

Access to Justice and the new front-loading system under our High Court Rules: A true perspective of witness statement on oath?

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INTRODUCTION

It is no gainsaying that one of the main reasons why many have lost faith in our justice system is the unusual delay and the resultant frustration. Cases have been reported as staying as long as twenty years or more before judgment is finally delivered. This has been a source of concern to everybody. The hues and cries about delay in justice administration are seen to be a major reason for the Lagos High Court in their Civil Procedure Rules which heralded the frontloading system in 2004¹. The High Court of the Federal Capital Territory² and other States High Courts like Rivers State³, Enugu State⁴, and Anambra State⁵ have amended their Civil procedure rules providing for frontloading of court processes.

The rules do not provide for the status and form of a statement on oath. Is a statement on oath the same as affidavit evidence? Should it take the form of affidavit? Should non-compliance with the words in the Oaths Act be taken as defect as to form or substance especially where there is evidence that it was sworn before an authorised person? These are some of the knotty issues we intend to address in this work. Yet we still need to consider the aims and objectives of the frontloading system.

¹ Lagos State High Court Civil Procedure Rules, 2004(Called Lagos Rules)

² High Court of the Federal Capital Territory, Abuja Civil Procedure Rules, 2004. (Called Abuja Rules)

³ River State High Court (Civil Procedure) Rules, 2006(Called Rivers Rules)

⁴ High Court Rules of Enugu State, 2006 (Called Enugu Rules)

⁵ Anambra State High Court Civil Procedure Rules, 2006 (Called Anambra Rules)

AIMS AND OBJECTIVES OF FRONTLOADING

Just as it has been previously acknowledged by learned author, D.I. Efevwerhan in his work⁶, the front-loading system was aimed at fast-tracking the dispensation of justice so as to save time and cost for litigants and the court. It is described as having great advantages⁷. It makes for efficient and effective case management of the court as the court can determine in advance the time for taking any of the processes, applications and time scheduling for trial.

Parties no longer have the unrestrained discretion to delay the proceeding with frivolous applications and adjournments. As pleadings, witnesses and documents are front-loaded, parties can easily determine the strengths and weaknesses of their case and that of their opponents. It therefore prevents litigants from presenting frivolous claims, or better still resort to alternative dispute resolution mechanisms such as arbitration, negotiation and mediation, etc. Above all the time and cost of both litigants and the court is saved.

If these are the true advantages of the front-loading system, then it should be encouraged. But how has it been applied? To what extent have these objectives being achieved?

APPLICATION

By the front-loading system, litigants are expected to file their processes in advance in court. These processes include originating processes such as writ of summons and the like; pleadings; list of witnesses to be called; witness statement on oath; copies of documents to be tendered in evidence⁸. In addition to the above processes that must be front-loaded, Abuja Rules has an innovation requiring the counsel to the plaintiff or in case of original application, to file pre-action counseling certificate (Abuja Rules) showing that the litigant was advised by him on the strength and weaknesses of the

⁶ D.I. Efevwerhan, *Principles of Civil Procedure in Nigeria*, Enugu, Chenglo Ltd, 2007

⁷ See D.I. Efevwerhan, *Principles of Civil Procedure in Nigeria*, Enugu, Chenglo Ltd, 2007.

⁸ Order 3 Rules 1 and 2 (Lagos High Court Rules, 2004); Order 3 Rule 2. (River State High Court Rules, 2006); Order 3 Rule 2 (Enugu High Court Civil Procedure Rules, 2006); Order 3 Rule 2.(Anambra State High Court Civil Procedure Rules, 2006)

case, and informed about alternative resolution mechanisms; where it is found that the case is frivolous, the counsel would be made to bear the cost⁹. Also in Abuja, the parties need not file list of their witnesses but they must file witness statement on oath. The defendant is also expected to file in advance his statement of defence (and perhaps with the counterclaim if any), list of witnesses (except in Abuja where list is not required); witness statement on oath; copies of documents to be tendered in evidence. Where the process entails applications (such as summary judgment proceedings) both the applicant and the respondent are expected to file their respective affidavit or counter-affidavit and written addresses. Written addresses are also to be filed at the end of trial by both parties¹⁰.

