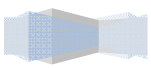
"HEADMASTER JUSTICE" AT THE SUPREME COURT:

Disentangling The Nigerian Legal System From The Web Of

OKAFOR vs NWEKE 2007 10 NWLR (PART 1043) 521

By:

Oluwemimo Ogunde, SAN



DEFINING "HEADMASTER JUSTICE"

1. It is necessary to begin this case review with a definition or explanation of what I have termed "Headmaster Justice". It stands for the attempt of the courts to instill responsibility and accountability in the practice of law particularly in the way court processes are signed for the purpose of dispute resolution through litigation. Where a court process is signed by a legal practitioner who omits to type the name by which he has been registered to practice under that signature but instead substitutes for it the name of the law firm in which he practises, that process will be adjudged incompetent and void. The court will strike out the suit if the process concerned is an originating process, notwithstanding that the case has been decided on the merits in favour of the party that the erring legal practitioner represents. The said action may be struck out on appeal (even at the Supreme Court) despite success at the trial court and at the Court of Appeal by the party that the legal practitioner represents.

2. The disciplinary process in the Nigerian legal system as it touches and concerns the legal practitioner has always been independent of the system of adjudication itself. It is of course true that sometimes the error of the lawyer results in the failure of his client's case. In that instance, the client loses because the error whether substantive or procedural affects the case on the merits, that is to say in the process of determination. The case does not fail as the result of the need to make the counsel handling it accountable and responsible.

3. By contrast, when the lawyer was to be disciplined (before "headmaster justice" forced its way into the Nigerian legal system) the focus of the disciplinary process was the erring lawyer himself. The conduct, speech or omission of the lawyer which forms the basis for discipline is identified, the

lawyer held personally liable, and punished in various ways. The punishment may be by imprisonment for contempt, reprimand for discourtesy, payment of costs for delay of court proceedings and suspension or disbarment for unethical conduct. However, "headmaster justice" has changed all that. It has introduced a disciplinary process by which the dispute to be resolved in court becomes the very means of correcting the lapses of counsel even if such correction is at the expense of the client's case.

4. It is like the headmaster who, in insisting on a pupil ironing his uniform suspends the class teacher or deducts the teacher's salary every time the erring pupil fails to iron his uniform. "Headmaster justice" does not seek to use the ordinary disciplinary process in correcting the lawyer. It seeks to do justice to a client in the process of correcting his counsel by using the client's case as a means of that discipline even if it means that the client will lose his case without the case being determined on the merits in order to discipline the counsel.

5. Even at a glance, "headmaster justice" appears revolting to one's sense of justice whether or not one is a lawyer. The problem is that it justifies its action on the fact that the Legal Practitioners Act particularly sections 2(1) and 24 compel it. The Supreme Court in the case of **OKAFOR vs NWEKE 2007 10 NWLR (PART 1043) 521** *(hereinafter OKAFOR)* per *Onnoghen JSC* explained the need for "headmaster justice" in this way:

> *"... I have taken into consideration the issue of substantial justice which is balanced on the other side of the scale of justice with the need to arrest the current embarrassing trend in legal practice where authentication or franking of legal documents particularly processes for filing in the courts have not been receiving the serious attention they deserve*

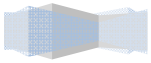
from some legal practitioners ..... *We owe the legal profession the duty to maintain the very high standards required in the practice of the profession in this country."* (Underlining supplied)

This dictum of the Supreme Court *per* ***Onnoghen JSC*** has become the forerunner for the establishment of a body of case law which seeks to ensure responsibility and accountability amongst legal practitioners in Nigeria at any cost even at the cost of the clients of the 'careless' lawyers losing at the Supreme Court the victories secured in litigation on the merits.

THE RUMBLINGS OF OKAFOR

6. It appeared to be a common sight in legal practice at the time; inscribing the name of a law firm below the signature authenticating a legal document but omitting to type the name of the particular lawyer in the firm who signed the document. The 'innominate' document was not regarded as invalid for that reason alone. This issue was however submitted for judicial resolution (perhaps for the first time) in the case of **THE REGISTERED TRUSTEES OF THE APOSTOLIC CHURCH, LAGOS AREA vs RAHMAN AKINDELE 1967 NWLR 263** (*hereinafter AKINDELE*). In that case, the Appellants unsuccessfully applied to the Registrar of Titles for registration as owners of a piece of land. On appeal to the High Court of Lagos, **SOWEMIMO J.** (*as he then was*) notwithstanding the argument of the appeal on the merits, raised *suo motu* the validity of the notice of appeal and held that the name of the legal practitioner representing the appellant, having been described in the notice of appeal as "J. A. Cole & Co." renders the notice invalid as the firm of J. A. Cole & Co. is not a legal practitioner under the Legal Practitioners Act 1962. The appeal was struck out.

