Leave to Issue and Serve Originating Process Outside Jurisdiction Versus Substituted Service: A Distinction with a Difference

Witten by Orji A Uka (Senior Associate at ALP NG & Co) and Damilola Alabi (Associate at ALP NG & Co)

Introduction

The issuance and service of an originating process are fundamental issues that afford or rob a court of jurisdiction to adjudicate over a matter. This is because it is settled law that the proceedings and judgment of a court which lacks jurisdiction result in a nullity[1]. Yet, despite the necessity of ensuring that the issuance and service of an originating process comply with the various State High Court Civil Procedure Rules or Federal High Court Civil Procedure Rules ("the relevant court rules") or the Sheriffs and Civil Process Act, legal practitioners and sometimes judges commonly conflate the issuance and service of court process on defendants outside jurisdiction with the concept of service of court process by substituted means on defendants within the jurisdiction[2]. This paper set outs the differences between both commonly confused principles with the aim of providing clarity to its readers and contributing to the body of knowledge on this fundamental aspect of the Nigerian adjectival law.

Territorial Jurisdiction of Courts in Nigeria

Historically, Nigerian courts have always exercised jurisdiction over a defined subject matter within a clearly specified territory as provided for under the Constitution of the Federal Republic of Nigeria 1999 (as amended) (the "Constitution"). As an illustrative example, a High Court of a State in Nigeria or that of the Federal Capital Territory, Abuja has jurisdiction over the subject

matter of a simple contract. However, the jurisdiction of each High Court is, as a general rule, confined to persons within the territorial boundaries of the State or the Federal Capital Territory, as the case may be. As highlighted below, there are three established bases under which a High Court in Nigeria can validly exercise jurisdiction in an action *in personam*.[3]

Firstly, a court in Nigeria is donated with jurisdiction in an action *in personam* where the defendant is present or resides or carries on business within the territorial jurisdiction of the court and the defendant has been served with the originating process.[4]In the oft-cited case of *British Bata Shoe Co. Ltd v. Melikan*[5], the Federal Supreme Court held that the High Court of Lagos State, rightly exercised its jurisdiction in an action *in personam* for specific performance of a contract because the defendant resided in Lagos State even though the land in respect of which the subject matter of the dispute arose, was situated at Aba, outside the territorial jurisdiction of the court.

Thus, jurisdiction can be invoked either by residence[6] or simply by presence within jurisdiction.[7] Upon a finding that the defendant is present or resident within the jurisdiction of the court, and the originating process has been duly served on the defendant within jurisdiction, the court automatically assumes jurisdiction over such defendant, subject to the provisions of the Constitution or statutes that confer exclusive jurisdiction on other courts e.g. the Federal High Court or the National Industrial Court in respect of such subject matter.

Secondly, a court can validly exercise jurisdiction over a defendant in an *action in personam* where such defendant submits to the court's jurisdiction or waives his right to raise a jurisdictional challenge. Submission may be express, where the defendant signed a jurisdiction agreement or forum selection clause agreeing to submit all disputes to the courts of a particular legal system for adjudication either or an exclusive or non-exclusive basis. Submission may also be implied where the defendant is served with a court process issued by a court other than where he resides or carries on business and the defendant enters an unconditional appearance and/or defends the case on the merit.[8]

A third basis for the valid exercise of the jurisdiction of a High Court in Nigeria is where the court grants leave for the issuance and service of the originating process on a defendant outside the court's territorial boundaries. As noted above, historically, Nigerian courts could only validly exercise jurisdiction over a defined

subject matter within its specified territory. With time, the powers of the court have now extended to the exercise of judicial power over a foreigner who owes no allegiance to the court's territorial jurisdiction or who is resident or domiciled out of its jurisdiction but is called to appear before the court in the jurisdiction[9]. It is important to note that as an attribute of the concept of sovereignty, the exercise of jurisdiction by a court of one State over persons in another State is *prima facie* an infringement of the sovereignty of the other State. In *Nwabueze v. Okoye*,[10] the Supreme Court highlighted the fundamental rule of Nigerian conflict of laws on exercise of jurisdiction over a foreign defendant by stating as follows:

*"Generally, courts exercise jurisdiction only over persons who are within the territorial limits of their jurisdiction … It should be noted that except where there is submission to the jurisdiction of the court it has no jurisdiction over a person who has not been served with the writ of summons. The court has no power to order service out of the area of its jurisdiction except where so authorised by statute or other rule having force of statute."***[11]**

