

Virtual Court Proceedings in Nigeria: Some Legal Matters Arising

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ABSTRACT

The outbreak of COVID-19 brought about the hitherto uncommon practice of e-filing as well as the practice of virtual court proceedings in the Nigerian Judiciary in a bid to dispense with extremely urgent, essential, or time-bound matters. The Lagos State High Court had its first virtual or remote court hearing on May 4, 2020, where a driver, Olalekan Hameed, was tried, convicted, and sentenced for the murder of 76-year-old Mrs Jolasun Okunsanya virtually. In the wake of these developments, there have been legal debates on the constitutionality or otherwise of virtual hearings. This Article examines the debates on the constitutionality or otherwise of the Nigerian courts' adoption of virtual court proceedings. The paper concludes that though utilizing the development brought by ICT, the internet, and associated technologies, virtual court proceedings, and e-filing are practicable and desirable, a lot needs to be done in terms of building the capacity of the Judiciary, amending the rules of court, the RPC, reviewing the curriculum of Nigerian Law School and in mandatory training of lawyers on the use of ICT in legal practice.

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1. INTRODUCTION

The basic principle is that a suit commenced by any recognized mode commences when such mode/process accompanied by the mandatory documents are prepared and taken to court for filing. The process registry checks the processes to confirm compliance with the rules, then assesses the claims/reliefs to determine how much is payable as court fees. This process is called assessment. After this, the person filing the processes will take them to the account section to effect the necessary payments.

Before COVID-19, with the developments brought by the ICT, internet, and associated technologies, there was an emerging trend that filing court processes could seamlessly be done electronically. Although the practice was not fully embraced in many countries, including Nigeria, due to its numerous challenges, several provisions were made in the rules of courts in some states recognizing that processes can be filed electronically.

Furthermore, the effect of the recent worldwide outbreak of COVID-19 necessitated the Nigerian Judiciary's intervention to curb the adverse effect of total lockdown of the courts in Nigeria as in other sectors of the country. The Judiciary's intervention took the form of some Heads of Courts in Nigeria, such as the Chief Judge of Lagos state signing the Lagos State Judiciary Remote Hearing of Cases (COVID-19 Pandemic Period) "Practice Direction," which came into force on May 4, 2020. Some other states followed suit.

This Practice Direction ensures that urgent and time-bound cases are heard and determined remotely through electronic platforms like Zoom, Skype, or any other video and audio-conferencing platforms approved by the court.

This paper, therefore, examines generally the prospects of employing these electronic and digital mechanisms for electronic filing of court processes and for conducting virtual court proceedings in some developed and developing countries to see if there is any lesson Nigeria can learn. It analyses both the legal and factual issues surrounding e-filing and virtual court proceedings under the extant



Nigerian laws, their operational practices side by side, and the challenges and prospects of each in civil proceedings in Nigeria.

In particular, the paper examines the debates on the constitutionality or otherwise of the Nigerian courts' adoption of virtual court proceedings. The paper concludes that though utilizing the development brought by ICT, the internet, and associated technologies, virtual court proceedings, and e-filing are practicable and desirable, a lot needs to be done in terms of building the capacity of the Judiciary, amending the rules of court, the RPC, reviewing the curriculum of Nigerian Law School and in mandatory training of lawyers on the use of ICT in legal practice.

2. DEFINITION OF TERMS

“Virtual” means “not physically existing” but made by software to appear to do so ([Oxford Learner's, n.d.](#)). It also means digital replication or a version of something real. The development of ICT and the internet affects all aspects of our lives, from trade and commerce to education and culture, medical practice, and legal practice. In legal practice, ICT and the internet brought about emerging trends and new ways of doing almost everything from law teaching, criminal investigations, and prosecution to legal practice, advocacy, and court management. It brought new thoughts and concepts like e-lawyering, e-trial, virtual legal practice, virtual court proceedings, and legal analytics. Lawyers can collaborate or interact with their clients or court officials remotely.

The legal practice can be conducted online without physically coming to court. This practice has been around for years, especially in developed countries, and Nigeria's court rules have recently recognized this reality. In recent years, the use, misuse, and abuse of ICT and the internet, although posed some serious legal challenges in many countries, including Nigeria, in terms of legal practice, bringing to the limelight many developments and concepts, among which are the following:

2.1. E-Justice

E-justice refers to using information and communication technologies to improve access to justice, increase cooperation between legal authorities, strengthen the justice system, and improve legal institutions and the overall administration of law ([LIBRE, n.d.](#)).

