



THE APPLICABILITY OF SECTION 83 (3) OF THE EVIDENCE ACT 2011 (AS AMENDED) IN JUDICIAL PROCEEDINGS IN NIGERIA*

Abstract

The determination of any dispute is anchored on evidence. Without evidence of the disputing parties, a court or tribunal cannot resolve the dispute before it and as between the parties. One of such evidence relied upon by the court or tribunal is documentary evidence. For any document to be considered by the court, such document must be relevant and admissible in law. On the other hand, a document may be relevant but inadmissible. One of the circumstances in which a document though relevant but inadmissible is where the document was made during the pendency or in anticipation of a suit by an interested party. Many documents have been rejected by the courts on the ground that they were made during the pendency or in anticipation of a case by an interested party. The question now is, is it in every situation that a document made during the pendency of a suit is inadmissible? This paper seeks to appraise section 83(3) of the Evidence Act 2011 and those situations where documents made during the pendency or in anticipation of a suit can notwithstanding the extant provisions of the Evidence Act be admissible. The paper therefore stressed the point that courts particularly the trial courts must be wary during trial to determine the capacity of the maker of a document made during the pendency of a suit. Documents made by experts, employees, issued to a party to the suit etc. by virtue of their office are admissible even though they were made during the pendency of a suit. The paper concludes that it is not in all situations that documents made during the pendency of a suit are inadmissible.

Keywords: Evidence, Admissibility, Interested Person, Statement made during the Pendency of a Suit, Exceptions

1. Introduction

It is a common knowledge that no dispute can be resolved in any judicial system without recourse to evidence. Evidence plays a major role in determination of disputes by the courts. Without the evidence of the parties before the court, the court will not be armed with any tool to resolve the controversy before it. One of such evidence relied upon by the courts or tribunal is documentary evidence. For any document to be considered by the court, such document must be relevant and admissible in law. On the contrary, a document may be relevant but inadmissible. One of the circumstances in which a document though relevant may be inadmissible, is where the document was made during the pendency or in anticipation of a suit by a person interested at a time when proceedings were pending or anticipated. Thus, section 83 (3) of the Evidence Act, 2011 which is *in pari materia* with section 91(3) of the repealed Evidence Act of 2004 prohibits the admissibility of documents made during the pendency of a suit or in anticipation of a suit by an interested party. The section was enacted to render inadmissible a document prepared by an interested person in order to defeat through its clear wordings the course of justice. It operates as a rule of exclusion. Such a document is rendered inadmissible when the maker knew about the pendency of the suit to which the document is made and even where he does not know about the existence of a suit, he anticipate that a dispute might arise.¹ It follows therefore that many documents have been rejected by the court on the ground that they were made during the pendency of a suit by an interested party. Such documents if tendered are usually objected to by the opposing party at the trial or refused by the court *suo motu* and in some cases expunged by the court during

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¹ *Gwar v Adole* [2003] 3 NWLR (Pt. 808) 516



judgment since such evidence is presumed in law to be generally inadmissible. The simple logic adopted by the court in ascertaining whether the document is caught by section 83 (3) of the Evidence Act, is to look at the date the suit in question was filed. If the date on the document sought to be tendered comes after the date the suit was filed, the document will be tagged to have been made during the pendency of the suit and accordingly inadmissible.²

The question now is, is it in every situation that a document made during the pendency of a suit is inadmissible? This paper seeks to examine those situations where documents made during the pendency of a suit can notwithstanding the extant provisions of the Evidence Act be admissible. As the saying goes, in every general rule, there is an exception. It is pertinent to note that over times, many documents had been rejected by the court on the mere ground that they were made after the institution of the suit without considering whether they fall within the exceptions or not. It is the finding of this paper that section 83 (3) of the Evidence Act, 2011 admits some exceptions and it is not in every circumstance that documents made during the pendency of a suit are inadmissible. The paper stressed the point that courts particularly the trial courts must be wary during trial to determine the capacity of the maker of a document made during the pendency of a suit as documents made by experts, government employees etc. by virtue of their office are admissible even though they were made during the pendency of a suit. The paper concludes that it is not in all situations that documents made during the pendency of a suit are inadmissible in our judicial system.

2. Concept of Admissibility

The Evidence Act 2011 (as amended) is the principal enactment regulating admissibility of evidence in the Nigerian judicial system. Notwithstanding, nothing in the Evidence Act shall prejudice the admissibility of any evidence that is made admissible by any other legislation validly in force in Nigeria.³ However, the term ‘admissibility’ is not specifically defined in the Act. The Black’s Law Dictionary,⁴ define ‘admissibility’ as the quality or state of being allowed to be entered into evidence in a hearing, trial, or other official proceeding. Therefore, to be admissible means capable of being legally admitted; allowable; permissible as evidence or worthy of gaining entry or being admitted⁵. As a general rule, it is only facts which are relevant to the facts in issue that can serve as the basis for the admissibility of a piece of evidence. It is important to note that:

- (a) Admissibility is a question of law and it is a precondition for the reception of evidence during trial. On the contrary, relevancy is not primarily dependent on the rule of law.
- (b) Admissibility in the first instance depends on relevancy of a high degree. To be admissible, the piece of evidence must satisfy all the auxiliary tests and extrinsic policies.⁶

It is worthy to note that what determines admissibility of evidence is relevancy. Put differently, admissibility is based on relevance.⁷ Evidence may therefore be given in any suit or proceeding of the existence or non-existence of every fact in issue and of such other facts as are declared to be

² *A.C. (O.A.O) Nig. Ltd v Umanah* [2013] 4 NWLR (Pt. 1344) 323

³ Evidence Act 2011 (as amended), s. 3

⁴ Ninth Edition, 55

⁵ Odo Celestine Obinna, ‘Relevance and Admissibility Under The Evidence, 2011’ being a paper presented at the refresher course for Magistrates at the National Judicial Institute, Abuja, on 23 March, 2022.

