



Dispute Resolution
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ELEVATING TRIAL JUDGES TO A HIGHER BENCH: IMPACT ON PART- HEARD MATTERS

1. INTRODUCTION

The recent approval and appointment of new Judges to the Court of Appeal by President Muhammadu Buhari³ from the bench of the Federal High Court, High Court of the States and High Court of the Federal Capital Territory, Abuja dredges up age-old issues in the administration of Justice with consequences that are far-reaching on the litigants and counsel in significant ways.

The immediate fallout of this development is that the matters that were at trial and post-trial stages before the elevation of the Judge(s) originally presiding over these matters will normally have to commence *de novo*. This is often without due regard to the checkered history of the matters, the time, energy and efforts so far expended on the affected cases. More pathetic are matters within the post-trial category (i.e., matters ordinarily awaiting delivery of judgment) as litigants of matters in this category suffer more hardship. It is a well-known principle that justice delayed is justice denied and this cannot be truer in any other scenario than where a matter has been set down for judgment and the trial Judge is suddenly elevated.

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Legal Practitioners and other stakeholders within and outside the Nigerian legal industry have over time been in the forefront of advocacy for accelerating the dispensation of justice in our court system in line with a significant part of the objectives of some of the rules of our High Courts which is 'efficient and speedy dispensation of justice'.

The recent experience of the authors, which inspires this article, drives home the stark reality that there are still many grounds to cover to put our justice administration on a pedestal of fulfilling its mandate. The authors are members of a team of Attorneys who represent the Plaintiffs in about 26 lawsuits across the USA and before Nigerian courts. These suits arose from the unfortunate Dana Airline's aviation accident that occurred in Iju-Ishaga area of Lagos on 3rd June 2012 – and all 26 cases were formerly pending before one of the judges recently elevated to the Court of Appeal from the bench of the Federal High Court, Ikoyi, Lagos. Before his Lordship's recent elevation to the Court of Appeal's bench on the **22nd June 2018**, trial had progressed substantially in 9 of the 26 cases; and final written addresses had in fact, been adopted on **11th April 2018** in 1 of the 26 cases with judgment reserved for **25th May 2018**. However, the judgment was not ready on **25th May 2018** and his Lordship subsequently adjourned the matter to **6th July 2018** for judgment. The direct impact of this development on the families affected by the legal and practical consequences of his Lordship's elevation cannot be quantified monetarily, emotionally or psychologically!

Comparatively, 2 of the 26 cases that were filed and retained in the USA had been settled. Settlement was reached by parties after all preliminary applications were expeditiously decided by the USA court and the trajectory of the cases became clear to both counsel and litigants involved in those cases.

2. THE LAW UNDER VARIOUS RELEVANT STATUTES

The provisions of section 294(2) of the 1999 Constitution⁴ partly addresses the issue as it relates to judgments pending before the Courts of Appeal and Supreme Court with the proviso that another justice of the court can deliver and pronounce the judgment of his learned brother who is absent by reason of elevation, retirement, dismissal or death. The provision of section 294(2) of the Constitution of the Federal Republic of Nigeria, 1999⁵ states as follows:

'Each Justice of the Supreme Court or the Court of Appeal shall express and deliver his opinion in writing, or may state in writing that he adopts the opinion of another Justice who delivers a written opinion:

Provided that it shall not be necessary for all the Justices who heard a cause or matter to be present when judgment is to be delivered and the

⁴ Cap A2 Laws of the Federation of Nigeria, 2004 (as amended).

⁵ See fn 4.

opinion of a Justice may be pronounced by another justice whether or not he was present at the hearing or not. (Emphasis ours)

This provision has also been judicially pronounced upon in the case of **Star Deep Water Petroleum Ltd & Ors v. A.I.C Limited & Ors.**,⁶ as well as plethora of other cases. The question is what inference can be drawn from this proviso as regards the pending matter before the High Court Judge elevated to the Court of Appeal or Supreme Court? Or better still, can the judgment written by a Judge who has subsequently been elevated to the Appeal Court or Supreme Court but delivered and pronounced by another Judge be said to be valid at law? The High Court laws of various States including that of the Federal High Court also provide little assistance in resolving these queries as they have all practically omitted to make precise provisions for situations where a Judge is allowed to pronounce the judgment of his learned brother (upon elevation to the Court of Appeal or Supreme Court) who presided over a trial and wrote the judgment. The combined effect of **sections 23 and 21 of the Federal High Court Act**⁷ further makes it practically impossible to statutorily salvage the effect of elevation of High Court Judges on trial and post-trial matters pending before the Judges before the elevation. Section 23 of the Federal High Court Act⁸ provides as follows:

“every proceeding in the Court and all business arising therein shall, so far as is practicable and convenient and subject to the provisions of any enactment or law, be heard and disposed of by a single judge, and all proceedings in an action subsequent to the hearing or trial, down to, and including the final judgment or order, shall so far as is practicable and convenient, be taken before the judge before whom the trial or hearing took place” (Emphasis ours)

While section 21 provides thus;

“where the judge who is presiding over the sitting of the Court is for any cause unable or fails to attend the same on the day appointed, and no other judge is able to attend in his stead, the Court shall stand adjourned from day to day until a judge shall attend or until the Courts shall be adjourned or closed by order under the hand of a judge”.

Furthermore, section 58 of the High Court Law of Lagos State⁹ which is *in pari materia* with the above stated provisions of the Federal High Court Act¹⁰ and on all fours with those of other States of the Federation provides:

⁶ (2011) LPELR-4979(CA).

⁷ Cap F12 Laws of the Federal Republic of Nigeria, 2004.

⁸ See fn 7.

⁹ CAP H5, Laws of Lagos State, 2015.

“subject to the provisions of this or any other enactment and subject to any rules of court, all civil and criminal causes or matters and all proceedings in the High Court and all business arising shall so far as practicable and convenient be tried, heard and disposed of by a single judge, and all proceedings in an action subsequent to the hearing or trial down to and including the final judgment or order shall so far as is practicable and convenient be taken before the judge before whom the trial or hearing took place”.

These provisions align with section 294 (2) of the Constitution which excludes the High Courts from the list of Courts to which the provision applies. This means the legislature’s target is that another High Court judge cannot validly deliver the judgment of his learned brother who has left the bench of the High Court based on the maxim of interpretation, *Expressio Unius Est Exclusio Alterius*, - meaning that the expression of one thing implies the exclusion of the other. It will appear that the drafters of the above referred provisions contemplated the situation of elevation of the High Court Judges and that must have been the reason behind the usage of the phrase “so far as is practicable and convenient be taken before the judge before whom the trial or hearing took place”. However, the relevant question that may be asked again is whether the use of this phrase has taken care of the effect of elevation of judicial officers to the Court of Appeal or Supreme Court. In our opinion, the above question should be answered in the negative. It is in this wise that a legislative enactment geared towards remedying this lacuna is suggested in this article in order to bring an end to the injustice unavoidably occasioned on litigants and counsel by the resulting effect of elevation of the High Court Judges to a higher Court.

3. JUDICIAL DECISIONS IN PERSPECTIVE

In the *locus classicus* case of **Ogbunyiya & Ors v. Okudo & Ors.**,¹¹ which came up before the Supreme Court for determination, the Respondents in 1958, filed their claims for title to land at Aboh in Ogidi, seeking damages for trespass thereon and injunction in the High Court of Onitsha in the former Eastern Nigeria (part of which is now Anambra State). After a checkered history in the wake of the Nigerian civil war and the creation of States, the suit was eventually heard by Nnaemeka-Agu J. who after listening to the address of counsel on both sides on the 13th day of June, 1977, adjourned the matter to 17th June, 1977, when he duly delivered judgment as already stated. Sometime subsequent to this judgment, Nnaemeka-Agu J. was appointed a Judge of the Court of Appeal with effect from the 15th day of June, 1977. The Appellants unsuccessfully appealed to the Court of Appeal, from the said judgment of Nnaemeka-Agu J. The Appellants again appealed to the Supreme Court contending as they did

¹⁰ See fn 7.

¹¹ (1979) LPELR-2295(SC).

at the Court of Appeal that the judgment of the High Court of Anambra State was null and void same having been delivered by the learned Judge when he had no jurisdiction to do so. The appeal was allowed and the judgments of Nnaemeka-Agu J as well as that of the Court of Appeal were set aside.

See also the case of **Sodeinde v. The State**¹² (referred to and relied on in the Ogbunyiya's case); where judgment was delivered on 10th February, 1978 in which the Court held that a judgement delivered by the Chief Judge of Oyo State on a date after he had been transferred to Ondo State as Chief Judge of that State was a nullity.

