

**THE CONSTITUTIONALITY OR OTHERWISE
OF DELIMITTING AMENDMENT TO PLEADINGS
UNDER THE HIGH COURT OF DELTA STATE
(CIVIL PROCEDURE) RULES 2009**

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Abstract

This article critically examines the provisions of Order 24 Rule 1 of the High Court (Civil Procedure) Rules 2009 of Delta State which allows a party to a suit to amend his originating process and pleadings at any time before the close of pre-trial conference and not more than twice during the trial before the close of the case. It argues that the provisions inhibit fair hearing and offends the provisions of section 36 of the Constitution of the Federal Republic of Nigeria 1999 (as amended) and Article 7 of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act. It argues that the provisions on amendment in the High Court Civil Procedure Rules of Bayelsa, Edo and Rivers State meet the purpose and intendment of amendment in this regard and do not inhibit the right to fair hearing.

Introduction

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Rules 2009 allows a party to a suit to amend his originating process and pleadings at any time before the close of pre-trial conference and not more than twice during the trial before the close of the case.¹ Prior to the said Rules, Order 26 Rule 2 of the defunct High Court (Civil Procedure) Rules 1988 of former Bendel State which was in operation before the 2009 Rules provided that the court or judge in chambers may at any stage of the proceedings allow either party to alter or amend his endorsement or pleadings in such manner and on such terms as may be just and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties. There was no restriction as to the number of times a party may be allowed to amend his pleadings during trial under the 1988 Civil Procedure Rules. This paper argues that amendment to pleadings should not be delimited during trial in as much as such amendments are necessary for the purpose of determining the real issues or questions in controversy between the parties and that it amounts to an inhibition on the right of a party to put across his case as required by section 36 (1) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) and Article 7 of the African Charter on Human and Peoples' Right (Ratification and Enforcement) Act².

Purport and Purpose of Amendment

¹ The High Court of Delta State (Civil Procedure) Rule 2009 was made pursuant to sections 274 and 135 of the Constitution of the Federal Republic of Nigeria 1999 and section 53 of the High Court Law Cap 65, Laws of Defunct Bendel State of Nigeria 1976 applicable to Delta State by virtue of section 11, States (Creation and transition Provisions) Decree No. 37 of 1991

² Cap. A 9 Laws of the Federation of Nigeria, 2004

Rules of court lay down guidelines for the due prosecution of cases in court. They also assist the courts to determine issues or controversies in order for justice to be served. Amendment to pleadings may be requested for a variety of reasons. A party may not have presented his case the way he feels it should be presented, a party may have omitted to plead certain fundamental facts or documents or certain facts which ought not to have been pleaded have mistakenly been pleaded. The aim of an amendment is to prevent justice from being defeated and for the real issues or questions in the case to be put forward for adjudication and determination. An amendment to set up a different cause of action or change the character of the case of a party will not be granted without an amendment of the writ of summons or counterclaim as the case may be. There must, however, be good faith and good reason for an amendment to be granted by the court.³ An amendment sought *malafide* or in bad faith or intended to overreach the other party or for the derailment of the case of the other party or the proceedings will generally be refused by the court.⁴ A misnomer like naming a non-juristic person as a party and seeking to substitute it for a juristic person is not grantable.⁵ The grant of amendment is at the discretion of the court; however the discretion must be exercised judicially and judiciously.

Concept of Fair Hearing

³ *Alcayde Joel v Federal Republic of Nigeria* (2018) All FWLR (Pt 958) 954 at 965 – 966

⁴ *Compagnie Generale De Geophysique (Nigeria) Limited v Jumbo Idorenyin* (2015) (Pt 804) 2093at 2103; Fidelis Nwadialo, *Civil Procedure in Nigeria* 2nd Edn (Lagos: University of Lagos Press 2000)p p459 – 471

⁵ *Agbomagbe Bank Ltd v General Manager, G.B. Ollivant & others* (1961) All NLR 116.

Fair hearing is a concept that is not easy to define; however, its element is easier to identify and determine. It connotes and denotes the procedure followed in the adjudication of a case. Fair hearing has been defined as

One in which authority is fairly exercised; that is, consistently with the fundamental principles of justice embraced within the conception of due process of law. Contemplated in a fair hearing is the right to present evidence, to cross examine, and to have findings supported by evidence⁶.

