INTERLOCUTORY APPLICATIONS, PERTINENT ISSUES FOR CONSIDERATIONS

PRESENTED BY:

S. D. KAWU

CHIEF JUDGE

KWARA STATE

AT ANDREWS OTUTU OBASEKI AUDITORIUM,

NATIONAL JUDICIAL INSTITUTE (NJI) ABUJA

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INTRODUCTION

May i first observe that on some occasions in the past, i have delivered papers on Interlocutory Applications and related subject matters at the invitation of the National Judicial Institute. It is my further observation that eminently qualified jurists have also, in the past delivered papers on the same or related topics. These observations have prompted me to wonder whether discussions on Interlocutory Applications and related matters have not been over flogged by the management of the Institute.

After a very careful reflection however, i came to the inescapable conclusion that the topic was neither over flogged nor was its constant choice for discussion by the Institute the result of a dearth of other topics for deliberations.

The recurring choice of Interlocutory Applications as a topic for discussion by the Institute is, in my view, informed by the following factors, among others:

1. Interlocutory Applications constitute the bulk of the matters that will come before my lords for determination in the course of your career from High Court to the Supreme Court Bench.

2. The manner and pace with which interlocutory applications are handled by the courts have a significant bearing on the outcome of the substantive suit in which such applications are made.

3. Some of the loudest complaints against the Judiciary in recent times bother on the way and manner Judges exercise their discretionary powers to grant Interlocutory applications particularly on adjournments and injunctions. It has been alleged, though sometimes wrongly that Judges do abuse their discretionary powers in granting Interlocutory injunctions. This abuse, often times is ascribed to corruption in the judiciary.

It is in the light of the foregoing that i consider it most apt at this time of our nation's history to emphasise the need for judges to exercise their discretion in granting interlocutory applications in a very transparent, fair and judicious manner. I therefore use the opportunity of this occasion to commend the foresight of the Administrator of the Institute and her able lieutenants in their choice of various relevant topics for deliberations at workshops and seminars for Judges.

I wish to express my sincere gratitude and appreciation to the Administrator of the National Judicial Institute (NJI) Hon. Justice R. P. I. Bozimo, OFR for according me the honour and

privilege to present a paper at this Refresher Course for Judicial Officers titled:

Interlocutory Applications, Pertinent Issues for Consideration.

INTERLOCUTORY APPLICATIONS

An interlocutory application is one made in the course of a proceeding or subsequent to judgment upon an appeal. Such an application may be made in civil or criminal proceedings.

An interlocutory application may be made to a judge sitting in open court where the judge and counsel are fully robed and members of the public are admitted or it may be made in chambers where the judge and counsel are not robed and members of the public are not admitted. Whether an interlocutory application is taken in the open court or in chambers, parties and their counsel must be admitted.

Generally speaking, contentious applications are made in court while non-contentious ones can be made to a Judge in chambers and in both cases the rules of natural justice apply.

The followings are examples of applications which the rules of the various high courts permit to be made in chambers. These are in addition to other matters which may be permitted to be heard in chambers by other rules or enactments.

(a) Application to serve a writ or other process out of the jurisdiction;

(b) Application for substituted service of a writ or other process;

(c) Application to have cases heard during vacations;

(d) Application for enlargement of time;

(e) Application for a writ of attachment or for a garnishee order;

(f) Application for payment or transfer to any person of any cash or securities standing to his credit in any cause or matter where there has been a judgment or order declaring the rights or where the title depends only upon proof of the identity of the birth, marriage or death of any person;

(g) Application as to the guardianship and maintenance or advancement of infants;

(i) Any matter relating to the adoption of children;

(j) Application connected with the management of property;

and

(k) Such other matters of an interlocutory nature as the Judge may think fit to dispose of in Chambers.

See: **Order 37 Kwara State High Court (Civil Procedure) Rules 2005.**

In an application or proceedings in chambers, a party who so desires may be represented by a legal practitioner of his choice.

Interlocutory applications are generally made by motion which may be exparte or on notice, as provided for by the rules of court.

The motion is generally supported by affidavit which constitutes evidence relied upon by the applicant. However where the applicant is not relying on facts but solely on point of law or on materials already in the domain of the court such as pleadings he need not accompany his motion with an affidavit.

See: **Keyamo vs. House of Assembly, Lagos State (2000) 11 W. R. N. 27 at 40-41.**

Order 11 Rules 22, 23, 24, 25, and 26 of the Kwara State High Court (Civil Procedure) Rules provides as follows:

22. Oral evidence shall not be heard in support of any motion unless by leave of the Court.

23. The Court may, in addition to or in lieu of affidavit if it thinks it expedient, examine any witness viva voce, or receive documents in evidence, and may summon any person to attend to produce documents before it, or to be examined or cross-examined before it in like manner as at the hearing of a suit.

24. Such notice as the Court in each case, according to the circumstances, considers

reasonable, shall be given to the persons summoned and to such persons (parties to the cause or matter or otherwise interested) as the Court considers are entitled to inspect the documents to be produced, or to examine the person summoned, or to be present at his examination, as the case may be.

25. **The evidence of a witness on any such examination shall be taken in like manner as nearly as may be as at the hearing of a suit.**

26. **Upon the hearing of any motion the Court may, on such terms as to costs and adjournment as it may deem fit, allow any additional affidavit to be used, after the affidavit has been duly filed and served on the opposite side.**

An application shall be accompanied by written address in support of the relief sought.

By the rules of most high courts an applicant shall state under what rule of court or law the application is brought. Where however a party fails to state the rule or law under which an application is brought, the court may treat the failure as an irregularity which will not be a ground for refusing it as

long as there is in existence a rule or law to support the application.

Although applications are normally made to the court in the course of proceedings by filing motions, such applications can be made orally where for example it is to correct a typographical error in pleadings and the other party does not object to it being made orally.

Applications for adjournment which have the effect of staying proceedings till a future date, are often made orally by parties or their counsel.

Where an interlocutory application requires evidence in support, it is generally given in the form of affidavit. A defendant who wishes to oppose the application files a counter affidavit. The situation may arise however where, on the application of any of the parties to the application, the court orders the deponent to an affidavit to appear before it for cross examination.

See: **Buhari vs. I. N. E. C. (2008) 19 N. W. L. R. (Pt. 1120) 246 at 377, Paragraphs E-F.**

Where a person ordered to appear in Court for cross-examination fails to attend, the Court may refuse to make use of his affidavit.

The court hearing an interlocutory application may take oral evidence to resolve the conflict between the affidavit in support of the application and the counter affidavit of the opposing party.

See: **Epe vs. Keshinro (2009) 4 N. W. L. R. (Pt. 1131) 405 at 427, Paragraphs B-C**

Siat S. A. Brussels vs. S. S. Ltd (2009) 17 N. W. L. R. (Pt. 1171) 525 at 543, Paragraphs B-C;

It must be noted that to receive the attention of the Court to necessitate calling for oral evidence to resolve a conflict in the affidavits, the conflict must really be material, substantial and fundamental to the live issues in the matter. The court should not waste time attending to conflicts that are peripheral, cosmetic, inarticulate or one which is a mere farce orchestrated by a party.

See: **Ogunsakin vs. Ajidara (2010) All. F. W. L. R. (Pt. 507) 109 at 133, Paragraphs A-C and Attorney General, Adamawa State vs. Attorney General of the Federation (2005) 18 N. W. L. R. (Pt. 958) 581 at 621, Paragraphs D-E and at 652, Paragraphs E-F.**

Note also that oral evidence to resolve the conflicts will not be necessary where the conflicts can be resolved on available documentary evidence before the court.

