



# BAZE UNIVERSITY ABUJA LAW JOURNAL

CITED AS (BUALJ VOL.1 NO.1, 2021)

ISSN: 2811-2210

## ARTICLES

**Guiding Principles of Injunctions In Nigeria: An Overview**

*-Dr. Halima Doma, Viko Iyudah John and Aliyu Hussein*

**Judiciary and Democratic Governance in Nigeria**

*-Dr. Ali Ahmad*

**Revival of Natural Law Philosophy AS Antedote To Failures of Positivism  
In The C21st: Finding Solution To Social Vices In Nigeria.**

*-Dr. Igonoh J.*

**The Winding Up Process and Protection of Corporate Capitalism:  
Liquidation and Dissolution of The Corporate Debtor**

*-Prof. Kathleen Okafor*

**Towards a Strict Liability Regime for Oil Spill Related Damage in Nigeria**

*-Pereowei Subat and Chineze Sophia Ibekwe*

**Reforming Minority Protection and Derivative Action in Nigeria.**

*- Dr. Effiong A. Esu*

**An Analysis of The Rules of Natural Justice and Equal Treatment in  
Arbitral Proceedings in Nigeria: Issues And Challenges**

*-Dr. Zuhair Jibril*

**The Global Impact of The COVID-19 Virus Pandemic Outbreak on the  
Alternative Dispute Resolution Mechanisms**

*-Dr. Adeuti Bosede Remilekun*

**Evaluation of The Extent of Liability of Directors for Bank Failure in Nigeria**

*-Alheri Bulus Nyako Esq.*

**Left Behind The Walls; COVID-19 Pandemic, The Constitution and  
The Rights of Prisoners in Nigeria: A Review**

*-Dr Akinola E. Akintayo*

**The Right To Food Of Persons With Disabilities: Moving Beyond The  
Humanitarian Paradigm In The Wake Of COVID-19 Pandemic**

*-Nnawulezi Uche, A. PhD*

**Accountability of Oil and Gas Multinational Corporations (MNCS)  
In Human And Environmental Rights Protection**

*-Salma Aliyu Dutse, Esq*

**An Appraisal on The Concept of Freedom of Religion or Belief Under  
International Law: It's Application In Nigeria**

*-Bello Abdullahi*

**Institutional Investors as a Tool for Sustainable Development In Nigeria**

*-Philip Osarobo Odiase  
and  
Opeyemi Yetunde Omotuyi*

**An Examination of *Maslaha Al-mursala* (Public Interest) As One of  
The Subsidiary Sources of Islamic Law**

*-M. S. Sheka and A.M. Ma'aji*

**Questions Arising from the Choice of Originating Processes in Application  
for Enforcement of Fundamental Rights on Nigeria**

*-Samuel A. Adeniji*

PUBLICATION OF THE FACULTY OF LAW , BAZE University, Abuja

LEARN TO LIVE

© BAZE UNIVERSITY ABUJA  
LAW JOURNAL  
CITED AS (BUALJ VOL.1 NO.1, 2021)



ABUJA, NIGERIA  
Pan-African Institute of Paralegal Studies  
Research & Publication Department  
7/9 Panaf Drive  
Dawaki Rockville, Gwarinpa  
Abuja, FCT  
☎ 08023400164, 08022239114  
08065889878, 09052442722

LAGOS, NIGERIA  
283, Murtala Mohammed Way  
Alagomeji Bus Stop  
Nigeria Railway Compound  
Yaba, Lagos.  
☎ 08038281443

*lawlords2010@gmail.com*  
*www.panafideas.com*

ISSN: 2811-2210

### Copyright

All rights reserved. No part of this publication may be reproduced, stored in a retrieval, or transmitted, in any form or by any means, electronic, mechanical, photocopying, recording, and/or otherwise without prior written permission of the editors. This book may not be lent, resold, hired out or otherwise disposed of by way of trade in any form of binding or cover other than that in which it is published, without the prior consent of the editors.

Printed and bound by:  
Panaf Press  
Abuja Nigeria  
☎ 08023400164, 08038281443

Cover Design: Panafgraphics & Company



**BAZE UNIVERSITY ABUJA  
LAW JOURNAL**

---

**MEMBERS OF ADVISORY BOARD**

**PROF. TAHIR MAMMAN OON, SAN**  
Vice-Chancellor  
BAZE University, Abuja  
(Chairman)

**PROF. ERNEST OJUKWU, SAN**  
(Deputy Chairman)

Members

**PROFESSOR SANI M. ADAMS (SAN)**  
**PROFESSOR KATHLEEN OKAFOR**  
**DR ALI AHMAD (DEAN OF LAW).**

---

## TABLE OF CONTENTS

<b>Guiding Principles of Injunctions in Nigeria: An Overview</b> <i>-Halima Doma Victor Iyadah and Aliyu Husseini</i>	1-24
<b>Judiciary and Democratic Governance in Nigeria</b> <i>-Dr. Ali Ahmad</i>	25-48
<b>Revival of Natural Law Philosophy as Antedote to Failures of Positivism in the C21st: Finding Solution to Social Vices in Nigeria.</b> <i>-Dr. Igonoh J.</i>	49-76
<b>The Winding Up Process and Protection of Corporate Capitalism: Liquidation and Dissolution of The Corporate Debtor</b> <i>-Prof. Kathleen Okafor</i>	77-94
<b>Towards a Strict Liability Regime for Oil Spill Related Damage in Nigeria</b> <i>-Pereowei Subai and Chineze Sophia Ibekwe</i>	95-120
<b>Reforming Minority Protection and Derivative Action in Nigeria.</b> <i>-Dr. Effiong A. Esu</i>	121-146
<b>An Analysis of The Rules of Natural Justice and Equal Treatment in Arbitral Proceedings in Nigeria: Issues and Challenges</b> <i>-Dr. Zuhair Jibril</i>	147-184
<b>The Global Impact of the COVID-19 Virus Pandemic Outbreak on the Alternative Dispute Resolution Mechanisms</b> <i>-Dr. Adeuti Bosede Remilekun</i>	185-206



