Whatsapp and Telephone Calls as Suitable Media of Service of Hearing Notice in Nigeria: Reviewing The Supreme Court Decision in *Compact Manifold & Energy Services Ltd v Pazan Services Nig Ltd*

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Abstract

This article uses the desk-based methodology to appraise the Supreme Court decision in *Compact Manifold & Energy Services Ltd v Pazan Services Nig Ltd*. In the case, the court held that the service of hearing notice through a text message by the registry of a court to a phone number supplied by the counsel, in this age of prevalence of information technology, is good and sufficient notice of an adjournment. The article argues that, while information technology is dominant, sending a text message, without evidence of its delivery, does not constitute service. It goes further to argue that even if the text is sent, it is common for its delivery to fail or for it to be delayed inordinately due to an unstable network. Even where the text message is delivered, the possibility of the counsel not seeing it cannot be ruled out. Thus, a text message, in a clime with unsteady mobile telecommunication services, may not be a proper medium of service. The article concludes by maintaining that when using a phone call and Whatsapp massaging, receipt of messages can be ascertained and therefore, these are preferable means of valid and sufficient service of hearing notice. Unlike these two mediums, a text message has limitations. In fact, service via Whatsapp has been held to constitute valid service. The article makes vital arguments on the impropriety of service via text message and makes recommendations on reliable means of effecting service.

Keywords: hearing notice; justice; Nigeria; Supreme Court; text message; Whatsapp

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Introduction

In human relations, disputes are bound to occur and when they do, it is necessary to settle such. Various forms of dispute settlement mechanisms exist, one of which is litigation (Eyongndi 2016:111). The court is the main forum for litigation and it is created by statutes. The judicial powers of the Federal Republic of Nigeria reside in the court. It is endowed with the power to settle all forms of disputes between individuals and individuals and the government.[1] In the course of litigation, a party may be absent from a proceeding on a particular date of sitting, necessitating the adjournment of the case.[2] Once the case is adjourned, the absent party must be notified about the new date the matter would be coming up to ensure attendance. If one party does not know the new date, the court is incapacitated to continue with the proceedings. If it proceeds with the matter, it would amount to a denial of the absent party's right to a fair hearing.[3]

To ensure the attendance of the other party, it is common practice that either upon the application of the present party, or *suo motu* by the court, a hearing notice of the next date is usually ordered by the judge/court to be served on the absent party/parties.[4] The essence of the hearing notice is to notify the party to whom it is issued about the next date the matter is meant to be heard. It also spells out the purpose of the sitting.[5] Usually, a hearing notice is issued and served on the party it is directed to in hard copy like any other court process. However, in this age, the prevalence of information technology has engendered several innovations in case management. Today, communication has evolved; new means of transmitting information have emerged. These include mobile phones that we use to make phone calls, send texts and Whatsapp messages. The courts, like other institutions, have embraced technology and the means that enable them to ensure fast communication. This expertise is also handy in various aspects of courts' operations, such as e-filing of court processes, e-service of court processes, online documentation of court judgments and even online hearing of cases. The 2004 Evidence Act, which was a federal legislation, was repealed and the 2011 Evidence Act[6] came into force. The new Act has copious provisions on the admissibility of electronic/computer-generated evidence in Nigeria.

Recently, in the *C.M. & E. S. Ltd. v Pazan Services Nig. Ltd.*[7] (hereinafter simply referred to as *C.M. & E. S. Ltd. v Pazan Services Nig. Ltd.*), the Supreme Court held that a hearing notice could be effectively and validly served through a text message on a party who was absent at the court sitting to give him notice of the next date. While

1 See section 6 of the 1999 Constitution of the Federal Republic of Nigeria, Cap. C28 Law of Federation of Nigeria (LFN) 2004.
2 *Ogunsanya v State* [2011] 12 NWLR (Pt. 1261) 401.
3 See section 36 (1) of the 1999 Constitution of the Federal Republic of Nigeria, Cap. C28 LFN 2004 (1999 CFRN).
4 Compact Manifold & Energy Services Ld. v Pazan Services Ltd. (2017) LPELR-41913.
5 *Ahmed v Ahmed* [2013] NWLR (Pt. 1377) 274.
6 2011 Evidence Act Cap. E14.
7 [2020] 1 NWLR (Pt. 1704) 70.

this is innovative and utilises available technology, it raises grave concerns. It is common knowledge that a text message as a medium of communication is subject to several inadequacies, which makes it less reliable as a means of communication. In all countries, particularly in Nigeria, telecommunication networks are unstable and this phenomenon affects text messages more than any other means of wireless communication. It is possible for a text not to be delivered to the intended recipient several days after having been sent. Sometimes the delivery can even fail altogether after several days of sending the text message.

Another challenge of using a text message is that the intended recipient may not even notice that there is a text message on his phone several days after its delivery. The decision of the Supreme Court places emphasis on sending a text message to a party as opposed to the receipt of the text, which is what actually constitutes service of notice. Receipt of a notice is guaranteed if it is given through wireless communication platforms like Whatsapp massaging and phone calls. A phone call or a Whatsapp message to a party does not give room for speculation or doubt about receipt of the message sent. Its receipt can be easily verified and not assumed based solely on the fact that a message has been sent. However, the only means of ascertaining that a text message was received is to verify from the mobile network operator, which is a Herculean task. The question is: at present, given the peculiarities of mobile network inefficiency in Nigeria, is a text message a viable means of communication, particularly in the service of a hearing notice? What makes receipt of a message so fundamental is that it relates to a litigant's right of fair hearing.

This article reviews the propriety of the Supreme Court decision by highlighting the challenges associated with the service of a hearing notice or facilitating any other court process through text messages. It argues that a text message coupled with a phone call, a phone call alone, an Instagram text, email and Whatsapp message, are preferable and reliable means of giving notice to another party where it ought to be given. In fact, there is judicial and scholarly opinion supporting the reliability of Whatsapp massaging as a means of service of court processes (Mahmoud 2019:72-74).

From the outset, it is apposite to note that information communication technology (ICT) is not a new phenomenon under Nigerian law. There is legislation dealing with various aspects of ICT in Nigeria, because it is one of the main sectors of the country's economic life. However, the focus of this article is not on ICT *per se*, but the extent to which same has been mainstreamed into the practice and procedure of courts in Nigeria by the various Rules of Court and the substantive procedural law on evidence, the Evidence Act, 2004.[8] The article is primarily concerned with the "novel" issue of introducing ICT in the service of court processes, especially the hearing notice. Hitherto, service of court processes, particularly hearing notices has been mainly by physical delivery to the designated address of the party concerned or his counsel, but this practice is being

8 Evidence Act 2004 is the citation given to the Evidence Act 1945 based on the compilation of all the laws in Nigeria into Volumes in 2004 under the Laws of the Federation of Nigeria, 2004.

abandoned or complemented by taking advantage of ICT innovations. The provisions of the Rules of Court and the Evidence Act dealing with regulating the adoption of ICT in courts practice and procedure are examined in the subsequent portions of the article.

This article is divided into five parts. The first part is the general introduction. The second part examines the admissibility of computer/electronically-generated evidence, such as text messages, to courts in Nigeria. The third part critically reviews the Supreme Court decision in *C.M. & E. S. Ltd. v Pazan Services Nig. Ltd*[9] by highlighting the drawbacks of the judgment against the background of fair hearing and challenges confronting mobile telecommunication services in Nigeria. The fourth part focuses on selected jurisdictions to examine the judicial sanctioning of Whatsapp as a medium of service of court processes. It does so while uncovering the shortcomings of a text message and recommending a telephone call and Whatsapp as complements or alternatives. The fifth and last part covers the conclusion and recommendations.

