AWARD OF COSTS IN JUDICIAL PROCEEDINGS: WHEN A LEGAL PRACTITIONER MAY BE PERSONALLY LIABLE FOR PAYMENT OF COSTS*

Abstract
The award by the Supreme Court of a collective sum of sixty million Naira in costs against two senior Counsel for filing an application which the Court found vexatious, frivolous, a gross abuse of court process, and a violation of the principle that there must be an end to litigation, raises current issues of when and why a legal practitioner would be personally amerced in costs in a judicial proceeding. In answering the question, we, set out the theoretical background of the meaning, definition and delineation of costs, and examined the general principles of award of costs. We brought out that, primarily costs are given by the law as an indemnity to a prevailing party. We also established that the burden of costs is primarily borne by a losing party. We then explained that though counsel is not primarily responsible for the burden of costs, under certain circumstances, the court may order that an award of costs should be borne by counsel personally. From this perspective, we concluded that it was within the powers of the Supreme to make a finding that under the referenced circumstances, the award of costs should be made personally against counsel.

Keywords: Costs, Counsel, Indemnity, Liable, personally liable, Prevailing party,

1. Introduction

On 26th February, 2020, the Supreme Court of Nigeria set judicial precedent. It ordered Chief Afe Babalola, SAN and Chief Wole Olanipekun, SAN respectively to pay to opposing parties, costs in the sum of Thirty Million Naira for filing an application requesting the Court to review its judgment in a particular case. The Court found that such application amounted to asking the court to unconstitutionally sit in appeal over its judgment, and that the application was vexatious, frivolous, a gross abuse of court process, and a violation of the principle that there must be an end to litigation. Both Counsel expressed dissatisfaction at the principle of awarding costs against them personally. In this paper, we will explore the jurisprudence underlying award of costs against Counsel personally. As a background, we would in the section next do a general overview of the meaning, definition and delineation of the concept of Costs in judicial proceedings. We would in the section thereafter conduct an in-depth investigation into principles for award of costs, and thereafter inquire into the persons who are entitled to award of costs and persons liable for costs. From the perspective of persons liable for costs, we would examine when and why Counsel may be personally liable for payment of costs awarded in a proceeding. We would then conclude.

2. Meaning, Definition and Delineation of Costs

The term *costs* as applied to proceedings in a court of justice are pecuniary allowances made to a successful party, and recoverable from the losing party, for his expenses in prosecuting or defending an action or a distinct proceeding within an action.[1] They are not imposed as punishment on the party who pays them, nor given as bonus to the party who receives them, but are given as an indemnity to the person entitled to them, and are designed to mitigate to a greater or lesser extent the necessary expenses incurred in the conduct of litigation.[2] Originally, costs were awarded in punishment of the defeated party for causing the litigation than as recompense to the successful party for the expenses to which he had been subjected.[3] Jurisprudence has however moved away from the penal theory of costs to the present indemnity theory.[4] Consequently, presently the object of awarding costs is not to

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[1] *Black's Law Dictionary*, (West, 6th edn.), 348; in *Mbanugo v Nzefili*, [1998] 2 NWLR Part 537, 343; the Court of Appeal held that the term '*Costs*' means two things in law. The first is the charge which a Solicitor is entitled to make and recover from the client for professional services. The other meaning is the sum of money which the court orders one party to pay another party in an action for compensation for the expenses incurred in the litigation. *See Maya v. Oshuntokun*, [2001] 11 NWLR Part 723, 62

[2] 20 Am. Jur. 2d. 5; In *NBCI v Alfijir Mining (Nig.) Ltd*., [1993] 4 NWLR Part 287, 346 the Court of Appeal per Justice Katsina-Alu, JCA quoting the Supreme Court of Nigeria per Justice Adetokunbo Ademola in *Rewane v. Okotie-Eboh*, (1960) 6 SCNLR 461 held '*Costs as between party and party are given by the law as an indemnity to the person entitled to them; they are not imposed as punishment on the party who pays them nor given as a bonus to the party who receives them. As a general rule, costs are an indemnity, and the principle is this, find out the damnification and then you find out the costs which should be allowed'.* See also *Harold v. Smith*, 157 ER 1229 at 1231 per Baron Bramwell.

