ANALYSIS OF THE SUPREME COURT'S NEW JURISPRUDENCE OF AWARD OF EXEMPLARY COSTS IN ABUSE OF PROCESS CASES*

Abstract

A fundamental principle in civil proceedings is that costs are awarded to indemnify a prevailing party for the expenses in the proceedings. A corollary to this principle is that costs must not be awarded to penalise a party. Application of these two principles establishes a jurisprudence in which appellate courts invariably set aside awards by lower courts where the awards are either so large as to be unexplainable, or are clearly stated to be punitive. On February, 26, 2020, in the most ginormous award of costs made in Nigerian legal history, the Supreme Court penalised two senior counsel for filing applications which the Court found were vexatious, frivolous and a gross abuse of court process. This award created a new jurisprudence of amercement in exemplary costs as cumulative to the traditional remedy of striking-out an abusive proceeding. This paper analysed the purport and effect of this new jurisprudence and its effect on the traditional jurisprudence that restricted response to abuse of process to a striking out of the abusive proceeding. In part 2, the paper set out the basic principle of indemnity as the purpose of costs, and in part 3, analysed the difference between costs on the one hand, and fines and penalties on the other. In part 4, the paper examined the introduction of punishment as a purpose of costs in most rules of court. In part 5, it scrutinised the functus officio rule, the powers of the Supreme Court to correct its judgments, the concept of abuse of court process and the traditional response to an abusive process. This led to part 6 in which the paper interrogated the new jurisprudence of the Supreme Court which makes an order striking out an abusive proceeding cumulative to penal costs against counsel implicated in the abusive proceeding. Thereafter it concluded.

Keywords: *Abuse of Process, Costs, Fines, Penalties, Supreme Court*

1. Introduction

On February 13, 2020, the Supreme Court voided the election of the APC candidate into office as Governor of Bayelsa state. The APC and its candidates, thereafter, through counsel filed applications requesting the Supreme Court to review and reverse its judgment. On February 26, 2020, in dismissing the applications, the Supreme Court held that by o. 8 r. 16 of the Supreme Court Rules, the Court has no powers to review its judgment delivered on merit '*safe for clerical error.'* The Court found that howsoever the prayers sought were crafted, clearly, the applicants were asking the court to review its judgment delivered on February 13, 2020. The Court also found that *'The two sets of applicants have not shown this court any clerical mistakes that need to be corrected in the judgment delivered on the 13th of February 2020 in this appeal. They have not pointed out any accidental slip or omission in the said judgment or shown this court any part of the said judgment that needs to be varied so as to give effect to its intention. There must be an end to litigation this is the final court of the land and is well settled that decisions of this court are final.'*[1] Then, in an epoch judicial precedent, the Supreme Court ordered the two senior counsel who argued the applications to pay to opposing parties, costs in the total sum of sixty million Naira. The Court found that such applications amounted to asking the court to unconstitutionally sit in appeal over its judgment, and the applications were vexatious, frivolous and a gross abuse of court process; and a violation of the principle that there must be an end to litigation; and applications of that nature were aimed at desecrating the sanctity of the Court, violating the principles and decisions of the Court and destroying the esteem on which the Court is held. This paper will analyse the new jurisprudence of chastisement of abuse of court processes by amercement of exemplary costs. Contextually, the section next will explain the indemnity rule as the basic principle of costs. Section 3 will explain the difference between costs, fines and penalties. Section 4 will describe the current confusion in the costs regime due to a conflation of the concepts of costs and penalties. Section 5 explains the *functus officio* rule, the powers of the Supreme Court to correct errors in its decisions, concept of abuse of process, and sets out the traditional punishment for abuse of process. Section 6 argues that award of penal costs is currently cumulative to the orthodox sanction for abuse of process.

2. Indemnity as the Cardinal Purpose of Award of Costs

Upon institution of an action, the Court is generally saddled with three functions, namely, determination of matters in controversy between the parties, making of order as to costs of the proceedings and, assessment as regards to quantum of costs.[2] Costs are incidental damages allowed to a successful party to indemnify him against the expense of asserting his rights in court when the necessity for doing so was caused by the others' breach of a legal

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[1] 'Bayelsa: How Lyon, APC incurred Supreme Court fines' <https://www.blueprint.ng/2020/02/> Accessed on May 28, 2022; 'No force on earth can change our decision' — Supreme Court fines senior lawyers N30m over Bayelsa' <https://www.thecable.ng/category/thenation> Accessed on May 28, 2022

[2] *CCB (Nig.) Ltd v Okpala* [1997] 8 NWLR Part 518, 673

duty. 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 by the law as an indemnity to the person entitled to them. They are intended to assuage to a greater or lesser extent the basic expenses incurred in the conduct of litigation.[3] The costs and expenses a prevailing party is entitled to be indemnified are reasonable costs which the party has been necessarily put to in the conduct of the proceedings.[4] While it is the general practice to emphasise the negative aspect of the award of costs, courts are equally entitled to consider the positive aspects governing the award. For instance, while courts of law are not allowed to award punitive costs, they are bound to award costs which are commensurate with the circumstances of the case. Such costs will not be said to be punitive. Costs follow the event and as long as they follow the event and vindicate out of pocket expenses of the party in victory, the adverse party cannot be heard to complain.