The Admissibility of Electronic Evidence in Nigerian Courts

The deployment of technology in Nigeria's administration of the justice process is not limited to the service of court processes (Ikpeze, 2015:119). Under the 1945 Evidence Act, which Nigeria inherited from Britain, its former coloniser, all computer or electronically-generated evidence in whatever nature or format was inadmissible.[10] The software formats that were not admissible include micro-chips, diskettes, compact discs, video compact discs, micro-films, etc.[11] In the *Federal Republic of Nigeria v Fani-Kayode*[12] the Federal High Court despite the prevalence of computer/electronically-generated evidence in Nigeria, took the controversial stance that same is not admissible in a court in Nigeria (Eyongndi, 2017:76). In *Esso West Africa Inc. v Oyagbola*[13] the admissibility of electronically-generated evidence was the issue; the court viewed its admissibility with suspicion and held that electronic evidence was inadmissible, because the chances of it being manipulated are high. In fact, the two justifications for the inadmissibility of computer/electronically-generated evidence under the 1945 Evidence Act (despite its expedience) are: it has increased propensity for alteration and the Act made no direct provisions for its admissibility.[14]

9 [2020] 1 NWLR (Pt. 1704) 70.

10 The 1945 Evidence is upon the compilation of the laws in Nigeria under the Laws of the Federation of Nigeria in 2004, was subsequently known as the Evidence Act, 2004. Dada, J. A. 2015. *The Law of Evidence in Nigeria,* 2nd Ed, Calabar: University of Calabar Press 9 opined that "historically, the Evidence Act, 2004 was the primary source of the Nigerian Law of Evidence. The Act was passed in `1943 as Evidence Ordinance but did not come into effect until 1945 through Gazette No. 33 of 1945, Notice 618."

11 Arase, S. 2013. *The Use of Electronically Generated Evidence as a Tool for the Speedy Dispensation of Justice,* A Paper delivered at the National Convention of Magistrates Association of Nigeria, Abuja, November, 3.

12 Unreported Suit No. FHC/L/523C/08.

13 (1969) 1 NMLR 194 at 198.

14 Dada, J. A. 2015. *The Law of Evidence in Nigeria,* 2nd Ed, Calabar: University of Calabar Press 300.

According to Chinwo, the admissibility of computer-generated evidence aroused a lot of jurisprudential debate given the fact that technological advancement has led to transmutation from the conventional article form of record-keeping to software formats (Chinwo, 2012:29-30). These changes coupled with the need to align Nigeria's law of evidence with prevailing technological advancements, instigated a review of the 1945 Act, which had become not only inadequate, but also obsolete.

Thus, after a horrendous journey, the 2011 Evidence Act was enacted and statutorily made admissible in Nigeria evidence generated through a computer or electronically.[15] On 3 June, 2011, the President of Nigeria, His Excellency, Ebele Goodluck Jonathan signed into law the Evidence Act of 2011 (Eyongndi, 2017:78). Section 84 (1) of the 2011 Evidence Act[16] made computer/electronically-generated evidence admissible in Nigerian courts subject to the fulfilment of certain conditions specified in the said section. Thus, in 2011, the inherited colonial 1945 Evidence Act was repealed by the enactment of the 2011 Evidence Act, making electronic/computer-generated evidence admissible in Nigeria (Fagbemi, 2011:153).

It is noteworthy that prior to the enactment of the 2011 Evidence Act, under the 1945 Evidence Act, where computer/electronically-generated evidence was inadmissible, in *Yesufu v Africa Continental Bank*,[17] the Supreme Court admitted that the use of electronic evidence in Nigerian courts was inevitable thus "the law cannot be and is not ignorant of the modern business methods and must not shut its eyes to the mystery of the computer." This pragmatic approach is buttressed by the dictum of Onalajathe, then Justice of the Court of Appeal JCA in *Ogolo v IMB*[18] when the court reasoned as follows:

> The commercial and banking operations in the keeping of accounts by the old system has changed to computer, which makes Nigerian businessmen to be modernized and in keeping with the computer age which system is so notorious that judicial notice of it can be taken under section 74 of the Evidence Act… however, beyond taking judicial notice, a proactive judicial outlook become inevitable.

The implication of the inadmissibility of computer/electronically-generated evidence in Nigerian courts due to the analogue nature of the 1945 Evidence Act was aptly articulated by a learned author thus:

> "statutory law in Nigeria has hardly kept pace with social realities. This is despite the fact that between such realities and the law there should be a mutually beneficial interpretation. This has ensured that in some important areas of life and business,

15 See section 84 of the 2011 Evidence Act.
16 Section 84 (1) of the Evidence Act, 2011.
17 (1976) 4 SC. 1.
18 [1995] 9 NWLR (Pt. 419) 324.

> statutory law remained in yesterday while the society marched on in dynamism."(Hon, 2012:2-3).[19]

Thus, whether in civil or criminal proceedings, evidence generated through a computer is admissible (Dada, 2015:302). Section 84 (4) specifies the prerequisites for the admissibility of electronic evidence in Nigeria. The party who seeks to tender such computer-generated evidence is duty-bound to produce a certificate of identification. The certificate shall fulfil certain conditions which are:

> It shall identify the document containing the statement and describing the manner in which it was produced; giving such particulars of any device involved in the production of that document as may be appropriate for the purpose of showing that the document was produced by a computer; dealing with any of the matters to which the conditions mentioned in subsection 2 above relates; and purporting to be signed by a person occupying a responsible position in relation to the operation of the relevant device or the management of the relevant activities, as the case may be, shall be evidence of the matter stated in the certificate; and for the purpose of this subsection it shall be sufficient for a matter to be stated to the best of the knowledge and belief of the person stating it.[20]

In *Oluwarotimi Akeredolu, SAN & Anor. v Rahman Mimiko & Ors*,[21] the mutually inclusive mandatory character of the conditions contained in section 84 (2) of the 2011 Evidence Act was emphatically emphasised by the Court of Appeal as follows:

> Going by the… provision, it is discernable that the appellants who were desirous of demonstrating electronically the content of Exhibits P50A and P50B failed to lay necessary foundation regarding the condition of the electronic gadget or computer they were going to use to the extent that those conditions as spelt out in section 84 supra were unfulfilled, the demonstration ought not be allowed.[22]

At present, it is settled law that computer-generated evidence is admissible in Nigeria just like in other developed jurisdictions that have embraced advancements in technology. Thus, the law in Nigeria is now technology compliant. Interestingly, it is apposite to note that section 84 of the Evidence Act, 2011 is a *verbatim* reproduction of section 65 B of the Indian Evidence Act, 1872 as amended. By this token, Nigerian courts can draw substantial inspiration from that jurisdiction in interpreting the provisions of section 84 of the 2011 Evidence Act (Dada, 2015:301).

19 Hon, S. T. 2012. *Law of Evidence in Nigeria*, Vol. 1, Port-Harcourt: Pearls Publishers 2-3.

20 See the Supreme Court decision in *Imoro Kubor & Ors. v Seriake Dicson & 2 Ors.* (2012) LPELR-9817.

21 (2013) LPELR-20532.

22 ibid 23.

C.M. & E. S. LTD. v Pazan Services Nig. Ltd: The Genesis of Service of Hearing Notice via Text Message and its Shortcomings

This section of the article reviews the decision of the court in the case of *C.M. & E. S. Ltd. v Pazan Services Nig. Ltd*[23] by explicating the drawbacks of the decision and its effects on fair hearing and the duty it has placed on legal practitioners. At this juncture, a summary of the case is necessary to ensure a thorough understanding of the subject under discussion.

