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BALANCING THE CONCEPT OF FAIR HEARING AND *EX PARTE* INJUNCTIONS UNDER THE NIGERIAN LEGAL SYSTEM: AN IMPERATIVE

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ABSTRACT

The attainment of the onerous task of even balance between fair hearing and *ex parte* injunctions to achieve substantial justice should remain the threshold of any judicial trial. The article examined the right to a fair hearing as one of the attributes of the common law. The Nigerian Constitution equally guarantees the right to fair hearing. The African Charter on Human and People's Right guarantees the right to have one's cause to be heard. So also the European Convention on Human Rights and the Universal Declarations of Human Rights. The principle of natural justice been subsumed in the right of fair hearing under the common law whilst ex- parte injunctions seem to negate the very essence of fair hearing been a deviation from the right to be heard. The article used secondary data drawn from case laws, legislation, conventions and other relevant internet materials to argue that real urgency should not be the only precondition for taking the application made *ex parte* and postulated further that although fair hearing is sacrosanct, it should not be treated as justice in itself but at best, a means to the attainment of justice. The article observed that substantial justice cannot be attained if the seeming correct assessment of the current position of the law sought to restrict the protection of the concept of fair hearing, to only rights that are procedural. The article concluded by reiterating the need to balance the age-long concept of a fair hearing and *ex parte* injunctions for the overall attainment of justice, which remains the threshold of any reliable judicial justice system.

Keywords: Substantial Justice, *Ex parte* Injunctions, Procedural Process, Fair hearing, Bias.

1. INTRODUCTION

The right to fair hearing as is generally regarded in law is a twin concept of another right against bias and interest. The twin set of rights, are encapsulated in a generic doctrine of natural justice. Justice and fair hearing are *sui generis.* They are so interwoven that one cannot exist without the other as one of the jurisprudential pillars of justice, without which justice remains one of such far off utopian dreams ravaged only in legal fictions. It is therefore a fundamental requirement of justice that when a person's interest is going to be affected by a judicial or administrative decision he or she ought to have the opportunity both to know and to understand any allegations made and, to make representations to the decision maker to meet the allegations.

Fair hearing is not only a common law right, but also a constitutional right under the Nigerian law, equally guaranteed under the African Charter on Human and Peoples Rights, the European Convention on People's Rights and the United Nations Convention on People's Rights. The true test of fair hearing is the impression of a reasonable man who was present at the trial, whether from his observation justice had been done in the matter. However, the reasonable man should be a person who keeps his mind and reasoning within the bounds of reason and not necessarily, extreme. In this wise, if in his view the principles of fair hearing were not violated, then the proceedings will not be a vitiated. It becomes fundamental that justice should not only be done but should manifestly and undoubtedly be seen to be done.

The principle of fair hearing entrenched in the Nigerian Constitution as a fundamental right is often illustrated by the twin pillars of justice: *Nemo Judex in Causa Sua* and *Audi Altrem Partem.* Fair hearing is synonymous but not coterminous with natural justice. Hearing of parties to a dispute need not be oral as it could be made in a written format. The important consideration been that fair and equal opportunity be accorded to the parties. It envisages that a party who fails to avail himself of an unimpeded opportunity of being heard cannot turn around to complain of lack of a fair hearing as the law assist the vigilant and not those that sleep, expressed in the Latin maxim; *subveniunt leges, subveniunt jura,succvrrit lex.*

Over the years some principles or features have been developed as vitiating the fundamental right of fair hearing to wit: notice of hearing in which parties will have to present their case before a decision is made, right to know the case of the opposing party, the right to be given an opportunity to present a defence, and that the procedure must ensure fair hearing. There is equally the rule against bias, trial within a reasonable time, trial by a court or tribunal, bodies or persons to whom it applies and that trial be in public. It connotes that every person charged with a criminal offence shall be presumed innocent until proven otherwise by the court. The person shall be entitled to defend himself in person or by a legal practitioner of his own choice. The record of the proceedings must be kept and the accused entitled to a copy of the judgment within seven days of the conclusion of the matter, no retrospective legislation, the vexed issue of double jeopardy that under no circumstance should a person who has been pardoned of a criminal offence or had been previously tried by a court of competent jurisdiction on the same facts or ingredients be tried for the offence again. Likewise, during the trial an accused person shall not be compelled to give evidence at the trial against him.

On the other hand, *ex parte* injunctions or applications sound antithetical to the notion of the concept of fair hearing as it breaches the maxim *audi arteram partem,* an essential element of fair hearing. It connotes a form of order made by the court upon the application of one party to an action without giving notice to the other party, the other party been absent. The *ex parte* injunction is valid until the next motion day by which time notice could have been served on the other party. The party will then have a chance of opposing the plaintiff's application for injunction. The phrase *ex parte* means in itself that the court had not had the opportunity of hearing the other side. In Nigeria *ex parte* injunctions seems to put individual interest above collective national interest and has been prone to abuses culminating in perverting the cause of justice. Understandably therefore a proper use of *ex parte* injunctions is essential for the administration and the attainment of justice, described in legal circles as an extraordinary procedure but sadly, experience has shown that an improper use or abuse of the process can defeat the course of justice which the process was designed to serve. *Ex parte* injunctions though constitutional and within the inherent jurisdiction of the courts as an exception to the *nemo judex* rule should be granted only where if it is not granted it results in irreparable or serious damage. Irreparable damages meaning damage that if it occurs, return to the *status quo* becomes impossible and the suffering party cannot be compensated by an award of damages. *Ex parte* injunctions are not only constitutional but indispensable and unavoidable in the course of procedural steps to achieve justice. So there is the need for balance to achieve substantial justice.

2. UNDERSTANDING THE CONCEPT OF FAIR HEARING

The right to a fair hearing is implicit within the concepts of rule of law and fundamental human rights. Right to fair hearing is the taproot of every trial; without it a trial becomes useless in law.[1] The principle of fair hearing was first introduced into Nigeria in the constitution by virtue of the 1960 Independent Constitution. Section 21 stated that: in the determination of his civil rights and obligations a person shall be entitled to a fair hearing within a reasonable time by a court or other tribunal established by law and constituted in such a manner to secure its independence and impartiality. Section 22 of the1963 Republican Constitution of Nigeria contained the same provision in *pari material* with that of the 1960 constitution. To solidify this position the 1979 constitution contains a similar but expanded provision. Section 33(1) stated that in the determination of his 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 within a reasonable time by a court or other tribunal established by law and constituted in such manner as to secure its independence and impartiality. Section 36(1) of the Constitution of the Federal Republic of Nigeria 1999 protects the rights to a fair hearing as it has a similar provision with the hitherto 1979 constitution.

The section[2] provides for a fair hearing for any person before any competent court or tribunal in civil matters and each party to a dispute must be given a fair hearing within a reasonable time by a court or other tribunal established by law and constituted in such a manner as to secure its independence and impartiality. The provision does not only enjoin the court and tribunal to allow each party to state his own case in court or before a tribunal but to give each party notice of the date of hearing and place of hearing[3].Under criminal proceedings, section 36(4)[4] confers upon an accuse person the right to a fair hearing, whilst subsection (5) to (12) lays down the steps which must be followed. Curiously subsection (4) after stating that fair hearing must be in public and within a reasonable time, curtailed the right of fair hearing by providing that the court or tribunal may exclude from the proceedings persons other than the accused or his legal counsel in the interest of defense, public safety, public order, public morality, the welfare of persons under the age of eighteen years and the protection of the lives of the parties. It equally preserves the existing right of the Government to withhold the disclosure of classified documents or other evidence on the ground that they are privileged.