<b>Evaluation of the Extent of Liability of Directors for Bank Failure in Nigeria</b>	<i>-Alheri Bulus Nyako Esq.</i>	207-240
<b><i>Left Behind the Walls; COVID-19 Pandemic, The Constitution and The Rights of Prisoners in Nigeria: A Review</i></b>	<i>-Dr Akinola E. Akintayo</i>	241-266
<b><i>The Right to Food of Persons with Disabilities: Moving Beyond the Humanitarian Paradigm in The Wake Of COVID-19 Pandemic</i></b>	<i>-Nnawulezi Uche, A. PhD</i>	267-294
<b><i>Accountability of Oil and Gas Multinational Corporations (MNCS) In Human and Environmental Rights Protection</i></b>	<i>-Salma Aliyu Dutse, Esq.</i>	295-314
<b><i>An Appraisal on The Concept of Freedom of Religion or Belief Under International Law: It's Application in Nigeria</i></b>	<i>-Bello Abdullahi</i>	315-346
<b><i>Institutional Investors as a Tool for Sustainable Development In Nigeria</i></b>	<i>-Philip Osarobo Odiase and Opeyemi Yetunde Omotuyi</i>	347-372
<b><i>An Examination of Maslaha Al-mursala (Public Interest) As One of The Subsidiary Sources of Islamic Law</i></b>	<i>-M. S. Sheka and A.M. Ma'aji</i>	373-394
<b><i>Questions Arising from the Choice of Originating Processes in Application for Enforcement of Fundamental Rights on Nigeria</i></b>	<i>-Samuel A. Adeniji</i>	395-412
<b>Index</b>		413-422

# QUESTIONS ARISING FROM THE CHOICE OF ORIGINATING PROCESSES IN APPLICATION FOR ENFORCEMENT OF FUNDAMENTAL RIGHTS IN NIGERIA

By  
*Samuel A. Adeniji*

## ABSTRACT

*This article is aimed at informing legal practitioners and applicants in the fundamental rights proceedings on the originating processes strictly allowed by the Fundamental Rights (Enforcement Procedure) Rules, (FREPR Rules) accepted by the court for the enforcement of fundamental rights matter in the high court's regardless of what FREPR Rules provide. Since application for the enforcement of fundamental right is heard on the affidavit in support of the application and the affidavits which every party to the application proposes to use at the hearing, this article draws distinction between affidavit evidence and written statement of oath. In conclusion, this article calls on the Chief Justice of Nigeria, in line with the power conferred on his office under Section 46 (3) of the Constitution of the Federal Republic of Nigeria (As Amended) to amend Order II of FREPR 2009 to correct this anomaly. This article, again, calls on the Supreme Court to decide on this issue.*

**Keywords:** Fundamental Rights, Proceedings, Originating Processes, Affidavit Evidence, Written Statement of Oath.

## INTRODUCTION

Rule of law and access to justice are critical to the realization of human rights.<sup>1</sup> Fundamental rights are in the realms of domestic law and they are fundamental because they have been guaranteed by the Constitution and other legal instruments, especially African Charter on Human and Peoples Rights,<sup>2</sup> adopting the concise definition as contained in the Fundamental Rights (Enforcement procedure) Rules 2009<sup>3</sup>. Order 1 Rules 2 provides thus:

*“Fundamental Rights means any of the rights provided for in Chapter IV of the Constitution, and includes any of the rights stipulated in the African Charter on Human and People’s Rights (Ratification and Enforcement) Act”.*

It is important to state from the onset that the concept of fundamental rights and human rights are used interchangeably within the purview of 2009 Rules. Order 1 Rule 2 admits the definition of Human Rights to “includes fundamental rights”. The definition of fundamental rights in the FREP Rules 2009 improves the similar provision in the 1979 Constitution which limits the scope of the “rights” to that which was provided in Chapter IV of the said Constitution.

---

\* Samuel A. Adeniji LL.M, B.L, Lecturer, Department of Jurisprudence & International Law, Faculty of Law, University of Ibadan Email address: [sa.adeniji@ui.edu.ng](mailto:sa.adeniji@ui.edu.ng), [samueldadeniji@ymail.com](mailto:samueldadeniji@ymail.com):

<sup>1</sup> *Sotonye Denton-West v. Nimi W. Jack & Ors* (2013) 54NSCQR (pt 4) p. 2083 @ 2103

<sup>2</sup> African Charter on Human and people’s Rights (Ratification and Enforcement) Act. LFN, 2004.

