Transforming the Supreme Court into a Citadel of Justice

MAY AGBAMUCHE-MBU

LEGAL EAGLE

may.mbu@thisdaylive.com

Over the years we have been inundated with articles, lectures, discussions and presentations on the best way to reform our court system but none have made an impact on me like the paper delivered by Honourable Justice Kudirat Olatokunbo Kekere-Ekun Justice of the Supreme Court, on the 10th of September 2015 at the 5th Annual Lecture in honour of Professor Alfred Bandele Kasunmu SAN. Justice Kekere-Ekun's paper was titled ***"The Nigerian Supreme Court: Structural Reform for Today's Dispensation of Justice"***. And presented a unique perspective on how the Supreme Court works and can be empowered through a practical and systematic optimisation of processes, people and a new approach coming from a core insider. The paper offered a rich source for discourse on the issue of judicial reform from a top-down approach.

After acknowledging Professor Kasunmu SAN's brilliance and how he had inspired her, Justice Kekere-Ekun in setting the tone of her outstanding paper stated that "the recurring refrain was that the role of the Supreme Court in shaping judicial policy is one of the important factors to be borne in mind when rendering an opinion. No doubt, for today's dispensation of justice in this era of information technology the Court must carry out its functions of safeguarding the Constitution, clarifying the law, promoting the Rule of Law, determining legal issues of national importance and setting judicial precedents among others at a considerably faster pace." It is worthy of note that the Supreme Court as well as being the final Court of recourse in the Nigerian Court hierarchy serves certain purposes that sets it apart, purposes which only it can and must in fact perform to sustain a productive legal system against which the Nigerian society is measured.

When the issue of court reform is being considered the first thing is to review the structure, composition and jurisdiction of the Supreme Court as laid down in Sections 230- 236 of the 1999 Constitution, Section 230 in particular establishes the Supreme Court of Nigeria and stipulates that the court shall consist of the Chief Justice of Nigeria and Justices not exceeding 21. At the moment there are 17 justices of the Supreme Court. Debates have been had whether an increase in number of Justices to 21 or even more will help reduce the backlog of pending cases. Justices Kekere-Ekun does not agree with that proposition as history she said has shown that previous increases in the number of justices in an attempt to cope with the workload have been largely unsuccessful. A cursory look at other jurisdictions reveals that the Supreme Court of the United States for instance has just 9 Justices for a nation with the population of over 320 million whilst the Supreme Court of the United Kingdom has 12 Justices, Canada 9 and the Constitutional Court of South Africa, South Africa's highest appellate Court has just 10 justices.

She further added 'it is also likely that with the appointment of more justices, there is a higher risk of conflicting opinions and a less cohesive court.' It is clear that Justice Kekere-Ekun's views on limiting the number of justices of the Supreme Court is one that is shared globally. Perhaps what is important then is how to learn from those that have successfully managed the caseload and defined their functions accordingly.

If one reviews the process a litigant embarks upon from either the customary/area courts or magistrate court and meanders its way through the High Court on to the Court of Appeal and all the way to the Supreme Court the litigant may be in for a very long haul indeed running up to 10 years in total. As the jurisdiction of the Supreme Court stands today all decisions from the Court of Appeal are appealable to the apex Court either as of right or with leave. The Court of Appeal has 16 divisions which all serve as conduits for appeals to the Supreme Court. A case in point discussed in the paper is that of Chief Eyo Edem Nsefik & Ors v Rosemary Muna & Ors (2013) that commenced at the High Court of Lagos State in 2000. "The issue that arose at the commencement of the trial was who should lead evidence first in proof of their case, a probate matter. The High Court, per Bode Rhodes-Vivour J (as he then was) ruled on 26/2/2001 that the Plaintiff should lead evidence first. The Court of Appeal, Lagos Division affirmed the decision on 13/3/2007. Not satisfied the appellant filed a further appeal to the Supreme Court. On 13/12/2013 the Court affirmed the concurring opinions of the two lower courts."

The result Justice Kekere –Ekun inferred is that " the situation that led to the agitation for an intermediate federal court of appeal pre-1976, has reared its head again. The court is overwhelmed with a very heavy docket and unless the case load pressure from the Court of Appeal can be capped, the Supreme Court system will collapse under the weight of its docket". She further added that "the role of the Supreme Court today should primarily be that of development of legal policy." She quite rightly quoted Dr. Muhammed Tawfiq Ladan who described the Supreme Court thus: " at the very pinnacle of the court hierarchy stands the Supreme Court, which has the final responsibility of piloting the course of administration of justice, judicial and legal development in the country".

In piloting this course Justice Kekere–Ekun observed that there were certain constraints namely: i) the very heavy caseload of the Court and a heavy backlog of pending appeals ii) lack of research assistants iii) lack of Information Technology iv) an inefficient Registry and v) the need for better training of Court and chamber staff."

The above limitations together effectively stymie the Supreme Court's ability to perform its roles. The cumulative effect is that the Court operates far below the performance standards necessary to deal with the multitude of legal issues that are raised in today's contemporary Nigerian society. These problems operate in tandem and so they require a carefully coordinated and concerted plan that systematically deals with them and is capable of anticipating and accommodating the problems of the future.