It is a “judicial or administrative hearing conducted in accordance with due process.”⁷

The right to fair hearing in England and Wales may be traced to the Magna Carta Act of 1215. Article 39 of the Act provides:

No freeman shall be taken, imprisoned, diseased, outlawed, banished or in any way destroyed, nor will we proceed against or prosecute him, except by the lawful judgment of his peers and by the law of the land.

This provision of Magna Carta has been the catalyst for many constitutional provisions of fair hearing in different parts of the world. For instance, the 14th Amendment of the Constitution of the United States of America among other provisions contains the Due Process Clause that states may not deny any person “life, liberty or property, without due process of law”. Section 36 (1) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) provides that:

⁶ Black’s Law Dictionary 5th Edition, 537 UTL. L. Rev. 6 (1956-1957)

⁷ Black’s Law Dictionary 9th Edition (Pt 789)

In the determination of his civil right and obligations, including any question or decision by or against any government or authority, a person shall be entitled to fair hearing within a reasonable time by a court or other tribunal established by law and constituted in such manner as to secure its independence and impartiality.

Section 36 (1) of the Constitution has the following constituents, fair hearing, hearing within a reasonable time and impartiality of the court or tribunal. In *Amanchukwu v Federal Republic of Nigeria*⁸ the Supreme Court noted that Section 36 (1) of the 1999 Constitution (as amended) encompasses the rules of natural justice, *audi alteram partem* and “doing in the course of trial all things which will make an impartial observer, leave the court room to believe that the trial has been balanced and fair on both sides”.

It is a fundamental requirement of the constitution that a court or tribunal be fair to all parties in a case giving them opportunity and ample time to present their cases.

A hearing is not a fair when a party to a case is denied or refused the opportunity to put forward his case or refused or denied a hearing or is not given an opportunity of being heard.⁹

The application of the principle of fair hearing is not done in vacuum; it is a matter of hard facts which must be established by credible evidence. Thus the facts of each case must be examined to

⁸ (2009) All FWLR (Pt 465) 1672

⁹ *Darma v Oceanic Bank International Ltd* (2005) All FWLR (Pt 248) 1622, 1636-1637.

determine whether indeed there is fair hearing or not. A party who has been offered the opportunity to present his case or fails to take advantage of the fair hearing process created by a court or tribunal cannot turn later to accuse the court or tribunal of denial of fair hearing. A party must take advantage of the opportunity of fair hearing offered by an adjudicating authority as a case or matter must be heard within reasonable time. When a case is not heard within a reasonable time justice maybe denied. Thus fair hearing is a double edged sword of equal advantage to the parties in a case. The rights of the parties to a case must be balanced as one cannot be sacrificed for the other. Equal opportunity and attention must be given to both parties as the validity of a trial is not dependent on the result of the trial but on the fairness of the proceedings. Fair hearing must therefore be impartial, free from bias, dispassionate, just, non-discriminatory, open-minded, evenhanded, fair minded, equitable, reasonable and rational¹⁰.

Order 24 of the High Court (Civil Procedure) Rules and Fair Hearing

Order 24 Rule 1 of the High Court (Civil Procedure) Rules of Delta State provides:

A party may amend his originating process and pleadings at any time before the close of pre-trial conference and not more than twice during the trial but before the close of the case.

The provision of Order 24 Rule 1 of the High Court of Delta State (Civil Procedure) Rules which limits a party to the number of times he can amend his pleadings constitute an impediment to the attainment of justice. A party may have amended his or her writ or

¹⁰ *Ozibo-Esere v Debekene* (2018) All FWLR (Pt 918) 109, 139-140

pleadings twice without his counsel completely putting forward his case to the court. If the party is yet to close his case it is submitted that an amendment by such a party should be considered on the facts presented particularly where the other party would not be overreached or otherwise prejudiced. A blanket ban without recourse to the circumstances of each case would not meet the cause of justice. The point being made in this paper is that the facts of each case must be carefully examined on whether to grant or refuse an amendment. It is conceded that an amendment cannot be made *ad infinitum*. A party should not, however, be debarred from presenting his case in the manner that seems right to him or her simply because he or she has amended twice in the course of the trial. To deny a party an amendment solely on the ground of having amended twice and nothing else is tantamount to denial of fair hearing.

