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Affidavit Evidence and Electronically Generated Materials in Nigerian Courts

Andrew I. Chukwuemerie [*]

Abstract

In this article the author seeks to discuss affidavit evidence, which is the branch of evidence most prevalent in Nigerian Courts and in other adjudicatory processes such as Commercial Arbitration in the country. It is hoped that the discussion will be of use not only to researchers and other persons with a general interest in Nigerian law on the subject but also to foreign practitioners who are currently litigating or who may soon litigate any claim in Nigeria.

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[*] *(formerly Okekeifere);* LL.M; MCIArb; Mediator & Arbitrator, World Intellectual Property Organisation, Switzerland; Member, London Court of International Arbitration; Partner, *Okibe Lawhouse*, (Legal Practitioners, Arbitrators) Port Harcourt, Nigeria; Studies Director, Centre for Arbitration Studies, Port Harcourt; Professor of Law, Ebonyi State University, Abakaliki, Nigeria. The author can be contacted at okibelaw@yahoo.com

1. Introduction

Save for law making in the political sphere where the politicians (who populate the legislative and executive arms of government) dutifully watch over their interests and, lately, in areas of economic reform such as the concerted legal war against corruption,[1] 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 ordinarily be a mutually beneficial interpenetration. This has ensured that in some important areas of life and business statutory law has remained in yesterday while the society marched on in dynamism.

Such legislative inertia and deadening anachronism make the law only a social relic of a less wizened past governing the present. However, the judiciary in most commendable manifestations of a liberal and activist disposition has come to the rescue, at least in some areas of the law. It has done this by interpreting and applying existing statutory and common law principles in ways and manners that incorporate the existing social realities and do justice not only directly to the litigating parties who have gone to Court but also indirectly to the entire society.[2] In playing that wonderful role the judiciary clearly demonstrates that indeed whatever the arguments may be in theoretical jurisprudence on whether or not the Courts should make law,[3] in

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[1] In recent times the country has enacted several commendable statutes in a determined legal war against corruption and economic crimes generally (viruses that had almost ruined the economy before 1999) the most important of which are the Corrupt Practices and Other Related Offences Act 2000, which is now cap. C31, Laws of the Federation of Nigeria (LFN) 2004, the Economic and Financial Crimes Commission (Establishment) Act, 2002 now cap. E1, LFN 2004 and the Money Laundering (Prohibition) Act, 2004. For examinations of these statutes see this writer in *The Nigerian Corrupt Practices and Other Related Offences Act, 2000 as an Instrument Against Financial Crimes* (2003) Journal of Financial Crime London, (vol. 10 No. 3) 275; *International Legal War on the Financing of Terrorism: A Comparison of Nigerian, UK, US and Canadian Laws* (2006) Journal of Money Laundering Control (vol. 9 No. 1) 71 and *Nigeria's Money Laundering (Prohibition) Act 2004: A Tighter Noose* (2006) Journal of Money Laundering Control (vol. 9 No. 2) 173.

[2] Of course it is now beyond argument that as a Court of law does real and substantial justice, not just mere declaration of legal technicalities devoid of true fairness, to the parties who have come before it, it equally does justice to every member of the society. Appropriate standard and due expectations of decent people are given life and free (due) reign.

[3] It is argued by some scholars that judges should only interpret the law, good or bad, whether it works justices or injustice, and not to make law, an argument which even in the most developed of legal cultures where statutory law keeps pace with relevant social developments can only be academic. In interpreting even the clearest and most understandable of provisions the Courts encounter ever disparate sets of facts and circumstances in the cases that come before them for the interpretation and application of those provisions and, therefore, have to elaborate or make out (different) rules for different circumstances. As Lord Denning would say,

> "Whenever a statute comes up for consideration it must be remembered that it is not within human powers to foresee the manifold sets of facts which may arise, and, even if it were, it is not possible to provide for them in terms free from all ambiguity. The English language is not an instrument of mathematical precision. Our literature would be much the poorer if it were. This is where the draftsmen of Acts of Parliament have often been unfairly criticised. A judge, believing himself to be fettered by the supposed rule that he must look to the language and nothing else, laments that the draftsmen have not provided for this or that, or have been guilty of some or other ambiguity. It would certainly save the judges trouble if Acts of Parliament were drafted with divine prescience and perfect clarity. In the absence of it, when a defect

developing legal cultures they should and actually do make law. As one of Nigeria's most liberal and progressive judges of all times would say,

> *"It is said that the function of the Court is to interpret laws made by the legislature and not to make laws. In theory that is so. But it must equally be admitted that Judges are not robots (or zombies) who have no mind of their own except to follow precedents. … As the society is eternally dynamic and with fast changing nature of things in the ever changing world and their attendant complexities, the Court should, empirically speaking, situate its decisions on realistic premise regard being had to the society's construct and understanding of issues that affect the development of jurisprudence."*[4]

This is exactly what has happened with respect to the law of evidence in Nigeria. While the Evidence Act made by the British colonial government in 1945 continues in operation as about the only source of the Law of Evidence in the country,[5] developments in such areas as information technology have gone way beyond what that statute could have envisaged at its enactment. For instance, concepts, doctrines and tenors of such things as documents, writing, systems of recording things etc have become fundamentally altered or completely unrealistic.[6] The advent of computer, for instance, brought with it new forms of record keeping in software - microfilms, microchips, diskettes, flash discs etc that are not by any means within the former understanding of the word "document" which was a written matter on a surface. The simplistic division of documents into originals and copies has also been made unrealistic with respect to several materials used in information transmission and storage. For instance, when information recorded or stored in the memory of a computer is printed out on paper it is not easy to say that the version in the memory is a document. Nor is it easy to assert that the print out is an original or a copy.

It is also not easy to classify an audio tape recording, a video tape recording, a text message on a GSM telephone, an electronic mail on a computer screen, information contained in CDs, VCDs or such other things, as originals or copies. Even if such

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> appears a judge cannot simply fold his hands and blame the draftsman. He must set to work on the constructive task of finding the intention of Parliament … Put into homely metaphor it is this: A judge should ask himself the question: if the makers of the Act had themselves come across this ruck in the texture of it, how would they have straightened it out? He must then do as they would have done. A judge must not alter the material of which it is woven, but he can and should iron out the creases."

- *Seaford Court Estates Ltd v. Asher* (1949) 2 KB 480, 498 – 499. For the arguments on the other side see the natural law theory and positivist inclinations in law in Dias, *Jurisprudence,* 2nd ed.

[4] Honourable Justice Pats-Acholonu of the Supreme Court in *Patrick Magit v. University of Agriculture, Markudi & 3 Ors* (2006) All FWLR (pt. 298) 1313, 1345 D – F. His Lordship recently passed on.

[5] It is now cap. E14, LFN 2004. An Evidence Bill prepared, even belatedly, in 1998 has failed to be enacted into law by the successive governments that have ruled the country ever since.

[6] Section 2 of the Act in defining a document states that it "includes books, maps, plans, drawings, photographs and also includes any matter expressed or described upon any substance by means of letters, figures or marks or by more than one of these means, intended to be used or which may be used for the purpose of recording that matter." This clearly did not envisage writing by software or any such thing.

things – when printed out on paper, for instance - and such other things as electronically transmitted mandates in commercial transactions can be regarded as documents,[7] the further doctrine that the maker of a document ought to sign it becomes cosmetic. The use of such media of communication and of personal identification numbers (PINs) is commonplace now in the banking industry for instance.[8]

In the face of such a deeply worrisome situation the Nigerian Courts have been very alert in interpreting the Act and complimentary case law or common law principles in a way that, in this writer's view, principally solves the problem of admissibility of pieces of evidence generated by information technology. In effect, they have fashioned out rules and principles by which all electronically generated evidence can be admitted and acted upon by Nigerian Courts. As we shall see hereinafter however, some challenges attend the admission and use of those electronically generated materials, which challenges the Courts have not even discussed talk the less of finding solutions for.

In this article we seek to show how these things are true for that branch of evidence which is the most occurring in the Nigerian Courts and in other adjudicatory processes such as Commercial Arbitration in the country, i.e. affidavit evidence. The first part of the work, Preliminary Matters, briefly examines the nature of an affidavit in Nigeria, the difference between affidavit and affidavit evidence as well as the relationship between affidavits and exhibits – electronic or otherwise – attached to and verified in those affidavits. It also deals with the interesting relationship in Nigerian law between affidavit evidence and the hearsay evidence rule, which relationship has provided a very veritable avenue making the use of electronically generated evidence in affidavits much easier than in *viva voce* evidence. It equally explains the challenges posed to evidence, particularly affidavit evidence, by electronically generated materials - such challenges as authenticity, integrity and confidentiality. It points out the different effects those challenges have on admissibility and weight attachable to the evidence and how the challenges can be solved. The article then explains how and why affidavit evidence is presently the most used form of evidence in the country. It then considers in turn, under relevant subheads, how computer printouts, tapes, etc have , through Court judgements, become admissible, and are actually being admitted and used, in Nigerian Courts.[9]

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[7] In the Evidence Act's definition of "document" they are definitely not documents. It is however the thesis of this work that all such materials – tangible and intangible – are documents in the contemporary understanding and implications of the word.

