RETHINKING THE RULE AGAINST VISITING OF THE SINS OF COUNSEL ON THE LITIGANTS IN JUSTICE ADMINISTRATION IN NIGERIA*

Abstract

The rule against visiting of the sins of counsel on the litigant was introduced in Nigeria in 1964 by the Supreme Court in Doherty v Doherty,[1]the *locus classicus. The essence of this rule is to ensure that litigants are not unduly penalized over the mischief of their counsel. However, this rule, which is one of the autochthonous features of Nigerian legal system, is clearly antithetical to its system of representative litigation, in which parties are deemed to be bound by the actions and inactions of their counsel – their juridical agents. Like other rules, which are founded on case law, the rule against visiting of the sins of counsel on the litigants is very ambiguous in scope and application. This has not only led to conflicting interpretations and inconsistent application of the rule, but has also created a dangerous leeway for litigants and their counsel, who always resort to it as a magic potion that heals all the ills of litigation. It is, therefore, very imperative to rethink this rule so as to put its application in perspective.*

Keywords: Client, Counsel, Litigant, Nigeria, Supreme Court, Visitation

1. Introduction

Counsel is a lawyer or group of lawyers who represent litigants in law courts. But, in many jurisdictions, including Nigeria, litigants are not bound to be represented by lawyers in judicial proceedings, as they may elect to plead their cause themselves. Lawyers are usually engaged because of their mastery of the intricacies of law and procedure. The engagement of a lawyer by a litigant to conduct his case creates a special legal relationship between them, under which the lawyer becomes the agent (legal representative) of the litigant. And as the agent of the litigant, his actions and decisions in the course of conducting the case, including his mistakes, inadvertence, negligence and omissions, ought to be vicariously attributed the litigant. Of course, this is the whole essence of law of agency and the very foundation upon which the counsel-client relationship is founded. While this is the case in most common law jurisdictions, the reverse is the case in Nigeria. In fact, since the Supreme Court's decision in *Doherty v. Doherty*[2] in 1964, it has become a general rule in Nigeria that the sins of counsel cannot be attributed to the litigants. By this rule, litigants are at liberty to pick and choose which actions of their counsel to endorse. It is contended that this rule is not only retrogressive, but also counterproductive because it has created a dangerous leeway for the sinking litigants to evade liabilities. Little wonder then that despite its age, this rule has continued to generate criticisms from the Bar and Bench and academics. There is, therefore, a genuine reason to reconsider this rule with a view to defining its scope so as to confine its application to isolated cases where it will be manifestly unjust to punish innocent litigants for the misdeed of their counsel.

2. Examining the Nature of Counsel-Client Relationship

Counsel-client relationship is a special legal relationship which is primarily founded on the law of agency. This point was eloquently made by the Supreme Court in *Ogboru v. Uduaghan*[3] where the Court noted that 'the relationship that arises from a litigant instructing a solicitor to act on his behalf in a court proceeding gives rise to a solicitor and client relationship, otherwise, founded on agency.' Generally, agency is a bi-partite relationship in which one person called an agent has legal authority to act for another called the principal.[4] In *Dina v. Daniel*,[5] the Court of Appeal defined an agent as 'a person authorized by another to act for him; one entrusted with another's business.' This definition unarguably captures the nature of the relationship between counsel and his client. However, the counsel-client relationship is, by far, wider than an ordinary agent-principal relationship because of a number of factors.

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[1](1964) NMLR 144.

[2]*Ibid.*

[3](2013)13 NWLR (Pt. 1370) 33 at 63.

[4] MC Okany, *Nigerian Commercial Law* (Onitsha, Nigeria: African-Fep Publishers Limited, 1992) p. 344.

[5](2010)11 NWLR (Pt. 1204) 137 at 157.

Firstly, in an ideal principal-agent relationship, the principal is in total control of the manner in which his agent goes about his business. Thus, according to the Second Restatement of Agency, '[a] principal has the right to control the conduct of the agent with respect to matters entrusted to him.'[6] But in client-counsel relationship, counsel is not totally subjected to the control of his client while conducting a proceeding in court, In *Ogboru*'s case the Supreme Court specifically observed that by counsel-client relationship, counsel takes over completely the control and conduct of his client's case in court,[7] a principle which was laid down as far back as 1866 in the Strauss v. Strauss.[8] Hence, counsel is neither a steward nor a servant of his client, but an independent contractor who should be given a free hand to conduct his client's case.[9] Although counsel must accept and adhere to the instructions given by or on behalf of his client, he ought to be in total control over how those instructions are carried out and over the actual conduct of the case. And if he is not given this control he is entitled to refuse or return the brief.[10] It was against this backdrop that the Supreme Court once observed that 'counsel's control over the instructions given to him by his client must either be complete and total or none.'[11]

