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**AKINTOLA A. JIMOH**

*Editor*

## THE NOTARY PUBLIC FOR NIGERIA

BY

DR. ENEFIOK ESSIEN\*

### INTRODUCTION

Historically, the office and role of a notary public (or notary, for short) for Nigeria is traceable to England.<sup>1</sup> Even till today, though the office (or appointment) of a notary public for Nigeria is governed by the Notaries Public Act,<sup>2</sup> his role, functions or duties can only be gleaned from the notarial practice in England. According to S. 2(2) of the **Nigerian Notaries Public Act**:

*“A notary appointed by the Chief Justice of Nigeria shall perform the same duties and exercise the same functions as a notary in England.”*

Thus, to know the functions of the Nigerian notary, resort must invariably be made to England. This paper sets out to examine the functions of the notary public in Nigeria, and in doing so, reference shall necessarily be made to England, and occasionally to Scotland<sup>3</sup> and the United States of America (particularly to the State of Alaska). It is intended that this examination will not only throw some light on the notarial practice in Nigeria but will as well give guidance to those who act as notaries public.

### DEFINITION

In Nigeria, an appointee to a notarial office is statutorily designated or appointed as a “notary public for Nigeria”, though for brevity he is usually

\* *Dr. Enefiok Essien, LL.M (Lagos), PhD (B'ham), Notary Public, Senior lecturer in law at the University of Uyo, Nigeria, and sometime Commonwealth Study Fellow.*

<sup>1</sup> *For an exposition of the law relating to notaries, see the Stair Memorial Encyclopaedia, vol. 13, p. 485; Brown, “Origin and Early History of the Office of Notary” 1935 47 JR 201, 336.*

<sup>2</sup> *Cap. 331 Laws of the Federation of Nigeria 1990.*

<sup>3</sup> *Scotland is part of the United Kingdom, but its substantive law, its court system and its legal professions are distinct from those of England and Wales: Ready, N. P.: Brooke's Notary, First Supplement to the Eleventh Edition, London: Sweet and Maxwell. 1994 at 7.*

referred to simply as a "notary public" or, even more laconically, as a "notary".<sup>4</sup> The question "who is a notary public" is neither raised nor answered in the Nigerian Notaries Public Act. The Act however makes it clear that the person whom the Chief Justice of Nigeria deems fit to be appointed to that office must be a "fit and proper person<sup>5</sup> being a legal practitioner",<sup>6</sup> probably because upon appointment, such a person is automatically deemed to be an officer of the Supreme Court.<sup>7</sup> These, however, do not constitute a definition; they all go to attributes or qualifications, to which we shall come to shortly.

In the Notary Manual of the State of Alaska, a notary public is variously defined as "a citizen of *high moral character and integrity*, appointed by the State to perform a ministerial witnessing function in connection with written agreements"<sup>8</sup>; "an official appointed by the State to serve the public as an *impartial* witness, with duties prescribed by law"<sup>9</sup>; a "person of *proven integrity* appointed by government to serve the public as an *impartial* witness, with duties specified by law".<sup>10</sup> These definitions fit the Nigerian notary except that unlike his colleague in Alaska who is appointed by Government, i.e. by the Lieutenant Governor,<sup>11</sup> he is appointed by the Chief Justice of Nigeria.<sup>12</sup>

In England, Scotland and Nigeria, there is no natural age limit at which one may be appointed a notary,<sup>13</sup> and once appointed, the Nigerian notary

<sup>4</sup> See s. 2(1) of the Notaries Public Act. In England, the term often used is "Public notary". See e.g. the Public Notaries (Qualification) (Amendment) Rules 1993.

<sup>5</sup> In practice, to determine that an applicant is a fit and proper person for appointment as a notary, a certificate to that effect is often obtained from a high court judge (or high court judges) of the State where the applicant is based. In England, such Certificate of Good Character may be given by (i) a person of good standing and character (ii) a person who has known the applicant for a period not less than 5 years and, (iii) he is not related to the applicant by blood, marriage or adoption, and he is not a professional partner, employer or employee of the applicant. The conditions are conjunctive. See rule 9 sub-rule (2), paragraph (b) of the Public Notaries (Qualification) Rules 1991, as amended by the Public Notaries (Qualification) (Amendment) Rules 1992, and further amended by the Public Notaries (qualification) (Amendment) Rules 1993.

