EXPERT WITNESS: THE LAND SURVEYORS’ CASE

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Abstract

This paper examined the basic practical role of a professional land surveyor as an expert witness in court. Land dispute is one of the major causes of violence and insecurity in our country hence surveyors need to be grounded on legal principles and their practice, so that they can assist the court to give a fair and proper judgment on land matters. An attempt has been made to explain who professional surveyors are and their functions during expert witnessing. The study revealed that although the court ultimately determines the issue during disputes on land, however the assistance of a professional surveyor with the right legal mind will serve the court better. This paper also contains useful recommendation, which if implemented will reduce violence and land litigation matters in Nigeria.

Key words: Land, land surveyor, Expert witness, Competency, Evidence, Boundary and Work product.

1.0 Introduction

The term 'land' includes all physical elements in the wealth of a nation bestowed by nature; such as climate, environment, fields, forests, minerals, mountains, lakes, streams, seas, and animals. As an asset, it includes anything on the ground (such as buildings, crops, fences, trees, water); above the ground (air and space rights), and under the ground (mineral rights), down to the center of the Earth. Land, according to Fekumo (2002) is defined, as a precious commodity. It is for this reason that our whole existence and creativity was tied to land and its ownership. In this precious commodity, its ownership is separated by boundary. A boundary line is the dividing line between two parcels of land, or every separation (natural or artificial) which marks the confines of line of division of two contiguous properties. Boundary dispute occurs when owners of adjacent land parcels disagree on the location of the line between their properties. “The boundary line comprising the four sides of a piece of property are identified by various descriptive elements such as monuments, courses, distances, area or by combination of such elements” (Hart, 2003).
The boundary of a given parcel of land is usually established by survey and included as the legal description in the instrument of conveyance. Well defined and delineated boundaries are required to limit the extent of territorial claims between and within nations. Boundaries in themselves function as dividing lines, starting with property lines between contiguous neighbors or farms that are guarded by a simple fence separating them, and extending to national and international boundaries identified by legal treaties and guarded by armies. Dispute has been with people and will continue to be with them particularly as it affects land.

In dispute generally, progress is stifled and development slows. When dispute is not resolved, claimants may take the matter to court as a means of settlement. “The professional land surveyor, by the very nature of surveying makes it probable that he or she will occasionally be a witness (expert witness) or a litigant. He is proficient in measurement and in computations and because the practice of surveying considers exact laws in addition to exact sciences, he is proficient in the law and in sound judgment (Strong, 2012). The surveyor then as an expert in the science of measurement and in the art of boundary location will assist the court to come to a proper conclusion in case of land disputes. The Testimony of experts is often necessary so that Trial judge can properly understand scientific or technical issues relevant to the lawsuit.

Professional Surveyors are often called upon to render expert testimony. This can occur through the employment by litigants (plaintiff or defendant) and sometimes by appointment of the Court. Also, Surveyors in many cases, act in a quasi-judicial capacity with the acquiescence of the concerned parties. However, it must be borne in mind that court will reject (as inadmissible) any expert report or opinion which has been unduly revised in consultation with legal counsel or others that failed the test of evidence admissibility.

However, the qualification of an expert is important for the court to be satisfied with his competency. A professional land surveyor exercises reasonable skill and care in producing documents and opinions as expert witness in court. He maintains interest in the public welfare including applying his special knowledge, skill and training for the use and benefit of the public. The surveyor’s
testimony, evidence and opinions are useful to the court and his client in particular when he and his product (map, plan, report, etc.) are in harmony with the rules guiding expert witness as well as evidence.

1.2 Statement of the Problem

Some surveyors are not grounded within the legal environment and such surveyors cannot excel as expert witnesses. Notwithstanding this short coming from some, others are versed in legal surveys. The important role surveyors play as expert witnesses cannot be over emphasized as the court generally depends on them for proper understanding of technical and scientific issues as contained in the evidence Act 2011 (opinion of experts). Hence surveyors in legal environment must train and retrain themselves so as to fit in within the confines of the law as it applies to their duties in court, if their contribution will be appreciated by judicial officers.

