



COVID-19, LEGAL PRACTICE AND ITS IMPLICATIONS FOR JUDICIAL DECISION-MAKING

By

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I. INTRODUCTION

Legal practice as understood in Ghana is about the work done by lawyers who have been called to the Bar in Ghana and are entitled to prepare legal documents and make legal representation for their clients in the courts.¹ A lawyer in Ghana cannot practise law unless that lawyer has been issued with a Solicitor's Licence or that lawyer is the Attorney- General or a lawyer from the Office of the Attorney- General.² The present position is that a pupil³ shall not practise law, cannot make a representation in court and is not competent to execute legal documents such as conveyances which are to be prepared exclusively by lawyers.⁴

The settled position is that for a person to be eligible to practise law in the jurisdiction, that person should have been enrolled as a lawyer, his or her name is registered in the Roll of Lawyers and has a valid Solicitor's Licence.⁵ The Supreme Court in a majority decision has settled the matter that a lawyer without a valid Solicitor's Licence shall not practise law and cannot make representation on behalf of a client in court.⁶

There is no distinction between solicitors and barristers in Ghana as practised in some jurisdictions including England.⁷ In England, a solicitor is a lawyer whose main business is to prepare legal documents on behalf of clients but does not have audience in the Superior Courts or in the case of Scotland, Session of Court unless specifically licensed for that purpose.⁸ Thus, in England, barristers practise law in the courts while solicitors consult with their clients and prepare all legal documents including pleadings for advocates to represent them in court.⁹

The Roll of Lawyers in which the name of every person who is called to the Bar in Ghana is entered does not draw a distinction between a solicitor and a barrister.¹⁰ In Ghana, a lawyer may be called a solicitor or barrister but the Roll of Lawyers recognises them as lawyers who can practise law in every respect.¹¹ A lawyer with a Solicitor's Licence may, therefore, decide

1 Section 9 of the Legal Profession Act, 1960 (Act 32) provides that a person who is not enrolled as a lawyer cannot practice as a lawyer, prepare a legal document or cause a matter before any court.

2 Section 8 of the Legal Profession Act, 1960 (Act 32).

3 A newly qualified lawyer, yet to complete a mandatory pupillage/apprenticeship under a senior lawyer.

4 Section 8 of the Legal Profession Act, 1960 (Act 32) & *Abraham Okan Klu v Joseph Agyei Laryea*, judgement of the Court of Appeal delivered on 24th October, 2019 in Suit No. H1/130/2019 (unreported).

5 *Henry Korboe v Francis Amosa* Civil Appeal No. J4/54/2014 21st April, 2016.

6 *Republic v High Court (Fast Track Division), Accra; Ex parte Teriwajah & Korboe (Reiss & Co Ghana) Ltd Interested Party* [2013-2014] 2 SCGLR 1247.

7 *The Modern Law Review*, Vol. 20, July 1957.

8 *Black's Law Dictionary*, Tenth Edition by Byran A. Garner.

9 *The Modern Law Review*, *The Profession and Practice of the Law in England and America*, Vol. 20, July 1957.

10 Section 6 of the Legal Profession Act, 1960 (Act 32).

11 Section 2(a) of the Legal Profession Act, 1960 (Act 32).

the type of practice that lawyer would like to engage in. A lawyer may decide to be an in-house-lawyer and also practise law in the courts or may be an advisor who counsel clients about their legal rights and obligations and suggest particular courses of action in business and personal matters.¹²

A lawyer may decide to be in-house and at the same time represent his/her establishment or the entity or institution he/she works in court.¹³ Some staff of the Office of the Attorney-General including those at the Legislative Drafting Division, Council for Law Reporting and Law Reform Commission practise law but do not appear before the courts.¹⁴ Some legal academics also appear in court to represent their clients while others do not appear before the courts but practise law by way of teaching.¹⁵ Legal practice therefore goes beyond the practice in the courtrooms, however, the topic under discussion requires a discussion on the court room practice and the effect COVID-19 has on it.

