

THE ROLE OF A SURVEYOR AS AN EXPERT WITNESS IN LAND LITIGATION PROCESSES

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1.0. INTRODUCTION

Expert evidence is nearly always essential in actions involving technical issues. The purpose of calling expert is to educate the court and explain to it the technical matters, which arise in action, so that the court can properly adjudicate upon the matters in issue. Expert evidence is only opinion evidence on either side, which must be with the aim of assisting the court to arrive at just determination of issues in controversies. Expert evidence is not a substitute to fill up the loopholes in the case of a party and it is open to court to accept or reject with its own opinion on the subject. An expert is fallible like all other witnesses and the real value of this evidence consists in the logical inferences, which he draws from what he has himself observed, not from what he merely surmises or has been told by others.²

- 1.1. Land disputes litigations often involve complicated issues of right and interests over **size, identity and boundaries** of parcel(s) of land. The roles of Surveyors are therefore crucial in the legal process when dealing with such issues to act as **experts**, prior to litigation, in the course of litigation and post litigation determination of such **size, identity and boundaries** of parcel(s) of land on which right and interest are claimed to exist.
- 1.2. A licensed surveyor who acts as an expert witness is required to have an understanding of the **legal process** in order to understand his/her role in that process and to understand the responsibilities and liabilities associated with being engaged as an expert witness. A surveyor, who intends to work as an expert witness, in land litigations, is not qualified simply by virtue of having a land surveyor's license, but must also possess the experience and expertise in surveying to form accurate and truthful opinions, in order to safe guard his/her professional integrity and credibility.
- 1.3. The purpose of this paper is to have a basic understanding of the land litigations processes and the roles of Surveyors as "expert witness" in land litigation proceedings, at every stage as may be required processes/stages.

Definition of Terms and Related Terms

LAND

- 1.4. Land is an immovable and indestructible three-dimensional area consisting of a portion of the earth's surface, the space above and below the surface, and everything growing on or permanently affixed to it. In its significant land is not restricted to the land surface but extends below and above the earth's surface nor is it confined to solids but may encompass

²² The Principles and Precedents of the Art of Cross Examination, Tenth Edition at Page 997

within its bounds such things as gases and liquids. Land is not the fixed content of the earth surface, the contents of the space may be physically severed, destroyed or consumed, but the space itself, and the land remains immutable.³

SURVEYOR

- 1.5. According to the Black's Law Dictionary⁴, a **"Surveyor"** is **"One who makes surveys, determine area of portion of earth's surface, length and directions of boundary lines, and contour of surface."**

By way of statutory definition, the **Surveyors Registration Council of Nigeria Act**⁵, defines a **"Surveyor"** to mean **"any person registered or deemed to be registered as such⁶ under the Act"**. The **Survey Laws of Ogun State**⁷; **Lagos State**⁸; and **Osun State**⁹ defines a **"Surveyor"** as a **"licensed surveyor or an officer of the Survey Department authorized by the Surveyor-General to carry out surveys"**.

1.6. **REGISTERED / LICENSED SURVEYOR**

A person is registered under the Act, if his name is entered in the Register maintained by the Registrar of the Surveyors Council of Nigeria.¹⁰ It is worthy of note that while the Ogun State Law used the word **"Registered"**, the Lagos State Law preferred the word **"Licensed"** to described a Surveyor that the registered in accordance with the provisions of Section 7 of the **Surveyors Registration Council of Nigeria Act**.

- 1.7. The **Survey Laws of Ogun State**¹¹ further defined a **"Registered Surveyor"** as **"a surveyor registered under the Surveyors Registration Council of Nigeria Act or under any Ordinance providing for such licensing which was in force at any time before the commencement of the Surveyors Registration Council of Nigeria Act"**

- 1.8. The **Lagos State** define to word **"Licensed Surveyor"** as **"a surveyor registered under the Surveyors Registration Council of Nigeria Act or under any Ordinance providing for such licensing"**

³ See Black's Law Dictionary, 8th Edition at Page 892-892, See also Peter Butt, Land Law (9) Second Edition 1988.

⁴ Black's Law Dictionary, 6th Edition at Page 1446

⁵ Cap. S18 Laws of Federation of Nigeria, 2004

⁶ i.e. as a "Surveyor"

⁷ Cap S 315 Vol. 4 Laws of Ogun State, 2006

⁸ Ch. S13 Vol. 10 Laws of Lagos State, 2015

⁹ Cap. 154 Vol. 6 Laws of Osun State 2002

¹⁰ See **Section 7** of the **Surveyors Registration Council of Nigeria Act**, Cap. S18 Laws of Federation of Nigeria, 2004

¹¹ Cap S 315 Vol. 4 Laws of Ogun State, 2006

which was in force at any time before the commencement of the Surveyors Registration Council of Nigeria Act”

- 1.9. The **Osun State Survey Law** simply defined a “**Registered Surveyor**” as “**Surveyor registered under the Surveyors Registration Council of Nigeria Act.**”
- 1.10. It appears that the issue of whether one is a “Registered Surveyor” or “Licensed Surveyor” is a matter of semantics and by combination of the statutory definitions one can safely say that a Registered or Licensed Surveyor is “**One who is registered under the Surveyors Registration Council of Nigeria Act or under any Ordinance providing for such licensing which was in force at any time before the commencement of the Surveyors Registration Council of Nigeria Act**”
- 1.11. As mentioned earlier, Surveyor is **any person registered or deemed to be registered as such¹² under the Act.** A person will be entitled to be registered as a ‘**Registered Surveyor**’ in Nigeria, if he holds a certificate recognized by the Council and has not less than post-qualification experience in the profession and has passed the qualifying examination for registration, recognized or conducted by the Council under this Act¹³. A candidate for registration must have attained the age of 21 years, be of good character and has not been convicted in Nigeria or elsewhere.¹⁴
- 1.12. A person shall be entitled to be registered as a ‘**Pupil Surveyor**’ if he holds a certificate recognized by the Council or has passed the examination approved by the Council and has not had the two years’ post-qualification practical experience required under **Section 9 (1) (a) of the Act.**¹⁵ A person may be registered as a ‘**Survey Technologist**’ or a ‘**Survey Technician**’ if he has passed an examination approved from time to time by the Council and has had two years practical experience as a survey technologist or survey technician in an office approved by the Council.¹⁶

