

TOWARDS FAST-TRACKING JUSTICE DELIVERY IN CUSTOMARY COURTS IN NIGERIA

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ABSTRACT

From a simplistic origin and somewhat patronizing reference as “Native Courts” the customary court system in Nigeria has evolved into a well-developed system of justice delivery committed to an avowed creed of quick dispensation of justice devoid of the rigours and technicalities that exist in what is referred to as common law courts. However, in its evolutionary ‘walk down the legal aisle’, considerable reforms have been introduced in contemporary times aimed not just at ensuring the sustainability of the system but also that it is up to date. This laudable endeavour has resulted in the injection and adoption of significant technical rules of law, evidence, practice and procedure. These rules have cumulatively midwife and projected customary courts system as a preferred alternative in justice delivery in Nigeria. This is true not only in matters involving customary law but in other areas of the law in general. Quite regrettably though, an obvious unintended bye-product of this endeavour is a slower pace of justice delivery at the level of customary courts. This paper therefore strives to distil factors responsible for the slow pace of dispensation of justice in customary courts in Nigeria. For a proper understanding of these factors, the paper discusses the nature, essence, jurisdiction, composition and functions of customary courts in Nigeria, with particular reference to customary court systems in some states in Nigeria such as Edo, Delta, Abia States as well as the Federal Capital Territory, Abuja. Finally, the paper concludes with some thought involving recommendations on how the legal and institutional drawbacks identified herein can be obviated so as to make sure that the lofty goal of fast pace justice delivery in customary courts in Nigeria envisaged by its founding fathers is achieved.

1. Introduction

The establishment of a customary court system of adjudication in Nigeria has been largely promoted and applauded as a simple, affordable, quick and grassroots friendly system of adjudication. Prominent among its laudable features, is that it is mostly devoid of rules, practice, procedure and technicalities of superior courts of record and what may be referred to as conventional common law courts. Indeed this is its fulcrum. The system takes great pride in this aforesaid simplicity and attraction to the common man.

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But over the years along its chequered history, the development of customary court, as has been said of customary law that constitutes a large chunk of its jurisdiction, has not been static. Rather than being a frozen and rigid system, the system of customary courts in Nigeria has been developed and modified to earn description in these terms:

The customary court system has become a living institution in this country, having regard to the approval accorded it in the Constitution of the Federal Republic of Nigeria...¹

The system has, it can be said, shed its condescending and neo-colonial tag as ‘native courts’ where it draws its historic origin, to become an efficient and well established system of justice. The customary court system was established primarily because of a dire need to bring justice closer to the people in an available, affordable and pedestrian manner. The expectation being that with customary courts in place, justice can be attained timeously by litigants in these courts as against what is obtainable in other conventional common law superior and inferior courts. In the pursuit of the attainment of these laudable objectives, the forms practice and procedure as well as the technicalities that are prevalent in these other courts were largely eradicated from customary courts. The reason for this is not far-fetched. The anticipated patronage of these courts was expected to come from litigants drawn from a largely illiterate and un-informed communal milieu.

In its everyday adjudication, lawyers were initially excluded from its proceedings, the Evidence Act inapplicable and the presiding officers and members of the courts were with little or no legal training. The proceedings and judgments of the courts were only required to be guided by ‘common sense’. But is this still the case?

¹ Ogbobine, R. An Outline of Customary Court Procedure (Part I).

Thankfully, in contemporary times, virtually all these have changed. These changes have been made possible by several legal and institutional reforms introduced in customary courts over the year. The vehicle of all of these has principally been the enactment of various customary court laws in many states in southern Nigeria and the Federal capital territory, Abuja and subsequent amendments made thereto which has not only given birth to modern customary court systems in states such as Edo, Delta, Osun, Abia, Kogi, and the FCT Abuja, but has also enthroned elaborate and well- articulated practice and procedure to guide the courts.

Regrettably, these reforms have not come without a price. In recent times, as a necessary fall out of all of these, we now have a customary court system with a fast growing reputation of delayed justice very much akin to what obtains in our superior and other common law courts. A simple civil suit involving a landlord and his tenant filed in a customary court in many cases now takes years to conclude. Interestingly, while there has been serious and concerted efforts aimed at fast tracking justice delivering in superior courts in Nigeria, little attention is being given to undertaking a radical review of justice delivery at the level of customary courts with a view to keeping the stream of fast pace justice at that level 'clear and pure' . The question may now be asked from the side lines, how well is the customary court system of justice administration living up to its essence in contemporary times?

2.0 Nature, Essence and Functions of Customary Courts

The nature, essence and functions of customary courts were succinctly captured by IGUH JSC in the celebrated case of *Erhunmwunse v. Ehanire*². In this case, His Lordship stated thus:

Customary courts, however, are not superior courts of record. No pleadings are filed in them either. Accordingly, the technical rules and/or procedure which govern the trial of actions in the superior courts of record are not stringently applied in those courts. Trials are conducted in a summary manner and the only opportunity a defendant has to project his case is by oral evidence, when he and his witnesses testify before the court in his own defence. In this connection, it cannot be overemphasized that the form of an action in customary courts must not be stressed where the issue involved is clear. The law is long settled that it is the substance of such actions that is the determinant factor.

