

**INTERLOCUTORY APPLICATIONS, PERTINENT ISSUES
FOR CONSIDERATION**

PRESENTED BY:

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**AT THE REFERESHER COURSE FOR MAGISTRATES ON
CURRENT TRENDS IN LAW AND ADMINISTRATION OF
JUSTICE AT ANDREWS OTUTU OBASEKI AUDITORIUM
NATIONAL JUDICIAL INSTITUTE, ABUJA.**

ON

WEDNESDAY 20TH APRIL, 2016.

INTRODUCTION

The choice of the topic – INTERLOCUTORY APPLICATIONS, PERTINENT ISSUES FOR CONSIDERATIONS for discussion at the Refresher Course for Magistrates on Current Trends in Law And Administration of Justice by the National Judicial Institute under the able leadership of the Administrator, Hon. Justice R. P. I. Bozimo, OFR is most commendable. This is because the greater percentage of judicial time is devoted to hearing of applications on preliminary issues and rendering decisions thereon. Some of these applications are time consuming and may necessitate the hearing of oral evidence of witnesses and or admission of documents as exhibits, with significant effects on the substantive suits. It is therefore important that Magistrates exercise their discretionary powers in granting interlocutory applications in a very transparent, fair and judicious manner.

May i therefore seize the opportunity of this occasion to appreciate the Administrator of the Institute for according me the honour and privilege to present a paper on this very important topic.

The Magistracy forms part of the judicial arm of government which is entrusted with the responsibility of interpreting the laws made by the legislature and ensuring that the Executive arm keeps within the bounds of the law.

Black's law Dictionary defines a magistrate as "a local official who possesses whatever power is specified in the appointment or statutory grant of authority".

By the provision of Section 6 (4) (a) of the 1999 Constitution of the Federal Republic of Nigeria as amended,

each State of the Federation of Nigeria is empowered to create courts with subordinate jurisdiction to the High Court.

One of such Courts with subordinate jurisdiction to the high Court created by each State of the Federation of Nigeria are Magistrate Courts with jurisdictions specified in the laws establishing them.

In Kwara State like in all States which formed the old northern region of Nigeria the Court is referred to as Magistrate Court when exercising criminal jurisdiction but as District court when exercising civil jurisdiction.

Section 4 of the Criminal Procedure Code of Kwara State provides:

“There shall be eight classes of criminal courts in the state namely:

- (1) The High Court.
- (2) Courts of Chief Magistrate of the first grade.
- (3) Courts of Chief Magistrate of the second grade.
- (4) Courts of Senior Magistrate of the first grade.
- (5) Courts of Senior Magistrate of the second grade.
- (6) Courts of Magistrate of the first grade.
- (7) Courts of Magistrate of the second grade.
- (8) Area Courts established or deemed to have been established in the State under any law.”

See also: **Section 8 of the Criminal Procedure Code Law (CPC) of Kwara State.**

Sections 15–17 of the CPC set out copiously the jurisdiction of the various grades of Magistrates while Section 19 empowers the State House of Assembly to increase the jurisdiction of Magistrates on the recommendation of the Chief Judge of the State.

As i stated earlier in this paper, in Kwara State and other States that formed the defunct northern region of Nigeria, Magistrate Courts are referred to as district Courts and Magistrates who preside in those Courts as District Court Judges. The District Courts law of Kwara State which is “..... for the establishment of District Courts for the State and for the appointment of District Judges and of other Court officers, and for further purposes relating to the administration of civil justice,” provides in Section 4 as follows:

“In each district there shall be and there is hereby established a Court for the administration of civil justice to be known as the District Court.”

The appointment, jurisdiction, power and classes of District Courts are set out in Sections 5, 6, 7A, 8, 9, 10, 13, 13A, 13B, 13C, 14, 15, 16, 18, 20 and 22 of the District Courts Law of Kwara State.

See Section 6(1) of the Magistrate Courts law of Imo State; and similar provisions in the various States of the Federation.

Available statistics have shown that in the exercise of both Civil and Criminal Jurisdictions, Magistrate Courts undertake more than half of the judicial workload in Nigeria. Little wonder they are referred to popularly as people’s courts or grass root courts.

