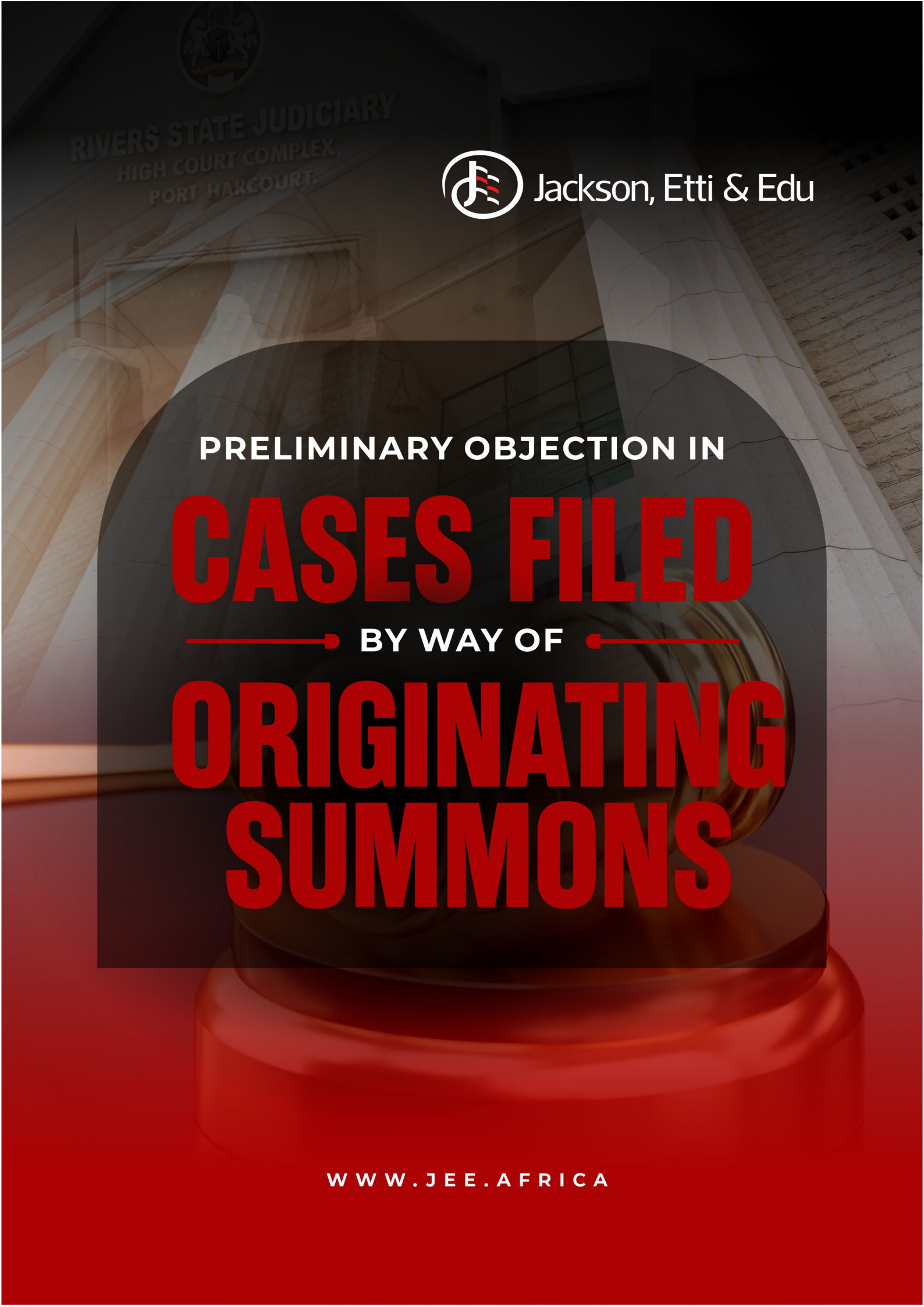

Jackson, Etti & Edu

PRELIMINARY OBJECTION IN

CASES FILED BY WAY OF ORIGINATING SUMMONS

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Originating Summons has been identified as one of the ways of commencing actions before the Superior Courts in Nigeria. This procedure entails the interpretation of documents, wills, deeds, enactments, or any other written instrument. It also involves the determination of any question of construction arising under the instrument and for the declaration of rights of persons interested. The use of Originating Summons has continued to be adopted in these special causes. It has become known as a special procedure to resolve disputes, particularly where contentions as to facts are quite minimal.

The position of the law with regards to hearing preliminary objections has become sacrosanct under the Nigerian Law. Objections to the jurisdiction of the courts must be heard first, before determining the substantive action. It has been held by the courts that it is either the court of law has jurisdiction or not, and the competency to proceed to determine any dispute, lies squarely within the jurisdictional powers of the court to do so. Consequently, cases commenced by way of originating summons must cross the jurisdictional hurdle, where raised. The fact that the case seeks to interpret documents or instruments alone, does not obviate the need to challenge the jurisdiction of courts in such cases.