In this case, the Supreme Court reiterated the new pedestrian principle that in dealing with proceedings from customary courts, an appellate court must not be unduly strict or rigid with regard to matters of form or procedure. As the whole object of trials before such courts is that the real dispute between the parties should be adjudicated upon.

Similarly, in the case of *Onwuama v. Ezeo-Koli*³, the Nigerian Supreme Court held *inter alia* that in considering proceedings of Native, Customary or Area Courts, an appellate court should act liberally and this is done by reading the record to understand what the proceedings were all about so as to determine whether there is evidence of substantial justice and the absence of miscarriage of justice. This is because such courts are not required to strictly comply with the rules and procedure or evidence and the rationale for creating them is for the need to make the administration of justice available to the common man in a simple, cheap and uncomplicated form. With the above at the back of its mind, the Supreme Court therefore adjudged in this case, that since the proceeding in question was that of a

² (2003) FWLR pt. 170, 1511 (at 1525 -1526 para H - B).

³ (2002) 5 NWLR pt. 760, 353.

customary court, the respondent therein was not bound to plead particulars in support of traditional history as would have been the case if the case was commenced at the High Court. Furthermore, the fact that the trial court called a witness *suo motu* to resolve the conflicting evidence adduced by the parties did not vitiate the proceedings.

The loathing/disdain and contempt of the customary courts system of justice delivery to forms, procedure and technicalities finds statutory armour in the customary court laws of the various states in Nigeria where the courts find comfortable residence. For example, under the Edo State Customary Court Edict 1984 (as amended),

*No proceedings in a customary court and no summons, warrant, process, order or decree issued or made thereby shall be varied or declared valid upon appeal solely by reason of any defect in procedure or want of form. But every court exercising powers of Appeal under this Edict shall decide all matters according to substantial justice, without undue regard to technicalities.*⁴

2.1 Customary Courts and the Nigerian Evidence Act

The applicability or otherwise of the Nigerian Evidence Act to the proceedings of customary courts has had quite a chequered history. Generally, from inception, the Evidence Act was inapplicable to proceedings of customary courts. Therefore, the need to adduce evidence in proof of a particular custom is dispensed with. Customary law was therefore rightly treated not as facts but as a matter of law.⁵

Where therefore, the court is presided over by a person knowledgeable in customary law of the place or a member of the court is so knowledgeable, it was unnecessary to establish that custom. Treatment of customary law as a question of law, finds justification in the presumption that judges of customary courts are vast in customary law. Which was (and still is), a prime condition of their appointment. As has been said of judges of superior and other

⁴ Section 55, Edo State Customary Court Edict (1984) (as amended).

⁵ *Ababio II v. Nsemfo* (1947) 12 WACA 127.

common law courts, customary law was said to exist in the breast of customary court judges. Proof of customary law was only required in Superior and other non-customary courts; where before these courts by virtue of the Evidence Act, customary law is essentially a question of fact. A person alleging a particular custom therefore bears the evidential onus of proving it.

In the case of *Okeke v. President and Members of Customary Court*,⁶ the court on this note stated thus:

Customary courts have their practice and procedure as embodied in the customary courts law and rules of the state in the country where they are applicable... where members of the court are familiar with the custom of community, they can apply it without first requiring evidence.

The above position of the law has followed an inconsistent path over time, often vacillating and changing as the question of the applicability of the Evidence Act to customary court proceedings changes. Under the Evidence Act, Cap 112 Laws of the Federation of Nigeria 1990, proceedings in or before Area and Customary were expressly excluded. The Act provided as follows:

This Act shall apply to all judicial proceedings in or before any court established in the Federal Republic of Nigeria, but it shall not apply –

- (a) To proceedings before an arbitrator, or*
- (b) To a field general court martial or,*
- (c) To judicial proceedings in any civil cause or matter in or before any Sharia Court of Appeal, Area Court or Customary Court.*

Unless the president, commander in chief of the Armed forces or the military Governor or Military Administrator of a State, by order published in the Gazette, confers upon any or all sharia courts of

⁶ (2001) 11 NWLR (Pt. 725) 507.

Appeal, Area Courts or customary courts in the Federal Capital Territory Abuja or a state, as the case may be, powers to enforce any or all of the provisions of the Act.⁷ (Underlining supplied for emphasis).

Note that this section excludes the application of the Evidence Act to the proceedings of Customary or Area Courts only in a 'civil cause or matter'. In Criminal causes or matters, an Area Court shall be guided by the provisions of the Act⁸ and is bound by the provisions of sections 138, 139, 140, 141, 142, and 143 of the Act.⁹ Arising from the above, the Supreme Court held in the case of Chief Awara Osu v. Ibor Igiri & 3 ors,¹⁰ and a host of other cases that customary courts are not bound by the Evidence Act unless subsequently so conferred with the power to apply the Act.

Pursuant to the above legal enablement, for example, the Governor of Edo state, by a Legal Notice dated 25 October, 2001 conferred upon all District and Area Customary Courts in the State, as well as the Customary Court of Appeal, powers to enforce any of the powers of the Evidence Act Cap.112 LFN, 1990.

However, following the enactment of the Evidence Act 2011, the entire section 1 of the 1990 Act is conspicuously omitted in the short title of the Act. Rather, the Act provides:

An Act to repeal the Evidence Act Cap E14 LFN 2004 and to Enact a new Evidence Act which shall apply to all judicial proceedings in or before courts in Nigeria and to provide for matters incidental thereto, 2001. (Underlining supplied for emphasis).