SURVEY PLAN

- 1.11. A ‘**Survey Plan**’ is a map indicating the result of measurement of a tract of land, its boundaries, and content¹⁷. It also means any document, map, plan or diagram made for the purpose of determining the boundaries of any land signed and certified by a Licensed Surveyor.¹⁸ The people that handle survey issues are referred to as Surveyors and they are regulated by

¹² i.e. as a “Surveyor”

¹³ See Section 9(1)(a) and (3) of the Surveyors Registration Council of Nigeria Act Cap S18

¹⁴ See Section 9(4) of the Surveyors Registration Council of Nigeria Act Cap S18

¹⁵ See Section 9(5) of the Surveyors Registration Council of Nigeria Act Cap S18

¹⁶ See Section 7 of the Surveyors Registration Council of Nigeria Act Cap S18

¹⁷ See Blacks Law Dictionary 8th Edition Page 1486

¹⁸ See Section 2 and 31 of the Survey Law of Lagos State.

the office of the Surveyor Council of Nigeria¹⁹. A survey plan must contain the following information:

- 1. The name of the owner of the land surveyed;**
- 2. The Address or description of the land surveyed;**
- 3. The size of the land surveyed;**
- 4. The scale of drawing;**
- 5. The drawn out portion of the land survey and mapped out on the survey plan document;**
- 6. The beacon numbers;**
- 7. The surveyor who drew up the survey plan and the date it was drawn up; and**
- 8. A stamp showing the land is either free from Government acquisition or not.**

- 1.13. A survey Plan is relevant in land dispute to show the graphical morphology, extent and size of an area of land in dispute, since in most cases, the Judge or the Court may not visit the land in dispute.

Is Survey Plan necessary in every land dispute?

- 1.14. A survey plan is not a necessity in every land litigation, if the identity, description, extent, location and size of land in dispute are clear and not in dispute. Hence, there are instances where the preparation and production of a Survey Plan can be dispensed with. In other words, It is not always that a plan is necessary in land litigation or that the absence of a plan is fatal to the case of a party. If the proper description of the land is available in the proceedings, there is no need for a Survey plan to be filed. In **Nwankwo v. Ofomata**²⁰, it was stated that:

“Where the identity, extent and boundaries of a parcel of land, the subject of an action are not in dispute or where the land is well and very much known and identifiable by the parties as in the instant case, neither a survey plan nor evidence of boundary men other than the evidence of persons in whose presence the grant was made under customary law is necessary”

- 1.15. However, where the identity, description, extent, location and size of land in dispute is not known to any of the parties or is being challenged by the Defendant in his defence, it will be necessary to file a Survey Plan to

¹⁹ See Section 1, 2, 3 and 4 of the Surveyors Registration Council of Nigeria Act Cap S18

²⁰ (2009) 11 NWLR (Pt.1153) 431 at 520 Paras E-F

establish the identity, description, extent, location and size of land in dispute. In the case of **Archibong v. Ita**²¹

“Where a land in dispute is not identifiable by one of the parties and, therefore, not identified or certain, a survey plan drawn to scale, accurate, reflecting the boundary features of the land and properly orientated is necessary to prove the identity of the land notwithstanding the fact that a declaration of title to the land is not sought by any of the parties.”

Must a Survey Plan be tendered by the Surveyor who prepared it?

- 1.16. It is established law that where a party to a land litigation has produced and tendered a survey plan showing the area he is claiming with degree of certainty and ascertainable boundaries, the party does not necessarily have to call a Surveyor to testify before the Court can attach credibility to the Survey Plan so produced.²²

EXPERT WITNESS

- 1.17. Simply put, an **‘Expert Witness’** is a person who is specially skilled in the field in which he is called upon to give evidence. It is however necessary to make a distinction between a **‘lay witness’** and an **‘expert witness’**. A lay witness is generally a witness of **fact only**. In its commonest form, his evidence consists of simply of knowledge of past events, which he has perceived with his own physical senses.
- 1.18. Under the Nigerian legal system, a witness is only allowed to testify to facts known to him and not his opinion. Facts refer to the real and the true or actual state of things. Facts are objective and concrete. An opinion exists in the thinking, imagination or understanding of the maker and it subjective and fickle. Therefore, as a general rule, the law of evidence does not allow a witness to give his opinion as to the existence of a fact in issue or relevant fact. **Section 67 of the Evidence Act** provides that:

“The opinion of any person as to the existence or non-existence of a fact in issue or relevant to the fact in issue is inadmissible except as provides in section 68 and 76 of this Act.”

- 1.19. Thus, when a person, whether he is a party himself, or a third party, is called upon to testify, he cannot give his opinion as to the existence or non-existence of a fact in issue or relevant fact.
- 1.20. However, where the nature of the evidence sought to be given is outside the experience and daily common knowledge and the court is to make a

²¹ (2004) 2 NWLR (Pt. 858)

²² See *Akpan & Ors v. Otong & Ors* (1996) 10 NWLR (Pt. 476) 108 at 127

finding or form an opinion in that respect, the opinion of an expert will be relevant. **Section 68(1) of the Evidence Act** provides that:

“When the Court has to form an opinion upon appoint of foreign law, customary law or custom, or of science or art, or as to identity of handwriting or finger impression, the opinion upon that of person specially skilled in such foreign law, customary law or custom, or science or art, or in questions as to identity of handwriting or finger impressions, are admissible.”

