

AN APPRAISAL OF THE NOVEL PROVISIONS OF THE FUNDAMENTAL RIGHTS (ENFORCEMENT PROCEDURE) RULES 2009

BY

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INTRODUCTION

The *Constitution of the Federal Republic of Nigeria (CFRN) 1999* contained provisions of fundamental rights under Chapter IV.¹ Fundamental rights are rights derived from natural or fundamental law. They are significant component of liberty, encroachments of which are rigorously tested by courts to ascertain the soundness of purported governmental justifications.² The premise of the inalienable rights of man; life, liberty and the pursuit of happiness.³ Human rights are specie of rights which can be said to *inhere* in every human being. Since they are regarded as inalienable and immutable such rights cannot be taken away from any person without affront to justice.⁴ It is in view of the above that the Constitution empowers the Chief Justice of Nigeria to make rules with respect to the practice and procedure of a High Court for the purpose of enforcement of fundamental rights guaranteed under Chapter IV of the Constitution.⁵ It is pursuant to the powers conferred on the Chief Justice of Nigeria above that the then Chief Justice of Nigeria, Honourable Justice Idris Legbo Kutigi (GCON) made the *Fundamental Rights (Enforcement Procedure) Rules 2009* (hereinafter referred to as the FREP Rules 2009) on the 11th day of November, 2009.⁶

Background to the New Rules

Before the coming into force of the FREP Rules 2009, there was in existence the FREP Rules 1979 which was made pursuant to Section 42 (3) of the *Constitution of the Federal Republic of Nigeria 1979* by the then Chief Justice of Nigeria, Honourable Justice Fatayi Williams on 5th

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¹ See Sec. 33 to 44 CFRN 1999.

² Garner, B.A., *Black's Law Dictionary*. 8th edition. West Group. U.S.A., 1999, p. 683.

³ See Oputa, C., (J.S.C) in *Ransome Kuti & Ors v. A.G., Federation* (1985) 8 NWLR (pt 6) 211.

⁴ Falana, F., *Fundamental Rights Enforcement*. Legal Text Publishing Co. Ltd Lagos, 2004, p.1

⁵ S. 46 (3) CFRN 1999.

⁶ The commencement date for the FREP Rules 2009 was 1st December, 2009.

December 1979. For the three decades of its existence the FREP Rules 1979 was fraught with issues of technicalities leading to various abuse of the procedures under the Rules rather than enhancing the salient aims and objectives of the Rules. Prominent among the instances of such technicalities were the vexed issue of *locus standi* which requires that a person must have 'a standing' or legal rights to institute proceedings before he can access the courts. There was also the requirement for leave before commencement of action and that the applicant's action must not only be commenced within 12 months of the act or event complained of, but the same must not have been caught by a statute of limitation. Last and by no means the least was the requirement for depositing to and filing of affidavit of service by the applicant stating the names and addresses of, and the place and date of service on all the persons who have been served with the application failing which the application shall be incompetent.

This article therefore examined the novel provisions of the *Fundamental Rights (Enforcement Procedure) Rules 2009* with the view to consider some of its provisions made specifically to cure the afore-stated shortcomings of the old FREP Rules of 1979 and some of the apparent lapses of the new Rules and to proffer solutions to the same where necessary.

1.2 Objectives of the FREP Rules 2009

The preamble to the Rules mandates the court to give effect to the overriding objectives of the FREP Rules at every stage of human rights action. And the parties and their legal representatives are to help the court to further the overriding objectives of the rules which include but not limited to the expansive and purposive interpretation and application of the Constitution especially Chapter IV, the *African Charter on Human and Peoples' Rights*, the *Universal Declaration of Human Rights* including Instruments and Protocols, African and United Nations human rights systems.⁷ The courts shall not only advance Nigerian democracy, good governance, human rights and culture but shall treat human rights cases as an emergency. This, it is conceded is a positive direction taken by the framers of the Rules in view of our experience as a nation and the seemingly conflicting decisions of the courts during the military regimes in

⁷ See Sections 1-3 of the Preamble to the FREP Rules 2009.