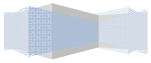
7. On a further appeal to the Supreme Court, the Court held as follows:



> *"Mr. J. A. Cole is admittedly a duly registered legal practitioner, and entitled to practice as such under the legal practitioners Act 1962. He has no partner in practice, but he has registered the name of J. A. Cole & Co. under the Registration of Business Names Act 1961 and uses that name in his practice……*
> *In our view, the business name was correctly given as that of the legal practitioner representing the appellants. In signing the notice of appeal, Mr. Cole used his own name, that is to say, the name in which he registered as a legal practitioner. We hold that on any interpretation of the rules that was a sufficient compliance with them, and we do not accept the submission that the addition of the words "for J. A. Cole & Co." would invalidate the signature if a signature in a business name was not permitted."*

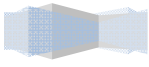
The Supreme Court, in defining the scope of its decision, stated further:

> *"That is enough for the determination of this appeal. Counsel addressed the court, and invited it to pronounce, on the wider issue of the use of a business name, including a name under which two or more legal practitioners carry on a practice in partnership, for the signature of documents which are required to be signed by a litigant or by a legal practitioner representing him, as it was said that its regularity had been doubted on occasion. The question does not arise in the present case, and we prefer to reserve it for a case in which it does arise." (underlining supplied)*



8. That opportunity came in the next year at the Supreme Court in the case of **COLE vs MARTINS & ANOR (1968) NMLR PAGE 217** *(hereinafter COLE)*. In that case, there was an appeal against the decision of the same Judge SOWEMIMO J (as he then was). The learned Judge had again *suo motu* held that a notice of appeal signed by a firm of solicitors known as "Lardner & Co." was invalid as Lardner & Co. is not a legal practitioner under the Legal Practitioners Act 1962. The Supreme Court in reversing the decision and allowing the appeal held thus:

> *"The effect, however, of registering a business name under the Registration of Business Names Act, 1961, is that where only one person constitutes the business, it is correct to describe that person as in the terms of the registered business name. In determining the meaning to be given to the use of the term "legal practitioner" in the Registration of Titles (Appeals) Rules, it is necessary to bear in mind that Section 18(1) of the Interpretation Act 1964 gives "legal practitioner" the meaning assigned to it by the Legal Practitioners Act 1962 namely "a person entitled in accordance with the provisions of this Act to practise as a barrister or as a barrister and solicitor, but this is subject to the overriding qualification of Section 1 of the Interpretation Act 1964 that this meaning is to be applied unless there is a contrary intention appearing in the enactment in question. In our view, having regard to the context of rule 4 of the Registration of Titles (Appeals) Rules, the purpose of which on this issue, it seems to us, is to ensure that the name of the legal practitioner giving notice of appeal and representing the appellant is clearly known, then it is a sufficient*



> *compliance with the requirement for a legal practitioner to sign and give his name, if a legal practitioner practising alone gives the name under which he is registered as a business name, as this can only refer and apply to the legal practitioner who so holds himself out as practising under that business name. No possible doubt or confusion can therefore arise in these circumstances."*(Underlining supplied)

In COLE, the Supreme Court, applying Sections 1 and 18 of the Interpretation Act held that the aim of the Registration of Titles (Appeal) Rules is to ensure that the name of the legal practitioner giving notice of appeal and representing the appellant is well known. Rule 4 of the said rules is complied with if a legal practitioner practising as a sole proprietor gives the name under which he is registered as a business name and this can only refer and apply to the legal practitioner who so holds himself out as practising under that business name.

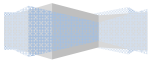
9. COLE thus ended the controversy and the storm in a teacup was blown away for almost FORTY YEARS. The clouds gathered again in 2005 and looked like threatening a storm. In **NEW NIGERIAN BANK PLC vs DENCLANG LIMITED (2005) 4 NWLR (PART 916) 549** *(hereinafter DENCLANG)*, the Court of Appeal had to decide whether a Notice of Appeal signed but with the firm name of "Ibrahim Hamman & Co." below it was valid. The Court of Appeal relying on AKINDELE held that only persons known to law can initiate an action in court. The firm of Ibrahim Hamman & Co. "*that issued, signed and filed the appeal on behalf of the appellant is not a person recognized by law to file an appeal*" as "*it is not a legal practitioner within the definition provided in Section 2(1) of the Legal Practitioners Act*". The Notice of appeal was therefore invalidated on that ground, although the appeal was still determined on its merits and dismissed. This was how the foundation of OKAFOR was laid.

FROM RAINDROPS TO TORRENTS

10. The facts of OKAFOR are straightforward but the principle upon which the case was decided has become not only controversial but puzzling. In the Supreme Court, the Appellant/Applicant filed a motion on notice seeking, inter alia, an order for extension of time for leave to cross-appeal and deeming the notice and grounds of appeal as properly filed and served. The said motion on notice and grounds of appeal and appellant's brief of argument all had J.H.C. OKOLO SAN & CO. below the signatures at the end of the processes.

The Respondents raised in their brief of argument an objection by which they contended that the processes referred to were null and void in that J.H.C. OKOLO SAN & CO. is not a legal practitioner authorized by law to appear or act before the Supreme Court. It was held by the Supreme Court that the combined effect of **Sections 2(1) and 24 of the Legal Practitioners Act** is that for a person to be qualified to practise as a legal practitioner, he must have his name in the roll and that the question that follows is whether J.H.C. OKOLO SAN & CO. is a legal practitioner recognized by law. The Court then held that:

> *".....it is very clear that by looking at the documents, the signature which learned senior advocate claims to be his really belongs to J.H.C. OKOLO SAN & CO. or was appended on its behalf since it was signed on top of that name. Since both counsel agree that J.H.C. OKOLO SAN & CO. is not a legal practitioner recognized by the law, it follows that the said J.H.C. OKOLO SAN & CO. cannot legally sign and/or file any process in the courts and as such the motion on notice filed on 19th December 2005, notice of cross appeal and appellants brief of argument in support of the said motion all*



signed by the firm known and called J.H.C. OKOLO SAN & CO. are incompetent in law particularly as the said firm of J.H.C. OKOLO SAN & CO. is not a registered legal practitioner." (Pages 531 Para G – 532 Para A) (Underlining supplied)

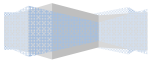
11. ***Onnoghen JSC*** who delivered the leading judgment stated that this "*conclusion… is very obvious having regard to the law…*" The learned jurist most importantly held that:

> "*the effect of the ruling is not to shut out the applicants but to put the house of the legal profession in order by sending the necessary and right message to members that the urge to do substantial justice does not include illegality or encouragement of the attitude of "anything goes"*.