[8] The Act has no provision whatsoever on such media of communication and therefore excludes them and their derivatives from being admissible in evidence if the strict words are to be followed and the Courts should do nothing about it. The closest the Act comes to any such thing, but which is quite dissimilar, is at s. 121 where it authorises the Courts to presume that a message, forwarded from a telegraph office to the person to whom the message purports to be addressed, corresponds with the message delivered for transmission at the office from which the message purports to be sent. Does that presumption by any means apply to text messages on GSM phones or transmissions on the internet by e-mails etc? It is extremely doubtful.

[9] It must be pointed out that there may still be some "persistent objectors" on the Bench in Nigeria hesitant about taking the bold steps already initiated by the country's apex Courts. Such judicial officers can not but be wrong since they are unflinchingly bound by the decisions of the apex Courts on the admissibility of electronically generated evidence. The doctrine of judicial precedent operates in Nigeria, by which even the Supreme Court and Court of Appeal themselves are bound to follow these existing decisions on the admissibility of such evidence. For more on such matters see, for instance,

The discussion also shows how they have always been used in arbitration proceedings since the Evidence Act, along its limitations and difficulties, have never applied to arbitration proceedings.[10]

It is hoped that the discussion will be of use not only to researchers and other persons with a general interest in the Nigerian law on the subject but also those foreigners who are currently litigating or who may soon litigate any claim in Nigeria.[11] It should also be of interest to some prospective foreign investors who often ask questions on the litigation process in the country and to administrators of justice in some other Third Word countries that may have in their laws the same problem which Nigeria has had in these matters. The approach of the Nigerian Courts may well provide for such persons and their countries a useful compass in navigating through an archaic statutory legal regime to do justice in a deeply dynamic age and time.

2. Preliminary Matters

2.1. Description of Affidavits; Affidavits and Exhibits

This part of the work will show the nature of affidavits in Nigeria and that any document or material - electronically generated or not – attached to an affidavit automatically becomes part of the affidavit and gets entitled to the waivers and exemptions from certain rules of evidence which affidavits and their exhibits are entitled to. One is the waiver of the rule that requires only originals of exhibits and not copies to be produced in Court except in very rare cases. We shall be seeing in Part 1C below that such waivers and exemptions in some cases even worsen, as it

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Eperokun v. University of Lagos (1986) 4 NWLR (pt. 34) 162, SC; *Mrs Eno Ekpuk v. Mrs Bassey Okon* (2005) All FWLR (pt. 279) 1304, SC; *Mrs Eno Ekpuk v. Mr. Bassey Okon* (2005) All FWLR (pt. 279) 1304, SC and this writer in *Exploring the Boundaries of Legal Certainty in Nigeria, UK, and USA: Stare Decisis, Justice and Injustice* (forthcoming).

[10] Section 1 (2)(a) makes the Act inapplicable to "proceedings before an arbitrator".

[11] Foreigners often want to know what the litigation (as well as arbitral) process in Nigeria is like. It may be of interest even in this sort of forum to state that there is no law in Nigeria imposing litigation on any foreigner or indeed on any person as a dispute resolution mechanism outside the realm of fundamental rights enforcement. Rather, arbitration is the favoured means of dispute resolution in every area of the economy where foreigners could conceivably invest. Even in the oil and gas sector, which is the mainstay of the country's economy, arbitration is the favoured mechanism under s. 11 of the Petroleum Act cap P10, LFN 2004 and no dispute whatsoever in that sector of the economy is excluded from arbitration. For an examination of the matter see this writer in *Commercial and Investment Arbitration in Nigeria's Oil and Gas Sector* (2003) 4 Journal of World Investment 5 p. 828. The Nigerian Arbitration and Conciliation Act, cap A18 2004 is based on the UNCITRAL Model Law on International Commercial Arbitration, 1985 and except for traditional issues like matrimonial disputes and crimes, no disputes are excluded from the Act, which the country could very well do under art. 1(5) of the Model Law, (which with respect to both domestic and international arbitrations simply enacted the Model Law and its philosophy) or from arbitration generally on account of public policy. For more on these matters see this writer in *Public Policy and Arbitrability Under the UNCITRAL Model Law* (1999) Int. Arb. Law Rev 70 and on the Nigerian arbitration law generally in *Salient Issues in the Law and Practice of Arbitration in Nigeria* (2006) 14 RADIC (African Journal of International and Comparative Law, UK) 1 and in his *Studies and Materials in International Commercial Arbitration,* Lawhouse Books, Port Harcourt, Nigeria, 2002. The marvelous legal framework for arbitration notwithstanding, some foreigners choose, as they are entitled to do, to litigate some claims since they seem to trust the Courts.

were, the problems of authenticity and integrity of electronically generated materials that are attached to affidavits as exhibits.

An understanding of "affidavit" which is gaining a very fast and wide acceptance in Nigeria is that it is,

> *"a signed and sworn or affirmed voluntary statement, made before a judge or other person authorised to administer oaths, of facts within the maker's knowledge or of knowledge or belief he derived at stated times, place and circumstances from a stated person or persons whom he believes"*[12]

Clearly, the statement in an affidavit must be in writing. This immediately distinguishes affidavit evidence from oral evidence.[12a]

Many of the affidavits filed in the country in Court or arbitral proceedings have exhibits attached to them. The exhibits are mostly documents. Sometimes one of the documentary exhibits is itself an affidavit. As we shall show subsequently, such things as information in computer memory or in diskettes, cd roms, video and audio tapes, movies, as well as telefaxes, computer printouts or printouts of electronic mails can be called documents. So also can GSM text messages, bank electronic transfers, or of other internet transactions text messages and voice mails on GSM telephones be called documents. They can, therefore, be attached to affidavits as documentary exhibits. They, like other documents, can even be attached to affidavits as objects and not documents when the aim is to prove not their written or language contents but of their physical nature or state.[13] Other materials are also sometimes attached as exhibits. Damaged sunglasses, torn dresses etc have been tendered before Courts through affidavit evidence in fundamental rights enforcement proceedings, where the Plaintiff or Claimant was assaulted and his/her belongings damaged by the Defendant. In the same vein it is possible to have such things as audio and video tapes, computer diskettes, flash discs or drives, cd roms, dvds etc as material exhibits. They can also be tendered through affidavits as documentary exhibits as we shall be seeing.

Subject to the rules on admissibility of documents, generally a document – electronically generated or not - attached to an affidavit as an exhibit forms part of the affidavit and should be considered together with the affidavit.[14] As a document it is even of greater evidential value and persuasive potential than the ordinary depositions in the affidavit. If there is a conflict between the depositions and the document, the document takes priority in matters of weight. It thus becomes a hanger from which the

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[12] Andrew Chukwuemerie, *The Law and Practice of Affidavit Evidence* Lawhouse Books, Port Harcourt Nigeria, 2004 para 1.01.

[12a] The requirement of writing is not stated but presumed by the Evidence Act, which at s. 79 provides that "the original shall be filed in Court, and the original or an office copy shall alone be recognised" for any use in Court. Only a document can have an original and an office copy. Section 82 makes provision for *prima facie* proof of the "seal or signature" of a Court, judge or other officer therein mentioned," such as a Commissioner of Oaths, appended on the affidavit and s. 90(d) provides for erasures, interlineations and alterations. Section 90(e) speaks of an affidavit being 'illegible or difficult to read" and 90(f) provides for jurat to be endorsed in appropriate cases.

[13] See para 2.12, *The Law and Practice of Affidavit Evidence* note 13 *supra.*

[14] *OA Gbere v. WB Alli-Owe* (2000) 11 NWLR (pt. 678) 294, CA. Cf, for English law, Byrne, J in *Carter v. Roberts* (1903) 2 Ch D 317.

depositions may be assessed.[15] In *viva voce* evidence a photocopy or other copies of a document are generally inadmissible.[16] In affidavit evidence however photocopies are routinely used. It is mainly a matter of convention and common sense since no enabling statutory provision exists on the point. Affidavits are typically filed in interlocutory proceedings and it is only sensible that photocopies be useable while the original will be tendered during the substantive trial. Even where affidavit constitutes pleadings for substantive trial it is normally filed in several copies, enough for the Court and all the parties to the case and at least an extra copy for endorsement and return in proof of service on each party. There is no way the original can be attached to all these copies except by photocopy. Again if the document must be preserved for other purposes after the Court proceedings, it is necessary to save it from being stamped with the insignia or imprimatur of Court which filing an exhibit involves. It is only with respect to public documents that the same rule on admissibility applies to affidavit and *viva voce* evidence, to the effect that only a certified true copy is admissible and, generally, even a photocopy of a certified copy is not adimisble.[17] It therefore follows that photocopies or other copies, not necessarily originals of electronically generated documents are admissible. This is particularly important for such things as computer printouts which are themselves difficult to classify other than as copies of the "original" in the computer memory, diskette or flash drive/disk. It is in fact as secondary copies that even direct or original printouts have been held admissible as we shall see in the cases discussed hereinafter. Attaching their photocopies therefore amounts to attaching photocopies of copies (i.e. secondary copies of secondary copies) of a document.

