

A PAPER DELIVERED BY HON. JUSTICE C. O. IDAHOSA, CHIEF JUDGE, EDO STATE AT THE CONFERENCE OF ALL NIGERIA JUDGES OF THE LOWER COURTS HELD BETWEEN 21ST – 25TH NOVEMBER, 2016 ON THE DOCTRINE OF "STARE DECISIS" AND JUDICIAL PRECEDENT: THE NEED FOR LOWER COURTS TO BE BOUND BY DECISIONS OF THE SUPERIOR COURTS OF RECORD.

INTRODUCTION:

I want to register my appreciation to the Administrator of the NJI, Hon. Justice R.P.I. Bozimo for counting me worthy of choice as a resource person in this conference to present a paper on this all important topic. I also commend Her Lordship and her team of organizers for their wise choice of topic like this at such a time when Judges of the lower court are hiding under the toga of judicial activism to denigrate the hallowed principle of Stare Decisis which forms the bedrock of the judicial process. It is therefore very important that a subject of this nature be accorded a prime place of discourse before its substance is completely eroded.

DEFINITION AND MEANING:-

The term "*stare decisis*" is derived from the full latin maxim "*stare decisis et non quieta movere*" which literally means to stand by a decision and not to disturb that which is settled. The Supreme Court of Nigeria has defined it to mean to stand by your decision and decisions of your predecessors, however wrong they are and whatever injustice they inflict. See the case of National Electric Power Authority v. Onah (1997) 1 NWLR (Pt. 484), Page 680 at 688.

Stare decisis or judicial precedent according Black's Law Dictionary 9th Edition page 1214 means to stand by things decided. It further stated that court must follow earlier judicial decisions when the same points arise again in litigation.

It means that cases must be decided the same way when the material facts are the same. The part of a case which constitute the binding precedent is called the ratio decidendi, i.e the reason for the decision or the rule of law upon which the decision is based.

HISTORICAL PERSPECTIVE:

I do not think I can give a better historical perspective of how judicial precedent and stare decisis evolved better than what Lord Denning MR said in his book "*What Next in the Law*" published by Butterworth London in 1982 at page 5 in his reference to Lord Henry Bracton and I quote:

"My first great name in the Law is Henry Bracton. He was a Devon man and is remembered in the cathedral as Exeter He lived long ago over 700 years ago and was a judge of the King's Bench He was also an ecclesiastic as most judges were then. The red robe which the judges still wear was originally a cassock. Bracton was the first to make the Law into a science.

From precedent to precedent

Bracton kept a note book. He made notes of 2,000 cases from the old plea rolls in the thirteenth century. These were rolls of parchment on which were written the pleadings in the cases tried by the judges. They were all in Latin. Bracton wrote in Latin. He used his note book as the basis of a treatise on the Laws and Customs of England. In this treatise he gave references to previous cases, just as we do now. By using decided cases in this way, he started the English system of precedent. In his note book he says:

Si tamen similia evenerint, per similitudinem judicentur, cum bona sit occasio a similibus procedere ad similia" (if however similar things happen to take place, they should be adjudged in a similar way: for it is good to proceed from precedent to precedent.)

Tennyson took up that phrase when he wrote of England that it is a land where

*“A man may speak the thing he will,
A land of settled government,
A land of just and old renown,
Where freedom slowly broadens down.
From precedent to precedent”*

HISTORICAL PERSPECTIVE OF JUDICIAL PRECEDENT IN NIGERIA

In Nigeria, our own historical perspective of judicial precedent or stare decisis, is as we got it from the received English Law. As stated earlier, the Supreme Court of Nigeria in the case of National Electric Power Authority (supra) has defined it to mean stand by your decision and the decisions of your predecessors, however, wrong they are and whatever injustice they inflict

Thus we can see that judicial precedent emanated from case law, which is the body of principles and rules of law which, over the years have been formulated or pronounced upon by the courts as governing specified legal situations.

