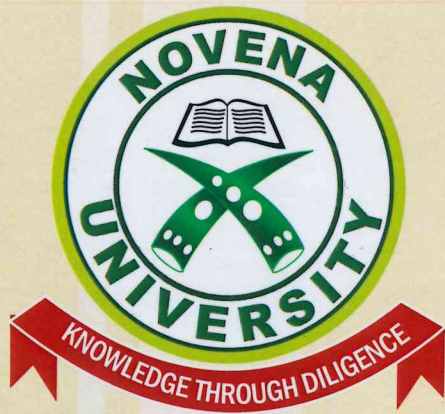




Novena University

COLLEGE OF LAW, OGUME

VOL. 5
AUGUST 2018

LAW **Journal**

ISSN: 2579 - 129



LAW

COLLEGE OF LAW OGUME

LAW

LAW JOURNAL

Vol 5, August 2018

EDICTORIAL BOARD

ADVISORY BOARD

Hon. Justice F. F. Tabai (JSC) Rtd.
Hon. Chief Justice Mrs. Kate Abiri C. J. Bayelsa State
Prof. Hon. Justice D. D. Narebor
Hon. Justice Ebiowei Tobi
Hon. Justic A. A. Onojowo

EDITOR IN-CHIEF

Prof. Bibobra Bello Oroubebe, F.A.I.R, LL.B (Hons), BL, LL.M and Doctor
of Juridical Science (SJD).

SECRETARY TO THE EDITORIAL BOARD

Okon Theresa Sebastian, LL.B (Hons), BL. & LL.M

SUBSCRIPTIONS

The Novena University Law Journal publishes four (4) issues per year. Subscriptions are \$60.00 (N20,000) a year (Nigeria, excluding VAT and Delivery), \$85.00 a year (foreign, excluding VAT and Delivery) and \$40.00 (N16,000) a year (students and alumni, excluding VAT and Delivery). All subscriptions will be renewed automatically unless timely notice of cancellation is provided. If you are interested in receiving a subscription to the Novena University Law Journal, please contact: The Editor in-chief, Novena University Law Journal, P.M.B. 2, Kwale Ogume Delta State Nigeria. E-mail: novenalawjournal@gmail.com Individual issues may be purchased for \$15.00 excluding VAT and Delivery (N5,000.00 excluding VAT and Delivery) per copy. Volumes 1 is published as Novena University Law Journal cited as NULJ Vol. 1.2017.

COPYRIGHT

Copyright © 2019 by Novena University Law Journal. All rights reserved. The Novena University Law Journal permits the copying of articles for classroom and other educational use, provided: (i) the user notifies the Publisher and identifies the university. All other rights are reserved. Excerpt when otherwise expressly provided.

The Novena University (NULJ) is a peer review international academic publication that publishes contributions dealing with national, regional and international law and policy with special focus in interdisciplinary legal scholarship of relevance to dialectical discuss. As a policy NULJ intends to promote balanced scholarly research in all aspects of law and policy particularly emerging themes relevant to students, judges, legal practitioners, legislators, decision makers etc. the journal is published in March, July, October and December every year.

Articles submitted for publication should not have been previously published. (All articles should be 8,000 and 12,000 words including footnotes) while review of cases and books should not be more than 2,000 words. All submissions must be typed in times new roman, at 12 point while footnotes must be 10 point font size and 1.5 line spacing. All articles must be in conformity with the Oxford University standard for all authors who used the authorized (COSOLA) or the Chicago Manual or style of the ALWD Citation Manual. A professional system of Citation.

Submitted articles should have an abstract of not more than 200 words and should also include a short professional profile of the author (s) with individual contact details. Articles should be submitted by e-mail in MS word format to the editorial board or mailed to the Provost/Dean Novena University, College of Law, P.M.B. 2 Kwale, Ogume, Delta State Nigeria.

We are v
develop
governn
(NULJ)
detailed
courts o
supreme
advance
Crimina
Trade
commu
these co
There is
govern
institut
Notwith
except t

commit
is our ex
'hallma
and pol
importa
integrit

tribute
cases. I
that reg
with a v
politica
scholar
intellec
events
Profess
Trump'
insistin
Project
human
sequen
interna
discove
human
conseq
countri
knowle
Nigeria
makes
at prom