2.2. Affidavits and the Hearsay Evidence Rule

As we shall be seeing later, the question as to whether or not the rule on hearsay applies to affidavits is of great importance with respect to the depositions themselves and documents attached as exhibits. It is also important with respect to if and how the hearsay rule affects electronically generated evidence when they are attached to an affidavit as exhibits. As in many other African countries, quite unlike the position in such jurisdictions as the UK, the hearsay rule still applies to oral and documentary evidence in Nigeria.[18] The rule was inherited from England in the first place as part of the received English common law when Nigeria was a colony of Britain. However, it was made inapplicable to affidavit evidence in Nigeria as far back as 1945 when the Evidence Act was enacted. Section 77 of the Act provides that "oral evidence must in all cases whatever, be direct" and that if it refers to a fact which could be seen, heard or perceived by any other sense or in any other manner, it must be the evidence of a witness who says he saw, heard or perceived the fact by that sense or in that manner. It further provides that if the evidence refers to an opinion or to the grounds

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[15] *Fashanu v. Adekoya* (1974) 6 SC 83; *Augustus W. Kindley & 11 Ors v. Military Governor of Gongola State & 7 Ors* (1988) 2 NWLR (pt. 77) 445, SC.

[16] Under ss. 96 – 99 of the Evidence Act which deal elaborately with secondary copies of documents.

[17] *Minister of Lands, Western Nigeria v. Dr. Nnamdi Azikiwe & Ors* (1969) 1 All NLR 4; *Chief Gani Fawehinmi v. IGP & 2 Ors* (2000) FWLR (pt. 12) 2015. CA.

[18] See such cases as *Friday Ekpo v. State* (2001) FWLR (pt. 55) 454, CA; *Pharmacists Board of Nigeria v. Adegbesote* (1986) NSCC (vol. 17) 1246, SC. Section 1 of the Civil Evidence Act, 1995 abolished the principle out of English law.

on which that opinion is held it must be the evidence of the person who holds that opinion on those grounds. The proviso saves expert opinion expressed in any treatise commonly offered for sale, where the author is dead or otherwise unavoidably unavailable to give evidence. It clearly does not apply to affidavit evidence which is, at least not in many a sense.

Be that as it may, ss. 86 and 88 which deal specifically with affidavit evidence explicitly permit hearsay in affidavits. Section 86 provides that every affidavit used in the court shall contain only a statement of facts and circumstances, to which the witness deposes, "either of his own personal knowledge **or from information which he believes to be true**."[19] The personal knowledge that the section envisages is simply direct evidence in this context i.e. evidence gathered by seeing, hearing or perceiving (by touch or smell) the facts, circumstances or matters on which he testifies. That is the equivalent of direct oral evidence required by s. 77 of the Act. The second leg of the provision - from information which he believes to be true – simply means information received from somebody else or gathered from a kept record, which information he believes to be true. It means hearsay evidence is admissible, the only precondition for his giving the evidence being that he must believe it to be true. Therefore, once he believes a piece of hearsay evidence to be true and deposes to it, the rule on hearsay cannot operate to exclude it.[20]

To believe it he must first apply his mind to the issue and be convinced that the information is credible and it would be irresponsible of him not to do so. Therefore, if the information is incredible he must not depose to it, and if he does the Court will reject the information as evidence. The Act at ss. 88 and 89 even places an onus of further disclosures on the deponent. This is to ensure transparency and further afford the Court an opportunity to assess the veracity of the information as evidence and, in appropriate cases, even the veracity of the his source of information. He does not bear this onus unless he is deposing to what would otherwise be hearsay evidence. This further ensures that no worthless piece of hearsay evidence is admitted under s. 86. Section 88 stipulates that when a person deposes to his belief in any matter of fact, and his belief is derived from any source other than his own personal knowledge, he shall set forth explicitly the facts and circumstances forming the ground of his belief.[21] Section 89 provides that when such belief is derived from information received from another person, the name of the informant shall be stated, and reasonable particulars shall be given respecting the informant, and the time, place and circumstances of the information. No doubt, the need to disclose the name and particulars of the informant and the other matters mentioned in connection therewith seriously helps reduce the

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[19] Emphasis supplied

[20] It is therefore, with all due respects, wrong to assert as a Court did in *Chief Amusa Orunlola v. Chief Yekini Adeoye* (1995) 6 NWLR (pt. 401) 338 that such evidence can fail for being hearsay. By making such evidence admissible under s. 86 the Act has placed the evidence above the hearsay principle. To indicate otherwise as the Court of Appeal did in that case, with respects, amounts to acknowledging admissibility on the one hand and removing it by the other hand. There is nothing in the tenor of s. 86 to suggest that a testimony given by a witness in an affidavit based on "information which he believes to be true" should be acted on by the Court only when it seeks to prove that the statement was made to him and not when he seeks to thereby prove the veracity of the information. As already stated, s. 77 applies only to oral evidence not affidavit evidence (1995) 6 NWLR (pt. 401) 338, CA

[21] *National Bank of Nig. Ltd v. Savol WA Ltd* (1994) 3 NWLR (pt. 333) 435, CA; *Macualay v. NAL Merchant Bank Ltd* (1990) 4 NWLR (pt. 144) 283; *Nishizawa Ltd v. Jethwani* (1984) 12 SC 234.

incidence of fabrication of evidence. Also, the disclosure of the grounds for the belief not only helps the deponent to critically assess the propriety or otherwise of his belief but also enables the Court to see whether or not the deponent's belief is proper so as to follow it or improper so as to discard it.

Even documentary evidence, such as an exhibit attached to an affidavit whether or not electronically generated, can be hearsay evidence.[22] This means that barring the exceptions already made in favour of affidavit evidence, as already seen above, exhibits to affidavits – electronically generated or not – can be afflicted by the rule against hearsay evidence. It is part of the thesis of this article however that since a document attached to an affidavit immediately becomes part of the affidavit, the exceptions applying to the affidavit applies to the document attached to it. It is after all the two of them (affidavit i.e. depositions therein and the exhibit) that form or make up the deponent's evidence – his affidavit evidence – in the circumstance.

In Arbitration the question of hearsay does not even arise at all whether the evidence is *viva voce,* affidavit or an exhibit – electronically generated or not – attached to an affidavit. This is because s. 1(2)(a) of the Act makes the Act inapplicable to arbitral proceedings. We shall however see in Part 1C below that this exemption makes more serious in Arbitration than in litigation the challenges posed by the nature of electronically generated evidence.

2.3. Challenges Posed to Affidavit Evidence by Electronically Generated Materials

By their very origin and nature, mode of transmission, storage and usage electronically generated evidence pose certain challenges when used in evidence, particularly affidavit evidence - challenges bordering on authenticity, integrity and confidentiality of the pieces of evidence.

Narrowly explained, authenticity has to do mainly with whether or not the material or piece of information actually emanated from the person or source it purports to emanate from and is correct in what it conveys. Normally, when information is entered on a computer memory, or an e–mail is sent or an order is placed for goods or services through the internet, the sender is unable to authenticate the information he has sent by way of a signature. It is the same if he speaks with another person on the telephone, leaves a message on that other person's voicemail or sends a text message (sms). Even if he uses a password or an acronym they may not be peculiar to him the way a signature written by him would be. The password or acronym can also be endorsed or used by anybody else who knows them far more easily than a signature can be imitated. A voice on the phone can also be imitated. In a work place, any person can enter information into a computer memory, purporting it to be entered by another person. As a result, when a customer's account records are called up in a bank's computer system there is hardly any way of knowing which person made which entry. This makes it difficult to ascertain whether or not that person was an appropriate officer to make the entry. Even if one of several appropriate officers makes a wrong entry, it may not be traceable to him since he has not signed it, because there is no way he can sign it.

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[22] *Miss Felicia Ojo v. Dr. Gharoro & Ors* (2006) All FWLR (pt. 316) 197, SC; *First Bank of Nig Plc v. Chief Victor Ndoma-Egba* (2006) All FWLR (pt. 307) 1012.

If such a false entry or message is presented to the Court there will hardly be a way of detecting the false nature. The Court can thus be easily misled. The presence of signatures in equivalent non-electronic documents or materials makes them more authentic and harder to forge or imitate. Of course, signatures can be forged on non-electronic documents but a Court can compare an allegedly forged signature with other signatures of the same person and come to an intelligent decision on the point. If the Court is unable to decide on the matter, a signature expert can be called in and he can detect any forgery that there is. Even in the absence of a signature, if a document is written in long hand a comparison with the alleged writer's other writings can be done. For an entry in a software (bank account entries, e-mail, websites etc) there is no opportunity for those steps to be taken.

Electronically generated materials therefore do not lend themselves to effective tests of authenticity that are normally possible with the conventional documents – the kinds of documents presently foreseen by the Evidence Act.

Integrity is also, in a way, a form of the problem of authenticity. It can however be seen as more of an issue of whether or not the information has got distorted or tampered with even after it emanated from a correct source. Thus a message can be sent from one source to another but is by some means tampered with such as to have at the receiver's end a different message, substantially or otherwise, from the one that was originally sent out. An audio or visual tape can be edited or tampered with through the introduction or removal of some bits and superimposition of images and devices etc. Through any such interference the later form of the contents is fundamentally different from the first or original form.

Through hacking of computers, crashing through passwords and kindred wrongdoings, information stored in computer memories, e-mails in etc transit can be altered even without the knowledge of the maker, sender and, or receiver as the case may be. Telefaxes can be intercepted and possibly changed just as text messages (sms), etc can be intercepted, listened in to and even edited by an unscrupulous operator working for a GSM network from or through which the message or conversation is sent. On the other hand, if a letter is sent through the post office (particularly by an express or registered mail) or through a courier service it may be only remotely possible, if at all, for it to be tampered with. A hard copy of a document is generally more difficult to tamper with than an electronic copy.