<sup>3</sup> Hereinafter referred to as FREPR, 2009



## PROCEDURES FOR THE ENFORCEMENT OF FUNDAMENTAL RIGHTS

An application for the enforcement of the fundamental human right may be made by any originating process accepted by the court, which shall, subject to the provisions of these rules lie without leave of court.<sup>4</sup> An application shall be supported by a statement setting out the name and description of the applicant, the relief sought, the grounds upon which the reliefs are sought, and supported by an affidavit setting out the facts upon which the application is made.<sup>5</sup> The affidavit shall be made by the applicant, but where the applicant is in custody or if for any reason is unable to swear to an affidavit, the affidavit shall be made by a person who has personal knowledge of the facts or by a person who has been informed of the facts by the applicant, stating that the applicant is unable to depose personally to the affidavit.<sup>6</sup> Every application shall be accompanied by a written address which shall be succinct argument in support of the grounds of the application.<sup>7</sup> Where the respondent intends to oppose the application, he shall file his written address within five (5) days of the service on him of such application and may accompany it with a counter affidavit.<sup>8</sup> The applicant may on being served with the respondent's written address, file and serve an address on points of law within five days of being served and may accompany it with a further affidavit.<sup>9</sup>

---

<sup>4</sup> Order II Rule 2 FREPR 2009; *Alhaji Ali Ahmad Maitagaran & Anor v. Hajiya Rakiya Saidu Dankoli & Anor* (2020) LPELR-52025(CA); *Moses Enyime & Anor v. The Commissioner of Police Benue State & Anor* (2020) LPELR-50358(CA); *Andee Iheme v. Chief of Defence Staff & Ors* (2018) LPELR-45354(CA); *2nd Lieutenant R.O Abiola & Ors v. Anjov Terfa Kahaga, PhD & Anor* (2020) LPELR-49963(CA)

<sup>5</sup> Order II rule 3 FREPR 2009

<sup>6</sup> Order II rule 4 FREPR 2009

<sup>7</sup> Order II rule 5 FREPR 2009

<sup>8</sup> Order II rule 6 FREPR 2009

<sup>9</sup> Order II rule 7 FREPR 2009



An application for the enforcement of the fundamental human right may be made by any originating process accepted by the court.

What is originating process? It is a means by which actions are commenced or lawsuits are instituted.<sup>10</sup> The competence of such process is a prerequisite for valid and subsisting claim(s) in fundamental rights claims. Where the process fails to comply with the requirement of the law regarding its procedure, the Court cannot assume jurisdiction. Jurisdiction of a Court is constitutional. No Court can therefore confer jurisdiction upon itself, nor can parties by their mutual agreement also confer any jurisdiction on the court.

A defective originating process cannot activate the Court's jurisdiction. What are the originating processes accepted by the court? It is elementary that ways of commencement of civil suits in law courts are, namely; by Writ of Summons, Originating Summons, Motion on Notice and Petition. Invariably, the validity of an originating process is most fundamental, as the competence of the proceedings of the Court is a condition *sine qua non* to the validity nay competence of any suit by the jurisdiction of the Court. Thus, failure to commence proceedings upon a valid and competent originating process deeply goes to the root of the action. And any decision or order resulting from such proceedings is liable to be set aside on appeal, for being rendered incompetent and a nullity.

Indeed, it is a well settled principle, that failure to commence proceedings with a valid originating process (a writ of summons, et al) clearly borders on the issue of jurisdiction, nay the competence of the Court to adjudicate upon the matter. Thus, such an issue can be raised at any time by the parties and even *suo motu* by the appellate Court.<sup>11</sup> The validity of originating

---

<sup>10</sup> See *Braithwhite v. Skye Bank Plc* (2012) LPELR - 15532 (SC) per Ogunbiyi, JSC @ 23-24."

<sup>11</sup> See *Mohammed Marikida v. A.D. Ogunmola* (2006) LPELR 169 (SC) @ 15 paragraphs E - G per Musdapher, JSC, (as he then was)

processes in a proceeding, like the originating summons, writ of summons, motion on notice or petition, is sine qua non for the competence of the proceeding that follows it, or that is initiated by such process.<sup>12</sup> Consequently, failure to commence a suit with a valid originating process is a fundamental error. It goes to the root of the action since the conditions precedent for the exercise of the Court's jurisdiction would not have been met to place the suit before the Court for the exercise of its jurisdiction to hear and determine the issues in the action.<sup>13</sup>

It cannot be over-emphasized that unless the action was initiated in accordance with the due process of law, which includes its commencement by or with a valid initiating or originating process, it is incompetent.<sup>14</sup> The proceedings in such action remain a nullity *ab initio*, no matter how well the proceedings were conducted.<sup>15</sup> Courts do not exercise their given jurisdiction in futility.<sup>16</sup>

### **CAN VIOLATIONS OF FUNDAMENTAL RIGHTS LAWSUITS BE COMMENCED AND ENFORCED IN A HIGH COURT BY FILING OF ANY ORIGINATING PROCESSES ACCEPTED BY THE COURT NAMELY, WRIT OF SUMMONS, ORIGINATING SUMMONS, MOTION ON NOTICE OR PETITION**

The question that follows is, can violations of fundamental rights suit be commenced and enforced in a High Court by filing of any originating processes accepted by the court namely, Writ of Summons, Originating

---

<sup>12</sup> *Wilson Obioha & Sons Ltd & Anor v. Inamsco Multi Concepts Ltd & Anor* (2017) LPELR-42332(CA). *David Sabo Kente v. Darius Dickson Ishaku & 2 Ors.* (2017) 15 NWLR (Pt. 1587) 94 at 118

<sup>13</sup> See *Kida v. Ogummola* (2006) 13 NWLR (Pt. 997); *Braithwaite v. Skye Bank Plc* (2012) LPELR - 15532 SC; (2013) 5 NWLR (Pt.1346) 1

<sup>14</sup> See *Madukolu v. Nkemdilim* (supra)