The Appellant/Defendant (Appellant/Defendant is used here to depict the capacity of the party at the trial court and the appellate courts, the Court of Appeal and Supreme Court. It refers to the same party) and the Respondent/Claimant (Respondent/Claimant is used here to depict the capacity of the party at the trial court and the appellate courts, the Court of Appeal and Supreme Court. It refers to the same party) entered into a contract for the supply of scaffolding material by the Respondent/Claimant to the Appellant/Defendant at Chevron EGP-3B Project, Offshore in Warri, Delta State, Nigeria. The Respondent/Claimant supplied the consignment, but was not fully paid by the Defendant, which led to a dispute between the two parties. The Respondent/Claimant filed a suit at the Lagos State High Court claiming the following reliefs against the Appellant/Defendant: The sum of ₦ 95, 399, 765. 28 and US$ 875,949. 22, being the balance for the supply of scaffolding material and services to the Defendant; the sum of ₦ 43, 522, 300.00, being the total cost of the unrecovered scaffolding material and equipment in possession of the Defendant at the Chevron EGP-3B project, offshore Warri Delta State. The equipment has been rendered unusable due to salty water and high humidity at the project site. In addition, the Claimant sought an order of the court releasing two offshore material baskets belonging to the Claimant still in the National Inland Waterways Authority (NIWA) yard warehouse of the Defendant in Warri.

The Appellant/Defendant filed its defence on 3 October, 2014 and the Respondent filed a reply on 29 December, 2014. Thus, issues were joined between the parties and the matter proceeded to trial. On 7 July, 2014, the matter was set down for hearing before Oke Lawal J. The Appellant/Defendant was absent from court and was not represented by counsel. A hearing notice was ordered to be served on the Appellant/Defendant for the next date being 15 September, 2014. On 15 September, 2014, the court did not sit and the case was adjourned to 13 October, 2014 and the Appellant/Defendant was represented by counsel, who applied for an adjournment to enable him to regularise the Appellant/Defendant's processes wherein the case was adjourned to 20 November, 2014.

On this day, instead of regularising its processes, the Appellant/Defendant moved a motion urging the court to strike out the writ and the statement of claim for being an irregularity, but it was heard and dismissed for want of merit. The matter was further

23 [2020] 1 NWLR (Pt. 1704) 70 at 72-73.

adjourned to 18 December, 2014 for mention and hearing of the motion for regularisation filed by the Appellant/Defendant. The motion was heard and granted on the said date and the case was adjourned to 19 and 26 January, 2015 for hearing, but it could not proceed on that date. On the 11 February, 2015, the Appellant/Defendant's counsel informed the court of the parties' intention to settle out of court. This necessitated the adjournment of the case to 25 March, 2015 for report of settlement, which was that negotiations had broken down irretrievably between the parties. On 6 May, 2015, the court was informed of the failure to settle.

The parties were, therefore, ordered to file Forms 17 and 18, which deal with issues for determination and answers. The matter was adjourned to 17 June, 2015 as agreed by counsel to both parties. On 24 November, 2015, the Appellant/Defendant's counsel drew the attention of the court to the motion he filed on 17 June, 2015 for the dismissal of the case on the ground that the Respondent/Claimant had abandoned same. The motion was heard and dismissed, and the case adjourned to 15 December, 2015 for a case management conference. The Appellant/Defendant filed a notice of appeal on 2 December, 2015 against the ruling of the trial court dismissing the motion to dismiss the case due to it having been abandoned by the Respondent.

When the case management conference (CMC) came up, the Appellant/Respondent applied for an adjournment and the matter was adjourned to 25 January, 2016. The CMC is a court proceeding that takes the form of an alternative dispute resolution aimed at giving parties an opportunity to explore an amicable settlement of the dispute (Azubike, 2020). On that day, the CMC was held and the case was adjourned to16 February, 2016, but the court did not sit. Thus, the Registrar of the Court sent new hearing notices to the parties via a short service message (SMS) informing them that the matter had been adjourned to 15 March, 2016 for continuation of the CMC. In most courts in Nigeria, there is an unwritten rule that compels counsel to oblige their phone number when filing processes. The court registry then uses these numbers to contact them whenever a need arises. Pursuant to Order 7 Rule 13 of the Lagos State High Court (Civil Procedure) Rules, 2012, the fact of service of hearing notice via text message was documented by deposition of an affidavit of service by the registrar as evidence of service. It must be pointed out that the Lagos State High Court (Civil Procedure) Rules, 2012 had no express provision permitting the service of court process via a text message, but as a practice, parties and their counsel are required to supply their telephone numbers to the registry of the court for communication, so it was pursuant to this that the text message was sent to the parties by the registrar.

However, on the set day, the Appellant/Defendant and its counsel were absent from court. Owing to their absence, the Claimant/Respondent, through its counsel, applied for default judgment pursuant to Order 25 Rule 6 (2) (b) of the High Court of Lagos State (Civil Procedure) Rules, 2012. The rule provides thus: "Where a party fails to comply with the directive of the ADR Judge or fails to participate in ADR proceedings the judge shall: in the case of a Defendant enter judgment against him where

appropriate." The court granted the application and went ahead to enter judgment for the Respondent/Claimant against the Appellant/Defendant. It is apt to note that the provisions of Order 25 Rule 6 (2) (b) of the High Court of Lagos State (Civil Procedure) Rules 2012[24] have been retained in the 2019 Rules,[25] which is the subsisting Rules of Court in Lagos State.

The Appellant/Defendant sought to use a motion filed on 18 March, 2016, to set aside the judgment of 15 March, 2016, but it was refused. The Appellant/Defendant appealed the judgment to the Court of Appeal, which was dismissed on 10 March, 2017. Thus, the Appellant/Defendant still dissatisfied, filed an appeal against the judgment of the Court of Appeal that affirmed the judgment of the trial court. In the appeal, the Defendant contended that the lower court was not right to hold that the Appellant was aware of the date the default judgment was entered when no hearing notice was served on the Appellant. The Supreme Court dismissed the appeal holding that:

> In the instant case, there is evidence that parties left their phone numbers with the registry of the court. The phone numbers were supplied for the purpose of communication between the parties and in this matter and the registry. *There is evidence that a text message containing 15th March, 2016 as the hearing date of this matter was sent to learned counsel for the respective parties through their phone numbers. Clearly, parties were properly served with hearing notice.* I agree with the lower Court that at this age of information technology super highway, it will be foolhardy for any litigant to insist on being served with hard copy hearing notice. Once a notice is sent to the G.S.M[26] numbers supplied by the litigants that is sufficient. In this instant appeal, there is evidence that a text message was sent by the Registry of the Court to the G.S.M. numbers provided by counsel to both parties informing that the matter had been adjourned to 15th March, 2016 for continuation of the case management conference. The Respondent (as plaintiff) attended court on the said 15th March, 2016 but the Appellant stayed away. I hold the view that at this age of prevalence of information technology, the service of hearing notice through text message by the Registrar of the Court is good and sufficient notice.[27]

(Italics for emphasis mine)

Through the above pronouncement, the Supreme Court sanctioned service of a hearing notice through a text message. It is pertinent to note that in coming to this conclusion, the court found that "there is evidence that a text message containing 15 March, 2016 as the hearing date of this matter was sent to learned counsel through their phone numbers. Clearly, parties were properly served with hearing notice."[28] However, there

24 Lagos State High Court (Civil Procedure) Rules, 2012.

25 See as Order 27 Rule 5 (2) (b) of the High Court of Lagos State (Civil Procedure) 2019.

26 This acronym used by the Court means Global System for Mobile Communications.

27 Compact Manifold & Energy Services Ld. v Pazan Services Ltd. [2020] 1 NWLR (Pt. 1704) 70 at 91, paras E-H.

28 Compact Manifold & Energy Services Ld. v Pazan Services Ltd. [2020] 1 NWLR (Pt. 1704) 70 at 91, paras E-F.

was no evidence of receipt or delivery of the text message allegedly sent. Sending a text is one thing, its delivery is another. A hearing notice fulfils its utilitarian purpose only when it is received or delivered to the party to whom it is issued and not when it is sent or issued, but the Supreme Court and Court of Appeal have approved this position in an avalanche of cases.[29]