It is submitted that Order 24 Rule 1 limits the right of a party to put across his case to the court when a blunder has been made by the party in the course of prosecuting his case insofar as the party has amended twice in the course of the trial. The order in reality punishes a party for a blunder or honest mistake in the course of trial. The punishment would have been better if it were limited to costs or abridgment of time to file amendment to save time.

A literal interpretation of the order debars a party from amending his pleading if he has amended twice in the course of trial. In *Madamedor v Okonedo*¹¹ the court refused an application for amendment by the claimant as the amendment sought was contrary

¹¹ Unreported Suit No. W/9/2013 Ruling delivered by Justice G.E Akperi of the Delta State High Court Warri Judicial Division on 01/03/2017

It is conceded that Rules of Court are meant to be obeyed but where strict compliance with the Rules will lead to injustice the Rules should be abandoned in favour of doing substantial justice¹². It is submitted that where a party whether claimant or defendant seeks to amend his pleadings and the claimant is yet to close his case, the amendment should be granted notwithstanding that the party has amended his pleadings twice in the course of the trial. This is because the defendant has the opportunity to make a consequential amendment. Such amendments can be assuaged by the award of appropriate costs to the other party. Refusal of the court to grant such an amendment because it is contrary to the provisions of Order 24 Rule 1 of the Civil Procedure Rules constitutes an infringement of section 36 (1) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended).

The provision of the Rules is also contrary to Article 7 of the African Charter on Human and Peoples' Right (Ratification and Enforcement) Act which provides:

Every individual shall have the right to have his cause heard.

It is submitted that hearing does not pertain to attendance of the parties in court alone but includes affording any of the parties the opportunity of bringing all the necessary materials to court to support his or her case. It is a breach of the principle of fair hearing to shut out a party from bringing his case before the court on the

¹² *Kinfou v Kinfou* (2006) All FWLR (Pt 325 188, 201

grounds that he has amended twice in the course of the trial. The right to fair trial is fundamental to the rule of law.

It is submitted that Order 24 Rule 1 of the High Court of Delta State (Civil Procedure) Rules constitutes a clog in the wheel to fair hearing. Rules of court should and are intended to do justice to the parties. The Rules of court are mere handmaid to do justice and inflexibility to the rules will be antithetical to justice. In *Cropper v Smith*¹³ Bower LJ made the following memorable statement:

I think it is well established principle that the object of courts is to decide the rights of the parties, and not to punish them for mistakes which they may make in the conduct of their cases by deciding otherwise than in accordance with their rights... I know of no kind of error or mistake which if not fraudulent or intended to overreach, the court ought not to correct, if it can be done without injustice to the other party. Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy and I do not regard such amendment as a matter of favour or grace... It seems that as soon as it appears that the way in which a party has framed his case will not lead to a decision of the real matter in controversy, it is as much a matter of right on his part to have it corrected, if it can be done without injustice as anything else in the case is a matter of right.

The fact that an amendment will cause delay in the proceedings should not be a cause for refusing an amendment. No doubt the

¹³ (1884) 26 Ch. D 700; 710-711

DELSU Law Review Vol. 7 2021 268
provision of Order 24 Rule 1 is to ensure expeditious trial of cases but expeditiousness should not be sacrificed for justice. Justice should be the foremost consideration of the Rules of Court and the decision of a court.¹⁴ Fair hearing is not an abstract term. The principle of fair hearing should thrive on the peculiar facts and circumstances of each case. Where a rule of court like Order 24 Rule 1 of the High Court of Delta State (Civil Procedure) Rules prevents a party from putting forward his case, such a rule should be jettisoned as it offends the principle of fair hearing.

Applications for amendment should be considered case by case on its merit and not on the basis of the number of times a party has amended his pleadings in the course of trial. Temporary delay caused by an amendment can adequately be taken care of by the award of costs if the application in all circumstances of the case is not oppressive and will determine the real issues or questions in the case.

