ISSUES WITH DE NOVO TRIAL OF COMMERCIAL CASES IN NIGERIA

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Abstract
De novo is a valid legal rule in the administration of justice which spans across our jurisprudence. The nature of commercial/financial litigations is averse to this principle given the dispatch or exigency of transaction or commerce. This paper examines continued application of the principle to commercial disputes. It analyses the inertia of our legislature to expunge or reform the use of de novo in commercial disputes proceedings; It further appraises the inadvertence of our judges or legal minds in promoting continuation of commercial cases even before a new judge so far, every stage of the proceedings has been fair and just. It examines the negative effects of de novo rule on our commercial jurisprudence. The paper finally highlights needed reforms.

Key words: Issue, De novo, Commercial Cases

1. Introduction

Disputes are generally an inevitable part of human interactions. Modern human interactions, whether commercial, matrimonial, socio-political or industrial, are carried on under very dynamic conditions. The expectation of the parties and the demands that they make upon one another are constantly changing. It is, thus, inevitable that occasional disputes would occur in the course of these interactions, and that the need for some kinds of civilized mechanisms for dealing with them remains a desideratum. It is classic in our traditional court that trial de novo is essential element of justice and fairness where necessary. In fact, it is a necessary constitutional requirement where conditions warranting it occurs. The concept "Trial de novo" connotes "afresh" trial in law. The word de novo is Latin word, meaning "anew" 'afresh' and beginning again'. A trial de novo is a new trial under criminal or civil case in which the entire case is presented as if there had never been a previous trial because new evidence and testimony can be presented "without reference to the initial judgment", meaning that the outcome of the previous trial is not considered.[1] The Black Law Dictionary defines a "trial de novo" as: "A new trial of the entire case that is on both questions of fact and issue of law – conducted as if there had been no trial in first instance",[2] while the cracknel's Law Student's Companion defines de novo trial as: "a new; starting afresh."[3] In explaining what de novo trial is all about, His Lordship Justice Elizabeth Brown in the American case of *Re Wilson*[4] stated inter-alia as follows:

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1 Jump up Santen V Tuthill, US: Courts, dreaded April 17, 2003, Case No.021781, retrieves on September 29, 2014.
2 B. Garner, Black's Law Dictionary (7th Edition, St. paul minm: Thompson West, 1999) p.1512.
3 V. Powell Smith, Cracknell's Law Students' Companion Contract (6th Edition London Butterworths, 1986) p. 170
4 (2007) 374 BR 251

> When a court is called upon to review a lower bankruptcy court's interpretation of a statute, it conducts a de novo hearing and a …… de novo review requires an independent determination of the issues, giving no special weight to the bankruptcy court's decision.

Furthermore, in the English case of *Collier Wallis v Astrar*[5] , the Court stated that:

> Trial de novo generally means a new trial or a trial for the second time, contemplating an entire trial in the same manner in which matter was originally heard and a review of previous trial. The court went further to hold that in trial de novo, court hears matter as court of original and not appellant jurisdiction…

The principle of starting a case afresh – (de novo trial) as enunciated above in both the English and American cases has been followed in a number of cases in Nigeria. Thus, in the case of *Udokpo v. Archibong & Ors*[6] the Court of Appeal per Tine Tur, J.C.A. (as he then was) stated that:

> "In most cases, where the judgment of the lower court or Tribunal is set aside and a new trial is ordered unconditionally the appellate court intends that the suit be heard de-novo meaning, anew,

De novo principle is invoked where a trial judge is either elevated, retired, transferred, deceased or removed from his judicial obligation. According to judicial practice in Nigeria, when any of the highlighted events occurs, the Chief Judge of such court, to wit, trial court reassigns the case files of the erstwhile judge to another judge appointed to that court who is under obligation to commence fresh proceedings. The implication is that all the trial proceedings and/or efforts of the erstwhile judge, counsel of both sides, litigants and witnesses are a nullity. It is a trite and settled legal principle that such erstwhile judge is no longer a member of such court because forum jurisdiction (composition of judges) is a mandatory requirement in settling the issue of jurisdiction. It is a fact that administration of justice system in Nigeria is fraught with challenges that need urgent fix. Regardless of the compass of the case either as criminal or civil, de novo principle applies to all trial proceedings. It is a universal principle of jurisprudence that purportedly aims at serving the interest of justice and fair play being an inherent substance of constitutionality. Commercial jurisprudence is a character of speed considering the nature of commerce. Exigency is sacrosanct to any legal issue arising from commercial transactions; hence the court of justice should conduct all proceedings particularly of commercial nature with dispatch.

