

CHAPTER **FOURTEEN**

BETWEEN A CINCH AND A CATCH-22 IN PROCEDURAL EFFICIENCY, STATUTORY DEADLINES, AND THE QUEST FOR SUBSTANTIVE JUSTICE IN NIGERIAN PRE-ELECTION LAW

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14.1 INTRODUCTION

The Nigerian electoral landscape is uniquely characterised by a compressed judicial timeline for the resolution of pre-election disputes.¹ The increasing use of time limits in election-related matters has assumed constitutional flavour as Section 285 of the Constitution of the Federal Republic of Nigeria 1999 (as amended) contains express provisions relating to time limits for both pre-election and post-election matters.² By virtue of these constitutional provisions and the Electoral Act, 2022, pre-election matters must be commenced and concluded within a 180-day period. This stringent

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¹Section 285

² Section 285 (5) provides for 21 days within which to file an election petition while subsection (6) mandates the tribunal to deliver judgment within 180 days of the filing of the petition. An appellate court (inclusive of the Supreme Court) has 60 days within which to deliver its judgment from the date of delivery of the judgment of the tribunal or Court of Appeal. Subsection (7) is very instructive in this regard. Subsection (9) provides that every pre-election matter shall be filed not later than 14 days from the date of the accrual of the cause of action and the judgment in such pre-election matter must be delivered within 180 days of its filings. The appellate court in a situation akin to election appeals have 60 days within which to determine the appeal while the notice of appeal itself must have been filed within 14 days from the delivery of the judgment being complained of.

timeframe represents a legislative response to the imperativeness of electoral certainty and the expeditious resolution of disputes before the main polls. In judgments reminiscent of the Biblical instruction to 'touch not my anointed', courts have treated these statutory periods and time limitations as untouchable and inviolable. This much is beyond doubt to anyone with the faintest acquaintance with electoral law and practice in Nigeria.

The Supreme Court, in *ANPP v Goni*,³ affirmed the constitutional time frame of being a rock of Gibraltar or mount Zion which cannot be changed, extended or elongated. This constitutional inviolability is well-settled. However, in recent times, the application of the Constitutional stipulation of time frame has been extended to rules and practice direction of the court, which are subsidiary legislations to the Constitution. This extension demonstrated through an analysis of *Akan Ekpe Okon v PDP & 2 Ors*,⁴ where the timelines were given no exceptions, despite the fact that the individual who was meant to file the process was kidnapped, has created a troubling jurisprudential development that threatens the very essence of substantive law. Simultaneously, to give effect to the constitutional and statutory mandate for speedy resolution, the Chief Judge of the Federal High Court, pursuant to the powers conferred on him, issued the Federal High Court (Pre-Election) Practice Directions, 2022. A central feature of this Practice Directions is the directive in Paragraph 4 that all pre-election matters shall be commenced by way of an Originating Summons. The stated rationale is sound on its face: an originating summons procedure, being predicated on affidavit evidence without the need for oral testimony and cross-examination, is inherently faster than a Writ of Summons, which involves pleadings, discovery, and a full trial. The objectives of the Practice Direction, as articulated in its preamble,⁵ are to "provide for a fair, impartial and expeditious determination of pre-election cases; ensure that in all election matters, the parties focus on matters which are genuinely in issue" and, very importantly, "minimize undue adjournments and delays in the conduct of matters."⁶

³(2012) LPELR – 7830 (SC)

⁴CA/C/369/2022 ruling delivered on 24th December 2022

⁵Preamble to the Federal High Court (Pre-Election) Practice Directions, 2022.

⁶ Preamble to the Federal High Court (Pre-Election) Practice Directions, 2022.

Yet, this quest for procedural efficiency has collided headlong with a fundamental and long-standing principle of Nigerian jurisprudence: those cases involving contentious or disputed facts are unsuitable for determination by Originating Summons.⁷ The Supreme Court has consistently held that where facts are riotously in dispute, a Writ of Summons, leading to a full trial with *viva voce* evidence (oral evidence) and cross-examination, is the appropriate vehicle for .⁸ This paper argues that the mandatory imposition of the Originating Summons procedure for all pre-election matters, irrespective of the factual contentiousness of the dispute, creates a profound inconsistency within the Nigerian legal system. It elevates a procedural rule which is ordinarily designed as a handmaiden to, above the substantive justice it is meant to serve, thereby trapping litigants in a procedural Catch-22 where adherence to the Practice Directions can lead to the fatal failure of their case.⁹ The choice of the phrase 'Catch-22' is deliberate and apt as it describes a situation of circular logic wherein a litigant is confronted with mutually conflicting requirements, such that compliance with one necessarily constitutes violation of the other.¹⁰ This is precisely the predicament of the Nigerian pre-election litigant who is faced with either complying with the Practice Directions by

