FIXING OF DATES FOR HEARING APPLICATIONS (GENERALLY) IN THE SUPREME COURT-WHAT HAVE WE FIXED?

"Now every medical practitioner will admit that before a cure can be proffered for a sick person by a qualified doctor, the nature of the ailment must be diagnosed and accurately identified. Without this initial exercise, **no doctor faithful to his calling will attempt to prescribe a remedy**."[1]

A. Introduction.

1. Dates for the hearing of all applications filed in the registries of the courts are regulated by two main principles. First, the established practice of the courts, and second, the rules of the courts themselves.

2. It has always been the established practice of the courts that dates for hearing applications are fixed by the respective Registrars of the courts in the registries in which the applications are filed. This is done at the time of filing such applications, not later. This has been the practice over the years.

3. As a practice, it sits well with one of the three main yardsticks in accordance with which our courts dispense justice, which is the well-known practice of the courts, the first two being statute law and common law.[2]

4. The practice apart, the rules of court, in some instances, provide a guide and, in some cases, dictate the time for fixing dates for the hearing of applications. In the High Court, for example, the rules stipulate two guiding principles for fixing motions by the Registrars of the High Court.[3] These are:

    i. First, the motion must be fixed to be heard on a day which ensures that there is "at least three clear days between the service of notice of a motion and the date named in the motion for the hearing of the motion."
    ii. Secondly, the High Court may dispense with the requirement above and direct otherwise, in which case the High Court's direction binds the High Court Registrar.

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[1] See Miscellany-At-Law: A Talk By Justice J N K Taylor On the Dilemmas of Law and Lawyers in Contemporary Ghana. The quotation is with emphasis.
[2] *Harlley v Ejura Farms (Ghana) Ltd* [1977] 2 GLR 179 at 214, CA (full bench) per Taylor J (as he then was). Quoted with approval by Atuguba JSC in the case of *Oppong v Attorney-General* [1999-2000] 2 GLR 402 at page 408.
[3] See Order 19 rule 2(1) of the High Court (Civil Procedure) Rules, 2004 (C.I. 47).

5. These two principles apply to applications generally. In some types of applications, the rules of the High Court specifically provide the manner for deciding when to fix the application for hearing.[4]

6. Although the Court of Appeal and, in some cases, the Supreme Court do not have direct rules which deal with the fixing of dates for applications generally, the general and established practice is that where there is a lacuna in the rules of the Court of Appeal and the Supreme Court, the rules of the High Court may be resorted to.

7. In the Supreme Court, the dates for the hearing of applications are guided by the same principles as those in the High Court. Generally, the dates for hearing applications in terms of the accepted practice were fixed at the time of filing. In specific instances, however, the rules, like in the case of the High Court, guide the timing of the dates to be fixed for the hearing of the applications.[5]

B. The new fourteen-day rule in the Supreme Court.

8. From about October 2023 a new guide [or directive] for fixing dates was served on all parties to the applications filed in the Supreme Court together with the applications filed. A reading of the notice in which this new guide [directive] is stated will reveal, at least to me, that it applies only to applications in the Supreme Court.

9. My view is that the guide, [directive] is out of accord with the established practice for fixing dates for the hearing of applications and the specific rules of court which regulate the fixing of dates for the hearing of particular types of applications in the Supreme Court.

10. By this new guide, when an application is filed in the Registry of the Supreme Court henceforth, there is an accompanying note addressed to the parties by the Registry of the Supreme Court informing the parties:

> "…that a date will be fixed for hearing of the…application with hearing notice(s) for the Respondent(s) by the Registrar upon request, 14 days after service of the application on the Respondent."

11. For the sake of convenience, I will call the guide [or directive] the "fourteen-day rule" or simply "the rule".

12. Before the introduction of this new guide, which, as will be shown, clearly supplants established practice and the rules of court, I sighted

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[4] See for instance the provisions of Order 55 rule 6(7) in the case of applications for judicial review and Order 67 rule 5 in the case of Human Rights applications in C.I. 47.

[5] See for instance, applications invoking the review and supervisory jurisdictions of the Supreme Court in rules 54 and 61 of the Supreme Court Rules, 1996 (C.I. 16).

no notice explaining the diagnosis which caused and/or justified the introduction of this prophylactic measure. My checks have revealed none.