Where the opposing party will not suffer any injustice denying an amendment will be tantamount to denial of fair hearing simply because the party had amended twice in the course of the trial.

It is submitted that Order 24 Rule 1 of the High Court Delta State (Civil Procedure) Rules offends the principle of fair hearing and is also inconsistent with the constitutional provision of fair hearing as provided in section 36 of the Constitution of the Federal Republic of Nigeria (1999) as amended as well as Article 7 of the African Charter on Human and People's Rights. Such rule is null and void

¹⁴ *Falana v Oloro* (2013) All FWLR (Pt 666) 569; 577 and 580-581, *Ita v Dazie* (2013) All FWLR (Pt 683) 1880 at 1892.

to the extent of its inconsistency.¹⁵ To interpret Order 24 Rule 1 of the High Court (Civil Procedure) Rules of Delta State in absolute terms as done by the court in the case of *Madamedor v Okonedo*¹⁶ without recourse to the justice of the case is to make the court slavish to rules. Courts are not to mechanically apply rules of court in order not to strangle justice.¹⁷ Rules of court should not be elevated to the status of statutes. Rules of court are to be used to discover justice and not to choke justice. Rules of court are not a *sine qua non* in the just determination of a case. Rules of court are subsidiary instruments to provide support and promote the administration of justice.¹⁸

They are not meant to serve as stumbling blocks in the way of the court to do substantial justice. In *Utong v Utong*¹⁹ Tur (JCA) asseverated thus:

The court would not have however insisted on strict Particular rule of court if such posture would inflict outright injustice on any of the parties in their pursuit of justice. In certain occasions the provision of some harmless rules of court will give way to the interest of justice when they conflict.

Unfortunately, some judges are wont to follow rules of court strictly so as not to be seen as displaying judicial radicalism. This it is submitted will not develop Nigerian jurisprudence. Indeed under

¹⁵ *Kotoye v Central Bank of Nigeria* (2001) FWLR (Pt 49) 1567 at 1602

¹⁶ Op cit note 6

¹⁷ *Gambari v Buhari* (2009) (Pt 479) 458 at 601-602

¹⁸ *Duke v Akpabuyo Local Government* (2005) 19 NWLR (Pt 959) 130 at 142-143 or (2001) All FWLR (Pt 294), 55 at; 569

¹⁹ (2014) All FWLR (Pt 746) at 461. See also *Igomu v Ibrahim* (2014) All FWLR (Pt 719) 1162 at 117

Order 24 Rule 1 of Edo State High Court (Civil Procedure Rules), a party is at liberty to amend his originating process at any time before the settlement of issues. There is no limitation to the number of times. Limitation to amendment comes during trial and before the close of the case. A party is not allowed at this stage to amend more than twice. However, where there are exceptional circumstances a party may amend more than twice even during trial before the close of the case. This means that the circumstances of each case must be considered.

Order 26 Rule 1 of the National Industrial Court (Civil Procedure) Rules, 2017 provides that an amendment will be allowed for the purpose of determining the real question or issue between the parties and either secure substantial justice or settle the controversy between the parties and related issues. An amendment will be refused where it will:

- a. present a completely different case, or cause injustice to the other party or where the application for amendment is brought mala fide;
- b. necessitate the hearing of further evidence especially on appeal;
- c. not cure the defects in the procedure sought to be cured or where it is inconsistent or useless and
- d. amount to over-reaching the other party or an abuse of court process.²⁰

It is submitted these conditions for the grant or refusal of amendment are a restatement of the common law position.

²⁰ Order 26 Rule 1(2) National Industrial Court of Nigeria (Civil Procedure) Rules, 2017

Order 26 Rule 2 states that

A party may at any time but not more than twice with leave of court alter, amend, or modify the party's originating and/or other processes provided that party may not completely change the cause of action.