Evolution of Using a Text Message to Serve Hearing Notice in Nigeria

This section of the article examines the point at which the courts in Nigeria accepted a text message as a medium of service of hearing notice. It is apposite to note that the Lagos State High Court (Civil Procedure) Rules 2004, which were replaced by the 2012 Rules had no provision for service of court process (including a hearing notice) via any other means than the anachronistic analogue personal delivery of a hard copy typed document. The document had to be delivered to the litigant or the law office of his counsel. The service of a hearing notice via a text message was introduced by the Lagos State High Court (Civil Procedure) Rules, 2012 through judicial activism. There is no express provision in the 2012 Rules that permits the Court Registrar to send a text message to counsel in notifying him about the next date a case is coming up. However, it is worth noting that it has become common practice (a convention of a sort) for counsel to write their phone numbers and emails on court processes presented for filing alongside their law firm addresses for ease of communication where there is a need. As a result, the Court Registrar can either call or text a counsel to communicate any information regarding a case, and it was pursuant to this generally acceptable practice that the registrar in the case under review sent the text message. All the three courts (the High Court of Lagos State, Court of Appeal and the Supreme Court), by upholding the service of the hearing notice via text message to be valid service, have expressly given judicial approval to this practice.

The High Court of Lagos State (Civil Procedure) Rules, 2012, came into effect a year after the 2011 Evidence Act. The said 2011 Evidence Act contains conspicuous and copious provisions on the admissibility of computer-generated or electronic evidence in Nigerian courts. The Evidence Act is a federal legislation applicable to all courts in Nigeria with the exception of those which it is expressly made inapplicable to. The Lagos State High Court (Civil Procedure) Rules, 2012, is only applicable to proceedings before the High Court of Lagos State and therefore, the service of a hearing notice via a text message is only practised in Lagos and those states that have countenanced it in the Civil Procedure Rules. Aside this, by virtue of Order 2 Rule 1(c) (i) of the Court of Appeal Rules, 2013, the service of a hearing notice via a telephone call would be good and sufficient notice provided that the telephone call is made at least 48 hours before the scheduled date (Balogun, 2020). The Supreme Court in *E-G. (SC) ENL Consortium*

29 *Folorunso v Shaloub* (1994) 3 NWLR (Pt. 333) 413; *Mirchandani v Pinheiro* (2001) 3 NWLR (Pt. 701) 557. The court held that "a hearing notice is a process of the court by which a party to the proceedings is notified of the date the case has been fixed in court where he is not otherwise aware of such date."

Ltd. v Shambilat (Nig.) Ltd.[30] upheld the regularity of service of a hearing notice via telephone call pursuant to the aforementioned provisions of the Court of Appeal Rules, 2013. Once the 48 hours interval between the time of making the phone call and the scheduled date of sitting is observed, the service is proper (Omoredia, 2020). The 2019 High Court of Lagos State (Civil Procedure) Rules has introduced a new vista to the law by approving service through electronic mail (which will include a text message) as an alternative service of court processes where personal service is impossible. Thus, it is doubtful whether without an order of court directing service via text as substituted service, the Court Registrar, can on his own volition send a text message of hearing notice to a party as a means of giving notice to that party. However, the demands of substantial justice, especially where the receipt of the text (notice) is not in issue (but the mode of service as in the case under review) the court may not discountenance the hearing notice sent via text message by the Court Registrar. It is hoped that other states would emulate the good example of Lagos State by giving legislative affirmation to service of court processes via the various e-platforms mentioned above for effective and efficient justice delivery during and post-Covid-19 in Nigeria.

Challenges Associated with a Text Message for Service of Hearing Notice

As discussed in the preceding section, the Supreme Court held that a text message can be used to serve a hearing notice. However, the suitability of a text message for service of a hearing notice is very contentious. This section, examines the challenges associated with the use of a text message for service of hearing notice while explicating the utilitarian value of a hearing notice in adjudication. Sending a text message conveying notice of a date when a case is to be heard only indicates an intention to notify the party that the message is sent to. This intention is fulfilled only when there is "actual" and not even "constructive" receipt of the message. Since this message is sent in compliance with the recipient's constitutional right to a fair hearing, compliance is fulfilled only upon receipt of the text and not after merely sending it. The Supreme Court of Nigeria in *Darma v Ecobank (Nig.) Ltd*,[31]while espousing on the anatomy of a hearing notice held that a "hearing notice is a document that emanates from the registry of a court, giving legal notification to parties in a suit the dates on which the suit would be heard. Once a party or his counsel is served a hearing notice, they are both deemed to have actual knowledge of the date the suit would be heard, and if such a party decides to stay away from court, he does so at his own peril."[32]

A hearing notice is the only legal means of getting a party to appear in court where the party or his counsel was absent at the last sitting. Thus, the issuance of a hearing notice to the absent party is imperative. Such an absent party is equally entitled to be issued and served with a hearing notice of the date of the sitting as well as delivery of the judgment, because it is a constitutive part of the hearing. The consequence is that where

30 [2018] 11 NWLR (Pt.1630) 315 at 326, paras F-G; (2018) LPELR-43902 (SC).
31 [2017] 9 NWLR (Pt. 1571) 480.
32 Prince Lanre Adeyemi v Lan and Baker (Nig.) Ltd & Anor. (2000) 7 NWLR (Pt. 663) 33.

such a process is not served, the entire proceeding would be vitiated. It would be immaterial that it was well conducted. The prescription is premised on the radical nature of the right enshrined both in the common law principle of *audi alterem partem* and section 36 (1) of the Constitution of the Federal Republic of Nigeria[33] (hereinafter referred to as 1999 CFRN).

Order 7 Rule 13 of the Lagos State High Court (Civil Procedure) Rules 2012[34] provides that "after serving any process, the process server shall promptly depose to and file an affidavit setting out the fact, date, time, place and mode of service describing the process served and shall exhibit the acknowledgement of service, such affidavit shall be *prima facie* proof of service." It should be noted that although, the Appellant/Defendant's case at the trial court and Court of Appeal was not that it was not served, but contested the mode of service adopted (service via text message). The Supreme Court came to the conclusion that the Appellant/Defendant was indeed served, but the point remains that the problem associated with the text message service persists. It is elementary principle of law that without seeking and obtaining the leave of the court, a party cannot set up a different case on appeal other than the one presented at the trial court.[35] To do otherwise is to give a party an opportunity to spring up surprises at the other party and the court, a clear case of "hitting below the belt".[36] Thus, the finding of the Supreme Court is unassailable. However, the contention here is rather on the suitability of approving a service of a hearing notice via a text message and not the legality of the finding, which is not contestable.

It is very possible that a text message could be actually sent, but its delivery to the intended recipient is either delayed or it is delivered after several days of it being sent. Sometimes the message is assumed to have been delivered. This mode of service is particularly not suitable for emergency service. For instance, where a matter is coming up in two days' time or the next day, a text may be sent, but fail to deliver and the recipient will be absent from court due to a problem he did not cause. Situations like this have been experienced by several counsel and they have had inimical outcomes to the litigants. Instances where text messages are not delivered culminating in the absence of both the litigant and counsel have led to some cases being struck out, thus exposing litigants to hardship. A text message is not a reliable medium of serving a hearing notice or any other court process as the same has limitations and there is no immediate remedy to its shortcomings.

In fact, service via text message is incapable of fulfilling the requirement of Order 7 Rule 13 of the Lagos State High Court (Civil Procedure) Rules 2012, which requires

33 *Onwuka v Owolewa* [2001] 7 NWLR (Pt. 713) 695; *Okafor v A.G. Anambra State* [1991] 6 NWLR (Pt.200) 659; *Deduwa v Okorodudu* [1979] 9-10 SC 329.

