BAIL AND OTHER INTERLOCUTORY APPLICATIONS: PERTINENT ISSUES FOR CONSIDERATION

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INTRODUCTION:

The word Interlocutory is applied to signify something which is done between the commencement and the end of a suit or action which decides some point or matter, which however is not a final decision of the matter in issue; as, interlocutory judgments, or decrees or orders.[1]

It would therefore be safe to say that an interlocutory application, within the perspective of this paper is any prayer sought after the commencement, before and even after the conclusion of a suit, the granting of which is connected to but not conclusive of the main suit.

Interlocutory applications can be made in civil and criminal proceedings and are primarily aimed at preventing irreparable harm from occurring to a person or property during the pendency of a lawsuit or proceeding.

As the title suggests, this paper shall, while looking at the various types of interlocutory applications and outlining the basic characteristics of each, endeavour to consider pertinent issues which are generally brought to bear by courts, counsel and litigants in the face of such applications.

As a general rule, the court is bound to decide every application before it one way or the other before deciding the substantive matter with finality as the outcome of such applications may tilt the balance of the pendulum of the substantive action in one direction or the other. *See* **NALSA TEEM ASSOCIATES LTD VS. NNPC**[2] and

[1] A Law Dictionary, Adapted to the Constitution and Laws of the United States. By John Bouvier. Published 1856.
[2] (1991) 8 N.W.L.R. Pt. 212 at 652

KOTOYE VS. SARAKI[3]. Once an action has been commenced all subsequent applications are referred to as interlocutory applications.

Applications do not need to be supported with an affidavit where the applicant is relying on points of law only or where the facts are already before the court such as in the pleadings filed in court. If the respondent intends to challenge the application on facts, he must file a counter-affidavit. Where there are conflicts in the affidavit and counter-affidavit filed by the parties on material facts, the court is under an obligation to call for oral evidence to resolve the conflict except where there is documentary evidence which could assist the court in resolving the conflict. In the case of **NWOSU VS. IMO STATE ENVIRONMENTAL SANITATIONBOARD**[4]***,*** the Supreme Court per Nnaemeka-Agu JSC of blessed memory observed:

> *"Evidence by affidavit is, it must be noted, a form of evidence. It is entitled to be given weight where there is no conflict, after the conflict has been resolved from appropriate oral or documentary evidence. For, true, it is the law that where there is a conflict of affidavit evidence called by both sides, it is necessary to call oral evidence to resolve the conflict! See Falobi v. Falobi (1976) 9 & 10 SC 1 @*6 *p. 15; Akinsete v. Akinditure (1966) 1 All NLR 147. But I believe that it is not only by calling oral evidence that such a conflict could be resolved. There may be authentic documentary evidence which supports one of the affidavits in conflict with another. In a trial by affidavit evidence such as this, that document is capable of tilting the balance in favour of the affidavit which agrees with it. After all even if oral testimony had been called, such a documentary evidence would be a yard stick with which to assess oral testimony: see Fashanu v. Adekoya (1974) 1 All NLR 35 at page 48."*

The procedure of serving an interlocutory motion together with a writ of summons or before the defendant enters appearance is usually adopted where the claimant feels the need to urgently obtain an order of court, for instance in actions for damages for trespass the claimant may feel the need to restrain a continuing trespass.

It should be noted that these applications are usually required to be in writing, that is, by way of motions unless there is a special law or rule of procedure to the contrary

[3](1991) 8 N.W.L.R. Pt. 211 at 638
[4](1990) 2 NWLR (PT. 135) 688 at 718 C-D, 734 G

as applicable in any particular court. In practice too, oral applications may in some cases be made to the court in the presence of the other party, but the court may refuse to entertain such an oral application and consequently, direct that it be put into writing and also served on the other party. With the mandatory provision of Delta State and indeed many other States Civil Procedure Rules requiring that applications shall be by motion, oral applications may not be permitted.

As mentioned earlier there are countless situations that may require counsel to make one application or the other to the court in the course of the proceedings. I shall highlight a few and discuss generally on issues that are prevalent in their application.

TYPES OF INTERLOCUTORY APPLICATIONS

BAIL – This is the procurement of the release of a person from legal custody, by undertaking that he shall appear at the time and place designated and submit himself to the jurisdiction and judgment of the court. It is also the securing of the liberty of a person arrested or imprisoned, on security being taken for his appearance on a day and a place certain. The object of bail in criminal cases is to secure the appearance of the accused person before the court when his presence is needed.[5]

In practice however, an accused person is only required to enter into recognisance in the sum fixed by the Court or law enforcement agency. It is not a requirement of law in Nigeria that he should deposit money before bail is granted. A **Recognisance** is a promise to pay a sum of money by way of security if the accused fails to appear in court. Additionally, instead of recognisance the accused may be required to provide a person who undertakes to pay a sum of money if the accused does not appear in court, otherwise known as a surety.[6]

There are two basic forms of bail which come into play depending on the circumstance the person seeking it finds himself:

[5] Black's Law Dictionary (8th ed. 2004)
[6] The Right to Bail as a Constitutional Right in Nigeria – Akintunde Esan Esq., 2015

Police Bail is codified in States such as Lagos where Section 17 (1) of the Administration of Criminal Justice Law of Lagos State 2011 provides that:

> *"When a person has been taken into police custody without a warrant for an offence other than an offence punishable with death, an officer in charge of a police station shall release the person arrested on bail subject to subsection (2) of this section if it will not be practicable to bring the person before a court having jurisdiction with respect to the offence alleged within twenty-four (24) hours after his arrest."*

For other States that are yet to domesticate the Administration of Criminal Justice Law, reliance is placed on section 27 of the Police Act which empowers the police to release a person on bail where it is not possible or practicable to bring such an arrested person before a court of law within a reasonable time. This is however limited to non-capital offences.[7]

Court Bail is grouped into *Bail pending the trial of the accused person and Bail pending the Appeal of an accused.* Section 118 of the Criminal Procedure Act, Cap. C41 Laws of the Federation 2004 classifies three categories of offences for the purpose of bail as well as the rules to be applied for each. The first category of offences are capital offences which by subsection 1 allow for bail to only be granted by a High Court Judge based on strict rules. The Second category of offences are felonies other than felonies punishable with death. In this instance subsection 2 provides that both the Magistrate Court and the High Court Judge have the powers to grant bail. The third category of offences are misdemeanours and other simple offences which by reason of subsection 3, both the Magistrate Court and High Court also have the powers to grant bail to an accused person being charged for an offence in this category. Also, bail must always be granted to an accused person who is charged for an offence under the third category unless the court sees any good reason not to so grant.

