Chapter 19

FRONTLOADING REQUIREMENTS UNDER THE NEW HIGH COURT RULES AND THE EFFECT ON SUBPOENA OF WITNESSES: RESOLVING THE CONUNDRUM

Introduction

Rules of court embody rules of practice and procedure and are part of the adjectival law which is the machinery by which substantive law is applied and enforced in practice.[952] Adjectival law prescribes the method for enforcement of rights and duties and obtaining redress as well as the enforcement of obligations or duties.[953] There is thus no gainsaying that rules of court as part of the corpus of adjectival law is important in the efficient and effective discharge of administration of justice in any society. It is because of the importance of rules of court that they are always amended and replaced with new provisions with a view to meeting the challenges of efficient system of administration of justice.

It is apparently the need to cope with the challenges that the legislators in the Lagos State enacted the High Court of Lagos State (Civil Procedure) Rules, 2004.[954] The enactment of the Lagos Rules is against the background of the fact that the 1994 Lagos State High Court (Civil Procedure) Rules,[955]

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[952] F Nwadialo, Civil Procedure in Nigeria, 2nd edn (University of Lagos Press, Lagos, 2000) 3.

[953] Ibid

[954] Hereinafter referred to as the "Lagos Rues".

[955] The 1994 Rules.

which was the operative Rules prior to the coming into force of the Lagos Rules was revised about a decade before 2004 and the 1994 Rules lacks the modern case management techniques which made the procedures under the 1994 Rules to become too slow and inadequate to meet the needs of commercial interests in a predominantly commercial city like Lagos, resulting in the apparent failure of the civil justice system.[956]

One of the concepts and techniques introduced by the Lagos Rules is front-loading requirements.[957] The gist of frontloading requirements is that in initiating and defending an action, parties are obliged to place before the court all documentary and potential oral evidence that they intend to rely upon to prosecute and defend the action at the time of filing the originating process or lodging a defence to the action.[958] Since the adoption of the frontloading requirement under the Lagos Rules, some other jurisdictions and courts like the High Court of the Federal Capital Territory, High Court of Ogun State, High Court of Osun State, High Court of Rivers State, the Federal High Court and the Governorship, Legislative House and National Assembly Election Petition Tribunals have also adopted rules with frontloading requirements.[959]

[956]See M. Banire, A Basiru & K Adegoke, The Blue Book; Practical Approach To The High Court of Lagos State (Civil Procedure) Rules, 2nd edn (Ecowatch Publications Ltd, Lagos, 2008) 3-4.

[957]M Banire, A Basiru & K Adegoke, *The Blue Book; Practical Approach To The High Court of Lagos State (Civil Procedure) Rules, 2nd edn* (Ecowatch Publications Ltd, Lagos, 2008) 4. The other concepts and techniques are active case management and pre-trial conference; formulation of issues; strict control of procedural timetable; strict and purposeful costs regime; striking out of pleadings; promotion of settlement and alternative dispute resolution; mode of evidence at trial; compulsory written address and reform of provision on stay of proceedings: M Banire, A Basiru & K Adegoke, *The Blue Book; Practical Approach To The High Court of Lagos State (Civil Procedure) Rules, 2nd edn* (Ecowatch Publications Ltd, Lagos, 2008) 4.

[958] M Banire, A Basiru & K Adegoke, *The Blue Book; Practical Approach To The High Court of Lagos State (Civil Procedure) Rules, 2nd edn* (Ecowatch Publications Ltd, Lagos, 2008) 5.

[959]See High Court of the Federal Capital Territory, Abuja Civil Procedure Rules , 2004; High Court of Ogun State(Civil Procedure) Rules 2008; High Court of Osun State(Civil Procedure) Rules 2008 High Court of

This paper will explore the frontloading requirements as a new concept in our civil litigation. However, there is an intricate relationship between procedure and evidence as both are constituents of adjectival law and also share much in common. It is because of this that topics such as securing the attendance and examination of witnesses are common to the High Court Rules and the Evidence Act.[960] In this connection, therefore, this paper seeks to explore issues as relates to the frontloading requirements now adopted in many of the High Court Rules in Nigeria in relation to issuance of subpoena. In this regard, the paper will examine the applicability or extent of applicability of the frontloading requirements in the circumstance where the oral or documentary evidence sought to be relied upon by a party is to be obtained from a witness to be subpoenaed. The adequacy or otherwise of the Rules in this connection as well as relevant judicial decisions will be examined.

