IN THE FEDERAL HIGH COURT
HOLDEN AT LAGOS, NIGERIA
ON TUESDAY THE 21ST DAY OF FEBRUARY, 2017
BEFORE THE HONOURABLE JUSTICE
M.B. IDRIS
JUDGE

SUIT NO: FHC/L/CS/827/2014

BETWEEN:-

MR. GEORGE OKONJI ..... **PLAINTIFF**
(Suing as Administrator of the Estate of
Mr. Patrick Eze Okonji (Deceased) for
and on behalf of the Dependents of the
Deceased and the Estate of the Deceased)

AND

1. **DANA AIRLINES LIMITED**
2. **STACEY VEOLETTE SELLERS** } **DEFENDANTS**
(Sued as the Personal Representative
of the Estate of Mr. Peter Simons Waxtan)

RULING

The suit came up on Tuesday, 24th January 2017, where Counsel to the Plaintiff sought to tender 23 (twenty-three) documents through the Plaintiff's witness (PW1), however, the Court adjourned the suit to 25th January, 2017, for the continuation of trial. On 25th January, 2017 when the trial

continued, Counsel to the 1st and 2nd Defendants objected to the admissibility of the documents. The first ground of objection proffered by the 1st and 2nd Defendant's Counsel was the challenge to the admissibility of the Certificate of Authentication by Rebecca Smith of Irwin Mitchell LLP on the ground that Mrs. Smith has to be here to personally depose to the Certificate of Authentication. Secondly, Counsel to the 1st and 2nd Defendant respectively, challenged the admissibility of the emails on the ground that PW1 is not the maker of the said emails and as a result he cannot give evidence of the said emails. Further, that some of the emails were not signed and dated. Counsel to the 2nd Defendant further contended that the WYG International employment extension letters dated 13th August 2010, 31st July 2011 and 17th November 2011, invoices to Atos Consulting dated 28th February 2012 and 28th March 2012, contract between Atos Consulting and Patrick Okonji dated 3rd March 2012, letter of employment of 26th November 2009, letter of limited extension of contract dated 12th January 2010, all consultant invoices, fax dated 12th August 2014, and letters of Irwin Mitchell to WYG International and the Atos Consultancy are all not originals.

He further contended that originals ought to be brought and that no foundation was laid as to the whereabouts of the original documents. It was also contended that the letter of WYG International dated 12th June 2015 and the Atos Consulting letter of 11th June 2015 was not addressed to anybody and as a result is a mere statement and that the witness not being the author of the aforementioned documents cannot testify to the said letters. Counsel relied on section 39 of the Evidence Act and contended that the documents were in breach of the Evidence Act.

In response to the objection of the Defendants, Counsel to the Plaintiff contended that the objection is misconceived and that a Certificate of Authentication is not equivalent to an affidavit and that there is no provision of the law which requires such a Certificate to be an affidavit. In other words, it does not say that it has to be sworn before a Commissioner for Oath or a sworn affidavit. He relied on Section 84 (4)(b)(i) of the Evidence Act. Counsel further contended that the foundation was that the documents were obtained from his late brother's employer's in the United Kingdom. That it is unreasonable inference to draw

that bringing the makers of these documents, it will have been unreasonably practicable. Counsel submitted further that it is for the Court to determine whether it is reasonable or unreasonable. He further contended that section 84 of the Evidence Act presupposes that the documents are not originals, if the authenticity of the documents are challenged, that goes to weight and not admissibility. Counsel further said that the documents have been pleaded and frontloaded and that the objections are not valid. Reliance was placed on Section 39 of the Evidence Act.

I have read and considered the arguments of Counsel and the question that arises is whether the documents are admissible giving the circumstance of the case and of the law?

On the first objection raised, Section 84(4) of the Evidence Act provides that:

(4) In any proceedings where it is desired to give a statement in evidence by virtue of this section, a

certificate doing any of the following things, that is to say:

(a) identifying the document containing the statement describing the manner in which it was produced;

(b) giving such particulars of any device involved in the production of that document as may be appropriate for the purpose of showing that the document was produced by a computer;

(c) dealing with any of the matters to which the conditions mentioned in subsection (2) above relate, and purporting to be signed by a person occupying a responsible position in relation to the operation of the relevant device or the management of the relevant activities, as the case may be, shall be evidence of the matter stated in the certificate; and for the purpose of this subsection it shall be sufficient for a matter

to be stated to the best of the knowledge and belief of the person stating it.

I refer to the case of **R. VS. SHEPHEARD (1993) 1 ALL ER 225 H. L.**, where the Court drew a difference between the competence of a witness to sign a certificate envisaged in paragraph 8(d) of Schedule 3 of the English PACE Act and Section 84(4) of the Evidence Act, and his competence to give oral evidence on the reliability of the computer. The Court held as follows:-

"The principal argument for the appellant starts with the proposition that the store detective was not a person occupying a responsible position in relation to the operation of the computer within the meaning of para 8(d) of Schedule 3 and therefore was not qualified to sign a certificate for matters contained in section 69(1). This I accept. Although the store detective understood the operation of the computer and could speak of its reliability she had no responsibility for its operation. I cannot however accept the next step in the appellant's argument, which is that

oral evidence is only acceptable if given by a person who is qualified to sign the certificate... Proof that the computer is reliable can be provided in two ways either by calling oral evidence or by tendering a written certificate in accordance with the terms of para 8 of Sch 3. subject to the power of the Judge to require oral evidence. It is understandable that if a certificate is to be relied upon it should show on its face that it is signed by a person who from his job description can confidently be expected to be in a position to give reliable evidence about the operation of the computer. This enables the defendant to decide whether to accept the certificate at its face value or ask the judge to require oral evidence which can be challenged in cross-examination. A defendant seeing a certificate signed by a store detective would not necessarily assume that such a person was familiar with the operation of the computer or had any responsibility for it and might well challenge the certificate. It does not however follow that the store detective cannot in fact give evidence that she is fully familiar with the

operation of the store's computer and can speak of its reliability".