As indicated earlier, section 294(2) of the constitution saves the day in **Okino v. Obanebira**,¹³ where *“an appeal was duly heard on the 10th March, 1993 by Uthman Mohammed, and Achike J.J.C.A, as they then were, and Okunola J.C.A and Judgment was thereafter reserved. Before the 9th June, 1993 on which date judgment of the court was delivered, Uthman Mohammed, J.C. A (as he then was) had been elevated to the Supreme Court bench and therefore ceased to be a judge of the Court of Appeal. Only Achike, J.C.A, as he then was, and Okunola, J.C.A sat on the date of the delivery of the said judgment.”* The judgment of Uthman Mohammed, J.C.A was subsequently pronounced by Achike, J.C.A which later became the subject of appeal at the Supreme Court.

The Supreme Court took judicial time to proclaim the law relying on plethora of authorities as follows:

“Once an appeal in any cause or matter has been fully heard before the Court of Appeal and judgment is reserved, it shall not be necessary for all the three justices who heard the appeal to be present together in court on the day appointed for the delivery of the judgment. It is lawful if the written opinion of any one of them who is unavailable is read by any other justice of that court. Thus, the judgment of the court of appeal would not be rendered void simply because only two justices of that court who were among those who heard the appeal were present to deliver the judgment of the court. However, section 11 of the Court of Appeal Act, 1976 appears to cover only cases where all the justices that sat on the appeal are still in the service of that court on the date of judgment and had written and signed their judgment but because some or all the justices for one reason or the other are unable to be physically present to deliver the judgment, they gave same to other justices to read them on their behalf. (Ishola v Societe Generale Bank (Nig.) Ltd. (1997) 2 NWLR (Pt. 488) 405;

¹² Suit No. FCA./1B/20/ 77 (unreported).

¹³ (1999) 13 NWLR (Pt. 636) 535.

Adesokan v Adegorolu (1997) 3 NWLR (Pt. 493) 261 referred to and followed.)” The Court went further to categorically state that “once the opinion of an absent justice even though written at a time he was a member of the relevant court is read as against being pronounced after he had ceased to be a member of such relevant court by elevation to a higher bench, death, dismissal or retirement, such an opinion would be given without jurisdiction and would consequently be a nullity. (Shitta-Bey v Attorney-General of the Federation (1998) 10 NWLR (Pt. 570) 392 followed; Ogbuanyiya v Okudo (1979) 3 LRN 318; Adesokan v. Adegorolu (1997) 3 NWLR (Pt. 493) 261)”.

The Court has also called in aid the provision of section 294 (2) of the Constitution where both the Judge that wrote the judgment and the Judge that delivered it were still in the service of the same Court as at the date of delivery of the judgment in a more recent case of **Attorney General of the Federation v. All Nigeria Peoples Party**.¹⁴ In this case, judgment was written, signed and sealed in an envelope by a Judge of the Federal High Court, but was delivered by another Judge of the Federal High Court who broke the seal. The Court held that although, the 1999 Constitution did not expressly provide for judgment of the High Court written by one Judge to be pronounced by another, there is nothing in the Constitution which bars a Judge from asking another Judge to read for him a judgment which the Judge who presided over the case has prepared. Therefore, a judgment written and signed by a High Court Judge can be read and pronounced by another Judge where such Judge is unavailable due to certain circumstances such as ill health as long as the Judge who wrote the judgment is still on the bench of that High Court. It must be stated that this does not include unavailability due to elevation to a higher bench, death, dismissal or retirement.

The ability of a Judge to read the judgment written by another Judge who is unavoidably absent however, lasts only as long as the Judge who wrote the judgment remained in the service of that same Court. Consequently, where the unavailability of the Judge is by reason of elevation to a higher Court, death, dismissal or retirement, it will be incompetent for another Judge to read the judgment written by the absent Judge from the date of the occurrence of the event causing the absence.

The most recent case of **Wulge v. Olayinka**¹⁵ comprehensively dealt with this issue of law and therefore clearly states the law after considering several earlier decided cases. In this case, Abiru JCA, who gave the lead judgment, stated as follows:

¹⁴ (2003) 15 NWLR (Pt. 844) 600.

¹⁵ (2017) LPELR-43356 (CA).