See: **P. D. P vs. Mohammed (2005) All. F. W. l. R. (Pt. 289) 1322 at 1343, Paragraphs E-G and Dana**

Implex vs. Awukam (2006) 3 N. W. L. R. (Pt. 968) 544 at 563, Paragraphs A-C.

The court may also examine viva voce, or receive documents in evidence or summon any person to attend to produce documents before it in addition to or in lieu of affidavit if it thinks it necessary for the fair determination of the application.

A court hearing an interlocutory application supported by affidavit may on terms as to costs, adjourn the hearing of the application to allow the use and filing of additional affidavit subject to it being served on the opposite party.

See: **Nweke vs. Orji (1989) 2 N. W. L. R. (Pt. 104) 484; Mba vs. Mba (1999) 10 N. W. L. R. (Pt. 623) 503 at 514- 515, Paragraphs H-B and MV "Delos" vs. Ocean Steamship Ltd (2005) 9 W. R. N. 155 at 174.**

See however, the position of the Court in **Majorah vs. Fassasi (1986) 5 N. W. L. R. (Pt 40) 243 at 255** which decision predated the earlier decisions cited above.

The decision or ruling of the court in an interlocutory application is called "order" which is drawn up with the date it is made and signed by the presiding judge thus clothing it with automatic legal force.

Since there are numerous and uncountable number of interlocutory applications which a party may make in the

course of a proceeding in order to advance his case, it will be virtually impossible to treat all of them on an occasion as this.

I shall therefore speak today on Injunctions with special reference to Interlocutory Injunction which constitute the single most important interlocutory applications that parties may make in the course of proceedings depending on what they feel will advance their cause/case.

Before i do so however, i will like to talk briefly about applications for stay of execution and stay of proceedings and the pertinent issues which the court must take into account before granting them.

Let me state from the onset that the power of the courts to grant stay of proceedings and stay of execution applications derive generally from the following three sources:

1. Inherent jurisdiction as vested by S.6 (6) (a) of the 1999 Constitution of the Federal Republic of Nigeria as amended and interpreted by the courts in a host of cases, which include:
   - Fawehinmi vs. Akilu (1989) 3 NWLR (PT 112) 643 at 670 – 671.
   - Adigun vs. A. G. of Oyo State (No. 2)(1989) 2 NWLR (PT. 56) 197 at 235.

- Governor of Lagos State vs. Ojukwu (1986) 1 NWLR (PT. 18) 621 at 641.

2. The Rules of Court

   Orders 11 and 12 of the Kwara State High Court (Civil Procedure) Rules 2005 make provisions for types of interlocutory applications which parties may make to advance their cause.

   Orders 34, 42, 48, 49, 50 and 55 of the Rules of Kwara State High Court and similar provisions in the various States, Federal and Federal Capital Territory (FCT) High Courts Rules make provisions for the grant of stay of proceedings and stay of execution by the Courts.

3. Statutory Powers

   There are several Federal and State legislations which confer powers on the High Courts to grant stay of proceedings and stay of execution.

   See: **Section 5 of the Arbitration Law of Kwara State; Sections 305, 306 and 438 of the Companies And Allied Matters Act.**

In exercising its powers to grant stay of proceedings or execution, the court must ensure that Justice is done to the parties in each case. This will require, in the case of an application for stay of execution the court to maintain a delicate balance between the right of the successful party to

reap the fruits of his litigation and the right of the losing party to have the success of his opponent tested on appeal.

Also in an application for stay of proceedings, a balance must be maintained between the right of a party to have the substantive suit heard timeously and the desire of his opponent to prepare for his defence by taking all appropriate steps.

(1) STAY OF EXECUTION

A party in whose favour judgment has been given is entitled to reap the benefits of the judgment and so may have it executed, particularly where the party against whom it is given fails to willingly comply with its terms. Where the party against whom judgment is given feels dissatisfied and appeals against it, then except the execution of the judgment is stayed, his appeal if successful may turn out to be worthless. The application for stay can only be made in respect of a judgment which is capable of being executed and not one which merely declares the right of the parties or one in which the court declines jurisdiction. See **OWO VS. ADETILOYE (1998) 10 NWLR (PT. 570) 488 at 497 PARAS C – D.**

ACHOR VS. ADUKU (2005) 27 WRL 97 at 143.

An application for stay of execution pending the determination of appeal may be made to the trial court or to the court of appeal. Where the application is refused by the

trial court or there exists special circumstances which make it impossible or impracticable to first make the application to the trial court, then the application may be made in the first instance to the court of appeal. The application is usually made by a person aggrieved by the judgment of the trial court and who has appealed against the judgment. A person who is not a party to the suit cannot apply for a stay of execution except he can show that the judgment was a fraud on him.

An application for stay of execution may not be connected with an appeal but for leave to pay the judgment debt instalmentally.

Also where a defendant counter claims and judgment is given against him in the substantive suit he may apply for stay of execution of the judgment in the substantive suit pending the hearing and determination of the counterclaim.

A court has the discretionary power to grant or refuse to stay the execution of a judgment pending the determination of the appeal against such judgment. The discretion must be exercised judicially and judiciously taking into consideration the peculiar circumstances of each case, the applicable laws and interest of justice.

The court has absolute and unfettered power as to the terms upon which the application is granted.

For example the court entertaining the application for stay may order the applicant to deposit with it, the amount of money adjudged due under the judgment.

Where the terms imposed by the court are not favourable, the applicant may apply to the trial court or court of appeal for a review of the terms. See **LINGO (NIG) LTD VS. NWODO (2004) 7 NWLR (PT. 874) 30 at 43.**

GUIDING PRINCIPLES FOR GRANTING STAY OF EXECUTION

The principles which must guide a court faced with an application for stay of execution have been amply stated by the Supreme Court of Nigeria in the case of **MARTINS VS. NICANNAR FOOD CO. LTD. & ANOR (1988) 71 N.S.C.C Vol. 19 PAGE 613 at 617-618** as follows:

"(a) The chances of the applicant on appeal. If the chances are virtually nil, then a stay may be refused. **Vaswani Trading Co. v. Savalakh and Co. (1972) 12 S. C. 77; Wey v. Wey (1975) 1 S. C. 1; Olusesan Shogo v. Latifu Musa (1975) 1 N.M.L.R 133; W.S.C.A; Odufaye v. fatoke (1975) 1 N.M.L.R. 222.**

(b) The nature of the subject matter in dispute whether maintaining the status quo until a final determination of the appeal in the case will meet the justice of the case

Dr. T. O. Dada v. The University of Lagos and Ors. (1971) 1 U.I.L.R. 344; Utilgas Nigerian & Overseas Co. Ltd. v. Pan African Bank Ltd. (1974) 10 S. C. 105.

(c) Whether if the appeal succeeds, the applicant will not be able to reap the benefit of the judgment on appeal. **See Wilson v. Church (N.2) (1879) 2 Ch. D. 454, 458.**

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

(e) Poverty is not a special ground for granting a stay of execution except where the effect will be to deprive the appellant of the means of prosecuting his appeal. **Nwajekwu Emefisi and Ors. v. Micheal Mbanugwo and Ors. (1970-71) 1 E.C.S.L.R. 110.**

The court's discretion to grant stay of execution must be exercised judiciously and it would be so exercised where it is shown that the appeal involves substantial points of law necessitating the parties and issues been in status quo until the legal issues are resolved. Vaswani's case (supra); Utilgas case (supra). It is clear that this court would consider granting a stay of execution where, as Coker,

J.S.C put it in Vaswani's case "the grounds of appeal filed do raise vital issues of law and there are substantial issues to be argued on them as they are".