In his key note address delivered at the National Workshop for Magistrates in October 2008, His Lordship the Chief Justice of Nigeria (rtd) Hon. Justice I. L. Kutigi (GCON) emphasised the importance of Magistrate as follows:

“As Magistrates, your Courts are closer to the people of this country more than the Superior Courts. Available statistics have shown that indeed your Courts attend to about 50% of cases in the entire justice system. This, i dare say is because of the proximity of your courts to the grass roots. Thus as far as the majority of the ordinary Nigerians are concerned your Courts are the Courts they know.”

The importance of Magistrate Courts in the administration of Justice in Nigeria eloquently attested to by no less a personality than the retired Chief Justice of Nigeria makes it imperative that all interlocutory applications and indeed all cases brought before your worships must be treated with fairness and despatch, based on a sound understanding of the applicable laws and principles.

Before i go into a discussion of the topic of my paper, i will like to observe that the work of Magistrates like that of all Judges of the Superior Courts of record, whether in dealing with interlocutory applications or substantive cases, civil or criminal consist in the exercise of the divine attribute of dispensing justice with fairness between and among the people.

For those who exercise this divine attribute of dispensing justice there are provisions in the two Holy Books on what

qualities are required of them. Chapter 4 verse 16 of the Holy Quran states:

“O ye who believe, stand out firmly for justice, as witnesses to God, even as against yourselves, or your parents or your kin and whether it be (against) rich or poor; for God best protect both. Follow not the lusts (of your hearts) lest, ye swerve, and if ye distort (justice) or decline to do justice, verily God is well-acquainted with all that you do”

It is also stated in Deuteronomy 16 verses 18 – 20 that,

“Thou shalt appoint Judges and Magistrates in all the towns, which the Lord thy God shall give thee, in all thy tribes: that they may judge the people with just judgments, you shall not pervert justice, you shall not show partiality; and you shall not accept a bribe for a bribe blinds the eyes of the wise and subverts the course of righteousness. Justice and only justice you shall follow, that you may live and inherit the land which the Lord your God gives you”

It is clear from the foregoing that the main and most pertinent qualities which Judges and Magistrates who sit in judgment over fellow men must have are firmness, impartiality and shunning bribery and corruption. In addition, they must possess erudition and learning which form part of the brief of the Institute.

You must not be influenced by the sentiments of tribe, religion or politics in the exercise your judicial powers. You must entertain and decide all interlocutory applications and

cases with the fear of God knowing fully well that a day is coming when you shall give account of your stewardship before your creator, the Judge of all Judges.

INTERLOCUTORY APPLICATIONS

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

The hearing of causes including interlocutory applications by a Magistrate shall ordinarily be public but if he feels there are special reasons to do so, a Magistrate may hear such an application in the presence of only the parties, their counsel if any, and the officers of the Court.

See: **Order XII of the District Courts Rules of Kwara State; Section 36 (4)(a) and (b) of the 1999 Constitution of Nigeria as amended.**

A party may make an interlocutory application orally to the Magistrate in whose Court a cause or matter is pending. It is however within the competence of the Magistrate to direct an application to be reduced to writing and that notice of such an application be given to any person affected thereby. The manner in which evidence relating to such an application shall be given by the parties may be prescribed by the Magistrate.

Interlocutory applications are generally made by motion which may be ex parte or on notice. 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 he need not accompany his motion with an affidavit.

See: **KEYAMO VS. HOUSE OF ASSEMBLY LAGOS STATE (2000) 11 WRN 27 at 40 – 41.**

An application may be accompanied by a written or oral address in support of the relief sought.

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 INEC (2008) 19 NWLR (PT. 1120) 246 at 377 PARAS 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.

I will like, in this respect to refer to the provisions of **Order xxii Rule 2 of Kwara State District Courts Rules which provides:**

" 2. Cross-examination of deponent

Where a party desires to cross-examine a deponent who has made an affidavit filed on behalf of the opposite party, the following provisions shall apply:-

- a) he may serve on the opposite party a notice requiring the production of the deponent for cross-examination at the hearing;

- b) if the party served with the notice does not produce the deponent at the hearing, he shall not be entitled to use the affidavit as evidence without the leave of the court;
- c) a witness summons may be issued on the application of the party served with the notice for purpose of summoning the deponent to attend for cross-examination.

