

**NOTES ON THE REVIEW OF THE HIGH COURT OF LAGOS STATE  
(CIVIL PROCEDURE) RULES, 2019. DR MUIZ BANIRE, OON, SAN, LIFE  
BENCHER.**

---

*INTRODUCTION*

The Lagos State High Court (Civil Procedure) Rules, 2019, made pursuant to Section 87(1) of the High Court Law, Cap H5, Laws of Lagos State of Nigeria, 2015, came into operation to address the shortfalls in the 2012 Rules. The overriding objectives of the Rules are geared towards achieving expeditious and efficient dispensation of justice.

As time changes, the Rules of Courts follow suit. To put it simply, the law evolves with time to cater for daily and rising human dealings. A good example of this is Section 9 of the 1999 Constitution of the Federal Republic of Nigeria, 1999 (as amended) which provides that the National Assembly may alter the provisions of the Constitution in accordance with the terms laid down therein. Chidi Nwaoma Uwa, JCA (as His Lordship then was) shared the same view on the advancement of law in the case of **EMZOR PHARMACEUTICAL IND. LTD v. GEENCAAF VENTURES LTD & ANOR (2021) LPELR-54695(CA)** where His Lordship held as follows:

*“My humble view is that no law should be stagnant for the convenience of anyone; on the other hand, new innovations and changes in various aspects of the law are necessary and a welcomed idea in line with the ever-changing face of the world and technology.”*

Thus, I believe that the time is ripe to make certain important changes to the High Court of Lagos State (Civil Procedure) Rules, 2019 to meet the dynamism of legal practice and the contemporary challenges confronting the realisation of the objectives. I believe the canvassed amendments solicited run from the need to develop the Rules of Court in the area of compliance with pre-action protocol, down to the eradication of Case Management Conference, service, remote hearings, and demurrer among other core issues.

Consequently, the approach is to bring out the relevant provisions of the rules, law and practice direction (as the case may be) and juxtapose them against the overriding objectives of the Rules of Court as well as the rationale behind the provisions.

***EVALUATION OF AFFECTED PROVISIONS:***

**A. THE NEED TO EXPUNGE THE PROVISIONS ON CASE MANAGEMENT CONFERENCE (CMC) FROM THE RULES OF COURT:**

The term “Case Management” is capable of different meanings depending on the jurisdiction involved and the objective of the Rules of Court under which it is being applied. William W Schwarzer and Alan Hirsch,<sup>1</sup> while examining the concept of case management under the Malaysian jurisdiction, opined that case management could have different meanings to different people, and there is no uniform conceptualisation. The scholars hold the view, however, that there is an agreement that case management, essentially, involves judges using the tools at their disposal with fairness and common sense (and in a way that fits their personalities and styles) to achieve the goal described in Rule 1 of the Jamaican Federal Rules of Civil Procedure. The said Rule 1 of the Federal Rules of Civil Procedure describes the goal of the judicial system as “*to secure the just, speedy, and inexpensive determination of every action.*”

Rule 1 of the Jamaican Federal Rules of Civil Procedure referred to above is *impari materia* with the core objectives of the High Court of Lagos State (Civil Procedure) Rules, 2019 which is our main focus. The foregoing is further buttressed by **Order 27, Rule 2(n)** of the 2019 Rules. In my words, Case Management Conference, in relation to this work, is a device created in line with the objectives of the Lagos State High Court Rules to streamline issues and promote amicable resolution

---

<sup>1</sup> William W Schwarzer and Alan Hirsch, *The Elements of Case Management: A Pocket Guide for Judges*, (2<sup>nd</sup> Ed.) Published by the Federal Judicial Centre in 2006./ <https://jeijamaica.gov.jm/wp-content/uploads/2021/10/Elements-of-case-management.pdf> assessed on 10/7/24

of matters in the bid to achieve expeditious disposal of cases for the common good of all.

Before proceeding on this point, it is pertinent to bring out the provisions on case management conference under the rules of court. Order 27, Rule 2 is the relevant order. On the agenda of case management conference, it provides as follows:

- a. formulation and settlement of issues;
- b. amendments, further and better particulars;
- c. the admission of facts, and other evidence by consent of the parties;
- d. control and scheduling of discovery, inspection and production of documents;
- e. settlement of documents to be admitted as exhibit as at the trial;
- f. narrowing the field of dispute between expert witnesses, by their participation at Case Management Conference or in any other manner;
- g. hearing and determination of applications and objections on points of law;
- h. giving orders or directions for a separate trial of a Claim, Counter-Claim, Set-Off, Cross-Claim or Third-Party Claim or of any particular issue in the case;
- i. settlement of issues; inquiries and accounts under Order 30;
- j. securing statement of Special Case of law or facts under Order 31;
- k. determining the form and substance of the Case Management Order;
- l. making referrals to the Lagos Multi-Door Courthouse or other relevant ADR bodies;
- m. implementing any ADR Order made under (1) above.

- n. any other matter as may facilitate the just and speedy disposal of the action.

Further to the above, the intention of the drafters of the Rules is clearly progressive. However, in terms of implementation and use, whether the provisions of the Rules on Case Management Conference are of any utilitarian value is another thing.

In view of the aforesaid, the pertinent issue to interrogate is whether the Lagos State High Court Rules, in relation to case management conference, is achieving its purpose. Without mincing words, the mechanism has failed in achieving the desired objectives.

Incidentally, Professor Konyinsola Ajayi expressed the same view at the Lagos State Justice Summit 2024. CMC, in its implementation, has become a Frankenstein monster that is defeating the purpose of its creation. Rather than being an efficient tool in ensuring speedy, effective and just determination of cases, in practice, CMC may run for up to 5 years in some instances, thereby defeating the core essence of the Rules, which is the expeditious dispensation of justice. The sad commentary is that the essence of CMC is hardly ever achieved as parties, despite the initial pre-action steps, hardly settle. I have done a work-through in my office, and I am sure, Prof Konyinsola Ajayi, SAN, must have done the same, in arriving at the conclusion that this mechanism is not achieving the desired objective. If our observation is not trusted, it is in the interest of the judiciary to effect research into the same issue and come out with its position.

It is therefore recommended that the provisions on CMC be expunged from the Rules of Court.

**B. MISAPPLICATIONS AND MISINTERPRETATIONS OF PRE-ACTION PROTOCOL BY JUDEX.**

Although by sections 274 of the Constitution of the Federal Republic of Nigeria, 1999 (As Altered) and Section 87 of the High Court Law of Lagos State, it is the Chief Judge of the High Court of Lagos State that makes rules and regulations to regulate the practice and procedure in the High

Court of Lagos State. However, the rules or practice direction presumably are the product of an interface with the other judicial officers. Consequently, it will be safely assumed that the perspectives of the judges will mirror the consensus position of the judges in the application of the rules. In other words, judges are expected to take similar approach and position on the import of the Rules. Regrettably, however, some provisions of the Rules are subject to different interpretations by Judges of the same High Court, who, presumably, are the authors of the Rules, thus leading to the delivery of conflicting decisions. An example of one of the most misapplied provisions is Order 7 of the High Court of Lagos State (Civil Procedure) Rules, 2019 which defines acts that constitute a nullity as opposed to irregularity. The said Order 7 Rule 1(1)(2)(3) and (4) of the Rules provides that:

**“(1) Any Action filed without compliance with provisions of Order 5 Rule 1 (2), or Order 5 Rule 5 shall be a nullity.**

(2) Failure to comply with the requirement of these Rules as to time, place, manner, form in connection with any proceedings shall be treated as an irregularity and may not nullify any action taken at any stage of the proceeding.

(3) Where any proceeding is commenced by an Originating Process other than the process prescribed by these Rules, the Judge shall not wholly set aside the proceeding or the Originating Process.

(4) Without prejudice to the provisions of sub (2) and (3), the Judge may give any direction as he thinks fit to regularize the error, act or omission.

