IN THE COURT OF APPEAL
KADUNA JUDICIAL DIVISION
HOLDEN AT KADUNA
ON FRIDAY THE 27TH DAY OF APRIL, 2018
BEFORE THEIR LORDSHIPS

IBRAHIM SHATA BDLIYA	**JUSTICE, COURT OF APPEAL**
OBIETONBARA DANIEL-KALIO	**JUSTICE, COURT OF APPEAL**
AMINA AUDI WAMBAI	**JUSTICE, COURT OF APPEAL**

CA/K/324/C/2017

BETWEEN:

ENGR. ANDREW YAKUBU ---- ---- ---- ---- APPELLANT

AND

FEDERAL GOVERNMENT OF NIGERIA ---- ---- RESPONDENT

JUDGMENT
(DELIVERED BY OBIETONBARA DANIEL-KALIO, JCA)

This appeal is over the refusal of the Federal High Court Kano Judicial Division to set aside, vacate or discharge its order of 13th February, 2017 made upon an ex-parte application. By the said order, the Federal High Court (the lower Court) made an interim forfeiture of the sums of $9,772,800 (Nine Million Seven Hundred and Seventy Two Thousand, Eight Hundred Dollars) and £74,000 (Seventy Four Thousand Pounds) to the Federal Government of Nigeria. The sums of money belonged to Engineer Andrew Yakubu, the Appellant. Following the said

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interim order of forfeiture of the sums stated, the Appellant by a motion on notice filed on 20/3/17, approached the lower Court to have the interim order set aside. The ground on which the Appellant sought that order was that the Court lacked the territorial jurisdiction to make the order, the matter being one relating to a crime that was allegedly committed in Abuja which is outside the territorial jurisdiction of the Court. In a counter-affidavit opposing the application to set aside the interim order of forfeiture, one Adamu Waziri, an operative of the Economic and Financial Crimes Commission (EFCC) made averments disclosing reasons why the lower Court should not set aside its interim order. The Appellant filed a further and better affidavit in a bid to debunk the averments in the counter-affidavit. In a bid to arrive at a considered view, the lower Court ordered Counsel to file written addresses. After considering the arguments of learned Counsel in the written addresses and the affidavit evidence before it, the lower Court refused to nullify its interim order of forfeiture. Aggrieved, the Appellant has challenged the decision of the lower Court in this appeal. In his Notice of Appeal filed on 22/5/17, the Appellant challenged the decision of the lower Court on twenty grounds. Each of the twenty grounds has accompanying it, lengthy particulars to show how the lower Court erred.

The Appellant's Brief of Argument was filed on 12/6/17. The Brief was settled by **Ahmed Raji SAN.** The Respondent's Brief of Argument was filed out of time with the leave of this Court. It was deemed properly filed and served on 10/10/17. The Respondent's Brief was settled by **A.T. Habib (Mrs).**

From the 20 grounds of appeal, the Appellant's learned Senior Counsel formulated in the Appellant's Brief of Argument, five issues for determination. The issues are as follows:-

i. ***Having regard to the provisions of Section 113 and 114 of the Evidence Act and the overriding duty on Courts of law to do substantial justice as against technical justice, whether the lower Court was right to have struck out paragraphs 9 (i) – (xv) 11, 12, 14, 15 and 16 of the affidavit in support of the Appellant's application dated 20/2/17. (Grounds 1, 2 and 3).***

ii. ***Was the lower Court right in holding that it had the jurisdiction to grant its Order of 13/2/17? (Grounds 4, 5, 6, 7 and 20).***

iii. ***Having regard to the fact that the lower Court's order of 13/2/17, was not premised on any pending criminal charge against the Appellant, whether the lower Court was right to have held that the pre-conditions to the exercise of the powers under Sections 28 and 29 of the Economic and Financial Crimes Act were duly complied with by the Respondent. (Grounds 8, 9, 10 and 11)***

iv. ***Whether the learned trial judge properly applied the decisions of this Court in the cases of FELIMON ENTERPRISES V. CHAIRMAN, EFCC (2010) LPELR VOL. 20 p. 366; DANGABAR V. FRN in coming to the conclusion that he was not misled as to the import of the interim order contemplated by Sections 28 and 29 of the EFCC Act. (Grounds 12, 13, 14 and 17).***

v. ***Having regard to the decision of this noble Court in NWAIGWE V. FRN and the provision of Section 43 of the EFCC Act, whether the lower Court was right to have upheld its Order of 13/2/17. (Grounds 15, 16, 18 and 19)***

All the above issues were adopted by the Respondent in her Brief of Argument.