[3] 20 CJS 257

[4] In *NCC Ltd v SCOA (Nig) Ltd*. [1991] 7 NWLR Part 201, 80 the Court of Appeal analysed the principles of costs and the controlling authorities per Justice Tobi JCA at 95H- *96B 'Costs are an indemnity to the successful party. Therefore, if the extent of the damnification can be found out, the extent to which costs ought to be allowed is ascertained. See Rewane v. Okotie-Eboh (1960) 5 FSC 200, (1960) SCNLR 461. The object of awarding costs is not to punish the litigant, but to compensate the successful party for the expenses to which he had been put by coming to court. See Inneh v. Obaraye (1957) 2 FSC 58 (1957) SCNLR 180. Costs generally follow the event although the two are neither invariable inseparable or*

punish the unsuccessful litigant but to compensate the successful party for amongst other things, expenses to which he has been put because of the litigation.[5] Movement away from the penal theory to the present indemnity theory is brought out by the principle consistently upheld by courts that costs should not be punitive. This has led appellate tribunals, on suspicions of penal or punitive underpinnings, to reduce or remit costs which are of such a quantum that they deem it either unexplainable, or inappropriate for the circumstances.[6]

Costs awardable in proceedings are identified and categorized in several ways. Costs of the day are costs awarded for the costs incurred in preparing for proceedings of a cause on a specified day. It may include witnesses' fees, transport costs and other fees of attendance. Interlocutory costs are costs accruing upon proceedings in the intermediate stages of a cause, such as motions. Final costs are such costs as are to be paid at the end of the suit, the liability for which depends upon the final result of the litigation.[7] An award of costs in the cause is an award that leaves the quantum of such costs to be decided at the end of the action in favour of either the plaintiff or the defendant depending on who wins the case eventually.[8] If the plaintiff wins and gets an order for his costs, he gets those interlocutory costs as part of his costs of the action against the defendant. Vice versa, if the defendant wins and gets an order for his costs, he gets those interlocutory costs as part of his costs of the action against the plaintiff. *'Plaintiffs costs in the cause'* means that, if the plaintiff wins, he gets the costs of the interlocutory proceedings; but if he loses, he does not have to pay the other side's costs of them. '*Plaintiff's costs in any event'* means that, no matter who wins or loses when the case is decided, the plaintiff is to have the costs of those interlocutory proceedings. '*Plaintiff's costs'* means that the plaintiff is to have the costs of the interlocutory proceedings without waiting for a decision.[9] Where the court states that no order as to costs would be made, it implies that parties would bear their own costs.

3. Principles for Award of Costs

It is primary to the concept of costs that costs are given by the law as indemnity.[10] In this regard, the award of costs is not meant to be punitive, rather, it is to follow the event, and are awarded at the discretion of the judge.[11] Where a statute provides that a prevailing party shall be entitled to costs, but does not fix the quantum of the costs, the party becomes as a matter of right entitled to those costs. The discretion of the court accordingly becomes limited to determining the quantum of those costs. If, however in course of the proceedings, he conducted himself in an odious or obnoxious manner, the court may properly sanction him by denying him the costs he would have been entitled to. Generally, subject to the enabling Act, rules of Court and other relevant enactment, costs of and

intertwined. See Adegbenro v. Akintola (No.2) (1963) 2 SCNLR 216; While the successful party is, as a matter of general principle entitled to costs, this cannot be arbitrarily awarded but rather, must reflect the party's reasonable expenses. See Kukoyi v. Odufale (1965) 1 All NLR 300, Haco v. Brown (1973) 4 SC 149, Obayagbona v. Obazee (1972) 5 SC 247.'

[5] *Francis v Osunkwo*, [2000] FWLR Part 14, 2469, here, costs awarded against appellant was punitive because the court below, after refusing the adjournment sought and dismissing substantive appeal, went ahead and awarded costs against him without following the procedure of first calling on appellant to ascertain whether he would be ready to conduct the appeal himself. Per Justice Omage, JCA at 2484A-D '*I now come to the issue of costs awarded against the appellant when the application for adjournment was refused, and the appeal was dismissed without hearing. It is often said that costs are in the discretion of the court. Discretion yes, but the circumstances of exercising the discretion must exist. Costs are awarded inter alia as compensation for the time lost in attending to the case, where one of the parties is unable to proceed with the case. The object of awarding costs is not to punish the unsuccessful litigant, but to compensate the successful party for among others, the expenses to which he had been put because of the litigation. See Imneh v. Obaraye, 2 FSC 58. In the instant case, the application for adjournment was refused, the appellant was not given an opportunity to decide whether despite the application of his counsel, he would not have wished to open his appeal before the appeal was dismissed. The appeal was dismissed, and costs were awarded against the appellant. It is difficult not to form the impression that the appellant was punished twice. ….. In other words, appellant was punished by the ruling of the court for his application for adjournment, when it was refused. Secondly, for awarding costs against the appellant when his appeal was dismissed'*. See also *Sogunro v Yeku* [2003] 12 NWLR Part 835, 644; *Akande v Alagbe*, [2001] FWLR Part 38, 1350; *Psychiatric Hospitals Management Board v Utomi*, [1999] 13 NWLR Part 636, 572; *Guda v Kita*, [1992] 12 NWLR Part 629, 21; *Ajagungbade III v Laniyi*, [1999] 13 NWLR Part 633, 92

[6] In *Coomasie v Tell Communications Ltd* [2003] 1 NWLR Part 802, 551, the court awarded costs of ₦400,000.00 against appellant upon his discontinuing his action. It appeared from the record that the reason for such large measure of costs was that *'[T]he plaintiff had the earliest opportunity to withdraw, but he failed to do so.'* The Court of Appeal in setting aside the award held that reference by the trial Judge to the fact that the appellant had the earliest opportunity to withdraw but failed to do so showed that the purpose of the award was punitive.

