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TOWARDS ABOLITION OF THE DOCTRINE OF DE NOVO TRIALS IN NIGERIAN COURTS

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ABSTRACT: *Whenever the problem of delay in the administration of justice is discussed the doctrine of de novo trial comes into focus with the various perspectives that the phenomenon presents. The Nigerian situation is as simple as stating that while the society is growing and moving forward, the Nigerian law (one of which is de novo trial) is dragging it backwards. The end result is that it is not only expensive and breeds delay and denial of justice, the system and those running it do not seem to bother and those affected do not also seem to have the will to make a fuss and perturbation. Yet, around the world, the evidence that the doctrine has been abandoned because it is 'bizarre' is so glaring that why it is still being maintained, entrenched and eulogized in Nigeria drives this study which adopts the doctrinal method. The study finds that de novo is a procedural bench problem and seeks to highlight that there are no dangers inherent in abolishing the procedure in the trial process where a Judge is elevated, dies, resigns, retires or is transferred so that his successor can continue from where he stopped and so that de novo can only be resorted to in the appellate realm where the need arises.*

KEYWORDS: Nigeria, Courts, Abolition, De novo, Trial and Appellate Procedures.

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INTRODUCTION

To state it mildly, the beginning of a trial all over again is evidently one of the greatest causes of delay in justice delivery in Nigeria. Litigants have suffered untold hardships when cases which have become part heard are ordered to be started all over again in a country in which a sitting trial Judge may have more than twenty cases on his cause-list daily. While economic activities have increased and population has exploded particularly in the cities all over Nigeria, the numbers of courts have not increased in corresponding terms. Demographics are clear on the point but infrastructural decay confronts any observer.

Currently in Nigeria and particularly in cities such as Lagos, Ibadan, Kano, Asaba, Port-Harcourt etc Judges have a minimum of 300 to 500 cases in their dockets, some have 2,000 to 3,000 and current statistics show that a case in Nigeria lasts between 20 to 30 years before it may be finally disposed off by the Supreme Court (Osibanjo, 2021) and a ratio of 1,200 Judges to a population of 220 million is grossly inadequate. No courtroom in the country has any sustainable IT system or are verbatim recorders or retrofitted systems found. What confronts a visitor is dilapidation (Azinge, 2022 and Akinkuotu, 2021). In many instances a case may come before the Supreme Court in more than two installments. The first appearance may be in the form of an interlocutory appeal which may succeed or not before the second installment may come before the Court in the form of a final appear.

All over the country, the court system is being shunned because of bribery and corruption and time consuming procedures. Technicalities are exploited by legal representatives and matters are being ordered to be re-started afresh in circumstances in which the level of administration of things ought to have been outstripped by speed. The worst hit is the confidence deficit that foreigners have had on the Nigerian courts whenever they come in confrontation with it. They believe that the Nigerian judicial system is one of the most corrupt around the world. The level of confidence in the system is so low, if not non-existent, that direct foreign investment suffers and foreign partners shun the Nigerian market in the consideration of whether to invest and do business or not despite her huge population and availability of human and natural resources. Worst still, Nigerian lawyers have mastered the act of sabotaging the system in which they practice. The more a lawyer undermines the system to achieve crooked results for clients the more he is acclaimed as successful. They have subjected even arbitral awards to judicial interpretation and intervention for fraud, corruption and misconduct allegation, so much so, that many commercial agreements have refused to take the country as a venue for Arbitration (Azinge, 2022).

Nigerian courts are in need, and urgently too, of reforms. Hitherto reforms have been cosmetic. No attempt has been made to assault the legal regime of de novo trials since the end of colonial rule despite the tons of research and adverse commentary on the doctrine. The ratio of a Judge to the population is worst in all sectors even though there are inadequate statistics. The conditions of the court rooms are decrepit and recording and filing systems are out-molded and out-dated. Yet technical issues are worshipped with fanfare to the detriment of the fair minded citizens and fast-tracked trials.

The Nigerian court is the last place to welcome technologic advances in the world. The Judges have regaled in analog systems to the detriment of their health, productivity and speed. Because Judges are not up to speed and have not put themselves up to computerization when procedural-cancer (like de novo) that is long forgotten in other jurisdictions across the

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world confronts them, the system collapses. Cases have lasted over 20 years due to de novo trials. In typical cases matters have seen five panels within the trial stage without any eyebrows being raised by the authorities in control of the system. Even when such curious delays spring into the open, no other deliberate action is taken than to order accelerated hearing which is (all the same) normally kept in breach.

In the country, the platform for addressing pendency of cases has never been established. Courts have never been established or are judges appointed on any agreed ratio of the population to the Judges and the importance of litigation over jungle justice is never addressed rather, the attitude of the judiciary is always to wait lamely until the legislature makes the laws which often do not suite the problems on ground. The concept of pro-activity is alien to the judiciary in Nigeria in the face of increasing demands for improved institutional capacity to deliver effective justice. In fact, to everyone they have refused or delayed right or justice contrary to the spirit of the Magna Carter (Azinge, 2022).

Statement of the Problem

Although several attempts have been made to restrict duration of trials especially in electoral cases to time bounds, half hearted and insignificant attempt has been made to bring such restrictions in timing to the entire trial of criminal and civil cases in Nigerian lower courts.

The crisis which this study attempts to interrogate was critically stated by Muhammad JSC in the Supreme Court decision in Bello v. COP (2018) 2 NWLR (Pt. 1603) 267 at 322. The Law Lord states vehemently, 'What a hoax? What a bizarre? Was it a genuine mix-up of records of proceedings of two different courts with two different Judges, with same parties, or what? Was there a reason for Honourable Justice Allagoa not to be in court on 18/3/2008 or it was a mistaken date? What brought about His Lordship, Honourable Justice Adah to sit (at the tail end of the case) to conduct a cross and re-examination; give dates for settlement of final addresses and then adjourn for adoption of the address? Even the date when Honourable Justice Adah signed that proceedings that is 23/10/2012 stood in conflict with the date when the proceeding was conducted that is 18/3/2008.'

