The Quagmire of Conflicting Court Decisions: A Look at the Mechanism of Subpoenas in Civil Trials in Nigeria

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Abstract

Subpoena being an instrument of law commanding the compulsory attendance of witnesses to court proceedings either to testify, produce documents or both is a tool that helps in the attainment of justice. The justice sector would have suffered a lot of setbacks in the adjudication of cases if not for this mechanism. This paper examines the mechanism of subpoenas in Nigeria, United States and Canada, and the conflicting decisions of the Court of Appeal in Nigeria surrounding it. The doctrinal method of research was adopted in this paper by analysing laws, rules of court, judicial decisions and relevant papers in arriving at our findings. The work espouses the conflicting decisions of the court on the mechanism of subpoena and the confusion and hardship it has created in achieving justice particularly in election petition cases. The judicial authorities and rules of practice created a dichotomy on the application of the principle of subpoena. This is with particular reference to election petition where the Rules of Procedure for Election Petitions contained in the 1st Schedule to the Electoral Act, 2022 stipulates that the written statements on oath of the witnesses must accompany the Petition. Where the witness statement of the witness does not accompany the Petition, evidence of the witness cannot be given via the instrumentality of subpoena while in other civil matters evidence can be given via subpoena. The paper finds that where subpoena duces tecum is issued for the production of document(s) in court some judicial authorities are to the effect that it need not be tendered through the witness while others assertively holds that it can be tendered through the witness. In addition, in electoral matters, the judicial authorities

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are insistent on having witness deposition on oath within the twenty-one days even if the subpoenaed witness is an adversary. The work postulates that there is need for certainty in this area of law for the objectives of the concept of subpoenas to be achieved. It recommends that the testimony of official witnesses or adversaries should be allowed to be given viva voce in the interest of justice, progress and development of our electoral jurisprudence.

Keywords: *Subpoenas, Viva voce, Civil proceedings, Witnesses, Deposition subpoena.*

Introduction

One of the potent tools available to a party in the course of resolving disputes before a court is the use of subpoenas. Subpoenas are common features in courts in different jurisdictions of the world.[i] In Nigeria, the power of the courts to issue subpoenas is principally statutory and is provided for in the different Rules of Courts.[ii] The word "subpoena" is derived from two Latin words: "sub" – meaning "under"; and "poena"- meaning "penalty". This literally means "under penalty". Therefore, when a person is either summoned to come and testify or to produce a document, he is (if he is a compellable witness) under a solemn duty to do so. Such a person is to appear or produce the document, or he stands the risk of being penalized by the court. This can be for instance, by being held to be in contempt of court.[iii] Contempt of court refers to any action that disrespects or obstructs the functioning of the court.[iv]

Subpoena is a writ commanding a person designated in it to appear in court under a penalty for failure. Subpoena arrived in Modern English (through the Middle English suppena) from the Latin word sub poena, a combination of 'sub' and 'poena', meaning "penalty" as stated above. Other poena descendants in English include impunity ("freedom from penalty"), penal ("of or relating to punishment"), and even punish.[v] The subpoena has its source in English Common Law and it is now used almost with universal application throughout the English Common Law world. John Waltham, Bishop of Salisbury, is said to have created the writ of subpoena during the reign of Richard II.[vi] However, for civil proceedings in England and Wales, it is now described as a witness summons, as part of reforms to replace Latin terms with plain English understandable to the layman.[vii]

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In civil proceedings, a claimant can prove his case to entitle him his claim with or without calling witnesses as a party may prove his claim before the court without necessarily calling witnesses. An example is when an action is commenced by originating summons or originating motion. Such an action would be proved through affidavit evidence. On the other hand, in actions commenced by writ of summons or petitions, witnesses are expected to give oral testimony. Where witnesses are expected to testify, the witnesses would either appear before the court voluntarily or through the instrumentality of the law. As such, subpoena is an instrumentality of the law to secure attendance of a witness. The point has been made - a subpoena is used where a potential witness is either unwilling to testify or there is need for a formal request from the court inviting him to court as a basis for permission to testify or tender documents.[viii] A party may need another person, who is a total stranger to the suit to give evidence in his favour. According to Efevwerhan (2023), this is necessary in cases where evidential burden has to be discharged by a preponderance of evidence at the trial; and when corroboration is a matter of law, imperative to establish a fact.[ix] This erudite author discussed the types of subpoenas as applicable only in Nigeria but did not consider the deposition subpoena as it is applied in the United States of America. This research shall endeavour to venture into discussing the deposition subpoena and how it can be of great impact to our regular civil and electoral matters in Nigeria. The formal written order known as subpoena may require a person to appear before a Court or other legal proceedings, such as a Congressional or Parliamentary hearing.[x] This article is a discourse on subpoena used in securing the attendance of a witness to a court and tribunal proceeding. Subpoena is used in both criminal and civil proceedings in court. However, the focus of this article is subpoenas in civil proceedings only.

Conceptual clarification

It has been stated earlier that a subpoena is a writ or order commanding a person to appear before a court or other tribunal, subject to a penalty for failing to comply.[xi] A subpoena has also been defined as a writ commanding a person designated in it to appear in court under a penalty for failure.[xii] By way of a general definition, a subpoena, is a formal document issued by the Court commanding a person required by a party to a suit to attend before the Court at

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a given date, to give evidence on behalf of the party or to bring with him and produce any specified document required by the party as evidence or for both purpose.[xiii] Thus, a subpoena is a document signed by a Judge commanding a person to attend Court as a witness to give evidence at the trial.[xiv]

- Viva Voce: *Viva voce* is a Latin word that means by voice. In law, it refers to evidence which is given orally to a court by a witness' word of mouth.[xv] As applied to the examination of witnesses, this phrase is equivalent to "orally". It is used in contra-distinction to evidence on affidavits or depositions.[xvi]

- Civil Proceedings: Civil proceedings means proceedings which are not criminal in nature and which are before the Supreme Court, the High Court, or magistrates court or any other court to which the strict rules of evidence apply.[xvii] By civil proceedings in this context, we mean matters such as land matters, torts (i.e libel, slander, defamation, etc.), matrimonial causes, electoral matters/petition, recovery of debt, etc.