Surveyors who desire to succeed as expert witnesses must learn to come to terms to the principles of evidence and its admissibility, Expert witnesses and their functions, as well as the qualification and competence requirements, opinion and their other roles in court. Most authors have treated this topic in isolation without bringing the surveyor’s work product and his action in court together, which this paper has abridged. Hence the purpose of this paper is to briefly outline the basic functions, categories, qualification and competency requirement of an Expert Witness. Though the expert owes his duty to the court, his chronological activities is concisely outlined here. Also a case is made for the surveyor as it relates to land in dispute matters generally. It presupposes that the surveyor is a witness and not a litigant. This paper therefore, discusses these practical principles as well as the check list for a surveyor during court attendance, sometimes referred to as courtroom techniques in Nigeria. This is the only way surveyors acting as expert witness can contribute effectively to the court and the nation.

2.0 Literature Review

Generally speaking, anyone with special knowledge may be an expert in his field. The term expert witness, can be properly understood if viewed from the legal perspective, because it is being perpetuated by the legal system (Evidence Act, 2011). The issues concerning expert witness’ function in courts have also been addressed in lots of seminars, workshops and articles (Cooley 1881; Strong 2012), and this, to an
extent, did not treat other aspects of experts’ duties. In the work of Saper (2007), he provided detailed information on the qualification and competence requirement as well as the basis of experts but no information on the sequence of evidence and the relationship between other experts and attorney. What is more worrisome is that the principles on how to excel during cross-examination have been omitted by many authors except the contributions of Babitsky & Mangraviti (1990) and few others.

Further studies have also shown that land ownership is possible within the context of boundaries and demarcations, a topic that is vast but few authors like Hart (2003) and others touched it. Also, Brown (1985) and Pallamary (2009) provided information on the general duties of the expert witness but omitted the guidelines. The guidelines for expert witness by Kent (1999) and Johal (2011) are useful contributions for practitioners in this field. It is therefore correct to state that expert witness presentation has been on, for a long time, but most works have been fragmented which makes it difficult for surveyors to appreciate their duty in court, holistically.

2.1 Basis and Function of Experts

It is an incontrovertible fact, that the expert witness existence is created and perpetuated by the legal system. But for the rules of evidence, Consulting and Testimonial evidence would not exist. A summarized restatement of evidence Act 2011 (opinion of Experts) section 68 (1) and (2) is that a qualified expert may give his opinion to help the court understand evidence or to establish a fact in issue.

Section 68 (1) states: “When the court has to form an opinion upon a point of foreign law, customary law or custom or of science or art or as to identification of handwriting or finger impressions, the opinions of persons especially skilled in such a foreign law, customary law, or custom or science or art or in questions as to identification of handwriting or finger impressions are admissible”.

Section 68(2) states: Persons, especially skilled as mentioned in subsection (1) of this section are called experts. Consequently, generally speaking, anyone with special knowledge may be an expert in his respective field. This is where the professional land surveyor comes in and he can appear in court as an expert witness. The
surveyor’s duty will be to assist the court in reaching a proper conclusion.

Here the expert witness performs two functions:

a. The scientific function - collecting, testing and evaluating evidence and forming an opinion as to that evidence, and
b. The forensic function - communicating that opinion and its basis to the judge and jury (Sapir, 2007)

A general rule of evidence is that witnesses may only testify to what they personally observe or encounter by hearing, smell, and taste, feel and see. These are the five senses. In addition to this general rule, the expert witness can also make an opinion on the issue. As professional surveyors are experts in the art and science of measurement, and because of their framing and experience, many surveyors are qualified to be declared experts by court. The word “many” instead of the word “all” was used advisedly. This is true, for mere registration or licensing is not proof. An expert is one who can demonstrate real knowledge, experience and wisdom on the point in question.