Secondly, beyond being the agents of their clients, counsel are also officers of the court and as such, they are obligated to represent their clients within the bounds of the law. Thus, in the case of *Gomwalk v. Military Administrator of Plateau,*[12] the Supreme Court held as follows: 'counsel are the officers of court and the court should at all times be able to count on their support in the quest to attain justice in litigation. He owes a duty not only to his clients but also to court.' In fact, a lawyer is duty bound to place the cumulative interest of justice above the parochial interest of his client. Thus, while representing his client, a lawyer 'shall keep strictly within the law notwithstanding any contrary instruction by his client and, if the client insists on breach of the law, the lawyer shall withdraw his service.'[13]

Similarly, lawyers are members of professional body, that is, the legal profession, which, all over the world, is regarded as the most honourable and noble profession.[14] By the Legal Practitioners Act,[15] lawyers are obligated to observe certain codes of conduct as stipulated in the Rules of Professional Conduct for Legal Practitioners 2007.[16] The failure to comply with the provisions of this *Rules* attracts sanction, which may include *derobing,* that is, banning the defaulting lawyer from practicing legal profession for a specified period[17] or for life.[18] Therefore, while representing their clients, lawyers must never lose the sight of their obligations to comply with the Rules of Professional Conduct for Legal Practitioners.

3. Legal Consequences of the Agency Nature of Counsel-Client Relationship

The whole essence of the law of agency is to make any person who authorized another person to act on his behalf answerable for the actions and decisions of the person so authorized. Identifying counsel as the agents of their clients – principals – invokes the established body of agency law that has developed over the years and applies to other agent-principal relationships.[19] In a nutshell, the law of agency demands that the actions and decisions of an agent in the course of representing his principal are that of his principal or, at least, deemed to be that of his principal. In view of this, the legal consequence of agency nature of counsel-client relationship is that any client who freely engages a counsel to conduct his case is bound by the actions and decisions of his counsel even when they are unfavourable to

[6]Second Restatement of Agency, 1958, 17 U.S. Code, S. 16.
[7]*Supra,* note 3 at 55.
[8](1866) L.R.I Q.B. 379.
[9]*Ibid.*
[10]*Adewunmi v. Plastex (Nig) Ltd* (1986) 2 NSCC 852 at 864.
[11]*Supra,* note 3 at 55.
[12](1998)7NWLR (pt. 558) 413 at 419.
[13] Rules of Professional Conducts for Legal Practitioners 2007, r. 15 (2) (a).
[14]*NBA v. Obioma* (2010) 14 NWLR (1213) 461 at 480.
[15]Legal Practitioners Act, Cap. L11, L.F.N., 2004.
[16]*Op cit,* note 13.
[17]*N.B.A. v. Obioma* (2010)14 NWLR (Pt. 1213)461 at 480.
[18]*NBA v. Odiri* (2008) 12 NWLR (Pt. 1100) 332 at 378.
[19] GM Gieself*Client Responsibility for Lawyer Conduct: Examining the Agency Nature of the Lawyer-Client Relationship*, 86 Neb. L. Rev. (2007) 346-395, at 348.

him, provided that the counsel apparently acts within the scope of his authority without any express or implied limitation.[20] Thus, in *Ogboru*'s case, the Supreme Court held that '[a] client having engaged counsel to conduct his case is bound by that counsel's engagement, however much he may disapprove of that course.'[21] This principle was hitherto laid down in *A.G.M. v. N.S.P. Ltd*,[22] where the Supreme Court held that 'having retained counsel, the client is bound by his conduct of his case.' Therefore, clients are not at liberty to pick and choose which actions and decisions of their counsel to endorse, but rather should accept them in good faith as the consequence of his free choice. Against the backdrop of the foregoing, the mistakes, errors, advertence, omissions and negligence of counsel in the course of conducting a case ought to be vicariously imputed to the litigant whom he represents. While this is not only the case, but also a general rule in most jurisdictions,[23] the reverse is the case in Nigeria, because Nigerian courts have repeatedly maintained that the sins of counsel should not be visited on their clients.[24]