<sup>15</sup> See *Timitimi v. Amabebe* (1953) 14 WACA 374

<sup>16</sup> *Registered Trustees of Divine Commission Intl Church v. Ikolodo* (2018) LPELR-44199(CA) Per Moore Aseimo Abraham Adumein . J.C.A ( Pp. 12-13. paras. A-E )

Summons, Motion on Notice or Petition? In answering this question a brief examination of procedures involve in commencement of civil suits in the High Courts would be carried out. First, when an action is commenced by Writ of Summons, it must be accompanied by a Statement of Claim, List of Witnesses to be called at the trial, Written Statement of Oath of the Witnesses, and copies of every document to be relied on at the trial.<sup>17</sup> Where a Plaintiff/Claimant/Applicant fails to comply with the above the court processes shall not be accepted for filing by the registry.<sup>18</sup> The Defendant/Respondent shall also file in response to the court processes served on him by entering an appearance; whether conditionally or unconditionally. Applicant shall also file a Statement of Defence, List of Witnesses to be called at the trial, Written Statement on Oath of the Witnesses and copies of every document to be relied on at the trial. Where the defendant has a Counter-claim the claimant shall file a defence to counter – claim and reply to Statement of defence where the need be.<sup>19</sup> When a matter is commenced via Writ of Summons and same is fixed for hearing, witnesses who had earlier filed their depositions before the court shall be required to enter witness box and be led in evidence.

When an action is commenced by an originating summons it shall be in the forms specified in the Rules of High Courts where the action is to be instituted and with such variations as circumstances may require. It shall be prepared by the applicant or his legal practitioner, and shall be sealed and filed in the Registry, and when so sealed and filed shall be deemed to be

---

<sup>17</sup> Order 3 rule 2 (1) of the Oyo State High Court (Civil Procedure) Rules 2010; Order 3 rule 2 (1) of the High Court of Lagos State (Civil Procedure) Rules 2012; Order 3 rule 2 (1) of the Osun State High Court Amended ( Civil Procedure) Rules 2008

<sup>18</sup> Order 3 rule 2 (2) of the Oyo State High Court (Civil Procedure) Rules 2010; Order 3 rule 2 (2) of the High Court of Lagos State (Civil Procedure) Rules 2012; Order 3 rule 2 (2) of the Osun State High Court Amended (Civil Procedure) Rules 2008

<sup>19</sup> Order 15 rule 1 (3) of the Oyo State High Court (Civil Procedure) Rules 2010; Order 15 rule 1 (3) of the High Court of Lagos State (Civil Procedure) Rules 2012; Order 15 rule 1 (3) of the Osun State High Court Amended ( Civil Procedure) Rules 2008



issued. Originating Summons shall be accompanied by: (a) an affidavit setting out the facts relied upon; (b) all the exhibits to be relied upon; (c) a written address in support of the application. The person filing the originating summons shall leave at the Registry, sufficient number of copies thereof, together with the documents in the Rules of Court for service on the respondent or respondents.<sup>20</sup> Where the respondent intends to oppose the application, he shall file his written address and may accompany it with a counter affidavit. The applicant may on being served with the respondent's written address, file and serve an address on points of law and may accompany it with a further affidavit. When pleadings are completed, originating summons would be fixed for hearing and parties would move their application, rely on the affidavits and exhibits attached where parties have and adopt their written addresses.

Motion on Notice is another mode of commencement of fundamental rights action in the High Courts. Where by the rules of High Courts, any application is authorized to be made to a Judge, such application shall be made by Motion on Notice, which may be supported by affidavit and shall state under what rule of Court or Law the application is brought. Every Motion on Notice shall be served within 5days of filing. Where the other party intends to oppose the application, he shall within 5days of the service on him of such application, file his counter affidavit. Upon receipt of the counter affidavit, the applicant shall file a written address and further affidavit if necessary, to be served on the opposing party within 5days. The opposing party shall then file and serve his written address not later than 7days on receipt of the applicant's written address and further affidavit if any. The Respondent shall file and serve his written address not later than 7days thereof.<sup>21</sup> When pleadings are completed, motion on notice would be fixed for hearing and parties would move their application, rely on the

---

<sup>20</sup> Order 3 Rule 8 of the Oyo State High Court (Civil Procedure) Rules, 2010

<sup>21</sup> Order 39 Rule 1 of the Oyo State High Court (Civil Procedure) Rules, 2010



affidavits and exhibits attached where parties have and adopt their written addresses.

Civil action can also be commenced through petition. In filing Notice of Petition in the High Court, the Petitioner must accompany his petition with the following documents namely, Petition itself containing the facts of the case, Affidavit of Verification, Certificate Relating to Reconciliation (as it is in matrimonial cases), Notice of Address, Acknowledgement of Service. The respondent may file Answer to the Petition or Cross-Petition stating facts of the cross-petition, Affidavit of Verification, Certificate Relating to Reconciliation, Notice of Address, Acknowledgement of Service. Petitioner may also file a Rejoinder to the Answer or file Answer to the Cross-Petition. When a matter is commenced via Petition, it is fixed for hearing, witnesses shall be required to enter witness box and be led in evidence.

### **ORIGINATING SUMMONS AND MOTION ON NOTICE ARE THE ONLY WAYS ENFORCEMENT OF FUNDAMENTAL RIGHTS LAWSUITS CAN BE INSTITUTED**

From the specific procedures enumerated under Order II of the FREP Rules and judicial precedent,<sup>22</sup> it is crystal clear that fundamental rights enforcement proceedings are determined strictly on affidavit evidence<sup>23</sup>.