Though, it is trite that Judges do not make laws, they are not altogether barred from the law making process. Hon. Justice A. Aboki JCA in his paper captioned: "***The Doctrine of Stare Decisis: The need for certainty of Judicial Decisions***" had this to say:

“A Judge that is confronted with a legal problem does not have to resign helplessly where the established laws are inadequate in resolving the problem. It is a cardinal maxim of law that where there is a wrong, there must be a remedy - Ubi Jus Ubi Remedium. Judges are, therefore, encouraged to formulate fresh rules of law or

to extend the existing ones to deal with novel cases by so doing they add to the corpus of existing laws through their judicial pronouncements.”

Also, Lord Denning in *Packer V. Packer*, 80 KB page 226 opined as follows:

"If we never do anything which has not been done before, we shall never get anywhere. The law will stand still while the rest of the world goes on, and this will be bad for the law."

PRECEDENT:

Judicial Precedent is a decision establishing a principle of law that any other judicial body must or may follow when called upon to decide a case with similar facts. Precedent manifest in two ways namely: *Binding Precedent and Persuasive Precedent.*

A precedent is said to be binding where it must be followed by a lower court, while a precedent is persuasive if a court has an option or is not under obligation to follow it. The binding part of the decision is called the ratio decidendi and the other part not binding but optional is called obiter dicta. The ratio decidendi simply means reason for the decision or the rule of law upon which the decision is based. It is precedent that gave birth to case law, that is the body of principles and rules of law which over the years, have been formulated or pronounced upon by the courts. The judgements of a higher court must be followed by a lower court in the judicial hierarchy unless such a decision can be successfully distinguished. A decision of a court of a co-ordinate jurisdiction is of persuasive effect on another court of similar or co-ordinate or concurrent jurisdiction.

In delivering the lead judgment in the case of *Amobi v. Nzegwu & Ors* reported in (2013) vol. 12 MJSC Pt. 1 at page 1, K.M.O. Kekere-Ekun JSC at page 38, paragraphs D-G stated inter alia:

"Ratio Decidendi means 'the reason for deciding' or the reasoning, principle or ground upon which a case is decided. The legal principle formulated by the court, which is necessary in the determination of the issues raised in the case, in other words the binding part of the decision is its ratio decidendi, as against the remaining part of the Judgment, which mainly constitute obiter dicta. An obiter dictum is a statement made in passing, which does not reflect that the reasoning of the court or ground upon which a case is decided. See, Afro Continental (Nig) Ltd. V. Ayantuyi (1995) 9 NWLR (Pt. 420) 411; Suade V. Abdullahi (1989) 4 NWLR (Pt. 116) 387; UTC (Nig.) Ltd. V. Pamotei (1989) 2 NWLR (Pt. 103) 244; Odunukwe v. Ofomata (2010) 18 NWLR (Pt. 1225) 404."

However, it need be pointed out here that obiter dicta from the Supreme Court are strong pointers to the probable directions of the law. Strictly speaking they are not binding precedents, but lower courts would be well advised to take them seriously. See the llediora V. Umeh (1988) 2 NWLR page 5 at 13.

In the words of Pats-Acholonu, JSC (as he then was) in the case of Buhari v. Obasanjo (No. 3) (2004) 1 W.R.N. Page 1 at 46.

"No lower court may treat an Obiter of the Supreme Court with careless abandon or disrespect, but the Supreme Court could ignore it if it does not firm up or strengthen the real issue in controversy."

THE APPLICATION OF THE DOCTRINE:

In order to have a clear understanding of how the doctrine of stare decisis works, it is needful to touch on the concept of distinguishing cases and hierarchy of courts in Nigeria.

DISTINGUISHING CASES:

Distinguishing cases means to point out an essential difference between the present case and an earlier one in facts and using such difference as justification for departing from the decision of the earlier case. In distinguishing, certain factual differences are found which justify the court not to follow the decision in the earlier case while still accepting that decision in the case is good law.

