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THE LEGALITY OF THE EXISTING LEGAL FRAMEWORK FOR VIRTUAL/REMOTE COURT SITTING IN NIGERIA

By Michael Akinleye and Adesoji Ojerinde

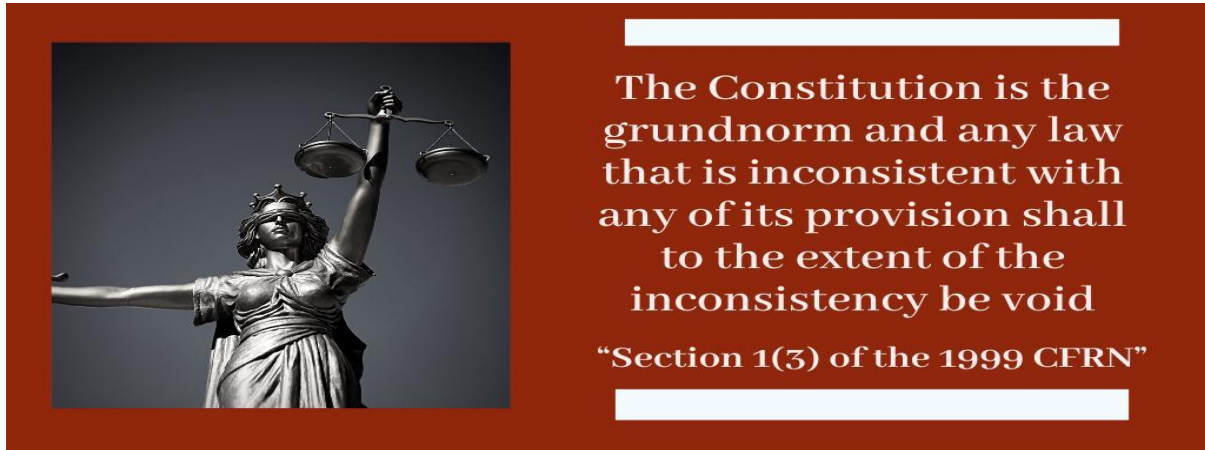
On 6th May 2020, the National Judicial Council (“NJC”) issued Guidelines for court sittings and related matters in the COVID 19 period¹ (“**Guidelines**”). According to the NJC, the Guidelines were issued based on the report of the committee that was set up by the NJC at its 91st Meeting held on 22nd day of April 2020 to devise guidelines and measures to enable safe court sittings during this challenging period of the coronavirus pandemic. One of the fundamental innovations introduced by the Guidelines is provided under paragraph E of the Guidelines titled “Virtual or Remote Court Sittings”. This innovation in the NJC Guidelines will constitute the theme of this article given the provisions of the Constitution of the Federal Republic of Nigeria 1999 (as amended), the Evidence Act² and the predominant positivist approach adopted by our Courts in the interpretation of statute.

Prior to the NJC Guidelines, the Chief Judge of the High Court of Lagos State had also issued a Practice Direction on remote hearing of cases by judges of the High Court of Lagos State pursuant to the provisions of Section 6(6) of the Constitution and other enabling statute. Essentially and as stated in the NJC Guidelines, remote/virtual court sitting entails conducting online court sittings through Microsoft Teams, Zoom, Google Meetings etc. A remote court sitting suggests a situation where proceedings of court are conducted online outside a courtroom and or where all the principal participants to the proceedings are not physically together. As recognised by the NJC, in order to host online court sitting, there are certain basic facilities that must be available for all the parties involved in the hearing. Instructively, at paragraph 6(a)-(d) of the Guidelines, the facilities required were listed thus: (a) **Fast-speed, pervasive and reliable internet connectivity** (b) End-user Hardware/Devices (i.e. desktops, laptops, tablets, smartphones etc.). (c) Collaborative Platform (d) Electricity power for, amongst others, the end-user device and ancillary equipment for the duration of the court sitting.