⁷Ajibulu v. Ajayi (2013) LPELR-21860(SC) (PP. 24-25 PARAS. E),

⁸ Olu of Warri Ogiame Atuwase II & Ors v Gov. of Delta State & Ors at (2022) LPELR – 52341 (SC) 16 Paras B-C

⁹In INEC v Julde (2023) LPELR – 59841 (CA) at 29-30 Paras A-B, the Court of Appeal held that "the point to underscore is that Rules of Court are meant to be obeyed and not treated with levity, for it is the observance of the rules that make for hitch-free administration of . See OGUNPEHIN v NUCLEUS VENTURES (2019) LPELR-48772 (SC) and DUKE v AKPABUYO [2005] 19 NWLR (PT. 959) 130. But rules of Court are designed for ensuring that is obtained by the parties in the citadel of [see MAINSTREET BANK REGISTRARS LIMITED v ELDER DAVID ALABI OGUNDIMU (2022) LPELR-57273(CA) 1 at 16 - 17] and we must never lose sight of the fact that rules of Court are not masters but handmaidens in the quest for doing substantial . See MMUODILI v ONWUBA (2020) LPELR-55917(SC). Thus, the Court will not hesitate to extricate itself from the clutches or rigour of strict observance where they clog the access to . As Lord Atkin famously intoned in UNITED AUSTRALIA v BARCLAYS BANK (1941) A. C. 1 at 29: "When these ghosts of the past stand in the path of clanking their mediaeval chains, the proper course for the judge is to pass through them undeterred."

¹⁰The Phrase "Catch-22" originated from the satirical war novel, "Catch-22" written by Joseph Heller in 1961 and it means "a paradoxical situation from which an individual cannot escape because of contradictory rules or limitations." See the Idioms, available at <https://www.theidioms.com>

using Originating Summons and facing the risk of the suit being struck out for improper commencement where facts are contentious; or using the procedurally appropriate Writ of Summons and facing immediate challenge for violating the Practice Directions. This is no longer a mere conundrum; it has crystallised into an untenable paradox demanding urgent judicial and legislative resolution.

14.2 THE JURISPRUDENTIAL FOUNDATION: SUI GENERIS NATURE AND INVIOABLE TIMELINES

A recurring theme in electoral law and decisions arising therefrom is that election matters are *sui generis* (of its own kind) and ought to be treated as such. In *LP & Ors v Amao*,¹¹ the Court of Appeal per Barka JCA brought to the fore the essence of provisions of this nature:

In election matters, unlike other matters, time is always of essence. The rights of a litigant is (sic) curtailed by a time frame, after which the legal maxim, *Ubi remedium* may not apply.

Similarly, in *Olubukola & Anor v A.G Lagos State & Ors*,¹² the Court of Appeal held:

One fundamental point that must be made at this stage is the effect of timing on institution of the suit. The *sui generis* nature of matters relating to elections has unwittingly made time of taking steps an important element. An otherwise legitimate claim in ordinary civil action fails to fly in election matter for failure to act within certain timelines.

The selection of these two decisions is deliberate. The same court, in decisions delivered a year apart, expressly highlighted the dire situation where an ordinarily legitimate and valid cause of action becomes stale or irredeemably incurable because of the failure to adhere to specific timelines, even though there is a reasonable, genuine and compassionate cause of action. The criticisms that this position infringes upon the right to

¹¹(2017) LPELR – 43748 (CA) at 16-18 Paras D-D

¹²(2016) LPELR – 41451 (CA) at 35 Para A

fair hearing have been persistent, yet despite these criticisms, the position of the law on this point has come to stay.¹³ The Supreme Court reaffirmed this position in *PDP v Richard Egenti*.¹⁴ Commenting on the obvious harshness of this position in some instances, the Court of Appeal in *Mustapher & Anor v Danladi & Ors*¹⁵ held:

...it is my view that section 285(6) (supra) is like a statute of limitation which takes away the right of action from a party leaving him with an unenforceable cause of action. The law may be harsh but it is the law and must be obeyed to the latter; more so when it is a constitutional provision."

