

Issuance and service of *in rem writ* in Nigeria

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Background

The proper service of originating processes – and all other court processes – on the relevant parties to judicial proceedings is fundamental to both the assumption of jurisdiction and adjudication by a court. The Supreme Court laid down this principle in *Madukolu v Nkemdilim*,⁽¹⁾ stating that every case before the court must be "initiated by due process of law and upon fulfilment of any condition precedent to exercise of jurisdiction". Thus, proper service is such a crucial condition that in its absence, further steps taken in proceedings amount to a nullity.

Under the Admiralty Jurisdiction Procedure Rules 2011, *in rem* actions are commenced by the issue of a writ of summons, which must be in the format specified in Form 1 of the Schedule to the rules. Under Order 5, Rules 1 and 2 of the Admiralty Jurisdiction Procedure Rules and Form 1 of the Schedule to the rules, the writ of summons must, in addition to the 'res' (ie, the ship or its cargo or freight), indicate as the defendant "the relevant person" that, by virtue of Section 25 of the Admiralty Jurisdiction Act 1991, is the party which would be liable to the plaintiff on the disclosed cause of action in an action *in personam*.

Serving an *in rem writ*

In serving an *in rem writ*, the practice in Nigeria – and in most other common law jurisdictions – has been that the plaintiff will cause it to be issued against the ship or other *res* and at least another defendant, which is usually named as, for example, 'the owner/s of MV ABC' or 'the demise charterer/s of MT XYZ'. With respect to the place of service of such defendant named along with the *res*, it was thought that leaving the writ in the care of the master of the ship or effecting any other form of valid service on the *res* would suffice – even when such other party resided or carried on business outside the court's jurisdiction. The authority for this practice stems from:

- Section 7(2) of the Admiralty Jurisdiction Act and Order 2, Rule 2 and Order 7(1)(1) of the Admiralty Jurisdiction Procedure Rules, which provide that a writ can be served only when the *res* is within the court's jurisdiction; and
- Order 5, Rules 1 and 2 of the Admiralty Jurisdiction Procedure Rules, which provide that the "relevant party" must be named as a defendant along with the *res*.

In other words, if such relevant party is required by law to be named as a defendant – and the writ for an action *in rem* can be served only when the *res* is within the court's jurisdiction, this implies that proper service on the *res* amounts to valid service on the relevant party – particularly considering that the admiralty procedure rules disallow the embodiment of *in personam* and *in rem* actions in the same originating process. Thus, the *in rem* action deals with the *res*, and service outside of the jurisdiction

requires no compliance with special rules on such issues (eg, Sections 97 to 99 of the Sheriffs and Civil Process Act).

Case law

However, this traditional view of service of the *in rem* writ on the owner or demise charterer of the *res* in an admiralty action *in rem* was altered by a recent appeal court decision. In *Deros Maritime Limited v MV MSC Apapa*,⁽²⁾ the appeal court held that: "By suing the owners of the vessel in addition to the vessel, the suit was made an action *in personam* as well." The court went further to state of the plaintiff at the trial:

"He could have sued only the vessel as done in *MV Mustafa v Afro Asian Impex Ltd*.⁽³⁾ As the additional parties were resident outside jurisdiction, he was bound to comply with the rules requiring leave of court to issue the writ."

This decision, although likely to be appealed to the Supreme Court, appears to have set a binding precedent for what was, for some time, a contentious issue. In recent years the Federal High Court had issued conflicting decisions on the matter. For example, in the unreported *in rem* action *MT 'Ane (Ex MT Leste) v MV Dalmar Majuro*,⁽⁴⁾ the Federal High Court held that as the plaintiff had joined the second defendant-owner of the ship, the action was not only an action *in rem* against a ship or other property, but also an action *in personam* against the owners of the vessel. Therefore, since the owners were resident outside the jurisdiction of the court, leave under the Sheriff and Civil Process Act was required for issue of the writ against them in an *in personam* action.

In another unreported case, *GeePee Industries Nigeria Ltd v MV Kota Manis*,⁽⁵⁾ the Federal High Court faced substantially similar circumstances to those in *MT 'Ane (Ex MT Leste)*. However, the court took a contrary view on a preliminary objection brought by the defendants and refused to set aside the writ on the grounds that court leave had not been obtained for the issue of the writ on the third defendant, which was ordinarily resident outside the jurisdiction – as required by the Sheriffs and Civil Process Act. The court also affirmed that service of the writ on the ship was proper service on its owners in an action *in rem*, in line with the Admiralty Jurisdiction Act and the Admiralty Jurisdiction Procedure Rules.

Under the doctrine of *stare decisis*, an inferior court is bound by the decision of a superior court. Thus, a point of law that has been settled by a superior court must be followed by inferior courts where the facts and circumstances are the same.⁽⁶⁾ Therefore, the decision in *Deros Maritime Limited* appears to be binding on the Federal High Court, unless the facts and application of the law in new cases can be distinguished from *Deros*.

Comment

Practitioners and operators in Nigeria now have serious issues to consider regarding the issue and service of the writ of summons in *in rem* actions. As the law stands, compliance with the Sheriff and Civil Process Act in the issue and service of an *in rem* writ where the owner of the *res* resides outside of the

court's jurisdiction is the prudent course to take, since the more traditional position now affords defendant shipowners reasonable grounds to apply for a stay of proceedings pending appeal.

Endnotes

(1) 1962, 2 SCNLR 34.

(2) Suit CA/L/960/2010.

(3) (2002) 14 NWLR (PT. 787) 395 @ 411 B-E.

(4) Suit FHC/L/CS/994/07),

(5) FHC/L/CS/427/2013.

(6) See *EPA v Edegero* (2002) 18 NWLR (Pt 798) 79; *Asanya v The State* (1991) 3 NWLR (Pt 180) 422, *Atolagbe v Awuni* (1997) 9 NWLR (Pt. 522) 536; *Dalhatu v Turaki* (2003) 15 NWLR (Pt. 843) 310.