

**Interim Forfeiture of Assets and  
Fundamental Rights of  
Accused persons\*** (This article is published in  
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**Abstract**

The paper discusses the paradox resulting from the powers of the EFCC of interim forfeiture of assets without the usual recourse to fundamental rights of the defendant. It posits that while at a face value the EFCC powers appear to override the rights provisions in the Constitution, the extensive circumscription of the powers act as sufficient brakes on right violation. It submits that the powers and its procedure are similar to those of Mareva and Anton Piller Order, and so should be considered as occupying the same square. It rather suggests that it is a veritable means of temporarily preventing an accused person from disposing the assets allegedly obtained from economic and financial crimes before the final disposal of the case.

**Introduction**

The Constitution of Federal Republic of Nigeria, 1999, guarantees to all Nigerians the right property as a fundamental right and more specifically the presumption of innocence to the accused person and right to fair hearing<sup>1</sup>. However in criminal trials involving economic and financial crimes under the Economic and Financial Crimes Commission Act, 2004 (EFCC Act)<sup>2</sup>, Economic and Financial Crimes are defined in Section 46 of the Act to mean the non-violent criminal and illicit activity committed with the objectives of earning wealth illegally either individually or in a group of organized manner thereby violating existing legislation governing the economic activities of government and its administration and includes any form of fraud, narcotic

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\* Nasiru Tijani, LL.B. (Hons.) LL.M., B.L. MCL.Arb (U.K.), Notary Public, Deputy Director (Academics), Nigerian Law School, Lagos

<sup>1</sup> See Sections 36(4), 36(5) and 36(1) of the Constitution of the Federal Republic of Nigeria, 1999 respectively.

<sup>2</sup> Economic and Financial Crimes are defined in Section 46 of the Act to mean the non-violent criminal and illicit activity committed with the objectives of earning wealth illegally either individually or in a group of organized manner thereby violating existing legislation governing the economic activities of government and its administration and includes any form of fraud, narcotic drug trafficking, money laundering, embezzlement, bribery, looting and any form of corrupt malpractices, illegal arms deal, smuggling, human trafficking and child labour illegal, oil bunkering and illegal mining, tax evasion, foreign exchange malpractices including counterfeiting of currency, theft of intellectual property and piracy, open market abuse, dumping of toxic wastes and prohibited goods, etc.

drug trafficking, money laundering, embezzlement, bribery, looting and any form of corrupt malpractices, illegal arms deal, smuggling, human trafficking and child labour illegal, oil bunkering and illegal mining, tax evasion, foreign exchange malpractices including counterfeiting of currency, theft of, the Court is empowered to make an interim order of forfeiture of assets of an accused person even before conviction and without hearing him<sup>3</sup>. This power on its face appears to contradict these constitutionally guaranteed rights of an accused. This article examine both the theoretical and procedural aspect of the powers of the Court to order an interim forfeiture of assets of an accused person for economic crimes as well as the fundamental rights of an accused person to property, fair hearing and presumption of innocence in a criminal trial with a view to show however, that the power is not necessarily antithetical with these constitutional rights of the accused person<sup>4</sup>.

### **What is Forfeiture?**

Blacks Law Dictionary defines forfeiture as:

(A) divestiture of specific property without compensation; it imposes a loss by the taking away of some pre-existing valid right without compensation. A deprivation or destruction of a right in consequence of the non-performance of some obligation or condition. Loss of some right or property as a penalty for some illegal act. Loss of property or money because of breach of a legal obligation<sup>5</sup>.

Interim forfeiture will presuppose something temporary between an order made and final determination<sup>6</sup>.

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3 This is in contrast with forfeiture otherwise known as “Final Forfeiture” after conviction under Sections 20 and 25 of the Economic and Financial Crimes Commission Act, 2004. Similar provisions are in Section 17(3) Advanced Fee Fraud and Other Related Offences Act, 2006; Sections 34 and 36 National Drug Law Enforcement Agency Act Cap. N30 Laws of the Federation of Nigeria, 2004. Section 37 Corrupt Practices & Other Related Offences Act Cap. C31 Laws of the Federation of Nigeria, 2004; Section 19 Criminal Code Act see *A.G. Ondo v. A.G. Federation (2002) 9 N.W.L.R. (Pt. 772) 222*.