⁷ Section 1(2) of the Evidence Act, 1990

⁸ Ibid, section 1(3)

⁹ Ibid, section 1(4)

¹⁰ (1988) 1 NWLR part 69, 221

From the foregoing, given that customary courts and customary courts of Appeal are undeniably courts in Nigeria and the general application of the Evidence Act nationwide, it is submitted that the provisions of the Evidence Act are now fully applicable in all civil and criminal causes or matters before customary courts throughout Nigeria. The legal effect of this present position of the law on customary courts we shall find out *anon*.

2.2 Establishing Customary Law in Customary Courts and the Evidence Act

Under the Evidence Act 2011, like others before it, a custom may be adopted as part of the law governing a particular set of circumstances, if it can be judicially noticed or can be proved to exist by evidence.¹¹ The burden of proving a custom shall lie upon he who alleges its existence. Also, under the new Act, the controversy relating to the number of times a rule of customary law need be applied before it can be judicially noticed that was apparent in cases such as *Giwa v. Erinmilokun*¹² and *Cole v. Akinyele*¹³ has now been effectively settled. In doing so, the Act provides that a custom may be judicially noticed when it has been adjudicated upon **once** by a superior court of record. Where it cannot be established as judicially noticed, it shall be proved as a fact.

3.0 Establishment and Composition of Customary Courts

The constitutional basis for the creation of customary court is provided as follows:

¹¹ Section 16(1) of the Evidence Act, 2011.

¹² (1961) All NLR 294.

¹³ (1960) 5 FSC 84.

The judicial powers of a state shall be vested in the courts to which this section relates, being courts established subject as provided by the Constitution for a State.¹⁴

The Constitution goes further to provide *inter alia* that:

Nothing in the foregoing provisions of this section shall be construed as precluding ,

a) The National Assembly or any House of Assembly from establishing Courts other than those to which this section relates, with subordinate jurisdiction to that of a High Court.¹⁵

Finally, by virtue of section 6(5) (k), the section relates to:

Such other courts as may be authorized by law to exercise jurisdictions at first instance or an appeal on matters with respect to which a House of Assembly may make laws.

From the foregoing, it is crystal clear that customary laws are creations by implication of the Constitution. This is so, given that the various laws establishing these customary courts in the various states where they exists, draw their breath from the above section of the Constitution read together in some cases with the provisions of section 315 of the Constitution dealing with existing laws.

Several states have in exercise of these constitutional powers established customary courts. Some of these states include Edo, Delta, Osun, Abia, the Federal Capital Territory, Abuja etc. Many others are in the process of doing so. Considering the marked similarities that exist in these various state laws establishing the courts, it should suffice for the purpose of this paper, to examine the states of Edo, Delta, Abia and the Federal Capital Territory in

¹⁴ Section 6(2) 1999 Constitution of Nigeria.

¹⁵ Ibid, section 6(4)

undertaking the establishment, jurisdiction, practice and procedure of customary courts in Nigeria.

3.1.0 Establishment of Customary Court in Edo and Delta States

These two states constituted the defunct Bendel State. Following the creation of States by the Military in 1991, Bendel state was split into Delta and Edo States. The Customary Law Edict (1984) as amended of Defunct Bendel State is still applicable to Edo State. But this is no longer the case in Delta state. However, the above Edict which continues to govern customary courts in Edo State is virtually *impari materia* with the Customary Court Edict, 1997 of Delta State.

Section 3(1) of the Customary Court Edict No.2 of 1984 (as amended) of defunct Bendel State as applicable to Edo state(which is *impari materia* with section 3(1) of the Delta State Edict 1997).¹⁶ established customary courts in the then Bendel state.

Under this law, the following categories of customary courts are created in Edo and Delta States. These are:

- (a) District Customary Courts; and
- (b) Area Customary Court.

In the Federal Capital territory, Abuja, 3 grades of customary courts are created. These are grades A, B and C.¹⁷ Whilst in Abia State, there is no categorization under the 1998 Customary Courts Law.

¹⁶ And also similar to section 1(1) of the Federal Capital Territory Customary Court Act, No.8 of 2007 as well as section 1 of the Abia State Customary Court Law, 1998.

Under all of these laws, every Customary Court shall be a court of record.

Composition of Customary Courts

Membership of customary courts is as stipulated in the customary court Law of the States where they exist. In virtually all the customary courts laws in the South, there is provision for a panel of customary courts judges of three members with the opinion of the majority hearing the case being the decision of the Court. Any dissenting member is entitled to write and deliver a minority judgment.

Under the Customary Court Edicts of Edo and Delta states, Area and District Customary Courts consist of a president and two members who shall be appointed by the judicial service commission of the State.

In Edo and Delta States, a person shall not be qualified to be appointed as president of an Area Customary court unless he is qualified to practice as a legal practitioner in Nigeria and has been so qualified for a period of not less than 5 years.¹⁷ Whilst a president of a District Customary Court or member of an area or district customary court is statutory required to be literate and versed in the customary laws and usages prevailing in the area of jurisdiction of the customary court of which he is president or member and is of good character.¹⁹

The provision of the Customary Court Act, FCT Abuja on the composition is much the same as in Edo and Delta States. A significant difference, however, being in the qualification of the members of the courts. The Act stipulates that members of the customary court shall also

¹⁷ See the schedule to the FCT Act No 8 of 2007.

