INTERLOCUTORY PROCEEDINGS IN THE MAGISTRATES COURTS: GUIDING PRINCIPLES

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INTRODUCTION:

May I most respectfully appreciate and thank God Almighty for a day like this and for his infinite mercy in bringing us together today to rub minds on our common task of doing justice to mankind. On that premise, I also extend my immense and profound gratitude to the Administrator of the National Judicial Institute, My Lord Hon. Justice R.P.I. Bozimo, OFR for believing in me and finding me worthy to be one of the resource persons in this workshop to present this paper.

My thanks also goes to the Director of Studies and all staff of the Institute for their untiring efforts in carrying on the mandate of providing continues Judicial Education for Judicial Officers and their support staff in making sure they are kept abreast and remain focused in their role in promoting excellence in the administration of justice.

There is no doubt that workshops of this nature will enhance and promote excellence in the Administration of Justice particularly for the newly appointed Magistrates for whom this workshop has been put together.

The topic which I am to discuss with you which is **"INTERLOCUTORY PROCEEDINGS IN THE MAGISTRATES COURTS: GUIDING PRINCIPLES"** is a topic that remains one of the pivots and pillars on which the theme of this workshop **"PROMOTING EXCELLENCE IN THE ADMINISTRATION OF JUSTICE"** hinges on. This is so because without following the guiding tenets or principles in hearing matters before a court especially intervening interlocutory applications, a Judge or Magistrate as the case may be, may run into muddy waters and come to a wrong conclusion leading to a miscarriage of justice.

In considering the topic under discuss, the operative words or expressions that readily comes to mind are **"proceedings, interlocutory, principles etc,"** which meanings or definitions will help us to appreciate the essence and import of the topic.

Interlocutory: Interlocutory means, interim, temporary, a relief or order sought or made in a Court or by a Court for the time being before a final decision in a case. Something done by any of the parties in

between the hearing of a case before a Court or order by the Court in between before the final decision of the Court in the case. See **the Blacks Law Dictionary Ninth Edition. Also Bouviers' Law Dictionary Vol. 1, Third Revision**.

Proceedings: Proceedings according to the Blacks Law Dictionary Ninth Edition per Edwin E. Bryant in his book **"The Law of Pleadings Under the Codes of Civil Procedure 2nd Edition,** "i**s an act done by the authority or direction of the court express or implied and may include all the steps taken or measures adopted in the prosecution or defence of an action etc"**.

In the case of **I.C.S. (NIG) LTD VS. BALTON B.V. (2003) 8 NWLR pt. 822 p. 223**, Aderemi JCA (as he then was) had this definition of the word processings:-

"The word "proceeding" when used in legal sense means carrying on of an action in law. It also means an act done by authority of a law court or any step taken by either party to a dispute in a law court. "Proceedings" is further defined as legal action; litigation. It is also defined as the form or manner of conducting judicial business before a court or judicial officer. Furthermore, "proceeding" is the course of procedure in an action at law and any step or action taken in conducting litigation".

From the above definitions, it is clear that interlocutory proceedings simply means an action or steps taken in law by any authority or the court or any of the parties in litigation or an interested party which decides some point or matter within the hearing of a matter before a final decision is taken on such matter. In that regard, in carrying out such action in the course of hearing any matter, there are laid down acceptable legal rules or law one has to follow in doing so.

In litigation before a court between contenting parties or interested parties, the court has often been approached to intervene in the interim by way of interlocutory applications by any of such parties to hear and determine preliminary issues or reliefs that may arise in the course of hearing the substantive matter. These preliminary issues may arise at the commencement or during the pendency of the substantive action in court or sometimes even after the court has decided the substantive issue in controversy between the contending parties. The application by

the parties as the case may be are usually and mostly in the form of motions (written or oral) praying the court for certain reliefs.

It must be noted and pointed out as a matter of emphasis that interlocutory proceedings are very vital, important, and essential in proceedings and in the general administration of justice. This is so because it is the internal procedure of navigating through the process of trial which if not applied according to laid down principles and the dictates of justice can lead to miscarriage of justice and has in some cases greatly dented the good image of the judiciary. In that wise, as magistrates involved and engaged in the administration of justice, it is necessary for you to be guided and adhere to the sacrosanct principles in hearing interlocutory applications as they come before you.

In hearing interlocutory applications or proceedings, the courts including the magistrate courts are guided by the provisions of the law on the matter and the inherent jurisdiction of the court which at all times must be judicious and judicial.

Primarily and speaking generally, there are four major sources of the courts jurisdiction in hearing interlocutory proceedings. They are as follows:

1. The Constitution (1999) as amended
2. Statutory Provisions of the Court
3. The Rules of the Court
4. The Court's inherent powers or jurisdiction

Section 6(6)(a) and (b) of the Constitution of the Federal Republic of Nigeria provides as follows:

"(6) The judicial powers vested in accordance with the foregoing provisions of this section –

(a) shall extend, notwithstanding anything to the contrary in this constitution, to all inherent powers and sanctions of a court of law;

(b) shall extend to all matters between persons or between government or authority and to any person in Nigeria and to all actions and proceedings relating thereto, for the determination of any question as to the civil rights and obligations of that person;"

By virtue of Section 6(2) and (5)(k) of the constitution (supra), there is no doubt that the Magistrate Court is a Court of Law with all inherent

powers and sanctions in line with the above section 6(6) (a) & (b) of the Constitution (supra).

In respect of a statutory provision I refer to section 17(i)(e) of the Magistrate's Courts Law of Ebonyi State Cap. 110 Laws of Ebonyi State of Nigeria, 2009. It provides thus:-

"subject to the provisions of this law and to any other written law, a Chief Magistrate Grade I or II shall have and exercise jurisdiction in civil causes or matters:

(e) 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 torts," see also Sections 18 – 22A of the Magistrate's Court Law (supra).

Considering the Rules of Court, reference is made to ORDERS IV and V of the Magistrate's Court Rules of Ebonyi State. I have to point out that in making reference to the Magistrate's Courts Laws and Rules of Ebonyi State is for ease of reference as I am aware that the various Magistrates Courts in Nigeria have similar provisions in their various laws as the case may be. The principles in the application of the rules and the law are the same. One only has to be guided by the provisions of the law and Rules applicable in their jurisdiction.

ORDER IV: Rule 1 – 3 of the Magistrate Court Rules (supra) provides as follows:

RULE 1:
"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.
(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".

Rule (2) Provides: *"where an application is not summarily disposed of, the Magistrate or Registrar shall appoint a day for the hearing thereof, and, where notice of the application is to be given to another person, such notice shall specify the date on which the application will be heard*

and the manner in which evidence relating there to shall be given by the applicant or any person affected thereby".

Rule (3) *"Any order made ex parte on an interlocutory application may be discharged or varied by the Magistrate at any time on application made by any person aggrieved thereby, after notice given to the party who obtained the order"*

ORDER V

Rule 1

"(1) In all cases in which it appear necessary, the court may appoint a received or manager of any property in dispute in a suit, and if need be commit the same to his possession or custody and grant him power to manage or preserve and improve the same and collect the rents and profits thereof and apply or dispose of them as may seem fit and power to sell perishable goods.

(2) The Court may authorize any person to enter upon or into any land or building in the possession of any party for the purposes of any appointment or order made as aforesaid.

(3) In making an injunction or order, under Section 17(e) of the law, the Court may grant the same on such terms as to its duration the keeping of an account, the giving of security or otherwise, as may seem just.

(4) Where application is made for an interlocutory injunction or order under Section 17(e) of the law the Court may direct notice there of to be given to any person affected thereby.

(5) Any such interlocutory injunction or order made ex parte shall be for a limited time only to be therein stated, and be served on the person affected thereby, but the Court may extend the time if service has not been possible within such time.

(6) Where an interlocutory injunction or order is made ex parte the same may be discharged or varied by the Court at any time on application made by any person aggrieved thereby, after notice given to the party who obtained the injunction or order".

The above provisions of the law as reproduced provides the basis upon which the Magistrate Courts can exercise their powers or jurisdiction in interlocutory matters brought before them in the course of hearing causes between parties in their courts before their final decision on such matters.

Interlocutory proceedings or applications as the case may be, arises as the occasion demands in the course of hearing matters in Court and such are treated subject to its nature or the reliefs sought in line with the provisions of the law and the guiding principles in handling them. As a matter of fact, there are many different types of interlocutory proceedings or applications which a party to a case or an interested party may make in the course of hearing a matter to protect and advance his interest. Such applications are usually made by motion, either on notice or ex-parte. In some cases, they are made orally as the occasion demands see order IV Rule 1 of the Magistrate Court Rules Ebonyi State. When such interlocutory applications are made in writing, thy are generally supported by affidavit which is the factual evidence that the applicant relies on it should be noted that in some cases, an applicant may rely solely on a point of law, which in such a case, he need not depose to an affidavit in support of such interlocutory application or motion. A party opposing such application has to file a counter-affidavit deposing to facts relied on in opposing such application. In some cases, the affidavits filed and relied upon by the contending parties in a case may be in conflict and in such a situation the court may take oral evidence to resolve or reconcile such conflict unless in a case where there is documentary evidence which can tilt the contradictory or "quarrelling" evidence one way or the other. The Court should not prefer one deposition to the other. **See case of EIMSKIP LTD VS. EXQUISITE IND. LTD (2003) 4 NWLR pt. 809 p. 88; also DANA IMPLEX VS. AWUKAM (2006) 3 NWLR pt. 968 544**.

In this regard, I have to state that conflicts in affidavits of parties must be on material and fundamental issues that are substantial to the issues before the Court and not any flimsy or minor conflict that does not touch on vital issues on the rights and obligations of the parties before the court or an interested party as the case may be.

When in a situation in which facts are provable by affidavit and one party deposes to facts in his affidavit and the other party fails to swear to an affidavit to controvert such facts, the fact may be taken as duly

establish and true. **See ADJOMALE VS. YADUAT (NO 2) (1991) 5 NWLR pt. 191 p. 286. ALSO OBIKOYA VS. WEMA BANK LTD. (1989) 1 NWLR pt. 96 157; NZERIBE VS. DAVE ENGINEERING CO. LTD (1994) 8 NWLR pt. 361 p. 124.** In the interest of Justice, a Court hearing an interlocutory application may on application allow a party to file additional affidavit as the case may be. In such a case an adjournment may be necessary for a party to do so which may be on terms, that is cost to the other party.