2.2 Categories of Expert Witnesses

There are basically two different capacities an expert can be used; consultation or for testimony. Therefore, consulting and testimonial witnesses are the bases for expert witnesses. Furthermore, expert witnesses are derived from five general categories of expertise: lay people, technicians/examiners, practitioners, specialists and scientists, i.e (LTPSS). Each is briefly discussed below.

a. Lay witnesses: Lay witnesses are those that may testify to facts within their knowledge and may not state their opinions. The lay witness testifies from common sense, life long experience and about subject matter readily understood by the court. Preventing the lay witness from stating opinions, especially matters regarding which he is not qualified to do so, tends to prevent fraud and perjury and is one of the strongest safeguards of personal rights.

b. Technicians/Examiners: these witnesses have limited and concentrated training, apply known techniques, work in a system and teach with the system e.g.
investigators and supervisors (observers and viewers). The technicians are generally taught to use complex instruments (Total Station, GNSS instrument, Dual frequency GPS, Theodolite, etc.) or even simple compass equipment for bearing and angular determination. In most cases, a technician has only a superficial understanding of what the instrument really does and how the bearings and or angular adjustment are computed. This type of witness is to some extent defective and lack the competence to testify in Nigerian legal system.

c. Practitioners: this class of experts has the capacity to obtain the required data, material, analyses, interpret and present them as plan/map (graphical representation of features on the earth surface on paper or digital form) and assist the court come to a fair and just conclusion.

d. Specialists: these experts are devoted to one kind of study or work with individual characteristics e.g. Surgeons, Ear, Nose and throat (ENT), etc. They include specialist medical doctors; cadastral surveyors/ boundary surveyors who are specialist land surveyors.

e. Scientists: this class conducts original empirical research, then experiments to verify the validity of the theory, designs and creates instrumentation and applied techniques; their works are usually published in their own fields with peers, making contributions to knowledge in their field.

A consulting expert is a person who has been retained or specifically employed in anticipation of litigation or preparation of trial, but who will not be called at trial.

A testimonial expert on the other hand is retrained for purposes of testifying at trial. The confidentiality/privilege is waived and all materials, notes, reports and opinions must be produced through applicable discovery proceedings. If an expert surveyor relies on work product e.g. dispute plan, reports, etc. or hearsay as a basis for his opinion, that material must be disclosed (shown) and produced (tendered) through discovery.

2.3 Expert Witness Qualifications and Competency Requirements
A witness is not deemed an expert until so qualified as such by the court. The witness must be competent in the subject matter. They may be qualified through knowledge, skill, practical experience, training, education or a combination of these factors. Minimally, the expert witness must know underlying methodology and procedures employed and relied upon as a basis for his opinion.

The qualification of an expert is necessary for the court to be satisfied of his competency. However, there is no absolute rule as to the degree of knowledge required to qualify a witness as an expert in a given field. Once competency is satisfied, witness’ knowledge of the subject matter affects the weight and credibility of his or her testimony. To be sure, opposing attorney is allowed to establish the expert’s competency and knowledge in the profession and field, subject to judicial approval, through an examination of the experts’ credentials. The review process is conducted through a voir dire examination. Voir dire is from the French language meaning “to speak the truth”, and from such questions the witness may bring out matters that might prevent his qualification as an expert. Voir dire creates the standard for an expert witness testimony and credibility. It is the first and foremost part of any examination process. It is the judge and jury’s first impression of the witness. Neither the movant (witness counsel) nor witness must take voir dire for granted or the proffered witness will not be properly qualified. Whether a witness is qualified as an expert can only be determined by comparing the area in which the witness has expertise with the subject matter of the witness testimony. Therefore, to prove a witness able to speak with authority (as an expert), the following must be evaluated, which are the qualifying questions for the expert witness:

Voir dir e questionnaires- Is an effective, elementary, practical outline questionnaire for qualifying a person as an expert witness: (Example: Expert Witness Voir Dire).

a. Name
b. Occupation
c. Place of employment
d. Present title/position currently held
e. Describe briefly the subject matter of your specialty
f. Specialization within that field
g. General education background
h. Registration or license
i. Present professional position
j. Technical experience especially on related questions.

k. Recognition of expertise by your professional, administrative, judicial or legislative bodies.

l. Membership in professional societies and other professional services.

m. Writing on surveying subjects (journals, books etc.)

n. Knowledge of general practice within the profession.

o. Number of times testimony has been given in court as an expert witness in this field.

p. Length of time registered and practicing on this field.

q. When and where you lecture or teach

r. Availability for consulting to any party, state agencies, law enforcement agencies, etc.

