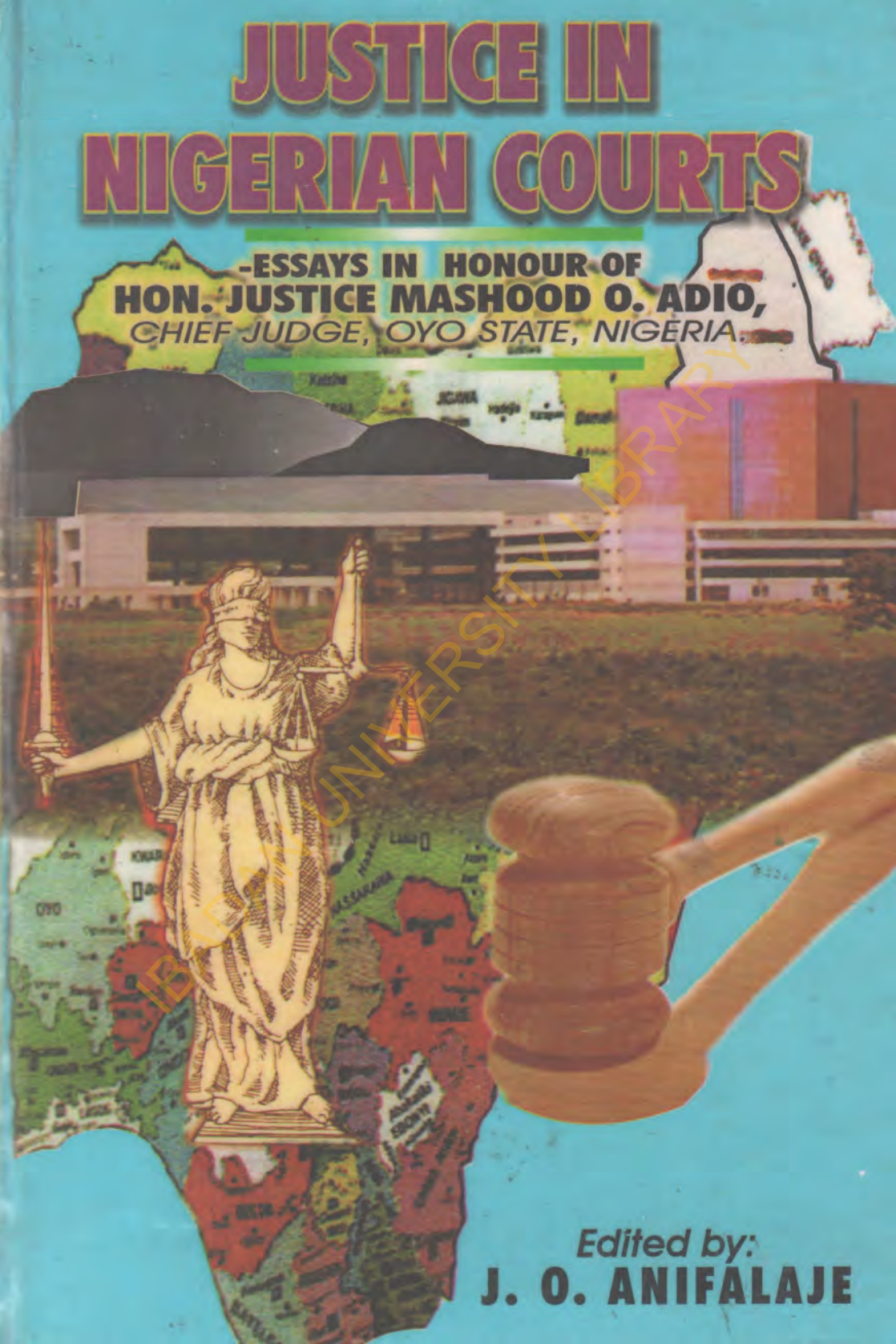
JUSTICE IN NIGERIAN COURTS

-ESSAYS IN HONOUR OF HON. JUSTICE MASHOOD O. ADIO,

CHIEF JUDGE, OYO STATE, NIGERIA.



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* Ensconced within the shores of the Federal Republic of Nigeria in Cartogram is the famous goddess of justice with the Supreme Court of Nigeria firmly entrenched behind the goddess and the judicial gavel beside the scale of justice in the foreground unisonously symbolising "JUSTICE IN NIGERIAN COURTS" without trammels!

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JUSTICE IN NIGERIAN COURTS

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PART FOUR - THE ENDS OF JUSTICE

CHAPTER 6

DEMANDS OF JUSTICE IN CONTROLS OF TECHNICALITIES IN NIGERAN COURTS.

Kehinde A. Anifalaje *

It is of fundamental importance that justice should not only be done but should manifestly and undoubtedly be seen to be done[1] and the operative maxim has been "*ubi jus ibi remedium*", (that is, where there is a right, there is a remedy).[2] There lies in the concept of justice itself a hidden conflict or tension between opposing conceptions of the end sought by justice. On the one hand, there is what has been called legal justice, a justice which demands that we stick which demands that we stick by the announced rules and not make exceptions in favour of particular individuals, a justice which conceives that men should live under the same "rule of law and be equally bound by its terms. On the other hand, there is the justice of dispensation, a justice ready to make exceptions when the established rules work unexpected hardship in particular cases, a justice ready to bend the letter of the law to accomplish a fair result.

It is the primary object of this paper to examine the *statutory* and *judicial* measures that have been taken by the Nigerian courts in controlling the incidence and impact of technicalities in the administration of justice in Nigeria.

Some litigants as well as even some of Nigerian Courts are caught in the web of over – reliance on the *technicality concept* in disregard of the actual purpose for the creation of court of law which is principally to do substantial justice to parties in a case. For example, the Court of Appeal in the celebrated case of *Adeniji V The State* revealed with concern that:-

> "Courts of law seem to be using the word 'technicality' out of tone or out of turn *Vis – a – Vis*, the larger concept of 'justice'. In most cases, it has become a vogue that once a court is inclined to doing substantial justice by deflecting from the rules, it quickly draws a distinction between justice and technicality so much so that it has become not only a cliche but an enigma in our jurisprudence."

It is therefore also the aim of this paper that it would serve as a reliable guidance to Nigerian courts in their efforts to dispense even-handed justice.. Thus, it is inevitable that some form of reforms would be proposed for the improvement of the present approach to the pressing demands for justice in Nigeria.

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1. Per Lord Hewart C. J. in *RV Sussex JJ., exp. Mc Carthy,* (1924) IK.B. 256 at 259
2. *Ecobank (Nig.) Plc* V *Gateway Hotels (Nig.) Ltd.* (1999) II NWLR (pt. 627) 397 *C.A. Bello V Altorney Great of Oyo State* (1986) 5NWLR (pt. 45) 828 SC; *Nwankwo v Nwankwo* (1992) 4 NWLR (pt. 238) 693 CA

The word "technicality" has been judicially explained in the case of *Adeniji* V *The State* (Supra), that;

> A technicality in a matter could arise if a party is relying on abstract or inordinate legalism to becloud or drown the merits of a case. A technicality arises if a party quickly takes an immediately available opportunity however infinitesimal it may be, to work against the merits the opponent's case. In other words, he holds and relies tenaciously unto the rules of court with little or no regard to the justice of the matter. As far as he is concerned, the rules must be followed to the last sentences, the last words, and the last letters without much ado, and with little or no regard to the injustice that will be caused the opponent"

In that case, the Court of Appeal expressed dismay at the way the trial Judge applied the equitable doctrine of lifting the corporate veil to a criminal matter and to ground the conviction of the appellant on such extended doctrine of equity, and also at the decision of the trial Judge in dismissing as one of mere technicality, the central issue for trial concerning whether there was any culpable conduct on the part of the appellant as distinct and separate from the liability of the company in which he has served in as Managing Director, as that was really the main issue before the trial court.

The issue of technicalities has long been with the courts almost invariably from the begining of the adjudicatory system in Nigeria. This is mainly because there are procedures to be followed right from the initiation of action in court to the end of the case when judgement is delivered. Hitherto, counsel were always in the habit of looking for loop-holes in terms of irregularities in pleadings, failure to file within the statutory stipulated time, failure to state under which law a relief or remedy was being sought or even failure to comply with some or other laid –down regulatory statutes or rules. Surprisingly however, the courts had always ruled in favour of those counsel who raised the objection and this had consequently spelt a lot of doom on the clients who were on the long run made to pay for the short-comings of their counsel. Furthermore, such a judgement given could not have been said to have been given on merits but rather on mere technicalities.

A judgement on the merits has been defined by Oputa JSC (as he then was) in the case of *Paul Cardoso V John Bankole Daniel & Ors*[3] as:

> A judgement is said to be on the merits when it is based on the legal rights of the parties as distinguished from mere matters of practice, procedure, jurisdiction or form. A judgement on the

3. (1986) 2 N. W. L. R (pt. 20) 1 at 45

merits is therefore a judgement that determines on an issue either of law or fact, which party is right".

It is however gratifying to note that the courts are now much more aware of their responsibilities to do substantial justice between parties instead of relying on mere technicalities to defeat the course of justice. The complex undertaking we call "law" requires at every turn the exercise of judgement and that judgement must be exercised by human beings for human beings. It cannot be built into a computer[4].

However, one may safely declare that the official position of Nigeiran courts is clearly against the dispensation of "technical justice" or justice secured without regards to the merits of litigated issues. Thus, the concern of the average citizen for the due dispensation of even – handed justice is equally shared involuntarily by Nigerian courts even though some critics may validly contend that the relevant judicial passion on the matter is not as strong as that of the average citizen.

