Order 81 of the High Court (Civil Procedure) Rules, 2004 (CI 47); A Fetish in Civil Procedure Practice.

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INTRODUCTION

Rules of court comes within the ambit of subsidiary legislation. Because it is a subsidiary legislation, our courts over the past two decades have ruled in legion of decided cases that any slip, mistake in any rules of procedure in civil litigation should be regarded as an irregularity but cannot nullify proceedings. In view of this legal practitioners have taken the rules of court for granted thereby rendering the rules of procedure subservient. However in the case of *Nortey (No.2) v African Institute of Journalism and Communication & Others*[1], the Supreme Court in stating clearly the importance of subsidiary legislation as compared to statutes said:

"…….the courts had a duty to ensure compliance with statutes including subsidiary legislation like LI 1444.

This clearly shows that subsidiary legislation like the High Court (Civil Procedure) Rules, 2004 (CI 47) should be obeyed and should not be used by lawyers just for the fun of it under the guise of Order 81 of CI 47.

Rules of procedure work hand in hand with substantive law. Edward E. Bryant in his work, *the law of Pleadings under the Code of Civil Procedure*[2] said:

"the body of law consists of two parts, substantive and adjective law. The former prescribes those rules of civil conduct which declare the rights and duties of all who are subject to the law. The latter relates to the remedial agencies and procedure by which rights are maintained, their invasion redressed, and the methods by which such results are accomplished in judicial tribunals."

This means that substantive law cannot achieve its purpose when rules of procedure are not well applied. It will lead to injustice.

[1] 2013-2014] 1 SCGLR 703

[2] 2nd ed, P. 1

Our courts over the years have relaxed the application of rules of procedure and given lawyers the latitude to abuse Order 81 of CI 47. I will highlight on some of the cases for the purposes of clarification.

In the case of *Halle & Sons v Bank of Ghana & Warm Weather Enterprise Ltd.*[3], the Supreme Court relying on the case of *In re Cole & Raven-Shear*[4], Per Collins MR said:

"Although I agree that court cannot conduct its business without a code of procedure, I think that the relation of rules of practice to the work of justice is intended to be that of a handmaid rather a mistress, and the Court ought not to be so far bound and tied by rules, which are after all only intended as general rules of procedure as to be compelled to what would cause injustice in the particular case."

In *Harkness v Bell's Abestos & Engineering Ltd*[5], Lord Denning MR also said:

"It can be asserted that it is not possible for an honest litigant in Her Majesty's Supreme Court to be defeated by mere technicalities, any slip, and any mistaken step in his litigation."

As Prof Ocran JSC said in *GIHOC v Hanna Assi*[6] I totally reject "*technicism*"… as a judicial approach to resolving to case resolution.

These principles have found expression in the various enactment by the rules of court committee. These are rule 79 of the Supreme Court Rules, 1996 (CI 16); rule 63 of the Court of Appeal Rules, 1997 (CI 19), and Order 81 of the High Court (Civil Procedure) Rules, 2004 (CI 47).

For the purposes of this article I will quote in *extenso* Order 81(1) of the High Court (Civil Procedure) Rules, CI 47.

Order 81(1) of the High Court (Civil Procedure) Rules, 2004 (CI 47) states as follows:

(1) Where in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of anything done or left undone, been a failure to comply with the

[3] [2010-2012] 2 SCGLR 599
[44] (1907) 1 KB at page 4
[5] (1967) 2 QB 729 at 736 CA
[6] [2005-2006] SCGLR 458 at 492

requirements of these rules, whether in respect of time, manner, form or content or in any other respect, the failure shall not nullify the proceedings, any steps taken in the proceedings, or any document, judgment or order in it……

(2) The court may, on the ground that there has been such a failure as stated in sub-rule (1), and on such terms as to costs or otherwise as it considers just;

Order 81(1) of CI 47, has been given judicial blessing in the case of *Republic v High Court, Accra; Ex parte Allgate Co. Ltd (Amalgamated Bank Ltd Interested Party)*[7], the Supreme Court speaking through Date-Bah JSC said:

"The language in Order 81(1) is intended to prevent non-compliance with rules of procedure resulting automatically in the invalidity of proceedings. The rules give the court the discretion to waive the non-compliance or set aside the proceedings which follow from the non-compliance. Thus a concept of Order 81 as an omnibus provision that cures deficiencies in jurisdiction is impossible to accept and is unlikely to have been the intent of the Rules of Court Committee. What is intended to be covered by Order 81 are irregularities, short of situations of want of jurisdiction or infringement of statutes other the High Court rules. Such irregularity are to nullify automatically the proceedings that follow them. Thus whilst Order 81, r 1 treats non-compliance with the High Court Rules as not nullifying non-compliance proceedings, the rule does not apply to non-compliance which is so fundamental as to go jurisdiction or which is in breach of a statute other than the civil procedure rules. Non-compliance is to be regarded as an irregularity that does not result in nullity, unless the non-compliance is also a breach of the Constitution or of a statute other than the rules of court or the rules of natural justice or otherwise goes to jurisdiction."