The zest to the subsections was imprimatur by article 6(1) of the European Convention on Human Rights which provides that in the determination of his civil rights and obligation or any criminal charge against him, everyone is entitled to a fair and public hearing within a

[1] Okpara O. *Human Rights Law and Practice in Nigeria*(Nigeria: Chenglo Ltd, 2005) p.179. In *P.D.P V. K. S.I.E.C* (2005) 15 NWIR (pt 948) at 240, the court held that fair hearing is in most cases synonymous with natural justice an issue which clearly is at the threshold of our legal system. Once there has been a denial of fair hearing,the whole proceedings automatically become vitiated with a basic and fundamental irregularity, which renders them null & void. See also *Ojengbede v Esan* (2001) 18 NWLR (pt.746) 771, *Sokoto State Government v. kamdex Nig ltd* (2004) 9NWLR (pt 878) 345. In *Ansambe v B.O.N Ltd* (2005) 8 N.W.L.R .(pt.928), the court opined that fair hearing does not necessarily mean a hearing involving oral representation . In other words, a hearing is fair if the parties are given the opportunity to state their case in writing. See *Alsthom v Saraki* (2005) M.J.S.C. VOL3 at 128, where the Supreme Court stated that the principle of fair hearing is fundamental to all courts procedure and proceedings and like jurisdiction the absence of it vitiates proceedings however well conducted.

[2] 36(1) of the Constitution of the Federal Republic of Nigeria1999(as Amended,2011)

[3] See *Olumesan v.Ogundipo*(19996)2NWLR(Pt.433)628. See alsoLukman, A.L.*An Anaysis of the Concept of Fairhearing and the Principles of Natural Justice* in Egbewole, E, The Jurist University of Ilorin:Essays in Honour of Hon Justice Faruk A,(Ilorin: Law Students Society,2005) at pp.127-128.

[4] *ibid*, 1999 Constitution of Nigeria.

reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or natural security in a democratic society. In construing Article 6(1) of the European Convention on Human Rights which is similar to section 36(1) of the 1999 Constitution of the Federal Republic of Nigeria, the European Court of Human Rights pointed out that neither the character of the legislation civil, commercial, administrative law *etcetera*, nor the nature of the tribunal ordinary court, administrative body *etcetera*, is important.

According to the court, the emphasis should be on the result-whether the result will be decisive for private rights. The court also held that there is no requirement that every dispute involving civil rights and obligations must be heard at every stage by bodies which meet the criteria of Article 6(1). This is in recognition of the fact that the demand of flexibility and efficiency may justify the use of administrative or professional bodies to deal with cases as a first step. Even if these bodies do not themselves provide the necessary guarantees, there will be no violation of the Convention provided their decisions are subject to review by a judicial body.[5] Civil rights therefore are those plethoras of rights which are enforced between person and person, or person and authority or government by the ordinary courts in a civilized society. Section 36(1) of the 1999 Constitution is intended to apply, but not limited, to all judicial determinations of rights and obligation as it derives its root from article 10 of the Universal Declaration of Human Rights which simply talks of rights and obligations. Also, Article 14(1) of the International Convention on Civil and Political Rights (ICCPR) 1966 provides that all persons shall be equal before the courts or tribunals. In the determination of any criminal charge against him, or his rights and obligations in a suit of law, everyone shall be entitled to a fair and public hearing of a competent, independent and impartial tribunal established by law. The provisions of article 14 apply to all courts and tribunals within the scope of that article whether ordinary or specialized.

The Human Rights Committee of the UN has noted the existence in many countries, of military or special courts which try civilians and is of the view that this could present serious problems as far as the equitable, impartial and independent administration of justice is concerned. Quite often the reason for the establishment of such courts is to enable exceptional procedures to be applied which do not comply with normal standards of justice. While the Covenant does not prohibit such categories of court, nevertheless the conditions which it lays down clearly indicate that the trying of civilians by such courts should be very exceptional and take place under conditions which genuinely afford the full guarantees stipulated in article 14. Paragraph 3 of the article elaborates on the requirements of a fair hearing in regard to the determination of criminal charges. However, it must always be borne in mind that the requirements of paragraph 3 are minimum guarantees, the observance of which is not always sufficient to ensure the fairness of a hearing as required by paragraph 1.[6]

The publicity of hearing is an important safeguard in the interest of the individual and of society at large. To give practical effect to this right the court or tribunal is obliged to make information about the time and venue of the hearing available to the public and to provide adequate facilities (within reason) for attendance by interested members of the public. At the same time, article 14(1), acknowledges that courts, have the power to exclude all or part of the public for reasons spelt out in that paragraph. Moral grounds for the exclusion of the public are usually asserted in cases involving sexual offenders. The term "public order" in this particular context has been interpreted to relate primarily to order within the courtroom while "national security" may be invoked so as to preserve military secrets. The "private lives of the parties"

[5] Ogbu,O,N, Fairhearing and Contracts of Employment: The Discordant Views of Nigerian Courts. *ABU, Journal of Private and Comparative Law* Vol.1,No,1,2006 at pp150-152.

[6] Ladan M.T *Materials and Cases on Public International Law*(Zaria: ABU Press,2007) p347. See also Umozurike,U.O *Introduction to International Law*(Ibadan;Spectrum Books Ltd,20050 p149

refers to family, parental and other relationships such as guardianship that might prejudiced in public proceedings.

It would appear that the linking of some of these reasons to those which ought to obtain in a democratic society is a qualification which seeks to prevent arbitrariness in decisions to hold trials in camera and does not necessarily imply that non-democratic state parties are not held to the same standards. It should be noted that, apart from such exceptional circumstances, a hearing must be open to the public in general, including members of the press, and must not, for instance, be limited only to a particular category of persons. Even in those cases in which the public is legitimately excluded from the trial, the judgment must, with certain strictly defined exceptions, be made public. A court judgment is considered to have been made public either when it is orally pronounced in court or when it is published. The primary consideration in this regard is the accessibility of the judgment.

Another component of the right to a fair trial is the presumption of innocence. By reasons of the presumption of innocence, the burden of proof of the charge is on the prosecution and the accused has the benefit of doubt. No guilt can be presumed until the charges have been proved beyond reasonable doubt. Further, the presumption of innocence implies a right to be treated in accordance with this principle. The presumption of innocence must therefore be maintained not only during the trial stage vis-à-vis the defendant, but also in relation to a suspect or accused throughout the pre-trial phase. In particular, it is the duty of all officials involved in a case as well as all public authorities to refrain from prejudging the outcome of a trial.

Among the minimum guarantees in criminal proceedings prescribed by paragraph 3 of Article 14, the first concerns the right of everyone to be informed in a language which he understands of the charge against him. Article 14(3) (a) applies to all cases of charges, including those of persons not in detention. The right to be informed of the charge "promptly" requires that information is given in a manner described as soon as the charge is first made by a competent authority. This right must arise when in the course of an investigation a court or an authority of the prosecution decides to take procedural steps against a person suspected of a crime or publicly names him as such. The specific requirements of sub-paragraph 3(a) may be met by stating the charge either orally or in writing, provided that the information indicates both the legal description of the offence and the alleged facts on which it is based. Article 14(3) is thus wider than the corresponding rights granted under Article 9(2) applicable to arrest which provides for a long time lag between information on the cause of arrest and information on the legal charge. The rationale at this stage is that the information provided must be sufficient to allow the preparation of a defense.

The point at which information can be deemed to have been promptly provided is subject to various interpretations. In general, however, the information must coincide with the lodging of the charge or directly thereafter, or with the opening of the preliminary judicial investigation in civil law jurisdiction or with the setting of some other hearing that indicates clear official suspicion against a specific person. Sub-paragraph (b) of Article 14 provides that the accused must have adequate time own choosing. What is "adequate time" depends on the circumstances of each case. Factors to be taken into account are the complexity of the case, the defendant's access to evidence, the time limits provided for in domestic law for certain actions in the proceedings and so on. The facilities must include access to documents and other evidence which the accused requires to prepare his case, as well as the opportunity to engage and communicate with counsel. When the accused does not want to defend himself in person or is indigent, he should be able to have recourse to a lawyer provided by the State. Furthermore, this sub-paragraph requires counsel to communicate with the accused in conditions giving full respects for the confidentiality of their commutations. Lawyers should be able to counsel or represent their established professional standards and judgment without any restrictions, influences clients in accordance with their pressures or undue interference from any quarter.

