

ASSET TRACING, RECOVERY AND CONFISCATION: PRACTICE AND PROCEDURE

PRESENTATION OF HON. JUSTICE J.O.K. OYEWOLE, JCA AT THE ALL NIGERIA JUDGES' CONFERENCE OF THE SUPERIOR COURTS, 25TH -29TH NOVEMBER, 2019 AT THE ANDREWS OTUTU OBASEKI AUDITORIUM, NATIONAL JUDICIAL INSTITUTE, ABUJA

INTRODUCTION

It is an exceptional privilege to be here in the midst of your eminent lordships to lead the discussion on this very important topic.

On a regular basis, Courts at various levels now daily contend with issues relating to seizure and confiscation of assets and it is only apposite that we discuss the issue at this Conference not only to enable us consider various perspectives but to also ensure some consensus and uniformity on practice and procedure.

A few years ago, asset forfeiture was hardly an issue in our jurisprudence and it occasionally peeped in after convictions for certain categories of offences

With the advent of a new genre of financial crimes, it was inevitable that the *raison d'être* be targeted if society is to have a fighting chance of curbing them.

Assets need to be identified before arrest and steps taken to deprive the target of ability to divert, control or dissipate identified assets before trial is concluded.

Preservation and management requirements of identified assets must be worked out before seizure is attempted before the courts.

ASSET FORFEITURE ORDERS-CONSTITUTIONAL BASIS

Attachment, freezing and forfeiture orders interfere with the property rights of citizens. Section 44 (1) and (2) (b) of the Constitution is thus relevant and provides as follows:

(1) No moveable property or any interest in an immovable property shall be taken possession of compulsorily and no right over or interest in any such property shall be acquired compulsorily in any part of Nigeria except in the manner and for the purposes prescribed by a law that, among other things

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(2) Nothing in subsection (1) of this section shall be construed as affecting any general law.

*(b) for the imposition of penalties or forfeiture for breach of any law, whether under civil process **or after conviction for an offence;***

The above provisions of the Constitution also provide an answer to the arguments that forfeiture of assets constitutes double jeopardy as

underlying the said provision is the basic principle that crime must not pay. Returning from jail to enjoy the loot defeats the justice of the case

It must be appreciated that our domestic position accords with global best practice as provided in the United Nations Convention Against Corruption (UNCAC). Article 31 thereof provides thus:

1. Each State Party shall take, to the greatest extent possible within its domestic legal system, such measures as may be necessary to enable confiscation of:

(a) Proceeds of crime derived from offences established in accordance with this Convention or property the value of which corresponds to that of such proceeds;

(b) Property, equipment or other instrumentalities used in or destined for use in offences established in accordance with this Convention.

Article 2 of UNCAC is the definition section and provides thus:

(d) "Property" shall mean assets of every kind, whether corporeal or incorporeal, movable or immovable, tangible or intangible, and legal documents or instruments evidencing title to or interest in such assets;

(e) "Proceeds of crime" shall mean any property derived from or obtained, directly or indirectly, through the commission of an offence;

(g) "Confiscation", which includes forfeiture where applicable, shall mean the permanent deprivation of property by order of a court or other competent authority;

Criminal forfeiture comes after conviction therefore property rights in the assets have been extinguished at the moment of conviction and such rights now belong to the victim. This became evident in the well-known case of FRN VS NWUDE.

NECESSARY INTERLOCUTORY ORDERS

To ensure that assets are available for final forfeiture, certain interlocutory orders must have been obtained as provided in the enabling act. Broadly categorized as -production, freezing and restraint orders.

General Observations:

Production orders are essential for effective investigation. For example bankers are under obligation to preserve the privileges of their customers, without production orders, vital information in their custody would not be availed investigators.

By the nature of the circumstances applications most certainly would be ex-parte, directing that respondents be put on notice would defeat the entire essence thereof and should not be contemplated. Focus should be on steps that would balance possible inconvenience to the respondents.

