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EDITORIAL NOTE

The Section on Legal Practice is fully back on track and this edition of the Section's Journal is a further testimony to that fact.

The Section on Legal Practice Journal is published for a reason, and that reason is to share and encourage scholarly practice-based articles on topical issues. Since our first publication, the journal has grown steadily with a remarkable increase in readership and article submissions. I am delighted by the growing reputation and visibility of our publication in the judiciary as manifest in the various decisions of the superior courts where articles in our journals have been cited. We are aware that one of our publications on Election Petitions is considered a treasure trove of information for those engaged in Election matters, despite the numerous changes in our Electoral Laws. The feedback we get encourages us to keep publishing the journal.

I never thought I would ever see a judgment of the Code of Conduct Tribunal remove the Chief Justice of Nigeria, the head of the third arm of Government. However, that decision is on appeal and as the matter is *sub-judice*, I will say no more. However, the Code of Conduct Tribunal, the jurisdiction of the Federal High Court over AMCON matters, the need for legislation on Hate Speech and the tenability of a trial-within-trial under the Administration of Criminal Justice Law are some of the articles in this edition. The social media has now become a force that cannot be ignored and, in this publication, the potential of WhatsApp as a medium of substituted service in the Nigerian Judicial System has been considered.

The ubiquity of ATMs and the related problem of unauthorized withdrawals that has driven dissatisfied customers to seek legal redress in court remains a burning issue and an article in this publication critically examines the judicial approach to the resolution of such disputes. With the frequency at which matters are being struck out due to the inadvertence of counsel, the need for meticulousness in signing court processes, as stressed in one of the articles, cannot be

overemphasized. Equally topical is an article juxtaposing the duties and current challenges confronting legal practitioners in Nigeria and the need for them to be addressed through the various reforms proposed by the author.

In this technology driven age, it is imperative that legal practitioners are constantly reminded of the Rules of Professional Conduct that regulate their conduct, especially as most legal practitioners find the allure of expressing legal opinions on social media irresistible. By constantly posting the work we do, the clients we do them for, expressing our opinions on matters *sub-judice* on social media platforms, are we not running afoul of our Rules of Professional Conduct? Does it constitute a breach of client confidentiality? How much information is too much information?

I cannot conclude my note without acknowledging the contributions of Mr. J. B. Daudu, SAN, Mallam Yusuf Ali, SAN, Mr. Emmanuel Ukala, SAN, Mr. A. B. Mahmoud, SAN, Mrs. Funke Adekoya, SAN and Mr. D.C. Denwigwe, SAN towards the Section and putting this Journal fully back on track. Distinguished Senior Advocates, I am grateful.

Please enjoy the journal.

Miannaya A. Essien, SAN, CArb.

April 2019

Article 4

THE POTENTIAL OF WHATSAPP AS A MEDIUM OF SUBSTITUTED SERVICE IN THE NIGERIAN JUDICIAL SYSTEM

By Rilwan F. Mahmoud*

Abstract

Expediency and fairness are two fundamental factors to be considered in determining an application for substituted service. This is because, while it is important to ensure the avoidance of unreasonable delay on account of difficulties regarding the service of processes, it is also necessary to ensure a fair hearing. While substituted service on platforms such as WhatsApp is a relatively novel concept, the traditional methods such as publication in newspapers and the pasting of notices on buildings are fast becoming idealistic and merely symbolic. This paper evaluates the practicality of WhatsApp as an alternative medium of service in Nigeria. It does so by considering the implementation of social media platforms for substituted services in other jurisdictions as well as the state of electronically generated evidence under the Nigerian Evidence Act. The paper finds that WhatsApp can be successfully utilized as an alternative to some far less effective methods.

SUBSTITUTED SERVICE OF LEGAL PROCESSES IN NIGERIA

As a general rule, service of legal processes, particular those initiating proceedings, should be effected personally on the respondent.[1] Service of originating processes on a defendant is a necessary condition precedent to the exercise of jurisdiction by any court out of whose registry the originating processes were issued.[2] The reason for this is to ensure that the respondent receives adequate notice so that he might, in addition to being aware of the process, 'resist, if he may, that which is sought against him.[3] Where an initiating process is not served as required by the law, such a failure is fundamental and the party who ought to have been served is

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[1] Order 6 Rule 1 of the Federal High Court Civil Procedure Rules 2009.

[2] National Bank Ltd. V. Guthrie (1993) 3 NWLR (Pt. 284) 643 at 659 Paras E-F, Per Uwais JSC.

[3] Odutola v. Kayode (1994) 2 NWLR (Pt. 324) 1 at 21 Paras D-E, per Mohammed JSC.

entitled *ex debitio justitae* to have the order set aside as a nullity.[4] The service is to be carried out by the sheriff of the appropriate court, preferably by delivering a copy of the document personally to the intended recipient.[5] It is pertinent to note, however, that such a service can be waived by entering an unconditional appearance and responding to the claims of the party on whose behalf service ought to be made.[6] Where the person sought to be served is a minor or under legal disability, the processes may be served on his guardian or his legal representative.[7] Where a party sought to be served has elected to authorize a legal practitioner to accept service on his behalf, the Legal practitioner or an agent of his, can receive such a process and enter an appearance on his behalf.[8]

However, where it appears to a court that it is not possible to effect service through one of the conventional means, whether or not an attempt at personal service has been made the court may order that a substituted means of service should be utilised instead.[9] The primary consideration of a court in an application for substituted service, is how best to bring notice to the attention of the respondent therefore, the court must be satisfied that all practical medium of effecting personal service has proved abortive (or is likely to prove abortive in certain circumstances) and that the proposed medium of service will very likely achieve the same objective.[10] This can be done by leaving a copy of the process with an agent or an adult at the last known address (residential or place of business) of the person sought to be

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[4] Kida v. Ogunmola (2006) 13 NWLR (Pt. 997) 377 at 393 Paras G-H, per Musdapher JSC; Okogi v. Okoh (2010) 9 NWLR (Part 1199) 311, 326G per Omoleye, JCA, and Okoye v. Centre Point Merchant Bank Limited (2008) 15 NWLR (Part 1110) 335, 352C-E per Tabai, JSC.