¹ RE: NATIONAL JUDICIAL COUNCIL COVID-19 POLICY REPORT: GUIDELINES FOR COURT SITTINGS AND RELATED MATTERS IN THE COVID-19 PERIOD - Ref. No. NJC/CIR/HOC/II/660 May 2020 on <https://njc.gov.ng/30/news-details>

² Evidence Act Cap E14 Laws of the Federation of Nigeria 2004

As at today, the only existing legal framework for conducting virtual court sittings in Nigeria are the Practice Directions issued by the various heads of court and the NJC Guidelines. However, it is pertinent to highlight the fact that the Rules of Court, Practice Directions or Guidelines are not the only instruments regulating the practice and procedure of courts in Nigeria. To put in a different manner, these subsidiary legislations do not constitute the sole reference for determining the practice and procedure of any court in Nigeria.



Fundamentally, the Constitution and the Evidence Act contain provisions which border on the practice and procedure of courts in Nigeria. It is an elementary point in our jurisprudence that the Constitution is the grundnorm and any law that is inconsistent with any provision of the Constitution shall to the extent of the inconsistency be void. See section 1(3) of the Constitution. Thus, the court cannot by way of Rules of Court seek to circumvent the provision of the Constitution on any matter. Similarly, the provisions of the Evidence Act are superior to any provisions in the Rules of Court, Practice Direction or Guidelines on any matter relating to evidence. The Evidence Act is the principal law regulating the taking of evidence in Nigeria and the provisions of the Evidence Act cannot be expanded, amended, and altered by any Rules of Court, Practice Direction or Guidelines. **See Josien Holdings Ltd & Ors v. Lornamead Ltd & Anor. (1995) 1 NWLR (PT.371) 254 at 264; Dr. Ooladipo Maja v. Mr. Costa Samouris (2002) 7 NWLR (PT.765) 78 at 102.**

Against the foregoing backdrop, it is apposite to juxtapose the provisions relating to online court sitting as contained in the NJC Guidelines and other Practice Directions of courts with the provisions of the Constitution and the Evidence Act in order to ensure that we develop a durable and sustainable system of administration of justice that will survive the inescapable crucible and pummelling of the dominant literal rule interpretation.

CONSTITUTION

We note that there are several provisions of the Constitution relating to the practice and procedure of courts. However, we will limit ourselves in this article to the provisions of the Constitution which may have direct impact on the Practice Direction and Guidelines on online court sitting. By the provision of section 36(1) of the Constitution, a court must be constituted in such manner as to secure its independence and impartiality. The independence and impartiality of the court are pillars that guarantee to a large extent, the capacity of the court to dispense justice in a fair and equitable manner. In order to foster the principle of independence and impartiality of the court, the Constitution provides under section 36(3) thus:

“The proceedings of a court or the proceedings of any tribunal relating to matters mentioned in subsection (1) of this section (including the announcement of the decisions of the court or tribunal) shall be held in public.” (Underlining supplied by us)

In our view, the above section of the Constitution creates both a duty and a right. It is a double-edged sword. On the one hand, it imposes a ministerial duty on the court to conduct its proceedings in public and on the other hand, it gives the members of the public an unfettered right to attend court proceedings. Assuredly, the right created in section 36(3) is a right that belongs to all members of the public without any form of restriction, qualification, or discrimination. It is a right that is available to every member of the public, rich or poor, illiterate or educated, computer literate or not etc. Indeed, considering the clear and unambiguous provision of section 42 of the Constitution which prohibits all forms of discrimination against any person, it will be difficult to argue against the proposition that the right created for members of the public in section 36(3) is not available to all members of the public. We rely on the decision of the Supreme Court in **Edibo v. State (2007) LPELR-1012(SC)** where the Apex Court held thus:

“In my respectful but firm view therefore, the right provided in Section 33(3) of the 1979 Constitution or 36(3) of the 1999 Constitution, on the decided authorities, is a public right for every citizen of this country. The courts must be open to anyone who may present himself or herself for admission or is obliged to be so presented.”