3. Difference between Costs, Fines and Penalties

Costs may be differentiated from fines. A fine is a sum of money exacted as a pecuniary punishment from a person guilty of an offence, while costs are statutory allowances to a party for his expenses incurred in an action. Penalties or fines are imposed as punishment for a violation of the law.[5] A typical provision for a fine in civil proceedings as contained in rules of court is a provision that a party who defaults in performing an act within the time authorised by the judge or the rules of court shall pay to the court, a stated sum of money for each day of his default.[6] A fine is in its nature at least a penalty, while costs approach more nearly a civil debt. The term fees and costs are often used interchangeably as having the same use. Nevertheless, they are distinguishable, and each has a peculiar and appropriate meaning in law. Costs are allowances made to a party for the expenses incurred in prosecuting or defending a suit - an incident to the judgment, while fees are compensation to public officers for services rendered in the progress of a cause, for example mileage fees for a witness appearing under a witness summons, or subpoena[7]. For an example, s. 50 of the Federal High Court Act provides that a judge may in any matter, order and allow to all persons required to attend, or examined as witnesses, such sum or sums of money as may be specified by Rules of Court as well as for defraying the reasonable expenses of such witness as for allowing them a reasonable compensation for their trouble and loss of time. All sums of money so allowed shall be paid in civil proceedings by the party on whose behalf the witness is called and shall be recoverable as ordinary costs of the suit if the court orders so. Though the fees awarded are not costs, but if the court makes an order, they may be enforced against the liable party in the same manner in which payment of costs is enforced. However, the fact that the fees may be enforced in the same manner as costs does not render them of the same genus as costs.

Costs differ from damages. Damages are pecuniary compensation or indemnity which may be recovered in the courts by any person who has suffered loss, detriment or injury, whether to his person, property or right by the unlawful act or omission or negligence of another[8]. While costs are, like damages, awarded as compensation, there is as to costs normally no *restitutio in intergrum*[9]. It is chiefly a pecuniary allowance made to the successful party and recoverable from the losing party for his expenses in prosecuting or defending an action or a distinct proceeding in an action[10].

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[3] 20 Am. Jur. 2d. 5; in *NBCI v Alfijir Mining (Nig.) Ltd* [1993] 4 NWLR Part 287, 346 the Court of Appeal per Katsina-Alu, JCA quoting the Supreme Court per Adetokunbo Ademola, CJN 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.

[4] *Iheasirim v World Courier (Nig.) Ltd* [2002] FWLR Part 131, 1852, the Court held that such items as costs of interstate air travel for party's counsel and expensive hotel accommodation are normally regarded as Solicitor and Client costs and should not be a prominent feature in the award of costs as between the parties.

[5] *NOSDRA v Mobil Producing Nigeria Unltd*., [2018] 13 NWLR Part 1636, 334

[6] o. 48 r. 4 of FHC (Civil Procedure) Rules 2019; o. 49 r. 5 of High Court of FCT Abuja (Civil Procedure) Rules 2018; o. 44 r. 4 of High Court of Lagos State (Civil Procedure) Rules 2012; unlike the rules of the FHC, FCT High Court and High Court of Lagos State which prescribe a flat sum for each day of default, the NIC adopts an increasing gradation for each period of default. In this regard, o. 57 r. 5(6) of NIC (Civil Procedure) Rules 2017 provides that where, a party is required to file a process or comply with the directive or order of the court within a specified time, and the party fails or neglects to do so, the party shall pay a penalty in a certain amount for each day of his default. After the first fortnight, the sum payable for each day of default is doubled. After the second fortnight, there is yet another exponential increase in the sum payable per day of default.

[7] 20 CJS 257-8

[8] *SPDC (Nig.) Ltd. v Tiebo II* [1996] 4 NWLR Part 445, 657

[9] *Mbanugo v Nzefili* [1998] 2 NWLR Part 537, 343

[10] *ASIMS (Nig.) Ltd v Lower Benue River Basin Dev. Auth*. [2002] FWLR Part 84, 101

4. The Confusing Introduction of Penology in the Jurisprudence of Costs

Current rules of court applicable in some jurisdictions have tried to introduce penology in the jurisprudence of costs by providing for the payment of very weighty costs that have no relationship with either the expenses of, or the inconvenience to the other party. Some rules, for an example, provide that where a party wishes to challenge the authenticity of a document, he shall, not later than a specified number of days of the service of the document, give notice that he does not admit the document, and requires it to be proved at the trial. In this regard, where a party gives notice of non-admission and the document is proved at the trial, the cost of proving the document, which shall not be less than a sum of ₦ 5,000 shall be paid by the party who has challenged it, unless at the trial or hearing, the judge declares that there is reasonable grounds for not admitting the authenticity of the document.[11] Some other rules provide that a party may, after close of pleadings, by notice in writing, filed and served, require any other party to admit any specific fact mentioned in the notice. The party so served shall within a specified number of days after service, give notice of admission or non-admission of the fact failing which he shall be deemed to have admitted it unless the judge otherwise orders. Where there is a refusal or neglect to admit the same within the specified number of days after service of such notice or within such further time as shall be allowed by the Judge, the cost of proving such fact which shall not be less than ₦ 5,000 shall be paid by the party so refusing or neglecting whatever the result of the proceedings; unless the judge certifies that the refusal to admit was reasonable.[12] Furthermore, some rules provide that when a notice to admit or produce comprises unnecessary documents, the costs occasioned thereby which shall not be less than ₦ 5,000 shall be borne by the party giving such notice.[13] These provisions are a complete departure from the basis for the award of costs. They depart from the indemnity basis of costs to a penalty basis for costs. Furthermore, decreeing the imposition of costs in a certain amount without any attempt at correlating the costs awarded and the expenses incurred is arbitrary and trammels exercise of judicial discretion. A better approach is to delineate the costs event and leave the court with the discretion of assessing the amount of costs to be imposed. An example of what should be the proper approach is a provision that where the court is of the opinion that any allegation of fact, denied or not admitted by any pleading, ought to have been admitted, the court shall make such order as may be just with respect to costs.[14]