On issue 1, which has to do with whether the lower Court was right to have struck out paragraphs 9 (i) – (xv), 11, 12, 14, 15 and 16 of the affidavit in support of the Appellant's motion dated 20/2/17 having regard to the provisions of Sections 113 and 114 of the Evidence Act, Ahmed Raji SAN submitted that a defective or erroneous affidavit can be remedied. He referred to Sections 113 and 114 of the Evidence Act and the case of **IZEDONMEREN V. UBN PLC (2012) 6 NWLR PART 1295 p. 1.** It was submitted that where a party takes necessary steps to remedy a defect or error in that party's affidavit, substantial justice requires that the Court will allow the error to be remedied. It was contended that the lower Court was wrong when it refused to allow a further and better affidavit to correct a typographical error in the affidavit in support of the

motion to set aside the interim order of forfeiture. By the refusal of the lower Court it was further contended, the said Court indulged in extreme technicality. It was argued that in the absence of any contention on the explanation and correction in the further and better affidavit, the justice of the matter required the lower Court to do substantial justice and not resort to technicalities. The case of **GWONTO V. THE STATE (1983) 1 SC NLE 142** was cited in support.

The learned Senior Counsel submitted that the lower Court was wrong to have held that paragraphs 9, 11, 12, 14, 15 and 16 of the affidavit in support of the Appellant's application to set aside the interim order of forfeiture offended Section 115 of the Evidence Act. It was submitted that on the contrary, the said paragraphs observed the provisions of Section 115 of the Evidence Act. We were referred to the case of **BAMAIYI V. THE STATE (2001) 8 NWLR PART 715 p. 270 at 289.** We were urged to restore paragraphs 9 (i) – (xv), 11, 12, 14, 15 and 16 of the affidavit in support of the Appellant's application which the lower Court struck out.

A.T. Habib (Mrs) in her submission in reply, agreed that a defective affidavit can be remedied but submitted that the remedy must be as provided by Sections 113, 114 and 115 (2) of the Evidence Act, 2011. It was contended that the defect in

the Appellant's affidavit is not one envisage by Section 117 of the Evidence Act. Learned Counsel submitted that the provisions of Section 113 of the Evidence Act 2011 cannot salvage the defect or error in the Appellant's affidavit that led to the striking out of paragraphs 9 (i) – (xv), 11, 12, 14, 15 and 16 thereof. With regard to the provisions of Section 114 of the Evidence Act, it was submitted that under the Section, the only remedy permissible is to amend the affidavit and have it re-sworn with the leave of the Court. It was submitted that the defect or error in the affidavit in question cannot be cured by filing a further and better affidavit. We were referred to the case of **DANSON IZEDONMWEN & ANOR V. UNION BANK PLC & ANOR (2011) LPELR – 4020 (CA).**

The Respondent's learned Counsel further submitted that paragraph 9 (i) – (xv), 11, 12, 14, 15 and 16 of the affidavit under reference violate the provisions of Section 115 (2) of the Evidence Act as the paragraphs contain extraneous matters by way of legal arguments and conclusions.

Now, one of the Sections of the Evidence Act which the Appellant's learned Counsel relied on in his submission that a defective or erroneous affidavit can be remedied is Section 113 of the Evidence Act. That Section provides:-

> ***"113. The Court may permit an affidavit to be used notwithstanding that it is defective in form according to this Act if the Court is satisfied that it has been sworn before a person duly authorised".***

It is clear to me that Section 113 of the Evidence Act allows a Court to permit the use of an affidavit even if it is defective in form if the Court is satisfied that it has been sworn before a person duly authorised. The emphasis here is on an affidavit which is defective in form. The Section is not about an affidavit which is defective in a manner other than the form. With regard to other mistakes or errors, the applicable provision of the Evidence Act is Section 114 which provides that a defective or erroneous affidavit may be amended and re-sworn by leave of the Court on such terms as to time, costs or otherwise as seem reasonable. It seems to me that the use of the word **"may"** in Section 114 of the Evidence Act implies that it is not only by having a defective or erroneous affidavit re-sworn by leave of Court after amendment, that a defective or erroneous affidavit can be amended. A defective or erroneous affidavit should be capable of being corrected through a further

