

## Trends and Developments

### Contributed by:

Yussuf Akinola Oyebanjo, Temilade Oluwaseun Adepate and Priscilla Ben-Okoh  
**Streamsowers & Köhn**

**Streamsowers & Köhn** is a reputable full-service law firm with over 16 years of history and a team of over 50 skilled lawyers. Its head office is in Lagos, with branch offices in Abuja and Port-Harcourt, Nigeria. The firm specialises in various practice areas, including arbitration, aviation, banking, insurance and intellectual property. Leveraging its intellectual capabilities, managerial expertise, technological proficiency and extensive networks, Streamsowers & Köhn provides valuable legal services to its diverse clientele. Notably, the firm acted as co-counsel

for over 85 of the victims of the EAS Airlines aviation accident of May 2002. In addition, one of its partners was team lead, representing the victims of the Pfizer Trovan clinical drug trial in Kano, Nigeria in *Abdullahi v Pfizer* 2005 U.S. Dist. LEXIS 16126 (S.D.N.Y.), which went up to the Supreme Court of the United States before a settlement was achieved. Streamsowers & Köhn also represented subscribers to the First Bank Hybrid public offer in 2007 in a class action.

## Authors



**Yussuf Akinola Oyebanjo** is an associate in Streamsowers & Köhn's dispute resolution practice, where he provides dispute resolution services to clients on matters relating to

civil litigation, debt recovery and insolvency, labour and industrial relations. He represents clients at various state High Courts, the Federal High Court, various divisions of the Court of Appeal and the Supreme Court.



**Temilade Oluwaseun Adepate** is an associate in Streamsowers & Köhn's dispute resolution and corporate commercial practices. She is actively involved in representing clients at various

courts of records in Nigeria. Temilade's expertise spans several legal domains and she plays a crucial role in providing exceptional legal representation in resolving clients' disputes.

# NIGERIA TRENDS AND DEVELOPMENTS

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**Priscilla Ben-Okoh** is an associate trainee in Streamsowers & Köhn's dispute resolution and corporate commercial practices. She has worked on notable transactions

within the dispute resolution and corporate teams. Priscilla's advocacy and oratory skills make her an excellent dispute resolution lawyer within and outside the court room. With her dedication to excellence, she ensures that clients receive the highest standard of service tailored to their needs.

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## Streamsowers & Köhn

16D, Akin Olugbade Street  
Off Adeola Odeku  
Victoria Island  
Lagos  
Nigeria

Tel: +234 1 271 2276  
Email: [info@sskohn.com](mailto:info@sskohn.com)  
Web: [www.sskohn.com](http://www.sskohn.com)



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## Navigating Class Actions in Nigeria: Challenges, Developments and Future Prospects

### Introduction

In the dynamic landscape of Nigerian law, class actions stand as a beacon of hope and collective empowerment. However, the absence of a comprehensive legal framework governing class actions has cast a shadow on its potentials, thereby creating uncertainties, stifling growth, and hindering access to justice for countless individuals. This article embarks on a comprehensive exploration, identifying the current legal framework for class actions and its deficiencies, juxtaposing the emergence of jurisprudence on class actions in other jurisdictions, and examines the options of using class actions as a robust tool for attainment of justice in the Nigerian context.

### What is class action?

Generally, a class action is a legal procedure which enables one or more persons to sue or be sued on their own behalf and or on behalf of other persons with respect to an alleged wrong. All parties in a class action are usually not identified as individuals but are described in the suit. For an action to qualify as a class action, the individuals in the action must be so large that individual suits would be impracticable, as determined in the case of *Abraham Adesanya v President of the Federal Republic of Nigeria* (1981) LPELR-147(SC).

Black's Law Dictionary, 7th Edition, defined class action as "a lawsuit which a single person or a small group of people represents the interests of a larger group".

### The legal framework for class actions in Nigeria and its deficiencies

Unlike other developed jurisdictions, Nigeria currently lacks any primary Act or legislation on class actions.