4 Other jurisdiction such as the U.S.A. England, Australia and South Africa have provisions on forfeiture of proceeds of crime. See Section 246 Prevention of Organised Crime Act of 1998 (South Africa). See Festus Emiri & Ayuba Giwa, *The Global Money Trial: A Comparative Reflection*, in Emiri & Deinduomo (eds.) *Law, Oil and Contemporary Development Issues in Nigeria*, Lagos: Malhouse Press, 2008 , Chapter 11, Adekunle Deji, “Tracking and forfeiture of proceeds of crime, being paper presented at an International Workshop on “Criminal issue in the Global Economic Meltdown” organized by the International Society for the Reform of Criminal Law (ISRCL) December 8 - 9, 2009, Alli Yusuf, “Tracing and Forfeiture of Proceeds of Crime”, paper presented at the workshop on “Criminal issue in the Global Economic Meltdown” Ibid.

5 See also Webster New Explore Encyclopedic Dictionary, 6<sup>th</sup> ed. (2006) 720 which defines forfeiture as the wet of forfeiting; the loss of property or money because of a breach of a legal obligation.

6 Black Law Dictionary op. cit. Page 814

## **Powers of the Court to Order Interim Forfeiture of Property**

Section 27(4) of the Act provides:

“Subject to the provision of Section 24 of this Act, whenever the assets and properties of any person arrested under this Act are attached, the Commission shall apply to the Court for an interim forfeiture order under the provisions of this Act”.

Section 24 deals with the general powers of the Court to order forfeiture of property whether real or personal which are traceable to violations or offences under the Act (that is, economic and financial crimes).

It is submitted that by the provision of Section 27(4) of the Act, before there can be a valid interim forfeiture of assets and properties of an accused person, the following conditions must be fulfilled:

- (1) There must be a complaint of commission of an economic and financial crime upon which there is an arrest or search<sup>7</sup>.
- (2) The Commission must have attached or seized the assets and properties of the accused whether real or personal which represents the gross receipts from economic or financial crimes.<sup>8</sup> The properties must then be in the legal custody of the Commission<sup>9</sup>.

It is noteworthy that upon arrest of a suspect, he is expected to disclose in the Assets Declaration Form specified in Form A of the Schedule to the Act his or her assets. The disclosed assets could be seized. The Commission can also seize any of the person's property or instrumentalities used in any manner to commit or to facilitate Commission of such offence not already disclosed in the Form. This is without prejudice to any other properties that may be confiscated<sup>10</sup>.

It is submitted that properties in a Declaration of Assets Form is not conclusive and the Commission is also empowered upon

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<sup>7</sup> Section 26(1)(a) of the Act.

<sup>8</sup> Section 24 of the Act. This seizure or attachment by E.F.C.C. is a condition precedent for competent ex-parte Motion to the Court for an interim order of forfeiture. See *Nwaigwe v. F.R.N. (2009) 16 N.W.L.R. (Pt. 1166) 169 at 191*.

<sup>9</sup> See Section 26(3) of the Act which states, expressly that properties taken or detained under the Section shall be deemed to be in custody of the Commission subject to an order of Court. See also Section 26(1) of the Act. It means that possession of the assets need not be physical. There may be constructive custody. If the Commission posts a notice on the property or a stop order in a bank account it will constitute legal custody.

<sup>10</sup> By Section 27(1) - (3) of the Act, the suspect shall make full disclosure of all his assets and properties in the Declaration of Assets Form. The Commission shall investigate the veracity of the declaration. If the Commission finds that any person knowingly fails to make full disclosure of his assets or makes a false declaration, he shall be liable on conviction to five years imprisonment.

arrest to immediately trace and attach all assets and properties purportedly acquired as a result of economic or financial crime.

- (3) The Commission shall apply to Court for the interim forfeiture order<sup>11</sup>.

The implication of the above is that without a valid complaint, arrest or search and seizure or attachment, the Court will not have any material upon which to make the interim forfeiture order. This interpretation is necessary so as to avoid a situation where there would be arbitrary seizure of assets of innocent citizens in flagrant breach of Section 43 of the 1999 Constitution. Infact, the seizure or attachment of the assets or properties of any person arrested for the offences is a condition precedent before applying ex-parte to Court to interim order forfeiture to property concerned to the Federal Government<sup>12</sup>.

### **Properties Subject to Order of Forfeiture**

The Economic and Financial Crimes Commission Act states various assets which are subject to forfeiture to the Federal Government<sup>13</sup>:

1. All assets and property which may or are subject of an interim order of forfeiture<sup>14</sup>.
2. All assets and properties disclosed in the declaration of assets Form A.
3. Any asset or property confiscated or derived from any proceeds the person obtained directly or indirectly, as a result of such offence not already disclosed in the Assets Declaration Form A in the schedule to the Act.
4. Any of the person's property or instrumentalities used in any manner to commit or facilitate the Commission of such offence not already disclosed in the declaration of Assets Form A<sup>15</sup>.

