

**PROCEEDINGS IN INTERIM AND INTERLOCUTORY  
APPLICATIONS: PRACTICE AND PROCEDURE**

**PRESENTED BY:**

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**AT THE INDUCTION COURSE FOR NEWLY APPOINTED  
JUDGES AND KADIS ON MONDAY 12<sup>TH</sup> JULY, 2021.**

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## **INTRODUCTION**

The choice of the topic for discussion in this paper titled: Interim And Interlocutory Applications: Practice And Procedure, by the National Judicial Institute (NJI) under the able leadership of Hon. Justice R. P. I. Bozimo OFR is, in my view, apt and most commendable for the following reasons, among others:

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

This point is underscored by His Lordship late Hon. Justice Niki Tobi JCA (as he then was) in the case of C.C.B. (NIG) PLC V. OZOBUN (1998) 3 NWLR (PT. 541) 290 AT 300 where he said, "In our judicial process and procedure, motions are a regular resort. Hardly are cases heard and disposed of without the filing of motion seeking for one type of relief or the other.

While some counsel love the filing of motions more than others, the truth is that they form an inevitable part of our judicial process."

2. The manner and pace with which interlocutory applications are heard and determined by the courts have a significant bearing on the substantive suit in which such applications are made or to which they are connected.
3. Some of the loudest complaints against the Judiciary in recent times bother on the way and manner Judges

exercise their discretionary powers to grant Interlocutory applications particularly on adjournments and injunctions. It has been alleged, though sometimes wrongly that Judges do abuse their discretionary powers in granting Interlocutory injunctions. This abuse, unfortunately is often times ascribed to corruption in the judiciary.

It is in the light of the foregoing that i consider it necessary in this paper to emphasise the need for judges to exercise their discretion in granting interlocutory applications in a very transparent, fair and judicious manner.

While congratulating my Lords on your appointments to the Superior Courts of record in Nigeria, let me state quickly that your appointment is a unique one which carries great and grave responsibilities.

In the exercise of criminal jurisdiction, you are empowered, for example, to determine whether a person charged with murder/homicide should live or die, whether the person charged should be incarcerated or be allowed to breathe the air of freedom; when it comes to matrimonial causes you determine which marriage should stand and which one should be dissolved. By the same token, my lords could decided whether or not a child belongs to a parent and which parent, if any, should take custody of the child in the event of dissolution of the marriage.

By virtue of your office, my lords are empowered to decide who owns what properties and who does not.

In pre election matters, judges decide who is eligible to stand for an election and who is not, while in post election matters, you are empowered to interpret, and determine the quantum, pattern and character of the ballots cast and thereafter decide who becomes the President of the Republic, the Governor of a State etc.

From the foregoing few examples therefore, it is manifest that Judges decide virtually everything under the sun, yet they are mere mortals just like those whose fate they decide.

Whether my Lords are exercising their judicial powers as donated by Section 6 of the 1999 Constitution of Federal Republic of Nigeria (CFRN) as amended on interlocutory matters which is the topic of my paper today or on criminal, matrimonial, commercial or election related matters, over fellow men, it is necessary that you exhibit and maintain at all times, independence, impartiality, erudition while shunning all forms of impropriety.

This must necessarily be so because, according to the Roman Slave, Publicius Syrus, "The greater a man is in power above others, the more he ought to excel them in virtue."

Having said this, may i most sincerely express my sincere gratitude and appreciation to the Administrator of the National Judicial Institute (NJI) Hon. Justice R. P. I. Bozimo, OFR for according me the honour and privilege to present a paper at the 2021 Induction Course For Newly Appointed Judges And Kadis.

I propose in this paper, first to talk briefly about interlocutory applications in general terms and then proceed to talk at some

length about certain applications which parties frequently make before the court in advancement of their cases.

## **INTERLOCUTORY APPLICATIONS**

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

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

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

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

- (a) Application to serve a writ or other process out of the jurisdiction;
- (b) Application for substituted service of a writ or other process;

- (c) Application to have cases heard during vacations;
- (d) Application for enlargement of time;
- (e) Application for a writ of attachment or for a garnishee order;
- (f) Application for payment or transfer to any person of any cash or securities standing to his credit in any cause or matter where there has been a judgment or order declaring the rights or where the title depends only upon proof of the identity of the birth, marriage or death of any person;
- (g) Application as to the guardianship and maintenance or advancement of infants;
- (i) Any matter relating to the adoption of children;
- (j) Application connected with the management of property;  
and
- (k) Such other matters of an interlocutory nature as the Judge may think fit to dispose of in Chambers.

