

Civil litigation is procedural, falling under adjectival law which consists of rules of procedure and law of evidence. Civil litigation refers to the body of rules that regulates the conduct of civil proceedings before the court.

ALTERNATIVE DISPUTE RESOLUTION

ADR relate to the alternative methods of dispute resolution that is aside litigation. In other words, should a potential litigant not willing to go to court, which other method can be used to resolve the dispute. The following are the methods available.

- Negotiation
- Mediation
- Conciliation
- Arbitration

Advantage of ADR over litigation

0. Cheaper than litigation: In short term, ADR can be more expensive than litigation but in long term it is cheaper than litigation. In ADR, all the expenses are borne by the parties while in litigation; some of the expenses are not borne by the parties.
1. Faster than litigation: In litigation, there is competition but in ADR, the parties' case is likely to be the only one.
2. Preservation of relationship between the parties: Most ADR has a win-win situation on both sides, although arbitration is now similar to litigation as it is governed by stringent rules where there is a winner and loser. Strictly in litigation, it is a win-lose situation.
3. Privacy of the parties: ADR helps preserve the privacy of the parties. In litigation, the process must be held in public except under certain conditions thus in private. Again most parties to litigation do not return as friends even in matrimonial proceedings. And in commercial area of law, ADR is most relevant as there might still be need to continue business relationship.
4. It is less formal: The court room where litigation is carried out is usually tense. For the lawyers, it is difficult, there are a lot of rules and procedures which must be followed and also for the layman, it is extremely difficult. In ADR session, it is more of business meeting where coffee can even be served. Hence the layman is likely to prefer such environment.
5. Involvement of people: ADR processes are parties driven. Parties can determine the time, venue and pace in the ADR process. In litigation, parties are not involved. It is controlled by the court.

Disadvantages of ADR

0. In arbitration, the arbitrator is not protected against hostility while in litigation; the judge can give judgment without fear or favor.
1. ADR hinders the development of case law. This is however seen as a positive limitation and not a negative one as case law is not an end in itself but a means to an end.
2. Lack of binding force: ADR processes usually lack binding force except arbitration as the Arbitration and Conciliation Act provides for its bindingness. However for the others that have no binding force, the parties can and usually make an effort to reduce the decision reached in the ADR process into a binding agreement. In other words, by their own nature, most are not binding but there are means to making them binding.

ADR is not useful in certain cases. These are:

- . In criminal cases generally, ADR is not used but there are exceptions. For instance, plea bargaining in its effect involve some ADR issues as it is give and take position; negotiation of plea of guilty.
 - a. Election petition being matter of public policy cannot be resolved through ADR.
 - b. In matrimonial causes, ADR is only relevant in certain ancillary matters and not in issue of dissolution of marriage as it is only the court that can decree a Decree Absolute.

- c. Certain matters that require evidence to be proved. For instance, a declaratory relief being sought must be proved by evidence.
- d. Dispute relating to binding interpretation of law, statute or document. The court is the only institution that can do so.
- e. Cases of urgency (immediate help like seeking an injunction) ADR will not be necessary.

SOURCES OF CIVIL LITIGATION

The following are the various sources of civil litigation:

1. Rules of courts

In practice, every court has its own rules that guide practice and procedure of such court. In this like, there is the Supreme Court Rules, Court of Appeal Rules, Federal High Court Rules, State High Court Rules, down to Sharia and Customary Court Rules.

2. The Constitution

The function of the constitution as it relate to it being a source of civil litigation can be divided into the following:

- The constitution creates the court. Section 230(1), 237(1), 249(1), 270(1) of CFRN 1999 creating the Supreme Court, Court of Appeal, Federal and State High Court respectively.
- The constitution gives power to the courts.
- The constitution prescribes the authority to make rules. Section 236 CFRN conferring power on the CJN to make rules regulating the practice and procedure in the Supreme Court.
- The constitution also has rule on civil litigation. Section 36 CFRN on fair hearing; section 233 on appeal to the Supreme Court.

3. Statutes creating courts

Rules of court are also made pursuant to statutes creating the courts. Also there are certain provisions in the statute directly on procedure. For instance, s. 7 & 25 of Supreme Court and Court of Appeal Act on time within which an appeal can be made. 14 days for interlocutory judgments and 3 months for final judgments.

4. Special statutes on procedure (civil)

Aside from the rules of court, there are statutes which have provisions on civil litigation. These statutes can cover an aspect of civil litigation. E.g. Admiralty. These special statutes include the following:

- The Sheriffs and Civil Process Act/Law and The Judgment (Enforcement) Rules. This is an Act of the National Assembly by virtue of the fact that the subject matter of the Act is found in item 57 of the exclusive legislative list, thus applicable in the whole federation. Hence, any law of a state in that respect is only applicable to Magistrate (South), District (North), Customary and Sharia Courts.
- Foreign Judgments (Reciprocal Enforcement) Act. It gives procedure on how a foreign judgment is to be enforced.
- Companies and Allied Matters Act. Under CAMA there are the Companies Winding up Rules 2004 and Companies Proceedings Rules 1992. There are rules on civil litigation but apply only to companies or entities under CAMA.
- Company Income Tax Act under it, the Federal High Court (Tax Appeals) Rule 1992 was enacted.
- Admiralty Jurisdiction Act under it the Admiralty Jurisdiction Procedure Rules was made.
- Matrimonial Causes Act and Matrimonial Causes Rules, all on practice and procedure for matrimonial causes.

5. Practice direction

These are rules and guidelines given by the necessary or appropriate authority when a lacuna exists in procedure. Examples are:

- A multi-door court rules is a practice direction.
- In election petition s, the 1st schedule to the Electoral Act had nothing like front loading but a practice direction was issued to that effect.

- In the National Industrial Court, the president introduced front loading based on practice direction. Whenever the rules may be short or inadequate the appropriate authority can quickly issue guideline. It is pertinent to note that a practice direction is not expected to depart from or be inconsistent with the rules of court, because it is not an enactment therefore has no force of law. As between the statute creating court and rules of court, the statute creating court is superior and as between the statute and the constitution, the constitution is superior, as between the rule and practice direction, the rule prevails.

Decisions of courts on procedure

There are some rules of procedure that are derived from decision of courts. For instance, the rules relating to grant of injunctions were developed by the court through its decision. Also the rule that requires addressing the court before ordering a non-suit. For instance, where there are two motions before the court of which one will render the suit competent or preserve the suit and the other would strike it out, the rule is that the court would first hear the motion that would make the suit competent before the other. The question has been asked as to the relevance of English rules in civil litigation. Section 26 of Lagos High Court Act, the position then was that when there is a lacuna, the English rules should be referred to. However, the position now is that where there is a lacuna, the court would take steps to do substantial justice. In this like, the court shall decide to go to England (English rules) when substantial will be done. Note that the High Court of Lagos (Civil Procedure) Rules 2012, the High Court of FCT, Abuja (Civil Procedure) Rules 2004 would principally be referred to.

JURISDICTION OF COURT

It is a function of law. In one word, it is power of the court to decide a dispute between parties. Every court is established by some laws and it usually the law establishing the court that also defines the jurisdiction of the court. In *Madukolu & Ors v. Nkemdili*, the court stated three conditions that must be in existence before the court can be said to have jurisdiction. These are:

1. There must be constitution as to qualification and numbers of members of the bench and no member is disqualified for one reason or another.
2. Subject matter of the dispute must be within the jurisdiction of the court and no feature in the case which prevents the court from exercising its jurisdiction.
3. The case must have been brought to court in accordance with due process after satisfaction of relevant provisions on condition precedents.

There should be a distinction between procedural and substantive jurisdiction. Substantive jurisdiction is the jurisdiction that relates to the subject matter of the dispute. This kind of jurisdiction can be raised at anytime even at the Supreme Court for the first time. It can also be raised *suo motu* by the court. Procedural jurisdiction relates to matters on pre-action notice, hence not being substantive jurisdiction must be done timeously. If it is not so done, then such party would be deemed to have waived it. Thus procedural jurisdiction cannot be raised at anytime but must be raised timeously.

COURTS IN NIGERIA

Supreme Court

The Supreme Court is established by section 230(1) CFRN.

Composition is CJN plus 21 Justices (not more than that).

Constitution - At least 5 Justices, however on the following, it must be 7 justices. Section 234, exercising original jurisdiction, interpretation or application of the constitution, contravention of chapter IV - fundamental rights.

Appointment - CJN is appointed by the President on recommendation of NJC subject to confirmation of Senate - section 231(1). Same for other justices - section 231(2) CFRN.

Removal - sections 292(1) (a) provides that the CJN to be removed by the President acting on address supported by 2/3 majority of the Senate. The question then is, does the National Judicial Council not have any role to play based on the express provision of section 292 CFRN.

The Supreme Court in *Elelu Habeeb v. Attorney-General of Kwara state*, stated that other statutes and provision of the constitution should be read along section 292 of CFRN. As it is by reading these other statutes that the function of the NJC which actually recommend removal to the president would be found. In effect the proper interpretation of section 292 cannot be done in isolation.

Jurisdiction

The Supreme Court has both original and appellate jurisdiction in civil litigation.

- In disputes between the federal and state government. Section 232(1).
- In dispute between states.

In accordance, section 232(2) which empower the National Assembly to confer additional original jurisdiction in respect of civil matters on the Supreme Court, the National Assembly enacted the Supreme Court (Additional Original Jurisdiction) Act 2002. These additional original jurisdiction are section 1(1) (a)-(c)

- In dispute between the National Assembly and the President.
- In dispute between the National Assembly and state government/state of the federation.
- In dispute between the National Assembly and State House of Assembly.

Hence the Supreme Court now has original jurisdiction in five aspects. The schedule to section 2 of the Act states that both the National Assembly (consisting of Senate and House of Representative) must have passed a resolution supported by a simple majority; and the State House of Assembly must have passed a resolution supported by a simple majority. The nominal parties as found in section 3 is National Assembly, State House of Assembly is speaker of the State House of Assembly. Generally, nominal parties for the federation and the states are Attorney-General of the federation and Attorney-General of the state.

- Appellate jurisdiction of the Supreme Court as found in section 233 lies from the court of Appeal as of right or with leave of the Court of Appeal or Supreme Court.
- ~~There is appeal from the Legal Practitioner Disciplinary Committee of the Body of Benchers to the Supreme Court.~~

Court of Appeal

Section 237(1) CFRN creates the Court of Appeal

Composition - President of the CA plus not less than 49 is outdated provision, as at the last time there is a bill before the National Assembly proposing at least 89 justices - President plus 89 justices with at least learned in Islamic law and 3 in Customary law.

Constitution: At least 3 in exercising an original jurisdiction and in appeal from Sharia Court of Appeal or Customary Court of Appeal, 3 justices learned in Islamic personal law or customary law as the case may be. Section 247(1)(a)&(b) CFRN

Appointment: President is appointed by the President of FRN on recommendation of NJC with the confirmation of senate. Other justices are appointed by the president on recommendation of NJC. Section 238(1) & (2).

Qualification: At least 12 years at the bar.

Jurisdiction: The Court of Appeal has both original and appellate jurisdiction. Original jurisdiction - section 239(1)

- Valid election to the office of the president/vice president.
- The term of office of president/vice president has elapsed.
- The office of the president/vice president has become vacant.

Appellate jurisdiction - section 240 of CFRN

- State High Court
- Federal High Court
- High Court of FCT
- Customary Court of Appeal
- Sharia Court of Appeal

- National Industrial Court
- National and State House of Assembly Election Tribunals
- Governorship Election Tribunal

By virtue of the second alteration to the 1999 constitution, in section 8(3) only the decision of the Court of Appeal in respect of appeals arising from the National and State House of Assembly Election petition Act shall be final.

Federal High Court

Section 249 (1) of CFRN, 1999 created the Federal High Court.

Composition – 9 chief judges and such other number prescribed by the Act of National Assembly.

Constitution – section 258 CFRN at least one judge

Appointment – section 250, same as Court of Appeal

Qualification – at least 10 years at the bar.

Jurisdiction – section 251(1) (a)-(s) CFRN, 1999. In addition to other jurisdiction to be conferred by an Act of National Assembly, it has exclusive jurisdiction in the following matters

- . Revenue of the government of the federation whether it or its organ as a plaintiff or defendant.
- a. Taxation of a company, bodies established to carry on business and persons subject to federal tax. Companies Income tax – Federal High Court; Personal Income Tax – state of residence; residents of Abuja are subject to federal taxation but those in other states, Personal Income Tax.
- b. Customs, excise duties, export duties, claim against Nigeria Customs Service or any member or office relating to performance of their duties.
- c. Banking, bank, other financial institution. Action between bank and bank. Action against CBN relating to final measures. However, no exclusive jurisdiction as between transaction involving a customer and his bank. There is a difference between banking policy and transaction (concurrent with State High Court), policy-mergers, revocation of banking license, capital, examination of banks, fiscal measures are within the exclusive jurisdiction of Federal High Court.
- d. Operation of CAMA or any law replacing CAMA. For instance, removal of a director by Federal High Court
- e. Any law on intellectual property, copyright, patents, business name, trade mark, industrial designs.
- f. Admiralty matter, shipping, carriage by sea, River Niger, River Benue, other inland waterways designated to be international waterways, federal ports.
- g. Diplomatic, consular and trade representation
- h. Citizenship, deportation, extradition, immigration, emigration, nationalization
- i. Bankruptcy and insolvency
- j. Aviation and safety of aircraft
- k. Arms, ammunition, explosives
- l. Drugs and poisons
- m. Mines and minerals
- n. Weights and measures
- o. Interpretation of the constitution that affect federal government or any of its agencies.
- p. Action, declaration, injunction affecting validity of executive or administrative
- q. Such other exclusive civil jurisdiction to be conferred on it by an Act of National Assembly.

CASES ON THE POINT

NEPA v. EDEGBERO: The former employees of NEPA sued it at the State High Court of Niger for wrongful termination. NEPA pleaded section 230 of 1979, now section 251(1) CFRN, 1999. The Supreme Court held that section 230 vests exclusive jurisdiction in the Federal High Court in matter in which the federal government or any of its agencies was a party. A State High Court would no longer have jurisdiction in such matter notwithstanding the nature of the claim in the action.

ONUORAH v. KRPC LTD: The appellant had sued Kaduna Refining & Petro-chemical Company Co Ltd, a subsidiary of Nigerian National Petroleum Company (NNPC) for breach of contract. The Supreme Court held that in simple contracts the Federal High Court did not have jurisdiction and that it was irrelevant whether one of the parties was the federal government or any of its agencies. It is humbly submitted that generally when the federal government or its agency is involved, the matter is within the exclusive jurisdiction of the Federal High Court (NEPA v. EDEGBERO). However if in considering the subject matter and it involves a simple contract (employment contract, landlord and tenant) even though the FG or its agency is a part, it is within the jurisdiction of State High Court or High Court of FCT. Hence the defining line is whether it is a simple contract.

NIGERIA DEPOSITS INSURANCE CORPORATION (liquidator of Allied Bank of Nigeria) v. OKEM ENTERPRISE LTD & ANOR: The Supreme Court per Kalgo JSC stated that section 272(1) of CFRN is subject to the provisions of section 251 and other provisions of the constitution. Since the Federal High Court has no exclusive jurisdiction over any dispute between an individual customer and his bank in accordance with the proviso to section 251(1)(d). The jurisdiction will now be shared between the Federal High Court and State High Court. (They both have concurrent jurisdiction in that regard).

JACK v. UNIVERSITY OF AGRICULTURE, MAKURDI: The appellant who had been employed by the respondent was dismissed from service after she was found guilty of misconduct in relation to the collection and issuance of receipt for fees and other dues from students. The appellant commenced an action at the Benue State High Court under the Fundamental Rights (Enforcement Procedure) Rules. Her claims were granted. The Court of appeal allowed the appeal on the ground that the State High Court lacked jurisdiction since the respondent was a federal government agency. The Supreme Court stated the following per Katsina-Alu JSC, Order 1 r. 2 of Fundamental Rights (Enforcement Procedure) Rules, 1979 which came into force 1st January, 1980 defines 'court' as meaning the Federal High Court or High Court of a State. What this means is that both the Federal High Court and the High Court of a state have concurrent jurisdiction. An application may therefore be made either to the judicial division of the Federal High Court in the state or the High Court of the State where the breach occurred, is occurring or about to occur. Section 42(1) CFRN 1979 is a special provision which deals with matters of fundamental rights. On the other hand, section 230(1) & (3) of the 1979 constitution (as amended) is a general provision. The law is that where there is a special provision in the same statute, a later general provision in the same statute capable of covering the same subject matter is not to be interpreted as derogating from what has been specifically provided for individually unless an intention to do so is unambiguously declared. A Federal High Court by virtue of section 22 of the Federal High Court Rules can transfer a matter to a State High Court if it found out that it does not have jurisdiction. Aluminium Manufacturing Co (Nig) Ltd v. NPA: The Supreme Court held that the Federal High Court has the power to transfer matters to a State High Court. A State High Court contrary to the provision of section 22 of Federal High Court Act cannot transfer to Federal High Court but can only strike out the suit.

FASAKIN FOOD (NIG) LTD v. SHOSANYA: I have taken some pain to go through the relevant Civil Procedure Rules of High Court of Lagos State and I cannot place my hands on any rule vesting in a judge of the High Court power to transfer a matter to the Federal High Court. I do not think a judge of the High Court of Lagos State can leave the enabling rules of his court and flirt with those of the Federal High Court by applying them. When a court lacks jurisdiction, it is to strike the action and allow the party commence the action de novo in a court of competent jurisdiction.

High Court of a State

Section 270(1) CFRN, 1999 creates a High Court for each state and section 255(1) CFRN, 1999 create the High Court of the FCT.

Composition – a chief judge and such number of judges as prescribed by law of the House of Assembly of that state or Act of National Assembly for FCT.

Constitution – at least one judge of the court. If the state high court is more than one judge then all the judges must be judge of the state high court. This is the decision of Oloriegbe v. Omotosho.

Appointment – chief judge is appointed by the governor on recommendation of NJC and confirmation by the House of Assembly of the state. For other judges, no need of confirmation by House of Assembly – section 271(1)(a) & (b) CFRN 1999.

Qualification – at least 10 years at bar.

Jurisdiction – subject to section 251, 254 of the third alteration of the CFRN, 1999. The National Industrial Court and Federal High Court are courts of enumerated jurisdiction. Thus once a matter is not within the jurisdiction of the state high court. Despite the restriction on the jurisdiction of the state, it is still the court with largest jurisdiction. Once jurisdiction given to other court is not specify to be exclusive, it share concurrent jurisdiction with such court. Original jurisdiction relate to wills, title to land inter alia. It has appellate jurisdiction to hear matter from the Magistrate (south) or District (north) and supervisory jurisdiction over Customary and Area courts.

Magistrate court (Lagos)

The jurisdiction of the Magistrate court has a flat rate. In Lagos state under the Magistrate Court Law, the flat rate is N10, 000, 000 (ten million). Their jurisdiction is in the following areas

- Personal actions arising from tort and contracts
- Action between landlord and tenant for possession
- Action for recovery of any penalty, rates, expenses etc
- Appointment of guardian ad litem
- Power to grant injunctions

A Magistrate court would have jurisdiction when excess of claim is abandoned. It does not have jurisdiction in issue of title to land or any interest in land; issue as to the validity of devise, bequest or limitation under any will or settlement.

District courts have civil jurisdiction in north. The Sharia Court of Appeal must be established for the FCT but for other states, it is optional. Same for Customary Court of Appeal.

Customary and Area Courts

In the south, it is the Customary court. In Lagos state, the AG of Lagos state is empowered under the Customary Court Law to establish a single grade of customary court. The Customary court has jurisdiction over persons who are subject to customary law. In the north, appeal lie from upper Area court to Sharia Court of Appeal or High Court. The jurisdiction of the Area court is subject to that contained in the warrant establishing it.

Election tribunals

The Court of Appeal, for election to the office of the president and vice president. This is an election tribunal for the purpose of elections and appeal from it to the Supreme Court. The National and State House of Assembly election tribunal as contained in section 1 of the CFRN (second alteration) Act, sixth schedule.

Composition – is a chairman and two other members. The chairman shall be a judge of a High Court and other members (two) shall be appointed from judges of a High Court, kadis of a Sharia Court of Appeal, or judges of a Customary court or other members of the judiciary not below the rank of a chief magistrate. Section 1(2) CFRN (second alteration) Act.

Appointment – the chairman and other members are appointed by the president of the Court of Appeal in consultation with the chief judge of the state, grand kadi of the Sharia Court of Appeal of the state or the president of the Customary Court of Appeal of the state. Appeal from the National and State House of Assembly lie to the Court of Appeal and ends there – section 7(3) CFRN (second alteration). The governorship election tribunal has the same as the National and State House of Assembly in section 2 of CFRN (second alteration) Act. Appeal from the governorship election tribunal lie to the Court of Appeal and then to the Supreme Court. Section 6(2)(e)(vi) CFRN (second alteration) Act. It is the only election tribunal that enjoys two appeals.

National Industrial Court – section 254 (third alteration)

Section 254 A (i) of the CFRN (third alteration) Act established the NIC of Nigeria.

Composition – The president and such other number of judges as may be prescribed by an Act of the National Assembly

Constitution – one judge or a panel of three judges as may be directed by the president of the court.

Appointment – president appointed by the President on recommendation of NJC and senate confirmation.

Other judges are appointed by President and on recommendation of NJC – section 254 B (1) & (2).

Qualification – qualified to practice as a legal practitioner and has been so qualified for a period not less than 10 years and has considerable knowledge and experience in the law and practice of industrial relations and employment conditions in Nigeria.

Jurisdiction – section 254 C. The jurisdiction of the NIC has to do with employment conditions and industrial relations, labour. It covers Factories Act, Trade Dispute Act, Trade Union Act, Labour Act, Employees' Compensation Act, International Conventions relating to labour, employment, workplace, industrial relations or matters connected therewith, chapter IV as it relates to employment, labour, industrial relation, trade unionism, employer's association. The jurisdiction of the NIC is extant notwithstanding the jurisdiction of the Federal High Court, High Court of States and High Court of FCT. In case of dispute involving federal government and its employees, the cases of NEPA v. EDEGBERO, KRPC LTD v. ONUORAH should be used in determining which court between the Federal High Court and NIC has jurisdiction. The question of jurisdiction is very important as a court without jurisdiction hearing a matter would amount to effort in nullity. Where a court lacks jurisdiction and party bring a matter before it, it can lead to abuse of court process, also non-professionalism and show of incompetence in the legal practitioner. It can lead to delay of justice. It can make the subject matter of action statute barred. Parties cannot by themselves confer jurisdiction on a court. If a counsel brings an action to the wrong court and the court denied jurisdiction and the case becomes statute barred, the legal practitioner has breached the rules of RPC on competency – Rule 16 RPC.

PARTIES

In any cause of action, after determining the nature of action, jurisdiction of court and proper advice on ADR mechanism, the next thought should be the likely parties to an action. Parties to an action is important because a court can only resolve a dispute if the right parties are before it. Once relevance of parties is not determined, it goes to the root of the matter. Again, any claim if successful must be against another party and such party must be the person who claims can be recovered from. There are usually two parties in a civil action, the party who is claiming and the party who is being claimed against.

Types of parties

There are different types of parties to a civil action

Necessary parties: These are persons who are not only interested in subject matter, but also persons who in their absence, the proceeding cannot be fairly dealt with. When an agent acts in behalf of a disclosed principal, the principal is a necessary party. In all actions, necessary parties are used except where the law specifies a nominal party.

Desirable parties: They are persons who have an interest or who may be affected by the result. The agent of a disclosed principal is a desirable party.

Proper parties: They are those who are not interested in the plaintiff's claim but made parties for some good reasons. A person who had been involved in the negotiation of a contract. The foregoing was stated in Green v. Green by Oputa JSC.

Nominal parties: they are made parties to the proceeding because of the position they are holding. Example is Attorney-General of the federation, Attorney-General of state. In case of passing off, the CAC.

Reconciling locus standi with constitution of parties to an action.

The concept of locus standi is that only a person who has interest in a subject matter is competent to bring an action. A busy body cannot institute an action. Locus standi is only relevant to a plaintiff thus a plaintiff – person claiming must have interest in the subject matter of the suit.

How parties are designated

- Writs of summons – Plaintiff (but called claimant in Lagos)/Defendant
- Originating summons – Applicant/Respondent
- Petition – Petitioner/Respondent

The same person can be both a plaintiff and defendant (in case of counter-claim) in the same matter; also an applicant and respondent. Parties are usually set out after the heading of the court, suit number.

IN THE HIGH COURT OF LAGOS STATE
IN THE LAGOS JUDICIAL DIVISION
HOLDEN AT LAGOS

SUIT NO:

BETWEEN

MRS. AYUBA ADA

CLAIMANT

AND

MR. EFE ABADA

DEFENDANT

IN THE FEDERAL HIGH COURT OF NIGERIA
IN THE ABUJA JUDICIAL DIVISION
HOLDEN AT ABUJA

SUIT NO:

MRS. KAYUBA ADA

PLAINTIFF

AND

MR EFE ABADA

DEFENDANT

Persons that can be sued – legal person

There are two categories of persons that can be sued and sue at law and there exist disability in both of them. They are natural person; and artificial person.

Natural person

A natural person may despite being recognized as a legal person lack capability to initiate proceedings or be sued as a party. Incapacity could be in the following:

Infants - In Lagos under the High Court Civil Procedure Rules, an infant is classified as persons under legal disability and can thus be sued and sue by their Guardian – Order 15, rule 10 LAG. In Abuja, under the High Court Rules, they can sue as plaintiff by their friend and defended by their guardian(s) appointed for that purpose. Order 10 rule 11 ABJ. The fact that a person suffers legal incapacity does not mean that they cannot sue or be sued only that such person can only sue or be sued through the persons designated.

Lunatics or person of unsound mind – In Lagos, such person can sue or be sued by their guardian. Order 13 rule 9 LAG. In Abuja they can sue as plaintiff by their committee or next friend and be defended by their committee or guardian(s) appointed for that purpose. Order 10 rule 12 ABJ.

Artificial person

Only artificial person conferred with juristic personality that can sue and be sued.

A company incorporated under part A of CAMA can sue and be sued in its corporate name. Such action must be brought in its corporate name and not trade or business name.

Also an association incorporated under part C of CAMA can sue and be sued in its corporate name.

A statutory corporation can sue and be sued. In *IYKE MEDICAL MERCHANDISE v. PFIZER INC*, Uwaifo JSC stated the following: ‘as a general rule, only juristic persons have the inherent right and/or power to sue and be sued in their names. Non-legal persons or entities again as a general proposition of

law, may neither sue nor be sued except of course where such right to sue or be sued is created and/or vested by or under a statute. Juristic persons who may sue and be sued *eo nomine* have been recognized to include

- a. Natural persons that is to say, human beings
- b. Companies incorporated under CAMA
- c. Corporate aggregate and corporation sole with perpetual succession.
- d. Certain unincorporated association granted the status of legal personae by law such as
 - Registered Trade Unions
 - Partnerships; and
 - Friendly Society or Sole Proprietorship.

The right to sue and be sued *eo nomine* apart from the fact that it can be created by or under a statute may also be established pursuant to some enabling statutory provisions. Such a right may therefore be vested by the rules of court appropriately made pursuant to and under powers conferred by the relevant law or statute establishing the court. Accordingly, where the rules of court vest the right to be sued *eo nomine* on an individual doing business within jurisdiction in a name other than his own, such right to all interests and purposes must be recognized as validly vested.

ACTION BY AN INFANT

IN THE HIGH COURT OF LAGOS STATE
IN THE IKEJA JUDICIAL DIVISION'
HOLDEN AT IKEJA

SUIT NO:

BETWEEN

MISS BLESSING ABADA

CLAIMANT

(An infant suing by her guardian MRS KATE ABADA)

AND

ABASCO NIG LTD

DEFENDANT

ACTION BY A LIQUIDATOR

IN THE HIGH COURT OF LAGOS STATE
IN THE EPE JUDICIAL DIVISION
HOLDEN AT EPE

SUIT NO:

BETWEEN

ABADA NIG LTD

CLAIMANT

(A company under liquidation suing by MR MARVIS ABADA,
the liquidator of ABADA NIG LTD)

AND

MASCO NIG LTD

DEFENDANT

ACTION BY AN ADMINISTRATOR

IN THE HIGH COURT OF LAGOS STATE
IN THE BADAGRY JUDICIAL DIVISION
HOLDEN AT BADAGRY

SUIT NO:

BETWEEN

MR KUNLE OKOROH

(Suing as the administrator of estate of MR. OBI ADE)

AND

MR. SHOLA WILLIAMS

CLAIMANT

DEFENDANT

Representative action

This is when an individual or more than one person sue on behalf of other having the same cause of action. Where more than one person have interest in one suit, one or more of them may be authorized by the court to sue on behalf of others. The following conditions are important

- Common interest and a common grievance.
- The relief sought must be beneficial to all
- The parties to be represented must give express permission or authority to those who are to represent them.

A dissenting number is made a defendant in a case when the representative action is to claim against another. Where parties have different causes of action or suffered independent damages, a joint action as plaintiff may be instituted and not a representative suit. See generally *Nwakhoba v. Dumez Nig Ltd*, *Ajaokuta*. The leave of court through ex parte motion is usually sought – MOTION EX PARTE. This is supported by an affidavit, a memorandum signed by a majority members authorizing representation. Where a person is suing in representative capacity, this fact should be reflected on the title of the writ as well as endorsement on it. In Lagos, Order 13 r 12(2) there is leave to defend in a representative capacity in LAG.

IN THE HIGH COURT OF LAGOS STATE
IN THE IKORODU JUDICIAL DIVISION
HOLDEN AT IKORODU

SUIT NO:

BETWEEN

1. ALHAJI ASAMU OLA

2. CHIEF DEDE SANYAOLU

(suing for themselves and on behalf of the Odofin family)

AND

CHIEF MOGAJI OKECHUKWU

CLAIMANT/APPLICANTS

DEFENDANT/RESPONDENT

MOTION ON EX PARTE

BROUGHT PURSUANT TO ORDER 13 RULE 12 OF THE HIGH COURT (CIVIL PROCEDURE) RULES, LAGOS STATE AND UNDER THE INHERENT JURISDICTION OF THE COURT.

In motion on ex parte address for service is not to be provided.

Class of Action

It is usually used where a wrong affect wide spectrum of persons. In this, certain individual can sue on behalf of others. The difference between class action and representative action is that in the latter, persons involved know each other unlike class action where the persons involved are not determinable. It is covered in Order 10 r 9 ABJ and Order 13 r 13 LAG. Under Order 10 r 9 ABJ, class action is used when:

- Persons have common interest
- Such persons are commonly affected or likely to be; and
- Such persons or group are not easily ascertainable.

Under Order 13 r 13(1) LAG, bringing of action under class action is restricted to administration of an estate; property subject to a trust; land held under customary law as family; or community or construction of any written instrument including a statute.

In Lagos, it covers both in cases where members of the class interested cannot be ascertained or cannot readily be ascertained. Where the person, class or some members of the class interest if ascertained cannot be found; and though the class or some members of the class interested if ascertained and found, it is expedient to appoint one or more persons to represent the class. The decision of the judge in the proceedings shall be binding on person or class or persons so represented. The leave of court is needed to bring class action. In ABJ on application for declaration or injunction the court may appoint one or more persons to represent any class.

Joinder of Parties/Misjoinder

Joinder of parties usually occurs when at the time of instituting an action, there is failure to join a party who ought to have been joined in the action. In such a case an application for joinder can be by:

- Either each party to the dispute on application
- The person himself on application/intervener
- A judge on suo motu

Order 13 r 2 LAG. The rule on joinder is to avoid multiplicity or duplicity of actions and avoid undue delay that may be occasioned by overloading the justice system with multiple suits. A person may be joined in a suit either as a plaintiff or defendant. Joinder of parties is different from joint plaintiffs or joint defendants. In the latter more than one person may be joined in one action as plaintiff on whom a right to relief arising out of the same transaction or in a series of transaction is alleged to exist whether jointly or severally where if the plaintiff decides to bring separate actions any common question of law or fact would arise. In misjoinder of parties, parties who ought not to have been joined are joined. The court can order the striking out of the names of such party(s). joinder of party is by MOTION ON NOTICE, with an affidavit and a written address. In Lagos, it is accompanied by pleadings and witnesses deposition, all the exhibits intended to be used – Order 13 r 17(2). Intervener is sometimes used to denote application to be joined to a suit by a person not already a party to the suit. In *Green v. Green*, the Supreme Court stated the following:

1. When a plaintiff conceives that he has a cause of action, he can proceed only against the defendant and should not be compelled to proceed against other persons whom he has no desire or intention to proceed against.

2. When a suit has been filed before the court, the court has responsibility to ensure that the proceeding accord with the justice of the case by joining either as plaintiff and defendant. Such parties are parties who may be entitled to or claim some interest or share in the subject matter of the suit. If it has not been done, the court can do this suo motu.

In every case of misjoinder and non-joinder, the court after commenting on the issue of joinder should deal with the matter in controversy as it relates to the rights and interests of the parties actually before it. The court should ask the following questions in joinder cases.

- . Is the cause or matter likely to be defeated because of the non-joinder?
- a. Is it possible for the court to adjudicate on the cause of action set up by the plaintiff unless the third party as defendant?
- b. Is the third party a person who ought to have been joined as a defendant?
- c. Is the third party necessary before the court can effectually and completely adjudicate on and settle all the questions involved in the cause or matter?

It is pertinent to note that the court cannot strike out a suit for non-joinder. In *Babayeju v. Ashamu*, the Supreme Court stated that even if the seven persons were necessary parties their non-joinder would not defeat the action. Note that when an action has been commenced in the name of a wrong claimant, the court may order substitution of such claimant on such terms as may be just. Order 13 r 2 LAG. Note also that there cannot be substitution of a juristic person for a non-juristic person. Where action has been instituted

against a wrong defendant or name of defendant incorrectly stated, the court can on application order substitution or addition of any person as defendant or connection of such name. Order 13 r 5 LAG.

Application for joinder is MOTION ON NOTICE

An application for joinder can be made at any time, before trial, during trial and even on appeal. Agbomagbe Bank v. GM G.B Ollivant. Application for substitution can be made by personal representative upon grant of application to ass, substitute, and originating process is to be allowed. Order 13 r 18 LAG.

DRAFT OF JOINDER OF PARTY

IN THE NATIONAL AND STATE HOUSE OF ASSEMBLY ELECTION TRIBUNAL
HOLDEN AT DELTA

PETITION NO:

BETWEEN

1.DR.BROWN

PETITION/APPLICANT

2.

AND

1.CHIEF OKAGBUE }

2.ECONOMIC AND FINANCIAL CRIMES COMMISSION}

3.UNITY CONGRESS PARTY}

RESPONDENTS

MOTION ON NOTICE

BROUGHT PURSUANT TO ORDER ...RULES...OF THE FEDERAL HIGH COURT (CIVIL PROCEDURE) RULES AND UNDER THE INHERENT JURISDICTION OF THIS COURT

The Federal High Court rule applies to election tribunal.

Third party proceeding

Order 13 r 19 – 22 LAG, Order 10 r 18, 19 – 26 ABJ. Third party proceedings relate to the defendant only. By this proceeding, the defendant sought a third person to be joined in the proceeding against him in other for the third party to indemnify him or contribute to liability against the defendant. A third party is not part of the proceeding involving the defendant and plaintiff. The third party is to contribute in whole or in part to liability which may be eventually declared against the defendant. Application for third party proceedings is MOTION EX PARTE seeking the leave of the court. Order 13 r 19 LAG, Order 10 r 18 ABJ. The leave of the court by ex parte motion is supported by affidavit and a written address. The third party proceeding is known through the facts contained in the affidavit. Leave for third party proceeding can only be made before judgment of the court, because once judgment has been delivered, leave for third party proceeding cannot be granted.

IN THE HIGH COURT OF FEDERAL CAPITAL TERRITORY
IN THE ABUJA JUDICIAL DIVISION
HOLDEN AT ABUJA

SUIT NO:

BETWEEN

DR HENRY OBAMA

PLAINTIFF

AND

1. MR DARLINGTON OBOYE}

2. CITY LINKS TRANSPORTATION CO LTD}

DEFENDANT/APPLICANT

AND

ABC INSURANCE PLC

THIRD PARTY

EX PARTE MOTION

BROUGHT PURSUANT TO ORDER 10 RULE 18 OF THE HIGH COURT (CIVIL PROCEDURE) RULES OF FEDERAL CAPITAL TERRITORY.

Take notice that this Honorable court on the 18th January 2013 at the hour of 9 o'clock or the forenoon or so soon thereafter will be moved as the applicant counsel will be heard on behalf of the applicant praying the court for the following orders

1. An ORDER that ABC Insurance Plc be joined in a third party proceeding.
2. AND such further ORDERS as the Honorable court will grant in the circumstances.

Dated this _____ day of _____ 2013

Name

What an intervener should ensure

1. Statement in affidavit should be simple and clear and not clumsy and ambiguous.
2. The parties should be addressed in their designated names, PLAINTIFF/CLAIMANT –DEFENDANT, APPLICANT – RESPONDENT (motion on notice).
3. An affidavit is a statement of fact and thus should not contain legal argument or legal conclusion. Strictly, it must be a statement of fact.
4. An affidavit should contain only reasons not conclusion or inferences or opinion.
5. An affidavit could be described as what a witness can come to court to say in the witness box reduced into writing.
6. Written agreement or contract can be stated in the affidavit and attached to it as an exhibit.