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 opponent.

See: **EPE VS KESHINRO (2009) 4 NWLR (PT 1131) 405 at 427 PARAS B – C.**

SIAT S. A. BRUSSELS VS S. S. LTD (2009) 17 NWLR (PT. 1171) 525 at 543 PARAS 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. I. 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 Magistrate 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 the following Interlocutory applications which parties frequently make in the course of proceedings.

These are:

1. Application for Disposal of Property.
2. Application for Interim Attachment of Property.
3. Application for Instalmental Payment.
4. Application for Bail.
5. Application for Stay of Execution.
6. Application for Stay of Proceedings.
7. Application for Injunctions.

1. APPLICATION FOR DISPOSAL OF PROPERTY

Under the provisions of the Criminal Procedure Code (CPC) of Kwara State applications for the disposal of property, in respect of which a crime has been committed or used for the commission of a crime or found in circumstances which suggest the commission of a crime, may be made to the court by the person entitled, the prosecutor or the accused person. Such application may be made before, during or after trial. See **Sections 356 - 363 CPC.**

(a) Application before trial

Where an arrested person is searched at the police station and articles found on him are suspected to have been stolen or unlawfully obtained, a report shall immediately be made to the court which shall order that the property be delivered to any person who appears to it to be entitled to the possession on any condition which the court deems fit to impose.

Where the owner of the property is unknown, the court may keep custody of it and issue public notice for the owner to make claim of it within Six (6) months from the date of the notice.

Where no claim of ownership is made within Six (6) months of the notice given and the person in whose possession the property was found cannot prove his ownership then the property may be ordered to be kept in appropriate custody or sold and the proceeds forfeited to the state.

(b) Application during trial

Where any property which is the subject of a crime such as a stolen item or one which has been used in committing crime is produced before a criminal court of law during trial, the court may, on the application of any person entitled or interested, order for the proper custody of the property or that it be sold, if it is one that can easily and quickly decay or spoil and the proceeds kept or released to the person entitled.

(c) Application after conclusion of trial

At the conclusion of trial and after judgment has been delivered, the court may, on the application of the victim of the offence or the prosecutor or the accused person, order that the property in its custody or one in respect of which an offence has been committed or used for the commission of an offence be destroyed, confiscated or delivered to any person who appears to it entitled to possession. In a case in which an appeal lies, the order of the court shall not be carried out until the time for appeal has passed or the appeal has been disposed of. The court may order a person to whom the property is released to execute a bond with or without sureties to return the property to the court if the order of the trial court releasing the property to him is modified or set aside on appeal.

A person who purchases stolen property innocently from an accused person who is found guilty and convicted may apply to the court for the refund of the money he paid for the stolen property. Where the property is recovered and eventually returned to the true owner, the court may order that the amount paid by the innocent purchaser be deducted from any

money found on the convict and paid to the innocent purchaser. See: **Sec. 358 CPC**

In all the instances given above the application for the disposal of property may be made to the court by the police.

Any person, apart from the police who claims entitlement to the property may equally apply that it be released to him.

See: **C. O. P. VS ADEBAYO, EXPARTE ROADS NIGERIA LTD (1981) 1 NCR 62.**

AKOSA VS C. O. P. (1951) 13 WACA 43.

2. APPLICATION FOR INTERIM ATTACHMENT OF PROPERTY

A plaintiff in an action may apply to the Magistrate at the time of instituting or during the pendency of the action for an order requiring the defendant to furnish sufficient security to fulfil any judgment or order which may be given against him and where the defendant fails to give such security or pending the giving of such security, to direct that any movable or immovable property of the defendant be attached until the court makes a further order.

The application is made where the plaintiff has reasons to believe that the defendant intends to obstruct or delay the execution of any judgment that may be obtained against him by disposing his property or removing it from the jurisdiction of the court. See: **Section 57 Kwara State District Courts Law and Order XX Kwara State District Courts Rules.**

SOTUMINU VS. OCEAN STEAMSHIP (NIG) LTD (1992) 5 NWLR (PT. 239) 1 at 25 – 26.