The expert witnesses’ qualifications will normally be drawn out by a series of questions. Though a witness should be modest, he should not neglect the complete statement of his qualifications. The Courts normally recognize certain testimony as being within the realm of an expert. Generally, such testimony must involve scientific, technical or other specialized knowledge. The expert witness, unlike the layman, may express opinions relative to matters not observed. The basic difference from lay testimony is the scope of opinion evidence allowed.

On the subject matter of the expert’s testimony, various restrictions are applied. Such testimony, for example must be beyond the general knowledge of the layman and it must be helpful to the court in determining the truth. Furthermore, acknowledged expertise in the relevant area must evaluate the testimony on the basis of acceptability. The testimony of the expert should exclude any bias or prejudice resulting from his association with his client or his previous consultations.

2.4 Expert Opinion Evidence: The Tests for Admissibility

The Surveyor has function, other than as a witness describing facts within his perception or as an expert witness expressing opinions within his special field. Generally speaking, the opinions of expert witness will be admitted into evidence if the following criteria are met.

a. Necessity: The expert opinion must relate to a subject matter which is outside the ordinary experience or knowledge of the trial judge, hence making it important for the judge to
fully understand the technical or scientific issues and to form a correct judgement about it;

b. Relevance: the opinion must be relevant to the issues in dispute in the lawsuit. In this regard, relevancy is decided by the judge as a question of law;

c. Proper Qualification: The witness must be duly qualified as an expert on the matters about which the opinion is being expressed. The qualification and competency requirement is already discussed under Voir Dire questionnaire above.

Similarly, Courts have taken judicial notice of common objections raised in case law as a test for admitting expert opinion into evidence. Some reasons for objecting or rejecting expert evidence include:

a. No foundation: when an opinion is based on a fact that has not been properly proved by way of admissible evidence at the trial.

b. Lack Qualifications: When the opinion is outside the expert’s specific area of expertise.

c. Unnecessary Evidence: When the opinion is relating to matters of common sense and general knowledge, within ordinary human experience and accordingly, no expert testimony on the point is required.

d. Usurping the Judge’s Role: If the report or opinion intrudes into the exclusive jurisdiction of the Trial Judge e.g. Purports to make findings of fact, allocates fault, interprets agreements, etc.

e. Simple Argument: The report or opinion will be rejected if it simply amounts to “argument” in the guise of evidence.

According to Johal (2011), evidence will be in compliance, if the expert does the following;

i. Stays within the designated area of expertise

ii. Confines his opinion to fact as stated and the document he provides.

iii. Maintains complete objectivity and

iv. if he frames his opinion in a dispassionate and non-argumentative manner.

However, these guidelines are not “rules” nor are they necessarily exhaustive. Naturally, every case may differ from
another, and an expert must have a complete understanding of his or her role and when necessary, clarification should be obtained from legal counsel at the outset.

2.5 The Surveyors’ Work Product

A professional land surveyor is one who complies with the requirement for education, experience and character and who has been duly registered and licensed by the regulatory body – the surveyors’ council of Nigeria (SURCON) in accordance to SURCON ACT 2011 or the surveyors’ registration council of Nigeria, decree 44 of 1989, to practice surveying.

When in court as expert witness, the surveyor’s main work product is a comprehensive survey plan or map. The term plan or map can be used interchangeably. There are different types and uses of map produced by surveyors but one of them is called cadastral map.

The cadastral map shows boundaries of land, sub-divisions, usually with bearings and distances between survey markers (pillars or beacons) and the areas of individual parcels carried out for the purpose of describing and recording ownership. This type of map is used for conveyance and evidence. In most cases, the map is the demonstrative evidence that will be presented to the court. It is advised that great pain should be taken in its preparation. Normally a professional product is a reflection of its maker that will pay great dividends. This is possible, if surveyors take personal interest in the preparation of the survey plan.

In recent time, applying geographic information system (GIS) method, which is a computer system that synthesizes, analyses and displays many types of geographic data in an understandable form, into the production of cadastral map, produces a cadastre, which is normally a parcel based, an up to date land information system, containing a record of interests in land (e.g. rights, restrictions and responsibilities) for effective land management. This is also the primary means of providing information about land. Since the cadastre provides information on interests, about the intent as well as the parcels, for example location, size, improvement and value, it is important to advise that in producing the survey document (plan or map, reports etc.), nothing should be taken for granted.