Bail Pending Appeal is granted by the Court of Appeal by reason of section 28(1) of the Court of Appeal Act which empowers the Court of Appeal to grant bail pending

[7] See the case of EDA VS. C.O.P BENDEL STATE (1982)3 NCLR 219; Section 17 of the Criminal Procedure Act, Cap. C41 LFN 2004 and Section 27 of the Police Act.

appeal. This power is however discretionary and must be exercised upon the existence of special or exceptional circumstances.

To grant or refuse bail just as with other interlocutory applications is a discretionary matter for which the trial judge must act judicially and judiciously. He must therefore act only on evidence placed before him. The grounds for refusing bail must be upon facts on record. The trial judge must not act on his instincts on which there is no evidence in support. The prosecution would always be in the best position to advise or suggest to the court on the antecedent or probability or even the tendency of the applicant to escape from being tried.[8]

INJUNCTIONS

An injunction is an order of an equitable nature restraining the person to whom it is directed from doing the things specified in the order or requiring in exceptional situations the performance of a specified act.[9] A claim for an injunction is a claim in equity. The order for injunction is available to restrain the defendant from the repetition or the continuance of the wrongful act or breach of contract complained of. It is generally granted to protect a legal right which is in existence. Injunctions are issued where mere award of damages at the end of the trial would not be satisfactory or effective or may lead to a greater harm or injustice. There are several types of injunctions such as:

a. ***Interim Injunction*** granted ex parte to maintain the status quo for a relatively shorter period of time usually for seven days or an extended period pending the hearing of a of a motion on notice;

b. ***Interlocutory injunction*** granted provisionally usually during a trial to maintain the status quo pending the hearing and determination of the suit;[10]

c. A ***Perpetual Injunction*** is a final order granted after the trial on the merits to protect the legal rights of the plaintiff which has been established at the trial;[11]

[8]See Omodara v State (2004) INWLR (pt 853) 83.
[9]For further reading see Equity Doctrines and Remedies 3rd Edition pages 531-543
[10]Kotoye v. CBN (1989) 1NWLR (Pt 98) 419 at 441-442

d. A ***Mandatory Injunction*** is granted to command the defendant to take steps to rectify the consequences of what he has already done. Mandatory injunctions are very harsh on the defendant and are hardly granted by the courts but they have been issued for example to compel the removal of buildings or other structures wrongfully placed upon the land of another;

e. ***Quia Timet Injunctions*** are granted to restrain harm which has not yet occurred but is threatened and imminent; Both the origin and the purpose was well defined by Lord Upjohn in **REDLAND BRICKS LTD VS. MORRIS**[12]

f. A ***Mareva Injunction,*** also known as a freezing order is granted to freeze the assets of the defendant to prevent him from dissipating the assets or taking them out of the jurisdiction of the court so as to frustrate the judgment; This injunction got its name from the case of **MAREVA COMPANY NAVIER ASA VS. INTERNATIONAL BULK CARRIERS S.A.**[13]

g. ***Anton Piller Order of Injunction***[14] is granted to allow the applicant to enter the premises of the defendant to search for and seize material documents and articles. It is used mainly in patent, copyright or passing off cases and is obtained ex-parte to avoid the destruction or spiriting away of the materials by the defendant if put on notice.

Having looked cursorily at some of the various types of injunctions, it is needful that I also consider the factors that a court must avert its mind to when determining whether or not to grant an interlocutory application.

RELEVANT CONSIDERATIONS FOR THE GRANT OF AN ORDER OF INTERLOCUTORY APPLICATION

For the court to exercise its discretion in favour of an applicant for injunction, certain conditions must be satisfied. These conditions must be deposed to in the affidavit in

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[11]. Anyanwu v. Uzowuaka (2009) 13 NWLR (Pt. 1159) 445 @ 489 –490 H – A
[12] (1979) AC 652
[13] (1975) 2 Lloyds Rep. 509 also reported at (1980) 1 All E.R. 213. See Chap. 5
[14]Order 26 Rule 8 2 (a) – (c) Federal High Court (Civil Procedure) Rules 2009.

support of the motion on notice or motion ex-parte as the case may be. The conditions for the grant of interim and interlocutory injunction are the same except for the element of urgency required for interim injunctions.[15] They are:

(1) LEGAL RIGHT –

In the case of **AKAPO VS. HAKEEM-HABEEB**[16]the Supreme Court per Karibi-Whyte JSC referring *to* **KOTOYE V C. B. N.(SUPRA) AND OBEYAMEMORIAL HOSPITAL VS. A-G FEDERATION (SUPRA**)reiterated that the essence of grant of an injunction is to protect the existing legal right or recognizable right of a person from unlawful invasion by another. Therefore, the first hurdle an applicant for an injunction must surmount is to show the existence of a legal right which is being threatened and deserves to be protected. This does not mean that the Applicant should prove ownership of the property; it is sufficient for him to show that he claims a legal right over the property on which he seeks the order of injunction. – see: **LAWAL VS. ADELEKE**[17]**.**

(2) THREAT OR ABUSE OF LEGAL RIGHT –

The legal right must be threatened or abused. This may arise by way of a threat to or the brutalization of the res, which may result in damage. The applicant need not show that the res was physically attacked or assaulted. A threatened trespass, for instance in the case of land, is enough to sustain an application. Once the application shows an actionable wrong against the res, an order of interlocutory injunction should follow. In **ADENIJI & ANOR VS. AKINTARO & ORS**[18], the Court of Appeal held that where a Plaintiff is unable to show an actionable wrong or an infringement of a legally enforceable right, the fact that the act of the Defendant is injurious to him is not sufficient for the grant of an injunction.