Professor Glanville Williams in his book "LEARNING THE LAW" pages 75-76 suggested two types of distinguishing: Restrictive and non-restrictive distinguishing. **Restrictive distinguishing** is a situation where a court cuts down or curtails the ratio decidendi of the earlier case on the ground that the rule formulated was too wide, considering the facts of the case or it was formulated without considering all of its possible consequences, some of which are unjust, inconvenient or otherwise objectionable. **Non-restrictive distinguishing** occurs where a court accepts the expressed ratio decidendi of the earlier case, and does not seek to curtail it, but find that the case before it does not fall within this ratio decidendi because of some material difference of fact. While establishing the concept of distinguishing, a learned author, Abiola Sanni, in his book "**Introduction to Nigerian Legal Method** (Ile Ife OAU Press Limited (2006) at page 179 stated as follows:

"In the flux of human existence, it is extremely difficult to find two cases with the same facts. It is the duty of the Judges to determine which facts are covered by the previous case and which are not. This is known as distinguishing."

FACTORS AFFECTING THE WEIGHT OF A PRECEDENT

Before a court considers either to accept or follow a precedent in any given case, certain factors weigh in the mind of such a Judge.

Abiola Sanni (Supra) at pages 187-188 enumerated such factors as follows:

“(i.) Age: Generally, the greater the age of a precedent, the greater would be the reluctance of the court to disregard

it even where the reasoning in it is not sustainable or convincing.

(ii) The status of the court and its composition are also of essence as to the value of the case as a precedent. In Nigeria, the decisions of Supreme Court Justice (sic) are accorded great weight.

(iii) The adequacy of law report is another factor that affects the weight of precedents. Early cases are often inadequately reported due to lack of modern standards of law reporting. In fact, some law reports concentrate on reporting judgments of certain specific courts thereby indirectly causing greater weight to be attached to such judgments. Example of this can be found in Nigeria where emphasis is concentrated on reporting judgments of only the Court of Appeal and the Supreme Court thereby deliberately omitting reporting sound judgments of the High Courts (State or Federal)

iv) The history of a precedent is also very significant in determining its weight. First, the extent to which such precedent has been applied in later cases and approval of such precedent by jurists will definitely affect the weight attached to it. Second, whether the case was fully argued on the particular point taken or relevant authority cited also affect the weight attached to such precedent. Judgment given on merit of the case the is likely to have more weight than judgment devoid of pleading or strict principle of Law. Third, subsequent courts are responsive to argument based on the unjust or absurd consequences resulting from a previous case. This factor is often linked with a change in social condition which renders the earlier decision obsolete.

v) **Where the court is unanimous in a given judgement, more weight is likely to be given to such judgment than where there is a dissenting judgment. The situation becomes complex where circumstances change, making the precedent inappropriate to modern condition."**

Notwithstanding the views expressed by this learned author, I wish to sound a note of warning here. A court is duty bound to adhere completely with the decisions of the Supreme Court and other courts higher than the court deciding a matter in the judicial hierarchy. As to do otherwise will be tantamount to judicial rascality, indiscipline, recklessness and insubordination which is sanctionable.

HIERARCHY OF COURTS AND JUDICIAL PRECEDENT

The word 'hierarchy' has been defined as a system especially in a society or in an organization in which people are organized into different levels of importance from highest to lowest. Going by this definition, hierarchy of courts in Nigeria simply means the order of superiority of courts in Nigeria. Generally, decisions of superior courts of record are binding on all lower courts and they are bound to follow same. It is therefore necessary to have a settled hierarchy of courts and a good system of law reporting for the operation of an efficient system of judicial precedent. In Nigeria, section 6(5) (g-h) of the 1999 Constitution (as amended) listed the superior Courts of records in descending order thus:-

- (a) The Supreme Court of Nigeria*
- (b) The Court of Appeal*
- (c) The Federal High Court*
- (d) The High Court of a State*
- (e) The Sharia Court of Appeal of a State*
- (f) The Customary Court of Appeal of a State*

The Constitution goes further to empower relevant bodies to create courts at the Federal and State levels if so desired. Pursuant to this

provision, we have courts such as the Magistrates Courts, Area and District Customary Courts, Juvenile Courts, Coroner's Court, Family Courts and the Multi-door Courts (ADR practices) and other courts various States of the country.