[7] *Black's Law Dictionary*, (n. 1)

[8] *Dike v Union Bank of Nigeria Plc*. [1987] 4 NWLR Part 67, 958

[9] *JT Stratford & Son Ltd v Lindley (No 2)* [1969] 3 All ER 1122

[10] *Balogun v Akanji* [1992] 2 NWLR Part 225, 591; *Atoyebi v Bello* [1997] 11 NWLR Part 528, 268

[11] *Olasope v Babatayo*, [2005] All FWLR Part 272, 339

incidental to all proceedings in Court are in the discretion[12] of the Court or judge, and the Court or Judge shall have full power to determine by whom and to what extent the costs are to be paid.[13] In every suit, costs of the suit, and of each particular proceeding therein, and costs of every proceedings in Court shall be in the discretion of the Court as regards the person by whom they are to be paid.[14] The provisions of the rules of Nigerian courts when taken together with the enabling Acts are quite similar to the English rules which provide that the powers and discretion of the Court (under s. 51 of the (English) Supreme Court Act, 1981) to award the costs of and incidental to proceedings of the Supreme Court shall be in the discretion of the Court and the Court shall have full power to determine by whom and to what extent the costs are to be paid.[15]

As a general principle, courts always have the discretion to award costs to the prevailing party. In his regard, costs are given as indemnity to the successful party. They are not meant to serve as imposition of punishment to the party who lost or given as a bonus to the successful party. In performance of its role as an umpire, the court has a duty to ensure that in the award of costs, the losing party does no suffer unnecessary financial hardship to the level of an indefensible advantage enjoyed by the successful party.[16] A court has unfettered and absolute discretion to award or refuse costs in any particular case, but that discretion must be exercised judicially and judiciously. Assessment of the amount allowed in terms of an award of costs is the responsibility of the court which determines what is reasonable in the circumstance. When the court in exercise of this discretion orders the costs payable and does so without being capricious in the sense that it is ordered in honest exercise of its discretion, it will not be questioned.[17] The judicial exercise of this discretion demands that grounds wholly unconnected with the action should not be taken into consideration.[18] Judicial discretion exercised in award of costs is exercised on fixed principles, that is, according to rules of reason and justice, and not according to whims and caprices or private opinion. Exercise of this discretion must be unaffected by questions of sympathy or benevolence. This discretion may be disturbed only if it is palpably wrong.[19] The principles or rules so far fashioned out by the courts are mainly designed to be useful aids to award of costs and not the final word on the issue. This is because, so much discretion is involved in the matter and the discretion can only be exercised in the light of the circumstances of the case.

4. Persons Entitled to Costs

Successful plaintiffs are generally entitled to costs. A defendant who has not been served with process, and who has not appeared, or who has not responded is not entitled to costs, and an award of costs made in favour of a defendant who has not appeared is clearly erroneous. However, a person may appear solely for the purpose of challenging the jurisdiction or service of process on him, and move a motion *in limine* to dismiss or strike out the action against him, and may so far be a party as to be entitled to costs on prevailing, notwithstanding he qualifies and limits his appearance for this particular purpose.[20] Where one or more defendants are successful in their defence, while the plaintiff recovers from some other co-defendants, the successful defendants are entitled to costs against the plaintiff[21]. The court has full and ample powers to order the plaintiff or the defendant or a third party[22] or any subsequent party to pay the costs of any other party or parties to the litigation, as the justice of the case may demand[23]. Clearly, no express provision authorises the court to order parties in a third-party action to pay costs.