In interlocutory proceedings or applications seeking for certain reliefs, they are usually accompanied by a written or oral address as the parties arguments in support of the relief sought. However, it should be noted that an address whether written or oral cannot take the place of evidence which can only be given by affidavit evidence as filed by a party or oral evidence before the Court. See case of.

When a Court is hearing an interlocutory application and in determining same, the Court should avoid making prejudicial pronouncements touching on the substantive case before it to be decided at the final trial. **See ADELEKE & ORS. VS. LAWAL (2013) VOL. 220 LRCN pt. 1. p. 189. SEE ALSO FALOMO VS. BANIGBE (1998) 60 LRCN 4166. ALSO ALCATEL NIG. BREWERIES PLC VS. OSHO (2001) 8 NWLR pt. 716 p. 746**.

We shall now consider in this discuss some of the specific applications which arise at the interlocutory stage of a matter pending before a Court in the due administration of Justice and the Principles that should guide the Court in determining each as they arise or made by parties.

They are many- both under the civil and criminal areas of our law. As time permits, we shall look at some, which among others are:

1. Application for interlocutory injunction; (ex-parte and on notice).
2. Stay of Proceedings
3. Stay of Execution
4. Enforcement of Judgments/Attachment of Property
5. Installmental payment
6. Contempt of Court
7. Applicant for bail
8. Preliminary objection

INJUNCTIONS:

An interlocutory injunction is a preservatory measure taken at an early stage in the proceedings, that is, before the Court has had an opportunity to hear and weigh fully the evidence on both sides and it is intended to preserve matters. It is an injunction which is directed to ensure that particular acts do not take place or continue to take place pending the final determination by the Court of the rights of the parties. It is to regulate the position of the parties pending the trial and determination of the issue between parties before a Court, whilst avoiding a decision on such issues which could only be resolved at the trial. **See case of ALCATEL KABELMETAL (NIG) LTD. VS. OJUEGBELE (2003) 2 NWLR pt. 805 P. 429; BRAITHWAITE VS. S.C.B. (NIG) LTD (2012) 1 NWLR pt. 1281 P.301**.

The purpose of an interlocutory injunction apart from protecting the rights of the applicant or an interested party, is also to preserve the res from being eaten up. As it does not make any sense for a Court to allow the res to be destroyed or annihilated before the final decision of the Court in the substantive matter, whether at the trial Court or an Appeal Court. **See case of OBIOHA VS. MILITARY ADM. IMO STATE (1998) 10 NWLR pt. 569 p. 205**.

It must be noted that an applicant for order of interlocutory injunction is not at the stage of the application required to make out a prima facie case before he can be granted an interlocutory injunction. However, the Court has to be satisfied that the applicants case is not frivolous or vexations and that there is a serious issue or question to be tried. He has to satisfy the Court that in the special circumstances of his case, he is entiled on the facts presented by him to the reliefs be seeks which the Court has the equitable discretion to grant. **See case of AYORINDE VS. A-G. OYO STATE (1996) 3 NWLR pt. 434 p.20**.

One important thing to bear in mind by the court when considering and granting an order of interlocutory injunction is that such an order when made and granted must in the interest of justice be tied to a specific period of time. **See case of ALCATEL KABELMETAL (NIG.) LTD. VS. OJU-EGBELE (Supra)**. And it is the law that such order of injunction for a specific duration becomes automatically discharged at the expiration of the period. And in such a case, it will not be necessary to bring or make a formal application to that affect. **See R-BENKAY**

(NIG.) LTD VS. CADBURY (NIG) LTD (2012) 9 NWLR pt. 1306 page 596. Also cited as (2012) 208 LRCN 57.

Your worships must bear in mind that the relief for interlocutory injunction like most other reliefs, is punitive, and therefore, should be granted only after due process of law, which involves giving the parties a fair hearing. **See Section 36(1) of the 1999 Constitution (Supra). Also case of OLUMESAN VS. OGANDEPO (1996) 2 NWLR pt 433 p. 628; AKPAMGBO-OKADIGBO & ORS VS. CHIDI & ORS (NO. 1) (2015) VOL. 247 LRCN p.45**.

The relief of interlocutory injunction which has the capacity of "arresting" the res in dispute pending the determination of the matter, deserves a full, dispassionate and proper consideration. This is because its transient effect is just as good as the relief of perpetual injunction, as long as it lasts, that is to say as long as the matter is not fully disposed off. **See BRAITHWAITE VS. S.C.B. (NIG.) LTD (Supra)**.

Generally, the Court in considering whether to grant or refuse an application for interlocutory injunction has to be guided by the principles as has been enunciated by our superior appellate courts in a plethora of authorities. These principles include:

(a) An applicant must show that there is a serious question to be tried, that is that the applicant has a real possibility, not a probability of success at the trial. **See AZUH VS. UBN PLC (2014) VOL. 237 LORCN 74; ORJI VS. ZARIA IND. LTD (1992) 1 SCNJ 119 OR (1992) 7 LRNN 55**. Once the claim or relief of the applicant is not frivolous or vexations to the satisfaction of the Court, the Court should consider granting an interlocutory injunction.

(b) The applicant must show that the balance of convenience is on his side; that is that more justice will result in grating the application than in refusing it. The Court will consider from the facts before it so far, in whose favour does the balance of convenience tilt to in the interest of Justice. See case of **ABOSELDEHYDE LAB. PLC. VS. UNION MERCHANT BANK LTD (2013) VOL. 224 LRCN pt. 1. 199**. Balance of convenience is the disadvantage to one or the other side, which damages cannot compensate. See **BRAITHWAITE VS S.C.B. LTD** (Supra). This principle is simply

to the effect that from the facts of the case considering the interlocutory reliefs sought, who between the parties will be more affected negatively if the application is refused or granted and where there exists no other way of compensating any such party. See also case of **ACB VS. AWOLOWO (1991) 2 NWLR pt. 176 711 at 719 WHERE TOBI JCA** (as he then was) stated thus:

"The balance of convenience….between the parties is a basic determinant factor in an application for interlocutory injunction. In the determination of this factor the law requires some measurement of the scales of justice to see where the pendulum tilts"

(c) The applicant must show that damages cannot be adequate compensation for his damage or injury if the opposing party is not restrained and he the applicant succeeds at the end of the day after the final decision in the matter. See case of **BELLO VS. A-G. LAGOS STATE (2007) 2 NWLR pt. 1017 155 at 138**. The requirement under this principle is that the applicant must satisfy the Court that if at the end of the full trial of the case, the opposing party is not put on hold based on the interlocutory relief sought and he the applicant succeeds, monetary compensation may not be adequate at all to compensate for the injury he may have suffered as a result of the matter, as it would have been otherwise if the application was granted.

(d) The applicant must show that his conduct is not reprehensible, an example, that he is not guilty of any delay or in disobedience of any order of Court. It is the law that if an applicant delays in bringing an application to protect his right that is being threatened or violated, this may be a ground for the Court to refuse the application for interlocutory injunction by such party. Delay it is said defeats equity. An interlocutory application is an equitable remedy which must be made timeously or else an applicant will be treated as having slept over his rights by delaying to bring such application. Equity helps the diligent and vigilant and not the indolent.

Again, a party in contempt of an order of Court may be refused such application in view of such contempt. He who goes to equity must do so with clean lands. **See the case of LAWAL – OSULA**

VS. LAWAL-OSULA (1995) 3 NWLR (pt. 382) 130 – 134; GOV. LAGOS STATE VS. OJUKWU (1986) 1 NWLR pt. 18 621; OYEYEMI VS. IREWOLE L.G.A. (1993) 1 NWLR pt. 270 462.

(e) No order for an interlocutory injunction shall be made unless the applicant gives a satisfactory undertaking to the Court as to damages except in certain circumstances. **See case of KOTOYE VS. C.B.N. (1989) 1 NWLR pt. 98 P. 419**. It is a matter of law and practice that an applicant for an interlocutory injunction to undertake to pay compensation or damages to the other party should the application be granted and he fails at the end of the day in the substantive case before the Court. The applicant is usually required to state so in his affidavit in support of his motion or application for interlocutory injunction. It must be noted that the court does not force or compel the applicant to under take to pay damages. It is at his discretion to do so. The only thing is that failure to do so may make the court to refuse the application for injunction. In undertaking to pay damages to the other party, an applicant for interlocutory injunction is binding or holding himself out to be liable for any damage which the other party may suffer as a result of the order of injunction granted in the event that he loses the matter in Court. See case of **ITA VS. INYANG (1994) 1 NWLR pt.318 P. 56**. Such undertaking becomes a future promise by the applicant to pay the other party damages which is to be determined at a future date depending on the outcome of the substantive matter. See also cases of **GOV. OYO STATE VS. AKINYEMI (2003) 1 NWLR (pt. 800) P. I. ONYESOH VS. NNEBEDUM (1992) 3 NWLR pt. 299 p. 315**.

If damages would be adequate compensation and the defendant (as the case may be) is in a financial position to pay, no interlocutory injunction should be granted. **See BAKARE VS. BAKARE (2012) 16 NWLR pt.1325 p.29; ALSO ILECHUKWU VS. IWUGO (1989) 2 NWLR pt. 101 p. 99**.

(f) One other important consideration in an application for interlocutory injunction is that the party or parties to be restrained by the order of injunction must be clearly identifiable and the order clearly stated with no ambiguity. It should also be noted that an injunction is not a remedy for a completed act. **See case of**

IDEOZU VS. OCHOMA (2006) 4 NWLR pt.970 364; A-G. ANAMBRA VS. OKAFOR (1992) 2 NWLR pt.224 p.369.