The involuntariness of the judicial concern for due dispensation of even-handed justice is borne of statutory, express or implied directives and settled judicial practice and tradition against the use of technicalities to secure "justice".

It would seem that the courts have been inspired by the relevant statutory directives in fashioning the judicial posture against technical justice. It appears reasonable to begin this enquiry with an examination of both the express and implied statutory provisions against technical justice in Nigeria.

Statutory Controls of Technicalities.

The awareness that statutory rights, privileges and powers if conferred on individuals may be claimed or asserted out of context and without restraints if such statutory rights, privileges and powers are of unlimited scope, has led the Nigerian law makers and policy makers to circumscribe such statutory rights, privileges and powers either expressly or impliedly within the respective legislative intent or intendment of the law makers and the policy makers. Without such, circumscription, the courts may be compelled to grant reliefs and remedies to some undeserving litigants who may seek to rely on relevant statutory provisions which letter may support their abstract claims or reliefs. The examples of this statutory circumscription, which may be either express or implied, are numerous and are to be found in virtually every statute and statutory instruments. Therefore, it is only possible to examine in turn by way of illustration only these express and implied statutory controls of "technical justice" in Nigerian law.

The 1999 Constitution of the Federal Republic of Nigeria for example, gives some fundamental inalienable rights to every citizen of Nigeria in its section

4 See Lon L. Fuller: *Anatomy of the Law*, The New American Library (New York & Toronto) p. 134

33 through section 43 thereof. Despite the fact that these are rights expressly granted by the constitution, yet, this same constitution has put certain limits to the extent that these rights may be enjoyed by the citizens of Nigeria so as to guard against instances where any person can go to court to assert a right, which basically affects the interest of the larger society. For instance, section 43 of the 1999 Constitution gives every citizen the right to acquire and own immovable property anywhere in Nigeria, yet the same Constitution in section 44 (1) thereof has also put a limit to the extent to which this right may be enjoyed as Government may take compulsory possession of any land for overriding public interest on the payment of compensation to any person whose right might have been affected or taken thereby.

Furthermore, section 45 of the same 1999 Constitution provides that:

(1). Nothing in sections 37, 38, 39, 40 and 41 of this Constitution shall invalidate any law that is reasonably justifiable in a democratic society –

(a). In the interest of defence, public safety, public order public morality or public health; or

(b). For the purpose of protecting the rights and freedom of other persons.

2. An Act of the National Assembly shall not be invalidated by reason only that it provides for the taking, during periods of emergence, of measures that derogate from the provisions of section 33 or 35 of this Constitution; but no such measures shall be taken in pursuance of any such Act during any period of emergency save to the extent that those measures are reasonably justifiable for the purpose of dealing with the situation that exists during that period of emergency:

Provided that nothing in this section shall authorize any derogation from the provisions of section 33 of this Constitution except in respect of death resulting from acts of war or authorize any derogation from the provisions of section 36 (8) of this Constitution. By this section, although the 1999 Constitution confers certain rights on the citizens by its sections 37, 38, 39, 40 and 41, these rights are not absolute rights to be enjoyed by the citizens. This section by its provisions validates any Act or Law made by the Federal government or State government respectively which is reasonably justifiable that may restrict or take the rights so conferred under the affected sections. Any person whose right might have been affected by such laws cannot effectively assert any absolute right in a court of law, as that would be clearly unjust.

In the case of *Ikem V Nwogwugwu & Ors*[5] the court of Appeal; held

5. (1999) 13 NWLR (pt. 633) p. 140.

that a citizen's right to free movement and ownership of properly be it movable or immovable is not absolute. Whereas section 38 (2) (a) of the 1979 Constitution (Section 41 (2) (a) of the 1999 Constitution) validates any act pursuant to any reasonably justifiable law which imposed restriction of movement on an individual reasonably suspected to have committed a crime, section 40 (2) (c) and (k) of the 1979 Constitution (section 44 (2) (c) and (k) of the 1999 Constitution will justify the taking of possession of any property or interest in same compulsorily for the purposes of enforcing rights and obligations arising out of contracts or for the purpose of investigation.

Moreover, from the provisions of the above – quoted section 45 of the 1999 Constitution, one can observe that sections 33 and 35 of the 1999 constitution which give the right to life and right to personal liberty to every citizen of Nigeria respectively are also not without some qualifications as any reasonably justifiable Act of the National Assembly made during periods of emergency cannot be invalidated by the general provisions of sections 33 and 35 of the 1999 constitution and no citizen can insist that he has such absolute rights where the enjoyment of such rights will be prejudicial or harmful to the interest of the public at large.

The proviso to section 45 of the 1999 constitution also by its provisions tries to guard against the dispensation of technical justice by ensuring that with respect to section 36 (8) thereof, no law derogates or affects the right conferred thereunder. Section 36 (8) of the 1999 Constitution provides that

> No person shall be held to be guilty of a criminal offence on account of any act or omission that did not at the time it took place, constitute such an offence, and no penalty shall be imposed for any criminal offence heavier than the penalty in force at the time the offence was committed.

It would be a great injustice if a person is punished for anything done or omitted to be done at a time where such act or omission could not be said to be an offence under the law.

Another section worthy of note is section 36 (5) of the 1999 constitution which provides that:

> Every person who is charged with a criminal offence shall be presumed to be innocent until he is proved guilty. Provided that nothing in this section shall invalidate any law by reason only that the law imposes upon any such person the burden of proving particular facts.

This section tries to foresee and guard against a situation where an accused person may be in exclusive possession of certain facts which are necessary to be produced before justice can be done in the trial. By the proviso to the sub-section, where there is a law which imposes on an accused person the duty to prove particular facts, such law cannot be invalidated by the general

provisions of the section and the accused person cannot insist that the burden of proving that he is guilty of the offence charged is upon the prosecution as such burden has been qualified by the provisions of the proviso. The 1999 Constitution of the Federal Republic of Nigeria also enjoins substantial justice to be done between parties in deciding disputes that may arise between them and that is why it is provided in section 36 (1) thereof 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.

The rules of Natural Justice, which are *Nemo Judex in causa sua* and *Audi alteram partem* and which have been put in the two words "Impartiality and fairness" have also been designed to ensure that there is fairness and substantial justice done in every trial. Thus, failure to give the required hearing notice to a party to a case in the bid to technically edge him out at the trial negates the principle of fair hearing and justice could not have been said to be done in such an instance. In *Credit Alliance Financial Services Ltd* V *Mallah*[6] the plaintiff/ respondent had instituted an action against the defendant/ appellant claiming *inter-alia* a declaration that the possession of a certain flat by the defendant/ appellant was unlawful, four hundred thousand naira as damages for the unlawful use and occupation of the said flat and perpetual injunction restraining the defendant/appellant from continuing their unlawful acts. The defendant/appellant filed a motion for extension of time for leave to file its statement of defence and it was granted. Thereafter, the case was adjourned several times before it was eventually heard. The defendant/appellant was absent in court when the case came up for hearing. Trial proceeded and judgement was entered for the plaintiff/respondent. By a motion, the judgement debtor/ appellant applied for prayers *inter-alia* for an order setting aside the judgement of the trial Court. The trial judge refused the prayers and promptly dismissed it. The defendant/appellant then appealed to the Court of Appeal. Allowing the appeal, the Court of Appeal held that where a party ought to be issued with a hearing notice but none was forth-coming or given so that such failure makes him absent in court, he has been effectively denied justice for he has not been heard and a judgement, ruling or decision given against him is null and void. It was also held that the rendition of judgement against a party who has filed his statement of denfence but was not in a court when the matter was to be heard particularly when he was unaware of the date set down for hearing strikes at

6. (1998) 10 NWLR (pt. 568) 341

the very root of the fundamental principles enshrined in our primary law of the land and that the right of fair hearing as enshrined in the constitution imposes an obligation on the court to treat parties equally by affording them the opportunity of being present and heard.

Similarly, where a person is a necessary party to a case and such person is not named as a party, that person would not be bound by the judgement, ruling or decision of the court as he or she could not have been said to have been given a fair hearing. Thus, the courts have persistently refused to make an order or give a judgement that will affect the interest or right of a person or body that is not a party to the case and who was never heard in the matter. In the case of *Tafida* V *Bafarawa & Ors*[7], the plaintiff/appellant who contested deputy governorship election in Sokoto State and who eventually lost the election to the respondent was dissatisfied with the declaration of the results of the election and he filed a petition to the Gubernatorial Election Tribunal. Upon being served with the petition, the 1st and 2nd respondents entered a conditional appearance and filed a notice of preliminary objection challenging the jurisdiction of the tribunal to entertain the petition on the ground that two necessary parties were not joined as parties to the petition. The tribunal ruled that failure to join them was fatal to the petition and therefore struck out the petition for lack of merit. The appellant was aggrieved and he appealed to the Court of Appeal. The Court of Apeal in affirming the decision of the Election Tribunal held *inter-alia* that a necessary party is a party who will be affected by the decision of a court. His right will be affected either positively or negatively by the outcome of the case. It therefore follows that a necessary party is a party whose right will be affected by the orders of the court, and that failure to join the necessary parties in this case was fatal to the petition.

