

# **LAGOS STATE JUDICIARY REMOTE HEARING OF CASES PRACTICE DIRECTION 2020: A RIGHT STEP IN THE RIGHT DIRECTION**

**BY**

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## **1.0 INTRODUCTION**

The Corona virus (Covid-19) pandemic has caused global disruption to life as we know it. The Courts are not immune from this disruption. In recognition of the fact that life must go on and the wheels of justice must not grind to a perpetual halt on account of the corona virus, the Honourable Chief Judge of Lagos State signed the Lagos State Judiciary Remote Hearing of Cases Practice Direction for timely and efficient disposal of cases during this covid-19 pandemic period. This paper briefly examines the workability of the practice direction and offers useful suggestions where necessary, to ensure the effective implementation and actualization of the objectives of the practice direction.

## **2.0 VIRTUAL HEARING; A RIGHT STEP IN THE RIGHT DIRECTION**

The Lagos State Judiciary has been in the forefront of justice reform in Nigeria. It is therefore not surprising to see that the Lagos State High Court is the first Court to issue practice direction for remote hearing of cases during this Covid-19 pandemic in Nigeria. This commendable effort of the forward thinking Chief Judge of Lagos State, Hon. Justice Kazeem Alogba, is in conformity with current global best practices towards justice delivery this pandemic period.

In the United Kingdom, the Lord Chief Justice, Lord Burnett of Maldon, realized that Courts must think quickly and effectively during this pandemic. Consequently, he issued directives on virtual hearing on March 20, 2020. The Lord Chief Justice directed that urgent virtual hearings should be conducted by civil and family courts in cases involving custody, deprivation of life and liberty. However, no new trials are to be conducted unless such trials will last for 3 days or less. The Courts are to utilize the following technology for the virtual hearing: Her Majesty's Courts and Tribunals Service (HMCTS) Justice Video Service, BT Meet Me (an approved

audio conferencing system) and Skype for Business to be used by Judges on their HMCTS issued laptops.

Similarly, the Supreme Court of India directed that urgent matters involving life, liberty and family law be conducted virtually with the consent of the parties. This directive has however been met with resistance from the Bar Council of India (BCI). The Chairman of the Bar Council, Manan Kumar Mishar, in conveying the Bar's disapproval stated that virtual hearings are impracticable because most lawyers are unaware of the technology and its nuances. Also, there is an absence of proper infrastructure and technical education for the successful introduction of virtual hearings in India. Despite the protestations of the BCI, the Indian Courts have continued to entertain and determine matters through virtual hearings.

An undeniable fact is that Covid-19 pandemic has caused a major disruption in every sphere of our lives including justice delivery. Lagos State, being the centre of excellence that it is, has therefore risen to the occasion by setting the pace in this regard. The gains and challenges of the remote hearing practice direction 2020 are examined below.

### **3.0 MATTERS ARISING**

The remote hearing practice direction 2020 contains very useful provisions. However, laudable as the practice direction is, its implementation will not be without some challenges. The following are some observations emanating from the said practice direction which need to be adequately addressed in order to actualize the objectives of the Lagos State Judiciary for the remote hearings:

#### **I. *Scope of the Practice Direction***

The scope of the practice direction is limited to urgent cases of time-bound interlocutory applications such as bail applications, fundamental human right matters where the applicant is in custody, adoption of addresses, rulings and judgments or any other matter as the Chief Judge may approve.

As aforementioned, this in itself is a huge step forward for the Lagos State Judiciary. However, there is a need to widen the scope of the practice direction to

new cases as well as all pending cases that are urgent with the objective of migrating from the physical court room hearing to virtual hearing.

