicant is relying on points of law only or where the facts are already before the court such as in the pleadings filed in court. If the respondent intends to challenge the application on facts, he must file a counter-affidavit. Where there are conflicts in the affidavit and counter-affidavit filed by the parties on material facts, the court is under an obligation to call for oral evidence to resolve the conflict except where there is documentary evidence which could assist the court in resolving the conflict. In the case of ***NWOSU V. IMO STATE ENVIRONMENTAL SANITATION BOARD (1990) 2 NWLR (PT. 135) 688 @ 718 C-D, 734 G,*** the Supreme Court per Nnaemeka-Agu JSC of blessed memory observed:

> *"Evidence by affidavit is, it must be noted, a form of evidence. It is entitled to be given weight where there is no conflict, after the conflict has been resolved from appropriate oral or documentary evidence. For, true, it is the law that where there is a conflict of affidavit evidence called by both sides, it is necessary to call oral evidence to resolve the conflict! See Falobi v. Falobi (1976) 9 & 10 SC 1 @*

p. 15; Akinsete v. Akinditure (1966) 1 All NLR 147. But I believe that it is not only by calling oral evidence that such a conflict could be resolved. There may be authentic documentary evidence which supports one of the affidavits in conflict with another. In a trial by affidavit evidence such as this, that document is capable of tilting the balance in favour of the affidavit which agrees with it. After all even if oral testimony had been called, such a documentary evidence would be a yard stick with which to assess oral testimony: see Fashanu v. Adekoya (1974) 1 All NLR 35 @p. 48."

It is inappropriate for a judicial officer to make findings of fact on the conflicting affidavit evidence of parties in the absence of any documentary evidence and without calling oral evidence to resolve the conflict. In the case of ***ISHIAQ V. EHITOR [2003] 10 NWLR (PT.828) 221,*** where the learned trial Judge failed to act in terms of this old established practice, the order the court made was held by the appeal court to have occasioned a miscarriage of justice and was set aside.

It is important to note that the obligation on the court to call oral evidence to resolve conflicts in affidavit evidence does not apply where the conflict is not fundamental or material to the substance of the case but is merely flimsy

and distractive. In such a situation the court can disregard the conflict and proceed to evaluate the evidence on both sides in order to resolve the conflict. Resort to the calling of oral evidence (which can consume the precious time of the court) should be confined to instances when it is impossible to resolve the conflict without extraneous evidence. See ***OIL & GAS EXPORT FREE ZONE AUTHORITY V. T. C. OSANAKPO (SAN) (2009) LPELR-8504(CA).***

At the conclusion of hearing of the interlocutory application, the decision of the court is drawn up in the form of an order by the registrar of the court and signed by the presiding judge.

As mentioned earlier there are countless situations that may require counsel to make one application or the other to the court in the course of the proceedings. The more important ones however are injunctions, stay of proceedings and stay of execution. I shall discuss these seriatim.

INJUNCTIONS

An injunction is an equitable order restraining the person to whom it is directed from doing the things specified in the order or requiring in exceptional situations the performance of a specified act. A claim for an injunction is a claim in equity. The order for injunction is available to restrain the defendant from the repetition or the continuance of the wrongful act or breach of contract complained of. It is generally granted to protect a legal right which is in existence. [3] Injunctions are issued where mere award of damages at the end of the trial would not be satisfactory or effective or may lead to a greater harm or injustice. There are several types of injunctions such as Interim or Interlocutory injunction granted provisionally before a trial to maintain the status quo pending the hearing of the suit; [4] Perpetual Injunction or a final order granted after the trial on the merits to protect the legal rights of the plaintiff which has been established at the trial[5]; Mandatory Injunction granted to command the defendant to take steps to rectify the consequences of what he has already done. Mandatory injunctions are very harsh on the defendant and are hardly granted by the courts but they have been issued for example to compel the removal of

buildings or other structures wrongfully placed upon the land of another;[6] Quia Timet Injunction granted to restrain harm which has not yet occurred but is threatened and imminent;[7] Mareva Injunction also known as a freezing order granted to freeze the assets of the defendant to prevent him from dissipating the assets or taking them out of the jurisdiction of the court so as to frustrate the judgment;[8] Anton Piller Order of Injunction[9] granted to allow the applicant to enter the premises of the defendant to search for and seize material documents and articles. It is used mainly in patent, copyright or passing off cases and is obtained exparte to avoid the destruction or spiriting away of the materials by the defendant if put on notice.

Having looked cursorily at some of the various types of injunctions I intend to dwell more on interim and interlocutory injunctions as they are the ones that are used more and consequently call for closer examination of their incidents.