The focal point is Order 7 Rule 1(1) (which has the same effect as Order 5, Rule 1(3) as well as Order 5, Rule 5(4)) on noncompliance with Order 5 Rule 1(2) and Order 5 Rule 5(3), prescribing the consequence as a nullity. Order 5 Rule 1(2) of the Rules provides as follows:

“All civil proceedings commenced by Writ of Summons shall be accompanied by a list and copies of the following:

- (a) a Statement of Claim;
- (b) a list of witnesses to be called at the trial;

- (c) written statements on oath of the witnesses except witnesses on subpoena;
- (d) copies of every document to be relied on at trial;
- (e) **Pre-Action protocol Form 01 with necessary documents.**

Order 5 Rule 5(3) of the High Court of Lagos State (Civil Procedure) Rules, 2019 states as follows:

“An Originating Summons shall be accompanied by:

- (a) an Affidavit setting out the facts relied upon;
- (b) all the exhibits to be relied upon;
- (c) a written address in support of the Application;
- (d) **Pre-Action Form 01 with necessary documents.**”

It should be noted that the requirement on compliance with Pre-action Protocol Form 01 appears in both Orders 5 Rule 1(2) and Order 5 Rule 5(3). The consequence of noncompliance is provided for in Order 5 Rule 1(3), which states that noncompliance with the provisions of Order 5 Rule 1(2) shall nullify the action. The provisions of Order 7 Rule 1(1) of the Rules solidify the provisions of Order 5 Rule 1(3) by reinforcing that non-compliance in this respect is irremediable and amounts to a nullity. The use of the word **“Shall”** is enough to cover and convey the intention of the drafters.

Compliance with the above provisions is *sine qua non* to instituting matters in the High Court of Lagos State.

In practice, the area that suffers non-compliance the most is the aspect of Pre-action Protocol Form 01. Compliance with Pre-Action Protocol goes beyond mere filing of Form 01. It is an affidavit which simply states that the provisions on pre-action protocol under the Practice Direction No. 2 made pursuant to the High Court of Lagos State (Civil Procedure) Rules 2019, the High Court Law and the Constitution have been fully complied with. A classic example is the provision of pages 5 - 6 of the ***High Court of Lagos State (Expeditious Disposal of Civil***

*cases) Practice Direction No. 2 of 2019*, particularly at paragraphs 1 - 9 which mandates that:

- **any person who wishes to make a claim against another to comply with the following before commencing proceedings in court:**
  - a. Prepare a memorandum of claim setting out concise details of the claim(s), including the basis upon which the claim(s) is made, a summary of the facts, reliefs and remedies sought, and if monetary, how the amount is calculated, and shall be accompanied by exhibits in support of the Claim(s) as well as a proposal for the settlement of the dispute through the Use of Alternative Dispute Resolution (ADR) mechanisms;
  - b. Deliver the memorandum of claim and accompanying documents to the party against whom the claim is made.

In page 6, the Practice Direction No. 2 further provides that:

- The party against whom a claim is made shall respond within 7 days of service of the written memorandum on him;
- Where the Respondent fails to ***file***<sup>2</sup> its response within the said 7 days, the Claimant shall send a reminder to the Respondent giving the Respondent additional 7 days after which the Claimant can approach the Court.
- Each Counsel is expected to deliver a statement on oath stating reasons for his/her insistence on pursuing a Court action rather than settling out of Court.
- Parties should continue to consider the possibility of reaching a settlement at all times, including after litigation has commenced.
- All correspondence and documents filed in pursuance of this part shall form the documents to be contained in the Pre-Action Protocol Form 01.

---

<sup>2</sup> The word “file” used by the Practice Direction in paragraph 3 of page 05 ought to be substituted with the word “serve” because, at the pre-action stage, action is yet to be filed. All that is required from parties is to exchange their various correspondence in compliance with the Practice Direction without necessarily involving the Court.

It can be seen from the above that these are conditions precedent in the Rules that must be followed prior to the commencement of an action in the High Court of Lagos State and failure to comply with same is fatal. It is, therefore, worrisome to see judges of the Court misinterpret and misapply these clear provisions of the Rules which were made to meet the core objectives of the Rules of Court which is filtration of frivolous cases. A good example is the decision of the court in Suit *No. ID/3022LM/2020 between Pastor Joseph Adewale Adefarasin & Anor. v. The Governor of Lagos State and 4 Ors.* in a Court's Ruling delivered on the 30<sup>th</sup> day of May 2024, it was held that:

***“The position of the law is that a Pre-Action Protocol Form 01 by itself cannot operate as a condition precedent to invalidate a writ validly filed and that Pre Action-Protocol 01 has nothing to do with the validity or competence of a writ of Summons.”***  
***(copy of the ruling attached for illustration).***

Without much analysis of the ruling, the above is in clear contravention of the unambiguous provisions of the Rules and Practice Direction of the Court. This is just one out of many afflictions of the ruling, as even in jurisdiction, no feature must fetter the assumption of it. The approach obviously defeats the essence of the entire rules.

Another example is a Court's ruling in Suit *No: LD/6309LMW/2018 - Between Ben Ikeakor & Anor. v. Emanuel Obikwelu & 4 Ors.* delivered on the 3<sup>rd</sup> day of November 2022 where it was held that non-compliance with pre-action protocol does not nullify an action. The decisions certainly demonstrate the non-recognition of the evolution of the provision and the objective.

Similarly, we have seen situations where Judges conflate the applicable principles for pre-emptive remedies for those bordering on interim injunctions. These are two different concepts with unrelated thresholds. Interim injunctions are for a specified period of time, while pre-emptive remedies are made pending compliance with pre-action protocols. For emphasis, page 7 paragraph 1 - 3 of the Practice Direction No. 2 provides thus:

“1. Where in the interest of justice or to prevent irreparable damage or serious mischief, there is a need for pre-emptive remedies to be ordered by the Court by the Court, the affected party must either file memorandum of claim with its accompanying documents and the memorandum for settlement, in the case of a Claimant or the response to the memorandum of claim with its accompanying documents in the case of a Respondent, together with an ex-parte originating application for the pre-emptive remedy sought supported by an affidavit and a written address in the Registry.

2. After the remedy is either granted or refused by the Court, the Judge is to order parties to continue with full compliance of the protocol.

3. Where an order of injunction is granted ex parte and parties are unable to settle before the order abates, **the Judge may extend its life span until compliance with the Protocol is complete.**

Paragraph 3 referred to above is clear on the period during which the order for pre-emptive remedy lasts. Unlike the regular interim injunction, which lasts for 7 days and is extendable for another 7 days<sup>3</sup>, Pre-emptive remedies granted can last till compliance with the Pre-Action Protocol.

Without doubt, there is an urgent need to create a platform to ensure that all Judges of this honourable Court are on the same page on the purpose of pre-action protocol and the implications of non-compliance and other aspects of the Rules. In this connection is also the issue of renewal of writ upon expiry.

### **Fate of an expired Originating Process**

A critical issue is, in view of the provision of the Rules requiring an Originating Process to be renewed before it expires, what happens where the Originating Process has expired before an application is made

---

<sup>3</sup> Order 43 Rule 3 (3) and (4) of the Lagos State High Court (Civil Procedure) Rules

for its renewal? Does it mean that the court cannot consider such an application? This was considered in *Kolawole v. Alberto*<sup>4</sup> in view of Order 5, Rule 6 of Lagos High Court (Civil Procedure) Rules, 1972, which has provisions *in pari materia* with the current Order 8 Rule 6(2) of the Lagos Rules and the Court concluded that an application for the renewal of a Writ of Summons can still be made and granted after the expiration of the time stipulated by the Rules. The reasoning of the court was based on the need to do substantial justice and it, definitely, would have amounted to technical justice were the court to have held otherwise.

In *Ayalogu v. Agu*<sup>5</sup>, the Court of Appeal held that a writ of summons which is not served within the period stipulated by the Rules after its issuance is not void. Such writ of summons merely ceases to be in force and is renewable either before or after the period stipulated but such renewal must be for good reasons. Equally, the above decision of the Supreme Court in *Kolawole v. Alberto* was fully applied by the Lagos Judicial Division of the Court of Appeal, per Okoro, JCA (as he then was) in *Apostle Philip Ilesanmi v. Segun Esan & Anor.*<sup>6</sup> Thus, it is recommended that the provision of the Rules stipulating that a writ must be renewed before it expires need to be amended to take cognizance of this judicial approach as it creates room for some Judges to rather apply the provision of the Rules in this instance technically.