- 1.21. By **Section 68 (2) of the Evidence Act**, an **“Expert”** is any one that is **“specially skilled in as mentioned in subsection (1)”** of the section. In the case of in **A.N.P.P. v. Usman**²³, it was stated that:

“The term “expert” is elusive because there is no guideline from the statutory provisions on how to identify an expert with a degree of certainty, See *Aigbadion v. State* (1999) 1 NWLR (Pt. 586) page 284. The Evidence Act under section 57(2) described an expert as a person ‘special skilled in any of science or art, or in identifying of handwriting or finger impression’

It has however been held in a plethora of decided cases than an expert is a person who the opinion of the court had got sufficient practice or experience in the particular field of knowledge as a professional or amateur. It follows therefore that is not academic qualification or formal training that can make one an expert in a particular field.

It is for the judge to decide whether or not a person is sufficient skilled to give expert evidence.”

- 1.22. Also in **A. G. Federation v. Abubakar**²⁴, it was held that:

“In legal parlance, an expert is any person who is specially skilled in the field he is giving evidence...whether or not such a witness can be regarded as an expert is a question for the judge to decide”

- 1.23. Therefore a person may be regarded as an expert in a particular field even where his knowledge was acquired without systematic tutoring provided that he has, in the opinion of the court, had sufficient practice in the particular field of knowledge as a professional or as an amateur, to make his opinion reliable.

²³ (2008) 12 NWLR (Pt.1100) 1 at 73

²⁴ (2007) 10 NWLR (Pt.1041) 1 at

2.0. SURVEYOR AS AN EXPERT WITNESS

- 2.1. The Courts have over the years recognized Survey as a specially skilled profession and Surveyors as Experts²⁵. Since a Surveyor is person who specially skilled in determining the area of portion of earth's surface, length and directions of boundary lines, and contour of surface, Surveyors are usually called to perform the role of an expert in assisting the Court in determining the area, size, location, dimension or description of a land in dispute.
- 2.2. Furthermore, having explained that an expert is a person who in the opinion of the court had got sufficient practice or experience in the particular field of knowledge either as professional or amateur and not necessarily with academic qualification or formal training, therefore the opinion of a **Registered Surveyor, Pupil Surveyor, Survey Technologist; and Survey Technician** as an Expert may be relevant in assisting the Court in forming an opinion in determining any issue relating to the size, location, measurement, boundaries and dimension of land in dispute.
- 2.3. However, since the area of expertise of Survey is one within the province of academic or technical study, such as Medicine, Psychiatry, Law, Engineering etc, the opinion of a **Pupil Surveyor, Survey Technologist and Survey Technician**, who are not **Registered Surveyor**, that can, by law sign and certify a Survey Plan, may not carry equal weight with that of a Registered Surveyor.
- 2.4. For the evidence of the Surveyor to be relevant in land litigations, it must be predicated on the credible and plausible evidence of the litigants it seeks to support. The opinion of a Surveyor in any land dispute is as matter of fact ought predicated on separate facts given by the litigant. These facts are usually primary facts. i.e. sketch drawing, direction, description, location and dimension know to the litigant, without which a Surveyor can only speculate. Thus Expert evidence of a Surveyor usually consists of both facts and opinion. The primary facts upon which the expert's views are based must, unless they are matters upon which the expert can give direct evidence or are admitted or agreed, be separately proved by witness of facts who are able to give admissible evidence of them. It is on this basis that the court had established the principle that although a licensed surveyors plan is the best if available, yet the absence of it need not be fatal to the claim if proper description of the land is available on the record.²⁶ In Nigeria, the proof of identity of land with definitive certainty is a

²⁵ See **Ogunwomiju, JCA** in the case of **Peterside & Ors v. Wabara & Ors** (2011) 6 NWLR (Pt. 1243) 328 at 337

²⁶ See **Etiko v. Aroyewun** 4 F.S.C. 129

sine qua non to an award of a claim seeking declaration of title, injunction or possession. This proof, however, can be achieved through:

- a). **Producing/adducing oral evidence describing the parcel of land with such degree of accuracy that will guide in producing a Survey Plan of the said land which can be achieved through - a non-expert, or**
- b). **By filing a Survey Plan reflecting all the features of the land and showing clearly the boundaries of the land which must be done by a licensed Surveyor- Expert²⁷**

2.5. In **Nwokorobia v. Nwogu**²⁸, the Supreme Court, reinstated the law thus:

“The identity of a parcel in dispute can be established by a Survey Plan or by an oral description that will enable a surveyor produce a plan. See also *Ofume v. Ngbeke* (1994) 4 NWLR (pt. 341) 746 at 747.”

- 2.6. However in order to have permanent records of description of land in dispute in land litigation, it is desirable to prepare, produce and tender a Survey Plan drawn to scale, showing dimension, boundaries, features etc of the land prepared by a Licensed Surveyor. A Survey Plan therefore represents a permanent documentary opinion of the Surveyor, predicated on evidence of facts given by the litigants. A Surveyor, as an expert, though cannot go beyond the scope of his brief, he is not permitted either to present an opinion, which he believes is untrue, simply because it suites the case of his clients.
- 2.7. It is generally believed that Expert witnesses, including Surveyors, are far too prone to take upon themselves the duty of deciding the question in issue in the actions, instead of confining themselves to stating fairly and clearly their real opinion on the matter. It is also believed that there is a natural tendency on the part of the expert witness to support the view of the party who called him. Many so-called experts have been shown to be remunerated witnesses making themselves on hire to pledge their oath in favour of the Party paying them.²⁹
- 2.8. In truth, witnesses of this description are apt to presume the ignorance of their hearers with respect to the subject matter of examination and have little respect for the law of perjury.³⁰ It is therefore important to ensure that the expert's views are not coloured by the result he knows his client is

²⁷ See the Supreme Court decisions in **Ogun v. Akinyelu** (2004) 18 NWLR (pt. 905) 362 at 384 paras C-H, 389-390 paras H-B; **Awole v. Owodunni** (No. 2) (1987) 2 NWLR (pt. 57) 367 on the above submission.