INTERIM AND INTERLOCUTORY INJUNCTIONS

An interim injunction is of short duration and typically arises in extremely urgent situations where there is no time to put the other side on notice and have the judge hear

from both sides in order to make a reasoned decision. It is therefore usually ex parte for a few days to enable the other side be put on notice for the interlocutory application to be heard which is usually granted pending the determination of the substantive suit. The difference between interim and interlocutory injunctions was eloquently stated by the Supreme Court in the case of

KOTOYE V. CENTRAL BANK OF NIGERIA (1989) 1 NWLR (PT 98) 419 @ 441 – 442 per Nnaemeka-Agu JSC of blessed memory:

> *"……Even though the word "Interlocutory" comes from two Latin words "inter" (meaning between or among) and "locutus" (meaning spoken) and strictly means an injunction granted after due contest inter parties, yet when used in contradistinction to "interim" in relation to injunctions, it means an injunction not only ordered after a full contest between the parties but also ordered to last until the determination of the main suit. Applications for interlocutory injunctions are properly made on notice to the other side to keep matters in status quo until the determination of the suit……they are such that they cannot, and ought not, be decided without hearing both sides to the contest.*
>
> *Interim injunctions on the other hand while often showing the trammels of orders of injunction made ex parte are not necessarily coterminous with them. Their*

main feature which distinguishes them from interlocutory injunctions is that they are made to preserve the status quo until a named date or until further order or until application on notice can be heard. They are also for cases of real urgencies. But unlike ex parte orders for injunction, they can be made during the hearing of a motion on notice for interlocutory injunction, when because of the length of the hearing; it is shown that irretrievable mischief or damage may be occasioned before the completion of hearing. Also it can be made to avoid such irretrievable mischief or damage when due to the pressure of business of the court or through no fault of the applicant, it is impossible to hear and determine the application on notice for interlocutory injunction: See Beese v. Woodhouse (1970) 1 W.L.R. 586 at p. 590. It must however be emphasized that what the court does in such a case is not to hear the application for interlocutory injunction ex parte, behind the back of the respondent but to make an order which has the effect of preserving the status quo until the application for interlocutory injunction can be heard and determined."[10]

I think the difference between the two concepts – interim and interlocutory injunctions are obvious and must not be confused as they are not interchangeable. ***Onyesoh v. Nebedum [1992] 3 NWLR (PT. 229) 315.***

GRANT OF INTERIM INJUNCTIONS EX PARTE

The problem of abuse of the power of issuing interim injunctions ex parte has been with us for years. In the case of ***OKECHUKWU V. OKECHUKWU [1989] 3 NWLR (PT. 108) 234*** where the lower court granted to a defendant who did not file a counterclaim an interim order of injunction ex parte, Uwaifo JCA (as he then was) held at page 247:

> *"It is most disturbing that the use of ex parte injunction by some judges cannot be supported in any measure either on the applicable principles or on the facts. They do not seem to advert to the need for caution in the exercise of that extraordinary jurisdiction. They appear to give the impression that the discretion is so personal that it does not matter if others see it as a means of inflicting undeserved punishment and hardship on another party or other persons. It has again become necessary to issue a reminder that even where everything points favorably to the granting of an ex parte injunction, there is always the need to make its life short; and indeed for an undertaking by the person who obtains it.……These were completely overlooked in this present case in which, indeed, a step has been taken further. The defendant who has not counter-claimed was given the benefit of an interim injunction behind the back of the plaintiff. This is most indefensible and unlawful."*

In the above case, Oguntade JCA (as he then was) at page 249 B-D observed:

> *"The grant of ex parte interim injunction will only be justified when the injury sought to be prevented is grave and such that if the application for it is heard on notice,* ***a great harm of unsurpassable proportion*** *will have been done to an applicant. Otherwise there can be no justification in clamping an injunction against a person who has had no notice it was being applied for and who can therefore not make representation in respect thereof. Usually these ex part injunctions can cause a great monetary and emotional loss to the party restrained and I can only warn that lower courts should be extremely cautious and reflective in its use. It is as I said designed to do justice when there is a grave emergency. If it is used uncaringly and in circumstances that do not warrant its use, it can be an instrument of great injustice which vendetta-seeking litigants can employ to harass and embarrass their adversaries. It can also put the court on the cross-fire line with suspicions enveloping it that it is taking sides with the disputants."*

The above two quotes have said it all. Judgment in the above appeal was delivered in 1989; 27 years ago. It is unfortunate that the sentiments expressed in the case still prevail today. The matter is viewed so seriously that Rule 2 of the Code of Conduct for Judicial Officers warned against the abuse of the power of issuing interim injunctions ex

parte. It is a misconduct which may render a judicial officer liable to disciplinary action or even dismissal from service. In spite of the frequent warnings and actual dismissal of some judicial officers there are still a few incidents in which some judicial officers have continued to defy the warning issuing exparte injunctions improperly to the embarrassment of the Judiciary. It is very important therefore that newly appointed judicial officers should familiarize themselves with the conditions for the grant of interim injunctions ex parte. In fact it should be avoided altogether except in cases of extreme urgency where in the words of Oguntade JSC (Rtd) 'a great harm of unsurpassable proportion will have been done to an applicant' if the application is refused. The conditions under which an application can be granted ex parte are set out in the Rules of Procedure of various High Courts and the Federal High Court. For example, Rule 7, Order 26 of the Federal High Court (Civil Procedure) Rules, 2009 provides:

(1) No motion shall be made without previous notice to the parties affected thereby.
(2) Notwithstanding sub-rule I of this rule, the Court may, if satisfied that to delay the motion till after notice is given to the parties affected would entail

irreparable damage or serious mischief to the party moving, make an order ex parte upon such terms as to costs or otherwise and subject to rule 12 of this order, and upon such undertakings, as the justice of the case demands.