(3) INJUNCTION SOUGHT HAS NOT BEEN CARRIED OUT –

[15]Modern Civil Procedure Law by A. F. Afolayan & P. C. Okorie Published by Dee Sage Nig. Ltd 2007 @ P. 198.
[16][1992] 6 NWLR(PT. 247) 266 AT 289
[17](2004) 13 NWLR (PT 891) 476.
[18] (1991) 8 NWLR (PT 208) 209

The act to which the injunction is being sought has not been carried out. The purpose of an interlocutory injunction is to preserve the *res.* Therefore, if the *res* are destroyed or no longer in existence at the time the application is made; the trial court will be in a helpless situation. An interlocutory injunction is not a remedy for an act which has already been carried out – **JOHN HOLT NIGERIA LIMITED VS. HOLTS AFRICAN WORKERS UNION OF NIGERIA & CAMEROONS;[19]ABDULLAH VS. MILITARY GOVERNOR OF LAGOS STATE[20].**

(4) SUBSTANTIAL ISSUE TO BE TRIED –

One other criteria an applicant seeking the discretion of the court to be exercised in his favour in an interlocutory injunction must prove is to show that there is a serious issue to be tried. This condition is important because it raises a fundamental issue which judicial officers must pay particular attention to. In considering an application for interlocutory injunction the court should not try to resolve conflicts of evidence on affidavit as to facts on which the claims of either side may ultimately depend or decide difficult questions of law which call for detailed argument and serious consideration. In other words, the court must be careful not to delve into facts the resolution of which might lead to a determination of the substantive suit. In a similar vein the Supreme Court re-emphasized the principle in the case of **ONYESOH VS. NZE CHRISTOPHER NNEBEDUN & OTHERS*[21]***

What is required of the applicant is to show that there is a substantial issue to be tried at the hearing. See **U.T.B. LTD VS.DOLMETSCH PHARM. (NIG.) LTD.[22]**Further, the applicant at this stage does not need to make out a case on the merits as he would in the substantive case. All he needs is to show is that there is a substantial issue to be tried. **OBEYA MEMORIAL HOSPITAL VS. A-G FEDERATION (SUPRA).*[23]***

[19](1963) 1 ALL NLR 379;
[20](1989) 1 NWLR (PT. 97) 356
[21](1992) 3 NWLR (Pt. 229) 315 at 318
[22](2007) 16 NWLR (PT. 1061) 420.
[23]Egbe v. Onogun (1972) 1 All NLR 9; Kufeji v. Kogbe (1961) All NLR 113; Nigerian Civil Service Union v. Essien (1985) 3 NWLR (Pt. 12) 26.

(5) BALANCE OF CONVENIENCE –

The balance of convenience is another principle that a trial judge must take into consideration. In **ABDULLAH VS. MILITARY GOVERNOR OF LAGOS STATE (SUPRA)** the Court of Appeal held that one of the cardinal principles of the law governing the grant or refusal of an order of interlocutory injunction is that the Plaintiff's need for protection must be weighed against a corresponding need of the Defendant to be protected against injury he may suffer should the application for injunction be granted. See **NWANGANA & ORS VS. MILITARY GOVERNOR IMO STATE & ANOR.**[24]

In the determination of this principle the court should pose two related questions: (a) who will suffer more inconvenience if the Application is granted? (b) Who will suffer less inconvenience if the Application is granted? The Judge, in providing answers to the questions, will allow himself to be guided by the facts before him. In the determination of this factor, our adjectival law requires some measurement of the scale of justice to see where the pendulum tilts. There should be enough evidence that the applicant will suffer more inconvenience if the Application is Refused – **AFRICAN CONTINENTAL BANK LTD. VS. AWOGBORO**[25]

(6) IRREPARABLE DAMAGE OR INJURY –

In **SARAKI VS. KOTOYE**[26] irreparable damage was defined as injury which is substantial and cannot be adequately remedied or atoned for by damages. The applicant in his affidavit evidence must depose to facts which show that if the injunction is not granted he will suffer serious and substantial damage which cannot be remedied by monetary compensation or damages thereby causing the defendant to do more damage.

(7) CONDUCT OF THE PARTIES –

[24](1987) 3 NWLR (PT. 59) 185.
[25](1991) 2 NWLR (PT 176) 711.
[26] (1994) 4 NWLR (Pt. 4J 3) J 44

The applicant must show that his conduct before and after the trial is not reprehensible. See **LADUNNI VS. KUKOYI.**[27] In **PETER V OKOYE**[28]**,** the Court of Appeal Enugu Division per Fabiyi JCA (as he then was) observed:

> *"In determining an application for interlocutory injunction, conduct of the parties is one of the relevant factors to be taken into consideration. On the part of an applicant, a reprehensible conduct is enough to deny him a grant of his application. An applicant for an order of interlocutory injunction should fail if he is guilty of delay. This is because an order of interlocutory injunction is an equitable remedy. It is known that delay defeats equity. An applicant should act timeously so as not to overreach his opponent."*[29]

The Supreme Court has held in the case of **AKAPO VS. HAKEEM HABEEB**[30], that where a respondent to an application for injunction relies on the illegality of his actions, he has no right to resist the application of the applicant with a recognized legal right to an order of injunction because injunction being an equitable remedy he who comes to it must come with clean hands.