²⁸ (2009) 10 NWLR (Pt. 1150) 553 at pages 588-589, paras H-A

²⁹ *Gulzar Ali v. State of HP* (1997) 8 JT 564

³⁰ *Best on Evidence* 11th Edition.

seeking, as warned by **Lord Denning MR**³¹ that “a particular expert report wears the colour of a special pleading rather than an impartial report”.³² Accordingly, if the expert does not think that his client's case is sound, it is better to discover this at an earlier stage so that the prospect can be reassessed before substantial cost are incurred by the client and embarrassment is inflicted on the expert.

LAND LITIGATION PROCESSES

2.9. **Litigation**, generally, is the process of carrying on a lawsuit or the lawsuit itself³³. ‘**Land Litigation**’ is the process of carrying on lawsuit for a claim or title in land. Land litigation generally falls within a Civil claim which is governed by the **Civil Procedure Rules of High Court of each State in Nigeria**³⁴. The crucial stages of Civil Litigation can be summarized under the following:

1. **Gathering of Facts:** the stage of ascertaining what are in dispute
2. **Pre-trial:** which comprises of filing of Pleadings and Pre-trial Conference (PTC) Stage.³⁵
3. **Trial:** this stage involves the taking of evidence through witnesses and examination of witnesses
4. **Post-Trial:** filing of final addresses by Counsel and Judgment.
5. **Post-Judgment:** giving effect to the judgment of Court

2.10. For this purpose of the topic under reference, only the ‘**Pre-trial**’ and ‘**Trial**’ stages are will be addressed. This paper will therefore consider the **role, requirements** and **responsibilities** of Surveyors, acting as expert witnesses under two broad headings: ‘**Pre-trial**’ and ‘**Trial**’ stages.

3.0. THE ROLE OF A SURVEYOR AS EXPERT WITNESS AT THE PRE-TRIAL

Case Preparation/Pleadings.

3.1. Generally, in a civil action, after the service of the writ of summons or originating summons, as the case may be, litigation is deemed to have

³¹ One of the Most Respected English Jurist of all times

³² See *White House v. Jordan* 1 All ER 650 at 655

³³ Black’s Law Dictionary (8th Edition) Page 952

³⁴ The extant High Court (Civil Procedure) Rule in Ogun State in the **High Court of Ogun State (Civil Procedure) Rules 2014**, Lagos State is the **High Court of Lagos State (Civil Procedure) Rules 2012**, Oyo State is the **High Court of Oyo State (Civil Procedure) Rules 2010**, while that of Osun State is the **High Court of Osun State (Civil Procedure) Rules 2008**

³⁵ In Lagos under the **High Court of Lagos State (Civil Procedure) Rules 2012** the **Pre-trial Conference** is called or known as **Case Management Conference (CMC)**

commenced. "Pleadings" (statement of claim, statement of defence, counter-claim, defence and reply) are usually filed where both parties to the dispute hold different position on the land in dispute. Therefore, pleadings must contain only facts and also indicate and/or state the specific evidence by which the fact is to be proved. In law, no evidence (oral or documentary) will be allowed on any fact that is not mentioned in the pleading of the party seeking to rely on it.

- 3.2. The Rules of Court provides that all documents (***Survey Plans inclusive***), sought to be relied upon by any party at the trial of the suit, must accompany the pleadings and filed along with it³⁶. **Order 3 Rule 2** of the **High Court of Ogun State (Civil Procedure) Rules** provides that:

"(1) All civil proceedings commenced by Writ of Summons shall be accompanied by

- (a) A statement of claim;**
- (b) Copies of every document to be relied**

Provided that dispute survey plans may not be filed at the commencement of the suit, but shall be filed within such time as may be ordered by the Court upon any application made under sub-rule 3 of this Rule.

- (c) List of witnesses to be called at the time at the trial and;**
- (d) Written statements on oath of the witnesses**

(2) Where a claimant fails to comply with the Rule 2(1) above, his originating process shall not be accepted for filing by the Registry"³⁷

- 3.3. The role of a Surveyor as an Expert may commence at this stage, particularly where the Surveyor is engaged by the Claimant (i.e. the party making the claim). The duty or responsibilities of the Surveyor at this stage primarily include:

a. Preparing a Survey Plan for filing in court.

- 3.4. The first duty of a Surveyor is to prepare a Survey Plan of the land in dispute showing the necessary features and landmarks on it, which may include: **buildings, streams, shrines, farmlands, access roads, developed structures etc; proper verging of disputed area of encroachment or trespass** and

³⁶ The process is loosely call the "**Frontloading Process**" which is the process by which all documents to by relied upon at the trial of suit together with the testimony of witnesses to be called are submitted to court or filed alongside the originating Summons

³⁷ **Order 3 Rule 2** of the High Court (Civil Procedure) Rules of Lagos State, Oyo State and Osun State contains similar provision save for the Proviso on dispute Survey Plan.

legend, where necessary. The Survey Plan at this stage will be filed alongside the Statement of Claim, in line with the provisions of **Order 3 Rule 2 of the High Court (Civil Procedure) Rules** set out above.