In Balogun v. Balogun (1969) 1 All N.L.R 349 at 351, this court, again as per Coker, J.S.C held that where grounds exist suggesting that a substantial issue of law is to be decided on appeal in an area in which the law is to some extent recondite, and where either side could have a decision in his favour, a stay ought to be granted. I am not unaware of the decision of this court in which the scope of this case appears to have been restricted. This is Okafor v. Nnaife (1987) 4 N.W.L.R. (Pt.64) 129. With all respect, I think this Court was swayed in the Nnaife case by the facts of that case which involved continuous acts of trespass. In a case in which a substantial point of law, such as on jurisdiction, does arise Balogun's case would still have full force. These cases have been followed by myriads of cases in this court and other courts.

See U.N.O. v. P.A.B. (1974) 10 S.C 105; Kigo v. Holman Bros Ltd. (1980) 5-7 S.C; El-Khalil v. Oredein (1985) 3 N.W.L.R. (Pt.12) 371 C.A.; Okafor v. Nnaife (1987) 4 N.W.L.R. (Pt.64) 129; See also Monk v. Bartram (1891) 1 Q.B. 346; Becker v. Earl's Court Ltd. (1911) 56 S.J. 206; The Ratata (1897) P.

at 132; Cooper v. Cooper (1876) 2 Ch.D. 293; Emmerson v. Ind. Coope (1886) 56 L.J.b Ch. 905; Youssoupoff v. Metro-Gldwyson Mayer Pictures (1934) 50 T.L.R 581, 585."

(2) STAY OF PROCEEDINGS

As stated in the early part of this paper, the power of the High Court to grant stay of proceedings is inherent, statutory and provided for in the respective rules of court.

A party to any proceedings who is dissatisfied with the decision of the court on an interlocutory point may appeal against that decision and then apply for stay of proceedings pending the determination of the appeal. The application may be made to the court from which an appeal lies or to the court to which an appeal lies. The application, however is first made to the court from which an appeal lies and if it is refused, then to the court to which an appeal lies but within fifteen (15) days after the refusal by the trial court (See court of Appeal Rules).

The nature of an order of stay of proceedings and the principles which should guide a court in exercising its discretion to grant or refuse an application for stay have been adequately stated by the Court of Appeal, Abuja Division in the case of **NNPC & ANOR VS. ODIDERE ENTERPRISES NIGERIA**

LTD (2008) 8 NWLR (Pt. 1090) 583 at 616-618 per Aboki JCA as follows:

"Stay of Proceedings is a serious, grave and fundamental interruption on the right of a party to conduct his litigation towards the trial on the basis of the substantive merit of his case, and therefore the general practice of the courts is that a stay of proceedings should not be granted, unless the proceedings beyond all reasonable doubt ought not to be allowed to continue.

See: Obi v. Elenwoke (1998) 6 NWLR (Pt. 554) page 436 at 437.

Where an interlocutory order does not finally dispose of the case, it would be wrong to stay proceedings because of an aggrieved party. This is so because such an order could be made the subject of appeal. If it ultimately becomes necessary following the final judgment, it saves time and expense to proceed with the case. It is the duty of every court to eliminate situations which may unnecessarily cause delay in the administration of justice. However, if a successful appeal will put an end to the proceeding in the trial court, prudence dictates that a stay of proceedings be granted; ***See Odogwu v. Odogwu (1990) 4 NWLR (Pt. 143) 224 at 235. Arojoye v. U.B.A (1986) 2 NWLR (Pt. 20) 101 at 112.***

In granting an order of stay of proceedings, the court should be guided primarily by the necessity to be fair to both parties. ***See: Okafor v. Nnaife (1987) 4 NWLR (Pt. 64) page 129 at 137.***

A stay of proceedings can only be granted by the court when there is no other option open to it. ***See Carribbean Trading & Fidelity Corporation v. N.N.P.C. (1991) 6 NWLR (Pt.197) page 352.***

In the exercise of its discretion to grant or refuse an application for stay of proceedings pending the determination of an appeal, the court is to be guided by the following:

(i) There must be a pending appeal.

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

(ii) There must be an arguable appeal.

The appeal, which forms the basis of an application for stay of proceeding, must be competent and arguable on its merits. Where an appeal is frivolous, vexatious or an abuse of court process, an appellate court will decline jurisdiction to entertain the application.

See: Arojoye v. UBA (Supra).

(iii) Where the appeal will dispose of the proceedings.

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

(iv) Where the res will not be preserved.

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

(v) Where greater hardship will be caused.

The court would be reluctant to grant an application for stay of proceedings if it would cause greater hardship than if the application were refused.

(vi) Where a refusal will render the order of the appellate court nugatory.

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

I will like to say that by the provisions of Section 306 of the Administration of Criminal Justice Act 2015, though yet to be domesticated by the various States of the Federation, the Courts shall not entertain applications for Stay of Proceedings in respect of a criminal matter.

INJUCTIONS

The Oxford Dictionary of Law, 6th Edition by Elizabeth A. Martin & Jonathan Law at pages 274 – 275 defines the word – INJUNCTION as "A remedy in the form of a court order addressed to a particular person that either prohibits him from doing or continuing to do a certain act (Prohibitory injunction) or orders him to carry out a certain act (a mandatory

injunction). The remedy is discretionary and will be granted only if the court considers it just and convenient to do so. It will not be granted if damages would be a sufficient remedy".

An injunction is a remedy and not a cause of action like in tort or contract. Therefore an applicant for an order of injunction must have a cause of action in law which entitles him to substantive relief.

TYPES OF INJUNCTIONS

There are several types of Injunctions designed to meet various causes of action some of which are:

1. Quia Timet Injunction
2. Mareva Injunction
3. Anton Pillar order of Injunction
4. Perpetual Injunction
5. Interim Injunction
6. Mandatory Injunction
7. Interlocutory Injunction

QUIA TIMET INJUNCTION

This is designed to prevent an apprehended legal wrong even though none has occurred at the time it is applied for. It is the requirement of the law that an Applicant applying for this remedy to prevent an apprehended legal wrong must show

near certainty of the wrong and that damage will result therefrom.

It is usual that injunctions are issued only when a tort has already been committed but where the conduct of the Defendant/Respondent is such that if it is allowed to continue, substantial damage to the Applicant is almost bound to occur, then the Application will be well founded. See **Redland Bricks Ltd vs. Morris (1970) A. C. 652 at 664** and **Torquay Hotel Co. Ltd vs. Cousins (1969) 2 CH. 106 at 120.**

MAREVA INJUNCTION

This injunction is used by a creditor to prevent a defendant who is out of jurisdiction from removing his assets from the jurisdiction of the Court so as not to make it difficult for the creditor to reap the fruits of his judgment if and when he obtains one. See Order 19 of the Kwara State High Court (Civil Procedure) Rules 2005; Order 30 of the Federal High Court Rules and similar provisions in order jurisdiction which deal with interim attachment of property. See also the case of **SOTUMINU VS. OCEAN STEAMSHIP (NIG) LTD (1992) 5 NWLR (PT. 239) 1 at 25-26.**

Mareva Injunction or Order is a security for Judgment which preserves the Res just as the ordinary Injunctions will do but in addition secures assets for execution of anticipated

judgment. It operates in rem and takes immediate effect upon pronouncement by the Court in relation to any asset of the defendant to which it is directed. See **R. Benkay (Nig) Ltd vs. Cadbury (Nig) Plc (2006) 6 NWLR (Pt. 976) 366. Paragraphs A – B.**

Application for Mareva injunction is made ex parte supported with an affidavit. See **F. M. B. N LTD VS. DESIRE GALLERY LTD (2005) 1 WRN 177 at 192** and **SOTUMINU VS. OCEAN STEAMSHIP (NIG) LTD (Supra) at 25.**

Note that it is improper to grant this remedy if the effect will impact adversely against the normal standard of living of a person involved or if it will affect the normal running of the business of a company adversely such that it will prevent meeting of other obligations by such company. See **E. S. & C. S. LTD VS. N. M. B (2005) 7 NWLR (PT. 924) 215 at 266-267, PARAS E-C.**

ANTON PILLER ORDER OF INJUNCTION

gives the plaintiff who applies for it, power to enter the defendant's premises and search for, and seize material documents and articles and is usually made in patent, copyright or passing off cases. In England the orders are often obtained exparte or in camera, if the plaintiff shows that the defendant is likely to destroy the property which is the subject matter of the suit upon getting notice of the proceedings.

