

Fast Track Procedure in Civil Litigation in Nigeria: A Critique of Order 56 Lagos State High Court (Civil Procedure) Rules 2012

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The desire for quicker litigation process has led to the introduction of the fast track procedure in some states of the Federation. This paper focuses on the fast track procedure as enshrined in Order 56 of the High Court of Lagos State (Civil Procedure Rules) 2012. The author highlights the strengths of the procedure and the challenges that hinders the realisation of its goals and offers suggestions for its improvement.

1. Introduction

The quest for the quick dispensation of justice and avoidance of protracted litigation is of a long history in Nigeria.¹ It is axiomatic that any nation that seeks direct foreign investment in the “global village” world economy should boast of a civil justice system

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¹ For example, in *Ariori v Elemo* [1983] ANLR 1, the suit was instituted in October 1960 but judgment was not delivered until October 1975; see also *Nnaji for v Ukonu* [1985] ANLR 334. See further, A.M. Olong: “Delay in the Administration of Criminal Justice in the 21st Century: The Nigerian Experience,” *Confluence Journal of Private and Property Law*, 2009 1 (CJPPL) at 94-105; The News Agency of Nigeria: “Lawyers list causes of delay in prosecuting cases,” in a feature dated 19th Jan 2013 available at www.nannewsngr.com/.../lawyers-list-causes-of-delays-in-prosecuting-cases, visited 12/06/13).

which guarantees a prompt, efficient and cost saving means of resolution of legal disputes.²

The different High Courts' civil procedure rules in Nigeria have extant procedures for quick disposal of cases. These include the summary judgment procedure, default judgment procedure, proceedings in lieu of demurrer, etc. However, each one of these procedures has its own peculiar functions, and limitations.

In a further move towards quicker resolution of civil litigation, the High Court Rules in some states in Nigeria now contain the fast track procedure.³ This procedure is found, for

² See the Preamble to the High Court of Lagos State (Civil Procedure) Rules 2012 (hereinafter referred to as "the Lagos Rules.") which recognizes the above fact. In this work, references will be made to any stated Order and rule of the different Court Rules as "Or." and "r." respectively.

³ This step is in tune with the growing tendency in several jurisdictions worldwide to introduce the fast track procedure in civil litigation. One of the earliest instances of the introduction of the procedure was in England's Civil Procedure Rules, (CPR) 1998, which recognises a three-track system, namely, the small claims track, the fast track and the multi track system. Cases are allocated based on consideration of several factors, especially the "financial value" of the claims, in an ascending order. With the latest update to the CPR which takes effect from 1st April 2013, generally, the upper limit for the small claims track in England is 10,000 Pounds; fast track allocation for claims ranging from 10,000-25,000 Pounds; and any claim in excess of 25,000 Pounds is allocated to the multi track system. See: The Civil Procedure Rules, 1998 (U.K); Civil Procedure (Amendment No 3) Rules 2008; Civil Procedure (Amendment No 3) Rules, 2013: all sourced at www.legislation.gov.uk; also see The Ministry of Justice, England: "Civil Procedure Rules" last viewed at www.justice.gov.uk/courts/procedure-rules/civil on 05/07/2013. For a glimpse of the adaptation of the fast track procedure in Australian Federal Court, see The Federal Court of Australia: "Fast Track System." www.fedcourt.gov.au/case-casemanagement-services/case.../fast-track-system, last viewed on 03/05/2013. In the Canadian Province of British Columbia, the fast track procedure was

example, in Order 56 of the Lagos High Court (Civil Procedure) Rules 2012.⁴ The avowed aim of the fast track procedure under the Lagos Rules is to abridge the period of litigation in any fast tracked case to a maximum of 9 months.⁵

The objective of this Paper is to critically examine the fast track procedure of Order 56 of the Lagos State High Court (Civil Procedure) Rules.⁶ Part 1 of the Paper is the introduction. Part 2 is a comparison between the aforementioned existing procedures for expeditious disposal of cases with the provisions of the fast track trial procedure. Part 3 contains a critical analysis of the fast track procedure. Part 4 closes with the conclusion and the suggested recommendations.

eventually adopted in the year 2005 on a pilot scheme basis, and was accorded Province-wide recognition in 2008. It applies to cases where the amount in issue is \$100,000 or less, provided such claim can be tried within 3 days. See the Canadian Forum on Civil Justice: “BC Supreme Court Rules Fast Track Litigation (Part 15)” at www.cfcj-fcjc.org/inventory-of-reforms/bc-supreme-court-rules-fast-track-part-15 viewed on 05/06/13.

⁴ See, also the provisions of the Kano State High Court Practice Directions, 2008 & 2010 (hereinafter referred to as “the Kano Practice Directions”). The Kano Practice Directions have made extensive amendments to the Kano High Court (Civil Procedure) Rules. The said Directions contain numerous amended rules affecting vital parts of the aforementioned Civil Procedure Rules.

⁵ Or. 56 r.1, Lagos Rules. Under the Kano Practice Directions a maximum period of eight months is specified for the fast track procedure.

⁶ Reference will, however be regularly made to the Kano State Practice Directions for provisions on the fast track procedure in the Kano State High Court for comparison in appropriate cases.

2. Comparison of existing procedures for quick justice delivery with the fast track procedure.

Some of the existing procedures for quick dispensation of justice in civil litigation will be highlighted in order to see their drawbacks and the need for a new fast track procedure.