## **II. *Public Hearing***

The hallmark of the adversary trial process is that justice must not only be done, it must be seen to be done. Section 274 of the Constitution provides that the Chief Judge of a State may make rules for regulating the practice and procedure of the High Court of the State. Notwithstanding the Chief Judge's power, such remote hearings must however be open to the public. Section 36 (3) and (4) of the 1999 Constitution provides as follows:

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

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

***Provided that-***

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

***(b) if in any proceedings before a court or such a tribunal, a Minister of the Government of the Federation or a Commissioner of the Government of a State satisfies the court or tribunal that it would not be in the public interest for any matter to be publicly disclosed, the court or tribunal shall make arrangements for evidence relating to that***

***matter to be heard in private and shall take such other action as may be necessary or expedient to prevent the disclosure of the matter.”***

Paragraphs 19 and 20 of the Practice Direction which deal with conduct of proceedings fail to provide for accessibility of the members of the public to proceedings of the Court in line with the above provisions of the Constitution. It is therefore necessary for the virtual proceedings of the Court to be made accessible to the public via streaming platforms and electronic links such that any interested member of the public is given the opportunity of viewing the proceedings. Public hearing is not synonymous with being physically present in the court room. It extends to the ability of members of the public to view the proceedings from any location in the world. The opportunity availed members of the public to view court proceedings from any location vide electronic links and streaming of court proceedings satisfies the requirement of public hearing guaranteed by the 1999 Constitution. As a corollary, it is important for the weekly cause list to be published on the website with sufficient information as to time of hearing and mode of streaming. It is envisaged that there will be technical and infrastructural challenges which may result in the proceedings being aborted, however, these are potential teething problems that can be gradually addressed.

### **III. *Demeanour of Witnesses***

It has long been settled by a host of cases that one of the essential duties of a trial Judge is the observation of the demeanour of witnesses. The court is entitled to draw inference from the demeanour of witnesses. See the cases of UTC NIG PLC v ALHAJI ABDUL WAHAB LAWAL (2013) LPELR 23003 (SC) and NGORKA v A-G IMO STATE (2014) LPELR-22532 (CA). As earlier mentioned, trials are not expressly stated as being within the contemplation of the practice direction however the Chief Judge may choose to extend the scope of the practice direction to cover trials. The trial Judge may observe the demeanour of a witness from the screen as to determine whether or not such a witness is a witness of truth. It is however suggested that hearings should compulsorily be conducted by a combination of audio and video. This is to prevent a situation where the hearing will be deliberately compromised by the witness. Exhibits to be admitted during trial should be agreed upon and documents to which objection is taken should be

admitted in evidence subject to the right of the parties to canvass arguments on their admissibility in their written addresses.

#### **IV. Proof of Service**

The Practice Direction makes provision for electronic service of processes in Paragraphs 10, 11, 12 and 13 through email, whatsapp or as otherwise directed by the Court. Pre-Covid 19, the Court of Appeal of Nigeria adopted the practice of electronic service of hearing notices. Needless to say several appeals have been heard and determined on account of hearing notices that were purportedly sent but not received by the recipient. It is not uncommon for electronic messages to end up in the recipient's spam or junk mail. The electronic mails may even be returned as having failed to deliver. Paragraphs 10 - 13 are an oversimplification of the issue of service which is intricately tied to the right to fair hearing. The practice direction is skewed in favour of the sender of the document without taking into consideration that the document may not have been received. Paragraph 13 further states that time shall begin to run from the date the process was sent and not when it was received which is contrary to the High Court rules and convention in Nigerian legal practice.

