PRE-TRIAL CONFERENCE AND CASE MANAGEMENT:

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By

Hon. Justice Cyprian O. Ajah, Ph.D[1]

SALUTATIONS

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I must not fail to register my gratitude to the Management and staff of N.J.I for keeping the flag of success of this great citadel of judicial learning flying notwithstanding the harsh financial, environmental and health climates.

To you all I say thank you.

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[1] ***LL.B (Hons), BL, LL.M,. Ph.D, FIIA, KSM, Judge, Enugu State High Court of Justice. Formerly Director of Research and also Director of Studies of The National Judicial Institute, Abuja.***

1. WHAT IS PRE-TRIAL CONFERENCE:

Pre-trial Conference is a meeting of the parties to an action and their attorneys held before the court prior to the commencement of actual courtroom proceedings.

The conference is held before the Trial Judge. A pre-trial conference may be requested by a party to the Suit or it may be ordered by the court. It's an informal meeting at which opposing counsel confer with the Judge to work towards the disposition of the case by discussing matters of evidence and narrowing the issues that will be tried. The conference takes place shortly before trial and ordinarily results in a pre-trial orders.

Pre-trial conference procedure can only take place after the close of pleadings or as specified under the relevant High Court Civil Procedure Rules. See ***PRINCE CLETUS KPEKON VS. MAURICE PROWEN & ORS (2011) LPELR 9777 (CA),***

Functions of Pre-trial Conference

Under the old High Court Rules of the various States and the FCT, the only way for progressing in a case after the close of pleadings was the 'Summons for Direction.' This method was found to be inefficient and cumbersome to operate and for that reason it was not much used .In the turn of the new millenium, States began to introduce the new method of progressing a case after the parties have closed their pleadings. This new method is called the Pre-trial conference, which is evidently inspired by the procedural reforms adopted in England pursuant to the Woolf reports.

In most jurisdictions where it is in use, pre-trial conference provides an occasion for the parties and their lawyers to sit down with the judge for the purpose of reviewing a case and

determining its future conduct[2]. The broad purpose of pre-trial conference is to strip of a case all confusing and extraneous issues so that the real issues in dispute may be identified for trial and efficient determination. This is why, in jurisdictions where pre-trial is not compulsory, it is nevertheless favuored in the more complex cases involving medical malpractice, products liability, etc. Conversely, such jurisdictions permit a Waiver in more straight forward cases of pre-trial. There, the parties may, after the filing of the answer, advise the court that the matter should not be subject to pre-trial rules of the court and give reasons why the court should order a waiver. If the court grants the waiver, parties then meet so as to prepare and file a comprehensive discovery schedule that will permit trial to be set as soon as possible. This option is however not expressly made available under the various High Court Rules in Nigeria.

In contrast to the summons for direction, the defining characteristic of pre-trial conference is that it gives the presiding judge the primary responsibility for progressing a case from the pretrial stage to trial. Pre-trial conference also provides the parties and the presiding judge with an opportunity to consider whether the case is suitable for settlement or resolution by Alternative Dispute Resolution (ADR). In that regard, the judge is conferred with the power to make orders on a wide range of interlocutory applications. This enables the judge, to some extent, to shape the content of the case presented by the parties at trial.

It should be noted at this stage that while the front loading requirements of the various High Court Rules in Nigeria make it possible for pre-trial conference to follow closely upon the close of pleadings, other jurisdictions, especially in the USA, provide for another conference which takes place even before pre-trial. This

[2] In the family court or Australia for instance, pre trials are conducted by a Deputy Chief Registrar. Who is a lawyer, merely to determine whether the case can be resolved and, if not whether it is ready for trial. Apart from setting the trial date in appropriate circumstances, the Deputy Registrar gives directions for the further filing, of documents and considers what other steps must be taken to ensure that the case goes on trial date. Where cases arc resolved at pre-trial. The Deputy Registrar is permitted to make consent orders only in terms of the parties' agreement.

is variously referred to as 'early meeting' or 'case management', 'planning' or 'status' conference, depending on the particular jurisdiction. The major function of the early meeting is to schedule all pre-trial activities and set a tentative trial date. In many instances, counsel on either side is also permitted to schedule mandatory mediation anytime between the early meeting and the pre-trial conference[3], which invariably makes it possible for all motions, except motions *in limine,* to be filed and heard prior to the pre-trial conference[4].

The pre-trial conference itself is sometimes bifurcated in many jurisdictions. In that case, the first part attempts a settlement and, if that fails, then an 'issue conference' follows whereby lawyers appear (usually without their clients) and try to agree on undisputed facts or points of law[5]. However, the new High Court Rules of Enugu State do not, as we shall show presently, make such a formal division of the pretrial activities, though it provides that pre-trial conference can be adjourned from day to day. Almost all the High Court Rules of the various states and the FCT contain similar provisions as regards pre-trial conference. What may differ may be the Order it is contained and the name it is called. For the purposes of this paper, I will be using the Enugu State High Court Rules, 2020, which came into force on 1st December, 2020, as the point of reference.

