



JOURNAL OF INTERNATIONAL LAW AND JURISPRUDENCE

A Publication of
Department of International Law and Jurisprudence
Faculty of Law, University of Jos
Jos, Nigeria

TO BE CITED AS JILJ VOL. 5. NO 1, 2019

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COSTS, LEGAL REPRESENTATION & PROFESSIONAL RESPONSIBILITY

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AND

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ABSTRACT

A lawyer is a trained professional with skills to conduct the case of a party, without fear or favour in court or tribunal. Recently, the courts have had occasion to award heavy cost to be paid by legal practitioners appearing in cases before them, in departure from previous practices and extant statutory provisions. The recent attitude instigates the query on the propriety of such awards and whether this does not hamper the right of legal representation and the protections afforded to a legal practitioner.

INTRODUCTION

The Supreme Court of Nigeria, while dismissing applications for a review of its judgment, observed:

...I cannot believe, and I say this with tears in my eyes, I cannot believe that in my lifetime I would see very senior members of the Bar bring applications of this nature to this court, which are aimed at desecrating the sanctity of this court; violating the well-known principle that the decisions of this court are final; and destroying the esteem, with which this court is held.¹

While further holding that the applications for review are vexatious, frivolous and a gross abuse of court process, the court awarded total cost of 60 Million Naira, to be personally paid by Counsel to the applicants in favour of the respondents.² The award of cost payable personally by legal practitioner (and not the losing party in a matter),³ reflects a recent attitude of the courts to deal with matters that they consider the legal practitioner should not have filed or brought, matters which the

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¹ Per Augie, JSC, delivering the ruling of the court.

² The application was filed by two senior lawyers, both of whom are Senior Advocates of Nigeria, Chief Afe Babalola and Chief Wole Olanipekun. The rank of Senior Advocate is only conferred on persons who have attained distinction in the legal profession. The two Senior Advocates are also Life Benchers; the Body of Benchers is made up of members who have attained the highest distinction in the legal profession. The cost of N60 Million Naira is perhaps the highest ever awarded by a court against legal practitioners in the history of the judiciary in Nigeria.

³ Sometimes the courts award cost for a variety of reasons, some of which we enunciate hereafter. Idum-Stanley, M. M., & Agaba, J. A., *Civil Litigation in Nigeria*, Nelag & Company Limited, Lagos, 2015, p. 1037.

courts view as abuse of process.⁴The pertinent questions are, when in the course of performing his duty as a legal practitioner before the courts, on behalf of a client, why would a legal practitioner be personally made to pay cost for a case he filed? Is the sin of the party not being visited on the legal practitioner who is simply performing his duties? On what basis is the court exercising such powers? Can the conduct of a legal practitioner in representing a client in court amount to professional irresponsibility? Does the age-long *cab rank rule* not protect a legal practitioner who is simply performing his professional duties? At the outset, Rule 24 (2) of the RPC provides:

It is the duty of every lawyer on his own responsibility to decide what cases he will bring into Court for the Plaintiff and what cases he would contest in Court for the Defendant; and he is not absolved from bringing questionable action or arguing questionable advice on the ground that he is only following his client's instructions.

Does this responsibility automatically activate the award of cost? Does violation of the rule require the action of the legal practitioner to be reported and tried? This paper attempts to answer these questions. The paper recommends for a review of judicial attitude towards achieving a less hazardous or fear-free legal representation by lawyers before courts or tribunals in Nigeria.

Abuse of Court Process: Frivolous, Vexatious and Speculative?

The grounds for which courts award cost that is personally paid by a legal practitioner are where such actions are considered as abuse of court process, frivolous, vexatious and speculative.⁵ Matters that constitute abuse of judicial process or the abuse of the proceedings of the court are very wide, of infinite variety and the categories are not closed.⁶ Actions are said to be frivolous and vexatious when they are brought on insufficient grounds, with the intention merely to annoy and vex a defendant;⁷ a suit, which is statute barred is an example of a suit that is vexatious.⁸ In making a determination on this, the courts have held that:

⁴ The common practice of courts in Nigeria is to award cost to the losing party in a suit, which is to be paid by the party bringing the action in court. Other decisions in which the court made an award of cost against the legal practitioner in a case is *Ugba v Suswam* (2014) 14 NWLR (Part 1427) 264, where the Supreme Court ordered the legal practitioner to pay the sum of N3, 000, 000; the court warned that a counsel should desist from accepting and filing frivolous and unnecessary suits which are merely academic and yielding no benefits but mere waste of quality time. In 2018, the Supreme Court ordered *Mr. Tolu Babaleye* (a legal practitioner) to personally pay cost totalling N2, 000, 000 for filing applications to join his clients; both the Federal High Court and the Court of Appeal dismissed the applications. On further appeal to the Supreme Court, the court held that the applications to join parties to a suit, in order to clear the names of the applicants were frivolous and vexatious. Accessed at <<https://dnlllegalandstyle.com/2018/supreme-court-awards-cost-n2m-lawyer-filing-frivolous-appeal/>> on 11th April, 2020.