2.2. E-Court

E-court is a system by which court management and trial of cases are conducted electronically leveraging the use of ICT, internet, and other gadgets and software. Through E-court, not only the court proceedings can be conducted remotely and digitally, but the administration of the entire court is being done not only electronically and digitally but also remotely. E-court goes beyond virtual court proceedings only. It includes e-filing, e-service (e.g., legal analytics, roboticization of judges), e-trial, e-judgment, and e-retrieval of every piece of court's information, records, and resources.

An Australian court in *Harris Scarfe v Ernst & Young* defined the concept thus:

“The electronic court enables the trial to be conducted largely in a “paperless” fashion. It goes beyond the electronic storage and retrieval of relevant documents on the court file, such as pleadings, particulars, lists of documents, and notices to admit. It includes electronic presentation of witness statements, expert reports, chronologies, lists of authorities, and argument outlines. More significantly, the database includes documents that will be, or are likely to be, tendered and the electronic transcript version. Users can “freeze” a document they wish to keep in front of them, make annotations to documents and transcripts, which annotations will be accessible only to that user, and move between related documents and transcripts through hyperlinks. The system allows for the orderly marking of documents for identification and the marking of exhibits, including references to the basis of tender, any qualifications on tender and admission, and transcript references at the point of tender, together with subsequent referrals by witnesses and counsel to that exhibit.” ([2005] SASC 407).

2.3. E-Trials or Remote Court Proceedings

E-trials or remote court proceedings can be defined as court proceedings whereby the court officials, the judge, the parties, and their counsel interact and conduct the court's business virtually ([Aneke, 2021](#)). In virtual proceedings, the audience or the general public is expected to have access to and observe the court proceedings without any hindrance to avoid encroaching upon the guaranteed rights under the constitution. The entire trial, including applications, examination of witnesses, tendering of documents, presentation of addresses, and even judgments, is to be done remotely without any physical contact between the counsel, the court officials, the parties, and the audience. This is very practicable with deploying ICT, internet, associated technologies, and software. Although the use of the internet and ICT has its peculiar challenges, which we will address, the trend has recorded tremendous successes in many countries, saving time and cost for both the government and litigants. Nevertheless, even

though the constitutionality of virtual court proceedings was put to rest in many countries, including Nigeria, there are some legitimate fears worthy of looking at, as raised by the opponents of virtual court proceedings.

2.4. *Virtual Law Firm (VLF) or Law Practice*

Virtual law firm (VLF) or law practice is the practice that exists online through a secure portal and is accessible to both the client and the lawyers anywhere the parties may access the internet.

It was also defined as a law firm that does not utilize a central office to house attorneys or permanent staff. Instead, the firm's attorneys work from wherever they choose (often their home).

In virtual law practice, the firms rely on SaaS applications to handle every aspect of their practice, including securely storing client documents and communicating with clients and court officials externally and internally collaborating with counsel.

2.5. *E-Filing or Electronic Filing of Court Processes*

E-filing or electronic filing of court processes form a branch of the e-court system whereby court processes are to be filed by the litigants and counsels, and those issued out by courts are electronically filed and presented.

3. THE LEGAL DEBATES

One of the effects of the spread of the novel coronavirus on the Nigerian Judiciary is bringing into the limelight the hitherto uncommon practice of e-filing and virtual court proceedings. Both were practically unknown in this sector before the outbreak of the virus. Consequently, most of the Heads of Courts in Nigeria, beginning with the Honourable Justice of Nigeria, Hon. Dr. Justice I.T Muhammad, suspended court sittings on March 23, 2020, for an initial period of two weeks¹ and subsequently on April 8, 2020, suspended all court sittings sine die in Nigeria except when expected to sit to dispense matters that are extremely urgent, essential or time-bound.² By implication, the federal courts allowed to sit were to conduct their proceedings virtually.

Following the CJN's directives, the Chief Judge of Lagos State signed the Lagos State Judiciary Remote Hearing of Cases (COVID-19 Pandemic Period) Practice Direction. The essence of the Practice Direction is to ensure the hearing and determination of urgent and time-bound cases through digital platforms like Zoom, Skype, or any other Video and Audio Conferencing Platform approved by the courts. Lagos State Judiciary had its first Virtual sittings in line with this Practice Direction. Expectedly, some other states of the federation's Judiciary adopted the Lagos model to hear cases virtually in both civil and criminal proceedings. The Attorney General and Minister of Justice of Nigeria, Abubakar Malami, SAN, and the National Judicial Council have separately at different times announced plans for Nigerian courts to resort to Virtual Proceedings during and after the COVID-19 pandemic. Interestingly, the Lagos State High Court had its first virtual or remote court hearing on May 4, 2020, where a driver, Olalekan Hameed, was tried for the murder of 76-year-old Mrs Jolasun Okunsanya on December 1, 2018. The court found him guilty and sentenced him to death by hanging.

