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Abstract

Before equity, common law reigned supreme – a system characterised by blind adherence to rules and the dominance of technical justice. Equity came with a new regime, mitigating the harshness and strictness of common law, and obviating blind followership of rules at the expense of true justice. However, this new era has brought with it controversies. Criticisms are often levelled against some decisions of courts by members of the legal profession and the general public, on grounds that the courts clung strictly to the rules rather than doing justice. It is suggested here that these criticisms usually stem from a lack of a full understanding of the courts' duty to see to the prevalence of substantial justice over technicalities; a failure to grasp what the duty truly entails. The paper explains that substantial justice is ultimately founded in legal rules and defines those circumstances in which technicalities would arise.

1.0 INTRODUCTION

It is generally accepted that technicalities greatly impede justice. A technicality is something immaterial and without substance; something not affecting the substantial rights of parties,[1] which if upheld would defeat the substance or merit of a case.

Technicalities dominated the common law era. Strict adherence to rules saw parties shut out and denied remedies without the opportunity of having their cases heard on the merits. In order to mitigate the frustration of justice by inordinate reliance on technicalities, it is now well-established that courts will no longer sacrifice substantial justice on the altar of technicality. Simply put, courts will now place value on the merits of a case and will not allow

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[1] B. A. Garner, *Black's Law Dictionary,* 10th ed. (Thomas Reuters: USA, 2014).

it to be defeated without giving it a chance. Ogbuinya J.C.A. in ***Abiola* v *The State***[2] put it as follows:

> The Court is an apostle of substantial justice, justice that accommodates fair trial on the merits, in that the spirit of the law does not reside in technicalities and formalities. Substantial justice and technical justice, arch enemies in adjudication, had been in a protracted imaginary battle on which to win and arrest the attention of the Nigerian Courts. In the process of the juridical duel, however, the case law rightly intervened and slaughtered technicality and buried it deeply under the temple of substantial justice. To accede to the respondent's request is tantamount to resurrecting the deceased technicality. This will be an affront to the law.

However, this aspect is now popularly emphasised in neglect of the equally fundamental principle that equity follows the law, but must only not do so blindly. There is often a failure to recognise that ultimately, equity is meant to complement the law and improve or enhance access to justice, and not to challenge it, erase it, or render it of no effect. As Eso, J.S.C. rightly said in ***Trans Bridge Co. Ltd* v *Survey International Ltd:***[3]

> Equity should not be treated as a tyrannous phenomenon threatening the law. It does not exist in vacuo or simply to roam about pouring water on the fire of the law. Equity is not a warlord determined to do battle with the law. It is part of a legal system which has been mixed with the law and the admixture is for the purpose of achieving justice.

Neglecting the foregoing, attempt is commonly made to invoke the duty of the court to do substantial justice to save certain actions or inactions of parties. That is, knowing that courts will not let technicalities stand, lawyers attempt to resort to this principle as a shield where for one reason or the other, there has been a failure to comply with legal rules. However, the intendment of the principle is not to shield and by consequence, encourage non-compliance. The

[2] *Abiola* v *The State* (2019) LPELR-47462(CA).
[3] *Trans Bridge Co. Ltd* v *Survey International Ltd* (1986) 4 NWLR (Pt. 37) 576 at 597.

principle is, borrowing the words of Niki Tobi J.S.C. in ***Orugbo & Anor* v *Una & 10 Ors*,**[4] not "a magic wand" which can simply be waved to rectify the lapses of counsel and parties, and cure all their inadequacies.

The development of our law vis-à-vis technicalities has always been fraught with controversies. The decision in ***Okafor* v *Nweke*** [5] presents a good example. Many have criticised this decision of the Supreme Court in voiding processes signed in the name of a law firm in that case as against the name of a legal practitioner, as a crucifixion of substantial justice on the altar of technicality, whereas courts ought to strive tirelessly to ensure the prevalence of substantial justice. It is suggested that controversies stem from a misconceived separation of the duty of the courts to follow and apply the law from their duty to do justice. This paper seeks to address this, additionally setting out those instances in which issues of technicality come up.

2.0 TO DO SUBSTANTIAL JUSTICE IS TO APPLY THE LAW

It is the duty of the courts not to slavishly follow the law to the detriment and at the expense of justice, thereby adorning technicality. Nonetheless, in as much as the courts must do justice, they are to do so within the law and cannot abandon the law in the name of pursuit of justice. Hence, what must be done is justice according to law. As the Supreme Court explained in ***Obi* v *INEC***[6]

> Justice according to law which any good judge must ensure he dispenses at all times, demands that even when he is seen to be free by the enormity of the power conferred on him, he is still no wholly free. He is not to invoke at pleasure. He is not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles.