Differences between joinder of parties and third parties proceeding

- . Third party proceeding is only available to a defendant while joinder of parties can be applied for the person to be joined either by the parties or the court suo motu.
- a. The application for third party proceeding is by MOTION EX PARTE, for joinder, it is MOTION ON NOTICE.
- b. Third party proceeding can only be applied for before judgment while joinder of parties can be at any time even on appeal.
- c. The third party proceeding is between the defendant and the third party thus not a party to the main suit, while in joinder the person joined is a party to the main suit.

PRELIMINARY CONSIDERATION

Before commencing any action in court, there are certain preliminary any issues which must be considered namely: The rules of Professional Conduct for legal practitioner must be considered.

1. Cause of action: The question is usually asked whether there is a legal cause of action or is it merely a frivolous action? A cause of action is series of facts that can lead to a party having a claim in a court of law. E.g. A & B agreed to enter a contract of which A will supply ten bags of cement for N10, 000. A supplied the cement and B has since refused to pay. In such scenario, a cause of action exists. In AG of federation v. AG of Abia state & ors, the Supreme Court defined cause of action to mean the aggregate of fact or facts which put together establishes or gives rise to a right of action. It is the factual situation which gives plaintiff the right to a judicial relief. The question has been asked - at what point did the cause of action arise? If in a contractual or statutory duty, the moment the other party fails to perform his own obligations, then a cause of action will be said to have arisen. In the above scenario, the moment B failed to pay A, then a cause of action had arisen. This is important for the purpose of calculating limitation period. As a defendant, a cause of action can be discovered from the statement of claim filed or claimed and particulars of claim if in the Magistrate Court. The duty is upon the plaintiff and his counsel to determine whether there is a cause of action.

2. Limitation period: Once the cause of action has been determined, then limitation period should then be determined because for every cause of action, there is a limitation period. Limitation period is determined from when the cause of action arose. There is a limitation period for every cause of action which is determined by the nature of the transaction. The following are some transactions with their limitation period.

- . Simple contract - 6 years.
- a. Tort libel/slander/defamation - 3 years.
- b. Land matters for individual in north & east - 12 years, west - 10 years and state government - 20 years.
- c. Suing public officers - 3 months.

Once the limitation period of a cause of action has expired, the defendant is entitled to full defense.

3. Condition precedent: There are conditions precedents which are to be met before the commencement of an action. Such conditions must be fulfilled by plaintiff and his counsel before commencing an action. These condition precedents are:

a) Pre-action notice: The statutes establishing statutory corporation (some) do provide for pre-action, notice to be given to such corporation before action is commenced against them. Example sections 12 of NNPC Act. There are specific information which are to be contained in the pre-action notice. In *Amadi v. NNPC* the pre-action to be issued to the NNPC in section 11(2) of the NNPC Act must be:

- Written notice of commencement of action.
- Notice to be served by intending plaintiff or his agent.
- Notice must clearly state the cause of action.
- Notice must clearly state the particulars of claim.
- Also name, address of plaintiff.
- The relief which he claims.

This notice must be served on NNPC for a period of one month before commencing action. The Supreme Court in that case stated that while the issuance of the notice by a prospective plaintiff is mandatory, the particulars to be included in the notice which are cause of action, particulars of claim, name and place of abode of the plaintiff and relief to be claimed are directory. In *Mobil v. LASEPA & 3 ors*, the Supreme Court stated

- Provisions prescribing pre-action notice are mandatory.
- Non-compliance with such mandatory provision can be waived.
- Non-compliance with such provision is an irregularity in the exercise of jurisdiction which should not be with total lack of jurisdiction.
- Non-compliance with a condition precedent to the commencement of action must be pleaded and failure to plead it amounts to a waiver.
- Service of a pre-action notice on the party intended to be sued pursuant to a statute is at best a procedural requirement and not an issue of substantive law on which the rights of the plaintiff depend. It is not an integral part of the process for initial proceedings.

In *Katsina Local Authority & anor v. Makudawa*. The Supreme Court stated that a condition precedent must be expressly or at least impliedly raised at the trial so that the other party may have opportunity of meeting the point. Thus cannot be properly raised on appeal for the first time when it was not raised at the

trial either expressly or implied. Pre-action notice will also include quit notice issued to periodic tenancy and intention to recover possession issued to tenant by landlord before commencing an action to recover possession of premises.

4. Locus standi: This is to determine whether the plaintiff has enough or sufficient interest in the matter. In determining whether a person has locus standi, such person must be directly affected by the facts or series of fact in issue. *Oloriode v. Oyebe* [1984], once a plaintiff/claimant lacks the locus standi, the court will strike out the action without considering the merit of the case.

5. Jurisdiction: In *Madukolu v. Nkemdili*, the Supreme Court defines jurisdiction in the following words:

- There must be constitution as to when a court is constituted as to number and qualification of the Bench and no number is disqualified for one reason or the other.
- The subject matter of the dispute is within the jurisdiction of the court and no feature in the case which prevents the court from exercising jurisdiction.
- The action was brought to court in accordance with due process after satisfaction of the relevant conditions precedent by the proper rules of court.
- Jurisdiction is the power of the court to adjudicate in the matter. Jurisdiction is statutory. The constitution which created the courts confers on them jurisdiction. Jurisdiction can be substantive or procedural. The plaintiff's counsel should determine which court have jurisdiction. Substantive jurisdiction can be raised at any time while procedural jurisdiction has to be raised timeously. The court can raise the issue of jurisdiction *suo motu*.

6. Pre-action counseling/pre-action protocol: Pre-action counseling is the advice given the client by the legal practitioner as to the strength and weakness of the case. Pre-action protocol Order 13 r 2(1)(e) LAG makes it compulsory in Lagos. Pre-action counseling is compulsory in Abuja. If pre-action counseling notice is filed with the necessary documents, Order 4 r 17 of High Court Rules of Abuja states the following:

- A counsel must advise client appropriately.
- The pre-action counseling certificate must be indicated in the originating processes.
- Where action is filed by the counsel on behalf of the litigant and the suit turns out to be frivolous, the counsel shall be personally liable to pay the costs of proceedings.

Importantly is that a certificate or pre-action counseling signed by the counsel must be filed along with originating processes.

7. Exhaustion of available resources

8. The relevant law

9. Whether there is immunity of any of the parties

10. Enforcement and realization of judgment: All the issues surrounding enforcement and realization of judgment should be considered.

11. Cost of litigation: The plaintiff's counsel is expected to weigh the gain to be derived from the suit and its cost before proceeding to instituting an action.

12. Parties to action: The parties to the action should also be considered so that wrong parties are not brought before the court.

Ogbah v. B.D.U Jos Branch where the court stated the following: where there exist a law limiting time within which actions or matters should be filed, such actions or matters must be a matter of law filed within the time so specified in the law and the period of time so specified automatically starts running from the

date of the accrual of the cause of action. It is plain therefore that the time begins to run when there is in existence a person who can sue and another who can be sued and when all facts have happened which are material to be proved to entitle the plaintiff to succeed. Three conditions to satisfy before cause of action arise and limitation period starts running

- All material facts for the proof of claim have happened
- There exist the plaintiff who can sue
- There exist the defendant who can be sued.

PROCEEDINGS IN MAGISTRATE COURT

The Magistrate that is of importance in this regard is the Magistrate court of Lagos regulated and created by the Magistrate Court Law 2009 and its rules. The Magistrate court of Lagos as noted in the Magistrate court law has a flat rate of N10, 000, 000, although excess of N10, 000, 000 can be abandoned by claimant.

Commencement of actions in Magistrate court of Lagos

By virtue of Order 1 r 1 & 2 of the Magistrate Court (Civil Procedure) Rules (MCR), actions are commenced by two modes, namely:

- By claims – Order 1 r 1 MCR
- Originating application – Order 1 r 2 MCR

Claim

- An action is commenced by claim if the defendant or one of the defendants resides or carries on business in Lagos.
- Also when the cause of action arose wholly or part in Lagos.

When a person wants to institute an action in the Magistrate, he is to deliver to the Registrar a claim and particulars of claim for filing – Order 1 r 4 MCR. There is a difference between the claim and the particulars of claim. The claim is the relief sought and the particulars of claim are the ground upon which the relief is sought. Particulars of claim need not be in paragraphs. It basically states the facts of the case leading to the claim. The particulars of claim are to be signed by the claimant or his legal practitioner where he sues on his behalf. Such legal practitioner is to provide the court with.

- An address for service
- Telephone number or email address

The particulars of claim must indicate cause of action else the Magistrate will strike it out if it does not disclose such cause of action. Order 1 r 5(1) MCR. Upon the entering of a claim by the Registrar, there are two types of summon that can be issued in the alternative, they are: Order 2 r 1 MCR.

- Ordinary summons; or
- Summary summons

Ordinary summons

Ordinary summons is used when the facts will be contentious or when it is a contentious matter. This is when there is going to be dispute as to facts. Ordinary summons ask the defendant to appear on so and so date before the court and defend the claim against him. The defendant upon being served with the ordinary summons, there are different steps which he can take namely:

- He may by himself or through his legal practitioner demand further particulars within 6 days of service of the summons on him – Order 2 r 4(1) MCR.
- He may within 6 days file a counter-claim or defense. Order 2 r 5(1) MCR.
- He may make a counter-claim against some other persons and apply to the court that those persons be added as defendant(s) – Order 2 r 6 MCR.
- He may admit liability as to whole or part of the claim and request for time to make payment – Order 2 r 7 MCR.
- He may tender before action and pay into court the amount tendered – Order 2 r 8 MCR.

Summary summons

Summary summons is usually issued for non-contentious matters. It is usually used in liquidated money demand or recovery of debt. Liquidated money is that capable of being ascertained through mathematical calculation. In this like, matters should be tried summarily. There are however certain group of persons which summary summons cannot be issued against as found in Order 3 r 1 MCR, they are:

- An infant or person of unsound mind/lunatic.
- To recover money lent by money lenders within the meaning of Money Lender's Law.
- A claim on behalf of an assignee of a debt or other thing in action.
- To recover money secured under a mortgage or charge.
- Against a defendant who has been served outside jurisdiction.

A defendant served with summary summons can take the following steps:

- Set up a counter-claim within 5 days of service – Order 3 r 3 MCR.
- He may set up a defense within 5 days – Order 3 r 5
- He may deliver an admission within 5 days of the whole or part of the claim – Order 3 r 6
- He may request for time.

If the defendant did not do anything, judgment may be given against him called DEFAULT JUDGMENT, if he does any of the above, the matter will go to trial.

Originating application

This is the other mode of commencing action in the Magistrate court – Order 1 r 2 provides that it may be used:

- If claimant(s) resides or carries on business in Lagos; or
- The subject matter of the application is within Lagos; or
- If no claimant is named in application, if the claimant(s) carries on business or resides in Lagos.

The actions which can be commenced with it are not so stated and the process is hardly used in Magistrate court.

Service in Magistrate court

All court processes need to be served on parties. Also documents inclusive need to be served. Service of documents is done by the Bailiff or Police and service is to be done personally. That is personal service. Order 5 r 1(1) provides how documents are to be served personally on persons.

- Individual is personally
- For partnership, either a partner or employee of the principal place of business.
- A company – the secretary or any person with executive authority.

Substituted service can be resorted to when personal service cannot be effected on defendant. Under Order 5 r 2, substituted service can be

- Delivery of the process with order of court to an agent of the defendant.
- Delivery of process through accredited courier service.
- By advertisement in some newspaper circulating within jurisdiction.
- By notice affixing the process in a conspicuous part of the court or other public place.
- By affixing the process together with order in a conspicuous position at the door of the defendant last known residential or business address.
- Such other place specify by the court.

An order of court upon an affidavit deposed to is needed for a substituted service. Under Rule 3, permission is needed for service of process outside Lagos state but within Nigeria. Order 5 r 6 provides that Bailiff or any member of the police or any person designated by Magistrate is the process server. A landlord is to service the notice for determination of tenancy and intention to recover possession on the tenant. For proof of service, an affidavit is to be deposed to of which set out the facts, time, place, mode and date of service – Rule 7. When a claimant wants to come through summary summons, the following documents are needed:

- Particulars of claim

- Relief sought
- Reason for relief
- Accompanied by a letter address to the Registrar to issue summary summons

Upon receipt of above documents, the Registrar would issue FORM 4. When claimant want to come through ordinary summons, only particulars of claim is needed and the Registrar will issue FORM 1. Both summary and ordinary summons are known as CLAIM. The particulars of claim and claim are contained in one document. Service of ordinary summons must be within 3 months. Summary summons can be converted to ordinary summons within 3 months of issue of the summons.

IN THE MAGISTRATE COURT OF LAGOS STATE
IN THE LAGOS MAGISTERIAL DISTRICT
HOLDEN AT LAGOS

CLAIM NO:

BETWEEN

MRS KAYUBA ADA

CLAIMANT

AND

AGRICULTURAL BANK PLC

DEFENDANT

PARTICULARS OF CLAIM

The claimant and defendant entered into an agreement for Cashew nuts worth N10, 000, 000 to be supplied by the claimant in March 2004. The defendant was to pay N3, 000, 000 as deposit and the defendant had paid same. The defendant had since refused to pay the outstanding balance of N7, 000, 000 and wrote on the 1st June, 2008 of its intention not to pay.

The claimant claims N7, 000, 000 (seven million naira) as the outstanding balance. N2, 000, 000 (two million naira) as special damages and N700, 000 (seven hundred thousand naira) as general damages.

Dated this _____ day of _____ 20__

Mrs. Kayuba Ada

11, Ikeja Road,

Ikeja, Lagos.

For service on

Agricultural Bank Plc OR

Elijah Leizou Esq

Claimant's counsel

Plot 555, Balarabe Musa Crescent,

Victoria Island, Lagos

Claimant's address

24, June 12 Road, Ikeja Lagos

For service on Agricultural Bank Plc

17, Amina Street, Ikeja, Lagos.

COMMENCEMENT OF ACTION AT THE HIGH COURT

By virtue of section 272 of the CFRN, 1999, there is only one High Court for state – every state of the federation. However judicial divisions are created for administrative convenience. The commencement of action in judicial division in Lagos as determined by Order 2 of the High Court of Lagos State (Civil Procedure) Rules 2012. In Abuja, it is Order 9 of the High Court of the FCT, Abuja (Civil Procedure) Rules 2004. In land matters, with regard to suit relating to land mortgage, charge or interest or injuries and all actions relating to personal property constrained or seized shall be the judicial division where the land is situated or the distress or seizure took place. The Abuja rules omitted judicial division. Thus in land matters, *lex situs* (where it is located) applies - Order 2 r 1 LAG, Order 9 r 1 ABJ.

In contract, the action is to be commenced where the contract was to **be performed** or where the defendant **resides** and carries **on business**. This is at it relate to specific performance and breach of contract. Order 9 r 3 ABJ, Order 2 r 3 LAG.

Action against public officers shall be in the judicial division where the cause of action arose. Order 9 r 2 ABJ, Order 2 r 2 LAG.

In all other suits, the action shall be commenced at the judicial division where the defendant resides or carries on business or where the cause of action arose. Order 9 r 4 ABJ, Order 2 r 4 LAG. Lagos did not include where the cause of action arose. Where more than one defendant is involved, the action can be commenced in any of the judicial division, a judge can direct on a more convenient arrangement for trial of the suit. When action is tried on the wrong judicial division the court can still exercise jurisdiction. However the judge can order a transfer to the appropriate judicial - Order 9 r 5 ABJ (or unless the chief judge directs otherwise. Order 2 r 5 LAG. The objection to be raised should be timeous.

Forms of commencement of action

Actions are usually commenced by originating process. For commencing civil action in the High court, the following can be used - Order 1 r 1 ABJ, Order 3 r 1 & 5 LAG.

- Writ of summons
- Originating summons
- Originating motion (application)
- Petition.

Note that the Lagos rules only provide for **writ of summons and originating summons**.

Petition

It is an originating process usually used when the law provides that it should be used. In the following, it is used in:

0. Matrimonial causes: The Matrimonial Causes Act provides that petition should be used in matrimonial proceeding - section 54 MCA.
1. Winding up of companies: The CAMA provides for the use of petition in commencing winding up any company - section 410 CAMA.
2. Electoral matters: The Electoral Act provides for its use in election matters.

Originating motion or application.

This originating process is also used when the statute or law provides that it should be used. It is used in **Fundamental Rights Enforcement proceedings**. Also, it is the accepted mode for applying for the prerogative writs or orders like certiorari, mandamus. Under CAMA some application are made by originating application.

Note that where a written law or rules provides for the use of originating motion or petition, such must be strictly complied with because there cannot be conversion from other originating processes to them, such action would be struck out. This applies strictly to PETITION AND ORIGINATING MOTION.

Originating summons

It is usually used in commencing an action when the facts are not in dispute or not likely to be in dispute. This is apart from instances where the rules expressly provide for: like the Companies Rules and High Court Rules of ABJ and LAG- Order 1 r 2(2) ABJ, Order 3 r 5. It include construction of

- Will
- Deed
- Written instrument
- Contract or some other question of law
- Written law or instruments made under a written law.
- Where there is unlikely to be a substantial dispute of law.

Aside from the foregoing when the matter involve a non-contentious issues then originating summons is to be used. In Lagos state under Order 3 r 8(2), originating summon is to be accompanied by:

0. An affidavit setting out the facts relied upon;
1. All exhibits to be relied upon - pre action protocol FORM 1.
2. A written address in support of the application.

Civil process under originating summons is likely to be faster because only affidavit is used and no witness is called. Also, based on the frontloading system, written address is filed in Abuja in addition to the affidavit.

In *Unilag v. Aigoro* where originating summon was issued in the guise of seeking interpretation to the judgment of the court in an earlier case, while dismissing the action, the CA stated that originating summons is intended to be used in limited situation. It is ideal for instruction and interpretation of documents. In *NBN & anor v. Alakija, Kayode Eso JSC* had stated that originating summons should only be applicable in such circumstances where there is no dispute on question of facts or likelihood of such dispute. In *Director, SSS v. Agbakoba*, the Supreme Court stated that an originating summons is not the same as writ of summons. In the case of the former, no pleadings are employed while in the case of the latter there are pleadings in the form of statement of claim, statement of defense reply etc. When the plaintiff has filed an originating summons together with affidavit, upon service, the defendant is expected to file a counter-affidavit. It is pertinent to note that **YOU CAN BE ASKED TO DRAFT ORIGINATING SUMMONS IN EXAM.**

Writ of summons

This is the most common mode of commencement of action in the High Court. It is used in commencing issues. Writ of summons is the general mode, others are exception. When there is uncertainty as to the mode to be used, the writ of summons should be used. Others are specified by rules of court and if no provision specifies a mode, then a writ of summons should be used. Order 1 r 1 ABJ and Order 3 r 1(a)(b)(c) LAG, the Lagos provision which is clear provides for where a

0. claimant claims
 - . Any relief or remedy for any civil wrong; or
 - i. Damages for breach of duty, whether contracted or statutory or otherwise; or
 - ii. Damages for personal injuries to, or wrongful death of any person or in respect of damage or injury to any person or in respect of damage or injury to property.
 1. Where the claim is based on or includes an allegation of fraud, or
 2. Where an interested person claims declaration.

Note that it is **facts** that determine whether an action should be commenced by writ of summons or originating summons. There can be conversion from originating summons to writ of summons only.

What can be found in a writ?

0. Heading of the court reflecting the judicial division and venue of the court.
1. Provision for suit number
2. Parties and their capacity. E.g. MRS KAYUBA ADA - CLAIMANT. Once parties are wrongly constituted, that action may be incompetent. Note the following

A minor brings an action - his/her name must be reflected and guardian's name in bracket. Donee presenting an action, the Donor must reflect with Donee's name in bracket. Administrator/Executor

commencing an action on behalf of an estate - his/her name must be reflected on the writ with the representing estate in bracket.

3. Command to the defendant
4. Endorsement of the claim
5. Relief sought
6. Full names and address of the plaintiff (claimant).
7. Address for service.
8. Endorsement for service
9. Dated and signed by the Registrar
10. Endorsement of the name and signature of the person that issues the writ (plaintiff or his counsel)

Endorsement of a writ

There is a distinction between a general endorsement and special endorsement under Abuja rules. In general endorsement which is Form 1, there is no statement of claim, it contain just the relief sought without factual basis for the basis for the relief. The factual basis is to be set out in the statement of claim. Under the special endorsement in Form 2, there is statement of claim, thus both the relief sought is set out and the factual basis for the relief is provided. Thus in Abuja, there are general Form 1 of writ of summons in Form 1 and specially endorsed writ in Form 2. In Lagos, there is no specially endorsed writ. Even though due to the system of frontal loading, specially endorsed writ might not be relevant. Do not be surprised when such is issued and served. In Lagos, the two forms are Form 1 for service within Nigeria and Form 2 for service out of Nigeria.

How to endorse writ

A writ must be endorsed at the back. In **Alatade v. Falode & anor**, the Supreme Court had stated that a writ of summons must be endorsed at the back and it is not within the contemplation of the law that a piece of paper can be pasted on the reverse side for the endorsement. Where any paper other than the form is used, it is my view that the writ is not proper, nor is any endorsement thereon proper. The court in one word stated that a writ without endorsement at the back is not a writ of summons.

Documents to accompany a writ of summons

Lagos – Order 3 r 2(1)

- . Statement of claim
- a. List of witnesses to be called at the trial.
- b. Written statements on oath of the witnesses and
- c. Copies of every document to be relied on at the trial

Abuja – Order 4 r 15

- . Statement of claim
- a. Copies of documents mentioned in the statement of claim to be used in evidence
- b. Witness statement on oath; and
- c. A certificate of pre-action counseling

FRONT LOADING

Front loading is a system whereby all relevant processes are held together at the commencement of writ. Both the plaintiff and the defendant frontload.

- It is faster as it only final address that is not frontloaded.
- There is opportunity for counsel to assess case before going to the court.
- Frivolous actions are eliminated.
- There is quick dispensation of justice
- It aids the efficient and effective case management by the court
- It guides against springing up of surprises on opposing parties.

Almost every High Court of states uses frontloading system. Even the National Industrial Court has direction on front loading. In Lagos, there is consequence for not front loading, Order 3 r 2(2) provides that failure to front load documents would amount to non acceptance of his originating process. His originating process would not be accepted. In Abuja, no consequence is provided for, but the position in Lagos as to non acceptance of plaintiff originating process will apply.

Pre-action counseling certificate

Under the documents to be filed in Abuja, the pre-action counseling certificate is required. Order 4 r 17 provides that both legal practitioner and litigant are to sign. However FORM 2 provides that only the legal practitioner is to sign. The provision of Order 4 r 17 is superior thus both legal practitioner and litigant will sign. Front loading documents for Abuja do not include list of witnesses to be called at the trial.

Concurrent writ – Order 6 r 9 LAG, order 4 r 13 ABJ

A concurrent writ is the true copy of the original writ. The only difference is that it is issued along with the original writ to be served outside the jurisdiction of the court and it is marked CONCURRENT. When there are two or more defendants, and one of them is outside Nigeria, the leave of court is obtained to serve a concurrent writ. The leave is by MOTION EX PARTE accompanied by affidavit stating grounds for the issue of the writ. When all defendants are in Nigeria, there is no need for concurrent writ, a writ of summon is issued and served on all. A principal writ is to be served on principal defendant.

When is action commenced?

In Lagos, a writ is issued when it is sealed by Registrar – Order 6 r 2(1) LAG. In Abuja, a writ is issued when it is signed by Registrar – Order 4 r 9 ABJ. In reality, both in Abuja and Lagos, a writ is issued when it is both signed and sealed by the Registrar. The question has been asked as to when an action is commenced. This is important for the determination of period of limitation. In *Alawode & ors v. Semoh*, the Federal Supreme Court stated that the test for the commencement of an action is to ask: has the plaintiff done all that is required of him by law to commence the action? In Nigeria, it is when he has made an application to the Registrar and pay the necessary fees. From then on, his responsibility ceases and what is left to be done is a domestic affair of the court and its staff. *Nicholas v. Gen Manager, Nigeria Railway*, the court established that an action would be said to have been commenced when the Registrar of the court accepts application for the writ and receipt of correct fees payable on the application. UBA, when a litigant has done all that is required of him; he cannot be held accountable for any default in administration on part of the court or Registrar.

Service of court processes

Service of court processes is necessary because of the provision for fair hearing in section 36(1) CFRN, 1999. Service can be within jurisdiction or out of jurisdiction and by personal service or substituted service. Order 11 r 1(1) ABJ, provides for the *bailiff* or *other officers* of court inter alia as persons authorized to serve processes of court. Order 7 r 1(1) LAG, originating process is to be served by a

1. sheriff,
2. deputy sheriff,
3. bailiff,
4. special marshal

or other officer of the court

Also, law chambers courier company or any other person registered by a judge to serve court process. Such persons are called PROCESS SERVER. For an individual, he is to be served personally – Order 7 r 2 LAG. For a company, there are two ways of effecting service – through human being or leaving it at a place. Service to human being includes (Order 7 r 9 LAG, Order 11 r 8 ABJ) director, secretary, trustee or other senior or principal officer of the organization. At a place include registered office, principal office, advertised office, place of business of the organization within jurisdiction. The foregoing provision is subject to the provision of rules regulating the company. Lagos rule is more detailed. When personal service cannot be effected, an order for substituted service can be made.

Substituted service is with leave of court, by application by the plaintiff/claimant and the application is MOTION EX PARTE supported with affidavit and written address. Order 7 r 5 LAG. It includes:

- Delivery to an agent or to an adult at the last known address.
- Advertisement in the national daily newspaper
- Pasting it at the court house

In Mark v. Eze, the Supreme Court held that there is no room for an order of substituted services on a company because the procedure for substituted service is not applicable to a company. In reality, this is so but under the law, it is applicable to company.

Service out of jurisdiction (within Nigeria)

Under the FCT rules, out of jurisdiction means out of the Federal Capital Territory, Abuja, thus within Nigeria is out of jurisdiction – Order 11 r 14 ABJ. Under the Lagos rules, out of jurisdiction means out of Nigeria. Under the Sheriff and Civil Process Act, out of jurisdiction means out of Nigeria. Based on the definition of out of jurisdiction under the FCT rules, leave is sought for issue of a writ out of the FCT. The leave is for issue and not service because service of processes is a federal matter regulated by the Sheriff and Civil Process Act, while issue of writs is within jurisdiction of states. Issuing of writ is a process of filing and service is bringing the process to the attention of the other party. When any writ is to be served out of the state of issue (within Nigeria) certain rules under the Sheriff and Civil Process Act must be complied with. In Abuja:

- Leave to issue the writ out of FCT, Abuja
- The writ of summon must be endorsed. E.g. This summon is issued in FCT to be served in Ogun state.
- The return date to endorse must not be less than 30 days.

In Lagos: Only the endorsement as to the issuing and serving state is required as the days for appearance in Lagos is 42 days. The foregoing is mandatory under the Sheriff and Civil Process Act.

Service outside Nigeria

In service outside Nigeria, the following is necessary.

- Application by MOTION EX PARTE for leave to issue and serve, supported by affidavit and written address.
- Return date must not be less than 30 days

In Lagos, Form 2 is used. Service is very important as where there is no service, the court would not have jurisdiction to go ahead with the case. In NEPA v. Onah, where the writ of summons was to be served outside Nigeria, no leave of court to issue and serve was obtained. In application for the writ to be set aside, the Supreme Court stated that non-compliance with section of the Sheriff and Civil Process Act renders the service null and void

Objections

When a writ of summons has been issued, there are possible objections. It could be:

- Objections as to defect in writ; or
- Objections as to defect in service of a writ

A defective writ could be:

- Improper endorsement as to capacity of the parties
- An Attorney under power of Attorney suing in his own name
- Writ of summons with no relief
- Writ of summons signed in chamber's name instead of legal practitioner's name

1. The defendant faced with a defective writ can enter a conditional appearance and subsequently file a motion or notice of preliminary objection that the action be struck out
2. Without entering an appearance, he can file preliminary objection listing the ground(s) for the objection with a written address

3. Without entering appearance, he can file a motion on notice or summon for the writ to be set aside on the grounds of defect – list the ground(s), affidavit and written address.

The defendant is to act within reasonable time. The plaintiff or claimant can apply for leave of court to amend the writ. Application is MOTION ON NOTICE. The plaintiff is to act timeously. Since there will be two motion before the court, the court will entertain that of the plaintiff first because it will preserve the suit and should the leave sought be granted, that of the defendant would have been overtaken and compensation can be awarded to the defendant as to cost.

Appearance by defendants – Order 9, LAG, Order 12, ABJ

A defendant upon being served with a writ of summons will file a memorandum of appearance. Memorandum of appearance can be:

- Conditional appearance – appearance under protest
- Unconditional appearance.

For a conditional appearance, the word conditional is to be added. The memorandum of appearance must contain address for service for the defendant. This is the importance of a memorandum of appearance. If appearance is not entered by the defendant; a default judgment can be entered against him – Order 10 LAG, Order 13 ABJ. The plaintiff is to apply for default judgment by MOTION ON NOTICE. The defendant upon service of the application for default judgment can apply for extension of time for appearance – MOTION ON NOTICE.

Time within which to appear

Lagos – 42 days, 21 days for originating summons.

Abuja – 8 days or 30 days if writ is served outside Abuja.

Time within which writ is to be served

The life span of a writ in Lagos – the initial life span is 6 months. Order 6 r 6 (1) LAG. It can be renewed for 3 months on not more than two occasions. The total is 12 months – Order 6 r 6 (2), Order 6 r 7.

In Abuja, the initial life span of a writ is 12 months. It can be renewed for another 12 months and no limit as to number of renewal. The question has been asked as to when an application for renewal should be made, is it before or after expiration of the initial life span of the writ. In *Kolawole v. Alberto*, the Supreme Court stated that the court can grant an application for renewal before or after expiration as it thinks fit. In Abuja, the application for renewal is granted before or after. In Lagos, the controversy is still on, most judges have taken the position that the application must be before the expiration of the writ. Application for renewal is MOTION EX PARTE supported by affidavit and a written address. In amendment of a writ before issuing without leave, after issuance, all amendments must be with the leave of the court.

Legal effect of non-compliance with rules of court

Under Order 2 r 1(1) ABJ, failure to comply with rules of court in respect of time, place, manner, form, or content may be treated as an irregularity which shall not nullify the proceedings, document, judgment or order. It does not matter whether it is at commencement or during proceedings. Under Order 5 r 1(1) LAG, if the non-compliance is at the beginning of the proceeding, it shall nullify the proceeding. On the other hand, if during the proceeding, non-compliance will be treated as irregularity and the judge may direct as he deems fit to regularize such steps – Order 5 r 1(2). *NEPA v. Onah*, *NBA v. Gullivant*.

Proof of service

Proof of service is very important especially when a default judgment is to be applied for. In Order 7 r 13 LAG, Order 11 r 28 ABJ, it provides that an affidavit depose to as to service is a prima facie evidence. The following must be contained in the affidavit:

- Date of service
- Time of service
- Place of service
- Mode of service
- Facts of service

- Description of process served
- Exhibit acknowledgment of service if any
- Also endorsement at the back of the writ by the person served on is an adequate proof.
- The signature of Registrar and seal appear under BY ORDER OF COURT before MEMORANDUM TO BE SUBSCRIBED.
- Endorsement appear on the second page-
- Each item of claim is to be numbered
- Special damages must be itemized
- The word “Agent to plaintiff in the writ of summons is not relevant.
- The word ‘Writ of Summons’ should be on top of writ.
- In originating summons, the question to be determined must be stated and if more than one, it must be numbered.
- The relief claimed in originating summons must be stated

Written Address contains the following:

- **Introduction**
- **Statement of facts**
- **Issues for determination**
- **Argument – each issue must be argued one after the other.**
- **Conclusion**

Legal practitioner signs written address. Where there are no valid question and relief in the originating summons, there is no document before the court. All motion starts with TAKE NOTICE. The following are the means of proving service (Mohammed v. Mustapha):

- Affidavit of service
- Certificate of service
- Appearance in court by the party served on the return date
- Acknowledgement of service

ETHICAL ISSUES

Rule 14(1), 15, 16(1), 24, 30.

- A legal practitioner is to devote his attention energy and expertise in instituting an action on behalf of his client. Rule 14(1) RPC.
- The legal practitioner in instituting the action and drafting the necessary processes is to act within the bounds of law. Rule 15(1) RPC
- A legal practitioner is not to file a suit on behalf of his client when he knows or ought reasonably to know that such action would serve merely to harass or maliciously injure another. Rule 15(2)(b) RPC
- A legal practitioner should advice his client of the option of ADR mechanisms before resorting to or continuing litigation on behalf of his client. Rule 15(3)(d) RPC
- A legal practitioner is expected to be competent and if he knows he is not competent, he should seek help from other legal practitioner, thus should know when to use writ of summons and other originating processes. Rule 16(1) RPC
- A legal practitioner as an officer of court is not to conduct himself in a manner that may obstruct, delay, or adversely affect the administration of justice. Rule 30 RPC.

INTERLOCUTORY APPLICATION – Order 7 & 8 ABJ, Order 39 LAG.

Interlocutory applications are requests and prayers made by either the plaintiff or defendant during the pendency of an action. There are however instances where they would be made before the commencement of an action. Parties can apply for interlocutory application at any time before delivery of judgment. In other words, it can be applied for at any stage of the proceedings before the judgment is given. Once an

action has been commenced, all subsequent applications are referred to as interlocutory applications. Parties in interlocutory applications are known as APPLICANT – the party making the application, RESPONDENT - the party against whom the application is made.

Reasons for interlocutory applications

- In most cases, interlocutory application is applied for in order to maintain the status quo.
- Speedy determination of action. Example is an application made for summary judgment when the defendant failed to enter an appearance.
- When there is need to plead facts not earlier pleaded but subsequently discovered after pleadings have been exchanged. The leave of the court is needed for application for amendment of pleadings.
- Some are condition precedent to the proper commencement of the substantive action.
- For the purpose of obtaining temporary relief in addition to the final claims as may be contained in judgment.
- For the purpose of nipping the substantive action in the bud and remedy defects in substantive action. Interlocutory applications before the court as a general rule are meant to be determined before the substantive action.

Note that interlocutory application(s) are made by MOTION – Order 7 r 2 ABJ, Order 39 r 1 LAG. Applications are required to be in writing and MOTION (motion refers to an application made to the court asking it to grant a relief asked for) can be:

0. MOTION ON NOTICE
1. MOTION EX PARTE

There are certain documents that should accompany a MOTION/APPLICATION – Order 39 r 1(1) & (2) LAG, Order 7 r 3 ABJ.

- An affidavit
- Written address
- Exhibit (when necessary)

The Lagos rules provides that application shall state the rule of court or law by which the application is brought.

Motion Ex Parte

Generally, motion ex parte does not require notice to be given to the other party as ex parte means ONE PARTY OR ON ONE SIDE. In one word, motion ex parte is a motion filed by one party to the proceeding and to be heard on behalf of that party alone. The other party cannot participate in the proceedings even when he is present – Order 7 r 9 ABJ. Seven Up Bottling Co & ors v. Abiola & Sons – the respondent brought an application ex parte in the High Court for the grant of interim injunction against the appellant. Counsel for the latter who was present in court, having previously filed a counter-affidavit to the affidavit in support of the application requested to be heard on behalf of the appellants. The trial judge refused and granted the application. The appeal at the Court of Appeal and Supreme Court was dismissed. The court held that refusal of appellant to be heard is not violation of section 33(1) of 1979 Constitution as it was an injunction pending the determination of motion on notice. The following are examples of application commenced by motion ex parte: leave to serve a third party proceeding, leave to commence a representative action, leave for substituted service, renewal of writ. The reasons for the use of motion ex parte are:

- Because the interest of the other party will not be adversely affected if not put on notice.
- In cases of urgency
- In order to preserve the res - the subject matter.
- When the law or rule provide for application to be made by way of motion ex parte - leave for representative action, third party proceedings, substituted service, renewal e.t.c.

Importantly, when it involves an injunction, motion ex parte cannot be heard alone, the rules state that it should be accompanied with motion on notice. Order 7 r 7(3), Order 39 r 3(2) LAG.

Life span of motion ex parte

- Lagos- 7 days and another 7 days if application for extension is granted. Order 39 r 3 & 4 LAG,
- Abuja - 14 days and another 14 days should application to vary or discharge be applied for if not only 14 days - Order 7 r 12(1) & (2) ABJ.

Motion on Notice

When an application is made through motion on notice, the other party is put on notice of the application. When application made by motion on notice is served on the other party, there must be at least 2 days between the service of motion on notice and the day named in the notice for hearing of the motion. Order 7 r 18 ABJ, Order 39 r 5 LAG. Under Order 39 r 1 of Lagos High Court Civil Procedure Rules, the rule under which the application is brought or law must be added. In Abuja, there is no equivalent provision. The court has stated that the application should not be struck out as long as the application is within the jurisdiction of the court. Non-compliance is a mere irregularity. In *Falobi v. Falobi*, the Supreme Court stated that if a remedy or relief is provided for by any written law or by common law, principle of equity, that relief or remedy if properly claimed by the party seeking it cannot be denied to the applicant simply because he has applied for it under the wrong law. To do so would be patently unjust.

Recipient of motion on notice

1. The respondent or his legal practitioner must be served with the application in order for him to be aware of the application.
2. Any person who is not a party to the proceeding but will be affected by the result of the proceeding must be served with the motion on notice.

