The Extent of *Exparte* Order of Interim Injunction in Judicial Proceedings

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Abstract

The law with respect to interim injunction constitutes one of the most difficult sections of our law. The difficulty exists not because the law is recondite but because the ascertained principles of law must be subjected at all times to a rather amorphous combination of facts which are perpetually different in every case. This by nature subjects exparte injunctions to occasional abuse and misuse, making it a subject of controversy of all the temporary Orders. This article seeks to examine the extent of Exparte Order of interim injunction in judicial proceedings. Utilizing the doctrinal approach, the paper emphasizes the need to balance the discretionary power of Judges in respect of exparte injunctions with the conscious duty imposed by the NJC Policy direction of May 11, 2022 which seeks to prevent the multiplicity of litigations at different Courts of coordinate jurisdiction across the nation. The article recommends that Judges should be alert and careful in granting interim Order of Injunction except in clear and deserving cases.

Keywords: Exparte Order, Interim Injunction, Fair Hearing, Judicial Discretion, Judicial Proceedings.

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1. Introduction

The grant of an *Exparte* Order of Injunction is the exercise of a very extra-ordinary jurisdiction given to a Court to make a temporary Order to meet emergency situations of real urgency, not self-imposed urgency;[1] and when granted, such an Order should not be allowed to hang on the opposing party forever. The rule that every person who may be affected by a decision of Court should be given an opportunity to be heard is an established rule of natural justice governing the administration of justice. That rule of fair hearing is also entrenched in the Constitution of the Federal Republic of Nigeria, 1999 (as altered) wherein it is provided that in the determination of the civil rights and obligations, including any question or determination by or against any government or authority, a person shall be entitled to a fair hearing.[2] Notwithstanding these constitutional provisions, instances occur where justice could not be done unless the subject matter of the suit is preserved from the danger of destruction by one party; or there is the need to prevent irremediable or serious and imminent damage from been inflicted upon the subject of litigation by a party. In such instances, a party that could be affected may approach the Court for interposition, even in the absence of the opponent on the ground that delay or further delay would involve greater injustice.

One way in which the Court exercises its judicial powers to preserve the subject matter of litigation is the Court's power to grant an order of interim injunction. To put the article in its proper perspective, it is divided into six segments. It begins with the meaning and nature of *exparte* order of interim injunction. The second segment handles the constitutional imperatives for granting *exparte* order of interim injunction and the challenge of fair hearing. The third segment is devoted to the principles guiding the grant or refusal of an *exparte* order of interim injunction. The fourth segment addresses the duration of an *exparte* order of injunction. The fifth segment handles abuse of *exparte* order of injunctions and the need for caution. The duty on court not to determine substantive case at the interlocutory stage is the focus of the

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[1] GBA Coker, JSC in *Ladunni v Kukoyi & Ors* (1972) 3 & 4 SC 30 at 33

[2] Constitution of the Federal Republic of Nigeria, 1999 (as amended), s36 (1)

sixth segment with a statement of the policy direction of the National Judicial Council of Nigeria in curtailing and stemming the fide on abuse of *exparte* orders.

This paper does not however set out to consider the various applications that could be made *exparte*, such as application for an order for substituted service, application to renew the lifespan of a Writ, application for leave to issue a Writ out of jurisdiction, application to sue in a representative capacity etc. These applications do not give much concern to the Nigerian Judiciary in the area of abuse as the *exparte* order of injunction.[2] This paper does not also treat the various types of injunctions such as Anton Piller Injunction, Quia Timet Injunction, Mareva Injunction, Interlocutory Injunction and Mandatory Injunctions etc. The scope of the paper is limited to *exparte* order of interim injunction in judicial proceedings.

2. The Meaning and Nature of *Exparte* Order of Interim Injunction

An *exparte* order is one made in a hearing in which the court hears only from one side of the controversy in an application. An arder of interim injunction is one granted to preserve the status quo and to last until a named date or definite date or until further order or pending the hearing and determination of a motion on notice. It is for a situation of real urgency to preserve and protect the rights of the parties before the court, from destruction by either of the parties. In *7-Up Bottling Company Ltd & 2 Ors v Abiola and Sons Nigeria Ltd*,[3] the Supreme Court of Nigeria was confronted with the nature of interim injunction and when it may be granted. Delivering the leading judgment, Adio, JSC held[4] that:

> There was a real misconception and some confusion on the part of the appellants. The appellants, somehow, did not distinguish between an interim injunction and an interlocutory injunction and, for that reason, did not recognize the difference between the purpose for which an interim injunction is granted and the

[2]IN Ndu, 'Abuse of *Exparte* Orders and the Challenge of Fair Hearing,' J*udicial Integrity, Independence and Reforms: Essays in Honour of Hon. Justice M.L. Uwais, GCON, CJN* (Enugu: Snaap Publishers 2006) 205

[3] (1995) 3 NWLR (pt. 383) 257

[4] *Ibid*, at 276, paras C-E

> purpose for which an interlocutory injunction is granted. The result was that, in the appellants' brief, authorities relating to an application for an Order of interlocutory injunction were being cited freely in support of contentions being made in relation to an Order of interim injunction, as if an interim injunction was the same thing as an interlocutory injunction. That should not be so. It was the aforesaid misconception on the part of the appellants that led to the erroneous submission in their brief that in the present case it was not necessary to make any distinction between an interim injunction and an interlocutory injunction.