Thus, to cure the controversy above, I suggest the redrafting of the provision as follows:

**Lifespan of Originating Process:**

- a. The lifespan of every Originating Process shall be for 6 (six) months.
- b. If a Judge is satisfied that it has proved impossible to serve an Originating Process on any Defendant within its lifespan and the Claimant applies for renewal of the process, the Judge may renew

---

<sup>4</sup> [1989] 1 NSCC Vol. 20, 213 at 219 to 220.

<sup>5</sup> [2002] 3 NWLR (Pt. 753) 168 at 179 paras A-D.

<sup>6</sup> 26. Suit No: CA/L/891/2010 decided on Friday, the 30th day of March, 2012 and reported in the Law Pavilion Electronic Law Reports without full citation. See also *Idowu v. Bamijoko* [1996] 7 NWLR (Pt. 461) 496.

the original or concurrent process for 3 (three) months from the date of such renewal.

**Provided always that no such renewal of the original process shall extend beyond the cumulative period of 12 (twelve) months.**

**C. THE NEED FOR MORE CLARITY IN ORDER 7 RULE 2 OF THE LAGOS STATE HIGH COURT (CIVIL PROCEDURE) RULES, 2019**

Despite the clarity in Order 5 Rule 1(3), Order 5 Rule 5(4) and Order 7 Rule 1(1) of the High Court of Lagos State Rules, the implication of non-compliance with the Pre-Action Protocol No. 2 is still subject to misinterpretations. In essence, in the absence of a clear nexus between Order 7 Rule 1(1) and 1(2), Judges still find a way to intertwine issues and apply Order 7 Rule 1(2) instead of sticking to Order 7 Rule 1(1) as clearly stated by the Rules of Court; or even travelling to the past to apply the provisions of Order 3 Rule 2(2) of the 2012 Rules which provided that noncompliance with Order 3 Rule 2(1) would cause the Registry not to accept the originating process for filing. This is possibly due to the confusion created in the Practice Direction by recalling that provision. However, the Rule of interpretation dictates that the Rules of court prevails. We refer this Court to the case of *Olusesi v. Oyelusi*<sup>7</sup> held thus

Rules of court are intended to be complied with strictly as a general rule and this is the main consideration in ensuring quick dispensation of justice (vide *Solanke v Somefun* (1974) 1 SC 141). Unless it would be unfair to so strictly apply the rules the circumstances must dictate that substantial justice ought to be done.

We also refer to the case of *Sakamori Constr. (Nig.) Ltd. v. L.S.W.C.*<sup>8</sup>

It is to be noted that rules of court must be obeyed and where there is non-compliance, it must be explained, otherwise, no indulgence of the court would be granted.

---

<sup>7</sup> (1986) 3 NWLR (Pt. 31) 634 at 638 paras E per Omololu-Thomas, J.C.A

<sup>8</sup> (2022) 5 NWLR (Pt. 1823) 339 at 393 paras G-H per Peter-Odili JSC

In Suit No: *LD/6309LMW/2018 - Between Ben Ikeakor & Anor. v. Emanuel Obikwelu & 4 Ors.* while ruling on the 2<sup>nd</sup> Respondent's Notice of Preliminary Objection on Pre-Action Protocol, the Honourable Court held as follows:

“Let me state right away that the statement of claim or any other document are not originating process. The only originating process is the Writ of Summons dated 27/2/2018 filed by the Claimant. See *HERITAGE BANK LTD V BENTWORTH FINANCE LTD (2018) 9 NWLR PT. 1625) 420 AT PAGES 434 - 435*. The said Writ of Summons with other processes and affidavit of compliance dated 27/2/2018 accepted by the Registry of this Court. It has been held that non-compliance with Pre-Action Protocols shall not nullify the processes after the Originating Processes with the supporting documents accepted at the Registry of this Court. See *SPOG PETROCHEMICAL LTD & ANR. VS PA1 PENNISULA LOGISTICS LTD (2017) LPELR 41853 (CA). PER GARBA JCA NOW JSC*. It is my considered view that the Claimant complied with the Rules of this Court in filing this suit.

It is more concerning that the above ruling was delivered in 2022 after the 2019 Rules came into force. It is worth noting that the Rules came to cure the challenge of Spog's case, which was decided in 2017 when the 2012 Rules was applicable. Besides, Order 5 rule 1 was not construed in the case but Order 5 rule 2. To that extent, the Appellate court decision is per incuriam.

The implication of non-compliance provided under the 2012 Rules is very different from what is obtainable under the present 2019 Rules. Order 3 Rule 2(2) of the High Court of Lagos State (Civil Procedure) Rules 2012 provides as follows:

“Where a Claimant fails to comply with Rule 2(1) above, **the Originating Process shall not be accepted for filing by the registry**”.

Meanwhile in the 2019 Rules, on the same issue, Order 5 Rule 1(3) of the 2019 Rules provides that:

**“Failure to comply with sub-Rule (2) above shall nullify the action.”**

It is essential to point out that Order 3 Rule 3 of the 2019 Rules expressly provides that from the commencement of the Rules, the old Rules (2012) shall cease to apply. It quotes as follows:

**“The High Court of Lagos State (Civil Procedure) Rules 2012 shall cease to apply to all civil proceedings in the High Court of Lagos State including all part heard causes and matters from the commencement of these Rules”.**

The Ruling of the Court in 2022 reflects the old position of the Rules, and the Hon. Justice ought to have applied the express provisions of the 2019 Rules (being the extant Rules) in delivering the ruling. The point needs to be made that the Rules of Court are meant to be obeyed by all and sundry, including the judex.

It is for this and other associated reasons that I now recommend that the provisions of Order 7 Rule 1(2) be made subject to Rule 1(1) to implant further clarity and avoid misapplication. Besides, the 2019 Rules was brought into force to override the position in the 2012 Rules.

It should be redrafted as follows:

***Proposed draft of Order 7 Rule 1(2):***

**“Subject to Order 7 Rule 1(1),** failure to comply with the requirement of these Rules as to time, place, manner, or form in connection with any proceeding shall be treated as an irregularity and may not nullify any action taken at any stage of the proceeding.”

In line with the aforesaid, the provisions of Practice Direction No. 2 on the consequence of non-compliance ought to be expunged or replaced with a clearer provision that tallies with what the Rules of Court provides. Page 7 of the Practice Direction No. 2 on Pre-Action Protocol reads:

“FAILURE OF COMPLIANCE WITH THE PROTOCOL

1. When a party has
  - a) not complied with the provisions of this protocol; or
  - b) not acted within a time limit set out in relevant protocol;
  - c) unreasonably refused to use a form of ADR, or failed to respond at all invitation to do so; or
  - d) has failed to comply with the order/directive of a Judge or the Chief Judge,

the following sanctions will apply:

- a) **originating process with supporting documents shall not be accepted for filing at the Registry.**
- b) Where a Respondent fails to file a response as required by this Protocol, unreasonably refuses to or fails to respond at all to an invitation to ADR, the Claimant may proceed to litigation by the required originating process with its supporting documents as well as the Pre-Action Protocol Bundle and obtain Judgment against the Respondent.
- c) Failure to comply with the Order of the Judge will amount to contempt of Court.
- d) Where the parties fail to comply with the time stipulations in this Pre-Action Protocol or any claim-specific pre-action protocol, it shall not affect the validity of the documents so filed but a daily default of NGN 1000 (One Thousand Naira) shall accrue as cost in favour of the counter-party, the sum of which shall be deducted or added to money reliefs awarded in the final judgment PROVIDED THAT a counter party, may in the interest of settlement, waive the applicability of these default fees.
- e) Where a party unreasonably or disproportionately fails or refuses to comply with the settlement procedure under this pre-action protocol or the directive of the Court referring parties to a form of ADR or to the Lagos Multidoor Courthouse or Lagos Court of Arbitration but insists on proceeding to trial, the Court shall impose cost of a minimum of NGN 100,000 (One Hundred Thousand Naira) only

which shall be deducted or added to money reliefs awarded in the final judgment or alternatively shall apply the provisions of Order 53 Rule 2 of High Court Civil Procedure Rules.”