(3) No application for an injunction shall be made ex parte unless the applicant files with it a motion on notice in respect of the application.

Order 26 Rule 8 (1) provides that a motion ex parte shall be supported by an affidavit which, in addition to the requirements of rule 3 of this order shall state sufficient grounds why delay in granting the order sought would entail irreparable damage or serious mischief to the party moving. Rule 12 (1) provides that no order made on motion ex parte shall last for more than fourteen days after the party or person affected by the order has applied for the order to be varied or discharged or last for another fourteen days after application to vary or discharge it has been argued. Sub rule (2) provides that if a motion to vary or discharge an ex parte order is not taken within fourteen days of its being filed, the ex parte order shall lapse.

The recurring phrase to warrant the grant of interim injunction ex parte is irreparable damage or serious mischief to the party moving or a great harm of unsurpassable proportion. What then is meant by

irreparable damage or serious mischief? In Kotoye v C.B.N. (supra) Nnaemeka-Agu JSC observed:

> *"The basis of granting an ex parte order of injunction, particularly in view of section 33 (1) of the Constitution 1979 is the existence of special circumstances, invariably, all pervading real urgency, which requires that the order must be made, otherwise an irretrievable harm or injury would be occasioned to the prejudice of the applicant. Put in another way, if the matter is not shown to be urgent, there is no reason why ex parte order should be made at all; the existence of real urgency and not self imposed urgency is a sine qua non for a proper ex parte order of injunction."*

Oguntade JCA (as he then was) in ***BANK BOSTON NA USA & ORS V. VICTOR ADEGOROYE & ANOR (2002) 2 NWLR (PT. 644) 217*** added:

> *"In recent times there has been a grounds well of judicial opinion against the reckless and improper use of the power to grant ex parte orders. There is no doubt that it is a very useful jurisdiction to be invoked only in cases of extreme urgency as where a building may be demolished, a property taken out of jurisdiction or some other grave irreversible injury caused if the order is not made. It is a jurisdiction to be sparingly and responsibly invoked and only in cases which justify its use"*

So clearly, the order can only be properly made where there is urgent need for it as where a building is about to be demolished or where the property in dispute is about to be taken out of jurisdiction. It is an abuse for the operation of a bank to be halted on an ex parte order of injunction granted to a person who had been removed as a director of the bank; it is an abuse for installation ceremonies of chiefs to be halted by ex parte interim injunction when the dispute had been dragging on for years. It is also an abuse of the process for the convocation ceremony of a University to be halted on an ex parte application of two students who failed their examinations.[11] I believe the issues are clear enough. As observed by Fabiyi JCA as he then was in ***OKEKE V. OKOLI [2000] 1 NWLR (PT. 642) 641 @ 653-654 F-B*** the law relating to order of interim injunction and injunction generally is now so well settled that it is only a person who decides to close his eyes while walking that will miss the road.

Injunction is an equitable remedy and consequently discretionary. The discretion must however be exercised judicially and judiciously. The primary purpose of the injunction is the preservation of the subject matter or 'res'

of the suit or the maintenance of the status quo pending the determination of the suit. Sometimes there is a dispute as to what is the status quo in a given situation. Generally, the status quo to be maintained is that in existence before the controversy or dispute arose and action commenced. In otherwise the situation as is before the defendant embarked on the activity sought to be restrained[12]. If, for example A is in possession of a piece of land and B enters the land and begins to erect a fence wall on the perimeters of the land claiming ownership of the land. A of course will immediately institute an action against B for declaration of title, trespass and injunction. To stop the construction by B, he would need to file a motion for interlocutory injunction. If A satisfies the conditions and injunction is granted, B would be restrained from continuing with the construction work on the land pending the determination of the suit. Or the order of the court may be that the parties maintain the status quo ante pending the determination of the suit. The status quo before the dispute was that A was in possession when B entered the land and started the construction work. The status quo that must be maintained pending the determination of the suit is that B

must stop his construction of the fence wall and await the decision of the Court as to who owns the land.

For the court to exercise its discretion in favour of an applicant for injunction, certain conditions must be satisfied. These conditions must be deposed to in the affidavit in support of the motion on notice. The conditions for the grant of interim and interlocutory injunction are the same except for the element of urgency required for interim injunction[13]. They are (1) existence of legal right; (2) substantial issue to be tried; (3) balance of convenience; (4) irreparable damage or injury; (5) conduct of the parties and (6) Undertaking as to damages.

