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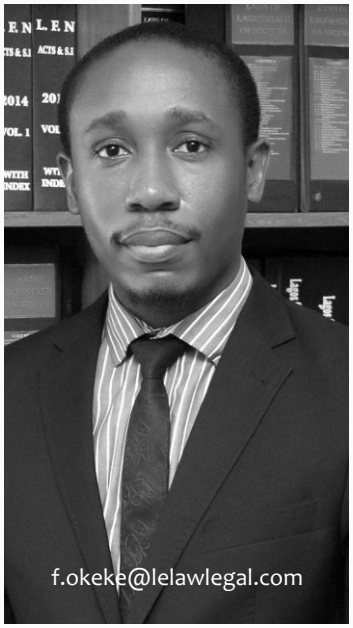
Details: Issues On Execution Of Documents In Nigeria



Frank Okeke

f.okeke@lelawlegal.com

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> Execution Of Documents Is An Issue Which Has Given Rise To Numerous Litigation Because It Is Often Taken With Levity

The execution of documents in Nigeria, as simple it may seem, is an issue which has given rise to numerous litigation because it is often taken with levity without due regard to law or legal protocol. Be it contracts, letters, court processes or high level agreements, there are certain rules that must be followed in its execution. A party on the receiving end of some unfavourable terms of a contract can rely on the lack of proper execution to vitiate the contract. This article seeks to highlight the various issues around execution of documents and their implications for efficacy of such documents.

a. Execution by/for Companies

Upon incorporation, a company acquires separate legal personality; and thus has contracting capacity. Thus, ***section 38 Companies and Allied Matters Act***[1] ***(CAMA)*** provides that *"every company shall, for the furtherance of its authorised business or objects, have all the powers of a natural person of full capacity."*[2] It would seem a safe practice that for a contract to be binding against a company, the company seal must be affixed against its name. ***Section 604 CAMA,*** provides that the common seal of the body corporate shall be binding on such body, notwithstanding any defect or circumstance affecting the execution of such instrument.

While ***CAMA*** does not expressly state that the absence of the company seal renders the document void, ***section 71(1)(a) CAMA*** provides that *"any contract which if made between individuals would be by law required to be in writing under seal, or which would be varied, or discharged only by writing under seal, may be made, varied or discharged, as the case may be, in writing under the common seal of the company."* This would be applicable in for example, in many real estate transactions.

Section 74 CAMA provides that a company shall have a common seal, the use of which shall be regulated by the articles.[3] A document would be deemed to have been duly sealed if it bears what purports to be the seal of the company attested by what purports to be the signatures of two persons who can be assumed to be a director and the secretary of the company.[4]

1 ***Cap. C20, Laws of the Federation of Nigeria (LFN) 2004***

2 ***Section 38 CAMA*** provides that *"every company shall, for the furtherance of its authorised business or objects, have all the powers of a natural person of full capacity."*

3 ***Section 75 CAMA*** makes provisions for facsimile of official seal to be created for use abroad, where the Articles of the Company permits same – such would have the same effect on a document as if it the common seal of the company had been placed on it.

4 ***Section 69 CAMA***

The company seal which could be considered *"the signature"* of the company, is an imprint of the company's name and its Registration Number. Although it is used for executing documents, use of the company seal should be restricted to the minimum and only for very important transactions or documents. Some common uses of company seals include: Company resolutions; important contracts and deeds, real estate transactions or where the law says such contract must be under deed, e.g. powers of attorney relating to land, execution of finance/security documents, or documents to be utilized abroad. [5]

Certain corporate acts are regarded as unauthorised without the company seal being appended on the relevant document. Where, for instance, a director solely executes a contract purporting to bind a company, such a contract would be voidable at the instance of the company. By the combined operation of ***sections 69*** and ***77 CAMA***, arguably for the contract to be binding on the company, it must be signed by a director and a secretary or two directors with the common seal of the company affixed to it. [6] Where an individual is both director and secretary, he cannot sign in both capacities. [7]

It is pertinent to note that the ***Bill for an Act to repeal and re-enact the Companies and Allied Matters Act, 1990 (CAMA Bill)*** [8] seeks to lessen the requirements on execution of documents by companies **by two directors or a director and a secretary.** [9] For instance, ***section 102 CAMA Bill*** provision on electronic signature states that:

"A document or proceeding requiring authentication by a company may be signed by ***a director, secretary, or other authorised officer*** *of the company, and need not be signed as a deed unless otherwise so required in this Part of this Act, provided that an electronic signature shall be deemed to satisfy the requirement for signing under this section." (Emphasis ours)*