- Witnesses: Witnesses are legal persons; either natural or artificial, required to give evidence or information about a court case. It has also been defined as a person who sees an event happening, especially a crime or an accident or someone who is asked to present at a particular event and sign their name in order to prove that things have been done correctly.[xviii]

- Deposition Subpoena: A deposition subpoena is a court order requiring a person who is not a party to a lawsuit to provide copies of business records and/or appear at a deposition to answer questions asked by one party in a lawsuit.[xix] This is a type of subpoena used in the United States to secure information about a court case from a witness or person that is not a party to the case via a deposition or outside of court.

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The Machinery of Subpoena

Subpoena is a powerful machinery used in securing attendance of witnesses in court proceedings. The means by which this is achieved is due to the nature and scope of subpoena. There are different types of subpoena which serve different purposes. The nature, scope and types of subpoena are discussed below.

- **The Nature of Subpoena**

The Evidence Act[xx] succinctly provides for the situation to ensure the attendance of a person in a proceeding whether he is a party to it or not. This has helped in curtailing circumstances where persons with vital facts that could lead to the just determination of a matter fails or refuses to attend the trial. The provisions of the Evidence Act read thus:

> A person, whether a party or not in a cause, may be summoned to produce a document without being summoned to give evidence, and if he causes such document to be produced in court, the court may dispense with his personal attendance.[xxi]

In the course of the proceedings, whether a person is a party or not, if a witness summons or subpoena is served on such person, he must make himself available in court, failing which he will be regarded as being in contempt of court and punished appropriately, and usually summarily.[xxii] Another consequence for failing to comply with a subpoena is that the court may issue a warrant for the arrest of a subpoenaed witness who has failed to attend court.[xxiii] A subpoenaed witness as the name suggests is a witness who has been compelled by an order of court called a *subpoena* to come to court to either testify, or to bring documents to court, or both.[xxiv] Thus, there are different types of subpoena. A subpoena may be issued and served on a person to attend the court and testify only, in which case it is known as *subpoena ad testificandum*,

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or for the person to produce document in his possession or control, which is referred to as *subpoena duces tecum*, or for the person to testify and also produce document.[xxv]

Subpoena is issued by the court upon the application made by a party. In Nigeria, the application is not brought or made in the form of motion. It is in the form of a letter similar to an application for adjournment. In the case of *Incorporated Trustees of Island Club & ors v. Sikuade*[xxvi] it was held that:

> It is trite that a subpoena is not issued on a motion that is heard ex parte or inter parties but a simple letter to the Court for the issuance of the subpoena. The issuance of a subpoena is basically done on a one -sided application not even a motion and it is an order of Court made pursuant to the jurisdiction of the Court which is exercised in chambers.

It is imperative to note that referring to a subpoena as an order of court does not mean that the order is secured via a motion ex parte or on notice. The party's application via a letter suffices. The issuance of the subpoena commanding a person to appear before a court or tribunal makes it an order. It is made, signed or issued under the hand of the presiding judge(s).

The mode for applying for a subpoena by a party depends on whether the court in question has precedent forms or not. The practice in Nigeria is that where the court has existing printed copies of the subpoena, the details of the parties, date to appear as previously adjourned and other vital details would be filled in. Where the court does not have printed precedent forms for subpoenas, the solicitor is expected to prepare one and take it to the registry for filing along with his application letter. The party applying should as practicable as possible decide what type of subpoena would be required in the circumstance of his action. This is hinged on the fact that the application is expected to indicate the type of subpoena applied for. This is particularly

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so as the various types of subpoenas have different legal effects and consequences. Where an application for subpoena *duces tecum* is granted, issued and served but the subpoenaed person neglected, ignored or refused to comply as ordered, the person shall be in contempt of court and the party that applied for it can tender the secondary document in evidence. This was the position held in the case of *Incorporated Trustees of Island Club* & *Ors* v *Sikuade*[xxvii] where the court held that:

> The consequences attached to subpoena duces tecum are two-fold: If the person summoned does not produce the document secondary evidence of it can be given by the adverse party on the issue; and second, contempt proceedings can be initiated against the person that defaulted in complying with the terms of the subpoena.

Interestingly, a subpoena is coercive in nature because it is aimed at compelling the person by order to attend court on a scheduled date. The convenience of the person subpoenaed is not considered at the time of the issuance. Failure to comply with it has coercive consequences as it may result in the arrest of the person subpoenaed, if there is proof of service on such person and the sum prescribed by law was given for the person's expenses.[xxviii] Where a party is subpoenaed to appear before a Court or Tribunal, it is a very serious matter and not one to be treated with levity. Thus, where a person is subpoenaed to produce a document, he must produce the document as commanded in the subpoena or suffer the penalty.[xxix] This is one of the instances where the person can be in contempt of court due to the disobedience. Any conduct which may amount to wilful disrespect to the authority of a court may cause a person to be cited for contempt.[xxx] In the case of *A.G. v Magazine*,[xxxi] Lord Diplock defined contempt as "… an interference with the due administration of justice either in a particular case or more generally as a continuing process."[xxxii] There are two types of contempt; criminal and civil, which may be committed in the face of the court – known as contempt in facie curiae, or outside the face of the court – known as contempt ex facie curiae.[xxxiii] Conducts that constitute criminal contempt includes prejudicing a fair trial,

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scandalising the court, and interrupting court proceedings. Civil contempt on the other hand involves wilful disobedience of the order of court. It also involves a breach of any undertaking given by a lawyer to the court, whether such undertaking is in writing or not. Civil contempt is also known as contempt on procedure.[xxxiv]