The application is made ex parte and supported with an affidavit which shall contain the following facts, among others:

- a. Specification of the property to be attached.
- b. Estimated value of the property.
- c. A declaration by the plaintiff that to the best of his information and belief the defendant is about to dispose or remove his property from jurisdiction with intent to obstruct or delay the execution of any judgment or order that may be obtained against him. See **F. M. B. N. (LTD) VS. DESIRE GALLERY LTD 1 WRN 177 at 192.**

Upon being satisfied with the merit of the application, the court issues an order which preserves the res in addition to securing assets for execution of anticipated judgment.

The order 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 PARAS A – B.**

3. APPLICATION FOR INSTALMENTAL PAYMENT

Application for instalmental payment may be made in the District/Magistrate Court.

Section 63 of the District Court Law Cap. D4 Laws of Kwara State 2006 makes Provision for application for instalmental payment. A judgment debtor directed to pay money or do any other act is bound to obey the order without any demand for payment or performance and if no time is expressed, he is bound to do so within two days. However, a judgment debtor

who is unable to satisfy the judgment of the court is entitled to make an application for instalmental payment by filing a Motion on Notice supported by affidavit.

An application for instalmental payment of a judgment debt, if granted, operates as a stay of execution of that judgment, hence shares some characteristics with an application for a stay of execution. A major difference between the two however is that unlike in an application for a stay, the requirement that an appeal must be pending is not needed in an application for instalmental payment.

See the case of **A.C.B. LTD V. DORNIMICO BUILDERS CO. LTD (1992) 2 NWLR (PT. 223) 296 C.A.**

An applicant for instalmental payment must fully disclose his facts, in order to properly invoke the court's discretionary power in his favour, by placing frankly and honestly before the court his income and expenditure. If the applicant is a company and its major reason for applying for the relief of instalmental payment is that the general economy is in depression, such applicant must exhibit its properly audited account showing a full disclosure of how the general economic depression has rubbed negatively on its finances.

See: **LIVESTOCK FEEDS PLC V. IGBINO FARMS LTD (2002) 5 NWLR (pt. 759) 118;**

A.B. LTD V. DOMINICO BUILDERS CO. LTD (Supra).

A court should not make an order that will frustrate its own judgment by granting an instalmental payment for an unreasonably long period of time.

See: **U.B.N LTD V. PENNYMANT LTD (1992) 5 NWLR (PT. 240) 228 at 244;**

A.C.B LTD V. MRS. A. EHIENUA & 1 OR. (1978) 2 S.C. 76.

4. APPLICATION FOR BAIL

Bail means the process by which a person who is arrested or imprisoned is released temporarily from State custody to sureties or on personal recognizance on security taken for his appearance in court whenever he is required, until the determination of the case against him.

The essence of bail is not to set the accused person free without trial but rather to release him temporarily to enable him prepare his defence, on conditions which assure and ensure that he would not escape justice.

See the cases: **NWAIGWE CHUKWUEBUKA V. FEDERAL REPUBLIC OF NIGERIA (2015) ALL FWLR (PT. 769) Pg. 1093 at pg. 1111; SULEIMAN V. C. O. P. PLATEAU STATE (2008) ALL FWLR (PT. 425) 1627.**

(a) Application pending trial

Bail is a constitutional right of an accused person as can be seen from the provisions of **Sections 35 and 36** of the 1999 Constitution of the Federal Republic of Nigeria.

Section 35 (4) of the 1999 constitution (as amended) 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 proceedings that may be brought against him) be released whether unconditionally or upon such conditions as are reasonably necessary to ensure that he appears for trial at a later date”.

See: **DAMBABA VS. STATE (2000) 14 NWLR (PT. 687) 396 at 411** where it was held that the essence of Section 35(4) is to give a suspect early trial failing which he should be released on bail.

Interpreting Section 32 (4) of the 1979 Constitution of the Federal Republic of Nigeria which is the same as the provisions of **Section 35 (4) of the 1999 Constitution as amended, IDOKO J. of the Benue State High Court in the case of ABECHI VS. C.O.P 1981 (1) NCR 342 at 345 to 347** held as follows:

“In our view, s.32(4) of the Constitution is designed to keep accused persons waiting for their trial out of incarceration until their guilt has been established in a court of law, unless of course, the charge is that of a capital offence. The section, if construed properly, also safeguards an accused’s liberty against delaying tactics that may be employed by the prosecution – either in the

continuation of a frivolous charge against him, or in the use of delay by not prosecuting the charge with diligence, so that, that could serve as a form of punishment separate from what the trial and its result may or may not bring. The section is aimed at preventing a criminal charge or allegation being hung on the neck of an accused person for a long time without him knowing his fate

.....