Content of a motion

0. Heading of the court in which the action is brought
1. The suit number
2. The names of the parties and capacity
3. Types of motion - MOTION ON NOTICE OR EX PARTE
4. The title of the application - MOTION ON NOTICE FOR INTERLOCUTORY INJUNCTION
5. Order or rule under which it is made.
6. The relief or order that is being sought
7. The date of application
8. Signature, name, address, of the legal practitioner or applicant who prepared the motion
9. Address of defendant for service (MOTION ON NOTICE)

Generally, moving a motion is by oral arguments. Order 31 r 4 LAG provide for twenty minutes for argument. In practice, it is less than that.

Priority of hearing application

When there are two applications before the court, the court by practice direction is to hear the one that would preserve the suit before the other that would render the suit incompetent. Note that every motion whether ex parte or on notice must be supported by an affidavit. However, an application founded on points of law alone need not be supported by an affidavit. *Erejuwa v. Deduwa*.

Affidavit - Order 8 ABJ, Order 39 LAG

Sections 115, 119, 120, 114, 109 of Evidence Act

Under the Lagos and Abuja rules, every motion must be accompanied by an affidavit. Affidavit is the sworn testimony which contains facts and nothing but facts. In one word, it is testimonies sworn to in the court. Before an affidavit is admitted, it must have been sworn to before the persons specified in section 109 of Evidence Act, 2011. These persons are: a judge, officer and other person duly authorized to take affidavit. The commissioner for oath falls under this category. Even though the commissioner for oath is the only person before whom an affidavit can be deposed to, in practice, it is the commissioner for oath that administer oath. An affidavit as a matter of law must be sworn to as an unsworn affidavit is an ordinary

paper. In *Maraya Plastics Industries Ltd & anor v. Inland Bank of Nigeria Plc*, the court of appeal per *Omage JCA*, an affidavit is averments contained in a paper which are sworn before commissioner for oaths. It is the swearing thereto that makes the document an affidavit. Where the document is not sworn to, it is only a piece of paper, not an affidavit. Without oath, therefore there is no affidavit. The above is a general rule and there are exceptions provided for in section 120(2) of the Evidence Act. Thus an affidavit may not be sworn to on:

- Religious grounds
- Age of the person – immaturity.

The above must be indicated by the officer taking the oath. The person deposing to an accused is the despondent.

Format of an affidavit

- Heading of the court
- Suit number
- Parties and their capacity.
- Title – Affidavit in support of motion
- The particulars of deponent
- The facts stated therein, well numbered in paragraphs
- Signature of the deponent
- Attestation of the fact that it was sworn to, where it was sworn to
- Date
- Signature of commissioner for oath or particulars of person administering the oath

Content of an affidavit – section 115 of Evidence Act

By virtue of section 115 of the Evidence Act, the following are what an affidavit should contain.

- Statements of facts
- The source of statement of facts which could be personal knowledge or otherwise
- An affidavit is not to contain extraneous matter by way of objection, prayer, legal argument or conclusion – section 115(2)
- When fact is from another person, the particulars of the person shall be stated and the time, place and circumstances of the information shall also be stated – section 115(4)

Affidavit is meant to state the material facts and allow the court to draw the conclusion. *Edu v. Commissioner for Agriculture*, the Court of Appeal stated that an affidavit is a statement of fact which the maker or deponent has personal knowledge or which are based on information which he believes to be true. No legal argument, conclusion or other extraneous matter must be included. When an illiterate or a blind person depose to an affidavit, the fact that such person is an illiterate shall be stated there and there must be a JURAT – section 119(1) Evidence Act. Also, the language in which the affidavit was deposed should be attached to that translated into the language of the court – English language. Note that a legal practitioner handling the action on behalf of the applicant can depose to an affidavit as no law provides otherwise. However where there are affidavit and counter-affidavit which are held to be contradictory, there would be need for the court to call oral evidence. When the legal practitioner is then called as a witness, problem would arise as to who will examine and re-examine. Thus it is not advisable for lawyers handling the matter to depose to such affidavit.

Defective affidavit

There are instances where an affidavit would be defective. A defective affidavit is an affidavit that does not comply as to format and content of an affidavit. The question is, can a defective affidavit be used in the court? A defective affidavit can still be admitted by the court provided that the affidavit was administered by the relevant authority. There is however a danger in filing a defective affidavit in that section 114 of Evidence Act provides that a defective or erroneous affidavit may be amended and re-sworn with the leave

of court on such terms as to time, costs, or otherwise as seen reasonable. This was restated in C & C Ltd v. Altimate Inv. Ltd

Further and better affidavit

This is an addition to the affidavit already filed in court. It is possible that an applicant in filing an affidavit omitted some important facts or when there are latest facts which are to be brought to the attention of the court. Thus in such cases, there is need to file a further and better affidavit. It can also be used to introduce new document. There is also further and further and better affidavit.

Counter-affidavit

This is the affidavit deposed to by the respondent challenging or countering the facts deposed to by the applicant. Counter-affidavit is important when the respondent intends to contradict the affidavit of the applicant and if it is not filed it would be deemed that the respondent has admitted the facts in applicant's affidavit. There are however instances when there would be no need to file a counter-affidavit namely:

- When the reply by the respondent on the affidavit is on point of law.
- When the affidavits (or paragraph of the affidavit) in support of the motion is so contradictory that no court would reasonably rely on it.
- When the documents in support of the affidavit are contradictory.

In practice it is important to file counter-affidavit and raise the contradiction. The Court of Appeal in Forson v. Calabar M.G stated that when a party disbelieve as assertion in a counter-affidavit, the best way is to file a further or better affidavit to counter rather than waiting to attack during arguments. This is important as argument cannot substitute evidence. And in cases fought on affidavits, the evidence is what is averred in an affidavit.

Conflicting averment in affidavits – section 116 Evidence Act

There are situation were a paragraph or the entire paragraph of an affidavit in support of motion conflict or contradict with a counter-affidavit. When such contradiction exists the court must call oral evidence in order to reconcile the conflict. The court can also call for documentary evidence/exhibit in support of the affidavit to reconcile the conflict. The applicant need not be the one to depose to an affidavit. Note that ex parte motion which does not put the other party on notice is rarely granted and the Supreme Court have cautioned lower courts to be careful in granting ex parte motion.

Affidavit is needed in the following application

- Originating motion/application, summons, petition excluding election petition.
- In all interlocutory applications whose grounds are on facts
- In the commencement of claim under the undefended last procedure
- Where the court orders it.

Types of affidavit includes

- Affidavit in support of application
- Affidavit of urgency
- Affidavit of service
- Counter-affidavit
- Further and better affidavit
- Further and further and better affidavit
- Affidavit for the record.

INJUNCTIONS

Injunction is an equitable remedy. It is an order of court prohibiting a particular person from doing an act. Injunctions can also be preservative reliefs meant to maintain the status quo between the parties pending the final determination of the suit. There are different types of injunction namely:

Interim injunction: An interim injunction which is by motion ex parte is usually filed along with originating process. It is used when the matter is of urgency. This injunction is regarded as lasting for a specific period of time. The Supreme Court in Kotoye v. CBN stated that their main feature is that they are

made to preserve the status quo until a named date or until further order or until an application on notice can be heard. They are also for cases of real urgency. In Lagos rules, interim injunction will last for 7 days - Order 39 r 3(4), in Abuja, it is 14 days – Order 7 r 12. Upon the order of interim injunction, the party against whom it is granted (defendant) can go to court by motion on notice, vacate or set aside the interim injunction. See *Okafor v. AG of Anambra state*. It is pertinent to note that the Supreme Court in *Kotoye's* case stated that it can be made during the hearing of an application for interlocutory injunction if it appears that irreparable damage may be done before the hearing is completed. Every application for interim injunction by motion ex parte must be followed by motion on notice for interlocutory injunction. Hence, interim injunction is granted pending the hearing of motion on notice.

Interlocutory injunction: An order of interlocutory injunction is pending the determination of the action. This is the main distinctive feature between interlocutory injunction and interim injunction. Interim order of injunction is pending the hearing of an application on notice while interlocutory injunction is pending the determination of the action. Note that injunction cannot be granted against a completed act. Equity does not act in vain. An order of mandatory injunction can be used to forestall executive lawlessness. In *Military Gov of Lagos State v. Ojukwu*, mandatory injunction was sought against the appellant by the respondent and was granted by the Supreme Court. Before an injunction can be granted, the following conditions must be met. These conditions were listed in *Obeya Memorial Specialist Hospital v. AG of the Federation*. An injunction can only be granted where the applicant satisfied the court that:

- . He has a legal right to be protected by the court. This is not equal to the determination of the final legal right to be determined by the parties
- a. There is a serious question to be tried between the applicant and the respondent. Not the existence of prima facie case but substantial existence of legal right to be determined.
- b. Also that the balance of convenience must be on his side. This means that greater harm would be done or occasioned to him should the order of injunction be refused.
- c. The applicant should satisfy the court that damages would not be an adequate compensation. The court can also decide this question.
- d. The applicant must have acted timeously. Equity aid the vigilant and not the indolent – the conduct of the party.
- e. The applicant will undertake to pay damages should the action be determined against him.
- f. The applicant must disclose all material facts. Note that the paragraphs of the affidavit must reflect these conditions. The statement of fact should disclose the above conditions. Do not state the conditions verbatim.
- g. The applicant must not be guilty of delay.

The order of injunction against anybody can be discharged or vacated by an order of the court. It is only injunction granted on ex parte motion – interim injunction – Order 7 r 11 ABJ. The application is on notice and may be for varying or discharging of the order. In *SAP (Nig) Ltd v. CBN*, the court held that the jurisdiction to vary or discharge an order made ex parte is always vested in the court that made it. It may be the judge or another judge of the same court. The usual grounds for setting aside on ex parte order include

- Default in giving security for costs or undertaking as to damages; or
- Suppression or misrepresentation of facts
- If it was irregularly obtained; or
- Obtained by fraud

Mareva injunction: This kind of injunction is sui generis in that it is directed at property - things and not persons are subject matter of the suit. It is thus granted over assets or res. It was developed from the *Mareva's* case. In *Mareva Compania Naviera SA v. Int'l Bulk Carriers SA's* case, a restraint order was granted against property of the defendant reasonably believed to be moving out of the jurisdiction of the court. This injunction is provided for in Order 15 ABJ. Application for the Mareva injunction is by

motion ex parte. Order 15 r 2 ABJ provides for the procedure of the application as follows: Application shall contain:

- Specification of the property required to be attached
- The estimated value of the property as far as plaintiff can reasonably ascertain; and
- A declaration that to the best of his information and belief, the defendant is about to dispose of or remove his property from jurisdiction.

This Mareva injunction is granted as a matter of course, conditions which must be fulfilled was outlined in **Sotuminu v. Ocean Steamship (Nig) Ltd & 6 ors**, by the Supreme Court. The applicant must show:

- That he has a cause of action against the defendant which is justiceable in the jurisdiction of the state.
- That there is a real and imminent risk of the defendant removing his assets from jurisdiction and thereby rendering nugatory any judgment which the plaintiff may obtain.
- That the applicant has made a full disclosure of all material facts relevant in the application.
- That he has given full particulars of the assets within the court's jurisdiction.
- That the balance of convenience is on the side of the applicant; and
- That he is prepared to give undertaking as to damages

Anton Piller injunction – Order 15 ABJ, Order 38 LAG.

This can be described in relation to injunction granted against the/an infringer of intellectual property as pertaining to equipment used in carrying out the infringement. Thus when Anton Piller injunction is granted, it allows the applicant or other person to forcefully seize the subject matter because of fear that the subject matter might be destroyed. The injunction was developed in *Anton Piller KG v. Manufacturing Process Ltd & ors* (1978) 1 ER. The Anton Piller injunction is similar to search warrant however it commands the defendant to allow the applicant into premises to seize named items, while search warrant command the Police officer to search premises. Order 31 r 2 ABJ provides for application to be by motion, however section 22(1) of the Copyright Act provides for motion ex parte. Thus application is by EX PARTE MOTION. Condition for granting this injunction includes:

- Property must be in possession of the defendant
- Property must be subject of litigation
- There must be likelihood of defendant destroying the property.
- The claimant needs the property as evidence and case of applicant will be frustrated without them.

INTERPLEADER

An application to court to determine the appropriate owner of the property where two or more owners exist. Thus the claimant are summoned to court to adduce evidence to his or her claim. There are two types of interpleader:

Stakeholder interpleader: The stakeholder interpleader involves where a party who is under liability for a debt of which there are conflicting claims, bringing an interpleader in such case would prevent him being in dilemma of paying the wrong person. For instance, a tenant, where two persons claim to be landlord.

Sheriff interpleader: It arises where a third party claims that the property on which execution is levied or about to be levied belong to him and not to the judgment debtor. In that case the Sheriff would bring an interpleader summon for the determination of the owner of the property. It is covered by Order 26 ABJ and Order 43 LAG.

Application is by motion on notice when the action is pending before the court – Order 26 r 3 ABJ. If it is new process then it is by originating summons. Order 26 r 3 ABJ, the application is to be made by originating summons unless when the action is pending. In Lagos, if it is new, it is originating summons, if pending interlocutory summons (thus in practice it is motion on notice). There are conditions the applicants must fulfill namely: Order 43 r 2 LAG, Order 26 r 4 LAG

- The applicant must satisfy the judge by affidavit or otherwise that he:
- Claims no interest in the subject matter in dispute other than for charges or costs;

- Does not collude with any of the claimants and
- Is willing to pay or transfer the subject matter into court or to dispose of it as the judge may direct

The court may make the following order

When there is a pending action the court may order that either of the claimants be made defendants in lien or in addition to the plaintiff.

Where there is no pending action, the court will make an order directing which of the claimant should be plaintiff and which should be defendant.

Where the question that arises between the claimants is one of law, the court may there and then decide the question. Order 43 r 7 & 8 LAG, Order 26 r 7 ABJ.

IN THE HIGH COURT OF LAGOS STATE
IN THE LAGOS JUDICIAL DIVISION
HOLDEN AT LAGOS

SUIT NO:

BETWEEN

MR JACK JOHN

APPLICANT

AND

1. MRS JOAN EZE}

CLAIMANTS/RESPONDENTS

2. MRS JUDITH FEMI}

Note that:

- In an interlocutory application, the court must not consider issues required to be determined in the substantive suit for to do so would amount to prejudicing that suit itself.
- A person making application by motion need not only file the motion in court but must also move it in court.
- A judge should not act carelessly or recklessly or in abuse of power in making orders based on ex parte applications.
- A counsel in filing counter-affidavit must only reply to that which in the affidavit and not to include fresh facts or ridicule as affidavit.

DEFAULT AND SUMMARY JUDGMENT

This is the judgment made when the defendant failed to make appearance or file pleadings upon the application of the plaintiff. There are two types of default judgment:

0. Judgment in default of appearance – Order 10 r 2 LAG, Order 13 ABJ. When the defendant did not file memorandum of appearance.
1. Judgment in default of pleadings. When the defendant though filed memorandum of appearance did not file pleadings - Order 20 LAG, Order 25 ABJ.

Application for default judgment is **motion on notice** – Order 10 r 1 LAG, Order 13 ABJ. This would be supported by affidavit and written address (in practice). In applying for default proceeding there must be proof of service – Order 10 r 2 LAG. This is as it relate to that of appearance. There are possible judgments that can be obtained in default of pleadings. They are:

- Final judgment if it is liquidated sum; or
- Interlocutory judgment if unliquidated sum.

Default judgments are not judgment on merit as it can be set aside. The grounds for setting aside are:

- Upon such terms as the court deems fit – Order 25 r 9 ABJ
- On just terms upon an application by the defendant – Order 10 R 11 LAG
- On grounds of fraud – Order 20 r 12 LAG
- Non service; and
- Lack of jurisdiction

Note the difference between Order 10 r 11 and Order 20 r 12 LAG, the latter is specific and the former is general provision. It is thus safer for the plaintiff in Lagos to bring his application for default judgment under Order 20 r 12 LAG, as the grounds for setting it aside are specified. The default judgment does not apply to all claims. It does not apply to any claim for declarations generally.

- Declaration of right
- Declaration of title to land
- Recovery of premises
- Matrimonial causes
- Election petition

The claimant is to set down his case for hearing. *Obawole v. Williams* (1996) 477. When there is application for default judgment by the claimant and another to regularize by the defendant, the court will hear that of the defendant. Even when parties have filed pleadings and the matter has been slated for hearing, Order 30 LAG, there can be default judgment of failure of either party to appear during trial.

Summary judgment

Summary judgment is usually applied for by the plaintiff or claimant when he believes that the defendant has no defense to the claim.

Types of summary judgment

- Summary judgment on admission of facts
- Summary judgment on application for account
- Summary judgment under Order 11 LAG
- Summary judgment under Order 21 ABJ - undefined list.

Admission of facts

When the defendant admits some facts in his statement of defense, the claimant or plaintiff can apply for summary judgment of those facts admitted.

Under Order 11 LAG

Summary judgment under Order 11 is only applicable in Lagos state. It is available in all claims where the plaintiff believes that the defendant has no defense to his claim. The claimant is to bring the following documents

- Originating processes - writs of summons
- The exhibit to be relied on in trial
- The deposition of his witnesses
- Statement of claim
- An application for summary judgment by motion on notice
- Affidavit in support of the application stating the grounds of his belief
- Written brief - Order 11 r 1 LAG

The content of affidavit must state the grounds of the claimant's belief. Generally, the claimant should depose to the affidavit, however other person can depose to the affidavit and must state that he had the authority to depose to it and that he reasonably believes that the defendant has no defense. *Enuma v. Consolidated Discounts Ltd* (2001) 897. The number of copies of processes and documents to be made depends on the number of defendants - Order 11 r 2 LAG. The documents are given to the Registrar who directs service to the defendant by the Sheriff. In practice, Registrar directs claimant to Sheriff. Upon service on the defendant, if he intends to defend the action, he is to: Order 11 r 4 LAG

0. File his statement of defense
1. Depositions of witnesses
2. Exhibits to be used in his defense
3. Counter affidavit
4. Written brief

Nwosu v. Ijesha, Adesina v. Commissioner of Osogbo & ors (1996). On hearing of the application, the court can make any of the following orders:

- Grant leave for defendant to defend the action where it appears to the judge that the defendant has a good defense - Order 11 r 5(1)
- Enter judgment for the claimant where it appears that the defendant has no good defense - Order 11 r 5(2)
- Where there are different/several claims, issues and it appears that the defendant has a good defense to part of the claim, the court is to grant leave to defend for that part, and enter judgment for the other party - Order 11 r 5(3)
- Where there are several defendants, the defendant who has good defense shall be granted leave to defend and for the others, judgment would be entered against them.

In determining whether the defendant has a good defense, the facts depose to in the counter-affidavit can be looked at or statement of defense to see if a prima facie defense exists.

Effect

The judgment obtained under Order 11 of LAG is a judgment on merit and cannot be set aside by the trial court but can be appealed against and overruled on appeal. When a defendant is granted an unconditional leave to defend, the claimant does not have a right of appeal - section 241(2) CFRN. Unconditional leave to defend does not impose any condition on the defendant and it just guarantee the right to fair hearing to the defendant.

Undefended list

Summary judgment under undefended list is available in all states of the federation except Lagos. Under Order 21 r 1(1) ABJ it is used to recover a debt or liquidated money demand. The principal requirements are:

- The defendant has no defense; and
- The plaintiff is claiming for debt or liquidated money demand.

The above conditions must be fulfilled. The procedures are:

- File Form 1- writ of summons
- Affidavit in support stating the grounds on which the claim is based and stating that in the deponent's belief, there is no defense to it - Order 21 r 1(1) ABJ. When there is compliance with the above, the judge in chambers shall enter it in undefended list. See Ahmed v. Trade Bank Nig Plc (1997) 524

The plaintiff is to deliver to the Registrar as many copies as there are defendants – Order 21 r 2 ABJ. Upon service on the defendant, if he wants to defend the claim, he is to file a notice of his intention to defend within five days to the day fixed for hearing. The notice is accompanied by affidavit (a counter-affidavit) disclosing defense on merit – Order 21 r 3 ABJ. The affidavit should contain the grounds for defense. The court on hearing can make the following orders:

Grant leave to defendant to defend the action upon fulfilling aforestated conditions (where there is reasonable defense). Thus the action would be removed from undefended list to ordinary cause list. Bature v. Savannah Bank (1998) 546. When the leave to defend is given, the action is to be removed from undefended list and placed on the ordinary cause list and the court may order pleadings or proceed to hearing without pleadings – order 21 r 5(2). Where the defendant neglects to deliver the notice of defense and an affidavit prescribed or is not given leave to defend by the court, the suit shall be heard as an undefended list and judgment given accordingly – Order 21 r 4. A court may call for hearing or require oral evidence where it feels so compelled at any stage of the proceedings – order 21 r 5.

When a defendant did not file notice of intention to defend but filed his defense, the court can still grant him leave to defend because the court are enjoined to do justice by considering what the defendant has on

merit. *John Holt v. Fajemirokun* (1961) All NLR 513. A defendant can file for an extension of time together with his notice of intention to defend and the court will hear the application for extension before that of notice of intention to defend. The judgment obtained in this regard is a final judgment on merit that can only be set aside (overruled) on appeal. The court has stated in a decided case that ordinarily, where the appellant did not file the notice of intention to defend as at when due, upon strict interpretation of the rules, the consequences of such failure or negligence shall follow. In *UBA v. Dike Nwora*, the defendant filed a statement of defense instead of notice of intention to defend and affidavit disclosing a defense on merit. The Supreme Court held that it was wrong for the trial court to ignore the statement of defense and give judgment summarily.

In summary judgment, the plaintiff or claimant who had before instituted the action decides to seek for summary judgment. In default judgment, it is the act of the defendant that gives rise to it. In summary judgment, the judgment obtained is on merit while that of default is not judgment on merit and can be set aside on grounds of fraud, lack of jurisdiction and proper service or grounds deems just – or just cause. In summary judgment, the plaintiff or claimant believes that the defendant does not have any reasonable defense to the action while there is no such in default judgment. The summary judgment in Lagos applies to all claims while the default judgment does not apply to claim for declaration of rights.

Difference between summary judgment under Order 11 LAG and Order 21 ABJ

0. In Lagos, the summary judgment applies to all claims. In Abuja, it applies to only debt or liquidated money demand.
1. In Lagos, the originating process and all accompanying documents must be filed. In Abuja, only writ of summons and affidavit.
2. In Lagos, there is application for summary judgment by motion on notice, affidavit and written brief. In Abuja, no such. Only the affidavit accompanying the writ of summons.

Under the new High Court of Lagos State Civil Procedure Rules 2012, the ADR mechanism is strengthened. There is introduction of active case management conference.

- There is now a pre-action protocol Form 1 to be front loaded with other documents along with originating processes – Order 3 r 2(e). it is on form of statement on oath whereby failure to depose to the fact that he has done all that is contained in the preamble – paragraph 2(e) – that he has made attempts at amicable resolution of the dispute through mediation, conciliation, arbitration or other dispute resolution option. NOTE THAT YOU CAN BE ASKED TO DRAFT A PRE-ACTION NOTICE AND PROTOCOL.
- There is now ADR screening. After filing a suit, the Registrar will screen it to know whether it should go to ADR – Order 3 r 11
- Address for service will include the address, telephone number and email – Order 4 r 6
- A legal practitioner to claimant must have made attempt at settling the matter out of court by filing and serving on the defendant written memorandum and terms of settlement and filing pre-action protocol Form 1 along with originating process.

PLEADINGS

Whether a case will succeed or not is depending on pleadings. No rule provides that pleadings must be in a particular form. Essentially, the basic rules for drafting pleadings are the same but pleadings drafted by lawyers A and lawyer B on the same facts will be different. Always adopt precedents effectively. IN YOUR CHAMBERS ATTACHMENT, READ THROUGH DIFFERENT PLEADINGS

What are pleadings?

Pleadings are essentially written statements of facts filed and exchanged by the parties in civil action containing the material facts by which the parties intend to rely on when action is commenced by writ of summons. Essentially, pleadings are used in writ of summons although in an action commenced by originating summons and the parties dispute as to facts, pleadings can be ordered by the court thereby converting the originating summons to writs of summons.

Examples of pleadings

- Statement of claim filed by the claimant or plaintiff
- Statement of defense filed by the defendant
- Reply filed by the claimant or plaintiff
- Counter-claim filed by the defendant
- Defenses to counter-claim filed by claimant or plaintiff
- Further and better particulars

Originating processes such as writ of summons, originating summons, petition, originating application (motion) are not the same as pleadings. However, a specially endorsed writ of summons in Abuja can qualify as pleading. This is because the specially endorsed writ of summons performs two roles as the statement of claims is endorsed at its back. It serves as an originating process and as pleadings. A generally endorsed writ cannot qualify as pleadings.

Functions of pleadings

1. To know the facts in dispute and the facts that is not in dispute. Identify the facts in issue and know those admitted and those not admitted as facts admitted need not to be proved. *Highgrade Maritime Ltd v. FBM Ltd* (1991) 1 NWLR 167. However in cases of declaratory reliefs, even though facts have been admitted, there is still need to prove it. In *SSS v. Agbakoba*, the Supreme Court held affidavit in support of originating summons can be a proof of evidence/is a valid evidence. In addition, pleadings determine what evidence would be called.
2. Pleadings generally serve as notice. Once pleadings have been filed, the other party is put on notice thus fulfilling section 36 CFRN which enshrines the principle of *audi alterem partem*. The party when served looks at the pleading and files his own. *George v. Dominion Flour Mills Ltd* (1963) 1 All NLR 92. The above result in the principle that parties are bound by their pleadings. Evidence cannot be lead on what has not been pleaded or contrary to what has been pleaded. It is possible to lead evidence upon the fact pleaded by the other party, thus pleading need not be from the party leading evidences on it.
3. Pleadings guides the courts as to what they should do thus the courts are bound by the pleadings of parties to action before it. It guides the court as to the issue to be determined between the parties. A decision based on issue not raised by the parties amounts to a nullity. The parties by their pleadings determine the issue(s). *National Investment Properties Ltd v. Thompson*.
4. Pleadings serve as permanent record of issues raised and determined by the court. Thus it is a public record which prevents re-litigation of issues as a plea of estoppels can be raised.
5. Pleadings help determine where the burden of proof lies. Example: if claimant alleges a fact and the defendant denies such fact, the burden of proof is on the plaintiff or claimant. If however defendant admits and raise new facts giving him defense (confession and avoidance), the burden of proof is on the defendant.
6. Pleadings determine steps to be taken by the parties. For instance, claimant claims against defendant the sum of N10m in one transaction and N45m in another transaction. The defendant admits the sum N10m in the first transaction, the claimant on that admission can file an application by motion on notice for judgment on admission of facts. Again where pleadings disclose that the action is statute barred, application in lien of demurer under Order 22 LAG and Order 22 ABJ can be made.

Formal parts of pleadings

- Heading of court together with judicial division. Note the following are the judicial division in Lagos namely Ikeja, Ikorodu, Badagry, Epe, Lagos,
- Suit number
- Parties
- Title E.g. STATEMENT OF CLAIM
- Body of the pleading divided into paragraphs and numbered consecutively. Numbers and dates are to be written in figures and in bracket amount in words (for sum) E.g. N5, 000, 000 (five million)
- Date and signature, name, address of person who drafted it.

- Address for service on the parties.

Statement of defense and counter-claim are to be in one document and numbered consecutively. If statement of defense stops in paragraph (10), counter-claim will start from paragraph (11). For reply and defense to counter-claim, it must be in the same document and numbered accordingly as stated above.

Content of pleadings – Order 23 r 4 ABJ, Order 15 r 2 LAG

These are what a pleading should contain

1. Pleadings should contain only material facts. In order to determine the material facts, the substantive law regulating the cause of action should be looked at. In a negligence case, the facts in statement of claim must disclose the existence of duty, its breach and consequential damages before they can be regarded as material facts.
2. In pleading materials facts, only facts should be pleaded and not law. The duty of the parties is to plead the facts that will bring the case within the law. However a party can plead point of law. For instance, when the cause of action is already statute bar (application in lien of demuner). The points of law are those that would affect the merit of the case or dismiss the case. Also, native law and custom are matters of facts that must be pleaded and proved subject to those that can be judicially noticed. Again, foreign law must be pleaded and proved by the party intending to rely on it.
3. Parties in their pleadings must plead facts and not evidence by which such facts are to be proved or established. In distinguishing facts from evidence, the Supreme Court in *Okagbue v. Romaine* stated that any fact relevant to establishing a material fact is evidence. Thus pleading document is wrong, however in practice, after pleadings fail, documents are or evidence are pleaded but under the law, no need for pleading it. *Odunsi v. Bamgbala* (1998) 1 SCN
4. Facts must be consistently pleaded thus if parties are referred to as claimant or defendant from paragraph one, such must continue till the last paragraph. No metaphor is allowed. Sentences must be direct and blunt – do not state “Adam knew his wife”.

Facts that must be specifically pleaded

Order 23 r 5 & 6 ABJ, Order 15 r 3 & 7 LAG

0. Defamation – in libel and slander, the plaintiff must specifically plead the defamatory words.
1. Matters on performance, release, any relevant statute or limitation, fraud or any fact showing illegality must be specifically pleaded. Matters ex facie illegal need not be pleaded.
2. Foreign law and customary law even though laws are regarded as facts that need to be specifically pleaded.
3. The plea of estoppels, laches and acquiescence or such other equitable remedies must be pleaded.
4. The plea of *res ipsa loquitur* must be specifically pleaded either by reference to the maxim or pleading facts justifying the application.
5. Any reliance on family tradition and history relating to chieftaincy or land matters must be pleaded. In this like, history must be traced even though caught by the hearsay will amount to an exception.
6. Reliance on negligence, the particulars of negligence must be specifically pleaded. E.g.
 - The plaintiff avers that defendant is the manufacturer of pure water with NAFDAC no: 7771
 - The plaintiff states that he drank the pure water made by the defendant company.
 - The plaintiff avers that after taking the water, the plaintiff started throwing up and was rushed to the nearby hospital.
 - The plaintiff states that the plaintiff was confirmed to have contacted bacteria from the water leading to renal failure.
7. Special damages must be specifically pleaded. Special damages are any item of injury that can be assessed in monetary terms. General damages are subject to the discretion of the court. Example of specifically pleaded special damages: the plaintiff claims N5, 000, 000 as special damages:

Particulars of special damages:

- The loss of a brand new Toyota Hilux – N2, 000, 000
 - Medical expenses incurred – N500, 000
 -
8. A purchaser for value without notice must specifically plead the defense.
 9. Insanity in probate matters
 10. Adultery in matrimonial causes/proceeding. Pleadings are not used in petition.
 11. Statutory defenses – immunity
 12. Condition precedent
 13. Set off
 14. Fundamental breach of terms in a contract

Types of pleadings

STATEMENT OF CLAIM: the statement of claim supercedes the writ of summons and there are two implications:

0. The statement of claim can alter or modify the reliefs without the need for amendment of the writ of summons (where interest is omitted in the writ but added in statement of claim). However, the cause of action must remain the same. If the cause of action is to be changed, apply for amendment of writ.
1. Secondly, what is stated in the writ but omitted in statement of claim would be deemed to have been abandoned.

To avoid the above, some lawyers would claim in statement of claim as per the writ of summons. This has its advantages and disadvantages. Its disadvantages is that the writ of summons is incorporated into the statement of claim and both will be read together and if there is conflict, the statement of claim will not supercede. **Keshinro v. Bakare** – no question of general rule of supercession.

Parts of statement of claim

- Heading of court
- Suit number
- Introductory part – description of claimant/plaintiff, description of defendant and how they met
- Body of claim – this is the fulcrum of the case. All the dos and do nots earlier stated are to be observed here.
- Relief claim – this is because the court will not grant to parties reliefs not sought. The court can grant less but not more. **Ekpeyong v. Nyong**. Ancillary reliefs can be granted, that is, reliefs consequential or that give effect to the main reliefs – **Amaechi v. INEC**. Plaintiff usually insert the word AND such order or orders the Honorable court may deem fit to make in the circumstances – **Adegboyega v. Igbinosun, Gafari v. UAC, Metal Construction's case**. All reliefs sought should be stated because once decision has been made on that cause of action, any relief not sought would be res judicata.

STATEMENT OF DEFENSE: There are different ways in which a defendant can answer to a statement of claim namely:

- Admission
- Denial of traverse
- Confession and avoidance
- Objection on point of law
- Plea of set off; and
- Counter-claim

Admission: this is when the defendant admits what is contained in the statement of claim and what is admitted need not be proved generally. Once a fact has been admitted, it cannot be denied. Note that a fact which ordinarily ought to be admitted but not admitted, if proved to be true, the court will award cost against the person that ought to admit – Order 23 r 19 ABJ, Order 19 r 3(3) LAG.

Denial or traverse: this is a categorical denial of facts not admitted. When facts are not admitted, it should be expressly denied. If facts are not denied, they are deemed to be admitted impliedly, thus avoid implied admission. There is the general traverse – this traverse in its content is said to deny every facts except those expressly admitted. However, in truth, it does not deny every facts because specific and material facts must be denied specifically – **Lewis & Peats Ltd v. Akhimien** (1976) 7 SC, Order 23 r 13 ABJ, Order 15 r 5(2) LAG. Note that the defendant must avoid erasing traverse as this would generally amount to implied admission. In **Aga v. Okoro** (1991) 9-10 SCNJ, the court however cautioned that it should not be in all cases as this might encourage the defendant to deny what he is not aware of. The defendant should avoid negative traverse. This denial that is capable of having or full of hidden meanings.

Confession and avoidance: in this like, the defendant admit but raise new facts that provide him defense that will negate the legal effect of what he has admitted. **The burden of proving the new facts is on him** – defendant.

Objection on point of law: this could be via application in lien of demuner – Order 22 ABJ and Order 22 LAG. This is an application inviting the court to determine a point of law before trial. It could be when the action is statute barred.

Set off: Order 17 r 6 LAG and Order 23 r 16 ABJ. Set off is a monetary defense raised by the defendant when the claimant/plaintiff's claim is in money thus the defendant is saying that plaintiff owes him money. Note that claimant relief must be for money and if for injunction or declaration, it cannot be relied on. Set off is not an independent claim in that if the plaintiff's claim is struck off, that is the end. A set off can be the basis of judgment for the defendant in that when the set off exceeds the plaintiff's claim, the balance can be given to the defendant – Order 23 r 34 ABJ and Order 17 r 12 LAG

Counter-claim: Order 17 r 6 LAG and Order 23 r 16 ABJ. This is the defendant's claim against the plaintiff or claimant. The defendant has a choice of either coming by a counter-claim or instituting a fresh action also called cross-action. A counter-claim is an independent action as the striking out of the plaintiff's claim will not affect the counter-claim. Also, everything that can come by way of counter-claim cannot come by way of set off but counter-claim can be monetary injunction or declaratory relief. Counter-claim unlike set off is not filed to the statement of defense.

REPLY: it is usually filed by the plaintiff when new issues arises from the defendant's statement of defense. New issues in statement of defense not envisaged by the claimant in the statement of claim. The rule is that when there is no new issue in the statement of defense, then there is no need to file a reply. On all other types of pleadings apart from statement of claim, there is an implied rule of joinder of parties. Thus if all the claimant want to reply to the statement of defense, in that the averments are not true, no need to file reply. Deny statement of defense. This is to avoid pleadings ad infinitum. New issues include: limitation of action. Confession and avoidance, illegality, fraud. If no reply to new issues, then it means that there is admission.

Defense to counter-claim: this is filed by the plaintiff in reply to the defendant's counter-claim. Failure to file it means that plaintiff has admitted the facts contained in the counter-claim. Statement of defense and counter-claim are contained in one document. Also the reply and defense to counter-claim is contained in one document.

The limit of filing pleadings

ABUJA

The statement of claim filed along with the writ of summons – Order 23 r 1, except a court grant leave to the contrary.

The statement of defense and counter-claim is filed within 14 days after the service of the statement of claim and writ of summons accompanied by witness(es) statement of oath, copies of documents to be used in evidence and a certificate of pre-action counseling – Order 23 r 2.

Reply and defense to counter-claim. Only reply is within 7 days after service of statement of defense – Order 23 r 3(1). If serving both reply and defense to counter-claim it is within 14 days after service of statement of defense and counter-claim on him – Order 23 r 3(4).

LAGOS

Statement of claim is filed by the claimant along with the writ of summons.

Statement of defense is filed by the defendant within 42 days after being served with writ of summons and statement of claim – Order 15 r 2(2).

Reply and defense to counter-claim is filed within 14 days after service of statement of defense and counter-claim – Order 15 r 1(3).

Default of pleadings

Where a plaintiff fails to file statement of claim along with the writ of summons in Abuja, the effect of such failure is not provided for but the position in Lagos is applicable. In Lagos, by virtue of Order 3 r 2, the Registrar will not accept the writ of summons for filing his statement of defense; default judgment may be entered against him if the claim is for debt or liquidated demand – Order 20 r 1 LAG and Order 25 r 1 ABJ. Failure to file statement of defense would mean admission. Where a party did not file his pleading the stipulated time, the party will file an application by way of motion on notice supported by affidavit setting out the ground for delay and a written address asking for execution of time. Pleadings filed without the leave of court is only voidable and not void thus can only be set aside by way of timely objection by the other party. In *UBA Ltd & ors v. Nwora*, the respondent/plaintiff claimed against the defendants. The defendants defaulted in filing their statement of defense within 14 days. The plaintiff applied for judgment and the defendants without leave of court filed their statement of defense. The trial judge had given the defendants opportunity of defending the claim and ordered that an application for enlargement of time be filed by the defendant. The defendants appealed. The Supreme Court stated that where pleadings (statement of defense) are filed out of time, the parties can by consent, regularize the position of the court provided the statement of defense discloses a substantial ground of defense and can do so by order either on application or suo motu. The order of the trial court was held to be erroneous. The decision of the above case is against the background that pleadings filed without leave of the court is only voidable and not void.

