

**PROCEEDINGS UNDER THE FUNDAMENTAL RIGHTS
(ENFORCEMENT) PROCEDURE RULES 2009**
A PAPER DELIVERED BY
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PROTOCOLS:

INTRODUCTION:

Fundamental Rights are generally regarded as those aspects of human rights which have been recognized and entrenched in the Constitution of a Country. They are specially provided for to enhance human dignity and liberty in every modern state. See; **E.F.C.C VS AKINGBOLA (2015) 11 NWLR (PT. 1470) PG. 249 AT 290.**

In **ODOGU V. A.G OF THE FEDERATION (1999)6 NWLR (Pt. 456) Pg. 508 (a) 552**, the Supreme Court defined Fundamental Rights as follows:

“Fundamental Rights is a right guaranteed in the Nigerian Constitution and can be found entrenched in a particular chapter there in i.e. chapter IV. It follows therefore that for an applicant to successfully institute an action under the Fundamental Rights (Enforcement Procedure) Rules, the claim must fall within sections 33-44 of the 1999 constitution being the sections under chapter IV of the said 1999 Constitution.”

Also in **UZOUKWU & ORS V. EZENU II & ORS (1991)6 NWLR (PT200) P. 708 (a) 761**, the Court of Appeal per Hon. Justice Mamman Nasir, PCA (as he then was) held:

“Due to the development of constitutional law in this field, distinct difference has emerged between ‘Fundamental Rights’ and ‘Human Rights’. It may be recalled that human rights were derived from and out of the wider concept of natural rights. They are rights which every civilized society must accept as belonging to each person as a human being. These were termed human rights.....Fundamental Rights remain in the realm of domestic law. They are fundamental because they have been guaranteed by the fundamental law of the country; that is by the Constitution.”

The fanciful distinction between Fundamental Rights and Human Rights in the above celebrated case has been overtaken by the introduction of the Fundamental Rights (Enforcement Procedure) Rules 2009.

The 2009 Rules was made by the then Chief Justice of Nigeria, Hon. Justice, I. L. Kutigi, CJN (as he then was) pursuant to S. 46 (3) of the 1999 Constitution, which empowers the Chief Justice of Nigeria to make Rules with respect to practice and procedure of a High Court for the purpose of Enforcement of Fundamental Rights. Flowing from the above, breach of Fundamental Rights in Nigeria can now be redressed under the Fundamental Rights (Enforcement Procedure) Rules, 2009.

OBJECTIVES OF THE 2009 RULES

Under paragraph 3 (a) of the preamble to the FREPR, human rights instruments “shall be expansively and purposely interpreted and applied, with a view to advancing and realising the rights and freedoms contained in them and affording the protections intended by them.” In this vein, Judges must constantly remind themselves of **Lord Denning’s admonition** to the effect that “the English language is not an instrument of mathematical precision” in consequence of which “a Judge should not

be a mere mechanic in the power house of semantics. See *SEAFORD COURT ESTATES LIMITED V. ASHER (1949) 2 K.B. 481 AT 498-499*. He should be the man in charge of it.” Judges should, therefore, resist the temptation to sacrifice justice on the altar of technicalities.

Paragraph 3 (b) of the preamble to the FREPR 2009 provides that, for the purpose of advancing but never for the purpose of restricting an applicant’s rights, courts with jurisdiction over human rights cases “shall respect municipal, regional and international bills of rights”. Concomitantly, while the determinations/decisions of foreign, regional and international human rights institutions and mechanisms are not binding on Nigerian courts in every situation, the “respect” language entails that, absent a compelling imperative, the latter should give effect to those determinations/decisions.

Under paragraph 3(d) of the preamble to the FREPR 2009, courts with jurisdiction over human rights cases “shall proactively pursue enhanced access to justice for all classes of litigants, especially the poor, the illiterate, the uninformed, the vulnerable, the incarcerated, and the unrepresented.”

Under paragraph 3(e) of the preamble to the FREPR 2009, courts with jurisdiction over human rights cases “shall encourage and welcome public interest litigation.”

Paragraph 3 (g) of the preamble to the new Rules directs courts handling human rights cases to give priority “in deserving cases” to those suits, relative to other cases, and “where there is any question as to the liberty of the applicant or any other person, the case shall be treated as an emergency.”

INFRINGEMENT THAT CAN BE ENFORCED UNDER THE 2009 RULES:

It seemed that the procedure under the 1979 Rules could only be resorted to in respect of Fundamental Rights contained in Chapter IV of the 1999 Constitution and cannot therefore be used in respect of a matter which was not within the ambit of the Chapter.