Furthermore, various provisions of the proposed ***CAMA Bill*** seem to have made the use of common seal to be optional. For instance, ***section 193(1)*** provides:

"Every company shall, within 60 days after the allotment of any of its debentures or after the registration of the transfer of any debentures, deliver to the registered holder thereof, the debenture or a certificate of the debenture stock under the common seal of the company ***(if the company has a common seal)*** *or otherwise executed as a deed by the company."(Emphasis ours)*

5 The latter category of documents may require notarisation.

6 Same is applicable for an entity registered under ***Part C CAMA***. ***Section 596 CAMA*** provides that: *"From the date of registration, the trustee or trustees shall become a body corporate by the name described in the certificate, and shall have perpetual succession and a common seal, and power to sue and be sued in its corporate name as such trustee or trustees and subject to section 602 of this Part of this Act to hold and acquire, and transfer, assign or otherwise dispose of any property, or interests therein belonging to, or held for the benefit of such association, in such manner and subject to such restrictions and provisions as the trustees might without incorporation, hold or acquire, transfer, assign or otherwise dispose of the same for the purposes of such community, body or association of persons."*

7 ***Section 294 CAMA***

8 The ***CAMA Bill*** which was passed by the Senate on 15 May 2018, awaits passage by the House of Representatives and the assent of the President before it becomes law. The writer understands that the ***CAMA Bill*** may not eventually become law in its present form if at all.

9 This is a departure from the combined provisions of ***sections 69*** and ***77 CAMA*** which provide that both the director and secretary must sign.

Section 832 CAMA Bill also states that:

> *"The common seal of the body corporate* ***(if there is one)*** *shall have such device as may be specified in the constitution; and any instrument to which the common seal of the corporate body has been affixed in apparent compliance with the regulations for the use of the common seal shall be binding on the corporate body, notwithstanding any defect or circumstance affecting the execution of such instrument."*

b. Execution of Pre-Incorporation Contracts

Often "promoters" take preliminary steps to incorporate a company, complying with requisite formalities. In doing this they may need to enter into contract(s) on behalf of the prospective company. These types of contracts are called "*pre incorporation contracts*".

The signing of a deed by the purchaser in his personal capacity for a company not yet registered can be likened to the activities of a promoter. In certain cases title in a property is transferred to a promoter of a business with the intent that the company would be the ultimate beneficiary of that transfer.[10] Upon incorporation, the transaction can be consummated with the company.

The question often associated with the activities of a promoter is whether pre-incorporation contracts bind the company. Are the promoters who executed those contracts the agents of the company? In ***Trans Bridge Company Ltd. v. Survey International Limited***,[11] it was held that:

"a pre-incorporation contract is generally made by the promoters of the company with the intention that such contracts would be ratified or adopted, or otherwise taken over on incorporation. In such a situation a valid contract can be made with the promoter of such company." [12]

Section 72 CAMA provides that a company may ratify a pre-incorporation contract and the company shall be bound thereby, entitled to both the benefits and liable to the obligations thereof. However until ratification, the promoter purporting to act for the company shall be personally bound by the contract. This was a welcome development from the common law rule which invalidated pre-incorporation contracts and denied companies the ability to ratify said contracts upon incorporation.

c - Execution of Court Processes

The signing of court processes has recently become a topical issue in legal discourse. In dealing with such questions, the courts have always been faced with the question of the path to follow: the choice between strict compliance with the rules or abandonment of technicalities in the pursuit for justice. We will discuss some statutory provisions and decided cases in this regard:
For a deeper understanding of

> "Use Of The Company Seal Should Be Restricted To The Minimum And Only For Very Important Transactions Or Documents"

[10] It is advisable that the company be the direct object of the initial transfer to avoid double perfection costs. Parties can hold off transaction for about two weeks giving time for the company to be incorporated and engage in the transaction itself.

[11] ***(1986) LPELR-3263 (SC)***

[12] In ***Edokpolo & Co. Limited v. SEM Edo-Wire Industries Limited (1984) 7 S.C. 119***, the SC held that: *"It is now a well settled principle of Company Law that a company is not bound by a pre-incorporation contract being a contract entered into by parties when it was not in existence. No one can contract as agent of such a proposed company there being no Principal in existence to bind. It is also settled that after incorporation, a Company cannot ratify such a contract purported to be made on its behalf before incorporation."*

a. Legal Practitioners Act Cap. L11, LFN 2004 (LPA)

the issues surrounding signing of court processes, regard must be had to the ***LPA. Section 2(1), LPA*** states that: *"Subject to the provisions of this Act, a person shall be entitled to practice as a barrister and solicitor if and only if, his name is on the roll."*

Section 24 LPA further states that *"a legal practitioner means a person entitled in accordance with the provisions of this Act to practice as a barrister or as a barrister and solicitor, either generally or for the purposes of any particular office or proceedings."* Where a party wishes to be represented by counsel, the law is that any court process must be duly signed and authenticated by a person whose name is found on the Roll of Legal Practitioners.