3.1. *Two Schools of Thoughts*

The various directives given by heads of courts throughout Nigeria on the issue of virtual or remote court proceedings led to many legal debates among legal luminaries and academicians, thereby giving rise to proponents and opponents of Virtual court hearings.

3.2. *Proponents of Virtual Court Proceedings*

Proponents of virtual court proceedings argue that it is convenient and saves time and cost (Bannon & Keith, 2020). In this regard, Banon and Keith believe that the norm of lawyers and litigants sitting in court for long hours just to have their cases heard for a few minutes is time-consuming. Also, proponents of virtual court proceedings opine that there will be increased transparency as the virtual courts will be more readily accessible to more people (McIntyre et al., 2020). Thus, remote technology makes it easier for individuals to participate in court hearings and for more significant numbers to participate in a single hearing. Parties lay witnesses, crime victims, expert witnesses, and other stakeholders who may live far away from the courthouse can all be heard in a remote hearing. A good example is over 3 million people accessing the live stream of the UK's Brexit hearing.

¹Circular (23rd March 2020) vide Ref No: NJC/CIR/HOC/II/631.

²Circular Ref (8th April 2020) vide Ref. No: NJC/CIR/HOC/II/656.

3.3. Opponents of Virtual Court Proceedings

Conversely, the opponents of virtual court hearings hinge on their contention on the constitutionality or otherwise of virtual court proceedings. This school of thought hinges on the provision of the 1999 Constitution, which states that court proceedings, including delivery of court decisions, shall be held in public. The requirement of public hearing and determination of cases in Nigeria is mandatory by using the word “shall.” It is settled law that using the word “shall” in a statute means a command to do or not to do a particular thing, and there is no room for discretion (Onochie et al., 2006).

Therefore, subject to certain limited exceptions, civil and criminal court proceedings shall be held publicly. In many cases, the Supreme Court has upheld the conduct of court proceedings in public as mandatory and compulsory. In *Simon Edibo v. The State* (2007), the appellant’s conviction and sentence for culpable homicide punishable with death was set aside on the contested ground that his plea was taken in the chambers of the trial judge. The Supreme Court, in allowing the appeal, based its decision on the provisions of S.33 (1) and (3) of the 1979 Constitution, which is *impari material* with S.36 (1) and (3) of the 1999 Constitution. The Supreme Court, in setting aside the decisions of both the trial and appeal court, held that the taking of the appellant’s Plea in the Judge’s chambers was not only irregular but fundamentally defective.

It is essential to note the rationale for the Supreme Court’s nullification of the trial court’s decision on the ground that the Judge’s chambers, where the plea was taken, is not a public place that permits unrestricted ingress and egress from the general public. The court explained as follows:

Let me dismiss with respect, and as completely misconceived and unacceptable to me, the submission on page 19, paragraph 6.2 of the respondent’s brief, that the chambers of a judge is a public place and satisfies section 33(3) of 1979 Constitution (as amended) and section 36(3) of the 1999 Constitution of the Federal Republic of Nigeria. I say no because nothing can be far from the truth. If I or one may ask, can a judge’s chambers be described as an “open place” accessible to all and sundry? I think not. I hold firmly that a Judge’s chambers cannot and will never be a public or “open” and unrestricted place. By these references and arguments, can the learned counsel for the respondent, in all honesty and seriousness, maintain or insist that he/she can walk into the chambers of any judge or justice without the consent or permission of the said judge or justice and unrestricted? I think not. Surely and certainly, a judge’s chambers are not and cannot be equated to a hall in a public building used for formal meetings. Chambers can also be defined as or equated with a private bedroom or private room. Even in Black’s Law Dictionary, 7th Edition, on page 224, a judge’s chambers is defined as “the private room or office of a judge.” (2007)13 NWLR (Pt. 1051) 306.