⁶ *Ibid*

⁷ *Owakah v R.S.H.P.D.A* [2022] 12 NWLR (Pt. 1845) 463



relevant and of no others.⁸ Consequently, all admissible evidence must be relevant but not all relevant evidence is admissible. A piece of evidence may be relevant to the issue in controversy but it can only be admitted in evidence if it passes the admissibility test. In effect, relevancy is a precursor to admissibility. Thus, what is not relevant is not admissible. The criteria which govern the admissibility of a document in evidence are whether:

- (a) The document is pleaded
- (b) It is relevant to the case before the court
- (c) It is admissible in law.⁹

3. The Expression of Section 83 (3) of the Evidence Act, 2011 (as amended)

A piece of evidence may be relevant and still can, by operation of law, be inadmissible.¹⁰ One of the provisions in the Evidence Act where the rule of exclusion of evidence can be found is section 83(3) of the Evidence Act, 2011. The sub-section excludes the admissibility of evidence though relevant but made during the pendency or anticipation of a suit by an interested person. For the benefit of doubt, the said sub-section provides: ‘Nothing in this section shall render admissible as evidence any statement made by a person interested at a time when proceedings were pending or anticipated involving a dispute is to any fact which the statement might tend to establish.’

The said section 83 (3) of the Evidence Act 2011 is *in pari materia* with section 91(3) of the Evidence Act Cap. 14 Laws of the Federation of Nigeria, 2004. Over the years, and after the commencement of the new Evidence Act, courts have held in several cases that documents made in the course of proceedings after pleadings have been filed and served are of no evidential value and should not be admitted in evidence.¹¹ In the case of *Abdullaho v Hashidu*,¹² Pats-Acholonu, JCA (as he then was) observed as follows:

The next issue is as to the status of Exhs. JJ and KK. There is no doubt that when these documents were made, pleadings have been filed and served, therefore they were made at the time of the proceedings of the case. Exh. M2 is a document which on its face value appears to be the government’s expression of its acceptance of the recommendation of the Judicial Commission of inquiry which indicted the 1st respondent. Exhs. JJ and KK which on their face seek to explain the Federal Government’s position on ‘M2’ were obviously wrongly admitted as they were made in the course of the proceedings. Therefore, they are of no evidential value in assessing the worth of these documents.¹³

As stated earlier in the introductory part of this work, the court in ascertaining if the document sought to be tendered is made during the pendency of a suit, will readily look at the date the action was filed and the date on the document sought to be tendered in evidence. If the date on the document is later in time, the document will be rejected pursuant to section 83(3) of the Evidence

⁸ *Abubakar v Chuks* [2007] 18 NWLR (Pt. 1066) 386

⁹ *Okonji v Njokanma* [1991] 14 NWLR (Pt. 202) 131; *Udoro v Gov., Akwa Ibom State* [2010] 11 NWLR (Pt. 1205) 322

¹⁰ *Kekong v State* [2017] 18 NWLR (Pt. 1596) 108

¹¹ *Abdullahi v Hashidu* [1999] 4 NWLR (Pt. 600) 638

¹² *Ibid*

¹³ *Ibid*, Pp. 645-646, paras. G-A



Act, 2011 and rendered inadmissible.¹⁴ Similarly, in the case of *Anagbado v Faruk*,¹⁵ the respondent as plaintiff filed the action at the High Court of Justice, Kaduna State in 2010 against the appellant as defendant wherein he claimed, amongst other reliefs, a declaration of title to land. At the conclusion of the trial, the trial court entered judgment for the respondent. The appellant being dissatisfied with the judgment of the trial court unsuccessfully appealed to the Court of Appeal and further to the Supreme Court. One of the issues resolved by the Supreme Court is whether exhibits D1, D2 and D3 were admissible. The Supreme Court in its judgment, held emphatically as follows:

Now, closely looking at exhibits D1, D2 and D3 which were relied on by the appellant in defence of the suit and in proof of his counter claim, there is no doubt that the said exhibits were made or procured after the suit was instituted at the trial court by the plaintiff/respondent or when the suit was pending at the trial court. The trial court, in my view, was correct in taking them to be inadmissible in view of the fact that they were manufactured, procured, produced or made in anticipation of the case pending in court as at the time they were made. The law is trite, that evidence procured during the pendency or in anticipation of a case is not admissible in law.¹⁶

