

REVIEW OF THE DECISION OF THE ROYAL COURT OF JUSTICE IN [2021] EWHC 36 (CH) - BILTA (UK) LIMITED V. SVS SECURITIES & ORS – COMPARATIVE ANALYSIS OF REMOTE HEARINGS IN KENYA AND GHANA AND LESSONS FOR NIGERIA

1.0 INTRODUCTION

1.1 The world has changed significantly since the outbreak of the COVID-19 pandemic. With governments across the world imposing lockdowns and other movement restrictions, the various sectors of the economy have had to adapt to avoid a total seizure of operations and the judiciary has not been left out. In many countries, there was a quick transition to remote hearings and a digitalised court system, however, here in Nigeria, the activities of the judiciary were halted as the courts were locked down. While there have been conversations on the introduction of remote hearing, there was barely any implementation such that a second wave of the pandemic, effectively, crippled the court system.

1.2 This article would review the decision of the English High Court in **BILTA (UK) LIMITED V. SVS SECURITIES & ORS** for lessons in COVID-19 case management which Nigeria can learn. The article would also examine similar developments in Kenya and Ghana.

2. Summary of the case

2.1 The Claimant, Bilta (UK) Limited (Bilta) had made allegations of dishonest assistance against the 5th Defendant, Traditional Financial Services Limited (TFS). The trial of the matter was listed in early 2020 but was adjourned due to the Covid-19 Pandemic. The trial was relisted to commence on the 25th of January 2021 but the 5th Defendant brought an application for the adjournment of the trial.

2.2 TFS was seeking to adjourn the trial on the ground that the matters before the Court could only be properly resolved at an "in-person hearing" at a much later date in mid-2022.

2.3 Specifically, TFS submitted that due to the dramatically worsening state of the Covid-19 pandemic and the national lockdown in England, the witnesses had indicated a strong reluctance to give in-person evidence on the scheduled trial date.

2.4 TFS stated that while three of its witnesses had simply indicated a reluctance to attend the trial in person because of the rise in COVID-19 infections, the other one of its witnesses had cited specific medical reasons as the reason for her inability to participate in an in-person hearing.

2.5 The Claimant, Bilta, however, opposed the application and was prepared to conduct the trial either in person or remotely.

3. The Judge's Decision

3.1 The Presiding Judge refused TFS' application despite taking judicial notice of the state of the nation since the pandemic and recent spike in infections, hospitalisations and deaths.

3.2 The judge considered TFS' reasons for the adjournment application separately, that is, the three witnesses who did not give specific reasons outside of the rising COVID cases on the one hand and the witness with a specific medical condition on the other. In all, the Court refused to grant the adjournment for the reasons stated hereunder:

Concerning the reluctance of the three witnesses to attend trial at the Rolls Building because of Covid:

- a. The judge noted that the business of the courts has been designated essential services that are intended to continue during the pandemic. He noted that, for the business of the courts to continue, there had been a substantial adjustment of the rules that applied prior to the pandemic including increased use of technology, the composition, filing and service of bundles, the manner and form of hearings. He further noted that such rules have continued to be revised to meet the unprecedented changes occasioned by the pandemic.
- b. He specifically noted the following summarized guidelines:
 - i. That interlocutory hearings and other hearings not involving witnesses are to be dealt with remotely;
 - ii. That for hearings involving the examination of witnesses, the decision to conduct a remote hearing and how each case may be heard, are a matter to be considered by the presiding judge or magistrate in every case. He noted that this was a case management decision over which the first instance court will have a wide discretion, based on the ordinary principles of fairness and justice and notwithstanding the parties' disposition to a preferred mode of hearing.

1. The learned Judge, in setting out these principles, relied on the decision of the English Court of Appeal in *Re A (Children)* [2020] EWCA Civ 583.



- c. The judge further noted that the factors to be considered in proceeding with a remote hearing to be as follows:
 - i. The importance and nature of the issue to be determined; is the outcome that is sought an interim or final order?
 - ii. Whether there is a special need for urgency, or whether the decision could await a later hearing without causing significant disadvantage to the child or the other parties.
 - iii. Whether the parties are legally represented.
 - iv. The ability, or otherwise, of any lay party (particularly a parent or person with parental responsibility) to engage with and follow remote proceedings meaningfully. This factor will include access to and familiarity with the necessary technology, funding, intelligence/personality, language, ability to instruct their lawyers (both before and during the hearing), and other matters.
 - v. Whether evidence is to be heard or whether the case will proceed based on submissions only. The source of any evidence that is to be adduced and assimilated by the court. For example, whether the evidence is written or oral, given by a professional or lay witness, contested or uncontested, or factual or expert evidence.
 - vi. The scope and scale of the proposed hearing. How long the hearing is expected to last?
 - vii. The available technology; telephone or video, and if video, which platform is to be used.
 - viii. The experience and confidence of the court and those appearing before the court in the conduct of remote hearings using the proposed technology.
 - ix. Any safe (in terms of potential Covid-19 infection) alternatives that may be available for some or all of the participants to take part in the court hearing by physical attendance in a courtroom before the judge or magistrates.
- d. The judge noted that these expansive considerations were important as a departure from the gold standard of adducing evidence under cross-examination required a standard that ensured that any such deviation remains fair and proper.



