EFFECTS OF AN ORDER OF TRIAL *DE NOVO* ON ORDERS MADE AT INTERLOCUTORY STAGE BY THE PREVIOUS TRIAL JUDGE

1. INTRODUCTION

What is the fate of decisions delivered at an interlocutory stage in a matter which is subsequently subjected to an order for trial *de novo*? Do such decisions survive the order of trial *de novo* or are they wiped clean by order of trial *de novo*? For instance, what is the fate of a ruling that granted leave to a party to amend his originating process given that it is trite law that amendment of originating process operates as if the amended process were the processes that initiated the matter?

Further, if all rulings survive and only a re-hearing is contemplated in an order for trial *de novo*, does this interpret as proscribing parties from bringing any consequential application not affecting strictly the rehearing of the matter before the new trial judge? This paper seeks to examine the effects of an order for trial *de novo* on interlocutory decisions made on interlocutory applications by the previous trial judge.

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2. BASIC JUDICIAL DEFINITION AND OUTLINE OF SITUATIONS NECESSITATING ORDER OF TRIAL DE NOVO

2.1 Definition: Trial de novo is interpreted to mean “fresh trial” or “new trial”. A trial de novo occurs where certain pre-conditions necessitate that the hearing in a matter is re-litigated. SANKEY, J.C.A in Alhaji Isiyaku Yakubu Ent. Ltd v. Tarfa & Anor\(^4\) held that: “The consequences of a retrial order or a de novo trial (o venire de novo), is an order that the whole case should be re-trying or tried anew as if no trial whatsoever had been held in the first instance.”

2.2 Situations Necessitating Order of Trial De Novo: Under Nigerian law, a trial de novo is necessitated under two broad limbs. Firstly, in the event that a judge is deceased, elevated, retired, transferred, or removed from his judicial office, the head of such Court is required to reassign the case file of the earlier Judge to a new judge who must try the case afresh notwithstanding the stage of the trial at the time the case was re-assigned for trial de novo. This principle was described by Stephen Jonah Adah, J.C.A in Etinyin E. H. Coco-Bassey & Anor v. Mr. Patrick Offong Bassey\(^5\) thus:

“By our procedural laws, it is essential that when a matter is part-heard and it is taken over by another judge of the Court, the judge must hear the matter de novo. The essence of this is to allow the trial judge the opportunity of carrying out his primary assignment of receiving evidence presented by parties and ascribing probative value thereto. The judge is privileged to do this because he sees, hears, and observes the demeanour of the witnesses.”

The crux of a trial de novo under this limb is that the Judge who had the privilege of receiving the evidence of parties and ascribing probative value to such evidence is burdened with the duty of writing the judgment.

Secondly, an Appellate Court is broadly empowered to order a retrial or a trial de novo where reliance on the trial administered by the Court of first instance will result in a miscarriage of justice. In Enang v. Umoh & Ors.,\(^6\) per Garba, J.C.A:

“In judicial practice, it is very well known that an order for a retrial, trial afresh or trial de novo, is usually made by an appellate Court when it is satisfied that the initial trial was no trial in law that was capable of

\(^5\) CA/C/271/2014 (unreported).
determining the real dispute between the parties. Its effect is to nullify the purported proceedings and trial as if it never was conducted at all.”

It is important to note that in both limbs where a retrial is justified, trial de novo order does not relate to the commencement of an action. In other words, the originating processes (where not tainted with fatal defects), subsist and survive an order of trial de novo.⁷

3. FATE OF ORDERS MADE AT INTERLOCUTORY STAGE ON TRIAL DE NOVO

3.1 Interlocutory Decisions made by the Previous judge: To reiterate the question - what is the fate of orders delivered in the earlier proceedings where a matter is retried de novo? For context and as an example, what would be the fate of a ruling granting leave to amend the originating processes in a matter that is to be re-tried de novo? In answer to this question, the full panel of the Court of Appeal in Ngige v Obi⁸ held:

“The judicial effect or consequence of a case starting de novo before another tribunal is to render null and void all previous and pending proceedings and orders made in the case before the order de novo is made.” (emphasis supplied)

