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WINNING THE CASE BUT LOSING THE BUSINESS: THE COMMERCIAL COST OF LITIGATION IN NIGERIA

Legal victory does not always translate into commercial success

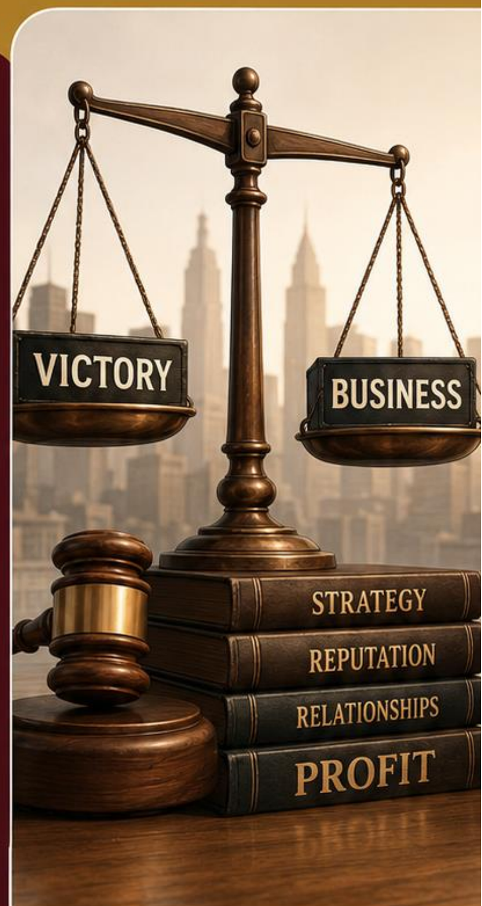
Litigation drains valuable time, finances, and business relationships

Delays in court proceedings often become a form of commercial injustice

Cost awards in Nigeria rarely compensate for the true financial burden of litigation

Public courtroom disputes can damage corporate reputation and investor confidence

Alternative Dispute Resolution (ADR) often provides a faster and commercially smarter path to resolving disputes



Info@krispylegal.com

www.krispylegal.com

Suite 911, 9th Floor,
Western House,
8/10 Broad Street,
Lagos.

Krispy_legal

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Abstract

The adage that 'justice delayed is justice denied' carries far greater weight in the commercial arena than its constitutional articulation suggests. This article interrogates the paradox at the heart of commercial dispute resolution in Nigeria: that a party may expend enormous financial, human, and reputational capital in winning a case, yet emerge from the courtroom as the commercial loser. Drawing on Nigerian judicial authorities, empirical data on court congestion, and practitioner perspectives, the article argues that the adversarial model as presently constituted in Nigerian litigation practice often exacts a commercial price that eclipses the value of the judgment obtained. The article further advocates for a more deliberate integration of alternative dispute resolution mechanisms, strategic pre-litigation assessment, and legislative reform as antidotes to the commercial haemorrhage that litigation invariably occasions.

Keywords: Corporate Practice, Litigation, Justice, Judiciary, Time factor.

I. INTRODUCTION

The Nigerian legal system, rooted in the common law tradition, regards the courtroom as the principal theatre of justice. Yet for the businessman and the corporate entity, the courtroom is also a theatre of commercial cost. It is a setting in which time, money, management energy, and reputational equity are consumed sometimes irrecoverably in the pursuit of legal rights. The Supreme Court of Nigeria has observed that litigation is a *'serious venture that has attendant consequences for all parties,'* a caution that resonates beyond its strictly procedural import.[1]

[1]Ariori v Elemo [1983] 1 SCNLR 1; see also Mobil Oil (Nig) Ltd v IAL 36 Inc [2000] 6 NWLR (Pt 659) 146.

The premise of this article is neither novel nor fictional. It has been observed that litigation tends to favour 'repeat players' typically institutional litigants with deep pockets over 'one-shotters,' who are often businesses without the resources to sustain protracted legal battles.[2] In Nigeria, this asymmetry is amplified by structural inefficiencies: underfunded judiciaries, an avalanche of interlocutory appeals, and enforcement challenges that transform a paper judgment into a hollow trophy. The party who 'wins' a case may do so only in the narrow legal sense, while its business suffers losses that no court order can undo.