4. The Rule against Visitation of the Sins of Counsel on the Litigants

Since the 1964 decision of the Supreme Court in the *locus classicus* case of *Doherty v. Doherty*[25], it has become a general rule in Nigeria that the mistakes and errors of counsel will not be visited on their clients. In this case, the appellants by motion on notice applied for the restoration of their appeal which had earlier been dismissed. According to the affidavit filed in support of the motion, it appeared that the appellants' solicitors who were served with summons in accordance with Order 7 rule 7(i) of the then Supreme Court Rules to attend and settle the records did not attend, but the registrar nonetheless settled the records and fixed the conditions for appeal. The appellants did not comply with that conditions and the appeal was for that reason dismissed. Appelants' address as given on the notice of appeal was the address of their solicitors. No notice for settlement of record was served upon the appellants personally but on their solicitors. Subsequently, the appellants filed a motion for the restoration of the appeal, which motion was opposed by the respondent. Coker, JSC, while granting the application held as follows: '[T]he failure of the appellants to comply with the conditions of appeal is entirely due to the fault of their solicitors and to shut them out from the hearing of the appeal on the merits is to hold them personally responsible for the negligence of their solicitors'.[26]This landmark judgment was probably influenced by the decision of Lord Greene, M.R. in the English case of *Gatti v. Shoosmith*[27]where an application for extension of time within which to appeal was granted because the omission to appeal in due time was due to a mistake on the part of a legal adviser.[28] It was this Doherty's case that established the general rule that the sins of counsel will not be visited on his client in Nigerian legal system. Little wonder then that the rule itself has become known as the Doherty Rule.[29] Basically, this rule is an equitable intervention geared towards doing substantial justice[30] – insulating innocent litigants from the harshness of the application of the traditional agency law in counsel-client relationship. And as a rule founded on equity, there should be no hard and fast rule about its application; and therefore, each case should be decided on its own facts and circumstances.

5. A Critique of the Rule against Visitation of the Sins of Counsel on Litigants

There is no doubt that the underlying logic behind the rule against visitation of the sins of counsel on a litigant was very sound, yet the rule has continued to generate criticisms from the Bar and Bench and academics. A number of factors are responsible for the criticisms surrounding the operation of this rule, one of which is the fact that the rule is without a definite scope, a common weak point of judge-made laws or case law. Unlike statutory laws that have well defined boundaries, the rule against visitation of the sins of counsel on the litigants, like most case law, is a open-

[20]*Afegbai v. A-G, Edo State* (2001) 14 NWLR (pt. 733) 425.
[21]*Supra*, note 3 at 56.
[22](1987) 2 NWLR (Pt. 55)110 at 119.
[23] See the Philippines' case of *Escudero v. Dulay*, 158 SCRA 69, 78(1988).
[24] See *Bowaje v. Adediwura* (1976) 6 SC 146.
[25]*Supra*, note 1.
[26]*Ibid* at 145.
[27](1939) 3 All E.R.916.
[28] See also *Iroegbu v. Okwordu* (1990) NWLR (Pt.159) 643.
[29]*Ogundeji v. Unilorin* (2013) LPELR, CA/IL/27/2012 at 24.
[30]*N.E.P.A. V Oboigbe* (2004) FWLR (Pt. 189) 1120 at 1131.

ended rule. This has not only led to the conflicting interpretations and inconsistent application of the rule, but has also created a dangerous leeway for the litigants and their counsel who do not see it as a safety net whenever they are at their wits' end, but always resort to it as a magic potion that heals all the ills of litigation. Thus, in *Ogundeji v. Unilorin,*[31]the Court of Appeal regretted that this rule has become 'a magic bullet for indolent applicants.'Sinking counsel now resort to it as a magic potion that heals all the ills of litigation.

Another factor responsible for the criticisms surrounding the Doherty Rule is its inconsistency with the agency nature of counsel-client relationship. In fact, the Doherty case was decided in to total disregard of the the agency nature of clients' relationship with his counsel. A litigant who freely engaged counsel of his choice as his legal representative has no choice but to face the consequences of his choice; and it is of no moment that the counsel is incompetent or inexperienced.[32]This is, in fact, the general rule in most jurisdictions.[33] For example, in *Link v. Wabash Railroad Co.,*[34] the United States Supreme Court upheld the district court's judgment dismissing a petition for failure of the petitioner's attorney to attend a pretrial conference. According to the US apex court:

> There is certainly no merit to the contention that dismissal of petitioner's claim because of his counsel's unexcused conduct imposes an unjust penalty on the client. Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent.[35]

The Doherty Rule has also been criticized on the ground that applications founded on it are usually overreaching and therefore always occasion injustice to the adverse party. Although the essence of the rule against visitation of the sins of counsel on the litigants is to ensure that the ends of justice are met, in practice the rule only serves the interest of one party. But as Oputa JSC observed in the case of *Josiah v. The State,*[36]'justice is not a one-way traffic. It is not justice for the appellant only…'