From the above, it still appears that the Practice Direction is still wallowing in the pool of the 2012 Rules. Although it is settled that where Practice Directions conflict with the Rules of Court, the Rules of Court must prevail<sup>9</sup>. It is of essence to harmonise the position (by expunging [b] - [e] above) to aid the reduction of mass misinterpretation of the rules of court. The Practice Direction should, just like the extant Rules, provide that noncompliance with pre-action protocol nullifies an action in court or be silent about it. Anyway, the provisions of the Practice Direction must now be integrated into the Rules, just as recently done at the Apex Court level.

**D. THE PROVISION ON CONTEMPT AGAINST THE PROCEEDINGS OF THE COURT OUGHT TO BE SIMPLIFIED.**

Judicial Review is regulated by Order 44 of the Lagos State High Court (Civil Procedure) Rules 2019. A perusal of the order exposes the fact that the procedure under the subject order is cumbersome and time-consuming. For instance, by Order 44 Rule 3, leave is required before even bringing an application for judicial review. The relevant Order quotes:

“No application for judicial review shall be made unless the leave has been obtained in accordance with this rule.”

By the Rules, Applicant for such relief of contempt against proceedings must observe and comply with the steps required for judicial review which is substantially complex and frustrating. A simplified procedure need be put in place to that effect.

As can be seen above, the procedure for judicial review is *sui generis* and cumbersome. Perhaps, this explains why the proceedings on contempt against judicial proceedings are uncommon, unlike other actions. For instance, by a single application, a party can seek leave

---

<sup>9</sup> Oni v. Fayemi & Ors. (2007) LPELR-8700(CA)

and other reliefs simpliciter. Where the relief for leave fails, the Court closes the case, and where the leave is granted, the Court proceeds to the substantive case. My position is that these procedures can be simplified and made less cumbersome. The draftsmen can deal with this.

#### E. DEMURER:

Demurrer is described as a written reaction to a suit filed in which the defendant pleads for dismissal on the point that even if the facts alleged in the complaint were true, there is no basis for an action.<sup>10</sup> Demurrer has been abolished under the Lagos State Rules. Order 24 Rule 1 of the High Court Rules provides that **“No demurer shall be allowed.”**

In essence, defendants are not allowed to stall proceedings by filing their notice of preliminary objection alone and go to sleep. However, based on the current state of the law and juridical decisions, it would appear that where the point of law in issue relates to jurisdiction, and the ground of objection is patent on the face of the originating process, the objector is allowed to raise his objection before or without filing a defence. In this regard, there appears to be a distinction between ordinary points of law (which would fall under demurrer) and jurisdiction.

Be that as it may, I believe that there ought to be no distinction in this regard and I, therefore, recommend that the Rules do away with the dichotomy between issue of jurisdiction and point of law. A defendant that believes he has a ground of objection relating to jurisdiction should raise his ground of objection in the defence and may also proceed to file his notice of preliminary objection with the statement of defence. It is also suggested that a Notice of Preliminary Objection be heard and delivered with the judgment where convenient and practicable. To effectuate speedy resolution, the Court may decide to rule on the preliminary objection in the final judgment.

---

<sup>10</sup> <https://dictionary.law.com/default.aspx/Default.aspx?selected=487> Assessed on 10/7/2024

This Honourable Court can draw inspiration from the Order 18 Rule 1, 2, and 3 of the National Industrial Court Rules which provides as follows:

“1. Whenever any motion is filed in a matter before the Court, except it is withdrawn by the applicant, it shall be heard and determined by the Court.

2.– (1) Where there are multiple motions in a matter before the Court, the Court may consider taking the motions in order of filing and type but may hear the motion that regularizes or saves the matter before taking that which may terminate the matter.

Provided that where there are many defendants in a matter before the Court and there is a multiplicity of Notice of Preliminary Objections either touching on;

- (a) the jurisdiction of the Court to hear the matter; or
- (b) the competency of the Court to hear the matter; or
- (c) application of the statute of limitation

the Court may hear the matter in the order listed in paragraphs (a), (b), (c) of this rule.

(2) Where in a matter before the Court, a defendant wishes to dispute the jurisdiction of the Court to entertain such a matter, the Defendant may by a motion on notice, and an affidavit disclosing the facts in support of the application with a written address, apply to the Court to hear and determine the motion.

**(3) Where an application made in line with provisions of sub-rule (2) of this rule, the Court may take such application together with the Claimant’s substantive suit.**

(4) A defendant making an application in line with the provisions of subrule (2) of this rule shall file along with the motion on notice a memorandum of appearance stating that he or she is appearing conditionally.

(5) Where a Respondent served with a motion on notice intends to oppose the application, he shall do so in line with the

provisions of Order 43 the matter may be handled in line with the provisions.

3. Where there are many defendants in a matter and more than one Preliminary Objection is filed, the Court may order that the Preliminary Objections be consolidated.

4. Where the Court orders a consolidation of Preliminary Objections as stated in Rule 3 of this Order, the Court may make an order that the Claimant's reply to the consolidated Preliminary Objections be consolidated.

5. Where there are many Claimants in a matter before the Court and there is a multiplicity of Preliminary Objections, the Court may order each Claimant to consolidate the Claimant's reply in the Written Address instead of filing separate Written Addresses on each preliminary objection.

6. Where there is a matter pending before the Court and the preliminary objection is raised by any of the parties, in so far as the objection does not challenge the Court's jurisdiction, the Court may decide to hear the preliminary objection and proceed to hear the substantive matter without delivering the ruling on the preliminary objection until the judgment is ready and the ruling on the preliminary objection shall be delivered first before proceeding to deliver the main judgment on the matter.

Provided that where the Court in its ruling decides that the preliminary objection be upheld, the Court may decide to proceed or not proceed with the delivery of the main judgment.”  
[Emphasis, ours.]

The net effect is certainly not to obliterate the position of the appellate courts on jurisdiction but simply to postpone the determination of the jurisdictional issue later, based on the discretion of the judge. It is not a new development as same equally applies in

election petition cases. All this simply requires is the express inclusion of jurisdiction amongst the points of law.

**F. INTERIM INJUNCTION:**

It is suggested that the filing of originating process operates as an interim injunction. This will ensure parties maintain status quo immediately after an action is filed and served on them in line with the principles in the case of *FBN LTD v. STALLIONAIRE (NIG) LTD & ANOR*<sup>11</sup>. This also aligns with the provisions on preservation of res under the extant Rules. This will eliminate the burden of determining ex parte applications. In this regard, the emulation of the FCT High Court (Civil Procedure) Rules is most apt. Order 4 Rule 7 of the FCT Rules states:

“Every Originating process shall contain an endorsement by the Registrar that parties maintain status quo until otherwise ordered by the Court.”

*In fact, there are so many authorities to the effect that the court can suo motto order the preservation of the res without express application.*

**G. SATURDAY BE TREATED AS A HOLIDAY:**

In practice, civil courts do not sit on Saturday in Nigeria except for election matters, which are governed by separate Rules. Saturday ought to be treated as a non-judicial day and same be incorporated in Order 48 of the Rules of this Court.

**Proposed draft:**

*“In this Order, non-judicial day means a day which is a Saturday, Sunday or a public holiday.”*

**H. REFORM ON SERVICE/SUBSTITUTED SERVICE:**

Like Order 7 of the National Industrial Court Rules, service should be by various means thus obviating or limiting the need for incessant applications for substituted service which also contribute to the delay in the administration of justice.