It is thus clear that as far as Nigerian electoral jurisprudence is concerned, constitutional timelines are absolute, immutable, and incapable of extension. The jurisprudence admits of no exception, no compassion, and no equitable intervention. The time fixed by the Constitution is, indeed, like the rock of Gibraltar.¹⁶ The settled principle articulated above relates strictly to the express provisions of the Constitution. However, recent judicial decisions have extended this principle of non-extension to time limits prescribed by rules of court and practice directions, treating these subsidiary instruments as though they possessed constitutional force. This extension was dramatically illustrated in *Akan Ekpe Okon v PDP & 2 Ors*.¹⁷

14.3 SYNOPSIS OF AKAN EKPE OKON V PDP & 2 ORS

This appeal arose from a Governorship pre-election matter from Akwa Ibom State. The Appellant had appealed against the judgment of the trial Federal High Court and, in pursuance of the said appeal, had filed and served the Appellant's brief of argument on all Respondents. Pursuant to the Election Judicial Proceedings Practice Directions, 2022, a Respondent to an appeal

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¹⁴SC.1330/19 delivered on 11th February 2019

¹⁵(2015) LPELR – 41655 (CA) at 51-54 Paras B-F

¹⁶It is believed that the Rock of Gibraltar which is a monolithic limestone mountain dominating the western entrance to the Mediterranean Sea is permanent and cannot be moved. See Edward G. Lengel, *The Rock of Legend: Gibraltar* available at <https://www.historynet.com/rock-legend-gibraltar/>

¹⁷CA/C/369/2022 with ruling delivered on 24th December 2022.

had five days from the service of the Appellant's brief of argument to file his Respondent's brief. The 2nd Respondent, in a bid to file his brief, commissioned one Nseobong Akrah, an administrative officer in the law firm of his counsel, to file the said brief of argument. Akrah was, however, kidnapped on his way to file the Respondent's brief and was not released until ten days after. When the 2nd Respondent discovered that the officer who had been dispatched was incommunicado, his counsel hurriedly filed another brief of argument, albeit one day after the five days prescribed by the Practice Directions. An application for extension of time to file the brief, supported by evidence including a police extract documenting the kidnapping, was however refused by the Court of Appeal. The Court held that the provisions of the Practice Directions are inviolable. In dismissing the application, the Court particularly relied on Paragraph 14(c) of the Practice Directions, which provides that "Any Brief of Argument which does not comply with these provisions shall be invalid." The net effect of this decision is stark to the effect that the Court of Appeal equated the provisions of the Practice Directions, ordinarily a subsidiary legislation made by the President of the Court of Appeal, with the Constitution of the Federal Republic of Nigeria, and refused an application to extend time despite the extraordinary circumstance of the kidnapping of the very person charged with filing the process within time.

The decision in *Akan Ekpe Okon* amongst others, compels a fundamental inquiry, seeking to determine whether time frames prescribed by rules of court or practice directions are inviolable in the same manner as constitutional time limits. Can it be said that time fixed by the President of the Court of Appeal is synonymous with time fixed by the Constitution? This question demands urgent resolution. The Court of Appeal in *Akan Ekpe Okon* purported to follow the Supreme Court decision in *Okechukwu v INEC*,¹⁸ where the Apex Court held:

"However, there is little or practically nothing this Court can do in the peculiar circumstance of the instant practice directions made pursuant to the provisions of the 1999 Constitution (as amended) on the computation of time to file processes in the prosecution of election appeals in this Court. In the result, not having been filed

¹⁸(2014) 17 NWLR (Pt. 1435) 255 at 285-285 Paras G-A

within five days of the service of the Appellant's Brief of Argument, the 26th Respondent's Brief of Argument which was filed on 26th August, 2014, was filed outside the required five days and therefore out of time. In the circumstance, it is incompetent and liable to be struck out. Accordingly, it is struck out and shall not be countenanced."

It must be noted, however, that the *ratio decidendi* (reason for the decision) in *Okechukwu* was likely that the brief was filed out of time without leave of court. Indeed, in *Sani v Agara*,¹⁹ the Court of Appeal held that a process filed outside time without leave of court to file same is void. The principle of non-extension of time has been further reinforced in *African Democratic Congress v INEC*²⁰ and *PDP v INEC*.²¹ Proponents of the view that time prescriptions in practice directions should enjoy constitutional status point to the long title of the Practice Directions.²² This suggests that the Practice Directions, being subsidiary legislation made pursuant to the Constitution, should be accorded a similar status as the Supreme Court held in *Governor of Oyo State & Ors v Folayan*,²³ 'a subsidiary legislation derives its validity and authority from a substantive Law.' Yet this proposition which suggests that validity derived from constitutional source confers constitutional inviolability, may be argued to be jurisprudentially unsound as it confuses the source of authority with the nature of the instrument. A practice direction, however validly made, remains a subsidiary instrument. It is not the Constitution. To hold otherwise is to blur the fundamental distinction between the supreme law of the land and the procedural regulations made thereunder.