[4] *Orugbo & Anor* v *Una & 10 Ors* (2002) 9-10 SC 61, 85-86.
[5] *Okafor* v *Nweke* (2007) 10 NWLR (Pt. 1043) 521.
[6] *Obi* v *INEC* (2007) 11 NWLR (Pt. 1046) 565.

In the words of the renowned American Jurist, Benjamin Cardozo, "He (the judge) is not to yield to spasmodic sentiment, to vague and unregulated benevolence…."[7] Society's conception of justice – that perception of what is right and wrong and what is fair, is unregulated, and it is not the job of the courts to succumb to it. A judge, in his quest for justice, must always be guided by law.

Primarily, law serves to achieve justice. The two ought not to be viewed as separate and independent of one another. Technicalities are as much an affront to the law as they are to justice.[8] According to the court in ***Owner MV 'Cape Breton'* v *Ganic Nig. Ltd***,[9]:

> The law is never intended to work injustice or to shut out a party. It is not the purport of the law that it should work injustice…. For indeed, the purport and essence of the law would be lost if such oratory, technicality or dexterity were allowed to subdue the justice of a case.

This being clear, it thus means that if the object of the law is to do good and not harm; if the purpose of the law is to do justice and not produce technicalities, then justice is done where the law is applied and its object, fulfilled. From the perspective of the courts, this is justice and not "what we think is the right thing to do". Fabiyi J.S.C. in ***FBN* v *Maiwada*,**[10] speaking with respect to the popularly criticised case of ***Okafor* v *Nweke***,[11] explained this plainly:

> There is also the view of some counsel that the decision in Okafor v Nweke had to do with technical justice. I agree that the age of technical justice is gone. The current vogue is substantial justice. But substantial justice can only be attained not by bending the law but by applying it as it is; not as it ought to be…. The law should not be bent to suit the whims and caprices of the parties/counsel. One should not talk of

[7] B. N. Cardozo, *The Nature of the Judicial Process* (Yale University Press: New Haven, 1921), p. 141.
[8] Abiola v The State supra note 2
[9] *Owner MV 'Cape Breton'* v *Ganic Nig.* ***Ltd*** (2007) All FWLR (Pt. 372) 1825.
[10] *FBN* v *Maiwada* (2013) 5 NWLR (Pt. 1348) 444.
[11] *Supra* note 5.

> technicality when a substantial provision of law is rightly invoked.

In ***Okafor* v *Nweke***[12] itself, it was held that:

> The law exists as a guide for actions needed for the practice of the law, not to be twisted and turned to serve whatever purpose, legitimate or otherwise, which can only but result in embarrassing the profession if encouraged…. the urge to do substantial justice does not include illegality or encouragement of the attitude of anything goes.

Indeed, we must not be quick to scream technicality without properly grasping this.

In ***Ude Jones Udeogu* v *FRN & 2 Ors*,**[13] the Administration of Criminal Justice Act (ACJA) 2015 came into question because it allows, "notwithstanding the provision of any other law to the contrary",[14]for a High Court judge who has been elevated to the Court of Appeal to continue presiding over any part-heard criminal matter pending before him at the time of his elevation, in order to see to its conclusion within a reasonable time. The provision conflicted with the Constitution and was thus declared null and void by the Supreme Court, which led to the ordering of a trial de novo. Because it was a sensitive matter that revolved around corruption, this sparked a lot of criticism from the public of the court's dwelling on technicalities rather than seeing justice done. However, the decision of the Supreme Court was not based on technicality. The court is not expected to compromise a principle as sacred as the supremacy of the Constitution, because people believe a defendant deserves to be punished.

In ***Okon* v *Adigwe & Ors***,[15] counsel to the defendant had been causing serious delay in proceedings by absenting himself from court during hearings leading to constant adjournments. The defendant

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[12] *Ibid.*
[13] U*de Jones Udeogu* v *FRN & 2 Ors* (2020) LPELR-57034(SC).
[14] See, ACJA, 2015, s. 396(7).
[15] *Okon* v *Adigwe & Ors* (2011) 15 NWLR (Pt. 1270) 350.

failed to prosecute his case diligently. Consequently, the judge opted to proceed with the matter during one of the court sittings, but failed to confirm that the defendant had indeed been served with the notice fixing hearing for that particular day. It was discovered that that particular hearing notice was not served; the Court of Appeal held that the defendant's right to fair hearing had been breached and declared the proceedings a nullity. The court held that although it would seem fair, logical and reasonable to hold in the plaintiff's favour considering the recalcitrance of the defendant and his deliberate attempts to frustrate proceedings, that was not the law founded on fair hearing which requires, as a matter of procedure, that equal opportunity be given to all parties.[16]

3.0 WHEN WILL TECHNICALITIES ARISE?

The fact that following the law seems unfair to a party does not mean that it is a technicality. That is not and cannot be the determinant. The law is to be followed and is not made to please the parties in a case. Generally, technicalities will typically only arise where strictly adhering to the law will produce injustice by shutting out a party, totally and unfairly depriving him of the chance to present his case on the merits.