OGUNTADE JSC, in his contribution, saw the issue in another light which is whether "*it is permissible for a legal practitioner to sign court processes in a partnership name without an additional indication on the practitioner who is a member of the partnership or firm handling the matter"*. The learned Justice then held that only human beings actually called to the Bar could practise by signing documents as a motion paper. He concluded that laws are to be strictly enforced and observed and "*it would have been quite another matter if what is in issue is a mere compliance with court rules."*

CHUKWUMA-ENEH JSC even went further in his contribution when he held that:

> "*It therefore follows willy-nilly that in the circumstances, the aforesaid processes cannot be signed nor remotely be authenticated as competent processes notwithstanding that the signature that had been appended on top of J.H.C. Okolo*



SAN & Co. might otherwise come to be the signature of a duly registered legal practitioner (in being) recognized to practise as such under the Legal Practitioners Act 1990…
The signature that has been appended on top of J.H.C. Okolo SAN & Co. with regard to these processes is the signature of J.H.C. Okolo SAN & Co…"

DISCIPLINE GIVES WAY TO JURISDICTION

12. After three years, the Supreme Court had to deal with a similar point in **OKETADE vs ADEWUNMI & ORS (2010) 8 NWLR (PART 1195) 63** *(hereinafter OKETADE).* A preliminary objection was raised to the competence of the notice of appeal and the appellant's brief of argument filed at the Supreme Court signed but with the inscription "OLUJIMI & AKEREDOLU" below the signature. In delivering the leading judgment, NIKI TOBI JSC held that OLUJIMI & AKEREDOLU is a firm with some corporate existence but not a name of a legal practitioner in Nigeria. The processes were declared incompetent. None of the justices who decided OKAFOR were in OKETADE except ***MUKHTAR JSC*** (as she then was). She concurred in both cases without giving a considered opinion.

13. One year later, on 15th April, 2011, the problem arose in a different way in **SLB CONSORTIUM LIMITED vs NNPC (2011) 9 NWLR (PART 1252) 317** *(hereinafter SLB CONSORTIUM)*. This time, there was a very strong representation of justices who participated in either OKAFOR or OKETADE or both, three out of five (***ONNOGHEN JSC*** who was in OKAFOR and delivered the leading ruling, ***MUKHTAR JSC*** who was involved in both cases and ***FABIYI JSC*** who participated in OKETADE).

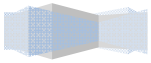
At the Supreme Court, the respondent raised a preliminary objection for the first time that the originating summons filed at the Federal High Court on 30th

June, 2000 and the Amended Statement of Claim filed on 29th July 2003 had the name "Adewale Adesokan & Co." inserted below the signatures in both processes in violation of **Order 26 Rule 4(3) of the Federal High Court (Civil Procedure) Rules 2000** which provides that pleadings shall be signed by a legal practitioner or the party if he sues or defends in person. It was then argued relying on OKAFOR that Adewale Adesokan & Co. that signed the processes is not a legal practitioner and as such, the trial court lacked jurisdiction to entertain that matter. It should be noted that the case involved a claim for almost US$20million.

14. The Supreme Court held agreeing with the respondent that the processes were signed by Adewale Adesokan & Co. who is not a legal practitioner. There were however two fresh obstacles: the issue of whether the previous decision of the Supreme Court in COLE could save the processes. The second was that it was too late to raise the objection since by participating in the proceedings without complaining of the defect in the processes at the Federal High Court, the Respondent is deemed to have waived it's right to object.

The Supreme Court dealt with the objections thus:

> "*This takes us to the decision of this Court in Cole vs Martins (supra), which learned counsel says is his authority for the above proposition. It is clear from the facts of this case that there is no evidence on record that Mr. Adewale Adesokan, who is a legal practitioner whose name is on the roll, is the only legal practitioner practising law under that trade name. Section 2(1) of the Legal Practitioners Act clearly states that "subject to the provisions of this Act, a person shall be entitled to practice as a barrister and solicitor if, and only if, his name is on the roll."*



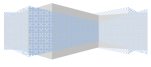
The above is a statutory provision which, even though in existence when Cole v. Martins (suprra) was decided, under the Legal Practitioners Act, 1962, it was neither cited not referred to by the court in that decision.

