Territorial Jurisdiction for Breach of Contract in Nigeria or whatever

Jurisdiction is a fundamental aspect of Nigerian procedural law. In Nigerian judicial parlance, we have become accustomed to the principle that the issue of jurisdiction can be raised at any time, even at the Nigerian Supreme Court – the highest court of the land – for the first time.[1] The concept of jurisdiction in Nigerian conflict of laws (often called "territorial jurisdiction" by many Nigerian judges) is the most confusing aspect of Nigerian conflict of laws. This is because the decisions are inconsistent and not clear or precise. The purpose of this write up is to briefly highlight the confusion on the concept of jurisdiction in Nigerian conflict of laws through the lens of a very recently reported case (reported last week) of *Attorney General of Yobe State v Maska* & *Ano*r. ("*Maska*").[2]

In *Maska* the 1st claimant/respondent instituted an action for summary judgment against the defendant/appellant and the 2nd respondent at the High Court of Katsina State for breach of contract. The 1st claimant/respondent alleged that the defendant/appellant purchased some trucks of maize from the 1st claimant/respondent and promised to pay for it. The 1st claimant/respondent also alleged that the defendant/appellant failed to pay for the goods, which resulted in the present action. It was undisputed that the place of delivery (or performance) was in Kastina State, the 1st claimant/respondent's place of business, where the defendant/appellant took delivery of the goods. However, the defendant/appellant challenged the jurisdiction of the Kastina State High Court to hear the case on the basis that the contract in issue was concluded in Yobe State, where it claimed the cause of action arose, which it argued was outside the jurisdiction of Kastina State. On this basis the defendant/appellant argued that the court of Yobe State had exclusive jurisdiction.

The High Court of Kastina State assumed jurisdiction and rejected the argument of the defendant/appellant. The defendant/appellant appealed but it was not successful. The Court of Appeal held that the concept of territorial jurisdiction for breach of contract is based on any or a combination of the following three factors

– (a) where the contract was made (*lex loci contractus)*; (b) where the contract is to be performed (*lex loci loci solutions)***;**.and (c) where the defendant resides. In the instant case, the place of performance – particularly the place of delivery – was in Kastina State – so the High Court of Kastina State could assume jurisdiction in this case.[3]

Maska adds to the confusion on the concept of jurisdiction in Nigerian conflict of laws. In *Maska,* the focus was on what it labeled as "territorial jurisdiction for breach of contract" in inter-state matters. In international and inter-state matters, Nigerian judges apply at least four approaches in determining whether or not to assume jurisdiction in cases concerned with conflict of laws.

First, some Nigerian judges apply the traditional common law rules on private international law to determine issues of jurisdiction.[4] This approach is based as of right on the residence and/or submission of the defendant to the jurisdiction of the Nigerian court. Where the defendant is resident in a foreign country and does not submit to the jurisdiction of the Nigerian court, then leave of court is required in accordance with the relevant civil procedure rules to bring a foreign defendant before the Nigerian Court. This is all subject to the principle of *forum non conveniens* – the appropriate forum where the action should be brought in the interest of the parties and the ends of justice. In *Maska,* the common law approach of private international law was not applied. If it was applied the High Court of Kastina State would not have had jurisdiction as of right because the defendant/appellant was neither resident in Kastina State nor submitted to the jurisdiction of the Kastina State High Court. In recent times, the common law approach to conflict of laws appears to be witnessing a steady decline among Nigerian appellate judges except for Abiru JCA (a Nigerian Court of Appeal judge) who has vehemently supported this approach by submitting that the concept of territorial jurisdiction in Nigeria is one of the misunderstood concepts of Nigerian conflict of laws.[5]

Second, some Nigerian judges apply choice of venue rules to determine conflict of law rules on jurisdiction.[6] This is wrong. Indeed, some Nigerian judges have rightly held that choice of venue rules are not supposed to be used to determine matters of jurisdiction in Nigerian conflict of laws.[7] Choice of venue rules are used to determine which judicial division within a State (in the case of the State