However, the *de novo* principle is an interplay between substantial justice and timeline in the dispatch of commercial dispute. The interest of *de novo* principle is that justice is served regardless of how long even if it takes the entire lifespan of a man. Commerce is accustomed to time- every transaction and economic activity is a character of timeliness. Hence, time is of essence in commercial litigation. The various legal and business minds have raised their discordant voices against the delays in justice delivery system particularly commercial and economic/financial matters. Hence, the antithesis between timeliness and substantial justice of commercial litigation begs for a fair interrogation. This paper, therefore, could not have been more apt, as it offers an opportunity to explore and review the effect of de novo principle on commercial disputes.

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[5] (1951) ITLR 789
[6] (2011) C.A

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2. De novo Principle: A Constitutional Doctrine or Statutory Convenience?

The 1999 Constitution[7]is the grundnorm that defines all instruments of governance in Nigeria. It is a document that addresses all administrative and regulatory events of every sphere of governance. Hence, our jurisprudence must be in conformity with it.[8]Events invoking *de novo* principle are not expressly provided for in the Nigerian constitution. However, the same grundnorm, in passing, partly provides for issue relating to judgments pending before the Courts of Appeal and Supreme Court with the exception that another justice of the court can deliver and pronounce the judgment of his learned brother who is absent by reason of elevation, retirement, dismissal or death[9]. The provision of the Constitution of the Federal Republic of Nigeria, 1999 states:

> Each Justice of the Supreme Court or the Court of Appeal shall express and deliver his opinion in writing, or may state in writing that he adopts the opinion of another Justice who delivers a written opinion. Provided that it shall not be necessary for all the Justices who heard a cause or matter to be present when judgment is to be delivered and the opinion of a Justice may be pronounced by another justice whether or not he was present at the hearing or not.[10]

However, the constitutional provision lacks operational auxesis in the trial court where the issue of *de novo* majorly and materially lies. Causes and consequences of judicial cases upon elevation, death, retirement or transfer of judges do not gain express ratiocinations for trial *de novo* in the constitution at the court of first instance, the High Court. However, since the same constitution vests enactment of laws in the parliament, all such laws are valid if and only if they are consistent with the grundnorm. Hence, it is instructive to consider the extant laws of courts and their attendant attitudes towards *de novo* trials. Various laws establishing hierarchy of courts elicit their disposition to de novo trial. The Federal High Court Act[11] particularly section 23 provides as follows:

> Where a judge retires or is transferred to another Division and having part-heard a cause or matter which is being re-heard de novo by another judge, the evidence already given before the retired judge or the judge transferred out of the Division can be read at the re-hearing without the witness who had given it being recalled. But if the witness is dead or cannot be found, the onus of establishing that the witness is dead or cannot be found, shall lie on the party that wishes to use the evidence.

Furthermore, section 21 provides of the same Act provides as follows:

> where the judge who is presiding over the sitting of the Court is for any cause unable or fails to attend the same on the day appointed, and no other judge is able to attend in his stead, the Court shall stand adjourned from day to day until a judge shall attend or until the Courts shall be adjourned or closed by order under the hand of a judge.

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7 Act No. 24 of 1999
8 Section 1 of the 1999 Constitution (as amended).
9 under section 294(2)
10 Section 294(2) of the 1999 Constitution (as amended)
11 Cap F12 LFN 2004

The substance of sections cited above are *pari materia* with section 58 of the High Court Law of Lagos State[12] and similar to those of other States of the Federation. The referred section 58 provides:

> subject to the provisions of this or any other enactment and subject to any rules of court, all civil and criminal causes or matters and all proceedings in the High Court and all business arising shall so far as practicable and convenient be tried, heard and 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.