In the case of *N E C V Izuogy*[8], Sulu – Gambari J. C. A. (as he then was) observed *inter alia.*

> "...Any person to be directly affected by an order of the court ought to be heard by that court before such order is made and indeed section 33 (2) (a) of the 1979 Constitution emphasized the need to provide any person whose right and obligations may be affected an opportunity to make representations before a decision or order affecting him is made." [9]

Simlarly, in the case of ***P.D.P. V A.P. P.*** [10], the 2nd appellant contested the Chairmanship of a Local Government Council in Kaduna State

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7. (1999) 4 NWLR (pt. 597) 70.
8. (1993) 2 NWLR (pt. 275) 270 at 295
9. See also *Maikori* V *Lere*; (1992) 3 NWLR (pt. 231) 525
10. (1999) 3 N. W. L. R. (pt. 594) p. 238

under the platform of P. D. P. while the 2nd respondent was sponsored by the A.P.P. After the election, the 2nd respondent was returned as duly elected. The 1st and 2nd appellants were aggrieved with this decision and they filed a petition at the Election Tribunal challenging the election result contending that the election was voided by non-compliance with the provisions of the Decree. Before the hearing of the petition, counsel for the 1st and 2nd respondents raised a preliminary objection on point of law on the ground that the electoral officer was not joined as a respondent. The tribunal upheld the objection of the respondent and the petition was strucked out. Dissatisfied, the petitioner appealed to the Court of Appeal. The Court of Appeal dismissing the appeal held that since there are allegations of malpractices in the conduct of the election and allegations of misconduct against those who conducted the election, it becomes necessary to join the officers who conducted the election. They are necessary parties because without these, the allegations made against them can not be proved.

It has also been held in the case of ***Attoney General of Lagos State V Dosunmu***[11] that where a necessary party is omitted in a petition, a court or tribunal lacks jurisdiction to entartain the case.

One would observe in these cases that the courts frown on instances whereby a counsel would ***deliberately*** prevent a party from appearing in a case knowing fully well that the interest of such a person will be affected by the outcome of the case. The principle of ***audi alteram partem*** has been, mainly,, the guiding principle of our courts in these cases in the bid to do substantial justice between parties to a case rather than placing unnecessary emphasis on technicalities.

There are numerous provisions in the Evidence Act, Cap.112, Laws of the Federation of Nigeria which also seek to guard agaisnt the dispensation of technical jusitce. For example, Section 5 of the Evidence Act provides that:

Nothing in this Act shall -

(a) prejudice the admissibility of any evidence which would apart from the provisions of this Act be admissible; or

(b) enable documentary evidence to be given as to any declaration relating to a matter of pedigree, if that declaration would not have been admissible as evidence if this Act had not passed.

This section in affect tries to ensure that substantial justice is done in a trial where any evidence which would have been admissible to prove a case would have otherwise been taken to be inadmissible if the provisions of the Evidence Act were to be implemented to the letter. Sub-section (b) on the other hand ensures that no person comes around to trial with tainted document in a

11. (1989) TWLR 1 at 7

matter of pedigree in order to defeat the cause of justice.

Section 25 of the said Evidence Act in the bid to do substantial justice in a trial has also guarded against a situation where a client may be claiming that the information he gives to his legal practitioner cannot be given in evidence except with his consent. Such communication cannnot be regarded as privileged communication if as provided by Section 170(1)(a) and (b) of the Evidence Act is made in furtherance of any illegal purpose or if it is a fact observed by the legal practitioner in the course of his employement as such, showing that any crime or fraud has been committed since the commencement of his employement. This section is very important as it also tries to safeguard the interest of the largeer society by ensuring that criminals are not encouraged to continue with their nefarious activities on the one hand and to see that substantial justice is done to victims of such crime or fraud. The legal practioner will be compelled to disclose such an information and the client cannot effectively assert his right under section 170-173 of the Evidence Act.

Another example of the statutory controls of techniclities would be found in the Land Use Act Cap. 202, Law of the Federation of Nigeria, 1990 which also has some provisions which seek to gaurd agaisnt reliefs based on technical justice.

Thus section 47 thereof provides:

> This Act shall have eefect notwithstanding anything to the contrary in any law or rule of law including the Constitution of the Federal Republic of Nigeria. . . .

By this provision, any right which a person may be claiming under the common law such as a right to fee simple has been abrogated.

Also, Section 32 of the Land Use Act, provides that:

> The revocation of a statutory right of occupancy shall not operate to extinguish any debt due to the Government under or in respect of such right of occupancy.

Therefore, where a statutory right of occupancy is revoked by the Governor, the aggrieved person cannot maintain that he has been relieved of his obligations with the revocation.

Futhermore, there have been many legislation enacted both at the Federal level and the State level to ensure that the ordinary citizen of this country is not deprived of the opportunity of having his rights and liabilities determined in accordance with the appropriate laws of the land. Thus, by virtue of the provisions of section 272(1) of the 1999 Constitution, any aggrieved citizen of the country whose interest has been affected one way or the other has the right to seek relief in court.

In Nigeria, the court system is the common law type with the lowest in hierarchy being the Magistrate courts, then the various State High Courts

including, the Federal High Court, the Court of Appeal and then the apex court which is the Supreme Court.

The operations of these various courts are strictly formal with the exception of the Magistrate courts where there is some laxity in its operation. Therefore, in the determination of matters brought before these courts, every state of the Federation has its own High Court Laws and High Court Rules to regulate the conduct of trials. For example, section 274 of the 1999 Constitution of the Federal Republic of Nigeria empowers the Chief Judge of a State to make rules for regulating the practice and procedure of the High Court of the State. Just as we have at the states there are also Rules for the Federal High Court. There is also the Court of Appeal Rules as well as the Supreme Court Rules as contained in the Constitution of the Federal Republic of Nigeria (Enactment) Act, Cap. 62. These Rules of Court are merely Rules of Procedure designed to regulate the exercise of a jurisdiction conferred ***alinude***. They can be described as the lubricants of the machinery of justice. These Rules contain minute details of the various steps which a litigant is expexcted to take in the process of getting the court to hear and adjudicate on the different types of cases which come before it[12].

The dictum of ***Obaseki J.S.C. in the case of Atipioko Ekpan & Or V Chief Aguni Nyo & Ors***[13] aptly summarised it thus:

> "The Rules of court are made to regulate practice and pracedure in the Supreme court and indeed Rules made for the regulations of practice and procedure in various courts in Nigeria have not been made for fun or to lie only in the statute books. They are made for the benefits of courts on the one hand and the legal practitioners and litigants in our courts on the other hand and guidelines for steps to be taken in any proceedings they must be followed".

We should consider examples from the Supreme Court Rules and the Court of Appeal Rules (as contained in the Constitution of the Federal Republic of Nigeria (Enactment) Act, Cap. 62) as well as from State High Court Rules as highlights of the attempts to controlling technicalities in Nigerian Courts.

The Supreme Court Rules in its Order 2 rule 31(1) provides that:

> The court may enlarge the time provided by these Rules for the doing of anything to which these Rules apply, or may direct a departure from these Rules in any other way when this is required in the interest of justice.
>
> Provided that in any civil proceedings, such enlargement

12. See Hon. Justice S. Ade Falade: *The Lawyer's Comapnion Appeals from High Court to Supreme Court.* p. 6.
13. (1986) 3 NWLR (pt. 26) 63 at 76

of time or departure from the rules may be granted only in exceptional circumstances.

Order 2 rule 31(2) of the same Supreme Court Rules also provides that:

> Every application for an enlargement of time in which to appeal or in which to apply for leave to appeal shall be supported by an affidavit setting forth good and substantial reasons for the failure to appeal or apply for leave to appeal within the prescribed period.

So, enlargement of time within which to do or take any step under these rules will not be granted as of course but only in exceptional cases. In the case of *Long-John* V *Blakk*[14], the plaintiffs/respondents sued the defendants/appellants claiming against them a declaration that they are entitiled to the customary right of occupancy to a particular piece of land, damages for trespass and an injuction restraining the defendants from committing further acts of trespass thereon. Judgement was entered for the plaintiffs and the defendants being dissatisfied appealed to the Court of Appeal. At the Court of Appeal, the defendants/appellants application for extension of time within which to file their brief of argument was refused while the plaintiffs/respondents application for the dismissal of the defendants/appellants appeal for want of prosecution was granted and the defendants/appellants appeal was accordingly dismissed with costs. Aggrieved by this decision, the appellants then appealed to the supreme court. The Supreme court while allowing the appeal of the defendants/appellants vield *inter-alia* that there can be no doubt that for an extension of time within which an appellant may file his brief of argument out of time or, indded, for an extension of time prescribed by the rules of court for taking certain procedural steps, to succeed, the applicant must establish good, substantial or exceptional reasons or circumstances to explain satisfactorily the delay in filing his brief or taking the steps in issue and thus justify the grant of the extention of time applied for. Whatever decision a court arrives at in such applications must entirely depend on the exercise of its discretionary jurisdiction, having regard to the general principles of law governing the exercise of discretionary powers by the courts and guided by the consideration of doing justice to all the parties to the dispute.

Considering the decision of the Supreme Court in this case, it only points to the fact that the interest of justice demands that all parties should be given adequate and resonable opportunity for their rights to be investigated and determined on the merits so long as the equities of the matter are not defeated and no injustice to the other party is thereby occasioned. Where a party seeks the indulgence of the court for extension of time to do what ought to have been

14. (1998) 6 N. W. L. R. (pt. 555) p. 524

done within the stipulate statutory period, the invariable rule, in all jurisdiction of our type of judicial system, is that the rules of court demand that such indulgence should not be granted as of course, but upon the showing of good reason(s) for the delay. In the words of Edmund Davies L.J (as he then was) in the case of ***Revici V Prentice Hall Incorp. & Ors***[15]

> "...the rules (i.e rules of court) are there to be observed: and if there is non-compliance (other than a minimal kind), that is something which has to be explained away. Prima - facie, if no excuse is offered, no indulgence should be granted."