In the said Enugu State High Court Rules, 2020, pre-trial conference is provided

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[3] See for instance Rules of the Circuit Court of Florida. Counsel may even request a without prejudice settlement conference in lieu of pre trial. In about 28 States in the USA, court annexed ADR is made compulsory in certain cases, e.g., child custody proceedings. In such situations the ADR process holds the added benefit of helping the parties to avoid publicity.

[4] Early meetings in California, USA, are occasions for resolving issues of subject matter jurisdiction, statutes of limitation, personal jurisdiction or venue requirements or other defences that might dispose of the action without trial on the merits. The Attorneys also use the occasion to agree on facts that they know or have reason to know there can be no dispute about; exchange exhibits and list of witnesses; designate expert witnesses; make all discoveries.

[5] The rules applicable in Illinois, US courts provide for a 'final pre trial or settlement conference at which Attorneys for each party "shall be prepared to exhaust any possibility of settlement and discuss all issues remaining prior to trial. In this case, it is further provided that "Counsel responsible for conducting the trial shall appear with full authority of their clients to discuss each Issue.

for in Order 25 of the Rules.

Practical Operation of Pre-trial Conferencing.

The Pre trial Information sheet

Within 14 days after the close or pleadings, the plaintiff, or claimant, shall prepare a Pre-trial proceedings as in Civil Form 17. This notice informs the parties of the date of pre-trial conference hearing and its purpose. This Notice must be accompanied by the pre-trial Information Sheet as in Form 18 which sets out a number of questions. The parties must put their answers on the Information Sheet. The parties are also required to serve a copy their answers on each other. The Information Sheet is for such purposes as follows:

1. Disposal of matters which must or can be dealt with on interlocutory applications;
2. Giving such directions as to the future course of the action as appear best adapted to secure its just, expeditious and economical disposal;
3. Promoting amicable settlement of the case.

As will be will be shown later, the questions on the pre-trial information sheet are designed to elicit such facts as will enable court, counsel and the parties to focus on the case and plan beforehand what needs to be done at the conference. This brings us to the question as to whether parties can supply information other than that expressly required in the pre- trial information sheet.

Can parties include more information on Form 18?

The information to be supplied in Form 18 should, in our view, be very detailed. For instance,

under the English Court of Queen's Bench Rules, the parties are obliged to state, at this stage, an estimated time required for the pre-trial conference as well as for the main trial. This assists the court in the task of setting an appropriate trial timetable.

Also, in most US jurisdictions, parties must inform the court of any audio-visual or other multi-media technology they intend to use, if any. Where interpreters are required, including sign language interpreters for the deaf, parties may also proffer the name, address and telephone number of the certified interpreter service they intend to use.

Though specific questions are asked on them, there is nothing to suggest that these and other relevant information cannot be supplied by the parties under the Rules. It is clear that the information required in the pre-trial information sheet are those that would facilitate an effective conference. The questions on the pre-trial information sheet should therefore not be taken as exhaustive of the requirements if the true intent of the rules is to be achieved. Of course all the information will only be useful if the court registry and the judge do study the details so as to make necessary preparations before the date of conference.

Filing and Service of Interlocutory Applications to Precede Pre-Trial Conference

In addition to their written answers, all parties are expected file and serve on other parties all applications in respect of matters to be dealt with before trial, including but not limited to the matters listed in response to the questions on Form 18[6]. This is a radical and extremely important move to speed up the civil litigation process. Obviously, the more the parties adhere to the explicit requirements of these rules, the better their chances of having their case properly managed and timeously resolved. With applications filed and served before

[6] This rule is found only in Form 18.

pre-trial sittings, contentious procedural and technical objections, which used to bog down trial proceedings can be easily identified and dealt with as early as possible[7].

Pre-trial Conference Agenda

Consistent with these broad objectives, at the first conference Order 25 rule 3 requires the judge to *"consider and take appropriate action"* with respect to such as of the following (or aspects of them) as may be necessary or desirable:

(a) formulation and settlement of issues;

(b) amendments and further and better particulars;

(c) the admissions of facts, and other evidence by consent of the parties;

(d) control and scheduling of discovery, inspection and production or documents;

(c) narrowing the field of dispute between expert witnesses, by requesting their participation at pre-trial conference or in any other manner;

(f) hearing and determination of objections on point of law;

(g) giving orders or directions fur separate trial of a claim, counterclaim, set-off, cross-claim or third party claim or of any particular issue in the case;

(h) settlement of issues, inquiries and accounts under Order 27;

(i) securing statement of special case or law or facts under Order 28;

(j) determining the form and substance of the pre-trial order;

(k) such other matters as may facilitate the just and speedy disposal or the action.