---

<sup>11</sup> (2022) LPELR-57332 (CA)

**Proposed Drafts:**

*“1.– (1) Any process or document required or authorised by these Rules or ordered by the Court to be served on any person who is a party in a matter may be served as follows:*

- (a) by handing a copy of the process or document to the person or the person’s counsel; or*
- (b) by leaving a copy of the process or document at the person’s or the person’s counsel’s residence or place of business;*
- (c) by leaving a copy of the document or process at the person’s place of employment;*
- (d) by sending a copy of the document or process by registered post or courier to the last known address of the party or the party’s counsel; or*
- (e) by sending a copy of the document or process to the person concerned or to the person’s counsel through the e-mail address(es) or any electronic mailing device provided by the parties concerned;*
- (f) by sending a notification by way of hearing notice through a telephone short message service (SMS) of a process filed before the Court in which the person has been named as a party; or*
- (g) by leaving at that person’s address for service or, where no address for service has been given, at the registered office, principal place of business or last known address; or*
- (h) (i) if the person is a company or other body corporate, by serving a copy of the document or process on a senior or a responsible employee of the company or body corporate at its registered office or at its principal place of business or its main place of business within the Judicial Division in which the*

*dispute first arose or, if there is no employee willing to accept service, by affixing a copy of the document or process to the main door of the office or place of business or by posting same on the wall or the fence of the residence or place of business.*

*(ii) if the person is a trade union or employers' organization, by serving a copy of the document on a responsible person, or officer or employee of the union or employers' organization who at the time of such service is apparently in charge of the main office of the trade union or association or employers' organization or the union's or employers' organization's office within the Judicial Division in which the dispute first arose, at that office of the union or employers' organization or, if there is no person willing to accept service, by affixing a copy of the document or process to the main door of that office.*

*(iii) if the person or party is a partnership, firm or association, by serving a copy of the document or process on a person who at the time of service is apparently in charge of the premises, at the place of business of such partnership, firm or association or, if such partnership, firm or association has no place of business, by serving a copy of the document or process on a partner, the owner of the firm or the Chairman or Chief Executive Officer or Secretary of the managing partner or other controlling body of such association, as the case may be; and such service shall be deemed good service upon the firm. No leave to issue an originating process against them shall be necessary.*

*Provided that in the case of a partnership that has been dissolved to the claimant's knowledge before the commencement of the action, the process shall be served upon every person sought to be made liable within the jurisdiction. Provided further that where a process or any process is to be served on a partnership, no leave to issue such a process against any of the partners in the firm shall be necessary.*

*(iv) if the person or party is a Local Government Authority, by serving a copy of the document or process on the Local Government Chairman, Secretary or Supervising Councillor or Director of personnel of the Local Government Council or the Treasurer or any other responsible person, officer, or employee of the Local Government acting on behalf of that person ;*

*(v) if the person or party is a statutory body or an institution, by serving a copy on the Director General, General Manager, the Executive, full-time member of the institution or Commission, Secretary or similar Officer or member of the Board or committee of that body, or any responsible person, officer, or employee of the statutory institution acting on behalf of that body;*

*(vi) if the person or party is a Ministry, Department, Agency, parastatal or any other institution of the Federal or State Government, by serving a copy of the document or process on a responsible person, officer or employee such as Attorney General or Permanent Secretary or Director, or their equivalent in any Ministry, Department, Agency or Branch of the Federal or State Government.*

(i) *by leaving copies of the process at the head office or any branch office of the claimant or defendant or the counsel of the Claimant/Applicant or Defendant; or*

(j) *by any other means permitted by the Rules of this Court or as may be directed by the Court; or*

(k) *As an attachment to an electronic message via the e-mail address provided by the party or/and the party's counsel.*

(2) *Any hearing notice or notice of adjourned date issued by the Court for service on any party may be served:*

a) *by telephone call to the numbers provided by the parties or their counsel; or*

b) *by any other means permitted by the Rules of the Court or as may be directed by the Court.*

(3) *The Court may direct that service of any document or process be effected in any manner prescribed by the Rules of this Court or by any Rules of a High Court in Nigeria or in any other manner the Court deems fit.*

(a) *The President of the Court may designate an Officer of the Court as the Official Process Server.*

(b) *The Official Process Server shall effect the service of any process or document filed in the Court on any of the parties before the Court or their witnesses.*

(c) *The Official Process Server shall effect the service of any process, document, ruling, judgment, order, subpoena or invitation relating to any matter before the Court.*

(4) *Any process filed in the Court other than originating processes may also be served or effected on the parties through any of the following devices—*

(a) *Fax machine, where available;*

(b) *As an attachment to an electronic message via the e-mail address provided by the party or/and the party's counsel;*

(c) *Short Message Service (SMS) to telephone number(s) provided by the party and/or the party's counsel;*

*Provided that the use of Short Message Service (SMS) shall be limited to communicating dates of hearing or any change in respect thereof and no to be extended to service of other court processes, proof of which must be filed in the Court's record.*

*(d) Any other electronic communication and messaging platform;*

*(5) Once a process is served by any of the above devices, its electronically downloaded and printed copy as a proof of service may be allowed to be tendered by a party who either transmitted the process or document or by the party or counsel that received same.*

*(6) An electronically transmitted process or document may be tendered as the original of the same process or document and the content therein may be received in evidence in proving the facts therein contained.*

*(7) Proof of service of any Court process, served on any of the parties using the devices mentioned in this Rules shall be deemed good and proper service on any of the parties or counsel in the matter.*

*(8) Where a hearing notice or any other Court process has been sent and delivered by means of any electronic device stated in sub-rule 4 of this Rule to the contact addresses or information provided by a party or counsel, it shall be deemed sufficient, good, and proper service on the party or counsel that provided the e-mail address(es) or electronic mailing device.*

*(9) Where prompt service of notice or documents authorized to be served by these Rules cannot be effected in any manner provided in this Rule, a party may by motion ex-parte move the Court for an order of substituted service to be effected by way of posting, publication in the media or any other means possible as the Court may deem effective and just.*

*(10) Every application for substituted service when necessary, shall be made by motion ex-parte supported by an affidavit.*

*(11) Every application for substituted service shall be accompanied by a Written Address in support of the order the applicant is seeking from the Court.*

*(12) Where the Officer of the Court or a person charged with the service of any complaint or document on any person (in this rule referred to as recipient) is prevented by the violence or threats of the recipient or made to be impossible by the person on whom any process or document is to be served in concert with the recipient or under the recipient's control, it shall be sufficient to inform the person to be served of the nature of the complaint or document as physically near that person as practicable.*

*(13) Where a person to be served, whether alone or in concert with others, resists service or insults or assaults or attempts to threaten or threatens violence to the Process Server or otherwise prevents the Process Server from serving the process, the Process Server may throw or leave the process within the reach of the person to be served.*

*(14) In all cases where service of any complaint or document has been effected by an Officer of the Court or an Official or External Process Server, an affidavit of service sworn to by the Officer of the Court or an Official or External Process Server appointed by the Court shall, on production, without proof of signature of the person so served be prima facie evidence of service.*

*(15) When service is effected under any of the rules of this Order and there is proof of delivery, it shall be deemed good and sufficient service for all purposes.*

*(16) Any process served by an officer of the Court or an Official or External Process Server shall be deemed to be good service unless the contrary is proved to the satisfaction of the Court.*

*(17) Service of any process required by these Rules, shall not be effected on a Saturday or Sunday or on any public holiday, unless the Court otherwise directs by an Order endorsed on the document to be served.*

*(18) Where these Rules do not sufficiently provide for service of any process or do not make provisions for service at all, an*

*application ex-parte may be made to the Court for leave to adopt any applicable Rules of a High Court in Nigeria. The application shall clearly state on the face of it the Order and Rules of the High Court sought to be adopted for the Court to apply and a copy thereof shall be attached to the application.*

*(19) (a) Where a counsel or the servant, agent, staff or partner of the counsel (in this Order referred to as the representative of counsel) undertakes to effect service of process on the other party, or counsel to the other party, counsel or the representative of the counsel shall file a proof of service of the process within three (3) days of effecting the service.*

*(b) Where a counsel or the representative of the Counsel, undertakes to effect service on the other party, such counsel or the representative of the counsel who effects the service shall depose to an affidavit indicating the name, position of the person that acknowledged receipt, the date, time, place and mode of transmission of the process to the other party.*

*(20) Where counsel or the representative of the counsel, in a matter has undertaken to effect service on the other party or counsel to the other party, the Registrar shall, notwithstanding the undertaking, also effect service of the process on the other party in accordance with the rules of the Court.*

*(21) Where any process is to be served on counsel in a matter, the service of such process on the Chambers, Secretary or any other counsel, clerk or officer in the counsel's Chambers shall be deemed good and proper service on counsel.*

*(22) Notwithstanding the provisions of sub-rule 21 of this rule, where a counsel in a matter agrees to accept service of process during proceeding in the Court, such service shall be deemed good and proper service.*

*2. – (1) Service of any process shall be made by a Sheriff, Deputy Sheriff, Bailiff or other officer of the Court or an Official or External Process Server.*

*(2) Where a party is represented by a counsel, service of court processes may be made on such counsel or on a person under the control of counsel.*

**I. AMENDMENT OF ORDER 5 RULE 1 (2)**

Order 5 Rule 1(2) of the Rules states that the documents to accompany a Writ of Summons are as follows:

- (a) Statement of Claim;
- (b) a list of witnesses to be called at the trial;
- (c) written statements on oath of the witnesses except witnesses on subpoena;
- (d) copies of every document to be relied on at the trial;
- (e) Pre-Action Protocol Form 01 with necessary documents.

