

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

OLUWASHINA AHMED)	
)	
Plaintiff,)	CIVIL ACTION NO.
)	
v.)	1:12-CV-0122-RLV
)	
ATTORNEY GENERAL OF THE)	
THE UNITED STATES, et al.,)	
)	
Defendants.)	

**UNITED STATES’ MOTION TO CLARIFY THE COURT’S
SERVICE ORDER, OR IN THE ALTERNATIVE TO PARTIALLY
VACATE THAT ORDER**

The United States, on behalf of the United States Marshals Service, hereby files this motion requesting clarification of the Court’s prior order regarding service of process (Docket Entry 12). Specifically, the Marshals Service requests that the Court clarify that its order did not require the Marshals Service to effect service upon a Nigerian consulate or the Nigerian Embassy. In the alternative, the Marshals Service moves to vacate any portion of the Court’s order imposing such a

requirement. The reasons supporting the United States' motion are set forth in the accompanying memorandum of law.

Respectfully submitted,

SALLY QUILLIAN YATES
UNITED STATES ATTORNEY

/s/ Lisa D. Cooper
LISA D. COOPER
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CERTIFICATE OF COMPLIANCE

I certify that the documents to which this certificate is attached have been prepared with one of the font and point selections approved by the Court in Local Rule 5.1B for documents prepared by computer.

/s/ Lisa D. Cooper
LISA D. COOPER
Assistant United States Attorney

CERTIFICATE OF SERVICE

I certify that I have electronically filed the foregoing United States Motion to Clarify Court's Service Order, or in the Alternative to Partially Vacate that Order with the Clerk of the Court using the CM/ECF system. I also certify that a copy of the foregoing has also been served upon the following person, by first class U.S. mail, properly addressed and postage paid to:

Oluwashina Ahmed
5 Robert Onadipe Str.
Gbagada Phase 1
Lagos, Nigeria

This 4th day of February 2013.

/s/ Lisa D. Cooper
Assistant U.S. Attorney

Background

Oluwashina Ahmed, a *pro se* plaintiff, filed this lawsuit against a number of defendants, including both private individuals and United States government officials. *See* Compl. (Docket Entry No. 3) at 1. Ahmed's Complaint also lists "Nigeria Embassy" as a defendant to his lawsuit. *Id.*

This Court recently entered an order directing how service of the summons and complaint should proceed. *See* Order of Sept. 25, 2012 (Docket Entry No. 12). Specifically, the Court directed the Clerk of Court to send Ahmed the appropriate number of blank USM 285 forms and summonses, and directed Ahmed to fill out those forms and return them to the Clerk of Court. *Id.* at 2. The Court then directed the Clerk of Court, upon receipt of Ahmed's forms and summonses, to prepare service packages for the United States Marshals Service. *Id.*

Particularly relevant here, the Court then stated: "Upon receipt of the service package, the court DIRECTS the United States Marshals Service to serve the defendant in accordance with the requirements of Rule 4(i)(3) of the Federal Rules of Civil Procedure." *Id.*

For the service package presumably intended for the Nigerian Embassy, Ahmed filled out the USM 285 form and blank summons, requesting service on the "Consulate General of Nigeria," at the address of:

Consulate General of Nigeria
Welfare Department
828 2nd Avenue
New York, NY 10017

See Summons (ECF No. 14) at 3.

After receiving this service package, the Marshals Service consulted with the United States Department of State about whether delivery of the service package on the Consulate General was proper. The Department of State informed the Marshals Service that effecting service on the Consulate General of Nigeria is impermissible under both domestic and international law. Accordingly, the Marshals Service has refrained from delivering the service package.

The United States now moves the Court for clarification of its prior service order, and in the alternative for partial vacatur of that order. Specifically, the United States seeks clarification that the Court's order did not require the Marshals Service to effect service on a Nigerian consulate or on the defendant Embassy, or in the alternative the United States seeks vacatur of any such requirement.