His Lordship Muhammad JSC then betrays the issues as follows: 'My Lords, several things are wrong with the development in this case. This is hoax (for a different Judge to abruptly come into a case which was almost completed, only to conduct a cross and re-examination which is unheard of and, unprecedented that spells doom for the entire system of adjudication). The truth is that such a hoax and or bizarre is capable of rendering not only that particular proceeding null and void but the whole judgment. The known principle of procedure is that where a different Judge who did not conduct the trial from the start including arraignment, talking of and evaluating all evidence placed before him, making his findings based on the evidence and submissions of counsel he cannot, legally speaking partake at the middle or end of the case. He has to start de novo' (Abiola, 2018)

This is the 'anathema' that this study intends to interrogate. Is it hoax, bizarre and unheard of around the world? Is it de novo that is not bizarre?

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THEORETICAL FRAMEWORK

Theory of evidence

In judicial proceedings both at trial and appellate stages the role of evidence is of utmost importance. It is the duty of a party who wants a judgment of a court of law to be in his favour to discharge the evidential burden of proof. Although the burden varies between criminal and civil trials in the sense that crime must be proved beyond reasonable doubt and the burden is generally always on the prosecution and does not shift to the defendant except in limited exceptions, the burden in civil cases is on the balance of probabilities or on the preponderance of evidence and this burden shifts from time to time depending on the nature of the facts of the case, nature of the evidence required to establish facts in issue and the nature of available evidence.

The theory of evidence is relatively wide but the important aspect relevant to our conversation is the evaluation of the evidence before the court. In a long line of cases it has been firmly established that it is the duty of the trial court to evaluate or access the evidence presented before it in a dispute. It is also the duty of the trial court to ascribe probative value to any piece of evidence. By probative value it is meant whether the trial court can believe the evidence or not. That is whether it is credible or incredible. Where evidence is credible the trial court can safely rely and act on it and reach a conclusion but if a piece of evidence is incredible, a trial court cannot rely on it as same is worthless.

Where evidence has been adduced by all the parties in a case it is also the duty of the trial court to attach weight to evidence. By attachment of weight, it is meant that the evidence of the parties is put on an imaginary scale of justice and the side to which the scale tilts is upheld by the trial court to be the victorious party which has establish its case.

It is therefore not the duty of an appellate court to re-evaluate and ascribe probative value to the evidence adduced at a trial. There is however a caveat. If the trial court fails to evaluate the evidence adduced before it appropriately or fails to ascribe the required probative value to it or fails to attach the relevant weight that it ought to attract to it, the appellate court will interfere or intervene and re-evaluate the evidence.

The theoretical foundation upon which the foregoing principles are laid down is the philosophy that seeing is believing; it is believed that the trial Judge who saw the witness in a case testify before him and respond to cross-examination is in a better position to evaluate, ascribe probative value and attach weight to the evidence. Therefore when matters are required to be heard de novo it is believed that the new Judge or Panel of Judges hearing the case afresh does not or do not have the opportunities which the previous Judge or Panel of Judges had by seeing the witnesses testify before him or before them. The handicap which is thus lighted is the basic reasoning for recalling of witnesses in a trial de novo.

But, from experience, one of the greatest drawbacks of de novo trials is the availability of the witnesses who testified in the first trial to testify in the second trial. The process of testifying before a court of law in Nigeria is so gruesome that a majority of witnesses dread to mount the witness box. Some witnesses are so overtaken by fright that they become so confused that they destroy the case of their side. Some are illiterate that the comprehension of the questions that are framed in technical and English languages appear difficult to them such that their responses may in the end turn out to be opposite of they had intended to say in response.

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Sometimes, and this is common, witnesses die, change their minds or move on in life such that to compel them to return to the witness box after several years when a de novo trial has been ordered may look to them like going back to their vomit. Some may prefer to say that they had forgiven the culprit than to go back to mount the box a second, third, fourth or fifth time.

Witnesses may have become too old and frail to come back to court. They may have forgotten the sequence of events and the previous narratives and they may be easily confused and they may easily contradict themselves because of the passage of time. Where an event was witnessed by a particular person who was not related to a victim of the crime and who had testified in a previous trial due to the necessity of the time, the witness may alter his mind a second time if called upon to do so or may have moved out of town. In the determination of the issue whether to order a de novo trial therefore, the availability of witnesses is a key issue because a trial can be stalled due to the unavailability of witnesses for a fresh trial.

Even when expert witnesses are involved, for instance, medical experts, a doctor may have gone on transfer or retired from service, a surveyor may have died or closed shop, a banker may have been relieved of his job and a bank may have been closed down or wound up. Witnesses have had occasions to complain of their loss of time, money and energy to attend proceedings that never held due to incessant adjournments, holidays, breaks, strikes and all what not. The financial bills of having to assemble witnesses on behalf of the state have been difficult to streamline whether it had to be borne by the state or the nominal complainant, victim of crime. In all divides the toll is unquantifiable.

It requires further explanation in this discourse touching on the law of evidence, to state that two major categories of evidence are available before a court namely: oral and documentary evidence. When a dispute revolves around the evaluation of oral evidence, the foregoing general principles are inviolate. But when the evidence to be evaluated is documentary the trial court as well as the court of appeal (is at large) has equivalent authority in procedural law to evaluate documentary evidence. It should also be emphasized that where oral and documentary evidence are comingling in trials documentary evidence is stronger, weightier and it is usually employed as the hanger or the gauge with which to evaluate the oral evidence in the matter.