When there is motion for extension of time for filing pleadings and another motion for default judgment, the court will hear that of extension first (AS A LAWYER, WHEN PRACTICING, DO NOT OPPOSE TO A MOTION FOR EXTENSION OF TIME). In *Nalsa & Team Ass. V. NNPC*, the Supreme Court stated the following: if there are two motions, one seeking to raise a point of non-compliance with a rule or an order of court and the other seeking to strike out or dismiss the proceedings on the ground of non-compliance, a court of justice and equity ought to take the motion which seeks to regularize the proceedings and preserve them from being struck out or summarily dismissed first before considering the application for striking out or dismissal for non-compliance. Indeed, invariably in practice, the motion to summarily dismiss or strike out the appeal is withdrawn and struck out and the applicant compensated with costs. This is in accord with the rule that the courts are now expected to do substantial and not technical justice.

Close of pleadings

This is the stage where pleadings are no longer allowed except with the leave of court. Issues are said to have been joined. Issues will be said to have been joined – close of pleadings even when a party has not filed his pleadings. Under Abuja rules, Order 23 r 35(1). 14 days after the service of reply, if there is any. Expiration of 14 days when no reply . expiration of 14 days after statement of defense. Even where order for filing pleadings was made based on its request, at the expiration of 14 days, pleadings will close – Order 23 r 35(2). Under the Lagos rules, Order 15 r 19(1) & (2) at the expiration of 7 days after service of reply. If none, expiration of 7 days after service of defense where the defendant default in filing pleadings (statement of defense) within 42 days.

Amendment of pleadings – Order 24 ABJ & LAG.

The amendment of pleadings is more like an exception to the rule that parties are bound by their pleadings. The issue of amendment is to allow the court to determine the real issue between the parties in the interest of justice subject to the rules of the court. *Akamnoro & ors v. Nsirim & ors* (2008) SC.

Instances where amendment would be allowed

1. When there is evidence of unpleaded facts. Ordinarily, evidence not pleaded should not be tendered. If it is done, objection should be made. It happens that such evidence is on record (this shows that a counsel was asleep).
2. To introduce a claim or relief that is covered by evidence or material before the court. This is common in reliefs that go together in a cause of action. In land matters, a claimant is expected to seek declaration of title to land, damages for trespass and injunction against further acts of trespass. If one of the above claims is missing, the court would readily grant amendment to pleading in order to avoid/prevent multiplicity of actions.
3. To correct name of parties to the suit. For instance, if PLC is omitted from a public company's name, amendment can be sought to reflect this.

Note where the connection is for amendment of non juristic person, the court will not grant the amendment application. *Agbomagbe v. GB Ollivant*

- When it would aid or serve substantial justice
- It will settle the controversy between the parties and related issues.
- When it will bring pleadings in line with evidence already adduced.
- Amendment will be refused where it would present a completely and different case or cause injustice to the other party
- When it will necessitate the hearing of fresh evidence
- It will not cure the defect in the pleading ought to be amended
- It is inconsistent and useless.

Stages of amendment

Under Order 24 r 1 ABJ, the court or judge may allow parties to amend their pleadings at any stage of the proceedings. Under Order 24 r 1 LAG, amendment is allowed any time before the close of the case management conference and not more than twice during the trial before judgment. Thus in Lagos, before the close of case management conference, as many times but on trial, only twice before judgment. In Abuja, even though it is at any time before judgment, late application is one of the grounds for denial of application.

Mode/procedure for amendment

The procedure is application on notice - motion on notice supported by affidavit stating the grounds for amendment and within address. Order 23 r 3 ABJ and Order 24 r 2 LAG is application for leave to amend. In Lagos, the application should have the following attached

- The proposed amendment must be attached as exhibit in the affidavit.
- List of additional witnesses and their written statement on oath
- Copy of any document to be relied on.

In both Lagos and Abuja, there must be exhibit of the pleadings, highlighting the area of the amendment being sought to be amended. When amendment is minimal, the amendment can be added in the motion paper. There can be oral application for typographical error (error in sum claim). *Lawal v. Area Planning Authority*.

In Lagos and Abuja, upon amendment, a copy is to be filed in the registry and additional copies served on all the parties to the action. A judge may at any time correct clerical mistakes in judgments or orders or errors arising from any accidental slip or omission upon application. Endorsement of amendment.

An amendment is retrospective in that it refers to the original pleading. Only facts in existence at the date of original pleading can be contained in the amended one. For instance, pleadings filed in 1st January 2012,

and amended in 31st December 2012 will be deemed to have been in existence in 1st January 2012. Only facts that were in existence in 1st January 2012 can be brought in. See *Oguma v. Ibero* (1988) 73. *Gowon v. Ike Okongwu*, the court stated that it is the law that an amendment relates back to the original pleading and the amendment sought to be filed in this case seeks to incorporate a cause of action which arose after the statement of defense was filed. Such an amendment generally should not be allowed.

Under Order 24 r 4 ABJ, amendment is to be done within the time limited for the purpose if no time limit within 7 days from the date of order for amendment. Under Order 24 r 4 LAG, amendment is within time limited, if none, within 7 days from date of amendment order. The effect of failure to amend in Lagos is an additional fee of N200 for each day of default. In Abuja, the amendment order would become void unless the time is extended further by the court. Every amended pleading must have endorsement of amendment on it. Order 24 r 6 ABJ and Order 24 r 6 LAG - whenever any pleading is amended, it shall be marked in the following manner.

"Amended _____ day of _____ pursuant to order of (name of judge) dated the day _____ of _____"

The amended pleading must be filed in the registry and additional copies filed on all the parties to the action. Order 24 r 5 LAG and Order 24 r 5 ABJ.

Question: state the procedure after an order for amendment has been given.

Answer: file in the court registry and endorsement.

The place of endorsement must be either at the top or foot of the front page of the amended pleading.

Grounds for refusing amendment application

- Where the application for amendment was brought late in the proceeding
- Where amendment contains facts not in existence at the time of filing original pleading - *Gowon v. Okongwu*
- Where the amendment sought is immaterial to the case
- Where the amended contain defense of illegality brought too late in the proceeding.
- Where the amendment will occasion injury on the other party of which injury cannot be remedied in cost.

When an order for amendment is made, cost is usually given to the other party. In a statement of defense, do not use THAT. It is for affidavit use - the claimant avers that, the claimant states or the claimant shall.

For exam purpose, general traverse should be at the beginning and it can be numbered or not numbered. Every paragraph in statement of claim must be accounted for in statement of defense. All paragraphs admitted in statement of defense from statement of claim must be in one paragraph. Note that pleadings are allegation of facts while affidavit is evidence. The first paragraph of counter-claim is likely to incorporate paragraph in statement of defense, if this is not done, the facts in statement of defense cannot be relied upon in counter-claim. There should be consistency in parties' names. Pleadings are settled when pleadings are no longer exchanged by the parties. Pleadings are deemed to have been closed when the time limit for filing and exchanging pleadings have elapse – 14 days (Abuja) and 7 days & 42 days (Lagos)

Proceedings in lieu of Demurrer

Under the old rules of court, there was a procedure known as DEMURRER. This is where the defendant admits all averments in the plaintiff's statement of claim and without filing any pleadings, raises a point of law that would dismiss the issue. For instance, in a suit for breach of contract, once the defendant successfully prove that 6 years limitation period has elapse, that would dismiss the plaintiff's action. However, under the new rules, demurrer is expressly prohibited and in its place is a proceeding in lieu of demurrer – Order 22 r 1 LAG and Order 22 r 1 ABJ. Thus a point of law can only be raised either along with the pleading (statement of defense) of which can be disposed of either before or at the trial – Order 22 r 2(1) LAG & ABJ. In this like, statement of defense can just be few paragraphs with points of law raised in it. In practice, there is only one exception which is, if the substantive jurisdiction of the court is challenge which is revealed on the face of the pleading (statement of claim). If the point of law in the opinion of the

judge dispose of the whole proceeding, he can make an order dismissing the suit (Abuja) or any decision as may be just (both) – Order 22 r 3 ABJ and Order 22 r 2(2) LAG. In Lagos rules – Order 22 r 3 LAG, the fact that the defendant must file his pleading before raising the point of law is extant in spite of the provision of the Arbitration Act or Law. Section 5 of the ACA allows a party to an arbitration agreement to file for stay of proceeding without filing his statement of defense. Under Order 22 r 3 LAG, a defendant applying for a stay of proceeding must file his statement of defense or other statement of case on the merits. In preliminary objection, no need to file pleadings. This is when the objection is on the processes filed by the claimant.

Striking out pleadings where no reasonable cause of action disclosed c.t.l

Order 22 r 4, 23 ABJ and Order 15 r 18(1) LAG – proceedings can be mistaken before trial relating to pleadings in the following instances

- Where a pleading discloses no reasonable cause of action or defense
- Where a pleading is frivolous, scandalous or vexatious; or
- Where a pleading may prejudice, embarrass or delay the fair trial of the action; or
- Where a pleading is otherwise an abuse of the process of the court

No reasonable cause of action disclosed or defense

Disclosure or otherwise of a reasonable cause of action would depend on the area of law relating to the action. For instance, if breach of contract, on the statement of claim of the claimant, it must show essentials of a valid contract, performance of obligation by claimant and the breach by the defendant. If the foregoing is not disclosed on the statement of claim, then no reasonable cause of action is disclosed. In *AG Fed v. AG Abia & 35 ors*, the Supreme Court stated that it is sufficient for a court to hold that a cause of action is reasonable once the statement of claim in a case discloses some cause of action or some question fit to be decided by a judge notwithstanding that the case is weak or not likely to succeed. The fact that the cause of action is weak or unlikely to succeed is no ground to strike it out. No reasonable cause of action disclosed or defense applies to pleadings (statement of claim, statement of defense, reply, and counter-claim). Thus in relying on it, the pleading should be specified.

Frivolous, scandalous and vexatious

A paragraph in pleading may be scandalous, that is untrue or vexatious – annoying. Pleadings may prejudice, and delay the fair trial of the action. Also pleadings may be an abuse of the process of court. This is where the party is using the machinery of justice for other things (multiplicity of actions). Where the pleadings are found to be either of the foregoing, the court can dismiss, stay proceedings or enter judgment accordingly – Order 22 r 4 ABJ and Order 15 r 18(1)(a)-(d) LAG. Where the claimant's statement of claim discloses no reasonable cause of action, the defendant can apply for an order dismissing the claim. Where the defendant's statement of defense discloses no reasonable defense, the plaintiff or claimant can apply for judgment to be entered for him. Where the statement of claim is an abuse of court process, the defendant can apply for an order staying proceedings or dismissal. If paragraph instatement of defense or statement of claim is scandalous, embarrassing, vexatious, application can be for the paragraphs to be struck out.

Procedure

Under Lagos rules, application may be made under Order 15 r 16 relating to case management conference stage. Also under Order 5 r 18 relating to trial stage, under the Order 28 r 20 ABJ. Under the above rules, application is by way of motion on notice supported by affidavit setting out the grounds upon which the order is asked for.

Settlement of issues

After pleadings have been filed and exchanged, which is settlement of pleadings, parties can join issues. Parties join issues when there is a positive averment and a positive contradiction to the averment that is when there are contrary views or dispute as to facts. Note that issues are not joined when there are no disputes as to facts. Thus if A claims B owes him N10 and B answered affirmatively then issues are not joined. Settlement of issues is thus the isolation of real issues in the facts and proceedings are focused on

them – focus on areas where issues have been joined. Settlement of issues is a case management technique. See below the draft of issue

“Where Mrs. Kate Ejoro Abada is the owner of the land situated at plot 111, Balarabe Musa Crescent, Victoria Island, Lagos state, more particularly describe in the survey plan”

“Where the supply of a cashew nut worth N100, 000, 000 is the subject matter of the contract between Mr. Nkem Alfred and Mr. David Abada”

Procedure

Order 27 r 1(1) & (2) LAG provides that issues of facts in dispute shall be defined by each party and filed within 7 days after close of pleadings. If parties differ on issue, the case management judge may settle the issue. Order 33 r 1 ABJ, parties are to submit in writing the material questions in controversy within 14 days on conclusion of pleadings. Where it appears necessary, the court can amend or frame additional issues – Order 33 r 5 ABJ. What will the court do if the parties fail to settle issues?

DISCOVERY

It involves finding something not known. There are two ways:

- Discovery by asking questions which is interrogatories
- Inspection and make copies of documents

In the regime of front loading of documents and statement of witnesses on oath, is discovery still material? Parties only front load documents and facts that would help his case and not those that will be against it. Thus, the regime of front loading have not obviated discovery.

Discovery by interrogatories: interrogatories are on facts only and not on law, thus, it is meant to confirm facts to be used. Interrogatories are in form of questions posed by one party to the other to clarify some facts. Interrogatories must relate to any question in the matter. Interrogatories are to be asked on unresolved issues – *Yar’dua v. Abubakar*. In ABJ, Order 30 r 1, interrogatories at the close of pleading is by leave of court on application on motion on notice. Order 30 r 2(1) ABJ provides for the delivery of the proposed interrogatories along with the summons or notice of application at least two days before hearing it. Interrogatories are in Form 30 – Order 30 r 3 ABJ. The answer to interrogatories shall be in form of affidavit which is to be filed within 5 days or such other time as the court/judge allows – Order 30 r 5 ABJ. An affidavit in answer to interrogatories shall be in Form 31 r 6 ABJ and within 5 days. Variations as circumstances permit are allowed for both forms. In Lagos, there is no need of obtaining leave of court as interrogatories forms part of case management conference – Order 26 r 7 LAG. Interrogatories are to be made within 7 days after close of pleading. Interrogatories are in Form 19 and affidavit in answer is in Form 20 – Order 26 r 2 & 6 LAG respectively. Variations can be made to the form. Affidavit in answer to interrogatories shall be filed within 7 days or such other times as the judge may allow – Order 26 r 5 LAG. Objections to answering any of the interrogatories can be made on the ground that it is:

- Scandalous; or
- Irrelevant; or
- Not bona fide for the purpose of the matter or cause – Order 30 r 7 ABJ and Order 26 r 5 LAG

Where a party fails or omits to answer, application can be made to the court/judge of case management conference and an order requiring him to answer shall be made – Order 30 r 8 ABJ and Order 26 r 7 LAG.

Discovery by documents inspection

In Abuja, where a party needs to inspect documents with the other party, leave of court will be sought which is by application on motion on notice – Order 31 r 9. The court on hearing the application may:

- Adjourn the application
- Refuse the application
- Make an order to the documents demanded or limited to certain class of demand.

In Lagos, discovery of documents is by request in writing served by one party on the other of which must be served within 7 days after close of pleadings (part of case management conference) – Order 26 r 8(1).

The other party is to answer on oath completely and truthfully within 7 days or such other Order 26 r 8(1) LAG. Every affidavit in answer to a request is to be accompanied by office copies of the documents referred to – Order 26 r 8(2) LAG. Affidavit in answer is in Form 21 in LAG and Form 32 in ABJ. The other party can object to producing certain documents of which must be specified – Order 30 r 11 ABJ and Order 26 r 8(3) LAG and the grounds for objection must be stated. The judge may order for the production of those documents; and when a party object to bringing a document under the request of the other party, such party cannot tender such document in evidence. Famuyide v. Irving (1992) 2 SCNJ.

Case Management Conference (CMC) - Order 25 LAG

It is a mechanism that enables the case management judge to assume adequate control over the proceedings preparatory to trial. Counsel in CMC is not to be robed. No formality. Within 14 days after close of pleading, the claimant is to apply for the issuance of a CMC notice - Form 17 - Order 25 r 1(1). Form 17 is hearing notice for CMC. The Registrar will then issue Form 17 and Form 18 (Case management information sheet) Order 25 r 1(2). The application is by a letter to the presiding judge. The questions contained in Form 18 are to be answered by the claimant. There is a case management conference judge who is different from a trial judge (if the matter goes to trial). If the claimant did not apply for issuance of Form 17, the defendant may apply for an order of dismissal of the claimant's claim/action - Order 25 r 1(3). Where claimant has filed Form 17 & 18, and the letter to the head judge, the defendant is to file Form 18 only. The CMC is to be completed within 3 months -Order 25 r 3. The time can still be extended on application of either party. The agenda of the CMC is contained in Order 25 r 2 (a)-(n) includes:

- Formulation and settlement of issues
- Amendment and further and better particulars e.t.c, interrogatories, discovery.

Parties are expected to be present during trial. The case management judge can refer the matter to the Lagos multi-door court house. After the CMC, the judge is to make a case management report and the report shall guide the subsequent course of the proceeding subject to modifications by trial judge - Order 25 r 4. The report is to contain the following:

- Name of court
- Parties
- Heading of the CMC report
- Nature of the claim (claimant's claim)
- Issues for determination: issues formulated by claimant, issues formulated by defendant, that adopted by CMC judge.
- Areas covered - Order 25 r 2 (agenda)
- Witnesses to be called by each party
- Accommodation to chief judge/head judge
- Date
- Signature of CMC judge

IN THE HIGH COURT OF LAGOS STATE
IN THE LAGOS JUDICIAL DIVISION
HOLDEN AT LAGOS

SUIT NO:

BETWEEN

MR. OGHO ABADA

CLAIMANT

AND

MRS. EJIRO ABAS

DEDENDANT

CASE MANAGEMENT CONFERENCE REPORT PURSUANT TO ORDER 25 RULE 4 OF THE
LAGOS STATE HIGH COURT CIVIL PROCEDURE RULES 2012

Sanctions for failing to participate in CMC

Where a party or his counsel fail to attend CMC or obey a scheduling order or substantially u prepare to attend or fail to participate, the CMC judge shall:

- If it is the claimant, dismiss the claim - Order 25 r 5(a)
- If the defendant enter a judgment against him where appropriate - Order 25 r 5(b).

Parties can apply within 7 days of making the judgment that it be set aside - Order 25 r 7. The application is to be accompanied by undertaking to participate effectively in the CMC.

Alternative Dispute Resolution - Order 25 r 6

Upon filing of originating process, it shall be screened for suitability for ADR and refer to the Lagos multi-door court house or other appropriate ADR institution - Order 3 r 11. When a case is so referred, the claimant shall file his statement of case within 14 days of the order of judge - Order 25 r 2(a). The defendant shall file his response within 14 days of the service of the claimant's statement of case. Where parties fail to comply with order or directives of ADR judge or fail to participate in ADR proceedings, the judge shall

- If it is the claimant, dismiss the claim - Order 25 r 6(a)
- If it is the defendant enter judgment against him where appropriate - Order 26 r 6(b).

The judgment can be set aside upon application of any of the parties within 7 days or such period as the ADR judge may allow - Order 25 r 7. The application is to be accompanied with undertaking to effectively participate in ADR proceeding.

Trial preparation

It involves a lot of issues and those issues usually arise before commencing action after client interview has taken place and the client decides to institute an action. This is because of the mandatory front loading of documents (for claimant/institution of action. The issues are:

- Identification of the issues
- Formulation of a case theory
- Drawing of trial plan
- Identifying the burden of proof and standard of proof
- Identifying and collating the relevant evidence
- Deciding how the evidence is to be brought to court.

Case analysis

Whether consciously or subconsciously, the legal practitioner must analyse the case after the first client interview. This would involve

- . The cause of action to pursue. The same facts can lead to contract and tort. The cause of action given and the relevant laws and what would be in the best interest of the client.?!
 - a. Limitation of action/parties and other preliminary considerations where relevant. For instance, in land acquired by the state government and given to a private individual/person, the government might not be joined because of limitation of action.

Issues

The issues to be raised depend on the cause of action (land matters, contract, torts). The issue(s) raised will determine the evidence that will be led on trial. After identifying the issues and the issue(s) are not supported by law, then an alternative should be sought. When identifying issues, research should be conducted.

Theory of case

It is a line of argument which if accepted by the court, will lead to judgment being given in your favour. Every lawyer whether for the claimant/defendant must have a line of argument which if accepted by the court, will give him judgment. In every case, there is usually two sides presenting their different theories of the case as viewed from their individual perspective and at the end, the court accepts one of the theories.

The acceptance of the theory of the case is determined by evidence in support of the theory. From commencement of the action to when judgment is given, every step taken is for the purpose of the theory of the case. Thus everything to be done is limited to the line of argument. Most time, the theory of the case is not written down but it is advisable to write the theory of the case down. This is because there are instances where another lawyer may take over the case and his own theory of the case might not be the same with the initial one.

Trial plan

In one word, it is the process of actualizing the theory of the case. This is the graphic representation of how the theory of the case would be achieved. It would involve putting into consideration what the other side would say and how to argue against the other side. It also involves stages - the theory is broken into component parts. The success of a case is not based on how much you prepare for your case but on how much you have prepared for the case of the other side. Look for the law in your favour and the law against you.

When you come across any evidence that will not help your case, disclose it to the court and distinguish it from your own case (if it is a case, show how the case is not relevant to the other party's case - Rule 31(2) RPC).

Aside from ethical issues involved, it is also a strategic issue. If for instance, the case law is from the opposite counsel to be used by the other counsel, the effect will not be as heavy as when it is coming from the counsel himself. Thus it neutralizes the argument from the other side. In relating the trial plan with the theory of the case, the theory of the case is like a destination and the trial plan is how to get to the destination – the steps to actualizing the theory of the case.

Burden of proof

Under burden of proof, the following questions arise

- What are the matters of fact/which issues need proving and whose duty is it to prove?
- The determination of the number of witnesses and documents to tender.
- Burden of proof is a question of who has responsibility to prove.
- There is the legal/general burden of proof; and the evidential burden of proof.

General/legal burden of proof – section 131 & 132 Evidence Act. The general burden of proof is determined by the state of pleadings. The claimant/plaintiff has the responsibility of proving the entire case. Section 132 Evidence Act provides that the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

Evidential burden – this is the duty of proving particular facts. The pleadings should be looked at in determining evidential burden. There are certain elements/circumstances that shift the burden of proof from one party to the other.

- Where there are admitted facts, the burden of proof shifts.
- Where there is presumption in favour of one of the parties.

Generally, presumption in itself shifts the burden of proof. Presumptions are divided into three:

- . Presumption of facts – rebuttable
 - i. Irrebuttable presumption of law; and
 - ii. Rebuttable presumption of law

Presumption of facts

The major feature of presumption of facts is that they are nothing but logical inferences. The court is not under the obligation to draw the inferences. Even when the court draws the inferences, the other party is at liberty to rebut it. See section 145(1) Evidence Act. However, for fact as conclusive proof of another, the court shall, on proof of the one fact regard the other as proved and shall not allow evidence to be given for the purpose of disproving it – section 145(3) Evidence Act. Section 167(a)-(e) Evidence Act provides for the classic cases of presumption of facts. They are not exhaustive but instances. Presumption of facts if inferred by the court is not conclusive unless there is no contrary evidence. Some are:

- The court may presume that a man who is in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession.
- The court may presume that a thing or state of things which has been shown to be in existence within a period shorter than that which such things or state of things usually cease to exist, is still in existence.
- The court may presume that the common course of business has been followed in particular cases.
- The court may presume that evidence which could be and is not produce would, if produced, be unfavourable to the person who withholds it; and
- When a document creating an obligation is in the hands of the obligor, the obligation has been discharged.

Rebuttable presumption of law

In presumption of law generally, the court is under the obligation to draw the inferences until the contrary is proved – section 145(2) Evidence Act. Official transactions – section 168(1) Evidence Act provides that when any judicial or official act is shown to have been done in a manner substantially regular, it is presumed that formal requisites for its validity were complied with and section 168(2) Evidence Act, provides that when it is shown that a person acted in a public capacity it is presumed that he has been duly appointed and was entitled so to act.

- Presumption of marriage – section 166 Evidence Act
- Presumption of death – section 164(1) Evidence Act. When a person has not been seen or heard of for 7 years. However, no presumption as at the age he died. On the other hand, if two persons died and it is not certain as at the time or date of death of both of them, the older one would be presumed to have died first, this is for purpose of determining title to property – section 164(2) EA.
- Presumption of legitimacy – section 165 EA
- Presumption of negligence – *res ipsa loquitur*

Standard of proof

Under the old Evidence Act, there was nothing on standard of proof in civil cases but a matter of common law. Section 134 of EA now provides for it, which is balance of probability or preponderance of evidence. There are however instances where certain matter will be proved beyond doubt in a civil proceeding. Where there is allegation generally in a civil case – section 135 EA. For instance, in election petition of fraud. In *Nwobodo v. Onah* on election petition, the Supreme Court stated that burden of proof of specific allegations of crime in the petition appears to be clear in that the commission of forgery, altering and dereliction of official duty can properly be said to be the basis or foundation of the petition. Since the respondents denied the allegations, the commission of crimes by the parties to the petition was directly in issue and consequently, section 137(1) {135}. If the commission of a crime by a party to any proceeding is directly in issue in any proceeding, civil or criminal, it must be proved beyond reasonable doubt.

Competence and Compellability

Competence –all persons shall be competent to testify unless the court considers that they are prevented from understanding the questions put to them or from giving rational answers to those question by reason of: tender years and extreme old age, disease whether of body or mind and any other cause of the same kind – section 175(1) EA. A person of unsound mind is competent to testify unless he is prevented by his mental infirmity from understanding the questions put to him and giving rational answers to them – section 175(2). A dumb person is competent to testify either in writing or by signs but such writing must be written and the signs made in open court – section 176(1). Importantly, the evidence so given shall be deemed to be oral evidence – section 176(2). For the evidence of a person of tender age, section 209(1) EA provides that if a person has not attain the age of 14 years and is tendered as a witness, such child shall not be sworn and shall give evidence otherwise than on oath or affirmation if in the opinion of the court if he is possessed of

sufficient intelligence to justify the reception of his evidence; and understands the duty of speaking the truth. However, a child of 14 years and above can give sworn evidence in all cases – section 209(2) EA. There is no provision for corroboration of unsworn evidence of a child. Generally, there is need for corroboration when the Evidence Act provides for it. In civil cases, only in breach of promise to marry.

Compellability

The general rule is that every competent witness is a compellable witness except where there are laws excluding certain competent persons from being compelled. These persons are:

The President, Vice-president, Governor of a state and Deputy-Governor of that state. Section 308 CFRN 1999 provides for this immunity. The immunity protects them in their personal capacity and not in their official capacity. Thus the office of the President and Governor can be sued. The immunity avails them for the period they occupy the office. For the commencement of action, time will not run until the person leaves office.

Legislative immunity – only the premises of the legislature and not the persons are protected. The subpoena cannot be served on a senator in the legislative house.

Diplomats – diplomats and ambassadors have diplomatic immunity under the Diplomatic Immunity and Privileges Act. Note that their staff members who are Nigerians do not enjoy the immunity. After determining that a witness is both competent and compellable, a witness which had refused to come can be compelled by:

- Subpoena used in the High Court; or
- Witness summons used in the Magistrate Court

There are two types of subpoena:

- Subpoena ad testificandum – Form 27 LAG
- Subpoena duces tecum – Form 29 LAG

Subpoena ad testificandum is used to compel a witness to attend court and testify in court while subpoena duces tecum is used to compel a witness to attend court with certain documents to give evidence. Witness can be lay witness or expert witness. Lay witnesses include witnesses that are not experts in what they want to testify about. Expert witness is defined in section 68(2) EA as persons so specially skilled. The EA did not provide for the means of acquiring the skill, thus what matters is evidence of sufficient experience. An expert must first establish his qualification and in the absence of this, his evidence will not be admissible – *Fasugba v. I.G.P.* evidence must be limited to the area of specialization. If an adverse party wants to challenge his qualification as an expert under cross-examination, the qualification must be challenged; if not, it would be deemed that such adverse party has accepted the witness as an expert and cannot on appeal challenge the expert's qualification.

Proof of facts

The facts that need to be proved by evidence are facts in issue and other facts declared to be relevant to facts in issue – section 1 EA. Facts in issue can be determined by looking at pleadings. The proof of facts is by tendering evidence. When a judge has evidence on the case before him, he should step down as a judge; and then give evidence as an ordinary witness. However, matters deemed to be within the knowledge of the court can be judicially noticed. Section 122(1) EA provides that no fact of which the court shall take judicial notice under this section needs to be proved. These are contained in section 122(2)(a)-(b) of EA. Such include all Acts of the National Assembly, Laws of the State House of Assembly and all subsidiary legislation. All general customs, rules, and principles which have been held to have the force of law in any court established by or under the constitution. Also facts admitted need not be proved – section 123 EA. This includes facts admitted by pleadings. There are two kinds of admission namely the formal and informal admission. Formal admission can be found in the pleadings. It arises in the court of pending civil proceedings and such admission is conclusive evidence. The formal admission can arise in the following instances:

- Admission in processes like in affidavit, pleadings
- Admission by agreement of the parties while the case is pending before the court.

A proviso to section 123 EA states that the court may in its discretion require the facts admitted to be proved otherwise than by such admission. Informal admission is usually at any stage before commencement of the civil proceedings - such admission is only relevant as evidence and not conclusive, thus can be rebutted. There are certain facts even though relevant, are not admissible in evidence.

Facts not admissible

1. Character evidence – section 78 and 79. Section 78 is to the effect that character of a person to a civil proceeding is inadmissible. This is the general rule that admits of exception. Where the character of such person is a fact in issue, for instance in defamation suit, where the defendant pleads the defense of justification, the character of the plaintiff becomes a fact in issue. Except in so far as such character appears from facts otherwise relevant. Where character will affect the amount of damages. Section 79 provides that notwithstanding section 78 in civil cases, the fact that the character of any person is such as to affect the amount of damages which he ought to receive may be given in evidence.

2. Similar facts – generally, similar facts are not admissible. However, in land matters such facts are admissible. For instance, A has plots of land. B & C which are adjoining. If there is dispute as to the ownership of one of them, the fact that it is adjoining to the other can be admissible to prior ownership by A to it. Also, negligence relating to procedure and subject matter that share common rule.

3. Opinion evidence – it is not admissible as a general rule except as otherwise provided by Evidence Act – section 67. The exceptions are contained in section 68, 69, 70, 71, 72, 73, 74 and 75.

4. Hearsay evidence – the general rule is that hearsay evidence is not admissible. Section 38 of EA provides that hearsay evidence is not admissible except as provided in this part or by or under any other provisions of this or any other Act. The exceptions are:

- Statements relating to cause of death – section 40
- Statements made in the course of business – section 41
- Statements against interest of maker with special knowledge – section 42
- Statements of opinion as to public right or custom and matters of general interest – section 43
- Statements relating to the existence of a relationship – section 44
- Declaration by testators – section 45
- Evidence of an employee of a company based on information derived from the record of the company.

Estoppel

The estoppel relevant in this instance is estoppels by record. This is that arising from the record of the court. There are two types of estoppels by record:

- . Issue estoppels – on a particular issue
- a. Cause of action estoppels – the entire case.

There are four conditions to be fulfilled before estoppels by record can avail a party

0. Parties or their privies are the same in the present suit and previous suit. Parties can be
 - by blood – children; or
 - by law – agent
 - privies in title or estate – subsequent purchaser
1. Subject matter and issues are the same. Note that action for trespass and ownership to land are not the same. Also estoppels on part of land does not relate to the other.
2. The previous action was determined by a court of competent jurisdiction
3. The previous decision was a final decision of that court. Even when a matter is on appeal, it is still a final decision as long as it is not interlocutory.

Privilege communication

Certain communications are regarded as privilege in court of which evidence of it is generally not admissible in court except as otherwise provided by the Evidence Act.

1. Communication between husband and wife during the subsistence of that marriage is privilege – section 187. The following are the exceptions:

- Where the person that made it or that person's representative in interest consents.
- Proceedings between the husband and wife

2. A Justice, Judge, Grand Kadi or President of Customary Court of Appeal or Magistrate court before whom proceeding is being held should not be compelled to answer any questions as to his own conduct in court. However, such can be compelled upon the special order of the High Court of the state, FCT, Abuja or Federal High Court.

3. Communication as to state affairs and official communication – section 190 and 191. For evidence as to affairs of states, when such is not published – in custody of state, no one is permitted to publish such. However, upon an order of the court, such can be given to the JUDGE ALONE IN CHAMBERS – section 190. Ordinarily, a public officer shall not be compelled to disclose communications made to them in official capacity when he considers that the public interest would suffer by the disclosure. However, upon an order of court, the public officer concerned shall disclose to the judge alone in chambers the substance of communication in question and if the judge is satisfied that the communication should be received in evidence, this shall be done in private in accordance with section 36(4) CFRN. The above lay to rest the controversy as to who has the final say – THE COURT.

4. Professional communication between client and legal practitioner – section 192. A legal practitioner is not expected to disclose communication between him and his client. However, there are circumstances in which such communication can be revealed:

- With the express consent of the client
- Communication made in furtherance of any illegal purpose.
- Communication showing intention to commit a crime.

The exception is that relating to a contemplated crime and not to the crime already committed (where client confesses to committing a crime).

Means of proof

Where the facts had not been admitted, not been judicially noticed and has not been presumed, there is then need to prove it. The following are the means of proof of facts:

Oral evidence: all facts except the contents of documents may be proved by oral evidence – section 125 and subject to the exceptions provided in the Act and evidence shall in all cases be direct – section 126. If it is a fact which could be seen, it must be the evidence of a witness who says he saw that fact – section 126(1)(a). If it is a fact which could be heard, it must be the evidence of a witness who says he heard that fact – section 126(1)(b). If it is a fact which could be perceived by any other sense or in any other manner, it must be the evidence of a witness who says he perceived that fact by that sense or in that manner – section 126(1)(c). If refers to an opinion or to the grounds on which that opinion is held, it must be the evidence of the person who holds that opinion on those ground. Exception on treaties – section 126(1)(d).

Real evidence: section 127, it could be movable or immovable. Movable is tendered in court and marked as exhibits. Immovable – the court adjourned to the place – visit to the locus in quo. The matter deliberated in such place is part of court's proceeding and the judge must be there personally to conduct the proceedings. Parties must also always be there because of fair hearing. Movable – section 127(1)(a), the court may require the production of such material thing for its inspection. Immovable – section 127(2)(a)-(b) provides the court with two options:

- Adjourned to the place where the subject matter of the said inspection may be and the proceeding shall continue at that place until the court further adjourns back to its original place of sitting or some other place of sitting.

- Attend and make an inspection of the subject matter only and the evidence of what transpired there to be given in court afterwards.

In both outside the court (sitting outside) or inspecting, the parties shall be present.

Documentary evidence: section 258(a) defines documents to include books, maps, plans, graphs, drawings, photographs and also includes any matter expressed or described upon any substance by means of letter, figures or marks or by more than one of these means, intended to be used or which may be used for the purpose of recording that matter. From specific items mentioned, it includes anything used to record information of which will qualify as document. Thus a building can be documentary evidence if information is inscribed on it. Bill boards on the road will qualify as documentary evidence. It therefore means that the same object can qualify as a real and documentary evidence. When using object, as an object, it is real evidence but if it is used as a means of recording, it will qualify as documentary evidence (no matter how big the object is).

Documents as public and private

Documents are basically divided into:

- Private documents; and
- Public documents.

Public documents – section 102. The following documents are public documents;

1. Documents forming the official acts or records of the official acts of the sovereign authority - Section 102(a)i. when the documents is an official act or record of the official acts of the President of Nigeria, that is a public document. For instance, a letter written by President Goodluck Jonathan congratulating the Super Eagles on their victory in the African Nations Cup is a public document.
2. Documents forming the official acts or records of the official acts of official bodies and tribunals are public documents – section 102(a)ii. For instance, the letter of admission given by the Council of Legal Education is a public document because it forms part of the acts of Council of Legal Education being official bodies.
3. Documents forming the official acts or records of the official acts of public officers, legislature, judicial and executive whether of Nigeria or elsewhere are public documents – section 102(a)iii. Examples include:
 - Marriage certificate issued by the Registrar of Marriage being a public officer is a public document.
 - Certificate of incorporation issued by the Corporate Affairs Commission
 - Records of legislative proceeding
 - Statutes
 - Judgment of the English court and courts of other countries.
 - Land certificate – certificate of titles issued by Registrar of Land Registry.
 - Certificate of occupancy issued by Governor.
4. Public records kept in Nigeria of private documents – section 102(b)
 - Memorandum and Articles of Association of a company upon incorporation, particulars of director, annual returns e.t.c
 - Deed of assignment, Deed of lease, Deed of Mortgage when registered under the Land Instrument Registration Law.
 - Newspaper – there are two laws on it. The Newspaper Act and National Library Act. Three copies one is to be kept at the library at University of Ibadan, another at National Library.

If the laws are complied both those kept at the designated places and those on the streets are public documents. In practice the certified copies are always obtained at the National Library. The list of public documents is not exhaustive but once a document emanate from a public officer just know that it is a public document (in his official capacity).

Private documents – section 103. All documents other than public documents are private document. All preliminary agreement between members or investors is private document as they are excluded from documents to be incorporated.