5. The *Functus Officio* Rule, Correction of Judgments and Abuse of Court Process

At the common law, a domestic judgment could not be collaterally impeached or called into question if rendered in a court of competent jurisdiction, and could only be questioned directly by a writ of error, petition for new trial, or by bill in chancery[15]. When a court has decided an issue, and the decision of the court is embodied in some judgment or order that has been effective, then the court cannot reopen the matter and cannot substitute a different decision in place of the one that has been recorded. That is the business of an appellate court. The provision of s. 6(6) of 1999 Constitution of the Federal Republic of Nigeria (CFRN) that the judicial powers vested in the court shall extend to all inherent powers and sanctions of a court of law does not empower a court to review its own decision.[16] Generally, when a court completes hearing a case and delivers its judgment thereon, it ceases to exercise further power in dealing with the case, except with respect to such ancillary matters as stay of execution, instalmental payment, etc. In legal parlance, the court is said to be *functus officio* in the case. Steps to reverse the judgment will fall within the jurisdiction of the relevant appellate court. If a judge makes an error (barring typographical errors) in a judgment which he has read in open court to the hearing of all - parties and non-parties alike - he has no business correcting that error himself. If he does so, he is usurping both the functions and the jurisdiction of the appellate court.[17] Under this *functus officio* doctrine, where the judgment is given by a lower court, it can only be reviewed or corrected by a higher court; but where the decision is given by the highest court

[11] o 15 r. 2 of FHC (Civil Procedure) Rules 2019; o. 34 r. 2(2) & (3) of NIC (Civil Procedure) Rules 2017; o. 20 r. 2(2) & (3) of High Court of FCT Abuja (Civil Procedure) Rules 2018; o. 19 r. 2(2) & (3) of High Court of Lagos State (Civil Procedure) Rules 2012

[12] o. 15 r. 3(1) & (3) of FHC (Civil Procedure) Rules 2019; o. 34 r. 3(1) & (3) of NIC (Civil Procedure) Rules 2017; o. 20 rule 3(1) & (3) of High Court of FCT Abuja (Civil Procedure) Rules 2018; o. 19 r. 3(1) & (3) of High Court of Lagos State (Civil Procedure) Rules 2012

[13] o. 15 r. 5 of FHC (Civil Procedure) Rules 2019; o. 34 r. 5 of NIC (Civil Procedure) Rules 2017; o. 20 r. 5 of High Court of FCT Abuja (Civil Procedure) Rules 2018; o. 19 r. 5 of High Court of Lagos State (Civil Procedure) Rules 2012

[14] o. 13 r. 19 of FHC (Civil Procedure) Rules 2019

[15] *Michaels v Post*, 88 US 398, 22 L Ed. 520

[16] *Bakare v Apena* [1986] 4 NWLR Part 33, 1; *Adigun v A-G, Oyo State*, [1987] 2 NWLR Part 56, 197

[17] *Edem v Akamkpa Local Government*, [2000] 4 NWLR Part 652,70 [There are situations in which the court that gave the judgment is permitted to set aside such judgment. The various High Courts' civil procedure rules allow courts, under certain conditions to set aside judgments obtained in the absence of one of the parties or in default of pleadings. There is also inherent power of the court to set aside its judgment obtained as a result of fraud practiced by one of the parties on the court or which for any reasons whatsoever as for example, lack of jurisdiction, is a nullity, or where it is obvious that the court was misled into giving the judgment under the mistaken belief that the parties consented to it.]

such as the Supreme Court, the decision can longer be reviewed and is final forever, subject only to legislative interference.[18]

Clearly, apart from provisions in rules of court, courts possess the power, subject to appropriate safeguards, where the justice of the case so requires, to correct or amend the terms of their orders or judgments and effect such variations therein in such a way, as to carry out the meaning which the court intends.[19] The words '*accidental slip*' mean a clerical mistake in a judgment or order. Such error must be an error in expressing the manifest intention of the court.[20] The general principle of law is that a court has jurisdiction to amend its judgment or order whether enrolled or not, and whether the error arose from a clerical slip or not, where the judgment or order concerned does not express the meaning of the judgment or order which was intended by the Judge or Court.[21] Where in its judgment, the court says one thing whereas in essence it means to say something else; such an error comes within the purview of the *'slip rule'*. The error is an accidental slip which is in law amenable to correction to give it its true meaning.[22] The slip rule is not very large. It is very restrictive because it only enables a court to correct accidental or clerical slips or omissions but not to change the form of the order.[23] The concept of a slip rule presupposes that it is occasioned by accident or mistake and therefore not deliberate. Its significant feature is that it is amenable to amendment which must not be of a fundamental nature.[24] The slip rule is not an opportunity for the court to rewrite its judgment no matter how subtly disguised. The rule does not permit the Judge to rehear an application to make an order which he intended to make but which he ought not to make. Even where an order has been obtained by fraud, the court has no jurisdiction under a pretension of the slip rule to rehear it.[25] It does not authorise the court to embark upon a review of its decision, or to make far-reaching alterations and incursions in it.[26] The slip rule principle only signifies the power of the court to amend its own judgment so as to correct and bring the judgment to carry the meaning which the court intended. The bounds would be overstepped where the court by such amendment in effect varies the judgment or order which in the first instance correctly represented what the court decided[27].

