FURTHER ISSUES ON PRE-EMPTIVE REMEDIES UNDER THE LAGOS STATE HIGH COURT (CIVIL PROCEDURE) RULES 2019

DR. MUIZ BANIRE, SAN*

ABSTRACT

The importance of the existence of the res prior to the institution of a suit and during the pendency of a suit is sacrosanct. This is because, in the absence of the res, litigants, lawyers and judges would have no business administering justice in court. It has been long established that all courts possess the power to preserve the res in an action. The rationale is to ensure that the final order made does not expose the court to a state of helplessness, leaving a victorious party with a mere empty and pyrrhic victory. A section of the High Court of Lagos State (Expeditious Disposal of Civil Cases) Practice Direction No. 2 of 2019 on Pre-action Protocol (hereinafter referred to as "The Practice Direction") deals with pre-emptive remedies, which this paper focuses on. The Practice Direction caters for the preservation of the res pending compliance with pre-action protocol preparatory to the institution of an action in the High Court of Lagos State. This paper is a follow-up to a previous paper on the nature and objectives of the pre-emptive remedy provision in the Practice Direction. It explains the need for proper application of pre-emptive remedies provision in the Practice Direction. This paper, which is a sequel to the previous paper, is necessitated by recent decisions of the High Court of Lagos State, which suggest that some Judges are yet to appreciate the essence and unique character of the preemptive remedy provisions. This paper, therefore, discusses further issues arising from the operation of the provisions in the Practice Direction.

INTRODUCTION

In my earlier paper titled "Pre-emptive Remedies for the Preservation of the Res: An Appraisal of Enforcement Challenges"[1] ("the earlier Paper"), I dealt extensively with the exposition of the issues surrounding and arising from the implementation of the provisions on pre-emptive remedies under the High Court of Lagos State (Expeditious Disposal of Civil Cases) Practice Direction No. 2 of 2019 on Pre-action Protocol ("the Practice Direction"). However, recent decisions of the High Court of Lagos State have shown that there remain further pertinent issues on applying the preemptive remedies provision of the Practice Direction that require further elaboration.

In the earlier paper, I observed that the essence of the pre-emptive remedy, like any other preservative order, is essentially to preserve the *res* of the litigation pending compliance with the Pre-action Protocol.[2] I further observed that the essence of the Pre-action Protocol is to promote amicable resolution of disputes through attempts at reconciliation of the positions of the parties and/or, in the event of failure to achieve an amicable resolution, to narrow down the issues between parties for an expeditious determination upon commencement of the suit.[3]

* **BL, PhD. Senior Advocate of Nigeria and Founder/Principal Partner of M. A. Banire and Associates. The author can be reached at mbanire@mabandassociates.com.**

[1] Muiz Banire, 'Pre- Emptive Remedies for the Preservation of The *Res*: An Appraisal of Enforcement Challenges' (2021) 12(4) The Gravitas Review of Business and Property Law 35.
[2] ibid 36-37.
[3] ibid 37-38; and para 3 High Court of Lagos State (Expeditious Disposal of Civil Cases) Practice Direction No. 2 of 2019 on Pre-action Protocol.

Although the pre-emptive remedies provisions of the practice direction have been in use by counsel and the bench since 2019, some misconceptions exist about the basic procedure and objectives of the provisions by lawyers and Judges. This paper, therefore, addresses these misconceptions.

ADDRESSING FURTHER ISSUES ON PRE-EMPTIVE REMEDIES

Before I descend into the subject of concern, let me quickly refreshen our memory on the distinction between the principles governing the grant of interim preservative orders generally and those governing the grant of pre-emptive remedies. Although I highlighted the distinction between the two preservatory mechanisms on page 44 of the earlier paper,[4] I have observed from my experience and evaluation of the operation of the mechanisms that both the bench and the bar continue to misapply and confuse the two distinct preservatory mechanisms, with the significant overreach of the essential destination of the mechanisms. An apt example is what transpired recently in a matter I was personally involved. It is the case of *MOJ Oil & Gas Limited & Anor v GMT Nigeria Limited & 2 Ors.*[5] This is a case in which the Applicants sought a pre-emptive remedy for the preservation of the res via an *ex parte* originating application. Although the case for urgency was painted successfully through the grant of leave for hearing during the long vacation by the earlier vacation judge, the presiding judge, Adeyemi, J, who presided over the substantive application, concluded there was no urgency, thereby unwittingly overruling His Lordship's learned brother, an abomination in the first instance under the Nigerian jurisprudence. That, however, is not my destination.