See: **ORDER 26 RULE 8 (2) a,b,& c of the Federal High Court Rules.**

PERPETUAL INJUNCTION

This is a final Order usually granted after trial on the merits. It is an ancillary relief granted to protect the legal rights of the plaintiff which has been established at the trial.

See: **ANYANWU VS. UZOWUAKA (2009) 13 NWLR (PT. 1159) 445 at 489 – 490 PARAS H – A.**

It must be noted that the remedy is not available to a successful party in a case if such a party has limited interest and the person with absolute interest was not made a party to the case. See the decision of the Supreme Court of Nigeria in the case of **MADU VS. MADU (2008) 6 NWLR (PT. 1083) 296 at 322 PARAS E - H.**

MANDATORY INJUNCTION

Generally, injunctions are prohibitory in nature but in deserving cases the Court can grant an Order of mandatory injunction directing the defendant to take positive steps to rectify the consequences of what he has already done, thus creating exception to the principle of law that concluded acts cannot be subject of an injunction.

Speaking about the nature of mandatory injunction, Nnaemeka – Agu, JSC in the case of **A.G**, **ANAMBRA STATE**

VS. OKAFOR (1992) 2 NWLR (PT. 224) 396 at 426 PARAS E – H held as follows:

"Originally, all injunctions were negative in form and restrictive in content. See **SMITH VS. SMITH (1875) 20 Esq. 500, P.504.** Mandatory injunctions, which were positive in form were complete new comers in the concept of injunctions and did not really get issued until the late 19th Century to deal with such a situation as where a defendant had surreptitiously put up a building during the pendency of a suit claiming an injunction in order to steal a march on his adversery.

In **DANIEL VS. FERGUSON (1891) 2 Ch. 27**, he was ordered to pull down the structure. See also **MATHIAS VS. DAVIES (1970) 114 S.J. 268.** But since their evolution, Courts have always been, and are still, reluctant to issue orders for mandatory injunctions except in very clear cases. They have always required the clearest evidence as well as very high standard of proof so as to make sure that at the trial, it will still appear that the order of mandatory injunction was rightly made, as grave consequences could follow such an order. In practice, therefore, there must be either a trial of a claim for mandatory injunction or at least a substantive prayer in an application for it in clear terms followed by irrefutable

evidence of the infringement that entitles the applicant to the Order"

Although an Order of mandatory injunction will be granted only in exceptional circumstances, courts have been enjoined not to hesitate in granting the remedy when occasion clearly demands, especially where it is sought in deserving situation to force public officials or government to retrace their steps.

See: **EKANEMI VS UMANAH (2006) 11 NWLR (PT. 992) 510 at 526 – 527 PARAS F – A.**

INTERIM AND INTERLOCUTORY INJUNCTIONS

On the meaning and difference between Interim and Interlocutory injunctions, I can do no better than to refer to the Locus Classicus case of **KOTOYE VS. CENTRAL BANK OF NIGERIA (1989)1 NWLR (PT. 98) 419 AT 441 – 442** where the Supreme Court held inter-alia:

".....Even though the word "Interlocutory" comes from two Latin words "inter" (meaning between or among) and "locutus" meaning spoken) and strictly means an injunction granted after due contest inter parties, yet when used in contradistinction to "interim" in relation to injunctions, it means an injunction not only ordered after a full contest between the parties but also ordered to last until the determination of the main suit.

Applications for interlocutory injunctions are properly made on notice to the other side to keep matters in status quo until the determination of the suit……they are such that they cannot, and ought not, be decided without hearing both sides to the contest.

Interim injunctions, on the other hand, while often showing the trammels of orders of injunction made exparte are not necessarily coterminous with them.

Their main feature which distinguishes them from interlocutory injunctions is that they are made to preserve the status quo until a named date or until further order or until an application on notice can be heard. They are also for cases of real urgency. But unlike ex parte orders for injunction, they can be made during the hearing of a motion on notice for interlocutory injunction, when because of the length of the hearing, it is shown that irretrievable mischief or damage may be occasioned before the completion of hearing.

Also it can be made to avoid such irretrievable mischief or damage when due to the pressure of business of the court or through no fault of the applicant, it is impossible to hear and determine the application on notice for interlocutory injunction.

See: **BEESE VS. WOODHOUSE (1970)1 WLR 586 AT P. 590.**

It must, however be emphasized that what the court does in such a case is not to hear the application for interlocutory injunction ex parte, behind the back of the respondent but to make an order which has the effect of preserving the status quo until the application for interlocutory injunction can be heard and determined.**"**

The difference between an interim injunction and interlocutory injunction was further spelt out brilliantly by Abdullahi JCA (as he then was) in the case of **NIGERIAN INDUSTRIAL DEVELOPMENT BANK VS. OLALOMI INDUSTRIES LTD. (1995) 9 NWLR (PT. 419) 338** where he said:-

"Be that as it may, it appears to me that there is an indiscriminate use of these words 'interim injunction' and 'interlocutory injunction' even though they are not synonymous, in the sense that an interim injunction is really interim in nature in that it is more appropriately and generally applied for and granted on ex parte application in an emergency situation, while on the other hand an interlocutory injunction is applied for pending the determination of a substantive suit or an appeal. I think a number of legal practitioners and some of the courts are tempted to make a general assumption that since both

expressions 'interim' and 'interlocutory' share a common feature in the sense that a particular action or thing is suspended until some future date, then the expressions can be interchangeable. I think this is a wrong assumption. Each of the two expressions should be given effect to what it stands for. Interim to be interim and serve the emergency situation for which it has been designated and interlocutory should be understood in the context for which it is designated".

From the decisions of the courts in **KOTOYE VS. CBN (supra)** and ***NIGERIAN INDUSTRIAL DEVELOPMENT BANK VS. OLALOMI INDUSTRIES LTD.*** (supra) emerge the following salient points:

1. Interim injunction and Interlocutory injunction share a common feature in the sense that both are temporary, provisional reliefs and not final. In this sense both can be contrasted to perpetual injunction which is a final order made after conclusion of trial.

2. Interim injunction and interlocutory injunction differ however in the following respects:

   (a) An interim injunction is granted at the instance of an applicant on an exparte application i.e. at the instance of one interested party in the absence of

and without notice to the other party and is designed to take care of a situation of real urgency.

(b) An interlocutory injunction on the other hand is made on notice and granted after contest by the parties before the determination of the substantive action**.**

See: **ONYESOH VS. NNEBEDUN (1992) 3 NWLR (Part 229) 315 at 338 Paragraph B – C.**

(c) 'Interim' injunction is made to preserve the status quo until a named date or until further order or the hearing and determination of the motion on notice while an 'interlocutory' injunction lasts till the determination of the substantive action i.e. till judgment is delivered.

See: ASOGWA VS. THE RI GHT HONOURABLE CHUKWU (2003)4 NWLR (Pt. 811) 540.

GLOBAL MEDICAL CARE (UK) LIMITED VS. MEDICAL (WEST AFRICA) LIMITED (1998)2 NWLR (PT. 536) 86.