Electronically generated materials hardly enjoy confidentiality since they are legitimately or illegitimately accessible to third parties or undesirable/unpermitted readers or users. Any information posted on the internet or used in what has come to be called e-filing of Court processes and e-trial and related procedures, in the US for instance, is accessible to many more people than the immediate parties and Court staff that directly deal with or treat the documents.

It needs to be pointed out that these challenges of electronically generated materials do not affect their admissibility in Nigerian law. They can only go to the weight attachable to those pieces of evidence after being admitted. Admissibility is purely a function of relevance[23] and a relevant piece of evidence will be admitted. Questions as to whether or not it is authentic, forged, tampered with or false in what it asserts only go to the weight the Court may attach to it. If the Court finds a document or other

[23] *Jacob v. A-G, Akwa Ibom State* (2002) FWLR (pt. 86) 578, CA

material to be lacking in authenticity or integrity in any material particular, it is likely to reject the contents or assertion as unproven. It is the same whether the evidence was electronically generated or not.

It is also a fact, however, that these challenges of electronically generated evidence are far less easy to detect, as for the Court to refuse to act on the evidence, than would be the case with conventional documents and materials. It is far more difficult to detect that an electronic message or document has been tampered with than it is to detect a tampering with a hard copy document or other material. The detection would be very difficult even for a hard copy or material when the tampering is done or perfected with the aid of an electronic device such as a scanning machine or such a thing as a photocopier. The Courts therefore run a far higher risk of being misled through electronically generated evidence than through other types of evidence.

The situation may even be made worse in some cases when electronically generated evidence is attached to an affidavit as an exhibit than would be the case if the exhibit was tendered though *viva voce* evidence. A witness tendering such an exhibit through *viva voce* evidence can be cross-examined on the authenticity and integrity of the document. In affidavit evidence the deponent or witness is not subjected to any such cross-examination. He can only be cross-examined on it if there is an irreconcilable conflict on the authenticity and integrity in the depositions on opposite sides of the case. In that case it becomes necessary for the Court to require *viva voce* evidence to resolve the conflict.[24] Again, if an electronically generated piece of evidence contains hearsay evidence but is an exhibit to an affidavit then, as already shown in this work, the rule against hearsay does not affect it. It would be so even if it is attached in support of depositions that are themselves hearsay! The effect then is that hearsay evidence, which may itself even be lacking in authenticity and integrity, gets admitted and acted upon when it would otherwise not be admissible at all if the trial was not by affidavit evidence.

2.4. Dealing with the Challenges

Much as the Nigerian Courts have admirably liberalized the law to ensure the admissibility of electronically generated evidence, they have not discussed or addressed at all the challenges identified above. They have simply normally acted on the electronic evidence as true, authentic and credible, possibly because the issues of authenticity and integrity have not been raised before them (the Courts).

The problems of authenticity, integrity and confidentiality are not insurmountable and the Courts will be able to deal with them as they are raised or arise. For instance, if a statement of account in a bank's computer memory has been tampered with before or after being printed out and tendered in Court, its authenticity and integrity can be successfully challenged by tendering the customer's copies of deposit slips and studs of the cheque leaves etc used for withdrawals. It can only be impossible to do so if the customer is in league with the bank to conceal the truth that the tampering with the statement of account set out to conceal. Of course, the same would be the case even if non-electronic means were used in keeping the statement of account. Such

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[24] When opposing affidavit are irreconcilably in conflict over an issue the Court is required to call for oral or other types of evidence on the issue to enable it resolve the conflict. See, for instance, *FSB International Bank Ltd. v. Imano Nig. Ltd & Anor* (2000) 11 NWLR (pt. 679) 629, SC

concealments have been attempted in the country. There have been instances where money laundering took place through an account in breach of the Money Laundering (Prohibition) Act and both the bank and the customer, who would be jointly and severally subject to conviction and punishment under the Act, were in concert to hide the crime.[25]

With respect to tapes, movies and indeed all the other kinds of materials there may or may not be such other background pieces of evidence by which to check them they way deposit slips and cheque studs would do for computer made statements of account. However, as in all other pieces of evidence it will depend on a party to exercise appropriate vigilance to ensure that any undesirable piece of evidence – electronically generated or not – is not admitted from the other party. Even if such a piece of evidence is admitted on the ground of relevance, he needs the same vigilance to ensure that it is not accorded any weight by the Court. Electronically generated materials have, as it were, become indispensable in life and business and it is extremely commendable that the Courts now admit and act on them in relevant cases. It would be lame to argue that they should be excluded from evidence just because they may sometimes be tampered with and tendered to mislead the Courts by unscrupulous parties. Every cost benefit analysis would show that the advantages of admitting and acting on electronically generated evidence far outweigh any difficulties they may pose in some cases.

2.5. The Peculiar Importance of Affidavit Evidence in Nigeria and Role as Evidence

Presently in the administration of justice in Nigeria affidavit evidence occupies a very important place. Much of the evidence used in the Courts are affidavit based. This is because well over 60% of the proceedings that take place in Courts of first instance are affidavit based. In the Court of Appeal it is not less than 40% whilst at the Supreme Court it may well be about 20%.[26]

The proceedings may be interlocutory or those classes of proceedings wherein affidavits constitute substantive pleadings as it were. The interlocutory proceedings are legion and include applications by Motions on Notice or *ex parte* for injunctions;[27] extensions of time within which to take particular steps in the proceedings when the party applying has run out of time for taking such steps;[28] amendment of a particular process such as a pleading or even the originating process of the Suit itself (such as a

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[25] This was the case with respect to some bank accounts of a former Inspector –General of Police

[26] Studies conducted on the matter by this writer covered only High Courts and other Courts of first instance. However, even a cursory look at the law reports published in the country or a practice in the appellate Courts indisputably shows that a lot of interlocutory proceedings go on at the Court of Appeal and Supreme Court, mostly by way of applications for leave to appeal, extensions of time, order for appeal to be heard on the Briefs of only one side when the other side fails or neglects to file its own Briefs. The studies referred to above were conducted in the course of preparing the text, *The Law and Practice of Affidavit Evidence* note 13 *supra.*

[27] Ord. 39 r. 3, Rivers State Rules, 2006; Ord.39 r. 3, Lagos State Rules 2004; Ord.9 r. 8, Federal High Court (Civil Procedure) Rules, 2000.

[28] Ord. 44 r. 4, Rivers State Rules, 2006; Ord. 44 r. 4, Lagos State Rules 2004; Ord. 3 r. 4, Court of Appeal Rules 2002; Ord. 2 r. 31, Supreme Court Rules 1985.

Writ of Summons) when the situation so warrants;[29] joinder of parties;[30] stay of proceedings including stay pending arbitration;[31] leave to appeal,[32] stay of execution;[33] relistment of a struck out case;[34] reopening of a concluded case or proceeding;[35] dismissal or striking out for want of diligent prosecution;[36] setting aside a default judgement in appropriate circumstances;[37] renewal of an expired Writ of Summons;[38] orders for furnishing of Costs by the other party;[39] departure from the rules of an appellate Court for the appeal to be heard on the bundle of documents;[40] order for an appeal to be heard only on the Briefs of an Appellant when the Respondent refuses or fails to file his Respondent's Brief[41] etc. Proceedings in which affidavits constitute pleadings include Suits instituted on the Undefended List[42] or by Originating Summons in appropriate cases[43] or by Originating Motion.[44] Proceedings for the

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[29] Ord. 24 rr. 1 – 8, Rivers State Rules, 2006; Ord. 24 rr. 1 – 8, Lagos State Rules 2004; Ord. 3 r. 16, Court of Appeal Rules 2002 (on amendment of Notice of Appeal and Respondent's Notice); Ord. 8 r. 3, Supreme Court Rules 1985.

[30] Ord.13 r. 7, Rivers State Rules, 2006; Ord.13 r. 7, Lagos State Rules 2004; Ord. 3 r. 3, Court of Appeal Rules 2002.

[31] Under the saving and omnibus provisions at Ord. 45 rr. 13 – 14 and Ord. 45 r. 13 respectively of the Rivers State Rules 2006 and Lagos State Rules 2004. For an examination of the law on stay pending arbitration see this writer in *Stay of Court Proceedings Pending Arbitration in Nigerian Law* J. Int. Arb. 13 J. Int. Arb. 3 (1996) 119.

[32] Under ss. 242 and 243 of the 1999 Constitution of the Federal Republic of Nigeria a litigant can appeal as of right to the Court of Appeal or Supreme Court from certain decisions of a High Court or Court of Appeal as the case may be but for other appeals he needs the leave of the High Court or Court of Appeal if the decision was given by the High Court and of the Court of Appeal or Supreme Court if the decision was given by the Court of Appeal.

[33] Ord.13 r. 7, Rivers State Rules, 2006; Ord.13 r. 7, Lagos State Rules 2004; Ord. 3 r. 3, Court of Appeal Rules 2002.

[34] Ord. 45, rr. 13 – 14, Rivers State Rules, 2006; Ord. 45 r. 13, Lagos State Rules, 2004.