Table of Contents

Letter to D.S.P Alamiyeseigha: Niger Delta Martyr	vii
Article <i>By Chief James Onanefe Ibori</i>	
The 'America First' Policy and Nigeria's Interest in the Patenting of the Human Genome: A Case for International Legal Reform	Page 1
<i>Professor Bibobra Bello Orubebe</i>	
Land and Property Taxation on Land and Infrastructural Development in Lagos and Rivers States, Nigeria.	Page 23
<i>Chukwu, Johnkennedy Obinna</i>	
Gender Equality and Access to Education: A Review of Factors Inhibiting Girl Child Education in Northern Nigeria	Page 31
<i>Mahmud Kayode Adebayo</i>	
The Legal Perspective of the Role of the Prosumer in Nigeria's Energy Sector	Page 49
<i>Dr. Erimma Gloria Orie</i>	
Subsidiarity Principle and its Dominant Role in Federal Systems: A Case for Inclusion in Nigeria	Page 75
<i>Elvis Akele Mannie</i>	
Towards an Effective Implementation of the Institutional and Reporting Requirements Under the Freedom of Information Act 2011	Page 96
<i>Ngozi J. Udombana</i>	
An Overview of Electoral Offences in the Light of the Electoral Act, 2010	Page 117
<i>Adamu Idris Tanimu Habilah Isah Barau</i>	
Hijab Perceptions in Selected Countries: A Legal Analysis	Page 130
<i>Oluwabusayo Temitope Wuraola Solomon O. Afolabi</i>	
Legal Protection of Maternity Rights of Women under the Nigerian Employment Law	Page 157
<i>S.M. Abdulmalik</i>	
A Revisit to the Question of Proper Custody of Documents	Page 169
<i>Razaq Justice Adebimpe</i>	
Greater Local Government Autonomy, the Exercise of Executive Power and Authority by Chairmen, and Checks on Corrupt Practices	Page 182
<i>Tumbo H Brodrick Ph.D Asoro Ejiro Gladys</i>	
Implementation of Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) by Malaysian Government: A Lesson to Nigerian Government	Page 200
<i>Ganiat Mobolaji Olatokun Ph.D</i>	
An Examination of the Challenges of the Nigerian Telecommunication Sector Legal Regime	Page 208
<i>Rilwan F. Mahmoud Abdulazeez, Hamza Okene Wuraola, Oluwabusayo Temitope</i>	

A Revisit to the Question of Proper Custody of Documents

By

Razaq Justice Adebimpe*

Abstract

One forensic battle amongst counsels is objection against admissibility of documentary evidence on the ground that it did not emanate from 'proper custody'. A related objection is that the witness through whom a document is sought to be tendered was not its maker. This paper, therefore, revisits the question of the relevance of proper custody of documents in Nigeria's Evidence Law. The study involves an indepth content analysis of statutes, case laws, texts and journal articles. Findings of the study are that how and from where a document is obtained may not affect its admissibility or credence to be attach thereto. It is concluded that in so far as a document is relevant and does not offend the rule against hearsay, the requirement as to proper custody or that the maker of documents be invited to testify to the correctness of its contents is dispensable.

I. Introduction

In a published article,¹ the author has evaluated and put in view the extent of the relevance of proper custody in Nigerian law. Efforts were made to address the question in relation to documentary evidence under the repealed Act² and a number of the now somewhat *otiose* case laws. The contending views and what ought to be the correct position was analyzed. The paper was motivated by the surprising trends on the part of counsels objecting to admissibility of documents, and some trial courts rejecting otherwise relevant documents often for being irregularly obtained, and more often for emanating from 'improper' custody³ or that the witnesses through whom such documents were sought to be tendered were not the makers.

Notwithstanding, it appears that the startling predisposition, as ever before, continues just as the notion that the Evidence Act 2011 may have

1. R J Adebimpe *An Assessment of the Relevance of Proper Custody in Nigerian Law of Evidence* (2010) 3 (1) Kogi State University Bi-annual Journal of Public Law 196-202; (2011) 16, *The Jurist* 351-366.
2. The old Evidence Act Cap E14 2004 Laws of the Federation of Nigeria 2004.
3. *Ogbunyiya v Okudo* (1979) 6-9 SC 39, also recently reported in [2001] FWLR (Pt.72) 2000-1.

throw
re-visi
review

II.

For a
howbe
expres
docun
Thus,
of the
expec
testan
testat
is autl
extan

circur
For ir
been
docur
custo
only
and a
foun
decis
of P
depo
reaso

4.
5.

6.
7.
8.

thrown some doubt on a number of positions hitherto firmly held provokes a re-visit to issues involved. It is against this backdrop that this follow-up paper reviews the extent of changes heralded by the enactment of the new Act.