In accomplishing this task, the paper will examine the frontloading provisions under the Rules, the essence and rationale of the frontloading requirements; nature and effects of subpoena; the interplay of frontloading requirements and giving effect to subpoena, the adequacy or otherwise of the existing Rules on frontloading vis a vis oral and documentary evidence to be obtained by subpoena. The paper will end with recommendations and conclusion.

Frontloading Requirements

Under the Lagos Rules, the frontloading requirements are basically contained in Order 3 rule

[960] F Nwadialo, Civil Procedure in Nigeria, 2nd edn (University of Lagos Press, Lagos, 2000)3.

2(1) and order 17 rule 1. By Order 3 rule 2(1) it is provided that where an action is commenced by a writ of summons, the writ must be accompanied by the following: Statement of Claim; list of witnesses to be called at the trial; written statements on oath of the witnesses to be called; and copies of every document to be relied on at the trial. In relation to a defendant Order 17 rule 1 provides that a statement of defence must also be accompanied by the: list of witnesses; written statement of witnesses on oath; and copies of every document to be relied on at the trial. It is apposite to state that the provisions under Order 3 rule 2(1) and order 17 rule 1 of the High Court of Rivers State (Civil Procedure) Rules 2006, the High Court of Ogun State (Civil Procedure) Rules 2008[961] and the High Court of Osun State (Civil Procedure) Rules 2008[962] are in *pari materia* with that of the Lagos Rules.

Under the Federal Capital Territory, Abuja Rules the applicable provision in the case of a plaintiff is Order 4 rule 15 which provides that a writ is issued when signed on by a Registrar or other officer of Court duly authorized to sign the writ accompanied by; a statement of claim; copies of documents mentioned in the statement of claim to be used in evidence; witness statement on oath; and a certificate of pre-action counselling. The relevant provision to a defendant under the Federal Capital Territory, Abuja Rules is Order 23 rules 2(1) which provides that except a court grants leave to the contrary, a defendant who enters appearance in, and intends to defend an action shall, within 14 days, after the service of the statement

[961] Hereinafter referred to as the Ogun State Rules.
[962] Hereinafter referred to as the Osun State Rules.

of claim and the writ of summons on him, serve a statement of defence on the plaintiff along with: copies of documents mentioned in the statement of defence to be used in evidence; witness(es) statement on oath; and a certificate of pre-action counselling.

Under the Federal High Court (Civil Procedure) Rules, by Order 3 rule 3(1) provides that all civil proceedings commenced by writ of summons shall be accompanied by: statement of claim; copies of every document to be relied upon at the trial;[963] list of non-documentary exhibits; list of witnesses to be called at the trial; and written statement on oath of witnesses.[964] In relation to the defence, Order 13 rule 2(1) provides that a defendant who enters an appearance and intends to defend an action shall, unless the court gives leave to the contrary serve the following processes on the claimant at the time he files his memorandum of appearance, that is: statement of defence;[965] list of witnesses to be called at the trial; written statement of the witnesses; copies of every documents to be relied on at the trial; and list of non-documentary exhibits.

The President of the Court of Appeal, in making the Election Petition Tribunal Practice Direction has also introduced frontloading requirements to election petition.

The Raison d'etre and Essence of Frontloading Requirements

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[963] It is however provided that disputed survey plans need not be filed at the commencement of the suit, but shall be filed within such time as may be ordered by the Court upon any application made under sub-rule 3 of the rule.

[964] See also Order 13 rule 1 of the Federal High Court Rules whereby it is specifically required that the statement of claim shall be served "together with documentary evidence therein mentioned".

[965] Which may include any preliminary objection he wishes to raise to the plaintiff's action.