The jurisprudence of the Supreme Court on the proper approach to rules of court is equally well-settled, and it stands in stark opposition to the

¹⁹(2010) 2 NWLR (Pt. 1178) 371 at 401 Paras B-C

²⁰(2022) LPELR – 59080 (CA)

²¹(2014) 17 NWLR (Pt. 1437) 525

²²"In exercise of the powers conferred on me by Sections 243, 248 and 285 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended), Section 140 of the Electoral Act, 2022 and by virtue of all other powers enabling me in that behalf, I, MONICA BOLNA'AN DONGBAM-MENSEM, President of the Court of Appeal, hereby issue the following Practice Directions."

²³(1995) LPELR – 3179 (SC) at 59 Paras C-F

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reasoning in *Akan Ekpe Okon*. The apex court has repeatedly and emphatically held that rules of court, including practice directions, are handmaidens of and not its masters. The decisions in *Duke v Akpabuyo Local Government*,²⁴ and *Alhaji Atiku Abubakar & Ors v Alhaji Umaru Musa Yar'adua*,²⁵ are very important in this regard. This principle has been affirmed in numerous decisions, including *AG Bendel State v AGF*,²⁶ *Oduah v FRN*,²⁷ and *Brittana-U Nigeria Ltd v Seplat Petroleum Development Company Ltd & Ors*.²⁸ The law is also trite that courts should frown upon technicalities: *State v Gwonto*,²⁹ *Ochor v Ojo*.³⁰ Remarkably, even the Court of Appeal, incidentally, the very court that decided *Akan Ekpe Okon*, has itself taken a radically different approach to the same Practice Directions. In *Umar Ibrahim v INEC*,³¹ the Court of Appeal held:

"I should also add, that the Practice Direction of this Court is a procedural guide, made by the Hon. President of the Court of Appeal, to assist the parties and the Registry of the Court in orderly and prompt presentations of Appeals for adjudication, in view of the time constraints in respect of time bound cases, in particular. The Practice Direction was therefore, not intended to take away the right of proper adjudication, or of fair hearing of causes and matters, within the confines of substantial . The Practice Direction, like the rules of Court, are meant to assist the Court to do ."³²

Thus, it is suggested with all sense of responsibility that there exists a clear and undeniable conflict in the jurisprudence of the Court of Appeal itself. The enormity of this conflicted jurisprudence is exacerbated by the fact that the Court of Appeal is a final court in many pre-election and election petition disputes. In *Akan Ekpe Okon*, the Court treated the Practice Directions as inviolable and refused relief despite compelling circumstances. In *Umar*

²⁴(2005) 19 NWLR (Pt. 259) 130 at 142-143

²⁵(2008) 4 WNL (Pt. 1078) 456 at 511

²⁶(1982) 3 NCLR 1

²⁷(2012) 11 NWLR (Pt. 1310) 76 at 104 Para H

²⁸(2016) LPELR – 40007 (SC) 1 at 58 Paras C-D

²⁹(1983) 1 SCNLR 142 at 160

³⁰(2008) 13 NWLR (Pt. 891) 639

³¹(2022) LPELR – 58822 (CA) 1 at 12-15

³²*INEC v Mbawike & Ors* (2017) LPELR – 41623 (CA)

Ibrahim v INEC, the same Court, interpreting the same Practice Directions, held that they are mere procedural guides not intended to "choke, annihilate, asphyxiate and strangle." This conflict cannot persist as it undermines the predictability and coherence of electoral jurisprudence and leaves litigants at the mercy of judicial serendipity where their fate determined not by settled principle but by the particular panel before which their matter falls.

