

MOCK VIRTUAL COURT PROCEEDINGS

IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY
IN THE ABUJA JUDICIAL DIVISION
HOLDEN AT ABUJA

BEFORE HIS LORDSHIP: THE HON. JUSTICE PETER O. AFFEN

MONDAY, MAY 18, 2020

SUIT NO. FCT/HC/CV/0001/2020

BETWEEN:

KEHINDE OGUNWUMIJU SAN CLAIMANT/RESPONDENT

AND

JIBRIN SAMUEL OKUTEPA SAN DEFENDANT/APPLICANT

R U L I N G

1. The Claimant herein [*Kehinde Ogunwumiju SAN*] and the Defendant [*Jibrin Samuel Okutepa SAN*] are senior lawyers plying their trade within the jurisdiction of this court; and it is quite understandable that they are acting *pro se*. In the wake of the lockdown/stay-at-home order imposed in the Federal Capital Territory, Abuja to combat the dreaded Covid-19 pandemic that has altered lives and livelihoods in unimaginable ways, court proceedings are being conducted in the Federal Capital Territory, Abuja by remote hearing pursuant to the **FCT High Court Covid-19 Practice Direction 2020** issued under the hand of the Chief Judge of the FCT, which entered into force on 11/5/2020. This Ruling is consequent upon a preliminary objection raised by the Defendant on the propriety and/or legal validity of conducting court proceedings virtually in the light of extant constitutional and statutory provisions.
2. The Defendant's grouse is that any eventual judgment entered in his favour in this case [as well as several other cases in which his services are

retained] may be set aside on appeal for being unconstitutional in the light of s. 36(3) and (4) of the Constitution of the Federal Republic of Nigeria 1999 (as amended) which makes mandatory the hearing of civil and criminal cases as well as delivery of judgments “in public” citing **EDIBO v STATE [2007] 13 NWLR (PT. 1051) 306**. Okutepa SAN contends that the 1999 Constitution (as amended) does not contemplate remote hearing or virtual court proceedings of any kind, whether by Zoom, WhatsApp, or any other audio visual or video-conference platform approved by the Chief Judge of the FCT High Court as provided in Clause 9 of the Covid-19 Practice Direction, and the same ought to be struck down for being inconsistent with the Constitution as well as s. 266 of the *Administration of Criminal Justice Act 2015* [“ACJA”] which enjoins the physical presence of an accused person at his/her trial in a courtroom that is open to the public as opposed to a remote hearing or virtual proceeding that can only be accessed by those invited to participate. He maintained that the Doctrine of Necessity often invoked to legitimise coups and other illegal actions is inapplicable in the present context, and there is urgent need to amend the Constitution to make express provision for remote hearing or virtual court proceedings, citing the recent decision of the Supreme Court in **UDE JONES UDEOGU v FEDERAL REPUBLIC OF NIGERIA & 2 ORS (Appeal No. SC 622C/2019, delivered on 8/5/2020, unreported)** which nullified the trial and conviction of former Governor of Abia State, *Orji Uzor Kalu* for being unconstitutional and void. The Court was urged to strike out or dismiss these virtual court proceedings.

3. The Claimant’s reaction is that there is nothing unconstitutional about remote hearing or virtual court proceedings as provided in the FCT High Court Covid-19 Practice Direction 2020 issued by the Honourable Chief Judge in exercise of powers conferred in that behalf by s. 259 of the 1999 Constitution (as amended), insisting that the provisions of s. 36 (3)

and (4) thereof are wide enough to accommodate remote hearing or virtual proceedings which are open and accessible not only to the Nigerian public but the entire world and therefore more public than proceedings conducted in a physical courtroom. Citing the decisions of the Supreme Court in **OBI v MBAKWE [1984] NSCC (Vol. 15) 127** and **MARWA v NYAKO [2012] 6 NWLR (PT. 1296) 199**, Ogunwumiju SAN submitted that the Constitution is an organic document that should be interpreted broadly rather than narrowly in order not to defeat the clear intention of its framers; and that the meaning of the word ‘public’, which is not qualified in any way in s. 36(3) and (4) of the Constitution, has evolved over time from open space to buildings and now to the internet or world wide web as we know it today, which explains why defamatory material published on the internet is actionable. The court was urged to dismiss the preliminary objection for being dilatory and bereft of substance.