Theory of records

All courts across the country are courts of record. By courts of record, it is meant that their proceedings are written down in public record books in long hand and in very legible and readable writing of the presiding Judges. It is argued that Nigerian courts have moved away from the era where the records of it proceedings are hazy or incomplete or incomprehensible. Furthermore, courts are now manned by legal practitioners and the standard of practice is higher than previously and not much is left to conjecture unlike when laymen were in charge. Therefore, where records of proceedings are available, they can be easily reproduced and replicated for purposes of transmission from one Judge to another or from the court to the litigants and their legal representatives. It is even available now for parties to compile records of appeal if the registry of the court fails to do so within time frame allowed by the rules of court. The questions of loss of records or intelligibility of records are now in the fringes. It follows that if the records of a previous Judge or Panel of Judges have been ascertained they can easily be adopted by the litigating parties and used by a new Judge or Panel as take-off

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spring-board to ensure or accelerate hearing and timely dispensation of justice instead of a de novo.

Furthermore, all courts are bound by their records and those of other courts duly certified by the Registrars of such courts. There is one Court of Appeal, one Federal High Court and one State High Court. The fact that these courts have divisions manned by different but coordinate Judges does not detract from the concept of oneness. Ighu JSC in Chief Osigwe Egbo & 13Ors v. Chief Titus Agbara & 4Ors (1997) LPELR-1036(SC) p. 24 para B-G (as cited in Kalu & Okeke, 2020) holds, 'A Judge of a State High Court having jurisdiction in one of the Judicial Divisions of the State does not lose the jurisdiction to sit and adjudicate on a matter by the mere fact of his transfer to another Judicial Division of the State.'

But what is the effect of a de novo on evidence and records of proceedings? For Kalu and Okeke (2020) the effect on previous records is to jettison it and the effect on previous evidence is to discard it. But a definition of de novo proffered by Georgewill JCA in Alhaji Isiyaku Ent. Ltd v. Aliyu Tarfar & Anor (2014) LPELR-24223(CA) indicates that the concept of everything being wiped out is not entirely correct. A de novo allows for the use of a previous proceeding in excepted circumstances in which the law allows the use of previous proceedings in the present proceedings including inter alia for the purposes of cross examination of witnesses who had earlier testified to contradict them and if possible tendering it as an exhibit to weaken the present evidence on issue of credibility and consistency.

State interest theory

It has been long established in the common law system and indeed the Anglo-American judicial school that it is in the interest of the republic, the state and the public that litigation should be brought to an end. The desire to bring disputes quickly to an end is because it is time consuming; it is expensive and may foster bad blood between the parties thereafter than harmony and cohesion. This is partly the reason why it is in the interest of the parties to explore alternative dispute resolution mechanism and courts are boldly encouraged and enjoined to advice the parties and their legal representatives on it.

The philosophy behind the desire for cases to be quickly brought to an end and for courts to encourage parties to settle out of it is not in tandem with de novo trials. By all possible means, courts have started to shun its adjudicatory procedures and powers to route for multi-door processes which are actuated towards mediation, conciliation and arbitration because of the avalanche of disputes before them. But the essentiality of a de novo trial is that the membership of court is one of the determinants of jurisdiction as the composition of a court as to its membership is one of the principal issues that gives a court the competence to adjudicate in any matter.

Constitutional theory

Constitutionalism is the principle that government should be underpinned by a written framework to guide the affairs and activities of the state. The courts believe that to rely on constitutional provisions is the safest way to attain justice in the resolution of disputes. When a matter is constitutionally provided for the way of getting it done is streamlined but when it is not, convention holds sway and uncertainty comes into the administration of things. The gravest drawback of the doctrine of de novo trial is that it is not constitutionally provided and

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entrenched as to what happens to a case when a Judge dies, resigns, is transferred, elevated, dismissed, or retired. It is vigorously argued that this constitutional lacuna has brought the doctrine of de novo trials into disrepute and unconstitutionality in a modern era of speed where issues touching on bias, emotions, sentiments, technicalities, ethnicity and religion are no longer driving forces. This leaves the space for all manner of delay that the banal practice of de novo creates by giving the head of courts the untidy assignment of having to reassign cases that suffer from such events to new presiding officers who in no distant time would also fall victims of the same events.

In the continuous cycle or rigmarole of de novo, the members of the bench proceed to enjoy and take care of themselves to the detriment of the cases filed before them and the litigants pursuing their rights and claims before the courts. In Nigeria, thousands of cases are forced to start de novo because of elevation of judges. In 2021 alone no fewer than 18 High Court Judges were elevated to the Court of Appeal with the obvious consequence that hundreds and thousands of the cases pending before such Judges and Courts must begin afresh. The presiding officers of courts know of the existence of these hardships. They stair them in their faces on every mentioning of the cases before them but in their usual stolid disposition, they whimper some complaints and maintain their decorum and carry on as if all is well. As cases are unnecessarily prolonged and defendants suffer as Judges get promoted and elevated, such promotions breed grave ill and untoward consequences on the litigants and those in custody awaiting trial while wild jubilation is heard in the quarters of the elevated presiding officers (Akinhuotu, 2021).

In Alagoma & Ors v. SPDC Ltd. (2013) LPELR-21394(CA) an accused person had been admitted to bail by the trial court and the temporal respite was being enjoyed by the accused person when an elevation was given to the trial Judge and the trial had to begin afresh before another Judge. The bail of the accused person was thereby revoked by the incident of the elevation of the trial Judge and unless the new Judge admits the accused person to a fresh bail-condition he will be remanded in prison custody. In such simple scenarios in which the original bail granted by the first court ought to have been restored as a matter of cause, discretion still laid with the new Judge to be exercised before the accused person can have a reprieve as by virtue of the de novo order the previous bail has been overridden; and sometimes the new Judge may radically review the conditions and the accused person may become unable to meet them with the sureties becoming technically disqualified.