The decision above was reiterated by the Court of Appeal in Nana & Ors v. Ningi & Ors.⁹ The full panel of the Supreme Court also aligned with this position in its more recent decision in Elijah v. State¹⁰ where the Court opined:

“Per OPUTA, J.S.C in KAJUBO V. STATE (1988) LPELR- 1646(SC) explained this constitutional provision thus: An Order for a retrial or a new trial or trial de novo or a venire de novo is an Order that the whole case should be retried or tried de novo or tried anew as if no trial whatever had been had in the first instance... This Court is not only a superior Court, but it is also the most superior of the Courts in this country. Once it makes an order for either the trial, or retrial, or new trial, of the Appellant as the case may be, that order has now the backing of the Constitution and it will then be futile to argue that having declared the first trial a nullity a retrial cannot be ordered. It is common knowledge that this Court is a Superior Court of record, in fact the highest Superior Court. Since the whole trial has been declared a nullity, which in short means that the appellant has never been tried, the

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⁸ (2012) 1 NWLR (Pt. 1280) 40.
relevant and appropriate order to make in the circumstance, taking the 
gravity of the offence and the interest of justice into consideration is the one for a fresh trial of the appellant.

On the extent of the powers of the fresh judge, EKO, J.S.C in ACN & Anor v. PDP & Ors\(^\text{11}\) observed:

"The authority of FIRST BANK OF NIGERIA PLC v. TSOKWA (2004) 5 NWLR (Pt.866) 271, heavily relied upon by the Appellants, \textit{does not say that where a case was partly heard by one Judge and it was taken over by another and heard de novo, the Judge who took over the case and heard it de novo cannot dismiss it or make such Orders as the previous Judge could not have made. The Judge hearing the case or any case de novo has full authority over the case.}"

To put this in further context, applications such as those challenging the jurisdiction of the Court or seeking an interlocutory injunction may be re-litigated before the fresh judge where there are fresh facts that may warrant his discretion. We consider the case of Bakule v. Tanerewa (Nig.) Ltd\(^\text{12}\) in this regard. The facts of the case are that it had commenced before Justice Tijani Abdullahi by a Writ of summons dated 28\(^\text{th}\) November 1990. The Appellant brought an application to strike out the suit for lack of jurisdiction which Justice Abdullahi dismissed and ordered that pleadings be filed. Before the conclusion of the matter, Justice Abdullahi was transferred to Jigawa State, consequently, the matter began \textit{de novo} before Justice B. S. Adamu. The Appellant filed a similar application as the one filed before Justice Abdullahi. However, Justice Adamu never considered the application but rather went into the substance of the matter. In Appealing the Judgment of the trial court delivered by Justice Adamu, the Appellant alleged that the Court assumed that it lacked Jurisdiction to entertain the application afresh. The Court of Appeal in ordering a retrial held that the fresh judge ought to have heard the application challenging the jurisdiction of the Court.

The Supreme Court in Babatunde v. Pan Atlantic Shipping And Transport Agencies Ltd & Ors\(^\text{13}\) decided that: "…\textit{On hearing 'de novo' court hears matter as court of original and not appellate jurisdiction} … … that a trial de novo could mean nothing more than a new trial. This further means that the plaintiff is given another chance to relitigate the same matter, or rather, in a more general sense, the parties

\(^{11}\) (2011) LPELR-3589(CA) - (p. 17, paras. A-B).
\(^{12}\) (1994) LPELR-14308(CA).
\(^{13}\) (2007) LPELR-696(SC).
are at liberty, once more to reframe their case and restructure it as each may deem it appropriate.”

From these cases, it can be deduced that certain interlocutory applications may be refiled and reheard before the fresh judge. Essentially, these decisions are authorities for the proposition that the parties to the suit are at liberty to choose to reframe their cases and restructure same as each party may deem appropriate. It does not mean for example, that an order amending the pleadings automatically lapses and the pleadings reverted to the original version before the amendment. But it means the party that amended the pleading before may choose to amend it again. The philosophy behind this position is that there is no argument of stare decisis, res judicata or sitting on appeal over the previous trial judge’s decision as that decision is considered non-existent, a trial de novo having been ordered. The case law authorities reviewed above and the philosophy behind them address interlocutory decisions made by the previous judge and do not take final decisions made at interlocutory stage into consideration.