Proof of contents of documents

The content of documents may be proved either by primary or by secondary evidence - section 85 & 86. Primary evidence means either of the following:

- Where the document itself is produced for the inspection of the court – section 86(1)
- Where a document has been executed in several parts, each part shall be primary evidence of the document – section 86(2)
- Where there are copies of agreement some have been signed and others have not been signed. To person signing it, it is a primary evidence but against the other person who did not sign it, it is secondary – section 86(3).
- Where a number of documents have all been made by one uniform process, as in the case of printing, lithography, photography, computer or other electronic or mechanical process, each shall be primary evidence of the contents of the rest but where they are all copies of a common original, they shall not be primary evidence of the contents of the original.

Secondary evidence - section 87

It includes (meaning not exhaustive) the following

- Certified copies given under the provisions contained in the EA.
- Copies made from the original by mechanical or electronic processes which in themselves ensure the accuracy of the copy and copies compared with such copies.
- Copies made from or compared with the original.
- Counterparts of documents as against the parties who did not execute them; and
- Oral accounts of the contents of a document given by some person who has himself seen it.

Proof of documents

Generally documents shall be proved by primary evidence except as provided in the EA - section 88. Before tendering secondary evidence, foundation must be laid. Proper foundation is the reason to be given for not producing the primary evidence. Cases in which secondary evidence are used in proving documents. Secondary evidence may be given of the existence, condition or contents of a document when

1. The original is shown or appears to be in the possession of the person against whom the document is sought to be proved - section 89(a)(i); or
2. The original is shown or appears to be in the possession or power of any person legally bound to produce it.

However with regard to the above, two situation notice is required to be given to such person under section 91 EA requiring him to produce. Section 91 EA provides for situation where notice will be dispensed with.

- . When the document to be proved is itself a notice
 - a. When from the nature of the case, the adverse party must know that he will be required to produce it.
 - b. When it appears or is proved that the adverse party has obtained possession of the original by fraud or force
 - c. When the adverse party or his agent has the original in court or
 - d. When the adverse party or his agent has admitted the loss of the document.

By virtue of section 90(1)(a), any secondary evidence of the contents of the document is admissible upon fulfilling the necessary

3. The existence, condition or content of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative in interest – section 89(5). By virtue of section 90(1)(b), the written admission is admissible.

4. The original has been destroyed or lost and in the latter case all possible search has been made for it – section 89(c). By virtue section 90(1)(a), any secondary evidence of the contents of the documents is admissible.

5. The original is of such a nature as not to be easily movable – section 89(d). By virtue of section 90(1)(a), any secondary evidence of the contents of the documents is admissible.

6. The original is a public document within the meaning of section 102, section 89(e). By virtues of section 90(1)(c), a certified copy of the documents but no other secondary evidence is admissible. A photocopy of certified public document should be re-certified – *Ogboru v. Uduaghan*.

7. The original is a document of which a certified copy is permitted by this Act or by any other law in force in Nigeria to be given in evidence – section 89(f). By virtue of section 90(1)(c), a certified copy of the document, but no other secondary evidence is admissible.

8. The originals consist of numerical accounts or other documents which cannot conveniently be examined in court and the fact to be proved is the general result of the whole collection – section 89(g), section 90(1)(d).

9. The document is an entry in the banker's book – section 89(h). By virtue of section 90(1)(e), the copies cannot be received as evidence unless it is first proved that

- . The book in which the entries copied were made was at the time of making one of the ordinary books of the bank.
- i. The entry was made in the usual and ordinary course of business.
- ii. The book is in the control and custody of the bank which proof may be given orally or by affidavit by an officer of the bank; and
- iii. The copy has been examined with the original entry and is correct which proof must be given by some person who has examined the copy with the original entry and may be given orally or by affidavit.

For section 89(9), 90(1)(d) provides that evidence may be given as to the general result of the documents by any person who has examined them and who is skilled in the examination of such documents.

Custody of documents

When a document is coming from where it should be coming from, it is used to be a proper copy and in proper custody. This relates only to authenticity and not relevancy as a document that is not genuine can be admissible. Genuineness only goes to weight to be attached to it. Admissibility before authenticity – *Torti v. Ukpabi*. In all civil proceeding, the parties to the suit and the husband or wife of any party to the suit shall be competent witness – section 178, *Elias v. Disu*. The only exception is that husband or wife is not competent to give evidence that will bastardize a child born within a valid marriage or within 280 days of dissolution of such marriage – section 165; section 84 Matrimonial Causes Act. As a general rule, corroboration is not needed in civil cases except in an action for breach of promise to marry.

Evidence admissible under section 83

By virtue of section 37, hearsay evidence which is generally excluded includes statement contained or recorded in a book, document. Thus oral testimony of another reduced into writing is hearsay evidence and not admissible. However, section 83 creates an exception to documentary hearsay. Before the statement reduced into document can be admitted, the following must be fulfilled

1. The maker of the statement had personal knowledge of the matters dealt with by the statement; or

Where the documents forms part of record made in the performance of a duty to record information supplied to him by a person who have personal knowledge of those matters; and

2. If the maker of the statement is called as a witness in the proceeding except the maker is dead, unfit by reason of his bodily or mental condition to attend as a witness or if he is outside Nigeria and it is not reasonably practicable to secure his attendance – section 83(1) & (2). Subsection 3 which makes inadmissible statement made by a person interested at a time when proceedings were pending or anticipated as such statement could be doctored to align with his own facts of the case. Also subsection 4 which states

that a document can only be said to have been made by a person who wrote it (produced it with his own hands or signed such document).

In defining documents – section 230 provides that it includes any device by means of which information is recorded, stored, or retrievable including computer output. Computer in this like will include desktop, laptop, ipad, GSM phones e.t.c. thus section 84(1) provides that statement contained in a document produced by a computer shall be admissible as evidence of any fact stated in it which direct oral evidence would be admissible provided the conditions stated are satisfied.

Conditions for admitting documents produced by computer

1. The computer producing the document must be one used regularly to store or process information for the purpose of any activities regularly carried on over that period by anybody (corporate or individual) – section 84(properly 2)(a).
2. Also, over that period, the kind of statement sought to be tendered is usually supplied to the computer – section 84(2)(b)
3. More so, throughout the material part of that period, the computer was operating properly or if not the fact of its not operating properly was not such as to affect the production of the document or the accuracy of its content – section 84(2)(c).
4. That the information contained in the statement is derived from information supplied to the computer in the ordinary course of those activities – section 84(2)(d).

Subsection 3 further explains that the computer referred to in the subsection need not be a single computer, it can be:

- Combination of computer operating over the period
- Different computer operating in succession over that period.
- Different combination of computers operating in succession over that period.

Subsection 4 provides that certificate should be produced in court which would:

- Identify the document containing the statement and describing the manner in which it was produced – (4)(a).
- Give particulars of the device involved in the production
- The certificate is to be signed by a person occupying a responsible position in relation to the operation of the relevant device or the management of the relevant activities.

Subsection 5 provides for supplying of information to the computer whether directly or with or without human intervention by means of any appropriate equipment – paragraph (a). Also, document can be produced directly or with or without human intervention by means of any application equipment – paragraph (c). The computer in the real sense of it is the evidence to be admitted, but section 84 provides for admissibility of copies generated from the computer. The adverse party can show that what is produce in court is not what is produced by the computer.

Exclusion of oral documentary evidence

See *Union Bank Plc v. Ozigi*. When anything (contract, judgment, disposition of property, official proceeding) have been reduced into writing or document or series of document, such must speak for itself. Thus no evidence can be given on such and the content of the document is not to be contradicted, altered, added to or varied by oral evidence. Hence, no extraneous evidence to what has already been reduced to writing – section 128(1). There are exceptions to the general rule:

1. Fraud, intimidation and illegality
2. Want of execution: the fact that it is wrongly dated, existence or want or failure of consideration, mistake in fact or law;
3. Want of capacity in any contracting party or the capacity in which a contracting party acted when it is not inconsistent with the terms of the contract:

4. Or any other matter which, if proved would produce any effect upon the validity of any document or of any part of it, or which would entitle any person to any judgment, decree or order relating to it – section 128(1)(a).
- . The existence of any separate oral agreement as to any matter on which a document is silent and which is not inconsistent with its terms, if from the circumstances of the case, the court infers that the parties did not intend the document to be a complete and final statement of the whole of the transaction between them – paragraph (b).
- a. The existence of any separate oral agreement constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property – paragraph (c)
- b. The existence of any distinct subsequent oral agreement to rescind or modify any such contract, grant or disposition of property; and – paragraph (d)
- c. Any usage or custom by which incidents not expressly mentioned in any contract are annexed to contracts of that description unless such would be repugnant or inconsistent with the express terms of the contract – paragraph (e)

Where documentary memorandum was not intended to have legal effect as a contract, grant or disposition of property (thus oral evidence is allowed) – subsection (2)

Where there is need to prove the existence of a legal relationship itself which has been reduced to document and not the terms on which it is established or to be carried on.

Laying foundation and objection to evidence

All evidence requires certain conditions before it can be admissible. At what stage can an adverse party raise objection? In Lagos, it is at the case management stage and in other jurisdiction, at the stage of the evidence being sought to be tendered. The original copy of official gazette and certified true copy of public document is admissible from the bar. Ordinarily, documents are tendered through witness but for the above; counsel can tender it without calling witness. When a document is disputed at the stage of tendering, counsel seeking to object should object and state the grounds of objection. If the grounds are proper in the eyes of the counsel seeking it to be tendered, such document should be withdrawn (apply to withdraw) and then remove the imperfection and re-tender the document. Thus, do not join issues with adverse party. If counsel joins issues on tendering of a document, the court is bound to deliver a ruling and if the ruling is not in favour of the party (counsel tendering it), it will be marked REJECTED and such document cannot be re-tendered again. *Alade v. Olukade* (1976) 2 SC. There are evidence that are inadmissible and there are evidence that are admissible upon satisfaction of certain conditions. Where evidence is inadmissible and the other side did not raise objection, the evidence will become valid evidence as he will be deemed to have waived his right. Section 251 is to the effect that the impact of evidence wrongfully admitted or excluded will depend on the role such evidence played or will play in the final decision. Both wrongfully admitted and excluded evidence will not be a ground for reversal of any decision unless the decision of the court will change – through material (i.e if it will have effect on the judgment delivered). The court on appeal will order the case to be heard de novo. Where such will not affect the decision of the court then there will be no need – not material

Note the following:

- Always identify what each witness would do and the document to be tendered through especially if he is the maker.
- As a mater of law, corroboration is not needed except when the law state so. In civil suit, it is in an action for damages for breach of agreement to marry.
- Anybody can be compelled to testify if competent except those expressly excluded. However, always bear in mind hostile witness.
- Every counsel should avoid the temptation of manufacturing facts and evidence.
- Evidence tendered from the bar is from the lawyer to the judge and it is an exception to the rule that evidence is to be tendered from witness box to Bench. Exception:

1. Original copy of official gazette,
2. Undisputed documents
3. CTC of public documents (original)

The following could be grounds of objection to documents with regard to its admissibility

- The document or facts relating to the document is not pleaded.
- No foundation is laid when tendering secondary evidence
- Public document sought to be tendered is not certified in accordance with section 104 (not in its prescribed form).
- Document is not relevant to the case.
- Document is on fact that is, that is privileged in any other way statutorily excluded.

TRIAL ADVOCACY

In exam, you will be asked to show the defect in an examination in chief, cross examination and re-examination. Trial advocacy deals with the vocal skills which a lawyer uses in proceedings before a court or other bodies in the course of handling matters for his client. Advocacy involves pleading the course of another. Trial advocacy starts in a lawyer's law firm because whether you will be successful or not depends on the home work that you have done in your office. A lawyer must have had a time out with his client in his law firm. This does not include doctoring a client. If a lawyer did not do his home work well in his office, he will not be composed and confident in court. First thing in court is to announce appearance for the counsel. "May it please your lordship; I am Elijah Leizou appearing for the defendant". The watch word to note is the jurisdiction and the capacity of the judge before whom you are appearing.

- High Court – Lordship/Ladyship, My Lord
- Magistrate Court – Worship/Honour (Lagos)
- Customary Court – Honour/Your Honour

Pre-preparation

Pre-preparation before trial courts are expected to sit at 9:00 AM in the forenoon. As a legal practitioner, be in court latest by 8:30 AM. A diligent legal practitioner will check the 'cause list' – reasons are:

- To confirm whether your case has been listed (some registrar and clerks do not do their work as they ought to do them)
- To confirm whether the matter/case will be called. If a matter is meant for judgment or ruling, there is a high probability that such matter will be called first.
- Settle down and make sure your witnesses are in court
- Do a final rehearsal with your witnesses
- Tell the witnesses where to sit
- Know where a new wig, SAN, AG, members of Bench are meant to sit (outer bar and inner bar).
- Three bangs usually announce the arrival of the judge. The court clerk will shout Court!
- Everybody rises and takes a bow, and wait for the judge to sit before you sit.

The claimant announces appearance first as a general rule but there are situations where the defendant will announce his appearance first. Order 30 r 8 LAG and Order 35 r 12 ABJ – the foregoing provides that the party on whom the burden of proof lies by the nature of the issues or questions between the parties shall begin. Thus where a defendant brings an application, the burden of proof is on the defendant. In a fresh matter except where the defendant admits and raises new facts, the burden of proof is on the plaintiff/claimant. When a case is called in court and either or both of the parties did not appear, there are effects - Order 30 r 1-5 LAG

- Where neither party appears, the judge shall, unless he sees good reason to the contrary, strike the cause out – Order 30 r 1 LAG.
- If the claimant appears and the defendant did not appear, the claimant may prove his claim so far as the burden of proof lies on him – Order 30 r 2

- If the defendant appears and the claimant did not, the defendant shall be entitled to judgment dismissing the case except he has a counter-claim, then he may prove such counter-claim, so far as the burden of proof lies upon him – Order 30 r 3.
- The judge may, if he thinks it expedient in the interest of justice, postpone or adjourn a trial for such time and upon such terms as he shall deem fit - Order 30 r 5 LAG.
- Where the cause is struck out, party can apply within 7 days for it to be replaced on cause list on such terms as the judge may deem fit – Order 30 r 4(1) & (3).
- A judgment obtained where one of the parties did not appear can be set aside by the judge upon such terms as the judge may deem fit – Order 30 r 4(2) & (3). Application is within 7 days.

Examination in chief

It is the examination of a witness by a/the party who calls him – section 214 Evidence Act. The main purpose of examination-in-chief is to elicit or deduce all facts that would be necessary in proving your case. Before a witness gives testimony, he is to affirm or swear on oath. Section 205 Evidence Act provides generally that all oral evidence given in any proceeding must be given upon oath or affirmation administered in accordance with the Oaths Act or Law. Also, any witness summoned to give oral evidence in any proceeding shall before giving such evidence be cautioned by the court in the following words: “You.....are hereby cautioned that if you tell a lie in your testimony in this proceeding or willingly mislead this court, you are liable to be prosecuted and if found guilty, you will be seriously dealt with according to law” – section 206 EA.

Affirmation does not involve the use of external material. It is as follows: “I, Elijah Leizou do solemnly affirm that the evidence I shall give before this honorable court shall be the truth, the whole truth and nothing but the truth”. Oath involves the use of external material – Bible, Quran or It is as follows: “I Elijah Leizou do solemnly swear by this Bible that the evidence I shall give before this honorable court shall be the truth, the whole truth and nothing but the truth, so help me God”. Note that the registrar is to ask the witness if he understands the language of the court. If the witness does not, an interpreter would be provided.

Questions usually asked by registrar:

- Do you understand English language?
- Caution to the witness
- Do you want to affirm or swear on oath?
- Repeat after me

After that, he would tell the court that the witness understands English, he has been cautioned and he has affirmed or sworn to an oath.

Exception to oath taking

Even though the law expects every witness to take an oath, there are categories of persons who are exempted. They are:

0. Persons who declare that taking of any oath whatsoever is according to his religious beliefs unlawful, or persons who have no religious belief and the court in its opinion should not give evidence on oath – section 208 EA.
1. A child or children less than 14 years who is possessed of sufficient intelligence to justify the reception of his evidence and understands the duty of speaking the truth.

The importance of oath taking is to make sure that the witness is saying the truth and it attributes more weight to the evidence being given. Thus for those not taking oath, their evidence, even though admissible, much weight might not be attached.

Types/nature of question to be asked in examination-in-chief

0. Open question: this question gives the witness opportunity of telling the whole story and explaining

1. Incremental question: this is an offshoot of open question as it tends to fill in the gaps. Thus dotting the 'I's and crossing the 't's.
2. Transitional question: going to historical facts. For instance, cast your mind back to what happen before. Have you ever noticed such behavior before? YES in.....

Always start with open, incremental, and then transitional question. In Lagos and Abuja questions to be asked in examination-in-chief are now limited because of front loading. The relevant questions are now

Introductory questions: "Can you please tell this honorable court your name, address and what you do for a living". This part is usually not contentious thus leading questions are allowed – section 221(2) EA

Main body: "and you make any statement relating to this case", "if you see the statement, will you recognize it?

Conclusion: "what do you want to do with the statement".

After the identification, the counsel ask the court to formally adopt it, since the court has a copy – I hereby (We humbly) apply that the witness' statement on oath be adopted as the witness examination-in-chief. The fact that examination-in-chief is in writing does not make it documentary evidence, it is oral evidence.

Leading questions

Leading questions are any questions which suggest the answer which the person putting it wishes or expects to receive – section 221(1) EA. Leading questions are not allowed in examination-in-chief or re-examination except with the permission of the court – section 221(2) EA. There are cases where leading questions are allowed.

- In introductory or undisputed or sufficiently proved matters – section 221(3) EA
- In cross examination – section 221(4)
- When permitted by the court
- Where the witness is declared a hostile witness.

When leading questions are asked of which circumstances does not fall under the exception, it can be objected to and the exception can be sustained by the court. A party cannot contradict his witness under examination-in-chief, however in circumstances where a witness is declared a hostile witness - section 230 EA. If a party wants to call a witness which the other party will call, wait for the other party to call him and then cross examine him when he has been called.

Cross examination

This is the examination of a witness by a party other than the party who calls him. The purpose of cross examination is:

- To weaken the testimony of the witness and contradict
- To destroy evidence given by the witness
- To test the veracity, accuracy and credibility of the testimony of the witness
- To shake the credibility of the witness by injuring his character.
- To put across the adverse party's case.
- To know who the witness is and his position in life.
- To extract facts from the witness which are favourable to the adverse party's case.

In testing the veracity or accuracy of the witness' testimony, other witness can be bought to testify that the witness' evidence should not be believed. Impeaching character of the witness is not one of the most favourable thing to do as it may incur the wrath of the court. The courts believe that witnesses come to court to assist the court. However, once the character of a witness is tainted, it is not relevant whether his testimony is true or not. Always know the approach to adopt for the purpose of cross examination. Closed question in cross examination always help counsel to maintain control over the witness as far as possible as the intention of the witness is not usually known. Always use close question and not open question. Open questions should only be used when a counsel is very sure of the answer. The technique of confrontation used in cross examination does not mean threaten the witness. Always treat all witness in examination with courtesy and politeness. Confrontation can be used when a witness has made a previous inconsistent

statement. In confronting him with this statement, first allow him to maintain a clear position in court; then remind him of the previous statement. Before cross examination always listen, analyze, evaluate and respond but now, it is read, analyze, evaluate, and respond (because of frontloading). Always ask the following question:

- Has his evidence damaged my case?
- In what way will cross examination help my case?
- Can the witness in cross examination help my case?
- In what way can he do that?
- Then what are the question you put to him to achieve your intention.

The examination-in-chief of the witness must be analyzed along with your theory of case. If it damage it, then you can cross examine or of not, there will be no need of cross examination. If a counsel can follow the LAER of RAER, cross examination by the counsel will be very weighty.

Techniques for cross examination

- Confrontation
- Probing
- Insinuation

Also closed questioning skill is used and the following questions should be avoided.

- Questions permitting the witness to explain
- Questions reminding the witness of facts
- Long and fishing questions

Restrictions to cross examination

There are certain questions which the court forbids – they are:

- Questions which the court regards indecent or scandalous – section 227 EA
- Questions which appears to the court to be intended to insult or annoy – section 228 EA

There are sanctions for asking such questions. Making report to the Attorney-General of the federation or other authority to which such legal practitioner is subject in the exercise of his profession. – section 226 EA. Note that cross examination need not be carried out in all circumstances – section 215(1) EA.

Re-examination

Re-examination is where a witness has been cross examined and he is then examined by the party who called him – section 214(3) EA. Re-examination is not compulsory in all cases except where ambiguities arise from cross examination; the purpose is to correct ambiguities that may have arisen during cross examination. Witnesses shall be first examined-in-chief then if any other party so desires, cross examination, then if the party who called him so desires, re-examination - section 215 EA. Only leading question can be objected to and not the answer provided to it. Documents can be tendered during any stage of examination of witness. Witness box is to the right. Dock is to the left. In cross examination, it need not be confined to the facts which the witness testified on his examination in chief - section 215(2). Re-examination shall be directed to the explanation of matters referred in cross examination and if a new matter is by permission of the court introduce in re-examination, the adverse party may further cross examine the witness - section 215(3). Generally witnesses are not allowed to refresh their memory. A witness is to testify from his head and not have recourse to any writing/documents made by him. There are exceptions:

- Where he made the document/written facts by himself at the time of the transaction – section 239
- An expert by reference to professional treatises
- Writing made by any other person, and read by the witness within the time of the transaction which he is questioned, if when he read it, he knew it to be correct – section 239(2)

Always identify the point to be re-examined on, and it is not an avenue to go over examination-in-chief. The rule applying to examination-in-chief applies to re-examination.

Ethical issues

- Adequate preparation: a lawyer should be adequately prepared for trial.
- Relevant questions are to be asked in examination of witness – Rule 33(1)(b) RPC
- A lawyer should be competent in handling the case of his client and he is at liberty to consult other lawyer(s) - Rule 16(1) RPC.
- Testimony or evidence of the witness must not be misquoted.
- A lawyer must not ask scandalous questions
- A lawyer must not produce evidence by bribery.
- A lawyer must not have secret witness that is prevent witness from testifying for adverse party.
- A lawyer should not doctor/tutor his witness as to give contrary/false testimony.

Examination of expert witness

Experts are persons that are specially skilled in the profession professed - section 68(2) EA. Ordinarily, expert opinion is generally not admissible - section 67. Where the opinion of the expert is reduced into writing, such is to be given directly by him unless he is dead - section 83 EA. For examination-in-chief of an expert, at first, always establish the status of the expert;

- His qualifications or experience must be given in evidence.
- His evidence must be limited to the areas that he is an expert.
- Expert must give reason for his opinion. This is important because where two experts are called; the court is more likely to accept that of the one that gave reasons for his opinion.

Under cross examination, questions should be directed at his competence/qualification. This should be done in cross examination and not on appeal. Also his opinion can be tested against the opinion of other more qualified expert in the same field. Test his opinion against the premise or hypothesis upon which the opinion is based. That is, it is insufficient as there are other facts the expert might not have taken into account. Always give respect to expert because by virtue of their position, they are supposed to be neutral persons (friends of the court). Before harassing an expert, make sure it is clear that the expert is not qualified. Note that expert is not brought solely for the purpose of testifying for the party bringing him. If an expert's qualification is not before the court, then there would be no need to cross examine the expert. A legal practitioner is an expert on matter involving law.

Evidence of children

Before a child under the age of 14 years can testify in any proceeding, the following test must be adopted:

- Whether he understands questions put to him; or he can give rational answers to them.
- Whether he has sufficient intelligence to justify the reception of his evidence.
- Whether he understands the duty of speaking the truth.

Once the child passes the above test, he can give unsworn evidence/testimony - section 175 and 209(1) EA.

Hostile witness – section 230, 231, 232 and 233 Evidence Act.

There are two conditions which makes a witness hostile: testifying against a party who called him; and not willing to tell the truth. The party that called him can then apply for leave to court for the witness to be declared hostile witness. In applying for the leave, it must be shown to the court that the two conditions exist. The easiest way is by bringing to court previous inconsistent statements – section 230. Where a witness is declared a hostile witness, the party calling him can cross examine him. A witness can only be declared hostile in examination-in-chief and re-examination and not in cross examination because the party cross examining is not the party that called him. The credit of a witness may be impeached in the following ways by any party other than the party calling him or with the consent of the court by the party who calls him

- By evidence of persons who testifies that they, from their knowledge of the witness, believe him to be unworthy of credit;
- By proof that the witness has been bribed or has accepted the offer of a bribe or had received any other corrupt inducement to give his evidence; or

- By proof of former statements inconsistent with any part of his evidence which is liable to be contradicted.

Closing/final address

Closing address or final address is the marriage of the facts and law in order to convince the court to grant or refuse to grant certain prayers. Closing address is immediately after trial, while closing statement is before judgment. The closing address is also known as written address.

Form of a written/closing address

The following are what a written address should contain in order for it to be properly identified:

0. The heading of the court
1. The suit number
2. The parties
3. The subject matter - If trial, it is FINAL/CLOSING ADDRESS and if interlocutory, ADDRESS IN RESPECT OF MOTION ON NOTICE.
4. Introduction: this introduces the reader of the address to the case at hand. Depending on how the action was commenced, it can be
 - . "This matter was commenced by a writ of summons together with statement of claim, written statement of witnesses on oath and certain documents listed. The defendant on the other hand filed a statement of defense, written statement of witnesses on oath and documents were listed".
 - a. "This matter was commenced by an originating summons supported with a 20 paragraphs affidavit and list of exhibits; and the defendant filed his counter-affidavit and list of exhibits".
5. Summary of facts – the summary of facts is as viewed by a party. In this like, the theory of case of a party would be relevant. For instance "The matter is for a contract between XYZ Ltd and ABC Ltd. The claimant called 10 witnesses and tendered 10 documentary evidence with which the claimant is able to prove that there was a valid contract between the parties and the defendant has breached 'the contract' (claimant). If defendant, "The facts of this case is that there was a purportedly written agreement. The defendant called 5 witnesses and was able to prove that there was no contract between the parties'.
6. Issues for determination – the issues for determination must be numbered accordingly. E.g.
 - . Whether a contract which was entered in 2006 and alleged to have been breached in 2006 of which action was commenced in 2013 can be said to have been statute barred in the circumstances of this case.
 - a. Whether a conciliation clause in an agreement between parties means conciliation must be resorted to before commencing an action in the circumstances of this case.
7. A succinct statement of argument on each issue – the argument is to be done on each issue and it must be logical. Thus the facts are to be stated first then the submission and authorities supporting it. E.g. My Lord, the claimant witness state that there was a contract and exhibit B was tendered in support. This was not challenged by the defendant. From summary of the facts, it is shown that there was a contract. We submit that there was a contract and where there is a breach of contract, there must be damages. We refer to the case of and section.....
8. Prayers or reliefs sought – E.g. 'Having canvass the argument, it is our belief that the claimant is entitled to the following reliefs.
 - . An order dismissing the case for lack of jurisdiction.
 - a. An order granting the claimant damages for cost
 - b. And such further orders as the honorable court may deem fit to make in the circumstance.
9. Conclusion – this contain the summary of what has been stated/written. E.g. My Lord, the facts as stated above are proved by witness 1, 2,..... in line with authority listed. It is our submission that the claimant is entitled to reliefs sought.

10. Date – Dated this _____ day of _____ 2013
11. Name & signature of counsel that prepare the written address.
12. List of authorities (some lawyers usually insert the list of authorities after conclusion. Either way is ok).

Filing and adopting written address/closing address

- If after the party beginning closes his case and the other party did not call evidence, then the party beginning would within 21 days file a written address – Order 36 r 1 ABJ and Order 30 r 13 LAG.
- Where the other party call evidence, such party shall within 21 days after the close of evidence file and serve written address within 21 days – Order 36 r 2 ABJ and Order 30 r 14 LAG.
- Where the party beginning has been served, he shall within 21 days file his won written address – Order 36 r 3 ABJ and Order 30 r 15 LAG. The party who first filed shall have a right of reply on point of law only and shall file his reply within 7 days after service of the other party's address – Order 36 r 4 ABJ and Order 30 r 16 LAG.

On the day set for the final address, the party that first file is to first adopt in the following words 'My Lord, before this honorable court is the claimant's final address dated _____ day of _____ 2013 and filed on the same date. We humbly seek the leave of the court to adopt same as our final written address.

After leave has been granted

We adopt the written address dated _____ day of _____ 2013 and filed on the same date as the claimant's final written address. The parties after adoption will be allowed to canvass oral argument. In ABJ, Order 36 r 5, 30 minutes is allowed. In LAG, Order 31 r 4, oral argument is allowed for 20 minutes. Each party is to file two copies of his written address in court and serve a copy thereof on every party – Order 31 r 5 LAG and Order 36 r 7 ABJ. A written address shall be printed on white opaque A4size paper – Order 31 r 2 LAG, Order 36 r 6 ABJ. Written address is based on both facts and law. The court cannot decide a case without facts and evidence. As a counsel, bring your case within the law and do not devote your attention to the law because if facts are clear and compelling, the judge can bring the facts within the law (the judge is presumed to know the law, so also are the lawyers. Every heading in written address should be capitalized and numbered accordingly.

Judgment

It is the binding decision of courts which decides rights of the parties to the suit – Obi v. Obi. The constitution of Nigeria did not define judgment but defined as follows: any determination of that court and includes judgment, act, order, conviction, sentence or recommendation.

Characteristics of a good judgment or how to identify judgment of court

0. Must be in writing – section 294 CFRN
1. A good judgment must demonstrate a dispassionate consideration of all the issues raised or as formulated by the court or the parties.
2. Also is the characteristic of a clear resolution of all issues raised and heard. That is, all the issues considered by the judge must be resolved one way or the other.
3. It must contain summary of all facts and evidence adduced by the parties. That is, evaluate the facts or evidence adduced by both parties – Mogaji v. Odofin

Where claimant called 10 witnesses, all the 10 witnesses must be considered and evaluated. What each side said must be contained in the judgment and the judge must be able to say that he believed witness A and did not believe witness B. The evidence of the claimant are to be put on one side of imaginary scale and the evidence of the defendant on the other side of the imaginary scale. Weighing of evidence of the parties is not by number of witnesses or documents but the substance of what was given and evidence must be considered along the line of available law. A good judgment must be declared within 90 days after the conclusion of evidence and final address – section 294(1) CFRN. If there is need for parties to further address the court on certain issues, the 90 days period will start to run from the date of the final address.

Where a judgment is not delivered within 90 days, there are effects. Under the 1979 Constitution, if for whatever reason, the judgment is delivered after 90 days, no matter how beautiful and good the judgment is, the judgment will be null and void. The reason is based on the tendency of forgetting the demeanor of the witnesses. Under that era, non-delivery could be for genuine reason and many judgments were nullified even though good and perfect. And a retrial ordered. – *Ifezu v. Mbadugha* and *Ojokobo v. Alamu*. Under the 1999 constitution, the effect is different. Section 294(5) provides that the decision of a court shall not be set aside or treated as a nullity solely on the ground of non-compliance with the provisions of subsection 1 unless the court exercising jurisdiction by way of appeal or review of that decision is satisfied that the party complaining has suffered a miscarriage of justice by reason thereof. The party who is asserting miscarriage of justice should prove.

Type of judgment

The type of judgment of court depends on how and when it was given. The following are the types of judgment:

Consent judgment

This judgment involves agreement between the parties. Thus the consent of the parties is given to the judgment. Consent judgment takes two forms

- . Where the parties are in court and then they agree on certain issues and the agreement is filed in court. The court then adopts and delivers it as judgment.
- a. The other is where parties are outside the court and they agree on certain terms and conditions which is reduced into writing and submitted to court. For instance, a negotiation agreement. Action upon such agreement will be by originating summons.

Consent judgment is a final judgment of the court and it binds all parties to it. Appeal against it is by the leave of court - section 241(2) CFRN. *Afegbai v. AG Edo state*. A non-party to the proceedings cannot be bound by the consent judgment. Non-party does not include privy and agent. A consent judgment may be set aside by the same court that gave it for fraud or any other reason for which a contractual agreement could be rescinded for instance, misrepresentation. For a consent judgment to be validly entered the parties must agree as to the exact terms of the judgment and their consent to it must be freely and voluntarily given - *UBN Plc v. Edamkue*. Order 35 r 6 LAG provides that in any cause or matter where the defendant has appeared by legal practitioner, no order for entering judgment shall be made by consent unless the consent of the defendant is given by his legal practitioner. Order 35 r 7 LAG provides that where the defendant has no legal practitioner, such order shall not be made unless the defendant gives his consent in person in open court.

Default judgment

This is the judgment given in default of or in breach of compliance with the rules of court. The essential feature of this judgment is that it is not on merit. Default judgment is given under any of the following circumstances:

- Where there is default of appearance
- Where there is default of pleadings
- Where there is default of appearance during trial
- Where there is default of appearance during case management conference.

Default judgment can be set aside on grounds of fraud, lack of jurisdiction, non service - Order 20 r 12, 10 r 11 LAG.

Declaratory judgment

This is the judgment that declares the rights of parties without ordering anything to be done or awarding of damages. For example, A is the owner of the land situated at.....Note that in a judgment of the court, there could be declaratory judgment combined with another judgment. Note that a declaratory judgment cannot

be entered in default of appearance or pleading. A party seeking the declaration still needs to prove it. A declaratory judgment cannot be stayed or executed because it only imposes rights. The only application against declaratory judgment is injunction.

Executory judgment

This judgment is the opposite of declaratory judgment in that it imposes certain sanctions and obligations on the party against whom it is given. Example is payment of damages and vacation of premises against a tenant. It is executory because it can be executed or stayed. If a party did not comply with judgment, there are certain mechanisms which the court can use to compel compliance.

Interlocutory judgment

This is the judgment given during the pendency of the suit and has not finally determined the rights of the parties. Where a judgment is interlocutory, leave of court must be sought before appeal can be made against it. A judgment is not interlocutory because it is given during interlocutory application. Some judgment can be given during interlocutory application which would determine the rights of the party in its interest. For instance, jurisdiction of court; when a court decides or upheld a preliminary objection on its jurisdiction that is a final judgment. Examples of interlocutory judgment are:

- An order to relist a suit
- An order of consolidation of suits
- An order of interlocutory and interim injunction.

Final judgment

Final judgment is given at the end of the substantive suit and this is the last thing in the process of civil litigation. A final judgment disposes of the rights of the parties finally in a suit. It is the opposite of interlocutory judgment. A final judgment has the following effect:

- After the judgment the court becomes *funtus officio*
- It determines the number of days within which an appeal will be made.
- It is a ground for estoppel *res judicata*

Note that rulings are decisions of court made during the pendency of the suit.

Dismissal of action

It involves a situation where after trial, the court believes that the claimant or plaintiff is unable to prove his case and if the defendant is not counter-claiming the suit would be dismissed. The following are the effect of dismissal:

- The matter cannot be re-litigated upon – estoppels.
- The matter may go on appeal
- The order of dismissal cannot be set aside
- This order of dismissal is a final judgment
- The court is *funtus officio*

Non-suit

This is the order of the court terminating the proceeding appropriately before the completion of the suit. The court in essence tells the parties to go home and put their house in order. The order of non-suit is by statute and not inherent power of the court (not discretionary). Order 34 r 1 & 2 LAG provides for order of non-suit on application of claimant. The order of non-suit cannot be ordered in Abuja. The parties to the proceedings have the right to address the court and the court is to call on parties to address it on the issue of non-suit. The order of non-suit is to the effect that the parties can come back to re-litigate on the same subject matter. In *Ibiyemi v. FBN Plc*, the Court of Appeal stated that without doubt, a trial court has a discretion to non-suit a plaintiff in appropriate cases. Before exercising that discretion, however, a court must hear the parties to the suit on that point. Usually, the power to enter a non-suit rather than making an order dismissing the plaintiff's claim is discretionary and will depend on the circumstances of each case arising from the facts or state of evidence presented or conceded in each particular case. What is important

when deciding whether to dismiss a plaintiff's claim or non-suit is the justice of the case. An order non-suiting a plaintiff cannot be made where on the facts, the plaintiff has not proved his claim. It can only be made where on evidence adduced; either of the parties is not entitled to the judgment of the court – *Chikere v. Okegbe*.

Delivery of judgment

Judgment generally is to be delivered in open court. The proceedings of a court shall be held in public – section 36(3) CFRN. Order 39 r 1 ABJ and Order 3 r 1 LAG provides that the decision or judgment in a suit shall be delivered in open court, unless the court otherwise directs for sufficient cause. Thus there are exceptions which are found in section 36(4) CFRN.

0. Public safety
1. Public order
2. Public morality; and
3. In case of minor

In this like, the hearing and delivery of judgment can be in the chambers of the judge – *Nigeria Arab Bank Ltd v. Barri Eng Nig Ltd* (1995) 9 SCNJ.

- Interlocutory – final judgment
- Declaratory – executor judgment
- Dismissal – non-suit
- Consent – default

A judgment may be written by one judge and delivered by another provided that the person who wrote the judgment is the person who heard the case. Once a judge has left that court, he cannot deliver a judgment in that court – *Ogunbiya v. Okudo*. All the justices who heard an appeal must not all be present at the time of delivery of the judgment. Where one justice is absent, his opinion can be read by another justice of the court, whether or not he was present during hearing. In *Okino v. Obanabira*, the Supreme Court held that under section 11 of the Court of Appeal Act, it shall not be necessary for all the justices who heard an appeal to be present together in court on the day appointed for the delivery of the judgment. It is lawful if another justice of that court reads the written opinion of any one of them who is unavailable. Court is to furnish parties with duly authenticated copies of the decision within 7 days from the date of delivery. However, non-compliance will not render the decision a nullity – section 29(4) CRFN.