This rule 2 of Order 26 sets a limit on the number of times a party is allowed to amend his processes. However, the provisions of Order 26 rules 3 and 9 give the court the latitude to grant an amendment to a party who has exceeded the limit prescribed by Order 26 rules 2. Order 26 rules 3 states:

The court may at any time²¹ and on such terms as to cost or otherwise as the court or judge may think just, allow a party to amend any defect or error in any process, and all necessary amendments shall be made for the purpose of determining the real questions or issues in controversy raised or arising from the proceedings.

And Order 26 Rule 9 provides:

A judge may at any time amend any defect or error in any proceedings.

A combined reading of these provisions clearly show that the National Industrial Court may entertain and grant an amendment for good cause even after a party has amended twice in the course of the proceedings. The general power granted under Order 26 Rules 3 and 9 of the National Industrial Court Rules is not subject

²¹ Emphasis ours

to subsection 2 of the same Order unlike the Delta State High Court (Civil Procedure) Rules which makes Order 24 Rules 8 (on general power to amend) subject to Order 24 Rule 1.

Comparism of the High Court (Civil Procedure) Rules of Delta State with Some Selected States in Nigeria

It is necessary to compare the provision on amendment of pleadings of the High Court of Delta State (Civil Procedure) Rules 2009 with some states in Nigeria in order to appreciate the argument that provision of Order 24 Rule 1 inhibits fair hearing. The provisions of High Court Civil Procedure Rules of Bayelsa, Edo and Rivers States which are neighboring states to Delta will be used for the purpose of comparism.

Order 24 Rule 1 of the Bayelsa State High Court Rules, 2010 provides:

A party may amend his originating process or other processes and pleadings at any time before the close of pre-trial conference and, except in exceptional circumstances, not more than twice during the trial

Order 24 Rule 1 of the Edo State High Court (Civil Procedure) Rules, 2018 states

A party may amend his originating process and pleadings at any time before the settlement of issue and not more than twice during the trial but before the close of the case, provided the court may grant more than two amendments in exceptional circumstances.

It is submitted that the provisions on amendment in the High Court Civil Procedure Rules of Bayelsa and Edo States do not offend the principles of fair hearing as a window is given to a party, unlike that of Delta State, to present his case on good cause shown. A claimant or defendant who has amended twice during trial can be granted leave to amend his pleadings upon exceptional circumstances. This then mean that the circumstances of each case will be taken into consideration after a party seeking amendment

has amended twice during the course of trial²². There is no total prohibition against amendment after a party has amended twice during the course of trial. The provision of the High Court (Civil Procedure) Rules, 2010 of

Rivers State is even better and is commendable. Order 24 Rule 1 states:

A party may with leave of court amend his processes at any time before judgment

And Order 24 Rule 8 provides:

Subject to the provisions of Rule 1 of this Order, a judge may at anytime and on such terms as to costs or otherwise as may be just, amend any defect or error in any proceedings and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceedings

It is submitted that the provisions on amendment as encapsulated in the High Court (Civil Procedure) Rules of the Rivers State meets the purport and intendment of amendment in law and does not

²² *Edokpayi v Edo State Government & 6 others* (Unreported) suit No. B/14/2010 Ruling delivered by Justice P.A. Akhiero of Edo State High Court on Wednesday, 22nd June, 2016.

DELSU Law Review Vol. 17 2021 274
inhibit the right of a party to fair hearing. The discretion to grant an application for an amendment should reside in the court. A party should not be inhibited from amending his process as the provision of Order 24 Rule 1 of the High Court of Delta State (Civil Procedure) Rules has clearly shown. The award of appropriate costs to compensate the other party for delay, inconvenience and consequential amendment is certainly better than inhibiting a party from amending his process.

Conclusion

It is submitted that provision of the Order 24 Rule 1 of the High Court of Delta State (Civil Procedure) Rules, 2009 inhibits fair hearing by limiting the number of times a party can amend his process. It offends the tenets of fair hearing, the provisions of section 36 of the Constitution of the Federal Republic of Nigeria 1999 (as amended) and Article 7 of the African Charter on Human and Peoples' Rights

(Ratification and Enforcement) Act and should be amended. Alternatively the judiciary is urged to display judicial activism by granting amendment in deserving cases with the award of appropriate costs even if a party has exceeded the limit prescribed by the Rules.