A REVIEW OF FEDERAL HIGH COURT (CIVIL PROCEDURE) RULES 2019

By Folabi Kuti

The new Federal High Court (Civil Procedure) Rules 2019 was unveiled to the public (lay and practitioners alike) for the first time on Friday, July 5, 2019. To be sure, the new Rules, with commencement date stated as 10th day of May 2019, do not intend to have retrospective effect on procedural steps taken with respect to pending matters in the Court prior to the commencement date. Neither does it affect part-heard matters, as suggested in O.1 r.1 2019 Rules 'revoking' the precursor 2009 Rules. The community reading of Rules (2) and (30) of Order 1 makes the clarification more glaring when the Rules expressly state that their application shall not extend to any cause or matter part-heard on the day the Rules come into operation, even as it will only apply to any pending matter where no further step has been taken beyond filing of the originating process.

INNOVATIONS:

Dispensing With Written Addresses

Perhaps in a bid to encourage oral advocacy, and/or promote case management through effective control of the 'motions' in the daily grind of litigation, the new Rules now endow the Judge with 'the power to dispense with the filing of written address where the interest of justice so demands' (O. 22 r.1 (b). The intent here is made more acute with the deletion of O.22 r.2 of the 2009 Rules which made it mandatory that 'The Court shall at the trial of any case whether by writ or originating summons, petitions, originating motion or otherwise order the filing of written addresses by the parties in support of or in defence to a claim'

E-courts: Electronic Filing and Hearing

The future of courtroom hearing is here. Electronic filing was introduced into the 2009 Rules even though, on account of infrastructure challenges, never really took off (well, not fully). A proactive approach in aiming for a 'paperless courtroom' has nonetheless guided the inclusion of more innovative provisions in O.58 dealing with electronically filed processes. O.58 now provides for the use of technology for the filing of court processes; hearing (calling in aid such electronic means); signing of such electronically filed documents (O.58. r.8 & 9) and dealing with e-filed processes affected by technical failure or power outage.

Affidavit verifying that action is not an improper use of the judicial process

O.3. r. 3 (1) (f) and O.3 r.9 (1) (f) are new provisions requiring the litigant, in filing his originating process, to swear to an 'affidavit of non-multiplicity of action on the same subject matter'. There is clarity in the intent to nip in the bud the worrisome trend of multiple court actions on same subject matter with their attendant stress on the dockets of the courts and the justice delivery sector. The argument is also potent in that it creates an avenue for invoking applicable sanctions against defaulting litigants and erring counsel.

A significant matter to note here though is that where an action is filed without any of the listed frontloaded papers, '…such an originating process shall not be accepted for filing by the registry'. To give proper effect, the 'penal' provision should have been worded to nullify the defective process; as court processes, a pile of those, sometimes casually make it through the din of routine filing at the registry of the court, even where there has not been strict compliance with the frontloading requirements. Relatedly, there is high authority in the reported decision of Spog Petrochemicals Limited & Anor v Pan Peninsula Logistics Limited (2017) LPELR-41853 (CA) where an objection was raised, inter alia, as to an inherent defect in the pre-action protocol form filed by the claimant.

The provision of Order 3 Rule 3 of the 2012 High Court of Lagos State (Civil Procedure) Rules was in sharp focus. The Court of Appeal, amongst other reasoned answers to the main issues for determination, held that the provision of the Lagos Rules 'did not say that failure to accompany a writ of summons with any one of the processes listed in Sub-rule (1) would render an otherwise valid writ incompetent…the provisions only provide that where writ was not accompanied by all the processes listed therein, it shall not be accepted for filing by the Registry. However, once accepted and assessed by Registry of the Court and the requisite fees paid by the claimant and duly filed, the consequence of any non-compliance with the provisions cannot go to affect the validity and competence of the writ.' (Per Nimpar JCA)

The decision under reference might have informed the intendment of the draftsman in deleting the referenced provision of the 2012 Lagos Rules from the 2019 Lagos Rules, and in its place, Or. 5 r. 1(3) and r. 5(4) (on Form and Commencement of Action) specifically provide that failure to comply with the provision as to frontloading shall nullify the action.