[35] *Ibid* note 34 *supra.*

[36] Ord. 30 r. 19, Rivers State Rules, 2006; Ord. 7 r.5, Court of Appeal Rules, 2002; Ord. 2, r. 29, Supreme Court Rules, 1985.

[37] Ord. 20 r. 12, Rivers State Rules, 2006; Ord. 20 r. 12, Lagos State Rules, 2004.

[38] Ord.6 r. 6, Rivers State Rules, 2006; Ord. 6 r. 6, Lagos State Rules, 2004; Ord. 6 r. 14, Federal High Court (Civil Procedure) Rules, 2000.

[39] Orders 49 of the Rivers State Rules, 2006 and Lagos State Rules, 2004; Ord. 52, Federal High Court (Civil Procedure) Rules, 2000.

[40] Ord. 7 rr. 2 – 3, Court of Appeal Rules, 2002; Ord. 7 r. 5, Supreme Court Rules, 1985

[41] Ord. 6 r. 10, Court of Appeal Rules, 2002; Ord. 6 r.9, Supreme Court Rules, 1985.

[42] A fast track proceeding in which rather than file a Statement of Claim the Plaintiff or Claimant supports his Writ of Summons with an affidavit (which is in effect a sort of Statement of Claim) clearly outlining his case and stating that in his opinion the Defendant has no defence to the claim.

[43] Suits in which facts are not in controversy and the Court is called upon to give judgement purely on matters of law, for instance the interpretation of a document or a legislative provision. The Plaintiff or Claimant would normally come under Ord 2 r. 2(2) of the different State High Court (Civil Procedure) Rules (other than Lagos and Rivers States where the relevant rules are Ord. 3 r. 3 and Ord. 3 r. 5 respectively) and Ord. 7 of the Federal High Court (Civil Procedure) Rules, 2000.

[44] Actions for the enforcement of fundamental human rights under chapter 4 (ss. 33 – 46 of the 1999 Constitution and the Fundamental Rights (Enforcement Procedure) Rules, 1979 made under the 1979

recognition and enforcement of arbitral awards or for challenge of awards are also commenced by Originating Motions or Summons supported by affidavits.

These procedures and processes are of extremely constant usage in the Courts. Parties to Suits in Court are always having need to file one interlocutory application or the other. It is very difficult to imagine any Suit that could be filed and heard to determination without the filling of an interlocutory application at one point or the other. In fact, the general tendency is even to file one interlocutory application or the other with the Writ of Summons or other originating process at the time of institution of the case. For instance, ever so often it is found necessary to file along with the Writ of Summons or other originating process a Motion *ex parte* for an interim injunction restraining the Defendant from taking any steps capable of destroying the *res* or rendering nugatory any order or judgement which the Court may subsequently make or enter. The great regularity with which Actions for the enforcement of fundamental rights and similar Actions (on Originating Motions) and other types of Actions on Originating Summons are taken to Court has ensured that supporting affidavits are always being filed.[45] The Defendants would normally respond with affidavits in support of a Notice of Intention to Defend in the case of Actions on the Undefended List. For Actions on Originating Motion or Summons and for all interlocutory applications they respond by a counter affidavit.

3. Computer Printouts as Evidence

In every facet of life and business questions on the admissibility and use of computer printouts have, for quite some time, been very practical. They demand quick answers if the law must be an instrument for effective social and economic engineering and not a fossilised anachronistic burden. As in other parts of the world, practically every serious minded business or other organisation in Nigeria has for quite some time used computer for ordinary record keeping and accounting. Computer based devices such as automated teller machines, PINs, electronic funds transfers etc are in profuse use particularly in the banking industry.

The Evidence Act does not contain any reference whatsoever to "computer" much less so printouts from computer memory. If the Courts were to fold their hands on the matter all computer printouts would be absolutely inadmissible. So also would it be with respect to such necessary procedures like taking evidence by video link which is already being used in some countries like the USA and UK where the law is doing much, even if imperfectly, to keep pace with the times.[46] This legislative inertia

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Constitution but which is applicable under the 1999 Constitution. Another example of the numerous Actions capable of being instituted by Originating Motion is any one for enforcement or challenge of arbitral awards, or even the challenge of arbitrators under the Arbitration and Conciliation Act cap A18 LFN 2004.

[45] For instance, Suits for enforcement of fundamental rights are filed with an amazing regularity. They are all filed with affidavits under the Fundamental Rights (Enforcement procedure) Rules 1979. For more on such Suits see this writer in *Problems of Jurisdiction and Modes of Fundamental Rights Enforcement Under Federal Constitutions in Developing Political Cultures: The Case of Nigeria* forthcoming in Hon. Justice Umezulike (ed) *Essays in Honour of Hon. Justice Ayoola.*

[46] In *Rowland & Anor v. Bock & Anor* (2002) 4 All ER 370 Newman, J of the English judiciary approved as normal the use of video link to take a witness' evidence. The Claimant, a Swedish businessman brought proceedings in England against the Defendant. The Claimant was however subject to a request for his extradiction to US and risked arrest if he entered the UK. He therefore

notwithstanding, the Courts have adopted[47] a liberal interpretation and application of the Act and existing legal rules so as to accommodate computer printouts and kindred types of evidence. Way back in 1969 in *Esso West Africa Inc v. T. Oyegbola*[48] the issue for decision was whether or not computer statements of account and their ledger copies were receivable in evidence as "books of account" under s. 37 of the Act.[49] In proof of a claim for the balance of an amount due and owing for petroleum products sold to the Respondent, the Appellants stated that they normally kept the Respondent's accounts and that at the end of each month statements of account were made out and sent to the Respondent. The Appellants' attempt to tender the ledger copies of the statements of account already sent to the Respondent in the manner stated above was rejected by the trial Court on the ground that they did not constitute the type of books of account contemplated by the law; that the ones contemplated by the law were "usually bound and the pages are not easily replaced". In rejecting that line of thought the Supreme Court stated at p. 198 of the report,

> *'Besides, section 37 of the Evidence Act does not require the production of "books" of account but makes entries in such books relevant for purposes of admissibility. … The Law can not 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 mechanical process are common place and section 37 cannot therefore apply to "books" of account … so bound and the pages … not easily replaced.'*

The Court took judicial notice of the kalamazoo system of accounting.

In *Chief Joseph Ogolo v. IMB (Nig) Ltd*[50]*Onalaja*, JCA stated,

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sought the Court's permission to give evidence at the trial by video link. The Master held that it would be unfair to the Defendant to be cross-examined in Court while the Claimant would be cross-examined on video and that the parties would not be on equal footing in such a proceeding. Newman, J reversed the Master and allowed the proceedings. There is hardly a statutory provision in Nigeria on which such a decision may be based in any literal interpretation. In *R (on the application of the DPP) v. Redbridge Youth Court* (2001) EWHC Admin 209; 4 All ER 411 leave for testimony by videolink was also granted in respect of two boys who might be upset or intimidated by the Court setting from giving accurate evidence.

[47] With respect to information technology the only relatively recent federal statute with any direct and purposeful bearing is the Nigerian Communication Commission Act, 1992 now cap N97 LFN 2004 under which the Nigerian Communications Commission licenses and regulates the operation of telecommunication companies (see s. 11 for instance). A Bill on Information Technology as well as the Evidence Bill, 1998 which are still both before the National Assembly have hardly been attended to. On the other hand, some countries such as the UK and USA have enacted statutes reforming their laws - particularly the Law of Evidence – to take benefit of the advances in Information Technology. It must be noted however that reform of the Law of Evidence has been a rather slow and uneasy process globally, for which see Prof. Yemi Osinbajo, *Electronically Generated Evidence* in Chief Afe Babalola (ed), *Law and Practice of Evidence in Nigeria,* Sibon Books Ltd, Ibadan 2001. p. 243.

[48] (1969) 1 NMLR 194, SC.

[49] Section 38 in the revised Act i.e. cap E14 Laws of the Federation 2004 which was previously s. 37 in the old Evidence Act. The section provides that entries in books of account, regularly kept in the course of business, are relevant whenever they refer to a matter into which the Court has to inquire, but that such statements shall not alone be sufficient evidence to charge any person with liability.

[50] (1995) 9 NWLR (pt. 419) 314, CA.

> *"The commercial and banking operations in the keeping of accounts by the old system has changed to computer, which makes Nigerian business to be modernised and in keeping with the computer age which system is so notorious that judicial notice of it can be taken under s. 74, Evidence Act."*

Nnamani, JSC had also earlier in 1988 posited that "one has to be circumspect in interpreting Section 96[51] in the light of modern day banking procedures and gadgets such as computers being increasingly used".[52] In *Mrs. Elizabeth Anyaebosi v. R. T. Briscoe (Nig) Ltd*[53] a statement of account was tendered and admitted as Exhibit P4 without any objection. On appeal, an objection to its admissibility was raised under s. 97. Uwais, JSC (as he then was) overruled the objection.[54]

Only one decision (of the Court of Appeal, not even the Supreme Court) has directly sought to make statements of account printed out of computer memory absolutely inadmissible under s. 97 i.e. *Nuba Commercial Farms Ltd & Anor v. NAL Merchant Bank Ltd & Anor*.[55] The Respondent's counter claim at the High Court succeeded based on a statement of account printed out of the computer. On this appeal the relevant issue with respect to the statement of account was whether or not the bank could go on calculating interest against the Appellant after filing the counter claim in Court. Taking on more issues than were necessary for the decision of that narrow point the Court of Appeal asserted,

> *"Section 97(1) provides for the admissibility of secondary evidence in certain stated cases including when the original is shown or appears to be in the possession or power of the person against whom the document is sought to be proved, or any person legally bound to produce it. In (1)(h), it provides "when the document is an entry in a bankers book". 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*

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[51] Section 97 used to be s. 96 in the old version of the Act.