It is trite that objection must be raised timeously and at the point of tendering the document. It follows therefore that a party who desires to raise an objection to the tendering of a document in evidence pursuant to section 83 (3) of the Evidence Act, must do so at the very moment the document is sought to be tendered. Thus, documents covered by section 83 (3) of the Evidence Act fall within the categories of evidence that are generally inadmissible in law. Also, parties by sheer collusion and for their mutually anticipated benefit cannot give consent to the admission of a statement which the Evidence Act clearly provides is inadmissible. Admission of such evidence will run counter or against the provision of the Evidence Act. The court will ignore the consent and rule that the evidence is inadmissible.¹⁷ It does not follow that since the document is admitted by consent, none of the parties will be allowed to resile from it as they are estopped from doing so. The doctrine of estoppel cannot work in favour of parties who mutually give their consent or agree to an illegality. Estoppel, as an equitable principle, cannot condone illegality. It rather aids justice and fair play.¹⁸ It is therefore illegal to admit a document by consent of parties contrary to the provisions of section 83 (3) of the Evidence Act. Consequently, where no objection is raised at the point of tendering such document, the trial court has the inherent power to expunge such evidence from the record at the point of writing judgment. On the other hand, such a document could be expunged by the appellate court on appeal. In the case of *Haruna v K.S.H.A.*,¹⁹ exhibits 22(a-g) where documents caught by section 91(3) of the repealed Evidence Act, 2004 and were admitted by consent of the parties. On appeal, the exhibits were excluded by the Court of Appeal and accorded no probative value. The Court of Appeal expatiated the position of the law, when it held:

¹⁴ *A.C. (O.A.O.) Nig. Ltd v Umanah* [2013] 4 NWLR (Pt. 1344) 323

¹⁵ [2019] 1 NWLR (Pt. 1653) 292

¹⁶ *Ibid*, Per Sanusi, page 307, paras. E-F.

¹⁷ *Ugwu v Ararume* [2007] 12 NWLR (Pt. 1048) 365

¹⁸ 454, paras. D-H, per Tobi, JSC.

¹⁹ [2010] 7 NWLR (Pt. 11940) 604



Where the provisions of a statute are clear and unambiguous, the court must give those provisions their liberal and ordinary interpretation. The provisions of section 91(3) of the Evidence Act are clear and unambiguous and it is mandatory. Therefore, if a piece of evidence is wrongly received in evidence by the trial court, an appellate court has the inherent jurisdiction to exclude or expunge it from the records notwithstanding that counsel at the trial court did not object to the admissibility of the piece of evidence. In other words, neither court nor the parties to a suit have the power to admit without objection a document that is in no way or circumstance admissible in law. Consequently, where a piece of evidence that is inadmissible in law is admitted by a trial court, counsel to either party can raise objection to the admissibility of the piece of evidence during final address at the trial court or on appeal.²⁰

4. The Conditions Stipulated under Section 83 (3) of the Evidence Act, 2011

The main conditions stipulated under section 83 (3) of the Evidence Act to render a statement inadmissible are:

- (a) It must be made by a “person interested”; and
- (b) When “proceedings are pending or anticipated’ involving a dispute as to any fact which the statement might tend to establish.²¹

4.1 Who is an Interested Person?

By ordinary reasoning, one may conclude that an ‘interested person’ as contemplated under section 83(3) of the Evidence Act is any person who is a party to a suit. Parties to a suit are often interested or concerned with the outcome of the proceedings either as a plaintiff or defendant as the case may be. On the other hand, a person who is not a party to a suit will be presumed not to be interested with the outcome of the proceedings. In resolving the controversy surrounding ‘who is an interested person’, the courts have over the years in a plethora of cases expanded the meaning of an ‘interested person’ under section 91(3) of the repealed Evidence Act and now section 83 (3) of the Evidence Act 2011 to mean not only the parties to the proceedings but also those who are interested in the outcome of the litigation. The Supreme Court in the case of *Ugwu v Ararume*,²² expressed the view that even though PDP was not a party in the proceedings at the material time, the document made by PDP was inadmissible under section 91(3) [now s. 83(3)] of the Evidence Act because they were interested in the outcome of the litigation between *Ugwu v Ararume*. Thus, even if the maker of the document is not a party to the suit, once he is interested in the outcome of the litigation, any document made by him will be inadmissible.²³

In the case of *Ladoja v Ajimobi*,²⁴ the Supreme Court emphasized on the meaning of “person interested” under section 91(3) and now section 83 (3) of the Evidence Act, 2011 when it held that:

As regards the phrase “a person interested” I agree with the respondent that the phrase has been examined in the case of *Evan v Noble* [1949] 1 KB at

²⁰ Ibid, Per Abba Aji, JCA, Pp. 636-637, paras. G-A; *Oseni v Dawodu* [1994] 4 NWLR (Pt. 339) 390; *Alao v Aknao* [2005] 11 NWLR (Pt. 935) 160.

²¹ *S. E. A. P. S. Ltd v Ogunnaike* [2008] 14 NWLR (Pt. 1106) 1

²² [2007] 6 SCNJ 316 at 354-355

²³ *A. C. (O. A. O) Nig Ltd. v Umanah* [2013] 4 NWLR (Pt. 1344)323; *Igbinovia v Agboifo* [2002] FWLR (Pt. 103) 505.