[5] Section 96 – 99 of the Sheriff and Civil Process Act Cap 6 LFN 2004; Part II of the Sheriff and Civil Process Act Cap 6 LFN 2004 defines the powers and duties of the Sheriffs, deputy sheriffs, and bailiffs; Kida v. Ogunmola (2006) supra; Order 6 & 7 of the High Court of Kwara State Civil Procedure Rules 2005; and Order 6 Rule 1 of the Federal High Court Civil Procedure Rules 2009.

[6] Odua Investment v Talabi (1997) 10 NWLR (Pt. 523) 1 at 51 Para G-H, Per Ogundare JSC.

[7] Order 6 Rules 10 and 11 of the Federal High Court Civil Procedure Rules 2009.

[8] Order 7 Rule 3 of the High Court of Kwara State Civil Procedure Rules 2005 and Order 6 Rule 3 of the Federal High Court Civil Procedure Rules 2009.

[9] P Farlam & DE van Loggerenberg *Erasmus Superior Court Practice* (Cape Town: Juta 2011) at B1-27 and 6 Rule 5 of the Federal High Court Civil Procedure Rules 2009.

[10] Okoye v. Centre Point Merchant Bank Limited (2008) 15 NWLR (Part 1110) 335, 352C-E per Tabai, JSC.

served, or any other person as long as the court is satisfied that there is a reasonable likelihood that the processes will come to the knowledge of the person sought to be served.[11] It can also be achieved by placing an advert in the Federal Government Official Gazette, or in a reputable newspaper circulating within the jurisdiction or, by placing a notice at the Court-House or in a public place in the jurisdiction where the processes sought to be served were instituted.[12] This notwithstanding, substituted service is not merely a symbolic gesture towards a respondent whose whereabouts is uncertain, rather it is a way of achieving in law the same result as if the processes, notice or order has been personally delivered to the intended respondent.[13]

An applicant for substituted service typically sets out the details of the nature, grounds and extent of the claim, the jurisdiction of the court to entertain the claim, and the manner of service which the court is sought to be ordered as well as evidence to be presented to convince the court that unsuccessful attempts have been made to ascertain the present whereabouts of the respondent.[14] These requirements are often presented for the purpose of convincing the court that although a traditional medium of service will not be used, the method sought is warranted and there is a realistic possibility that service will indeed be adequately accomplished.[15]

The prospects of social media platforms in the amelioration of the Nigerian Judicial Process

Technology has increasingly become a necessary part of human interactions globally with billions of people connected to the internet via computer systems, mobile phones, and other electronic devices daily.[16] This growth is

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[11] Order 6 Rule 5 of the Federal High Court Civil Procedure Rules 2009 and Order 7 Rule 5(1) of the High Court of Kwara State Civil Procedure Rules 2005.

[12] Ibid.

[13] Okoye v Central Point Merchant Bank Limited (2008) supra at 352; see also the South African cases of *Pretoria City Council v Ishmail* 1938 TPD 246 and *Engen Petroleum Ltd v Multi Waste (Pty) Ltd* 2012 5 SA 596 (GSJ).

[14] Rule 6(1) of the High Court of Kwara State Civil Procedure Rules 2005 and P Farlam & DE van Loggerenberg *Erasmus Superior Court Practice* (Cape Town: Juta 2011) at B1-27.

[15] Ibid

[16] World (meters), "world population", http://www.worldometers.info/world-population/ retrieved on the 30th of September, 2016.

aptly reflected in social media websites and applications where the number of subscribers has substantially risen over the last few years with popular social media websites and applications such as Facebook and WhatsApp having over a billion subscribers each.[17] This regardless, the Nigerian courts still seem to have an over-cautious attitude to social media information and other forms of electronic information being introduced into evidence.[18]

The need to understand the nature of electronic devices and their potentials in the Nigerian judicial system becomes even more imperative when it is considered that while academics might have time to study the changes and effects brought about by the information revolution, most legal practitioners simply do not have the time to study these quantum changes and this limitation is bound to negatively affect the use of such evidence and the legal applications applicable to it.[19] One unavoidable implication of this limitation is the exercise of extreme caution on the use of and value to be placed on electronic information.[20] This caution due in part to the fact that courts have far less experience with electronic evidence than with paper owing to the fact that some judges and lawyers are unfamiliar with technology and thereby logically question the integrity of the proffered evidence.[21]

The introduction of electronic evidence into the Nigerian procedural laws has been reactionary at best and this is primarily due to the overcautious and conservative approach to judicial reforms in the Country. As is the case with several common law countries, the traditional procedural rules of civil or

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[17] Statista "Leading social networks worldwide as of April 2016, ranked by the number of active users" http://www.statista.com/statistics/272014/global-social-networks-ranked-by-number-of-users/ retrieved on 26th July 2016.