⁵ However, it is not in respect of every matter that is frivolous and vexatious that the court orders a legal practitioner to personally pay cost. The question then would arise as to what degree of annoyance would make a court to not simply award cost against a party but to personally exact the cost from the legal practitioner?

⁶ *C.P.C. v Ombugadu* (2013) 18 NWLR (Pt. 1385) 66

⁷ *Sodipo v Lemminkainen OY* (1992) 8 NWLR (Pt. 258) 229

⁸ *H.S. Eng. Co. Ltd. v S. A. Yakubu (Nig.) Ltd.* (2003) 10 NWLR (Pt. 829) 505

The critical factors in the determination of whether an action is an abuse of the judicial process are considerations of the circumstances for bringing the suit, the reasons for doing so, the grounds relied upon for instituting the action and the desirability for instituting the action.⁹

In *Peoples Democratic Party & others v Biobarakuma Degi-Eremienyo & others*,¹⁰ the applicants filed an application in which they sought to review the judgment of the Supreme Court delivered on the 13 February, 2020 to the effect that the applicants had no valid nomination for the office of the Governor of Bayelsa State. It accordingly returned the candidate of the People's Democratic Party as the duly nominated and elected Governor of the State. In dismissing the application for a review of its judgment, the court held its judgment is final, and no force on earth could change it.¹¹ In awarding the cost to be personally paid, it considered that the suit was simply intended to desecrate the sanctity of the court and destroy the esteem, with which the court is held. While the Supreme Court made many of the rulings in which cost was awarded against legal practitioners, lower courts have joined the trend.¹²

Nature and Rationale for Award of Costs by the Courts

Cost is a quantifiable amount charged for something.¹³ In law, it stands for compensatory recoverable expenses incurred in proceedings. While cost in a broad sense, refers to the expenditure incurred by a party in litigation, in this work, cost is used in its narrow technical sense. In this sense, cost refers to an order of court for any person to indemnify a party to a suit for any necessary and reasonable expenses incurred in the course of litigation.¹⁴ In litigation, cost is the expenses of litigation, incurred in prosecution or other legal transaction, especially those allowed in favour of one party against the other. In this sense, cost is concomitant to compensation for

⁹ Per Karibi-Whyte, JSC in *Attorney General Federation v Attorney General Abia* (2001) 11 NWLR (Pt. 725) 689. In the instant case, the court held that the endorsement on the writ of summons and the averments in paragraphs of the statement of claim demonstrate unequivocally the academic nature of the claim in the writ of summons, and the lack of *bona fide* of the plaintiff in respect of the claim.

¹⁰ SC 1/2020.

¹¹ The court held that its judgment can only be reviewed to correct clerical mistakes or some error arising from any accidental slip or omission or to vary the judgment to correctly represent what the court decided.

¹² Thus in *Busola Dakolo v. Fatoyinbo*, the suit filed by the claimant was dismissed for being statute barred. While awarding the costs of 1 Million to be personally paid by Counsel to the claimant, the court held that the suit was filed in bad faith and intended at cruelty to the defendant rather than achieving justice. The background to the suit was an allegation by the claimant that she was raped by the defendant, an allegation which he denied. While a police investigation was instituted, the claimant brought a civil suit claiming damages against the defendant. See Ronke Idowu, Rape Allegations: Court Dismisses Busola Dakolo's Suit against Pastor Fatoyinbo, *Channelstv.com* <<https://www.channelstv.com/2019/11/14/rape-allegations-court-throws-out-busola-dakolos-case-fines-her-n1m/>> Accessed on 12th April, 2020

¹³ Oloworaran B. D. and Oloworaran E. O., *Civil Procedure*, Institute of Human Capacity Development, Port Harcourt, 2nd Edition (2018) p. 777. It is the amount paid or charged for a thing, a price or expenditure. Garner B. A., *Black's Law Dictionary* 8th Edition, p. 1050.