Order must ensure preservation and equally ensure transparent management- where cash in bank accounts are involved, orders could include directives to ensure interest yield.

Prosecutors and the courts must be circumspect to ensure that listed orders being interlocutory do not include anything which breathes or could involve complicated management- ranches, poultries, farm lands, residential premises with special pets etc.

On becoming aware of any of the listed orders, the defendant could validly apply to have them set aside on compelling grounds to show that the order was made in error for sundry reasons.

The respondent could show that balance of convenience was in his favour and that the asset involved was better off in his custody in which case he could be made to execute a bond.

The orders being ex parte must not be made at large but must be given a return date to ensure prosecution is not handed a blank cheque.

The respondent could apply for variations to allow for reasonable expenditure for family up-keep, school fees and asset maintenance depending on given circumstances.

Where cash in bank accounts are involved, orders could include directives to ensure interest yield otherwise banks are given free funds.

Seizures must be wary of anything which breathes or could involve complicated management- ranches, poultries, farm lands, residential premises with special pets etc.

PRODUCTION, FREEZING AND RESTRAINT ORDERS- LEGISLATIONS-EFCC ACT

Pursuant to sections 24 and 26 of the EFCC (Establishment) Act, 2004, seizures and attachments in the course of investigation and search by the commission are interim subject to court order.

Under section 28 assets of arrested persons traced and attached are subject to subsequent court orders for interim attachment

Interim orders of forfeiture under section 29 must be construed in a sense not to transcend the interlocutory thereby preempting or prejudicing the trial of the criminal defendant and violating his constitutional rights to fair hearing

Post no debit orders by the EFCC pursuant to 34(2) are very temporary subject to court orders. Abuse must be consciously curbed by the Courts as through it people have been arbitrarily subjected to needless hardships.

PRODUCTION ORDERS ETC- ICPC ACT

Minimal facts linking asset to investigative activity should suffice at that stage.

Sec 28 of the ICPC Act gives officers of the Commission powers to order production of documents without recourse to the courts.

Where legal practitioners are involved, High Court is to be approached via section 39. The said section 28 of the ICPC Act states thus:

28.-(1) an officer of the commission investigating an offence under this act may-

(b) order any person to produce before him any book, document or any certified copy thereof, or any other article which may in his opinion, assist in the investigation of the offence; or

(2) Sub-section (1)(b) shall not apply to banker's books save in accordance with the provisions of the Evidence Act.

Freezing orders are essential for preservation of the identified illicit assets to prevent dissipation and in this regard Sections 37 and 38 of the ICPC Act come into play. The provisions are as follows:

37.-(1) If in the course of an investigation into an offence under this act, any officer of the commission has reasonable grounds to suspect that any movable or immovable property is the subject matter of an offence of evidence relating it the offence, he shall seize such property.

(2) A list of all movable or immovable property seized pursuant to sub-section (1) and of the places in which they are respectively found shall be prepared by the officer of the commission effecting the seizure and signed by him.

(3) A copy of the list referred to in sub-section (2) shall be served on the owner of such property or on the person from whom the property was seized as soon as possible.

(4) Where any movable immovable property liable to seizure under sub-section (2) is in the possession, custody or control of a bank, sub-section (1),(2and)(3) shall not apply thereto and the seizure shall be effected in the manner provided for, in sections 35 and 42?

38.-(1) Where any movable property is seized under this act, the seizure shall be effected by removing the movable property from the custody or control of the person from whom it is seized and placing it under the custody of such person or authority and at such place as an officer of the commission may determine.

(2) Where it is not practicable, or otherwise not desirable, to effect removal of any property under sub-section (1), the officer referred to in that sub-section may leave it at premises in which it is seized under the custody of such persons as he may detail for the purpose.