However, in order to ensure that the principle of pre-action protocol is duly complied with before the institution of the matter, Order 5 Rule 1 (2) (e) should read:

**“(e) Pre-Action Protocol Form 01 with necessary documents showing compliance with Pre-Action Protocol Requirement.”**

**J. ON THE NEED TO DISPENSE WITH PRE- ACTION NOTICE IN MATTERS THAT PROVIDE FOR STATUTORY NOTICE I.E. TENANCY MATTERS.**

In situations where certain Laws/Acts already provide for statutory notices period (e.g. quit notice, notice of owner’s intention in tenancy matters, or pre-action notice), they should suffice as a written memorandum of claim, thus dispensing with the need to serve same.

**K. AMENDMENT OF ORDER 49 RULE 5**

Order 49 Rule 5(2) provides thus:

***“An application for an urgent hearing shall be made by motion ex parte and the decision of the judge on such an application be final.”***

The literal interpretation of the above provision suggests that once a motion *ex parte* is heard and determined by a vacation court, such a decision is final and not subject to further review or reconsideration

by that same court. With respect, this position is both legally unsustainable and inconsistent with the settled principles of judicial review, fair hearing, and the inherent power of the High Court—especially as they relate to matters heard during judicial vacation.

While it is true that vacation courts are established to hear *urgent* matters under the Rules of Court and Practice Directions as provided by the Chief Judge, such courts do not lose their character as courts of record, nor are their decisions insulated from review. The vacation court is not a court *sui generis*, but rather a continuation of the regular Court, albeit sitting under special administrative arrangements during vacation periods. It therefore follows that any order made by a vacation court – especially one granted *ex parte* – can be set aside, reviewed, or varied where the interest of justice so demands and the threshold for such is met.

The danger of interpreting the powers of the vacation court to mean that *ex parte* decisions are final and only appealable was demonstrated in the case of *Mr. Eniola Adenuga v. Damilola Ogun* (Appeal No: LD/3058MJR/2019), decided by the High Court of Lagos State on the 13th day of January 2023. In that case, the vacation court granted certain orders *ex parte*, and when the Respondent applied to set them aside based on material non-disclosure, the court declined jurisdiction to entertain the application, relying on the fact that it was constituted during the vacation period and by Order 49 Rule 5, the order is said to be final. This interpretation effectively shut the door to judicial review and compelled the aggrieved party to seek redress on appeal.

This procedural detour was ultimately corrected by the Court of Appeal in *Appeal No: CA/LAG/CV/104/2023 - Mr. Eniola Adenuga v. Damilola Ogun*, delivered on the 7th day of June 2024. The appellate court, sitting in the Lagos Division, held emphatically that the fact that a matter was heard during vacation does not oust the jurisdiction of the court to revisit its own *ex parte* orders. The Court of Appeal reaffirmed the long-standing principle that every court of record has the inherent

power to set aside its own orders made in error or obtained by fraud, misrepresentation, or suppression of material facts.

Based on the foregoing, we propose that the provision should be amended to read thus simply:

***“An application for an urgent hearing shall be made by motion ex-parte.”***

**L. AMENDMENT OF ORDER 9 RULE 5 (2)**

It is our belief that the mode of substituted service should be inclusive to provide for more modern means of doing same such as WhatsApp, Facebook, Instagram and other social media platforms.

The provisions of Order 9 Rule 5 (2) should therefore be amended to read:

***“Where personal service of an Originating Process is required by these Rules and a Judge is satisfied that prompt personal service cannot be effected, the Judge may, upon application by the Claimant, make such order for substituted service as may seem just, including service by electronic mails and/or social media platforms.”***

**M. ON FILING AND SERVING A REPLY ON POINT OF LAW**

Order 43 Rule 1 (4) of the Rules provides thus:

“The Applicant may within seven (7) days ***file and serve*** a reply on point of law to the Counter Affidavit on the Applicant and he may file Further Affidavit with his reply.”

The above provision suggests that the Applicant must ***file and serve*** reply on point of law within 7 days. My understanding is that while it is the intention of the draftsmen that the reply on point of law be filed within seven (7) days of receiving the counter-affidavit, the draftsmen do not intend to mandate service within the said seven days. This is so considering the fact that there is no such provision on service with respect to the counter-affidavit. It is, therefore, suggested that the

word “serve” be expunged from Order 43 Rule 1 (4) of the Rules. It should read:

“The Applicant may, within seven (7) days, file a reply on point of law to the Counter-Affidavit on the Applicant and he may file Further Affidavit with his reply.”

This, I believe, will resolve this confusion. However if that is the intendment of the rule, I am not vehement.

#### ADMINISTRATIVE ISSUES

1. Order 57 Rule 4 (1) provides for the mode of serving originating summons on unknown persons. Order 57 Rule 4(1) provides thus:

***“Where any person in occupation of the land is named in the Originating Summons, the Summons together with a copy of the Affidavit in support shall be served on him:***

***(a) personally or in accordance with Order 8 Rule 4;***

***(b) or by leaving a copy of the Summons the Affidavit or sending them to him at the premises; or***

***(c) in such other manner as the Judge may direct.”***

Despite the provisions in Order 57 Rule 4(1)(b) stating that service may be affected by leaving a copy of the summons, Sheriffs insist on legal practitioners getting an order of substituted service from court before effecting service in the manner provided for in Order 57 Rule 4(1)(b). Court Sheriffs should be enlightened properly on the purport of the Rules in this regard, thus obviating the further burden on the court.

#### CAPACITY BUILDING FOR REGISTRARS.

There is also a need to organise workshops and classes for Assistant Chief Registrars (ACR), Legal Registrars, and Registrars to educate them on the existing Rules. For instance, where a party reacts to a pre-action protocol less than the 30-day window provided in the Practice Directions No. 2, there would not be any need to wait for the expiration of 30 days before accepting filing. However, we have seen situations where, notwithstanding the defendant’s response to the pre-action protocol memorandum, the court officials insisted that parties must

wait for the expiration of 30 days before filing an action in Court, which runs contrary to the Paragraph 1.2, page 20 of the Practice Direction No. 2.

Beyond the conduct of CMC, the re-assignment of cases after the close of CMC is another impediment to the quick dispensation of justice. I must admit that in recent times, this is significantly improving. In the past, it takes as much as 7 months before re-assignment. Besides, case files also go missing in the process of re-assignment at times. The elimination of the CMC will render the reassignment unnecessary. The present arrangement complicates issues instead of facilitating a quick and efficient justice delivery system. It is, therefore, recommended that we go back to the traditional way before the 2004 Rules, where parties proceed to trial immediately after the close of pleadings. There is no better time to return to normalcy than now. The net effect of this is that a singular judge hears the case from the commencement to conclusion, with the deserved speed.

Furthermore, it has been established that disputes can be resolved at any time by parties, even after the delivery of judgment, much less during trial. The point being made here is that, in the absence of CMC, parties would still be able to give an amicable resolution a go at any time.

In a plethora of decided cases, the court has been resolute and consistent in holding that Courts are enjoined to encourage amicable resolution of disputes. It must be noted that whilst many other jurisdictions have borrowed so much from the Lagos High Court Civil Procedure Rules since it came into being in 2004 and through its evolution up to 2019, most jurisdictions refuse to copy Lagos on the CMC provisions because they have realised that it has become a burden more than a blessing.<sup>12</sup>

It is noteworthy that the High Court of Lagos State (Expeditious Disposal of Civil cases) Practice Direction No 2 of 2019 has effectively taken care of CMC at the pre-action stage. This means that the various steps

---

<sup>12</sup> See for instance the Federal High Court (Civil Procedure) Rules, 2009 and the Federal High Court (Civil Procedure) Rules, 2019.

taken prior to the institution of the case are more than sufficient to narrow issues and afford parties the opportunity of settling their disputes. Consequently, in order to fully appreciate and achieve the objectives of the Rules on expeditious hearing of cases, it is strongly recommended that we dispense with it.