2.1 Default judgment procedure

This is a procedure that is available where a party to an action in court defaults in taking a procedural step or failed to comply with a requirement of the rules of court or an order of court.⁷ Usually, default judgments result from the failure of the defendant to file either the memorandum of appearance or a statement of defence to an action.⁸ It may also arise where either party to an action fails to appear in court on the trial date.⁹ A default judgment is however not a judgment on the merit, and it may, therefore, be set aside by the court which in the first instance granted it.¹⁰ In contrast, a judgment under the fast track procedure is a judgment on the merit.

2.2 Summary judgment procedure

This refers to any procedure laid down in the several High Court Rules whereby a claimant is allowed to bypass the process of plenary or full trial to obtain judgment.¹¹ The two major types of summary judgment procedures are the Order 11 procedure of the

⁷ Or. 20 Lagos Rules; Or.13 & Or. 25 of the High Court of the Federal Capital Territory, (Civil procedure) Rules 2004, (hereinafter referred to as “the FCT Rules”). *Mohammed v Hussaini* [1998] 14 NWLR (pt. 584) p. 108; *Evans v Bartlam* (1937) AC 480.

⁸ See Orders 10 & 20 Lagos Rules; *UTC Ltd. v Pamotei* (1989) 3 SC 79.

⁹ *Mohammed v Hussaini*, note 7 above; *N.A Williams v Hope Rise Voluntary Funds Society* (1982) 1-2 SC 145.

¹⁰ Or. 20 r.12 Lagos Rules; *UTC Nig. Ltd. v Pamotei* (see above note 8)

¹¹ See Or.11 Lagos Rules; Or.21. Such claimant is required in all cases to verify his claim on oath and satisfy the court that the defendant has no defence to the claim in the action.

Lagos Rules, and the undefended list procedure of other jurisdictions other than Lagos.¹²

2.2.1 Summary trial procedure under Order 11 in the Lagos Rules

Under Order 11, a claimant is at liberty to include an application for summary judgment with the originating processes in his action.¹³ Such claimant is required to hold the belief that the defendant has no defence to the claim in issue.¹⁴ There is no limitation on the type of claims that can be brought under this procedure.¹⁵ A defendant can only be let in to defend if he satisfies the court that there is at least a triable issue that calls for resolution at a full or plenary trial.¹⁶ As a general rule, such summary judgment is a judgment on merit which cannot be set aside by the trial court.¹⁷

Nevertheless, in contrast to the fast track procedure, Order 11 procedure lacks a robust inbuilt time limitation mechanism against undue delays. Secondly, the requirement for the belief that the

¹² See for example, Or. 21 FCT Rules. For other less known types of summary judgment procedures, see Orders 12 and 53 Lagos Rules.

¹³ Or. 1 r.1 Lagos Rules. The ground for the belief that there is no defence to the action must be verified by affidavit.

¹⁴ *Nishizawa Ltd. v Jethwani* (1984) 12 SC 234; *UTC Nig. Ltd. v Pamotei*, see above note 8; *Fed. Mil. Gov v Sanni* (1990) 4 NWLR (pt. 147) 688; *Okamba v Sule* (1990) 1 SCNJ 1; *Pan Atlantic Shipping & Transport Ltd. v Rhein Mass. GMBH* [1997] 3 NWLR (pt. 493) p. 248.

¹⁵ Or.11 Lagos Rules.

¹⁶ Or.11 r. (5) (1) Lagos Rules.

¹⁷ Examples of exceptional instances where such summary judgment may be set aside by the court that granted it are: where the court that gave the judgment lacked jurisdiction to entertain the case. Also where the judgment was granted in default of an affidavit to show cause, and the matter was not heard on the merit, the summary judgment can be set aside: see *UTC Nig. Ltd. v Pamotei* : see above note 8.

defendant has no defence to a claim under Order 11 is absent under the fast track procedure.

2.2.2 Undefended list procedure:

A plaintiff/claimant on the belief that the defendant has no defence to his claim could apply to the court to place his suit on the undefended list for summary judgment.¹⁸ The application for such placement is made at the commencement of the action, along with an affidavit and all exhibits to be relied on.¹⁹ The writ is subsequently entered in the undefended list by the judge.²⁰ A defendant who wishes to be let in to defend the action is required to file a notice of intention to defend the suit, with an affidavit that shows a defence on the merit.²¹ In contrast to Order 11 Lagos, the undefended list procedure is only available for liquidated monetary claims.

The fast track procedure has the advantage of being more time limited than the undefended list summary judgment procedure.

2.3 Proceedings in lieu of demurrer

Proceedings in lieu of demurrer are provided for in Orders 22 of the Lagos and the FCT Rules. These are proceedings that isolate salient points of law arising from the pleadings of the parties to an action, for preliminary hearing.²² Where any point of law so raised

¹⁸ See for example the provisions of Or. 21 FCT Rules.

¹⁹ See the conflicting decisions of the Court of Appeal on the proper mode of commencing an action sought to be placed on the undefended list: *Cash Affairs Finance Ltd v Inland Bank (Nig.) Plc* [2000] 5 NWLR (pt. 658) p. 568; *Moley v Isah* [2002] 5 NWLR (Pt. 658) p. 651; *Kwara Hotels Ltd. v Ishola* (2002) 9 NWLR (pt. 776) p. 509.

²⁰ O. 21 FCT Rules; *Nwakanma v Iko Local Govt. Council, Cross Rivers State*. [1996] 3 NWLR (pt. 439) p. 732.

²¹ Or. 21 r. (3) (1) FCT Rules.