¹⁴ See Order 53 Rule 1(3) High Court of Lagos (Civil Procedure) Rules 2019 which provides that '... when costs are ordered to be paid, the amount of such costs shall, if practicable, be summarily determined by the Judge at the time of delivering the judgment or making the Order.' Cost is usually monetary and the amount to be paid is determined by the court in its order or is ordered to be determined by way of taxation by the court.

expenses necessarily incurred or for the waste of time and effort of the party in favour of whom the cost is awarded. It is not granted to punish the other party or as a bonus to the party in favour of whom it has been awarded.¹⁵

The power of the courts to award cost is derived from both statute and the inherent jurisdiction of the courts. Cost whether statutorily imposed or imposed due to the inherent jurisdiction of the courts, should conform to laid down principles on cost, which primarily is to indemnify for expenses.¹⁶ Since the courts generally have the discretion to determine the amount of cost, the amount to be awarded is a function of the circumstance of each case.¹⁷ Hence, in reality, the amount awarded by a court by way of cost, rarely fully indemnifies a party by way of *restitutio in integrum*. The discretion must be exercised judicially and judiciously and not on the basis of benevolence or sympathy.¹⁸ Also, deeply entrenched is the principle of 'cost follows events', such that a successful party or the party put to incur expenses should be compensated. Hence, cost whether or not pleaded may be claimed and granted at the end of a case.¹⁹

Generally, the kind of expenses covered by cost are those expenses incurred by a party in the course of litigation, such as cost of filing, travel expenses or for procuring evidence; recently, statutes have provided for recovery of expenses from lawyers' fees or the '...cost of legal representation.'²⁰ Cost may be awarded at any stage of proceedings. It may be ordered in respect of interlocutory proceedings or as part of a final judgement. Cost becomes payable, when it is ordered to be paid. Where it is ordered to be 'in the cause', it is payable after judgement.²¹ Generally, where order as to cost is not complied with, it may be enforced like any other monetary judgement.

The court in *Lonestar Drilling Nig. Ltd v New Genesis Executive Security Ltd*,²² delimited the types of cost; it held that cost falls into two broad species. They

¹⁵ Fidelis Nwadialo, *Civil Procedure in Nigeria* (2nd ed.), University of Lagos Press, 2000 p. 748

¹⁶ Statutes include Order 53 Lagos State Civil Procedure Rules; Order 56 Abuja FCT Civil Procedure Rules 2018; & Order 8 Supreme Court Rules 1985 (Practice Direction of 1991); and Order 25 rule 14 FHC rules 2019. Inherent jurisdiction is derivable from the equitable jurisdiction of the courts due the fusion of common law and equity by the judicature Act in England).

¹⁷ See Order 53 Rule 7 High Court of Lagos (Civil Procedure) Rules 2019

¹⁸ Nwadialo op cit. p.748

¹⁹ Law of Costs: Justice's Boogeyman', Duhaime.Org: Learn Law. <www.duhaime.org/LegalResources/CivilLitigation/lawArticle-1185/the-law-of-costs-justice-boogeyman.aspx> Accessed 28/3/2020

²⁰ See Order 53 Rule 1(2) (a) High Court of Lagos (Civil Procedure) Rules 2019. Traditionally, lawyers' fees was not regarded as part of expenses to be covered, as was held in the case of *Nwanji v Coastal Services (Nig.) Ltd*, (2004) 11 NWLR (pt. 885) 552 that it is unethical for one party to pass on solicitors fees to an opponent. The changing attitudes of the court is reflected in the case of *Int'l Off Shore Construction Ltd v SLN Ltd.*, (2003) 16 NWLR (pt. 845) 157 at 179 relying on the Supreme Court decision in *Rewane v Okotie-Eboh*(1960) SCNLR 461, where it was held that under Nigerian law, expenses on services of Counsel are reasonably compensated by way of cost, as they fall under the principle of genuine and reasonable out of pocket expenses. Solicitors' cost is akin to special damages and can only be awarded where it is specifically proven. What this entails is that, it must be specifically pleaded and proven at the trial.