- e. In contextualising the considerations, the judge, relying on Chief Justice Lord Burnett in *Re A* stated that the significant increase in the incidence of COVID-19 makes it imperative that no participant in legal proceedings should be required by a judge or magistrate to attend court unless it is necessary in the interests of justice. Accordingly, all matters should be heard remotely unless there are strong reasons to the contrary.
- f. In applying the considerations to the case, the judge, in refusing the application, prescribed extremely tight case management guidelines if there would be an in-person hearing thus:
- i. The use of a super court² to accommodate the parties and their legal teams;
 - ii. That judge would use his discretion to control the (i) the times of the hearings, (ii) the number of persons in court at any one time, (iii) the dates on which and times at which witnesses are called; and (iv) how a witness is introduced into court;
 - iii. That the court should not be used in the 48 hours preceding the day of the hearing;
 - iv. That the public be invited to watch remotely;
 - v. That there be a reduced number of persons in the courtroom;
 - vi. That the witness box be as far removed from all other persons as possible, witnesses be sworn at a distance and no paper files should be handed to the witness;
 - vii. That the Witness be allowed to be accompanied by one person from his household if desired to reduce the Witness's sense of isolation;
 - viii. That there will be an operator for electronic case management system the parties have agreed to deploy;
 - ix. That no court usher or clerk be present;
 - x. That there should be no waiting around of witnesses and times should be allocated to each witness for their evidence;
 - xi. That there should be breakout rooms for the parties, witnesses and their legal team;
 - xii. That the parties should use Covid-secure taxis or private cars to transport themselves to court.

2. A bigger court



- g. Further, the judge noted that:
- i. The witnesses could give their evidence remotely, preferably from their solicitor's office;
 - ii. The advocates had to appear in person as it is important that, where possible, the judge and the lead advocates should see the same oral evidence;
 - h. The Judge noted the possibility of glitches in remote proceedings but stated that, while a remote hearing is second best, the reluctance of the witnesses to be present in court despite the case management guidelines proposed in subparagraph f above was justified and that, as such, a remote hearing would be fair in the circumstances.

Concerning the witness with a specific medical condition

- i. TFS's counsel had argued that due to medical reasons, this witness would not be able to give evidence, but if the trial were to be adjourned to a later date, it might be possible. The judge refused this application noting that the reason was not sufficient to justify an adjournment of a significant trial.
- j. The judge also noted that the appropriate time to have made the application was in early November 2020 when the witness' medical condition came to her solicitors' attention. The Judge also stated in the alternative that, even if the reasons were satisfactory, he would refuse the application after a consideration of all relevant factors as stated above.

4. Our thoughts and lessons for Nigeria

4.1. This decision balances the law, evidence and the exercise of the discretion of the court in the dispensation of justice. From the above, it is clear that the judge was more disposed to an in-person hearing because of the importance of oral evidence and cross-examination to the case. The judge showed how effective dispensation of justice would be if the court exercises its role in case management.

4.2. The court acknowledged the glitches in remote hearing but leaned towards the adoption of same because it was possible and an effective mode of hearing, taking into consideration the concerns of the parties and the need to do justice to the case.

4.3. The starting point, as far as lessons are concerned, is to recognise justice administration as an essential service. This would give priority to the judiciary and facilitate the need to adjust to changing times.



Unfortunately, March 2020 to May 2020 was a bad time for the Nigerian Judiciary because rather than adjusting to the changing times, the courts were closed as the dispensation of justice is not classified as essential services.

4.4. After the lockdown, to meet the exigencies and adapt to the new realities of the COVID 19 pandemic concerning legal proceedings, the National Judicial Council (NJC) issued Guidelines for Court Sittings and Related Matters in the COVID 19 Period and in applying the guidelines, various courts issued their respective Practice Directions. Examples are; the Lagos State Judiciary (Remote Hearing of Cases) Covid-19 Pandemic Period Practice Direction (the LHC Practice Directions); and the Federal High Court of Nigeria Practice Direction 2020 for the Covid-19 Period (the FHC Practice Direction).

4.5. One would think that the directives would facilitate steps to adjust to the changing times but such progress has been stalled by lawyers and judges' manifest opposition to remote hearings. Worthy of note, on remote hearings, are two separate actions filed by Lagos State - **Suit No. SC/CV/260/2020 - Attorney General of Lagos State v. Attorney General of the Federation & Anor** and Ekiti State - **Suit No SC/CV/261/2020 - Attorney General of Ekiti State v Attorney General of the Federation** respectively, invoking the original jurisdiction of the Supreme Court to decide on the constitutionality of virtual proceedings in the Nigerian courts. Both actions were dismissed for disclosing no reasonable cause of action but the Supreme Court stated that Remote Hearing was not unconstitutional.