However, prior to the decision in Cole v. Martins (supra) this court had decided the case of Registered Trustees of Apostolic Church Lagos Area v. Rahman Akindele (1967) NMLR 263…" (Underlining supplied)

15. On the second point, the Supreme Court held further:

"*It has been argued that non-compliance with the provisions of Order 26 Rule 4(3) supra is a mere irregularity which had been waived as the same involves the procedural jurisdiction of the court. I hold the view that the submission is misconceived on the authority of Madukolu v. Nkemdilim (supra). That apart, the provisions of the Legal Practitioners Act, 1990 are statutory and therefore matters of substantive law which cannot be waived. The provisions of the Rules of Court involved herein are, by the wordings mandatory not discretionary.*

The argument that the objection ought to have been taken before the trial court and that it is rather too late in the day to raise same in this court particularly as the respondents had taken steps in the proceedings becoming aware of the defect or irregularities is erroneous because the issue involved in the objection is not a matter of irregularity in procedure but of substantive law – an issue of jurisdiction of the courts to hear and determine the matter as constituted…." (Page 332 Paras D-H) (underlining supplied)



16. ***FABIYI JSC*** in his contribution held as follows:

> "*The case of Cole vs Martins (1968) 1 All NLR 161 seriously relied upon by the appellant was, with due respect, decided per incuriam of the applicable provisions of sections 2 and 19 of the Legal Practitioners Act, 1962 which are similar to section 2(1) of the Legal Practitioners Act, 1975 and the Legal Practitioners Act, 1990 which provide as follows:*
>
> > *"Subject to the provisions of this Act, a person shall be entitled to practice as a barrister and solicitor if, and only if, his name is on this roll"*
>
> *Even then, in the earlier case of Registered Trustees, The Apostolic Church vs R. Akindele (1967) NMLR 263, it was firmly held and established that a firm of solicitors is not competent to sign a process"* (Page 336 Paras B-E)

It should be noted that ***MUKHTAR JSC*** (so he then was) applied COLE and did not say that it was decided *per incuriam* (See Page 334 Paras A-H)

17. ***RHODES-VIVOUR JSC*** in his contribution stated thus:

> *"What then is so important about the way counsel chooses to sign processes. Once it cannot be said who signed a process it is incurably bad, and rules of court that seem to provide a remedy are of no use as a rule cannot override the Law (i.e. the Legal Practitioners Act)"* (See Page 337 Para G)

From this point on, the application of OKAFOR took a new turn. The aim was no longer to "*send the necessary and right message to members"* of the legal profession to "*put their house in order*". OKAFOR became a mine field or a booby-trap in the armoury of a losing defendant to render proceedings void at

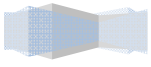
any stage of the proceedings once he is able to establish that the name below any signed process is not that of the particular counsel who signed but that of the law firm in which he or she practises.

THE FORTIFICATION OF OKAFOR

18. Clearly, OKAFOR was set for many battles particularly following the extension of the principles to stand against the doctrine of waiver and apply to processes filed at the trial court even when objection is raised for the first time in the Supreme Court after full participation without objection at the trial and intermediate courts. This battle came up in the Supreme Court in May 2012 in the case of **FBN PLC & ANOR vs MAIWADA** consolidated with **FRAMPHINO PHARMACEITUCALS vs JAWA INTERNATIONAL LIMITED (2013) 5 NWLR (PART 1348) 444**. In these cases, the Supreme Court empanelled a full court and invited seasoned lawyers, including the then President of the Nigerian Bar Association, J. B. Daudu SAN to consider whether OKAFOR should be overruled. In these cases, objections were raised at the Supreme Court to the validity of notices of appeal signed with the names "David M. Mando & Co. and O. E. Abang & Co." below them.

FABIYI JSC who was in the panel that decided **OKETADE and SLB CONSORTIUM** in delivering the leading judgment held thus:

> "*The purpose of Sections 2(1) and 24 of the Act is to ensure that only a legal practitioner whose name is on the roll of this court should sign court processes. It is to ensure responsibility and accountability on the part of a legal practitioner who signs a court process. It is to ensure that fake lawyers do not invade the profession. This, in my considered opinion, accords with the sacred canon of interpretation of law.* (Page 483 Paras C-D)



FABIYI JSC further opined that a literal construction of these sections shows that only legal practitioners who are 'animate personalities should sign court processes and not a firm of a legal practitioners which is inanimate and cannot be found in the roll' of the Supreme Court.

CHUKWUMA-ENEH JSC in his contribution regarding the application of AKINDELE and COLE held as follows:

> "*The decision in OKAFOR v. Nweke (supra) although it has not specifically adverted to the two earlier decisions of The Registered Trustees (supra) and Cole v. Martins (supra) as it has not expressly overruled any of them nonetheless it has decided that the provisions of sections 2(1) and 24 of the Act affect the jurisdiction of the court as a matter of substantive law and not as a matter of procedural law (and so in certain cases they cannot be waived). Clearly the decision in Okafor v. Nweke has impliedly abandoned and dissented from the decisions of the two cited cases as no longer good precedent to follow*" (Page 494 Paras C-E) (underlining supplied)

19. Needless to say, the Full Court of the Supreme Court refused to overrule OKAFOR. Since MAIWADA, the Supreme Court has continued to apply OKAFOR without exception. In **BRAITHWAITE vs SKYE BANK PLC (2013) 5 NWLR (PART 1346) 1** *(hereinafter BRAITHWAITE)*, a preliminary objection raised for the first time in the Supreme Court to strike out the Appellant's suit on the ground that the name of a law firm, OLUYEDE & OLUYEDE was inserted below the signature on the writ of summons and statement of claim was upheld. The Supreme Court held that when the name of a law firm is inserted below a signature in a court process instead of the name of the particular legal

practitioner in the firm who actually signed the process, it is not just the rules of court that are breached but also **Sections 2(1) and 24 of the Legal Practitioners Act** and as such, the rules of court must bow before the Legal Practitioners Act, an Act of the National Assembly. However, the emphasis shifted from the need to discipline lawyers to observe the laws regulating their profession to validity of such processes which in law deprives the courts of jurisdiction. It was for the same reason that the Supreme Court held in **THE NIGERIAN ARMY vs SAMUEL & ORS (2013) 14 NWLR (PART 1375) 466** that even where the Rules of the Court of Appeal were not breached by the inscription of N.O.O. Oke & Co. below a signature in a notice of appeal, such inscription being in breach of **Sections 2(1) and 24 of the Legal Practitioners Act** must still invalidate the process.