All necessary data or information must be shown. As a principle, it is wise to check and double check everything, because
errors or mistakes on the final document can be embarrassing to the surveyor as well as the client.

2.6 Preparing Survey Plan or Map For Expert Witness Use

a. The surveyor should leave no stone unturned in preparing work products. The surveyor’s work includes elimination/determination of errors/mistakes; so the surveyor should check, double check, then check again. Remember, the correctness and accuracy of his product is a measure of his professionalism.

b. Carefully field notes should always be kept and quality time spent on the project will also prove helpful. Care in measurement, computation of data and final drawings are required for good work product.

c. Obviously no measurement can be perfect, but the errors must be within allowable limits for the data to be acceptable. The equipment employed, the method of measurement and a comparison to recognized standards may be questioned in court. A frank or truthful statement of error must be presented in a language the layman can understand. Unnecessary technical jargons are not required because lawyers and judge in court are not surveyors.

d. The survey plan or map, the various features including orientation (direction) must be clearly produced. The legend (which is list of symbols used on map with each symbol’s meaning), explains the symbols, (drawings or pictures or icons that represent different things on the map), conventional signs (everything that appears on the map except a printed name and they are not drawn to scale) and their relationship must be written in a manner that what it tends to convey is properly
understood by the ordinary man.

2.7 The Surveyor, Other Experts and His Attorney

In some cases, during land in dispute matter, the team is made up of the surveyor and the attorney(s). In other cases, especially in claims due to pollution etc. the surveyor, other experts such as the estate surveyor, the environmental scientist and the attorneys can also make up the team. In any of the above cases, the team will work closely together from inception through a final determination of the case. It is of great importance that the relationship be sincere and open and that all the expert(s) and the attorney educate each other in their respective areas of expertise.

Initial Phase

In the first phase, it is important and proper for the expert(s) to understand the position of his or their client which position will be established by the attorney. The expert(s) will study the matter to determine if he or they can support the attorney’s position. Thereafter, the team (surveyor, and other experts if any) should communicate their position to the client and attorney. Cross education at this stage is very necessary, as each expert has much to learn about the other. A surveyor for example knows the law related to land surveying and boundaries better than their; therefore the surveyor should make his position known. He is the expert in measurement and in boundaries. He should therefore state his opinion firmly. He must be cautioned on legal matters because he is not an expert in law. Therefore he must be open-minded to the opinions of others. It is important to note that the surveyor and the attorney have distinctly different duties when land is in dispute. The attorney is an advocate for her client while the surveyor is a witness offering expert testimony in an unbiased, objective manner.

According to Babitsky&Mangraviti (1991), “Your role as an expert (surveyor) is to tell the truth and render an objective opinion. You will be much more effective witness if you ….. do not attempt to advocate for the party who has retained you. The attorneys in their own case have a far different role. Although they are also obligated to tell the truth, they are ethically obligated to advocate the position of their respective clients. It is their job, not the experts, to present the evidences to make it appear as favorable as possible to their clients”. When a surveyor is in court executing his duties as an expert witness in
boundary dispute or claims survey, his obligation to the public is equal to his responsibility to his client’s interest. The surveyor’s responsibility to his client and his client’s neighbors or defendants is same.

“This is because the professional status assigned through public registration, assign him or her responsibility to keep peace in the neighborhood or at least present fair and truthful evidence of what he saw as at the time of survey. Therefore, when the expert is in the witness stand in court, he should make every effort to rid himself of any bias or prejudice resulting from who is paying the fee or who has previously consulted with him. “For surveyors do not have the legal authority to determine ownership, though in many cases, they act in a quasi-judicial capacity with the acquiescence of party concerned …… yet, surveyors are not and cannot be judicial officers; and it is important for them to know by what rules they are to be guided in the discharge of their judicial functions.” (Cooley, 1881).