There is a little more innovation under Enugu Rules. Apart from the processes listed above to be front-loaded, litigants are expected to file a list of non-documentary exhibits (such as real evidence under section 77(d)ii of the Evidence Act)¹¹. Survey plans need not be front-loaded but shall be filed within such time as may be ordered by the court upon any application made under sub-rule 3 of the Order 3 of the Enugu Rules. The rule provides that a plaintiff may file a motion on notice along the originating processes for leave to enter the land in dispute for the purpose of preparing a survey plan¹².

These originating processes are not to be accepted for filing by the registrar unless the rules are complied with. Order 3 Rule 2 (2) of the Lagos Rules provides¹³:

Where a claimant fails to comply with Rule 2 (1) above, his originating process shall not be accepted for filing by the registry.

Even where the processes are inadvertently accepted for filing at the registry, the court still has the inherent jurisdiction to strike out the

⁹ Order 4 Rule 17(Abuja Rules)

¹⁰ Order 31(Lagos Rules); Order 36,(Abuja Rules); Order 31 (Rivers Rules); Order 31 (Enugu Rules), and Order 31 (Anambra Rules)

¹¹ Order 3 Rule 2(1) (c) (Enugu Rules)

¹² Order 3 Rule 2 (3) (Enugu Rules)

¹³ Similar provision is contained in Enugu Rules, Anambra Rules, and Rivers Rules.

processes. In *Jabila v. Onikoya*¹⁴ where both parties failed to comply with the rule on front-loading, both the claim of the claimant and counterclaim of the defendant were struck out by the court.

Under the Lagos Rules, a witness confirms his statement on oath as his evidence in chief (known as adoption), then he would be subjected to cross-examination if found to be necessary by counsel of the opposite side. Order 32 Rule 1(3) of the Lagos Rules provides¹⁵; The oral examination of a witness during his evidence in chief shall be limited to confirming his written deposition and tendering in evidence all disputed documents or other exhibits referred to in the deposition.

In Abuja, a witness does not adopt the statement already made and front-loaded. He goes through the usual examination-in-chief and cross-examination. Order 38 Rule 2 of the Abuja Rules provides: Subject to the provisions of any enactment relating to evidence, any fact required to be proved at the trial of an action commenced by writ, by the evidence of witness shall be proved by the examination of the witness orally and in open court.

PROBLEMS/ARGUMENT

Is a statement on oath the same as affidavit evidence? Should it take the form of affidavit? Should non-reflection of the words in the Oaths Act be taken as defect as to form or substance especially where there is a statement confirming that the statement was sworn before an authorised person? Must the deponent adopt his witness statement already made on oath before a court of law; can treat it as evidence in the proceeding? What is the status of witness statement on oath were the party that files the witness statement fails or neglects to call the deponent or changes his mind and decides not to rely on the witness? Can the other party who must have been led to believe on the state of things as contained in the processes act on the statement? We intend to consider these issues in this work.

The Rules of Court requiring the filing of witness statement on oath do not provide for the form of the statement. It assumes litigants or their counsel should have knowledge of the form. There is no consensus even amongst practitioners as to the format of the witness

¹⁴ [2004] ALL FWLR (pt.233) 1625 at 1647.

¹⁵ This is also the position under the Rivers Rules(Order 32 Rule 1(3); Enugu Rules(Order 32 Rule 1(3), and Anambra Rules(Order 32 Rule 1(3).

statement. Whilst some adopts the form of an affidavit, others adopt a narrative approach in which the witness narrates his story as if he is in the witness box giving evidence-in-chief.

It is submitted that to determine the status or form of a witness statement on oath made in a court proceeding, the provisions of the Oaths Act and Evidence Act should be taken into consideration. In court proceedings there are two forms of statement that can be made requiring oath-these are evidence given on oath in court during trial *viva voce*, and affidavit evidence or deposition¹⁶.

Thus where a party is expected by the rules of court to file his witness statement on oath, this statement must take the form of an affidavit since it is not *viva voce* evidence, and yet relates to court proceeding. In the second schedule to the Oaths Act, if it is not oath made *viva voce* in court during trial, then it is an affidavit. Such witness statement on oath must therefore take the form of affidavit as prescribed by the Evidence Act.

An affidavit has been variously defined to mean 'a signed and sworn or affirmed voluntary statement, made before a judge or other person authorized 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'¹⁷. It has also been defined as a 'written statement sworn before a person having authority to administer an oath'¹⁸. Niki Tobi, JSC, defines it as

'a court process in writing deposing to facts within the knowledge of the deponent..¹⁹. It was also considered to be

¹⁶ See second schedule to the oaths Act.