"It is settled law that in deserving circumstances, there is nothing wrong with one Judge reading the judgment written by a fellow Judge of the same Court who is unavoidably not available to deliver it - Yunusa Vs Otun (1967) LLR 34, Edibi Vs The State (2009) LPELR-8702(CA), Attorney General of the Federation Vs All Nigeria Peoples Party (2003) 15 NWLR (Pt 844) 600, IPC (Nig) Ltd Vs Nigerian National Petroleum Corporation (2015) LPELR-24652(CA). Case law authorities however suggest that this ability of a Judge to read the judgment written by another Judge who is unavoidably absent lasts only as long as the Judge who wrote the judgment remained in the service of that same Court and that where the absence of the Judge is by reason of elevation to a higher bench, death, dismissal or retirement, it will be incompetent for a Judge to read the judgment written by the absent Judge from the date of the occurrence of the event causing the absence. In other words, that another Judge is incompetent to read the judgment written by a Judge who has either been elevated to a higher bench or who has died or was dismissed or who has retired or was retired, from the date of such elevation, death, dismissal or retirement. Adesokan Vs Adegorolu (1997) 3 NWLR (Pt 493) 261 at 274, Okino Vs Obanabira (1999) 13 NWLR (Pt 636) 535 and IPC (Nig) Ltd Vs Nigerian National Petroleum Corporation supra. The only exception to this position of the law appears to be that created by the proviso to Section 294 (2) of the 1999 Constitution of the Federal Republic of Nigeria (as amended) in respect of the judgments of the Supreme Court and Court of Appeal only. The section allows the written opinion of a Justice, who participated at the hearing of an appeal but who is absent for any reason on the date of the judgment to be read by another Justice of the same Court - Attorney General of Imo State Vs Attorney General of Rivers State (1983) 2 SCNLR 108, Anyaoko Vs Adi (1985) 1 NWLR (Pt 2) 342, Kano Vs Oyelakin (1993) 3 NWLR (Pt 282) 399, Niyu Vs Sodipo (1994) 5 NWLR (Pt 342) 1 Adesokan Vs Adetunji (1994) 5 NWLR (Pt 346) 540, Ishola Vs Societe Generale Bank of Nig. Ltd (1997) 2 NWLR 488) 405, Shitta-Bey Vs Attorney General of the Federation (1998) 10 NWLR (Pt. 570) 392, Okino Vs Obanabira supra."

In effect and to reiterate, a Judge is incompetent to read the judgment written by another Judge who is no longer a Judge of that Court either by reason of elevation to a higher bench, death,

dismissal or retirement. The cases of **Adesokan v. Adegorolu**¹⁶ and **Okino v. Obanabira**¹⁷ referred to by Abiru JCA in **Wulge v. Olayinka**¹⁸ are instructive on this point. Consequently, it is clear from the above that the effect which the elevation of a Judge of the High Court to the Court of Appeal will have on trial and post-trial cases pending before the Judge before elevation is retrial before another Judge. In the face of this flagrant injustice set in place by our judicial system, all the Court (which epitomizes justice) could do in the circumstance in **Wulge v. Olayinka**¹⁹ was only to lament helplessly in the following terms:

*“The unfortunate reality of this case is that a judgment obtained by the first Respondent after a full length hearing spanning about six years, and exercise of patience for about another three years for the delivery of the judgment, has to be set aside, not for any fault, default, misdeed or omission on the part of the first Respondent or of her Counsel, but for circumstances and default of others over which she had no control. There is no doubt that the circumstances of the delivery of the judgment in Suit No M/76/2003 written as far back as 2nd of November 2009 could have been better and more professionally handled in the lower Court by all those concerned. **Additionally, the situation in this matter would have been saved by a simple provision in the High Court Law of Borno State to the effect that a Judge may pronounce, deliver or read a judgment written by another Judge who is unavoidably absent to deliver same for whatever reason. It is high time that every tier of Court in this country wakes up and begins to take pragmatic and practical steps, including being more upbeat about its responsibilities and initiating and pursuing statutory amendments, to deal with situations, like the one in this case, that create frustrating outcomes for the users of our justice delivery system. Lest we be seen as another dysfunctional government establishment set up to take people for a ride.**”*

The facts of the **Wulge’s** case is similar to the facts of the string of cases in the authors’ recent experience, which inspires this article, where the trial Judge had concluded a matter, reserved judgment to a date certain, but for some unexplained reason adjourned the judgment again to another future date; and within the intervening period, was elevated to the Court of Appeal. If our justice administration is to be placed on a pedestal of fulfilling its mandate, something urgent

¹⁶ (1997) 3 NWLR (Pt 493) 261 at 274.

