



## Challenges to grant of injunction pending appeal in Nigeria – way out

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**Abstract:** This paper examined the conditions for the grant of Order of Injunction Pending Appeal by Nigerian Courts. The paper traced the origin of the Order from the English authorities, and the adoption into the Nigerian judicial system. The author examined the High Court of Lagos State Rules and the Federal High Court Rules to establish the procedural source of the application of the Injunction Pending Appeal by the Courts and concluded that the rules do not support the Order. The confusion by the Courts in associating the conditions for the grant of Interlocutory Injunction and Injunction Pending Appeal was critically examined. The proper and acceptable conditions for the grant of the Order as laid down recently by the Supreme Court and a call for liberal application of the conditions by the Court as well as a suggestion for a change in the nomenclature concludes the paper.

**Keywords:** Injunction. Appeal. Nigeria.

### INTRODUCTION

A party who fought and won a matter in court is entitled to the fruits of his labour, the court will not therefore make it a practice to deny a successful party the fruits of his judgment<sup>1</sup>, a successful party without any further requirement, may proceed to enforce the judgment of court using the procedure laid down in the Sheriffs and Civil Process Act<sup>2</sup>. The law however allows for appeals against judgments of the lower courts, until the matter is finally settled at

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<sup>1</sup> Vaswani Trading Co V Savalack & Co (1972) 1 All: N.L.R. (pt. 2) 483

<sup>2</sup> Cap.S6 LFN 2004



the Supreme Court, there is a constitutional right of appeal<sup>3</sup> which can still be exercised by the unsuccessful party whether Plaintiff or Defendant. Even though there is a presumption that the trial court's decision is correct<sup>4</sup>, an appellant still has the opportunity to overturn the lower court's decision on appeal. The implication of this is that where execution has been carried out pursuant to the judgment of the lower court, the judgment of the Appeal Court would become a worthless victory, especially where there is a *res* or subject matter of the action which would have been permanently destroyed irretrievably. There is therefore a necessity for the Court of Appeal to protect not only the *res* but also to ensure that their judgment is not rendered nugatory upon being delivered. The court is therefore empowered to grant an order for stay of execution of the judgment pending the determination of an appeal lodged against the judgment. This is the way the court preserves the *res* and also protects its judgment from being rendered nugatory.

There are two main types of judgment, it is either the judgment is executory or declaratory<sup>5</sup>. However, only the executory judgment can be executed, and therefore could be stayed by order of stay of execution. Obaseki JSC<sup>6</sup> pointed out that where the judgment is a declaratory judgment or where a court merely ruled that it has no jurisdiction<sup>7</sup>, there is nothing that can be enforced by any of the parties so that there is nothing to be executed and the court order of stay of execution is of no use in the circumstances<sup>8</sup>.

Contrary to above, the law in fact recognises a situation where a declaratory judgment is made by the court, and the dissatisfied party is entitled to also appeal against such declaratory order or any other type of order which requires no execution<sup>9</sup>. In the circumstances, the plaintiff may further appeal against refusal to grant a declaratory order by a lower court. Here,

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<sup>3</sup> See Sections 233 and 243 Constitution of the Federal Republic of Nigeria. 1999

<sup>4</sup> *Otogbolu v Onwumena Okehuwa* (1981) 6-7 SC 99, *Agbonmagbe Bank Ltd v C.F.A.O.* (1966) All N.L.R. 140 at 143.

<sup>5</sup> *Akunnina v Attorney – General of Anambra State* (1977) 5 S.C. 161 at 177.

<sup>6</sup> *Government of Gongola state v Turkur* (1989) All N.L.R. 647.

<sup>7</sup> *Government of Gongola State v Turkur* (1989) All N.L.R. 647 at p. 653

<sup>8</sup> *Mobil Oil Ltd v Agadaigho* (1988) 2 NWLR 383 of 405-406.

<sup>9</sup> Such as order striking out a matter for lack of jurisdiction, or other orders that requires no enforcement or cannot be executed.



the plaintiff cannot apply for an order for stay of execution as there is nothing to execute<sup>10</sup>. The Plaintiff may however find it necessary, in order to preserve the *res* and in the event that the appeal court finds in his favour, the appeal would not have become an exercise in futility, or foist upon the court a *fait accompli* situation may apply to the court for an order of injunction pending the outcome of the appeal.<sup>11</sup> In this paper we shall examine critically the nature and conditions for the grant of the order for injunction pending appeal, and recommend a more simpler and practicable conditions precedent for the grant of the order.

## 2. Historical and conceptual developments.

Historically, the order for injunction pending appeal is an order that is granted by court after the court has delivered judgment. The court lacks jurisdiction in fact it becomes *functus officio* once it has delivered its ruling or judgment in a matter and may not give any further directions on it. Turner L.J. in the case of *Galloway v The Mayor, the Commonality, Citizens of London*<sup>12</sup> observed thus,

I think that the plaintiff if he intended to appeal to the House of Lords, ought at the hearing to have asked the court so to frame its order to keep alive its jurisdiction pending the appeal. This is not having been done, we should be departing from what I understand to be the course and practice of the court if we were to grant the plaintiff the injunction he asks.