- 3.5. With respect to **Dispute Survey Plan**, the High Court of Ogun State (Civil Procedure) Rules allows a party to file a dispute survey plan after the commencement of the action upon the **leave of Court**³⁸ properly sought and obtained.³⁹ Also where for any reason, it will be **impossible** or **impracticable** for the Surveyor to have access to the land in dispute to conduct the survey, an application can be brought to seek the leave of court to enter the land in dispute for the purpose of making dispute survey plan for the suit.⁴⁰
- 3.6. It should be note that though similar provisions are not available under the **High Court of Lagos State (Civil Procedure) Rules**, and that of **Osun State**, the same application can be brought under the omnibus “**inherent power/jurisdiction**”⁴¹ of the Court and the Court in appropriate circumstances and in the interest of justice may grant such leave.
- 3.7. Where a Defendant by his defence, is challenging the Claimant's **identity, location, boundaries, extent and size** of the land in dispute, it will therefore be necessary to file his own separate survey. A Surveyor that is engaged by the Defendant may also be required to prepare a Survey plan, which will be filed alongside the Statement of Defence of the Defendant.⁴²
- 3.8. It should be noted that where a Defendant is challenging the identity of the land in dispute, but fails to a dispute survey plan, the Defendant cannot maintain that the Claimant did not prove the identity.⁴³ Therefore the filing of a Survey Plan or a Dispute Survey Plan in this instant will be material to the Defendant's success in defending his title to the land in dispute. The responsibility at this stage may require preparing dispute survey plan, juxtaposing the Claimant's Survey Plan with the Defendant's existing Survey Plan (if any) with precise and proper orientation.
- 3.9. For Surveyors engaged by the Claimant, there may be need to also to file a Composite Plan, upon been served with the Defendant's Statement of Defence and Survey Plan. This will be filed alongside with the Claimant's Reply to Statement of Defence particularly where the Defendant's defence is accompanied with a Counterclaim.

³⁸ Normally used in the legal parlance to mean “**Permission of Court**”

³⁹ See the Proviso to **Order 3 Rule 2 (1) (b)** of the **High Court of Ogun State (Civil Procedure) Rules**

⁴⁰ See **Order 3 Rule 3** of the **High Court of Ogun State (Civil Procedure) Rules 2014**

⁴¹ “**Inherent power/jurisdiction**” refers to the power or jurisdiction that necessarily derived or innate in the office, position or status of the Judge or Court.

⁴² See Paragraphs 1.12 and 1.13 above.

⁴³ See *Orodoegbulum v. Orodoegbulum* (2014) 1 NWLR (Pt.1387) 80 at 97 Paras F-H

- 3.10. Put together, by whatever means a party's Survey Plan is bought before the Court, either by filing alongside the pleadings or subsequently by leave of Court, parties must have exchanged the Survey Plans sought to be relied upon in the course of trial before the commencement of trial otherwise same will not be admitted in evidence except by order of Court and upon **"special reason"**. **Order 32 Rule 4 of the High Court of Ogun State (Civil Procedure) Rules** provides thus:

"Unless, at or before the trial, a Judge for special reasons otherwise order or directs, no documents, plan, photograph or model shall be receiveable in evidence at the trial of an action unless it has been filed along with the pleadings of the parties under these rules"⁴⁴

- 3.11. The purpose of these procedure are to ensure that neither party is taken by surprise by the contention of his opponent, and that each party has ample time to prepare his case as held in **American Cyanamid Company v. Vitality Pharmaceuticals Ltd.**⁴⁵ that **"the purpose of pleading is to give the other side at the earliest opportunity, the case the other side is to meet"**.

b. Deposition to Witness Deposition on Oath before the Commissioner for Oaths

- 3.12. As stated earlier under the High Court Rules of various Court, Ogun State inclusive, the Rules requires that the **Written Statements on Oath**⁴⁶ of the witnesses to be called at the trial of the suit should be filed alongside the Writ of Summon and Statement of Defence as the case may be. Therefore the Written Statement on Oath of Surveyor who is to be called, as an expert witness, would be filed together.⁴⁷

What is Witness Deposition?

- 3.13. A Witness Deposition is the out-of-court testimony/statement that is reduced to writing and later used in Court for discovery purpose or as evidence.⁴⁸ Simply put, it is the evidence of testimony of the witness that is reduced to writing and sworn to before a Commissioner for Oaths.

Witness Statement on Oath of a Surveyor called as an Expert Witness

- 3.14. The Witness Statement on Oath of a Surveyor called as an Expert Witness can be likened to an **Expert Report** on the survey conducted. It should therefore be well structured, well written, well presented; and should be

⁴⁴ Similar provisions can be found at in **Order 32 Rule 4 High Court (Civil Procedure) Rules of Lagos State, Osun State and Oyo State.**

⁴⁵ (1991) 2 NWLR (Pt.171) 15

⁴⁶ Also called **"Witness Deposition on Oath"**

⁴⁷ **Order 3 Rule 2 (1) (d)** of the **High Court of Ogun State (Civil Procedure) Rules** as well as that of Lagos, Oyo and Osun States.

⁴⁸ See Black's Law Dictionary 8th Edition Page 472.

free of grammatical, punctuation, and spelling errors. Even though it is primarily the responsibility of the lawyer to prepare the Witness Statement on Oath, a Surveyor, as Expert Witness, should be involved in finalizing the Witness Statement on Oath to ensure that the Statement is expressed with proper accuracy and not prone to measurements or mathematical errors. It must be prepared with due regards to objectivity and professionalism.

- 3.15. The early paragraphs of Witness Deposition on Oath should state the Surveyor's qualifications and experience. This should include: the schools attended; certification obtained; aggregate years of experience in the field; professional body or bodies he belongs to; his status in such bodies; for how long he has been in practice and in what capacities, his clientele, etc. The detail of the Surveyor's qualifications and experience remains the exclusive preserve of the expert. However for a guide, the Surveyor should ensure that his or her resume are sufficiently detailed and current, without any misrepresentations.
- 3.16. The Witness Statement on Oath should also state clearly: the instruction given to the Surveyor by the party engaging him; the date and extent of inspection of the land in dispute; descriptive facts of the land in dispute such as the location of the property; construction details on it (if any); and neighbourhood or neighbouring characteristics including access road, adjacent lands etc In the case of **Composite Plan** or **Dispute Survey Plan**, the number of Survey Plans considered and/or juxtaposed and lastly any opinions, assumptions, and limiting conditions upon which his opinion is predicated (if any).
- 3.17. This aspect of the Witness Statement on Oath should exhibit a vivid description of the Survey Plan produced, it should demonstrate a transparent process of reasoning which shows that the opinion expressed is wholly or substantially based on specialised knowledge as applied to the facts (assumed or observed). The Surveyor is also expected to carry out his work within the ambit of the practice standards and ethics prescribed by the relevant professional codes and Regulations.
- 3.18. **Upon preparing the Witness Deposition, the Surveyor will be led either by the Counsel or any official in his office to the Registry of the Court to append his signature before the Commissioner for Oaths.** This marks the end of the role of a Surveyor at the **Pre-trial Stage**. It should be noted however, that the attention of the Surveyor may be required from time to time by the party calling him or the lawyer (*even to re-appear before the Commissioner for Oaths*) for such amendments as may be ordered by the Court or required by the party or his counsel from time to time.

