Modern Civil Procedure Law

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CHAPTER 8

PRE-TRIAL AND TRIAL PROCEEDINGS

Settlement of Issues

Meaning

Settlement of issues is the process by which the real issues for determination in a case are isolated so that the proceedings are focused on them. It is on such issues that a decision in the case will be arrived at. The advantage of settlement of issues in a case is that it reduces the expense of trial in terms of time and costs.[1] Settlement of issues is only necessary where there is some imprecision or lack of clarity or manifest obscurity as to the nature of the issues that have emerged from the pleadings of the parties.[2]

High Court Rules (Lagos)

By Order 30 Rule 1, High Court of Lagos State (Civil Procedure) Rules, 1994, it is provided that where in any cause or matter, it appears to the Court or a Judge in Chambers that the issues of fact in dispute are not sufficiently defined, the parties may be directed to prepare issues; and such issues shall, if the parties differ, be settled by Court or a Judge in Chambers. The implication from this provision is that only where the issues of fact are in dispute can there be settlement of issues.

Order 27 Rule 1 of the High Court of Lagos State (Civil Procedure) Rules 2004 is more emphatic. It provides:

> "(1) In all proceedings, issues of facts in dispute shall be defined by each party and filed within 7(seven) days

1 Nwadialo, F: *Civil Procedure in Nigeria*, 2nd Edition (University of Lagos Press, 2000) p. 667

2 *Ukaegbu v. Ugoji* (1991) 6 NWLR (Pt. 196) 127 at 159, 161

after close of pleadings.

(2) If the parties differ on the issues, the pre-trial Judge may settle the issues."

Comparison between the 1994 and 2004 Rules

1. Under the 1994 Rules, it is the Judge that directs the parties to settle the issues if in his opinion the issues of facts are not sufficiently defined. But under the 2004 Rules, it is mandatory for each party in all proceedings to settle issues of fact and this shall be filed within 7(seven) days after close of pleadings.
2. The time limit for settlement of issues is not stated in the 1994 Rules. It is for the trial Judge to make an order to that effect. Under the 2004 Rules, such issues must be filed within 7(seven) days.

A common feature of both Rules is that where the parties differ, the Judge or the pre-trial Judge may settle the issues.

Settlement of issues usually takes place after the closure of pleadings. Where the Judge or the pre-trial Judge settles the issues, it ought to be a succinct reflection of the issues that arose from the parties cases as pleaded, and not an amendment of or a substitution for them.[3]

High Court Rules (Abuja)

Order 33 Rule 1 of the High Court of the Federal Capital Territory, Abuja (Civil Procedure) Rules, 2004, provides that on conclusion of pleadings, the parties shall within 14 (fourteen) days thereof in writing to the Registrar submit the material questions in controversy between them in the form of issues which shall be noted by the Court and set for trial.

Where a party to the proceedings default in settling issues, the Court may proceed to set down the matter for hearing upon the issues submitted by the other party.[4] On the other hand, where neither party takes the initiative

3 *Ibid* at p. 161
4 Order 33 Rule 2

to settle issues, the Court will give notice to the parties to attend the settlement of issues.[5] The settlement of issues is without prejudice to the power of the Court to amend the issues or frame additional issues as it deems fit.[6]

In the course of settlement of issues, the Court may direct the parties to settle all documentary evidence which they intend to rely on at the trial.[7] This will help eliminate putting in evidence irrelevant documents though pleaded.

During the settlement of issues, if it appears to the Court that the decision of any question or issues arising in a matter when tried separately from the matter substantially disposes of the cause or matter or renders the trial unnecessary, it may dismiss the matter or make such order or give such judgment as may be just.[8]

Uniform Rules and Federal High Court

Order 35 Rule 1 of the High Court (Civil Procedure) of Kano State (Uniform Rules) provides that at any time before or at the hearing, the Court may, if it thinks fit, on the application of any party or on its Motion proceed to ascertain and determine what are the material questions in controversy between the parties, and may reduce those questions into writing and settle them in the form of issues which when settled may state questions of law on admitted facts or questions of disputed facts or questions partly of the one kind and partly of the other. The Court may direct the parties to prepare the issues and those issues will be settled by the Court.

