journals.unizik.edu.ng/index-php/jcpl ISSN: 2736-0342
NNAMDI AZIKIWE UNIVERSITY, AWKA
JOURNAL OF COMMERCIAL AND PROPERTY LAW

# Dialectics of Notice to Produce in Civil Litigation in Nigeria: An Examination of the Evidence Act 2011 and Selected Rules of Court

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## Abstract

*The challenge of securing or producing documents that are either in the custody of an adverse party or a non-party to a suit, ethically justifies the introduction of the notice to produce procedure. However, a proper appreciation, construction and application of the notice to produce procedure has posed several challenges to parties, counsel and the courts as can be deducted through decided cases. This paper therefore aims to unravel and expound the position of the law on a successful invocation of the notice to produce procedure through the frameworks of the Evidence Act 2011, the Federal High Court rules, National Industrial Court of Nigeria rules and the Bayelsa State High Court rules. The paper thereafter makes recommendations on the streamlining of extant provisions and dispositions of court for a better appreciation of the notice to produce procedur*e.

## 1. Introduction

One form of evidence that has featured substantially in adjudication in Nigeria is documentary evidence.[1] A lot of cases have been won or lost on the availability or otherwise of relevant documents needed to aid the courts arrive at the truth of the facts asserted or denied. Litigants or prospective litigants desirous of proving or defending their cases on the basis of documentary evidence are expected to be in possession of all documents relevant to their cases during evidence gathering before proceeding to litigation. However, it is not in all cases that a litigant or prospective litigant may be fortunate to have all the relevant documents he intends to rely on in proof of a claim or defence to a suit. In some situations, the important documents needed for a civil action by a litigant may be in the possession of the adverse party in the suit or in the possession of a third party who is a stranger to the suit. In either case, the importance of the documents may warrant the litigant to want to produce them or cause them to be produced in evidence to enable the court inspect them and reference them where necessary in its judgment.

A veritable tool that has been made available for litigants and counsel alike to secure the said documents or their copies for inspection by the court is the 'notice to produce documents' procedure. Notice to produce documents in court is one of the very important aspects of civil litigation that litigants and their counsel have not really considered very important to properly explore in the course of conducting a case. Some litigants have appreciated the resort to the 'notice to produce documents' procedure from a rather parochial perspective. This paper therefore seeks to re-ignite the discussions on the vagaries, scope and application of the notice to produce documents procedure in civil litigation in Nigeria.

## 2. The Concept of 'Notice to produce'

Notice to produce documents is a written letter that asks another party to produce evidence relevant to the case at hand. This may include items like emails, photos, financial records, data, and text messages. The concept has also been defined by the court in the case of *Ekiti State Independent Electoral Commission &Ors v PDP & anor*[2] thus:

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[1] See sections 83(1) and 85 of the Evidence Act 2011.

[2] (2013) LPELR-20411(CA) at p. 31, paras. E - F.

> *Notice to produce presupposes request for production. It is therefore a party's written request that another party provide specified documents or other tangible things for inspection, copying or use by the party requesting at the trial or on demand.*

Notice to produce document shares some features with *subpoena duces tecum*. They are clearly different procedures with same anticipated conduct or result on the person against whom they are issued. Despite this common feature, notice to produce is different from *subpoena duces tecum* in some material respect.[3]

The notice to produce document procedure can only be resorted to before the proceedings advance to hearing. It is therefore more of a pre-trial or pre-hearing procedure that must be applied for or issued at the pre-trial conference session. Little wonder the procedure is made one of the items envisaged to be part of the pre-trial conference of the parties.[4]

## 3. Legal Framework of Notice of to Produce in Nigeria

Legal framework is the body of laws, their inter-relations and application that gives structure and defines the parameters for legal conduct. Save for a few practices and procedure that are products of long-standing traditions of the legal profession, most tools of litigation have their roots in one statute, subsidiary legislation or case law. Notice to produce documents is not an exception, as it has been rooted basically in statutes and subsidiary pieces of legislation. Notice to produce documents has its base in the Evidence Act 2011, the Rules of Procedure of the respective trial courts of record in Nigeria, and a few case laws. The scope, procedure for issuance, the form such a notice should take and obligations of parties to the proceedings shall be briefly examined under the extant legal framework. The subsequent sub-heads of this paper would be considered in the light of the provisions of the Evidence Act 2011, the Federal High Court (Civil Procedure) Rules 2019, the National Industrial Court of Nigeria (Civil Procedure) Rules 2017 and the Bayelsa State High Court Rules 2010.