The point made in the Galloway case is that once a court has dismissed or refused a claim for injunction, the court no longer has power to entertain or grant the same claim

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<sup>10</sup> See the judgment of Nnaemeka – Agu JSC in *Government of Gongola State v Tukur* supra. Note 7. Page 657-658, *Shell Petroleum Development Company of Nig Ltd. v Amadi* (2011) sc 1501

<sup>11</sup> See the judgment of Idigbe JSC in *Chief Yeshua Popoola Oyeshile Shodeinde and others v Registered Board of Trustees of the Ahmadiya Movement- in- Islam* (1980) 1-2 SC 163, see also, *Okoya v Santili* (1966) 2 NWLR 172 at 221.

<sup>12</sup> 46 E.R. 560



(injunction) even in the interim. This may sound reasonable, but misconceived.<sup>13</sup> McPhillips J.A.<sup>14</sup> observed,

with great respect to all contrary opinion, even although the judgment has been taken out and entered, there remains the power to preserve the *res*- it is not in any way changing or altering the judgment, it is merely a preservative order from time immemorial exercised by the courts.

Cotton L. J. in the same vein observed that,

It (the court) does so (i.e. suspends pending an appeal, what it has declared to be the right of one of the litigant parties) on this ground that where there is an appeal about to be prosecuted the litigation is to be considered as not at an end, and that being so, if there is a reasonable ground of appeal, and if not making the order to stay the execution of the decree... would make the appeal nugatory... then it is the duty of the court to interfere and suspend the right of the party who, so far as the litigation has gone, has established his rights. That applies... just as much to the case where the action has been dismissed, as to the case where a decree has been made establishing the plaintiffs title<sup>15</sup>

<sup>13</sup> See McPhillips, J.A. in the British Columbia Court of Appeal in his dissenting judgment in *Adler v Duke* (1932) D.L.R. 210

<sup>14</sup> *Ibid*, p, 218

<sup>15</sup> *Polani v Gray* (1879) 12Ch.D 438 at 446, cited with approval by Idigbe JSC in *Shodeinde v Ahmadiya*.



In *Orion Property Trust v Du Cane*<sup>16</sup> the Court<sup>17</sup> was of the view that on principle the court will intervene pending an appeal to restrain an act that might deprive an appellant of the results of the appeal, Pennyquick J has no problem in concluding that the court had jurisdiction to grant an injunction and in the circumstances of the case, he granted the injunction sought. This was the same position taken by Meggery J in the case of *Eringford Properties Ltd v Cheschire County Council*<sup>18</sup>.

The position of the law was clearly stated in Nigeria in the case of *Ogunremi v Dada*.<sup>19</sup> In this case, Brett F.J and with which Taylor and Bairamian F.JJ concurred, observed as follows:

I hesitate to propound any general principle without a more complete review of the authorities and of the history of the jurisdiction, than we have had in this case, than we have had in this case, but the authorities appear to me at least to justify the proposition that a court of record whose judgments are subject to appeal has inherent power to stay the execution of any judgment against which an appeal has been brought, in order to render the right of appeal more effective. It is clearly not an appellate power, since it is possessed in England by the court from which an appeal lies as well as by those to which the appeal is brought.

The power of court to exercise such power originated as far back as the supreme Court of Judicature Act 1875<sup>20</sup> upon which Sir George Jessel M.R. relied when he held as noted in the case of *Wilson v. Church No (1)*<sup>21</sup> that 'when an action has become altogether dismissed by a Divisional Court, no order can be made under Rules of Court of 1875( Order 58 Rules 2 and 5) to stay proceedings pending an appeal, but the Court of Appeal will in a proper case, grant an injunction to restrain any of the parties parting with the property till the hearing of the appeal<sup>22</sup>.

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<sup>16</sup> (1962) 3 All E.R. 466

<sup>17</sup> Per Pennyquick J.

<sup>18</sup> (1974) Ch. 261. See also, *Wilson v Church* (1879) 11 Ch.D. 576, *Otto v Lindford* (1881) 18 Ch. D 394, the Nigerian case of *Ogunremi v Chief Dada* (1962) 1 ALL N.L.R. p. 670

<sup>19</sup> supra

<sup>20</sup> Which amended the Supreme Court of Judicature Act of 1873 (R.S.C. 1875)

<sup>21</sup> (1879) 11 Ch. D. 576

<sup>22</sup> *Cropper v Smith* (1883) 24 C.D. 305



The point is to separate the issue of rehearing a matter after judgment when the court has become *functus officio*, and merely entertaining and granting an order to preserve the *res* or ensure that the appeal is not rendered nugatory. The jurisdiction to ensure that the court do not act in vain is preserved by law and in equity and like any other interlocutory application, may be made first to the lower court and if refused, the appellant may make the application to the appeal court. It is interlocutory because there is a pending appeal, and the order is conditioned upon the life of the appeal<sup>23</sup>. The Court of Appeal in England aptly summarised all the authorities and stated thus, "...the effect of the principle is that the court of first instance has jurisdiction to make an order preserving the subject - matter of the action in the appeal, even though the action has wholly failed, such a principle plainly seems to be consonant with the undoubted jurisdiction of a judge who has made an order to grant a stay of execution of that order pending an appeal, a jurisdiction which is the subject of the rule".

The power to grant order for stay of execution or injunction pending appeal is therefore inherent in the courts, and the jurisdiction to grant the order is unquestionable. The Courts in Nigeria, has also in many cases that will be discussed below, approved and adopted the position in England.