In deserving circumstances therefore, the courts have held that the hearing of a preliminary objection, before the originating summons, constitutes good law. In some other cases, the Courts have held that hearing both simultaneously would demonstrate the essence of justice, thus balancing the need to resolve the objection with the quick dispensation of justice. The discretion of the Courts is, therefore, imperative consideration in this regard. Claimants wish to have their disputes resolved in good time, especially when the disputed facts are narrow. Defendants on the other hand, may deploy strategies to delay litigation in order to slow down the momentum. In this article, we would be considering the prospects and constraints of taking either of the positions, while reflecting on the new provisions contained under the Rivers State High Court (Civil Procedure) Rules, 2023.

ORIGINATING SUMMONS AS A MODE OF COMMENCEMENT OF ACTION

The very nature of an Originating Summons is to simplify areas of disputes in preparation for hearing.[1] It is available to claimants in actions requiring the interpretation of documents, deeds, wills or any other written instrument, for the determination of any question of construction arising under the instrument and for a declaration of his interest.[2] The evidence relied upon is mainly affidavit evidence, with documents annexed as exhibits, thus requiring no serious disputes as to facts. The procedure, therefore, comes in handy to quickly resolve disputes as against the use of Writ of Summons or Petition, which require the calling of oral evidence. The use of Originating Summons therefore seems quite attractive among litigants.

[1] Famfa Oil Ltd. v. A.G., Federation [2003] 18 NWLR P. 461 (Paras D-G).
[2] See for instance, the provisions of Order 5 Rule 4 (1) of the High Court of Lagos State (Civil Procedure) Rules 2019. Order 3 rule 6 of the Federal High Court (Civil Procedure) Rules 2019.

The seemingly attractive nature of Originating Summons as a mode of commencing actions, has arguably led to abuse over the years. Litigants have resorted to using originating summons, even where the facts are contentious. One other impediment to the use of Originating Summons is the defence strategy more often used by defendants. A common defensive strategy deployed by defendants in cases commenced by Originating Summons, is to file a preliminary objection against the case. The filing of the objection, therefore, renders the substantive action ineffectual, while the objection would be given priority, and thereby liable to further appellate proceedings. The decision on the preliminary objection after all, represents an appealable decision[3], which an appellate court would have to entertain and resolve. Cases filed by way of originating summons often get clogged with this procedure, thereby leading to several years of delay in resolving the dispute.

The conclusion, therefore, is that originating summons procedure is appropriate, whenever the law so provides, and when the sole or principal question in issue is or is likely to be, with regards to the construction of a written law or any written instrument, where there is not likely to be any dispute as to the facts. In general terms, it is used for non-contentious actions - i.e., those actions where facts are not likely to be in dispute.

PRELIMINARY OBJECTIONS IN CASES COMMENCED BY ORIGINATING SUMMONS

The question of whether a court should hear a preliminary objection together with the substantive suit in an action commenced by originating summons, has garnered significant legal discourse in recent times. It is arguably a matter of litigation strategy for the defence and seen as a delay tactic from the standpoint of the claimant. This stance has made the originating summons procedure seem unattractive to litigants, due to the undue delay in resolving preliminary objections. The major essence of a Preliminary Objection is to determine whether there are any jurisdictional or procedural issues which need to be resolved before going into the substantive suit. It is invariably to terminate the lifetime of the suit on the threshold, as held in the case of ***Allanah v Kpolokwu***[4] (see also ***Uwazurike v A.-G., Fed***.[5], ***B.A.S.F.(Nig.) Ltd. v. Faith Ent. Ltd.)***[6]

The court's approach to handling preliminary objections and the substantive suit can vary. There is a growing trend where courts are inclined to hear both together. It is however pertinent to consider

[3] See Section 241 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended)
[4] [2016] 6 NWLR PT 1507 P 17,
[5] (2007) 8 NWLR (Pt. 1035) 1.
[6] (2010) 4 NWLR (Pt.1183) 104.

the position of the superior courts on this issue. Perhaps one of the most cited cases in this regard is the Court of Appeal's decision in ***Senate President v. Nzeribe***[7]***.*** In that case[8], the Court of Appeal posited that the issue of taking the preliminary objection together with the substantive suit squarely lies within the discretionary powers of the Judge. The Court found that it may be prudent to hear the arguments as to jurisdiction and the merit of the case, together. The decision was, perhaps, found worthy, that the Supreme Court adopted the Court of Appeal's reasoning in its subsequent decisions in the celebrated case of **Inakoju v. Adeleke.**[9] Other cases that have maintained this decision include; ***Gbadebo & Anor v. Oyenitun & Ors***[10]***, Central Bank of Nigeria v Dr. B.O Akingbola & Anor***[11] and a host of other cases.