34 Order 7 Rule 13 of the Lagos State High Court (Civil Procedure) Rules 2012.

35 *Ogundimu v Kasunmu* [2006] All FWLR (Pt. 326) 207.

36 *Adesanya v Aderonmu* [2000] All FWLR (Pt. 15) 2492; *Elema v Akeuzua* [2000] All FWLR (Pt. 19) 534.

that the process served is annexed to the affidavit of service deposed by the process server as proof of service. Yet, the Supreme Court relied on this provision without adverting its mind to the peculiarity of the text message or electronic service platforms. Besides, the possibility of a text message being received without the actual knowledge of the recipient is a common occurrence. What this means is that this situation has placed on legal practitioners the unrealistic onerous duty of frequently checking their text message inboxes for possible new messages.

The point being canvassed is not that other means of electronic communication suggested as alternatives or complements to text message are immune to the challenges that trail a text message. However, mediums, such as telephone calls and Whatsapp messages, pose minimal challenges as far as the service of a hearing notice is concerned. Where a Whatsapp message is sent and there is no delivery, it is easy to detect as compared to a text message. Whatsapp is configured in a way that makes determining receipt not only easy, but also possible. A telephone call on the other hand totally overcomes the challenge of non-reception. Once a counsel or litigant is telephoned by the Registrar and given notice of a hearing, it is settled that service has been effected. Where a call fails to connect, there is no issue as to whether the person being called has been served or not. Thus, the argument of service but without receipt, associated with text message, is greatly, if not totally eliminated with the adoption of these other forms of communication.

It is even possible for a counsel who has supplied his phone number to travel out of Nigeria and when a text is sent, he cannot receive it as not all people can afford to roam their phone numbers when they are abroad. In such a situation, there is no way, the counsel will receive service of the hearing notice sent via text message and the possibility of such an occurrence is very probable. However, a medium such as Whatsapp, has a universal receptive capability once there is internet even if the phone number is off or not in use. Hence, the possibility of using Whatsapp in serving a hearing notice or any court process, is higher than that of text message. There are instances where litigants have suffered due to the shortcomings of a serving a hearing notice through a text message. Similarly, there are counsel that have been exposed to ridicule and have clients whose cases have not been heard due to the absence of their lawyers in court, because a text message giving them notices to appear in court could not be delivered on time. Take for instance, a litigant whose counsel was sent a text message for a date to move an *ex-parte* application seeking an injunctive relief, but unfortunately, the text message was either delayed or not delivered. Failure to move the application as expected, may lead to what is meant to be stopped eventually happening. This failure could lead to the litigant suffering a harm that compensation may not be sufficient to put him back to the position he was in. Such damage is an irreparable one.

In fact, a counsel[37] recounted a personal experience to demonstrate that a text message is unreliable as a means of service of a hearing notice. He had filed an appeal in *Airtel Networks Ltd. v Chief Lade Ogunsakin*[38] at the Court of Appeal, Akure division against the decision of the Ondo State High Court. Due to certain eventualities, the Appellant's brief was not filed timeously. The Respondent filed a motion to dismiss the appeal for want of diligent prosecution based on the failure to file Appellant's brief. The court fixed a date to hear the motion to dismiss the appeal and the Court Registrar sent a hearing notice via a text message to the Appellant's counsel who was absent at the last hearing. The Appellant's counsel did not receive the text message; the Respondent moved the motion and the court granted it by dismissing the appeal. The Appellant got to know about the dismissal of the appeal and filed a motion to set aside the order dismissing the appeal for want of jurisdiction, as its right to a fair hearing was infracted owing to the failure of service of a hearing notice. It took the Appellant one year to get the court to set aside the judgment dismissing its appeal as it successfully proved that the hearing notice purportedly sent by a text message was not received by any counsel in the law office. This is just one of the several experiences litigants and counsel undergo when service is made via a text message.

Another counsel[39] has suggested that whenever a court process, particularly a hearing notice is served via a text message, the Registrar of the Court should make a phone call to the counsel or litigant to whom the text message has been sent. This is to ensure that the receipt of the notice is ascertained and not merely assumed. Only this can be described as a proper and valid service. In the event of any disagreement as to whether there was service, the call log or recorded call can be used as evidence.

Another counsel[40] opined that "the approval of serving a hearing notice through a text message by the Supreme Court is a laudable innovation; however, a text message alone may not be sufficient to guarantee giving notice as there may be failure or delay of delivery of the text message. After a text message is sent to counsel or the litigant, a follow-up email should also be sent. A text message alone, might not be sufficient hence, it should be complemented by an email as the delivery of the text message is subject to availability of the mobile network. This challenge, if not fully and timeously addressed, may in a way, frustrate the laudable intention of the Supreme Court.[41]

37 Interview conducted on the 26th of March, 2020 at Pacific Partners, Ibadan with Adeniyi Ojo Esq. former Legal Adviser, Nigerian Bar Association, Ibadan Branch who served from 2016-2018 on the suitability of text message for service of court processes particularly hearing notice.

38 Appeal No. CA/AK/68/2013.

39 Interview conducted on the 26th of March, 2020 with Osas Justus Erhabor Esq. Former National Second Vice President of Nigerian Bar Association and First National Vice President, Nigerian Bar Association from 2010-2012 and 2012-2014 respectively.

40 Interview conducted on the 27th March, 2020 with Banke Olagbegi-Oloba, National Treasurer, and Nigerian Bar Association 2018-2020.

41 The interviews referred to above were conducted via a telephone call with the participant who was at the time in Nigeria.

The Origin and Powers to Make Rules of Court in Nigeria

One may ask: how do the Rules of Court come into existence? What law enables the making of various Rules of Court, which guide and regulate both criminal and civil procedures in various courts in Nigeria? The answer to this question is straightforward. All the superior courts of record (SCR) in Nigeria are created by the 1999 CFRN. Section 6 of the Constitution deals with the judiciary and section 6(6) enumerates the SCR in Nigeria. Chapter 7 of the 1999 CFRN deals with the judicature and creates various courts as follows: Section 230 (1) the Supreme Court of Nigeria as 237(1) Court of Appeal, section 249(1) Federal High Court, section 255 The High Court of the Federal Capital Territory, Abuja, section 260(1), Sharia Court of Appeal of the Federal Capital Territory, Abuja, section 274(1) Sharia Court of Appeal of a State, section 265(1) Customary Court of Appeal of the Federal Capital Territory, Abuja, section 270(1) High Court of a State, section 275(1) Sharia Court of Appeal of a state, and 280(1) Customary Court of Appeal of a state. The same constitution empowers the heads of these various courts to make rules to regulate the practice and procedures of these courts. For instance, section, 274 of the 1999 CFRN empowers the chief judges of high courts in states to make rules to regulate the practice and procedures of high courts within their various states. Section 236 thereof, empowers the Chief Justice of Nigeria (CJN) to make rules that would regulate the practice and procedure of the Supreme Court just as section 248 empowers the President of the Court of Appeal to makes similar rules for the Court of Appeal.

Thus, it is clear that the heads of the various courts created by the 1999 CFRN have the powers to make rules to guide the civil and criminal practice and procedures of particular courts. Pursuant to this power, the various heads of courts in Nigeria have all made both civil and criminal procedure rules for the courts. The 2012 Lagos State High Court (Civil Procedure) Rules is an example.