affidavit where the further affidavit makes express reference to the defective or erroneous affidavit, explains why the error or defect came about, and then proceeds to state the true or correct facts. Where that is done in a further affidavit a Court of law should accept the correction made. In the further affidavit of the Appellant at the lower Court, the Appellant sought to correct a mistake as to a date stated in the affidavit in support of his application. That date was 17th April, 2017. The further affidavit stated that the 17th April, 2017 was a wrong date and that the error was typographical in nature. It went on to give the correct date as 17th February 2017. I think it serves the interest of justice for a Court to allow such an error in an affidavit to be corrected in a further affidavit. Mistakes, after all, are a fact of life. ***Aliquando bonus dormitat Homerus*** is a Latin expression that states that even the good Homer nods off. Homer was a Greek poet who wrote the epic Odyssey and the maxim is to show that even a scholar of that high repute and stature is not above mistakes. The lower Court ought to have accepted 17th February, 2017 as the correct date in view of the very reasonable explanation given in the further affidavit, for the error made in the affidavit in support of the Appellant's application at the lower Court.

With regard to the submission of the Appellant's learned Counsel that paragraphs 9, 11, 12, 14, 15 and 16 of the

Appellant's affidavit in support of the application to set aside the earlier order of the lower Court do not offend the provisions of Section 115 of the Evidence Act as held by the learned trial judge, it is necessary to take a look at the said paragraphs 9, 11, 12, 14, 15 and 16 under reference. The paragraphs are at p. 32 – 36 of the Record of Appeal and read as follows:-

> *9. That I have also read Sections 28 and 29 of the EFCC Act and I fully understand its purport. In addition to the foregoing, on 17th of April, 2017, at about 10am, I was informed by Mr. Ahmed Raji, SAN, the lead Counsel to the Respondent/Applicant in this matter, in our office located at No. 65, Lamido Road, Nassarawa GRA, Kano State of the following facts which I verily believe to be true that:-*
>
> *i. The underlying complaint in **Exhibit B** leading to the grant of **Exhibit A** alleges the commission of a crime by the Respondent/Applicant in Abuja, outside the territorial jurisdiction of this Honourable Court.*
>
> *ii. The jurisdiction of this Court in respect of criminal offences or related matter can*

only be activated over offences committed within this Court's territorial jurisdiction.

iii. *No aspect of the perceived offence in respect of which **Exhibit A** was made was committed within the Kano judicial division of this noble Court.*

iv. *The Applicant/Respondent (i.e. The Federal Government of Nigeria) lacks the competence **(locus standi)** to seek the interim reliefs contained in **Exhibit B** whereof **Exhibit A** was made by this Honourable Court.*

v. *The power of this Honourable Court to make interim forfeiture Order(s) pursuant to Section 28 and 29 of the EFCC Act is applicable ONLY to alleged offences charged under the EFCC Act and not to offences cognizable under any other law.*

vi. ***Exhibit A** was made in respect of perceived offences under the Independent Corrupt Practices and other Related Offences Commission Act (hereinafter*

*"**ICPC Act**") and not the EFCC Act as prescribed by Section 28 and 29 thereof.*

vii. *The conditions precedent to the grant of **Exhibit A** by this Honourable Court was not complied with by the Applicant/Respondent before same was made on 13/2/17.*

viii. *The combined effect of Sections 28 and 29 of the EFCC Act is that a charge alleging infractions against the provisions of the EFCC Act ought to be brought against a suspect before the powers of this Honourable Court under Sections 28 and 29 of the EFCC Act to order interim forfeiture of property can be actuated.*

ix. *An order of interim forfeiture of property pursuant to Sections 28 and 29 of the EFCC Act can only be properly made by this Honourable Court upon the existence of **prima facie** evidence that the property concerned is liable to forfeiture.*

x. *No formal charges were proffered against the Respondent/Applicant as at the date **Exhibit B** was filed and argued.*

xi. *Without a formal charge, no **prima facie** evidence can be established in order for the provisions of Sections 28 and 29 of the EFCC Act to be competently actuated against the property of the Respondent/Applicant.*

xii. *No charge was brought against the Respondent/Applicant before the provisions of Sections 28 and 29 of the EFCC Act were activated to grant **Exhibit A.***

xiii. *Indeed, the Affidavit deposed by the Applicant/Respondent in seeking the grant of **Exhibit A** does not disclose any **prima facie** evidence whatsoever.*

xiv. *In obtaining the **ex-parte** Order of 13th February, 2017, no **prima facie** evidence was placed before this Honourable Court by the Applicant/Respondent necessitating the making of the said order.*

xv. *The Federal Government of Nigeria (i.e. The Applicant/Respondent) concealed and misrepresented material facts in **Exhibit B** leading to the grant of **Exhibit A.***

11. *Further to the above and contrary to the depositions in the said paragraphs 14, 15, 16 and 17 the Respondent/Applicant stated in his extra judicial statement to the EFCC as follows:-*