It should be noted that a subpoena issued by a court in Nigeria cannot be enforced on a person outside Nigeria nor can it bind a person outside Nigeria. This is because the territorial jurisdiction of any court in Nigeria does not extend beyond the national boundaries.[xxxv]

The nature of subpoena in the United States and Canada is also coercive. In these jurisdictions, subpoena is also regarded as a legal document that orders a person to appear in court or before a tribunal, and such person can be punished for failure to attend.[xxxvi] The mode of applying for subpoena in these jurisdictions is by filling out a Subpoena form. In the United States, a party seeking to subpoenaed a witness is required to take a blank subpoena form to the court clerk's office for the clerk to issue the subpoena. This means the clerk will sign and stamp the subpoena form before it is filled out.[xxxvii] In Canada, a witness is notified that he needs to attend court when a court form called a subpoena is served on the witness.[xxxviii] The mode of applying for subpoena in the two jurisdictions mentioned above is clear – by filling out a subpoena form. However, in Nigeria, the Court of Appeal has stated the mode of applying for subpoena which is by a simple letter to the Court for the issuance of the subpoena.[xxxix] But in practice, the mode of applying for a subpoena depends on the particular court in question, whether it has precedent forms or not. Where the court in question does not have printed precedent forms for subpoenas, the solicitor would have to prepare a subpoena form and take it to the court registry for filing in addition with a letter.

- **The Scope of Subpoenas**

  The scope of an issued subpoena is dependent on the type in question. As stated earlier, there are three types of subpoenas in Nigeria, *viz* subpoena *ad testificandum*, subpoena *duces tecum*, and subpoena *duces tecum ad testificandum*, which will be discussed below.

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It is pertinent to briefly mention here that in some other jurisdictions such as the United States and Canada, there are also three types of subpoena. In the United States, the subpoenas are known as witness subpoena, subpoena *duces tecum*, and deposition subpoena. A witness subpoena is a court order that requires a person to appear in court on a certain date and testify as a witness. The purpose of a witness subpoena is to ensure that relevant testimony is provided under oath. The second type of subpoena is subpoena *duces tecum*. It is a court order that requires the subpoenaed witness to produce documents, books, record, or other evidence pertinent to a legal proceeding at a specified time and place in a court hearing.[xl] This subpoena is part of the pre-trial discovery process in the United States.[xli] The third subpoena used in the United States is deposition subpoena. It is a court order requiring a person who is a third party; usually not a party to the law-suit, to provide copies of records and/or appear as a deponent to a deposition, to answer questions asked by one of the parties involved in the law-suit.[xlii] A deposition subpoena differs from the subpoena ducs tecum in that the documents and testimony requested are part of the "discover process" before trial and may not be used in an actual court hearing.[xliii] A deposition is taking a witness' testimony outside of the court. The location of the deposition should be suitable to all the attorneys or self-represented parties in the case, the witness, and a stenographer. In the United States, business centres, libraries and other facilities often have conference rooms that can be rented. At a deposition, a witness is sworn on oath, and answers questions under the penalty of perjury. A court reporter is hired to transcribe the testimony. The witness might also be audio or video recorded. A party intending to subpoena a witness by deposition subpoena usually schedules the location of the deposition before filling out the subpoena form. A deposition is useful to know in advance what a witness will testify at trial and creates evidence that can be used if the witness changes the story at trial, or if the witness ends up not being able to attend the trial for genuine reasons.[xliv]

The three types of subpoena in Canada's legal system are subpoena *ad testificandum*, subpoena *duces tecum*, and subpoena for deposition. Subpoena *ad testificandum* orders a witness to appear in a court proceeding to give oral evidence under oath. It is like a witness subpoena in the United States. The second type of subpoena which is

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subpoena *duces tecum* is a court order compelling a witness to provide the court with documents or other physical evidence that is relevant to the case. Subpoena for deposition is the third type of subpoena which orders a witness to be questioned under oath before trial. This type of subpoena is used for witnesses who may not be available to testify in court or not be able to attend court proceedings for legitimate reasons or who is located far away from the court.[xlv] A subpoena for a deposition is a type of subpoena that allows a witness to be questioned under oath before trial.

The types of subpoena in the United States and Canada are alike except for a change in nomenclature in some of them. However, the essence of the three types of subpoenas in both jurisdictions are similar. The type of subpoena issued and served would determine the latitude of the witness' conduct or role during the proceedings.

Types of Subpoena in Nigeria

There are three types of subpoena under the Nigerian law. These are subpoena *ad testificandum,* subpoena *duces tecum* and subpoena *duces tecum ad testificandum*. These subpoenas serve different purposes in the proceedings. It depends on the purpose the party seeking to use the subpoena desires to achieve in conducting the trial. These are veritable tools in the hand of a party in a proceeding to use. They shall be briefly discussed below.

- *Subpoena ad testificandum* is a subpoena ordering a witness to appear and give testimony.[xlvi] It has also been defined as a writ commanding a person to appear in court to testify as a witness.[xlvii] This is the instrument of law used to compel the attendance of a witness to give evidence in court or tribunal. Upon its issuance the named person has no right to decide whether to attend or not. The court is always interested to ensure that justice is served at the end of every proceeding. Therefore, this is one of such instruments of law to ensure that person(s) with evidence that could lead to serving justice to all testifies.
- *Subpoena Duces Tecum* is a subpoena ordering the witness to appear in court and to bring specified documents, records, or things.[xlviii] It is a writ commanding a person to produce in court certain designated documents or evidence.[xlix] When a Court issues a subpoena *duces tecum*, it commands the person summoned to produce a

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document. And a witness summoned by subpoena *duces tecum* only, should not testify in the case.[l] This is one of the mechanisms that the law clothes the courts with the power to ensure that documents in the custody of another person are brought to court. Once the person summoned produces the document, he is obliged to be released and cannot be regarded as a witness.[li] A subpoena *duces tecum* is thus a court process, initiated by a party in litigation compelling the production of certain specific documents and other items, material and relevant to facts in issue in a pending judicial proceeding, which documents and items are in custody and control of the person or body served with the process.[lii] The person who has the custody of the document(s) could either be a party or not a party to the pending suit. It only entails producing the requested document in court without giving oral testimony.

