THE SERVICE OF HEARING NOTICES THROUGH SMS: AN ANALYSIS OF THE SUPREME COURT OF NIGERIA's DECISION IN C.E.&M.S. LTD v. PAZAN SERVICES NIGERIA LTD

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Introduction

Technology has transformed the means by which we carry out our everyday activities. Every sector of the society has experienced technological advancement and the legal profession is not any different. Although, some believe that being a noble profession, the prestige of the legal profession can only be preserved by maintaining the traditional values and carrying out traditional processes. However, this school is being overtaken by the global wave of technological innovation.

This article analyses how technology has impacted on the processes of Nigerian Courts, using the decision in the C.E. & M.S. v Pazan case as a study. It also examines how efficiently and fairly justice can be dispensed through the use of technology in the service of court processes.

The Decision in C.E.&M.S. Ltd v. Pazan Services Nigeria Ltd

In the case of Compact Energy & Manifold Services (C.E.&M.S.) Ltd V Pazan Services Nigeria Ltd[2], the Supreme Court stated its decision on the validity of service of hearing notices through text messages. The case at the High Court involved the recovery of outstanding fees due to the Respondent for the supply of scaffolding material and other services rendered to the Appellant. The matter suffered several adjournments at the instance of the appellant, and was eventually scheduled for continuation of Case Management Conference (CMC) on 15th of March, 2016 and hearing notice were ordered to be served on the two parties. Respective Counsel for the parties had, beforehand, made their phone numbers available to the court and the court's registry chose to send the hearing notice via text message to those numbers.

On the date scheduled for the continuation of CMC, the appellant was absent, and the Respondent applied for Judgment under **Order 25 Rule 6 (2) (b)** of the High Court of Lagos State (Civil Procedure) Rules 2012[3] on the grounds of the Appellant's non-participation in Alternative Dispute Resolution (ADR) proceedings. The Court granted the application and entered judgement in favour of the Respondent. The Appellant then applied to the Court of Appeal to set aside the Judgment and was refused. The Appellant later appealed up to the Supreme Court on the grounds that its right to fair hearing had been breached because the service of the Hearing Notice did not comply with the Rules of Court. The Appellant contended, inter alia, that it was wrong for the trial Court to enter judgment against it in default of appearance, especially since the Court did not sit on the previous adjourned date and there was no proof of service of the hearing notice on the Appellant who had consistently appeared before the Court. He further contended that the proof of service purported to have been made via a text message by the Court's Registrar was not in line with **Order 7 Rule 13 of the Lagos Civil Procedure Rules**[4]. The Appellant's argument was as follows:

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[2] (2020) 1 NWLR (Part 1704) 70
[3] Now Order 27 Rule 5(b) of the High Court of Lagos State (Civil Procedure) Rules 2019
[4] 2012 Amendment

> *"…although electronic service is permitted by the Rules of the trial court, none was effected on the appellant, and there was no affidavit of service to that effect. There was no evidence before the trial court upon which the lower court could come to the conclusion or assumed that the text message which the court room registrar of the trial court allegedly sent to the appellant's learned counsel's phone was received."*

The Supreme Court, in dismissing the Appeal, held that:

> *"In the instant case, there is evidence that parties left their phone numbers with the registry of the Court. The phone numbers were supplied for the purpose of communication between the parties in this matter and the registry. There is evidence that a text message containing 15th March, 2016 as the hearing date of this matter was sent to learned counsel for respective parties through their phone numbers. Clearly, parties were properly served with hearing notice. I agree with the lower Court that at this age of information technology superhighway, it would be foolhardy for any litigant to insist on being served with hard copy hearing notice. Once a notice is sent to the GSM numbers supplied by the litigants, that is sufficient."* (emphasis mine)

In analysing the above decision, it is important to examine the underlying principles that require the service of Hearing Notices, the Rules of Court which implement them, procedurally, and the efficacy of service through technological means in the modern age.

The Principle of Fair Hearing

The legal maxim - audi alterem partem (i.e. let the other side be heard) is an inextricable component of natural justice, as it embodies the principle of fair hearing. In order for a party to a suit to be seen to have been fairly heard, a reasonable opportunity must be given to him to be present in Court for the purpose of offering evidence, cross-examining anyone giving evidence against him, and to give his defence. The primary aim is to ensure that justice is done.

It is for this reason, that the courts always seek to ensure that all reasonable steps have been taken to ensure that a party in a matter has been given the opportunity to participate in proceedings through the service of hearing notices. Indeed, the failure to serve hearing notices when required has been held to render any proceeding that is conducted thereafter a nullity, even if such failure is based on a procedural fault[5].