> ***"These moneys were essentially gifts and goodwill by well-wishers and friends. Particularly during celebration and ceremonies I hosted and seasonal goodwill. The savings estimated time of start was around the end of 2010 – 2014."***

12. *Contrary to paragraph 15 of the supporting Affidavit to* ***Exhibit B,*** *I understand the forgoing statement of the Respondent/Applicant to mean that he commenced saving the moneys within the period between 2010 and 2014 and not that he received all the money between 2010 and 2014 as mispresented to this Honourable Court by the Applicant/Respondent.*

14. *In view of the foregoing facts, I know as a fact that this Honourable Court lacks the jurisdiction*

to make the interim order encased in ***Exhibit A.***

15. *I know as a fact that this Honourable Court has the power,* ***ex debito justiciae,*** *to set aside its own order if made without jurisdiction.*

16. *That it will be in the interest of justice to set aside* ***Exhibit A*** *as same was made without jurisdiction.*

A close examination of the averments in paragraph 9 of the affidavit above will show that with the possible exception of the averments in paragraph 9 (x), all the averments were legal arguments or conclusions contrary to the provisions of Section 115 (2) of the Evidence Act, 2011 which states that an affidavit shall not contain extraneous matter by way of objection, prayer or legal argument or conclusion. With the possible exception of paragraph 9 (x) therefore, the lower Court cannot be faulted in striking out paragraph 9 of the affidavit in support of the Appellant motion on notice dated 20/2/17.

With regard to paragraphs 11, 12, 14, 15 and 16 of the affidavit in question, the content of which are reproduced above, again, the paragraphs offend the provisions of Section 115 (2) of the Evidence Act as they contain extraneous matters by way of objection, legal argument and conclusions.

Consequently, the lower Court was also right to have struck out those paragraphs for offending the provisions of Section 115 (2) of the Evidence Act.

It is the law that an affidavit to be used in the Court shall contain only a statement of facts and circumstances to which the deponent deposes either of his own personal knowledge or from information which he believes to be true. See Section 115 (1) of the Evidence Act. A fact needless to say, is a thing known to be true, to exist or to have happened. It is truth or reality as distinct from mere statement or belief. See Chambers Concise Dictionary. What the Appellant averred in the above reproduced paragraphs were not facts properly so called. They were also not circumstances to which the witness deposed either of his own personal knowledge or from information which he believed to be true. Rather, they were legal arguments and conclusions. Such have no place in an affidavit. The place for argument is in the address of learned Counsel.

Issue 2 as will be recalled is whether the lower court was right in holding that it had jurisdiction to grant its order of 13/2/17. In arguing this issue, Ahmed Raji SAN for the appellant submitted that the lower court's order of 13/2/17 against the appellant was premised on a perceived breach of

criminal laws by the appellant. We were referred to paragraphs 14-17 of the affidavit in support of the respondent's ex-parte application of 10/2/17. We were also referred to a portion of the written address of the respondent's learned Counsel at the lower Court before the lower Court made its order of 13/2/17. It was contended that from the paragraphs of the affidavit and the written address aforesaid, the offence allegedly committed by the appellant could only have been committed in Abuja where the appellant served as the Group Managing Director (GMD) of the Nigerian National Petroleum Corporation (NNPC). Learned Counsel submitted that the lower court in its Ruling alluded that the alleged offence was committed in Abuja. Learned Counsel then argued that the alleged offence having been allegedly committed in Abuja, the lower court lacked the territorial jurisdiction to make the order of 13/2/17. It was submitted that the provisions of Section 45 of the Federal High Court Act barred the lower court sitting in Kano from presiding over the respondent's ex-parte application of 10/2/17 which application alleged the commission of a crime in Abuja. We were referred to the decision of this Court in the case of **FELIMON ENTERPRISES V. CHAIRMAN EFCC (2010) LPELR VOL. 20 p. 366.** It was submitted that the lower Court having found that the appellant's office as Group Managing Director of NNPC was in Abuja and that the appellant allegedly

committed alleged offences during his tenure in office as Group Managing Director of the NNPC, ought to have held that it lacked jurisdiction to grant the interim order of forfeiture.

The learned Senior Counsel submitted that by approaching the Federal High Court, Kano, the respondent was engaging in forum shopping, a practice deprecated by the Courts. The case of **IBORI V FRN (2009) 3 NWLR PART 1128 p. 283 at p.320 - 321** was cited in support.

