

Legal Alert ? May 2012 ? **Admissibility of Electronic Evidence**

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Introduction

The inestimable benefits of the various advancements in information and communication technologies have until the enactment of the new Evidence Act in 2011 remained a matter of much debate and judicial uncertainty.

Tendering of electronic mails ("emails") for example are usually as contentious and acrimonious as the litigation itself, with the opposite party usually relying on the hearsay rule, among other forms of objections under the old Evidence Act 1945, to prevent the admission of such electronically generated evidence.

The enactment of the Evidence Act, 2011 has attempted to correct some of the difficulties that the admissibility of electronically generated evidence do encounter in Nigerian Courts.

However, is the general perception that all electronic communication and mails are now admissible in Nigeria, correct? This Legal Alert is our contribution to the enlightenment process on the provisions of the 2011 Evidence Act regarding the admissibility or otherwise of electronically generated evidence.

Admissibility of Evidence Generally

Relevant to the admissibility of electronic evidence are the common rules governing the admissibility of evidence generally. Some of these common rules need mention in this Alert. Under Nigerian Law, facts which are in issue, with the facts which are relevant to the facts in issue, are generally admissible in evidence.

In the 1945 Evidence Act which is now repealed, technologically generated evidence was argued to offend some of the following general rules of evidence:

- (i) The issue of the custody and the reliability of the evidence tendered if it is not the original document.
- (ii) The best evidence rule which requires that a party must produce the original document during a trial or where the original document is not available, secondary evidence of it in the form of a copy, with other corroborating notes, etc, must be produced.
- (iii) The rule against the admission of hear-say evidence which forbids witnesses giving evidence on facts that they do not directly or personally witness or know about.

The underlined words above are for emphasis only.

The general basis for the admissibility of documentary evidence has not radically changed under the Evidence Act 2011 as documentary evidence is still mostly admissible where the original hard copy of such a document is produced in a Court of Law. See Section 83(1) of the Evidence Act 2011. The Evidence Act 2011 has however expanded this basis general rule to enable the admission of electronically generated documents under certain conditions which are enumerated hereunder.

Explanatory Memorandum ? Evidence Act, 2011

In its explanatory Memorandum, the Evidence Act, 2011 repealed the 1945 Evidence Act, Cap. E14, Laws of Federation of Nigeria, and enacted a new Evidence Act, 2011 which latter Act applies to all judicial proceedings in or before any Court of Law in Nigeria.

Starting with some definitions, this Alert will follow with some succinct highlights of the provisions of the Evidence Act, 2011 as they relate to electronic communication, electronic information, court processes, decided cases, etc, in Nigeria.

Definitions of "Document, "Computer", Evidence

Section 258 (1)(d) of the Evidence Act, 2011 describes a document, for the purpose of this Legal Alert, to include "any device by means of which information is recorded, stored or retrievable including computer output".

A Computer is in turn described to be "any device for storing and processing information, and any reference to information being derived from other information is a reference to its being derived from it by calculation, comparison or any other process."

Evidence itself has generally been described by authors to be "the means by which facts are proved, excluding inferences and arguments'.

2011 Evidence Act, Hearsay and Electronic Evidence

Under the new Evidence Act 2011, one of the exceptions to the hearsay rule of evidence, which hearsay evidence will otherwise be inadmissible under the old repealed 1945 Evidence Act, is the provision that where even though the maker of the evidence cannot be called to give primary evidence on the "hearsay evidence", such evidence is established to have been made and kept contemporaneously in an electronic device, in the ordinary course of business or in the discharge of a professional duty or in acknowledgement, written or signed, of the receipt of money, goods, securities or of property of any kind. See Section 41 Evidence Act, 2011.

Where the statement and the recording of the transaction are not instantly contemporaneous, they must occur such that a Court of Law will consider it most likely that the transaction was at the time of the record, still fresh in the memory of the maker of the recorded statement.

Admissibility of Documents produced by a Computer

Section 84 of the Evidence Act 2011 provides that a statement contained in a document produced via a computer, which statement is relevant to the facts in issue, is admissible as evidence on the fulfilment of the following conditions precedent:-

- (a) The computer from which the document was produced, was used regularly during the material period to store electronic information or to process information of the kind stated in the document;
- (b) The computer from which the document was produced also had stored in it other information of the kind contained in the document or of the kind from which the information contained in the document was derived;
- (c) That throughout the material period, the computer was operating properly; and where it was not, evidence must be provided to establish that during the period when the computer was not operating properly, the production of the document or the accuracy of its contents were not compromised or affected;
- (d) That the information in the statement is reproduced or derived from the information supplied to the computer in the ordinary course of the activities in question.