The taboo committed concerning the learned judge is that he fell into the same long confusion that has consistently plagued the consideration of the pre-emptive remedy applications by equating the pre-emptive application with the general interim injunction application, thereby concluding that there was no urgency in preserving the res. Again, for the umpteenth time, let it be noted by all that the thresholds of pre-emptive remedy are interest of justice, irreparable loss, and serious mischief. The situation need not be urgent, and the request could even be brought during the course of proceedings to preserve the res. All that is required is a demonstration of any of those needs.

As if that error was insufficient, upon refusing the pre-emptive reliefs, the said judge proceeded to order that parties be put on notice. Obviously, this is a classic case of misconception of the pre-emptive remedy application. The question is, what notice is to be put to the defendants when there is yet no suit? Upon what is the motion on notice to be premised? What will be the relief in the motion on notice? Did the judge forget that no suit can be instituted without compliance with a pre-action notice? Did His Lordship forget that the pre-emptive remedy application is an exception to the general rule? I can continue eternally multiplying the absurdities inherent in the said ruling, one of which is the effect of purportedly overruling the decision of His Lordship's learned brother, which is not our concern here.[6]

DISTINGUISHING GENERAL INTERIM INJUNCTION AND PRE-EMPTIVE REMEDIES

To this end, while both mechanisms (of general interim injunction and pre-emptive remedy) aim to achieve the same objective of preserving the res, the rationale behind and the process towards achieving the desire differs. For instance, while the central premise of granting an interim injunction is urgency, for pre-emptive remedies, the bases are described as interest of justice,

[4] (note 1).
[5] Suit No. ID/3948LM/2022, Adeyemi, J of the Lagos State High Court.
[6] See the case of *N.P.A.S.VF. v Fasel Services Limited* [2001] 17 NWLR (Pt. 742) 291[C]-[D].

prevention of irreparable damage and prevention of serious mischief. While these could constitute a sense of urgency for the grant of a pre-emptive remedy, it is not exclusively the underlying premise.

Additionally, principles surrounding the grant of an interim injunction, as adumbrated in several cases, are not absolutely applicable to the pre-emptive remedy protocol set out in the practice direction. Accordingly, a distinction must always be drawn between the injunctive principles contemplated by Order 43 of the High Court of Lagos State (Civil Procedure) Rules, 2019 (hereinafter referred to as "the Rules of Court"), which is geared toward the interim preservative order generally, and the pre-emptive remedy order provided under the practice directions.[7] In this light, an essential distinction between the general interim injunction application and an application for pre-emptive remedies can be gleaned from their respective procedural requirements. For example, under the provision on pre-emptive remedies, the claimant is required to file the following:

a. Memorandum of Claim with its accompanying documents;
b. Memorandum for settlement;
c. An ex-parte originating application praying for the pre-emptive remedy sought;
d. Affidavit in support of the ex-parte originating application; and
e. Written address.[8]

These are the required documents for the consideration and determination of the *ex-parte* originating application in pre-emptive remedies. However, under the general interim injunction application, not only must the originating processes have been filed, a motion on notice for an interlocutory injunction must equally be filed before the court. This procedural requirement is particularly distinctive because the application for pre-emptive remedies precedes compliance with pre-action protocol and the institution of an action in court. This procedural element amplifies the need to preserve the res to prevent the possibility of any interference with the res pending the commencement of an action in court.

