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Collective Redress & Class Actions 2024


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Nigeria: Law & Practice

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Nigeria: Trends & Developments

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NIGERIA



Law and Practice

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NIGERIA LAW AND PRACTICE

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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.

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1. Policy Development of Collective Redress/Class Action Mechanisms

1.1 History and Policy Drivers of the Legislative Regime

Class actions have evolved in Nigeria through court rules and judicial decisions. However, the concept is still evolving in Nigerian jurisprudence and is restrictive in nature.

Historically, class action procedure existed in Order 13 Rule 15 of the High Court of Lagos State (Civil Procedure) Rules of 1972 (the “Lagos 1972 Rules”) and continues to be retained in subsequent re-enactments of the Rules in later years. Order 15 Rule 13 of the High Court of Lagos State (Civil Procedure) Rules 2019 (the “Lagos 2019 Rules”), which are the extant rules, provides for class action in cases relating to the administration of estates, or property subject to a trust, or land held under customary law, or construction of a written instrument, including a statute in Lagos State.

Other High Courts in the various states in Nigeria also mirrored the Lagos Rules by making provision for class actions in their various rules of court.

The emergence of the class action framework at the federal level in Nigeria can be traced back to the Federal High Court (Civil Procedure) Rules, 2009 (the “FHC Rules 2009”), which made provision for a class action procedure specifically for intellectual property rights cases. The Federal High Court (Civil Procedure) Rules, 2019 (the “FHC Rules 2019”), which are the extant rules, makes provision for class action with a limited scope for only disputes involving trademarks, copyright or patents and designs. This is in line with the Constitution of the Federal Republic

of Nigeria, 1999 (as amended) (the “Constitution”), which vests the Federal High Court with the exclusive jurisdiction to entertain intellectual property-related actions.

Order 13 Rule 11 (5) of the National Industrial Court Civil Procedure Rules, 2017 incorporates the general provisions on class actions which are *impari materia* with the rules of the various High Courts of the States and those of the Federal High Court.

The major policy drivers/reasons for class actions in Nigeria have been aptly identified by the Supreme Court in the case of *Adedeji v CBN* [2022] LPELR – 57809 SC. Though the action is a representative action, the rationale proffered by the Supreme Court of Nigeria is apposite to the discourse with respect to class actions. The apex court held that it is a salutary and common-sense provision (in the rules of court in Nigeria) that if there are numerous parties, it will be extremely cumbersome and frustrating if all those interested parties are joined as a named party. The Court held in that case that it will find it difficult to determine a case justly by insisting that everyone interested should be named on the writ as a party. For the sake of convenience, the courts in Nigeria therefore approve of representative actions. Thus, given a common interest or a common grievance, a representative action is in order if the relief sought is in its nature beneficial to all whom the named plaintiffs proposed to represent. Class actions enjoy a broader perspective as class members need not have the same interest.

1.2 Basis for the Legislative Regime, Including Analogous International Laws

Generally, just as the principles of common law and equity were inherited from England, so also were the Rules of the old Supreme Court of

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Nigeria fashioned out of those applicable in the English County Courts. When the old Supreme Court was federalised, giving way to High Courts in each of the Regions and in the then Federal Capital of Lagos, these High Courts made their individual rules of court which were also substantially based on those of the defunct court. The rules of each High Court in the country therefore derived from the rules of procedure of the County Courts in England (Fidelis Nwadialo, *Civil Procedure in Nigeria*, 2nd Edition, Lagos; University of Lagos Press, page 12)

However, it is interesting to note that with respect to class actions, it does not appear that Nigeria modelled its provisions in the rules of courts on class actions after the regime in the UK as class actions are not allowed in the UK.

In the USA, Rule 23 of the Federal Rules of Civil Procedure (Fed R Civ P 23) (Rule 23) is the principal source of law relating to class actions in US federal courts. Most states have enacted standards analogous to Rule 23 that govern class action proceedings in their respective state courts. However, in 2005, the US Congress passed the Class Action Fairness Act, 28 USC § 1332(d) (CAFA). This is a salient difference with the Nigerian regime, and there is no legislation passed by the National Assembly (Parliament or Congress or legislative arm of government) that legislates solely for class actions.

The provisions of the Nigerian Rules of Court and Rule 23 of the Federal Rules of Civil Procedure in the USA are similar. However, some of the provisions of Rule 23 of the Federal Rules of Civil Procedure in the USA that are not contained in the Nigerian Rules are as follows.

- The court must be satisfied that prosecuting separate actions by or against individual class members would create a risk of:
 - (a) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class action; or
 - (b) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would impair or impede their ability to protect their interests.
- There is a provision for a certification order whereby the court certifies the action as a class action, defines the class members, appoints the class counsel who must meet certain requirements, defines the class and the class issues, claims or defences. Such an order may be amended before judgment.

1.3 Implementation of the EU Collective Redress Regime

Nigeria is not an EU member state and is therefore not subject to the EU collective redress regime. Nigeria's jurisdiction operates under its own legal framework and regulations for class action lawsuits.

2. Current Legal Framework and Mechanisms Applicable

2.1 Collective Redress and Class Action Legislation

There are currently no principal laws governing collective redress/class actions in Nigeria. However, these types of action are recognisable and permissible by virtue of the provisions of existing civil procedure rules of the various High Courts

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of States in Nigeria, the Federal High Court and the National Industrial Court.

3. Scope and Definitional Aspects of the Legal Framework

3.1 Scope of Areas of Law to Which the Legislation Applies

The applicable civil procedure rules of various courts in Nigeria determine the areas of law such rules permit for class action lawsuits; some of these are mentioned below.

Order 15 Rule 13 (1) of the Lagos 2019 Rules provides that class actions can be instituted in the following areas of law:

- the administration of estates;
- properties subject to a trust;
- land held under customary law as family or community property; and
- the construction of any written instrument, including a statute.