## 4. Scope of Notice to produce

The scope of application of notice to produce in civil litigation arguably applies to documentary evidence and real evidence only. Notice to produce strictly speaking does not apply to oral evidence. Where the evidence needed to be given to prove a fact is evidence that can only be given orally by a witness, the appropriate procedure would be to field the witness or subpoena the witness to appear in court and testify. The scope of the application of notice to produce is however defined by the relevant legal instrument or framework wherein it is sought to be invoked.

A close examination of sections 89(a) and 91 of the Evidence Act 2011 reveals that what is envisaged therein is 'documents'.[5] It therefore implies that no other form of evidence may be

[3]The difference between the two procedures is highlighted by the court in the case of Shittu v Olaegbe (2011) All FWLR (Pt. 595) 343 CA.

[4] Order 25 rule 3(d) of the Bayelsa State High Court Rules 2010.

[5]Section 89 (a) provides that secondary evidence may be given of the existence, condition or contents of a document when the original is shown or appears to be in the possession or power of the person against whom the document is sought to be proved, or of any person legally bound to produce it, and when after the notice mentioned in section 91 such person does not produce it while section 91 provides that secondary evidence of the contents of the documents referred to in section 89 (a) shall not be given unless the party proposing to give such secondary evidence has previously given to the party in whose possession or power the document is, or to a legal practitioner employed by such party, such notice to produce it as is prescribed by law ; and if no notice to produce is prescribed by law then such notice as the court considers reasonable in the circumstances of the case.

sought to be produced under the said sections of the Evidence Act 2011. It must also be noted that documents as used in the said sections contemplates what has been defined as document in the Evidence Act 2011.[6]

The scope of application of the notice to produce procedure under the rules of some courts appears to be substantially the same with that of the Evidence Act 2011. Specifically, the rules of the National Industrial Court of Nigeria and that of the Bayelsa State High Court restrict the scope of notice to produce to only documents.[7] Though the National Industrial Court rules appeared to have further referred to '…a recording on an electronic device such as computer hard disk, external hard drive, flash drive or compact disc referred to as CD, tape, memory card, electronic camera and phone etc….',[8] they all come within the meaning of document in the Evidence Act.

The Federal High Court rules appear to have taken a slightly different path on the scope of application or use of the notice to produce procedure in civil litigation. This may be gleaned from the wordings of Order 20 Rule 29 of the Federal High Court (Civil Procedure) Rules 2019 which provides thus:

> *Where a party to a suit desires any other party to the suit to produce in court at the trial, a document or any other thing, which he believes to be in the possession or power of that other party, the party desirous of the production shall give "Notice to Produce" to that other party.*

It is submitted that the expression 'any other thing' includes tangible or material objects not contemplated within the meaning of 'document' or 'oral evidence'. When the expression 'any other thing' is looked at from the prism of the meaning of 'real evidence' in the Evidence Act 2011, it can be conveniently submitted that the Federal High Court Rules contemplated real evidence as part of the kind of evidence made subject to notice to produce procedure.

## 5. Procedure for the Issuance of Notice to Produce

A litigant is at liberty to resort to any of the available options to secure the production of a document he desires to rely on in court which is not in his possession. The notice to produce procedure can either be invoked using the Evidence Act or the relevant rules of court, where same is envisaged therein. The decision to resort to either of them requires strict compliance with the respective legal instruments and to attract the incidents that arise or are borne out of each procedure. It is pertinent therefore to briefly examine the notice to produce documents procedure under the respective legal instruments identified as well as the incidents each attracts.

### 5.1 Who can Issue and on Whom can a Notice to Produce be Issued or Served

Notice to produce documents under the Evidence Act 2011 can only be issued or served on a party or parties to a suit or to a legal practitioner employed by such party or parties.[9] It does not apply to a non-party to a suit. This position was expressed by the Court of Appeal in the case of *Edokpolo& Company Ltd v Sem-Edo Wire Industries Ltd &Ors*[10] thus:

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[6] Section 258 of the Evidence Act 2011.

[7] Order 43 rules 2 and 3 of the National Industrial Court of Nigeria (Civil Procedure) Rules 2017 and Order 26 rules 8 and 10 of the Bayelsa State High Court Rules 2010.

[8] Order 43 rule 2 of the National Industrial Court of Nigeria (Civil Procedure) Rules 2017.

[9] This is by virtue of the wordings of section 91 of the Evidence Act 2011.

[10] (1989) LPELR-20241(CA).