4. I have given a careful and insightful consideration to the arguments forcefully pressed by the parties on the vexed question of whether virtual court proceedings are consistent with s. 36 (3) and (4) of the Constitution of the Federal Republic of Nigeria 1999 (as amended) [hereinafter “CFRN”] and/or s. 266 ACJA 2015. Whereas s. 36 CFRN provides for the plenitude of the right to fair hearing in civil and criminal matters 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, subsections (3) and (4) thereof specifically provide that:

(3) The proceedings of a court or the proceedings of any tribunal relating to the matters mentioned in subsection (1) of this section (including the announcement of the decisions of the court or tribunal) shall be held in public.

(4) Whenever any person is charged with a criminal offence, he shall, unless the charge is withdrawn, be entitled to a fair hearing in public within a reasonable time by a court or tribunal:

Provided that –

(a) a court or such a tribunal **may exclude from its proceedings persons other than the parties thereto or their legal practitioners** in the interest of defence, public safety, public order, public morality, the welfare of persons who have not attained the age of eighteen years, the protection of the private lives of the parties or to such extent as it may consider necessary by reason of special circumstances in which publicity would be contrary to the interests of justice;

(b) if in any proceedings before a court or such a tribunal, a Minister of the Government of the Federation or a Commissioner of the Government of a State satisfies the court or tribunal that it would not be in the public interest for any matter to be publicly disclosed, the court or tribunal shall make arrangements for evidence relating to that matter to be heard in private and shall take such other action as may be necessary or expedient to prevent the disclosure of the matter.

5. As no reference was made to proviso in s. 36(4) CFRN 1999 (as amended) which *inter alia* permits a court to exclude from criminal proceedings persons other than the parties or their legal practitioners in the interest of public safety, I did not have the benefit of counsel's submission on the point. However, it occurs to me that the Covid-19 pandemic is a veritable example of "public safety" that could warrant exclusion of the public from criminal proceedings. Of immediate relevance in the present preliminary objection is the meaning of the word 'public' in s. 36 (3) and (4) CFRN 1999 (as amended). To the best of my knowledge, neither the Supreme Court of Nigeria nor the Court of Appeal has had the opportunity of construing "public" in relation to remote hearing or virtual court proceedings. This is therefore an uncharted territory, as it were. The decided cases upon which the

Defendant has heavily relied relate to proceedings conducted, or judgment delivered, in Judges' Chambers which has been held not to satisfy the constitutional requirement of a hearing "in public". For instance, **EDIBO v STATE supra** involved a scenario in which the plea of an accused person was taken in Chambers, whilst in both **MENAKAYA v MENAKAYA [2001] 16 NWLR (PT. 738) 203** and **OVIASU v OVIASU (1973) 11 SC 315**, matrimonial proceedings for dissolution of marriage were heard in Chambers contrary to the dictates of s. 103 (1) and (2) of the Matrimonial Causes Act of 1970 which provide for hearing "in open court". See also **NIGERIA ARAB BANK LTD v BARRI ENGINEERING NIG. LTD [1995] 8 NWLR (PT. 413) 247** where hearing was conducted in open court but judgment was delivered in Chambers. The rationale for these decisions, as Ogbuagu JSC put it in **EDIBO v STATE supra**, is that "a Judge's Chambers is not and cannot be equated to a hall in a public building that is used for formal meetings. As a matter of fact, a Chambers can also be defined as or equated with a private bedroom or private room. Even in *Black's Law Dictionary, 7th Edition* at page 224, a Judge's Chambers as defined as the private room or office of a Judge". In different words, the Chambers of a Judge "is not one of the regular courtrooms nor is it a place in which the public have right to ingress and egress as of right except on invitation by or with permission the Judge". See **NIGERIA ARAB BANK v BARRI ENGINEERING NIG. LTD supra at 273-274** –per Ogunbare JSC.