Idigbe JSC in the case of *Sodeinde v. Registered Trustees of Ahmadiya Movement –in-Islam*<sup>24</sup> explained the position,

"...the court, pending an appeal ... suspends what it has declared to be the right of one of the litigant parties.... On this ground, that where there is an appeal about to be prosecuted the litigation is to be considered as not at an end, and that being so, if there is a reasonable ground of appeal and if not, making the order to stay the execution of the decree to the distribution of the fund would make the appeal nugatory, then it is the duty of the court to interfere and suspend the

<sup>23</sup> *Re St Naziare Co* (1879) 12 Ch.D. 88, *Flower v Lloyd* (1877) 6 Ch.D. 297, , *Otto v Lindford* (1881) 18 Ch. D 394

<sup>24</sup> (1980) 1-2 SC 163 at 170



right of the party who, so far as litigation has gone, has established his right”.

The learned Justice of the Supreme Court rightly concluded that the Judge of the High Court (and this also extends to the Court of Appeal where there is an appeal against the judgment of the Court of Appeal) does not lose its jurisdiction to entertain applications for stay of execution or injunction pending appeal over its judgment or order because the court has dismissed the claim before it “absolutely” (i.e. without reservation) and is of no consequence,

- (1) that the applicant in the circumstance is the plaintiff who lost his claim or
- (2) that his application is couched in the form of request for an order of injunction and
- (3) the order or judgment has been drawn up or enrolled<sup>25</sup>.

### 3. The Rules of Court

It is important we look at the relevant aspects of the Rules of court to determine if the rules support the grant of the order for injunction pending appeal.

#### *i. The High Court of Lagos State Civil Procedure Rules 2012.*

The High Court of Lagos State Civil Procedure Rule 2012 makes provision for injunction and for preservation of the subject matter of the proceedings. In Order 38 Rule 3, the judge may upon the application of any party make any order for the sale by any person or persons named in such order for the sale of any perishable goods or wares or warehouse which is likely to be damaged or destroyed and which is desirable to sell at once<sup>26</sup>. This rule empowers the court to preserve the *res* by ordering a sale of perishable goods which may be sold at once but the order is only useful during the pendency of the suit and not after judgment has been

<sup>25</sup> *Idigbe JSC in Sodeinde v The Reg. Trustees of Ahmadiya-in -Islam (1980) 1-2 SC 163 at 170*, This was the position taken by Cotton LJ. in *Polani v Gray (1879) 12 Ch.D 438 at 447* which Idigbe JSC cited with approval.

<sup>26</sup> Order 38 rule 3 High Court of Lagos State Civil Procedure Rules 2012 (hereinafter called Lagos Rules)



delivered.<sup>27</sup> However, where the unsuccessful party has applied for stay of execution pending appeal<sup>28</sup>, the successful party may apply under this rule to protect the *res*<sup>29</sup>. This order will not be appropriate and is not the authority for a trial court to grant an order for injunction pending appeal.

The other relevant rule is Order 38 Rule 8. Rule 8 provides as follows,

In any action or matter in which an injunction has been or might have been claimed the claimant may before or after judgment, apply for an injunction to restrain the defendant or respondent from the repetition or continuance of the wrongful act or breach of contract complained of or from the commission of any injury relating to the same property or right or arising out of the same contract and the judge may grant the injunction either upon or without terms as may be just<sup>30</sup>.

Under this Rule of Court<sup>31</sup>, the Court is empowered to grant injunction during trial or after judgment has been delivered by the court to restrain the repetition of a wrongful act. The injunction may be applied for by the claimant only and the rule does not accommodate an application by the defendant. The injunction that may be ordered will include, to restrain (1 ) the repetition or continuance of a wrongful act, (2) breach of contract complained of (3) commission of any injury relating to the same property (4) right arising out of the same contract. This rule will therefore not permit the defendant from applying to court to restrain the claimant from proceeding on an act that is already on appeal before the court of appeal. Secondly, the Court is not competent under this rule to stay execution of the judgment of the court. There is no reference in the rule to a pending appeal, therefore, the court will lack jurisdiction to grant order for injunction pending appeal under the rule. Order 38 Rule 8 may

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<sup>27</sup> The Order must be upon application of any of the parties.

<sup>28</sup> After judgement has been delivered.

<sup>29</sup> See generally Order38 of the Lagos Rules.

<sup>30</sup> Order 38 r 8 Lagos Rules

<sup>31</sup> Order 38 r 8 Lagos Rules



permit the court in granting injunction where it has been claimed in the writ of Summons but in an application for injunction pending appeal, the claim could not have been made in the writ, and so makes the order inapplicable.

We must note that the nature of the order for injunction pending appeal is not akin to “injunction” but in fact is a judicial order for stay of execution of the judgment of court. The relevant Order in the Lagos Rules dealing with stay of execution is Order 54 of the Lagos Rules. Order 54 Rule 1 provides as follows:

Where any application is made to a judge for a stay of execution or of proceedings under any judgment or decision appealed from such application shall be made by notice of motion supported by affidavit setting forth the grounds upon which a stay of execution or of proceedings is sought.