Discussion

The Court's order governing service does not expressly require the Marshals Service to effect service on the defendants who are not US governmental officials, and the Court should clarify that service is not required on a Nigerian consulate or on the Nigerian Embassy. Alternatively, if such service is required, the Court

should vacate that portion of its order because requiring the Marshals Service to effect service on a Nigerian consulate or the Nigerian Embassy would not comply with domestic or international law, and would not constitute proper service of process allowing this suit to proceed.

I. The Court Should Clarify That Its Prior Order Does Not Require the Marshals Service to Effect Service on a Nigerian Consulate or on the Nigerian Embassy.

As a preliminary matter, it is unclear whether the Court's order currently requires the Marshals Service to perform service on the Consulate General of Nigeria and/or the Nigerian Embassy. The relevant portion of the Court's order directed the Marshals Service to "serve the defendant in accordance with the requirements of Rule 4(i)(3) of the Federal Rules of Civil Procedure." That provision of Rule 4, however, governs only service of process on United States officers or employees who are sued in their individual capacity:

Officer or Employee Sued Individually. To serve a United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf (whether or not the officer or employee is also sued in an official capacity), a party must serve the United States and also serve the officer or employee under Rule 4(e), (f), or (g).

Fed. R. Civ. P. 4(i)(3).

Clearly neither the Consulate General of Nigeria nor the Nigerian Embassy is a United States officer or employee sued in its individual capacity. Moreover,

the order did not reference Rule 4(j)(1), which sets forth the requirements for service on foreign entities. *See* Fed. R. Civ. P. 4(j)(1) (“A foreign state or its political subdivision, agency, or instrumentality must be served in accordance with 28 U.S.C. § 1608.”).

Accordingly, to avoid a conflict with the domestic and international legal authorities discussed below, the Court should clarify that its service order does not require the Marshals Service to effect service on a Nigerian consulate or on the Nigerian Embassy.

II. Alternatively, the Court Should Vacate Any Requirement on the Marshals Service to Perform Service on a Nigerian Consulate or on the Nigerian Embassy.

If the Court’s prior order is, in fact, intended to require the Marshals Service to effect service on a Nigerian consulate or the Nigerian Embassy, the proper course is to vacate any portion of the order imposing such a requirement. Both domestic and international legal authorities compel the Court to vacate that service requirement.

First, the service requirement would be inconsistent with the Foreign Sovereign Immunities Act (“FSIA”), 28 U.S.C. §§ 1602-1611. Both the Consulate General of Nigeria and the Nigerian Embassy are considered foreign states, *see Joseph v. Office of the Consulate General of Nigeria*, 830 F.2d 1018, 1021 (9th

Cir. 1987), and thus the exclusive procedures for effecting service of the summons and complaint are set forth in 28 U.S.C. § 1608(a).

The methods of service set forth in § 1608(a) are mandatory, require strict compliance, and cannot be replaced with other procedures. *See Magness v. Russian Fed'n*, 247 F.3d 609, 615 (5th Cir. 2001) (concluding that “the provisions for service of process upon a foreign state . . . outlined in section 1608(a) can only be satisfied by strict compliance” and collecting cases holding the same); *Transaero, Inc. v. La Fuerza Aerea Boliviana*, 30 F.3d 148, 154 (D.C. Cir. 1994) (stating that the procedures of § 1608(a) are “exclusive” and that “strict adherence to the terms of 1608(a) is required”); *Finamar Investors Inc. v. Republic of Tadjikistan*, 889 F. Supp. 114, 118 (S.D.N.Y. 1995) (discussing § 1608(a) and stating that “[w]hether or not respondent received actual notice of the suit is irrelevant when strict compliance is required”).