<sup>6</sup> S. 2(1)

<sup>7</sup> s. 6

<sup>8</sup> At p. 1 (emphasis mine).

<sup>9</sup> At p. 4 (emphasis mine).

<sup>10</sup> At p. 8 (emphasis mine)

<sup>11</sup> S. 44.50.010 of the Notaries Public Alaska Statute 44.50.

<sup>12</sup> S. 2(1) of the Notaries Public Act, Cap. 331.

<sup>13</sup> There is however a legal age limit: the applicant for appointment as a notary must have at least seven years post-call experience as a legal practitioner before he may be appointed a notary.

may exercise his notarial functions in any of the States in Nigeria. This is unlike in the State of Alaska where the appointee must be at least 19 years of age<sup>14</sup> and may not use his notary seal outside Alaska's boundaries. Documents that originate in other States of the United States of America may be notarised only as long as the notary is in Alaska and in such case he must identify on the notary certificate the jurisdiction in which the notarisation took place. Significantly also, the notary in Alaska, and indeed in all the States in the United States, is "commissioned" for a fixed term, say four years, from the date of commission.<sup>15</sup> In Nigeria a notary is "appointed" not for a particular State but for the whole federation, and his appointment is for an indefinite term, unless he is for some reason suspended or his name is removed from or struck off the register of notaries.<sup>16</sup> In England and Scotland the appointment is also permanent.<sup>17</sup> This distinction is of great practical significance particularly when a Nigerian notary is notarising a document which arises from or/and is for use in the United State of America. Such documents normally require that the notary states when his/her notary commission would expire. In Nigeria only legal practitioners<sup>18</sup> may be appointed as notaries.<sup>19</sup> In Scotland only solicitors may be so appointed. In the State of Alaska, any person of not less than 19 years of age and who is a resident of Alaska may be appointed a notary. Since such persons may not be "attorneys-at-law", as legal practitioners in America are called, an educational test was

<sup>14</sup> S. 44.50.020 of the Notaries Public Alaska Statute 44.50.

<sup>15</sup> S. 44.50.030 of the Notaries Public Alaska Statute.

<sup>16</sup> Under ss. 7 and 8 of the Notaries Public Act, Cap. 331.

<sup>17</sup> Unless struck off the Roll of Notaries or suspended from practice for notarial misconduct, i.e.: (i) fraudulent conduct (ii) practising as a notary public without a valid practising certificate or in breach of a condition or limitation imposed in a practising certificate, (iii) other conduct unbefitting the office of a public notary. See, for England: Public Notaries (Conduct and Discipline) Rules 1993, r. 2(h); Public Notaries (Practising Certificates) Amendment Rules 1993, r. 3, which amends the Public Notaries (Practising Certificates) Rules 1991. In Scotland the admission of notaries is regulated by Part V of the Solicitors (Scotland) Act 1980, as amended by the Solicitors (Scotland) Act 1988 and the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990. The petition for admission is addressed to the Inner House of the Court of Session in Edinburgh. Any solicitor is eligible for admission.

<sup>18</sup> In Nigeria, the term "legal practitioner" is used to denote someone who is qualified to practice as barrister and solicitor in Nigeria. See s. 24 of the Legal Practitioners Act 1975, Cap. 207 of the Laws of the Federation of Nigeria 1990, as amended by the Legal Practitioners Act (Amendment) Decree 1994.

<sup>19</sup> In England the profession of notary is separate from that of solicitor and although many notaries in England are also solicitors not all are, and there are firms comprising notaries only. In London there is a separate organisation which performs notarial functions, the Incorporated Company of Scriveners, whose numbers are strictly controlled and regulated. Members of this body are described as Scrivener Notaries, as opposed to Solicitor Notaries.

implemented by the Lieutenant Governor or the State, starting January 1, 1992. The test was enacted to help notaries public within Alaska become more familiar with Alaskan notary laws and to give them a general information on the duties of being a notary public.