¹⁷ Andrew I. Chukwuemerie, *The Law and Practice of Affidavit Evidence*, PortHarcourt, Lawhouse Books Ltd, 2004 at page 1.

¹⁸ C.D Field in *C.D Field's law of Evidence* (in India & Pakistan) 11th edition, Law publishers, Allahabad, 1981 at 148. Also cited by Andrew I. Chukwuemerie, *op. cit*, page 1.

¹⁹ In *Chief Chukwuemeka Odumegwu Ojukwu v. Miss Stella Onyeador* [1991] 3 NWLR (pt.203) 286 at 317 para H.

'statement of fact which the maker or deponent swears to be true to the best of his knowledge, information and belief'²⁰.

The summary of all these definitions is that an affidavit is a written statement of fact made on oath or affirmed before an authorised person by another who signs it as being true and correct. Thus, where the rules of court require a party to a proceeding to file his witness statement on oath, such a party is required by consequence to make such witness swear to an affidavit of the facts.

The requirement of the Evidence Act on affidavit should be complied with. There are no given styles for drafting affidavit but the Evidence Act requires it to be headed in the court and in the cause or matter (if it is to be filed in a matter in court); divided into convenient paragraphs numbered consecutively and stated in the first person²¹ and the affidavit shall contain the full name, trade or profession, residence and nationality of the deponent²². The affidavit should contain a jurat which should state that the swearing took place; the place of the swearing; and state that the affidavit was sworn before the person taking the affidavit²³.

Where the person taking the affidavit could not sign or is an illiterate or blind person or where two or more persons jointly take the oath or where the affidavit was merely affirmed, the jurat shall state such fact²⁴. As to substance, it should contain only statement of fact²⁵, and not objections, prayers, arguments or legal conclusions²⁶. Where the facts deposed to are not derived from personal knowledge but from another source, the name of the informant, place, date and time information was given; and the deponent must confirm he believes the information²⁷.

²⁰ *Josien Holdings Ltd v. Lornamead Ltd* [1995] 3 NWLR (pt.371) 254 at 265.

²¹ S.90 (c) of the Evidence Act.

²² S.90 (b) of the Evidence Act

²³ S.90 (g) of the Evidence Act

²⁴ S.90 (g) and (k) of the Evidence Act

²⁵ S. 86, Evidence Act.

²⁶ S. 87, Evidence act.

²⁷ S. 88 and 89, Evidence Act.

The words of oath to be taken are provided in the Oaths Act²⁸. Section 1 of the Oaths Act provides:

The oath to be taken as occasion shall demand shall be the oaths set out in the first schedule to this Act

The form of the oath to be administered on the person to swear or affirm, and the person before whom the oath is to be taken is set out in the first and second schedules to the Oaths Act. Where the evidence to be given is oral in court the words to be administered on the person taking the oath or affirming is as follows:

EVIDENCE OATH

I,.....do hereby swear by Almighty God that the evidence I shall give shall be the truth the whole truth and nothing but the truth.

And where the person taking oath is making the statement in an affidavit or written statement the appropriate words to be administered are:

OATHS FOR AFFIDAVIT

I,.....do hereby solemnly swear by Almighty God that this is my name and handwriting and that the fact deposed by me in this affidavit are the truth, the whole truth and nothing but the truth.

It is submitted that the above words stipulated to be administered by the person before whom the oath is to be taken, are not required to be in writing first by the person taking the oath. They are to be 'taken'. To strengthen our position section 5 of the Oaths Act provides for the manner in which the oath is to be administered. It provides:

5. (1) Whenever an oath is required to be taken under the provisions of this or any other Act, or in order to comply with the requirement of any law in force for the time being in Nigeria, or other country, the following provisions shall apply-

The person taking the oath may do so in the form and manner following, that is to say-

²⁸ Cap O1, Laws of the Federation of Nigeria, 2004.

a. He shall-

- i. If a moslem, place both hands on a copy of the Koran;
- ii. If a christian, hold in his right hand a copy of the holy book or of the new testament;
- iii. If a jew hold in his uplifted hand, a copy of the old testament;

And shall say or repeat after the person administering the oath the words prescribed by law or by the practice of the court as the case may be;

a. in any other manner which is lawful according to any law, customary or otherwise, in force in Nigeria.