N. **INCORPORATION OF THE PRACTICE DIRECTION IN THE RULES:**

Practice Directions are known for setting out procedures to be followed in court proceedings. I shall refer to page 3 of the Practice Direction on Pre-Action No 2. which provides as follows:

“Pre-Action Protocol explains the conduct and sets out the steps required of parties prior to commencement of proceedings to which the High Court of Lagos State (Civil Procedure) Rules apply. **They are issued by the Chief Judge of Lagos State and form an integral part of the High Court of Lagos State (Civil Procedure Rules)”**

The point being made here is that Practice Direction explains and supplements the Rules of Court. It is indeed an integral part of the Rules. The objectives of the High Court Rules would better be served if the existing practice directions were incorporated into the body of the Rules of Court. It is therefore recommended that the existing Practice Directions be incorporated into the Rules. This will ensure harmonisation of the Rules, give them more force of law and easily bring their existence to practitioners’ awareness. This approach was just adopted in the review of the Supreme Court Rules in which I had the privilege of partaking.

It is strongly recommended that professional draftsmen be engaged in the drafting of any further amendment to the Rules. Legislation or subsidiary legislation is not an area of which experts in drafting must not be part.

O. **ENABLING THE FILING OF COUNTER-CLAIM IN AN ACTION INSTITUTED BY ORIGINATING SUMMONS**

The Lagos State High Court Rules permit the filing of a Counterclaim where an action is commenced by Writ of Summons. Order 19 Rule 7 states:

“Where a Defendant by his Defence sets up any Counterclaim which raises questions between himself and the Claimant along with any other persons, he shall add to the title of his Defense a further title similar to the title in the Statement of Claim, setting forth the names of all persons who, if the Counter-Claim were to be enforced by cross action, would be Defendants to such cross action.”

There are no equivalent provisions on filing of counter-claim in actions commenced by originating summons in the Rules. Meanwhile, in decided cases, courts have held that filing of counterclaim in an action commenced by Originating Summons is not unknown to law. The Affidavits in originating summons are considered to be pleadings. The claimant's affidavit is taken as the Statement of Claim, while the Defendant's counter-affidavit is taken as statement of defence and a Respondent is permitted to raise a counterclaim.

It is thus necessary to bring the Rules in conformity with the said judicial authorities in affirming the position. This is in line with decided court cases. See *ITUEN v. SPEAKER, AKWA IBOM STATE HOUSE OF ASSEMBLY & ORS (2021) LPELR-53318(CA)*, where the Court held as follows:

"The grouse of the Appellant in his issue No. 1 is that the counter claim of the 1st Respondent is contained in and or embedded in his counter affidavit. This, according to the Appellant, constitutes abuse of Court process. The above complaint of the Appellant cannot be countenanced because of the recognition in case law that the Counter Affidavit in the Originating Summons procedure is synonymous with Statement of Defence in pleadings under the Writ of Summons procedure. It follows logically that in originating summons procedure, the counterclaim has to be contained in the Counter Affidavit as Counter Claim is contained

in Statement of Defence in Writ of Summons procedure. In the case of GBAJABIAMILIA v. CBN & ORS (2014) LPELR - 22756 (CA) pp. 36-37, the Court of Appeal, per Ikeyegh JCA laid the principle thus: Affidavits in originating summons are considered to be pleadings. The claimant's affidavit is taken as the Statement of Claim. While the Defendant's counter affidavit is taken as statement of defence. See PORTS AND CARGO HANDLINGS SERVICES COMPANY LTD. & ORS v. MIGFO NIGERIA LTD. & ANOR (2012) 18 NWLR (Pt. 1333) 555 @ 609 per the judgment by Ariwoola, JSC, as follows "Surely, the deposition and averments in an affidavit in support of an originating summons are like the averments contained in the statement of claim or pleadings in support of a general writ of summons in an action commenced by such writ of summons." ... Again, in the case of NNPC & ORS v. FAMFA OIL LTD. (2012) 17 NWLR (Pt. 1328) 148 @ 189 it was stated in the lead judgment by Rhodes-Vivour, JSC, inter alia that "When an originating process (as in this case) is an originating summons, the affidavits filed in support serve as the statement of claim, while the counter affidavits serve as statement of defence. The affidavits are the pleadings for the case." (My emphasis). See also UWAZURUONYE v. GOVERNOR OF IMO STATE & ORS. (2013) 8 NWLR (Pt. 1355) 28 @ 56. Also, in FAJIMI v. (LASTMA) & ORS. (2014) LPELR - 22253 (CA) page 39, Ikyegh JCA said: Where the case is not fought on pleadings but on affidavit evidence in an originating summons action, the Defendants counter-affidavit serves as his statement of defence in which he is expected to raise the defence of time-bar of the action based on the Public Officers (Protection) Act or Law, as the case may be. See NNPC & ANOR. V. FAMFA OIL LTD. (2012) 17 NWLR (Pt. 1328) 148 @ 189 per the lead judgement prepared by Rhodes-Vivour, JSC, thus - "when the originating process is an originating summons, the affidavit filed in support serve as the statement of claim, while the counter affidavit serves as statement of defence. The affidavits are the pleadings for the case" .... In the case of FRIDAY & ORS. V. THE GOVERNOR OF ONDO STATE & ANOR. (2012) LPELR 7886 (CA) @ pages 53-54

Kekere-Ekun, JCA, emphasized that whether it is a procedure governed by pleadings or Counter Affidavit, what is important is for the Counter Claimant to sufficiently indicate an intention to rely on the same pleadings in support of his counter claim, those pleadings would satisfy the requirement of pleadings in support of his Counter Claim. Listen to the erudite jurist: In the case of ADENIYI v. OROJA (supra), reliance was placed on the decision in the case of OKONKWO v. C.C.B (2003) FWLR (154) 457 @ 508 where it was held that "a counter claim is a cross action with its separate pleadings, judgment and costs." The case of HASSAN v. REGD. TRUSTEES BAPTIST CONVENT (1993) 7 NWLR (308) 679 @ 690 was cited with approval. My understanding of these decisions is that where a Defendant files a counter claim, there must be pleadings upon which his case is founded, as it is those pleadings and the evidence led in respect thereof that the Court would consider in determining the merit or otherwise of his counter claim. Being a separate claim, if there are no pleadings to support it, it would certainly fail. It is often the case that the facts relied upon by the Defendant in defence of the main action are the same facts being relied upon in support of the counter claim. In such circumstances, as long as the counter claimant sufficiently indicates an intention to rely on the same pleadings in support of his counter claim, those pleadings would satisfy the requirement of pleadings in support of the counter claim. In the event that the main claim fails, the Court would not be precluded from considering the pleadings in the statement of defence (or counter affidavit in the case of a suit begun by originating summons) in determining the counter claim. In the instant case, the counter affidavit of the 1st Respondent in opposition to the Appellant as contained on page 122 of the Record of Appeal is titled "Counter Affidavit/Counter Claim". At page 124 of the same Record of Appeal and in the same process, there is a sub-title "Counter Claim" containing fresh numbering of depositions from No. 1 on page 124 to No. 25 on page 127 of the Record." Paragraph 26(a) to (d) specifically counter claimed and the process/document

ended up in paragraph 27 to say: 27. That I make this deposition (Counter Affidavit and Counter Claim) in good faith, believing its contents to be true and correct and in accordance with the provision of the Oaths Act. In the above circumstance, I do agree with the learned counsel to the Respondents and in the words of Kekere-Ekun, JCA (as he then was) in the case of FRIDAY & ORS. V. THE GOVERNOR OF ONDO STATE & ANOR. (supra) that: In such circumstances, as long as the Counter Claimant sufficiently indicates an intention to rely on the same pleadings in support of his counterclaim, those pleadings would satisfy the requirement of pleadings in support of the counter-claim. In the event that the main claim fails, the Court would not be precluded from considering the pleadings in the Statement of Defence (or counter affidavit in the case of a suit begun by originating summons in determining the counter claim). Issue No. 1 is resolved against the Appellant.” *Per MOJEED ADEKUNLE OWOADE, JCA (Pp 15 - 20 Paras A - C).*

The above quote, though may appear long and windy, confirm the propriety of filing a counterclaim in a matter commenced by originating summons.