Under this rule, either party may bring an application for the order of stay of execution of the judgment of the court. The court is empowered under this rule to stay the execution of its judgment pending appeal. There is no distinction between whether the judgment is declaratory or executory. Where it is executory, there is no problem of interpretation, but where it is declaratory can we by stretch of interpretation apply this rule for order of injunction pending appeal.? Execution simply means the process whereby a judgment or order of a court of law is enforced or given effect to according to law<sup>32</sup>. Execution is regulated by the Sheriffs and Civil Process Act<sup>33</sup> which deals with the process of execution of judgements that are recognized under the law. Execution and manner of levying execution will depend on the type of judgment of the court.

Where (1) A judgment/order for payment of money may be enforced by a Writ of fieri facias<sup>34</sup>, garnishee proceedings,<sup>35</sup> writ of sequestration<sup>36</sup> or an order of committal on a judgment debtor’s summons.<sup>37</sup>

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<sup>32</sup> Per Nnameka-Agu JSC in *Government of Gongola State v Tukur Government of Gongola State v Turkur* (1989) All N.L.R. 647 at p. 653

<sup>33</sup> Cap S6 LFN 2004

<sup>34</sup> Section 21 Sheriffs and Civil Process Act



2) A judgment for possession of land may be enforced by a writ of possession<sup>38</sup>, a writ of sequestration<sup>39</sup> or a committal order<sup>40</sup>

3) A judgment for delivery of goods may be enforced by a writ of specific delivery<sup>41</sup> or restitution of their value,<sup>42</sup> a writ of sequestration<sup>43</sup> or a writ of committal<sup>44</sup>

4) A judgment ordering or restraining the doing of an act may be enforced by an order of committal or a writ of sequestration against the property of the disobedient person<sup>45</sup>.

There may also be some terms of equitable execution by means of appointment of receiver,<sup>46</sup> apart from the specified means of execution as highlighted above and regulated by the Sheriff and Civil Process Act, there are no other means of execution. It follows that where it is not possible to apply any of the processes for execution in the Act<sup>47</sup>, Nnaemeka-Agu JSC declared that “where none of the above processes can be applied, there can be no stay of execution”<sup>48</sup>.

By the nature of the declaratory judgement, there is nothing to execute and nothing to stay, only the party is restrained from effecting the terms of the judgment. The Order 54 is therefore not appropriate for the order of injunction pending appeal. We therefore submit that there is no relevant rule or order in the Lagos Rules under which the order of injunction pending appeal may be based.

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<sup>35</sup> Section 86 Sheriffs and Civil Process Act

<sup>36</sup> Section 82 Sheriffs and Civil Process Act

<sup>37</sup> Section 65 Sheriffs and Civil Process Act

<sup>38</sup> Section 35 Sheriffs and Civil Process Act

<sup>39</sup> 82 Sheriffs and Civil Process Act

<sup>40</sup> Section 65 Sheriffs and Civil Process Act

<sup>41</sup> Section 52 Sheriffs and Civil Process Act

<sup>42</sup> Section 72 Sheriffs and Civil process Act

<sup>43</sup> Section 82 Sheriffs and Civil Process Act

<sup>44</sup> Section 65 Sheriffs and Civil Process Act

<sup>45</sup> See Section 66 Sheriffs and Civil Process Act generally

<sup>46</sup> Order 38 rule 10 Lagos Rules

<sup>47</sup> Sheriffs and Civil Process Act

<sup>48</sup> Nnameeka-Agu JSC in *Governemnt Gongola State v Tukur* (1989) All N.L.R. 647 at page 660



ii. *Federal High Court Rules*

The Federal High Court (Civil Procedure) Rules 2009 made copious provisions on interlocutory injunctions and interim preservation of property, almost in *pari materia* with the provisions of the Lagos Rules<sup>49</sup>. Order 28 Rule 1 of the Federal High Court (Civil Procedure) Rules 2009 (hereinafter called Federal High Court Rules) simply provides,

An application for the grant of an injunction may be made by a party to an action before, during or after the trial of the action, whether or not a claim for injunction was included in that party's action.

This is also reinforced by Section 13 of the Federal High Court Act<sup>50</sup> which also gives the court power to grant injunction in appropriate cases. Order 28 Rule 4 also makes provision for sale of perishable property in order to preserve the *res*, subject matter of the claims before the court.

The same argument applies here too. The injunction restraining a party from doing an act is quite different from injunction pending appeal. The injunction pending appeal is basically in the form of stay of execution of a declaratory order of court. There is no property to preserve, it is to protect an intangible right from being violated pending the determination of the appeal. We therefore submit that the rules of the Federal High Court do not support the grant of the order of injunction pending appeal. Order 32 makes provisions for stay of proceedings or staying of execution pending appeal which is also in *pari materia* with the Order 54 of the Lagos Rules. The same arguments will apply here also. Clearly, the courts have operated under these provisions to assume jurisdiction in matters in claims for injunction pending appeal. In the case of *Econet Wireless Limited v Econet Wireless Nigeria Limited*, Shuaibu J. entertained an application based on Order 26 Rules 1 and 2, Order 28 Rule 1(1), Order 32 Rules 1,2, and 4 of the Federal High Court Rules for injunction pending appeal, without first examining the provisions of the Rules to determine whether he has jurisdiction or

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<sup>49</sup> Order 38 of the Lagos Rules

<sup>50</sup> Chapter 134 LFN 2004



power to grant the order, the learned Judge proceeded to discuss the main issues and conditions for the grant of the order and the court refused the application<sup>51</sup>.