(2) Where any person taking an oath is physically incapable of taking the oath as provided in the foregoing subsection, he may touch or hold such copy otherwise, or if necessary such copy may be held before him by the person administering the oath.

Thus the words of the Oaths Act are to be 'taken' or 'said' by the person taking the oath, and not to be stated in written form. It needs to be determined whether the Oaths Act imposes the responsibility to 'say' the words in the first schedule, Oaths Act, on the deponent or on the officer administering the oath? From the words of the Act, the responsibility is on the officer administering the oath on the deponent. If it is true that the responsibility for applying the words of the Oaths Act lies with the officer administering the oath, why should a witness or the party that calls the witness be made to suffer for the omission or inadvertence of the officer if at all there was such omission?

The words of the Oaths stated above are to be said by the person before whom the oath is taken and merely to be repeated by the person taking the oath. It is the person administering the oath that must tell the deponent or witness what to repeat after him. And this is done viva voce in the presence of the person administering the oath.

There is no statutory requirement for those words to be printed by the person taking the oath. The law merely requires the person taking the oath to repeat the words after the person administering the oath, and nothing more. It is preposterous to expect more. Therefore, it is not correct to say, as was stated by learned author, Chukwuemerie, A. that the Oaths Act requires an affidavit to end with a statement like the following;

I, John litigant do solemnly and sincerely declare that I make this solemn declaration conscientiously believing the same to be true and by virtue of the provisions of the oaths Act²⁹. There is no such requirement in the Oaths Act. The Act merely provides that the oath is to be taken and not to be stated. Section 1 of the Oaths Act uses the word 'taken' and section 5 uses the word 'say or repeat'. These are clear and unambiguous words. It is trite law that where the words of a statute are clear and unambiguous, the court must give it the literal interpretation³⁰. Jervis C.J in *Abley v Dale* had this to say:

If the precise words used are plain and unambiguous, in our judgment, we are bound to construe them in the ordinary sense, even though it does lead, in our view, of the case, to absurdity or manifest injustice...Better to be accused of a narrow prejudice for the letter of the law (Baron Bramwell said) than set up or sanction vague claims to disregard it in favour of some hypothetical interpretation more consonant with the supposed intention of the framer or the spirit which ought to have animated them³¹.

The interpretation now being urged does not in anyway lead to any manifest absurdity or injustice. To 'say or repeat' cannot by any stretch of interpretation mean 'state' or 'write'. They are words the person administering the oath is expected to administer on the person taking the oath, that is the deponent, who is merely expected to repeat the words after the officer. Yes, it could be said, what then is the evidence that in fact oath was taken? It is submitted that it is the statutory responsibility of the person before whom the oath is expected to be taken to confirm that he administer the oath as prescribed by law or not, and this they always do by having in the jurat, a statement to the effect that the oath or affidavit was sworn before them in a given date. Section 6 of the Oaths Act provides:

Every commissioner for oath or notary public before whom any oath or affidavit is taken or made under this Act shall state

²⁹ Andrew Chukwuemerie, op cit page 18 para 1.27.

³⁰ *Abley v. Dale* [1851] 11 C.B 378; R. Judge of the City of London Court [1892] 1 Q.B 290.

³¹ Jervis C.J in *Abley v. Dale* [1851] 11 C.B 378 at 350.

truly in the jurat or attestation at which place and on what date the oath or affidavit is taken or made.

And that is why the deponent is expected to follow the manner of saying the words as prescribed in section 5 by placing both hands on the Holy Koran or right hand on the Bible or hold the old testament in his uplifted hand in case of a Moslem, or Christian or a Jew respectively and repeat the words after the person administering the oath. Those words are not part of the statement of fact to be stated in evidence by the deponent or witness. They are merely preliminary statement to be 'said or repeated' by him after the person administering the oath.

