APPRAISING THE REQUIREMENT OF FILING AN APPLICATION OR ORIGINATING SUMMONS IN THE COMMENCEMENT OF CONTEMPT PROCEEDINGS IN NIGERIA[1]

Abstract

Contempt proceedings are extreme measures undertaken by courts to punish parties for disobeying its judgment or orders, which are not for payment of money. It is a procedure undertaken to commit the contemnor to prison custody for a stated period, or until he purges himself of the contempt. The provisions and rules thereof are therefore interpreted strictly since it touches on the liberty of citizens. The rules for bringing contempt proceeding are however misunderstood by lawyers as to whether a motion on notice for contempt ought to be filed after the service of forms 48 and 49. There is also confusing case law. This paper attempts to elucidate on the procedure for bringing contempt proceedings in Nigeria, to clear the grey areas, and to recommend improvement on the case law on the subject.

Keywords: Contempt, Judgment, Order, Committal, Procedure, Motion, Prison.

1. Introduction

Contempt proceedings refer to the procedure and proceedings embarked on by the court to enforce its judgment by committing a contemnor, or someone in disobedience of an order of the court, or an injunction to prison custody, usually for a term, or until he purges himself of the contempt. It is a necessary tool of the court without which it cannot enforce its orders, and litigants would ignore the court's orders and judgments, which will in turn hinder and frustrate the administration of justice.

2. Definition of Judgment Under the Sheriffs and Civil Process Act[2]

Section 19 of the Sheriffs and Civil Process Act which is the interpretation section provides that "judgment" includes "order". Judgment for the purposes of s.72 of the Sheriffs and Civil Process Act also includes both final and interlocutory orders. In the case of *Grema* v *Janyan & Ors*[3]**.,** the Court of Appeal held thus:

> On issue 2, it is submitted by the appellant that the trial judge erred in holding that forms 48 and 49 under the Sheriffs and Civil Process Act, apply only to final judgments and not to interlocutory orders. Order is defined in Section 19 of the Sheriffs and Civil Process Act as: "order includes an injunction, an order for the payment of cost of any party and an order for the payment of a counter –claim by a plaintiff". From the above definition, there is no distinction between an interlocutory order and a final or perpetual order. The trial Judge was therefore wrong to have distinguished the two.

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[2] Sheriffs and Civil process Act Act CAP. F35 LFN 2004.

[3] (2000) LPELR-10007

3. Procedure for Bringing Contempt Proceedings

There are however laid down procedures for commencing contempt proceedings, which are strict because contempt proceedings affect the liberty of the citizen. Where the procedure undertaken by counsel in bringing the application is defective, it makes the application and entire proceedings incompetent and void and the court would have no jurisdiction to entertain it because it was not brought by the due process of law. A court can only assume jurisdiction if a process is brought by the due process of law.[4]

Where an applicant is of the view that a respondent has disobeyed a court judgment or order, the correct procedure is to file and serve him with form 48 (notice of consequences of disobedience of court order), and form 49 (notice to show cause why an order for attachment should not be made). Thereafter the applicant has to file a motion on notice or originating summons to commence a suit for committal.

Contrary to the popular assumption, committal proceedings are not commenced by filing form 49 *simpliciter*, or form 49 supported by an affidavit. That is not the procedure prescribed by the law.

Order 43 Rule 9(1) of the High Court (Civil Procedure) Rules of Anambra State 2019, which is in *pari mari materia* with the High Court rules of other States, provides as follows:

> The procedure in application for attachment for contempt of court in cases to which this rule applies shall be the same as for application for an order for judicial review under Order 41 so far as may be applicable.

Order 41 Rule 3(1) of the High Court (Civil Procedure) Rules 2019 provides as follows:

> An application for judicial review shall be made by way of motion on notice or Originating summons and shall be supported by:
>
> (a) A statement setting out the name and description of the applicant, the reliefs sought and the grounds on which they are sought;
> (b) An affidavit verifying the facts relied on; and
> (c) A written address in support of application.