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

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

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

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

See: **KEYAMO VS. HOUSE OF ASSEMBLY, LAGOS STATE (2000) 11 W. R. N. 27 AT 40-41.**

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

- 22. Oral evidence shall not be heard in support of any motion unless by leave of the Court.**
- 23. The Court may, in addition to or in lieu of affidavit if it thinks it expedient, examine any witness viva voce, or receive documents in evidence, and may summon any person to attend to produce documents before it, or to be examined or cross-examined before it in like manner as at the hearing of a suit.**
- 24. Such notice as the Court in each case, according to the circumstances, considers reasonable, shall be given to the persons summoned and to such persons (parties to the cause or matter or otherwise interested) as the Court considers are entitled to inspect the documents to be produced, or to examine the**

**person summoned, or to be present at his examination, as the case may be.**

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

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

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

By the rules of most high courts an applicant shall state under what rule of court or law the application is brought. Where however a party fails to state the rule or law under which an application is brought, the court may treat the failure as an irregularity which will not be a ground for refusing it as long as there is in existence a rule or law to support the application. See: **ONYEJIKE VS. ANYASOR (1992) 1 NWLR (PT. 218) 437 AT 451-452 PARAS A – B.**

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

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

Where an interlocutory application requires evidence in support, it is generally given in the form of affidavit. A defendant who wishes to oppose the application files a counter affidavit. Where the plaintiff/applicant wishes to debunk any material fact contained in the counter affidavit of the defendant then he is required to file a Reply affidavit otherwise the facts in the counter affidavit will be deemed admitted and conceded by the plaintiff/applicant. See: **LAWAL V. FRN (2013) 3 NWLR (PT. 1342) 451 AT 468 PARAS C – D.** The situation may arise however where, on the application of any of the parties to the application, the court orders the deponent to an affidavit to appear before it for cross examination.

See: **BUHARI VS. I. N. E. C. (2008) 19 N. W. L. R. (PT. 1120) 246 AT 377, 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. See Order 13 Rule 1 of the Kwara State High Court Rules.

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

See: **EPE VS. KESHINRO (2009) 4 N. W. L. R. (PT. 1131) 405 AT 427, PARAS B-C**

**SIAT S. A. BRUSSELS VS. S. S. LTD (2009) 17 N. W. L. R. (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 or one which is a mere farce orchestrated by a party to delay proceedings.

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, PARAS D-E AND AT 652, PARAS E-F.**

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

See: **P. D. P VS. MOHAMMED (2005) ALL. F. W. L. R. (PT. 289) 1322 AT 1343, PARAGRAPHS E-G AND DANA IMPLEX VS. AWUKAM (2006) 3 N. W. L. R. (PT. 968) 544 AT 563, PARAS 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. See Order 11 Rule 23 of the Kwara State High Court Rules.

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.**

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

Since there are numerous interlocutory applications which a party may make in the course of or in connection to 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 restrict myself to a discussion of the following interlocutory applications which parties frequently make before the court:

- 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 Kwara State Administration of Criminal Justice Law (ACJL), 2018 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 335, 336 and 337 ACJL.

### **2. Application for Interim Attachment of Property.**

A claimant in an action may apply to the judge 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:

**Order 19 Kwara State High Court (Civil Procedure) Rules 2005 (2005 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 before the Court. See: **Order 43 Rule 9 of the Kwara State High Court Rules.**

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: **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 provided in **Sections 35 and 36** of the 1999 Constitution of the Federal Republic of Nigeria.

See also **Section 165 ACJL**, Kwara State.

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."

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 168 (1) ACJL Kwara State provides that a suspect arrested for an offence punishable with a term of 21 years or more, life imprisonment or death shall not be released on bail except under exceptional circumstances and only by the High Court. Such exceptional circumstances which may enure in favour of such a suspect includes ill health, extraordinary delay in the investigation, arraignment and prosecution for a period

exceeding 2 years or under any circumstances considered by the Judge to be exceptional.

See also Section 169 ACJL, Kwara State which provides that a defendant charged with an offence punishable with imprisonment exceeding 3 years may be released on bail except where there is reasonable ground to believe that the defendant, if released on bail will commit the same or another offence; may attempt to escape his trial; influence or intimidate witnesses or interfere with investigation; attempt to conceal or destroy evidence or where the offence involves sexual misconduct etc.