20. The decisions of **OKARIKA & ORS vs SAMUEL (2013)** and **MINISTRY OF WORKS AND TRANSPORT ADAMAWA STATE & ORS vs YAKUBU (2013) 6 NWLR (PART 1351) 481** *(hereinafter YAKUBU)* have also applied OKAFOR. OKAFOR has thus become a categorical imperative applicable irrespective of change in facts and circumstances. The only condition necessary for its application is to have the name of a law firm inserted below a signature on a court process without the name of the legal practitioner who signed coming on top of the name of the law firm.

21. Notwithstanding its apparent invincibility, OKAFOR does not stand on solid ground. Its weakness lies in its operation as an immutable principle, inflexible and subject to no exception. OKAFOR has become infallible and irrefutable. Undoubtedly, there can be no such principle since that will result not just in injustice but travesty. The essence of precedent is to ensure a gradual build-up of rules and principles that respond to the changing facts and circumstances as they are submitted for adjudication. Judicial precedent begins with the formulation of a general principle which is, over time modified

by a body of exceptions in the need to achieve justice. OKAFOR does not seek to work that way. It sets itself as the law of Medes and Persia that recognizes no changing circumstances and accommodates no new developments.

In fairness, OKAFOR did not begin its journey the way it appears to have ended in MAIWADA. It is therefore necessary to retrace the journey in order to show why it should be overruled or at least restricted to being just a general principle which admits of exceptions.

OKAFOR DECIDED IN IGNORANCE OF AKINDELE AND COLE

22. It is clear that the ratio decidendi in AKINDELE was that the notice of appeal signed by J. A. Cole was valid as that name is that of a legal practitioner enrolled pursuant to the Legal Practitioners Act. The fact that Mr. J. A. Cole also inscribed "for J. A. Cole & Co" under his name will not invalidate the process. No issue of jurisdiction arose. The Supreme Court expressly declined to consider the "wider issue *of the use of a business name, including a name under which two or more legal practitioners carry on a practice in partnership, for the signature of documents which are required to be signed by a litigant or by a legal practitioner representing him"*. The Court of Appeal erred in applying AKINDELE to that 'wider issue' in DENCLANG as COLE was even nearer than AKINDELE. DENCLANG was cited in OKAFOR by Counsel in arguments but the Supreme Court overlooked it and deprived itself of considering AKINDELE and even COLE.

23. Having not considered either or both cases, OKAFOR became a conflicting decision with COLE which at the time OKAFOR was decided was a binding decision on the issue of the validity of a court process signed without typing below the signature the name of the legal practitioner who signed the process. The proper approach therefore should have been to treat in MAIWADA both OKAFOR and COLE as conflicting decisions when the Supreme

Court was invited to overrule OKAFOR. The Supreme Court was therefore wrong in holding both in MAIWADA and SLB CONSORTIUM that AKINDELE was rightly decided on the issue of whether "a firm of solicitors can sign a process" (since the issue did not arise in AKINDELE) or that COLE was decided *per incuriam* having not considered the Legal Practitioners Act (when COLE actually did and the *ratio decidendi* in that case is that such signature is valid if the firm name used is the registered business name of a legal practitioner who is not in partnership as there would be no confusion as to who is the practitioner acting for the party on whose behalf the process was issued). OKAFOR therefore cannot be a binding precedent as it was decided in ignorance of another binding decision on the issue it decided.

24. The Supreme Court as the final court in our country must be very careful in the interpretation and application of previous decisions. In **N. A. B. LIMITED vs BARRI ENGINEERING (1995) 8 NWLR (PART 413) 257**, the Supreme Court carefully distinguished **OYEYIPO vs OYINLOYE** from **OVIASU vs OVIASU** and preserved both.

See also:

1) AFRO-CONT. (NIG) LTD vs AYANTUYI (1995) 9 NWLR (PART 420) 411

2) ODUA INVESTMENT LTD vs TALABI (1997) 10 NWLR (PART 523) 1

The Supreme Court does not lightly depart from its previous decisions. It is doubtful even if the Supreme Court can be taken to impliedly overrule itself when faced with conflicting decisions. It appears the correct position with respect to the doctrine of judicial precedent in the Supreme Court is that conflicting decisions would remain so until there is an express invitation for one or more of them to be overruled. There was no invitation to the Supreme Court in MAIWADA for AKINDELE and COLE to be expressly overruled and they still remain, in my humble view, decisions of the Supreme Court

notwithstanding OKAFOR. As OKAFOR did not consider AKINDELE and COLE, it was gratuitous for the Supreme Court in SLB CONSORTIUM and MAIWADA to hold that the two decisions were impliedly overruled in OKAFOR. MAIWADA and SLB CONSORTIUM on this score went beyond OKAFOR and these statements were made obiter.