(g) The applicant seeking remedy of an interlocutory injunction must show that he has a legal right – **see case of DYKTRADE VS. OMNIA (NIG) (2000) 80 LRCN 2856**. The applicant must show in his application that he has a legal right which is capable of being protected by such an order. **See OBEYA MEMORIAL SPECIALIST HOSPITAL & ANR VS. A-G. FEDERATION & ANR (1987) 2 NSCC 961; Also SARAKI VS. KOTOYE (1990) 4 NWLR pt. 143 p. 144**.

It must be pointed out that in an interlocutory proceedings, the burden of proof based on the reliefs sought lies on the applicant throughout as the onus is on him to satisfy the court that he is entitled to the equitable remedy of injunction being sought. See **LADUNNI VS. KUKOYI (1972) 1 ALL NLR pt. 1 p. 133**.

EX-PARTE APPLICATIONS/AND INTERIM ORDERS:

What is an Ex-parte application? An ex-parte application is one made by one party to the court seeking for an interim relief as against the one made inter parties, that is with the knowledge of the other party who is served with such process and putting him on notice. The law allows for such applications in interlocutory proceedings if such will serve the interest of justice. If such an application is granted by the court, the court then makes and order which must be interim that is for the mean time, to last for a short time.

The object of an ex-parte order is to maintain the status quo until a named date pending the determination of a motion on notice. In the locus classicus case of **KOTOYE VS. CBN (1989) 1 NWLR pt. 89 p. 419.** The Supreme Court per Nnaemeka-Agu JSC on the issue of an ex-parte application stated thus:

"By their very nature injunctions granted on ex-parte applications can only be properly interim in nature. They are made, without notice to the other side, to keep matters in status quo to a named date, usually not more than a few days, or until the respondent can be put on notice. The rational of an order made on such an application is that delay to be caused by proceeding in the ordinary way by putting the other side on notice would or might cause such an irretrievable or serious mischief.

Such injunctions are for cases of real urgency. The emphasis is on "real". What is contemplated by the law is urgency between the happening of the event which is sought to be restrained by injunction and the date the application could be heard if taken after due notice to the their side. So, if an incident which forms the basis of an application occurred long enough for the applicant to have given due notice of the application to the other side if he had acted promptly but he delays so much in bringing the application until there is not enough time to put the other side on notice, then there is a case of self-induced urgency, and not one of real urgency within the meaning of the law."

In considering an application made Ex-parte seeking for an injunction, the court must be guided by the principles as enunciated in the above case of **KOTOYE VS C.B.N. (Supra)**. Such an application must in the affidavit in support disclose on fact showing real urgency. That is the applicant must gives reasons that are so compelling that to refuse or delay in granting such will lead to a great damage on the legal rights of the applicant. And the court must be satisfied that the reasons given were not self-inflicted or self induced urgency. See **UNIBIZ NIG. LTD. VS. C.B.C. I. LTD (2003) 6 NWLR pt. 816 402**.

An ex-parte injunction can be made in an interlocutory injunction application until a certain date which in most cases is usually the next notion day by which time the other side should have been put on notice. In this context, the law is that a person who seeks an interim order ex-parte while also applying for an interlocutory injunction, files two motions simultaneously, one ex-parte asking for the interim order and the other one on notice applying for an interlocutory injunction pending the determination of the substantive suit. The Court before which the applications are filed takes the ex-parte motion, and if satisfied that it has merit ex-facie, grants it making the order to last for up to a date when the motion on notice shall be heard. **Per Mohammed JSC in the case of AZUH VS U.B.N. PLC (2014) VOL. 237 LRCN 74; Also KOTOYE VS. CBN (Supra)**.

The reliefs sought in an ex-parte application are predicated upon the reliefs set out in the writ of summons or plaint.

An ex-parte injunction cannot be granted pending the determination of the substantive suit or action. It has to be by motion on notice. Such should not be contemplated at all by the court as that will be an abuse

of the use of ex-parte injunctions which has severally been frowned at and condemned. This abuse has led to serious sanctions of judicial officers whose careers have been cut short as a result of the wrong use or application of Ex-parte orders. In the case of **ECHAKA CATTLE RANCH LTD. VS. N.A.C.B. LTD (1998) 56/57 LCRN 3333,** Ogundare JSC on the abuse of ex-parte injunction by a Judge of a court had this to say:-

"Before ending this judgment, I need to comment briefly on the interlocutory injunction obtained ex-parte by the Plaintiff in this case. It is observed that the order of interlocutory injunction was made…..without hearing the defendant. It is strange that after all that has been said and written on the grant of interlocutory injunctions, one would still see a judge granting ex-parte an interlocutory injunction pending the determination of an action. This to say the least, is very unfortunate".

An ex-parte injunction can be granted where it is seen that the res which is the subject matter of the substantive action is in danger or imminent danger of being destroyed. This of course is clear in that, if the court is satisfied that the subject of the main suit may not exist at the end of the trial due to some imminent factors that may affect it before putting the other side on notice then the court should grant an ex-parte injunction to preserve the res.

The court or judge in considering an application for interlocutory injunction, particularly an application made ex-parte has to bear in mind the provisions of **Section 36(1) of the 1999 Constitution as amended** in order to ensure fair hearing in such a matter. The said Section 36 (1) provides thus:-

"In the determination of his civil rights and obligations, including any question or determination by or against any government or authority, a person shall be entitled to a fair hearing within a reasonable time by a court or other tribunal established by law and constituted in such manner as to ensure its independence and impartiality". In so many decide cases by our Courts particularly the Superior Courts of Appeal, the Courts in Nigeria have taken the position that the principle of fair hearing implies that a Judge or Court shall hear all sides to a dispute before making any consequential pronouncements against them. **See cases of AKPANGBO-OKADIGBO & ORS VS. CHIDI & ORS (NO.**

1) (2015) VOL. 247 LRCN P.45; EJEKA VS. STATE (2003) 7 NWLR pt. 819 p. 408; S.B.N. PLC VS. CROWN STAR & CO. LTD (2003) 6 NWLR pt. 815 p. 1. OLUMESAN VS. OGANDEPO (1996) 2 NWLR pt. 433 pt. 628.

From the provisions of Section 36(1) of Constitution (supra), it is clear that there exists a sort of relationship between it and the grant of Ex-parte orders. This relationship in my view exists in protecting the rights of parties before a court whose duty is to from the circumstance ensure that justice is done to a deserving party. On this relationship, the court of Appeal in the case of **SABRU NIG. LTD. VS JEZCO NIG. LTD (2001) 2 NWLR pt. 697 364 at 380** stated as follows:

"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 had the opportunity of being heard in defence. But instances occur where the 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 irremediable or serious damage be imminent, the other may come to court, and ask for its inter-position even in the absence of his opponent, on the ground that delay would involve greater injustice than instant action".

The Supreme Court in the case of **KOTOYE VS. C.B.N. (Supra) at p. 449** on the relationship between **Section 36(1) of the Constitution (Surpa)** and Ex-parte order of injunction held as follows:

"…the basis of granting any ex-parte order of injunction, particularly in view of Section 33(1) of the Constitution of 1979 (now Section 36(1) 1999 Constitution, as amended), 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, of 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 sina qua non for a proper ex-parte order of injunction".

The simple interpretation that I have from the position of the Supreme Court and the Court of Appeal above, is that all parties to a case must

be given an opportunity to be hard in a case concerning them unless in very special circumstances which needs urgency, then one party can be heard and a decision or order made for the time being in the interest of justice. The bottom line however, is to preserve or protect the res which is the object of the matter to be decided by the Court after full trial and hearing.

The victim of an ex parte injunction, may on becoming aware of the ex parte order move the count to discharge the order within 7 days. **See ORDER IV RULE (1) (3) of the Magistrates Courts Rules, Laws of Ebonyi State (supra)**.

A party seeking the court to discharge an order made ex parte may rely on some grounds in doing so. These are:-

1. *Where the Plaintiff refuses to disclose all material facts before the court;*
2. *Where the order was frequently obtained;*
3. *Where the Plaintiff has not given security for cost;*
4. *Where the Plaintiff deliberately delays the hearing of the motion on notice.*
   See case of **OGBONNA VS. N.U.R.T.W. (1990) 3 NWLR (pt. 141) 696.**

SOME TYPES OF INJUNCTIONS:

In the area of injunctions, there are various types which are classified according to the nature of the relief sought and the order made by the court. Some are as follows:

1. **Mandatory Injunction:** In a mandatory injunction it is an order which requires the party it is directed at to do a specific act or acts. It is an equitable relief. The courts are often reluctant to grant a mandatory injunction. This is because it is only in special and exceptional cases which has to be proved by the applicant that the court can grant such. There must be a clear evidence by the applicant showing that if such is not granted, serious damage or injury will occur against the applicant. **See cases of NDIC VS. S.B.N. PLC (2003) 1 NWLR pt. 801 p. 311; C.B.N. VS. U.T.B. (NIG) LTD (1996) 4 NWLR pt. 445 p. 694**.

   A mandatory order of injunction may not be granted to impose an obligation on a defendant to do something which is impossible or which cannot be enforced or which is unlawful or which has the

effect of interfering with an existing order of a court of competent jurisdiction.

The circumstances under which mandatory injunction may be granted are as laid down by the Court of Appeal in the case of **NDIC VS. S.B.N. PLC (Supra)** as follows:-

a) where the injury done to the Plaintiff cannot be estimated and sufficiently compensated by damages;

b) when the injury to the Plaintiff is so serious and material that the restoration of things to their former condition is the only method where justice can be adequately done;

c) where the injury complained of is in breach of an express agreement;

d) where the Defendant attempts to steal a match on the Plaintiff such as where, on receipt of notice that injunction is about to be applied for, the Defendant hurries on the work in respect of which complaint is made so that when he receives the notice of interim injunction, it is completed. **See also ABUBAKAR VS. JMDB (1997) 10 NWLR pt. 524 p. 212 referred to**.

2. **Perpetual Injunction:** A perpetual injunction is usually considered in the state of the law, that is at the end of a trial of a case. It is a post trial relief grantable as an ancillary one. It is granted as a final order after the complete hearing of a matter by a Court and the rights of the parties established. **See ADENIRAN VS. ALAO (1992) 2 NWLR pt. 223 p. 350**.