Sections 170, 171 and 172 ACJL, Kwara State provide that in all other circumstances except those referred to in Sections 168 and 169 bail shall be at the discretion of the court and shall not be excessive.

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 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.**

- (x) Safety and security of the suspect.

An application for bail may be denied for the protection and safety of the applicant.

See the case of **IHUEZE V. STATE (2019) LPELR 46811 (CA)** where the Court of Appeal, speaking on the guiding principles for grant of bail held, "..... In the concept of the presumption of his innocence i think if the circumstances warrant incarceration of the accused person or denial of bail to him or that becomes a strong option, the same (discretion to incarcerate him) should be exercised in the interest of the accused person, probably to save him from the anger of his accusers or mob action by the uninformed/vandals or in the case of an habitual criminal to deny him the opportunity of committing more crimes."

- (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 the presumption of innocence in his favour under 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 is made by motion on notice supported by affidavit sworn to by the convict or any person familiar with the facts of the case.

#### 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 to include the followings.

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 7<sup>th</sup> 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".

### **5. Application for Stay of Execution.**

See Order 50 Kwara State High Court (Civil Procedure) Rules 2005.

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. See: **Order 50 Rule 2 (2) of the Kwara State High Court Rules.**

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; YOUSSEUPOFF 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 or prosecute his appeal.

A party to any proceedings who is dissatisfied with the decision of the court on an interlocutory point may appeal against that decision and then apply for stay of proceedings pending the determination of the appeal. The application may be made to the trial court or to the court to which an appeal lies. The application, however is first made to the trial court from which an appeal lies and if it is refused, then to the 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: **CARRIBBEAN TRADING & FIDELITY CORPORATION V. N.N.P.C. (1991) 6 NWLR (PT.197) PAGE 352.**

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

(i) There must be a pending appeal

A stay of proceedings can be granted only if there is a pending appeal which is valid in law. See: **N.B.N. LTD V. N.E.T. LTD. (1986) 3 NWLR (PT.31) PAGE 667.**

(ii) There must be an arguable appeal

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

See: **AROJOYE V. UBA (Supra).**

(iii) Where the appeal will dispose of the proceedings

Where the interlocutory appeal following an application for stay of proceedings will finally dispose of the case or put an end to the proceedings in the Lower Court, stay of proceedings would be granted. An example is where an appeal raises an issue of jurisdiction of the Lower Court. An appellate court will grant an application for stay of proceeding, if on the face of the appeal the court is

satisfied that there is a real issue of jurisdiction to be tried as the decision on appeal will dispose of the proceedings in the Lower Court. Such other issues include Locus Standi, propriety of cause of action, admissibility of material evidence in the case of one of the parties and appeals in which the rulings are on material issues but manifestedly wrong.

(iv) Where the res will not be preserved

Where the res will be destroyed, damaged or annihilated before the matter is disposed of, appellate court will grant stay. See: **SHODEHINDE V. REGISTERED TRUSTEES OF THE AHMADDIYA MOVEMENT-IN-ISLAM (1980) 1-2 SC. 163.**

(v) Where greater hardship will be caused

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

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

A stay of proceedings will be granted where to do otherwise will tend to render any order of the appellate court nugatory. See: **SARAKI V. KOTOYE (1992) 9 NWLR (PT.264) PAGE 156; BIOCON AGROCHEMICALS (NIG) LTD. V. KUDU HOLDINGS (PTY) LTD (1996) 35 LRCN 754; (1996) 3 NWLR (PT.437) 373; NWABUEZE V. NWOBU (1988) 4 NWLR (PT.88) PAGE 257; INTERNATIONAL**

## **AGRICULTURAL INDUSTRIES (NIG) LTD V. CHIKO BROS (1990) 1 NWLR (PT.124) PAGE 70."**

I will like to say that by the provisions of Section 306 of the Administration of Criminal Justice Act 2015, though yet to be domesticated by some States of the Federation, the Courts shall not entertain applications for Stay of Proceedings in respect of a criminal matter. See also Section 311 of ACJL, Kwara State.

### **7. Application for Injunctions**

The Oxford Dictionary of Law, 6<sup>th</sup> Edition by Elizabeth A. Martin & Jonathan Law at pages 274 – 275 defines the word – INJUNCTION as "A remedy in the form of a court order addressed to a particular person that either prohibits him from doing or continuing to do a certain act (Prohibitory injunction) or orders him to carry out a certain act (a mandatory injunction). The remedy is discretionary and will be granted only if the court considers it just and convenient to do so. It will not be granted if damages would be a sufficient remedy".