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

(8)UNDERTAKING AS TO DAMAGES –

One of the conditions for a grant of interlocutory injunction is that the applicant must give an undertaking to pay damages in the event it turns out that the injunction ought not to have been granted. The usual practice is for the applicant to depose in his affidavit in support of the application his willingness to pay damages. The undertaking is an enforceable promise at large to pay the defendant what he might suffer by way of damages to be determined at a later stage.[31] If the plaintiff loses the case on the merit the undertaking becomes realizable. The defendant would

[27](1972) 1 ANLR (Pt 1) 133.
[28][2002] 3 NWLR (PT. 755) 529 @ 552 AC
[29] See also: NIGERIAN CIVIL SERVICE UNION VS. ESSIEN (1985) 3 NWLR (PT. 12) 306, EZEBILO VS. CHINWUBA (1997) 7 NWLR (PT. 511) 108.
[30](1992) 6 NWLR (PT. 247) 266
[31]Anike VS. Emehelu (1990) 1 NWLR (Pt. 128)603 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

however have to apply to the court for an inquiry as to the quantum of damages suffered as a result of the injunction. The application for inquiry would be refused if not promptly made. Such applications are uncommon, probably because the defendant is so happy that the plaintiff lost the case that he could not be bothered about the damage suffered. I believe however that where the damage was really heavy, the defendant will take necessary action to make the plaintiff pay.

INTERLOCUTORY APPLICATIONS PENDING APPEAL:

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

STAY OF PROCEEDINGS:

Stay of proceedings as the name suggests, puts a stop to the due adjudication of a suit during the pendency of an appeal.

A salient point to note is that a stay of proceedings should not be granted where the interlocutory appeal upon which stay of proceedings is sought would not finally dispose of the case. It is advisable in such a situation the aggrieved party waits till the final judgment to lodge an all-embracing appeal. A stay of proceedings should only be granted by the court where it is absolutely necessary and there is no other option open to the court. In the case of **N.N.P.C. V. O. E. (NIG) LTD**[32], the Court of Appeal Abuja Division per Aboki JCA set out as gathered from various decided cases the principles which should guide the court in the exercise of the discretion

[32][2008] 8 NWLR (PT.1090) 583 AT 617C – 618D

whether or not to grant a stay of proceedings pending the determination of an appeal:

> *"i. There must be a pending appeal. A stay of proceedings can be granted only if there is a pending appeal which is valid in law. See N.B.N. Ltd v. N.E.T. Ltd (1986) 3 NWLR (Pt. 31) page 667.*
>
> *ii. There must be an arguable appeal. The appeal which forms the basis of an application for stay of proceedings must be competent and arguable on its merits. Where an appeal is frivolous, vexatious or an abuse of court process, an appellate court will decline jurisdiction to entertain the application. See Arojoye v. UBA (Supra).*
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> *iii. Where the appeal will dispose of the proceedings. Where the interlocutory appeal following an application for stay of proceedings will finally dispose of the case or put an end to the proceedings in the lower court, a stay of proceedings would be granted. An example is where an appeal raises an issue of jurisdiction of the lower court. An appellate court will grant an application for stay of proceedings if on the face of the appeal the court is satisfied that there is a real issue of jurisdiction to be tried as the decision on appeal will dispose of the proceedings in the lower court. Such other issues include issues as to locus standi, propriety of cause of action, admissibility of material evidence in the case of one of the parties and appeals in which the ruling are on material issues, but manifestly wrong.*
>
> *iv. Where the res will not be preserved. Where the res will be destroyed, damaged or annihilated before the matter is disposed of, appellate court will grant stay. See Shodehinde v. Registered Trustees of the Ahmadiyya Movement in Islam (1980) 1-2 SC 163.*
>
> *v. Where greater hardship will be caused. The Court would be reluctant to grant an application for stay of proceedings if it would cause greater hardship than if the application were refused.*
>
> *vi. Where it will render the order of the appellate court nugatory. A stay of proceedings will be granted where to do otherwise will tend to render any order of the appellate court nugatory. See Saraki v. Kotoye (1992) 9 NWLR (Pt. 264) page 156; Biocon Agrochemicals (Nig) Ltd v Kudu Holdings (Pty) Ltd. (1996) 35 LRCN 754; (1996) 3 NWLR (Pt. 437) 373; Nwabueze v. Nwosu(1988) 4 NWLR (Pt. 88) page 257; International Agricultural Industries (Nig) Ltd v. Chika Bros. (1990) 1 NWLR (Pt. 124) page 70."*

It is pertinent to bear in mind that sometimes applications such as the one under consideration are used by unscrupulous litigants to frustrate and oppress a party

with a good case in his effort to attain justice under the rule of law. For that reason judges and indeed judicial officers must be alert to stop such litigants from undermining the due administration of justice by refusing to grant leave to appeal interlocutory decisions where leave is required.

STAY OF EXECUTION:

When judgment has been given in a case, the successful party is entitled to reap the fruits of his success. In the case of **INTEGRATED (NIGERIA) LTD V. ZUMAFON (NIGERIA) LTD(2014) LPELR-SC 189/2004** stay of execution of a judgment was defined as the postponement, halting or suspension of judgment of a court. Where the party who lost in a case appeals against the judgment, unless the execution of the judgment is halted temporarily, his appeal if it succeeds may become nugatory or worthless. The courts therefore had to devise a means of maintaining a balance between the right of the successful party to reap the fruits of his success and the right of the losing party to appeal against the judgment. The principle laid down in the locus classicus on stay of execution, **VASWANI V. SAVALAKH(1972) SC 77**quoting Bowen L.J. in **THE ANNOT LYLE(1886)) 11 P.D. 114 AT P.116**is that:

> *"When the order or judgment of a lower court is not manifestly illegal or wrong, it is right for a court of appeal to presume that the order or judgment appealed against is correct or rightly made until the contrary is proved or established and for this reason the court of appeal, and indeed any court, will not make a practice of depriving a successful litigant of the fruits of his success unless under very special circumstances. Special circumstances in this context involves a consideration of some collateral circumstances and inherent matters in some cases which may unless the order of stay is granted, destroy the subject-matter of the proceedings or foist upon the court, a situation of complete helplessness or render nugatory any order or orders of the court of appeal or paralyse, in one way or the other, the exercise by the litigant of his constitutional right of appeal or generally provide a situation in which whatever happens to the case, and in particular even if the appellant succeeds in the court of appeal, there could be no return to the status quo."*

The Supreme Court in the case of **MARTINS V. NICANNER FOOD CO LTD (1988) NWLR (PT. 74) 75**per Nnamani JSC referred to Dr. T. A. Aguda's book: Practice

and Procedure of the Supreme Court, Court of Appeal and High Courts of Nigeria, First Edition, para 44. 29. Page 535 where the learned author set out the following applicable principles elicited from the cases over the years as issues to be considered in deciding whether or not to grant a stay of execution pending appeal:

> *"(a). The chances of the applicant on appeal if the chances are virtually nil, then a stay may be refused. Vaswani Trading Co. v. Savalackh and Co. (1972) 12 SC 77; Wey v. Wey (1975) 1 SC 1; Olusesan Shogo v. Latifu Musa (1975) 1 NMLR 133; Odufaye v. Fatoke (1975) 1 NMLR 222.*
>
> *(b). The nature of the subject matter in dispute. Whether maintaining the status quo until a final determination of the appeal in the case will meet the justice of the case. Dr. T.O. Dada v. The University of Lagos and Ors. (1971) 1 U.I.L.R. 344; Utigas Nigerian & Overseas Co Ltd. V. Pan African Bank Ltd. (1974) 10 SC. 105.*
>
> *(c). Whether if the appeal succeeds, the applicant will not be able to reap the benefit of the judgment on appeal. See Wilson v Church (No.2) (1879) 2 Ch.D 454, 458*
>
> *(d). Where the judgment is in respect of money and costs whether there is a reasonable probability of recovering these back from the respondent if the appeal succeeds. Lawrence Ogobegu Ebegbuna v. Janet Omotunde Ebegbuna (1974) 3 W.A.C.A. 23.*
>
> *(e). Poverty is not a special ground for granting a stay of execution except where the effect will be to deprive the appellant of the means of prosecuting his appeal."*

Nnamani JSC in the above case further espoused:

> *"The court's discretion to grant stay of execution must be exercised judiciously and it would be so exercised where it is shown that the appeal involves substantial points of law necessitating the parties and issues being in status quo until the legal issues are resolved*."

There is a long line of decided authorities on the matter of stay of execution and it is now well settled that it is within the discretion of a court to grant or refuse an application for stay of execution. The discretion must however be exercised judicially and judiciously applying the principles laid down in the myriad of cases.

For the application for a stay of execution to succeed, the applicant must in his affidavit in support of the application depose to facts showing the existence of

special, exceptional or strong circumstances tilting the balance of justice in favour of granting the application. What constitutes the special, exceptional or strong circumstance will of course vary from case to case depending on its peculiar circumstances. The guideline has been established in many decided cases. The special circumstances which the court will take into consideration are circumstances which concern the enforcement of the judgment and not just the correctness of the judgment. If however the judgment on the face of it suffers a fundamental defect or is null and void on grounds of jurisdiction that could amount to a special circumstance justifying the grant of a stay. Discretion to grant or refuse a stay must take into account the competing rights of the parties. For further emphasis, the court in the exercise of its discretion to grant or refuse a stay must consider the following special circumstances: Whether execution of the judgment would:

1. Destroy the subject matter of the proceedings; or
2. Foist upon the court a situation of complete helplessness; or
3. Render nugatory any order or orders of the appeal court; or
4. Paralyse in one way or the other, the exercise by the litigant of his constitutional right of appeal; or
5. Provide a situation in which even if the appellant succeeds in his appeal, there could be no return to the status quo; or
6. Where the applicant can show that when the money is paid, the respondent will be unable to refund it in case the appeal succeeds; or
7. That the appeal has great merit and to enforce the judgment or order in the meantime will be ruinous to the applicant.[33]

An appeal ordinarily will not operate as a stay of execution. An application for stay pending an appeal may be made in the trial court or to the court of appeal. Where

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

the application is refused by the trial court, the appellant/applicant can apply to the Court of Appeal for a stay rather than appeal against the refusal by the court of first instance provided the application is made within the prescribed time. See **NDABA (NIG) LTD V.U.B.N. PLC**[34]***.***

In the case of monetary judgments, a conditional application for stay may be in the form of an order that the judgment debt be paid into court or an income yielding account in a specified bank under the control of the registrar of the court to await the determination of the appeal.

ISSUES FOR CONSIDERATION:

DELAY –

Undue delay in the administration of justice is a malaise that has bedevilled the judiciary of this country and which has generated considerable outcry from the citizenry especially in high profile criminal cases. Stay of proceedings is one of the specially inbuilt delay mechanisms in our system of jurisprudence. This is why the courts have established principles as set out above that ensure that the application is granted sparingly and only in absolutely deserving cases. Further, amendments in certain laws and procedure have been introduced to lessen or totally abrogate the negative effects of applications for stay of proceedings.

Paragraph 10 (b) of the Court of Appeal Practice Direction 2013 empowered the courts to refuse to hear appeals from interlocutory decisions of the Court below (in criminal appeals originating from or involving the EFCC, ICPC, or any other statutorily recognized prosecutorial agency or person or where the offence relates to Terrorism, Rape, Kidnapping, Corruption, Money laundering and Human Trafficking) where it is of the opinion that the grounds raised in the appeal are such that it can conveniently be determined by way of an appeal arising from the final judgment of the court below except where the grounds deal with issues of pure law. The court should rather order the court below to give the matter accelerated hearing.