It has been held that in "introducing the frontloading system (the upfront filing of all documents to be used at the trial is so called) the intention of the maker of the rules of court is to ensure that only serious and committed litigants with prima facie good cases and witnesses to back up their claims would come to court and fewer lame duck claims would find their way into court". Therefore, the requirement of frontloading is aimed at ensuring that only actionable cases and defences are brought before the Court and possibly avail parties of the opportunity of knowing the case of the opposing party with a view to enabling them to decide whether to compromise or otherwise resolve the matter out of court.[966]

According to Candide-Johnson J:

> *...the advent of the new 2004 High Court Rules, sufficiently demonstrates the better view that parties to a civil litigation be given an unfettered opportunity, by the mechanism of "front-loading", to place before the court their respective full upfront factual and documentary case and leaving it to the judge to eventually assess, evaluate, weigh and apportion creditability and probative evidentiary value to the cases of the respective parties.*[967]

Frontloading may also be relevant in preparation of cases by parties and the court for pre-trial conference.[968] It has been commented that "the intendment and objectives of the front-loading requirements are:

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[966] M Banire, A Basiru & K Adegoke, *The Blue Book; Practical Approach To The High Court of Lagos State (Civil Procedure) Rules, 2nd edn* (Ecowatch Publications Ltd, Lagos, 2008) 5-6.

[967] Allen Properties Ltd. v. Hadiya A. Ibrahim [2008] BLR (pt 1) 204.

[968] M Banire, A Basiru & K Adegoke, *The Blue Book; Practical Approach To The High Court of Lagos State (Civil Procedure) Rules, 2nd edn* (Ecowatch Publications Ltd, Lagos, 2008) 6.

i. To discourage the filing of weak or frivolous cases
ii. To afford parties an opportunity to assess the relative strength and weakness of their cases and thus facilitate settlement at the earliest possible time before too much expenses are incurred
iii. To identify and focus on the main issues from the onset and thus avoid the tendency to dissipate energy on irrelevancies
iv. To minimise the incidence of amendments of pleadings."[969]

The critical point of inquiry in this paper is what impact does the frontloading requirement have on the utility of subpoena as a means of procuring oral and documentary evidence. However, before taking a ladle into this discussion, it is pertinent to examine subpoena and its nature.

Subpoena: Nature and Effect

A subpoena has been defined as "a formal document issued by the court commanding a person required by a party to a suit to attend before the court, at a given date, to give evidence on behalf of the party or to bring with him and produce any specified documents required by the party as evidence or for both purposes.[970]

The resort to subpoena becomes necessary to ensure a witness's appearance by making it mandatory under the pain of sanction of a court.[971] The necessity

[969] Hon. Justice Adesuyi Olateru-Olagbegi, 'Emerging Issues and Challenges in the 2004 High Court of Lagos State (Civil Procedure) Rules in High Court of Lagos State (Civil Procedure) Rules, 2004: So far, so what (Nigerian Bar Association, Ikorodu Branch, 2006) 45 at 47.

[970] F Nwadialo, Civil Procedure in Nigeria, 2nd edn (University of Lagos Press, Lagos, 2000) 652.

[971] F Nwadialo, Civil Procedure in Nigeria, 2nd edn (University of Lagos Press, Lagos, 2000) 651. Of course there will be no need to subpoena a witness if his attendance can be voluntarily secured and it has been held that there is nothing saying that a witness in a civil case must be subpoenaed before he qualifies as a truthful witness as a party in a civil case is entitled to bring to court unaided his witnesses; See Arewa Textiles Plc v Finetex Ltd [2003] 7 NWLR (pt 819) 322 at 350.

[972] Uzoho v Task Force, Hospital Management [2004] 5 NWLR (pt 867) 627 at 643.

for resort to subpoena comes to fore in view of the position of law that a party will not be allowed to complain of non-production of a document which he could easily obtain by going through the proper legal channel.[972] Even failure to produce a document upon issuance of subpoena without more will not avail a party seeking reliance on those documents. Thus, in *Buhari v Obasanjo*[973] the 3rd Respondent who was served with a subpoena failed to produce election materials pursuant to the subpoena. It was held that the finding of bias and lack of neutrality against the 3rd Respondent for failure to produce election materials pursuant to a subpoena is not justified. According to the Supreme Court, subpoena is a court process commanding any person to attend the court and produce document and evidence before the court and that the effect of failure to answer the subpoena does not lead to an adverse finding against the defaulting party. Thus, where a person subpoenaed failed to comply with the subpoena, the party issuing the subpoena is entitled to issue committal processes or lead secondary evidence on the matter.[974]