(1) LEGAL RIGHT

In the case of ***Akapo v. Hakeem-Habeeb [1992] 6 NWLR (Pt. 247) 266 @ 289*** the Supreme Court per Karibi-Whyte JSC referring *to Kotoye v C. B. N. (Supra) and Obeya Memorial Hospital v. A-G Federation (supra)* reiterated that the essence of grant of an injunction is to protect the existing legal right or recognizable right of a person from unlawful invasion by another. Therefore the first hurdle an applicant for an injunction must surmount is to show the

existence of a legal right which is being threatened and deserves to be protected. Justice Karibi-Whyte JSC in the case further observed:

> *"The claim for injunction is won and lost on the basis of the existence of competing legal rights……where an applicant for an injunction has no legal right recognizable by the courts, there is no power to grant him an injunction."*

An example of a situation where there was a clear legal right justifying the grant of an injunction is the case of ***Ojukwu v. Governor of Lagos State (1986) 3 NWLR (Pt. 26) 39***. In the cases of ***Ifekwu v Mgbako [1990] 3 NWLR (Pt 140) 591 and Okechukwu v Okechukwu (Supra)*** where injunctions were granted in favour of defendants who did not counterclaim; the appeals were successful because the injunctions were not based on any interest or rights claimed, the defendants having not filed counterclaims.

(2) SUBSTANTIAL ISSUE TO BE TRIED

This condition is important because it raises a fundamental issue which judicial officers must pay particular attention to. In considering an application for interlocutory

injunction the court should not try to resolve conflicts of evidence on affidavit as to facts on which the claims of either side may ultimately depend or decide difficult questions of law which call for detailed argument and serious consideration. In other words, the court must be careful not to delve into facts the resolution of which might lead to a determination of the substantive suit. All that is required of the applicant is to show that there is a substantial issue to be tried at the hearing. There is no longer any need to show a strong prima facie case as a condition for grant of an injunction. See ***U.T.B. Ltd v. Dolmetsch Pharm. (Nig.) Ltd (2007) 16 NWLR (Pt. 1061) 420.*** Further, the applicant at this stage does not need to make out a case on the merits as he would in the substantive case. All he needs is to show is that there is a substantial issue to be tried. ***Obeya Memorial Hospital v. A-G Federation (Supra).*** [14]

(3) BALANCE OF CONVENIENCE

Balance of convenience means that the court must look critically at the facts deposed to in the affidavits of the parties and determine on whose side the balance of convenience tilts. That is, who will suffer more

inconvenience if the application for injunction was granted or refused? An injunction will be granted if the balance of convenience favours the applicant. In the case of Egbe v Onogun (1972) LPELR-1034 (SC) the Supreme Court referred to Para 766 of Halbury's Laws of England 3rd Edition Vol. 21 where it was stated that:

> *".....the Court in determining whether an interlocutory injunction should be granted, takes into consideration the balance of convenience to the parties and the nature of the injury which the defendant, on the one hand would suffer if the injunction was granted and he should ultimately turn out to be right, and that which the plaintiff, on the other hand, might sustain if the injunction was refused and he should ultimately turn out to be right. The burden of proof that the inconvenience which the plaintiff will suffer by the refusal of the injunction is greater than that which the defendant will suffer, if it is granted, lies on the plaintiff."*

Consequently, balance of convenience means the disadvantage to one side or the other which damages cannot compensate. If the balance of convenience is on the side of the applicant it means more justice will result in granting the application than in refusing it.[15]

(4) IRREPARABLE DAMAGE OR INJURY:

In ***Saraki v. Kotoye (Supra)*** irreparable damage was defined as injury which is substantial and cannot be

adequately remedied or atoned for by damages. The applicant in his affidavit evidence must depose to facts which show that if the injunction is not granted he will suffer serious and substantial damage which cannot be remedied by monetary compensation or damages.[16]

(5) CONDUCT OF THE PARTIES:

In ***Peter v Okoye [2002] 3 NWLR (PT. 755) 529 @ 552 A-C,*** the Court of Appeal Enugu Division per Fabiyi JCA (as he then was) observed:

> *"In determining an application for interlocutory injunction, conduct of the parties is one of the relevant factors to be taken into consideration. On the part of an applicant, a reprehensible conduct is enough to deny him a grant of his application. An applicant for an order of interlocutory injunction should fail if he is guilty of delay. This is because an order of interlocutory injunction is an equitable remedy. It is known that delay defeats equity. An applicant should act timeously so as not to over-reach his opponent. Kotoye v. CBN (Supra); Nigerian Civil Service Union v. Essien (supra); Ezebilo v. Chinwuba (supra) at page 128."*[17]

In the case of ***Akapo v. Hakeem Habeeb (1992) 6 NWLR (Pt. 247) 266***, the Supreme Court held that where a respondent to an application for injunction relies on the illegality of his actions, he has no right to resist the

application of the applicant with a recognized legal right to an order of injunction because injunction being an equitable remedy he who comes to it must come with clean hands.

It is clear then that the conduct of both the applicant and the respondent are very material in the exercise of the discretion whether or not to grant an injunction.

(6) **UNDERTAKING AS TO DAMAGES**:

One of the conditions for a grant of interlocutory injunction is that the applicant must give an undertaking to pay damages in the event it turns out that the injunction ought not to have been granted. The usual practice is for the applicant to depose in his affidavit in support of the application his willingness to pay damages. The undertaking is an enforceable promise at large to pay the defendant what he might suffer by way of damages to be determined at a later stage.[18] If the plaintiff loses the case on the merit the undertaking becomes realizable. The defendant would however have to apply to the court for an inquiry as to the quantum of damages suffered as a result of the injunction. The application for inquiry would be refused if not promptly made. Such applications are

uncommon, probably because the defendant is so happy that the plaintiff lost the case that he could not be bothered about the damage suffered. I believe however that where the damage was really heavy, the defendant will take necessary action to make the plaintiff pay.