Traditionally the service of the Hearing Notice has been done through the conventional delivery of physical notices personally on the recipient or by substituted means through service on other persons or by publication. With the advent of technology, however, the courts have begun to permit service of its processes digitally using technology such as e-mail, sms messages and, in some cases, media enabled instant messaging services such as WhatsApp[6].

[5] See Skenconsult (Niq.) Ltd. v. Ukey [1981] 1 SC 6, 26; [1981] 1 SC; and Eimskip Ltd v. Exquisite Industries (Nig.) Ltd (2003) 4 NWLR (Part 809) 88

[6] In the Indian case of SBI Cards & Payments Services Pvt Ltd v. Rohidas Jadhavå (2018 SCC Online Bom) a Bombay High Court accepted the service of a notice through WhatsApp on a Respondent who had been evading all other means of service.

Upon service of a hearing notice, the Court will satisfy itself that service has been properly effected through the affidavit of service containing the depositions on oath made by the person who served it. The affidavit will contain details of the fact, place, date and mode of service of the notice. It will be considered as prima facie proof that service was properly effected, until rebutted. **See Estate of Humphrey Idisi v. Ecodril Nigeria Ltd**[7] where it was held that:

> *"It is settled that an affidavit of service deposed to by the person effecting the service, setting out the fact, place, mode and date of service and describing the process or document served shall be prima facie proof of the matters stated in the endorsement or affidavit."*

The purpose of the affidavit of service is to promote accuracy and honesty in the Bailiffs who serve court processes. If a server makes a false statement in an affidavit regarding a service carried out by him, he may be prosecuted for perjury. Thus, where an affidavit of service is not filed, it is the duty of the Court to demand to see proof in the form of an affidavit sworn by the Bailiff[8]. Through the affidavit the Court will be able to satisfy itself that the court process has come to the attention of the respondent or will be brought to his attention. There lies its importance.

The Rules of Court

The service of court processes is governed by the Rules of court and several Courts in Nigeria have in recent amendments of their procedural rules introduced the use of technology as a standard in the service of processes and notices.

The **Supreme Court of Nigeria Rules (2014 Amendment),** for example, provides under **Order 2 Rule 1 (3) (c)** [9] that:

> *"Where any person has given an address for service of any notice or other process not required to be served personally under these Rules, it shall be sufficiently served upon him, if transmitted by electronic means to the electronic mail address, facsimile number, GSM telephone number or other electronic mode of communication."*

The **Industrial Court Rules 2017** makes substantial provisions for service using technology and has been quite progressive in making the Rules. Apart from providing the service of all court processes[10] through all electronic communication and messaging platforms under **Order 7 Rule 1 (4)** of its Rules, it goes further to state the manner in which such service shall be proved in Court, which is important as we shall see later. Specific to the service of hearing notices through SMS, which is relevant to this analysis, **Order 7 Rule 1 (4)** of the **Industrial Court Rules 2017** provides that delivery of notices through electronic contact information provided by a party in a matter, it shall be considered good service as follows:

> *"Where a hearing notice or any other Court process has been sent and delivered by means of any electronic device stated in sub-rule 4 of this Rule to the contact addresses or information provided*

[7] (2016) LPELR-40438 (SC) page 22 paragraphs B - C
[8] See Umar & Anor v Okeke (2016) LPELR 40258 (CA)
[9] The Court of Appeal Rules (2016) contain identical provisions under Order 2 Rule 10 (c)
[10] Except Originating Processes.

by a party or counsel, it shall be deemed sufficient, good, and proper service on the party or counsel that provided the e–mail address(es) or electronic mailing device."

The **High Court of Lagos State Civil Procedure Rules 2019** makes provisions for the substituted service of originating processes through e-mail under **Order 9 Rule 5**[11]. Apart for service through substituted means, the 2019 Rules do not make provision for the service of processes or notices in the usual way using technology. The Rules also require a claimant and defendant or the legal practitioners representing them to include their phone numbers and email addresses in their originating process and memorandum of appearance under **Order 5 Rule 6**[12] and **Order 11 Rule 2**, respectively, suggesting that, apart from e-mails, communication with the parties regarding court proceedings through phone calls and text messages are permitted under the Court's Rules.