It is apposite to state that it is in the options available to a party using the process that marks a distinction between notice to produce and subpoena whereas a notice to produce merely allows the party giving the notice to lead secondary evidence where the party to whom the notice was given did not comply,[975] in the case of subpoena, however, in addition to being able to call secondary evidence, the party issuing the subpoena may initiate contempt

[973] [2005] 13 NWLR (pt 941) 1 at 257, Edozie JSC.
[974] Buhari v Obasanjo [2005] 13 NWLR (pt 941) 1.
[975] [2005] 13 NWLR (pt 941) 1 at 146, Uwais CJN.

proceedings.[976] It is therefore submitted that the fact that a person has inserted notice to produce in his pleading or issue notice to produce does not preclude such a party from issuing a subpoena. Thus, the decision of the Osun State National Assembly Election Petition Tribunal in Yusuf Sulaiman Lasun v Leo Adejare[977] to the effect that the existence of notice to produce renders superfluous the issuance or giving effect to subpoena is not only absurd but certainly per incuriam.

In Obi-Odu v Duke,[978] it was held that a subpoena duces tecum is a court process "initiated by a party in litigation compelling the production of certain specific documents and other items, material and relevant (emphasis mine) to facts in issue in a pending judicial proceeding which documents and items are in custody and control of the person or body served with the process".[979]

The case of Obi-Odu v Duke[980] concerns circumstances when an order of subpoena can be validly set aside. The court held that the situations in R v Agwuna[981] (where it was held that the subpoena was not necessary to obtain evidence to the criminal trial) or in A-G Western Nigeria v African Press Ltd[982]

[976] [2005] 13 NWLR (pt 941) 1 at 257, Edozie JSC. The pre-condition for invoking the coercive powers for failure to obey a subpoena was considered in *Usani v Duke* [2006] 17 NWLR (pt 1009) 610 at 652 where Ngwuta JSC held that: "...the application for warrant for the arrest of prospective witness who did not respond to the subpoena served on them is an invocation of the coercive power of the court. It is a criminal process that may lead to imprisonment. It is the duty of the applicant for such warrant to satisfy the court that the two conditions imposed by S.229(2) of the Evidence Act are satisfied. It is not enough to show that the person on whom a subpoena was served did not attend at the time and place stated in the subpoena. In addition to proof of service of the subpoena there must be proof that the sum prescribed by law was tendered to him for expenses. It is a legal requirements and the deposit of the sum with the registry of the court does not amount to a tender of the sum to the person subpoenaed".

[977] Petition No: NA/EPT/OS/1/07 delivered on 17 November 2007.

[978] [2006] 1 NWLR (pt 961) 375 CA.

[979] [2006] 1 NWLR (pt 961) 375, 391, Dongban-Mensem, JCA)

[980] [2006] 1 NWLR (pt 961) 375 CA.

[981] 12 WACA 456 at 457.

[982] (1965) 1 All NLR 6.

(where the subpoena was a wild one and therefore held to be vague and applied for on frivolous grounds) or the English case of Morgan v Morgan[983] (where the witness was subpoenaed to obtain evidence from him about his testamentary intention and the subpoena was thus set aside because such evidence sought to be obtained will amount to invasion of the witness's personal right and private affairs) are not similar to the instant case. Rather, it was held that the documents sought are clearly and distinctly identified and that they are all documents which are personal to the 1st Respondent and are therefore under his personal control and custody.

In that case, the tribunal had set aside the subpoena on the ground of the relevance of tendering the documents which had already being admitted. The Court of Appeal however held that relevance in the circumstance is a matter of details which should arise only at the adduction of evidence and that the appellant/petitioner must not be shut out/short charged at the stage of collating materials for the prosecution of his petition unless he short charges himself.[984] The Court of Appeal further held that assuming the admission of the existence of the documents preclude their production, the petitioner should not be denied the right to a visual perception of the said documents.[985]

The importance of the court letting litigants have access to documents was brought out in the case of Obi-Odu v Duke[986] when the court held that:

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[983][1877] 2 All ER 515.
[984][2006] 1 NWLR (pt 961) 375, 402 CA.
[985][2006] 1 NWLR (pt 961) 375, 403 CA.
[986][2006] 1 NWLR (pt 961) 375, 401 CA.