Amendment of judgment

A court cannot amend his judgment. Once it has been delivered. Thus it cannot review or correct it. The judgment becomes *funtus officio* after delivery. There are exceptions – Order 24 r 7 LAG and ABJ provides that clerical mistakes in judgments or orders or errors arising from any accidental slip or omission, may at any time be corrected by the court or a judge in chambers on motion or summons without an appeal. In Lagos, it is only application. Procedure for correcting clerical errors is by application – motion on notice, supported by affidavit setting out the grounds of application and a written address. Also, the record of the court showing the place where error occurred is to be attached. In *JCL Ltd v. Ezenwa*, the court held that while a court has jurisdiction to correct a misnomer or misdescription under the slip rule, it cannot whilst acting under its inherent jurisdiction or powers conferred on it by rules of court vary a judgment or order which correctly represents what the court decided. In *Intra Motors Nig Plc v. Akinloye*, a judge may re-open in the following circumstances:

- To correct clerical errors/mistake.
- To set aside a default judgment obtained in absence of one party or in default of pleadings.
- To set aside a judgment obtained by fraud.
- Where the judgment is a nullity. Any judge can set a judgment that is a nullity aside.

Ethical issues

Rule 30 RPC. A lawyer is an officer of the court and accordingly, he shall not do any act or conduct himself in any matter that may obstruct, delay or adversely affect the administration of justice. Rule 32(3)(g) – in appearing in his professional capacity before a court or tribunal, a lawyer shall not with knowledge of its invalidity cite an authority, a decision that has not been overruled or a statute that has been repealed with intent to mislead the court or tribunal. Also, a lawyer shall not intentionally or habitually violate any established rule of procedure or of evidence – Rule 32(3)(e) RPC. Again a lawyer shall not in his argument assert as a fact that which has not been proved, or in those jurisdiction where a side has the opening and closing argument to mislead his opponent by concealing or withholding his in his closing argument position which his side intends to rely – Rule 32(3)(h) RPC. Rule 15(30)(g) RPC in his representation of his client, a lawyer shall not knowingly make a false statement of law or fact.

APPLICATION PENDING APPEAL AND ENFORCEMENT OF JUDGMENT

Application pending appeal

Where an interlocutory judgment or ruling or a final judgment is delivered, the person against whom such judgment is given can bring any of the following applications depending on the nature of the judgment and the person bringing it.

1. Stay of execution
2. Stay of proceeding
3. Injunction pending appeal

Generally, application pending appeal is made for any of the following reasons:

- (i) The preservation of the res – subject matter, pending the determination of appeal
- (ii) So that the character of subject matter is not changed.
- (iii) So that a party who succeeds on appeal do not have an empty judgment.

Note generally that any of the above application is first made at the trial court. Lower court which delivered the ruling or judgment before it is made before an appellate court. There are exceptions:

Stay of execution

Once judgment of the court has been delivered, a successful party is entitled to the fruit of the judgment. However, the other party can apply for stay of execution of that judgment. This is governed by Order 45 r 1 ABJ and Order 54 r 1 LAG. Note that application is first to be made to the trial court before an appellate court. Generally the procedure is by

- Motion on notice
- Supported with affidavit setting forth the grounds upon which a stay of execution is sought.
- Written address

An order for stay of execution is discretionary as a court may make or refer the order – Order 45 r 2 ABJ. A stay of execution could be made conditional or unconditional. If the judgment sought to be stayed is money judgment, the applicant may be asked to pay the money into the court (an interest yielding account) – Order 45 r 2 ABJ. Payment on installment is an order staying execution because the judgment creditor is entitled to the entire sum of the judgment debt. There are peculiar provisions in the Lagos rules – Order 54 r 2 & 3 LAG

0. The applicant for stay of execution in Lagos must compile the record within 40 days from the date of filing the notice of appeal.
1. Where the applicant fails to compile the record within 90 days, the judgment creditor/respondent can bring an application to strike out the motion for stay of execution.
2. If the period of 90 days have not elapsed and the application for stay of execution is granted and the judgment debtor fails to compile the record within 90 days, then the judgment creditor can apply to discharge the order for stay of execution.

Application for stay of execution is regarded as an urgent matter. Note that where an application for an order of stay of execution is made in the trial court and it was struck out, another order cannot be made

again in the same court. Thus generally, only subsequent applications are made at the appellate court (Court of Appeal). Order 7 r 4 Court of Appeal Rules provides as follows:

No first application will be made to the Court of Appeal. However, where there are special circumstances, the first application can be made. *Bashorun v. Chief of Army Staff*. One of such special circumstances is when the application has been entered in the Court of Appeal. An appeal is bought when it is filed and a notice of appeal is filed in the lower court. When the registrar of the trial court has compiled the record and sends them to the Court of Appeal, appeal is deemed to have been entered. In this like, the lower court is devoid of jurisdiction.

IN THE HIGH COURT OF LAGOS STATE
IN THE LAGOS JUDICIAL DIVISION
HOLDEN AT LAGOS

SUIT NO:

BETWEEN

CROWN KITCHEN LTD CLAIMANT/JUDGMENT CREDITOR/RESPONDENT

AND

K & T LTD

DEFENDANT/JUDGMENT DEBTOR/APPLICANT

TAKE NOTICE

An order of stay of execution of the judgment of this honourable court delivered on the day of _____ pending the determination of the appeal of the defendant/judgment debtor/applicant.

Note: always describe parties in their full status. Example:

- Claimant/judgment creditor/respondent
- Defendant/judgment debtor/applicant

Stay of proceedings – Order 45 r 1 ABJ and Order 54 r 1 LAG

An order of stay of proceeding is to stay the substantive or proceeding in the lower court pending the determination of an appeal on a ruling of the court. This is usually where the court grants an interlocutory judgment and the party against appeals on it. The procedure is by an application on motion on notice supported by an affidavit stating the ground of the application and a written address. In Lagos the procedure for compilation of notice of appeal applies and it is also an urgent matter. First, application is at the lower court except it is impracticable or exceptional circumstances. The difference between an order for stay of proceedings and an order for stay of execution. An order for stay of proceeding is during the pendency of the suit while an order for stay of execution is after the judgment of the court – final judgment. There are conditions which an applicant for stay of proceeding must satisfy.

- Appeal must be made within 14 days of delivery of the ruling.
- There must be notice of appeal filed at the trial court but have the heading of the appellate court.
- There must be a valid appeal and arguable grounds of appeal. *S.G.B Nig Ltd v. I.F.I Ltd* (2001) 640.

In *Kigo (Nig) Ltd v. Holman Bros (Nig) Ltd*, the Supreme Court stated that the court from which an appeal lies have a duty to preserve the res for the purpose of ensuring that the appeal if successful is not nugatory. In making a first application to Court of Appeal under special circumstances or second application, the following is the procedural requirement:

- Motion on Notice
- Affidavit stating the grounds (no written address at the Court of Appeal)
- A certified true copy of the notice of appeal (proposed).
- A CTL of ruling appealed against
- A CTL of the ruling of the lower court on first application (if a second application).

- Other relevant documents like writ of summons, pleadings, record of proceedings.

Special circumstances can include a strike action in the lower court or a statement by the justice of the lower court stating that the counsel should not bring any application for stay of proceeding.

Injunction pending appeal

An application for an injunction pending appeal can arise in the following circumstances:

Where a plaintiff or claimant bringing an action lost the case (case was dismissed), the plaintiff if he appeals, cannot ask for stay of execution or proceeding, but he can ask for an injunction to restrain the defendant from taking action on anything that would affect the subject matter. In *Shodeinde v. Registered Trustees of Ahmadiya Movement of Islam*, a plaintiff whose action had been dismissed and who had appealed against the judgment was granted an injunction to restrain the successful defendant from acting under the judgment until the determination of the appeal.

Also where an interlocutory injunction filed was refused. An unsuccessful applicant can apply for injunction pending appeal on the interlocutory ruling – *Odotola v. FBN* (2000) 4 (653).

Where the claims are declaratory and a declaratory judgment is given to the claimant, the defendant can only apply for injunction pending appeal. The defendant cannot apply for stay of execution as declaratory judgment cannot be stayed. Note the difference between stay of execution, proceeding and injunction pending appeal. If an order is sought from the Court of Appeal, always mention the name of the judge that gave the ruling and the court.

Specimen of injunction pending appeal before Court of Appeal

IN THE COURT OF APPEAL OF NIGERIA
IN THE LAGOS JUDICIAL DIVISION
HOLDEN AT LAGOS

APP NO:

BETWEEN

CROWN KITCHEN LTD CLAIMANT/JUDGMENT CREDITOR/RESPONDENT

AND

K & T LTD

DEFENDANT/JUDGMENT DEBTOR/APPLICANT

MOTION OF NOTICE BROUGHT PURSUANT TO ORDER __RULE__ OF THE COURT OF APPEAL RULE

TAKE NOTICE that the Court of Appeal will be moved on the day of _____ 2013, at the hour of 9'O clock in the fore noon or so soon thereafter as the applicant counsel on behalf of applicant can be heard praying for the following orders.

1. An order granting injunction restraining the respondent from acting on the judgment of the High Court of Lagos state delivered by Honorable Justice Ayo Suleiman delivered on 12th September 2012, pending the determination of the appeal before the Court of Appeal.

2. And such

Dated this _____ day of _____ 2013

Elijah Leizou

Enforcement of judgment

A party who judgment is given in his favour is entitled to the enforcement of the judgment. Thus a judgment once it is pronounced becomes enforceable. On the other hand, the person against whom a judgment is given is expected to comply with the judgment. This is not usually the case. Generally, judgment takes effect immediately being pronounced upon. Order 35 r 2 LAG & Order 39 r 6 ABJ. The Lagos rules is to the effect that the day judgment is pronounced, it is dated on such day and takes effect unless the judge otherwise orders. Enforcement of judgment is on item 57 of the exclusive legislative list, thus within the exclusive powers of National Assembly. The regulatory law is the Sheriff and Civil Process Act applicable in the whole Nigeria. Thus in all states in Nigeria, there is a uniform enforcement law which is the Sheriff and Civil Process Act.

MODES OF ENFORCEMENT OF JUDGMENT:

The following are the modes or types of judgment for the purpose of enforcement.

1. Money judgment – liquidated money
2. Non-money judgment (land matters)
3. Declaratory and executory judgment.

Money judgment – liquidated money

There are four ways of enforcing this kind of judgment namely:

- Writ of fieri facias (fifa)
- Garnishee proceedings
- Judgment summons
- Writ of sequestration

Garnishee proceedings: in this procedure of enforcing money judgment, three parties are involved; the judgment creditor, the judgment debtor and a third party. The third party is a debtor of the judgment debtor and the judgment creditor then puts himself in the position of the judgment debtor to collect the debt due to the judgment debtor. The third party is known as the garnishee, while the judgment creditor is known as the garnishor. Essentially, the arrangement is between the third party and the judgment creditor. Garnishee proceedings is regulated by section 83 of Sheriff and Civil Process Act. The following are the debts that can be attached:

- A due salary
- Rent that is due; and
- Present debt

Section 83 of Sheriff and Civil Process Act mention the following procedure.

0. Application is by motion ex parte
1. Supported by an affidavit in Form 25 – Order 8 r 3(1) Judgment Enforcement Rules (JER). The affidavit is to have the following particulars:
 - The amount entitled to under the judgment order
 - That the judgment order is still wholly or partially unsatisfied.
 - The amount paid on the judgment order by judgment debtor if any;
 - The indebtedness of the garnishee (third party) to the judgment debtor (amount in custody of the garnishee); and
 - The amount in custody of garnishee should satisfy the judgment order (debt).
2. Exhibit the judgment of the court. A certified true copy. This is to be attached in the affidavit and marked as “exhibit”.
3. An enrolled order is to be served at least 14 days before the day of hearing (a copy) on the judgment debtor and garnishee – section 83(2) Sheriff and Civil Process Act
4. Service is effected like writ of summons – Order 8 r 4 JER.
5. The garnishee pays into court the amount within 8 days of service of the summons on him – Order 8 r 5 JER.

Where a garnishee claims that a judgment debtor does not have any money in his custody, the garnishee is to depose to an affidavit stating such fact. Where there has been payment into court by the garnishee, he is to depose to an affidavit of compliance. The affidavit of the applicant attached to the motion ex parte is to be deposed to by the applicant or his legal practitioner – section 83 Sheriff and Civil Process Act. Upon the application and affidavit, the court has the direction of granting an order nisi ordering the garnishee to pay to pay the amount. It is this order nisi that is served on the judgment debtor and garnishee. Where the money is in custody of a public officer in his official capacity or in custodia legis, the court will not make the order nisi unless consent of the appropriate officer or court (in case of money in custodia legis) first obtained is attached to the application. Appropriate officer is either the AGF or AGS. Once the garnishee order nisi is served on the garnishee and judgment debtor, there would be a binding order against the

amount with the garnishee – section 85 Sheriff and Civil Process Act. This is so, so that the judgment debtor will not go behind the order nisi and withdraw the amount/money.

If the garnishee within 8 days after service of summons on him refuse to comply with the order nisi, by paying the amount into court and without disputing the debt due, the court upon proof of service may order that execution be levied against the garnishee for that amount. – section 86 Sheriff and Civil Process Act. The garnishee instead of complying can by affidavit deny liability. The court instead of an order of execution, may order trial of his liability – section 87 Sheriff and Civil Process Act. If the garnishee is found liable, then execution levied against him and if otherwise, he will be discharged. After hearing, the garnishee proceeding, an order absolute would be made. The effect is that the money paid into the court is transferred to the judgment creditor. The garnishee order absolute is a final order of court – section 91 Sheriff and Civil Process Act. If execution is levied against garnishee under section 86 Sheriff and Civil Process Act, the writ of execution is Form 27 and the application for writ is by filing a pre recipe in Form 3. The garnishee order nisi is made when the garnishee is in the state where judgment was given – section 83 Sheriff and Civil Process Act.

Writ of fieri facias: this is execution against any movable property of judgment debtor. Movable property here includes all property of the judgment debtor except his wearing apparel and bedding and that of his family. It could be goods, money, promissory notes, bonds, securities, bills of exchange e.t.c. – section 25 Sheriff and Civil Process Act. There is difference between process on land and other properties. A defendant is only to vacate possession of land on the day ordered to do so by court, if none after expiration of 14 days from the day on which judgment is given – section 4 r 1 JER. Other process is after expiration of 3 days which judgment was given except by express leave of the court – Order 4 r 3 JER. Goods can only be sold after 5 days of giving the judgment.

Procedure

The general rule is that execution cannot be levied against immovable property except:

- . No movable property of the judgment can with reasonable diligence be found; or
- i. If such movable property is insufficient to satisfy the judgment and the cost of execution – section 44 Sheriff and Civil Process Act.

Thus, application is first for movable property. Where application is for immovable, either of the above condition must be stated in the affidavit supporting the application – Order 4 r 6 JER. The proviso to section 44 SCPA states that even where judgment is obtained in a Magistrate court, the court does not have jurisdiction to issue an execution order on immovable property. Only the High Court upon the conditions in Order 4 r 16 JER can make such order. These conditions are:

- The application showing the steps that have been taken by the applicant.
- The sum that remains due under the judgment; and
- That no movable property of the judgment debtor or none sufficient to satisfy the judgment debt, can with reasonable diligence be found

Issuing execution against immovable property is discretionary (the court may). A writ of the attachment and sale against immovable property shall be in Form 38 – Order 4 r 16(4) JER.

Non-money judgment

This is judgment for recovery of land or delivery of possession other than an action between landlord and tenant. This is enforceable by writ of possession – Order 11 r 6 JER. The writ of possession is to be filed after 14 days of pronouncing judgment, except otherwise ordered by the court.

Enforcement of judgment in another state

Section 104-110 SCPA. The procedure is as follows:

- Obtain certificate of judgment in the state where the judgment was given in the form and containing the particulars set forth in the second schedule or as near as possible.
- Registration of the certificate of judgment by the registrar of the state where judgment is to be enforced, the particulars are entered in “the Nigerian Register of Judgment”.

- After registration, the judgment would become a record of the court and have the same effect as judgment of that court – section 105(2) Sheriff and Civil Process Act.
- Process of levy of execution of judgment will be taken on it.
- Every application must be supported by an affidavit stating either of the following facts – section 107 Sheriff and Civil Process Act
 - . That the amount for which process is proposed to be issued is actually due and unpaid; or
 - a. That an act ordered to be done remains undone; or
 - b. That the person ordered to forebear from doing an act has disobeyed the order.

After execution, the registrar of the enforcing court shall file a report under seal of the court of the outcome of the execution notifying the registrar of the court where the judgment was given, that the judgment has been satisfied either wholly or in part.

Intra-state judgment

- This involves judicial divisions or district. This is where the home court gave judgment but its enforcement can only be done outside the judicial division of the home court.
- The registrar of the home court issues the writ of execution and sends the process for execution to the registrar of the foreign court
- A warrant in form 11 accompanies the process, requesting and authorizing execution in the foreign court.
- The registrar of the foreign court acts on the process as if it were issued in his court.
- After execution, the registrar of the foreign court pays over all monies(if any) received from the execution and reports back to the registrar of the home court.

APPEALS

Appeals involve proceeding from the judgment of a trial court to an appellate or from one appellate court to another appellate court. Appeals are important because there is a realization that judges are human and they can be wrong. Thus opportunity is given for another set of judges to assess the decision of a lower judge. Also, appeal helps curb the excessive power of the trial court. There is no inherent or general right of an appeal. Appeal is purely statutory – Adegun v. AG Oyo state. The applicable laws are:

- The constitution of the federal republic of Nigeria 1999 as amended
- The Court of Appeal Act
- The Court of Appeal Rules

Right of appeal

Right of appeal is divided into two categories; namely

- Appeal as of right
- Appeal with the leave of court (consent of lower or appellate court)

Appeal as of right

Knowing the instances of appeal as of right is important because the processes to file depend on whether the appeal is as of right or with the leave of the court. The following are the instances of appeal as of right which does not require the leave of court. They are found in section 241(1)(a)-(f) excluding (e) CFRN 1999.

1. Final decisions of the Federal High Court, State High Court (FCT), National Industrial Court sitting at first instance – (a). The decision must be final and the court stated must be sitting as court of first instance. This instance is general as long as the conditions are met and it is not case specific.
2. Where the ground of appeal involves questions of law alone. The requirement here does not involve the court sitting as court of first instance or final decision. What is important is the ground of appeal which must be question of law alone – (b). This instance is also not case specific but general as long as the condition is fulfilled. The following instances are specific relating to subject matter.
3. Decisions on interpretation or application of the CFRN 1999 - (c).

4. Decisions as to whether any provisions of chapter IV CFRN 1999 has been, is being or is likely to be contravened in relation to any person – (d)
5. Decisions on liberty of a person is concerned or the custody of an infant – (f0)
6. Where an injunction is granted or refused.
7. Where the appointment of a receiver is granted or refused.
8. Decision determining the case of a creditor or the liability of a contributory or other officer under any enactment relating to companies.
9. In the case of a decree nisi in a matrimonial cause
10. A decision in an admiralty action determining liability.

Appeal with leave of court – section 241 CFRN

The leave required here is the leave of the trial court that is Federal High Court, State High Court, High Court FCT, National Industrial Court or that of the Court of Appeal. The instances are:

- Matters not coming under section 241(1) CFRN, appeal in such cases require leave of court – section 242
- When consent judgment is given by the court – section 241(2)(c). *Abdulkareem v. Incar Nig Ltd* (1992)SC, *Ayanloye v. Balogun* (1990) NWLR 392.
- Appeal as to cost only. Award or non award of cost – section 241(1)(c).

Cases where there is no right of appeal

Decision of an High Court granting unconditional leave to defend an action. The decision granting unconditional leave is only trying to protect a person's right to fair hearing. This does not determine the case between the parties. For instance, in summary judgment, where the defendant is given unconditional right to defend, the claimant cannot appeal on such decisions and the defendant would not want to appeal except if conditions are attached.

From an order absolute for the dissolution or nullity of marriage in favour of any party who, having had time and opportunity to appeal from the decree nisi on which the order was founded has not appealed from that decree nisi.

It is only applicable to persons/party who had the time and opportunity of appealing against the decree nisi (last for 3 months before it is made absolute) and did not. In *Nabhan v. Nabhan*, the Supreme Court held that there is a right of appeal from a decree nisi and not decree absolute.

Effect of failure to obtain leave of court

Where leave of court is required and such is not obtained, such goes to the jurisdiction of the Court of Appeal. This is because appeal is statutory and not inherent. Thus it will not be a question of irregularity which can be rectify. *Ogbechie v. Onochie* (1986). The appeal is made against decision and decision in section 318 CFRN is the determination of a court. There are many things that are done in court that are not decisions and thus cannot be appealed against. They are:

0. Transfer by chief judges: the decision of the chief judge to transfer a case is an administrative decision which is not subject to any appeal. *Dike v. Areluba* (2001) 2 SCNJ. Upon an application for transfer of a case from Magistrate to Higher Court, the Supreme Court said the function is administrative and the decision arrived at is not appellable to the Court of Appeal
1. Minority opinion: where there is a dissenting judgment appeal cannot be on it. *Ige v. Olunloyo* (1984) 15 SCNLR 156.
2. Obiter dictum: this is a mere statement not based on any issue before the court. Thus an appeal cannot be made on it. *Abacha v. Fawehinmi*.

Difference between final and interlocutory

Decisions of the court in light of appeal. The distinction between final and interlocutory appeal is important in two respects.

- Time limit for appealing (3 months for final and 14 days for interlocutory)
- Right of appeal; whether appeal is as of right or with leave of court

Interlocutory decision does not determine the rights of the parties finally. Final decision determines the rights and issues between the parties finally. The test has been laid down by the Supreme Court in *Omonuwa v. Oshodin*. They are:

- The nature of the order that was made; or
- The nature of the application made to the court

If the order finally determines the rights and issues between the parties leaving nothing to be decided by the court then it is final. This does not include ancillary proceedings like stay of execution, enforcement of judgment. In *Ebokam v. Ekwenibe & sons*, the Supreme Court stated that where the decisions of the court under consideration clearly and wholly dispose of all the rights of the parties in the case, that decision is final. But where the decision only disposes of an issue or issues in the case, leaving the parties to go back to claim the other rights in the court, then that decision is interlocutory and in order to determine whether the decision is final or interlocutory, the decision must relate to the subject matter in dispute between the parties and not the function of the court making the order.

Note the following

Where a court rules upon a preliminary objection that it has jurisdiction (the court assumes jurisdiction) this is an interlocutory decision.

Where the court however rule that it has no jurisdiction this would be a final decision, as no rights of the parties can be determined by the court again. The court in that instance would either be striking or dismissing the action. If the decision is from the trial court to the appellate court, either of the two tests can be applied. Where the appeal is from one appellate court to another, the test is the combination of the nature of the proceeding brought and the decision made on it.

Applications brought in between the appeal of the interlocutory decision, the judgment of the Court of Appeal will be interlocutory. The decision of Court of Appeal on appeal of interlocutory decision is interlocutory judgment too. However where the decision is to the effect that the lower court has no jurisdiction, this would be a final decision. This could be when the lower court assume jurisdiction (interlocutory appeal to Court of Appeal).

In an appeal of final decision, applications made in between the determination at the Court of Appeal is interlocutory.

The court of Appeal decision on the final appeal is however final.

Examples of final judgment are:

- Committal for contempt. *Arobokun v. Adeyemi* (1968) 2 All NLR.
- Order of non-suit. *Omonuwa v. Oshodin*
- Issue of jurisdiction: this is where the court declines jurisdiction. *Western Steel Works Ltd v. Iron and Steel Workers*.

Grounds of appeal

A ground of an appeal is a complaint on an issue of fact or law or procedure which if upheld will lead to the appeal being allowed – *Egbe v. Adefarasin*. A bare notice of appeal that does not contain any ground or grounds is valueless and incompetent and an abuse of court process – *Akeredolu v. Akinremi*. The ground of appeal must be valid and raise serious questions to be considered on appeal. The grounds of appeal are not considered alone, particulars must be supplied with it. The particulars of appeal are the reason while grounds are the complaint. Each reason (particulars) are to be in paragraph(s). In *Orakosin v. Menkiti*, the Supreme Court stated that in determining the nature of a ground of appeal, the ground and its particulars must be read together. For it is only by reading the ground as a whole that it can be determined what the appellant is complaining about in the judgment. The body of the grounds is not to be considered in isolation of its particulars.

Distinguishing between ground of law and facts

This is important in order to determine whether an appeal lies as of right or with the leave of court. A ground of law is any ground of appeal that complain about misunderstanding of law or misapplication of

law to settle or admitted facts (applied law wrongly to facts). For instance, the law that a willing employer cannot be forced on an unwilling employer does not apply to employment with statutory flavor. Grounds of facts are where the court has to settle issues of facts or evaluation of evidence.

The following are ground of law

Determination of who has the burden of proof. The Evidence Act would be looked at first before pleadings for confirmation. The Evidence Act says the person who will lose if no evidence is admitted on either side has the burden of proof.

Determination of whether a piece of evidence is admissible. The Evidence Act determines what is admissible or not. Determination of jurisdiction of court – jurisdiction is the creation of statute. Ground of fact can be accepting one witness' testimony and rejecting the other. There are instances of mixed facts and law. The exercise of discretion which is to be done judicially and judiciously is mixed law and facts. Example, amendment of pleadings, interlocutory injunction. For interlocutory injunction, the condition to be fulfilled before the injunction is granted is a matter of fact while by stating that "an interlocutory injunction will not be granted until the conditions are fulfilled is law".

Party to appeal

- Party on record: this is the party to the proceedings – section 243(c) CFRN
- Interested party with leave of the High Court or Court of Appeal.

Where a party claims to be interested party, he must know that his interest is affected by the decision he wants to appeal against. In *Societe Generale Bank (Nig) Ltd v. Afekoro*, the Supreme Court stated that the expression "person having interest" is synonymous with person aggrieved. And a person aggrieved is a person who has suffered a legal grievance, a person against whom a decision has been given which has deprived him of something or refused him something or affected his right or title to something. Where an interested party is appealing with respect to a matter that requires leave of court, he needs two separate prayers, one for leave to appeal as an interested party and the other, appeal with the leave of the court. The court has the right to grant both prayers or refuse both or grant one and refuse the other.

Commencement of appeal

- Time to appeal – section 24(2)(a) Court of Appeal Act. For an interlocutory decision, the period is 14 days (within 14 days) after the decision.
- For a final decision, 3 months (within 3 months) after the decision. See *CCB v. AG Anambra state*

Where a party is out of time, he can file an application for extension of time to seek the leave of the Court of Appeal. Only the Court of Appeal is empowered to extend time for filing appeal and not the High Court – Order 7 r 10 Court of Appeal Rules 2011 (CAR). See *Mobil Oil v. Agadaigbo*, *Odojin v. Agu* (1992) 229, *CCB* (supra). Application is by motion of notice supported by affidavit. This is applicable to all application before the Court of Appeal – Order 7 r 1 CAR. If it is appeal as of right on the decision of the lower court, the prayer would be: "An order for extension of time within which to file notice of appeal". Where the appeal is to be by leave of court, the prayers will be three in number, known as trinity:

0. An order for extension of time within which to seek leave to appeal
1. An order granting leave to appeal; and
2. An order granting extension of time within which to appeal – file a notice of appeal.

If the party is out of time, the High Court does not have jurisdiction for extension of time for appeal. Application can only be at Court of Appeal. The heading of the application should be Court of Appeal. For the trinity prayers, the couching of the prayers is important in that if one of them is missing, a party's application will be strike out. The documents required are:

- Notice of motion for extension of time
- Affidavit in support
- CTC of judgment of the lower court
- Propose notice of appeal.

After the grant of application for extension of time or where party was not out of time, the court at which notice of appeal is to be filed is the registry of lower court that gave judgment. This is because there is compile record of appeal – Order 6 r 2 CAR, *Obi v. INEC*.

Content of notice of appeal

- Heading of the court of appeal
- Suit and appeal number
- Parties
- Heading (NOTICE OF APPEAL)
- Body (it will contain the judgment you are appealing against, the court, name of the judge and the date of judgment).
- Part of decision appealing against
- Grounds of appeal
- Relief sought from court of appeal
- Persons directly affected by the appeal
- Date
- Address for service

The grounds of appeal must arise from the decision of the lower court - *Nwadike v. Ibekwe*. The grounds must be examined along with the particulars supplied to it. Order 6 r 2(2) CAR states that the notice of appeal shall set forth concisely and under distinct heads the grounds upon which the appellant without any argument or narrative and shall be numbered consecutively. The only general or omnibus ground that is permitted is that “the decision of the court is against weight of evidence”. The omnibus ground is most useful when you want to apply for stay of proceedings, execution of judgment. The ground of appeal is important and it must be contained in the notice of appeal. Where appeal is with leave of court that is, after seeking/applying for leave from trial court. There is additional 15 days in applying for leave at the Court of Appeal if denied and application for leave is to be made first at the lower court – trial court, except the party is out of time.

Cross appeal and respondent’s notice

Respondent’s notice: is where the respondent does not appeal from the decision but contends that it should be varied – Order 9 r 1 CAR. In *Western Steel Worker Ltd & anor v. Iron & Steel Workers Union of Nigeria & ors* stated that a respondent’s notice is only available to vary and retain the judgment and not its reverse. Thus where respondent intends to defend the judgment and also want a variation, he should file respondent’s notice. It could be that he wants the judgment to stand on a different reason from that relied on by the lower court.

Cross appeal: as a general rule, a judgment given in a party’s favour cannot be appealed against by that party unless a substantial part is against the party. In *Western Steel supra*, the Supreme Court stated that where a respondent wishes to contest a different issue or cause of action different from the one raised by the appeal served on him, or a reversal of an adverse ruling, he can only do so by notice of appeal and not a respondent’s notice. Cross appeal is another appeal. It could be that where two notices of appeal are before the registrar, the first notice will qualify as appeal and the other cross appeal. Apart from when part of the judgment is against the respondent, it could be that the respondent wants a substantial part to be set aside. At the Supreme Court, there is no respondent’s notice, the respondent must file a cross appeal.

Record of appeal

Once an appellant/party has filed notice of appeal, the registrar of the lower court is to compile the record of appeal and transmit it to the registrar of Court of Appeal within 60 days after filing – Order 8 r 1 CAR. The record of appeal is the entire document necessary for the determination of the appeal. If the registrar of the lower court did not, within 60 days compile the record of appeal, the appellant is to compile the records of all documents and exhibits necessary to his appeal and transmit to the Court of Appeal within 30 days – Order 8 r 4 CAR. Where both registrar of lower court and appellant failed to compile the records and

transmit same, the respondent may by notice of motion move the court to dismiss the appeal – Order 8 r 18 CAR. An appeal is commenced or lodged or file or brought when the notice of appeal is filed at the lower court. An appeal is entered when the record of appeal has been transmitted to, received and entered in the cause book of Court of Appeal. When an appeal has been entered, the lower court ceases to have jurisdiction.

Briefs of argument

This is a brief summary of argument at the hearing of appeal. Presently, it represents the entire argument. There is no room for arguing what is not contained in it. The content of brief is just like written address

- Introduction
- Summary of facts
- Issues for determination
- Argument on each issue
- Prayers/relief
- Conclusion
- Date & signature
- Address for service
- List of authorities

Relationship between ground of appeal and decision appealed against: the grounds of appeal must be traced to the decision of the lower court. Thus questioning what has been decided on and not what has not been decided on. However, some new issues can be raised for the first time on appeal E.g. jurisdiction (substantive jurisdiction). Issues for determination in briefs of argument are formulated from grounds of appeal. Any issue for determination which is not based on any ground is without basis. If no time is formulated for a ground of appeal, that ground should be deemed to have been abandoned. In *Araka v. Ejeagwu*, the Supreme Court stated that an appellant is at liberty to withdraw a ground of appeal by applying to the court to do so. In that case, the court will then strike out the ground in question. However, where appellant does not formulate an issue in his brief of argument to cover a ground of appeal, that ground would be deemed abandoned even where arguments have been proffered on it. An issue for determination must be based on a ground of appeal. Where therefore an issue raised is not based on or does not arise from the grounds of appeal, the issue will be discountenanced by the court. In *Onowhora v. Odiuzon*, the Supreme Court stated that it has been the practice of this court not to entertain arguments on a fresh issue which was not raised in the court below except in a few cases for example, where the question involves a substantial point of law or procedure which should be allowed in order to prevent an obvious miscarriage of justice. 20 copies of briefs of argument are to be filed – Order 18 r 8 CAR. The time for filing briefs of argument by each party are:

- The appellant is to file within 45 days of receipt of the Record of Appeal. The registrar of lower court while sending to Court of Appeal, also sends to the parties – Order 18 r 2 CAR.
- The respondent is to file the respondent's brief within 30 days of service of appellant's brief on him – Order 8 r 4 CAR.
- The appellant if necessary may within 14 days of service of the respondent's brief on him, file a reply brief and serve same on the respondent – Order 18 r 5 CAR. the respondent has 10 days to reply.
-

Oral argument is allowed for 40 minutes to emphasize and clarify written argument appearing in the brief already filed in court – Order 18 r 9 CAR. In reality, the Court of Appeal does not give up to 40 minutes (it is a luxury).

Alternative Dispute Resolution in Court of Appeal – Mediation – Order 16 CAR

Before the appeal is set for hearing, the court may in appropriate circumstances upon the request of any of the parties refer the appeal to the Court of Appeal Mediation Programme – CAMP. This is limited to an appeal of a purely civil matter and relates to

- Liquidated money demand
- Matrimonial causes
- Child custody; or
- Such other matter as may be mutually agreed by the parties – Order 16 r 1 CAR

The request for ADR is to be made in Form 15 in the first schedule to CAR – Order 16 r 2 CAR. Once there is reference to CAMP, the appeal is to be adjourned. The parties can also resort to other ADR mechanism – Order 16 r 3(a) CAR. The parties are to take joint responsibility of all administrative expenses and can operate and give due regard to the CAMP at all times – Order 16 r 3(1)(b) CAR. Where the parties were able to settle, the agreement reached by the parties will be adopted by the Court of Appeal as the decision of the court. Where they were not able to settle, the appeal shall be set down for hearing – Order 16 r 4 CAR.

Departure from the rules

An appellant instead of waiting for 10 days within which the registrar is to compile record of appeal can apply for departure from the rules, so that he compile the record at a shorter period.

Hearing of appeals and judgment

Preliminary objection to hearing of appeal: where a respondent intends to rely on a preliminary objection, he is to give a clear 3 days notice before the hearing. The notice is to set out the grounds of objection – Order 10 r 1 CAR.

The preliminary objection can be filed in the respondent's notice. On the date set for hearing, raise the objection before the appellant adopts his brief.

An appellant may at any time before hearing serve on the parties to the appeal and the registrar a notice of withdrawal – Order 11 r 1 CAR. The notice can be filed by the appellant's legal practitioner. *Edozien v. Edozien*, the Supreme Court also stated that once a notice of withdrawal is given, the order of withdrawal must be made. If all the parties consent to the withdrawal by the appellant, it shall be a bar to further proceedings on application made by the respondent – Order 11 r 4 CAR. If they all did not agree, the appeal will remain on the list. Where a party to the appeal is absent, the Court of Appeal has the power to treat the appeal as having been argued, especially where briefs have been filed – Order 18 r 9(4) CAR. A party who did not file brief of argument will not give oral argument except with the leave of the court where the court considers the circumstances of an appeal to be exceptional – Order 18 r 10 & 11 CAR.

Judgment

For the hearing of the appeal, at least three judges while for the delivery, at least one. The one judge need not be the judge who participated in the hearing – section 294 CFRN. The judgment is to be pronounced in the open court – Order 19 r 1 CAR. A judge who participated can either have his opinion read or pronounced. The lead judgment must be read. The Court of Appeal's decision is final as it relate to the National and State House of Assembly, Election Tribunal – section 246(2) CFRN, section 239(8) CRFN (second alteration). In *Shitta-Bey v. AG of federation*, the Supreme Court stated that a decision derived at by the Court of Appeal or the Supreme Court in which a member who participated at the hearing and at conference and signified his views therein could on account of death, retirement, elevation, dismissal or other cause, have his judgment pronounced or read by another justice as the case may be. The time for appeal is:

- Interlocutory decisions is within 14 days
- Final decisions within 3 months

RECOVERY OF PREMISES

Applicable laws

1. Recovery of Premises Act 1990, applicable in FCT, Abuja.

2. District Court Act applicable in FCT, Abuja
3. High Court of FCT (Civil Procedure) Rules 2004 & Act.
4. Tenancy Law of Lagos state, 2011
5. Magistrate Court Law, Lagos state and its rules
6. High Court Law and High Court of Lagos state (Civil Procedure) Rules 2012.
7. Recovery of Premises Law Cap R18 Laws of Lagos State.

The Tenancy Law in Lagos state does not apply to Apapa, Ikeja GRA, Victoria Island and Ikoyi – section 1(3) Tenancy Law. Thus the Recovery of Premises Law of Lagos state applies to the areas aforesaid.