The words of Lord Griffiths above, are clear and unambiguous. In other words, the argument of Counsel that Rebecca Smith ought to be present to depose to the certificate will fail. Moreover, Counsel to the 1st and 2nd Defendants may challenge and discredit the veracity of the Certificate of Authentication at cross-examination stage. Further, I am of the opinion that a challenge of this nature should be to the content of the Certificate of Authenticity as stipulated in the provisions of section 84(4)(a) – (c) of the Evidence Act. There is nothing in the Evidence Act, 2011 which requires the deponent to be present here or before a commissioner for oaths to depose to a certificate, all that the law requires is that the device used be stated, it should mention the condition of the device and it should contain the name and signature of the officer responsible for the operation of the device.

On the second ground objection, Counsel to the Defendants challenged the admissibility of the emails on the

ground that PW1 is not the maker of the said emails and as a result he cannot give evidence of the said emails.

It is a general principle of law that a maker of a document is expected to tender it in evidence, however, the Evidence Act has proferred certain exceptions to the above rule. In the light of the foregoing I refer to the case of **OMEGA BANK PLC VS. O.B.C. LIMITED NSCQR VOL. 21 (2005) 771** where the Supreme Court held that:-

> *" there are two basic exceptions to this principle of law: (1) the maker is dead (2) The maker can only be procured by involving the party in so much expenses that could be outrageous in the circumstances of the case. The rationale behind this principles of law is that while a maker of a document is in a position to answer questions on it, the non-maker of it is not in such position. In the latter situation, a court will not attach any probative value to the document and a document that a court does not attach any probative value is as good as the mere paper on which it is made. After all, probative value is the root of admissibility of evidence".*

In other words, as a matter of law, documentary evidence can be admitted in the absence of the maker because in the end of the day, relevance is the key to admissibility and probative value will come after admissibility. Therefore, the document could be admissible without the Court attaching any probative value to it.

Further, it was also a ground of objection that some of the email correspondences were not signed and dated. The question now is, what will constitute a proper signature and date in the light of an electronic mail? This question was properly answered in the English case of **PEREIRA FERNANDES VS. MEHTA (2007) ALL ER 891**, where Judge Pelling, Q.C, held that the header and the email address constituted enough signature. He went further to say:

> *"I have no doubt that if a party creates and sends an electronically created document then he will be treated as having signed it to the same extent that he would in law be treated as having signed a hard copy of the same document. The fact that the document is created electronically as opposed to as a hard copy can make no difference....., In my view it is not*

impossible to hold that the automatic insertion of an email address is, to use Cave J's language, "intended for a signature..."

I have looked at all the printed email trails and I hold that the email trails are admissible. The emails contained the names of authors, position occupied by the said authors and above all, it was signed off with their email addresses. Moreover common practice dictates that an email is concluded with the authors name, phone number, email address and a contact number which are present on all of the emails. I find that there has been full and substantial compliance with the above, therefore, this objection will not stand.

On the issue that the photocopies of the documents were inadmissible, it is general knowledge that documents referred to in pleadings become part of the pleadings. Furthermore, in **CHRISTOPHER U. NWANJI VS. COASTAL SERVICES NSCQR VOL. 18 2004 895**, it was held that where a photocopy of an agreement is referred to, and nothing was suggested that the contents were different from that of the original, the photocopy will be admissible. Further, an

exception to the rule that there will be no need to lay foundation is where in a trial by pleadings, the party seeking to tender it had already pleaded it in its form, that is as a photocopy, the document will, barring other legal problems be admissible without much ado. See **OKPARA VS. SELOBAR (2003) FWLR (PT. 142) 1 and NWANJI VS. COASTAL SERVICES NIG. LIMITED (2004) ALL FWLR (PT. 219) 1150.** I have looked at the Statement of Claim of the Plaintiff and I found that reference was made to the documents, however, there was no pleading as to the form of the document. That is, witness did not state in his Statement on Oath that he will be relying on the photocopy of the said documents. Therefore, this ground of argument cannot hold. It is necessary to lay foundation for the said documents to be admissible. From the evidence of witness on record, the witness had stated that the documents were procured from his brothers employers in the UK and that his lawyers assisted in procurement of the document. For the purpose of Section 39 of the Evidence Act, I find that the aforementioned will suffice to amount as foundation as to the whereabouts of the originals. It is pertinent that Courts of law observe

substantial justice rather than technical justice, and again, I find that the above is sufficient foundation laid.

In the circumstance of this case, I find that the documents are admissible. The objections of the 1st and 2nd Defendants are hereby rejected. The document is hereby marked Exhibits E12 to E43 respectively.

M.B IDRIS
JUDGE
21/2/2017

B. Ajibade SAN with A. Dalley, P. Olalere
O. okuomola, A. Odenajo and C. Uzodima for the Plaintiff
T. Kola – Balogun (Mrs) with O. Omogbemi for the 1st Defendant
J. Majeiagbe with M.C. Nnadi for the 2nd Defendant