Order 41 Rule 5(1) of the High Court (Civil Procedure) Rules 2019 provides as follows:

> The application for judicial review shall be made by way of motion on notice or Originating summons.

[4] *Madukolu* v. *Nkemdilim*.(1962) 2 SCNLR 341

Therefore by the combined provisions of Order 43 Rule 9(1) and Order 41 Rules 3(1) and 5(1) of the High Court (Civil Procedure) Rules of Anambra State 2019**,** an application to commit a person to prison for contempt, ought to be commenced in the manner in which an application for judicial review is commenced, which is by a motion on notice, or by an originating summons, supported by (a) A statement setting out the name and description of the applicant, the reliefs sought and the grounds on which they are sought; (b) an affidavit verifying the facts relied on; and (c) A written address in support of application.

According to Halsbury's Laws of England[5] a committal proceeding is commenced as follows:

> An order for committal is made upon motion to the court, notice of which must be served on the person sought to be committed.

It should be borne in mind that form 49 (notice to show cause why an order for attachment should not be made) is simply a notice, and not a motion on notice, nor is it an originating summons. It is akin to a court summons, judgment summons, or a hearing notice. Since it is not a motion on notice, or originating summons, it cannot be supported by an affidavit, or grounds, or exhibits, or a written address.

Where this correct procedure is not followed in the suit, and the applicant merely files form 48 and form 49, an affidavit in support of form 49, exhibits, and nothing more, and does not file a motion on notice or originating summons, or a statement, or a verifying affidavit, or a written address, or the grounds for the application to commence the suit, the application is incompetent, and there is no committal proceedings before the court. The suit would therefore be incompetent and the court would lack the jurisdiction to entertain it.

In *D.D. Atser & Ors* v *J.M. Okosa Gachi*[6] on the correct procedure for committal for contempt, the court held as follows:

> Contempt of court is an offence sui generis. An application for committal for any disobedience of an order of court is a very serious matter as it involves in most case an exceptional interference with the liberty of the citizen. Therefore, when any antecedent process has to be put in motion, every prescribed step and rule, however technical, should be carefully taken, observed and insisted upon.

[5]Halsbury's Laws of England (3rd edn, volume 8 London: Butterworths & Co. Publishers, 1953) 31

[6] (1997) 6 NWLR (Part 510) 609 at 624 D-E, 631 B-C

> Any irregularity in the procedure for committal is a fundamental vice which vitiates the entire application and committal proceedings.

The Court of Appeal in the above case[7] considered the correct procedure for committal proceedings for contempt in Benue State, from which the case before it arose. After considering same, the court in the said case held as follows:

> The applicable procedure for committal for contempt in Benue State is laid down in Order 42 Rules 1 and 2 of the Benue State High Court (Civil Procedure) Rules, 1988. Under the rules, the person initiating the contempt proceedings must:
>
> (a) Bring a motion on notice supported by an affidavit and shall state the grounds of the application; and
> (b) The motion on notice, affidavit and grounds of the application shall be personally served on the person sought to be committed unless the court dispenses with personal service.

The applicable procedure for committal in Anambra State is laid down in Order 43 Rule 9(1) and Order 41 Rules 3(1) and 5(1) of the High Court (Civil Procedure) Rules of Anambra State 2019, which provide that a person initiating the contempt proceedings must do so in the manner in which an application for judicial review is commenced, which is by a motion on notice, or by an originating summons, supported by (a) a statement setting out the name and description of the applicant, the reliefs sought and the grounds on which they are sought; (b) an affidavit verifying the facts relied on; and (c) a written address in support of application.

Where an applicant fails to comply with these procedural rules after filing his form 48 and 49, and simply files an affidavit in support of form 49, which is unknown to the judgment (Enforcement Procedure Rules) and also unknown to the High Court Rules. He has failed to file the appropriate processes to commence a proper committal proceeding before the court. The failure to comply with the rules vitiates it and makes it incompetent.