No such test is conducted in Nigeria for applicants for notarial appointment. This is probably because the applicants are normally legal practitioners of some years standing, who are therefore presumed to know all the notarial duties and are already aware of the general information in that regard. It is however doubtful that this is the reality. Indeed, even in the United Kingdom there is admittedly inadequate knowledge of the work of notaries not only by the notaries themselves but also by the general public.<sup>20</sup> This is why, to help develop recognition of the work of notaries in the United Kingdom, a new body has been set up: The United Kingdom Notarial Forum, which comprises the English Notaries Society, The Society of Public Notaries of London (representing the Scriveners), The College of Notaries of Northern Ireland and The Law Society of Scotland. In addition, the Isle of Man, Jersey and Guernsey have observer status. The Forum meets informally to discuss matters of mutual interest and to promote the role of the notary.

This is a very necessary development which should be emulated by Nigerian notaries so as not only to enlighten members of the public about the role of notaries, but also to synchronise notarial practice, develop and exchange ideas among the notaries *inter se*, particularly so as to meet the requirements of, and be of continuing relevance in this fast-moving computer age. One ready area where the development of notarial ideas is most wanting is that of electronic transmission of documents. There is, for example, the present day electronic transmission of documents, and the introduction of CREST where paperless share dealings can be made electronically. With an increasingly computer-dependent age especially as we enter the millennium, it is probable that in the not too distant future, many commercial transactions will be made electronically without the need for paper. Certainly, some means will need to be devised by the Nigerian notary, of authenticating such electronic documents. It is also probable that some form of digital signature will be called for.<sup>21</sup> This

<sup>20</sup> Brand, D.: "The Modern Notary Public in Scotland" *Journal of the Law Society of Scotland* (1997) vol. 42 No. 2 pp. 50-52 at 50.

<sup>21</sup> This new super-computer-literate notary has been given a name already: the Cyber-Notary. Indeed, the United Kingdom Notarial Forum has already formed a company which will be used to promote the introduction of the Cyber Notary.

may be dismissed by some as tomorrow's (or future) problem and, in any case, one may ask, why should we try to cross the bridge when we have not yet come to it? It is our view, however, that this is one case where the Nigerian notary will be caught napping if he has to wait for the problem before searching for a solution. Thus, this is one area of practice that should be reflected upon by the notary even as we proceed to consider some of today's functions of a notary.

## Present Functions of a Notary

### Noting Protests

It is normally the case that when a protest is made in maritime matters, e.g. against poor wind and weather conditions by a sea captain on arrival in a port, it is made before a notary public. The Nigerian Notaries Public Act recognises this function when, in providing for magistrates and ex-officio notaries it states:

*"S.17(1) All magistrates and also the collectors of customs and excise at the ports in Nigeria shall ex-officio be notaries public:*

*Provided that a collector of customs and excise, shall only exercise the duties of a notary in respect of minuting or noting or extending ships' protests and such collectors shall not exercise any of these duties at any port at which a notary appointed by the Chief Justice of Nigeria is available".*

Further recognition of this function is given in *Order 47 rule 5* of, and the Third Schedule in, the **Akwa Ibom State High Court (Civil Procedure) Rules 1989**, which indeed applies uniformly throughout Nigeria. The rule provides for the present notarial functions as including the noting of protest on bill or (promissory) notes, extending such protest, noting or minuting and extending ship's protest and attesting any document or translation thereof. A similar provision is made in *Order 56 rule 6* of, and Appendix 3 to, the **Federal High Court (Civil Procedure) Rules 1999**. From the Appendix, it appears that the Notary may as well perform (which is why he may for) the registration of a certificate of a judgment of a high court and, indeed, of any court.