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<sup>11</sup> See generally Sections 20(1)(a), (2), 21 and 28 of the Act.

<sup>12</sup> See: *Nwaigwe v. F.R.N. (Supra)*.

<sup>13</sup> From the various provisions of the Economic and Financial Crimes Commission Act, it is clear that the properties are forfeited to the Federal Government. There is no provision for restitution. See for example Section 31 of the Act. However Section 263(1), (3) Criminal Procedure Act (South) and Section 360(1) Criminal Procedure Code applicable to the North make provision for restitution of stolen property. In Lagos, Sections 300 and 301 of the Administration of Criminal Justice Law, 2007 deal with restitution. In the case of *Federal Government of Nigeria v. Emmanuel Nwude Charge No. ID/92C/2004 of 15/7/05 and 18/11/05* wherein the Commission returned the proceeds of fraud to the Brazilian Bank. The Accused persons were arraigned upon a complaint of stealing and obtaining by false pretences of about two hundred and forty-two Million United States of America Dollars (\$242,000,000) from a Brazilian Bank called Banco Noroese S.A. of Sao Paulo. In practice, the Court may order restitution. In this case, Justice Oyewole of the High Court, Lagos ordered restitution to the bank which was defrauded. In the case of *Ogunlana v. The State (1995) 5 NWLR (Pt. 395) 260.*, the Supreme Court affirmed the order of forfeiture and/or restitution made by the trial Judge in respect of some properties of the accused persons.

<sup>14</sup> Section 21 provides that the properties of a convicted person subject to an interim forfeiture order shall also be forfeited without further assurance to the Federal Government.

<sup>15</sup> Section 20(1) of the Act.

5. Foreign Assets or Properties of a convicted person<sup>16</sup>.
6. The Passport of a convicted person<sup>17</sup>.
7. All means of conveyance, including aircraft, vehicles which are used or are intended for use, transport or in any manner, to facilitate the transportation, sale, receipt, possession or concealment of economic or financial crime. The only exception is where the means of conveyance was in unlawful possession of another person in violation of the criminal laws in the country; or committing an offence without the knowledge, consent or willful connivance of that owner<sup>18</sup>.
8. All books, records, research materials and data used or intended to be used in violation of any provision of the Act<sup>19</sup>.
9. All monies, negotiable instruments, securities or other things of value furnished or intended to be furnished by any person in exchange for any illegal act or in violation of the Act or all proceeds traceable to such an exchange, and all monies, negotiable instruments and securities used or intended to be used to facilitate any violation of the Act<sup>20</sup>.
10. All real property, including any right, title and interest (including any leasehold interest) in the whole or any piece or parcel of land and any improvements or appurtenances which is used or intended to be used in any manner or part to commit, or facilitate the Commission of an offence<sup>21</sup>.

### **Rationale for Interim Forfeiture**

The object of interim forfeiture under Section 29 of the Act is to temporarily give possession to the Economic and Financial Crimes Commission the assets of persons under investigation for alleged economic and financial crimes to prevent them from disposing the assets while investigation including trials are still going on. This is akin to a *Mareva* injunction granted to prevent party from transferring assets from the jurisdiction of the Court or disposing of his property so as to frustrate or render nugatory any judgment that the other party may obtain in the case before the Court<sup>22</sup>.

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<sup>16</sup> Section 22(1) of the Act.

<sup>17</sup> Section 23 of the Act.

<sup>18</sup> Section 25(a) of the Act.

<sup>19</sup> Section 25(b) of the Act.

<sup>20</sup> Section 25(c) of the Act.

<sup>21</sup> Section 25(c) of the Act.

<sup>22</sup> See: *Sotuminu v. Ocean Steamship (1992) 5 N.W.L.R. (Pt. 239) 1 at 25*. For detailed discussion on Mareva Injunction, see F Emiri & A. Giwa, *Equity and trust in Nigeria*, Lagos; Malthouse Press, 2012, chapter 3.

Interim forfeiture of assets of accused persons in criminal trials is not peculiar to the E.F.C.C. Act nor is it new or unique in the administration of criminal justice in Nigeria as evidenced by similar provisions in other statutes<sup>23</sup>. It is particularly used where there are fears that the accused person may have dissipated the proceeds of the crime before the actual trial. In other jurisdictions, interim forfeiture of assets of accused persons have also been given statutory recognition. In Australia, Section 40 of the Criminal Property Forfeiture Act, 2002 expressly empowers the Court on application of the Police or the Director of Public Prosecutions to make an interim restraining order<sup>24</sup>.