14.4 THE ORIGINATING SUMMONS MANDATE

The tension between procedural rigidity and substantive finds another, equally troubling, expression in the mandatory use of Originating Summons for pre-election matters at the trial court. A clear understanding of the procedural dichotomy between Originating Summons and Writ of Summons is essential to appreciating the conflict. An Originating Summons is designed for the determination of short questions of law, construction, or interpretation, where the material facts are not in dispute.³³ It is a proceeding on affidavit evidence, with limited or no cross-examination, and its advantages are speed, lower cost, and efficiency.³⁴

Conversely, a Writ of Summons is the standard mode of commencing actions where the facts are in serious dispute. It initiates a process of pleadings (Statement of Claim and Statement of Defence), where parties clearly define the issues in controversy. This is followed by a full trial where witnesses testify orally, are cross-examined, and documents are formally tendered. This process is indispensable for resolving conflicts in evidence, testing credibility, and making findings of fact.³⁵ However, the distinction between 'hostile' and 'non-hostile' facts may not be as helpful in reality as it first appears. The question that begs to be answered is: can a case ever be litigated without facts? Can a case suddenly become unsuited for Originating Summons because the facts are in dispute? If facts are never in dispute, would there be reason to approach the courts in the first instance? The Court of Appeal per Eko JCA in *Asogwa v PDP & Ors*³⁶ noted the importance of facts in dispute as follows:

³³Regd Trustees, A.S.P & M.D.A. v John (2020) 17 NWLR (Pt. 1753) 189

³⁴Ashayi v A.P.C (2023) 18 NWLR (Pt. 1916) 297

³⁵Ashayi v A.P.C (Supra)

³⁶(2012) LPELR-8575(CA) (Pp. 19 paras. B)

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"It cannot be denied that every case is decided on the peculiar facts before the court. Facts, therefore, are the fountainhead of the law. The courts in deciding cases, determine the issues therein by relating the facts to the issues and the law. The significance and importance of facts to adjudication by the courts cannot be down played. It is for this reason the Supreme Court stated, in *A.G., BENDEL STATE v. A.G., FEDERATION* (1983) 1 SCNLR 239 and *A.G., ABIA STATE v. A.G. FEDERATION* (2005) 16 NWLR [pt.1005] 262 at 361, that facts being the fountain head of the law, decisions or determination of cases are related to the facts and each case should be considered in its factual milieu."

It is on this basis that the Supreme Court in *Sani v Kogi State House of Assembly*³⁷ held that not every matter commenced by originating summons must be devoid of disputes, for it is the disputes in the facts that give rise to litigation. Yet the jurisprudence of the Supreme Court on this point remains ambiguous. In *Sulaiman & Ors v APC & Ors*,³⁸ the Court held that a plaintiff must fight on pleadings where all the disputes as contained in the affidavit and counter-affidavits of the parties will be resolved through the test of oral cross-examination. It cannot be otherwise, as substantial disputes can only be resolved in the usual adversarial proceedings upon the settlement and exchange of pleadings, with averments in pleadings borne out by oral evidence and oral evidence tested in cross-examination. The importance of the mode of commencing a pre-election case came to the fore in *APC v Bashir Sheriff*.³⁹ The 1st Respondent had by Originating Summons filed at the trial Court, sought that the 2nd Respondent should not be recognized as the Appellant's candidate for the Yobe North Senatorial District as submitted to INEC.

³⁷(2019) 4 NWLR (Pt. 1661) 172

³⁸LPELR-58846(SC) (PP. 93-99 PARAS. D).

³⁹(2023) LPELR – 59953 (SC)

The crux of his case was that the candidate whose name was submitted to INEC had contested for and lost the presidential primary election but was allowed to contest another primary election without notice. The trial court agreed with the 1st Respondent, and this judgment was affirmed by the Court of Appeal. On appeal to the Supreme Court, a sole issue was argued: whether, in the circumstances of the appeal, especially with allegations of fraud and irreconcilable conflicts in the parties' affidavits and further affidavits, the Court of Appeal was correct to hold that the trial court was right to have adjudicated the 1st Respondent's case on Originating Summons. The Supreme Court, per Nweze JSC, held that the suit was improperly commenced. His Lordship reasoned:

"What then are the facts in this case? The facts are not to be found in submissions of counsel but in the affidavit evidence before the Court. I am aware that it is not every seeming conflict arising from affidavit evidence that would warrant the calling of or resort to oral evidence for its resolution. However, where the issues of facts are contentious and border on the copious allegations of fraudulent practices as in the first respondent's suit, it calls for caution on the path of the Court from rushing to determine such a claim on affidavit evidence alone in an Originating Summons, as such a case is, in my view, one more suited and proper for determination on the pleadings and evidence of the parties under the procedure by way of a Writ of Summons."