Order 36 Rule 1 of the Federal High Court (Civil Procedure) Rules, 2000 is in *pari-materia* with that of the Kano Rules/Uniform Rules.

5 Order 33 Rule 3
6 Order 33 Rule 5
7 Order 33 Rule 6. Note that by Order 4 Rule 15, a writ of summons should be accompanied by a statement of claim, copies of documents mentioned therein to be used in evidence, witness statement on oath and a certificate of pre-action counselling.
8 Order 33 Rule 7

Pre-Trial Conferences and Scheduling

This procedure, which is peculiar to Lagos State, is one of the innovations in Civil Procedure introduced by the High Court of Lagos State (Civil Procedure) Rules 2004 aimed at expediting trials.[9]

Within 14(fourteen) days after the close of pleadings, the claimant is required to apply for the issuance of a pre-trial conference notice as in Form 17.[10] Where the claimant does not make the application, the defendant may do so or apply for an order to dismiss the action.[11]

If an application is duly made, the Judge shall cause to be issued to the parties and their Legal Practitioners (if any) a pre-trial conference notice as in Form 17 accompanied by a pre-trial information sheet as in Form 18.

Purposes of Pre-Trial Conference

The purposes of a pre-trial conference are:

(i) Disposal of non-contentions matters which must or can be dealt with on interlocutory application;

(ii) Giving such directions as to the future course of the action as appear best adapted to secure its just, expeditious and economical disposal;

(iii) Promoting amicable settlement of the case or adoption of alternative dispute resolution.[12]

By Order 25 Rule 2, the Judge is expected to enter a scheduling order for the following:

(a) joining other parties;

(b) amending pleadings or any other processes;

(c) filing motions;

(d) further pre-trial conferences;

(e) any other matter appropriate in the circumstances of the case.

9 This replaces the summons for directions under Order 27 of the 1994 Rules

10 Order 25, Rule 1(1)

11 Order 25, Rule 1(3)

12. Order 25 Rule 1(2)

The Judge is required to consider and take appropriate action with respect to any of the following (or aspects of them) as may be necessary or desirable:

(a) formulation and settlement of issues;

(b) amendments and further and better particulars;

(c) the admissions of facts and other evidence by consent of the parties;

(d) control and scheduling of discovery, inspection and production of documents;

(e) narrowing the field of dispute between expert witnesses by their participation at pre-trial conference or in any other manner;

(f) hearing and determination of objections on point of laws;

(g) giving orders or directions for separate trial of a claim, counter-claim, set-off, cross-claim or third party claim or of any particular issue in the case;

(h) settlement of issues, inquiries and accounts under Order 27 of the Rules;

(i) securing statement of special case of law or facts under Order 28

(j) determining the form and substance of the pre-trial order;

(k) such other matters as may facilitate the just and speedy disposal of the action.

order not to leave the conduct of the pre-trial conference at large, Order Rule 4 provides that the conference shall be completed within 3(three) nths of the close of pleadings. If practicable, the conference is to be held n day to day. The Judge will issue a Report after the conference which l guide the subsequent course of the proceedings unless modified by the Judge.[13]

'n order to underline the importance of the pre-trial conference, Order le 6 provides for sanctions for failure to participate in the conference.

der 25 Rule 5: This presupposes that a pre-trial Judge may be different from the trial lge.

The Judge may:

(a) in the case of the claimant dismiss, the claim; and

(b) in the case of the defendant, enter final judgment against him.

However, any judgment given under this Rule may be set aside upon an application made within 7 (seven) days of the judgment or such other period as the pre-trial Judge may allow not exceeding the pre-trial conference period of 3(three) months. The application shall be accompanied by an undertaking to participate effectively in the pre-trial conference. The implication of this is that the judgment is a default judgment which can be set aside at the discretion of the Court.[14]

Summons for Directions

This procedure was peculiar to Lagos State under the High Court of Lagos State (Civil Procedure) Rules, 1994.[15] It is taken out within seven days after close of pleadings or when pleadings are deemed to have closed.

Summons for directions was mandatory for all actions commenced by writ of summons except:[16]

(a) actions in which the plaintiff had applied for judgment under Order 10 or Order 11 and directions had been given under the orders;

(b) actions in which an order for accounts had been made under Order 13;

(c) actions in which an order had been made for the trial of an issue or question before determining a right to discovery or inspection;

(d) actions which had been dealt with under Order 31 Rule 7 which relates to the trial of questions of fact where the parties are agreed as to the questions of fact to be decided between them.