The learned Senior Advocate of Nigeria referred us to the finding of the lower court at p. 249 of the Record of Appeal and submitted that the finding that the funds or monies could have been received in any part of Nigeria was speculative and ought to be set aside. The cases of **AGIP NIG LTD V AGIP PETROLI INTERNATIONAL (2010) 5 NWLR PART 1187 p. 348; FRN V SANI (2014) 16 NWLR PART 1433 p. 299** were cited in support. It was also argued that the lower Court misapplied the decision of the Supreme Court in Nyama v FRN (2010) 7 NWLR part 1193 p 344 when it came to the conclusion that the Respondent had ***locus standi*** to make the application of 10/2/17.

The Learned Senior Counsel submitted that from Sections 28 and 29 of the Economic and Financial Crimes Commission

Act it is the Commission alone that can make an application to Court for an interim order of forfeiture of assets.

The respondent's learned Counsel A.T Habib (Mrs) submitted that contrary to the submission of the learned Senior Counsel of the appellant, the lower court did not allude to the commission of a crime in Abuja. It was further submitted that there was nowhere in the affidavit in support of the respondent's application before the lower court where the respondent expressly mentioned the commission of offences in Abuja. It was submitted that the proceedings at the lower court were not criminal proceedings to which Section 45 of the Federal High Court Act would apply to bar the lower Court from assuming jurisdiction. Even if the proceedings were criminal in nature, respondent's learned Counsel agued that the respondent never posited that the alleged offences were committed in Abuja. Learned Counsel submitted that the case of **Felimon Enterprises V. Chairman EFCC** is very different from the case of the appellant as there was no pending criminal matter against the appellant before the application for an order of interim forfeiture was made, unlike in the case of **Felimon Enterprises V. Chairman EFCC.**

Now, the argument of Ahmed Raji SAN on issue 2 is on the premise that an offence was allegedly committed by the

appellant while he was the GMD of the NNPC in Abuja and therefore the lower court sitting in Kano had no territorial jurisdiction to make the interim order of forfeiture of the sum of money to the Federal Government. The learned Senior Advocate of Nigeria relied on Section 45 of the Federal High Court Act. Section 45 of the Federal High Court Act deals with the place for the trial of offences. It is important to point out that the appellant was not being tried for any offence when the respondent made the application ex-parte for an interim order of forfeiture. A trial, needless to say, is a formal examination of evidence by a judge in order to decide a Criminal case. There was no trial of any offence and therefore reliance on Section 45 of the Federal High Court Act is misplaced. The Case of **FELIMON ENTERPRISES V CHAIRMAN EFCC** cited by the learned Senior Counsel is also not useful. In that case, the appellant was arraigned on a 26 count charge which was later amended to 44 counts. It was during the trial in that case that the 1st respondent in the case filed an application ***ex-parte*** which sought ***inter-alia,*** to attach and freeze some accounts affiliated to the 2nd respondent in the case. The lower court in that case granted the application and the appellant sought to have the order of the lower court set aside. Thus it a clear that in that case a criminal trial was going on. Besides, in that case, the application to set aside the order was not for want of

jurisdiction but on the ground that there was misrepresentation and suppression of facts. Thus Felimon's case is not a useful precedent.

With regard to the submission of the learned Senior Advocate of Nigeria that having regard to Sections 28 and 29 of the EFCC Act it is only the EFCC that can bring an application for an interim order of forfeiture, it seems to me that the position taken by the learned Senior Advocate cannot be anchored on the said provision of the EFCC Act. Section 29 of the EFCC Act talks about when a person has been convicted and that is not the situation here. As for Section 28 of the EFCC Act, it requires that where any asset or property has been seized by the EFCC under the EFCC Act, the EFCC shall cause an application to be made to the court for an interim order forfeiting the property to the Federal Government and that where the court is satisfied, the court shall make an interim order forfeiting the property to the Federal Government. The Federal Government therefore has an interest and as such can institute the action.

Issue 2 is resolved against the appellant.

On issue 3, the Learned Senior Advocate of Nigeria submitted on behalf of the appellant, that the lower court misunderstood the responsibility imposed on it by Sections 28

and 29 of the EFCC Act and therefore erroneously concluded that paragraphs 14 - 17 of the respondent's affidavit contained the requisite ***prima facie*** evidence for granting the order of 13/2/17. The learned Senior Advocate of Nigeria submitted that in order for evidence to be ascertained ***prima facie***, there must be a criminal charge together with proof of evidence.