II. The Expression 'Proper Custody' Defined in Relation to Documentary Evidence

For a correct understanding of the theme of the present paper, it is instructive howbeit briefly to define the phrase 'proper custody.' In this context, the expression means the place and in the care of the person with whom a document would, in the circumstance of the particular case, reasonably be. Thus, a deed of assignment may reasonably be expected to be in the custody of the assignee or his successor in title; a deed of legal mortgage may be expected to be, for example, in the custody of the mortgagor-bank; a testamentary document or its codicil may well be in the custody of the testator. Similarly, a public officer who by ordinary course of his official duty is authorized to deliver copies of public documents under section 104(3) of the extant Evidence Act is deemed to have proper custody of same.

Conversely, provided the custody is reasonable and natural in the circumstance, proper custody of documents need not be the most proper place. For instance, documents belonging to a late bishop by virtue of his office have been held to be in 'proper custody' when found in the midst of his personal documents, even though they were supposed to have been deposited in the custody of his successor in office.⁴ It would, thus, seem that whilst there can only be one custody that is strictly proper, there could be lots of other credible and acceptable custodies, and it is not necessary that a document should be found in the best and most proper place of deposit.⁵ Relying on judicial decisions in *Meath v Winchester*⁶ and *Croughton v Black*,⁷ the learned author of *Phipson on Evidence* defines proper custody of a document as meaning its deposit with a person and in a place where, if authentic 'it might naturally and reasonably be expected to be found.'⁸ It is posited further that such custody is

4. *Bishop Meath v Marquess of Winchester* (1836) 3 Bing NC183.

5. *Ibid*, per Tindale C.J., at 201; cf. *Doe d Lord Arundel v Fowler* (1850) 14 QB 700 which held that in the absence of further explanations, a Parish clerk's house is not a place of proper custody for the parish registers.

6. Fn.4.

7. 12 M & W 205.

8. Howard M.N. *Phipson on Evidence* (14th ed. Sweet and Maxwell, London 1990) 953.

sufficient though 'there might be another which would be more strictly and absolutely proper.'⁹ Accordingly, the new Evidence Act provides as follows:

Documents are said to be in proper custody within the meaning of sections 148 to 155 of this Act if they are in the place in which, and under the care of the person with whom, they would naturally be, but no custody is improper if it is proved to have had a legitimate origin, or if the circumstances of the particular case are such as to render such an origin probable.¹⁰ (Underline added).

Apparently, judicial pronouncements in Nigeria follow these line of definitions. In the case of *Ogbunyiya v Okudo*,¹¹ the Supreme Court, per Idigbe, JSC held as follows:

What after all, is meant by the expression proper custody of a document? It means no more than its deposit with a person and in a place where, if authentic, it might naturally and reasonably be expected to be found.¹²

Having explained the meaning of the expression the succeeding paragraphs assess the relevance if any, of proper custody in the Nigerian Law of Evidence.

(a) *Relevance to the Issue of Genuineness of Documents*

For ease of reference, it is apposite to reproduce the provisions of section 148 (a)-(e) Evidence Act 2011. It states as follows:

The Court shall presume the genuineness of every document purporting to be (a) the Official Gazette of Nigeria or of a State (b) the Official Gazette of any country other than Nigeria (c) a newspaper or journal (d) a copy of the resolutions of the National Assembly or House of Assembly of a State, printed by the Government Printer; or (e) a copy of a document directed by any law to be kept by any person, if such document is kept substantially in the form required by law and is produced from proper custody. (Underline & italic added).

9. Ibid; Colin Tapper, *Cross & Tapper on Evidence* (11th ed. Oxford University Press, Oxford 2007) 724; Dennis I.H. *The Law of Evidence* (Sweet and Maxwell, London 2002) 410; Steve Uglow, *Evidence: Text & Materials* (Sweet and Maxwell, London 1997) 168-169; Nwadialo F. *Modern Nigerian Law of Evidence* (Ethiope Publishing Corporation, Benin 1979) 144.
10. Section 156 Evidence Act, 2011.
11. (fn 3).
12. *Isibor v State* (1970) NRNL 248; *Anyakora v Obiako* [1990] 2 NWLR (Pt 130) 52.

For a quick and easy understanding of section 148 EA, the section is herein divided into two parts, namely, the first part which is neither underlined nor italicized, and which is herein referred to as the Group 'A' documents; and the second part which is either underlined or italicized herein referred to as the Group 'B' documents.