His Lordship continued thus:

In the instant case, the bedrock of the suit before the trial Court, from a perusal of the affidavit and further affidavit of the first respondent, along with exhibits attached thereto, shows that there were allegations of fraudulent practices by both parties. It is here necessary to reproduce some material portion of the affidavit in support of the Originating Summons filed at the trial Court...I have carefully read the affidavit, further affidavits endorsed in the Originating Summons and counter-affidavits and I am of the view that the first respondent made allegations of fraudulent practices

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against the appellant as well as other irreconcilable conflicts. Order 3 Rule 2 (b) of the Federal High Court (Civil Procedure) Rules, 2019, provides that where a suit is based on or alleges an allegation of fraud, it must not be commenced by Writ of Summons. Surely, any attempt "to prove the liability of the defendant" through the Originating Summons procedure, where the Affidavit(s) and Counter-Affidavits evince the subsistence of substantial disputes, must be resisted, *Inakoju v Adeleke* (supra), *Re Sir Lindsay Parkinson*."

The Supreme Court thus sounded the death knell on the case, holding that because the dispute related to fraud and irreconcilable differences, it ought to have been commenced by Writ of Summons. This decision raises troubling questions. Are there likely to be pre-election cases where issues of fraud and irreconcilable differences do not arise? Will the Originating Summons not become a plague for plaintiffs seeking to bring their pre-election disputes? Will it not suddenly become a magic wand in the hands of respondents to challenge the commencement of pre-election suits by Originating Summons instead of Writ of Summons? However, Agim JSC, in a powerful dissenting opinion, envisaged precisely this bottleneck and affirmed the decision of the Court of Appeal to the effect that the commencement of the pre-election suit by originating summons is valid, and the process is competent. With profound respect to the majority of the s of the Supreme Court in *APC v Bashir*, it is submitted that the Court's reliance on Order 3 Rule 2(b) of the Federal High Court (Civil Procedure) Rules, 2019 may have been misplaced. The applicable provision was not the Federal High Court Rules but the Federal High Court (Pre-Election) Practice Directions, 2022. Paragraph 2(2) of the Practice Directions provides: "This Practice Direction shall apply notwithstanding the provisions of the Federal High Court (Civil Procedure) Rules, 2019."

The Chief Judge of the Federal High Court, by the powers conferred on him, made both the Rules of Court and the Practice Direction at different times and intended the derogation in the Practice Direction. It is a settled principle of statutory interpretation that later laws repeal earlier ones, encapsulated in the maxim *posteriora derogant prioribus*. It is good to note that the phrase 'notwithstanding' has been given tacit judicial definition in

N.D.I.C. v Okem Ent Ltd,⁴⁰ where the Supreme Court per Uwaifo JSC held when the term "notwithstanding" is used in a section of a statute, it is meant to exclude an impinging or impeding effect of any other provision of the statute or other subordinate legislation so that the said section may fulfill itself. The case of *Saraki v FRN*⁴¹ is also instructive.

The implication is clear to the effect that no other provision of the Federal High Court Rules can impugn or override the Practice Direction. While Order 8 of the Practice Direction, 2022 provides that "The Federal High Court (Civil Procedure) Rules, 2019 shall apply to any issue not captured under this Practice Directions," this only implies that the Federal High Court Rules are applicable when the Practice Direction is silent on an issue. A cursory analysis of Order 4 of the Practice Direction, 2022, under the caption 'filing of processes' and the marginal note "Commencement of action", reveals that the Practice Direction adequately provides for the use of originating summons and the form in which it is to be used. Although marginal notes do not *ipso facto* form part of the legislation, the Supreme Court held in *Yabugbe v C.O.P.*,⁴² that it is permissible to approach a consideration of marginal notes to determine the general purpose of the section and the mischief it is aimed to cure. It thus suffices to submit that the intention of the Chief Judge of the Federal High Court was that the provisions of Order 4 of the Practice Direction apply to the commencement of pre-election actions, to the exclusion of the Federal High Court Rules.