The legal framework for class actions in Nigeria is encompassed in the various civil procedure rules of courts in Nigeria as well as judicial decisions which have given an interpretation to this mode of action. An example is the case of *Gallaher Limited & Another v British American Tobacco Co. & Others* (2015) 13 NWLR (Part 1476) 325 where a class action suit was instituted at the Federal High Court against infringement of patent/trademark. In this case, the appellants contended that in a class action, the named defendants must qualify as members of the class to be approved to represent other members of the class. The Court of Appeal affirmed the order of the lower court by stating that the class action regime in Nigeria permits both ascertainable and unascertainable defendants, including the plaintiffs.

The unreported case of the *Welcome Foundation v Ope-Oluwa & Co. and 2 Others* Suit No FHC/L/40/89 is also a class action suit bordering on intellectual property rights where an application for the leave of court was granted to institute a class action on behalf of members who were not before the court.

The existing provisions of the civil procedure rules of various courts in Nigeria indicate the legal subject matters over which class actions can be instituted as follows.

- Order 9 Rule 4 of the Federal High Court Civil Procedure Rules, 2019 (the "FHC Rules 2019") makes provision for class actions to

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- be instituted with respect to trademark, copyright or patents and designs.
- Order 15 Rule 13 (1) of the High Court of Lagos State (Civil Procedure Rules) 2019, (the “Lagos 2019 Rules”) expressly provides that class actions can be instituted in respect of the administration of estates, properties subject to trust, land held under customary law as family or community property, and construction of any written instrument including a statue. The Lagos 2019 Rules also provide other preconditions before a claimant can maintain an action as a class action under the Lagos State High Court Rules, which include:
    - (a) the members of the class of the individuals cannot be ascertained, or if ascertained cannot or if ascertained and found it is expedient that one or more members of the class represent the whole class;
    - (b) the need for the claimant to obtain leave of court to be appointed to represent the class of individuals intended in the class action; and
    - (c) the provision of the Lagos 2019 Rules on the preconditions for instituting a class action was affirmed in the case of *Babalola v Apple Inc (2019) LPELR-50986 (CA)* where the Court of Appeal affirmed the decision of Justice Okuwobi of the Lagos State High Court dismissing the claimant’s claims for failure to fulfil the preconditions stipulated in the Rules of Court for class actions.
  - Order 13 Rule 15 of the High Court of the Federal Capital Territory Rules, 2018 (the “FCT Rules”) provides that class actions are applicable in proceedings in administration of estates, properties subject to trust, land held under interest as family or community property, construction of any written instrument including a statue, torts and any other subject matter. The FCT Rules further state that

in any action in which the court is satisfied that the person, the class or some members of the class cannot be ascertained or readily ascertained, if ascertained cannot be found, and if ascertained and found, for purposes of expediency and administrative efficiency, a person may be appointed to represent the class or members of a class.

- Order 13 Rule 11 (1) of the National Industrial Court of Nigeria Civil Procedure Rules, 2017 (the “NICN Rules”) empowers one or more persons to sue or be sued on behalf of or for the benefit of persons so interested with respect to labour and employment law matters.

By the extant various rules of courts, a class action cannot be rightly maintained without an appointment by the judge, appointing a person or some persons to represent other person(s) or class or members of the class. Further, Order 9 Rule 4 of the FHC Rules, as well as corresponding provisions of other rules of courts, outlines the conditions required before a judge can appoint a person or class of persons to represent others in a class action. The conditions are that:

- it is expedient for a person or members of a class to be appointed to represent the class; and
- the courts must ascertain that the class of persons cannot be ascertained, readily ascertained or be found; or the person, the class or some members of the class if ascertained, cannot be found; or the persons, or class and the members thereof cannot be ascertained and found.

It is imperative to state that these conditions apply to both claimants and defendants in a suit.

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The NICN Rules do not expressly refer to such actions as class actions but refer to them as actions by numerous persons with the same interest in a suit. It may be presumed that class actions would come under this provision of the NICN Rules considering that class actions are actions undertaken by numerous persons and as well as the peculiarity of the National Industrial Court as the special court for employment and labour matters.