Furthermore, it is instructive to note that to succeed in an application for an interim injunction, the applicant must demonstrate to his favour the under-listed injunctive requirements:

a. A substantial issue to be tried;
b. Balance of convenience;
c. Irreparable damage or injury;
d. Conduct of the parties; and
e. Undertaking as to damages.[9]

The above requirements are not *stricto sensu* applicable for the consideration and determination of an application for pre-emptive remedy but could at best serve as a guide in the exercise of judicial discretion. The need to preserve the *res* is the underlying basis for the grant of a pre-emptive remedy. While other requirements may be persuasive, they matter to the extent that they substantiate the need to preserve the res. Consequently, it is essential to outline some key issues

[7] Under the High Court of Lagos State (Expeditious Disposal of Civil Cases) Practice Direction No. 2 of 2019 on Pre-action Protocol.
[8] ibid para. 1, 3.
[9] *Adeleke v Lawal* [2014] 3 NWLR (pt 1393) 1 at 17[G]-[H].

that arise from the practice surrounding the grant or otherwise of pre-emptive orders (a novel development) and the established principles for the grant of interim injunctions.

The first concern is the question of urgency as the basis for the application brought under the pre-emptive remedy provision. As mentioned above, while urgency is not optional in applications for interim injunction, under an application for pre-emptive remedy, the ingredient of urgency is not always necessary. This implies that without establishing urgency, an applicant under the pre-emptive remedy provision may show or demonstrate that it is in the interest of justice that such an order be made, notwithstanding that there is no urgency. Similarly, an applicant who can satisfy the court that irreparable damage will be done if the order is not made can equally be favoured with the grant of such remedy without any need to establish urgency. Similarly, a court can still grant the remedy when an applicant establishes a case of serious mischief, even without urgency. The foregoing, based on the provisions of the Practice Direction, clearly shows that it is not in all instances that the court must, in an application for pre-emptive remedy, insist on the establishment of urgency. A good illustration is where a party would like to bring an action in respect of a *res* but would also like to protect the *res* from a reasonably foreseeable or imminent threat. This party may apply for pre-emptive order showing the court that it would be in the interest of justice to protect the *res* from such imminent or reasonable threat/damage. Therefore, the point is that judges need to desist from imposing the unnecessary prerequisite of urgency in all instances of the application for a pre-emptive remedy.

Another area of concern is regarding the tenure of the order grantable by the Court under the pre-emptive remedy provision. Because pre-emptive orders are granted to foster compliance with the pre-action protocol without exposing the res to the risk of dissipation or destruction, the orders are meant to last until compliance with the pre-action protocol is complete. However, some courts grant pre-emptive orders to last for seven (7) days, apparently in compliance with the provisions of the Rules of Court on the grant of interim injunction, which provide that: "An Order of injunction made upon an application *ex-parte* shall abate after seven (7) days"[10]. By this provision, interim preservative orders can only be made for a period of (7) seven days and are renewable for a maximum period of another seven days, in line with Order 43(3)(4) of the Rules of Court,[11] which provides that:

If satisfied upon an application, a judge may extend the effective period of an order made ex parte that the motion on notice has been served and that such extension is necessary for the interest of justice or to prevent severe or irreparable mischief. The application for such an extension shall be made before abatement of the order and the extension shall not be for a period exceeding seven (7) days from the day the extension is granted.[12]

The effect of the foregoing, therefore, is that an order for interim injunction cannot endure beyond a maximum period of 14 days.[13] The misconception around the above provision has led many judicial officers to tend to equally delimit the tenure of a pre-emptive order to 7 days, as opposed to the period covering full compliance with the Pre-action Protocol. In many instances, this tends to militate against the tenet and objective of the pre-emptive remedy, as the order would have abated while the period of compliance is still running, thereby defeating the essence of the order. A good demonstration of this is where a pre-emptive order is sought in a matter

[10] Order 43(3)(3), Lagos State High Court (Civil Procedure) Rules, 2019, or 43(3)(3).
[11] ibid
[12] ibid or 43 (3)(4).
[13] ibid.