Where there is a dispute as to the status of counsel (whether counsel is a legal practitioner whose name is on the roll), evidence can be led to that effect. Only legal practitioners who are animate personalities have the capacity to sign court processes, and not a firm of legal practitioners which is inanimate and therefore cannot be found on the roll of legal practitioners.

b. Case Law: Strict Interpretation

It has been argued that the ***LPA*** is clear and nothing other than strict application of its provisions would be permissible. This would result in a court process being void and irredeemable where it is not signed by a person who is entitled to practice law in Nigeria. By that definition, a law firm is not entitled to practice law in Nigeria and as such cannot be seen to execute court processes. The *locus classicus* for this position is the case of ***Okafor v. Nweke***.[13]

> "Only Legal Practitioners Who Are Animate Personalities Have The Capacity To Sign Court Processes"

The Supreme Court (SC) held in ***Okafor*** that:

"… ***J.H.C. OKOLO SAN & CO is not a legal practitioner and therefore cannot practise as such by say, filing processes in the courts of this country.*** *I had earlier stated that the law does not say that what should be in the roll should be the signature of the legal practitioner but his name. That apart, it is very clear that by looking at the documents, the signature which learned Senior Advocate claims to be his really belongs to J.H.C. OKOLO SAN & CO or was appended on its behalf since it was signed on top that name.* ***Since both counsel agree that J.H.C. OKOLO SAN & CO is not a legal practitioner recognised by law, it follows that the said J.H.C OKOLO SAN & CO cannot legally sign or file any process in the courts…"***

13 *[2007] 10 NWLR (Pt. 1043), 521*

> "Courts Are Beginning To Adopt A More Substantive Approach Towards The Dispensation Of Justice Regarding Execution Of Court Processes"

A similar decision was reached ***in SLB Consortium Limited v. NNPC***,[14] where the SC held that court processes endorsed by persons not enrolled as legal practitioners renders such processes incurably bad. In ***Iwunze v. FRN***,[15] ***Rhodes-Vivour, JSC***, observed *inter alia* that: *"...the originating process in all appeals is the Notice of Appeal. Once it is found to be defective the CA ceases to have jurisdiction to entertain an appeal in whatever form."*

In ***FRN v. Dairo***,[16] *Nweze, JSC*, opined that:
"As it is well known, it is a notice of appeal that initiates an appeal from a High Court to the lower Court-Put differently, the notice (actually a competent notice of appeal) is the foundational process that triggers off an appeal from the High Court to the lower Court (CA). As such any virus in this process would, invariably, corrode or taint the entire appeal thereby rendering it incompetent. The effect of such viral corrosion is, usually, far-reaching as it nibbles at the jurisdiction of the appeal Court which must, as of necessity, strike out such a process. In effect, the absence of a competent Notice of Appeal, simply, translates to the non-existence of an appeal... This must be so for it is a condition precedent to any valid exercise of the appellate jurisdiction."

c. A Middle Line?

It seems the courts are beginning to adopt a more substantive approach towards the dispensation of justice regarding execution of court processes. In ***Heritage Bank v. Bentworth Finance Nigeria Limited***,[17] the SC in its judgment of February, 2018 held:
"In most cases procedural jurisdiction is secondary to the substantive jurisdiction. The distinction between the two lies in the fact while procedural jurisdiction can be waived; substantive jurisdiction cannot. ***A.G Kwara State & Anor v. Alhaja Saka Adeyemo & Ors (2016) 7SC (Pt. 11) p. 49*** *is one of the most recent decisions of this Court on this distinction. Rhodes-Vivour, JSC, delivering the Lead Judgment in the case, stated: Jurisdiction is a question of law. There are two types of jurisdiction: 1. Jurisdiction as a matter of procedural law. 2. Jurisdiction as a matter of substantive law. A litigant may waive the former. For example, a litigant may submit to a procedural jurisdiction of the Court where a Writ of Summons has been served outside jurisdiction without leave or where a litigant (the defendant) waives compliance by the claimant of pre-action notice. The facts of this case, particularly on this objection, are that in spite that the Statement of Claim was allegedly not signed by a known legally qualified Legal Practitioner, but by a firm of legal practitioners, the Appellant, as the defendant condoned the defective process."*