4.0. THE ROLE OF A SURVEYOR AS EXPERT WITNESS AT THE TRIAL

- 4.1. **Trial** is the official and formal judicial examination of evidence for the purpose of determining legal claims in an adversary proceeding. Trial involves taking of evidence from witnesses and examining such evidence.
- 4.2. For adequate preparation for trial, a Surveyor may need to conduct a physical inspection or re-inspect the land in dispute, and undertake extensive tape measurements, carry out a great deal of onsite checks. This is crucial as issues at trial may warrant a visit by the court to the **locus in quo**. A visit to the Locus-in-quo is when the Court makes a physical visit or inspection to the land in dispute for proper evaluation of the issues or question in dispute.⁴⁹
- 4.3. Some details that may seem inconsequential while preparing the Survey Plan, may become fatal during trial and a proper check would enable the Surveyor to give an answer under cross-examination which may sway the mind of the court.
- 4.4. The aforementioned pre-trial duties are to prepare the Surveyor for the most important aspect of his role as expert witness in giving of his evidence during trial. The manner in which the evidence is given can win or lose a case for the party who engages the expert. The weight that the court accords the opinion of an expert witness invariably depends on a number of factors principal among which are:
 - (a) the formal qualification of the witness;
 - (b) the practical experience gained in the field of expertise;
 - (c) the extent to which he has researched or tested the subject matter under consideration;
 - (d) the extent of his preparation for the giving of his evidence;
 - (e) his familiarity with the facts of the particular case; and
 - (f) his manner of giving evidence.
- 4.5. It is therefore necessary for Surveyors engaged as expert witness to be familiar with the usual court proceedings. After the preamble to the litigation session which include: the entrance of the judge to the court room; calling of the cases as listed on the cause list; taking attendance of parties; appearances of the advocates; and opening addresses by the Counsel advocate; trial proper is commenced by calling of Witnesses.

Section 214 of the Evidence Act, 2011 provides thus:

⁴⁹ See Section 127 (1) and (2) of the Evidence Act, 2011.

- “(1) The examination of a witness by a party who calls him shall be called Examination – in – chief
- (2) The examination of a witness by a party other than the party who calls him shall be called Cross-Examination
- (3) Where a Witness has been cross-examined and is then examined by the party who called him, such examination shall be called re-examination.”

4.6. Therefore the trial procedure or examination of witness are usually divided into **three (3) stages** to wit:

- i. **Examination – in – chief** by the counsel to the calling the witness,
- ii. **Cross – examination** by the adversary
- iii. **Re-examination** by the counsel to the calling the witness.

4.7. In land litigation, like every other court proceedings, the witness is called into the witness-box and each witness in turn undergoes three examinations as above and all witnesses are examined under 'oath' or they may alternatively 'affirm'.

Examination-In-Chief

4.8. It is a way of establishing the party's case with facts and evidence. The advocate 'leads' the witness in the box starting with introductory matters by asking such questions regarding the **names, address, occupation, qualification and experience to establish the competence or expertise of the witness is**. It should be noted that '**leading questions**' are not permitted to be asked at this stage.⁵⁰ "**Leading Questions**" are questions suggesting the answer which the person putting it wishes or expects to receive from the witness. See **Section 221(1) of the Evidence Act 2011**.

4.9. The nature of questions at stage are merely introductory such as **name, address, occupation and identification of the Witness Statement on Oath for adoption and the related and relevant Survey Plans** mentioned in the analysis contained in the Witness Statement on Oath.

4.10. With the introduction of the '**frontloading process**' earlier discussed, since the evidence-in-chief of the Surveyor is already filed before the court i.e. the Witness Statement on Oath earlier deposed to before the Commissioner for Oath as his evidence-in-chief, the Surveyor at this stage is

⁵⁰ **Section 221(2) of the Evidence Act 2011** provides that:
"**leading questions shall not be asked in examination-in-chief, or in re-examination, except with the permission of the Court**".

only required to adopt his Witness Deposition on Oath, after certain introductory questions are put to him by the Counsel to the Party calling him as a witness.

- 4.11. This brings to fore the importance of information contained in the Witness Statement of Oath of a Surveyor who is an expert witness, as not much will be allowed to be said outside what is contained in the Witness Statement on Oath. The Counsel may however lead the witness to comment on certain areas of his proof such as figures, basis and method of valuation, comparable, opinion, if there is no objection from the other party's counsel.
- 4.12. Documents, such as Survey Plans prepared by the Surveyor or analysed by him in preparing a Composite or Disputed Survey Plan can also be tendered as Exhibit(s) through the Surveyor at this stage. It is important that such Survey Plans must be mentioned in his Witness Statement on Oath.