14.5 THE CATCH-22: LOCATING THE LITIGANT'S DILEMMA

The inconsistency between the mandatory language of the Practice Directions, 2022 and the substantive legal principles articulated by the Supreme Court places the pre-election litigant in an impossible position. Be that as it may, this chapter posits that the Practice Directions, by their blanket application, assume a fiction that pre-election matters, by their very nature, are non-contentious. This, in light of the current attitude of the Supreme Court, is a fallacy. Pre-election matters are often the most politically charged and factually complex disputes. They involve challenges

⁴⁰(2004) 10 NWLR (PT. 880) 107 AT 182 PARA H

⁴¹(2016) LPELR – 40013 (SC) 256 AT 304

⁴²(1992) LPELR – 3505 (SC) at 17-18 Paras C-A

to party primaries, allegations of certificate forgery, fraud, non-compliance with electoral guidelines, and questions of membership and sponsorship. These cases frequently involve 'riotously substantial disputes,' 'conflicting documentary evidence,' and 'allegations of forgery.' To ask a court to resolve such serious allegations, including criminality, solely on the basis of conflicting affidavits is to ask it to do the impossible. The dilemma for the plaintiff is thus acute. Does he immediately obey the Practice Directions, 2022 by commencing via Originating Summons and have his case later struck out for improper commencement by the appellate courts when the facts are held to be contentious? Or does he disobey the Practice Direction, 2022, commence the action by Writ of Summons, arguing that the facts are contentious, but invite an immediate challenge that he is in violation of the Practice Directions, 2022? Either path leads to potential ruin. This is the essence of the Catch-22. The litigant is damned if he does and damned if he does not. The procedural regime designed to expedite has, through its rigid application, become an instrument for its denial.

14.6 THE WAY FORWARD: REINTRODUCING DISCRETION

The current framework is self-defeating, but the solution is not to abandon the quest for efficiency. Rather, it is to reintroduce judicial discretion which is the hallmark of a mature and responsive legal system. After all, the essence of judicial discretion has been determined by the Supreme Court to mean "equitable decision of what is just and proper under the circumstance or a liberty or privilege to decide and act in accordance with what is fair and equitable under the peculiar case guided by the principles of law"⁴³ and "the very fundamental essence of the proper exercise of judicial discretion is rooted in the belief that it be exercised in accordance with well established rules of law, practice, fairness and not in accordance with whimsical opinion, humour parochial, or sentimental disposition."⁴⁴

The chapter also submits that the Practice Directions be amended. Paragraph 4 should be rephrased to state that pre-election matters "shall be commenced by an Originating Summons, provided that where the reliefs

⁴³ARTRA INDUSTRIES NIG. LTD V. N.B.C.I (1998) LPELR-565-SC

⁴⁴Okowa v. Emerhor & Ors (2015) LPELR-25656(CA) (Pp. 47 paras. A)

sought are founded on allegations of fraud, forgery, or any other complex factual dispute, the court may, upon application by the plaintiff or on its own motion, order that the suit proceed by way of Writ of Summons." This formulation preserves the presumption in favour of the Originating Summons and its attendant efficiency. However, it renders that presumption rebuttable and it empowers the court, in the exercise of its inherent jurisdiction and its obligation to do substantial justice, to order a different mode of trial where the facts demand it. It places the decision where it belongs, that is, in the hands of a judicial officer, not in the inflexible language of a subsidiary instrument. This chapter also posits that pending when an amendment is made to the Federal High Court Practice Directions, 2022, there is an urgent need for the Supreme Court to immediately reconcile its jurisprudence.

The Supreme Court should affirm that the Practice Directions create a legitimate presumption in favour of the Originating Summons but that this presumption is rebuttable. Thus, where a defendant's counter-affidavit demonstrates a 'riotous' dispute of fact that goes to the heart of the case, the trial court must have the discretion and the duty to convert the originating process to a Writ of Summons. Crucially, this conversion should not defeat the constitutional timeline as the 180-day period should continue to run from the initial filing date. This approach honours both the constitutional imperative of speedy resolution and the constitutional guarantee of fair hearing and substantive justice.

Further, objections relating to the mode of commencement should be limited to the trial court. Once such objection is not raised at the trial court, a defendant should be precluded from raising it at any subsequent stage. The law is trite that there is just one recognizable way—and period—to raise an issue of procedural jurisdiction, and that is timeously. This principle has been recognized in a plethora of decisions including *AG Kwara State & Anor v Adeyemo & Ors*,⁴⁵ *Tallen & Ors v Jang & Ors*,⁴⁶ and *Kalu v FRN & Ors*,⁴⁷ *Olupo v Polaris Bank Ltd*,⁴⁸ *Shaba & Ors v Kpotun & Ors*,⁴⁹ amongst

⁴⁵(2016) LPELR – 41147 (SC)

⁴⁶(2011) LEPLR – 9212 (CA)

⁴⁷(2012) LEPLR – 9287 (CA)

⁴⁸(2019) LPELR – 51071 (CA)

⁴⁹(2021) LPELR – 64766 (CA)

others. This principle, if consistently applied, would prevent the scenario witnessed in *APC v Bashir Sheriff*, where the objection to the mode of commencement was raised at the Supreme Court, long after the trial court and Court of Appeal had pronounced on the merits. It would compel defendants to raise such objections at the earliest opportunity, allowing trial courts to make necessary adjustments within the 180-day window rather than allowing a procedural defect to lie dormant until it can be deployed as a strategic weapon on appeal.