The rules of Court and the rules of practice and procedure discourage applications made *exparte*. By the High Court of Rivers State (Civil Procedure) Rules, 2023, no application for an injunction shall be made *exparte* unless the applicant files with it a motion on notice in respect of the application.[5] The Rules further provides that except where an application *exparte* is required or permitted under any law or rules, every motion shall be on notice to the other party.[6] Consequently, where a party files an *exparte* application without an accompanying motion on notice, the motion exparte emanating from that application may be considered incompetent, and may be refused on that ground.[7]

According to Tobi,[8] the expression *exparte*, in our adjectival law generally means proceedings brought on behalf of one interested party without notice to and in the absence of the other. This means that an application for interim injunction brought Exparte is heard by the trial Judge in the absence of the adverse party. This is one of the accepted exceptions to the well-established rule of *audi alteram partem*. According to Tobi, since the adverse party is not in a position to reply to the affidavit evidence in support of the application, a trial Judge should not grant an application for interim injunction where the facts averred do not substantiate or justify the prayer sought. Since the

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[5] High Court (Civil Procedure) Rules, 2023, Rivers State, Order 42 Rule 3(2)
[6] Ibid, Order 42 Rule 3(1)
[7] J Amadi, *Modern Civil Procedure Law and Practice in Nigeria, Vol. II,* (Port Harcourt: Pearl Publishers, 2014) 1137-1138
[8] N Tobi, *The Nigerian Judge* (Enugu: A & T Professional Publishers, 1992) 283

adverse party is not in a position to reply to the affidavit evidence in support of the application, the burden of proof is heavily on the applicant to succeed.[7] Where there is an element of malafide in the application, the trial Judge is well advised to refuse it. For instance, if the application is brought mainly or basically to overreach, embarrass or ridicule the respondent or expose him to public opprobrium, the trial Judge should dismiss or refuse the application. When the Judge grants the application for interim injunction, the respondent is put on notice in respect of the application for interlocutory injunction. All interim injunction becomes moribund or spent the moment the application for interlocutory injunction is heard.[8]

As a general rule, the granting of an *exparte* application for an injunction in cases of urgency and real emergency are one of the inherent powers of a Court of law for the purpose of enhancement of the administration of justice.[9]In *Nathaniel Adedamola Babalola Kotoye v Central Bank of Nigeria & 7 Ors*,[10] Nnaemeka-Agu, JSC delivering the lead judgment of the Supreme Court held as follows:

> With respects, I believe that the learned Senior Advocate for the appellant has missed the point. To start with, as I have stated, the C.J. decided the application. Also the basis of granting any Exparte Order of injunction, particularly in view of Section 33(1) of the Constitution of 1979, is the existence of special circumstances, invariably, all-pervading real urgency, which requires that the Order must be made, otherwise an irretrievable harm or injury would be occasioned to the prejudice of the applicant. Put in another way, if the matter is not shown to be urgent, there is no reason why *Exparte* Order should be made at all: the existence of real urgency, and not self-imposed urgency is a sine qua non for a proper *Exparte* Order of injunction. On the contents of the affidavit of urgency set out above, I agree with the learned Justices of the Court of Appeal that no case of real urgency or any other exceptional circumstances was made out.

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[7]*Ibid*, 283
[8]*Ibid*, 279
[9] *Per* Ogunbiyi, JCA in *Extraction System & Commodity Services Limited v Nigbel Merchant Bank Ltd* (2005) 7 NWLR (pt. 924) 215 at 261 paragraph D
[10](1989) 1 NWLR (pt. 98) 419

> What was shown was self-imposed urgency caused by the applicant's culpable delay in bringing the application. This was not enough.[11]

An interim Order of injunction is of short duration and typically arises in extremely urgent situations where there is no time to put the other side on notice and have the Judge hear from both sides in order to make a reasoned decision.[12] The application is usually brought by Motion *exparte*. Motions generally are of two types: Motion on Notice and *exparte* Motion. A motion is on notice where the applicant has put on notice or awareness the attention of the other party or parties involved of the existence of the motion. An *exparte* Motion is one in which the applicant for some cogent reasons, cannot put the other party or parties on notice. Both are acceptable in law. The general practice however is that motions are filed in Court on notice. *Exparte* motions are filed but sparingly considered by the Court in extreme or special circumstances.

The decision whether an application should be brought *exparte* or on notice is one to be considered in the light of the prevailing circumstances and not to be based on the dictates of the applicant or the Judge's whims.[13]In *Leedo Presidential Motel Ltd v Bank of the North Ltd & Anor,*[14] the Supreme Court of Nigeria (Per Michael Ekundayo Ogundare, JSC) approved the statement of the law by Mohammed, JCA (as he then was) in *Bayero v Federal Mortgage Bank Nig. Ltd*[15]on when application can be made *exparte* as follows:

> An application *exparte* could be made in two main circumstances:

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[11] *Ibid*, 449 paras B-D

[12] Hon. Justice Chinwe Iyizoba, JCA, 'Proceedings in Interlocutory Applications: Injunctions, Stay of Proceedings and Execution,' being a Paper delivered at the 2016 Induction Course for Newly Appointed Judges and Kadis held 23rd – 3rd June, 2016 on pages 9-10

[13] Ogundare, JSC in *Leedo Presidential Motel Ltd v Bank of the North Ltd & Anor* (1998) 10 NWLR (pt. 570) 353 at 379-380 paras H-B

[14] *Ibid*

[15](1998) 2 NWLR (Pt. 538) 509

> *(i)* When, from the nature of the application, the interest of the adverse party will not be affected.
> *(ii)* When time is the essence of the application and in these two situations, a Court will be right in exercising its discretion in granting a motion Exparte. But where the motion brought before the Court will affect the interest of the adverse party, a Court of law should insist and Order that the adverse party be put on notice.
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> I think the learned Justice is right in the two passages above. I should myself think that an Exparte motion is inappropriate where the interests of the other party will be adversely affected except in a case of extreme urgency and for a limited period only. Justice demands that both sides are heard or given an opportunity to be heard before an Order adversely affecting the rights and obligations of one of them is made. This is in accord with the provisions of the Constitution. Natural justice also demands it. I am impressed by the reasoning of their Lordships of the Court below in Bayero and I have no hesitation in agreeing with them and adopting the statement of law pronounced by them.[16]

We proceed to examine the constitutional imperatives for granting *exparte* Orders in view of the rule of natural justice, fair hearing and the provisions of our Constitution.