Also, under Order 25 Rule 2, the judge is required to enter a Scheduling Order at the pre-trial conference, setting out a time frame for the accomplishment of the following:

[7] In Australia this process is strengthened by the requirement of a Compliance Certificate as a precondition of pre-trial. The certificate is a document indicating that a party has met all the orders in the Pre Trial Notice and is ready for pre-trial conference.

(a) joining other parties:

(b) amending pleadings or any other processes;

(c) filing motions:

(d) further pre-trial conferences; and

(e) any other matters appropriate in the circumstances or the case.

The open-ended category (c) would normally include admissions, objections on point or law, and other matters that normally arise by way of interlocutory application. Of course, the old Summons for Direction proceedings is now subsumed under Order 25 Rule 1 (b) which allows the judge to give such directions as to the future course of the action as appear best adapted to secure its just, expeditious and economical disposal. The obvious aim of all these is to ensure that when a case goes to trial it is indeed ready for trial. Ideally, all side skirmishes should have been settled and specific issues set down for hearing.

To the same end, the rules in most American jurisdictions go further to provide that all pending motions that are not called to the Judge's attention at the pre-trial conference shall be deemed abandoned and waived. However, the same rules allow such motions to be subsequently heard 'at the judge's discretion and for good cause.' In the absence of similar stipulations in the Enugu High Court rules, it would appear that counsel can request the hearing of his motion at any time unless such had been overtaken by events or he had done some other things from which a waiver can be clearly implied.

Can a party object to admissibility of evidence at pre-trial conference?

Order 25 Rule 2 enjoins the pre-trial conference to dispose of all those matters that can be dealt with on interlocutory application. Rule 3(c) and (I) also requires the pre-trial judge to "consider and take action appropriate action" with respect to the admissions of facts, and other evidence by consent of the parties as well as hearing and determination of objections on point or law. Obviously, in the course of considering admission of evidence by consent, admissibility contests would ensue and these would be based on objections on point of law. These are of course interlocutory contests that can only be dealt with on interlocutory application. There appears to be no reason why issues of admissibility of evidence should not be dealt with at the pretrial conference. However, my advice is that matters of tendering and admissibility of documentary evidence should be done during trial of the case. Parties can at the stage of pre-trial conference indicate their intention to object or not to object to the admissibility or non-admissibility of any of the documents pleaded and frontloaded by the other party.

Time Limit on Conference Sittings

As with other aspect or the pre-trial process, pre-trial conference id also subject to a time limit. Order 25 r 4 provides the pre-trial conference or series of pre-trial conferences with respect to any case shall be completed within 3 months of the close of pleadings. However, unlike the old rule that is so strict that the pre-trial judge is deprived of the power to extend the time, the present rule allows the pre-trial judge to extend the period of pre-trial beyond the 3-month period. It is also provided that the parties and their legal representatives shall co-operate with the judge in working within that time table.

It will be seen from this that, in the context of proceedings in the High Court, the era of

party control has come to an end. The Judge is under a duty to actively manage a case to ensure that it is fully prepared for hearing within the 3-month time limit applicable to the pre-trial phase. This is reinforced by Order 25 r 7 which provides that the Judge **"shall"** direct the pre-trial conference with due regard to its purposes and agenda as provided under this order and shall require parties or their legal practitioners to co-operate with him effectively in dealing with the conference agenda.

In view of the frontloading requirements of the new rules, the pre-trial Judge is particularly well placed to achieve these objectives. All information necessary for the disposal of the case are already before the Judge, including the evidence to be relied upon by all the parties to the dispute. Also, the participants are not put in a belligerent mode yet. The silting is informal. Parties are encouraged to be present with their counsel and no one (not even the pre-trial judge) is expected to be robed. In fact, the judge is expected to sit on the same level with the parties, as much as possible in a roundtable formation. However, in most cases pre-trial conferences are done in open court during the sitting of the court, due to time constraints. In such situations both the Judge and the counsel for the respective parties are robbed. A corporate body would normally appear by an officer or by an employee having knowledge of the subject matter of the case, although a party unable to appear by reason of illness or other disability may obviously he excused.

In all cases, the pre-trial judge is expected to be in full control of the proceedings throughout. Order 25 Rule 7 provides that the Judge shall direct the pre-trial conference with due regard to its purposes and agenda as provided under this order and shall require parties or their legal practitioners to co-operate with him effectively in dealing with the conference agenda.