The essence of granting a perpetual injunction on a final determination of the rights of the parties is to prevent permanently the infringement of those rights and to obviate the necessity of bringing multiplicity of suits in respect of every repeated infringement. **See AFRO TECH SERV. (NIG) LTD) VS. M.I.A. & SONS LTD (2005) 15 NWLR PT. 692 P. 730; GOLD MARK (NIG) LTD VS. IBAFON CO. LTD (2012) 10 NWLR pt. 1308 p. 291; L.S.P.D.C. VS. BANIRE (1992) 5 NWLR pt. 243 p. 620**.

It should be noted that after the grant of a perpetual injunction, any disobedience to the order by any party who is aware of the

order is punished by way of proceedings for contempt of the order.

3. **Mareva Injunction:** A mareva injunction is a preservatory order. It is a form of injunction whereby the Defendant in a suit is restrained or prevented from disposing of his properties or alienating same pending the determination of a dispute between him and the applicant in order not to frustrate or render nugatory the judgment of the court which the Plaintiff or Applicant may obtain against him in the court. This principle was enunciated in the case of **MAREVA COMPANY NAVIE A.S.A VS. INTERNATIONAL BULK CARRIERS S.A. (1975) 2 LLOYD'S REP. 509; also cited as (1980) 1 ALL E. R. 213**.

   Applications for mareva injunctions are made ex parte. This is so because secrecy from the Defendant is most fundamental. And such ex parte application must be made expeditiously with dispatch as delay may spell doom for the applicant should the Defendant dispose of his assets and the Plaintiff getting judgement in his favour. **See AKINGBOLA VS. CHAIRMAN E.F.C.C. (2012) 9 NWLR pt. 1308 p.475. Also I.F.C. VS. DSNL OFFSHORE LTD (2008) 7 NWLR pt. 1087 p. 592**.

   The following principles should guide the court in granting an application for mareva injunction.

   i. There must be a justifiable cause of action against the Defendant.

   ii. There must be real and imminent risk of the Defendant removing his assets from jurisdiction of the court and thereby rendering nugatory any judgment which the Plaintiff may obtain.

   iii. The application must make a full disclosure of all material facts relevant to the application.

   iv. The application must give full particulars of the assets within jurisdiction.

   v. The balance of convenience must be on the side of the applicant.

   vi. The applicant must be prepared to give an undertaking as to damages. See the cases of **SOTUMINU VS. OCEAN**

STEAMSHIP (NIG) LTD (1992) 5 NWLR PT. 239 P.1. A.I.C. LTD VS. N.N.P.C. (2005) 11 NWLR PT. 937 P. 563.

7-UP BOTTLING CO. LTD VS. ABIOLA & SONS (NIG) (1995) 3 NWLR pt. 383 p. 257.

4. **Quia Timet Injunction:** It is a type of injunction granted when a parties legal right has not been infringed but he has the fear that the wrong will be done to him if the order is not made. It is an order of injunction to prevent an apprehended legal wrong although such has not occurred at present. **See REDLAND BRICKS LTD VS. MORRIS (1970) A.C. 652**.

5. **Anton Piller Order:** By this type of order, a Plaintiff is permitted to demand entry to and enter the Defendants premises or proposed premises to search them and to remove in the interim documents and other items which might form evidence in his action or proposed action against the Defendant.

   Section 17(e) of the Magistrate's Court Law (Supra) empowers the Magistrate Court to make an order for the detention or preservation of any property which is the subject matter of an action. **Order V Rule 1 sub-rules (1) and (2) of the Magistrate Court Rules (Supra)** empowers the court to authorize any person to enter upon any land or building in possession of any party to an action.

6. **Prohibitory Injunction:** As the name implies, this type of injunction is restrictive in nature and it is aimed at restraining a person to whom it is directed from doing or carrying out specific act or acts as the case may be.

STAY OF PROCEEDINGS: Stay of proceedings is an interlocutory proceedings. It simply means that a Court that is hearing a matter should stop so far because of one thing or the other. It is an application brought before a court by any of the parties in the a case or even an interested party. It is therefore a temporary suspension of the normal and regular course or order of proceeding in a case or matter by the direction or order of a Court, in order for some other thing to take place. Thus, a party to any proceedings who may feel dissatisfied with the conduct of a courts proceedings or decision of a court can bring an

application which is interlocutory asking the court to stay further proceedings pending an appeal on a point. This application for stay can be made to the Magistrate Court or the High Court if the appeal is before the High Court. However, an application must be made first to the court of trial in this case the Magistrate Court and if it is refused by such Magistrate Court, then it will be made to the High Court.

All courts including the Magistrate Court have inherent powers to grant and make an order for stay or refuse same. It is a discretionary power which must be exercised judicially and judiciously. The Court must not be arbitral. The rights of the parties to the case must at all times be considered bearing in mind the justice of the case. **SEE AKILU VS. FAWEHINMI (NO. 2) (1989) 2 NWLR PT. 102) 122. OKAFOR VS. NNAIFE (1987) 4 NWLR pt. 64 p. 129**.

It should be noted that an order of stay of proceedings is anti-thesis to the speedy hearing of a case. It connotes a punitive element not desirable on the part of the anxious plaintiff, the hearing of whose claim will be unjustifiably delayed. **See case of OKEM ENT. (NIG.) LTD. VS. N.D.I.C. (2003) 5 NWLR pt. 814 492**.

"Stay of proceedings is a serious, grave and fundamental intervention in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits in the case, and therefore the general practice of the Court is that a stay of proceedings should not be imposed unless the proceedings beyond all reasonable doubt ought not to be allowed to continue" – **See NNPC & ANR VS. ODIDERE ENT. NIG. LTD (2008) 8 NWLR pt. 1090 583; Also SODEINDE VS. REGISTERED TRUSTEES OF THE AHMADIYA MOVEMENT-IN-ISLAM (1980) 1 – 2 S. C. 163**.

Unless an applicant has established beyond doubt that an action ought not go on, it should not be stayed. It is essential for an applicant for a stay of proceeding to establish not only that the respondent might not succeed but that he could not possibly succeed. The applicant for stay of proceedings has the duty to show that it is imperative to stay proceedings by placing sufficient materials before the court to enable it exercise its discretion in his favour; as such applications are not granted as a matter of course. **See REGISTERED TRUSTEES OF F.G.C. NIG & 2 ORS VS. DR. KOLA ADEYINKA & 2 ORS (2010) 8 NWLR pt. 1195 33; I.G.P. VS. FEYOSE (2007) 9 NWLR pt. 1039 263**.

The court should grant a stay of proceedings where it has no other option other than to grant it. **See case of NNPC & ORS VS. ODIDERE ENT. NIG. LTD (SUPRA). ALSO CARIBBEAN TRADING & FIDELITY CORPORATION VS. N.N.PC. (1991) 6 NWLR pt. 197 352**.

In all, the basic principles to be considered by the Court in an application for stay of proceedings are:

1. **There must be a pending Appeal:** A party applying for stay of proceedings where one of the reasons is that he is appealing against an interlocutory order of the Court must show that there is a pending appeal on a point decided by the trial court. It is not enough for the party to allege or claim that he has appealed. No. He must show that there is a valid and proper appeal pending. The appeal must have been entered. **See BARIGHA VS. PDP (2012) 52.2 NSCQR 63**. The reason being that a court can consider an application for stay of proceedings pending appeal and will not consider an application for stay of proceedings in respect of an invalid appeal. An example is where such an appeal is filed out of time which makes it invalid and incompetent. **See OWEMA BANK (NIG.) PLC VS. OLATUNJI (1999) 13 NWLR pt. 634 218; OLAWUNMI VS. MOHAMMED (1991) 4 NWLR pt. 186 516. NATIONAL BANK OF NIGERIA LTD VS. NET (1986) 3 NWLR pt. 31. 667; MOBILE PRODUCING (NIG) LTD. VS. MONOKPO (2001) 18 NWLR pt. 744 212**.

2) **The pending Appeal must be an arguable one in law:** This is decided by considering the grounds of appeal filed. It is from the grounds of Appeal that the court will consider and make up its mind whether there is an arguable point that can be given attention on appeal. The success or otherwise of the appeal is not considered at this stage. And the appeal must not be frivolous, oppressive or vexations. **See NAA VS. AJAYI (2001) 15 NWLR pt. 735 p. 173**. Once the applicant could show that the appeal is arguable, a stay could be granted.

3) **Where the action before the trial court is an abuse of the judicial process:** Where an applicant for stay of proceedings shows that the action before the court is an abuse of the courts process, the court in such a case can order a stay of proceedings.

The applicant for example may show that the cause of action for which the action is brought is already before another court of competent jurisdiction between the same parties and the same subject matter. The court in such a situation may order for stay of its own proceedings. Infact, in some extreme cases such actions have been struck out.

4) **Where the issue of jurisdiction is raised as a ground in the pending appeal:** In a situation where the interlocutory appeal filed as a reason for the application for stay of proceedings will finally dispose of the case and put an end to the proceedings at the trial court, then a stay will be granted. Such a situation is where the issue of jurisdiction is raised. This is because if the issue of the jurisdiction of the lower court which is seen as very fundamental is raised and may succeed on appeal, then a stay of proceedings becomes necessary in order not to waste the time of the lower court in going through the whole hog of hearing the matter. If otherwise, the court should refuse the application. **See case of EZE VS. OKOLONJI (1997) 7 NWLR pt. 513 p. 515**.

5) **Preservation of the Res:** As a matter of fact, the whole essence of interlocutory applications is for the preservation of the subject matter in litigation. In applications for stay of proceedings, preserving the res is always the fundamental consideration bearing also in mind the contending legal rights of the parties. Where the subject matter or res will be damaged, destroyed or annihilated before the final hearing of the matter by the court, justice dictates that a stay of proceedings to preserve the res should be granted. There must be evidence of such that is convincing to the court before the court can grant such. If otherwise, the application should be refused. **See KIOGO (NIG) LTD VS. HOLMAN BROTHERS (NIG.) LTD (1980) 5-7 SC 60**.