OBEYA MEMORIAL SPECIALIST HOSPITAL VS. A. G. FEDERATION (1987)3 NWLR (PT. 60) 325.

OJUKWU VS. GOVERNOR OF LAGOS STATE (1986)3 NWLR (PT. 26) 39.

I would like to talk briefly about the grant of interim injunctions ex parte as they are liable to abuse with disastrous consequences to the image of the judiciary.

The Federal and various states High Courts and the High Court of the Federal Capital Territory have undoubted powers to grant ex parte orders of injunction under certain conditions.

By the provisions of Order 11 Rules 7,8,9 and 10 of the Kwara State High Court (Civil Procedure) Rules 2005, no motion exparte for an injunction shall be made except the applicant files with it a motion on notice. Such an application which may be supported by an affidavit shall state sufficient grounds why delay in granting the order sought would entail irreparable damage or serious mischief to the applicant.

Similar provisions are to be found in Order 7 Rules 8 – 12 of the High Court of the Federal Capital Territory, Abuja (Civil Procedure) Rules 2004 and Order 26 Rules 8 – 12 of the Federal High Court (Civil Procedure) Rules 2009.

A court faced with an application by motion ex parte for interim injunction may do any of the followings:

1. Grant or refuse to grant the Order sought. Where the court grants the order sought, it shall not last for more than 7 days. Where it is satisfied that the 7 days period ought to be extended in the interest of justice or for the purpose of preventing an irreparable or serious mischief, the court may grant an extension which shall not last for more than 7 days from the day the extension is granted.

The application for extension shall be made before the expiration of the Order of injunction originally granted.

2. The court may grant an order to show cause why the order sought should not be made. This implies postponing the hearing of the application and bringing the opposite party to court to be heard before the order is made.

3. The court may direct the motion to be made on notice to the parties to be affected thereby.

Talking about the justification for the grant of exparte Order of injunction, the Supreme Court in the case of **KOTOYE VS. C.B.N. (supra) AT 449 PARAGRAPHS B – C per Nnaemeka – Agu JSC said:-**

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

imposed urgency, is a sine qua non for a proper ex parte order of injunction".

An ex parte order of injunction serve very useful purpose in an emergency situation where it is impossible to serve the other party or where the delay which will be caused by proceeding in the ordinary way of giving notice might entail irreparable or serious mischief.

In exercising its extra ordinary jurisdiction of granting an injunction without hearing the person to be adversely affected thereby, it is necessary for the court to examine the time when the applicant first became aware or had notice of the act or conduct sought to be restrained and the time the application is brought so that the court is not misled into making an order based on self induced urgency.

Because it is a one party proceeding which may adversely affect another party who is not heard or given the opportunity of being heard, ex parte orders of injunction are liable or prone to abuse.

Instances of abuse of power to grant interim orders exparte were highlighted by the Supreme Court in the case of ***KOTOYE VS. CENTRAL BANK OF NIERIA (supra) at page 450 paragraphs F – H as follows:-***

"Above all, this court ought to take notice of the numerous cases of abuse of ex parte injunctions that have come up in recent times.

The operation of a bank has been halted on an ex parte order of injunction granted to a person who had been removed as a director of the bank. Installation ceremonies of chiefs have been halted in the same way even though the dispute had been dragging on for years.

The convocation ceremony of a University has been halted on an ex parte application by two students who failed their examinations. As the courts can not prevent such applicants from exercising their constitutional rights by stopping such applications, they can, and ought, at least see that Justice is done to the victims of such ex parte applications and orders by ensuring that the applicant fully undertakes to pay any damages that may be occasioned by any such order which may turn out to be frivolous or improper in the end".

The code of conduct for Judicial Officers of the Federal Republic of Nigeria Rule 2 A warns Judicial Officers to desist from abusing their powers to issue or grant interim orders ex parte.

A misuse or abuse of power of issuing interim orders exparte amounts to a misconduct which may render the judicial

officer concerned liable to disciplinary action or even dismissal from service as has been done in some cases in the past.

My advice to Judges is that when you are confronted with a motion exparte for the grant of an interim injunction, except in cases of real and extreme urgency, instead of granting the motion ex parte, it is safer to grant an order in favour of the applicant for the other party to show cause why the order sought by the applicant should not be made, or direct the motion to be made on notice to the parties to be affected thereby. See Order 11 Rule 9 of the Kwara State High Court (Civil Procedure) Rules.

Before I go into a discussion of the pertinent issues which a court will take into consideration in granting or refusing to grant an application for interlocutory injunction, it is necessary to state that an interlocutory injunction is granted mainly for the purpose of maintaining the status quo so that the subject matter of the action before the court can be preserved from being wasted or damaged before the conclusion of the action or appeal as the case may be. See **MOHAMMED VS. UMAR (2005) All FWLR (PT. 267) 1511 at 1524 PARAS H-D.**

LAWAL VS. ADELEKE (2004) 4 WRN 35 at 43.

DANTATA VS. C.R. LIMITED (2005) All FWLR (PT. 280) 1474 at 1491 PARA C.

Preservation of the subject matter of the action so that the successful party would not be confronted with an empty judgment is the sole purpose for the grant of an order of interlocutory injunction.

See: **OYEYEMI VS. IREWOLE LOCAL GOVERNMENT (1993)1 NWLR (PT. 270) 462.**

The status quo to be maintained by an order of interlocutory injunction is that in existence before the controversy or dispute or suit or action commenced. It means the prevailing situation before the defendant embarked on the activity sought to be restrained. See **ENUNWA VS. OBIANUKOR (2005) 11 NWLR (PT. 935) 100 at 122 PARAS G-H.**

ADEWALE VS. GOVERNOR, EKITI STATE (2007) 2 NWLR (PT. 1019) 634 at 652 PARAS F-G; 658 PARAS D-E.

For example where a person enters upon the land of another wrongfully and in a manner which violates that other person's legal right, the owner of the land may file an action in court challenging the wrongful and illegal entry. The mere filing of an action before the court does not however stop or prevent the defendant from continuing with his wrongful conduct, reason being that the question of whether or not his conduct is wrongful has not yet been determined by the court.

See **TANIMOWO VS. ODEWOYE (2008) All FWLR (PT. 424) 1513**.

It is upon an application for injunction that the court may order the defendant to stop the alleged wrongful act until the case between him and the plaintiff is finally determined. A defendant, who for example, begins construction on the land in dispute between him and the plaintiff, can be stopped from continuing with the construction by an order of injunction pending when the action is finally determined by the court.

Being an equitable relief, an injunction is granted at the discretion of the court which discretion must be exercised judiciously and judicially.

Any of the parties to an action can apply to the court for an order of interlocutory injunction even though generally speaking it is applied for by the plaintiff.

A defendant who counterclaims may apply for an order of interlocutory injunction based on his counterclaim.

An interlocutory injunction must be based on a pending suit and so cannot be considered in complete isolation from the pleadings if filed or to be filed. In appropriate cases however the court can still consider an interlocutory application in the absence of pleadings and oral evidence.

See the case of **NIGERIA CEMENT COMPANY LTD. VS. N. R. C. (supra) page 759 paragraphs G – H** where Kolawole JCA, stated that, "An injunction will generally be granted ONLY after a writ of summons has been issued. If however, the circumstances of the case are very urgent or where, owing to the offices of the court being closed, the issue of the writ is delayed, an injunction may be granted before the writ has been issued, upon the plaintiff undertaking to issue the writ at once. **THORNELOE VS. SKOINES (1973) L.R. 16 Eq. 126**. **YOUNG VS. BRASSEY (1875)1 CH. D. 277** ***CARR VS. MORICE (1873) L.R. 16 EQ. 125".***

See also the case of: ABAKALIKI LOCAL GOVERNMENT COUNCIL V ABAKALIKI RICE MILLS OWNERS ENTERPRISES OF NIGERIA (1990) NWLR (PT. 155) 182 at 189 – 190 where Oguntade JCA (as he then was) held that the power of the Court to grant an injunction before the Writ of Summons is issued where the circumstances of the case are urgent or the issue of the Writ is delayed upon the plaintiff undertaking to issue the Writ at once is subject to any statutory provision in force.