The underlying theme in these decisions is that the Court is encouraged to hear both the preliminary objection and the substantive suit together. The exercise of such discretion may not affect the defendant's fundamental right to fair hearing. It would also support the drive for a quick dispensation of justice and avoid protracted legal processes.

In deserving cases however, the Court may opt to hear and determine the preliminary objection first, before considering the substantive suit. This may be due to the nature or form of objection being raised, non-fulfilment of a condition precedent, or at best, within the discretionary powers of the Judge. In a recent ongoing case, the High Court of Ogun State exercised its discretion to hear and determine the preliminary objection first, before considering the substantive suit. It was our argument on behalf of the Claimant that justice would be better served by taking both the substantive suit and preliminary objection together. The Court was however of the opinion that hearing the preliminary objection was paramount, under the circumstances. The Court eventually found in the Claimant's favour, and dismissed the objection, thereby setting down the originating summons for hearing. As expected, the objectors hurriedly lodged an appeal to the Court of Appeal, while seeking a stay of proceedings on the substantive suit.

The issue came up subsequently before the Court of Appeal, Ibadan, and it was our argument that in order not to render the substantive suit ineffectual, it is imperative for the Court to order an accelerated hearing of the substantive suit at the trial Court. The Court agreed with our contention and accordingly invoked its powers, remitting the case to the trial Court for accelerated hearing of the substantive suit. This example may constitute one of the imperatives of hearing both the preliminary objections and substantive suit together, to save time – a nudge towards legislation of the procedure, to make it mandatory.

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[7] [2004} NWLR 9 257.

[8] Supra.

[9] [2007] 4 NWLR PT 1025 P 481.

[10] (2021) LPELR-52928 CA.

[11](2019 LPELR-48807 (SC)

REFLECTIONS FROM THE RIVERS STATE HIGH COURT (CIVIL PROCEDURE) RULES 2023

The Rivers State High Court has gone a step ahead by laying the issues above to rest, as it pertains to the appropriate procedure to adopt. Under the provisions of the Rivers State High Court (Civil Procedure) Rules, 2023, particularly **Order 3 Rule 11 of the Rules,** the issue has been made mandatory, as against being discretionary. The Rule provides thus, with respect to cases filed by way of originating summons:

> ***"On the hearing date, the preliminary objection shall be heard together with the Main suit."***

The import of the above provision in the Rivers State High Court Rules is that it now mandates the Court to hear the preliminary objection filed against an action commenced by an originating summons, together with the substantive action. Suffice it to say that the use of the word 'shall' has removed the decision from the discretionary powers of the court. The Supreme Court held in the case of **Amokeodo V. IGP & ORS**[12] that the long-standing principle governing the use of the word "shall" is that it is generally imperative or mandatory and in its ordinary meaning, denotes obligation. See also R. v. Secretary of State for Social Services Exp. Association of Metropolitan Authorities (1986) 1 All E.R. 164.

Overall, the innovative provisions under the Rivers State High Court Rules seem to have buried the contention, paving the way for a quicker dispensation of justice.

CONCLUSION

In conclusion, as the legal landscape continues to evolve, it is essential for our courts to adapt and explore innovative approaches to enhance access to speedy justice. The consideration of preliminary objections and the substantive suit together, in matters commenced by originating summons, is an approach that can contribute to a more efficient and effective justice delivery.

The courts should consider a review of the Rules in line with this provision, to avoid delay. By addressing both aspects simultaneously, the court can streamline the legal process, ensure a holistic evaluation of the case, save time and resources, prevent duplication, avoid overburdening the court, and uphold procedural fairness. It is advisable for other Superior courts of record in Nigeria to follow the giant step taken by the Rivers State judiciary through the High Court of Rivers State (Civil Procedure) Rules, 2023.

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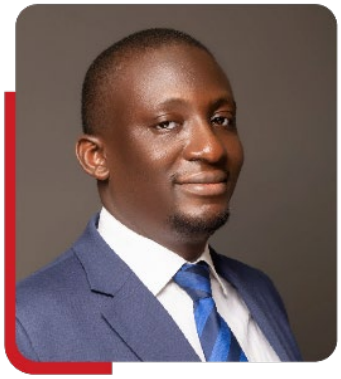
[12] (1999) LPELR-468.

Authors



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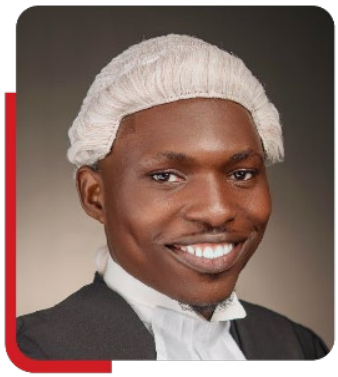

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