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Okafor v Nweke [2007] 10 NWLR (Pt. 1043) 521

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Facts

This section of the article, examines the facts and decision in the *Okafor's Case* by highlighting other decisions of both the Court of Appeal and the Supreme Court which the decision has been followed, it also contextualises the consequences of the decision on Nigeria justice delivery system.

The brief facts of the case are as follows. It is not an exaggeration for one to assert that no decision of the Supreme Court has had such a devastating effect on Nigeria's adjudicatory system than the decision in *Okafor v. Nweke.*[2] The Respondent in the case, filed a Motion on Notice at the Supreme Court seeking *inter alia*, an order of extension of time within which to apply for leave to cross appeal against the judgment of the Court of Appeal, Enugu Division, delivered on the 25th day of January, 2001, and extension of time within which to file the Respondent/Applicant's Notice of Cross Appeal. The Motion of Notice, Notice of Cross Appeal and the Applicant/Respondent Brief of Argument in support of the Motion on Notice, were all signed by the law firm of J.HC. Okolo, SAN & Co. In response to the Motion, the 1st-3rd Respondents filed a counter-affidavit and a Brief of Argument and challenged the competence of the processes filed, challenging them on the ground that they were signed by a law firm as opposed to an animate legal practitioner *in tandem* with the provisions of Rule 10 of the Rules of Professional Conduct for Legal Practitioners (RPCFLP).

The Supreme Court, in a unanimous ruling delivered on the 9th day of March, 2007, considered the provisions of section 2(1) and 24 of the Legal Practitioners Act which defines who a legal practitioner is and held that the Motion on Notice, Notice of Cross Appeal and Brief of Argument all signed by the law firm of J.H.C. Okolo SAN & Co. were incompetent and according struck out the said processes. While the Court acknowledged the fact that prior to its decision, legal practitioners have formed the habit of signing court processes in their partnership or firm's name without indicating the name of the practitioner. The court justified its striking out of the process the because of the way and manner they were signed thus:

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[2][2007] 10 NWLR (Pt. 1043) 521.

> … the need to arrest the current embarrassing trend in legal practice where authentication or franking of legal documents particularly processes for filing in the courts have not been receiving the serious attention they deserve from some legal practitioners. Legal practice is a very serious business that is to be undertaken by serious minded practitioners particularly as both the legally trained minds and those not so trained always learn from our examples.

The Applicant had responded to the object that it was fanning to flame the embers of technicality which is inimical to substantial justice which the court is enjoined to do. The signing of the processes in the way and manner they were signed, is an act of the counsel which the litigant should not be punished, especially having regard to the fact that there was nothing that the litigant could do as he lacked the knowledge or legal expertise to know that a wrong was being or has been committed by his counsel.

Holding

However, the court discountenanced this erudite contention and held that:

> In arriving at the above conclusion, which is very obvious having regard to the law, I have taken into consideration the issue of substantial justice which is balanced on the other side of the scale of justice with the need to arrest the current embarrassing trend in legal practice when authentication or franking of legal documents, particularly processes for filing in the court have not been receiving the serious attention they deserve from some legal practitioners. Legal practice is a very serious business that is to be undertaken by serious minded practitioners particularly as both the legally trained minds and those not so trained always learn from our examples. We therefore owe the legal profession the duty to maintain the very high standards required in the practice of the profession in this country. The law exists as a guide for actions needed for the practice of law, not to be twisted and turned to serve whatever purpose, legitimate or otherwise which can only but result in embarrassing the profession if encouraged.[3]

While this case lay down the principle that legal documents filed by a legal practitioner on behalf of a client signed in the name of his firm and not him personally, are incompetent, the lower courts have adopted this decision by *stare decisis.* They are unjustly stretching it to render incompetent processes which were signed by a legal practitioner on behalf of another legal practitioner without indicating the name of the signatory, as was in the cases of *Peak*

[3][2007]10 NWLR (Pt.16534) 348 at 532, Paras. A-D.

Merchant Bank v. Nigerian Deposit Insurance Commission[4] and *Adeneye v. Yaro.*[5] This slavish application of the principle enunciated in the case, is, with due respect, rather too wide, unjustifiably over stretched, extreme and capable of perpetuating avoidable injustice.

The decision in the *Okafor's Case,*[6] has, pursuant to the revered doctrine of *stare decisis,* been followed in several other cases. A few will be examined. Firstly, *Oketade v. Adewunmi*[7] the facts of which are that on the 31st day of May 1994, the Chief Magistrate Court, Ibadan delivered a judgment whereby it ordered the Appellant to deliver possession of the Respondent's property he was occupying. He brought an application for stay of execution instead of vacating the premises and it was refused. He appealed the judgment to the High Court of Oyo State, Ibadan and praying for a stay of execution. This was granted and the Respondent appealed to the Court of Appeal on the failure of the Appellant to diligently prosecute the appeal after obtaining a stay of execution, the appeal was successful and the stay of execution was set aside.