Order 9 Rule 4 of the FHC Rules 2019 provides that class actions can be instituted with respect to trade marks, copyright or patents and designs.

Order 13 Rule 11 (1) of the National Industrial Court of Nigeria Civil Procedure Rules, 2017 (the “NICN Rules”) empowers one person or more to sue or be sued on behalf of or for the benefit of persons so interested with respect to labour and employment law matters. The NICN Rules do not expressly refer to such actions as class actions but as actions by numerous persons with same interest in a suit.

Order 13 Rules 14 and 15 of the High Court of the Federal Capital Territory Civil Procedure Rules, 2018 expanded the scope of the class

action regime for suits instituted at the Federal Capital Territory by providing that class actions can be brought for proceedings concerning the administration of estate, property subject to a trust or land devolved under other interest as family or community property, the construction of any written instrument, including a statute, or torts or any other class action.

For an order of class action to be granted, Nigerian courts must ascertain that the class of persons cannot be ascertained, readily ascertained or be found.

3.2 Definition of Collective Redress/ Class Actions

There is no statutory definition of a class action or collective redress save for the provisions in procedural rules of the various courts in Nigeria.

The common denominator in the various rules of court is that class actions are actions where one or more persons are appointed by the judge to represent that person(s) or class or members of the class in a lawsuit where the person, class or some members of the class interested in the lawsuit cannot be ascertained or cannot readily be ascertained or, if ascertained, cannot be found, or for purposes of expediency and efficiency if they can be ascertained or found.

Nigerian courts have also interpreted what constitutes a class action. In the cases of *Abraham Adesanya v President of Federal Republic of Nigeria* (1981) 5 S.C. 69 and *Gallaher Ltd. & Another v British American Tobacco Co. Ltd. & Others* (2015) 13 NWLR (Part 1476) 325, it was held that a class action must be centred on the principle of commonality, ie, there must be common factual questions or legal interest with the claims and defences of the larger group to be represented being protected.

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In the case of *Babalola v Apple Inc* [2021] 15 NWLR 193, the Court of Appeal in accordance with Black's Law Dictionary gave the definition of "class action" as: "a lawsuit in which the court authorises a single person or a small group of people to represent the interests of a larger group, specifically, a lawsuit in which the convenience either of the public or of the interested parties requires that the case be settled through litigation by or against only a part of the group of similarly situated persons and in which a person whose interests are or may be affected does not have an opportunity to protect his or her interests by appearing personally or through a personally selected representative, or through a person specially appointed to act as a trustee or guardian".

In that case, the Court further pronounced on the peculiarity of class action as follows: "[i]n a class action, the class must be so large that individual suits would be impracticable. There must be legal or factual questions common to the class. The claims or defences of the representative parties must adequately protect the interests of the class".

4. Procedure for Bringing Collective Redress/Class Actions

4.1 Mechanisms for Bringing Collective Redress/Class Actions

In Nigeria, class actions can be commenced at the Federal High Court and the various State High Courts. Inasmuch as these actions can be commenced in these courts, the rules guiding the causes of action are different under the various rules of court, for example:

- by the provisions of Order 15 Rule 12(1) of the Lagos 2019 Rules, the institution of class

actions is restricted to proceedings concerning the administration of an estate, property that is the subject of a trust, land held under customary law as family or community property, or the construction of any written instrument including a statute;

- by virtue of Order 9 Rule 4(1) of the FHC Rules 2019, a class action may be brought in any matter concerning trade marks, copyright or patents and designs; and
- by Order 13 Rule 15 (1) of the Federal Capital Territory Abuja, (Civil Procedure) Rules, 2018, class actions can be brought for proceedings concerning the administration of estate, property subject to a trust or land devolved under other interest as family or community property, the construction of any written instrument, including a statute, or torts or any other class action.

In all the provisions stipulated above, where the court is satisfied that it is expedient to do so, it may appoint one or more persons to represent a person, a class or members of a class where:

- the person, the class or some members of the class interested cannot be ascertained or readily be ascertained; or
- the person, the class or some members of the class interested if ascertained cannot be found.

There is no exclusive procedure or mechanism for commencement of collective redress/class action under the rules of the various courts. This is because the mechanism for commencement of a class action under the various rules of court is not different from that which is obtainable in commencement of other types of civil actions. These are usually by way of a writ of summons or by originating summons and shall be accom-

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panied by relevant documents as specified by the rules of court.

4.2 Overview of Procedure

Under the High Court rules of various states and the Rules of the Federal Capital Territory Abuja, there is no exclusive procedure for the commencement of a class action. However, Order 43 Rule 1 of the Lagos 2019 Rules provides that whereby any application is authorised to be made to a judge, such application shall be made by a motion which may be supported by an affidavit and shall state the rule of court or law under which the application is brought.

According to the provisions of the various procedural rules of court, the procedure for commencing a class action is as follows.

- The action may be brought by way of writ of summons or originating summons, subject to the provisions of the rules of court and shall be accompanied by the relevant documents as specified by the rules of court.
- An application by way of motion ex-parte (without notice to the other parties) must be made to the judge seeking leave to appoint one or more persons (named in the originating process filed) to represent a person, class, or some members of the class in a subject matter suit.
- The motion ex-parte will contain a relief to advertise/publicise the action in the interest of the persons, class or some members of class in a subject matter so as to be aware of the pendency of the action with the option to opt in/out by any member of the class or person(s).
- Upon hearing an application, the judge appoints one or more persons to represent the class or some members of the class.

4.3 Standing

In Nigeria, persons who have standing to bring collective redress/class action suits are persons having an interest in the suit, which may be commenced or defended by one or more such persons, for the benefit of other interested persons. In a class action, it is sufficient for members of the class to have common issues without necessarily having the same interest.

