

# THE ADMISSIBILITY OF ORIGINAL COPIES OF PUBLIC DOCUMENTS – STATE OF THE LAW

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## Introduction

Evidence is the cornerstone of litigation, because, *facts are the fountain of law, legal principles or rules are not applied in vacuo*.<sup>1</sup> In other words, without facts which are deduced from evidence presented, no decision can be reached by a court of law. Documentary evidence is a fundamental type of evidence and it is the best form of evidence to prove a party's case before a court of law. In Nigeria, documents are statutorily classified as either private or public.<sup>2</sup> While the best evidence rule<sup>3</sup> dictates that the original copy of a document is superior in proving its contents, the position of the law has been unsettled as to whether primary evidence of public documents are admissible. It is this controversy that this article discusses.

## Documentary Evidence

Documentary evidence refers to statements recorded in a document and tendered for the purpose of establishing a fact.<sup>4</sup> It is the use of documents to prove or disprove the existence of a fact in issue. The importance of documentary evidence cannot be overemphasised. In fact, the validity and veracity of oral testimony is tested and affirmed by documentary evidence.<sup>5</sup> In emphasising this point, the Supreme Court in *Felicia Akinbisade v The State*,<sup>6</sup> stated thus:

“The most reliable if not the best evidence in most cases is documentary evidence. I say so because it is, in most instances, more reliable than oral or parol evidence. Although documentary evidence could be victim of forgery, by human conduct, act or intervention, the instances of forgery are less when compared with oral or parol evidence, where witnesses tell lies with ease”.

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<sup>1</sup>Babalola, Afe “Definition, Nature, Scope, Classification and Sources of Nigerian Law of Evidence” in <sup>1</sup>Babalola, Afe (ed) *Law and Practice of Evidence in Nigeria* Ibadan, Sibon Books Limited 2001, p. 1.

<sup>2</sup>Section 102 of the Evidence Act, 2011 (Evidence Act).

<sup>3</sup>*Felicia Akinbisade v The State*(2006) 17 NWLR (Pt. 1007) 184, 201.

<sup>4</sup>Yemi Osinbajo, *Cases and Materials on the Nigerian Law of Evidence* (Macmillan Nigeria, 1992) 1.

<sup>5</sup>See: *First African Trust Bank Ltd v Partnership Inv. Co. Ltd* (2003) 18 NWLR (Pt. 851) 35, 74; *Alhaji Mukaila Kotun & Ors. v Mrs. Adeola Olasewere & Ors.* (2010) 1 NWLR (Pt. 1175) 411, 437 and *Tijani Jolasun v Napoleon Bamgboye* (2010) 44 NSCQR 94, 132-133.

<sup>6</sup>(2006) 17 NWLR (Pt. 1007) 184, 201.

## **Classifications of Documentary Evidence**

Documentary evidence may either be tendered as primary evidence (i.e. in its original form) or as secondary evidence (i.e. a copy of the original document).<sup>7</sup>

Primary evidence refers to the document itself produced for the inspection of the court.<sup>8</sup>

Secondary evidence generally refers to any copy of a document other than its original. Certified copies of a document provided in accordance with the Evidence Act 2011 (the Act); copies of an original document made through a mechanical or electronic process, which in itself ensures the accuracy of the copy; counterparts of a document as against the parties who did not execute them; and even oral accounts of the contents of a document given by a person who has seen the document, are all examples of secondary evidence recognised by the Evidence Act.<sup>9</sup>

By the 'Best Evidence Rule', the contents of a document must be proved by the original copy of the said document.<sup>10</sup> However, for secondary evidence of a document to be admitted in proof of its contents, a proper foundation must be laid. In other words, justifiable explanations must be given as to why primary evidence of the document in question is unavailable as proof of the relevant facts in issue.<sup>11</sup> Section 89 of the Evidence Act provides a non-exhaustive list of circumstances and forms in which secondary evidence of a document may be admitted as evidence of facts in issue.

## **Public and Private Documents**

A document may also be classified as either a public or a private document.<sup>12</sup> Section 102 of the Evidence Act defines public documents as:

- (a) Documents forming the official acts or records of the official acts of –
  - (i) The sovereign authority;
  - (ii) Official bodies and tribunals, or

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<sup>7</sup> Section 85 of Evidence Act 2011.

<sup>8</sup> Section 86 (1) of Evidence Act.

<sup>9</sup> See Section 87 of the Evidence Act.

<sup>10</sup> Section 88 of the Evidence Act.

<sup>11</sup> Section 89 of the Evidence Act.

<sup>12</sup> Sections 102 & 103 of the Evidence Act 2011.

- (iii) Public officers, legislative, judicial and executive, whether of Nigeria or elsewhere; and
- (b) Public records kept in Nigeria of private documents.