This statement of the law by the eminent jurist, Date-Bah JSC seeks to give absolute waiver of any slip, mistake in civil procedure practice except for lack of jurisdiction, breach of statute and breach of the rules of natural justice. In another case of *Boakye v Tutuyehene*[8], the Supreme Court Per Twum JSC also said:

"The new Order 81 of the High Court (Civil Procedure) Rules, 2004 (CI 47), has made it clear that perhaps apart from lack of jurisdiction in its true and strict sense,

[7] [2007-2008] SCGLR 1041

[8] [2007-2008] SCGLR 980

any other wrong step taken in any legal suit should not have the effect of nullifying the judgment or the proceedings."

This article is aimed at informing readers that Rules of Court are very important like statutes and therefore they are not made for fun or for cosmetic purposes. That is to say, they must be obeyed or complied with in order to achieve their chief aim of fast tracking the course of administration of justice.[9] In the case of *Hanna Buckman v Ankumayi*[10], the Supreme Court Per Akoto Bamfo JSC said thus:

"Rules of procedure are not ornamental pieces, but they are meant to be complied with."

On the other hand, the aim of this paper is not meant to advocate that rules of procedure should be applied strictly where it will lead to injustice. But to caution the court about too much laxity in the application of rules of procedure.

Rules of procedure subservient to statute

Order 81 popularly known as the 'saving provision' should not be used as carte blanche by legal practitioners to abuse the purpose of the provision. The rules of court derives its powers from the Constitution. The Constitution under article 157(2) has given powers to the rules of court committee, by constitutional instrument, to make rules and regulations for regulating the practice and procedure of all courts.

So the question is what makes rules of court subservient to statute? I will answer this question by first defining what a statute is.

Meaning of statute

There is a draught of definitions of statute in the legion of Ghanaian case-law authorities. For this reason, it is imperative to, first and foremost appreciate the meaning of statute. To this end, owing to the paucity of definitions in Ghanaian case, recourse shall be had to the meanings assigned to it by alien writers. This voyage is legitimate, in that Ghanaian courts are persuaded by foreign decisions while interpreting statutes.

In *Maxwell on Interpretation of Stututes*[11], P. St. J. Langan defines it thus:

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[9] ASTC v Quorum (2009) 9 NWLR (Pt 1145) 1

[10] [2013-2014] 2 SCGLR 1372

[11] 12th ed. (India: Butterworths, 1969, P.1

A STATUTE has been defined……simply as "the will of the legislature" and this definition….remains sufficient provided that it understood that the will of the legislature must be expressed either by the agreement of the three parts (Queen, Lords and Common) or by the agreement of the queen and Commons in accordance with the Parliament Acts 1911 and 1949.

From the *Halsbury's Laws of England*[12];

A statute, or Act of parliament… is a pronouncement by the sovereign in Parliament, that is to say, made by the Queen by and with the advice and consent of both Houses of Parliament… or, in certain circumstances…, the House of Commons alone, the effect of which is either to declare the law, or to change the law (normally for the future only, but sometimes with retrospective effect..), or to do both.

To S.G.G Edgar: The Word 'Statute' in English law is now synonymous with "an Act of Parliament." In the words Jacqueline Martin,[13] statute means;

"Laws passed by Parliament are known as Acts of Parliament or Statutes, and the source of law is usually referred to as statute law."

According to the *Black's Law Dictionary*[14], statute is: "A law passed by a legislative body."

These definitions can simply mean that statute is an Act of Parliament. An act of parliament derives its powers from the Constitution. Rules of procedure also derives its powers from article 157(2) of the Constitution 1992 which is the supreme law of the land. The Constitution 1992, in article 1 states that:

"The sovereignty of Ghana resides in the people of Ghana in whose name and for whose welfare the powers of government are to be exercised in the manner and within the limits laid down in this Constitution."

Drawing strength from the definition of the Constitution offered by Prof. Hoods Philips, a university don, Dr. Ben Igwenyi, sees it as:[15]

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[12] (London; Butterworths & Co. (publishers) Ltd..1961) vol. 36, Pp. 361-362

[13] The English Legal System, 3rd Ed. (London Hodder & Stoughton, 2002) P. 39

[14]Bryan A. Garner, etal, 7th ed. (USA: West Group, St. Paul, MINN, 1999) P. 1420

[15] Modern Constitutional Law in Nigeria, KLoc, Cit, P. 3

…the Supreme law of the state (country) which distributes powers to all organs of government and determines how these organs relate among themselves and with the citizens."

My submission is that since rules of court derives its powers from the Constitution 1992, it should not be subservient to statute. Legal practitioners always hide under the omnibus provision in Order 81 and apply the rules any how forgetting that the rules of court are meant to be obeyed but was not made just for fun or for cosmetic purposes. However, even though subsidiary instruments command legal force, when situated with statutory provisions, they, nevertheless, lose steam and should be submissive to substantive provisions of any enactments in circumstances of conflicts between them.