Another major argument against the Doherty Rule is the fact that it leads to waste of judicial time and delay in the administration of justice, which inevitably results in court congestion. The existence of the Doherty Rule encourages laxity and lack of seriousness on the part of litigants and their counsel, because of the feeling that there would always be a second chance if their cases are struck for want of diligent prosecution or where they fragrantly fail to comply with the rules of court. All they need to do to attract the indulgence of the court is to plead the Doherty Rule. This state of affairs is certainly not in the best interest of the legal profession. Unarguably, the unrestricted application of the Doherty Rule is one of the factors responsible for the backlog of cases in our courts. Thus, in his concurring judgment in the *Banna* case, Niki Tobi, JSC, blamed the unnecessary resort to the Doherty rule for the plethora of cases in the cause lists of our courts.[37] Indeed, every agent of delay in the administration of justice needs to be confronted head-on, and so, the need to rethink the rule against visitation of the sins of counsel on his client with the view to limiting and restricting its application cannot be overstated.

Finally, the rule against visitation of the sins of counsel on the litigants encourages laxity and unseriousness in the practice of law. It is out of fear of too much laxity in the practice of law that the Supreme Court cautioned in *Lenas Fibreglass Ltd v. Furtado*[38] that 'discretion of court… must not be invoked to over-indulge an erring party because he says the error, whether commission or omission, is that of counsel.' In particular, this rule encourages counsel to

[31] Supra, note 29 at 24.
[32]*Akanbi v. Alao* (1989) 3 NWLR (Pt.108)118 at 140.
[33]*Supra,* note 23.
[34]370 U.S. 626 (1962).
[35]*Ibid* at 633-634. See also *Supra,* note 19 at 347.
[36](1985) 1 NWLR (Part 11) 125 at 141.
[37]*Ibid* at 242.
[38](1997) 5 NWLR (504)220 at 234.

handle their clients' case carelessly because they know that they can always plead mistake of counsel on behalf of their clients. It was for this reason that the Supreme Court warned in *Ativie v. Kebelmetal (Nig) Ltd*[39] that counsel should not be permitted to 'hide under the principle of not visiting the sins of counsel on the party to shy away from his professional responsibility to his client in the conduct of his case.' Thus, even though the Doherty Rule has remained the extant law as far as the issue of counsel-client relationship is concerned, there is a growing move to depart from it in the recent times.[40]

6. Exceptions to the Rule against Visitation of the Sins of Counsel on the Litigants

It is a general rule that for every rule there is an exception or exceptions and the rule against visitation of the sins of counsel on the litigants is not an exception. This is what the Court of Appeal meant when it held in *A.P.K.G. v. B.S.W.C.*[41]that 'the principle of law that the sins of counsel should not be visited on his client is not a blank cheque.' Thus, over the years a number of exceptions have been formulated by courts so as to check the abuse of the rule against visitation of the sins of counsel on the litigants. In *Mingi Services Ltd v. Imaoye*[42] it was held thus: '[t]rue, it is the law that mistake or lapse of counsel should not be visited on the litigants. This, however, must be subject to a number of riders.'Niki Tobi, JSC, was very specific on this point when he noted in *Lenas Fibreglass Ltd v. Furtado*[43] that '[t]here are quite a number of exceptions' to the principle of law that the mistake of counsel should not be visited on the litigants. The reason for the exceptions to the rule against visitation of the sins of counsel on the litigants was recently restated by the Supreme Court in *FBN Plc v. Maiwada*[44] where the Court noted as follows:

> [T]he principle that a party should not be punished for the mistake of counsel needs to be qualified. This is because, if courts are to allow litigants to plead every wrong step counsel took in the prosecution of their client's case, and uphold such plea, such liberal access to this laudable legal principle will engender a retrogressive effect which cannot be imagined. The court upholds it [only] when the peculiar circumstances justify resort to it.

In this section, frantic effort shall be made to examine various exceptions and qualification to the rule against visitation of the sins of counsel on their clients.