The Rules of Court empower the courts in appropriate cases to make an order for accelerated hearing of the suit instead of wasting time hearing an application for injunction.

STAY OF PROCEEDINGS AND EXECUTION

A party in a court proceeding who is dissatisfied with the decision of the court on an interlocutory point may appeal against the decision and then apply for stay of proceedings pending the determination of the appeal. A party against whom a judgment of the court is given who is dissatisfied with the judgment may appeal against the judgment. Where he has lodged an appeal, it may then be necessary to apply for a stay of execution of the judgment pending the determination of the appeal in order to avoid his appeal being rendered nugatory. The power of the Courts to grant stay of proceedings and execution derive from their

inherent jurisdiction, the Rules of Court and other statutory provisions.

STAY OF PROCEEDINGS:

Stay of proceedings as the name suggests delays the trial process and should be granted only when absolutely necessary. In the case of ***Obi v Elenwoke (1998) 6 NWLR (Pt. 554) 436 @ 442-443*** H-A; Oguntade JCA (as he then was) stated succinctly with reference to decided cases and other authorities the law with respect to stay of proceedings. Permit me to quote from the judgment.

> *"On the grant of an order of stay of proceedings, the learned authors of Halsbury's Laws of England 4th Edition Vol. 37 paragraph 442 at page 330 write:*
>
> > *'The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantial merits of his case, and therefore the court's general practice is that a stay of proceedings should not be imposed unless the proceedings beyond all reasonable doubt ought not to be allowed to continue.'*
>
> *In Schackleton v. Swift (1913) 2 KB 307 at 312 Vaughan Williams L.J. said:*
>
> > *'Generally speaking, the consequence is that judges are very slow to stay actions; that does not mean that there is no discretion in the judges, but the general practice is that you*

should not stay actions unless the action, beyond all reasonable doubt, ought not to go on. In other words you ought not to stay an action unless one or two things occur; either the action before the court is what in old days would have been held to be a demurrable claim, or the action is of such a character that, although it may not be demurrable, there is plain reason why it must fail.'

In Odogwu v. Odogwu (1990) 4 NWLR (Pt. 143) 224 at 235 this court re-stated the views of Apkata JCA as he then was in Prince Titus Arojojoye v. U.B.A.& Anor (1986) 2 NWLR (Pt. 20) 101 at 112 thus:

'Whether or not to stay proceedings following an appeal against an interlocutory order depends on a number of factors. It is for the trial judge to exercise his discretion judicially bearing in mind the circumstances of each case. Invariably, however, where an interlocutory order does not finally dispose of the case, it would be wrong to stay proceedings because of an appeal lodged against it by an aggrieved party. This is so because such an order can be made the subject of appeal if it ultimately becomes necessary following the final judgment. It saves time and expense to proceed with the case. It is the duty of every judge to eliminate situations which may unnecessarily cause delay in the administration of justice.

On the other hand, if the appeal, if successful, will put an end to the proceedings in the trial court, prudence dictates that a stay of proceedings be granted.'

> *In Lawrence Okafor and Ors v. Felix Nnaife (1987) 4 NWLR (Pt.64) 129 at 137, the Supreme Court stressed that in the grant of an order staying execution or proceedings, the court should be guided primarily by the necessity to be fair to both parties."*

The salient point to note therefore is that a stay of proceedings should not be granted where the interlocutory appeal following the application for stay of proceedings would not finally dispose of the case. It is advisable in such a situation that the aggrieved party waits till the final judgment to lodge an all embracing appeal. If however he chooses to file an interlocutory appeal, stay of proceedings should not be granted as that would lead to unnecessary delay in the administration of justice. A stay of proceedings can only be granted by the court where it is absolutely necessary and there is no other option open to the court. In the case of ***N.N.P.C. v. O. E. (Nig) Ltd [2008] 8 NWLR (Pt.1090) 583 @ 617C – 618D***, Court of Appeal Abuja Division per Aboki JCA set out as gathered from various decided cases the principles which should guide the court in the exercise of the discretion whether or not to grant a stay of proceedings pending the determination of an appeal:

i. *"There must be a pending appeal.*
A stay of proceedings can be granted only if there is a pending appeal which is valid in law. See N.B.N. Ltd v. N.E.T. Ltd (1986) 3 NWLR (Pt. 31) page 667.

ii. *There must be an arguable appeal.*
The appeal which forms the basis of an application for stay of proceedings must be competent and arguable on its merits. Where an appeal is frivolous, vexatious or an abuse of court process, an appellate court will decline jurisdiction to entertain the application. See Arojoye v. UBA (Supra).

iii. *Where the appeal will dispose of the proceedings.*
Where the interlocutory appeal following an application for stay of proceedings will finally dispose of the case or put an end to the proceedings in the lower court, a stay of proceedings would be granted. An example is where an appeal raises an issue of jurisdiction of the lower court. An appellate court will grant an application for stay of proceedings if on the face of the appeal the court is satisfied that there is a real issue of jurisdiction to be tried as the decision on appeal will dispose of the proceedings in the lower court. Such other issues include issues as to locus standi, propriety of cause of action, admissibility of material evidence in the case of one of the parties and appeals in which the ruling are on material issues, but manifestly wrong.