In *Chief Darby Akpan & Ors*. v *Chief Effiong Akpan & Ors*.[8], the court held as follows:

> Since contempt proceedings affect the liberty of the individual, the law expects strict compliance with the procedural rules. Therefore, where there is the slightest deviation or non-compliance with the rules, a court of law must exercise its discretion in favour of the

[7] *Ibid*
[8] (1996) 7 NWLR (Pt 462) 620 at 626 B

contemnor. This is because the law cannot afford to gamble with the liberty of an individual.

4. **Endorsement of the Order on Forms 48 and 49**

Furthermore, the form 48 served on the respondent is incompetent if it is not endorsed with the order of the court served on the respondent. That is to say, the order of court allegedly disobeyed, served on the respondent must have the form 48 endorsed on it. The order and the form 48 cannot be served separately.[9] The said order must also be set out on the face of the form 49.

Failure to type the order on the reverse side of form 48, or to type it in a separate sheet of paper, makes the said form 48, and indeed the entire suit incompetent.

In *Chief Tom Ikimi* v *Godwin Omamuli* [10] the Court held as follows:

> In committal proceedings it is no compliance with Order 9 Rule 13(1) of the Judgments (Enforcement) procedure Rules to serve the order and form 48 separately. What must be served is the order endorsed with form 48. The endorsement is mandatory and there must be proof of personal service.
> It seems clear that the order purportedly served on 31 October, 1991 without form 48 endorsed on it is not authorized under rule 13. It is therefore no service upon which a disobedience of the order can be based.
> The law is that if Order 9 Rule 13(1) of the Judgments (Enforcement) procedure Rules, being a procedure for commencing proceedings which may result in an imposition of a penalty, is not strictly complied with, the proceedings may be set aside and any conviction therein quashed. This is because all proceedings in *poena* (i.e. punishment) are *strictissimi juris* (i.e. of strictest right or law), and though the formalities of law here and there may lead to the escape of an offender they are intended on the whole to ensure the safe administration of justice and the protection of innocence and must be observed. A party accused has the right to insist on such formalities as a matter of right, of which he cannot be deprived against his will, and the judge must see that they are followed…thus an application for attachment can be refused even where the defect in procedure has been of a relatively trivial nature.

[9] See Order 9 Rule of the Judgment Enforcement procedure Rules.
[10] (1995) 3 NWLR (Pt 383) 355 at 365 F-H

5. Personal Service of Forms 48 and 49

Another point regarding competence is that forms 48 and 49 must be served on the respondent personally. The failure of an applicant to effect service of the form 48 or 49 on the respondent personally is fatal to the proceedings.

Neither of the form 48 or 49 can be served on the respondent's counsel. Service on the counsel to the respondent is not sufficient service.[11] Any defect in the issuance or service of forms 48 or 49, or failure to serve same personally vitiates the entire proceedings and the said forms 48 and 49, and any other steps taken therefore ought to be set aside.

In Uriel Ezeji v H.C. Ike[12], the court held as follows:

> As committal proceedings touches on deprivation of freedom and liberty of the person, the service and procedure thereof are applied strictly and any break or departure from strict application of the rules vitiates the proceedings.

6. Grounds for Committal to be Set Out In A Separate Document

Assuming without conceding that the suit could be commenced by form 49 and not by motion on notice, failure to clearly set out the grounds of the application for committal in a separate document is fatal, and reliance cannot be placed on the supporting affidavit. The grounds must be in a separate document from the affidavit in support. The failure to file a written address will also be fatal.[13]

7. The Order or Judgment Ought to be Set Out Word for Word

Another salient point is that the judgment or order of the court allegedly disobeyed must be set out word for word in the form 48 and 49, and in the prayers on the motion paper filed before the court.

Where the order of court allegedly disobeyed, served on the respondent, and also set out in the form 48 and 49, was not the exact order, word for word, made by the said court, or where it deliberately omits some of the words, or wrongly adds other words, which are not in the order, this is contrary to the law, and Order 9 Rule of the Judgment

[11] See *Ellerlon* v *Thirsk* (1820) 37 ER 419

[12] (1997) 2 NWLR (Pt 486) 206 at 221 E

[13] See D.D. Atser & Ors v. J.M. Okosa Gachi (1997) 6 NWLR (Part 510) 609 at 624 D-E, 631 B-C.