[12] In *Dike v. Union Bank of Nigeria Ltd* (n. 8) here, it was held that the discretion of the court to award costs is limited only by the rule that a successful party should not be deprived of its costs except for good reason.
[13] s. 49 FHC Act, 1973; s. 76(1) High Court Law of Lagos state, 1955
[14] o. 55 r. 1 of NIC (Civil Procedure) Rules, 2017; *see also* o. 25 r. 7 of FHC (Civil Procedure) Rules 2019; o. 56 r. 6 of High Court of FCT, Abuja (Civil Procedure) Rules, 2018; o. 49 r. 7 of High Court of Lagos State (Civil Procedure) Rules 2012
[15] o. 62 r. 2(4) of Rules of the Supreme Court (England)
[16] *Salau v Araba*, [2004] All FWLR Part 204, 88; *NCC Ltd. v. SCOA (Nig.) Ltd*. (n. 4)
[17] *NBCI v. Alfijir (Mining) Nigeria Limited* [1994] 14 NWLR Part 638, 177
[18] English Supreme Court Practice (1982) vol. 1 para. 62/2/10
[19] *Balogun v. Akanji* (n. 10)
[20] 20 CJS 346, 347; however, in *Wilson v Oshin***,** [1994] 9 NWLR Part 366, 90, the appellant formulated an issue for determination viz:- *Whether the learned trial Judge was right in awarding separate costs of N500.00 each in favour of the 2nd defendant and the 3rd and 4th defendants when they filed a joint statement of defence and were represented by the same counsel*. The Court of Appeal held that the award of costs in that manner was proper, since the trial Judge had the option to have made a single award of costs in the same amount to the defendants.
[21] 20 CJS 347; in *Kukoyi v Odufale*, [1965] 4 NSCC 243, the magistrate had awarded costs of 400 guineas against the appellants. The Supreme Court found that the major expense the respondents incurred at the lower court was 150 pounds for the cost of a survey plan. The Supreme Court held it that was wrong for the magistrate to have awarded costs in the supposition that each plaintiff was entitled to 10 guineas, forgetting that all the plaintiffs were represented by one counsel. The costs were reduced to 200 pounds.
[22] Third party procedure is generally provided in the rules of court, particularly at o. 10 rr. 17-25 of FHC (Civil Procedure) Rules 2019; o. 13 rr. 11-20 of NIC (Civil Procedure) Rules 2017; o. 13 rr. 21-24 of High Court of FCT, Abuja (Civil Procedure) Rules 2018; o. 13 rr. 19-22 of High Court of Lagos State (Civil Procedure) Rules 2012
[23] *Edginton v Clark* [1963] 3 All ER 468

The authority therefore rests on the general provisions authorising courts to exercise their discretion as to costs.[24] In the exercise of that discretion, the court should be guided by the principle that costs normally follow the event, and should, therefore, generally order the defendant, though successful in the action, to pay the costs of the third party if he also be successful. Then if in the circumstances of the case, those costs ought fairly to be borne by the plaintiff, the court will further order that they be added to the defendant's costs of the action against the plaintiff.[25] The court also has jurisdiction to order an unsuccessful plaintiff to pay directly, costs of third parties brought in by a successful defendant, or to order that such costs, if ordered to be paid by the defendant, be added to the costs to be paid by the plaintiff to the defendant.[26] One improperly and unnecessarily made a party may be awarded costs as against the party responsible for the misjoinder.

5. Persons Liable for Costs

Parties are primarily responsible for costs incurred by them. Where a party is however found to have misconducted himself in terms of any of various statutory provisions, he may in addition to costs incurred by him, be liable for payment of costs of the opposing party. Where in any cause or matter, anything is done or omission is made improperly or unnecessarily by or on behalf of any party, the Judge may direct that any costs to that party in respect of it shall not be allowed to him and any costs occasioned by it to other parties shall be paid by him to them.[27] The judicial tendency is that where from facts and circumstances of a case, it is clear that counsel has absolute control of a case and the fault arising therefrom is that of counsel, costs should not be awarded against the innocent litigant.[28] For purposes of reaching a decision on whether the cause or matter done or omitted on behalf of a party was improper or unnecessary, the Judge would have particular regard to:[29]

(i) omission to do anything the doing of which would have been calculated to save costs;
(ii) doing of anything calculated to occasion or in a manner or at a time calculated to occasion unnecessary costs;
(iii) any unnecessary delay in the proceedings.

In a representative action, both the named plaintiffs or defendants and those they represent (unnamed plaintiffs/defendants) are all parties to the action and are all bound by the eventual decision therein. The represented/unnamed parties, even though they are parties are however not full parties. They are therefore not liable individually for any costs awarded.[30] Where liability for costs is due to be borne jointly by a number of persons, the Judge may not proceed to apportion the costs unless he causes the records of the court to reflect his reasons in making the apportionment. In this regard, reasons must be stated where there is disparity in apportioning costs.[31] The cases of *Lawal v. Adeniji* and *Wurno v. UAC Limited* should be understood from the basis that the trial Judge is competent to apportion costs provided the apportionment is equal. Where an unequal apportionment is made, the trial Judge must cause the records to reflect reasons why the incidence of costs was disproportionately apportioned. If one of the joint parties was solely responsible for unduly refractory conduct or other misconduct, it would of course be permissible if a larger proportion of costs is taxed to him. The Judge must however cause the records to indicate this reason at the time the costs are apportioned[32]. If, however, the costs are apportioned