[18] Alaba Omolaye-Ajileye (2016) "Admissibility of Electronic Evidence in Civil and Criminal Proceedings" Being a paper delivered at the Refresher course organized for Judicial Officer by the National Judicial Institute (NJI) from 14th – 18th March 2016. http://nji.gov.ng/images/Workshop_Papers/2016/Refresher_Magistrates/s09.pdf Retrieved on the 26th of February, 2019.

[19] Van der Merwe D. "A Comparative overview of the (Sometimes Uneasy) relationship between digital information and certain legal fields in South Africa and Uganda" http://dx.doi.org/10.4314/pelj.v17i1.07 retrieved 20 June 2016.

[20] Collier D (2005) "Evidently not so Simple" The quarterly law review for people in business VOL 13 PART 1 ISSN 1021-7061.

[21] Kenneth N. Rashbaum, Matthew F. Knouff & Dominique Murray "Admissibility of Non-U.S. Electronic Evidence" RICH. J. L. & TECH. 9 XVIII (2012), http://jolt.richmond.edu/v18i3/article9.pdf retrieved on the 20 July 2017.

criminal law are not dynamic enough to accommodate all of the electronically stored information and the need for clear and concise definitions of fundamental terms of electronic evidence is most glaring.[22] Nigeria only recently made provision for the admissibility of computer-generated or electronic evidence in the Nigerian Evidence Act, 2011 (Act No. 18) 'NEA, 2011'.[23]

While the potentials of substituted service of judicial processes via electronic applications such as WhatsApp are immense, it is still a relatively novel concept and it is substantially different from the traditional means of substituted service such as publication in newspapers and the pasting of notices on buildings.

Features of WhatsApp as a social media platform

WhatsApp is a social media application designed primarily for smartphones and computers. It has been acquired by another social media giant, Facebook, and surpassed over 1 billion users worldwide in over 180 countries as at July 2017 making it the largest online messenger app in the world.[24] To work, WhatsApp requires a smartphone or a tablet with a SIM card and an internet connection. The application uses the phone number of the SIM card as its username and the account is exclusive to one phone at a time although the contacts (the names and contact details of other users) can be transferred over to other devices.[25] Social media websites and applications have become a potent hub for information in the 21st century making it a very important source of electronic evidence.[26] They are generally designed to allow individuals to construct a public or semi-public profile within a bounded system, articulate a list of other users with whom they share a connection and view and traverse their list of connections and

[22] Chinwe .J. (2009) 'Admissibility of Documentary/ Electronic Evidence Issues, Challenges and Options' Ibadan, University Press, p. 15.

[23] Section 84 of the NEA, 2011.

[24] www.whasapp.com.

[25] https://www.webwise.ie retrieved on 9th of March, 2019.

[26] De Villiers DS (2010) "Old 'documents', 'videotapes' and new 'data messages' – a functional approach to the law of evidence (part 1)" Tydskrif vir die Suid-Afrikaanse Reg at 558.

those made by others within the system.[27] A common characteristic of social media websites and application is that subscribers use them to add contacts in order to build relationships thereby giving them access the subscriber's profile information for purposes such as making new friends and maintaining existing ones as well as gaining professional contacts and just staying connected generally.[28]

While WhatsApp shares many features and purposes with other social network sites and applications one of its primary advantages over some of the others is the ease with which it has expanded its user base especially since it deals directly with phone contacts which are already saved on the contact lists of a prospective subscriber.[29] WhatsApp has capitalized on a growing demand to create a brand of reliable and easily accessible instant messaging service while also being free of advertisements.[30] Another advantage of WhatsApp is its multiplatform flexibility because it not only works on many mobile platforms it also provides the messaging service over web-based applications that run on computers as well.[31] One other positive feature of the application is its end-to-end-encryption service which helps secure privacy and guarantees the authenticity of communications at both ends of the message. The End-to-end-encryption works by replacing the messages being sent with cryptic messages and only translates it back with the right keys upon the message delivery to the intended user.[32] The implication of this is that all the chats and data like voice messages, media,

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[27] Boyd D M, & Ellison N (2007) "Social network sites: Definition, history, and scholarship" Journal of Computer-Mediated Communication (Vol 13 no 1).

[28] Roos A. 'Privacy in Facebook Era: A South African Legal Perspective' http://uir.unisa.ac.za/bitstream/handle/10500/7643/A_Roos_Inaugural_.pdf?sequence=1 retrieved on 20th July 2016.

[29] Khatri S. and Narula K. (2015) "General maturity model for social messaging application" International Conference on Reliability, Infocom Technologies and Optimization: Trends and Future Directions, ICRITO

[30] Tole Sutikno et all (2016) "WhatsApp, Viber, and Telegram: which is the Best for Instant Messaging?" International Journal of Electrical and Computer Engineering (IJECE) Vol. 6, No. 3 at 910 and Mensa-Bonsu, M.A.S (2015) 'The old order changeth and giveth way to the new: WhatsApp debuts as a means of substituted service in Ghana. *Oxford University Commonwealth Law Journal*, vol.15, pp. 149-154.

[31] Mathew, A.B., Madhu Kumar, S.D (2015) 'Analysis of data management and query handling in social networks using NoSQL databases' International Conference on Advances in Computing, Communications, and Informatics (ICACCI), pp. 800-806.