PRECEDENT IN NIGERIA COURTS

The doctrine of judicial precedent is dependent on settled judicial hierarchy. This is because under the doctrine, decisions of courts higher up in hierarchy are generally binding on lower courts in the hierarchy.

Since October 1963, the Supreme Court of Nigeria became the highest court in the country. Accordingly, its decisions are binding on all other courts in Nigeria. In the same vein, the decisions of the Court of Appeal are binding on all other courts except the Supreme Court. Decisions of a State High Court are not binding on another State's High Court but merely persuasive. The reason is that for the purpose

of precedent, other State High Courts are regarded as foreign courts. In the case of Barclays Bank v. Hassan, reported in (1961) MLR pages 293, it was held that a Judge of a High Court does not feel himself bound by his own decision or by those of other Judges of Courts of coordinate jurisdiction. Decisions of Magistrate, Area and District Customary Courts are not binding on any other court. Down the line, the decisions of the Federal and State High Courts are binding on the Magistrates, Area and District Customary courts.

The Supreme Court adheres to its own previous decisions and may only depart or deviate therefrom if it accords with the imperative requirements of fairness and justice. In the case of Bronik Motors Ltd & Anor V. Wema Bank, reported in (1983) NSCC P.225, the Supreme Court enumerated conditions under which it can deviate from its previous decision as follows:

1. Where there is a breach of justice.
2. On ground of Public Policy, and
3. Question of legal principle such that the retention of the decision will amount to a perpetuation of injustice.

Predicated upon these principles, the Supreme Court in the case of Abdulkarim V. Incar Nigeria Ltd reported in (1992) 7 SCNJ P.366 held that although it will respect its previous decisions as a court of last resort which is not bound by precedent, the court will not hesitate to overrule any decision of its own which was reached on wrong principles since that is the only way to keep the stream of justice pure. In the case of the Court of Appeal, the practice adopted by the court is the practice in England established in the case of Young V. British Aeroplane Co. reported in (1944) K.B Page 718 which is to the effect that the Court of Appeal is bound by its previous decision subject to three important exceptions which are:-

- 1. The Court of Appeal is entitled and bound to decide which of its two conflicting decisions it will follow.*
- 2. The Court of Appeal is bound to refuse to follow a decision its own which though not expressly overruled cannot in opinion stand with a decision of the House of Lords.*
- 3. The Court of Appeal is not bound to follow a decision of its own if it was given per incuriam e g, where a statute or rule having statutory effect which would have affected the decision was not brought to the attention of the Court.*

See also the case of Kobia Osumanu v. Kofi Amadu & 2ors (1949) 12 WACA 437

In the hierarchical system of courts, each lower tier is bound by the decision of the higher tier or tiers. A lower court must accept decisions of higher courts and apply them. See the case of A.G Ogun State and Anor V. Dr. L.C. Egenty reported in (1986) 1 C.A. (pt 11) page 162. If a lower court is of the strong view that there is something wrong in the decision of a higher court it can only make its observation in very

polite language, but must bow to the higher court. See the case of Nwangwu V. Nwangwu (2000) Pt. 2 FWLR Page 273.

FOREIGN AUTHORITIES

It is acceptable for Nigeria Courts to rely on foreign or English authorities whilst construing provisions of Nigeria statutes that have English equivalents. However, the Supreme Court has emphasized the need to prefer Nigerian decisions to foreign decisions. See the case of Araka V. Egbue (2003) 3 WRN 20. The court opined that foreign authorities of the greatest learning cannot supplant Nigerian case law which is rightly decided on any issue. In the words of Justice Niki Tobi JCA (as he then was) in the case of Carribbean Trading & Fidelity Corporation V. NNPC (1992) 7 NWLR pt 252 page 161, where he stated as follows:-