²² Orders 22 in FCT and Lagos Rules, respectively.

is capable of determining the suit, judgment can be entered by the court without undertaking a plenary trial.²³

Nevertheless, as a drawback, proceedings in lieu of demurrer, in general, are applicable where points of law are in issue; whereas the fast track procedure is applicable to cases founded on grounds of facts and/or law.

In general, all the aforementioned existing procedures lack any meaningful time frame and are liable to be affected by delays and adjournments resulting in prolonged litigation.²⁴ This trend discourages investment and has adverse effect on the Nigerian economy and democracy.²⁵ It is globally recognized that litigation of commercial transactions requires swift determination, so as to reduce the cost of business and litigation.²⁶

From the foregoing analysis, the need for a fast track system becomes apparent, and an analysis of Order 56 Lagos Rules fast track procedure now follows.

3. Critical analysis of the basic provisions on fast track procedure of Order 56 Lagos Rules.

3.1 Goal of the fast track procedure

²³ *Fadare & others v. Attorney Gen. Oyo State*. (1982) 4 SC. 2; *Okamba v Sule* (1990) 1 SCNJ 1; *Pan Atlantic Shipping & Transport Ltd. v Rhein Mass. GMBH* [1997] 3 NWLR (pt. 493) p. 248.

²⁴ A.M Olong, see above note 1. A former Chief Justice of Nigeria was reported to have given the number of pending cases in the High Courts in Nigeria to be in excess of 110,000. See “Daily Independent” Newspaper: “Lethargy and delayed Justice in Nigeria.” at www.dailyindependent.com/.../lethargy-and-delayed-justice-in-nigerian-court. (Last viewed on 12/06/13); for more information on delay in litigation in Nigeria, also see The News Agency of Nigeria: “Lawyers list causes of delay in prosecuting cases.” at www.nannewsngr.com/.../lawyers-list-causes-of-delays-in-prosecuting-cases (Last viewed 12/06/13).

²⁵ “Daily Independent” Newspaper: see above note 24.

²⁶ Federal Court of Australia, above note 3.

The main objective of the Fast Track Procedure in Lagos State is the abridgment of litigation time of actions on the fast track, to a maximum period of nine months.²⁷ This is in obvious response to the international best practices that advocates for swift dispute resolution and court decongestion.²⁸ The real test for the procedure in Lagos State is to ensure that there is in existence adequate mechanism in the procedure to meet the set goals. The objective of the fast track appears to be in agreement with the “overriding objectives” of the Lagos Rules.²⁹ Part of the said objectives of the Rules include a promise “...to secure simplicity in procedure, fairness, in administration, elimination of unjustifiable expense and delay, efficient and speedy dispensation of justice.”³⁰

We now proceed to examine specific provisions of Order 56, against the background of the entire objectives of the Lagos Rules.

3.2 Qualification for placement of cases on the fast track.

The criteria for qualification for placement on the fast track are stated in Order 56(2) of the Lagos Rules as follows:

- 56(2)(1) A suit shall qualify for the fast track where:
- (a) the action is commenced by Writ of Summons;
and
 - (b) an application is made to the Registrar by a
Claimant or Counter-Claimant; and

²⁷ O. 56 r.1 Lagos Rules. The Kano State Practice Directions aim at conclusion of fast track cases within 8 months from their commencement.

²⁸ See “Daily independent” Newspaper: “Lethargy and delayed Justice in Nigeria.” at www.dailyindependent.com/.../lethargy-and-delayed-justice-in-nigerian-court... (last viewed on 12/06/13).

²⁹ See the Preamble to the Lagos Rules.

³⁰ See paragraph 1(b) of the Preamble to the Lagos Rules.

- (2) (a) the claim is for liquidated monetary claims or counterclaim in a sum not less than One Hundred Million Naira (N100,000,000.00);or
- (b) the claim involves a mortgage transaction, charge or other securities; or
- (c) the claimant is suing for a liquidated monetary claim and is not a Nigerian national or resident in Nigeria and such facts are disclosed in the pleadings.

As a preliminary observation, the conditions in the provisions of Order 56 r. 2(2) of Lagos Rules above are disjunctive and not conjunctive.³¹ Thus, it is posited that a litigant only has to satisfy at least any one of the aforesaid conditions. The interpretation of the provisions of Order 56 r. 2 (2)(a) and (b) will not pose much problem, as the intendment of those sub-rules is apparent. As it will be seen later, it is the condition contained in Order 56 r. 2(2)(c) of the Lagos Rules that will pose an interpretative challenge. Each of the conditions for qualification for placement under Order 56 will now be examined anon.

3.2.1 Requirement that the action for fast track be commenced by a writ of summons

The claimant who seeks the inclusion of his action on the fast track must have commenced such action by the writ of summons, and not through any other type of originating processes.³² Each of the

³¹ O. 56 r. (2) (2) (a), (b) and (c), Lagos Rules.

³² The other originating processes are originating summons, originating motion, or petition. Under the Kano Practice Directions, there is no stipulation for a suit to commence by writ of summons before such can be amenable to fast track procedure. See Or.1 Kano Practice Directions.

other originating processes has its peculiar function in civil litigation.³³

The writ of summons is the usual method for actions where the facts are likely to be in dispute, and there is the need to prove facts by any of the forms of evidence.³⁴ The use of the writ of summons normally facilitates resort to some time consuming procedures such as discoveries of fact or documents, inspection, and lengthy oral examination, etc. Consequently, the limitation of the fast track procedure to actions begun by the writ is justifiable.