In addition to making provisions for the procedure through which processes may be served, the Rules of Court also provide for the manner in which such service shall be established. In particular, **Order 7 Rule 13 of the Lagos Civil Procedure Rules (2012 Amendment)**[13] provides that:

"After serving any process, the process server shall promptly depose to and file an affidavit setting out the fact, date, time, place and mode of service, describing the process served and shall exhibit the acknowledgment of service. Such affidavit shall be prima facie proof of service."

The Courts have in several decisions held that the Rules of Court are meant to be followed strictly, except when the Court is granted discretion under those Rules[14]. It is apposite, then, that where the Rules of Court require that things be done in a particular way, anything done contrary to those Rules would be invalid.

However, the Supreme Court in the **C.E.&M.S. case**, considered the Appellant's arguments that service had not been effected in accordance with **Order 7 Rule 13** of the High Court of Lagos 2012 Civil Procedure Rules (i.e. that no proof of service had been filed), and rejected them. The Court held that:

"Learned Senior Counsel for the Respondent was served the same way Appellant's Counsel was served. At the lower Court, learned Counsel for the Appellant did not deny at the earliest opportunity that he did not receive any hearing notice. He only argued that the hearing notice was not served in accordance with the Rules of Lagos State High Court. His sudden summersault before this Court is an attempt to frustrate the speedy disposal of this case. From the history of the case, learned Counsel for the Appellant has not been forthright in pursuit of this case. Having therefore

[11] There was no provision for this under the 2012 Rules

[12] An identical requirement for the Claimant or his Counsel to provide telephone numbers and email addresses was contained in the 2012 Rules under Order 4 Rule 6. However, there was no similar requirement for the Defendant under those Rules.

[13] The provisions of Order 9 Rule 15 of the 2019 Amendment of the Rules now requires, in the place of an Affidavit of Service, that the process server should record the service of court processes in a register kept at the Court Registry, where he shall state the method of service, personal or otherwise, and the manner used to ascertain that the right person was served.

[14] See Imunze v. FRN (2014) LPELR 22254 (SC) where the Supreme Court held that *"Rules of court are meant to be obeyed. They are not made for the fun of it. They must be followed strictly, unless the court is given discretion under them. These rules bind all parties before the court. No party is allowed to choose when or which to obey and/or disobey."*

been properly served with hearing notice, the Appellant's right of fair hearing has not been breached at all." (emphasis mine)

The Court also held that:

> *"the essence of a hearing notice is to bring to the notice of the party that his matter will come on the date named in the notice of hearing. Can the notice be effected by other means of notification? The answer is in the affirmative when the rules use the words hearing notice, it did not specify that it must be hard copy. Was the judge wrong to use the electronic method of informing parties about the date of hearing? I pause here to say this is the 21st century and technology is ruling every aspect of human endeavour and therefore even courts must be abreast of these technological advancements and be ready to absorb the aspects that will enhance the quality of justice and aid speedy determination of cases. The courts have also moved on in that regard. Indeed, electronic service has taken root in the Nigerian legal system and it would be strange for anybody to frown at being served electronically"*

From the reporting of the cases, and the Appellant's arguments at both the Court of Appeal[15] and at the Supreme Court, it would appear that the Registrar of the trial Court merely showed his phone to the trial judge as proof that he had delivered hearing notices to the parties. The Supreme Court's rejection of the Appellant's arguments is, therefore, strange, considering the numerous authorities which state the importance of an affidavit of service in establishing the proper service of processes. A possible reason for this position of the Court, in this author's respectful opinion, is that it was the impression of the Court that the delivery of an SMS message to a recipient, once it has been sent from the phone of the sender, is an unassailable fact. This opinion is because the Court accepted that "there (was) evidence that a text message containing 15th March 2016 as the hearing date of (the) matter was sent to learned Counsel for respective parties through their phone numbers", even though no proof of service had been filed by the Registrar asserting that fact. The Court also seemed to consider at length the issue of whether the service of a hearing notice by electronic means instead of a hard copy was proper, rather than whether there was prima facie evidence that the hearing date had been properly communicated to the Appellant.

It is also worth noting that the High Court of Lagos State 2012 Civil Procedure Rules did not make provision for service through technology except by substituted means through e-mail. Even the requirement under the said Rules that the Claimant's counsel should make available its phone number was not similarly stipulated for the Defence Counsel and may have been imposed by fiat of the Registry.

In any event, the C.E.&M.S case, for all intents and purposes, now appears to stand as the authority that the service of hearing notices through text messaging technology will be considered as proper service on parties, even where the service procedure did not satisfy the Rules of Court .