¹⁸ Section 6(a) Customary Courts Edicts, Edo and Delta States.

¹⁹ Ibid section 6(b).

be legal practitioners or literate in English and any other Nigerian language and has wide knowledge of customary law.²⁰ In addition, a member shall not be less than 25 years and not more than 60 years old. Clearly, this provision is aimed at ensuring a relatively young, dynamic and vibrant panel. The president of the panel in Edo and Delta state is referred to as ‘the Chairman’ under the Fct and Abia state laws. Also worthy of note is the fact that under the FCT Act, three members of the court constitute a quorum, whereas in Edo, Delta and Abia states this is not the case.

4.0 Jurisdiction

Customary courts in the Southern States of Nigeria have both civil and criminal jurisdictions. The jurisdiction of the Courts is contained in the laws establishing them. Under the Edo and Delta States Edicts, a customary court shall have jurisdiction over all persons.²¹ Whilst under the FCT Customary Court Act, a customary court exercises its jurisdiction over all persons within the territorial limits of the FCT, Abuja who submit to its jurisdiction.

Given the similarities that exist in the substantive jurisdiction of customary courts in these states, an examination of the position in Edo and Delta States will effectively x-ray the nature and extent of jurisdiction of customary courts.

In Edo and Delta States, the civil jurisdiction and powers of a customary court is as spelt out in the first schedule to the Edict,²² whilst the criminal jurisdiction is as contained in the second schedule.²³ In addition to the above, the governors of the states may by order confer

²⁰ Section 4(1) (a) & (b) supra.

²¹ Section 19 Customary Court Edict of Edo and Delta States.

²² Ibid, section 20(1).

²³ Ibid, section 21(1).

upon all or any customary court, jurisdiction to enforce within the local limits of the jurisdiction of such court, all or any of the provisions of any law of the state specified in such order and to impose penalties on person who being subject to such restrictions or limitations, if any, as may be specified in the order. Pursuant to this legal backing, the jurisdiction and powers formerly exercisable by rent tribunals, by the Rent Control and Recovery of Residential Premises Law have now been conferred on Area Customary Courts in Edo and Delta States. This has been expressly incorporated by section 20A (2) thereof into the aforesaid Delta state Edict.

4.1 Jurisdiction of Area and District Customary Courts in Edo State

Civil Matters (Limit of Jurisdiction and Power)

	Types of Causes or Matters	Area Customary Courts	District Customary Courts
1	Land when the value does not exceed amount specified in columns hereof.	Unlimited.	Unlimited
2	Matrimonial Causes or matters	Unlimited.	Unlimited
3	Causes or matters under customary law whether or not the value of the debt demand or damages is liquidated.	Unlimited.	Unlimited
4	Guardianship and custody of children under customary law	Unlimited.	Unlimited
5	Inheritance upon intestacy under customary law and grant of powers to administer the estate of an intestacy under customary law.	Unlimited.	Up to N5,000
6	Causes or matters under any law (other than customary law) including bye-laws where the amount of debt, demand or damages does not exceed the amount indicated in the columns hereof	Above N2,000 but not exceeding N7,000	Up to N2,000

It is important to note that items 5 and 6 above have been reviewed upward several times since the enactment of this edict in Edo state. Until recently, the limit of the jurisdiction of the court in item 6 above in area customary courts in the state in causes or matters under any other law was increased to not exceeding N600,000(six hundred thousand naira only).The limit of the jurisdiction of district customary courts in items 5 and 6 was also increased to N50,000.Once again, by virtue of the Increased Jurisdiction of Area Customary Courts in Civil and Criminal matters Order 13 of 2012, the maximum monetary limits of the jurisdiction of Area Customary Courts in Edo State in civil and criminal matters has been further increased. Pursuant to this order, in civil matters, the limit of the powers of an Area Court in Edo State is as follows:²⁴

- (a) President (Special Grade) - N10,000,000
- (b) President Grade I - N8,000,000
- (c) President Grade II - N5,000,000

It is interesting to note that under the FCT, Abuja Customary Law in civil causes or matters under any law (other than customary law) including bye-laws, the jurisdiction of customary courts Grade A & B is UNLIMITED, whilst that of Grade C is pegged at N100, 000.²⁵

²⁴ Section 3, Increased Jurisdiction of Area Customary Courts in Civil and Criminal matters order, 2012.

²⁵ Item 5 of the FCT, Customary Court Act.

Criminal Jurisdiction (Limits of Power)

	Types of Offences	Area Customary Courts	District Customary Courts
1	Where any person is charged with doing any act or with omitting to do any act required under any written law	Not exceeding 7 years imprisonment or a fine exceeding N5,000	Not exceeding 6 months imprisonment or a fine not exceeding N200.00
2	Contempt of court committed in the face of the court.	Not exceeding 14 days imprisonment or N200.000 fine	Not exceeding 14 days imprisonment or N200.000 fine.
3	Statutory Offences as may be prescribed	As provided in the bye-law	As provided in the bye-law.