In our view S.32(4) of the Constitution, reading it in its plain language means that, for the purpose of this argument, an accused should be tried within three months or be discharged after three months if not tried as from the date he is brought before either (a) both the court which is only taking cognizance of the offence and the court trying the offence, or (b) when he is taken directly to the court which has jurisdiction to try the offence. It follows, in our view, that the jurisdiction conferred on "a court of law" to discharge unconditionally or conditionally cannot be interpreted narrowly to mean only the court that is competent to try the offence. If the court has power to take cognizance of an offence it similarly has the power to discharge under S.32 (4) of the Constitution.

The discharge under S.32(4) of the Constitution by the court that takes cognizance of the offence does not mean that the accused cannot be taken to the competent trial court for the trial if and when the prosecution is then ready. The whole aim is to speed up the trial of the accused and not to keep him in jeopardy for as long as the prosecution may wish over an accusation of which the law still presumes him innocent.....

In conclusion we hold that S.32 (4) of the Constitution refers to “a court of law” and this includes both the court taking cognizance of an offence as well as the court that has jurisdiction to try the offence. The learned Magistrate has jurisdiction to enter an order of discharge either unconditionally or conditionally under S.32 (4) of the Constitution for the offences for which the appellant was brought before him and he erred in law when he held he has no such jurisdiction.”

It is thus clear from the decision of the court in the case of ABECHI VS. C.O.P (Supra) that in appropriate cases a Magistrate may exercise his discretion to release on bail, a person accused of an offence which the Magistrate has no jurisdiction to try but is only taking cognizance of.

This position is further supported by the provisions of Section 71 of the CPC which provides thus:

“When any person for whose appearance or arrest a summon or warrant may be issued is present before a court or justice of the peace, the court or justice of the peace may require him to execute a bond, with or without sureties, for his appearance before a court.”

From the provisions of section 1 of the CPC which defines “Court” to mean “..... any court of civil or criminal justice established by any law or deemed to be so established”, and the decision of the court in ABECHI VS. C.O.P (Supra) i am of the firm view that the lack of jurisdiction to try an offence does not preclude a Magistrate from entertaining and granting an application for bail. Besides, it will be quite illogical to concede that a Magistrate can order a person accused of an offence

over which he has no jurisdiction to be remanded in, and produced from custody but that he cannot entertain and grant an application for such an accused to be released on bail.

I must be quick to admit that this my position is tenable only in states operating the CPC and not the CPA where Section 118 (1) categorically states that "A person charged with an offence punishable with death shall not be admitted on bail except by a judge of the High Court."

Section 36 (5) of the same constitution provides that:

"Every person who is charged with a criminal offence shall be presumed to be innocent until he is proved guilty".

The moment an accused person is arraigned before the court and his plea taken and he denies the allegation against him, the next issue for consideration is the issue of bail. At this stage the accused or his counsel can make an oral application to the court for bail. The grant or refusal of such application is at the discretion of the court which discretion must be exercised judicially and judiciously.

See the case of **OMODARA V THE STATE (2004) 1 NWLR (PT. 853) pg. 80 at pg. 81.**

After a refusal of an oral application, the accused person may bring a motion on notice supported by affidavit containing materials upon which the court is called to exercise its discretion.

See the cases of **OLATUNJI V. FEDERAL REPUBLIC OF NIGERIA (2003) 3 NWLR (PT. 807) PG. 406 at Pg. 425; ABIOLA V. FEDERAL REPUBLIC OF NIGERIA (1995) 1 NWLR (Pt. 370) 155 at 197.**

The factors which a court must consider in an application for bail are to be found in the rules of the various courts and case law.

For example, Section 341 of the Criminal Procedure Code C.P.C. provides that:

- “(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 subsections (1) and (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 are sufficient grounds for further inquiries, such person may, pending such inquiry be admitted to bail”.