Whatsapp and Telephone Calls as Suitable Media of Service of Hearing Notices

This section of the article examines the deployment of information technology in the service of court processes in Nigeria and selected jurisdictions of the world (Tole, 2015:900-920). It compares the viability of these media platforms to that of a text message in the service of court processes. It is germane to reiterate two facts. First, every aspect of human life is being disrupted by improvements in technology and second, the world has become a global village. The distance between two people is no longer measured in metres or kilometres, but by a click from an internet-enabled mobile device. In fact, it is becoming increasingly difficult for the legal profession to ignore technology. Most states, if not all in Nigeria, have amended their Civil Procedure Rules to incorporate various changes that have resulted from technological innovation.

The Supreme Court of Nigeria has affirmed that a hearing notice for a court proceeding to a party that was absent at the last date could be effectively served through the medium

of a phone call. For this to be valid and sufficient, the call must have been made not less than 48 hours before the date the matter was scheduled. This was the position of the court in *E-G. (SC) ENL Consortium Ltd. v Shambilat Shelter (Nig.) Ltd.*,[42] where the Supreme Court held that the phone call as a mode of service of a hearing notice would ordinarily be good service as long as the party is provided the hearing notice at least 48 hours before the scheduled court date. The effectiveness of a phone call as a medium of service or communication of a new date of a case cannot be overemphasised. Since it is direct, it eliminates any possibility of not receiving the notice. It effectively fulfils the intendment of service of a hearing notice.[43] It can be safely argued that service via a phone call is even more efficacious than a hard copy hearing notice as the notice gets directly to the person who receives the call. The reception of the call eliminates the possibility of getting complaints about not getting the hearing notice.

While the Nigerian courts are yet to sanction Whatsapp as a medium of direct or substituted service of court processes, the courts in some jurisdictions have. I undertake an analysis of some selected jurisdictions in Africa and Europe.

Adoption of E-Platform for Service of Court Processes in Other Jurisdictions

As noted before, advancements in science and technology are being felt in most, if not all parts of the globe. Thus, most jurisdictions in Africa and beyond have adopted electronic platforms like Whatsapp, email, Facebook, text message, witter, etc. as medium for service of court processes and even communication of acceptance of contracts. This section of the article examines selected jurisdictions with the aim of identifying the challenges in the deployment of e-platforms for service of court processes, proffers possible solutions and extricates lessons for Nigeria. In fact, the overwhelming disruptive effect of technology in the process of justice administration cannot be overemphasised nor be resisted. Every jurisdiction must improvise, particularly owing to the effects of Covid-19.

Ghana

In 2015, a Ghanaian court granted an application for substituted service by use of Whatsapp. This was in the *Kwabena Ofori Addo v Hidalgo Energy and Julian Gyimah* case.[44] While this position was the first of its kind, it depicts the progressive attitude of Ghana's judiciary towards embracing technological advancement to ease justice administration. Its effects are far-reaching and it is hoped that the trend will be maintained and extended to other viable mobile telecommunication platforms (Mensa-

42 [2018] 11 NWLR (Pt.1630 SC) 315 at 326, paras F-G.

43 Otobaimere v Akporehe [2004] 14 NWLR (Pt.894)591; First Bank of Nigeria Plc. v TSA Ind. Ltd. [2015] 11 NWLR (Pt. 1470) 346; Nigerian Agricultural and Co-operative Bank Ltd. v Mr. Lewechi Ozoemelam [2016] 9 NWLR (Pt. 1517) 378 at 406 paras. The Supreme Court held that "the purpose of hearing notice is to inform the person served about the date for the matter… Non-service of hearing notice robs the court of jurisdiction to hear and determine a matter and any order made thereby against the party who should be have been served with the hearing notice becomes null and void."

44 Writ No. AC 198/2015 (unreported).

Bonsu, 2015:149-154). When using a text message, the degree of certainty that service (as opposed to issuance) of the hearing notice or any other court process will be effected on the intended recipient is very minimal when compared to a phone call or Whatsapp message. It is germane to reiterate that the essence of a hearing notice is to bring to the attention of the party who was absent in court the next date the court will be sitting to adjudicate over a matter. Thus anything that interferes with the certainty of the receiver's knowledge about the notice must be avoided. [45] It is not only important for the notice to be sent, but its receipt or delivery must be guaranteed as sending a notice without having it received makes the communication process incomplete.

South Africa

In South Africa, the courts have also given judicial impetus to the use of electronic platforms for serving court processes. The KwaZulu Natal High Court in Durban in the *CMC Woodworking Machinery (Pty) Ltd. v Pieter Odendaal Kitchen*[46] case, Steyn J. granted an application for substituted service of a notice to set down and pre-trial directions on the Respondent via a Facebook message.[47] In addition, the notice had to be published in a local newspaper.[48] It is apposite to note that in Nigeria, substituted service via a newspaper publication is also practised (Mahmoud, 2019:73).

The courts in South Africa in the *CMC Woodworking Machinery (Pty) Ltd. v Pieter Odendaal Kitchen*[49] have also countenanced the use of e-platforms just like in jurisdictions aforementioned. As far as adoption of e-platforms is concerned, the decision of the South African Labour Court (SLC) in the *Jafta v Ezemvelo KZN Wildlife*[50] is instructive as the court, unlike the Supreme Court of Nigeria in *C.M. & E. S. Ltd. v Pazan Services Nig. Ltd*,[51] laid emphasis on the delivery of a text message, which is the distinguishing feature between the two decisions. The court dealt with the important question: when will an acceptance of offer of employment communicated via e-platforms, such as email and SMS, be considered as received for there to be a binding contract?

A brief fact of this case is relevant. Jafta applied for employment in the Respondent organisation. During the interview, he disclosed that he would be on leave from 22 December 2006 to 8 January 2007. He also told them that he was obliged to give a two months' notice to his employer and would be able to do so only after he returned from leave in January 2007. He also explained that renegotiation of his leave would make

45 *Marion Obimonure v Ojumoola Erinosho & Anor.* (1966) 1 ALL NLR 245 at 252 "where service of process is required, failure to serve is a fundamental vice, and the person affected by the order but not served with the process is entitled *ex debito justitiate* to have the order set aside as a nullity."

46 (2012) SA 604 KZD 5.

47 ibid 15.

48 ibid 16.

49 (2012) SA 604 KZD 5 at 8-9.

50 [2008] 10 BLLR 954 (LC).

51 [2020] 1 NWLR (Pt. 1704) 70.

him incur financial loss as he had already paid for his holiday in Maputo, Mozambique. He was offered the position of General Manager, Human Resources. The offer of employment was emailed to him on 13 December, 2006 and he was asked to assume duty on 1 February, 2007. Another email was sent to him urging him to respond to the offer before the end of December, 2006 and it also stated that the assumption of duty date was non-negotiable. Jafta responded to the email before the end of December, despite being on leave, but the Chief Executive Officer of the Respondent denied having received the response. On 29 December, Jafta received an SMS from an officer of the Respondent informing him that he had to assume work on 1 February, 2007 failure to do so, the offer would be made to another person.