3. Constitutional Imperatives for Granting *Exparte* Order of Interim Injunction and the Challenge of Fair Hearing

As we have noted in the meaning and nature of *exparte* Order, an application for interim injunction is heard *Exparte* and this has given rise to the argument as to whether it is constitutional to grant such Orders since granting it will amount to a breach of the principles of fair hearing as enshrined in the Nigerian Constitution. The question whether *exparte* applications are unconstitutional fell for determination in the case of *7UP Bottling Co. Ltd v Abiola & Sons Ltd* (supra) by the Supreme Court of Nigeria. In resolving the question, Uwais, JSC (as he then was) held as follows:[9]

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[16] *Ibid*, 380 paras B-E

[9] *7 UP Bottling Co. Ltd* (Note 2a) at pages 280-281 paras D-A

> There is no doubt that the right to fair hearing under the Constitution is synonymous with the common law rules of natural justice. See Mohammed v. Kano N.A (1968) 1 ALL NLR 424 at 426. In both criminal and civil proceedings, there are certain steps to be taken which are incidental or preliminary to the substantive case. Such steps include motions for directions, interim or interlocutory injunction. The time available for taking the steps may be too short or an emergency situation may have arisen. It therefore, becomes necessary to take quick action in order to seek remedy for or attest the situation. It is in respect of such cases that provisions are made in Court rules to enable the party affected or likely to be affected to make Exparte application… I see nothing wrong or unconstitutional for a trial Court to deal with an Exparte motion under its rules.

The Supreme Court of Nigeria emphasized in the *7 Up Bottling case* that the Orders to be made by the Court, unlike final decisions, are temporary in nature, so that they do not determine the 'civil rights and obligations' of the parties in the proceedings as envisaged by the Constitution. Again, by the provisions of Order 8 Rule II of the High Court of Kwara State (Civil Procedure) Rules, 1987, where an Order is made on a motion *exparte*, any party affected by it may, within seven days after service of it, or within such further time as the Court shall allow apply to the Court by motion to vary or discharge it, and the Court, on notice to the party obtaining the Order, either may refuse to vary or discharge it with or without imposing terms as to costs or security or otherwise, as it seems just. The Court may also direct that the other party be put on notice. By the decision of the Supreme Court of Nigeria in the *7 Up Bottling Co. Ltd* case (supra), failure to hear the other party on an *exparte* application do not amount to breach of principle of fair hearing. *Exparte* application does not contravene the provisions of Section 33(1) of the 1979 Constitution. To argue otherwise is to unwittingly undermine the continued existence of interim *exparte* applications. According to Wali, JSC in the *7 Up Bottling Co. Ltd* case:[10]

[10] *7 Up Bottling Co. Ltd* (note 2a) at pages 282-283 paras E-E.

> To my mind, since the status quo sought to be maintained inures to the interest of both parties and any damage to which the other party may be exposed consequent to the making of the interim *exparte* Order is fully guaranteed, and also mindful of the wide residuary inherent powers reserved to the Courts under Section 6(b)(a) of the Constitution, it seems to me that the powers of the Courts to grant interim *exparte* orders thus confined within the safeguards of rules of Court and rules of practice ought not to be given a strict interpretation of being in conflict with the right of a fair hearing. In my respectful view, that is a simplistic view of Section 33(1) of the Constitution. It is counter-productive. Operating within safeguards against abuse, the Court ought to sanction their continued powers to grant Exparte interim injunction in deserving cases – only in extreme cases where there are imminent and grave dangers of the res being destroyed or disposed of in rather suspicious or unwholesome circumstances.

The Constitution of the Federal Republic of Nigeria, 1999 (as amended) requires in Section 36(1) that a person shall be entitled to a fair hearing within a reasonable time. Natural justice equally demands that both sides be heard or given an opportunity to be heard before an Order adversely affecting the rights and obligations of another is made. Fair hearing gives a party the right to challenge or contradict the other party. It gives the right to cross-examine the other party and the right to present his case before a decision is reached by the Court on an issue.[17]Little Wonder, in *Animashaun v Bakare*[18]it was held by the Court of Appeal (Per Agbo, JCA) that:

> *Exparte* Orders are intrinsically unconstitutional in nature because they are made without offering the other party a hearing. The Courts have however retained and exercised the powers to make *exparte* Orders in order to avoid situations where irreparable damage may be done to the *res* of any dispute. That is why *exparte* Orders must be made most sparingly and must be made for a very limited period of time principally to put the other

[17] Ndu (n2) 215
[18](2010) 16 NWLR (Pt. 1220) 513 CA

> party on notice of the complaint against his conduct. It must be interim in nature.

One of the twin pillar of natural justice is *audi alteram partem* meaning no one should be condemned unheard without hearing the other side. In *R. v Chancellor of the University of Cambridge: Dr. Richard Bentley's case,*[19] Fortesque, J. stated the need to observe natural justice by pointing out the example set by the Almighty God himself as recorded in the Bible. According to the learned Judge:

> The laws of God and man both give the party an opportunity to make his defence, if he has any. Even God himself did not pass sentence upon Adam before he was called upon to make his defence. 'Adam' says God, where art thou?' … And the same question was put to Eve also.

Although, the principle of natural justice are easy to proclaim but their precise extent is far less easy to define,[20]its antiquated origin lies in natural law theory which has its connotation with what is fair and just. According to Oputa, JSC in *Otapo v Sunmonu,*[21]

> Almighty God gave us two ears, so we have to hear both sides. To hear one side to a dispute and refuse to hear the other side is a flagrant violation of the principle of eternal justice.