²⁴ [2016] 10 NWLR (Pt. 1519) 88



225 where a person not interested in the outcome of action has been described as, ‘a person who has no temptation to depart from the truth one side or the other, a person not swayed by personal interest but completely detached, judicial, impartial, independent’. In other words, it contemplates that the person must be detached, independent and non-partisan and really not interested which way in the context the case goes. Normally, a person who is performing an act in official capacity cannot be a person interested under section 91(3). I think the phrase ‘a person interested’ ever more so has been quite definitely put in the case of *Holton v Holton* [1946] 2 AER 534 at 535 to mean ‘a person who has pecuniary or other material interest in the result of the proceeding- a person whose interest is affected by the result of the proceedings and therefore would have no temptation to prevent the truth to serve his personal or private ends. It does not mean an interest in the sense of intellectual observation or an interest purely due to sympathy. It means an interest in the legal sense, which imports something to be gained or lost.’²⁵

An interested person in the context of admissibility or otherwise of documentary evidence is one who is likely to pervert the truth as a result of his pecuniary or other material interest in the result of a proceeding. The rationale of the provision is that he must be a person who has no temptation to depart from the truth on one side or the other - a person not swayed by personal interest, but completely detached judicially, impartial and independent. The nature of interest envisaged under the said section 83(3) of the Evidence Act, is personal interest and not an interest in official capacity. In the case of *UTC (Nig) Plc v Lawal*,²⁶ Supreme Court held that:

Generally, it is trite law that document made by a party to a litigation or person otherwise interested when proceedings are pending or is anticipated is not admissible. See *Barkway v South Wales Transport Co. Ltd* (1949) 1 KB 54. However, the interest that is envisaged by the law which disqualifies is a personal interest not merely interest in an official capacity. See *Bearmans Ltd. Metropolitan Police District Receiver* (1961) 1 ALL ELR 634. Therefore, where the interest of the maker of a document is purely official or as a servant or employee without a direct interest of a personal nature, the document is not excluded pursuant to the provision of section 91(3) of the Evidence Act....A “person interested” is said to mean one who has pecuniary or other material interest in the result of the proceeding. A person whose interest is affected by the result of the proceedings, and therefore would have a temptation to pervert the truth to serve his personal or private ends. It does not mean an interest in the sense of intellectual observation or an interest purely due to sympathy. It means “an interest in the legal sense, which imports something to be gained or lost.”²⁷

²⁵ 169-170, paras. E-E, per Peter-Odili, JSC

²⁶ [2014] 5 NWLR (Pt. 1400) 221, 236, paras. C-E; 239-240, paras. 241-242, paras. E-D

²⁷ 241-242, paras. E-B, Per Ariwoola, JSC



5. The Exceptions to Section 83(3) of the Evidence Act, 2011 (as amended)

Document made during the pendency or in anticipation of a suit is not at all times inadmissible pursuant to section 83 (3) of the Evidence Act. The document is not rendered *ab initio* illegal and absolutely inadmissible in law for having been prepared during the pendency of the case. The law also requires that it must be shown that the maker of the document has an interest in the outcome of the case to render such document inadmissible²⁸ In other words, it is not all statement made at a time when proceedings were pending or anticipated involving a dispute as to any fact which the statement might tend to establish, is inadmissible. Section 83(3) of the Evidence Act admits some exceptions such that documents made during the pendency of a suit can still be admissible. This means that where such document is caught by the exceptions, a party to the suit or ‘a person interested’ can rely on it in proof of his case and same will be admitted in evidence. Some of the exceptions are:

5.1 Document made by a Third Party and Issued to a Person Interested during the Pendency of a Suit.

It is not enough as envisaged under section 83(3) of the Evidence Act that the document was tendered by a person interested, it must be clear on the face of the document that the document was actually made by the person interested in the outcome of the suit. Where the document is not made by a person interested, such a document will not be inadmissible by virtue of section 83(3) of the Evidence Act. It is settled law regarding interpretation that provisions of a statute should not be read in isolation. In order to avoid miscarriage of justice, the provisions must be read together. Thus, in ascertaining the true meaning of the provisions of a statute, the statute must be read as a whole.²⁹ In determining whether the document sought to be tendered is made by a person interested, the court must read together sections 83 (3) and 84 (4) of the Evidence Act. Section 83(3) refers to document made by ‘a person interested’ and section 83(4) goes further to define who a maker of a document is. The said section 83(4) of the Evidence Act provides that:

For the purpose of this section, a statement in a document shall not be deemed to have been made by a person unless the document or the material part thereof was written, made or produced by him with his own hand, or was signed or initialed by him or otherwise recognized by him in writing as one for the accuracy of which he is responsible.