The cited provisions are interpretively consistent with the provision of section 294 (2) of the Constitution on the condition that the High Courts are excluded from the list of Courts to which the provision applies. The implication is that the parliament or drafters' intent is that another High Court judge cannot validly improvise or deliver the judgment of his learned brother who is no longer on the bench of the High Court based on the implied statutory interpretation and the legal maxim, *Expressio Unius Est Exclusio Alterius*. It is presumed that the lawmakers of s. 294 (2) of the Constitution contemplated the event that the High Court Judges are elevated to Court of Appeal or Supreme Court and that could have been the reason behind the construction that *so far as is practicable and convenient be taken before the judge before whom the trial or hearing took place.*

3. De novo Principle of Justice Delivery in Commercial and Financial Cases in Nigeria

The delay in the nation's judicial process has remained a sad commentary on the nation's justice sector, attracting condemnation from stakeholders in the administration of justice, the malaise has regrettably remained intractable with litigants waiting for decade of years or more before justice could be dispensed. First of all, it is important that we understand that a businessman wants to be able to determine his commercial disputes with fairly degree of certainty and expeditiously. When that does not happen, it leaves him in a limbo of not knowing where he stands. So, to a large extent, commercial dispute resolution is slow in Nigeria. This, though not the only reason for investors reluctance in the Nigerian market, but a major reason. It is a fact that no one likes to deal with uncertainty and definitely not when there are commercial interests. The reason is simple; there is a time value on money because what you get today is by far better than what you may get tomorrow. It is intractable when you have a jurisdiction where justice drags forever. Sometimes, it takes 7, 9 to 15 years for some of these disputes to be resolved. It certainly does undermine the investors' confidence in investing in a particular jurisdiction such as ours**.**

In Nigeria, the share volume of commercial cases before some of our courts is overwhelming. Even if the judges worked for the next five years without taking any new cases particularly at the Court of Appeal, they are not going to be able to clear the backlogs. We have up to 5000 cases to deal with and you have to write judgments. So, the ratio of commercial lawsuits available to judges has increased over the years as trade and commerce increases. Administration of commercial and financial justice systems are fraught with technicalities and lacunae in legal principles which are

[12] L.S.L.N No 7 of 2001

deployed by scheming and intriguing counsel to grind slowly commercial/financial justice system. This is occasioned when there are no certainties in the laws to unequivocally define the applying principles or rules of law as characterized by de novo principle. In the universal dispensation of cases in court, fairness and substantial justice is *sine qua non* and a primal character of commercial transactions. Commercial disputes are drawn in the argument of time value supply in the sense that N700, 000 today is probably worth more than NI million, you may win next year because you discount the value using inflation and all that. So, the businessman wants to speedily conclude his disputes. Hence, time is of essence. Considering the substantial ingredients of de novo principle, whether commercial cases enjoy material dispatch in court.

4. Interrogating the Two Limbs of Substantial Justice Characterizing Commercial Disputes

Exuding substantial justice in guaranteeing investors' confidence is hinged on two pillars-fair hearing and reasonable time in dispute resolution. Civil proceedings are the proceedings including the procedures and steps taken and undertaken in the determination of a person's civil rights and obligations. The provisions of the extant Constitution make it clear that trial of civil cases must be conducted and the cases determined within reasonable time. The terms 'fair hearing' and 'within reasonable time' are not defined anywhere in the Constitution of the Federal Republic of Nigeria 1999 in the same manner they were not defined in the extant 1999 Constitution of Nigeria but they have received judicial interpretation.[13]

4.1. Fair Hearing in Commercial Disputes

Fair hearing could be construed to mean a trial conducted according to all the legal rules formulated to ensure that justice is done to the parties in a case.[14] Ordinarily, what constitutes fair hearing depends on the circumstances of each case. Fair hearing is defined in the case of *Arobieke vs N.E. L. M. C*[15] it was held thus:

> Fair hearing means giving equal opportunity to the parties to be heard in the litigation before a court or tribunal, an ad-hoc tribunal inclusive. Where parties are given opportunity to be heard and the charge or complaint against the party standing trial or being investigated made available to them, they cannot complain of breach of fair hearing principles…

The principle of fair hearing in the determination of civil rights and obligations as enshrined under the extant Constitution of Nigeria[16] is for all the parties in a given civil case.[17]Section 36(1) of the Constitution of the Federal Republic of Nigeria 1999 (as amended) provides that:

> In the determination of his civil rights and obligations, including any question or determination by or against any government or authority, a person shall be entitled to a fair hearing within a reasonable time by a court or other tribunal established by law and constituted in such manner as to secure its independence and impartiality.[18]