[32] Hacker Lexicon: What is End-to-End Encryption? 2016. Available: https://goo.gl/o3ZKuf.

and documents are secured so that not even the host, WhatsApp can read or understand the data in its cryptic form as it remains unintelligible.[33]

The global trend of WhatsApp as a means of substituted service of legal processes

In 2015, a Ghanaian court approved an application for substituted service by use of the WhatsApp mobile application.[34] This was the first of its kind in Ghana but the potential impact of this decision is far-reaching and extends not only to service of processes but to other aspects of procedural law as well.[35] More recently, in 2016, a high court in Singapore granted an order allowing substituted service through email, Skype, Facebook and an internet message board in **David Ian Andrew Storey v Planet Arkadia Pte Ltd** and others 'David Storey'.[36] In David Storey, the court while noting the absence of any local law on service through an electronic medium, acknowledged some authorities in other jurisdictions that have allowed substituted service through an electronic means other than email.[37] In reaching this decision, Zhuang Wen Xiong AR highlighted a number of jurisdictions[38] that have recently introduced the permission of substituted service by social messaging services which include Australia,[39] Canada,[40] England,[41] New Zealand[42] and South Africa.[43] The court in relying on the Rules of Court (Amendment No 4) Rules of Court 2011 (S 513/2011) of the Singapore statues, construed 'electronic means to include WhatsApp and other smartphone messaging platforms linked to mobile phone numbers'.[44]

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[33] Tole Sutikno et all at 910.

[34] *Kwabena Ofori Addo v Hidalgo Energy and Julian Gyimah* Writ no AC 198/2015 (unreported).

[35] Mensa-Bonsu at 154.

[36] *David Ian Andrew Storey v Planet Arkadia Pte Ltd and others* [2016] SGHCR 7.

[37] David Storey paragraph 1.

[38] David Storey, paragraph 10.

[39] *MKM Capital Pty Ltd v Corbo & Poyser* (Supreme Court (ACT), 12 December 2008 (unreported).

[40] *Burke v John Doe* 2013 BCSC 964.

[41] *AKO Capital LLP v TFS Derivatives*, February 2012 (unreported).

[42] *Axe Market Gardens v Axe* (High Court (New Zealand), 16 March 2009, CIV: 2008-845-2676.

[43] *CMC Woodworking Machinery (Pty) Ltd v Pieter Odendall Kitchens* [2012] ZAKZDHC 44.

[44] David Storey paragraph 12.

Also, in Australia, a court in determining the validity of service made via a Facebook message sent to a defendant, held it was sufficient for the purpose of service of litigation processes (*Symes v Saunders*[45] (Symes). The reasoning of the Court for the rather unorthodox procedure was that though substituted service by Facebook was not expressly provided for in the Australian Rules of Civil Procedure, it was adequate in that particular instance especially giving the cost savings and the interest of efficiency.[46] This position was also shared by a Court in Canada where an application for an order to serve motion proceedings via the defendant's Facebook account was granted (*Boivin & Associés c. Scott* 2011 QCCQ 10324 (CanLII) '*Boivin & Associés c*'). This was held although there was no rule expressly granting this.[47]

In South Africa, the premier decision authorizing social messaging as a medium of service came in the case of **CMC Woodworking Machinery (Pty) Ltd v Pieter Odendaal Kitchens** (2012 (5) SA 604 (KZD) 'CMC'). In CMC, Per Steyn J of the KwaZulu-Natal High Court in Durban granted an application for substituted service of a notice of set down and pre-trial directions on the respondent via a Facebook message, in addition to the notice being published in a local newspaper.[48] The applicant, who was the plaintiff in the main action, instituted an action against the respondent to recover a sum of money which was the purchase price of a woodwork machine[49]. The notice of set down was served on the respondent's attorneys and the defendant defended the action and filed both a plea and a claim in reconvention. However, in April 2010, the respondent's attorneys served a notice of withdrawal as attorneys of record. Since then, the applicant attempted to serve various notices on the respondent without success and launched the present application as it viewed the respondent's 'evasive

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[45] [2011] QDC 217 DCJ 08/09/2011.

[46] Adrian Bellengère and Lee Swales (2016) "Can Facebook ever be a substitute for the real thing? A review of *CMC Woodworking Machinery (Pty) Ltd v Pieter Odendaal Kitchens* 2012 (5) SA 604 (KZD) Stell LR 454.

[47] Bellengère and Swales at 458 and Kim Hawkey 'Service of court process by social media': *CMC Woodworking Machinery (Pty) Ltd v Pieter Odendaal Kitchens* (KZD) (unreported case no 6846/2006, 3-8-2012) http://www.saflii.org/za/journals/DEREBUS/2012/40.pdf. Retrieved on 6th of October, 2018.

[48] Ibid.

[49] Ibid.

conduct as prejudicial to its case and hampering its preparation for trial'.[50] In proving that that service via Facebook was warranted and that there was a real likelihood that the notice would be brought to the attention of the respondent, the applicant in a supplementary affidavit showed that other than the Facebook account, the defendant had not provided an email address or telephone number.[51] The court held that the applicant had discharged this onus and granted it leave by way of substituted service to serve the notice on the respondent via its Facebook message account and as a precautionary step, ordered the same notice to be published in a local newspaper to promote legal certainty.[52]

An Overview of the Regulation of Electronic Evidence in Nigeria

The most noticeable improvement upon the previous Evidence Act was the legal recognition of a "*statement contained in a document produced by a computer*".[53] Before the NEA, 2011, the Nigerian courts relied on deductions from procedural rules as well as obiters to admit and rely on electronically stored information, even so, the skepticism and extreme cautiousness were still very evident in some cases. An example of this was brought to light in ***Esso West Africa Inc v. T. Oyegbola***[54] where the court had to determine whether computer statements of account and copies of their ledger were admissible as books of accounts under section 37 of the previous Nigerian Evidence Act 'NEA, 1990'.[55] The Trial court rejected the evidence as a book of account as contemplated by the section on the ground that they did not constitute the type of books of account envisaged by the law. While disagreeing with the line of reasoning by the trial Judge, The Supreme Court in recognising the limitations of legal recognition of electronically stored information held as follows:

"The Law cannot be and is not ignorant of modern business methods and must not shut its eyes to the mysteries of the computer. In modern times, reproduction or inscriptions on ledgers or other documents by a mechanical process are

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[50] CMC (supra) Paragraph 4.
[51] Ibid. Paragraph 10.
[52] Ibid. paragraph 13.
[53] Ibid.
[54] (1969) 1 NMLR 194, SC.
[55] Nigerian Evidence Act (Cap 112) Laws of the Federation of Nigeria 1990.

commonplace and section 37 cannot, therefore, apply to "books" of account ... so bound and the pages ... not easily replaced."[56]

In ***Nuba Commercial Farms Ltd & Anor v. NAL Merchant Bank Ltd & Anor***, the absence of the legal recognition of electronically stored information was also evident when the court decided against admitting banking records produced electronically because its nature made it unsuitable for the requirements of banking records as contemplated by the NEA, 1990.[57] The Court held as follows:

"The first issue that falls to be determined in the issues in this appeal on the admissibility of the banker's particulars stored in a computer, is that in the proper interpretation of the statute the words in the Evidence Act does not contemplate in its ambit the information stored by the respondent to be other than in a book and the appellants cannot be said to have in his possession copies of its contents. More importantly, the contents of such information have never been in the possession of the person against whom it was used. It is therefore right to conclude that the information retrieved from the computer being made by the respondent for its own use, is wrong to be used in the trial against the appellants."[58]

The Impact of the Nigerian Evidence Act, 2011 on Electronic Evidence

The NEA, 2011 gave some much needed legal recognition for electronic evidence particularly on statements contained in a document produced electronically with or without human intervention.[59] The Act also broadly redefines 'document' to include film, tape, soundtrack as well as any device by means of which information is recorded, stored or retrievable with or without the aid of some other equipment.[60]

The NEA, 2011 states that for the purpose of a statement contained in a document produced by a computer, it shall be taken to have been produced by the said computer whether or not it was produced with or without any

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[56] *Esso West Africa Inc v. T. Oyegbola* (supra) at 198.

[57] (2003) FWLR (pt. 145) 661.

[58] Ibid; See also Anyaebos v R. T. Briscoe (1987) 3 NWLR (pt. 59) 84, 2 NSCC (vol. 18 pt. 2) 805 where the Supreme Court held that a computerized statement of account are merely secondary evidence which will only be admissible as secondary evidence upon the fulfilment of proper foundation.

[59] Section 84 of the NEA, 2011.

[60] Section 258 (1) of the NEA, 2011.

human intervention.[61] The act also states that information contained therefrom shall be taken to be supplied to a computer if it is supplied to it in any appropriate form whether it is supplied directly with or without human intervention by means of any appropriate equipment.[62] And where such information is supplied in the course of activities carried on by any individual or body with a view to its being stored or processed by a computer operated otherwise than in the course of those activities, the information shall be taken to be supplied to it in the course of those activities.[63]

Admissibility of Electronic Evidence in Nigeria

The primary requirement for admissibility of evidence in Nigeria like other common law countries is relevancy. The conditions for relevancy are set out in Parts II and III of the NEA, 2011.[64] The Act also specifically set out requirements for the admissibility of statements in documents produced by computers. Such statements are admissible as evidence of the facts contained therein if it is shown that the document containing the statements was produced by a computer during a period over which it was used regularly to store or process information for the purposes of any activities regularly carried on over that period.[65] It must also be shown that the computer was operating properly or if not, that in any respect in which it was not operating properly or was out of operation during that part of that period was not such as to affect the production of the document or the accuracy of its contents and that the information contained in the statement reproduced or is derived from information supplied to the computer in the ordinary course of those activities.[66] For the purpose of determining what a computer is with regards to the admissibility of a statement in this form, the NEA, 2011 construes a computer to include combinations of computers used for the production of such statements so far as the computers have been

[61] Section 84 (5) (c) of the NEA, 2011.
[62] Section 84 (5) (a) of the NEA, 2011.
[63] Section 84 (5) (b) of the NEA, 2011.
[64] Relevancy of facts, statements, admissions and improperly obtained evidence Sections 4 to 36 NEA, 2011.
[65] Section 84 (2) (a) of the NEA, 2011.
[66] Section 84 (2) (c) and (d) of the NEA, 2011.

and are being regularly used to carry out such activities.[67] The NEA, 2011 also requires that for such a statement to be admissible, it should be accompanied by a certificate attested to by a person responsible for the operation and management of the computer or any other relevant device.[68] The certificate shall detail the manner in which the document was produced or any other relevant particulars regarding the production of the document as well as his/her position in relation to the operation and management of the relevant device.[69]

It is pertinent to note that although the legislative intention behind Section 84 of the NEA, 2011 is to ensure that statement in documents produced electronically are *prima facie* reliable and represent accurately, what was fed into the computer, the process set out is rather overarching and overcautious. This was evident in ***Akeredolu & Anor. Vs. Mimiko & Others*** where the Court of Appeal, while affirming the decision of the trial tribunal, rejected a piece of vital electronic evidence for not meeting fully all the requirements as set out by the NEA, 2011.[70] The Court's justification read as follows:

"Going by the foregoing provision it is discernible that the appellants who were desirous of demonstrating electronically the content of Exhibit P50A and P50B failed to lay the 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 to be allowed"[71]

Similarly, in ***Kubor vs Dickson***, the Supreme Court rejected evidence of a newspaper and information from a website of the Nigerian Electoral Commission that had previously been admitted in the trial court not because they were not relevant or admissible in law but because they did not fulfil the conditions set out in 84 (2) of the NEA, 2011.[72]

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[67] Section 84 (3) of the NEA, 2011.
[68] Section 84 (4) of the NEA, 2011.
[69] Ibid.
[70] Oluwarotimi O. Akeredolu & Anor. Vs. Dr. Rahman Olusegun Mimiko & Others. (2014) NWLR (PART 1388) 402.
[71] Ibid.
[72] (2013) 4 NWLR (Pt.1345), 534.

