THE GRANTING OF EXPARTE ORDERS OF INJUNCTION SEEMS TO RUN COUNTER TO THE PRINCIPLES OF FAIR HEARING. HOW TRUE IS IT?

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Abstract

Ex-parte order of interim injunction is a constitutional leverage specifically given to Judges to make an order in exceptional circumstance granting the request of an applicant in a suit in the interim without hearing from the other party. Such order is specifically granted to preserve the Res of a subject matter pending the determination of a suit. Such order, if not granted will make a mess of a suit in question as the Res may be destroyed before the matter is determined. For a curious observer, it may appear that the granting of such order runs counter to the principles of fair hearing which demands that in any given matter and at all material time the Judge must hear both parties before making an order. But to the extent that a Judge grants such order to maintain the status quo pending the time litigants go full blast in determining the merits and demerits of their cases, makes it imperative and necessary in our legal system. And this is one of the judicial doctrines which we imported from the English legal system. However, caution must be the watchword in granting such orders as it has been proven time and time again that in certain circumstances especially in political matters, Judges tend to abuse this privilege by granting such order at the drop of a hat and this does not augur well in the development of our legal system.

Intellectual finesse demands that an academic exercise of this nature must of necessity begin with the definition of concepts. When this is done, the expose will assist the writer to have a birds eye view of what the conceptual framework is all about.

And the appreciation of such conceptual framework, when put into proper perspective, will go a long way in answering the question from the writers point of view thereby priming up further academic debate from another scholar who takes a different position on the subject matter.

However, whatever academic position either party takes, what must be central to a discerning mind is that the subject matter being discussed must lay credence to a fairly acceptable module-aimed at explaining thoroughly what the concept is all about. And in line with this academic tradition, the operational concepts in this paper that will require a general definition/explanation are as follows:

- What is the meaning of ex-parte order of interim injunction?
- How did it originate?
- How does it operate?
- What is the meaning of fair hearing as enshrined in the Nigerian Constitution?
- Does Ex-parte Orders of interim Injunction Violate the principles of fair hearing?

Answers to these questions and policy prescriptions made thereafter will resolve all the issues that are germane to this study. In going about this, we shall draw inferences from case laws, from different jurisdictions, venture into the arguments for and against the granting of ex-parte orders, its processes, abuses and intention of the makers. A synthesis of all these factors will finally enable us to come out with a position on the debate either way.

Definition of Concepts

i) Ex-parte

The word ex-parte is derived from a Latin phrase meaning **"One side to a dispute**. In legal parlance it connotes one side to a law suit. Breaking down this technical meaning into a very simplier understanding, it implies that a party to a dispute is urgently asking the court to grant him a relief (without hearing from the other party) so as to preserve the **Res** of the matter.

For example if A & B are in dispute over ownership claims on a portion of land and A wants to sell the disputed land to C-an innocent third party purchases for value without notice of the dispute, if A is not restrained by B from selling the land through an ex-parte order of interim Injunction, A will sell the land to C who has bought litigation.

And when this is done, reverting to status quo ante will take a very complex legal process that may lead to multiplicity of suits and waste of precious time and money. It therefore becomes very apparent on the face of it that application for an interim order of injunction must be one of extreme urgency. Time must be of essence and once an application for interim injunction is filed, the judge must try as much as possible to hear it immediately. He must suspend all other court processes to hear it.

He has no justification to conclude that the application does not disclose any urgency. Doing this will amount to shutting out the applicant without hearing him and this will be against all cannons of fair hearing (Tobi 1995).

And describing the practice in England, Afe Babalola (2000) (SAN) has this to say.

> In England, ex-parte orders are taken both during the court hours. For the Queens Bench Judge in chambers, each day is a call over night. In short the High court provides emergency services that is similar to that of the medical profession with emergency/doctors on duty. for 24 hours. The judge may conduct hearing in his private residence or indeed anywhere. In case of extreme urgency, judges have granted an injunction by telephone after reference to the registrar or judges clerk. In **R. N. V. No. 2**, an ex-parte order was granted by a high court judge in his residence on a Sunday to prevent the husband from taking their child to Australia.

And Niki Tobi (1992) JSC in his widely published work THE NIGERIAN JUDGE defined it to means as follows.

> Ex-parte in our adjectival laws means proceedings brought on behalf of one interested party without notice to, and in the absence of the other party. This means that the application for interim injunction brought ex-party is heard by trial judges in the absence of the adverse party.