The Limitations of Service through Electronic Messaging Services

While the preparedness of the various courts to embrace innovation in the dispensation of justice is laudable, the Supreme Court's willingness in the C.E.&M.S case to accept service by SMS, even though the manner in which the service was carried out did not satisfy the procedure laid down in the trial court's Rules, suggests an over eagerness on the part of the judiciary to utilise new technology in the dispensation of justice without fully appreciating the limitations involved.

[15] (2017) LPELR – 41913 (CA)

In the traditional mode of service of hearing notices using hard copy notices, the process server takes the hearing notice to the address for service supplied by the party to the suit or his counsel and effects personal service, and then requests that the recipient endorses his acknowledgement of receipt on a copy of the notice. In the case where an order for substituted service is made, the process server pastes the notice in a conspicuous place where it will very likely come to the attention of the intended recipient. The acknowledged copy of the served notice or a copy of the pasted notice is then attached to an affidavit of service and placed in the case file for the trial judge's attention. Through this process the court is satisfied that the notice has been delivered to the respondent or that it has been put in a place where it is reasonable to expect that it will come to his attention eventually.

When a text message (SMS) is sent, it, typically, shows a "message sent" notification, which many often assume to be an indication that the message has been delivered to the recipient. What happens, in fact, is that the SMS is first delivered to an SMS message centre, which is a sort of electronic post office, then the message is forwarded from the message centre to the intended recipient's phone, if it can be located within the network[16]. If it happens that the recipient is not within the network's coverage area, or there is some network downtime in his area, or his mobile phone is turned off, then the message is stored for a limited time to be delivered later. In the event that the message is not able to be delivered before the expiration of the storage period, then that message fails to deliver without any notice to the sender of that occurrence. Thus, a "message sent" indicator on a dispatched SMS message is not an absolute confirmation of delivery as many would imagine.

One reliable way of ascertaining whether an SMS has been delivered is by enabling the SMS delivery report feature on a phone, which is supported by most carrier networks in Nigeria. When the feature is on, the network-defined message centre number will send a status report on a sent message to the sender's mobile phone. The sender will be alerted as to whether the message they sent was successfully delivered or not. However, there are occasions where the message centre may fail to issue a report on a sent message as a result of a technical failure. Also, the recipient could prevent his phone from issuing such delivery receipts under his phone's privacy settings or it could be disabled by default by the phone manufacturer.

Read receipts are also available for various media enabled messaging applications like iMessage, WhatsApp and WeChat, but are only available to users within those applications' ecosystem and can also be switched off under the application's privacy settings by default.

From the foregoing it is clear that due to the nature of the technology, there is no certainty on when a notice that is sent by SMS message has been delivered to a recipient, as would a physical hearing notice. There is the risk, therefore, that an overreliance on the efficacy of SMS messaging technology may give rise to the injustice of lack of fair hearing, that is sought to be avoided through the requirement for service of hearing notices.

It is worth noting that the procedural rules of the trial court in the C.E.&M.S case only provides for the service of court processes through the use of technology as an alternative (i.e. through substituted means), rather than as the primary means of service. This trend can be observed in decisions in various jurisdiction where service of processes through text messages, social media or messaging application has

[16] Tiesha Whatley, How Does Text Messaging Work - https://www.techwalla.com/articles/how-does-text-messaging-work

been permitted. In those jurisdictions, service through technology was allowed after the traditional means of service had been exhausted without success[17]. Indeed, the Rules of the Supreme Court only permit the service of processes through electronic means where the personal service is not required under its Rules. It would appear, then, that the draftsmen of those Rules had considered the limitations of electronic service and were careful in making provisions for its use in order to avoid injustice.

Possible Solutions through the Law

It is the considered view of this author that any questions as to the validity of service through technological means will be put to rest once a process has been effectively developed to establish that both parties consented to accept that means of service. This idea of consent formed the rationale for the development of the postal rule in the British case of **Adams v Lindsell**[18] where it was decided that acceptance communicated by post will be deemed complete upon posting, provided that post has been designated by the offeror as the accepted means of transacting. The rationale for the postal rule being that the risk of a communication delay or failure should be placed on the party that chose the communication method. Although it has been said that the postal rule does not apply to electronic communications such as telex[19] due to their instantaneous nature, it has been posited that electronic messaging shares a common aspect with dispatch by post in that it can get lost, delayed or fail to reach its destination and that the postal rule should, therefore, apply to electronic transactions for the purpose of achieving functional equivalence of transactions in the offline and online word[20].