Being dissatisfied, the Appellant appealed the decision of the Court of Appeal to the Supreme Court. The Respondent raised a preliminary objection on the competence of the appeal on the ground that both the Notice of Appeal and Appellant Brief were signed by a legal practitioner known to law but by the law firm of 'Olujimi and Akedolu.' The Court took cognizance of the provisions of section 2(1) and 24 of the LPA and upheld the objection and dismissed the appeal because the processes were not duly signed as expected. It jettisoned the argument that the objection was a mere irregularity thus "where a court process is issued in the name of a firm and not in the name of a legal practitioner, it is not a mere technicality that can be brushed aside. It is fundamental to the judicial process. Such a process is incompetent, invalid, null and void."

In *First Bank of Nigeria Plc. & Anor. v. Alh. Salmanu Maiwada*[8] the Supreme Court held that a Notice of Appeal signed by notice of appeal signed by 'David M. Mando & Co.' is incompetent and the appeal was liable to be struck out for want of jurisdiction. The Court made reference to the provisions of section 2(1) and 24 of the LPA and concluded that:

[4][2011] 12 NWLR (Pt. 1261) 253.
[5][2013] 3 NWLR (Pt. 1342) 625.
[6][2007] 10 NWLR (Pt. 1043) 521.
[7][2010] 8 NWLR (Pt. 1105) 63.
[8] [2013] 5 NWLR (Pt. 1348) 444.

> It is indeed clear in my humble opinion that the interpretation of the above provisions (i.e. sections 2(1) and 24 of the LPA, Order 51 Rule 1 of the Federal High Court (Civil Procedure) Rules, 2009) is that it is the human person legally trained or termed a legal practitioner that is meant under those legislations above and only such persons and not a firm or group in the firm of legal practitioner come within the ambit of those two sections of the law. Therefore for the purpose of the authorizing signature, it is either the litigant himself or the human person who is the legal practitioner that can sign.

It was contended by the Appellant that adherence to the decision in the *Okafor's Case*,[9] on the anchor of section 2(1) and 24 of the LPA, are mere technicalities but the Court vehemently refuted this on the ground that:

> The Legal Practitioners Act seeks to make legal practitioners responsible and accountable more especially in modern times. There is nothing technical in insisting that a legal practitioner should abide by the dictates of the law in signing court processes. The issue is not in the domain of public policy. The convenience of counsel should have no pre-eminence over the dictates of the law. The law as enacted should be followed.

In fact, the appellant contended that given the fact that the law firm had been incorporated under part C of the Companies and Allied Matters Act (CAMA) clothes the same with the vires to sign court documents. Thus, the process signed in the name of the law firm ought to be countenanced as proper. The court in rejecting this argument, held that:

> It is a misconception of the law to contend that a law firm registered as a business name under section 573(1) of the Companies and Allied Matters Act is entitled to practice and sign processes in its registered name. Section 573(1) of the Companies and Allied Matters Act is not an authority that can be relied upon to uphold the view that a process signed and filed by a firm of legal practitioners which has no life is valid in law. The general provisions of section 573(1) of the Companies and Allied Matters Act is subject to the specific provisions of section 2(1) and 24 of the Legal Practitioners Act[10]

In fact, the Court was comfortable in upholding this decision despite acknowledging that it would inflict avoidable untoward hardship on litigant when per Ckukwuma Eneh, JSC (as he then was) held that:

> I am aware of the hardship the decision has caused and is bound to cause. Notwithstanding even then that to hold otherwise may tend to hamper an apparent development of law. This is

[9] [2007] 10 NWLR (Pt. 1043) 521.
[10] *F. M. B. N. v. Olloh* [2002] 9 NWLR (Pt. 773) 475; *Kraus Thompson Org. Ltd. v. N.I.P.S.S.* [2004] 17 NWLR (Pt. 901) 44.