6) **Hardship:** The question of hardship no doubt is a matter of fact which can only be seen and considered from affidavit evidence of the parties. A court should show reluctance to grant an application for stay of proceeding if it will cause greater hardship than if the application is refused. Once the court after considering all available evidence before it comes to the conclusion that it will result in more hardship in granting the application, the court should not

grant a stay of proceedings. **See AROJOYE VS. U.B.A. (1986) 2 NWLR pt. 20 p. 101**.

It should be noted that where a court makes an interlocutory order which does not in any way finally dispose off the suit, an application for stay of proceedings based on the fact that an appeal has been lodged against such interlocutory order should not be granted by the court. This is in order not to unnecessarily delay the trial of the main issue is litigation between the parties. Appeals against such interlocutory orders or decisions of the court should be taken alongside the whole case on appeal after the final decision of the trial court and not fragmented at the interlocutory stage. The court should always be guided by this principle. See cases **THE REG. TRUSTEES OF F.G.C. NIG. & 2ORS VS DR. KOLA ADEYINKA & 2 ORS (supra)**.

Where the refusal to grant a stay of proceedings will render the order of an appellate court nugatory, a stay of proceedings will be granted. **See NWABUEZE VS. NWOSU (1988) 4 NWLR (PT. 88) 257; BIOCON AGROCHEMICALS (NIG) LTD. VS. KUDU HOLDINGS (PTY). LTD (1996) 3 NWLR pt. 437, 373. SARAKI VS. KOTOYE (1992) 9 NWLR pt. 264, 156**.

In an application for stay of proceedings, the court may also consider the conduct of the parties to the case. And an applicant for stay must establish a right of action and a prima facie claim in law.

The principles governing stay of proceedings are not exhaustive. Each case depends on its peculiar circumstances. **See MOBILE PRODUCING NIG. UNLIMITED VS. HIS HIGHNESS OBA YINUSA A. AYENI & ORS (2008) 1 NWLR (pt. 1067) 1855**. What matters in applications of this nature is that the applicant must at all times satisfy the court by reasons of special circumstances that make it necessary for the court to grant such an application in his favour. The interest of justice must always be in the mind of the court when faced with such applications.

STAY OF EXECUTION:

Once the phrase *"stay of execution"* is mentioned, what readily comes to mind is that a judgment or order has been given or

made in a case by a court of competent jurisdiction and a party wants to put a hold on the terms of the judgment or order being carried out.

A party to a case in whose favour judgment has been given is accordingly to law entitle to reap the full benefits of the said judgment. In that wise, the successful party takes steps in law to execute the judgment and this is in situations where the adverse party shows unwillingness to abide by the terms of the judgment. To this effect, such adverse party takes some steps and begins a process in law to stop the successful party from executing the judgment. This he does by bringing before the trial court an application seeking for a stay by the court of the execution of the judgment.

A stay of execution is a discretionary remedy to temporarily deprive the judgment creditor of the fruit of his judgment. However, the court does not make a practice of depriving a successful litigant of the fruits of his judgment. **See ALHAJI FATAI AYODELE ALAWIYE VS. MRS. ELIZABETH A. OGUNSANYA (2012) 12 MJSC pt. 145 at 156**.

And a stay of execution only prevents the beneficiary of the judgment or order from putting into operation the machinery of the law, the legal process of warrants of execution etc.

An application for stay of execution can only be made in respect of a judgment that is executory and not declaratory or where the court declines jurisdiction. **See ACHOR VS. ADUKU (2005) 27 WLR 97; TUKUR VS. GOVT. OF GONGOLA STATE (1989) 4 NWLR pt.117 D. 517; A-G ANAMBRA VS. ONITSHA N.L.G. (2001) 9 NWLR pt. 717 p. 105**.

As a court, you must bear it in mind that in the course of your work in the judicial process, you are going to be inundated with an endless flow of applications for stay of execution of a judgment or order you may have given after the trial of a case. This is so even at the appellate courts. The court has the discretionary powers to grant or refuse an application for stay of execution which powers to do so is inherent in the court just as it applies to stay of proceedings. It must however be borne in mind that such

discretionary powers must be done judicially and judiciously and the court as a matter of fact must consider and take into account the competing rights of the parties. When presented with facts based on an application for stay of execution, you must proceed to act on those facts on laid down principles, that is judicially and go ahead to give reasoned account based on fair exercise of your discretion one way or the other, that is judiciously.

Stay of execution will only be granted by the court if and only if the court is satisfied that there are special or exceptional circumstances to warrant doing so. **See INCAR NIG. PLC VS. BOLEX ENT. NIG. LTD (1996) 8 NWLR pt. 469 at 687**. The reason is that, the law is that a judgment of a court of law is presumed to be correct and rightly given until the contrary is proved or established. It follows therefore that you should guide against your judgments being easily stayed by you without exceptional good reason and you should not make it a practice of depriving a successful litigant of the fruit of his success in court. **See CHIEF J.S. AMADI & ORS VS. MR. EDMUND CHUKWU & ORS (2013) 5 NWLR (pt 1347 301; MARTINS VS. NICANNER FOOD CO. LTD (1988) 2 NWLR pt. 74 p. 75. VASWANI TRADING CO. LTD. VS. SAVALAKH (1972) 12 SC 77.**

What would amount to special and exceptional circumstances depends on the facts and circumstances of each case. That is the circumstances surrounding each case determines the special or exceptional things as presented that will influence the court to grant the application for stay. This situation is more where there is an appeal of the judgment by the unsuccessful party. In the case of **MRS. VERONICA OLOJEDE & ORS VS. MRS. ADEOLA A.B. OLALEYE & ORS (2010) 4 NWLR pt. 1183 1 at 13** the court of Appeal recognized certain principles to guide the court and special circumstances to be considered by the court in an application for stay of execution:

1. *Whether the execution would destroy the subject matter of the proceedings. See **UTIL GAS NIG. & OVERSEAS CO. LTD VS. PAN AFRICAN BANK LTD. (1974) 10 S. C. 105**.*

2. *Whether it would foist a situation of complete helplessness.*

3. *Whether it will render nugatory any order or orders of the appellate court, – see case of* ***IKENI VS. EFAMO (1995) 4 NWLR pt. 387 P. 30****.*

4. *Whether it will provide in one way or the other the exercise by the litigant of his constitutional right of appeal;*

5. *Whether the appellant cannot be returned to his status quo if the appeal succeeds:*

6. *Whether the appeal has merit. That is the chances of the applicant on appeal. See the following cases:*
   1. **NWABUEZE VS. NWOSU (1988) 4 NWLR (pt. 88) 257 at 258.**
   2. **VASWANI TRADING CO. VS. SAVALAKH (1972) 12 S.C. 77.**
   3. **VOLTIC (NIG.) LTD. VS. GROUPE DANONE (2003) 8 NWLR pt. 821 58.**
   4. **ORIENT BANK PLC VS. BILANTE INTERNATIONAL LTD (1996) 5 NWLR pt. 447 166 at 178**.

You should always bear in mind that what amounts to special circumstance depends on the facts of each case as I had earlier stated above. The list is endless. Where the law is recondite in an area where substantial issue of law is to be decided which can go either way, it has been held that in such a case a stay of execution should be granted. See **BALOGUN VS. BALOGUN (1969) 1 ALL N.L.R. 349 at 351**.

A party to a case may bring an application for stay not for purposes of an appeal but for him to pay the judgment debt installmentally. In such a case, the court may consider the financial position of the judgment debtor and the total amount involved in the judgment. And based on the facts deposed to by such a party in the accompanying affidavit, the court will be in a better position to decide whether to grant the application or not. **SEE OLADEJI ISE-OLUWA (NIG) LTD. VS. NIG. IDSTILLERIES LTD (2000) 6 NWLR pt. 709 p. 427; GOV. OYO STATE VS. AKINYEMI (2003) 1 NWLR pt. 800 P.1**.

As a presiding court to which an application for stay is brought, you have the absolute and unfettered power to decide or give the terms and conditions upon which the application is granted. However, if such terms

or conditions appear to be too unfavourable or difficult to be met by an applicant, such applicant can apply to the trial court or an appellate court for a review of such terms. **See LINGO (NIG) LTD VS. NWODO (2004) 7 NWLR pt. 874 30 at 43**.

In an application for stay of execution like in other similar applications, the onus is always on the applicant to show by affidavit evidence in support or any other evidence which may be placed before the court that the balance of justice was on his side. **See PAMOL (NIG) LTD VS. ILLAH AGRIC PROJECT LTD (2003) 8 NWLR pt. 821 38; JOSIAH CORNELIUS LTD VS. EZENWA (2000) 8 NWLR pt. 670. 616**.

POVERTY simpliciter does not constitute a special or exceptional circumstance to be considered in an application for stay of execution unless where it will have the effect of depriving the applicant the means of prosecuting his appeal. **See PAMOL (NIG) LTD. ILLAH AGRIC PROJECT LTD (SUPRA). NWAJEKWU VS. MBANUGO & ORS (1970-71) I.E.C.S.L.R. 100**.

But where the poverty alleged will result from allowing execution of the judgment and making it difficulty to prosecute an appeal, then stay should be granted. **See ABDULKADIRI VS. ALI (1999) 1 NWLR pt. 588 p. 613**.

A bare assertion of poverty is not enough. The applicant must make a full and frank disclosure of his assets and liabilities, including income and expenditure to enable the court make a judicious finding. **See DAILY TIMES OF NIG. PLC VS. KUSAMOTU (2002) 15 NWLR pt. 790 p. 401. LEADERS & CO. LTD VS. ADETONA (2003)14 NWLR pt. 840 p. 431. DENTON-WEST VS. MUOMA (2008) 6 NWLR pt. 1083 P. 418**.

In all case of interlocutory applications pending appeal, you should bear in mind that there must be before you evidence of a valid and competent appeal and the grounds of such appeal exhibited which must be substantial, cogent and arguable. Mere filling of a Notice of appeal is not enough. **See cases of ARGOS (NIG) LTD VS. UMAR (2002) 8 NWLR PT. 769 P. 284; INCAR (NIG) LTD VS. BOLEX ENT. (NIG) LTD (1996) 8 NWLR pt. 469 687**.