This article proceeds in six parts. Following this introduction, Part one examines the direct financial costs of litigation. Part two analyses the indirect commercial costs disruption, reputational injury, and loss of business relationships. Part three considers the temporal dimension, arguing that delay is itself a form of commercial injustice. Part four reviews the inadequacy of cost-award regimes in Nigerian courts. Part five proposes a framework for litigation risk management and reform. The conclusion synthesises these insights into a practitioner-oriented perspective on commercial dispute strategy in Nigeria.

THE DIRECT FINANCIAL COSTS OF LITIGATION

The most visible commercial cost of litigation is financial outlay. Legal representation in Nigerian courts, particularly at the appellate levels, involves substantial expenditure on counsel fees, filing fees, service fees, and the costs of preparing records of appeal. While there is no universally applicable tariff structure, the reality in commercial disputes is that fees can reach millions of naira well before a matter is concluded at the Court of Appeal, to say nothing of the Supreme Court.[3]

[2]Marc Galanter, 'Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change' (1974) 9 Law & Society Review 95, 97.

[3]Nwafor v Commissioner of Police [2022] LPELR-58401(CA);

In ***Chevron (Nig) Ltd v Warri North Local Government Council*,**[4] the legal contest between the parties spanned nearly two decades and traversed multiple courts. The financial cost of such protracted proceedings is difficult to quantify publicly, but it is well understood within the profession that years of litigation management filing fees, counsel retainers, motion practices, interlocutory appeals consume corporate resources at a rate that no business plan anticipates. The case is a useful, if cautionary, illustration of a broader pattern.

Beyond professional fees, litigating parties in Nigeria bear costs that are rarely indexed against any realistic prospect of recovery. Order 62 of the Federal High Court (Civil Procedure) Rules 2019 makes provision for costs, but Nigerian courts have traditionally been conservative in awarding costs that reflect actual expenditure. In ***Adimora v Ajufo***[5] and ***SPDC (Nig) Ltd v Isaiah,*** courts awarded costs that bore no meaningful relationship to the actual legal fees incurred. The award of nominal costs, a long-standing feature of Nigerian litigation culture, means that even a successful claimant frequently bears a net financial loss from the litigation process itself.

Expert witnesses whose engagement is indispensable in complex commercial disputes involving quantum of damages, engineering issues, financial calculations, or technical matters add further to the financial burden. Their fees, travel costs, and preparation time are overwhelmingly borne by the parties, with no guarantee of recovery in the event of success. The cumulative effect is that direct financial costs of commercial litigation in Nigeria routinely constitute a material drag on the profitability of pursuing or defending even a meritorious claim.

[4]See Chevron (Nig) Ltd v Warri North Local Government Council [2006] 14 NWLR (Pt 1000) 614, where years of litigation devastated the plaintiff's resources.

[5]SPDC (Nig) Ltd v Isaiah [2001] 11 NWLR (Pt 723) 168;

INDIRECT COMMERCIAL COSTS:
DISRUPTION, REPUTATION, AND RELATIONSHIPS

The indirect commercial costs of litigation are, in many respects, more damaging than the direct financial outlays, yet they receive comparatively little judicial or scholarly attention. Three categories are examined here: business disruption, reputational damage, and the destruction of commercial relationships.

Litigation is a management distraction of the first order. Senior executives who become witnesses or deponents are drawn away from their core commercial functions. Discovery processes or their Nigerian equivalent under the rules governing pre-trial inspection and discovery consume internal resources and management attention in ways that can materially impair operations. In ***Ras Pal Gazi Construction Co Ltd v FCDA,***[6] Iguh JSC warned against the casual engagement of litigation as an instrument of commercial pressure, precisely because of the disruptive consequences for all parties involved. The diversion of human capital from revenue-generating activity to litigation support is an invisible cost that appears on no balance sheet but is felt in every contested commercial dispute.

Reputational injury is a second category of indirect cost. Nigerian commercial practice is largely relationship-driven, and a company seen to be embattled in litigation particularly where the proceedings receive press attention may find itself excluded from procurement processes, denied credit facilities, or regarded with wariness by prospective business partners.[7] In regulated industries such as banking, insurance, and telecommunications, adverse findings by courts even at first instance and pending appeal can trigger regulatory scrutiny that undermines business confidence. The reputational cost of litigation does not await the final judgment; it accrues from the moment proceedings are filed.