- *Subpoena Duces Tecum ad testificandum* is a hybrid of subpoena *duces tecum* and subpoena *ad testificandum*. It is a jumbo subpoena which combines two conditions or characteristics - appear, bring specific documents and give testimony. It is trite that a witness called or subpoenaed to come and only tender documents need not be sworn.[liii] However, subpoena *duces tecum ad testificandum* is the synthesis of both appearing to testify and to produce document in court. Thus, the subpoenaed witness will be sworn on oath and liable to be cross-examined on the oral evidence given and the document presented in court. This type of subpoena is not expressly contained in the rules of court. It emanates from the practice and procedure of courts.

Conflicting Decisions in the Mechanism of Subpoena

There are a plethora of authorities on subpoena with lots of conflicting procedural positions. Some of these decisions are to the effect that once a witness is served with subpoena *duces tecum* and he produces the documents, the subpoenaed witness will only place the document before the court. On the other hand, some of the decisions are to the effect that the document produced by the subpoenaed witness can be tendered through him. These would be discussed in detail below.

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- Effect of a Subpoena Duces Tecum

In Nigeria, where it is a subpoena *duces tecum* that is issued to a person, in obedience, he shall only produce the document(s) requested in the subpoena and place same in court. It was held in the case of *Okoye v. Charles & Ors*[liv] thus:

> A person who appears in Court in obedience to a subpoena duces tecum has the duty of only producing and placing before the Court the documents he is commanded in the subpoena to produce. The documents can be tendered and admitted through him and he need not swear to an oath as a witness.

Once the person lays the documents on the table of the Court, there ends his duty, and he is not a witness and cannot be sworn on oath or cross examined.[lv] It then means that a person who appears in court on the strength of subpoena *duces tecum* need not be sworn on oath. His major role is to confirm to the court that the documents sought for are produced and available in court. Once the document(s) is ascertained it would be tendered in evidence.

Where it is subpoena *ad testificandum* that is issued on the person, upon his arrival in court and during the proceedings, the person must be sworn on oath or affirmed to enable him give evidence. The person who appears in Court in obedience to subpoena *ad testificandum* must testify under an oath or affirmation.[lvi] Where the subpoena is twofold; in that it commands that the person produces certain documents and testifies, the person commanded would be sworn in or affirmed as a witness before he produces the documents and testifies as a witness.[lvii]

The content of the subpoena as issued determines the nature of the subpoena. It is very important not to lose sight of the fact that it is what the subpoena commands in its text and not its heading that determines the nature of the subpoena.[lviii] In other words, it is the wordings i.e. what the subpoena commands in its text and not its heading that determines the nature of the subpoena. The confusion often created due to lack of stating the exact type of subpoena should with great effort be avoided. It is suggested

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that both solicitor(s) and court registrars should be meticulous in the process of issuing the subpoena.

It is trite law that upon placing the documents on the table of the court the duty of the person subpoenaed terminates there and the documents cannot be tendered or deemed tendered through him.[lix] It then behooves the party at whose instance the subpoena was issued to discharge the burden of proving the documents, by having them admitted in evidence by tendering or demonstrating its purpose through a person who has the capacity to do so.[lx] It was held in the case of *Obi-odu v. Duke*[lxi] that a person who brings forward a document in court in obedience to subpoena cannot be said to have given evidence not to talk of his having capacity to give or tender in evidence the said document, particularly when the person served with the subpoena has the option or liberty to cause it to be produced in Court through any other person of his choice. Once a document is delivered to the Court, the person's obligation is discharged and can neither be sworn nor cross-examined. But the delivery of the document in Court pursuant to Section 218 of the Evidence Act does not relieve the person who summoned an adverse party to produce the document, of the burden of proving the document by having it admitted in evidence, by tendering it through a person who has the capacity to do so.

The party at whose instance the documents as requested in the subpoena are placed in court should endeavour to formally apply and tender same in evidence. Apart from tendering it in evidence, he must also ensure that witnesses are called to speak to the document(s) and demonstrate or link its relevance to the proceedings in proof of his case.

However, the same Court of Appeal of Nigeria has also held that upon production of the requested document(s), that the document can be tendered through the person that produced it. In the case of *Keystone Bank Ltd v. The Carrington Heritage (Nig.) Ltd*,[lxii] it was held thus:

> A person who appears in Court in obedience to a subpoena duces tecum has the duty of only producing and placing before the Court the documents he is commanded in the subpoena to produce; *the documents can be tendered and*

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> *admitted through him* and he does not for this reason need to swear to an oath as a witness. (Emphasis ours)

Pursuant to the above authority, it shows that the document(s) brought to court by the subpoenaed person can be tendered through him. While in the earlier case referred to,[lxiii] it was held that the document(s) as produced cannot be tendered through the subpoenaed person. This leaves the litigants and legal practitioners in a dilemma regarding the procedure to adhere to. It can also result to unnecessary dissipation of useful legal time and energy during trial. This is common during the hearing when a party adopts a particular procedure and the opposing party armed with the contrary authority would object. After the ruling, the person would likely go on appeal to the Supreme Court. Conflicting decisions delivered by the Court of Appeal pose a concern to lawyers.