Furthermore, any application that has to be brought by a party to set aside must be brought within a reasonable time as time is of the essence. Thus, Order 2 rule 29(1) of the Supreme Court Rules provide that:

> An application to strike out or set aside for non-compliance with these Rules, or for any other irregularity arising from the rules of practice and procedure in this court, any proceedings or any step taken in any proceedings or any document, judgement or Order therein shall only be entatained by the court if it is made within a reasonable time and before the parts applying has taken any fresh step after becoming aware of the irregularity.

The Supreme Court Rules also give discretionary powers to the court to waive compliance by the parties with any of the provisions of the Rules where it is in the interest of justice so to do. Order 10 rule 1(1) of the same Rules provides that:

> The Court may, in an exceptional circumstance, and where it considers it in the interest of justice so to do, waive compliance by the parties with these Rules or any part thereof:

Order 10 rule 1(2) of the same Rules provides further that:

> Where there is such waiver of compliance with the Rules, the court may, in such manner as it thinks right, direct the appellant or the respondent, as the case may be, to remedy such non-compliance or not but may, notwithstanding order the appeal to proceed or give such directions as it considers necessary in the circumstance.

Hitherto, the Supreme Court had decided in Several applications coming before it that it had no power under the Rules of Practice, the Supreme Court Act, 1960, or under its inherent jurisdiction to re-enter an appeal dismissed for want of prosecution. This was the stand of the Supreme Court in the cases of

15. (1969) A All E.R. 772 at 774
16. (1987) INWLR (pt. 50) 356 at 371
17. (1967) I All NLR 82

the *Jacob Oyeyipo & Ors V Chief J.O. Oyinloye*[16] *and Asiyanbi V Adeniji*[17] The Supreme Court had also hitherto held that it had no inherent jurisdiction to set aside an order of dismissal it had properly made on exercise of its powers and jurisdiction and re-enter the appeal. This was the position of the Supreme Court in the case of ***John Chukwuka & Ors V Ndubueze Gregory Ezulike & Ors.***[18] However, the current judicial stand of the Supreme Court is not to dismiss an appeal for want of prosecution unless the court is satisfied that the appeal has no merit anyway. This has now been the position of the court since the case of ***Niyi V Chukwu***[19].

With due respect, the current stand of the Supreme Court is highly commendable as it further ensures that cases are decided on merits and not otherwise.

The provisions of the Court of Appeal Rules as contained in the Constitution of the Federal Republic of Nigeria (Enactment) Act, Cap 62 are also worthy of note in their attempt at controlling technicalities in the conduct of a case in order to ensure that justice is not sacrificed on the altar of technicality. For example, order 7 rule 3 of the Act provides that:

> Non-compliance on the part of an appellant or a respondent with these Rules or with any Rule of practice for the time being in force shall not prevent the further prosecution of the appeal if the court considers that such non-compliance was not wilful, and that it is in the interest of justice that such non-compliance be waived. The court may in such manner as it thinks fit, direct the appeallant or the respondent, as the case may be, to remedy such non-compliance, and thereupon, the appeal shall proceed. The Registrar shall forthwith notify the appellant or the respondent as the case may be of any directions given by the court under this rule where the appellant or the respondent was not present at the time when such directions were given.

So, where failure to comply with the Court of Appeal Rules is not deliberate on the part of the appellant or the respondent as the case may be, the court will readily ignore such non-compliance so long as it does not occasion any miscarriage of justice and it is inthe interest of justice to proceed to hear the case on the merits.

Infact, Order 7 rule 2 of the same Court of Appeal Rules provides that:

> The Court may direct a departure from these Rules in any way when this is required in the interest of justice.

18. (1986) SNWLR (pt. 45) 872 at 889)
19. (1988) 3NWLR (pt. 81) 184 at 210

The Court of law exists mainly to do substantial justice and not to defeat the rights of the parties before it by reliance on technicalities like non-compliance with the rules of court: For instance, where a party fails to appeal within the prescribed period stated in the Rules, such failure will not substantially affect his right of appeal as long as he can prove to the satisfaction of the court that he has a good and reasonable cause why he has failed to appeal within the prescribed period. Thus, Order 3 rule 4(2) of the Court of Appeal Rules provides that:

> Every application for an enlargement of time in which to appeal shall be supported by an affidavit setting forth good and substantial reasons for failure to appeal within the prescribed period, and by grounds of appeal which prima-facie show good cause why the appeal should be heard. When time is so enlarged, a copy of the order granting such enlargement shall be annexed to the notice of appeal.

In ***Olaseinde & Ors F.H.A. & Ors***[20], judgement was given against the plaintiffs/applicants at the trial court whereby they appealed to the court of Appeal. Before the appeal could be heard however, it was dismissed for non-compliance with the conditions of appeal. The plaintiffs/applicants therefore applied again to the Court of Appeal praying for *inter-alia*, an order relisting the appellants appeal. They submitted that sufficient reasons have been adduced in the affidavit and further affidavit to persuade the court to relist the appeal and that the grounds of appeal are substantial and therefore constitute exceptional circumstances that should persuade the court to grant the prayers adding that the respondents would not suffer anything if the appeal is restored. The Court of Appeal held that prayers for an order relisting a case or an appeal struck out or dismissed or an order enlarging the time within which the appeallants/applicants shall comply with the conditions of appeal and an order staying the execution of the judgement of the High Court necessarily invlove the exercise of judicial discretion. The court also held that the termination of the appeal by an order of dismissal is a technical judgement and technical judgement must never be allowed to tie the hands of any court in ensuring that principles of fair hearing are strictly adhered to.

Moreover, in the case of *Williams & Ors V Hope Rising Voluntary Funds Society*[21], Idigbe J. S.C. stated that:

> "Non- compliance with rules of court do not prima facie invalidate proceedings unless reasons for such non-compliance are not advanced to the court, and, in addition, the party in breach fails

20. (1999) 9 NWLR (pt. 619) 448
21. (1982) 2 S.C. 145

to put before the court sufficient material upon which to exercise its discretion to waive or over look the omission."

There are also numerous provisions in the various state High Court Rules which are also geared towards controlling the dispensation of technical justice. It would be necessary to consider some examples from these state High Court Rules. In the Oyo State High Court (Civil Procdure) Rules 1988, Order 2 rule 1 (1)[22] generally provides that:

> Where in begining or purporting to begin any proceeding or at any stage in the course of or in connection with any proceeding, there has, by reason of anything done or left undone, been a failure to comply with the requirements of these rules, whether in respect of time, place, manner, form or content or in any other respect, the failure may be treated, as an irregularity and if so treated, will not nullify the proceedings, or any document, judgement or Order therein.

Also , Order 2 rule 1 (2)[23] of the same Oyo State High Court Rules provides that:

> The Court may on the ground that there has been such a failure as mentioned in pragraph (1) aand on such terms as to costs or otherwise as it thinks just, set aside either wholly or in part the proceedings or any document, judgement or order therein, or it may exerciese its powers under these rules to allow such amendments (if any) to be made and to make such Order (if any) dealing with the proceedings generally as it thinks fit.

This provision gives the Court certain powers to deal with any issue of irregularity in the conduct of trial and such powers include ordering the party at fault to amend the offending part, asking him to pay costs to the other party, setting aside part of or the entires, proceedings, document, judgement or Order that may have been made before the irregularity is discovered, and also making such other orders as the court thinks fit will not occasion any miscarriage of justice.

However, as can be seen from the provision, of Order 2 rule 2 (1), time is of the essence in applying to set aside for irreegularity for any reason as the party applying will be estopped from making such application if he does not apply within a reasonable time and before he has taken any fresh step after becoming aware of the irregularity.

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22. See also Order 5 rule 1 (1) of the High Court of Lagos State *(Civil Procedure)* Law. (1994) Cap. 61; Order 2 rule (1) of the Federal High Court *(Civil Procedure)* Rules, 1999.
23. See also Order 5 rule 1 (2) of the High Court of Lagos State *(Civil Procedure)* Law (1994) cap 61; Federal High Court (Civil Procedure) Rules 1999 in its Order 2 rule 1 (2)

Notwithstading the provisions of Order 2 rules 1 (1), 1 (2) and 2(1) of the Oyo State High Court Rules, the Court still has the power to strike out any pleading where it discloses no cause of action or is found to be frivolous, vexatious or abuse of the process of court as can be seen from the provisions of Order 24 rule 4[24] thereof which provides that:

The court or a Judge may order any pleading. to be struck out on the ground that it discloses no reasonable cause of action or answer, and in any such case or in case of the action or defence being shown by the pleadings to be frivolous or vexcitios, the court or a Judge may order judgement to be entered accordingly, as may be just.

The provisions of order 25 rule 28[25] which provides that:
No technical objection shall be raised to any pleading on the ground of any alleged want of form does not apply where the preliminary objection being raised is on a question of law. Once any point of law is raised in the pleadings, the court or the Judge has the duty to first determine that question of law before judgement is delivered. This can be seen from the provisions of Order 24 rule 2[26] of the Oyo State High Court Rules which provides thus:

> Any party shall be entitled to raise by his pleading any point of law, and any points so riased shall be disposed of by the Judge who tries the cause at or after the trial.
>
> Provided that by consent of the parties, or by order of the court or a Judge on the application of other party, the same may be set down for hearing and disposed of at any time before the trial.
>
> *Furthermore, Order 24 rule 3 provides that:*
>
> If, in the opinion of the court or a Judge, the decision of such point of law substantially disposes of the whole action, or of any distinct cause of action, ground of defence, set-off, counter-claim, or reply therein, the court or Judge may there upon dismiss the action or make such other Order therein as may be just.