By Order 13 Rule 15 (1) of the Federal Capital Territory Abuja, (Civil Procedure) Rules, 2018, Order 15 Rule 13 (1) of the Lagos 2019 Rules and Order 9 Rule 4(1) of the FHC Rules 2019, a judge is empowered to appoint one or more persons to represent the a person, members of a class, or class of persons interested in a class action.

4.4 Class Members, Size and Mechanism – Opting In or Out

Determination of Persons Who Belong to a Relevant Class for the Purposes of Collective Redress/Class Action

In Nigeria, the determination of persons who belong to a relevant class for the purposes of collective redress/class action litigation is dependent on whether the persons have an interest in the subject matter of the suit. There must also be legal or factual questions common to the class.

Limits on the Number Within a Class/Size of Classes

In the Nigeria legal regime, there are no limits on the number of persons who constitute a class. The rules of the various High Courts in Nigeria recognise that a class may be made of persons interested in a class action some of which:

- cannot be ascertained;
- cannot be rightly ascertained; or
- if ascertained, cannot be found.

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This presupposes that there is no restriction on the number of persons in a class or the size of classes.

Mechanism for Joining an Action Opt In/Out

Order 9 Rule 4 (3) and (4) of the FHC Rules 2019 provides that a person or member of a class may, in any class proceedings, apply to the court or a judge in chambers to opt in or opt out of the class and the court or judge in chambers may then, on good and justifiable cause, permit such person or member of a class to opt in or opt out of the class action.

The application to the court or judge in chambers is by a motion which sets out the grounds which the party making the application intends to rely on, supported by an affidavit setting out the facts which the party making the application intends to rely on, and a written address. Generally, all motions are to be made on notice to any party affected by it. However, motions *ex-parte* (without notice to the affected party) are granted by the court, if it is satisfied that to delay the motion till notice is given to the affected party would entail irreparable damage or serious mischief to the party making the application.

There are no specific provisions in the relevant High Court rules of various states in Nigeria and the Federal Capital Territory stating the procedure for opting in or out of a class action proceeding. However, generally, applications are allowed to be made to a court for the grant of any orders.

By making an application to opt in in the course of proceedings, a class member takes formal steps to be bound by any decision made in the suit; by applying to opt out, a class member would not be bound by the outcome of the

suit and is at liberty to commence an individual action.

4.5 Joinder

Generally, under the rules of the various High Courts in Nigeria, any application to add a plaintiff/claimant or defendant to any suit pending before the court may be made to a judge by a motion on notice. Such application shall be accompanied by the proposed statement of claim or defence as the case may be, all the documents intended to be used and the depositions of all the witnesses. The same procedure is applicable while seeking to add further parties to a collective redress/class action.

4.6 Case Management Powers of Courts

Unlike some other jurisdictions, Nigeria does not have a well laid out case management system for class actions, especially as there is a dearth of provisions under the various rules of courts to guide the court in the management of class action cases. However, in relation to case management for class action, Order 56 Rule 8 of the FHC Rules 2019 provides that the court shall adopt such procedure in similar rules of court or such procedure as will in its view do substantial justice to the parties.

The general provisions and -stipulated in the various court rules for the filing of originating processes are applicable for class actions. The time-frame varies according to the various processes and the courts. Upon the service of the originating processes and accompanied documents on the defendant, the defendant is mandated to file its defence within the time prescribed by the rules of court. The claimant/plaintiff may then file any reply to the defence filed by the defendant. Once these processes are filed, pleadings are deemed closed, and a pre-trial conference will be held by the pre-trial

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judge who tries to settle the matter amicably or narrow down the issues for trial. Where the claims cannot be settled amicably, the matter would be assigned to a trial judge and the trial would commence. After the close of trial, the defendant files its final written address, followed by the plaintiff's final written address after which the defendant files a reply. The judgment is delivered at a later date.

4.7 Length and Timetable for Proceedings

In Nigeria, the average length of legal proceedings for various types of actions can vary significantly based on the complexity of the case and the jurisdiction in which it is being heard.

For instance, under the Lagos 2019 Rules, claims involving liquidated monetary amounts of NGN100 million or more, mortgage transactions, charges, or other securities, as well as liquidated monetary claims by non-Nigerian nationals or non-residents in Nigeria, can be commenced in the fast-track court. In this specialised court, litigation must conclude within nine months from the date of commencement, and the presiding judge is required to deliver judgment within 60 days after the trial is concluded.

To ensure timely progression of cases, various civil procedure rules in Nigerian courts have established specific timelines for actions preceding the commencement of trials. Under the Lagos 2019 Rules, which are mirrored by other rules of court, a defendant has 42 days after being served with a claim to file a statement of defence, and the claimant has 14 days to file a reply. After pleadings have closed, a case management conference follows within three months, where the case management judge decides whether the matter should proceed to settlement or trial.

In cases without technical objections, the period from action commencement to trial should ordinarily not exceed six months. Nevertheless, delays may occur due to late filing and congested court dockets, leading to trials being scheduled up to nine months later or more. In some instances, it may take a year or more from commencing proceedings to the actual trial.

Furthermore, some common timetabling aspects in Nigeria's legal system include the following.

- Case management conferences: these are meetings between the parties and the case management judge to discuss the case's progress, attempt settlement, narrow down the issues for trial and set deadlines.
- Discovery deadlines: parties are given specific timeframes to exchange evidence and information.
- Trial scheduling: courts allocate dates for trials based on their availability.

4.8 Mechanisms for Changes to Length/Timetetable/Disposal of Proceedings

The average duration of a civil proceeding in Nigeria typically spans two to three years from commencement to conclusion. However, expedited civil trial procedures are available across Nigerian courts. Notably, there is the summary judgment application/undefended list summary trial procedure, suitable for uncontested matters and monetary claims.