iv. *Where the res will not be preserved.*

Where the res will be destroyed, damaged or annihilated before the matter is disposed of, appellate court will grant stay. See Shodehinde v. Registered Trustees of the Ahmadiyya Movement-in-Islam (1980) 1-2 SC 163.

v. *Where greater hardship will be caused. The Court would be reluctant to grant an application for stay of proceedings if it would cause greater hardship than if the application were refused.*

vi. *Where it will render the order of the appellate court nugatory. A stay of proceedings will be granted where to do otherwise will tend to render any order of the appellate court nugatory. See Saraki v. Kotoye (1992) 9 NWLR (Pt. 264) page 156; Biocon Agrochemicals (Nig) Ltd v Kudu Holdings (Pty) Ltd. (1996) 35 LRCN 754; (1996) 3 NWLR (Pt. 437) 373; Nwabueze v. Nwosu(1988) 4 NWLR (Pt. 88) page 257; International Agricultural Industries (Nig) Ltd v. Chika Bros. (1990) 1 NWLR (Pt. 124) page 70."*

Undue delay in the administration of justice is a malaise that has bedeviled the judiciary of this country and which has generated considerable outcry from the citizenry especially in high profile criminal cases. Stay of proceedings is one of the inbuilt delay mechanisms in our system of jurisprudence. This is why the courts have established principles as set out above that ensure that the application is granted sparingly and only in absolutely

deserving cases. Further, amendments in certain laws and procedure have been introduced to lessen or totally abrogate the negative effects of applications for stay of proceedings. Paragraph 10 (b) of Court of Appeal Practice Direction 2013 empowered the courts to refuse to hear appeals from interlocutory decisions of the Court below (in criminal appeals originating from or involving the EFCC, ICPC, or any other statutorily recognized prosecutorial agency or person or where the offence relates to Terrorism, Rape, Kidnapping, Corruption, Money laundering and Human Trafficking) where it is of the opinion that the grounds raised in the appeal are such that it can conveniently be determined by way of an appeal arising from the final judgment of the court below except where the grounds deal with issues of pure law. The court should rather order the court below to give the matter accelerated hearing. Section 306 of the Administration of Criminal Justice Act, 2015 went a lot further and completely abolished applications for stay of proceedings in criminal matters. That is a much welcome development. Applications for stay of proceedings have been abused by accused persons to delay the hearing of criminal cases

unduly. The Administration of Criminal Justice Act has put a final stop to the practice.

Judges should take note that it is not in their interest to spend precious time hearing these applications and writing rulings on them. It takes away from the time they should spend in writing final judgments which is what the NJC is interested in when returns are made. Judges should therefore be pro-active and advise counsel when appropriate not to go on appeal on trivial interlocutory decisions but to wait for the final judgment. In the case of ***International Agricultural Industries Ltd & Anor v. Chika Brothers Ltd (1990) 1 NWLR (Pt. 124) 70 at 80-81*** Obaseki JSC put the matter thus:

> *"It is sad to observe that it was at the tail end of the proceedings in the High Court that the interlocutory decision to reject the document was made. It is even sadder to observe that the proceedings before the High Court had to be stayed to allow the pursuit of appeal proceedings against the decision. Although the hearing before the court did not take more than an hour to conclude, it took 8 years for the appeal to travel from High Court through Court of Appeal to this court. If the plaintiff had allowed the learned trial Judge to conclude the hearing and deliver the judgment, he could still have had the opportunity to raise the issue of admissibility in the appeal courts….."*

It is pertinent to bear in mind that sometimes applications such as the one under consideration are used by unscrupulous litigants to frustrate and oppress a party with a good case in his effort to attain justice under the rule of law. For that reason judges must be alert to stop such litigants from undermining the due administration of justice by refusing to grant leave to appeal interlocutory decisions where leave is required.

STAY OF EXECUTION:

When judgment has been given in a case, the successful party is entitled to reap the fruits of his success. In the case of ***Integrated (Nigeria) Ltd v. Zumafon (Nigeria) Ltd (2014) LPELR-SC 189/2004*** "stay of Execution of a judgment was defined as the postponement, halting or suspension of judgment of a court." Where the party who lost in a case appeals against the judgment, unless the execution of the judgment is halted temporarily, his appeal if it succeeds may become nugatory or worthless. The courts therefore had to devise a means of maintaining a balance between the right of the successful party to reap the fruits of his success and the right of the losing party to appeal against the judgment. The principle laid down in the

locus classicus on stay of execution, ***Vaswani v. Savalakh (1972) SC 77*** quoting Bowen L.J. in ***The Annot Lyle (1886)) 11 P.D. 114 at p.116*** is that "when the order or judgment of a lower court is not manifestly illegal or wrong, it is right for a court of appeal to presume that the order or judgment appealed against is correct or rightly made until the contrary is proved or established and for this reason the court of appeal, and indeed any court, will not make a practice of depriving a successful litigant of the fruits of his success unless under very special circumstances. Special circumstances in this context involves a consideration of some collateral circumstances and inherent matters in some cases which may unless the order of stay is granted, destroy the subject-matter of the proceedings or foist upon the court, a situation of complete helplessness or render nugatory any order or orders of the court of appeal or paralyse, in one way or the other, the exercise by the litigant of his constitutional right of appeal or generally provide a situation in which whatever happens to the case, and in particular even if the appellant succeeds in the court of appeal, there could be no return to the status quo."