> *…it is abundantly clear from the foregoing that none of the respondents on record was privy to any of the two agreements averred, neither was any of them a party to the substantive suit. The notice to produce claimed to have been filed and served can only apply to a party or parties to the suit. It is clear as said earlier that none of the respondents is party to the proceeding. "Notice to produce", if filed and issued at all, is totally irrelevant to them.*

One would wonder whether the Court of Appeal did not consider the provisions of section 89(a)(ii) of the Evidence Act 2011 when it held that it is only the parties or their counsel that can be issued and served a notice to produce. The said provision has also been subjected to judicial scrutiny and has been held to have restrictive interpretation to parties only.[11]

The respective rules of court seem to have taken a similar stance with respect to the person against whom a notice to produce documents may be issued.[12] There appears to be an interesting addition in the Bayelsa State High Court Rules, which is to the effect that a Judge may *suo motu* or upon application extend an order of production of documents and inspection to a witness, prospective witness or even a non-party to the suit.[13]

### 5.2 How to Issue a Notice to Produce Documents

The Evidence Act 2011 did not state how a notice to produce documents may be issued. It may therefore be argued that any method or procedure for bringing the notice to the adverse party to produce documents which is permitted by the practice and procedure of the court would be sufficient.

The procedure under the Federal high Court is that a notice to produce document can be given on the face of the pleadings.[14] This is when a party states in his pleadings that the document in question is in the custody of the opposing party and intends to rely on same. He can in the relevant paragraph state that the opposing party is given notice to produce the said document. The Court of Appeal in the case of *Access Bank Plc v Etim*[15] acknowledged this method of giving notice to produce when it held thus:

> *The aim and essence of pleading is to give notice of the case to be met which enable either party to prepare his case and argument upon the issues raised by the pleadings and saves the other side from being taken by surprise…. As I said before, a party who has issued adequate notice vide his pleading need not produce such notice to render the secondary document admissible.*

It is arguable that this method applies only when the notice is intended to be given to the opposing party in the suit who has been sued and brought to court. Same method may hit a brick wall where the notice is intended to be given to a non-party to the suit as envisaged under the Bayelsa State High Court Rules.

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[11] See Edokpolo& Co Ltd v Sem-Edo (Supra). Also, Ayo Adeyemo 'Admissibility of Secondary Evidence and Notice to Produce under section 89(1)(a)(ii) of the Evidence Act 2011' https://www.academia.edu accessed 7 January 2024.

[12] Order 20 rule 29 of the Federal High Court (Civil Procedure) Rules 2019; Order 43 rules 2 and 3 of the National Industrial Court of Nigeria (Civil Procedure) Rules 2017; and Order 26 rules 8(1) and 10(4) of the Bayelsa State High Court Rules 2010.

[13] This is envisaged in Order 26 rule 10(5) of the Bayelsa State High Court Rules 2010.

[14] Order 20 rule 30 Federal High Court (Civil Procedure) Rules 2019.

[15] (2021) LPELR-55913(CA) at pp. 25 – 26, paras. D - B.

It can take the form of a judicial application or an administrative letter. This method of application is directed at the court, and where same is granted and issued, it goes out in the form of an order of court. A litigant may apply to the court for an order directing the adverse party or a third party in possession of the document sought to be produced to do so.[16] This is resorted to only when the adverse party fails to comply with the notice to produce.

A party may issue a notice to produce documents by filling out a form in the likeness of the template provided in the schedule of forms annexed to the rules of the respective courts. Whereas the said templates are in the Federal High Court and National Industrial Court of Nigeria Rules,[17] the Bayelsa State High Court Rules, 2010 appears not to have a template. One can presume that by the wordings of Order 26 rule 8(1) of the Bayelsa State High Court any written request, even in the form of a letter should suffice. However, a party intending to resort to this method needs to plead facts to show that the document intended or sought to be produced is in the possession of the adverse party or a third party. It is only when this foundation is laid in the pleadings that the prescribed court forms can be filled-out and served on the person intended to be served.

### 5.3 The Stage of Proceedings when Notice to Produce may be issued

Civil proceedings comprise different components and stages from commencement to the delivery of judgment. Every stage requires different steps to be taken or processes to be filed and served to either ignite or give effect to the said step or procedure. A step or procedure taken when same is not ripe or out of time, usually attracts consequences some of which may be fatal to the proceeding or establishment of a desired fact or state of the law. It is in like manner that even a notice to produce is required to be resorted to at a particular or series of stages in civil litigation.

The Evidence Act 2011 is not clearly expressive on the stage of proceeding that a notice to produce document may be given. However, from a careful examination of the provisions of sections 89(a) and 91 of the Evidence Act, it is obvious that the notice may be given any time before the party requesting same intends to use it during hearing. The said sections envisage the production of the document or leading of secondary evidence of same upon failure or refusal of the adverse party to produce same. All these steps or actions are usually taken at the stage of hearing when evidence is led by the parties. Notice to produce document can therefore be argued as issuable at any stage of the proceeding between the filing of pleadings to the hearing of the suit.