(3) Notwithstanding sub-section (1), when any movable property, including any movable property referred to in sub-section (6), has been seized under this act, an officer of the commission other than the officer who effected the seizure, may at his discretion-

(a) Temporarily return the movable property to the owner thereof, or to the person from whose possession, custody or control it was seized, or to such person as may be entitled thereto, subject to such terms and conditions as may be imposed, and subject, in any case, to sufficient security being furnished to ensure that the movable property shall be surrendered on demand being made by the officer who authorized the release or any other officer of the commission and that such terms and conditions, if any shall be complied with; or

(b) Return the movable property to the owner thereof, or to the person from whose possession, custody or control it was seized, or to such person as may be entitled thereto, with liberty for the person to whom the movable property is so returned to dispose of the property, such return being subject to security being furnished in an amount not less than an amount which represents the open market value of such property on the date on which it is returned.

(4) Where any person to whom movable property is temporarily returned under sub-section (3) (a) fails to surrender such property on demand or to comply with any term or condition imposed under that sub-section.

(a) The security furnished in respect of such property shall be forfeited; and

(b) That person shall be guilty of an offence and shall on conviction be liable to a fine of not less than two times the amount of the security furnished by him, and to imprisonment for a term not exceeding two years.

(5) Where an order of forfeiture is made by the court in respect of property returned under sub-section (3) (b), such forfeiture shall be effected by forfeiting the security furnished by the person to whom the property was returned in lieu of the property.

(6) When any movable property seized under the act consists of money, share, securities, stocks, debentures or any chose-in-action, in the possession or under the custody or control of any person other than the person against whom the prosecution is intended to be taken, the seizure shall be effected by an officer of the commission serving an order on such person-

(a) Prohibiting him from using, transferring, or dealing with such property; or

(b) Requiring him to surrender the property to an officer of the commission in the manner and within the time specified in the order

(7) Where any movable property seized is liable to decay or deterioration, or is property which cannot be maintained without difficulty, or which it is not practicable

to maintain, and which cannot be dealt with under subsection (3), an officer of the commission may sell or cause such property to be sold at the prevailing market value and shall hold the proceeds of the sale, after deducting there from the costs and expenses of the maintenance and of the sale of the property, to abide by the result of any proceedings under this Act.

It must be observed that seizure and attachment of movable or immovable assets under section 37 of the ICPC Act could be made by officers of the Commission who with respect to movable assets have liberty to either take control or where not practicable instruct custody subject to bond punishable on violation under Section 38.

The ICPC Act grants powers to operatives of the ICPC to seize and attach without recourse to the courts but without ousting the supervisory powers of the courts to entertain complaints from persons adversely affected or at the receiving end.

The ICPC Act gives wider powers to seize and attach than provided by the EFCC Act.

SCOPE OF CIVIL FORFEITURE UNDER AFF ACT, 2006

- *17. (1) Where any property has come into the possession of any officer of the Commission as unclaimed property or any unclaimed property is found by any officer of the Commission to be in the possession of any other person, body corporate or financial institution*

or any property in the possession of any person, body corporate or financial institution is reasonably suspected to be proceeds of some unlawful activity under this Act, the Money Laundering Act of 2004, the Economic and Financial Crimes Commission Act of 2004 or any other law enforceable under the Economic and Financial Crime Commission Act of 2004.

The legislation targets assets not the perpetrator.

Approach to the court is ex parte with affidavit deposition tying asset to any of the listed criminal acts.

The assets covered are not restricted to those seized in the course of investigation while by the provisions order nisi is only made absolute after notice to the whole world, which notice need not be in newspapers.

Moreover, return date is short, 14 days or as directed by the court and the Respondent must show evidence of legitimate acquisition of asset involved otherwise absolute forfeiture would be ordered.

The stated provisions are designed to guarantee fair hearing to a legitimate Respondent.

With regards to criminal forfeiture under Section 16, enforcement of Advance Fee Fraud Act statutorily comes under the purview of the EFCC.