[52] *Oguma Associated Cos. (Nig) Ltd v. IBWA Ltd* (1998) 1 NSCC (vol. 19 pt. 1) 395, 412.

[53] (1987) 3 NWLR (pt. 59) 84, 2 NSCC (vol. 18 pt. 2) 805.

[54] See also other cases like *Chukwurah Akunne v. Matthias Ekwunno & Ors* 14 WACA 59; *Yassin v. Barclays Bank DCO* (1968)1 All NLR 171, 177; *Alade v. Olukade* (1976) 1 All NLR 67; 6 SC 183. However, if such a statement was built up by a machinist from vouchers prepared by other people then it cannot be described as "book of account" and is therefore completely not admissible as such even in the absence of objection: *Festus S. Yesufu v. ACB Ltd* (1976) 4 SC 1; All NLR (Reprint) 264, SC. It is not a banker's book under s. 97(2)(e) because it is not one regularly kept by a banker in the course of business but rather prepared by the machinist from vouchers.

[55] (2003) FWLR (pt. 145) 661

> *respondent for its own use, is wrong to be used in the trial against the appellants."*[56]

It is clear from the statement that the Honourable Court took the view that such a statement of account printed from computer memory was not a "bankers book" and that even if it was it must be shown to have been in the possession of a party before it could be used against him in evidence. With the greatest respects, both views are hardly correct. From the Supreme Court decision in *Esso West Africa Inc v. Oyegbola*[57] and the comment in *Oguma v. IBWA*[58] it is clear that a statement of account printed from computer memory is a banker's book for the purposes of the Evidence Act. It is also not necessary under s. 97 of the Act for a bank's customer to have had the banker's book in his possession before that book or its entries become relevant for purposes of admissibility or even weight. The need for a document to have been in a party's possession before it can be used against him arises only if the document is sought to be tendered under s. 97(1)(a). Subsection 97(1)(a) does not control subsection 97(1)(h). The section provides,

> *"97(1) Secondary evidence may be given of the existence, condition or contents of a document in the following cases -*
>
> *(a) when the original is shown or appears to be in the possession or power-*
>
> *(i) of the person against whom the document is sought to be proved, or*
>
> *(ii) of any person legally bound to produce it, and when, after the notice mentioned in section 98 of this Act, such person does not produce it.*
>
> *(b) when the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative in interest;*
>
> *(c) when the original has been destroyed or lost and in the latter case all possible search has been made for it;*
>
> *(d) when the original is of such a nature as not to be easily moveable;*
>
> *(e) when the original is a public document within the meaning of section 109 of this Act;*
>
> *(f) when the original is a document of which a certified copy is permitted by this Act, or by any other law in force in Nigeria, to be given in evidence;*

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[56] Per Omage, JCA pp. 672G - 673 A.

[57] (1969) 1 NMLR 194, SC.

[58] Note 52 *supra*

> *(g) when the originals consist of numerous accounts or other documents which cannot conveniently be examined in court, and the fact to be proved is the general result of the whole collection;*
>
> *(h) when the document is an entry in a banker's book."*

In practice across the States' and Federal High Courts, computer printouts of customers' statements of accounts are in constant use to prove debts against the customers.[59] In fact, such debt recovery Suits are often filed on the Undefended List. The Courts do not only admit the statements of account in evidence but are very often sufficiently persuaded by their contents as to enter the Suits on the Undefended List. They quickly enter judgement in each Suit that the Defendant fails to show defence on the merits.

4. Tapes, Movies, Telephone Conversations Etc as Evidence

Concerning audio and video (and, therefore, other visual) tapes the Nigerian Courts do not seem to have adopted a definite stand yet. However, the existing authorities are suggestive of a favourable disposition towards such classes of evidence. In *Prince Edward Eweka & Ors v. Asonmwonriri Rawson (alias AAU Eweka) & Ors*[60] the dispute was over succession to the position of Enogie of Obagie in Edo State. The issue was whether or not the 1st Respondent was indeed a son of the late Enogie and if so whether or not he was acknowledged as such by the late Enogie. To prove those facts he tendered at the trial a tape recording in which the late man acknowledged him as the first son, which tape was admitted without opposition. On appeal the Appellants contended that the tape was inadmissible but the Court of Appeal easily dismissed the argument. It was obvious that the trial judge had placed reliance on the tape in holding that the 1st Respondent was indeed accepted by the late Enogie as the Enogie's first son. There was no other evidence of that fact other than that contained in the tape. Ba'aba, JCA refrained from a detailed discussion of the matter because there was no appeal on the particular point.

No doubt, there is hardly an express provision in the Act under which a video recording, a movie or other visual tape such as cd or vcd may be admitted. It must however be noted that the Act does not anywhere specifically prohibit their admission or the admission of any evidence of their kind. It is our view that they are admissible on the same pedestal on which photographs are admissible in evidence. A photograph is a still image. A video recording of actions (with or without voices) of an event or of participants or actors, just like a movie, is simply a series of still images. Each still image is simply recorded one immediately after its predecessor in time and because every second is captured all add up to a series of pictures in motion. Each still image gives way in the next second to its own successor in time. It is of no moment that, unlike in the case of a photograph, an equipment may be needed in Court for the recording or movie to be seeable or intelligible to the Court. It has been held about

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[59] See such cases as *Esso West Africa Inc* and *Oguma* already discussed, as well as PHC/286/2001: *Trident Steel Works Nig. Ltd v. Genprogetti Ltd* unreported case decided by the Rivers State High Court, Port Harcourt, 2001

[60] (2000) 10 NWLR (pt. 722) 723, CA.

tapes generally in the English case of *Grant v. Southwestern & County Properties*[61] that "the mere imposition of necessity of an instrument for deciphering the information can not make any difference in principle". The instrument only helps the Court to see the recorded action or event exactly as it took place. The instrument does not add or remove from the action or event. Holding otherwise would amount to hypocrisy and fanciful reasoning. It would be like insisting that just because a Court has held up a book with a lamp it has affected the contents. There is no reason whatsoever why a Nigerian Court should not be inclined to the decision in *Grant*. If a Court does it would be going against the manifest policy position of the Nigerian apex Courts in *Esso, Joseph Ogolo* and *Anyaebosi* to the effect that the Nigerian Courts cannot shut their eyes to (but should rather take judicial notice of) new useful scientific devices.

We have already seen that the hearsay rule does not apply to affidavit evidence.[62] It therefore does not apply to exhibits attached thereto which automatically become part of the affidavit. Even if the hearsay rule was applicable to other exhibits attached to an affidavit it would not apply to a visual tape recording or movie attached to an affidavit unless the authenticity or integrity of the evidence is in issue. As the Court views the pictures (movements etc) in the visual tape or movie it is just seeing the witnesses do or say the things in question. It is not a case of the credibility of the evidence depending on the veracity or competence of a witness that the Court has not seen.[63] It has in fact been specifically held in an English authority that the best evidence (hearsay) principle does not apply to such evidence.[64] Since the Nigerian rules of hearsay have normally generally been the same with the English[65] the authority has great persuasive influence.[66]

If in the circumstances of a particular case it is not possible to bring a visual tape or movie to Court for the Court to see, the evidence of its contents given by a party who has watched the tape or movie is, in England, on the same pedestal as the evidence of

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[61] (1974) 2 All ER 465, 474. See also Osinbajo op cit pp. 257 – 258 where he also cites Style & Hollander, *Documentary Evidence* 2nd ed, Longman 1987 p. 89

[62] Part 1B *supra.*

[63] Which is what the rule against hearsay is concerned with. The rule was formulated by the English Court of Appeal in *Subramanian v. Public Prosecutor* (1956) 1 WLR 965, 969 to the effect that the evidence of a statement made to a witness is "hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement" and that it not hearsay and therefore admissible "when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made". The Nigerian Court of Appeal has elaborated the inadmissibility by stating that it is "evidence which does not derive its value solely from the credit given to the witness himself, but which rests also in part on the veracity and competence of some other person". *Judicial Services Committee of Delta State v. Michael Omo* (1990) 6 NWLR (pt. 157) 407, 468.

[64] In *Kajala v. Noble* (1982) 75 Crim. App. R 149. Visual tapes and movies are admissible in England.

[65] I.e. before the enactment of the English Civil Evidence Act 1995 except in very few cases as concerns affidavit evidence.

[66] Though Nigeria was a colony of Great Britain English authorities, even of the House of Lords, now have only a persuasive influence on even the lowest of Nigerian Courts and a Nigerian authority of even the lowest Courts has greater persuasive influence on the country's higher Courts than even those of the House of Lords (for more on which see this writer in *Exploring the Boundaries of Legal Certainty in Nigeria, UK and USA: Stare Decisis, Justice and Injustice* note 9 *supra*) the authority under reference here is very likely to be followed by Nigerian Courts. This is in view of the stand the country's Courts have already taken to liberalise the law and admit electronically generated evidence.

a direct eye-witness who viewed the scene itself as it was happening in real life.[67] In Australia if the transcript of an examination *de bene esse* is admissible, a video tape of the examination is equally admissible: *Hyslop v. Australian Paper Manufacturers (No. 2).*[68] Nigerian Courts are likely to follow these wise counsel. It means that the deposition in an affidavit by such a witness can be admitted and acted upon, all other things being equal.