Resolution of Cases and referral to ADR

Order 25 proceedings clearly envisage that many cases will terminate at the pre-trial stage, or that the scope of many disputes would have been narrowed as a result of the settlement of specific issues in the case. Thus, Order 27 Rule 2 allows the Judge at any time to order the whole cause or matter or any question or issue of facts arising therein to be referred to an official referee or officer of court. At the pre-trial conference, parties may also concur in stating the questions of law arising in their case in the form of a special case for the opinion of the Judge. In this case, the judge's ruling on the questions of law may well resolve or dispose of the whole case. Order 25 also envisages that ADR will play a prominent role in the pretrial phase or the litigation process. As we saw earlier, parties are expected not only to inform the court of efforts made towards alternative dispute resolution but also to give reasons if they have not done anything in that regard (Form 18).

This is an entirely novel aspect and gives rise to a number of legal and practical issues, especially as regards its compatibility with section 33 of the Constitution which guarantees fair hearing before a court or law. Nevertheless, the possibilities offered by the ADR mechanisms or pre-trial conference confront the obvious problem of trying to negotiate a settlement well after the parties have become entrenched in their positions, especially after having disbursed large sums of money to pay legal fees. If, in essence, the ADR process, or the outcome,

is voluntary and consensual[8], it appears that no legal objection can validly be raised against it.

At any rate, it is remarkable that more far reaching provisions are to be found on this subject in other jurisdictions. In British Columbia for instance, the judge or master may order or direct that the parties attend a mini-trial in which case the parties attend before a judge or master who will in private and without hearing witnesses, give a non-binding opinion on the probable outcome of a trial of the dispute. Alternatively, the Judge or Master is allowed to set up a settlement conference which the parties attend in private and without witnesses and at which all possibilities of settlement of outstanding issues are explored.

Order 25 Rule 8 of the Enugu State High Court Rules provides something similar to this. It provides as follows:

"8 (1) Subject to any law or Rules in force, the Judge may in appropriate cases during the pre-trial conference refer a matter to the Enugu State Multi-Door Courthouse or any other person or forum for amicable resolution of the case after which the terms of settlement duly signed by the parties and authenticated by the dispute resolution officer concerned shall be filed in court for the judge to adopt as a consent judgement.

"(2) Such consent judgement arrived at under sub-rule (1) above shall operate and be enforced as a judgement of the court."

The import of the above provision is very clear and unambiguous. It mandates

[8] In this regard. Rule 7.5 of the Miami County Municipal Court is commendable. It provides that statements of the parties or their counsel made in the course of any pre trial hearing shall not be binding upon the parties unless expressly made so by written stipulation in the course of pre trial.

judges to refer any matter that appears to be suited for ADR mechanisms to the Enugu State multidoor court house during the pre-trial conference. The judges have always done this and the results have been very positively heartwarming.

Is it mandatory for parties to be personally present at the pre-trial conference even when they are represented by counsel?

There is nothing in the rules that make it mandatory for parties to be present at the pre-trial conference once their Counsel is there. The Constitutional right to be fully represented by Counsel in a matter that affects one's rights and liabilities is one that the rules cannot take away.

Also, much of the matters to be discussed at pre-trial conference are legal issues best handled by the lawyers. However, the rules betray a clear expectation that parties would be present at pre-trials. Rule 6, which provides sanctions for non-attendance, and Rule 7 which provides for the Management of pre trials both refer to parties or their legal practitioners.

Attendance of parties is especially desirable in view of the need to promote amicable settlement or adopt alternative dispute resolution[9]. Also, the admission of facts and other evidence by consent of the parties, as required by Order 25 Rule 3 can be most effectively done when parties are on hand.

In this respect, the most important issue is the extent of authority granted to the

[9] Order 25 Rule (1)(2)(c).

lawyers. For instance, the Florida rules (USA) expressly state that each party shall be represented by an Attorney and/or persons who will participate in the trial of the cause and who is vested with full authority to make admissions and disclosures of facts and bind his or her client by agreement in respect to all matters pertaining to the trial of the matter, including settlement[10]. Also, it is also possible to require in clear terms that the pre- trial conference be attended by the counsel who will actually conduct the trial and that such counsel should be prepared to freely and openly discuss agreed facts, disputed facts, legal issues defences, conflicts and other preliminary application or matters. Once we have these provisions incorporated into our rules, the need to have parties in attendance would have
been minimized.