“The Nigerian Legal System attained sovereignty and republican status way back in October, 1963 when the Supreme Court and not the Judicial Committee of the Privy Council became the final Court of Appeal, Section 120 of the 1963 Republican Constitution did it all, thus making section 114 of the 1960 Independence Constitution not only moribund but completely dead. England is English. Nigeria is Nigerian. The English are English as also Nigerians are Nigerians. Theirs are theirs. Ours are ours. Theirs are not ours. Ours are not theirs. We cannot therefore continue to enjoy this "borrowing spree" or “merry frolic” at the expense and to the detriment of our legal system. We cannot continue to pay loyalty to our colonial past with such servility or servitude. After all, we are no more in slavery. While some of our laws make omnibus provisions to fall back on English laws, and English rules of Court, these can only be resorted to in appropriate circumstances where our local laws and rules of court are silent.”

Therefore, while Nigerian Courts are free to make use of decision of other jurisdictions in the process of their administration of Nigeria Law and Justice, they do not have the jurisdiction to make foreign decisions at the expense of local ones.

APPLICATION OF THE DOCTRINE IN NIGERIA

The doctrine of Stare Decisis is well rooted in the Nigeria jurisprudence. It is a well settled principle of judicial policy which must be strictly adhered to by all lower courts. While lower courts may depart from their own decisions reached per incuriam, they cannot refuse to be bound by decisions of higher courts even if those decisions were reached per incuriam. The implication is that a lower court is bound by the decision of a higher court even where that decision was given erroneously. The Supreme Court speaking through ESO JSC (as he then was) in the case of Isaac Madubuago v. Dr. Mudiaga Odje & Ors, reported in (1985) 10 SC 267 at pages 268 269 opined as follows:

“In the hierarchy of the Courts in this country, as in all other free Common law Countries, one thing is clear, however learned a lower court considers itself to be and however contemptuous of the higher Court that lower court is, the lower court is still bound by the decisions of the higher court. I hope it will never happen again whereby the Court of Appeal in this Country or any lower court for that matter, would deliberately go against the decision of this court, and in this case, even to the extent of not considering the decisions when those of this court were brought to the notice of that court. This is the discipline of the law. That is what makes the law certain and prevents it from being an ass.”

Also, the Supreme Court per Katsina - Alu JSC (as he then was) in the case of Dalhatu V. Turaki (2003) 15 NWLR Pt. 843 page 310 at 323 stated as follows:

“.....This Court is the highest and final Court of Appeal in Nigeria. Its decisions bind every court, authority or persons in Nigeria. By the doctrine of stare decisis, the Courts below are

bound to follow the decision of the Supreme Court. The doctrine is a sine qua non for certainty to the practice and application of law. A refusal, therefore, by a Judge of the court below to be bound (and I dare say such a judicial officer) is a misfit in the judiciary.”

INSTANCES WHEN COURTS CAN DEVIATE FROM THE DOCTRINE OF STARE DECISIS

DECISIONS REACHED PER INCURIAM

Where a decision is impugned on the ground that it has been arrived at the court in ignorance or forgetfulness of an authority, statutory or otherwise, which is binding on that court, the decision is said to have been given per incuriam. This is an exceptional case in which the court making the error is not bound to follow its earlier decision because of the error. It need be said here that the state of the law, as handed down by Nigerian Courts, is that the Court of Appeal has no jurisdiction to overrule its previous decision. If the decision of the Court of Appeal is challenged, it is only the Supreme Court that can overrule it. The implication of this is that if matter does not go to the Supreme Court on appeal, then the Court of Appeal will continue to apply its previous decision which it considers to be bad. The Supreme Court can overrule or review its decision and this can only be done by a full court.