Where a Judge's attention had been directed to a particular point, and, applying his mind to that point he decided it, there can be no alteration under the slip rule even if the Judge had fallen into manifest error.[28] The court cannot vary its decision once it is delivered, and a formal order correctly representing that decision is drawn up.[29] Where a judgment, and this includes a ruling, is clear, and devoid of any clerical mistake, or not within the slip rule or any other form of omission, the court is not competent to vary it. The only remedy available to an aggrieved party is to proceed on appeal[30]. A misinterpretation of a court order already drawn up and enrolled is not a basis for the variation of such an order under the inherent jurisdiction of the court. It is open to any person to misinterpret the Court's decision but that does not mean the decision is not that of the court or that the order made does not reflect the courts intention[31]. A court cannot vary its judgment or order which correctly represents its decision, nor may it vary the operative and substantive part of its judgment so as to substitute a different form. The error or omission which the court can correct must be an error in expressing the manifest intention of the court. The court cannot correct a mistake law on its own in law, even though apparent on the face of the order or judgment. If the order correctly expresses its intention, it cannot be corrected under the rules of court or under the inherent jurisdiction of the court.[32] Where there is no ambiguity in the judgment or order of a court which calls for interpretation, construction or clarification, any attempt to import some contrary interpretation would amount to varying the

[18] *ARCON v Fassassi* [1987] 3 NWLR Part 59, 42
[19] *UBN Plc v CFAO Nigeria Ltd*., [1997] 11 NWLR Part 527, 118
[20] *Ogunsola v NICON* [1996] 1 NWLR Part 423, 126; *Stirling Civil Engineering (Nig.) Ltd. v Yahaya* [2005] All FWLR Part 263, 628
[21] *Koiki v FBN Plc* [1994] 8 NWLR Part 265, 665
[22] *Agwunedu v Onwumere* [1994] 1 NWLR Part 321, 375, [Here the court made reference to 'Statutory right of occupancy' whereas it had 'Customary right of occupancy' in mind.] *Eze v Obiefuna* [1995] 6 NWLR Part 404, 639 [Here the court erroneously declared that respondents are the holders of 'Customary certificate of occupancy' of the land in dispute. The appropriate declaration the court ought to have made was the respondent's entitlement to a 'Customary right of occupancy' in respect of the land in dispute.]
[23] *Nnaji v Ede* [1996] 8 NWLR Part 466, 332; *Obioha v Ibero* [1994] 1 NWLR Part 322, 503
[24] *Aregbesola v Oyinlola*, [2011] 9 NWLR Part 1253, 458
[25] *Macron Services Nigeria Ltd v Afro Continental Nigeria Ltd* [1995] 2 NWLR Part 376, 201
[26] *Ufele v Umeh* [1995] 5 NWLR Part 393, 114
[27] *Koiki v FBN Plc* (n 21)
[28] *Berliet (Nig.) Ltd. v Kachalla* [1995] 9 NWLR Part 420, 478
[29] *OHMB v BO Apugo & Sons Ltd*. [1990] 1 NWLR Part 129, 652
[30] *Megwalu v Megwalu* [1996] 2 NWLR Part 428, 104
[31] *Faleye v Otapo* [1987] 4 NWLR Part 64, 186
[32] Obioha v Ibero (n 23)