---

<sup>22</sup> *Jack v. University of Agriculture, Makurdi* (2004) LPELR-1587 (SC)

<sup>23</sup> *SSS & Anor v. El-Rufai* (2018) LPELR-45080(CA) Per Oyebisi Fodayemi Omoleye, J.C.A ( Pp. 27-31, paras. A-D ) held "As correctly submitted by the Appellants' learned counsel, it is the general principle of law that, where a matter is being tried on affidavit evidence and the Court is confronted with conflicting or contradictory or irreconcilable evidence relied on by the opposing parties on a very material issue placed before the Court for determination, the Court cannot achieve the resolution of such conflict or contradiction by evaluating the conflicting or contradictory evidence. Rather, in order for the Court to arrive at the justice of the matter, it can only resort to the "viva voce" evidence from the deponents of the relevant affidavit/counter affidavit and such other witnesses as the parties may be advised to call. See the cases of: (i) *Falobi v. Falobi* (supra); (2) *Olu-Ibukun v. Olu-Ibukun* (1974) NSCC p.51; (3) *Akinsete v. Akindutire* (1966) 1All NLR p.147; (4) *Chairman, National Population Commission v. Chairman,*

*Ikere Local Govt. & Ors.* (2001) LPELR-3166 (SC) and (5) *Eze v. Unijos* (2017) LPELR-42345 (SC). However, the Fundamental Rights (Enforcement Procedure) Rules, 2009, under which the application of the Respondent was initiated, specifically stipulate a peculiar procedure for the enforcement of the fundamental rights of an aggrieved person perceived by him to have been infringed. Therefore for that purpose, the said Rules clearly provide that, the applicant in a fundamental right proceedings must file a verifying affidavit setting out the facts relied upon by him and a written address as accompaniments of his application for the enforcement of the fundamental right allegedly breached. In addition, the applicant may file a further affidavit in conjunction with his reply on point(s) of law. Albeit, the adverse party is not required to file a counter affidavit, he can file a written address in opposition to the application of the applicant. Hence, fundamental right enforcement proceedings are "sui generis" and decided solely on affidavit evidence. To put it in other words, "viva voce" or oral evidence and the keeping with strict compliance with the general position of the law regarding the use of affidavit evidence in civil proceedings are alien to fundamental right enforcement proceedings. Thus, it is the affidavit evidence placed before the Court which the Court must fastidiously evaluate in order to reach a just resolution of the application of an applicant. In short the facts averred in the affidavits placed before the Court by the parties in fundamental rights enforcement proceedings constitute the pleadings, the adduced evidence in the matter. See the cases of: (1) *Jack v. University of Agriculture, Makurdi* (2004) LPELR-1587 (SC); (2) *IGP & Ors. v. Eze* (2017) LPELR - 42923 (CA); (3) *Bamaiyi v. The State* (2001) FWLR (Pt.46) p.956 at p.978; (4) *ASCO Investment Ltd. & Anor. v. Ezeigbo & Anor.* (2015) LPELR-24460 (CA); (5) *B. N. Mbang v. W/PC Janet* (2015) All FWLR (Pt.767) p.766 at p.784; (6) *Ukaobasi v. Ezimora* (2016) LPELR -40174 (CA). In the case of: *Ikudaisi & Ors. v. Oyingbo & Ors.* (2015) LPELR-40525, this Court per Abiriyi, J.C.A on this issue pointed stated as follows: The special procedure of the Fundamental Rights (Enforcement Procedure) Rules is not to be equated with the normal procedure in actions tried on pleadings and to which normal rules of pleadings apply. In the procedure under the Fundamental Rights (Enforcement Procedure) Rules, the affidavits constitute the evidence. If the only evidence before the Court or Judge is that of the complainant, that is the material he should consider in order to determine the entitlement of the complainant. The other party is not compelled to file any affidavit. However, notwithstanding that the other party has not filed any affidavit that other party can still be heard on the application to contend that the facts disclosed by the complainant's affidavit do not point to the existence of a right or of an infringement of any right. See *Agbakoba v. Director S.S.S.* (1994) 6 NWLR (Pt.351) 475 at 500. In the instant matter, contrary to the misconceived position of the Appellants' counsel, I am of the humble but firm view and hold that, the procedure under the fundamental Rights (Enforcement Procedure) Rules is "sui generis", it is not akin to the procedure in other civil actions tried on pleadings. Hence, the normal hard and fast rules of pleadings are not applicable thereunder. Therefore, the trial Court's resolution of the application of



Therefore, only two out of the four originating processes identified above can be used to initiate fundamental rights lawsuit accompanied by affidavit evidence, that is originating summons and motion on notice. In another word, fundamental rights lawsuits cannot be commenced by filing of writ of summons or petition.

However, the FREP Rules, 2009 specifically stipulates a peculiar procedure for the enforcement of the fundamental rights by a person who perceived that his rights have been violated. The law is equally trite that where a statute stipulates a particular method of performing a duty regulated by the statute, that method, and no other method must be followed in performing the duty.<sup>24</sup> The procedure prescribed by the FREP Rules, 2009 being a requirement of law, must be strictly adhered to.