As canvassed by Eyongndi (2022) the implication of de novo is that no matter the resources (human and financial) expended in a previous adjudication once a matter is to commence afresh before another judge, nothing is said about the wasted efforts and those wasted efforts are great financial drain on the litigating community. And one of the reasons why the public is greatly disenchanted with the administration of justice in Nigeria is the inability of the system to accurately compensate for these loses. They are rather considered as mere incidental issues that form the accretion of litigation.

Theory of reasonable time

Length of trial is perhaps the crux of the issue involved in interrogating the doctrine of de novo. Trial within reasonable time is one of the constitutional provisions that the Nigerian legal system has largely taunted as the safeguard for fair hearing and complications arising from de novo order. Kalu and Okeke (2020) in their study considered the wide application of

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trial de novo vis-à-vis the doctrine of reasonable time and found that de novo trial contribute tremendously to delay especially in civil cases and the delay has resulted in eroding the confidence of the public in the judicial system giving rise to self-help.

They argue that the 1999 Constitution of the Federal Republic of Nigeria (as amended) makes ample provision for reasonable time within which civil disputes are to be resolved and that within 90 days after the adoption of written addresses of Counsel to both parties in a dispute, the trial Judge must enter judgment in the matter. The constitutional provision for the delivery of judgment within 90 days is more often than not kept in the breach. The trial courts have even concurrently devised a procedural method in which having fallen foul of the constitutional requirement of pronouncing judgment within 90 days, they call upon the legal representatives of the parties to readopt the final written addresses to enable the trial court adjourn the matter relatively further in order to deliver the judgment and thereby circumvent the 90 days.

A further re-adoption of the final written address may be invited by the trial court if after 90 days it is unable to render its judgment. And characteristically of the Nigerian appellate courts, a ground of appeal that the judgment is invalid and should be voided because it was not delivered within the constitutionally required period of 90 days may not be sustained unless it can be further shown that there was a miscarriage of justice.

Conceptual clarifications

Abolition is the act of doing away with a system or institution or procedure and practice. The concept of abolition as used in this study is to abandon and to cease having recourse to de novo in trial courts and to restrict the procedure to appellate practice.

De novo means to start afresh. To begin all over again a judicial trial that had ready commenced before a court of law but in which a final judgment (on the merits of the case) has not been delivered. It is a new trial on the entirety of the case both on facts and law (Okocha, 2020). It is deciding the issues in a matter without reference to any previous legal conclusion or assumption (Johnson & Anyawu, 2020).

A trial de novo comes into existence where a judge of a court is ether deceased, elevated, retired, transferred or removed from his judicial office such that in new trials after any of these stated events the case must be reproved (de novo) and the evidence and decision rendered and the Judge's finding at the previous trial are inadmissible. And this meaning and purport of a de novo trial cannot by any means be thwarted (Malek et al, p. 706). The holding in Bakule v. Tanerewa (Nig.) Ltd (1994) LPELR – 14308 (CA) that any previous decision in a case started de novo is wiped away is different from the holding in Eyo v. Ekpenyong (2012) 11 NWLR (Pt. 1311) 316 which holds that the decisions in the previous case subsists. A distinction has been offered by Johnson & Anyawu (2020) for the conflict in the holdings to the effect that while the decision in Bakule was given in a civil case, the decision in Eyo (supra) was given in an election case and that as election cases are sui generis, the two conflicting decisions are valid.

The foregoing point sought to be attacked can be found from the philosophical reasoning of the highest court in the land. The reasoning had been made many years ago (in 1988) perhaps when the country was in the throes of the harshest military dictatorship in Africa and when the judiciary was merely the handmaiden of the despots. In Orubu v. National Electoral

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Commission (1988) 5 NWLR (Pt. 94) 323 at 347 Uwais CJN made the point as follows, 'an election petition is not the same as ordinary civil proceedings. It is a special proceeding because of the peculiar nature of elections, which by reason of their importance to the well being of democratic society are regarded with aura that places them over and above the normal day to day transaction between individuals which give rise to ordinary or general claims in court.'

The constitutional jurisprudence in such a legal milieu would be quick to give time frames to decide election petitions and constitute special military tribunals for arm robbery while civil claims can stagnate for eternity without constitutional recognition in time framing. In their work, Kalu and Okeke (2020) believe that the time frames in such disputes are 'as firm as the rock of Gibraltar' and cannot be enlarged or extended for any reason thus an election petition must be filed within 21 days after declaration of result and judgment must be delivered within 180 days. They can even pronounce their verdict and withdraw to render their reasoning another day. It is urgent but for civil claims the sky is the limit in delay.

In recent times however, and this was happening many years after delay has rendered the Nigerian judiciary prostrate, constitutional amendments have started to trickle in on installment basis such that currently, judgment must be delivered in a civil claim within 90 days after adoption of final written addresses but no time frames exist between commencement of hearing to adoption of final written addresses. Even before the concept of written addresses was allowed in Nigerian courts in 1977 (Tobi, 1999, p. 1), it was a tug-of-war and till date no formalized rules have been made for it in trial courts lower than the High Court of a State; discretion is still at the disposal of the presiding officers to call for written addresses to avoid the tedium of oral advocacy and manual recording of written addresses by the trial courts.

LITERATURE REVIEW

Now, the claim that election matters are soundly in their own class and that they required speed or that they are special proceedings completely separated and divorced from civil proceedings is an unsound attitude that is most unbecoming of a legal system stripped and steeped in delay for the complaint of the commoner. It is one of the worst principles of law to propose and propagate in a modern Nigeria with the highest demographic credentials in the world. If speed is the issue then, what is sauce for the goose is sauce for the gander after all, the central argument in this study is that the judiciary at all levels of hierarchy should submit to speed in the determination of the complaints of the commoner for as a human rightist believes, 'the office of the citizen is the highest office in the land' (Aisha Yesufu as cited in Akinsuyi, 2022).