Furthermore, the reality is that “the vocation of a surveyor is limited to the ascertainment of definite line or boundary, …… where the line or boundary lies and where it corners are issues which the surveyor on account of his superior facilities for doing so, may be called upon to officially determine and give an opinion based on his or her survey. What lines or boundary and corners are, is a matter of law, which courts can only declare” (Wilson v Powell, 1905; 37 Ind.APP44, 70N.E. 611).

2.8 The Courts

The professional surveyor must be familiar with the rules of the court. Though litigation on land matters can be treated also by the lower courts (that is Area and Magistrate courts) but time and resources are their defects. In Nigeria generally, matters concerning land falls within the purview of the High Court as contained in section 39, subsection (1) and (2) of the land use act No. 6 of 1978. From a surveyor’s aspect, there is a difference between the Magistrate, Area and High Courts. In the lower courts (Area, Magistrate, etc.), the judge must be addressed as “Your Honor” whereas in the high court, the judge is addressed as “My Lord” whether male or female. An expert witness must familiarize himself with some of his basics.

Giving evidence is a solemn serious business and can be very stressful, particularly for beginners, and it is even worse during cross-examination. Those of a
nervous deposition are encouraged to train and retrain themselves before accepting this type of assignment, as some surveyors have been physically sick after appearing in the witness box. Below is an abridged sequence of giving evidence in court.

a. Oath taking
b. Examination in chief (counsel for the party you have been instructed by).
c. Cross-examination (counsel for the other party)
d. Re-examination (sometimes by the counsel for the party you have been instructed to correct or make your evidence proper)
e. Sometimes questions from the judge.

3.0 Testimony and Role of the Surveyor

A surveyor in court may be a litigant or an expert. One of his duties is to provide fact. In law, any of the material items or assertions of fact that may be submitted to a competent tribunal or court as a means of ascertaining the truth of any alleged matter of fact under investigation (boundary line determination, trespass etc.) before it is called evidence. Hence evidences are available facts or statements of facts or proofs admissible as testimony in a law court or information with a tendency to prove a fact or proposition in a matter or case. These declarations or statements of facts or evidences, demonstrated by a witness, produce testimonies. On the other hand, a witness’ statement under oath, etc. is a testimony (Fimie, 2016). The primary duty of a court is to conduct proper proceedings so as to hear and determine matters based on evidence to the end that court decision is based on truth, founded on evidence.

Eventually, the surveyor will be called to the stand, sworn in, and his testimony will begin. In this circumstance the surveyor must present facts, and he must change his mode of thinking. It is not he who is solving the problem; he is a witness assisting the court decree the solution. “His duty is to the court, and his watchwords are honesty, candor and fairness, in a word credibility. The witness should frankly accept undisputable facts, even if they aid the opposition’s case. The expert manner should be dignified, modest and must speak from a composed state of mind. It is important to restate that all questions should be answered truthfully but only to the extent of his knowledge” (Strong, 2012).

For surveyors generally, whether they are defending their works or
themselves, the courtroom techniques may include but not limited to; pretrial, oath, direct and cross-examination. The surveyor must be aware that the testimony could be substantially more effective, if he keeps certain precepts in mind, some of which include but not limited to:

i. Understand the question and do not volunteer information
ii. Do not assert knowledge.
iii. Be professional and do not become adversary
iv. Establish exhibits, how and when to use them
v. Admit facts
vi. Tell the truth
vii. Be prepared
viii. Be yourself and communicate effectively.

All these are the “checklist for the expert witness” (Fimie, 2016), which will serve as a guide for surveyors during court attendance. An abridged detail of each is given below:

a. **Understand the question and do not volunteer information**: remember, if you volunteer information, you open up areas to cross-examination that may not have been considered earlier. And if you do not understand or are unsure of the question, say so. Do not guess. If a question is posed and you are requested to answer yes or no, you can assert your right to explain (when necessary)

b. **Do not assert vast knowledge**: when you say too much, you may trap yourself. Avoid answering every question with certainty, so that you will have room to add a detail that you have overlooked earlier.

c. **Be professional and do not become adversary**: as an expert, you should be well dressed. Field cloths and jeans and Tee shirts are not to be worn to the court. Suit and good native wears will give you the necessary demeanors. Do not become angry and do not engage on testimony outside the matter.