6. It cannot escape notice that the language employed in s. 36(3) and (4) CFRN 1999 (as amended) is "in public", but not "open court" as is the case with s. 103 (1) and (2) of the Matrimonial Causes Act 1970. The proposition that 'a case is merely an authority for what it decides' is so notorious that the citation of authorities is unnecessary, but for reasons of completeness I will refer to the decision of the Supreme Court in **NSEFIK v MUNA [2014] 2 NWLR (PT. 1390) 151 at 188-189** –per M. D. Muhammad

JSC. Even though s. 36 (3) and (4) CFRN was considered in the decisions to which I have referred, I reckon that the phrase “in public” was not construed *at large* but in the light of the peculiar facts of the cases that came before the court; and what those cases decided was/is that conducting hearing or delivering judgment in the Chambers of a Judge does not amount to a hearing in public. Nothing more. Nothing less. Nothing else. It seems to me therefore that those cases are not of much assistance in determining the constitutionality *vel non* of remote hearing or virtual court proceedings. Indeed, to assume that virtual proceedings are unconstitutional merely because conducting hearing and/or delivering judgment in Judges’ Chambers have been held to be unconstitutional would be to commit the fallacy of false analogy. After all, it is cliché that each case must be treated on its own merits; and as Lord Steyn once said: “*In law context is everything*”. See **REGINA v. SECRETARY OF STATE FOR HOME DEPT., EX PARTE DALY [2001] UKHL 26, [2001] 3 ALL ER 433.**

7. As stated hereinbefore, the **FCT High Court Covid-19 Practice Direction 2020** entered into force on Monday 11/5/2020. Clause 9 thereof provides that: “*Causes and matters and other proceedings that can be determined on the basis affidavit evidence may, as far as practicable, be heard and disposed of by Remote Hearing on virtual platforms such as Zoom, Microsoft Teams, Skype or other audio or video platforms as may be approved by the Chief judge. This includes cases initiated by originating summons or originating motion, applications for enforcement of fundamental right and interlocutory motions, as well as adoption of written final addresses and delivery of judgments/rulings. All participants in a remote hearing shall dress appropriately for court proceedings*”.
8. The essential legal validity of the said Practice Direction is not issue in these proceedings, but I will permit myself to underscore the point in passing that the power to issue practice directions is a necessary adjunct

of the power to make rules of court conferred on the Chief Judge of the FCT under and by virtue of s. 259 CFRN 1999 (as amended). See **UNIVERSITY OF LAGOS & ANOR v. AIGORO (1984) 11 SC 152, [1984] NSCC 745 at 779-780** –per *Oputa, JSC*. Practice directions are a supplemental protocol to rules of civil and criminal procedure in the courts: they are written explanation or guideline on how to proceed in a particular area of procedure of the court, or instructions in aid of practice in court. See **OLAFEMI & ORS v. AYO & ORS (2008) LPELR-4739(CA)**. From a purely practical perspective, both rules of court and practice directions are designed to achieve the same object and attain the same objective, namely: regulating the practice and procedure of the court. But a practice direction is not coterminous with rules of court which have greater authority and stand on a higher pedestal. Practice directions complement and enhance the efficiency of rules of court in the overall scheme of administration of justice, and have the force of law in the same way as rules of court insofar as they are not in conflict with the Constitution or the statute that enables them. See **BUHARI v. INEC [2008] 19 NWLR (Pt. 1120) 246** and **ABUBAKAR v. YAR’ADUA [2008] 4 NWLR (Pt. 1078) 465 at 511**.