14 [2011] 9NWLR (Pt. 1252), 317
15 (2015) 6 NWLR (Pt. 1404) at 580
16 (2015) 6 NWLR Pt. 1454 at 141
17 Suit No. SC/175/2005

The reasoning of the SC is that where a jurisdictional issue is raised as to the substantive law, a decision in favour of such objection goes to the root of the matter and renders the suit incompetent. For instance, where an issue is raised as to statute of limitation, proper court for the action to be commenced or lack of *locus standi*, such an issue goes to the root of the matter. If the objection succeeds, there is no other Order that can be given by the court, except to strike out the matter. However, for procedural jurisdiction, such an issue can be waived by the other party. For instance, where a Writ of Summons was served outside jurisdiction without leave of Court as was the case in ***Heritage Bank's case***.

> "The Reasoning Of The SC Is That Where A Jurisdictional Issue Is Raised As To The Substantive Law, A Decision In Favour Of Such Objection Goes To The Root Of The Matter And Renders The Suit Incompetent"

d. Special Consideration – Execution of Writ vs Statement of Claim

There appears to be special consideration for situations where the Statement of Claim (SoC), as opposed to the originating process, is not validly signed as per the ***LPA***. The *CA* in ***M.O Moudkas Nigeria Limited & Anor v. Emiko Israel Obioma***,[18] had cause to determine whether an SoC signed by a law firm was irregular and therefore curable, or incompetent and therefore a *nullity ab-initio*.

The *CA* in considering the signature on the SoC stated:
"Of the [SoC] I am clear in my modest opinion that it was not signed by a recognized or known registered legal practitioner or the claimants. It is on that score incurably defective. The defect cannot be cured by an amendment. The amended [SoC] does not therefore cure the mortal defect in the [SoC]."

The *CA* in ***Moudkas' case*** therefore held that the defective SoC was a nullity and same could not be cured by subsequent amendment. The *CA* considering the proper order to make in the circumstances where there was a valid writ but an incompetent and void SoC decided:
"However, because the writ of summons by which the action was commenced, and which originated the action was properly signed by a legal practitioner as prescribed by our law, it remains valid and can still be built upon as a solid foundation. It is the [SoC] upon which evidence was based that cannot stand. Indeed, as the saying goes, you cannot put something or nothing and expect it to stay, it will fall. Evidence led in the case based on incompetent [SoC] is also incompetent and should be discountenanced and struck out. Therefore, the writ of summons which was separately filed several months before the [SoC] was filed having been properly signed and competent cannot and should not be allowed to be killed by an incompetent [SoC]. It stands, while the [SoC] is struck out."

The decision of the CA here was that since the issue was not as to the originating processes, the suit could not be struck out. The lack of proper signing of the SoC only rendered the SoC, (and not the entire suit) void.

18 *(2016) LPELR-40165 (CA)*

e. Ticking/Marking Beside the Signee on a Court Process

Another issue that has been contentious in recent times is whether a court process which was validly signed but failed to tick or indicate the signee of the court process (i.e. amongst several listed counsel) can be deemed to have been validly executed. Would such a mistake be deemed fatal as to affect the validity of the process or suit as the case may be? The CA laid this debate to rest in ***Allu & Anor v. Gyunka & Ors,***[19] where it held that:

"The purpose of Sections 2 (1) and 24 of the Act [the LPA] is to ensure that only a Legal Practitioner whose name is on the Roll of this Court should sign Court processes. It is to ensure responsibility and accountability on the part of a Legal Practitioner who signs a Court Process. It is to ensure that fake Lawyers do not invade the profession. This, in my considered opinion, accords with the Sacred Canon of interpretation of Law. A cursory look at the Signature portion of the Notice of Appeal in this matter reveals the following on page 474 of the record viz: 'Dated this 22nd day of September, 2015. Signed:

DR. M. E. EDIRU
JOHN OVYE, ESQ.
S. N. YUSUF ESQ.
O. G. EDIRU, ESQ.
COUNSEL TO APPELLANTS.M. E. EDIRU & CO,
ADJUYA CHAMBERS
No, 23, DOMA ROAD,
LAFIA NASARWA STATE.
0803608574.'