It follows from the above that for a document to be excluded from evidence pursuant to section 83(3) of the Evidence Act, such document must be shown to have been made by the person interested. So, where a document though made during the pendency or in anticipation of a suit was made by a third party and tendered by the so called ‘a person interested’ in establishing his case, the document will be admissible. The fact that it was made during the pendency of a suit will be immaterial and of no effect to its admissibility. In the case of *Muhammed v Kayode*,³⁰ where the respondent instituted the action against the appellants in the Obangede Judicial Division of the Kogi State High Court for negligence arising from a fatal accident in which the vehicles of both parties were involved in a collision. At the trial while testifying, the respondent sought to tender five receipts showing cost of the repairs carried out on his own vehicle by himself. The appellant then

²⁸ *N.B.C. Plc v Ubani* [2014] 14 NWLR (Pt. 1398) 421

²⁹ *Akpamgbo-Okadigbo v Chidi* (No. 1) [2015] 10 NWLR (Pt. 1466) 171; *A.C. v INEC* [2007] 12 NWLR (Pt. 1048) 222

³⁰ [1997] 11 NWLR (Pt. 530) 584



objected to the admissibility of the receipts on the ground that that they were made in anticipation of the commencement of the action contrary to the provisions of section 91(3) of the Evidence Act. The trial court in its ruling upheld the objection partially, by rejecting three of the receipts and admitted the remaining two receipts as exhibits 2 and 2A respectively. The two receipts were tendered by the respondent as proof of the fact that he had spent the sum of over ₦72, 000 in the purchase of motor spare parts from Cintex International Agency Ltd of Block C6/10 New Auto Spare Parts, Nkpor, Onitsha, Anambra State, for use in the repair of his vehicle as pleaded in his statement of claim. Dissatisfied by the ruling of the trial court, the appellant appealed to the Court of Appeal. The Court of Appeal in its considered Judgment touching on the admissibility of the said exhibits 2 and 2A pursuant to section 91(3) of the repealed Evidence Act, 1990 which is the same as s. 83(3) of the Evidence Act, 2011 held as follows:

Exhibits 2 and 2A are receipts respectively issued by Cintex International Agency Limited and Oremeji Motor Mechanic Works to the Respondent. The respondent is neither of the two organizations whose employees issued the respective receipts on their behalf to the respondent. Before the provisions of sub-section (3) of section 91 of the Evidence Act, Cap. 112, Laws of the Federation, 1990 can operate against the respondent it has to be shown that the statement in question, id est the contents of the two receipts, exhibits 2 and 2A or material part thereof were written, made or produced by the respondent in his own hand writing or was signed or initialed by him. The respondent has also not recognized in writing the two receipts as documents accuracy of which he is responsible. In the absence of evidence showing that the respondent personally made the document or is liable to vouch for their accuracy no inference can be drawn that the respondent as a person interested in the outcome of the suit prepared exhibits 2 and 2A during the pendency of anticipation of an action.³¹

Also in the case of *A.C. (O.A.O) Nig. Ltd v Umanah*,³² the Court of Appeal opined that:

This court has held that estimate of repairs, though made during the pendency of the suit does not suffer from the disability of S.91 (3) of the Evidence Act because the maker of the estimate was not an interested party in the suit. An interested party contemplated in the exclusion of evidence or disqualification therefore, is a person who is interested in the outcome of the litigation.

Furthermore, at page 347, para. F, the court held that:

The receipts were issued/made by Allen Transport Service Association and since Allen Transport Services cannot be considered a party interested, I do not see how any of the receipts can fall within the meaning of section 91(3).

³¹ 602, paras. B-D, per Salami, JCA

³² (n.23) 247, paras. B-C, para. F



In the case of *Primewest Properties Limited v Aso Savings and Loans Plc*,³³ it is a ruling on the admissibility or otherwise of a set of documents; bill dated September, 2018 issued by Nojim Tairu & Co to Primewest Properties Limited and receipt No. 000436, issued by Nojim Tairu & Co to Primewest Properties Limited dated September, 2018 now sought to be tendered in evidence by PW1 during his evidence in-chief. Defendant's counsel objected to the admissibility of the said documents on the ground that the documents were procured during the pendency or in anticipation of the action by an interested party and refers to section 83 (3) of the Evidence Act. The Claimant's counsel accordingly responded. In his ruling, the trial Judge observed as follows:

I have taken a considered look at the documents in contention vis-à-vis the pleadings of the Claimant and I find that the facts which the documents refers are pleaded in paragraph 13 of the Statement of Claim filed by the Claimant. I also find the fact contained in the document relevant to the case. The question which follows is whether the document is admissible in law? Which in my view are the bases of the objection of the Defendant's counsel? The grouse of the Defendant's counsel is that the document in issue runs contrary to the provisions of section 83 (3) of the Evidence Act, which reads: "Nothing in the Section shall render admissible as evidence any statement made by a person interested at a time when proceedings were pending or anticipated involving a dispute is to any fact which the Statement might tend to establish." For this provision of the Evidence Act to avail the Defendant, it must be established that the documents sought to be tendered in evidence were indeed made by the witness, the Claimant in this case-the "person interested". A considered look at the documents in issue reveals that the documents were issued by Nojim Tairu & Co and the Claimant, this provision of Section 83 (3) of the Evidence Act cannot avail the Defendant. I say so in view of the clear provision of section 83 (4) of the Evidence Act which provides; "For the purpose of this section a statement in a document shall not be deemed to have been made by a person unless the document or the material part of it was written, made or produce by him with his own hand, or was signed or initiated by him or otherwise recognized by him in writing as one for the accuracy of which he is responsible". Therefore, the documents not being one, made by the Claimant who seeks to tender it in evidence, the provision of section 83 (3) cannot preclude them from being admissible in evidence. I so hold. The document being relevant pleaded, pleaded and being originals are admissible as evidence. From all of these and having found the set of documents pleaded, relevant and admissible in law, the court hereby admit same in evidence and mark them Exhibits "L1-L2". Accordingly, the objection to the admissibility of the documents is hereby overruled".³⁴