[24] o. 55 r. 1 of NIC (Civil Procedure) Rules, 2017; *see also* o. 22 r. 7 of FHC (Civil Procedure) Rules 2019; o. 56 r. 6 of High Court of FCT, Abuja (Civil Procedure) Rules, 2018; o. 49 r. 7 of High Court of Lagos State (Civil Procedure) Rules 2012

[25] *Johnson v Ribbins* [1977] 1 All ER 806; in *Thomas v Times Book Co Ltd* [1966] 2 All ER 241, the court ordered the plaintiff to pay the third and fourth parties' costs, because the plaintiff's claim rendered the third and fourth-party proceedings inevitable.

[26] *Edginton v Clark* (n. 25)

[27] o. 25 r. 13(1) of FHC (Civil Procedure) Rules 2019; o. 56 r. 12(1) of High Court of FCT, Abuja (Civil Procedure) Rules 2018; o. 49 r. 13(1) of High Court of Lagos State (Civil Procedure) Rules 2012

[28] *Yusuf v Ibekwe; In Re Williams (No. 3)* [2001] 12 NWLR Part 727, 349

[29] o. 25 r. 13(2) of FHC (Civil Procedure) Rules 2019; o. 56 r. 12(2) of High Court of FCT Abuja (Civil Procedure) Rules 2018; o. 49 r. 13(2) of High Court of Lagos State (Civil Procedure) Rules 2012

[30] *Okonji v Njokanma* [1984] 4 NWLR Part 114, 161

[31] In *Lawal v Adeniji*, [1997] 3 NWLR Part 494, 457, the trial Judge found that the 1st, 2nd & 4th defendants liable to pay costs to the plaintiff. He awarded the costs and apportioned those amongst the defendants. The 4th defendant was apportioned a substantial part of the awarded costs to pay. The records did not contain any reason why the trial Judge ordered the 4th defendant to pay more than what he asked both the 1st & 2nd defendants to pay. The Court of Appeal stated that the question was whether in his exercising discretion, the Judge is bound to give reasons where there is such disparity in the award and apportionment of costs as in the instant case, and held that in the exercise of his discretion, reasons must be stated where there is a disparity in apportioning the costs. In consequence of the failure of trial Judge to give reasons for the apportionment, the award was set aside. This decision was based on *Madan Idi Wurno v. UAC Limited* (1956) 1 FSC 33 at 34; (1956) SCNLR 99, where the Supreme Court held '*After anxious consideration I have reached the conclusion that the learned judge did not exercise his discretion when he apportioned 100 guineas costs in connection with the second action. He does not say why he made that apportioning and I can see no valid reason for it'.*

[32] In *Clarke v ER Wright & Son* [1957] 3 All ER 486, in a case of joint liability for breach of statutory duty, the first defendant had before trial offered to contribute one quarter of the damages recovered by the plaintiff. The second defendant

equally amongst the different defendants or different sets of defendants, it is not necessary to state any reasons.[33] Generally, a court can only exercise its jurisdiction or power over parties before it and strictly in respect of the case between them. It cannot do so concerning, and to the extent it may affect, persons who are not parties before it and must resist any temptation to do so.[34] Where however the conduct of the non-party is such that it could be interpreted as making him other than an innocent bystander to the proceeding and could be construed as bringing him within ambit of possessing an interest in the results of the litigation, his interest may make him liable for costs.[35] The critical issue is that even though the Court has the competence to award costs against a non-party, judicial discretion properly exercised would require that such costs may only be awarded against a non-party that has compromised himself to the extent that his relationship with the proceedings is obviously partisan.

6. Personal Liability of Legal Practitioner for Costs[36]

As a general principle, no matter what profession it may be, the common law does not impose on those who practice it any liability for damage resulting from what in the result turns out to have been errors of judgement, unless the error was such as no reasonably well informed and competent member of that profession could have made.[37] However, where the court finds that counsel did not have requisite authority to commence proceedings and thereby sets aside the proceedings, the counsel will be personally liable for costs of the action.[38] Thus, counsel may be compelled to bear personal responsibility for acts which though performed in the name of the client are not for the benefit of the client, but in actual fact are for personal aggrandizement of the counsel. Accordingly, a solicitor may be ordered to pay the costs where the proceedings are not genuinely brought in the client's interest, as for example where they are so frivolous and vexatious that they could not have been brought in expectation of favourable result, or are controlled by solicitors who have given client an indemnity, or a commission on the proceeds, or are brought solely for the solicitor's purposes.[39] In this regard, where it appears that any legal practitioner has by any act of negligence or deceit induced his client to enter into or continue any litigation, he shall, on failure of his client to succeed in the litigation, be liable to indemnify the client in damages of loss incurred by him in the litigation.[40]