Enforcement Procedure Rules, and makes the suit incompetent. The court in *Chief Darby Akpan & Ors*. v Chief Effiong Akpan & Ors.[14] stated thus:

> By the provisions of Order 9 Rule 13(1) of the Judgments (Enforcement) Procedure Rules what is required for service on a judgment debtor is a copy of the order endorsed with a notice in form 48. And a copy for this purpose is a reproduction of the original order, word for word, comma for comma, full stop for full stop, and all that, throughout the document. Once there is a deviation however infinitesimal, the document does not qualify as a copy but something else.

Where the order of the court is wrongly reproduced in the motion served on the respondent and on the forms 48 and 49 filed before the court, it would be deemed that they were deliberately omitted by the applicant to mislead the court, and to commit the respondent to prison willy-nilly.

It must therefore be a reproduction of the original order, word for word, comma for comma, full stop for full stop, throughout the document, as held in the case of Chief Darby Akpan & Ors. v Chief Effiong Akpan & Ors.[15] otherwise it would vitiate the entire proceedings.

8. Service on the Proper Parties

It should be further noted that the applicant has to serve on the proper parties together with the form 48 and form 49, and the motion on notice. The proper parties are the person or persons against whom the order was made. Failure to do this is fatal to the application, and the suit would be dead on arrival. The form 49 alone cannot confer jurisdiction on the court which it did not have in the first place by the non service of forms 48 and 49 and the motion on notice on the proper respondents in the suit.

Where the proper parties are not before the court, and there is no way the orders of the court would be carried out, or bind the persons who were not served. It would be a denial of fair hearing, and the application would therefore be incompetent.

9. Case Law on the Subject

The case of Noah & Ors. v Williams & Ors.[16] seemed to have modified the principle set out in the case of D.D. Atser & Ors v J.M. Okosa Gachi[17], on the correct procedure for committal for contempt to wit: that a motion on notice or originating summons, with a statement, verifying affidavit, and address must be filed after the service of form 49, to

[14] (1996) 7 NWLR (Pt 462) 620 at 625-626 G-A.

[15] *Ibid*

[16] (2020) LPELR-50564 (CA)

[17] (1997) 6 NWLR (Part 510) 609 at 624 D-E, 631 B-C

commence the proceedings, when it held that there are two instances of commencement to wit: that if the order was made in the course of proceedings, a motion on notice must be filed, but if it was made at the conclusion of the case, filing form 48 and 49 only, were enough.

But the said case of Noah & Ors. v Williams & Ors. did not consider, or overrule the case of D.D. Atser & Ors v. J.M. Okosa Gachi and both of them being Court of Appeal decisions, courts have a discretion to choose any of them which it is more persuaded with.

However, it is submitted that even the said case of Noah & Ors. v Williams & Ors**.**, supported the principle set out in the case of D.D. Atser & Ors v J.M. Okosa Gachi that a motion on notice ought to be filed pursuant to the High Court (Civil Procedure) Rules of the relevant State, in the commencement of contempt proceedings. It did not negate it but merely sought to add another dimension to it by splitting orders made in the course of proceedings and orders made at the conclusion of proceedings into two categories.

In the case of Noah & Ors. v Williams & Ors., the Court of Appeal held thus:

> … It seems to me that the implication of the provision of Order 42 Rule 9(2) and (3) are as follows: 1. Where the contempt is committed ex facie curiae, in the course of proceedings, the service of form 48 and form 49 shall be accompanied by a motion on notice. This is because, for contempt in the course of proceedings, there is the dual applicability of the requirement of a motion on notice as provided for under Rule 9(2) of Order 42 and also the requirement of service of forms as prescribed under the Sheriffs and Civil Process Act. 2. Where however, the contempt relates to disobedience of court order (when proceedings have been concluded) as in the instant case an order for stay of execution, all that would be required from the judgment debtor is the strict proof of service of forms 48 and 49…

Thus according to the court in that case, if the contempt the applicant is alleging, is one allegedly committed ex facie curiae, (not in facie curiae), and it is in the course of proceedings, a motion on notice must be filed, but if the said order was made when proceedings have been concluded, a motion is not necessary. In the case of Noah & Ors. v Williams & Ors., proceedings had been concluded and the respondent was alleged to have disobeyed an order for stay of execution, not an order of injunction.