Section 1608(a) sets forth four potential methods for service: (1) pursuant to a special arrangement between the parties; (2) in accordance with “an applicable international convention on service of judicial documents”; (3) if methods (1) or (2) are unavailable, then by “sending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and

dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned”; and (4) if service cannot be made within 30 days using method (3), then by:

sending two copies of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the Secretary of State in Washington, District of Columbia, to the attention of the Director of Special Consular Services--and the Secretary shall transmit one copy of the papers through diplomatic channels to the foreign state and shall send to the clerk of the court a certified copy of the diplomatic note indicating when the papers were transmitted.

28 U.S.C. § 1608(1)-(4). These four methods are ordered hierarchically, and each is “available only if the previously enumerated options are in some way foreclosed.” *Democratic Republic of Congo v. FG Hemisphere Assocs., LLC* 508 F.3d 1062, 1063 (D.C. Cir. 2007); *see also Magness*, 247 F.3d at 613.

As relevant here, none of the four methods of service permit the Marshals Service to deliver the summons and complaint directly to the Consulate General of Nigeria in New York, or for that matter to the Nigerian Embassy. An order requiring the Marshals Service to perform such an act would therefore be inconsistent with the FSIA, and even if followed would not result in either entity being a proper defendant before this Court. To avoid a conflict with domestic law,

therefore, the Court should vacate any portion of its order requiring the Marshals Service to perform such service.

Moreover, any such service requirement would also be inconsistent with international law. Specifically, an order requiring the Marshals Service to deliver the summons and complaint to a Nigerian consulate would run contrary to the Vienna Convention on Consular Relations (“VCCR”), Apr. 24, 1963, 21 U.S.T. 77, T.I.A.S. 6820 (entered into force with respect to the United States Dec. 13, 1972).

Under the VCCR, to which both the United States and Nigeria are parties, a country’s consular premises are inviolable such that “[t]he authorities of the receiving State shall not enter . . . the consular premises” except with consent. *Id.* art. 31(2). Directing service of process on consular premises would be contrary to this inviolability. *See* Restatement (Third) of Foreign Relations Law § 466 note 2 (1987) (“Service of process at . . . consular premises is prohibited.”); *see also Sikhs for Justice v. Nath*, 850 F. Supp. 2d 435, 441 (S.D.N.Y. 2012).

Under the VCCR, therefore, the Marshals Service cannot intrude upon the consular premises in an effort to effect service. *See also* VCCR art. 43(1) (“Consular officers and consular employees shall not be amenable to the jurisdiction of the judicial or administrative authorities of the receiving State in respect of acts performed in the exercise of consular functions.”). Any

requirement that the Marshals Service deliver service of process to a Nigerian consulate should therefore be vacated.

International law would similarly prohibit the Marshals Service from effecting service on the Nigerian Embassy, which is the entity named as a defendant in Ahmed's complaint. The Vienna Convention on Diplomatic Relations ("VCDR"), Apr. 18, 1961, 23 U.S.T. 3227, T.I.A.S. 7502 (entered into force with respect to the United States Dec. 13, 1972)—to which both the United States and Nigeria are parties—provides that "[t]he premises of the mission shall be inviolable." *See* Art. 22(1). Thus, a court order requiring service of legal documents upon an embassy conflicts with Article 22(1) of the VCDR. *See also Autotech Techs. LP v. Integral Research & Dev. Corp.*, 499 F.3d 737, 748 (7th Cir. 2007) ("[S]ervice through an embassy is expressly banned both by an international treaty to which the United States is a party and by U.S. statutory law. The Vienna Convention on Diplomatic Relations . . . prohibits service on a diplomatic officer."). Any requirement to effect service on the Nigerian Embassy should therefore also be vacated.

Conclusion

The United States respectfully requests that the Court clarify that its prior order governing service (ECF No. 12) did not require the Marshals Service to effect service upon a Nigerian consulate or the Nigerian Embassy. Alternatively, the United States respectfully requests that the Court vacate any portion of that order imposing such a requirement.

Respectfully submitted,

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