In the argument in response, the respondent's learned Counsel submitted that the condition precedent to the grant of an interim order of forfeiture as provided by Sections 28 and 29 of the EFCC Act was satisfied by the respondent. It was submitted that in an application for an interim order of forfeiture, the ***prima facie*** evidence that will be relied on by the court is that contained in the affidavit in support of the application. It was therefore submitted that the lower court was right to have relied on paragraphs 14 – 17 of the Respondent's affidavit in support of the application for the interim order of forfeiture.

Now, the relevant precondition for a Court to make an interim order of forfeiture is stated in Section 28 of the EFCC Act. The Section provides:-

"Where –

(a) The assets or properties of any person arrested for an offence under this Act has been seized; or

(b) Any assets or property has been seized by the Commission under this Act, the Commission shall cause an application to be made to the Court for an interim order forfeiting the property concerned to the Federal Government and the Court shall, if satisfied that there is a *prima facie* ***evidence that the property concerned is liable to forfeiture make an interim order forfeiting the property to the Federal Government."***

It is clear from the above provision that the question of the Court eliciting **prima facie** evidence from a criminal charge does not arise. The conditions precedent for a Court to grant an interim order of forfeiture going by Section 28 of the EFCC Act are that:-

(a) A person arrested by the EFCC must have had his property seized; or

(b) Assets or properties must have been seized by the EFCC pursuant to the EFCC Act

(c) With respect to the situations in (a) and (b) above, the EFCC has applied to the Court for an interim order of forfeiture of the property; and

(d) The Court shall consider the application referred to in (c) above to see if there is any *prima facie* ***evidence that such property is liable to forfeiture.***

All that was required of the lower Court when deciding on whether to make the interim order of forfeiture was simply to consider the facts deposed to in the affidavit in support of the application. Where it is satisfied that the facts show a **prima facie** evidence that the property the subject matter of the application for forfeiture to the Federal Government should be forfeited, the Court can make an interim order of forfeiture. The lower Court cannot be faulted for following that simple procedure in Section 28 of the EFCC Act. It is totally out of place to read into Section 28 of the EFCC Act what is not contained in it. There is nothing in the provision that states that to make an interim order there must be a criminal charge to which reference must be made as to whether there is **prima facie** evidence to make the interim order of forfeiture. It is trite law that in interpreting a piece of legislation the literal or plain meaning is to be given effect. See **ONAGORUWA V.**

ADENIJI (1993) 5 NWLR PART 293 p. 317 at 334. Issue 3 is also resolved against the Appellant.

On issue 4 which has to do with whether the lower Court properly applied the decision in **FELIMON ENTERPRISES V. CHAIRMAN EFCC (2010) LPELR VOL. 20 p. 366** and the case of **DANGABAR V. FEDERAL REPUBLIC OF NIGERIA 12 NWLR PART 1422 p. 575,** the Appellant's learned Senior Counsel referred to what the lower Court held at p. 259 and 263 of the Record of Appeal and submitted that the decision of the lower Court was based on a misapplication of the decisions of this Court in both **FELIMON ENTERPRISES V. CHAIRMAN EFCC** and **DANGABAR V. FRN.**

In the Respondent's learned Counsel's argument in response, it was submitted that the lower Court properly applied the decisions of this Court in the case of **FELIMON ENTERPRISES** as well as in **DANGABAR'S** case. It was contended that the argument of the Senior Counsel of the Appellant that an ex-parte application for an interim order must be incidental or preliminary to a substantive suit is a misapplication and wrong interpretation of the intendment of the provisions of the EFCC Act.

Now what exactly did the lower Court say about the decisions of this Court in **FELIMON ENTERPRISES V.**

CHAIRMAN EFCC (Supra) and the case of **DANGABAR V. FEDERAL REPUBLIC OF NIGERIA (Supra)** which made the learned Senior Counsel of the Appellant submit that those cases were misapplied by the lower Court? The learned Senior Advocate of Nigeria referred us to p. 259 and 263 of the Record of Appeal.

At page 259 of the record, the lower Court stated after it referred to the case of **UTB V. DOLMETISH PHARM. (NIG) LTD (2007) 16 NWLR PART 1061 p. 520 at 542** and the case of **OYEMELUKWE V. ATTAMAH (1993) 5 NWLR PART 293 p. 250 at 363,** thus-

> ***"The said decisions were all for interlocutory injunction based on interlocutory application for injunction on ordinary civil cases which is not the same as the interim order envisaged by the EFCC Act. This distinction has received judicial pronouncement in the case of*** *FELIMON ENTERPRISES V. CHAIRMAN EFCC (2010) LPELR VOL. 20 p. 366* ***also reported in (2013) 1 BFLR p. 94 at 103 lines 30 – 45 where it was held ..."***

The reference to Felimon's case by the lower Court as can be seen above is to the effect that the case distinguished between an interim order made pursuant to Sections 28 and 29

of the EFCC Act and an order of injunction made in ordinary civil cases. The reference by the lower Court to Felimon's case as an authority to draw a distinction between an order made pursuant to Sections 28 and 29 of the EFCC Act and an injunction in civil cases cannot be faulted and consequently the question of a misapplication of Felimon's case by the lower Court does not arise.