3.2.2 Application by the claimant to the registrar for placement on the fast track.

The claimant is required to make an application to the Registrar for the placement of his suit under the fast track procedure.³⁵ The appropriate mode of application is however not specified in the Rules. As a general rule, Order 39 rule 1 of the Lagos Rules requires all applications to the court to be by motion supported by affidavit. It is however submitted that the provisions of that particular rule will not apply to an application for a placement under Order 56 fast track procedure. Order 39(1) of the Lagos Rules specifically refers to applications that are made to a judge and cannot therefore be invoked in an application that is directed to the Registrar as required under the fast track procedure. Consequently, it would appear that an application for placement under Order 56 should be in writing, and may be by means of a letter addressed to the Registrar or Director in charge of litigation.

³³ For example, the originating summons is appropriately used where the facts are not in dispute and the main question is on interpretation or construction of some legislation, instrument, will or document. The originating motion is usually employed where a particular statute requires its use. This is the form of commencement of actions in matters of fundamental rights actions and judicial review.

³⁴ Or.3 r.1 Lagos Rules; Or. 1 FCT Rules.

³⁵ Or. 56 r. 2(1)(b) Lagos Rules.

Such application will necessarily accompany the originating process, and the pleadings, and it should disclose evidence of satisfaction of the requirements contained in Order 56 rule 2(2) of the Rules.

It is noted that although the provisions Order 56 rule 2(1) (b) Lagos Rules simply require such application to be made to the “Registrar,” the subsequent provisions of Order 56(3) place the duty of the exercise of the discretion to grant or refuse the application (after an enquiry into the satisfaction of the conditions in Order 56 rule 2(2)) on “the Deputy Chief Registrar or any other person in charge of the Litigation Section.”³⁶ The addressee of such application will not however be of any consequence once the person who actually exercises the discretion falls within the category of persons that are qualified to be “Registrars” as defined by the Rules.³⁷

However, it is submitted that the determination of the question whether a suit qualifies under the conditions set out in Order 56(2) Lagos Rules amounts to an exercise of some form of judicial discretion. It should therefore attract some type of judicial hearing by a judge in accordance with section 36 of the Constitution.³⁸ Such judicial hearing will make the exercise of the discretion subject to an appeal, where the discretion has not been exercised judicially or judiciously. A judicial intervention at the earliest stage of the fast track procedure will lead to the firm

³⁶ Emphasis supplied.

³⁷ By O.1 r.2 Lagos Rules, a “registrar” is defined to mean “ the Chief Registrar, Deputy Chief Registrar, Assistant Chief Registrar, Principal Registrar, Senior Registrar, Higher Registrar, or any other Officer acting or performing the function of a Registrar.”

³⁸ Such judicial hearing as envisaged herein may be carried out by mere consideration of the documents placed before the court and not necessarily by oral hearing. In any case this option will be quickened by the provisions already in the Rules for frontloading of motions with the affidavit and written addresses of the parties. See Or. 39 Lagos Rules.

determination of the issue of jurisdiction.³⁹ Furthermore, a judicial hearing will enhance the fast track procedure since such hearing will necessarily involve a consideration of affidavit evidence.⁴⁰ Thus instead of proof of the matters required under Order 56 rule 2 by the mere averments in the pleadings as currently required by the Rules, such proof of qualification will then be by deposition made in an affidavit.

It is also further observed that an application for placement under Order 56 Lagos Rules is only permitted to be brought by the claimant or the counterclaimant, and not by the defendant defending *qua* defendant.⁴¹ This pre-supposes that it is only the claimant or the counterclaimant who can ever be interested in the swift prosecution and conclusion of any given case. It will seem that this approach is fraught with some underlying misconception that defendants will in all cases prefer to delay proceedings and will not be interested in a fast track procedure.

The denial of the defendant of the right to apply for placement of a case where he is a party on the fast track erodes the notion of equality or parity of the contending parties to a court action. It would also appear that the defendant under Order 56 procedure is denied any form of participation in the process leading to the decision to place a suit on the fast track. The provisions of Order 56 rule 2(1)(b) Lagos Rules may therefore run the risk of being perceived as been inconsistent with the defendant's constitutional right to fair hearing within a reasonable time.⁴² It is not inconceivable that a claimant may bring an action on frivolous grounds for some unwholesome purposes and without

³⁹ Issue of jurisdiction is of primary importance and a threshold matter, which is critical to the competence of court to adjudicate on any matter placed before it. See *Madukolu v Nkemdilim* (1961) NSCC (Vol.2) 374.

⁴⁰ Or.39 r.1 Lagos Rules.

⁴¹ See Or. 56 r.2(1)(b) Lagos Rules.

⁴² S. 36(1) of the Constitution.

the means or will to pay the costs of the defendant if the litigation is protracted.⁴³ In such an instance, the defendant might as well desire to apply for the fast track procedure, thus avoiding undue wastage of time and financial cost of lengthy litigation.

A comparative study of the practice in some other jurisdictions may provide some help or guide, on the issue. Under the Kano Practice Directions, admittedly it is the Director for Litigation in the Registry, who initially has the duty *suo motu* to mark an action that is found qualified for fast track as “qualified for fast track.” Nevertheless, both the claimant and the defendant play an active role in the subsequent process leading to the placement and hearing of such suit on the fast track. Firstly, the claimant has to consent to such placement, after which he is required to apply for issuance of the Pre-Trial Conference notice in the applicable form.