II. IMPACT OF COVID-19 ON THE LEGAL PROFESSION

Lawyers who do not practise law in the courtrooms are equally affected by COVID-19 with the closure of all schools and institutions of higher learning.¹⁶ Some of the Universities including Ghana Institute of Management and Public Administration (GIMPA) substituted in person teaching for online teaching with equal amount of contact hours.¹⁷

Other lawyers who do not practise law in the courtrooms including in-house lawyers have equally been affected by COVID-19 and had to work from home. Legal academics and other in-house lawyers who were not computer literate before the emergence of COVID-19 have had to develop themselves to avoid being laid off. Lectures are delivered through the Internet and lecturers who cannot cope with technology have had to lay down their tools. In-house lawyers have to work from home and one has to be computer literate to be able to work from home effectively. However, the legal practitioners whose practices have been seriously affected are the court room practitioners.¹⁸

The Judiciary and the Judicial Service Staff were affected by COVID-19 and as a result of that, the Chief Justice as the head of Judicial Service issued directives to regulate the work in the courts to ensure that Judges and Magistrates, staff of the Judicial Service, Members of the

12 [Lawyers- What they do; studentscholarships.org.](https://studentscholarships.org/)

13 [Lawyers- What they do; studentscholarship.org.](https://studentscholarship.org/)

14 [Office of the Attorney General and Ministry of Justice/ mojagd.gov.gh.](https://mojagd.gov.gh/)

15 [Lawyers- What they do; studentscholarship.org.](https://studentscholarship.org/)

16 March 15, 2020; Using Data and Evidence to inform school reopening in Ghana; Cynthia Bosumtwi-Sam and Sarah Kabay.

17 COVID-19: Impact on Ghana's Education, United Nations Ghana, 3 May, 2020.

18 COVID-19, Legal Practice and its implications for Judicial Decision Making; African Centre on Law and Ethics; May 19, 2020.

Bar and the court users are not infected by the virus at the court premises.¹⁹ The President of the Republic of Ghana assented to the Imposition of Restrictions Act, 2020 (Act 1012) on 21st March, 2020. The long title of the Act which sums up the objectives of the law provides thus:

“An Act to provide for the imposition of restrictions in accordance with paragraphs (c), (d) and (e) of clause (4) of article 21 of the Constitution and for related matters”

The imposition to be placed on the people of Ghana was in the interest of public health and safety with the view of curbing the spread of COVID-19. The Chief Justice on 16th March, 2020 issued case management directives to advise judges, magistrates, lawyers and court users in a bid to prevent infection of COVID-19 in the courts.²⁰ There was an insistence on the physical distancing practice to prevent infection, also only allowing parties whose cases were scheduled for hearing into the court room to avoid large gatherings in the court room and exercising restraint in remanding accused persons.²¹ The Chief Justice further set up a COVID-19 Response Team under the leadership of the Judicial Secretary to see to the provision of hand sanitizers for all staff of the Judicial Service and the provision of “Veronica Buckets”²² complete with bowls, liquid soap and bins at all vantage points at the premises of the various courts throughout the country.

After the President of Ghana had made the nationwide broadcast on Friday, 27th March 2020 on the lockdown in Greater Accra, Greater Kumasi and some selected Districts in Accra, Ashanti and Central Regions exempting the Judicial Service from the lockdown, the Chief Justice on 30th March issued a press release to give further directives.²³ Registrars were to adjourn cases in the affected areas to May and June as court users and their lawyers were not exempted from the lockdown.²⁴ Some Courts were selected in these areas to deal with critical cases including violations of the restriction orders.²⁵ Other critical staff were to go to work while the others were to remain at home. The Supreme Court and the Court of Appeal were to handle urgent cases as may be determined by the Chief Justice during that period.²⁶ The courts in the other parts of the country which were not affected by the lockdown were to work in strict compliance with the Chief Justice’s earlier directive issued on 21st March, 2020.

19 Press Release; Judiciary’s steps to prevent spread of COVID-19 in Courts nationwide, 16th March 2020; SCR 176.

20 Press Release; Judiciary’s steps to prevent spread of COVID-19 in Courts nationwide, 16th March 2020; SCR 176.

21 Press Release; Judiciary’s steps to prevent spread of COVID-19 in Courts nationwide, 16th March 2020; SCR 176.

22 These are water buckets that have been designed and calibrated as a receptacle that stores water, fully equipped with a tap for easy dispensation of water.

23 Press Release, Restriction of Movement of Persons Resident in Greater Accra and Greater Kumasi by H.E. The President of the Republic- Impact on the Judiciary; 30th March, 2020.

24 Press Release, Restriction of Movement of Persons Resident in Greater Accra and Greater Kumasi by H.E. The President of the Republic- Impact on the Judiciary; 30th March, 2020.

25 Press Release, Restriction of Movement of Persons Resident in Greater Accra and Greater Kumasi by H.E. The President of the Republic- Impact on the Judiciary; 30th March, 2020.

26 Press Release, Restriction of Movement of Persons Resident in Greater Accra and Greater Kumasi by H.E. The President of the Republic- Impact on the Judiciary; 30th March, 2020.