Certificate Authenticating Computer Generated Documents

Section 84(4) of the Evidence Act 2011, provides that where it is desirable to give a statement in evidence by virtue of Section 84 of the Evidence Act 2011, a Certificate identifying the document containing the statement and describing the manner in which the document was produced, with the particulars of any device involved in the production of the document, signed by a person occupying a responsible position in relation to the operation of the electronic device, shall be primary and sufficient evidence of the matters stated in the Certificate.

Primary and Secondary Electronic Evidence

Primary documentary evidence is the original document itself produced for the inspection of the Court. Secondary evidence is the direct opposite of primary evidence.

Section 86 (3) (d) of the Evidence Act 2011 provides that where a number of documents have all been produced by one uniform process as in the case of printing, lithography, photography, computer or other electronic or mechanical process, each of such documents shall be the primary evidence of the contents of all the documents so produced by this one uniform process.

Electronic Signatures

An electronic signature will satisfy the legal requirement that a document must be signed where the electronic signature shows that a procedure was followed whereby the person that executed a symbol or followed some other security procedure for the purpose of verifying that an electronic signature was made to an electronic record, actually followed such an established procedure. See

Section 93 (1-3)

Admissibility of other forms of Evidence

BOOKS OF ACCOUNTS. Also admissible under the new Evidence Act, 2011 are entries in books of accounts or electronic records of such books of accounts regularly kept in the ordinary course of business. However, Section 51 of this Law provides the caveat that such statements alone shall not be sufficient evidence to discharge any person of liability. See Section 53.

PUBLIC BOOKS. Any entry in any public or other official books, register or record including electronic records made by a public servant in the discharge of his official duties, stating a fact in issue or a fact relevant to a fact in issue, are now admissible evidence under the provision of Section 52 of the Evidence Act 2011.

Electronic Evidence and the Burden of Proof in Civil Cases

The burden of proof in civil cases lies on the person who would fail if no evidence at all were given or provided on either side to establish a claim or claims.

Also remember that the burden of proof in civil cases is discharged on the balance of probabilities and not beyond reasonable doubt which is the burden of proof required in criminal proceedings.

See Sections 132 and 134 of the Evidence Act 2011.

Presumption and Estoppel

One of the presumptions under the Nigerian law of Evidence is that an electronic message forwarded by the originator of the message through an electronic mail server corresponds with the message as fed into his computer for transmission. But the Court shall not make any presumption as to the person to whom such message was sent without corroborating evidence. See Section 153(2) of the Evidence Act.

Lagos State Rules of Civil Procedure

It is arguable that Lagos State has the most revolutionary High Court Civil Procedure Rules in twenty-first century Nigeria. There are however no direct provisions in the High Court of Lagos State (Civil Procedure) Rules 2004 ("Lagos Civil Procedure Rules") regulating the electronic filing and service of court processes.

Order 6 of the Lagos Civil Procedure Rules requires that all originating processes should be printed in A4 paper of good quality. Order 7 of the said Rules requires personal service of all court processes and where personal service is not possible, physical hard copies with the leave of Court can be served by pasting at the last known address of the party with the Process Server required to swear to an Affidavit of Service exhibiting the acknowledgement of the court process that was served.

Order 32 Rules 1 and 4 of the Lagos Civil Procedure Rules requires that real evidence shall be

tendered during trial. Where depositions are required, they must be written with the witness available for examination and cross-examination in open Court. Order 32 Rule 6 of the Lagos Civil Procedure Rules however allows the admission of official copies of court processes filed at the High Court as original copies of the filed court processes.

Case Law on Electronic Evidence in Nigeria

The earliest and most commonly referred to case on the admissibility of electronic evidence in Nigeria is the Nigerian Supreme Court decision in *Esso West Africa Inc. v. T. Oyegbola* (1969) 1 NMLR 194 where the Supreme Court said obiter that "The law cannot be and is not ignorant of modern business methods and must not shut its eyes to the mysteries of the computer".

The document that called for the decision of the Court in the *Esso West Africa Inc.* matter was one that was signed in quadruplicate with carbon copies through one single process with the original copy. The Supreme Court ruled on this matter, relying on the old Section 93 of the 1945 Evidence Act to hold that where a number of documents have been made by one single act of the use of carbon paper, each of such document so reproduced is primary evidence of the other quadruplicate copies.