The right to communicate with counsel applies to all stages of the criminal proceedings and is particularly relevant in cases of pre-trial detention. Thus, all arrested detained, or imprisoned persons must be provided with adequate opportunities to be visited by and to communicate with a lawyer without delay, interception or censorship and in full confidentiality throughout the proceedings. Sub-paragraph 38 provides that the accused shall be tried without undue delay. This guarantee relates not only to the time by which a trial should commence, but also the time by which it should end and judgment rendered. All stages must take place "without undue delay. What amounts to undue delay again depends on the circumstances of the case such as its complexity, the conduct of the parties, whether the accused is in detention and so on. Sub-paragraph 3(d) is a conglomerate of the following specific rights:-

a) The right to be tried in one's presence
b) To defend oneself in person
c) To choose one's own counsel
d) To be informed of the right to counsel
e) To receive free legal assistance

Whether or not the interest of justice requires the State to provide legal assistance depends primarily on the seriousness of the offence and the potential maximum punishment, according to prevailing interpretation, the right to counsel applies to all stages of criminal proceedings, including the preliminary investigation and pre-trial detention. The right to defend one means that the accused or his lawyers must have the right to act diligently and fearlessly in pursuing all available defenses and the right to challenge the conduct of the case if they believe it to be unfair.

Both the European Court of Human Rights and the Inter-American Court of Human Rights, ascribe to the fact that that the right to a fair trial is not only restricted to a judicial proceeding but administrative proceedings if the individual right is at stake, the dispute might be determined through a fair process. In *latisco Pet (Nig) Ltd v. UBA Plc*[7], the Court held that although section 36(1) of the Nigerian Constitution gives a party the right to a fair hearing, the constitution only creates an opportunity for the party to be heard before a decision is taken against him. The opportunity does not last for forever as it is enjoyed subject to the rules of court[8] and the dictates of justice. By this decision, the court gave judicial affirmation to the constitutional provision of the inherent powers of the court and the rules of court which permit a deviation from right to meet the demand of justice.[9] The right to a fair hearing is an ancient[7] and a first generation right. No wonder then that justice Oputa succinctly opined that if there is one single right which has been constant, so vigorously agitated in our courts, it is the right to a fair hearing.[9]

[7] (2009) 3NWLR(Pt.1127)22CA No.CA/A/1/M/07

[8] Section 6(6)(a) of the 1999 Constitution (as Amended,2011).

[9] See High Court Civil Procedure Rules of the various States in Nigeria provide for *Ex parte* applications

[7] Some salutary scriptural leverages have been identified to authenticate the immemorial existence of fairhearing; see the book of Genesis chapter 2 verse 15-18, Deuteronomy chapter 18 v. 16 – 17, the book of Acts chapter 25 v. 16 reads that it is not the manner of the Romans to deliver any man to die, before he which is accused have the accuser face to face, and have license to answer for himself concerning the crime laid against him. Nicodemus in John 17 v.15 equally asked; doth our law judge any man before it hears him, and know what he doeth? Suffice to mention John chapter 7 v. 57 where the Holy Book documented the question; But surely our law does not allow us to pass judgment on anyone without first giving him a hearing and discovering what he is doing.

[9] See. Oputa C.A. *Human Rights in the Political and Legal Culture of Nigeria*, 2nd Idigbe Memorial Lectures. Nigerian Law Publications Lagos, 1989, p.99. For a hearing to be fair the person affected must be given the opportunity to be present at the proceeding, to cross- examine or otherwise contradict any witness who testifies against his interest to enable him access to all documents in evidence against him, to disclose to him the nature of all relevant material evidence prejudicial against him within the limits of recognized rule and procedure. The immortal words of Justice kayode Eso, JSC (as he then was) in *Akande v. The State* (1988) 3 NWLR (pt. 85) 681 at 690 become apposite as he opined that fair hearing

Article 10[10] of the Universal Declarations of Human Rights provides that everyone is entitled in full quality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligation and of any criminal charge against him. Folake Solanke (SAN)[10] uttered on fair hearing that at the beginning of the creation of Heaven and earth, both Adam and Eve were present before God to defend them of the charge of having flouted God's instruction not to eat the tree in the mist of the garden under pain of death. In any event, the Adam and Eve story underline the legal requirement that, when a person is accused of a wrong doing or a complaint is laid against them; they must be present to answer their adversary. It is thereby canvassed therefore that concept of *audi alterem partem* has divine approval.

The content and extent of the right of fair hearing are not easily determinable. Nowhere in constitutions, statutes or otherwise is it defined. Such definitions and explanations can only come from court decisions and pronouncements. In *Federal Republic of Nigeria v. Joe Brown Akubueze*[11], the court per Fabiyi, J.S.C. said that fair hearing presupposes a trial done in accordance with rule of natural justice which in the broad sense, is that which is done in circumstances which are fair, equitable and impartial. Thus natural justice should not only be done but should be manifestly and undoubtedly being seen to be done. Fair hearing must include giving to a party or legal practitioner of his choice the opportunity to present his case before an impartial court or other tribunal in an atmosphere free from fear and intimidation. The Supreme Court in *Oyewole v. Akande*[12] defined fair hearing to mean, hearing which is all about fairness, which is the determining factor for the application of natural justice. In *Oni v Fayemi,*[13] the Court of Appeal defined the term to mean the right of a party to correct or contradict the evidence against him or in his favour. Fair hearing is ambidextrous and both

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connotes the fact that the other side must be heard, not that the other side had been heard once and need not again be heard, especially when the decision taken after the hearing was in favour of that party. In *T. O Wilson v. Oshin & ors* (2000) 2 SCNR 215, Karibe Whyte could not hide his zeal for the adherence of fair hearing when he postulated that in the first place not considering one of many contentions of a party in a case cannot itself constitute a denial of fair hearing. A denial of fair hearing connotes a refusal to consider the pertinent and relevant issues in the case essential to its determination. In such a situation, a fair hearing minded objective observer will come to the conclusion that the hearing of the case has not been fair to the person. See also *Dapo Adeyemi v. Oladipo* (2003) FWLR pt. 155 pp.775 at 787, *Akulega v. Benue State Civil Service Commission* (2002) 2 CHR, *Ibrahim Alemona v. Abubakar Bide* (2001) 8 NWLR pt 688,p.186 and *Bassey Essien & ors v. Okon Edet* (2004) NWLR pt 667, p 51 at 557.

[10] See United Nations Charter 1945. Article 7 of the African Charter on Human and Peoples Rights (Ratification and Enforcement) Act Cap 10 Laws of the Federation of Nigeria, 2004 provides in no uncertain terms that every individual have the rights to have his case heard, this comprise; the right to be heard within a reasonable time by an impartial Judge. See Also Article 6 of the European Convention on Human Rights. See also the Magna Carta of 1215 which sates that we will sell to no man, we will not deny or defer to any man either justice or right. In his commentaries from the Bench part 11 ct p.48 Justice Olana ga wrote that the concept of fair hearing which is the foundation and bedrock of the construction of justice had further confirmation by the Romans in the rules of Justice in the twin pillars of (a) *Audi alterem partem* and (b) *Nemo Judex in causa sua*.