3.2 **Final Decisions made at Interlocutory Stage:** On the other hand, as far as the final decision/order made at interlocutory stage by the previous judge before the order of trial de novo, is concerned, the Court of Appeal has held in *Eyo v. Ekpenyong & Ors,*\(^{14}\) thus:

> "When a trial is starting de novo, it does not mean that processes already filed would be filed afresh. De novo means starting the hearing afresh. All other processes filed, and orders remain valid. Orders can only be challenged on Appeal to a higher Court i.e. the Court of Appeal." (Emphasis provided).

In the case of *Nwaosu & Ors v. HFP Engineering Nig. Ltd*\(^{15}\) where trial de novo was ordered after the retirement of the previous judge who made an order of leave to sue in a representative capacity, upon a contested application, it was held that:

> “In the present case, the Plaintiff/Appellant applied, and leave was granted to them to sue in a representative capacity. The case started de novo in another Court. When a case starts de-novo, it does not affect the parties suing. It only affects the proceedings. The parties have already obtained leave to sue on a representative capacity. The trial Court was therefore wrong to hold that the leave already obtained is void when the case started de-novo.”


The Court also held that since they had sought for and obtained the leave of the lower Court to sue in a representative capacity and the appellants not having appealed against the said order of Court, they cannot be heard to complain while the order is subsisting. An order of trial de novo precludes or does not extend to any action taken or any order made towards the initiation of an originating process such as the filing of a writ of summons and statement of claim. The decision of the Court in that circumstance is a final decision.

It is therefore not within the powers and competence of the same Court (though presided over by another judge) to revisit, ignore or set aside its previous order duly made upon a formal application by a party in a suit. In other words, the lower Court had become functus officio of the Ruling delivered on 14th October 1996, granting leave to sue in a representative capacity and the only option left for the respondent in such a situation is to have recourse to an appeal and not by raising the issue in a written address. It is important that once an issue has been raised and determined finally by the Court between the litigating parties, the Court becomes functus officio to either direct or allow parties to reopen the same issue before it for relitigation. The court considers such decisions to be final (creating issue estoppel and res judicata between the parties on the subject of that decision) that cannot be relitigated but can only be appealed to the Court of Appeal. In the same vein, the Supreme Court in Omonuwa v. Oshodin & Anor,\(^\text{16}\) held a decision of the High Court on the question of law referred to it by Arbitrator is a final decision on the point of law decided by it as in answering the question put to it the court has finally disposed of the question referred to it.

4. **FINAL ORDER EVEN IF MADE AT INTERLOCUTORY STAGE CONSTITUTES ISSUE ESTOPPEL / RES JUDICATA AGAINST AN ORDER OF TRIAL DE NOVO.**

In the case of Makun v. Federal University of Technology, Minna\(^\text{17}\) it was held that:

"It is entirely a question of fact whether the parties and their privies, the facts in issue and the subject matter of the claim are the same in both the previous and the present suits. The plea of res judicata applies except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment but to every point which properly belonged to the subject-matter of litigation and which the parties exercising reasonable diligence might have brought forward."

\(^{16}\) (1985) LPELR-2654(SC).

\(^{17}\) [2011] 18 NWLR (Pt. 1278) 190.

The plea of res judicata operates not only against the parties but also against the jurisdiction of the Court itself and robs the Court of its jurisdiction to entertain the same cause of action on the same issues previously determined by a Court of competent jurisdiction between the same parties."