Nigeria on whether or not the provisions of the *African Charter on Human and Peoples Rights* are subordinated to or overrides the provisions of the Nigerian Constitution and whether or not the Nigerian Courts are bound to apply the provisions of the African charter.⁸

The Issue of Locus Standi

Of great interest to this article is the provisions of section 3 (e) of the Preamble to the Rules. For a better clarity the provision is hereby reproduced.

Section 3 (e) of the Rules provides that;

The court shall encourage and welcome public interest litigations in the human rights fields and no human right case may be dismissed or struck out for want of locus standi. In particular, human rights activists, advocates or groups as well as non-governmental organizations, may institute human rights application on behalf of any potential applicant. In human rights litigation the applicant may include any of the following:

- (i.) *Anyone acting in his own interest;*
- (ii.) *Anyone acting on behalf of another person;*
- (iii.) *Anyone acting as a member of, or in the interest of a group or class of persons;*
- (iv.) *Anyone acting in the public interest, and*

⁸ See for example the case of *Oshivire v. British Caledonian Airways Ltd* (1990)7 NWLR (pt 163) 507 where the Court of Appeal, per Ogundare JCA (as he then was) held that international agreements are above domestic legislation. Thus any domestic legislation in conflict with the convention is void. See also *Fawehinmi v. Abacha* (1996) 9 NWLR 719. However, the Supreme Court, per Wali JSC in *Ibidapa v. Lufthansa Airlines* (1997) 4 NWLR (pt 498)124 held that Nigeria shall continue to adhere and enforce multilateral and bilateral agreements where their provisions are not in conflict with our fundamental law. See also the Supreme Court decision in *African Renaissance Corporation v. Fatanye* (1986) NCLR (pt 3) 811 at 834. The law is therefore settled by the apex court that our fundamental law (Constitution) shall override any International instrument that conflicts its provisions.

*(v.) Association acting in the interest of its
members or other individuals or
groups.*

The above provisions of the Rules tend to open the floodgates for multiplicity of actions with respect to human rights by encouraging every person, to initiate or commence an action respecting human rights once he or she perceived that his constitutional rights or the rights of another person on behalf of whom he or she is acting is violated. It is submitted that by abolishing the principle of *locus standi* the new Rules encourage 'busy-body' litigations which may in the long run advance rather than hinders the Nigerian public interest. *Locus standi* is defined as the "place of standing" that is, the right to bring an action or to be heard in a given forum.⁹

In *Senator Adesanya v. The President of Federal Republic of Nigeria & Ors*,¹⁰ the Supreme Court of Nigeria, per Fatayi William CJN held thus:

The term 'Locus Standi' denotes legal capacity to institute proceedings in a court of law. It is used interchangeably with the terms like 'standing' or 'title to sue'. The question which of course naturally arise are...if in a developing country like Nigeria with a written Constitution, a Legislative enactment appears to be ultra vires Constitution or an Act infringe any of its provisions dealing with fundamental rights who has the locus standi to challenge its constitutionality? Does or should any member of the public have the right to sue? Or should locus standi be confined to persons who vested legal rights

⁹ Garner, B.A., op. cit., p. 952.

¹⁰ (1981) 5 SC 112; It has been observed that there were two views on the scope of *Locus Standi* in the above cited case of *Adesanya v. The President of Federal Republic of Nigeria & Ors*. First, is the restrictive view which was then the majority view of apex court, while the second view was the liberal view championed by the dissenting decision of Fatayi Williams CJN (as he then was). The majority view led by Bello JSC was to the effect that an act of any arm of government is not unconstitutional without any allegations of infraction of, or its adverse effect on one's civil rights and obligations poses no question to be settled between the parties. Williams on his part was of the view that it is not desirable to subject the interpretation of the constitutional provisions to unnecessary technicalities. That it is a civil right of any person who is subject to the laws of Nigeria to see to its enforcement. See Ogbu, O.N., *Human Rights Law and Practice in Nigeria: An Introduction*. CIDJAP Publishers, Enugu, 1999, pp. 288-289.