Can it be said that the Notice of Appeal herein was not signed in tandem and in accordance with Sections 2(1) and 24 of the Legal Practitioners Act, 2004 LFN 2004*?*

The answer to this question can be found in case of ***SLB CONSORTIUM LTD. VS. NNPC (2011) 5 SCM L87 at 197 - 198*** *where my Lord ONNOGHEN JSC who incidentally delivered the leading Judgment in OKAFOR v. NWEKE demonstrates the acceptable manner of signing Legal process(es) by Legal Practitioners thus:*

"The above decision clearly states that a process prepared and filed in a Court of Law by a Legal Practitioner must be signed by the Legal Practitioner and that it is sufficient signature if the Legal Practitioner simply writes his own name over and above the name on top of Adewale Adesokan & Co. because Mr. Adewale Adesokan is a Legal Practitioner registered to practice Law in the Roll at the SC, not Adewale Adesokan & Co." ***I am of the solemn view that the person who signed the Notice of Appeal herein is known to Law. The name of the person directly below the signature is "DR. M. E. EDIRU" which name is very far and high above M. E. EDIRU & CO. Signature of anyone of the four persons listed as the Counsel to Appellants would make the Notice of Appeal valid. The Appellants are not caught in the shackles of decisions of Apex Court even though it makes assurance double sure when indication or ticking is made by the side of the signatory for purposes of knowing which of the Legal Practitioners named as Lawyers to Appellants signs the Legal Process. The failure to indicate or tick the name of Signatory in this appeal cannot vitiate the Notice of Appeal."*** (Emphasis supplied)

Thus, failure of the appellant to tick the name of counsel who signed the NoA is a mere technicality that cannot vitiate the entire appeal. ***Allu's*** case further held that: *"The thunder in their objection against the validity of the Notice of Appeal herein brings no lightening. It is an exercise in crass technicality which this Court*[20] *will not yield to."*

19 *(2015) LPELR-40478(CA), 18-20, F-D*
20 *Pp 24, C-D*

Furthermore, in ***Williams v. Adold/Stamm International Nigeria Limited,***[21] ***Kekere-Ekun JSC,*** stated as follows:

"…a process prepared and filed in court by a legal practitioner must be signed by the legal practitioner, ***and it is sufficient signature if the legal practitioner simply writes his own name over and above the name of his/or firm in which he carries out his practice.*** *On page 14 of the applicant's written address, at the bottom of the page, the handwritten name, Ladi Williams, appears above two names, Chief Ladi Rotimi Williams, SAN and Chris I. Eneje.* ***The grouse of the respondents appears to be that there is no mark beside either of the two names to identify which of them signed the process.*** *In the instant case, the name Ladi Williams, though handwritten, is very clear and legible.* ***The respondents are not contending that Chief Ladi Rotimi Williams, SAN is not the same person as Ladi Williams who signed the process or that the person who signed the process is not a legal practitioner whose name is on the roll of legal practitioners entitled to practice law in Nigeria.*** *The omission to place a tick beside the name of Chief Ladi Rotimi Williams, SAN has not misled the respondents nor this Court…* ***and such omission cannot invalidate it.*** *I therefore hold that the applicant's written address filed on 16/11/2015 is competent." (Emphasis Ours)*

Conclusion

Execution of court processes is a delicate matter which has been deliberated upon by various courts. It would appear that where a law firm executes a court process instead of a legal practitioner, such a process is incurably bad and liable to be struck out. If the error were to be made on an originating process, then the entire suit would be void. On the other hand, where a party fails to tick or signify the legal practitioner who executed the process, it is not a wrong as to rob the court of its jurisdiction. The practice of ticking beside the name of the legal practitioner is a matter of custom which is to aid the process of identification,

> "Where A Company Intends To Execute An "Important" Document, It Is Necessary That Two Directors Or A Director And Secretary Executes In Addition To The Common Seal Of The Company"

and is not an issue that could deprive the court of its jurisdiction. This is a welcome development as the courts should endeavour to do substantial justice.

Where a company intends to execute an "important" document, it is necessary that two directors or a director and secretary executes in addition to the common seal of the company. In practice, sometimes during *'friendly agreements'*, companies may decide to execute agreements through a single director; the new ***CAMA Bill*** seeks to relax the two director/one director and company secretary rule even for "important" documentation such that only one signatory would always be required.[22] This is more common in MOUs or term sheets (precursor terms to definitive agreements) however, for a company to be bound to an agreement it must follow the conditions as itemised earlier in the article

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21 *[2017] 6 NWLR (Pt. 1560), 1 at 35 E-*

22 Care must be taken that these provisions do not become instruments of fraud since the execution of a single director is sufficient to bind the company. These might have negative impacts on proper corporate governance measures.