Commenting on the issue of conflicting decisions during the valedictory court session in honour of Justice Mojeed Owoade, who retired as a Court of Appeal Justice, Chief Wole Olanipekun, SAN, pointed out that such decisions do not only throw the legal profession into confusion but also distorts the sacred order of judicial precedence, particularly when such conflicting decisions interfere with and derail the age-long doctrine of *stare decisis*.[lxiv] Conflicting decisions significantly obstruct the ability of lawyers to effectively predict the position of the law in the delivery of legal opinions for clients.[lxv] The conflicting decisions highlighted above with regards to subpoenas and its application have created a form of uncertainty in the use of subpoena *duces tecum*. It is trite that where there are conflicting decisions or judgments of courts of coordinate or equal jurisdiction, the decision that is latter in time prevails.[lxvi] The Supreme Court, *per* Ogbuagu JSC, restated this position of the law in the case of *Osakwe v. Federal College of Education*[lxvii] that where there are conflicting decisions of the Supreme Court, the later or latest will apply and must be followed by lower courts if the circumstances are the same. But in the case of the Court of Appeal or other lower courts, such conflicting decisions will be resolved by an appellate court if there is no judicial precedent already laid down by the apex court; a case on all fours in which the Supreme Court has earlier decided upon. It is submitted therefore that the two conflicting decisions of the Court of Appeal on the procedure to be adopted upon

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production of the requested document(s) by the subpoenaed witness through a subpoena *duces tecum* needs to be resolved by the Supreme Court when the opportunity presents itself.

It is pertinent to note that a person commanded to appear by subpoena *duces tecum* ought not to be cross examined. But where the person, even though in Court in obedience of subpoena *duces tecum*, proceeds not only to swear to an oath, but also gives evidence, that person cannot escape being cross examined. This is because he or she has become a witness for all intents and purposes, liable to cross examination.[lxviii] There is nothing limiting the oral cross examination of a witness in open Court to only when he has adopted a written deposition.[lxix] It is within the right of a party to cross examine a person who having appeared in Court in obedience to a subpoena *duces tecum*, took oath or affirmed, before producing and tendering in evidence the documents he was ordered to produce. His oath taking renders him a witness and exposes him to cross-examination by the adverse party.[lxx] The fact that the witness was allowed to lead evidence in chief, advertently or not, means the interest of justice will be better served by cross examining the witness, and upon a holistic appraisal of the circumstances, none of the parties stands to lose anything by the cross examination of the witness anyway.[lxxi]

- Subpoenaed Witnesses testifying *Viva Voce* or Deposing to Written Statement on Oath

Where the witness is to testify without a written deposition, he is expected to testify *viva voce.* In regular civil proceedings, *viva voce* testimony is allowed and is the centre of the judicial proceedings to ensure justice is served. In this instance, once the subpoenaed witness appears on the predetermined date, place and time if he is to give *viva voce* testimony the witness will either be sworn on oath or he will be affirmed and cautioned to speak the truth.[lxxii] He will then proceed with his oral testimony. On the other hand, where it is subpoena *duces tecum*, the witness would produce the documents as requested. There are conflicting judicial pronouncements on the procedure to be adopted upon the production of the document(s) in court as discussed earlier. It should be noted that they have different legal implications. Where the document(s) as produced by the subpoenaed witness were tendered through him and

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admitted in evidence as exhibit, the implication is that they form part of the record of the court. Where the document(s) as produced by the subpoenaed person were not tendered, admitted and marked as exhibit but only placed before the court the implication is that they do not form part of the record of the court. Efforts should be made by the party at whose instance the documents were placed before the court to tender them. In either case as stated above it is advised that parties should avoid dumping the document(s) on the court.

This work finds that there are conflicting decisions of court on the issue of whether or not subpoenaed witnesses should depose to written statements on oath in regular civil matters and in election petitions. The judicial pronouncements have created a form of dichotomy on the procedure to be adopted for subpoenaed witnesses in this area. In *Bello & ors v Odofin & ors*[lxxiii] the court held that a subpoenaed witness does not need a written statement on oath, once a subpoena has been served on him, he is competent to testify. This decision encourages *viva voce* testimony of a subpoenaed witness. It is submitted that this is the philosophy behind the concept of subpoena in civil proceedings. It was further held thus:

> Under the Nigerian Legal System, it is the duty of litigants to call witnesses in proof of their cases. Order 3 Rule 2 (c) and (d) of the High Court of Ogun State (Civil Procedure) Rules 2014 provides thus:-
> (1) All Civil Proceedings commenced by writ of summons shall be accompanied by:-
>
> **(c) List of witnesses to be called at the trial and**
> **(d) Written statements on oath of the witnesses.**
> In view of the provisions of the Civil Procedure Rules set out above, a party who intends to rely on the testimonies of witnesses is expected to prepare a list of his witnesses and written statements on oath of his witnesses and he is expected to file and serve same on the other party. It

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> is only when the condition precedent had been satisfied that a witness can be said to be competent to testify.[lxxiv]

The above decision was hinged on the interpretation of the High Court of Ogun State (Civil Procedure) Rules 2014. This provision is similar to most of the provisions in High Court Rules of the various states.[lxxv] Section 175(1) of the Evidence Act 2011 provides that all persons shall be competent to testify, unless the court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those question as a result of tender years, extreme old age, infirmity or disease of the mind or body, or any other cause of the same kind as listed in the sub-section. However, in the case of *Bello & Ors v. Odofin & Ors*,[lxxvi] mentioned above, the Court of Appeal went a step further and held in respect of civil proceeding that, it is only when the condition precedent of - filing and serving a list of witnesses and written statements on oath of the witnesses on the other party or parties to the case - has been satisfied, that a person who is a witness can be said to be competent to testify. It is apposite at this juncture to state what a written statement on oath of a witness is. A written statement on oath of a witness is the same as a witness statement on oath. This is the evidence of the witness reduced into writing and usually sworn before a Commissioner for Oaths.[lxxvii] A witness statement on oath is the evidence-in-chief of a witness in written form. Prior to the High Court (Civil Procedure) Rules of the various States of the Federation, the mode of taking the evidence-in-chief of a witness in Court was through his oral testimony. However, the Rules require that the evidence of a witness be reduced into a written statement on oath. Thus, when a witness now gives evidence-in-chief in Court, he is limited to adopting his written statement on oath.[lxxviii] The Court has held that until the witness statement on oath is so adopted as part of the witness testimony in Court, the witness statement is worthless.[lxxix] Upon adoption of the witness statement on oath, the witness is then cross-examined and re-examined orally.[lxxx] For a subpoenaed witness, in civil proceedings, the High Court (Civil Procedure Rules) of the various States of the Federation excludes the witness statement on oath of a subpoenaed witness to be accompanied with the writ of summons at the time of filing the writ.[lxxxi] The Court of Appeal has also held that a subpoenaed witness