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

### **TYPES OF INJUNCTIONS**

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

1. Quia Timet Injunction

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

## **QUIA TIMET INJUNCTION**

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

It is usual that injunctions are issued only when a tort has already been committed but where the conduct of the Defendant/Respondent is such that if it is allowed to continue, substantial damage to the Applicant is almost bound to occur, then the application will be well founded. See: **REDLAND BRICKS LTD VS. MORRIS (1970) A. C. 652 AT 664** and

**TORQUAY HOTEL CO. LTD VS. COUSINS (1969) 2 CH. 106 AT 120.**

## **MAREVA INJUNCTION**

This injunction is used by a creditor to prevent a defendant who is out of jurisdiction from removing his assets from the jurisdiction of the Court so as not to make it difficult for the creditor to reap the fruits of his judgment if and when he obtains one. See Order 19 of the Kwara State High Court (Civil

Procedure) Rules 2005; Order 30 of the Federal High Court Rules and similar provisions in other jurisdictions which deal with interim attachment of property. See also the case of **SOTUMINU VS. OCEAN STEAMSHIP (NIG) LTD (1992) 5 NWLR (PT. 239) 1 at 25-26.**

Mareva Injunction or Order is a security for Judgment which preserves the Res just as the ordinary Injunctions will do but in addition secures assets for execution of anticipated judgment. It operates in rem and takes immediate effect upon pronouncement by the Court in relation to any asset of the defendant to which it is directed. See **R. BENKAY (NIG) LTD VS. CADBURY (NIG) PLC (2006) 6 NWLR (PT. 976) 366. PARAGRAPHS A – B.**

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

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

## **ANTON PILLER ORDER OF INJUNCTION**

Gives the plaintiff who applies for it, power to enter the defendant's premises and search for, and seize material

documents and articles and is usually made in patent, copyright or passing off cases. In England the orders are often obtained *ex parte* or *in camera*, if the plaintiff shows that the defendant is likely to destroy the property which is the subject matter of the suit upon getting notice of the proceedings.

See: **ORDER 26 RULE 8 (2) A,B,& C OF THE FEDERAL HIGH COURT RULES.**

### **PERPETUAL INJUNCTION**

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

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

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

### **MANDATORY INJUNCTION**

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

Speaking about the nature of mandatory injunction, Nnaemeka – Agu, JSC in the case of **A.G, ANAMBRA STATE VS. OKAFOR (1992) 2 NWLR (PT. 224) 396 at 426 PARAS E – H** held as follows:

“Originally, all injunctions were negative in form and restrictive in content. See **SMITH VS. SMITH (1875) 20 Esq. 500, P.504**. Mandatory injunctions, which were positive in form were complete new comers in the concept of injunctions and did not really get issued until the late 19<sup>th</sup> 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 Federal and various states High Courts and the High Court of the Federal Capital Territory have undoubted powers to grant exparte orders of injunction under certain conditions.

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

Similar provisions are to be found in the Rules of the High Court of the Federal Capital Territory, Abuja, the Federal High Court and the various states High Court.

A court faced with a 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 an 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 cannot prevent such applicants from exercising their constitutional rights by stopping such applications, they can, and ought, at least see that Justice is done to the victims of such ex parte applications and orders by ensuring that the applicant fully undertakes to pay any damages that may be occasioned by any such order which may turn out to be frivolous or improper in the end”.

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

A misuse or abuse of the power to issue 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 is that when a judge is faced 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 11 Rule 9 of the Kwara State High Court (Civil Procedure) Rules.

Before I go into a discussion of the factors which a court will take into consideration in granting or refusing an application for interlocutory injunction, it is necessary to state that an interlocutory injunction is granted mainly for the purpose of maintaining the status quo so that the subject matter of the action before the court can be preserved from being wasted or damaged before the conclusion of the action or appeal as the case may be.