## Administering Oaths and Affirmations

One of the traditional, and in Nigeria one of the commonest, tasks for a notary is that of administering an oath or the receipt of an affidavit or solemn affirmation.<sup>22</sup> He takes depositions and affidavits, administers oaths and affirmations, in all matters incidental to the duties of the office, or to be used before a court, judge or officer.<sup>23</sup>

Before notarising<sup>24</sup> an affidavit or other deposition however, it behooves the notary to ensure and satisfy himself that the mark (usually an "x") or thumb-impression<sup>25</sup> or signature on the document is that of the person whom it purports to be. In the State of Alaska it is statutorily stipulated that the notary shall require the "presence and identification" of the signer. In Scotland as well, the notary is required to satisfy himself as to the identity of the deponent, and also be satisfied, in the case of affidavits, that he understands the meaning of the contents of the affidavit.<sup>26</sup> The need to ensure that the deponent understands the content and the import of the words used in the document is all the more important where the person (or one of the persons) before the notary is illiterate.<sup>27</sup> In such case of signature-by-mark or thumb-impression, the notary must satisfy himself that the deponent understands what he is thumb-impressing or marking. To this end, if the document is short it may be prudent to read it over to the deponent and ask if he or she understands what is written. If the document is lengthy, the notary may summarise or paraphrase the contents before signature, mark or thumb impression. Indeed, the Evidence Act<sup>28</sup> makes it obligatory that where the deponent is illiterate, the

<sup>22</sup> See *Notaries Public Act, s. 18; Oaths Act, Cap. 333 Laws of the Federation of Nigeria 1990, s. 6.*

<sup>23</sup> Same for the Alaskan notary: *Sec. 44.50.060(3) of the Notaries Public Alaska Statute, op. cit.*

<sup>24</sup> By notarisation is meant a certification by an impartial witness that a signer has been screened and that an oath has been administered.

<sup>25</sup> A person who cannot write (and therefore cannot sign) due to illiteracy may simply make a mark or thumb-impression on the document: *s. 90 of the Evidence Act, Cap. 112 of the Laws of the Federation of Nigeria 1990.*

<sup>26</sup> See *Ready, N. P.: Brooke's Notary, op cit., p. 8.*

<sup>27</sup> As stated in *Jiboso v. Obadina (1962) WRNLR 303*, in the absence of evidence to the contrary, the fact that a person merely made a mark or thumb-impressed a document rather than sign it, is *prima facie* evidence that he is illiterate. In *Ntiashagwo v. Amodu (1959) WNLR 273*, an "illiterate person" was defined as a person who is unable to read with understanding, and to express his thoughts by writing, in the language used in the document made or prepared on his behalf. Thus, a person may be sufficiently literate to sign his name and read figures but he may not be sufficiently literate to understand the meaning and effect of the document which he is signing: *SCOA Zaria v. Okon (1960) NNLR 34, (1959) 4 FSC 220*. Illiteracy is therefore a matter for evidence.

<sup>28</sup> *Cap. 112 of the Laws of the Federation of Nigeria 1990.*

contents of the document be read over and interpreted to him until he or she appears to understand the same before affixing his/her thumb impression or mark thereto,<sup>29</sup> and that in such case, a jurat<sup>30</sup> be inserted to the effect that these requirements have been met, and that the mark or thumb impression was made in the presence of the notary.<sup>31</sup> All these necessarily require that the signature, mark or thumb impression must be made in the notary's presence<sup>32</sup> and the notary should obtain some credible form of identification or otherwise satisfy himself as to the identity of the deponent.

Significantly too, where an oath or affirmation is required, the notary must ensure that the oath or affirmation is actually given. For this purpose, it may be regarded as good practice to ask the deponent to stand up and raise his or her right hand and repeat the words asked by the notary. The words could be along the lines: "I swear by the Almighty God that the contents of this document are true ..." or "I affirm that...". It is the words "swear by Almighty God" or "solemnly affirm" that constitute a solemn oath.