The Federal High Court Rules appear to be silent on the stage of a proceeding that a notice to produce may be given. By the Rules of court, a notice to produce may be given at a point of preparing the pleadings, and to take effect upon being filed and served. It can also be given before or during trial, where a separate notice is served on the adverse or the third party.[18]

The National Industrial Court Rules envisages that a notice to inspect or produce documents has to be given or issued within seven (7) days of the parties joining issues.[19] Parties are deemed to have joined issues in their pleadings only when the opposing party has in his pleading denied a material allegation of fact.[20] The necessary implication from the above is that parties must have

[16] Order 26 rules 10(4) and (5) of the Bayelsa State High Court Rules 2010 and Order 43 rule 3 National Industrial Court of Nigeria (Civil Procedure) Rules 2017.
[17] See Form 34 of the Federal High Court (Civil Procedure) Rules 2019, and Form 30 of the National Industrial Court of Nigeria (Civil Procedure Rules) 2017.
[18] Order 20 Rules 29 and 30 of the Federal High Court (Civil Procedure) Rules 2019.
[19] Order 43 rules 14 of National Industrial Court of Nigeria (Civil Procedure Rules) 2017.
[20] Order 30 rule 10 of National Industrial Court of Nigeria (Civil Procedure Rules) 2017.

filed and exchanged pleadings already before issues can be joined. It therefore means that a notice to produce or notice of inspection may be given by either party at least after a statement of defence has been filed and served. This presupposes that parties may give notice to produce when pleadings have been filed and exchanged. It therefore means that it is after[21] pleadings have been filed and exchanged that a notice to produce may be issued. This more or less excludes the method of giving the notice to produce documents on the adverse party through the pleadings. It therefore implies that parties are expected to give notice to produce documents 7 days after close of pleadings by filling out, filing and serving Form 39 on the party sought to produce the document. The above submission does not rule out the practice of stating the fact that the document in question is in the possession of the adverse party and first giving the notice to produce in the pleadings. It only goes to show that despite the aforesaid, the party is still expected to fill-out and serve Form 39 of the National Industrial Court of Nigeria rules in order to activate the notice given in the pleadings.

The Bayelsa State High Court Rules envisages a notice to produce documents to be given within 7 days of close of pleadings.[22] Similar to the National Industrial Court procedure, the Bayelsa State High Court Rules doesn't envisage the giving of notice to produce in the pleadings of parties. This is because the request or notice in writing is to be given within 7 days of close of pleadings and shall form part of the agenda of pre-trial conference. Though the rules state that the notice may be given 'in writing', it did not state the format same should take. Little wonder, the Rules do not have the template as being part of the schedule of forms attached to it. It is therefore submitted that even a written letter giving notice to produce the documents in question to the adverse party will suffice.

### 5.4 Obligations on Parties upon giving of Notice to Produce

The failure or refusal to produce the document for which the notice was given is not restricted to a deliberate refusal on the part of the person given the notice to produce alone, but includes a complete denial of the existence of the said documents.[23]In either case, a party to a suit who issues a notice to produce as well as the adverse party or non-party has been placed with different obligations depending on the stage, method of issuing the notice to produce, and the relevant legal framework the notice is given. The obligations of parties shall be examined in the light of the respective legal instruments upon which a notice to produce documents may be issued and the consequences they attract.

#### a. Notice to produce under the Evidence Act 2011

It is expected that a party who desires to give notice to produce under the Evidence Act should know the contents or better still have a copy of the document that is sought to be produced by the adverse party.[24] This is because the drafters of the Evidence Act envisage that secondary evidence of same be made admissible and reliable where there is a failure or deliberate refusal to produce the document for which the notice to produce was issued. Very instructive is the provision of section 91 of the Evidence Act 2011 which states thus:

> *Secondary evidence of the contents of the documents referred to in section 89(a) shall not be given unless the party proposing to give such secondary evidence has*

[21] See Babajo& Anor v Bawa &Ors (2011) LPELR-9204(CA) at p. 33, paras. B – C.
[22] Order 26 Rules 8(1) Bayelsa State High Court Rules 2010.
[23] *Mainstreet Bank Registrars Ltd v Olugbenga (*2017) LPELR-50998(CA).
[24] This was the disposition of the Supreme Court in the case of *Buhari & Anor v Obasanjo &Ors* (2005) LPELR-815(SC).