Thus, a court may only stretch its jurisdictional arm outside its territory in certain limited circumstances.[12]Where such circumstances apply, the claimant is not entitled as of right to have the originating process issued by the court for service on a defendant who is resident or present outside the jurisdiction and must seek and obtain leave to this effect.**[13]**

The Issuance and Service of Originating Process Outside Jurisdiction

The power of courts to exercise jurisdiction beyond their territorial boundaries has been variously described as "long-arm jurisdiction", "assumed jurisdiction" or even "exorbitant jurisdiction". However, the power is only activated using the instrumentality of the grant of leave for the issuance and service of such originating process outside jurisdiction. While applying for leave, the claimant must convince the court that there exists a special reason for it to exercise its long arm to reach a defendant outside its jurisdiction. The special reasons which must be established by a claimant are contained in the relevant rules of courts.[14] Where none of the conditions outlined in the Rules are met, the courts

must refuse the application for leave. This is because – in the language commonly employed in private international law -there would be no real and substantial connection between the cause of action and the jurisdiction of Nigeria and therefore no special reason to justify the exercise of the court's long arm jurisdiction. Further, even where it is established that the claimant's case falls within one or more of those jurisdictional pathways contained in the Rules, the claimant is nevertheless not entitled as of right to be granted leave and the courts are not automatically bound to grant leave as a matter of course. The claimant must still demonstrate to the court that it is the *forum conveniens* to hear and determine the claim.[15] Unfortunately, in practice, apart from a few instances, which are exceptions rather than the general rule, Nigerian courts hardly give this serious consideration during the *ex-parte* hearing stage for the application for leave.

The failure of a claimant to seek leave to issue and serve an originating process on a defendant outside jurisdiction, is not a rule of mere technicality. As the learned authors of "Private International Law in Nigeria" brilliantly summarised,[16] there are at least three reasons for this conclusion. First, courts are wary of putting a defendant who is outside jurisdiction through the trouble and expense of answering a claim that can be more conveniently tried elsewhere. Two, a court has to satisfy itself before granting leave that the proceedings are not frivolous, vexatious, or oppressive to the defendant who is ordinarily resident outside jurisdiction. Three, Nigerian courts, on grounds of comity, are wary of exercising jurisdiction over a foreign defendant who is ordinarily subject to the judicial powers of a sovereign foreign state. These also explain why the grant of leave is a judicial act – that can only be done by a Judge in chambers or the court; but not by the Deputy Chief Registrar or other court official, even if such leave is subsequently ratified or endorsed by the court. Thus, there is a long line of authorities by appellate courts in Nigeria (including the Supreme Court)to the effect that where leave was not obtained before the Writ of summons was issued and served, such writ is void and must be aside.[17]

Substituted Service

Substituted service on the other hand is resorted to when personal service of an originating process on a defendant within jurisdiction is not possible due to

reasons such as evasion of service by the defendant or the inability to locate the defendant. A claimant seeking to serve a defendant within jurisdiction by substituted means must seek and obtain an order of court to serve the defendant by a specific means as stated in the relevant court rules. For example, Order 9 Rule 5 of the Lagos State High Court Civil Procedure Rules provides that upon an application by a claimant, a judge may grant an order for substituted service as it may seem just. Some of the popular modes of effecting substituted service include by pasting the originating process at the last known address of the defendant, by newspaper publication, or especially more recently, by sending same to the defendant by email. Since the defendant is otherwise within the court's territorial reach, and the court has jurisdiction over him, there is no need to comply with real and substantial connection test set out in Order 10 Rule 1 of the Lagos State High Court Civil Procedure Rules.

Leave to Issue and Serve Versus Substituted Service

As simple as these concepts are, legal practitioners repeatedly confuse an application for leave for the issuance and service of originating process outside Nigeria with an application for substituted service within Nigeria.

In *Kida v. Ogunmola*[18]the appellant commenced an action for specific performance against five defendants. The court bailiff however was not able to serve the respondent, who was resident outside the jurisdiction of Borno State. It was known to the appellant that the 2nd respondent was resident in Ibadan. The appellant then applied for leave to serve the originating process on the 2nd respondent out of jurisdiction. Curiously, the appellant also applied for leave to serve the originating process on the 2nd, 3rd & 4th respondentsby substituted means by pasting same at their last known address in Maiduguri, Borno State and the court granted same. When the respondent failed to file a defence, the High Court entered default judgment against him. When the appellant initiated enforcement proceedings against the respondent, the respondent brought an application to set aside the judgment on grounds that leave of court was not obtained to issue the originating process outside jurisdiction. The High Court refused the application but upon an appeal to the Court of Appeal, the appellate court overturned the trial court's decision. The Appellant ultimately appealed to the Supreme Court

which upheld the decision of the Court of Appeal.