ENFORCEMENT OF JUDGMENTS/ATTACHMENT OF PROPERTY:
Where a court delivers its judgment and makes orders in respect there of, the judgment creditor is entitled to execute the judgment as may be provided for in the law. By virtue of **ORDER XIII RULE 6(1)** of the Magistrates Court Rules Laws of Ebonyi State (Supra), the issue of any execution in any proceedings shall be in accordance with the provisions of the Sheriffs and Civil Process Law, Cap. 138 Vol. 6 Laws of Ebonyi State of Nigeria,2009.

If a judgment is in respect of an immovable property to be attached, the judgment creditor as applicant for an order for attachment and sale of the immovable property for the realization of the judgment debt, has the duty to attach and sell first the movable property of the judgment debtor and if, on the exhaustion of the movable property, the debt remains or where no more movable property is available any more, the judgment creditor may apply for the sale of the immovable property. In making the application, the applicant must show that he has with reasonable diligence searched and ensured that no movable property exists any where else. Once the judgment creditor satisfies the court that there is no moveable property to attach, he becomes entitled to leave for the issue of a writ against immovable property of the judgment debtor – **See ASRACO (NIG.) LTD VS. TRADE BANK PLC (2003) 6 NWLR pt. 815 p. 22; OSUNKWO VS. UGBOGBO (1966) NMLR 184; MUTUAL AIDS SOCIETY LTD S. OGONADE (1957) NNLR 118**.

The court before whom the application to attach and sell the property of the Judgment Debtor is brought must be guided properly. This is because the discharge of the onus imposed by the law on the applicant for the attachment and sale of immovable property of a Judgment debtor must be by the applicant's own efforts and not the effort or report of others who are not applicants for leave to attach. The procedure to follow in order to show such information of the efforts made by the applicant should be given in an affidavit in support of the motion seeking an order to attach **– See case of LEEDO RESIDENTIAL MOTEL VS. B.O.N. LTD (1998) 10 NWLR pt. 570 p. 353; ASRACO (NIG) LTD VS. TRADE BANK PLC (Supra)**.

It is necessary at this stage to point out one interesting caveat in respect of a judgment given by a Magistrate Court in respect of an immovable property of a Judgment debtor when an application is made

for its attachment and sale. The caveat is that where the judgment has been obtained in a Magistrate's Court, execution shall not issue out of the Magistrates Court against the immovable property but shall issue out of the High Court upon the conditions and in the manner prescribed. **See Section 43 of the Sheriffs and Civil Process Law Cap. 138 Vol. 6, Laws of Ebonyi State of Nigeria, 2009**. Consider this section with **Section 70 of the Magistrate's Courts Law of Ebonyi State (Supra)**.

APPLICATION FOR INSTALLMENTAL PAYMENT:

Application of installment payment can be made and granted in the Magistrate Court. **See ORDER XIII RULE 6(2) & 5(1) & (2) of the Magistrate's Court Rules of Ebonyi State**. When a judgment is given or an order is made by court under which sum money of any amount is payable, whether by way of satisfaction of the claim or counter-claim in the proceeding or by way of costs or otherwise, the court may, as it thinks fit, order the money to be paid either.

(a) in one sum, whether forth with or within such period as the Court may fix; or
(b) by such installments payable at such times as the court may fix.

In a situation of this nature, the Magistrate may in using his discretion, suspend or stay any judgment or order given or made in the proceedings as he deems fit and from time to time until it appears to him that the cause of the inability by any such party to pay has ceased.

It is clear from the above that if an application for installmental payment is granted, such operates as a stay of execution of the judgment. See general the following cases on the subject:- **LIVESTOCK FEEDS PLC VS. IGBINO FARMS LTD (2002) 5 NWLR pt. 759 118. UBN LTD VS. PENNYMANT LTD (1992) 5 NWLR pt. 240 228**.

CONTEMPT OF COURT

Contempt of court has been defined as a conduct that defies the authority or dignity of a court and because such conduct interferes with the administration of justice, it is punishable by fine or imprisonment. **See ABEKE VS. ODUNSI & ANR (2013) VOL. 224 LRCN PT. 2 P. 181**. A contempt of court exists to protect the dignity of the court in order to ensure that justice shall be done. It prohibits any acts or words

which tend to obstruct the due administration of justice. See **SHUGABA VS. UBN (1997) 4NWLR pt. 500 p. 483**.

There are two kinds or categories of contempt:- civil contempt and criminal contempt. Contempt of court can be committed in facie curie or ex facie curie. See **CHIEF G.D. DIBIA VS. CHIEF M. E. IGWE & ORS (1998) 9 NWLR pt. 564 p. 78**.

It should be noted that the Magistrate Court is a court created by law under the constitution of the Federal Republic of Nigeria 1999 as amended by virtue of **Sections 6(2) and 6(5) (K) thereof**. By virtue of **section 6(6)a** of the constitution (supra) the Magistrate Court is a court having all inherent powers and sanctions of a court of law. Drawing from the above provisions of the constitution, the power to punish for contempt is inherent in the Magistrate Court and this is only necessary in order to maintain the dignity and authority of the court and the due administration of justice for a better society governed by the rule of law.

There are laws that guide and provide for contempt proceedings which include section 6 and 13(3) of the Criminal Code Act,274 of the Criminal Procedure Act, Section 133 of the Criminal Code, 6 of the Penal Code, 315 of the Criminal procedure Code, and Sections 64, 66, 67, 68 and 71 of the Sheriffs and Civil Proceeds Law (Supra).

Civil Contempt:

By virtue of Section 93 of the Sheriffs and Civil Process Law (Supra), the procedure to be followed in enforcing and punishing for civil contempt ex-facie curie is as provided for under the Judgment (Enforcement) Rules, Laws of Ebonyi State 2009. Also Judgment (Enforcement) Rules Laws of the Federation 2004.

Civil contempt exists when there is disobedience to the Judgments, orders or other process of the court. **See cases of OGUNLAN VS. OBA L. ABAYOMI DADA & 3ORS (2012) 2 NWLR pt. 1176 634.** Also the elements that constitute a civil contempt of court which must be proved are:

1. The terms of the Judgment/order

2. The alleged contemnor must have notice of the terms of the judgment or order breached which the enrolled order must be served on him.
3. Proof that he has disobeyed the order.
4. All the necessary processes as laid down by the law must be served on the alleged contemnor. See section 71 of the Sheriffs and Civil Process Law (Supra) and order IX Rule 13 of the Judgment (Enforcement) Rules.

It should be noted that a charge for a civil contempt ex-facie curie is quasi-criminal which has to be proved beyond reasonable doubt. The burden of proof in contempt proceedings is on the applicant who is moving or asking the court to commit the alleged contemnor to prison for disobeying a court order. If the applicant fails to discharge this burden, then the court cannot exercise its jurisdiction in the matter. **See OJOMO VS. IJEH (1987) M.N.L.R. pt. 64 216; F.C.D.A & ORS VS. DR. KOPUPAMO-AGARU (2010) 14 NWLR pt. 1213 364**.

Contempt proceedings can be proved by affidavit evidence. But where there are conflicts in the affidavit evidence, oral evidence should be led to reconcile the conflict, unless there is documentary evidence which can tilt the contradictory or "quarrelling" evidence one way or the other. Thus, where depositions in affidavits of contending parties conflict the court is not allowed to prefer one deposition to the other. See **ISYAKU VS. MASTER (2003) 5 NWLR (pt. 814 p. 443)**. In cases of such conflict the only course open to the court in order to resolve the conflict is to hear oral evidence. So held by the Supreme Court per Tobi JSC in the case of **EIMSKIP LTD VS. EXQUISITE IND. LTD (2003) 4 NWLR pt. 809 p. 88. See also OKERE VS. NLEM (1992) 4 NWLR pt. 234 p. 132**.

Under the Sheriffs and civil process law (Supra) and the Judgment (Enforcement) Rules in Order IX Rule 13, an alleged contemnor of a court order must be served with the relevant processes of court, that is Forms 48 and 49; Form 48 must contain a copy of the courts enrolled order. These processes Forms 48 and 49 must be issued on application by a judgment creditor (the applicant) signed and issued by the Registrar of the Court in which the application for Committal is made. The processes must be served personally. **See the case of ODU VS. JOLAOSO (2003) 8 NWLR pt. 823 p. 547 page 753**. In the above case, the Form 49 was signed by the Judge of the court and on appeal,

it was held (declaring the whole process a nullity) that such process can only be signed by the Registrar of Court and not the Judge.

You should bear in mind that in contempt proceedings no matter how serious that alleged contempt is and the manner it was done, the principle of fair hearing must not be compromised. It must be followed strictly. See **AKPAMGBO-OKADIGBO & ORS. VS. CHIDI & ORS (Supra)**. Where a party to a case before your refuses to obey or implement an order, the court will not exercise its discretionary powers in his favour if he asks for any equitable relief from the court. See cases of **SHUGABA VS. UBN PLC (1997) 4 NWLR PT. 500 483; NWOBODO VS. NWOBODO (1995) 1 NWLR pt. 370 at 206**. However, there are exceptions to this common law rule. **See ODOGWU VS. ODOGWU (1992) 2 NWLR PT. 225 AT 547; MOBIL OIL (NIG) LTD VS. ASSANT (1995) 8 NWLR pt. 412 p. 133**.

Criminal Contempt: A contempt of Court is an offence of a criminal character for which the contemnor may be sent to prison for it. **See IFEKWU VS. MGBAKO (1990) 3 NWLR pt. 140 at 588**.

Criminal contempt may be committed either in facie curie or ex-facie curie. Contempt in facie curie consists of words spoken by a person or acts done by him in or in the precincts of a court which conduct obstructs or interferes with the due administration of justice or calculated to do where the court is entitled to try summarily. To this end, all the circumstances must be within the personal knowledge of the Court. But where they are done outside the Court or its precincts, then such is ex-face curie since the acts are outside the personal knowledge of the court and the Court will have to rely on evidence of other witnesses. **See the case of IN RE ONAGORUWA (1980) I.N.C.R. 254**. What amount to contempt in facie curie is subjective which does not require any application by a party to arouse the courts jurisdiction to punish for such. **See case of NUNKU VS. I.G.P. 15 WACA 23 – 25**.