d. **Exhibits**: mark your exhibits with numbers and when you testify refer to your exhibits with those numbers, using
demonstrative evidence whenever possible. This will allow an easy review of the case, at a later date, by a higher tribunal or court.

e. **Admit undisputable fact with honesty**; the best advice is to be yourself and impress the court with credibility.

f. **Tell the truth**: as experts, surveyors are expected to be impartial. If there are evidences that support the opposition’s case, it is immaterial to him. His duty is to state these facts as you would those that support your case.

g. **Be prepared**: The Boys scout law “be prepared” is applicable to an expert in court. To achieve this goal, the surveyor’s work product (the plan and map) may be reviewed. Sometimes it may be necessary to review the entire matter, including another visit to the site. Testimonies and possible cross-examination may be rehearsed. It is important to recheck everything, and take extra time to prepare carefully, so that you can answer questions truthfully and straightforwardly.

h. **Be yourself**: the court is not a place for tea party, or excessive egotism or modesty. Try as much as possible to be composed and speak in a calm, steady voice and answer questions put to you straightforwardly.

i. **Communicate effectively**: talk to the court or the judge, not the attorney. Use terms that layman could understand. As much as necessary, adjust your testimony to obtain maximum effect with clarity.

It is common to note that only few surveyors excel as expert witnesses in court. This is usually due to lack of exposure. To reverse this trend, surveyors, particularly those interested to practice as expert witnesses are expected to learn the art of litigation by practicing it with the assistance of counsel through chamber conference or mock court method, sometimes called pre-trials.
For clarity, a simplified explanation on the sequence is given below.

a. **Pretrial /Mock Court**

As practiced all over the world, pre-trials are done in conference form, usually in the counsel’s chambers. They are practiced to prepare the expert and other witness in a particular matter. It is normally between the expert, witness and the attorney. It is mainly to prepare and educate them (expert and other witnesses) on the procedure of court as well as to verify the documents (plan, map, report etc.) produced by the expert, as well as those provided by other witnesses. The conference will discuss the issues and agree upon which points, the attorney may ask for evidence that will enable him formulate, decide, seek for an applicable case law to be applied in the matter.

b. **Oath taken on witness stand**

When in court and prior to testifying, the expert or witness is placed under oath to tell the truth, the whole truth and nothing but the truth. The reason testimony is in general, limited to the answering of questions is that the court wants to know in advance whether the subject matter the witness is to talk about is admissible evidence.

c. **Direct and cross-examination**

After the oath has been administered to the expert witness, then direct examination will take place. The examination of a witness by the counsel producing him is called the direct examination; the examination of the same witness, upon the same matter, by the adverse (opposing) party is called the cross-examination. Usually the direct examination must be complete before the cross-examination begins unless the court otherwise directs.

During the direct examination process, question that suggests to the witness the answer which the examining party desires may be asked. This is called a leading or suggestive question. The opposite party through their counsel may cross-examine the witness as to any fact stated in his direct examination or connected therewith. But if he examines the witness as to other matters, such examination is to be subject to the same rules as direct examination.

In surveying practice, the surveyor sometimes bases his opinion upon hearsay
facts as told by his clients. Hence expert opinion is admissible even though they may be based upon inadmissible hearsay evidence.

d. **The role of the surveyor**

In litigation involving land, if the surveyor is a witness as expert, he has no function other than as a witness describing fact within his perception or as expert expressing opinion with his special field. A registered surveyor in court is often of great assistance in boundary dispute or other matters in relation to land. This is so, because he can provide some of the following functions generally because he is the first person on the site who can actually measure up the land with sufficient accuracy to enable comparison of the deed plans, maps and photographs so that evidence of any encroachment or other problems like:

i. Conflicts in the title document

ii. Conflicts between title document

iii. Conflicts between title document and physical evidence

iv. Conflicts between items of physical evidence

v. Conflicts between surveyor’s opinion and interpretations, as well as

vi. Conflicts in law between decision and litigation” (Brinker & Minnick, 1997) can be reliably presented and proved, along with his map in evidence

A Surveyor might also:

a. Examine the problem objectively regardless of the client’s preferred solution.