Documents which come under the Group 'A' include official Gazette of Nigeria or of a state, a government notice, the official Gazette of any other country; a newspaper or journal; a copy of resolutions of the National Assembly or House of Assembly of a state printed by the government printer. The question as to production from proper custody does not arise in respect to this category of documents before they can be presumed to be genuine and admitted.¹³

Remarkably, in *Ogbunyiya's Case*, the trial judge after listening to addresses of counsels on both sides on 13 June 1977 adjourned the matter to 17 June (two days afterward) for delivering of judgment. But before delivering the judgment he was elevated to the Court of Appeal with effect from 15 June 1977, as contained in the Official Gazette announcing his elevation. He was unaware of his new appointment when he delivered his judgment. On appeal against the judgment, counsel for the appellants produced a copy of the Official Gazette from which he read from the Bar the elevation of the trial judge. He urged the court to hold that by 15 June the judge had ceased to be a High Court Judge and accordingly striped of jurisdiction to deliver the judgment of 17 June. Nonetheless, the Court of Appeal rejected the argument on the ground that it was not bound to take judicial notice of the Gazette as it was not produced from proper custody.

Consequently, the appeal was dismissed and the appellants further appealed to the Supreme Court which construed (the now) sections 106 (a) (i)-(ii) and 148 (a)-(e) of the Act. It was held that under section 148 of the Act documents such as an Official Gazette and the government notice or any fact of a public nature which they were intended to convey did not need to be produced from proper custody before their genuineness can be presumed by a court.

Therefore, the pre-requisite of production of documents from proper custody does not properly apply to an official gazette, a newspaper or journal and government printer's copy of a resolution of the National Assembly or of the House of Assembly of a state. In the same manner, the requirements of proper custody can be dispensed within the application of presumption of genuineness of government notice in those documents. Therefore, a party who intends to rely on such category of documents may tender or rely on his personal copy of them. However, an opposing party who does not agree with

13. *Ogbunyiya v Okudo* fn.3; *R v The Governor of the Western Region of Nigeria, ex. P. Alasan Babatunde Ajagun II* (1957) WRNLR 104.

the genuineness of such copy is at liberty to produce his own copy. The practice of bringing a Registrar of Newspapers before the court for the purpose of tendering a copy of a newspaper complained is superfluous.

On the other hand, a proper interpretation of the section is that only the Group 'B' documents¹⁴ must be shown to have been kept substantially in the form required by law and proved to have been produced from proper custody before their genuineness can be presumed by the court. Consequently, a party who intends to tender such category of documents must prove that they emanate from proper custody, or that he is the proper depository for the court to presume that those documents are genuine.¹⁵ It would seem, therefore, that it is sufficient for the chairman of a registered political party in Nigeria to produce its registration documents and may be sufficient for the general-overseer of a place of worship such as a Church to produce its certificate of incorporation without showing where it came from.

If the genuineness or authenticity of a Group 'B' document is in dispute, it must be proved by the party seeking to rely on it. However, the proof is needed merely to presume its genuineness not as a basis for reception.¹⁶ The Nigerian Supreme Court gave its imprimatur to this opinion in *Ogbunyiya's Case*¹⁷ when it held:

...and proof of production from custody is required not as ground for reading the document...but to afford the judge reasonable assurance of it as being what it purports to be.¹⁸

To put the point in a nutshell, whether documents are from proper custody or not, they are legally admissible but Group 'B' documents may not be presumed to be genuine unless they are proved to be from proper custody as defined in section 156 EA.

It should be added, however, that requirement as to presumption of genuineness of a document purporting to be a certificate, certified copy or other document which is by law declared to be admissible as evidence of any particular fact is specially provided for in section 146 EA which provides that once the document is substantially in the form and purports to be executed in the manner directed by law,¹⁹ it would be presumed to be genuine whether or not it is from proper custody.

14. I.e. copies of documents referred to in Paragraph (e)-the underlined or bolded part of section 148 EA.

15. Section 148 (e) *ibid*.

16. *Ibid*.

17. (fn 3).

18. *Ibid*.

19. That is, containing a certificate duly subscribed to by the officer having its custody with his name and official title, seal or stamp, dated, and stating at the foot of such copy that it is a true copy of the document: section 104 EA; *Ogbunyiya v Okudo*

C
public do
witness
in section

Act do
therein
whether
summo
require
court, h
not be
possess
witness

20.

21.

22.