Though this has not changed under the 2009 Rules but there is now an enlarged list of Fundamental Rights that may now be enforced under the procedure by virtue of the provision of Order I Rule 2 of the 2009 Rules which provides that:

“Fundamental Right means any of the rights provided for in chapter IV of the Constitution and includes any of the rights stipulated in the African Charter on Human and peoples’ Rights (Ratification and Enforcement) Act.”

The African Charter on Human and Peoples’ Rights was ratified and re-enacted as a Municipal Law by the National Assembly on 17th March, 1983. The Charter became part of Nigerian Law by virtue of the African Charter on Human and Peoples’ Rights (Application and Enforcement) Act cap.10 Laws of the Federation, 1990.

Thus, infringement of the Fundamental Rights embodied in Chapter IV of the 1999 Nigerian Constitution as amended as well as those spelt out in Chapter 1 of the African Charter on Human and Peoples’ Rights, in so far as they are not similar to those listed under Chapter II of the 1999 Constitution which has been declared non-justiciable, are enforceable under the 2009 Rules.

FUNDAMENTAL RIGHTS UNDER CHAPTER IV, OF THE 1999 CONSTITUTION (AS AMENDED):

The right to life is provided under **Section 33 (1)**. It is obviously the most fundamental of all rights because other rights can only be exercised by a person who is alive. The Section, nevertheless, subjects this right to the execution of a death sentence of a Court of law in respect of criminal offence of which one has been found guilty.

Section 34 provides for the right to the dignity of human person. The said Section provides for what would amount to inhuman treatment to include torture, slavery, and compulsory labour.

Right to personal liberty is also guaranteed by the provisions of **Section 35**. The word '**liberty**' has been defined to mean freedom from arbitrary or undue external restraint especially by a government.

Section 36 provides for the right to fair hearing. The concept of fair hearing is synonymous to Natural justice which is anchored on the twin pillars of *Nemo iudex in causa sua* and *Audi alteram partem*.

Right to privacy is provided under **Section 37** while **Section 38** provides for Freedom of thought.

The right to freedom of expression and press is provided under **Section 39** while **Section 40** guarantees the right to peaceful assembly and association.

Section 41 provides for freedom of movement. This guarantees every citizen to move freely through Nigeria and to reside in any part thereof.

Section 42 provides right to freedom from discrimination. The unacceptable acts which the Constitution forbids are when the

discrimination is based on a citizen's ethnic group, place of origin, sex, religion, political opinion or the circumstances of one's birth.

The right to own immovable property anyway in Nigeria is guaranteed under **Section 43**.

SOME FUNDAMENTAL RIGHTS UNDER THE AFRICAN CHARTER ON HUMAN AND PEOPLE'S RIGHT:

Article 3 (1) & (2) provides for equality before the law and equal protection of all individuals before the law respectively.

Article 4 guarantees the right of every human being to respect for his life and integrity of his person.

Article 5 provides that every individual should have the right to the respect of the dignity inherent in human being.

Article 6 provides that every individual should have the right to liberty and to the security of his person.

Article 7 provides that every individual shall have the right to have his cause heard.

Article 8 provides for freedom of conscience, the profession and free practice of religion.

Article 9 guarantees the right of every individual to receive information to express and disseminate their opinions within the law.

Article 10& 11 provides for the right to free association and the right to assemble freely with others respectively.

Article 12 guarantees the right to freedom of movement and residence within the borders of a State, right to leave one's Country and to return to his Country, right to seek asylum in other Countries when persecuted.

Article 13 provides for the right to participate freely in the government of his Country, right of equal access to the public service of his Country.

Article 14 provides for right to property.

Article 19 guarantees equality of all people, etc

SUMMARY OF SOME PROVISIONS OF THE 2009 RULES:

These present Rules marked new vistas in the enforcement of Fundamental Rights in Nigeria. It removed some of the hurdles placed on the way of Fundamental Rights enforcement. Before I highlight those innovations, it is expedient that I attempt a brief summary of the Fundamental Rights (Enforcement Procedure) Rules, 2009.