BETWEEN A NAME AND A SIGNATURE

25. The pillar upon which OKAFOR rests is this: When the name of a law firm appears below a signature in a court process, it is taken that the law firm has signed the process. As such, the said process has not been signed by a legal practitioner since it is only a human being whose name can be on the roll of legal practitioners, not a law firm. It is with respect absurd to say that a law firm can sign any document. This is not what the Supreme Court meant. The issue was also not that the processes were signed by a quack or a fraud. The point made by the Supreme Court in invalidating the processes was that the name of the legal practitioner was omitted before the name of the law firm was inscribed. The Supreme Court in COLE held that the inscription of the name of the law firm is sufficient if it is the name in which a legal practitioner is registered as a business name. None of the decisions after COLE has touched this point or the effect of the Interpretation Act raised in COLE.

26. It is submitted that OKAFOR made a fundamental linguistic and grammatical error: that there is always a difference between a name and a signature. Grammatically speaking, a name is a word, term or phrase by which something or somebody is known and distinguished from other people or things. A signature is somebody's name written by him or her in a characteristic way. The signature of a person is different from his initials which is the first letter of each of the names of a person used as an abbreviation or means of identification. A signature must be the handwritten name of a

person. It may be cursive or in any other style of writing but no inscription can be properly called a signature without showing the name of the signatory. A signature cannot be any 'contraption' as one of the learned Justices of the Supreme Court held in SLB CONSORTIUM. It is this fundamental mistake that made the Supreme Court to suggest that the signature above the inscription of the name of a law firm is that of a law firm (an impossibility) or that a signature must also show below it the name of the particular lawyer who signed. It is true that a legal practitioner's name must be on the roll kept at the Supreme Court but that name is also authenticated at the Supreme Court after call to Bar by the legal practitioner. Therefore, both the typed name and the handwritten name (signature) authenticating it are what is meant by "name" in **Section 2(1) of the Legal Practitioners Act**. If that had not been the case, any person merely by having his or her name typed on the roll would have been entitled to practise.

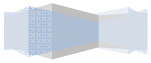
THE TRAVESTY OF THE "HEADMASTER JUSTICE" IN OKAFOR

27. OKAFOR is unique in its quest to "put the house of the legal profession in order" by striking out court processes in which a duly registered legal practitioner signs a process but omits to type his or her name below the signature. The aim of every judicial system is to determine according to law disputes submitted to it by parties and not to throw out such disputes as a means of instilling discipline or responsibility in counsel to such parties. The law is not a headmaster with a whip in its hands flogging erring lawyers into line and using the very disputes to be determined on the merits as the means of achieving this aim. It is not, with respect, correct that Sections 2(1) and 24 or indeed any other section of the Legal Practitioners Act taken singly or together were enacted to dispense this "headmaster justice".

28. The overall objective of the Legal Practitioners Act is to regulate the eligibility for becoming a legal practitioner and therefore how such a lawyer should practise. Once it is clear that a process has not been signed by a quack or a fraud, then the applicability of the Act ends. It must be remembered that invalidating any process on the ground that it has not been signed by a legal practitioner is another way of saying that it has been signed by a quack which exposes such a quack to criminal prosecution. If the law firm is that quack, it must be prosecuted. When the process is invalidated, but the 'quack' is let of the hook it only proves there was no quackery, but only an omission – the failure of a legal practitioner to inscribe his name under his signature.

29. Such a lawyer can be directed to refile the process if it is struck out or better still, an adjournment granted for him to properly inscribe his name, with costs of the delay, which may be punitive ordered to be paid by the legal practitioner personally. All these are acceptable disciplinary measures that will make the lawyer 'put his house in order'. With due respect, it is most unjust indeed to nullify at the Supreme Court processes filed at the High Court against which there was no objection because a legal practitioner omitted his typed name below his hand written name (his signature).

30. When processes are invalidated and actions struck out, it is the client not the lawyer who loses. The public ought to trust the institutions that regulate legal practice in Nigeria that they would not permit careless and tardy lawyers to set up shop. If by some oversight, such a lawyer starts to practise, it should be that lawyer, not the helpless client that should suffer for his carelessness or tardiness. That is why the Rules of Court instituted payment of costs personally by counsel if he is found to have been undisciplined in his handling of his or her client's case.



THE BLINKERED VIEW OF OKAFOR IN SLB CONSORTIUM AND MAIWADA

31. A rule or principle which can in the Supreme Court result in the reversal of success at the High Court and the Court of Appeal merely because the typed name of a signatory is not inscribed below his or her signature clearly breathes out injustice. That such an omission would become a jurisdictional issue is puzzling if not baffling. In SLB CONSORTIUM and MAIWADA, the Supreme Court held that OKAFOR dealt with a breach of statutory provisions and not just a breach of the rules of court. As such, where the signature of a court process by a law firm constitutes a breach of the rules of court, any provision in the said rules which directs the court to treat such breach as an irregularity would be ineffectual. This, according to the Supreme Court is because such an act by a legal practitioner not only constitutes a breach of the rules of court but also a violation of the Legal Practitioners Act which is an act of the National Assembly before which rules of court, a mere subsidiary legislation, must "bow". The Supreme Court further stated that such breach deprives the court of substantive and not just procedural jurisdiction since it involves a breach of statutory provision.