## General

For the purpose of his notarial functions, a notary must provide and keep an official seal which bears his full name as it appears in his notarial certificate and the words "Notary Public for Nigeria". This is not directly provided for in the **Nigerian Notaries Public Act**, but may be inferred from the case of *ex-officio* notaries where the Act provides that they "shall use a seal bearing thereon the name of their offices and in addition the words "Notary *ex-officio*".<sup>33</sup>

It is not clear if the seal should be a seal press (iron seal) or rubber stamp. Whatever it is, however, it appears essential that the seal should be such as will print or emboss a seal that legibly reproduces, under photographic methods, the words on the seal. It appears also that the seal may be in any

<sup>29</sup> S. 90(f) and (g)(iv).

<sup>30</sup> A jurat is a certificate to the effect that the notary has watched the signing, marking or thumb impressing of the document and administered an oath or affirmation in which the signer, marker or thumb-impresser declares the document to be truthful and accurate.

<sup>31</sup> S. 90(g)(v). In *Anuforo v. Obilor* (1997) 11 NWLR (Pt. 530) 661, the court held, at 676-677, that by virtue of s. 90 (g)(i) of the Evidence Act, where a deponent makes a mark instead of signing, there shall be a jurat stating that fact and that the mark was made in the presence of the person before whom it is taken.

<sup>32</sup> It may constitute a professional misconduct for a notary to send a document for signature and for the notary to "notarise" that signature without having seen the deponent sign or without having seen that signature acknowledged.

<sup>33</sup> S. 17(2).



form: circular or rectangular.<sup>34</sup> In England and Scotland<sup>35</sup> the keeping of the notary seal is as well a statutory requirement. However, though Scots notaries have seals, their use is not regarded as compulsory for documents to be used inside Scotland.

Generally speaking, a notarial act<sup>36</sup> by a notary in one country is recognised and acted upon in another country. For Nigeria, the Oaths Act<sup>37</sup> specifically provides:

*“Section 11(1) Any oath or affidavit required for any court or for the purposes of registration of an instrument may be taken or made in any place out of Nigeria before any person having authority to administer an oath in that place.”*

Also, by **Order 9 rule 12 of the Akwa Ibom State High Court (Civil Procedure) Rules 1989**, which applies uniformly in other States of the Federation of Nigeria:

*“A document purporting to have affixed or impressed thereon or subscribed thereto the seal or signature of a ... Notary Public ... in any part of the Commonwealth outside Nigeria in testimony on an affidavit being taken before ... him in that part shall be admitted in evidence without proof of the seal or signature of that ... Notary Public ...”*

However, the notary has to be careful to ensure the document meets all the formalities needed for it to be valid in the foreign jurisdiction. In this regard, vital jurisdictional issues fall for consideration: What is the law of the jurisdiction where the document originated? What is the law of the jurisdiction where the document is to be notarised? And finally, what is the law of the jurisdiction where the notarised document is to be used? The law of the jurisdiction where the document originated, or of the place where the

<sup>34</sup> In Alaska the seal, if circular, may not be over 2 inches in diameter and if rectangular, may not be more than 1 inch in width by 2.5 inches in length. See the *Alaska Notary Manual*, *op. cit.*

<sup>35</sup> In Scotland each notary has a Latin motto, which forms part of the seal. This is due to the close connection of Scots law to the civil law systems: *Brooke's Notary*, *op. cit.* at p. 7. It has however been said that the motto on the seal need not be in Latin: *Brad, D.: "The Modern Notary Public in Scotland"*, *op. cit.* at p. 52.

<sup>36</sup> "Notarial act" means acts that the laws and regulations of the State authorise notaries public of the State to perform, including the administering of oaths and affirmations, taking proof of execution and acknowledgement of instruments, and attesting documents.

<sup>37</sup> Cap. 333 Laws of the Federation of Nigeria 1990.

document is to be used, may stipulate that only its own notaries can act. If this is so, then the Nigerian notary has no business notarising the document. Where, however, there is no such stipulation, it means that any notary in any country may act. However, in notarising a document which originates or is to be used abroad, great care must be taken not only to fulfil the formalities under the law of the forum but also that of the foreign country, where these differ from those of the forum.