Can a Pre-trial Judge deliver Judgment in Conference (i.e., without reconstituting as a Court)

Under Order 25 Rule 6, if a claimant or his legal practitioner fails to attend the pre-trial Conference, or obey a pre-trial order, or is substantially unprepared to participate in the conference or fails to participate in good faith, the judge may dismiss the claim or, in the case of the defendant, enter judgment against him. Judgment may also result where the Pre-trial Judge holds a settlement conference in the context of a pre-trial conference or otherwise pursues the settlement option at the conference. To this end, Order 35 Rule 1 provides that ***"The judge shall, at the pre-trial conference or after trial, deliver judgment in open court, and shall direct judgment to be entered."***

[10] Most US jurisdictions actually impose a direct obligation on the Attorney for each party to ascertain in advance or the conference the extent or settlement authority. Furthermore, it is required that each Attorney must have present or immediately available by telephone a representative with authority to discuss and determine each aspect of potential settlement.

To start with there is no doubt that the pre-trial conference is "a court or other tribunal" as stipulated by section 36(1) of the 1999 Constitution. Therefore, the pre-trial judge does not have to robe and sit as a judge before delivering judgment. However, it is necessary to ensure that the venue qualities as an open court, i.e., open to the public in compliance with section 36(3) of the Constitution and Order 35 Rule (1). For this purpose, hearing in public only entails a situation where members or the public are not barred. Their actual presence is not necessary[11]. Once these conditions are satisfied, it appears that a pre-trial judge can enter valid judgments even when silting in conference.

Is Pre-trial necessary in cases of an application for Default or Summary Judgment?

Pre-trial conference Notice (Form 17) can only be issued after close of pleadings. According to Order 15 Rule 19, pleadings are deemed close at the expiration of 7 days from the service of the defence or reply (where a pleading subsequent to reply is not ordered). Where the Defendant makes no response, there would be no point in applying for pre-trial conference by issuing him a pre-trial notice. In my view, the purposes of the conference can only be achieved where parties have joined issues and all relevant particulars have been frontloaded.

This approach is supported by Order 10 Rule 5, which provides that where the claim in the originating process is for pecuniary damages or for detention of goods, and the defendant fails to appear, a claimant may apply to a judge for judgment. By this rule, applications for judgment in default of appearance will be assigned directly to a trial judge as there is nothing to meet over in conference.

[11] See *Scoff* **I I** *Scoff* (1913) AC 417 and *Mcl'herson v. Mcl'herson* (1939) AC 177.

Also, in the case of Summary Judgment, Order II Rule I provides: *"Where a Claimant believes that there is no defence to his claim, he shall file with his originating process the statement of claim, the exhibits, the depositions of his witnesses and an application for summary judgment…"* All the judicial activity envisaged by Order II are to performed by 'a judge', meaning any judge of the High Court to whom the case is assigned, but there is no indication as to whether that judge should sit as pre-trial judge or otherwise. In the circumstance, it seems reasonable to assume that where the Defendant shows up and files all necessary papers within the time prescribed, the Claimant should issue pre-trial notice and the issue of' whether the Defence is good or bad (Order II Rule 5) should be resolved by the pre-trial judge. However, where the Defendant does not enter a defence, the case should be assigned directly to a trial judge. In making this suggestions, we take the view that three parties - claimant, defendant and judge- are essential participants in a successful pre-trial conference. The conference is not meant to be between the claimant and the judge. See ***ACCESS BANK PLC VS SIJUWADE (2016) LPELR 40188 (CA).***

Order 11 is a specific and special procedure and different from ordinary summons procedure where pleadings are fully exchanged and calls for factual trial of the case. Pre-trial conference is designed as an avenue for the parties to settle their issues and facts preparatory to the full trial of the case. It is clearly inapplicable in Summary Judgement Procedure, as the Summary Judgement Procedure is targeted at speedy disposal of the case where there is no defense or good defense to the claim, and so there are then no issues to settle. The provisions of Order 11 have no room for exploration of amicable settlement as under the pre-trial conference. Once the Trial Judge rules that the defendant has no good

defense to the suit that is the end of the matter. But all the issues under pre-trial conference will come into play if the Judge rules that the defendant has disclosed good defense to the claim of the plaintiff.

Amendments of Court Processes

Amendments and adjournments are reputed to be the main cause of delay in civil litigation. Under the old rules, adjournments were granted almost as a matter of course and a party was allowed to amend his pleading at any time before judgment. The position has now changed. A party may amend his originating process and pleadings at any time before the pre-trial conference and during the entire conference period, but he cannot amend more than twice during the actual trial and before closing his case (Order 24 Rule I).

It is interesting to see how this new rule will interact with the established principles on amendment of processes. Normally, if an amendment is sought before the close of pleadings, it would be allowed in, order to make such evidence as may be called admissible. This is because evidence on an issue which was not pleaded or on a claim which is not on the record is inadmissible[12]. Under the new rules however, this basis for amendment is virtually obviated. By reason of the frontloading requirements, evidence is put in at the same time as the claim and if, in spite of that, an amendment of pleadings is required, no problem entails since the request would ordinarily come at the earliest opportunity, i.e., before the completion of pre-trial. Indeed, by the time pre-trial is ended, a diligent counsel would have had limitless opportunities to align his pleadings with the evidence.