[10] Folake S. *Fair Hearing; A Sine Quo Non for the Attainment of Justice*. In Yemi Akinseye (ed). The Pursuant of Justice & Development: Essay in Honour of Hon. Justice Omotayo Onalaja Lagos, 2004 at p. 23 See also Shoyele O. *Fair Hearing; An integral part of Managerial Decision Making Process*. Vol. 3. 1997 UniJos LSJ. P. 103 where he wrote that an interesting dimension to the meaning of fair hearing can be found in Genesis as traced by Fortescue J. an eighteenth century judge, in the celebrated case of R v. Cambridge where he made reference to the biblical incidence in the garden of Eden thatI remember to have heard observed by a learned man upon such an occasion that even God Himself did not pass sentence upon Adam before he was called upon to make his defense 'Adam' says God "where are thou" Hast thou not eaten of the tree that thou should not eat?" And the same question was put to Eve as well.

[11] *http;//easylawonline:worldpress.com*/2010/06/04(Las visited on 27/05/2012).

[12] (2009)15NWLR(Pt.1163)119S.C.Suit 196/2004.

[13] (2008)8NWLR(Pt.1089) 400C.A Suit No..CA/IT/EPT/GOV/1/2007.

limbs often operate with synchronic nimbleness.[14]Gladly, however, certain requirements have been identified as basic to it[15]. In *Ariori v. Elome*,[16] the court held that fair hearing means a trial conducted according to all the legal rules formulated to ensure that justice is done to the parties to the course. Fair hearing implies that the subject matter must be heard by the authority charged with the determination of his rights before any decision is reached for it implies that both sides must be given an opportunity to present their respective causes and each side is entitled to know what case is being made against it and be given an opportunity to reply thereto.[17] In *Mohammed v. Kano Native Authority*[18], Ademola JSC (as he then was) observed that it has been suggested that a fair hearing does not mean a fair trial. We think a fair hearing must involve a fair trial, and a fair trial of a case consists of a whole hearing. We therefore see no difference between the two. The true test of a fair hearing it was suggested by counsel, is the impression of a reasonable person who was present at the trial, whether from his observation, justice had been done in the case.

The case of *Ndukauba v. Kolomo*,[19] adumbrated the fact that fair hearing means nothing less than a trial conducted according to all the legal rules formulated to ensure that justice is done to the parties. In the same case, the court subsumed the ingredients of fair hearing to include the following:

a) A hearing can only be fair when all parties to the dispute are given a hearing or opportunity of a hearing. If one of the parties is refused a hearing or not given an opportunity to be heard, the hearing cannot qualify as hearing.
b) The principle of fair hearing implies that both sides must be given an opportunity to present their respective cases. It also implies that each side is fully entitled to know what case is being made against it and be given the opportunity to respond thereto. Fair hearing also implies some obligations on the tribunal or court hearing the case and fundamentally the court or tribunal should not take or hear evidence in a case or receive a submission or representation from a party at the back of the other.

[14] See Asuzu,c. *Fair Hearing in Nigeria*(Lagos; Mathouse Press Ltd,2009) p.2. See also Malemi E.,*The Nigerian Constitutional Law*(Lagos:Princeton Publishing Co.2006) pp266272.

[15] See Okpara op. cit p.180 see *Ezechukwu v. Onwuka* (Supra) where some guiding principles were enunciated and they are (a) hearing which is fair to all parties to the suit whether the plaintiff, the defendant, the prosecution or the defense (b) Fair hearing is a doctrine of substance and the question is not whether injustice has been done, but whether a party entitled to be heard has been given an opportunity of being heard (c) fair hearing entails doing during the course of trial all that will take an impartial observer to believe that the trial has been balanced and even to both sides. It is not a one sided affair in which one party will be expecting all the good things to fall on his knees/laps while complaining without thought for the other party's rights. Justice is not one sided affair for the court has a duty to hold even balance (a) A party has every opportunity to present his case before the court and if he fails to do so, cannot be heard to complain of breach of his right to fair hearing; (e) fair hearing is speedy trial. See also Olabisi etc (eds) *Rights to Prompt and Speedy Trial in Criminal Proceedings; Myth or. Reality* (2005) ODLSJ , P.71 Oputa C.A The Philosophy of Justice with emphasis on Arbitration, In *Nigeria Law and Practice Journal* Vol. 3 No.1 March 1999, p.82 and Adeyemi A.A. *Rights to Fair and Prompt Trail Under the Law; Administration of Criminal Justice and Human Rights in Nigeria,* Mohammed Tabu ed. P.37. See also Shoyele O. *Principles and Practice of Administrative Law in Nigeria.* (Nigeria, Mono Expression Ltd, 1997) P.20 See Barnttet, *Constitutional and Administrative Law,* 5th Edition (London: Cavendish Publishing Ltd, 2004) P.572

[16] (1983) !. S.C 13 at 24. See *Extractions System and Commodity Service Limited v. Nigbel Merchant Bank Ltd.* (2005) All FWLR pt. 353 at 773, *Governor Ekiti State v, Osayomi* (2005) 2 NWLR pt 909 at 67, Abena v. Ben Obi & 4 ors (2006) 6 NWLR pt 920 at 183 and Idris Rabiu v. State (2005) 2 NWLR pt 221 at 33.

[17] In *Darma v. Oceanic Bank Nig. Ltd* (2005) 4 NWLR pt 915 at 393, Fair hearing was defined as meaning that which authority is fairly expressed that is consistent with the fundamental principles of justice embraced within the conception of due process of law. Contemplated in a fair hearing is the right to present evidence, to cross-examine and to have findings supported by evidence.

[18](1968)1ALL WLR424 at426.

[19] (2005)4NWLR(Pt.915) at 415

c) An important essence of the right of fair hearing is that a party should not be denied not only the opportunity to present his defense to the defense being put up against his case. The rights of fair hearing do not stop parties being present in court. It also includes a right to be heard at any material stage of the proceedings.
d) Fair hearing involves fair trial or vice versa, and in all cases what is required is that from the observation of persons present at any trial or investigation justice must appear to be done in the case.

On the implication of the right to a fair hearing in relation to a plaintiff in a civil case, the court[2] held that fair hearing translates into these:

a) A plaintiff or a party is entitled to a counsel of his choice.
b) A Plaintiff must be afforded the opportunity to call all necessary witnesses in support of his case.
c) A plaintiff by himself or counsel must have the opportunity to cross – examine or otherwise challenge the evidence of witnesses called by his adversary.
d) At the close of the case and in accordance with relevant court rules, a plaintiff must have the same rights as given to his adversary to offer by his counsel the final address of the law in support of his case.

The Nigerian Judicial System attaches great importance to the rule of fair hearing. It follows, therefore, that the effect of a breach of the rule of fair hearing renders the hearing liable to be set aside or declared invalid by the court. The court will treat the situation as if such a hearing never in fact took place. The desire of a court to dispose of as many cases as possible, whilst understandable and expedient, should not be at the expense of the rights to a fair hearing. It is a basic preamble of law that where a person's legal right or obligations are called into question, he should be accorded full opportunity to be heard before any adverse decision is taken against him with regard to such rights and obligations. The twin pillars of natural justice constituting the element of fair hearing is of general application not only in Nigeria but also other common law countries to the extent that a presumption has been evolved that whenever any power is conferred by any statute on any authority or body to make a determination, such a determining power shall be exercised judicially and in accordance with rule of natural justice.