¹⁷ (1999) 13 NWLR (Pt 636) 535.

¹⁸ Supra.

¹⁹ Supra.

needs to be done by the Chief Judges, the trial Judges and the trial lawyers, and the legislature to resolve the injustice occasioned by this defect.

4. CURRENT PROCEDURE ON CONTINUATION OF PART-HEARD MATTERS UNDER THE RULES OF COURT

Currently, by the provisions of **Order 49 rule 4**,²⁰ “*where a Judge retires or is transferred to another Division and having part-heard cause or matter which is being re-heard de novo by another judge, the evidence already given before the retired or the Judge transferred out of the Division can be read without the witness who had given it being recalled...*” By this, the new Judge hearing the matter *de novo* can adopt the evidence and the proceedings in the part-heard matter and proceed from where the erstwhile Judge stopped. As useful as this proviso appears to be, it still does not cover scenarios that involve elevation of Judges.

Much as one may attempt to seek solace in **Order 56 rule 8**²¹ which provides that “*where a matter arises in respect of which no provision or no adequate provisions are made in these Rules, the Court shall adopt such similar procedure in other Rules as will in its view do substantial justice between the parties concerned,*” judgment of an elevated Judge cannot be delivered by another Judge and it is doubtful whether the evidence led prior to the elevation of the Judge can be adopted by the new Judge. In fact, there seems to be no similar provision in other rules of the High Courts that can be recommended. States’ High Court rules only make provisions for transfer and consolidation of cases between Judges of the same state High Court or transfer from Federal High Court or Magistrate Court to the State High Court without any provision for when a trial Judge is elevated to the higher Bench.²²

The provisions of the rules are clear that the evidence already given before the erstwhile Judge can be adopted without the witness who had given it being recalled in a part-heard civil cause where the trial Judge is transferred to another division of the same High Court. On the other hand, there are judicial pronouncements, as highlighted above, with respect to what happens to a part-heard matter when the trial Judge is elevated to a higher Court in the hierarchy of Courts and essentially, the matter will have to start afresh pursuant to the provisions of the Constitution setting up the High Courts and other laws in that regard.

5. PROCEDURE OF CONTINUATION OF PART-HEARD CRIMINAL MATTERS UNDER ADMINISTRATION OF CRIMINAL JUSTICE ACT²³

²⁰ Federal High Court (Civil Procedure) Rules, 2009.

²¹ See fn 21.

²² See Order 37 of the High Court of Lagos State (Civil Procedure) Rules 2012 and Order 32 of the High Court of the Federal Capital Territory (Civil Procedure) Rules 2004.

²³ 2015, Laws of the Federal Republic of Nigeria.

The Administration of Criminal Justice Act (“ACJA”) is an Act of the National Assembly enacted purposefully to remedy the shortcomings associated with criminal prosecution in Nigeria. The challenge of part-heard criminal matters appears to have been resolved significantly under the ACJA. Arguably, by far the most revolutionary provision of the ACJA (in relation to the subject of discuss) is that contained in **section 396(7)** which betrays the desperation of the lawmaker to confront headlong the problem of delay caused by the so-called trial *de novo* phenomenon which usually arises whenever a Judge is elevated to the Court of Appeal. The section boldly stipulates:

“notwithstanding the provision of any other law to the contrary, a Judge of the High Court who has been elevated to the Court of Appeal shall have dispensation to continue to sit as a High Court Judge only for the purpose of concluding any part-heard criminal matter pending before him at the time of his elevation and shall conclude the same within a reasonable time: Provided that this subsection shall not prevent him from assuming duty as a Justice of the Court of Appeal.”

This provision is not only novel, it is highly imaginative. It exemplifies the kind of ‘thinking outside the box’ that is required to achieve significant progress in addressing the deep-rooted problems of our criminal justice system and indeed the entire justice system.²⁴ Although, the provision is laudable, the challenge associated with part-heard criminal matters too cannot be said to have been completely resolved in view of the number of the criminal matters that could be part-heard at the time a Judge is elevated to a higher Court, especially if the said Judge was in the Criminal Division of the judicial system from where the elevation was made. Thus, will the Judge be sitting as both a High Court Judge and Justice of the Court of Appeal at the same time considering the volume of work awaiting such Judge upon assumption of duty at the Court of Appeal, and for how long? In the interim and proactively, rather than pick holes in the law as it is and finding reasons why it cannot work, the institutional authorities should begin to put in place administrative measures which would assist elevated Judges to conclude the part-heard matters on time. Furthermore, we foresee a serious problem with the determination of what could be said to be reasonable time for those part-heard criminal matters to be concluded in view of the length of time it naturally takes our Courts to finally decide cases.