[12] See *Imoniklie v. A ttornev General. Bendel State* (1992) 7 SCNJ 197 at 207 - 208, per Nnaemeka-Agu .ISC *George* & *ors* v. *Dominion Flour Mills Limited(1963)* 1 All NLR 71.

The second aspect of the general principle regarding amendments is that when the calling of evidence has been concluded, any amendment of the pleading or claim can be justified only on the premise that evidence in support of it is already on record. In that case, the argument would be that it is necessary and in the interest of justice to allow the amendment in order to make the pleadings or the claim accord with the evidence on record[13]. Again, we think that these issues would arise mainly at pre-trial, since all pleadings and much of the evidence would already be available to the court and the parties.

A third general rule on amendment of pleadings is equally relevant here: Where the amendment sought, if granted, would entail further evidence led on both sides and one of them has already closed his case, the application would ordinarily be refused[14]. Therefore, an amendment of pleadings sought at the time of address and which goes to a relief not originally claimed will be refused[15]. If anything, this justifies the new rule which forbids amendment of processes alter the closure of a party's case.

However, in the course of trial, the body of evidence may indeed alter somewhat, either because fresh evidence is introduced during cross-examination or admitted documents are found to be of little or no evidential value. In that case, requests for an amendment of pleadings are in order. Two such requests will be granted almost as a matter of course.

The question is whether a third request can be justifiably refused. In our view, if as in this case, the rules or court says so, then the parties are bound by the provisions of the rules. The right to a fair hearing is, in reality, the right to adequate opportunity to be heard. After frontloading and

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[13] See *Imonikhe v. Attorney General, 13endel State,* op. cit. Limitations on the freedom of amendment rule arc further illustrated by *Mrs.* (. *I. Adetutu v. Mrs. W.* 0. *Aderohunmu* & *ors* (1984)6S.C.92.

[14] Bamishebi v. Ore (19(5) 9 SCN.I 220 at 22R.

[15] *Taiwo* v. *Lawani* (1975) 2 SC 15. On amendment of pleadings, see generally Fidel is Nwadialo, *Civil Procedure ill Nigeria,* University of Lagos Press, 2"'1 Ed. (2000), pp. 467 to 480.

pre-trial conference, none of the parties can really complain of not having had sufficient opportunity to present his case.

Preconditions for Amendment

Where any originating process or pleading is to be amended, the application must be accompanied with an exhibit of the proposed amendment, a list of any additional witnesses to be called, their written statements on oath and copies of any document to be relied upon consequent on such amendment. This is in line with the front-loading concept adopted by the new rules. The requirement of leave to amend is however dispensed with to save time. The application to amend is brought directly before a Judge and may be allowed upon such terms as to costs or otherwise as may be just (see Order 24 Rules 2 & 3).

Adjournment of Court Proceedings

Attempts are also made in the rules to curtail the number of adjournments that a court would allow. Understandably, a pre-trial conference is primarily a settlement conference. Adjournments have a particularly disrupting effect on such proceedings and should therefore not be given lightly. Apart from the award of realistic costs to be paid by the defaulting party, the rules provide that hearing of any motion or application may from time to time be adjourned provided that application for adjournment at the request of a party shall not be made more than twice (see Order 39 Rule 7).

Traditionally, adjournments have always been a matter within the court's discretion. The presiding judge would only grant an adjournment if he thinks it expedient in the interest of justice to do so or if he is satisfied that the adjournment will conduce to the hearing and

determination of the case on the merits and not sought for the purpose of mere delay[16]. In view of the apparent appeal of this principle, the limitation on the number of adjournments allowed by the rules may prove difficult to enforce, e.g., where a party's counsel is absent in court even after the he has exhausted the number of adjournments allowed to him. In addition, there will be instances where there has been a change of counsel, or where an expected witness does not show up in court. Refusal to adjourn in these cases may amount to taking away the right of a party to have a counsel of his own choice or to present his own side of the case[17]. In our view, adjournments will still be granted at all events where the applicant has a justifiable reason and where granting it will further the interest of justice.

Discoveries

The old rules on discovery and inspection were hardly ever used, so they have now been restructured. Under the 2020 rules, the claimant or defendant in any proceeding has the right to deliver interrogatories in writing for the examination of the opposite party and such interrogatories must be delivered within seven days of close of pleadings. Indeed, they form part of the agenda of pre-trial conference. Interrogatories are also required to be answered by affidavit filed within seven days, or within such other time as the Judge may allow. If any person interrogated omits to answer or answers insufficiently, the pre-trial Judge shall on application issue an order requiring him to answer or to answer further as the case may be (see Order 26, particularly rules I, 5 and 7). Under the current dispensation, inspection is expected to take place during the pre-trial conference.