Cross-Examination

- 4.13. After the Examination-in-chief, the witness will be 'cross examined' by the Counsel to the adversary party this is most crucial, because this will put to test the truth of the matter of litigation. The process of cross-examination, where utilised, will question the expertise and qualification of the Surveyor. Here leading questions are permitted⁵¹. Under Cross-examination, a Witness may be asked questions outside the scope of the issues or matters submitted to court for adjudication, but relevant to the facts in dispute.. According to **Section 223 of the Evidence Act, 2011** a witness may be asked questions which tends to:

- (a) **To test the accuracy, veracity or creditability of the evidence:**
- (b) **To discover who the witness is and what is and is his opinion in life;**
- (c) **To shake the credibility of the witness by injuring his character.**

- 4.14. **The following Tips may assist a Surveyor under Cross-Examination:**

- a. **A Surveyor as Expert Witness should be abreast of facts relating to the land in dispute.** For instance, he should understand the Survey analyses as contained in his Witness Statement on Oath and able to explain what formed the basis of his expert opinion.
- b. **The Surveyor should be careful to explain the Survey process and justify the conclusion with available facts.** It might be helpful to make recall to any Survey Plan to be certain as to answer to be

⁵¹ See Section 221 (4) of the Evidence Act.

given. A witness would impress the court if the answers of the witness flow naturally and not that (or seems that) it is being forced out of his mouth by his advocate. To this end there must be exhaustive Pre-trial discussions with the Counsel on the manner on which the counsel intends to take him through his proof. The conduct of such mock-examination is likely to assist the expert in responding to questions in a calm, intelligent and professional manner to the admiration of the court regardless of the intimidation by the opposing counsel.

- c. **The Surveyor should try to deal with the questions posed to him precisely.** Good memory is of great advantage here. Though he may recall his plans, request for a repeat or proper understanding of questions put to him, but this should be done sparingly. He may call for document plans, maps already tendered and admitted has exhibits before the Court to refresh his memory.
- d. **In cross examination, slang and abbreviations should be avoided** as much as possible, and the answer to the cross examination questions should be short and direct to the point. The Surveyor should not panic, take offence or be intimidated by questions that are likely to discredit or injure his character. These are attempts to throw the Surveyor off-balance and to test his steadfastness and question his credibility.
- e. **The Surveyor should be calm, courteous, firm, and bold with a good focus of truth.** He should rather concentrate on the facts and leave the weight to be attached to his evidence to the court.
- f. **A Surveyor should know his professional limitations.** It should be noted that a Surveyor, as Expert Witness, is to guide the Court in forming an opinion as to identity, size and measurements. The Surveyor should not engage in act that will suggest that he is out to win the case of the party that has called him at all cost, by going outside the area of his engagement. Therefore a Surveyor as Expert Witness must strictly confine himself to the matter in which he has received full brief.

Re-Examination

- 4.15. After the cross-examination of the witness by the counsel to the adversary, the next step is the re-examination of the witness by counsel to the party calling him. Re-examination arises only out of cross-examination to enable a witness to enlarge upon an analogous or ambiguous answer(s) extracted from him under cross-examination. It is done to clarify the facts or

information, which was distorted by the opponent advocate during the cross-examination. Re-examination may not be called for if no ambiguity arose under cross-examination. After the re-examination if there is any, the witness is asked to be discharged.

Surveyor as Expert Witness on Subpeona

- 4.16. There are also instances where a party or the court may request the attendance of a Surveyor, who was not called initially by any of the parties or whose Witness Statement on Oath was not filed alongside with the originating processes for the purpose of clarifying or also assisting the court in arriving at a conclusion on the area of his expertise.
- 4.17. Provisions of the High Court Rules of the various States, empowers a Judge at any stage of any proceedings to order the attendance of any person for the purpose of producing any writing of or other document named in the Order. Therefore a Court may require the attendance of the Surveyor-General or any other Surveyor in his office to tender a Government Survey or clarify any issue on a Survey drawn by his office. Another instance may be where the Court requires the attendance of a Registered Surveyor recommended by the Surveyors Registration Council of Nigeria, in court before to clarify two conflicting expert testimonies before it.
- 4.18. In this instance, a '**subpoena**'⁵² will be served on Witness, directing him to appear in court on a certain date and time either to tender document only or to tender document and to give evidence. A Witness may either be called on subpoena to tender documents alone or to tender document and also give evidence. Where a Witness is required to only tender documents in his custody, he will be served with a **subpoena duces tecum**;⁵³ but where the Witness is to tender document and also give evidence he will be served with a **subpoena duces tecum ad testificandum**⁵⁴
- 4.19. Where a Witness is served with **subpoena duces tecum**, he is only required to appear in court and tender document and will not be sworn on oath to be subjected to cross-examination by any of the parties to the litigation.
- 4.20. Where the witness is served with a **subpoena duces tecum ad testificandum** he may not be required file a Witness Statement Oath before the Commissioner for Oath, except otherwise ordered by the Court. It

⁵² A "**subpoena**" is a writ commanding a person to appear before a court or a tribunal, subject to a penalty for failing to comply. See Black's law Dictionary 8th Edition at Page 1467

⁵³ Is a subpoena ordering the witness to appear and bring specified documents, records or things Black's Law Dictionary Page 1467.

⁵⁴ Is a subpoena ordering the witness to appear and give testimony Black's Law Dictionary Page 1467.

should be noted that a Witness on subpoena is a Witness of the Court and not that of the party initiating the subpoena.

5.0. LEGAL ISSUES ASSOCIATED WITH EXPERT WITNESS/OPINION

Admissibility

- 5.1. The credibility of the expert witness is linked to his persuasion which largely depends on his knowledge, confidence, and integrity. Judges are most adept at weighing up knowledge and integrity very high. The expert witness should therefore seek to protect his personal and professional integrity. While personal integrity may be hard to assess, professional integrity comes over loud and clear. The Judge may find the opinions of even a highly qualified expert to be unpersuasive when the expert is not sufficiently familiar with the specific facts of the case
- 5.2. The courts have set clear rules and exceptions governing the admissibility of expert evidence. The weight or relevance given to the expert testimony is often determined by what is referred to as "**voir dire**" or "**qualifying the expert**," a process used to determine the competence of an expert witness to act as an expert, during the course of the trial process upon judgment. Admissibility of expert evidence has to do with whether the evidence is relevant; whether the expert has specialized knowledge based on training, study or experience; and whether the opinion sought to be relied upon has been shown to be wholly or substantially based on the specialised knowledge. Admissibility of a piece of evidence is one thing, its cogency or weight or probative value is another i.e. oral or documentary evidence, may not have any probative value or any weight at all, though admissible.
- 5.3. Having admitted a piece of evidence, the court goes further to consider what weight to attach to it in the light of the issues in contention. In estimating the weight, to be attached, **Section 34 (3) of the Evidence Act** provides that, regard shall be had to all the circumstances from which any inference can reasonably be drawn as to the accuracy or otherwise of the statement, and in particular to the question whether or not the statement was made **contemporaneously** with the occurrence or existence of the facts stated, and to the question whether or not the maker of the statement had any incentive to conceal or misrepresent facts. Court may therefore not attach much weight to the opinions of an expert if the factual basis of such opinions is not produced before it.