### **Procedure for Interim Forfeiture**

Where the assets or properties of any person arrested for an offence under the Act has been seized by the Commission<sup>25</sup>, the Commission shall bring an application *ex-parte* to the Court for an interim order of forfeiture of the property concerned to the Federal Government. The Court if satisfied that there is a *prima facie* evidence that the property concerned is liable to forfeiture, may make an interim order forfeiting the property to the Federal Government<sup>26</sup>.

It is submitted that from the provisions of Section 29 of the Act, although the application is made *ex-parte*, the grant of it is not as a matter of course. The prosecution must place before the Court sufficient materials to enable it make the interim forfeiture order. Section 29 of the Act requires the Commission to produce "*Prima facie evidence*"<sup>27</sup>.

"*Prima facie*" evidence is not defined in the Act but from the judicial authorities, *prima facie* evidence must be such as to link the suspect to the Commission of the crime and a relationship between the assets and properties and the crime. If there is no *prima facie* evidence of nexus between the offence and the asset the Court will not grant the interim order.

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<sup>23</sup> Section 17(3) Advance Fee Fraud and Other Related Offences Act, 2006; Sections 34 and 36 National Drug Law Enforcement Agency Act Cap. N30 Laws of the Federation of Nigeria, 2004, Corrupt Practice and Other Related Offences Act Cap. C31 Laws of the Federation of Nigeria, 2004.

<sup>24</sup> Infact, under the Criminal Property Forfeiture Act, an interim order of forfeiture could be obtained *ex-parte* by telephone. See Section 40(3) of the Act.

<sup>25</sup> This is a condition precedent to a valid *ex-parte* application. *Nwaigwe v. F.R.N. (Supra)*.

<sup>26</sup> Section 29 of the Act. See also Section 34(1) of the Act which empowers the Commission to apply to the Court *ex-parte* for an order to issue to freeze the accounts of suspect where the money in the account is the proceeds of economic or financial crime. This overrides the duty of confidentiality of the bank to its customer. See Ndombana, N.J.: An analysis of the Economic and Financial Crimes Act, 2002 in Trends in Nigerian Law: Essays in Honour of D.V.F. Olateru-Olagbegi III, Edited, O. Oluduro et al Ibadan, Constillations (Nig.) Publishers, 2007 Edition, page 142 at 166

<sup>27</sup> See: Festus Emiri, Human Rights Issue in Mareva Injunction, in A.D. Badaiki (ed.) Landmarks in Legal Development Essays in honour C.A.R. Momoh, C.J., NY Newberg: Choice Publishing, 2003, Chapter 21.

In *Ajidagba v. Inspector-General of Police*<sup>28</sup>, the Supreme Court stated as follows:-

“What is meant by a prima facie (case)? It only means that there is ground for proceeding ..... But a prima facie case is not the same as proof which comes later when the court has to find whether the accused is guilty or not guilty” (per Grose, J.) and “the evidence discloses a prima facie case when it is such that if uncontradicted and if believed it will be sufficient to prove the case against the accused<sup>29</sup>”.

The method of showing a prima facie evidence is by affidavit attached to the Motion Ex-parte.

It is submitted that since an interim order of forfeiture is akin to an application for *mareva injunction*, the principles for grant of a *mareva injunction* will serve to guide the Court in granting the application.

The application must be supported by an affidavit which disclose on the part of the applicant:

1. That there is an action against the defendant/accused within jurisdiction.
2. That he has a good arguable case.
3. That the Defendant/accused has assets within jurisdiction and must give particulars of the assets.
4. Must give grounds for believing that the Defendant/accused is the owner of the assets stated in the affidavit and in respect of which the application relates.
5. Must show that there is real and imminent danger that the Defendant/accused will remove the assets from jurisdiction or dispose of them and thereby render nugatory any judgment, which the state may obtain.
6. Must give full disclosure of all material facts relevant to the application.
7. Must show that the balance of convenience is on the side of the State<sup>30</sup>.

The procedure for obtaining an order of interim forfeiture of property in Nigeria exparte is similar to that of Criminal Property Forfeiture Act in

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<sup>28</sup> (1958) S.C.N.L.R. 60; (1958) 3 F.S.C. 55.

<sup>29</sup> This definition was adopted in *Abacha v. State* (2002) 11 N.W.L.R. (Pt. 779) 437. See also *Ikomi v. State* (1986) 3 NWLR (Pt. 28) 340; *Egbe v. State* (1980) 1 N.C.R. 341; *Ohwovoriole v. State* (2003) 2 NWLR (Pt. 803) 176; *Nasiru Tijani: Institution of Criminal Proceedings: The Role of Proof of Evidence* (2002) 6 *Nigeria Law and Practice Journal* 218.