6. RECOMMENDATIONS

²⁴ Prof. Y. Akinsete-George SAN “The Administration of Criminal Justice Act 2015: An Overview in relation to criminal cases adjudication in the Federal High Court” - <https://www.google.com.ng/url?sa=t&source=web&rct=j&url=http://www.censolegs.org/publications/4.pdf&ved=2ahUKEwjy3Jm7zYXcAhWMX8AKHbY3C4UQFjABegQIARAB&usq=AOvVaw3NkHSfh17h5p6GaXBlcS6k> (accessed on 4th July 2018).

To cure some of the mischief highlighted above, we recommend a two-pronged (administrative and statutory amendment) approach via a 3 stage methodology (incorporating administrative adjustments, amendment of rules of courts and amendment of relevant statutes). Firstly, and pending when the appropriate amendments are made to the rules of court and the laws as recommended above, we commend the administrative practice in England to the National Judicial Council and Mr. President who are the authorities appointing the Justices of the Court of Appeal and the Supreme Court in Nigeria. The procedure in England is that before formal appointment to a higher Bench is made; the Judge would be given a period of grace within which to complete any part-heard matters, prepare and deliver judgment where judgement has been reserved etc. The appointing authority accepts that the trial Judge will be in the midst of and at various stages of deliberations on many cases at any one time; hence will allow the Judge complete cases that could have far reaching implications on the litigants before a formal appointment is made.

However, where such appointment is made in the UK, it is a common practice that the elevated judge will be allowed to return to the lower court to conclude the partly-heard matters. We recommend that the National Judicial Council, which ultimately recommends trial judges for elevation should liaise with such judges and their respective Chief Judges and give adequate time for the affected judges to clear their diaries before confirmation of their appointments to the higher bench. This will ensure no litigant, whose case has been set down for judgment suffers the kind of experience of the families of the victims of the Dana air crash earlier referred to in this article, due to sudden elevation of the judge handling the matter. Similarly, in the U.S.A's federal court system, when a district court judge is appointed to an appellate court position, the judge's case load generally gets distributed among the other district court judges by the chief judge of the district as is the case in Nigeria. However, the practice is for the elevated district court judge to finish work on any case with pending but undecided motions, and certainly to reach a decision on any bench trials that the judge presided over but had not yet decided. Also, a district court judge can retain significant cases that he or she was working on and continue to handle the case even after appointment to the appellate court. It is noted that these practices in the UK and USA ensure that the litigant does not suffer what the counterpart in Nigeria suffers; hence we recommend same for our courts and justice administration.

Secondly, we implore the Honourable Chief Judges of the various States High Courts, High Court of the Federal Capital Territory and Federal High Court to, pursuant to **section 254 of the 1999 Constitution of the Federal Republic of Nigeria (as amended) and Order 57 of the Federal High Court (Civil Procedure) rules** to amend the applicable High Court statutes and other appropriate provisions of the rules of the various states High Courts and the High Court of the Federal Capital Territory enabling their Lordships in that regard, to adopt and issue a

practice direction in the following or similar terms as an amendment to **Order 49 rule 4** of the Federal High Court (Civil Procedure) Rules, to ensure that no litigant or counsel, who has substantially gone through the rigor of conducting significant part of a hearing or trial once is compelled to do it all over again:

“Where a Judge *of the High Court* retires, dies, is dismissed or is transferred to another Division or is elevated to a higher bench and having part-heard or reserved a duly written and signed judgment in a cause or matter which is being re-heard *de novo* by another Judge, the evidence already given or the duly written, signed and reserved judgment before the retired, dead or dismissed Judge or Judge transferred out of the Division or the Judge elevated to a higher bench can be read at the re-hearing without the witness who had given it being recalled, but if the witness is dead or cannot be found, the onus of establishing that the witness is dead or cannot be found shall lie on the party that wishes to use the evidence while the duly written, signed and reserved judgment can be pronounced and delivered by another judge of the court .”