No matter where the document originates or where it is to be used, the first task of the notary is to determine if the document needs notarisation. The question is a strictly legal one. Where the document has a printed provision for notarisation or where a notarial certificate is attached for completion, no question arises. Where however there is no such provision or attachment it is left to the issuing or receiving agencies of the document to say if notarisation is called for.

Having decided or been satisfied that notarisation is necessary, the next question is that of proper placement. Here again, the document may indicate the place where the notarial seal should be placed. This may be just a blank space or a space with the letters LS (i.e. the place of the seal)<sup>38</sup> printed thereon. In such case the seal should be affixed on the space provided, with care being taken to ensure that it can easily be read and that it is not over the notary's signature or printed matter if possible. In the circumstance that the space available is not enough for an embosser (iron) seal or rubber stamp, one may probably adopt the practice in the State of Alaska whereby the notary may affix a separate notary certificate to the document. This is called a loose certificate, and the notary may place the seal half on the loose portion of the certificate, and half on the original document. Where the notarial certificate is attached to the document, it is significant that it should be identified in some way as belonging to that document. The notary might, for example, write in the margin: "This certificate is attached to the Power of Attorney dated August 12, 1999, signed by **Mr. Nduke Obong**". Alternatively, the notary may carefully place the rubber stamp information (or the embosser seal) on the document in a place where it will cover only a very small part of the printing on the document.

<sup>38</sup> The letters "LS" is an abbreviation for the Latin words, *Locus sigilli*, meaning the place of the seal. See: *First National Securities Ltd. v. Jones* [1978] 2 All ER 221.

In the State of Alaska a signature-by-mark notarisation<sup>39</sup> requires two witnesses in addition to the notary.<sup>40</sup> In England (and indeed in Nigeria) when certifying a document, say a power of attorney, the certificate must be at each and every page of the document. It is probably immaterial where in the document the certificate is placed provided it refers to and certifies the document.<sup>41</sup> However, it may be regarded as good practice to place it "at the foot or end"<sup>42</sup> of each page. This precludes copying a document in a way that there is a change in pagination, either by reproducing more than one page of the original on one page or by showing only part of an original page on a sheet of the copy. If certifying a copy as being that of the original, the certification may be something like: "This is certified to be a true and complete copy of page 1 (as the case may be) of the 3-paged affidavit of XYZ dated 30 July 1999", followed by the notary's signature, date and seal.

## WHERE A NOTARY CANNOT ACT

S. 19 of the Nigerian Notaries Public Act provides that "No notary shall exercise any of his powers as a notary in any proceedings or matter in which he is interested". This means that a notary cannot notarise his own signature and, probably, the signature of his own relatives. "Interest" may be quite wide and embracive, but it can probably be safely said, following the practice in Scotland,<sup>43</sup> that a notary should not notarise a document that confers on his or her spouse, son or daughter, "a benefit in money or money's worth". The notary should not put himself in such a position that if the notarised document should ever be challenged in court, it might be determined that he was not acting as an impartial witness when the document was notarised.

<sup>39</sup> *i.e.* where the deponent who is physically handicapped or is illiterate, merely makes his mark because he cannot sign. It is submitted that this will apply as well to cases of thumb-impression.

<sup>40</sup> See the *Notary Manual of Alaska*, *op. cit.*

<sup>41</sup> In Scotland the main governing statutes in this regard are the *Subscription on Deeds Act 1681* and the *Deeds Act 1696*. Signatures appear only at the end, except for wills, which must be signed by the testator on each sheet. Notaries are not normally necessary for the execution of deeds in Scotland: *Brooke's Notary*, *op. cit.* This however has the important exception that powers of attorney for use outside Scotland are normally notarially attested. Such attestation is probably only at the foot or end of the document.

<sup>42</sup> This brings to mind the spate of litigation regarding the proper placement of signature on a will. See s. 9 of the *Wills Act 1837*, a statute of general application in Nigeria. In England this provision has now been substituted by the *Administration of Justice Act 1982*, s. 17.

<sup>43</sup> Under the *Requirements of Writing (Scotland) Act 1995*.