See **MOHAMMED VS. UMAR (2005) All FWLR (PT. 267) 1511 at 1524 PARAS H-D.**

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

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

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

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

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

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

For example where a person enters upon the land of another wrongfully and in a manner which violates that other person's legal right, the owner of the land may file an action in court challenging the wrongful and illegal entry. The mere filing of an action before the court does not however stop or prevent the defendant from continuing with his wrongful conduct, reason being that the question of whether or not his conduct is wrongful has not yet been determined by the court. See **TANIMOWO VS. ODEWOYE (2008) All FWLR (PT. 424) 1513.**

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

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

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

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

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

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

See also the case of: **ABAKALIKI LOCAL GOVERNMENT COUNCIL V. ABAKALIKI RICE MILLS OWNERS ENTERPRISES OF NIGERIA (1990) NWLR (PT. 155) 182 at 189 – 190** where Oguntade JCA (as he then was) held that the power of the Court to grant an injunction before the writ of summons is issued, where the circumstances of the case are

urgent or the issue of the writ is delayed upon the plaintiff undertaking to issue the writ at once is subject to any statutory provision in force.

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

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

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

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

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

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

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

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

Where the Supreme Court per Omo JSC held:

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

See also **SOLUDO VS. OSIGBO & ORS (2009) 12 SC. 137 at 142** per Fabiyi JSC, "viewed in a proper manner, the order of injunction granted by the Court below was most unwarranted as a Court should not make an order of injunction on a completed act ....."

Where the jurisdiction of the Court is challenged, the Court cannot issue an order of injunction until the issue of jurisdiction is resolved.

To do otherwise will amount to jumping the gun. See: **SOLUDO VS. OSIGBO & ORS (Supra) per F. F. TABAI, JSC**, "And it is therefore my humble view that until the issue of jurisdiction is resolved at the Court below in favour of the Plaintiffs/Appellants therein, it cannot go ahead to make the injunction orders complained of. In my view the Court below jumped the gun by the orders it made on the 16/12/2009. The orders are accordingly hereby vacated."

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.**

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.**

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

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

from making findings of facts at that stage which may prejudice the substantive case.

It is very important that in dealing with all interlocutory applications during the pendency of the substantive matters, the Court must be cautious and should avoid dealing with, going into, resolving or making any pronouncements on the main issues it ought to determine at the end of the trial.

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

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

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

### **(3) BALANCE OF CONVENIENCE**

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

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

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

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

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

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

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

If damages in the measure recoverable at common law will be adequate remedy and the defendant would be in financial position to pay them, no interlocutory injunction should formally be granted however strong the plaintiff’s claim appeared to be at that stage. If, on the other hand, damages would not provide an adequate remedy for the plaintiff in the event of his succeeding at the trial, the court should then consider whether, on the contrary hypothesis that the defendant were to succeed at the trial in establishing his right to do that which was sought to be enjoined, he would be adequately compensated under the plaintiff’s

undertaking as to damages for the loss he would have sustained by being prevented from doing so between the time of the application and the time of the trial. If damages in the measure recoverable under such undertaking would be an adequate remedy and the plaintiff would be in a financial position to pay them, there would be no reason on this ground to refuse an interlocutory injunction”.

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

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

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

#### **(4) IRREPARABLE DAMAGE OR INJURY**

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

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

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

In order to succeed therefore, an applicant must show the Court that an 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, 2<sup>nd</sup> 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, 4<sup>th</sup> Edition".

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

1. The applicant for injunction must give an undertaking to pay damages.
2. Where applicant fails to give an undertaking in his affidavit, the court can extract one from him. The court cannot compel the applicant to give an undertaking. What the court can do is to refuse to grant an injunction unless an undertaking is given.
3. Since the undertaking is in respect of a future and unascertained damages which the defendant may suffer as a result of the injunction, it becomes an enforceable promise to pay the defendant damages to be determined at a future date.
4. The undertaking becomes realizable when the plaintiff/applicant fails on the merits of the case or the injunction is dissolved.

5. The defendant will have to apply to the court for an inquiry as to the quantum of damage he has suffered as a result of the injunction unless the amount of damage is trifling or remote or where there are facts known to the court from which it can determine the amount of damages.
6. There must be no delay in applying for an inquiry otherwise it will be refused.

### **ORDER FOR EARLY TRIAL**

Where a party files a suit in court and follows this up with an application for injunction, the court may order for an early trial of the suit instead of wasting time on hearing of arguments on the application. The various Rules of court permit the court to take this course of action in appropriate cases. See Order 12 Rule 2 Kwara State High Court Rules.

### **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 important factors for consideration 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) Interlocutory applications for stay of execution, stay of proceedings and injunctions, all seek to maintain the status quo in one form or another.

I hope and trust that my Lords and courts generally will strictly apply these principles in the consideration of interlocutory applications that may come before them in order to uphold the Rule of Law and safeguard the dignity of the Judiciary.

I thank you all for your kind and rapt attention.