9. Now, remote hearing or virtual court proceedings entail the conduct of legal proceedings whether wholly or in part by the use of live video or audio links whereby parties and their counsel as well as interested members of the public take part using telephone or video conferencing facilities without the necessity of physical attendance in the courtroom. The question I have been invited to resolve is whether virtual court proceedings qualify as hearing “in public” within the meaning and intendment of s. 36(3) and (4) CFRN 1999 (as amended). To my mind the key to unlocking this puzzle lies in the meaning of the word “public”, which has fortunately been judicially defined. At **p. 330** of **EDIBO v. STATE supra**

upon which the Defendant has placed heavy reliance, his Lordship *Prof. Niki Tobi, JSC* (May God bless his legal soul) enthused as follows:

By Section 33(3) of the 1979 Constitution, the proceedings of a court or tribunal shall be held in public. “Public” means, for the use of everyone without discrimination. Anything, gathering or audience which is not private is public.
[underlining supplied]

10. It is hardly necessary to state that s. 33(3) of the 1979 Constitution construed in ***EDIBO v STATE supra*** is the precursor of, and *impari materia* with, s. 36(3) and (4) CFRN 1999 (as amended). Whilst it seems to me obvious that a Judge’s Chambers does not fit the above judicial definition of public, the relevant enquiry is whether a remote hearing or virtual court proceeding is also not available for the use of everyone without discrimination. Can it be said that a remote hearing or virtual court proceeding is a private gathering or audience that can be likened to proceedings conducted in a Judge’s Chambers? I do not think so. Bearing in mind that the word “public” in s. 36(3) and (4) CFRN 1999 (as amended) is not qualified in any way, and the Constitution is an organic document that should be interpreted broadly as it “*is drafted with an eye to the future*” and “*capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers*” [see ***HUNTER v. SOUTHERN INC. (1984) S.C.R. 145 at 146*** –per *Dickson*, CJ of the Canadian Supreme Court, quoted with approval in ***MARWA v. NYAKO supra at 290 -291***], I take the considered view that remote hearing or virtual court proceedings to which members of the public have or are granted access without discrimination qualify as a hearing held in public within the meaning and intendment of s. 36(3) and (4) CFRN 1999 (as amended).

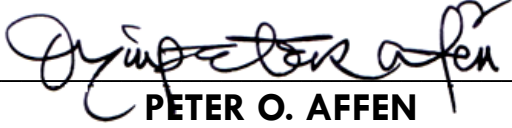
11. In this regard, I take judicial notice of the practice of the court which enjoins Court Registrars to give notice of Cause Lists and access codes,

links or Meeting IDs for remote hearings/virtual court proceedings to parties or their counsel, and to publish same in the Court's Website to enable interested members of the public observe court proceedings without any discrimination in much the same way they are at liberty to attend court proceedings in the courtroom without discrimination. I equally take judicial notice of the fact that there are over 150 persons either participating in or observing these virtual court proceedings, which is certainly much more than what any average courtroom can accommodate. Pray, what can be more public than that!

12. In the premises of the foregoing, I entertain no reluctance whatsoever in affirming my agreement with *Kehinde Ogunwumiju SAN* that the provisions of s. 36(3) and (4) CFRN (as amended) are wide enough to accommodate remote hearing or virtual court proceedings which are open not only to the Nigerian public but the entire wide world without any necessity to further amend the extant 1999 Constitution (as amended) for this purpose. That will be one amendment too many! Also, no necessity arises for the invocation of the Doctrine of Necessity, even as the reference made to the recent decision of the Supreme Court in ***UDE JONES UDEOGU v FEDERAL REPUBLIC OF NIGERIA & 2 ORS supra*** is a distant unrelated analogy.
13. I cannot but hold that Clause 9 of the **FCT High Court Covid-19 Practice Direction 2020** [which provides for remote hearing or virtual court proceedings] is neither unconstitutional nor does it offend s. 266 ACJA 2015 as has been urged upon me by *Okutepa SAN*. The mere fact alone that remote hearing or virtual court proceedings are a novelty in our court system is certainly not a valid basis for developing any anxiety in this regard. To paraphrase the legendary Lord Denning, if we never do anything which has not been done before, nothing will change; the entire world will move on whilst the law remains the same and that will be bad

for both the world and the law. See **PACKER v PACKER [1953] 2 ALL E.R. 127.**

14. The preliminary objection is not well taken and the proper thing to do is to record an order dismissing it for want of merit. I so order. Hearing of the substantive suit shall proceed in the manner earlier scheduled without further assurance. There shall be no order as to costs.



PETER O. AFFEN
Honourable Judge

Appearance

Parties acted *pro se*