are directly interfered with by measure taken or to persons whose interests are liable to be specially affected by its operation or to an Attorney General who is a functionary of the executive branch...I take significant cognizance of the fact that Nigeria is a developing country with multi ethnic society and a written Federal Constitution, where rumour mongering is the past time of the market places and the construction sites. To deny any member of such society who is aware or believe or is led to believe, that there has been an infraction of any of the provisions of our Constitution or that any law passed by any of our legislative house, whether federal or state is unconstitutional, access to court of law to air his grievance on the flimsy excuse of lack of sufficient interest is to provide a ready recipe for organized disenchantment with the judicial... it is better to allow a party to go to court and to be heard than to refuse access to our courts. Non access in my mind will stimulate the free for all in the media to which law is Constitutional and which law is not. In any case our courts have inherit powers to deal with vexatious litigants or frivolous claims. If we are to keep our democracy there must be one commandment YOU SHALL NOT RATION JUSTICE... By coming to court to ask for declaration, the plaintiff/Appellant... has completely misconceived his role as a Senator. In short Senator Adesanya has no locus standi in this particular case...

Though, the Appellant, Senator Adesanya did not succeed on the ground that he lacked the requisite *standi* or sufficient interest to initiate the action, the decision became the precursor to subsequent cases which seem to

watered down the potency of the concept of *locus standi* in constitutional issues.

In *A.G. Bendel State v. A.G. Federation & Ors*,¹¹ the apex court, per Eso JSC, held thus; "on constitutional issues... let there be floodgates. The Constitution can only be tested in the courts for such test will give satisfaction to the people for whom the Constitution is made..."

Also in *A.G., Kaduna State v. Hassan*,¹² the apex court held, per Oputa JSC, that:

"There is perhaps no question more fundamental in the whole process of adjudication than that of access to the courts. He who cannot even reach the courts cannot talk of justice from these courts. It is in this context and for this fundamental occasion that many legal systems are now relaxing the severity of their rules regarding locus standi..."

Thus, in *Constitutional Rights Project v. The President of the Federal Republic of Nigeria*,¹³ the applicant registered under CAMA 1990 as a human rights organization brought an application to stop the execution of Major-General Zamani Lekwot and five others who were condemned to death by Zango-Kataf Disturbances, Tribunal Kaduna on the ground that they did not receive fair hearing. The High Court of Lagos State presided by Justice M.O. Onalaja not only assumed jurisdiction in the case and restrained the government from executing the convicts but rejected the objections of the respondent on the issue of *locus standi* by stating that the applicant has the *locus standi* to initiate the suit. The court further held that the *African Charter on Human and Peoples Rights* which preserves the jurisdiction of Nigerian Courts overrides the ouster of jurisdiction clauses in our Decrees.

¹¹ (1981) 10 SC 190.

¹² *1985) 2 NWLR (pt 8) 48.

¹³ Suit No. M/102/93. Reported in *Journal of Human Rights Law and Practice*. Vol. 4, No 91, 213, December 1994, pp. 218-249.

This decision appears not to give consideration to *Federal Military Government (Supremacy and Enforcement of Powers) Decree* which made Decrees and Edicts superior to all other laws during military regimes.¹⁴

Besides, in *Owners of M/V Baco Lines Ors v. Emmanuel Adeniyi*,¹⁵ the Court of Appeal, per Tobi JCA (as he then was) held that where it is proved that a plaintiff lacks *locus standi* to bring an action, the court will decline jurisdiction as it has none. A court of law has no jurisdiction to manufacture *locus standi* on a party and arrogate to itself jurisdiction that is never done.

What is now certain under the FREP Rules 2009 is that, the court shall welcome public interest litigations and allow access to court in human rights field. The vexed issue of *locus standi* has been put to rest in human rights cases. Thus, any person whether in his own interest or on behalf of another person may commence public interest litigation in human right fields. This is not without its negative effect, because the courts must be prepared to have their hands full of such litigations. The question to ask now is; can the preamble of the FREP Rules 2009 overrides statutory and judicial authorities?

It can be stated here that the corpse of *locus standi* might not have been completely buried. This is because the provisions of section 3 (e) of the Preamble to the FREP Rules and Order 13 Rules 1 and 2 thereof appear to be in conflict with the provisions of section 6(6) (b), 36 (1), and 46 (1) of the *Constitution of the Federal Republic of Nigeria 1999*. For a better appreciation of the provisions afore-stated, the same are reproduced herein.