[34](2007) 9 NWLR (PT. 1040)

Section 306 of the Administration of Criminal Justice Act, 2015 went a lot further and completely abolished applications for stay of proceedings in criminal matters. That is a much welcome development. Applications for stay of proceedings have been abused by accused persons to delay the hearing of criminal cases unduly. The Administration of Criminal Justice Act has put a final stop to the practice.

Judges should note that it is not in their interest to spend precious time hearing these applications and writing rulings on them. It takes away from the time they should spend in writing final judgments which is for the better good of the litigants and what the judge would be evaluated for by the Performance Committee. In the case of **INTERNATIONAL AGRICULTURAL INDUSTRIES LTD & ANOR V.CHIKA BROTHERS LTD (1990) 1 NWLR (PT. 124) 70 AT 80-81**Obaseki JSC put the matter thus:

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

ABUSE OF INTERIM ORDERS MADE EXPARTE –

An interim order of injunction serves very useful purposes in an emergency situation where it is impossible to serve the other party or where delay will be caused by proceeding in the ordinary way of giving notice might entail irreparable damages or serious mischief. The problem of abuse of the power of issuing interim injunctions ex parte has been with us for years. In the case of **OKECHUKWU V. OKECHUKWU**[35]where the lower court granted to a defendant who did not file a

[35] [1989] 3 NWLR (PT. 108) 234

counterclaim an interim order of injunction ex parte, Uwaifo JCA (as he then was) held at page 247:

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

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

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

The above two quotes have painted a clear picture of the risks involved when an ex parte injunction is granted without proper scrutiny. The Judgment in the above appeal was delivered in 1989; 28 years ago. It is unfortunate that the sentiments expressed in the case still prevail today. The matter is viewed so seriously that Rule 2 of the Code of Conduct for Judicial Officers warned against the abuse of the power

of issuing interim injunctions ex parte. It is a misconduct which may render a judicial officer liable to disciplinary action or even dismissal from service. In spite of the frequent warnings and actual dismissal of some judicial officers there are still a few incidents in which some judicial officers have continued to defy the warning and issue ex parte injunctions improperly to the embarrassment of the Judiciary. It is very important therefore that newly appointed judicial officers should familiarize themselves with the conditions for the grant of interim injunctions ex parte. In fact, it should be avoided altogether except in cases of extreme urgency where in the words of Oguntade JSC (Rtd) *'a great harm of unsurpassable proportion will have been done to an applicant'* if the application is refused.

The conditions under which an application can be granted ex parte are set out in the Rules of Procedure of various High Courts and the Federal High Court. For example, Rule 7, Order 26 of the Federal High Court (Civil Procedure) Rules, 2009provides:

> (1) No motion shall be made without previous notice to the parties affected thereby.
>
> (2) Notwithstanding sub-rule 1 of this rule, the Court may, if satisfied that to delay the motion till after notice is given to the parties affected would entail irreparable damage or serious mischief to the party moving, make an order ex parte upon such terms as to costs or otherwise and subject to rule 12 of this order, and upon such undertakings, as the justice of the case demands.
>
> (3) No application for an injunction shall be made ex parte unless the applicant files with it a motion on notice in respect of the application.[36]

Order 26 Rule 8 (1) provides that a motion ex parte shall be supported by an affidavit which, in addition to the requirements of rule 3 of this order shall state sufficient grounds why delay in granting the order sought would entail irreparable damage or serious mischief to the party moving. Rule 12 (1) provides that no order made on motion ex parte shall last for more than fourteen days after the party or person affected by the order has applied for the order to be varied or discharged or last for another fourteen days after application to vary or discharge it has been

[36]See also: Order 39 Rules 7 & 8, High Court of Delta State (Civil Procedure) Rules, 2009

argued. Sub rule (2) provides that if a motion to vary or discharge an ex parte order is not taken within fourteen days of its being filed, the ex parte order shall lapse.

It has been the view of several authors that ex parte application for injunction is a violation of the constitutional provisions of fair hearing and the common-law principle of AUDI ALTEREM PATEM. However, the Supreme Court in the case of **7-UP BOTTLING CO. LTD. V. ABIOLA & SONS LTD,**[37]in rejecting the contention held that such an application *is a necessary step to be taken* before the commencement of the substantive matter. It was also held that the affected person is not denied right to fair hearing simply because an interim order for a limited period is made pending the determination of motion on notice.

The recurring phrase to warrant the grant of interim injunction ex parte is irreparable damage or serious mischief to the party moving or a great harm of unsurpassable proportion. What then is meant by irreparable damage or serious mischief? In **KOTOYE V C.B.N.** (supra) Nnaemeka-Agu JSC observed:

> *"The basis of granting an ex parte order of injunction, particularly in view of section 33 (1) of the Constitution1979 is the existence of special circumstances, invariably, all pervading real urgency, which requires that the order must be made, otherwise an irretrievable harm or injury would be occasioned to the prejudice of the applicant. Put in another way, if the matter is not shown to be urgent, there is no reason why ex parte order should be made at all; the existence of real urgency and not self-imposed urgency is a sine qua non for a proper ex parte order of injunction."*

Oguntade JCA (as he then was) in **BANK BOSTON NA USA & ORS V. VICTOR ADEGOROYE & ANOR**[38]added:

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

[37] See 7-Up Bottling Co. Ltd. v. Abiola & Sons Ltd (1995) 3 NWLR (Pt. 383) 257 at 261 (Notable Case No. 3)
[38](2002) 2 NWLR (PT. 644) 217

made. It is a jurisdiction to be sparingly and responsibly invoked and only in cases which justify its use"

So clearly, the order can only be properly made where there is an urgent need for it as where a building is about to be demolished or where the property in dispute is about to be taken out of jurisdiction. It is an abuse for the operation of a bank to be halted on an ex parte order of injunction granted to a person who had been removed as a director of the bank; it is an abuse for installation ceremonies of chiefs to be halted by ex parte interim injunction when the dispute had been dragging on for years. It is also an abuse of the process for the convocation ceremony of a University to be halted on an ex parte application of two students who failed their examinations. I believe the issues are clear enough. As observed by Fabiyi JCA as he then was in **OKEKE V. OKOLI**[39] the law relating to order of interim injunction and injunction generally is now so well settled that it is only a person who decides to close his eyes while walking that will miss the road.