Also, **Nuhu v. Ogele (2003) LPELR-2077(SC)** in the Supreme Court admonished thus:

“It cannot be doubted that in a democratic setting where the Rule of Law prevails, id est, where all people, organs and institutions of the Government are under the law, it is the indisputable right of the public to have undeniable and unlimited access to Court proceedings. Courts exist for the citizenry. They adjudicate on the rights of the parties and the method of adjudication can only be adjudged right and in keeping with the dictates of the primary law if the proceedings are open for all to see. I hold that no excuse should be advanced in any form to give the impression that the court could sit in camera and be “cabined, confined and cribbed not to saucy doubts and fears”, (Apologies to William E Shakespeare), but to perform an act in a way that violates the tenor and intendment of Section 33(3) of the 1979 Constitution, analogous to Section 36 (3) of the present Constitution.”

Having established that the provision of section 36(3) creates a right for every citizen of Nigeria, the question is what is the meaning of the phrase “*held in public*”? We contend that there are several decisions of the Supreme Court from which we can clearly and unequivocally infer or deduce the meaning of the phrase *held in public*. In the case of **NAB Ltd v Barri Eng. (Nig) Ltd (1995) LPELR-2007(SC) Pg. 48 - 49, paras. F – A**, the Apex Court **Per Ogundare JSC** of blessed memory held thus:

“Coming back to the case on hand, it is my respectful view that sitting in Chambers to deliver judgment is not, on the facts before us, sitting in public or in open Court. A Judge’s Chambers is not one of the regular Courtrooms nor is it a place to which the public have right to ingress and egress as of right except on invitation by or with permission of the Judge.” (Underlining supplied by us)

Again, in **Edibo v. State**³ the Supreme Court held as follows:

“...I say so because, nothing can be far from truth. If I or one may ask, can the chambers of a Judge, be described as an “open place” which is accessible to all and sundry? I think not. This is in spite of the “strained” reference to New English Dictionary and Thesaurus page 814, new edition as to the definition of a “Public Place Black’s Law Dictionary page 1230, 6th edition and the case of - .1965) 1 All ER 707 cited at page 2094 of Stroud’s Judicial Dictionary, 5th Edition, Vol. 4 in the respondent’s brief and other cases cited therein, I hold firmly, that a Judge’s Chambers, cannot and will never be, a public place or an “open” and unrestricted place. By these references and arguments, can the learned counsel for the respondent, in all honesty and seriousness, maintain or insist, that he/she can walk into the Chambers of any Judge or Justice, without the consent or permission of the said Judge or Justice and unrestricted? I think not.”

From the above decisions of the Supreme Court, the phrase *held in public* connotes held in a place where the public has *right of ingress and egress as of right*. An *open place that is accessible to all and sundry*. An *unrestricted place where the members of the public do not require the consent or permission of the court to attend the court proceedings*. These are the determinant factors in ascertaining whether a court proceeding was held in public.



Courts proceedings must be conducted in a manner that gives the members of the public an undeniable and unlimited opportunity to exercise their right to attend court proceedings. If it is shown that a court proceeding was held in a place that is accessible to all and sundry without any form of restriction or discrimination, then the requirement of section 36(3) of the Constitution has been complied with. Court proceedings is not a private arrangement for the court, litigants and their lawyers alone. By the said provision of section 36(3), members of the public are indispensable stakeholders in the administration of justice. The public acts as a watchdog to assist the court in conducting its business in an independent and impartial manner. The effect of failure to hold a court proceeding in public is deleterious to the court proceedings. It renders the proceedings null and void without any need to prove any miscarriage of justice.