32. With the greatest respect, these principles in SLB CONSORTIUM and MAIWADA drip with error. The omission to type a counsel's name below his signature in a court process, even if such omission offends a statutory requirement will remain an issue of procedure, just like the statutory requirement of giving a pre-action notice or commencing an action against a public officer within a stipulated period have been treated as procedural matters. The courts have consistently held that whether or not a court may be deprived of jurisdiction as a result of non-compliance will depend on the circumstances. A party who fails to object to such non-compliance at the earliest opportunity may be taken to have waived his right to object.

See:

1) **KOSSEN NIG LTD vs SAVANNAH BANK (NIG) LTD (1995) 9 NWLR (PART 420) 439**

2) **ROSSEK vs ACB LTD (1993) 8 NWLR (PART 312) AT PAGE 382**

33. The Supreme Court also held in **OYEYIPO vs OYINLOYE (1987) 1 NWLR (PART 50) 356** that the Supreme Court Rules were made pursuant to a constitutional provision and thus have constitutional force. By the same token, the Court of Appeal Rules, Federal High Court Rules and the State High Court Rules made pursuant to Sections 248, 254 and 274 of the 1999 Constitution similarly have constitutional force and thus cannot 'bow' before an Act of the National Assembly with respect to practice and procedure in these courts. The 1999 Constitution makes it clear that the Rules of Court made to regulate practice and procedures would only be subject to any Act of the National Assembly (in respect of the Federal Courts) and a Law of the House of Assembly of a State (in respect of the High Court of a State) which also regulates practice and procedure.

34. The Supreme Court unfortunately failed to advert its mind to these constitutional provisions on practice and procedure particularly Sections 248, 254 and 274 respectively. With respect to Section 274 of the 1999 Constitution, the rules of court made by the Chief Judge of a State is not even subject to any Act of the National Assembly and as such cannot "bow" to any Act. It is my respectful view that the Supreme Court would not have regarded Rules of Court as a mere "subsidiary instrument" if its decision in OYEYIPO vs OYINLOYE had been considered.

THE LOSING BATTLE AGAINST OKAFOR AT THE COURT OF APPEAL

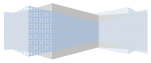
35. Thankfully, the Court of Appeal have not always followed OKAFOR. In **DAVID vs JOLAYEMI (2011) 12 NWLR (PART 1258) 320**, the Appellant in a additional

ground of appeal questioned the validity of the writ of summons and motion ex-parte filed on behalf of the Respondent which were duly signed but had the name of OLU ADESINA & CO. below the signatures in the two processes with the name of the particular counsel in the firm who signed the processes omitted. ***AGUBE JCA*** held as follows:

> *"The learned counsel has introduced the decision of the Supreme Court in Emmanuel Okafor and 2 ors vs Augustine Nweke and 2 ors (2007) 19 W.R.N. at 8; (2007) 10 NWLR (PART 1043) 521 and sections 2(1) and 24 of the Legal Practitioners Act … … … … … However the particular rule which fell due for interpretation by my Lord Onnoghen, J.S.C. with the greatest respect, was not the 1989 Kwara State, High Court (Civil Procedure) Rule, which specifically provides for alternatives in the mode of endorsing writs and processes either in the name of the legal practitioner or the firm name of the practitioner. In any event, be it under the 1989 or 2005 rules, it had long been settled even by the apex court that the rules of court, even though are meant to be obeyed should not be elevated to the status of statutes, as their breach thereof is tantamount to mere irregularity."*

36. In **FATOKI vs BARUWA (2012) 14 NWLR (PART 1319) 1, *KEKERE-EKUN JCA*** (as she then was but now JSC) faced with the application of OKAFOR in the interpretation of **Order 5 Rule 12(1) of the Oyo State High Court (Civil procedure) Rules 1988** held as follows:

> "*Order 5 Rule 12(1) of the Oyo State High Court (Civil Procedure) Rules 1988 provides:*



"Rule 12(1) Where a plaintiff sues by a legal practitioner, the writ shall be endorsed with the Plaintiff's address and the legal practitioner's name or firm and a business address of his within the jurisdiction and also, if the legal practitioner is the agent of another, the name or firm and business address of his principal."

Interpreting Order 5 Rule 12(1) of the Kwara State High Court (Civil Procedure) Rules 1989 (which are in pari material with the provisions of Order 5 Rule 12(1) of the Oyo State High Court (Civil Procedure) Rules 1988, the Ilorin Division of this court in David v. Jolayemi (2011) 12 WRN 55 @ 85 lines 5-22, (2011) 11 NWLR (Pt. 1258) 320 per Agube, J.C.A. held that under the provisions the legal practitioner who sued on behalf of the plaintiff had the option to endorse the writ with either his name or practitioner's/firm's name.....

I agree with His Lordship that the decision in Okafor v. Nweke (supra) is sound and binding on this court under the doctrine of stare decisis. It is also correct as observed by my learned brother in David v. Jolayemi (supra) that provisions similar to the Oyo State High Court (Civil Procedure) Rules 1988 under reference here were not considered in Okafor v. Nweke. It is however not in doubt that Yemi Ajibola & Co. is not the name of a legal practitioner within the meaning of Sections 2(1) and 24 of the Legal Practitioners Act. The writ of summons ought therefore to be held incompetent.