> so as the court has to interpret the law as it is and not to make or write it as it ought to be. The said provision of the Legal Practitioners Act has been strictly interpreted and have to be applied as prescribed therein no matter the hardship occasioned thereby as is the case in the two instant appeals.[11]

With due respect to the above stated position of the court, while it is true that the duty of the court is to interpret the law and not make law, what is called the law, is not words printed on paper but the interpretation given to the printed words by the court, that is what becomes binding. That judges actually engage in law making (i.e. judicial legislation), is beyond controversy for anybody who has a minimum acquaintances with the history of common law. Decisions such as *Donoghue v. Stevenson*[12] and *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.*[13] became law based on the interpretation of the court. In fact, Oliver Wendell Holmes had emphasized that the life of the law was experience as well as logic.[14] He contends that "the prophecies of what the court will do in fact, and nothing more pretentious, are what I mean by the law…"[15] In fact, it was through judicial legislation that the Supreme Court found for the Appellant in the celebrated case of *Nasir Bello v. Attorney General of Oyo State*[16] where the court applied the maxim of *ubi jus ibi remedium* to find the killing of the appellants bread winner by the respondent while his appeal was pending, was a breach of his right to life. Thus, the excuse given by the court, under the circumstance, is with respect, not tenable.

In the same vein, in *SLB Consortium Ltd. v. Nigerian National Petroleum Corporation.*[17] The Supreme Court made the same pronouncement to the effect that the writ of summons signed by 'Adewale Adesoka & Co.' is incompetent as Adewale Adesoka & Co. is not licensed to practice law in Nigeria and cannot therefore signed any process filed before a court. The effect is that the court processes (writ of summons) purportedly signed by Adewale Adesokan & Co. "is not just bad but, is incurably bad and all proceedings, including the appeal founded on it, no matter how well adjudicated, is a nullity as the courts had no jurisdiction to be seised on the matter.[18]

[11] *First Bank of Nigeria Ltd. v. Maiwada* [2013] 5 NWLR (Pt. 1348) 444 at 497-498 Paras. H-A.
[12] (1932) A.C. 562.
[13] (1963) 3 W.L. R. 101.
[14] Juan Elegido, *Jurisprudence* (Ibadan, Spectrum Books Ltd., 1994) 303.
[15] Michael Freeman, *Lloyd's Introduction to Jurisprudence* 6th Ed. (London, Sweet & Maxwell, 1994) 695.
[16] [1986] 5 NWLR (Pt. 45) 79.
[17] [2011]9 NWLR (Pt. 1252) 317.
[18] *Cole v. Martins* (1968) 1 All NLR 161.

This decision and others predicated on it, no doubt, have adversely affected many litigants and its effects are hereunder examined. The decision, is draconian and is an obliteration from the established position of law that the iniquity of the counsel should not be visited on the litigant or the litigant should not be punished for the fault of his/her counsel as was held in *Majekodunmi v. Chrislieb Plc.*[19] In as much as it is appreciated that the rationale for the decision is to instill professional responsibility and accountability in legal professions in the discharge of their duties to the client, the court failed to recognize the fact that the processes presented by the legal practitioner were presented for and on behalf of a litigant, who most likely, is unaware of the intricacies of litigation but depends on his counsel and should not be exposed to hardship because of an error on the part of his counsel. Aside this, the processes so presented, bears the name of the litigant and are presented in exploitation of his right of access to court guaranteed by section 6(6)(b) of the 1999 CFRN which by sections 1(3) and 36(5)(c) thereof, are *primus interpere*[20] and should be jealously guarded and only trampled upon sparingly when it has become totally unavoidable and justifiable.

The question is, has the premature striking out of the case based on the irregular processes signed by the counsel "determined the civil right and obligation of the litigant" as contemplated by these sections of the 1999 CFRN? The answer, of course, is in the negative which ought not to be. It is worthy to note that the provisions of section 2 1) and 24 of the LPA are subservient to the provisions of section 6(6)(b) 1(3) and 36(5)(c) of the 1999 CFRN and ought to be so in their interpretation and application and not otherwise as done by the court. The resoluteness of the Supreme Court in preserving the sanctity of the provisions of section 2(1) and 24 of the LPA, with due respect, is shedding crocodile tears.

In the absence of any express provision whether in the LPA or any other statute, stipulating the endorsement of the name and signature of the legal practitioner as later expatiated by the Supreme Court, the evidential rule of presumption of regularity ought to be invoked in favour of the court process. Once this is done, the onus will be on the party contending otherwise to established credibly, that the process was not signed by the legal practitioner who filed them.

[19] [2008] 9 NWLR (Pt. 1145) 121.
[20] *Primus interpere* is a Latin maxim that means "first amongst equal."