Please note that as has already been pointed out, the powers to impose fines or sentences by the Area Customary Courts in Edo State has similarly been reviewed upwards by the increased jurisdiction of Area Customary Courts in Civil and Criminal Matters Order 12 as follows:

- (a) President (Special Grade) - 14 years I.H.L or N250,00.000
- (b) President Grade I - 10 years I.H.L or N200,000.00
- (c) President Grade II - 7 years I.H.L or N150,000.00

5.0 Practice and Procedure of Customary Courts

The practice and procedure of Customary Courts is also contained in the various laws establishing the courts, the rules of court made pursuant thereto and in criminal causes or matters, the criminal procedure law where applicable.

In Edo and Delta States, similar to many other states, the practice and procedure of Customary Courts is regulated by the rules of court made pursuant to section 68 of their extant Edicts.²⁶ This section empowers the president of the Customary Court of Appeal to make rules guiding the proceedings of the court in matter enumerated therein under. Stated succinctly, under the Edo and Delta States Customary Court rules, a civil or criminal cause or matter shall be instituted in a Customary Court that has jurisdiction to entertain the particular cause or matter as provided for under the Edicts.

A cursory look at these Edicts reveals that civil causes or matters are commenced by summons. An application for summons may be made by a written complaint or orally in person. Where the application is made orally in person, the registrar shall record the particulars of the claim or charge which are necessary for the completion of the proper summons. Upon payment of the requisite filing fees, the summons is filed by the registrar of court and personal service effected on the defendant or respondent as the case may be by the officer of the court responsible for service of court's processes, this is usually the bailiff of the court. Where personal service is impossible or cannot be conveniently done, the court may grant leave to effect service by substituted means in various mode spelt out under the Edict. Service of all processes is a condition precedent to the hearing of all causes or

²⁶ Section 28, of the Edo and Delta Customary Court Edict.

matters, except in the case of *ex parte* applications under the rules. Upon service, an affidavit of service by the officer that carried out the service is usually sufficient proof of service. On the return date, if neither party to the cause or matter appears when it is called, the court unless there are some good reasons to keep it on the list, shall strike out the cause or matter.

If there is good reason for keeping the cause or matter on the list, the reason shall be recorded and a hearing date fixed. If the plaintiff or the complainant in a cause or matter fails to appear, the matter may also be struck out, unless there is good reason not to do so.

Where the defendant fails to appear, provided there is proof of service, the court may proceed with the hearing and determination of the matter in the absence of the defendant on the evidence of the plaintiff and his witnesses if any: provided that if the defendant filed an admission in writing of the plaintiffs claim, the court may give judgment for the plaintiff without further proof of service.

It is imperative to state that any cause or matter so struck out, may ,by leave of court, upon reasonable cause be relisted upon such terms as the court may deem fit. Please note that when a suit is struck out, it is merely removed from the cause list to the registry of the court. When relisted, it is not a new or fresh suit; it is a continuation of the old matter. This view was recently re-echoed by the Nigerian Court of Appeal in the case of *Ushie v. Agbalu*²⁷. Any judgment or order obtained against any party in the absence of such party, may, upon reasonable cause being shown, be set aside by the court upon such terms as the court may deem fit and the matter heard on its merit.

²⁷ (2013) All FWLR pt. 686, 581 CA.

At the trial, the subject of a claim or charge shall be read out by the clerk of the court to the defendant/respondent/accused who shall be asked how he pleads to it, and his answer shall be recorded, where the defendant enters a preliminary objection to the claim or charge, the court shall proceed to consider such objection(s) and thereafter proceed to either strike out the claim or charge or direct the defendant to plead to it.

Where the defendant admits the claim or charge, the court shall hear the statement of the parties or in a criminal trial hear the facts as presented by the prosecution and the court shall thereafter proceed to give its judgment. But where the defendant or accused person denies the claim or charge, the plaintiff or complainant shall adduce evidence together with his witness if any, in support of his case.

At the conclusion of evidence on both sides, the court shall consider the entire evidence and give its judgment thereon and the grounds upon which the judgment is based. It is significant to spotlight on a general note that any party may be represented by a legal practitioner in any cause or matter before an area customary court.²⁸ Indeed, legal practitioners have right of audience generally in customary courts in the south, unlike the native or customary courts of old.

6.0 Fast Tracking Justice Delivery in Customary Court

A critical evaluation of the customary court system of adjudication along its evolutionary path no doubt shows that this mode of adjudication has largely delivered on its campaign promise of a simple, quick and affordable system of justice delivery. However, it must be said that overtime the wheel of fast pace justice delivery has slowed down considerably in

²⁸ Section 29(3), of the Edo and Delta State Edict.

customary courts. To the extent that it has become a familiar spectacle to see cases pending in some customary courts for so many years; up to a decade or more. Whilst there has been an animated resolve and efforts aimed at fast tracking justice delivery at the level of superior courts in Nigeria, little or no effort has been made towards extending the same considerations to lower courts, especially customary courts. What are some of these factors responsible for the murkiness of the stream of quick dispensation of justice at the level of customary courts?

6.1 Factors Responsible for the Slow Pace of Justice in Customary Courts

Several factors can be implicated under this head; most notable of these are the following:

- (1) Composition of the Courts.
- (2) Appearance of legal practitioners.
- (3) Litigation – centric disposition of the courts.
- (4) Practice and procedure.
- (5) Inadequate courts (particularly in urban areas).

