

THE IMPORTANCE OF ELECTRONIC EVIDENCE AMIDST THE CORONAVIRUS PANDEMIC by Paul Kalejaiye¹

The outbreak of the coronavirus pandemic has led to a shutdown of so many sectors worldwide, including Nigeria, and the legal sector has not been left out of the equation. The pandemic has led to several companies and individuals having to resort more to the use of electronic platforms in order to communicate with each other, discuss and enter into business transactions, enter and execute commercial agreements, hold meetings, and even in recent times, hear court proceedings and deliver court judgments. Some of the electronic platforms that have been widely used are Zoom, Skype, WhatsApp and Facebook. It is certain that a lot of legal issues will arise from the use of these electronic platforms during and after the period of the pandemic. Some of the likely issues in Nigeria will be whether a company's extra-ordinary general meeting held via any of the electronic platforms complies with the provisions of the Companies and Allied Matters Act with respect to place of meeting² and whether the courts can order remote hearings despite the provision of the Constitution of the Federal Republic of Nigeria 1999 (as amended) on court proceedings to be held in public.³

It is worthy to mention that prior to the period of the pandemic in Nigeria, there was a widely accepted need to amend our laws, Rules of Court (civil & criminal) and Practice Directions to make provision for the admissibility of electronic evidence. The frontrunner to the admissibility of computer generated/electronic evidence came in the year 2011 by the enactment of the Evidence Act 2011. It was enacted by the National Assembly by virtue of the power conferred upon it by the Constitution of the Federal Republic of Nigeria 1999 (as amended)⁴, and signed into law by the President of Nigeria. The Evidence Act 2011 also amended the meaning of documents to include computer generated/electronic evidence⁵. Furthermore, the Evidence Act 2011 also provides for the conditions to be satisfied before a person can rely on computer generated/electronic evidence as well as the relevant Certificate of Authentication to be made by the system operator.⁶

With the introduction of the admissibility of computer generated/electronic evidence by the Evidence Act, all the courts in Nigeria started admitting computer

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² Section 216

³ Section 36(3)

⁴ Item 23, Part 1 of the Second Schedule

⁵ Section 258

⁶ Section 84 (5)

generated/electronic evidence tendered by a party to a suit in evidence, so far such party complies with the conditions for its admissibility stipulated in Section 84 of the Evidence Act 2011. It also became sacrosanct that the Rules of Court (civil and criminal) reflect and provide for acceptance of the use of electronic mails and other forms of electronic evidence. An example is the provision of the use of electronic mails by the Lagos State High Court (Civil Procedure) Rules 2019 as a form of substituted service of court processes on a party.⁷

Another example is provision of the Administration of Criminal Justice Act 2015 (“ACJA”) for the recording of the confessional statement of suspects in writing and electronically on a retrievable video compact disc or such other audio visual means by the⁸. The ACJA also provides that the Attorney-General of the Federation shall establish an electronic and manual database of records of arrest at the Federal and State level⁹. The ACJA further provides that where the evidence of a technical, professional or expert witness would not ordinarily be contentious as to require cross-examination, the court may grant leave for the evidence to be taken in writing or by electronic recording device¹⁰, and that court proceedings may be recorded electronically and verbatim.¹¹

The above examples are as contained in the relevant Rules of Court (civil and criminal) prior to the outbreak of the pandemic. In order to reduce the spread of the coronavirus, the need arose for the courts to take steps to minimise the number of lawyers and litigants that would be in the courtroom at a point in time, maintain social distancing during court proceedings and the courts began to consider the use of electronic platforms to conduct remote hearings. In a recent move, the Chief Judge of Lagos State passed the Practice Direction for Remote Hearings of Cases (Covid-19 Pandemic Period) (“the Practice Direction”). The Practice Direction provides for the electronic filing of court processes, service of court processes electronically, payment of filing fees electronically except where same is impracticable, remote hearings of cases through Zoom, Skype for business or any other video communication method approved by the court, recording of the proceedings of the remote hearing by the court, adoption of written addresses and delivery of judgment. The Practice Direction is to come into force on 4 May 2020.