4.6. While the English decision under reference does not delve into the ways to make remote hearing work, the robust guidelines on in-person hearings can be adopted by the courts in Nigeria while the Covid-19 Pandemic subsists.

4.7. The prescribed case-management guidelines in Paragraph 3.2(b) and (g) will work with the right attitude of judges and other judicial staff and lawyers. Further, the courts could adopt a hybrid system where while proceedings are conducted in the court, the public can watch same virtually. The courts are not equipped to have persons waiting around in court as there are no waiting rooms or seats where social distancing can be effectively practised.

5. Developments in Kenya and Ghana in light of remote hearings

Remote hearings in Kenya

5.1 In March 2020, the National Council for the Administration of Justice (NCAJ) in Kenya recommended certain measures to combat the growing possibility of a shutdown of the country's judiciary.



These measures included the adoption of virtual hearings which were subsequently announced by the judiciary for all courts. To this end, various courts issued practice directions. An example is the Supreme Court (General) Practice Directions, 2020.

5.2 Consequently, the courts were inclined to use various online platforms such as Skype, Microsoft Teams or Zoom for mentions and hearings. Virtual court sessions are conducted with prisoners through video link sessions for matters such as bail and plea taking.

5.3 Following the third wave of the Covid 19 in Kenya, the judiciary again on 28th of March, 2021 issued a new set of guidelines instructing the complete closedown of Courts, Tribunals and all Registries in the five counties of Nairobi, Machakos, Kajiado, Kiambu and Nakuru. By the guidelines, matters requiring hearing including all criminal pleas and urgent hearings are to be by virtual hearing. Presently, most courts in Kenya are taking advantage of technology in conducting legal proceedings.

Kenya - Electronic Case Management System

5.4 In ensuring the speedy dispensation of justice in light of the COVID 19 pandemic realities, the Kenyan Judiciary gazetted the Civil Procedure (Amendment) Rules 2020 and the Practice Directions on Electronic Case Management to provide a comprehensive framework for the functioning of the judiciary e-filing system.

5.5 By the Practice Directions, parties are mandated to provide their postal address, telephone number, email, and physical address when filing their pleadings in court.

5.6 The electronic court case management system supports electronic filing of documents, electronic service, electronic search of cases, electronic payment and receipting and electronic request for extraction of orders.

5.7 The system has two interfaces: the user interface for litigants and the court interface for judicial officers.

5.8 Law firms, organizations, self-represented parties, and the state can register on the portal, consequent upon which all entities can file and serve documents through the portal. Registration and filing of documents on both existing and new matters are permitted on the system. Upon uploading the documents on the system, the user is required to input details of the case and make payment subsequently.



Remote hearings in Ghana

5.1 Like Kenya, the Ghanaian judiciary also commenced virtual proceedings in selected courts in August 2020 using Microsoft Teams. However, it was not mandatory and depended on the mutual agreement of counsel involved in the matter. They were required to communicate and agree to virtual hearings as a condition precedent to its use. As a result, a simulation exercise on the modalities for the virtual court proceedings was organised by the Judiciary. An ICT expert was also dedicated to each court to assist lawyers in accessing the virtual courts.

Ghana - E-Justice Platform

5.2 Ghana also has an E-Justice Platform referred to as Paperless Electronic Case Management System (ECMS) similar to that of Kenya. The ECMS seeks to completely dispense with the use of paper filing of court processes(E-filing).

Other features of the system are;

5.2.1 **The E-docket** - a digital copy of the physical docket which contains all processes filed in a matter and can be accessed remotely from the comfort of one's home.

5.2.2 **E- Cause lists** that dispenses with the physical presence of lawyers or clerks at court premises to check on dates scheduled for their cases.

5.2.3 The ECMS facilitates the;

- Digitisation of records and creation of e-docket for easy access and reference by Judges.
- Electronic generation of suit numbers.
- Easy retrieval of court records.
- Quick and efficient processing of cases
- Receipt of electronic notifications on all Court actions or activities, thus keeping Court Users abreast of the status of their cases.
- Improved Court User engagements with the Courts via portals, thus limiting human interaction, which sometimes breeds corruption.
- Compliance with policies and
- Improved security of case-related information.



The advantages and lessons for Nigeria

5.11 Although e-filing and virtual hearing are not unknown to the Nigerian Judicial System, the electronic case management systems adopted by the Ghanaian and Kenyan Judiciary prove to be more effective and efficient in the quick dispensation of justice.

5.12 With the electronic system serving as a link between the parties and the judiciary, parties do not have to visit the courts before filing or making the requisite payment. It also provides ease in serving other parties and reduces the costs associated with filing and service. Likewise, the virtual transmission of judgments and rulings will aid the quick dispensation of justice.

5.13 In light of the above advantages, it will be beneficial to the Nigerian Judicial System to adopt a similar electronic case management system to meet the realities of virtual hearing. Invariably, promoting access to justice.

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