In *D.U. Tamti v. Nigerian Custom Service Board*[20], it was held that the principle or doctrine of fairhearing in its statutory and constitutional sense is derived from the principle of natural justice under the twin pillars namely; *audi alteram partem* and *nemo judex in causa sua. Audi alterem partem or audiator et altera pars* is a Latin phraseology which means it should be heard. *Audiatur* meaning also the other party, to hear *audi,* the other side too or hear the alternative party too. It means hear the other side or the various sides in a dispute before reaching a decision or judgement[21]. It is a principle of fair hearing that no person should be judged without a fair hearing in which each party is given the opportunity to respond to the evidence against them or that no one should be condemned unheard. It is considered a principle of fundamental justice or equity in most legal systems. The principle includes the rights of a party or his lawyers to confront the witnesses against him, to have a fair opportunity to challenge the evidence presented by the other party, to summon one's own witnesses and to present evidence and to have counsel, if necessary at public expense, in order to make one matter.

Over time the question has been whether legislation or case law has brought greater clarity concerning the application of the *audi alterem partem* rule? In *Engr. Asukwo Effiong*

[2] (supra) See also *Tunbi v. Opawole* (2000) 2 NWLR pt. 644 p. 273, *Gukas V Jos International Breweries ltd* (1991) 6 NWLR pt 199 and *Salu v. Egeidon* (1994) 6 NWLR pt 348 p. 23
[20] (2009)7NWLR(Pt.1141)631 at 636. Suit No.CA/A/183/06
[21] Malemi E, *The Nigerian Constitutional Law* (Lagos:Princeton Publishing Co.2010) p.267

Odiong v. Obong Iyamba[22], it was held that the right to be heard or to be given an opportunity of being heard is a constitutional right under section36 (1) of the 1999 constitution of the Federal Republic of Nigeria which is itself predicated upon the rule of natural justice requiring that the other side be heard-*audi alteram partem.* Failure to comply with these sacrosanct and fundamental principles of fair hearing touches on the competence of the court and the proceedings and any decision arrived at while in breach of the right to fair hearing must be set aside. Also, in *Chief Bassey & Ors v. Felix Edet & Ors*[23] the court opined that it is a settled law that one basic requirement of natural justice is that a party should be given an opportunity any case without let or hindrance. The court must hear both sides at every material stage of the proceedings before handing down a decision. It is the rule of fairness and a court cannot be fair unless it considers both sides as may be presented by the parties.

In law a hearing can only be fair when, *interalia,* all the partied to a dispute are given a hearing or an opportunity of hearing. If any of the parties is refused or denied a hearing or is not given an opportunity of being heard, such hearing cannot qualify as a fair hearing under the rule of *audi alteram partem.* The word hearing or opportunity to be heard includes both where oral submissions are made, as well as where written representations are made. A hearing may be by both oral evidence and written representations, or either method alone.[24] A decision reached after a full inquiry without an oral hearing does not violate the principle of fair hearing.[25]Therefore, a decision reached after a full inquiry based on documentary evidence and written does not necessarily amount to a denial of fair hearing provided that, all the parties are treated equally and none of them is given oral hearing. The Supreme Court in *Mobil Producing (Nig) Unltd v. Monokpu*[26] held that it is the duty of every court to entertain and determine all applications brought before it. It is immaterial that the application is downright stupid, unmeritorious or even an abuse of court prowess. A refusal to hear a motion by a court or tribunal is a breach of the right of fair hearing an essence of the *audi alterem rule.* The recent trial of Charles Taylor at the Hague when he was given the opportunity and he so assembled his own team of lawyers for his defense attested to the import attached to the *audi alterem partem rule.*

The other arm of natural justice is *nemo injudex causa sua,* the rule against bias and it is strict. It is not necessary to show that bias exists. The mere appearance or possibilities of bias will suffice[27]. The suspicion of bias must, however, be a reasonable one. Both financial and personal interest in a case may disqualify a person from adjudicating. Whether there is a reasonable suspicion of bias should be looked from the objective standpoint of an aggrieved party. The actual test being the impression of a reasonable person who is present at the trial, whether from his observation justice has been done. But where a reasonable person will get away with the notion that Justice has not been done, thus a likelihood of bias exists. In *P.D.P v. K.S.I.E.C*[28], Justice Ikongben J.C.A, ruled that the court of Appeal has no jurisdiction to entertain an appeal directly from the Local Government Election Tribunal. The ruling was delivered on 15/7/2004 after which the Kwara State Legislature amended the Kwara State Electoral Law conferring jurisdiction to hear appeals from the said Local Government Election tribunal on the State High Court instead of the Court of Appeal.

The appeal from the Local Government Election tribunal was then heard by the High Court of the State and Judgment was delivered. The appeal against the judgment of the High Court came up for hearing at the Court of Appeal on 4/4/05 as Applied No. GA/14/31/04. When

[22] (2011) LPELR-CA/C/112/2009.
[23] (2003) LPELR-CA/C99/98
[24] Malemi op cit at p.272
[25] Queen v. Director of Audit Western Region & Ors(1961)ALL NLR659 at 660.
[26] (2003) 18NWLR(Pt.852) 346.
[27] See *R v. Sussex Justice Ex parte Mc Carty* (1924) p. 259 where it was succinctly put that Justice should not only be done but should manifestly and undoubtedly be seen to be done.
[28] (2005) 15 NWLR pt 918 at 232 –233

the hearing was about to commence Mr. Gafer, counsel for the 1st and 4th respondents raised an objection to the hearing of the appeal by the panel of the Court of Appeal as constituted. He argued that the panel should reconstitute it to exclude Justice A.J Ikongbeh J.C.A. His reason was that the said Ikongbeh JCA had participated in an earlier Appeal No. CA/L/M/14/2004 and had acquired prior knowledge. In dismissing the application, the court held that: "A court should be wary of coming to the conclusion that there is a likelihood of bias on a mere allegation without prima facie evidence. The question of likelihood of bias leading to lack of their hearing cannot be loosely handled. It is meant for both parties. There is no reason for disqualifying a justice of a Court of Appeal for mere saying what is substantially true in law and in fact.

Muntaka – Coomassie J.C.A further added that in this matter I cannot see how a body could say that Justice Ikongbeh, JCA has previous knowledge of the facts of the case. Obviously nobody alleged any pecuniary interest against him, I think it is only gossip and speculation to say that because my learned brother Hon. Justice Ikongbeh wrote a ruling and held that he read the record of the tribunal that without more makes him bias In the same case[29] the court enunciated some grounds that would preclude a judge from hearing a case on grounds of personal interest to wit:

(a.) When he would be seen to be a Judge in his own matter, or

(b.) Having dealt with the same issue and it comes or resurfaces when he is in a Superior Court and is being called upon to decide an appeal against his own decision; or

(c.) Because of some obvious or latent connection of him with either of the parties or all of them it would not be conscionable of him to participate in hearing the case; or

(d.) Generally his being a member of the tribunal would not appear to be in the interest of justice as he will not be seen to do justice

A vague suspicion which is not rested on reasonable grounds would not amount to a real likelihood of bias on the part of the person or judge whose decision a party may want to impugn.[30] Where the judge feels he has a bias against one of the parties to litigation he may disqualify himself from sitting on the case, as did Lord Denning MR in *Ex parte Church Scientology of California*[31]. The Supreme Court hard warned in *Olawole Abiola v. FRN*[32] that: "a judge should not hear a case if he is suspected of partiality because of consanguinity, affinity, friendship or enmity with a party or because of his subordinate status towards a party because, he was or had been a party's advocate. Also natural justice demands, not only that those whose interest may be directly affected by an act or decision should be given prior notice as adequate opportunity to be heard, but also that the tribunal should be disinterested and impartial. The test of bias is not a question of whether the tribunal has arrived at a fair result; the question is whether the fair-minded and informed observer, having considered the facts, would conclude that the tribunal was biased.