b. Pursue several lines of enquiry including

i. Investigating historical documents

ii. physical features of the land

iii. Available legal documents

c. Compile technical evidence to prove current and historical ownership

d. Give a reasoned opinion

e. Display results in plan/map form.

f. provide the court with an expert opinion if a dispute is not resolved

g. Upon resolving a dispute, prepare an accurate plan for submission/lodgment.
According to Brown (1958), the summary of the role or duties demanded of an expert witness may include but not limited to:

(a) All questions put to him should be answered clearly and intelligently.
(b) He should be absolutely unbiased and honest.
(c) He should have real expert knowledge of his particular subject.
(d) He should be prepared to discuss the opinions of other authority and state why he agrees and disagrees with them.
(e) His testimony should be limited to things and opinions that he can defend before experts in his particular field.
(f) After the dispute is resolved; the surveyor will liaise with the lawyers and the court to ensure that a new survey plan is executed in the correct position in accordance with the court judgments.

Many disputes have resurfaced because the line ordered by the court has not been marked out accurately on the ground or has been misunderstood by surveyor or a fencing contractor. Finally, the surveyor’s new plan in accordance with the court’s decision must be forwarded to his instructing solicitor who will consult his opposing colleague for agreement between the parties concerned for record purposes.

**Survey must be done by surveyor**

In practice the surveyor who testifies in a case must be the one who made the survey. This is a trite law. “It will therefore be wrong or in error to permit a witness to testify concerning a plan, when the survey was not made by him personally, but by men in his employ. “(HermanceVs. Blackburn 206 CA 653).

**4.0 Conclusion**

Land rights are indispensable in the administration of any nation especially at the local level, whether now or in the future. By trying to circumvent tradition and custom by which ownership, acquisition of land is determined ab initio. A lot of tension has also been created in many communities particularly in Nigeria. Violence over land rights will continue until better reforms are implemented. This research work has proven that the work of a land surveyor as an expert witness is very voluminous and technical. Therefore, detailed explanation of his functions, qualification, competence, his relationship with other experts and attorney,
exhibits’ presentation, other courtroom techniques and their relationships are required. The expert testimony and evidence must be in compliance to court rules. By this work, the hiatus (gap) that existed between similar topics and this one has been bridged.

5.0 Recommendations:

It is the researcher’s opinion that a careful study of the work and the implementation of the recommendations contained herein will equip the professional surveyor to perform his or her duties judiciously; this no doubt will assist the court in its pronouncement. The introduction of Geographic information system (GIS) in virtually every state of the Federation of Nigeria will provide a Cadastral system of boundary records, “The Nigerian Cadastre” will provide useful information on interest and intent as well as about parcels for example; location, size, improvement and value. This should be encouraged by government at all levels as it would eliminate a large proportion of disputes on land. Politicians interested in leadership positions should be encouraged to campaign for total installation of cadastral system with modern tools. All these will reduce litigation and violence to the barest minimum.

This study states that time and cost of legal proceedings on land related matters will be reduced if the following recommendations are implemented.

a. Early site visits by judges hearing the case.

b. Orders from the court compelling parties to obtain single joint dispute survey plan (as applicable in advanced countries) to the land in dispute and then compelling the parties to pay for the cost of survey plan or report to the land in dispute.

c. Government to provide through regulation/law land courts made up of requisite professionals (land surveyors and lawyers) to handle the land matters as done in other climes e.g. Washington in the United States, etc. (Hart 2003), (Reed V. Firestack, 93 Wash 148, 1916)

d. Government to provide local authorities (e.g. land mediation committee comprising experts in (c) above to have the powers to resolve land matters.

e. Government to encourage land professionals like surveyors to establish Land surveyors Board of Arbitrators (LASUBA) for land arbitration purposes only as done in
other advance clime e.g. Washington USA, etc.

f. Establish a new law that, disputed land is owned by the state pending determination.

From studies, similar rules apply in many countries. Therefore, if implemented, the many land related issues in our courts as well as community based land dispute will be reduced to the barest minimum and the citizenry will be most grateful for government intervention on their matter at last.

References


Powell, D.J. (2005), *Boundary Dispute Resolution in England & Wales; Surveyors and lawyers working together to Resolve problems*.