Where any of the parties are unable to meet the timelines set by the rules of the court, the party by motion can apply to the court to extend the time to accommodate the delay or late filings. However, there are default fees and penalties which are calculated per diem that must be paid by the party in default of filing. The amount

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payable as default fees differs according to the various rules of courts.

At the Magistrates' Court level, states like Lagos have introduced small claims courts, specialising in resolving matters involving sums up to NGN5 million efficiently within a few months.

These expedited procedures, combined with statutory timelines and specific rules, contribute to the efficient management of legal proceedings in Nigeria, ensuring that cases are resolved in a timely manner.

4.9 Funding and Costs

There is no general rule or legal framework guiding costs and funding for collective redress/class actions. Class actions are typically funded collectively by the members of the class, or by one or some of them.

In some cases, where parties are not able to fund the action, a third party or uninterested party in the class action, such as a non-profit organisation, can assume responsibility for the action as an investment such that if judgment is delivered in the favour of the claimants, the third party would receive certain percentage of the judgment sum awarded to the claimants.

Parties may also choose to enter a contingency fee agreement with their lawyer where payment is made for legal representation upon a successful conclusion of the case. Under this type of agreement, however, the lawyer is not allowed to advance the cost of litigation except as a matter of convenience and subject to reimbursement.

4.10 Disclosure and Privilege

The Nigerian judicial system accepts that parties to litigation should share documents and other information prior to trial. Parties must plead and

provide in advance ("front-load") all documents they require as proof of their case.

During the trial, any party can apply to the court or judge in chambers for an order directing the other party to make discovery, that is, to disclose on oath the documents that are or have been in its possession or power. Similarly, any party can ask written questions required to be answered by the other party to clarify matters of fact and help to determine in advance what facts will be presented at any trial in the case. These questions are referred to as interrogatories.

Failure to make discovery of documents or to produce the disclosed documents for inspection or to answer the interrogatories, when ordered by the court, is contempt of court rendering the defaulting party liable to committal.

The exception to the above disclosures is where they are privileged from production or there are any other legally recognised grounds excluding their production. Privileged information includes:

- documents which are self-incriminating;
- documents created or shared by a party for the purpose of assisting a party or for use by the party's legal representative in an existing or contemplated litigation (except information shared between a client and a legal practitioner in furtherance of or exposing any illegal or criminal purpose, or if such disclosure is in the interest of public policy or national security);
- documents owned by a third party; and
- letters or other documents marked "without prejudice".

4.11 Remedies

There are remedies available to parties through collective redress/class actions which could be

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obtained in the pendency of the suit before judgment and/or in the judgment. In the pendency of the suit, the reliefs are in the form of interim and interlocutory orders, which are provisional in nature and are usually in the form of injunctions restraining a party from doing an act or mandating a party to act in a particular way. Interim orders are expected to last between seven or 14 days depending on the applicable court rules, or as directed by a court pending the hearing of an application which seeks to sustain the injunction until the determination of the suit motion or the occurrence of a particular event. Interlocutory orders usually take effect until the judgment is delivered in a suit.

The remedies available in class actions are set out below.

Declaratory Relief

Declaratory relief is where the court makes findings and pronounces on a legal issue that has been brought to its attention. It merely confirms or denies a legal right or an entitlement or the position of the law but contains no specific order to be carried out by the successful party or enforced against the unsuccessful party. Declaratory relief is discretionary and granted only in circumstances where the court is convinced by credible evidence. Thus, declaratory relief is not given either in default of defence or on admissions without the court hearing evidence and being satisfied by such evidence that the plaintiff is entitled to the declaration sought.

Injunctive Relief

Injunctive relief is a readily available remedy in the private law field for preventing the commission of an unlawful act such as tort or breach of contract. However, in the public law field, it is a remedy available against a public authority to prevent the commission of or continuation of

unlawful acts. The remedy would not be made available to a litigant who does not have a legal right to the subject matter of the action. The types of injunctions available are:

- mandatory injunctions, which are granted by the court to compel a party to do a specific thing or action;
- prohibitory injunctions, which seek to prevent someone from engaging in a particular act pending the determination of the case; and
- perpetual injunctions, which are an ancillary relief, granted to protect an established right in law or in equity, and where the substantive right has not been established, no injunctive relief would be granted.

Damages

Whether the matter complained about is a breach of contract or a tort, the primary theoretical notion is to place the plaintiff in as good a position, as far as money can, as if the matter complained about had not occurred. The principle envisages that a party that has been injuriously affected by the act complained of must be put in a position in which they would have been if they had not suffered the wrong for which they are being compensated. Damages awarded from a class action are in two categories, compensatory and punitive damages.

Compensatory damages are awarded to compensate for direct or actual loss suffered such as illness, loss of life or pain and suffering and could be further categorised as follows.

- General damages, are damages that the law will presume to be the direct, natural or provable consequence of the act complained of, or damages resulting from loss or harm suffered by the plaintiff, flowing naturally from the act of the defendant and which the

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plaintiff need not specifically set out in their pleadings.

- Special damages are those which are the actual, but not necessarily the result of injury or harm complained of, and which in fact follow such injury or harm as a natural and proximate consequence in the case, that is, by the reading of unusual circumstances or conditions.
- Punitive damages, on the other hand, are a form of exemplary damages postulating a punishment for the defendant and not mere compensation for the plaintiff and must also be specially claimed for the court to grant them.