5.2 Documents prepared by Experts during the Pendency of a Suit

It is also common for documents to be relied upon in a suit to be prepared after the suit is pending before the court. Where such a document is prepared by an expert to enable the court to form an

³³ Suit No: FCT/HC/CV/2825/2018 (unreported) delivered on the 10/3/2021 per Hon. Justice O. C. Agbaza-Ruling

³⁴ <<https://www.fcthighcourt.gov.ng>> accessed December 8, 2023



opinion on the issue before it³⁵, the document will be excluded from the disability created by section 83 (3) of the Evidence Act. Even though the document was prepared at the expense or instance of one of the parties to the suit or a person interested, it is presumed that such expert has no personal interest in the outcome of the proceedings but basically discharging his professional competence at the material time and incapable of having pecuniary or other material interest in the outcome of the proceeding. He is not a person whose interest is affected by the result of the proceedings, and therefore would have a temptation to pervert the truth to serve his personal or private ends. Expert evidence is treated as an exception to section 83(3) of the Evidence Act. Thus, a document prepared by any expert in their field of knowledge during the pendency of the action is admissible in proof or disproof of the facts in issue. In *Gbadamosi v Kabo Travels Ltd*,³⁶ the Court of Appeal emphasized the point when it held that:

Consequently, in land matters when experts, in that case, surveyors prepare plans after a case is filed or one is anticipated or in some cases the plan is ordered by the trial court such plans are admissible and are invariably admitted. There have never been objection that they were made after commencement or in anticipation of action and where such objection are taken they are hardly entertained not to talk of sustaining them. Similarly, medical report as to injury or cause of death are admissible and are admitted as opinion of expert even where such opinions are sought and obtained when such actions are already in court or are contemplated. The report of the expert is not excluded because the party commissioning the report did so in contemplation of litigation. Such evidence is permitted and is not excluded by the provisions of section 91(3) of the Evidence Act because they are opinion of an expert and not the hard facts on which the cause of action is founded. To form an opinion on a matter such as this the courts have no alternative than to fall back on opinion of expert or persons technically equipped to assist them provided always such expert opinion is relevant. I cannot envisage in cases involving technical matters, such as this, a situation when the evidence will not be prepared in anticipation of action. This is because it is the value at the time the cause of action arises that is relevant or material. In an action in tort the value of the vehicle at the time of the cause of action that will be accepted and not a value obtained several months earlier which may not be the value at the time of accident.³⁷

A typical example of such a document prepared by an expert during the pendency of an action is the case of *Peterside v Wabara*,³⁸ where the trial court in a ruling delivered on 12th March, 2003, granted the appellants application for an order of extension of time within which to file their statement of claim, but refused their application for leave to enable them enter with their surveyor to produce a plan of the land in dispute. According to the trial court, even if their request to enter the land in dispute for the purpose of producing a plan of the land in dispute was granted, the plan would be inadmissible in evidence under section 91(3) of the Evidence Act, as a document produced

³⁵ Evidence Act, 2011, s. 68(1)

³⁶ [2000] 8 NWLR (Pt 668) 243

³⁷ 279-280, paras. G-A, per Salami, JCA

³⁸ [2011] 6 NWLR (Pt. 1243) 328



by a person interested at the time when the proceedings were pending. Aggrieved by the refusal of the trial court to grant the second leg of their application, the appellants appealed to the Court of Appeal. The held that:

It has been held that the word “interested” in S. 91(3) of the Evidence Act must be given a narrow rather than a broad meaning. See *Anyaebosei v RT. Briscoe (Nig) Ltd* (1987) 3 NWLR (Pt. 59) Pg. 84 or (1987) 6 SCNJ 9 at Pg. 22-23; *Apena v Aiyetobi* (1989) 1 NWLR (Pt. 95) Pg. 85. The attitude of the courts is settled that a surveyor, like an expert in any other field of knowledge, who is tendering a survey plan is not an “interested person” in respect of the admissibility of the document (survey-plan) made by him during the pendency of the action.”³⁹

Also, in *Ize-Iyamu v Alonge*,⁴⁰ the Court of Appeal regarding the admissibility of statement made by an expert during the pendency of a suit held as follows:

In other words, by virtue of section 91(3) of the Evidence Act, Cap. 112, Laws of the Federation of Nigeria, 1990, any statement made by a person interested at a time when proceedings were pending or anticipated involving a dispute as to any fact which the statement might tend to establish is inadmissible. See *Salako v Williams* (1998) 11 NWLR (Pt. 574) 505. However, as rightly submitted by respondents’ counsel, expert evidence is treated as an exception to Section 91(3) of the Evidence Act. In *Apena v Aiyetobe* supra it was held that a surveyor or any expert in his field of knowledge who makes a statement in any form in respect of a matter in court at any stage of the proceedings is generally regarded as a person who has no temptation to depart from the truth as he sees it from his professional expertise. The submission of appellants’ counsel on the issue is not tenable as there is no evidence to support his conclusion that DW2 as handwriting analyst made the report to favour the respondents because they paid him. There must be a real likelihood of bias before a person making a statement can be said to be a “person interested” within the meaning of section 91(3) of the Evidence Act. In the instant case there is no evidence on record”.⁴¹

In *Ya’u v Dikwa*⁴², it was also held by the court that:

...In the instant case, given the position of the law, PW3 (the valuer) was not a “person interested” in the suit in terms of section 91(3) of the Evidence Act and therefore Exhibits C was admissible. The valuer could not by any stretch of imagination be a person interested in the suit. He was not the vehicle owner, nor party to the suit but a professional requested to perform the professional examination of the accident vehicle.