In contempt in facie curie, no warrant is needed to arrest the offender. There is no formal charge preferred against the contemnor and no plea taken. The offender is merely put in the dock, the misconduct or complaint against him is explained to him and is asked to show cause why he should not be punished for contempt. Where he fails to show good cause, the Magistrate may proceed and pass sentence on him. There are instances where the offender may not necessarily to put in

the dock and this is where the circumstances of the conduct are clear which will not require the offender to be called upon to show cause. An example is where a litigant in the face of the court uses abusive or contemptuous words at the judge and pointing fingers at the face of the Judge. **See OKOROMADU VS. STATE (1975) 12 S.C. 87, 88 – 89. ATAKE VS. A-G FED. & ANR (1982) 11 S.C. 153**.

It should be emphasized that where the court would rely on evidence or testimony of witnesses to events occurring outside his view and outside his presence in court, such court should not try the case. The matter must be placed before another court where the usual procedure for the arrest, charge and prosecution of the offender must be followed. **See OMOIJAHE VS. UMORU (1999) 69 LRCN 1349; OKU VS. STATE (1970) INLR 60**.

In such a case, a full trial has to be conducted. The proper procedure of arrest, charge, plea, prosecution and defence, address, judgment or conviction/sentence or discharge or acquitted (as the case may be) must be followed. There must be proof beyond reasonable doubt. **See EZEJI VS. IKE (1997) 2 NWLR pt. 456. p. 206**.

It should be noted that by virtue of **Section 36(5) of the 1999 Constitution**, an accused person is presumed to be innocent until he is proved by due process of law to be guilty. **See OLATUNJI VS. F.RN. (2003) 3 NWLR pt. 807 p. 406**. Drawing therefore from the above provisions of the constitution, the principles of fair hearing as epitomized in the legal maxims "**NEMO JUDEX IN CAUSA SUA"** and **"AUDI ALTERAM PARTEM"** must be complied with.

The following are some conducts or acts that constitute contempt of Court. But the list is not exhaustive as they arise according to circumstances.

1. Every private communication to a Judge for the purpose of influencing his decision in a pending matter is contempt.

2. It is contempt of Court to resort to disrespectful conduct, continued interruptions and disturbances in the course of a trial in Court.

3. An article or publication in a newspaper that scandalizes or calculated to bring the Court into disrepute amounts to contempt.

4. Any publication in any Newspaper which is likely to prejudice the fair trial of any person is contempt of the Court.

5. Any publication in a Newspaper misrepresenting proceedings of a Court is contempt **see Section 133(d) of the Criminal Code Laws of Ebonyi State (Supra)**.

6. A lawyer who prepares a contemptuous affidavit for a deponent is equally if not more seriously guilty of contempt of Court.

7. Disobedience of the order of a superior Court by a lower court to which it is issued may in certain cases amount to contempt of the court that issued the order. See case of **AWOSANYA VS. BOARD OF CUSTOMS (1975) 3 S.C. 47 at 52**.

Priority must be given to contempt proceedings in a suit. The Supreme Court in the case of **EBHODAGHE VS. OKOYE (2004) 18 N.W.L.R. pt. 905 p. 472** held as follows:

"The purpose of giving priority to contempt proceedings in a suit is to demonstrate to the public that the Court, being the creature of the constitution vested with the constitutional duty to decide cases between all manners of litigants, can protect its dignity and would not allow the legislative or the executive arm of government or a citizen to brazenly do an act that would diminish the powers of administration of justice duly vested by the constitution and the common law in the Court. Consequently, paramountcy ought generally to be given by way of priority of proceedings to contempt matters where the issues of contempt and jurisdiction are before a court for adjudication".

In concluding this topic of contempt of Court I would like to bring to Your Worships notice the admonishing words of My Lord **NIKI TOBI JCA** (as he then was) in the case of **OKOYA VS. SANTILL P. 753 (1991) 7 NWLC PT. 206** where he said:

"In examination an application on the exercise of the court's jurisdiction, the Judge must try to keep his head and mind completely out of the sentiment and sensitiveness of the matter at all times. He should keep

himself aloof from the arena of the alleged disobeying conduct and allow the applicant to prove it. On no account should the Judge take up the matter as a personal attack on him, for the reason that the contempt is physically addressed to his person. Let him not take that line of action. He should leave his head and mind open and go into the matter like every other matter coming before him. It is only by such cautious conduct that he can do justice to the parties".

APPLICATIONS FOR BAIL: Bail application is an interlocutory proceedings in court under our criminal justice system. It is a security required by a Court for the temporary release of a person who is arrested or detained or imprisoned from lawful custody to sureties or on self recognizance who must appear in court at a future time until the determination of the case against such person.

By virtue of **Section 35(4) of the 1999 Constitution (Supra)**, a person who is arrested or detained in accordance with law, is entitled to bail. Bail is therefore a constitutional right. The said section provides thus:

"Any person who is arrested or detained in accordance with subsection (1) (c) of this section shall be brought before a court of law within a reasonable time, and if he is not tried within a period of –

(a) two months from the date of his arrest or detention in the case of a person who is in custody or is not entitled to bail; or

(b) three months from the date of his arrest or detention in the case of a person who has been released on bail, he shall (without prejudice to any further proceeding that may be brought against him) be released either unconditionally or upon such conditions as are reasonably necessary to ensure that he appears for trail at a later date".

The essence of bail from the above provision of the constitution is to set an accused person charged to court at temporary liberty on conditions that ensures he will attend court and stand his trial and not escape justice or to set an accused at liberty who is detained without trial in breach of constitutional provisions on condition to ensure his attendance in court for his trail at a certain future date as the case may be. **See**

SULEIMAN VS. C.O.P. PLATEAU STATE (2008) ALL FWLR pt. 425 1627.

It should be noted that the aim of section 35(4) of the Constitution (Supra), is for the speedy trail of an accused without delay in the interest of Justice and not to indefinitely hang a criminal charge or allegation on his head without trial since he is by virtue of section 36(5) of the Constitution presumed innocent until he is proved by due process of law to be guilty. **See case of OLATUNJI VS. FRN (Supra)**.

Apart from the constitution, the issue of bail in our Courts-Magistrate Courts and the High Court is also provided for under the Criminal Procedure Act and the Criminal Procedure Code. I am aware that the various states have their domesticated Criminal Procedure Laws. To a large extent the provisions of the laws on bail are basically the same except in some few circumstances.

Section 118(1) (2) and (3) of the Criminal Procedure Law Cap. 34, Laws of Ebonyi State of Nigeria 2009 provides as follows:-

"(1) A person charged with any offence punishable with death shall not be admitted to bail, except by a Judge of the High Court.

(2) Where a person is charged with any felony other than a felony punishable with death, the Court may, if it thinks fit, admit him to bail.

(3) When a person is charged with any offence other than those referred to in the two last proceeding subsections, the Court shall admit him to bail, unless it see good reason to the contrary".

Section 341 of the Criminal Procedure Code provides as follows:

"(1) persons accused of an offence punishable with death shall not be released on bail.

(2) Persons accused of an offence punishable with imprisonment for a term exceeding three years shall not ordinarily be released on bail; nevertheless the Court may upon application release on bail a person accused as aforesaid if it considers:-

(a) That by reason of the granting of bail the proper investigation of the offence would not be prejudiced; and

(b) That no serious risk of the accused escaping from justice would be occasioned; and

(c) That no grounds exist for believing that the accused, if released, would commit an offence

(3) Notwithstanding anything contained in sub-sections(1) & (2) if it appears to the Court that there are not reasonable grounds for believing that a person accused has committed the offence but that there sufficient grounds for further inquiries, such person may, pending such inquiry be admitted to bail".

Under Section 118(1) of the Criminal Procedure Law (Supra), a Magistrate Court cannot grant or even consider the issue of bail as the offence under reference in the sub-section is punishable with death. It is a no go area for any Magistrate Court. This is also the case under Section 341(1) of the Criminal Procedure Code. However, for purposes of clarity in the subsections, whereas under Section 118(1) of the CPL (Supra) a Judge can grant bail. Under Section 341(3) of the CPC, it gives a Magistrate Court the power to grant bail even in capital offences provided if it appears to the Court that there are not reasonable grounds for believing that a person accused has committed the offence and also if there are sufficient grounds that give room for any further inquiry. There is no doubt that the provisions of Section 341(3) of the CPC is wide on the issue of bail. It allows a Magistrate discretion to grant or not to grant even in capital offences.

From the provisions of Section 118(2) a Magistrate has a discretionary power to grant bail to an accused person. The import or meaning I can decipher from that subsection (2) of 118 of the CPL or CPA as the case may be is that in the case of imprisonable offences bail may be granted if it is established that there is no risk that an accused will fail to surrender himself to custody, or that he will commit an offence while on bail, or interfere with witnesses or even jump bail thus not surrendering himself to justice. **See the case of OLATUNJI VS. FRN (Supra)**.
In the Magistrate Court, when an accused is charged with an offence which is bailable, if he is represented by counsel, his counsel will usually make an oral application for bail giving reason why the Court should

exercise it discretion in favour of the accused and grant him bail. In some cases, the prosecution may oppose the application giving its own reasons, which the Magistrate after considering same will make up his mind one way or the other. Usually, in cases that are though indictable but do not attract years of imprisonment up to 7-10 years, the Magistrate will grant bail except if there exist certain circumstances that may warrant him to refuse bail. In some cases, the Magistrate may adjourn to consider bail or order that a formal application be placed before it with an accompanying affidavit. It all depends on the circumstance of a case.

In simple offences and misdemeanors, it appears the Magistrate is under obligation to grant bail except if he thinks otherwise in view of what is placed before him.

Generally, an applicant for bail must first place before the Court for its consideration materials upon which to found the exercise of its discretion. It is only after the applicant has discharged this onus that rests on him that the onus will shift to the prosecution to show cause why the bail should not be granted. **See OLATUNJI VS. FRN (Supra)**.