Other issues that may possibly arise in connection with tendering of public documents include whether such documents can only be produced by a witness while testifying under oath? The answer to this question can be found in section 106 EA which is partly produced hereunder:

- 106(a) The following public documents may be proved as follows-
 Acts of the National Assembly, Laws of the House of Assembly of a State or bye-laws of a Local Government Council, proclamations, treaties or other acts of State, orders, notifications, nominations, appointments and other official communications of the Government of the Federation, State or Local Government in Nigeria-
- (i) which appear in the Federal Gazette or the Gazette of a State, by the production of such Gazette, and shall be *prima-facie* proof of any fact of a public nature which they were intended to notify,...²⁰

On proper reading of section 106 EA cited above, it is obvious that the Act does not contemplate that production of public documents mentioned therein must be by witness whilst testifying under oath, because a witness, whether a party or not in a cause (in this situation public officer) may be summoned only to produce documents (*subpoena duces tecum*) without being required to attend court, and if he causes the document to be produced in court, his personal attendance may be dispensed with.²¹ Indeed, a person does not become a witness by mere fact that he produces document in his possession; and he cannot be cross examined, unless he is called as a witness.²² In addition, section 50 of the Act states that:

In the case of a person employed in the public service of the Federation or of a State who is required to give evidence for any purpose connected with a judicial proceeding, it shall be sufficient to account for his non-attendance at the hearing of the said judicial proceedings if there is produced to the court either a Federal or State Gazette or a telegram, an email or letter purporting

(fn3); *Ndayako v Mohammed* [2006] 17 NWLR (Pt 1009) 655; *Kporoaro v Dugbo* (1958) SCNLR 180.

20. Section 106 (a) to (i) EA.

21. Section 218 EA. Indeed, it has been decided as far back as 1834 in *Perry v Gibson* (1834) 1A & EI that a witness called merely for the purpose of producing documents need not be sworn. And following *Perry's Case*, the Supreme Court of New Zealand held that a person called in criminal proceedings merely to produce documents was not required to be sworn but that he could produce the document in court where they could be identified and used by the other witness: *R v Gilmore* (1961) NZLR 384.

22. Section 219 EA; *Famakinwa v University of Ibadan* [1992] 7 NWLR (Pt 255) 608.

to emanate from the head of his department, sufficiently explaining to the satisfaction of the court his apparent default (Underline added).

When this section was considered by the West African Court of Appeal, the court was satisfied that the mere production of an Official Gazette without the formality of production on oath from the witness box by a witness who (having testified at the preliminary inquiry) was required to testify again at a subsequent trial, was out of the country on leave was sufficient foundation for the admission of the deposition of the witness.²³ Thus, once a Gazette (a group 'A' document under section 148 EA) deals with facts of a public nature²⁴ and the document²⁵ is produced before a trial court, unless the contents are irrelevant, the court ought to admit same in evidence under that section as well as under section 106 (a) of the Act.

Similarly, as section 104 EA does not make any provision as to who should tender certified copy of public documents in court proceedings, whoever procures them is competent to tender same without calling the public officer who is deemed to have its custody. It is, therefore, not the law that public records of private documents kept in Nigeria by virtue of section 102 (b) EA can only be tendered by the officer who in the ordinary course of his official duty authorized to deliver certified copies of them for as tersely put by Kolawole JCA, in *Agagu v Dawodu*:

It will be most anomalous to prevent a party to a proceeding from tendering in evidence a certified true copy of a document for which he paid in accordance with section 110 (now 104) of the Evidence Act.²⁶

Indeed such public documents may be tendered from the bar.²⁷

(b) *Relevance to the Issue of Maker or Signatory to Documents*

Another common contention amongst counsels is to take objection against application to tender document under sections 83(1) and 49 on the ground that the witness through whom the document is sought to be tendered was not the maker of the document. It is necessary to deal with the issue with provisions of those sections. Firstly, by virtue of section 83(1), it is necessary for the maker of statements in a document to be called as a witness in the

23. *Majekodunmi v The Queen* (1952) 14 WACA 64, 667; see *Isibor v State* (fn.12) where the Supreme Court held that the trial court erred in law in refusing to admit the deposition of a witness duly signed by the Magistrate when the learned counsel for the accused sought to tender the same in evidence from the Bar, and insisting that it could only be proved in evidence through a witness on oath.

24. Of which it is the intention of government to notify the public.

25. I.e. the document containing the said notice.

26. [1990] 7 NWLR (Pt160) 565.