4.12 Settlement and ADR Mechanisms

Settlement

Settlement of claims in a collective redress or class action is similar to settlement in individual civil claims brought before the court. While the various High Court rules do not explicitly address the management of settlements or settlement agreements, the courts are enjoined to promote and encourage amicable settlement of claims filed by the parties. Parties involved in the proceedings may choose to pursue an out-of-court settlement. In such cases, where settlement is agreed, the terms of settlement are drawn up and filed in the court, which then adopts them as a consent judgment in the action. For a consent judgment to be granted, the parties must be in agreement, their consent must be voluntary, and the terms of settlement must be filed with the court. Once a consent judgment is issued, none of the parties have the right of appeal except with the leave of the court and only on limited grounds such as conspiracy or fraud.

Alternative Dispute Resolution (ADR)

There is no specific ADR mechanism exclusively designed for collective redress or class actions.

Instead, general procedural law governs these processes. ADR methods that may be employed include mediation or informal without-prejudice roundtable meetings between the class representatives and defendants. Legal practitioners are generally required by the Rules of Professional Conduct for Legal Practitioners to inform their clients about alternative options to litigation that are reasonably available. However, the decision to engage in ADR ultimately rests with the parties, and there is no mandatory requirement to do so.

While the various High Court rules make provisions for alternative dispute resolution methods such as arbitration and conciliation/mediation, they do not explicitly address how class actions should be handled. Some High Court rules mandate the use of settlement mechanisms before commencing actions in court. For example, the Lagos 2019 Rules and High Court of Lagos State (Expeditious Disposal of Civil Cases) Practice Direction (No 2) of 2019 on Pre-action Protocols require parties to:

- exchange sufficient information;
- attempt to settle the issues without litigation;
- consider ADR to facilitate settlement and reduce costs; and
- treat litigation as a last resort.

Similarly, Order 5 Rule 8 of the Lagos 2019 Rules mandates that upon the filing of originating processes, the registry of the court shall screen the processes for suitability for ADR and where it is considered appropriate, the chief judge may refer the case to the Lagos Multi-Door Courthouse or other appropriate ADR institutions or practitioners. Similar provisions are made in Order 2, Rule 7 of the High Court of the Federal Capital Territory, Abuja (Civil Procedure) Rules 2018.

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Once an action has commenced, the court has the authority to order the parties to attempt an amicable resolution of the dispute. In deciding whether to exercise this power, the court will consider the circumstances, including whether any party has refused amicable resolution. The court may also propose potential solutions for amicable resolution at any stage of the proceedings. Throughout the proceedings, parties are encouraged to explore the possibility of ADR and settlement. The overriding objective of the various High Court rules is to actively manage cases by encouraging parties to use an ADR procedure if the court deems it appropriate and by facilitating the use of such procedures.

For instance, the High Court of the Federal Capital Territory Abuja (Civil Procedure) Rules 2018, under Order 19, provides for ADR and arbitration as alternative means of resolving disputes. Similarly, Orders 27 and 28 of the Lagos 2019 Rules make provisions for referring suitable actions to the Lagos Multi-Door Courthouse or any other ADR centre.

4.13 Judgments and Enforcement of Judgments

The judgment in a collective redress or class action is considered final and enforceable, unless successfully appealed. This judgment applies to all parties involved in the dispute, including the class members who were part of the action at the time the judgment was made. These class members consist of individuals who have claims or obligations that fall within the defined scope of the class action as determined by the court.

In Nigeria, it is currently recognised that in a representative action, both named and unnamed plaintiffs and/or defendants, along with those they represent, are considered parties to the

action. However, the named representative plaintiffs and/or defendants hold a dominant role until the case is resolved. This means that when an action is initiated in a representative capacity, it is not solely against or carried out by the named parties, but also includes those whom they represent, even if they are not specifically mentioned by name. It is important to note that claimants who choose to opt out of the proceedings will not be bound by the judgment. The withdrawal becomes effective once the court receives notification of the withdrawal.

Enforcement of Judgments

Enforcement of judgments in collective redress or class actions does not have a specific mechanism in place. Instead, the usual procedural rules govern the relevant enforcement mechanisms. These may include attachment, charging, sale and possession orders, as well as potential committal proceedings. The mechanisms for enforcing judgments in Nigeria, including procedures, are outlined below.

Writ of Attachment and Sale (Writ of Fieri Facias)

A judgment sum becomes immediately due and payable upon a pronouncement in a judgment.

A writ of fieri facias (fi fa) is issued for execution against the goods, chattels and immovable property of the judgment debtor for the recovery of any sum of money payable under a judgment of a court in case of default or failure of payment. The writ is obtained by completing the praecipe form at the registry of the court.

The writ empowers the sheriff of the court to seize and sell the judgment debtor's property within the jurisdiction to satisfy the judgment debt (except wearing apparel and bedding of the judgment debtor or their family and the tools

and implements of their trade, to the value of NGN10). The proceeds from the sale are used to cover sale expenses and offset the judgment debt, with any remaining balance being given to the judgment debtor.

In cases where the court ordered the judgment sum to be paid in instalments, the writ can only be issued after the default in payment of some instalment, and execution may be for the remaining sum and costs then unpaid, or for a part of it as the court may order (either in the judgment or subsequently).

Also, unless they are perishable in nature or the judgment debtor requests so in writing, the seized property cannot be sold until the expiration of a period of at least five days from the date of seizure.

Garnishee Proceedings

This is a method of enforcing a monetary judgment by recovery through third parties (garnishees) who are in custody of the judgment debtor's funds or indebted to the judgment debtor. The judgment creditor steps into the position of the judgment debtor to collect such funds. In most cases, the garnishees are bankers of the judgment debtor.

The judgment debtor files an application ex-parte (without notice to the judgment debtor and the garnishees) and, upon being satisfied that the case is deserving, the court would make an order nisi (initial order) directing the garnishees to disclose the amount standing to the credit of the judgment debtor in their custody and show cause why such sums should not be attached and paid to the judgment creditor in satisfaction of the judgment. The order nisi is served on the garnishees, and each garnishee is expected to

file affidavits in court disclosing the judgment debtor's monies in its custody, if any.