Here, it is not in dispute that the court has inherent jurisdiction under Section 6 of the Constitution to exercise judicial powers, and the power to preserve the *res* from being destroyed but the particular type of *res* and the order is not taken care of under the Rules.

#### 4. Conceptual Basis of the Order

The party who had lost in the lower court, and who had exercised his constitutional powers to appeal may apply for order for stay of execution of the judgment where the judgment is the type that may be executed. Where the order cannot be executed, the only recourse is for the party to apply for an injunction pending appeal. It is not only in his interest to ensure that the *status quo* be maintained but also that the *res* be not tampered with; since there is no judgment to execute, there can be no stay of execution. In the leading case of Chief Yeshua Popoola Oyeshile Shodeinde & Others v. Registered Trustees of the Ahmadiya Movement- in -Islam<sup>52</sup> a Plaintiff whose action has been dismissed and who had appealed was granted an injunction to restrain the successful defendant from acting under the judgment until the determination of the appeal.<sup>53</sup>

In the case of *Makinde v Akinwale*<sup>54</sup> the plaintiffs claim for declaration of the title to a piece of land, damages for trespass thereon and injunction against defendants were all dismissed by the Court of Appeal. They further appealed to the Supreme Court and applied for a stay of execution of judgment of the Court of Appeal pending the determination of the appeal before the Supreme Court. It was held that the application for stay of execution was misconceived for as the Supreme Court explained, the order dismissing the plaintiff's claim did not require the defendants to cause any execution to be carried out, the order not being

<sup>51</sup> Suit No. FHC/KD/CS/39/2008 Ruling dated 7<sup>th</sup> May 2012, Federal High Court, Kaduna Division, Ruling dated 7<sup>th</sup> May 2012, .

<sup>52</sup> (1980) 1-2SC 163

<sup>53</sup> See also *Okafor v Attorney-General Anambra State* (1988) 2NWLR 736.

<sup>54</sup> (1995) 6 SCNJ 65



executory. There was therefore nothing for which a stay of execution could be ordered. The Court however recognised the need for preservation of the *res* in the case and stated that the appellants' remedy for that was not an order for stay of execution. The proper order as explained by the court "was an injunction or an order that the status quo be maintained in the matter pending the final determination of the appeal".

In the case of *Yaro v Arewa Construction Ltd*<sup>55</sup> it was held by the Supreme Court that, for the purpose of maintaining the status quo and preserving the *res* pending the determination of the appeal by the plaintiff following the dismissal of his entire case, that stay of execution is not the appropriate remedy. The plaintiff had applied for stay of execution of the judgment dismissing all his claims.

Undoubtedly, the need for the preservation of the *res* and the maintenance of the status quo is paramount and with the view of ensuring that the appeal is not rendered nugatory<sup>56</sup>. The point is that while the court may grant an order to maintain the status quo, the plaintiff whose claims were dismissed may require more than maintenance of status quo, but to also ensure that the substratum of the appeal is not destroyed by the defendants who may naturally continue the act to the detriment of the plaintiff<sup>57</sup>. In the case of *Okafor v Attorney-General Anambra State*<sup>58</sup> the plaintiffs' claims were dismissed following an objection raised by the defendants. The plaintiffs appealed to the Court of Appeal and also applied to the trial judge for a stay of execution of the judgment pending the determination of the appeal. The trial judge refused the application on the grounds that he merely dismissed the action and did not make any order which could be stayed. In the appeal against the refusal, the Court of Appeal granted the application, and declared null and void the act done by some of the defendants which in effect, destroyed the substratum of the dispute while the appeal in the substantive suit and the application for stay, which to their knowledge were pending before the Court of Appeal. The court cannot be constrained that the judgment being sought to be stayed is not

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<sup>55</sup> (1998) 6SCNJI

<sup>56</sup> *Polini v Inag* (1979) 12 Ch.D. 438

<sup>57</sup> *Ike v Uigboaja* (1989) 2 NWLR (PtCo3) 332

<sup>58</sup> (1988) 2 NWLR 736



executory but declaratory, or the fact that the plaintiffs' claims was dismissed does not hinder the court from granting an order of injunction pending appeal.

## 5. Conditions for grant

The grant of the order for injunction pending Appeal is not as a matter of course, though a discretionary remedy<sup>59</sup> which must be exercised both judiciously and judicially<sup>60</sup>. The court in exercising its discretion must consider the balance of the competing interests and rights of the parties and justice of the case. The effect of the order is to deprive the successful party the profits of his judgment, a practice which the courts are reluctant to do<sup>61</sup>. There must therefore, in order to succeed in an application for injunction pending appeal, be a cogent, substantial and compelling reasons to warrant the deprivation of the victory of the successful party. The facts must be disclosed in the affidavit in support of the application otherwise the application is bound to fail<sup>62</sup>

The Supreme Court in several cases have ruled that the conditions for the grant of injunction pending appeal is the same as the conditions that must be satisfied in an application for Stay of Execution<sup>63</sup>. The Supreme Court in the case of *Ike v Ugbojia*<sup>64</sup> seemed to confuse the issues between interlocutory injunction and injunction pending appeal when the court observed inter alia:

*The plaintiff whose action has been dismissed by the lower court can still apply to that lower court against whose judgment he has lodged an appeal for an injunction pending appeal where an applicant seeks an interim injunction to protect a condemned right, he must show by*

<sup>59</sup> *Vas wani Trading Company v Savalak & Co* (1972) 12 SC. 77

<sup>60</sup> *Mobil Oil (Nig) Ltd. v Agadowagbo* (1988) 12 NWLR (Pt 77) 383, *Marina v Niconnar Food Co. Ltd.* (1988) 2 NWLR (Pt 74) 75, *Balogun v Balogun* (1969) 1 All NLR 349, *Olunloyo v Adeniran* (2001) 14 NWLR (pt 734) 699, *Okafor v Nnaife* (1987) (1987) 4 NWLR (pt. 64) 129

<sup>61</sup> *Okafor v Nnaife*

<sup>62</sup> *Onzulobe v Commissioner for Special Duties Anambra State* (1990) 7 NWLR (pt 161) 252.

<sup>63</sup> *The Shell Petroleum Development Company of Nigeria Limited v Ojiowolor Amadi & co.* (2011) LPELR-SC 150/2010.

<sup>64</sup> (1989) 2 NWLR (Pt 103) 332



*evidence that the right he seeks to protect is in existence. The application for injunction pending appeal is normally considered on the basic principles for interlocutory injunction in a pending substantive suit.*  
(italics mine)

The Supreme Court therefore missed the point by applying the same requirements for interlocutory injunction and injunction pending appeal. However, the same position was taken by the Court of Appeal in the case of *Onzuloke v Commissioner for Special Duties Anambra State*<sup>65</sup>, where the court said that an order for stay of execution or injunction pending appeal amounts to the same end and that there are some similar and vital conditions to be satisfied before granting the order. These are:

- a) There must be special circumstances
- b) The grounds of Appeal must be somewhat on a novel point
- c) The grounds of Appeal must raise substantial legal issues to be determined.
- d) It is right to put the matter in status quo or preserve *the res* if the Appeal is to have any meaning.

The courts however, have not stated the correct conditions for the grant of the order for injunction pending appeal; just as in a stay of execution, a plaintiff who was unsuccessful in a lower court can apply for an injunction to protect his right arising from reliefs sought by him in the lower court, pending the determination of an appeal lodged. In a proper case, a court from which appeal lies has a duty to preserve *the res* in order to ensure that the appeal, if successful is not rendered nugatory and does not make the entire efforts of the appellant and the court end in ruin.

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<sup>65</sup> (1990) 7 NWLR (Pt 161) 252



In another case the Court of Appeal wrongly also, stated and applied the requirements for the grant of interlocutory injunction. In *Soyanwo v Akinyemi*<sup>66</sup>, after restating the principles for stay of execution, the court went further to outline separate principles for the grant of injunction pending appeal as:

- a) The presence of a legal right
- b) Where there is triable issue
- c) Whether the balance of convenience is in favour of the applicant
- d) Whether the applicant's conduct is not reprehensive, such as undue delay in bringing the application
- e) Whether damages would be adequate compensation
- f) In land matters, whether the property in respect of which injunction is sought can be identified or ascertained.
- g) Whether there is undertaking as to damages<sup>67</sup>

It is submitted here that the courts are in error in confusing the requirements for an interlocutory injunction with that of injunction pending appeal.

The Supreme Court in the case of the *Shell Petroleum Development Company of Nigerian Ltd v Amadi and co.*<sup>68</sup> correctly stated the position of the law when the court observed as follows:<sup>69</sup>

I must point out here that the principles guiding an application for stay of execution and injunction pending appeal are the same. Both are subject to the discretion of the court; and in

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<sup>66</sup> (2002) All Floor (Pt 104) 592

<sup>67</sup> See cases where the requirements for grant of interlocutory injunction are I stated and fallowed such as *Obande Obeya Memorial Specialist Hospital v Attorney General of Benue State* (1987) 2 NSCC 961, *Alowonle v Bello* (1972) AllWLR 45, *Central Bank of Nigeria v Ahmed* (2001) S.S.C. (Pt II) 146, *Sotuminu v Ocean Steamship (Nig) Ltd.* (1992) 5 NWLR (Pt. 239)

<sup>68</sup> (2011) LP ELR – Sc 150/2010

<sup>69</sup> Per Bode Rhodes – Vivor JSC delivered the Lead Ruling.



exercising its discretion the court is enjoined to consider the same conditions in granting or reducing the application....

The court thereafter listed the conditions and the principles upon which the court will exercise its discretion as follows:-

- 1) The grounds of appeal must raise substantial legal issues in an area of law that is novel or recondite
- 2) The application must disclose special circumstances why the judgment should be stayed
- 3) The application must disclose why matters should be put in status quo or preserve the res so as not to render the appeal nugatory.