[6]Ras Pal Gazi Construction Co Ltd v FCDA [2001] 10 NWLR (Pt 722) 559, 575 per Iguh JSC.

[7]Longe v First Bank of Nigeria Plc [2010] 6 NWLR (Pt 1189) 1 (SC);

Perhaps the most underappreciated indirect cost is the destruction of commercial relationships. Business disputes, at their origin, are often susceptible to negotiated resolution. The act of commencing litigation, however, frequently transforms a commercial disagreement into a personal and institutional conflict. The adversarial process with its pleadings, cross-examination, and public exposure of internal communications erects barriers to settlement that grow progressively more difficult to surmount. In a market the size of Nigeria, with its dense interlocking networks of commercial relationships, the permanent alienation of a former partner, customer, or supplier can carry economic consequences that long outlast the particular dispute in question.[8]

THE TEMPORAL DIMENSION: DELAY AS COMMERCIAL INJUSTICE

Time is money. In commercial law, this observation is not a cliché but a juridical reality. The temporal cost of litigation in Nigeria deserves particular emphasis because it has reached a scale that amounts to a structural dysfunction in the administration of commercial justice. Official data indicate that the average commercial case in Nigeria's federal courts takes between five and twelve years to conclude at first instance, with appellate resolution adding further years.[9] Against this backdrop, the concept of a 'successful' litigant must be interrogated with rigour.

The Court of Appeal has repeatedly deprecated the culture of interlocutory appeals that characterises Nigerian litigation. In ***Odutola v Papersack (Nig) Ltd***[10] and ***Saeby Jernstoberi & Maskinfabrik AS v Olaogun Enterprises Ltd****,* the appellate courts observed that the proliferation of preliminary objections and interlocutory appeals was a device by which parties typically defendants in commercial disputes converted the judicial process into an instrument of delay. While courts have developed doctrines to discourage this practice, the reality is that dilatory tactics

[8]Court statistics cited in Nigerian Law Reform Commission, Report on Administration of Justice in Nigeria (2019) 44; see also Access to Justice Commission Report (Federal Ministry of Justice, Abuja 2021).

[9] Nigerian Law Reform Commission, Report on Administration of Justice in Nigeria (2019)

[10]Odutola v Papersack (Nig) Ltd [2006] 18 NWLR (Pt 1012) 470;

remain commercially rational for a defendant who calculates that the cost of litigation to the plaintiff will exceed the value of the judgment ultimately obtained.

The commercial impact of temporal delay is most starkly illustrated in contract disputes and debt recovery matters. A creditor who obtains judgment five years after the cause of action arose has, in real economic terms, been denied the time-value of its money over that entire period. Where post-judgment interest is awarded under Order 38, Federal High Court Rules 2019, the rate often fails to reflect commercial lending rates or inflation. In ***Ogundare v Ogunlowo,***[11] courts awarded pre-judgment interest at rates that bore little relationship to the cost of capital, effectively subsidising the debtor's delayed payment at the creditor's expense.

In the construction industry, the temporal dimension of litigation has generated its own body of commercial grievance. Contractors who obtain arbitral awards or court judgments against public bodies frequently discover that enforcement itself becomes a further episode of protracted litigation. The judgment debtor's resort to contempt proceedings, garnishee objections, and constitutional challenges to execution has, in several reported cases, extended the life of a commercial dispute by a further decade after final judgment.[12]

THE INADEQUACY OF COST-AWARD REGIMES

The theoretical remedy for the commercial cost of litigation lies in a robust cost-award regime. In England and Wales, the principle that 'costs follow the event' entitling a successful party to recover a significant proportion of its actual legal costs operates as a partial corrective to the economic burden of litigation. Nigerian courts have adopted the same principle in formal terms; however, its application in practice is markedly different in both quantum and philosophy.[13]

[11] Ogundare & Anor v Ogunlowo & Ors (1997) JELR 45392 (SC)
[12] NBCI v Alfijir (Mining) Nig. Ltd (1999) 14 NWLR (Pt. 638) 179.

[13] Emeka Chianu, 'The Commercial Realities of Litigation in Nigeria' (2017) 12 Nigerian Bar Journal 45, 52.