In ***Balogun v Balogun (1969) 1 All NLR 349 at p.351,*** the Supreme Court observed:

> *"We are in full agreement with the principle that in order to obtain a stay of execution of judgment against a successful party an applicant must show substantial reasons to warrant a deprivation of the successful party of the fruits of his judgment by the court. We are in no doubt whatsoever that where grounds exist on the motion suggesting a substantial issue of law to be decided on the appeal in an area in which the law is to some extent recondite and where either side may have a decision in his favour such substantial grounds as would warrant an interference clearly exist."*

The Supreme Court in the case of ***Martins v. Nicanner Food Co Ltd (1988) NWLR (Pt. 74) 75*** per Nnamani JSC referred to Dr. T. A. Aguda's book Practice and Procedure of the Supreme Court, Court of appeal and High Courts of Nigeria First Edition, para 44. 29. Page 535 where the learned author set out the following applicable principles elicited from the cases over the years as issues to be considered in deciding whether or not to grant a stay of execution pending appeal:

> *"(a). The chances of the applicant on appeal.*
> *If the chances are virtually nil, then a stay may be refused. Vaswani Trading Co. v. Savalackh and Co. (1972) 12 SC 77; Wey v. Wey (1975) 1 SC 1;*

Olusesan Shogo v. Latifu Musa (1975) 1 NMLR 133; Odufaye v. Fatoke (1975) 1 NMLR 222.

(b). The nature of the subject matter in dispute.
Whether maintaining the status quo until a final determination of the appeal in the case will meet the justice of the case. Dr. T.O. Dada v. The University of Lagos and Ors. (1971) 1 U.I.L.R. 344; Utigas Nigerian & Overseas Co Ltd. V. Pan African Bank Ltd. (1974) 10 SC. 105.

(C). Whether if the appeal succeeds, the applicant will not be able to reap the benefit of the judgment on appeal. See Wilson v Church (No.2) (1879) 2 Ch.D 454, 458

(d). Where the judgment is in respect of money and costs whether there is a reasonable probability of recovering these back from the respondent if the appeal succeeds. Lawrence Ogobegu Ebegbuna v. Janet Omotunde Ebegbuna (1974) 3 W.S.C.A. 23.

(e). Poverty is not a special ground for granting a stay of execution except where the effect will be to deprive the appellant of the means of prosecuting his appeal.

Nnamani JSC in the above case further espoused:

> "The court's discretion to grant stay of execution must be exercised judiciously and it would be so exercised where it is shown that the appeal involves substantial points of law necessitating

the parties and issues being in status quo until the legal issues are resolved."

There is a long line of decided authorities on the matter of stay of execution and it is now well settled and trite that it is within the discretion of a court to grant or refuse an application for stay of execution. The discretion must however be exercised judicially and judiciously applying the principles laid down in the myriad of cases. For the application for a stay of execution to succeed, the applicant must in his affidavit in support of the application depose to facts showing the existence of special, exceptional or strong circumstances tilting the balance of justice in favour of granting the application. What constitutes the special, exceptional or strong circumstance will of course vary from case to case depending on its peculiar circumstances. The guideline has been established in many decided cases.[19] The special circumstances which the court will take into consideration are circumstances which concern the enforcement of the judgment and not just the correctness of the judgment. If however the judgment on the face of it suffers a fundamental defect or is null and void on grounds of jurisdiction that could amount to a special circumstance justifying the grant of a stay. Discretion to grant or refuse a

stay must take into account the competing rights of the parties. For further emphasis, the court in the exercise of its discretion to grant or refuse a stay must consider the following special circumstances:

Whether execution of the judgment would

1. Destroy the subject matter of the proceedings; or
2. Foist upon the court a situation of complete helplessness; or
3. Render nugatory any order or orders of the appeal court; or
4. Paralyse in one way or the other, the exercise by the litigant of his constitutional right of appeal; or
5. Provide a situation in which even if the appellant succeeds in his appeal, there could be no return to the status quo; or
6. Where the applicant can show that when the money is paid, the respondent will be unable to refund it in case the appeal succeeds; or
7. That the appeal has great merit and to enforce the judgment or order in the meantime will be ruinous to the applicant.[20]

An appeal ordinarily will not operate as a stay of execution. An application for stay pending an appeal may be made in the trial court or to the court of appeal. Where the application is refused by the trial court, the appellant/applicant has the discretion or option re-apply to the court of appeal for a stay rather than appeal against

the refusal by the court of first instance provided the application is made within the prescribed time, fifteen days after the refusal by the lower court. ***Ndaba (Nig) Ltd v. U.B.N. Plc (2007) 9 NWLR (Pt. 1040).*** In the case of monetary judgments, a conditional application for stay may be in the form of application to pay the judgment debt instalmentally. A conditional stay may also be in the form of an order that the judgment debt be paid into court or an income yielding account in a specified bank under the control of the registrar of the court to await the determination of the appeal.