²¹ Also the Lagos rules provides that where cost is ordered to be paid, it becomes payable immediately and shall be paid within 7 days of the order and if it is not paid, the defaulting party or his legal practitioner may be denied audience Order 53 Rule 10(2) High Court of Lagos (Civil Procedure) Rules 2019

²² (2011) LPERL 4437 CA

include the cost as between parties to a suit i.e. party-to-party cost. This refers to cost arising from the expenses incurred in filing fees, transport, and witnesses' expenses; where they are incurred, a party is entitled to be indemnified by the other party. The second class of cost is one arising from what a party pays his lawyer as fees. This is referred to as 'solicitor and own clients cost', which is ordinarily meant to be borne by the client and is not ordinarily subject of cost except where it is provided for by law as is the case under the Lagos State High Court Civil Procedure Rules.²³

While the circumstances for the award of cost are varied, the rationale for the award of cost is compensatory, corrective and punitive, deterrence, access to justice and clarity and simplicity.²⁴ In fixing cost, the principle to be followed is to indemnify the party who is successful, as cost follows events or the losing party in deserving cases.²⁵ The goal should not be solely to punish the losing party.²⁶ A successful party is entitled to cost that were reasonably incurred and not extraordinary expense as a result of being overly cautious or anxious. The status of the parties should not be a consideration in the determination of cost as was held in

²³ See Order 53 Rule 1(1). Apart from the distinction between 'party to party cost' and 'solicitor and own clients cost', there are other types of orders as to cost that a court can make. These include 'Order as to Cost', which is an order to pay cost made at the end of proceedings; 'No Order as to Cost', which no cost is ordered at the end of a proceeding; 'Cost in the Cause', that is where cost is awarded at an interlocutory stage, (that is, in the cause), the cost would be in favour of the party who is successful at the end of the suit proceeding. Others include 'Cost in any Event', which means the cost will be paid by a party ordered to pay same, regardless of whether he is successful eventually or not. Cost may be awarded against parties to a suit as well as their legal practitioners. It may also be awarded against third parties in third party proceedings or other like proceedings in so far as their action has resulted in a party incurring necessary and reasonable expense in respect of a matter subject of litigation.

²⁴ These are (1). Compensation or Indemnity: cost is generally awarded against a party, where by their action or inaction another party is caused to incur expenses; whether in terms of 'Party to Party Cost' or 'Solicitor and Own Party's Cost.' The essence of cost is to compensate or indemnify a party who is brought to court or by reason of an interlocutory application has been put to some expense, whether monetary or in terms time and effort. Cost is meant to 'heal the wound' fully or partly as may be ordered by the court. (2). Penalty: cost serves to penalise parties for taking steps they ought not to take by an order to pay an amount. A ready example is the provision of Order 53 Rule 2 of the High Court of Lagos (Civil Procedure) Rules 2019 to the effect that a party who refuses an offer settlement before an action but goes on to get judgement of an amount less than the settlement offer, will pay the cost of the losing party. (3). Encourages settlement out of court. Order 53 rule 2 of Lagos referred to above also bears this out, to the effect that cost in the circumstance encourages settlement. Where a party fails to use the opportunity afforded by the rules to accept an offer of settlement at the Case Management Conference or the Pre action Protocol Procedure stage, he may be damnified with cost, even if he succeeds. (4). Deterrence: cost deters parties from filing or pursuing frivolous suits. It is a disincentive for the filing of baseless suits and also for taking steps that are geared at delaying the trial of suits. It is a tool in the hand of the court to influence behaviour and to prevent the abuse of the legal process. Cost has a winnowing effect, by making parties to examine properly their case before coming to court, otherwise they could be met with the burden of bearing the expense of the other party. (5). Cost increases access to justice to the extent that it reduces the cost of approaching a court by litigant who believes he is in the right. Since where he eventually succeeds, his expenses may be fully or partially compensated by way of cost. (6). Cost brings about clarity and simplicity in the legal process to the extent that, a party is able to ascertain at the outset, the cost of litigation, in terms of what is recoverable by way of cost at the end of the suit. See Isaiah Oreweme, *Cost Awards in Nigeria* <https://www.academia.edu/37964550/CASE_LAW_ON_AWARD_OF_COST> accessed 02 April 2020.

²⁵ See for example Order 53 Rule 1(1) High Court of Lagos (Civil Procedure) Rules 2019

²⁶ In *Inneh v Obaraye* (1957) 2 FSC 58, the Court of Appeal held the trial judge was wrong for granting what he termed as 'exemplary costs'. The Court of Appeal described the cost as inordinately excessive having found the losing party liable for trespass and an order of damages and an injunction granted against him. The cost was consequently reduced to a reasonable amount with the goal to indemnify

the case of *Rewane v Okotie-Eboh*.²⁷ Cost awarded should not be outrageous, but should be based on facts or out of pocket expenses. Where it is granted, a judge should set out in respect of which items the cost was allowed and how much is payable in respect of each of the items. The award of cost also should not be on the length of trials, especially where the party against whom cost is awarded did not cause it.²⁸