Therefore as held in that case, the service of form 48 and form 49 need not be accompanied by a motion on notice as would an order made in the course of proceedings, and not at the conclusion of proceedings.

10. What Governs the Procedure of Committal Proceedings

It should be stated at this point that it is not s.72 of the Sheriffs and Civil Process Act and Order 9 Rule 13(1) of the Judgments (Enforcement) procedure Rules that govern the procedure of bringing an application for contempt in the court, but the High Court (Civil Procedure) Rules of the various States.

Section 72 of the Sheriffs and Civil Process Act only provides for the punishment of contemnors by committal to prison, but it does not provide for the rules to be applied in court for its enforcement. It is a section of the Act, and not the rules of court.

Also, Order 9 Rule 13(1) of the Judgments (Enforcement) Procedure Rules provides for the filing of forms 48 and 49, which are the notice of consequences of disobedience of court order, and notice to show cause why an order of committal should not be made. But it does not prescribe the rules of court to be followed for committal proceedings pursuant to the said notices.

Section 94 of the Sheriffs and Civil process Act provides that it is the Chief Judge of the Federal Capital Territory or the Chief Judge of a State, who has the power to make rules of court in respect of any of the following matters:

(a) the duties of bailiffs;
(b) the procedure to be adopted by bailiffs and others on the receipt of money paid or received at a sale in execution or otherwise in respect of process of execution and the accounting therefor;
(c) the fees and allowances if any, to be paid to, or for the use of the services of the bailiffs and the other officers of the court;
(d) the fees to be paid in respect of any application or the filing of any document or in respect of anything done or furnished under this evidence;
(e) the conditions precedent to the issue of any process;
(f) the issue of process to or against any person or class of persons;
(g) anything to be done by any person in respect of the issue or execution of process;
(h) the method of attaching any property;
(i) he enforcement of judgments not for the payment of money;
(j) the procedure in execution against immovable property;
(k) the entertainment and adjudication of claims to property attached or sold in execution;
(l) the custody or disposal of property attached;
(m) the appointment of managers or receivers over attached or sequestrated property;

the procedure on sale in execution of writs and the persons by whom each sales may be conducted;

(n) the method of transfer of property, moveable or immoveable, shares, securities, and other chattels on sales in execution of writs;

(o) the circumstances in which proceedings in process may be transferred from one court in a division or district to another court in the same division or district or to a court in another division or district;

(p) the procedure to be followed in the High Court upon an application of a judgment creditor in a magistrate's court for a writ of execution in respect of immoveable property;

(q) prescribing anything or any person required by Parts III, IV, and VI of this Act to be prescribed; and

(r) generally for giving effect to the provisions and intentions of Parts III, IV, V, and VI of this Act and prescribing and regulating procedure thereunder.

It should be observed that s.72 of the Sheriffs and Civil Process Act falls under Part IV of the Act. Therefore by the provisions of s.94 of the Sheriffs and Civil Process Act it is the Chief Judge of the Federal Capital Territory or the Chief Judge of a State, who can validly make rules with respect to:

(i) the enforcement of judgments not for the payment of money.
(r) prescribing anything or any person required by Parts III, IV, and VI of this Act to be prescribed; and
(s) generally for giving effect to the provisions and intentions of Parts III, IV, V, and VI of this Act and prescribing and regulating procedure thereunder.

As noted earlier, s.19 of the Sheriffs and Civil Process Act which is the interpretation section provides that "judgment includes order".