[13] *Chief Osigwe Egbo & 13 Ors.v. Chief Titus Agbara & 4Ors.* (1997) LPELR-1036(SC) Pp. 25 – 26, paragraphs A – E
[14] *Ariori & Ors.v. Maraimo Elemo & Ors.* (1983) 1 SC 13 at 24.
[15] (2018) 5 NWLR (Pt. 1613 @ p. 383-402. paras. A-C.
[16] The Constitution of the Federal Republic of Nigeria 1999 (as amended).
[17] *Darlington Eze v. Federal Republic of Nigeria* (2017) LPELR-42097(SC) p. 17, para. B
[18] This was quoted by the Supreme Court per Bage, JSC., in *Darlington Eze v. Federal Republic of Nigeria* (supra)

Apparently, from the above section, the Constitution that serves as a moderator for the action and interest of all the citizens requires any court to conduct the proceedings in accordance with the procedural steps or rules formulated to ensure that justice is done to the parties. It is very important to note that, this provision also requires the observance or consideration of the twin pillars of the rules of natural justice, namely, *audi alteram partem* hear the other party and *nemo judex in causa sua* no one is a judge in his own case". First pillar which is *audi alteram partem* means that a court must hear both parties to a dispute at every stage of proceeding. In other words, parties should not be subjected to any decision of a court without being given an opportunity to be heard. Further still, there are basic criteria which should be seen considered before the fair hearing can be confirmed done; the criteria and attributes of fair hearing were set out in the case of *Sani vs. State.*[19] It was held thus:

> This court set out certain basic criteria and attributes of fair hearing, as follows –
> i That the courts shall hear both sides not only in the case but also on all material issues in the case before reaching a decision, which may be prejudicial to any party in the case;
> ii That the court or tribunal shall give equal treatment, opportunity, and consideration to all concerned;
> iii That the proceedings shall be heard in public and all concerned shall have access to and to be informed of such a place of public hearing;
> iv That having regard to all the circumstances, in every material decision in the case, justice must not only be done but must manifestly and undoubtedly be seen to have been done."

The second pillar which is "*nemo judex in causa sua* "means a judge should not be a judge in his own cause, i.e.; a judge before whom the matter is, should not have substantial interest in that matter or any of the parties to the dispute to the extent of influencing the outcome or to be seen to have influenced the outcome of the decision.

4.2. Interpreting Reasonable Time in Commercial Disputes

This paper perceives and verily believes that trial/hearing within a reasonable time is such a constitutional element and rule formulated to ensure that justice is not only done to the parties in a case but seen to be so done. Reasonable time is therefore an inevitable and indispensable constitutional element of fair hearing, which the Supreme Court per Obaseki, JSC. has held, must mean the period of time which, in the search of justice does not wear out the parties and their witnesses and which is required to ensure that justice is not only done but appears to reasonable persons to be done.[20] The phrase 'within a reasonable time' implies that the time for the determination of the civil matter should not be too short or too long,[21] depending on the nature and facts of the case.[22] The true test of fair hearing, and of course necessarily of fair hearing within

[19] (2018)8 NWLR (Pt. 1622) p.412 @ 439, paras. F-H.

[20] *Ariori & Ors.v. Maraimo Elemo & Ors.* (supra). See also the of *Idakwo v. Ejiga* (2005) 48 WRN page 35 at 36

[21] *Alhaji Sani Abubakar Danladi v. Barr.Nasiru Audu Dangiri & Ors* (2014) LPELR-24020(SC) Pp. 43 – 44, paragraphs E – A

[22] *Alhaji Sani Abubakar Danladi v. Barr.Nasiru Audu Dangiri & Ors* (supra). See also the case of Wema Bank Plc v. Arson Trading and Engineering Company Limited &Anor. (2015) LPELR-40030(CA) p. 46, paras. C – F where the Court

reasonable time, is the impression of a reasonable person who was present at the trial , whether from his observation, justice has been done in the case.[23] Who then is a 'reasonable man' or 'reasonable person' for the purpose of assessing what time is a reasonable time in a trial? In response to this important question, the Court of Appeal, Port Harcourt Judicial Division, per Rhodes-Vivour, JCA (as he then was), on Thursday, the 12th day of July 2007 stated inter alia that:

> A reasonable man is a fair-minded man, rational in thought and orientation. He is a man endowed with reason. It includes the ordinary person seen on our streets, whose means of transport is the popular Okada or mammy wagon. It also includes the affluent, highly literate or otherwise.[24]

In the premises of the foregoing, it is clear that no reasonable person will approve the wide application of the principle of trial de novo especially where it is merely by reason of the transfer of a trial Judge of a Court from one judicial division of the same Court to another. This should be a correct application and interpretation in all commercial cases having their utilitarian value in speedy justice. It is observed that virtually all the Civil Procedure Rules of the various trial Courts in Nigeria provide for time frame within which certain procedural steps may be taken such as time for filing[25] and service[26] of processes, time for entry of appearance,[27] time for filing and exchanging pleadings, time for conduct of pre-trial / case management conference and scheduling,[28] time for discovery and inspection,[29] time for filing final addresses,[30] et cetera. Where any party fails to do any act or to take a required procedural step within the time stipulated therefor, he/she will be required to bring an application for extension of time with substantial reasons why it is not done within the prescribed period.[31] There is also usually a penalty for failure to do an act or take a step within the time frame prescribed therefor.[32] Equally, without prejudice to Section 294(5) of the Constitution of the Federal Republic of Nigeria 1999 (as amended), timeframe of not later ninety days is stipulated by the extant Constitution of Nigeria within which every Court established under the Constitution shall deliver its decision in writing after the conclusion of evidence and final addresses.[33]

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held that reasonable time in its nebulous content cannot be determined in vacuo but in relation to the facts of each case because what constitutes a reasonable time in one case may not so constitute in another case.

[23] *Chukwuma v. Federal Republic of Nigeria* (2011) LPELR-863(SC) p. 49, paragraphs A – B. See also *Unongo v. Aku* (1983) 2 SCNLR p. 332

[24] *Oliserv Limited v. L. A. Ibeanu & Company Nigeria Limited & Anor* (2007) LPELR-5149(CA) Pp. 18 – 19, paragraphs F – A.

[25] See for example, Order 15 Rule 1 (2) & (3), and Order 18 Rule 1 of the High Court of Lagos State (Civil Procedure) Rules 2012

[26] For example, see Order 39 Rule 1 (3) & (5) of the High Court of Lagos State (Civil Procedure) Rules 2012

[27] For example, see Order 9 Rule 1 of the High Court of Lagos State (Civil Procedure) Rules 2012

[28] See for example, Order 25 Rule 1 of the High Court of Lagos State (Civil Procedure) Rules 2012; also Order 26 Rule 1 of the High Court of Anambra State (Civil Procedure) Rules 2019.

[29] See for example, Order 26 Rule 1 of the High Court of Lagos State (Civil Procedure) Rules 2012

[30] Midland Galvanizing Product Limited v. Ogun State Internal Revenue Service (2014) LPELR-22935(CA) p. 18, paragraph A.

[31] For example Order 36 Rules 2, 3, and 4 of the High Court of the Federal Capital Territory, Abuja (Civil Procedure) Rules 2004 provides for the manner and time[frame] for filing of final written addresses

[32] For example, see Order 9 Rule 5 and Order 44 Rule 4 of the High Court of Lagos State (Civil Procedure) Rules 2012

[33] Section 294(1) of the Constitution of the Federal Republic of Nigeria 1999 (as amended).

However, no time frame is constitutionally fixed for trial of civil cases/commercial cases (taking of evidence and conclusion of evidence) as it is fixed for election petitions. It is obvious because the provisions in the various Rules of trial Courts relating to proceedings at trial seem to be there for fancy[34]. Should those provisions be implemented, then commercial cases would certainly be determined within reasonable time and will not always stand prone to the overwhelming pain of being heard de novo. This is unlike in election petitions, where for example, the entire proceedings including the procedural steps, taking and conclusion of evidence, delivery of the tribunal's decision, and even determination of appeals arising therefrom are all timed and accordingly special attention is given to the proceedings from the beginning to the end[35] . On the importance of taking and conclusion of evidence timeously (that is, within reasonable time), the Supreme Court per Iguh, JSC., has held inter alia that:

> It cannot be over emphasized that the taking of evidence in a suit must, as far as possible, be continuous and not punctuated by very long periods of adjournments and /or long intervals between the reception of the evidence of witnesses in the proceedings. This will ensure that the case receives fair hearing and is concluded with the minimum delay and certainty within a reasonable time. It will also ensure that the case is determined at a time when the impressions made on the trial Judge by the witnesses are still fresh and present in his mind and have not become dimmed or vague by the passage of time.[36]

It is our considered view that the above pronouncement of the Supreme Court per Iguh, JSC, is very apt and instructive and should give a hint to the National Assembly on the need to alter/amend the Constitution to make provisions for a specific [maximum] time for the determination of civil matters particularly commercial/economic cases. This paper prescribes a maximum of two (2) years for the trial (hearing and determination) of commercial/economic and civil matters.

4.3. Trials De Novo, Record of Proceedings and Evaluation of Evidence in Civil/Commercial Cases

Generally, it is settled principle of law that the Court is bound by its record, which is the true reflection of what transpired in the Court,[37] and that 'Record of Proceedings is the only indication of what took place in Court; it is always the final reference of events, step by step, that took place in Court.'[38] Again, in the case of *Daggash v. Bulama*[39], the Court of Appeal per Ogbuagu, JCA (as he then was) held that 'a court is entitled to look at its case file and make use of its contents'.[40] It is equally settled law that it is the primary function of the trial Court which had the advantage of seeing the witnesses and observing their demeanours as well as hearing them to evaluate their evidence and to make findings of facts therefrom.[41] Therefore, the better position of the law is

[34] See for example, Order 30 of the High Court of Lagos State (Civil Procedure) Rules 2012.
[35] Section 285 (5) to (8) of the Constitution of the Federal Republic of Nigeria 1999 (as amended).
[36] *Chief Osigwe Egbo& 13 Ors.v. Chief Titus Agbara & 4Ors* (1997) LPELR-1036(SC) p. 27, paragraphs B – D
[37] *Mohammed v. Nigerian Army* (2016) LPELR-41594(CA) pages 9 – 10, paragraphs F – A.
[38] *Fawehinmi Construction Co. Ltd. v. OAU* (1998) LPELR-1256(SC) page 10 paragraph B.
[39] (2004) 14 NWLR (Pt 892) 144 at 233 paragraphs F – H.
[40] See also *West African Provincial Ins. Co Ltd. v. Nigerian Tobacco Co. Ltd* (1987) NWLR (Pt 56) 299 at 306; *Nwankwo v. Nwankwo* (1993) 5 NWLR (pt. 203) 281 at 287; *Agbasi v. Ebikarefe* (1997) 4 SCNJ 147 at 160.
[41] *Tijani Sofolahan & 5Ors.v. Chief J. S. Folakan – OlumoIjeun & 5Ors.* (1999) LPELR-13106(CA) Pp. 20 – 21, paragraphs F – A.

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that both the evidence adduced by witnesses and the demeanours of the witnesses observed by the trial Court are reflected, and should necessarily be reflected, in the record of proceedings, which record of proceedings should be a true reflection of what transpired in Court and the final reference of events, step by step, that took place in Court. A trial Court, for instance, the Federal High Court of Nigeria, includes[42] all the Judges of the Federal High Court and is not by any law limited to any particular Judge of that Court. The Federal High Court is therefore one Court and does not translate into many Courts by reason of having many Judges of that one Court. In support of this view is the fact that Section 249(1) of the Constitution of the Federal Republic of Nigeria 1999 established only one Federal High Court as it provides that 'There shall be a Federal High Court.'

The proper constitution of the Federal High Court,[43] and the fact that the Federal High Court shall consist of the Chief Judge thereof and such number of Judges of the Federal High Court as may be prescribed by an Act of the National Assembly,[44] are different questions altogether which do not affect the constitutional position that there is only one Federal High Court. The above constitutional position on the Federal High Court equally applies to the High Court of each of the thirty-six (36) federating States in Nigeria. Accordingly, there is only one High Court for every State regardless of the prescribed number of the Judges thereof.[45] The implication of the foregoing is that generally, cases should not be suffered to be tried de novo merely because a Judge of a certain trial Court had cause to take over the recording of the proceedings of a particular case from another Judge of the same trial Court. The record of proceedings of a particular trial Court should remain the true reflection of what transpired in that trial Court and always remain the final reference of events, step by step, that took place in that trial Court.