1. Composition of the Courts

The point has earlier been made in this paper that generally, customary courts in the south are constituted by a panel of customary court judges, usually three. The highest grades of customary courts, as we have also already seen above in Edo, Delta and the FCT Abuja customary courts law, mandatorily provide that a legal practitioner of not less than 5 years post call shall preside as President or Chairman of the court supported by 2 other members. These members are usually not necessarily lawyers. Lower cadre of customary courts are also usually manned by a panel of all lay judges; in the absence of a mandatory requirement

that they be lawyers. The only mandatory requirement for this lower cadre of customary courts being that they be literate and versed in customary law and usage in their areas of jurisdiction. The idea whereby lay judges sit with presiding legal practitioner in Area or Grade 'A' customary courts no doubt has its precursor the use of "Assessors" in the past during the evolutionary journey and development of customary court. During this period, assessors who were persons knowledgeable in customary law, usually were engaged to sit with the judges of the court and assists the court in determining the applicable custom in each case under consideration. Although initially, they did not form members of the court in the sense that they did no vote in the court's ultimate decision but they soon became part of the decision making.²⁹

It is imperative to note that at the time that these assessors were in demand, customary courts,(then called native courts) were expected to know applicable native law and custom and to apply same. Strict proof of customary law was not obligatory. In Edo and Delta States, the lay judges are more commonly, elderly and their employment is contractual, renewable from time to time.

However, with the growth and development of customary courts and the increasing influence, culminating in a wholesale applicability of the Evidence Act to civil and criminal proceedings, the question may now be asked whether the continuous presence of lay judges in customary courts have not become unnecessary and indeed anachronistic and therefore in dare need of reforms. Even before the 2011 Evidence Act, it was not easy on the eyes to see these lay judges clad in various traditional apparel, struggle to understand and apply the technical provisions of the Evidence Act.

²⁹ Park, A. E. W. *The Sources of Nigerian Law*, Sweet & Maxwell, 89.

This fact has become acutely self-evident against the backdrop of the provisions of sections 16, 17, 18 and 19 of the 2011 Evidence Act. A combined reading of these sections firmly establishes that a custom may be adopted, if it can be judicially noticed or proved to exist by evidence. The burden of proving an applicable custom resting squarely upon the person alleging its existence. If the extant law requires custom that is not judicially noticed, having been pronounced upon once by a superior court, to be proved as a fact by evidence, then of what relevance are lay judges and their vest chest of customary law. Particularly, against the backdrop of the law that a customary court cannot substitute its own version of the applicable custom outside the evidence adduce before it. Some may argue that a panel of 3 heads is better than one. But this argument is devalued by the fact that the presence of these lay judges contributes in no small measures to the delay experienced in Customary Courts. A vast chunk of adjournments is caused by inability of the court to form a quorum mostly due to the non-availability of members due to one reason or the other. This is particularly true in the Edo and Delta States where majority of them are elderly and gone past the statutory age of retirement. Also because of this most of them can hardly sit for a long period of time.

2. Role of Legal Practitioners

As we have also seen, legal practitioners have right of audience in customary courts in the south unlike in the days of yore when this was not the case. No doubt the presence of legal practitioners has in no small measure assisted and contributed to the development of customary law and the customary court system in Nigeria. However, the large bag of advantages that came with this development did not come unaccompanied. Following their arrival, the edges of the envelope of simplicity and quick dispensation of justice in

customary courts has had its edges pushed with considerably greater venom. Customary courts have now become the recipients of endless applications for adjournment under one pretext or the other; most times simply because some lawyers want to 'seem busy'. In addition, frequent interlocutory applications and accompanying long oral submissions, which at times are out of tune with the point at stake etc. has cumulatively only served to ensure that the proceeding and speed of justice delivery at the level of the customary courts now sadly bears striking resemblance to superior courts. It is however noteworthy that the problem of lawyers delaying cases is not peculiar to customary courts. The only difference is that while concerted efforts has been made in our superior courts to solve or at least reduce this problem, hardly any attention is paid to extend such measures aimed at fast tracking proceedings at the level of customary courts. For example, the introduction of measures such as frontloading of process and evidence, written addresses, limitation of oral evidence in chief introduced in the new Edo State High Court (Civil procedure rules) 2012 and the earlier Lagos State High Court Rules 2004 are primarily aimed at fast tracking proceedings in civil matters at the High Court and checking some of the problems directly traceable to the practice of legal practitioners at the high court.

3. Litigation – Centric Laws, Rules and Procedure

A careful examination of various laws establishing customary courts in Nigeria and rules of practice and procedure made pursuant thereto easily expose the fact that virtually all of these are fashioned along the same path with those of superior and other common law courts. Basically, they are fundamentally litigation-centric. By this is meant that scant consideration is given or paid to the provision and incorporation of basic modes and methodology of alternative dispute resolution into the rules, practice and procedure of customary courts.