(e) actions in which directions had been given on applications for orders of mandamus, for an injunction, for orders for the preservation or inspection of property or for any of the other similar purposes;

(f) actions which had been referred for trial to a referee; and

(g) actions for the infringement of a patent.

14 See generally: *Alapa v. Sanni* (1967) N.M.L.R. 397; *Evans v. Bartlam* (1937) A.C. 473 at 480; *Wimpey Ltd. v. Balogun* (1986) 3 N.W.L.R. (Pt. 28) 324; *Sanusi v. Ayoola* (1992) 1 - 12 S.C.N.J. (Pt. 2) 142 at 156 - 157

15 Order 27 Lagos State High Court Rules, 1994. This has been replaced by pre-trial Conference and Scheduling under Order 25 of the 2004 Rules. This procedure is discussed for historical purpose and for comparison with the 2004 Rules.

16 Order 27 Rule 1(2)

The summons should be taken out by the plaintiff but the defendant may do so or apply for an order to dismiss the action if the plaintiff fails to take out the summons within 7 (seven) days after the pleadings have closed or cleared to have closed.[17] A summons for directions is returnable in not less than 21(twenty-one) days and is in civil Form 9 of Appendix E to the Rules.[18]

Where a defendant applies to Court to dismiss the plaintiff's action for failure to take out a summons for direction, the Court may either dismiss the action in such terms as may be just or deal with the application as if it were a summons for directions.[19]

Object of Summons for Directions

The object of the summons for directions was to provide an occasion for the consideration, by the Court or Judge in Chambers, of the preparations for trial of the action, so that:

(a) all matters which must or can be dealt with on interlocutory applications and have not already been dealt with may, so far as possible, be dealt with; and

(b) such directions (including directions for setting down for trial) may be given as to the future course of the action as appear best adapted to secure the just, expeditious and economical disposal thereof.[20]

Advantage

The main advantage of summons for directions was that by means of it, a

17 Order 27 Rule 1(3)

18 Order 27 Rule 1(5)

19 Order 27 Rule 1(4)

20 Order 27 Rule 1(5)

number of interlocutory applications which would otherwise have been made individually in trial can be made in one single proceeding.

Consolidation of Actions

This is the process whereby two or more actions pending in the same Court are by order of the Court joined and tried at the same time. The actions, though separate and distinct, are tried simultaneously in the same proceedings. In other words, consolidation of action results in joinder of two or more actions for trial in one single proceeding. The Rules of Court empowers the Court to consolidate where the issues are the same in all the actions and can be properly tried and determined at one and the same time. Also, consolidation of actions is possible where two or more actions are pending between the same plaintiff or claimant and the same defendant or between the same plaintiff or claimant and different defendants or between different plaintiffs or claimants and different defendants. However, where actions are brought by the same plaintiff or claimant against different defendants, they shall not be consolidated without the consent of all parties concerned unless the issues to be tried are precisely similar or identical.[21]

By Order 37 Rule 7 (2) of the High Court of Lagos (Civil Procedure) Rules, 2004, where actions are pending before different Judges, a party desiring consolidation shall first apply to the Chief Judge for transfer of the matter to a Judge before whom one or more of the matters is pending. This is a condition precedent to the application for consolidation.

Rationale

The main purpose of consolidation is to save costs and time. Therefore, it will not be ordered unless there is some common question of law or fact bearing sufficient importance in proportion to the rest of the subject matter of the actions to render it desirable that the whole matter be disposed of at

21 Order 37 Rule 7 Lagos (2004); Order 32 Rule 7 Abuja (2004); Order 34 Rules 6(1) & (2) Kano Rules.

the same time thereby preventing multiplicity of actions.[22]

Circumstances under which Consolidation may be Ordered

Consolidation may be ordered by Court where:

i. The actions to be consolidated is pending in the same High Court. Such actions may be pending before the same or different Judges of the same High Court but not before different Judges in High Court of different States;

ii. There is a common question of law or fact in each of the actions which could be conveniently disposed of in the same proceedings; or

iii. The right to relief claimed in each action arises out of the same transaction or series of transactions; or

iv. For any other reason it is desirable to order consolidation;

v. Pleadings must have been delivered and issues joined in each of the pending actions.[23]