This should be the position regardless of the fact that there was inevitable cause for the proceedings to be presided over and recorded, even at different times, by more Judges than one of the same trial Court, perhaps due to elevation, resignation, demise, removal, retirement, transfer of cases from one Judge of the same trial Court to another, transfer of Judges from one judicial division of the same trial Court to another. After all, if any party has any valid ground to challenge the record of proceedings or any content thereof, there is a procedure for such a challenge, but in the absence of such challenge, why should a case start de novo when the record is there for continuation by another Judge of the same Court? Particularly, on the transfer of Judges of a trial Court from one judicial division of the same trial Court to another, the position of the law is as captured in *Chief Osigwe Egbo & 13 Ors. v. Chief Titus Agbara &4Ors*[46] wherein the Supreme Court per Iguh, JSC, stated inter alia that:

> A Judge of a State High Court having jurisdiction to sit in one of the Judicial Divisions of that 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 same State'.[47]

[42] See Section 258(1) of the Evidence Act, 2011.
[43] Section 253 of the Constitution of the Federal Republic of Nigeria 1999
[44] Section 249(2) of the Constitution of the Federal Republic of Nigeria 1999
[45] Sections 270 and 273 of the Constitution of the Federal Republic of Nigeria 1999.
[46] (1997) LPELR-1036(SC) p. 24, paragraphs B – G.
[47] M. S. Aliyu v. M. N. Ibrahim & Ors (1992) 7 NWLR (Pt. 253) 361 at 370

In the light of the foregoing, what then is/are the justifiable reason(s) why the constitutional element of fair trial within reasonable time in civil cases (i.e., commercial cases), as guaranteed under Section 36(1) of the Constitution of the Federal Republic of Nigeria 1999, should continue to stand in jeopardy on the strangulating altar of trials de novo save where an appellate Court so orders for retrial or trial de novo in appropriate cases? For instance, the researcher and this paper is aware of a case filed in 1972 still pending before the High Court of Anambra State,[48] which has suffered greatly on the altar of trial de novo; in fact, the last time the hearing of the case was at the verge of conclusion in the year 2018, the learned trial Judge retired and the matter had to bow again at the altar of trial de novo. This paper would also want to observe and opine that Nigeria is blessed with much more than enough resources to have more number of Judges and Justices employed by the Federation and the Federating States as the case may be so that the serving Judges and Justices would not continue to labour under a heavy load of cases congested in their Courts. This would contribute immensely to the deliverance of the constitutional element of fair hearing/trial within reasonable time from strangulation. Who will believe that Nigeria does not have enough money to appoint and pay enough Judges and Justices when we hear about huge sums of money looted and recovered, spent by politicians in their election campaigns and allied matters?

It is sad that since around August 2009, when the Central Bank of Nigeria (CBN) sacked five bank chief executives whose names are: Sebastin Adigwe (Afribank), Okey Nwosu (Finbank), Erastus Akingbola (Intercontinental Bank), Cecilia Ibru (Oceanic Bank) and Bath Ebong (Union Bank) and. the EFCC took over the cases and charged them to court. Till date, majority of the cases are still being frustrated by *de novo* principle. This continues to frustrate the speedy compass of commercial cases and investors' confidence continue to wane. Without going into much highfalutin arguments, the Nigerian judicial system attitude towards resolving challenges posed by de novo principle to commercial and other litigations brought before it has been cold and of great concern. Our judges have been too religious in following the principle without applying any discretionary deference to salvaging commercial disputes from rigours of *de novo* principle. Even the Court of Appeal and Supreme Courts are hell bent in applying de novo principle regardless of how long a case has been in the docket of court. The evidence of this is seen in the recent case of *FGN v Orji Kalu & Anor*[49]decided by the Supreme Court. In fact, the relevant question is whether section 294 (2) of the Constitution has been effective to mitigate the harshness of *de novo* principle. The question is answered in the negative considering the Supreme Court's decision in *FGN/Orji Kalu Case.* The same decision has also put to trial the constitutionality of section 396 (7) of the Administration of Criminal Justice Act (ACJA). [50]Section 396(7) empowers a High Court Judge, upon elevation to the Court of Appeal, to conclude as a High Court Judge the part heard criminal case and deliver judgment on the case.