[29] (Supra)

[30] See *Ojengbede v. Esan* (2001) 18 NWLR pt 746 p. 771

[31] (1978) There, Counsel for the Church registered that he disqualified himself as a result of eight previous cases involving the church on which he had sat. In R v. Bow Street Metropolitan and Stipendry Magistrate Exparte Pinochet Urgate (1999) Extradition Proceedings against the former Chilean Head of State were challenged on the basis that one of the law Lords, Lord Hottman, had links with Amnesty International, the charitable pressure group which works on political prisoners around the world, which had been allowed to present evidence in court. It was accepted that there was no intend bias on the part of Hottman, but there were concerns that the Public perception might be that a senior judge was biased. As a result, the proceedings were abandoned and re – heard by a new bench of seven judges. See *Taylor v. Lawrence* (2002) *Locabail (U K) Ltd v. Bayfield Properties Ltd* (2000)

[32] (1995) 7 NWLR Pt. 415 P1

3. UNDERSTANDING THE CONCEPT OF *EX-PARTE* APPLICATIONS

Exparte order is that order made at the instance and for the benefit of one party only, and without notice to, or argument by, any person adversely interested; of or relation to court action taken by one party without notice to the other, usually for temporary or emergency relief. [33] An *exparte* application is simply an application made without putting other affected parties on notice. [34] It is the one in which the one party to the suit is not put on notice. [35]

The various High Court Civil Procedure Rules make provision for the grant of *exparte* injunction in Nigeria.[36] It should also be noted that *ex parte* order is granted only when the law provides that a particular application may be made *ex parte*.[37] For example applications for laws to serve a third party notice.[38] The grant of *ex parte* order has become part and parcel of the administration of justice in Nigeria and therefore one of the reasons that informed this research. The statutory framework for *ex parte* injuction in Nigeria is one of inherent powers vested in Court by virtue of the Nigerian Constitution.[39] The Constitution also confers power to make rule on the Chief Justice of Nigeria,[40] the President of the Court of Appeal,[41] the Federal High Court's President[42] and the Chief Justices of the various States High Courts.[43] And in line with these constitutional provisions, we have Civil Procedure Rules of various High Court and provisions for *ex parte* order are made in these Rules. It then opens to the Judges or the court under these rules to make an immediate order upon *ex parte* application or to ask that the other party be put on notice.[44] Thus the laws give the judge's discretion to make order *ex parte* and also provide for the limit to which that discretion can be made. In *Oliver vs. Dangote*,[45] the Court of Appeal held that the grant of *ex parte* order is purely within the discretion of the trial court but it must be exercised in accordance with sound judicial principles of law and rules of court and not in any arbitrary manner. Also Order 9 Rule 12[46] provides that an *ex parte order* shall not last more than 14 days after the application for the discharge of same.

The argument against the grant of *ex parte* injunction is not tenable because where a statute or any rule of law confers a power, exercising same should not be interpreted as violating the law.[47]There are various types of injunctions; *ex parte* order or injunction. This is an Order granted following an application made urgently and without notifying the other side that the application is being made.[49] It is the preservative relief designed to maintain the *status quo* between the parties pending the final determination of the suit or pending a certain date,[50] and they are of three types.

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[33] The Black's Law Dictionary 4th Ed, pg. 657
[34] Sebastine T., *Civil Procedure, in Nigeria* Vol. 1 (Port Harcourt: Pearl Publishers, 2008) pg 601
[35] Nwadialo F, *Civil Procedure in Nigeria* 2nd Edition (Lagos: University of Lagos Press, 2000) Pg 553
[36] For example Order Rule High Court Civil Procedure Rule of Lagos State, 2004
[37] Ojukwu E, et al., *Introduction to Civil Procedure*, 3rd Edition (Abuja: Helen-Roberts, 2009) pg 207
[38] Order 18 Rule 19 Lagos
[39] Section 6(6)(a) 1999 Constitution of the Federal Republic of Nigeria (As Amended 2011)
[40]Section 237
[41] Section 248
[42] Section 254
[43] 274
[44] Aguda F A., *Practice and Procedure of the Supreme Court, Court of Appeal and High Courts of Nigeria*, 2nd Edition (Lagos: Mig Professional Publishers, 1995) pg 67
[45] (2009) 10 NWLR (1150) 467 CA @ 476
[46] Federal High Court Civil Procedure Rules 2009. It has its equivalent in various High Court Civil Procedure Rules.
[47] This is against the argument that *ex parte* order is unconstitutional. Kolajo argues that it is contrary to the principle of fair hearing in section 36 to grant *ex parte* injunction.
[49] Jonathan et al., *Legal Practice Course series on Civil litigation,* 3rd Edition (London: Cavendish Publishing Ltd, 1998) pg 114
[50] Nwadialo op cit Pg 224

The *mareva* injunction is a peculiar kind of injunction.[51] Whereas injunctions generally relate to the subject matter of the suit, *mareva* injunctions are granted over assets or *res* not over the subject matter of the suit. The development of this kind of injunction arose out of the need to secure the position of a possible judgment creditor and prevent a situation whereby the prospective judgment debtor will defeat the action by either dissipating his assets or removing them from jurisdiction.[52] It has its origin in *Mareva Compania Naviera SA vs. International Bulk Carriers SA,* "The mareva"[53] where Lord Denning Said now, therefore, whenever, a right which can be asserted at law or in equity, does exist, then whatever, the previous practice may be, the court is enabled in a proper case, to grant an injunction to protect that right. In *IFC (International Finance Corps vs. DSNL Offshore Ltd*,[53] the Court held that the purpose of *mareva* injunction is to prevent the injustice of a defendant taking away his assets from the jurisdiction, asset which might otherwise have been available to satisfy a judgment. This decision affirms the position of the Federal High Court Civil Procedure Rules on interim attachment of property.[54]

Another is the Anton Pillar Injunction. An Anton Pillar Order is a court order requiring the defendant to allow the plaintiff to enter the defendant's premises to search for and seize documents and articles. It is an order which can be given *ex parte* for inspection, photographing and delivering up of infringing materials in the possession or control of an infringer. It is most often used in breach of copyright cases. The idea behind the *Anton Pillar* order is based on urgency and secrecy. It has its origin in *Anton Piller KG, Manufacturing Process*[55]. Where Lord Denning held to the effect that *Anton pillar* order authorizes the entry and inspection by the permission of the defendants. The plaintiff must get the defendant's permission. But it does do this; it brings pressure on the defendant to give permission. It does more. It actually orders him to give permission with I suppose, the result that if he does not give permission he is guilty of contempt of court.

This Order is regarded as Discovery and Inspection Order under The Lagos State Civil Procedure Rules.[56] There is the Interim Injunction. It is an injunction granted to last until a definite date, usually a short period or until further order or pending the hearing or determination of a motion on notice for an order of interlocutory injunction. It made or meant to last for short periods. The duration must be specified and must not be extensive and all-pervasive as to prejudge the main suit[57]. It is necessary to state at this point that while only interim orders are made upon the hearing of an *ex parte* application, it may also be possible to make an interim order in an interlocutory application, that is, in a motion on notice until a named date, to forestall a threatened breach. An interim order is thus an order made in a cause for the preservation of the status quo, it however, stated that the grant of interim injunction is purely within the discretion of the trial court, but the discretion must be exercised in accordance with sound judicial principles of law and rules of court and not in any arbitrary manner.

4. THE NECESSITY FOR *EX PARTE* APPLICATION IN NIGERIA

The rules of Court are replete with reasons and circumstances for granting *ex parte* orders. In *Kotoye v Central Bank of Nigeria*[58], the Supreme Court held that an *ex parte* injunction can be granted by the Court provided there is real urgency. Nnaemeka-Agu, JSC (as

[51] *ibid*
[52] *ibid*
[53] (1980)1 All ER 213
[53] (2008) 7 NWLR (1087) CA 592 Suit No CA/PH/214/2006
[54] Order 30, Rule 1 and 2, Federal High Court Civil Procedure Rules, 2009. pg. 212
[55] (1976)CH. 55
[56] Order 26.
[57] Hom T.S, Op Cit p.600
[58] (1989)20NSCC at 238

he then was) while delivering the lead judgment said that there is a primary concept 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 prejudice the party unless he has the opportunity of being heard in defense. But instances occur where justice could not be done unless the subject matter of the suit were preserved and, if that is in danger of destruction by one party, or if irreparable or serious damage is imminent, the other party may come to the court, and ask for its interposition even in the absence of his opponent, on the ground that delays would involve greater injustice than instant action.