The lifting of the lockdown in the affected areas invited the Chief Justice to remind the judges, magistrates, lawyers and court users of his earlier directives on cases management. The question is what the case management policy prevailing and how effectively it could be practised in the face of COVID-19. Filing of court processes online in the High Court within the Law Court Complex has been practised for more than a year with its teething problems including instability of the Internet system. The passage of the **High Court (Civil Procedure) (Amendment) Rules, 2019 (C.I. 122)** now allows processes to be filed on-line and service is proved after service of same on WhatsApp, e-mail and other electronic modes of service. It will reduce human contact and interference as a lawyer or a party may file a court process from the comfort of their home. **Order 7 of C.I. 47 as amended by C.I. 122** by the insertion after rule 3 of Order 7 provides thus:

“1. A party who initiates an action in a cause or matter, or files an appearance or a response in respect of a cause or matter in court shall, at the time of the initiation of the action or filing of the appearance or response, clearly state whether the service of any process or document in respect of the cause or matter should be by electronic means

2. Where in accordance with subrule (1), a party states that service of a process or document should be by electronic means, that party is deemed to have received any process or document served on that party by electronic means.

5. A process or document required to be served personally may subject subrule (1), be served by electronic means either by a bailiff, a registered process server or the party in that particular cause or matter, but where a party serves the process or document by electronic means, that party shall deliver a hard copy of the process or document to the Registrar of the Court for verification only.”

Service by electronic means now has a legal backing in the High Court and the Circuit Courts.²⁷Parliament has passed into law Constitutional Instruments to allow electronic service in the High Court.²⁸

However, service by electronic means in the High Court and the Circuit Courts introduced by C.I. 122 is limited to the High Courts in the Law Courts Complex in Accra and it is to be expanded to the other parts of the country. The facilities to make electronic service operational in the High Court outside Accra and the Circuit Courts are not available and service is still by physical means. Ghana can be commended for the introduction and implementation of the E-justice platform which introduced an electronic case filing of court processes.²⁹This has

²⁷ “The old order changeth and giveth way to the new: WhatsApp debuts as a means of substituted service in Ghana Maame A.S. Mensah-Bonsu, Oxford University Commonwealth Law Journal (Volume 15,2015 – Issue 1);IFS Financial Services Limited v Jonathan Mensah (Suit No. GJ563/2017) approved the service of a writ via Facebook; Kwabena Ofori Addo v Hidalgo Energy and Julian Gyimah (Suit No. AC 198/ 2015) approved an application for substituted service via WhatsApp.

²⁸ High Court (Civil Procedure) (Amendment) Rules, 2019 C.I. 122.

however been fraught with a lot of challenges such as network failures among others.³⁰

Ghana could adopt the Rwandan judiciary system whereby all institutions of the justice sector have been integrated making it possible for all case related processes to be conducted electronically.³¹ In the face of COVID-19, the Rwandan IECMS has helped the courts not to close down entirely.³² The system continues to provide an interface between the Rwandan Judiciary and litigants for electronic filing of cases, which allows registrars to receive new cases from litigants.³³ It is a capital expenditure project but efforts should be made to ensure its provision to alleviate the burden of the Judicial Service, lawyers and court users.

Further, most lawyers attend court for motions with only a few lawyers actually going to court for substantive cases. With the virtual hearing, motions could be heard online while the few lawyers with substantive cases who cannot by one reason or the other have a virtual court appearance, make it to court.³⁴ This will limit the physical presence of both lawyers and clients and limit human interaction which might lead to the prevention of the spread of the deadly virus. Additionally, hearing of motions online will save lawyers and clients the need to drive all the way to court just to have their cases adjourned and would result in the saving of time and productivity.³⁵

The High Court (Civil Procedure) (Amendment) Rules, 2014 (C.I. 87) introduced several case management interventions which if properly implemented will help the High Court and the Circuit Courts to work under COVID-19 without the lawyers and their parties being physically present in the courts. The Court may give directions for the management of the case and set a timetable for the taking and giving of directions and the trial or Case Management Conference online.³⁶ Application for directions can be taken via online and all the other subsequent processes including Pretrial Check list can be deposited with the court online apart from equipment or metals which must be submitted physically to the Court. Parties can use their mobile phone to take copies of exhibits or may be served through WhatsApp.

29 Justice Barbara Tetteh-Charway, A Judge's Perspective: Preparedness of the Judicial Service of Ghana Post COVID-19.

30 Justice Barbara Tetteh-Charway, A Judge's Perspective: Preparedness of the Judicial Service of Ghana Post COVID-19.

31 Rwanda Integrated Case Management System (IECMS), 2016.

32 Justice Barbara Tetteh-Charway, A Judge's Perspective: Preparedness of the Judicial Service of Ghana Post COVID-19.

33 Synergy International Systems; During the COVID-19 Crisis, Case Management Systems are helping Justice sectors to Continue Operations, while practicing social distancing, April 6, 2020.