FREP Rules, 2009 is a creation of the Constitution. The procedures for seeking redress in the High Court stipulated therein cannot be deviated from.<sup>25</sup> Therefore for that purpose, the said Rules clearly provide that the applicant in a fundamental right proceedings must file an affidavit setting out the facts relied upon by him and a written address as accompaniments

---

the Respondent based on the evaluation of the affidavit evidence placed before it by both parties is the correct legal procedure. Albeit whether the exercise of its discretion in resolving the case in favour of the Respondent is judicial and judicious in accordance to law is a different matter and not the crux of the present issue under consideration. As hereinbefore enunciated above, proceedings under Fundamental Rights (Enforcement Procedure) Rules, as in the instant matter, are determined only on affidavit evidence of parties and not "viva voce" evidence as had been advocated by the Appellants' counsel. To put it in other words, "viva voce" evidence is a legal sacrilege in the determination of an application under the Fundamental Rights (Enforcement Procedure) Rules."

<sup>24</sup> See the cases of: (1) *Commerce Bank Nig. Ltd v. A.-G., Anambra State* (1992) 8 NWLR (Pt. 261) p. 528; (2) *Ibrahim v. I.N E C.* (1999) 8 NWLR (Pt. 614) p. 334 and (3) *Abubakar v. A.-G., Fed* (supra) at pgs. 643 - 644, paras. G-C.

<sup>25</sup> See the cases of: (1) *Sosanya v. Onadoko* (2000)11 NWLR (Pt. 677) p. 34; (2) *Mil Admin. of Ekiti State v. Aladevelu* (2007) 14 NWLR (Pt. 1055) p.619 and (3) *Akuneziri v. Okemwa* (2000) 16 NWLR (Pt.691) p. 526.

of his application for the enforcement of the fundamental right allegedly breached. In addition, the applicant may file a further affidavit in conjunction with his reply on point(s) of law. Albeit, the adverse party is not required, to file a counter affidavit.

Applicant can file a written address in opposition to the application of the applicant. Hence, fundamental right enforcement proceedings are "sui generis" and decided solely on affidavit evidence. In other words, "viva voce" or oral evidence, and strict compliance with the general position of the law regarding the use of affidavit evidence in civil proceedings are alien to fundamental right enforcement proceedings. It is the affidavit evidence placed before the Court that must be fastidiously evaluated in order to reach a just resolution on the application of an applicant. Therefore, the facts averred in the affidavits placed before the Court by the parties in fundamental rights enforcement proceedings constitute the pleadings the adduced evidence in the matter.<sup>26</sup> It is the general principle of law that, where a matter is being tried on affidavit evidence, and the Court is confronted with conflicting or irreconcilable evidence relied on by the opposing parties on a very material issue as placed before the Court for determination, the Court cannot achieve the resolution of such conflict or contradiction by mere evaluating the conflicting or contradictory evidence. Rather, in order for the Court to arrive at the justice of the matter, it can only resort to the "viva voce" evidence from the deponents of the relevant affidavit/counter affidavit and such other witnesses as the parties may be advised to call.<sup>27</sup>

---

<sup>26</sup> See the cases of *Jack v. University of Agriculture, Makurdi* (2004) LPELR-1587 (SC); *IGP & Ors. v. Eze* (2017) LPELR - 42923; (3) *Bamaïyi v. The State* (2001) FWLR (Pt.46) p.956 at p.978; *ASCO Investment Ltd. & Anor. v. Ezeigbo & Anor.* (2015) LPELR-24460 (CA); *B. N. Mbang v. W/PC Janet* (2015) All FWLR (Pt.767) p.766 at p.784; *Ukaobasi v. Ezimora* (2016) LPELR -40174 (CA); *Ikudaisi & Ors. v. Oyingbo & Ors.* (2015) LPELR-40525. Per Abiriyi, J.C.A

<sup>27</sup> *SSS & ANOR v. El-Rufai* (2018) LPELR-45080(CA) Per Oyebisi Folayemi Omoleye, J.C.A (Pp. 27-31, paras. A-D); *Falobi v. Falobi* (supra); *Olu-Ibukun v. Olu-Ibukun*



## **DISTINCTIONS BETWEEN AFFIDAVIT EVIDENCE AND WRITTEN STATEMENT ON OATH**

In commencing an action for the enforcement of fundamental right, Order II Rule 3<sup>28</sup> provides that an application for the enforcement of fundamental right shall be supported by a statement setting out the names and description of the applicant, the relief sought, the grounds upon which the reliefs are sought and supported by an affidavit setting out the fact upon which the application is made. There are no processes such as statement setting out the names and description of the applicant, and an affidavit setting out the fact upon which the application is made if violations of fundamental rights are enforced by Writ of Summons and Petition. What the applicant can file in support of writ of summons is statement on oath not affidavit.

There are distinctions between affidavit evidence and written statement on oath. It is a general statement of the law that an affidavit and a written statement of a witness are to be sworn before a Commissioner for Oaths or a Notary Public. In law, they are neither synonymous nor interchangeable. Simply put, an affidavit is not the same as a written statement on oath. Written statement on oath does not necessarily or strictly need to be in compliance with the provisions of the Evidence Act 2011 relating to Affidavit. The duty of a witness making a written statement on oath is to ensure that it is deposed to before a Commissioner for Oaths duly authorised by law to do so.

Now, witness statement is a statement on oath in which the deponent tells his story of the evidence on the facts as pleaded by the party on whose behalf he is testifying. Once it is sworn to before the authorised Commissioner for

---

(1974) NSCC p.51; (3) *Akinsete v. Akindutire* (1966) 1 All NLR p.147; (4) *Chairman, National Population Commission v. Chairman, Ikere Local Govt. & Ors.* (2001) LPELR-3166 (SC) and (5) *Eze v. Unijos* (2017) LPELR-42345 (SC).