In the case the presiding Judge, who was elevated to the Court of Appeal, took cognizance of section 396(7) ACJA, to complete the proceedings at the Federal High Court. However, the Supreme Court welded its axe and unanimously held that the Court was, in the circumstance, not properly constituted, ordering for the case to be remitted to the Chief Judge of the Federal High

[48] A/26/1972 between Mr. ObioraMbah& 5 Ors.v. Basil Efobi& 4 Ors
[49] Unreported Suit No: (SC 622C/2019
[51]

Court for the trial to start ***de novo***. The decision of the Supreme Court has elicited crucible of arguments in the legal and non-legal climes. Some minds in the legal aisle opined that the decision follows the law, while the other side of the legal divide posits that the decision oscillated into technicalities, which is crude medieval and mundane. It is sad to note that the common men on the streets and foreign investors particularly the blue ship investors whose interest in justice are frustrated have expressed dissatisfaction to the judgment. It is their view that the judiciary is the missing link in Nigeria's strife to attaining a corrupt-free society, particularly in relation to politicians or politically exposed persons. They opined that the Judiciary is not advancing commercial and economic jurisprudence and neither is it using law as an instrument of socio-economic engineering.

5. Recommendations

In view of the above, this paper has ardent passionate for reviewing *de novo* application particularly on commercial and economic matters which have been having negative effects on investments in Nigeria. This paper recommends the following reform options to mitigate the hardship caused by trial *de novo*:

a. Nigeria should see it as a matter of policy directive that superior courts of record craft for themselves practice directions administering instances where elevated judges could conclude part-heard trials; also, a provision enabling another judge to inherit the part-heard trials should be incorporated bearing in mind the practicability and convenience test. The logic that an 'elevation of a judge makes for no jurisdiction' should put in perspective the fact that it is possible for an elevated judge not to be criticized for serving two courts once it is seen that though he was appointed, he was yet to either take the oath of allegiance or declare assets vide **s. 290 CFRN**. The appointing authority should make sure that the elevated judge be given a grace period to conclude pending trials on his docket before resuming or functioning as a Justice of a higher court – the time frame being a reasonable time. This is even the practice in the United Kingdom as confirmed by Queen's Counsel resident in that jurisdiction. To be added here is the fact that rather than practice directions, it could form as statutory provisions to avoid future sound arguments on the weight of a practice direction.

b. Another way to cure the mischief will be to amending relevant provisions of the statutes regulating the Superior Courts of Record such as the Federal High Court Act or other High Court Laws of States. There would not have been need for superior courts to forcefully untie itself from the shackles of the bad mammoth practice brought by *trial de novo*. For example, if section 23 of the Court of Appeal Act had a proviso incorporating instances of the mentioned events with the ultimate conclusion that another judge of the High Court could continue with the part-heard trials such that where the case was even inherited before the erstwhile judge could deliver judgment on the day reserved for same, another judge of the court could do same. This in itself will forestall, in parts, the occurrence of unending or prolonged litigation.

c. Finally, this paper suggests amendment of the Constitution to unequivocally settle the controversy by removing the hurdle created by *de novo* principle as that will avoid or end the reign of rigid judgments of the Supreme Court on this matter since hardly would technicalities become the interpretive norm of the court. The call for an outright amendment to reflect the mentioned

events is put last because of the cumbersome procedure in effecting an amendment of the Constitution. It is however hoped that all arms of government, particularly the judiciary and their fervent love for *trial de novo*, rethink this concept and work towards dispensing justice to all and sundry remembering always that Justice delayed is Justice denied.

6. Conclusion

De novo principle is not bad in itself but as discussed in this paper, it should indeed reflect and serve the interest of commercial, financial and economic justice. That is, it should factor in time as a great essence and strong pillar of commercial transaction and resolution of any suit arising therefrom. The Nigerian constitution is not the major problem but the various statutes and practice instruments adopted by our courts. Our judges should imbibe culture of timely dispensation of commercial, economic and financial justice. Hence, the above recommendations should serve as template for stakeholders and policy makers to lay better foundation for redefining *de novo* principle to serve the interest of timely dispensation of commercial matters.

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