Such claimant is bound at that stage of proceedings to formally request for allocation for fast track trial.⁴⁴ Following the formal request for fast track allocation, the Kano Practice Directions provide that the Pre-Trial Conference Information Sheet that will then be issued by the court to the parties and their legal practitioners should contain questions for obtaining the consent of both parties to the action.⁴⁵ The question is stated as follows: “Do you consent that this case be allocated to the Fast Track and managed according to the applicable practice directions? If not, state your reasons below.”

⁴³ For example, the above scenario may be true of a situation where such claimant is a foreign company which is not resident in Nigeria. However, in such a case as painted above, the defendant might apply for security for costs, to cover the costs that might be incurred in the course of prolonged litigation. See *Oduba v Scheep* (1997) 6 NWLR (Pt. 508) p. 185.

⁴⁴ O.1 r.5 Kano Practice Directions.

⁴⁵ O.2 r.1 Kano Practice Directions.

This inclusionary approach in Kano Practice Directions, it is submitted, provides a better option as it guarantees some autonomy to the parties in the way and manner that a case brought to court is handled. In addition, the participatory nature of such consensual decision guarantees the co-operation of the parties and the court, in the effective compliance with the fast track case management. The provisions of Order 56 will therefore benefit from an amendment that will allow either party to an action to apply for the placement on the fast track or at least allow for the consent of all parties to be sought for fast track placement.

3.2.3 Requirement of liquidated monetary claim not below the monetary threshold of 100 Million Naira

Order 56 r.2(2)(a) Lagos Rules, specifies a minimum financial qualification of N100 million for liquidated claims for the fast track.⁴⁶ It would appear that the requirement is to prevent the floodgate or avalanche of cases that might otherwise come within the ambit of the fast track procedure. Two issues arise from the provisions under consideration. Firstly, any claim for the fast track must be a liquidated sum of money; and secondly, such claim must not be for less than N100 Million Naira. In the discussion of the provisions of Order 56 r.2(2)(a) Lagos Rules, it must be kept in sight that the condition stipulated therein constitutes only one of the three alternative requirements that an action for fast track may satisfy.

As the provisions of the above sub-rule appear to be the condition for fast track placement with the widest application to the generality of litigants, its restriction to only liquidated claim will adversely affect the availability of Order 56 procedure. Thus cases for damages for non-pecuniary loss in personal injury cases, which are usually indeterminate with reference to an accepted or

⁴⁶ A similar requirement is contained in O. 1 r. 2 Kano Practice Directions.

agreed data for their computation will be shut out of the fast track procedure.⁴⁷ Such stance will create and lend credence to the impression that the provisions of Order 56 Lagos Rules are elitist and exclusionary.

It is submitted that universal access to Order 56 fast track procedure should be given to all claimants, irrespective of the nature of their claims.⁴⁸ This will broaden the frontiers of accessibility to an efficient and responsive civil justice delivery system.

3.2.4 The monetary threshold of 100 million naira

Perhaps one of the strictest requirements enshrined in the provisions of Order 56 r.2(2)(a) is for the claim in a fast track action to be in the sum of 100 Million Naira or above. Coupled with the requirement for such claim to be liquidated, the hope for access by main-stream litigants to the benefit of the fast track procedure largely appears to be sealed.⁴⁹ Certain questions might be asked as follows in relation to the financial threshold: should the bar be set as high as 100 million naira? And would such benchmark aid the cause of the quick justice delivery promised to all parties who invoke the civil jurisdiction of the Court?⁵⁰

⁴⁷ *Odume v Nnachi* (1964) 1 All NLR 329.

⁴⁸ It is of note that no distinction is made under Or. 1 r. 2 of the Kano Practice Directions, between liquidated and un-liquidated claims, in the placement of suits on the fast track; see, also the Canadian Forum on Civil Justice: above note 3, for what obtains in the Canadian Province of British Columbia. Under the provisions of Part 15 of the Supreme Court Rules of that Province, no distinction is made between liquidated and non-liquidated claims at the point of placement under the fast track, provided the amount in issue is \$100,000 or less, and provided the claim can be tried within 3 days.

⁴⁹ The same threshold test avails under the Kano Practice Directions.

⁵⁰ The Preamble to the Lagos Rules stated the “overriding objectives” of the rules as “(a) to promote a just determination of every civil proceeding (b) to construe these Rules to secure simplicity in

Would the requirement not be discriminatory against the less affluent members of the society whose litigation claims may probably never amount to the aforesaid sum of 100 million? Granted that the fast track might properly be within “a fair hearing within a reasonable time,” envisaged by section 36(1) of the Constitution, will the requirement for a minimal claim of N100 million under Order 56 not leave a great proportion of litigants out of the fast track, for the paucity of their claims? And lastly, would the requirement not attract undue over-inflation of claims as at the time of filing, in order to benefit from the fast track procedure?⁵¹

Answers to the above questions will mostly likely be in the negative and may not augur well for the smooth operation of Order 56 Lagos Rules. Rather it is submitted that like the practice in some other jurisdictions where similar fast track procedure is available, the sum of 100 Million naira might be fixed as the upper limit of the claim for the fast track procedure.⁵²

In the light of the foregoing, there is the need to revisit the philosophical basis of the provisions of Order 56 to allow all

procedure, fairness in administration, elimination of unjustifiable expense and delay, efficient and speedy dispensation of justice....”

⁵¹ The point above is pertinent since the fact that a claim is liquidated and calculable with reference to some data or ascertainable means does not exclude the existence of dispute as to the exact amount in issue. For example a bank loan claim which in most cases will be liquidated in nature may yet be a subject of a dispute on the exact amount already paid back and the outstanding indebtedness.