With respect to labour and employment matters, the prior view of the jurisprudence is as spelt out in *Bemil Nigeria Limited v Emeribe & Others* (2009) LPELR-8732 (CA) 54-55, F-A and, *Enugunum & Others v Chevron Nigeria Limited* (2014) LPELR-24088 (CA) 23-24, B-C, where the Court of Appeal stated that a contract of employment is personal to each employee and where there is a breach, the respondents do not have a collective right to sue the appellant jointly and severally. In essence, class action was unknown hitherto to individual personal employment dispute adjudication in Nigeria, except with regard to suits instituted by unions on behalf of members, which are also sui generis, by reason of the statutory juristic personalities of registered unions to carry out such functions.

However, in *Suit No NICN/EN/13/2014 between Irokanulo Obioha Samuel & 3 Others v National Orthopaedic Hospital Enugu Management Board & 4 Others*, Honourable Justice Olukayode Ojo Arowosegbe considered the revolution in the employment and labour law regimes in countries across the world since Section 254C-(1)(f) of the 1999 Constitution (as altered) enjoins the National Industrial Courts to adopt international best practices. In this case, the claimants sought to institute a class action in respect of the terminal benefits of several employees who were terminated at the same time pursuant to

the extant NICN Rules. The Court noted that employment class action was becoming rife in jurisdictions such as USA, UK and South Africa, and the same should be encouraged in Nigeria.

Unfortunately, the Court pronounced that this case was not properly initiated as an employment class action because, even though the employees stated that they had the consent of the others to file and prosecute, there was no proof and this casts a serious doubt on whether the named claimants actually had the consent of the unnamed or unlisted persons.

It must be noted that this case shows the willingness of Nigerian judges, particularly at the National Industrial Court, to transform the current state of class actions within the labour and employment law sphere. It is hoped that affirmative pronouncements will be made in future, recognising the use of class actions in employment and labour matters, particularly in cases of mass termination of employment and similar labour disputes.

## *Deficiencies of the Nigerian legal framework on class actions*

In the intricate tapestry of Nigeria's legal landscape, a critical thread is notably absent – comprehensive legislation governing class actions.

Also, despite occasional references in existing court rules, the lack of a dedicated order/rule regulating class actions and stating a step-by-step procedure and case management of class actions has created a void, leaving room for ambiguity and stunted growth in this vital area of law.

Whether the absence of a dedicated Act regulating class actions in Nigeria should be regarded as a glaring void in the legal framework is a ques-

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tion worth asking and one that deserves much more answering. Because existing court rules offer fragmentary provisions, should the drafting of a unified Act therefore be indispensable? Can the proper delineation of the procedural nuances, establishing of clear definitions, and the provision of a comprehensive framework that guides both legal practitioners and the judiciary only be catered for by such an Act?

### *The growth of class actions in Nigeria*

Class actions, despite having found their way into Nigeria's legal framework for over a decade, still maintain an air of novelty within our jurisdiction. In their broad and intricate scope, class actions have not been fully developed, although the fundamental concept is not entirely foreign to the country's legal principles. Notably, the emergence of class actions in Nigeria can be primarily attributed to the presence of procedural court rules governing the subject, rather than a substantial number of cases filed or reported.

Class actions remain relatively rare in Nigeria. In fact, it is plausible that there is only one reported decision by the Court of Appeal on this matter, notably in the case of *Gallaher Limited & Another v British American Tobacco Co. & Others* (2015) 13 NWLR (Part 1476) 325, which centred on patent and trade mark infringement under the FHC Rules. This case marked a significant moment in the history of class actions, making express pronouncements and shedding light on when a court would issue an order of appointment, especially in accordance with the FHC Rules (Olumide Babalola, "[The Increasing Need for Utility of Class Actions in Seeking Redress for Consumer Rights Violations in Nigeria](#)", 16 March 2020, accessed 20 September 2023).

Regrettably, quantifying the exact number of class actions within the region remains an insur-

mountable task due to the absence of a centralised database or a comprehensive list of class action lawsuits.