> *previously given to the party in whose possession or power the document is, or to a legal practitioner employed by such party, such notice to produce it as is prescribed by law; and if no notice to produce is prescribed by law then such notice as the court considers reasonable in the circumstances of the case.*

The Courts have over the years given judicial stamp to the above provision of the Evidence Act 2011 to the effect that the party who issued the notice to produce document and has secondary evidence of same can tender same and such will be admissible in evidence. In *Nweke v State*[25] the apex court stated thus:

> *A party on whom notice to produce is served is not under obligation to produce the document. The service of the notice to produce only entitles the party serving the notice to adduce secondary evidence of the document in question by virtue of section 91 of the Evidence Act 2011. It is unnecessary to serve a notice to produce, when the secondary copies of those documents are not in the possession of the party serving the notice.*

It is expected that a party who desires to give notice to produce under the Evidence Act should know the contents or better still have a copy of the document that is sought to be produced by the adverse party. The failure, refusal or denial of the existence of a document or thing by an adverse party or a non-party to a suit upon whom a notice to produce is served on, does not entitle the court to invoke withholding evidence against the said adverse or non-party to the suit. In *Ainoko v Yunusa & Ors*[26] the Court of Appeal held thus:

> *In other words, the service of a notice to produce a document does not relieve the person serving the notice of the burden of producing the document if he can or of proving its contents. Consequently, the non-response to a notice to produce will not cause the court to invoke the presumption of withholding of evidence under section 149(d) of the Evidence Act against the defaulting party.*

The adverse or non-party that is expected or obliged to produce the document but fails has also not disobeyed an order of court. The obligation to lead secondary evidence of same only shifts to the party issuing the notice to produce. Therefore, once the party giving the notice upon whom the obligation has shifted to also fails to lead secondary evidence, the court would become helpless in determining the issue in question with the 'not produced' document or secondary evidence of same.

### b. Notice to Produce under the Federal High Court Rules

Notice to produce once given or caused to be giving to the adverse party in possession of the document under the Federal High Court Rules, the party served with the notice is expected to produce the said document. It should be noted that the party that has been served with the notice is not under compulsion to produce the document. The failure or refusal of the party served, to produce the document, shifts the obligation of resorting to secondary evidence to prove the set of facts the document is needed to prove.[27] The obligations of the parties upon the issuance of a notice

[25] (2017) LPELR-42103(SC) at p. 8, paras. B – E.

[26] (2008) LPELR-3663(CA), at pp. 19 – 20, paras. F – C. Also see the cases of *Buhari v Obasanjo* (2005) 13 NWLR (Pt. 910) 241, *UBN v Idris* (1999) 7 NWLR (Pt. 609) 105, *Gbadamosi v Kabo Travels Ltd* (2000) 8 NWLR (Pt. 668) 243.

[27] See Order 20 Rule 33 of Federal High Court Rules 2019.

to produce documents under the Federal High Court (Civil Procedure) Rules are substantially the same with that of the Evidence Act 2011.

**c. Notice to Produce under the National Industrial Court of Nigeria Rules**

Under the National Industrial Court Rules, a party served with a notice to produce documents is expected to produce same. The failure or refusal to produce same has two available procedures to follow, each of the respective procedure with their attendant obligations and consequences.

The first of the available option is that the party seeking for the document to be produced may apply to court by way of motion on notice for an order compelling the adverse party to produce the document.[28] Where the court finds the application meritorious and grants same, it becomes mandatory and no longer obligatory on the adverse party to produce the document. Failure of the adverse party to produce the document would expose such party to the consequences that follow disobedience of court order.

Where in any case the adverse party despite the order of court fails or refuses to produce the document the court is also entitled to presume withholding of evidence against the party that failed or refused to produce the document.[29] This presumption can only be drawn where the order of the court was disobeyed and the issuing party doesn't also have copies of the document to tender in evidence. The worry however, is whether the drafters of the National Industrial Court of Nigeria (Civil Procedure) Rules 2017 can stretch their competence to the realm of regulating evidence which has been made exclusive for the National Assembly.[30]

The second option available to a litigant under the National Industrial Court procedure is to tender secondary or other copies of the document sought to be produced which are in the custody of the issuing party. It should be noted that under this procedure, what the rules permit the issuing party to tender is copies of the document and not secondary evidence. Where the issuing party tenders other copies of the document in his possession, the adverse party would be barred from objecting to the tendering of same.[31] It should also be noted that this option is resorted to when the issuing party did not seek and obtain the order of court and has a copy of the document sought to be tendered.