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does not need a written statement on oath, that once a subpoena has been served on him, he is competent to testify.[lxxxii] However, the same court has also held that nothing shall limit the oral cross examination of a witness in open Court to only when he has adopted a witness statement on oath.[lxxxiii] A combined reading of the decisions in both cases suggests that a witness subpoenaed to tender documents through a subpoena *duces tecum* does not require any statement on oath. Thus, there is nothing for him to adopt. However, he can be cross-examined in open court even though there was no written statement on oath and he did not adopt any. This implies that a witness subpoenaed by subpoena *duces tecum* can be cross-examined. It is submitted that a clear-cut procedure on whether a witness subpoenaed by subpoena *duces tecum* can be cross-examined should be decided upon by the apex court in Nigeria in order to settle the conflicting decisions of the Court of Appeal.

Position of Witnesses Subpoenaed by Subpoena Duces Tecum in the United States and Canada

In the United States, subpoena *duces tecum* is subject to the same regulations as subpoenas generally, under Rule 45 of the Federal Rules of Civil Procedure 2023.[lxxxiv] Rule 45 was amended to add 'notice and inspection' requirements. Thus, a party can schedule a deposition, at which the opposing party would be present and would have an opportunity to review and obtain copies of the subpoenaed records. The documents or items can be inspected by parties.[lxxxv] The amendment made to Rule 45 recognises that electronically stored information as defined in Rule 34(a) of the Federal Rules of Civil Procedure 2023, can also be sought by subpoena.[lxxxvi] A traditional subpoena *duces tecum* requires production of documents or other items in relation to a proceeding in the case to which the witness is subpoenaed, such as pre-trial hearing, deposition, or trial. The person subpoenaed is ordered to both produce the documents or things and appear as well as testify for the purpose of identifying and authenticating the items. In North Carolina for example, the person named in the subpoena is not compelled to testify, but rather to produce and authenticate the specified records stated in the subpoena. If the person is to testify, a subpoena for that purpose should be issued as well. A subpoena to produce evidence may be issued separately or joined with a

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subpoena to appear and testify.[lxxxvii] The physical presence of the person named in the subpoena to produce the documents in court is required. However, there are exceptions. One of such exceptions is a Custodian of Public Records. Instead of appearing personally, a custodian of public records may send by registered mail certified copies of requested records and an affidavit authenticating the records.[lxxxviii] The second exception is Custodian of Hospital Records. This person is not required to attend court personally but may personally deliver to the court by registered mail certified copies of requested records and an affidavit concerning the identity and authenticity of these records.[lxxxix] The last exception is Custodian of Business Records. The word "Business" includes businesses, institutions, and associations of every kind. Instead of appearing personally, a records custodian may submit an affidavit or documents under seal concerning the identity and authenticity of records, reports or data compilation in any form, made at the time or near the time, or from information transmitted by a person with knowledge if it was kept in the course of a regularly conducted business activity and it was the regular practice of that business activity to make the memorandum, report, record or data compilation. Authentication of evidence by affidavit shall be confined to the records of non-parties and the proponent of that evidence shall give advance notice to all other parties of intent to offer the evidence with authentication by affidavit.[xc] Lord Denning in the case of *Penn-Texas Corporation v. Murat Anstalt and Ors (No. 2)*[xci] laid down the procedure for subpoena *duces tecum*. He noted that when a subpoena *duces tecum* is issued to an individual, he was originally sworn even though only called to produce documents.[xcii] Later, to overcome subjecting the subpoenaed witness to cross-examination on the entire case when his only role was the formal one of producing the documents and informing the court that he had custody of them and how he came by them, a witness called only to produce documents did not have to be cross-examined at large but he could be sworn if any issue arose as to his custody and for that limited purpose only he could be cross-examined.[xciii]

In Canada, a subpoena *duces tecum* may not require the physical presence of the witness at the proceeding but instead may order the witness to submit the requested documents or other evidence to the legal party that issued the subpoena. This will usually be conveyed by the subpoena's text, and will include a deadline for compliance.[xciv] Failure to comply with the subpoena will *inter alia* amount to contempt of court.[xcv] The Supreme Court of Canada settled the issue of procedure to be followed by the court where a witness attends court in obedience

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to a subpoena *duces tecum* in the case of *United States of America (District Court) v. Royal American Shows, Inc. etal*.[xcvi] The case was an appeal from the Court of Appeal for Alberta, in the matter of an application pursuant to section 43 of the Canadian Evidence Act. The Chief Justice delivered the judgment in the *inter alia* following words:

> I say this because documents for use in … proceedings are not expected to walk into Court unescorted… I am not concerned here with the procedural question whether the person called only to produce documents need be sworn. (In Canada, the rule is that he is sworn.)[xcvii]

From the decision of the Supreme Court, it is obvious that a witness subpoenaed by subpoena *duces tecum* is sworn in court and can be cross-examined.