The primary purpose of the injunction is the preservation of the subject matter or 'res' of the suit or the maintenance of the status quo pending the determination of the suit. Sometimes there is a dispute as to what is the status quo in a given situation. Generally, the status quo to be maintained is that which was in existence before the controversy or dispute arose and action commenced. In other words, the situation as is before the defendant embarked on the activity sought to be restrained.

DELVING INTO SUBSTANTIVE ISSUES AT THE INTERLOCUTORY STAGE –

It has been heralded by a great many cases of the impropriety of determining a substantive issue of a suit while determining an interlocutory application. The principle has virtually been cast in stone. The reason for this is that a trial court should not be seen by its consideration of an interlocutory application to have pre-judged the main or substantive suit.

[39][2000] 1 NWLR (PT. 642) 641 at 653-654 F-B

In **AJIDAHUN & ORS v. OLABODE & ORS**[40]the Court of Appeal per ABIRIYI, J.C.A. with reference to the Supreme Court case of **AKAPO V. HAKEEM-HABEEB**[41] contextualized this concept as follows:

> *"In an application for the grant of interlocutory injunction pending the determination of the substantive claim the judge has a duty to ensure that he does not in the determination of the application determine the same issues or right that would arise for determination in the substantive suit. It is not proper for the Court at that stage to express any opinion as to such rights as such an opinion might give the impression that the Court has made up its mind on the substantive issues on trial before it."*

The consideration of interlocutory applications must therefore be closely looked at by a presiding judicial officer and the temptation to delve into substantive claims, no matter how enticing, must always be resisted.

DISCRETION –

Judicial discretion is the power or right to make official decisions using reason and judgment to choose from acceptable alternatives. Judges are charged with exercising judicial discretion in the discharge of judicial functions. All decisions made are subject to some kind of review and are also subject to reversal or modification if there has been an abuse of judicial discretion. [42]

Judges as human beings are prone to human weaknesses. Hence, whenever the courts are exercising their judicial discretion on matters before them, the outcome of such actions cannot entirely be free from the personal prejudices, whims and caprices of the Judge. No wonder, the law as believed by most proponents in the realist school of thought; as a product of what the judge deems right under different situations.

It must be stated that the exercise of judicial discretion is normally limited to guidelines or principles or by reference to the list of relevant factors to be

[40](2016) LPELR-40092(CA)
[41](Supra)
[42] See Davis, Kenneth C. (1971) Discretionary Justice: A Preliminary Inquiry Champaign, Illinois University of Illinois Page 5.

considered. It is never absolute and must be exercised within a broader legal and social context.[43]

Judicial discretion is exercised only in instances where the law confers on the court, derivable from the relevant statutes.[44] Judicial discretion has been said to be the power the law gives the court or a judge to choose among two or three alternatives, each being lawful.

As laudable as judicial discretion is, one of the challenges inherent in its applicability is that it breeds inconsistency and uncertainty. It is apparent that the exercise of judicial discretion by different judges on the same subject matter and facts can never be the same. This attracts criticisms and allegations of bias or partiality against judges and the judiciary from members of the general public. The principle that a judge should be impartial is supreme and sacred.

Another challenge borders on the exercise of judicial discretion by judges on instinct and intuition instead of reasoned decision. The observation of Hon. Justice Amina Augie J.S.C. in her paper" THE ROLE OF THE JUDICIARY IN THE MAINTENANCE OF LAW AND ORDER IN A DEDMOCRACY" at the 2002 NBA Annual Conference clearly gave credence to the contention that the central pillar in the concept of the rule of law is a judge and he performs his functions depending on the political situation of the state.

The exercise of discretion by judges in a bail applications and interlocutory applications is enormous. Judges are granted judicial discretion to act without strict adherence to any statutory provision. However, this has posed several challenges and several judges have come under attack for granting bail to some accused persons or granting/refusing certain interlocutory applications. No doubt there are some other factors that exist aside the laid down principles which affect the discretionary power of courts. All judges are not from the same social background. They cannot share the same ideology and opinion or view. For instance, what a

[43]Discretion from Wikipedia, the free encyclopedia, available on http:Wikipedia/org2013p.561.
[44]See also University of Lagos & Ors VS. Olaniyan (1978) All NLR 1

Magistrate from Okwagbe Magisterial District in Delta State for instance would see and appreciate as high standard of social life will be different from what a magistrate in Ikoyi, Lagos State would perceive as same.

In **DOKUBO ASARI V F.R.N.**[45] the court held that on a question of exercise of discretion, authorities are not of much value. No two cases are exactly similar and if they are the court cannot be bound by a previous decision to exercise its discretion because that would be putting an end to discretion. No discretion in one case can be a precedent to another.

The pertinent question at this point is this *"if the courts have realized that cases on discretionary power cannot be a precedent for another, then why the need for factors laid down for granting bail in exercising discretionary power?"* In the Asari Dokubo's case, bail was refused at the lower court and the court of Appeal dismissed the appeal while the Supreme Court granted bail in the case.