The Supreme Court in ***Newswatch Communications Ltd v Atta***[14] affirmed the discretionary nature of cost awards in Nigerian courts, emphasising that costs are at the discretion of the court and are awarded to serve the ends of justice rather than as compensation for legal expenses per se. This formulation, while doctrinally sound, operates in practice to insulate the courts from any obligation to make parties financially whole. The discretion is exercised with marked conservatism: cost awards in even substantial commercial disputes rarely reflect solicitor-and-client costs.

The National Industrial Court presents a particular dimension of this problem in employment and labour disputes. The Court's enabling legislation[15] and its practice direction preclude costs awards in most categories of employment disputes, leaving an employer who successfully defends a claim for wrongful termination with no mechanism for recovering its substantial legal costs. Given the frequency with which vexatious employment claims are brought in the guise of constitutional rights actions under section 36 of the Constitution, this regime effectively socialises the cost of litigation onto the successful defendant.

In arbitration, the picture is somewhat more favourable. Section 58 of the Arbitration and Mediation Act 2023 empowers tribunals to award costs including legal representation costs in proportions that reflect the outcome and the conduct of the parties.[16] The Act thus provides a mechanism more consonant with commercial reality. However, where one party is a public body or a state-owned enterprise a common feature of commercial disputes in Nigeria the recoverability of costs remains limited by sovereign immunity considerations and the practical difficulty of executing against government assets.[17]

[14] Newswatch Communications Ltd v Atta [2006] 12 NWLR (Pt 993) 144 (SC).

[15] Section 254C, Constitution of the Federal Republic of Nigeria 1999 (as amended); Skye Bank Plc v Iwu [2017] 16 NWLR (Pt 1590) 1 (SC).

[16] Sections 59-64, Arbitration and Mediation Act 2023; see National Judicial Policy (National Judicial Council, Abuja 2016) ch 4.

[17] GoldLink Insurance Plc v Lonestar Drilling Co Ltd [2015] 4 NWLR (Pt 1449) 268;

LITIGATION RISK MANAGEMENT AND THE CASE FOR REFORM

Given the foregoing, the rational commercial actor in Nigeria must approach litigation not merely as a quest for legal vindication but as a strategic business decision with profound commercial implications. This Part outlines a framework for litigation risk management and advances proposals for systemic reform.

The first imperative for commercial counsel and their clients is pre-litigation assessment that incorporates commercial not merely legal analysis. The question is not only 'do we have a good case?' but 'is winning this case worth what it will cost us in time, money, management attention, and relationships?' The Legal Profession Regulations 2023 and the professional ethics framework of the Nigerian Bar Association impose no obligation on counsel to raise these commercial considerations proactively; yet the modern solicitor's duty of care to a commercial client arguably encompasses exactly this kind of holistic advisory function.[18]

Contractual dispute resolution clauses represent the second line of defence against the commercial cost of litigation. The Supreme Court has affirmed the parties' autonomy to agree to arbitration,[19] and the Court of Appeal has held that a valid arbitration agreement ousts the jurisdiction of the court at first instance.[20] The Arbitration and Mediation Act 2023, which supersedes the Arbitration and Conciliation Act 1988, has significantly strengthened the arbitral regime in Nigeria. Its provisions on expedited proceedings, emergency arbitrators, and third-party funding offer the commercial community tools that can radically reduce both the duration and the cost of dispute resolution when properly deployed.[21]

[18]Yemi Osinbajo, 'Reforming the Administration of Justice in Nigeria' (Keynote Address, Annual Law Week of the Nigerian Bar Association, 2019); see also Babatunde Ajibade, 'Litigation Management and its Commercial Implications' (2020) 15 Lagos Law Review 1.

[19]NICON Insurance Corp v Power & Industrial Engineering Co Ltd [1986] 1 NWLR (Pt 14) 1;

[20]UAC (Nig) Ltd v Macfoy [1962] AC 152 (PC);

[21]Section 15(1), Arbitration and Mediation Act 2023 (Nigeria); see also UNCITRAL Model Law on International Commercial Arbitration 1985 (as amended 2006).

Mediation deserves special emphasis. The Lagos Multi-Door Courthouse, established under the Lagos State Multi-Door Courthouse Law, and similar mechanisms in Abuja and Rivers State, offer structured mediation that preserves commercial relationships while achieving binding resolution.[22] In ***Elf Petroleum (Nig) Ltd v Umah***[23] the Court of Appeal endorsed the principle that courts should encourage parties to settle commercial disputes through consensual mechanisms where the nature of the relationship permits. This judicial disposition, combined with the court-annexed ADR provisions of the Federal High Court Rules 2019,[24] creates a framework within which mediation can be pursued without sacrificing legal rights.