In fact, the decision has become a sword, readily used at the slightest opportunity by defendants who have weak cases to terminate the claimant's claim prematurely instead of allowing the matter to be litigated based on its merit. This grave injustice is rather unfortunate and should not be allowed to subsist beyond the time it has whenever the Supreme Court is presented with the opportunity to reappraise the situation. The reasoning by the Supreme Court that "no injustice is done to the litigant since the result of the irregularity an order striking out the suit or process which leaves the real legal practitioner with an opportunity to come back to the court to lift his veil and file a proper process as the legal practitioner whose name is on the roll of this court",[21] is to say the least, a denial of the fact of the slow pace of Nigeria's justice delivery process. For a matter to get to the Supreme Court and be decided one way or the other, it is very likely that such a matter, if it were to be reinstituted, would have become statute barred. Once this unfortunate but avoidable situation set in, as it is most likely to, the litigant is left with a sterile cause of action which cannot be litigated because the time for its hearing has lapsed.

The court, with due respect, came close to ascertaining a grave injustice in its insistence on the decision in the *Okafor's Case*[22], but did not acknowledge it with the seriousness that it requires. The fact that such a matter has been struck out because the counsel did not sign a process(es) in the way and manner it ought to and will become statute barred, or witnesses will die or become untraceable and unreachable or even if not, their memory of the event, would have succumb to memory diminishing return, ought to have guided the court, to treat the counsel mistake as a mere irregularity and hear the case on its merit.

Moreover, a writ of summons, originally, is a process owned by the court and kept by it. The litigants are expected to go the court's registry, after payment of prescribed fee, the claims are endorsed on the writ and the same is issued (by the Registrar affixing the seal of the Court) once this is done, it suffices. However, with the volume of cases being filed in court at present, it is practically impossible for the Court, through the Registrar, to be in possession of the writ or any other initiating processes but the litigant prepares it, and brings it for filing and all the endorsement that ought to be done by the court registry, is done. Once the Registrar seals the writ, after the endorsement of the claims, that should be regarded as sufficient and any other

[21] *First Bank of Nigeria Ltd. v. Maiwada* [2013] 5 NWLR (Pt. 1348) 444 at 489, Paras. A-C.
[22] [2007] 10 NWLR (Pt. 1043) 521.

thing, including, contemporaneously indicating the name and signature of the legal practitioner, should be treated as surplusage.

Alternatively, poised to encourage substantial justice, the court should have held that all cases filed prior to the decision in the *Okafor's Case*[23] will be treated as haven been properly filed since that practice of signing court processes in the name of a law firm was not uncommon during that period. It should have not led the decision to affect matters already filed, but any matter that would be filed thereafter as it would be foolhardy for any legal practitioner, to continue in the practice after the decision. This would have mitigated the effect of the decision and given a human face to the law and not an entrenchment of technicality over substantial justice. This decision no doubt, is an extreme elevation of form over substance which works serious injustice polluting the stream of justice.

Significance

The issue of whether a law firm can sign legal process has receive attention in jurisdictions other than Nigeria. This section examines the position in jurisdictions such as the United Kingdom, the United States of America and Australia. In the US, Rule 11 of the Federal Rule of Civil Procedure for District Courts[24] states that while it does not permit a non-animate legal practitioner to sign a legal document, it makes room for correction of a legal document improperly signed at the earliest opportunity the mistake is brought to the knowledge of the legal practitioner. On signature, it provides that:

> Every pleading, written motion, and other paper must be signed by at least one attorney of record in the attorney's name or by a party personally if the party is unrepresented. The paper must state the signer's address and telephone number unless a rule or a statute specifically states otherwise, a pleading need not be verified or accompanied by an affidavit. The court must strike out an unsigned paper unless the omission is promptly corrected after being called to the attorney's or party's attention.

While a document or paper not signed is bound to be struck out, this is only after the "unsigned" paper is brought to the attention of the party or their attorney to take remedial steps and these

[23] [2007] 10 NWLR (Pt. 1043) 521.
[24] Federal Rule of Civil Procedure for District Courts 2006 originally made in 1938 have been reviewed in 1948. 1963. 1966, 1970, 1980, 1987, 1993, 2000 and 2006.

steps are not taken. This shows that the court is more interested in having the suit determine on its merit than having it struck out inchoate because of not signing. While the benefit of signing after filing is opened to "unsigned paper", it is most likely that it will be extended to improperly signed processes or paper in the interest of justice.

In the United Kingdom, the issue of signing court processes by a law firm is adequately regulated by Rule 2.1 of the Practice Direction on Court Document (PDCD).[25] The Rule provides that "statement of Case and other documents drafted by a legal representative should bear his/her signature and if they are drafted by a legal representative as a member or employee of a firm they should be signed in the name of the firm." This provision legally permits a legal practitioner as an employee of a firm to sign a legal document either in their name or in the name of the firm unlike the position of the Supreme Court that permits only legal practitioners to sign legal documents. In fostering justice, the position in the UK is preferable to the principle laid down in the case under review.