High Court) or judicial division within the Nigerian Federation (in the case of the Federal High Court) has jurisdiction. Choice of venue rules are mainly utilised for geographical and administrative convenience. Unfortunately, it appears that in *Maska* choice of venue rules were utilised to determine the jurisdiction of the Kastina State High Court in matters of conflict of laws. Order 10 rule 3 of the Kastina State High Court Civil Procedure Rules provides that all suits for breach of contract "shall be commenced and determined in the Judicial Division in which such contract ought to have been performed or in which the defendant resides or carries on business." Although *Maska* did not explicitly refer to Order 10 rule 3, it referred to some previous decisions of Nigerian appellate judges that were influenced by choice of venue rules to determine which court has jurisdiction in matters of conflict of laws.[8] *Maska* makes the confusion more problematic because it did not cite the wrong choice of venue rules in question (Order 10 rule 3 of the Kastina State High Court Civil Procedure Rules) but wrongly created the impression that this represents the position on Nigerian conflict of laws on jurisdiction.

Third, some Nigerian judges apply the strict territorial jurisdiction approach.[9] This approach is that a Nigerian court cannot assume jurisdiction where the cause of action arose in one State, or another foreign country. I label this approach as "strict" because my understanding of the Nigerian Supreme Court decisions on this point is that based on constitutional law a Nigerian court is confined to matters that arose within its territory, so that one State High Court cannot assume jurisdiction over a matter that occurs within another territory. This approach is also wrong as it ignores the principles of traditional Nigerian common law conflict of laws. There is no provision of the Nigerian constitution that states that a court's jurisdiction is limited to matters that occur within its territory. It also leads to injustice and unduly circumscribes the jurisdiction of the Nigerian court, which ultimately makes Nigerian courts inaccessible and unattractive for litigation. Nigerian courts should have jurisdiction as of right once a defendant is resident or submits to the jurisdiction of the Nigerian court. In *Maska*, even if the strict territorial jurisdiction approach was applied, the Kastina State High Court would have had jurisdiction because the cause of action for breach of contract arose in Kastina State where the defendant/appellant took delivery of the goods.

Fourth some Nigerian judges apply the mild territorial jurisdiction approach.[10]

This approach softens the strict territorial jurisdiction approach. This is an approach that has mainly been applied by the Nigerian Court of Appeal probably as a way of ameliorating the injustice of the strict territorial approach applied in some Nigerian Supreme Court decisions. This approach is that more than one court can have jurisdiction in matters of conflict of laws where the cause of action is connected to such States. With this approach, all the plaintiff needs to do is to tailor its claim to show that the cause of action is also connected to its claim. The danger with this approach is that it can lead to forum shopping and unpredictability – the plaintiff can raise the slightest grounds on why the cause of action is connected with its case to institute the action in any court of the Nigerian federation. The mild territorial jurisdiction approach was applied in *Maska* because the Court of Appeal held either the Kastina State High Court or Yobe State High Court could assume jurisdiction as the cause of action was connected with both of them.

In conclusion, in very recent times the Nigerian traditional common law principle of conflict of laws (based on English common law conflict of laws without EU influences) on jurisdiction is beginning to witness a steady decline among Nigerian judges and lawyers. The concept of strict territorial jurisdiction, mild territorial jurisdiction, and choice of venue rules appears to be the current norm despite criticism from some Nigerian academics and even a Court of Appeal judge (Justice Abiru).[11] *Maska* is just another case that demonstrates why the principle of private international law should feature more in the parlance of Nigerian lawyers and judges. I have argued for judicial decisions and academic works in private international law in Africa to be intellectually independent and creative. This means that in Nigeria we should not blindly follow English common law rules. It could be that the common law approach might be an inadequate basis of jurisdiction for Nigerian private international law especially in inter-state matters. For example in *Maska*, if the Kastina State High Court had applied the common law private international law rules, it would not have had jurisdiction despite being the place of performance, since the defendant was neither resident nor submitted to the jurisdiction of the court! Should there be a reformulation of the principle of jurisdiction in Nigerian conflict of laws in international and inter-state matters so that it is clear, consistent and predictable? This is a discussion for another day.