involving land. By the Practice Direction, the exchange of correspondence is expected in the first instance not to be less than seven (7) days.[14] Now imagine the consequence of a pre-emptive order made to last seven (7) days while the period of compliance with the pre-action protocol is still running. This reveals an apparent mismatch between the tenure requirements for both reliefs. Thus, the tenure of a pre-emptive order is determinable by the subject of the Pre-action Protocol concerned. For example, in a defamation case where the period of 14 days[15] at the barest minimum is applicable for compliance before an originating process can be filed, the pre-emptive order must not be granted for a period less than 14 days.[16] Consequently, the practice in which some judges grant pre-emptive orders for a period shorter than the compliance period prescribed for the appropriate pre-action protocol under the practice direction does not align with the intent of the pre-emptive remedy provision under the practice direction. This is a crucial area of attention that lawyers and judges need to consider.

THE LIFESPAN OF A PRE-EMPTIVE ORDER

The import of the foregoing is that a pre-emptive order must be made to cover the particular pre-action protocol compliance period and not otherwise. Consequently, the court must avoid the practice of fixing the determinable period of the pre-emptive order prior to the period of full compliance with the pre-action protocol, as this would be equivalent to defeating the essence of pre-emptive remedies granted by the court.

This scenario occurred recently in an application for pre-emptive remedy in *Suit No: LD/11364LMW/2021 - Solnik Nigeria Limited v Amytorix Company Nigeria Limited & 2 Ors.,* wherein the court granted manifestly contradictory orders. First, the Court granted the pre-emptive remedy pending pre-action protocol compliance. Apparently equating pre-emptive order with a regular interim injunction, the Court held that the order shall subsist until the next adjourned date, which was mid-way into the compliance period prescribed by the pre-action protocol. In other words, the court granted the pre-emptive order to last for 15 days as opposed to the 30-day pre-action compliance period for land matters under the Protocol.

Ordinarily, the mischief inherent in the said order would not have become apparent if there had been a hearing on the next adjourned date, in which event, the court may have extended the order.[17] Unfortunately, on the next adjourned date, on which the order could probably have been extended, the court did not sit due to the Judges' Conference. At this stage, the contradiction in the said order became manifest as the said adjourned date was the expiry date of the order. Due to the official engagement of the court, as indicated above, the case was further adjourned by a period of one week when the order had lapsed. Upon resumption of proceedings at the further adjourned date, the order for preemptive remedies was pronounced by the judge to have lapsed and the applicant's application for extension of the order was refused by the court, notwithstanding that the pre-action protocol period had not lapsed and compliance with the protocol was still ongoing.

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[14] See The Pre-Action Protocol for Land Matters, para 1(1.1-1.3), 20 of the High Court of Lagos State (Expeditious Disposal of Civil Cases) practice Direction, No. 2 of 2019.

[15] ibid para 2.1 of pg 12.

[16] It should be noted that the provisions on pre-emptive remedies in the High Court of Lagos State (Expeditious Disposal of Civil Cases) Practice Direction No. 2 of 2019 on Pre-action Protocol did not expressly provide for a duration within which the order shall lapse. However, it is inferable from the Practice Direction that the order is made to preserve the res pending compliance with pre-action protocol. This point was also noted in the page 52 of the Dr. Muiz Banire, SAN, Pre-emptive Remedies from the Preservation of Res: An appraisal of enforcement challenges '(2021) 12(4) Gravitas Review of Business and Property Law.

[17] See para 3 of the Preemptive Remedies provision under the Practice Direction No. 2 of 2019.

So many pertinent issues rear their heads from the above. The first of these is whether indeed the order could be said to have lapsed when, in the first instance, it was granted to last until full compliance with the pre-action protocol and, on the other hand, tied to a specific date that was earlier than the period required for compliance. Suppose the view is taken that the court, haven granted the initial order to last till completion of the pre-action period, cannot make a subsequent order that is contradictory. In that case, the later order fixing the expiry date is nullified[18]. However, another rule of interpretation is that the later order overrides the earlier one. Which one is then applicable? This is confusion at its peak[19].