As cited by Azinge (2022) the Magna Carta states that 'To no one will we refuse or delay right or justice' but to the common man in Nigeria, the judiciary is not the last hope. Why set up special courts for politicians and criminals when the disputes of the commoners who elected the politicians and who are the victims of the crimes and in whom ultimate sovereignty resides are allowed to queue up and vegetate within the first rung of the trial courts for over 20 years? Whether an action tried de novo is an election petition or a robbery

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case or an 'ordinary civil case' the principle of law laid down by the apex court with regards to de novo trial should and ought to be the same.

The concept of giving criminal cases and election petitions priority over civil cases is to say the least discriminatory and unfair. It is extremely tendentious to hold the view that time is of essence in the determination of a dispute in an election while the dispute of the voter can be delayed. Such a jurisprudence or philosophical thinking is at the bedrock of de novo trials and the huge confusion and integrity deficit that is exhibited currently in the Nigeria judiciary space. A citizen whose claim is ranked third in the hierarchy in the realm so that the outlaw who killed or the public till hunter who wants to be elected by the citizen can be heard is shortchanged and his underhanded treatment by the system falls short of all known standard in the equality of all persons before the law. If the law is no respecter of persons and everyone is equal before it and no one is above it and cases are treated under the cab-rank rule of first come first served, then such prioritization, categorization and philosophical justification of claims and right of access to court or right of audience before a court of law must be urgently reviewed if not repudiated. Because the judiciary is currently under heavy siege, platitudes and uncomplimentary statements regarding the status of a commoner's claim as 'ordinary' are indicative of the systemic failure of the judiciary and the essential fact that it does not exist for the benefit of the poor but the wealthy and that it is an end in itself in Nigeria. From all intents and purposes the doctrine of de novo is a creation of the judiciary and a monster it uses to mystify the legal process and weaponize it for the oppression of all that come before it for justice and hope. With a decrepit court system that refuses to reform and accept modern change prevailing all over the world, Nigerian courts and Judges have sometimes elevated themselves to bodies above the ordinary citizens who suffer to submit their claims and plights for adjudication. Often times, they see the truth but they deliberately choose to insist on procedure and form.

No dispute is ordinary or should the court of all quarters in the realm be allowed to hold the notion that a dispute is ordinary. No claim of a citizen ought to be considered insignificant and not worthy of entertainment and the dispatch it requires. It is the build-up of all these so-called 'ordinary claims' which the nation's judiciary has been unable to decide that has turned the nation ungovernable. It has killed businesses and industry in Nigeria. It has given an image of Nigeria to the world that is coterminous with an underworld where the rule of law and due process do not prevail.

One of the beauties in the characteristics that the literature on a rehearing (de novo) has yielded is not just the discard of the previous verdict but the amplitude that the parties are granted to modify, reconstruct or alter the character of their original cases and re-litigate the same matter by reconstructing and restructuring it to suit their present needs. In Ngige v. Obi (2021) ALL FWLR (PT. 617) 734 T 757 – 758 it was held that on hearing a matter de novo the court hears the matter as a court of original and appellate jurisdiction. It means nothing other than a new trial. This further means that the Plaintiff is given another chance to re-litigate the same matter or rather in a more general sense the parties are at liberty to once more reframe their case and restructure it as each may deem fit or appropriate. This is also borne out of the fact of delay because while the delay is being inflicted on the parties in the entertainment of their claims, change which is a permanent phenomenon in nature must take place and alter the positions of parties. If this is not allowed, some claims may become stale, statute barred or overtaken by events.

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Who and what cause trial de novo?

De novo trials have all along been necessitated by the court. It has nothing much to do with the parties or their legal representatives. When parties are dead and the suit is such as can survive the dead party, the dead party is swiftly substituted. If the death occurs to the Solicitor, he is equally replaced. The question of de novo trial is also one more of procedural than substantive law. The I999 Constitution of the Federal Republic of Nigeria (as amended) does not make any outstanding or clear-cut provision for trial de novo. It is also not provided for by any extant procedural laws like the Rules of Court governing procedures but it is easily invoked (from nowhere) whenever the situation arises for it to come into play. The importance of trial de novo is such that if the matter is taken up on appeal, the trial which was conducted without the governing principles would be declared a nullity no matter how ably conducted.

Several events and circumstances give rise to trial de novo. Change of court's panel due to death of the trial Judge. The composition of court determines its jurisdiction. Transfer of a trial Judge to another judicial division. Transfer of a case to another court arising from a petition based on allegation of bribery, corruption and bias. A trial court's decision to transfer a case before it for personal reasons or any of the reasons adumbrated above.

The arguments canvassed for the institution of the procedure of de novo trial are deep-seated. According to Kuwornu (2021) the rationale is that the new presiding officer must have the opportunity to watch the demeanour of the parties and their witnesses who may have given evidence before the preceding judge. There is equally the opinion that adopting proceedings in a case where the liberty of an accused person is at stake may lead to adopted prejudice as the previous notes and records may be filled with the views of the previous officer on the case even as de novo defeats the quest for expeditious trials.

While in time past the premises of the case for de novo as canvassed above by Kuwornu were eminently plausible, they are currently overtaken by the explosion of litigation in the lives of Nigerian citizens. With growing population reaching 220 million and the number of courts not increasing at the same rate or is the judiciary infrastructure across the nation improving, recourse to beginning trial afresh is certainly uncalled for. The essence of justice is to achieve it swiftly and surely because the constant increase in population, improved financial conditions of citizens, lack of tolerance and the quest for materialism have resulted in increased litigation (Azinge, 2022).