It is submitted, this explains the provisions of the Oaths Act as it relates to non-compliance with the procedure for the administration of oath. It treats it as an irregularity. The section unambiguously provide that such irregularity would not invalidate the official act or invalidate proceedings in any court, or render inadmissible evidence in or in respect of which an irregularity took place in any proceedings. Section 4 of the Oaths Act provides:

- (1) Nothing in this Act shall render, or be deemed to render or be deemed to have rendered invalid any act done or which hereafter may be done by a public officer in the execution or intended execution of his official duty by reason only of the omission by the public officer to take any oath or to make any affirmation which the officer should take or should have taken or should make or should have made provided that any person who declines, neglects, or omits to take the required oath or make the required affirmation under this Act shall-
 - a. If he has already entered on his office, be deemed to have vacated that office from the date of refusal; and
 - b. If he has not already entered on his office, be disqualified from entering on the same.
- (2) No irregularity in the form in which an oath or affirmation is administered or taken shall-
 - a. invalidate the performance of official duties; or
 - b. invalidate proceedings in any court; or
 - c. render inadmissible evidence in or in respect of which an irregularity took place in any proceedings.
- (3) The failure to take an oath or make an affirmation or any irregularity as to the form of oath or affirmation shall in no

case be construed to affect the liability of a witness to state the truth.

The Act unambiguously provides that any irregularity in the form the oath or affirmation is taken shall not invalidate the proceedings or render evidence inadmissible. Where there is a confirmation by the person who administered the oath that there was a swearing that was made on a specific date in his presence, there should be presumption that he administered the appropriate words of oath. By this statement made by the person who administered the oath, there is substantial compliance with the Oaths Act. In the case of viva voce evidence in court, the officer of court who administered the oath tells the court that the witness is on oath, and this raises the presumption of compliance.

Where a witness statement contains, in the jurat, a statement that it was sworn before a competent commissioner for oath (even where the words of the Oaths Act are not reflected on the face of the statement, why should the presumption that the commissioner administered the relevant words of oath to the witness not apply? Where there is such official confirmation that the statement was sworn before him, and there is no doubt that the person before whom it was sworn is authorized to take such oath, it is substantial compliance with the requirement for making those introductory statements. Section 150 (1) and (2) of the Evidence Act provide:

(1) When any judicial or official act is shown to have been done in manner substantially regular, it is presumed that formal requisites for its validity were complied with.

(2) When it is shown that any person acted in a public capacity it is presumed that he had been duly appointed and was entitled to act.

Thus where in the jurat it is clearly stated:

SWORN TO AT THE HIGH COURT REGISTRY.....

THIS.....DAY OF200...

BEFORE ME

COMMISSIONER FOR OATH

This raises presumption that the appropriate oath was administered. How does a witness swear in the court if not by repeating the usual words of oath after the commissioner for oath or such authorized officer of court? The above twin presumptions should avail the witness. It shows there was swearing to an oath, and the swearing was before a commissioner for oaths. This should raise presumption of compliance. And the later part of the jurat confirms that the person who took the oath was authorized to take it.

Where a given fact is presumed, the burden to rebut the fact is on the party alleging the contrary³². The adverse party who alleges that there is no compliance with the Oaths Act as to the manner of taking oath has the burden to prove either that the oath was not administered or that the person before whom the swearing to the oath took place was not an authorized person. This he can conveniently do by leading evidence as to what actually happened if at all he has such evidence. The burden is not and should not be on the deponent or witness to establish that oath was administered.

The court is enjoined to use an affidavit even if it is found to be defective as to form if the court is satisfied that it has been sworn before a person duly authorised³³. The statement that it was sworn before a commissioner for oaths should be enough to satisfy the court of compliance. It is usually argued that failure to state that the affidavit was deposed to solemnly and that the deponent believed its content to be true is no defect as to form but as to substance as it is non-compliance with substantive law³⁴. This cannot be correct. Where it is clearly stated in a jurat that the affidavit was sworn, and this is confirmed by the person before whom the oath was taken, it is

³² See *Jimoh Adekoya v Victor Oladipo* [1993] 7 NWLR (pt308) 637; F.Nwadialo, *Modern Nigerian Law of Evidence*, 2nd edition, Lagos, University of Lagos Press Ltd, 1999 at page 406.