It should be noted that in cases where a formal application with an accompanying affidavit for bail is brought before a Court, the fact that the prosecution fails to file a counter-affidavit in opposition to the affidavit filed by an applicant for bail or fails to oppose an application for bail made orally, is not enough reason to admit an accused person to bail. The trial Court still has a discretion whether or not to grant the application for bail.

In a plethora of authorities, the Courts have laid down fundamental principles that a Court should consider in granting or refusing an application for bail. In the case of **OLATUNJI VS. FRN (Supra)** the Court of Appeal Lagos Division laid down the following principles for consideration in applications for bail pending trail:-

1) The nature of the charge
2) The strength of the evidence by which the charge is supported
3) The severity of the punishment in the event of conviction
4) The criminal record of the accused, if any;
5) The likelihood of the repetition of the offence;

6) The probability that the accused may not surrender himself for trail; thus not brining himself to justice; and
7) The risk that if released, the accused may interfere with witnesses or suppress the evidence likely to incriminate him.

See also cases of **DANBABA VS. STATE (2000) 14 NWLR PT. 687 396; BAMAIYI VS. STATE (2001) 8 NWLR P.t 715 p. 270**.

Other principles that a Court may consider in an application for bail pending trial include:

a) **The prevalence of the offences:** In our present day society offences such as armed robbery, kidnapping, secret cult activities, car snatching, rape, child trafficking etc are now rampant and on the increase. The Judge or Magistrate may show reluctance and withhold his discretion to grant bail in such offences to discourage perpetrators. **See UDEH VS. FRN (2001) FWLR pt. 6 1734**.

b) **Ill-health of an applicant for bail is also a ground that a Court may consider in granting bail:** If such is established, the court should grant bail. There are so many cases pending now in our courts on this issue. Some decided cases on the point are:- **FAWHEINMI VS. STATE (1990) 1 NWLR pt. 127 486; ASARI-DOKUBO VS F.R.N (2007) ALL FWLR pt. 375. 558**.

c) **Whether investigations are concluded:** There are some cases where investigations are still going on where if an accused is released on bail, it may jeopardize the proper carrying out of the investigation. This is so because the law provides for an accused to be charged to Court within a given period which in compliance to such law, investigation into the case involving such accused may still be on. In such a case, a Court may tarry a little and refuse bail for the time being if it will serve the ends of Justice.

Bail Pending Appeal: When an accused has been tried, found guilty and convicted by a Magistrate Court and if he is appealing, he has the option of applying for bail to be granted him pending his appeal. Such application is first usually made to the Magistrate that convicted the applicant. It is only where the Magistrate refuses the application (in most case it does refuse) that the applicant can apply to the Appellate

Court for bail. **See EFFIONG VS. COP (1967) N.M.L.R. 341**. It should be noted that bail after conviction is at the discretion of the Court which the Magistrate Court which heard the case rarely grants. For the Court to grant bail to a convicted person ending his appeal against such conviction, the applicant for bail must show special and exceptional circumstances that will move the Court to look his way, consider same and grant the application. Some of the exceptional and special circumstances to be considered by the Court are as laid down in some decided cases. The principles to be considered are:-

1) *If the Appellant/Applicants health is in serious jeopardy and if not allowed on bail to take care of his health may not be alive or in a position to prosecute his appeal.*

2) *Like in the case of FAWEHIMNI VS. STATE (Supra) where it was held "where a sentence is manifestly contestable as to whether or not it is a sentence known to law, it constitutes a special circumstance for which bail should be granted to an applicant pending the determination of the issue on appeal".*

3) *If the Appellant/Applicant is a first offender and satisfies the court that he is not only a first offender but has been of good behavior, such could be considered by the Court is granting him bail pending his appeal.*

4) *In a situation where the Appellant/Applicant would have served out his sentence in prison by the time his appeal will be ripe and heard, then such a ground is special and exceptional to weigh in the mind of the Court in granting him bail pending such appeal.*

See generally the cases of **R. VS. TUNWASHE (1935) 2 WACA 236. BUWAI VS. STATE (2004) FWLR pt. 227 p. 540. DORIS OBI VS. THE STATE (1992) 8 NWLR pt. 257 p. 76**.

It should be noted that the Court is not under obligation to consider and apply all the principles in a case in cases of this nature. The principles or the criteria to be applied all depends on the circumstances of each particular case. The conditions arise as each case demands. The principles are a guide.

In granting bail, the Court usually does so on conditions that will ensure that the accused attend Court at a named day or as required to take his trial. The conditions or the terms of the bail is usually at the discretion of the Court depending on the nature of the charge or matter and the facts placed before the Court.

The Court should as a matter of fact in granting bail do so on liberal terms except in capital offences and very serious offences not punishable by death. Some Magistrates are in the habit of imposing stringent and suffocating bail conditions which amounts to a refusal only that it was not out rightly refused. The result being that an accused who ordinarily should be given some temporary liberty will end up in detention until the fulfillment of such burdensome conditions which in most cases are not fulfilled. The accused in such a case will then be among the awaiting trial persons in prison custody. Our superior Appellate Courts have frowned at this. The Court of Appeal in the case of **IBORI & ANR VS. FRN (2009) 3 NWLR pt. 1127 94 at 106 – 107** (which was referred to and quoted by the Chief Judge Kwara State Hon. Justice S. D. Kawu in a paper he delivered at the N.J.I on 20th April,2016) had this to say on the issue of unbearable bail conditions:

"In this vein, it does not speak or say well of our Courts or our Justice system, that when bail is granted with one hand it is surreptitiously retrieved, withdrawn or taken away with the other by the imposition of unwieldy and inhibitive bail conditions. Hence, Courts must always be conscious and approach the issue of grant of bail with an element of the liberalism and circumspection". I have nothing else to add. Be guided accordingly.

PRELIMINARY OBJECTIONS:

A preliminary objection is a statement (formal or oral) opposing something that has occurred or is about to occur in Court seeking the Courts immediate ruling on the point, which if upheld may render further proceedings in a matter impossible or unnecessary. A party coming up with such an objection must state the basis for such. It is a threshold issue which is a preemptive strike aimed at scuttling the hearing of a case before a Court. **See case of RABUI VS. ADEBAJO (2012) 15 NWLR pt 1322 page 125**. A preliminary objection must be disposed of before any further step can be taken in a case. This is so to avoid a situation where the Court will embark on a futile adjudication where it has no jurisdiction or where the matter before the Court is already dead.

See AKARE VS. GOV. OYO STATE (2012) 12 NWLR pt. 13 14 p. 2240. It is very obvious that in the Magistrate Courts, the issue of preliminary objections are common.

One common feature in preliminary objections is where the jurisdiction of the Court is put to question in a matter. In such a case the Court has to consider same first and resolve before going into the hearing of the suit if need be. **See UBA PLC VS. ACB (NIG) LTD (2005) 12 NWLR pt. 939 p. 232; also N.N.B PLC VS. IMONIKHE (2002) 5 NWLR pt. 760 p. 294**.

In most cases at the Magistrate Courts counsel and to an accused person in a criminal charge raises an objection before the accused takes his plea. That is the correct procedure. This is because once an accused person speaks the language of the Court or understands the language of the court and pleads to a charge before the Court without any objection, it presupposes that he understands the charge preferred against him and read to him which will be presumed that the plea is valid and that the proper procedure was employed in the trial. **See OKEKE VS. STATE (2003) 15 NWLR pt. 842 P. 25. OKEWU VS. FRN (2002) 9 NWLR p. 327; ALSO SOLOLA VS. STATE (2005) 11 NWLR pt. 937 P. 460**.

It is advised that preliminary objections that touches on the jurisdiction or competence of the Court to entertain a suit before it or where the issue of the competence of a party to the suit is raised, such should come by way of a motion on notice supported by affidavit.

A successful preliminary objection that touches on the fundamental issue in a matter that goes to the root of such matter has the effect of bringing such matter to an end. **See NJEMANZE VS. NJEMANZE (2013) VOL. 217 LRCNI**. However, one has to apply caution in dealing with a preliminary objection that appears to have the effect of bringing an action before the Court to an end. The Supreme Court has sounded this warning of applying caution in the case of **AINA VS. THE TRUSTEES OF NIGERIAN RAILWAY PENSIONS BOARD (1970) 1 AIL NLR 281** where it said –

"It is only in exceptional cases when it is absolutely clear that it is likely to dispose of the action that a Judge consents to a hearing of preliminary issue even on a point of law before the action is heard in

full. Such points could always be taken in the course of the hearing if there is any doubt whether a preliminary issue will dispose of the matter". **See also case of JADESEMI VS. OKOTIE-EBOH (1986) 1 NWLR 264, 276**.

"Whenever the performance of an action in legal proceedings is predicated by the fulfillment of certain conditions procedural or substantive, the adverse party is entitled to raise a preliminary objection founded on the non fulfillment of such conditions. For instance where the applicant has filed a motion and is required to give two or three clear days, as the case may be before the application is to be fixed for argument, the adverse party is entitled to raise a preliminary objection if this provision is not observed" **culled from a Paper on Preliminary objections Delivered by Hon. Justice A. G. Karibi-Whyte J.S.C. in 1990**. See also the cases of **MOHAMMED VS. MUSAWA (1985) 3 NWLR pt. 23 89; ABBA VS. SPDC (NIG) LTD (2013) VOL. 224 LRCN pt. 1 33; UDENWA VS. UZODINMA (2013) VOL. 218 LRCN pt. 1. P. 172**.

CONCLUSION:

The topic we have just discussed is quite a vast one. There are still areas not touched in this discuss. It is my advise that as Magistrates you should make it a point of duty to read widely and study these interlocutory applications as their importance in enhancing the due administration of justice cannot be overemphasized in order not to be taken by surprise by counsel who appear before you.

Always bear in mind that in granting or refusing interlocutory applications, you should be guided by the fact that such is at your discretion to so do which must be exercised judicially and judiciously. And meeting the ends of justice must be most paramount.

It is my believe that you have been enriched by this little contribution from me.

May the Almighty God continue to give us his grace to carry on in this task of judging our fellow man.

Thank you all and remain blessed.

Hon. Justice F. O. Ibiam
13th July,2016