The burden to show that a fundamental right has been breached lie on the applicant. See **OKANU VS IMO STATE COMMISSIONER OF POLICE (2001) 1 CHR 407 AT 410.**

CAUSE OF ACTION

By the provisions of Order II Rule 1, any person who alleges that any of the Fundamental Rights provided for in the Constitution or African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act and to which he is entitled, has been, is being, or is likely to be infringed, may apply to the Court in the State where the infringement occurs or likely to occur, for redress; and by the proviso to this Rule, where the infringement occurs in a State which has no Division of the Federal High Court, the Division of the Federal High Court Administratively responsible for the State shall have jurisdiction.

MODE OF COMMENCEMENT

An application for the enforcement of the Fundamental Right may be made by any originating process accepted by the Court which shall lie

without leave. This is one of the innovations under this Rule as under the 1979 Rules, leave of the Court was necessary to apply for the enforcement of the Fundamental Rights. See the cases of:

UNIVERSITY OF CALABAR VS ESIAGA (1997) 4 NWLR (PT. 502) 719.

REGISTERED TRUSTEES OF THE FAITH TABERNACLE CONGREGATION CHURCH OF NIGERIA & ORS VS ABEL UCHE IKWECHEGH (2000) 1 WRN 134 AT 140.

The originating process shall be supported by a statement setting out the name and description of the applicant, the relief (s) sought, the grounds upon which the reliefs are sought and supported by an affidavit setting out the facts upon which the application is made. See Order II Rules 2 and 3. See **E.F.C.C VS AKINGBOLA (2015) 11 NWLR (PT..1470) PG. 249 AT 289.**

Order II Rule 4 allows any person who has personal knowledge of the facts or who has been informed of the facts by the applicant to swear to the affidavit.

By Order II Rule 5, 6 & 7, the application shall be accompanied by a written address followed by a Respondent's written address and a counter affidavit (if necessary) within 5 days. The applicant also has an option of filing a written address on point of law and a counter affidavit within 5 days of service on him of the Respondent's address. **This in my view will Fast Tracks Human Rights Litigation through Frontloading.** See; **E.F.C.C VS AKINGBOLA (SUPRA).**

It is worth noting that by the provisions of Order III, an application for the enforcement of Fundamental Rights is not affected by any limitation

of Statute whatsoever. Thus, it can be brought any time irrespective of the time the act constituting the breach was committed.

GENERAL CONDUCT OF THE PROCEEDINGS

The 2009 Rules taking into consideration the fact that justice delayed is tantamount to justice denied provided in Order IV that the hearing of the application shall be fixed within 7 days from the day the application was filed and that hearing of the application may from time to time be adjourned where extremely expedient.

By Order IV Rules 2, the hearing of the application may from time to time be adjourned where extremely expedient, depending on the circumstances of each case or upon such terms as the court may deem fit to make, provided the court shall always be guided by the urgent nature of application under these Rules.

EX PARTE APPLICATION

Order IV Rule 3 of the rules provided that The Court may, if satisfied that exceptional hardship may be caused to the Applicant before the service of the application especially when the life or liberty of the applicant is involved, hear the applicant *ex parte* upon such interim reliefs as the justice of the application may demand.

- (a) The application *ex parte* under this Order shall be supported by affidavit which shall state sufficient grounds why delay in hearing the application would cause exceptional hardship;
- (b) A party moving the Court *ex parte* may support the application by argument addressed to the Court on the facts put in evidence;
- (c) Where the application is made *ex parte* for interim reliefs, the court may make the following orders;

- (i) Grant bail or order release of the Applicant forthwith from detention pending the determination of the application;
- (ii) Order that the Respondent against whom the order for the release of the applicant is sought be put on notice and abridge the time for hearing the application;
- (iii) Order the production of the Applicant on the date the matter is fixed for hearing if the Applicant alleges wrongful or unlawful detention.
- (iv) Grant Injunction restraining the Respondent from taking further steps in connection with the matter or maintaining *status quo* or staying all actions pending the determination of the application;

(v) Any other order as the Court may deem fit to make as the justice of the case may demand. See **E.F.C.C VS AKINGBOLA (2015) 11 NWLR (PT..1470) PG. 249 AT 289.**

By Order IV Rule 6, where an order is made on a motion *ex parte*, a party affected by it may within seven days after service of the order, or within such further time as a Court may allow, apply to the Court by motion to vary or discharge it; and the Court may, on notice to the party obtaining the order, either refuse to vary or discharge it with or without imposing terms as to costs or security, or, as may seem just.

SERVICE OF COURT PROCESS

The rule under Order V provides that service of the originating application or order of Court shall be done by a Sheriff, Deputy Sheriff,

Bailiff or other officer of the Court. The application must be served on all parties directly, so long as a service duly effected on the Respondent's agent will amount to personal service on the Respondent.