With respect to audio tapes, the law may be somewhat trickish. All the same, *Chief Gani Fawehinmi v. Nigeria Bar Association (No. 1)*[69] is encouraging. Chief Fawehinmi tendered a tape recording of the proceedings of a peace meeting for the amicable settlement of the dispute between him and the Bar. Its rejection was hinged on the fact that it was evidence obtained at a meeting for the amicable settlement of the matter out of Court and not on whether or not it was admissible as evidence at all under the Act. It is this writer's view that, consistent with the favourable disposition of the country's appellate Courts to electronically generated evidence since 1969 in *Esso West Africa Inc*[70] and the particular approach to tapes as foreshadowed in *Prince Edward Eweka & Ors,*[71] audio tapes are cognisable in the Nigerian Courts. There should therefore be nothing stopping a deponent from attaching as an exhibit to his affidavit in an appropriate case an audio tape to prove any fact in issue.

Before the past few years, telephone conversations may not have cropped up as evidence in Nigerian Courts very often. Telephone lines were generally few compared to the population and demand. Now with the expansion in telephony by the coming of the Global System of Mobile Telecommunication (GSM) in 2001 and other wireless and fixed networks a lot more people now have telephones and many business deals are now started and, or concluded on the telephone. In consequence, parties shall soon be needing to testify orally on or depose to transactions conducted on the phone, particularly GSM phones.

Telephone conversations are simply oral discussions passed through telecommunication cables. A sound emanates from the speaker and gets to the hearing of the other participant(s) in the conversation the same way as if they are talking across a wall or a screen. Evidence of it is therefore on the same footing as evidence of discussion held within hearing distance of each other but without seeing each other. A deponent may therefore simply depose to the contents of such a discussion as he would to that of a any other discussion including face-to-face discussion.

5. Electronic Mails, other Internet Transactions, Telefaxes Etc

If statutory provisions for the admission of ordinary or regular computer printouts are insufficient in Nigeria, they are completely non-existent for the admission of e-mails, other internet transactions, telefax messages, electronic funds transfers etc. It is this writer's considered view however that printouts of e-mails, other transactions on the internet and even electronic funds transfers which are all computer based can be

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[67] See Taylor v. Chief Constable of Cheshire (1986) 1 WLR 1479.

[68] (1987) VR 309

[69] (1989) 2 NWLR (pt. 105) 494

[70] Note 57 *supra*

[71] Note 60 *supra*

tendered simply as computer printouts under the rules of law already discussed in this article. It needs to be so pending the effectment of a statutory law reform that will specifically provide for them and their peculiarities. It is noteworthy that information contained in these things can hardly be tendered in Court in any other way other than through their printouts.

A telefax machine may or may not be a computer in the conventional sense as for a fax message that it prints out to ordinarily come under the classification of computer printouts. The New Edition Concise English Dictionary defines computer as, "a device, usually electronic, that processes data according to a set of instructions".[72]

Since a fax machine receives a message sent to it by another fax machine in unintelligible electronic impulses or codes and processes them back to intelligible word form and prints out the message, it may well be a computer within such definitions. Be that as it may, it would be necessary for the Courts to adopt the same liberal approach they have adopted towards computer generated evidence. On that basis they should interpret "computer" liberally to include a telefax machine and every other such electronic device. There is no specific definition of telefax or computer in Nigerian law yet. Again, there is a dire need for the Courts to now countenance and act on fax messages. It is very possible that in the unreported judgements of the numerous High Courts that view has been taken already time and again.[73] That view is after all the way that the Nigerian statutory law seems to be headed. Section 258 of the Evidence Bill, 1998 defines a computer as "any device for storing and processing information". Though a fax machine does not necessarily store information for a long time, it holds the information for such period as is necessary for the processing of the information from unintelligible electronic impulses into the intelligible form, which is then printed out on paper by the machine. It is also to be expected that in the ongoing review of the Evidence Act and the Bill specific provisions will be made for fax messages.[74]

6. Other Steps for the Future

In addition to the suggestions already made in this article for further judicial activism or legislative reform, it is necessary to point out a few other developments that should soon take place in this area of the law.

Considering the very commendable position which the Courts have taken with respect to tapes generally as shown in *Prince Edward Eweka* (visual tapes) and somewhat

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[72] HarperCollins Publishers, Glasgow, 1999 p. 301.

[73] As of now decisions of the 36 States High Courts (a few of which have up to 50 judges sitting in particular Courts) and the Federal High Courts are hardly reported. The law reporters concentrate on the decisions of the appellate Courts.

[74] Some important areas of the Nigerian law are currently undergoing fundamental and extensive reviews with the aim of bringing then in tandem with present national and international developments and realities. They are such areas as Investment Laws, a uniform Criminal Code and Criminal Procedure statute (as different from the present arrangement wherein the southern and northern parts of the country have different statutes on Criminal Law and Criminal procedure), Evidence, Child's Rights and Legal Education. It can only be hoped that the product of these exercises being undertaken at great cost and inconvenience by the Federal Ministry of Justice and private sector stakeholders will not be allowed to go the way of the Evidence Bill, 1998 by the National Assembly.

suggested in *Chief Fawehinmi* it is hoped that with respect to audio tapes their exclusion from the hearsay principle even in *viva voce* testimony will soon be effected. It should be same for voice mails and text messages (sms) on GSM telephones. If the makers of statutory law (politicians) are not forthcoming in passing the new Evidence Bill prepared by the Law Reform Commission since 1998 the Courts should take on the challenge. The Courts bear the direct duty of administering justice and of ensuring that the existing laws are made to meet the needs of each day and age. They would simply ask themselves, "if the makers of the Evidence Ordinance in 1945 had known of audio and visual tapes and GSM phones as media for the conduct of business the way it currently happens in the country, would they have excluded those things or evidence generated through them from admissibility?" The obvious answer would be "no" and it would also be obvious that the word "document" would have been expansively defined so as to include every device that can contain information.

In this writer's view this admissibility and exclusion from the hearsay rule even in oral evidence must now apply to all sorts of tapes - audio, video, cd etc - and all such information storage devices as diskettes, micro films and smart cards. This suggestion may appear rather bold or far-fetched upon a cursory consideration of the issues involved. If however it is realised and remembered that the aim of the law is not to fossilise life and business but to aid them, to do the much of beneficial social and economic engineering as is necessary through the administration of justice, then the inevitability of such liberal application of the extant rules in the absence of statutory reforms will be obvious. The only other alternative is for the law and the Courts to abdicate their responsibilities hiding under the technical excuse that the words of the Evidence Act do not permit such an approach. What we have canvassed will not amount to judicial legislation but simply a process of ironing out the creases. As Lord Denning would say,

> *"Whenever a statute comes up for consideration it must be remembered that it is not within human powers to foresee the manifold sets of facts which may arise, and, even if it were, it is not possible to provide for them in terms free from all ambiguity. The English language is not an instrument of mathematical precision. Our literature would be much the poorer if it were. This is where the draftsmen of Acts of Parliament have often been unfairly criticised. A judge, believing himself to be fettered by the supposed rule that he must look to the language and nothing else, laments that the draftsmen have not provided for this or that, or have been guilty of some or other ambiguity. It would certainly save the judges trouble if Acts of Parliament were drafted with divine prescience and perfect clarity. In the absence of it, when a defect appears a judge cannot simply fold his hands and blame the draftsman. He must set to work on the constructive task of finding the intention of Parliament … Put into homely metaphor it is this: A judge should ask himself the question: if the makers of the Act had themselves come across this ruck in the texture of it, how would they have straightened it out? He must then do as they would have done. A*

> *judge must not alter the material of which it is woven, but he can and should iron out the creases."*[75]

Speaking recently on the need for the law to adapt itself to the times for the achievement of justice, Pats-Acholonu, JSC stated,

> *The beauty of the law in a civilised society is that … It should be progressive and act as a catalyst to social engineering. Where it relies on mere technicality*[76]*or out-moded or incomprehensible procedures and immerses itself in a jacket of hotchpotch legalism that is not in tune with the times, it becomes anachronistic and it destroys or desecrates the temple of justice it stands on.*[77]

As Lord Denning would also say,

> *"What is the argument on the other side? Only this, that no case has been found in which it had been done before. That argument does not appeal to me in the least. If we never do anything which has not been done before we shall never get anywhere. The law will stand still whilst the rest of the world goes on and that will be bad for both"*[78]

This is simply what the Nigerian Courts have done with respect to the problems they have solved in this area of the law. In adopting those approaches for the admission of computer printouts and tapes, the Courts were simply being pragmatic and using existing statutory provisions, as full of limitations as those provisions are, to solve existing problems. They were not conforming strictly with the theoretical or analytical finesse of those provisions since those brands of evidence (and any other bred by information technology) could hardly have been admitted on a strict analysis of those provisions. For, instance, "books of account" in s. 38, on a strict literal interpretation, could not by any means have contemplated anything other than a book and a book is "a number of printed or written pages bound together along one edge and usually protected by covers".[79] Indeed a book properly so called is "usually bound and the pages are not easily replaced".[80]

Even upon scaling the test of being "books of account" such printouts would have faced the problem of whether or not they could be called originals. They probably could not be originals. To be able to admit them the Courts took the view that they were secondary copies.[81] The pertinent question on a strict literal approach to the law

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[75] Seaford Court Estates Ltd v. Asher note 3 supra

[76] Such as the lead judgement of the Court of Appeal did in *UBA Plc v. Sani Abacha Foundation for Peace and Unity & 5 Ors* (2003) FWLR (pt. 178) 978.