A way out of this predicament is to invoke the presumption as to telegraphic and electronic messages as provided for in Section 153 (1) and (2) of the Evidence Act, 2011 read along with Section 145 of the Evidence Act, 2011. The said provisions are reproduced for ease of reference:

***145 (1) Whenever it is provided by this Act that the court may presume a fact, it may either regard such fact as proved unless and until it is disproved; or may call for proof of it.***

***(2) Whenever it is directed by this Act that the court shall presume a fact, it shall regard such fact as proved unless and until it is disproved.***

***(3) When one fact is declared by this Act to be conclusive proof of another, the court shall on proof of the one fact, regard the other as proved and shall not allow evidence to be given for the purpose of disproving it.***

***153 (1) The court may presume that a message forwarded from a telegraph office to the person to whom such message purports to be addressed corresponds with***

*a message delivered for transmission at the office from which the message purports to be sent; but the court shall not make any presumption as to the person by whom such message was delivered for transmission.*

*(2) The court may presume that an electronic message forwarded by the originator through an electronic mail server to the addressee to whom the message purports to be addressed corresponds with the message as fed into his computer for transmission; but the court shall not make any presumption as to the person to whom such message was sent.*

A combined reading of Section 145 and 153(1)&(2) of the Evidence Act, 2011 can be utilized to create a rebuttable presumption of fact that the electronic message/court documents were received on the day it was sent. The effect of this rebuttable presumption is that it places the burden of proof on non-service/non-receipt of the electronic messages on the intended recipient of the electronic message. The practice direction should be redrafted to incorporate this presumption.

#### **V. *Consent of the Parties***

Paragraphs 15 and 17 of the practice direction on voluntary participation in the remote hearing and consent of all parties on record before ordering a remote hearing are likely to serve as obstacles to the smooth implementation of the practice direction. It is unlikely that a Defendant will consent to participate in such a proceeding especially where (s)he has secured an advantage. This requirement of consent and voluntariness may need to be revisited. The Chief Judge may wish to explore the possibility of revising the practice direction to empower the Judge to compel the attendance of all parties where the matter is deemed urgent.

#### **VI. *Technical Facilities***

Paragraph 17 of the Practice Direction states that the Registry shall liaise with Counsel on record to ensure that suitable facilities are available. What exactly amounts to suitable facilities is undefined. Whose duty is it to provide the suitable facilities? An accused person being remanded at the Ikoyi Prisons is unlikely to have suitable facilities to appear at a remote hearing for his bail application. An unwilling defendant may choose not to engage in litigation that may result in him

losing his advantage by stating not to have facilities for the virtual hearing. What happens in this scenario? Does the accused possess the requisite knowledge to operate the technology?

A likely solution may be for the Nigerian Bar Association (N.B.A) to ensure that all its branches in Lagos State have the facilities for a virtual hearing. Lawyers who do not have facilities for virtual hearing can proceed to their branch N.B.A offices to conduct their hearings. Senior members of the profession may also be encouraged to make their facilities available to younger members who are unable to acquire the facilities.

#### **VII. *Virtual/Remote Hearing Judges***

Are all Judges going to be mandated to carry out virtual hearings or is the Chief Judge going to select/designate Judges for these hearings? Will these Judges work from Home or work from the Court House? If all the Judges are designated as remote hearing Judges and all work from the Court House, it will be difficult for all the proceedings to hold simultaneously regard being had to the bandwidth requirements of the Court House internet. These may lead to poor audio or video quality. There are also obvious challenges with the Court File which is supposed to guide the Judge in the proceedings. How do parties verify the content of the Court file? It is suggested that the contents of the Court's file should be uploaded before the hearing for all parties to be clear on the contents of the file. The transcript of the proceedings should also be sent to the parties within a day of the proceedings.

#### **VIII. *Cost of Implementation and Maintenance***

Technological innovation and advancement come at a cost. The High Court will need to acquire high end technological facilities and recruit personnel for the maintenance of these facilities. The Court may also need to support the various branches of the Nigerian Bar Association in their drive to acquire facilities for virtual hearings.

### **4.0 CONCLUSION**

Undoubtedly, the Remote Hearing Practice Direction 2020 is a step in the right direction as it provides a platform for the gradual implementation of virtual/remote court proceedings. The gains of the practice direction have been examined,

however, there is a need to revise and improve upon this practice direction to take into consideration the factors highlighted above to ensure that the objectives of the practice direction are realized.