Similarly, in the case of *Oviasu v. Oviasu* (1973), a petition for dissolution of marriage conducted in the judge’s chambers was set aside by the Supreme Court. The Supreme Court held that the petition’s hearing in the judge’s chambers occasioned a fundamental irregularity as the same was not conducted in public. The court defined “public” as “open to everyone without discrimination. Anything, gathering or audience which is not private is public.”

Likewise, in the case of *Nigeria-Arab Bank Ltd v. Barri Engineering Nig. Ltd* (1995), the Supreme Court set aside the trial court’s decision in the Judge’s chambers. It held that it occasioned an irregularity that touched on the whole proceedings’ legality.

Nevertheless, in another case, the Supreme Court set aside the decision of an Upper Area Court delivered in chambers, holding that the procedure adopted by the Upper Area Court was a fundamental breach of the constitution, which rendered the judgment delivered null and void (*Alhaji Bani Gaa Budo Nuhu v. Alhaji Isola Are Ogele*, 2003).

The right provided in Section 36(3) and (4) of the 1999 Constitution is a public right for every citizen of Nigeria, to the effect that court proceedings must be open and easily accessible to everyone free of obstacles. The Supreme Court has severally emphasized this principle. Thus, the respondents’ arguments that delivery of judgment in Judges’ chambers ought to stand since there was no miscarriage of justice, notwithstanding that trials in such cases were not held in open court, were rejected by the Supreme Court (*Simon Edibo v. The State*, 2007).

3.4. Can Virtual Court Proceedings, as Presently Constituted in Nigeria, Qualify as a Proceeding held in the Public?

Aside from a consideration of constitutional, statutory, and judicial decisions in helping to determine the constitutionality of virtual court proceedings, a resort to and understanding of all the facilities that must be put in place before virtual court proceedings can be conducted will also no doubt help in answering the question herein. Such facilities include appropriate technological gadgets such as functional smartphones and computer gadgets, access to the internet, and registration with a Virtual communication service provider, among others. These facilities are not easily affordable and accessible by most of the poverty-stricken Nigerian public. Poverty is a lack of disposable capital/finance and technological knowledge to operate related facilities.

Again, virtual court proceedings as presently constituted are opened only to judges, respective litigants, and their counsel, not to the public at large, as opposed to the constitutional provision in sections 36(1), (3) and (4) of the 1999 Constitution. This practice, no doubt, is restrictive and limiting in nature as members of the public would not have access to any such Virtual proceeding.

The argument in some quarters that link to virtual court proceedings should be shared online for all and sundry to join is presently unfeasible or impracticable because many Virtual communication platforms can only permit a limited number of participants. This, aside from the fact that many of such platforms are paid for, and poverty in Nigeria is a severe obstacle to the dispensation of justice where the poverty rate is almost 40%, and about half of her population earns less than a meager 1.92 USD per day.

Emphatically, the Supreme Court in *Edibo v The State* held on the breach of any mandatory constitutional provision as to whether it occasions a miscarriage of justice as follows:

“A breach of a mandatory constitutional provision is more than a mere technicality; it is fundamental. And it is no argument that there has been no miscarriage of justice.” (*Simon Edibo v. The State, 2007*).

Furthermore, the introduction of Virtual court proceedings as presently constituted and operated conflicts with the spirits and intendments of some substantive laws and regulations such as the Evidence Act, Legal Practitioners Act (“LPA”), and the Rules of Professional Conduct, 2007 (“RPC”) which inter alia regulates the appearance of counsel before courts. The RPC provides that a lawyer shall not wear the Barrister’s or Senior Advocate’s Robes on any occasion other than in court³.

Will this Rule be relaxed during virtual court proceedings? Rule 20 of the Lagos Practice Directions contrarily provides that lawyers shall dress “appropriately.” during Virtual court proceedings. If the “appropriately” is assumed to mean to “be clothed in Barrister’s or Senior Advocate’s robe,” would the wearing of these robes to conduct Virtual court proceedings in Barrister’s offices not be a violation of the provisions of Rules 45(2) of the RPC hence such a lawyer is committing professional misconduct on such occasion?

Finally, on this public trial issue, it must be noted that it is one of the fundamental rights guaranteed to a litigant or accused as the case may be under the Constitution, and this cannot be taken away lightly as being done presently by Virtual court proceedings through Practice Direction. Even though the forum “public” may not only refer to a formal courtroom, it has been said that it must be a place where there is access by the public (*Agaba, 2017*). Afolayan said criminal proceedings (including civil proceedings) should be held in public where all public members will have free right of ingress and egress (right to enter and go out freely) of the courtroom to observe proceedings (*Afolayan, 2016*). Going by the above arguments and authorities cited, can it be said that Virtual court proceedings qualify as proceedings conducted in public? We submit that it does not qualify.