Mistake on Substantive Point of Law

The rule that the mistakes of counsel will not be visited on their clients applies only to the mistakes of counsel on procedural matters[45] and does not apply to the mistakes of counsel on substantive matters, which are ordinarily visited on their clients as the direct consequence of the agency nature of counsel-client relationship. Thus, it was held in *A.P.K.G. v. B.S.W.C.*[46]that 'it is usually only when the mistake of counsel involves procedural matters that the court will give the litigant respite, where it is possible to do so.' Procedural matters are matters that border on procedural laws, like the rules of courts, practice direction, etc.; whereas substantive matters are those that border on substantive law, like constitutions, Acts, Laws, etc.[47]

Initially, there was a controversy over the conclusiveness of this particular exception, that is, that mistakes of counsel on substantive point of law are visited on their clients. This controversy was partly created by the Supreme Court decision in *Trans Nab Ltd. v. Joseph*,[48]where it was held that '[i]t is not only where there are procedural

[39](2008) 10 NWLR (Pt. 1095) 399 at 425.
[40]*Antonia Eze v. James Obi Eze* (2010) LPELR-CA/A/84/M/08 at 19-20.
[41](2009) 17 NWLR (1171) 429 at 441.
[42]*(2003) FWLR (Pt. 143)341 at 346* at 346.
[43]*Supra*, note 3, at 236.
[44](2013) 16 NWLR (Pt. 1348) 444 at 509.
[45] 'The exercise of such discretion is limited to procedural irregularities only. See *Akanbi v. Alao*, *supra*, note 40 at 140; *Bamaiyi vs. The State* (2003) 17 NWLR (Pt.842) 47 at 64.
[46]*Supra*, note 41 at 441.
[47] Note however that where a provision of substantive law is by its nature procedural, it will be treated as such. See the case of *F. & F. Farms (Nig.) Ltd. v. N.N.P.C.* (2009) 12 NWLR (Pt. 1155) 387 at 402.
[48](1997) 5 NWLR (Pt. 504) 176 at197.

irregularities that a mistake of counsel are not visited on litigants.' The only reasonable inference from the above holding is that some substantive mistakes of counsel may not be visited on their clients. However, the controversy created by *Trans Nab Ltd case* was later resolved in *Okafor v. Nweke*[49]where the Supreme Court held that the failure of the appellant's counsel to comply with the provisions of Legal Practitioners Act, a substantive law regulating the conducts of the legal practitioners in Nigeria, is fatal to the case. Relying on this case, the Supreme Court held in *Anyadike v. Omehia*,[50] that 'the principle that mistake of counsel cannot be visited on a litigant cannot be called in aid to save a badly conducted case where the mistake was on a substantive point of law.'This decision is predicated on the fact that the need to do substantial justice and avoid technicality, which, is the pillar on which the rule of non-visitation of the sins of counsel on their clients rests, cannot override a substantive provision of the law, because substantial justice itself demands that a clear provision of law should be applied the way it is and not the way it ought to be.[51] Moreover, it is not the duty of a judge to make laws, but to apply them, not the way they ought to be, but the way they are. Hence, a plea of mistake of counsel is a nonissue if the mistake borders on a substantive point of law.

Incompetence or Deliberate Actions of Counsel

The rule that the sins of counsel will not be visited on their litigants is not a magic potion that heals all the ills of litigation. It only avails litigants 'where such sins arose from professionally genuine mistakes or pure inadvertence by counsel…'[52]Thus, it cannot be called in aid of litigants where such sins were due to the incompetence or deliberate actions or strategies of their counsel.[53] This point was amply made clear by the Court of Appeal in the case of *Irrumdu Jamari & Ors. v. Ijabani Yaga*,[54]where it was held as follows:

> We have a duty to point out that there is authority for the view that the mistake of counsel should be differentiated from the incompetence of counsel because only the former avails the litigant. Indeed, mistakes of counsel must be distinguished from the deliberate action or strategy of counsel. This is because deliberate action or strategy cannot be excused or categorized as mistake of counsel.

Similarly, it was held in *Emmanuel v. Gomez*[55] that 'the rule that a litigant should not be made to suffer because of the negligence of his counsel… will not extend to a situation where counsel has displayed tardiness and incompetence'. Thus, in *A.P.K.G. v. B.S.W.C.*[56] it was held that 'the incompetence of counsel in carelessly drafting the pleadings would not avail his client.'