34 Nana Yaw Ntrakwah, Litigation and Technology: Making the case for virtual courts in Ghana, 2017.

35 Nana Yaw Ntrakwah, Litigation and Technology: Making the case for virtual courts in Ghana, 2017.

36 Order 32 rule 7A subrule (a) & (b) of C.I.87.

Order 38 rule 3A³⁷ now permits the High Court and Circuit Courts to give evidence by video or by any other means. However, “any other means” as stated under the Rule has not been defined. It is my opinion that there are various web and cloud- based video conferencing platforms which can operate effectively on every mobile device and are cost effective. These platforms could be used to hear cases and may come under the phrase “any other means”. A fraction of the money used by court users on transportation could be used to cover expenses regarding virtual court. Where Internet facilities are extended to prisons, cases may be heard through video link or any other means to avoid infection. Appeals may be heard via video link after all the written submissions and statements of case have been duly filed. The judge will fix a date for judgement and deliver it through online means.

III. PROPOSED AMENDMENTS TO EXISTING LEGISLATION

Several amendments ought to be made to facilitate the virtual disposal of cases within this COVID-19 era and beyond. The **High Court (Civil Procedure) Rules, C.I. 47** requires parties to attend trials, failure of which attracts a sanction³⁸ should be amended to make video link or any other means a way of attending trials. Order 33³⁹ which requires the Court to provide for place of trial should be amended to include any other electronic mode as the court may determine and not only a physical place as in the court room.

Witness statements in both criminal and civil matters should be properly regulated to allow all objections to be raised at the case management or pre-trial review stage. **Section 6 of the Evidence Act, NRC 323** which provides that objection may be made at the time the evidence is being offered, defeats the purpose of case management and should be amended so that all objections would be raised at the case management stage so that the trial would not be faced with any issues of objection.

It is also suggested that an amendment be made to the Rules to require statement of case to be added to every application and on the day of hearing, the matter could be determined online or adjourned for the ruling to be delivered online at the adjourned date. **Section 69 of the Courts Act, Act 459** must also be amended to allow recordings made online to be presented as evidence.⁴⁰

Section 70 of the Courts Act, Act 459 which provides for access to records of the Court by an application must be amended to include “upon request made to the court through any accepted mode” after paying the appropriate fees or in the case of online submission the payment of fees may be made online without affecting the revenue from court filing and payment of fees.

There are several factors which have contributed to make legal practice and its implication for judicial decision making difficult. The Court rooms should be fully connected with Internet facilities.

37 High Court Civil Procedure (Amendment) Rules, 2014, C.I 87.

38 Order 36 of C.I 47.

39 High Court (Civil Procedure) Rules, C.I 47.

40 Section 69 of the Courts Act, Act 459.

Amendments must be made to make the Courts E- Justice practice friendly as the Court is supposed to deliver its core mandate in the face of COVID-19 and at the same time protect the economic rights of its staff in accordance with article 24 of the Constitution⁴¹. The Courts further owe a duty of care under common law to lawyers and stakeholders who may use the facilities to prevent them being infected with COVID-19.⁴²

There are cases such as jury trial which cannot be heard online and under such circumstances appropriate case management skills coupled with physical distancing as well as all other COVID-19 protocols should be religiously observed.

IV. CONCLUSION

The implementation and amendments suggested above will go a long way in the justice delivery and decongestion of the courts in the country. It will also aid in the reduction of costs of litigation and thus not only will it be beneficial to the lawyers but to courts, clients and judges as well.

It is, however, inevitable that there will be challenges at the beginning of the transition to a full scale virtual court proceedings such as huge data and equipment costs, massive capacity building for the court staff and equipping all stakeholders in the justice delivery system⁴³ but as Justice Constant Hometowu stated, “Change is inevitable, resisting change is myopic, allowing change to pass by without embracing same is anachronism, allowing change to work for one is wisdom and gain and finally the only thing that does not change is change itself”⁴⁴. It is time that change is embraced by amending our laws and making room for full scale virtual court proceedings.

41 1992 Constitution.

42 Lord Atkin in *Donoghue v Stevenson* stated that “you must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbor”; Collings Dictionary defines duty of care as the legal obligation to safeguard others from harm while they are in your care, using your services or exposed to your activities.

43 Justice Barbara Tetteh-Charway, *A Judge’s Perspective: Preparedness of the Judicial Service of Ghana Post COVID-19*.

44 Justice Constant Hometowu, “Equipping the Judge for E-Justice: The answer is change management” published in “The Bench”, A journal of the Association of Magistrates and Judges of Ghana, 2019, Volume 1 page 48.