Similarly, in Odutola v. Oderinde & Ors., even though the court found that on the particular facts of that case, a plea of res judicata was not made out, the court discussed the nature of a final decision and held that:

“The position is that where a hearing of any action is taken in parts under a rule of Court permitting such procedure, e. g. under proceedings in lieu of demurrer, a decision reached in such hearing is regarded as final if the decision is in respect of an issue which would have formed a substantive part of the final trial. A decision reached on a plea of res judicata, whatever the result, is one on an issue which would have formed a substantive part of the final trial in the sense whether or not a plaintiff may in law be allowed to maintain his action. It is a final decision. In the present case, Order 23 Rule 2 of the High Court (Civil Procedure) Rules, 1958, Cap. 44, Vol. III, Laws of Ogun State, 1978, is relevant. It reads: "Any party shall be entitled to raise by his pleading any point of law, and any points so raised shall be disposed of by the Judge who tries the cause at or after the trial: "Provided that by consent of the parties, or by order of the Court or a Judge on the application of either party, the same may be set down for hearing and disposed of at any time before the trial" This rule is now provided under Order 24, Rule 2 of the Ogun State High Court (Civil Procedure) Rules Edict, 1987. It is under it that the question of res judicata was set down for hearing and determination in the present case. It is similar to Order 33 Rule 3 of the Rules of the Supreme Court of England which provides thus: "The Court may order any question or issue arising in a cause or matter, whether of fact or law or partly of fact and partly of law, and whether raised by the pleadings or otherwise, to be tried before, at or

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after the trial of the cause or matter, and may give directions as to the manner in which the question or issue shall be stated."

The court further referred to the case of *Igunbor v. Afolabi* at page 165, where Karibi Whyte, J.S.C. observed thus:

“Where the order made finally terminates the rights of the parties, as to the particular issue disputed, it is a final order even if arising from an interlocutory application … The instant case as rightly submitted by appellant’s counsel, is an interlocutory motion by the appellant to be joined as co-administrators with the respondents. The order of the learned trial Judge granting the application determined the rights of the parties in the application. It is an order which did not require something else to be done in answer, and without any further reference to itself or any other Court of co-ordinate jurisdiction. The order of the learned trial judge is therefore a final order.”

The court also relied on the decision in *Holmes v. Bangladesh Biman Corporation*,¹⁹ where a passenger, a British citizen domiciled in the United Kingdom, had been killed on a domestic flight in a Bangladeshi aircraft which crashed in Bangladesh. His widow brought an action in the British Court for compensation under the Law Reform (Miscellaneous Provisions) Act, 1934 and the Fatal Accidents Acts, 1976. The question was whether the claim was governed by Schedule 1 to the Carriage by Air Acts (Application of Provisions) Order, 1967 or by the Bangladeshi provisions incorporated in the contract between the passenger and the airline. That question was tried as a preliminary issue. In the course of deciding the appeal from the ruling given by the trial Judge, Bingham, L. J. in his leading judgment made reference to Order 33, Rule 3. He said at page 24:

"Order 33, Rule 3 gives the Court a wide discretion to order the separate trial of different issues in appropriate cases and a decision is not to be regarded as interlocutory simply because it will not be finally determinative of the action whichever way it goes. Instead, a broad commonsense test should be applied, asking whether (if not tried separately) the issue would have formed a substantive part of the final trial. Judged by that test, this judgment was plainly final, even though it

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¹⁹ (1988) 2 Lloyd's Rep. 120. See also the case of *White v. Brunton* (1984) QB 570 at 573 per Sir John Donaldson, M. R.
did not give the plaintiff a money judgment and would not, even if in the airline’s favour, have ended the action."

5. CONCLUSION

From the rules and cases reviewed thus far, the effect of the order of trial *de novo* on the orders made at the interlocutory stage by the previous judge depends on whether the order was an interlocutory or a final order. The case of *Babatunde v. Pan Atlantic Shipping and Transport Agencies Ltd & Ors (supra)* and other cases reviewed before it are authorities to the effect that interlocutory decisions are considered to have been wiped clean by the order of trial *de novo*.

On the other hand, if an order made at the interlocutory stage by the previous judge is a final decision/order, the case of *Eyo v. Ekpenyong (supra)* and all the other cases reviewed after it as highlighted above establish that the decision cannot be re-litigated or overturned or even heard again as the trial court will lack jurisdiction to do so irrespective of the order of trial *de novo*.20

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