Circumstances under which rules of procedures can be relaxed.

Most rules of court have in-built provisions which render non-conformity with their provisions mere irregularity incapable of nullifying any proceedings. Another qualification to obeisance of rules of court is: where they do not agree with statutory provisions, the latter will prevail. The reason is plain. Rules of courts must, willy-nilly, cave in to legislative provisions, a *fortiori* the Constitution. Indeed, they have been described as *mere handmaids of the law not omnipotent masters of their own*.[16]

Obedience to the rules of court will be sidetracked where their application will be antithetical to or constitute a decoy on the wheel of substantial justice. In such a situation, the court will desist from utilizing them to avoid worshipping them sheepishly on the exception.[17]

One other exception to strict fidelity to the rules of court is where the non-compliance with them is a curable irregularity. In law, non-adherence to the rules are curable when it does not go to the props or foundation of the case, but incurable when it is fatal to any proceedings. In the Nigerian case of *NDIC v Sheriff*[18], Chukuma-Eneh JCA (as he then was) drew the distinction in these illuminating words:

"It is equally important to note that non-compliance with the rules of court can either be curable or incurable irregularity. It is curable if it does not affect the

[16] Halle & Sons v Bank of Ghana supra
[17] F.S.B Bank Ltd v Imano Nig. Ltd (2000) 3NSCQR 1
[18] (2004) 1 NWLR (Pt. 855) 563 at 590

merits of the matter but incurable where jurisdiction or competence of the court is involved."

This means that where the irregularity is redeemable, the proceedings are salvaged and inversely, the proceedings are ruined, as nullity, where the irregularity is irreversible.

An outstanding critical point about rules of court is that objection to their violation must be taken timeously at the commencement of the action e.g. issue of capacity, even though it can be raised at any stage of the trial and even after judgment.[19]

It means that, if a party dithers in registering any protestation against non-observance of the rules of court, and proceeds to take steps in the matter, he is deemed to have acquiesced in the irregularity and his objection is taken as too late in the day. In the legal parlance, such a party will be caught in the vortex of waiver.

Waiver under this circumstance connotes taking a 'fresh step'. It has been held that a party takes a 'fresh step' if he makes any application to the court such as filing a statement of defence. *In Republic v Akin Abuakwa Traditional Council; Ex parte Sakyiraa II*[20], Per Patu-Plange (as he then was) held that filing an affidavit in opposition after knowledge of an irregularity amounted to a fresh step.[21]

Simply put, a party must embrace vigilance and repel indolence vis-à-vis infractions of rules of court in proceedings.

Conclusion

I will conclude by advocating that rules of court command legal force. They are tied or connected to practice and procedure aimed at achieving the provisions of statutes or substantive law. This means, they belong to the realm of procedural or adjectival law. In *Inakoju v Adeleke*[22], Tobi, JSC explained procedure thus: "Procedure is the set of actions necessary for doing something. It is also method and order for directing business in an official meeting. I am of the view that 'time' needed in filing pleading when it is slipped by lawyers should not be countenanced by the court. The essence of complying with rules of procedure setting time limit in the administration of justice has been enforced and

[19] Kwaku v Serwaa & Ors [1993-94] 1 GLR 241
[20] [1977] 2 GLR 115-153
[21] City Investment Co. Ltd v Ankomah [2007-2008] 2 SCGLR 1064.
[22] (2007) 4 NWLR (Pt. 1025) 427 at 596

strengthened by the Supreme Court case of *Oppong v Attorney-General & Others*[23], where Bamford Addo JSC said:

"Many a time litigants and their counsels have taken the rules of procedure lightly, and ignored them altogether as if those rules were made in vain and without any purpose. Rules of procedure setting time limits are important for the administration of justice, they are meant to prevent delay by keeping the wheels of justice rolling smoothly. If this were not so, parties would initiate action in court and thereafter go to sleep, only to wake at their own appointed time to continue with such litigation at their pleasure. If this were allowed, litigation would grind to a halt, a sure recipe for confusion and inordinate delay in the due and proper administration of justice."

Also in *Revici v Prentice Hall Incorporated*[24], Lord Denning M.R said:

"Nowadays, we regard time very differently from the way they did in 19th century. We must insist on the rules as to time being observed. We have had occasion recently to dismiss many cases for want of prosecution, where the people have not kept the rules as to time…"[25]

Taking time needed for filing processes in court lightly will defeat the purpose of Order 1 r 2 of the High Court (Civil Procedure) Rules, 2004 (CI 47). It states as follows:

"These rules shall be interpreted and applied so as to achieve speedy and effective justice, avoid delays and unnecessary expense, and ensure that as far as possible, all matters in dispute between parties may be completely, effectively and finally determined and multiplicity of proceedings concerning any of such matters avoided."

[23] [2000] SCGLR 275
[24] [1969] 1 WLR 157 at 159, 160 CA
[25] Agbewole v Agbewo le [2012] 14 GMJ CA at 145