The doctrine of fair hearing as encapsulated in the maxim, *audi alteram partem*, has been long recognized and its observance is indispensable where the determination of the rights and obligations of anyone is involved. In *Chief Joseph Oyeyemi v Commissioner for Local Government, Kwara State & Ors*,[22]the Supreme Court of Nigeria (Per Nnaemeka-Agu, JSC) had this to say on the doctrine:

> Now, the principle has been for long incorporated into our jurisprudence that a man cannot be condemned without being

[19](1723) 93 ER 698 at 704
[20]Evershed, M.R in *Abbot v Sullivan* (1952) 1 KB 189 at 195
[21](1987) 2 NWLR (pt. 58) 587 at 624
[22](1992) 2 NWLR (pt. 226) 681

> hard. As Fortesque, J. put it in Dr. Bentley's case, 'The laws of God and man both give man the opportunity to make his defence, if he has any'. This principle, which obliges us to hear a man before his interest can be taken away in any judicial or quasi-judicial proceedings or even in purely administrative proceeding in which the right of the person is to be taken away or his interest interfered with, has been reiterated in numerous cases.

In *Olatunbosin v NISER*,[23]Oputa, JSC emphasized the point as follows:

> That no man is to be judged unheard was as old as creation, as old as Genesis and as old as the Garden of Eden. In R. v. Chancellor of the University of Cambridge (1723) 1 Str. 557, we find Fortesque, J. affirming that '… even God himself did not pass upon Adam before he was called upon to make his defence…' And what was Adam's defence? It was this: The woman who thou gavest to be with me, she gave me the fruit of the tree and I did eat (Gen. 3:12). God did not also condemn Eve unheard; 'Then the Lord said to the woman, what is this that you have done? What was Eve's defence? Eve said: The serpent beguiled me and I did eat. Gen. 3:13. Having heard both of them, Almighty God proceeded to pass his sentence. He expected us to do the same.

Again, Oputa, JSC had this to say in the case of *Adigun v. Attorney General, Oyo State*:[24]

> The Latin maxim, Audi alteram partem expresses the fair hearing aspect of the rule. I simply mean that no one is to be condemned, punished or else deprived of his property or right without an opportunity of being heard. Therefore, when a person's legal right and or obligations are called in question, he should be accorded full opportunity of being heard before any adverse decision is taken in relation to those rights or obligations. It is an indispensable requirement of justice that the party who had to decide shall hear both sides, giving both sides the same opportunity and according each side the same method of

[23](1988) 3 NWLR (pt. 80) 25
[24](1987) 1 NWLR (pt. 53) 678

> presenting his case. It will therefore be wrong to receive oral evidence from one side and deny the other side the privilege of adducing oral evidence. It will also be wrong to call for written statements from one side while denying same to the other side.

Kayode Eso, JSC was more emphatic when he observed in *Federal Civil Service Commission v Laoye*[25]that:

> The reasoning of this Court on fair hearing is not only in accord with the law over the ages but agrees with common sense. Anyway, is there a reason the other side should not be heard before he is condemned? I think, it is admitted in every reasonable culture, even apart from the decisions of this Court, that a Judge should hear both sides before determining the guilt or otherwise of a person.

Conclusively, Byles, J. in *Cooper v Wardsworth Board of Works*[26] made a remarkable statement on the point which is reproduced:

> He who shall decide anything without the other side having been heard, although, he may have said what is right, will not have done what is right.

It follows from the above that the jurisdiction of the Court to grant an *exparte* order is an exception to the constitutional provisions of fair hearing. This exceptional circumstance is recognized even in England where Lord Greene, M.R in *Craig v. Kanseen*[27]held as follows:

> Apart from proper *exparte* proceedings, the idea that an Oder can validly be made against a man who has had no notification of any intention to apply for it is one which has never been adopted in England.

Consequently, the jurisdiction to grant an *exparte* order of injunction is an extraordinary one given to a Court to make a temporary

[25](1989) 2 NWLR (pt. 106) 265 at 681
[26](1863) 143 ER 414
[27](1943) KB 256 at 262-263; (1943) 1 ALL ER 108

order to meet emergency situations. It is extraordinary in the sense that it is an exception to the rule of *audi alteram partem*. This extraordinary jurisdiction given to the Court therefore calls for and imposes a great duty on the Judge to be cautious and circumspect and not to be reckless in order to avoid an abuse of the judicial process. Undoubtedly, a good deal of judicial discretion is called for, and we would think that no one imagines that such an Order could be granted as a matter of course.

Evidently, an applicant has a duty to satisfy the Court that in the special circumstances of his case, he is entitled to such a relief.[28]It must again be emphasized that the jurisdiction to grant an Order of interim injunction is equitable and for this purpose, the Court must consider the conduct of the parties both before and at the time of the application and the decision whether to grant (or not) the Order sought must be related to actual and ascertained facts of the current situation.[29] It must be borne in mind at all times that the burden of establishing a case for an order of interim injunction, as indeed that of a balance of convenience, rests always on the applicant for the Order. We shall now proceed to examine the principles guiding the Court in the grant of an *exparte* order of interim injunction.