³³ S.84 of the Evidence Act

³⁴ Andrew Chukwuemerie, op cit, page 25. This reflects the view of the court in all instances where statement on oath has been struck out for not stating that it was deposed to solemnly and its contents believed by the deponent to be true and correct in accordance with the Oaths Act, or words of like effect. See *Mrs. B. Osude v Umorji Chukwuma & Ors* EPT/AN/NAE/ HR/12/07 (unreported); *Hon Ossy Chinwuba v Joseph Isiagu & Ors* EPT/AN/SAE/28/07 (unreported); *Alphonsus Uzoegwu v Anthony Ezechi & ors* EPT/AN/SAE//6/07 (unreported)

a matter of style and surplusage for a direct statement of the form of words used by the person before whom the oath was taken to be recited. If this is not true, then failure to state that the hands of the deponent was placed on the Bible or Holy Koran lifted in the manner prescribed in section 5 should be taken as a fundamental breach or defect. It is most unnecessary. At worst, failure to specifically state the words of the oath administered should be taken as mere omission. Omission must be taken to be defect as to form and style and not substance. The substance is that oath was taken or said and is confirmed by the person before whom it was taken and place and date the oath was administered. It is a different matter where there is no jurat at all to confirm that the oath was taken before an authorised person.

We therefore find unsatisfactory some of the decisions of the court in which affidavit found not to have the declaration of the words of the Oaths Act (which are words to be administered viva voce by the person administering the oath) as fundamentally defective.

In *NNB & anor v. IBW Enterprises Nig. Ltd & 2 Ors*³⁵ where the statement had no deposition whatever on whether or not the deponent was making the affidavit solemnly or anything of the sort, the court held it defective and incompetent. The court has therefore held that where there is a semblance of statement by the deponent of the words used in administering the oath, and whether he takes the oath solemnly or not, holding that a mere statement that the deponent swears to the affidavit in good faith suffices and that the deponent was not expected to strictly quote the first schedule verbatim. Akintan, JCA observed that:

I believe that the form prescribed in the first schedule is expected to serve as a guide as to the form as acceptable oath within the provisions of the Oaths Act should take. In the author's view, the prescribed form is not expected to be rigidly followed word for word or letter by letter. We also believe that what is required therefore is to ensure that there is substantial compliance with the requirements of the Act. A situation therefore where an affidavit would be said to have failed to

³⁵ [1998] 6 NWLR (pt.554) 446.

comply with the requirement of the Act, would in my opinion depends on the facts in every case. This is because I believe that it is not possible to lay down a totally rigid general principle on the point³⁶.

There is no provision in the Oaths Act requiring the form of the oath administered to be reflected in the affidavit; just as the court does not record the words of oath taken before a court officer in *viva voce* evidence. It is usually recorded that the witness was on oath or was sworn and this suffices. If any party to the proceeding, where the court merely records that the witness was sworn (without reflecting the exact words administered on the witness), challenges the evidence of the witness on appeal on the ground that proper oath was not administered, the burden of proof lies on him for the records of the court attracts presumption of correctness or of compliance.

It is contended that where the commissioner for oaths confirms in the jurat that the affidavit was sworn, that should be sufficient proof of compliance. The party challenging this should have the burden of rebutting the presumption. If the court is not satisfied that the appropriate oath was administered despite the written confirmation, this should be resolved by calling evidence from the commissioner for oath alleged to have administered the oath instead of declaring the affidavit to be defective or incompetent.

During the hearing of many petitions from Anambra State on the 2007 general elections (National Assembly, and House of Assembly) many petitions were struck out for incompetence on the ground that the witness statement that accompanied the petitions did not contain a declaration that the statement was solemnly sworn and that the deponent believed the content of the statement to be true and correct; even though there was confirmation in the jurat by the commissioner for oath who administered the oath that the statement was sworn³⁷. These decisions were most unfortunate. They cannot be said to be right in law. It is technical justice and not substantial justice.

³⁶ *Marcel Ogwuegbu v. Mark Agomo & 9 ors* [1999] 7 NWLR (pt.609) 144, 167-168.

³⁷ See for instance, *Mrs. B. Osude v Umorji Chukwuma & Ors* EPT/AN/NAE/ HR/12/07 (unreported); *Hon Ossy Chimwuba v. Joseph Isiagu & Ors* EPT/AN/SAE/28/07 (unreported); *Alphonsus Uzoegwu v Anthony Ezechi & ors* EPT/AN/SAE//6/07 (unreported).

ADOPTION OF WITNESS STATEMENT ON OATH

It is already stated that under the Lagos Rules, the maker of the witness statement on oath is expected to adopt the statement before it becomes his evidence-in-chief³⁸. Under the Abuja Rules, there is no provision for adoption of the statement by the maker. Despite the making of the statement, the witness still gives evidence as in normal trial except that the evidence of the witness must be limited to his statement on oath already front-loaded³⁹. Must the deponent adopt his witness statement on oath before a court of law can act on it? What is the rationale for requiring a witness to confirm his statement on oath?