The procedure has caused more damage than improvement in justice delivery in lower courts. The implicit confidence which the public used to have about the institution of English judicial system inherited by the people of Nigeria has gravely waned to the extent that they have begun to seek alternatives measures of self help leading to more extra-judicial killings and revisionism. By revisionism in this study, it is meant the retreat which the public and the communities are making back to their traditional ways of deciding disputes such as trial by ordeal, oath taking, swearing and invocation of juju on the founded allegation that the English legal system has become too cumbersome and bedeviled with delay.

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Judicial and legislative rivalry in de novo

The rivalry between the legislature and the judiciary in Nigeria is a core problem in the development of the country. The intervention of the military has helped the legislature to emasculate the judiciary. The combination of the executive and legislative functions of the State by the military for a very long duration of time in the history of the country eventually made the rivalry worse. It left the judiciary as 'an orphan' going always with cap in hand to the other arms of government for financial survival. Most critically the powers of the judiciary were abused or whittled down through the suspension of certain provisions of the constitution, the promulgation of ouster clauses, creation of special courts and coagulation of executive and legislative functions.

However in the study of the rivalry between the arms of government with regards to the doctrine of de novo trials, the judiciary has appeared to be stronger in the battle but with a pyrrhic victory. It has gained strength and victory that have failed woefully to advance the cause of speedy adjudication in the country but have rather, promoted delay in the legal system. The most recent and vicious display of this delay has been the promotion of the law which forbids a Judge who has been elevated etc from taking further actions in relation to cases he is handling once he ceases to be a Judge of the court.

On 8 May, 2020 the Supreme Court in Ude Jones Udeogu v. Federal Republic of Nigeria & Ors (the Senator and ex-Governor Orji Uzor Kalu's case) struck down section 396(7) of Administration of Criminal Justice Act 2015 as unconstitutional on the ground that an elevated Judge of the High Court of Justice to the Court of Appeal had no jurisdiction upon elevation to hear any part heard matter after his elevation (Obisanya, 2020). Before 8 May, 2020 the unwholesome delay in the administration justice had become an open sore in the sight of the National Assembly. It enacted the Administration of Criminal Justice Act with the aim of empowering an elevated High Court Judge to the Court of Appeal to sit over and conclude his part heard cases before his former court. Section 396(7) of ACJA had provided, 'Notwithstanding the provision of any other law to the contrary, a Judge of the High Court who has been elevated to the Court of Appeal shall have dispensation to continue to sit as a High Court Judge only for the purpose of concluding any part heard criminal matter (not even civil matter) pending before him at the time of his elevation and shall conclude the same within a reasonable time: provided that this subsection shall not prevent him from assuming duty as a justice of the Court of Appeal.

Holding that by virtue of section 238 of the Constitution of the Federation, 1999 such a Judge ceases to be a Judge of the previous court on the date of appointment and becomes functus officio, the Supreme Court released the ex-Governor from custody forthwith for the matter to recommence de novo before another trial Judge of the High Court. The decision in the resumed trial in which the Senator and ex-Governor was found guilty and sentenced to a term of imprisonment, was declared null and void (Akinkuotu, 2021). Addressing the reasoning of the Supreme Court, Mohammad (2016) correctly canvassed that section 396(7) of the ACJA 2015 was contrary to the holding of the Supreme Court in Ogbuniyiya v. Okudo (2001) FWLR (Pt. 72) 1987. The holding in the case is that once a High Court Judge is elevated he cannot sit over his high court cases again and any such sitting and decision therein would be null and void. Mohammad situated the rivalry in the inherent functions of the two arms of government and the need for each to remain within its remit. Arguing that assignment, control and administration of cases are within the remit of the judiciary not the legislature and

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that the stream of the State judiciary is separate from the Federal under section 6 of the 1999 Constitution, the determination of the Supreme Court to strike down section 396(7) was essentially in the heart of the rivalry and the doctrine of de novo.

A study by Lakai (2017) revealed the case of Benjamin Ezeoke v. Wash Pam which was filed in 1993 and by 2017 when the study was carried out, the matter had remained in the trial court for more than 20 years. Lakai stated that the case went before Justice Oyetunde who died and it was transferred and came before Justice Naron and later came up before Pius Damulak Chief Judge of Plateau State and by 2017 when Lakai was writing there had not been any resolution in the matter within the dispensation of trial. This was most probably because the records of each of the preceding courts were discarded under the doctrine of de novo.

Knocks against de novo

Knocks against the doctrine of de novo have not been in short supply or terse sentences. Three strong opinions have been cited by Lakai, (2017) from three authoritative sources in Nigeria as follows: Funke Adekoya states, 'De novo doctrine slows down determination of cases and in many instances, causes excessive delay. I think its application should be *modified* by allowing the new Judge to use his *discretion*. If upon reading the file he thinks he can continue with the case without having to start all over again, so be it. This will help avoid unnecessary waste of time.'

Tunji Gomez (as cited in Lakai) states, 'De novo … is an age-long practice meant to preserve justice in adjudication by ensuring that the same person who would pronounce judgment hears a case from the beginning to the end. But I think it should be *modified* now to discourage a situation where it would cause injustice. For example where the case is nearly completed, a party who brought a matter to court would have invested time not to talk of costs. If the litigants have to start all over again, it would cause hardship. Thus, I would want the rule to be *relaxed* such that if the parties agree that a new judge should continue where the old judge leaves the matter then, this should happen.'