The Court of Appeal in the case of *Msadinee v INEC*<sup>70</sup> in an application for an injunction pending the appeal, in allowing the application the Court of Appeal<sup>71</sup> held that,

Similar principles are applicable in an application for stay of execution pending appeal and application for injunction pending appeal. They have the same legal effects (which is) that of a suspension or postponement or preventing the successful party from reaping the fruits of his judgment pending the determination of the appeal

- a) Where the grant of Appeal disclose serious or substantial issues of law for determination
- b) Where the grant of appeal is substantial and arguable
- c) Where there is need to preserve the res so as not to render the decision of the appellate court nugatory
- d) Where it is the interest of justice to make such order, having regard to the facts and circumstances of the case.

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<sup>70</sup> (2010) All FWLR (Rt 547) 745

<sup>71</sup> Per Galadima JCA



The principles listed by Bode Rhodes –Vivor JSC<sup>72</sup> is the same and agrees with the position taken by Oputa JSC and the principles laid down in *Vaswani Trading Company v Savalakh Company*<sup>73</sup>. The principles will now be discussed.

**(a) Substantial Legal Issues**

The applicant must be able to eloquently demonstrate that he has substantial legal issues to argue in the appeal. The legal points must be recondite or serious enough as to display convincingly that the points of law may tilt the balance of justice in his favour. The court must not however sit on appeal to consider the merits of the appeal at this stage or to invite the applicant to address the court on the probability of the appeal succeeding, or to determine whether the appeal will succeed or not. In the words of Rhodes-Vivor JSC.

It is not the duty of the court at this stage to consider whether the appeal will succeed or not. It is sufficient if the ground raises a point of law on the face of it. The requirement that the ground of appeal must raise a point of law that is recondite does not depend on the importance or seriousness of the ground of appeal taken in isolation, rather it relates to what the effect of a refusal of stay of execution on the appellant if the appeal succeeds<sup>74</sup>

Nnaemeka-Agu JSC also pointed out that, “The recondity of a point of law with reference to an application for a stay of execution is not determined in the abstract by reference to the importance or difficulty of the point raised in the ground of appeal. Rather, it is determined in concrete terms by reference to what the effect of a refusal to stay of execution may be on the rights of the applicant, if successful in the appeal...”<sup>75</sup>

The court will therefore not consider the points of law in the grounds of appeal in isolation; the court must also weigh the justice of the case and the effect of the refusal on the applicant if the appeal succeeds.<sup>76</sup> The court must take a liberal view of this principle as a strict

<sup>72</sup> *Shell Petroleum Development Company of Nigerian Ltd v Amadi and co.*

<sup>73</sup> In *Okafor v Nnaife* note 50

<sup>74</sup> (1972) RSC 77

<sup>75</sup> *Shell Petroleum Development Company of Nigerian Ltd v Amadi and co.*

<sup>76</sup> *Ajomali v Yadaut (No. 2)* (1991) 5 NWLR (pt 191) 266 of 291.



look of the grounds of appeal to determine its 'fecundity' or its 'importance' or 'difficulty' will amount to trying to determine the success of the case before it is heard and thereby deprive the court the essence of the whole application.<sup>77</sup>

**(b) Special Circumstances**

The application must disclose special circumstances why the judgment should be stayed. Belgore JSC has pointed out that special circumstance is very wide and its category is not closed<sup>78</sup> Oputa JSC quoting Coker JSC<sup>79</sup> in *Okafor v Nnaife*<sup>80</sup>, that such special circumstances will involve,

A consideration of some collateral circumstances and perhaps in some cases inherent matters which may, unless the order for stay is granted, destroy the subject matter of the proceedings or foist upon the court, especially the Court of Appeal, a situation of complete helplessness or render nugatory any order or orders of the Court of Appeal or paralyse, in one way or the other, the exercise by the litigant of his constitutional right of appeal or generally provide a situation in which whatever happens to the case, and in particular even if the appellant succeeds in the Court of Appeal, there could be no return to the status quo.

The special circumstances, or exceptional circumstances as the courts have interpreted will mean when execution would:

- (a) Destroy the subject matter of the proceedings
- (b) Render nugatory any order of the Appeal Court
- (c) Penalise in one way or the other the exercise or by the litigant of his constitutional right of appeal

<sup>77</sup> See the judgment of Muntaka – Coomasie JSC in the Shell case (supra) p. 57-58.

<sup>78</sup> *Onuzulike v Commission for Special Duties Anambra State & Ors* (1990) 7 NWLR (Pt 161) 252 at 259 per Uwaifo JCA (as he then was), *Alobu v Oduntan* (1991) 2 NWLR (Pt 171), *Nwosu v Nuajimka* (1977) 12 NWLR (Pt 531) 100, *Nduba (Nigeria). Ltd v UBN Plc* (2007) 7 NWLR (pt 1040) 439.

<sup>79</sup> *Odebiji v Odedeyi* (2000) 2 S.C. 93 at 94.

<sup>80</sup> In *Vaswani Trading Company v Savalakh and Company* (1972) 12 S.C. 77 at 82.



(d) Provide a situation in which even if the appellant succeeds in his appeal, there could be no return to status quo<sup>81</sup>

The circumstances that will translate into special circumstance is not closed and not restricted to the above. In the case of *Okafor v Nnaife*<sup>82</sup> Oputa JSC<sup>83</sup> also added the fact that where the refusal of the order would deprive the appellant of the means of prosecuting the appeal<sup>84</sup>.