In that case, the injunctive Order granted by the Lower Court was set aside on the ground that the pre – action notice required by Section 158 (1) Anambra State Local Government Edict No. 9 of 1976 was not given by the plaintiff before he

applied for, and was granted an order of injunction by the Lower Court.

It is only the court before whom an action is pending that can grant an interlocutory injunction in respect of the subject matter of the action. A court should not therefore grant an interlocutory injunction on a matter before another court. It is important that the interlocutory injunction sought must arise from, and be connected with the main claim before the court.

It cannot exist on its own as it is like a support pillar in an existing suit. Therefore , where an injunction is sought which is unconnected with substantive suits, it must fail. See **ATTORNEY GENERAL, ENUGU STATE VS. AVOP (1995) 6 NWLR (PT. 399) 90 at 122-123.**

GOMBE VS. P.W. (NIG) LTD (1995) 6 NWLR (PT. 402) 421 – 422.

AGBOMAGBO VS. OKPOGO (2005) All FWLR (PT. 291) 1606 at 1624 PARAS C-D.

STALLION VS. EFCC (2008) 7 NWLR (PT. 1087) 461 at 473-474 PARAS H-B.

Where the defendant had already completed the act sought to be restrained then an order of interlocutory injunction can no longer issue as a court would not act in vain.

See: **A. G. ANAMBRA STATE VS. OKAFOR (1992)2 NWLR (PT. 224) 396 AT 419 PARAGRAPHS G – H**

Where the Supreme Court per Omo JSC held:

"Normally an interlocutory application such as the one now being considered (CA/E/331M/87) is made to maintain the status quo pending the determination of the substantive action (appeal). In the present case however the order sought is to set aside an action that has already taken place. It has been held many times by the courts that such interlocutory application (usually for grant of injunction) is not perceived as a proper remedy for an act which has already been carried out and will not be granted where even the act complained of is irregular vide ***JOHN HOLTS NIGERIA LTD. VS. HOLTS AFRICAN WORKERS UNION OF NIGERIA AND CAMEROOM (1963)1 ALL N.L.R. 379; (1963)2 SCNLR 383.***

UWEGBA VS. ATTORNEY – GENERAL OF BENDEL STATE (1986)1 NWLR (PT. 16) 303 (309 – RATIO 27);

GOVERNOR OF IMO STATE VS ANOSIKE & OR (1987) 4 NWLR (PT. 66) 663 (RATIO 12 & 13).

The last two cases are Chieftaincy matters where actions of the Executive….. were being challenged. The courts refused interlocutory applications on the ground, inter-alia, that the acts complained of have already been performed."

An application for interlocutory injunction may be made at any stage of the proceedings and even after judgment. Where

the case of the plaintiff is dismissed, he may apply to the trial court for an order of interlocutory injunction to restrain the defendant from dealing with the subject matter of the claim pending the determination of the appeal.

A party who fails to comply with an order of injunction may be committed for contempt of court.

The court may discharge, vary or set aside an order of interlocutory injunction on an application made to it by any party who is not satisfied with such order.

It is very important to observe that an Order of interlocutory injunction made by a Court may be discharged at any time before judgment. The same Court that made the Order can set it aside in deserving cases where genuine reasons for it exists and the exercise of such power of discharge is not contrary to the principle that a Court is without jurisdiction to sit on appeal over its decision. See **SUN INSURANCE (NIG) PLC VS. L.M.B.S. (Supra) at 627–629.**

I will like to advise my Lords not to grant an application for interlocutory injunction which seeks the same relief as claimed by a party in the substantive suit. Where the relief prayed for in an interlocutory application is the same as that claimed in the main suit, it is advised that rather than grant

such relief, an Order for accelerated hearing of the main suit be made by the Court. See **EYO VS. RICKETTS (2005) All FWLR (PT. 241) 387 at 393 PARAS D-E.**

PERTINENT CONSIDERATIONS FOR THE GRANT OF AN ORDER OF INTERLOCUTORY INJUNCTION

In considering an application for the grant of an interlocutory injunction the court must be guided by the following considerations which also apply in an application for the grant of an interim injunction.

(1) LEGAL RIGHT

The reason for the grant of injunction is to protect the existing legal right of a person from unlawful invasion by another. It follows therefore that an applicant for the grant of an interlocutory injunction must show that he has a legal right which is threatened and ought to be protected. Once the acts complained of will lead to an infringement of the applicant's rights, it is proper for the court to intervene by the grant of an injunction. Therefore where an applicant has no legal right or fails to show that he has one, the court has no power to grant an injunction.

See: **AKAPO VS. HAKEEM – HABEEB (1992)6 NWLR (PT. 247) 266.**

ATTORNEY GENERAL, ABIA STATE VS. ATTORNEY GENERAL OF THE FEDERATION (2005) 12 NWLR (PT. 940) 452 at 514 PARA. A.

DANTATA VS. C. S. LTD (2005) All FWLR (PT. 280) 1474 at 1491 PARA. D.

It is also an essential requirement that the evidence must disclose that applicant has a legal right to bring the substantive action on which the application is based.

See: **ONYESOH VS. NNEBEDUN (1992) 3 NWLR (PT. 229) 315 AT 339 PARAGRAPH E.**

It is because of the requirement that an applicant for injunction must disclose that he has a legal right which makes it improper and wrong to grant an injunction in favour of a defendant who did not counter-claim.

See: **IFEKWU VS. MGBAICO (1990)3 NWLR (PT. 140) 591 – 592.**

OKECHUKWU VS. OKECHUKWU (1989)3 NWLR (PT. 108) 234.

(2) SUBSTANTIAL ISSUE TO BE TRIED

An applicant must show the court that there is a serious or substantial issue to be tried at the hearing.

Since the decision in the American case of **AMERICAN CYNAMID VS. ETHICON LTD. (1975) AC. 396 AT 407,** which was followed by the Supreme Court in **OBEYA MEMORIAL HOSPITAL VS. ATTORNEY-GENERAL OF**

THE FEDERATION (1987)3 NWLR (PT. 60) 325, the Nigerian courts no longer require an applicant to show a prima-facie case or a strong prima-facie case as a condition for the grant of his application for an order of interlocutory injunction. An applicant for an order of interlocutory injunction does not have to make out a case as he would do on the merits, it being sufficient for him to establish that there is a substantial issue to be tried at the hearing. It is enough for the court to be satisfied that the claim is not frivolous or vexatious. See **AGBOMAGBO VS. OKPOGO (Supra).**

At the stage of hearing an interlocutory application the court must not be involved in the resolution of conflicts between the affidavit and counter affidavit as to facts on which the claims of either party ultimately depend. See **OPOBIYI VS. MUNIRU (2005) 15 NWLR (PT.948) 320 at 332-333.** It must also refrain from deciding difficult question of law that may require detailed argument and sober consideration. Since at the time of hearing an application for interlocutory injunction the claims of either party have not yet been determined and will not be determined until final judgment is given in the action, the court must desist from making findings of facts at that stage which may prejudice the substantive case.