The Supreme Court reasoned that the respondent was outside the jurisdiction of the court at the material time and could not be served by substituted means, and that substituted service can only be employed in situations where a defendant is within jurisdiction but cannot be served personally. The Supreme Court further held per Musdapher JSC (as he then was), at page 411 as follows:

"For a defendant to be legally bound to respond to the order for him to appear in Court to answer a claim of the plaintiff, he must be resident within jurisdiction, see National Bank (Nig.) Ltd. v. John Akinkunmi Shoyoye and Anor. (1977) 5 SC 181. Substituted service can only be employed when for any reason, a defendant cannot be served personally with the processes within the jurisdiction of the Court for example when the defendant cannot be traced or when it is known that the defendant is evading service. Also, where at the time of the issuance of the writ, personal service could not in law be effected on a defendant, who is outside the jurisdiction of the Court, substituted service should not be ordered, see Fry vs. Moore (1889) 23 QBD 395. If the defendant is outside the jurisdiction of the Court at the time of the issue of the writ and consequently could not have been personally served in law, not being amenable to that writ, an order for substituted service cannot be made, see Wilding vs. Bean (1981) 2 QB 100."

In the same vein the Court of Appeal stated as follows in *Abacha v. Kurastic Nigeria Ltd*[19]

"Courts exercise jurisdiction over persons who are within its territorial jurisdiction: Nwabueze vs. Obi-Okoye (1988) 10-11 SCNJ 60 at 73; Onyema vs. Oputa (1987) 18 NSCC (Pt. 2) 900; Ndaeyo vs. Ogunnaya (1977) 1 SC 11. Since the respondent was fully aware that before the issuance of the writ the appellant's abode or residence for the past one year was no longer at No.189, Off R.B. Dikko Road, Asokoro, Abuja within jurisdiction, substituted service of the processes should not have been ordered by the learned trial Judge."

The above cases emphasise that a writ issued in the ordinary form cannot be served by substituted means on a defendant who is not present or resident in the jurisdiction of the court, except the leave of court was sought and obtained in accordance with the relevant rules of court. As Okoli and Oppong lucidly put it, where a writ cannot be served on a person directly, it cannot be served indirectly

by means of substituted service.[20]

One area of law where parties commonly make the mistake of conflating an application for leave to issue and serve out of jurisdiction with an application for substituted service is in maritime claims. This, in our experience, stems from a historically commonplace mischaracterisation of actions as *actions in rem* instead of *actions in personam*.[21] In *Agip (Nig) Ltd v Agip Petroli International* **[22]** the Supreme Court held where an action is not solely an action *in rem* but also an action *in personam*, the plaintiff is bound to comply with the procedural rules, such as obtaining leave of the court.

Further, there is a common practice – particularly in cases with multiple defendants, with one defendant residing within jurisdiction and another outside jurisdiction – where parties apply to the courts to serve the originating process on the party outside jurisdiction through substituted service on the party within jurisdiction. It is pertinent to state that the above practice does not cure the defect and that the only circumstance where it is acceptable is where the party within jurisdiction is the agent of the party outside jurisdiction, and that is not the end of the story. The position of the law is that where a foreign company carries on business through an agent or servant company resident within a court's jurisdiction, the principal company is deemed to also be carrying on business within the same jurisdiction.[23] However, the courts have also held that where the agent company has no hand in the management of the company and receives only the customary agent's commission, the agent's place of business in Nigeria is not the company's place of business. Thus, the company has no established place of business in Nigeria and is not resident in Nigeria,[24] therefore leave of court is still required for the issuance and service of the writ.

Conclusion

The power vested in an appellate court to set aside a judgment of a lower court on the grounds of improper issuance or service of the originating process which is for service out of jurisdiction is symbolic of the imperativeness for claimants and their legal practitioners to ensure that the issuance and service of the originating process are done in conformity with the law and relevant court rules. It is respectfully submitted that the confusion between the service of an originating

process outside the jurisdiction of a court and the service of an originating process by substituted means is unnecessary. The principles are clear and distinct and should not be mixed up.

[1]See. *Boko v. Nungwa (*2019) 1 NWLR (Pt. 1654) 395. In *CRUTECH v. Obeten (*2011) 15 NWLR (Pt. 1271) 588 the Court of Appeal reemphasised the importance of jurisdiction when it stated that "the lack of jurisdiction is detrimental, disastrous, devastating and without leverage for salvaging the situation, regardless of desirability of such a course of action."