13. It is important to say that every application I have sighted since the introduction of this new guide has been made subject to the guide, regardless of its nature, purpose, or substance of the application. My view is that the new guide and any directive which birthed it:

    i. have no legal basis,

    ii. is/are unnecessary.

    iii. lack certainty in their application.

    iv. Is prone to abuse, and

    v. undermines the due administration of justice.

14. I will precede my discussion of the points above stated by first discussing the meaning of the rule.

C. What does the directive mean?

15. Although it communicates its purpose, some aspects of the rule are quite hazy in my mind. To understand the rule, I try to break it down. A reading of the rule on the fixing of dates for the hearing of applications in the Supreme Court will reveal the following:

    i. dates for the hearing of applications filed in the Supreme Court are fixed after the filing of the application but not at the time of filing.

    ii. the date for the hearing of the application will be confirmed "with hearing notice(s)…"

    iii. the hearing notice [and by extension the date for hearing the application] will be issued "**14 days after service of the application on the Respondent**."

    iv. [the hearing notice] will be issued "by the Registrar…"

    v. the hearing notice will be issued "**upon request**…"

16. The above breakdown fairly encapsulates the meaning of the directive. The upshot then of the new rule is as follows:

    i. dates for hearing applications will no longer be fixed by the Registrar of the Supreme Court at the time of filing of the applications as has always been the practice.

ii. contrary to the established practice by which parties had notice of the dates fixed for the hearing of their applications when they received their applications, they will now be informed of the dates fixed for the hearing of their applications by hearing notice(s).

iii. the parties should only expect hearing notices "**14 days after service of the application on the Respondent**." The question that follows this point is: how do the parties know that the Respondent [and others, if any] has been served and when? Or must the parties continue to check? **In any event**,

iv. does it matter if the rules by which the application is made accord the applicant the right to a reply?

vi. the notice for the hearing of the application will be issued "by the Registrar…" but the Registrar will only issue the hearing notice

vii. "**upon request**…" And I ask whose request? Anybody's?

D. Rationale for the innovation.

17. On 27th March 2024, whilst waiting for my case to be called in the Supreme Court, the Chief Justice explained the rationale for the rule in the course of interactions between counsel and the bench. This happened when the case of *Ogyeadom Obranu Kwesi Atta VI v Ghana Telecommunications Company Limited and Anor* was called.[6]

18. The learned Chief Justice explained that the reason for fixing dates for hearing applications as per the new rule was to ensure that all parties had the opportunity to file the processes relevant for the hearing of the applications, in other words [my own words] that all housekeeping matters are dealt with before the dates are fixed for their hearing.

19. From the learned Chief Justice's explanation, the rule was destined to promote efficiency and avoid delays as well as inconvenience to parties and the court if the rule had any chance of achieving its purpose.

E. The directive is subversive of the rules of court.

20. As already noted, some applications in the Supreme Court are directly regulated by the rules of the Court itself. In applications invoking the review jurisdiction of the Court, rule 59 of the rules of the Supreme Court regulates the setting down of a date for the hearing of the application. Its sub rule (1) says that the Registrar "may set the [review]

[6] Suit No. J7/01/2024.

application down for hearing" after receiving the respondent's statement of case or, in any event ", after fourteen days of the service of the applicant's statement of case on the respondent."

21. With regard to applications invoking the Court's supervisory jurisdiction, rule 65 of the Supreme Court rules mandatorily requires the Registrar of the Supreme Court to set down the application for hearing on a date convenient to the Court on the receipt of the reply to the respondent's statement of case, or where the applicant does not file a reply within seven days of the service on the applicant of the respondent's statement of case.

22. Since the rules just discussed regulate the applications made pursuant to them, there can be no basis for applying the fourteen-day rule to them. The dates for hearing applications made under the two rules are prescribed by statute. The fourteen-day rule is clearly an administrative directive and cannot supplant the statutory provisions that deal with those types of applications.