<sup>28</sup> FREPR, 2009

Oaths, it is competent. Being the evidence in chief of a witness, it need not therefore, be subject to the stringent requirements of an affidavit. After all, a statement on oath or evidence in chief of a witness in writing is in all cases, except where the opposing party elects not to, subject to cross examination to test its veracity as oral evidence unlike an affidavit evidence which unless there be irreconcilable conflicts is not usually subjected to cross examination. There is nothing therefore, sacrosanct about a statement on oath if it is still subject to cross examination to determine its veracity, credibility or its worth or evidential value.<sup>29</sup>

On the other hand, an affidavit is a voluntary declaration of facts written down and sworn to by the declarant before an officer authorised to administer Oath. It is a deposition which is made under oath. Therefore, its contents are sacrosanct and can only be controverted by another deposed affidavit not by cross-examination or analysis.<sup>30</sup>

It should be noted that, unlike an affidavit per se, a Written Statement on Oath filed in Court is not evidence on its own, unless it has been duly adopted by the witness at the trial. In other words, a Written Statement on Oath will only become evidence to be used by Court in the determination of a Plaintiff's claim, if it has been adopted by the person who deposed to it as his testimony during the trial. If it is not so adopted, it is deemed abandoned and therefore cannot be examined by the trial Judge.<sup>31</sup> However, affidavit

---

<sup>29</sup> See *Funtua v. Tijani* (2011) 7 NWLR (Pt. 1245) 130. See also *Splinters Nig. Ltd v. Oasis Finance Ltd.* (2013) 18 NWLR (Pt.1385)

<sup>30</sup> See Blacks Law Dictionary 9th Edition P. 66. See also *Ezeudu v. John* (2012) 7 NWLR (Pt.1298) 1; *Maraya Plastics Industries Ltd v. Inland Bank of Nigeria Plc.* (2008) FWLR (Pt. 120) 1832; *Josien Holdings Ltd v. Lornamead Ltd.* (1995) 1 NWLR (Pt. 371) 254."

<sup>31</sup> See *NNB Plc v. IBW Ent.* (1998) 6 NWLR (Pt. 558) 446, *Maraya Plastic Ltd. v. Inland Bank* (2002) 2 NWLR (Pt. 765) 109; *Lonestar Drilling Nig. Ltd. v. Treven Engr. Industries Ltd.* (1999) 1 NWLR (Pt. 558) 622." *Abubakar v. Ali & Ors* (2015) LPELR-40359(CA) Per Ridwan Maiwada Abdullahi ,J.C.A ( Pp. 47-48, paras. E-B )

on the other hand, is the evidence of a witness made in writing. So, whether or not the deponent appears in Court, such depositions are capable of being evaluated by the Court as evidence.<sup>32</sup>

A witness written statement on oath is different from affidavit evidence. An affidavit is a statement of fact which the maker or deponent swears to be true to the best of his knowledge. It is a Court process in writing, deposing to facts within the knowledge of the deponent. It is documentary evidence which the Court can admit in the absence of any unchallenged evidence. On the contrary, a witness statement is not evidence. It only becomes evidence after the witness is sworn in Court and adopts his statement. At this stage, at best, it becomes evidence in chief. It is therefore subjected to cross-examination after which it becomes evidence to be used by the Court. If the opponent fails to cross-examine the witness, it is taken that the true situation of facts is contained therein. The effect is that, a written statement on oath becomes evidence upon which the Court can act, only if it has been adopted on Oath at the trial by the deponent. Therefore, it means that where the written statement on oath was adopted at the trial without any objection by the opponent, opponent cannot later challenge the competence of that statement.<sup>33</sup>

Are the procedures outlined under Order II, Rules 3, 4 & 5 in conformity with all the mode of commencing civil suits acceptable in High Courts? The answer is in the negative. Then, what happens if an applicant commences enforcement of his fundamental rights through writ of summons or petition? In my opinion, where an applicant commences enforcement of his

---

<sup>32</sup> See *Splinters (Nig.) Ltd & Anor v. Oasis Finance Ltd* (2013) 18 NWLR (pt.1385) p.188 at 227 per Izoba, JCA; *Agagu v. Mimiko & Ors* (2009) 7 NWLR (pt.1140) p.34; *Oraekwe v. Chukwuka* (2012) NWLR (pt.1280) p.87 at 201

<sup>33</sup> *Agagu v. Mimiko* (2009) 7 NWLR (pt.1140) p.342 at 424 paragraphs E – F; *Majekodunmi & Ors v. Ogunseye* (2017) LPELR-42547(CA) Per Haruna Simon Tsammani, J.C.A (Pp. 40-45, paras. D-C)



fundamental rights through writ of summons or petition, it should be deemed as procedural defect or irregularity.

A procedural defect or irregularity occurs where a step taken in a proceeding is not in accordance with procedure (in breach of procedure). Such defect or irregularity is generally treated as not fundamental as to render the process or proceedings a nullity. The irregularity in such a case is curable and can thus be waived. It is not a substantive defect which has the effect of rendering the affected process and the proceeding conducted thereon incompetent. It is not a matter of law that is capable of rendering the process invalid.<sup>34</sup> A procedural defect does not define the rights and obligations of the parties in controversy. It is merely a vehicle which assists the Court or tribunal in going into matters in controversy or litigated before it. It is a matter of procedure regulated by procedural law. It is not a fact which constitutes the cause of action, rather it is a fact which relate to how a party is to invoke the jurisdiction of the Court for a remedy, pursuant to his cause of action. It is a matter of procedure outside the realm of pleadings.<sup>35</sup> It will only affect the jurisdiction of the court because the matter will not be seen

---

<sup>34</sup> See *Ibibiyama F.G. Odom & Ors. v. The P.D.P. & Ors* (2015) LPELR - 24351 (SC); *Mobil Production (Nig.) Unltd v. LASEPA* (2002) 18 NWLR (pt.798) p.1; where Ayoola, JSC said: "The distinction between substance and procedure is blurred, it is generally accepted that matters (including facts) which define the rights and obligations of the parties in controversy are matter of substance defined by substantive law, whereas matters which are mere vehicles which assist the Court or tribunal in going into matters in controversy or litigated before it are matters of procedure regulated by procedural law. Facts which constitute the cause of action are matters of substance and should be pleaded, whereas facts which relate to how a party is to invoke the jurisdiction of the Court for a remedy pursuant to his cause of action is a matter of procedure outside the realm of pleadings."