In addition, there is an urgent need for the Supreme Court to clarify, definitively and unequivocally, the status of time prescriptions in practice directions. The conflict between *Akan Ekpe Okon* and *Umar Ibrahim v INEC* cannot be allowed to persist. This article submits that the approach in *Umar Ibrahim* is jurisprudentially sound and consistent with the long line of Supreme Court authorities holding that rules of court are handmaidens, not masters. The approach in *Akan Ekpe Okon*, while purporting to follow *Okechukwu v INEC*, represents an unwarranted extension of the 'rock of Gibraltar' principle to subsidiary legislation. That principle is properly confined to the express provisions of the Constitution. To extend it to practice directions is to blur the fundamental distinction between the supreme law and subordinate instruments, and to vest in the President of the Court of Appeal a power akin to constitutional amendment, a power the Constitution does not confer.

14.7 CONCLUSION

The Nigerian legal system stands at a crossroads in its treatment of pre-election litigation. On one hand, the constitutional imperative for speedy resolution is undeniable and must be respected. The 180-day timeline is not merely a procedural direction; it is a constitutional command, and its violation robs the court of jurisdiction. On the other hand, the pursuit of speed cannot become a licence for the sacrifice of . A judgment delivered within time but founded on an incomplete or untested factual basis is no victory for the rule of law. The Court of Appeal per Oredola JCA in *Monye v. Abdullah*⁵⁰ has held that: "It is rather unfortunate, that delayed is as equally untoward and unconscionable as hurried . Hence, while delay is

⁵⁰ (2012) LPELR-20103(CA) (Pp. 36 paras. D)

tantamount to denial; similarly, hurried is harried. Both are to be avoided in the pursuit of justice." The current legal framework governing pre-election matters is internally inconsistent and self-defeating.

The mandatory Originating Summons provision in the Federal High Court (Pre-Election) Practice Directions, 2022, while well-intentioned, creates a direct conflict with the substantive principles of as articulated by the Supreme Court. It forces the use of a summary procedure for disputes that are inherently and often explosively contentious, leading to judgments that are vulnerable to being overturned on appeal and, more importantly, to a denial of substantive. Simultaneously, the extension of the "rock of Gibraltar" principle to the time prescriptions in practice directions, as exemplified by *Akan Ekpe Okon v PDP*, represents a dangerous jurisprudential development. It elevates subsidiary legislation to constitutional status, strips courts of their equitable jurisdiction to remedy genuine and unavoidable defaults, and, in the most extreme cases, permits the denial of justice even where a litigant's failure to comply with a procedural deadline is occasioned by a criminal act, such as kidnapping. This cannot be what the Constitution intends.

The phrase 'Catch-22' aptly captures the predicament of the Nigerian pre-election litigant. Trapped between the Scylla of the Practice Directions mandatory Originating Summons and the Charybdis of the Supreme Court's insistence on Writs for contentious facts; between the Constitution's inflexible timelines and the Court of Appeal's novel extension of that inflexibility to subsidiary rules; between the settled principle that rules are handmaidens and the emerging counter-principle that they are inviolable masters, the litigant navigates a procedural landscape of shifting and contradictory obligations. It is thus not uncommon to see most cases lost before they are started. The solution lies not in abandoning the quest for efficiency but in reintroducing judicial discretion.

The solution lies in amending the Practice Directions to permit flexibility. Also, the Supreme Court has a role to play by reconciling its jurisprudence to the effect that while constitutional timelines are indeed immovable, practice directions are not. Similarly, there is need to limit procedural objections to the trial court and deeming them waived if not raised timeously. It is no gainsaying the fact that when procedure ceases to serve

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and becomes its master, the law loses its legitimacy. And in the high-stakes arena of electoral disputes, where the very mandate of democratic governance is contested, the legitimacy of the judicial process is not merely desirable, it is indispensable.