4. The Principles Guiding the Grant or Refusal of an *Exparte* Order of Interim Injunction.

The principles to guide the Court in the grant or refusal of an application for an *exparte* order of interim injunction have been established by a series of decided cases, and they are to be the proper guide to Judges in Courts of equity.[30] In *Richard Ndubuisi Okechukwu v Author E.N.D. Okechukwu,*[31]the Court of Appeal, Enugu Division, was confronted with the provisions of Order 21 rule 1 of the Anambra State High Court Rules and Section 21 of the High Court Edict (Anambra State) No. 16 of 1987. The appellant instituted an action for damages for an alleged

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[28]See *Followers & Sons v. Fisher* (1975) 3 W.L.R 194 at 198

[29]Se Coker, JSC in *Adiatu Ladunni v Oludoyin Adekunle Kukoyi & Ors* (1972) 3 & 4 SC 30 at 33

[30]Per Lord Blackburn, J. in *Doherty v Allaman* (1878) 2 A.C. 709 at 728

[31](1989) 3 NWLR (pt. 108) 234

trespass to land and perpetual injunction against the defendant by Civil Summons in the Nnewi High Court. While the action was pending and after service on the defendant of the Civil Summons, without filing a counter claim, the defendant brought an *exparte* motion for interim injunction against the plaintiff. The defendant purported to rely on Order 21 rule 1 of the Anambra State Rules as well as Section 21 of the High Court Edict of Anambra State, 1987.

The application for interim injunction was granted by the trial Judge, Olike, J. on July 20, 1988. The plaintiff subsequently applied unsuccessfully to the lower Court to have the Order of interim injunction set aside contending, inter alia, that the injunction was liable to be discharged since the defendant did not have a counter claim before the Court and he suppressed and misrepresented material facts to the Court. In allowing the appeal of the appellant, the Court (Per Uwaifo, JCA) as he then was, delivering the lead judgment held on the basis of application for interim injunction as follows:[32]

> The first issue in this appeal is whether the defendant could have been awarded an injunction in the circumstances. It seems to me that Section 21 of the Edict and Order 21 rule 1 cannot be resorted to by a person or party who does not show that he has a right to protect. This is always the basis of any application for an interim injunction… A defendant who has no counter claim and has given no notice of one can hardly be said to have a right asserted before the Court, the violation of which he seeks to prevent. Of course, if there is no such right *exfacie* upon which an interim injunction can be founded, it appears absolutely untenable and unwarranted for a defendant to be granted *exparte* injunction.

Again, the Court of Appeal (Per Uwaifo, JCA) as he then was, emphasized on conditions for grant of Exparte injunction as follows: [33]

> The second issue arising from the appeal is the use of *exparte* motion in the present circumstances. The affidavit of the defendant does not at all disclose any urgency. He said he first

[32] *Ibid* at 243 paras B-E
[33] *Ibid* at 245 paras D-E

> knew of the development on the land on or about 27 March, 1988. He did not file his said motion until 18 July, 1988. In fact, he did nothing by way of motion against the plaintiff until the plaintiff sued him for trespass and injunction when he brought this incompetent application. *exparte* injunctions are for cases of extreme urgency where there has been a true impossibility of giving notice of motion, and such an injunction will be refused, unless the applicant (i.e. the plaintiff) has an overwhelming case on the merits, on the ground that the delay in making the application has been insufficiently explained. See *Bates v Lord Hailsham of St. Marylebone* (1972) 3 ALL ER 1019.

It has been long established that in granting *exparte* injunction, being an exercise of a very extraordinary jurisdiction, the time at which notice was first had of the act complained of must be taken into careful consideration in order to prevent an improper order being made against a party in his absence.[34]In the leading case of *Kotoye v CBN & 7 Ors* (supra), the Supreme Court of Nigeria (Coram: Augustine Nnamani, JSC, Adolphus Godwin Karibi-Whyte, JSC, Abdul Ganiyi Olatunji Agbaje, JSC, Philip Nnaemeka-Agu, JSC and Ebenezer Babasanya Craig, JSC) dealt exhaustively on the main features and principles guiding the Court in the grant or refusal of an *exparte* order of interim injunction. The Court held on the main attributes and principles regarding the grant of an Order of *exparte* injunction as follows:[35]

> (a) It is made to preserve the status quo until a named date or until further Order or until an application on notice for an interlocutory injunction is heard.
> (b) It is for a situation of real urgency to preserve and protect the rights of the parties before it from destruction by either of the parties.
> (c) Unlike an *Exparte* injunction, it 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 an

[34] *Per* Lord Langdale, M.R in *Earl of Mexborough v Bower* (1843) 7 Beav. 127 at 131
[35]See *Kotoye v. CBN* note (10) at pages 422 to 423. See also *CBN v. S.A.P. (Nig.). Ltd* (2005) 3 NWLR (pt. 911) 152 at 199 paras D-H.

irretrievable mischief or damage may be occasioned before the completion of hearing.

(d) It can be made to avoid such an 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.

(e) What the Court does in making an Order of interim injunction is not to hear the application for interlocutory injunction *Exparte*, 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.

(f) It can be made when there is a real urgency but not a self-induced or self-imposed urgency.

(g) It cannot be granted pending the determination of the substantive suit or action.

(h) It can be granted where the Court considers on a prima facie view that an otherwise irreparable damage may be done to the plaintiff before an application for an interlocutory injunction can be heard after notice has been given to the opposing party. It can therefore be made where it is necessary to preserve the *res* which is in danger or imminent danger of being destroyed.

(i) A person who seeks as interim order of *exparte* while also applying for an interlocutory injunction, files two motions simultaneously, one *exparte* asking for the interim order and the other on notice applying for an interlocutory injunction; the Court before whom the applications come takes the *exparte* motion and if satisfied that it has merit ex facie, grants it making the Order to the date when the motion on notice shall be heard.

(j) Although, it is made without notice to the other party, there must be a real impossibility of brining the application for such injunction on notice and serving the other party.

(k) The applicant must not be guilty of delay.

(l) It must not be granted unless the applicant gives a satisfactory undertaking as to damages.