⁵² For example in the British Columbia, Canada, see note 3 above. In England, the fast track is applicable to cases where the claim is between 10,000 and 25,000 Pounds. Any case above this monetary threshold automatically goes to the multi-track as such case is deemed too complicated for the fast track. See: Martyn Prowel Solicitors: *Fast Track Cases* available at www.martynprowel.co.uk/fasttrack.html, visited 11/06/13.

claimants whose claims are below the sum of N100 million to fast track their cases.⁵³

3.3 Claim that relates to mortgage transaction, charge, or other securities

An alternative requirement that may qualify a claim for hearing on the fast track is that the claim relates to some “mortgage transaction, charge or other securities.”⁵⁴ This requirement is apparently referable to the practice of securing a loan or overdraft transaction with a real property. Mortgage transactions are largely conducted by banks and registered mortgage institutions in Nigeria.⁵⁵ Thus, it will appear that the main focus of the provisions of Order 56 r. 2(2)(b) Lagos Rules is to assist the banks and other financial and mortgage institutions in their secured loan recovery efforts. It is important to note that the monetary threshold requirement for the claim to be at least in the sum of 100 million Naira is not applicable when the suit for the fast track relates to mortgage and securities.⁵⁶

Procedurally and logistically, an overwhelming reason against the preferential treatment of banks and financial houses may be stated here. Under the Constitution, a matter involving a customer and his banker may be brought before either the Federal or the States’ High Courts, since both courts have concurrent

⁵³ The general trend is that the higher a claim, the higher its likelihood of being contended and the vaster the evidence that might be called, i.e. expert evidence. In addition, such high claims will most likely give rise to the need for discoveries and inspection, which will potentially take time.

⁵⁴ Or. 56 r. 2(2)(b) Lagos Rules. See similar provisions in Or. 1 r. 2 (c), Kano Practice Directions.

⁵⁵ See s. 1 Mortgage Institutions Act Cap. M19, Laws of the Federation Nigeria (LFN) 2004. Also see Y.Y Dadem, *Property Law Practice in Nigeria* (2nd ed.), (Jos: Jos Univ. Press Ltd., 2012), p. 134 *et seq.*

⁵⁶ See Or. 56 r. 2(2)(b) Lagos Rules.

jurisdiction in such matter.⁵⁷ With the preferential treatment accorded to actions based on charges and mortgage, it is most likely that banks and mortgage houses within the jurisdiction of the Lagos High Court will prefer to commence recovery actions in the Lagos High Court rather than the Federal High Court.

This trend might lead to a deluge of cases on the fast track in the Lagos High Court as time goes on, thus defeating the apparent aim of the requirement of Order 56(2) Lagos Rules. This fact is significant as it is a well-known fact that Lagos is the home to a large proportion of the banks and financial houses in Nigeria, and a large number of the banking-customer businesses take place in the city-state.

Although Banks and allied financial houses are the essential powerhouses for national economic growth and should therefore be assisted in the national interest, it must be borne in mind that the said financial institutions are still largely private business ventures. In a properly run economy, there is no reason why they should not be given the same treatment as common citizens or even other corporate citizens outside the financial sector of the economy.

However, it is submitted that if access to fast track will be allowed on grounds of business, (and not being made subject to the N100million minimum requirement), it would be better in the interest of the economy for the procedure to apply in all disputes

⁵⁷ Sections 251(1)(d) and 272, 1999 Constitution (as amended). See also *NDIC v Okem Ent.* (2004) 10 NWLR (pt. 880) 107; *I.T.T.P Ltd. v U.B.N* (2006) 12 NWLR (pt. 995) 485. There are at least 3 instances where the Federal and the States' High Courts have concurrent jurisdiction, namely on matters of (i) the fundamental rights enforcement: s. 46 Constitution (as amended) (ii) banker/ customer disputes, see s. 251(1)(d) Constitution; *NDIC v Okem Ent.*, above note 61, and (iii) interpretation of the Constitution; See section 295 of the 1999 Constitution (as amended).

arising from all commercial dealings.⁵⁸ The increase in the number of cases that might arise from such expansion could be taken care of by appointing and dedicating more judges to the fast track procedure of the court.⁵⁹

3.4 Requirement of liquidated claim and the foreign citizenship or residency of the claimant

The provisions of Order 56 r. 2(2)(c) of the Lagos Rules require that: “The claimant is suing for a liquidated monetary claim and is not a Nigerian national or resident in Nigeria and such facts are disclosed in the pleadings”

The provisions are liable to interpretative ambiguity. The common ground in the provisions which is beyond controversy, however, is that the claimant or the counterclaimant in question must have sued for a liquidated monetary of money. The controversy will relate to the second clause of the provisions. It is submitted that Order 56 r.2(2)(c) is open to two conflicting sets of meanings. In the first sense, by the rule of literal interpretation of ascribing the ordinary meaning, the words “and” and “or” in the above provisions will take their respective normal conjunctive and disjunctive senses. Order 56 r.2 (2) (c) will then mean that an action will qualify for the fast track either if (i) the claimant claims

⁵⁸ Under similar provisions in the Australian Federal Court Fast Track, claims in respect of commercial transactions are allowed, without any limitation to mortgage transactions. See Federal Court of Australia, see above note 3.