**P. THE PRACTICE DIRECTION ON VIRTUAL/REMOTE HEARING BE INCORPORATED INTO THE RULES OF COURT AND MODE OF APPLICATION**

After the impact of Covid-19 pandemic, it became necessary to devise an alternative means to continue the court’s business amidst the growing pandemic. The Honourable Chief Judge of Lagos State, pursuant to the provisions of Section 6(6) of the Constitution of the Federal Republic of Nigeria 1999 (as amended), Section 87 of the High Court Law of Lagos State 2015, Order 49 Rules 1, 2 and 3 of the High Court of Lagos State (Civil Procedure) Rules 2019, Lagos State Magistrates’ Court (Civil Procedure) Rules, 2009, Administration of Criminal Justice Law of Lagos State, 2015 issued the Practice Direction for remote hearing of cases in the Lagos State Judiciary for the very first time. The introductory paragraphs of the Practice Direction on Remote Hearings read:

“The current Corona Virus (Covid-19) pandemic necessitates the use of Remote Hearing to ensure cases are heard and disposed of urgently where possible. This Practice Direction applies to: new cases where there is urgency; pending cases involving urgent or important and time bound interlocutory applications such as bail applications, adoption of addresses, rulings and judgments or any other matter as the Chief Judge may approve.”

This Practice Direction therefore sets out the guidelines to be adopted in remote sittings, recognizing the urgent need for the Judiciary to put in place measures to guarantee continued access to justice and expeditious disposal of cases while minimising the risk of transmission of Covid-19.”

Further, paragraph 16 of the Practice Directions provides as follows:

“Remote hearing shall be by Zoom, Skype for business or any other video communication method approved by the Chief Judge.”

The coverage of the Practice Direction on remote hearing is limited to certain situations and was introduced due to the prevalence of Covid-19. However, it has now been widely accepted by all stakeholders in cases that are unrelated to Covid-19 situations.

Pronouncing on the constitutionality or otherwise of Virtual Sitting, the Supreme Court, in **AG Lagos State v. A.G. Fed [2020] 12 NWLR (Pt. 1738) 345 at 346**, per Rhodes-Vivour, JSC Held as follows:

**“Virtual sitting as of today are not unconstitutional.”**

Interestingly, no law forbids the conduct of virtual hearings in Nigeria. What is not expressly forbidden is permitted. Proceedings can be held virtually and publicly as required by the law, not necessarily physically. It is in view of the aforesaid that I recommend that the provisions on virtual hearing be incorporated into the Rules of Court. This will give virtual hearing more bite. It will also be tantamount to adopting the already existing practice with clarity and precision. The new Supreme Court Rules have incorporated same into the rules expressly.

Proposed draft of the main provision:

*“Upon application by motion on notice by any of the parties or suo motu, the Court may conduct its proceedings virtually where it deems fit.”*

*Virtual proceedings shall be conducted upon payment of prescribed fee by either of the parties.*

*Proceedings conducted via videoconferencing technology must be recorded by the court.*

*The required recording must be sufficient to produce a verbatim written transcript as if the hearing were held in person in the courtroom.*

*For purposes of generating a transcript, courts may use the recording of a remote proceeding generated using Zoom or another remote meeting service provider.”*

In Canada, there is the Virtual Courtroom Etiquette Rules which guides the conduct of parties in virtual hearings. The Lagos State High Court can consider some of the Rules to imbibe orderliness during virtual trials. Excerpts from the Ontario Courtroom Etiquette Rules<sup>13</sup> are provided as follows:

“All participants and members of the public that attend a virtual court proceeding must conduct themselves as if they were physically in the courtroom. We ask all individuals participating in virtual court proceedings to continue to observe the following well-established rules of court decorum. However, they are all subject to the directions of the presiding judge.

---

<sup>13</sup> <https://www.ontariocourts.ca/scj/notices-and-orders-covid-19/virtual-courtroom-etiquette-rules/> assessed on 10/7/24

All participants and members of the public attending a virtual hearing should observe the following rules:

**1. *Eliminate distractions, prepare and arrive on time:***

- a. Try to locate a quiet area and minimize interruptions and distractions by others who may be around while you participate in the proceeding.
- b. Turn off all electronic devices before entering the virtual proceeding apart from the one you are using to enter the virtual proceeding. This includes muting any notifications on your computer/device.
- c. If participating in a virtual proceeding by videoconference, inappropriate profiles or background photos must not be used.
- d. Check to ensure that you have a stable internet connection.

**2. *Identification:***

- (i) Identify yourself when in the virtual meeting:

If you are appearing in a Zoom courtroom, sign in with your last name followed by your first name. Participants, including litigants and witnesses, are also encouraged to proactively provide their prefix (e.g., Mr./Ms./Mrs./Mx., etc.) and/or pronouns (e.g., he/him, she/her, they/them, etc.) when stating their name or by updating their screen name during a virtual proceeding.

**3. *Attire:***

Dress appropriately for court when appearing via videoconference. Dress as you would if you were attending court in person.

**4. *Behaviour:***

- a. Be courteous and respectful to all virtual court participants.

- b. Participants must remain on mute until their matter is called.
- c. If the judge determines that you are behaving in a disruptive or abusive manner, they may remove you from the meeting.

**5. *Recording:***

Unless authorized by the judge, you shall not make any recording of the proceedings or take photos or screen captures of the proceedings.

**6. *Preparation in advance of the hearing:***

- b. All counsel should ensure that their Internet connection and the Internet connection of any witnesses they intend to call is stable in advance of the hearing.
- c. All counsel should join the hearing at least 15 minutes before the actual start time to ensure that there are no technological issues that could create a delay.
- d. All counsel appearing in virtual proceedings must ensure that backgrounds are neutral and the setting is professional and appropriate for a court hearing, which specifically does not include the interior of a vehicle.
- e. All counsel appearing in virtual proceedings must ensure that they are appearing from a private space free from any distractions, such as people or pets that could wander into the room.

**6. *In-court etiquette:***

- a. The judge and counsel should be addressed as if they were in a physical courtroom.
- b. Unless directed otherwise by the court, it is not necessary to stand when a judge joins the hearing or when addressing a judge. In lieu of bowing to the judge, counsel may nod or bow their heads when the judge enters the video.

*This may be subsumed in the schedule including the issue of the applicable fees for arrangement.*

There is now also the Supreme Court Rules guidance on this which can serve as a guide. Finally, I suggest the privatisation of the electronic services as done in other progressive jurisdictions, with the State simply acting as regulator of service level.

**Q. TRANSFER OF CASES.**

There should be a push for the inclusion of power to transfer to other courts of coordinate jurisdictions as contained in other rules of court like the Federal High Court and National Industrial Courts. The Federal High Court Act is also instructive on this point. Order 41 Rule 6 of the FCT Rules provides that:

**“Where a court has no jurisdiction in a cause or matter the judge may by order transfer the cause or matter to a court with competent jurisdiction”.**

It is my belief that incorporating the above in the High Court of Lagos State Laws will greatly enhance administration of justice.

**R. CLARITY ON THE STATUS OF WITNESS DISPOSITION**

**In practice, some judges admit witness statements on oath as Exhibits which ought not to be so. The witness statement on oath should only be adopted, being evidence of parties and not be admitted as an exhibit. Thus, there is a need for uniformity on this issue as far as approach is concerned.**

**S. UNDERTAKING TO SERVE**

To ease the service of processes, like in the Federal High Court, the Rules should enable Counsel to file an undertaking to serve processes on the Court’s behalf.

**T. NEED TO IMPOSE SANCTION ON COUNSEL FOR ABUSE OF COURT PROCESSES.**

It is recommended that the Rules impose heavy sanctions on counsel who abuse court processes. This part, to some extent, has been covered by the provisions of the Order 53 Rule 13 of the High Court of Lagos

State (Civil Procedure) Rules, 2019. However, it is recommended that a minimum amount be fixed to serve as a punitive measure against counsel for filing abusive matters. The new Supreme Court Rules is instructive in this regard.

***CONCLUSION:***

This is my little thought for now.