Jafta responded to the officer's SMS using a text message. In his response he stated that he had already responded to the CEO's email in the affirmative. The Human Resource Manager of the Respondent confirmed that he had received the text, but did not remember seeing the word "affirmative", he claimed the word was deleted. Jafta had lost his cell phone after this correspondence, so he applied to his network provider and got a forensic computer printout of the record of his text messages, which showed that he had indeed sent the message at the time he alleged. Another person was appointed in Jafta's place. Jafta felt aggrieved and sued for damages for breach of contract. First, the court had to determine whether Jafta's communication was valid acceptances of the offer made by the Respondent in terms of the common law. Second, the court had to determine whether the Respondent had received Jafta's acceptance of the offer in terms of the Electronic Communications and Transactions Act (25 of 2002). The court held that Jafta had to show that the content of the text had the qualities of a valid acceptance for it to determine that he had indeed accepted the offer of the Respondent. At common law, acceptance has to be clear, unequivocal, unambiguous and same must be made in the mode prescribed by the offeror. The court found that the contents of the emailed letter of 29 December, 2006 sent by Jafta, was clear, unequivocal, and unambiguous as he had accepted the offer as made via email. The court also held that Jafta's text message, wherein he responded to the reminder text message from the Human Resources Manager of the Respondent as "affirmative", was clear, unequivocal and unambiguous, same was an implicit and unequivocal acceptance of the offer communicated via text message.[52] Jafta also communicated the acceptance via the mode prescribed by the Respondent that is, an email and text message. The court finally came to the conclusion that from the totality of the circumstances, Jafta's acceptance, which was communicated via email and text message was valid under common law as same had met all the requirements of a valid acceptance.[53]

By the provision of section 1 of the Electronic Communications and Transactions (ECT) Act, the court found that an SMS is a form of electronic communication. Section 11(1)

52 *Jafta v Ezemvelo KZN Wildlife* [2008] 10 BLLR 954 (LC) paras 38–40.
53 ibid paras 32-55.

of the ECT Act Prem (2020),[54] is to the effect that between the originator and the recipient of a data message, an expression of intent or other statement is not without legal force and effect merely on the ground that it is in the form of a data message (Stoop, 2009:113).

As mentioned before, Whatsapp is the most preferred social media platform for service of court processes due to its special features. Besides having the features shared by other platforms, it has an end-to-end encryption service, which helps secure privacy and confidentiality of the communicators as well as guarantees the authenticity of the communication at both ends of the message (Mahmoud, 2019:71). This special feature of the application works by replacing the message being sent with cryptic messages and only translates it back with the right keys upon delivery of the message to the intended recipient (Hacker Lexicon, 2016). The effect of this profound feature of the application is that all the chats and data like media, voice messages and documents sent via the application are secured so that not even the host, Whatsapp, can read or understand the data in its encrypted form and it therefore remains unintelligible until received by the person it is sent to in its unencrypted form (Tole, 2015:912). Whatsapp also has the advantage of its multiplatform flexibility, because it does not only work on many brands of mobile phones, but also provides the messaging service over web-based applications that run on computers as well (Mahmoud, 2019:71). It has also expanded its user base since it deals directly with contacts which are already saved on the contact list of a subscriber (Van der Merwe, 2014:297-326).

Section 22 of the ECT Act provides that electronic contracts (including those consummated via emails and SMS) are formed when and where the offeror receives the acceptance from the offeree. However, unlike the common law, section 23 of the ECT Act does not require an acceptance of an offer to come to the knowledge of the offeror for a contract to arise. The Act favours the reception theory as opposed to the common law information theory. To do otherwise is to disadvantage the offeree, who would have to wait for acknowledgment of receipt from the offeror, which might not come. While the reception theory under the ECT Act of South Africa is justifiable under the subject matter of contract which it relates to, and may give the impression that the Nigeria Supreme Court's reliance on "sending" rather than both "sending" and "delivery" of the text is plausible, it may not be tenable. The argument is, while the *Jafta Case*[55] deals with acceptance of a contract, the *Pazan Case*,[56] deals with the hearing notice, which is not only a constitutional right, but its receipt is the essence of it being sent. These two decisions demonstrate the fact that while courts in both jurisdictions have countenanced the impelling effect of technological advancement in the practice and procedure of

54 Prem, M., "Contracting in the Digital Age – Electronic Contracts" available online at <http://mprem.co.za/Publications/post/contracting-in-the-digital-age-electronic-contracts> accessed 29 September 2020.

55 [2008] 10 BLLR 954 (LC).

56 [2020] 1 NWLR (Pt. 1704) 70.

courts, the various e-platforms, adopted in the process of administration of justice, are not without varied degrees of challenges.

It can be safely argued that the adoption of service via social media platforms like Facebook, Whatsapp, Snapchat and others did not come to be as a result of an express statutory provision enabling the court to grant such applications or empowering applicants to make such applications. However, out of necessity or ingenuity, such applications were made and the court in some of these jurisdictions (particularly Nigeria), after evaluating the merit of adopting such platforms, granted the applications. They came to be as an act of judicial activism or proactive administration of justice. However, in some jurisdictions like South Africa, service can be done through e-platforms, which is permissible under the Electronic Communications and Transaction (ECT) Act. The Court of Appeal Rules 2013 of Nigeria and the 2019 Lagos State High Court (Civil Procedure) Rules have also incorporated service via e-platforms.

It is clear that most jurisdictions have accepted the electronic platform service of court processes owing to its multifarious advantages. These changes come in the aftermath of disruptive technology. However, it is necessary to ensure that these means of service of court processes are not deployed to the disadvantage of litigants or even counsel as the possibility of that occurring is high. It will be foolhardy for anyone or a system, to shy away from technology or attempt to subvert the effects of technology; however, it must be cautiously embraced.

Adoption of E-Platforms for Service of Court Processes in Selected Non-African Jurisdictions

In 2016, a Singaporean court granted an order permitting service through several electronic/social media platforms like Skype, email, Facebook and an internet message board. This was the order of the court in *David Ian Adrew Storey v Planet Arkadia Pte. Ltd.*[57] In this case, the court noted the absence of any local/domestic legislation authorising electronic service of court processes, but acknowledged the existence of judicial authorities in other jurisdictions sanctioning it with the exception of an email (Mahmoud, 2019:72). The court made reference to cases from jurisdictions where technologically enabled media have been deployed to serve court processes effectively. For instance, in Australia in *MKM Capital Pty Ltd. v Corbo & Poyser*[58] service of a default judgment on the Defendant was allowed to take place using Facebook. The court approved that Facebook could be used for service after the Applicant had satisfied it that the traditional methods of service were impracticable and the alternative method (Facebook) was reasonably likely to bring the documents to the Defendant's attention.

57 [2016] SGHCR 7.

58 SC (ACT), 12 December 2008. (Unreported).

Similarly, the New Zealand High Court in *Axe Market Gardens v Axe*[59] allowed an individual to be served with process via Facebook in commercial litigation over failed business transactions. Based on the failure of conventional efforts at service, because the defendant's whereabouts were unknown, the court consented to service through Facebook. The same happened in Canada in the case of *Burke v John Doe.*[60] In this case, the British Columbia Supreme Court allowed a plaintiff, Brian Burke, to serve his defamation claim via a message board on which the defamatory publications were posted. Service was thereafter effective on the defendants. Also, in the *Knott Estate v Sutherland case.*[61] The judge entered an order for substitutional service by ruling that the plaintiff could serve one Defendant through publication by forwarding a copy of the statement of claim to the Human Resources Department (HRD) where the Defendant had formerly worked and by sending a notice to the Defendant's Facebook page.[62]

Another example is the case of *AKO Capital LLP v TFS Derivative*,[63] which was brought to a court in England. In this case, the claimants had been experiencing difficulties locating one of the defendants, Fabio De Biase, a former employee of TFS. As a result, they applied for the court's authorisation to serve him a notice via his Facebook account. On the basis of Rule 6.15 of Civil Procedure Rules, *where it appears to the court that there is a good reason to authorise service by a method or at a place not otherwise permitted by this part, the court may make an order permitting service by an alternative method or at an alternative place.* The court granted the application having been satisfied by the applicants that the Facebook page they sought to serve him on actually belonged to him. He was active on it as he regularly visited and had recently accepted friend requests. The court came to the conclusion that service of court processes could be effectively effected through social media platforms. It relied on the Rules of Court (Amendment No. 4) Rules of Court[64] of the Singapore statutes and construed electronic means to include various social media platforms, such as Facebook, Snapchat, Instagram, Whatsapp and other smart phones messaging platforms linked to mobile phone (Mahmoud, 2019:72).