Section 6(6) (b) CFRN 1999 provides that; The judicial powers...shall extend to all matters between persons, or between government or authority and to any person in Nigeria and all actions and proceedings relating thereto, for the determination of any question as to the *Civil rights and obligations of that person*.

On its part, section 36 (1) CFRN 1999 provides that; *in determination of his civil rights and obligation*, including any question or determination by or

¹⁴ See for example the *Federal Military Government (Supremacy and Enforcement of Powers) Decree No. 107 of 1993*.

¹⁵ (1993)2 NWLR (pt 274) 195. Also in *Akilu v. Fawehinmi* (1989) 2 NWLR (pt 102) 483, the Supreme Court maintained that *Locus Standi* is still the law of the land.

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 manners as to secure its independence and impartiality. While section 46 (1) CFRN 1999 provides thus; “Any person who alleges that any of the provisions of this chapter has been, is being or likely to be contravened in any state *in relation to him* may apply to the High Court in that state for redress.”¹⁶ It is submitted that the combine effects of the afore-stated constitutional provisions and the Supreme Court decision in *Akilu v. Fawehinmi (supra)* make room for the principle of *locus standi* under Nigeria law.

According to Okany;¹⁷

There are provisions under the Constitution of the Federal Republic of Nigeria 1999 which requires locus standi in bringing certain suits in courts... the right to a fair hearing under S. 36 (1) CFRN 1999 should avail when a court or tribunal is determining the ‘civil rights and obligations of the party... S. 46 (1)¹⁸ confers the right of access to the courts in respect of breach of fundamental rights in question which must relate to the individual who is alleging the breach...’ The language of these constitutional provisions show that locus standi is required in order to sustain a claim that there has been an infringement of a particular provision of the Constitution.¹⁹

The principle of *locus standi*, being a constitutional requirement²⁰ cannot be abolished by the Chief Justice of Nigeria without the necessary constitutional amendments. The Constitution is the supreme law in Nigeria. Any law which is inconsistent with the provisions of the Constitution shall

¹⁶ See also Order 2 Rule 1 FREP Rules 2009.

¹⁷ Okany, M.C., *Nigerian Administrative Law*. Africa Fep Publishers Ltd, Onitsha, 2007, p.325-326.

¹⁸ CFRN 1999.

¹⁹ Okany, M.C., *op cit.*, See also Olang, A.M., *Administrative Law in Nigeria*. Malthouse Press Ltd. Lagos, 1999, p.96.

²⁰ See Sections 6(6) (b), 36 (1) and 46 (1) CFRN 1999.

to the extent of the inconsistency be void.²¹ In *Adekoye v. Nigerian Security Printing and Minting Company Ltd*, the apex court held that the provisions of the Constitution are supreme over any other provision, law or Act of the National Assembly.

It is not in doubt that under the new FREP Rules 2009 any person with the requisite locus may commence human rights action in his own interest but whether or not any person acting on behalf of another person, group, or class of persons or an association or even in the public interest will commence an action, much are yet to be seen or determined by the courts. The High Court of Lagos state decision in the case of *CRC v. the President of the Federal Republic of Nigeria (supra)* may be valid during military rule in Nigeria where the provisions of the African Charter can be said to override the ouster of jurisdiction clauses in the Decrees.²² The same cannot hold water in the civilian dispensation where the Constitution is the supreme law and the provisions of the *African Charter* which is an Act of the National Assembly, is subordinated to it.

It is recommended here that the relevant constitutional provisions be amended to capture issues of public interest litigation.

Mode of Commencement

Hitherto, an applicant seeking to enforce a fundamental right must first seek the leave of the High Court in the state where the infringement has taken place.²³ Thus in *Udene v. Ugwu*,²⁴ the Court of Appeal, per Achike JCA held that: I find it difficult to appreciate that since the coming into operation of the Rules on 1/1/80 that any court can in its whims and caprices set the rules aside wherever any such applications for violation of fundamental rights is before the court and in respect of which no leave was sought for and obtained. The respectable conclusion one would be drawn to is that the court lacks competence to entertain it and the same should be struck out. The application for leave under the old FREP Rules must be brought within 12 months from the date of the happening of the event or act complained of, failing which the application shall be refused.²⁵ In *Akanbi v. Gnagnatumi &*

²¹ See Section 1 (1) & (3) CFRN 1999.