<sup>30</sup> See Afe Babalola: *Injunctions and Enforcement of Orders* (2<sup>nd</sup> Edition) Afe Babalola, Ibadan, 2007, 146.

Australia<sup>31</sup>. Under the said Act, the application may be made either by the Police or the Director of Public Prosecutions (DPP). However, the applicant is still required to satisfy the Court that circumstances justify the making of the interim restraining order apart from showing that an application *inter partes* is to be made in relation to specified property or property of named persons<sup>32</sup>.

A notable provision in the Australian Act is found in Section 40(3) which provides that “an application for an interim restraining order may be made to a magistrate in Chambers or by telephone or other electronic means” by the Police or DPP. There is no similar provision in Nigeria. This buttresses the argument that an order of interim forfeiture of property is not unknown to other jurisdictions.

### **Discharge of Interim Forfeiture**

Although there is no provision in the E.F.C.C. Act on discharge of an interim forfeiture order, the accused person usually applies to Court for discharge of the Order<sup>33</sup>. The grounds upon which an *ex parte* order of injunction may be discharged can also be used to discharge an interim forfeiture order. The application to discharge is usually brought by motion on notice.

The Federal High Court (Civil Procedure) Rules, 2009 makes express provision for discharge of *ex-parte* order as follows:

“Where an order is made on a motion *ex-parte*, any party affected by it may, within seven days after service of it, or within such further time as the Court shall allow, apply to the Court by motion to vary or discharge it; and the Court may, on notice to the party obtaining the order, either refuse to vary or discharge it, or may vary or discharge it with or without imposing terms as to costs or security, or otherwise, as seems just<sup>34</sup>”.

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<sup>31</sup> See Section 41(3) of the Criminal Property Forfeiture Act, 2002 of Northern Territory of Australia.

<sup>32</sup> See Section 40(1)(c)(d), *Ibid*.

<sup>33</sup> See: *Re: Emmanuel Nwude* Suit No: FHC/ABJ/M244/2004 of 22/10/2004 by Honourable Justice A. I. Chikere of the Federal High Court, Abuja. In this case, the learned trial Judge refused to *set aside* the *ex-parte* order of interim forfeiture. The appeal against the refusal was dismissed by the Court of Appeal in *Nwude v. Chairman, EFCC Appeal No. CA/A/183/2004* of 5<sup>th</sup> May, 2005. See also the case involving the Sun Newspapers as reported in <http://www.sunnewsonline.com/webpages/news/national/2007/august22/national> visited on 10/29/2007. Also an application to discharge the interim forfeiture order on the assets involving 30 properties and 20 bank accounts of the former Enugu State Governor, Dr. Chimaroke Nnamani was refused by Justice Tijani Abubakar of the Federal High Court on 26<sup>th</sup> October, 2007. See Order 26 Rule 11. See also Order 8 Rule 11 High Court of Lagos State (Civil Procedure) Rules, 2004; Also *Tindoz Ltd. v. Tindoz Eng. Ltd. (2005) 9 N.W.L.R. (Pt. 929) 189*

<sup>34</sup> Section 33(1) of the Act. It is submitted that the accused or suspect can also apply for the setting aside or variation of the order. See *Nwude v. EFCC CA/A/183/2004 unreported and delivered on 5/5/05 (supra)*.

In *R. Bankey (Nig.) Ltd. v. Cadbury Nigeria Ltd.*<sup>35</sup> the following conditions were stated under which an ex-parte order of interim injunction will be discharged:

- (a) If the applicant for the ex-parte injunction failed to make full disclosure of all material facts even though the omission was due to error of judgment;
- (b) Where the order was granted on suppression or misrepresentation of facts;
- (c) That it was irregularly granted;
- (d) That there had been delay in complying with an undertaking to amend the writ by adding a party or plaintiff;
- (e) That default has been made in giving security for costs;
- (f) That there had been delay in complying with undertaking as to damages;
- (g) That the plaintiff deliberately delays the hearing of the motion on notice;
- (h) A court can *suo motu* call upon the party at whose instance the ex-parte order was made to show cause why the order should not be discharged if the court is satisfied that it was led to make the ex-parte order in the belief of the application's good faith;
- (i) By the provisions of Order 26 Rule 12(2) of the Federal High Court (Civil Procedure) Rules, 2009, if a motion to vary or discharge an ex-parte order is not taken within fourteen days, of its being filed, the ex-parte order shall lapse automatically.