In Australia, the courts have held that service of court processes effected through Facebook Messenger sent to the Defendant constitutes valid and sufficient service of the processes concerned. This was the decision of the Australian court in *Seemed v Saunder.*[65] The court took this iconoclastic stance basing its reasoning on the fact that although the Australian Rules of Civil Procedure (ARCP), do not contain express provisions authorising service by means other than hard copy, given the cost-saving

59 2009, CIV: 2008-845-2676, High Court, New Zealand.

60 (2013) BCSC 964.

61 [2009] AJ No. 1539 (Alta. Q.B.).

62 See also the New South Wale decision in *Mothership Music Pty Ltd. v Darren Ayre (T-As Vip Entertainment and Concepts Pty Ltd.),* [2012] NSWDC 43, where service of an injunction application was permitted by e-mail transmission and by Facebook.

63 (*2012*) 12(2) E-Commerce. Law Reports 4, 5.

64 Rules of Court (Amendment No. 4) Rules of Court 2011 (S 513/2011).

65 [2011] QDC 217 DCJ 08/09/2011.

effect and interest of efficiency, the medium adopted was valid (Mahmoud, 2019:73). A Canadian court followed the reasoning above in *Boivin & Associes v Scott*[66] and granted service through a social media platform even though there was no express provision for it in the Rules of Court (Bellengere and Swales, 2018:454-475).

It is obvious that in Europe and Asia, particularly the jurisdictions from which the issue of using e-platforms to serve court processes has been specifically examined, service of court processes via electronic platforms is prominent (Browning, 2010). The adoption of these e-platforms by these jurisdictions is to further the course of justice and ensure speedy justice delivery. This prevents defendants from evading service of court processes, which is a norm if service is done through traditional means. Service of court processes is important in adjudication, so defendants may resort to evade service in an attempt to frustrate legal proceedings.

The Use of E-Platforms for Service of Court Process in Nigeria during and Post Covid-19

It is apposite to note that the advent of the novel corona virus (Covid-19) has left the justice administration process and its administrators with no option, but to aggressively embrace technological innovations for the conduct of proceedings and ancillary functions. Prior to the emergence of the audacious Covid-19, most jurisdictions, particularly Nigeria, deployment of e-platforms by courts was sparingly done. However, the outbreak of the pandemic has changed the narrative positively. The Chief Justice of Nigeria (CJN) as the Chairman of the National Judicial Council (NJC) issued the "National Judicial Council Covid-19 Policy Report and Guidelines for Court Sittings and Related Matters"[67] Part E thereof, makes copious provisions on the adoption and operation of virtual hearing of cases by various courts in Nigeria.[68] It permits courts to adopt virtual hearings for all matters except extremely important and time-bound ones, which are contentious and require tendering of evidence. Only these cases are to be heard in a courtroom with all parties physically present as it used to be prior to the outbreak of the pandemic. The various heads of courts have also issued practice directions adopting virtual hearings. The Chief Judge of Lagos State, issued the "Lagos State Judiciary Remote Hearing of Case (Covid-19 Pandemic Period) Practice Direction"[69] same has mainstreamed the use of e-platforms such as Zoom meetings, video conferences, GotoMeetings, Skype, Whatsapp, etc. for the filing and conduct of cases. Pursuant to the practice direction, the Ikeja Judicial Division of the court used a Zoom meeting to deliver judgment in *The People of Lagos v Mr. Olalekan Hammed*.[70]

66 (2011) QCQC 10324 (CanLII).

67 *National Judicial Council Covid-19 Policy Report and Guidelines for Court Sittings and Related Matters of Ref. No. NJC/CIR/HOC/II/660 of 7th May, 2020.*

68 Section 1, 2, 4, 6 and 7 of the *National Judicial Council Covid-19 Policy Report and Guidelines for Court Sittings and Related Matters of Ref. No. NJC/CIR/HOC/II/660 of 7th May, 2020.*

69 *Lagos State Judiciary Remote Hearing of Case (Covid-19 Pandemic Period) Practice Direction of 4th May, 2020.*

70 Suit No. ID/9006C/2019 judgment delivered on 4th May, 2020.

The Lagos State High Court Civil Procedure) Rules 2019 has also factored in the use of email, Whatsapp and other electronic platforms for judicial activities, such as service of notices.[71] The President of the National Industrial Court of Nigeria has also issued the court's remote hearing of cases practice direction.[72] Section 7 enjoins the court to shun physical hearing of cases except those that are urgent, important and contentious, which require physical hearings. Hearing notices are to be served online via the court's website (Awomolo 2020). The practice direction issued by the Chief Judge of the High Court of the Federal Capital Territory, Abuja, approves of the deployment of virtual hearing by providing that:

> Causes and matter and other proceedings that can be determined on the basis of affidavit evidence may, as far as practicable, be heard and disposed of by Remote Hearing on virtual platforms such as Zoom, Microsoft Teams, Skype, or other audio or video platform as may be approved by the Chief Judge. This includes cases initiated by originating summons or originating motion, application for enforcement of fundamental right and interlocutory motions, as well as adoption of written final addresses and delivery of judgments/rulings. All participants in a remote hearing shall dress appropriately for court proceedings.[73]

Other states' high courts have also issued practice directions adopting virtual hearing of cases through various e-platforms despite the challenges involved in using them.[74] It is obvious that technological advancement cannot be shunned in the administration of the justice sector, particularly post-Covid-19. The judiciary in Nigeria and all over the world would have to creatively deal with the inherent challenges of these e-platforms.[75]

Conclusion and Recommendations

Gleaning from the above, it is obvious that traditionally, in Nigeria, hearing notices used to be in hard copy issued under the hand of the Court Registrar pursuant to the order of the court. However, improvements in technology in the justice sector have disrupted the way court processes are filed and served. Today, there is e-filing of court processes and service of process via social media platforms in various jurisdictions in the world, including Nigeria.

In Nigeria today, the courts have held that aside the traditional hard copy hearing notice, a litigant who is to be put on notice of the next date a matter is coming up, could be duly notified through a phone call as long as the call is made at least 48 hours before the date. Recently, courts have extended the service of hearing notices to text messages by the

71 Order 9 Rule 5(1) Lagos State High Court (Civil Procedure) Rules, 2019.

72 Section 7 of National Industrial Court of Nigeria Practice Directions and Guidelines for Court Sitting 2020 issued on the 13th day of May, 2020.

73 Section 9 High Court of the Federal Capital Territory, Abuja Covid-19 Practice Direction, 2020.

74 The Ogun State High Court Practice Direction No. 2 of 5th May, 2020.

75 Onanuga, A. 2010. "Why Virtual Proceedings is Legal, Constitutional by Falana" available at <https://www.thenationonlineng.net> accessed 28 June 2020.

Court Registrar. Service of hearing notice through text message, although valid through the pronouncement of the court, is subject to several challenges as outlined above. Thus, it has been argued that these challenges make service of a hearing notice via text message unsuitable. The only means of confirming delivery of a text in the event of a dispute is to verify from the network provider, which in itself is not an easy task and the litigant should therefore not be exposed to it. Some mediums such as Whatsapp and phone calls are devoid of these challenges and therefore, more suitable, reliable and verifiable. Emphasis is placed on sending a text message to a recipient and this is viewed as translating to service, which is not tenable because the requirement of a fair hearing entails not just the sending a text message, but also ensuring its delivery/receipt. However, this is not guaranteed due to factors already identified.

Based on the discussion above, it is recommended that whenever the opportunity presents itself, the Supreme Court, due to the various challenges identified with a text message as a medium of communication, should hold that in addition to a text message for service of a hearing notice or any other court process, a call should be made or a Whatsapp message sent to ensure certainty of receipt. A text message alone should not be sufficient in giving notice of a proceeding as it is subject to several inhibitions.

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