judgment or order which correctly represents what the court decided and is erroneous on point of law.[33] In accordance with its rules, the Supreme Court has no powers to review any judgment once given and delivered by it save to correct any clerical mistake or some error arising from any accidental slip or omission, or to vary the judgment or order so as to give effect to its meaning or intention. A judgment or order shall not be varied when it correctly represents what the Court decided, nor shall the operative and substantive part of it be varied and a different form substituted.[34] The Supreme Court's lack of jurisdiction, constitutional, statutory or inherent to review its own order once a judgment has been delivered, is irrespective of whether or not the order has been enrolled or drawn up. A judgment or order of the Supreme Court once given is final. It cannot be reviewed by that Court again in the same case, whether by the same panel that gave the decision or by another panel or even by the full court.[35] In this regard, it will be scandalous and suggestive of improper and corrupt motives if the Supreme Court, after delivering a well-considered judgment, will be allowed to turn around and deliver a different decision. Such conduct will precipitate erosion of confidence in the integrity of the court.[36] The jurisdiction given to the Supreme Court by the constitution is to hear and determine the matters set out and specified in the constitution.[37] The inherent powers of the court are the powers that enable it to effectively and effectually exercise this jurisdiction. In the discharge of its main duty of adjudication, the Court takes and expresses its decision which it intends to give in the matter in writing, and delivers it. If the decision is what the court intends to give in the matter, that is the end of the adjudication process. If the expression used does not accurately convey the Court's intention, both o. 8 r. 16 of the Supreme Court Rules and s. 6(6) of the 1999 Constitution enable the court to make the necessary correction, but if the terms of the judgment correctly conveys the intention of the court, neither the inherent powers of the court nor o. 8 r. 16 of the Supreme Court Rules allows an alteration in the judgment to convey a different intention.[38] Accordingly, the Supreme Court generally cannot review its judgment except under the conditions laid down in o. 8 r. 16 of the Supreme Court Rules, under which, the Supreme Court, having decided an issue, and its decision embodied in a judgment or order that has been made effective, is *functus officio* and cannot reopen the matter and substitute a different decision to the one already recorded. In this regard, the power of the Supreme Court to review its judgment does not extend to corrections of errors of law made in the judgment, even though apparent on the face of the judgment or order.[39] This is because section 235 of CFRN stipulates that, no appeal shall lie to any other body or person from the determination of the Supreme Court. In short, there can be no re-hearing of any matter the Supreme has dealt with to conclusion, and the judgment of the Supreme Court is final in respect of any matter dealt by it. Thus, except in narrow situations where the slip rule applies, the Supreme Court has no jurisdiction to entertain an application for a review of its judgement once it has been delivered. The Supreme Court would not review any judgment once given and delivered by it, save to correct any clerical mistake or some error arising from an accidental slip or omission. Any error outside this saving clause would not be permitted by the slip rule since the judgment would then have represented what the court decided and any alteration or variation would be a variation of the substantive part of the judgement. The inherent power of the court would only be invoked if there is a missing link in the main body of the judgment and steps must be taken to fill the gaps or clear the ambiguity in the interest of justice. Exercise of this power would not be used to review or re-hear the case or alter the rights and obligations of the parties under the ruling or order made.[40]

Abuse of process is a term generally applied to a proceeding which is wanting in *bona fides* and oppressive. Abuse of process can also mean abuse of legal procedure or improper use of legal process.[41] In determining whether an

[33] *Ezenwa v Josiah Cornelius Ltd.* [1994] 7 NWLR Part 356, 292
[34] o. 8 r. 16 of Supreme Court Rules 1985
[35] *ARCON v Fassassi* (n 18)
[36] *Adigun v A-G, Oyo State* (n 16); *Ibe v Onuorah (No.2)* [2001] 9 NWLR Part 719, 519
[37] s. 232 and s. 233 of CFRN
[38] *Adigun v A-G, Oyo State*, (n 16) However the principle of the slip rule does not preclude a party, according to the principle in *Akinsanya v UBA Ltd* [1986] 4 NWLR Part 35, 273, from asking the Court in a subsequent and different case to depart from its decision or order in a previous case. See *Dingyadi v INEC* [2011] 10 NWLR Part 1255, 347 [Even though the Supreme Court cannot sit over its judgment or review it once delivered, it does not preclude the court from departing from its former decision in a previous case if the principles laid down for such departure apply. The departure from such previous decision is not setting aside or declaring a nullity the decision of the previous case.]
[39] *Oyeyipo v Oyinloye* [1987] 1 NWLR Part 50, 356; *Odofin v Olabanji* [1996] 3 NWLR Part 435, 126
[40] *Dingyadi* v INEC (n 38), here, it was stated that the rare jurisdiction given to the Supreme Court to review its judgment or ruling is limited to: (a) clerical mistakes and errors that arose from accidental slips or omissions in the judgment; (b) if necessary to vary the judgment in order to give effect to its real meaning, thereby making the judgment clearer; (c) where the judgment is obtained by fraud; (d) where it becomes clear that the Supreme Court was misled into delivering the judgment under a mistaken belief that parties consented to it; (e) where the decision is a nullity
[41] *7Up Bottling Co. Ltd. v Abiola & Sons Bottling Co. Ltd*. [1996] 7 NWLR Part 463, 714; see also *CBN v Ahmed*, [2001] 11 NWLR Part 274, 369 [The concept of abuse of judicial process though imprecise, involves situations and circumstances of infinite variety and conditions, with a common feature of improper use of the judicial process by a party to interfere with due administration of justice.] *Saraki v Kotoye* [1992] 9 NWLR Part 264, 156 [Abuse of process may lie in both a proper or