²² See also Pats-Acholomu J.C.A in *Favvehinni v. Abacha* (1996) 9 NWLR 719.

²³ See Order 1 Rule 2 (2) FREP Rules 1979.

²⁴ (1992) 3 NWLR (pt 491) 57 at 67-68.

²⁵ See Order 1 Rule 3 (1) FREP Rules 1979.

Ors,²⁶ an application for leave made pursuant to the old FREP Rules was dismissed on the ground that it was made over 14 months after the act complained of.

The requirement for leave (permission to proceed with an action) was justified on the ground that it enables many unmeritorious cases to be disposed of summarily if an arguable case cannot be shown. In principle it seems wrong to impose this special requirement on proceedings against public authorities, who ought not to be treated more favourably than other litigants.²⁷

The new FREP Rules has abolished the requirement for leave. Hence, an application for the enforcement of a fundamental right may be made by any originating process accepted by the court which shall lie without leave of court. The 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. Also the application shall be accompanied by a written address which shall be succinct argument in support of the grounds of the application.²⁸

The respondent who intends to oppose the application shall file his written address within 5 days of the service on him of such application and may accompany it with a counter affidavit. The applicant on being served with the respondent's processes may file his reply on points of law with or without a further affidavit.

Requirement for Affidavit of Service

Under the old Rules it is mandatory to the applicant to file an affidavit of service which must state the names and address of the respondents before the hearing of the application failing which will be fatal and robs the court of jurisdiction to hear the application. Failure to fulfill this precondition is not a mere irregularity but it impacts upon the competence of the trial court to

²⁶ (1984) 5 NCLR 722.

²⁷ Wade H. W.R. & Forsyth, C.F., *Administrative Law* 9th edition, Oxford University Press, New Delhi, 2005, p. 657.

²⁸ See Order 2 Rules 2-5 thereof.

entertain the action.²⁹ This requirement has been abolished by the new Rules. It is a positive step in the right direction and the same must be commended because it has created and led to untold hardship on the part of applicants under the old FREP Rules.³⁰

The Exclusion of the Application of Statute of Limitation in Fundamental Rights Cases.

One notable addition made by the 2009 rules is to be found in Order 3 which shielded application for the enforcement of fundamental rights from Statute of Limitations. In other words, no matter how long an application for redress in fundamental rights issues take, it will not be affected by any other law that prescribe time limit within which such applications are to be made. The essence of statute of limitation is to allow public officers to enjoy a limited form of protection in respect of all actions.³¹

An instance of limitation placed by a statute on commencement of actions is to be found in section 2 of the *Public Officers Protection Act*³² which provides:

Where any action, prosecution or other proceedings is commenced against any person for any act done in pursuance or execution or intended execution of any Ordinance (Act) or law or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such Ordinance (Act), law, duty or authority, the following provisions shall have effect;

- (a) The action, prosecution, or proceeding shall not lie or be instituted unless it is commenced within three months next after the act, neglect or default complained of, or in case of continuance of damage or injury, within three months after the ceasing thereof.

The question that will seem to bug our minds is; can a rule of procedure, in this case FREP Rules 2009 alter, modify or overrides statutory provisions,

²⁹ See Order 2 Rule 1 (4) FREP Rules 1979; see *Chukwuogor v. Chukwuogor* (2007) ALL FWRL (pt 349) 1154 at 1166 paras D-F.

³⁰ See Suit No. KDH/Z/103/08 *Salihu Halilu Tumbuku v. C.O.P. Kaduna State & Ors* and Suit No. KDH/Z/34/09 *Alh. Salihu Ali Kwastan v. Zaria Local Govt. & 1 Or.*

³¹ Thyomade, B.O. & Eka, B.O., *Cases and Materials on Administrative Law in Nigeria*. Obafemi Awolowo University Press Ltd, Ile-Ife, 1992, p. 507.