For a case in which judgement has been written and signed by the trial Judge before the elevation, retirement, death or dismissal of the trial Judge nothing can be more unjust on the litigants than having to commence such case *de novo* on account of the elevation, retirement, death or dismissal of the trial Judge. To cure this mischief, we further suggest an amendment to the current provisions of the Federal High Court Act,²⁵ and similarly appropriate amendments to the states’ High Court Laws²⁶ and the High Court of the Federal Capital Territory, Abuja Act as follows or in similar terms:

“every proceeding in the Court and all business arising therein shall, so far as is practicable and convenient and subject to the provisions of any enactment or law, be heard and disposed of by a single judge, and all proceedings in an action subsequent to the hearing or trial, down to, and including the final judgment or order, shall so far as is practicable and convenient, be taken before the judge before whom the trial or hearing took place:

Provided that notwithstanding this provision and the provision of any other law to the contrary where the trial judge had prepared, written, signed and reserved a judgment in a cause or matter before

²⁵ Cap. F12 Laws of the Federation of Nigeria 2004.

²⁶ E.g. section 58 of the High Court of Lagos State Law Ch. H5 Laws of Lagos State, 2015.

his elevation, retirement, dismissal, ill-health or death such prepared, written, signed and reserved judgment may be pronounced by another judge as may be directed by the Chief Judge of the Court.”

With regard to the part-heard criminal cases, while we are unable to assess the performance of the provisions of the ACJA enabling a Judge already elevated to a higher bench to continue the trial of part-heard criminal trials and to conclude them within reasonable time after being elevated; we nevertheless are of the view that the better approach would be for the National Assembly and the respective state assemblies to enact a provision that is similar to the one recommended for the part-heard civil cases where the trial Judge of a part-heard criminal matter is elevated. On that note we recommend this:

“Notwithstanding the provision of any other law to the contrary, a Judge of the High Court who has been elevated to the Court of Appeal shall have dispensation to continue to sit as a High Court Judge only for the purpose of concluding any part-heard criminal matter pending before him at the time of his elevation and shall conclude the same within a reasonable time:

Provided that:

- i. this subsection shall not prevent him from assuming duty as a Justice of the Court of Appeal or justice of the Supreme Court;***
- ii. where he is unable to conclude the same within a reasonable time and another High Court judge is to take over the criminal trial from the elevated Judge the evidence already given before the elevated Judge can be read and adopted at the re-trial or continuation of the criminal trial while the duly written, signed and reserved judgment can be pronounced and delivered by another judge of the court”***

We believe that the constitutionality of the provisions of the rules of courts, the High Court statutes, and the ACJA when placed side by side the provisions of section 294 (2) of the constitution cited above is arguable by counsel who may choose to challenge this up to the Supreme Court. Given the possibility that the Supreme Court may strike down any law that conflicts with the *grundnorm* to the extent of the conflict, we suggest a constitutional amendment by creation of a new section 294 (3) in the following or similar terms:

“every proceeding in the High Court and all business arising therein shall, so far as is practicable and convenient and subject to the provisions of any enactment or law, be heard and disposed of by a single judge, and all proceedings in an action subsequent to the hearing or trial, down to, and including the final judgment or order, shall so far as is practicable and convenient, be taken before the judge before whom the trial or hearing took place:

Provided that where the judge who heard the matter, prepared, written, signed and reserved judgement in a matter or cause is not present when the judgment is to be pronounced and delivered by reason of retirement, death, dismissal or elevation to a higher bench, the judgment may be pronounced and delivered by another judge of the court as may be directed by the Chief Judge of the Court”.

7. CONCLUSION

Being clearly aware of the aphorism that ‘*justice delayed is justice denied*’ and to give confidence to litigants and their counsel that our judicial architecture can deliver on its targets, a cardinal part of which is to do justice between parties fairly and expeditiously, we must continue to reform the justice administration process, the rules of Court and the laws to do substantial justice to litigants who appear before our courts.

For further information on this review and area of law please contact **Peter Olaoye Olalere** or **Olaniyi Fayomi** at: S. P. A. Ajibade & Co., Lagos by telephone (+234 1 472 9890), fax (+234 1 4605092) mobile (+234 815 979 4216), email (oolalere@spaajibade.com) or mobile (+234 905 569 0606), email (ofayomi@spaajibade.com).

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