The above conditions should also apply in discharge of an interim forfeiture order. As long as an accused person has the opportunity to apply for discharge of an interim forfeiture order, it will not be correct to state that his fundamental right is violated.

#### **Peculiar Nature of Interim Forfeiture**

Interim forfeiture of assets is made ex-parte pending the final determination of the charge when a final order may be made confirming the order or the order of interim forfeiture is revoked if the accused is discharged and acquitted<sup>36</sup>. Where an interim order of forfeiture is revoked, all assets and properties of the person concerned shall be released to him by the Commission<sup>37</sup>.

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<sup>35</sup> (2006) 6 N.W.L.R. (Pt. 976) 338. See also *Ogbonna v. NURTW* (1990) 3 N.W.L.R. (Pt. 141) 696; *Nwakonobi v. Udeorah* (1991) 9 N.W.L.R. (Pt. 213) 85; *Animashaun v. Bakare* (2010) 16 N.W.L.R. (Pt. 1220) 513

<sup>36</sup> Section 33(2) of the Act. Remarkably no mention is made of any depreciation to the assets when under interim forfeiture.

<sup>37</sup> By Order 26 Rule 12(2) of the Federal High Court (Civil Procedure) Rules, 2009, an ex-parte order of injunction will lapse after 14 days. In Lagos State, it is 7 days - see Order 39 Rule 2(3) High Court of Lagos State (Civil Procedure) Rules 2004. *Kotoye v. C.B.N.* (1989) 1 N.W.L.R. (Pt. 98) 419

It is submitted that interim forfeiture of property obtained ex-parte have largely not been subject to expiration periods as those for general ex-parte order in civil matter<sup>38</sup>.

Interim forfeiture of assets will deprive a party of the use of his assets even without hearing him. To this extent it is arguably a deprivation of the right to be heard before being deprived of property. But the safeguard requirement to obtain it and the possibility of reversal balances the concerns<sup>39</sup>.

### **Interim Forfeiture of Assets and Fundamental Rights Right to Fair Hearing**

By Section 36(1) of the 1999 Constitution of the Federal Republic of Nigeria, a party to a matter before a Court is entitled to fair hearing within a reasonable time by a Court or other Tribunal established by law and constituted in such manner as to secure its independence and impartiality. The cornerstone of administration of justice is that no man is to be condemned without hearing and also that no order should be made to the prejudice of a party unless he has the opportunity of being heard in defence<sup>40</sup>. This emphasizes one of the twin pillars of the rule of natural justice - *audi alteram partem* - hear the other side. Some commentators argued that ex-parte orders derogate from the right to fair hearing and the common law principle of *audi alteram partem*<sup>41</sup>.

However, the Supreme Court in *7UP Bottling Company Ltd. v. Abiola & Sons Ltd*<sup>42</sup> rejected the argument and held that the right to fair hearing is not denied simply because an interim order for a limited period is made. It said:

There is no doubt that the right to fair hearing under the Constitution is synonymous with the common law rules of natural justice - See *Mohammed v. Kanno N.A., (1968) 1 ALL N.L.R. 424 at page 426* and *Deduwa v. Okorodudu (1976) 1 NMLR 237 at page 246*. In both criminal and civil proceedings, there are certain steps to be taken which are incidental or preliminary to the substantive case. Such steps include motions for direction, interim or interlocutory injunction. The time available for taking the steps may be too short or an emergency situation may have arisen. It, therefore, becomes necessary to take quick action in order to seek remedy for or arrest the situation. It is in respect of such cases that provisions are made in court

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<sup>38</sup> See F. Emiri (n. 27)

<sup>39</sup> *Sabru v. Pora-Koyi (2001) 13 N.W.L.R. (Pt. 697) 263 at 380*

<sup>40</sup> Section 44(1) Constitution of the Federal Republic of Nigeria, 1999

<sup>41</sup> Ibid page 333D contrast however the case of *Leedo Presidential Hotel Ltd. v. Bank of the North Ltd. (1998) 7 SCNJ 328* and *Bayero v. F.M.B.N. Plc (1998) 2 NWLR (Pt. 538) 509* where the court held that ex-parte application to sell immovable properties pursuant to a judgment violates the judgment creditor's right to fair hearing and right to property.

<sup>42</sup> (1995) 3 N.W.L.R. (Pt. 383) 257 at 280, 281 per Uwais, J.S.C. *Animashaun v. Bakare (2010) 16 N.W.L.R. (Pt. 1220) 513*.

rules to enable the party affected or likely to be affected to make *ex-parte* applications.