At p. 263 of the Record of Appeal, the lower Court relied on Dangabar's case thus:-

> ***"Similarly as to whether an interim order for forfeiture can be made only where there is pending proceedings, the Court of Appeal in the same case of*** *DANGABAR V. FRN* ***(Supra) at page 609, paragraphs E – F has held:-***
>
> > ***"By virtue of Sections 26, 27, 28, 29 and 30 of the Economic and Financial Crimes Commission (establishment etc.) Act, 2004, an interim order for the preservation of assets is obtainable immediately after the commencement of the investigation and to last till final determination of the criminal charge that***

may be initiated against the accused person"

Based on the foregoing, I hold that the order of interim forfeiture dated 13/2/2017 made by this Court against the Respondent/Applicant's money or property is not a nullity, it is valid and in order."

Again it can be seen from the passage above that the lower Court relied on Dangabar's case to arrive at its decision that an interim order of forfeiture cannot be made only where there is a pending proceedings and that such an order can be made immediately after the commencement of an investigation. I cannot see how the lower Court misapplied the decision in Dangabar's case. Issue 4 is therefore also resolved against the Appellant.

I now turn to the 5th and final issue which is whether the lower Court was right to uphold its order of 13/2/17 having regard to the provisions of Section 43 of the EFCC Act and the decision of this Court in **NWAIGWO V. FRN.** In arguing the issue, the Appellant's learned Counsel submitted that Sections 28 and 29 of the EFCC Act are inoperative by reason of the failure of the Attorney – General of the Federation to make rules and regulations for the operation of the Commission. We

were referred to the decision of this Court in **ONAGORUWA V. I.G.P. & ORS (1991) 5 NWLR PART 193 p. 593** and also to the decision of **TSOHO J** in an unreported Ruling in suit No. FHC/ABJ/CS/14/2017. The learned SAN on behalf of the Appellant contended that the failure of the Hon. Attorney-General of the Federation to make rules with respect to the powers of the EFCC concerning applications for orders of forfeiture and attachment constitute a jurisdictional problem and renders Sections 28 and 29 of the EFCC Act inoperative. We were referred to Section 43 of the EFCC Act which empowers the Hon. Attorney –General of the Federation to make rules or regulations with respect to the exercise of the duties, functions or powers of the EFCC under the EFCC Act. It was contended that the EFCC acted outside its powers by applying for and obtaining the order of interim attachment and forfeiture, knowing fully well that by virtue of the failure of the Hon. Attorney – General of the Federation to comply with the provisions of Section 43 of the EFCC Act, the EFCC had no power to do so. It was argued that the lower Court was wrong in its decision at p. 262 of the Record of Appeal that this Court has departed from its decision in **NWAIGWO V. FRN (2009) 16 NWLR PART 1166 p. 190 at p. 210.** It was submitted that Section 29 of the EFCC Act remains unconstitutional and

void on account of the decision of this Court in **NWAIGWO V. FRN.**

On issue 5, the Respondent's learned Counsel submitted that Section 43 of the EFCC Act on the power of the Hon. Attorney–General of the Federation to make rules or regulations uses the word **"may"** which connotes that it is not mandatory for the Hon. Attorney – General of the Federation to make rules and regulations.

On the submission that Section 29 of the EFCC Act is unconstitutional, it was submitted that this Court by necessary implication, has departed from its decision in **NWAIGWO V. FRN** after being convinced that the decision in that case was reached per incuriam or in conflict with another decision of this Court in **NWUDE V. EFCC (2005) ALL FWLR PART 276 p. 270.** It was submitted that **FELIMON ENTERPRISES V. CHAIRMAN EFCC** and **DANGABAR V. FRN** were decided in 2013 and 2014 respectively and both did not follow the decision in Nwaigwe's case. It was pointed out that Mukhtar JCA who read the lead judgment in **NWAIGWE V. FRN** was on the panel of the justices that decided **DANGABAR V. FRN** and that the learned jurist concurred with the lead judgment delivered by **Bada JCA** in that case. That being the case, it was further submitted, the previous position in **NWAIGWE V.**

FRN (Supra) that Section 29 of the EFCC Act is unconstitutional, has been put to rest.