Upon disclosure by the garnishees, the order nisi is made absolute against the garnishees, mandating them to pay the judgment debtor's funds disclosed as being in their custody to the judgment creditor, in satisfaction of the judgment sum.

Bankruptcy/Insolvency Proceedings

In this mode of enforcement, where a judgment debtor defaults in payment of the judgment sum, the judgment creditor is at liberty to commence an action against the judgment debtor under bankruptcy proceedings in the case of an individual debtor or winding-up proceedings in the case of a company. However, it must be shown that the judgment debtor is unable to pay its debt in all instances.

Generally, it involves filing a petition and providing evidence of bankruptcy or insolvency. Once the judgment debtor is declared bankrupt or insolvent, their assets are liquidated and the proceeds are distributed among creditors according to their priorities.

Writ of Possession

This is issued for the recovery of premises where the judgment of the court is for the recovery of land, or for the delivery of possession of land, in an action other than an action between landlord and tenant. An application for a writ of possession is made by filing a praecipe form.

Writ of Sequestration

This is issued upon application to a judge against the property of a person who has had an order or warrant of arrest, commitment or imprisonment made against them but cannot be found, or where a person is taken and detained in cus-

tody without obeying the judgment of a court. An application for a writ of sequestration is made to a judge in the prescribed form.

Writ of Delivery

A writ of delivery is issued for the enforcement of a judgment for the delivery of goods. An application for a writ of delivery is made by filing a praecipe form.

Judgment Summons

This is issued by the court upon application of a judgment creditor where a judgment debtor defaults on payment of a judgment sum or any instalment. The judgment debtor is summoned to appear before the court for examination on oath as to their means. An investigation into the judgment debtor's means is conducted, and the court may make an interim order for the protection of any property applicable or available in discharge of the judgment debt. Upon the conclusion of investigations, the court may make one or more of the following orders:

- an order for the commitment of the judgment debtor to prison;
- an order for the attachment and sale of the judgment debtor's property;
- an order for the payment of money by instalments or otherwise by the judgment debtor; or
- an order for the discharge of the judgment debtor from prison.

5. Legislative Reform

5.1 Policy Development

The Nigerian law as regards class action has remained stagnant. Although the various rules of court provide for the procedure to institute class actions, there is no law or legal precedent

that addresses same holistically. Of the few recent class action cases in Nigeria, none has been fully litigated and concluded with the final judgment delivered at the Supreme Court. The slow pace of the class actions filed in various courts, which are now pending at the appellate courts, coupled with the lack of legislation on the subject has made Nigerian courts unattractive for class action matters. Where possible, parties largely forum shop for favourable jurisdictions for their class action matters. A good example is the case of *Abdullahi v Pfizer Inc* 562 F.3d 163 which began in Kano, Abuja and New York and went up to the Supreme Court of the United States before a settlement was achieved.

5.2 Legislative Reform

Besides possible amendments to the various rules of court, which provide for the procedure for instituting a class action, no major legislative reform has been initiated in relation to the matters mentioned in the sections above.

However, there has been a clamour for the development of the class action regime to cover fundamental human rights and consumer rights violations in Nigeria.

5.3 Impact of Environmental, Social and Governance (ESG) Issues

The ESG framework is used to evaluate a company's impact beyond its financial performance. The ESG framework looks at the impact of the activities of the company on the environment, stakeholders within and outside the company and corporate governance issues.

Over the years, ESG-related issues have been the subject matter of class actions. Some of the ways ESG-related issues have influenced class action litigation are discussed below.

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Class actions have been instituted against companies based on the impact of their activities on the environment. In Nigeria, there have been several class actions against international oil companies especially in the oil producing states for oil spillage, which has affected both the environment and the communal livelihoods of people. In 2021, the UK Supreme Court ruled in favour of the Bille community and the Ogale people of Ogoniland against Royal Dutch Shell on grounds of pollution.

There have also been instances of shareholders' class action against companies for not addressing ESG concerns, including corporate governance issues, diversity and inclusion. Most class actions are ESG-related claims and, due to the huge amount of money involved in these suits, companies have devised policies to limit the occurrence of ESG-related claims. The effect of ESG-related issues on class action will continue to grow as companies, government agencies, regulatory bodies and business continue to integrate these policies.

Trends and Developments

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Streamswowers & 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, Streamswowers & 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. Streamswowers & Köhn also represented subscribers to the First Bank Hybrid public offer in 2007 in a class action.

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Labour and Employment Representative/ Class Action – The Nigerian Perspective

In recent years, labour and employment jurisprudence in Nigeria has undergone a transformative shift, particularly concerning recognition and acceptance of representative and class actions. Traditionally, employment disputes in Nigeria were adjudicated on an individual basis, largely due to the perception that employment contracts are inherently personal and exclusive to each employee.

However, the enactment of the National Industrial Court Act, 2006 (the “NIC Act”), the National Industrial Court Rules 2017 (the “NIC Rules”), and subsequent judicial interpretations have paved the way for a more inclusive approach. Courts have begun to embrace the idea that collective actions can serve to protect the rights of employees, particularly in situations where common grievances exist.

This article focuses on the current legal framework for representative/class actions pertaining to labour and employment, while also identifying the evolving attitudes of the courts toward such actions.

Approach of the Courts

Previously, employment and labour disputes were limited to individual personal employment dispute adjudication in Nigeria, with the exception of 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 on such functions. The rationale for this is that a contract of employment is personal to each employee, and, where there is a breach of such a contract, a representative/class action cannot be brought against the employer.