However, in the recent case of *Siate SA v Brussel S Sec Ltd*[59] it was stated that an applicant for an *ex parte* order must make full and fair disclosure to the courts of all the relevant facts he knows. In *Group Danone v Voltre (Nig)*[60] it was held that *ex parte* injunction or order must be made sparingly and only when the circumstances are urgent and compelling such as to leave the court with no other alternative in preventing or anticipating injury of a grave nature. The term order connotes any decision given by a court on a question or questions at issue between parties to the proceeding before the court. The enforcement of order secured *ex parte* may present certain problems. A person who is not aware of any suit against him may feel reluctant in obeying the order. In a commercial transaction, the judgment may at times be given in foreign currency. At the enforcement stage, it is stipulated that the amount in foreign currency would be converted to Naira for the purpose of enforcement of the judgment at the time of payment. It should be noted that enforcement of judgment is regulated by Sheriff and civil Process Act. And judgment is defined to include Orders. Judgment orders are executed and directed to the Sheriff commanding him to do what is necessary to enforce the judgment or the order of the Court.

5. FEATURES, SCOPE AND LIMITATION OF EX-PARTE APPLICATIONS

An *ex parte* Order of injunction is interim in nature. It is an equitable remedy and is therefore granted at the discretion of the court. Simply put, an *ex parte* application is one which is made to the court in litigation without the other party or parties in the litigation being put on notice[61]. *Ex parte* applications are a rare necessary procedure whereby the other party to a case is unheard. It means on behalf of, or on the part of one side only. In *Kotoye v. Central Bank of Nigeria*,[62] the court held that an *ex parte* application is an application made without notice to the parties sought to be affected by the order to be made. *Ex parte* injunctions or interim injunctions are synonymous. An *ex parte* injunction which is either interim or interlocutory is granted where there is a real urgency.[63] Thus the application becomes necessary when there is an extreme urgency which is of such a nature that the delay which would arise in seeking to put the other party or parties in the litigation on notice would have resulted in irreparable or serious mischief. In other words the court makes an order upon the applicant's request without the due process of hearing the other side.

Secondly the rules of court as to the hearing of interlocutory applications by notices ordinarily require that such notices shall be served on the other party[64] but subsection (2) of the same rule provides that notwithstanding paragraph (1), the court if satisfied that to delay the motion till after notice is given to the parties affected would entail irreparable damage or

[59](2009)17NWLR(Pt.1121)CA252
[60] (2008)7NWLR9Pt.1082) 637
[61] Akin at al Op.Cit at p.62. See also Savannah Bank ltd v. NDIC (2005) 11 NWLR Pt 936 at 315 where the court defined ex-parte proceedings as one in which only one of the parties to an action; usually the applicant is heard.
[62] (Supra) at 466
[63] Okpara O. Op.Cit P. 208
[64] Order & Rule 7(1) High Court Civil Procedure Rules.

serious mischief to the party moving, may make an order *ex parte* upon such terms as to costs or otherwise and subject to such undertakings if any, as the justice of the case demands.

Justice Edet in exposing the above passage wrote that it becomes very clear that an application could be made to the court either when the opposite party is placed on notice or it could be made *ex parte* when the court is satisfied that to delay the notion till after notice is given to the parties affected would entail irreparable damage or serious mischief. The real urgency between the event brought to be restrained and the hearing of the application thus determines when an application can be made *ex parte* to the court[65].Real urgency as a feature of an *ex parte* application. The emphasis is on real urgency. What is contemplated by the law is urgency between the happening of the event which is sought to be restrained and the date the application can be heard if taken. So if an incident which forms the basis of an application occurred long enough for the applicant to have given due notice of the application to the other side if he acted promptly, but if he delays so much in bringing the application until there is not enough time to put the other side on notice, then there is a case of self – imposed urgency and not one of real urgency within the meaning of the law. Thus self – imposed urgency will not warrant the granting of the application *ex parte*.

Again, an *ex parte* application is made ordinarily for a short – span and in making it the court exercises great care in granting the applicant a favour that would turn out to be a great injustice to the respondent. Furthermore, the aim of *ex parte* applications is to preserve the status quo or protect the *res* by keeping matters ad they were before the action until a named time of hearing of an interlocutory application. *Ex parte* orders should not be made to last until the final determination of the substantive suit.

6. CONSTITUTIONALITY OF *EX PARTE* INJUNCTIONS.

In *Savannah Bank (Nig) Ltd. V. NDIC*, [66] the court re – affirmed the constitutionality of *the ex parte order* by asserting that the power or jurisdiction of the court to make *ex parte* orders is derived from the statute of the rules of the court and an exercise of such a jurisdiction by the court cannot be said to amount to a violation of the constitutional right of fair hearing of a party, who by the provisions of the law or the rules is not to be heard in the first place.[67] *Ex parte* applications and orders are indispensable and unavoidable in the course of procedural steps to achieve justice. For instance *ex parte* applications become useful or needful for an order of substituted service where personal service is not possible, so also, where leave is required before an action can be instituted[68]. Again, *ex parte* application comes handy where the subject matter is destroyable and the return to status quo may be impossible. *Ex parte* order can be discharged or varied if need be, this underscores the import of *ex parte* applications or orders. Order 8 Rule 11[69] states that where an order is made on a motion *ex parte* 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

[65] Akin Op. Cit at P.63

[66] (Supra) See 7 Up Bottling Co Ltd. v. Abiola & Sons (Nig) Ltd. (1989) 3 NWLR Pt 83 P.257. See also Emmanuel E, *Encyclopedia of Legal Authority Injunctions Basic Rights* (Nig: Aba, 2002) P. 32 Where it was stated that it is impossible to make an interim order of injunction which on the face of it may do some injustice to one party or the other. It is impossible to go fully into the facts of that stage of the case, and with the best will in the world an order may be made which will onwards be regretted. The aim of interim order is to preserve the status quo.

[67] See Order 8 Rule 8 of Kogi State High Court Civil Procedure Rules, Edict 1991, states in emphatic terms that: a motion ex parte shall be supported by affidavit which is addition to the requirement of rule 3, shall state sufficient grounds why the delay in granting the order sought would entail irreparable damage or serious mischief to the party moving.

[68] See Order 12 Rule 5 and Orders 11 Rule 8 Ibid

[69] High Court Civil Procedure Rules of Akwa Ibom State.

party obtaining the order either may refuse to vary or discharge it with or without imposing as to cost or security or otherwise as seems just.

Justice Edet[70] commenting on the above rule stated that the party affected by the order has two options; he either applies under the above rule of court to discharge or vary the order should he conceive that the order was improperly made either upon a misrepresentation of the fact or that it was obtained by fraud. Justice Edet[71] commented further that the applicant could in arguing the motion on notice put forward his defense by articulating the facts in a counter affidavit opposing the grant of the interlocutory application. He should also base his arguments against the interim order on grounds of law. This is the stage where he exercises his rights guaranteed under Section 36 (1) of the 1999 constitution of the Federal Republic of Nigeria.