27. *Ogbunyiya v Okudo* (fn.3) 677; *Anyakora v Obiako* (fn.12).

proceedings, and he is obliged to testify to the correctness of its contents for same to be admitted in evidence, provided of course, and in all cases, that he has personal knowledge of the matters dealt with therein.²⁸ The proviso to the section, however, treats the document admissible if the maker is not called as a witness on the ground that he is dead or unfit to attend as a witness by reason of bodily or mental condition.²⁹ The attendance of the maker may also be dispensed with if he is outside Nigeria, or it is impracticable to secure his attendance or cannot be found after all reasonable efforts to find him.³⁰ In addition, the Act provides that the court may, if having regard to the circumstances of the case, it is satisfied that undue delay or expense would be caused order that a document be admissible; and may without an order admit same notwithstanding that the maker is available and not called as a witness.³¹

By virtue of the above provisions of the Act, it is clear that the court has discretion, *albeit* judicially exercisable,³² having regard to the circumstances of a case, to admit documents, even if the maker of the document is available but not called as a witness if undue delay or expense would otherwise be caused. The inference here is that the court may not put to task the party tendering the document to give explanation for the non-attendance of the maker of the document. Section 83(2) of the Act, therefore, constitutes an erosion of the direct evidence rule as it relates to documentary evidence,³³ since a document may be admitted where its maker has not been called as a witness.

Furthermore, by virtue of section 49 of the Act, 'where in the course of any criminal trial, the court is satisfied that for any sufficient reason' the presence of the police officer who investigated the case cannot be procured, his written and signed report may be received in evidence provided that the defence does not object thereto; and if the Court consents to its admission; and provided in all cases that the maker would have been capable of giving direct oral testimony of the contents of the document, particularly by having

-
28. Section 83(1) (a) (i); sections 37-38; *Subramanian v Public Prosecutor* (1956) 1WLR 965; *Armels Transport Ltd v Martins* (1970) 1 All NLR 27; *Amobi v Amobi* [1996] 8 NWLR (Pt. 469) 638, 652 SC; *Okonkwo v State* [1998] 8 NWLR (Pt 561) 210, 258.
 29. Section 83(1) (b); *Glorylux Associated Ind. v NPFB* [1993] 7 NWLR (Pt. 305) 349-350.
 30. *Ibid.*
 31. Section 83(2) (a).
 32. *Williams v Hope Rising Voluntary Funds* (1981)1-2 SC 145; *Peter Ogiogun v Idukpaye* (1959) WRNLR 81
 33. *Obembe v Okele* [2001] 10 NWLR (Pt.677) 690; *Igbodin v Obianke* (1978) 9-10 SC.

personal knowledge of matters dealt with by the document.³⁴ From the foregoing provisions of the Act, it is clear that it is not *sine qua non* for admissibility of a document in evidence that it be tendered through its maker because the court has discretion under section 83 to admit a document in evidence even if the maker is available and has not been called as a witness; and under section 49 EA for sufficient reason' that the attendant of the maker cannot be procured.

Having assessed the relevance of proper custody and found that the concept is not *sine qua non* for admissibility of documents in Nigerian evidence law, the succeeding sections explain the prerequisites for admissibility of documents in evidence and the distinctions between admissibility and weight of documentary evidence.

III. Criteria Governing Admissibility of Documents

As stated in the Supreme Court decision in *Okonji v Njokanma*³⁵ three main criteria discussed seriatim below govern admissibility of documents in evidence:

(a) *Whether it is Relevant to the Inquiry Being Tried*

The relevance of facts encompasses a wide area in the law of evidence.³⁶ In order for evidence of facts in documents to be receivable under section 1 of the Act, it must be relevant to the fact-in-issue or to some other facts deemed relevant to those in issue. An irrelevant document is unarguably not admissible.³⁷ If through inadvertence or otherwise an evidence of a document declared in the Act to be irrelevant is admitted, even without any objection, the admission would not advance the case of either party, and must be expunged from records by the trial court, or otherwise be disregarded by the appellate court for having no evidential worth.³⁸

34. Ibid; *Osuoha v State* [2010]16 NWLR (Pt.1219) 364; *Ekpo v The State* [2001] 7 NWLR (Pt.712) 292, 304; cf. the case of *Nwangwa v The State* [1997] 8 NWLR (Pt.517) 457.

35. (1999) 12 SCNJ 259, 272.

36. Sections 1-18EA.

37. *Agunbiade v Sasegbon* (1968) NMLR 223, 226; *Oyediran v Alebiosu II & Ors* (1992) 7 SCMR (Pt.1) 291; Aguda T.A, *The Law of Evidence* (4th ed. Spectrum Law Publishing, Ibadan 2000) 26; Nwadiakor F, *Modern Nigerian Law of Evidence* (fn.9) at 29.