Despite the criticism from some legal practitioners that the Lagos State High Court cannot by a Practice Direction override the provisions of the Constitution of the Federal Republic of Nigeria 1999 (as amended) on court proceedings to be held in

⁷ Order 9 Rule 5(1)

⁸ Section 15(4)

⁹ Section 29(5)

¹⁰ Section 362(1)

¹¹ Section 364(1)

public, and which discussion on its legality or not I will not want to delve into now, it is a welcome and innovative development by the Chief Judge of Lagos State in order to immensely curb the spread of the pandemic, maintain the social distancing rules, ensure that litigants and the general public can still have access to courts during this period and the administration of justice is not halted.

The introduction of the Practice Direction gives credence to the fact that electronic evidence will be at the front burner of most evidence to be tendered in court either during or immediately after this pandemic period. Parties will rely more on computer generated/electronic evidence to prove their cases in court and even the courts will rely on the electronic recordings of the remote hearings as record of the court's proceedings. All the superior courts of record had already started accepting the use and reliance on cases reported in electronic law reports like LawPavilion and Legalpedia. Legal practitioners who seldom explore the use of electronic evidence will be compelled to familiarise themselves with the provisions of the Evidence Act 2011, as most briefs that will arise will majorly involve a reliance on computer generated/electronic evidence. Strict compliance with the conditions stated in the Evidence Act 2011 will be necessary in order to make such evidence admissible before the courts.

Furthermore, more attention is being directed at the other superior courts of record, Federal High Court, Court of Appeal and Supreme Court, to amend their Rules of court to accommodate the use of electronic platforms for either the service of court processes or for the conduct of court proceedings and delivery of judgments and rulings. An example of such Rules that need amendment is the Federal High Court (Civil Procedure) Rules 2019 on substituted service of court processes¹² and also to include the use of remote hearings. The other superior courts, the Court of Appeal and Supreme Court, had earlier incorporated the service of Hearing Notices of the courts through electronic mail but there is an anticipation that a Practice Direction will be passed by both courts to provide for remote hearings.

On the corporate governance part, company secretaries will need to pay close attention to the fact that irrespective of the use of electronic platforms, strict compliance must be accorded to the provisions of the Companies and Allied Matters Act ("CAMA") with respect to Notice and Agenda of meeting, length of Notice of meeting¹³, content of Notice of meeting¹⁴, persons entitled to Notice of meeting and service of the Notice of meeting¹⁵, additional Notice of meeting by public

¹² Order 6 Rule 5

¹³ Section 217

¹⁴ Section 218

¹⁵ Sections 219 and 220

companies¹⁶, procedure of voting at meetings¹⁷, proxies¹⁸, quorum of meeting¹⁹, resolutions passed at such meetings²⁰ and the categorisation of the meeting as board meeting, statutory (for public companies within six months of incorporation) or annual general meeting (both of which the CAMA provides must be held in Nigeria) or extraordinary general meeting which can be held anywhere. Private companies can also explore the use of written resolutions by both the board of directors and the general meeting²¹.

Pursuant to the foregoing, it will be very interesting to observe how computer generated/electronic evidence will be heavily relied upon by parties for all their transactions and to prove their cases in court, and to see how parties will challenge the computer generated/electronic evidence bearing in mind the disadvantages of using such electronic platforms in line with the current technological realities in Nigeria. A wise man once said that “only time will tell”. We continue to observe and actively participate in the process.

Disclaimer:

Nothing in this Article should be construed as legal advice. The article is a general summary of developments, principles, rules, laws and practice direction of interest on the subject of discussion and may not apply directly to any specific circumstance. Professional advice should therefore be sought before any action is taken.

¹⁶ Section 222

¹⁷ Section 224

¹⁸ Section 230

¹⁹ Section 232

²⁰ Section 233

²¹ Section 234