[1]*Madukolu v Nkemdilim* (1962) 2 SCNLR 341; *Drexel Energy and Natural Resources Ltd v Trans International* Bank Ltd (2008) 18 NWLR (Pt. 1119) 388, 424 – 27, 437 – 38 *Dangote General Textiles Products Ltd v Hascon Associates (Nig) Ltd* (2013) 16 NWLR (Pt. 1379) 60, 91*; B Apugo & Sons Ltd v Orthopaedic Hospitals Management Board* (2016) 13 NWLR 206, 240. In principle, what can be raised for the first time on appeal is substantive jurisdiction as prescribed by the Constitution or enabling statute and not procedural jurisdiction. This is a point that has been stressed by Abiru JCA in recent cases such as *Khalid v Ismail (* 2013) LPELR-22325 (CA); *Alhaji Hassan Khalid v Al-Nasim Travels & Tours Ltd* (2014) LPELR-22331 (CA) 23 – 25 ; *Nigerian National Petroleum Corporation v Zaria* (2014) LPELR-22362 (CA) 58 – 60; *Obasanjo Farms (Nig) Ltd v Muhammad* (2016) LPELR-40199 (CA).

[2](2021) 7 NWLR (Pt. 1776) 535.

[3] *Attorney General of Yobe State v Maska* & *Ano (2021) 7 NWLR (Pt. 1776)* 535, 548-9.

[4]See generally *British Bata Shoe Co v Melikan* (1956) SCNLR 321; *Nigerian Ports Authority v Panalpina World Transport (Nig) Ltd* (1973) 1 ALR Comm 146, 172; *Muhammed v Ajingi* (2013) LPELR-20372 (CA); *Barzasi v Visinoni* (1973) NCLR 373.

[5]*Muhammed v Ajingi* (2013) LPELR-20372 (CA) 23-5; Foreword to CSA Okoli and RF Oppong, *Private International Law in Nigeria* (1st edition, Hart, Oxford, 2020); 'The Concept of Territorial Jurisdiction' in IO Smith (ed), *Law and Developments in Nigeria: Essays in Honour of Alhaji Femi Okunnu, SAN, CON* (Ecowatch Publications (Nig) Ltd , 2004).

[6]See generally the Supreme Court cases of; *Dangote General Textiles Products Ltd v Hascon Associates (Nig) Ltd* (2013) 16 NWLR (Pt. 1379) 60; *First Bank of Nigeria Plc v Kayode Abraham* (2008) 18 NWLR (Pt. 1118) 172; *Arjay Ltd v Airline Management Support Ltd* (2003) 7 NWLR (Pt. 820) 57.

[7]*British Bata Shoe Co v Melikian* (1956) SCNLR 321, 325 – 26, 328; *Muhammed v Ajingi* (2013) LPELR-20372 (CA); *Zabusky v Israeli Aircraft Industries* (2008) 2 NWLR (Pt. 109) 109, 133-6; *Ogunsola v All Nigeria Peoples*

Party (2003) 9 NWLR (Pt. 826) 462, 480

[8]*A.-G. Abia State v. Phoenix Environmental Services Nig. Ltd* (2015) LPELR-25702

[9] See the Supreme Court cases of *Capital Bancorp Ltd v Shelter Savings and Loans Ltd* (2007) 3 NWLR 148; *Dairo v Union Bank of Nigeria Plc* (2007) 16 NWLR (Pt 1059) 99; *Mailantarki v Tongo & Ors* (2017) LPELR-42467; *Audu v. APC & Ors* (2019) LPELR – 48134.

[10]*Sarki v Sarki & Ors* (2021) LPELR – 52659 (CA).; *Onyiaorah v Onyiaorah* (2019) LPELR-47092 (CA).

[11]See generally Abiru JCA in *Muhammed v Ajingi* (2013) LPELR-20372 (CA) 23 – 25, 25 – 26; CSA Okoli and RF Oppong, *Private International Law in Nigeria* (1st edition, Hart, Oxford, 2020) 95-103; AO Yekini, "Comparative Choice of Jurisdiction Rules in Cases having a Foreign Element: are there any Lessons for Nigerian Courts?" (2013) 39 *Commonwealth Law Bulletin* 333; Bamodu O., "In Personam Jurisdiction: An Overlooked Concept in Recent Nigerian Jurisprudence" (2011) 7 *Journal of Private International Law* 273.