The principle behind this view is that each employee has domestic rights exclusively personal to them, even though they may share common terms of employment. For example, in *Enugunum & Ors v Chevron (Nig.) Ltd.* [2014] LPELR-24088(CA) (Pp. 23-24, paras. B-C)), the Court of Appeal held that a contract of employment is personal to each employee, and that employees cannot therefore have a collective right to sue for breach of terms of their contract of employment jointly and severally. The court, in that case, relied on its earlier decision in *Bemil Nigeria Limited v Emeribe & Ors* [2009] LPELR-8732 (CA) where an area of contention

raised by the employer was that the employees had different contracts of employment with the employer, and that their appointments were terminated for different reasons and on different days, and therefore could not maintain a joint action against the employer. The court agreed with this reasoning, and held that the employees could not maintain an action jointly and severally against the employer.

Current Trends

The view that a labour/employment action cannot be maintained as a representative or class action has been relaxed by the courts. The National Industrial Court (NIC) in *Umahi Orji & Ors. v University of Nigeria & Ors – Suit No NICN/EN/01/2021* delivered on 17 March 2022 stated that the Third alteration to the 1999 Constitution of the Federal Republic of Nigeria as (amended) (the “Constitution”) places a sacred duty on the NIC to implement international best practices in labour and employment relations in Nigeria. The court also relied on the provisions of Order 13 Rule 11(1) – (5) of the National Industrial Court of Nigeria (Civil Procedure) Rules 2017 (“The NIC Rules”) to find that the extant position of the law in Nigeria is that employment class action, where appropriately invoked, is no longer outlawed.

Similarly, the Supreme Court in *CBN v Adedeji & 11 Ors.* [2022] 13 NWLR (Pt. 1847) 361 at page 386 paras C-F, found that, even though the employees might have had separate contracts of employment with the employer, the basis of the action before the court related to rationalisation exercise conducted across board by the employer, and that the common grievance/interest was therefore their redundancy and the restoration of their jobs. The court ruled that the action was rightly commenced as a representative action.

A labour/employment representative/class action will be appropriate where there is a common interest, and the reliefs sought are beneficial to all whom the named plaintiffs represent. For the sake of convenience, the courts in Nigeria therefore approve of representative actions.

The courts have identified instances where labour/employment disputes may be commenced in a representative capacity or as a class, as follows:

- where subject matter relates to failure to pay the correct terminal benefits to a whole class of employees that were disengaged at the same time; see *Akuroseokika Charles Egerton & 8 Ors v Nigeria Ports Authority – Suit No: NICN/PHC/159/2020* delivered on 6 July 2024, where the NIC allowed a representative action for the review of pensions accruable to a class of retired employees as constitutionally required;
- where the subject matter involves violation of common rights of the employees by the employer; for example, failure of an employer to pay employees’ rightful overtime wages; in *Amu Felix & 90 Ors. v Nigerian Railway Corporation & Anor – Suit No NICN/EN/CS/25-52/2013*, delivered on 25 February 2019, the NIC found that an action by 91 former employees complaining that the employer broke the law in stopping payment of pension, refusal to give the claimants right of first refusal, and deliberately using the wrong salary structure to calculate retirement benefits, thereby owing them shortfall, could be rightly commenced as a class action since the defence of the employer would be the same;
- where there is a case of public interest litigation by a single individual on behalf of many to fight work-related infractions; in *Mr.Chukwunonso Daniel Ogbe* (suing for him-

self and on behalf of Nigerian Lawyers who filed and/or obtained legal documents from State Courts in Enugu State) v the Government of Enugu State & Ors. – Suit No: NICN/EN/43/2020, delivered on 5 March 2021, the NIC held that public interest litigation for and behalf of legal practitioners on work-related complaints could rightly be commenced as a class action; and

- in a collective redundancy dispute; see *CBN v Adedeji & 11 Ors.* (supra), where the Supreme Court ruled that the action commenced on behalf of just over 1,000 colleagues who were relieved of their employment was rightly filed as a representative action.

Legal Framework for Commencing Labour and Employment Representative/Class Actions.

The NIC Rules make provisions for representative and class actions as follows:

- Order 13 Rule 11 (1) of the NIC Rules provides that where there are numerous persons having the same interest in one suit, one or more of them may sue or be sued on behalf of or for the benefit of all persons so interested.
- Order 13 Rule 11(5) makes provision for the appointment by the court in any action for declaration or injunction of one or more persons to represent any class or group of persons who may be commonly interested in any matter or commonly affected, or likely to be commonly affected, by any act or action of any person or authority where such class or group of persons may not be easily ascertainable or conveniently found, if satisfied that is expedient to do so.

Apart from the above general provisions, the NIC Rules do not make any specific provision for the

mode of commencement of a representative or class action.

Representative Action

The Supreme Court in *CBN v Adedeji & 11 Ors.* (supra) listed the requirements for an employment dispute to be commenced in a representative capacity as follows:

- there must be numerous persons interested in the case or the side to be represented; all those interested must have the same interest in the suit;
- all of them must have the same grievance;
- one of them must be the proposed representative; and
- the relief or reliefs sought must be in its/their nature beneficial to all the persons being represented.

The above decision of the Supreme Court (though based on an appeal from the Federal High Court which had jurisdiction to determine some labour and employment disputes prior to the establishment of the NIC) mirrors the provisions of Order 13 Rule 11(1) of the NIC Rules which have been relied upon by the courts to permit an employment representative action. In *Odah Ezekiel & Ors. v Total E & P Nigeria Ltd & Ors.* – Suit No: NICN/LA/663/2016 delivered on 30th January 2024, the NIC relied on the provision of Order 13 Rule 11(1) to permit an action filed by four former employees on behalf of themselves and 140 other disengaged security personnel of the employer.