However, the locus classicus on the concept and explanation of the principles surrounding the operation and the granting of ex-parte orders of interim injunction in Nigeria was enunciated in the celebrated case of **Kotoye V the Central Bank of Nigeria** (1989) where Nnaemeka Agu JSC in explaining the principles surrounding the operation and granting of ex-parte orders stated among other things.

That by their nature injunction granted on ex-parte application can only be interim in nature. They can be made without notice to the other side.

But most importantly it must be stated that the applicant who is seeking for an interim order vide ex-parte application must disclose all materials facts pursuant to the application as the court will deal strictly with a party applying for an ex-parte order and misrepresenting facts (Evidence Act 2004).

Again where an affidavit evidence is materially inconsistency in favour of the respondent, it will not be granted as the application has not satisfied the burden of proof requirement (Evidence Act 2004).

Finally, ruling on ex-parte order must be confined to the application and not touch or deal with merits of the matter and a trial judge has the discretion to grant or refuse the application for interim injunction but once a judge has exercised his discretion judicially and judiciously an Appallate court will not interfere with it (Evide nce Act 2004).

The Historical Origin

Britain Colonized Nigeria and introduced the English common law to Nigeria as a by – product of that colonization. Commenting on this development Prof Smith (1980) stated that.

> The common law migrated to the old common wealth by conquest and colonization rather than because of the intrinsic merit of the substantive rules – especially in matters of private law evaluated by comparison with other European system.

The inference drawn from Prof Smith's assertion is that the English common law was introduced into Nigeria by force rather than by choice. Besides, the colonial masters believed that the English common law is the foundation of justice in England which can be easily interposed into Nigeria.
Section 45 (1) of the interpretation Act (1989) drove home this point when it stated that:

> *"Subject to the provisions of this section and except in so far as other provisions is made, by a Federal law, the doctrines of equity, together with the statue of general application, that were enforced in England on 1st day of January 1900, shall be in force in Lagos and in so far as they relate to any matter within the exclusion legislative competence of the Federal Legislature, shall be in force elsewhere in the federation".*

And it was in this regard that the doctrine of ex-parte orders which was an integral part of the English common law was introduced into Nigeria.

The Meaning of Fair Hearing

The principles of fair hearing is premised upon the following Latin maxims.
The first is*: "Audi alteram parterm"* connoting that both parties to a dispute must be heard fairly-by giving each party the opportunity to state his case before an impartial adjudicator.
The second is *Nemo Judex in causua* connoting *that no one should be a judge in his own case.*
And a re-statement of these obvious doctrine was highlighted in the celebrated case of *R.V. Cambridge* (1723) where Forjescue J. while referring to the biblical incident in the garden of Eden said.

> I remember to have heard it observed by a very learned man upon such an occasion, that even God himself did not pass sentence upon Adam (and Eve) before (they) were called upon to make (their) defence. Adam, says God, where are thou? Has thou eaten of the tree that thou should not eat? And the same question was put to eve also.

The *fons et origo* of this theological discourse is that God even gave Adam and Eve the opportunity to state their case before judgment was passed on them. The opportunity for parties to a dispute to state their case therefore becomes the foundation upon which the principles of fair hearing and natural justice is built.

This standpoint seems to run counter with the doctrine of ex-parte application but it has been said time and time again that the ex-parte doctrine is a child of circumstance designed to safeguard the sanctity of a suit before the Res is destroy. To appreciate this concept, we have to examine the next subheading which is:

The Constitutional Imperatives for Granting of Ex-parte Orders Vis-a Vis the Principles of Fair Hearing

As was enunciated in our previous discussion, application for interim injunction is heard ex-parte and this position has given rise to the argument as to whether it is constitutional to grant such orders since granting it will amount to breaching the principles of fair hearing as was enshrined in the Nigerian constitution.

However, several case laws have given credence to the fact that granting of such order *ab-initio* is not unconstitutional as long as it does not work hardship on the opponent.

In 7-Up Bottling Company Limited V Abiola & Sons Limited (1995)

Following an action filed by the Plaintiff/Respondent against the defendant/appellants, their servants and or agents from disturbing the Respondents quiet and peaceful enjoyment and occupation of the company's factory pending the determination of the motion on notice for an interlocutory injunction already filed and before the motion ex-parte for interim, injunction was heard, the appellants filed a motion on notice seeking leave to be heard on the motion ex-parte or in the alternative; they sought for an order requesting the respondents ex-parte application to be heard on notice.