So while s.72 of the Sheriffs and Civil Process Act provides for punishment of contemnors by committal to prison, it is the Chief judge of a State that is given the powers by s.94 of the Sheriffs and Civil Process Act to make the rules to be applied in court for the enforcement of s.72 of the Sheriffs and Civil Process Act, which deals with the enforcement of judgments, (which includes orders) not for the payment of money; and generally for giving effect to the provisions and intentions of Parts III, IV, V, and VI of the Act, and prescribing and regulating procedure thereunder.

It is therefore submitted that Order 9 Rule 13(1) of the Judgments (Enforcement) Procedure Rules does not apply to the High Court of a State, as to the rules for the enforcement of s.72 of the Sheriffs and Civil process Act to wit: the enforcement of judgments not for the payment of money.

11. Application of the Judgments (Enforcement) Procedure Rules to High Courts

It is also submitted that the Judgments (Enforcement) Procedure Rules does not apply to the High Court of a State as regards to the rules for the enforcement of s.72 of the

Sheriffs and Civil Process Act to wit: the enforcement of judgments not for the payment of money. This is because the Judgments (Enforcement) Procedure Rules was made by the Chief Justice of Nigeria, pursuant to s.111 of the Sheriffs and Civil Process Act.

Section 111 of the Sheriffs and Civil process Act, states that the Chief Justice of Nigeria can only make rules of practice and procedure in connection with the execution and enforcement by the courts of a State, or of the Capital Territory of the process and judgments of the courts of other States.

Thus the Judgments (Enforcement) procedure Rules only applies if it is the judgment of the courts of other States that is to be enforced in a State.

So it is the rules made by the Chief Judge of a state, which is the High Court (Civil Procedure) Rules of that State that is applicable, and not the rules made by the Chief Justice of Nigeria, which is the Judgments (Enforcement) Procedure Rules.

12. The Position Under the English Law

The position under the English law is also the same with that under Nigerian law. Halsbury's Laws of England[18] set out the position of the English law on the subject, and stated that:

> An order for committal is made upon motion to the court, notice of which must be served on the person sought to be committed.

Again, as earlier said, Form 49 (notice to show cause why an order for attachment should not be made) is a notice and not a motion on notice, and cannot therefore be supported by an affidavit, or grounds, or exhibits, or written address.

The case of D.D. Atser & Ors v J.M. Okosa Gachi[19] is therefore preferable and more applicable in all cases, whether the order was made in the course of proceedings, or at the conclusion thereof, since it is the High Court Rules of a State that is applicable by s.94 of the Sheriffs and Civil Process Act**,** and not the Judgment Enforcement Procedure Rules**,** which only applies when the Judgment to be enforced is that of another State.

The High Court Rules of all the various States provide that the procedure to be followed is that for filing judicial review which is by motion on notice or originating and did not create a distinction or difference between procedure for filing contempt

[18] Halsbury's Laws of England, (3rd edn, volume 8 London: Butterworths & Co. Publishers, 1953) 31
[19] (1997) 6 NWLR (Part 510) 609

proceedings when the order was made in the course of proceedings or at the conclusion of proceedings.

The applicable procedure for committal therefore, for example in Anambra State is laid down in Order 43 Rule 9(1) and Order 41 Rules 3(1) and 5(1) of the High Court (Civil Procedure) Rules 2019[20], which if an applicant fails to comply with, will render the proceedings incompetent, and liable to be struck out.

Conclusion and Recommendation

The confusion in the area of commencing committal proceedings has endured for too long. It is therefore now time to have a measure of certainty so that lawyers can commence committal proceedings with more assurance, as following a wrong principle or procedure may be fatal to an otherwise clear case of contempt. It is recommended that the case of Noah & Ors. v. Williams & Ors. should be reviewed in subsequent cases, preferably by the Supreme Court, to align with the case of D.D. Atser & Ors v. J.M. Okosa Gachi, and remove the dichotomy on when a motion on notice should be filed, or otherwise, to make for a uniform and clear procedure for commencing committal proceedings.

[20] High Court (Civil Procedure) Rules 2019.