³⁹ 337, paras. A-B, per Ogunwumiju, JCA

⁴⁰ [2007] 6 NWLR (Pt. 1029) 84

⁴¹ 115, paras. D-G, per Mshelia, JCA

⁴² [2001] 127, ratio 27, 154, para. E, per Nzeako, JCA



5.3. Document Stored in a Computer before Commencement of a Suit but Printed during the Pendency of the Suit.

By reason of modern technology, computer is now commonly used as a device for storing and keeping information for future usage. Such information stored in a computer is usually printed when the need arises. Where such information which has been in existence and stored in a computer before commencement of a suit is printed during the pendency of the suit, such document containing the stored information will not qualify as a document made during pendency of suit pursuant to section 83(3) of the Evidence Act, 2011. It is believed that the computer was not fed by the interested party with the details or particulars of the information contained in the document printed at the time when the case was pending.

A clear example of such information stored in a computer is banker's statement of account. A party to a suit or an interested party may have the need to use his or her statement of account as the case may be, in proof or disproof of an issue in controversy before the court. Notwithstanding, such document may be printed before the commencement of a suit and tender in evidence without the challenge of the rule of exclusion. However, where such document is printed during the pendency of the suit and sought to be tendered in evidence, such document will be admissible and not caught by the exclusionary rule under section 83(3) of the Evidence Act. The reason is that the document was already in existence but merely printed out from the computer during the pendency of the suit. The party is neither the author nor producer of the statement of account but only printed same from the computer where it was stored and brought to the court. The fact that the document bears the date it was printed after the commencement of the suit will not be disqualified from being admissible. What is material is for the document to be pleaded and satisfy other conditions for its admissibility particularly pursuant to section 84 of the Evidence Act.

In *Trade Bank Plc v Chami*,⁴³ the Court of Appeal regarding the admissibility of banker's statement printed during the pendency of the suit observed as follows:

There is no evidence on record that the computer was fed by the witness with the details or particulars of the account at the time when the case was pending. I am encouraged in this view by the evidence of the same witness under cross-examination that-“All my information was based on what I saw on the record. The computer printout was fed in by another person and not myself”. Exhibit 4 is therefore not caught by the provisions of section 91(3) of the Evidence Act, Cap. 112 of the Laws of the Federation of Nigeria, 1990 contrary to the finding by the trial Judge.⁴⁴

5.4. Document made during the Pendency of a Suit in an Official Capacity by an Employee/Servant of a Party to the Suit

Just as documents made by an expert during the pendency of a suit is admissible notwithstanding the express provision of section 83(3) of the Evidence Act, documents made by an employee of a party to a suit during the pendency of the suit in his or her official capacity, is admissible notwithstanding the provision of section 83(3) of the Evidence Act. Consequently, employment does not *ipso facto* make the person employed to become a person interested under section 91(3) [now s. 83(3)] of the Evidence Act in a case involving his employer.⁴⁵ The disqualifying ground is only where such a

⁴³ [2003] 13 NWLR (Pt. 836) 158

⁴⁴ 216, paras. B-D, per Salami, JCA; *Esso West Africa Inc. v T. Oyegbola* [1969] NMLR 194. 198

⁴⁵ *Gbadamosi v Kabo Travels Ltd* [2000] 8 NWLR (Pt. 668) 243, 276, paras. A-D



person has personal interest in the matter and not where he merely has interest in an official capacity. Thus, where the interest of the maker of the document is purely official or as a servant or employee having no direct personal interest, the provision of section 83 (3) of the Evidence Act, will not apply to such a person as a person interested and the document will be admissible. For example, where an employee to a party in a suit respond to a letter written by the other party or other persons during the pendency of a suit and such letter is relevant to prove or disprove a fact in issue, such document is admissible despite been made during the pendency of the suit.

In *Susano Pharm. Co. v Sol Pharm. Ltd*,⁴⁶ in course of trial of the suit, an officer of the 2nd respondent sought to tender a special power of attorney empowering him to testify as a witness for the 1st respondent, the learned counsel for the appellant objected to the admissibility of the document on the ground that the document was made after the institution of the action contrary to section 91(3) of the Evidence Act and thus inadmissible. The trial court in its ruling overruled the objection and admitted the special power of attorney in evidence. Dissatisfied by the ruling of the trial Judge, the appellant appealed to the Court of Appeal. The Appeal Court dismissed the appeal and held that:

Disqualifying interest exists only in a situation where there is likelihood of bias. It is trite law that where an employee or a servant makes a document in the course of discharging his official duty/function which does not involve any personal opinion, the question of bias does not arise, and such document will be admissible under Section 91(3) of Evidence Act.⁴⁷

In *Highgrade Maritime Services Ltd v First Bank of Nigeria Ltd*,⁴⁸ the Supreme Court emphatically held as follows:

The main contention of the appellant under subsection (3) of section 93 supra is that Exhibits 13 and 14 were made by persons interested and in anticipation of proceedings against the appellant. It is not in all circumstances where a servant of an employer wrote a document on the latter's behalf that it becomes inadmissible by virtue of section 90(3) of the Evidence Act. Exhibits 13 and 14 were written by DW2 as a servant of the respondent in reply to an inquiry sent from the respondent's Bank to ascertain the genuineness of Exhibits 12 and 12A before honouring the appellant's cheque-Exhibit 7. This in my view is not tantamount to making DW2 a person interested in the proceedings as contemplated in section 90(3) of the Evidence Act. The mere fact that he was the author of Exhibits 13 and 14 in his capacity as servant of the respondent, and which is a party to the present suit, did not make him a party interested, as he had no direct interest in the matter. See *Bearmans Ltd v Metropolitan Police District Receiver* (1961) 1 WLR 634; *The Atlantic and Baltyk* (1945) 62 T.L.R. 461. A person is held not to be interested under subsection (3) of Section 90 of the Evidence Act when he has no temptation to depart from the truth on one

⁴⁶ [2000] 4 NWLR (Pt. 651) 60

⁴⁷ 69, para. C, per Sanusi, JCA

⁴⁸ [1991] 1 NWLR (Pt. 167) 290



side or the other, a person not swayed by personal interest, but completely detached, judicial impartial independent.⁴⁹

Also, in *A.A. Chanchangi & Sons v Nigerian Roads Construction*,⁵⁰ the Court of Appeal observed as follows:

The mere fact that the maker of a statement tendered in evidence is in the employment of a party to the action does not itself make him a person interested in the proceedings within section 90(3) of the Evidence Act. Also the evidence by any servant or agent of the company is relevant and admissible to establish any transaction entered into by that company.⁵¹ See also *Anyaegbosi v R.T. Briscoe Nigeria Ltd.* (1987) 3 NWLR (Pt. 59) 84.

6. On Objection to Admissibility of a Document under Section 83(3) of the Evidence Act

In determining the applicability of section 83(3) of the Evidence Act, the court has to consider first whether an action in court was anticipated or was pending at the time material to the making of the document. It should also at that point establish who the maker of the document is. Upon being satisfied that the party to whom the section is sought to be applied made the document, it can then proceed to ascertain the motive for making it.⁵² Thus, before the provisions of sub-section (3) of section 83 of the Evidence Act can be activated against a party or the supposed interested person, it must be shown that the document in issue, or a material part thereof was written, made or produced by that party in his own handwriting or was signed or initialed by him. It is therefore not sufficient that the document in question was made after the filing of the action, it must be shown that the affected party indeed made the document pursuant to section 83(4) of the Evidence Act.

7. Conclusion and Recommendations

The court, particularly the trial courts, are easily swayed by the objection of the opposing party that the document or documents sought to be tendered were made after the institution of the case in court and as a result, inadmissible pursuant to section 83(3) of the Evidence Act. This is made possible the moment the objecting party is able to demonstrate that the date on the document is later in time to the date the suit was filed without much ado.⁵³ Consequently, several documents which otherwise would have been admissible despite the provisions of section 83(3) of Evidence Act have been thrown out by the court and thus affecting the just the determination of the case. This paper has painstakingly examined the exclusionary rule under section 83(3) of the Evidence Act, 2011 and the circumstances in which documents made during the pendency or anticipation of a suit would otherwise be admissible. It is the finding of this paper that it is not in all cases that documents manufactured, procured or produced during the pendency of a case are generally inadmissible. Such documents are admissible if they fall within the exceptions addressed above.

It is the recommendations of this work that the courts should therefore be cautious and exercise restraint when considering objections made pursuant to sub-section (3) of section 83 of the Evidence Act to determine whether the affected document falls within the limits of the

⁴⁹ 307-308, paras. F-A, per Wali, JSC

⁵⁰ [1995] 3 NWLR (Pt. 446) 46

⁵¹ 56, para. F, per Abdullahi, JCA

⁵² *Muhammed v Kayode* (supra)

⁵³ *Olomo v Ape* [2015] 14 NWLR (Pt. 1478) 46



exceptions. Also, a party relying on such document caught by the exceptions must ensure that the document is properly pleaded or sufficient facts leading to its admissibility are pleaded.⁵⁴ In the alternative, since such document is usually made after the filing of the suit, the pleadings can be amended to enable the bringing in of the document for just determination of the suit.⁵⁵ Furthermore, where a document which falls within the exceptions of section 83 (3) is refused by the trial court, the appellate court should on interlocutory appeal quickly reverse such position taken by the trial court to allow for just determination of the case. But where it is a final judgment, the appellate court should order for a re-trial of the case to allow for the admissibility of those documents wrongfully rejected by the lower court on ground of inappropriate application of section 83 (3) of the Evidence Act at the trial.

⁵⁴ *Okafor v UBN Plc* [2000] 3 NWLR (Pt. 647) 42; *Ogboja v Access Bank Plc* [2016] 2 NWLR (Pt. 1496) 291;

⁵⁵ *Oloro v Falana* [2011] 17 NWLR (Pt. 1275) 207