"A party that seeks to tender in evidence a computer-generated aocument needs to do more than just tendering same from the bar. Evidence in relation to the use of the computer must be called to establish the conditions set out under Section 84(2) of the Evidence Act, 2011. ... Since appellants never fulfilled the pre-conditions laid down by law, Exhibits "D" and "L" were inadmissible as computer-generated evidence/documents."[73]

The requirements of section 84 are very much similar to the requirements in the now repealed Computer Evidence Act 57 of 1983 of South Africa which was also vilified for not achieving its purpose due to its "over-cautious approach" in placing a high premium on authenticity and reliability.[74] The requirements in the Computer Evidence Act were: an authenticating affidavit establishing the reliability of the generated document, the deponent to the authenticating affidavit must have been a person qualified in knowledge and experience of the particular system in question, s/he had to verify the facts if s/he had control of the computer in the ordinary course of her/his business and if not, there would be another affidavit deposed to by a person who had such control and access.[75]

Evidential Weight of Electronic Evidence in Nigeria

The requirements of admissibility of electronic evidence in Nigeria like other common law countries, do not automatically confer ascription value on the evidence. While admissibility is predicated on relevancy to the fact of the case at hand i.e. the evidence is deemed to have the potential to make the facts in issue more or less probable, the ascription of weight involves a critical examination of the probity of the evidence in establishing the truth or falsehood of the facts in issue. The eliciting of ascription value of electronic evidence is often done by trial and maybe by demonstration in open court, this would also afford the opponents the opportunity of testing the accuracy and veracity of the evidence by cross-examination of a witness

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[73] Ibid.

[74] Watney M. 'Admissibility of Electronic Evidence in Criminal Proceedings: An Outline of the South African Legal Position' Journal of Information, Law & Technologyhttp://go.warwick.ac.uk/jilt/2009_1/watney Retrieved on the 18th June 2016: see also Section 65B (1) and (2) of the Indian Evidence Act, 1872.

[75] Section 2 of the Computer Evidence Act 57 of 1983 (South Africa).

who is brought forth to speak to the truth of the content of the evidence.[76] In ***Buhari v. INEC*** the court held as follows:

"Weight can hardly be attached to a document tendered in evidence by a witness who cannot or is not in a position to answer questions on the document. One such person the law identifies is the one who did not make the document. Such a person is adjudged in the eyes of the law as ignorant of the content of the document."[77]

In determining the weight of electronic evidence, it must not only be shown that the evidence is admissible but also that its content is the truth of what it purports to be, thus any witness speaking to it must be in the position of verifying its content as was pointed out in Okereke v. Umahi & Others:

"Surely, since the witness [PW1], was not "in any polling unit in Ebonyi State on the day of election;" "had never worked at INEC office;" "did not participate in the offloading of information from the Card Reader Machine to the INEC Database" and "was not part of the team that came to Abakaliki for the exercise," the Lower Court, rightly, affirmed the position of the trial Tribunal that no weight could be attached to his evidence for he was "ignorant of [their] content."[78]

It is necessary to point out that it is not sufficient for the purpose of eliciting evidential value that a witness was brought to court to fulfil the requirements of section 84 of the NEA, 2011. This is because the purpose of a witness at that point is merely to certify that the statements in the document produced electronically represent accurately, what was fed into the computer. The party presenting the evidence must after admissibility, demonstrate the probity and value of the evidence as they relate to the facts of the matter in question. This issue was brought to light in ***Dickson vs Sylva & Others*** where the Supreme Court, overruling the trial court's decision not to allow a witness to return to the stand for the purpose of demonstrating the value of the already admitted evidence.[79] The Supreme

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[76] Alhaji Onibudo & Others v. Alhaji Akibu & Others [1982] 7 SC 60.
[77] Buhari v. INEC (2009) 19 NWLR (pt 1120) 246, 391 -392.
[78] Okereke v. Umahi & Others (2016) LPELR-40035(SC).
[79] Dickson v. Sylva & Others (2016) LPELR-41257(SC).

court in reaching its decision aligned itself with the reasoning of the Court of Appeal (which also overruled the trial court) as follows:

"One may ask, if electronically-generated evidence is already an exhibit before the trial Tribunal or Court, in this case, the DVD, was not to be demonstrated or played, what was the purport of admitting it in evidence? Was it simply to dump it on the lower Tribunal ... In the same vein, when it is an electronically-generated document which has been admitted in evidence, upon fulfilling all pre-conditions and it is not taken as read by consent, then it ought to be demonstrated or played to prove the facts alleged. Otherwise, it remains a closed or 'sleeping' document, which is unusable and which need not have been brought before the trial Court or Tribunal in the first place as it would merely amount to clutter".[80]

Determining the Standards of Ensuring Effectiveness of Substituted Service via WhatsApp

In exercising the discretion on whether to grant an application for substituted service via WhatsApp, there are two primary factors the court ought to consider. The first is that the manner in which the applicant seeks to effect service on the respondent is warranted, the onus of which is borne by the applicant.[81] The second factor is that the Judge needs to be convinced that there is a real likelihood that the processes sought to be served will be brought to the respondent's notice if service via the method proposed is granted.[82]

IS THE CHOSEN METHOD WARRANTED?