⁵⁹ The Lagos Judiciary currently has only fifty six (56) High Court Judges. See “The Nation” newspaper of May 20, 2013 available at: thenationonlineng.net >Home>News Update (viewed on 20/5/13). The number of judges contrasts sharply with the population of the state which by the 2006 national census was stated to be over 9 million. The census figure is however disputed by the State Government, which has now estimated the state population to be in excess of 21 million. See Lagos State Government available at www.lagosstate.gov.ng/pagelinks.php? viewed on 1/6/13.

for a liquidated sum of money and he is shown to be a non-Nigerian national, whether he is resident in Nigeria or not so resident; or, (ii) the claimant claims for liquidated monetary demand and he is not resident in Nigeria, whether such claimant is a Nigerian or not.⁶⁰ In the second meaning should the “or” be interpreted to read “and” in light of the preceding conjunctive “and,” the following rendition could also be made out of the aforesaid provisions:⁶¹ that an action will qualify for the fast track if the claimant whose claim is for a liquidated monetary claim is a non-Nigerian, and he is not resident in Nigeria.

Whichever of the two meanings is adopted, there is an apparent preferential treatment in favour of non- Nigerians or the non- resident Nigerians claimants, in the availability of the Fast Track Procedure. The provisions (a variant of which also is contained in the Kano Practice Direction) are unduly discriminatory and will appear to amount to exhibition of bias against Nigerians living in Nigeria in having access to quick dispensation of justice.⁶² This is against the background of the fact that this alternative route to fast track does not carry a minimum monetary requirement of N100 Million Naira. Order 56 r.2(2)(C) appears to run against the grain of the preamble to the Lagos Rules

⁶⁰ The above approach was taken in the Kano State Practice Directions, where by its Or.1 r.2(c), one of the factors for consideration for fast track is stated as: “one or more of the parties is a non resident investor in the Nigerian economy.” The Kano provisions also appear to be nebulous. For example, how will the court determine who is an investor in the Nigerian economy? What parameters will be used in such classification? It is clear that Or. 56 r. 2(2)(c) Lagos Rules can benefit from some clarification, by way of an amendment.

⁶¹ That is if the intention is to allow the procedure only on grounds of convenience of non resident foreigners.

⁶² None of the foreign jurisdictions referred to in this Paper has such discriminatory ground for qualification for the fast track.

and it might even run the risk of being seen to be contrary to the Constitution.⁶³

It is conceded that the above discriminatory provisions might have been in response to the global or international best practices which require quick dispensation of justice, especially in international commercial matters. It may also be argued that such measures encourage the flow of foreign direct investment into the Nigerian economy. However, such commercial ventures are carried out under the aegis of corporate personalities, such as incorporated companies. It is a known fact that where foreign companies are involved or desire to participate in commercial ventures in Nigeria, they usually obtain an incorporation of their Nigerian *alter ego*, as a separate entity, to carry on business in Nigeria.⁶⁴ Such foreign companies that have been registered in Nigeria without doubt have become Nigerian companies that will normally be required to fulfil its obligations as such corporate citizens (including the payment of taxes).⁶⁵

It will then be doubtful if the benefit conferred by Or.56 r. 2(2)(c) Lagos Rules can properly accrue to such Nigerian registered subsidiary company should it seek to claim any liquidated monetary claim of less than 100 Million Naira. This essentially, thwarts the advantage that the company might otherwise have enjoyed in its original foreign form. It will therefore mean that the benefit of the above provisions of O. 56 r.2(2) (c) will rather be accorded to a non Nigerian entity than to an entity that is duly re-incorporated in Nigeria, in compliance with the provisions of s. 54 Companies and Allied Matters Act.

By the same token, if the first interpretation is relied on, why should a Nigerian claimant whose liquidated monetary claim may be far less than 100 million be entitled to an access to the fast

⁶³ Sections 35 & 36 1999 Constitution.

⁶⁴ S. 54 Companies and Allied Matters Act, Cap C. 20 LFN (2004.)

⁶⁵ S. 54 Companies and Allied Matters Act.

track procedure simply because he resides outside Nigeria, and a Nigerian with a far higher claim (which however is less than 100 Million Naira) be deprived of the same right, merely because he lives in Nigeria?⁶⁶

4. Procedural time frame of the fast track procedure

The main vehicle for achievement of the fast track procedure lies in the abridged timeframe that applies to the procedure. The time schedule specified under O.56 shall now be critically examined:

- i. Although the defendant still has 42 days within which to file a defence, the period for a reply has been shortened from 14 days to 7 days.⁶⁷
- ii. The claimant has 7 days from the date of the close of pleadings to apply for the Case Management Conference, a reduction from 14 days allowed under the general cause list.⁶⁸
- iii. The length or duration of the Case Management Conference is now reduced to 30 days.⁶⁹
- iv. The parties have 90 days from the date the trial directions are given to give their evidence and address the court.⁷⁰
- v. The order and timing of the addresses of the parties are now 14 days for the party that has the right to first give address from the close of evidence. The opposing side equally has 14 days (instead of 21 days apiece for each party in the

⁶⁶ The fact of residency outside Nigeria does not necessarily mean that it will be difficult or costly to commute to and fro Nigeria from the country of residence. For example a Nigerian resident in any of the neighbouring ECOWAS countries, e.g Benin Republic may find out that it costs less to commute between that country and Lagos, Nigeria, than if he were travelling from Lagos to Sokoto State within Nigeria.

⁶⁷ Or. 56 r. 5(2) Lagos.

⁶⁸ Or. 56 r. 6(1) Lagos.

⁶⁹ Or.56 r. 7(1) Lagos Rules. (This is *in lieu* of the 3 months period allowed under the general cause list.)