The power to award cost by a court is statutory and is usually provided by the rules of court. For instance, the High Court of Lagos State (Civil Procedure) Rules 2019 provides that:

[I]n fixing the amount of costs, the principle to be observed is that the party who is in the right is to be indemnified for the necessary expenses he has incurred in the course of proceedings and compensated for his time and effort in coming to court.²⁹

The jurisdiction of courts to make order of cost against legal practitioners like those against parties is derived mainly by statute, i.e. the rules of court. Under the High Court rules, an order as to cost as against a legal practitioner arises where costs have been improperly incurred or without reasonable cause or by undue delay or any other misconduct or default, a judge may make an order against a legal practitioner whom the court considers responsible, whether personally or through a servant or agent.³⁰ Most rules provide that the liability of a legal practitioner could be in any of the following forms:

- i. disallowing cost as between the legal practitioner and his client; or
- ii. directing the legal practitioner to pay to his client costs which the client has been ordered to pay to other parties; or
- iii. directing the legal practitioner to personally indemnify such other parties against cost payable.

What this entails is that, courts have the jurisdiction to award personal cost against legal practitioners on account of the same principles of indemnity for necessary and reasonable cost incurred. The jurisdiction of the court arises where there has been serious neglect, incompetence or misconduct. However, the rules of courts require that an opportunity of hearing on cost be given to a legal practitioner before an order of cost is made against him.³¹

²⁷ (1960) 5 FS 200

²⁸ It should also not be based on the number of the successful parties. See Nwadialo *op cit.* p.753

²⁹ Order 53 Rule 1(1)

³⁰ Order 53 Rule 14 High Court of Lagos State (Civil Procedure) Rules 2019. See also Peter Moran, 'Personal Cost Orders against Solicitors.' *Law Society Journal of NSW (New South Wales Australia)* <<https://lsj.com.au/articles/personal-cost-orders-against-solicitors/>> Accessed 28 March, 2020.

³¹ We do not think that in the cases at hand, any opportunity was afforded the lawyers at the Supreme Court to be heard on the issue of cost, before the awards were made. See Order 53 rule 14(3) Lagos High Court Rules, Order 56 rule 13 (3) Abuja High Court Rules, 2018. However, Order 25 rule 14(1) FHC rules 2019 omits the requirement of fair hearing but was available under 2009 FHC rules order 25 rule 14(3).

Right of Legal Representation: Extent and Limit

An advocate is a person who assists, defends, pleads, or prosecutes for another.³² He is a person who is trained in both canon and secular laws and appears in an ecclesiastical or admiralty court on another's behalf and gives legal advice.³³ In the United Kingdom, an advocate was a member of the College of Advocates also known as Doctors' Commons and bore the title of Advocate. After the dissolution of the College in 1857, the term became indistinguishably associated with barrister.³⁴ In the same vein, a barrister is a person in England or Northern Ireland, who is admitted to plead at the bar and who may argue cases in superior courts.³⁵ In many other Commonwealth nations, the legal profession is divided into barristers and solicitors.³⁶ In Nigeria, however, the legal profession is fused; a legal practitioner practices as both a barrister and a solicitor.³⁷ His law office is engaged in both classes of work; requiring competences and skills in pleading cases in court, drafting documents and deeds, conducting searches, supervising the completion of transactions and advising clients.

While a citizen can plead his cause in court by himself, where he chooses to have that done on his behalf, it must be done by a legal practitioner who is qualified to do so.³⁸ In such a case, representation of litigants in any proceedings and preparation of documents relating to the proceedings in court is the sole prerogative of the legal practitioner engaged to do so.³⁹ Such legal practitioner has a right to appear and plead the cause in any court and tribunal in Nigeria and in certain instances outside Nigeria, thus the exclusive right of a legal practitioner to represent a litigant extends to all courts of law in Nigeria.⁴⁰ The constitution vests the right to legal representation to citizens, in the sense that a person has the right to a counsel of his choice.⁴¹

Morrison & Leith see the barrister more accurately portrayed as a fully social individual who must satisfy all sorts of competing demands while at the same time carving out a living from a not particularly welcoming environment.⁴² A lawyer has a duty to accept his client's brief subject to proper professional fees being paid.⁴³ The *cab rank* rule, expects barristers to accept any instructions offered to them at a fair

³² Garner B. A., *Black's Law Dictionary* (8th Edition), p. 171

³³ *ibid.*

³⁴ *ibid.*

³⁵ *ibid.* p. 453

³⁶ In such cases, the legal practitioner practices either as Solicitor or Barrister but not as both

³⁷ *First Bank Plc. vs. Maiwada* (2003) FWLR, part 151, p. 2001, at p. 2013

³⁸ The requirements to be qualified to be a legal practitioner are contained in the Legal Practitioners Act, Laws of the Federation, 2004. These include being a person of good character, person a qualifying examination and being called to the Nigerian Bar by the Body of Benchers.