From the foregoing provision, one would readily note that although objections on a technical point may not be fatal to any cause of action, any objection on a point of law might be so fatal to the whole action as the Judge may dismiss the action in its entirety.

In the case of ***City Eng. (Nig.) Ltd. V NAA***[27], the Applicant was

24. See also Order 25 rule 20 of the Federal High Court (Civil Procedure)
25. See also Order 25 rule 27 of the Federal High Court (Civil Procedure) Rules 1999
26. See also Order 2 rules 2,3 and 4 of the Federal High Court (Civil Procedure) Rules.
27. (1999) 11 N. W. L. R. (pt. 625) 76. See also the case of I A L 361 INC. V MOBIL OIL (NIG). PLC. (1999) 5 N. W. L. R. (pt. 601) 9. C. A.

awarded a contract for the construction of the Interim Measures Building and Utility Services and External Works at the Kaduna Airport, Kaduna by the Respondent in 1980. However, the Respondent Unilaterally terminated the contract in 1982 for alleged poor performance in the execution of the contract. A reply was sent by the Applicant to the Respondent stating that the termination was a breach of contract and as a result, a dispute had arisen between the parties within the meaning of clause or section 19 of the General conditions of contract which provides for a preliminary procedure for the settlement of disputes to proceed on eventual submission to arbitration within the meaning of the Arbitration Law of Lagos State. The parties having failed to agree on the appointment of an arbitrator, the Applicants filed an application before the High Court relying on section 6 (1) (a) and Section 6 (2) of the Arbitration Law of Lagos State. The respondent too filed a counter affidavit in opposition to the application arguing that the Application did not meet the requirement or condition imposed on it by clause or section 19 of the Contract Agreement, the General conditions of contract by its failure to comply with the preliminary procedure for the settlement of dispute. The Respondent further contended that the Applicant failed to give the mandatory seven (7) days notice to it before filing the application contrary to section 6 (2) of the Arbitration Law of Lagos State. The application was dismissed by the trial Judge on the ground that it did not comply with Section 6(2) of the Arbitration Law of Lagos State as the notice to concur was not given before the filing of the action. The Applicant appealed to the Court of Appeal where the appeal was dismissed. Dissatisfied the applicant further appealed to the Supreme Court. The Supreme Court dismissed the appeal and held *inter-alia* that what was required by Section 6(2) of the Arbitration Law of Lagos State was a formal notice, a condition precedent before taking out the Originating summons and there was none. The defect was fundamental which could not have been cured or waived. It also held that the written notice prescribed by Section 6(1) of the Arbitration Law is a statutory notice which, as a condition precedent to the institution of a valid action for the appointment of an arbitrator, confers the necessary jurisdiction on the court to appoint such an arbitrator who shall have the like powers to act in the reference and make an award as if he had been appointed by the consent of all the parties. It is only after the requirement under Section 6(1) is complied with and the necessary appointment is not made within seven clear days after the service of such notice, that the provision of section 6(2) come into play and an application may then be made to the court under that section of the law by the party who served the notice for the appointment of an arbitrator or umpire as the case may be.

So, where a special statutory provision as is the case in the City Eng. (Nig) Ltd's case is made for the filing of a claim before the court, the procedure so laid down ought to be followed in the presentation of the action and no other

one. This is simply a question of law and not mere unsubstantial procedural irregularity that may be waived by the court.

Judicial Controls of Technicalities.

The primary duty of a Court of law, which is admittedly the third arm of government is to interprete laws made by the legislature and to apply these laws to individual cases presented before it. Section 272(1) of the 1999 Constitution of the Federal Republic of Nigeria which was noted earlier provides that:

> Subject to the provisions of section 251 and other provisions of this Constitution, the High Court of a State shall have jurisdiction to hear and determine any civil proceedings in which the existence of extent of a legal right, power, duty, liability, privilege, interest, obligation or claim is in issue or to hear and determine any criminal proceedings involving or relating to any penalty, forfeiture, punishment or other liability in respect of an offence committed by any person.

Therefore, the court as it were, is essentially established to do justice to the parties by deciding on the merits of the case. In doing this, the court is expected to take cognisance of the relevant laws, the rules of court and in some cases, the court has been given a wide latitude of discretion which it is expected to exercise judicially and judiciously in the determination of cases brought before it.

The question of the exercise of discretion is governed by several factors which are not necessarily constant but do change with the changing circumstances and times and cannot be taken to be immutable and applicable for all times. Indeed, a judicial discretion properly exercised must be founded upon the facts and circumstances presented to the court from which a conclusion governed by law must be distilled. The exercise of such discretion must be ***bonafied*** and must not harbour any irrelevant considerations[28].

It is the duty of a Judge to analyse the evidence and demonstrate where the evidence seems strong or thin and where it appears reliable or untrustworthy. In fact, gone are the days when as Lord Denning puts it, judges will wring their hands and say "There is nothing we can do about it." In deciding cases now, whenever the strict interpretation of a statute will give rise to an absurd and unjust situation, the judges can and should use their good sense to remedy it - by reading words if necessary - so as to do what parliament would have done, had they had the situation in mind[29].

This new approach is what Lord Diplock in the case of ***Kammins V Zenith Investments Ltd***[30]. described as the "purposive approach".

28. See Olaseinde V F.H.A. (1999) 9 N.W.L.R. (pt. 619) 448
29. See Lord Dennig: The Discipline of Law. (Butterworths) 1979 at p. 16
30. (1971) A.C. 850 at 881

In other words, for instance, rules of court are mainly and can be described as lubricants of the machinery of justice and are made to guide the litigant on the various steps to take in the process of getting the court to hear and adjudicate on his matter. The litigants as well as their counsel are expected to follow these rules and failure to do so may render their cases incompetent. Also, no informed observer supposes that a judge is a variety of impersonal calculating machine who merely applies the law. He does not automatically render an answer mechanically derived from learning. First, he has to consider the facts from the ligants and second, rules of law from books in a library. His judgements are not as predictable by lawyers as eclipses are predictable by astronomers[31].

Hitherto, Nigerian courts were known to be mechanical in their approach to compliance by litigants and their counsel to the rules of court. That is why in so many instances where there had been failure to so comply by counsel, their cases had been thrown out to the detriment of their clients. For example, in ***Moses V Ogunlabi*** [32]., the supreme court noted that with respect to the notice of Preliminary Objection, quite apart from typographical errors appearing on the bond purportedly filed by the defendants, it was headed in the High Court when it should be headed in the Supreme Court and that the bond did not provide for "the due prosecution of the appeal" as required by the provisions of Order 7 rule 10 of the Supreme Court Rules. The Supreme Court further observed that those defects were sufficient to characterise the bond as defective. The Supreme Court further noted that in order to be entitled to execise a right of appeal, the appellant must come within the provisions of the statutes creating such a right. The defendant's appeal was consequently struct out as being incompetent.

Similarly, appellant's appeal in the case of ***Addis Ababa & Anor. V Adeyemi*** [33] was struck out as being incompetent. In this case, the court observed and ruled that:

"The most serious objection, in our view, to this appeal being heard by this court concerns the notice of appeal, which was, filed by the appellants. It was signed by learned counsel for the appellants. The notice is a most disorderly document. It is defective in many respects, and incurable so... It is quite plain that as an appeal can only be initiated by the filing of appropriate notice of appeal as presented under order vii rules of this court, and since in the present appeal, there has been filed no proper notice of appeal in terms of Order vii rule 2, we hold, to continue the structural metaphor already employed elsewhere by

31. See Charles E. Wyzanski, Jr: *The New Meaning of Justice*, (Little, Brown and Company in association with the Atlantic Monthly Press) P. 22
32. (1975) 4 S.C. 81
33. (1976) 12 S.C. 51 at pp. 51 at pp. 59 & 61. See also Ngelizana V Hindi (1965) NNLR, 12; Dada V Ayo Fasanmi (1965) WRNLR 94 at 96

us in this ruling, that this apeal like a wooden structure, has not got of the ground at all. . . . . At present, there is no appeal properly before this court. The defects as to the notice of appeal are so fundamentally incurable that the only reasonable conclusion that should be, and which we have reached in the circumstances is that the appeal is incomptent.It is therefore struck out ...

"This approach had undoubtedly done a lot of injustice as it was the law binding on all the other lower courts, oppressive as it was. However, the Supreme Court in the celebrated case of ***Surakatu V Nigerian Housing Development Society Ltd & Anor*** [34]. reconsidered its decision in the two cases of ***Addis Ababa V Adeyemi and Moses V Ogunlabi*** and overruled its judgements given there under.

In the case of *Surakatu* V *Nigerian Housing Development Society Ltd* & *Anor*[35], the respondents at the Federal Court of Appeal raised two preliminary objections to the hearing of the appellants appeal, namely - (a) that the bond of appeal executed by the appellant was defective; and (b) that the bond did not provide for the due prosecution of the appeal. The Federal Court of Appeal ruled after examining the bond in question that it was clear that it was not executed, "for the due prosecution of the appeal", and that it was wrongly headed. "In the High Court of Lagos State" The Federal Court of Appeal finally decided that the defect could not be cured and thereafter struck out the appeal. The appellant dissatisfied then appealed to the Supreme Court. The Supreme Court allowing the appeal held that the provisions of Order IX of the Supreme Court Rules invested the Court which heard the appeal in the case of *Moses* V *Ogunlabi* with the widest possible powers to remedy any non-compliance with the said Rules. The Supreme Court further held that if it had adverted to the provisions of Order IX, it would have allowed the appeal the case of *Moses* V *Ogunlabi* to remedy the non-compliance and do substantial justice by hearing the appeal on merits. For these reasons, the Supreme Court held that its decision in the case of *Moses* V *Ogunlabi* should no longer be allowed to stand. It held that if it was so allowed, it would continue to fetter the discretion which the Federal Court of Appeal undoubtedly had under Order IX to remedy any non-compliance with the Rules if it was in the interest of Jusitce to do so. The Supreme Court also held that the judgement of the Supreme Court in *Addis Ababa* V *Adeyemi* which considered that part of the decision in *Moses* V *Ogunlabi* as unsatisfactory but followed it nevertheless was also overruled. The Supreme Court then further held that it was evident that the respondent who raised the objection in the instant case before the Federal Court of Appeal was not misled by any defects in the bond. Moreover, the Court had

34. (1981) 4 S.C. 26
35. (Supra)

ample powers under Order IX of the Supreme Court Rules to cure any such defects.