23. It is submitted that if the new rule is "*grundnormed*" in an administrative directive of the Chief Justice or the brainchild of the Registrar of the Court, its legality is questionable because, in terms of article 157(2) of the 1992 Constitution, it is only the Rules of Court Committee which is constitutionally constituted and mandated to formulate "rules and regulations **for regulating the practice and procedure of all Courts in Ghana**."[7]

24. It has been held that the Chief Justice does not have the power and authority to make rules of court, and no officer working under him/her has any such power on the instructions of the Chief Justice.[8] **This is the reason why it is illegal.**

25. There is a second reason why the rule is illegal. The established practice of the courts forms a huge part of our practice before the courts. In this regard, the established practices of the courts cannot be discounted when applying the law. By their very nature, such practices may often be reflected by *communis opinio* or by *contemporanea expositio* in the legal profession, both to civil and criminal matters alike.[9]

26. Whilst it may be argued that the well-known practice of the courts should be restricted to matters relating to actual practice before the courts and not administrative matters, such thinking is retrogressive when account is taken of the fact that the registry of the courts is the

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[7] See the case of Tsatsu Tsikata (No.1) v Attorney-General (No.1) [2001-2002] SCGLR 189

[8] Ibid at page 269 per Adzoe JSC

[9] The whole of the sentence is credited to Atuguba JSC in the case of *Trustees of the Synagogue Church of All Nations v Agyeman* [2010] SCGLR 717 at page 721.

fulcrum of all practice before the courts. For this reason, the established practice must include those registry practices which the courts have endorsed as facilitating practice before them.

27. Having regard to the submission just made, it is contended that there was nothing wrong with the established practice by which the registrars of the courts fixed dates. These registrars were experienced enough to realistically figure out dates within which they expected parties to have been properly notified, prepared and ready for the hearing of their applications by the courts. I, therefore, endorse the caution:

> "In the interests of all concerned, and particularly of litigants, a long settled practice of a court of record… is not to be disturbed except by establishing that a departure from it is necessary in order to do justice to an applicant who can get justice in no other way, and to whom the court has always had jurisdiction to grant the relief prayed for. A heavy burden lies, therefore on those who challenge a practice so long settled."[10]

28. In light of the principle of the respect to be given to the established practices of the courts, the introduction of the new rule should have been deliberated upon a little more. The justification for this submission is the case of *Connelly v Director of Public Prosecutions,*[11] where Lord Devlin advised that rules of practice applied by the courts should be followed until that court or a higher court declares it to be obsolete or bad or until it is altered by statute.

F. The existing rules provided for same.

29. As already submitted, it is certainly more efficient, cost-effective and convenient for parties who appear before the courts to have their cases dealt with accordingly without the inconvenience of having their cases adjourned only because of non-service. Aligned with this point, the fourteen-day rule would have earned my vote if its introduction would have cured the intended mischief.

30. Unfortunately, the existing rules were not oblivious to the mischief that the rule sought to cure. The existing rules, therefore, made service an indispensable first step for the hearing of all applications, special or general.

31. For example, in the case of review applications, rule 57 of the Supreme Court rules requires the respondent to file their statement case "within fourteen days **of service** on the respondent of the [review] application".

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[10] Rex v. Chancellor of St *Edmundsbury and Ipswich Diocese, Ex parte White* [1948] 1 K.B. 195 C.A at 216 per Wrottesley L.J. Quoted with approval by Atuguba JSC in the case of *Trustees of the Synagogue Church of All Nations v Agyeman* [2010] SCGLR 717 at page 721.
[11] [1964] A.C 1254 at 1360-1361

32. Where the respondent fails to file their statement of case, rule 58 of the Supreme Court rules entitles the applicant to "set down the application for hearing with notice to the respondent." Alternatively, the Registrar may set the application down for hearing fourteen days after "**service** of the applicant's statement of case on the respondent", whether the respondent files their statement of case or not, or fourteen days **after receipt** of the respondent's statement of case.[12] The Registrar is entitled to do this because there are no statutory rights to file a reply in review applications.

33. It is about the same with applications invoking the Supreme Court's supervisory jurisdiction. The Registrar of the Court must ensure that "after the filing of the applicant's statement of case… copies of the statement of case together with a copy of the notice of motion [**are served**] on the respondent."[13] The respondent must then file their response to the applicant's statement of case "within fourteen days **of the service**, or within the time that the Court on terms may direct".[14]

34. The applicant may file a reply to the respondent's statement of case within seven days **of service** on the applicant of the respondent's statement of case.[15] Where the applicant does not file a reply to the respondent's statement of case as required by the rules of the Court, the Registrar "**shall**" set down the application.