Miscellany
Happily, the potential scope of the rule in MV Arabella (from the reported case of 'Owners of the MV ‚Arabella' vs. Nigerian Agricultural Insurance Corporation reported in (2008) 11 N.W.L.R (Pt. 1097) 182) and the spate of objections that permission of court ought be sought and had before an action can be properly issued outside the territorial jurisdiction of the Federal High Court for service in another territorial jurisdiction of the selfsame Federal High Court has now been sounded a final death kneel with the insertion in the Interpretation Section to Order 6 of the new Rules that 'service out of jurisdiction' means out of the Federal Republic of Nigeria, and more importantly, 'that an originating process or Court process filed by any party before the Court shall be served on any other party in any part of the Federation without the leave of Court' (O. 6 r. 31 (1) & (2). The provision well accords with the decision of the apex Court in Appeal No. SC. 341/2019 John Hingah Biem v Social Democratic Party & 2 Others, in which judgment was delivered on Tuesday, 14 May 2019.

Time to promptly raise objection to jurisdiction of the court is 30 days from the receipt of the originating process O.29 r. 4, as opposed to the 21 days stipulated for same under the 2009 Rules.

O. 46. R. 8 is a new provision, more of an administrative procedure, on assigning Judges for hearing of causes or matters during vacation and in other judicial divisions.

Whilst not expressly restricting number of pages for written address, O.22 r. 5(2) now allows the Judge to 'guide counsel on the volume or limit of their address'.

In computing payment to be made for default in performing an act within the time stipulated by the Court or the Rules, O.48 r. 4 refers to Appendix 2 to the Rules for clarity.

Considered primarily in the context of ensuring proper service on, and securing attendance of witness subpoenaed, O.20 on 'Evidence Generally' (which, lest the argument is made that the Court lacks the 'legislative competence' to make rules on Evidence by virtue of the subject matter being on the exclusive legislative list, is merely complementary and not altering or departing from the provisions of the applicable legislation) has new provisions in O. 20 r. 24. Where the evidence required involves inspecting and taking copies of entry in a banker's book, an ensuing order of Court enabling that, 'must be served at least three days before the same is to be obeyed.' O.20 r. 35.

In making for a civil justice system that is more responsive to the needs of litigants (and lawyers, alike), the content of the Rules are more readable and user-friendly. The new Rules, in several parts succeed in simplifying the use of language, avoiding incorrect shift in tenses, the use of the definite article; and, in making for precision and consistency of meanings, employing the use of the active voice to clarify the obtuse, passive occurrences in several of the provisions of the 2009 Rules. Thus, for instance, 'There shall be no demurrer.' (O.16 r.1) now replaces 'No demurrer shall be allowed.' (2009 Rules).

All said, the new Rules are a welcome development in the regime of practice and procedure in the Federal High Court, particularly in the areas of access to justice and streamlining of the courts' workload in an increasingly efficient way. They can however be improved on, more acutely in the noticeable gaps or areas such as:
The provision of the 2009 Rules endowing the Court with the power to dismiss a matter called up for hearing but for which the plaintiff does not appear (O.19. r.3) has been deleted/omitted, even as the new O.19 r.3 is inelegantly drafted (clerical slip and all) to intend the consequence of striking out.

O. 20 r. 36 of the new Rules is substantially the same as the provision of O.20 r. 34 of the 2009 Rules. The pitfall here is the verbatim reproduction of 'provisions of section 97 of the Evidence Act relating to the proof of an entry in a banker's book 'from the 2009 Rules. The provision under reference can now be found in Section 89(h) of the extant 2011 Evidence Act, which replaced Evidence Act, Cap. E14, Laws of the Federation of Nigeria, 2004.
The inelegant drafting of some of the provisions that have survived successive Rules of the Court, for instance, the cumbersome provisions relating to steps in effecting service outside jurisdiction (that is, outside Nigeria) in O.6 of the Rules.

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