abuse of the process of court has occurred, it is not the exercise of the right *per se*, but its improper and irregular exercise which constitutes an abuse.[42] Abuse of court process in regard to multiple actions between the same parties and on the same subject matter may arise where it is sought to raise in a subsequent action, matters which could and should have been litigated in the earlier action.[43] When a motion or an action is heard and dismissed on the merit, it cannot be relisted and heard again because there is a subsisting ruling or judgment that must be given the force of law. The only remedy for the dismissal of the motion or action is an appeal. It would therefore constitute an abuse of process for a party to re-file and seek a rehearing of a motion or an action that has earlier been dismissed. The situation is still so, even if the phrasing of the prayers sought in subsequent motion or action is different from that in the first.[44] An abuse of process also occurs where a party litigates again on the same issue which has already been litigated upon between him and the same person on facts on which a decision had already been reached.[45] Inherent jurisdiction or power is a necessary adjunct of powers conferred by the rules and is invoked by a court of law to ensure that the machinery of justice is duly applied not abused. A court of law, being a court of justice, will always prevent the improper use of its machinery and will not allow it to be used as a means of vexatious and oppressive behaviour in the process of litigation.[46] The CFRN grants every superior court of record all the inherent powers and sanctions of a court of law.[47] Embedded in the power is the right of the court to ensure that its process is not abused. Once a court is satisfied that any proceeding before it is an abuse of process, it has the power and duty to terminate it.[48] As a general rule, courts decline jurisdiction over causes and matters brought before them by ways and means which the courts consider abusive of their process.[49] In this regard, the ordinary remedy in a case where there is abuse of process of court is to stay the proceedings, or to prevent further proceedings being taken without the leave of the court.[50] As stated earlier, the applications of the two senior counsel to the Supreme Court in the Bayelsa state, baldly, boldly and plainly requested the Supreme Court to review and reverse its judgment delivered on 13th of February 2020. As the Court found, the applications did not allege or show any clerical mistakes that need to be corrected, neither did they point out any accidental slip or omission in the said judgment or show any part of the judgment that needed to be varied so as to give effect to its intention. Howsoever the applications were crafted, unmistakably, the applicants were asking the Court to sit in appeal over its judgment The Supreme Court found that the request for it to sit on appeal over its decision and reverse itself in respect of its judgment on the merits was an abuse of the process of the court. In this regard,

improper use of the judicial process. However, the employment of judicial process is only regarded generally as an abuse when a party improperly uses the judicial process to the irritation and annoyance of his opponent, and the efficient and effective administration of justice.]

[42] *CBN v Ahmed*, (n 41), *Attahiru v Bagudu*, [1998] 3 NWLR Part 543, 656 [Abuse of process is a malicious perversion of a regularly issued process to obtain a result not lawfully warranted or properly attainable thereby.] *Governor of Anambra State v Anah*, [1995] 8 NWLR Part 412, 213, [Abuse of court or judicial process occurs when the judicial process or procedure is invoked in bad faith for the purpose of gaining an advantage or interest by a party against or to the detriment of his adversary.] *FRN v Abiola* [1997] 2 NWLR Part 488, 444, [It may involve some bias, malice or desire to misuse or pervert the course of justice or judicial process.]

[43] *Awofeso v Oyenuga* [1996] 7 NWLR Part 460, 360; in *Christian Outreach Ministries, Inc. v Cobham*, [2006] 15 NWLR Part 1002, 283, it was held that an abuse of process always involves some desire to misuse or pervert the system. It is only if *mala fide* can be read into the motive of resorting to a court of justice that the process of initiating a suit can be properly described as an abuse of court process. It is not the exercise of the right *per se*, rather, it is the improper and irregular exercise which constitutes an abuse.

[44] *Ugese v Siki*, [2007] 8 NWLR Part 1037, 452

[45] *Uba v Ukachukwu* [2006] All FWLR Part 337, 515; *Expo Ltd. v Pafab Enter. Ltd*. [1999] 2 NWLR Part 591, 449

[46] *Christain Outreach Ministries Inc. v Cobham*, (n 43)

[47] s. 6(6)(a) of CFRN

[48] *COP v Fasehun*, [1997] 6 NWLR Part 507, 170; *Kotoye v Saraki* [1991] 8 NWLR Part 211, 638, [A court of law has the jurisdiction to terminate *in limine* the proceedings when it is satisfied that they constitute an abuse of itself.] *Eze v Okolonji*, [1997] 7 NWLR Part 513, 515 [All courts of record have inherent power to stay their proceedings. A trial court has inherent power to stay its own proceedings; so too an appellate court.]

[49] *Attahiru v Bagudu* (n 42); see *Ntuks v NPA*, [2007] All FWLR Part 387, 809, [Abuse of Court process generally means that a party in litigation takes a most irregular, unusual and precipitous action in the judicial process. The process of the court is used *mala fide* to overreach the adversary. The court process is initiated with malice or in some premeditated or organized vendetta. The court process could also be said to be abused where the court process is premised or founded on recklessness.] *Nnonye v Anyichie*, [1989] 2 NWLR Part 101, 110 [The court may exercise its inherent jurisdiction to stay proceedings in a pending action where it is demonstrated that such action is either oppressive or vexatious and ought not to go on, being an abuse of the process of the court.] *Jadesimi v Okotie-Eboh (No.2)* [1986] 1 NWLR Part 16, 264 [The judicial process is abused if a party employs improper and perverse procedure or means with an unlawful objective to obtain a relief or advantage undeservedly. Where an action is an abuse of the judicial process, the court has power to protect itself from abuse, and it can do so by ordering a stay of proceedings]

[50] *7Up Bottling Co. Ltd. v Abiola & Sons Bottling Co. Ltd*. (n 41), there is however another view that abuse of the process of court merits an order of dismissal and not merely an order of striking out. In *Christian Outreach Ministries Inc. v Cobham*, (n 43), the court held that once a court is satisfied that any proceedings before it is an abuse of process, the proper order is that of dismissal of the process.

the action of the Supreme court in terminating the abusive proceeding by dismissing it is in accord and agreement with well-settled and longstanding judicial principles. The question however is, should the Supreme Court have gone further to penalise Counsel in costs? In other words, was not the dismissal of the abusive proceeding sufficient judicial response? Furthermore, even if there was a need to award costs on the principle that costs follow the event, was there any reason why the principle for award of costs should not be restricted to the usual indemnity principle? We shall answer these questions in the next section.