At the stage of preparation as in this case, investigation and discoveries are vital in building up the case of the litigant. Should the litigant desire such documents of his opponent, he must be allowed the benefit of such enquiry.

It would appear that refusing a party from giving effect to a subpoena to bring in relevant evidence or documents will not only occasion injustice but may in fact amount to infraction of the constitutional right of such a party to fair hearing. It was thus held in Obi-Odu v Duke[987] that:

I fail to see what injustice was occasioned by the issuance of the subpoena. The injustice to be suffered by the appellant by the setting aside of the subpoena is however visible and apparent; the party is being denied an opportunity to prosecute his case with the materials he deems relevant. While the setting aside of the subpoena was an act to protect the one party from "whatever", its withdrawal constitutes a denial of an element of fair hearing, a constitutional and natural right which is more fundamental than mere shielding a party from a "perceived embarrassment". It needs to be accentuated that the right to fair hearing is more than a personal right of the individual, it is a matter of public policy. The individual's right to a fair hearing is non-negotiable, sacrosanct.[988]

In Obi-Odu v Duke[989] it was held that a person served with a subpoena has the right to apply to the

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[987][2006] 1 NWLR (pt 961) 375, 404 CA.
[988][2006] 1 NWLR (pt 961) 375, 404 CA, Dongban-Mensem, JCA.
[989][2006] 1 NWLR (pt 961) 375, 410 CA.

court to set it aside on the ground that the subpoena is not bona fide required for the purpose of obtaining evidence that can be relevant and the court on application will interfere where it is satisfied that its process is being used for indirect or improper objects.[990]

The Interface of Frontloading and Subpoena

As a matter of law, no court or Tribunal can do substantial justice in any case when all the relevant facts and documents available are not placed before it.[991] Thus, the essence of justice would be defeated should the court shut out oral and documentary evidence being brought forward through subpoena because there has not been compliance with frontloading requirements. In this regard, it may first be stated that the provisions of the Lagos Rules, Ogun State Rules, Osun State Rules, Rivers State Rules, FCT Abuja Rules and the Election Petition Practice Direction No. 1 did not specifically make provisions as regards interface of frontloading requirements and subpoena of witnesses. The position under the Federal High Court Rules is slightly different from the other Rules and this peculiar position under the Federal High Court Rules will be discussed much later in this paper.

Flowing from the decision in Famakinwa v Unibadan,[992] it would appear that it is safer to issue subpoena duces tecum et ad testificandum if a party desires tendering of the documents and not mere production even though the party does not really require oral testimony from the person subpoenaed.

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[990]Per Ba'aba JCA.

[991]Obi-Odu v Duke [2006] 1 NWLR (pt 961) 375, 419; FBN Plc v May Medical Clinics and Diagnostic Center Ltd [2001] 1 NWLR (pt 48) 1343 at 1384; [2001] 9 NWLR (pt 717) 28.

[992][1992] 7 NWLR (pt 255) 608.

Thus one of the issues that have arisen in practice is whether the court will give effect to subpoena duces tecum et ad testificandum which had been issued where the person subpoenaed was not listed as a witness and/or his witness statement on oath was not filed along with the requisite court process, that is, the originating process or defence.

This issue came up in an election petition case of Bashir Adeyela v Olajide Adeyeye.[993] In that case, the Petitioner had caused subpoena duces tecum et ad testificandum to be issued against the Resident Electoral Commissioner who was a respondent in the petition. When the Resident Electoral Commissioner appeared to the subpoena and was about to be sworn in, the Respondents raised objection on the ground that there had not been compliance with the frontloading requirements. The Tribunal upheld this objection by holding that to grant the application to swear in the subpoenaed person "will run contrary to the provisions of Paragraph 4(1) and (3) and 1(1) of the Practice Direction for the following reasons- (1) the name of the subpoenaed witness is not one of those front loaded in the petition; His written deposition did not accompany the petition; (3) Rules of Court and Practice Directions are meant to be obeyed and must be complied with ; (4) A party acts at his peril if he failed to follow the outlined procedure;" The same position was taken by the same panel in Sulaimon Yusuf Lasun v Leo Awoyemi[994] where the Tribunal held:

> *We had also further held that it is a condition precedent that by virtue of paragraphs 1(i)(a)(b)*

[993]Petition No: HA/EPT/OS/18/07. Delivered on 24 January 2008.
[994]Petition No: NA/EPT/OS/1/07 delivered on 17 November 2007.

and (2) of the Practice Directions that all witness depositions and number of witnesses shall accompany the petition at the time of filing, the failure of which, such a petition shall not be accepted by the secretary.
From the list of witnesses before the Tribunal, the witness sought to be sworn in is not one of those listed nor her statements frontloaded in the petition.
We therefore disallow the witness from being sworn.

It is not hard to see that the effect of the above decision if it were to stand will be to totally render subpoena otiose and inapplicable because of the frontloading requirements. However, the Court of Appeal had occasion to consider the above decision upon appeal in *Sulaimon Yusuf Lasun v Leo Awoyemi.*[995]

In reversing the above decision of the Tribunal, the Court of Appeal held that the party to whom the subpoena was issued is a respondent and that therefore it cannot be within the contemplation of the provisions of the Practice Direction that the respondent should sign a witness statement or deposition on behalf of the petitioner whose allegation of irregularities was against the said party. According to the Court, "it is not within the expectation of the said Practice Direction that the petitioner would frontload the statement of the respondent. By the mere fact of the subpoena having been issued, the witness is bound to be sworn in on oath to testify and be cross-examined". The Court of Appeal further held:

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[995]Appeal No: CA/I/EPT/NA/80/08 delivered on 22 June 2009.

The general provision of the Practice Direction on frontloading of witness's deposition on oath only contemplates willing and voluntary witness and not one who had to be compelled by an order of court to testify by way of subpoena.

The court also held that the maxim *lex non cogit ad impossibilia* is in this context significant. It is not logical therefore that a party should prepare witness's deposition for his adversary who is a respondent against the petition. The Court of Appeal also held that failure to allow effect to be given to a subpoena on the account of failure to frontload amounts to denial of fair hearing. The Court thus held:

With the tribunal having issued subpoena duces tecum et ad testificandum on a competent and compellable witness but prevented him from giving evidence, such tribunal cannot be said to have obeyed the hallowed principles of natural justice, equity and good conscience.

In *Olaniyan v Oyewole*,[996] a case decided on the basis of the provisions of Order 2 rule 2(2) of the Kwara State High Court Rules, 2005, the situation that arose in that case was where the plaintiff cannot attach all documents to the writ because he is not in possession of them since he intends to subpoena the witness who would eventually tender the documents. Also, the plaintiff could not specifically mentioned the name of the person being subpoenaed to tender the documents. The Court of Appeal held that the question to be determined is whether the word 'shall' in Order 2 rule 2(2) of the Kwara State High Court

[996] [2008] 5 NWLR (pt 1079) 114, CA.

Rules, 2005 is mandatory or directory or merely regulatory. This is because, according to the Court, if the word 'shall' in the context is mandatory then it would mean that "under every circumstances even where such situations are not ordinarily envisaged by the law, the claimant must supply the statements on oath of witnesses to be called and copies of every document to be relied on at trial". The Court of Appeal however held that the word 'shall' may be interpreted as mandatory, obligatory or merely directory depending on the contextual usage. The court also held that in interpreting the rules of court they are to be interpreted as a whole and not in isolation and thus that the wholistic reading of the said rules of court shows clearly that the effect of non compliance may be treated as a mere irregularity which will not nullify the original process or subsequent proceedings. Reference was made by the Court to Order 4 rule 1(1) of the High Court of Kwara State Rules which provides that:

> *Where in beginning or purporting to begin any proceedings, there has, by reason of anything done or left undone, been failure to comply with the requirements of these Rules in respect of time, place, manner, form or content or in any other respect, the failure may be treated as an irregularity and if so treated, will not nullify the proceedings or any document, judgment or order therein.*

The Court also held in Olaniyan v Oyewole[997] that the claimant's constitutional right to fair hearing must not be sacrificed on the altar of strict adherence to the rules of court. It was thus held that the rules

[997] [2008] 5 NWLR (pt 1079) 114, CA.