Courts having jurisdiction

The courts having jurisdiction over recovery of premises are:

Magistrate Court in Lagos: the Magistrate Courts have the flat rate of N10, 000, 000. Thus for recovery of premises, the annual rental value must not exceed N10, 000, 000 if the action is to be commenced in the Magistrate Court.

District Court: the District Court in FCT, Abuja have civil jurisdiction. Thus for recovery of premises, where the annual rent value is within the jurisdiction of the District Court, the action will be commenced there.

High Court: where the annual rent value exceeds the flat rate jurisdiction of the Magistrate or District Court, the action would be commenced in the High Court. Note that even when the matter falls under the jurisdiction of Magistrate Court, it can still be commenced in High Court but it would not be diligent of a lawyer to do so.

Definition of key terms

Landlord and owner: landlord is defined in section 47 of Tenancy Law, Lagos, section 2 of Recovery of Premises Act Abuja, and Sule v. Nigerian Cotton Board. From the foregoing it was defined as the person entitled to the immediate reversion of the premises and any person who gives out the premises. Landlord is different from owner of premises. Landlord is used where there exist a tenancy relationship between two parties while owner of premises is used where no such relationship exist or it has expires – tenancy relationship.

Tenant: section 47 Tenancy Law and section 2 RPA. The foregoing provisions defined it as any person lawfully in possession or occupation of premises whether by payment of rent or not. Also include person who occupy premises by operation of law, and a sub-tenant - Section 47 Tenancy Law. It does not include persons unlawfully occupying any premises under a bona fide claim to be the owner. Payment of rent is not a condition precedent to being a tenant.

Premises: section 47 Tenancy Law, section 2 Recovery Premises Act, the foregoing provisions defined premises to include buildings with its grounds or appurtenances or simply as land without any building thereon. Also, it includes that used for business, residential and non-residential purposes.

Tenancy: where there is the existence of relationship of landlord and tenant between parties.

Types of tenancy

Tenancy at will: this is a tenancy relationship created where the landlord permits the tenant to occupy the premises with no definite time. Thus, importantly the tenant occupies the premises with landlord's consent but no definite time. The following are the instance that it can arise:

- When the tenant holds property after expiration of tenancy terms.
- Where the person holds property before entering into a formal tenancy agreement. ODUTOLA PAPER SACK NIG LTD.

Tenancy at will can be determined at any time. The only requirement is a 7 days quit notice.

Tenancy at sufferance: this is a tenant who enters the premises lawfully but he is in occupation without the consent or dissent of the landlord. There is a thin line between the trespasser and a tenant at sufferance in that a trespasser is on the premises unlawfully. The circumstance in which it arises is similar to tenancy at will. This is however a common law tenancy as under the laws in Nigeria, Such tenant is now known as statutory tenants who are accorded the protection of the law.

Statutory tenancy: this is the tenancy created under the statute where the tenant had entered the premises lawfully but ceased to have the consent of the landlord. For instance, where the tenancy relation has expired. The law still regards them as tenants and accords them the necessary protection. Statutory tenancy arises by operation of law. Thus, before the tenant vacates possession, the provisions of the statute must be complied with. Apart from persons holding property after expired tenancy, a licensee can be regarded as a statutory tenant as he enters the premises lawfully and the law says that whoever enters property/premises lawfully cannot be ejected unlawfully. The conclusion is that whoever is in occupation of premises in Nigeria enjoys some minimum protection as long as he enters the premises lawfully. In *AP Ltd v. Owodunni*, the Supreme Court had stated that on point of law and of fact, once there is an incident of statutory tenancy, the tenancy can only be lawfully terminated.

Periodic tenancy: this is the tenancy for a particular term which properly renews itself perpetually until it is determined by a notice to quit. *Gand v. Jubber*. This tenancy can be weekly, monthly, quarterly, half yearly or yearly.

Tenancy by estoppels: under this tenancy, a landlord cannot question the validity of his own grant nor can the tenant question it while he is enjoying possession of the land – *Ude v. Nwara*. In other words, once a tenant accepts the title of the landlord, he cannot challenge the title. Where there is agreement to take tenancy and it turns out that the person does not have the right, such would not affect the tenancy.

Tenancy for fixed period: this is a tenancy for a fixed period or duration. This is an ideal tenancy as there is certainty of duration. It can be one year, ten years, fifty years or more. Usually this tenancy is determined upon effluxion of time. Once the term for which it was granted expires, that would bring the tenancy to an end – *UBA v. Tejumola & Sons Ltd*.

Licensee: a license is the permission or privilege to use premises of another of which if there is no authority or permission, it would amount to trespass. The licensee has no exclusive possession and the owner can enter the premises at any time. However, there can be contractual license and license coupled with interest. A contractual license would provide for the time of notice to terminate the license. A license coupled with interest is when the licensee is on the premises, for the premises to do certain things and until such has been done, the license cannot be terminated.

Service tenant and service occupancy: this usually involves an employer providing accommodation for the employees. Service occupancy is where the occupation of the premises provided is necessary for performance of employee's duty. Thus no special interest, for instance, the police barrack. Such tenancy is where occupation is not inherent or necessary to the employee's employment. Such tenancy qualifies as tenancy thus the employee is a tenant. Under service occupancy, the employee is synonymous with a licensee thus, no definite estate and no right of exclusive possession. Unless such service occupancy is coupled with interest or contractual, it terminates at any time upon reasonable notice to be given to the employee. The cases of *Sule v. Nigerian Cotton Board*, *Oduye v. Nigerian Airways Ltd* established that an employee in occupation of employer's premises is entitled to reasonable notice and protection under the law thus statutory tenants which cannot be ejected except with due compliance to the law. However, the cases of *Chukwuma v. Shell Pet Dev Ltd* and *Nwana v. Federal Capital Dev. Authority (FCDA)*, the Supreme Court had stated that once employment terminates, the occupation terminates and the employer need not go to court before the employer can be ejected thus contrary to the position of the law that once a person is in lawful occupation of premises such person should not be ejected by use of self help but in accordance with due process of the law.

Procedure for recovery of premises

The procedures for recovery of premises are as follows

1. Letter of authority
2. Notice to quit
3. 7 days notice- notice of owner's intention to recover possession
4. Action in court by way of summons.

Letter of authority

Letter of authority is important when the landlord authorizes a solicitor or his agent to issue quit notice and recovers premises on his behalf. The instructions to be given here must be reduced into writing by the landlord and if the landlord is an illiterate, an illiterate jurat must be included. In *Ayiwoh v. Akorede*, where the solicitor had asked on the oral instruction of the landlord, the court held that a solicitor unless specially authorized in writing cannot give a statutory notice to quit. In *Olusi v. Solana*, *Nianda v. Alake*, the court held that it applies to only notice of intention to recover possession. However in *Coker v. Adetayo*, the Court of Appeal held that written authority applies to both notice to quit and notice of intention to recover possession. The letter of authority is very important in that where it was not given, all steps taken by an agent or solicitor to recover the premises would amount to a nullity and there cannot be any ratification of such act by the landlord.

Notice to quit

Notice to quit is usually applicable to periodic tenancy and tenancy at will. The notice to quit can be issued by the landlord or his solicitor or agent with the written authority.

Length of notices

The length of notice is determined by the period of tenancy whether the parties agreed that it should be yearly, monthly or weekly tenancy. Where there is no tenancy agreement provided for the period of tenancy, the mode of payment of rent by the tenant or demand of rent by the landlord would be used in determining the period of tenancy. The requisite notices to be given to terminate the different periodic tenancy are provided for by the law. However the application of the law is subject to any length of notice agreed on by the parties in their tenancy agreement thus where parties agreed that a yearly tenancy should be terminated with a week's notice, so be it. In absence of agreement the following are applicable:

- A. Tenancy at will – a week's notice
- B. Weekly tenancy – a week's notice
- C. Monthly tenancy – one month's notice
- D. Quarterly tenancy – three months notice
- E. Half-yearly tenancy - three months notice (not in Abuja law)
- F. Yearly tenancy – six months notice

The foregoing are provided for in section 13(1) Tenancy Law of Lagos State and section 8 Recovery of Premises Act. The notices to be issued in Lagos under Tenancy Law need not terminate at the eve of anniversary of the tenancy but may terminate on or after the date of expiration of the tenancy – section 13(4) TL.

However, in Abuja, a yearly tenancy must be determined with at least six months notice to quit, to terminate at the eve of anniversary of the tenancy. If a tenancy agreement commenced on 1st January, 2010, the anniversary is 1st January and the eve of anniversary is 31st December. Thus in Abuja, if instruction is given to terminate the notice in July 2011, the notice will only be valid if it terminates the tenancy on 31st December 2012. In this like, the period of at least 6 months is satisfied and the eve of anniversary is also complied with, although span a period of 17 months. See *AP V. Owodunni*, *Ochie v. Ajose and Universal Ins Co Ltd v. Hammed Nig Ltd*.

Note the difference between 'on' and 'from' in computation of time. 'On' inclusive of the day while 'from' excluding the day. Always draft a lease while using 'on'. Notice can be longer than the period provided for but it must not be shorter else, invalid. Whether a tenant pays rent or not, such tenant is entitled to notice to quit and issuing notice to quit does not mean that rent would not be paid. For monthly tenancy, a month is a calendar month. A month is not to be computed from two different months – not 16 January – 16 February – section 18 Interpretation Act. In *Oyekoya v. G.B Ollivant*, the Supreme Court held that the plaintiff was entitled to one month's notice and it is clear that the month must expire at the end of a current month so that as here, the notice given on 2nd March 1962 would expire at the earliest on the 30th April 1962. See *Osawaru v. Ezeiruka*. Except otherwise provided for, instructions are to be given on the day of exam, thus do not back date your notice. It should be futuristic – Bar part II 2013/2014 might be August/September

thus draft from thereon if instruction was not otherwise given. In Lagos state there are some tendencies that can expire or determined by operation of the law with no need of issuing notices:

- In case of monthly tenancy where the tenant is in arrears of rent for 6 months – section 13(2) TL.
- In case of quarterly or half-yearly tenancy where the tenant is in arrears for 1 year rent – section 13(3) TL.

For fixed term tenancy, no notice to quit shall be required, once the tenancy has been determined by effluxion of time – section 13(5) TL, Lagos. See *Nweke v. Ibe*.

Form and content of notice to quit

Forms for notice to quit are provided for in the schedule to the Recovery of Premises Act, and Tenancy Law. These forms may be used and the essential requirement of a valid notice to quit must be contained therein. See *Adejumo v. David Hughes & Co Ltd*.

The contents are:

0. Name of the landlord or his authorized agent
1. Name of the tenant
2. Description of the property/premises
3. Address of the property/premises
4. The nature of the tenancy – yearly, monthly
5. The date when tenancy will expire or the date on which the tenant is to deliver up possession
6. Date of writing notice
7. Signature of the landlord or agent

Notice to quit, if drafted by a solicitor will be letter headed. There is a difference between the date of issue and the date of service. The date of issue is the date on the quit notice while the date of service is the date the notice was served on the tenant. The date of service is of importance as the length of the notice will start counting from that date. In *Nnadozie v. Oluoma*, the notice that was prepared on 29th March requiring the tenant to quit and deliver up possession of the premises on the 30th April which was served on the tenant on 1st April was held to be invalid as the commencement date was date of service. See also *Enifeni v. Ademoye*.

SERVICE OF NOTICE TO QUIT.

The service of statutory notice must be personal but the Lagos Tenancy Law provides for other mode. Thus under sections 17 & 18 TL, Lagos proper service on tenant include the following:

- . Service on the tenant in person ;
 - a. Delivery to any adult residing at the premises to be recovered;
 - b. By courier where the tenant cannot be found by delivering same at the premises sought to be recovered and courier shall provide proof of delivery; or
 - c. Affixing the notice on a prominent part of the premises to be recovered and providing corroborative proof of service.

Upon the expiration of a valid notice to quit, the tenancy ends. See *UIC v. Hammond (Nig) Ltd*.

Notice of owner's intention to apply to court to recover possession

After the notice to quit expires, the tenancy relationship no longer exists. Thus the status of the parties becomes owner of premises and occupier of premises. The notice of owner's intention to recover possession is usually given for all types of tenancy. This is 7 days notice which is compulsory for all tenancies – section 13(5), 14 and 16 TL. *Iheanachu v. Uzochukwu*. Where the tenant is not given the 7 days notice, any proceeding commenced will not be valid. The notice of the owner's intention to recover possession must be properly served on the occupier/tenant. In addition to the mode of service stated above is the following:

- . Proper service on a tenant of a business premises shall be by:
 - (i) Delivery to a person at the business premises sought to be recovered; or
 - (ii) Affixing the notice on a prominent part of the premises to be recovered and providing corroborative proof of service.

Defect in notice to quit or service of such renders any subsequent proceeding a nullity – Awe v. Saidi, Iheanacho 's case supra. In Iheanacho, supra, the Supreme Court had stated that a landlord desiring to recover possession of premises let to his tenant shall, firstly unless the tenancy has already expired; determine the tenancy by service on the defendant of an appropriate notice to quit. On the determination of the tenancy, he shall serve the tenant with the statutory 7 days notice of his intention to apply to the court to recover possession of the premises. Thereafter, the landlord shall file his action in court and may only proceed to recover possession of the premises according to law in terms of the judgment of court in the action.

Grounds for possession

In Abuja, there is no need of giving grounds for possession as long as there is compliance with notice to quit and statutory notice of intention to recover possession. In Lagos, prior to the new Tenancy Law, the tenant must have alternative accommodation or the landlord prove other ground of possession. Now under section 25 TL, the grounds for possession are not mandatory. They are:

- a. Arrears of rent
- b. Breach of any covenant or agreement
- c. Where the premises is required by the landlord for personal use; or
- d. Where the premises requires substantial repair

The foregoing is subject to the agreement between the parties. With regard to the following, notwithstanding any agreement, the court has power to make an order for possession upon proof:

- . The premises is being used for immoral or illegal purposes
 - a. The premises has been abandoned
 - b. The premises is unsafe and unsound as to constitute a danger to human life or property
 - c. The tenant or any person residing or lodging with him or being his sub-tenant constitutes by conduct an act of intolerable nuisance or induces a breach of a tenancy agreement.

Check Chianu's cases and comment for the following cases

- . Olaoya v. Mandilas
 - a. Idowu v. Adekanmi
 - b. Owole v. Taylor
 - c. Coker v. Adetayo
 - d. Omoniyi v. Okeowo

Commencement of action

Mode

- In the Magistrate Court, it is claim then ordinary summons
- In the High Court, it is by writ of summons

There is no recovery of premises by default as there is still the need to prove certain facts even when tenant did not show up in court. For instance, the compliance and service of the notice to quit and the statutory notice of 7 days intention to recover possession. The appropriate court is either the Magisterial District or the High Court division where the premises is situated - lex situs, section 24 TL. The appropriate forms are TL6A or TL6B and Form 7 ABJ. Frontloading Front is applicable. The following are the facts to be proved at the trial:

0. Landlord being entitled to possession
1. Nature of tenancy or holding
2. Annual rental value of the premises
3. Determination of tenancy and service of the notices
4. The fact that the tenant is still in possession
5. That the tenant(defendant) is still neglecting or refusing to deliver up possession
6. The proof of the summons or writ if the defendant/tenant does not appear - section 27(4)(a) TL.

Reliefs

The following are the reliefs to be sought

1. An order granting possession
2. An order on payment of arrears of rent
3. An order on mesne profit

There is a difference between rent and mesne profit. Rent is tied to tenancy. During the tenancy period, the tenant is to pay rent. Once the tenancy relationship terminates, the tenant pays mesne profit which is payment for use of the premises. Mesne profit is usually calculated with prevailing market value but in practice, the last rent paid until the possession is given up, is used

Reference to Arbitration and other ADR

The alternative dispute resolution mechanisms are recognized with regard to recovery of possession of premises. Section 30 TL, Lagos upheld the validity of a tenancy agreement which have an arbitration clause and provides that such clause is not construed as an ouster court's jurisdiction. Either the parties agree to appoint the arbitral tribunal or an application is made to court to appoint the arbitral tribunal. Under the Recovery of Premises Act in Abuja, no such provisions, but parties can still resort to arbitration. Most long leases contains arbitration clause. Other ADR mechanisms like mediation, negotiation and conciliation can be uses. The court can without the consent of the parties refer them to a Mediation Centre or Lagos Multi-Door Court House.

Judgment and Enforcement

After the hearing and prove of necessary facts, the court may make an order for possession of the premises either immediately or on or before such date (within 6 months from the date of the order) as the court may direct – section 27 TL, Lagos. Where mesne profit is claimed or a sum for use and occupation of the premises, once such is proved, judgment is to be entered for the amount so proved – section 31 TL. Where the foregoing judgment has been given, it is to be complied with, if not complied with, then enforcement by the landlord – section 39-42 TL.

Mode of enforcement for order of possession is by warrant for possession. Where judgment includes arrears of rent and mesne profit, writ of fi-fa or garnishee proceeding will also be taken out. Where the date of vacation of premises is not stated in the judgment, warrant of possession is to be filed after 14 days of delivery of judgment. Warrant of possession/warrant for possession is to be in force for 3 months and can be renewed for another 3 months not exceeding 3 renewals. Under Recovery of Premises Act (RPA), it is warrant of possession and under Sherriff and Civil Process Act, it is known as writ of possession (non money judgment only for the judgment on recovery of possession of the premises and not the rents and mesne profits)

Counter-claim

This is the claim of the tenant. Section 15, 16, 17 RPA, the counter-claim of the tenant can be as a result of any of the following:

- An unexhausted improvement made by the tenant with the written consent of the landlord – section 15 & 16 RPA.
- An unexhausted rent paid in arrears paid by tenant.
- Damages for trespass by the landlord (this could be when the landlord removed the roof while tenant was in possession)

See Iheanacho case supra. RPA provides that tenant is to give the landlord notice of counter-claim at least 3 days between hearings – section 16 RPA. The ethical issues involved in the issuing, drafting of quit notices and services of the required notices and court processes and the famous Jankara practices. Rule 1, 14, 15, 16, 23, 30 RPC. See the following drafting on recovery of premises.

Letter of Authority from Landlord to Solicitor

11, Ikeja Street,
Ikeja,
Lagos State
12th March, 2013

Elijah Leizou
11, Ikoyi Road,
Ikoyi,
Lagos State

Dear Sir,

AUTHORITY TO ISSUE QUIT NOTICE TO THE TENANTS IN KOKO LODGE, SURULERE AND
ISSUE OTHER RELEVANT NOTICES.

I, Chief Olowo Adeowo of 11, Ikeja Street, Ikeja, hereby appoint Mr. Elijah Leizou, a legal practitioner to
act on my behalf with respect to the issuance of notices to the tenants in occupation of my property at 7,
Uyo Road, Surulere, Lagos.

Also, to do other acts necessary for the recovery of the premises.

Thank you

Yours faithfully

(signature)

Chief Olowo Adeowo

Notice to quit

LEIZOU, TALABI, CHUKWU & Co
Legal practitioners, 111 Ikoyi Road, Ikoyi Lagos
08021234567, abadatalabi@yahoo.com

Our Ref: ATL/201/111

14th March, 2013

Mr. Dauda Kareem
7, Uyo Road,
Surulere,
Lagos
Attention: Mr. Dauda Kareem

NOTICE TO QUIT

I, LEIZOU ELIJAH, a legal practitioner to CHIEF OLOWO ADEOWO, your landlord, and on his behalf
give you notice to quit and to deliver up possession of the flat in Koko lodge with appurtenances, situate at
7, Uyo Road, Surulere, Lagos in the Ikeja Magisterial District of Magistrate Court which you hold as a
yearly tenant on 30th September, 2013

Dated this _____ day of _____ 2013

(signature)

LEIZOU ELIJAH

Legal practitioner

LEIZOU, TALABI, CHUKWU & Co

Notice of owner's intention to recover possession

LEIZOU, TALABI, CHUKWU & Co
Legal practitioners, 111 Ikoyi Road, Ikoyi Lagos
08021234567, www.abadatalabichukwu.com

Our Ref: ATL/201/111

10th October, 2013

Mr. Dauda Kareem
7, Uyo Road,

Surulere,
Lagos

ATTENTION: MR. DAUDA KAREEM

NOTICE TO TENANTS OF OWNER'S INTENTION TO APPLY TO COURT TO RECOVER POSSESSION OF PREMISES.

I, Leizou Elijah, a legal practitioner to CHIEF OLOWO ADEOWO, the owner do hereby give you notice, that unless peaceable possession of the premises, the flat in Koko lodge and the appurtenances situate at 7, Uyo Road, Surulere, Lagos which you held of the owner under a tenancy from year to year which was determined by a notice to quit from me on 30th September 2013 and which premises you now held over and detained from the said owner, be given to the owner on or before the expiration of seven clear days from the service of this notice, I shall apply to the Magistrate/High Court for summons to eject any person from the premises.

Dated this _____ day of _____ 2013

(signature)

Leizou Elijah

Legal practitioner

LEIZOU, TALABI, CHUKWU & Co

A claim at the Magistrate Court

IN THE MAGISTRATE COURT OF LAGOS STATE
IN THE IKEJA MAGISTERIAL DISTRICT
HOLDEN AT IKEJA

CLAIM NO:

BETWEEN

CHIEF OLOWO ADEOWO

CLAIMANT

AND

DAUDA KAREEM

DEFENDANT

PARTICULARS OF CLAIM

The claimant and the defendant entered into a tenancy agreement on a yearly tenancy in 2006 at the rent of N500, 000 per annum over a flat at Koko lodge. The defendant paid the rent of 2006 and 2007 and has since then refused to pay. A notice to quit determining the tenancy was served on the defendant on 31st March, 2013 to expire on 30th September, 2013. The defendant failed to deliver up possession. The notice to tenant of owner's intention to apply to recover possession was served on 10th October, 2013 to expire on 18 th October, 2013; and that notwithstanding the said notice, the defendant has refused to deliver up possession of the premises.

The claimant thus claims as follows:

1. the outstanding of 2008, 2009, 2010, 2011, 2012 and 2013,
2. the mesne profit for use of premises being N50, 000 per month, and
3. an order granting possession of the premises.

Dated this _____ day of _____ 2013

(signature)

Leizou Elijah Esq.

Claimant counsel

Address for service on claimant

LEIZOU, TALABI, CHUKWU & Co

111 Ikoyi Road, Ikoyi, 08021234567

Address for service on defendant

Dauda Kareem

7, Uyo Road, Surulere
Lagos state
08031234567

All the foregoing must be drafted. It could be from the letter of authority to the claim or writs of summons. A legal practitioner cannot issue quit notices without letter of authority. State the fact that the tenant/landlord is still in occupation and grounds for seeking possession.

MATRIMONIAL CAUSES

Matrimonial causes simple means the procedural means of settling family relations

There are two types of marriage, the statutory and the customary marriage in Nigeria. Statutory marriage is marriage under the Act and a monogamous marriage that is voluntary union of one man and a woman for life to the exclusion of others – Hyde v. Hyde

VENUE OR PLACE TO CONDUCT A STATUTORY MARRIAGE-21 & 27 MA:

1. Marriage registry
2. A licenced place of worship
3. The parties can obtain permission from the minister of internal affairs, and marriage may be conducted anywhere. S. 13 & 29 of MA.

Matrimonial cause is defined under the sections 2 & 114 of Matrimonial Causes Act (MCA) to include the following proceedings for a decree of

1. Dissolution of marriage
2. Nullity of void marriage
3. Nullity of voidable marriage
4. Judicial separation
5. Restitution of conjugal rights
6. Jactitation of marriage

There are other ancillary proceedings like maintenance custody of children, damages for adultery among others. They are also matrimonial proceedings only that they cannot be instituted without either of the foregoing.

Courts with jurisdiction

The only court with jurisdiction for any of the above proceedings is the High Court of any state of the federation – section 2(1) MCA. However, where the High Court of a state makes an order, as regard maintenance, the order can be enforced in a court of summary jurisdiction in a summary manner. Thus the Magistrate Court being a court of summary jurisdiction can enforce such order of maintenance – section 2(1) (b) MCA. There is a single jurisdiction for the High Court as any High Court of any state of the federation can exercise jurisdiction irrespective of where the parties to the proceedings are domiciled. Thus for the purpose of matrimonial causes, there is only one domicile which is Nigeria domicile notwithstanding the parties being domicile in different states – section 2(3) MCA. Note that because the Act has conferred on every High Court of a state jurisdiction on matrimonial causes where the petitioner is domiciled in Nigeria, the jurisdiction of the court cannot be objected to. Even though where the petitioner and respondent are resident in Lagos and the petitioner decides to commence petition for dissolution of marriage in Zamfara High Court, which he can validly do, there is room for forum conveniens (the court that is more convenient for the parties).

Section 9(2) MCA provides for the transfer of any matrimonial proceeding in a court where it was commenced to another court on the ground that the first court is not convenient for the parties and the latter is more convenient. In Adegroye v. Adegroye, the petition was brought in Benin, Edo state while the parties were resident in Lagos. The respondent was a 68 years old woman, on her application for transfer, the case had been transferred. Also in Folorunsho v. Folorunsho, the proceeding had been transferred from Kaduna to Lagos where the parties were resident in Lagos. The transfer under this provision is subject to

the discretion of the court and an application is to be brought for the petition to be transferred to a forum conveniens. The provision of section 9(2) prevents forum shopping. Another practice which usually arises from the single jurisdiction granted is abuse of court process. This can happen when the petitioner is seeking dissolution of his marriage at all cost. Thus he files a petition in Kano High Court and then when there is delay, without application for it to be struck out, files another petition in Enugu High Court. Section 9(1) MCA provides that upon such incidence, the court may stay proceeding. Importantly as a counsel, application should be made for one of the petitions to be struck out as these amounts to abuse of court process. See *Harriman v. Harriman*.

Domicile

The general rule is that it is the domicile of the petitioner that confers jurisdiction on the High Court of a state for the purpose of hearing matrimonial proceedings. The petitioner must be domiciled in Nigeria before the court can have jurisdiction. Section 2(3) MCA, see *Bhojwani v. Bhojwani*, *Ugo v. Ugo*, *Omotunde v. Omotunde*. Domicile in one word is the permanent home of a person. There are three types of domicile:

- . Domicile of origin
 - a. Domicile of choice; and
 - b. Domicile of dependence

Domicile of origin is given to a child on his birth. If legitimate, he takes the domicile of his father. If illegitimate, he takes the domicile of his mother.

Domicile of choice is the domicile taken by a person upon attaining majority. In this like, there must be residence in that state permanently or indefinite period and an intention to so remain. That is the animus. State here refers to country.

Domicile of dependence is a domicile given to persons dependent on others e.g. a child, wife, e.t.c. thus the domicile of wife follows that of the husband. Upon marriage, the wife takes the domicile of her husband. If the husband changes his domicile, the wife's domicile automatically changes. Hence, before a wife can bring matrimonial proceedings in Nigeria, she must be domiciled in Nigeria, that is, her husband must be domiciled in Nigeria. However, because of the injustice that is likely to be done to a deserted wife in Nigeria whose husband may have change his domicile, special domicile for the purposes of matrimonial proceedings before the Nigerian court was created for such wife - section 7(a) &(b) MCA. Thus where the wife was domiciled in Nigeria either immediately before her marriage or immediately before the desertion, she shall be deemed domiciled in Nigeria - section 7(b) MCA. Also, where at the date of instituting the proceeding, she has been resident in Nigeria for at least 3 years before instituting the matrimonial proceeding, she shall be deemed to be domicile in Nigeria - section 7(b) MCA. The special domicile so created is only for the purpose of matrimonial proceeding, thus limited.

MATRIMONIAL RELIEFS

The matrimonial reliefs to be considered are

1. Decree of dissolution of marriage
2. Decree of nullity of void marriage.
3. Decree of nullity of avoidable marriage
4. Decree of judicial separation
5. Decree of conjugal rights
6. Decree of jactitation of marriage (s. 2(2) MCA).

Dissolution of marriage

Under MCA there is only one ground for dissolution of marriage, which is that the marriage has broken down irretrievably - section 15(1) MCA. See *Megwalu v. Megwalu*. However, the court can only hold that a marriage has irretrievably broken down if at least one of the following facts is proved - petitioner satisfies the court that: (section 15(2)(a)-(g) MCA

- The respondent has willfully and persistently refused to consummate the marriage. Willful implies that it is within the capacity of the respondent and persistent refusal implies that there must have been a request. *Owobiyi v. Owobiyi*.
- a. That since the marriage, the respondent had committed adultery and the petitioner finds it intolerable to live with the respondent. Intolerable implies repulsion. The petitioner must not have condoned the adultery. For instance, any act of subsequent sexual intercourse is condonation. Adultery is mostly proved by circumstantial evidence. See *Akinyemi v. Akinyemi*, *Erharon v. Erharon*. Opportunity, evidence of STDs, cohabitation can be evidence of adultery among others. Importantly, where facts are on adultery, there must be a co-respondent. See *Ebe v. Ebe*.
- b. That since the marriage, the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent. This seems like an omnibus ground and section 16 MCA provides circumstances that can fall under the fact. Example rape, sodomy, bestiality, drunkenness, going in and out of jail e.t.c Note that cruelty falls under the ground.
- c. That the respondent has deserted the petitioner for a continuous period of at least one year immediately preceding the presentation of the petitioner.

Desertion means living apart with intention to bring to an end all rights and duties of marriage. Living apart with consent of the other party does not amount to desertion. Note that such consent can be withdrawn and upon withdrawal of consent, the period for purpose of desertion begins to count. There is willful and constructive desertion. In willful desertion, the person that left is in desertion while in constructive desertion, the person in the house is in desertion (by conduct causing the other party to live apart).

- d. That the parties to the marriage have lived apart for a continuous period of at least two years immediately preceding the presentation of the petition and the respondent does not object to a decree being granted.
- e. That the parties to the marriage have lived apart for a continuous period of at least three years immediately preceding the presentation of the petition. This is the no fault fact to be proved.
- f. That the other party to the marriage has for a period of not less than one year, failed to comply with a decree of restitution of conjugal rights made under MCA.
- g. That the other party to the marriage has been absent from the petitioner for such time and in such circumstances as to provide reasonable grounds for presuming that he or she is dead. Under the Evidence Act, a party must be absent for 7 years. Section 164(1) EA, 2011, section 16(2)(a) MCA.

OTHER FACTS THAT THE PETITIONER MAY ESTABLISH are that the respondent has committed

- a. Sodomy
- b. Bestiality
- c.rape.

The Two year rule - section 30 MCA

Because of the need to protect the sanctity of marriage, as stated in *Fisher v. Fisher*, section 30(1) MCA provides that proceeding for dissolution of marriage shall not be made/instituted within two years after the date of the marriage except by leave of the court. Thus where proceeding for dissolution of marriage is to be instituted within two years of celebrating the marriage, the leave of court must be sought. However the court can only grant leave on the ground that to refuse to grant leave would impose exceptional hardship on the applicant or that the case is one involving exceptional depravity on the other party to the marriage - section 30(3) MCA. Application for leave involves the following

- Motion ex parte
- Affidavit disclosing the exceptional circumstances with marriage certificate attached and proposed petition
- Written address

The foregoing provisions and requirements do not apply where the fact relied on are:

- Willful and persistent refusal to consummate the marriage - section 15(2)(a)
- Adultery since the marriage by the respondent and the petitioner finding it intolerable to live with the respondent - section 15(2)(b)
- Commission of rape, sodomy, or bestiality - section 16(1)(a)
- Where the institution of proceedings for a decree of dissolution is by way of cross petition. Thus respondent had brought proceeding - a matrimonial proceeding aside decree for dissolution of marriage. The matrimonial bar of two years rule only apply to proceedings for dissolution of marriage and not any other.

Decree of nullity

Under the decree of nullity, there is void and voidable marriage. The ground for void marriage is provided in section 3 MCA, and ground for voidable marriage is provided for in section 5 MCA.

Void Marriage

Any marriage that takes place under any of the following cases is void, that is, where

- . Either of the parties is at the time of the marriage lawfully married to some other person. This could be marriage under Act or customary law marriage, no single status.
- a. The parties are within the prohibited degrees of consanguinity or affinity. Consanguinity is by blood and affinity is by marriage. For affinity, application can be made to a judge for leave permitting them to marry - section 4. Look at first schedule to the MCA for the prohibited degree of consanguinity and affinity - section 3(2) & (3) MCA
- b. The marriage is not a valid marriage under the law of the place where the marriage took place by reason of a failure to comply with the requirements of the law of that place with respect to the form of solemnization of marriages.
- c. The consent of either of the parties is not a real consent because
 - It was obtained by duress or fraud
 - That party is mistaken as to identity of the other party or as to the nature of the ceremony performed
 - That party is mentally incapable of understanding the nature of the marriage contract
- d. Either of the parties is not of marriageable age.

For compliance with the law of the place where marriage was celebrated in Nigeria, the procedure involves

- Obtaining and filling Form A which is intention to marry by either of the party to the proposed marriage.
- Publication of names of parties with details for at least 21 days
- Issuing of Registrar Certificate, Form C
- Celebration of marriage within 3 months of issuing of Registrar Certificate in the Marriage Registry or licenced place of worship. The Minister of Interior is responsible for licencing places of worship.
- If in a licenced place of worship, marriage is to be solemnized by the minister qualified in accordance to that religious denomination. A church with an headquarter and branches, by licencing the headquarter does not imply that the branches have been licenced for purpose of conducting marriages. Those branches must be licenced. Special licence can be given by the Minister of Interior.

Voidable marriage – section 5

The following are the grounds upon which a marriage can be declared voidable. Importantly, like void marriage, the grounds or circumstances must have occurred at the time of the marriage – section 15(1) MCA

Where at the time of the marriage any of the following circumstances existed

- . Either party to the marriage is incapable of consummating the marriage

- a. Either party to the marriage is
 - Of unsound mind
 - A mental defective
 - Subject to recurrent attacks of insanity or epilepsy.
- b. Either party to the marriage is suffering from a venereal disease in a communicable form; or
- c. The wife is pregnant by a person other than the husband.

The following on proceedings on nullity on the ground of voidable marriages

- Where the petitioner is aware of the incapacity of the other party, he or she cannot bring the petition for nullity. Thus petitioner must not be aware of the defect.
- The party suffering from any of the above incapacity cannot bring the proceedings for nullity. In other words any party affected by the defect – section 35 (a) (b) (c) MCA.
- The circumstances must be present at the time of marriage.

The court will only make the decree of nullity on the ground that is void if the court is satisfied that:

- . The petitioner was at the time of the marriage ignorant of the facts constituting the ground.
- a. The petition was filed not later than 12 months after the date of the marriage; and
- b. Marital intercourse has not taken place with the consent of the petitioner since the petitioner discovered the existence of the facts constituting the ground – section 37(a) (b) (c).

The difference between church marriage and marriage under the Act: church marriage is not marriage under the Nigerian Law. There is either a customary marriage or statutory marriage and both can be entered into by the same parties – the Double Decker marriage. See *Nwangwa v. Ubani*.

Procedure

Every matrimonial cause or proceedings shall be commenced by petition – section 54(1) MCA. The petitioner commences or institute matrimonial proceeding by a PETITION. The respondent can also cross-petition which is like another petition. The respondent can also file answer to petition within 8 days. The petitioner then files a reply within 14 days. See *Ebe v. Ebe*.

Content of petition

- Heading of the court
- Petition number/suit number
- Parties and status
- Title of petition
- 0. Full names, occupation and address of each of the party to the proceeding. Name of the wife immediately before marriage.
- 1. Particulars of the marriage
- 2. Particulars of birth of the parties to the marriage
- 3. Particulars relating to domicile or residents of the marriage in Nigeria
- 4. Particulars of cohabitation of the parties to the marriage and its ceasing
- 5. Particulars of children of the parties to the marriage and the children of either party to the marriage.
- 6. Particulars of previous proceedings between the parties to the marriage,
- 7. Ground of the petition
- 8. Facts relied but not evidence by which the facts are to be proved. Facts to support the ground.
- 9. Condonation, connivance and collusion
- 10. Proposed arrangement for children
- 11. Custody
- 12. Maintenance and settlement of property
- 13. Relief
- 14. Date
- 15. Signature and address of petitioner's counsel

16. Settler of petition
17. Address for service on respondent

The following documents are to accompany a petition when it is being filed, namely:

- Verifying affidavit
- Notice of petition
- Marriage certificate
- Certificate relating to recommendation signed by counsel and petitioner – Reconciliation Certificate.
- Acknowledgment of service – Form 11
- Discretion statement. This admits certain act and still seeks dissolution of marriage.

Setting down for hearing

There is no room for default judgment in matrimonial proceedings, therefore all facts or matters must be proved, thus there are defended or undefended suit. In defended suit, the parties join issues as there are petition, answer or cross-petition and answer; and reply. Defended suit is set down for trial in Form 32 MCR. Undefended suit is where parties have not joined issues because respondent did not file answer. It is set down in Form 31 MCR. Then a Registrar Certificate is issued that the matter is ripe for hearing. The notice of the trial is in Form 33 MCR. Every matrimonial proceeding is to be heard in public – section 103(1) MCA. In *Menakaya v. Menakaya*, the Supreme Court held that this did not permit a court to sit in chamber to hear matrimonial proceedings but rather allows the proceedings to be heard in court with the public excluded. The Supreme Court was interpreting section 103(2) which empowers the court to exclude every other person aside the parties and their counsel or representatives where it is desirable for the interest of the proper administration of justice.

Decrees in matrimonial causes

In matrimonial causes, there is the decree nisi and decree absolute.