Furthermore, it is arguable that the applicable order should be the one that ought to protect the *res* than the order that will expose the *res* to dissipation or destruction. By way of illustration, the rule is that where there are two pending applications before a court of law, one to save the proceedings and another to terminate the proceedings, the one seeking to save the proceedings takes priority[20]. By parity of reasoning, in this instance where there are two contradictory orders, one that would have preserved the res and another that would expose the res to the risk of destruction, law and logic demand that the one that would save should have been adopted and upheld by upholding the continued existence of the order.[21] So, the court should have applied the interpretation that would have preserved the res and allowed for the order's subsistence pending full compliance. However, the Court held the order to have lapsed, with the consequential effect of exposing the *res* to the risk of destruction.

Another issue arising from the scenario above is the consequence of pronouncing the extinction of the order. This means that the *res*, which was hitherto preserved by the pre-emptive order, would become exposed, thereby defeating the essence of the pre-emptive order. So, what was the purpose of granting the Order in the first instance when what it set out to prevent was eventually allowed to happen? This is so because the order's expiration implies the determination of the entire process, that is, signalling the death of the originating application and its product, the pre-emptive order. The further implication, for emphasis, is that the pre-emptive order had expired and there was nothing before the court on the subsequent adjourned date, as the initial grant of the *ex-parte* originating application automatically renders lifeless the initiating originating application. The effect of this is that the pre-emptive order did not achieve the purpose it was granted in the first place. Therefore, judges must avoid adjourning matters which originate under the pre-emptive remedy provision to periods shorter than the period within which there can be full compliance with the pre-action protocol.

However, to prevent preemptive orders from operating indefinitely to the prejudice of the respondent, it is essential for courts to give a return date for the report on compliance with the Pre-action Protocol. Where the applicant fails to comply with the pre-action protocol within the time prescribed, and the delay is attributable to the applicant, the court should vacate the order to protect the respondent. This is the approach which, in our view, will accord with the tenets of the pre-emptive remedy and further the interest of justice.

[18] See para 3 of the Preemptive Remedies provision under the Practice Direction No. 2 of 2019.
[19] *Sanni v Unity Bank & Anor* [2017] LPELE –50197(CA) 14[B]-[C]
[20] *NalsaTeam Associates v NNPC* [1991] NWLR (Pt. 212) 652, 676[B]-[C].
[21] See *Ovunwo v Woko* [2011] 17 NWLR (Pt. 1279) 522, 546[D]-[G] per Chukwuma-Eneh, JSC

THE CONSEQUENCE OF LAPSE OF PRE-EMPTIVE ORDER

Another pertinent area is the effect of a substantive action not being instituted after the compliance period's expiration. As contended above, the order becomes spent in such instances, thereby terminating the entire proceeding. Again, parties are still exploring settlement under the pre-action protocol mechanism, but the period for full compliance has expired. What does the court do in such circumstances? Ordinarily, by the tenet of the pre-action protocol, the judge is empowered to extend the order until such full compliance with the protocol. However, the question is, how does this come about? Does such an extension require application by the party concerned? In this wise, it is essential to point out that the applicant needs make no application before the judge exercises the discretion to grant the extension. An application will only be a surplusage and not a requirement for such extension.[22] However, the courts, viewing preemptive orders as general interim preservative orders under the Rules of Court,[23] consider an application a requirement for an extension.[24]

WHAT NEXT AFTER A PRE-EMPTIVE ORDER LAPSES

Finally, what happens when the order has already lapsed? Does it imply, as the judge held in the *Solnik's* case,[25] that the order could not be renewed or extended, thereby defeating the essence of the preemptive remedy? I certainly do not think so. A construction of this nature would defeat the objective of pre-emptive remedies, which is essential to preserve the *res*. This reasoning finds support in *Kolawole v Alberto,*[26] given Order 5, Rule 6 of Lagos High Court (Civil Procedure) Rules, 1972, which provisions deal with whether an expired writ of summons can be renewed for it to be effectively served or time for renewal must be before the writ expires. The Supreme Court concluded that an application for the renewal of a writ of summons can still be made and granted after the expiration of the writ. The reasoning of the court was based on the need to do substantial justice and it would have amounted to technical justice were the court to have held otherwise.