The logic behind this exception is very obvious: if the incompetence of counsel or their deliberate actions and strategies are excused as mistakes of counsel, then whenever any decision of the court is not favourable to a party, he will apply for it to be set aside on the ground of the mistake of counsel or he will make it one of his grounds of appeal. This is so because most legal battles fought in our courts are lost due to the incompetence and poor or wrong appreciation of the relevant and applicable laws on the part of the lawyer who handled them.[57] According to Eso, JSC, 'if, however, he [counsel] takes a deliberate decision and loses thereby, then, it is his privilege to lose and will

[49](2007) 10 NWLR (Pt. 1043) 521.
[50](2010) 11 NWLR (Pt.1204) 92 at 136.
[51]*Supra*, note 32 at 158.
[52]*Antonia Eze v. James Obi Eze*, *supra*,note 38, at 19-20.
[53]*Trans Nab Ltd. v. Joseph* (1997) 5 NWLR (Pt.504)176 at 197.
[54](2012) LPELR- 15188, CA/J/190/08 at 22.
[55](2009) 7 NWLR (Pt. 1139) 1 at 13.
[56]*Supra*, note 41 at 441.
[57] In *Lenas Fibreglass Ltd v. Furtado*, *Supra*, note 38 at 236, the Supreme Court noted that 'if there no mistake, either from the parties or from counsel litigation will attract less romances and its legal content in terms of the decision-taking process, will be minimal.'

not constitutes a right for the client to utilization as a ground of appeal. For, if it was not so, the profession will be in jeopardy.'[58]

This raises the question whether a litigant, who lost the opportunity to properly present his case as a result of the deliberate action, strategy or approach of his counsel in pursuing his case, can turn around and complain of denial of fair hearing. Certainly such a litigant cannot complain of lack of fair hearing because he is bound by the decision of his counsel. This point was amply made clear in *Nwadiogbu v. A.I.R.B.D.A.*[59] where it was held as follows:

> In our accusatorial system of jurisprudence, counsel has wide powers to handle a case in the way he finds convenient. He can even compromise the case. Where counsel denies his client a fair hearing by the unusual approach he chooses to take, he cannot be heard to complain that he was denied fair hearing.

It must however be noted that the distinction between mistakes of counsel and their incompetence or deliberate actions is a tricky one, because most acts that could easily pass for mistakes of counsel are obvious signs of professional incompetence.[60] Professional incompetence is no more than the lack of requisite knowledge, skill or ability to do one's job in a way expected of a diligent member of that profession. Viewed in this light, the bulk of the mistakes, lapses, faults and defaults of counsel as regards the conduct of cases entrusted to them are occasioned by incompetence. Moreover, the distinction between mistake of counsel and incompetence of counsel is almost irrelevant as far as non-compliance with the rules of court is concerned, because the Supreme Court had held in a number of cases that the rules of court are handmaids of justice and that priority would always be given to the interest of justice in the event of noncompliance with any provision of the rules of the court.[61] Hence, any wrong step or decision of counsel on any question that borders on the rules of procedure will always be overlooked if it will be in the interest of justice to do so, even when it was a clear act of incompetence.

Indolence of the Litigants and their Contributory Negligence

As we observed earlier, the rule against visitation of the sins of counsel on the litigant is founded on the principles of equity and therefore, it is primarily subject to the rules of equity, one of which is that equity aids the vigilant, not the indolent. By this rule, any litigant who was indolent in pursuing his case cannot turn around and complain about mistake of counsel. Similarly, litigants who contributed either expressly or impliedly to the mistake or negligence of his counsel cannot invoke the plea of mistake of counsel, because he who seeks equity must come with clean hands. These points were recently restated by the Court of Appeal in *Ogundeji v. Unilorin.*[62] In this case, an application for extension of time within which to file a notice of cross appeal was brought 16 months after the judgment sought to be cross appealed was delivered. The only reason adduced for the delay in filing the notice of appeal on time was the oversight or negligence of the applicant's counsel. While dismissing the application Onyemena, JCA, held as follows:

> I do appreciate the fact that the excuse of inadvertence of counsel for a litigant's failure to perform an act in accordance with the rules of court used to be a magic bullet for indolent applicants. This was in consonance with the reason stated in *Doherty v. Doherty* (1964) NMLR 144...However, the Law has been expounded beyond the straight jacket Doherty rule, hence an applicant though may establish lack of due diligence or inadvertence on the part of his counsel, but he must also establish that he too did not fail to exercise reasonable diligence... the Applicant needs to show that it acted promptly in giving instruction to its counsel.[63]

[58] *Supra*, note 32 at 143.
[59] (2010)19 NWLR (Pt. 1226) 364 at 389.
[60] See *Supra, note 38* at 236 for a definition of mistake vis-à-vis the sin of counsel.
[61] *Oloba v. Akereja* (1998) 2 NSCC120 at 136.
[62] *Supra*, note 29.
[63] *Ibid* at *24.*

The legal burden on the litigants to prove that they have acted diligently, does not stop at acting promptly in giving instructions to their counsel to undertake their cases, rather they are further required to make reasonable effort at ensuring that their instructions are carried out. Thus, it was once observed that 'even when an applicant had acted promptly in instructing its counsel, the legal burden on him does not lift; it is expected of the applicant to ensure that the counsel carried out the instruction.'[64] This is so because a litigant who does not follow up his counsel to ascertain if he has taken necessary steps to file his appeal or suit is as well negligent.[65] This point was made by Galinje, JCA, in the case of *Emmanuel v. Gomez*[66]as follows: 'A litigant who fails to ascertain if his counsel has taken necessary steps to bring his case is negligent. This is because even where a litigant acted promptly in instituting his counsel; he is still expected to ensure that the counsel carried out the instruction'.