3.5. *Are Heads of Courts Constitutionally Empowered to Make Practice Directions to Regulate Virtual Court Proceedings in Nigeria?*

It is indisputable that the Heads of the Superior Courts of Record created under the 1999 Constitution are imbued with powers to make Rules of court regulating the practice and procedures of their respective courts.⁴

On its part, Section 36 (3) and (4) of the 1999 Constitution have expressly stipulated that the court proceedings, including the pronouncement of its decisions, shall be held in public. Suppose the word “Public” as argued in this paper and understood in legal parlance excludes any other implied forum restricting the right of ingress and egress to the public, as in the case of the virtual forum. Therefore, it can be contended that the said Heads of Courts do not have constitutional powers to Practice Directions that are either in conflict with or tend to expand the express provisions of the Constitution.

The law is settled that all other implied provisions will be excluded when there is a specific provision in a statute. This principle of law is expressed in the Latin maxim, *expressio unius exclusio al terius* (*Lagos State v. AG Federation & 34 Ors, 2014*).

Therefore we submit that any Practice Directions which seek to create and regulate Virtual courtroom proceedings in a Judge’s chambers or any other forum where there is no right of ingress and egress by the public will be in direct conflict with the provision of S. 36(3) and (4) of the 1999 Constitution. The law is settled that any such conflicting Practice Directions with the express provisions of the Constitution will be null and void to the extent of their inconsistency (*Muhammadu Buhari v. Independent National Electoral Commission & 4 Ors, 2008*).

³Rules of Professional Conduct (2007), Rule 45(2).

⁴SS.236, 248, 254F, 259 and 274 of the 1999 Constitution for the powers of Heads of the Supreme Court of Nigeria/CJN, President of the Court of Appeal, Chief Judge of the Federal High Court, President of the National Industrial court, Chief Judge of the High Court of the FCT, Abuja and Chief Judge of High Courts of the States Respectively in making Rules of procedure for the court they head.

3.6. The Supreme Court Decisions

The Supreme Court expressed its position on the constitutionality or otherwise of Virtual hearing in the case of *Attorney General of Lagos State v Attorney General of the Federation & the National Assembly*⁵, where the Lagos State Government filed a suit at the Supreme Court of Nigeria against the Attorney General of the Federation to inquire whether virtual/hearing commenced in the Lagos State High Court or any other court is constitutional. This is because of sections 36(1), (3), and (4) of the Constitution, which require court proceedings to be held in public. Also, in *Attorney General of Ekiti State v Attorney General of the Federation & 2 others*⁶, the Ekiti State Government prayed the Supreme Court to nullify an instruction by the Attorney General of the Federation made on April 20, 2020 to heads of all courts in the country directing virtual court hearing. It stated that the instruction contravened the Constitution particularly sections 1(3), 4(6), 5(2), 6(2), 36(34), 272, and 274 of the Constitution. Regarding the two suits, the Supreme Court stated that the suits are speculative and premature until there is an infringement of a right by the virtual hearing. It ruled that virtual court hearings are not unconstitutional. By this ruling, the two suits were withdrawn.

4. RECOMMENDATION AND CONCLUSION

While the desirability of Virtual Court proceedings by the Nigerian Judiciary is incontestable owing to recent global trends and in the light of the pronouncement of the recent Supreme Court cases, we recommend that specific laws such as the Nigerian Constitution, Rules of Professional Conduct, Evidence Act, Legal Practitioners' Act ought to be amended to avoid fundamental conflicts and the consequent slaughtering of justice on the altar of modernization. Also, the provision of constant power supply, training of judicial staff on how to deploy information technology (IT) for the use of the courts, upgrading and improving the courts' infrastructural facilities, and improved internet services are essential precursors to implementing Virtual Court hearings in Nigeria. Also, the curriculum for training lawyers at the university and the Nigerian Law School should be reviewed to include information communication technology.

In conclusion, implementing the above recommendations would enable virtual court hearings to flourish in Nigeria.

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⁵Unreported suit no. SC/CV/260/2020, ruling was delivered by Hon. Justice Rhodes-vivour JSC on July 14, 2020.

⁶Unreported suit no. SC/CV/261/2020, ruling was delivered by Hon. Justice Rhodes-vivour JSC on July 14, 2020.