A good example is the case of ***Ashakacem Plc*** **v** ***Asharatul Mubashshurun Investment Ltd.***[17] It is a well-known rule in law that an unsigned document is a worthless document and has no probative value.[18] However, in that case, the respondent tendered an unsigned document for admission, after giving oral evidence clarifying the document and its authorship. The appellant objected, urging the court to discountenance the Exhibit because it was unsigned. It was held that the court would not adhere to the rule in such an instance, pointing out that the requirement of signature is made by the law to determine its origin and authenticity with regard to its maker and so where certain situations exist, such as in this instance where oral

[16] *Ibid* at 356-357.
[17] *Ashakacem Plc* v *Asharatul Mubashshurun Investment Ltd* (2019) LPELR-46541(SC).
[18] *Lawrence* v *Olugbemi & Ors (2018) LPELR-45966(CA).*

evidence has clarified the document and its authorship, it would be needless formality to insist upon the presence of a signature. The document was held admissible.

It is important to point out that had the court decided to rigidly stick to the rule, the respondent's case would have been compromised on a mere formality, even after the object of the law had been fulfilled. This is a clearly different circumstance from a situation where the document is unsigned and the party still gave no oral evidence clarifying it, or where the party outrightly failed to plead the piece of evidence. It is not the place of the court to make a case for the parties after giving them the chance to do so; the court will apply the law and not accept the document, and it would not matter that the party would obviously have succeeded if the document was admitted. The courts will not go about making compromises in the law in order to 'help' parties.

4.0 STRIKING OUT A PROCESS IS NOT INJUSTICE TO GROUND TECHNICALITY

It is trite that in the face of a lapse in procedure, following a timeous objection by the party on the other side, the court will strike out the defaulting process. It is necessary to note that the striking out of a matter for failure to comply with the rules does not amount to a denial of justice, and is not tantamount to blind adherence to ground an allegation of technicality. It is fundamental that due process be followed, else a court cannot assume jurisdiction. This is because a precondition for jurisdiction is that acts are to be done in accordance with the due process of law.[19] If a party fails to follow laid down procedure, the case would be struck out and he cannot be heard complaining of technicality.

In ***Obasi Brother Merchant Co. Ltd*** **v** ***Merchant Bank of Africa Securities Ltd*****,**[20] the Supreme Court held that:

[19] *Madukolu* v *Nkemdilim* (1962) 2 NSCC 374 at 379–380.
[20] *Obasi Brother Merchant Co. Ltd* v *Merchant Bank of Africa Securities Ltd* (2005) 2 SCNJ 272 at 278.

> A final judgment is one which decides the rights of parties. In other words, it is a decision on the merits of the case where the matter is assiduously canvassed and the rendition of a judgment is based on what is canvassed and agitated before the Court by the legal combatants…. It is erroneous to construe a mere striking out of a case on the basis that because the proponent of the action had become lethargic or nonchalant to prosecute a case and the court relying on its inherent powers to strike out the case, it amounts to dismissal on the merit.

As the Supreme Court stated in ***FBN v Maiwada,***[21] no injustice is done to a litigant since the result of an irregularity is an order striking out the suit or defective process. Striking out a matter or an application does nothing to affect its substance. The defaulting party still has the opportunity to correct his errors and approach the court again, for the case to be heard on its merits. The issue of technicality does not arise; rather, as the court noted, it is done to ensure that proceedings before the courts are not without structure, and to ensure due accountability and responsibility on the part of legal practitioners, to protect high standing of the profession and enhance good practice culture generally.

However, there are exceptions; instances where insisting on compliance with the law and striking out a matter would birth technicality, even though the substance of the case is not affected:

A. Where the requirement of the law is dispensable or the defect is resolvable by a simple amendment

Courts are usually not inclined to strike out a matter where the requirement of the law is of no real consequence, that it is dispensable; where it is a mere formality and striking out would cause needless delay. In such situations, insistence upon strict compliance with the law would be treated as a technicality. Oftentimes, in such instances, the irregularity complained of can usually be rectified by a simple amendment without need to cut short proceedings with a striking out order.