G. The new rule is unnecessary and counterproductive.

35. If ensuring service of the processes on all parties before the hearing of applications was the rationale for the new rules, it is clear from the rules just discussed that the existing rules made service of the necessary processes a condition *sine qua non* for setting the applications for hearing. For each process, the rules make it clear that service is necessary before the next step is taken. This cannot be a good reason for introducing it.

36. Secondly, the requirement that a date be fixed fourteen days after the application has been served on the Respondent is also not only needless but myopic because a reading of the rules just discussed will reveal that the fourteen days rule is catered for in the review applications rule, and also that the said rule completely discounts the applicant's statutory right of reply in applications invoking the supervisory jurisdiction of the courts.

37. Thirdly, the new rule appears to take away the Registrar's statutory obligation to fix a date after the statutory procedural steps that the

[12] Rule 59 of C.I. 16.
[13] Rule 63 of C.I. 16.
[14] Rule 64(1) of C.I. 16.
[15] Rule 64(2) of C.I. 16.

parties are required to execute before the fixing of the date for hearing have been accomplished. This is because the new rule says that the Registrar must only fix a date for the hearing of applications "upon request".

38. In the case of general applications that are not statutorily regulated, lawyers knew that it was their responsibility to find out whether their filed applications were served. If they found out that their application was not served, they enquired about the reasons and, if possible, applied for substituted service or some other necessary or relevant order.

39. The way the new rule is represented gives the impression that the Registrar of the Court is in full control and guarantees service of the application with only a date left to be fixed. Parties may, therefore, relax and wait for the Registrar's date [upon request] fourteen days after service of the application, regardless of whether there is a right of reply or not.

40. Given the text of the new rule, the other question that arises is whether there are circumstances in which the fourteen-day rule can be dispensed with, such as in cases of urgency. For instance, it completely defeats the purpose of an urgent application, which is usually drafted to include a direct request to the Registrar to fix a date for the hearing of the specific application. There is no basis for the Registrar in such a situation to ignore the request and defer the date for the hearing of the application at a future date.

41. In the case of time fixed by the Registrar under the established practices of the courts and under the rules of the courts, parties can apply for abridgement of time. Such applications are decided on their merits. Parties are heard, and the discretion of the court is brought to bear on the decision to abridge time or otherwise. This is a process which our judicial process recognises as transparent.

42. In the case of the new rule however, no date is fixed. Once no time is fixed until the Registrar does so on request, a party cannot apply for abridgement of time. It leaves a party who wants their application heard urgently in quite an inconvenient situation.

43. The following interrogatories better explain the position of a party wanting a quick hearing of their application:

    i. Should an early date for the hearing of the application be requested by letter? or

    ii. by meeting with the Registrar?

iii. if it is by letter, should the other parties [the Respondent in particular] be copied?

iv. if it is by meeting with the Registrar, should the Registrar meet just one party?

v. by what tests is the discretion to abridge time to be exercised?

44. The questions above show how complicated the new rule is if its application persists. It may just create room for discontent among lawyers and parties. The recent case of *Dafeamekpor* is one such case. There has been quite some discussion of it in the media. It is, therefore, a good example to use.

H. The case of Dafeamekpor.

45. In this case[16], the Plaintiff invoked the exclusive original jurisdiction of the Supreme Court by writ on the 18th of March 2024. The Plaintiff then filed an application for an order of interlocutory injunction on the 21st of March 2024. The application was served with notice to the parties that the hearing of the application was subject to the new fourteen-day rule.

46. The Plaintiff did not stop there; he filed another application for interlocutory injunction at 2:00 pm on the 25th of March 2024. This application was also dispatched to the parties with notice to the parties that the hearing of the application was subject to the new rule.

47. Subsequently, the Supreme Court Registry notified the public of its cause list for the week commencing Tuesday, 26th March 2024. The *Dafeamekpor* applications were not listed for hearing because, in terms of the new fourteen-day rule to which the applications were subject, none of them was ripe for hearing.

48. At this point, the following matters are better listed than narrated.

i. the Supreme Court took notice of the filing dates of the two applications for an injunction.

ii. the Court must, therefore, have noticed that in terms of the fourteen-day rule the applications were not ripe for a hearing.

iii. the Court did not determine the effect of the fourteen-day rule and the ripeness for hearing the applications.