[77] *Muhammadu Buhari & 2 Ors v. Chief Olusegun Obasanjo & 266 Ors* (2004) FWLR (pt. 191) 1487, 1532 B – C.

[78] *Packer v. Packer* (1954) P. 15, 22.

[79] *Concise English Dictionary* New Edition, Harpercollins Publishers, Glasgow, 1999.

[80] Per the learned trial judge in *Esso WA Inc v. Oyegbola* note 57 *supra*. On a strict interpretation the trial judge was right in his definition of "book" and his rejection of the evidence.

[81] See, for instance, the judgement of Karibi-Whyte, JSC in *Anyaebosi v. R.T. Briscoe,* note 53 *supra.*

would be "secondary copies of what?". Can the unprinted version of the information in a computer memory be called an original "document" as assumed by such an approach? Section 2 of the Act defines document as follows,

> *"document" includes books, maps, plans, drawings, photographs and also includes any matter expressed or described upon any substance by means of letters, figures or marks or by more than one of these means, intended to be used or which may be used for the purpose of recording that matter;"*

It is plain that the definition only envisages a writing or inscription "upon any substance" i.e. upon a surface. It certainly does not contemplate writing in a computer memory even when same is displayed on the surface of the computer monitor. Even if it is noted that the definition is not exhaustive since it uses "includes" instead of "means", information in computer memory or screen could still have been excluded by the *ejusdem generis* principle of statutory interpretation. The principle would have limited the definition to things of the same family and nature with those enumerated. It would mean things with a surface on which the information is physically written, and exclude any electronic or magnetic process of displaying information contained in something that is by no means a surface. Even in treating such statements or printouts are secondary copies they would still have been a problem. They would have needed to fall into any of the classes mentioned in s. 97 of the Act to be admissible as secondary copies. The section provides for secondary copies at subsections (I)(a) – (h) reproduced hereinbefore. Even a cursory reading of the section shows that the printouts can hardly come under any of them in a strict interpretation and application.

Even the Court's decision in *Anyaebasi* that the computer printout of the computerised statement of account was admissible under subsections (I)(d) and (I)(g), would admit of several criticisms if a literal interpretation of the provisions is adopted. For instance, as Prof Osinbajo has pointed out, subsection (I)(d) envisages a situation where the original can actually be seen or observed but great difficulty would be encountered in bringing it to Court and not where the "original" is not visible to the human eye on account of the condition in which it exists.[82] The learned commentator further argues that the problem with bringing the original of such printout – the information stored in the computer in magnetic form - to Court is not one of immovability but visibility because if the information storage facility is moved to the Court the Court will still find it impossible to decipher the contents without assistance. He argues that subsection (I)(g) is even less fitting because the memory of the computer cannot be the "originals consisting of numerous accounts … and the fact to prove is the general result of the whole collection" which the subsection speaks of. He contends that the printouts are also not oral evidence of someone who has examined them and is skilled in such examinations, as equally envisaged by the subsection.

It is this writer's view that right as these criticisms are, they only serve to show how bold and activist the Courts are minded to be so as to make the Nigerian Evidence law relevant to every age and time. Those decisions must be understood as children of circumstances. They are most commendable as giant strides in the law for the solution

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[82] Prof. Yemi Osinbajo as in note 47 *supra* at p. 260

of practical problems unsolved by a strict abidance with legal finesse and theoretical purity. It is instructive that in other jurisdictions the Courts are taking similar steps to make the law relevant. As the learned commentator points out, in places like America the law is moving away from strict rules and principles (on authentication for instance) and would even waive the principle if it is shown that a strict abidance would be impractical or would not add much more to the evidence.[83]

It is also hoped that as information technology makes new devices available Nigerian Courts would confirm their admissibility at the earliest opportunity. This streak of judicial activism in the face of legislative inertia in a dizzyingly dynamic age should continue.

All said and done, there is an urgent need for the National Assembly to give quick attention to the Evidence Bill, 1998 and any other revised version that may soon be presented to it. Such a new legislation should incorporate necessary modifications in the light of developments that have taken place since the Bill's drafting in the second half of the 1990s. Statutory reform is the far better way of providing for the specific peculiarities of each of the kinds of evidence bred by information technology. Some of them - like e-mails, electronic funds transfers especially through the use of Personal Identification Numbers (PINs), and even the run-off–the-mill computer typesetting and book keeping – are very susceptible to manipulations and fraud which need to be specifically provided for.

Formulation of necessary precautionary rules cannot be left to the Courts alone for so long because it would be slow and laborious. Courts do not adjudicate on issues, no matter how important, except and unless those issues arise in the cases placed before the Courts by litigants. Before each and every one of the issues where precautionary rules are necessary with respect to these several types of evidence would arise for determination by the Courts, numerous abuses may have been perpetrated to the detriment of the law and the society it regulates. What is more, even if all the relevant issues were to actually arise before the Courts, the worrisome delay in the Courts[84] will ensure that the necessary rules take so long in coming. To be relevant in these age and times, the Nigerian law, particularly the evidence specie, needs to move at about the same pace with developments in the society, of course without becoming as ephemeral as fashion.

7. How To Exhibit Electronically Generated Materials

Documents and objects are made exhibits to an affidavit by "attaching" them to and verifying them in the affidavit.[85] For a document existing by way of a sheet or sheets of paper (computer printouts for instance), the process is straight forward and easy. All that the deponent needs do after referring to the paper document in his deposition(s) in the affidavit are:

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[83] For which he cites Massachussettes Bonding & Ins. Co. v. Norwich Pharmacal Co. 182d (2d Cir).

[84] For an examination of which see this writer in *Delay and Congestion in Nigerian Courts: Some Urgent Tasks and Viable Alternatives* chapter 24 of *In Search of Legal Scholarship,* Abia State University Law Centre, Aba, Nigeria, 2001.

[85] See *The Law and Practice of Affidavit Evidence* note 12 *supra* para 2.12 – 2.13 pp. 162 – 165; Note 16 *supra* and the text thereof.

(1) to immediately say as a part of his depositions,

"The document is hereby attached and marked as **Exhibit "A"**[86]

(2) to staple the document or by some other means band it to the affidavit

(3) endorse an identification at the back of the last page of the document that it is the document referred to as Exhibit A at paragraph XYZ in the affidavit of ABC (the deponent).

He makes as many photocopies of the documents as the number of copies of the affidavit and attaches one to each copy of the affidavit.

If the document is such a material as a video or audio tape, a movie or such other material the verification in the affidavit is the same but two differences may apply, namely;

(a) the relevant numbering and identification of the paragraphs where it is referred to will need to be done on a piece of paper which is then gummed to the exhibit. There is no need for attachment in the literal sense as it is not possible or practicable.
(b) Generally speaking, the deponent or the party on whose behalf he deposes, as the case may be, will need to make copies of the exhibit and accompany each copy of the affidavit with it. If it is impossible to make copies[87] he may be allowed to attach the only available copy to the original i.e. the Court's copy of the affidavit. In that case every party and the Court can only watch or hear the contents when played in Court.

8. Conclusion

This article hopes to have shown that what has happened in this area of the Nigerian law is an encouraging evidence of the fact that theoretical and jurisprudential disputations aside, judges sometimes have a duty, particularly in developing legal cultures, to make law. The article has canvassed the view that they should not shy away from that sacred duty simply on account of criticisms by academic commentators operating in different regions of the world where the operative factors are different. For the law to be relevant and useful to each age and clime, judges must indeed always be ready to "iron out the creases" in the law occasioned by legislative (human) imperfection in a particular statute or failure to even make necessary statutes at all.

The latter is of common occurrence in several developing countries and the Courts must not allow life and business to be stifled by the insensitivity or selfishness of politicians who fail in their duties to make necessary laws for their countries.

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[86] The numbering can be done in one of several ways. Another way is to prefix "A" or 1, 2, 3, etc as the case may be with the initials of the deponent as a way of distinguishing his exhibits from those of other deponents in the proceedings who may also simply number their exhibits as A, B, C, or 1, 2, 3, etc as the case may be. For more on these things particularly as they affect exhibits if there is an appeal being heard on the bundle of documents see paras 2. 06 – 2. 11 pp. 157 – 162 of *The Law and Practice of Affidavit Evidence* note 12 *supra.*

[87] Which can only be the case in very rare cases.

The article has also pointed out the challenges that electronically generated evidence pose in the Courts and how they can be tackled or contained. Ultimately, vigilance of the parties to a Suit is very necessary as every kind of evidence – even conventional paper documents – can in some cases have, though in lesser degrees, such problems as lack of authenticity and integrity.