<sup>35</sup> See also the cases of *Oghoni v. SPDC (Nig.) Ltd* (2008) 17 NWLR (pt.955) p.596 and *Owata v. Anyigor* (1993) 2 NWLR (pt.276) p.380; *Majekodunmi & Ors v. Ogunseye* (2017) LPELR-42547(CA) Per Haruna Simon Tsammani, J.C.A. (Pp. 19-20, paras. A-B)



to have been commenced through the due process of law due to lack of fulfillment of conditions precedent to the exercise of jurisdiction.<sup>36</sup>

There is a distinction between jurisdiction as a matter of procedural law and substantive law. There are broadly two types of jurisdiction and a distinction must be drawn between them namely: (a) Jurisdiction as a matter of procedural law; (b) Jurisdiction as matter of substantive law. While a litigant may submit to a procedural jurisdiction, he or she cannot confer jurisdiction on a Court where the Constitution or a Statute or any provision of the common law says that the Court does not have jurisdiction. A defect in competence is extrinsic to adjudication; hence a challenge to jurisdiction can be entertained at any stage of the proceedings, at first instance or on appeal even at the Supreme Court by any of the parties and even by the Court itself *suo motu* to prevent an obvious miscarriage of justice."<sup>37</sup>

## **CONCLUSION**

In summary, the special procedure of the FREP Rules 2009 is not to be equated with the normal procedure in actions tried on pleadings and to which normal rules of pleadings apply<sup>38</sup>. In the procedure under the FREPR, 2009 the affidavits constitute the evidence. If the only evidence before the Court or Judge is that of the complainant, that is the material the court should consider in order to determine the entitlement of the complainant. The other party is not compelled to file any affidavit. However, notwithstanding that the other party has not filed any affidavit he can still be heard on the application to contend that the facts disclosed by the

---

<sup>36</sup> *Madukolu v. Nkemdilim* (2001) 46 WRN 1; Adeniji, S.A, Legal Armoury, Brighter Star Publishers Nigeria Ltd, 2006, pp. 74-75

<sup>37</sup> *Majekodunmi & Ors v. Ogunseye* (2017) LPELR-42547 (CA) Per Haruna Simon Tsammani, J.C.A (Pp. 20-21, paras. D-B); *Obiweubi v. Central Bank of Nigeria* (2011) LPELR - 2185 (SC), the Supreme Court, per Rhodes-Vivour

<sup>38</sup> *Grace Jack v. University of Agriculture* (2004) 17NSCQR 90 @ 101-103

complainant's affidavit do not point to the existence of a right, or an infringement of any right.<sup>39</sup>

I am of the humble but firm view and hold that, the procedure under the FREP Rules 2009 is "sui generis". It is not akin to the procedure in other civil actions tried on pleadings. Hence, the normal hard and fast rules of pleadings are not applicable here. Therefore, our Judges at the High Courts must resolve application of the any complainant/applicant based on the evaluation of the affidavit evidence placed before it by both parties. This, in my opinion is the correct legal procedure. Albeit whether the exercise of Court's discretion in resolving the case in favour of the Applicant or Respondent is judicial and judicious in accordance to law is a different matter and not the crux or form of instituting fundamental right under consideration. As enunciated above, proceedings under FREPR, 2009 are determined only on affidavit evidence of parties and not "viva voce" evidence. To put it in other words, "viva voce" evidence is a legal sacrilege in the determination of an application under the Fundamental Rights (Enforcement Procedure) Rules.

It is apparent from the above provisions of FREPR 2009, that application for the enforcement of fundamental rights is heard on affidavit evidence. No oral evidence is allowed. This is the position of the law as stated in the case of *Grace Jack v. University of Agriculture, Makurdi* where the Supreme Court held as follows:

...No oral evidence is called. The application is heard on the affidavit in support of the application and the affidavits which every party to the application proposes to use at the hearing. The affidavits constitute the evidence. (Underlined is mine)

---

<sup>39</sup> See *Agbakoba v. Director S.S.S.* (1994) 6 NWLR (Pt.351) 475 at 500

I submit, most humbly, that an application for the enforcement of fundamental rights cannot be instituted by Writ of Summons and Petition. It is my advice that the Chief Justice of Nigeria, in line with the power conferred on his office under Section 46 (3) of the Constitution of the Federal Republic of Nigeria (As Amended) amends the Order II of FREPR 2009 to correct this anomaly.

What is certain, however, is that the last has not been heard on this controversy. It is submitted that for the sake of certainty in law in this context, the Supreme Court which is the apex court in Nigeria should, at the appropriate time, take a definite position on the matter whether application for the enforcement of fundamental rights can be instituted by Writ of Summons and Petition. The present position as contained in the FREPR, 2009 on the subject is not good for the development of our laws.