This approach was also adopted in *Mr. Ulokanjo Emmanuel & Ors v Plantgeria Company Limited* – Suit No: NICN/PHC/45/2021, delivered on 29 February 2024, where the court permitted an action filed by five former employees on behalf of themselves and other former automobile

drivers employed by the employer from 2006 to 2008 as a representative action. The court held that there were numerous persons represented by the former employees, that their grievance was the non-payment of their benefits and pension contribution, and that reliefs sought were beneficial to them all.

While the NIC Rules do not provide for the mode of commencement of a representative action, the current practice of the courts in Nigeria is to allow parties to maintain a suit in representative capacity once the claimant(s) indicates in the title of the originating process and in the pleadings that the action has been commenced in such capacity, without the necessity of obtaining prior leave of the court. In *Ajubo Bereiweriso & 2 Ors (suing for themselves and representing workers of Ibeto Cement Company Ltd) v Ibeto Cement Company Ltd* Suit No: NICN/YEN/171/2016 delivered on 30 May 2024, the NIC found that a deposition in a witness statement on oath that an action commenced in a representative capacity sufficed.

The courts have also held that a defendant may not challenge the representative capacity in which an action is commenced as only members of the group being represented may challenge such representation. In the unreported case of *Ebosa Clement & 39 Ors (for themselves and on behalf of Tonal-Buchi Nig Ltd Security Guards of PPMC, Ekpan) v Tonal-Buchi Nig Ltd – Suit No: NICN/YEN/39/2018* delivered on 9 February 2022, the NIC found that a defendant may not challenge the representative capacity in which an action is commenced as only members of the group being represented could challenge the representation. This view was also adopted in *Odah Ezekiel & Ors. v Total E & P Nigeria Ltd & Ors.* (supra).

Class Action

Unlike in a representative action, for a class-action litigation to be initiated, Order 13 Rule 11(5) of the NIC Rules provides that a would-be representative must first be appointed by the court in an action where declaration or an injunction is sought. The conditions that must be fulfilled are that the judge must be satisfied that:

- the class or group share common interest; or
- they are commonly affected or likely to be affected by any act of any person or authority, where such class or group of persons are not easily ascertainable, unknown or conveniently found.

Generally, for a class action litigation to be initiated, a would-be representative must first make a successful application to a court for class certification. Unlike the practice in the US and South Africa, where adequate procedure is made for employment class action, the NIC Rules do not provide for the procedure of certification. The NIC Rules do not also make provision for members of a class to opt in or opt out of the class action.

There are very few decisions of the NIC wherein the Court has interpreted the provisions of Order 13 Rule 11(5) of the NIC Rules in respect of a class action. This is largely because the courts have loosely used the term “representative action” interchangeably with “class action”, and also because there are very rare situations where groups of employees are unknown and cannot be conveniently found. However, the decision of the NIC in *Irokanulo Obioha Samuel & Ors. v National Orthopaedic Hospital Enugu Management Board & Ors* Suit No: NICN/EN/13/2014 (Samuel’s Case), delivered on 15 February 2022, provides some interesting insights into the leaning of the court.

In that particular case, four former employees filed an action at the NIC in a representative capacity for themselves and for 49 staff of the employer disengaged in April 2007. The former employees claimed for payment of their rightful terminal benefits. One of the issues determined by the court was the procedure for commencement of employment class action. The court held that by Order 13 Rule 11(1)-(5) of the NIC Rules, it is mandatorily required that a would-be representative must first be appointed by the court in an action where declaration or an injunction is sought.

The court observed that, although the provisions of the NIC Rules were not perfectly drafted, Section 254C-(1)(f) & (h) of the Constitution permits the court to decide an action in line with international best practices. The court therefore relied on the USA Federal Civil Rule 23 and held that, for an action to be commenced as a class action, it is incumbent on the representatives to bring a formal application supported with affidavit to supply the requisite evidence to prove:

- how the representatives got in touch with those being allegedly represented;
- that those allegedly being represented are genuinely interested in the representative suit; and
- that, if the court grants the monetary claims, the monies will get to those allegedly being represented.

According to the court, this procedure is to ensure that the court is fully satisfied that those to be represented actually give their consent to be so represented and to obviate the case of meddlesome interlopers who have a dubious purpose to serve. The court further found that the defendants must be afforded the opportunity

to react and be heard in opposition before the court rules on this important question.

The approach adopted by the court in Samuel's Case was further endorsed by the same judge in a latter decision in Umahi Orji & Ors. v University of Nigeria & Ors (supra). However, in the latter case, the court added that failure to obtain prior certification before commencing a class action may not be grievous where the action is commenced by an originating summons and the reliefs are mainly declarative in nature.

The two decisions above are useful demonstrations of the provisions of Order 13 Rule (11) (5) of the NIC Rules and conditions for the appointment of representatives of a class action.

It is important to note that, although the court made much reference to the provisions of Order 13 Rule 11 (1)-(5) of the NIC Rules in the above cases, it used the terms "representative" and "class" action interchangeably. The decisions therefore appear to suggest that, in both representative and class actions, certification by the court must be obtained.

However, in subsequent decisions of the NIC, the approach adopted by the NIC judges is to allow an action filed in representative capacity if, on the face of the process and in the pleadings, the claimant indicates that the action is brought in that capacity without the necessity of obtaining prior leave of the court.

In conclusion, the evolving stance of Nigerian courts towards representative and class actions in employment disputes marks a significant step forward in labour and employment law in Nigeria. This shift not only facilitates greater access to justice, but also reflects a commitment to protecting workers' rights in a manner consistent

with international best practices. However, the absence of clear procedural guidelines in the NIC Rules presents challenges that need to be addressed. To fully realise the potential of these collective actions, it is essential for the legal framework to provide comprehensive guidelines, ensuring that employees can effectively navigate the complexities of such proceedings without ambiguity or mischaracterisation.

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