³⁹ Once a legal practitioner is also appearing as a litigant before the court, he cannot appear for others in the same suit. *Fawehinmi v NBA* (1989) 2 NSCC 1. In other words, in his role as a litigant he is not and cannot appear in court as a legal practitioner. He therefore cannot exercise the right of audience and the right to represent a co-defendant in an action, being a party himself.

⁴⁰ Section 36 (6) (c) and (d) of the 1999 Constitution; *Uzodinma v Police* (1982) 1 NCR 27

⁴¹ Section 36 (6) (c) and (d) of the 1999 Constitution

⁴² John Morrison & Philip Leith, *The Barrister's World and the Nature of Law*. (Queens University Belfast, 1992) p. 29. <<https://www.researchgate.net/publication/301350373>> accessed 26 March 2020

⁴³ Rule 24(1) of the Rules of Professional Conduct for Legal Practitioners 2007.

and proper fee and not select the client for whom they act.⁴⁴ The rule is applicable to barrister's work before the courts and inapplicable to solicitor's work. Adumbrating this rule, Lord Denning argues that an advocate is a minister of justice equally with a judge. That no one except the legal practitioner can address the judge, unless he is also a litigant. This carries with it a corresponding responsibility; a barrister cannot pick or choose his client; he is bound to accept a brief from any man who comes before the court, no matter how great a rascal the man might be, or given to complaining or undeserving or unpopular his cause.

The barrister must defend him to the end, provided only that he is paid a proper fee or in the case of a dock brief, a nominal fee; he must accept the brief and do all he honourably can on behalf of his client.⁴⁵ In *Rondel v Worsley*,⁴⁶ Lord Reid added that, '[I]t has long been recognized that no counsel is entitled to refuse to act in a sphere in which he practices and on being tendered a proper fee for any person...'⁴⁷ The whole essence of such a rule is to protect the reputation of counsel in the course of performing their duties. In essence, a lawyer who has accepted a brief and has been paid the agreed fees but refuses or fails to handle the matter, clearly violates the provisions of Rule 24 of the Rules of Professional Conduct 2007 (RPC); this amounts to a professional misconduct and a breach of Rule 55 (1) of the RPC 2007.⁴⁸

In his representation of his client however, the duty to the court and fidelity to the cause of justice outweighs any other consideration. Lord Denning opines that the barrister has a duty to the court, which is paramount; that it is a mistake to suppose that he is the mouthpiece of his client to say what he wants or his tool to do what he directs. He is none of these things; he owes his allegiance to a higher cause, the cause of truth and justice. He must not consciously mis-state the facts. He must not knowingly conceal the truth; he must disregard the most specific instructions of his client, if they conflict with his duty to the court. The code, which requires a legal practitioner to do all these, is not a code of law; it is a code of honour. If he breaks it, he is offending against the rules of the profession and is subject to its discipline.⁴⁹ Such being his duty to the court, the legal practitioner must be able to do it fearlessly. He has time and time again to choose between his duty to his client and

⁴⁴ *Osborn's Concise Law Dictionary*, (Sweet and Maxwell, 8th Edition, 1993) p. 58

⁴⁵ Lord Denning, *The Discipline of Law*

⁴⁶ (1969) 1 AC 191

⁴⁷ *ibid.*

⁴⁸ Rule 55 (1) of the RPC 2007 provides that if a lawyer acts in contravention of any of the rules or fails to perform any of the duties imposed by the rules, he is guilty of a professional misconduct and liable to punishment as provided in Legal Practitioners Act, 1975. Now Legal Practitioners Act Cap L11 LFN 2004

⁴⁹ Lord Denning, in *The Discipline of Law*, p. 6, states that the legal practitioner must not unjustly make a charge of fraud, that is, without evidence to support it. He must produce all the relevant authorities, even those that are against him. He must see that his client discloses, if ordered, the relevant documents, even those that are fatal to his case. No counsel is however permitted to act otherwise particularly in the sphere in which he practices and on being paid a proper fee; for any person no matter how unpopular or even offensive his or her opinions may be and it is essential that the duty continues.

his duty to the court. This is a conflict often difficult to resolve and he should not be under pressure to decide it wrongly.⁵⁰