5. The Duration of an *Exparte* Order of Injunction

An interim injunction is not granted for all times. That is certainly not the meaning of the word 'interim.' An interim injunction is an injunction granted 'meanwhile.' It is an injunction granted for a specific and specified, if not definite period, the period of the hearing of the motion on notice. The period should be and is usually short, very short indeed.[36]It is difficult to give an arithmetical figure as to the duration of the Order, according to Niki Tobi. That will depend on the rules of Court and on the facts and circumstances of each case which ultimately calls for the discretionary power of the trial Judge, a Judge who is capable of exercising that power judiciously. And, because interim injunction is interim and granted *exparte*, it cannot outlive an interlocutory injunction, which is granted on notice.[37]

Exparte Order of injunction does not relieve the beneficiaries of the duty to follow up the matter by a motion on notice for interlocutory injunction as it should be made pending the hearing of the motion on notice for interlocutory injunction.[38]In *Goddy Okeke & 12 Ors v Chief Michael Ozo Okoli & 5 Ors,*[39] the Court of Appeal, Enugu Division (Per John Afolabi Fabiyi, JCA) as he then was held on the nature and duration of Order of interim injunction as follows:[40]

> To round it up, I need to state it that interim injunction Order is not meant to provide a temporary victory to be used against an adverse party ad infinitum. It should not be allowed to hang on the opposing side like the proverbial sword of Damocles. The duration of its potency is always invariably limited to a period of about two weeks. It must not be granted to humiliate the other party. It is a temporary restraining Order made pending the determination of the motion on notice to sustain the status quo ante bellum and *afiotiori*, keep the res intact.

It is interesting to note that in the *Okeke v Okoli's* case (*supra*), the trial Judge, Obiesie, J. of the High Court of Anambra State, Awka

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[36]Tobi, (n6) 282
[37] *Ibid*
[38] Ndu, (n2) 211
[39](2000) 1 NWLR (pt. 642) 641
[40] *Ibid* at page 655 paras C-D

took a stand point on the life span of an Exparte Order in *Nze Peter Chika Ogbinamor v Obidegwu C. Onyesoh & Ors.*[41]Therein, Obiesie, J. held that the life span of an *exparte* ought to be very short. The learned trial Judge also maintained that where one has obtained the Order and failed to move the motion on notice, it will be concluded that his action has not been in good faith. In his words, 'the Court will not allow such an Order to last indefinitely. It is the Court of Justice that had its genesis partly from the Court of Equity and he who seeks equity must come with clean hands'.[42]Surprisingly, the same Judge failed to pronounce on the duration of an *exparte* Order in a similar matter before him. That is, the case of *Okeke v Okoli* wherein the learned trial Judge delivered a Ruling on the 14th day of October, 1993. Hear what Fabiyi, JCA had to say in allowing the appeal of the appellants: [43]

> But surprisingly, the same Judge failed to pronounce in a similar fashion in this matter. He closed his eyes to the pronouncement or maybe he preferred to look at the other direction this time around. The law relating to order of interim injunction and injunction generally is now well settled. See in particular Kotoye v. CBN (supra) page 419. I think, it is only a person who decides to close his eyes while walking that will miss the road. The learned trial Judge herein, through self-imposed mistrial, missed the road. He failed to discharge the wrongly ordered interim injunction made by him. Such led to utter miscarriage of justice. After refusing to discharge the interim injunction order made on 23rd July, 1993, the motion on notice remains unheard and the main suit, as well, remains in abeyance. What an irony of fate for the appellants. I feel constrained to express it here that certainty and consistency in the construction and application of our law should be adhered to more especially in the areas where the law is well settled.

[41](1994) ASNLR (Vol. 3) 191 at 194
[42]Referred to by Fabiyi, JCA (as he then was) in *Okeke v Okoli* (n39) at 653 paragraph H
[43] *Ibid*, 654 paras A-C

In *Secondi Bogban & 2 Ors v Motor Diwhre & 2 Ors,*[44]the Court of Appeal, Benin Division (Per Abba Aji, JCA) as she then was held on the nature and duration of an Order of interim injunction as follows:

> An injunction is a serious matter and must be treated seriously. *Unibiz (Nig.) Ltd v CBCL Ltd* (2003) 6 NWLR (pt. 816) 402. It is a preservatory measure taken at an early stage in the proceedings. The order of interim injunction is not meant to provide a temporary victory to be used against an adverse party ad-infinitum. It should not be allowed to hang on the opposing party. The duration of its potency is always limited to a short period. Courts must ensure that an *Exparte* Order of injunction is not allowed to over stay. Delay or inaction is not tolerated by the Court and the counsel to the party that obtained an interim order should act very fast to see that all that needs to be done in order not to make it as if getting the *Exparte* injunction was all that concerned him".[45]

It was also held in the *Boghna's case* (*supra*) that an *exparte* injunction should not normally be more than seven days after which the party affected by the Order may have applied for the Order to be varied or discharged. The grounds for setting aside or discharging an Order of interim injunction made *exparte* are clearly well stated. They include inter alia where the application was granted in a suppression or misrepresentation of material facts or it was irregular.[46]The jurisdiction to vary or discharge an Order made *exparte* is almost always rested in the Court that made it. It might be by the same or another Judge of the same Court.[47] While the Court has discretion to refuse the application discharging the interim Order, such a discretion must be exercised judicially and judiciously. We proceed to examine the abuse of *exparte* Order of interim injunction and the need for caution.