In New South Wales in Australia, corporations like law firms are legally permitted to engage in legal practice as "incorporated legal practice." Section 14 (1) (2) of the Legal Practice Act[26] of New South Wales provides, among others things that "a person must not engage in legal practice in this jurisdiction unless the person is an Australian Legal Practitioner. Subsection 1 does not apply to engaging in legal practice of the following kinds. Legal practice engaged in by an incorporated legal practice in accordance with part 2.6 (Incorporated Legal Practices and Multidisciplinary Partnership)." Section 134 of the Act defines incorporated legal practice as "a corporation that engages in legal practice in this jurisdiction, whether or not is also provides services that are not legal services." Thus, in this jurisdiction, an incorporated practitioner can engage in legal practice and therefore sign legal processes in its incorporated name, it even permits them to offer service that are not legal. This position is not only commendable but it meets with the dynamics of society and legal practice as well. It is hoped that the Nigeria National Assembly will follow the laudable example and amend the LPA to permit incorporated/registered law firms, consisting of qualified legal practitioners, to engage in legal practice under its incorporated name or through the individual legal practitioners therein.

[25] Reference needed
[26] Legal Practice Act 2004.

In *Abdilkarim v. Incar (Nig.) Ltd.*[27] the Supreme Court held that it will not depart from its previous decision unless the party calling for it to do so is demonstrably able to show that:

> That the earlier decision is manifestly wrong and there is a real likelihood of it constituting a vehicle for perpetuating injustice by a rigid adherence to it; or that the decision was given *per incuriam;* or that it hinders the proper development of the law in which a broad issue of public policy was involved; or that it is inconsistent with the provisions of the Constitution; it will cause temporary disturbance of rights acquired under it and it will continue to fetter the exercise of judicial discretion of a court.[28]

In *Fatoki v. Baruwa*[29] the Court of Appeal per Coram Kekere-Ekun JCA (as he then was) dealt with a case where the originating process was signed in the name of a law firm but was not raised by any of the parties, at the risk of being declared a *persona non grata* or judicial insubordinate. However, with a determination to facilitate the dispensation of substantial dispute, Kekere-Ekun JCA navigated through the murky waters of the decision in the *Okafor's Case.* The court reasoned that since none of the parties raised the issue of the writ being signed in the name of a law firm instead of a legal practitioner licensed to practice law in Nigeria, it will not raise it *suo motu* because it is not an issue that would enable the court to do substantial justice. This step of judicial activism, although commendable, is capable of exposing the court to avoidable chastisement, although a court has the power to raise an issue *suo motu* and permit the parties an opportunity to address it on the issue, this duty is not iron cast as it is at the discretion of the court either to raise or not to raise an issue and it is guided by the demand of justice.[30]

It is crystal clear that the right of access to court is guaranteed under the 1999 CFRN. A person who has a legal grievance, can pursuant to this right, seek redress in court personally or through a legal practitioner of his choice. If the person opts to litigate the cause of action through a legal practitioner, the legal practitioner must exercise due diligence in ensuring that the legal documents are properly franked. By being properly franked means signed by them personally and not in the name of a law firm. This is the position taken by the Supreme Court in the *Okafor's Case* and a host of others. This decision which the Court justified on the need to instill

[27][1992] 7 NWLR (Pt. 251) 1.
[28]*Odi v. Osafile* [1985] 1 NWLR (Pt. 1) 17; *Adisa v. Oyinwola* [2000] 10 NWLR (Pt. 674) 116.
[29][2012] 14 NWLR (Pt. 1319) 1.
[30] David Eyongndi (2019) Assessing the Judicial Practice of Court Raising Issues *Suo Motu* in Nigeria" 3 *Orient Law Journal* 146-148.

professional discipline in legal practitioners in the discharge of their duties, has created untoward hardship. The decision is criticized as failing to take to cognizance established principles of law such as that the mistake of a legal practitioner should not be visited on the litigant, initiating processes are ‘owned’ and ‘issued’ by the court although prepared by the litigants. The decision is a clear case of elevating form over substance by institutionalizing technicality at the expense of substantial justice.

While the Supreme Court seems to have created an exception to the decision to the effect that cases commenced with initiating processes signed in the name of a law firm instead by the animate legal practitioner are not subject to the effect of the decision, it is doubtful whether, in the light of the implementation of the NBA stamp and seal regime, the decision has not become moribund and should be totally jettisoned in the overall interest of justice. It is the argument of this author that the decision is draconic and should be overruled forthwith.