Service of the application and other processes, notices, summons, orders and documents whatever shall be effected between the hours of six in the morning and six in the evening. Save in exceptional circumstances and as may be authorised by a Court, service shall not be effected on Sunday or public holiday.

SUBSTITUTED SERVICE

Where it appears to the Court, either after or without an attempt at personal service of the Court processes that for any reason personal service cannot be conveniently effected, the Court may order that service be effected either –

- (a) By delivery of the document to an adult person at the usual or last known place of abode or business of the party to be served; or
- (b) By delivery of the document to some person being an agent of the party to be served, or to some other person, on it being proved that there is reasonable probability that the document would in the ordinary course, through that agent or the person, come to the knowledge of the party to be served; or
- (c) By delivery of the document to any senior officer of any Government agency that has office both in the State where the breach occurred and head office either in the Federal Capital Territory or elsewhere; a service on the

- agency through its office in any state where the breach occurred will be considered as sufficient service; or
- (d) By advertisement in the Federal Government *Official Gazette*, or in some newspapers circulating within the jurisdiction; or
 - (e) By notice put up at the principal Court House of, or some other place of public resort in the Judicial Division where the proceedings in respect of which the service is made is instituted, or at the usual or last known place of abode, or business, of the party to be served.

If on the hearing of the application the Court is of the opinion that any person who ought to have been served with the application has not been served, whether or not the person is one who ought to have been served, the Court may adjourn the hearing on such terms, if any, as it may direct in order that the application may be served on that person.

HEARING OF THE APPLICATION

By the provisions of Order VI, grounds or relief not contained in the Statement shall not be relied upon at the hearing of the application. However, the Court may at the hearing of the application allow amendment of Statement and further affidavit to be used if they deal with new matters arising from the counter affidavit of any party to the application. The application for amendment shall be supported by an exhibit of the proposed application to be amended and may be allowed by the Court upon such terms or otherwise as may be just.

Order VI Rule 4 abhors lackadaisical attitude of litigants and Counsel by providing that amendment shall be deemed abandoned where a party fails to comply with an order of amendment within the time allowed by the order of Court.

CONSOLIDATION OF SEVERAL APPLICATIONS RELATING TO SAME INFRINGEMENT

Order VII empowers the Court to consolidate several applications and determine them jointly and/or severally in the consolidated suits where the applications relate to the infringement of a particular fundamental right in respect of the same matter and on the same grounds although they may be pending against several persons. It must be noted that Consolidation can only take place on the application of the applicant. See **GBENGA KOMOLAFE VS AGF 1 NPILR 407**.

Where applications are pending before different Judges, the Applicant shall first apply to the Chief Judge of the Court for re-assignment of the matter to a Judge before whom one or more of the matters are pending. The Applicant must show that the issues are the same in all the matters before the application for consolidation may be granted by the Court.

APPLICATION TO SET ASIDE PROCEEDING

By order VIII, a Notice of Preliminary Objection challenging the Court's jurisdiction to hear an application may be filed by the Respondent. The Notice of Preliminary Objection must be filed along with the counter affidavit to the main application; failure of which the Court shall presume that the Respondent has accepted the facts as presented by the

Applicant. The Preliminary Objection shall be heard along with the substantive application at the date of hearing.

The Court after hearing the application may make any of the following orders:

- (a) Striking out the application for want of jurisdiction; or
- (b) Setting aside the service of the originating application.

Where the Court does not decline jurisdiction, the Court shall go ahead to give its Ruling on the substantive application.

EFFECT OF NON COMPLIANCE

The provisions of Order IX states that noncompliance with the requirement to time, place, manner or form in the proceedings under this Rule shall be treated as an irregularity and may not nullify such proceedings except as they relate to;-

- a. The mode of commencement of the application;
- b. The subject matter is not within Chapter IV of the 1999 Constitution; or
- c. The African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act.

HOW TO COMMENCE APPLICATION TO QUASH ANY PROCEEDINGS

Order X provides that in the case of any application for an order to remove any proceedings for the purpose of their being quashed, the applicant may not question the validity of any order, warrant, commitment, conviction, inquisition or record *unless* before the hearing of the application he has served a certified copy thereof together with a

copy of the application on the Attorney-General of the Federation or of the State in which the application is being heard as the case may be, or accounts for his failure to do so to the satisfaction of the Court hearing the application. See **MAJOR GENERAL ZAMANI LEKWOT & ORS JUDICIAL TRIBUNAL ON CIVIL AND COMMUNAL CRISIS IN KADUNA STATE (1997) 8 NWLR (PT.515) 22 AT 35.**

Where an order to remove any proceedings for the purpose of their being quashed is made, in any such case, the order shall direct that the proceedings shall be quashed forthwith upon their removal into the Court which heard the application.