The *Esso West Africa Inc. v. T. Oyegbola* case was referred to in the case of *Yesufu v. A.C.B.* (1976) 4SC (Reprint) 1 @ 9-14 where the document that was tendered with objection by opposing Legal Counsel, was a bank statement prepared by a Machinist from the Ledger Card of the Respondent Bank; the Machinist obtained the entries from the Respondent's Bank day-to-day Vouchers. The bank officer that tendered the statements did not personally prepare the statements or verify that the statements were correct. Objection was raised to the admissibility of the bank statements on the grounds that the existence of a banker's book from which the entries were extracted was not established neither was the custody and control, with the examination of the original entries established, before the lower Court admitted the bank statements.

The Supreme Court held in the *Yesufu v. A.C.B.* case that the admission of the bank statements which entries were derived from the day-to-day vouchers of the Respondent bank did not qualify, without other supporting oral evidence, as a bankers book and therefore offended the provisions of Section 96 (1)(h) of the 1945 Evidence Act.

The Supreme Court did however refer to the obiter in *Esso West Africa Inc.* (supra) and said as follows "... it would have been much better, particularly with respect to a statement of account contained in a book produced by a computer, if the position is clarified beyond doubt by legislation as has been done in the English Civil Evidence Act, 1968."

It is the provision of Section 5 of the English Civil Evidence Act 1968 regarding the conditions precedent for the admissibility of documentary evidence produced by a computer that were finally

adopted in the 2011 Evidence Act as counselled by the Supreme Court in the 1976 case of *Yesufu v. A.C.B* (supra).

In another Supreme Court decision of *Elizabeth Anyaebosi v. R. T. Briscoe* (1987) 3 NWLR (part 59) 84 @ 96-97, the statement of account upon which the claims in this suit was reproduced and upheld were stored in and reproduced from a computer. This statement of account was admitted in evidence without objection at the High Court and in the Court of Appeal. The Supreme Court on further appeal upheld the judgements of the lower Court to the effect that the computerised statement of account were admissible under Section 96 (1) and (2) of the now repealed Evidence Act 1945 which section allows the admission of secondary evidence upon the fulfilment of certain conditions precedent. This is in contrast with some kind of evidence which are absolutely inadmissible under Nigerian law.

In the case of *Oguma Associated Companies (Nig.) Ltd v. I.B.W.A Limited* (1988) 1 NSCC 395 @ 413 the Nigerian Supreme Court said obiter that Nigerian Courts need to become circumspect in interpreting Section 96 of the 1945 Evidence Act in the light of modern day banking procedures and gadgets such as computers which are now increasingly used by businesses. The Supreme Court also said obiter that there are certain types of evidence such as hearsay evidence, unstamped and unregistered documents which are inadmissible in Law and which cannot be admitted by consent of the parties.

It was held in the *Oguma Associated Companies* case that while the correctness of whether the statement of account was rightly or wrongly rejected by the lower Court as there was no cross-appeal on this point, other admissible and uncontradicted evidence were provided to entitle the Respondent Bank to judgment. This appeal was accordingly dismissed.

Conclusions

There are typographical errors in the Evidence Act 2011. These minor typographical errors will have to be corrected at the first opportunity of any amendment to this legislation. See examples of these errors in Sections 71 and 206.

The subject of evidence and the admissibility of documents have remained a very technical subject for many years. The Evidence Act 2011 continued with this tradition by failing to simplify the evidence rules for both legal practitioners and non-legal practitioners, to easily read and understand the provisions of this Law.

Lastly, we adopt and recommend to you the conclusions of Zachary G. Newman and Anthony Ellis in their article entitled "The Reliability, Admissibility and Power of Electronic Evidence" published on January 25, 2011 in the Litigation Section of the American Bar Association Journal to the effect that "Electronic evidence is becoming more and more prevalent in lawsuits.

Therefore, significant time should be devoted to identifying and analysing the authentication and admissibility issues relative to the electronic data involved in the litigation. Addressing these issues at the earliest possible phase is critical to a successful evidentiary presentation on summary judgement, at a hearing or at trial.

The groundwork for establishing the authenticity and admissibility should begin as soon as the information is gathered and reviewed as additional discovery may be required to ensure that the electronic evidence can be used in Court."

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