Surveyor as an Expert not Interested Person

- 5.4. The general rule, according to **Section 83 (3) of the Evidence Act 2011**, is that any statement made by a person '**interest**' in the proceedings at the

time when the proceeding were pending or anticipated are not admissible. The word “**interested**” in its ordinary etymological meaning refers to either financial interest or natural interest in the outcome of proceedings. The Courts usually warns itself to be wary of admitting report of experts prepared not at the instance of the Court but at the behest of any of the parties.⁵⁵ Therefore, the question may arise whether a Surveyor tendering a Survey Plan is an “**interested party**” within the context of **Section 83 (3) of the Evidence Act**. In **Peterside & Ors v. Wabara & Ors**⁵⁶, the Court of Appeal per **Ogunwomiju**, JCA held that:

“The attitude of the Courts is settled that a surveyor, like an expert in other field of knowledge, who is tendering a survey plan is not an “interested party” in respect of the admissibility of the document (survey plan) made by him during the pendency of the action

The rationale held by Olagunju, JCA in Okonkwo v. Okonkwo (supra) is that such a n expert has no reason or temptation ordinarily to depart from the truth as he sees it from his professional experience. He ordinarily should have no personal purpose to serve.”⁵⁷

- 5.5. Therefore the fact that a Surveyor is engaged by a party or that he prepared a Survey Plan in anticipation or while litigation is pending will not affect the admissibility of such the Survey Plan and the opinion of the Surveyor has an expert.

Whether Court is bound by the evidence of a Surveyor as Expert Witness in Land dispute

- 5.6. It should be noted that the testimony or opinion of a Surveyor Expert Witness is not binding on the Court. It is a rule that the court is not bound to willy-nilly accept or act upon the opinion of an expert, especially where such opinion contradicts common sense and the usage of mankind. However, where the expert evidence is unchallenged and uncontradicted by any other evidence, the court is bound to accept such expert evidence and act on it. In **Amosun v. Independent National Electoral Commission & Ors**⁵⁸ the stated that:

“The law is also settled that where such expert evidence is unchallenged and uncontroverted and not discredited by way of cross examination, a court or tribunal is bound to accept and act on it. SEISMOGRAPH SERVICES NIGERIA LTD V. OSENI (1976) 1 NMLR 290,

⁵⁵ Waziri v. State (1997) 2 NWLR (Pt. 496) 689

⁵⁶ (2011) 6 NWLR (Pt. 1243) 328 at 337

⁵⁷ See also the case of Gbadamosi v. Kabo Travels Ltd (2000) 8 NWLR (Pt. 688) 243

⁵⁸ (2010) LPELR-CA/I/EPT/GOV/01/2009

SEISMOGRAPH SERVICES v. AKPOROVO (1974) 6 SC 115 at 136. Salami, JCA (now PCA) put it bluntly in the case of ADELAKUN v. ORUKU (2006) ALL FWLR (pt.308) 1360 at 1373 when he stated thus:- "A court is, however, bound to accept and act on expert evidence if available and is unchallenged and uncontradicted." But this principle of law is not limited to expert evidence but equally applicable to the unchallenged and uncontroverted evidence which was not discredited under cross examination of a witness who testifies in a given case. see OMOREGBE V. LAWANI (1980) 3 -4 SC 108, OKEKE V. AONDOAKAA (2000) 9 NWLR (PT.673) 501 at 516, EGOM V. ENO (2008) 12 NWLR (PT.1098) 320."Per GARBA, J.C.A.(Pp. 114-115, paras. F-C)"

- 5.7. Therefore the Court is bound to accept the evidence of Surveyor if the evidence is credible, particularly if it is not controverted or challenged. However, where there is a conflict in the opinions of Surveyors (Expert Witnesses) called by the litigants, the court has the discretion and power to come to his conclusion by resolving such conflict, either by rejecting the opinion of the two Expert Witness and call an Independent Expert Surveyor agreed to by both parties. See ***Elabanjo v. Darlington***⁵⁹.
- 5.8. **Alternatively, the Court in order to bring a permanent resolution to the dispute and controversies between the litigants, may in its discretion and power refer the matter to an independent referee or the office of Surveyor General for a third view, with the parties bearing the cost of the exercise.**
- 5.9. It is instructive to note that regardless of the option adopted by the Court, in dealing with opinions of the Surveyors called by the litigants in support of their respective cases, the opinion of the Court on the subject matter is always the final statement on the issue.

6.0. CONCLUSION

- 6.1. Land is one of the most valuable resources for human development. Over the years, claims of right and interests over parcels of land have never diminished, so also are disputes and controversies arising from claims and counterclaims over **size, identity, features and boundaries by litigants, from time immemorial.**
- 6.2. **The resources embedded under the land surface are even more valuable and inexhaustible that perpetual disputes in respect of rights thereon are assured. Here lies the importance of Surveyors, above other persons, whose**

⁵⁹ (1970) 1 All NLR 41

opinions and expertise will be required as constant aids for resolving all problems of land identity.

- 6.3. Surveyors must therefore count themselves privileged and fortunate that, irrespective of economic oscillation, their expertise does not know recession. It is in this light that I, commend the **Nigerian Institution of Surveyors, Ogun State Branch**, for choosing this topic, which will be relevant to its members at all times.
- 6.4. **And I hope that the purpose of calling a Surveyor in land litigations, will engender more certainty and less confusion in the vexed areas of land litigations.**

THANK YOU.