- The decree nisi is the decree of dissolution of marriage or nullity of a voidable marriage in the first instance – section 56 MCA.
- The decree absolute is the decree at the expiration of 3 months of making decree nisi. This decree absolute finally dissolve or nullifies the marriage.

Until a decree nisi becomes absolute, the marriage is still subsisting. Thus before the expiration of 3 months, if one of the parties died, the other party is entitled to letters of administration, if the party had died intestate. The death of either party nullifies the decree nisi. See *Amobi v. Nzegwu*, *Dejunwo v. Dejunwo*. Appeal can only lie against a decree nisi and in decree absolute; a party who had opportunity of appealing and failed to appeal do not have a right of appeal. Section 241 (2)(b) CFRN. Between decree nisi and decree absolute, parties can reconcile. A third party neutral can be asked to intervene within the 3 months. Also, within 3 months of decree nisi before it becomes absolute application can be made to set aside the decree nisi. After decree absolute all rights freeze up. There will be foreclosure of all rights. In void marriage, there is no need of certificate of reconciliation, but necessary in dissolution and nullity of voidable marriages. Where there are two petitions before the court, one to nullify the marriage and the other for dissolution. The court will hear that of the nullity first.

Note the ethical issues – Rule 17 on conflict of interest, Rule 16 on competency, Rule 15 on acting within the bounds of law and Rule 15(3)(d) RPC on ADR option. ADR is only relevant custody, maintenance and other ancillary reliefs and not for a decree of dissolution, nullity, judicial separation or jactitation of marriage proceedings. In the absence of marriage certificate, proof of marriage can be by a certified true copy obtained from the Registrar of Marriage.

A PETITION FOR DISSOLUTION OF MARRIAGE ON ADULTERY

IN THE HIGH COURT OF LAGOS STATE
IN THE LAGOS JUDICIAL DIVISION
HOLDEN AT LAGOS

SUIT NO:

PETITION NO:

BETWEEN

LYDIA BABA

PETITIONER

AND

1. PAUL BABA

RESPONDENT

2. ADA OGUN

CO-RESPONDENT

1. PETITION FOR DISSOLUTION OF MARRIAGE

The petitioner, Lydia Baba, whose address is at plot 111, Balarabe Close, Victoria Island, Lagos and whose occupation is a legal practitioner, petitions the court for a decree of dissolution of marriage on the ground that the marriage has irretrievably broken down, against the respondent Paul Baba whose address is plot 121, Balarabe Street, Ikoyi, Lagos and the co-respondent is Ada Ogun, whose address is 7, Sharp Street, Ajegunle, Lagos whose occupation is a company secretary.

2. MARRIAGE

- . The petitioner then a spinster was lawfully married to the respondent then a bachelor at the Marriage Registry, Lagos on 7th January, 2010.
- a. The surname of the petitioner immediately before marriage is Roberts

3. BIRTH OF PETITIONER AND RESPONDENT

The petitioner was born on 22nd March 1984 in Lagos state, Nigeria and the respondent was born in 1980 in Delta state, Nigeria.

4. DOMICILE OR RESIDENCE

The petitioner is within the meaning of the Act, domiciled in Nigeria, the facts on which the court will be asked to find that the petitioner is so domiciled are as follows; prior to the marriage and immediately after desertion, has been resident within the jurisdiction – Nigeria, Lagos.

5. CO-HABITATION

Particulars of the places at which and periods during which the petitioner and the respondent co-habited are as follows:

Immediately after marriage, the petitioner and the respondent lived at plot 121, Balarabe Street, Ikoyi, Lagos.

The date and circumstances in which co-habitation between the petitioner and the respondent first ceased are as follows:

14th September, 2012, the petitioner found a note written by the petitioner stating that he was leaving for Australia and never to come back to Nigeria.

6. CHILDREN

Nil

7. PREVIOUS PROCEEDINGS

Since the marriage, there have not been any proceedings in court between the petitioner and respondent.

8. GROUND FOR PETITION

That the marriage has irretrievably broken down

9. FACTS SUPPORTING THE GROUND

- . The fact that the respondent has repeatedly committed adultery with co-respondent, as he contacted venereal disease and the petitioner finds it intolerable to live with him.
- a. That the respondent had constantly used every opportunity and slight provocation to inflict physical injury on the petitioner.

10. CONDONATION, CONNIVANCE AND COLLUSION

The petitioner has not condoned, connived at the facts specified above and not guilty of collusion in presenting this petition.

11. PROPOSED ARRANGEMENT FOR CHILDREN

Nil

12. CUSTODY

Nil

13. MAINTENANCE

The petitioner claim a lump sum of N100, 000, 000 as maintenance from the respondent

14. RELIEF

Decree of dissolution of marriage on the ground that the marriage has irretrievably broken down.

DATED THIS _____ DAY OF _____ 2013

(signature)

Abada Mavis Esq

Group Six Chambers

7, Kate Close

Victoria Island, Lagos

08031234567

abadamavis@yahoo.com

The petition was settled by Abada Mavis, legal practitioner for the petitioner. Filed on _____ day of _____ 20____ by Abada Mavis on behalf of the petitioner whose address for service is.....

FOR SERVICE ON

1. Respondent

.....

2. Co-respondent

.....

FUNDAMENTAL RIGHTS ENFORCEMENT

There are natural rights, human rights and fundamental rights. There are differences among them. Natural rights are rights that pertain to individual by virtue of the fact that they are human. These rights need not be codified before they can be regarded as 'natural right'. Human rights are the rights that are recognized by laws. Fundamental rights are the rights that have a constitutional backing. In Nigeria, such rights are contained in chapter IV of the Constitution of the Federal Republic of Nigeria, 1999, as amended (CFRN, 1999). For the purpose of this discuss, enforcement of fundamental rights would be limited to the chapter IV, CFRN 1999 and by extension, the African Charter on Human and Peoples Rights (Ratification and Enforcement) Act, Order 1 r 2, Fundamental Rights (Enforcement Procedure) Rules, 2009. Human rights for the purpose of enforcement includes fundamental rights – Order 1 r 2 FR. The rules use human rights also.

For the purpose of enforcement, the principal law is the Fundamental Right (Enforcement Procedure) Rules 2009, which repealed the 1979 Rules. The rules are made pursuant to section 46(3) CFRN by the Chief Justice of Nigeria. In addition, where a lacuna exist in the rules in the course of any human rights proceeding, the civil procedure rules of the court (high court where the action is commenced) shall be resorted to – Order 15 r 4 FR.

Preamble to the Fundamental Right Rules

- Unlike the old rules, the scope of the new rules is wider as the definition of fundamental rights includes the African charter
- Also, there is an overriding objectives of the rules as it concerns chapter IV CFRN, 1999, African charter and other international bills of rights where reference is made to by the charter. Also, the Universal Declaration of Human Rights and other instruments in UN human rights system – paragraph 3 of the preamble to the rules.
- Also, the overriding objectives are for the purpose of advancing and never for the purpose of restricting applicant's rights and freedom.
- Even consequential orders to be made by court should be for the foregoing purpose

- There is duty on the court to enhance access to justice for all classes of litigants especially the poor, the illiterate, the uninformed, the vulnerable, the incarcerated and the unrepresented.
- There is encouragement of public interest litigation as no action can be struck out for lack of locus standi. Specifically, human rights activists, advocates or groups as well as any non-governmental organization may institute action on behalf of potential applicant.

In human right litigation, the applicant includes any of the following:

- . Anyone acting in his own interest – the person whose rights have been breached.
- i. Anyone acting as a member of, or in the interest of a group or class of persons
- ii. Anyone acting on behalf of another person
- iii. Anyone acting in the public interest, and
- iv. Association acting in the interest of its members or other groups or individuals – paragraph 3(e)(i)-(v) of preambles to the rules

Also any person who desires to be heard in Human Right application and who appears to be a proper party whether or not he has been served any of the relevant processes or has any interest in the matter, he may be heard – Order 13 r 1. Again, amici curiae who are friends of the court may be encouraged in human rights application and may be heard at any time if the court's business allows it – Order 18 r 2. The respondent could be an individual, corporate, the government, any person who has legal personality and who is alleged to have infringed the provisions of chapter IV CFRN and African charter. See Abdulhamid v. Akar, Theresa v. Nwafor. In Theresa's case, the widow had brought human rights action against the family of her deceased husband. The deceased and applicant had been married under the Act. When the husband died, the family compelled her to stay with the corpse, for the purpose of complying with the burial rites. The respondent objected that fundamental rights cannot be enforced against individual. The Supreme Court found otherwise and held that it can be enforced against individuals.

Courts and jurisdiction

Where a person alleges that the fundamental rights in chapter IV CFRN and African charter to which he is entitled has been, is being or is likely to be infringed is to apply to the court in the state where the infringement occurs or is likely to occur for redress - Order 2 r 1. The definition of court means Federal High Court and the High Court of a state or High Court of FCT - Order 1 r 2.

The FHC have jurisdiction in this regard where the infringement arise from original exclusive jurisdiction of the FHC as contained in section 251 CFRN, 1999 or any other Act of National Assembly. The division of the FHC must be the one where the infringement occurred and if there is no division, then the one covering that state. The foregoing is the decision of Tukur v. Gov of Gongola state, Adetona v. I G Enterprise Ltd, Inah v. Ukor. As it affect the FHC, ignore the decision in Grace Jack v. University of Agriculture, Makurdi. Where there is cross border infringement, the state where substantial infringement took place should have jurisdiction.

Mode of commencement

Mode is by originating process without leave of court and Form No 1 in appendix may be used as appropriate. This is for the purpose of the format - Order 2 r 2

Originating motion is most often used and any other form is appropriate as long as it is accepted by the court. The originating motion is motion on notice. The originating motion is to contain the following:

0. Name/heading of court/judicial division/venue
1. Suit number
2. In the matter of an application by, for an order of the enforcement of a fundamental right.
3. Parties - applicants starts with: in the matter of respondent(s) name(s)
4. Title - ORIGINATING MOTION ON NOTICE BROUGHT IN PURSUANT TO
5. Body
6. Relief sought
7. Statement as to attachment of affidavit and exhibits
8. Date and signature

9. Address for service

Necessary particulars should be supplied in the reliefs like section of law or type of right breached and the reliefs can be a declaration, injunction, damages, apology e.t.c. The originating motion is to be accompanied with the following documents.

- Statement of facts setting out the name and description of the applicant, the relief sought, the grounds upon which the reliefs are sought - Order 2 r 3
- Affidavit setting out the facts upon which the application is made – Order 2 r 3
- Written address, a succinct argument in support of the grounds of the application - Order 2 r 5

Note the following on the affidavit, Order 2 r 4

- The affidavit can be deposed to by the applicant himself
- By a person who has personal knowledge of the facts
- By a person who was informed of the facts by the applicants

The other categories of person can swear where the applicant is in custody or if for any reason is unable to swear to an affidavit. It must be stated in the affidavit that the applicant is unable to depose personally to the affidavit

- Where respondent intends to oppose the application, he shall file his written address within 5 days of the service on him of such application – Order 2 r 6.
- The written address may be accompanied by a counter-affidavit. This is where he wants to depose to a contrary fact. If opposing the application on ground of law alone, there is no need for an affidavit, counter-affidavit.
- The applicant upon being served with respondent written address may file and serve an address on points of law within 5 days on being served.
- The address – Reply may be accompanied with a further affidavit (when new contrary facts arise in counter-affidavit) Order 2 r 7

Where the respondent intends to challenge the jurisdiction of the court, he is to file

- A notice of preliminary objection
- Counter-affidavit to mean application
- Written address

Where he decides not to file a counter-affidavit, he is presumed to have admitted the facts in affidavit – order 8 r 1, 2, 3. In this like, there would be two applications before the court. The court will take both applications and hear both preliminary objection and original application. The court can make either of the following orders:

- . Strike out the application for want of jurisdiction
- a. Set aside the service of original application – Order 8 r 5

If the court assume or did not decline jurisdiction, it can go ahead and give its ruling on substantive application. – Order 8 r 6

Service of court process

- . Originating application and order of court is to be served by a sheriff, deputy sheriff, bailiff, or other officer of the court – Order 5 r 1
- i. Service may be effected between 6 a.m and 6 p.m – Order 5 r 10
- ii. Service is not to be effected on Sunday or public holidays unless authorized by court in exceptional circumstances – Order 5 r 11
- iii. Personal service on persons to be served where it is an order for production of applicant, personal service would include, if the person directed to as police officer, a prison superintendent or other public officer, leaving it with
 - Any other officer working in the office of the police officer, office of superintendent, or
 - Office of public officer

Order 5 r 3 – 6. Where personal service with or without attempt at it, appear to the court that it cannot be conveniently effected, substitutional service upon application may be ordered. This includes:

- . Delivery to adult members of abode or business place last known.
- a. Delivery to agent on prove that such in ordinary course will come to knowledge of the party
- b. Delivery to any senior officer of any government agency that has office in where breach occurs or FCT.
- c. By advertisement in official gazette, federal government official gazette or some newspapers circulating within the jurisdiction; or
- d. Notice put up in court, public place within judicial division, last known place of abode or business – Order 5 r 7(a)-(e)

Service is important as where a person who ought to be served is not served; the court may adjourn the hearing of the application – Order 7 r 9

Hearing

The date for hearing of the application is to be fixed within 7 days of filing of the application – Order 4 r 1. Application for enforcement of fundamental rights is to be treated as urgent matter and the court will not entertain or grant frivolous adjournments, except that which is extremely expedient – Order 4 r 2. The hearing of the application is to be on the parties' written address – Order 12 r 1. The content of written address is as follows:

- . Introduction
- a. Statement of facts – brief, with reference to exhibit if any attached
- b. Issues arising for determination
- c. Argument on each issue
- d. Prayers and reliefs
- e. Conclusion
- f. List of authorities
- g. Date and signature
- h. Address for service – Order 12 r 4 & 5

There must be heading of court and other preliminary matters. Oral arguments are allowed for twenty minutes from each party on matters not contained in written address and which to his knowledge after filing his written address – Order 12 r 2. If on the date set for adoption of written address and either of the parties is absent, the court may suo motu or on application(oral) of the counsel to the party present, orders that the addresses be deemed adopted, if the court is satisfied that:

- Parties had notice of the date of adoption as he was present in court that day it was made; or
- He was served with the notice of the day of adoption – Order 12 r 3

VERY IMPORTANT, to note that an application for the enforcement of fundamental right shall not be affected by any limitation statute whatsoever. The Public Officer Act is not excluded – Order 3 r 1.

Ex Parte application

Because time is already being abridged in fundamental right enforcement application, where a party desires interim orders on ex parte application, the court may only hear ex parte application on interim reliefs, where

- Exceptional hardship will be done to the applicant especially when life or liberty of the applicant is involved – Order 4 r 3
- The application ex parte is to be supported by affidavit, setting the grounds why delay in hearing the application would cause exceptional hardship – Order 4 r 4(a)
- May be supported by an address

This is in addition to the originating motion application.

Amendment and consolidation

Amendment is permissible on only the statement of facts, as further affidavit can deal with new issues in counter-affidavit – Order 6 r 3. Amendment is by application supported by an exhibit of the statement of facts to be amended – Order 6 r 3. The applicant upon grant of amendment is to amend within the time stated or apply for extension, else amendment would be deemed abandoned – Order 5 r 4. Consolidation is upon application of applicant where the applications relating to infringement of rights is

- Pending against several parties
- In respect of the same matter; and
- On the same grounds
- The same issues - Order 7 r 1,3

If the applications are before different judges, then application can be made to chief judge to re-assign to one of such judges - Order 7 r 2

Effect of non-compliance with rules

Non-compliance at any stage in course of or in connection with the proceedings shall be treated as an irregularity and not nullify such proceeding except if such non-compliance relate to

- Mode of commencement of the application; or
- The subject matter is not within chapter IV of the CFRN or the African charter on Human and Peoples Right (Ratification and Enforcement) Act - Order 9 r 1

Orders the court can make

The court is empowered to make orders as it may consider just or appropriate. The orders are: Order 11 r 1

- Orders contained in chapter IV CFRN
- Orders in African charter on Human and Peoples Right (Ratification and Enforcement) Act
- Damages
- Declaration, injunction, mandatory order
- Apology
- Interim orders as provided in Order 4 r 4
- Grant bail or order release of applicant from detention.
- Production of applicant on the date the matter is fixed for hearing if unlawful or wrongful detention is alleged.
- Injunction restraining respondent from acting - maintaining statute quo
- Others orders like access to counsel and family members; mandatory order not to arrest again.

Judicial Review and Fundamental Right Enforcement

Judicial review is usually directed at interior courts and administrative body(s) and it is the means of enforcing fundamental rights. However the application for judicial review is usually on.

- An order of mandamus - this is compelling a public officer to do an act
- An order of certiorari - this is to quash the decision of the court or administrative body or tribunal where he acts in excess of his power.
- An order of prohibition - this is to stop or prevent the doing of an act
- Declaration and injunction
- Habeas corpus - an order commanding the body of a person to be brought to court and determine why the body is being detained. Order 42 LAG, Order 40 ABJ.

Application for the foregoing orders is by leave of the court - Order 40 r 3 LAG, Order 42 r 3 ABJ. The application is ex parte supported by statement of facts, verifying affidavit and written address. After grant of leave, the application on motion is brought supported with necessary documents.

Note the following

- Judicial review is directed at only inferior courts and tribunals and administrative actions and decision.
- The leave of court is a condition precedent for seeking the orders

- Motion ex parte is used for seeking the leave of court on judicial review.
- Not used for enforcement of fundamental rights
- Restricted to certain orders
- No urgency in the hearing.

COST AND SANCTIONS

Cost and sanctions are different. Failure to comply with the rules will amount to sanctions. Cost is usually paid by the party who lost for making the other party incur expenses in pursuing the action. Cost is paid to the party who is right and he is to be indemnified for the necessary expenses which he has incurred. The object is to award cost to compensate a litigant for his expenses as cost usually follow event and cost is at the discretion of the court. What is paramount is to take into account all circumstances of the case. See *Rock shell Int'l Ltd v. BQS Ltd*. The cost should not be awarded as a means of punishing the losing party. The object of awarding cost is not to punish the unsuccessful litigants but to compensate the successful litigant for his expenses. The court will not allow costs which are unreasonable in the sense that they are incurred as a result of the self-aggrandizement of the litigant. It is also the law that cost should not be inflicted on a party who is not to be blame. See *Atanda v. Lakanmi*. But the court may order that costs be paid before such party institutes further proceedings. That order is also discretionary. It should not be given without regard to certain parameters such as when the defendant is known to be a vexatious litigant or where without any reason files a matter and when he discover a block wall discontinues in order to file another one in such a case as a matter of practice and sometimes the rules of court provide for such a procedure. The foregoing is the decision of *Commase v. Tell Comm. Ltd*

Importantly cost goes to the party while sanctions goes to the court. That is the fees to be paid as cost or sanction. Cost may be dealt with at any stage of the proceedings - Order 49 r 10(1) LAG and it is to be paid within 7 days of the order - Order 49 r 10(2). Cost can be ordered against a legal practitioner - Order 49 r 14(1)(a)-(c) LAG. Cost is covered by Order 49 LAG and Order 52 ABJ. An example of sanction is found in Order 9 r 5 LAG. Where a defendant files an appearance after the time prescribed, he is to pay N200 for each day of default. Also where a party files final address after expiration of the period specified. An example of cost against the legal practitioner is Order 4 r 17 ABJ, where the counsel upon signing the pre-action counseling certificate and the case turns out to be frivolous, the counsel shall be personally liable for costs of the proceeding. Where the court awards cost, there is a right of appeal, only that, the appeal can only be made with the leave of court - section 241(2)(c) CFRN. Note the ethical issues in Rules 14, 15, 16, 24(2)(3), 47 RPC.

ELECTION PETITION

Regulating laws

The following are the laws applicable to election petition as stated in *Obi v. Mbakwe*.

1. The constitution of FRN, 1999 as amended.
2. Electoral Act 2010 as amended
3. Court of Appeal Rules
4. Federal High Court (Civil Procedure) Rules
5. Case laws

Before any election can be conducted in Nigeria, there must be an Electoral Act in place. Election petition is the process meant to challenge the validity of an election. An election petition is a special procedure on its own. The following are the elective positions awarded in Nigeria:

- The office of the President of FRN
- The office of the Vice-President of FRN
- The office of Governor of a state
- The office of the Deputy-Governor of a state
- Members of the National Assembly (Senate and House of Representatives).
- Members of the House of Assembly of States

- Chairman of Local Government Area/ Vice Chairman
- Councillor of LGA

The foregoing aside the last two are regulated by the Electoral Act 2010. The various laws enacted by state regulates the last two being residual matters to the state. See AG Abia & ors v. AG Federation.

Courts with jurisdiction

The following are the courts with jurisdiction over election petition, their composition and their subject matter. The courts with jurisdiction are:

- Court of Appeal
- The National and State Houses of Assembly Election Tribunal
- The Governorship Election Tribunal

Court of Appeal - section 239 CFRN, 1999. The jurisdiction of the court of appeal in election petition is over the office of president and vice-president. The jurisdiction is on any of the following:

- Whether any person has been validly elected into the offices of the president or vice-president
- Whether the term of office of the president or vice-president has ceased; or
- Whether the office has become vacant

The jurisdiction of the court of appeal in this regard is exclusive and the composition of the court is at least three justices of the court of appeal - section 239(1)(2) CFRN.

National and State House of Assembly Election Tribunal - section 285 (2nd alteration)

It is to be established in each state of the federation and the FCT. Their jurisdiction is to determine whether a person has been validly elected as a member of the National Assembly or State House of Assembly - section 285(1). The composition as found in the 6th schedule, CFRN is

- The chairman who shall be a judge of the HC; and
- Two other members appointed from judges of High Court, Kadis of Sharia Court of Appeal, president of the Customary Court of Appeal or other members of the judiciary not below the rank of chief magistrate. They are to be appointed by president of court of appeal in consultation with chief justice of the state, the Grand kadi of the Sharia Court of Appeal or the president of the Customary Court of Appeal of the state – section 1(1)(3) of sixth schedule. Note that their jurisdiction is exclusive.

Governorship Election Tribunal - there shall be a Governorship Election Tribunal for each state of the federation – section 285(2) CFRN (second alteration). The jurisdiction is to determine whether any person has been validly elected to the office of governor or deputy-governor of a state. Composition is same as the National and State House of Assembly Election Tribunal – section 2(1)-(3) sixth schedule CFRN (second alteration) Act. Section 1333 of Electoral Act also provided for the following courts and stated that the Election Tribunal is to be constituted 14 days before election.

Election petition

In election petition, the petition is presented and not filed unlike other civil processes. An election petition is to be presented within 21 days after the date of the declaration of result of the elections – section 285(5) CFRN (second alteration). Of importance is when the election result was declared and not when it was conducted. The 21 days period cannot be extended no matter what. This was the decision of the Supreme Court in **Marwa v. Nyanko**. On computation of time, the day of declaration is not to be counted.

Parties to election petition

The parties to the election petition are the petitioner and the respondent. A petitioner is the person challenging the validity of an election and section 137(1) Electoral Act states that an election petitioner can be presented by

1. a candidate in an election or
2. a political party which participated in the election. See **Anazodo v. Audu**.

A respondent is a returned candidate whose election is being challenged or complained of – section 137(2) Electoral Act.

Also where the petitioner complains of the conduct of the electoral officer, a presiding or returning officer, the person to join as respondent is the INEC. INEC is to defend the petition on its behalf and that of the officer concerned – section 137(3) Electoral Act. See *Buhari v. Yusuf* (2003) 841, 346

Content of election petition

- Heading of court or tribunal – IN THE NATIONAL AND STATE HOUSE OF ASSEMBLY ELECTION TRIBUNAL
- Petition number
- IN THE MATTER OF PETITION OF GOVERNORSHIP ELECTION
- Parties
- Holding of the election and result of the election, the scores of the candidates and the person returned as the winner.
- Grounds of petition
- Facts in support of the grounds
- Prayers/reliefs sought
- Address for service

Grounds for petition

The grounds of petition to be contained in the petition must be within the purview of the Electoral Act – section 138(1)(a)-(d) Electoral Act provides for the grounds as follows;

- That a person whose election is questioned was at the time of the election not qualified to contest the election;
- That the election was invalid by reason of corrupt practices or non-compliance with the provisions of Electoral Act; the non-compliance must be substantial as to substantially affect election
- That the respondent was not duly elected by majority of lawful votes cast at the election; or
- That the petitioner or its candidate was validly nominated but was unlawfully excluded from the election. See *Obi v. Enwerem*.

Prayers and signature

The prayers and reliefs to ask for could be that contained in paragraph 4(3)(a) first schedule to Electoral Act, they are:

- . That the petitioner be declared validly elected or returned having polled the highest number of lawful votes cast at the election; or
- a. That the election be declared nullified and a consequential order of bye-election/fresh election be made.

The two prayers cannot be asked at the same time as such would amount to contradictory prayer. A court cannot nullify an election and still declare a person winner of such election. See *Ige v. Olunloyo*, *Opia v. Ibru*. On the signing of the petition, the petitioner or all the petitioners or the solicitor must sign at the foot of the petition – paragraph 4(3)(b). see *Orizu v. Ozoigbu*.

Presentation of the petition in court

The election petition shall be presented to the secretary of election tribunal or registrar of the court either by the petitioner or his solicitor – paragraph 3(1). A copy of the petition to each respondent and 10 copies of the petition to the court is to be delivered to the secretary/registrar – paragraph 3(2). Presenting the petition in a wrong court or tribunal shall be regarded as fundamental error which cannot be rectified. See *Ogbolumani v. Okobi*.

Frontloading

The system of frontloading applies to the election tribunal and the following documents are to be frontloaded along with the petition

- A list of the witnesses that the petitioner intends to call in proof of the petition
- Written statements on oath of the witnesses; and
- Copies or list of every document to be relied on at the hearing of the petition – paragraph 4(5).

Where the foregoing documents are not frontloaded, the petition shall not be accepted by the secretary – paragraph 4(6).

Service to respondent

Generally, service of the petition and frontloaded documents is to be personally served – paragraph 8(1). However, if the respondents cannot be found at the places listed by petitioners for service, upon application of petitioner, supported by affidavit showing that reasonable efforts have been made to effect personal service, and the court is satisfied on such, then an order for substituted service may be made – paragraph 8(2). Substituted service shall be in accordance with civil cases that is, as effected in other civil case.

Security for cost

Security for cost is an amount of money deposited by a party in court for the purpose of compensating the other party for any expenses which may be incurred in process of the litigation. The amount to deposit for secretary for cost by the petitioner is N200, 000 with another addition of another N200, 000 for series of notices and all other expenses. Where the amount/security is not paid there would be no further proceedings on the election petition – paragraph 2(4). In reality, the secretary or registrar will accept the presented petition and other documents but would not file it and wait for the period of 21 days to elapse and then the petition would be of no effect.

Respondent's reply/Entry of appearance

The respondent upon being served with the petition and frontloaded documents, he is to enter an appearance by filing memorandum of appearance – paragraph 9(1)(a)-(b). Thereafter the respondent files his reply to the election petition in the registry within 14 days from receipt of election petition. A respondent can file a reply without memorandum of appearance – paragraph 10(2). The respondent is to provide/deliver 10 copies to the court and a copy each for all the parties to the petition – paragraph 12(4).

Content of reply

- The facts admitted
- The facts denied
- The facts he relies on in opposition to the election petition
- Where need arises, the facts and figures clearly and distinctly disproving the claim of the petition should be set out
- Signed by respondent or solicitor

The following documents are to be frontloaded with the reply

- A list of the witnesses that the respondent intends to call in proof of the petition
- Written statements on oath of the witnesses; and
- Copies or list of every document to be relied on at the hearing of the petition.

Where the ground of petitioner's challenge is on paragraph (1) of section 138(1) Electoral Act, the respondent should set out the facts and figures clearly and distinctly disproving the claim of the petitioner.

Petitioner's reply

The petitioner is to file within 5 days of receipt of the respondent's reply, a petitioner's reply in answer to the new issues raised in respondent's reply. This reply is limited to new issues and the time given is not to be extended – paragraph 16.

Amendment of election petition and reply

Amendment is allowed at electoral proceedings; however, amendment can only be made within 21 days of bringing the election petition. Within the 21 days, any of the content of the petition or reply can be amended. However, after the expiration of the 21 days, only clerical or typographical error can be amended – paragraph 14.

Pre-hearing notice

It presupposes that there is a pre-hearing conference or session. The pre-hearing session is just like the case management conference. The procedures are as follows:

- Within 7 days of filing and service of petitioner's reply or respondent's reply, the petitioner applies for the pre-hearing notice in Form TF008
- The tribunal or court issues the pre-hearing notice accompanied by a pre-hearing information sheet in Form TF009.
- Where the petitioner fails to do so, the respondent may bring the application.
- In the alternative, the respondent by motion shall apply for an order dismissing the petition
- Where both petitioner and respondent failed to act accordingly, the tribunal shall dismiss the petition as an abandoned petition.

The order of dismissal is final and the tribunal or court shall be functus officio. At the pre-hearing session, the tribunal or court addresses the following among others

- Amendments and further particulars
- The admission of fact, documents and other evidence by consent of the parties.
- Formulation and settlement of issues for trial
- Hearing and determination of objections on point of law
- Giving orders or directions for hearing of cross petition or any particular issue in the petition.

Attendance of parties in the prehearing session like case management conference is mandatory. If the non-compliance is from petitioner, the petition would be dismissed. If from the respondent, judgment would be entered against him. Upon application by the person whom judgment at pre-hearing session was against, of which application is accompanied by an undertaking signed by such person and his legal practitioner to participate fully in the pre-hearing session, the order of the court may be set aside. See paragraph 18(1)-(13) for the foregoing. Note that the pre-hearing is to be completed within 14 days of its commencement. All the interlocutory application/motions are to come up at the pre-hearing session. Thus even though interlocutory applications are not allowed at the election tribunal, they are only limited to pre-hearing session. However at the hearing with the leave of court, motion can be moved – paragraph 47(1), see *Ngige v. Obi*. The following issues are the procedure for making application.

- Application is by motion on notice stating the law or rule which the application is brought.
- Supported by affidavit
- Written address

Respondent to the application responds within 7 days by

- Written address; and
- Where necessary, counter-affidavit
- Applicant can reply on point of law with a written address within 3 days of being, and
- Where counter-affidavit is served, counter-affidavit, further and better affidavit – paragraph 47(1)-(5)

Hearing of the petition

Election petitions are to be heard in an open court or tribunal – paragraph 19. Notice of the time and place of the hearing (may be Form 005) is to be given by the parties. 5 days to the day is fixed for the hearing – paragraph 20

- On the date fixed for the hearing, if neither of the parties are present, the tribunal shall strike out the petition and no application can be brought to re-list except good cause is shown – paragraph 46(1).
- If only the petitioner is present, that is appear, the petitioner will be asked to prove his case if burden of proof lies on him and judgment will be given (final judgment).
- If it is only the respondent that appears, the respondent shall be entitled to the final judgment of dismissing the petition. Where both parties are present, then hearing commences.

The onus of proof is proof on the balance of probabilities or preponderance of evidence. However, where there is allegation of fraud or crimes generally, then the proof of such is beyond reasonable doubt as in

criminal cases. See *Nwobodo v. Onah*. The following are the order of filing and service of written address – paragraph 46(10)-(13). It is basically the same as in general civil proceedings

- The party beginning if the other party did not call evidence will within 10 days file a written address. The party to begin depends on whom the burden of proof lies. The Evidence Act provides that the person who will lose if no evidence is presented on either side. In most cases, the petitioner – burden of proof.
- However, where the respondent calls evidence, then he will file his written address first
- And the petitioner upon being served would within 7 days file his own written address
- A right of reply on point of law alone only avails the party who first stated the written address. This is to be made within 5 days of being served with the other party's written address.

Judgment

The following are the orders that can be made by the tribunal or the court in the election tribunal – section 140 Electoral Act.

- Where the court or tribunal finds that the return candidate was not validly elected on any ground, the tribunal or court shall nullify the election.
- The court or tribunal finds that the person returned had the majority vote cast but was not qualified to contest the election; a fresh election shall be entered.
- Where the court finds that the candidate elected did not secure the majority of valid votes cast at the election, the court or tribunal shall declare as elected the candidate who scored the highest votes cast at the election and satisfied the requirements of the constitution and the Electoral Act.

Section 141 Electoral Act provides that an election tribunal or court shall not under any circumstances declare any person a winner at an election in which such person has not fully participated in all the staged of the election. A reaction to *Amaechi v. INEC* decided by the Supreme Court.

An accelerated hearing is to be given to an election petition and the appeal arising out of it. Thus the election tribunal or court shall deliver its judgment in writing within 180 days from the date of filing of the petition – section 285(6) CFRN (second alteration). An appeal from the tribunal or court's decision is to be filed within 21 days from the date of the decision – section 143 Electoral Act. The appeal is to be heard and disproved within 60 days from the date of the delivery of the judgment of the tribunal of court of appeal – section 285(7) CFRN (second alteration). There is no room for extension of the time prescribed.

- Appeal from the National and State House of Assembly Election Tribunal lie to the Court of Appeal. This appeal is as of right – section 239(8)(1)(b) CFRN, 1999 (second alteration) Act. The decision of the Court of Appeal in respect of appeals arising from the National and State House of Assembly Election Tribunal shall be final – section 239(8)(3) CFRN.
- Appeal lies from the Governorship Election Tribunal to the Court of Appeal as of right – section 283(8)(1)(c) CFRN. Appeal can also lie from decision of the Court of Appeal on the appeal of Governorship Election Tribunal to Supreme Court – section 233(1)(iv). The appeal is as of right.
- Appeal lies from the decision of Court of Appeal, acting as an election tribunal to the Supreme Court. The appeal is as of right – section 233(2)(e) CFRN.

Requirements and qualification of persons for the elective position

- National Assembly
- State House of Assembly
- President of FRN
- Governor

No person shall be qualified for the above elective positions if

- He has voluntarily acquired the citizenship of a country other than Nigeria or has made declaration of allegiance to such other country unless in cases prescribed by the National Assembly.
- He has been elected to such office at any two previous elections

- He is under a sentence of death by a competent court or tribunal in Nigeria or a sentence of imprisonment for any offence involving dishonesty or fraud.
- He has within a period of less than 10 years before the date of election to the office been convicted and sentenced for an offence involving dishonesty or has been found guilty of the contravention of the code of conduct
- He is an undischarged bankrupt, having been adjudged or otherwise declared bankrupt under any law in force in Nigeria.
- Being a person employed in the public service of the federation or of any state, he has not resigned, withdrawn or retired from the employment at least thirty days to the date of the election
- He is a member of any secret society
- He has presented a forged certificate to the Independent National Electoral Commission

Ethical issues - Rule 14, 15 and 16

FAST TRACK PROCEDURE – Order 56 LAG

Objective: the main objective of the fast track court is to reduce the time spent on litigation to a period not exceeding 9 months from the commencement of the action till the final judgment – rule 1

Qualification/subject matter: before a suit can qualify for fast tracking procedure, there are three main conditions to fulfill namely:

0. The action must be commenced by writ of summons; rule 2(1)(a)
1. An application is made to the registrar for fast track by a claimant or claimant in counter-claim (b)
2. The claim is for liquidated monetary claims or counter-claim in a sum not less than N100, 000, 000; or
 - The claim involves a mortgage transaction, charge or other securities;
 - Or the claimant suing for liquidated money claims is not a Nigerian national or resident in Nigeria. These facts must be disclosed in the pleadings.

Upon fulfilling the foregoing provisions, the deputy chief registrar in charge of litigation section or any other person shall cause the originating process to be marked 'QUALIFIED FOR FAST TRACK' and direct the payment of appropriate fees – rule 3. Unlike in the other matters, the defendant is still to file his statement of defense within 42 days of being served along with other frontloaded processes – rule 5(1). However reply by claimant is 7 days unlike other matters which is 14 days after service of statement of defense – rule 5(2).

Case Management Conference under fast track: the claimant is to apply for the CMC notice in Form 17 & 18 within 7 days of the close of pleadings – rule 6(1). This is unlike in other matters which is 14 days. Failure of claimant not applying is the same as in other matters – rule 6(2). CMC is to be held from day to day and can only be adjourned for the purpose of compliance with the CMC orders. CMC must be completed within a period of 30 days. The provision for extension when necessary is only for 14 days or such other period he may deem fit – rule 7(1) & (2). This is unlike in other matters where CMC is 3 months. Consequences of non-participation in CMC of fast track is the same as in other matters – Order 25 r 5 & 7. CMC report is also issued and forwarded to the CJ for designation to the judge.

Trial: upon the matter being referred to trial, the trial judge is to give directions for trial including a trial time-table which it considers appropriate – rule 8(2). Thus application by parties not within the time-table is to be done as soon as possible – rule 11. Trial is to be conducted from day to day unless the trial court directs otherwise – rule 12. Adjournment is only ordered as an order of last resort and this is where the court has no option but to adjourn. Adjournment is for a short possible time – rule 13(1) & (2)

The entire trial period including the final addresses of the counsel shall not be later than 90 days from the trial decisions are made - Rule 14. The order of filing final address is the same as in other matters. However, the period for filing is 14 days, 14 days and 7 days for reply, unlike the 21 days, 21 days and 7 days in other matters - Rule 14(1)-(6). In all fast track cases, the judge is to deliver his judgment within 60 days of completion of trial. Rule 15 unlike others which is 90 days