..... The attitude of the courts has shifted towards doing substantial and not technical justice in matters brought before them and to endeavour as much as possible to hear and determine cases on their merits. As the notice of appeal

is competent, I am of the view that it is in the interest of the parties to determine the appeal on the merits." (See Page 16 Para E to Page 17 Para E).

It is obvious that for ***KEKERE-EKUN JCA***, OKAFOR was a conundrum. Her Ladyship distinguished it in one breath, with regard to the application of the Rules of Court but applied it in another breath with regard to the application of **Sections 2(1) and 24 of the Legal Practitioners Act** and held that the writ of summons was incompetent. In the end, the learned Justice sought refuge under the shadow of that large sanctuary – interest of justice – and determined the appeal on the merits, in spite of having held that the writ of summons was incompetent.

37. This is where the journey ends. Since FATOKI, OKAFOR has held sway also at the Court of Appeal, with just a lone decision not going the way of OKAFOR. (**OKUNADE vs OLAWALE (2014) 10 NWLR (PART 1415) 207**.

In **BUHARI vs ADEBAYO (2014) 10 NWLR (PART 1416) 560**, the Court of Appeal applied OKAFOR in deciding whether a signature placed beside the names "FEMI FALANA, A. O. MOHAMMED & CO. in a writ of summons validates the writ. The Court of Appeal understood that the validity of the process had to be determined by the Rules of the High Court of Kwara State but still applied OKAFOR. Curiously, JOLAYEMI and FATOKI were not brought to the notice of the Court of Appeal.

38. In **TIJANI vs FBN PLC (2014) 1 NWLR (PART 1387) 57**, the Court of Appeal held as follows:

"*I think by the combined effect of the provisions of Order 15 Rule 2 of the High Court of Lagos State (Civil Procedure) Rules 2004 (supra), sections 2(1) and 24 of the Legal Practitioners*

Act (supra) and the authoritative decisions of the Supreme Court in Okafor v. Nweke (supra), it has become rather obvious that any processes purportedly signed by a legal practitioner not known to law (as in the instant case), are deemed to be incompetent.

As alluded to above, in the instant case, the 1st appellant's "further amended statement of claim" (contained at pages 2-9 of the record) was purportedly signed by –

"Rouq & Company, Legal practitioners, 12, Oyinkan Abayomi Drive, Ikoyi, Lagos, Nigeria"

that is unknown to law.. Thus, the purported further amended statement of claim in question is rendered incompetent, and liable to be discontinued." (See Page 76 Paras B-D)

39. Just like BUHARI, the Court of Appeal did not have the benefit of pronouncing on the correctness of JOLAYEMI and FATOKI as they were not cited by Counsel who argued the appeal.

One may at this point refer to another variant of the OKAFOR principle which the Supreme Court is yet to consider. This relates to the validity of a court process in which the name of a legal practitioner is inscribed under a signature on the process but there is a 'for' or 'ff' beside the signature giving an indication that that signature belongs not to that legal practitioner but to some other person who signed the process on behalf of that legal practitioner. The Court of Appeal has consistently held that such processes are incompetent in that there is a doubt as to whether that signature belongs to a legal practitioner as the name of the person who actually signed is not indicated.

See: **AREMU vs SHINABA (2014) 8 NWLR (PART 1408) 63**.

OKAFOR MUST BE TESTED AGAIN

40. A call for another review of OKAFOR may appear to be swimming against the tide. However daunting the task, it is in the interest of justice that it be done. The decision is erroneous in law in that it has misinterpreted the word "name" in Section 2(1) of the Legal Practitioners Act. The decision is inconsistent with the Constitution by ignoring the constitutional force of the Rules of the Court. The decision has become a vehicle of injustice in the way it has been applied in subsequent decisions particularly SLB CONSORTIUM and BRAITHWAITE. The respite at the Court of Appeal is only but a pyrrhic victory.

41. It is almost certain that an appeal against JOLAYEMI, FATOKI and OKUNADE on the point that OKAFOR has decided will succeed as these decisions will face an almost insurmountable task of standing against YAKUBU (in the case of OKUNADE), SLB CONSORTIUM and BRAITHWAITE (in the cases of JOLAYEMI and FATOKI). In any event, the present state of uncertainty (or confusion) both at the Court of Appeal and the Supreme Court is worrisome if not outrightly sad. OKAFOR presently rides triumphant but with a specious victory. Its headmaster justice has not curbed the penchant for putting the name of a firm below a signature. Since OKAFOR was decided, more than seventeen reported decisions of the Court of Appeal and the Supreme Court have followed. With the few exceptions in which substantial justice was done with the cases being decided on the merits notwithstanding the headmaster justice principle, all the others (indeed more than 70%) have resulted in incalculable losses for the parties rather than the legal practitioners.

42. I cannot recall a <u>single</u> instance in which the law firm whose carelessness resulted in a case being lost facing any form of punitive discipline either by being ordered to pay costs personally or being made to face the Legal

Practitioners Disciplinary Committee or being sued for negligence or being disciplined in any other way. This is not surprising since the "headmaster justice" applied by the Supreme Court is not suited for what it seeks to achieve. A legal practitioner is not disciplined by striking out cases he has filed on behalf of other parties. The result is that substantive justice lies prostrate and litigants who have turned to the courts for redress and succor have become victims of the very system that ought to give them justice. The headmaster must be turned out of our courts into the regulatory institutions where lawyers can be properly disciplined. The "headmaster justice" has worn out its welcome. OKAFOR must go.

Oluwemimo Ogunde, SAN