Let me begin by examining the provisions of Section 43 of the EFCC Act. The Section states:-

> ***"43. The Attorney – General of the Federation may make rules or regulations with respect to the exercise of any of the duties, functions or powers of the Commission under this Act"***

From the above Section it seems quite clear that it is not compulsory for the Hon. Attorney – General of the Federation to make rules or regulations with respect to the exercise of any of the duties, functions or powers of the Commission under the EFCC Act. This is so because the legislature used the discretional word **"may"** in Section 43 reproduced above. In **MOKELU V. FEDERAL COMMISSIONER FOR WORKS AND HOUSING (1976) 3 SC 60,** the Supreme Court stated that **"may"** is an enabling or permissible word and that in that sense, it imposes or gives a discretionary or enabling power. The Supreme Court went on to explain in that case that where the object of the power is to effectuate a legal right **"may"** has been construed as compulsory or as imposing an obligatory duty. The use of the word **"may"** in Section 43 of the EFCC Act

merely imposes an enabling power on the Hon. Attorney – General of the Federation and therefore he does not have to exercise that enabling power if he chooses not to.

Let me state here that it is not as though the EFCC Act has not laid down any procedure for approaching the Court for an interim order of forfeiture. In Section 29 of the EFCC Act the procedure for obtaining an interim order of forfeiture is stated and it is simply that the Commission shall cause an ex-parte application to be made to the Court for an interim order forfeiting the property concerned to the Federal Government. One does not have to have an elaborate set of rules like the Civil Procedure Rules of the High Courts to conclude that rules of procedure are in place. It is therefore not correct as submitted by the Appellant's Senior Counsel that Section 28 and 29 of the EFCC Act were rendered inoperative by reason of the Hon. Attorney – General of the Federation not making rules and regulations with respect to the powers of the Commission for orders of forfeiture and attachment.

On the Appellant's Senior Counsel's submission that the lower Court was wrong in its decision that the Court of Appeal has departed from its decision in **NWAIGWE V. FRN (Supra),** it is my view that the learned Senior Counsel is wrong in that submission. The decision in **NWAIGWE V. FRN** was in 2009

and since then this Court has decided the case of **FELIMON ENTERPRISES V. CHAIRMAN EFCC** in **2010** and **DANGABAR V. FRN** in **2014** which decisions did not follow **NWAIGWE V. FRN (Supra).** Following the decision in **YOUNG V. BRISTOL AEROPLANE CO. LTD. (1994) 2 ALL ER 293,** this Court in deciding **DANGABAR V. FRN** had the option of either following its earlier decision in **NWAIGWE V. FRN** or in **FELIMON ENTERPRISES V. CHAIRMAN EFCC.** This Court however preferred to follow its decision in **FELIMON ENTERPRISES V. CHAIRMAN EFCC.** What is more, in **DANGABAR V. FRN** that followed Felimon's case, a member of the panel of Justices that decided the case wrote the lead judgment in Nwaigwe's case, thereby implying that Nwaigwe's case is no longer good law. I also resolve issue 5 against the Appellant. All considered, the appeal has no merit. I dismiss it. The judgment of the lower Court is affirmed.

OBIETONBARA DANIEL-KALIO
JUSTICE, COURT OF APPEAL

BETWEEN:

Ahmed Raji SAN. For Appellant.

A.T. Habib Esq (Mrs) for the Respondent.

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CA/K/324/C/2017

JUDGMENT

(DELIVERED BY IBRAHIM SHATA BDLIYA, JCA)

I read in advance the draft copy of the leading judgment just delivered by learned brother, **OBIETONBARA DANIEL-KALIO, J.C.A**. I am in full agreement with the reasonings and the decision arrived at in dismissing the appeal for lacking in merit. I have nothing useful to contribute to the erudite judgment. I abide by the orders made, including that on costs.

IBRAHIM SHATA BDLIYA
JUSTICE, COURT OF APPEAL

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CA/K/324/C/2017
JUDGMENT
(DELIVERED BY AMINA AUDI WAMBAI, JCA)

I was privileged to read before now the draft copy of the Judgment of my learned brother, **OBIETONBARA DANIEL-KALIO, JCA** whose reasoning and conclusion I adopt as mine. I have nothing more valuable to add. I also dismiss the Appeal and affirm the judgment of the lower court.

AMINA AUDI WAMBAI
JUSTICE, COURT OF APPEAL.

...RIS MUSA
LITIGATION II
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