Although the charge of acting unreasonably or negligently is a serious one, and such a charge ought not to rest solely on inference without evidence,[41] nevertheless, the wasted costs jurisdiction against counsel is one which the court has powers to invoke and exercise upon sufficient showing.[42] Accordingly, where in any proceedings, costs

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rejected the offer. At the trial, the first defendant's liability in damages was assessed at one fifth. In apportioning costs unequally between the defendants, the court stated that its basic consideration was the fact that the ratio in the award of damages and the further fact that the rejection by the second defendant of the first defendant's costs unduly increased the first defendant's costs.

[33] In *CMI Trading Services Ltd v Panchenko Yuriy* [1998] 11 NWLR Part 573, 284, the Court apportioned the costs equally amongst the three sets of respondents. Even though the number of respondents in each set differed, the costs having been apportioned equally amongst the sets, it was not necessary to state the reasons for the apportionment.

[34] *Lebile v Trustees of Cherubim and Seraphim,* [2003] 2 NWLR Part 804, 399

[35] *Symphony Group Plc v Hodgson***,** [1993] 4 All ER 143

[36] Courts are generally unwilling to hold Counsel personally liable for costs, except possibly in cases of particularly atrocious or egregious misconduct. See *Yusuf v Ibekwe*, (n. 30)

[37] *Saif Ali v Sydney Mitchell & Co (a firm) (P, a third party)* [1978] 3 All ER 1033

[38] *Carl-Zeiss Stiftung v Rayner and Keller Ltd (No. 2)* [1965] 1 All ER 300

[39] See *Re Jones* (1870) LR 6 Ch. App. 497; *Harbin v Masterman* [1896] 1 Ch. 351; *Danzey v. Metropolitan Bank* (1912) 28 TLR 327; the Supreme Court Practice vol. 2 para 3875, nonetheless, in *Berkeley Administration v McClelland* [1990] 2 QB 407 it was held that over-vigorous conduct of an action is different in nature from deliberate dishonesty in the prosecution of an action and does not attract taxation on a higher basis.

[40] o. 55 r. 5 of High Court of FCT Abuja (Civil Procedure) Rules 2018

[41] In *Orchad v South Eastern Electricity Board* [1987] 1 All ER 95, Dillion LJ pointed out at 105-106 *'Such a charge ought not to rest solely on inference without evidence. I appreciate that as already mentioned; defendants who wish to make such a charge against solicitors for the plaintiff have a difficulty in getting evidence because of the rules of professional privilege. Those rules of privilege also, however, hamper the solicitor in seeking to justify his own conduct of the case. The justification of privilege lies in the field of public policy; that a defendant may thereby be precluded from making out a claim that his costs should be paid by the plaintiff's solicitor personally is part of the price which has to be accepted from rules designed to ensure that a litigant has freedom to consult with his lawyers before his case comes to court'.*

[42] In *R v Horsham District Council, ex parte Wenman,* [1994] 4 All ER 681, counsel to a party submitted that too ready a resort to wasted costs order jurisdiction, and the threat or fear of such applications, might lead to three wholly undesirable results. First, lawyers might allow their judgment in advising their clients, and their willingness to carry a case forward, to be prejudicially affected by considerations of their own financial position, thus inhibiting bona fide claimants from putting their case before the court at all: a wedge might be driven between plaintiffs and their legal advisers, which would inhibit giving of favourable advice for fear of personal liability. Secondly, lawyers might lose their objectivity and might, in consequence, become more determined than ever not to abandon their clients. And thirdly, there was real danger that the bringing, or threat, of such applications might 'frighten' legal representatives acting for legally aided clients and lead to the latter being treated

are incurred improperly or without reasonable cause or are wasted by undue delay or by any other misconduct or default, the judge may make an order of personal liability for costs against any Counsel whom he considers to be responsible. The order of personal liability for costs against Counsel may also be made where undue delay or other misconduct was made by a servant or agent of Counsel.[43] A Judge is entitled to find that costs are incurred improperly or without reasonable cause or are wasted by undue delay or by any other misconduct or default if proceedings in court cannot conveniently proceed or fail or are adjourned without useful progress being made: because of failure of Counsel to attend in person or by a proper representative; or because of failure of Counsel to deliver any document for the use of the court which ought to have been delivered or to be prepared with any proper evidence or account or otherwise to proceed.[44]