It follows therefore that before any litigant can sustain a plea of mistake of counsel, he must assure the court that he has done all that he is reasonably required to do to ensure that such mistake was avoided. In this connection, a litigant who stopped paying legal fees to his counsel cannot complain of fault of his counsel, because he who seeks equity must do equity.[67]

Mistake of Counsel Affecting Jurisdiction

The rule against visitation of the mistake of counsel on the litigants does not apply where the mistake affects the jurisdiction of the court to determine the case.[68]This is premised on the fact that jurisdiction is the life-wire of litigation and so no court can entertain a matter where it lacks jurisdiction.[69]This point was amply made clear by Mangaji, JCA, in *FBN Plc v. Maiwada*[70] as follows:

> I am aware of the principle that parties cannot be punished in the litigation process for mistakes committed by their counsel. However where the mistake affect the jurisdiction or competence of the court to adjudicate on the matter, it presents a different consideration. The court in that situation is rendered incompetent to entertain the suit and it makes no difference at all who committed the mistake.

A number of factors could strip a court of its jurisdiction to entertain a suit brought before it. For example, a court's jurisdiction to adjudicate on a matter would be fettered if the subject matter of the suit had become statute-barred. Hence, where the subject matter of a suit has become statute-barred as a result of the mistake of counsel, the plea of sin of counsel cannot save the suit, because a litigant cannot hide under the mistake of counsel to relist a suit which was struck out if the subject matter of the suit has subsequently become statute-barred. This point was made in the case of *Kolawole v. Alberto*,[71] where Nnamani, JSC, specifically expressed his dissatisfaction at the way the appellant's solicitors at the trial court have handled the matter. However, notwithstanding this, he held that the suit could not be saved because its subject-matter has become statute barred.

Similarly, the jurisdiction of a court to adjudicate on a suit before it will also be fettered where a suit is commenced with an incurably defective writ. A writ will be incurably defective where it is unsigned[72] or where it is signed by nonexistent person or a person not authorized to do so.[73] This will also be the case if a suit is commenced with an expired writ.[74] Also, a suit will be struck out for want of jurisdiction if a requisite condition precedent was not met

[64]*Ibid*.
[65]*Ibid*. See also *University of Lagos v. Aigoro* (1984) 11 S.C. 152.
[66]*Supra*, note 55 at 16.
[67]*Okwute v. Nwadike* (2009) 5 NWLR (1134) 360.
[68]*Lenas Fibreglass Ltd v. Furtado*, *supra* note 38 at 236.
[69]*Dairo v. UBN Plc.* (2007) 16 NWLR (Pt. 1059) 99 at 130.
[70] Supra, note 44 at 2015.
[71][1989] All NLR 137 at 151.
[72]*FBN v. Maiwada*, *supra*, note 44.
[73]*Ibid*.
[74]*Alaov.Omoniyi*(1966) NMLR 161.

before instituting the suit even where the counsel is the one responsible for it. Thus, in the case of *Registered Trustees of United African Methodist Church v. Kenneth Enemuo,*[75] the Court of Appeal held as follows:

> Counsel's sins are usually not visited on litigants. But where a condition precedent for courts' being seized of Jurisdiction is absent, for instance where, as in the present case, counsel fails to sign the originating process in a manner according to law, that lacuna cannot cure the Courts' lack of jurisdiction in the first place.