The point has clearly been lost, that customary courts essentially operate within the milieu of close knit communities in the exercise of its territorial jurisdiction. Members of these communities are often related by blood. To this end, the imperativeness of alternative dispute resolution as a tool to maintaining relationships and communal harmony as a preferred option to litigation is lost on the drafters of the rules governing customary courts. The existing rules generally adopted with glee, the practice and procedure of superior and common law courts such as the magistrates court with slight amendments. For example, under the customary courts Laws of Edo, Delta, Abia and the Federal Capital Territory, Abuja, there is only a passing reference to amicable resolution of disputes in these terms:

*In civil causes or matters a customary court may promote reconciliation among the parties thereto and encourage and facilitate the amicable settlement thereof.*³⁰

*In criminal cases, customary courts may promote reconciliation and encourage and facilitate in any way the settlement of all proceedings within its competence of any terms of payment or compensation or other terms approved by the court, and may thereupon order proceedings to be stayed.*³¹

These provisions are similar to sections 34 and 35 of the Magistrates' Court Law of Defunct Bendel State as applicable to Edo State and the High court rules. Nothing more than this can be found in existing customary courts Laws on ADR. Litigation should no doubt be the preferred option to a system that wants to continue to pride itself as a medium of fast pace justice delivery.

Interestingly, the rules governing the practice and procedure of superior courts that are largely guilty of litigation – centric disposition have witnessed greater interest and efforts

³⁰ Section 22 Customary Court Edict of Edo and Delta States similar to sections 15(2) FCT, Abuja Customary Law Act 2007, and section 18 of the Abia State Law.

³¹ Ibid, section 23.

aimed at, not only granting greater prominence to ADR provisions but in many cases, making them mandatory . For example, under the Lagos State (Civil Procedure) Rules 2004, pre-trial conference has been introduced. This is a conference of parties and their lawyers brokered by a judge, in an informal setting. The duty of the judge at pre-trial conference is to see if amicable settlement can be brokered between the parties. It is beyond dispute that a principal component of the DNA of litigation is time wasting. Conversely, ADR is more time saving, efficient and less frustrating.

4. Insufficient Court

As the customary courts have had its jurisdiction expanded overtime, so has the volume of cases pending before them increased. Given the present wide jurisdiction of customary courts in States such as Edo, Delta and the FCT, Abuja as has been seen in this paper, the cause list of the few courts that are available, particularly in urban areas makes it very slow to obtain judgment in these courts within a reasonable time. We now have an unwholesome situation in some states where even the few existing courts share court halls. Under this regime a customary court sits in the morning i.e. morning shift and another sit in the afternoon i.e. afternoon shift.

7.0 Recommendations and Conclusion

7.1 Appointment of a Sole Judge or a Panel of Legal Practitioners.

The point has been made that with the increasing influence and application of the Evidence Act to the proceedings of customary courts, the continuing presence of lay judges, being people without legal training has become anachronistic and out-dated. It only now serves to slow down or delay justice delivery in customary courts. As these lay judges struggle to

grapple with the provisions of the Evidence Act, often running afoul of them. Their plight is not helped by the resultant barrage of objections by counsel involved in the cases and the court having to pause frequently to resolve the avoidable problems occasioned. It is therefore submitted that the amendment of the various customary laws providing for a sole judge who shall be a legal practitioner of not less than 5 years post call in the case of an Area Customary Court and not less than 2 years post call in the case of other grades of Customary Court. In the alternative, a panel fully constituted by legal practitioners to replace lay judges will better serve the appetite of fast pace, efficient, and qualitative justice delivery in customary courts in Nigeria for the 21st century. Pursuant to this proposal, lawyers will be engaged as career members of Area customary courts as well as career presidents and members of district and other lower cadres of customary courts.

Already, the Federal Capital territory Abuja customary court system has started the march in this direction in providing that the chairman of customary court shall be qualified legal practitioner with no less than 5 years post qualification experience. Members are also to be legal practitioners of not less than 2 years post call or literate in English language or any other Nigerian language and has wide knowledge of customary law. It is submitted however, that this latter provision is quite clearly unnecessary and should be expunged. Another commendable provision of the FCT Act is that in order to guarantee that only young and active persons are appointed as members of the customary courts, the Act stipulate that the age for eligibility shall be not less than 25 and not more than 60 years.

7.2 Introduction and Adoption of Fast track Measures such as Frontloading Court Processes, Mandatory Written addresses, etc.

It is only self-delusional for anybody to pretend not to notice that the proceedings of customary courts today are not as simple as they were in the time past. This is made more acute with the presence and participation of legal practitioners in customary courts proceedings in the south and the attendant delays that have accompanied them. Given this fact, it has become imperative to introduce some proactive measures in the practice and procedure of customary courts aimed at fast tracking trials especially where both parties are represented by lawyers similar to what obtains in superior courts. Some of these measures include: frontloading of processes, mandatory written addresses and limitation of oral evidence in chief. An examination of some of these measures herein under is desirable.

7.2.1 Frontloading

This is a term used to describe the act of forwarding the oral and documentary evidence required in the conduct of a case by a plaintiff or defendant at the onset of the case rather than waiting to do so at the trial.

According to Justice Agube, JCA in the case of *Olaniyan v. Oyewole*³² “*There is no doubt that the philosophy behind frontloading procedure is to quicken the dispensation of justice*”.

The requirement of frontloading ensures “*that only serious and committed litigants with prima facie good cases and witnesses to back up their claims would come to court*”.³³ This procedure has indeed heralded a new lease of life in the area of fast pace justice delivery at

³² (2008) All FWLR (Pt. 399) 532-524.

³³ Ibid, 503

the high court of Edo State since its introduction in the Edo State High Court (Civil Procedure) Rules 2012.