Misconduct requisite to charge counsel with personal liability for costs is quite different from misconduct identified as *professional misconduct*. Here mere negligence even of a serious character will not suffice. The application is strictly personal and relates to the solicitor himself and his fitness to practice. Jurisdiction as to costs is different, and its primary object is not to punish the solicitor, but to protect the client who has suffered, and to indemnify the party who has been injured. The jurisdiction is not limited to misconduct or default, but expressly extends to costs incurred improperly or without reasonable cause, or costs which have proved fruitless by reason of some undue delay in proceeding under a judgement or order. The duty owed to the court to conduct litigation before it with due propriety is owed by the solicitors to the respective parties, whether they be carrying on the business alone or as a firm.[45] Where a *decree nisi* was obtained wrongly but without any error on the part of the court, it was subsequently set aside. The court was of the opinion the solicitor to the petitioner was at fault in respect of the wrongly obtained order. Upon an application by the solicitor to be awarded his costs, the court held that the solicitor who had been in default should not be entitled to his costs.[46] Where in spite of being served with a hearing notice, counsel omitted to enter the hearing date in his diary and thereby missed the next court date, it was construed as *misconduct or default* within the meaning of the rules, and counsel was accordingly held personally liable in costs.[47] Where a solicitor in perfect good faith, but with lack of the diligence which is the duty of a solicitor to observe, failed to ascertain from his client, or, if he did ascertain from his client, to note, the change of address which had taken place and an indication of which was apparent from the documents which were in his possession. It was the failure on his part that led to his client not having notice that the suit was coming up, which led to a waste of costs. The court held that the solicitors were in default, and held that default includes negligence.[48] Where the Judge finds that in the proceedings, costs have been incurred improperly or without reasonable cause or are wasted by undue delay or by any other misconduct or default of a Legal Practitioner representing a party to the proceedings, the Judge may make an order against the legal Practitioner whom he considers to be responsible:[49]

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less favourably than private paying clients, especially at the 'cutting edge'. The judge in response to these concerns held that if the law [on wasted costs order] was to lead those who hold themselves out as competent to practice in a complex field of litigation to decide that they do not in fact have competence to enable them to avoid risk of wasted costs orders against them, or to take more active steps to pursue continuing education than is now the norm in order to ensure that they continue to possess standards of the reasonably competent practitioner in the field, then it was a welcome development.

[43] o. 25 r. 14(1) of FHC (Civil Procedure) Rules 2019; o. 56 r. 13(1) of High Court of FCT Abuja (Civil Procedure) Rules 2018; o. 49 r. 14(1) of High Court of Lagos State (Civil Procedure) Rules 2012; *see also* o. 55 r. 3 of NIC (Civil Procedure) Rules 2017, which is framed differently and provides that where counsel admits that the failure or neglect or unwillingness of the party to act, or where the party has acted negligently, and Counsel admits that the failure, neglect or unwillingness is the fault or mistake or Counsel, any costs awarded shall be awarded against Counsel and not the party. The weakness of this provision is two-fold. First, it requires admission by counsel his own default before costs would be awarded against him personally. Second, it permits costs to be awarded against Counsel personally, even when default is that of client personally.

[44] o. 25 rule 14(2) of FHC (Civil Procedure) Rules 2019; o. 56 r. 13(2) of High Court of FCT Abuja (Civil Procedure) Rules 2018; o. 49 r. 14(2) of High Court of Lagos State (Civil Procedure) Rules 2012

[45] *Myers v Elman* [1939] 4 All ER 484.

[46] *Saltmarsh v Saltmarsh*, [1952] 2 All ER 6

[47] *Kaye v Kaye* [1964] 1 All ER 620

[48] *D. v D*. [1963] 1 All ER 602; in *Jakeman v. Jakeman & Turner***,** [1963] 3 All ER 889, the court found that the solicitor was guilty of negligence and lack of diligence, and was also guilty of disregard of the client's instructions to contest the issue on damages. He failed to enter appearance; failed to take the advice of counsel either as to the expedient course during interlocutory bargaining on damages or as to what damages were likely to be awarded, so that an appropriate offer could be made; and failed to instruct counsel or appear at the trial to argue in mitigation. Instead, he tried to strike a collusive bargain. In the latter respect he was also in disregard of his duty to the court and the proprieties of his profession. The court held that in the circumstances, his conduct amounted to a default and misconduct within the meaning of the rules

[49] o. 25 r. 14(1) of FHC (Civil Procedure) Rules 2019; o. 56 r. 13(1) of High Court of FCT Abuja (Civil Procedure) Rules 2018; o. 49 r. 14(1) of High Court of Lagos State (Civil Procedure) Rules 2012; *see also* o. r 55 r. 7(3) of NIC (Civil Procedure) Rules 2017; s. 51(6) of English Supreme Court Act 1981 [and o. 62 r. 11 of English Supreme Court Rules] provides that *'In any proceedings mentioned in subsection (1) the court may disallow, or (as the case may be) order the legal or other representative concerned to meet, the whole of any wasted costs or such part of them as may be determined in accordance with the rules of court.'*

(i) disallowing costs as between Legal Practitioner and his client; and
(ii) directing the Legal Practitioner to pay to his client costs which the client has been ordered to pay to other parties to the proceedings; or
(iii) directing the Legal Practitioner personally to indemnify such other parties against costs payable by them.