It is well established in our law that conducting court proceedings in our traditional courtrooms satisfies the requirement of section 36(3). This is because members of the public have free right of ingress and egress in the courtroom. There is no form of restrictions, discrimination or qualifications as to the members of the public that can attend court proceedings. Any member of the public regardless of their sex, education, religion, economic status etc. is allowed access to the courtroom without the need for any permission or consent by the court. The courtroom is like a village square where every member of the village has undeniable access to. Assuming

³ Supra

members of the public are required by the Rules of Court to pay gate fees or meet certain educational or economic qualifications before they are allowed access into the courtroom, will such provisions in the Rules of Court not be inconsistent with the provision of section 36(3) of the Constitution which mandates courts to hold their proceedings in public? Can a court proceeding conducted under these circumstances be deemed to be have been conducted in public? Will any such provision in the Rules of court be considered valid on the basis that there are members of the public that can pay the gate fees and meet the requirement in the Rules of Court?

Given the nature of online proceedings and the facilities listed in 6(a)-(d) of the NJC Guidelines, the question that arises is whether an online court sitting is a sitting in public? There is also the question as to whether the phrase proceedings of a court as used in the Constitution will apply to online court sitting? Considering the level of our economic development, we contend that online court sitting is not a sitting held in public as members of the public will be required to pay a significant amount before gaining access to court proceedings.

Online court sitting imposes a serious restriction and qualifies the members of the public that can attend court sitting contrary to the provisions of sections 36(3) and 42 of the Constitution. It does not meet the qualification of undeniable and unlimited access. Evidently, without any of the items listed in paragraph 6(a)-(d) of the Guidelines, it will be impossible for any member of the public to attend online court sitting. What is the population of Nigerians that have the items listed in paragraph 6(a)-(d) of the NJC Guidelines? How many Nigerians have fast and reliable internet services or steady electricity required for online court sitting? Clearly, online court sitting discriminates against members of the public who may not have the financial capability to purchase a fast and reliable internet service or provide a steady electricity.

The Guidelines of the NJC has by implication qualified the members of the public that can attend court proceedings contrary to the provisions of the Constitution. Under the NJC Guidelines, members of the public are now required to pay to attend court proceedings. The fact that there are Nigerians who can afford the items listed in paragraphs 6(a)-(d) of the Guidelines does not justify the adoption of a platform that requires members of the public to pay to gain access to court sitting. The Constitution did not envisage that only a certain category of Nigerians can have access to court proceedings.

EVIDENCE ACT

As noted earlier, the provisions of the Evidence Act will prevail over any inconsistent provision in any Rules of Court or Guidelines relating to admissibility of evidence in Nigeria. By the provision of section 205 of the Evidence Act, all oral evidence must be given upon oath or affirmation administered in accordance with the Oaths Act or law. Section 5 of the Oaths Act⁴ prescribes the manner for taking the oath referred to in section 205 of the Evidence Act. We submit that from a combined reading of the provisions of section 205 of the Evidence Act and section 5 of the Oaths Act, a witness must be physically present before the person administering the oath. Thus, the Evidence Act has laid out the procedure for giving oral evidence in any proceedings before the court. Can the provisions of the Evidence Act be altered or amended by the Rules of Court? The answer is in the negative. There are a host of provisions in the Evidence Act that clearly indicate that the Evidence Act does not contemplate online court sitting and as such cannot be validly applied in any online court proceedings.

⁴ Cap O1, Laws of Federation of Nigeria, 2004

The essence of the foregoing issues raised in this article is to call attention to the need to take into account the entire legal framework regulating the practice and procedure of courts in Nigeria in order to ensure that we establish an enduring system of administration of justice.

This article was written by Michael Akinleye and Adesoji Ojerinde. Michael and Adesoji are both Senior Counsel in the Dispute Resolution Group of Adepetun CaxtonMartins Agbor & Segun (ACAS-Law).

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Adepetun Caxton-Martins Agbor & Segun by telephone (+234 1 462 2094), fax (+234 01 461 3140)