The third area of reform concerns the culture of interlocutory litigation. The systemic abuse of preliminary objections, jurisdictional challenges, and interlocutory injunctions as instruments of commercial delay is a subject that has been periodically addressed by the superior courts[25] but inadequately resolved by legislative intervention. The authors of the Federal High Court (Amendment) Rules 2023 have attempted to streamline pre-trial procedures, and the National Judicial Policy of the National Judicial Council prescribes case management techniques designed to eliminate unnecessary delay. Yet the commercial reality is that rules alone cannot alter the behaviour of litigants who calculate correctly that delay serves their interests. Only a cost-shifting regime that makes dilatory tactics economically irrational will produce sustainable change.

Fourth, the business community itself must advocate for a reformed cost-award regime. The argument for indemnity costs or at least a costs regime that reflects a substantially higher proportion of actual legal expenditure than currently prevails is a commercial, not merely a legal,

[22]Sections 4-6 and Part II, Arbitration and Mediation Act 2023; Lagos State Multi-Door Courthouse Law, Cap L32 Laws of Lagos State 2015.

[23]Elf Petroleum (Nig) Ltd v Umah (2018) JELR 39595 (SC);

[24]Section 19(d), Constitution of the Federal Republic of Nigeria 1999 (as amended); Federal High Court (Civil Procedure) Rules 2019, Order 31.

[25]Eze v F.R.N (2017) 15 NWLR (Pt. 1589) 433 @ 478

argument. If the legal system is to serve as an enabler of economic activity rather than a drag upon it, the cost of using the system must bear a rational relationship to the outcome it delivers.[26]

CONCLUSION

The paradox that this article has sought to illuminate is real, recurring, and commercially consequential. A party that pursues litigation in the Nigerian court system to its final conclusion may obtain a judgment that vindicates its legal position while devastating its commercial one. The financial costs, the management disruption, the reputational exposure, and the temporal drain of protracted proceedings collectively constitute a form of collateral damage that no award of costs, however generous, is likely to make whole.

The Nigerian judiciary, to its considerable credit, has in recent years demonstrated a growing awareness of the commercial implications of delay and procedural abuse. The Supreme Court's interventions in[27] matters involving abuse of process, and the Court of Appeal's development of the doctrine of abuse of interlocutory appeals **in *Obasi Brothers Merchant & Shipping Ltd v Marine & General Assurance Co Plc,*[28]** are positive indicators of a jurisprudential trend. Yet judicial creativity, however admirable, operates within the constraints of a system whose structural features underfunding, inadequate case management infrastructure, and a culture that rewards proceduralism over finality remain substantially unreformed.

The Arbitration and Mediation Act 2023 represents the most significant legislative contribution to commercial dispute resolution in a generation.[29] Its full commercial potential will only be realised, however, if the transactional bar routinely incorporates robust ADR clauses into commercial instruments, and if in-house counsel develop the institutional capacity to manage disputes outside

[26]Babatunde Raji Fashola, 'Law and the Economy' (Annual Law Lecture, Chartered Institute of Arbitrators Nigeria, Lagos 2018) 14.

[27]Nigeria Deposit Insurance Corporation v Okem Enterprises Ltd [2004] 10 NWLR (Pt 880) 107 (SC).

[28]Obasi Brothers Merchant & Shipping Ltd v Marine & General Assurance Co Plc [2005] 2 NWLR (Pt 910) 584.

the courtroom. The 'win at all costs' litigation culture inherited from a tradition that prizes adversarial contest above commercial outcome must give way to a 'resolve on best terms' philosophy that serves the interests of commercial actors in a developing economy.

Ultimately, the measure of a commercial legal system is not the elegance of its judgments but the economic utility of its dispute resolution. When winning a case means losing a business, the system has failed its most fundamental commercial purpose. The reform agenda is not academic; it is urgent, practical, and overdue.[30]

[30] Kano State Urban Development Board v Fanz Construction Co Ltd [1990] 4 NWLR (Pt 142) 1;