There is no reason why this cannot be introduced with necessary modifications to customary courts, especially in cases where both parties are represented by counsel or parties who may not be so represented opt to do so. The argument that it may introduce complications, complexities and formalities to an otherwise simple mode of adjudication at the level of the customary courts is untenable and clearly does not appreciate the fact that this recommendation only goes to cure the problem of delay occasioned by the complexities and formalities already embedded in the system, thereby fast tracking proceedings. Apart from this, since the adoption of these measures is not compulsory, parties will still be left with the option of proceeding the old fashioned way.

7.2.2 Written Addresses

This entails the mandatory written addresses to all applications and upon the conclusion of trial. By the adoption of this procedure, valuable time is saved by eliminating recording of lengthy addresses and submissions by counsel representing the parties.

Some might say that this practice is already operational and is being adopted in customary courts. Whilst it is conceded that to a limited extent written addresses has been used by a few customary courts, this is not in any way widespread or mandatory. Apart from this, the legality of this form of usage of written addresses has not been without question. This is so because, there is nowhere in the extant rules of practice and procedure of customary courts in Nigeria where the filing and adoption of written addresses is expressly provided for.

Before the present express incorporation of written addresses in the various High Courts (Civil Procedure Rules), the Court of Appeal in the case of *Uzoho v. Task Force on Hospital Management*,³⁴ seriously frowned at similar attempts made by the various High Courts to adopt the practice of written address not expressly contained in the rules of court. According to Adeniyi JCA in this case “*the practice of lower courts inviting counsel to submit written address appears not to be favoured by judicial decisions...*”

Arising from this therefore, it will certainly be better and indeed imperative to expressly incorporate the practice of compulsory written addresses where both parties are represented by counsel to customary courts rules. In addition, it enable counsels to both parties to more comfortably prepare, articulate, argue, and present their addresses in the cosy comfort of their chambers.

7.2.3 Limitation of Oral Evidence in Chief

Another time saving measure already also operational in some superior courts is the practice of limiting oral evidence in chief to mere confirmation of written deposition of a witness and tendering in evidence all disputed documents or exhibits already referred to in the depositions. The advantage of this practice in saving considerable time, particularly in complex cases with plenty of witnesses cannot be overemphasized. Where both parties are represented by counsel, it is submitted that nothing stops the extension of this requirement to customary courts.

With the adoption of the above proposals, the presence of legal practitioner rather than being a draw mark can indeed be effectively utilized to fast track proceedings in customary courts.

³⁴ (2003) FWLR Pt. 166, 606, CA.

7.2.4 Greater introduction and Adoption of ADR Measures into customary court rules.

At this age and time the advantages of Alternative Dispute Resolution mechanisms in the area of fast tracking justice delivery and promoting contributing peace and harmony between disputants has become of pedestrian knowledge. Litigation is infamous in its brilliance in achieving the direct opposite. Given the close knit catchment area of customary courts, which essentially is within closely related communities and villages. The absence of adequate ADR provisions in the laws and rules governing customary courts is a great disservice to these communities. It is undoubtedly self-evident that a terse and passing reference to amicable dispute resolution as presently contained in the extant customary courts laws of virtually all the states where they exist is grossly inadequate and completely unacceptable. Therefore, it is hereby proposed that compulsory pre-trial conference provisions similar to that contained in Orders 25 of the Lagos State (Civil Procedure) rules 2004 should be introduced into various customary courts Law and rules. Under this procedure, a pre-trial conference is held with the parties to an action, brokered by a customary court Judge or member in the presence of Counsel for both party (if any). An attempt is then made to resolve the issues in controversy in an informal setting. Many a time, parties are willing to settle and thereby save themselves the cost and time wastage that is associated with litigation if they are obliged to at least attempt to do so by an independent umpire such as a judge or member of a customary court.

7.2.5 Provision of Adequate Courts

With the accelerated growth of customary courts system, the need to provide adequate courts and personnel is clear for all to see. This is particularly true of the urban areas.

8.0 CONCLUSION

It is a great disservice to development of the law in Africa for us to continue to view customary courts through the lenses of ‘primitive’ or ‘native’ courts as was the case in the past. This is because, like the English Common Law Court that gradually evolved from the English Common Law, Nigerian customary courts have developed into a refined and efficient system of justice delivery. Whilst various attempts have been made in the recent past to ensure that the system continues to grow, the fear of detracting from its simplicity must not blind law reformers to the need to introduce measure aimed at fast tracking its proceedings even when some of these are already contained in superior or other common law courts. The above recommendations made herein will no doubt ensure a 21st century friendly customary court system without necessarily radically changing its DNA.

After all, according to Osborne CJ in *Lewis v. Bankole*³⁵,

One of the most striking features of West African nature custom... is its flexibility. It appears to have been always subject to motives of expediency, and it shows unquestionable adaptability to altered circumstances without losing its character.

The customary court system primarily established to administer customary law can therefore not afford to remain static. The time has come, once again, to trudge the long road of reforms and introduce these proposed changes aimed at fast tracking its proceedings. The fear that the system may lose its original character and become too formal and technical is, with respect, patronizing. It is similar to the fear and argument put forward in the distant past by some that the recognition of writing as an integral part

³⁵ (1908) 1 N.L.R. 81 (at 100-101)

of customary law is an unhealthy development and that is it indeed unknown to customary law. This kind of argument clearly belittles the giant strides so far made by the customary court system over the years.