[21] *Supra* note 10.

In ***Abiola* v *The State*,**[22] the Appellant's Notice of Appeal contained a ground of appeal which complained that the lower court's judgment was against the weight of evidence (referred to as an omnibus ground of appeal). The respondent greeted the issue raised from the ground with an objection that it was incompetent, having emanated from a ground of appeal not applicable in criminal appeals. The ground of appeal read: "The judgment of the trial Court is against the weight of the evidence adduced at the trial by the Appellant/Applicant." The court conceded that this was a classic example of an omnibus ground of appeal in civil appeals, and that in criminal appeals, the omnibus ground is usually couched: "That the verdict is unreasonable and cannot be supported having regard to the evidence." This difference in the language, it stated, is occasioned by the fact that in criminal matters, the prosecution must prove its case beyond reasonable doubt, while civil matters are decided on preponderance of evidence. According to the court, the appellant's omnibus ground admittedly ran afoul of the general nature of such grounds of appeal in criminal appeals. However, it held that although the ground was stained with incompetence, the court, in an effort to do substantial justice, would allow an amendment or ignore it and proceed on the merits of the appeal.

Another good example is where there is a misdescription of the law under which a charge is preferred. Rules of criminal procedure demand that the law and the specific section of the law creating an offence be stated on a charge[23]. However, it is now trite as was held in ***FRN* v *Adamu*,**[24] that the mere misdescription of the law under which a charge is brought does not necessarily render the offence charged unknown to law and that as long as the charge discloses an offence in written law and such law is in existence at the time of the commission of the act alleged in the charge, the charge is valid.[25] What is intended is that the offence be in existence and contained in a written law, therefore strict insistence on unmistaken

[22] *Supra* note 2.
[23] See, for example, ACJA 2015, s. 194.
[24] *FRN* v *Adamu* (2018) LPELR-46024(CA).
[25] Egunjobi v FRN (2012) 3 NWLR (Pt. 1342) 534.

statement of the exact title or section of the enactment allegedly contravened by the accused would be technicality, except where, as stated by the Supreme Court in ***John* v *State*,**[26] the defect is capable of and did in fact mislead the accused, prejudice the defence and occasion a miscarriage of justice.

The law on Misnomers also illustrates the point. It is settled law that only legal persons can sue or be sued as parties in an action. A misstated party name would however not be fatal if there is no doubt as to the identity of parties or issues before the court and there is no indication of miscarriage of justice. According to the Supreme Court in ***Registered Trustees of the Airline Operators of Nigeria* v *Nigerian Airspace Management Agency*,**[27] a misnomer that would vitiate proceedings would be such that will cause reasonable doubt as to the identity of the person intending to sue or be sued. In that case, the appellant was sued at the trial Court as "Airline Operators of Nigeria". It nonetheless, entered appearance and filed its defence to the action, thus indicating the absence of any misgiving that it was the one intended to be sued by the respondent. It was held that the action was valid and that the misnomer was immaterial and resolvable by a simple amendment.

B. Where a party has acquiesced to the irregularity

The fact that striking out a suit on grounds of procedural irregularity would not ordinarily be technicality, does not mean that the court will allow objections to procedural irregularities to be raised at any time. A party's failure to take objection to a particular procedure at the appropriate time in Court amounts to acquiescence to the validity of the procedure even if it was irregular.[28] Part of the courts' duty to do substantial justice is to aid the vigilant and not the indolent, as long as it concerns a mere procedural anomaly and not something fundamental, capable of totally robbing the court of

[26] *John* v *State* (2019) LPELR-46935(SC).
[27] *Trustees of the Airline Operators of Nigeria* v *Nigerian Airspace Management Agency* (2014) LPELR-22372(SC).
[28] Ebita & Anor v Ekpor & Ors (2018) LPELR-46164(CA).

jurisdiction.[29]The point essentially being made is that it is common practice to strike out a suit on grounds of irregular procedure; however, technicalities will arise where a court allows a party to insist upon an irregularity after he has acquiesced to it and thereby, strike out a matter.

The rationale is that a mere procedural requirement creates a personal/private right for the benefit of a party which he may choose to exercise or alternatively, waive regardless of the other party's non-compliance.[30]According to the court in **Alfa v *Atai,*[31]** the law is trite that where an action was commenced by a procedure that is irregular, a party who took active part in the proceedings without raising a formal objection to the irregular procedure cannot later be heard complaining and praying that the action be set aside on grounds of irregularity, to which he himself had acquiesced.