Even though courts are generally circumspect in awarding costs to be personally borne by counsel, where the circumstances are sufficiently compelling, the court is not timid in making the necessary order.[50] If an order is to be made, disallowing costs as between Counsel and his client; and directing Counsel to pay to his client costs which the client has been ordered to pay to other parties to the proceedings; or directing Counsel personally to indemnify such other parties against costs payable by them, it must be because; costs are incurred improperly or without reasonable cause or are wasted by undue delay or by any other misconduct or default of the counsel. Where however there is no question of costs being wasted or thrown away, the court may not make any of these orders. Where the issue pertains solely to a matter of professional ethics, without abutting on incurrence of costs the wasted costs jurisdiction is not available.[51] The appropriate approach of a court in these cases is to ask itself three questions:

(i) was there improper, unreasonable or negligent act or omission by the legal representative concerned,
(ii) if so, has a party as a result incurred cost,
(iii) if so, should the court exercise its discretion to make a wasted costs order in respect of all or part of such costs.

Even where questions (i) and (ii) are answered in the affirmative, the court still has the ultimate discretion whether or not to make any award, and the quantum of such award. The materials upon which the exercise of the discretion of the court would be based may either compel or exculpate the award of wasted costs. It however goes without saying that there must be a clear causal connection between the conduct in question and the costs thereby incurred.[52]

7. Conclusion

The wasted costs jurisdiction should be carefully and rarely exercised by the court. The r/Reason for circumspection in its exercise is that lawyers might allow their willingness to carry a case forward, to be prejudicially affected by considerations of their own safety, thus inhibiting *bona fide* claimants from putting their case before the court at all. Nonetheless, the jurisdiction exists and when necessary, should be exercised by the court. In this regard, where the circumstances are sufficiently compelling, the court is not timid in making the necessary order. This jurisdiction may be exercised where the proceedings initiated and carried forward by the lawyer are frivolous and vexatious. Where an order of court that costs be personally borne by counsel was preceded

[50] In *Ibbs v Holloway Brothers Ltd*, [1952] 1 All ER 220 Devlin, J. held at 221F-222A '*What I have to consider is: Who is to bear the costs thrown away? Is it to be the parties themselves, or is it to be the solicitors who in my judgement are responsible for the error which has resulted in those costs being wasted? It is not a matter of importance for this purpose whether the plaintiff be a poor man who can ill afford to bear the costs, or whether he be a substantial corporation, and the same applies to the defendant. I think that parties, whether they be rich or poor, are entitled to expect that their solicitors will act with all proper diligence to protect their interests. I entirely accept the view that, if there were a small or accidental error, it would not be right to penalise the solicitors. Then it would be right to look on the extra costs as one of the misfortunes which may arise in the course of litigation, and parties must be prepared to bear themselves….There is really no difficulty about solicitors making the necessary arrangements provided they are alive to their duty in the matter…. The time has come when one must enforce these rules strictly and see that the costs fall where the blame lies. Therefore, I think that I should make an order that the parties on both sides should not have to pay the costs thrown away as the result of the adjournment and transference of this case, but that they should be borne by the solicitors personally.'*

[51] *Davies v Davies*, [1960] 3 All ER 248; here, a solicitor, instructed to act for a wife in divorce on grounds of the husband's adultery, telephoned the husband and obtained oral admission of adultery. Subsequently, the solicitor interviewed the husband and took from him a written statement admitting the adultery. The evidence of adultery tendered at hearing was the written statement. On making an order for taxation, the court excluded all of the solicitors' costs relating to the written statement made by the husband and the attendances and telephone conversation in relation thereto, and similar costs were excluded from the order for party and party taxation, so that the costs should be borne by the solicitor personally. In excluding these costs, the court was actuated by its disapproval of what it considered a general practice followed by petitioner's solicitor of approaching a respondent to matrimonial proceedings and obtaining such a statement as was obtained in the present case. On appeal, it was held that it was not part of court's function in this connection to say whether solicitor's conduct was professionally proper or improper, and that a matter of professional ethics was for the Law Society and not the trial judge. As the costs in question had not proved fruitless, the order excluding them was misconceived.

[52] *R v Horsham District Council, ex parte Wenman* (n. 44)

and predicated upon a finding by the court that applications by counsel before the Court were vexatious, frivolous, a gross abuse of court process, and a violation of constitutional principles, the order of court is not erroneous.