So, suppose the essence of the court's existence is to do justice. In that case, the provision of Section 6(6)(a) of the Constitution of the Federal Republic of Nigeria 1999 (as altered)[27] is a further enabling provision to preserve the *res* under the inherent powers of the court, even where the rules of the court do not so provide.

Furthermore, although the relevant provision of the Practice Direction uses the word "extended" in cases of need for the order to be sustained, the word ought to be construed in a liberal manner, particularly in the face of the mischief that the provision seeks to remedy. As such, the judge's pronouncement that the order had expired and, therefore, was incapable of being extended, with respect, cannot be the correct interpretation of that provision. To this end, one's expectation would have been that the court, if unable to extend the order due to its lapse, should have renewed the same in line with the objective of pre-emptive remedy. The interpretation of the term "extend" should have been approached literally to cover what would ordinarily be seen as a renewal of a lapsed order. In essence, an applicable rule of interpretation which should apply in

[22] This is unlike the situation under or 43 rl 3(4), where such an application has to be made by the claimant/applicant.
[23] or 43 rl 3 of the Lagos State High Court (Civil Procedure) Rules, 2019.
[24] Suit No: LD/11364LMW/2021.
[25] Suit No: LD/11364LMW/2021.
[26] [1989] 1 NSCC 20, 213, 219-220.
[27] This section of the Constitution provides that the judicial powers of the court "shall extend … to all inherent powers and sanctions of a court of law".

this situation would be the one that avoids absurdity and does justice to the parties, particularly as it relates to the preservation of the *res* and sustenance of the action irrespective of the exact wording of the Practice Direction. Although it is noted that the wording of the law must be adhered to unless where it would lead to manifest absurdity or inconsistency[28], this is assuming, without conceding, that the order had lapsed. This is the only interpretation that aligns with the cause of justice and the provision's objective. The apex court has enjoined that the interest of justice and the objective of a provision must be considered in applying the rules of court.[29] This, I believe, is where wisdom lies.

CONCLUSION

The essence of the voyage in this paper is to ensure that justice is done to litigants as envisaged by the law, especially as it relates to the preservation of the *res*. Once aware of the commencement of an action through initiation of pre-action protocol, parties ought to automatically maintain the *status quo* and ensure the preservation of the *res* pending the outcome of the matter. Unfortunately, in practice, such a provision is more honoured in the breach than the observance. It may be difficult to observe when there are no existing or subsisting orders mandating parties to do all that is necessary to preserve the *res* in a suit. Thus, provisions such as those contained in the protocol on pre-emptive remedies are needed.

This paper has established that it is dangerous to grant a pre-emptive remedy order to lapse on a date before the expiration of the pre-action protocol compliance period prescribed in the Practice Direction. The other party may take advantage of the lapsed order to perpetrate injustice or destroy the *res*. A court may utilise the renewal-enabling provisions in the Practice Direction to extend the life span of a pre-emptive remedy order to align (such orders) with the objectives of pre-emptive remedies provisions in the Practice Direction where justice so demands or to prevent irreparable loss. Finally, in applications for pre-emptive remedies, putting the other party on notice is an anomaly, as there is no suit to predicate the notice on. The net implication of the misapplication of the principle is the defeat of the essence of the preemptive remedy provisions as well as the interest of justice. Therefore, judges must have a proper appreciation of the provisions.

[28] *INEC v Yusuf* [2020] 4 NWLR (pt 1714) 374, 410[F]-[H].

[29] See, on this purposive approach to interpretation, Aharon Barak, *Purposive Interpretation in Law* (Princeton University Press 2005).