7. INSTANCES OF ABUSE OF *EX PARTE* APPLICATIONS/ORDERS

At a point in time in the annals of the Nigerian Judicial Justice System, *ex parte* orders were more or less weapons of repression, injustice and fraud. It was known that some judicial officers never exercised any discretion whatsoever in the grant of *ex parte* applications. It was reported that a university convocation which had been planned for months was stopped simply because an aggrieved student thought he ought to have graduated even though he failed his examinations[72]. A termination of a contract of employment was once stopped by an *ex parte* application. Justice Edet[73] went down memory lane to Chronicle the abuse of ex Parte orders giving instances like in Cross River State where between the 12th and 16th of September 1997, arrangements were made openly for the handing over of the Ika IKa Opua market in Calabar from the Calabar Municipal Council to consolidated Management consultant as directed by the government of Cross River State. About one hour to the ceremony a judge of the Cross River State Judiciary granted an *ex parte* injunction restraining the State Government from performing the function. The ceremony was thus postponed.

There was a complaint that the personal effects of a defendant before an Abia State Judge, which had been seized had been released secretly to the plaintiff and that the goods had been illegally sold by the plaintiff, His Lordship, had made an *ex parte* as he claimed for preserving the goods, the goods had disappeared. His Lordship seemed unperturbed by the disappearance of the goods. The question was whether he made the *ex parte* order to preserve the goods or simply as it were, had handed them over to the plaintiff/applicant and thereby determines the suit prematurely without giving a hearing, to the defendant/respondent[74]. While *ex parte* orders have played a very significant role in the administration of justice, such orders are known to have been used by some courts, as weapons of repression and injustice and fraud. An *ex parte* order should be granted only when it is not unlawful or unconstitutional or inequitable to do so. It should not be granted contrary to the accepted principles upon which the court exercises its jurisdiction.

Some judicial officers do not exercise any discretion whatsoever, in the grant of *an ex parte application*. The grant of an *ex parte* order has now been abused to the extent that it has been converted into a bulldozer for the demolition of substantial justice. In all the cases of abuse of *ex parte* injunction, the principles laid down for the grant of such injunction have been violated or completely neglected. Some judges end up embarrassing the judiciary in the process. The feature and factors necessary for the grant of such injunction are not present in cases where the grant is abused. What justification is there in a court stopping by an *ex parte* order, the convocation of university which had been planned for months simply because one aggrieved

[70] Akin Op. Cit at P.68
[71] *ibid*
[72] Akin etal Op. Cit. P 71
[73] *ibid*
[74] *ibid*

student thinks he too ought to have graduated even if he failed the examination. The discretion in granting *ex parte* order must be exercised judicially and judiciously and bona fide in accordance with justice as regards on necessary and relevant considerations.

On the need for caution, before granting ex parte injunctions, per Uwaifo JCA (as he then was) in *Richard N. Okechukwu v. Author E. V. D. Okechukwu*[75] opined that it is most disturbing that the use of *ex parte* injunction by some judges cannot be supported in any measure either on the applicable principles or on the facts. They do not seem to direct their minds to the need of caution in the exercise of that extraordinary jurisdiction. They appear to give the impression that the discretion is so present that it does not matter if others see it as a means of inflicting undeserved punishment and hardship on another party or other persons. The court needs to be alert in safeguarding the judicial process from abuse. To issue far reaching *ex parte* orders without regard to its consequences and without adequate inquiry does not show a due apprehension of court's responsibilities in the awesome powers vested in it in making orders of injunctions. It is submitted that although the court cannot do away with *ex parte* order, where the occasion demands, it should be granted strictly with regard to common sense.

8. CONCLUSION

There is every need to balance the right of fair hearing and the purpose for which *ex parte* orders are meant to serve. A rigid judicial attitude to *audi alteram partem* cannot serve the cause of justice. It is expected that both the Bench and the Bar must seek to balance the need for fair hearing and the purpose for which *ex parte* applications are meant to serve,[76] notwithstanding the much reviled abuse of the order of *ex parte* injunctions remains part of the civil procedure law in Nigeria. It is, therefore, wrong for a judge to have made up his mind against granting *an ex parte order* of injunction regardless of the merits of the *ex parte* applications. It is strongly suggested that every *ex parte* application be treated on its own merit.[77]In granting *ex parte* in interlocutory injunctions many judges target the rule and principle of natural justice of fair hearing of *audi alterem partem* entrenched in the constitution without giving any person in the defense and prosecution of his right of fair hearing which rule cannot be waived or compromised especially that the party should not be condemned without hearing him. It is by upholding the fundamental right of fair hearing that *ex parte* interlocutory injunction should not be granted as a matter of course but in exceptional circumstances in each case turning out on its peculiar facts.

The court should thus be guided by laid down principles before granting an application upon an *ex parte* application. The cardinal principle is whether to delay the motion till after notice is given to the parties, would entail irreparable damage or serious mischief to the party moving. In *Onyesoh v. Nze Nnabedin*[78] the Supreme Court advised judges that applications of this nature should be made on notice to the party who would be affected by the order to be made. They should not be designed to create embarrassment or deliberate inconvenience. In this regard it is not only irregular or unfair. It is unjust to fix the hearing of the motion so close to the event sought to be restrained. In the instant case the date of the event sought to be restrained had been known, well ahead before the institution of the action. There was therefore no real urgency on the part of the parties to proceed by way of an *ex parte* application.

The need for caution was even more exemplified in the case of *Onuzulike v. Nwokedi,*[79] where Uwaifo JSC (as he then was) warned that: "Whilst ex parte interim order may serve propitious end in an emergency and therefore be regarded as a tolerable exception to the rule of

[75] *ibid*
[76] Yemi Akinseye et al Op. Cit 236
[77] Afe Babalola SAN, Injunctions and Enforcement of Orders P. 11
[78] (1992) 3 NWLR (Pt.299)P. 315 at 311
[79] (1969) 2 NWLR (Pt. 102) P.299 at 241

natural justice, the manner of foreclosure it was used in the case against the defendants and circumstances in which an application for its discharge was vested even though no interlocutory application was then ever filed, tend to put the element of fair hearing provided in Section 36[80] of the constitution under real stress. The effect of non-compliance with fair hearing renders any decision reached a nullity. This means that it must not be sabotaged by an improper judicial handling via *ex parte* proceedings. It is in the interest of the judge, the lawyer, the litigant and the society that all parties be heard in legal disputes unless special circumstances justify an *ex parte* procedure. A victory not well founded on the principles of fair hearing but scored in an *ex parte* hearing many turn out to be a pyrrhic one when the ruling so rendered in the absence of a party is overturned on appeal on the grounds of want of hearing. Justice is not a game of hide and seek or deceitful manoeuvres. It is an open game, straight and time is of its essence.

The search for justice cut across the entire gamut of human existence, administration of justice cannot be an exception. What would amount to justice in cases of real urgency may not amount to justice where the parties are given time to argue their cases. Section 36 of the constitution of the Federal Republic of Nigeria is to the effect that a person shall be entitled to fair hearing within a reasonable time so also both regional and international statutes. In another breath, in *Latisco Pet (Nig) Ltd v. UBA PLC*[81], the court held that the constitution only creates an opportunity for the party to be heard before a decision is taken against his interest. The opportunity does not exist *ad- infinitum* .as it is enjoyed subject to the rules of court and the dictates of justice. The various High Court Civil Procure Rules provide for *ex parte* injunctions. It would then mean that *ex parte* injunctions are not a violation of the principle of fair hearing where, the powers in grant ting it is exercised judicially and judiciously.

Having x – rayed the doctrine of fair hearing and *ex parte* applications, the extremity of some judges not to even entertain *ex parte* applications at all and insisting that the other party be put on notice should be avoided, for the constitutionality of *ex parte* applications is not in doubt. Caution and the need for balance remains an imperative in curbing the excesses of the grant of *ex parte* orders. So the need to balance the age long concept of fair hearing with *ex parte* injunctions. The task of being a judge or adjudicator is an arduous one; even more onerous is the task of effecting balance for the attainment of substantial justice.

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