**d. Notice to Produce under the Bayelsa State High Court Rules**

A party served with a notice to produce under the Bayelsa State High Court Rules is also expected to produce the required document. Where the party served fails or refuses to produce the document, the court may either on application or *suo motu* make an order directing the defaulting party to produce the document where the justice of the case demands.[32] The Court of Appeal while confronted with similar provisions in the High Court of Federal Capital Territory Rules in the case of *GTB Plc v. Kuti*,[33] restated the position of the law thus:

[28] Order 43 rule 3 of National Industrial Court of Nigeria (Civil Procedure Rules) 2017.

[29] Order 43 rule 12 of the National Industrial Court of Nigeria (Civil Procedure Rules) 2017. This provision is very similar to that of section 167(d) of the Evidence Act 2011.

[30] See item 23 of the Exclusive Legislative List, Second Schedule to the Constitution of the Federal Republic of Nigeria, 1999 (as amended) and the case of *Anagbado v Faruk* (2018) LPELR-44909(SC) at pp. 31 – 33, paras. E - C.

[31] Order 43 rule 13 the National Industrial Court of Nigeria (Civil Procedure Rules) 2017.

[32] Order 26 rule 10(4) & (5) of Bayelsa State High Court Rules 2010.

[33] (2020) 9 NWLR (Pt. 1730). 448 at 482-483, Paras D-B.

> *The import of Order 30 rules 14(1), (2) and 17(1) of the High Court of the Federal Capital Territory (Civil Procedure) Rules, 2004 is that if a party fails to produce documents for inspection after being served with notice to produce, the court may order him to produce them….*

As it is expected, failure or refusal of the party so ordered by the court may attract the necessary consequences. Unlike the Federal High Court Rules and National Industrial Court rules, the Bayelsa State High Court rules are silent on further obligations or actions the party requesting the document may take. It is however submitted that the issuing party may resort to secondary evidence of same (if he has such) or enjoin the court to invoke the principle of withholding evidence under the Act 2011.

### 5.5 Nature of Evidence to be led after Issuance of Notice to Produce Documents

The respective legal instruments examined above on the giving of notice to produce document appears substantially to permit resort to other pieces of evidence that are contemplated as 'secondary' to the document sought to be produced. The Evidence Act 2011 and the rules of court appears to have expressed the admissible evidence in place of the document or thing failed or refused to be produced by the party in possession or deemed to be in possession of same as 'secondary evidence of the document'. It is wondered whether it is every piece of secondary evidence that would be admissible when there is failure or refusal to produce a document or thing sequel on a notice to produce. The respective legal instruments have made provisions describing the nature of the evidence that may be tendered in place of the document or thing not produced.

The respective rules of courts though not instruments enacted to regulate evidence, they appear to have donated some discretion to the court on the nature of evidence to be allowed or admitted. While there may be serious legal concerns on the capacity of the rules of court to regulate admissibility of evidence, this paper is however focused on what the rules have provided with respect to the obligations and acceptable practices when a notice to produce has been issued. The Federal High Court rules provide to the effect that where a notice to produce has been given the adverse party fails or refuses to produce what is sought to be produced, the party who gave the notice may lead secondary evidence of the content of the document or thing sought to be produced. The legal implications of the Federal High Court procedure would be x-rayed hereafter in this paper.

The Bayelsa State High Court Rules seem to be quiet on the nature of evidence that should be made admissible. The posture of the Bayelsa State High Court rules on the nature of evidence to be led after issuance of notice to produce is most commendable as it clearly avoided intermingling on a subject it arguably has no competence on. It is worthy of note that the rules of court are not substantive pieces of legislation and ought not to lock horns with the legislature on their constitutional competence. The realm of procedure is well within the contemplation of the respective courts and the courts are entitled to legislate thereon, which appears to be the posture of the extant rules of the Bayelsa State High Court.[34] It is therefore submitted that once the procedure for the giving of a notice to produce has been duly complied with under the Bayelsa State High Court rules, the necessary implication on evidence provided for the Evidence Act 2011 may be invoked.

[34] Section 274 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended).

The National Industrial Court rules did not stop at defining the procedure for the giving of notice to produce but also proceeded further just like the Federal High Court rules to regulate the nature of evidence that may be led. The National Industrial Court rules require the party issuing a notice to produce to tender 'a copy or copies of the document' sought to be produced that are in his possession.[35] It is notable that the nature of evidence that may be admitted sequel on the failure or refusal of the adverse party to produce the document sought to be produced is restricted to only copies of the document and nothing else.[36] This restriction would be better appreciated when compared with the nature of evidence envisaged by the Evidence Act.