Where a legal practitioner violates such responsibility, what are his liabilities? If the question extends to one of negligence, he may be liable to his client.⁵¹ If the question bothers on abuse of process, is the award of costs payable by the legal practitioner, one that is contemplated? Is the barrister immune from liability for filing a frivolous action in court where in his view, there is a legal and legitimate course of action to be pursued? In this respect, the legislative intent of this Rule, to our mind is that, even if it is legal to do in terms of navigating an argument that the conduct is legal, the lawyer's view that he believes that the conduct is unlawful should restrain him from proceeding further with the brief. This ought to serve as an exception to the *cab rank rule* in Rule 24 of the RPC 2007. This will also save his client or himself from incurring reasonable costs for proceeding with a seemingly unlawful course in court as a Minister in the temple of justice and officer of the court.

The requirement of fidelity to the honour to the legal profession, the courts and the cause of justice has been codified in many provisions of the Rules of Professional Conduct in the Legal Profession, 2007. The relevant ones being Rule 14 (2 & 3), which requires a lawyer to consult a client and exercise independent professional judgment;⁵² Rule 14 of the RPC 2007, encapsulating the duty imposed on a lawyer to devote his attention, energy and expertise to the service of his client and subject to any rule of law, to act in a manner consistent with the best interests of the client; and Rule 15 (1, 2 & 3) which obliges a legal practitioner not to do acts that cause disrespect or knowingly advance wrong claims.⁵³

⁵⁰ *ibid.* p. 7

⁵¹ A legal practitioner owes his client a general duty of care and diligence. Damages arising from a lawyer's negligent conduct may make him liable. Section 9 (1) of the Legal Practitioners Act 2004 provides that a lawyer shall not be immune from negligence while acting in his capacity as a legal practitioner. The section provides that subject to the provisions of this section, a person shall not be immune from liability for damage attributable to his negligence while acting in his capacity as a legal practitioner, and any provision purporting to exclude or limit that liability in any contract shall be void. Where a lawyer gives his services gratuitously and without consideration, the law protects him from liability resulting from his actions or inaction.

⁵² Without prejudice to the generality of paragraph (1) of this rule, a lawyer shall: (a) consult with his client in all questions of doubt which do not fall within his discretion; (b) keep the client informed of the progress and any important development in the cause or matter as may be reasonably necessary; (c) warn his client against any particular risk which is likely to occur in the course of the matter; (d) respond as promptly as reasonably possible to requests for information by the client; and (e) where he considers the client's claim or defence to be hopeless, inform him accordingly. Subsection 3 provides further that when representing a client, a lawyer may, where permissible, exercise his independent professional judgment to waive or fail to assert a right or position of his client.

⁵³ Rule 15 (1-3) provides that (1) In his representation of a client, a lawyer may refuse to aid or participate in conduct that he believes to be unlawful even though there is some support for an argument that the conduct is legal; (2) Rule 15 (2) of the RPC 200, which provides as that in his representation of his client, a lawyer shall (a) keep strictly within the law notwithstanding any contrary instruction or by his client and, if the client insists on a breach of the law, the lawyer shall withdraw his service; (b) use his best endeavours to restrain and prevent his client from committing misconduct or breach of the law with particular reference to judicial officers, witnesses and litigants and if the client persists in his action or conduct, the lawyer shall terminate their relations; and rule 15 (3) In his representation of his client, a lawyer shall not: (a) give service or advice to the client which he knows or ought reasonably to know is capable of causing disloyalty to, or breach of the law, or bringing

Based on Rule 14 of the RPC 2007, it is our view that the duty expected of counsel is so much and demands watchfulness *vis-à-vis* the present reality of our time. Except the option of declining to accept the brief, there are instances where the client insists on pursuing a course despite the lawyer advising the client in line with Rule 14 (2) [c] & [e] of the RPC. Where a lawyer upon the client's insistence and the need to make reasonable profitable legal practice files a case in court and, the court finds such case as frivolous, the lawyer will be in clear breach of the foregoing provisions of the rules. This is because the lawyer would not be heard to tell the court that it was the client who insisted on filing the case in spite of the hopelessness of his defence. We must therefore clearly redefine the degree of negligence expected of the lawyer. There ought to be reforms to the effect that a lawyer may request a client to complete a Consent Form showing that in spite of being advised, the client insisted on pursuing the opposite course of action. The client must give a further assurance to indemnify the lawyer, where the court awards punitive cost on the lawyer for filing a frivolous case in court or tribunal. Finally, Rule 30 of the RPC expressly provides that a lawyer is an officer of the Court and accordingly, he shall not do any act or conduct himself in any manner that may obstruct, delay or adversely affect the administration of justice. This rule does not allow for innocent mistake on the part of a legal practitioner while appearing in court.