It would be more efficacious for an all-encompassing Act on class action to be enacted Nigeria. This would create a general class litigation regime with specific procedural rules under the various rules of court on how to activate such actions.

However, bearing in mind the current unpopularity and dearth in class action proceedings, perhaps what is needed is for the various court rules to be meticulously revised to provide detailed and unambiguous procedures for class action litigation. This includes setting specific timelines for opting in or out, determining the criteria for class certification, and outlining the methodology for equitable distribution of damages (Nigerian Institute of Advanced Legal Studies Communique on the Roundtable on Class Action Litigation in Nigeria (2013)). These rules must expand the scope of class actions to encompass a wider array of legal issues, from consumer rights violations to environmental concerns, providing citizens with a robust legal avenue for seeking redress. These systems would not only empower citizens but also act as deterrents against corporate malfeasance and rights violations.

An accurate assessment of class action trends is vital for policy formulation and judicial evaluation. However, the absence of a centralised database poses a significant challenge. Establishing a comprehensive, accessible database is imperative to enabling policymakers, legal scholars and practitioners to analyse trends, identify gaps and bolster the efficacy of class actions in Nigeria.

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## *The international legal framework and jurisprudence on class actions and reasons to adopt the same*

Indeed, several international models have an all-encompassing legislation tailored to the unique legal landscape of class actions. Section 38(c) of the Constitution of South Africa provides a broad base for the right to class actions in all types of cases, while the Labour Right Act of South Africa provides for the application of that section.

Unlike the Nigerian jurisdiction where there are no principal Acts, statutes or legislation governing class actions, some jurisdictions have statutes governing this kind of action. The USA for example has the Class Action Fairness Act 2005 (Mondaq, [United States: Class Actions Comparative Guide](#) by Micheal R. McDonald and Caroline E. Oks, 8 August 2023), which regulates class actions in the USA, Australia has the Federal Court of Australia Act (Part IVA), and Canada has the Class Proceedings Act of Canada 1992.

In the USA, class actions can be instituted for almost any violation of substantive law, such as federal securities fraud laws, consumer protection laws, breach of contract, federal laws forbidding employment discrimination on the grounds of race or sex or national origin, antitrust (or competition law) violations and other matters. This position differs from that of the rules of courts in Nigeria where there is a limited area of law wherein class actions can be initiated.

In Australia, a class action may be commenced by or against any one person as a representative of numerous persons who have the same interest in the proceeding and the claims brought give rise to a substantial common issue of law or fact. Here, there is no requirement for every group member to have a claim against every defendant. In this jurisdiction, representative

proceedings may be brought where seven or more people have claims which arise out of the same or related circumstances and give rise to a substantial common issue of fact or law ([Global Litigation Guide Country Insight: Class actions](#) (2023), accessed 28 September 2023).

In Brazil, the Federal Law No 7.347/1985, which was enacted in 1985, governs class action proceedings. There is also the Brazilian Consumer's Code which contains further supplementary provisions regarding class actions.

On 19 March 2019, the Dutch Senate adopted the Act on collective damages in class actions (WAMCA), which is applicable in Netherlands.

These jurisdictions have revealed the existence of a class action legal framework which is worthy of emulation. Some of the statutory frameworks have removed the uncertainties surrounding class actions, which if adopted will greatly benefit Nigeria, such as the enlargement of the number of cases that will qualify for class action as opposed to the restricted regime currently in force in Nigeria.

## *Conclusion*

The absence of comprehensive class action legislation in Nigeria not only hampers justice but also stifles social progress. Nigeria stands at a pivotal juncture in its legal evolution. Embracing the challenges posed by class actions and addressing the queries raised herein necessitates bold, decisive action. A robust rule of court regulating class actions will not only empower citizens but also instil confidence in the legal system. Transparent procedures, equitable settlements and a centralised database will collectively foster an environment where justice is not merely an aspiration but a tangible reality. Through careful reforms, meticulous planning

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and unwavering commitment to the principles of justice, Nigeria can pave the way for a legal landscape where class actions truly serve the people, embodying the essence of a just and equitable society.

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