Regarding the first factor, an applicant bears the onus of satisfying the court that the social messaging website or application that it has chosen is warranted as a substituted means of service. In exercising its discretion to grant substituted service via Facebook, the court in CMC alluded to the fact that Facebook has grown exponentially in terms of active users. While it was originally intended to be a social network service, it has developed to serve multiple purposes including 'tracing individuals and in some instances

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[80] Ibid.
[81] CMC, Paragraph 3.
[82] Supra.

to bring information to the knowledge of those individuals concerned.[83] It has been argued that this is the same rationale which provides the foundation upon which newspapers and other traditional print media have been used, and effectively so, but with the exponentially rapid rise of, and dependence on, social media coupled with the dwindling subscription of newspapers there is a fair argument to be made that not only does social media serve the same purpose, it is likely to do it better.[84]

This is also true for WhatsApp which now has well over a billion active monthly subscribers.[85] WhatsApp has also been shown to be the preferred messaging service for active participation particularly with regards to the sharing of content. A recent study revealed that although 97.3% of 23 – 34-year-olds have an account on Facebook, only 17.8% of them actively share their own content to the platform.[86] The usage patterns that these numbers show have been opined to be the reasons why messaging services like WhatsApp have grown exponentially over other media services when it comes to news consumption;[87]

In general, every case has its own unique set of facts and circumstances that are considered when determining whether substituted service via a social media platform is warranted. However, the procedural rules regulating substituted service are meant to be facilitating rather than restrictive and so the great potential of serving court process via social media platforms should be given some preference when determining any such applications.[88]

Is there a compelling likelihood that notice will be brought to the intended recipient?

The second significant factor which a court will consider in determining an application for substituted service via a social media platform is the degree

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[83] CMC, Paragraph 9.

[84] Bellengere and Swales, 458 and Statista.

[85] Statista "Leading social networks worldwide as of April 2016, ranked by number of active users" http://www.statista.com/statistics/272014/global-social-networks-ranked-by-number-of-users/ last accessed 26th July 2016.

[86] http://www.thedrum.com/news/2017/06/22/messaging-apps-emerge-growing-force-news-sharing. Retrieved on the 8th of June, 2018.

[87] Callum McCahon https://www.bornsocial.co.uk/Exploring%20Social%203.0%20-20The%20Social%20Survey.pdf. Retrieved on the 6th of January, 2019.

[88] State v. Anibijuwon II & 5 Ors (2009) 1 NWLR (Part 1128) 597, 613B-C per Fasanmi, JCA.

of certainty that the processes sought to be served will be brought to the intended recipient's attention.[89] In evaluating this degree of certainty, the court must be convinced of that the account/handle on which the processes are sought to be served to is indeed connected to the recipient. The court must also be convinced that there is indeed a reasonable degree of certainty that the processes sought to be served will come to the attention of the recipient if sent via the suggested social media platform.[90]

One major drawback in allowing substituted service through a social media platform is predicated on the fear that such a platform may not be convincingly effective in bringing the notice to the intended recipient's attention. This fear tends to lose sight of the fact that the only compelling and indubitable way of bringing such notices to the recipients' attention is by actual physical service on the intended recipients.[91] The nature of substituted service necessitates dispensing with direct physical service when it is impossible or impracticable, and this trade-off always bears the risk that the process may not actually be brought directly to the notice of the intended recipient, which is a risk that is not unique to social media platforms. While substituted service via social media platforms does not absolutely guarantee delivery, pasting a copy of the process on the front door of the last known address of the recipient doesn't either. The more often used substituted service alternative of publication in a newspaper may also not be effective, or may, in fact, be even less likely to be effective because the intended recipient may not have read the notice section of that newspaper or may not even have read that particular newspaper at all. In any event, the ultimate purpose of substituted service is to achieve, as closely as possible, the same result as if the processes or information had been brought to the notice of the intended recipient.[92] For this reason, social media platforms like WhatsApp and Facebook, if utilised maximally, can help achieve this purpose. This is especially so if the court can be confident that the identified person on the social media platform of choice is, likely, the intended recipient.

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[89] CMC, Paragraph 3.
[90] CMC, paragraphs 3 and 12, Bellengere and Swales Page 464.
[91] David Storey at paragraph 13.
[92] Ibid.

Factors to be considered in verifying a WhatsApp account for the purpose of substituted service

Verifying a WhatsApp account for the purpose of substituted service need not be an overtly technical task. All the applicant needs to show is that if the processes are sent to the chosen WhatsApp account, there is a real likelihood that the processes will be brought to the attention of the intended recipient. The approaches adopted by the courts in addressing issues of authentication of social media accounts in the David Storey, CMC, and *Dheaneshwer and Tri-Media*[93] (Tri-Media) cases are all very useful in providing guidance to a court in how to utilize its discretion.[94] Extrapolating from these cases, for a court to reach the conclusion that there is real likelihood that notice will be brought to an intended recipient via a WhatsApp account, the court needs to be convinced that (a) the WhatsApp account is held by the intended recipient, (b) the WhatsApp account is being regularly operated by the intended recipient and, (c) the WhatsApp account has been used within a reasonable period preceding the intended time of service.[95]

A. Is the WhatsApp account held by the intended recipient?

Proving a prima facie ownership of, (or access to) a WhatsApp account can be done by viewing the profile of the account which usually contains basic biographical data such as pictures, name, and phone number and status updates.[96] In the CMC case, although the account in question was a Facebook account, the prima facie ownership of the account was proved by identifying pictures of the intended recipient on it.[97] While identifying a profile picture of the intended recipient alone is not an ironclad proof of ownership of the account, the profile name, phone number, status updates as

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[93] (2016) 37 ILJ 272 CCMA.