This was also the case in *Oyegun v. Nzeribe,*[76] where the appellant's counsel failed to comply with the conditions of appeal. While dismissing the appeal, the Court of Appeal held as follows: Court will not visit the blunders, mistake and inadvertence of counsel on the litigant… Unfortunately the blunder committed in this case was through the mistake of counsel and it did not save the appeal which was lacking in merit and was therefore dismissed.[77]

Ground of Appeal against Judgment on the Merits

The rule against visitation of the sins of counsel on the litigants cannot be a ground of appeal against a judgment on the merits. Judgement on the merits according to *Black's Law Dictionary* is 'a judgement based on the evidence rather than on technical or procedural grounds.'[78] This is so because the whole essence of the rule is to ensure that cases are heard on merits. This was the mindset of the Supreme Court in *Doherty v. Doherty*[79], when it held that the appellants should not be shut out from the hearing of their case on the merits because of the sin of their counsel. In this connection, this rule can only be called in aid of a litigant during the preliminary or interlocutory stage of his case or in the event of a default judgment against him; and therefore will not avail a litigant after a suit or an appeal has been heard on the merits.[80] This exception is largely premised on the maxim, *interest reipublicaeut sit finis litium* (in the interest of society as a whole, litigation must come to an end). Hence, in *Akanbi v. Alao*[81], Craig, JSC, warned that if every party whose counsel made a wrong decision is allowed to repair his case at appeal, then there will be no end to litigation. In his concurring decision in this suit, Eso, JSC, specifically observed that a wrong decision of counsel 'will not constitute a right for the client for utilization as a ground of appeal.'[82] A similar point, as we noted earlier, was made by the Court of Appeal in *Mingi Services Ltd v. Imaoye.*[83]

7. Conclusion

Nigerian courts have undoubtedly placed considerable restrictions on the application of the rule against visiting of sins of counsel on the litigants; and these restrictions have not only diluted the cure-all posture of the rule, but have also strengthened the agency nature of the counsel-client relationship. However, the continuing abuse of this rule by desperate litigants and their counsel has made the need for its further restrict inevitable. Thus, it is recommended that before the plea of mistake of counsel could be called in aid of a litigant, the counsel that allegedly made the mistake must depose to an affidavit admitting the mistake complained of. Furthermore, there is an urgent need for legislative and judicial safeguards for the protection of helpless litigants, whose lawyers exposed to huge financial and material loss by sheer incompetence and negligence. Currently, the only way such loss could be remedied is through an action in tort for professional negligence against such lawyers[84] otherwise called a legal malpractice

[75](2014) LPELR-24071(CA) at 25.
[76](2010) 7 NWLR (Pt. 1194) 577.
[77]*Ibid* at 596.
[78]BA Garner, *Black's Law Dictionary 8th edn*, Thompson West (2004) 860.
[79]*Supra*, *note 1*.
[80]*LenasFibreglass Ltd. v. Furtado (1997) 5 NWLR (504)220* at 234.
[81]*Supra*, note 41 at 140.
[82]*Ibid* at 143.According to him, 'if it were not so, the [legal] profession would be in jeopardy.'
[83]*Supra*, note 42 *at 347*.
[84]Mosheshe *General Merchant Ltd v. Nigerian Steel Products Ltd* (1987)2 N.W.L.R (pt 55)110 at 121; *Akanbi v. Alao* , above at note 41; *Irrumdu Jamari & Ors. v. Ijabani Yaga*, above at note 70 at 23.

suit.[85] This is, however, not an effective remedy, especially in this part of the world, where parties are always afraid of their counsel. Even the courageous few who may want to lock horns with their counsel will find it difficult securing the services of a lawyer, because most lawyers detest appearing in legal malpractice suits. Thus, there is a pressing need to empower our courts via legislation to order lawyers to pay any 'wasted cost'[86] awarded against their clients or any other loss directly suffered by their clients, where the court is of the view that they were unreasonably negligent in conducting their clients' case. A leave may be borrowed from England, where by virtue of the Courts and Legal Services Act 1996,[87] English courts are empowered to order the legal representative to meet the whole of any wasted costs or such part of them awarded against the party he represents, if the court considers it is unreasonable to expect that party to pay them. Finally, the interest of the adverse parties should always be factored in while adjudication on any application founded on the mistake of counsel with the aim of fully compensating them by way of cost for all losses reasonably arising from the mistake. And where the loss suffered by the adverse party is such that cannot be made good by cost, the application should not be granted, because justice should not be done to one of the parties, at the expense of the other party, but should be evenly spread between the parties.[88]

[85]A legal malpractice suit are suits filed in situations where a lawyer has been negligent in his or her dealings with a client, causing harm to that client. See Lawyers and settlements.com, available at [https://www.lawyersandsettlements.com/lawsuit/legal-malpractice.html] (last accessed on 16 March 2016).

[86] Wasted costs means any costs incurred by a party as a result of any improper, unreasonable or negligent act or omission on the part of his counsel or his agent.

[87]The Courts and Legal Services Act 1996, s. 4.

[88]*Dada v. Dosunmu* [2006] 18 NWLR (pt.1010)134 at 166.