Jiti Ogunye (as cited in Lakai) states, 'That doctrine takes a *huge toll* on the administration of justice. For Judges before whom cases are pending who are then suddenly elevated to the Court of Appeal, we recommend that regardless of the elevation of those Judges, they should continue with those cases and finish them. In Ghana we are told that this is the procedure. It will not do any harm to litigants or disrupt justice delivery system. The only caveat is that if those cases should go on appeal, those Judges should not sit on those appeals when they come for determination. For cases that have to start de novo because a Judge is retiring, I think once a Judge is retiring the cases that are assigned to him must be expedited in such a way that the Judge finishes everything. In other words, the docket of the Judge must be moderated in such a way that more cases are not assigned to him until the last day. (But) what we have today is that three weeks before retirement Judges are being assigned cases. I think this can be achieved administratively through practice direction.'

When Okogbule (2023) states that there is inordinate delay in the administration of justice, he did not find the delay in itself as the bane but the question that agitates him is why the country and its citizens find the phenomenon reasonable and commodious for decades 'without proffering solutions to it.' It is misleading to hold that solutions have not been

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proffered to the obnoxious doctrine of de novo from within and without the judiciary in Nigeria. The circumstance in which section 296(7) of ACJA was repudiated prefigures the fact that it is the judiciary at its highest echelon that has kept the doctrine of de novo in place. It keeps it in place because of its ideological inclination to maintain the status quo of poverty, retrogression, decay and corruption. It is a weapon it readily deploys whenever the need arises to keep the state of things the way they are! Of the three arms of government, the judiciary appears to have given to itself in 'arrogant arrogation' the last defensive mechanism of a threatened social structure, and a mechanism that is regularly used when the interest of the bourgeoisies (like Orji Uzo Kalu a Senator, ex-Governor and one of the five richest politicians in Nigeria) are involved (Tucker, 1972, p. 63).

Okogbule, for instance, believes that it is generally accepted in Nigeria that 'cases must last several years in court before they are concluded' to make citizens reluctant to approach courts in dispute resolution without the judiciary prefiguring the consequence of such ideological disposition to the erosion of confidence in the court and the undermining of the existence of the courts as the keepers of sanity and social balance in the society. In the ideological justification for why matters must start de novo or why justice must be timely dispensed, it is not the interest of any other party in the stream or arena of justice delivery that is of importance but that of the Judge or the bench. It must be done timely so that the impression the Judge has formed of the witnesses may still be fresh and not lost in his mind or become so dimmed that much is left to conjecture and vague recollections (Ighu JSC as cited in Kalu & Okeke, 2020). The sedate and snail speed mode in which the bench is kept in a maddening and extremely annoying and displeasing environment in Nigeria may have to be addressed urgently for speed otherwise the applecart may be up-turned violently.

Evidence around the world

In a study by Martins Library (2011-2021) it was clearly claimed that in Continental Europe, the presiding officers do not start all over again but continue from where their predecessors stopped. The study equally compared the prevailing law in Nigeria with what obtains in India and came to the conclusion that section 34 of the Evidence Act in Nigeria is on all fours with section 33 of the Evidence Act in India and both laws of evidence provide that, 'evidence given by a witness in a judicial proceeding or before any person authorized by law to take it is relevant for the purpose of proving in subsequent judicial proceedings the truth of the facts which it states when the witness is dead or cannot be found or is incapable of giving evidence or is kept out of the way by the adverse party or if his presence cannot be obtained without an amount of delay or expenses which under the circumstances of the case the court considers unreasonable: provided the proceeding was between the same parties or their representatives in interest; that the adverse party in the first proceeding had the opportunity to cross examine; that the questions in issue were substantially the same in the first as in the second proceedings.'

Another study by Kuwornu (2021) on Ghana cited another similarity between section 326(1) of the Indian Code of Criminal Procedure, 1973 and what is being canvassed in this study as follows, 'Where any Judge after having heard and recorded the whole or any part of the evidence in any enquiry or trial and ceases to exercise jurisdiction thereon and is succeeded by another Judge, who has and who exercises such jurisdiction, the Judge so succeeding may act on the evidence so recorded by his predecessor, or partly recorded by his predecessor and partly recorded by him: provided that if the succeeding Judge is of opinion that further

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examination of any of the witnesses whose evidence has already been recorded is necessary in the interest of justice, he may re-summon any such witness and after further

examination, cross examination and re examination, if any, as he may permit, the witness shall be discharged.'

In Kenya, the procedure is the same. However, in the Kenyan case of Joseph Kamau v. Gichuki v. Republic NRB (2013) eKLR it was observed that the situation in Ghana and Kenya should be sparingly invoked in cases where the ends of justice will be defeated if a succeeding Judge does not continue a trial commenced by his predecessor (Kuwornu, 2021). In USA, Rule 25 of the Federal Rules of Criminal Procedure provides, '*That during trial, any Judge regularly sitting in or assigned to the court may complete a jury trial if the Judge before whom the trial began cannot proceed because of death, sickness or other disabilities: provided the Judge completing the trial certifies familiarity with the trial record*' (Kuwornu, 2021).

In Nigeria, the law and the practice are clumsy and 'half-baked.' By section 23 of the Federal High Court Act, 'every proceeding in the court and all business arising thereat shall, as far as is practicable and convenient and subject to the provisions of any enactment or law, be heard or disposed of by a single Judge, and all proceedings in an action subsequent to the hearing or trial, down to and including the final judgment or order shall so far as is practicable and convenient, be taken before the Judge before whom the trial or hearing took place. Section 294(2) of the 1999 Constitution provides continuation with regards to judgment pending before the Court of Appeal and the Supreme Court but the ground-num is silent on the Judges in other courts particularly the High Court.

When de novo trial should be allowed

When then should a de novo trial be allowed? It appears reasonable if a de novo trial is ordered after an appeal has been lodged. An appellate court can, after hearing an appeal on the merits, order that a matter should be tried de novo. This order should also be sparingly made. If the appellate court forms the opinion that all the issues have been substantially addressed by the lower court and the parties in their evidence before the trial court and the addresses of learned counsel to the parties have turned in all that are necessary, the desire for an order for a retrial de novo should be discouraged rather, the court of appeal should proceed to give its judgment. Ishiola & Abikan (2017) have also studied how delay is caused by challenging jurisdiction and exercising the right of appeal particularly interlocutory appeal and have found that the lamentations of the apex courts against the practice of frivolous interlocutory and final appeals have not yielded any results and that both judicial and legislative lack of wills are to blame.