6. Abuse of *Exparte* Order of Injunction and the Need for Caution

[44](2005) 16 NWLR (pt. 951) 274
[45] *Ibid* 299 paras A-D
[46] *Ibid* 297 paras C-F
[47] *Ibid* 297 para B. See also *S.A.P. (Nig.) Ltd v CBN* (2004) 15 NWLR (Pt. 897) 665

The problem of abuse of the power of issuing interim injunctions *exparte* has been with us for years.[48]It should not continue to be with us. In *Richard Ndubuisi Okechukwu v Author E.N.D. Okechukwu* (*supra*), Uwaifo, JCA (as he then was) delivering the lead judgment expressed his displeasure on the power of the Court in abusing the grant of *exparte* Order of interim injunction and the need for caution. Hear what His Lordship had to say:[49]

> It is most disturbing that the use of exparte 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 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 favourably to the granting of an exparte injunction, there is always the need to make its life very short; and indeed for an undertaking by the person who obtains it. See Fennar v Wilson (1893) 2 Ch. 656. 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 his contribution to the lead judgment, Macaulay, JCA made the following pungent but penetrating observations:[50]

> The rather untidy haste in entertaining interim injunctions from certain High Courts is becoming common place. Apart from the fact that *exparte* applications do not appear to satisfy the requirement that a person to be proceeded against in Court should be made aware of the complaint against him, there must be evidence that there is a pending cause of action enabling a complainant to show that he has a right to protect, under Order

[48] Iyizoba, (n12) 12
[49] *Okechukwu v Okechukwu* at p0age 247 paras A-C
[50] *Ibid* 248-249, paras G-A

> 21 Rule 1. It is to be hoped that less emphasis will be put on inappropriate resort to the granting of *exparte* interim injunction when the conditions precedent had not been laid.

Perhaps, Oguntade, JCA (as he then was) was more lucid on the matter when he conveyed and expressed himself in these words:[51]

> The grant of *exparte* 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 upon a person who has had no notice it was being applied for and who can therefore not make representations in respect thereof. Usually these *exparte* 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 a great injustice 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.

In *Kotoye v CBN* (*supra*), Nnaemeka-Agu, JSC identified various instances in which the power to grant *exparte* Order of interim injunction has been ridiculously abused and misused. Hear what His Lordship had to say:[52]

> Above all, this Court ought to take notice of the numerous cases of abuse of *exparte* injunctions that have come up in recent times. The operation of a bank has been halted on an *exparte* Order of injunction granted to a person who had been removed as a Director of the Bank. Installation ceremony of Chiefs have been halted in the same way even though the dispute had been

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[51] *Ibid* 249 paras B-D; Oguntade, JCA (as he then was) in *Bank Boston, USA & Ors v Victor Adegoroye & Anor* (2002) 2 NWLR (pt. 644) 217

[52] *Kotoye v CBN* (n10) 450

> dragging on for years. The convocation ceremony of a university has been halted on an *exparte* application by two students who failed their examinations.

The Hon. Justice Iche N. Ndu, C.J retired also gave some curious instances of abuse of *exparte* Order of injunction. A politician who has lost an election sues the electoral body in the High Court which has no jurisdiction to hear election matters. The plaintiff applies to the Court for an order *exparte* to restrain the swearing in of the successful candidate, and the Court makes such an Order.[53] Or, in the case of the five residents of the Federal Capital Territory (FCT) who have sued the Attorney General of the Federation (AGF) and the Chief Justice of Nigeria, (CJN) over the inauguration of the President-Elect, Bola Tinubu as the nation's President on the 29th day of May, 2023 because of the alleged failure of Tinubu to score 25% of votes in Abuja, and the Judge (whosoever he is) decides to grant an *exparte* order stopping the inauguration and swearing in of the President-Elect in the midst of the nation's preparation.[54]

A Judge could also be said to abuse the process where he avoids taking the motion on notice for interlocutory injunction in a case he has, on good grounds, granted the *exparte* order of injunction and also avoids vacating it. Other instances include where to the knowledge of the Judge a case is pending in another High Court, he makes an Order *exparte* affecting the subject matter before that other Court, or even restrain that other Court of co-ordinate jurisdiction from going on with the case. A plaintiff rushes to the Court on a Friday with an application *exparte* to restrain a family from burying the remains of an old man who has been

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[53] Ndu, (n2) 212

[54] The Suit is marked FHC/ABJ/CS/578/2023 filed on April 28, 2023. The plaintiffs are Anyaegbunam Okoye, David Adzer, Jeffrey Ucheh, Osang Paul and Chibuike Nwanchukwu. They sued for themselves and on behalf of other residents and registered voters in the FCT. These people are asking the Court to set aside the Certificate of Return issued to Tinubu and restrain the CHN and any other judicial officer from swearing in any candidate in the presidential election as President or Vice President of the Federal Republic of Nigeria until the issue is determined by the Court. The Plaintiffs are also asking for a declaration extending President Buhari's tenure pending when a successor is determined in accordance with the Constitution.

in the mortuary for over five years, the following Saturday merely on the claim that he too should be one of the Chief Mourners, and the Court makes such an order *exparte*, in spite of the concluded arrangements for the old man's burial. When such an *exparte* order is made in the instances described above, the press will pick it up with some headlines such as 'Cash and Carry Judge,' 'A Judge Demolishes Justice,' 'A Court makes Black Market Order,' etc.

These remarks from the press paint the judiciary wrongly and it is an embarrassment to the nation's judiciary. A Judge should not be involved in painting the judiciary wrongly or in causing any form of embarrassment to the judiciary. According to Ndu, there could be two reasons for the possible abuse of *exparte* Orders of injunction. First, it is possible that the integrity of the Judge is doubtful. He must have been influenced. He has some motive to serve and he decides to manipulate the judicial process. Secondly, it is possible that the Judge lacks the intellectual competence required to appreciate the procedure and the law involved in dealing with an application for *exparte* order of injunction.

Before drawing conclusion in terms of looking at the policy direction of the NJC in curtailing abuse and the improper exercise of discretion in the grant of *exparte* order of injunction, it is important to mention what a Judge should not do when considering an *exparte* application.