Subpoenaed Witnesses in Electoral Matters in Nigeria

The position of the law on a subpoenaed witness in electoral matters is different and sets a herculean task for the petitioner in proving his case. In electoral matters, the petition shall be accompanied by written statements on oath of the witnesses[xcviii] at the time of filing. The failure of the Petitioner to comply with sub-paragraph (5) of the First Schedule, shall not be accepted for filing by the Secretary[xcix] to the tribunal. These provisions are detrimental to the petitioner because he is expected by law to file the Petition within 21 days after the date of the declaration of result of the election.[c] The failure to file the petition at the statutory period is fatal and the said 21 days cannot be extended.[ci] The point here is that despite the tedious nature of filing electoral matters due to difficulty in accessing documents in possession of Independent National Electoral Commission (INEC) the petitioner is given a limited time and still expected to accompany the petition with all statements on oath of the witnesses he intends to call during hearing. In some circumstances, the petitioner does not get the documents requisitioned from the electoral body known as INEC. The unimaginable task before the petitioner is to accompany his petition with a written statement on oath of an electoral officer

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who shall be subpoenaed at the trial. This is a herculean task for the petitioner in prove of his case.

It is submitted that due to the challenges highlighted above petitioners should have been accorded special privilege to subpoenaed witnesses and adduce evidence either *viva voce* or through a deposition of oath even if the number of witnesses to be subpoenaed would be limited to two or four only.

Subpoenaed witnesses are not allowed to testify *viva voce* in electoral proceedings as against the general principle applicable to civil proceedings. In the case of *Danbaba & Anor v. INEC & Ors,*[cii] it was held thus -

> The appellants in this case merely called nine witnesses in proof of over voting which they alleged occurred in 28 polling units. The witnesses were PWs 1, 4, 5, 8, 22, 30, and 34, who were subpoenaed, and their depositions were not filed along with the petition, thus contravening the provisions of Paragraph 4(5)(a) & (b) of the First Schedule to the Electoral Act 2022. The contention that subpoenaed witnesses do not have to file their written dispositions along with the petition is not supported by the sue generis nature of election petitions. The law as it is, is that ordinary subpoenaed or expert witness in an election petition must have their statement filed along with the petition; and subpoenaed witnesses whose depositions were not filed along with the petition and all the documents tendered through and by them must be expunged.

Conceding that election petitions are sui generis, it must be emphasized that the sole and ultimate aim of summoning a witness to give evidence is to unravel the truth in the interest of justice. This means that ultimate aim is to ensure that all facts that will lead to just determination of the matter are placed before the court for a holistic consideration. To our

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mind, the mischief sought to be cured through the tribunal is to correct the anomalies and malpractices perpetrated at the polls. The rules of procedure should not be a shield to deter the court from handing down decisions that would entrench the tenets of democracy in Nigeria. The Court of Appeal in Danbaba's case[ciii] above held that subpoenaed witnesses whose depositions were not filed along with the petition and all the documents tendered through and by them must be expunged. It is submitted, with respect, that this is a way of sacrificing justice on the altar of technicality. It is a needless sacrifice because it does not in our view serve the interest of justice and the objectives of subpoenas.

The recent decision of the Supreme Court in the case of Atiku & Anor v INEC & Ors[civ] held thus

> …subpoenas are not a tool with which to circumvent the provisions of the law and the effect and purpose of section 285[5) of the constitution and **paragraph 4[5] of the first schedule to the Electoral Act 2422** (*sic*), lt is on this note that I hold that the decision of the court below to strike out the offending witness depositions cannot be faulted. I resolve this issue against the Appellants. [*Emphasis ours]*

The above decision supports the procedural position of the law for election cases in Nigeria that a subpoenaed witness cannot be allowed to adduce *viva voce* evidence, which should, respectfully, be held otherwise. It submitted that subpoenas being a mechanism for securing attendance of unwilling witness(es) to tribunal or court has never and would not serve as tool with which to circumvent the provisions of the law and the effect and purpose of section 285(5) of the Constitution and paragraph 4[5] of the First Schedule to the Electoral Act 2022, rather it would promote justice. The reasoning here is that election petition is one of the types of a civil action and the same First Schedule made provision for recourse to the Federal High Court (Civil Procedure) Rules which provides thus:

> Subject to the express provisions of this Act, the practice and procedure of the Tribunal or the Court in relation to an election petition shall be as nearly as possible, similar to the practice and procedure of the

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> Federal High Court in the exercise of its civil jurisdiction, and the Civil Procedure Rules shall apply with such modifications as may be necessary to render them applicable having regard to the provisions of this Act, as if the petitioner and the respondent were respectively the plaintiff and the defendant in an ordinary civil action. [cv]

The First Schedule to the Electoral Act, 2022 which is the Rules of Procedure for Election Petition makes provision for recourse to the Federal High Court (Civil Procedure) Rules. In terms of practice and procedure of the Tribunal or the Court with regards to election petition, it is expected to be as nearly as possible or similar to the practice and procedure of the Federal High Court (Civil Procedure) Rules. The operative word is 'Shall' which makes it mandatory to comply with its requirement as procedurally practiced in the Federal High Court. The word "Shall" when used in a statutory provision, imports that a thing must be done. It is not merely permissive, it is mandatory.[cvi]

With specific reference to subpoena, what then are the similarities and the differences of the practice and procedure under civil matters in the Federal High Court and election petition in the Election Tribunal? Under the extant Federal High Court (Civil Procedure) Rules, 2019, a subpoenaed witness can testify *viva voce* but paragraph 4(5)(b) of the First Schedule to the Electoral Act 2022 has been interpreted that a subpoenaed witness cannot testify *viva voce* if his witness statement on oath does not accompany the Petition at the time of filing the Petition. In exceptional circumstances, under the Federal High Court Rules, a party who desires to call any witness not being a witness whose deposition on oath accompanied his pleading shall apply to the Judge for leave to call such witness. The said application for leave is to be accompanied by the deposition on oath of such witness.[cvii] On the other hand, the Rules of Procedure for Election Petition which is mandatorily expected to be similar to Federal High Court (Civil Procedure) Rules[cviii] does not make such allowance and does not comply with the need to seek for leave to call a witness whose deposition does not accompany the Petition.