CONCLUSION:

Interlocutory applications for injunction, stay of proceedings and stay of execution all seek to maintain the status quo in one form or the other. The grants are usually at the discretion of the court but the discretion must be exercised judicially and judiciously in accordance with rules laid down in myriads of cases. Of prime importance is that the court must weigh the conflicting interest of the parties and determine where the balance of justice lies. In doing so it must be careful not to pronounce on issues meant for the substantive suit. Courts must also be

circumspect and careful to avoid the use of these equitable remedies as delay tactics to frustrate a party interested in the expeditious trial of his case. Further, it is important that a court does not lend its power to the reversal of a judgment of a court of competent jurisdiction through the back door by the grant of a stay of execution unfairly. Justice is the name of the game.

Thank you for your attention.

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1. Per Nnamani JSC Omonuwa v. Oshodin (1985) 2 NWLR (Pt.10) 924
2. For example see Order 50 Lagos State High Court (Civil Procedure) Rules 2004.
3. Adenuga v. Odumeru (2001) 2 NWLR (Pt. 696) 184 @ 195; (2001) 1 SC (Pt. 1) 72 per Karibi Whyte JSC
4. Kotoye v. CBN (1989) 1 NWLR (Pt 98) 419 @ 441 – 442
5. Anyanwu v. Uzowuaka (2009) 13 NWLR (Pt. 1159) 445 @ 489 – 490 H – A.
6. A. G. Anambra State v. Okafor (1992) 2 NWLR (Pt.224) 396 @ 426
7. Meier & Anor v. Sec. of State for Environment Food & Rural Affairs (2009) LPELR – 17890 (UKSC)
8. R. Benkay (Nig) Ltd v. Cadbury (Nig) Plc (2006) NWLR (Pt.976) 338 @ 366 A – E.

9. Order 26 Rule 8 2 (a) – (c) Federal High Court (Civil Procedure) Rules 2009.

10. See also further distinction by Abdullahi JCA (Rtd.) in Nigerian Industrial Development Bank v. Olalomi Industries Ltd (1995) 9 NWLR (Pt. 419) 338.

11. Kotoye v. CBN (Supra) per Nnaemeka Agu JSC.

12. Enunwa v. Obianukor (225) 11 NWLR (Pt. 935) 100 @ 122 G – H; Adewale v. Governor Ekiti State (2007) 2 NWLR (Pt. 1019) 634 @ 652 F – G 658 D – E.

13. Modern Civil Procedure Law by A. F. Afolayan & P. C. Okorie Published by Dee Sage Nig. Ltd 2007 @ P. 198.

14. Egbe v. Onogun (1972) 1 All NLR 9; Kufeji v. Kogbe (1961) All NLR 113; Nigerian Civil Service Union v. Essien (1985) 3 NWLR (Pt. 12) 26.

15. See Generally Kotoye v CBN (Supra) A.C.B v. Awogboro (1996) 2 SCNJ 233 @ 239 – 240; Nwankwo v. Ononeze – Madu (2005) 4 NWLR (Pt.916) 470 @ 486; Adeleke & Ors. V. Lawal & Ors (2013); Ayantuyi v. Governor Ondo State (2005), Buhari & Ors v. Obasanjo & Ors (2003) LPELR – SC 133/2003, Nwagana v Military Governor Imo State (1987) 3 NWLR (Pt.59) 185.

16. Bello v. Attorney General Of Lagos State (2007) 2 NWLR (Pt. 1017) 155 @ 138 D-E; Otu v. Udonwa (2000) 13 NWLR (Pt. 683) 157, Udeze V. Orazuluke Trading Co. Ltd. (2000) 3 NWLR (Pt. 648) 203, Akinkugbe v. Bucknor (2004) 11 NWLR (Pt. 885) 652, Bello V. Attorney General of Lagos State (2007) 2 NWLR (Pt. 1017) 155 @ 138 D-E, Amachree V. I.C.C. Ltd (1989) 4 NWLR (Pt. 118) 686 @ 695.

17. Nigerian Civil Service Union V. Essien (1985) 3 NWLR (Pt. 12) 306, Ezebilo V. Chinwuba (1997) 7 NWLR (pt. 511) 108.

18. Anike V. Emehelu (1990) 1 NWLR (Pt. 128)603 Leasing Co. (Nig) Ltd V. Tiger Industries Ltd (2007) 14 NWLR (Pt. 1054) 346; Ita V. Nyang (1994) 1 NWLR (Pt. 318) 56 @ 67.

19. U.N.O. V. P.A.B. (1974) 10 SC 105, Kigo V. Holman Bros. Ltd (1980) 5-7 SC, El-Khalil V. Oredein (1985) 3 NWLR (Pt. 12) 371.

20. Olunloye V. Adeniran (2001) 14 NWLR (Pt. 734) 699, Deduwa V. Okorodudu (1974) 6 SC 21; Nwabueze V. Nwosu (1988) 4 NWLR (Pt. 88) 257.