6. The New Jurisprudence of Exemplary Costs in Response to Abusive Process

Although originally costs were amerced as a punishment of the defeated party, jurisprudence has moved away from the penal theory of costs to the present indemnity theory[51], so that currently, award of costs is to compensate a successful party.[52] Consequently, presently costs are not meant to punish the unsuccessful party.[53] Movement away from the penal theory to the current indemnity theory of costs is brought out by the principle consistently upheld by the courts that costs should not be punitive. This has led to the situation where appellate tribunals have on suspicions of penal or punitive footings, reduced or remitted costs which are of such a large quantum that they deem it either unexplainable, or inappropriate for the circumstances.[54] Accordingly, punitive costs are disallowed. Punitive in this context relates to an award which does not have a primary motive of indemnity, but is intended either solely or mostly to punish the failing party.[55] Ordinarily, in a civil appeal at the Supreme Court, the costs to be awarded a successful party is in the sum of ₦ 10,0000.00, while the costs to be awarded a successful party in an application in a civil appeal is in the sum of ₦ 1,000.00.[56] Although the Court is entitled in making the order of costs to consider the records and conduct of the parties,[57] the main issue is that the award should not serve as punishment on the losing party or a bonanza to the successful party.[58] There is however jurisprudence to the effect

[51] 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 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 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'*

[52] *Akande v Alagbe* [2001] FWLR Part 38, 1350; *PHMB 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

[53] *Francis v Osunkwo*, [2000] FWLR Part 14, 2469, here, costs awarded against the appellant was in the form of punishment because the court below, after refusing the adjournment sought and dismissing the substantive appeal, still went ahead and awarded costs against him without following the procedure of first calling on the appellant to ascertain whether he would be ready to conduct the appeal himself. Per 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 our law, the practice from the dictum is there is a remedy wherever there is a wrong, ubi jus, ibi remedium, and not there is a remedy where there is no wrong. No wrong has been committed for which the respondent was compensated at the expense of the appellant. 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

[54] In *Coomasie v Tell Communications Ltd* [2003] 1 NWLR Part 802, 551, the court had awarded costs of ₦400,000.00 against appellant upon his discontinuing his action. It appeared from the record that the reason for such a large measure of costs was that; '*The plaintiff had the earliest opportunity to withdraw, but he failed to do so'.* the Court of Appeal in setting aside the award held that the reference by the trial Judge that the appellant had the earliest opportunity to withdraw but failed to do so showed that the purpose of the award was punitive.

[55] *Maya v Oshuntokun* [2001] 11 NWLR Part 723, 62

[56] Supreme Court Practice Directions made on 18/8/97 effective from 15/9/97. See also o. 8 r. 19 of Supreme Court Rules, 1985

[57] o. 13 r. 19 of FHC (Civil Procedure) Rules 2019; under o. 15 r. 16 of High Court of FCT, Abuja (Civil Procedure) Rules 2018, the court may at the pre-trial conference order any unnecessary or scandalous pleadings or endorsement which may tend to prejudice, delay or embarrass the fair trial of the action to be struck out, and may in such a case, if the court think fit order costs of the application to be paid between solicitor and client. *See also* o. 15 r. 16 of High Court of Lagos State (Civil Procedure) Rules, 2012.

[58] *Salau v Araba*, [2004] All FWLR Part 204

that if a losing party misconducted himself in a particularly atrocious, egregious or horrid manner, the Court may properly sanction him by award of aggravated and punitive costs against him. This is in accordance with the inherent powers of the court to maintain its dignity and integrity by exercising powers of control including sanctions to parties before it.[59] This is nevertheless, subject to the requirement that the trial judge must state clearly in the court's records, the conduct that made such award requisite, and the fact that the award was made due to the conduct. This will enable the appellate tribunal on scrutiny of the record to reach a finding whether the exercise of discretion by the trial judge was proper in the specific conditions.[60] Notwithstanding powers of the court to sanction a party's misconduct by awarding aggravated costs against him, appellate tribunals have remained hesitant about upholding such awards, mostly on the grounds that the award of punitive costs represents an intrusion of penology in the civil justice system.[61] However, with the recent award by the Supreme Court, penalising a party's abuse of process by award of aggravated costs has finally received precedential imprimatur and is thus accepted as judicial best practise.