From the foregoing, special circumstances is not extra-ordinary, difficult or unattainable issues upon which the court may hide to refuse an application. The circumstance and extent should not be closed but must be expanded in each case to meet the justice of the case and protect the *res*<sup>85</sup>. The special circumstance that must be shown by the applicant is actually linked to the justice of the case and ensuring “that the balance of justice is obviously weighted in favour of a stay”.<sup>86</sup>

The applicant must also show any peculiar features which will influence the court to grant or refuse the application for injunction pending appeal. He must also demonstrate that damages will not be an adequate compensation in lieu of the order<sup>87</sup> and whether the *res* will be irretrievably destroyed<sup>88</sup> if the order is not granted.<sup>89</sup> We submit that this is a matter for the court’s discretion and as the circumstances that make up ‘special’ circumstances, and being a discretionary remedy, the court has laid down the general rule as a guiding principle in this matter that the Court ‘does not make it a practice to lay down rules or principles to fetter the exercise of its discretion, no one case is authority for the other. A court cannot be bound by a

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<sup>81</sup> (1987) All N.L.R. 517 at 524

<sup>82</sup> *Olunloyo v Adeniran* (2001) 14 NWLR (Pt ) pp. 22-23

<sup>83</sup> supra

<sup>84</sup> *Okafor v Nnaife* (supra) page 524

<sup>85</sup> *Emmerson v Coope & Co* (1885) 5S.L.J. Ch. 905,

<sup>86</sup> *Coker v UBA Plc* (1997) 2NWLR (Pt 846) p. 226 at 232.

<sup>87</sup> Per Oputa JSC in *Okafor v Nnaife* note 50 at page 525

<sup>88</sup> Injunction Pending Appeal

<sup>89</sup> *Chief (Dr.) Pere Ajuwa v The Shell Petroleum Development Company of Nigeria Limited* (2011) 12 S.C. 118



previous decision to exercise its discretion in regimented way, because that would be as it were putting an end to discretion”<sup>90</sup>

Discretion has been defined to mean ‘a power or right’ conferred upon public functionaries by law of acting officially in certain circumstances according to the dictates of their own judgment and conscience.<sup>91</sup> The most important consideration is that the courts must exercise their discretion judicially and judiciously<sup>92</sup>. The courts in exercising its discretion will also consider that the winning party is entitled to the fruits of his judgment until further appeal sets aside the earlier decision. The court should also consider the fact that the applicant has a legally enforceable right to protect and that he has complied with all necessary procedural formalities, and the application is supported by important materials properly placed before the court to persuade it to exercise its discretion in favour of the applicant<sup>93</sup>. Also, important is the conduct of the parties, whether the applicant has acted timeously or he has come before the court with clean hands<sup>94</sup>

## CONCLUSION

Since the decision of the Supreme Court in *Shodeinde v Ahmadiya Islamic Movement-in-Islam* the Nigerian courts have clearly shown that they have jurisdiction to ensure that the res is preserved and that the judgment of the appeal court will not be rendered nugatory. The inherent jurisdiction of the court is to be exercised judicially and judiciously, based on the established principles. Being a discretionary remedy, it must be exercised with a singular aim of achieving justice between the parties. The initial misunderstanding and complexity in the grant of order of injunction pending appeal is now resolved, as there need not be anything to execute but the intangible rights of the parties that must be sustained and protected as not to render

<sup>90</sup> *UBN Ltd v Odusote Bookstores Ltd.* (1994) 3 NWLR (Pt 331) 129.

<sup>91</sup> Per Fabiyi JSC in *Ajuwa v S.P.D.C.* (2011) 12 S.C. (Pt. IV) 118 at 155.

<sup>92</sup> *State v Whitman* R. 11, 431 A 2d1229, 1233; Blacks Law Dictionary, 6<sup>th</sup> ed, 466.

<sup>93</sup> *University of Lagos v Olaniyan* (1985) 16 NSCC (Pt 1) 98 at 113.

<sup>94</sup> *Kabba Multipurpose Cooperative Union Ltd. v Irewole Multipurpose Union Ltd* (2009) All FWLR (Pt. 493) 1378.



the entire exercise of appeal a futile and useless exercise<sup>95</sup>. The court must liberalise the principles guiding the grant of order of injunction pending appeal to protect the *res* and ensure that justice is done in all matters before the court.

The law is that the same principles applicable to the grant of stay of execution are also utilised in the consideration of the order of injunction pending appeal. We submit, that in so far as the stay of execution involves tangible property rights, the injunction pending appeal is in most cases merely intangible rights being protected, the principles or the application thereof must be more relaxed and the issue of justice and the effect of refusal on the applicant must weigh more on the mind of the court than looking for exceptional circumstances which may not be easily proved due to the intangible rights involved. The use of the word 'injunction' pending appeal has also been confusing to the extent that some courts have applied principles laid down for the grant of interlocutory injunction and thereby came to an unjust decision; we suggest that such application should be called "Stay Pending Appeal" and not injunction pending appeal. This will in fact reveal a more appropriate description of the purport of the application. The change will clear the ambiguity and give a proper focus and direction to the exercise of the power. We also recommend that the rules of the High Courts be amended to accommodate the order for injunction pending appeal as a separate power and the required principles that the court may adopt without necessarily inhibiting the exercise of the court's discretion.

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<sup>95</sup> *Tov v Bello* (2009) All FWLR (Pt 493) p. 1378 at 1381