The above dictum of the Supreme Court is related to a civil case and it is understood that the *ex-parte* order is not meant to last up to the time the case is determined. This is in contrast with the position of interim forfeiture. The order often stays up to the determination of the charge.

It is submitted that although the making of an interim order *ex-parte* would seem to derogate from the right of fair hearing of accused person, if it is weighed against the rationale for the procedure and the fact that similar orders of Court such as Mareva injunction and Anton Pillar Orders (albeit in civil cases) are usually made *ex-parte* there is nothing sacrosanct about the making of an interim order of forfeiture.

In the case of *Savannah Bank (Nig.) Ltd. v. N.D.I.C.*<sup>43</sup> one of the two issues raised for determination before the Court of Appeal was whether the order made *ex-parte* on police to remain on the appellant's premises does not violate the constitutional right to fair hearing of the appellant. The Court of Appeal held *inter-alia*:

“The power or jurisdiction of the Court to make *ex-parte* orders are derived from statute or the rules of court and I am of the view that an exercise of such a jurisdiction by the court cannot be said to amount to a violation of the constitutional right to fair hearing of a party, who by the provisions of the law or rules is not to be heard in the first place”<sup>44</sup>.

In the recent case of *Nwaigwe v. F.R.N.*, where one of the issues for determination was whether an order of interim forfeiture of property was a breach of the fundamental right to fair hearing, the Court of Appeal held that it did not violate the fundamental right to fair hearing of the appellant<sup>45</sup>.

I agree with this position. An order interim forfeiture pursuant to an *ex-parte* application does not necessarily violate the fundamental right to fair hearing.

### **Right to Property**

Section 43 of the 1999 Constitution provides that “subject to the provisions of the Constitution, every citizen of Nigeria shall have the right to acquire and own immovable property anywhere in Nigeria”.

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<sup>43</sup> (2005) 11 N.W.L.R. (Pt. 936) 311. See also Afe Babalola: Injunction and Enforcement of Orders op. cit. pages 20 - 23

<sup>44</sup> See Section 44(1), 1999 Constitution. In the case of *A.G. Bendel State v. Aideyan* (1989) 4 NWLR (Pt. 118) 646 at 675 the Supreme Court held that the rights of fair hearing and property are entrenched, secured and guaranteed by the Constitution. They cannot be changed unless the constitution is amended. See also *Bello v. Diocesan Synod of Lagos* (1973) 1 ANLR (Pt. 1) 247; *Peenok Investment Ltd. v. Hotel Presidential Ltd.* (1983) 4 NCLR 122.

<sup>45</sup> (2009) 16 N.W.L.R. (Pt. 1166) 169 at 196 H.

Section 44(1) provides that:

“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 –

Requires the prompt payment of compensation therefor; and gives to any person claiming such compensation a right of access for the determination of his interest in the property and the amount of compensation to a Court of law or tribunal or body having jurisdiction in that part of Nigeria”<sup>46</sup>.

However by Section 44(2) of the Constitution, the following exceptions are provided:

“Nothing in subsection (1) of this Section shall be construed as affecting any general law -

- (b) For the imposition of penalties or forfeiture for the breach of any law, whether under civil process or after conviction for an offence.
- (e) Relating to the execution of judgments or orders of court
- (k) Relating to the temporary taking of possession of property for the purpose of any examination, investigation or enquiry”.

Whilst it may be argued that interim forfeiture is before conviction and Section 44(2)(b) of the 1999 Constitution recognizes forfeiture of property only after conviction in a criminal case and that the process of interim forfeiture conflicts with this constituted provision, holistic reading of Section 44 especially Section 44(1)(k) will show that a temporary taking of the property pending enquiry/trial is not unconstitutional<sup>47</sup>. It will be appreciated that by virtue of Section 44(2)(b), (e) and (k) of the Constitution, the Court can by an interim order of forfeiture validly derogate from the Constitutional right of a party to property under Section 43 thereof. The power of interim forfeiture is therefore not in breach of the right to property protected by the Constitution<sup>48</sup>.

I submit with respect that the Court of Appeal in *Nwaigwe v. F.R.N.* erred in holding that because forfeiture is a fair of punishment after the trial and conviction, interim forfeiture which is based on mere suspicion is wrong. My opinion is that the order of interim forfeiture is not against the right to property. In the case of *A.G. Ondo State v. A.G. Federation*<sup>49</sup>, the Supreme Court in construing Section 37 of the Corrupt Practices and Other Related Offences Act, 2000 which is similar to Section 29 of the EFCC Act held that it was constitutional to seize property on an interim order.