The nature of evidence envisaged to be led where the adverse party fails or refuses to produce a document or thing under the Evidence Act 2011 is 'secondary evidence'.[37] What then is 'secondary evidence' that can be tendered and relied on in place of the document itself? Secondary evidence has been stated to include:

(a) Certified copies given under the provisions hereafter contained in this Act;
(b) Copies made from the original by mechanical or electronic processes which in themselves ensure the accuracy of the copy, and copies compared with such copies;
(c) Copies made from or compared with the original;
(d) Counterparts of documents as against the parties who did not execute them; and
(e) *Oral accounts of the contents of a document* given by some person who has himself seen it.[38]

Quite captivating is the fact that though the notice given under section 91 of the Evidence Act 2011 is to produce "documents". However, the failure or refusal to produce the 'documents' will entitle the party giving the notice to lead "Secondary evidence". The Act does not also permit all or any form of Secondary evidence to be resorted to at all times whenever the primary evidence can't be secured or tendered. Section 90 of the Evidence Act 2011 expressly provides and specifies the secondary evidence that can be tendered and made admissible under the respective paragraphs of Section 89.

With particular attention on Section 89(a) of the Evidence Act 2011(which requires the issuance of notice to produce), "… any secondary evidence of the contents of the document…" is admissible.[39] The implication of the use of the word 'any' in the said provision is that one or more of the listed options may be resorted to in proof of the contents of a document.[40] Paragraphs (a) – (d) of section 89 of the Evidence Act 2011 define 'secondary evidence' strictly within the context of hardcopy documents. It is only paragraph (e) thereof that has a substantially different nature

[35] Order 43 rule 13 of the National Industrial Court of Nigeria (Civil Procedure) Rules 2017.
[36] The implication of the above provision of the National Industrial Court of Nigeria (Civil Procedure) Rules 2017 is to the effect that it is only hard copies of the document as secondary evidence envisaged in section 87(a) – (d) of the Evidence Act 2011 that can be admitted in evidence.
[37] A look at the provisions of sections 89(a), 90(1)(a) and 91 of the Evidence Act 2011 shows that the catch phrase consistently used is "Secondary evidence".
[38] Section 87 of the Evidence Act 2011.
[39] Section 90(1)(a) of the Evidence Act 2011.
[40] *APC v Omisore &Ors* (2014) LPELR-24074(CA) @ 15 paras A-C.

from the meaning of 'document'. A litigant who does not have a copy of the primary document[41] is therefore permitted to lead or give oral accounts of the content of such document(s).[42]

Our courts appear not to have placed much value on the content of section 87(e) of the Evidence Act 2011 with respect to obviating the need to produce a hardcopy document as secondary evidence of the document sought to be produced. An express display of this attitude by the courts may be seen in the case of *Bala v Gwaram&Ors*[43] where in construing the implication of the provisions of section 128(1) of the Evidence Act 2011 with respect to oral accounts of the contents of a document stated thus:

> *By the above provision of the Evidence Act, a party seeking to establish the existence of a judgment of a court must produce the said judgment or secondary evidence of the same as no oral evidence is allowed to be given on the said judgment in its proof.*

Having regard to the statutory definition of the phrase "secondary evidence" which the judex also used, it is wondered whether it considered the full import in maintaining its disposition. This disposition was also seen in the case of *Holloway & Anor v SCOA (Nig.) Plc &Ors*[44] when the Court of Appeal held thus:

> *In the instant case, the 4th and 5th Respondents in their bid to prove a case of acquisition of the property the subject of dispute can have recourse to this procedure and invite the 1st respondent or any other person to which Notice of Acquisition and other documents were served to produce them in court for the purpose of being tendered as evidence pursuant to section 89(c) and 91 of the Evidence Act to establish the fact that government (4th and 5th Respondents) indeed acquired that land and in doing so observed due process. The 4th and 5th Respondents did not discharge this burden at the trial court given the printed record before us. This burden duty is not discharged merely because the evidence of certain persons i.e. 1st Respondent and 3rd Respondent who testified as witnesses, had not been challenged and on account of the fact that they knew or had knowledge that the property had been acquired by the government, cannot in … my view be taken as the required evidence needed to prove acts of the acquisition of the subject property by the government.*

The judicial exclusion of 'oral accounts of the contents of a document by a person who has seen…' same from the meaning of secondary evidence within the Act,[45] gives some epistemological disturbances. Without express mention, this paper is tempted to believe that the judex in the above case was influenced by the provisions of section 125 of the Evidence Act 2011. The said provision is a general rule that excludes oral accounts as source of proof for the contents of a document. It is however submitted that with respect to notice to produce, section 91 of the Evidence Act has specifically stated that 'secondary evidence' is admissible. In the absence of an express exclusion of a type of secondary evidence, it is submitted that all types of secondary evidence are qualified to be given in place of the document sought to be produced. With the above disposition, one