What is the status of witness statement on oath where the party that files the witness statement fails or neglects to call the deponent or changes his mind and decides not to rely on the witness? Can the other party who must have been led to believe on the state of things as contained in the processes act on the statement? This can only be determined by a consideration of the status of the witness statement made on oath. Is the witness statement made on oath pleading or affidavit evidence? If it is a mere statement, and not affidavit evidence; then the party that front-loads it can decide not to use it again.

The position of the court has been that the witness statement on oath is not affidavit evidence but merely part of the pleadings of parties and therefore must be adopted first by the maker before it becomes his evidence⁴⁰. This is so because the rules of court provide that the statement is only relevant upon adoption or confirmation by the deponent. We humbly submit that this should not be so.

³⁸ Order 32 Rule 1(3), Lagos Rules.

³⁹ Order 38 Rule 2, Abuja Rules.

⁴⁰ This was the position taken by the Election Petitions Tribunal, Anambra State, 2007. See *Mrs. B. Osude v Umorji Chukwuma & Ors* EPT/AN/NAE/ HR/12/07 (unreported); *Hon Ossy Chinwuba v Joseph Isiagu & Ors* EPT/AN/SAE/28/07 (unreported); *Alphonsus Uzoegwu v Anthony Ezechi & ors* EPT/AN/SAE//6/07 (unreported)

It has been submitted earlier that affidavit is a sworn or affirmed statement by the maker of the truth of a statement signed or thumb printed by him. It must be seen the same way as the evidence given by a witness on oath in open court. In the case of statement on oath that are front-loaded, it is evidence given though outside the court room, it is given on oath. This is strengthened by the rule in Lagos where the witness merely adopts the statement and he is subjected to cross-examination. If the statement is not evidence, why will the witness not be made to repeat his statement like in normal trial procedure, before cross-examination?

We have heard many argued that if it is evidence why would the witness be put on oath again? This is not far-fetched. It is because he is expected to give his evidence in cross-examination also on oath. The position that statement made on oath is evidence is also strengthened by the rule in both the Lagos Rules and Abuja Rules and the States that take after Lagos in providing that the court could order a fact to be proved by statements on oath. Order 32 Rule 2 of the Lagos Rules provides:

(1) A judge may, at or before trial of an action, order or direct that evidence of any particular fact be given at the trial in such manner as may be specified by the order or direction.

(2) The power conferred by sub-rule 1 of this rule extend in particular to ordering or directing that evidence of any particular fact be given at the trial:

a. By statement on oath of information or belief; or If the judge could order or direct that a fact be proved before trial by statement on oath, it means a statement on oath is a way of giving evidence in court. Is the statement on oath made pursuant to the order or directive of court different from that filed or front-loaded pursuant to the rules of the court? It is submitted that they are not different in substance. It is submitted that the judge can only make such an order or give such directive where the fact is necessary for the just determination of the matter before him and is not already covered by existing statements on oath front-loaded by the parties. A Statement on oath is evidence given on oath by the deponent and should be used in the same manner as any other affidavit evidence.

It is submitted that the need for confirmation under the Lagos Rules is for the deponent to be presented, by the party that called him, for cross-examination. Hence rule I of Order 32 of Lagos Rules provides that facts are to be proved by depositions and by oral evidence. The oral evidence referred to must and should only be for evidence required for foundation to be laid for the tendering of documentary evidence, and during cross-examination. If affidavit evidence given in support of Originating Summons; and applications are taken as evidence and acted upon by the court without the need for confirmation by the deponent, there is no special gain to be achieved by the requirements of the rules for confirmation (in Lagos) or for the deponent to be made to merely recite his evidence already given in the statement on oath (In Abuja) except to the extent of laying foundation for the admissibility of disputed documentary evidence and for cross-examination.

This makes the process of adoption most unnecessary where a witness is not required to tender any disputed document. If the witness is in court, then he should only be reminded of his statement already in court which he made on oath, and be subjected to cross-examination unless he is to tender some exhibits like documents or non-documentary evidence, in which case question laying foundation for the admissibility of such documentary or non-documentary evidence should be allowed. Where he does not come to court or the party that front-loads such statement decides not to call him⁴¹, the statement on oath should be taken as his evidence-in-chief and whether or not weight should be given to such evidence should depend on the circumstances of each case⁴².