Thus, ever since the Supreme Court's decision in the case of *Surakatu V Nigerian Housing Development Society Ltd & Anor*[36], the Nigerian Courts have tried as much as possible to see that undue reliance on technicalities is done away with and also to ensure that their principal focus is to do substantial justice between parties to a case regardless of whether there has been strict compliance with the rules of court.

Thus in the case of *Folabi* V *Folabi*[37], the Supreme Court held that "failure to indicate the rule and Order of Court under which an application is brought or to bring the application under the wrong Order or rule of court does not invalidate the application; provided the relief or remedy is provided for by any written law".

The courts have therefore repeatedly in subsequent cases[38] stated that the heydays of tehnicalities are over and that cases would now be decided principally on merits. However, this is not to say that the law has now totally done away with its technical nature as there are some instances where non-compliance with the rules of court will render an action incompetent. For instance, where a party fails to do what ought to have been done within the stipulated statutory period, and he now seeks the indulgence of the court to do that which he has failed to do, the rules of court[39] demand that such indulgence should not be granted as of course, but upon the showing of good reason(s) for the delay.

So, apart from such cases, the court has now de-emphasised strict compliance with the rules of court as can be seen from the following decided cases.

In *Mercantile Bank* of *Nigeria Plc* V *Feteco Nigeria Ltd.*[40], the plantiff claimed against the defendant the sum of N5,791,857.61 (five Million, Seven hundred and Ninety -One thoudsnad, eight hundred and fifty seven naira, sixty - one kobo) being overdraft granted to the defendant with interest. The defendant in its defence pleaded that the loan plus interest was statute-barred under the English Limitation Act of 1939, applicable in Cross River State. The trial Judge upheld the objection of the defendant and held that the Statute of Limitations of 1623 of England was applicable to defeat the claim. It

36. (Supra)
37. (1976) 9 - 10 S.C. 1
38. For example; See Dr. Okonjo V Dr. Odje & Ors. (1985) 10 S.C. 267; Hyppolite V Egharevba (1998) II N.W.L.R. (pt. 575) 598; Olasceinde V F.H.A. (1999) 9 NWLR (PT> 619) 448; Salami V Bunginmi & Anor (1998) 9 NWLR (pt. 565) 235; Chigbu V Tommas (Nig.) Ltd. (1999) 3 N.W.L.R. (pt. 593) 115
39. See e.g. Order 2 rule 31 of the Supreme Court Rule Cap 62, Order 3 rule 4 (2) of the Court of Appeal Rules.
40. (1998) 3 N.W.L.R. (pt. 540) p. 143

then dismissed the claim. The plaintiff was dissatisfied and it appealed to the Court of Appeal contending that the learned trial Judge erred in Law in holding that appellant's claim was statute of barred by Section 7 of the Statute of Limitation of 1623 of England, when respondent in its statement of defence only referred to limitation Act of 1939 without giving the section of the said Act and without stating whether the Act was of Nigeria or Engalnd. The appellant further submitted that without these particulars, the respondent was relying on a non-existent law, and the learned trial judge should not have helped the respondent in deciding the applicable law. Unanimously dismissing the appeal, the Court of Appeal held that the failure to indicate the rule or Order of court under which an application is brought or the bringing of an application under a wrong order or rule of court does not invalidate the application provided the relief or remedy sought is provided for by any written law. In this case, the trial court was right in holding that the applicable Limitation Law is the Limitation Act, 1623 of England even though such was not canvassed by either party. The learned trial Judge was right in using his wealth of experience in determining the correct Limitation Law applicable at the material time. The Court of Appeal further noted that:

> " It is the law that where a party has a valid cause of action and has so proved it, he cannot be denied justice merely because he has in inadvertently predicated his relief on a wrong or errorneous law. The important consideration is whether the enabling law has provided for the cause of action and the relief is properly sought in the claim".

In *Ike V Enang & Ors*,[41] the appellant was a candidate for the councillorship election at a Ward of Abi Local Govenrment Area of Cross River Sate. At the end of the election, the appellant was declared the winner and was accordingly returned as elected. The 1st respondent/petitioner filed an election petition at the Election Tribunal challenging the election result and the result of the appellant. At the trial, after the close of the parties case, the tribunal ordered the production of ballot papers for the said ward for the purpose of recounting the votes. The papers were recounted and the tribunal in its judgement granted the petition and declared the 1st respondent elected. Dissatisfied, the appellant appealed to the Court of Appeal arguing that the documents (the ballot papers) not being part of the evidence before the tribunal, the tribunal was wrong to have based its judgement upon the same. While affirming the decision of the tribunal, the Court of Appeal held that it has to be realised that the ballot papers were produced at the instance of the tribunal and inspected and counted before the tribunal. It also held that although for the purpose of

41. (1999) 5 N.W.L.R. (pt 602) 261

identification, the ballot papers should have been marked as exhibits, the mere fact that they were not so marked does not detract from their relevance and the weight to be attached to them.

It is remarkable that in these two cases, the Judges by using their ingenuity and drawing from their wealth of experience saw to it that justice was done. Thus, the courts, in appropriate cases, would ignore a mere technicality in order to do substantial jusitce according to the law.

However, in Nigeria - *Arab Bank Ltd* V *Comex Ltd*[42] the trial Judge was found by the Court of Appeal to be too strict over a very simple matter which was the result of an inadvertent mistake. In the case, the respondent sought certain declaratory, injuctive and compensatory reliefs against the appellant. In the course of trial, the defendant/appellant sought to tender a document (letter) bearing a different date from the document pleaded in its statement of defence. Upon the objection of the counsel to the respondent to the admissibility of the document, the counsel to the appellant recognised the error in the pleading and orally applied to amend the statement of defence to reflect the actual date of the letter sought to be tendered. With the statement of defence as it stood before the oral application the trial court only needed to substitute "85" for "88". The trial court however refused the amendment. Judgement was subsequently given in favour of the respondent an the appellant appealed to the court of appeal. Allowing the appeal, the court of appeal held that by order 25 rules 1 and 2 of the high court of Lagos State (Civil procedure) Rules, 1972, the court or a judge in chambers may at any stage of the proceeding allow either party to alter or amend his indorsement or pleadings in such manner and on such terms as may be just and such terms as may be necessary for the purpose of detemining the real questions in controversy between the parties. The court of appeal further held that the trial judge had amplitude of discretion to grant the amendment to correct what was an obvious typographical error. It would have save time and costs to have granted the amendment and that the trial judge should not have adhered to technicality at the expense of justice.

Furthermore, in the determination of issues presented before it, the court has the inherent jurisdiction to correct or amend its clerical ship in order to avert any misapprehension that may arise therefrom. Thus, in the case of *J. E. A. Shuaibu Nigeria Arab Bank Ltd.*[43], the plaintiff/appellant was an employee of the defendant respondent. He was dismissed from service and he filed an action at the High Court claiming that his dismissal was wrongful and that being wrongful, he was entitled to be reinstated to his job or in the alternative, special damages for wrongful dismissal. Judgement was entered for the plaintiff by the trial judge and the defendant appealed to the court of appeal which allowed the

42. (1999) 6 N.W. L.R. (pt. 608) 648

appeal. The plaintiff being dissatisfied then appealed to the Supreme Court and one of the issues raised by him was whether the court of appeal was properly constituted the day judgement was delivered. The complaint of the appellant was that the Court of Appeal judgement was a nullity because a justice who did not partake in the hearing of the appeal wrote a concurring judgment; and that the composition of the court having changed, the court has become incompetent to give a valid judgement. He also argued that it did not matter that the judgement was in all respect correct as to the issues raised. The Supreme Court dismissed the appeal and held *inter alia* that the sudden appearance of the name of justice who was not at the hearing of the appeal as delivering a concurring judgement must be without doubt a genuine mistake made in the course of compiling the record. The supreme court further held that it has the inherent as well as statutory power under section 22 of the Supreme Court Act, 1960 to correct such a slip made by the courts below [44]. The Supreme Court also emphasised the importance of doing substantial jusitce when it noted that the wheel of justice could no longer be allowed to be dogged with technicalities. In ***Gabriel Madukolu V Johnson Nkemdilim*** [45] Bairamian, F.J. had stated much ealier that:

" Any defect in competence is fatal, for the proceedings are a nullity however well conducted and decided: the defect is extrinsic to the adjudication. If the court is competent, the proceedings are not a nullity; but they may be attacked on the ground of irregularity; in the conduct of the trial. . . . . We are therefore of the opinion that variations in the bench do not make the judgement a nullity; they may make it unsatisfactory, and it may have to be set aside for this reason, but whether they do or not depends on the particular circumstances of the case".

Also, in the case of *Ahmadu* V *Salawu* [46], the Supreme Court held that where the subject matter of the action is substantial enough to dispose the court not to allow mere procedural irregularity to preclude an opportunity to scrutinize the case and determine it on the merits, it should not decline to do so.