"It has been suggested by many scholars and other legal luminaries that in order for the court to carry out its function of determining legal issues of national importance, a review of the Constitutional provisions governing the jurisdiction of the Supreme Court is necessary, so that certain appeals, especially interlocutory appeals, and appeals in respect of which the two courts below have made concurring findings of fact, should terminate at the Court of Appeal. It has been suggested that any case that does not involve any principle of law, however important, should not go beyond the Court of Appeal." Justice Kekere-Ekun goes on to add that "I am in full support of certain classes of cases terminating at the Court of Appeal."

She further added that "another way of limiting the number of cases that are filed in the Supreme Court, and thereby reducing its docket considerably, is by giving the court greater power to select its caseload. Not every decision from which a citizen may appeal as of right, as the law stands today, is one that would fulfil any of the purposes enumerated above. Appeals involving settled principles of law in respect of which there is a plethora of precedents, should not find their way to the apex court. The Court should have the discretion to determine if it is a case that should be entertained."

From her speech we gathered that the Supreme Court of the United States controls its docket by way of certiorari, the discretionary power of review. Applications are filed seeking review of judgments of state and federal courts but the cases for review must fall within very narrow confines and the justices evaluate the petitions and determine which cases are to be granted full review. Their decision is final. So also does the Supreme Court of England hear appeals on arguable points of law of general public interest and concentrate on cases of the greatest public and constitutional importance. In that Court also, appeals are with the leave of the court. A decision on whether or not to grant leave to appeal is taken in chambers and is final. Justice Kekere-Ekun however opines while awaiting legislative intervention the court should be stricter in exercising its discretion to grant leave to appeal.

There is no doubt that first and foremost a constitutional amendment to section 230 is needed to change the stipulation regarding matters that are appealable or that lie within the ordinary jurisdiction of the Supreme Court. Secondly, in concert with this constitutional amendment would be a greater exercise of discretionary powers to allow appeals to the Supreme Court from the Court of Appeal. Essentially the Supreme Court would have more control over which appeals it heard and which it did not, allowing it to direct itself towards the issues it identifies as having national importance or being of fundamental legal relevance. Justice Kekere-Ekun quotes Paul Weiler, a Professor of Law at Harvard from his book *In the Last Resort: A Critical Study of the Supreme Court of Canada* "when appeals lie as a matter of right rather than with judicial permission, we give the private litigants the power to allocate the scarce time of our Supreme Court."

On the use of Information Technology it is extremely encouraging that the top most leadership of the Judiciary, the Chief Justice himself and his predecessors, appear to have been involved in the extensive planning process for a robust IT system and now they are working with a notable global industry leader Microsoft to deliver these systems that not only work at the Supreme Court level but are intended to seamlessly integrate with the Court of Appeal and the High Courts. It remains to be seen what the finished product will look like but going by the detailed plan reported at the NBA Conference 2015, should they be as good as intended we can expect significant improvement at the Supreme Court in terms of case management and filings.

Alternative Dispute Resolution (ADR) is seen as an appropriate alternative to litigation for dealing with the issue of case overload at the Supreme Court says Justice Kekere-Ekun. She strongly believes that there are many cases before the Court that could easily be resolved by alternative means such as arbitration, mediation and conciliation.

Another poignant issue towards administrative reforms, Justice Kekere-Ekun affirmed, is that of the need by the Supreme Court for research assistants to conduct their functions effectively, advocating for a formal system of Research Assistance for Justices to be established. She specifically discloses that the work pressure on Justices is increased by the time spent carrying out research. Citing the example of other jurisdictions such as the United States, Justice Kekere-Ekun points out that it is a prestigious assignment coveted by the best brains from the nation's Law Schools to serve as a legal clerk to a Justice of the Supreme Court. I particularly agreed with her original suggestion that the deployment of some of the best brains from the Nigerian Law School to serve as research assistants to the Justices during their National Youth Service might be a good starting point. She identifies some of the limitations on the use of research assistants to include the confidential nature of the work of the Court. She recommends that necessary checks and balances should be introduced to safeguard confidentiality. Importantly, Justice Kekere-Ekun recommends that research assistants should be adequately remunerated and given opportunities for growth.

In addition, Justice Kekere-Ekun recognises the need for heavy investment in the training of court staff for the effective implementation of the suggested structural reforms. She recommends that there should be a higher percentage of legally trained staff. She further strongly asserts that all the reforms so far considered will not achieve the desired effect if the court staff are unable to adapt. Notably, she states that a more efficient delegation of power from the Chief Registrar to the Deputy Registrar will minimise the bureaucratic bottlenecks experienced in the daily running of the Court.

"Some of the recommended reforms require constitutional amendments by the National Assembly, which will take a considerable amount of time. However, pursuant to his powers under section 236 of the 1999 Constitution, the Chief Justice of Nigeria may make necessary amendments to the Supreme Court Rules and issue Practice Directions to facilitate the expeditious hearing of appeals. For instance, there has been an amendment to the provisions of Order 2 Rule 1 of the Supreme Court Rules regarding address for service and the mode of service of processes, waiting to be gazetted. Under Order 2 Rule 1(1) an address for service must now include an email address, a facsimile number, and a GSM number."

What Justice Kekere-Ekun's paper achieves successfully, perhaps above all else, is to direct our attention to the core problem bedevilling our Justice system in Nigeria. To achieve the desired reform we so long for we must start from the top down and finally prioritise the functions of the Supreme Court as being in reality the administration of justice, judicial and legal development.