The other party who must have been led to believe the state of the case of the party that front-loads such statement should be free to

⁴¹ In most cases, parties would usually decide not to call a witness whose statement is later found out not to have supported the party that frontloaded it or where it is found that the witness is no more well-disposed to the party that frontloaded the statement on oath.

⁴² Usually the court attaches little or no weight to evidence of a witness who is not cross-examined by the other party who is willing and ready to cross-examine.

make use of it (where he finds it relevant to his case)⁴⁵ or argued against weight being attached to it. If this is not done, then the primary purpose of front-loading would be defeated. It is meant to prevent frivolous cases from being filed in court, and gives the parties a true picture of the case of the other party, thereby allowing for settlement. It therefore serves as notice to both the parties and the court. This would be defeated if a party that front-loads a statement is to choose and pick from the statements on oath already front-loaded. This would allow for a game of hide and seek; and grand deceit. The writer who witnessed the hearing of several election petitions in Anambra State observed a situation where some of the respondents who had front-loaded their witness statements on oath (which are later found to be against them) deliberately refused to call these witnesses. This is wrong because it is like calling a witness to give evidence and after giving evidence-in-chief, but because the evidence-in-chief is not in support of the party that calls it, later decides not to allow the witness to be cross-examined.

It could be argued that if the adverse party finds the statement of the witness to be relevant for his case, he should take necessary steps to call the witness either by mere appeal or by ensuring witness summons or *subpoena* is issued on him. It must not be forgotten that witnesses to be called by parties to proceedings may not be known to the other party. And why should a party insist on cross-examining a party whose evidence is supportive of his case? The statement on oath being evidence like affidavit, should be admitted and used by both parties to the proceedings without the requirement of adoption or confirmation by the maker. This brings certainty to this new mode of civil litigation that requires front-loading.

SUGGESTIONS/CONCLUSION

From the analysis given above, it is submitted that an affidavit and by extension, witness statement on oath, should not be struck out just because there is no declaration of the words of the oath that was administered. It is not a statutory requirement that the oath administered by the person before whom oath is taken be reflected on the statement.

⁴⁵ Such as where the evidence-in-chief of a witness supports the case of the adverse party. he may decide not to cross-examine the witness and merely rely on the evidence -in-chief.

Both the holding of Bible or Koran or raising of hands and repeat of words of oath contained in the first schedule to the Oaths Act, only relates to the manner of taking oath and must not be seen as part of the statement sworn to by the deponent. Once there is confirmation by the person before whom the oath is taken that the statement is sworn, it should be sufficient to raise the presumption that the oath was in fact taken. The party contesting that oath was not taken despite such confirmation should have the burden to rebut the presumption.

Also the requirement under the Abuja Rules for a deponent who has already front-loaded his statement on oath to be examined-in-chief again as if there was no such statement already made is most unnecessary. It defeats the original purpose of front-loading. What is the purpose of front-loading a statement on oath when the deponent would still be expected to repeat the same evidence in court in evidence-in-chief? Why would the statement on oath already front-loaded not be taken as his evidence-in-chief?

If the court has jurisdiction to order evidence of a particular fact to be given by statement on oath, it means statement on oath is a form of evidence. Why is the statement on oath already front-loaded not accorded the same status? If the primary purpose of front-loading is to fast-track trial and consequently the administration of justice, and forestall frivolous matters in court, then these witness statements on oath must be taken as evidence in court. This would make parties to be more cautious in filing matters in court, and would really fast-track the trial.

The rules of court on the status of the witness statement on oath should be amended. We must not allow our rules to become instrument of fraud. A party who has been led to believe or take the case of a party as presented in his pleadings and evidence given in the statement on oath should not be made to suffer by a sudden change of position by the other party who may decide not to call these witnesses who might have made statements on oath that will help the case of the adverse party.

The Rules can be amended to the effect that the adverse party should be free to rely on the witness statement on oath front-loaded whether or not the party who front-loads it calls or produces the deponent for cross-examination or not; and where the party that front-loads a witness statement on oath fails or neglects to call the deponent, no weight should be attached to that evidence on his behalf, such evidence having not been subjected to cross-examination.