In the case of **TARKA & ORS. V. D.P.P. (1961) N.R.L.R 376** the court held that all the three conditions contained in Section 341 (2) of the C.P.C must exist together before the court can exercise its discretion to grant bail to persons charged with offences carrying imprisonment of more than three years.

The courts have also laid down factors to be considered in granting an application for bail. In the case of **OMODARA V. THE STATE (2004) 1 NWLR (Pt. 853) pg. 80 at pg. 92 – 93**, the Court of Appeal held that the fundamental principles that should guide a court in granting or refusing an application for bail pending trial are:-

- (i) The nature of charge;
- (ii) The strength of the evidence in support of the charge;
- (iii) The severity of the punishment in the event of conviction;
- (iv) The previous record of convictions, if any, of the suspect: a suspect with a long record of convictions will generally not be admitted to bail unless the trial Judge has a real doubt as to his guilt;
- (v) The likelihood of the repetition of the offence;
- (vi) Whether there is real danger that the accused will abscond and thereby not surrender himself for trial;
- (vii) The risk that if released, the suspect may interfere with witnesses or suppress the evidence which may be adduced to incriminate him.

See: **CHINEMELU V. C. O. P. (1995) 4 NWLR (PT. 390) 467; DANBABA V. STATE (2000) 14 NWLR (PT. 687) 396.**

(viii) The prevalence of the offence – where the offence with which an accused/applicant is charged is rampant in the society, the presiding Judge or Magistrate may withhold his discretion to grant bail in order to discourage the perpetrators of the prevailing crime.

See the case of **UDEH V. FEDERAL REPUBLIC OF NIGERIA (2001) FWLR (PT. 6) 1734 AND THE STATE V. FELIX (1978) 2 LRN 308.**

(ix) Ill-health as a ground for seeking bail: where a clear case of ill-health is made out by an applicant, it will entitle him to bail.

See the cases of **OFUFUE V F.G.N (2005) 3 NWLR (Pt. 913) 571 at Pg. 596 – 597; FEWEHINMI V. STATE (1990) 1 NWLR PT. 127 486; DOKUBO-ASARI VS. FRN (2007) All FWLR (PT. 375) 558 at 572.**

(b) Application after trial/conviction

An accused person who has been tried or one who admitted the offence alleged or charged, convicted and sentenced has lost his constitutional presumption of innocence in Section 36 (5) of the constitution and consequently his freedom until the expiration of his prison term or payment of fine. Where, however such a convict files an appeal, he may apply to the court for bail pending the determination of his

appeal. While bail pending trial of an accused is as of right by virtue of Section 35 (4) and (5) of the Constitution, bail after conviction pending appeal is often at the discretion of the court.

The application for bail by a convict must first be made to the Magistrate Court. See the case of **EFFIONG V. C.O.P. (1967) N.M.L.R 341**, where it was held that the applicant must first file his application at the court of trial and it is only when the trial court refuses the application that he can apply to the appellate court.

The application is made by motion on notice supported by affidavit sworn to by the convict or any person familiar with the facts of the case.

The power of a Magistrate to grant bail to a convicted person pending appeal is contained in Section 283 (4) and (5) of the CPC as follows:

- “4. If the appellant is in custody he may at the discretion and on the order of a Magistrate be released on bail on complying with the provisions of this section as to security for prosecuting the appeal and abiding the results thereof.
5. If the appellant who is in custody is not within the district of the Magistrate from whose decision the appeal is made, any Magistrate of the district in which such appellant may be shall have the powers and functions given and assigned to the Magistrate by this section ”.

Conditions for grant of bail pending appeal

In the case of **ADAMU V. I.G.P (1957) NNLR 5**, it was held that bail after conviction is usually granted upon the applicant:

- (i) Showing some "unusual or exceptional circumstances" for granting it;
- (ii) The fact that the appeal will not come up until the sentence has expired will on its own afford ground for granting bail after conviction.

Before an application for bail after conviction is considered, the applicant must have filed an appeal which is pending.

What constitutes special circumstances have been stated in judicial decisions.

1. Where the sentence is manifestly contestable.

In the case of **FEWEHINMI V. THE STATE (1990) 1 NWLR (pt. 127) 486 at 498**, it was held that:

"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"

2. If the duration of the appeal will likely out last the duration of the sentence or the convicted person may have served the sentence before his appeal is determined, then bail may be granted.