It is the facts and circumstances of a given case that determine the decision in that particular case, thus a lower court can reject earlier case as authority either on the ground that that facts of the earlier case are different from the facts of the case in hand, or that the decision is too wide, considering the issues before that court. This process is known as ‘distinguishing.’ However, in order not make a mess of the doctrine of Stare decisis, Judges who choose to distinguish cases should back up their opinion rather than make bare declarations that the facts of the case are different. In the words of Thompson J. in

Board of Customs and Excise V Bolarinwa reported, in (1968) NMLR 350 at 352.

“It is not sufficient to say that the facts are different. A Magistrate who does not intend to apply a decision of the High Court must state:

- (1) The ratio decidendi of that decision;*
- (2) The facts proved in that decision; and*
- (3) Show by judicial reasoning in the body of the judgment, in what manner the High Court decision is different from the case before him.”*

The above prescription, which is recommended to all courts, will serve to curb the incidence of reckless abandonment of binding precedent under the tenuous guise of distinguishing. Otherwise, the whole essence of precedent could be defeated.

CONFLICTING DECISIONS OF THE HIGHER COURTS

The trend is that where there are conflicting decisions of a Higher court, the Lower Court picks any of the decisions and applies it accordingly. For instance in Oliko & anor v. Okonkwo &Ors, reported in (1977) N.C.A.R. 368, the Court of Appeal unilaterally picked the decision of the Supreme Court in Babajide V. Aris & anor reported in (1966) 1 ALL N.L.R 254 and dropped the decision in Bowaje V. Adediwura, reported in (1968) NMLR 350 at 357. The new trend I dare say is that where a court is faced with two conflicting decisions of an appellate court, the practice is to adhere to the latest decision as it can be safely assumed that the earlier decision was considered in the more recent decision

BENEFITS OF THE APPLICATION OF THE DOCTRINE OF STARE DECISIS AND JUDICIAL PRECEDENT

The application of the doctrine of stare decisis and judicial precedent was evolved in order to foster stability and enhance the development of a consistent and coherent body of legal rules. In addition, it preserves continuity and manifest respect for the past. It ensures equality of treatment for litigants similarly situated. It helps to maintain order within the judicial system. Also, it spares the Judges the task of re-examining rules of law or principles with each succeeding case and gives a desirable measure of predictability to the law.

The doctrine of judicial precedent ensures predictability, creditability, consistency, cogency, stability and reliability of legal principles that define and constitute all aspects of our jurisprudence.

SOME COUNSEL

Judicial precedent is anchored on a thorough knowledge of case law. We must all endeavour to read law reports as a knowledge of case law is a desideratum in effective application of relevant judicial authorities to the facts adumbrated in any case we adjudicate upon. I also enjoin the judiciary in the various States and publishers to publish the decisions of the high court in their respective States so that the lower court judges can use such decisions as reference and research materials. Those reports may be more relevant for their purpose than the Court of Appeal or Supreme Court reports which some Judges of the lower court may find somewhat too complicated, arcane, esoteric and recondite at that level. In Edo State we had a project in the past by the State Judiciary and Bar to publish decisions of the high court. We now have Edo State High Court Law Report ably and admirably published by Ogbeide Ihama & Co. in Benin. I commend the publishers and I recommend similar projects in other States.

CONCLUSION

Does the concept of judicial precedent disavow and repudiate development of the law? I do not think so, as I believe that faced with challenges of new technology, global best practices and trends, the Supreme Court will always do the needful when it is saddled with such challenges and will always uphold the tenet of justice and ensure that the entire legal system in the country does not lag behind other democratic societies in the development of the law.

In further amplification of this concept I wish to refer to the decision of the Supreme Court in Cardoso v. Dan (1986) 2 NWLR (Pt.20), wherein it was stated as follows:

“Nothing but anarchy and chaos will emerge where a lower court decides to ignore the decision of a higher court or refuses to follow the decision. The lower court must follow the decision even if it considers the decision to be given per incuriam”

See also Dalhatu V. Turaki (2003) FWLR (Pt. 174) page 247.

This little discourse cannot be exhaustive on this topic. We are all required in our quiet moments to continue to ponder and reflect on this topic which is the hub and soul on which the entire legal system revolves. I thank you for your attention .