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[16] This is the case of *Rockson Nelson Etse Defeamekpor v The Speaker of Parliament* Writ No. J1/12/2024.

iv. it was also not clear from the proceedings of the day how the fourteen-day rule was circumvented and the applications fixed for hearing earlier. I can say this for myself.

vi. it is also not clear how the reason for the overnight revision of the cause list included the hearing of the Dafeamekpor applications for hearing regardless of the fourteen-day rule, in which the parties were initially notified when the applications were served on them.

vii. the court, however proceeded straight into an enquiry regarding whether the Plaintiff had notice of the hearing date of his applications.

v. the Court satisfied itself that the Plaintiff was duly notified of the hearing date of the applications. The Court ascertained this from a bailiff of the Court who testified that he was entrusted with a hearing notice for service on the parties and that the Plaintiff had refused service of the hearing notice.

49. The Court dismissed the first application filed on the 21st of March 2024. The Court dismissed the application after hearing submissions from counsel [including myself, who prayed the Court to dismiss the application.] The Supreme Court, however, dismissed the second application *suo motu* on the grounds that it was duplicitous.

Subsequently, however, the cause list was seemingly revised to include the hearing of the Dafeamekpor applications on Wednesday, 27th March 2024, contrary to the fourteen-day rule.

50. Since the Plaintiff was not heard on the facts regarding his absence [including his lawyer], I will not comment on its implications. Suffice it to say that regardless of the Plaintiff's conduct, the questions provoked by the hearing of the applications in the light of the new fourteen-day rule to which the hearing of the applications was subject leave more questions than answers and certainly, if unaddressed, will once again raise the very questions that all of us involved in the justice system will usually prefer to ostrich about.

51. Whilst we would rather ostrich about the valid questions raised on matters that scar the justice system, we endure the pain of criticism, which we are overly sensitive about but do little to avoid or conduct ourselves in a manner that needlessly court them. An indication as to why his [Dafeamekpor] case was treated outside the fourteen-day rule may have dispelled any thinking of special treatment, if I may ration my words.

52. Maybe on this one occasion, the Registrar who notified the parties that the applications would be fixed for hearing subject to the fourteen days rule should have been a little more proactive and reached out to the parties and/or their lawyers and informed them about the change and indeed the reason for the change in the rule as applicable to the case. The silence regarding the reason for the change in the rules leaves for legitimate speculation.

I. Dual roles of the Supreme Court Registrar.

53. A reading of the notice which reminds parties of the new rule will confirm that the Registrar of the Supreme Court occupies two public offices. From the endorsements, she is not discharging any of her two public functions in an acting capacity. In one breath, she is a circuit court judge, and in another, the Registrar of the Supreme Court.

54. I am not sure that one Ghanaian can legally and efficiently serve in two public capacities, especially in the offices in question here. Whatever may be the case, one of the offices will suffer. In this case, none deserves to suffer. I recommend that a second look be taken at this overburdening of the Registrar without the need to ask for details on why lawyers think efficiency is likely, if not already the victim of this dualisation of roles.

J. Conclusion.

55. Court processes are expected to be served promptly, and if that is not done, we should direct our efforts to ensure that it is done. Introducing directives without a proper diagnosis of the reasons for delays in disposing of applications before our courts will serve no useful purpose.

56. The issues discussed in this piece on the relevance of the fourteen-day rule for the fixing of dates for the hearing of applications filed in the Supreme Court make its immediate retraction imminent. The media publicity given to the Dafeamekpo case does not extol a positive impact of the new rule on the fixing of dates for the hearing of applications in the Supreme Court.

57. In our anxiety [I include myself] to improve the justice system, there have been too many needless innovations, directives and reorganisations. For instance, only recently, there was a directive that the High Court sitting at Adenta will now operate on a shift basis. The directive, it was explained, was intended to help ease the pressure on the deluge of cases tried there. How did we reach the conclusion that it was the insufficiency in the number of hours worked that created the backlog of cases?

58. We forget that in the not-too-distant past, we flooded cocoa affairs and submitted to Judges who wrote in long hand, heard more motions, conducted more trials and delivered more judgments than many who have the luxury of automated courts. The delays will not be solved by more rules, amendments, deletions, substitutions and/or repeals, including Practice Directions and directives. Being true to ourselves will help.

The end.