When Consolidation will not be Ordered

The Court will refuse to order consolidation:

i. If the plaintiff or claimant in one action is the same person as the defendant in another and the case does not affect the defendant.

ii. If the plaintiffs cannot be represented by the same Counsel in the consolidated suit.

iii. Where there will be likely embarrassment at the trial.

iv. Where the different actions are at different stages e.g. pleadings completed in one and not in the other.

v. Where actions are by the same plaintiff or claimant but against different defendants who did not consent to the consolidation.

vi. In Lagos if the actions are pending before different Judges and the

22 See *Diab Nasr v. Complete Home Enterprises (Nig.) Ltd.* (1977) 5 S.C. 1at 11; *D.S.C. v. Owners of Aditya Prabha* (1991) 3 N.W.L.R. (Pt. 179) 369

23 *Toriola v. Williams* (1982) 7 S.C. 27

applicant has not applied to the Chief Judge for transfer of the matter to a Judge to which application for consolidation is made.

Procedure

Application for consolidation may be made by summons or notice for directions in Chambers or may be made by motion on notice.[24] Under the High Court of Lagos State (Civil Procedure) Rules 2004, where actions are pending before different Judges, a party desiring consolidation shall first apply to the Chief Judge for transfer of the matter to a Judge before whom one or more of the matters is pending.[25] The implication of the new rules is that there must first be a transfer before an application for consolidation can be made. The transfer by the Chief Judge is administrative based on the application. It is submitted that such application should be in writing stating the grounds for the transfer. If the Chief Judge refuses to transfer, then an application by motion or summons for further directions for consolidation cannot be made.

Either a plaintiff or defendant may make the application for consolidation. Where all the parties consent to the consolidation, oral application for consolidation may be made. Where an order for consolidation has been made, it shall be drawn up at the expense of the party or parties who applied for consolidation and shall be recorded in the cause book.[26]

Judgments in Consolidated Suits

Where suits are consolidated, each retains its individual and separate existence nonetheless. Therefore, at the end of the trial, judgment should be given in respect of each suit. The Court cannot determine one suit and ignore the other.[27]

24 Order 32 Rule 7(4) Abuja (2004); Order 34 Rule 6(3) Kano Rules
25 Order 37 Rule 7(2). *Ibid.*
26 Order 32 Rule 7(5) Abuja (2004); Order 37 Rule 7(4) Lagos (2004); Order 34 Rule 6(4) Kano Rules.
27 *Diab Nasr v. Complete Home Enterprises (Nig.) Ltd. (supra); Contrast Attah v. Nnnacho* (1965) N.M.L.R. 28.

Appeals in Consolidated Suits

Although judgments should be delivered in respect of each consolidated case, an aggrieved party does not have to file separate notices of appeal in the various cases consolidated. He can file only one.[28] However, his appeal is limited to the decision in the particular suit complained against in the notice of appeal unless the notice is amended to attack the whole decision or was so initially.[29]

Discovery – Inspection and Interrogatories

Discovery

What is Discovery?

This is the procedure whereby a party in the search for evidence to prove his case, finds out certain material documents in the possession of the opposing party. If such documents are in support of his case, he would need to inspect them and obtain copies of them and if they are material to the opponent's case, he may need to read and study them so as to know to what extent they support that case. This is called discovery by inspection.

On the other hand, a fact which a party needs in evidence may be within the knowledge of his opponent and if the opponent admits that fact, the burden of proof on the party is to the extent of the admission lessened. The party can do this through series of questions or interrogatories

These two procedures of inspection and interrogatories are collectively referred to as discovery.

Parties to Discovery

Discovery, whether by way of inspection or interrogatories, is available to any party to the proceedings and as long as there is a question for decision between them in the proceedings.[30] There must be an issue to be determined between the parties. Discovery is not limited only to the plaintiff or claimant

28 *Igwe v. Kalu* (1993) 4 S.C.N.J. 21 at 27
29 *Okegbe v. Chikere* (2000) 7 S.C. (Pt. 1) 106 at 114 - 115
30 *Shaw v. Smith* (1986) 18 Q.B.D. 193