[2] See *Nwabueze v. Okoye* (1988) 4 NWLR (Pt. 91) 644; *Bimonure v. Erinosho* (1966) 1 All NLR 250; *Mbadinuju v. Ezuka* (1994) 8 NWLR (Pt. 364) 535; and *Khatoun v. Hans Mehr (Nigeria) and Anor.* (1961) NRNLR 27.

[3] According to the 10th Edition of the Black Law Dictionary, an action is said to be *in personam* when its object is to determine the rights and obligation of the parties in the subject matter of the action, however, the action may arise, and the effect of the judgment may bind the other. A common example is a breach of contract claim.

[4]*Ogunsola v. All Nigeria People's Party* (2003) 9 NWLR (Pt. 826) 462.

[5]*British Bata Shoe Co. Ltd v Melikan* (1956) 1 FSC 100.

[6]*United Bank of Africa v. Odimayo* (2005) 2 NWLR (Pt. 909) 21.

[7]*Ayinule v. Abimbola* (1957) LLR 41.

[8]See *Barzani v Visinoni* (1973) NCLR 383; *Ezomo v Oyakhire* (1985) 1 NWLR (Pt. 2) 195;*Adegoke Motors Ltd v Adesanya* (1989) 3 NWLR (Pt. 107) 250.

[9]*Caribbean Trading & Fidelity v. Nigerian National Petroleum Corporation* (2002) LPELR- 831 (SC).

[10](1988) 4 NWLR (Pt 91) 664.

[11]See also *United Bank for Africa Plc v Odimayo* (2005) 2 NWLR (Pt. 909) 21, 40

[12] Bamodu, G. (1995) 'Jurisdiction and Applicable Law in Transnational Dispute

Resolution before the Nigerian Courts' 29 Int'l L 555 available at https://scholar.smu.edu/til/vol29/iss3/6.

[13] *Broad Bank of Nigeria v. Olayiwola* (2005) LPELR-806 (SC).

[14]For instance, Order 10 Rule 1 of the Lagos State High Court Civil Procedure Rules 2019 provides that a judge may allow its originating process to be served on a defendant outside Nigeria where, *inter alia*, the whole subject matter of the dispute is land which located within jurisdiction; the claim is for the administration of the personal estate of any deceased person who was domiciled within jurisdiction at the time of his death; the action is brought in respect of a contract that is made within the jurisdiction, made by an agent residing or carrying on business within jurisdiction, or governed by Lagos State laws; the claim is in respect of a contract breached within jurisdiction regardless of where it was executed; the claim is founded on a tort committed within the jurisdiction; etc.

[15]While it is beyond the purview of this paper to undertake a comprehensive exposition on the concept of *forum conveniens*, it is pertinent for the present purposes to note that another commonly mistaken belief among lawyers is to equate the rule of *forum non conveniens* with the convenience of the parties or their legal practitioners. The word, conveniens is a Latin word for convenient or appropriate. The rule simply means that that there is another forum in which the case may most suitably be tried in the interests of all the parties and the ends of justice.

[16]Okoli, C. S. A. and Oppong, R. (2020) *Private International Law in Nigeria* Hart Publishers p. 75.

[17] An illustrative example is the case of *Owners of the MV Arabella v. Nigeria Agricultural Insurance Corporation (2008) LPELR- 2848 (SC).*Some later authorities have however held that such writ is not void but voidable and is capable of being waived by the defendant if not timeously raised. Whether a writ which is issued without leave is void or voidable is not within the purview of this paper. Either way, such writ is capable of being set aside.

[18]*Mohammed Kida v. A. D. Ogunmola* (2006) All FWLR (Pt. 327) 402.

[19](2014) LPELR-22703(CA).

[20]Okoli, C. S. A. and Oppong, R. (2020) *Private International Law in Nigeria* Hart Publishers p. 59.

[21]For a detailed treatment of the distinction between *actions in rem* and *actions in personam* please see Okoli, C. S. A. and Oppong, R. n. (16) above.

[22](2010) 5 NWLR (Pt. 1187) 348, 416.

[23]*Spiropoulos and Co Ltd v. Nigerian Rubber Co Ltd* (1970) NCLR 94; *Eimskip Ltd v. Exquisite Industries (Nig) Ltd* (2003) 14 WRN 77.

[24]See *In re Gresham Life Assurance Society (Nig) Ltd (*1973) (1) ALR Comm 215, (1973) 1 All NLR (Pt. I) 617, (1973) NCLR 215.