38. *Oyediran v Alebiosu II & Ors* (ibid) 291; *Buhari v INEC* [2008] 4 NWLR (Pt.1078); *Abubakar v Joseph* [2008] 13 NWLR (Pt.1104) 307 SC; *Okereke v The State* [1998] 3 NWLR (Pt. 540) 75, 87-87; *ACB Ltd v Gwagwalada* (1994) 4 SCNJ (Pt.11) 268, 277.

(b) Question on the Plea of the Document

The rule of pleadings presupposes that to be admissible in evidence, documents upon which a party wishes to anchor his case must be specifically pleaded so that the other party is not taken by surprise.³⁹ Hence, an un-pleaded document (or failure to plead the facts which it covers) is as a general rule inadmissible.⁴⁰ An allusion in a pleaded document to another which is not pleaded is not tantamount to pleading.⁴¹ Where a document which is not pleaded is inadvertently admitted, it goes to no issue and would be discountenanced⁴² as it is not open to a court of pleadings to act on such document.⁴³

(c) Whether it is in a Form Admissible in Law

Having scaled the hurdles of relevancy and pleadings, another question which may be the real bone of contention is whether formal requirements for admissibility of such document under the Act are satisfied.⁴⁴ For instance, the formalities for admissibility of public documents (such as records of proceedings in a suit) within the purview of section 102 (a) (ii) of the Act are laid down under sections 104 and 105 of the Act. It is only if the requirements of the Act are conformed to⁴⁵ that the document would be admissible in evidence. It should be added, however, that if a document is admissible under certain provision of the Act, it does not *ipso facto* make the same document admissible for all intents and purposes, because a document may be intended in proof of a specific item under the relevant law.⁴⁶ More so, admissibility is one thing, probative value or weight of documentary evidence is another.

IV. Distinction between Admissibility and Weight of Documentary Evidence

39. *NNPC v AIC Ltd* [2003] NWLR (Pt.805) 569.

40. *Oba Ipinlaye II v Olukotun* (1996) 6 SCNJ 74, 87; *Okeke v Oruh* (1999) 4 SC (Pt. 11) 37, 51.

41. *Oba Oyediran v Oba Alebiosu II & Ors.* (fn.37).

42. *NNPC v AIC Ltd* (fn.39) 583; *UBA Ltd v Ademuyiwa* [1999] 11 NWLR (Pt.628) 590; *Emegokwe v Okadigbo* (1973) 4, 113 SC; *Emegokwe v Okadigbo* (1973) 4 SC.

43. *Allied Bank Ltd v Akubueze* (1991) 6 SCNJ 116 at 140-141.

44. *ACB v Umaru Gwagwada* [1995] NWLR (Pt.345) 25.

45. *A.G. Kwara State & Anor v Alao & Anor* [2000] 9 NWLR (Pt. 671) 84,104.

46. *Okonji v Njokanma* (fn.35); *Abgahonovo v Eduyegbe* (1999) 2 SCNJ 94, 105.

More often, mistake is made as not to realize that there is a distinction between admissibility of documents and the weight to be attached to same. Hence, in a number of judicial decisions, rules on weight of evidence have been employed to refuse admissibility of documents. This is erroneous in law. The Supreme Court's decision in *Musa Abubakar v E.I. Chuks*⁴⁷ is very instructive in respect to the distinction between 'relevancy,' 'admissibility' and 'weight' of documents. The court held *inter alia*:

Relevancy and weight of evidence are two distinct compartments in our law of evidence. They convey two separate meanings in our adjectival law and not in any form dovetail.... Relevancy which propels admissibility is invoked by the trial judge immediately the document is tendered... weight comes in after the document has been admitted.⁴⁸

Hence, a document may though be admissible in evidence but when it passes through the crucible of probative value found to be a worthless document with no credence.⁴⁹ In the same vein, competence of a witness to tender document in a case is different from the weight of the evidence.⁵⁰ Furthermore, whether facts contained in a document are admissible depend almost entirely on its relevance to the fact in issue, not on how a party obtained it or whether it was improperly obtained or in contravention of a law,⁵¹ unless the court is of the opinion that the desirability of admitting the document is out-weighed by the undesirability of admitting the document in evidence.⁵²

47. (2007) 32 NSCQR 317.

48. In *Sufuyanu Monmodu v University of Benin* [1997] NWLR (Pt. 512) 345 the Supreme Court held that in the law of evidence, 'relevancy,' 'admissibility' 'the weight of evidence' or 'proof' are each in separate and independent departments. Once a piece of evidence is admissible and it is admitted, it is *ipso facto* relevant. But a piece of evidence may be relevant but inadmissible if it is remotely relevant while 'weight of evidence goes to question of proof.