It is very important that in dealing with all interlocutory applications during the pendency of the substantive matters, the Court must be cautious and should avoid dealing with, going into, resolving or making any pronouncements on the main issues the Courts ought to determine at the end of the trial. The foregoing is so fundamental and sacrosanct that our law reports are replete with the decisions of the superior Courts on it. See the followings:

GOMWALK VS. OKWUOSA (1996) 3 NWLR (PT. 439) 681 at 689;

A. C. B. VS. AWOGBORO (1996) 2 SCNJ 233 at 239 to 240;

OJO VS. U. B. T. H. M. B. (2006) 47 WRN 163 at 187 to 188.

(3) BALANCE OF CONVENIENCE

A court must decide where the balance of convenience tilts in considering whether or not to grant an application for interlocutory injunction.

In this regard, the court must ask itself the questions – who will suffer more inconvenience if the application is granted and who will suffer more inconvenience if the application is refused? See **NWANKWO VS. ONONOEZE-MADU (2005) 4 NWLR (PT. 916) 470 at 486.**

EYO VS. RICKETTS (Supra) at 395 PARAS A-C.

It is the duty of the trial judge to provide answer to the above questions from the facts contained in the affidavit evidence before him. If available evidence shows that the applicant will suffer more hardship if the application is refused, then the balance of convenience is in his favour.

In **NWAGANGA VS. MILITARY GOVERNOR IMO STATE (1987)3 NWLR (PT. 59) 185 AT 194 – 195** the court of Appeal held.

"In **AMERICAN CYNAMID VS. ETHICON** (supra) Lord Diplock on page 510 stating the General Principle of balance of convenience said:

"As to that (the balance of convenience) the governing principle is that the court should first consider whether if the plaintiff were to succeed at the trial in establishing his right to a permanent injunction he would be adequately compensated by an award of damages for the loss, he would have sustained as a result of the defendant's continuing to do what was sought to be enjoined between the time of the application and the time of the trial.

If damages in the measure recoverable at common law will be adequate remedy and the defendant would be in financial position to pay them, no interlocutory injunction should formally be granted however strong the plaintiff's claim appeared to be at that stage. If, on the other hand, damages

would not provide an adequate remedy for the plaintiff in the event of his succeeding at the trial, the court should then consider whether, on the contrary hypothesis that the defendant were to succeed at the trial in establishing his right to do that which was sought to be enjoined, he would be adequately compensated under the plaintiff's undertaking as to damages for the loss he would have sustained by being prevented from doing so between the time of the application and the time of the trial. If damages in the measure recoverable under such undertaking would be an adequate remedy and the plaintiff would be in a financial position to pay them, there would be no reason on this ground to refuse an interlocutory injunction".

The consideration of the issue of balance of convenience in an application for interlocutory injunction boils down to the question who will lose more between the plaintiff/applicant and defendant/respondent if the status quo ante (i.e. the position of the parties before the conflict or filing of action) is restored and maintained till the final determination of the action?. If the balance of convenience is in favour of the applicant it means that more justice will result from granting the application than in refusing it. See **GOVERNOR OF KWARA STATE VS. OJIBARA (2005) All FWLR (PT.267) 1545 at 1554 PARAS B-C.**

What damages or injury will be done to the defendant if the injunction is granted and he ultimately gets judgment in his favour at the conclusion of trial should be balanced against the damages or injury which the plaintiff will suffer if the injunction is refused and he gets judgment in his favour at the conclusion of the trial. If in the circumstance the injury which the defendant will suffer will be greater than the injury which the plaintiff will suffer, then the injunction ought to be refused. If the reverse is the case, then the injunction must be granted.

The burden is always on the applicant for injunction to establish by evidence that the balance of convenience tilts in his favour. See **AYANTUYI VS. GOVERNOR, ONDO STATE (2005) 14 WRN 67 at 99-100.**

(4) IRREPARABLE DAMAGE OR INJURY

The applicant for an order of interlocutory injunction must satisfy the court that he will suffer irreparable damage or injury if the acts of the defendant are not restrained by such an order.

By irreparable injury is meant an injury which is substantial and cannot be adequately remedied or atoned for by damages or cost. See **SARAKI VS. KOTOYE (1990) 4 NWLR (PT.143) 144 at 187.**

BELLO VS. ATTORNEY GENERAL OF LAGOS STATE (2007) 2 NWLR (PT. 1017) 155 at 138, PARAS D-E.

In order to succeed therefore, an applicant must show the Court the award of monetary damages would not be adequate compensation from the injury which he would suffer from the violation of his right, if the application is refused and he eventually succeeds in the main action.

Where damages recoverable at law would be adequate remedy for the applicant for injunction and the defendant would be in a financial position to pay such damages, then no interlocutory injunction should ordinarily be granted. Where on the other hand damages would be adequate remedy for the defendant and the applicant would be in a financial position to pay there would be no reason to refuse an application for interlocutory injunction. The Courts are however enjoined not to grant injunction where greater hardship will be visited on the respondent than the good to the applicant. See Nelson's Law of Injunction, 2nd Edition at pages 590 – 591.

AMACHERE VS. I. C. C. (LTD) (1989) 4 NWLR (PT.118) 686 at 695.

The Court should not grant an Order of injunction which will adversely affect persons who are not made parties to the action.

(5) CONDUCT OF PARTIES

In order to succeed in his application for an interlocutory order of injunction, an applicant must show that his conduct is not reprehensible i.e. he is not guilty of delay. This is because an order of interlocutory injunction is an equitable relief which requires the court to consider the conduct of the parties both before and at the time the application is made. See **FADINA VS. VEEPEE INDUSTRIES LTD (2000) 5 WRN 131 at 135-136.**

An applicant for the equitable remedy of Interlocutory Injunction must fail if he is guilty of delay. This is because delay defeats equity. To succeed in his application, the applicant must act timeously so as not to over reach his opponent. See **PETER VS OKOYE (2002) 3 NWLR (PT. 755) 529 at 552.**

In the case of **AKAPO VS. HAKEEM HABEEB** (supra), the Supreme Court allowed the appeal of the appellant against the decision of both the High Court and Court of Appeal refusing the appellant's application for an interlocutory injunction on the ground that the respondent who resisted the application did not come with clean hands. At page 291 of the report Paragraphs D – F the court held:

"The claim for an injunction is won and lost on the basis of the existence of competing legal rights. As I have already said above, where an applicant for an injunction has no legal right recognizable by the courts, there is no power to grant him an injunction.

Similarly where the respondent to the application relies on the illegality of his actions, there is no right in him to resist the claim of the applicant with a recognized legal right. Injunction being an equitable remedy he who comes to it must come with clean hands. I consider it not only curious but manifestly reprehensible and absurd for the respondents to rely on their illegal acts in forcibly taking over the constitutional functions of the appellant, to contend that the court should by refusing the injunction ratify such a conduct. This court cannot accede to such a preposterous argument"

Similarly where the conduct of the applicant is tainted with illegality or delay, his application will be refused by the court.

(6) UNDERTAKING AS TO DAMAGES

Where a court grants an order of interlocutory injunction, the effect is to restrict the activities of the defendant in relation to the action before that court. This restriction may lead to the defendant suffering some damage or loss. Where the plaintiff

who obtained an order of interlocutory injunction as a result of which the activities of the defendant are restricted, fails in his claim at the end of the proceedings, the defendant would have suffered loss unfairly. It is in order to take care of situation as this that the applicant is required to give an undertaking as to damages as a condition for the grant of interlocutory injunction. By this undertaking the plaintiff binds himself to be liable for any damage which the defendant may suffer as a result of the order of injunction in the event that the plaintiff loses the action. See **LEASING CO. (NIG) LTD VS. TIGER INDUSTRIES LTD (2007) 14 NWLR (PT.1054) 346.**
ITA VS. NYANG (1994) 1 NWLR (PT.318) 56 at 67.
AYANTUYI VS. GOVERNOR, ONDO STATE (Supra) at 100-101.