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[16] *African Continental Bank* v. *Agbayim* (1960) 5 FSC 19.

[17] See for instance *Nabsons Ltd V Mobil Oil* (1995) 7 SCN.I 267 at 272 - 275.

Measures to ensure the success of Pre-Trial Conferences

(i) Defendant may apply for pre-trial notice

Several measures are embedded in the Rules to ensure the expeditious conduct and disposal of pre-trial sessions. Although it is primarily the business of the claimant to move his case forward, Order 25 Rule I (2) provides that if the plaintiff does not make the application for a pre-trial notice, the defendant may do so or apply for an order to dismiss the action. However, no time limit is set for the defendant to bring his application.

In deciding whether to seek dismissal or to apply for pre-trial, the Defendant should, in our view, have in mind the need to dispose of the case in an expeditious and permanent manner. It is possible that the plaintiff lost interest in the case after getting the statement of defence, documents and depositions attached to it. In such cases, a dismissal may be obtained quite early and without contest. However, where the plaintiff has just been tardy or forgetful in applying for pre- trial conference, an application to dismiss the suit filed by the Defendant would be met with a counter affidavit and arguments to show cause. The process might thus result in more time wasting, which will at best fetch the Defendant an award of costs.

Thus, where it appears clear that the plaintiff has an arguable case but has neglected to apply for pre-trial conference within the time stipulated for doing so, the Defendant would be better off in applying for pretrial conference than seeking dismissal of the case.

(ii) Deadline for Completion of Pre-trial

Under Order 25 Rule 4, pre-trial conference or series of pre-trial conferences in any particular

case must be completed within three months of their commencement. Presumably, time begins to run from the day after the first day of sitting, and since the period allowed is more than six days, it may include Saturdays, Sundays and public holidays (see Order 45 Rule I (c) & 2). Parties and their Legal Practitioners are expressly enjoined to co-operate with the Judge in working within this time-table. Also, the pre-trial conference is expected to continue from day to day, as far as practicable. Adjournments are allowed only for purposes of enabling the parties to comply with pre-trial conference orders.

(iii) Obligation of parties to Participate in Good Faith

Order 25 R 6 provides that if a claimant or his Legal Practitioner

(i) fails to attend the pre-trial conference; or

(ii) fails to obey a scheduling or pre-trial order, or

(iii) is substantially unprepared to participate in the conference; or

(iv) fails to participate in good faith,

The Judge shall take the extreme measure of dismissing the claim. Where dismissal is not resorted to we are of the view that default should nevertheless result in an assessment of costs.

Where the default is that of' the defendant, the Judge may enter judgment against him under the rules. However, any **judgment** given under this rule may be set aside upon an application made within seven days of the judgment or such other period as the pre-trial Judge may allow, not exceeding the actual pre-trial conference period. Such application must he accompanied by an undertaking to participate effectively in the pre-trial conference (Order 25 Rule 6). This means that the pre-trial Judge may extend the time within which application may be

brought to set aside the default judgment but his power to do so is limited to the 3-month period within which the conference was expected to run its course. After that, he becomes *functus officio*. The judgment becomes final in the sense that it can only be set aside on appeal.

It is arguable though that since the Judge is empowered to extend the time for pre-trial conference under the rules, it then means that the application to set aside the default judgement could be made any time within the period the pre-trial lasted including the period extended by the judge. However, the problem with this argument is that once delivered, the default judgment effectively ends the pre-trial conference proceedings and, *a fortiori,* the Judge's power to extend the time allowed for those proceedings. Where pre-trial proceedings have come to an end for whatever reason, there is no room for extending time for the continuance of the proceedings.

Also, while the import of Order 25 r 6 is reasonably clear, the rules do not define "bad faith". In the context of administrative law the term imports the idea of acting dishonestly or acting for illegitimate reasons[18]. It is perhaps more pertinent to consider how that term has been interpreted by the courts in the United States in the context of Rule 16F of the Federal Civil Procedure Rules. These courts have found bad faith in conduct ranging from the failure of attorney to take to the pre-trial conference a client with full authority to settle; the failure to make available essential factual information or witnesses, to dilatory tactics or a pattern of other conduct considered frivolous, obstructive, or abusive of the pre-trial

[18] E.g. Roberts v. Hopwood [19251 AC 578, at p 603; *Webb* v. *Minister of Housing* & *Local Government (19*65) I WLR 1965

process[19].

(vi) General Powers of a Judge to make appropriate orders

Aside from the specific measures to ensure the success of the pre-trial conference, Order 1 Rule 1 (4) (b) makes a general provision as follows:

"In order to discourage delay, abusive and dilatory tactics and to streamline the litigation process by lessening the amount of frivolous matters brought before the court, a presiding Judge may not hesitate to impose appropriate cost on counsel who is employing delay tactics to frustrate the hearing and conclusion of a case".