[41] An envisaged by section 89(a), (b), (c) and (d) of the Evidence Act 2011.
[42] Section 89(e) of the Evidence Act 2011.
[43] (2017) LPELR-43205(CA) at p. 25, paras. A – F per Onyemenam JCA.
[44] (2022) LPELR-58639(CA) at pp. 18 – 19, paras. E - F.
[45] As defined by section 87 of the Evidence Act 2011.

wonders the true effect of the inclusion of oral statement of the contents of a document as secondary evidence. It would therefore imply that the said section 87(e) is merely salutary and of no effect with respect to documentary evidence.

### 5.6 Presumptions in Favourof Notice to Produce

Generally, as espoused above, when a notice to produce is given and the adverse party to whom the notice was given fails or refuses to produce same, the other party is allowed in law to lead secondary evidence. Where the secondary evidence led is any of those contemplated in section 87(a) – (c) of the Evidence Act 2011, the court would merely consider the contents of the said copies of the document sought to be produced and evaluate same as evidence of the facts they tend to prove. The situation would however be different where the document in the possession of the party giving the notice (though reflects the contents of the document sought to be produced) does not bear either or all of the formal requirements to validate the document. The drafters of the Evidence Act envisaged such scenario when they provided the necessary consequences that will follow when the adverse party fails or refuses to produce the copy that has all the formal requirements on it for inspection by the court.

The Evidence Act mandates the court to presume that a document for which notice to produce was issued and same not produced was duly attested, stamped and executed in the manner required by law.[46] This section merely mandates the court to presume due or substantial compliance with formalities that pertains or portends the existence and making of the document. So where the fact in issue with respect to which the notice to produce under section 91 of Evidence Act was given borders on the existence or satisfaction of formal requirements or authenticity of the document, the court is to presume that such requirements were duly complied with. The implication therefore is that even when the secondary evidence tendered in evidence in line with section 91 of the Evidence Act 2011 does not appear to have been attested to, stamped or executed, the court is mandated to presume satisfaction of such formal requirements.

It should be noted however that section 154 of the Evidence Act 2011 must be given restrictive application to the express words used therein. The failure of the party who caused the issuance of the notice to produce under section 91 of the Evidence Act 2011 to produce secondary evidence of the document sought to be produced, will disentitle the court from invoking the presumption in section 154 of the Act.

## 6. Conclusion and Recommendations

Notice to produce is a fine tool in civil litigation in Nigeria that is often not resorted to or where resorted, improperly invoked or utilized. Litigants and counsel should understand the scope of the tool under the respective legal instruments and the attendant incidents of the use of notice to produce. The respective legal instruments also have their boundaries so that they may not have completely provided for the procedure and at same time the admissibility status of evidence secured in the process. Litigants and counsel should be skillful enough to appreciate the sliver line between the invocation process and admissibility criteria when resort is made to the 'notice to produce' procedure.

From the digest of the law and procedure for the use of notice to produce procedure, one can glaringly see some of the challenges bedeviling litigants, counsel and the courts with respect to

[46] Section 154 of the Evidence Act 2011.

clearly defining the path to follow. It is with respect to some of these challenges that this paper recommends as follows:

1. A party may be aware of the existence of a document or thing in the possession of the adverse party, which for certain reasons or circumstances, he may not be able to access. Where the said party is able to describe the relevant thing or part thereof or state the contents of the document, in relation to the particular issue or question before the court, such should be admitted as proof of the existence of the said thing or contents of the document, where there are no strong contentions. It may impress a man of ordinary understanding that justice would be seen to have been done when such secondary evidence is admitted. The case of *Holloway & Anor v SCOA (Nig.) Plc*[47] comes to mind, when both parties appeared to have admitted the acquisition of the property by government.
2. Every provision of statute is enacted to have effect except where specifically restricted or derogated from. The meaning of specific terms, words or expressions that have been statutorily defined aids the courts in arriving at more meaningful and justice inclined constructions of provisions of the said statute. This therefore questions the rationale for the exclusion of oral accounts of contents of documents within the meaning of 'secondary evidence' entrenched by the Evidence Act 2011. It is therefore recommended that courts should be consistent in the inclusion of oral accounts of contents of documents as secondary evidence and not making the provision of section 87(e) of Evidence Act 2011 to appear salutary.

[47] (supra).