The defendant may also offer an undertaking not to perform the act complained of in lieu of an injunction until the conclusion of the trial.

Where no undertaking is given by the applicant, the order of interlocutory injunction is liable to be set aside.

See: **ONYESOH VS. NNEBEDUN (1992)3 NWLR (PT. 229) 315 AT 344 – 345**

where Nnaemeka Agu JSC. Said:

"I wish to point out straight away that although, as I stated in KOTOYE VS. CENTRAL BANK OF NIGERIA & ORS.

(1989)1 NWLR (PT. 98) 419 AT P. 450, *an undertaking as to damages is the price which every applicant for an interlocutory injunction has to pay for it and that save in recognized exceptions, it ought not to be granted if no undertaking has been given, it is putting the consequences of the failure to give the undertaking too high to say, as the Learned Senior Advocate for the appellant has stated in his brief that that rendered the order made incompetent. A similar contention was rejected at page 451 of Kotoye's case (supra). The true position is that it renders the order liable to be set aside. Whether it will be set aside in any case will depend upon the facts of the particular case".*

The usual practice is for an applicant to include in his affidavit, a paragraph stating that he undertakes to pay damages for any injury or loss that the respondent may suffer from the grant of the injunction.

It is only where this is not done that the necessity for the court to extract an undertaking in damages from him would arise.

In **ANIKE VS. EMEHULU (1990)1 NWLR (PT. 128) 603 AT PAGES 610 – 611,** the court of Appeal held:

"….it is true that subject to known exceptions, an undertaking must be extracted from the party in whose favour

an interim injunction is granted. This much is laid down in ***KOTOYE VS. THE CENTRAL BANK OF NIGERIA & ORS. (1989)1 NWLR (PT. 98) 419*** and other authorities. It must be explained however that by extraction it is not meant that the court will compel a plaintiff to give an undertaking. The court cannot do so. What it can do is to refuse to grant an injunction unless an undertaking is given:

See: **TUCKER VS. NEW BRUNSWICK TRADING COMPANY OF LONDON (1890) 44 CH. D. 249.**

ATTORNEY – GENERAL VS. ALBANY HOTEL CO, (1896)2 CH.D. 696.

This means that where in an appropriate case an injunction is considered desirable, the court should not grant it without an undertaking.

When an undertaking is given in a case of this nature, it is not predicated on what damages are known before hand that the defendant is likely to suffer as a result of the injunction.

Such damages are usually not ascertainable in advance and cannot be made a wholly arbitrary figure.

The undertaking to pay damages which the party obtaining the order gives is to abide by any order as to damages which the court may make in case it should afterwards be of opinion that the defendant has, by reason of

the order, sustained any damages which such a party ought to pay.

See: **GRIFFITH VS. BLAKE (1884) 27 CH. D. 474.**

Therefore, to all intents and purposes an undertaking is an enforceable promise at large - a precautionary safeguard – to pay the defendant what he might suffer by way of damages to be determined at a later stage because of the interim injunction.

The realization of that undertaking depends upon certain contingencies. First, if the plaintiff ultimately fails on the merits, or the injunction is dissolved, the defendant is entitled to an inquiry as to the damages sustained by reason of the interim injunction:

See: **KINO VS. RUDKIN (1877) 6 CH.D. 160 AT 165** unless there are special circumstances warranting the refusal of such an inquiry.

See: **MODERN TRANSPORT CO. LTD. VS. DUNERIC S.S. CO. (1917)1 K.B. 370.** Second, the defendant will have to apply for an inquiry as to the damages he has suffered. Third, he will have to show a prima-facie case sufficient to justify an inquiry.

See: **BUTT VS. IMPERIAL GAS LIGHT AND COKE CO. (1866)14 LJ. 349.**

Fourth, regard must be had to the amount of the damage and if it is trifling or remote, the court will be justified in refusing an inquiry. Fifth, the application must be made speedily and if not made within a reasonable time it may be refused.

See: **SMITH VS. DAY (1882)3 CH. 159.** Sixth, if there are facts already known from which the court can satisfy itself as to the amount of the damages without an inquiry, it will be unnecessary to order an inquiry.

See: **GRAHAM VS. CAMPBELL (1878)7 CH.D. 490 AT 494.** See generally paragraphs 1072 – 1078 of Halsbury's Laws of England Vol. 24, 4th Edition".

From the above decisions of the Supreme Court and Court of Appeal emerge the following principles which a Judge must bear in mind when faced with an application for interim or interlocutory injunction.

1. The applicant for injunction must give an undertaking to pay damages.

2. Where applicant fails to give an undertaking in his affidavit, the court can extract one from him. The court cannot compel the applicant to give an undertaking. What the court can do is to refuse to grant an injunction unless an undertaking is given.

3. Since the undertaking is in respect of a future and unascertained damages which the defendant may suffer as a result of the injunction, it becomes an enforceable promise to pay the defendant damages to be determined at a future date.

4. The undertaking becomes realizable when the plaintiff/applicant fails on the merits of the case or the injunction is dissolved.

5. The defendant will have to apply to the court for an inquiry as to the quantum of damage he has suffered as a result of the injunction unless the amount of damage is trifling or remote or where there are facts known to the court from which it can determine the amount of damages.

6. There must be no delay in applying for an inquiry otherwise it will be refused.

ORDER FOR EARLY TRIAL

Where a party files a suit in court and follows this up with an application for injunction, the court may order for an early trial of the suit instead of wasting time on hearing of arguments on the application. The various Rules of court permit the court to take this course of action in appropriate cases.

CONCLUSION

Let me state in conclusion that although it is impossible to lay down any general rule which will guide a court in the exercise of the discretion to grant or refuse an application for interlocutory injunction in all cases, some of the principles which I have highlighted above as pertinent issues for considerations in such an application must be strictly observed. This is because an interlocutory injunction is not granted as a matter of course. See: **JOHN HOLT VS. HOLTS AFRICAN WORKERS UNION OF NIGERIA AND CAMEROONS (1963)2 SCNLR 383 AT 387 PARAGRAPH F.**

(1) I will also like to state by way of summary that the grant or refusal of an interlocutory application is at the discretion of the Court which must be exercised judicially and judiciously.

To act judicially means considering and weighing the interests of both sides so as to arrive at a just or fair decision while a judicious act means:

(a) Proceeding from or showing sound judgment.

(b) Having or exercising sound judgment.

(c) Proper exercise of discretion, wisdom and good sense.

See: **ERONINI & 3 ORS. VS. FRANCIS IHEUKO (1989) 2 NWLR (PT. 101) 46 at 60-61.**

(2) As I stated above, it is impossible to lay down any general rule which shall guide a Court in the exercise of its discretion to grant or refuse an interlocutory application in all cases because doing so will make nonsense of the meaning and essence of discretionary power. Each case is to be considered in the light of its peculiar facts.

(3) In the exercise of its discretion the Court must weigh the conflicting interests of the parties and determine where the balance of justice of the application lies.

(4) The Court must not allow the hearing and determination of interlocutory applications to cause delay or injustice in the trial of the substantive suit.

(5) The Court must refrain from determining at an interlocutory stage, issues which form the bone of contention between the parties in the substantive suit.

(6) The principles which I have highlighted in this paper as pertinent to a proper consideration of interlocutory applications must be strictly observed.

(7) Interlocutory applications for stay of execution, stay of proceedings and injunctions, all seek to maintain the status quo in one form or another.

I hope and trust that my Lords and courts generally will strictly apply these principles in the consideration of interlocutory applications that may come before them in order

to uphold the Rule of Law and safeguard the dignity of the Judiciary.

I thank you all for your kind and rapt attention.