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<sup>46</sup> A cardinal rule of interpretation is that all Sections of a statute must be taken into consideration to arrive at a right interpretation. See: *C.B.N. v. Ukpong (2006) 13 NWLR (Pt. 998) 555 at 571.*

<sup>47</sup> See the case of *Din v. F.R.N. (1988) 4 N.W.L.R. (Pt. 87) 147*

<sup>48</sup> (*Supra*) at Pages 200 - 201

<sup>49</sup> (*Supra*) at Page 310. Even the Court in *Nwaigwe's case* acknowledged this at page 200.

### **Presumption of innocence**

Presumption of innocence is at the cornerstone of criminal trials and proceedings. Hence, Section 36(5) of the 1999 Constitution provides that every person who is charged with a criminal offence shall be presumed to be innocent until he is proved guilty. This also places the burden of proof on the prosecution to prove the guilt of accused beyond reasonable doubt<sup>50</sup>.

Can it be said that an order of interim forfeiture negates the fundamental principle of criminal trial and constitutional safeguard. It is conceded that it is only after full trial and conviction following proof beyond reasonable doubt that an accused convicted the alleged offence or offences that the presumption of innocence may be reversed.

I respectfully submit that a Court which makes an order of interim forfeiture, does not pronounce the guilt or innocence of the accused. It is only making an order relating to the assets of the accused suspended to have been acquired from the commission of the economic crime. The fact that the assets can be returned to the accused after trial, shows that this power of interim forfeiture does not negate Section 36(5) of the Constitution. I therefore disagree, with respect, with the judgment of the Court in *Nwaigwe case* that:

“Forfeiture of property cannot be anything other than punishment and as provided by the above provision. It is quite natural and appropriate when it is inflicted on the appellants after due trial and conviction. Section 29 of the EFCC Act clearly imposes punishment on the appellants by way of forfeiture of property on the basis of mere suspicion. It constitutes an infraction on the rights of the appellants under Section 36(5) of the Constitution and is in wild riot or conflict with that constitutional provision. I have no hesitation in finding the provisions of Section 29 of the EFCC Act as unconstitutional. I therefore invoke the provision of Section 1(3) of the Constitution to declare the provision of Section 29 of the EFCC Act as null and void<sup>51</sup>”.

With respect, the learned justice of the Court misconstrued forfeiture (final) with order of interim forfeiture. An order of interim forfeiture made by a court is not against the presumption of innocence of the accused. The aim of the order of interim forfeiture is to preserve assets obtained illegally through economic or financial crimes. Delay in freezing can result in a spirit away of the assets, making it almost impossible to restore the *status quo* or have the properties retrieved.

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<sup>50</sup> See Section 139 Evidence Act.

<sup>51</sup> The process of proof of guilty by legal process will involve the following; competence of a Court trying the case, a proper charge for the offence or offences suspected to have been committed, plea taking, trial proceedings in which evidence is taken on both sides, finding of guilt, conviction and sentences. See *Nwaigwe v. F.R.N. (supra) at 199 and 201*.

An assurance to the accused is Section 33 of the Act which states expressly that if the accused person is discharged or acquitted by the court of an offence, an order of revocation or confirmation of the interim order may be made by the court. If the interim order is revoked, all assets and properties of the accused shall be released to him by the Commission. The present right of the accused must be weighed against the public interest right. It is submitted therefore that an order of interim forfeiture is not a conviction of an accused and does not negate the presumption of innocence.

### **Conclusion**

Interim forfeiture of property of an accused person by the Court upon the application ex-parte of the E.F.C.C. pursuant to the provisions of Sections 27(4) and 28 of the Economic and Financial Crimes Commission (Establishment) Act, 2004 is a veritable means of temporarily preventing an accused person from disposing the assets allegedly obtained from economic and financial crimes before the final disposal of the case. This power of Court does not a breach of the right of an accused to fair hearing as the Courts have justifiably held that in appropriate similar circumstances ex-parte orders may be employed to preserve the judicial process from those not likely to play fairly. The nuclear weapons of Mareva injunction and Anton Pillar Orders are good examples. The risks in dissipation of the assets clearly outweigh the temporary deprivation. The same argument goes for the right to property under Section 43 of the 1999 Constitution. This right is not absolute. Neither does it derogate from the presumption of innocence of the accused person. The Constitution itself recognizes that these rights may be derogated from in appropriate cases. Interim forfeiture of assets is not a violation of the fundamental rights of the accused person.