Extensive study has also been carried out by Martins Library (2011-2021) on de novo trial arising from successful appeals positing that in a majority of incidences of delay caused by de novo trial, they were ordered by the court of appeal relying extensively on the celebrated case of Yesufu Abodunde & Ors v. The Queen (1959) 4 FSC 70 at p. 73-74. Although the Federal Supreme Court advanced five circumstances in which an order of retrial or rehearing de novo can be made, the study in Martins Library went to a significant extent to advance 17 concrete circumstances under which the order can be invoked as detailed below.

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First, where the court believes that there has been an error in law (including the none observance of the law of evidence) or an irregularity in procedure of such a character that on the one hand the trial was not rendered a nullity and on the other hand, the court is unable to say that there was no miscarriage of justice. Secondly, that leaving aside the error or irregularity, the evidence taken as a whole discloses a substantial case against the appellant that he ought to be put on trial a second time. Thirdly, that there is no such special circumstance as would render it oppressive to put the appellant on trial a second time. Fourthly, the offence for which the appellant was convicted or the consequences on the appellant (or any other person of the conviction or acquittal) are not trivial. Fifthly, that to refuse an order for retrial would occasion a greater miscarriage of justice than to grant it.

Proceeding from the foregoing five general principles enunciated in Yesufu Abodunde (supra), it is believed that retrial has been ordered in the following circumstances. First, where there was absence of the defendant during the trial as it is a principle of criminal law that a defendant must be present throughout his trial. Secondly, failure to comply with arraignment procedure where the defendant is placed before the court unfettered and made to plead to each of the counts brought against him. Thirdly: a court's inability to deliver final judgment in a trial after 90 days of final addresses of counsel to the parties. Fourthly: where a defendant is not informed by the trial court of his right and option to defend himself if a prima facie case has been made out against him.

Fifthly, a retrial may be ordered on the emergence of fresh evidence. Sixthly, if a no case submission is wrongly upheld by a trial court, an appeal court would order a retrial de novo. Seventhly, if a trial court lacks jurisdiction to try a case, a court of appeal holding as such, may order a retrial de novo. Eighthly, if a trial court fails to convict an accused person before sentencing him a retrial would be ordered. Ninthly, where a piece of inadmissible evidence had swayed the trial court to give a judgment but the Court of Appeal cannot determine whether the extrication or exclusion of the evidence can lead to a different result, a rehearing can be ordered. Tenthly, where a trial court has misdirected itself, an order of retrial can be made.

Eleven, where a trial is founded on a defective charge and the defect is fundamental. Twelve, where the trial Judge was bias or partial or where the trial Judge had worked previously for any of the parties.

Martins Library has further advanced other circumstances where a court of appeal may order a trial de novo to include where the offence is serious and prevalent in the region or area; where length of time that has elapsed between the commission of the offence and the vacation of the judgment of the trial court is not odious; where the previous trial had been lengthy and complicated and the new one envisaged could be lengthier and more complicated; where it would take inordinate time to commence another trial; where the psychological effect of a second trial on the issues would be devastating on the defendant due to no fault of his; where the strength of the prosecution's case is still laudable and where the witnesses are still available and can be easily reassembled and the effect of time has not diminished their memory.

It is noted that the circumstances under which a Court of Appeal can order a rehearing are quite far reaching and elaborate, they are interwoven and can be taken and considered by a

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court of law in their clusters which ever suites the justice of the individual case under determination. As facts are unique so would the factors to be put into consideration.

Effect of de novo in appeal

One of the devastating effects of a de novo trial in appeal is on the previous court itself. This has been captured in Bakule v. Tanerewa (supra) to the effect that decisions and orders made by a court in a matter which later starts de novo before another court of competent jurisdiction are not in existence and are lifeless in the new trial. What view is created of the court whose orders and trials have been rendered null arising from a de novo order on the success of an appeal? The view in the eyes of the general public is one of ridicule and contempt.

Sometimes, order of accelerated hearing is issued to the new court where the matter is to re-commence de novo. In other cases where such matters are ordered to be transferred before a new court, time frame within which the new trial is to be completed is imposed. Experience has also shown that orders of accelerated hearing are kept more in breach and time frames are never kept in 100 percent of the cases so transferred.

CONCLUSION

This study subscribes to the views that no one stream of dispute is superior to another or that emphasis can be placed on criminal and election petitions while civil cases can come from behind in the race for speed. That an elevated judge should be given a window period to conclude the cases before him; a retiring judge should be given a window period to deliver all his judgments; and a dead judge's cases should be given to another judge to continue from where he stopped not de novo. That it should be within the province of the parties to determine whether matters should began afresh otherwise, the Judge should not be given the discretion whether to proceed de novo. The jurisprudence which puts discretion on the Judge should be varied for the one which puts it on the parties.

RECOMMENDATIONS

- Urgent attempts should be made to abolish de novo trials in all trial courts.
- Where the record of the previous court in part-heard matters is intact and not disputed or illegible or unintelligible, de novo trial should not be ordered.
- Where the event that leads to de novo is elevation, death, resignation, transfer, dismissal of a Judge it should not be ordered rather, the assuming Judge should be given adequate opportunity (fiat or warrant or assignment) to conclude all such cases to give added confidence to the image of the judiciary before the public.
- De novo trials should only be ordered in exceptional cases by appellate courts.
- A call for constitutional amendment is made to provide for time frames for civil matters from commencement to adoption of written addresses.

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