METHODS EMPLOYED AS ALTERNATIVES TO GRANTING OF INJUNCTIVE ORDERS:

It is a well-known adage that where the hunter learns to shoot without missing, the bird will also learn to fly without perching. Necessity is the mother of invention and the need to curb the consequences that accompany the challenges highlighted above have over time given birth to a few ingenious orders by judicial officers to prevent or at least minimize the challenges that come with interlocutory applications.

UNDERTAKING IN LIEU OF INJUNCTION:

Several backlashes often result from granting injunctive orders especially on the parts of litigant against whom an injunctive order is made. This has necessitated the court looking for other means to achieve faster and better results. A highly efficacious remedy which parties and the courts in Nigeria seldom makes use of is undertaking by the defendant in lieu of injunction.

[45] (2008) Vol 6. LRCNCC Pg 1 at Page 6 particularly pages 20-21

An undertaking given by the respondent not to perform the acts which if performed would give rise to irreparable injury achieves the same result as ordering injunctive reliefs given. Apart from being a voluntary act a lot of time is saved.

A refusal by the defendant to give an undertaking may tend to establish a probability that the apprehended acts will take place. On the other hand the preparedness of the defendant to give an undertaking may affect the balance of convenience so as to justify the withholding of an injunction. If the plaintiff accepts an undertaking he must ensure that it is properly worded. He cannot re-open a claim for an interlocutory injunction if it turns out that the defendants undertaking does not give adequate protection before trial. If the plaintiff delays in pursuing the substantive action, the defendants undertaking may be discharged.[46]

ORDER FOR SPEEDY TRIAL IN LIEU OF INTERLOCUTORY INJUNCTION:

Speedy trial is an essential element of fair hearing and as the popular saying goes; 'justice delayed is justice denied'. Litigants decry the long delays in our court and this has caused many to lose their confidence in the judiciary since the mill of justice takes almost an eternity to grind. The delay is oftentimes due to prolonged arguments on interlocutory applications, most of which are applications for injunctions. The courts and parties fail to take advantage of our rules that empower the court to make preservative order and order accelerated hearing instead of entertaining endless arguments on motions for interim and interlocutory injunctions.

In **JOHN HOLT NIG. LTD V. HOLTS AFRICAN WORKERS UNION OF NIGERIA AND CAMEROONS**,[47] Justice Ademola, CJN reading the judgement of the court held:

> *"The first application for an interlocutory injunction was made in August, 1961; the second in September, 1961. The appeal which followed was heard over two years later, indeed in October, 1963. It should have been obvious to the trial judge that this is a matter in which time and inconvenience would be saved by the hearing of the substantive action itself instead of the time spent on hearing*

[46]See Greek City Ltd v. Demetrion (1983) 2 All ER 921
[47](1963) 1 All NLR P. 179 at 383

arguments on an interlocutory injunction and granting order for leave to appeal."

About 30 years later, the Supreme Court in the case of **ONYESOH V. NNEBEDUM**[48] admonished the defendant for not taking advantage of accelerated hearing. The judgement which was a unanimous approval of its earlier decision in John Holts case (supra) reads:

> *"It does appear that the defendant instead of using advantage of or pursuing the order for accelerated hearing decided to appeal against the order for interlocutory injunction. This is quite a surprising course to take. For quite apart from the fact that this has apparently led to further delay in the hearing of the substantive suit which is said to be still pending since March, 1988, it should now be obvious to parties and their counsel from a gamut of decided cases that in practically most applications for interlocutory injunction the justice of the case can quite often be met by accelerating the hearing instead of granting an order of interlocutory injunction. A successful application for interlocutory injunction simply keeps matters in status quo until the completion of hearing. But a successful hearing disposes of the matter for good. The better view is therefore, that whenever it is possible to accelerate the hearing instead of wading through massive affidavits and hearing lengthy arguments on interlocutory injunction, the courts should accelerate the hearing and decide finally on the rights of the parties*."

The above judgement of the Supreme Court if applied regularly would ensure that no case suffers the delay associated with a court order refusing or granting interlocutory injunction. Yet the *res* would have been preserved even if the court does not specifically so order. This is so because both parties are in any event expected not to tamper with the subject matter of the court pending the determination of the case whether or not an express order has been made.

ORDER TO MAINTAIN STATUS QUO:

The courts are also often urged by counsels to in lieu of granting an interlocutory injunction order that the court makes an order that status quo be maintained. On the flip side the whole purpose of seeking an interim or interlocutory injunction is to

[48] (1992) 3 NWLR (Pt. 229) 315

maintain status quo pending the determination of the motion on notice or the substantive suit as the case may be. This eventually leads to a case of going through the backdoor to get into the same house. It is therefore necessary to understand the term ***"status quo".***

Status quo is the state of affairs existing during the period immediately preceding the issue of the writ. In **AKAPO V. HAKEEM HABEEB**[49] the Supreme Court ruled per Nnaemeka Agu JSC as follows:

> *"To begin with, the literal meaning of status quo ante bellum is the state of affairs before the beginning of hostilities. So the status quo that ought to be maintained in this case is the state of affairs that existed before the defendant's forcible takeover of the management and control of the family properties which constitutes the wrongful act complained of in the application. See Thomson v Park (1944) 1 KB 408."*

CONCLUSION:

It is germane to note at this point that 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 interlocutory application, however some of the principles and issues raised above are issues the courts take into consideration in granting or denying an interlocutory application.

To act judicially entails a proper evaluation of 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 judgement.

(b) Having or exercising sound judgement.

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

[49](1992) 6 NWLR (Pt. 247) Pg. 266 at 303

It is believed that judges' exercise of their judicial discretion in line within the bound of the laws, would help maintain the integrity of the bench, which has come under stiff scrutiny and criticism in recent times.

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

Our judiciary has evolved with society. It is hopeful that this paper has established a mindset that is ready to introduce and welcome changes that can eliminate the challenges which cast an unpleasant shadow alongside interlocutory applications.

Thank you.

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