49. *Etajata v Ologbo* (2007) 6 SCNJ 462, 485; *Comptoir Commercial & Ind. SPR Ltd. v Ogun State Water Corporation & Anor* (2002) 4 SCNJ 342; *Ayeni v Dada* (1978) 3 SCNJ 27, 37.

50. *Motanya v Elinwa* [1994] 7 NWLR (Pt 356) 252; *Okafor v Obiwo* (1978) 9-11SC 115.

51. Section 14 Evidence Act; *Torti v Ukpabi* 1984) 1SCNLR 214; *NAB Ltd v Shuaib* [1991] 4 NWLR (Pt.2) 5 SC; *Musa Sadau & Anor v The State* (1968) NMLR 208 which held that evidence which is relevant is not excluded merely by the way in which it has been obtained, if it is relevant to the matter in issue, it is admissible and the court is not concerned with how the evidence was obtained.

52. Section 15 EA.

Based on the foregoing, the Supreme Court in *James Igbioria v The State*⁵³ cited with approval the statement of Lord Diplock in *R v Sang*⁵⁴ to the effect that:

A trial judge in criminal trial...has no discretion to refuse to admit relevant admissible evidence on the ground that it was obtained by improper or unfair means. The court is not concerned with how it was obtained...

Thus, a stolen document or a document obtained as a result of an illegal search of the body or the residence of an accused is admissible provided it is relevant.⁵⁵ In *Agagu v Mimiko*,⁵⁶ the State Security Service (SSS) report pleaded by the two principal parties to the appeal was alleged by the witness sent by the SSS not to be in existence. Nevertheless, the first respondent tendered the document. Invariably, the learned counsel for the appellant urged the court not to attach any weight to the document because the witness summonsed to tender it denied the existence of the document. It was held that the document does not detract from its evidential value or the weight to be attached to it since in any case it was a relevant document.⁵⁷ The illegality may, however, attach to the person who obtained the document illegally; and it may, having regard to the circumstance of each case affect the weight to be attached to the document or the fact contained in it, and perhaps the issue of presumption of genuineness under section 148 (e).⁵⁸

It follows, therefore, that there is no law requiring that a document must emanate from proper custody for its admission provided that it is pleaded, relevant to the inquiry being tried and is in the form admissible in law. All that the law says is that a document emanating from proper custody may be presumed to be genuine or otherwise affect its probative value.⁵⁹

V. Conclusion

This paper re-evaluated the relevance of proper custody in Nigeria's law. It examined the purport of the concept in relation to documents and how this relates to the issue of attendance of the maker thereof as a witness in a proceeding. Germane to the issue of proper custody is whether documents are

53. (1981) 2 SC.

54. (1979) 2 All ER 1282, [1979] 2 WLR 263.

55. *Karuma v R* (1955) AC 197, 203; *Elias v Pasmore* (1934) 2 KB 164.

56. [2009] 7 NWLR (Pt. 1140) 403-405.

57. *NBA v Fawehinmi* (1986) 2 QLRN 190, 207-210 where it was held that a tape recorded evidence of what transpired at a meeting was admissible irrespective of how it was obtained illegally or tortuously.

58. *Agagu v Mimiko* (fn.56); *Agbanomovo's Case* (1999) 2 SC 79, 86; *Motanya v Elinwa* (fn.50); *Okafo v Obiwo* (fn.50).

59. *Oshunrinde v Akande* (1999) 6 SCNJ 193, 199-209; *Adebayo v Adusei* [1994] 4 NWLR (Pt. 862) 44.

to be produced only while testifying under oath by one who has custody of it. Criteria governing the admissibility of documents and distinction between admissibility and weight of documents are also extensively evaluated. The paper argued that once a document is in the form and executed in the manner required by law, it is legally admissible notwithstanding that it is not from proper custody, although certain documents may benefit from the presumption of genuineness only when they are shown to be from proper custody. In a nutshell, prove of proper custody raises, at best, the presumption of genuineness and enhances the weight of the document, or at worst adversely affect evidential value of the document.

Greate

Abstrac

Local g
instituti
third tie
democr
local go
Due to
Assemb
govern
But if t
power c
likely to
This stu
likely a
recomm
powers
analysis

Keywo
and sep

Introduct

Local g
colonia
Author

* H I
Ogu
** E C
Mar