The learned trial Judge heard the arguments of the appellant's counsel on the application that the appellants be heard on ex-parte and granted it.

Dissatisfied with the ruling, the appellant's appealed to the court of appeal which equally dismissed it and they appealed to the Supreme Court.

In resolving the appeal, the count held inter-alia that ex-parte applications are not unconstitutional.

In his consenting Judgment Uwais JSC (as he then was) stated that:

> There is no doubt that the right of fair hearing under the constitution is synonymous with the criminal law rule of natural justice …in both civil and criminal proceedings, there are certain steps to be taken which are incidental or preliminary to the substantive case, such steps include, motion for directions, interim or interlocutory injunction. It is in respect of such cases that the provision are made in count rules to enable the party differed to make ex-parte applications… if the supreme count can dispose of an applications under S. 213 (4) of the 1979. Constitution, without oral hearing of the application, then I see nothing wrong or unconstitutional for a trial court to deal with an ex-parte motion under its rule.

Again in Provisional Liquidator of Tapp Industries Limited v Onyekwelu (1995)

The Supreme Court held further that as the rules of court have made provisions for ex-parte application tenable there is nothing unconstitutional with them.

Wali JSC (1995) in his concurring judgment said that:

> As to the contention of the respondents that the ex-parte order made by the learned trial Judge, as a result of the appellants application of 15 December, 1988 & 12 December 1988 was in violation of section 33 (1) of the 1979 constitution, suffice it to say that there was no such violation.

Iguh JSC (1995) in his contribution on this issue equally said that:

> It is my view that the act of obtaining the said two orders by the provisional liquidator in respect of his general and statutory powers are quite in order". To take into custody or under his control, all properties to which the 1st

> respondent is or appears to be entitled, does not constitute a violation of section 33 (1) of the constitution; there, being no determination of the civil right and obligation of the parties at that stage over the properties in issue.

In the English case of *Thomas Limited V Bullock* (1912) Grattith C.J has this to say on the constitutionality of the application of ex-parte orders vis-a vis the fair hearing principles that;

> "There is a primary precept governing the administration of Justice that no man is to be condemned unheard; and therefore as a general rule no order should be made to the prejudice of party unless he has the opportunity of being heard on defence. But instances occur where justice could not be done unless the subject matter of the suit is preserved and if that is in danger of destruction by one party or if irremediable or serious damage is imminent, the other party may come to the court and ask for interposition even in the absence of the opponent on the ground that delay would involve greater injustice than instant action…"

From the decided cases, it is apparent on the face of it that in so far as the granting of ex-parte order is provided for by the rules of the court and in so far as the granting of such order will not work hardship on the party, the granting of such order in our own opinion will not be unconstitutional.

Attitude of Judges Towards the Granting of Ex-parte Orders of Interim Injunction in Nigeria

To guide against abuses, Appellate courts have warned trial courts to exercise caution in granting application for interim injunction and that is why the application for interim injunction in Nigeria is granted with the greatest reluctance. Application for interim injunction must as a matter of rule be heard in chambers. This is provided for by order 30 n (J) of the High court civil procedure Rules.

However, courts most commonly hear such application in open courts, while there is no compelling reason for that, the general feeling of the court is that the hearing of the application in court will enhance public hearing requirement as enshrined in the Nigeria constitution (1999).

Conclusion

The summation of our study so far shows that as a matter of law, judges are free to grant interim injunctions and they do grant such injunction but the problem in granting it is to guide against the abuse.

While injunction could be granted in deserving cases, our adjectival laws, frown's at granting the injunction in non-deserving case (Tobi 1995).

This being case, we cannot but find solace in the submission of Landgale: Mr. in *Earl of Mexiborough v Brower* (1843) where he started inter-alia that:

> The granting of an ex-parte order of injunction is the exercise of a very extra-ordinary jurisdiction and therefore the time at which the plaintiff first had the choice of the act complained of will be looked at very carefully in order to prevent an improper order from being made against a party in his absence.

While aligning ourselves with position we restate unequivocally that while it is very important that in cases of extreme urgency, application for ex-parte order of interim injunction has to be granted, caution, in granting such orders must be the watchword of judicial officers to guide against abuse. And this is our stake in this debate.

Recommendation

This writer recommends that Judges should grant Ex-parte order in well disserving cases but caution should be the watchword to guide against abuse.

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