[94] See also South African case of *Dheaneshwer and Tri-Media* (2016) 37 ILJ 272 CCMA 274-275 where the applicant's employment was terminated after she was sexually harassed by a senior manager, (who described himself as the owner of the business) with inappropriate text messages and lewd photographs sent via WhatsApp. In attempting to verify the identity of the senior manager as the sender, the claimant presented the evidence of the text and photographs contained in her cell phone to the court, which she circulated during the hearing, thereby enabling the court and the parties to see them.

[95] David Storey paragraphs 14-17.

[96] www.WhatsApp.com.

[97] CMC paragraph 12.

well as a relevant WhatsApp story (which is usually a short video clip) may all provide strong enough circumstantial evidence as to the ownership of the WhatsApp account. All this evidence can be presented to the court in accordance with Section 84 of the NEA, 2011 on the admissibility of data messages and information created on the WhatsApp account either with or without human input.[98]

B. Has the WhatsApp account been regularly operated by the intended recipient?

In addition to proving the identity of the intended recipient as the owner or operator of the WhatsApp account, the applicant should also prove that the WhatsApp account is active by giving evidence that it has been regularly operative. In the case of WhatsApp, this can be done by giving evidence of recent correspondence involving the account in question such as messages sent to and received from the account (including the blue tick which indicates the operator of the WhatsApp account has not only received the message but has also read it), profile photographs and WhatsApp stories shared on the account, displayed status messages and so on.[99] This was done in the Tri-Media case where the applicant presented her phone to the court during the trial to enable the court to examine the WhatsApp account of the person who had sent her WhatsApp harassing messages, in an attempt to prove the authenticity of the account in question.[100]

Another indicator of the operational state of a WhatsApp account is the phone number which it is registered to. Every WhatsApp account is registered to one phone number assigned to a sim card which serves as the account's username and is exclusive to one phone at a time, although the contacts can be transferred over to other devices.[101] Consequently, if an applicant can show that the phone number to which the WhatsApp account in question is registered as being active and functional, this may assist in convincing the court of the likelihood that notice will reach the intended recipient.[102] On the whole, proof of any and all activities directly involving

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[98] Nigerian Evidence Act, 2011 (Act No. 18).
[99] www.WhatsApp.com.
[100] Tri-Media at 274-275.
[101] https://www.webwise.ie. Retrieved on the 10th of March, 2019.
[102] David Storey paragraph 12.

the WhatsApp account including its registered number and mobile device are relevant to showing not only that the intended recipient is the operator of the WhatsApp account but also that the account is active and operative.

C. Has the WhatsApp account been used recently preceding the date of the application?

The final requirement in showing a strong likelihood that notice will be brought to an intended recipient if served via WhatsApp is evidence that the account has recently been in use. [103] The key issues here are what constitutes "recent" and what constitutes "use" and the two are, of course, linked. Recent simply means within a reasonable timeframe, usually from the date the application was made.[104] Evidence of use can be provided by showing that there has been recent activity on the account such as sending and receiving messages or simply by showing that the user of the account was 'last seen' online within the aforementioned reasonable timeframe.[105] WhatsApp also provides details of the delivery reports of messages which can aid in tracking the activities of the user of the account. These reports give the exact timeframe of the receipt and the acknowledgement of a received message by the user of the account, in form of ticks which appear at the end of the sender's message, on the sender's account/device. The first tick means the message has been sent to the recipient's account, the second tick means the message has been delivered (not necessarily read) and the blue double tick means that the message has been read by the recipient.[106] Such delivery reports as well as the indication of when the user was last online are all very pertinent metadata that can help in determining how recent the usage of the WhatsApp account has been which is a factor in determining the likelihood that notice will be brought to the attention of the user.

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[103] David Storey, Paragraph 14.

[104] It should be noted that what constitutes a reasonable timeframe will depend on the circumstances of each case. It is possible that a flurry of activity on a WhatsApp account (after the application was made) which was previously dormant might raise concerns about the authenticity of the activity, which will need to be tested against other corroborative evidence.

[105] David Storey, Paragraph 14.

[106] Tole Sutikno et all "WhatsApp, Viber, and Telegram: which is the Best for Instant Messaging?" International Journal of Electrical and Computer Engineering (IJECE) Vol. 6, No. 3, June 2016, table 1 at 912.

Conclusion

The potential of WhatsApp as a practical medium of substituted service is limitless. This is primarily because WhatsApp is capable of providing a reasonable degree of legal certainty that notice will be delivered if the court is convinced that the account is being held and regularly operated by the intended recipient and that it has been used within a reasonable period preceding the intended time of service. It will thus be counterproductive not to explore all potential mediums of substituted service provided the court is convinced that if such an order is granted, there is a reasonable possibility that notice will indeed reach the intended recipient. It is therefore submitted that WhatsApp can be a most effective medium for substituted service in Nigeria if the above-suggested guidelines are considered in determining the likelihood that notice will indeed reach the intended recipient.