The above provision expressly bars a lawyer from proceeding with a breach of the law in the representation of his client and empowers him to withdraw from the shackles of Rule 24 of the RPC under any guise. The lawyer is duty bound to use his powers to prevent his client from committing a misconduct with particular reference to judicial officers, witnesses and litigants.⁵⁴ Thus, the client cannot use the rules as a tool to insist that a lawyer does whatever his client wishes; it is thus a shield to protect the lawyer. Where a client wants to invoke Rule 24 as a sword against a lawyer, the lawyer is protected by Rule 15 and the pronouncements of courts.⁵⁵

Conclusion and Recommendations

In as much as the courts enjoy inherent powers to punish for contempt and award costs against erring lawyers, the pronouncement of the court in awarding cost should be within the confines of the law and not be exercised arbitrarily. In proven cases of professional misconduct before the court by a lawyer in the course of prosecuting a matter, it is the duty of the court to refer such a lawyer to the Legal Practitioners Disciplinary Committee or other disciplinary bodies as provided by statute. A court should not misconceive a professional misconduct for contempt of court and

disrespect to the holder of a judicial office, or involving corruption of holders of any public officer; (b) file a suit, assert a position, conduct a defence, delay a trial, or take over action on behalf of his client when he knows or ought reasonably to know that such action would serve merely to harass or maliciously injure another; (c) knowingly advance a claim or defence that is unwarranted under existing law, but he may advance such claim or defence if it can be supported by argument in good faith for an extension, modification, or reversal of existing law.

⁵⁴ Judicial officers here includes Magistrates and adjudicators in tribunals created by law while acting in their judicial capacity.

⁵⁵ *Rondel v Worsley* (1969) A.C. 227; See also *Adewunmi v Plastex Nigeria Limited* (1986) 3 NWLR (Part 32) 767

therefore assume jurisdiction to summarily punish the lawyer for professional misconduct, but should punish for contempt where applicable. If the actions of the legal practitioner amount to professional misconduct in breach of the provisions of the RPC, can the court punish summarily by cost or refer the matter to the appropriate committee with the powers to punish for breach of the rules? It is our view, that where a lawyer commits a professional misconduct, the duty of the court is to refer such lawyer to the appropriate body, which should punish the lawyer. In this case, it is the Legal Practitioners Disciplinary Committee created by Section 11 of the Legal Practitioners Act LFN 2004 and not the court. The courts can only punish for contempt of court and in deserving circumstances award costs against the lawyer in line with its rules and limits, only after affording the legal practitioner an opportunity to be heard. The award of excessive cost is hazardous and unhealthy for the legal profession as a whole. The effect of such excessively punitive cost is that, it scares the lawyer from approaching the courts to seek redress for wrong done to his client. It is akin to preventing a surgeon from carrying on a surgical operation for fear of liability on account of the likelihood of death of the patient in the course of the surgical exercise.

Where a statute has provided for the maximum amount of costs awardable by the court, under no guise should the court depart from such statute no matter how grave the misconduct is on the part of the lawyer. This is because courts are creation of statute and should not become judicial legislators under the guise of interpreting the law. Rather, the courts should push for legislative intervention where cost as prescribed by statute is far from the reality of the present circumstance and grossly inadequate. In the light of the above, award of costs should not be too low so as not to defeat the essence of the award of costs in line with statutory provisions. It is our further view that the award of punitive costs to the tune of millions of Naira, especially where the expense incurred by the opposing party is not commensurate to the cost awarded by the court, is inimical to access to justice and endangers the society in its quest for a just and egalitarian democratic environment. While it may be argued that the rationale for the punitive cost against a lawyer is to serve as deterrence to lawyers from filing frivolous actions or deliberate abuse of the process of court, the court should not depart from its laid down rules and custom. Since the court is a creation of the law and the legal profession is heavily regulated by principles of law, sanctions should follow the law, regardless of the gravity of the misconduct committed by the lawyer. The exercise of the courts' power to award cost should be exercised with care; it should not be exercised simply because a lawyer appears in a case that is doomed to fail, since a lawyer is not a judge of credibility. He should not be penalised simply because he decides to act and represent a client in the court. This would enhance access to justice; encourage the legal practitioner to be courageous in the pursuit of justice and enrich jurisprudence even in areas of law that appear settled.