From the above, a public document would include any document or record connected with public business or the administration of public affairs or preserved in or issued by an office or department of the government. Essentially, a document may be classified as public if it originates from or is in the custody of a public officer. All documents other than public documents are private documents.<sup>13</sup>

### Identifying a Public Document

In *Onwuzuruike v Edoziem*,<sup>14</sup> the court held that a public document must form part of the records of a public officer. It is immaterial that the document was neither authored by nor originated from the public officer, in so far as it forms part of such public officer's records. As such, a private document once kept in the public records of a public officer is categorised as a public document for the purposes of the Act.

Consequently, in *Udo v State (2016) 12 NWLR (Pt. 1525) 1, 23-24*, a confessional statement was held to be a public document. In *Jukok Int'l Ltd v Diamond Bank PLC (2016) 6 NWLR (Pt. 1507) 55*, a deed of debenture over fixed assets, an all assets debenture, a duly registered deed of appointment of a receiver, a notice of appointment and certificate of registration with the Corporate Affairs Commission were all held to be public documents. In *Gov., Ekiti State v Olayemi (2016) 4 NWLR (Pt. 1501) 1, 48*, a law enacted by the Ekiti State House of Assembly was held to be a public document. However, in *Governor, Ekiti State & Anor. v Chief George F. Ojo and Ors. (2006) 17 NWLR (Pt. 1007) 95 127*, the court held that a classified document was not a public document as the said document was not intended to be used by the public.

### Admissibility of Documents

For a document to be admissible in evidence, the following factors must co-exist:

1. It must be pleaded;

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<sup>13</sup> Section 103 of the Evidence Act.

<sup>14</sup>(2016) 6 NWLR (Pt. 1508) 215, 233-234.

2. It must be relevant to the subject matter of inquiry; and
3. It must be in an admissible form.<sup>15</sup>

### **Requirements for Admissibility of Public Documents**

The Evidence Act makes it permissible to tender both primary and secondary evidence of a public document. The Act accordingly provides as follows:

88. Documents shall be proved by primary evidence except in the cases mentioned in this Act.
89. Secondary evidence may be given of the existence, condition or contents of a document when –
  - a. the original is a public document within the meaning of section 102...

A few sections further down, the act provides that in proving public documents, the only form is a Certified True Copy (CTC).

The Act qualifies this provision further by stating that only a certified true copy of a public document may be admitted as secondary evidence in proof of the contents of a public document.<sup>16</sup>

In *Oba Aruna Okiki II & Ors. v Nosiru Jagun & Ors. (2000) 5 NWLR (Pt. 665) 19, 26*, the court identified the requirements for a proper certification of a public document:

- (a) The legal fees must be paid where payable;
- (b) There must be a certificate at the foot of such a document that it is a certified copy of the original or part thereof;
- (c) It must be dated;
- (d) It must be subscribed by the officer issuing the document with his name and title of office; and
- (e) It must be sealed.

### **Admissibility of Original Copies of Public Documents**

Flowing from various judicial interpretations of the provisions of sections 87, 88 and 90 the Act, there have been diverse views on the issue of whether or not an original

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<sup>15</sup>*Dr. David C.O. Okoye & Anor. v Christopher N. Obiaso & Ors. (2010) 8 NWLR (Pt. 1195) 145, 168.* See also: Onah, C.O, *Evidence Law in Action* (Eunis Educational Publishers 1996) 1.

<sup>16</sup>Sections 90 (1) (c) & 104 of the Evidence Act. See also *Ajao v Ambrose Family (1969) 1 NMLR 25* and *Udom v Umana (2016) 12 NWLR (Pt. 1526) 179, 235* and *Abdullahi v FRN (2016) 10 NWLR (Pt. 1521) 475, 498 – 499.*

of a public document is admissible in evidence. Before going into the judicial interpretations, it is pertinent that we point out that in the introductory sentence of Section 89 of the Act the word “may” is used and it is an elementary rule of interpretation of statutes that when the word “may” is used then the said provisions are not compulsory. One is therefore at a loss as to how the courts have gone on to interpret the sections of the act as they have so far done. When it is clear from the said provisions that an original is admissible<sup>17</sup> and if you intend to rely on secondary evidence then you must provide a Certified True Copy.<sup>18</sup>

*In Lawson v. Afani Continental Company Nigeria Ltd. & Anor.*,<sup>19</sup> the Court of Appeal Per Salami J.C.A. held that

“This takes me to the question of admissibility of statutory right of occupancy, Exhibit 3, the plan, Exhibit 4 and the customary certificate of occupancy issued by Chikun Local Government. The three documents qualify as acts of public officers, within the contemplation of section 109 of the Evidence Act, Cap. 112 of the Laws of the Federation of Nigeria, 1990. In the result only certified copies thereof are admissible and not original see *Sidi Yero v. Union Bank of Nigeria (2000) 5 NWLR (Pt.657) 470, 478* where the Court of Appeal said: “The case of *Okeke v. Attorney-General & Commissioner for Justice Anambra State (supra)* cited in the appellant's brief of argument seems to have been wrongly decided. In that case this court, at page 80, per Uwaifo J.C.A. (as he then was) held that a public document may be proved “by producing either the original or the secondary evidence of it”.