Hence, in ***Zakirai* v *Muhammad*,[32]** the issue of non-compliance with Section 97 of the Sheriff and Civil Process Act was raised by the appellant, after he had filed all the necessary and requisite processes at the trial court. His complaint was that the originating summons was not endorsed or marked for service outside jurisdiction as required by the said Act. The Supreme Court held that the defect amounted to a mere irregularity that can be waived by the parties and the objection was accordingly dismissed.

Also, it was held in ***Feed & Food Farms (Nig.) Ltd* v *NNPC*[33]** that by reason of the failure of the respondent to object to the non-service of a pre-action notice which was made a precondition for the commencement of an action against the corporation by the Nigerian National Petroleum Corporation Act, it had waived its right and said act of non-service ceased to be fatal to the case. According to the

[29] Fundamental issues are not considered procedural irregularities and go to the root of the matter; for example, issues of fair hearing, subject matter jurisdiction, failure to obtain leave to appeal where leave is necessary, etc.
[30] UBA Plc & Anor v Ugoenyi & Anor (2011) LPELR-5065(CA) at 53-55.
[31] Alfa v *Atai* (2017) LPELR-42579(SC).
[32] *Zakirai* v *Muhammad* (2017) LPELR-42349(SC).
[33] *Feed & Food Farms (Nig.) Ltd* v *NNPC* (2009) 12 NWLR (Pt. 1155) 387.

court, the rationale for service of pre-action notice is to enable the agency decide what to do in the matter, to negotiate or reach a compromise or have another hard look at the matter in relation to the issues and decide whether it is more expedient to submit to jurisdiction and have a pronouncement on the point in controversy or not. Failure to object was indicative of a decision to submit to the court's jurisdiction.

Worthy of mention is the Supreme Court's decision in ***Heritage Bank Ltd* v *Bentworth Finance (Nig.) Ltd.***[34] In that case, the appellant, for the first time at the Supreme Court, raised an objection that the respondent's statement of claim at the trial court was signed by a law firm and not a legal practitioner. The court held that court processes (except originating processes) signed by a law firm will not be struck out, unless the other party timeously objects to the defect. The appellant's failure to raise an objection based on this irregularity before the trial court meant that it condoned the defective process and thereby waived its right to object to it.

It is vital to draw a distinction between this case and the cases of ***Okafor* v *Nweke***[35] *and* ***FBN* v *Maiwada***.[36] In those cases, the objections to the validity of the processes were made timeously, hence the final conclusions voiding the improperly signed processes are unassailable. In Okafor's case, the objection was against an application filed right there at the Supreme Court, and in Maiwada's case, it was against the Notice of Appeal filed at the Court of Appeal (which moreover, is an originating process). However, where a court voids a court process other than an originating process[37] on the basis that it was signed by a law firm, at a stage where the other party has acquiesced to it, it is humbly submitted that the court would have forfeited its duty to do substantial justice.

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[34] *Heritage Bank Ltd* v *Bentworth Finance (Nig.) Ltd* Suit No.: SC/175/2005.
[35] *Okafor* v *Nweke* [2007] 10 NWLR (Pt. 1043) 51.
[36] *FBN* v *Maiwada* (2012) 5 SC (PT.3) 1 AT 28-29 (25-39).
[37] Originating processes are excluded because defects in such processes are fundamental. It is deemed that a matter founded on a defective originating process was never commenced. See, *Lala & Ors* v *Akala & Ors* (2018) LPELR-46470(CA).

5.0 CONCLUSION

It has been established in this paper that the courts' duty to do substantial justice entails placement of value on the conduct of fair trials on the merits over strict adherence to the law, but does not entail a general willingness to tolerate non-compliance. Strict application of the law does not in itself, produce technicality, for it is the job of the courts to do so. Technicalities will arise only in the circumstances as explained in this paper. The law must not be undermined. Obedience to rules of court still stands as very important, and cannot be undervalued in the name of doing away with technicalities. Moreover, the courts will not, by condoning all manner of anomalies, encourage incompetence, ineptitude, and strategic blunders, which will not only lead to a general lacklustre attitude amongst lawyers and compromise the high standing of the profession, but also cause established legal standards to wane and lose value. It is thus expected that lawyers take time to diligently study and familiarise themselves with rules of procedure and the various laws guiding the practice of law, and ensure that due care is exercised in the delivery of services, so as to avoid incessant slip-ups, which would not bode well for their clients' cases.