The next question is whether any logical basis exists for awarding penal costs for abuse of court process against counsel personally? In answering this question, it must be set forth as a basic predicate, that while an attorney always must be zealous in his representation of individuals, there are limits, and the provisions of the rules of professional responsibility have been drafted to set forth these limits.[62] *'Bounds of law,'* within rule that the lawyer has a duty to represent his client zealously within bounds of law, include disciplinary rules and enforceable professional obligations.[63] In appearing in his professional capacity before a court or tribunal on behalf of a client, a lawyer is never excused from his duty of dealing candidly and fairly with the court or tribunal; and the assertion of zealous advocacy on behalf of the client would not provide an excuse or permit the lawyer to do or perform any act which, may obviously amount to an abuse of the process of the Court.[64] Thus, as a general duty and obligation, it is imperative on the legal practitioner not to, in any way do or perform any act which may obviously amount to an abuse of the process of the Court.[65] Accordingly, as a general principle, counsel is entitled to conduct his client's case in whatever manner he deems fit in so far as the manner he chooses to conduct the client's case does not constitute abuse of the process of the court, or offend the law.[66] Even though the general rule is that the client is concluded by the acts of his attorney as his agent, this general rule is subject to the exception that clients are not bound by the wrongful acts of their attorney.[67] Thus, the client would not be bound by a misconduct of his attorney which is a deliberate breach of professional ethics. Consequently, where the attorney is guilty of contempt of court, or abuse of the process of court or perversion of the course of justice, or disrespect to the court, the client would not be bound.[68] Where the court finds that a process or procedure employed by an attorney before it constitutes an abuse of its processes, the court is entitled to deal with the process by striking it out or dismissing it as the case might be. The exercise of the powers of terminating the abusive process does not however exhaust the powers of the court to proceed against the attorney for violating the rules of professional conduct. Apart from proceeding against the attorney for contempt of court of for his disbarment, the court may in the interim, amerce

[59] In *Maya v Oshuntokun* (n 55) the Court of Appeal held that the attitude of parties and their Counsel might be considered in awarding costs.

[60] In *ACB Plc v Ndoma-Egba*, [2001] FWLR Part 40, 1780, the Court held that though an award of costs should not be punitive, arbitrary and unreasonable, but where a trial court decides to award costs which are on the high side, or punitive costs the court must state the reason for so doing. Counsel to respondent argued that large costs of ₦25, 000.00 was awarded because there were series of adjournments at the instance of the appellants. The Court held that the records of the lower court failed to show that was the reason why the costs were assessed at that sum. The Court also held there was no evidence on the record that respondent had incurred substantial out of pocket expenses. The Court held that in the circumstances, the award was unreasonable and arbitrary.

[61] In *Olusanya v Osineye,* [2002] FWLR Part 108, 1462, upon conclusion of trial, the lower court had dismissed the entirety of the plaintiff's claims, and held that the entire action constituted an abuse of process of court. In order to deter others from similar abuse, the trial judge awarded punitive costs to serve as a deterrent. On appeal, the Court of Appeal set aside the award and held per Onalaja, JCA at 1495D-F '*Based on the compensatory theory of award of costs and not to punish the unsuccessful party, the learned trial judge was categorical that the award was punitive and to deter other people from bringing the type of cases derogates from the concept that costs are not awarded to punish the unsuccessful party. In the instant case, the learned trial judge by awarding the cists to be punitive and serve as deterrent to others had gone into the theory of penology thereby the learned trial judge did not exercise his discretion judicially'*

[62] *In Re Murray*, 7 CJS 923

[63] *Hawk v Superior Court in and for Solano County*, 7 CJS 923

[64] Article 32(3)(k) of Rules of Professional Conduct for Legal Practitioners, 2007

[65] Ibid article 32

[66] *NNPC v Ibi*, [2009] All FWLR Part 456, 1870

[67] *Fretz v Stoyer*, 89 US 198, 22 L Ed 769

[68] *Virginia Electric & Power Co v Bowers*, 7A CJS 286, in holding the client not bound by the attorney's contempt, it was held that an attorney is the agent of his client and has authority to take all lawful steps for the protection of his client's interest but he has no implied authority to bind his client by committing a quasi-criminal act, such as contempt in the face of the court.

him for aggravated costs for his abuse of its process. In thus proceeding against the attorney personally, the court bears in mind that an attorney is more than a mere agent or servant of his client. Within his sphere, he is as independent as a judge is; he has duties and obligations to the court as well as to his client, and he has powers entirely different from and superior to those of an ordinary agent.[69] It is thus deducible from the jurisprudence of the Supreme Court in the Bayelsa case that were a proceeding initiated by an attorney is found to be an abuse of the process of a court, the court would not hold the litigant liable for the abuse of court process since the litigant does not control the attorney in the mode of discharge of his professional instructions. The attorney would personally be held responsible for initiating or continuing the abusive proceeding. The court would deem a termination of the abusive proceeding as sufficient punishment to the litigant. His attorney who initiated or continued with the abusive proceeding would not get off so lightly. The court, apart from terminating the proceeding *brevi manu*, is also entitled to penalise the attorney for devoting his professional knowledge and time to the pursuit of proceedings abusive to the court.

7. Conclusion

The costs regime in Nigerian jurisprudence, for a long time disclosed a disturbing double vision. While it assiduously proclaimed the indemnity principle, it nevertheless propounded a theoretical perspective that costs may go beyond indemnity principle to punish a party's misconduct. However, acceptance of this penal principle of costs did not translate into practice. Its application at *nisi prius* was invariably upturned on appeal. The Supreme Court's application of the penal principle of costs in the Bayelsa case appears to presage a clarification of the otherwise confused jurisprudence that had hitherto existed in this area. It now appears that award of costs may go beyond the mere indemnity theory. Furthermore, and more importantly, the judicial response to abuse of court process may now be cumulative in the sense that the party is punished by his abusive process being struck out or dismissed, and his erring counsel is punished by being required to bear weighty costs personally. By this singular precedence, the Supreme Court has achieved not just a weaponisation of costs, but also more importantly, clarity of vision to the otherwise confused unitary typology of costs.

[69] *Curtis v Richards,* 7 Am Jur 2d 57