³² Cap. P41 LFN 2004.

that is, the *Public Officers Protection Act*? It is submitted that the answer to the above poser is in the affirmative because the law is that an action under the FREP Rules is a peculiar action... a special action... the procedure of which must be specifically or strictly followed because the rules have the same force of law as the constitution itself.³³ Commenting on the legal status of the FREP Rules, Falana³⁴ observed that the FREP Rules were made pursuant to Section 42 (3) of the 1979 Constitution (now Section 46 (3) of the 1999 Constitution) they are deemed to be at par with the provisions of the Constitution. Since they have the same force as the Constitution itself, the FREP Rules are higher than other laws in hierarchy of superiority of laws. In the case of any inconsistency the FREP Rules and any other law the former will prevail to the extent of such inconsistency. Therefore the FREP Rules will override any other enactment made to limit the period of enforcement of fundamental rights.³⁵

Order 3 of the new Rules have now come to the aid of the applicant to limit the application of the statute of limitations. This is a welcome development which will make public officers cautious in the way and manner in which they approach issues bordering on a citizens fundamental rights, hence it will deter them from breaching same as no matter how long it takes, they can be held accountable.

Hearing of the Application

Unlike under the 1979 rules, the new rules provide that the hearing of an application to enforce a fundamental right shall be based on the party's written address.³⁶ However the Rules allow each party twenty minutes to proffer oral arguments in respect of matters not contained in their respective written addresses, which came to their knowledge after they had filed the written address.³⁷ The position taken by the new rules is in line with the current trend of front loading in civil litigations with front loading approach,³⁸ both the applicant and the respondent are now expected to reveal their entire case before trial. The objectives of the front loading

³³ See *Abia State University, Uturu v. Anyaibe* (1996) 1 NWLR (pt 439) 646 at 660-661.

³⁴ Falana, F., *Fundamental Rights Enforcement*. Legal Text Publishing Company Ltd., Lagos, 2004.

³⁵ In *FRN v. Ifegwu* (2003) 45 WRN 27 at 69, the attempt to invoke the provisions of the *Public Officers Protection Act* to prevent the enforcement of fundamental right to fair hearing was rejected by the Supreme Court.

³⁶ Order 12 Rule 1.

³⁷ Order 12 Rule 2.

³⁸ See for example the *Kaduna State High Court (Civil Procedure) Rules*, 2007.

requirement are to discourage the filing of weak and frivolous cases; to afford the parties an opportunity to assess the relative strength and weakness of their case and thus facilitate settlement at the earliest possible time before too much expenses are incurred and to identify and focuses attention on the main issues from the onset and thus avoid the tendency to dissipate energy on irrelevances. These, it is submitted are essentially aimed at achieving just, efficient and speedy dispensation of justice.

Application of Civil Procedure Rules of the Court in the FREP Rules 2009.

Also worthy of note is the provision of Order 15 Rule 4 of the FREP Rules 2009. The provision is to the effect that in the course of any human rights proceedings, any situation arises which there is or appears to be no adequate provision in the FREP Rules, the civil procedure rules of the court for the time being in force shall apply. Before now, Judges and counsel have taken the view that the Fundamental Rights (Enforcement Procedures) Rules are distinct from the High Court Civil Procedure Rules as such neither can be employed to complement or aid the other in the event of a *lacuna* in the course of proceedings.³⁹ This is a revolution in our court practice and procedure for which *Kudos* has to be given to the framers of the new FREP Rules. Now, recourse can be had to the provisions of the civil procedure rules of the court in force for the time being. This will reduce the possibility of using technicalities to hinder the course of justice.

Conclusion

The foregoing is an attempt to highlight some of the changes brought about by the new FREP Rules 2009. The 2009 Rules brought about novel provisions that will go along way in enhancing the applicant's right of access to court for redress in respect of fundamental rights issues not only under Chapter IV of the *Constitution of the Federal Republic of Nigeria, 1999* but even those given to the applicant by the *African Charter on Human and Peoples Rights*. However, for such changes brought about by the new rules to bear fruits, areas of likely conflicts with the Constitution would require constitutional amendments. Perhaps, more personnel may be required to handle the floodgate of cases that the procedure under the new Rules would entail.

³⁹ This became a subject of heated debate during the interactive sessions of Zaria Bar Week held at the Kongo Conference Hotel, Zaria in August 2009.