HEARING OF THE APPLICATION

By Order XII, hearing of the application shall be on the parties' written addresses and oral argument of not more than twenty minutes shall be allowed to each party on matters not contained in the written addresses provided such matters came to the knowledge of the party after he had filed his written address. See **E.F.C.C VS AKINGBOLA (2015) 11 NWLR (PT..1470) PG. 249 AT 299.**

ABSENT OF EITHER OF THE PARTIES AT THE HEARING OF THE APPLICATION

When all the parties' written addresses have been filed and come up for adoption and either of the parties is absent, the Court shall either on its own motion or upon oral application by the Counsel for the party present, order that the addresses be deemed adopted if the Court is satisfied that all the parties had notice of the date for adoption and a

party shall be deemed to have notice of the date for adoption if on the previous date last given, the party or his Counsel was present in Court.

RIGHT OF ANY OTHER PERSON TO BE HEARD

Order XIII allows a person or body who desires to be heard and who appears to the Court to be a proper party to be heard may be heard, whether or not he has been served with any of the relevant processes and whether or not he has any interest in the matter. It also encourages opinions from *Amici Curiae* if the Court's business allows it. See **HOFFMAN VS SOUTH AFRICAN AIRWAYS (2001) 38 WRN 147.**

By Order XIV disobedience to any order or direction made or given by the Court in pursuance of an application under the Rules is punishable with contempt.

PENDING APPLICATIONS UNDER THE 1979 RULES

From the commencement of these Rules the Fundamental Rights (Enforcement Procedure) Rules 1979 are hereby abrogated. However, all pending Human Rights applications commenced under the 1979 Rules shall not be defeated in whole or in part, or suffer any judicial censure, or be struck out or prejudiced, or be adjourned or dismissed, for failure to comply with these Rules provided the applications are in substantial compliance with the Rules. Such pending Human Rights applications may continue to be heard and determined as though they have been brought under these Rules.

INSTANCES NOT COVERED BY THESE RULES

Where in the course of any Human Rights proceedings, any situation arises for which there is or appears to be no adequate provision in these Rules, the Civil Procedure Rules of the Court for the time being in force shall apply.

CONCLUSION/OBSERVATIONS:

It is glaring that the requirement of leave which was a *sine qua non* under the 1979 Rules has been dispensed with. Order II Rule 2 of the 2009 Rules dispenses with the prior requirement that an application for the enforcement of fundamental rights must commence with leave of court. Under the new Rules, such applications shall “lie without leave of Court.” This will hopefully save valuable time and also redirect the court’s attention to the merits of the application. This has liberalized the procedure as technical objection on originating process will no longer be entertained.

Under the 1979 Rules, an application for the enforcement of fundamental rights could only be effected through motion or summons. However, Order II Rule 2 of the 2009 Rules provides that an application for the enforcement of fundamental rights “may be made by any originating process accepted by the Court...” This reposes considerable discretion on judges which they must, in turn, exercise in a manner consistent with the overarching thrust of the new Rules.

Another innovation in this Rule is the provision that application shall be accompanied by a Written Address. This is in tune with the trend of quick dispensation of justice adopted by most Rules of Court.

The Statute of Limitation under the 1979 Rules which requires commencement of an application within 12 months of occurrence is also no longer applicable under this Rule. The 2009 Rules is also expansive in nature as no application shall be dismissed on grounds of lack of locus standi.

From the above it is clear from the above that the general thrust and policy of the new Rules includes the following among others:

1. To ensure speedy and expeditious dispensation of justice in Human Rights Cases.
2. To ensure the simplification and liberalisation of Human Rights procedural rules.
3. To eliminate all inordinate delays and technicalities which have hitherto bedeviled the enforcement of the Fundamental Rights of Litigants.
4. To give Human Rights Cases overriding precedence and priority over all daily business of the court.
5. To guarantee increased and unlimited access to court for litigants seeking to enforce their Fundamental Rights;
6. To ensure that the court expansively construe the provisions of the Constitution and other Human Rights Provisions.
7. To ensure that the rights of the populace are not whittled down in any way.

Thank you for listening.

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JUSTICE, COURT OF APPEAL