The above decision was based on the provisions of the repealed Evidence Act, which has similar provisions as the extant Act and the decision shows clearly what the controversy was. According to the courts, the mere inclusion of the fact that when secondary evidence of public documents are sought to be tendered then they must be certified excluded the admissibility of original evidence of public documents. It would be quite strange that a man who has in his hand his original title documents would then need to go to the states ministry of lands to get a Certified True Copy of the same document merely because he wants to tender it in court.

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<sup>17</sup>Section 89 of the Act.

<sup>18</sup>Section 90 (1) (c) of the Act.

<sup>19</sup>(2001) LPELR-9155(CA) (Pp. 27-29, paras. C-F).

The Court of Appeal appreciated this absurdity in *Ebu v. Obun*,<sup>20</sup> where the learned counsel for the respondent submitted that originals of public documents ought to be certified to make them admissible. The Court of Appeal *per* Opene J.C.A. in deciding gave intelligent response thus: "I do not know how the learned counsel came about this argument? When a document is certified, it is certified to be a true copy of the original. If then the original is to be certified, what will it be certified to be a true copy of itself (original)?"

Also in *The Registered Trustees of the Port Harcourt Christian Council Project v Amadi & Ors.*,<sup>21</sup> the Court of Appeal in analyzing the decision of the Supreme Court in *Okeke v The Attorney-General of Anambra State*<sup>22</sup> had a divergent opinion. The Court of Appeal *per* Thomas J.C.A. held that:

"Now since the appellant had tendered the original of the deeds of conveyance, it was patently wrong for the trial judge, to say, that the original was inadmissible. What was the need for a certified true copy of the document since the original was available? In the case of *Okeke v The Attorney-Gen of Anambra State (1993) 1 NWLR (Pt. 215) 60, 80*, the Supreme Court held that in establishing the admissibility of documents, the court must in the first instance, be proved by producing either the original or in its absence, the secondary evidence of it. As argued by the senior counsel, the Supreme Court has never rejected the inadmissibility of the original of a public document. I entirely agree that it is only in the absence of the original document which is the primary evidence, that secondary evidence duly certified will come in as an alternative or substitute. As earlier stated, by virtue of section 93 of the Evidence Act, 2004, primary evidence means the document itself, just as the appellants pleaded and tendered for the inspection of the trial court".

The views of the Court of Appeal in the later cases discussed above seem to be more in line with the intent of the draftsman of the Act. It should however be noted that one does not need to employ the mischief rule of interpretation to see the clear and literal meaning of section 89 of the Act read in consonance with Section 88 and 90.

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<sup>20</sup>(2004) 14 NWLR (Pt. 892) 76, 88.

<sup>21</sup>(2010) LPELR-9119(CA) (p. 10, paras. A-F).

<sup>22</sup>(1993) 1 NWLR (Pt. 215) 60, 80.

Quite recently, the Supreme Court helped litigants by settling this issue in the case of *Kassim v State*.<sup>23</sup> The Supreme Court in examining Sections 83, 85, 86 (1), 87, 88, 89, & 90 (1)(c) of the Evidence Act, 2011 was unanimous in holding that the provisions of the Act are clear that when an original of a document is available, it will be foolhardy to ask a litigant to go bring a Certified True Copy because the Act in Section 83 provides that “where direct oral evidence of a fact is admissible, any statement made by a person in a document shall on production of the original document be admissible.”(Underlined for emphasis).

## Conclusion

While there seemed to be much ado about the admissibility of primary evidence in respect of public documents, the decision of the Supreme Court in *Kassim v State* appears to have settled, once and for all, the law on this issue. It is therefore hoped that in the spirit of *stare decisis*, lower courts would follow and apply the ratio in *Kassim v State*. As they have been cautioned by the appellate courts when they fail to do so. In *Malot Omokoya & Ors. v Hosea Ogbere & Ors.*,<sup>24</sup> the Court of Appeal per Abubakar J.C.A. held "It is proper at this stage to state clearly that lower courts need to respect the hierarchy of courts and refrain from engaging in deliberate and inexcusable judicial disrespect".

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<sup>23</sup>(2017) LPELR – 42586 (SC).

<sup>24</sup>(2018) 39 WRN 96 at 115-116 lines 40-15.