The said section 16 requires the existence of prima facie case in the charge brought against the defendant before his assets could be subject of control by the court divesting him of access and control prior to conviction.

It is however essential that application for interlocutory restraint is made before another Judge other than Trial Judge to prevent possible inferences of prejudice which could scuttle trial.

FORFEITURE UNDER THE ACJA

Under the Administration of Criminal Justice Act, 2015, forfeiture orders could be sought interlocutorily pending conclusion of trial and post conviction. The relevant provisions of the said Act are set out as follows:

337. (1) The seizure by the police of property taken during arrest or investigation under this Act, or alleged or suspected to have been stolen or found in circumstances which create a suspicion of the commission of an offence, shall, within a period not exceeding 48 hours of the taking of the property or thing, be reported to a court, and the court shall make an order in respect of the disposal of the property or its delivery to the person entitled to its possession or such other orders as it may deem fit in the circumstances.

(2) Where the person entitled to the possession of property referred to in subsection (1) of this section is unknown, the court may detain it and shall issue a public notice specifying the articles of which the property consists and requiring any person who may have a claim to it, to appear before the court and establish his claim within six months from the date of the notice.

Procedure on seizure of property taken during arrest or investigation or stolen.

338. (1) Where no person within the period referred to in section 337 of this Act establishes his claim to property referred to in that section and where the person in whose possession the property was found is unable to show that it was lawfully acquired by him, the property shall be at the disposal of the court and may be sold in accordance with the order of the court and proceed forfeited to the Federal Government of Nigeria.

(2) At any time within six years from the date of the property coming into the possession of the police, the court may direct the property or the proceeds of the sale of the property to be delivered to any person proving his title to it, on payment by him, of any expenses incurred by the court in the matter.

Procedure where owner of property seized is unknown.

339. Where the person entitled to the possession of property referred to in section 337 of this Act is unknown or absent and the property is subject to speedy decay or, for the benefit of the owner, the court may, at any time, direct it to be sold and the provisions of sections 337 and 338 of this Act shall, as nearly as may be practicable, apply to the net proceeds of the sale.

Power to sell perishable property.

340. Where a defendant is convicted of an offence relating to property and it is proved that a person has bought the stolen property from him without knowing or having reason to believe that the property was stolen, and that money has, on the arrest of the convict been taken out of his possession, the court may:

(a) On the application of the purchaser; and

(b). On the restitution of the stolen property to the person entitled to the possession, order that out of the money a sum not exceeding the price paid by the purchaser, shall be delivered to him.

Section 342. (1) Where a defendant is convicted of an offence relating to property, the court convicting him may order that the property or any part of it be restored to the person who appears to it to be the owner of it, either on payment or without payment by the owner, to the person in whose possession the property or any part of it then is, of any sum named in the order.

Forfeiture orders must of necessity accompany convictions for restitution purposes and where forfeiture proceedings appear complicated, special address could be invited.

PRODUCTION, FREEZING AND RESTRAINT ORDERS- LEGISLATIONS-CCB AND TRIBUNAL ACT

Section 23 (2) (c) of the said Act grants wide powers to the Code of Conduct Tribunal to seize and forfeit to the Federal Government any assets acquired in abuse or corruption of office by any public officer.

Inherent in the final power to seize and forfeit is the power to preserve in the interim while investigation or prosecution is in progress.

POST CONVICTION FORFEITURE

Penal sentences without asset forfeiture ineffective in financial crimes cases. Courts must therefore make adequate preparation for sentencing and ensure forfeiture of not only proceeds but also instrumentalities of the offence. The general rule remains that the convict must be deprived of known profit without sentiments to serve as deterrence.

CONCLUSION

The evolution of new faces of crime naturally pushes the judiciary to expand its adjudicatory capacity. As Achebe said, if eneke the bird has acquired the ability to fly without perching then the hunter must develop the skill to shoot without missing.

Thank you my lords for your attention!