7. What a Judge Should Not Do

The duty of a trial Judge upon a motion *exparte* for an order of interim injunction is to consider upon the evidence before him whether the applicant has shown a probable case of relief at the hearing. Where the applicant has not established a prima facie case, a trial Judge should be very reluctant to interfere with the rights of the defendant.[55]It is a fundamental rule that a trial Judge will only grant an injunction to support a legal right. A Judge ought not to exercise this equitable jurisdiction where there is no right cognizable in law. Injunction is only granted to protect the violation of a legal right.[56]

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[55]*Republic of Peru v Dreyfus Bros and Co* (1888) 38 Ch.D 348

[56]*Commissioner of Works, Benue State and Anor v Devcon Development Consultants Ltd and Anor* (1988) 3 NWLR (pt. 83) 407

Consequently, a Judge upon considering an application either for interim or interlocutory injunction, should not resolve conflicts of evidence on affidavit to facts on which the claims or counter-claims of either party ultimately depend or to decide difficult questions of law which call for detailed argument and mature consideration.[57]The equitable remedy of an interim injunction is not designed to assist or compensate a litigant who has instituted an action praying the Court for a relief of perpetual injunction. On the contrary, it is a hard matter of law considered in the light of the facts of the case before the Court, and hardly are the circumstances of two cases the same, even though they may be identical. In determining an application, a Judge is expected to apply or invoke only the principles applicable to the case and no more.

The Judge must allow himself to be guided by the overall interest of justice in the matter. Where the Judge is convinced that it will serve the interest of justice to have the other party put on notice, this must be properly made known to the party who filed the motion *exparte* for an Order of interim injunction. Parties and their counsel should not be encouraged to file and argue application *exparte* when asking for Orders which can only be properly made on notice. The appellate Courts have said it all. We cannot say more.

8. Policy Direction of the National Judicial Council of Nigeria in Curtailing Abuse of *Exparte* Orders

The Code of Conduct for judicial officers of the Federal Republic of Nigeria serves as the minimum standard of conduct to be observed by each and every judicial officer as defined by the code. Violation of any of the rules contained in the Code of Conduct constitutes judicial misconduct and or misbehaviour which shall attract disciplinary action.[58]By the said code, a judicial officer must avoid the abuse of the power of issuing interim injunctions, *exparte*.[59] In order to address the issue of conflicting *exparte* Orders of different Courts in Nigeria, and offer enduring solution to the problem in saving the face of the judiciary

[57]*Obeya Memorial Specialist Hospital Ayi-Onyema Family Ltd v A.G. Federation and Anor* (1987) 3 NWLR (pt. 60) 325

[58] The Application of the Code of Conduct for Judicial Officers of the Federal Republic of Nigeria, 2016

[59] Rule 3.5 of the Code of Conduct, 2016

in the nation, the National Judicial Council of Nigeria in its Policy Direction No. 1 of 2022 which came into effect from the 11th day of May, 2022 directed as follows:

Without prejudice to the powers of the Election Petitions Tribunals constituted pursuant to the provisions of the Constitution of the Federal Republic of Nigeria, pending the Constitution of a Cross Jurisdiction Litigation Panel (CJLP) to give directions on appropriate litigation fora for cross jurisdiction litigations:[60]

(a) All suits to which these Policy Directions apply shall be filed, received or entertained only at the High Court of the Federal Capital Territory in so far as the reliefs sought, or potential consequential Order(s) or declaration(s) may restrain or compel persons or actions beyond the territorial jurisdiction of any one State.
(b) Where such suits are within the exclusive jurisdiction of the Federal High Court, they shall only be filed or received at Abuja and assigned by the Chief Judge of the Court.
(c) All such suits wherein the cause of action arose in a State and the relief seeks a declaration or to compel or restrain person(s), natural or legal, within that State's territory, with no consequences outside the State, shall be filed, received or heard only in that State.
(d) All Heads of Court shall assign cases or constitute panels with a view to forestalling the incidence of conflicting judgments and rulings.
(e) Once facts or issues have been ruled upon, no other Court or panel of co-ordinate jurisdiction shall be assigned or entertain suits on the same subject matter and parties shall comply or proceed on appeal to the appropriate higher Court.
(f) Rules of Court shall require sufficient notice and publicity of actions that potentially impact other cases.
(g) Rules of Court shall stipulate solemn disclosure duties on litigants filing actions that may impact other actions.

9. Conclusion

[60]The NJC Policy Direction 2022 signed by Hon. Dr. Justice I.T. Muhammad, CFR

The question of the extent of *exparte* Order of interim injunction in judicial proceedings has raised serious controversies in recent times. *exparte* Order of interim injunction touches an area of the law which, in spite of numerous appellate decisions, appears to have been quite often misunderstood and misapplied by some trial Judges. This article has attempted to reinstate the law. There can be no better conclusion for this paper than to draw from the imperishable words of The Honourable the Chief Justice of Nigeria, Hon. Justice M.L. Uwais, GCON who in his address to the Conference of the Nigerian Bar Association, Enugu held on the 25th day of August, 2003 had this to say: [61]

> Talking of *exparte* injunctions, I think, it is not out of place to appeal to legal practitioners at large to exercise more restraint in and desist from advising their clients to bring absurd applications to Court for *exparte* injunctions. You will agree with me that unless such applications are brought, the inconsiderate and reckless Judges amongst us will not find the opportunity to embarrass the judiciary and the profession in general. I, therefore, appeal to the Nigerian Bar Association and the Conference to examine the possibility of achieving this objective. Although, the National Judicial Council is resolved to deal with Judges who abuse the power of granting the injunction, one other way of dealing with the abuse is for counsel to be more reasonable and cautious in bringing the application.

This admonition from the CJN to legal Practitioners who files an application *exparte* for an Order of interim injunction applies in equal force to the *Judex* who needs to know that as *dominus litis*, the trial Judge should be more circumspect and cautious in granting such *exparte* Orders knowing that the respondent has not been given an opportunity to be heard.

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[61] Ndu, (n2) 216