The Supreme Court further restated its stand in *Joseph Afolabi & Ors* V *John Adekunle & Anor* [47] that:

> ". ..It is perhaps necessary to emphasised that justice is not a fencing game in which parties engage themselves in an exercise of out-smarting each other in whirligig of technicalities, to the detriment of the determination of substantial issues

43. (1998) 5 N.W.L.R. (pt. 551) 582
44. See also Asiyanbi V Adeniji (1967) 1 ANLR 82
45. (1962) 2 SCNLR 341
46. (1974) II S.C. 43; (1974) NSCC (Vol. 9) 538 at 542
47. (1983) 2 SCNLR 141 at 149

between them"

Moreover, although the courts have certain discretionary powers which they must exercise judicially and judiciously, it should be noted, however, that in the exercise of such discretionary powers, the court cannot be bound by a previous decision to exercise its discretion in a particular way. The only consideration to be taken into account by the court in such instance is that such judicial discretions must be exercised according to common sense and according to justice, and in case there is any miscarriage of justice in the exercise of such discretion, it is within the competence of an appellate court to have it reviewed. Therefore, although rules of court are meant to be complied with, it is however the main object of the courts to decide the rights of the parties and not to punish them for mistakes they may make in the conduct of their cases.
Justice can only be done if the substance of a matter is examined as reliance on technicalities leads to injustice.

"The proper role of a judge is to do justice between the parties before him. If there is any rule of law which impairs the doing of jusitce, then it is the province of the judge to do all he legitimately can to avoid that rule - or even to change it - so as to do justice in the instant case before him. He need not wait for the legislature to intervene; because that can never be of any help in the instant case. I would emphasise however the word "legitimately", the judge is himself subject to the law and must abide by it" [48].

The courts have repeatedly expressed the view in numerous decided cases such as ***Ezekiel Nneji & Ors V Chief Nwankwo Chukwu & Ors*** [49] that:

> "Rules of Court are made to help in its primary duty and objective, namely to do justice to the parties by deciding on the merits of their case. These rules are mere handmaids to justice and inflexibility of the rules will only render justice grotesque. It will therefore be undersirable to give effect to Rules which will merely enable one party to score not a victory on the merits, but a technical knock-out at the expense of a hearing on the merits. Therefore, if strict observance of a rule of practice will produce injustice, then a court of Justice will naturally prefer doing justice to obeying a rule which is no longer an aid to jusitce."[50].

In *Alaribe V Nwankpa & Ors,*[51]. Objections were raised to the

48. See; Lord Denning, The Family Story p. 174
49. (1988) 3 NWLR (pt. 81) 184 at pp. 206 - 207
50. See also; University of Lagos V Aigoro (1985) 1 N.W.L.R. (pt. 1) 143; Obadiaru V Grace Uyigue & Ors. (1986) 3 S.C. p 39 at p 40. Okonjo V Odje (1985) 10 S.C. 267
51. (1999) 4 N.W.L.R. (pt. 600) 551

appellants' appeal mainly on the ground that no valid Notice of Appeal was served on the 1st respondent in accordance with the provisions of Order 3 rule 2(1) and 5 of Court of Appeal Rules, the Notice of Appeal having being wrongly headed and presented to "The Secretary, Local Government Election Tribunal" and (ii) there being no relief sought in the Notice of Appeal, it is incurably defective and incompetent. The court of Appeal overruled the objection raised by the respondents and held that it is as clear as daylight on the face of the Notice of Appeal that the petitioner is desirous of appealing against the decision of the Abia State Local Government Election Tribunal dismissing his petition. The Court of Appeal also held that no doubt the Notice of Appeal has not strictly complied with the rules of the court as to what a Notice of Appeal should look like and contain. However, the defects are not so fundamental as to affect the competency of the appeal, and, therefore, the competence of the court to hear the appeal. The defects are held not to be serious enough to erode the jurisdiction of the court to hear his appeal as they are curable defects, or such defects as the court can ignore.

Similarly, in ***Obasi Brothers Merchant Coy. (Nig.) Ltd V Willbros (Nig.) Ltd***[52], the plaintiff sued the defendant for the sum of ₦28, 332.05 (Twenty-Eight Thousand, Three Hundred and Thirty-Two naira, five kobo) being the balance due to the plaintiff and payable by the defendant for services rendered to the defendant at its request. The writ and Statement of Claim were both served on the defendant. The defendant's address for service indorsed on the writ of summons was in Part-Harcourt. The defendant however brought an application under Order 29 Rules 1, 2 and 3 of the High court Rules of Eastern Nigeria Cap 61 applicable to Rivers state at the material time praying that the suit be dismissed for want of jurisdiction by the Port-Harcourt Judicial Division of the High Court of Rivers State to entertain the suit. The trial Judge dismissed the objection where upon the defendant appealed to the Court of Appeal. Unanimously dismissing the appeal, the Court of Appeal held *inter alia* that Order 7 of the High court Rules cap. 61, Laws of Eastern Nigeria applicable to Rivers State at the material time which provides for the venue for the institution and trial of actions is primarily designed for the convenience of the parties and to save the costs of litigation. It is quite clear that unless an action is shown to be within the area of the territorial jurisdiction of another state, an action commenced in a Judicial Division other than the Judicial Division where it ought properly to have been commenced but within the area of the territorial jurisdiction of the State High Court shall not be defeated or dismissed by reason only of the fact that the action was commenced in the wrong Judicial Division. The Court of Appeal further held that in the instant matter on its merits particularly where,

52. (1991) 3 N.W.L.R. (pt. 181) p. 606

as at this stage, the defendants admitted that they had paid part of the debt, rather than cling to technicalities to refuse the plaintiffs the opportunity of being heard. The court further noted that a strict observance of a rule of practice, which denies the plaintiffs the amount, which is not disputed by the defendants, will produce injustice against the plaintiffs. It is preferable for this court to do justice than to obey a rule which in the instant case is no longer an aid to justice.

In *Hyppolite V Egharevba*,[53] the plaintiff/appellant got a judgement against the applicant/respondent at the Superior Court of Suffolk county in the Department of the Trial Court of the common – wealth of Massachusetts, United States of America. The appellant later obtained an Order at the Benin High Court registering the judgement pursuant to the provisions of section 4 (1) of the Foreign Judgements (Reciprocal Enforcement) Act, Cap 151 of the Laws of the Federation of Nigeria, 1990. The respondent reacted to the order by filing a motion on notice with a supporting affidavit under section 6 of the Foreign Judgments (Reciprocal Enforcement) Act, 1990 praying for an order to set aside the registration of the purported judgment. The learned trial Judge, gave judgement for the applicant/respondent by setting aside the registration of the judgment received from the U.S.A. The plaintiff/appellant was dissatisfied and thereby appealed to the Court of Appeal. The appellant contended that the motion on notice made for the purpose of setting aside the registration of the foreign judgement is void as it was not made by any of the four originating processes Viz – Writ, Originating summons, Petition and Originating Motion. It was argued that the proper mode of commencing the proceeding in this matter is only by an Originating Summons and not by motion an notice. The court of Appeal dismissed the appeal and held that it is true that the Foreign Judgment (Reciprocal Enforcement) Act, cap 152, Laws of the Federation of Nigeria 1990 does not make provision for the manner in which an application for setting aside a registered judgement may be brought to court; however, the High court (Civil Procedure) Rules, 1988 of the defunct Bendel State which are applicable in Edo State by its section 4 gives the trial court the discretion on which procedure to adopt where there is a lacuna in the rules. The main consideration is for the court to ensure that substantial justice is done between the parties. It further held that the appellant was not adversely affected by the mode of bringing the application to court. In other words, the mode the respondent brought the application to court did not occasion any miscarriage of justice. The court of Appeal further stated that:-

> "This Court and the Supreme Court now pursue substance and not shadow and will not allow narrow legal technicalities

53. (1998) II N.W.L.R. (pt. 575) 598

to defeat the justice that a case demands. Reliance on technicalities leads to injustice."

Furthermore, the Court of Appeal in Ezeghu F. A. T. B. Ltd stated that

"Rules of Court are meant to be obeyed. Of course, that is why they are written... Their obedience cannot or better still, should not be slavish to the point that the justice of the case is destroyed or thrown over board. The greatest barometer as far as the public is concerned, is whether at the end of the litigation process, justice, that very elastic and elusive expression has been done to the parties. Therefore, if in the course of doing justice, some harm is done to procedural rule, which eventually hurts that rule, the court should be happy that it took that line of action in pursuance of justice... It is preferable for the institution of the Court to operate in the course of doing justice than to fossilize into thin air in the course of unguarded pursuance of rules of procedure"

In *Salami* V *Bunginimi* [55], the court was faced with a situation where the validity of the notice of appeal, which only bears a thumb – print, was challenged. The Court of Appeal held that even if the rules require that the appellant writes his name to identify his signature, it will still be wrong to strike out the appeal on that ground alone, because this would be strict adherence to the rules which may lead to miscarriage of justice.