This provision confers on the judge an invaluable power, which may be used to remedy most procedural problems that may be encountered at pre-trial.

VALIDITY OF ORDERS MADE DURING PRETRIAL CONFERENCE:

Order 25 Rule 6 (c) provides that any decision made under this rule may be set aside upon an application made within 7 days of the decision or such other period as the Judge may allow, not exceeding the pre-trial proceedings period. The application shall be accompanied by an undertaking to participate effectively in the pretrial proceeding.

Furthermore, it is wrong for a pre-trial Judge to convert a pretrial conference into an actual trial and any judgement delivered in such proceeding that is tantamount to deciding the merit of the case will be declared a nullity. See ***AFRIBANK NIG PLC***

[19] See especially, Gilling v. *Easter Airlines,* See Generally, Federal rules of civil Procedure, 50 University of Pitt L Review 7X9 (1989).

VS UBANA (2011) LPELR – 3632 (CA); and ACCESS BANK PLC VS SIJUNADE (2016) LPELR 40188

Pre-Trial Conference Report

Upon completion of the pre-trial conference phase, the pre-trial judge issues a Report, which serves as a guide to subsequent course of the proceedings unless modified by the trial judge (Order 25 Rules 4 & 5). Since a full transcript of proceedings would ordinarily be in the case file, the pre-trial report should contain, inter alia, a summary of issues resolved, issues not resolved, conduct of the parties and estimated length of trial.

As in most other jurisdictions, trial of an action under the Enugu rules is by the Judge who is assigned the case and who must also conduct the pre-trial conference. However, in order to preempt allegations of bias, a judge who has taken full part in a settlement session and who may have taken a position on some of the issues at pre-trial is obviously not the ideal person to conduct the trial. In such a situation the Judge should remit the case file back to the Chief Judge for assignment to another Judge to hear and determine. For instance, under Rule 35(7) and (8) of the British Columbia Rules, a judge who has heard a mini-trial or who has attended a settlement conference is forbidden from presiding at the trial unless all the parties give their consent on record. Since there is no apparent opportunity for securing the parties' consent to the appointment of a trial judge under the Enugu rules, the Chief Judge is more likely to appoint another judge once there is any indication in the report that the pre-trial judge had somehow entered the fray.

Cases in which pre-trials are not required

It is worth noting that the New Rules do not require Applications for judicial review or *habeas*

corpus to go through the pre-trial conference procedure. In view of the special provisions requiring leave of court as a precondition and the *ex parte* nature of the application for leave, there is room for pre-trial conference. There is also no provision for pre-trial conference in fundamental rights enforcement suits. The Matrimonial Causes Rules do not provide for pre-trial conference in matrimonial causes, etc.

REPORT OF PRETRIAL CONFERENCE:

A Judge shall issue a report after the pre-trial conference or series of pre-trial conferences and this report shall guide the subsequent course of the proceedings unless modified by the Trial Judge. This is provided for in Order 25 Rule 5.

CONCLUDING REMARKS:

Our Justice System is in desperate need of an overhaul. We need a comprehensive justice centre where both the consumers and providers will be collaborators and co-creators of a streamlined and agile process. A fast case flow management system where parties are not left impoverished and embittered, a system where disputants could solve problems and search for common grounds within the backdrop of integrity, understanding and human decency, creating a synergy of peace, fairness and effective administration of justice in our dear country. Judges should create a friendly atmosphere for pre-trial conference, the serious serene state of courts and stern look of the Judge create fear in the litigants.

The proceedings in pre-trial conference should involve only three (3) parties- the parties, their counsel and the presiding Judge. This promotes confidentiality, parties are confident that their interests and secrets are revealed to the other

party only so far as the case requires. This will ultimately encourage parties to open up with the mind of settling the matter.

Anything that can cause delay should be avoided. Delay affects the tenure of a cause. It elongates the cause list of a Judge and the counsel. A Judge should not hesitate to apply sanction where appropriate. In order to yield remarkable success in terms of participation, Judges must always apply the strict cost policy. This in essence makes pre-trial conference a desirable interlude in the litigation process.

It means that at the end of each action, Judges in awarding cost should take into account an unreasonable refusal of a court's proposal to parties that the matter be settled at the pre-trial conference stage.

In conclusion, pretrial conference is a mandatory stage in the civil litigation process. The essence is to allow all stakeholders have input in the just, efficient and appropriate system of resolving disputes.

I thank you so much for your listening. May God bless us all and reward all of us with successful career on the Bench.

Hon Justice Cyprian O. Ajah, Ph.D

23/3/2021