⁷⁰ Or. 56 r.14 Lagos Rules.

normal track cases.) The right of reply is still retained, and it is exercisable by the party that begins to address within 7 days from the receipt of his opposite's address.

- vi. The trial judge is under a duty at the first appearance of the parties in court to issue direction for the speedy conclusion of the trial; and such directions will sketch out a trial timetable designed to achieve the aim of the Fast Track Procedure.⁷¹
- vii. Trial under the fast trial procedure takes place from day to day.⁷²
- viii. The court is enjoined to give its judgment not exceeding 60 days of the conclusion of the trial.⁷³

The above timeframe represents the major attempt at reducing the real time expended on litigation conducted in the fast track. However, the problem or challenge may really be seen in the provisions on enforcement of the timeframe. Thus the question is: have sufficient regulatory or enforcement provisions been made in the Rules, for the seamless operation of the procedure of fast track?

In summary, the provisions on compliance with the Rules for the above purposes can be found in the provisions of Order 56 r. 9 – 13 (and to a lesser extent in Order 25) of the Lagos Rules. Under the aforesaid provisions, failure of a party or his legal practitioner to attend the case management conference or obey a scheduling order will result in the dismissal of the claim or judgment being entered against the defendant.⁷⁴ The court may at the instance of the opposite party, make an order for the payment of costs and daily default fee against a defaulter.⁷⁵ In addition, it is

⁷¹ *Ibid.*, Or. 59 r. 8 (2).

⁷² *Ibid.*, Or. 56 r. 12.

⁷³ *Ibid.*, Or. 56 r. 15.

⁷⁴ *Ibid.*, Order 25 r. 5.

⁷⁵ *Ibid.*, Order 56 r. 9.

provided that the opposite side may apply to the court for an order to enforce compliance.

The above provisions are generally suitable for their purposes, although some other challenges may arise in the operation of Order 56 in general. The provisions of the Order 56 in terms of time scheduling have however made no sufficient consideration for the possibility of discovery and inspection of facts and documents.

Secondly, the provisions of Order 56 have merely shortened the time taken to undertake steps under the normal track litigation, without introducing any innovation in the hearing process that might avert undue delay. For example, pleadings with all the attendant need for reply and amendments are still the standard format of placing the case and the defence before the court. Rather, the practice adopted in the Australian Federal High Court of parties filing and exchanging summaries of their cases, will commend itself. This model will obviate the need for replies and amendments as each party will have put in the case summaries all they intend to rely on for the case.⁷⁶ Also, the above time schedule does not explicitly give a time limit to the presentation of the parties' cases.⁷⁷

Thirdly, the provisions of O.56 do not allow enough deterrent measures as regards non compliance with the time schedule. Apart from the risk of having his case struck out, a claimant may be more serious if he knows that the court has powers to make an order removing the case from the fast track procedure for all times.

5. Conclusion

⁷⁶ See The Federal Court of Australia, above note 3.

⁷⁷ See The Federal Court of Australia: *Fast Track System*, see above note 3 for the operation of the "chess clock," method.

It is widely acknowledged that long delay is the bane of litigation in Nigeria, leading to resort to self help in some cases.⁷⁸

Some challenges that might face the new fast track procedure of Order 56 Lagos Rules were identified to be the ambiguous and discriminative requirements for qualification for the procedure. The offensive requirements generally relate to the nature and quantum of the claim, as well as the nationality and residency tests for the claimant.

A holistic approach that will make the fast track procedure available to all litigants is what is needed. In this regard the following recommendations are suggested:

1. The general minimum monetary requirement of N100 million for fast track under Or.56 r.2 (2) (a) Lagos Rules should considerably be reduced or removed entirely. Rather the said amount of money should be made the maximum/upper limit for claims under the fast track procedure.
2. Order 56 r. 2(2)(c) of the Lagos Rules is ambiguous and discriminatory. It should be expunged or amended, as follows:

“(1). The claimant is suing for a liquidated monetary claim and is not a Nigerian national, or (2). The claimant who is suing for liquidated monetary claim is not resident in Nigeria; and such facts are disclosed in the pleadings.”

3. The question of the qualification of any given action for the fast track procedure should be judicially determined by a judge, and should not be left to the registrar, as an administrative step.

⁷⁸

Olong, A.M: above note 1; *Ajao v Ashiru* (1973) 8 NSCC 525; *Agbai v Okogbue* (1991) 7 NWLR (pt. 204) p. 391 *per* Wali JSC at 442; *Nkpa v Nkume* (2001) 6 NWLR (pt. 710) p. 543.

4. The Rules should provide for adequate enforcement of the time frame for the fast track procedure, including the removal of the non-compliant cases from the fast track, for all times.
5. The procedure and the timeframe in Order 56 should be enhanced. Pleadings exchange should be replaced with exchange of summary of the facts of their cases. The “chess clock” system of the Australian Federal Court should be adopted.⁷⁹ Each party should be given specific time to state his case. A party defaults to his own disadvantage. The number and mode of evidence of expert witnesses should be controlled.
6. There should be further sensitization of legal practitioners to prevent unnecessary delays and adjournments in court cases.
7. The number of the High Court judges should be increased for quicker disposal of cases. For example Lagos with her population requires at least 250 High Court Judges, equipped with decent court rooms, offices and basic tools and infrastructure. The constitutional provisions on financial autonomy of the judiciary should be strictly enforced.

⁷⁹

The Federal Court of Australia: “Fast Track System, see above note 3.