The argument for consent as to mode of service where done through electronic means was lent credence in the case of **Bermith Lines Ltd v. High Seas Shipping Ltd**[21] where it was held as follows:

> *"where a party is to be served by 'electronic means', the party whom is to be served or his legal representative must previously have expressly indicated in writing to the party serving that he is willing to accept service by electronic means.*
>
> *Where a party seeks to serve a document by electronic means, he should first seek to clarify with the party who is to be served whether there are any limitations to the recipient's agreement to accept service by such means including the format in which documents are to be sent and the maximum size of attachments that may be received."*

Another option would be to make broad legislation which covers the issue of uncertainty of the service through technological means generally. **The Uniform Electronic Transactions Act (UETA) 1999 is a United States of America legislation which harmonises United States laws regarding the retention of paper records and the validity of electronic signatures**. While the provisions of UETA are applicable only to commercial transactions under U.S. laws, they provide some guidance to how Nigeria can legislate for the uncertainty surrounding the delivery of messages through electronic means. In particular Section 15 of the Act

[17] See the Indian case of SBI Cards & Payments Services Pvt Ltd v. Rohidas Jadhavå (supra) where electronic service through WhatsApp was utilised only after it was clear that personal service was not viable.
[18] (1818) 1B & A 681
[19] See Entores Ltd v Miles Far East Corp (1955) 2 QB 327
[20] Paul Todd - E Commerce Law, p 174
[21] [2006] 1 Lloyd's Rep. 537. Queen's Bench Division

provides default rules regarding when and from where an electronic record is sent and when and where an electronic record is received.

Some key provisions of the UETA which would be useful in expanding the Nigerian law of electronic evidence are as follows:

Section 8 of UETA:

> *"If parties have agreed to conduct a transaction by electronic means and a law requires a person to provide, send, or deliver information in writing to another person, the requirement is satisfied if the information is provided, sent, or delivered, as the case may be, in an electronic record capable of retention by the recipient at the time of receipt. An electronic record is not capable of retention by the recipient if the sender or its information processing system inhibits the ability of the recipient to print or store the electronic record."*

Section 15 of UETA:

> *(a) Unless otherwise agreed between the sender and the recipient, an electronic record is sent when it:*
>
> *(1) is addressed properly or otherwise directed properly to an information processing system that the recipient has designated or uses for the purpose of receiving electronic records or information of the type sent and from which the recipient is able to retrieve the electronic record;*
>
> *(2) is in a form capable of being processed by that system; and*
>
> *(3) enters an information processing system outside the control of the sender or of a person that sent the electronic record on behalf of the sender or enters a region of the information processing system designated or used by the recipient which is under the control of the recipient.*
>
> *(b) Unless otherwise agreed between a sender and the recipient, an electronic record is received when:*
>
> *(1) it enters an information processing system that the recipient has designated or uses for the purpose of receiving electronic records or information of the type sent and from which the recipient is able to retrieve the electronic record; and*
>
> *(2) it is in a form capable of being processed by that system.*
>
> *(c) Subsection (b) applies even if the place the information processing system is located is different from the place the electronic record is deemed to be received under subsection (d).*
>
> *(d) Unless otherwise expressly provided in the electronic record or agreed between the sender and the recipient, an electronic record is deemed to be sent from the sender's place of business and to be received at the recipient's place of business. For purposes of this subsection, the following rules apply:*
>
> *(1) If the sender or recipient has more than one place of business, the place of business of that person is the place having the closest relationship to the underlying transaction.*
>
> *(2) If the sender or the recipient does not have a place of business, the place of business is the sender's or recipient's residence, as the case may be.*

(e) An electronic record is received under subsection (b) even if no individual is aware of its receipt.

(f) Receipt of an electronic acknowledgment from an information processing system described in subsection (b) establishes that a record was received but, by itself, does not establish that the content sent corresponds to the content received.

(g) If a person is aware that an electronic record purportedly sent under subsection (a), or purportedly received under subsection (b), was not actually sent or received, the legal effect of the sending or receipt is determined by other applicable law. Except to the extent permitted by the other law, the requirements of this subsection may not be varied by agreement.

Conclusion

Cases like C.E.&M.S. Ltd v. Pazan are proof that Nigerian laws and Rules of Court must be drastically expanded to accommodate legal issues rooted in technology, in order to continue to ensure fairness in the delivery of justice. The laws relating to electronic transactions and electronic evidence in Nigeria need to be further developed to accommodate the realities of technology and how their use in legal proceedings may be limited compared to offline methods, as this will convey the judiciary's readiness to enhance the delivery of justice through innovation. It is hoped that Supreme Court will have an opportunity to revisit this issue when the circumstances arise.