In *Egolum* V *Obasanjo* [56], following the Presidential Election held throughout Nigeria on the 27th day of February, 1999, Chief Olusegun Obasanjo was declared duly elected. The appellant in this case then filed a petition at the Court of Appeal against the election of the 1st respondent praying that it be determined that the 1st respondent was not duly elected or returned and that the petitioner was duly elected and ought to have been returned. On the petition coming before the Court of Appeal for hearing, objection was taken by the respondents as to the competence of the petition Judgement was given in favour of the respondents and the pelitioner then appealed to the Supreme Court. The 1st respondent also cross – appealed against certain aspects of the court's ruling and also questioned essentially the exercise of discretion of the trial court wherein it overlooked the error in the petition as to the appellant's address for service within five kilometers of a post office in the Judicial Division and the name of its occupier as contained in paragraph 5(4) of Schedule 4 to the Decree No 6 of 1999 titled Presidential Election (Basic Constitutional and Transitional Provisions) Decree 1999, and the lower court's failure to strike out the petition for non- compliance with paragraph 5(6) of schedule 4 to the Decree. The Supreme Court held that there is no doubt that the plenitude of the powers of

54. (1992) 1 N.W.L.R. (pt. 220) p. 699 at pp 722 - 723 per TOBI, J.C.A.
55. (1998) 9 N.W.L.R. (pt. 565) 235. See also E. Aighobahi & Ors V. Aifuwa (1999) 12 N.W.L.R. (pt. 635) 412
56. (1999) 7 N.W.L.R. (pt. 611) 358

the Court of Appeal under paragraph 50 (1) of schedule 4 accords it enough powers to over look the short – comings in a petition. That was a matter of discretion. In any event, the Supreme Court further held that the errors complained of were purely of technical nature and play no role in relation to the substantiality of the competence of the petition. The Supreme Court in this *Egolum's* case further re-emphasized the stand of the supreme court with regards to the issue of technicalities when it further stated that the heydays of technicality are now over because the weight of judicial authorities has today shifted from undue reliance on technicalities to doing substantial justice even – handedly to the parties to the case.

However, it must be understood that despite all that has been discussed so far, it is not in all cases that the court will ignore non- compliance with the rules of court. For instance, appeals are required to be filed within a specified period of time. If a litigant allows the time to expire, for whatever reason, than, he is out of court, unless, of course, the law empowers the court to extend time.[57] So any notice of appeal filed out of time without leave when required is not a proper notice of appeal.

Similarly, a notice of appeal or any action for that matter filed in court without the payment of the prescribed fees, or without fulfilling a statutory precondition is not a proper notice of appeal[58] Furthermore, any action filed in court or a notice of appeal filed by a person who has no *locus standi* to[59] file it is not a proper notice of appeal[59].

Also, where a party ought to be issued with a hearing notice but was[59] not issued, any judgement, order or ruling obtained in such a situation will be null and void . In *Credit Alliance Financial Services Ltd.* V *Mallah*[60], the defendant was not issued with a hearing notice as required by law. This prevented him from being present at the hearing of the case and judgement was entered against him. On Appeal, the Court of Appeal allowing the appeal held *inter-alia* that where a party ought to be issued with a hearing notice but none was forthcoming or given so that such failure makes him absent in court he has been effectively denied justice for he has not been heard and a judgement, ruling or decision given against him is null and void.

The position of the law was expressed by Lord Atkin in the case of *Evans V Bartlam*[61] that:

> "The principle obviously is that unless and until the court has pronounced a judgement upon the merits or by

57. See e.g Long-John V Blakk (1998) 6 N.W.L.R. (pt. 555) p. 524
58. See Olaseinde V F.H.A. & Ors (Supra)
59. See *Oredoyin V Arowolo* (1989) 4 NWLR (pt 114) 172 S.C. *Morohundade V Adeoti* (1997) 6NWLR (pt 508) 326 C.A.
60. (Supra)
61. (1937) 2 A.E.R. 646 at 650

consent, it is to have the power to revoke the expression of its coercive power where that has been obtained only by a failure to follow any of the rules of procedure.

It has also been held in *City Eng. (Nig .)Ltd. V N. A. A.*[62] that a statutory provision which is expected to be follwed by parties before instituting an action in court cannot cannot be Ignored by the court. This is also the position of the court in *I A L 361 INC.* V *Mobil Oil (Nig.) PLC.*[63] in which the plaintiff/appellant was the owner of Boeing 737 - 200 aircraft leased to Barman Airlines Ltd. and which was driven into and severely damaged by the fuel truck of the 1st defendant /respondent. The appellant had been paid its claims in England by a consortium of insurers who collectively insured the aircraft and who substituted their rights of action to the appellant who then instituted the present action against the respondents in its name. The respondents at the trial court filed a motion by way of demurrer and asked the court to dismiss the suit on the grounds *inter-alia* that there has been failure to comply with section 54 of Insurance Decree No 58 of 1991 as no notice was given to the 2nd defendant respondent to have it joined. The trial Court in its ruling upheld the argument of the respondent and promptly dismissed the suit. The plaintiff/appellant being aggrieved appealed to the Court of Appeal contending that based on decided cases, once the defendants/respondents had filed their statement of defense, they could no longer files a demurrer. The Court of Appeal dismissing the appeal held that a party can take a point of law and if it will bring about the termination of the case at any early stage, it does not matter whether such recourse to wind up the case at that stage is made after the statement of claim, before the defence or even after the parties close their pleadings. The Court further stated that time has passed where by a mere reliance on technicalities by a party would win a lawsuit. Modern development of law is aiming to attain justice without over reliance on forms. However, where a party conceives that an action has in – built weakness manifestly latent to the extent that it is discernible without the need to make vigorous analysis of the contents of the action to detect errors, the other party can move the court to have the matter dismissed.

The Rules of court as can be seen so far are therefore meant to be complied with as scrupulously as possible. However, where strict application of it will bring injustice, the rules must be dispensed with. There should not be too rigid application of the rules. Courts of law and equity should not follow arid legalism or technicalities at the expense of justice. The aim of the court should be to keep the path to justice clear of obstructions, which may impede it. The

62. (Supra)
63. (1999) 5 N.W.L.R. (pt. 601) 9
64. See T. O. Elias; The Judicial Process in Common Wealth Africa (University of Ghana Legon, Fep International Ltd.) p. 124

ultimate aim of the judicial process also is to effect a dynamic compromise between the technicalities of legal science and the requirement of social justice[64]

Proposals for Reforms.

The judiciary and the legislature in Nigeria have made considerable efforts in ensuring that the primary duty of the court to do substantial justice in every case is not jettissoned in favour of technicalities. However, the findings in this study would readily warrant the plea to many Nigerian lawyers especially the beginner to be more diligent and committed to their work. Starting from the filing of pleadings up to the judgment stage, all lawyers need to be meticulous. Although, the courts in a number of cases have always ignored any objection raised on any technical point, this should not give room to indolence or carelessness on the part of any lawyer. The legal profession is undoubtedly a noble profession and anything that may provoke ridicule or shame to the legal profession should be carefully avoided by all. Furthermore, in cases where costs will adequately compensate the opposing party, the court should not hesitate in awarding costs instead of striking out a case, as this option will better serve the interest of justice.

Moreover, Rules of court should always be subject to periodic review as this will ensure that necessary amendments to the Rules are effected at the appropriate time to reflect fleeting social values and intentions.

Also, any complaint of irregularity deserving to be entertained by the court should be only one that is fundamental to the case and one that will certainly occasion miscarriage of justice. For instance, where a person is a necessary party to a case, that person ought to be joined since at the end of the day, he will be affected by whatever judgement that is given by the court.

With due respect, the Nigerian judiciary has undoubtedly done a very brilliant job in dealing with the cases that have come up before them with regards to the issue of technicality. However, Nigerian judges, most especially, trial judges can still improve by being more creative in dealing with various cases presented before them as the ultimate end of all litigations should be to see that substantial justice is done to every party even – handedly.

It must also be noted that the Constitution of the Federal Republic of Nigeria, 1999, gives the right of access to the courts of law to every Nigerian citizen to have his rights,liabilities or obligations determined by a competent court of law and section 36 thereof also gives every citizen the right to a fair – hearing. For example, a person cannot be said to have had a fair hearing if his case is struck out on an unsubstantial technical point. Indeed, it has been acutely

65. (1999) 6 N.W.L.R. (pt 608) 648. per pats - Acholonu J.C.A

noted in *Nigeria Arab Bank Ltd* V *Comex Ltd*[65] that :-

> The ***best judgement*** in the realms of jurisprudence is the one which is arrived at after counsel for both sides have demonstrated the knowledge of the nuances of the subject – matter by the application of scholarship, which they bring to bear by the forensic advocacy, they exhibit in court. Short – circuiting a trial because a judge is annoyed with the seeming antics of a counsel does not accord with the equable mien of one sitting on the bench" (Italics Supplied).

As the constitution has conferred this right on every Nigerian citizen the right cannot be taken away by any Rules of court or any Rules of practice. The Rules of court or of practice are only made to regulate practice and procedure in the courts and they all derive their form from the Constitution. So, where any provision of the Rules of court contradict any provision of the constitution, such provision will be inconsistent with the Constitution and void to the extent of the inconsistency under section 1 (3) of the 1999 Constitution which provides that:-

> If any other law is inconsistent with the provisions of this Constitution, this constitution shall prevail, and that other law shall to the extent of the inconsistency be void.

As it must have been apparent, Nigerian judges have generally tried within the limits of their impressive vision and resources to introduce order into chaos by the rational administration of the judicial process. However, it should still be noted that the ultimate aim of the judicial process is to see that substantial justice is done to every serving to a case by every party judge. Thus in *Combe V Edwards*[66] it was eloquently pointed out that: -

> "The spirit of justice does not reside in formalities, or words, nor is the triumph of its administration to be found in successfully picking a way between the pitfalls of technicality. After all, the law is, or ought to be but the handmaid of justice, and inflexibility which is the most becoming robe of (law), often serves to render (justice) grotesque."

Surely, one may say that statutes should not be so construed that the injured man will never, at any moment of time, acquire a claim he can effectively assert. It is our belief that *Legal* justice should be abandoned in favour of the justice of dispensation, as the law must not itself become an instrument of injustice.