Remarkably, it is explicitly encapsulated in the Federal High Court (Civil Procedure) Rules[cix] that where a statement on oath of witnesses requires a subpoena from the Court, it need not be filed at the commencement of the suit. In this instance, it then means that where the suit was commenced via writ of summons and some of the witnesses listed require subpoena

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before making their statements on oath, their deposition(s) shall not accompany the pleading when commencing the substantive action. It is also logical that if the above provision is to be applied strictly, the witnesses' statements on oath of the witnesses from INEC often being subpoenaed before attending trial should not accompany the Petition at the initiating stage of the Petition. It is strongly advocated that there should be strict adherence to the provisions relating to procedure, as enshrined in the Federal High Court (Civil Procedure) Rules.

Under the Federal High Court (Civil Procedure) Rules, a witness shall be in contempt of Court where he is duly summoned by subpoena to attend for examination but refuses to attend or where he attends, he refuses to be sworn, affirm, or answer any lawful question.[cx] It is asserted that it would not amount to over stretching the law to posit that pursuant to Paragraph 54 of the First Schedule to the Electoral Act, 2022 the rules of practice and procedure of the Federal High Court as per subpoena should be adopted for election petition in Nigeria. The adoption of the Federal High Court procedure in the election petition proceedings would help in attaining justice. It is our believe that exempting official witnesses, especially from the Independent National Electoral Commission being electoral umpire, from filing statements on oath to accompany the petition at the point of commencing the action would be logically judicious. This is because the official witnesses from the electoral umpire are always unwilling to freely volunteer facts or make deposition on oath to accompany the petitioner's petition without a subpoena. It needs to be noted that the Respondent whose declaration the petitioner seeks to void was return by INEC. It would be unimaginable for the same INEC to voluntarily depose on oath to facts that would lead to the setting aside of their declaration.

We had earlier mentioned that in the United States, a deposition subpoena is issued to summon a person to make a sworn statement in a time and place other than a trial.[cxi] This method can be adopted by the courts in electoral matters to ensure that a subpoenaed witness without a witness statement on oath make a deposition in the ultimate interest of justice, instead of expunging vital evidence by a subpoenaed witness due to not filing witness statement on oath alongside the Petition. Our opinion is hinged on the fact that allowing the subpoenaed witnesses in electoral matters to make deposition on oath will save the court's time instead of an oral account. It will also further entrench the doctrine of democracy and the citizens would see that justice is done.

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Recommendations

The use of subpoenas is an invaluable part of civil proceedings. Uniformity and certainty in its administration is something that must be taken seriously. It is therefore recommended as follows:

1. The courts, particularly the Supreme Court, should endeavour to make a definite pronouncement on the procedural steps to be taken by witnesses subpoenaed through a subpoena *duces tecum*.
2. The procedural dichotomy in the manner in which subpoenaed witnesses give evidence in court in general civil matters and in election petitions should be harmonised in the interest of justice.
3. The Registrars of the various courts and solicitors should make sure subpoenas are drafted elegantly to avoid unnecessary delay in court proceedings. There should be prototype forms or printed precedent forms for the different types of subpoena as obtainable in the other jurisdictions discussed in this paper.
4. For electoral matters, leave of Court should be granted, in the interest of justice, to subpoena a witness after the Petition has been filed.
5. A deposition subpoena as obtainable in the United States can be adopted by the Election Tribunal/Court for electoral matters in Nigeria to prevent expunging vital evidence of a subpoenaed witness in the interest of justice.

Conclusion

A witness may or may not attend court voluntarily. The Rules of Court provide for the means of securing attendance of witnesses in court for the purpose of testifying in a case being heard by the court. This mechanism has enabled the courts and parties in an action to compel the attendance of the witness either to produce documents or to testify. This instrument is designed to promote the course of justice. The unwilling witness eventually attends the trial to avoid the imminent consequences of his failure to obey the issued subpoena. Subpoena is a veritable instrument of law that was designed to assist parties and the court in the course of justice. A judicious use of this mechanism would help stabilise the society and encourage the citizens to testify for national progress and development. The Tribunal and the appellate

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courts should adopt a holistic approach in the interpretation of the Rules of Procedure for Election Petition contained in the First Schedule to the Electoral Act, 2022. It would be in the interest of justice to have proper recourse to the extant Federal High Court (Civil Procedure) Rules. It is not in the interest of justice to have such disparity in the same jurisdiction in the procedure for a subpoenaed witness. The essence of the recourse is not to water down the electoral jurisprudence but to ensure that justice is done even in the view of a reasonable man on the street.

The issuance of subpoena is aimed at serving a purpose. The objective of the subpoena is to ensure that witnesses that are not willing to attend court proceedings on their own volition are compelled to do so. The witness that has been unwilling to attend court voluntarily would also not be willing to volunteer the facts in his disposal to the court. It could be that the facts in his disposal are inimical to him or to his employer. This is often common with persons in government employment. Afraid of losing their means of livelihood, most employees would not freely want to appear in court as a witness.

Subpoena is a veritable instrument in judicial proceedings. Aside the purpose stated above, it can also serve other purposes. Subpoena can be used to aid in the fact-finding process and help to establish the truth in a legal case. It can be used by lawyers to obtain information that may bolster their client's case.[cxii] A well-timed and crafted subpoena can provide a lawyer's client with corroborating evidence or expose weaknesses in the opponent's case.[cxiii] Being a Court Order, subpoena is not only used to compel the attendance of a witness, including an unwilling witness, it can also be used to secrete the truth from such witness. A witness subpoenaed to give oral testimony is sworn on oath or affirms to speak the truth, and lying under oath will amount to perjury, thus, making such perjured-witness liable to be prosecuted.

Whenever a witness is subpoenaed to court for the purpose of giving evidence, i.e. subpoena *ad testificandum*, he can do so either by giving oral testimony or deposing to a written statement on oath. A subpoena may require a person to provide testimony or a deposition. In any of the situations, the person should endeavor to appear in court on the assigned date, place and time listed in the subpoena. It is advisable that the subpoenaed person should seek the counsel of an attorney to avoid the risk of contempt of court.

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