See the cases of **MADIKE V. THE STATE (1992) 8 NWLR (pt. 257) 85**; and **DORIS OBI V. THE STATE (1992) 8 NWLR (Pt. 257) 76**.

3. If the appellant's health is in serious jeopardy. In **FEWEHINMI V. THE STATE (SUPRA) 486**, the Court of Appeal considered the ill-health of the convict sufficient special circumstance to grant him bail. See **also the case of ex-beauty queen, IBINABO FIBERESIMA** convicted and sentenced to five years imprisonment for manslaughter by a Lagos High Court but granted bail by the Court of Appeal Lagos Division on Thursday 7th April, 2016 mainly on ground of ill health.
4. Where the Appellant is a first-time offender – if the appellant shows that he is a first time offender and that he has previously been of good behaviour, his application for bail pending appeal may be more favourably considered.

See the case of **BUWAI V. STATE (2004) ALL FWLR (pt. 227) 540**.

Terms of bail

Bail is a basic constitutional right which should be granted on liberal terms except in capital offences. Therefore, a court should not attach excessive conditions to bail.

See the case of **IBORI & ANOR V. FEDERAL REPUBLIC OF NIGRIA (2009) 3 NWLR (Pt. 1127) 94 at 106 – 107** where the Court of Appeal Kaduna Division held as follows:

" In this vein, it does not speak or say well of the 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. See: **EYU VS STATE (1988) 2 NWLR (PT. 78) 602; DANBABA VS STATE (2000) 14 NWLR (PT. 687) 396**. Thus, by extension, conditions attached to grant of bail must not be suffocating, unbearable, unworkable and unduly burdensome".

APPLICATION FOR STAY OF EXECUTION

In exercising its powers to grant stay of execution the court must ensure that justice is done to the parties. This will require the court to maintain a delicate balance between the right of the successful party to reap the fruit of his litigation and the right of the losing party to have the success of his opponent tested on appeal.

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 an application for stay of 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 of execution 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."

(6) APPLICATION FOR STAY OF PROCEEDINGS

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 be given adequate time to prepare for his defence.

A party to any proceedings who is dissatisfied with the decision of the Magistrate 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 Magistrate Court or to the High

Court to which an appeal lies. The application, however is first made to the Magistrate Court from which an appeal lies and if it is refused, then to the High Court to which an appeal lies.

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: Caribbean 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 manifestly wrong.

(iv) Where the res will not be preserved

Where the res will be destroyed, damaged or annihilated before the matter is disposed of, appellate court will grant stay. See: ***Shodehinde v. Registered Trustees of the 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.

(7) APPLICATION FOR INJUNCTIONS

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.

Sections 13; 13A; 13B and 13C of the District Courts Law of Kwara State confers on the various grades of District Courts power to grant injunctions or orders to stay waste or alienation or for the detention and preservation of any property

which is the subject of the suit before the court or to restrain breaches of contracts or torts.

TYPES OF INJUNCTIONS

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

1. Perpetual Injunction
2. Interim Injunction
3. Mandatory Injunction
4. Interlocutory Injunction

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 adversary.

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 *ex parte* are not necessarily coterminous with them.

Their main feature which distinguishes them from interlocutory injunctions is that they are made to preserve the status quo until a named date or until further order or until 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 ex parte 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 RIGHT 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 District and Magistrate Courts of the various states have undoubted powers to grant ex parte orders of injunction under certain conditions. See **Order XV and XVI of the District Courts Rules.**

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 ex parte 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 ex parte 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 ex parte 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 2A admonishes Judges and Magistrates to desist from abusing their powers to issue or grant interim orders ex parte.

A misuse or abuse of power of issuing interim orders ex parte 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 Magistrates is that when you are confronted with a motion ex parte 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 XV of the District Court Rules of Kwara State.**

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 writ of summons if filed or to be filed. In appropriate cases however the court can still consider an interlocutory application before the filing of a writ of summons.

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 VS 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 the substantive suit, 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 Your Worships 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 matter, 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 Magistrate 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 that the award of monetary damages would not be adequate compensation for 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 Magistrate 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.

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 participants 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.